

No. 41597-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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ROBERT EMERICK

Respondent,

v.

CARDIAC STUDY CENTER, INC., a Washington corporation,

Appellant.

APPELLANT'S CORRECTED OPENING BRIEF

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I. ASSIGNMENTS OF ERROR

Assignments of Error

1. The Superior Court erred as a matter of law by granting summary judgment in favor of Respondent, declaring a reasonable noncompetition provision between physicians unenforceable as a violation of public policy.

2. The Superior Court erred as a matter of law by using a analysis previously unknown in Washington law to conclude that the noncompetition provision between the parties violated public policy.

3. The Superior Court erred as a matter of law by refusing to “blue pencil” the noncompetition provision, that is, by refusing to enforce it to the fullest extent it was reasonable in duration and scope.

4. The Superior Court erred as a matter of law by refusing to consider the history of the relationship between the parties when construing the noncompetition provision between the parties.

5. The Superior Court erred as a matter of law by allowing Respondent to solicit Appellant’s referral sources, including hospitals and patients, in direct contradiction of its own Order and in violation of the agreement.

6. The Superior Court erred as a matter of law when it ordered Appellant to mail notice to its patients when Respondent opens his competing medical practice, providing Respondent's new location and contact information.

7. The Superior Court erred in awarding attorneys fees and 12% interest.

Issues Pertaining to Assignments of Error

1. Whether an otherwise reasonable noncompetition provision between consenting physicians may be declared invalid based on a public policy analysis never before seen in Washington law. (Assignment of Error 1)

2. Whether the length of time it took a physician to get his credentials is a sufficient public policy consideration to invalidate a noncompetition provision between physicians. (Assignment of Error 2).

3. Whether nominally prohibiting solicitation of a medical practice's patients, while permitting solicitation of all referral sources and requiring the medical practice to write to its patients to announce the opening and location of a departing physician's new practice constitutes a valid "blue-penciled" of a noncompetition provision under Washington law. (Assignment of Error 3, 5, 6)

4. Whether the validity of a noncompetition provision can be properly considered under Washington law without considering the history between the parties and their agreement. (Assignment of Error 4.)

5. Whether an attorney fee awards to the prevailing party must be reversed when the trial court's ruling is reversed. (Assignment of Error 7.)

II. STATEMENT OF THE CASE

Appellant Cardiac Study Center is a medical practice group of approximately fifteen cardiologists. CP 521. The practice has provided care to patients with heart disease in Pierce County since 1966. *Id.* Appellant has four offices located near area hospitals: (1) Tacoma (near Tacoma General, St. Joseph and Allenmore); (2) Puyallup (near Good Samaritan); (3) Gig Harbor (near St. Anthony's); and (4) Lakewood (near St. Clare). CP 522. Each hospital serves as a major referral source for the physicians. *Id.* Collectively, they manifest a long-term business strategy: to be Pierce County's primary provider of such medical services. *Id.*

Before Respondent Robert Emerick moved to the area to join the practice in February 2002, he agreed to the same noncompetition provision in the same Employment Agreement that each of the other doctors had agreed to when joining the group. CP 522. The agreement

says that if a doctor leaves the group, he or she promises not to practice in Pierce County and Federal Way for a period of five years. *Id.*

The noncompetition provision was the group's consideration for having Respondent come into their practice: a practice that years of effort on their part had built and sustained. CP 521. Respondent was provided with a regular income, a full schedule of patients and an experienced staff that scheduled, billed, and otherwise supported his practice. Transcript of Verbatim Proceedings, Friday, March 5, 2010 ("TR") 5. He "walked into" the group and received the immediate benefit of the other doctors' reputations for excellence and the business model that had been built and nurtured to sustain fifteen medical practices. *Id.*

Respondent became a valued member of the practice, and in February 2004, he was asked to and became a shareholder. CP 522. In exchange for the financial benefits of becoming an owner, he again agreed to the same noncompetition provision, as had each of the other doctors when they had become shareholders. *Id.* He remained an owner until September 30, 2009, and during the five and a half years he practiced there, never raised any complaint about enforcing the noncompetition provision against his former colleagues. CP 523.

