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COURT OF APPEALS
DIVISION II

2012 NOV -6 PM 1:30

STATE OF WASHINGTON

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No. 43486-5-II

**Court of Appeals, Div. II,
of the State of Washington**

Will McKasson,

Petitioner,

v.

**Brian Johnson, Danielle Johnson, and
Academy of Brian Johnson, LLC,**

Respondents.

Brief of Petitioner

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1. Introduction

After working for the Academy of Brian Johnson for about five years, Will McKasson was presented with and signed an employment agreement containing a non-competition provision. The agreement stated that the parties intended no consideration for the non-competition provision other than continued employment. Under the rule set forth in *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 100 P.3d 791 (2004), continued employment is insufficient consideration to support a non-competition agreement. The Academy now seeks to escape the legal effect of its own contract by claiming, contrary to the contract's express terms, that there was additional consideration for the non-competition clause. However, under the parol evidence rule and the context rule, the Academy's extrinsic evidence cannot be used to contradict the written terms of the agreement. This Court should reverse and grant summary judgment in McKasson's favor.

2. Assignments of Error

Assignments of Error

1. The Superior Court erred in denying McKasson's motion for summary judgment when there were no material facts in dispute and McKasson was entitled to judgment as a matter of law.

Issues Pertaining to Assignments of Error

Whether extrinsic evidence that would modify or contradict the written terms of the employment agreement can create a dispute of material fact to preclude summary judgment (assignment of error #1).

3. Statement of the Case

Will McKasson started work as a martial arts and fitness instructor at the Academy of Brian Johnson in 2004. (CP at 3, 9.) The Academy, owned by Brian and Danielle Johnson, is a fitness facility in Lacey, Washington, with about 400 members. (CP at 25.)

After five years of employment, McKasson was presented with and signed a written employment agreement that included a non-competition provision. (CP at 3, 11-16.) The Academy contends that prior to signing the agreement the parties discussed giving McKasson a management role and opportunities for additional income in exchange for the non-competition clause. (CP at 26.) None of these opportunities were reflected in the written agreement. (*See* CP at 11-16.) McKasson's employment did not change when the agreement was signed. (CP at 9.)

The agreement recites that it is a fully integrated contract:

9. **Entire Agreement and Amendments.** This instrument contains the entire agreement between the parties. No amendment or variations of the terms and conditions of this Agreement shall be valid unless it is in writing and signed by all parties hereto. Any prior agreements between the parties are revoked in their entirety by this Agreement.

(CP at 15.) It also specifies: "Any other employment agreements by and between the parties hereto are hereby revoked." (CP at 15, ¶ 7.)

The non-competition clause (titled "Section 2") states that employment is the only consideration for McKasson's agreement not to compete. (CP at 13.) It further states: "No additional consideration for

Employee's post-termination competition agreement hereunder is intended by the parties." (CP at 13.)

McKasson was fired by the Academy in October, 2011. (CP at 4, 9.) Since McKasson's termination, the Academy and the Johnsons have sought to prevent McKasson from being employed elsewhere as a fitness instructor. (CP at 4, 9-10.)

McKasson sued the Johnsons and the Academy. (CP at 3-5.) He brought a summary judgment motion seeking the court's determination that the non-competition clause was unenforceable as a matter of law. (CP at 6-8.) In response to the motion, the Academy argued that its extrinsic evidence of prior negotiations demonstrated there was additional consideration to support the non-competition clause. (CP at 37-38.)

The trial court denied McKasson's motion for summary judgment and subsequent motion for reconsideration. (CP at 46-47, 58.) The court held that the Academy's extrinsic evidence raised an issue of material fact as to whether additional consideration existed. (RP at 20-21; CP at 58.)

McKasson petitioned this Court for discretionary review pursuant to RAP 2.3(b)(4). The parties stipulated that the trial court's orders involved a controlling question of law as to which there is substantial ground for a difference of opinion: put simply, whether the court properly considered the extrinsic evidence. The parties agreed that resolution of this question will materially advance settlement of the case. This Court accepted review.

4. Summary of Argument

The trial court erred in denying McKasson's motion for summary judgment because there were no material facts in dispute and the enforceability of the non-competition clause could be determined as a matter of law. The written employment agreement stated that the only consideration for the non-competition clause was continued employment. This is insufficient as a matter of law, rendering the clause unenforceable.

