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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES MAJORS,

Appellant,

vs.

MULTICARE HEALTH SYSTEM,
a Washington Non-Profit Corporation,

Respondent.

APPELLANT'S OPENING BRIEF

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I. INTRODUCTION

Plaintiff-Appellant Dr. James Majors is a licensed obstetrician and gynecologist (OB/GYN) who worked at Good Samaritan Hospital in Puyallup helping mothers deliver babies. He and his family have strong, local ties to the community, and the community needs his expertise. When he was fired without cause, he looked to continue serving the community by getting another job. He was offered a job delivering babies for existing patients at another hospital. The other hospital would not continue the conversation because Dr. Majors had a writing that purported to restrict his freedom to earn a living and accept that job.

Respondent MultiCare Health System is a nonprofit, which enjoys special privileges and tax benefits because of its mission to serve the community. Unlike for-profit private practices, it has no owners or partners, no franchisees, and no profits. It has lost sight of that mission. Serving the community comes second to winning a competition in the marketplace—even if it means fewer doctors serving the community. To prevent doctors from serving the community, it has a one size fits all noncompete agreement that it uses for nearly all of its physicians. Neither MultiCare nor the trial court factored in the impact on Dr. Majors, his family, or the community when they refused to entertain any reformation or exception to the express terms of the agreement.

The law treats post-employment restrictions the right to work differently for physicians from other promisors. The law also treats them differently in the sale of a business and business owners from employees. The law encourages courts to weigh the legitimate business interests of the employer (a finite list) to impose restrictions necessary to serve those interest; and the impact of the restrictions on the worker and the community. Sometimes those restrictions are drafted too broadly to fit the rule of reason test. Washington law has experimented with a shrink-to-fit doctrine, however, the experiment has so obviously failed that legislatures are looking at drastic solutions. Shrink-to-fit has failed because it gives the employer no incentive to be reasonable. This court should, drawing on precedent, hold the following with respect to post-employment restrictions on competition: (1) courts may weigh the profession of medical doctor as a factor in balancing the public interest against the employer's interest; (2) business sellers and owners, franchisees, and employees are analyzed differently; (3) restrictions of time, geography or client list, and the scope of activities must be limited to those necessary to protect the legitimate business interests of the employer; (4) a nonprofit employer's obligations to serve the community prevent it from restricting a former employee from serving the community without a specific and overriding legitimate business interest; (5) a court may infer an unlawful anti-competitive

motive by the express terms of a noncompete agreement and the refusal to reasonably accommodate reformation or an exception; (6) there exists a noncompete agreement so broad that a court in equity may refuse to reform it to satisfy the rule of reason and be enforceable; and (7) the trial court erred in denying Dr. Majors and granting MultiCare relief in declaring that the contract is enforceable as written, without reformation or any possible exception.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting MultiCare's motion for summary judgment and finding that the noncompete had consideration, was enforceable as written, and could under no circumstances be limited in scope, geography, or time in any way as a matter of law.
2. The trial court erred in denying Dr. Major's motion for summary judgment seeking to invalidate or reform the noncompete agreement.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the court should weigh an employer's status as a nonprofit against enforcement of a post-employment noncompete restriction if the restricted party's job performing the charitable mission for the benefit of the community.
2. Whether the law treats noncompete agreements with employees with higher scrutiny than those with business owners.

3. Whether the rule of reason applies differently in the context of medical doctors.
4. Whether the terms of the noncompete provision at issue were necessary to protect a legitimate business interest.
5. Whether a noncompete agreement could be written so broadly or with anti-competitive intent that a court should refuse to modify it.
6. Whether a reasonable inference is that MultiCare's motives were anti-competitive.

IV. STATEMENT OF THE CASE

A. Dr. Majors is a licensed obstetrician and gynecologist.

Appellant James Majors, a licensed medical doctor who delivers babies, is board-certified in obstetrics and gynecology. CP 992. Dr. Majors moved to Washington in 2003. *Id.* He, his wife, and their newborn son settled in Bonney Lake. *Id.* They moved there to be near family and to accept a job with Good Samaritan Hospital long before it was acquired by MultiCare. *Id.*

Dr. Majors and his wife now have five children. *Id.* Their youngest child was born at Good Samaritan. *Id.* Their two youngest children, ages 12 and 15, attend Lakeridge Middle School and Sumner High School. *Id.* Dr. Majors's children have attended schools in the Sumner School District

for all their primary schooling and have participated in many school athletic programs. CP 993.

Dr. Majors's wife is a part-owner and operator of a consignment store in Sumner, Washington, and is a member of the Sumner Downtown Business Association. *Id.* She is also involved with the Parent-Teacher-Association of both of their youngest sons' primary schools. *Id.* The family has significant ties to the community.

B. MultiCare required Dr. Majors to sign a noncompete agreement.

When MultiCare took over Good Samaritan, it required Dr. Majors to sign an employment contract. CP 993. This contract set out the terms of Dr. Majors's employment with MultiCare. CP 7–21. The contract was set for a fixed term, yet MultiCare would extend the term through a new version of the employment contract. CP 993. Dr. Majors signed agreements with MultiCare in 2010, 2014, and 2017. CP 455. The last version of the contract had a term from January 1, 2017, through December 31, 2019. CP 1108. Under this contract, Dr. Majors was an at-will employee. CP 1114–15.

C. MultiCare is a nonprofit organization for the benefit of the community, not competing for profit or market share, and Dr. Majors was an employee who provided care to the community.

MultiCare is a charitable organization with a mission to partner for healing and a healthy future.¹ Its stated values include respecting the dignity of each individual and treating them with care and compassion. One stated value is to “always treat everyone we come into contact with as we would want to be treated.” *Id.* MultiCare enjoys advantages not available to for-profit entities in exchange for its charitable mission and value to the community.

Dr. Majors was an employee of MultiCare. *See* CP 1108. While many physicians enjoy the benefits of ownership as part of a for-profit venture, Dr. Majors could never be an owner or share in profits, because MultiCare has neither owners nor profits.

Dr. Majors was not a salesperson or development director. He had no access to any secret formulas or proprietary process. He delivered babies.

D. MultiCare invested nothing specific or special in Dr. Majors.

MultiCare testified that it did not spend any money on (1) advertising for Dr. Majors, about Dr. Majors, or featuring Dr. Majors

¹ <https://www.multicare.org/our-mission-values/> (last visited Jan. 8, 2019).

or his achievements; (2) opening any new facilities for or because of Dr. Majors, since any money it spent expanding would have been spent regardless of Dr. Majors's presence at MultiCare; or (3) on any other expense whatsoever because of Dr. Majors other than his compensation. CP 922–25.

E. MultiCare terminated Dr. Majors without cause.

On September 15, 2017, MultiCare informed Dr. Majors that it was terminating him without cause.² CP 1006. MultiCare memorialized its decision in a letter to Dr. Majors. *Id.* At the time of his termination, Dr. Majors had been with Good Samaritan Women's Medical Group for 15 years. CP 993.

F. Dr. Major's job requires him to live close to his hospital.

To provide care as an obstetrician, Dr. Majors must reside within 30 minutes of his hospital. CP 993–94. This is an industry-standard requirement for any hospital providing obstetric services. *Id.* This requirement serves the patients. CP 994. The industry term of being “immediately available” enables the physician to handle emergencies for gynecology and obstetricians in a timely manner. *Id.* Caesarian-section

² MultiCare admitted in its answer that it terminated Dr. Majors without cause. CP 61.

and ectopic pregnancies³ are two such emergencies. *Id.* Employers in populous counties enforce this by requiring the obstetrician's residence to be a short distance from the hospital. *See id.*

If Dr. Majors were to accept a job more than 30 minutes from his residence, he would need to sell his house, buy a new house closer to the job, move further away from his wife's job, and pull his kids out of their current schools. *Id.* In the light most favorable to Dr. Majors, the restrictions were greater than necessary to protect specific, legitimate business interests.

