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Case No. 52414-7II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES MAJORS, M.D.,
Appellant,

v.

MULTICARE HEALTH SYSTEM,
Respondent.

AMENDED BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves a physician's effort to evade contractual promises, specifically covenants not to compete, which he understood his former employer would reasonably expect (and require) him to abide.

> Q: When you signed [the employment agreement], did you expect that MultiCare would live up to the promises that are set forth in the document?
>
> A: Yes.
>
> Q: And did you, likewise, understand that MultiCare would expect you to live by the promises made by you in the document?
>
> A: Yes.

CP 159-160. The covenant extends two years and a radius of twenty (20) miles. The parties to it are Appellant James Majors, M.D. and Respondent MultiCare Health System ("MultiCare"), his former employer.

The validity of the non-compete is established through application of well-settled legal rules to established facts, drawn mainly from Dr. Majors' own deposition testimony. The primary legal rule is that restraints are enforceable where, as here, they are reasonable in scope, duration and purpose. The undisputed facts include that Dr. Majors entered the covenant at issue, as well as four others, knowingly and voluntarily after being provided ample time for review and encouragement to consult counsel; his covenant is the same one that applies to hundreds

of other physicians employed by MultiCare for their mutual benefit and protection; it is tailored to protectable interests and narrower than many others that have been consistently enforced in Washington and in other jurisdictions; it is part of a larger employment agreement that binds MultiCare with contractual obligations it consistently satisfied; he seeks to work for MultiCare's primary competitor less than 10 miles from his prior practice location; and that competitor will require him to enter into a noncompete which he is broader than he claims is lawful.

Ultimately, Dr. Majors' only genuine argument is that he finds compliance with the MultiCare covenant personally and professionally inconvenient. This is not grounds for successful legal challenge.

II. ASSIGNMENT OF ERROR

A. Assignment of Error

The trial court did not err in granting summary judgment to MultiCare on Dr. Majors' claim for a declaratory judgment that the MultiCare covenant be stricken or reformed, and finding that, as a matter of law, the covenant is reasonable and enforceable as written.

B. Issues Related to Assignment of Error.

Whether the trial court properly concluded, as a matter of law, that a sophisticated physician should be held to a reasonable, industry-standard covenant not to compete, which is necessary to protect his former

employer's substantial investments in him and the practice of which he was an integral part.

III. STATEMENT OF THE CASE[1]

A. From 2004 to 2009, GSCH Supported Dr. Majors in Consideration for a Covenant Not to Compete.

MultiCare is a Tacoma-based, not-for-profit healthcare organization that provides medical services throughout Washington. CP 137-138, ¶2.

Dr. Majors is an obstetrician-gynecologist (OB-GYN). CP 454. He has practiced medicine in Washington continuously since March, 2004. CP 182, 269-405. During this period, he has worked for two employers, Good Samaritan Community Healthcare (GSCH) and MultiCare. CP 2 at ¶¶2.1-2.2, 182. GSCH employed him from March, 2004 through December, 2009. CP 182, 287-368. MultiCare employed him from January 2010 to September 15, 2017. CP 269-285, 369-405.

More specifically, GSCH hired Dr. Majors in 2004 as part of a major expansion, and paid to relocate him from California and establish him in Washington. CP 183.[2] GSCH provided him the opportunity, platform, and support to (a) develop a practice in a new locale and (b) per

[1] Dr. Majors' appeal brief is replete with allegations that are alternatively unsupported by citation to the record, contradicted by his prior sworn deposition testimony, or otherwise inadmissible. MultiCare identifies several here, and more in its motion to strike.
[2] Prior to hire by GSCH, Dr. Majors was a partner with Los Olivos Women's Medical. CP 183. He does not recall whether he was subject to a non-compete. CP 184-185.

the terms of his employment agreement, "enhance the availability of and expand access to Obstetrics and Gynecology medical care providers within [the] GSCH service area as an important component of GSCH's mission." CP 287, 342. Consistent with this mission, GSCH provided Dr. Majors $10,000 to defray relocation expenses; $6,000 to cover temporary housing; a $5,000 signing bonus; front-end guarantee of a $350,000 line of credit and back-end graduated forgiveness of any corresponding debt obligation; and a $39,582 loan, subsequently forgiven at 25% per year over four years. CP 286-368 at 304, 308, and 326-327. In short, GSCH subsidized Dr. Majors for several years as he built a practice within GSCH's health system and for its benefit.

Given these investments, and to protect them, GSCH required Dr. Majors to sign a two-year non-compete, first, as a condition to hire (in 2004) and, later, as a condition to continued employment (in 2007). *Id*. Dr. Majors agrees that some measure of protection is reasonable for these purposes. CP 172-173, 197 (agreeing employer's initial investment should be protected, but nothing more), 188-189 (agreeing protection reasonable "in the first few years, yeah, because they've invested a lot of money getting me up here and getting me started").

B. In 2009, MultiCare Acquired GSCH And Continued To Support Dr. Majors In Consideration For A Noncompete.

The investment in and support of Dr. Majors continued, in fact escalated, under MultiCare. MultiCare hired him as part of its own expansion effort, which included its acquisition of GSCH through merger in or about late 2009. CP 138-139, 196-197. The acquisition was the culmination of a process that began in 2006, when MultiCare entered into a formal affiliation with GSCH, assumed a controlling position on the GSCH Board of Directors, and committed to investing an additional $150 million in GSCH. *Id*. GSCH became a de facto subsidiary of MultiCare, though still a separate entity until the merger. *Id*. Upon completion of the merger, MultiCare's total investment in GSCH exceeded $400 million. *Id*.

Still more investment and expansion followed. CP 138-139. This included construction and staffing of the 357,000 square foot Dally Patient Care Tower in or about 2010 and other medical buildings and clinics, and expansion of medical services across East Pierce County. *Id*. The medical buildings included a 58,500 square foot, three-story structure in Bonney Lake, Washington (the "Bonney Lake Facility"), which was completed in 2011 and became Dr. Majors' home clinic. CP 138-139. This is the location from which the MultiCare covenant's 20-mile radius is measured.

As these facts demonstrate, while Dr. Majors was still employed by GSCH, MultiCare was investing in his employer directly and in him

indirectly: It was investing in the very assets it would later acquire through merger. CP 138-139. Dr. Majors benefited from these investments. MultiCare then entrusted him to help lead the expansion of its OB-GYN practice, first to Sunrise, Washington, then to Bonney Lake. CP 201-204. In both instances, he moved into new facilities, the latter of which (the Bonney Lake Medical Facility), as noted above, was developed largely under MultiCare's leadership and financial contribution. *Id.*

MultiCare continued to maintain, and provide Dr. Majors unbridled access to, the larger infrastructure and medical ecosystem that historically had supported his individual practice, and would continue to do so for the foreseeable future. For example, MultiCare provided him office space, equipment, and supplies; professional and administrative staff; subsidization of continuing medical education and licensing expenses; billing/collection services; marketing; malpractice insurance; comprehensive benefits; and substantial annual compensation, more than $600,000 over the last three years of his employment. CP 143-144, 268-285.

