102566-1

No. 84867-4

Whatcom County Superior Court No. 22-2-00519-37

COURT OF APPEALS OF THE STATE OF WASHINGTON, DIVISION I

JEREMY DAVID & MARK SPRINGER,

Petitioners,

v.

FREEDOM VANS LLC,

Respondents.

PETITION FOR DISCRETIONARY REVIEW

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IDENTITY OF PETITIONERS

Petitioners are Jeremy David and Mark Springer, who were Plaintiffs in the Superior Court and Appellants/Cross Respondents in the Court of Appeals.

COURT OF APPEALS DECISION

Even though the decision involved the first appellate interpretation of RCW 49.62.070, Division I of the Court of Appeals issued an unpublished opinion on October 16, 2023, affirming the Superior Court's grant of summary judgment to Respondent Freedom Vans, LLC.

ISSUES PRESENTED FOR REVIEW

RCW 49.62.070(1) makes employer prohibitions on outside employment presumptively unlawful with respect to workers who earn less than twice the state minimum wage. RCW 49.62.070(2)(b) saves from invalidity restrictions on outside employment that is contrary to the "obligations of an employee to an employer under existing law, including the common law duty of loyalty…." The Court of Appeals erroneously held that a

blanket prohibition on any outside employment with a competitor—even if that outside employment (1) would not directly compete with the original employer *and* (2) is unrelated to the workers' job duties with the original employer—does not violate RCW 49.62.070. The decision presents the following issues for review:

1. Are noncompetition covenants prohibiting low wage workers from accepting *any* outside employment with a competitor invalid under RCW 49.62.070? Yes.
2. Are noncompetition covenants that prohibit low wage workers from accepting *any* outside employment with a competitor consistent with the existing common law duty of loyalty in Washington? No.

STATEMENT OF THE CASE

I. Factual Background

Appellant Jeremy David is a self-taught carpenter. CP 72. For years, his carpentry work consisted mostly of building foundations and walls and installing insulation. CP 73. In

approximately 2010, David was introduced to conversion vans. *Id.* Conversion vans are full-sized cargo vans that are sent to third-party companies to be outfitted with features and amenities for camping, road-trips, and off-the-grid living. *Id.* Through this work, David acquired a wealth of knowledge in building and repairing conversion vans. *Id.*

Appellant Mark Springer is a mechanic by trade. CP 50. For most of the past decade, he has worked in the automotive and maritime repair industries. CP 51. To supplement his income, he has performed automotive repair work for friends, family, and acquaintances. *Id.*

On August 5, 2019, Freedom Vans offered David a Shop Assistant position at $16/hour. CP 74. David's job responsibilities consisted of installing paneling, insulation, flooring, windows, fixtures, and related components. *Id.* David was also responsible for maintaining the parts room. *Id.*

On February 3, 2020, Springer was offered an electrician position at Freedom Vans with a pay rate of $18/hour. CP 51.

Springer's job responsibilities consisted of installing auxiliary battery systems, auxiliary lights, solar power systems, ventilation fans, and other electrical components. *Id.*

To perform these job functions, David and Springer relied almost exclusively on their own prior experience and publicly available resources. CP 51, 75. They did not receive training or guidance from Respondent on how to perform their job duties in a uniform or repeatable manner. *Id.* Nor did they receive instruction manuals, standard operating procedures, or other such documentation. *Id.* Whenever they went to their managers for instruction or clarification, they were told to consult publicly available resources on the internet. *Id.*

On April 29, 2020, all Freedom Vans' employees were told they needed to sign noncompetition agreements as a condition of continued employment because two employees were building vans "on the side." CP 22, 52, 75. David and Springer were individually summoned into an office and handed

a document entitled "NON-COMPETE AGREEMENT." CP 52, 75. It contained the following material terms:

> 1. **NON-COMPETE COVENANT**. During employment for any reason [*sic*], [Employee] will not directly or indirectly engage in any business that competes with FREEDOM VANS LLC.
>
> Directly or indirectly engaging in any competitive business includes, but is not limited to…(ii) becoming an employee of any third party that is engaged in any such business….

CP 66, 103.

David signed the Non-Compete Agreement because he could not afford to be unemployed and wanted to continue working in the van conversion industry. CP 75. Springer signed the Non-Compete Agreement because he did not want to lose his job. CP 52. Respondent did not offer David or Springer any

additional consideration for signing the Non-Compete Agreement. CP 52, 76.

Soon after David signed the Non-Compete Agreement, Freedom Vans promoted him to Foundations Manager and increased his wage to $25/hour. CP 76. His additional job responsibilities included managing the construction and installation of paneling, insulation, flooring, windows, fixtures, components, and electrical prewiring. *Id.* In August 2020, Springer received a wage increase to $21/hour. CP 52. In February 2021, he received a wage increase to $22/hour. CP 53.

In March 2021, Springer left Freedom Vans and began working for Al's RV as a van electrician. *Id*. On May 10, 2021, David received and accepted an offer to be a van builder for Nordic Vans. CP 77. David's final day of employment with Respondent was June 3, 2021. *Id.*

II. Procedural Background

Petitioners filed a class action complaint for damages, injunctive, and declaratory relief on April 28, 2022. CP 4-10.

They alleged that Respondent required them and the proposed Class to sign illegal Non-Compete Agreements in violation of RCW 49.62 as a condition of employment.

On August 11, 2022, Respondent filed a motion for summary judgment. CP 16-21. *Inter alia*, Respondent asserted that the Non-Compete Agreements fell within the savings provision in RCW 49.62.070(2)(b). The Superior Court granted Respondent's motion for summary judgment on October 28, 2022. CP 130-131. Specifically, the Superior Court ruled that the restrictions at issue were "consistent with the common law of duty of loyalty…." CP 131. The Superior Court denied Respondent's request for attorneys' fees. *Id.* On December 1, 2022, the Superior Court denied both parties' motions for reconsideration. CP 169-170, CP 171-172.