G. Terms of the noncompete provision were onerous.

One of the sections of Dr. Majors's employment agreement with MultiCare is entitled "Protection of MHS Business Interests." CP 1207–08. This section has two subparts, "Covenant not to disclose" and "Covenants not to solicit or compete." *Id.* The "Covenants not to solicit or compete" subpart included the following term:

During the term of this Agreement and for a period of **two years** following the date that Physician's employment under this Agreement ends, regardless of the reasons therefor, Physician shall not ... **be a physician**, employer, consultant, officer, director, partner, trustee or shareholder of **any person or entity that engages in whole or in part in the practice of medicine** within a **20 mile radius from MHS** (measured by a line from the office at which

³ <https://www.mayoclinic.org/diseases-conditions/ectopic-pregnancy/symptoms-causes/syc-20372088>

Physician practiced most during the six (6) months prior to termination[)].

CP 1207 (emphasis added). MultiCare required Dr. Majors to sign the employment agreement or else it would not allow him to keep his job.

CP 993.

H. Noncompete agreements are becoming more troublesome in the medical profession.

The physician-patient relationship is unique. Physicians promote the most important of human needs—health and well-being. In this case, Dr. Majors helps bring new life into the world. Unfortunately, some profiteering companies see the aims of providing personalized, high-quality care to their patients as being in tension with running a profitable business. This tension is evident in the current battles over the legality of physician restrictive covenants.

Those entities that employ physicians—such as Health Maintenance Organizations (“HMOs”), hospitals, and practice groups—often seek to protect their business interests by using restrictive covenants. S. Elizabeth Wilborn Malloy, *Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests*, 41 WAKE FOREST L. REV. 189, 189–90 (2006). A physician restrictive covenant is a clause typically found in employment agreements between physicians and their employers that restricts the right of a physician to engage in a business similar to or

competitive with that of the employer after the conclusion or termination of the physician's employment. *Id.* Physicians are often required by their employers to sign such covenants prior to beginning their practice. *Id.* The contractual clauses obligate physicians to refrain from engaging in or establishing a competitive medical practice within a certain geographic region for a limited time period. *Id.* The restrictive covenant typically will also prohibit a physician from treating patients at hospitals within the same geographic area. *Id.*

Physician restrictive covenants have steadily gained in use within the medical community, in part due to the increased professional mobility of physicians. *Id.* Physicians today are more likely to change employers than in the past. *Id.* Prior to 1990, less than two percent of physicians changed jobs during their career. *Id.* Physicians entering the workforce after 1990, in comparison, had switched employers on average about three times before 2000. *Id.* (citations omitted). In fact, recent studies indicate that approximately ten percent of physicians may change jobs annually. *Id.* (citations omitted). Many of these physicians are unaware of the impact that restrictive covenants can have on their mobility and professional opportunities. *Id.* at 191 (citations omitted). Although a physician who chooses to leave a practice in spite of a restrictive covenant may suffer financially because of the loss of a patient base, the physician has an

ongoing responsibility to the patients with whom he may no longer be legally permitted to have a relationship. *Id.* Thus, for physicians, these covenants often present difficult economic and ethical challenges. *Id.*

Court opinions tend to emphasize the negative impact of these covenants upon the doctors themselves. *Id.* (citations omitted). However, individual patients of these doctors can also suffer from the enforcement of these covenants. *Id.* A patient's quality of care is often directly affected by the stability of the patient's relationship with his or her physician. *Id.* (citations omitted). Physician restrictive covenants can inhibit the formation of long-term relationships between physicians and patients and, thus, result in a lesser quality of care for the patient. *Id.* (citations omitted).

I. The medical profession discourages noncompete agreements and acknowledges that patients get to pick their doctors.

It is well established that patients have the right to choose their doctor. MultiCare acknowledges this right in its employment agreements, which have a section entitled, "Continuity of Care; Patient Freedom of Choice." CP 1111–12. This section states, in part, that "under all circumstances, the freedom shall be preserved of any patient to choose the facility or provider from which he or she receives medical services." *Id.*

The American Medical Association (AMA) Council on Ethical and Judicial Affairs issued a report in 2014 discouraging restrictive covenants

in the medical profession. CP 1014–20. The Council concluded that noncompete covenants restrict competition, disrupt continuity of care, and limit access to care. *Id.* The Council also discourages covenants that (a) unreasonably restrict the right of a physician to practice medicine for a specified period of time or in a specified geographic area on termination of a contractual relationship; and (b) do not make reasonable accommodation for patients’ choice of physician. *Id.*

J. The baseless restrictions were the same as to other MultiCare doctors.

1. The restricted area was uniform and baseless.

When implementing the noncompete provision, MultiCare did not rely on any data in choosing the radius or the 2-year time period. CP 899, 902, 904, 906. Instead, MultiCare decided the terms of the noncompete on assumptions about the nature of the practice of medicine that a doctor practicing within 20 miles would draw away its patients. CP 901–02. A restriction of this radius equates to 1,256.637 square miles of the second biggest area of growth in the state⁴ MultiCare apparently used the same distance for the vast majority of its doctors and failed to consider either

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https://www.ofm.wa.gov/sites/default/files/public/dataresearch/pop/april1/ofm_april1_poptrends.pdf

the needs of the community for his service or that Dr. Majors’s job required him to be within a certain distance of the hospital. *See id.*

MultiCare concedes that a two-mile radius around its hospital and Bonney Lake clinic would capture roughly the same amount of competition as a five-mile radius. CP 920. MultiCare had no estimate of how its interests would be affected if the radius was reduced from 20 miles to 5 miles. CP 920–22.

The MultiCare location at issue was the Bonney Lake Medical Building. CP 994. Applying the 20 miles radius referenced in the noncompete clause, a visual representation of the area roughly looks like this:



Id.

Assuming a patient wanted to have Dr. Majors deliver her baby, which is likely an unscheduled procedure requiring a hospital, it is not

likely that the patient would drive outside the 1,256 square mile area to have Dr. Majors conduct the urgent procedure. Therefore, the restricted area looks like a way of denying patients continuity of care. *See id.*

2. The two-year time restriction was uniform and baseless.

MultiCare has no data or information regarding why a noncompetitor of a 10-month duration (the gestational period for humans) for Dr. Majors would not adequately address its concerns, considering his patients come to him for care gestating and delivering their babies. CP 989–90.

MultiCare is also unaware of a single patient asking about Dr. Majors, why he left, where he is, if he still works, where he works, or for any information about him whatsoever. CP 902, 903, 930. MultiCare does not actually know how much of his practice was non-obstetric (short-term) patients and has no data to support its presumption that Dr. Majors had any such patients. CP 928. When pressed, MultiCare ultimately admitted that such information was not considered in making its decisions regarding the noncompetitor provisions. CP 928–29.

MultiCare indicated the only real information it relies on in evaluating the competitive effect on MultiCare is “market-share” data. CP 937–38. That data does not exist for clinics, however, only hospitals. *Id.* MultiCare does not know the market share effect of any practice in Enumclaw. CP 940. Furthermore, MultiCare has no information regarding

the direct effect these other businesses actually have on MultiCare's business. *Id.*

MultiCare assumes that if Dr. Majors were permitted to work in Enumclaw, he would take MultiCare's patients that treat in its Bonney Lake clinic. CP 931. MultiCare bases this assumption entirely on one doctor's general experience in the practice of medicine. CP 931–36.