Against this backdrop MultiCare, like GSCH before it, reasonably required Dr. Majors to sign a two-year non-compete, first, as a condition to his hire and, later, as a condition to his continued employment. CP 269-285, 369-405. He signed his first covenant with MultiCare effective 2010,

and subsequent ones effective 2014 and 2017. *Id.*

During the nearly 13 years Dr. Majors worked for these two employers, then, i.e., his entire career in Washington, he agreed to reasonable post-employment restraints in exchange for their substantial investments in him and the larger medical practices and health systems he became a part of. CP 128, 131, 269-405. Specifically, he entered into five such agreements—two with GSCH, three with MultiCare:

> *Agreement 1*: GSCH—March, 2004-August, 2005
> Non-compete duration: 2 years
> Non-compete reach: "GSCH Service Area" (13 zip codes/498.99 sq. miles)
> Liquidated damages at $150,000
>
> *Agreement 2*: GSCH—October 1, 2007-September 30, 2009
> Non-compete duration: 2 years
> Non-compete reach: "GSCH Service Area" (29 zip codes/1,619.4 sq. miles)
> Liquidated damages at $150,000
>
> *Agreement 3*: MultiCare—January, 2010-December, 2013
> Non-compete duration: 2 years
> Non-compete reach: 20 mile radius (1,256 sq. miles)
> No liquidated damages
>
> *Agreement 4*: MultiCare—January, 2014-December 2016
> Non-compete duration: 2 years
> Non-compete reach: 20 mile radius (1,256 sq. miles)
> No liquidated damages
>
> ***Agreement 5*: MultiCare—January 2017-December, 2019**
> **Non-compete duration: 2 years**
> **Non-compete reach: 20 mile radius (1,256 sq. miles)**
> **No liquidated damages**

CP 155, 181-183, 191-193, 196, 269-405.

Each of these covenants is set forth in a larger employment agreement. Dr. Majors acknowledges he was provided sufficient time to read all of the agreements, specifically including the restrictive covenants; he did read them; he understood them; he knew he had the right to consult legal counsel before signing, but elected not to because he did not think it was necessary; and he entered them knowingly. CP 156, 160, 208-209, 1377-1383. He further acknowledges that he expected MultiCare (and GSCH) to live up to its contractual obligations, he knew MultiCare (and GSCH) expected him to live up to his, and he understood that upon separation from MultiCare (or GSCH) he would be subject to the non-compete. CP 159-160) Majors Dep. at 12:6-13:8.

Agreement number 5, Dr. Majors' final covenant with MultiCare, is at issue. It provides, in relevant part:

> 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.

> * * *
>
> (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:… (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 from the office at which Physician practiced most during the six (6) months prior to termination)**.

CP 269- 285 at 276 (emphasis added).

This covenant is found in all three of Dr. Majors' agreements with MultiCare. CP 269-285, 369-405. It did not change from 2010 to the present. *Id.* It includes Dr. Majors' acknowledgement that the restrictions are reasonable and do not unduly limit his employment opportunities:

> 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.

CP 276.

While all MultiCare covenants extend two years, their geographic reach (a radius measured in a direct line from the physician's primary work location) varies by practice type. As a general rule, the correlation is as follows: ten (10) miles for primary care physicians, twenty (20) miles for specialists, which include OB-GYN providers, and thirty (30) miles for

sub-specialists. CP 125-126. The tiers rest on MultiCare's assessment of the potential harm to its business interests in the event of employment separation. *Id.* Dr. Majors' covenant falls within the middle tier.

Dr. Majors' covenant with MultiCare is narrower, less restrictive, than the covenants he agreed to while employed by GSCH. His last covenant with GSCH had an exclusion zone of 1619.4 square miles and a heavy liquidated damages provision in the event of breach. CP 341-368 at 350. His MultiCare covenant reduces the zone by nearly 22% (to 1,256.6 square miles) and has no liquidated damages. CP 269-285, 369-405.

While MultiCare's covenant is narrower than its predecessors' and limited to a small fraction of MultiCare's overall operations throughout Washington where Dr. Majors would have an unfair competitive advantage, it is meaningful. It matters. Roughly 2,963 MultiCare patients live within the 20-mile radius. CP 1223-1224, 1226-1227. Nearly two-thirds of this number live within four miles of his former facility. *Id.*

Further, these patients fall within highly competitive markets. CP 131, 139-141. In its primary service area of Pierce County and south King County, MultiCare competes directly with Franciscan Health System (Franciscan), which is part of the Catholic Health Initiative, an organization that operates across the nation. *Id.* MultiCare's secondary service area includes the rest of King County (Seattle), the Counties of

Kitsap, Thurston, and Snohomish. *Id.* Across these areas, MultiCare competes with many prominent health systems, including Providence, Virginia Mason Hospital & Medical Center, Overlake Hospital Medical Center, UW Medicine, and Seattle Children's Hospital. *Id.*

All of these competitors require non-competes, some more restrictive than MultiCare's. CP 145-147. For example, MultiCare has recently hired physicians from Franciscan, Seattle Children's Hospital, and OB Hospitalists Group who were subject to restrictions one to two years in duration and up to 40 miles in radius. *Id.*[3]

C. In September 2017, MultiCare Discharged Dr. Majors.

In September 2017, a MultiCare physician reported that prescriptions had been submitted under her name and DEA control number without her knowledge or authorization. CP 128-130. The prescriptions were for Dr. Majors and handled by his primary nurse. *Id.* Investigation confirmed they had been filled in an unacceptable manner. *Id.* Dr. Majors stated he had asked the nurse to have another provider write the prescriptions for him as a professional courtesy, despite the fact that the other physician was not treating him. CP 128-130, 236-242, 246. As a rule, prescriptions are to be authorized by a treating physician. Here, they were not: The nurse corroborated Dr. Majors' instruction to call in

[3] These hires, of course, occurred under circumstances that did not implicate the restrictions. *Id.*

the prescriptions, but denied he referenced another physician. CP 128-130. She understood him to be directing her to fill the prescriptions, which she did. *Id.* While there was disagreement as to Dr. Majors' precise words and intent, there was no dispute that, at a minimum, he had directed a nurse to fill prescriptions in an unacceptable manner and his actions had created risk for his nurse, peer physician, and employer. *Id.*

MultiCare concluded that Dr. Majors' poor judgment warranted his discharge (his nurse's as well). CP 130-131. Given MultiCare's substantial investment in Dr. Majors and his role in its OB-GYN practice, this decision was not made lightly. *Id.* MultiCare believed Dr. Majors' actions constituted cause, but elected to discharge him without cause. *Id.* His employment agreement permits either, but provides him three months' pay if without cause. CP 130-131, 268-285 at 277-278. MultiCare reasoned that discharge without cause offered several advantages, including this severance for Dr. Majors and a less adversarial separation for everyone. CP 130-131. His discharge was effective September 15, 2017. CP 236. MultiCare advised him of the decision orally and in writing, while also reminding him of his non-compete obligation. CP 130-131, 135-136, 243, 249, 415-416.

D. While MultiCare Searched For Dr. Majors' Successor, He Sought Employment With Its Primary Competitor.

On October 16, 2017, while meeting with Dr. Carlson, Dr. Majors

asked MultiCare to waive or modify his non-compete. CP 131, 174-178. Dr. Carlson asked whether Dr. Majors had specific job opportunities in mind, and Dr. Majors refused to answer because "I didn't think it was his business." CP 175. By email dated October 31, MultiCare declined Dr. Majors' request and reiterated its expectation that he comply with his non-compete and other contractual obligations. CP 214-215, 407.

Dr. Majors was the only doctor permanently assigned to MultiCare's Bonney Lake Facility. CP 206-207. After months of recruitment effort, MultiCare hired two physicians to replace him, one to be permanently assigned to that facility, the other to assist while rotating through East Pierce County. CP 139, 148. The two physicians recently completed their residencies, have no established practice or presence, and will not commence work until August. *Id.* Both will be bound by the same covenant that applies to Dr. Majors. CP 816.

