Court of Appeals Case No. 72834-2-I
Supreme Court Case No. 92283-7

SUPREME COURT OF THE STATE OF WASHINGTON

ROBERT EMERICK

Appellant,

v.

CARDIAC STUDY CENTER, INC., a Washington corporation,

Respondent.

CARDIAC STUDY CENTER, INC.'S ANSWER TO EMERICK'S PETITION FOR REVIEW TO SUPREME COURT

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I. INTRODUCTION

Emerick's latest Petition for Review should be denied because Emerick again fails to establish any of the criteria necessary to support discretionary review under RAP 13.4, just as he failed to do when seeking review here of *Emerick I.* Once again Emerick claims that physician noncompetes are per se void as a matter of public policy, and they violate the Washington Constitution. There is no Constitutional question in this case and this Court has previously declined to review Emerick's previous petition for review raising these identical issues.[1] Now with a second adverse opinion from Division I,[2] *Emerick v. Cardiac Study Center*, 2015 WL 5009319 (August 24, 2015) ("*Emerick II*"),[3] Emerick raises a handful of "new" issues, which are not new and are addressed by existing Washington precedent. Emerick's Petition for Review should be denied.

II. COUNTERSTATEMENT OF FACTS

The opinions in *Emerick I and II*,[4] set out a clear and accurate

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[1] The issues in this case have already been twice determined by Washington appellate courts, in accord with longstanding Washington precedent. Division II's initial opinion consolidated and clarified existing Washington precedent regarding the enforceability of covenants not to compete, reversing the trial court's determination that physician noncompetes violate public policy. *Emerick v. Cardiac Study Center*, 170 Wn. App. 248, 286 P.3d 689 (2012) (*Emerick I*).The opinion in *Emerick I* is included as Appendix A. Following his loss in *Emerick I*, Emerick sought review raising the same issues he included in this Petition. *See* Sup. Ct 87752-1. This court denied review of these identical issues on December 4, 2012. This Court's order denying discretionary review in Emerick I is included in Appendix B.

[2] Due to a backlog of cases at Division II, this case was transferred to Division I.

[3] Division I's opinion in *Emerick II* is included in Appendix C.

[4] See Appendices A and C.

statement of the facts. Cardiac Study Center, Inc. ("Cardiac") provides the following additional statement of the facts to clarify the omissions and misstatements in Emerick's Petition.

All of the cardiologists at Cardiac, not just Emerick, provide life-saving care for heart patients. Emerick had practiced medicine in Tennessee before he came to Washington, but he met all of his patients in Washington through his employment with Cardiac. CP 640.

Emerick signed two noncompetes. One before he began working at Cardiac and in consideration of his employment at Cardiac. CP 522. He was offered shareholder status after two years, and like all other shareholders at Cardiac, he signed a second noncompete in consideration of becoming a shareholder. CP 522. After he became a shareholder, Emerick's tenure with Cardiac was troubled. Long standing referral sources (hospitals and other physicians) stopped referring cases to him and even began to restrict referrals to Cardiac if Emerick's involvement was possible. CP 137, 523. Cardiac's Practice Committee made several attempts to work with Emerick and correct these issues. CP 136-47. Unfortunately, Emerick refused to change his conduct and Cardiac eventually ended his employment. CP 147.

Emerick's claims that Cardiac impeded his ability to see patients and tried to divert patients away from him are baseless.[5] While Cardiac attempted to resolve this issue without litigation, Emerick rejected Cardiac's offers that would have permitted him to see and treat his existing patients approximately fifteen minutes from his Cardiac office. CP 1274. Emerick refused to accept anything other than a complete voiding of his noncompete. *Id.*

After losing in *Emerick I*, Emerick unsuccessfully petitioned this court for review, claiming public policy and constitutional issues he repeats in this Petition. This Court denied Emerick's first petition on December 4, 2012.[6] The mandate issued in January 2013 and Cardiac filed its motion for summary judgment seeking injunctive relief (the only measure of relief Cardiac has ever sought in this case). Contrary to Emerick's depiction of the trial court "blue penciling" the noncompete, the

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[5] Emerick's claim that Cardiac "impeded" his ability to see his patients for improper reasons is demonstrably false. The record below establishes that Dr. Cecil Snodgrass, the Chief of Staff at Good Samaritan Hospital and a non-Cardiac physician who had earlier referred his patient to Cardiac, asked that someone other than Emerick see his patient because Dr. Snodgrass "had concerns about [Dr. Emerick's] temperament and practice." CP 1139-40. Dr. Snodgrass's complaints were similar to many others, but he went so far as to specifically ask Dr. Krishnan, another Cardiac physician, to see his patient. *Id.* Dr. Krishnan tried to politely decline because the patient had been seeing Emerick. CP 114-15. Snodgrass persisted. CP 1139-40. Cardiac attempted to schedule the patient with Dr. Krishnan, but when the patient objected, Cardiac placed her back on Emerick's schedule. CP 637. Cardiac did nothing other than try to accommodate the reasonable concerns of the patient's primary and referring physician. In addition, Emerick refused to tell Cardiac if or where he was practicing, leaving patients inquire after him through Cardiac, who had no information to provide. CP 523-25; 1148-50.

[6] Appendix B.

trial court carefully weighed the parties' respective interests and judiciously balanced the scope and duration of the noncompete to protect those interests.[7]

Here, Cardiac did not seek to prevent Emerick from treating patients, nor did it attempt to interfere with his ability to seek privileges at any hospital. Cardiac asked the trial court to enforce the noncompete for its full five year term and for a five mile radius around each of Cardiac's Pierce County offices. The trial court enforced the noncompete in a slightly reduced scope than proposed by Cardiac – for a duration of four years within a two-mile radius from each Cardiac office.

In addition, while Cardiac's appeal was pending Emerick opened a competing cardiology practice in June 2011 about 1,000 feet from Cardiac's Gig Harbor office. CP 34. The trial court gave Emerick credit for the 20 months he had not competed, but in fashioning injunctive relief, the trial court ordered that Emerick would have to fulfill the remaining 28 months of the noncompete after he relocated his office to a compliant location.[8]

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[7] It should be noted that Washington is not a mechanical "blue pencil" jurisdiction; instead, Washington courts enforce noncompetes to the extent they are reasonable and comport with public policy. *Wood v. May*, 73 Wn.2d at 313 (rejecting the "blue-pencil" test in favor of "whether partial enforcement is possible without injury to the public and without injustice to the parties.")

[8] Emerick has obtained a stay of this order while his appeals have been underway and continues to practice in violation of the noncompete.

Because Emerick never conceded that the noncompete was valid to any extent, he did not substantially prevail and CSC was awarded its attorneys' fees and costs pursuant to the attorneys' fees provision in the parties' agreement. Far from winning only a "shred" of relief, Cardiac achieved the majority of the enforcement it sought, and in any review of the outcome substantially prevailed.

In his Petition for Review, Emerick has included assertions and documents that are not part of this record. This Court should not consider this information. *See* RAP 13.7(a) (limiting the record before the Supreme Court to the record in the Court of Appeals); RAP 13.4(c) (permitting appendices to a petition but limiting the content to the Court of Appeals decision, an order granting or denying reconsideration, and any applicable statutes or constitutional provisions relevant to the appeal). Emerick's attempt to inject additional *factual* information into the record on appeal is improper and Cardiac respectfully requests that the Court strike or disregard internet news articles Emerick submitted. Specifically, reference to the shortage of doctors in a limited part of California, at Appendix B. Petition at 9. Not only is this material completely irrelevant, as it deals with an entirely different market in another state, but the undisputed record in this case reflects that Pierce County is "saturated" with cardiologists. CP 1256-72; 1288-96; 1354-60. Moreover, an article about

the legislature's failure to pass bills seeking to outlaw physician noncompetes or all noncompetes is similarly irrelevant. Appendix C.

III. ARGUMENT IN REPLY

To the extent that the pending case involves an issue of substantial public interest, that issue has already been determined by the Courts of Appeals, including this Court who previously denied review in in *Emerick I.* This petition does not provide any adequate basis for review under any subsection of RAP 13.4(b) and should accordingly be denied.

A. Washington Courts Have Long Held that There is No Public Policy Against Physician Noncompetes.

Noncompetition provisions in Washington are enforceable if they are reasonable. *Wood v. May*, 73 Wn.2d 307, 312, 438 P.2d 587 (1968). This Court long ago set out the proper analysis to determine whether noncompetition agreements - including those among physicians - are reasonable and thus enforceable. Whether a covenant is reasonable involves a consideration of three factors: (1) whether the restraint is necessary for the protection of the business or goodwill of the employer; (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill; and (3) whether the degree of injury to the public is such loss of the service and skill of the employee as to warrant non-enforcement of the covenant. *Perry v. Moran*, 109 Wn.2d 691, 698, 748 P.2d 224 (1987), *modified on*

reconsideration, 111 Wn.2d 885, 766 P.2d 1096 (1989) (citing *Racine v. Bender*, 141 Wash. 606, 252 P. 115 (1927)). *See also Knight, Vale & Gregory v. McDaniel*, 37 Wn. App. 366, 680 P.2d 448 (1984).

In *Emerick I* the Court of Appeals accurately recited and applied them, reversing the trial court. In reviewing the trial court's implementation of those standards in fashioning a remedy in *Emerick II*, the Court of Appeals again followed the well-established line of Washington precedent governing noncompete issues that followed the *Racine* decision.

Emerick continues to emphasize the public policy factor, asserting that it should render void any physician noncompete. However, the public policy test requires that a noncompete not "injure the public" to such a degree that it should not be enforced. In other words, a noncompete does not violate public policy if it prevents the former employee from servicing a community whose residents have a choice of service providers in the employee's line of business. *Wood v. May*, 73 Wn.2d at 313.

"The law presumes that the [professional's] service can be performed by someone else." *Wood v. May*, 73 Wn.2d at 310. In *Racine v. Bender*, 141 Wash. 606, this Court directly addressed this type of public policy argument, and rejected it, reversing the trial court's grant of

summary judgment to the defendants. In addressing the public policy issue and the alleged public need for the services offered the court said:

> They do not desire his services because he is the only person who has the ability to perform them, but because they know him well, and he knows all about their business. **The case is no different than those contracts so often before the court where a physician's or dentist's assistant has contracted not to engage in the practice of the profession within reasonable limits of his employer's clientele.** No doubt the patients prefer the services of the assistant who has cared for their health in the past, but the law presumes that the service can well be performed by someone else.

Id. at 612-13 (emphasis added). Similarly, in *Knight*, 37 Wn. App. at 371, the Court of Appeals directly rejected this public policy argument when the employees in question, demonstrated that they were "exceptionally skilled" but not that their services were "unique" or "incomparable."

Indeed, the clear import of the *Ashley* decisions is that private agreements between physicians are binding legal contracts that may be enforced through the courts. *See Ashley v. Lance*, 75 Wn.2d 471, 451 P.2d 916 (1969) ("*Ashley I*"); *Ashley v. Lance*, 80 Wn.2d 274, 493 P.2d 1242 (1972) ("*Ashley II*"). In *Ashley I* and *Ashley II* this Court twice upheld a physician noncompete against two separate challenges. In both cases, the court recognized the investment and motivation of doctors entering into such restrictive covenants. Specifically considering such restrictions in the context of physicians, the court in *Ashley I* stated:

> Partnership under agreements which restrict future competition appears to be a common avenue of professional advancement. *** A young professional man may be willing to trade his future right to compete in a given community for an immediate and lucrative share in an established practice.***"

75 Wn.2d at 476.

In ruling again that the physician noncompete covenant was enforceable, the Court in *Ashley II* noted:

> It is clear that the covenant involved was intended to prevent the type of harm that occurred in this case (competition by a partner or partners who leave the partnership.) It is also clear, and uncontested that the restrictive covenant was deliberately prepared and freely entered into by all the parties.

