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No. 11-2-03210-6 (trial court)
No. 72314-6 (Court of Appeals)

COURT OF APPEALS DIVISION I
OF THE STATE OF WASHINGTON

Michael Salewski, D.V.M., an individual,
Appellant

v.

Pilchuck Veterinary Hospital, Inc., P.S., a Washington corporation,
Respondent

REPLY OF APPELLANT IN SUPPORT OF APPELLANT'S OPENING BRIEF

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ARGUMENT

Appellant Dr. Michael Salewski ("Salewski") respectfully submits this reply brief in response to Respondent Pilchuck Veterinary Hospital, Inc. P.S.'s ("Pilchuck") response brief.

I. There are errors of law on the face of the arbitration award thus warranting review by this Court.

Pilchuck argues in its response brief that this matter is not appealable because Salewski is challenging the merits of the underlying decisions by the arbitrator and Trial Court as opposed to errors of law on the face of the award. To the contrary, the arguments advanced by Salewski are not "simply challenges on the merits," as Pilchuck contends, but rather reflect errors of law committed by the arbitrator and Trial Court in this matter.

Washington courts "have repeatedly articulated a rule that explicitly includes facial errors of law as grounds for vacation." *Broom v. Morgan Stanley DW Inc.*, 169 Wn. 2d 231, 237, 236 P.3d 182 (2010). "The error should be recognizable from the language of the award." *Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg*, 101 Wn. App. 119, 123, 4 P.3d 844 (2000). In addition, the Court of Appeals may properly consider "any issue of law evident in the reasoning" of the arbitrator's decision in situations "[w]here a final award sets forth

the arbitrator's reasoning along with actual dollar amounts awarded." *Cummings v. Budget Tank Removal & Envtl. Serv. LLC*, 163 Wn. App. 379, 389, 260 P.3d 220 (2011).

Here, a brief look at the face of the arbitrator's award makes clear that the arbitrator misconstrued established Washington law.

As to the consideration issue, the award states:

> Plaintiff argues as if the agreement signed in January 1, 2007 was the first non-compete agreement that he signed. It was not. The first one was signed the day he began employment in 1992. This current one was the last of three or four such agreements executed by all of the shareholders of Defendant, of which Plaintiff was one. The promises of the other shareholders were consideration for Plaintiff's promise. Thus there was a bargained for exchange of promises. *Williams Fruit Co. v. Hanover Ins. Co.*, 3 Wn.App. 276, 281.

CP 148.

For the reasons discussed in Salewski's opening brief and below, these statements clearly misconstrue Washington law which provides that a subsequent noncompetition agreement and/or a modification **must be supported by separate and independent consideration** (not simply continued employment); promises of other shareholders are not recognized as sufficient consideration under established Washington law. *Labriola v. Pollard Group, Inc.*, 152 Wn. 2d 828, 100 P.3d 791 (2004); *Schneller v. Hayes*, 176 Wn. 115, 28 P.2d 273 (1934).

Similarly, with regard to the liquidated damages issue, the arbitrator concluded:

> This arbitrator is unable to conclude that is [sic] was a mere penalty in view of the fact that the shareholders had decided to increase the amount from $200,000 to $300,000 and declared that the terms of the agreement were necessary for the protection of the Defendant and that the non-compete provisions contained therein did not create any undue hardship for any of the shareholders.

CP 150.

Again, this was clear error inasmuch as the liquidated damages provision constitutes an unenforceable penalty under Washington law. *Lind Building Corp. v. Pacific Bellevue Developments*, 55 Wn. App. 70, 75, 776 P.2d 977 (1989).

Accordingly, the issues articulated by Salewski are appealable because they appear on the face of the award. Moreover, because the award sets forth the arbitrator's reasoning along with the dollar amount awarded, any issue of law evident in the arbitrator's reasoning is reviewable as well.

II. Pilchuck's reliance on Georgia law is misplaced; under Washington law, promises of the other shareholders cannot serve as additional, independent consideration for the noncompetition covenant.

Pilchuck's response focuses almost exclusively on the 1993 Georgia Court of Appeals case of *Pittman v. Harbin Clinic Professional*

Association, 210 Ga. App. 767, 437 S.E.2d 619 (1993), rather than addressing relevant Washington law (*e.g.*, *Labriola; Schneller*). Pilchuck urges this Court to abandon well-settled law and adopt an entirely new test to govern the consideration required in noncompetition agreements when the employee is a shareholder or partner.