MultiCare's noncompete provision term is two years. CP 1113. Human pregnancy is completed in under two years. This two-year period was longer than necessary to prevent patients from following Dr. Majors.

3. Dr. Major's noncompete provision prevented him from practicing medicine.

Under the express terms of the noncompete provision, Dr. Majors was forbidden to be a physician. CP 1113–14. He could not take his own child's temperature, volunteer at a local charitable clinic, or call a patient or review a chart from home—even if his practice was 20 miles away. *See id.*

K. The restrictions prevented him from taking work.

A few weeks after MultiCare terminated Dr. Majors, he received a job offer from another health care provider. CP 994–95. The job was at a hospital designated as being in a Critical Access area. CP 995. The government recognizes that some communities are “Critical Access” areas, which are medically underserved communities. *Id.* These are

communities in need of a physician with Dr. Majors's skill set. *Id.* This offer was for a job in Enumclaw, but one day a week Dr. Majors would work in Bonney Lake, which is roughly two miles away from the Bonney Lake Medical Building. CP 994–995. MultiCare has no presence in Enumclaw. CP 995.

At this new job, Dr. Majors would only treat existing patients of the new employer. CP 996. Dr. Majors did not seek to take patients with him or advertise his other practice. *See id.* Practically, this meant there was little or no risk of a single patient stopping care with MultiCare and following him to a competitor. *See id.* There were no trade secrets threatened, and no vendors or fellow employees were going to quit MultiCare to follow Majors. CP 995–96. This new job would have also allowed Dr. Majors to practice in his field without having to relocate his family. CP 994–95.

Dr. Majors informed the prospective employer of the existence of his noncompete agreement. CP 995. The prospective employer informed Dr. Majors that it could not hire him because of the noncompete provision and revoked the job offer. *Id.* MultiCare, a nonprofit entity, effectively used its noncompete provision to prohibit Dr. Majors from providing much-needed medical services to mothers and babies in the very community MultiCare pledged to serve. *See id.*

L. The community needs Dr. Majors's specialty.

The United States is facing a shortage of physicians in the coming years, particularly obstetricians and gynecologists. McKenna Moore, *These Cities Are Most Likely to Face an OB-GYN Shortage by 2020*, FORTUNE.⁵ By 2020, there will be a shortage of up to 8,800 OB-GYNs, according to the American Congress of Obstetricians and Gynecologists. *Id.* And by 2050, the shortage may grow to 22,000. *Id.* One recent study found there are fewer than 700 OB/GYNs in Western Washington.⁶ Letting private employers push doctors away from patients in much-needed specialties threatens the public.

M. Dr. Majors asked MultiCare to adjust the scope of his noncompete provision, with no success.

The MultiCare location where Dr. Majors practiced most during his last six months was the Bonney Lake Medical Building, located in Bonney Lake, WA. CP 994. The area within 1,256 square miles of this location includes Kent, Federal Way, Tacoma, Puyallup, Lakewood, Buckley, and some of SeaTac. *Id.*

⁵ <http://fortune.com/2018/06/27/these-cities-are-most-likely-to-face-an-ob-gyn-shortage-by-2020/> (June 27, 2018).

⁶ <http://depts.washington.edu/fammed/chws/wp-content/uploads/sites/5/2015/09/washington-states-physician-workforce-in-2016.pdf> (last visited Dec. 20, 2018)

Dr. Majors asked MultiCare whether it would modify the noncompete clause in his contract so that he could pursue other job opportunities. CP 993, 1008–10. MultiCare responded by saying that it would neither release nor negotiate Dr. Majors’ noncompete provision. CP 993. MultiCare’s position was fixed before it had any information as to the prospective job or employer.

Dr. Majors then wrote a letter to MultiCare regarding his noncompete agreement. CP 1008–10. In this letter, Dr. Majors explained to MultiCare that the noncompete provision of his contract was unenforceable. *Id.* He went on to explain why MultiCare should agree to modify the noncompete provision. *Id.*

During litigation, MultiCare testified that it made an exception for a different OB/GYN to take another job as a laborist for a direct competitor because he would only be treating the competitor’s existing patients. CP 853–856. A laborist is an OB/GYN who specializes in caring for women in labor and delivering. A laborist works on-site at the hospital, devoting his or her full attention to any woman who arrives in labor. Once a patient is admitted, the laborist is responsible for her care through delivery of her baby or until the patient’s personal health care provider arrives. In this role, Dr. Majors would not even have his own patient base—he would only treat patients who were already at the hospital.

N. The parties brought cross-motions for summary judgment.

Dr. Majors filed a declaratory judgment action, and the parties filed cross-motions for summary judgment. CP 22–30. Dr. Majors asked the trial court to hold MultiCare’s noncompete provision as unenforceable, or in the alternative, to reform it. *Id.*; CP 453–74, 1041–56. MultiCare asked the trial court to hold that the noncompete provision was reasonable and enforceable as written. CP 453–74.

O. The trial court erroneously held that the noncompete provision was reasonable and enforceable.

1. First Factor: Necessary to Protect Business or Goodwill

For the first factor, the trial court looked at whether MultiCare had a legitimate interest in protecting its **existing** client base and the investment MultiCare had made in Majors. RP 49. The court then held, without elaboration, that it was “clear” that MultiCare had “a protectable goodwill and business interest.” RP 49. The court did not address the fact that Dr. Majors had an existing client base before MultiCare bought Good Samaritan or that MultiCare had made essentially no investment into Dr. Majors’s practice (other than paying his salary). *See* RP 49–50. It did not look at the contract, which states MultiCare’s so-called business interests (¶12) and does not mention any investment in Dr. Majors. *Id.* The court did not consider that the contract already prohibits Dr. Majors from

soliciting MultiCare patients by a non-solicit clause independent from the noncompete clause. *Id.*

2. Second Factor: Greater Restraint than is Reasonably Necessary

For the second factor, the trial court found that geographic restrictions greater than two miles were found to be reasonable in other cases, such as *Armstrong v. Taco Time*. RP 50. The trial court also accepted at face value MultiCare's position that it needed 1,256 square miles to protect the **investment** it made in Dr. Majors. *Id.* The trial court went on to state that the noncompete did not prohibit Dr. Majors from obtaining gainful employment outside the noncompete area. RP 51. The trial court went further to state that there was **nothing** to indicate that the noncompete provision had infringed on Dr. Majors's ability to earn a living. *Id.* The court concluded,

To limit his ability to work for two years and limit the scope so that competitors to MultiCare Health System do not, for lack of a better terminology, **incur a loss on their investment** appears to this Court not only to be reasonable but necessary to protect their business or goodwill.

RP 51–52 (emphasis added).

3. Third Factor: Injury to the Public

For the third element, the court held that there was nothing indicating a denial of public access to necessary services or any other harm to the public. RP 52. The court did not consider that the noncompete

provision prohibited Dr. Majors from accepting a position with a non-profit organization that provided accessible medical services to an underserved community. *Id.*

4. Trial Court’s Conclusion and Nature of Restriction

In conclusion, the court stated that it was reaching its holding by looking at the facts in “the light most favorable to **both** sides.” RP 52. The court then held that there were “**no** disputed facts” regarding MultiCare’s motion. *Id.* The trial court granted MultiCare’s motion. *Id.*

After the court made its oral ruling, Dr. Majors asked the court whether it had considered in its ruling the nature of the restriction the noncompete provision placed on Dr. Majors; namely, that he could not practice medicine in any form. RP 52–54. The trial court responded, “[G]iven how the covenant is written and given what I’ve made my ruling and how I’ve made my ruling, he’s prohibited per the terms of the covenant to the – Well, he’s prohibited per the terms of the covenant.” RP 54–55.