Ashley II, 80 Wn.2d at 279.

Here, this traditional public policy test is clearly met because the record is clear that residents of the restricted area have a choice of service providers, but also that the area is "saturated" with cardiologists with skills identical to Emerick's. CP 1256-72; 1288-96; 1354-60. Emerick has produced no evidence that his skills are "unique" when compared to those of any other cardiologists in the area.

1. Emerick's Out of State Cases Are Contrary to Washington Precedent and Offer No Support.

Emerick's claim that this Court should completely ban physician noncompetes has no more merit than it did three years ago. No court, not even the Arizona Supreme Court, who is an outlier on this issue, has taken

this extreme judicial position. *See Valley Medical Specialists v. Farber*, 982 P.2d 1277 (Ariz. 1989) (after finding the restrictive covenant at issue too broad to be enforced, the court stated: "We stop short of holding that restrictive covenants between physician will never be enforced, but caution that such restrictions will be strictly construed.")

Emerick is asking this Court to exempt physicians from noncompetes, asking this Court to impose a new general rule, without a case-by-case examination of the facts, that "public policy" trumps any balancing of interests, including those of physicians who bring a new partner into a highly regarded, established practice and provide that physician with a full schedule of patients from day one.

In addition to the Arizona Supreme Court's *Farber* decision, Emerick cites ten other cases from eight other states to support his argument. But even those small numbers are misleading. Only a handful of states – Arizona, Idaho and Ohio – have adopted a more stringent analysis for physician noncompetes. Three state legislatures have passed statutes prohibiting physician noncompetes. The rest of the jurisdictions referenced by Emerick (and the vast majority of all others) allow physician noncompetes under standards similar to Washington's. The cases Emerick cites either enforce the noncompetition provision or decline to do so for very specific and fact-based reasons. For example, in *Iredell*

Digestive Disease Clinic, PA v. Petrozza, 373 S.E.2d 449 (N.C. 1988), the noncompetition provision was not enforced on a public policy basis, because enforcement would have created a monopoly for the one remaining gastroenterologist in the restricted area, and twenty-one area physicians testified that one gastroenterologist would not be enough. In *Dick v. Geist,* 693 P.2d 1133 (Id. 1985), the covenant was not enforced because the two pediatricians against whom enforcement was sought provided 90% of the neonatal critical care in the restricted area. Neither case bears any resemblance to Emerick's where there is an oversupply, rather than a shortage, of cardiologists in Pierce County.

2. AMA Opinion 9.02 Does Not Change Washington Law.

Emerick relies heavily on American Medical Association Opinion 9.02. Most jurisdictions to address the issue since this AMA Opinion was adopted have continued to enforce noncompetition provisions among physicians. Perhaps most notably, the Illinois Supreme Court, in *Mohanty v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85 (Ill. 2006) described the relationship between the Opinion and Illinois law (which is very similar to Washington's) in this way:[9]

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[9] *See also, e.g., Raymundo v. Hammond Clinic Ass'n*, 449 N.E.2d 276, 280–81 (Ind. 1983); *Rash v. Toccoa Clinic Med. Assocs.*, 320 S.E.2d 170 (Ga. 1984); *Gant v. Hygeia Facilities Found. Inc.*, 384 S.E.2d 842 (W.Va. 1989); *Weber v. Tillman*, 913 P.2d 84 (Kan. 1996); *Duneland Emergency. Physician's Med. Group, P.C. v. Brunk*, 723 N.E.2d 963 (Ind. Ct. App. 2000).

> AMA Opinion 9.02, while informative, is not the equivalent of an Illinois statute or rule of professional conduct and, for that reason, does not provide a clear expression of the public policy of this state. Thus, AMA Opinion 9.02 cannot dictate the manner in which restrictive covenants should be construed in Illinois. That having been said, we point out that Opinion 9.02 does not prohibit, but merely *discourages,* restrictive covenants in medical employment contracts. Furthermore, the AMA's position on restrictive covenants, as set forth in Opinion 9.02, is commensurate with the manner in which restrictive covenants in physician employment contracts are treated in this state. Historically, covenants restricting the performance of medical professional services have been held valid and enforceable in Illinois as long as their durational and geographic scope are not unreasonable, taking into consideration the effect on the public and any undue hardship on the parties to the agreement. *Cockerill v. Wilson*, 51 Ill.2d 179, 183–84, 281 N.E.2d 648 (1972); *Canfield v. Spear*, 44 Ill.2d 49, 254 N.E.2d 433 (1969). Thus, the AMA provision is no different from the common law requirements of this state. *Seeldbeis v. Wichita Surgical Specialists, P.A.,* 279 Kan. 755, 112 P.3d 81 (2005) (AMA requirements are no different from common law requirement that restrictive covenants be reasonable and not adverse to the public welfare).

This balancing of interests and requirement that the restrictions be "reasonable" are precisely the same concerns currently addressed by the analysis required under Washington's existing law. Moreover, the AMA could prohibit noncompetition agreements if it chose to, but it has not.

B. <u>There Is No Constitutional Issue Because Noncompetes Are Not "Regulation of the Practice of Medicine."</u>

Emerick asserts that review is needed pursuant to RAP 13.4(b)(3) and (4), because this case presents a significant constitutional question. He theorizes that noncompetition agreements among physicians violate

Article XX, Section 2 of the Washington Constitution, because only the Legislature can regulate the practice of medicine. If doctors agree not to compete with one another, his theory continues, that agreement somehow constitutes an "employer" regulating the practice of medicine. Petition at 13-14.

Then, in a bizarre twist to his argument opposing "employers" or anyone other than the Legislature "regulating medicine," Emerick asks this Court to inject itself into the Legislature's territory, and "regulate medicine" by establishing a "flat-out bar" on physician noncompetes. Emerick cites no authority for this proposal, and none exists. There is no Washington case law cited, nor is there any authority cited from any of the far-flung jurisdictions Emerick relies on in other sections of his Petition.

This Court may of course reject this renewed argument for its lack of precedential support, but also because it was never advanced in the trial court. *See* RAP 2.5(a); *Choate v. Choate*, 143 Wn. App. 235, 245, 177 P.3d 175 (2008). Under RAP 2.5(a)(3), Emerick could obtain review of an issue raised for the first time on appeal if he is able to show that it constitutes "a 'manifest error affecting a constitutional right." *Id.* However, because RAP 2.5(a)(3) is "an exception to the general rule that parties cannot raise new arguments on appeal, [the Court will] construe the exception narrowly by requiring the asserted error to be (1) manifest and

(2) 'truly of constitutional magnitude.'" *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999). Here, Emerick cannot show that the alleged error was "manifest" because he cannot show any likelihood of succeeding in his argument that physicians' noncompetes "are an unconstitutional attempt to regulate the practice of medicine and surgery by the employer." *See* Petition at 14, *and see State v. WWJ Corp,* 138 Wn.2d at 603 ("The policy behind RAP 2.5(a)(3) is simply this: Appellate courts will not waste their judicial resources to render definitive rulings on newly raised constitutional claims when those claims have no chance of succeeding on the merits.")

Indeed, the clear import of the *Ashley* decisions is that private agreements between physicians are binding legal contracts that may be enforced through the courts. *Ashley v. Lance*, 75 Wn.2d 471, 451 P.2d 916 (1969); *Ashley v. Lance*, 80 Wn.2d 274, 493 P.2d 1242 (1972). These private contracts do not encroach on the Legislature's ability to set standards of qualifications for medical practitioners or otherwise regulate the practice of medicine.

Emerick was the party who originally brought this action in the trial court and proposed application of existing Washington law to the restrictive covenant in this case. CP 1-22; 1236-39. As the party inviting the trial court to apply what Emerick now claims is a constitutionally

prohibited legal analysis, Emerick is not entitled to assert this alleged constitutional violation as a basis for relief. *See, e.g., City of Seattle v. Patu*, 147 Wn.2d 717, 720, 58 P.3d 273 (2002).

C. Washington Law Is Clear: Cardiac Obtained Substantial Injunctive Relief and Was the Substantially Prevailing Party.

Under Washington law, a prevailing party is "one who receives an affirmative judgment in his or her favor." *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997); *see also Pipekorn v. Adams*, 102 Wn. App. 673, 686–87, 10 P.3d 428 (2000) (a party who is successful in obtaining injunctive relief was substantially prevailing party even when the court declined the same party's request for damages).

The trial court correctly determined that Cardiac was the substantially prevailing party in this action after Cardiac was awarded affirmative relief and Emerick was denied all forms of relief he sought. Washington law provided the trial court with clear guidance to determine which party "substantially prevailed" for the purposes of awarding prevailing party attorneys' fees under a contract, even in a scenario where only partial relief was obtained. *See, e.g., Pipekorn*, 102 Wn. App. at 686–87; *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 773–74, 677 P.2d 773 (1984). In rejecting Emerick's claim that there is no Washington authority to guide the Court, Division I wrote in *Emerick II*:

> Specifically he contends that there is no reported Washington decision addressing whether there is a prevailing party for purposes of attorney fees when the trial court modifies a noncompete covenant. But, there is analogous case law that states that simply because one party is not afforded as much relief as is originally sought, does not mean that the opposing party has obtained relief. *Silverdale Hotel Associates v. The Lomas & Nettleton Co.,* 36 Wn. App. 762, 774, 677 P.2d 773 (1984). In *Silverdale,* Lomas & Nettleton argued that neither party prevailed in the case, because both parties received relief. *See Id.* But, the court rejected that argument stating that just because the damages against Lomas & Nettleton were not as high as Silverdale originally prayed for, does not mean that Lomas & Nettleton received relief. *Id.* at 774, 677 P.2d 773. Similarly, here, just because certain terms of the noncompete were modified, does not mean that Emerick received relief when the covenant was still substantially enforced.

Here, the trial court enforced the original agreement to the extent it was reasonable and properly concluded Cardiac had substantially prevailed, entitling it to an award of attorneys' fees. This was not a close call.

D. <u>The Trial Court Enforced a Reduced Temporal Restriction It Found Reasonable Upon Weighing the Interests.</u>

Emerick ignores the fact that the trial court carefully evaluated and **<u>reduced</u>** the duration of his noncompete from five years to four years which it determined as a matter of law to be reasonable. He claims that because some courts have refused to enforce a five year noncompete, it was error for the trial court to find four years was reasonable. However, each decision involves a unique balancing based on the nature of the interests involved in each case. Here, the trial court's decision to issue an injunction enforcing the remaining 28 months of Emerick's noncompete

was proper, and took into account the limited geographic scope in imposing a four-year time period. As Division I stated in *Emerick II*:

> Emerick argues that as a matter of law, the temporal restraint is unreasonable, because no Washington appellate court has ever found that a four or five year restrictive covenant is reasonable. He cites to *Perry* in which the court stated, "It may be that a clause forbidding [accounting services] for a 5-year period is unreasonable as a matter of law." 109 Wn.2d at 703–04. But, the *Perry* court did not hold that a five year noncompete is unreasonable as a matter of law. And, the noncompete at issue in *Perry* did not have geographical limitations — distinguishing it from the temporally and geographically limited noncompete at issue here.