On December 14, 2022, Petitioners filed a timely notice of appeal regarding both the October 27, 2022, Order granting Respondent's Motion for Summary Judgment and the December 1, 2022, Order Denying Petitioners' Motion for Reconsideration.

CP 173-194. On December 28, 2022, Respondent filed a timely cross appeal of the orders denying its request for attorneys' fees. CP 195-200.

On October 16, 2023, without oral argument, Division I issued an unpublished opinion affirming the Superior Court.

ARGUMENT

I. The Correct Interpretation of RCW 49.62.070 is an Issue of Substantial Public Interest that Should be Decided by the Supreme Court

This petition involves an issue of substantial public interest that should be determined by the Supreme Court. RAP 13.4(b)(4). Although unpublished, the Court of Appeals' opinion is the only appellate case to address RCW 49.62.070. If left standing, Division I's decision will undermine the legislature's remedial intent to protect low wage workers from unreasonable restrictions on outside employment in contracts of adhesion.

In 2019 Washington enacted E.S.H.B. 1450, "AN ACT Relating to restraints, including noncompetition covenants, on persons engaging in lawful professions, trades, or businesses…."

The law took effect on January 1, 2020. RCW 49.62.900. The purpose of the law is set forth in its Findings: "The legislature finds that workforce mobility is important to economic growth and development. Further, the legislature finds that agreements limiting competition or hiring may be contracts of adhesion that may be unreasonable." RCW 49.62.005.

The Legislature provided RCW 49.62 "shall be construed liberally for the accomplishment of its purposes." RCW 49.62.110. "Liberal construction requires that any statutory exceptions be narrowly confined." *Dautel v. Heritage Home Ctr., Inc.*, 89 Wn. App. 148, 152, 948 P.2d 397 (1997).

RCW 49.62.010 broadly defines "noncompetition covenant" to include "every written or oral covenant, agreement, or contract by which an employee or independent contractor is prohibited or restrained from engaging in a lawful profession, trade, or business of any kind." RCW 49.62.010(4).

"If a court or arbitrator determines that a noncompetition covenant violates this chapter, the violator must pay the

aggrieved person the greater of his or her actual damages or a statutory penalty of five thousand dollars, plus reasonable attorneys' fees, expenses, and costs incurred in the proceeding." RCW 49.62.080(2).

RCW 49.62 sets forth numerous prohibitions and restrictions on noncompetition covenants. Only one is relevant here. RCW 49.62.070 is titled "Employees having an additional job—When authorized." It provides:

> (1) Subject to subsection (2) of this section, an employer may not restrict, restrain, or prohibit an employee earning less than twice the applicable state minimum hourly wage from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed.
>
> (2) (a) …..
>
> (b) This section does not alter the obligations of an employee to an employer under existing law, including the common law duty of loyalty and laws preventing conflicts of interest and any corresponding policies addressing such obligations.

RCW 49.62.070. Thus, employer restrictions on low wage workers' having an additional job or supplementing their

incomes are presumptively unlawful under RCW 49.62.070(1), subject to the savings provisions set forth in RCW 49.62.070(2).

Petitioners were "employees," and Respondent is an "employer" within the meaning of RCW 49.62.010(2). The Non-Compete Agreements Petitioners signed are "noncompetition covenants" within the meaning of RCW 49.62.010(4). At all times during their employment with Respondent, Petitioners earned less than twice the applicable state minimum wage.[1] Accordingly, the Non-Compete Agreements Respondent required Petitioners to sign on April 29, 2020, as a requirement of continued employment, fall within the prohibitions of RCW 49.62.070(1) and are presumptively unlawful. However, the Court of Appeals ruled that the Non-Compete Agreements were valid under RCW 49.62.070(2).

[1] The Court can take judicial notice that effective January 1, 2020, Washington's minimum wage was $13.50, and increased to $13.69 on January 1, 2021. See www.lni.wa.gov.

As set forth in section II below, the Court of Appeals' determination that the Non-Compete Agreements were consistent with the existing duty of employee loyalty is contrary to law. Moreover, Division I held that "[w]hether or not the common law duty of loyalty itself *requires* that current employees avoid working in any capacity for a direct competitor of their current employer … [a]nd even assuming, as the former employes contend, that Freedom Vans' policy is broader than the common law duty of loyalty…," RCW 49.62.070(2) preserves the freedom of employers to define their employees' duty of loyalty. Decision at p. 10.[2]

The Court of Appeals correctly noted that RCW 49.62.070(2)(b) preserves "any corresponding policies addressing" the employee duty of loyalty. *Id.* The panel then reasoned that noncompetition covenants are "undoubtedly" "policies" that address obligations imposed by the duty of loyalty

[2] Freedom Vans never made this argument and Petitioners never had an opportunity to address it. *Id.*

and therefore RCW 49.62.070(2)(b) preserves such covenants. *Id.*

There is no support in law or logic for the court's conclusion that noncompetition covenants limiting the ability of current employees to accept outside employment are "policies addressing" the duty of loyalty that the legislature intended to preserve under RCW 49.62.070(2). The plain text of RCW 49.62.070(1) demonstrates that just the opposite is true. The legislature's broad remedial purpose in enacting that statute was to limit the ability of employers to "restrict, restrain, or prohibit an employee earning less than twice the applicable state minimum hourly wage from having an additional job, [or] supplementing their income by working for another employer…." RCW 49.62.070(1).

The Court of Appeals' decision turns RCW 49.62.070 on its head. Employer-imposed noncompetition covenants precluding low wage workers from accepting outside employment were the very evil the legislature intended to

remedy by enacting RCW 49.62.070. Contrary to what the Court of Appeals held, the legislature did not intend to "preserve" employers' ability to define their current employees' duty of loyalty beyond the existing common duty of loyalty and thereby prevent them from accepting additional employment "in any capacity, with a competing business." *Cf.* Decision at p. 10.

