No. 101973-4

Court of Appeals No. 81584-9-I

SUPREME COURT
OF THE STATE OF WASHINGTON

RYAN HITES,

Petitioner,

v.

GRIFFIN MACLEAN, INC.,

Respondent.

ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF ANSWERING PARTY

Respondent Griffin MacLean, Inc. ("GM") submits the following Answer to Ryan Hites' ("Hites" or "Petitioner") Petition for Review.[1]

II. INTRODUCTION

Hites asks this Court to review two discrete issues: (1) whether the Court of Appeals misapplied *Robbins* in concluding that GM sufficiently placed Hites' affirmative defenses at issue in its Motion for Summary Judgment; and (2) whether Section 4 of the parties' employment agreement (the "Agreement") constitutes an unconscionable waiver of defenses. Neither of these issues justify review by this Court.

First, the Court of Appeals did not misapply *Robbins*. GM moved for summary judgment, asking the trial court for a determination that the Agreement was valid, binding, and enforceable and that Hites had breached the non-solicitation

[1] Following the commencement of Hites' appeal, GM's name was changed to TD Insurance, Inc., but for sake of simplicity the company will be referred to herein as GM.

provision by actively soliciting GM customers immediately after leaving GM's employ. In response, Hites stipulated that the Agreement was valid, binding, and enforceable subject only to defenses argued in his response brief. In his response to GM's Motion for Partial Summary Judgment, Hites raised the arguments of unclean hands, failure of consideration, unconscionability/illegality, and first material breach. Each of these arguments was considered, but ultimately rejected, by the trial court.

Despite this, Hites claims that he is entitled to another bite at the apple because *Robbins* required GM to affirmatively and specifically challenge each of his affirmative defenses in its Motion for Summary Judgment. As the Court of Appeals stated, however, "*Robbins* does not apply when a moving party's requested relief clearly puts at issue the nonmoving party's affirmative defenses." GM's Motion for Partial Summary Judgment placed squarely at issue Hites' affirmative defenses as well as any argument his breach of the

Agreement was justified or excused. Because of this, Hites had an opportunity to assert and argue his affirmative defenses in his response, which he did.

Second, Section 4 to the Agreement is not an unconscionable "waiver of defense" clause. Instead, Section 4 merely provides that any claims Hites may have against GM "shall not constitute a defense to the enforcement" by GM of the restrictive covenants—like the non-solicitation provision—in the Agreement.

Neither of these issues raise a conflict with a decision of this Court or the Court of Appeals, raise a significant question of constitutional law, or involve an issue of substantial public interest which should be determined by this Court. *See* RAP 13.4(b). Accordingly, Hites' Petition for Review should be denied.

III. STATEMENT OF THE CASE

A. Hites' Employment at GM.

Ryan Hites began work for GM in 2015. CP 159:4-6.

GM offered him the job on May 22, 2015. CP 317. He completed his new hire documents, including an employment agreement (the "Agreement") which was a prerequisite and condition of his employment, and delivered them to GM's office on May 29, 2015. CP 23-26; CP 159:4-6.

Hites could not, however, begin working immediately as he was not licensed as an insurance broker when hired. CP 2583:1-6. He had to complete property and casualty licensing school. *Id.* He also had a pre-planned vacation during the month of June 2015. *Id.* Hites obtained his license on June 17, 2015, and was not able to work prior to that date.[2] *Id.*

Hites' Agreement contained non-solicitation provisions which prohibited Hites from soliciting or servicing GM's customers, clients or accounts after separation from

[2] Hites' license was later revoked on December 19, 2019, by the Office of the Insurance Commissioner due to fraudulent and dishonest practices under RCW 48.30.210 and 48.17.530. CP 2604:16-20; CP 2630-2635.

employment. CP 23-24. Hites further agreed not to interfere with the relationships of GM and any of its customers, employees, agents, representatives, or suppliers, and to relinquish all items, documents, and/or information originating from or belonging to GM. *Id.*

B. Hites Resigns from His Job and Begins to Violate His Agreement.

On Friday, October 19, 2018, neither Hites nor his colleague Antony Neville ("Neville") came to work. CP 159. That morning, an attorney representing them sent a letter to GM stating, among other things, that Hites and Neville were leaving GM and did not consider themselves to be bound by restrictive covenants contained in their employment agreements. CP 159:13-17; CP 28-31. By the following Monday, October 22, 2018, Hites and Neville had formed and registered their new company, Victory. CP 159:20-160:1; CP 189-93.

