72314-6

72314-6

No. 72314-6-I

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.

ON APPEAL/REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR SNOHOMISH COUNTY
No. 11-2-03210-6

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant, Michael Salewski, D.V.M., ("Salewski") has appealed a Snohomish County Superior Court Order confirming an arbitration award and denying Appellant's Motion to Vacate the Award on July 14, 2014.

At issue is the enforceability of a non-competition agreement and a liquidated damages clause within the agreement. Salewski was employed by Pilchuck Veterinary Hospital, Inc., P.S. ("PVH") and signed various binding non-competition agreements between 1992 and 2007. Salewski was also a shareholder between 1998 and 2009. Salewski sold his shares in PVH to the other shareholders in the Spring of 2009 but remained an at-will employee until 2010. The Stock Redemption Agreement signed by Salewski when he sold his shares of PVH provided that the non-compete agreement from 2007 was in full effect through the remainder of Salewski's employment and the agreement to pay for the shares was conditioned upon the non-compete agreement.

In 2010 PVH became aware that Salewski had violated the non-compete agreement and stopped making the regular payments under the promissory note for the purchase of his shares. Salewski filed an action for breach of the promissory note. PVH filed a counter claim for breach of the non-compete agreement and enforcement of the liquidated damages clause.

The breach of the promissory note is not at issue here. The parties agreed to go to binding arbitration to settle the non-competition agreement breach and enforceability of the liquidated damages clause. The Arbitrator found in favor of PVH.

In May 2014 PVH filed a Motion for Order of Confirmation of Arbitration Award with the Snohomish County Superior Court. Salewski filed a Motion to Vacate the Arbitration Award. On July 14, 2014 Superior Court Judge Richard T. Okrent issued an order confirming the arbitration award and denying Salewski's Motion to Vacate. Salewski filed this appeal on August 7, 2014.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Plaintiff assigns errors to the Superior Court's Order Confirming the Arbitration Award that it is erroneous on its face on the grounds that the non-competition agreement was not supported by consideration and the liquidated damages clause was unenforceable against a single violation of a non-compete agreement and as an unenforceable penalty.

PVH reformulates the issues in this appellate matter as follows:

A. Whether the Arbitration Award is Erroneous on its Face Where the Arbitrator Found Adequate Consideration for the Enforcement of the Non-Compete Agreement

B. Whether the Arbitration Award is Erroneous on its Face Where the Arbitrator Found the Liquidated Damages Were Not a Penalty

C. Whether Respondent is Entitled to Attorneys' Fees and Costs Under the Non-Competition Agreement

III. FACTUAL BACKGROUND

A. Factual History

Dr. Salewski began employment with Pilchuck Veterinary Hospital in 1992 as an associate veterinarian. CP 133. On the date of hire Salewski signed a Agreement Not to Compete. CP 146. In 1998 Salewski signed another Agreement Not to Compete. CP 146. On or around 1998 Salewski became a shareholder of PVH. CP 147. Each time a new shareholder was brought in to the company each shareholder, including Salewski, signed a new set of employment documents including an Agreement Not to Compete. CP 147. In 2007 the Agreement Not to Compete signed by Salewski included a liquidated damages clause of $300,000.00, a fifty mile radius and a three year term limit. CP 147.

In 2008 Salewski indicated he wanted to leave the ownership of PVH and remain an at-will employee. CP 147. A Stock Redemption Agreement was executed on December 31, 2008 between Salewski and the

remaining shareholders. CP 147. The Agreement provided that the Non-Compete Agreement signed by Salewski in 2007 would remain in full force and effect. CP 147.

In December 2010 Salewski notified PVH he would be leaving employment. CP 147. During his exit interview PVH and Salewski discussed the terms of the non-compete agreement. CP 147. Later in 2010 PVH became aware that Salewski was or had violated the non-compete agreement. CP 147. Salewski violated the non-compete agreement by providing veterinary services within fifty miles of PVH and performing services outside of fifty miles from PVH for previous clients of PVH. CP 147. Upon learning of the breach in December 2010 PVH stopped making payments on the Stock Redemption note on the basis that it had a right to a setoff against Salewski for the liquidated damages clause in the Agreement Not to Compete. CP 135.

B. Procedural History

On February 23, 2011 Salewski filed an action for breach of promissory note against PVH in the Snohomish County Superior Court. CP 387-390. PVH counter-claimed for breach of the covenant not to compete and for enforcement of the liquidated damages clause. CP 380-382. On June 12, 2012 Salewski's Motion for Summary Judgment was granted on

breach of the promissory note and PVH's Motion for Summary Judgment was denied. CP 151-152. The parties agreed to arbitrate the enforceability of the non-competition agreement and liquidated damages clause. The arbitration was heard on October 23, 2013. CP 146. On November 4, 2013 Honorable Richard J. Thorpe, retired, issued his ruling in the arbitration for PVH. CP 133. Salewski moved for reconsideration and was denied. CP 143-145. On February 25, 2014 the Honorable Richard J. Thorp affirmed his prior ruling and filed the Arbitration Award with the court. CP 146-150.

