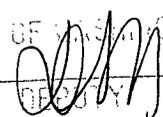


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STATE OF WASHINGTON
BY 

Court of Appeals No. 42139-9-II

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

ED BRICKER,
Appellant,

v.

STATE OF WASHINGTON, et al,
Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Paula Casey

BRIEF OF APPELLANT

Christopher W. Bawn, WSBA #13417
1700 Cooper Pt. Rd. SW, #A-3
Olympia, WA 98502
voice: (360) 357-8907
cwbawn@justwashington.com

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I. ASSIGNMENTS OF ERROR

Assignment of Error #1. The trial court erred in granting the State's Motion for Summary Judgment as to Bricker's claims for: 1) interference with a business expectancy; 2) retaliation/ "blackballing/blacklisting" due to whistleblowing and opposing discrimination; 3) breach of contract; and 4) negligence and intentional infliction of emotional distress/outrage. (See Complaint CP. 12-15; and SJ Motion CP. 44)

Assignment of Error #2: The trial court erred in failing to enter any findings of fact, conclusions of law, or lawful basis for granting summary judgment.

Assignment of Error #3: The trial court's order granting summary judgment does not meet the standards required by CR 56, and is therefore defective.

Assignment of Error #4: The trial court erred in apparently concluding as a matter of law, despite material facts in dispute, that language in a prior settlement agreement resolving a employment discrimination/retaliation lawsuit, precluded Bricker's claims arising from post-settlement misconduct by the Department of Health. See 4/22/2011 Summary Judgment Hearing RP. 20.

Assignment of Error #5: The trial court erred in rejecting Bricker's claims that the agreement violates public policy, and was ultra vires, unconscionable, and ambiguous.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether the trial court erred in granting the Respondents' Motions for Summary Judgment.
2. Whether the trial court erred in failing to enter any supporting findings of fact, or conclusions of law, or resolving the material facts and disputed language in the agreement.
3. Whether the trial court erred in interpreting the terms of a settlement agreement as precluding Bricker's claims as a matter of law.

4. Whether the trial court failed to properly address the traditional contract principles Bricker presented, which merited denial of summary judgment.
5. Whether the trial court erred in failing to find the settlement agreement's terms violate public policy, are ambiguous, unconscionable and ultra vires as applied to the facts of this case.

III. STATEMENT OF THE CASE

Ed and Cynthia Bricker, husband and wife, filed a federal lawsuit in 2002, seeking injunctive relief and damages for “discriminatory employment actions “ including disability discrimination, whistleblower retaliation, and constitutional deprivations, associated with Ed Bricker's employment with the State Department of Health. CP. 146-147. The CP. 28-33. In April 2005, Ed and Cynthia Bricker entered into a settlement agreement, “for the purpose of resolving the full range of misunderstandings, disputes, and potential claims that have arisen between the parties in connection with Edwin Bricker's employment at the Washington State Department of Health.” CP. 28. The Brickers agreed to release “all unknown and unanticipated damages arising from or alleged to arise from or which might later be alleged to have occurred during the period of [Ed Bricker's] employment with the

department up to the effective date of th[e settlement] agreement.”

CP. 28. The agreement required that the Brickers dismiss their federal lawsuit with prejudice. CP. 31. The agreement also contained a provision drafted by the State of Washington (CP. 142), that said: “Resignation, Agreement not to Seek Further State Employment or Interact with the Department” which said Ed Bricker agreed “not to seek or accept at any time employment with the Department of Health or the State of Washington. He further agrees that he will not have any further professional or official contact with the Department of Health. Mr. Bricker shall immediately resign from the department.” CP. 31. The State agreed to a specific manner of providing a reference and to provide a letter of reference (CP. 31), the terms of which were agreed upon and attached to the agreement. CP. 34. The agreement provided that either party could seek “specific performance in Thurston County Superior Court” for any violation of the Agreement. CP. 32. The agreement, by its express terms, only involves the settlement and release of claims against the State arising from Bricker’s former employment.

CP. 28.

Ed Bricker testified in response to the motion for summary judgment that he had worked in the "Radiation Protection" division of the Department of Health and he "blew the whistle" on the State's oversight of a nuclear waste incinerator. CP. 77. His understanding of the agreement was that "I agreed to give up my job with the DOH, and not to maintain my close connections with the regulators of nuclear safety." CP. 84. Consistent with the limitation to the release of claims associated with his "former employment," Ed Bricker also testified that he believed the additional words "further professional or official contact" related to his past activities as a former expert witness and consultant concerning nuclear safety. CP. 79. Ed Bricker noted that the agreement, read as a whole, seemed to ensure he would still be able to find employment in a health-related field, since the agreement contained a procedure for providing him with job references from the Department of Health, as well as a letter of reference specifically extolling his work in health-related fields. CP. 79-80.