Hites and Neville registered Victory as an insurance

producer with the Office of the Insurance Commissioner and began to aggressively solicit GM's customers. CP 160-68; CP 192-95; CP 197-275. Their solicitations included instructions to GM clients to cancel GM policies and transfer their business from GM to Victory. *Id.* They also falsely claimed that GM did not understand certain insurance products and sought to convince GM clients to leave GM for Victory, targeting the GM clients which they knew had upcoming insurance renewal dates. CP 161-67; CP 216; CP 223-27; CP 2608. They had taken GM's confidential renewal lists. CP 2608; CP 2664-65.

C. Procedural History.

GM filed suit against Hites and Neville on November 9, 2018, and sought and obtained a Temporary Restraining Order, and then a Preliminary Injunction. CP 121-26; CP 453-61. Hites and Neville responded to the motions and appeared at the hearings through the same counsel who had written the letter to GM on October 19, 2018. The trial court later held

Hites and Neville in contempt for violating the Preliminary Injunction, after they continued to solicit and service GM clients despite the trial court's order that they cease doing so. CP 580-90.

In answer to GM's Complaint, Hites asserted only five affirmative defenses: (1) laches; (2) lack of clean hands; (3) illegality of Plaintiff's conduct and the conduct of its principal, Paul Dent; (4) estoppel; and (5) failure of consideration. CP 48.

Approximately two months before trial, GM moved for partial summary judgment on its breach of contract claim, seeking an order that the Agreement was valid, binding and enforceable and that Hites had breached it. CP 1339-67. Hites' response included a stipulation that the Agreement was valid, binding and enforceable, subject to defenses raised in his response. CP 1413-14. At the same time, Hites raised only two of his affirmative defenses—failure of consideration and unclean hands. He also raised new defenses of first material

breach and unconscionability/illegality of Section 4 of the Agreement. The trial court considered and rejected these defenses and entered partial summary judgment holding that the Agreement was valid, binding, enforceable and had been breached. CP 1451-58.

The case was tried to a jury over the course of three weeks from late February through the middle of March 2020. The jury returned a verdict in favor of GM, finding for GM on its claims breach of contract, unjust enrichment and tortious interference. CP 1851-53.

Hites appealed[3] the trial court's summary judgment ruling that the Agreement was valid and that he breached the Agreement by soliciting business from GM clients after leaving its employ.[4] The Court of Appeals affirmed the trial court's order granting GM's Motion for Partial Summary

[3] Neville and Victory also appealed, but ultimately settled and dismissed their appeals. Hites is now the sole appellant.
[4] Hites' appeal involved other issues that were not raised in his Petition for Review to this Court and so are not addressed here.

Judgment.

IV. ARGUMENT

A. Hites Does Not Meet the Standard for Accepting Review.

Pursuant to Rule of Appellate Procedure 13.4(b), "[a] petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

Neither of the issues Hites presents for review by this Court meet this standard.

B. The Court of Appeals' Conclusion that GM's Motion for Partial Summary Judgment Placed Hites' Affirmative Defenses at Issue is not in Conflict with *Robbins*.

1. Hites Stipulated to Only Those Defenses Raised in Opposition to Summary Judgment.

Hites stipulated that his Agreement with GM was valid, binding and enforceable, subject only to issues he raised in response to GM's motion for partial summary judgment. CP 1413. In his Response, Hites identified only four specific defenses on which he relied to avoid liability under the Agreement: lack of consideration, unconscionability/illegality, first material breach, and unclean hands. *See* CP 1414; CP 1417-18; CP 679; CP 1414-15; CP 1451-58; CP 1705-08. "The trial court rejected each of these four arguments." COA Opinion at p. 9.

2. *Robbins* does not Require GM to Move Separately on Each of Hites' Affirmative Defenses.

Now, in his Petition, Hites does not challenge the trial court or Court of Appeals' findings as to the merits of his defenses, but rather contends that *Robbins v. Mason Cnty. Title Ins. Co.*, 195 Wn.2d 618, 462 P.3d 430 (2020), precludes his affirmative defenses from being resolved on summary judgment unless GM specifically moved to dismiss each defense. As the Court of Appeals stated, however, *Robbins* is distinguishable and does not apply here.