It is immaterial whether the written employment agreement is a full or only a partial integration of the terms of the agreement, because the end result is the same. The parol evidence rule prohibits the use of extrinsic evidence to prove additional, unwritten terms that contradict the written terms. Similarly, the context rule prohibits the use of extrinsic evidence to interpret a term contrary to the meaning of the written words. Regardless of whether the employment agreement is a full or only a partial integration, the Academy's extrinsic evidence cannot be used to contradict the written term that no additional consideration was intended by the parties. There is only one possible conclusion: the only consideration was continued employment. The non-competition clause is unenforceable as a matter of law. This Court should reverse and grant summary judgment to McKasson.

5. Argument

5.1 Summary Judgment Orders Are Reviewed De Novo.

This Court reviews summary judgment orders de novo. *Schmitt v. Langenour*, 162 Wn. App. 397, 404, 256 P.3d 1235 (2011). The Court engages in the same inquiry as the trial court. *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 832, 100 P.3d 791 (2004). Summary judgment should be granted when there is no genuine issue as to any material fact and the issues can be resolved as a matter of law. CR 56(c). The court considers the facts in the light most favorable to the nonmoving party. *Labriola*, 152 Wn.2d at 833. A material fact is one that affects the outcome of the litigation, in whole or in part. *Schmitt*, 162 Wn. App. at 404. A genuine issue of material fact exists only if reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

5.2 McKasson Is Entitled to Summary Judgment Because There Are No Material Facts in Dispute and the Non-Competition Clause Is Unenforceable as a Matter of Law.

The Academy seeks to selectively enforce the terms of the written employment agreement it presented to McKasson after five years of employment. The Academy hopes to convince the Court, through extrinsic evidence of prior negotiations, that the Academy intended additional consideration for the non-competition clause, despite clear language to the contrary in the Academy's own written contract.

“The whole panoply of contract law rests on the principle that one is bound by the contract which he voluntarily and knowingly signs.” *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 381, 745 P.2d 37 (1987). Not only did Mr. Johnson voluntarily sign the employment agreement on behalf of the Academy, it was the Academy’s own contract. The courts will not rewrite a written contract to enforce an intent inconsistent with the intent shown by the terms of the writing. *See Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 510, 115 P.3d 262 (2005).

McKasson was entitled to summary judgment. The non-competition clause in the written employment agreement is unenforceable as a matter of law. The written terms provide that the only consideration for the non-competition clause is continued employment, which is insufficient to support a non-competition agreement. The Academy seeks to avoid this effect by presenting evidence of prior negotiations regarding additional employment opportunities, but this extrinsic evidence is immaterial because it cannot be used to contradict the written terms of the agreement. Thus, there are no material facts in dispute. This Court should reverse and grant summary judgment to McKasson.

5.2.1 The non-competition clause is unenforceable as a matter of law because continued employment is not consideration for a non-competition agreement.

The only issue presented in McKasson’s motion for summary judgment was whether the non-competition clause was unenforceable because it lacked consideration. “A noncompete agreement entered into after

of \$16 per hour had been McKasson's wage for many months prior to the agreement and continued to be his wage for many months after. (CP at 9, 14, 17.) McKasson is not given any management authority or authority to enter into contracts binding on the Academy. (CP at 14.) The Academy reserves the authority to determine McKasson's specific duties (CP at 14) and to modify the terms of employment at its sole discretion. (CP at 12.) McKasson remains an "at will" employee with no fixed term of employment. (CP at 12.) McKasson received no promotion or other improvement in his employment. (CP at 9.)

Just as the employer in *Labriola*, the Academy did not incur any additional duties or obligations to McKasson by executing the employment agreement. The Academy did not offer any independent consideration in exchange for the non-competition clause. The written terms of the contract confirm that the parties did not intend any additional consideration other than continued employment. The non-competition clause is unenforceable because it was not supported by independent consideration.

5.2.2 There are no material facts in dispute because the Academy's extrinsic evidence of alleged additional consideration cannot be used to contradict the written term that no additional consideration is intended by the parties.

The Academy's extrinsic evidence of prior negotiations is immaterial for purposes of summary judgment because it does not affect the outcome of the case. Regardless of whether the written employment agreement contained the entire agreement of the parties, extrinsic evidence cannot be

used to prove or interpret terms contrary to the written word. Ultimately there is only one conclusion: the written terms must prevail.

Washington follows the “objective manifestation theory” of contracts. *Hearst*, 154 Wn.2d at 503. Under this theory, the courts determine the parties’ intent by focusing on the objective manifestations in the written agreement itself, imputing an intention corresponding to the reasonable meaning of the words used. *Id.* The courts enforce what was actually written, not what might have been intended to be written. *Id.* at 504.