The trial court entered its order granting MultiCare’s motion for partial summary judgment and denying Dr. Majors’s motion for summary judgment. CP 1371–73. The court also dismissed with prejudice

Dr. Majors's claim for declaratory judgment regarding the noncompete provision. CP 1372.⁷

V. ARGUMENT

A. **The standard of review is *de novo*.**

The court should review *de novo* the trial court's decision granting MultiCare's motion for summary judgment and denying Dr. Majors's motion for summary judgment. The court reviews a trial court's order granting summary judgment *de novo*. *Parker Estates Homeowners Ass'n v. Pattison*, 198 Wn. App. 16, 24, 391 P.3d 481 (2016). The court also reviews interpretations of contracts *de novo*. *See, e.g., Viking Bank v. Firgrove Commons 3, LLC*, 183 Wn. App. 706, 711–12, 334 P.3d 116 (2014). This court lends no deference to the trial court's decision.

B. **MultiCare is a nonprofit charity, not a for profit partnership.**

Unlike traditional for-profit entities, whose main goal is profit maximization, charitable nonprofits are organized and operated to benefit the greater good of the community. As a result, charitable nonprofits

⁷ On August 22, 2018, the trial court entered a stipulated order dismissing Dr. Majors's remaining claims without prejudice. Appendix A. The parties agreed that the purpose of this stipulation was to facilitate appellate review of the trial court's order granting MultiCare's motion for partial summary judgement. *Id.* On September 5, 2018, Dr. Majors's timely filed a notice of appeal seeking review of the trial's orders (1) granting MultiCare's motion for partial summary judgement and (2) dismissing Dr. Majors's remaining claims without prejudice. Appendix B.

receive donations from philanthropic individual, as well as various tax breaks from the government, which are unavailable to for-profit entities. Lindsey D. Blanchard, *Charitable Nonprofits' Use of Noncompetition Agreements: Having the Best of Both Worlds*, 44 GOLDEN GATE U. L. REV. 277, 277–78 (2014). One commentator argues that Charitable nonprofits' use of noncompetition agreements is contrary to their missions and tax-exempt statuses, as well as to the public interest, because the noncompetition agreements restrict individuals' abilities to serve the community. Moreover, there are less intrusive means of protecting an employer's interests. To narrow the argument from the article, the court should not enforce noncompete agreements as against employees of a nonprofit organization when that employee's primary duties are to deliver the very service that is the mission of the charitable organization. Exceptions may exist for development officers who relate to donors, or others with specialized knowledge or training. However, to prevent a physician from practicing medicine, even if with a competitor, in the very community the nonprofit serves is inconsistent with the privileged status of a tax-exempt nonprofit organization.

C. Dr. Majors was an employee, not an owner.

Courts enforce noncompete agreements more strictly against partners (i.e., owners) than as against employees. *Alexander & Alexander*,

Inc. v. Wohlman, 19 Wn. App. 670, 684–85, 578 P.2d 530 (1978); *see, e.g., Salewski v. Pilchuck Veterinary Hosp., Inc.*, 189 Wn. App. 898, 905 n.18, 359 P.3d 884, *rev. denied*, 185 Wn.2d 1006 (2016) (citing 2 LOUIS ALTMAN & MALLA POLLACK, CALLMANN ON UNFAIR COMPETITION, TRADEMARKS AND MONOPOLIES § 16:27, at 16-112 to -113 (4th ed. 2009) (“When a covenant not to compete is signed by a true partner in a professional partnership, some courts have recognized that this presents a situation which is entitled to a level of scrutiny intermediate between that which is applicable to an employment and that which is applicable to a sale of a business interest.”)); *Ashley v. Lance*, 75 Wn.2d 471, 451 P.2d 916 (1969) (reviewing a noncompete between partners (i.e., owners) of a medical practice); *Smith Adcock & Co. v. Rosenbohm*, 518 S.E.2d 708, 238 Ga. App. 281 (1999) (applying strict scrutiny to restrictive covenants with employees, rather than owners); *Arthur Murray Dance Studios of Cleveland v. Witter*, 105 N.E.2d 685, 702–03, 62 Ohio Law Abs. 17 (1952) (distinguishing between sale of a business and the critically examined and strictly construed noncompete agreement with an employee).

The trial court erred when it relied upon a case about protecting franchisees from overcrowding or unfairly competing from a peer franchisee in deciding that an employed physician should be prohibited

from practicing medicine. The *Armstrong v. Taco Time Intern., Inc.* court analyzed a franchisee's breach during the franchise contract, not an employee's post-employment restrictions on his right to practice his profession. 30 Wn. App. 538, 635 P.2d 1114 (1981). Public policy applies differently to physicians who bring babies into the world than it does to franchisees' tacos. The trial court erred.

D. Overly broad noncompete restrictions should be stricken, not rewritten.

The landmark case allowing courts to rewrite noncompete agreements to be reasonable is now fifty years old. *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968). The experiment has failed. It failed because employers, which invariably are the drafters of these agreements, believe they have no incentive to draft reasonable restrictions. The proliferation of legal forms on the Internet means far too many employers feel compelled to use them. Prospective employers may reject qualified candidates because employment that violates unenforceable express terms carries the risk of litigation. The rule should be clarified that the express terms must be near to reasonable before a court will then shrink to fit them to be reasonable. This adaptation of the common law reflects changing of the times and circumstances. It is also consistent with our jurisprudence

that an overly broad noncompete agreement is not enforceable, as in *Schneller v. Hayes*, 176 Wash. 115, 28 P.2d 273 (1934).

E. MultiCare’s noncompete provision was unreasonable under the *Perry* factors.

The trial court also erred in holding that MultiCare’s noncompete provision was reasonable as a matter of law because it was broader than necessary, significantly impacted Dr. Majors’s ability to work, and harmed the public. Courts enforce noncompete agreements if they are reasonable and lawful. The court reviews three factors for reasonableness:

- (1) Whether the restraint is necessary to protect the employer’s business or goodwill;
- (2) Whether it imposes on the employee any greater restraint than is reasonably necessary to secure the employer’s business or goodwill; and
- (3) Whether enforcing the covenant would injure the public through loss of the employee’s services and the skill to the extent that the court should not enforce the covenant, i.e., whether it violates public policy.

Perry v. Moran, 109 Wn.2d 691, 698, 748 P.2d 224 (1987), *judgment mod. on recons.*, 111 Wn.2d 885, 766 P.2d 1096 (1989).

1. First Factor: The employer did not have legitimate business interests that required a noncompete to protect.

The restraint imposed by MultiCare’s noncompete provision is broader than necessary to protect MultiCare’s business or goodwill. There is a short list of legitimate business interests that courts accept as a basis for enforcing a noncompete agreement. MultiCare argues that it bought

the patient base. Because the patients should be allowed to choose their own doctor, and medical ethics require physicians to put patients' needs first and cooperate with continuity of care, this seems primarily aimed at MultiCare patients that were not Dr. Majors's. There is no evidence in the record that Dr. Majors has any ability to take patients from MultiCare that were not his, and the law would not protect such an interest. *See Scott, Stackrow & Co., C.P.A.'s, P.C. v. Skavina*, 9 A.D.3d 805, 806 (N.Y. 2004) (holding that a former employer's interest in goodwill is not legitimate if the employer seeks to bar the former employee from soliciting or providing services to clients with whom the former employee never acquired a relationship through his or her employment or if the covenant extends to personal clients recruited through the employee's independent efforts); *Madison v. LaSene*, 44 Wn.2d 546, 268 P.2d 1006 (1954); *Diesel Injections Sales & Serv., Inc. v. Renfro*, 619 S.W.2d 20 (1981).