On May 14, 2014 PVH filed a Motion for Entry of Arbitration Award with the Snohomish County Superior Court. CP 132-142. On May 21, 2014 Salewski filed a Motion to Vacate Arbitration Award. CP 114-115. On July 14, 2012 the Honorable Richard T. Okrent heard argument and granted PVH's Order on Motion for Entry of Arbitration Award and denied Salewski's Motion to Vacate. CP. 10-14. On August 7, 2014 Salewski filed his Notice of Appeal. CP 2-9.

IV. ARGUMENT

The grounds for vacation of an arbitration award are set forth in RCW 7.04.230 as follows:

> (1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:
> (a) The award was procured by corruption, fraud or

other undue means;

(b) There was:
    i. Evident partiality by an arbitrator appointed as a neutral;
    ii. Corruption by an arbitrator; or
    iii. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
(d) An arbitrator exceeded the arbitrator's powers;
(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or
(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

Arbitration awards can be vacated only upon one of the grounds enumerated in the above statute. Salewski is alleging there is a legal error on the face of the arbitration award. Legal error on the face of the award falls under "exceeding the arbitrator's powers" in subsection (d) of the statute. *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 236 P.3d 182 (2010). *See also Westmark Properties, Inc. v. McGuire*, 53 Wash.App. 400, 766 P.2d 1146

(1989).

The facial legal error standard is very narrow ground for vacating an award. *Broom* at 239. "[C]ourts may not search the arbitral proceedings for *any* legal error; courts do not look to the merits of the case, and they do not reexamine evidence ... the facial legal error standard does not permit courts to conduct a trial de novo when reviewing an arbitration award. *Id.* (citing *Boyd v. Davis*, 127 Wash.2d 256, 262, 897 P.2d 1239 (1995)).

At issue here is whether there is an error of law on the face of the award. Salewski argues that the arbitrator exceeded his powers. PVH maintains the arguments being advanced by Salewski are simply challenges on the merits. The distinction is critical as the courts have repeatedly held a challenge to an arbitration award on the merits is not appealable. Salewski argues the arbitrator erred as a matter of law in his award by finding adequate consideration for the agreement and for upholding the liquidated damages clause of the agreement. These are the same arguments Salewski made in the arbitration, his motion for reconsideration and his motion to vacate the arbitration award. PVH maintains that the award contains no errors of law on its face and therefore this appeal is improper.

If the merits of the case are to be considered, then PVH states the primary issues as whether there was adequate consideration for a non-

compete agreement where the employee was also a shareholder and all the shareholders agreed the continued welfare of the company was adequate consideration for the non-compete agreement and whether a liquidated damages clause in the agreement is enforceable where the shareholders of the company agreed to a specific amount for liquidated damages in lieu of trying to assess actual or projected damages from violation of the agreement.

A. The Arbitrator Did Not Err in Finding Adequate Consideration Where All Shareholders, Including the Employee-Shareholder, Agreed to Sign a Non-Competition Agreement For the Benefit of the Corporation

Restrictive covenants are valid restraints of trade when supported by adequate consideration. "'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. ...'" *Ashley v. Lance*, 75 Wash. 2d 471, 476, 451 P.2d 916, 919 (1969) (quoting *McCallum v. Asbury*, 238 Or. 257, 263, 393 P.2d 774, 777 (1964)).

Dr. Salewski first entered into an agreement not to compete that was ancillary to an employment agreement on December 17, 1992. Restrictive covenants, in one form or another have been an integral part of his employment and progression from associate veterinarian to shareholder/owner/director and back to associate veterinarian within the company. Dr. Salewski does not dispute he has violated the terms of the covenant, but urges it is unenforceable for lack of consideration.

The closest case law in Washington is the above referenced *Ashley*. That case dealt with a partnership agreement between five doctors which contained a covenant not to compete. Four of the five doctors left the partnership and started a new practice down the street. The remaining doctor sued to enforce the non-compete and the liquidated damages clause. The Court held that it was a clear covenant not to compete intended to prevent the harm which occurred when the doctors opened a new practice and that because it was deliberately prepared and freely entered into by professionals it was enforceable. *Id.* at 279. The court upheld both the non-competition agreement and the liquidated damages. *Id.* However, the court provided no discussion as to the adequacy of the consideration given for the non-competition clause within the partnership agreement and so it provides no guidance on what is consideration here.

The mutual entry by shareholders as consideration for a covenant not to compete is a matter of first impression in the State of Washington. The only case which appears to have specifically addressed this case is *Pittman v. Harbin Clinic Professional Ass'n*, 437 S.E. 2d 619, 210 Ga.App. 767 (Georgia 1993). While not binding on Washington Courts, the logic of that case is persuasive. That case differentiates the typical covenant not to compete case from a case such as this where shareholders of equal power enter into a mutual agreement for the benefit of the company and its shareholders similar to the facts in *Ashley*.

The typical covenant not to compete case involves an employee and an employer who are on vastly different bargaining levels. For example, imagine the fry cook at a fast food restaurant. The fry cook obviously does not have the same bargaining power as the manager. These "master/servant" types of cases make up the vast majority of reported cases. The common thread through these cases is that the Employer is attempting to prevent a former employee from working in his profession in some restricted area for some period of time. The issue almost always in these cases is an examination of the circumstances under which the employee executed the covenant not to compete and whether the circumstances were "fair." There is an almost inherent unfairness in these cases because of the

relative bargaining power that exists in the typical master/servant relationship.

