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I. INTRODUCTION

Respondent's brief must be read carefully because it misstates the facts in several important particulars. It also makes assertions of fact without citation to the record and assertions of law without authority.

It also needs to be read carefully because the Respondent is making a "big ask." It is asking this Court to establish precedent that noncompetition provisions between physicians are unenforceable in Washington State. Respondent asserts nothing about this noncompetition provision that would permit a valid distinction between it and every other physician noncompetition provision in Washington. In fact, the respondent specifically says that the Superior Court considered the "perverse" effect that enforcement of this agreement would have on the "medical community as a whole."¹

The difficulty in making distinctions between some physician noncompetition agreements and others is unintentionally emphasized by Respondent. Dr. Emerick distinguishes his situation from that of dermatologists, suggesting that a noncompetition provision between dermatologists was enforced because dermatologists do not engage in "life

¹ Br. of Resp. 27

saving care”² like Dr. Emerick does. This, of course, could come as a surprise to patients diagnosed with and treated for melanoma by a dermatologist. The Superior Court very specifically held that this noncompetition provision violated public policy because it took this physician a long time to get his credentials and he had patients. That will be true of every single physician who is subject to a noncompetition provision in Washington State.

II. ARGUMENT

A. Equitable Considerations

Respondent asserts that “[T]here can be no doubt that a component of equity comes into play in a case like this....”³ Appellant agrees that this Court should consider the equities in this case. The problem is that Respondent wants this Court to take into account only the equities that favor him.

Respondent’s Departure from CSC

Respondent wants this Court to consider as an equity in his favor that he did not voluntarily leave CSC,⁴ but he does not want this Court to

² This, of course, could come as a surprise to people diagnosed with melanoma by a dermatologist.

³ Br. of Resp. at 28.

⁴ Br. Of Resp. at 28.

consider the conduct that caused his involuntary termination,⁵ most of which he admitted.⁶ He does not want this Court to consider that his colleagues on CSC's Professional Conduct Committee, including Drs. Melvin Henry, Needham Ward, Devendra Vora, Michael Rome and others, spent literally scores of hours in meetings with and about Dr. Emerick, desperately trying to get him to conduct himself in a way that would not generate patient and hospital complaints.⁷ He does not want this Court to consider the countless hours his colleagues spent dealing with the fallout from the people he had hurt and angered, or the damage he did to their practice.⁸ He does not want this Court to consider that their patience with him and their efforts to help him went on for four full years.⁹ He does not want this Court to consider that, when it finally was clear that he could not or would not alter his conduct, they tried for another eight months to negotiate a way for him to leave the practice, while doing as little damage to his reputation as possible.¹⁰

When Appellant has asked that the equities that that may be unfavorable to Dr. Emerick be considered, Appellant has consistently been

⁵ CP 136-289.

⁶ CP 191; CP 205; CP 225; CP 227; 235.

⁷ See, e.g., CP 184-185; CP 191; CP 205-206; CP 214; CP 216; CP 218; CP 220; CP 222; CP 227.

⁸ See, e.g., CP 184; CP 201; 208- CP 209.

⁹ CP 136-289.

¹⁰ CP 1148-CP 1204.

accused of “attempting to smear Dr. Emerick’s reputation.”¹¹ But this is not true. Respondent made his own conduct an issue when he sought a temporary restraining order on two business hours notice to prevent enforcement of the non-competition provision.¹² He claimed “a well-grounded fear of immediate invasion of a clear legal or equitable right” if the noncompetition provision was enforced. The best proof on short notice that there was no “emergency” was that the issue had been pending for many years. Dr. Emerick had long known for four years that his conduct was an issue, and for nine months that he had to leave the practice. He had known he was subject to a non-competition provision from the beginning of his employment. The TRO was denied.¹³ Dr. Emerick's conduct has remained an issue because Respondent has repeatedly referred to it, in an effort to cast his former colleagues in the role of the "bad actor" in this case. It has also remained an issue because it is an important element of the history of this partnership,¹⁴ is at the core of an important legal question for this Court, and is very relevant to the

¹¹ Br. of Resp., p. 8, CP 1073-1074, CP 1233.

¹² Even though the event in question happened in early September, Respondent filed his complaint and a Motion for TRO at 4:30 on a Friday, September 24, setting a hearing for eight o'clock Monday morning, after the parties had been in discussion about how to handle the noncompetition provision for nine months. CP 1-22 and 290-291.