While MultiCare searched for Dr. Majors' successor, Dr. Majors engaged in a very modest effort to find new employment. He accepted a job offer with Franciscan, which is MultiCare's primary competitor in the region. CP 222-229, 811. This position was nevertheless acceptable to MultiCare because it is at a Franciscan clinic located in Burien (Highline), which is outside the geographic scope of Dr. Majors' covenant not to compete. CP 161-163. It provides for employment which, per Dr.

Majors, is for "a three-month trial period" and will likely translate to a permanent position. *Id.* At the time the trial court ruled on this matter, the credentialing process for this job was underway. CP 758.

Despite having a permissible opportunity in hand, Dr. Majors preferred a similar, 90-day job with the same employer, Franciscan, that falls *within* the scope of the MultiCare covenant and, therefore, is prohibited: This job is at Franciscan's Enumclaw clinic. CP 163-165.

Franciscan has declined to further consider Dr. Majors for the Enumclaw position because of his non-compete obligation to MultiCare. *Id.*[4] Franciscan also declined Dr. Majors' request to help him defray the expense of challenging the MultiCare covenant in court. CP 210-211. This is because, like MultiCare, Franciscan requires all of its employed physicians to sign covenants not to compete as a condition to hire and continued employment. CP 760-762. It will require Dr. Majors to do so, too. *Id.* The Franciscan covenant applies regardless of the reason(s) for termination (with or without cause), is one year in duration, and prohibits the practice of medicine within a 15 mile radius "either in a medical practice group of thirty (30) or more physicians providing medical services or with two (2) or more physicians who were employed by Franciscan in the preceding twelve (12) months." *Id.* In fact, Franciscan's

[4] This is the job offer Dr. Major claims he has been unlawfully denied. *See* CP 2 at ¶ 2.7; CP 166-167, 212-213.

covenant additionally applies *during* employment to an expanded reach of "within 50 miles of any Franciscan location." CP 760-761, 780.

Beyond the Burien/Highline position, Dr. Majors has limited his search to potential employers who operate within the exclusion zone of his non-compete with MultiCare, and even then to less than a handful of entities (Franciscan, SFM, DWHS and OBHG) and only over a short period of time. CP 231-232. In January, 2018, he discontinued his job search effort altogether, to care for his spouse who underwent a medical procedure, and he does not know when he will resume. CP 1291 at ¶4, 231-232 (acknowledging "I have not actively looked").

When he does resume his job search, Dr. Majors will find there are many opportunities that do not implicate the covenant. These include the following women's health facilities and other providers that offer women's health services, many of which are located in or near the greater Seattle and Eastside areas and all of which are between 20 and 45 miles from Dr. Majors' MultiCare work location.

Facility	**Miles**
Peninsula Family Medical Center	22.01
Highline Community Hospital	22.01
Franciscan Women's Specialty Associates at St. Anthony	25.42
Swedish OB/GYN Specialists	26.42
Overlake Obstetricians	26.42
Swedish Issaquah	26.42
Neighborcare Health at Columbia City	28.20
Polyclinic	29.41

Pacific Medical Center	30.49
Virginia Mason-Bellevue	30.98
Overlake Medical Clinics at Sammamish	30.99
Women's Health Clinic at Harborview	31.33
Kaiser Permanente Bellevue Medical Center	31.38
Overlake Hospital Medical Center	31.50
Bellegrove Obstetrics/Gynecology	31.62
Swedish Medical Center - First Hill	31.63
Seattle Obstetrics & Gynecology Group	31.68
Northwest Women's Health Care	31.68
Virginia Mason Medical Center	31.74
Group Health Cooperative	32.25
Seattle Reproductive Medicine	32.74
Olympia Obstetrics & Gynecology	33.26
Complete Women's Health Care	33.34
Providence Saint Peter Hospital	33.45
UW Department of Obstetrics & Gynecology	34.25
Seattle Children's	34.90
Harrison Memorial Hospital	36.26
Swedish Ballard	36.26
Evergreen Health Obstetrics and Gynecology Care, Coral	38.06
Evergreen Hospital Medical Center	38.07
Center for Women's Health at Evergreen	38.11
Capital Medical Center	38.38
Northwest Hospital	38.92
Edmonds Family Medicine	39.24
Harrison Silverdale	41.68
Kitsap OBGYN	41.72
Swedish Edmonds (Stevens)	44.90
Mason General Hospital	45.18

CP 827, 829-833.

Rather than explore these potential employers, or capitalize on the Burien/Highline opportunity with Franciscan, on February 6, 2018, Dr. Majors commenced this lawsuit in Pierce County Superior Court. CP 2.

On June 15, 2018, the parties filed cross-motions for summary

judgment. CP 453-474, 1041-1055. By order dated July 13, 2018, the trial court denied Dr. Majors' motion and granted MultiCare's, finding the MultiCare covenant enforceable as written. CP 1371-1373.

On September 5, 2018, Dr. Majors filed this appeal.

IV. AUTHORITY AND ARGUMENT

A. Dr. Majors May Not Raise New Arguments Or Evidence.

The majority of Dr. Majors' appeal brief addresses new arguments never presented to the trial court, often coupled with newly-disclosed, but previously available, evidence. The new arguments include that (i) "[t]he law treats post-employment restrictions [sic] the right to work differently for physicians than from other promisors," subjecting them to a higher level of scrutiny because of the special nature of a doctor's services; (ii) heightened scrutiny also applies to covenants sought to be enforced by non-profit employers, because of their community-service mission, requiring not only proof of reasonableness, but demonstration of "a specific and overriding legitimate business interest"; (iii) "unlawful anti-competitive motive" may be inferred from an employer's mere refusal to voluntarily modify or waive a restraint and this motive factors into the contractual analysis; and (iv) the well-established "blue pencil" rule should be abandoned or materially changed because "shrink-to-fit has failed [insofar as] it gives the employer no incentive to be reasonable."

Appellant's Brief (App. Br.) at pp. 2-3. Because these arguments were not presented to the trial court, they may not be raised now.

In the event the Court of Appeals nevertheless considers any of them, they should be rejected on their merits. As shown below, they alternately urge the appellate court to legislate, rest on hypothetical scenarios and conclusory assertions in lieu of the specific and undisputed facts of this case, grossly exaggerate the reach of the covenant at issue, and not only ignore, but reject, well-settled law. The last point bears emphasis. The focus of Dr. Majors' appeal is not what the law is, but rather what he thinks it should be. He consistently argues that the governing legal rules should be fundamentally changed or discarded, and he does so without any basis other than his own self-interest and two law review articles. The clear, albeit tacit, admission is that based on current law his position is without merit.

B. The Governing Standard is Reasonableness.

Under Washington law, restrictive covenants are generally enforceable.

> A bargain by an employee not to compete with the employer during the term of employment or thereafter for a reasonable time and within a reasonable territory, as may be necessary for the protection of the interests of the employer without imposing undue hardship on the employee, is valid.

Perry v. Moran, 109 Wn.2d 691, 698, 748 P.2d 224 (1987). There is no negative presumption. Where, as here, one of the interests at issue is the employer's stake in business relationships, particularly customers (patients), covenants not to compete are not only reasonable but necessary:

> It is clear that if the nature of the employment is such as will bring the employee in personal contact with patrons or customers of the employer, or enable him to acquire valuable information as to the nature and character of the business and names and requirements of the patrons and customers, enabling him, by engaging in a competing business in his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons or customers of his former employer, and thereby gain an unfair advantage, equity will interfere in behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business . . .

Racine v. Bender, 141 Wash. 606, 612, 252 P. 115 (1927).