The present case involves a case of first impression in the State of Washington. The difference in this case vis-a-vis the typical covenant not to compete case is that the covenants entered into in this case were the result of the mutual bargaining among equal corporation shareholders. So rather than this being a typical master/servant case, it is more akin to a partnership agreement. For the sake of clarity the situations will be labeled accordingly.

PVH relies primarily on *Pittman v. Harbin Clinic Professional Ass'n*, 437 S.E. 2d 619, 210 Ga.App. 767 (Georgia 1993) as that case has almost identical facts as the present case. While PVH realizes the law of the State of Georgia is not binding upon the State of Washington the analysis is instructive. In this appeal PVH is requesting that the *Pittman* rationale be employed to uphold the restrictive covenant that Salewski violated. Even if the rationale of *Pittman* is not adopted, then Washington law still accomplishes the same result, just in a more circuitous fashion through the application of the decision in *Ashley*.

In *Pittman*, neurosurgeons Harris Pittman and Dennis Murphy were both shareholders at the Harbin Clinic Professional Association, a clinic that employed approximately fifty doctors, thirty-five of which were

shareholders. Drs. Pittman and Murphy were invited to join the clinic permanently and become shareholders. The association agreed to re-purchase the stock in the event that they terminated their employment contracts. Drs. Pittman and Murphy each signed restrictive covenants upon becoming shareholders which provided they could pay liquidated damages to compete should they choose. The Court upheld the covenants and Drs. Pittman and Murphy were prohibited from practicing neurosurgery within a thirty mile radius of the Rome, Georgia clinic for a period of one year. In the consolidated case two other doctors at the same practice, not shareholders, had also signed covenants not to compete within a fifty mile radius. The Court held the bargaining power between the company and the non-shareholder doctors was unequal and that the restriction was unforeseeable and unreasonable. *Id.* at 771.

Typical covenant not to compete cases require that the covenant must be entered into upon the start of employment to be enforceable; or that the covenant entered into be accompanied by a raise or introduction to new or privileged information; or that the employee receives some new benefit not otherwise bestowed upon the employee. *Racine v. Bender*, 141 Wash. 606, 609, 252 P. 115 (1927); *Labriola v. Pollard Group, Inc.*, 152 Wn.2d

828, 836-38, 100 P.3d 791 (2004). The issue being whether there was adequate consideration to enforce the agreement.

To be enforceable, all restrictive covenants must pass the muster of elementary contract principles of offer, acceptance, and consideration. The typical employee/employer covenant is reviewed under a stricter level of scrutiny than the partnership restrictive covenant because of the relative bargaining strength of the parties. Because shareholders are on an equal footing from a bargaining standpoint the courts generally apply a looser standard of scrutiny. That is, the courts generally consider that shareholders do not need the same level of protection from one another that a non-owner employee needs from his employer.

The *Pittman* court, quoting *Rash v. Toccoa Clinic Med. Assoc,*. 253 Ga. 322, 320 SE2d 170 (1984) summarized *Rash*, stating that the Supreme Court also examined the respective bargaining positions of the parties and whether the restrictive covenants at issue worked a mutual, rather than a unilateral, advantage. Consideration of these factors draws into sharp focus the differences between professional partnership agreements and employment contracts generally. It weighs in favor of the enforceability of restrictive covenants in the former and against their enforceability in the

latter. The *Pittman* court compared the employment contracts in question and stated:

> The contracts of Drs. Pittman and Murphy are denominated employment contracts. These doctors, however, were shareholders in the [professional association], and when they executed the agreements, they not only committed themselves to the restrictions but also derived a benefit by exacting the same restrictions from the approximately 35 other physician shareholders who executed identical contracts. The covenants obviously provided mutual advantages. *Id.* at 769

Salewski, like all of the other shareholder employees, freely and voluntarily negotiated and entered into the restrictive covenants and "derived a benefit by exacting the same restrictions" from the other shareholders who executed identical contracts. The shareholders need less protection vis-à-vis each other because they have equal bargaining power. The present case is distinguishable from a routine "covenant not to compete" case between a master and a servant (where the master and servant do not have equal bargaining power). It is analogous to a partnership agreement (where the partners have equal bargaining power) and is properly analyzed under those principals and deference. See *Pittman*.

Non-compete agreements among shareholders are more akin to a "partnership agreement" or a partnership relationship rather than a master/servant relationship because each of the shareholders has an equal

say in the operation of the business and each stands to gain or lose when a shareholder leaves and competes. There do not appear to be any reported cases where an employee in a master/servant relationship attempted to enforce a covenant not to compete. This is particularly so where the company has also promised to purchase the stock back in the event of termination of the employment relationship and the redemption price reflects the value inherent in the covenant not to compete.