Under the Court of Appeals' interpretation of RCW 49.62.070, an employer can prohibit its low wage workers from taking a second job at another company with multiple business lines if one of those lines, no matter how small, competes with the original employer. It makes no difference what the employee's job duties are for the original employer or what their job duties would be for the second employer. And it makes no difference that the employee would work in a business line that does not compete with the original employer. According to the Court of Appeals, McDonalds could prohibit its low wage workers from taking a second job at Costco *in any capacity*

because the latter company sells some fast food. The legislature did not intend this preposterous result.

The Court of Appeals rejected Petitioners' interpretation of RCW 49.62.070 because the panel wrongly believed that their reading of the statute would allow a Pepsi marketing executive to moonlight as an accounting executive for Coca Cola. Decision at p. 11. If a Pepsi marketing executive took a second job as an accounting executive for Coca Cola, that might well violate the employee's common law duty of loyalty under *Kieburtz & Associates, Inc., v. Rehn*, 68 Wn. App. 260, 265, 842 P.2d 985 (1992), given the interrelationship between marketing a company's products and accounting for the revenues brought in by their sale. As the Court of Appeals recognized, such roles are "fluid and overlapping." Decision at p. 11.

Moreover, marketing and accounting executives are not covered by RCW 49.62.070. The statute limits employer restrictions on outside employment only with respect to low wage workers, those earning less than twice the state minimum

wage. The legislature understood that many Washingtonians must work two or more jobs to survive. Marketing and accounting executives are not among them.

The Court of Appeals upheld the Non-Compete Agreements' prohibition on working for a competitor in any capacity, even one that does not directly compete with the Respondent, because otherwise "a competing business will benefit, directly or indirectly, from the knowledge and skills acquired or refined at the principal place of employment." Decision at p. 11. The Court of Appeals asserted that Petitioners' "view that furthering a competing employers' business depends on identity of job duties or title does not reflect the reality of the workplace." *Id.*

Petitioners have *never* argued that a breach of the duty of loyalty requires an "identity of duties or title." And it is the Court of Appeals' opinion that "does not reflect the reality of the workplace" for the low wage workers covered by RCW 49.62.070. Low wage workers do not typically possess

"knowledge and skills acquired or refined at the principal place of employment." Petitioners neither acquired nor refined their skills and knowledge while working for Freedom Vans. RCW 49.62.070 constitutes the legislature's determination with respect to low wage workers that limitations on outside employment are valid only to the extent they enforce employee obligations under the existing common law duty of loyalty. By upholding restrictions on outside employment beyond the scope of the existing duty of employee loyalty in Washington, the Court of Appeals improperly substituted its judgment for the legislature's.

The legislature intended RCW 49.62.070(2) to be a narrowly confined exception to RCW 49.62.70(1)'s prohibition on outside employment restrictions for workers earning less than twice the state minimum hourly wage. The legislature enacted RCW 49.62 to increase workforce mobility. RCW 49.62.005. The Non-Compete Agreements are contracts of adhesion that unreasonably restrict employee mobility. *Id.* The Court of Appeals' opinion nullifies the legislature's intent. The decision

in this case is the only appellate opinion on RCW 49.62.070 and other courts will follow it. There is substantial public interest in a Supreme Court interpretation of RCW 49.62.070 consistent with its statutory purpose. Therefore, review should be accepted.

II. The Court of Appeals' Opinion Conflicts with All Washington Precedent Regarding the Common Law Duty of Employee Loyalty

The Supreme Court should also accept the petition for review because the decision in this case conflicts with all published court of appeals precedent regarding the employee duty of loyalty under existing law. RAP 13.4(b)(2). "Existing law" is determined as of the date of the statute's enactment. *See Lenander v. Washington State Dep't of Retirement Sys.*, 186 Wn.2d 393, 407, 377 P.3d 199 (2016).

Kieburtz & Associates, Inc., v. Rehn, 68 Wn. App. 260, 842 P.2d 985 (1992), is the foundational case in Washington regarding the common law employee duty of loyalty with respect to noncompetition. *Kieburtz* involved two employees who were also shareholders of the company. 68 Wn. App. at 262. While

still employed by the company, the two employees set up their own partnership in direct competition with Kieburtz & Associates. *Id.* at 263. The two employees then obtained for themselves additional work from a Kieburtz client they had been servicing on their employer's behalf. *Id.* Kieburtz filed suit claiming breach of the duty of loyalty. *Id.* at 263-64.

The two employees asserted that "absent an employment contract which imposes a contractual duty of noncompetition, no authority in Washington holds that an employee owes such a duty to his or her current employer." *Id.* at 265. The Superior Court agreed with the employees and dismissed the action on summary judgment, but the court of appeals reversed. In doing so, the appellate court relied heavily on *Restatement (Second) of Agency* § 393 (1958), which is titled "Competition as to Subject Matter of Agency." 68 Wn. App. at 265. *Kieburtz* quoted the general rule set forth in that section: "Unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." *Id*. *Kieburtz* also endorsed

comment e to § 393: "During the period of his or her employment, an employee is not 'entitled to solicit customers for a rival business' or to act in direct competition with his or her employer's business." *Id.* (quoting § 393 comment e) (internal punctuation omitted).

In Washington, the employee's duty of loyalty "stems from *Kieburtz*…." *Burton v. Becker*, 175 Wn. App. 1073, at *4 (Aug. 12, 2013) (unpublished). *Kieburtz* "outlined the rule provided by *Restatement (Second) Agency* § 393 (1958)." *Id.* In *Evergreen Moneysource Mortg. Co. v. Shannon*, 167 Wn. App. 242, 274 P.3d 375 (2012), Division III held that *Kieburtz* established the following rule regarding the duty of loyalty in Washington: "During the period of employment, an employee has a duty to refrain from soliciting customers for a rival business or to act in direct competition with his or her employer's business." *Id.* at 251.