The only requirement is that the covenant be reasonable. This means that it (i) is reasonably necessary to preserve the employer's protectable business interests; (ii) imposes no greater restraint than is reasonably necessary for that purpose; and (iii) does not unduly harm the public through the loss of the service or skill being temporarily restrained. *Perry*, 109 Wn.2d at 698. Whether these requirements are satisfied presents a question of law. *Emerick v. Cardiac Study Center*, 189 Wn. App. 711, 721, 357 P.3d 696 (2015). Here, they are.

Importantly, these standards are not variable: The rule of reasonableness is constant, fixed across industries and jobs. The evidential threshold does not rise or fall based on the employer's corporate form or the employee's profession. Washington courts have applied the reasonableness standard consistently across multiple industries and positions, specifically including physicians and the medical field, and have not once even suggested, let alone adopted, any measure of variation. *See*, *e.g.*, *Emerick*, 189 Wn. App. 711 (cardiac surgeons); *Perry*, 109 Wn.2d 691 (professionals in the accounting business); *Knight Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 686 P.2d 448 (1984) (same); *Armstrong v. Taco Time International, Inc.*, 30 Wn. App. 538, 635 P.2d 1114 (1981)(franchisees, fast food industry); *Hometask Handyman Services, Inc. v. Cooper*, 2007 WL 3228459 (W.D.Wash. Oct. 30, 2007) (salesman/executives, home repair industry); *Pacific Aerospace & Electronics, Inc. v. Taylor*, 295 F.Supp.2d 1205, 1216 (E.D. Wash. 2003) (engineers, aerospace industries); *Sheppard v. Blackstock Lumber*, 85 Wn.2d 929, 540 P.2d 1373 (1975)(millworkers, woodworking industry). To be sure, the evidential threshold may be more readily satisfied on one set of facts than another, but the bar stays at a consistent height.

Dr. Majors' arguments to the contrary are without merit. Specifically, he argues that heightened scrutiny is to be applied to

covenants that are (i) to the detriment of physicians and/or (ii) for the benefit of non-profits. He made neither argument before the trial court, and he offers no meaningful legal authority to support either now. His new argument for an increased evidential burden on non-profits rests solely on "one commentator's" opinions in a single law review article. App. Br. at p. 23 ("One commentator argues that charitable nonprofits' use of noncompetition agreements is contrary to their missions and tax-exempt status…"), citing Lindsey D. Blanchard, *Charitable Nonprofits' Use of Noncompetition Agreements: Having the Best of Both Worlds*, 44 Golden Gate U. L. Rev. 1277, 277-78 (2014). The article is of no precedential value. Further, consistent with the thrust of Dr. Majors' entire appeal, the article posits the commentator's opinion of what the law should be, rather than what it is. The commentator specifically proposes that "Congress should adopt a law…" 44 Golden Gate U. L. Rev. at 278. Later, the commentator similarly suggests that "state legislatures could amend the statutes currently governing noncompetition agreements, or Congress could issue a federal mandate." *Id*. at 307. Neither has happened.[5]

This case involves a court, which must apply the law as it exists, and Washington law does not draw the distinction Dr. Majors and the

[5] The Washington legislature has narrowed application of restrictive covenants within the broadcasting industry, but not the medical field, and even this modification rejects any distinction based on the employer's for-profit/not-for-profit status. *See* RCW 49.44.190.

commentator argue. Nor do other jurisdictions. The very article upon which Dr. Majors relies acknowledges that, under the current state of the law, nonprofit employers are legally entitled to the same "right of expectation" as their for-profit counterparts. *Id*. at 277.

In applying this single commentator's view to this case, Dr. Majors also misstates facts. He concludes discussion of the article with the broad assertion that the MultiCare covenant "prevent[s] [him] from practicing medicine…in the very community the nonprofit serves is inconsistent with the privileged status of a tax-exempt nonprofit organization." App. Br. at 23. But his covenant has no such reach. It does not prevent him from practicing medicine in the community MultiCare serves. MultiCare serves large swaths of Washington, yet the covenant is limited to a 20-mile radius from one clinic, and he had many opportunities for work outside this zone, including one he has been offered subject to credentialing.

MultiCare's nonprofit status does not change the legal standards.

Nor does the nature of Dr. Majors' services. Here, again, Dr. Majors' argument rests precariously on a single law review article, S. Elizabeth Wilborn Malloy, *Physician Restrictive Covenants: The Neglect of Incumbent Patient Interests*, 41 Wake Forest L. Rev. 189 (2006), which is without precedential value. Dr. Majors parrots this commentator in arguing that noncompete law should be changed insoafar as it applies to

physicians. *Id.* at 194 ("This Article advances an argument that courts must modify the traditional test of reasonableness in further evaluation of physician restrictive covenants.") Based on the article and less than a handful of cases from other jurisdictions, he contends that the public service dimension of his professional services requires deeper examination of the covenant's potential effect on patient relationships.

Emerick previously rejected this argument. There, as here, the party challenging the non-compete "cit[ed] cases from other jurisdictions that have either declined to enforce or have strictly construed restrictive covenants between physicians because of the significant personal relationship that exists in a doctor-patient setting." 170 Wn. App. at 258. There, as here, the party also argued that "some states have legislatively precluded restrictive covenants in a medical setting," and "an American Medical Association opinion discourag[es] retrictive covenants…" *Id*. The Court was unmoved: "But Washington courts have not yet held that restrictive covenants between physicians are unenforceable." *Id*. at 259. To the contrary, the court noted, in *Ashley v. Lance*, 75 Wn.2d 471, 451 P.2d 916 (1969), the Washington Supreme Court held they are. *Id*.

In short, Washington law requires application of the traditional reasonableness analysis and it does not grant Dr. Majors any exemptions or different standards by virtue of his profession or the non-profit status of

his employer. The law review article upon which he relies acknowledges these facts. For example, it notes that the reasonableness test is the "dominant judicial approach to enforceability"; "courts generally accept" the idea that patients are "assets of the physician employer that could be unfairly appropriated by the physician, thus warranting protection by a covenant not to compete"; and, as a result, "courts have only rarely invalidated physician restrictive covenants solely out of concern for the public welfare." 41 Wake Forest L. Rev. at 192-193, 195-198. This is an accurate description of current (and historical) Washington law, and it is precisely why Dr. Majors' challenge fails.

C. Dr. Majors' Covenant is Reasonable.

The MultiCare covenant satisfies each element of the reasonableness standard.

1. MultiCare has many protectable interests.

To begin with, there can be no genuine dispute that the MultiCare covenant is reasonably necessary to preserve several interests that Washington law has long held are protectable.

The first such protectable interest is MultiCare's patient relationships. *Perry*, 109 Wn.2d 691, is illustrative. There, the Washington Supreme Court enforced a non-competition agreement against a former employee of an accounting firm. The covenant prohibited her

from serving firm clients for five years. The Supreme Court held the employer clearly had "a legitimate interest in protecting its existing client base from depletion by a former employee," "a justifiable expectation that if it provided employment to an accountant, that employee would not take its customers." *Id.* at 700. The Court reasoned:

> A bargain by an employee not to compete with the employer during the term of employment of thereafter for a reasonable time and within a reasonable territory, as may be necessary for the protection of the interests of the employer without imposing undue hardship on the employee, is valid. Such covenants encourage employment of accountants by accounting firms and they discourage the taking of the employer's clients without preventing the employee from engaging in the profession.

Id. (Citations omitted).