Where all of the shareholder employees have virtually identical non-compete agreements, the restrictive covenants work a mutual advantage, rather than a unilateral restraint of trade, and the bargaining positions of the shareholders are equal. *Pittman* at 622. The *Pittman* court highlighted the sharp difference between the situation where the non-compete covenants are ancillary to professional partnership agreements (such work mutual benefits to all shareholder/covenantees) versus employment contracts generally (such are restraints on trade and are more closely scrutinized). *Id.* at 622. In other words, the Court explained, a non-compete covenant of professional employee shareholders weighs in favor of the enforceability of restrictive covenants in partnership agreements, and against their enforceability where the covenantee is simply a mere employee. *Id.*

Here, as in *Pittman* and analogous to *Ashley*, the covenants entered into among the doctors were all based upon the presumption and desire of the shareholders that by entering into the covenants not to compete were any one doctor to depart the practice, the remaining doctors would be able to protect their very substantial investment and goodwill in the medical complex the shareholders had created. Indeed, this increased the value of each of their shares and would be paid in the form of a higher share price upon sale or departure from PVH. This equal bargaining power and specific and deliberate negotiation is a broad and fundamental difference from a typical "master-servant" covenant not to compete, and the covenant not to compete in the instant matter is accordingly presumed valid. When the restrictive covenants were entered into it was highly unlikely that any one shareholder imposed his will on the other shareholders knowing who would be the first to leave.

The mutual promises of the shareholders resulting in the increased value of the shares and the protection of their investment and goodwill in the company cannot be viewed as anything other than consideration. Salewski argues that the promises of the other shareholders cannot be consideration for his own promise not to compete and yet, as a shareholder Salewski relied upon this mutual promise to protect his own investment and

goodwill. The redemption price of Salewski's shares in PVH reflected the inherent value of the covenant not to compete. It would create unjust enrichment to allow Salewski to have redeemed his shares for that full value without finding the mutual agreements of the shareholders as consideration for the non-competition clause.

B. The Arbitrator Did Not Err in Enforcing the Liquidated Damages Clause Where the Parties Agreed That Breach of the Agreement Would Result in Irreparable Damage to the Company and All Parties Agreed It Would Be Necessary to Protect the Shareholders and Clients of the Company and Did Not Create an Undue Hardship

Salewski argues that the liquidated damage provision is unenforceable. However, "[Washington courts] are loathe to interfere with the rights of parties to contract as they please between themselves, and the fact that the parties to a contract call a sum stipulated to be paid in case of breach of the contract liquidated damages is a circumstance to be given serious consideration in determining whether it is in fact liquidated damages." *Mgmt., Inc. v. Schassberger*, 39 Wash. 2d 321, 326, 235 P.2d 293, 297 (1951). Accordingly, liquidated damages clauses are looked at with favor, even in covenant not to compete cases. *Perry v. Moran,* 109 Wn. 2d 691, 698, 748 P.2d 224 (1987). Liquidated damages clauses will be enforced if they are reasonable at the time they are entered into.

"It is not the role of the court to enforce contracts so as to produce the most equitable result. The parties themselves know best what motivations and considerations influenced their bargaining, and, while, "[t]he bargain may be an unfortunate one for the delinquent party, ... it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence ..." *Watson v. Ingram*, 124 Wash. 2d 845, 852, 881 P.2d 247, 250 (1994) (quoting *Reichenbach v. Sage*, 13 Wash. 364, 368, 43 P. 354 (1896) (quoting *Dwinel v. Brown*, 54 Me. 468, 470 (1867)).

The party asserting that the liquidated damages provision is an unenforceable penalty, has the ultimate burden of proof on that issue. A non-compete agreement liquidated damages provision is enforceable if it is reasonable. See, *Ashley v. Lance (Ashley II)*, 80 Wash. 2d 274, 280, 493 P.2d 1242, 1246 (1972) (determining that partner was entitled to liquidated damages provision in partnership agreement after other partners left the firm and competed).

In analyzing whether or not to uphold a liquidated damages provision, Washington modifies the two part test from the Restatement Second of Contracts, focusing on the reasonableness of the liquidated

damages amount at the time of contract formation, not second guessing and looking at actual damages retrospectively. *Watson* at 853.

"The test for enforceability of liquidated damages is (1) the amount fixed must be a reasonable forecast of just compensation for the harm that is caused by the breach, and (2) the harm must be such that it is incapable or very difficult of ascertainment." *Knight, Vale & Gregory v. McDaniel*, 37 Wash. App. 366, 371, 680 P.2d 448, 453 (1984) (citing *Management, Inc. v. Schassberger*, supra; *Brower Co. v. Garrison*, 2 Wash.App. 424, 432, 468 P.2d 469 (1970); Restatement (Second) of Contracts § 356 (1981)). "The central inquiry is whether the specified liquidated damages were reasonable at the time of contract formation. The reasonableness of liquidated damages is not determined retroactively by their correspondence with actual damages, but by reference to the prospective difficulty of estimating the possible damages that would flow from a breach." *Watson* at 853.; See also, *Weber, Lipshie & Co. v. Christian*, 52 Cal. App. 4th 645, 654, 60 Cal. Rptr. 2d 677 (2d Dist. 1997) (in upholding a liquidated damages provision of the noncompetition clause in a partnership agreement, the court held that all circumstances at the time of making the contract are relevant, including the foreseeability of harm and the relative equality of bargaining power among the parties).

The second factor does not play a large role, if any, in covenant not to compete cases because harm resulting to one business from the competition of another business is difficult to estimate accurately as a matter of law. *McDaniel* at 371 (citing *Mead v. Anton*, 33 Wash.2d 741, 207 P.2d 227 (1949)).