Cindy Bricker, who was also a party to the agreement and present for the mediation, explained that she understood the

agreement as requiring Ed Bricker to resign his employment, and the added language was a “gag” order on her husband from further contacts with co-workers to discuss radiation protection issues. CP 123. Cindy Bricker pointed out that an “unwritten” condition of the agreement, which supported her understanding, was a demand that Ed Bricker withdraw a letter he had written to Governor Gary Locke, concerning problems with a nuclear waste incinerator. CP. 123 (See CP. 110 (Letter to Governor)).

After searching unsuccessfully for other work, Ed Bricker discovered that the DOH was mishandling his job reference, in violation of the agreement. CP. 81. In order to pursue business opportunities, Ed Bricker applied for and was granted a State Department of Health Drug Counselor Certificate, and he did some volunteer drug counseling work. CP. 82. In an effort to start a family business, Ed Bricker and his brother William Bricker applied for Clandestine Drug Lab (CDL) certificates. CP. 82. After completing the application and satisfying the Hazardous Waste Operations requirements, both Ed and William Bricker enrolled in and successfully completed a \$600 state-

approved clandestine drug lab worker certification course. CP. 55-56, 83, 117.

Unfortunately, after Ed Bricker had completed his application for the CDL certificate, an attorney for the State Department of Health who was not present for the mediation and not a signatory to the contract, said that Ed Bricker was not entitled to hold a CDL certificate because of language appearing in the settlement agreement of the 2002 federal employment discrimination lawsuit. CP. 162-164.

Ed Bricker commenced the present lawsuit, alleging that the bad job references he received, and the subsequent denial of a CDL certificate after he trained, qualified and applied for the certificate constituted: 1) interference with a business expectancy; 2) retaliation/ "blackballing/blacklisting" due to whistleblowing and opposing discrimination; 3) breach of contract; and 4) negligence and intentional infliction of emotional distress/outrage. Complaint CP. 12-15; and SJ Motion, CP. 44.

The trial court granted the State's motion for summary judgment on the State's assertion that the language of the

settlement agreement precluded Ed Bricker's lawsuit. The Appellant now seeks review in this court.

IV. ARGUMENT

ERRORS #1, #2, #3, #4 – ERROR IN USING PRIOR SETTLEMENT AGREEMENT TO DEFEAT SUBSEQUENT MISCONDUCT BY STATE OF WASHINGTON

Summary judgment motions shall be granted only if the pleadings, affidavits, depositions or admissions show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56. The court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party, and, when so considered, if reasonable persons might reach different conclusions the motion should be denied. Balise v. Underwood, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issues or genuine issues of credibility. Balise, 62 Wn.2d at 199. The appellate court must consider all reasonable inferences in the light most favorable to the nonmoving party. Clements v. Travelers

Indem. Co., 121 Wn.2d 243, 249, 850 P.2d 1298 (1993). A defendant moving for summary judgment bears the burden of showing the absence of an issue of material fact. Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).

Settlement agreements are interpreted in the same as other contracts. Mut. of Enumclaw Ins. Co. v. USF Ins. Co., 164 Wn.2d 411, 424 n.9, 191 P.3d 866 (2008). Contract construction is a matter of law that an appellate court reviews *de novo*. Tacoma Northpark, LLC v. NW, LLC, 123 Wn. App. 73, 80, 96 P.3d 454 (2004). The intent of the parties is controlling. Mut. of Enumclaw Ins. Co. v. USF Ins. Co., at 424 n.9. Courts must determine the parties' intent by looking to the contract as a whole, its objective, the parties' conduct, and the reasonableness of the parties' interpretations. *Id.* Ambiguities are construed against the drafting party. Rouse v. Glascam Builders, Inc., 101 Wn.2d 127, 135, 677 P.2d 125 (1984). Even when the terms are clear, appellate courts consider extrinsic evidence to assist in ascertaining the intent of the parties and in interpreting the agreement. Berg v. Hudesman, 115 Wn.2d 657, 667, 801 P.2d 222 (1990).

Here, the State failed to provide any evidence of the intent of the parties, or support for the vague expansive language in the agreement. Meanwhile, Ed and Cynthia Bricker both provided the trial court with the contextual understanding of the parties. In addition, reading the agreement as a whole, the agreement clearly involves a settlement of past conduct, and does not release the State from liability for its future conduct. In the present lawsuit, the settlement agreement “release” expressly limits the claims Ed Bricker released as those related to his former employment up to the date of the agreement, and no farther. Using the traditional method of contractual interpretation, this should preclude an award of summary judgment.