The Washington Court of Appeals reached a similar conclusion in *Knight, Vale & Gregory*, 37 Wn. App. 366. It enforced a covenant which, for a period of three years following termination of employment, prohibited two accountants from performing services for clients with whom they had contact as a result of their employment with their former employer. The Court stressed that the restraint was necessary because the employer "has a legitimate business interest in maintaining a large and profitable clientele acquired over the years." *Id.* at 370. The Court noted that the nature of the accounting business is such that employees "gain extensive valuable knowledge of the client's business and internal

operations" and develop a "close familiar working relationship" with clients, like patients, which enables them to be particularly competitive thereafter if not reasonably restrained. *See also Racine*, 141 Wn. at 612 ("if the nature of the employment is such as will bring the employee in personal contact with patients or customers of the employer…enabling him, by engaging in a competing business on his own behalf, or for another, to take advantage of such knowledge of or acquaintance with the patrons or customers of his former employer…equity will interfere on behalf of the employer and restrain the breach of a negative covenant not to engage in such competing business"); AMA Council on Ethical and Judicial Affairs, CEJA Report 3-A-14: Restrictive Covenants at 2 (2014)(hereafter, "AMA Report")("such agreements can help protect a practice's relationships with its patients, as well as protect monetary and other investments health care organizations and practices make in physician training and mentoring").[6]

[6] Contrary to Dr. Majors' argument, this report does not discourage the use of non-competes in the medical industry. It simply canvasses relevant ethical and legal considerations and, in the process, makes several points that support MultiCare. These include acknowledging that (a) within "bigger health care systems [like MultiCare] where physicians enter into contractual relationships for employment, restrictive covenants have become a ubiquitous component of employment agreements"; and, as noted above, (b) "such agreements can help protect a practice's relationships with its patients, as well as protect monetary and other investments…" The report concludes by simply recommending physicians reject covenants that are unreasonable (without offering any means of measurement). It restates the governing legal rule as an ethical standard.

The analysis in *Perry, Knight Vale & Gregory* and *Racine* (and many other cases cited below) applies here. The medical profession is relationship-driven. MultiCare's acquisition of GSCH was not simply a purchase of brick-and-mortar resources. It included the right to service GSCH's (and Dr. Majors') existing patient base and goodwill. The value of that patient base to MultiCare derived from the exclusivity of MultiCare's access to it. MultiCare's acquisition took into account the fact that GSCH's physicians, including Dr. Majors, were subject to non-compete provisions, and had been for years. MultiCare acquired GSHC with the reasonable expectation that the value of its purchase was not vulnerable to unchecked, piecemeal depreciation by virtue of individual physicians leaving with portions of the patient base or using the experience and reputation gained through their employment to compete directly for new patients within the zone they contractually agreed to respect. After acquiring GSCH, MultiCare had physicians sign new covenants for these very reasons.

MultiCare also hired Dr. Majors on the express mandate that he establish new patient relationships while also maintaining—for MultiCare's benefit—the then-existing patient relationships he had developed with GSCH's prior support, and which, as just noted, MultiCare had essentially purchased from GSCH. The number of these patients—

actual and potential—was substantial. Approximately 3,000 MultiCare patients live within the 20-mile radius of the covenant, and fully two-thirds of this group live within four miles of Dr. Majors' former facility.

Whether MultiCare has lost patients to date is irrelevant. The absence of actual harm to date shows that the covenant works, not that it is unenforceable. The whole point of the covenant is to prevent harm. Its purpose would be defeated if MultiCare had to incur losses to establish enforceability. That is a circular argument that has been rejected. An employer "does not have to prove actual competition or damages," because "it is the potential to compete—not the actual competition—that makes the non-compete necessary." *Emerick*, 189 Wn. App. at 723. Here, the requisite potential for harm is significant and clearly established.

There is little doubt that if Dr. Majors violates the noncompete, losses will follow. One of his supporters, Dr. Morris, made this very point when explaining why her practice would consider hiring him:

> He comes with a following, which of course is you know why the noncompete is there, so that he doesn't take his following with him. But his patients were very loyal. They would have followed him straight to our door, which is exactly what MultiCare doesn't want.

CP 1157. Dr. Morris boasted that this was her own experience: When she left her prior employer, "90%" of the patients went with her. CP 1275. Dr. Majors made the same point at his deposition. CP 207 (stating "my

patients followed me" in relation to his move from a "downtown" facility to a more rural one).

Further, the potential harm to MultiCare extends beyond the loss of direct services by Dr. Majors to individual patients at his specific clinic. Each time a doctor services a new patient, he or she effectively introduces the patient to the larger MultiCare network, which creates opportunities for multiple other providers. CP 1221. Perhaps no specialty is better situated than OB/GYN providers to capitalize on this point-of-entry opportunity: A mother's decision to retain a specific OB/GYN provider often leads to her larger (often growing) family becoming long-term patients of the larger network in which that doctor practices. Specialists like Dr. Majors help create a patient pipeline and act as a primary referral source of patients to the larger network. *Id.* In this way, each provider helps others such that the whole of the network is greater than the sum of its parts. And every participating doctor, not just Dr. Majors, is required to sign a non-compete for the benefit of the others.

MultiCare has a clearly defined, legally recognized interest in protecting its patient base.

MultiCare's second category of protectable interests is the assortment of additional investments, small and large, that it made to develop and maintain the underlying infrastructure and overarching

ecosystem necessary for Dr. Majors (and other physicians) to properly service its patient base. "Washington courts have recognized the importance of employer investment, providing office space, equipment, and an existing patient following, in the medical non-compete agreement context." *Emerick*, 189 Wn. App. at 722, citing *Ashley*, 75 Wn.2d at 476. Many of these protectable investments are squarely set forth in the same agreement in which the non-compete is found.

A third set of protectable interests includes MultiCare's standing, goodwill and referral sources. As the *Emerick* court explained:

> Here, there is clear evidence in the record that CSC [the employer/medical facility] had protectable goodwill and business interests. CSC spent 40 years developing goodwill in the community before it hired Emerick. Before Emerick arrived, CSC was a well-established, longstanding cardiology practice with a large patient census, a highly recognized name, a strong reputation, and referral sources through all of its long established relationships. Emerick acknowledged these facts when he signed the Agreement, and, as a shareholder, he would have had the benefit of enforcing the non-compete against any other departing member.

Emerick, 189 Wn. App. at 722-23. This language applies here. MultiCare spent "[more than] 40 years developing goodwill in the community before it hired [Dr. Majors]," and had a "well-established, longstanding [OB-GYN] practice with a large patient census, a highly recognized name, and strong reputation, and referral sources through all of its long-established

relationships"; and as an employed physician for 14 years (with GSCH, then MultiCare) Dr. Majors "had the benefit of enforcing the non-compete against [the] other departing member."

All of the above investments were made, bargained for, with the non-compete provision in mind. Dr. Majors cannot enjoy these benefits for nearly 14 years, sign five consecutive covenants, and then simply walk away from his principal reciprocal obligation. The first criterion in the reasonableness analysis is satisfied: The restraint is necessary to protect MultiCare's protectable business interests.

2. The covenant is reasonable in scope.

The second criterion in the reasonableness analysis is satisfied as well: For several reasons, the covenant is reasonable in scope—temporally and geographically.

First, non-competes are commonplace in the medical field, particularly in the context of large health care systems, like MultiCare and Franciscan. CP 131, 146-147, 170; AMA Report at p. 2 (recognizing that within "bigger health care systems where physicians enter into contractual relationships for employment, restrictive covenants have become a ubiquitous component of employment agreements").