In August 2005, the other physicians in the group began to receive complaints about Respondent's conduct from his patients and from

medical providers outside the group with whom he worked (hospital physicians, nurses, etc.). CP 522. As the number of complaints grew and the allegations became more serious, the concern of the other doctors also increased. CP 522-523. They were concerned for the patients, for the other medical providers and for Dr. Emerick, who admitted most of the conduct. CP 523. Because of Dr. Emerick's behavior, a key group of referring physicians at Multicare's Tacoma facility, and other individual physicians quit referring to the group. CP 137, 523. Other complaints were received about Respondent's care of his patients. CP 142.

His colleagues at Cardiac Study Center tried various measures to ameliorate the situation. CP 137-147. After the Multicare physicians said they would no longer refer to the group if Dr. Emerick would be caring for the referred patient, his colleagues suggested and Dr. Emerick agreed to perform his procedures at Multicare's Good Samaritan Hospital in Puyallup. CP 137. The Chair of their Professional Conduct Committee and several of his individual colleagues tried to work with Dr. Emerick to modify his behavior. CP 137-147. His conduct would improve for a while and then the same issues would resurface. *Id.*

Over the next three and a half years, dozens of complaints were received about Dr. Emerick. *Id.* The other doctors in the group spent hours meeting and working with Respondent, addressing the complaints,

soothing hurt patient feelings, and repairing damaged relationships with medical providers throughout the area. *Id.* After they had tried everything else, the other physicians told him for a final time that if the conduct continued, he could no longer practice with the group. CP 146. The problems continued until, on February 2, 2009, the group's Professional Conduct Committee recommended terminating Dr. Emerick's relationship with the group. CP 147. On May 6, 2009, the group formally voted to terminate the relationship as a result of the volume and nature of complaints he had generated. *Id.* Even then, the doctors tried to work with Dr. Emerick to allow him the opportunity to resign rather than have a termination on his credentials, but he refused to resign so the relationship was terminated involuntarily, effective September 30, 2009. *Id.*

In September 2009, Respondent filed this lawsuit against the group, seeking declaratory relief, primarily to avoid the obligations imposed by the noncompetition provision.¹ CP 1. Dr. Emerick also sought a temporary restraining order, which was denied. CP 291.

After the case was transferred to Judge Fleming, he ruled that he would not consider the history of the parties' relationship. CP 1112, Transcript of Hearing 12/11/09, p. 20-21. Appellant later moved for

¹ Dr. Emerick also sought an accounting of amounts due to him under the Shareholder Agreement. After months of careful analysis, Dr. Emerick dismissed that aspect of the suit, effectively conceding that the accounting as done by the group was accurate.

summary judgment, asking the court to enforce the noncompetition provision. CP 305. Respondent filed a cross motion, asking the court to declare the noncompetition provision void as against public policy. CP 1236. Relying on the method of assessing public policy considerations set out in Washington case law, Appellant submitted evidence from two experts who evaluated the number of cardiologists and interventional cardiologists serving Pierce County and opined that there are more cardiologists than needed based on Pierce County's population.² CP 1256-1272; 1288-1296. In short, published industry standards relied upon by experts in the field showed that the restricted area had an overabundance of cardiologists, not a shortfall. *Id.* This evidence was uncontroverted. CP 1354-1360.

At oral argument Appellant asked the trial court to declare the noncompetition provision enforceable and to restrict Respondent from practicing cardiology, except as to his existing patients, within a five mile radius of Cardiac Study Center's offices in Pierce County for a period of five years. TR 20-22. This ensured that Respondent's existing patients could continue care with him,³ and also ensured that the noncompetition

² The ratio of full-time-equivalent ("FTE") adult cardiologists, including interventional cardiologists in Pierce County is two or three times higher than the "required number of cardiologists for each 100,000 residents. CP 1256-1272; CP 1288-1296.