"The purpose of a motion under the civil rules is to give the other party notice of the relief sought." *Pamelin Indus., Inc., v. Sheen-U.S.A., Inc.*, 95 Wn.2d 398, 402, 622 P.2d 1270 (1981). In *Robbins*, the moving party specifically asked the trial court not to consider the non-moving party's affirmative defenses. *Robbins*, 195 Wn.2d at 636. Accordingly, "[b]ecause Robbins' motion had not raised legal or factual issues relating to any of MCTI's affirmative defenses, [the Supreme Court]

concluded that MCTI was not on notice that Robbins sought summary judgment on these defenses and they remained to be resolved by the trial court." COA Opinion at p. 9 (citing *Robbins*, 195 Wn.2d at 637).

Here, to the contrary, Hites was fully aware his affirmative defenses were placed at issue by GM's motion. First, Hites waived three of his affirmative defenses by stipulating that his Agreement was valid, binding and enforceable, subject to the arguments in his response. He did not argue—and therefore waived—his affirmative defenses alleging laches, estoppel and "illegality of Plaintiff's conduct and the conduct of its principal, Paul Dent." Second, Hites did specifically raise, and the trial court considered and rejected, four defenses—two challenging the validity and enforceability of the Agreement (failure of consideration and unconscionability) and two allegedly excusing his breach (first

material breach and unclean hands).[5] In raising these defenses, Hites made clear that he was on notice that GM's Motion for Partial Summary Judgment required him to raise defenses to defeat the motion.

Specifically, GM's Motion for Partial Summary Judgment sought an order establishing the Agreement was reasonable, enforceable and binding. The only way for Hites to defeat summary judgment on these issues was to raise defenses that the Agreement could not be enforced. This is exactly what he did in raising the arguments of failure of consideration and unconscionability. As a result, the Court of Appeals rejected Hites' argument that these defenses—lack of consideration and unconscionability—were not sufficiently placed at issue by GM. As the Court of Appeals concluded:

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[5] As the trial court recognized, Hites "did not specify which affirmative defenses related to which claims." CP 1706. Contrary to Hites' contention, the trial court did not dismiss his affirmative defenses in granting GM's motion for partial summary judgment, but rather held "[a]ll of the affirmative defenses potentially remain as to [GM's] other causes of action that were not the subject of the Motion." CP 1708.

> Hites was on notice that Griffin Maclean sought a legal ruling that the Agreement was "reasonable, enforceable, and binding." Griffin MacLean explicitly argued that the Agreement was supported by consideration, discussing Hites' unsuccessful reliance on *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004), in opposing the employer's request for preliminary injunctive relief. It also specifically argued that the Agreement did not violate any Washington public policy and was therefore lawful. The request for relief and arguments set out in Griffin Maclean's motion gave Hites notice that it was challenging his affirmative defenses of lack of consideration and illegality. ***Robbins*** **does not apply when a moving party's requested relief clearly puts at issue the nonmoving party's affirmative defenses.**

COA Opinion at p. 10 (emphasis added). The Court of Appeals also rejected Hites' argument that GM did not sufficiently place at issue his defenses which would excuse his breach—first material breach and unclean hands. It concluded:

> [B]y seeking a factual finding that Hites had breached the Agreement, Griffin Maclean also put at issue any facts that might have excused or justified Hites' conduct. Yet, Hites failed to produce any evidence to establish a justification for his breach. While Hites argued he could not be liable for breach if Griffin MacLean breached the agreement first by not paying wages owing to him, he presented no evidence to support his contention that Griffin Maclean had, in fact, breached any provision of the Agreement. *Robbins* does not modify well-established law under *Young v. Key*

> *Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989) that when a moving party presents evidence to establish certain dispositive facts, the nonmoving party must come forward with evidence to dispute those facts. Hites did not do so.

Id. As to Hites' argument that GM had failed to pay him commissions owed during his employment, the Court of Appeals concluded: "Hites cannot rely on *Robbins* to claim he was denied the opportunity to litigate an affirmative defense when he clearly had notice that this factual issue was part and parcel of the employer's dispositive motion, raised it in his responsive pleadings, and chose not to present evidence to support it." *Id*. at p. 11.

The Court of Appeals lastly rejected Hites' argument that the trial court's decision on summary judgment in any way precluded him from raising his unclean hands argument at trial. Indeed, as the Court of Appeals noted, the trial court did not dismiss Hites' unclean hands affirmative defense on summary judgment but rather considered it and rejected it

after Hites raised the argument in post-trial motions. COA Opinion at p. 12.