The Court of Appeals here recognized that numerous cases "restate the holding of *Kieburtz*" that an employee violates the

duty of loyalty by engaging in direct competition with their employer or by soliciting their employer's customers. Decision at p. 8. The Court of Appeals, however, disagreed with Petitioners that "duty of loyalty prohibits only 'direct' competition with an employer, such the merely working for a competing business in unrelated 'job duties' does not violate the duty." *Id.* at p. 7. The Court of Appeals asserted that none of the cases applying *Kieburtz* "supports the proposition that the duty of loyalty is limited to prohibiting *only* direct competition and solicitation…." *Id.* at p. 8.[3]

The Court of Appeals upheld the Non-Compete Agreements on the ground that the covenants merely prohibited Petitioners from doing "indirectly, through assistance to a competing business, what they undisputedly may not do directly." *Id.* at p. 11. However, by allowing employers to

[3] To be sure, an employee can also violate the duty of loyalty by, for example, misusing the employer's property (including confidential information) but this case concerns only the noncompetition aspect of the duty of loyalty.

prohibit low wage workers from taking second jobs with competitors in any capacity, even in one that neither directly competes with the original employer nor falls within the subject matter of the employee's agency, the panel's decision directly conflicts with *Kieburtz*, *Evergreen Moneysource*, and a plethora of federal district court cases applying those published court of appeals decisions.

Relying on *Evergreen Moneysource*, *Kische USA LLC v. Simsek*, held that the "duty of loyalty prohibits an employee from soliciting customers for a rival business or acting in direct competition with his or employer's business." No. C16-0168-JLR, 2017 WL 3895545, at *13 (W.D. Wash. 9/6/2017) (internal quotation marks omitted). "The duty further requires an employee to refrain from competing with his employer concerning the subject matter of his agency." *Id.* (quoting *Kieburtz*) (internal quotation marks omitted). In *Kische*, the employee formed and managed a rival company engaging in the same business as his employer, transferred one of his employer's

design trademarks to his new company, and amended the lease of his employer's warehouse to name his rival company as the tenant. *Id.* at *2.

"Under Washington law, regardless of the existence of a written contract of employment, employees owe their employer a duty of loyalty. This duty prohibits employees from acting in direct competition with their employer, for example, by soliciting customers for a rival business." *Earthbound Corp. v. MiTek USA, Inc.*, No. C16-1150-RSM, 2016 WL 4418013, at *9 (W.D. Wash. 8/9/2016) (citing *Kieburtz*). There, "while still employed by Earthbound, the individual Defendants established relationships with MiTek, a competing business, …shared Earthbound's confidential information with a primary competitor…[and] referred at least a few Earthbound client to MiTek." *Id.*

Omega Morgan, Inc. v. Heely set forth the employee's duty of loyalty with respect to noncompetition as follows: "During the period of his or her employment, an employee is not

entitled to solicit customers for a rival business or to act in direct competition with his or her employer's business." No. C14-556-RSL, 2015 WL 1954653, at * 6 (W.D. Wash. 4/29/2015) (citing *Kieburtz* and *Restatement (Second) Agency* § 393 comment e) (internal punctuation omitted).

Similarly, *Compuvest Corp. v. Dolinsky* described the "common law duty of loyalty" in Washington thus: "During the period of his or her employment, an employee is not entitled to solicit customers for a rival business or to act in direct competition with his or her employer's business." No. C07-1525-RAJ, 2009 WL 1604525, at *2 (W.D. Wash. 6/5/2009) (quoting *Kieburtz* and *Restatement (Second) Agency* § 393 comment e) (internal punctuation omitted). There, the defendants admitted that "while they were still employed by Compuvest, they incorporated Defendant Equipment Hall Corporation ("EHC"), which sells items similar to those sold by Compuvest," and "solicited business in direct competition with Compuvest during the period of their employment…." *Id.* at *1-2.

Keystone Fruit Marketing, Inc., v. Brownfield held that *Kieburtz* adopted the following rules concerning the common law duty of loyalty under Washington law: "During the period of employment, an employee is not entitled to solicit customers for a rival business or to act in direct competition with his or her employer's business. In like manner, unless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency." No. CV-05-5087-RHW, 2008 WL 1971412, at * 5 (E.D. Wash. 5/5/2008) (quoting *Kieburtz* citing *Restatement of Agency (Second) of Agency* § 393) (internal quotation marks and punctuation omitted.) In *Keystone Fruit*, the court found that the defendant violated his duty of loyalty because, while still employed by the plaintiff, he established a competing business and solicited a customer for a rival business "which acted in direct competition with" his employer. *Id.* at *6.

Contrary to what the Court of Appeals held here, *Kieburtz* drew a distinction between impermissible acts of direct

competition, such as soliciting the original employer's customers, and acts of indirect competition outside the subject matter of the employee's agency. For this reason, *Kieburtz*, *Evergreen Moneysource*, and the federal cases applying those decisions examined whether the defendant-employees' *own* activities impermissibly competed with the employer in violation of *Restatement (Second) of Agency* § 393. If merely accepting employment with a competitor were sufficient to breach the duty of loyalty in Washington, there would have been no reason for those courts to have considered the specifics of the defendant-employees' competitive conduct. Therefore, contrary to the holding of the Court of Appeals here, neither *Kieburtz* nor any decision following it suggests that employees violate the common law duty of loyalty in Washington simply by accepting outside employment in any capacity with a competitor.

