

APPELLATE CASE NUMBER 68417-5-I
WHATCOM COUNTY CAUSE NO. 11-2-00750-9

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Choong H. Lee, DMD, PLLC, and CH LEE, PLLC,

Appellants,

v.

Thaheld/Lee-01, LLC, and Johann Thaheld,

Respondents.

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

REPLY OF APPELLANT LEE DENTAL PRACTICE

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I. ARGUMENT

Thaheld's response confirms that his Service Agreement with Lee Dental Practices' was crafted to form a partnership in all but name. Dr. Lee was to take care of billable "dental services" (i.e., "hands in mouth" dentistry), and Thaheld was to take care of the "management/business services" side of the dental practice. Resp. at 3, 1. The contract provides for the parties to share the business's profits. Agreement at §7.3.2. And if the contract terminated for any reason, the parties were to sell the business and split the proceeds §7.3.3-7.3.6. Thaheld's protestations that he never intended to "own" the business ring hollow in light of his contractual entitlement to half of its value. Under the Agreement terms that actually governed the parties' actions (as opposed to boilerplate savings clauses), there is no meaningful distinction between the association formed and a partnership.

Indeed, as far as lawyer Thaheld was concerned, the parties *were* partners, as confirmed in numerous text messages he sent to Lee. CP 224 ("You are the best partner anyone could have :)"); *Id.* ("Thank you partner, I'll be up again today"), CP 226 ("Hello partner, the termination agreement is finished"); CP 227 ("I trust your judgment partner"), CP 228 ("I agree partner"), CP 232 ("I'm

sorry about that partner”), CP 234 (“Yes partner, very close !!” ... “Me too, partner, me too”), CP 236 (“Lol – thank you partner”), CP 244 (“Our numbers are climbing partner & we will be over this headache soon.”).

And this confirmation of an attempt to form an illegal “partnership”-type relationship from Thaheld does not even take into account the Agreement’s other, more one-sided terms giving Thaheld additional managerial control over Lee Dental Practices. See Brief of Appellants at 5-8.

In sum, the Service Agreement drafted by Thaheld manifestly and facially formed an arrangement where a non-dentist “owns, maintains or operates an office for the practice of dentistry.” RCW 18.32.020(3). It violates Washington law, and it is unenforceable. The Whatcom County Superior Court erred when it declined to rule on summary judgment that the Agreement violates Washington law. The Court should reverse the Whatcom County Superior Court’s ruling and remand for entry of summary judgment in favor of Lee Dental Practices.

A. No Disputes of Fact Exist for Purposes of This Appeal

A summary judgment ruling is appropriate where there are no issues of material fact. CR 56(c). Thaheld argues that there are “multiple material questions of fact” regarding the parties’ post-execution conduct. Resp. at 33. He does not identify, however, a single disputed fact. At most, Thaheld has shown that the parties advance conflicting interpretations of the contract at issue. The Court need only decide as a matter of law whether the contract is illegal under the undisputed facts.

B. Boilerplate Savings Clauses Cannot Render an Otherwise Illegal Agreement Legal.

Thaheld declines to make any real attempt to argue that the *operative* provisions of the agreement are consistent with Washington’s law against unlicensed practice of dentistry. See *generally* Brief of Appellants at 5-8. Instead, Thaheld’s entire legal argument is based on the Agreement’s several general savings clauses purporting to disclaim any illegal intent or effect. See Agreement §§ 2.4, 2.5, 3.4, 11.1, 11.2. Thaheld’s “savings clause” argument cannot redeem his contract from illegality.

It is a basic tenet of contract law that the specific governs over the general. Diamond B Constructors, Inc. v. Granite Falls

Sch. Dist., 117 Wash. App. 157, 165, 70 P.3d 966, 970 (2003); Washington Local Lodge No. 104 of Int'l Broth. of Boilermakers v. Int'l Broth. of Boilermakers, 28 Wash. 2d 536, 541, 183 P.2d 504, 507 (1947) (holding that specific provision prohibiting use of funds without local union members' consent controlled despite general contractual provision giving international union head supervisory powers over local lodges).

Thus, the Agreement's general averments that Lee is to be "solely" responsible for "Dental Care," Agreement §2.5(b)(i), do not eliminate the Agreement's specific provisions giving Thaheld substantial financial and operational control over Lee Dental Practices. Brief of Appellants at 5-8.