The trial court's injunction was consistent with Washington law and with decisions from other jurisdictions facing situations where a party has breached a noncompete agreement during the pendency of the litigation.[10] Emerick relies on *Alexander & Alexander v. Wohlman*, which is distinguishable because it involved a scenario where the term of the original noncompete had already expired and the court found that money damages were adequate compensation. 19 Wn. App. 670, 688 (1978) (two

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[10] *See, e.g., Thermatool Corp. v. Borzym*, 575 N.W.2d 334, 337 (Mich. App. 1998) ("under appropriate circumstances, an agreement not to compete can be extended beyond its stated expiration date as a remedy for breach of the agreement."); *Rogers v. Runfola & Assoc., Inc.*, 565 N.E.2d 540, 544 (Ohio 1991) (court reporter subject to a noncompete started a competing firm, obtained an order from the trial court invalidating the noncompete which the employer reversed on appeal; appropriate remedy an injunction running from the date of the competing business shut down to the full term of the noncompete); *Roanoake Eng'g Sales v. Rosenbaum*, 290 S.E.2d 882, 886 (Va. 1982) (employee who continued to compete during the years the case was on appeal was ultimately restrained prospectively from the date on which the employer prevailed).

year restriction was reasonable but monetary relief requested by plaintiff was an adequate remedy so no injunction was necessary).

Emerick's remaining authorities are equally unpersuasive as Division I noted:

> Emerick's reliance on *National School Studios, Inc. v. Superior School Photo Service, Inc.*, 40 Wn.2d 263, 242 P.2d 756 (1952) and *Economics Laboratory, Inc. v. Donnolo,* 612 F.2d 405 (9th Cir.1979) is similarly misplaced. In *National Schools,* the trial court declined to order injunctive relief. 40 Wn.2d at 265, 242 P.2d 756. The Washington Supreme Court found that the question was moot, because no judgment it entered for injunctive relief could have become effective prior to the expiration of the restrictive covenant. *Id.* at 270, 242 P.2d 756. Here, although the original restrictive period has now elapsed, we are not in a position where we need to order injunctive relief — the trial court has already done so. And, it did so prior to the expiration of the original restrictive period. In *Economics Laboratory,* the Ninth Circuit concluded that the district court should have denied a request for an injunction that was first made after the restrictive period had elapsed. 612 F.2d at 408. Again, in Emerick's case, the trial court ordered injunctive relief during the original restrictive period.

Cardiac requested injunctive relief from the outset. Cardiac never sought monetary relief, because the only meaningful relief was injunctive relief stopping Emerick from competing. Emerick acknowledged as much when he signed the noncompete. CP 653. The trial court correctly extended the period to provide Cardiac the benefit of its bargain.

E. The Court of Appeals Properly Awarded Cardiac Its Earlier Appellate Fees Because It First Prevailed on Remand When It Obtained Summary Judgment Ordering Injunctive Relief.

After the trial court determined that Cardiac was the prevailing party in this action, Emerick argued that Cardiac was not entitled to recover its prevailing party attorney's fees for work done on the *Emerick I* appeal, because Cardiac had failed to devote a section of its appellate brief to fees. CP 470-71. This argument, and the decision of the trial court based on this argument, is legally flawed.

Washington case law supports an award of prevailing party attorney's fees under RAP 18.1 only where the party requesting those fees is the prevailing party in the underlying action and can demonstrate a basis for the recovery of fees for work performed during a successful appeal. *See, e.g.*, *Belfor USA Group, Inc. v. Thiel*, 160 Wn.2d 669, 671, 160 P.3d 39 (2007) (appellate court affirmed order compelling arbitration, but "Belfor is not yet a 'prevailing party' for purposes of the contract's attorney fees provision"); *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 817-18, 225 P.3d 213 (2009) (neither party entitled to fees because the appellate court's "decision is not determinative of the prevailing party with regard to the underlying litigation.").

Here, Division I reversed the trial court's denial of Cardiac's request for fees for the appellate work in *Emerick I,* because only after

returning to the trial court and prevailing on summary judgment did Cardiac become entitled to recover its reasonable attorney's fees under RCW 4.84.330 and the Agreement, which provided that these included fees incurred in "any suit or action for any type of relief ... including any appeal thereof, arising out of this Agreement." CP at 21.

To avoid this result, Emerick argues that that Cardiac was required to make a premature request for prevailing party attorneys' fees to the Court of Appeals under RAP 18.1 in its earlier appeal, and that Cardiac is forever barred from recovering any fees that would have been included in that baseless request once it prevailed. This argument is illogical and not supported by legal authority. Cardiac was not yet the "prevailing party" in this action when it was before Division II, and only after it returned to the trial court and obtained affirmative relief did Cardiac become the final prevailing party entitled to recover all reasonable attorneys' fees under the Agreement, including the fees incurred for work done on appeal. The trial court erred as a matter of law when it determined that Cardiac had waived the right to that portion of its prevailing party attorney's for work performed on appeal, and this decision should be reversed.

IV. CONCLUSION

Emerick has not shown any of the grounds for Discretionary Review under RAP 13.4. Therefore, Cardiac asks this Court to deny

Emerick's Petition for Discretionary Review

RESPECTFULLY SUBMITTED this 21st day of October, 2015.

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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 21st day of October, 2015, I arranged for a copy of the foregoing document to be served by email and by regular mail to the below-listed counsel:

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I hereby certify, under penalty of perjury, that on the 21st day of October, 2015, I arranged for the foregoing document to be filed with the Supreme Court of the State of Washington by sending the same for filing as follows:

Via e-mail to: Supreme@courts.wa.gov
Subject Line: 92283-7 Response to Petition

s/ Frances Ostruske
Frances Ostruske, Legal Assistant
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Appendix A

170 Wash.App. 248
Court of Appeals of Washington,
Division 2.

Robert EMERICK, Respondent,
v.
CARDIAC STUDY CENTER, INC., P.S., Appellants.

No. 41597–6–II. | Feb. 28, 2012. | As Amended and Ordered Published Aug. 8, 2012.

Synopsis

Background: Employee, who was interventional cardiologist, filed suit for declaratory judgment that covenant not to compete, which prohibited employee from practicing anywhere within county for period of five years upon termination of employment relationship. was invalid. The Superior Court, Pierce County, Frederick Fleming, J., granted employee's motion for summary judgment, and employer appealed.

Holdings: The Court of Appeals, Armstrong, P.J., held that:

[1] in determining of reasonableness of covenant, trial court should have considered employer's legitimate business interests in its patients and established referral services, and employee's immediate access to employer's patient base, business model and goodwill;

[2] reasonableness determination required balancing of employer's protectible business interests against former employee's ability to earn living, and consideration of what portions of covenant could be reasonably and fairly enforced; and

[3] trial court should have considered possible harm to patients who would be denied access to cardiologist practicing in his specialty, and then balanced that harm against employer's protected business interests.

Reversed and remanded.

West Headnotes (13)

[1] **Contracts**
Questions for jury

Whether a covenant not to compete is reasonable is a question of law.

1 Cases that cite this headnote

[2] **Contracts**
Restraint of Trade or Competition in Trade

Courts will enforce a covenant not to compete if it is reasonable and lawful.

1 Cases that cite this headnote

[3] **Contracts**
Restraint of Trade or Competition in Trade

Contracts
Restriction necessary for protection

A court tests the reasonableness of a covenant not to compete by asking (1) whether the restraint is necessary to protect the employer's business or goodwill, (2) whether it imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether enforcing the covenant would injure the public through loss of the employee's service and skill to the extent that the court should not enforce the covenant, i.e., whether it violates public policy.

3 Cases that cite this headnote

[4] **Contracts**
In restraint of trade

If the trial court determines that certain terms of a covenant not to compete are unreasonable, the entire covenant does not fail; the court should still seek to enforce the covenant to the extent reasonably possible to accomplish the contract's purpose—specifically, whether partial enforcement is possible without injury to the public and without injustice to the parties.

Cases that cite this headnote

[5] **Contracts**
Restriction necessary for protection

In considering reasonableness of covenant not to compete, pursuant to which employee, who was interventional cardiologist, agreed not to practice anywhere within county for period of five years upon termination of employment relationship, trial court should have considered employer's legitimate business interests in its patients and established referral services, and employee's immediate access to employer's patient base, business model and goodwill.

Cases that cite this headnote

[6] **Contracts**
Restraint of Trade or Competition in Trade

A restrictive covenant in an employment agreement protects an employer's business as warranted by the nature of employment.

1 Cases that cite this headnote

[7] **Contracts**
Restraint of Trade or Competition in Trade

To protect the employer's business, equity allows the employer to require the employee to sign a noncompetition agreement.

Cases that cite this headnote

[8] **Contracts**
Restriction necessary for protection

An employer has a legitimate interest in protecting its existing client base and in prohibiting the employee from taking its clients upon the termination of the employment relationship.

Cases that cite this headnote

[9] **Contracts**
Restriction necessary for protection

In considering whether employer's covenant not to compete, pursuant to which employee, who was interventional cardiologist, was prohibited from practicing cardiology within county for minimum of five years upon termination of employment relationship, was reasonable in scope, trial court should have balanced employer's protectible business interests in keeping its patient base and goodwill against former employee's ability to earn living, and should have considered what portions of covenant could be reasonably and fairly enforced.

Cases that cite this headnote

[10] **Contracts**
Restraint of Trade or Competition in Trade

The "scope of restraint" factor in determining the reasonableness of a noncompete agreement focuses on the extent to which the covenant adversely affects the employee's ability to earn a living.

Cases that cite this headnote

[11] **Contracts**
Limitations as to time and place in general

Generally, a court determines the reasonableness of a covenant by analyzing its geographic and temporal restrictions.

1 Cases that cite this headnote

[12] **Contracts**
Restriction necessary for protection

In determining reasonableness of covenant not to compete pursuant to which interventional cardiologist agreed not to practice within county for minimum period of five years upon termination of employment relationship, trial court should have considered possible harm to patients who would be denied access to cardiologist practicing in his specialty, and then balanced that harm against employer's protected business interests.

Cases that cite this headnote

[13] **Contracts**

Restriction necessary for protection

Public policy requires a court to consider possible harm to the public from enforcing a covenant not to compete, such as restraint of trade, limits on employment opportunities, and denial of public access to necessary services, and then balance those harms against the employer's right to protect his business.

Cases that cite this headnote

Attorneys and Law Firms

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Stuart Charles Morgan, Attorney at Law, Tacoma, WA, for Respondent.

Opinion

ARMSTRONG, P.J.

*250 ¶ 1 When Dr. Robert Emerick joined Cardiac Study Center's specialty practice, he signed a covenant not to compete with Cardiac if he left the practice. Cardiac terminated Emerick, and he filed this action seeking a declaration that the covenant was unreasonable and thus unenforceable. The trial court agreed and granted Emerick summary judgment, invalidating most of the covenant's provisions. On appeal, Cardiac argues that the trial court misapplied Washington law in granting the summary judgment. We agree and, therefore, reverse and remand.

FACTS

¶ 2 Cardiac is a medical practice group of approximately 15 cardiologists. The practice has provided care to patients *251 with heart disease in Pierce County since 1966. The practice has four offices, each near a hospital. The hospitals serve as a referral source for Cardiac.