The facts establish that the present lawsuit is over alleged subsequent misconduct by the Department of Health, in providing bad job references that cost Bricker employment with other entities and in denying a CDL certificate that cost Bricker the ability to work in a private occupation. RCW 49.60.210 makes it illegal to expel, discharge or in any other manner discriminate against a person who has blown the whistle on misconduct by filing a complaint with the State Auditor and/or filed a charge of discrimination. See RCW

49.60.201 (providing statutory protection for whistleblowers and victims of employment discrimination). With respect to providing bad references in relation to Bricker's employment, the trial court offered no explanation for its conclusion that such a claim was precluded by the "official contact" provision in the agreement. Washington courts have recognized discrimination claims for loss of prospective employment. See Hegwine v. Longview Fibre Company, 162 Wn.2d 340, 172 P.3d 688 (2007)(permitting "refusal to hire" claim by pregnant job applicant); Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997)(negative post-employment job reference claim), certiorari denied, 118 S.Ct. 1803, 523 U.S. 1122, 140 L.Ed.2d 943 (1998); Charlton v. Paramus Bd. of Educ., 25 F.3d 194, 200 (3rd Cir.)(allowing post-employment retaliation claims, noting that: "Post-employment blacklisting is sometimes more damaging than on-the-job discrimination . . ."), cert. denied, 513 U.S. 1022, 130 L.Ed. 2d 503, 115 S.Ct. 590 (1994).

The trial court, during its hearing and in its written order in this case, offers no findings of fact, and does not state that the requirements of CR 56 were met. There is also no legal precedent in Washington, and no plain meaning that can be drawn from the

language in this agreement without reviewing the context under which it was entered. To that extent, it was error for the trial court to completely refuse to consider the factual context presented by the Brickers.

Rather than performing the form of contractual interpretation that is necessary in this case, the trial court simply relied upon its gut instinct as to what the settlement agreement probably meant to the State. In that regard, it was error for the trial court to impose its own interpretation of the facts and circumstances, or the undisclosed interpretation not offered by the State, upon the party that was not the drafter. The trial court at one point suggested that the State might have to determine if Bricker was performing his job as a private CDL holder. This was clearly not something the parties were contemplating, since the agreement expressly limits itself to claims related to Bricker's former employment. Such claims would include Bricker's prior employment, whistleblowing and expert witness work, but clearly not every other form of occupation Bricker would seek to hold in the future. The trial court's conclusion is belied by the State's own reference letter, attached to the agreement, which emphasizes Bricker's qualification for health-

related and regulated occupations, as well as the State's decision to continue to allow Bricker to hold a registered counselor license.

As Bricker pointed out in the court below, the agreement clearly does not contain any statement about the issuance or denial of a CDL certificate. In addition, the same interpretation would preclude Bricker from holding a food handler's permit, or any of a myriad of other services that touch upon the State's role as issuer of certificates. . The State relies upon a vague, unsupported assertion that, the following words have an unambiguous meaning, and prevent Ed Bricker from obtaining a CDL certificate: "[Ed Bricker] further agrees that he will not have any further professional or official contact with the Department of Health. Mr. Bricker shall immediately resign from the department." Clearly, upon *de novo* review, this court cannot discount the Brickers' assertion that the agreement was consistent with their understanding that Bricker was giving up the his job and all of his existing professional and official contacts with the department of Health (including a letter he had submitted to the governor).

The State told Ed Bricker he violated the agreement by asking for a CDL certificate but simultaneously permitted Ed

Bricker to obtain and continue to hold a drug counselor certificate, even after this lawsuit was filed.

Error #5 – This court should conclude that the expanded scope of the agreement permitted by the trial court, precluding Bricker from complaining about retaliatory bad reference/blacklisting and denial of the hundreds of occupations that are regulated by the State because they might involve “official contact” violates public policy, and such agreements are ultra vires, unconscionable, and too ambiguous to be enforced.