³ The provision specifically provides that any patient is entitled to see their doctor of choice. CP 522.

provision would be enforced only to the extent reasonably necessary to protect CSC's goodwill and business interests.

On March 5, 2010, Judge Fleming completely released Dr. Emerick from his obligations under the noncompetition provision, stating that he did not believe it "fair . . . or just to prevent Dr. Emerick from practicing medicine" because it had taken him a long time to develop his skills as a cardiologist. TR 23. The trial court denied CSC's motion and granted Dr. Emerick's motion, ruling that the noncompetition provisions "are not enforceable because they violate public policy." TR 23-24; CP 1363. In a series of apparent inconsistencies, the trial court also held:

- (1) That Dr. Emerick had to comply in all other respects with Paragraph 13 (the noncompetition provision). 1363, p. 2.
- (2) That Dr. Emerick was not permitted to solicit Cardiac Study Center's patients, but could solicit the groups referral sources, such as hospitals and physicians. TR 23, 24. CP 1363.
- (3) In a direct reversal, the Trial Court then ordered Dr. Emerick's former colleagues to notify its patients in writing of Dr. Emerick's departure and his new business contact information, effectively requiring them to solicit their patients for him. TR 33-34. CP 1363.

III. ARGUMENT

A. Standard of Review

Whether a noncompetition provision is enforceable is a question of law. When the issues before the Court involve questions of law, the standard of review on appeal is *de novo*. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 833, 100 P.3d 791, 793 (Wash. 2004), citing *Nationwide Mutual Fire Ins. Co. v. Watson*, 120 Wn.2d 178, 195, 840 P.2d 851 (1992). When reviewing an order of summary judgment, the court engages in the same inquiry as the trial court. *Marincovich v. Tarabochia*, 114 Wn.2d 271, 274, 787 P.2d 562 (1990). A summary judgment motion can be granted only when no genuine issue as to any material fact exists, and the moving party is entitled to judgment as a matter of law. *Id.* The court must consider the facts in the light most favorable to the nonmoving party, and the motion should be granted only if reasonable persons could reach only one conclusion. *Id.*

B. Washington Enforces Reasonable Noncompetition Provisions.

There can be no dispute that Washington enforces reasonable noncompetition provisions. *Knight, Vale and Gregory v. McDaniel*, 37 Wn. App. 366, 680 P.2d 448 (1984), *review denied*, 101 Wn.2d 1025 (1984); *Perry v. Moran*, 109 Wn.2d 691, 700, 748 P.2d 224 (1987), *modified on other grounds*, 111 Wn.2d 885, 766 P.2d 1096 (1989), *cert.*

denied, 492 U.S. 911, 109 S. Ct. 3228, 106 L. Ed. 2d 577 (1989). Whether a covenant is reasonable involves consideration of three factors, which are identified, analyzed and applied to the noncompetition provision at issue in this case in **Section D** below.

C. Washington Enforces Reasonable Non-Competition Provisions Among Physicians.

There can be little serious dispute that Washington enforces reasonable noncompetition provisions among physicians. *Ashley v. Lance*, 75 Wn.2d 471, 476 (1969), (“*Ashley I*”); *Ashley v. Lance*, 80 Wn.2d 274 (1972) (“*Ashley II*”); *Lehrer v. Dept. of Social & Health Services*, 101 Wn. App. 509 (2000); *Schneller v. Hayes*, 176 Wn. 115 (1934). In doing so, it joins the vast majority of other jurisdictions.

The *Ashley* cases are the clearest Washington cases on point, and they indisputably establish that the Washington Supreme Court enforces noncompetition provisions among physicians. For that reason, an in-depth look at the cases and the Court’s reasoning is appropriate.