MultiCare argued to the trial court that it invested money into Good Samaritan. This is not a legitimate business interest to support a noncompete agreement with Dr. Majors. The interest must be the training of Dr. Majors, which MultiCare did not provide.

MultiCare argued to the trial court that it must protect its goodwill and referral sources. Goodwill is another way of saying its existing patient base and expectation of on-going business, such as from referral sources.

While goodwill and referral sources may be legitimate business interests to protect, there is no evidence in this case that Dr. Majors knew or threatened to take any referral source. To the contrary, Dr. Majors was looking at taking a job in which he would serve only existing patients of another healthcare system and not take his current patients or any referral sources. MultiCare's meanspirited approach merely deprives him of his ability to earn a living and deprives the critically underserved community of a physician with an underserved specialty. MultiCare must articulate a legitimate business interest and then tie the restrictions to that interest. It did not.

2. Second Factor: The noncompete imposes greater restraint than is reasonably necessary to secure the employer's business or goodwill.

Post-employment restrictions must be reasonable in terms of duration and scope, and they must be necessary to protect the employer's business interests. *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 370, 680 P.2d 488 (1984). For five reasons, the contract cannot be enforced as written.

First, the duration of the restriction is longer than necessary to protect the legitimate business interests of MultiCare. Second, the 1,256 square mile geographic restriction is too large. If MultiCare was concerned that Dr. Majors would take specific patients with him

(assuming the court finds that a legitimate interest), MultiCare could have substituted geography for a restriction on patients of MultiCare. Because MultiCare did not write the restriction in terms of MultiCare patients, this court may make assumptions about MultiCare's true motivations for restricting Dr. Majors (and its other doctors) by its choice of terms.

Third, the restricted scope of activities prohibits fair competition. The express terms prohibit his ability to "be a physician," regardless of whether it was for profit or in a specialty or kind of medicine that MultiCare practices. *See, e.g., Intermountain Eye and Laser Centers, P.L.L.C. v. Miller*, 127 P.3d 121, 142 Idaho 218 (2005) (holding restriction on "practice of medicine" was invalid as it prohibited beyond the legitimate business interests of the employer).

Fourth, other factors in weighing the reasonableness of the noncompete include the needs of his family, the current conditions of employment, and the necessity of the promisor changing his residence. *See, e.g., Hopper v. All Pet Animal Clinic, Inc.*, 861 P.2d 531, 540 (1993) (citing *Phillip G. Johnson & Co. v. Salmen*, 317 N.W.2d 900, 904, 211 Neb. 123 (1982)); *Wood v. May*, 73 Wn.2d 307, 313, 438 P.2d 587 (1968) (enforceability only without injustice to the parties) (citations omitted). The restrictions weigh needlessly heavy on Dr. Majors, his family, and the community.

Fifth, even if MultiCare did have protectable business interests, the scope of its noncompete provision significantly impacted Dr. Majors's ability to earn a living and the community's access to medical care. An employee's ability to earn a living is an important factor. *See, e.g., Emerick v. Cardiac Study Center, Inc., P.S.*, 170 Wn. App. 248, 256, 286 P.3d 689 (Div. II 2012) (*Emerick I*); *Emerick v. Cardiac Study Center, Inc., P.S.*, 189 Wn. App. 711, 724-25, 357 P.3d 696 (Div. I 2015) (*Emerick II*). The contract cannot be enforced as written.

3. Third Factor: Enforcing the covenant would injure the public through loss of the employee's services and the skill.

The noncompete provision cannot be enforced as written without needless injury to the community. Public policy requires the court to carefully examine covenants not to compete, even when a legitimate business interest is present, because of equally competing concerns of freedom of employment and free access of the public to professional services. *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 370, 680 P.2d 488 (1984). In *Murfreesboro Medical Clinic, P.A. v. Udom*, the Tennessee Supreme Court, relying on public policy, banned noncompete agreements between physicians and their private employers. 166 S.W.3d 674 (Tenn. 2005). Other courts agree. The trial court also failed to properly consider the public harm, an example of which the court

considered in *Amazon.com, Inc. v. Powers*, No. C12-1911RAJ, 2012 WL 6726538, at *9 (W.D. Wash. 2012) (Washington Courts have been “less deferential to general restrictions on competition that are not tied to specific customers”); *see, e.g., Peachtree Fayette Women’s Specialists, LLC v. Turner*, 699 S.E.2d 69, 305 Ga. App. 60 (2010) (affirming trial court’s rejecting noncompete of OB/GYN as unreasonable as a matter of law). The agreement should not be enforced as written under the circumstances.

In searching for a legitimate business interest, public policy applies differently to medical doctors due to public policy promoting their profession and the importance of the doctor-patient relationship. Indeed, the court recognizes the importance of less important relationships. A patient trusts the physician to save his or her life, to help give birth to a child or make family planning choices, to help in such a fundamental position of trust and confidence that to expose the patient to such vulnerability violates public policy. *Cf. Alexander & Alexander, Inc. v. Wohlman*, 19 Wn. App. 670, 687, 578 P.2d 530 (1978) (“In considering the injury to the public test, in this instance members of the public should be entitled to select whatever insurance broker they desire,” because the “relationship between broker and insured is often highly personal.”). Moreover, legislators and commentators distinguish between physicians

and all other noncompete agreements. Colo. Rev. Stat. §8-2-113(3); Del. Code Ann. Tit. 6 § 2707 (noncompete agreements between physicians are void); Mass. Gen. Laws Ann. Ch. 112, § 12X (voiding noncompete agreements between physicians); Paule Berg, *Judicial Enforcement of Covenants Not to Compete Between Physicians: Protecting Doctors' Interests at Patients' Expense*, 45 RUTGERS L. REV. 1 (1992) (arguing that the three-factor “rule of reason” to judge noncompete agreements is as illegitimate when applied to physicians as it is when applied to attorneys). Courts should scrutinize contracts that limit the public’s access to physicians, especially in critical access areas. Washington appellate courts have not enforced such an agreement against an employee (i.e., non-owner) physician.

F. MultiCare’s noncompete provision is an unlawful restraint of trade.

State law prohibits restraint of trade. RCW 19.86.030. The state Constitution likewise prohibits monopolies and restraint of trade. *Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wn.2d 929, 540 P.2d 1373 (1975) (analyzing whether noncompete agreement violates Wash. Const. Art. 12, § 22). In an analogous case, a noncompete prohibiting a physician from practicing medicine within 18 miles of the employer hospital for twenty-four months was an unreasonable restraint of trade designed to

eliminate competition and would unreasonably interfere with both the public's right to access the physician of their choice and the physician's right to earn a living. *Mercy Health System of Northwest v. Bicak*, 383 S.W.3d 869 (2011). The contract is in restraint of trade as against a former employee; MultiCare bears the burdens of proof and persuasion. A reasonable inference from the way the terms restrict nearly all MultiCare's doctors and the absence of data or basis is that MultiCare's motive was anti-competitive. Restraints of unfair competition may be made, yet restraints of fair competition are illegal. MultiCare has not met its burden.