In short, liquidated damages provisions are particularly appropriate in covenant not to compete cases because "[t]he harm caused by the breach of a covenant not to compete is very difficult to accurately quantify." *Perry* at 887 (citing *Walter Implement Co.*, 107 Wn.2d at 559, 730 P.2d 1340 (1987). See also, *Perry v. Moran*, on reconsideration).

The shareholders of PVH, from time to time, specifically considered the economic cost to PVH should any one of the shareholder employees desire to leave the practice and compete with his former employer. The amounts derived from these discussions changed from time to time based on the economic circumstances. Generally, concurrent with the discussions of the liquidated damages amount was a discussion regarding the amount or the method of paying for the redemption of a departing shareholder. In this case, these are sophisticated business persons who exercised their best business judgment to determine the outcome of their business decisions.

Under the business judgment rule a court should not interfere with the business decisions made by a board of directors consisting of equal peers.

> It is ... fundamental in the law of corporations, that the majority of its stockholders shall control the policy of the corporation, and regulate and govern the lawful exercise of its ... business ... and courts of equity will not undertake to control the policy or business methods of a corporation, although it may be seen that a wiser policy might be adopted and the business more successful if other methods were pursued.

Scott v. Trans-System, Inc. 148 Wn.2d 701, 64 P.3d 1 (2003) (quoting *Wheeler v. Pullman Iron & Steel Co.,* 143 Ill. 197, 207-08, 32 N.E. 420 (1892); *see Nursing Home Bldg. Corp.,* 13 Wash.App. at 498, 535 P.2d 137 ("Courts are reluctant to interfere with the internal management of corporations and generally refuse to substitute their judgment for that of the directors.").

The shareholders of PVH decided that the best interest of the business and the shareholders were served by a liquidated damages clause in the non-competition agreement. Salewski agreed as a shareholder and expected all other shareholders to abide by the same agreement. Salewski received just compensation for his shares in PVH. Salewski had the choice to abide by the non-competition agreement he freely entered in to or to compete and pay the liquidated damages. It would be unjust enrichment to

allow Salewski to violate the non-competition agreement and not adhere to the agreed upon damages.

C. Respondent is Entitled to Attorney Fees and Costs as Provided in the Non-Competition Agreement

In general each party bears its own attorney fees. *Seattle School Dist. No. 1 v. State*, 90 Wn.2d 476, 585 P.2d 71 (1978). Reasonable attorney fees may be claimed where provided for by contract, statute, or recognized ground in equity. *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 716 P.2d 959 (1986). A provision in a contract allowing attorney fees incurred in an action on the contract is generally interpreted to include those fees on appeal as well as at trial. *Marine Enters. v. Security Trading*, 50 Wn. App. 768, 750 P.2d 1290, *rev. denied*, 111 Wn.2d 1013 (1988); *Schmitt v. Matthews*, 12 Wn. App. 654, 531 P.2d 309 (1975).

The non-competition agreement contains an attorney fee provision which states "should principal be the prevailing party in any action to enforce this Agreement (Contract) the Principal shall be entitled to all attorneys' fees and costs incurred enforcing its right under this agreement." CP 139. The agreement specifically provides for attorney fees for the prevailing party. The non-competition agreement is a valid binding agreement enforceable according to its terms. PVH should be awarded attorney fees and costs.

V. CONCLUSION

As a shareholder of the PVH Salewski signed a non-competition agreement which he reaffirmed when he sold his shares and returned to being an at-will employee. Although Washington courts have yet to decide whether the mutual promises in a partnership agreement are adequate consideration for a non-competition agreement our courts have upheld a non-competition clause contained in a partnership agreement. Salewski signed the non-competition agreement understanding that all shareholders would be bound by its limitations and consequences and that the promises of the shareholders created value which would be reflected in the redemption prices of the shares. Salewski benefited from this value when he redeemed his shares in PVH. It would be unconscionable to allow Salewski to benefit from the value in the promises made by all of the shareholders and then deny there was any value to those same promises in order to render the non-competition agreement unenforceable.

The liquidated damages clause at issue is not a penalty. The courts have held that liquidated damages are particularly suited to a non-competition agreement as actual damages are difficult to quantify. Salewski signed the non-competition agreement with full knowledge as to the consequences as a shareholder of a corporation and intelligent businessman.

Salewski did not have to violate the non-competition agreement. Salewski chose to violate the non-competition agreement and in doing so he was fully aware that he was subject to the liquidated damages clause. It would create unjust enrichment to allow Salewski to receive full value for the shares of PVH under the Stock Redemption Agreement and not hold him to the liquidated damages clause of the non-competition agreement which he affirmed.

The non-competition agreement provided that in any action to enforce the agreement in which PVH is the prevailing party it is entitled to attorneys' fees and costs. The non-competition agreement is a valid and binding agreement and enforceable on its terms.

The trial court's order affirming the arbitration award and dismissing Salewski's Motion to Vacate should be affirmed and attorneys' fees and costs should be awarded to PVH.

Dated this 6th day of January, 2015.