The *Ashley* cases involved a group of physicians in Bothell. As physicians were added to the medical group, each signed a noncompetition provision, exactly as each of the physicians that have joined Cardiac Study Center--including Dr. Emerick--have. Over several years, the relationships in the group began to deteriorate. Several of the partners left

and began to practice medicine nearby, competing with the original doctor in the group in violation of the noncompetition provision. The remaining physician sought enforcement of the noncompetition provision against the others. The trial court granted summary judgment for the defendants. The Supreme Court reversed the trial court, holding that the noncompetition provision was enforceable.

In doing so, the Supreme Court explained the rationale behind the enforcement: “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 I*, 75 Wn.2d 471, 476 (1969), *citing McCallum v. Asbury*, 393 P.2d 774, 777 (Or. 1964). Dr. Emerick made that same choice, reaped the benefits of the bargain, but is now unwilling to honor the obligation he incurred when he walked into an established lucrative practice in Tacoma.

Our Supreme Court expanded on its rationale, citing the decision in *Bradford v. Billington*, 299 S.W.2d 601 (Ky. 1957). In facts remarkable similar to those in the case before the court, *Bradford* was a doctor who moved across the country to join an established physician’s medical practice. Like Dr. Emerick, Bradford was provided an ownership interest in Billington’s practice. The Court specifically noted that in signing the noncompetition provision, the parties knew that Bradford would become

“acquainted with his partner’s patients” and that “it was only natural that Dr. Billington wished, in the event the partnership was terminated to retain the patients he had spent years serving.” The Court enforced the noncompete against Bradford, stating that it was reasonable that it encompassed the county because the situation reflected “. . . an agreement . . . made between two intelligent men; both highly trained in their profession and both with interests to protect.” *Bradford, supra*.

After citing and discussing the *McCallum* and *Bradford* cases, our Supreme Court returned to the facts before it. In its holding that the noncompetition provision in *Ashley* was enforceable, the Court said:

It is clear that the covenant involved was intended to prevent the type of harm that occurred in this case (competition by a partner or partners who leave the partnership). It is also clear, and uncontested, that the restrictive covenant was deliberately prepared and freely entered into by all the parties. There is no finding, and the record contains no evidence, of either a specific clause or intent to the contrary. Thus the restrictive provision of the agreement inures to the benefit of plaintiff.

Ashley II, 80 Wn.2d at 279, *citing Ashley I*, 75 Wn.2d at 920.

This case parallels *Ashley*, *Bradford* and *McCallum*. The cardiologists in the group shared their established patient population--the ultimate “investment” in Dr. Emerick’s practice. The existing group has a right to protect its goodwill, referral sources, patient lists and the time and expense it has invested in establishing its highly regarded cardiology

practice. The trial court's ruling permits Dr. Emerick to unfairly compete by setting up a competing practice, perhaps literally right next door to Cardiac Study Center. He is permitted to use his former colleagues' referral sources, its patient lists and its practice methods. This is precisely what the noncompetition provision was intended to prevent, and Washington law will not permit Respondent to ignore it.

The *Lehrer* case is less directly on point--the restrictive covenant there was the product of a settlement agreement, and restricted Dr. Lehrer from reapplying to work for Washington's Department of Social and Health Services. But it is instructive because the three *Perry* "reasonableness" factors were used to analyze the covenant that restricted the physician's practice, and it specifically rejected Dr. Lehrer's claim that the restrictive covenant violated public policy. In that case, this Court affirmed the Trial Court that enforced the covenant. *Lehrer*, 101 Wn. App at 513-514, *citing Perry* 109 Wn.2d at, 698.

The analysis, as set out so clearly in *Lehrer*, *Ashley*, *Perry* and *Knight*, and numerous other Washington cases, required the Superior Court to determine the reasonableness of the current noncompetition provision by using the three factors set out below. In this case, the Superior Court erred when it declined to engage in the analysis required by Washington case law, and instead summarily refused to enforce the

provision for “public policy” reasons, based on its own view that it would not be “fair and just” to prevent Respondent from practicing medicine. The use of an undefined “fair and just” standard to deny enforcement of this noncompetition provision flies in the face of longstanding precedent from this Court and the Supreme Court.

