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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 REPLY BRIEF

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I. LEGAL ARGUMENT

A. Excess Specialists or Critically-Underserved Community

In *Emerick I*, the physician argued that noncompete agreements were not enforceable against physicians. *Emerick v. Cardiac Study Ctr., Inc.*, 170 Wn. App. 248, 259 ¶20, 286 P.3d 689 (Div. II), *rev. denied*, 175 Wn.2d 1028, 291 P.3d 254 (2012). The court rejected that argument. In this case, the trial court went too far the other way and erred by failing to consider the public harm of restricting a physician as the third factor in determining the reasonableness of the noncompete agreement.

The law requires consideration of restraint of trade, limitation on employment opportunities, and denial of public access to necessary services. *Emerick*, 170 Wn. App. at 257 ¶18 (citations omitted); Mark A. Rothstein, *et al.*, *Employment Law* at 804 (4th ed. 2010) (“For example, a physician will not be enjoined from practicing in a particular area if the effect would be to deprive the public of that specialty.”)(citations omitted); Restatement (Second) of Contracts §188(1)(b) (unreasonable restraint of trade if “the promisee’s need is outweighed by the hardship to the promisor and the likely injury to the public.”) Illustration 14 of the Restatement section uses a physician signing a contract when joining a private practice as an example of when the court may refuse to enforce a

noncompete because of the likely injury to the public. It is uncontroverted that the community needs his skill and is under-served.

In *Emerick*, the court reviewed a noncompete restriction of a physician who had a specialty that was overabundant in the community.¹ However, in this case, the need of the community is critical.

One job Dr. Majors pursued and was taken off the table because the noncompete was with Dedicated Women's Health Specialists. CP 990. That clinic had more patients than its doctors could handle:

Well, the thing is, in Puyallup it's sort of -- Puyallup is so busy that there literally is no competition. I mean, we are all full. We are booked eight weeks out. For every one person that you see there's 10 people waiting to get in. [CP 1267.]

The city is "bursting at the seams and we need providers," said the Women's Clinic, so "we're just packed," and our doctors are "overworked and exhausted." CP 1265. So "patients are calling everywhere trying to get in and everybody is full," so "it's very difficult." *Id.* Dr. Majors was offered a newly-created full-time position to care for their existing patients and not expected to bring any patients with him from MultiCare. CP 991, 1276. There were no other candidates up for consideration, so Dr. Majors

¹ *Emerick I*, 170 Wn App. at 253 ¶5 (the surrounding communities had "an excess of cardiologists for the population's needs."); *Emerick v. Cardiac Study Cetner, Inc.*, PS, 189 Wn. App. 711, 723 ¶21, 357 P.3d 696 (Div. I 2015) (market "oversaturated" with cardiologists), *rev. denied*, 185 Wn.2d 1004, 366 P.3d 1244 (2016) (*Emerick II*).

was a shoe-in. CP 991. The “non-compete provision was the only reason that Dr. Majors was not formally evaluated for employment.” *Id.*

A second job Dr. Majors was in conversation with was Sound Family Medicine. CP 1021-22. It was within the 40-mile diameter restricted area, so this clinic also ceased the conversation. CP 1022.

A third job Dr. Majors was being considered for was at St. Elizabeth Hospital in Enumclaw. CP 995. This community is designated as a “Critical Access” area because it is medically underserved. *Id.* Dr. Majors was offered a job as a laborist. CP VRP 13-14. Laborists have no patient base of their own and work out of the hospital when the patient has no personal doctor available. *Id.*

MultiCare does not have any physical presence within 5 miles of Enumclaw, nor has it had any facility within that area in the last 15 years. *See, e.g.*, CP 897. It apparently has not ever been there in the past. CP 897. It has no plans in the future to locate in Enumclaw. CP 898. It probably does not advertise in Enumclaw. *Id.* It does not make house calls there or send physicians to deliver babies there. *Id.* at 898-90. The trial court erred by failing to consider the public need for Dr. Major’s service in the community.

B. Necessary to Protect a Legitimate Business Interest

1. Interests Stated in the Contract

The contract states that MultiCare’s legitimate business interest supporting the noncompete agreement is MultiCare’s “relationship with its physicians, patients, vendors and suppliers,” its “standing, reputation and goodwill, particularly in the medical industry and local medical community, and [its] rights in confidential information.” *See, e.g.*, (Amd. Resp. Brief at 8). Most of these stated interests are not at issue.