Respectfully submitted,

David S. Carson, WSBA #13773
Carson Law Group, P.S.
Attorney for Respondent

DECLARATION OF MAILING

Dawn Misawic declares as follows:

I am an employee of Carson Law Group, P.S., a United States citizen, over the age of eighteen (18) years, and am competent to testify to the matters set forth herein.

I certify that on January 6th, 2015, I mailed by U.S. First-Class Mail, postage prepaid copies of the above BRIEF OF RESPONDENT

to the following:

Charles Paternoster
Parsons Farnell & Grein, LLP
1030 SW Morrison St.
Portland, OR 97205
Attorney for Appellant

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Dated at Everett, Washington on January 6th, 2015.

Dawn Misawic, Legal Assistant

VI. APPENDIX E

Pittman v. Harbin Clinic Professional Ass'n, 437 S.E. 2d 619, 210 Ga.App. 767 (1993).

210 Ga.App. 767
Court of Appeals of Georgia.

PITTMAN et al.
v.
HARBIN CLINIC PROFESSIONAL ASSOCIATION.
HARBIN CLINIC PROFESSIONAL ASSOCIATION
v.
PITTMAN et al.
HARBIN CLINIC PROFESSIONAL ASSOCIATION
v.
NAGUSZEWSKI et al.
NAGUSZEWSKI et al.
v.
HARBIN CLINIC PROFESSIONAL ASSOCIATION.

Nos. A93A1525, A93A1527, A93A1526 and A93A1528. | Oct. 19, 1993. | Reconsideration Denied Nov. 4, 1993. | Certiorari Denied Jan. 27 and 28, 1994.

Physicians commenced action against professional association clinic that was their former employer, for declaration that covenants not to compete in their employment contracts were unenforceable. The Floyd Superior Court, Salmon, J., found restrictive covenants in shareholder physicians' contracts to be valid and enforceable and those in nonshareholder physicians' contracts to be void and unenforceable. Clinic and physicians appealed and cross-appealed. The Supreme Court, 263 Ga. 66, 428 S.E.2d 328, transferred appeals to the Court of Appeals. The Court of Appeals, Smith, J., held that: (1) covenants in shareholders' contracts prohibiting them from practicing medicine within 30-mile radius of clinic's location for period of one year were reasonable and enforceable, and (2) covenants contained in nonshareholders' contracts, which prohibited them from practicing medicine within 50-mile radius for period of one year, were void and unenforceable.

Affirmed.

West Headnotes (6)

[1] **Contracts**
Nature of Business to Which Contract Relates

Noncompetition clauses in physicians' employment contracts do not per se violate state's public policy; like such clauses in other employment contracts, if they are sufficiently limited and reasonable, considering interest to be protected and effects on both parties to contract, they will be upheld.

3 Cases that cite this headnote

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

In determining reasonableness of noncompetition clause in employment contract, three-part test is applied, examining duration, territorial coverage, and scope of prohibited activity; test is applied not as arbitrary rule, but as helpful tool in examining reasonableness of particular factual setting to which it is applied.

1 Cases that cite this headnote

[3] **Contracts**
Limitations as to Time and Place in General

Covenant not to compete contained in shareholder physicians' employment contracts with professional association clinic, which prohibited them from practicing medicine within 30-mile radius of clinic's location for period of one year after leaving employment at clinic, were reasonable and enforceable; it was clear that covenants' plain meaning prohibited only establishment of office and hospital practice within protected area, contract itself set forth counties, all within 30-mile radius, from which clinic drew its patients, and, since physicians were shareholders when they executed agreements, agreements were more usefully viewed as medical partnership agreements rather than traditional employment contracts.

10 Cases that cite this headnote

[4] **Contracts**
Contracts Immoral and Against Public Policy

Public policy and statutory law of Alabama were irrelevant to construction of covenants not to compete contained in physicians' employment

contracts, which prohibited them from practicing medicine within 30-mile radius of clinic's location in Georgia for period of one year after leaving employment at clinic, even though portion of covered territory was located in Alabama; contracts were Georgia contracts, executed in Georgia, by Georgia residents and covered practice of medicine in Georgia.

[5] **Contracts**
Limitations as to Time and Place in General

Covenant not to compete contained in physician's employment contract with clinic, which prohibited him from practicing medicine within 30-mile radius of clinic's location for period of one year after leaving employment at clinic, did not conflict with medical ethical principles or Georgia law requiring informed consent, and did not injure public in general.

2 Cases that cite this headnote

[6] **Contracts**
Limitations as to Time and Place in General

Covenants not to compete contained in nonshareholder physicians' employment contracts with professional association clinic, which prohibited them from practicing medicine within 50-mile radius of clinic's location for period of one year after leaving employment at clinic, were void and unenforceable; 50-mile area was unreasonable since it exceeded territory of clinic's practice as described in contract and since 50-mile restriction was used only in contracts of nonshareholder physicians, whose bargaining position was not equal to that of clinic, while shareholder physicians' contracts contained only 30-mile restriction.