While there does not appear to be any Washington authority on this precise point with regard to illegality disclaimers, it is long-standing legal principle that "where the instrument on its face discloses its illegality, an expression therein of an intent that it should conform with the law does not correct the defects." 17A C.J.S. Contracts §256; Haverhill Shoe Novelty Co. v. Leader Shoe Co., 180 A. 242 (N.H. 1935) ("If it was intended that the instrument should comply with legal requirements, the fact remains that it does not. The instrument on its face shows its invalidity, and an

expression of intent that it should conform with the law does not controvert its nonconformity. Legality may not displace illegality when only a disclaimer of illegality appears.”).

Thaheld wrote a document containing a vast array of specific provisions granting him granular control over significant aspects of Lee Dental Practices’ finances and operations. See Brief of Appellant at 5-8. He cannot now claim that these specific provisions disappear by virtue of general provisions disavowing any intent to engage in “Dental Care.” This argument is inconsistent with longstanding authority discounting illegality disclaimers, and the basic Washington principle that specific contractual provisions will not be overridden by general ones.

In any event, Thaheld makes no effort to explain what the parties’ rights and responsibilities would be if his interpretation of the disclaimers were adopted. There is no practical way Lee or Thaheld to determine which of the contract’s specific grants of power are eliminated in the face of the general prohibitions on Thaheld providing “Dental Care.” Like the non-dentist in OCA, Inc. v. Hassel, Thaheld “offers no guidance on how to sever any of the unlawful provisions.” 389 B.R. 469, 481 (E.D. La. 2008). Accepting Thaheld’s argument would put these parties (and any other party to

an otherwise illegal contract with a savings clause) in an untenable position.

For the same reasons, Thaheld's argument that Lee's "interpretation" of the contract "contradicts its express terms" is ineffective. Resp. at 24. Thaheld's claim is effectively that recognizing the contract's illegal effect would contradict the contract's own assertions that it is consistent with Washington law (i.e., its requirements that Thaheld is not permitted to engage in "Dental Care"). *Id.* at 24-25.

A contractual relationship is governed by the rights and duties the contract actually grants the parties. A contract's self-characterization cannot control whether it is illegal or not. United States v. City & County of San Francisco, 310 U.S. 16, 28, (1940) ("Mere words and ingenuity of contractual expression, whatever their effect between the parties, cannot by description make permissible a course of conduct forbidden by law."). For example, a contract to set up a lottery is void and unenforceable. Sherwood & Roberts-Yakima, Inc. v. Leach, 67 Wash. 2d 630, 636, 409 P.2d 160 (1965). It would be absurd to hold that a thirty-seven page contract containing a detailed scheme setting up a lottery is "ambiguous" as to its legality because the parties inserted

provisions stating that they “shall not in the course of this agreement conduct a lottery in violation of RCW 9.46.”

In sum, Thaheld's near-total reliance on precatory savings clauses should not prevent the Court from recognizing that the contract's *operative* provisions give non-dentist Thaheld an unacceptable level of involvement and control over Lee Dental practices. There was no reason for the Whatcom County Superior Court to Deny Lee Dental Practices' motion for summary judgment.

C. Thaheld's Self-Serving Interpretation of the Policy Board is Unreasonable as a Matter of Law

This Agreement contains a multitude of specific provisions granting Thaheld an ownership-like interest in Lee Dental Practices. Brief of Appellant at 5-8. As Thaheld appears to have recognized, there is no way to effectively rebut the dozens of specific grants of power to Thaheld. Indeed, Thaheld ignores all but *two* of the operative provisions in his brief, and even his interpretation of those is deficient.

1. Policy Board Gives Thaheld Control Over Lee Dental Practices.

First, Thaheld claims that the “Policy Board” composed of Lee and Thaheld that the Agreement vests with substantial “duties,

responsibilities and authority,” Agreement at §3.2, is completely powerless. By the Agreement's terms, the Board acts by majority vote. *Id.* at §3.1. According to Thaheld, however, Thaheld's vote has no effect. If Lee votes to take action and Thaheld agrees with him, then the Board takes action according to Lee's wish. Resp. at 6. If Lee votes to take action and Thaheld disagrees with him, Lee's decision still controls. *Id.*

Thaheld's interpretation renders meaningless the four pages of the Agreement detailing the powers and responsibilities of the Policy Board. If Lee's views control regardless, there is no reason to have a Policy Board at all. Washington Courts will not interpret contracts such that large swaths of them are moot. Wagner v. Wagner, 95 Wash.2d 94, 101, 621 P.2d 1279 (1980) (“An interpretation of a writing which gives effect to all of its provisions is favored over one which renders some of the language meaningless or ineffective.”). The only reasonable interpretation of the Policy Board is that the “authority” it is granted is real. Thus, for example, the requirement that “[a]ny renovation and expansion plans and capital equipment expenditures with respect to the Clinic(s) *shall be*

reviewed and approved by the Policy Board,”¹ means that such plans and expenditures cannot take place without the Board’s approval. As a result, non-dentist Thaheld can prevent the clinic from building a new operating room by withholding his consent. Such control is not permitted under Washington law.