MultiCare does not argue it has confidential information, and Dr. Majors testified there was such information, CP 53, so this interest is not at issue. Neither the law nor MultiCare’s briefing supports the argument that its standing or reputation is affected by Dr. Majors being gainfully employed or serving the community with his skill, so those interests are not at issue. *See also* CP 53, CP 885-88 (testifying to interests). The contract, CP 276, and tort law already restrict Dr. Majors from interfering with its employment or contractual relationships, and he declared he practically could not do so, CP 52, so these are not at issue. All that remains stated in the contract are existing patients, and goodwill, meaning expectation of future patients.

2. Continuity of Care versus Goodwill

Dr. Majors and all physicians have an ethical consideration to provide for continuity of care and the choice of the patient. Courts should be careful not to write overly-broad about patients being property of one entity over another. MultiCare concedes it would not “ever prevent patients from seeing the provider of their choice,” CP 131 (declarant), CP 274-75 (contract), yet it restricts former employees for such a great distance that patients would not want to choose them. CP 452. Enforcement of that kind is not narrowly tailored and hurts the community.

The next issue is goodwill, or the expectation of future patients. MultiCare spent no money advertising Dr. Majors personally. CP 923-24. Dr. Majors did not know MultiCare’s referral sources and has no practical way to divert its goodwill. The evidence does not support this as a legitimate business interest in this case. Moreover, several of the jobs Dr. Majors was considering would exclusively serve patients that were already hospitalized at another facility, not a private practice accepting new patients. Patients “cannot call to make an appointment specifically with me....” CP 53.

Goodwill may support a restrictive covenant. However, the Supreme Court has rewritten a five-mile restriction down to a single

address, because it was all that was necessary to prevent unfair competition. *Madison v. LaSene*, 44 Wn.2d 546, 268 P.2d 1006 (1954).

MultiCare argues its contracts restrict physicians geographically in three tiers. The Assistant General Counsel explains the three-tiered approach to restricting distances “are related to MultiCare’s assessment of the potential harm to its business interests should the physician leave, or be removed from, its employment and practice elsewhere.” CP 452. MultiCare based the three-tier on no data whatsoever. CP 878. She goes on to swear, “In our experience, for instance, a patient is less likely to travel significant distance for a primary care physician than for a specialist or subspecialist.” CP 452. The distance in the noncompete is for the purpose of pushing the provider far enough that the patient will not follow and to prevent its competitor from getting a physician. These are anti-competitive motives aimed at limiting fair competition. MultiCare further testified that physicians do not read these contracts. CP 860-61. Of the 100 to 150 renewed every year, almost no doctor attempted to renegotiate the noncompete in the last five years. CP 862.

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, e.g., 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). Neither the facts nor the law necessitates a post-employment restriction of the ability to be a physician.

The American Medical Association agrees with Dr. Majors. The AMA Code of Ethics recognizes that noncompete agreements "restrict competition, disrupt continuity of care, and potentially deprive the public of medical services." CP 48. Therefore, such agreements are discouraged and are "unethical if they are excessive in geographic scope or duration," or if "they failed to make reasonable accommodation of patients' choice of physician." *Id.* The contract in this case does not adequately address patients' choice of physician, because Dr. Majors is prohibited from being a physician in a 1,256 square mile area. Doctors believe, "Competition between and among physicians" is "not only ethical but is encouraged," because "medical practice thrives best under free market conditions when prospective patients have adequate information and opportunity to choose freely between and among competing physicians and alternate systems of medical care." *Id.* MultiCare's position is a danger to the public.

3. Signing Bonuses and Overhead

The law will not enforce a post-employment restriction absent a legitimate business interest. The law provides a short list of such interests. Not every investment a business makes constitutes a legitimate business interest in this context. MultiCare argues its interests include Dr. Majors' relocation bonus, and its investment in buildings and overhead.²

MultiCare argues that Dr. Majors' relocation bonus is a legitimate business interest. (Amd. Resp. Brief at 4). The relocation bonus, which was paid by Good Samaritan, not MultiCare, may have arguably been a legitimate business interest for Good Samaritan in 2004, four contracts ago, but it is not consideration for the fifth contract effective 2017-2019.

