

No. 70554-7-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

3MD, INC., d/b/a DENALI ADVANCED INTEGRATION,

Appellant

v.

SHAWN OLSEN,

Respondent

APPELLANT'S REPLY TO RESPONDENT'S BRIEF

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RE-STATEMENT OF ASSIGNMENTS OF ERROR

1. The trial court erred in granting partial summary judgment in favor of Respondent, Shawn Olson (“Respondent” or “Mr. Olson”) where it determined that valid consideration existed for his restrictive covenant obligations but nevertheless determined that those obligations expired by the terms of Mr. Olson’s contract when his job title changed on January 1, 2012. (Conclusion of Law No. 2).
2. The trial court erred by determining that Mr. Olson’s job title change in January 2012 triggered the beginning of his restrictive covenant obligations to Denali when such change was expressly permitted by Mr. Olson’s contract and he did not terminate from employment at Denali at that time. (Conclusion of Law No. 2).
3. The trial court erred by concluding that the March 1, 2010 Employment Agreement was limited by its own terms to Mr. Olson’s employment with Denali as “VP Network Business” (Conclusion of Law No. 2).

APPELLANT’S REPLY

A. A Change In Job Title or Duties Is Not a Termination of “Employment”.

Washington’s Minimum Wage Act defines the term “employ” to mean “to permit to work.” RCW 49.46.010 (3). Likewise, an “employee”

includes “any individual employed by an employer”, with “employer” being defined to include “any individual, partnership, association, corporation, business trust, or any person or group of persons acting directly or indirectly in the interest of an employer in relation to an employee.” RCW 49.46.010(4) and (5).

Other authorities define the word “employment” as the “act of employing” or the “state of being employed” or “activity in which one engages or is employed”. Black’s Law Dictionary, 8th Ed. (2004); Webster’s Collegiate Dictionary 10th Ed. (1998).

Likewise, other authorities define the word “employee” as “a person who works in the service of another person (the employer)” or “one employed by another for wages or salary and in a position below the executive level.” Black’s Law Dictionary, 8th Ed. (2004); Webster’s Collegiate Dictionary 10th Ed. (1998).

Washington courts regularly look to dictionary definitions when direct statutory definitions are absent. *City of Redmond v. Burkhardt*, 99 Wn. App. 21, 24, 991 P.2d 717 (2000); *State v. Batten*, 95 Wn. App. 127, 129, 974 P.2d 879 (1999) (“In the absence of a statutory definition of a word, we employ the plain and ordinary meaning of the word as found in a dictionary.”).

Under either the foregoing statutory or common meaning of the

term “employment”, despite Mr. Olson’s position that he was “employed” only as the “VP of Network Business” under his March 2010 Employment Agreement, he undisputedly remained “employed” by Denali even though the company changed Mr. Olson’s job duties and title in January 2012.

In apparent ignorance of the foregoing definitions or the continued employment benefits he received until he resigned after he changed job titles, Mr. Olson’s opposition fails to address the fact that Denali changed Mr. Olson’s job title, daily duties and compensation pursuant to its undisputed authority to do so. And under the plain language of the 2010 contract *nothing else* in his employment situation changed from the original terms of his 2010 agreement. For instance, and as stated in Denali’s opening brief, Mr. Olson is not defined as the “Vice President of Network Business” under his contract; rather, the term “Employee” is defined as “Shawn Olson”. CP 51. Moreover, despite his job change, he continued to abide by company policies, did not return any company property as one would do if terminated, did not announce that he had been “terminated” and continued to come to Denali’s place of employment as an “employee”.

It matters not that Mr. Olson was no longer receiving the same benefits he contracted for in 2010 when his job changed in 2012 because he specifically contracted for that potential in 2010 when he agreed to give

Denali discretion to change his job duties and/or compensation at any time during his employment. CP 51.

And even if the trial court inferred, through the use of parole evidence, that Denali sought to end the 2010 Employment Agreement by its offer of a new 2012 agreement to Respondent, which he did not accept, the undisputed fact remains that Respondent remained “employed” under his 2010 Agreement in the absence of any execution of any new agreement until he resigned in February 2013.

Accordingly, Mr. Olson’s argument that the “consideration accepted by him was the compensation and duties associated with his position as VP Network Business” lacks merit. The consideration for Mr. Olson’s obligations to Denali that it seeks to enforce was his “employment” with the company, given its clear right to change his job duties, title and compensation as it did. As a result, Mr. Olson’s March 2010 Employment Agreement did not terminate in January 2012 when he switched jobs and the trial court erred in determining it did.

B. Timing Does Not Render This Appeal Moot.

If this Court’s grant of Denali’s Motion to Stay the Enforcement of the Trial Court’s Order is any indication, Denali’s appeal is not moot simply because Mr. Olson’s restrictive covenants of not competing and not-soliciting may expire by their terms in February 2014. Under his

March 1, 2010 Employment Agreement that Denali seeks to enforce, Mr. Olson still owes Denali confidentiality obligations that do not expire by their terms. And it remains possible that this Court will address this issue before February 2014. Even if that date passes, the Court will address the issue of whether an employee's change in job title, compensation and duties qualifies as the end of "employment" as determined by the trial court, which itself has precedential value to Washington businesses that regularly change their employees' job titles and compensation. Accordingly, Mr. Olson's argument in opposition regarding mootness is inapposite.