VI. CONCLUSION

The trial court's decision granting MultiCare's motion for summary judgment and finding that the contract was enforceable as written and without theoretical exception was in error. This court should refuse enforcement because the restrictions were untethered to legitimate business interests, for anti-competitive motives, and too overbroad to reform. In the alternative, the court should reform the agreement to a reasonable restriction under the circumstances or remand with direction for further proceedings.

DATED this 11th day of January, 2019.

Respectfully submitted,



Aaron V. Roche, WSBA No. 31525
Peter Montine, WSBA No. 49815
Roche Law Group, PLLC
Attorneys for Appellant

APPENDIX A

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6 IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

7 JAMES MAJORS, an individual,) Case No.: 18-2-05344-2
8)
9 Plaintiff,) STIPULATION AND
vs.) [proposed] ORDER DISMISSING
10) PLAINTIFF'S REMAINING CLAIMS
MULTICARE HEALTH SYSTEM, a) WITHOUT PREJUDICE
11 Washington non-profit corporation,) PURSUANT TO CR 41
12)
13 Defendants.)

14 THIS MATTER comes before the Court on the parties' stipulation that Plaintiff's
15 remaining claims be dismissed without prejudice in order to finalize the issues under this cause
16 number.

17 **I. STIPULATION**

18 This Court granted partial summary judgment to Defendant on the issue presented in
19 "Cause A" of Plaintiff's Complaint.¹ The parties agree and stipulate that the remaining causes of
20 action² in the Complaint be dismissed without prejudice in order to finalize the action. The
21 parties further agree that the purpose of the dismissal of these actions is to facilitate appellate
22 review of the Court's Order Granting Partial Summary Judgment in favor of the defendant. As
23 such, Plaintiff further stipulates that Defendant retains the ability to revisit this cause number in
24 order to pursue a motion for costs, expenses, and attorney's fees, if Defendant chooses to do so

¹ Order Granting Defendant's Motion for Partial Summary Judgment, entered July 13, 2018.

² B, C, and D.

1 in the future or while any appeal in this matter is pending. Plaintiff does not stipulate that the
2 Defendant is entitled to such relief, but rather that Defendant, by entering into this stipulation,
3 has not given up its ability to pursue such relief if it chooses to do so in the future.

4 ROCKE | LAW Group, PLLC

Winterbauer & Diamond PLLC

5 s/ Jeremy Bartels



6 Jeremy S. Bartels, WSBA No. 36824
7 Attorney for Plaintiff
8 101 Yesler Way, Suite 603
9 Seattle, WA 98104
10 (206) 652-8670

Steven Winterbauer, WSBA No. 16468
11 Nicholas Gillard-Byers, WSBA No. 45707
12 Attorney for Defendant
13 1200 5th Avenue, Suite 1700
14 Seattle, WA 98101
15 (206) 676-8440

9 II. ORDER

10 The Court has considered the parties' stipulated motion and the materials contained in the
11 Court's file. The Court agrees with the parties' position and grants the stipulated motion.

12 IT IS ORDERED:

- 13 • The Parties' Stipulated Motion to Dismiss is GRANTED and the remaining causes of
14 action in this matter are dismissed without prejudice;
- 15 • By stipulation, this Order does not preclude Defendant from pursuing any litigation
16 costs and/or attorney's fees otherwise due to Defendant under the law, should the
17 Defendant elect to pursue such a remedy, including while any appeal in this matter is
18 pending;
- 19 • For purposes of such a motion for costs or fees, the period provided for in CR
20 54(d)(2) shall be extended until 30 days after the termination of any pending appeal,
21 either by decision of the Court of Appeals or by denial of review or decision of the
22 Supreme Court if appeal is sought therein; and

APPENDIX B

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF PIERCE

JAMES MAJORS, an individual,)	Case No.: 18-2-05344-2
)	
Plaintiff,	)	NOTICE OF APPEAL TO THE COURT OF
vs.	)	APPEALS, DIVISION II
)	
MULTICARE HEALTH SYSTEM, a)	
Washington non-profit corporation,)	
)	
Defendants.)	

Plaintiff James Majors seeks review by the designated appellate court of the Order Granting Defendant’s Motion for Partial Summary Judgment, entered on July 13, 2018, and the Order Dismissing Plaintiff’s Remaining Claims Without Prejudice, entered on August 22, 2018. Copies of these decisions are attached to this notice.

DATED this 5th day of September, 2018.

ROCKE | LAW Group, PLLC

s/ Jeremy Bartels

Jeremy Bartels, WSBA No. 36824
Attorney for Plaintiff

Attorneys for Plaintiff:
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Jeremy S. Bartels, WSBA No. 36824
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Attorneys for Defendant:
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Nicholas Gillard-Byers, WSBA No. 45707
Winterbauer & Diamond PLLC
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(206) 676-8440
steven@winterbauerdiamond.com
nicholas@winterbauerdiamond.com

1 **DECLARATION OF SERVICE**

2
3 I caused a copy of the foregoing Notice of Appeal to be served to the following in the
4 manner indicated

5 **Via E-mail to:**

6 Steven Winterbauer
7 Nicholas Gillard-Byers
8 Winterbauer & Diamond PLLC
9 1200 5th Avenue, Suite 1700
10 Seattle, WA 98101
steven@winterbauerdiamond.com
nicholas@winterbauerdiamond.com
mail@winterbauerdiamond.com

11 on today's date.

12 I declare under penalty of perjury under the laws of the state of Washington that the
13 foregoing is true and correct to the best of my belief.

14 Signed and DATED this 5th day of September, 2018, in Seattle, Washington.

15
16 *s/ Kaelan Hale*
Kaelan Hale, Legal Assistant

APPENDIX C

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IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
COUNTY OF PIERCE

JAMES MAJORS, an individual,)	Case No.: 18-2-05344-2
)	
Plaintiff,	)	NOTICE OF APPEAL TO THE COURT OF
vs.	)	APPEALS, DIVISION II
)	
MULTICARE HEALTH SYSTEM, a)	
Washington non-profit corporation,)	
)	
Defendants.)	

Plaintiff James Majors seeks review by the designated appellate court of the Order Granting Defendant’s Motion for Partial Summary Judgment, entered on July 13, 2018, and the Order Dismissing Plaintiff’s Remaining Claims Without Prejudice, entered on August 22, 2018. Copies of these decisions are attached to this notice.

DATED this 5th day of September, 2018.

ROCKE | LAW Group, PLLC

s/ Jeremy Bartels

Jeremy Bartels, WSBA No. 36824
Attorney for Plaintiff

Attorneys for Plaintiff:
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Attorneys for Defendant:
Steven Winterbauer, WSBA No. 16468
Nicholas Gillard-Byers, WSBA No. 45707
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1200 5th Avenue, Suite 1700
Seattle, WA 98101
(206) 676-8440
steven@winterbauerdiamond.com
nicholas@winterbauerdiamond.com

1 **DECLARATION OF SERVICE**

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7 Nicholas Gillard-Byers
8 Winterbauer & Diamond PLLC
9 1200 5th Avenue, Suite 1700
10 Seattle, WA 98101
steven@winterbauerdiamond.com
nicholas@winterbauerdiamond.com
mail@winterbauerdiamond.com

11 on today's date.

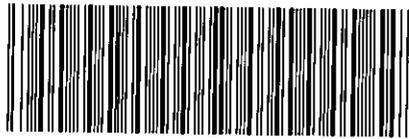
12 I declare under penalty of perjury under the laws of the state of Washington that the
13 foregoing is true and correct to the best of my belief.