¶ 3 Dr. Robert Emerick practiced medicine in Memphis, Tennessee for approximately three years before joining Cardiac. In February 2002, Cardiac hired him as an employee. In February 2004, Emerick became a shareholder of Cardiac. At that time, Emerick signed a shareholder employment agreement, which included the covenant not to compete at issue here. The covenant states that if a doctor leaves the group, he promises not to practice competitively in Pierce County or Federal Way for a period of five years. The covenant specifically provides:

> **691 (e) Non–Competition.... The Employee further recognizes and acknowledges that because the goodwill of the Corporation's business is a valuable asset, and because the solicitation of patients of referral sources or persons or entities with whom the Corporation contracts, by the Employee, after the Employee has ceased to be employed by the Corporation, will cause irreparable harm to the goodwill of the Corporation, the Corporation would not continue to employ the Employee unless it is assured that such solicitation will not occur. The Employee therefore agrees and covenants that during the Employee's employment by the Corporation and for sixty (60) full months after termination of such employment for any reason, the Employee will not, directly or indirectly, (i) anywhere within Pierce County and Federal Way, Washington ("Restricted Area") engage in the practice of cardiac medicine in any manner which is directly competitive with any aspect of the business of the Corporation as presently conducted or as said business may evolve in the ordinary course of business between the date of this Agreement and the expiration of this covenant not to compete, whether or not using any *Confidential Information*, (ii) anywhere in the Restricted Area, have any business. dealings or contracts, except those which demonstrably do not relate to or compete with the business or interests of the Corporation, with any then existing patient, customer or client (or party with whom the Corporation

> contracts) of the Corporation or any person or firm which has been contacted or *252 identified by the Corporation as a potential customer or client of the Corporation; or (iii) be an employee, employer, consultant, agent, officer, director, partner, trustee or shareholder of any person or entity that does any of the activities just listed. Provided, however, nothing herein shall preclude a patient from selecting a provider of their choice.

Clerk's Papers (CP) at 19–20.

¶ 4 During oral argument below, Cardiac conceded that Emerick should be allowed to practice in Federal Way; Cardiac suggested a geographic restriction of a five-mile radius around the existing Cardiac centers. Cardiac also conceded that Emerick should be allowed to see his former patients from Cardiac.

¶ 5 Emerick specializes in interventional cardiology.[1] He explained that Cardiac has six other interventional cardiologists. Approximately five other interventional cardiologists practice in Pierce County, and three practice in Federal Way. Cardiac submitted evidence that the distinction between interventional cardiologists and non-interventional cardiologists is not critical in determining an appropriate physician-to-population ratio. Further, Cardiac presented evidence that Pierce County and Federal Way have an excess of cardiologists for the population's need.[2]

¶ 6 In August 2005, patients and other medical providers began to complain to Cardiac about Emerick's conduct (CP at 522 (stricken)).[3] Because of Emerick's conduct, some *253 physicians stopped referring patients **692 to Cardiac (CP at 137 (stricken)). Cardiac's Professional Conduct Committee met with Emerick to address the complaints (CP at 137 (stricken)). The Committee met again after more complaints were received, yet Emerick's behavior did not change (CP at 137–40 (stricken)). In February 2009, the Conduct Committee recommended that the Board discipline Emerick (CP at 147 (stricken)). On My 1, 2009, Cardiac's Board of Directors terminated Emerick (CP at 147 (stricken)).

¶ 7 Emerick remained a shareholder until September 30, 2009.

PROCEDURE

¶ 8 Emerick sued Cardiac seeking a declaration that the covenant was unenforceable. Emerick moved for summary judgment, arguing that the covenant was void as against public policy.[4] In March 2010, the trial court granted Emerick's motion, ruling that the covenant was unenforceable because it violated public policy. Although the trial court's ruling appeared to void the covenant in its entirety, the court also ordered Emerick not to solicit Cardiac patients. And the court ordered the parties to remedy the effects of a letter Cardiac sent to patients regarding Emerick leaving the practice. Then, on December 3, 2010, the trial court entered findings of fact and conclusions of law, concluding in part that the covenant's temporal scope was "overly broad." CP at 1389. The court permanently enjoined Cardiac from enforcing the covenant, which "bar[s] Dr. Emerick from serving patients whom Dr. Emerick does *254 not solicit, and has not solicited." CP at 1390. The, trial court awarded Emerick fees and costs totaling approximately $60,000.

ANALYSIS

I. STANDARD OF REVIEW

[1] ¶ 9 We review summary judgment de novo. *Trimble v. Wash. State Univ.*, 140 Wash.2d 88, 92–93, 993 P.2d 259 (2000). Whether a covenant not compete is reasonable is a question of law. *See Alexander & Alexander, Inc. v. Wohlman*, 19 Wash.App. 670, 684, 578 P.2d 530 (1978).

II. NONCOMPETITION PROVISION

[2] [3] ¶ 10 Courts will enforce a covenant not to compete if it is reasonable and lawful. *Wood v. May*, 73 Wash.2d 307, 312, 438 P.2d 587 (1968). We test reasonableness by asking (1) whether the restraint is necessary to protect the employer's business or goodwill, (2) whether it imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether enforcing the covenant would injure the public through loss of the employee's service and skill to the extent that the court should not enforce the covenant, i.e., whether it violates public policy. *Perry v. Moran*, 109 Wash.2d 691, 698, 748 P.2d 224

(1987), *judgment modified on reconsideration,* 111 Wash.2d 885, 766 P.2d 1096 (1989).

[4] ¶ 11 If the trial court determines that certain terms of the covenant are unreasonable, the entire covenant does not fail. *Wood,* 73 Wash.2d at 312, 438 P.2d 587. The court should still seek to enforce the covenant to the extent reasonably possible to accomplish the contract's purpose. *Wood,* 73 Wash.2d at 312 13, 438 P.2d 587. Specifically, the court considers "whether partial enforcement is possible without injury to the public and without injustice to the parties." *Wood,* 73 Wash.2d at 313, 438 P.2d 587 (distinguishing Washington law from the so called "blue-pencil ***255** test," which requires the changes to the contract to still be grammatically viable).

A. *Necessary for Employer*

[5] [6] [7] ¶ 12 A restrictive covenant protects an employer's business as warranted by the nature of employment. *Wood,* 73 Wash.2d at 310, 438 P.2d 587 (citing 9 A.L.R. 1467–68). An employee who joins an established business gains access to his employer's customers and " 'acquire[s] valuable information as to the nature and character of the business....' " *Wood,* 73 Wash.2d at 310, 438 P.2d 587 (quoting 9 A.L.R. 1467–68). This exposure to the employer's clients and business ****693** model allows the employee to compete with his employer after he leaves the employment. *Wood,* 73 Wash.2d at 310, 438 P.2d 587 (citing A.L.R. 1467–68). To protect the employer's business, equity allows the employer to require the employee to sign a noncompetition agreement. *Wood,* 73 Wash.2d at 310, 438 P.2d 587.

[8] ¶ 13 Specifically, an employer has a "legitimate interest in protecting its existing client base" and in prohibiting the employee from taking its clients. *Perry,* 109 Wash.2d at 700, 748 P.2d 224. In *Perry,* our Supreme Court considered an accounting firm's restrictive covenant with a newly hired accountant. *Perry,* 109 Wash.2d at 692, 748 P.2d 224. Moran, the new accountant, had worked as an accountant for a significant period of time before joining the firm. *Perry,* 109 Wash.2d at 692, 748 P.2d 224. The court recognized the firm's legitimate interest in protecting its client base after Moran left: *Perry,* 109 Wash.2d at 700, 748 P.2d 224; *see also Knight, Vale & Gregory v. McDaniel,* 37 Wash.App. 366, 369–70, 680 P.2d 448 (1984) (recognizing a firm's interest in maintaining a client base built over many years). Courts also consider an employer's investment in training a newly minted professional. *See Ashley v. Lance,* 75 Wash.2d 471, 475–77, 451 P.2d 916 (1969) (" 'A young professional man may be willing to trade his future right to compete in a given community for an immediate and lucrative share in ***256** an established practice.' ") (quoting *McCallum v. Asbury,* 238 Or. 257, 393 P.2d 774, 777 (1964)), *affirmed on other grounds in Ashley v. Lance,* 80 Wash.2d 274, 493 P.2d 1242 (1972); *Wood,* 73 Wash.2d at 310–11, 438 P.2d 587 (discussing the substantial investment the master horseshoer made in training the apprentice).

¶ 14 When the trial court made its oral ruling, it did not discuss Cardiac's protected interest in its client base or its investment in Emerick. In its subsequent written conclusions of law, however, the trial court found that Cardiac was entitled to "minimal" protection under the covenant because Cardiac did not teach Emerick his skills and knowledge. CP at 1388. Similar to *Perry,* where Moran was already trained as an accountant, Emerick was a trained cardiologist before he joined Cardiac. But the trial court's focus on Emerick's medical training in analyzing Cardiac's protected interest was too narrow. Cardiac provided Emerick with an immediate client base and established referral sources when he moved to the area. Moreover, Emerick had access to Cardiac's business model and goodwill. These are all protectable business interests that the trial court should have considered in assessing the covenant's enforceability.

B. *Scope of Restraint*

[9] [10] [11] ¶ 15 The second reasonableness factor focuses on the extent to which the covenant adversely affects the employee's ability to earn a living. *See McDaniel,* 37 Wash.App. at 370, 680 P.2d 448 (a court carefully considers a restrictive covenant because of a concern about freedom of employment). Generally, a court determines the reasonableness of a covenant by analyzing its geographic and temporal restrictions. *See Wood,* 73 Wash.2d at 311–12, 438 P.2d 587.

¶ 16 Having determined that Cardiac had only minimal interests to protect, the trial court concluded without explanation that the covenant's temporal scope was too broad and that the six months Emerick had not practiced was ***257** "ample time" to protect Cardiac's financial interests and allow it to hire a replacement. CP at 1389. The trial court's discussion of the geographic restriction was equally brief, concluding that "[the covenant] would bar Dr. Emerick from practicing in countless cities throughout Pierce County and in Federal Way, where Dr. Emerick never worked as a [Cardiac] doctor; and it would bar Dr. Emerick from practicing cardiac medicine." CP at 1388–89.

¶ 17 The trial court's analysis of the scope of the covenant is flawed for several reasons. As we stated, the court erred in determining that Cardiac had only minimal interests to protect. And this error allowed the court to dispose of the scope analysis without balancing Cardiac's actual protectable business interest against the time and geographic restrictions on Emerick's ability to earn a living. Moreover, the court made no attempt to save as much of the covenant **694 as could reasonably and fairly be enforced. *Wood*, 73 Wash.2d at 314, 438 P.2d 587 (explaining that a covenant should be enforced to the extent it is reasonable).

C. *Public Policy*

[12] [13] ¶ 18 Finally, public policy requires a court to consider possible harm to the public from enforcing the covenant. *McDaniel*, 37 Wash.App. at 369, 680 P.2d 448. Such harm may include restraint of trade, limits on employment opportunities, and denial of public access to necessary services. *Organon, Inc. v. Hepler*, 23 Wash.App. 432, 436 n. 1, 595 P.2d 1314 (1979); *McDaniel*, 37 Wash.App. at 370, 680 P.2d 448. But the court must still balance these concerns against the employer's right to protect his business. *Wood*, 73 Wash.2d at 310, 438 P.2d 587; *see generally Perry*, 109 Wash.2d at 700, 748 P.2d 224 ("A bargain by an employee not to compete with the employer ... is valid."); *Organon, Inc.*, 23 Wash.App. at 436 n. 1, 595 P.2d 1314 ("[A]n employer should certainly have the right ... to condition employment on the employee's promise to refrain from certain activities.").