¹³ CP 290-291.

¹⁴ *Ashley v. Lance*, 75 Wn.2d 471, 476 (1969); *Ashley v. Lance*, 80 Wn.2d 274 (1972) (“*Ashley II*”).

“equitable component” Respondent has acknowledged this Court should consider.

“Steering Patients Away”

Respondent also wants this Court to consider as an equity in his favor that he “had patients that desired care and treatment from him and said patients were intentionally steered away from him by the appellant to other physicians in appellant's employe...”¹⁵ But he does not want this Court to consider that his assertion falls apart when all of the evidence, rather than only that he wants considered, is reviewed.

His primary example of his colleagues “steering patients away from him” is his claim that CSC tried to keep him from seeing a particular patient near the end of his work at CSC.¹⁶ In the actual event, Dr. Cecil Snodgrass, the Chief of Staff at Good Samaritan Hospital and a long time source of referrals for CSC, called another CSC cardiologist, Dr. Uma Krishnan, and asked her to see one of his patients.¹⁷ She initially declined because the patient was a patient of Dr. Emerick’s.¹⁸ Dr. Snodgrass knew Dr. Emerick had been seeing the patient, but, because of concerns he had

¹⁵ Br. of Resp. p. 28.

¹⁶ Resp. Brief, p. 11, and his Declaration at CP 635-638. Dr. Emerick’s proof of this event is his own perception of what occurred, and nothing else. Notably there is no proof on this record from the patient in question.

¹⁷ CP 1139.

¹⁸ CP 1139-1140.

about Dr. Emerick's "temperament and practice," he persisted in his request that Dr. Krishnan see his patient.¹⁹ Dr. Snodgrass told Dr. Krishnan that he would explain the situation to the patient. The patient was placed on Dr. Krishnan's schedule, but came in and asked to see Dr. Emerick. After clarifying with the physicians what they should do, the office staff immediately complied.²⁰

Dr. Emerick's Skills

Throughout this proceeding, the Respondent has argued that he has extraordinary if not unique skills, that he one of very few cardiologists in Pierce and King Counties who can provide "life saving" treatment to his former patients.²¹ He has argued that Cardiac Study Center is a huge corporate monolith, trying to keep him from his get between him and his patients purely for the sake of filthy lucre.²² This is another of his "equitable" arguments: That the noncompetition provision should be invalidated because he is doing the right thing and his colleagues are doing the wrong thing.²³

¹⁹ CP 1140.

²⁰ CP 114-119 and CP 1139 -1142.

²¹ Br. of Resp., e.g., p. 8, 9, 14, 21, 23, 28.

²² Br. of Resp., e.g., 11-12, 14,15, 27; CP 2.

²³ It should be noted that the only proof on this point that Dr. Emerick has placed on this record comes out of his own mouth and consists solely of his own opinion.

No one has argued that Dr. Emerick does not have adequate technical skills to practice cardiology, but the remainder is simply untrue. There is literally no proof on the record to this effect. Each of his colleagues has skills and experience that are equal or even superior to Dr. Emerick's. Each has patients to whom they render "life saving" treatment. The uncontroverted proof on this record is that the restricted area is "saturated" with cardiologists with skills identical to those of Dr. Emerick.²⁴ In addressing the issue of skills in the context of a noncompetition provision, the Washington Court of Appeals has said:

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

In *Knight*, 37 Wn. App. at 371, the Court of Appeals directly rejected a public policy type argument when the employees in question demonstrated that they were "exceptionally skilled," but not that their

²⁴ CP 1256-1296.

services were “unique” or “incomparable.”²⁵ This Court should follow that precedent, not reverse it.

Dr. Emerick's Concern for his Patients

Similarly, Dr. Emerick has claimed for two years that his request to invalidate the noncompetition provision is made strictly out of concern for his patients.²⁶ That may be true because no one can get inside his head, but the only objective evidence on this record would suggest to the contrary. Dr. Emerick worked primarily in CSC's Puyallup office. He could have moved his office 14 miles from CSC's Puyallup office and opened an office or joined a practice in Federal Way.²⁷ Instead, it's believed that he wants to move in literally next door to CSC's Gig Harbor office so that he can practice at the new St. Anthony's Hospital.²⁸ The distance from the Puyallup office to the Gig Harbor office is 19 miles.²⁹ That, of course, means his patients would have to travel 5 miles farther to

²⁵ *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 368 (1984).