The first step in this process is to determine whether the agreement is integrated. *Denny’s Rests., Inc. v. Sec. Union Title Ins. Co.*, 71 Wn. App. 194, 202, 859 P.2d 619 (1993). A fully integrated contract is a writing intended by the parties to be a final expression of all of the terms of the agreement. *Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). A partially integrated contract, on the other hand, is a writing intended as a final expression of only those terms it contains, leaving the possibility that there are other agreed terms not in the writing. *Id.*

If a contract is only partially integrated, the second step is to determine the remaining, unwritten terms of the agreement. Under the parol evidence rule, prior negotiations or agreements generally merge into the written contract. *Id.* at 555-56. However, unwritten terms may be proven by extrinsic evidence as long as the unwritten terms are not inconsistent with the written terms. *Berg v. Hudesman*, 115 Wn.2d 657, 670, 801 P.2d 222 (1990).

Finally, the court must interpret the meaning of the terms. Under the context rule, extrinsic evidence is generally admissible to determine the

meaning of specific words and terms used. *Hearst*, 154 Wn.2d at 503.

However, extrinsic evidence cannot be used to vary, contradict, or modify the written word or to show an intention independent of the instrument. *Id.* Extrinsic evidence can elucidate the meaning of the written words but cannot emasculate the written expression of the parties' intent. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 571, 919 P.2d 594 (1996).

Ultimately, the integration of the employment agreement is not a material fact because it does not affect the outcome of the case. Regardless of whether the written employment agreement is a full or only a partial integration, extrinsic evidence cannot be used to contradict the written term that no additional consideration was intended by the parties.

5.2.2.1 Whether the written employment agreement is a full or only a partial integration of the parties' agreement is only the first step in the court's analysis.

People have the right to make their agreements partly oral and partly in writing, or entirely oral or entirely in writing. *Barber v. Rochester*, 52 Wn.2d 691, 698, 328 P.2d 711 (1958). Where there is a writing, the court must determine whether the entire agreement has been incorporated into the writing. *Id.* In making this inquiry, the court may consider extrinsic evidence of negotiations and circumstances surrounding the formation of the contract. *Denny's*, 71 Wn. App. at 202. The presence of an integration clause strongly supports a conclusion that the parties' agreement was fully integrated. *M.A. Mortenson Co., Inc. v. Timberline Software Corp.*, 140 Wn.2d 568, 579-80, 998 P.2d 305 (2000).

There is evidence that the written employment agreement was fully integrated. The agreement has an integration clause: “This instrument contains the entire agreement between the parties.” (CP at 15.) It also revokes all previous agreements: “Any other employment agreements by and between the parties hereto are hereby revoked.... Any prior agreements between the parties are revoked in their entirety by this Agreement.” (CP at 15.) In keeping with the written terms, which did not provide any additional opportunities, McKasson’s employment did not change when the written agreement was executed. (CP at 9, 11-16.)

The Academy presented evidence of prior negotiations to show the writing was only a partial integration. Mr. Johnson testified that he and McKasson had agreed to give McKasson a management role at the Academy and to offer him additional business opportunities, such as teaching private lessons and “open” classes, from which McKasson could earn extra income. (CP at 26.) Mr. Johnson indicated these extra opportunities were to be given in exchange for McKasson signing an employment agreement with a non-competition clause. (CP at 26.) The Academy argues that the integration clause is false and these prior agreements are additional, unwritten terms of the employment agreement.

Viewing the facts most favorably to the Academy, there may be a dispute of fact as to whether the written employment agreement is fully or only partially integrated. However, the dispute is not *material* for purposes of summary judgment, because it does not affect the ultimate outcome of a proper analysis of the contract. *See Morgan v. Kingen*, 166 Wn.2d 526, 533,

210 P.3d 995 (2009) (“A material fact is one that affects the outcome of the litigation.”). Even when an integration clause is disregarded as false, the court must still consider the effect of the parol evidence rule on the proposed additional terms. *See, e.g., Lopez v. Reynoso*, 129 Wn. App. 165, 172, 118 P.3d 398 (2005) (“Assuming that the written sale agreement was only partially integrated and that the parties had orally agreed to additional terms, we address the remaining question: whether the purported oral agreement contradicts any valid terms of the written contract.”).

5.2.2.2 Under the parol evidence rule, extrinsic evidence cannot be used to prove additional terms that contradict the written terms of the contract, regardless of whether the contract is fully or only partially integrated.