Pilchuck's argument, however, is a red herring, as the framework for analyzing noncompete agreements in Washington does not, and need not make a distinction between noncompete agreements entered into between employers and employees versus those entered into between or among partners or shareholders. Rather, the critical inquiry under Washington law is whether the agreement "unreasonably restrict[s] the freedom of current or former employees to earn a living." *Labriola*, at 846-847 (Madsen, J., concurring). If the subject agreement unreasonably restrains an individual from his "lawful use of labor and skills," the agreement is unenforceable as a matter of law. *Id.*

Nothing in *Labriola* or the cases decided before (or since) suggest the Washington Supreme Court would apply an alternative test, or weigh any of the relevant factors differently, simply because the party being asked to sign the agreement was a shareholder or partner. Indeed, at the time Salewski parted ways with Pilchuck, and for the preceding 18 months, he was in fact an employee. CP 147.

Moreover, the language of the 2007 noncompetition agreement itself betrays to a large extent the suggestion Salewski was on equal terms with the "Principal" at the time he was required to sign the agreement. The actual language of the agreement provides that "acceptance of the terms of this Agreement by Employee is a pre-condition imposed by Principal to entering into or continuance of an employment agreement." CP 109. In addition, the "promises" made by the shareholders were not made to Salewski, but simply their own individual "promises" to Pilchuck in their own, separate employment agreements.

Similarly, Pilchuck's reliance on *Ashley v. Lance*, 75 Wn. 2d 471, 451 P.2d 916 (1969) is also misplaced. While *Ashley* is a Washington case, and was concerned in part with a noncompete agreement, the issue in *Ashley* was whether the sole remaining "partner" could avail himself of the remedies available under a partnership agreement. *Id.* at 472.

The trial court in *Ashley* ruled the partnership agreement was not enforceable because one doctor does not meet the legal definition of a "partnership." *Id.* at 474. The Washington Supreme Court reversed, holding that the plaintiff could invoke the partnership agreement despite being the only remaining partner. *Id* at 476-77. Importantly, and as recognized by Pilchuck, the *Ashley* court never addressed the salient issue of whether the noncompete agreement was supported by sufficient

consideration or whether the terms were reasonable under Washington law. Consequently, *Ashley* is not helpful to Pilchuck and does not in any way suggest a different test should apply where a noncompete is executed by a professional as part of an initial or ongoing partnership or other joint venture.

III. The liquidated damages provision is a penalty and hence unenforceable, despite agreement by the shareholders on the amount of liquidated damages to be paid.

Pilchuck argues the liquidated damages provided for under the parties' agreement does not constitute a penalty inasmuch as the shareholders agreed to that amount. Rather than explain how such a large figure ($300,000 for any violation) is a reasonable forecast of potential harm, Pilchuck rests on the fact that such an amount was agreed to by the shareholders.

Liquidated damage clauses are considered penalties and consequently unenforceable when they are punitive in nature and not an attempt to estimate damages in the event of a breach. "Its essence is a payment of money stipulated as in terrorem of the offending party, while the essence of liquidated damages is a genuine covenanted pre-estimate of damages." *Lind Building Corp. v. Pacific Bellevue Developments*, 55 Wn. App. 70, 75, 776 P.2d 977 (1989).

Here, the $300,000 figure for a violation simply cannot be construed as "a genuine covenanted pre-estimate of damages." *Id.* It is not based on any formula and bears no reasonable relation to any actual damage that might befall Pilchuck if a veterinarian were to leave the practice and compete. This is especially the case here where the $300,000 must be paid for any violation during the three-year period, whether inside the 50-mile geographic radius for a single patient who had no connection to Pilchuck, or without geographic bounds for anyone formerly treated at Pilchuck. The shareholders' agreement as to this figure is simply not sufficient to justify it; following this logic, all cases of liquidated damages would not be subject to challenge inasmuch as they are agreed to prior to a dispute arising.

The arbitrator summarily concluded the liquidated damages clause was enforceable and erred on the face of the award in upholding it. Given the lack of any meaningful basis on which the $300,000 figure is based, the liquidated damages clause must properly be characterized as a penalty.

CONCLUSION

For the reasons set forth above and in Salewski's Opening Brief, Appellant respectfully requests that the judgment of the Trial Court be reversed and that the arbitration award entered on July 14, 2014 be vacated.

DATED this 9th day of February, 2015.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing REPLY OF APPELLANT IN SUPPORT OF APPELLANT'S OPENING BRIEF was served on:

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by the following indicated method or methods:

X by sending a full, true and correct copy thereof via **overnight courier** in a sealed, prepaid envelope, addressed to the attorney as shown above, to the last-known office address of the attorney, on the date set forth below.

Dated this 9th day of February, 2015.

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