While it is the task of this court to enforce noncompetition provisions among physicians because our Supreme Court has established that precedent, it is also noteworthy that the vast majority (at least forty) of other states in the United States also enforce such agreements between physicians and generally speaking, State Legislatures, not courts, have made those decision.⁴ Arizona appears to be the only state whose Supreme Court has made such a ruling.

⁴ A few states have statutory provisions that prohibit or limit noncompetition restrictions on physicians. See Colo. Rev. Stat. Ann. § 8-2-113(3) (2003); Del .Code Ann. tit. 6, § 2707 (1993); Mass. Gen. Laws Ann. ch. 112, § 12X (1991). See also Tenn. Code Ann. §63-6-204(d), (e) (Supp.1998) (allowing physician noncompetes only where the employer is a hospital affiliate or a faculty practice plan associated with a medical school). In some other states, courts have interpreted their anti-trust statutes which expressly prohibit contractual restraints on the practice of a profession to preclude noncompetes being enforced against physicians unless ancillary to the dissolution of a partnership. See, e.g., *Odess v. Taylor*, 211 So. 2d 805 (Ala. 1968); *Bosley Medical Group v. Abramson*, 207 Cal. Rptr. 477 (Ct. App. 1984); *Bergh v. Stephens*, 175 So. 2d 787 (Fla. App. 1965); *Gauthier v. Magee*, 141 So. 2d 837 (La. App. 1962); *Western Montana Clinic v. Jacobson*, 544 P.2d 807 (Mont. 1976); *Spectrum Emergency Care, Inc. v. St. Joseph's Hospital and Health Center*, 479 N.W.2d 848 (N.D. 1992). Washington has no such statutory provisions and as *Ashley, Lehrer and Knight Vale & Gregory* make clear, reasonable noncompetition provisions will be enforced against professions including physicians.

In language typical of those states who enforce noncompetition provisions among physicians, the New Mexico Supreme Court put it this way:

The public has an interest in seeing that competition is not unreasonably limited or restricted, but it also has an interest in protecting the freedom of persons to contract, and enforcing contractual rights and obligations.

Lovelace Clinic v. Murphy, 417 P.2d 450, 453-454 (N.M. 1966).

D. The Noncompetition Provision Before The Court Meets The Reasonableness Factors

The Emerick noncompetition provision was clearly reasonable under the three reasonableness tests established by *Racine* and *Perry*. These cases say that, to determine the reasonableness of a noncompetition provision, a Court must consider the following three factors: (1) whether the provision is necessary to protect the business or goodwill of the employer, (2) whether it imposes any greater restraint than is reasonably necessary to secure the employer's business or goodwill; and (3) whether the loss of the particular services and skill would cause such public injury that it should not be enforced. *Perry*, 109 Wn.2d at 698, citing *Racine*.

1. The Noncompetition Provision Is Necessary to Protect CSC's Business Interests and Goodwill

Washington law is well established that a business, including a medical practice, has a legally protectable interest in its goodwill, referral

sources, patient relationships and in the time, energy and expenses expended to assist a professional in establishing a practice. *Perry*, 109 Wn.2d at 701 (an employer “has a legitimate interest in protecting its existing client base from depletion by a former employee.”) *See also*, *Intermountain Eye & Laser, PLLC v. Miller*, 127 P.3d 121, 229 (Idaho 2005), which further articulates the elements of business interests in a medical practice; *Knight Vale & Gregory*, 37 Wn. App. at, 369-70; *Racine*, 141 Wn. at 612-13; *In re Marriage of Zeigler*, 69 Wn. App 602 (1993). CSC’s business interests also include its referral sources, such as physicians and hospitals in Pierce County, as well as CSC’s patients, who come from throughout the South Puget Sound. CSC has a large patient base, a highly recognized name, an excellent reputation, and excellent referral sources through long-established relationships in Pierce County.