C. The Trial Court Erroneously Interpreted Subsequent Acts.

Mr. Olson wrongfully argues in opposition that the trial court correctly considered subsequent acts in determining that Mr. Olson's 2010 contract ended when Denali changed Mr. Olson's job title, duties and compensation in January 2012. Denali acknowledges that under *Berg v. Hudesman*, 115 Wn.2d 668, 669 P.2d 222 (1990), subsequent conduct of the parties may be used by a court in interpreting the parties' intent. *See, Berg* at 668. But Mr. Olson conveniently ignores the remainder of the *Berg* rule: Namely, that subsequent conduct cannot be used by a court to import meaning into a writing that is not expressed therein. *Id.* at 669

(citing *J.W. Seavey Hop Corp. v. Pollock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)).

Even viewing the facts in a light most favorable to Mr. Olson and even if the trial court considered Denali's intent and desire to enter a new contract with Mr. Olson, the fact remains that the parties did not enter that 2012 proposed contract. Accordingly, in the absence of any written amendment to the March 1, 2010 Employment Agreement, that 2010 agreement remained valid with respect to the terms of Mr. Olson's employment except where changed by Denali at its discretion consistent with those terms.

It is unclear where Mr. Olson derives the notion that his employment with Denali under the common vernacular or statutory definition of that term somehow ended upon Denali's stated intent to enter a new contract with him in 2012. But the fact that such employment did not end runs contrary to his contention that the "only conclusion that can be drawn is" that "Mr. Olson's restrictive covenants began to run when he took his new role in 2012." The trial court erred in determining the same conclusion and its decision should be reversed.

D. The Trial Court Properly Denied Fees and Respondent's "Appeal" is Improper.

RAP 5.2(d) provides that a party "already a respondent to an appeal" seeking "cross review" of a trial court ruling "must file a notice of appeal or notice for discretionary review within the time allowed by rule 5.2(f)." Mr. Lambro as the Respondent in this appeal, did not file a notice of appeal or a notice for discretionary review of the trial court's order denying his motion for attorneys fees brought after the trial court's order on the parties' cross motions for summary judgment. Accordingly, Mr. Olson's request for fees on the basis that the trial court erred in not awarding them to him as a "substantially prevailing party" is improper and should not be considered by this Court.

Even if this Court were to consider Mr. Olson's arguments for fees, reversing the trial court's order denying fees would be improper because, as discussed at the trial court level below, neither party was the substantially prevailing party in this matter. CP 137-147. To wit, the trial court denied Lambro's motion for summary judgment on the issue of whether there was sufficient consideration for his restrictive covenants and therefore granted Denali's cross-motion on that very issue. The court further agreed with Lambro that the non-competition obligation held through Lambro's March 1, 2010 Employment Agreement had expired

and therefore was no longer enforceable. The court did not rule, as posited by Lambro that the non-competition and non-solicitation obligations were void. Rather, the court ruled that the enforceability had lapsed. As such, and because the court both granted and denied summary judgment for each party, neither party is the “substantially prevailing party” for purposes of fees under paragraph 19 of Lambro’s written agreement. Nor should he be in this appeal. Lambro’s request for fees is inappropriate.

E. Respondent is Not Entitled to Fees Under RAP 18.1.

As discussed at the trial court and above, Mr. Olson is not the prevailing party in this litigation and therefore his attorney fees are not awardable under his argument that the trial court erred in awarding them or under RAP 18.1 because there is no other legal basis for granting them.

Reasonable attorney fees may be awarded on appeal if applicable law grants to a party the right to recover such fees or expenses on review before either the Court of Appeals or the Supreme Court. RAP 18.1(a). But where neither party is the substantially prevailing party for purposes of administering a contractually-based attorney fee provision, fees are not awardable. *See Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 818, 225 P.3d 213 (2009) (declining to award fees under RAP 18.1 where neither party prevailed in condominium claim brought pursuant to written contractual fee provision). Mr. Lambro’s request for fees should therefore be rejected.

CONCLUSION

The trial court's entry of partial summary judgment in favor of Mr. Olson and conclusion that his restrictive covenant obligations to Denali expired by their terms when he changed jobs at Denali lacks legal or factual basis and must be reversed. The trial court improperly considered parol evidence and did not consider the plain language of the March 1, 2010 Employment Agreement, which undisputedly remained in effect despite Denali's offer of a new contract to Mr. Olson that he did not accept. For these reasons and those above, Denali respectfully requests that this court reverse the trial court's partial summary judgment order and enter summary judgment in favor of Denali.

RESPECTFULLY SUBMITTED this 26th day of December,
2013.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this Declaration is affixed was deposited with the United States Postal Service, first class postage prepaid at Seattle, Washington, addressed to:

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