Accepting the Brickers' facts, for purposes of CR 56, it is clear that the trial court's decision allows the State to arbitrarily issue bad references, and to ban Ed Bricker from receiving any certificate that may result in contact with the State. It is well settled that Washington courts will not enforce agreements that bar a former employee from working in a field of expertise where the employee takes no unfair advantage of his former employer. Labriola v. Pollard Group, Inc., 152 Wn.2d 828, 100 P.3d 791 (2004)(Madsen, J., concurring). It seems particularly disgusting that a public employer would be granted such relief. An employer

cannot "prevent or inhibit" its former employees from using the "normal skills of the[ir] trade." Restatement (Second) of Contracts ¶188 comment (b) (1981). Id. As Justice Madsen points out, the venerable authority on contract law, "Corbin says: 'Public policy prevents the enforcement of a restraint that is unconnected with a contract that has a purpose other than restraining trade.'" 2 CORBIN ON CONTRACT § 6.19, at 340 (1995). " If the State is allowed to enter into such a broad settlement agreement, it will be the first such contract in the history of this state that has been upheld on such broad terms, and this court is opening the floodgates of contractual bans. The Washington Supreme Court in Wood v. May, 73 Wn.2d 307, 310-312 (1968), details concerning the "illegality" of a contract provision like the one presented here. Notably, this contractual provision is worse than the Wood v. May agreement, because the State claims it is entitled to contract for a 1) lifetime ban, 2) in the entire state of Washington, 3) to a person holding any profession that involves any alleged professional or official contact with the Washington Department of Health. The judges in the Wood v. May case were not convinced that contract a contract which only contained a 5-

year ban, extending for 100 miles was enforceable. The fact that our state government is now advocating for this court to uphold the present, more onerous, unconscionable sort of provision is even more problematic.

Here, the State should be granted no greater power than any private employer to enter into an agreement with an employee in “restraint of trade.” Notably, courts do not permit governmental entities to engage in *ultra vires* acts by contractually avoiding their regulatory duties. Chemical Bank v. WPPSS, 99 Wn.2d 772, 666 P.2d 329 (1983)(invalidating financing arrangements on the ground that the municipal corporations involved exceeded their authority in agreeing to them).

In Washington, employment agreements that unilaterally and severely limit the remedies of only one side are substantively unconscionable. Zuver v. Airtouch, Inc., 153 Wn.2d 293, 317-18, 103 P.3d 753 (2004)(broad arbitration clauses). See also Scott v. Cingular, 156 Wn.2d 1001, 135 P.3d 478 (2005)(broad waiver of class actions)(citing Zuver, 153 Wn.2d at 320 (in turn, citing Daniel P. O’Meara, Arbitration of Employment Disputes § 4.22 (2002) (unconscionable terms may be struck to preserve essential ones)).

This court should not grant the State the contractual right to insert language in settlement agreements which terminate government employees from every State occupation as well as every occupation the State regulates. This sort of ban shocked the court in Wood v. May, and coming from the state, it should be stricken as unconscionable. As such, the provision, being unconscionable, should be stricken from the agreement and not allowed to operate to defeat Ed Bricker's retaliation and other lawful claims.

Finally, Bricker tried to argue to the trial court that it should consider the strong mandate and public policy against retaliatory actions against persons who complain of discrimination and initiate a whistleblower complaint with the State Auditor. Washington's law against discrimination must be liberally construed to deter and eradicate discrimination. RCW 49.60.020. Franklin County Sheriff's Office v. Sellers, 97 Wn.2d 317, 335, 646 P.2d 113 (1982); Blaney v. Int'l Ass'n of Machinists & Aerospace Workers, Dist. No. 160, 151 Wn.2d 203, 214, 87 P.3d 757 (2004); Marquis v. City of Spokane, 130 Wn.2d 97, 922 P.2d 43 (1996)(due to its broad import. discrimination may be claimed by independent contractors).

See also RCW 49.60.201 (providing statutory protection for whistleblowers and victims of employment discrimination).

Here, the Plaintiff expressly settled his employment discrimination and whistleblower retaliation lawsuit with the State for acts occurring prior to the date of the April 2005 agreement. It would clearly violate the policy of this state to permit any employer, let alone the State of Washington, to engage in retaliatory acts after an employee attempts to resolve an employment dispute. By its terms, the settlement agreement did not preclude such subsequent actions, and there is clearly no support for allowing such outlawed misconduct to occur in the future based upon a claimed release of past misconduct in a settlement agreement.

CONCLUSION

This court should reverse the trial court, and reinstate Ed Bricker's claims.

Respectfully submitted January 3, 2012

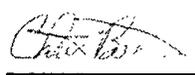
A handwritten signature in black ink, appearing to read "Chris Bawn", followed by a stylized signature that likely represents the attorney's name.

Christopher W. Bawn, #13417, Attorney for Appellant

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STATE OF WASHINGTON
BY _____
DEPUTY

CERTIFICATE OF SERVICE

On this date, I delivered the Brief of Appellant to the Court of Appeals by ABC LEGAL MESSENGER, together with a check in payment of sanction, and I personally submitted the Brief of Appellant to the Respondent's counsel. January 3, 2012:



CHRISTOPHER W. BAWN, WSBA #13417