The Court of Appeals claimed to find support for its holding in *Restatement (Third) of Agency* § 8.04 (2006). Decision at p. 9. No precedential Washington case has adopted

or cited *Restatement (Third) of Agency § 8.04*, and it is not part of "existing law" within the meaning of RCW 49.62.070(2)(b). As the Court of Appeals recognized, § 8.04 has been cited only once in Washington, in the unpublished opinion of *Steven Cole Salon, LLC, v. Salon Lotus*, 148 Wn. App. 1036 (Feb. 9, 2009). Decision at p. 9 n.4. Unpublished decisions of the court of appeals issued before March 1, 2013, "have no precedential value" and may not be cited for any purpose. RAP 10.4(h); GR 14.1(a).[4]

The Court of Appeals' adoption of *Restatement (Third) of Agency* § 8.04 directly conflicts with *Kieburtz* because § 8.04 imposes significantly greater restrictions on employee freedom than *Kieburtz* does. Section 8.04 prohibits an agent not just from "competing with the principal," but also "from taking action on behalf of or other otherwise assisting the principal's

[4] The citation of an unpublished Washington Court of Appeals opinion issued prior to March 1, 2013, is sanctionable. *Dwyer v. J.I. Kislak Mortg. Corp.*, 103 Wn. App. 542, 548-49, 13 P.3d 240 (2000) (imposing $500 sanction).

competitors," even if such action or assisting does not itself compete with the principal. In the 17 years since the promulgation of § 8.04, only 19 jurisdictions nationwide have adopted it. *See id*. By contrast, 85 jurisdictions follow *Restatement of Agency (Second) of Agency* § 393, which has been in place for 65 years. *See id.*

The Court of Appeals' reliance on *Restatement (Second) of Agency* § 394 to support its unprecedented ruling in this case, Decision at p. 9, also conflicts with the common law duty of employee loyalty as set forth in *Kieburtz*. Section 394 is entitled: "Acting for One with Conflicting Interests." Until the decision in this case, no court in Washington has ever cited § 394 as relevant to the common law duty of employee loyalty. Indeed, § 394 conflicts with § 393. See *Restatement (Third) of Agency* § 8.04 Reporter's Notes, *a. Relationship to Restatement Second, Agency*. The *only* time that § 394 has been cited by a Washington court was in *Mersky v. Multiple Listing Bureau of Olympia, Inc.*, 73 Wn.2d 225, 229, 437 P.2d 897 (1968). There, the Supreme

Court cited § 394 as one of the bases for holding that real estate brokers could not have conflicting interests in a real estate transaction.[5] Accordingly, § 394 is no more part of existing common law duty of employee loyalty in Washington set forth in *Kieburtz* than *Restatement (Third) of Agency* § 8.04 is.

The Court of Appeals' decision in this case also conflicts with *Kieburtz* and its progeny by holding that the "subject matter of the employee's agency" for purposes of assessing compliance with the duty of loyalty is the "precise (or 'direct') subject matter of the *employer's* mission…." Decision at p. 9 (emphasis supplied). "In other words, the duty is a duty to not compete in the principal's direct commercial area, and whether that duty is violated does not turn on the employee's job description." *Id.* at 9-10. If allowed to stand, these holdings regarding the subject matter of an employee's agency would dramatically expand the scope of the common law duty of loyalty in Washington.

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[5] The Legislature overruled *Mersky* by statute. *Jackowski v. Borchelt*, 174 Wn.2d 720, 733, 278 P.3d 1100 (2012).

The comments to *Restatement (Second) Agency* § 393 make clear that the subject matter of an employee's agency depends upon what matters have been "entrusted to him" by the principal. Comment c to § 393. *See also* comment e ("After the termination of his agency, in the absence of a restrictive agreement, the agent can properly compete with his principal as to matters for which he has been employed"). Under *Restatement (Second) Agency* § 393, the job duties which the employer entrusts to the employee define the subject matter of the employee's agency. *See Kieburtz*, 68 Wn. App. at 265.

In direct conflict with that principle, the Court of Appeals here held that the subject matter of an employee's agency is "the employer's mission," *i.e.*, the employers' "direct commercial area." Decision at p. 9. Under the Court of Appeals' flawed reasoning, every employee of a large corporation, from the Chief Executive Officer to the receptionist, has an agency of the same subject matter. That is not the law.

In sum, the unpublished Court of Appeals' decision here directly conflicts with the published decision in *Kieburtz*, not to mention all the state and federal cases applying *Kieburtz*. Review should be accepted for this reason as well.

CONCLUSION

For these reasons, Petitioners respectfully request that this Court grant discretionary review.

I certify that in Compliance with RAP 18.17(c)(10) that the foregoing contains 4,802 words not including the sections excluded by RAP 18.17(b).

RESPECTFULLY SUBMITTED, this 15th day of November 2023.

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APPENDIX

EXHIBIT A

FILED
10/16/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JEREMY DAVID and MARK SPRINGER, individually and on behalf of all others similarly situated, Appellants/Cross Respondents, v. FREEDOM VANS, LLC, a Washington limited liability company; and DOES 1-10, Respondents/Cross Appellants.	No. 84867-4-I DIVISION ONE UNPUBLISHED OPINION

DÍAZ, J. — RCW 49.62.070 places limits on an employer's ability to prohibit its employees from supplementing their income through outside employment. However, restrictions on outside employment are permissible under the statute if they are grounded in obligations under existing law, including the duty of loyalty owed to employers and the duty to avoid conflicts of interest, or the restrictions are "policies addressing" those established obligations. Here, the employer required its employees to agree not to "directly or indirectly engage in any business that competes with the employer," and specifically to refrain from working for any competing business. The trial court granted summary judgment and dismissed a putative class action lawsuit brought, under the statute, by former employees challenging those "anti-moonlighting" provisions of their employment contracts, concluding that the provisions comply with the statute. We agree and affirm. We

also affirm the trial court's decision denying the employer's request for its attorneys' fees.

I. FACTS

Freedom Vans LLC, based in Bellingham, converts and customizes vans into mobile houses. In September 2019, Jeremy David, an experienced carpenter, accepted a job with Freedom Vans as a shop assistant. Freedom Vans later promoted David to the position of Foundations Manager. In February 2020, Mark Springer, an automotive mechanic, accepted a position to work as an electrician for Freedom Vans.