As implied in *Robbins* and expressly recognized in *Evanston Ins. Co. v. Penhall Co.,* 13 Wn. App. 2d 863, 871, 468 P.3d 651, 656 (2020), review denied, 196 Wn.2d 1040, 479 P.3d 713 (2021), a motion can be sufficient to attack affirmative defenses even when the defenses are not the express subject of the motion. *Robbins*, as noted above, was decided on a narrow set of facts where the moving party expressly asked the court to not consider affirmative defenses. The Court of Appeals clearly distinguished and accurately applied *Robbins* to this case and review on this issue is not justified.

Finally, Hites' efforts to assign error to the Court of Appeals' application of *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 770 P.2d 182 (1989), and *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 810 P.2d 4 (1991), are also misplaced. The Court of Appeals cited *Young* for the well-

established rule that a party opposing summary judgment must bring forth admissible evidence to create a genuine issue of material fact. COA Opinion at p. 10. Hites "presented no evidence to support his contention that Griffin MacLean had, in fact, breached any provision of the Agreement." *Id.*

The Court of Appeals also properly applied *White*. Hites cited *White* to argue GM improperly raised new arguments regarding the validity of Section 4 of the Agreement in its reply on summary judgment. The Court of Appeals correctly recognized, however, that "Griffin MacLean was actually responding to Hites' argument that section 4 was an 'inconspicuous' waiver of defenses that violated public policy. Griffin MacLean's response to Hites' argument was not improper." COA Opinion at 19, n.7.

Hites is unable to establish that the Court of Appeals' decision relating to Hites' affirmative defenses is in conflict with either *Robbins*, *Young* or *White* or otherwise justifies

review by this Court pursuant to RAP 13.4(b). As a result, review must be denied.

3. The Trial Court did not Err on Summary Judgment and any Alleged Error is Harmless as Hites Could Not Have Prevailed.

An appellate court "will not reverse unless an error prejudiced a party because it 'affects, or presumptively affects, the outcome of the trial.'" *Dormaier v. Columbia Basin Anesthesia, PLLC*, 177 Wn. App. 828, 857-58, 313 P.3d 431, 444-45 (2013), quoting *Brown v. Spokane Cnty. Fire Prot. Dist. No. 1*, 100 Wn.2d 188, 196, 668 P.2d 571 (1983). Accordingly, even if the trial court had erred—which it did not—when rejecting Hites' defenses in ruling on GM's motion for partial summary judgment, this cannot form the basis for reversible error.

As noted above, Hites waived three of his five affirmative defenses in stipulating to the validity of the Agreement subject only to the defenses raised in his response to summary judgment. Even absent his stipulation, Hites'

affirmative defenses could not have defeated GM's contract claim.

Of the five defenses Hites pleaded, laches and estoppel can most easily be disposed of. First, Hites did not raise these defenses on either summary judgment or appeal and, as a result, were waived. *See Rapid Settlements, Ltd.'s Application for Approval of Transfer of Structured Settlement Payment Rights v. Symetra Life Ins. Co*., 166 Wn. App. 683, 695, 271 P.3d 925 (2012). Second, there was no evidence to support either defense, or any indication they even allegedly related to GM's contract claim. GM brought suit within weeks of the defendants' wrongful actions, and there are no facts on which to base an estoppel argument. Neither laches nor estoppel could have provided a viable defense, and indeed, Hites did not offer argument or jury instructions on them or otherwise pursue them.

Similarly, the alleged affirmative defense of "Illegality of Plaintiff's conduct and the conduct of its principal, Paul

Dent" could not have helped Hites on his breach of contract claim.[6] In Section 4 of the Agreement, discussed below, the parties contractually agreed that any claims which Hites may have stand separately, but cannot form a defense to enforcement of the restrictive covenants in Hites' Agreement. In other words, this affirmative defense is in direct conflict with enforceable provisions of the parties' agreement.

Hites' failure of consideration defense also fails. First, the only evidence placed before the trial court on summary judgment established that Hites entered the Agreement, including the non-solicitation provision, prior to commencing work for GM. CP 2604. This fact alone distinguishes this case from cases like *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004), relied on by Hites, where a noncompetition agreement was signed after the employee

[6] This purported defense appears to relate, at least in part, to *Neville's* false allegations, explicitly rejected by the jury, that GM breached Neville's severance agreement, and that GM and Paul Dent breached fiduciary duties and the Washington State Securities Act. CP 1413-14; CP 1580; CP 1852-53.

began working for the employer. Second, as the Court of Appeals recognized, the Agreement "explicitly stated that Griffin MacLean was providing Hites with employment, specialized training and access to Griffin MacLean's customers, buyers and employees, as the bargained-for exchange." COA Opinion at p. 15. Hites' failure of consideration claim was properly rejected by the trial court and Court of Appeals.