Respondent had no relationship with any of these groups when he arrived in Pierce County from Tennessee, and he has had no access to these referral sources except what he has gained through his association with CSC and while he was being compensated by CSC. If Dr. Emerick is permitted to ignore the noncompetition provision and practice in direct competition with CSC, his practice would unfairly draw from the same referral sources, and CSC’s referrals would be negatively impacted.

2. *CSC's Noncompetition Provision Imposes No Greater Restraints than Reasonably Necessary*

A noncompetition provision is reasonable if it imposes no greater restraints than what is reasonably necessary to protect the employer's interests. *Perry*, 109 Wn.2d at 698. The reasonableness inquiry centers on the duration and scope of the noncompetition provision. *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968.)

In *Ashley*, the Supreme Court enforced a noncompetition provision against physicians for a period of ten years and within a 10 mile radius from the city limits of Bothell. Courts in other jurisdictions routinely uphold and enforce noncompetition provisions between physicians of two to five years duration and involving a much larger geographic scope⁵ than the ten-mile radius from Tacoma or a five mile radius of the four CSC offices here.

The geographic and temporal restraints in this noncompetition provision were narrowly tailored to protect CSC's business interests and

⁵ See, e.g., *Mohanty v. St. John Heart Clinic, S.C.* 866 N.E.2d 85 (Ill. 2007) (five-year restriction within five mile radius upheld); *Keeley v. Cardiovascular Surgical Assocs., P.C.*, 510 S.E.2d 880 (Ga. App. 1999) (two-year 75 mile restriction upheld); *Fumo v. Medical Group of Michigan City, Inc.*, 590 N.E.2d 1103, 1109 (Ind. App. 1992); *Gant v. Hygeia Facilities Found., Inc.*, 384 S.E.2d 842, 845 (W. Va. App. 1989) (three-year, 30 mile restriction upheld); *Gomez v. Chua Medical Corp.*, 510 N.E.2d 191, 193 (Ind. App. 1987) (two-year, 30-mile restriction upheld against surgeon) (two-year, 25-mile restriction upheld); *Fields Found., Ltd. v. Christensen*, 309 N.W.2d 125, 132 (Wisc. App. 1981) (two -year, 50-mile restriction upheld); *Gelder Med. Group v. Webber*, 363 N.E.2d 573, 41 N.Y.2d 680 (N.Y. App. 1977) (five year and 30 mile restriction upheld); *Cogley Clinic v. Martini*, 112 N.W.2d 678, 681 (Iowa 1962) (three-year, 25-mile restriction upheld).

goodwill in Pierce County. Its four offices are strategically placed throughout Pierce County, near all major hospitals in Pierce County as a reflection of its business model. Appellant asked the trial court to enforce the noncompetition provision within a five mile radius of each of its four Pierce County offices, which would permit Dr. Emerick to set up practice in Federal Way--15 minutes from the offices where he previously worked. Dr. Emerick could practice without limitation in King County, Thurston County, Kitsap County or anywhere else in the Puget Sound area, the rest of the state, or throughout the world. Respondent knew about Appellant's service model when he joined the group moving from Tennessee in 2002 and enjoyed its benefits for almost 10 years. Respondent participated in enforcing the noncompetition provision against others, but seeks to avoid his own identical obligation.

3. The Pencil Test

Wood v. May also stands for the proposition 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. *Wood*, 73 Wn.2d at 314. This was identified by the *Wood* court as the "blue pencil test." In *Wood*, the Supreme Court reversed the trial court's decision to invalidate the entire noncompetition agreement, and remanded to the trial court for a determination of

reasonable time and geographic restrictions. *See also Sheppard v. Blackstock Lumber Co., Inc.*, 85 Wn.2d 929, 934 (1975) (remanding to trial court to determine reasonable restrictions).