Second, Dr. Majors' covenant is at the mid-point of MultiCare's covenant structure, less restrictive than some specialists, more than

others. CP 451-452. While the duration of two years applies across the board, the geographic reach of its covenants are tiered based on the nature of the practice and a corresponding risk assessment: from a 10-mile radius for primary care doctors to 30 miles for sub-specialists. OB-GYN physicians, like Dr. Majors, fall in the middle at 20 miles.

Third, and related, Dr. Majors' covenant encompasses, and is limited to, the existing and potential patient base for which he was responsible when previously employed by MultiCare. It extends to only a fraction of MultiCare's overall operations. It is supported by analyses of market share and patient demographics; differences in substantive practice areas; and the key role OB/Gyn doctors play in attracting individual patients, and their families, to MultiCare's larger health system. CP 140-141, 451-452, 1221, 1223-1224, 1356-1359.

Fourth, his covenant is within the spectrum of restrictions currently in use in Western Washington, which range from one year and 15 miles (Franciscan), to one year and 40 miles (also Franciscan), to two years and 25 miles (OB Hospitalist Group), and even to two years and 40 miles (Children's Hospital). CP 146-147, 760-762.

Fifth, his covenant is within the spectrum of restrictions held to be enforceable in Washington. The *Knight* Court enforced a prohibition on services for the former employer's customers, regardless of location, for a

period of three years, finding the restriction did not "unduly restrain freedom of employment." *Knight*, 37 Wn. App. at 370. The *Perry* Court upheld a covenant with a five-year restrictive period. In *Armstrong v. Taco Time Int'l, Inc.*, 30 Wn. App. 538, 545, 635 P.2d 1114 (1981), the original covenant prevented a franchisee from selling Mexican food nationally for a five-year period following commencement of competitive activities. The trial court reduced time period to two-and-a-half-years and to a 25-mile radius around all franchises. On appeal, the court expanded the geographic radius to encompass not only the 50-mile area of his franchisee's agreement, but also the entire exclusivity-protected areas (or "buffer zones") around areas covered by other franchisees' agreements. *See also Hometask Handyman Servs. v. Cooper*, 2007 WL 3228459 at *4 (W.D. Wash. Oct. 30, 2007) (unpublished)(two years, 25-mile radius, reformed from original 100-mile ban); *Alexander & Alexander, Inc. v. Wohlman*, 578 P.2d 530, 539-40 (Wash. Ct. App. 1978)(prohibition of solicitation and servicing clients in "greater Seattle area", reformed from original 100-mile ban).

Sixth, the covenant is within the spectrum of restrictions held to be enforceable in other jurisdictions that follow the reasonableness test, in the medical field and other industries, which range from two to five years in duration, and two to 75 miles, in geographic reach. See, e.g., **Medical**

field: *Occ. Health Ctrs. of the Southwest, P.A. v. Toney*, ELH-17-0975, 2017 WL 1546430,*13 (D. Md. 2017)(two years, 20 miles; *Central Indiana Podiatry, P.C. v. Krueger*, 882 N.E.2d 723, 729-731 (2008)(two years, three counties); *Wichita Clinic, P.A. v. Louis*, 39 Kan.App.2d 848, 859-60 (2008)(three years, one county); *Mohanty v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85 (III. 2007) (three and five years, two and five miles); *Keeley v. Cardio. Surgical Assocs., P.C.*, 510 S.E.2d 880 (Ga. Ct. App. 1999) (75 miles); *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 41 N.Y.2d 680 (N.Y. Ct. App. 1977) (five years, 30 miles); *Martini v. Cogley Clinic*, 253 Iowa 541, 112 N.W.2d 678 (1962)(three years, 25 miles, and noting, "[i]n these days of good roads, rapid transportation and an expanding perimeter for business and professional influence, 25 miles is not far for a client or patient to go to see a professional of his [or her] choice"). **Non-medical lines of business:** *Schetter v. Newcomer Funeral Serv. Grp., Inc.*, 191 F. Supp. 3d 959 (E.D. Wis. 2016)(25-mile radius for two years*); Nat'l League of Junior Cotillions, Inc. v. Porter*, No. 306-CV-508-RJC, 2007 WL 2316823, at *5 (W.D.N.C. Aug. 9, 2007), aff'd, 280 F. App'x 322 (4th Cir. 2008) (25-mile radius for two years); *Branson Ultrasonics Corp. v. Stratman*, 921 F.Supp. 909, 913-14 (D.Conn. 1996)(enforcing prohibition against competing anywhere for one year); *Kramer v. Robec, Inc.*, 824 F.Supp. 508, 512 (E.D.Pa. 1992)(two years

anywhere in United States); *Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W.2d 678 (1962)(three years, 25-mile radius).

Dr. Majors' arguments against the collective weight of the above-referenced law and facts are without merit. These are that the above-referenced cases are distinguishable, that the trial court placed too much emphasis on *Taco Time* and too little on *Emerick*, that he will experience great hardship if the covenant is enforced, and that the covenant does not rest on empirical data or deep statistical analysis.

To begin with, Dr. Majors's effort to distinguish the case law fails. *See* CP 1252-1256. He principally argues that none is factually identical to this case. MultiCare agrees. The reasonableness analysis is nearly always too fact specific to turn on the precedential value of a published decision. MultiCare's point is not that any one case is dispositive, but rather that as a group they are. Read together, they set a range of reasonableness within which the covenant at issue comfortably rests.[7]

Related, the trial court neither relied too heavily on *Taco Time* nor too lightly on *Emerick*. As for the latter, the trial court specifically stated

[7] Dr. Majors also ignores unfavorable facts. For instance, he argues that *Mohanty v. St. John Heart Clinic*, 225 Ill. 2d 52, 866 N.E.2d 85 (2006), "illustrates significantly less restrictive covenants (two and five miles)." *See* CP 1255. He omits that the geographic restrictions were not being challenged, the court upheld temporal durations of three and five years, and the court noted that the AMA position on restrictive covenants "is no different from the common law requirements of this state," i.e., that they are reasonable. 225 Ill. 2d. at 67-68.

that *Emerick* was the touchstone to its entire analysis. RP 48. It properly emphasized the legal rules set forth in *Emerick*, applying them to the specific facts of this case. As for *Taco Time*, the trial court referenced it only once, and even then only to note—accurately—that the *Emerick* court relied upon *Taco Time* to illustrate the point that Washington law has enforced covenants with restrictions that extend well beyond the two mile radius upheld in that decision. RP 50. This is hardly undue reliance.

To the contrary, it was *necessary* reliance to rebut Dr. Majors' argument that the MultiCare covenant should be reformed to the same two-mile radius upheld in *Emerick*. Like the trial court, this court should reject this superficial argument, which urges rejection of legal rules that are universal and transferable, and rigid adherence to facts that are distinguishable. The trial court properly noted that each case is fact-specific, and the *Emerick* Court specifically noted that "Washington courts have previously concluded that geographically restricted areas greater than two miles are reasonable." *Id.* at 727. *Emerick* also relies upon *Taco Time*, which, as noted above, upheld geographic restrictions that were not only "greater than two miles," but were far greater than MultiCare's 20-mile radius. Further, in *Emerick*, for reasons not known, the employer conceded that its covenant was too broad and should be narrowed: "[T]he trial court accepted [employer's] concession that the covenant as written—

preventing Emerick from practicing in all of Pierce County and Federal Way—was too broad and concluded that a two mile area of protection around each of CSC's offices would serve to protect CSC's business interests…." *Id.* at 725. Here, there is no such concession.