¶ 19 In its oral ruling, the trial court explained its public policy analysis: "I don't think it's fair ... or just to prevent *258 [Emerick] from practicing medicine and the skills that have took [sic] him so long to acquire ... I'm not going to enforce the non-compete agreement." RP (Mar. 5, 2010) at 23. The court's conclusions of law are similarly broad: "[a] non-competition agreement that professes to bar a specialized physician from providing care to unsolicited patients has public policy implications" and, in enforcing a covenant, "the Court has considered the fairness to the public." CP at 1389. But the court failed to apply these concepts specifically to the covenant at issue by addressing, for example, the risk that patients in the geographic area would be denied access to physicians practicing in Emerick's specialty.[5] Nor did the court attempt to balance these concerns against Cardiac's protectable business interest. *Perry*, 109 Wash.2d at 698, 748 P.2d 224.

¶ 20 Emerick argues, in effect, that such balancing is unnecessary, citing cases from other jurisdictions that have either declined to enforce or have strictly construed restrictive covenants between physicians because of the significant and personal relationship that exists in a doctor-patient setting. *Ohio Urology, Inc. v. Poll*, 72 Ohio App.3d 446, 594 N.E.2d 1027 (1991); *Valley Med. Specialists v. Farber*, 194 Ariz. 363, 982 P.2d 1277 (1999); *Intermountain Eye & Laser Ctrs., v. Miller*, 142 Idaho 218, 127 P.3d 121 (2005). Some states have legislatively precluded restrictive covenants in a medical setting. *See* COLO.REV.STAT. § 8–2–113(3); DEL.CODE ANN. tit. 6, § 2707; MASS. GEN. LAWS ch. 112, § 12X. Emerick also cites an American Medical Association opinion discouraging restrictive covenants in the medical profession because they interfere with continuity of care. AMERICAN MEDICAL ASSOCIATION CODE OF MEDICAL ETHICS, OPINION 9.02, RESTRICTIVE COVENANTS AND THE PRACTICE OF MEDICINE, June 1998.

*259 ¶ 21 But Washington courts have not yet held that restrictive covenants between physicians are unenforceable. In *Ashley*, our Supreme Court considered a covenant among physicians where four of the five partners in a medical group decided to dissolve the partnership and open a competing clinic 300 feet from the original clinic. *Ashley*, 75 Wash.2d at 473, 451 P.2d 916. The court explained that restrictive covenants are common among professionals because they allow a new professional to step into an already established practice while protecting the employer from future competition. *Ashley*, 75 Wash.2d at 476, 451 P.2d 916 (citing *McCallum*, 393 P.2d at 777 (Or.1964)). Thus, to the extent the trial court relied on authority from other jurisdictions, it erred in invalidating the covenant on public policy grounds.

¶ 22 In conclusion, the trial court erred in evaluating Cardiac's protectable business interest. In part, due to this initial error, the court failed to properly analyze the scope **695 and public policy factors included in the test for enforceability, and the court failed to address whether the covenant could be saved to some extent.

¶ 23 We reverse the order granting summary judgment, vacate the attorney fees award to Emerick, and remand for further proceedings. We also award Cardiac its statutory attorney fees.

¶ 24 A majority of the panel having determined that only the foregoing portion of this opinion will be printed in the Washington Appellate Reports and that the remainder shall be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Unpublished Text Follows

¶ 25 Finally, the trial court's oral and written rulings contain fundamental inconsistencies. In its March oral ruling, the court invalidated the covenant in its entirety on public policy grounds, yet it ordered Emerick not to solicit Cardiac patients. In December, the court's written conclusions prohibited Cardiac from preventing Emerick from serving patients he had not solicited, thereby implicitly allowing Cardiac to prevent Emerick from soliciting patients in its area. The court then concluded that the temporal restriction in the covenant had expired. But if the covenant was invalid on public policy grounds or had expired, there was no reason to restrict Emerick's actions or grant Cardiac relief. The trial court's rulings cannot be reconciled.

End of Unpublished Text

We concur: HUNT and JOHANSON, JJ.

All Citations

170 Wash.App. 248, 286 P.3d 689

Footnotes

1 Interventional cardiology provides patients with a nonsurgical alternative to coronary bypass surgery. Often, patients participating in interventional cardiology, rather than surgical options, will need longer term care and periodic adjustments to treatment.

2 The studies cited show (1) for every 100,000 persons, there is a need of 2.6 to 4.22 cardiologists; and (2) the Pierce County and Federal Way area has approximately 4.4 cardiologists per 100,000 persons.

3 Emerick moved to strike Cardiac's declarations setting forth its history with him. The trial court struck as hearsay large portions of Cardiac's declarations explaining why it terminated Emerick. Cardiac does not assign error to this evidentiary ruling, but it indirectly challenges the ruling because it claims the court should have considered the parties' history. Most of the assertions in these declarations do not appear to be hearsay ("a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). ER 801(c). Rather, the statements simply document the complaints Cardiac received about Emerick and Cardiac's responses to the complaints. Accordingly, we report the history for the same purpose, noting the parts the trial court struck. The truthfulness of the complaints is not an issue in our resolution of the case.

4 Cardiac also moved for summary judgment.

5 As stated, Cardiac submitted evidence that the geographic area it served has an excess of cardiologists.

Appendix B

THE SUPREME COURT OF WASHINGTON

DR. ROBERT EMERICK, MD, Petitioner, v. CARDIAC STUDY CENTER, INC., P.S., a Washington corporation, Respondent.	)	NO. 87752-1 **ORDER** C/A NO. 41597-6-II

E/m

FILED
2012 DEC -5 A 9:58
BY RONALD R. CARPENTER
CLERK

Department II of the Court, composed of Chief Justice Madsen and Justices Chambers, Fairhurst, Stephens and González, considered at its December 4, 2012, Motion Calendar, whether review should be granted pursuant to RAP 13.4(b), and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the Petition for Review is denied.

DATED at Olympia, Washington this 5th day of December, 2012.

For the Court

Madsen, C.J.
CHIEF JUSTICE

651/122

Appendix C

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DR. ROBERT EMERICK, M.D., Appellant/Cross Respondent, v. CARDIAC STUDY CENTER, INC., P.S., a Washigton corporation, Respondent/Cross Appellant.	No. 72834-2-I DIVISION ONE PUBLISHED OPINION FILED: August 24, 2015

APPELWICK, J. — Emerick's employment agreement with CSC included a noncompete covenant that prevented Emerick from practicing cardiology competitively in Pierce County or Federal Way for five years after termination. Days before his termination, Emerick sought declaratory relief that the noncompete covenant was unenforceable. The trial court concluded that the geographic and temporal restraints in the noncompete covenant were unreasonable. It reformed the restraints accordingly and concluded that the noncompete was reasonable and enforceable as reformed. Emerick appeals, arguing that noncompete agreements involving physicians violate public policy as a matter of law and that the reformed geographical and temporal restrictions in the noncompete covenant are excessive. We affirm.

FACTS

Cardiac Study Center, Inc., P.S. (CSC) was founded in 1966 and provides cardiology services. CSC has four Pierce County offices, each located near a main hospital. Doctor Robert Emerick began working at CSC in 2002. Immediately prior to joining CSC, Emerick was a cardiologist in Memphis, Tennessee. After Emerick had practiced with CSC for two years as a general employee, CSC offered him the opportunity to become a shareholder in the practice. In order to become a shareholder, Emerick—

like all others seeking shareholder status—was required to sign a shareholder employment agreement (Agreement). Emerick signed the Agreement on February 1, 2004.

The Agreement included a noncompete covenant in paragraph 13(e). Emerick agreed that during his employment and for five full years after termination of his employment for any reason, he would not directly or indirectly "engage in the practice of cardiac medicine in any manner which is directly competitive with any aspect of the business of" CSC within Pierce County or Federal Way. Paragraph 13(f) of the agreement stated that CSC and Emerick agree and stipulate that the noncompete covenant in paragraph 13(e) is "fair and reasonably necessary for the protection of [CSC]'s Confidential Information, goodwill, and other protectable interests." It further stated that "[i]n the event a court of competent jurisdiction should decline to enforce any provision of paragraph 13(e), such paragraph shall be deemed to be modified to restrict [Emerick]'s competition with [CSC] to the maximum extent, in both time and geography, which the court shall find enforceable." Paragraph 13(g) stated that Emerick acknowledged that any breach of the noncompete would give rise to injury not adequately compensable through damages and that CSC would be entitled to seek injunctive relief.

On September 9, 2009, CSC sent Emerick a letter informing him that the Agreement—and Emerick's employment with CSC—would terminate on September 30, 2009. On September 24, 2009, days before termination, Emerick filed a lawsuit against CSC seeking injunctive and declaratory relief to invalidate the noncompete provisions in the Agreement. Subsequently, CSC filed a motion for summary judgment. On November 6, 2009, Emerick filed a cross motion for summary judgment. On March 5, 2010, the trial

court denied CSC's motion for summary judgment and granted Emerick's cross motion for summary judgment. The trial court concluded that the noncompete provisions of paragraph 13(e) of the Agreement were not enforceable, because they violate public policy. The court further ruled that the remainder of paragraph 13 was still enforceable.

Shortly thereafter, CSC sought discretionary review of the trial court's order on the cross motions for summary judgment. Division Two denied CSC's motion for discretionary review, and it awarded attorney fees to Emerick as the prevailing party on September 27, 2010. On December 3, 2010, the trial court entered a judgment in favor of Emerick including reasonable attorney fees and costs. CSC then appealed the judgment. See Emerick v. Cardiac Study Ctr., Inc., 170 Wn. App. 248, 286 P.3d 689 (2012) (Emerick I).

Relying on the trial court's favorable judgment, but while CSC's appeal was pending, Emerick opened a new practice, Choice Cardiovascular. Emerick opened the practice about a quarter of a mile away from one of CSC's Pierce County offices in June 2011. Emerick describes Choice Cardiovascular as a unique concierge cardiovascular medicine practice that is different than CSC's "traditional" practice.

In Emerick I, Division Two held that the trial court misapplied Washington law when it granted Emerick's motion for summary judgment. Id. at 250. The Emerick I court said the trial court erred, because it did not apply the three part test established by the Washington Supreme Court for determining whether a noncompete covenant is reasonable.[1] Id. at 259. Consequently, it reversed the trial court's order granting

[1] The test for reasonableness asks (1) whether the restraint is necessary to protect the employer's business or goodwill, (2) whether it imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and

summary judgment, vacated the attorney fee award to Emerick, and remanded for further proceedings. Id. It also awarded CSC its statutory attorney fees. Id. Emerick filed a petition for review to the Washington Supreme Court, and it was denied. See Emerick v. Cardiac Study Ctr., Inc., 175 Wn.2d 1028, 291 P.3d 254 (2012).