²⁶ Br. of Resp., 11-12, CP 2.

²⁷ CP 1206. Dr. Emerick claims that CSC "steadfastly refused to meaningfully discuss the parameters of its board of the SEA [sic]." There is no citation to the record. The trick there is in the respondent's definition of the phrase "meaningfully discuss." The record is clear that Dr. Emerick's definition of that phrase included only complete and total abrogation of the noncompetition provision. See CP 1148-1204 for a small sample of the meaningful discussions that actually occurred over 9 months, contrary to Respondent's claims; For demand for abrogation, see e.g., CP 1178; 1180 (the deletion by Respondent's lawyer of Appellant's draft agreement to permit Respondent to practice in Federal Way.)

²⁸ CP 1240-1255.

²⁹ CP 1209.

see him in Gig Harbor than if he were in Federal Way.³⁰ Further, Dr. Emerick has made no effort to explain why, if he were so concerned about his patients, he didn't begin to practice in Federal Way, at least during the course of this litigation. What has become of his patients in the last two years? Dr. Emerick wants to go to Gig Harbor, "where the money is," and compete directly with CSC for referrals from St. Anthony's one of the only two major referral sources in Pierce County.³¹ This Court should not be swayed by Respondent's claims that his sole concern is his patients, well-being.

Unfair Competition

Respondent brief cites a few cases that say noncompetition agreements will be enforced only in order to prevent "unfair" competition. It claims that Dr. Emerick does not want to unfairly compete with his former colleagues. But Dr. Emerick has refused to say what his professional plans are, even when asked by the Superior Court. It is hard for a Court or third party to assess whether the competition you want to engage in is "unfair," if you won't say what manner or form that competition is going to take. Said differently, it is a lot harder to be

³⁰ CP 1206-1210.

³¹ Dr. Emerick's astonishment that his former colleagues must continue, after his departure, to consider the financial health of their practice is reminiscent of the dialogue between Claude Rains and Marcel Dalio in Casablanca: Captain Renault: "I'm shocked, shocked to find that gambling is going on in here." Emile: "Your winnings, sir." Captain Renault: "Thank you very much."

accused of unfair competition when you won't tell anyone that you want to open an office next door to CSC's Gig Harbor office near the new St. Anthony's Hospital, which is one of two major source of referrals for cardiologists in Pierce County.

Because of his refusal to say how he is going to compete, this Court is being asked to decide that it is *impossible* for Dr. Emerick to engage in unfair competition with his former colleagues. And whatever this Court decides on that point will serve as precedent for any physician in Washington State who wants to get out of a promise he made not compete with his or her former colleagues.

This Court should consider the equities of Dr. Emerick "hiding the ball" until it is too late for his former colleagues to demonstrate the unfairness in the way he will choose to compete.

Even if Respondent will not admit it, by asking this Court to consider the "equities" in this case, he is also asking this Court to consider the "history of the partnership," as the Supreme Court required in the *Ashley* cases. And at the risk of being circular, Respondent makes the best case for why is essential to consider that history. If the decision made by the Superior Court in this case is permitted to stand, a physician subject to a noncompetition provision could intentionally engage in misconduct - harming his existing practice and colleagues to the point that his partners

fired him, in order to free himself from noncompetition obligations. The likelihood of this increases if a Trial Court refuses to even consider the history of the parties and their agreement. This is not permitted by Washington law nor is it sound public policy. The decision of the Superior Court should be reversed.

B. The AMA's Position

Respondent asserts that the AMA discourages noncompetition provisions among physicians.³² That is precisely accurate. It discourages them. It does not prohibit them in the same way that Washington Courts and the American Bar Association prohibit noncompetition provisions among lawyers.³³ The AMA has the authority to prohibit noncompetition provisions, but it has not done so. Instead, it sets out the common law as Washington and most other states observe it, which is to permit physicians to enter into them and enforcement of such agreements if reasonable.³⁴ - These parties entered into this noncompetition provision and, since there is no finding that it is unreasonable under the traditional tests, it should be enforced. The judgment of the Superior Court should be reversed.

³² Br. of Resp., 21.

³³ Wash. Rules of Prof'l Conduct R. 5.6 (2010); ABA: Model Rules of Prof'l Conduct R. 5.6 (1983).