Existing Washington precedent holds that the five year temporal restriction and the geographic area of Pierce County and Federal Way, as set out in the Agreement are reasonable. *Ashley II*, 80 Wn.2d at 274. The Agreement expressly acknowledges that Dr. Emerick may see any patient who wants to obtain care from him and CSC did not seek to prevent Dr. Emerick from seeing his existing patients anywhere. CP 522. The noncompetition provision should be enforced for Dr. Emerick's new patients. If the Court determines that the proposed restriction are too broad, it should still enforce the restriction to prohibit Dr. Emerick from practicing within a five-mile radius of CSC's four existing offices for five years (except as necessary to treat his former patients), or to the maximum extent that is reasonable and lawful.

4. ***There is No Risk of Injury to the Public if this Noncompete Is Enforced.***

The third factor used to determine reasonableness is known as the "public policy" factor. The Superior Court clearly stated that this noncompetition provision was unenforceable because it violated public policy. TR 23-24; CP 1363. The Court failed to use the public policy test

set out in Washington case law, however, and instead used something similar to Arizona precedent.⁶

The “public policy” factor attempts to assess the potential damage to the public (not to the employee)⁷ 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. *Knight*, 37 Wn. App. at 368; *Alexander & Alexander Inc. v. Wohlman*, 19 Wn. App. 670, 684 (1978). In this case the noncompetition provision, which expressly allowed Respondent to continue to see his existing patients, did not limit the ability of Pierce County residents to obtain the services of a cardiologist. The opinions of two experts that there is a surplus of cardiologists, including interventional cardiologists, in the restricted area went unchallenged and is the only evidence on the public policy test on this record. CP 1256-1272; CP 1288-1296.

Moreover, neither the Respondent nor the trial court even attempted to engage in the public policy analysis set out in the cases. Dr. Emerick did not argue that Pierce County is underserved by cardiologists,

⁶ *Valley Medical Specialists v. Farber*, 194 Ariz. 363 (1999).

⁷ The second test focuses on the employee.

and certainly provided no proof to rebut that to the contrary presented by Appellant. Instead, he asserted that the trial court should follow the precedent of Arizona. The Trial Court specifically held the provision violated public policy because he didn't think it was "fair or just" to prevent Respondent from practicing in the restricted area.

I don't think it's fair . . . or just to prevent him from practicing medicine and the skills that have took (sic) him so long to acquire, part of which is his experience that he gave while he was at CSC. I understand. But I am just not going to enforce the non-compete agreement.

TR 23.

Even the three states that have prohibited noncompetition provisions between Physicians have done so based on a "public policy" argument about the public's freedom to choose a physician. There is no case law identified which holds that a physician should not be required to keep his promise not to compete with his former colleagues just because it wouldn't be "fair or just" because it took him a long time to develop his skills.

Every Washington court that has considered the *actual* public policy test set out in the case law, as well as the vast majority of jurisdictions around the United States, have rejected the public policy argument and enforced reasonable restrictive covenants against physicians.

In *Lehrer*, the public policy argument was expressly rejected. *Lehrer*, 101 Wn. App. at 513-14. The Washington Supreme Court has also expressly held that “the law presumes that the [medical professional’s] service can be performed by someone else.” *Wood*, 73 Wash. at 310. Additionally, in *Racine v. Bender*, the Washington Supreme Court directly addressed this public policy argument, and rejected it, reversing the trial court’s grant of summary judgment and specifically referenced medical providers:

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.**

Racine, 141 Wash. 606, 612-13 (1927) (emphasis added).

In *Knight, Vale & Gregory*, 37 Wn. App. at 371, this Court directly rejected this public policy argument when the employees in question (Certified Public Accountants), demonstrated that they were “exceptionally skilled” but not that their services were “unique” or “incomparable.” In *Lehrer*, the Court found that there were other psychiatrists available to serve the public. *Lehrer*, 101 Wn. App. at 514.

It is undisputed on this record that there are many cardiologists in Pierce County to serve the needs of the public. A47-51, A64-65.

Dr. Emerick's only response to this was his reliance upon the Arizona Supreme Court and statutes from other jurisdictions to bolster his public policy argument. This should have been of little or no relevance to the Superior Court because of established Washington precedent. The general public will suffer no loss if Dr. Emerick does not practice in the restricted area. The freedom of persons to contract should be honored.