The parol evidence rule prohibits the court from using extrinsic evidence to “add to, subtract from, modify, or contradict the terms of a fully integrated contract.” *Brogan & Anensen LLC v. Lamphiear*, 165 Wn.2d 773, 775, 202 P.3d 960 (2009). It is not a rule of evidence but one of substantive law. *Emrich*, 105 Wn.2d at 556. Under the rule, prior or contemporaneous negotiations and agreements are said to merge into the writing, leaving only the written terms. *Id.* Extrinsic evidence is rendered incompetent and immaterial, and cannot be used to prove the existence of any additional terms outside the fully integrated written contract. *Id.*

The parol evidence rule also applies to partially integrated contracts. When a written contract is only a partial integration, “terms not included in the writing may be proved by extrinsic evidence *provided that the additional terms*

are not inconsistent with the written terms.” *Berg v. Hudesman*, 115 Wn.2d at 670 (emphasis added). Prior or contemporaneous negotiations or agreements inconsistent with the integrated, written terms merge into the writing, rendering such extrinsic evidence incompetent and immaterial to contradict the written terms. Extrinsic evidence can only be used to prove terms that are *consistent* with the written terms. *E.g., Lopez*, 129 Wn. App. at 172 (“Ultimately, the extrinsic evidence of prior negotiations reveals terms that did not contradict the written terms of the vehicle’s price and the number of payments Ms. Lopez owed.”)

Unlike *Lopez*, the Academy’s extrinsic evidence cannot be reconciled with the written terms of the employment agreement. The Academy seeks to prove as an additional term that the Academy promised to give McKasson a management role and additional business opportunities as consideration for the non-competition clause. (*See* CP at 26.) This directly contradicts the clear written term that “no additional consideration...is intended by the parties.” (CP at 13.) There is no way to make the Academy’s alleged additional consideration consistent with the written term that there was *no additional consideration*. Under the parol evidence rule, the Academy’s extrinsic evidence is incompetent and immaterial to prove this “additional consideration” term.

The Academy’s extrinsic evidence also contradicts the employment terms provided in the written agreement. The written agreement provides that the Academy would continue to employ McKasson as an at-will employee. (CP at 12.) He would continue to be paid his previous wage of \$16 per hour. (CP at 14.) The Academy would continue to have the right to direct

McKasson's duties, decide what services McKasson would provide, and which clients McKasson would serve. (CP at 14.) All fees generated by McKasson's services would belong to the Academy, not to McKasson. (CP at 14.) The Academy reserved the right to modify the terms of McKasson's employment in the Academy's sole discretion. (CP at 12.) These written terms are entirely inconsistent with McKasson receiving a management role or additional income opportunities. The alleged additional opportunities cannot become additional terms of the agreement because they contradict the written terms.

5.2.2.3 Under the context rule, extrinsic evidence cannot be used to contradict the meaning of the written terms, regardless of whether the contract is fully or only partially integrated.

Once the court has determined what the terms of an agreement are, it must then determine what those terms mean. Contract interpretation is the process by which the court or fact finder ascertains the meaning of the terms of an agreement. *Berg v. Hudesman*, 115 Wn.2d at 663. The purpose of interpretation is to determine what the parties intended the terms to mean. *Id.* The court determines the parties' intent "by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties." *Hearst*, 154 Wn.2d at 503. The courts enforce what was actually written, not what might have been intended to be written. *Id.* at 504. The courts generally give the written words their ordinary, usual, and popular meaning unless a contrary intent is clearly demonstrated. *Id.*

Courts apply the context rule as an aid to interpretation. *Berg v. Hudesman*, 115 Wn.2d at 667. Under the context rule, extrinsic evidence can be used “to determine the meaning of *specific words and terms used.*” *Hearst*, 154 Wn.2d at 503 (emphasis in original). “Evidence of this character is admitted for the purpose of aiding in the *interpretation of what is in the instrument*, and not for the purpose of showing intention independent of the instrument.” *Berg v. Hudesman*, 115 Wn.2d at 669 (emphasis added). Extrinsic evidence cannot be used to vary, contradict, or modify the written word. *Hearst*, 154 Wn.2d at 503. Extrinsic evidence can elucidate the meaning of the written words but cannot emasculate the written expression of the parties’ intent. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 571, 919 P.2d 594 (1996).