On May 17, 2013, on remand, CSC again filed a motion for summary judgment to enforce the noncompete covenant. On September 11, 2013, the trial court entered an order granting CSC's motion for summary judgment enforcing the noncompete covenant and providing CSC injunctive relief. It concluded that the noncompete covenant is necessary to protect CSC's protectable business interests. But, it also concluded that the covenant not to compete in paragraph 13(e) is overly broad and unreasonable and therefore unenforceable with respect to its geographic and temporal restraints. As a result, the trial court reformed the covenant to reduce the geographical limitations on Emerick's cardiology practice to a two mile radius of CSC's current offices and reduced the temporal restriction to four years. The trial court found that the four years began in September 2009 when Emerick was terminated. It deducted 20 months from that four year period for the time between September 2009 and June 2011 before Emerick began improperly competing with CSC. The trial court ordered that the remaining 28 months, would begin once Emerick relocated his new practice. The trial court clarified that nothing would enjoin Emerick from practicing cardiology at a hospital or emergent care clinic, making house calls, prescribing medicine, ordering tests, or otherwise caring for patients,

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(3) whether enforcing the covenant would injure the public through loss of the employee's service and skill to the extent that the court should not enforce the covenant, i.e., whether it violates public policy. Perry v. Moran, 109 Wn.2d 691, 698, 748 P.2d 224 (1987), judgement modified on recons. on other grounds, 111 Wn.2d 885, 766 P.2d 1096 (1989).

and nothing would preclude a patient from selecting the cardiologist of his or her choice. Finally, the trial court concluded that CSC obtained injunctive relief and substantial enforcement of the noncompete agreement against Emerick and was thus the substantially prevailing party.

On September 25, 2013, CSC, as the substantially prevailing party, moved for attorney fees. On October 18, 2013, the trial court entered its judgment and findings of fact and conclusions of law regarding the award of attorney fees and costs to CSC. It concluded that CSC was entitled to attorney fees and costs for all activities, hearings, and motions related to the litigation except the fees and costs of the Emerick I appeal. The trial court found that the fees on the appeal were denied by Division Two and declined to award them.

Emerick appeals the trial court's order granting CSC's motion for summary judgment, its judgment and order granting CSC's motion for prevailing party attorney fees and costs, and its findings of fact and conclusions of law regarding CSC's award of attorney fees and costs. Specifically, Emerick claims the trial court erred when it granted CSC injunctive relief beyond the terms of the noncompete, when it found that CSC was the substantially prevailing party, and when it awarded attorney fees without making necessary reductions. CSC cross appeals the trial court's denial of its request for fees from its earlier successful appeal.

DISCUSSION

I. Reasonability and Enforceability of the Noncompete Covenant

Emerick argues that the trial court erred in granting CSC's motion for summary judgment. Specifically, he argues that the covenant, even as reformed, is unreasonable and unenforceable.

This court reviews a grant or denial of summary judgment de novo. Washburn v. City of Federal Way, 169 Wn. App. 588, 609, 283 P.3d 567 (2012), aff'd, 178 Wn.2d 732, 310 P.3d 1275 (2013). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). In conducting this inquiry, the court must view all facts and reasonable inferences in the light most favorable to the nonmoving party. Hisle v. Todd Pac. Shipyards Corp., 151 Wn.2d 853, 860-61, 93 P.3d 108 (2004).

As a preliminary matter, Emerick argues that summary judgment was inappropriate because there are disputed material facts as to the reasonableness of the noncompete covenant. These facts include whether (1) Emerick traded on CSC's goodwill in establishing his new practice, (2) Emerick is in competition with CSC, (3) CSC has any goodwill to protect given Emerick's unique practice, different patient pool, and ability to continue seeing patients that he treated while working for CSC, and (4) the location of Emerick's new practice unreasonably competes with CSC's location given the fact that Emerick has no signage and cannot be seen from CSC's office. Emerick contends that he raised these genuine issues of material fact below and CSC failed to rebut them, relying instead on conclusory statements.

But, these facts go to whether Emerick's current cardiology practice is causing actual harm to CSC, which has no bearing on the reasonableness and enforceability determination. That determination considers the reasonability of the noncompete covenant as written as opposed to whether and how much the employer experiences actual harm and competition.[2]

Under Washington law, noncompete covenants are enforceable if they are reasonable and lawful. Emerick I, 170 Wn. App. at 254. The determination of whether a covenant is reasonable is a question of law. See Alexander & Alexander, Inc. v. Wohlman, 19 Wn. App. 670, 684, 578 P.2d 530 (1978). As the reasonability of the noncompete covenant is a legal question, this court's review is de novo. Labriola v. Pollard Grp., Inc., 152 Wn.2d 828, 832, 100 P.3d 791 (2004).

The three part test for reasonableness asks (1) whether the restraint is necessary to protect the employer's business or goodwill, (2) whether it imposes on the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether enforcing the covenant would injure the public through loss of the employee's service and skill to the extent that the court should not enforce the covenant, i.e., whether it violates public policy. Perry v. Moran, 109 Wn.2d 691, 698, 748

[2] It is worth noting that much of the case law considering the enforceability and reasonability of noncompete covenants does discuss whether the employee was actually in competition at the time the action commenced. See, e.g., Perry, 109 Wn.2d at 694; Knight, Vale, Gregory & McDaniel, 37 Wn. App. 366, 367, 680 P.2d 448 (1984). But, those cases are all breach of contract cases where the employer needed to prove actual harm—not actions for declaratory relief where only general covenant enforceability was at issue. Perry, 109 Wn.2d at 694; McDaniel, 37 Wn. App. at 367; Nw. Indep. Mfrs. v. Dep't of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

P.2d 224 (1987), judgment modified on recons. on other grounds, 111 Wn.2d 691, 748 P.2d 224 (1987).

A. Necessary for Employer

The first factor in the three part test is whether the noncompete restraint is necessary to protect the employer's business or goodwill. Id.

A restrictive covenant protects an employer's business as warranted by the nature of employment. Wood v. May, 73 Wn.2d 307, 310, 438 P.2d 587 (1968). An employee who joins an established business gains access to his employer's customers and acquires valuable information as to the nature and the character of the business. Id. This exposure to the employer's clients and business model allows the employee to compete with his employer after he leaves the employment. Id. To protect the employer's business, equity allows the employer to require the employee to sign a noncompetition agreement. Id.

Specifically, the law in Washington is clear that an employer has a " 'legitimate interest in protecting its existing client base' " and in prohibiting the employee from taking its clients. Emerick I, 170 Wn. App. at 255 (quoting Perry, 109 Wn.2d at 700). And, Washington courts have recognized the importance of an employer investment, providing office space, equipment, and an existing patient following, in the medical noncompete agreement context. Ashley v. Lance, 75 Wn.2d 471, 476, 451 P.2d 916 (1969).

Here, there is clear evidence in the record that CSC 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 noncompete against any other departing member.

Further, CSC provided Emerick with an immediate client base and established referral sources when Emerick moved to Washington to practice in an oversaturated and competitive cardiology market.[3] Emerick, as a shareholder, benefitted from CSC's reputation, connections, and facilities. And, he was privy to information about CSC's business—including confidential information.

Still, Emerick argues that CSC failed to demonstrate why the noncompete was necessary to protect its goodwill and business interests. He contends that it was not enough that CSC prove, via generalized statements, that it has protectable business interests. He claims that CSC needs to prove that the noncompete is necessary to protect its business interests, because Emerick has already taken actual affirmative steps to threaten CSC's business interests.

He is wrong. CSC needs to demonstrate a protectable interest exists and that Emerick could pose a threat to that interest if not adequately restrained. CSC has done so. It does not have to prove actual competition or damages. Emerick does not dispute that he could have competed and damaged CSC. He merely asserts that he has not relied on CSC's referral sources or traded on his prior employment at CSC since leaving

[3] Emerick argues that CSC's claim that its client base is a protectable business interest is belied by the fact that CSC acknowledged that Emerick can continue seeing the patients he treated while he was employed by CSC. But, that argument acknowledges both that the interest exists and that only a portion of it is not subject to protection.

CSC, and therefore the enforcement of the covenant is not necessary. But, it is the potential to compete—not the actual competition—that makes the noncompete necessary. In fact, he has an office in close proximity to CSC from which he practices cardiology. The risk is clear, as is the need for the restraint.

We hold that CSC had business interests and goodwill to protect and that the noncompete agreement was necessary to protect those interests.[4]

B. Scope of Restraint

The second reasonableness factor focuses on the extent to which the covenant adversely affects the employee's ability to earn a living. Emerick I, 170 Wn. App. at 256. Generally, a court determines the reasonableness of a covenant by analyzing its geographic and temporal restrictions. See Wood, 73 Wn.2d at 311-12. If the trial court determines that certain terms of the covenant are unreasonable—such as the geographic and temporal scope of the restraint—the entire covenant does not fail. Id. at 312. The court should still seek to enforce the covenant to the extent reasonably possible to accomplish the contract's purpose.[5] Id. Specifically, the court considers whether partial

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[4] Emerick also relies on an unpublished federal order to argue that the noncompete covenant here fails under this first factor of the test, because noncompete covenants should never create general restrictions on competition. See Order of the U.S. District Court, Amazon.com, Inc. v. Powers, 2012 WL 6726538, at *9 (W.D. Wash. Dec. 27, 2012). But, even assuming Amazon was binding authority on this court, the Amazon court conceded that although Washington courts have looked more favorably on restrictions against working with specific former clients or customers, Washington courts will enforce general noncompetition restrictions that apply in a limited geographical area. Id. at *9. Here, the trial court enforced the noncompete, but with geographic restrictions. Therefore, Emerick fails to provide support for his assertion that the generally restrictive nature of the noncompete is per se unnecessary to protect CSC's interests.

[5] Emerick also agreed to this partial enforcement when he signed the Agreement. Paragraph 13(f) of the Agreement stated that "In the event a court of competent jurisdiction should decline to enforce any provision of paragraph 13(e), such paragraph

enforcement is possible without injury to the public and without injustice to the parties. Id. at 313.

In Emerick I, Division Two instructed the trial court to balance CSC's actual protectable business interests against the time and geographic restrictions on Emerick's ability to earn a living. 170 Wn. App. at 257. On remand, as to the geographic restriction, the trial court accepted CSC's concession that the covenant as written—preventing Emerick from practicing in all of Pierce County and Federal Way—was too broad. The trial court took judicial notice of a map of Pierce County and concluded that a two mile area of protection around each of CSC's offices would serve to protect CSC's business interests, but would also allow Emerick viable areas of Pierce County in which to locate his practice. And, the trial court emphasized that the noncompete covenant does not restrict Emerick's ability to work at any hospital. As to the temporal restriction, the trial court reformed the covenant's original restraints to four years instead of the five years originally in the covenant. It reasoned that four years would be appropriate to protect CSC's interests in being free of competition from Emerick and that it would be a reasonable amount of time for Emerick to build a practice at a place that is reasonably distant from CSC's current offices.

Under the terms of the reformed noncompete covenant, Emerick can practice cardiology at a hospital or emergent care clinic, make house calls, prescribe medicine, order tests, set up an office outside of the geographically limited area, and otherwise care for patients he previously treated at CSC or any other patients who wish to see him.

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shall be deemed to be modified to restrict [Emerick]'s competition with [CSC] to the maximum extent, in both time and geography, which the court shall find enforceable."