Finally, even if Thaheld were correct, the contractual provisions regarding the Policy Board require both parties to “make their best efforts to reach consensus with other members.” Agreement §3.1. Thus, even under Thaheld’s interpretation, Dr. Lee is contractually required to attempt to reach consensus with a non-dentist in making policy decisions regarding his dental practice.

In sum, the Policy Board (along with the Agreement’s many other grants of power to Thaheld) has no other purpose but to provide Thaheld with a measure of control over Lee Dental Practices unacceptable under our state’s laws.

2. The Agreement Severely Limits Dr. Lee’s Professional Mobility

Thaheld also suggests that Lee Dental Practices is inventing a “doomsday” scenario in asserting that the Agreement prevents Dr. Lee from quitting unless he can find another dentist who will

¹ Service Agreement §3.2.1 (emphasis added).

accept the Agreement's onerous terms. Resp. at 20. The provision reads:

Lee further agree[s] that Lee shall not, in any circumstance, voluntarily terminate his Employment Agreement, or cause [Lee Dental Practices] to terminate or default upon his Employment Agreement, without otherwise providing a qualified dentist to manage [Lee Dental Practices] and causing the transfer of his interest in Providers to such dentist

Agreement at ¶5.1(b). As with the Policy Board, Thaheld first claims that this provision is meaningless because Dr. Lee remained an at-will employee, and did not ultimately execute a written employment agreement. Resp. at 20. However, this court has recognized oral, at-will employment agreements. Winspear v. Boeing Co., 75 Wash. App. 870, 874, 880 P.2d 1010 (1994). By the agreements terms, therefore, Dr. Lee is prohibited from quitting.

Thaheld also asserts that the requirement that Lee cannot quit without providing a replacement dentist "does not grant any control of the practice to Thaheld." Resp. at 20. This is incorrect. The provision is an explicit limitation on Lee's professional freedom – inherent in the ability to work is the ability to stop working. Moreover, if Lee were to quit without finding a replacement "partner" for Thaheld, Thaheld could sue Lee for damages.

E. Thaheld's Case-law Analysis Flawed.

Each time Washington courts have evaluated a corporation's attempt to assert control over a dental practice and obtain an interest in its profits—even where the corporation was completely uninvolved in the provision of dental services—they have found the practice illegal. Thaheld's claim that Washington Courts have “struggled” this issue is thus difficult to credit.

Thaheld largely relies on the same tired argument made by every other non-dentist in Washington's cases in this context: that the Dentist “controlled 100% of all dental and patient decisions.” Resp. at 8 (emphasis omitted).² Much of Thaheld's brief is devoted to knocking the stuffing out of this straw man. But as explained by the court in Fallahzadeh v. Ghorbanian, the fact that Thaheld was not drilling cavities or advising patients is irrelevant in light of the other rights of control the Agreement purports to give him:

[Non-dentist] Fallahzadeh argues that *Boren* is distinguishable because his firing demonstrated that [dentist] Ghorbanian retained complete control of all

² See also Resp. at 12 (“Lee continues to own the entire practice and ... have absolute control over all facets of the practice of dentistry.”); *id.* at 13 (“[A]ll Dental Decisions are in the exclusive authority of Lee.”); *id.* (“There are no allegations of Thaheld control of Dental Decisions”); *id.* at 22 (arguing that agreement did not give “so much control to Thaheld that he might be able to affect Dental Decisions.”); 19 (Thaheld “never took over control.”); 22 (arguing that Service Agreement is valid because it did not give “carte blanche authority and control to corporate conglomerates”).

business and professional activities for his practice. ***Under Washington law, however, Fallahzadeh's non-involvement in the delivery of professional services is not determinative.*** In *State ex rel. Standard Optical Co. v. Superior Ct. for Chelan County*, 17 Wn.2d 323, 334, 135 P.2d 839 (1943), the fact that an optometrist retained complete professional control did not prevent the Washington Supreme Court from concluding that his employer was illegally maintaining and operating an optometry practice. Furthermore, this distinction is not particularly persuasive in light of the 50 percent net profit rent provision and the other terms of the lease. Regardless of whether Fallahzadeh was employed by the practice, he still retained a substantial beneficial interest in the practice's profits. In this respect, the lease is no different than Boren's conditional sales contract, which also guaranteed to the sellers a steady income stream from the practice. Furthermore, Fallahzadeh reserved significant rights under the lease as landlord. He had sole and exclusive discretion to approve any changes, modifications, or alterations. Thus, his absence from the practice's day-to-day operations did not affect his ability to control certain aspects of Ghorbanian's practice, such as making physical improvements to the premises that might be necessary for patient care.