In April 2020, Freedom Vans required its current employees, including David and Springer, to sign a "Non-Compete Agreement" (the "agreement"). Among other things, the agreement prohibited Freedom Vans' employees, during their employment, from "directly or indirectly" engaging "in any business that competes" with Freedom Vans. The agreement defined direct or indirect competition, in pertinent part here, to include "becoming an employee of any third party that is engaged" in a "competitive business."

David and Springer signed the agreement. According to their later declarations, after signing the agreement, both employees declined offers to perform repairs and vehicle conversion work from various individuals out of fear of violating the agreement. By June 2021, both David and Springer had terminated their employment with Freedom Vans.

In April 2022, David and Springer (together the "former employees"), individually and on behalf of a class of similarly situated individuals, filed a class

action lawsuit against Freedom Vans, alleging that the employment agreement violated RCW 49.62, a statute that largely regulates non-competition clauses in employment contracts. In addition to damages, the former employees sought injunctive and declaratory relief.

Freedom Vans filed a motion for summary judgment, arguing that prohibiting current employees from "directly or indirectly" competing with the employer was permissible under the statute. Freedom Vans asked the court to award fees, arguing that the former employees' lawsuit was frivolous.

Opposing summary judgment, the former employees argued that, since Freedom Vans paid them less than twice the minimum wage, Freedom Vans' "anti-moonlighting polic[y]" violated the statute, which does not allow an employer to prohibit its employees from "working anywhere else." The former employees also pointed out that the statute includes no language limiting its remedies to current employees. See RCW 49.62.080 (providing penalties for violation of the statute including reasonable attorneys' fees, expenses, and costs).

After a hearing, the trial court granted Freedom Vans' motion, but denied its request for attorneys' fees. The court's order provides, in part:

> RCW 49.62 does not restrict an employer's right to require employee loyalty and avoidance of conflicts of interest during the course of employment consistent with the common law. RCW 49.62.070(2)(b). Such a restriction can be express or implied. Kieburtz & Associates v. Rehn, 68 Wn. App. 260, 265, 842 P.2d 985 (Div. 1 1992). Here, Freedom Vans LLC did nothing more than that when it required Plaintiff employees to sign an employment agreement which stated, "During employment for any reason, [NAME] will not directly or indirectly engage in any business that competes with FREEDOM VANS LLC." Attachment 1 to Declaration of Kyleigh Rogers. This restriction is consistent with the common law duty of loyalty,

> expressed in Washington caselaw as, "During the period of employment, an employee is not entitled to ... act in direct competition with his or her employer's business.["] See Kieburtz, 68 Wn.App. 260, 265, citing Restatement (second) of Agency, sec. 393 comment e (1958). As such, the employment agreement as written is not a violation of RCW 49.62.070, and does not provide a basis for Plaintiff's claims.

The former employees sought reconsideration, arguing that "[i]ndirect competition is not a breach of the duty of loyalty." Freedom Vans also sought reconsideration of the court's decision denying its request for fees, arguing that it was entitled to fees under a separate provision of the agreement. The trial court denied both motions. Both parties appeal.

II. ANALYSIS

A. Standards of Review

We review a trial court's decision on a motion for summary judgment de novo. Int'l Marine Underwriters v. ABCD Marine, LLC, 179 Wn.2d 274, 281, 313 P.3d 395 (2013). "Summary judgment is proper only where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Id. We "must view the evidence, and all reasonable inferences from the evidence, in the light most favorable to the nonmoving party, and the motion should be granted if a reasonable person could reach only one conclusion." Dunnington v. Virginia Mason Med. Ctr., 187 Wn.2d 629, 638, 389 P.3d 498 (2017).

We also review issues of statutory interpretation de novo. Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In doing so, we focus on "the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a

whole." Lenander v. Dep't of Ret. Sys., 186 Wn.2d 393, 403, 377 P.3d 199 (2016). We likewise interpret the language of contracts de novo. Kim v. Moffett, 156 Wn. App. 689, 697, 234 P.3d 279 (2010).

B. RCW 49.62

The legislature enacted RCW 49.62 in 2019 to promote "workplace mobility" and to ensure that agreements that limit workplace competition are not the product of negotiation and are reasonable. RCW 49.62.005. The legislature provided that the statute "shall be construed liberally for the accomplishment of its purposes." RCW 49.62.110.

At issue here is the statute's provision that governs an employer's authority to restrict supplemental employment, RCW 49.62.070. The statute provides:

> Employees having an additional job—When authorized.
>
> (1) Subject to subsection (2) of this section, an employer may not restrict, restrain, or prohibit an employee earning less than twice the applicable state minimum hourly wage from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed. . . .
>
> (2) (b) This section does not alter the obligations of an employee to an employer under existing law, including the common law duty of loyalty and laws preventing conflicts of interest and any corresponding policies addressing such obligations.

C. Validity of the Agreement under RCW 49.62.070

The relevant section of the agreement that Freedom Vans required the former employees to sign provides, in full:

> NON-COMPETE COVENANT. During employment for any reason, [employee] will not directly or indirectly engage in any business that competes with FREEDOM VANS LLC.

> 1. Directly or indirectly engaging in any competitive business includes, but is not limited to: (i) engaging in a business as owner, partner, or agent, (ii) becoming an employee of any third party that is engaged in such business, (iii) becoming interested directly or indirectly in any such business, or (iv) soliciting any customer of FREEDOM VANS LLC for the benefit of a third party that is engaged in such business. [employee] agrees that this non-compete agreement will not adversely affect [employee's] livelihood.