Emerick is only precluded from establishing an office within the geographical areas set by the terms of the covenant and from soliciting CSC's patients. Still, Emerick argues that the geographic and temporal restraints the covenant imposes—even the reformed restraints—are excessive and unreasonable.[6]

Emerick argues that as a matter of law, the temporal restraint is unreasonable, because no Washington appellate court has ever found that a four or five year restrictive covenant is reasonable. He cites to Perry in which the court stated, "It may be that a clause forbidding [accounting services] for a 5–year period is unreasonable as a matter of law." 109 Wn.2d at 703-04. But, the Perry court did not hold that a five year noncompete is unreasonable as a matter of law. And, the noncompete at issue in Perry did not have geographical limitations[7]—distinguishing it from the temporally and geographically limited noncompete at issue here. Id. at 693, 701-02.

Emerick also relies on Armstrong v. Taco Time International, Inc., 30 Wn. App. 538, 541, 635 P.2d 1114 (1981) to support that no Washington appellate court has ever found a four or five year temporal restraint reasonable. The original noncompete covenant in Taco Time prevented former franchisees from selling Mexican food nationally

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[6] Emerick contends that this court must consider the reasonableness of the geographic and temporal limitations separately. In so far as Emerick urges this court to completely divorce the reasonability of the noncompete covenant's temporal limitation from the geographic limitations, his argument is flawed. While courts have engaged in the geographic and temporal reasonableness analyses separately, Emerick points to no authority that explicitly says the two factors must be considered in isolation.

[7] Emerick also relies on Labriola, 152 Wn.2d at 847 (Madsen, J., concurring) for the assertion that broad sweeping postemployment restraints that generally limit competition are never reasonable. But, the majority in Labriola did not reach the determination as to whether the noncompete agreement was reasonable. Id. at 842. And, the noncompete agreement analyzed in Justice Madsen's concurrance in Labriola was much broader in geographical scope (75 miles) than the noncompete covenant here. Id. at 847, 831.

for five years after termination of the franchise. Id. at 540. The trial court reduced the five year noncompete to two-and-a-half-years. Id. at 541. The Court of Appeals also reformed the geographic restrictions of the noncompete. Id. at 545. It reduced the national scope of the covenant to areas covered by existing franchise agreements with which the former franchisee would be competing. Id. Even though the covenant in Taco Time was reformed to a shorter duration than the four or five years here, the geographic limitations in Taco Time were more restrictive and had the potential to exclude very large geographic areas. See id. Therefore, Emerick errs in so far as he relies on Taco Time for the assertion that two-and-a-half-years is a more appropriate temporal restriction without considering the connected geographic limitations.

Emerick argues that although the trial court correctly concluded that the original five year temporal restraint was unreasonable, it erred when it rewrote the restraint for "such a lengthy time period"—four years. But, none of the case law cited leads us to conclude that Emerick's argument that a four or five year temporal term in a noncompete covenant is per se unreasonable as a matter of law. The temporal term must be considered in the context of the entire convenant.

Emerick also argues that the trial court erred in concluding that a two mile geographic restriction is reasonable. Emerick argues that there is no evidence in the record showing that such a restriction is necessary to preserve CSC's legitimate business interests. In support of his argument, Emerick once again relies on evidence that his new practice is not attracting any patients or business away from CSC. This argument is misplaced. The necessity of some restriction was addressed in consideration of the first

factor. Consideration of duration and geography are more properly focused on whether the restriction is excessive.

Washington courts have previously concluded that geographically restricted areas greater than two miles are reasonable. See, e.g., Taco Time, 30 Wn. App. at 544-45 (concluding that a 25 mile geographic limitation might be insufficient to protect franchisees from competition); Alexander, 19 Wn. App. at 687-88 (concluding that a geographic limitation of the "greater Seattle area" was reasonable). None of the case law cited establishes that the two mile geographic restraint is per se unreasonable as a matter of law.

Under the reformed noncompete, Emerick is not restrained from practicing cardiology at any hospital or emergent care clinic, making house calls, prescribing medicine, ordering tests, or otherwise caring for patients. While Emerick is restricted from establishing a practice within a two mile radius of any existing CSC office for four years, the reformed noncompete does not preclude him from establishing a competitive cardiology practice immediately outside of the restricted area. Emerick has not established, on balance, that the reformed noncompete covenant as a whole unreasonably infringes on his ability to earn a living in cardiology or that it provides unreasonable protection to CSC.

We conclude that the temporal and geographic scope of the reformed covenant is reasonable.

C. Public Policy

The public policy factor of the three part reasonableness test requires the court to balance possible harm to the public by not enforcing the covenant against the employer's

right to protect its business. Wood, 73 Wn.2d at 309-10. Emerick first argues that CSC's noncompete covenant creates a substantial risk of injury to the public and that restrictive covenants against doctors violate public policy as a matter of law. In so arguing, Emerick effectively asks this court to disregard the first two factors of three part test.

In Emerick I, Division Two reiterated the three part test and stated that "Washington courts have not yet held that restrictive covenants between physicians are unenforceable." 170 Wn. App. at 259. The Emerick I court criticized Emerick's argument that the balancing was unnecessary and criticized his reliance on cases from other jurisdictions that have declined to enforce covenants between physicians. Id. at 258-59. It reasoned that reliance on cases from other jurisdictions was inappropriate, because some of the other jurisdictions have legislatively precluded restrictive covenants in a medical setting and Washington has not done so. Id. And, it cited to Ashley, 75 Wn.2d 473, where the Washington Supreme Court upheld a noncompete agreement among physicians. Emerick I, 170 Wn. App. at 259. After Emerick I was decided, the Washington Supreme Court denied Emerick's petition for review. See Emerick v. Cardiac Study Ctr., Inc., 175 Wn.2d 1028, 291 P.3d 254 (2012).

Therefore, to the extent Emerick claims that all noncompete covenants between physicians are void as a matter of public policy—and attempts to avoid engaging in the requisite three part analysis and individualized balancing test under Washington law—his argument fails. But, we must still consider whether enforcement of the covenant creates a possibility of harm to the public. See Emerick I, 170 Wn. App. at 257. Such harm may include restraint of trade, limits on employment opportunities, and denial of public access

to necessary services. Id. And, if necessary, we must balance these concerns against the employer's right to protect its business. Id.

Under the reformed covenant, Emerick is able to practice in Pierce County and Federal Way. The proscribed areas are circles of a two mile radius. This would not force Emerick's patients to travel inordinate distances. And, nothing in the covenant would preclude Emerick from practicing cardiology on his former or new patients at any hospital or preclude a patient from selecting and using the cardiologist of his or her choice. Therefore, we conclude that the reformed covenant does not result in denial of public access to necessary services or cause any other harm to the public.

After applying the appropriate three part test, we conclude that the reformed noncompete covenant is reasonable and enforceable.

II. Injunctive Relief

Next, Emerick argues that even if the covenant as reformed by the trial court is reasonable and enforceable as written, the trial court erred when it granted injunctive relief and when it tolled the duration of the noncompete until Emerick relocates his office.

The trial court ordered that for 28 months after Emerick relocates his cardiology practice from its current address, Emerick is enjoined from maintaining his practice in a location within two miles of CSC's offices. The trial court reasoned that Emerick was not competing with CSC from his termination in September 2009 to June 2011 when he opened his practice—20 months. Therefore, it concluded that Emerick was entitled to credit for those 20 months and needed to honor only the remaining 28 months of the 48 month restriction.

Because a trial court has broad discretionary authority to fashion equitable remedies, this court reviews such remedies under the abuse of discretion standard. Cornish College of the Arts v. 1000 Virginia Ltd. P'ship, 158 Wn. App. 203, 221, 242 P.3d 1 (2010).

Emerick first argues that injunctive relief is not available after a noncompete covenant expires.[8] He cites to Alexander for this assertion. In Alexander, the Court of Appeals held that because the noncompete covenant had expired by the time the case reached the Court of Appeals, it was not within its authority to award injunctive relief. See 19 Wn. App. at 688. But, it specifically stated that had the trial court found that the noncompete covenants were valid, it could have granted injunctive relief because the covenant had not yet expired at that point. Id.

Here, at the time the trial court ordered the injunctive relief, September 11, 2013, the original terms of the five year noncompete had not yet expired. The original five year noncompete would not have expired until September 30, 2014. Because the noncompete covenant was still viable at the time the trial court awarded the injunctive relief, this case is distinguishable from Alexander.

Emerick's reliance on National School Studios, Inc. v. Superior School Photo Service, Inc., 40 Wn.2d 263, 242 P.2d 756 (1952) and Economics Laboratory, Inc. v. Donnolo, 612 F.2d 405 (9th Cir. 1979) is similarly misplaced. In National Schools, the

[8] Emerick also assigned error to the trial court's conclusion that he was in competition with CSC in violation of the noncompete covenant and claims that there are disputed facts that exist as to whether injunctive relief is even appropriate. But, he provides no additional argument or authority to support it. A party waives an assignment of error not adequately argued in its brief. Milligan v. Thompson, 110 Wn. App. 628, 635, 42 P.3d 418 (2002); see RAP 10.3(a)(6).

trial court declined to order injunctive relief. 40 Wn.2d at 265. The Washington Supreme Court found that the question was moot, because no judgment it entered for injunctive relief could have become effective prior to the expiration of the restrictive covenant. Id. at 270. Here, although the original restrictive period has now elapsed, we are not in a position where we need to order injunctive relief—the trial court has already done so. And, it did so prior to the expiration of the original restrictive period. In Economics Laboratory, the Ninth Circuit concluded that the district court should have denied a request for an injunction that was first made after the restrictive period had elapsed. 612 F.2d at 408. Again, in Emerick's case, the trial court ordered injunctive relief during the original restrictive period.

Next, Emerick argues that the trial court had no basis to toll the running of the noncompete covenant. And, Emerick argues that the tolling effectively granted CSC a seven year restrictive covenant in excess of what was bargained for or what is reasonable.

But, in so arguing, Emerick is effectively asking this court to credit Emerick with two years of compliance with the noncompete covenant when he has been practicing cardiology in violation of the covenant. If we were to accept Emerick's argument that the covenant should not have been tolled, the restrictive covenant would have expired September 30, 2013. That would mean that Emerick used the litigation to his advantage—the covenant would have expired before resolution of the dispute and Emerick would have violated the restrictive covenant without consequence.

The trial court granted the injunctive relief just days before the noncompete covenant would have expired. We conclude that trial court was within its equitable

authority and did not abuse its discretion when it tolled the running of the noncompete covenant until Emerick is in compliance to ensure that Emerick was not rewarded for his violation of the covenant. The trial court did not abuse its discretion when it granted equitable relief that provides CSC the benefit of its bargain.[9]

III. Substantially Prevailing Party

Emerick also contends that the trial court erred when it concluded that CSC was the substantially prevailing party. Specifically, Emerick claims that, because the trial court rejected the relief sought by both parties and instead granted relief neutral to each party's requests, neither party is the prevailing party.

In general, a prevailing party is one who receives an affirmative judgment in his or her favor. Riss v. Angel, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). If neither party wholly prevails, then the determination of who is a prevailing party depends upon who is the substantially prevailing party. Id. at 633-34. This question depends upon the extent of the relief afforded the parties. Id. Whether a party is a prevailing party is a mixed question of law and fact that this court reviews under an error of law standard. Cornish College, 158 Wn. App. at 231.