The covenant in *Emerick* is also far more restrictive than the "two-mile radius" suggests in isolation. The two-mile radius applies to all CSC facilities, of which there were four, and, as the Court noted, "each [was] located near a main hospital." In contrast, MultiCare's non-compete applies the restrictive zone to only one location. And it covers a largely rural area that, relative to the CSC exclusion zones, is less populated and covers significant areas that have no competing facility. Further, while the *Emerick* restraint extended four years, MultiCare's is half that length. The net result of *Emerick* is a covenant that is broader than MultiCare's, in both duration and reach. MultiCare's covenant extends just two years compared to the *Emerick* covenant's four, and MultiCare has far more than 100 separate facilities compared to the *Emerick* employer's four. CP 1221, 1328-1329. If the *Emerick* radius of two miles per facility was applied to MultiCare, the protected zone would expand well beyond the current radius of 20-miles from a single facility.[8]

[8] MultiCare opposes reformation on these lines, because while overall broader, this type of per-facility restriction would not reasonably protect its interests.

While the MultiCare covenant certainly impacts Dr. Majors, its effects are neither as significant nor as relevant as he contends. As for relevance, Washington law recognizes that, by definition, a restrictive covenant will limit the former employee's employment opportunities and this inevitable consequence does not establish unreasonableness:

> If a restriction is not greater than reasonably necessary to protect the employer's business or goodwill, **it will be upheld even if it restrains the employee of his liberty to engage in a certain occupation or business and deprives the public of the services, or restrains trade**.

Perry, 109 Wn.2d at 698 citing *Racine,* 141 Wash. at 610-11 (emphasis added). This ends the analysis on this subject.

But were it to continue, it would not support Dr. Majors. While the alleged personal consequences of the covenant are a centerpiece to his appeal, he sketches them in dramatic terms that exceed the evidence. For example, he asserts that the covenant's practical effects include that "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 schools." App. Br. at p. 8. He also claims he is "forbidden to be a physician" and "could not take his own child's temperature, volunteer at a local charitable clinic, or call a patient or review a chart from home…" *Id.* at p. 15.

The covenant is not nearly so broad. In fact, Dr. Majors' argument is remarkable, given that the facts regarding the reach and consequences of

the covenant are beyond dispute, and alternately rest principally on the letter of the provisions and/or Dr. Majors' own sworn testimony. The covenant does not, and will not, preclude him from working, or even entirely remove him from the scope of his prior service area. By its express terms, it is limited to a radius of 20 miles, measured "as the crow flies" from his prior practice location, the Bonney Lake Facility. Beyond the 20-mile radius, he may ply his trade. This is undisputed.

It is also undisputed that Dr. Majors has already secured a position (subject to credentialing) that falls outside this scope and, therefore, does not violate the non-compete. He simply prefers an opportunity that does. (Which may explain why, as of May 23, 2018, when a Franciscan Rule 30(b)(6) designee was deposed, he had not yet returned the paperwork required to conduct the credentialing process, even though it had been forwarded to him three months earlier in February. CP 1365-1366.)

Since receiving this offer in January, 2018, he has suspended his search. He claims not to know whether there are other opportunities outside the reach of the covenant. CP 231-232. There are: More than 30 women's service providers operate outside the 20-mile radius of the covenant but within 45 miles of his residence. CP 827, 829-833.

The 30-minute response standard is a large red herring and changes nothing. It governs response time, not location of residence. It requires

the ability to respond within 30 minutes when on call, not perpetually. As Dr. Morris (a strong supporter of Dr. Majors) testified, some doctors manage the issue by making other arrangements, such as staying at a hotel during on-call nights. CP 1277. *See also* 1220-1221. Others stay at the facility while addressing paperwork or other matters, or pursue positions, such as hospitalists and locum tenens physicians, that do not require on call work. *Id.* Dr. Majors has been offered such a position, the temporary job at Franciscan's Highline facility, which does not carry the response standard. CP 1291 (Dr. Majors acknowledging greater than 30-minute commute).

The response-time requirement also is nothing new. It was in place throughout Dr. Majors' employment with both GSCH and MultiCare. It was a known part of the medical landscape each time he entered into his five consecutive non-competes. Its potential as a future inconvenience was a known risk that he assumed and that does not affect the enforceability analysis. Washington courts have rejected his argument to the contrary on far more sympathetic facts than he presents here. In *Emerick*, for example, the doctor-plaintiff complained that, because the court adjusted the non-compete radius on appeal, he would suffer heavy expenses to relocate. The court rejected this complaint, noting that:

> [A]lthough Emerick's relocation may come at great expense and inconvenience to him, that need not inform our decision. Emerick took a calculated risk by opening his practice in June 2011 while the appeal in *Emerick I* was pending. And, the trial court considered the expense and inconvenience to Emerick when it made its ruling. As such, it provided Emerick nearly eight months to relocate…

Emerick, 189 Wn. App. at 732. Dr. Majors, in contrast, had 14 years to prepare for the possibility that he might need to extend his commute for work. This inconvenience was already accounted for in his contractual compensation, which he gladly accepted for more than a decade.[9]

Respectfully, the inconvenience is also overstated. It may require a longer personal commute, but it certainly does not require uprooting family. On this score, Dr. Majors is no different than many other people. Roughly 30% of Pierce County residents commute to jobs outside the county, and 47% commute longer than 30 minutes.[10] CP 1069-1070.[11]

Finally, Dr. Majors challenges the scope of the covenant as being speculative because neither its temporal duration nor its geographic reach

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[9] Dr. Majors is incorrect when he asserts that MultiCare "testified unequivocally that all OBGYN physicians must be within 30 minutes of their delivering facility while on call, that the requirement is in every contract, and the requirement is the industry standard." CP 1234. MultiCare testified that this is a requirement for physicians who have on call duty (CP 1344), and not all physicians have such a duty, which is periodic/rotational when it attaches at all (CP 1221-1221).

[10] 2016 survey data published by Commute Seattle, a non-profit partnership among King County Metro, Sound Transit, Seattle Department of Transportation, and the Downtown Seattle Association, shows further that nearly 20% of survey respondents who work in Seattle commute from the "South region, including Pierce County. CP 1080-1083.

[11] And, of course, whether inside or outside the 20-mile radius, this case is not about allowing Dr. Majors to "take his child's temperature" or perform volunteer work. It is about his undisputed desire and intention to assume a position with a competitor to render the same services he previously provided on MultiCare's behalf.

is supported by rigorous data analysis or modeling. He complains, for example, that, prior to implementing the covenants, MultiCare did not first determine the precise number of patients within each additional radius mile, calculate the percentage likelihood of patients' moving with the departing physician, or model or project the precise dollar value of the corresponding loss in future revenue potential. These complaints do not advance his position. There is no legal principle that requires this type or depth of underlying examination or analysis. Not one case cited by either party even mentions, let alone recommends or requires, the type of scientific or otherwise objectively verifiable analyses that Dr. Majors suggests. No such authority exists. This is because the issue presented is a question of law, not scientific validity. The issue is whether the covenant is "reasonable," not whether it is supported by numerical analysis that satisfies peer-review standards of scientific rigor.

In addition to not being required, the analysis Dr. Majors posits is not practicable, and largely not even possible. MultiCare operates in many different regions, each with its own mix of relevant factors, including population size, density, and distribution; patient socio-economic information; fertility rates; the availability of public transportation; the number of competing medical providers; and so on. And the analysis would have to be conducted on an on-going basis

because these factors all change over time. Populations grow and redistribute. Economic conditions rise and fall. Public transportation is built out or neglected. Competitors move in and out of the region. The practical issues are compounded still further when physician mobility is added to the calculus. Physicians' primary practice locations change. Dr. Majors is exhibit A on this score, having moved from downtown Puyallup to Sunrise to Bonney Lake. Under Dr. Majors' concept, the underlying non-compete would suddenly be invalid because it was no longer grounded in the risk assessment associated with the original location. Dr. Majors' proffered standard is neither required nor realistic.