The former employees contend that the trial court misapplied Washington law when it concluded that the agreement does not violate RCW 49.62.070. It is undisputed that the former employees were paid less than twice the applicable minimum wage, and therefore, according to the former employees, Freedom Vans' restriction on employees' ability to obtain outside employment in section (ii) is presumptively unlawful under RCW 49.62.070(1).[1]

For its part, Freedom Vans contends that the trial court correctly concluded that the challenged provision merely encompasses the common law duty of loyalty owed by an employee as it existed when the statute was enacted, and the restriction is therefore permissible under RCW 49.62.070(2)(b).[2]

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[1] There is no claim before us that the agreement's prohibitions on (i) owning or controlling a competitive business, (iii) having a financial interest in such a business, or (iv) soliciting the employer's customers for the benefit of a competitive business, are inconsistent with the common law duty of loyalty. And while it appears that employment with a direct competitor would lead to conflicts of interest, no party argues that the restriction at issue is permissible because it conforms to existing law as to an employee's obligation to avoid conflicts of interest. Thus, on this briefing, we will not further consider the merits of the "conflict of interest" exception.

[2] While it is true that the former employees' positions have shifted during the course of this litigation, they have sufficiently preserved their claim of error relating to the validity of the employment agreement under RCW 49.62 to warrant review, and we therefore reach the merits of their claims on appeal. We further note that Freedom Vans concedes on appeal that the former employees have standing to

The statute expressly preserves, but does not codify or explicate, the duty of loyalty. Our resolution of the parties' dispute, first, centers on the scope of the duty and, secondarily, whether the duty may be memorialized in policy to require current employees to refrain from indirectly competing with the principal by accepting employment with a "competitive business."

According to the former employees, this court's decision in Kieburtz & Assoc., Inc. v. Rehn, 68 Wn. App. 260, 265-66, 842 P.2d 985 (1992) and the Restatement (Second) of Agency § 393 (Am. L. Inst. 1958) set forth the "existing law" on the common law duty of loyalty when the statute was enacted. The former employees maintain that, under these and subsequent authorities, the duty of loyalty prohibits only "direct" competition with an employer, such that merely working for a competing business in unrelated "job duties" does not violate the duty.

In Kieburtz, an employer sued two employees for tortious interference after they solicited work for their own separate business from one of the employer's clients. Kieburtz, 68 Wn. App. at 264. In reversing the trial court's dismissal of the claim, this court held that a jury could reasonably conclude that the employees' actions violated a duty of loyalty to their employer. Id. at 267. The court held, "[d]uring the period of his or her employment, an employee is not 'entitled to solicit customers for [a] rival business ...' or to act in *direct* competition with his or her

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argue that the agreement at issue impermissibly restricted competition. See Walker v. Munro, 124 Wn.2d 402, 411, 879 P.2d 920 (1994) (to establish standing under the Uniform Declaratory Judgment Act, a party must present a justiciable controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract).

employer's business." Id. at 265 (quoting RESTATEMENT (SECOND) OF AGENCY § 393 cmt. e (AM. L. INST. 1958)) (emphasis added). In so holding, the Kieburtz court expressly and principally relied on the description of the duty of loyalty set forth in the main portion of Section 393 of the Restatement (Second): "'[u]nless otherwise agreed, an agent is subject to a duty not to compete with the principal concerning the subject matter of his agency.'" Id. (quoting the RESTATEMENT (SECOND) OF AGENCY § 393).

The former employees claim that Kieburtz and Section 393 thereby implicitly distinguish between "direct" and "indirect" competition, and conclude that *only* direct competition with an employer contravenes an employee's duty of loyalty, where "direct" means doing the same "job duties" for the competitor.

The former employees cite numerous cases that restate the holding of Kieburtz, but none of that authority supports the position that the duty of loyalty is limited to prohibiting *only* direct competition or solicitation, and none defines the term "subject matter of the [employee's] agency" as an employee's "job duties." In other words, Kieburtz and its progeny on their face still permit the common law duty of loyalty to preclude assisting another to compete with the principal employer "indirectly" or in ways that are not tied simply to an employee's job description, as long as they are tied to the "subject matter" of the employee's agency.

The former employees also rely on some of the comments to Section 393 to argue that "the subject matter of the employee's agency" is confined to the

employee's specific "job duties."[3] But the comments to Section 393 do not so limit the scope of that agency and are susceptible to different interpretations. And the former employees' reading of the "subject matter" of the agency is arguably inconsistent with other related Restatement provisions. See RESTATEMENT (SECOND) OF AGENCY § 394 (duty not to act for persons whose interests conflict with those of the principal in matters concerning the agency); RESTATEMENT (THIRD) OF AGENCY § 8.04 (AM. L. INST. 2006) (agent has a duty to avoid taking action on "behalf or otherwise assisting the principal's competitors").[4]

In turn, we conclude that the more natural reading of Section 393 is that the duty of loyalty requires a current employee to refrain from competing with the employer with respect to the precise (or "direct") subject matter of the employer's mission, whether that means the employee is performing the same "job duties" or not. In other words, the duty is a duty not to compete in the principal's direct commercial area, and whether that duty is violated does not turn on the employee's

[3] For instance, one of the comments the former employees rely on provides that the employee may use knowledge independently acquired "for all purposes except that of competition with the principal in matters entrusted to him." RESTATEMENT (SECOND) OF AGENCY, cmt. c.

[4] The former employees aver that no published Washington decisions have cited the Restatement (Third) § 8.04 or the Restatement (Second) § 394 in the context of the duty of loyalty. But this court has relied on Section 8.04 in unpublished decisions to support the proposition that the duty of loyalty "prevents a current employee from competing with the employer or assisting others to compete with the employer." Steve Cole Salon, LLC v. Salon Lotus, No. 61342-1-I, slip op. at 11 (Wash. Ct. App. Feb. 9, 2009) [https://perma.cc/J4L5-HGGK] (citing RESTATEMENT (THIRD) OF AGENCY § 8.04 (AM. L. INST. 2006)). Moreover, agency principles articulated in the Restatement are, in general, relevant to employment relationships. Kieburtz, 68 Wn. App. at 265. And like the employees in Kieburtz, the former employees offer no rationale that would support a decision to reject these particular provisions. Id. at 266.

job description.