Similarly, the trial court correctly found that Hites failed to present any evidence to support his unclean hands defense, though he had ample opportunity to obtain evidence and develop that defense throughout discovery. Not only does Hites lack evidence to support this defense, but, as noted by the Court of Appeals, the equitable doctrine of unclean hands does not apply to a legal claim for breach of contract and is only a valid defense to a party's request for equitable relief. COA Opinion at p. 11-12 (citing *Dollar Sys., Inc. v. Avcar Leasing Sys., Inc.*, 890 F.2d 165, 173-75 (9th Cir. 1989); *J.L.*

Cooper & Co. v. Anchor Sec. Co., 9 Wn.2d 45, 73, 113 P.2d 845 (1941)).

There was no evidence, and Hites has pointed to none in his appeal, which would have supported his defenses, and none of Hites' defenses could have affected the outcome at trial. Even if trial court and Court of Appeals had erred—and they did not—the alleged error was harmless.

C. Section 4 of the Agreement is Neither Unconscionable nor Involves Significant Public Policy Concerns Which Necessitate Review by this Court.

Hites contends Section 4 of the Agreement constitutes a waiver of common law defenses. Section 4 of the Agreement provides:

> The existence of any claim or cause of action the Employee [has] against the Employer, whether predicated on his or her employment with the Employer, shall not constitute a defense to the enforcement by the Employer of these covenants.

CP 24-25.

Hites did not allege unconscionability or illegality of a contract as an affirmative defense. Hites only alleged

"illegality of Plaintiff's conduct and the conduct of its principal, Paul Dent." CP 48. Unconscionability and illegality are affirmative defenses and are waived if not timely pled. *Beroth v. Apollo Coll., Inc.,* 135 Wn. App. 551, 561, 145 P.3d 386, 392 (2006); *Davidson v. Hensen*, 135 Wn.2d 112, 131, 954 P.2d 1327, 1336-37 (1998); CR 8 (c); CR 12(b). The first time Hites raised these defenses was in response to GM's partial summary judgment motion one month before trial. This is not timely, and Hites waived these affirmative defenses.

In addition, contrary to Hites' contention, Section 4 is not an inconspicuous waiver of defenses that violates public policy. In fact, Section 4 is not a waiver at all. Waivers of liability "deny an injured party the right to recover damages from the person negligently causing the injury." *Johnson v. Spokane to Sandpoint, LLC*, 176 Wn. App. 453, 458, 309 P.3d 528 (2013) (quoting *Scott v. Pac. W. Mountain Resort*, 119 Wn.2d 484, 491, 834 P.2d 6 (1992) (internal quotations omitted)). In contrast, the provision at issue does not preclude

Hites from pursuing claims and recovering damages should those claims be successful; no claims are waived. GM and Hites simply agreed that such claims do not affect the enforceability of the restrictive covenants in Hites' Agreement.

Moreover, Hites does not identify defenses which would exist, but for Section 4. As discussed above, in response to GM's motion for partial summary judgment, Hites expressly stipulated his Agreement was valid, binding and enforceable, subject to alleged defenses argued in his opposition brief. CP 1413-14. The trial court considered the defenses he raised, and correctly rejected them. To the extent Hites now argues that other claims would constitute defenses to GM's enforcement of the non-solicitation agreement, such an argument fails. Hites did not previously make this argument, nor is there legal support for such a position.

Indeed, Hites was entitled to bring counterclaims against GM, which he did, related his claims of unpaid

overtime and commissions. Section 4 merely precludes Hites from using separate claims against GM to invalidate the otherwise enforceable restrictive covenants in the Agreement. Section 4 is not a waiver, does not involve questions of substantial public interest, and does not necessitate review by this Court.

V. CONCLUSION

Hites is unable to meet the standard for review set forth in RAP 13.4(b). Accordingly, this Court should deny Hites' Petition for Review.

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DATED this 9th day of June, 2023.

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DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury and the laws of the State of Washington that, on the date indicated below, I caused service of true and correct copies of the foregoing using the Courts' Electronic Filing Portal, via email and U.S. Mail, postage prepaid to:

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Place: Seattle, WA

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