Emerick first claims that, because the trial court concluded that CSC's noncompete was unreasonable and unenforceable, the court granted Emerick the relief he sought from the outset. At the outset of the litigation, Emerick filed a complaint seeking declaratory relief that paragraph 13 of the Agreement—in its entirety—is void and unenforceable as

[9] Moreover, although 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 his office.

against public policy. Emerick sought a permanent injunction enjoining CSC from enforcing paragraph 13 and a judgment declaring paragraph 13 unenforceable. Conversely, CSC sought declaratory relief that the noncompete covenant is enforceable.

Emerick argues that the trial court must have found the noncompete covenant unenforceable before it could revise the agreement. He relies on Perry for the assertion that a modification to a covenant is proper only where the original covenant is unenforceable. But, Emerick's reliance on Perry for that assertion is misplaced. The Perry court concluded that the trial court erred in modifying the covenant, because the covenant there was reasonable and therefore did not require modification. 109 Wn.2d at 703. It did not hold that a trial court must find the entirety of a restrictive covenant unenforceable before it may modify it.

Moreover, the trial court did not conclude that the noncompete was unreasonable and totally unenforceable. Rather, it concluded, "The covenant not to compete . . . is overly broad, unreasonable and therefore unenforceable with respect to the geographic (Pierce County and Federal Way, Washington) and temporal (60 months) restraints it seeks to impose, as those restraints are greater than is reasonably necessary to protect Defendant's interests."

Emerick then relies on authority from other jurisdictions. Specifically he contends that there is no reported Washington decision addressing whether there is a prevailing party for purposes of attorney fees when the trial court modifies a noncompete covenant. But, there is analogous case law that states that simply because one party is not afforded as much relief as is originally sought, does not mean that the opposing party has obtained relief. Silverdale Hotel Associates v. The Lomas & Nettleton Co., 36 Wn. App. 762, 774,

677 P.2d 773 (1984). In Silverdale, Lomas & Nettleton argued that neither party prevailed in the case, because both parties received relief. See Id. But, the court rejected that argument stating that just because the damages against Lomas & Nettleton were not as high as Silverdale originally prayed for, does not mean that Lomas & Nettleton received relief. Id. at 774. Similarly, here, just because certain terms of the noncompete were modified, does not mean that Emerick received relief when the covenant was still substantially enforced.

The trial court did not err when it concluded that CSC was the substantially prevailing party.

IV. Fee Award Calculation

Emerick argues that the trial court abused its discretion when it awarded CSC $204,251.39 in attorney fees and costs. The trial court's fee award included expenses for all activities, hearings, and motions related to this litigation, including those through the entry of the findings and conclusions related to the attorney fee award. We review an award of attorney fees for abuse of discretion. Steele v. Lundgren, 96 Wn. App. 773, 780, 982 P.2d 619 (1999).

Emerick first argues that CSC's fees should be limited to the amount of fees for prevailing on its motion for summary judgment. He further argues that CSC is not entitled to fees for claims on which it was previously unsuccessful. But, Emerick provides no authority to support either of these assertions. Therefore, he has not established that the trial court abused its discretion.

Emerick also contends that CSC is not entitled to attorney fees for administrative tasks performed by attorneys. He contends that CSC billed $3,275 in attorney time for

administrative tasks. Emerick requested a reduction of the same amount of fees for administrative tasks below. While compensation for administrative tasks such as preparing pleadings for duplication, delivering copies, and requesting copies, are not within the realm of reasonable attorney fees, the trial court acknowledged that CSC excluded those billings. N. Coast Elec. Co. v. Selig, 136 Wn. App. 636, 644, 151 P.3d 211 (2007). The trial court found that CSC reduced its request for attorney fees by $6,326 or other noncompensable time included in the billing records. It reasoned that this amount exceeded the amount of reductions Emerick sought. On appeal, Emerick does not specify why the $6,326 reduction was inadequate to address the administrative tasks in the billing. As such, we have no grounds upon which to conclude the trial court abused its discretion in refusing to reduce the fee award further.

Emerick then contends that the trial court improperly awarded CSC attorney fees for matters unrelated to the litigation. Specifically, he contends that CSC was not entitled to fees for its efforts to terminate Emerick, to determine its potential conflicts of interest, corporate work for CSC, legal action CSC considered against nonparties, and its work on malpractice coverage. But, Emerick provides no authority to support the assertion that the trial court did not exclude fees for unrelated work nor does he provide specific argument or authority indicating that the trial court abused its discretion in making its calculation.

Finally, Emerick claims that the fees and costs were unreasonable because CSC did not exercise billing discretion. He contends this is so, because 15 attorneys worked on the briefing constituting duplicative work. Emerick compares the amount of fees he was entitled to earlier in the litigation to the amount of fees CSC would have collected at

that point in time and claims that CSC's fees were 405 percent greater. But, Emerick does not provide any authority for the assertion that a party is per se not entitled to fees when it has a large number of attorneys working on the case or because its fees are much higher than its opponent's fees.

Finally, CSC incurred costs when it hired an analyst to determine the ratio of adult cardiologists to population in Pierce County and Federal Way. It did so in order to show that the public would not be harmed by the restrictions placed on Emerick by the noncompete provision. Emerick claims that the $7,400 cost of the analyst was unreasonable, because "it is excessive given the market." But, Emerick provides no authority to support this assertion.

Emerick provides no basis upon which we can conclude that the trial court abused its discretion in ordering the fee award in the amount that it did.

V. CSC's Fees for *Emerick* I

CSC cross appeals and argues that the trial court erred as a matter of law by denying it fees incurred during the Emerick I appeal.

Whether a party is entitled to attorney fees is an issue of law that this court reviews de novo. Unifund CCR Partners v. Sunde, 163 Wn. App. 473, 484, 260 P.3d 915 (2011). RAP 18.1 states that applicable law must grant a party the right to recover reasonable attorney fees or expenses on review before the Court of Appeals. RCW 4.84.330 provides attorney fees to the prevailing party on contracts that specifically provide for an

attorney fee and costs award. Here, the Agreement authorized attorney fees to the prevailing party, including fees on appeal.[10]

Division Two first issued its opinion in Emerick I, unpublished, on February 23, 2012. In that opinion, Division Two vacated Emerick's attorney fee award, remanded for further proceedings, and awarded CSC statutory attorney fees on appeal. Emerick I, slip op. at 11. Subsequently, on July 10, 2012, Division Two issued an order amending the opinion. Order Amending Opinion, Emerick v. Cardiac Study Ctr., Inc., No. 41597-6-II, at 1-2 (Wash. Ct. App. Jul. 10, 2012). The order clarified that it awarded CSC its costs on appeal as the prevailing party, but it denied CSC's request for attorney fees under RAP 18.1, because CSC did not devote a section of its opening brief to the request for fees. Id. Then, on August 8, 2012, Division Two issued an order amending the opinion again and granting a motion to publish. Order Amending Opinion & Granting Motion to Publish, Emerick v. Cardiac Study Ctr., Inc., No. 41597-6-II (Wash. Ct. app. Jul. 10, 2012). Among other things, the order reverted to the language regarding CSC's fees from the original opinion—CSC is awarded statutory attorney fees. Id. at 1-2. There was no mention of CSC's RAP 18.1 fees.

On remand, the trial court found that CSC's attorney fees were reasonable for work performed at the trial court both before and after remand, but it ultimately determined that CSC did not have a legal basis for recovering its prevailing party attorney fees for the appellate work. It concluded this was so, because CSC did not follow RAP 18.1's

[10] Paragraph 18 of the agreement provided that, "If either party shall bring any suit or action against the other for any type of relief, declaratory or otherwise, including any appeal thereof, arising out of this Agreement, the prevailing party shall have and recover against the other party, in addition to all court costs and disbursements, such sum as the court may adjudge to be reasonable attorney's fee." (Emphasis added.)

procedural requirement that a party seeking attorney fees request them in its opening brief. In its findings of fact, the trial court reasoned that the fees on appeal were already denied by the Court of Appeals. As a result, it declined to award CSC $83,169.50 in fees incurred on the appeal and $1,368.87 in costs.

CSC claims that the trial court erred as a matter of law when it denied CSC its reasonable attorney fees incurred on appeal. It argues that Washington case law supports an award of prevailing party attorney fees under RAP 18.1 only where the party requesting those fees is the prevailing party in the underlying action. CSC argues that it was not yet the prevailing party on the underlying action until it prevailed on its motion for summary judgment. Therefore, it claims any request for fees pursuant to RAP 18.1 before Division Two would have been premature.

CSC's appeal was a challenge to the trial court's order granting Emerick's motion for summary judgment. See Emerick I, 170 Wn. App. at 250. The Emerick I court's decision had the effect of undoing Emerick's status as the prevailing party, but the court had not yet concluded—and could not yet conclude—that CSC should prevail on the merits of the underlying action. See Id. at 259. CSC did not directly appeal—nor could it—the trial court's denial of its motion for summary judgment. Therefore, a request for fees as the prevailing party on the underlying action would have been premature.

Emerick claims that CSC should be estopped from arguing that a fee award was premature, because it sought attorney fees under RAP 18.1. But, simply because CSC made a premature request for attorney fees, does not mean that it was ineligible to request those fees at a later time—when it was determined to be the prevailing party on the merits of the underlying action.

Emerick also argues that CSC should be estopped from arguing that it was not yet determined to be the prevailing party on appeal because the Emerick I court awarded CSC statutory attorney fees. In other words, Emerick argues that because the trial court declared CSC a prevailing party for purposes of statutory attorney fees on the first appeal, CSC would have been awarded any other prevailing party attorney fees at that time had the Emerick I court wished to award them.

But, the Emerick I court awarded CSC statutory attorney fees not based on a prevailing party contract theory. While not specified in Emerick I, the court likely awarded the statutory fees pursuant to RCW 4.84.080 which provides for $200 of fees in all actions where a judgment is rendered in the court of appeals after argument. RCW 4.84.080 is different than RCW 4.84.330, which provides for recovery of prevailing party attorney fees under a contract.

It was not until after CSC prevailed on summary judgment—until the trial court determined that the noncompete covenant was reasonable as reformed—that CSC became the prevailing party on the underlying contract. Therefore, CSC had no reason to request, and the Emerick I court could not reach the issue of, CSC's prevailing party fees under RCW 4.84.330 and RAP 18.1 until that time. It thus delayed that determination pending resolution of the underlying action on remand.

The trial court erred to the extent that it believed the holding in Emerick I precluded it from awarding CSC attorney fees for the first appeal once it determined that CSC was the substantially prevailing party. We remand to the trial court for consideration of a reasonable attorney fee award, including fees from the first appeal.

VI. Fees for the Current Appeal

Both Emerick and CSC argue that they are entitled to attorney fees and costs for this appeal.

Emerick argues that he is entitled to attorney fees and costs pursuant to RAP 18.1(a) as the prevailing party on this appeal. Similarly, CSC argues that it is the prevailing party in the action and is entitled to fees under RAP 18.1, the terms of the Agreement, and RCW 4.84.330.

CSC prevailed on every issue in this appeal, and is therefore entitled to fees under RAP 18.1. Because we remand to the trial court for reconsideration of the Emerick I attorney fee award, we also remand for the trial court to award reasonable attorney fees for this appeal. See RAP 18.1(i) (stating that the appellate court may direct that the amount of fees and expenses be determined by the trial court after remand).

We remand to the trial court for an award of fees to CSC. We otherwise affirm.

Appelwick, J.

WE CONCUR:

Cox, J.

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Attached for filing in the above matter, please find Cardiac Study Center, Inc.'s Answer to Emerick's Petition for Review to Supreme Court.

Frances Ostruske

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