More importantly, while the parties' arguments are confined to the scope of the duty of loyalty, we are not so limited because, as explained, we review the statutory and contractual issues de novo. Kim, 156 Wn. App. at 697. Furthermore, we may affirm the trial court's decision on summary judgment on any ground supported by the record, even if the trial court did not consider the argument. See LaMon v. Butler, 112 Wn.2d 193, 200-01, 770 P.2d 1027 (1989).

Here, the statute preserves not only existing legal obligations, including the common law duty of loyalty and obligation to avoid conflicts of interest, but also "*any corresponding policies addressing such obligations*." RCW 49.62.070(2)(b) (emphasis added). Whether or not the common law duty of loyalty itself *requires* that current employees avoid working in any capacity for a direct competitor of their current employer, the agreement is undoubtedly a policy that "addresses" obligations imposed by the duty of loyalty.

That is, Freedom Vans chose to define its current employees' duty of loyalty, by policy, to prohibit employment, in any capacity, with a competing business. And even assuming, as the former employees contend, that Freedom Vans' policy is broader than the common law duty of loyalty, Freedom Vans' policy is entirely consistent with the duty under existing law and advances the same objective. The purpose of the duty of loyalty is to prevent competition between an employer and its employees in the employer's sphere of business. In the former employees' view, the duty of loyalty merely prohibits employees from "personally competing" with a current employer. But Freedom Vans' policy simply does not

allow employees to do indirectly, through assistance to a competing business, what they undisputedly may not do directly.

Moreover, the policy at issue furthers the objectives of the duty of loyalty because a competing business will benefit, directly or indirectly, from the knowledge and skills acquired or refined at the principal place of employment. And the former employees' view that furthering a competing employers' business depends on identity of job duties or title does not reflect the reality of the workplace.

For instance, a Pepsi marketing executive's loyalty would undoubtedly be compromised (even setting aside conflict of interest issues) if that executive also moonlighted as an accounting executive for Coca Cola. This is so because roles and duties in the workplace are often fluid and overlapping. And in many cases, knowledge, skills, and context are applicable to multiple positions. At a minimum, a policy preventing a current employee from working for a direct competitor "addresses" the duty of loyalty and is consistent with that duty.

In sum, notwithstanding RCW 49.62.070(1), RCW 49.62.070(2)(b) allows an employer to restrict its employees' outside employment insofar as the restrictions are consistent with existing law, including the duty of loyalty, duty to avoid conflicts, and policies that secure and further those legal obligations. Policies do and may vary, depending on context. The restriction prohibiting employees from obtaining employment with competing businesses does not contravene the provisions of the statute or its purpose.

D. Cross Appeal—Attorneys' Fees

In its cross appeal, Freedom Vans challenges the trial court's decision denying attorney fees under a provision of the agreement which provides:

> In the event of a dispute between the parties, the parties hereby agree that the prevailing party shall be entitled to reasonable attorney fees and costs incurred as a result of the dispute.

In denying reconsideration, the superior court explained that the former employees raised claims and sought damages under RCW 49.62. "Thus, while the employment agreement was the subject of the dispute, Plaintiff's claims 'arose out' of asserted rights under RCW 49.62, rather than the agreement itself." And the court noted that the attorneys fee provision under the noncompetition statute, RCW 49.62.080, provides only for award of fees to prevailing employees, not employers.

Citing RCW 4.84.330, Freedom Vans argues that attorney fees to the prevailing party under the contractual provision are mandatory. Freedom Vans contends, contrary to the superior court's ruling, that the action arose out of the contract and seeks fees on appeal under the same contract provision.

We disagree with Freedom Vans for two reasons. First, the contractual fee provision Freedom Vans relies on is bilateral and "[b]y its terms, RCW 4.84.330 applies only to contracts with unilateral attorney fee provisions." Kaintz v. PLG, Inc., 147 Wn. App. 782, 786, 197 P.3d 710 (2008). Second, as the trial court ruled, the former employees' cause of action arose out of RCW 49.62.070 and the remedies provided by the statute, rather than out of the agreement. Like the plaintiff in LaCoursiere v. CamWest Dev. Inc., 181 Wn.2d 734, 748, 339 P.3d 963

(2014), the employees' claim was "grounded exclusively" in the statute and they made no claims seeking to enforce the employment agreement.

III. CONCLUSION

We affirm the court's order on summary judgment and its ruling on fees, and deny fees on appeal. Affirmed.

Díaz, J.

WE CONCUR:

Chung, J.

Smith, C.J.

EXHIBIT B

West's Revised Code of Washington Annotated
Title 49. Labor Regulations (Refs & Annos)
Chapter 49.62. Noncompetition Covenants

West's RCWA 49.62.070

49.62.070. Employees having an additional job--When authorized

Effective: January 1, 2020
Currentness

(1) Subject to subsection (2) of this section, an employer may not restrict, restrain, or prohibit an employee earning less than twice the applicable state minimum hourly wage from having an additional job, supplementing their income by working for another employer, working as an independent contractor, or being self-employed.

(2)(a) This section shall not apply to any such additional services when the specific services to be offered by the employee raise issues of safety for the employee, coworkers, or the public, or interfere with the reasonable and normal scheduling expectations of the employer.

(b) This section does not alter the obligations of an employee to an employer under existing law, including the common law duty of loyalty and laws preventing conflicts of interest and any corresponding policies addressing such obligations.

Credits
[2019 c 299 § 8, eff. Jan. 1, 2020.]

West's RCWA 49.62.070, WA ST 49.62.070
Current with all legislation from the 2023 Regular and First Special Sessions of the Washington Legislature.

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FRANK FREED SUBIT & THOMAS LLP

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