MultiCare argues that investing money in the building, equipment, and overhead is a protectable interest. (Amd. Resp. Brief at 5-6, 29-30); *see also* CP 118, 128, 140, 876 (risk assessment includes having to recruit a replacement employee); CP 892 (interest in revenue to offset the building and overhead). This represents a misunderstanding of what

² These interests were not stated in the contract MultiCare seeks to enforce. It will argue that the contract says the interests listed in the contract are not exclusive, however, elsewhere the contract states the writing is the "entire agreement" and "the final and complete expression of the parties' agreement relating to" his employment and "supersedes any previous employment agreement" and all prior and contemporaneous agreements and understandings. CP 281-82 (Employment Agreement at ¶23).

interests the law considers as legitimate in this context. MultiCare erroneously argues that office space and equipment are legitimate business interests that support a noncompete agreement. (Amd. Resp. Brief at 30) (citing *Ashley v. Lance*, 75 Wn.2d 471, 476, 451 P.2d 916 (1969); *Emerick II*, 189 Wn. App. at 722-23). MultiCare built no building specifically because of Dr. Majors. CP 924. Its buildings would be the same regardless of whether it employed Dr. Majors or any other physician in his place. CP 924-25. There is no expense, other than his salary and benefits, that MultiCare would not have spent if it employed any other doctor instead of him. CP 925. Moreover, it gets to keep all the equipment and buildings.

MultiCare argues that bringing in a new doctor has expenses up front that are abated as the physician becomes profitable, yet it did not consider in any way that, at some point, MultiCare has broken even and profited from Dr. Majors. CP 8894-96 (“Q: Okay. So you didn’t consider it at all? A: No.”). MultiCare’s stated reasons are a pretext for its unlawful motive of prohibiting fair competition.

4. Restraint Greater than is Reasonably Necessary

The court considers whether the restraint is too great for what is necessary to protect the legitimate business interest. MultiCare is a non-profit, so Dr. Majors personally could never be an owner or partner. The

Restatement (Second) of Contract § 188 breaks the seller of a business, partners, and employees into different subsections, and the comments distinguish the three. Restatement (Second) of Contract § 188, Cmts. f (seller of business), g (employee), h (partner). In discussing the needs of the promisee, the comments differentiate between the seller of a business and an employee. *Id.* at cmt. b. The trial court erred by refusing to take this into account.

MultiCare was asked if it would lose patients to Dr. Majors if he went to Enumclaw. In its answer, it used the word “suspect” three times in two sentences. CP 931. When asked how many of Dr. Majors’ patients were from Enumclaw, would have to drive past MultiCare’s Bonney Lake clinic to get to Enumclaw, or lived within 5 miles of Enumclaw, MultiCare had no information. CP 931. It had no information how many of those patients lived closer to the hospital in Enumclaw than to the hospital that they would deliver in with MultiCare in Puyallup. CP 931-32. It had no information how many patients live either within two or five miles, or more than eight miles away from the Bonney Lake location. CP 932, 935-36. Not one patient from MultiCare’s Bonney Lake clinic had ever expressed that she would rather deliver her baby in Enumclaw than Puyallup. CP 933. And, it agreed most of his patients live closer to the hospitals in Tacoma and Puyallup than Enumclaw. CP 932. But it

could not say how many lived within two or five miles of Puyallup. CP 935-36.

MultiCare was asked why the restriction was for two years and gave an answer that was nonspecific and not compelling, “Well, I still think there’s this process of rebuilding, the process of patient relationships,” and “there’s people, who, you know, have another baby, there people who make recommendations, there’s you know – so I support a host of those reasons.” CP 927. When asked the percentage of patients who are repeat OB patients, MultiCare stated it did not track that and did not take it into consideration. CP 928.

Dr. Majors declared that industry standard for obstetricians requires him to be “immediately available,” meaning be present at the hospital within thirty minutes. CP 50. MultiCare agrees it is industry standard. CP 870-71. MultiCare never considers that a physician would have to move residences if they lived within 30 minutes of MultiCare and needed to work outside of the 20-mile restricted area. CP 872. It also fails to consider whether the restricted area is rural or urban. CP 873 (Seattle vs. Bonney Lake). It does not care how dense the population is. CP 875. The trial court failed to consider these factors and the burden on Dr. Majors and the community.

C. MultiCare's Unlawful Motive to Restrain Trade

Dr. Majors accuses MultiCare of nothing short of prohibiting fair competition by an unlawful restraint of trade. In response, MultiCare cannot resist but to argue fierce competition. Patients “fall within a highly competitive market.” (Amd. Resp. Brief at 10). This was the same argument made to the trial court. *See e.g.*, CP 110. MultiCare monitors and measures its competition. (Amd. Resp. Brief at 43). Its primary competitor is eight miles away from the relevant MultiCare facility. *Id.* The fight against Dr. Majors is anti-competitive. *Id.* at 44.