E. The Court Erred in permitting solicitation and requiring CSC--to send letter

In what is an obvious inconsistency, the Superior Court both prohibited and permitted Dr. Emerick to solicit his former colleagues patients and referral sources. TR 23-24; 33-34; CP 1363. This is plain error, and should be reversed.

F. The Court Erred in refusing to consider the history of the partnership as required by *Ashley*

The Court erred in refusing to consider the history of the parties and their agreement. Instead, he entered an order striking the relevant evidence and specifically said he would not consider the facts that lead to the disintegration of the relationship between the parties. CP 1112. While it may be unpleasant in certain circumstances, Washington law requires

that it be done. The *Ashley* cases are clear on this point, as this Court has also held.

In interpreting the partnership agreement, including the restrictive covenant, the agreement must be read as a whole. It must also be construed in the light of the history of the partnership and its purpose.” *Ashley I*, 75 Wn.2d at 919. When interpreting a contract, the court seeks to ascertain the parties' intent. *Berg v. Hudesman*, 115 Wn.2d 657, 663, 801 P.2d 222 (1990). The court may consider extrinsic evidence about the circumstances under which the contract was made to determine such intent. *Berg*, 115 Wn.2d at 667, 801 P.2d 222. A partnership agreement should be read as a whole and construed in light of the history of the partnership and its purpose. *Ashley v. Lance*, 75 Wn.2d 471, 451 P.2d 916 (1969). And courts should attempt to harmonize clauses that seem to conflict and interpret the agreement in a way that gives effect to all of the contract provisions. *Turner v. Wexler*, 14 Wn. App. 143, 146, 538 P.2d 877 (1975); *Mayer v. Pierce County Med. Bureau, Inc.*, 80 Wn. App. 416, 423, 909 P.2d 1323 (1995).

Parker v. Tumwater Family Practice Clinic, 118 Wn. App. 425, 434, 76 P.3d 764, 769 (Wash. App. Div. 2, 2003).

The history of the partnership in this case is every bit as important as the history of the partnership in *Ashley*. The other physicians at Cardiac Study Center did not terminate this relationship quickly or lightly. They spent hundreds of hours over almost four years working with Dr. Emerick to try and resolve the issues that were causing him and the practice such difficult problems.

It became impossible for his partners to determine whether Dr. Emerick was unwilling or unable to modify his conduct. Whichever is true, 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.

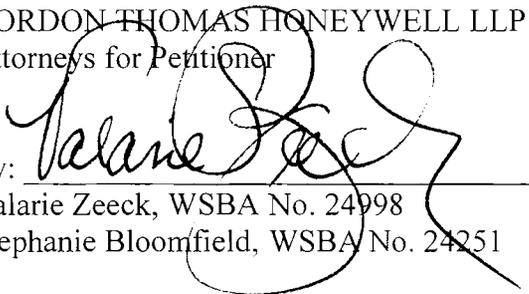
IV. CONCLUSION

No Washington appellate opinion has ever held that a noncompetition provision is void on its face as a matter of public policy because it involves a physician who spent years in training. Appellant asks this Court to reverse the Superior Court's judgment granting Summary Judgment to Respondent and its denial of Appellant's motion for Summary Judgment for the reasons stated herein.

In addition, Appellant respectfully requests its reasonable attorney's fees and costs in the action below and on appeal.

RESPECTFULLY SUBMITTED this 22^d day of April, 2011.

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By: 

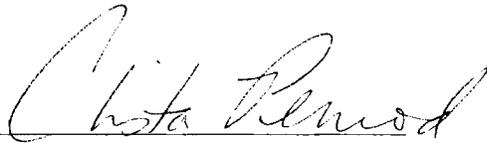
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CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury, that on the 20th day of April I served the foregoing Appellant's Corrected Opening Brief as follows:

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