119 Wn. App. 596, 603-04, 82 P.3d 684 (2004) (emphasis added).

The facts relied upon by the Fallahzadeh court in its legal discussion are all present in this case. Thaheld has a fifty percent interest in the Lee Dental Practices' profits. Agreement ¶ 7.3. Thaheld also retained the ability to control many aspects of Dr. Lee's practice (far more than just physical improvements). Brief of Appellant at 5-8.

Thaheld's "creative" characterizations of Boren and Fallahzadeh baldly misrepresent those courts' holdings. In Boren, for example, the Court never found that the dentist was "at the mercy of Boren, the non-dentist owner," or that his "ownership and control of the practice" was "illusory." Resp. at 16. Instead, the Court issued a straightforward holding that there was "no question" that a non-dentist who managed a dental practice and maintained a financial interest in the profits of the practice was engaged in the "practice of dentistry" even though ownership was technically vested in a dentist. 36 Wn.2d at 532.

As with Boren, Thaheld's analysis of Fallahzadeh is almost entirely untethered to the decision itself. The decision was not premised on arcane distinctions regarding the specific type of interest in "net profits" obtained by the non-dentist. Nor did the court make any findings that the dentist's control of his practice was "illusory," that the lease at issue was "essentially a conditional sales contract," or that the "non-dentist asserted unilateral control over the practice." Resp. at 17. As explained above, the decision turned on the simple determination that a non-dentist maintained a "substantial beneficial interest in [a dental] practice's profits" and

also reserved discretion to approve modifications of the premises.
119 Wn.App. at 603-604.

Moreover, Thaheld cannot distinguish Fallahzadeh on the grounds that the parties of that case “tried to form a partnership,” when Thaheld’s own declaration establishes that he repeatedly assured Dr. Lee that the two were “partners.” *See supra* pp. 1-2.

Thaheld’s equally creative and largely citation-free characterizations of OCA and Engst are similarly unhelpful. Indeed, Thaheld’s attempts to distinguish Engst rely primarily on facts that the Service Agreements in Engst actually *share* with the one in this case.

- As in Engst, the Service Agreement here purports to allow Thaheld to assume ownership of Practice assets. *See, e.g.*, Agreement §4.1.2 (Thaheld may “require” Lee to assign practice’s lease to Thaheld); §4.2.1 (Lee Dental Practices required to transfer all rights and title to practice’s software and data to Thaheld).
- As in Engst, the Service Agreement entitles Thaheld to a large “Service Fee” even if the Practices lose money. *See* Agreement § 7.3.1 (\$120,000 or highest paid dentist’s salary, whichever was greater). Furthermore, while the fees

in Engst keyed to the dentists' income were only 17% of adjusted gross revenue, Thaheld's "Performance Fee" tops out at **50%** of the practice's "Actual Margin" **in addition** to his \$120,000 fee. See Service Agreement at §§ 7.3.2., 12.1.

- As in Engst, Thaheld's contract requires Lee Dental Practices to execute a power of attorney permitting Thaheld to collect and receive all accounts receivable.
- Finally, Thaheld notes that the Engst agreements contained "5 year" non-competes and exclusivity provisions. It is unclear why Thaheld would highlight this fact when the noncompetition and exclusivity clauses in Thaheld's own agreement purport to bind Dr. Lee for an incredible **40–50 years**. See Agreement at §§ 2.1 (exclusivity clause), 5.6 (noncompetition clause), 8.1 ("Term" defined as 40 years).

Thaheld fails to raise any reason that the Service Agreement in this case should be treated any differently from the agreements in Boren, Fallahzadeh, Engst or OCA. The Agreement purports to give a non-dentist corporation significant control and financial interest in a dental office. It is illegal and void.

E. Thaheld's May Not Introduce Extrinsic Evidence to Delete Objectionable Portions of the Agreement.

Thaheld admits that he is introducing extrinsic evidence to show that the parties "**modified** the terms of Agreement by **removing** any provisions of the contract that could have possibly violated statute." Resp. at 12 (emphasis added). Under Washington law, extrinsic evidence is not admissible for the purpose of modifying or removing written contractual terms. Schweitzer v. Schweitzer, 81 Wn. App. 589, 595, 915 P.2d 575 (1996). Thaheld's concession thus bars his offered extrinsic evidence. Extrinsic evidence is not admissible to accomplish wholesale modifications to the terms of a written contract.