MultiCare's own testimony admits the anti-competitive motive: Noncompete “clauses are necessary to ensure that physicians do not leave a medical group ... and open up shop across the street,” because “it would be a significant barrier to operating a medical facility if we were not able to use non-compete provisions.” CP 131; *contra* (“True,” that “he’s never asked to work across the street though”), 902-03, 922 (no patient has asked to see where Dr. Majors works now), 903 (lost no patient because he left); 906 (relied on no data in making decision to enforce Major’s noncompete). The Senior Vice President of Provider Enterprises for MultiCare went on, “This especially true when a provider leaves the organization to work for a direct competitor.” CP 131.

Dr. Majors asked MultiCare to modify the noncompete agreement before filing suit. MultiCare was motivated to enforce the noncompete without change to prohibit Dr. Majors for working for a specific competitor. CP 132. (“This is precisely the type of competition that the covenant is intended to prevent,” referencing its “largest and most direct competitor.”); *see also* CP 901 (“we don’t waive non-competes for the Franciscans.”), CP 140-41 (analyzing competitors and naming Franciscans as primary competitor).

After consulting with its Assistant General Counsel, MultiCare refused. MultiCare presents facts about patients and distance, but those facts were developed on summary judgment, not when it wrote the contract. *See* CP 901-02 (no data to support supposition that Dr. Majors would draw patients from MultiCare), 876-77 (never did a geographic specific assessment), 913-15 (could only speculate as to number of doctors in restricted area). Likewise, it has never gathered any data to support the temporal restriction. CP 878. MultiCare simply does not want its patients served by any other provider, and it is using a noncompete to prevent that fair competition. CP 901.

MultiCare wants to prevent Dr. Majors from serving patients, including “new patients that come into the area that seek out an OB-GYN,” because he would be “in direct competition and against the

practices that we have and specifically with the Franciscans who are our most fierce and direct competitors in all of our areas.” CP 901. MultiCare cannot say that it has ever lost a single patient or any specific number of patients from its care to the Franciscans. CP 933. It cannot provide any data to support the contention that an OB-GYN patient would leave its system to go anywhere else in mid-treatment. CP 934.

Preventing employees from quitting or fair competition is not a legitimate business interest in this context. MultiCare’s motive for enforcing this contract is illegal restraint of trade. The motive of MultiCare should also be a factor that the trial court may use in reforming the agreement within reasonable bounds.

D. Reformation of Overly-Broad Contracts

A court rightfully refuses to rewrite a post-employment noncompete agreement to be reasonable if it was written unreasonably in bad faith.³ Washington law is consistent with hornbook law on this point. The approach of rewriting covenants “fails to give the employer an incentive to avoid overreaching,” so “courts adopting this ... approach have noted that there is a general requirement of good faith.” Mark A.

³ This trial court was presented with this issue, even if articulated differently. Moreover, court rules permit the court to review issues before it. RAP 2.5(a); *see e.g., Lunsford v. Saberhagen Holdings, Inc.*, 139 Wn. App. 334, 338, 160 P.3d 1089 (2007).

Rothstein, *et al.*, *Employment Law* at 792 (4th ed. 2010). “An oppressive contract that is ‘deliberately unreasonable’ should not be enforced regardless of its severability or ability to be enforced reasonably.” *Id.* MultiCare’s noncompete is written deliberately overly-broad.

In *Emerick I*, the court reviewed a post-employment noncompete of a physician restricting him from “the solicitation of patients of referral sources or persons or entities with whom the Corporation contracts,” and engaging “in the practice of cardiac medicine[.]” *Emerick*, 170 Wn. App at 251 at ¶3.

In contrast, Dr. Majors is prohibited from being a physician, and the contract fails to account for continuity of care. Dr. Majors argued that the scope restricted him beyond being the work he did at MultiCare and prevented him from being a physician within the restricted area. *See e.g.*, VRP 11-13, 25, 52-55. The contract restricts him from volunteer work, work outside his specialty, or even reviewing a chart from home. The court may refuse to rewrite the restrictions and consider it unenforceable.

II. CONCLUSION

The trial court's decision granting MultiCare's motion for summary judgment and finding that the contract was enforceable as written and without 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 28th day of March, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

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

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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 28th day of March, 2019, in Seattle,
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