³⁴ *Mohanty, M.D. v. St. John Heart Clinic, S.C.*, 866 N.E.2d 85 (2006) (American Medical Association guidelines regarding covenants not to compete do not prohibit, but merely discourage, such covenants, and are no different than common law requirements that covenants be reasonable.)

C. Controlling Case Law

The Respondent gives the *Ashley* cases short shrift, and from the chair he is sitting in, for good reason. It is difficult if not impossible to square the ruling Respondent seeks with the *Ashley* cases, both in their holdings and in their expansive rationale approving noncompetition provisions among physicians.

Respondent correctly asserts that the noncompetition provision in the *Schneller* case was not enforced - for the very specific reason that there was an unlimited temporal scope.³⁵ That is not true in this case.

The value of the *Lehrer* case in this analysis is that the Court of Appeals used the traditional reasonableness test analysis out of *Perry* to determine that public policy was not violated by a physician noncompetition provision.³⁶

Every case cited by Respondent in support of its “public policy” argument is out of a jurisdiction other than Washington: Ohio, Arizona, Idaho, Pennsylvania, Alabama, North Carolina, Florida and Indiana. And most of these do not prohibit reasonable noncompetition provisions among physicians, as demonstrated by the opinions themselves. For example, the Alabama case was based on a shortage of doctors in Jefferson County. The

³⁵ *Schneller v. Hayes*, 176 Wn. 115 (1934).

³⁶ *Lehrer v. Dept. of Social & Health Services*, 101 Wn. App. 509 513-514 (2000), citing *Perry* 109 Wn.2d, at 698.

Florida case was based on a shortage of doctors in the area and a restricted area with a 70 mile radius. In this case, there is a surplus of cardiologists³⁷ and it is simply an untruthful statement of fact, clearly contrary to the only proof on this record, to say that "there are only a small handful of positions practicing in Dr. Emerick's specialty outside of appellant in Pierce County and Federal Way."³⁸ Two different experts attest that the restricted area is "saturated" with cardiologists, including interventional cardiologists.³⁹

It should also be noted that the requirement of "stricter scrutiny" of noncompetition provisions between physicians is found nowhere in Washington law.

Respondent is asking this Court to make a decision that will change the law in Washington and place Washington in a very small minority of states. This Court should decline to do so and enforce Washington law rather than the law of other jurisdictions.

D. "The Traditional Tests."

The parties agree that the traditional reasonable tests, as set out by the Washington Supreme Court in *Perry v. Moran*,⁴⁰ are:

³⁷ CP 1256-1296.

³⁸ Br. of Resp., p.23.

³⁹ CP 1256-1296.

⁴⁰ *Perry v. Moran*, 109 Wn.2d 691, 698 (1987).

(1) whether [the] restraint is necessary for the protection of the business or goodwill of the employer, (2) whether it imposes upon the employee any greater restraint than is reasonably necessary to secure the employer's business or goodwill, and (3) whether the degree of injury to the public is such loss of the services and skill of the employee as to warrant nonenforcement of the covenant.

The parties also agree that the Superior Court made no finding that the noncompetition provision in this case was unreasonable.⁴¹ Respondent agrees that the Superior Court made its ruling solely on the basis that the noncompetition provision violated public policy.⁴²

There can be no serious argument that the noncompetition provision at issue is unreasonable under the traditional tests as set out in *Perry*. This issue has been briefed more than a half-dozen times by these parties. The Superior Court could not find a basis for determining that this agreement was unreasonable, other than to make up its own new public policy test.

In summary, all of the evidence on this record demonstrates that this covenant meets the first test, in that it is necessary for the protection of the business and goodwill of CSC. Before it hired Respondent, CSC was a firmly established and highly regarded Pierce County cardiology practice, with a large patient census and excellent referral sources through its long-established relationships. Specifically, CSC has protectable

⁴¹ Br. of Resp., 30.

⁴² *Id.*

interests in its referral sources, patient relationships and in the time energy and expense it invested in bringing Respondent into a full schedule, providing equipment for his use, staff for his assistance, etc.