8 Cases that cite this headnote

Attorneys and Law Firms

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Opinion

***767** SMITH, Judge.

Neurosurgeons Harris Pittman, Dennis Murphy, and Carl Herring, and neurologists Robert and William Naguszewski brought an action against their former employer, the Harbin Clinic Professional Association, seeking a declaration that the covenants in their respective employment contracts restricting them from competing with the clinic after leaving its employ were unenforceable. The ****621** clinic answered and counterclaimed, seeking to enjoin the doctors from establishing their new practices in the Rome, Georgia, area in violation of the covenants in their contracts. The trial court found the restrictive covenants in the contracts of Drs. Pittman and Murphy valid and enforceable, and those in the contracts of Dr. Herring and both Drs. Naguszewski void and unenforceable. In Case No. A93A1525, Drs. Pittman and Murphy appeal from the trial court's order finding the ***768** covenants in their contracts valid and enforceable and enjoining them from practicing in the Rome area. In Case No. A93A1526, the Harbin Clinic appeals from the trial court's order finding the covenants in the contracts of Dr. Herring and the Drs. Naguszewski void and unenforceable and refusing to enjoin the doctors from practicing in the Rome area. Case Nos. A93A1527 and A93A1528 are the cross-appeals filed by the appellees to each direct appeal. The cases have been consolidated for review in this opinion.

We note initially that these appeals were filed originally in the Supreme Court, which transferred them to this court, 263 Ga. 66, 428 S.E.2d 328. Although nominally involving injunctions, no substantive issues of equity are involved in these appeals. Resolution of the appeals turns instead on the question of the validity and enforceability of the contract provisions restricting competition, which is a question of law. See *Roberts v. Tifton Med. Clinic,* 206 Ga.App. 612, 426 S.E.2d 188 (1992).

The record reveals that the Harbin Clinic Professional Association employs approximately 50 doctors, including general practitioners and medical specialists. While employed at the clinic, Drs. Pittman and Murphy were shareholders in the professional association, while Dr. Herring and the Drs. Naguszewski were not. The employment contracts of Drs. Pittman and Murphy were those entered into only by physicians who had worked for the clinic for at least two years and had been invited to join the clinic permanently and purchase stock, which the

association agreed to repurchase in the event of termination of the employment relationship.

All the plaintiff doctors were recruited to the clinic from outside the Rome area and none brought patients with them. Each left employment at the clinic through voluntary resignation, not through termination by the association. They resigned on various dates over a period of several months and began a new practice together in Rome. Their resignations left one physician in the neurosurgery department at the clinic.

[1] [2] In Georgia, it has long been the law that non-competition clauses in physicians' employment contracts do not per se violate the state's public policy. Like such clauses in other employment contracts, if they are sufficiently limited and are reasonable, considering the interest to be protected and the effects on both parties to the contract, they will be upheld. See *Rash v. Toccoa Clinic Med. Assoc.,* 253 Ga. 322, 323-324(1), 320 S.E.2d 170 (1984). In determining reasonableness, a three-part test is applied, examining duration, territorial coverage, and the scope of the prohibited activity, see *W.R. Grace & Co. v. Mouyal,* 262 Ga. 464, 465(1), 422 S.E.2d 529 (1992), not as an arbitrary rule, but as "a helpful tool in examining the reasonableness of the particular factual setting to which it is applied." *Watson v. Waffle House,* 253 Ga. 671, 673(2), 324 S.E.2d 175 (1985).

***769 [3]** 1. In Case No. A93A1525, the covenants in issue prohibit Drs. Pittman and Murphy from "practicing medicine" within a 30-mile radius of the clinic's location in Rome, Georgia, for a period of one year after leaving employment at the clinic. They also provide for waiver of this restriction, upon payment by the employee doctor of a sum certain, calculated in a method set forth in the contract. Applying the three-element test, the trial court found that all three elements of the restriction in the contracts of Drs. Pittman and Murphy were reasonable and that the restrictions were therefore enforceable. Drs. Pittman and Murphy contend this ruling was erroneous.

We affirm. The one-year limitation is patently reasonable. Limitations of one year and greater have been held to be reasonable. See, e.g., *Rash,* supra; ****622** *Carroll v. Harris,* 243 Ga. 34, 252 S.E.2d 461 (1979). We reject, as did the trial court, the argument made by Drs. Pittman and Murphy that the scope of the activity prohibited is overbroad because it encompasses such activities as telephonic communication from outside the prohibited area with patients or colleagues within it. Reading the covenants as a whole, it is clear that their plain meaning prohibits only the establishment of an office and hospital practice within the protected area. See *Rash,* supra, 253 Ga. at 326-327(4), 320 S.E.2d 170; *McMurray v. Bateman,* 221 Ga. 240, 254-255(3), 144 S.E.2d 345 (1965). As to geographical limitation, the contract itself sets forth the counties, both in Georgia and neighboring states, from which the clinic draws its patients. The trial court found that the counties listed are all within a 30-mile radius of the clinic location and that consequently, a covenant not to compete within a 30-mile radius is reasonable to protect the clinic.