Moreover, Thaheld has presented no authority suggesting that parties may "modify" a facially illegal agreement. As explained in Lee Dental Practices' opening brief, extrinsic evidence can show that a facially legal contract is in fact illegal, but not the other way around. Brief of Appellant at 20-21. A facially illegal contract is void from the outset. Hammack v. Hammack, 114 Wn. App. 805, 810, 60 P.3d 663 (2003). Such an agreement remains illegal "even if the parties may, in performing it, depart from the agreement and keep within the law." 17A Am. Jur. 2d Contracts § 228.

Finally, Lee Dental Practices specifically indicated numerous objectionable contractual terms that give Thaheld an unacceptable level of involvement in the practice. Brief of Appellant at 5-8. Even if the extrinsic evidence Thaheld advances were admissible or relevant, Thaheld does not disclose which of those contractual terms he believes were modified, or what the new terms were. He does not explain which of the terms he believes are ambiguous, or why those terms are susceptible to two or more meanings. In fact, Thaheld offers nothing more than repeated platitudes that Dr. Lee retained "unilateral control" of the practice under the various legality disclaimers. If this is the case, is the remainder of the Service Agreement meaningless? Did Dr. Lee have any obligations to Thaheld at all? Did the Agreement impose any limitations on Dr. Lee's control over Lee Dental Practices? If so, what were those obligations/limitations? Thaheld offers the Court no answers.

A party responding to summary judgment cannot rely on conclusory assertions. Doty-Fielding v. Town of S. Prairie, 143 Wn. App. 559, 566, 178 P.3d 1054, 1058 (2008). In light of Thaheld's complete failure to engage with the contract's actual operative provisions, he has not met his burden of demonstrating how the extrinsic evidence he submits operates to modify the contract into

legality. Thaheld's repeated, conclusory statements that despite the many contractual provisions transferring ownership-like control to Thaheld, Dr. Lee retained "ultimate authority" over everything are not sufficient. Resp. at 29. As such, his argument that the contract was "modified" must be rejected as a matter of law.

F. Thaheld's Policy Arguments for a Legislature Not a Court.

Thaheld has chosen the wrong forum to argue that Washington should codify his ideas about the "needs of our society" with regard to the practice of dentistry. Resp. at 36. Washington courts do not "distort a statute's meaning in order to make it conform to the Justices' own views of sound social policy." Aviation W. Corp. v. Washington Dept. of L&I, 138 Wn. 2d 413, 432, 980 P.2d 701 (1999). To the contrary, they "resist the temptation to rewrite an unambiguous statute to suit our notions of what is good public policy, recognizing the principle that 'the drafting of a statute is a legislative, not a judicial, function.'"

Sedlacek v. Hillis, 145 Wn.2d 379, 390, 36 P.3d 1014 (2001).³

The case law to which Thaheld objects has been around for decades. The Washington Legislature has had ample opportunity act in response to Boren or Fallahzadeh if it wanted to. In light of the Legislature's apparent decision to leave those decisions in place, there is no reason for this court to assume the legislative role and modify longstanding law.

II. CONCLUSION

Thaheld's response relies almost entirely on boilerplate legality disclaimers to establish that the Service Agreement is legal, while ignoring the pages upon pages of additional terms granting him specific control and involvement in Lee Dental Practices.

Neither these disclaimers, nor Thaheld's declaration that he had not yet chosen to enforce the contract's many terms granting him operational control can save the facially illegal Service Agreement. A facially illegal contract is void and unenforceable

³ And in any event, Mr. Thaheld's self-serving assertion that his Service Agreement is "standard for the industry" is belied by reams of recent case law holding similar practice agreements to be illegal. See, e.g., OCA, Inc. v. Hassel, 389 B.R. 469, 478 (E.D. La. 2008) (orthodontic service management agreement illegal under Washington law); Mason v. Orthodontic Centers of Colorado, Inc., 516 F. Supp. 2d 1205 (D. Colo. 2007) (service management agreement illegal under Colorado law); Orthodontic Centers of Illinois, Inc. v. Michaels, 403 F. Supp. 2d 690 (N.D. Ill. 2005) (service management agreement illegal under Illinois law).

from the outset, and parties' subsequent conduct cannot change that.

Lee Dental Practices was entitled to summary judgment, and the Court should reverse and remand.

DATED this 9th day of April, 2013.

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SUBSCRIBED AND SWORN to before me this 9th day of April 2013.



Marissa McCauley
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Washington; Residing in: Bham
Printed Name: MARISSA McCAULEY
My commission expires: 2-12-16