Additionally, this covenant meets the second test, in that the provision imposes no greater restraint than is reasonably necessary to protect CSC. This test examines whether the temporal and geographic scope of the provision are reasonable. Contrary to Respondent's argument based on case law from other states, Washington courts have found temporal and geographic restrictions greater than those in this case to be reasonable. With respect to temporal scope, the provision at issue here called for a five-year restriction. The restriction upheld in *Ashley* was 10 years.⁴³ Further, if the Superior Court had thought the five years too long, it had an obligation to blue pencil that portion of the provision to the maximum extent it considered reasonable. With respect to geographic scope, the Supreme Court approved the geographic scope of within "ten miles of the then City Limits of Bothell."⁴⁴ Appellant here specifically suggested to the Superior Court that the provision be enforced within a five-mile radius of any CSC office. The Court rejected that as well, because the invalidation was not based on whether the temporal and

⁴³ *Ashley*, 75 Wash.2d 471 at 473.

⁴⁴ *Id.*

geographic scope were reasonable, it was because Dr. Emerick had spent a long time developing his skills and because he had his patients. TR24.

The noncompetition provision at issue in this case clearly meets the third traditional test, the so-called “public policy test” as well. The “public policy” test assesses the potential damage to the public (not to the employee)⁴⁵ if an individual is restricted by a noncompetition provision. If the provision prevents the individual from servicing a community *that does not offer its residents a choice of service providers* in the employee’s line of work, the Court may decline to enforce the covenant, or reform it. In this case, the uncontroverted expert opinions that the restricted area is “saturated” with cardiologists, more than meets this test.⁴⁶ What is new here is that the Respondent wants a public policy analysis that has never been done before in Washington. It wants this Court to affirm the Superior Court’s judgment that the noncompetition provision violates public policy because it is it took Dr. Emerick a long time to develop his skills and he had patients to whom he rendered care. Simply, Respondent wants this Court to decide that the public should have the option of choosing Dr. Emerick, even in an area saturated by cardiologists. If this Court wants to do that, it can, of course, but Appellant requests that the

⁴⁵ The second test focuses on restrictions on restrictions on the employee.

⁴⁶ CP 1256-1296.

Court recognize that every physician noncompetition agreement in Washington State will be invalidated by such a ruling.

E. Plain Error in Permitting Dr. Emerick to Solicit and Requiring CSC to Solicit on His Behalf.

The plain error in the Superior Court's handling of the solicitation issue is as follows:

At page 23-24, the Court said that the nonsolicitation provisions of paragraph 13 should be enforced, because Respondent should not be permitted to solicit Cardiac Study Center's patients.

At page 28, the Court required Cardiac Study Center to solicit its patients for Dr. Emerick. To perhaps put too fine a point on it, but in the interest of clarity, the Superior Court contradicted itself within 4 pages of transcript. The larger point is that, not only did the Superior Court refuse to enforce a valid noncompetition provision between these parties, but flipped that entire agreement on its head, requiring his former colleagues to *assist* Dr. Emerick in competing with them.

F. Assertion That Refusal to Enforce Is the Same As "Blue Penciling."

Respondent's assertion at Resp. Brief, p. 43 that the Superior Court actually "blue penciled" this noncompetition provision is absurd.

The Court: "I'm not going to enforce the non-compete agreement."

Appellant's Counsel: Just to be clear, Your Honor, are you holding that the non-compete in this case is unenforceable as a matter of public policy except for the non-solicitation?

The Court: That would be the bottom line. TR23-24

In *Wood v. May*,⁴⁷ the Supreme Court held that, if a noncompetition provision is determined to be overbroad in time or area, Washington law requires enforcement of the to the extent that it is reasonable and lawful. This was identified by the *Wood* Court as the "blue pencil test." If it needs to be said, this is a different thing than refusing to enforce a noncompetition agreement.

Respondent tries to hedge the question because he knows that asking this Court to establish precedent eliminating noncompetition provisions between physicians in Washington State is enormous. This Court should decline to do so.

III. CONCLUSION

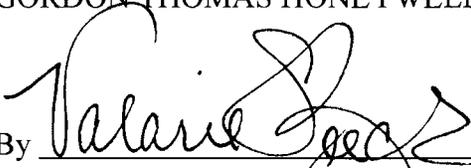
Appellant requests that the Court of Appeals reverse the Superior Court's Grant of Summary Judgment for Respondent and denial of Summary Judgment for Appellant. Appellant also requests an award of its reasonable attorneys' fees incurred in the Superior Court proceeding and on this appeal.

⁴⁷ *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968).

Dated this 22^d day of June, 2011.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

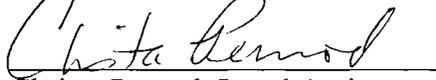
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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 22nd day of June, 2011, I served the foregoing Appellant's Reply Brief as follows:

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