14 Signed and DATED this 5th day of September, 2018, in Seattle, Washington.

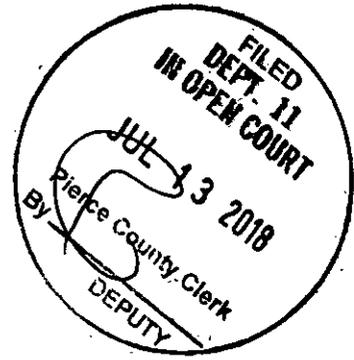
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16 *s/ Kaelan Hale*
Kaelan Hale, Legal Assistant

Exhibit 1

0022



18-2-05344-2 51884180 ORGPSJ 07-17-18



SUPERIOR COURT OF WASHINGTON IN AND FOR PIERCE COUNTY

JAMES MAJORS, M.D.,

Plaintiff,

No. 18-2-05344-2

v.

MULTICARE HEALTH SYSTEM,

Defendant.

~~PROPOSED~~ ORDER GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Clerk's Action Required)

THIS MATTER came before the above-entitled Court upon Defendant's Motion for Partial Summary Judgment. Defendant MultiCare Health System was represented by its attorneys, Steven H. Winterbauer and Nicholas A. Gillard-Byers, Winterbauer & Diamond, PLLC. Plaintiff was represented by his attorneys, Aaron Rocke and Jeremy Bartels of Rocke Law Group PLLC.

This Court has considered the records and files herein, including but not limited to:

- Defendant's Motion For Partial Summary Judgment;
- Declarations of the following persons, including all exhibits thereto, if any, filed with Defendant's Motion For Partial Summary Judgment:
 - David Carlson, D.O.

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- Maureen Faccia
- Barbara Barronian
- Jason Haney
- Linda Heinrich
- Erin Kobberstad
- Sharon Royne
- Shelley Nelson; and
- Nicholas Gillard-Byers.

- Plaintiff's response in opposition to Defendant's Motion For Partial Summary Judgment, and all supporting declarations and exhibits thereto, if any;
- Defendant's reply memorandum, and all supporting declarations and exhibits thereto, if any.

Based upon the foregoing and considering all evidence pursuant to CR 56, Defendant is entitled to summary judgment on Plaintiff's claim for declaratory judgment that the non-compete provision of his Employment Agreement be stricken or reformed.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

- 1) Defendant's Motion For Partial Summary Judgment is granted in full;
- 2) Plaintiff's claim for declaratory judgment regarding his non-compete provision be dismissed with prejudice; and *summary judgment*

~~3) Defendant is granted statutory costs and disbursements herein to be taxed.~~

DONE this 13th day of July, 2018.



 Honorable G. Helen Whitener

[Handwritten initials and signatures]

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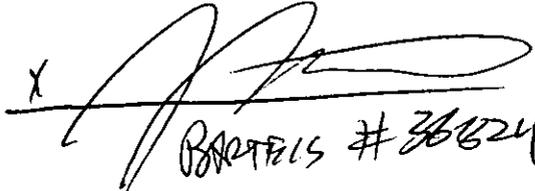
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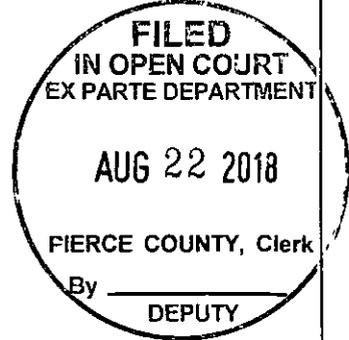
WINTERBAUER & DIAMOND PLLC

s/ Nicholas Gillard-Byers
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Telephone: (206) 676-8440
Fax: (206) 676-8441
Attorneys for Defendant
MultiCare Health System

APPROVED AS TO FORM:

BARTELS #36624
ATTY FOR PLAINTIFF.

WINTERBAUER & DIAMOND PLLC
1200 Fifth Avenue, Suite 1700
Seattle, Washington 98101
Telephone: [206] 676-8440

Exhibit 2



IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

7	JAMES MAJORS, an individual,	)	Case No.: 18-2-05344-2
)	
8	Plaintiff,	)	STIPULATION AND
	vs.	)	[proposed] ORDER DISMISSING
9		)	PLAINTIFF'S REMAINING CLAIMS
10	MULTICARE HEALTH SYSTEM, a	)	WITHOUT PREJUDICE
	Washington non-profit corporation,	)	PURSUANT TO CR 41
11	Defendants.)	

THIS MATTER comes before the Court on the parties' stipulation that Plaintiff's remaining claims be dismissed without prejudice in order to finalize the issues under this cause number.

I. STIPULATION

This Court granted partial summary judgment to Defendant on the issue presented in "Cause A" of Plaintiff's Complaint.¹ The parties agree and stipulate that the remaining causes of action² in the Complaint be dismissed without prejudice in order to finalize the action. The parties further agree that the purpose of the dismissal of these actions is to facilitate appellate review of the Court's Order Granting Partial Summary Judgment in favor of the defendant. As such, Plaintiff further stipulates that Defendant retains the ability to revisit this cause number in order to pursue a motion for costs, expenses, and attorney's fees, if Defendant chooses to do so

¹ Order Granting Defendant's Motion for Partial Summary Judgment, entered July 13, 2018.

² B, C, and D.

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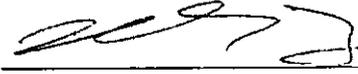
8/23/2018

1 in the future or while any appeal in this matter is pending. Plaintiff does not stipulate that the
2 Defendant is entitled to such relief, but rather that Defendant, by entering into this stipulation,
3 has not given up its ability to pursue such relief if it chooses to do so in the future.

4 ROCKE | LAW Group, PLLC

Winterbauer & Diamond PLLC

5 s/ Jeremy Bartels



6 Jeremy S. Bartels, WSBA No. 36824
7 Attorney for Plaintiff
8 101 Yesler Way, Suite 603
9 Seattle, WA 98104
10 (206) 652-8670

Steven Winterbauer, WSBA No. 16468
Nicholas Gillard-Byers, WSBA No. 45707
Attorney for Defendant
1200 5th Avenue, Suite 1700
Seattle, WA 98101
(206) 676-8440

11 **II. ORDER**

12 The Court has considered the parties' stipulated motion and the materials contained in the
13 Court's file. The Court agrees with the parties' position and grants the stipulated motion.

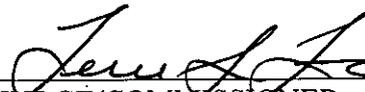
14 **IT IS ORDERED:**

- 15 • The Parties' Stipulated Motion to Dismiss is GRANTED and the remaining causes of
- 16 action in this matter are dismissed without prejudice;
- 17 • By stipulation, this Order does not preclude Defendant from pursuing any litigation
- 18 costs and/or attorney's fees otherwise due to Defendant under the law, should the
- 19 Defendant elect to pursue such a remedy, including while any appeal in this matter is
- 20 pending;
- 21 • For purposes of such a motion for costs or fees, the period provided for in CR
- 22 54(d)(2) shall be extended until 30 days after the termination of any pending appeal,
- 23 either by decision of the Court of Appeals or by denial of review or decision of the
- 24 Supreme Court if appeal is sought therein; and

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- 1 • By stipulation, nothing in this Order prevents Plaintiff from refileing the causes
- 2 dismissed herein at a later date and/or if Plaintiff is successful in seeking review of
- 3 the Court's previous order(s) in this matter.