In *Rash,* supra, 253 Ga. at 325-326(2), 320 S.E.2d 170, the Supreme Court also examined the respective bargaining positions of the parties and whether the restrictive covenants in issue worked a mutual, rather than a unilateral, advantage. Consideration of these factors draws into sharp focus the differences between professional partnership agreements and employment contracts generally. It weighs in favor of the enforceability of restrictive covenants in the former, and against their enforceability in the latter. The trial court correctly considered and applied this portion of the *Rash* analysis. The contracts of Drs. Pittman and Murphy are denominated employment contracts. These doctors, however, were shareholders in the P.A., and when they executed the agreements, they not only committed themselves to the restrictions but also derived a benefit by exacting the same restrictions from the approximately 35 other physician shareholders who executed identical contracts. The covenants obviously provided mutual advantages. As in *Roberts,* supra, 206 Ga.App. at 615-616, 426 S.E.2d 188, because the bargaining power of Drs. Pittman and Murphy was equal to that of those with whom they contracted, the agreements are more usefully viewed as medical partnership ***770** agreements analogous to those in *Rash* than as traditional employment contracts. *Roberts,* supra at 616-617, 426 S.E.2d 188.

2. The other enumerations of error of Drs. Pittman and Murphy may be summarized by describing their broad contentions. The first of these includes several arguments founded on the basic premise that the phrase "otherwise reasonable," as used in *Rash,* supra, established a fourth element in the test for reasonableness of a restrictive covenant in employment contracts.

We agree with the trial court that this premise is untenable. The phrase refers to "the interests to be protected and the effects on both parties to the contract." *Rash,* supra, 253 Ga. at 323 (1), 320 S.E.2d 170. Consequently, the arguments made by Drs. Pittman and Murphy based on the need for more neurosurgeons in the Rome area, the impact on third parties of enforcement of the covenants, and various other arguments, are without merit.

[4] We likewise find no merit in the contention of Drs. Pittman and Murphy that because the protected geographical territory includes a portion of the State of Alabama and Alabama law prohibits non-competition clauses in physician employment contracts, the restrictions in issue are not "otherwise reasonable." These are Georgia contracts, executed in Georgia by Georgia residents and covering the practice of medicine in Georgia, thereby

distinguishing them from those in *Nasco, Inc. v. Gimbert,* 239 Ga. 675, 238 S.E.2d 368 (1977), cited by the doctors. The trial court correctly found that "the contracts at issue have as their very essence the practice of medicine physically located in Rome, Floyd County, Georgia. This Court concludes that Georgia was the state for performance of these contracts. [Cits.] The application of Georgia law renders the public policy and statutory law of Alabama irrelevant for the construction of these contracts. [Cits.]"

[5] 3. Drs. Pittman and Murphy also rely in several enumerations on their broad contention that the "richer record" in this case provides a basis for holding that these covenants are unenforceable despite the existence of previous Georgia case law, such as ****623** *Rash,* supra, to the contrary. We agree with the trial court that the issues raised in this appeal are controlled adversely to Drs. Pittman and Murphy by previously decided cases, and that even if the "richer record" emphasized by Drs. Pittman and Murphy exists, it does not demand a different result. Georgia case law, as well as that of other jurisdictions, has established that covenants such as the ones in issue do not conflict with medical ethical principles or Georgia law requiring informed consent or injure the public in general. See *Rash,* supra, 253 Ga. at 326, 320 S.E.2d 170 (restrictive covenant not void as against public policy because it limited patients' choice of physician within geographical area). See also *Shankman v. Coastal Psychiatric Assoc.,* 258 Ga. 294, 368 S.E.2d 753 (1988); *Karlin v. Weinberg,* 77 N.J. 408, 390 A.2d 1161, 1168, n. 6 (1978).

4. In Case No. A93A1526, the clinic appeals from that portion of the trial court's order finding that the restrictive covenants in the contracts of Dr. Herring and Drs. Naguszewski were void and unenforceable.

The restrictive covenants in the contracts of Dr. Herring and Drs. Naguszewski, who were not shareholders in the professional association, are identical to those in the contracts of the shareholder doctors except that the protected area lies within a 50-mile radius of the clinic, and the doctors may pay a smaller sum to secure the association's waiver of the restriction.

[6] Although the trial court found that a 50-mile radius protected area was not per se unreasonable, see *McMurray,* supra, 221 Ga. at 255(4), 144 S.E.2d 345, it found that in this case it was unreasonable and unenforceable, based on two factors. First, the 50-mile area exceeds the territory of the clinic's practice as described in the contract. Second, the 50-mile restriction was used only in the contracts of physicians who were not shareholders and whose bargaining position, therefore, was not equal to that of the clinic, necessitating stricter scrutiny of the restriction. *Rash,* supra. The record supports these findings.

We do not agree with the clinic that the trial court's obvious slip of the tongue in referring to stricter scrutiny as strict construction renders the standard of review employed "fundamentally wrong." It is clear from the authority cited by the trial court, as well as from its reasoning, that the correct standard was applied. Based on the same reasoning and authority, we affirm the trial court's ruling that the covenants in the contracts of Dr. Herring and Drs. Naguszewski are void and unenforceable. See generally *Osta v. Moran,* 208 Ga.App. 544, 546-547(2), 430 S.E.2d 837 (1993).

5. No additional enumerations of error or argument having been raised in the cross-appeals, Case Nos. A93A1527 and A93A1528 are hereby dismissed.

Judgment affirmed in Case Nos. A93A1525 and A93A1526. Appeals dismissed in Case Nos. A93A1527 and A93A1528.

BEASLEY, P.J., and COOPER, J., concur.

Parallel Citations

437 S.E.2d 619, 1994-1 Trade Cases P 70,498

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