That said, MultiCare's covenant in general, and its application to Dr. Majors in particular, rest on far more than whim and assumption. They rest on experience, common sense, Dr. Major's own testimony and stated intentions, and some measure of quantifiable analysis. No data crunching is necessary to see the potential harm in permitting him to violate his covenant to accept the job he prefers, i.e., with MultiCare's primary competitor a mere eight miles from his prior practice location.

Still, MultiCare does actively measure and monitor market share, competitors' as well as its own. In its own motion for summary judgment, MultiCare discusses this market share data as it relates to Franciscan, and to its and Franciscan's competing efforts to expand into the East Pierce

County region. *See* CP 140-141, 821-822. Dr. Majors grudgingly acknowledges this fact, but then dismisses it on the ground that it is tied to hospitals, not clinics. His argument is that he hopes to work at an individual Franciscan clinic and, therefore, the relative market shares of the larger networks are somehow meaningless. The argument, of course, ignores the fact that the clinics are important parts of the larger networks, and the specific clinic he is interested in is part of the Franciscan system, MultiCare's largest competitor. The corresponding market share data clearly is probative of the risk of enhanced competition in the event Dr. Majors is relieved of his non-compete. So, too, is the demographic data showing nearly 3,000 MultiCare patients within the 20-mile radius. [12]

It also bears noting that Dr. Majors' proposed two-mile radius suffers the same flaws that he so aggressively attaches to the existing 20-mile benchmark, in fact more so: It is completely without rationale, let alone the empirical analysis he claims is required. It reflects nothing more than legal gerrymandering transparently aimed at giving Dr. Majors the freedom to pursue the one opportunity he desires. The unprincipled nature of his calculation is perhaps most evident in the fact that, to whittle the MultiCare current restriction down to a point where he can accept the

[12] Indeed, if anything, this underestimates the risk. Dr. Majors is not prohibited from providing care to patients who reside within the non-compete zone, he simply cannot provide them medical services within that area.

position with Franciscan, he must (and, in fact, does) argue that the restriction that Franciscan will require him to sign is also overly broad and, therefore, unenforceable. He argues that any restriction beyond two miles is unenforceable, yet Franciscan's covenant has a 15-mile radius. He should not be permitted to evade one covenant on the grounds it exceeds a limit he has arbitrarily established, just so he can enter into another with a direct competitor that exceeds the limit as well.

The MultiCare covenant satisfies each element of the reasonableness standard.

3. The covenant does not implicate public policy.

The final factor, i.e., whether the loss of the employee's skill or service substantially injures the public, does not change the analysis. "If a restriction is not greater than reasonably necessary to protect the employer's business or goodwill, it will be upheld even if it…deprives the public of the services**…"** *Perry*, 109 Wn.2d at 698. The deprivation must be particularly significant to implicate public policy. Here, it is not.

As in *Knight Vale & Gregory*, *Perry, Emerick* and *Racine* (and many other cases cited herein), Dr. Majors' services are "neither unique nor incomparable." There is no evidence that a single patient has been (or will be) neglected. Dr. Majors' former practice location with MultiCare (the Bonney Lake Facility) has continued to operate, without interruption,

since his departure. CP 148. The relevant region has not experienced a net loss of a service provider. Dr. Majors is set to begin employment in a position that is essentially in the same region; specifically, 22.01 miles from the Bonney Lake Facility. And the Bonney Lake Facility will soon have more coverage than before Dr. Majors' discharge as MultiCare has hired one physician who will be assigned to Bonney Lake and a second who will serve that location as part of a larger East Pierce County rotation (both of whom will sign the same form of covenant that applies to him).

Requiring Dr. Majors to work 20.1 miles from his prior primary location has no effect on the availability of OB-GYN services, let alone an effect so materially adverse as to implicate broad public policy considerations. In fact, there are underserved communities in areas beyond the covenant's 20-mile radius. CP 1223-1224, 1228-1229. Enforcing the provision expands, rather than contracts, service to underserved areas. The Bonney Lake community gets two new MultiCare providers, and a different community gets Dr. Majors.

D. There Is No Basis For Challenging The Blue Pencil Rule.

Dr. Majors' arguments regarding the blue pencil rule do not change this conclusion, or the underlying analysis. Once again, he argues aspirations, rather then current law and established facts. Rather than apply existing law, he conjures a more supportive future legal landscape.

Specifically, he claims the blue-pencil rule should be discarded or at least "clarified that the express terms must be near to reasonable before a court will then shrink to fit them to be reasonable." App. Br. at p. 25.

Both arguments fail in the first instance because the covenant at issue is reasonable as written. There is nothing to reform. The blue pencil rule does not apply. Even if discarded, its demise would have no bearing on the enforceability of this covenant. Related, even if the covenant was deemed unreasonable, given the above-discussed law and undisputed facts, it certainly would be "near to reasonable." Therefore, under Dr. Majors' own suggested standard, the blue pencil rule would, in fact, apply.

Dr. Majors' arguments against the blue pencil rule also fail because he never squarely pursued them before the trial court. To the contrary, he invoked the rule and argued strenuously that the court should reform the covenant to two miles. RP 45-46, CP 1250-1251.

Further, Dr. Majors' arguments to narrow or eliminate application of the blue pencil rule rest on nothing but conclusory assertions and conjecture. He begins by noting that the rule traces to a "landmark case" – *Wood v. May* – that "is now fifty years old," suggesting that it is an outdated relic. He ignores the fact that, over the course of the intervening five decades, the rule has been regularly invoked and relied upon, and in the rare circumstances where a trial court has strayed from this established

line of authority, the appellate court was quick to call out, condemn and correct the error. *See, e.g.*, *Emerick*, 170 Wn. App. at 257 ("The trial court's analysis of the scope of the covenant is flawed for several reasons," including because "it made no attempt to save as much of the covenant as could reasonably and fairly be enforced."); *Alexander & Alexander*, 19 Wn. App. at 686 (rejecting trial court finding covenant "wholly unenforceable," and holding "the proper approach is to apply the test and then to enforce the covenants so are as reasonable"). Far from being a long-forgotten historical vestige of a bygone era, the rule is dynamic and current and has been repeatedly reaffirmed.

Next, Dr. Majors recasts the legal rule as an "experiment"; declares it has "failed"; traces the failure to unsubstantiated supposition that employers as a group have no incentive to be reasonable and "feel compelled" to unthinkingly rely upon "the proliferation of legal forms on the Internet"; and claims that his alternate approach "reflect changing of the times and circumstances" App. Br. at p. 25. Once again, all of these assertions are new on appeal. None was presented to the trial court, and none is supported by a shred of admissible evidence or legal authority.

V. CONCLUSION

The covenant is reasonable. It strikes an appropriate balance between Dr. Majors' interests and MultiCare's. It permits him to practice

his profession, while protecting MultiCare from unfair competition as the facility he exited hires and integrates his replacement. He was provided the benefit of the bargain reflected in his employment agreement. MultiCare simply seeks the benefit of its bargain.

DATED this 4th day of March, 2019.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 4th day of March, 2019 I served a true and correct copy of the foregoing Amended Brief of Respondent at the address stated below, via the method of service indicated below:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

WINTERBAUER & DIAMOND PLLC

s/ Adam Love
Adam Love, Litigation Assistant to
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