4 SO ORDERED this 22 day of August, 2018.

5 
 6 JUDGE/COMMISSIONER **TERRI S. FARMER**
 COURT COMMISSIONER

7 *Presented by:*

8 **ROCKE | LAW Group, PLLC**

9 *s/ Jeremy Bartels*

10 Jeremy S. Bartels, WSBA No. 36824
 Attorney for Plaintiff
 101. Yesler Way, Suite 603
 11 Seattle, WA 98104
 (206) 652-8670

Approved as to form;
Notice of presentation waived by:

Winterbauer & Diamond PLLC



Steven Winterbauer, WSBA No. 16468
 Nicholas Gillard-Byers, WSBA No. 45707
 Attorney for Defendant
 1200 5th Avenue, Suite 1700
 Seattle, WA 98101
 (206) 676-8440



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APPENDIX D

**Employment Agreement
Obstetrics and Gynecology**

MHS is limited to two million dollars (\$2,000,000) per occurrence/six million dollars (\$6,000,000) aggregate (during the term of the policy, not per calendar year) as to occurrences arising out of direct patient treatment rendered by Physician on behalf of MHS during his or her employment.

(d) The professional liability policy or program covering Physician is available to Physician for his or her inspection and governs the professional liability coverage if there is a conflict between the description in this Section and the insurance policy. MHS retains the right to change insurance carriers and to self-insure.

12. Protection of MHS Business Interests. Physician understands and agrees that MHS has many substantial, legitimate business interests that can be protected only by Physician agreeing not to compete with MHS under certain circumstances. These interests include, without limitation, MHS's relationships with its physicians, patients, vendors and suppliers, MHS's standing, reputation and goodwill, particularly in the medical industry and local medical community, and MHS's rights in its confidential information. For the purpose of reasonably protecting these interests, Physician agrees to the covenants set forth below. Physician acknowledges that these covenants are reasonable in inception, scope and duration, and do not unreasonably interfere with Physician's ability to earn a living.

(a) Covenant not to disclose. Physician agrees that information not generally known to the public to which Physician shall be exposed as a result of his/her employment by MHS is confidential information that belongs to MHS. This includes information developed by Physician, alone or with others, or entrusted to Physician and/or MHS by its physicians, employees, vendors, suppliers and/or patients. More specifically, MHS's confidential information includes, without limitation, information that relates or refers to MHS's know-how, procedures, techniques, accounting, marketing, patient identities and medical needs, finances, Practice Plans, policies and procedures, protocols, and third-party payor contracts. During the Term and at all times thereafter, Physician shall hold MHS's confidential information in strict confidence and shall not disclose, copy, or use it except as authorized in writing by MHS and for MHS's sole and exclusive benefit.

(b) Covenants not to solicit or compete. During the term of this Agreement and for a period of two years following the date that Physician's employment under this Agreement ends, regardless of the reasons therefor, Physician shall not, directly or indirectly, alone or with others: (i) solicit, encourage or otherwise influence any MHS physician or employee to leave his or her employment with MHS; (ii) solicit, encourage or otherwise influence or attempt to influence any MHS patient to seek medical care elsewhere; (iii) solicit, acquire, divert or otherwise influence or attempt to influence any other person or entity that utilizes MHS services to seek the same or similar services elsewhere, or otherwise interfere with MHS's relationships with such persons and entities; or (iv) establish or be a physician, employer, consultant, officer, director, partner, trustee or shareholder of any person or entity that engages in whole or in part in the practice of medicine within a 20 mile radius from MHS (measured by a line

**Employment Agreement
Obstetrics and Gynecology**

from the office at which Physician practiced most during the six (6) months prior to termination. The covenant not to solicit set forth at (i) above means that Physician shall not, among other things: disclose to any third party the names, backgrounds or qualifications of any MHS physicians or employees or otherwise identify them as potential candidates for hire; personally or through any other person approach, encourage, recruit, interview or otherwise influence or attempt to influence any MHS physician or employee to work for any person or entity other than MHS; or participate in any hiring or recruitment process, including without limitation pre-employment interviews, which involve any MHS physician or employee.

13. Termination of employment. Physician's employment may be terminated prior to expiration of the Term as follows, in which event Physician's compensation and benefits shall terminate except as otherwise provided below:

(a) By Physician without cause. Physician may terminate his/her employment at any time without cause upon three (3) months advance written notice to MHS.

(b) By Physician with good reason. Physician may terminate Physician's employment for good reason, in which event Physician shall be entitled to the same rights under this Agreement as if MHS had terminated Physician's employment without cause. If Physician wishes to terminate employment for good reason, Physician shall first give MHS 30 days written notice of the circumstances constituting good reason and an opportunity to cure. Following the notice and opportunity to cure (if cure is not made), Physician may terminate employment for good reason by giving written notice of termination. The notice may take effect immediately or at such later date as Physician may designate, provided, however, that MHS may accelerate the termination date by giving five business days' written notice of acceleration. For purposes of this Agreement, "good reason" means, and is limited to, the occurrence without cause and without Physician's consent of a material change in the character of Physician's duties or level of work responsibility, MHS's failure or refusal to provide compensation or benefits owed to Physician and/or any material breach by MHS of its duties or obligations to Physician that results in material harm to Physician.

(c) By MHS with cause. MHS may terminate Physician's employment at any time for cause, but not arbitrarily or capriciously. "Cause" shall be defined per Washington common law and shall include, without limitation: (i) Physician's death or disability, which, unless otherwise required by law, is defined as any mental, physical or emotional impairment that, with or without accommodation, renders Physician unable to perform the essential functions of his/her position on a regular, full-time basis; and (ii) termination of standard-rated malpractice insurance covering Physician with the primary carrier or self-insurance program utilized by MultiCare; and/or (iii) breach of any of the representations or warranties set forth at paragraph 6.

DECLARATION OF SERVICE

I caused a copy of the foregoing Appellant's Brief to be served to the following in the manner indicated:

Via E-Mail to:

Steven Winterbauer
Nicholas Gillard-Byers
Winterbauer & Diamond PLLC
1200 5th Avenue, Suite 1700
Seattle, WA 98101
steven@winterbauerdiamond.com
nicholas@winterbauerdiamond.com
mail@winterbauerdiamond.com

On today's date.

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct to the best of my belief.

Signed and dated this 11th day of January, 2019, in Seattle,
Washington.



Kaelan Hale, Legal Assistant

ROCKE LAW GROUP, PLLC

January 11, 2019 - 3:15 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 52414-7
Appellate Court Case Title: James Majors, Appellant v. Multicare Health System, Respondent
Superior Court Case Number: 18-2-05344-2

The following documents have been uploaded:

- 524147_Affidavit_Declaration_20190111150449D2065401_8014.pdf
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Affidavit/Declaration - Service
The Original File Name was 190111 Cert of Service.pdf
- 524147_Briefs_20190111150449D2065401_8518.pdf
This File Contains:
Briefs - Appellants
The Original File Name was 190111 Appellants Brief.pdf

A copy of the uploaded files will be sent to:

- jeremy@bartelslegal.com
- mail@winterbauerdiamond.com
- nicholas@winterbauerdiamond.com
- steven@winterbauerdiamond.com

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Address:
101 YESLER WAY STE 603
SEATTLE, WA, 98104-2580
Phone: 206-652-8670

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DECLARATION OF SERVICE

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Via E-Mail to:

Steven Winterbauer
Nicholas Gillard-Byers
Winterbauer & Diamond PLLC
1200 5th Avenue, Suite 1700
Seattle, WA 98101
steven@winterbauerdiamond.com
nicholas@winterbauerdiamond.com
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On today's date.

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Kaelan Hale, Legal Assistant

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Briefs - Appellants
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- jeremy@bartelslegal.com
- mail@winterbauerdiamond.com
- nicholas@winterbauerdiamond.com
- steven@winterbauerdiamond.com

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