The Academy’s extrinsic evidence directly contradicts the written terms of the agreement. The mutually agreed written term, “no additional consideration . . . is intended by the parties” (CP at 13), cannot be reasonably interpreted to mean that the Academy will give McKasson a management role and expanded business opportunities as consideration for the non-competition clause. To say that the parties intended the written term, “no additional consideration,” to mean “additional consideration” is an absurd result that would emasculate the written expression of the parties’ intent. The context rule does not allow extrinsic evidence to be used in this manner to contradict the written word and show intent independent of the written instrument.

The *Hearst* case is instructive. In *Hearst*, the Seattle Times Co. and Hearst Communications, Inc. entered into a written joint operating agreement, under which Seattle Times printed and distributed both its own newspaper and the competing Seattle P-I (owned by Hearst) and the parties shared costs and revenues. The agreement had a “loss operations” clause that allowed either party to terminate the agreement after three consecutive years of losses. Hearst argued that extrinsic evidence demonstrated that the parties intended that the agreement would only terminate if the Seattle market was no longer able to support two newspapers. *Hearst*, 154 Wn.2d at 508-09. The court held that by agreeing to the written terms of the loss operations clause, the parties objectively expressed the intention to terminate the agreement if losses continued for three consecutive years. *Id.* at 510. The loss operations clause had only one reasonable interpretation. *Id.* Extrinsic evidence could not be used to interpret the written terms to incorporate an intention not expressed in the writing: “If the parties intended the JOA could be terminated *only* upon a showing that the marketplace would no longer support two newspapers...they failed to express that intent within the agreement they wrote.” *Id.*

Similar to *Hearst*, here the written terms of the employment agreement demonstrate the parties’ objectively manifested intent—that there was no additional consideration for the non-competition clause. The written employment terms were no different than the terms of McKasson’s employment prior to signing the agreement. (*See* CP at 11-16.) The agreement clearly states that this continued employment was the only

consideration for the non-competition clause and that the parties intended no additional consideration. (CP at 13.)

There is only one reasonable interpretation of the written terms of the employment agreement. Even if the Academy had intended to give McKasson a management role and additional business opportunities as additional consideration for the non-competition clause, “they failed to express that intent within the agreement they wrote.” *Hearst*, 154 Wn.2d at 510. The Academy wrote the employment agreement and presented it to McKasson to sign. (*See* CP at 11, 26.) The Academy cannot now use extrinsic evidence to escape the legal effect of the terms it wrote and signed.

5.2.2.4 The integration of the written employment agreement is not a material fact because it does not affect the outcome of the case.

Summary judgment “shall be rendered forthwith” if there are no disputes as to any *material* fact and the moving party is entitled to judgment as a matter of law. CR 56(c). A material fact is one that affects the outcome of the litigation. *Morgan v. Kingen*, 166 Wn.2d 526, 533, 210 P.3d 995 (2009). A genuine issue of material fact exists only if reasonable minds could reach different conclusions. *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 601, 200 P.3d 695 (2009).

Viewing the facts most favorably to the Academy, there may be a dispute of fact as to whether the written employment agreement is fully or only partially integrated. However, the dispute is not *material* for purposes of summary judgment, because it does not affect the outcome of the case.

There are only two possible outcomes of a dispute on the integration issue: either the written employment agreement is fully integrated or it is only partially integrated. In either case, extrinsic evidence cannot be used to prove additional terms that are inconsistent with the written terms. In either case, extrinsic evidence cannot be used to vary, contradict, or modify the written word or to show intention independent of the instrument. As shown above, the Academy's extrinsic evidence is entirely inconsistent with the written terms of the employment agreement. The written terms must prevail, regardless of whether the written agreement is a full or only a partial integration.

The trial court should have granted summary judgment in McKasson's favor. There are no material facts in dispute. Regardless of whether the agreement is a full or only a partial integration, the outcome is the same. Under the parol evidence rule and the context rule, the only reasonable conclusion is that there was no additional consideration for the non-competition clause. The clause is unenforceable under *Labriola*. McKasson is entitled to judgment as a matter of law.

6. Conclusion

The Academy drafted a written employment agreement and presented it to McKasson to sign. The written terms expressly provided there was no additional consideration for the non-competition clause other than continued employment. The Academy cannot now escape the legal effect of its own contract by using extrinsic evidence that directly contradicts the terms that it wrote. Even if the agreement is only a partial integration, both the parol evidence rule and the context rule prohibit the use of extrinsic evidence to contradict the written term that “no additional consideration...is intended by the parties.” This Court should reverse and grant summary judgment in McKasson’s favor.

Respectfully submitted this 5th day of November, 2012.



Kevin Hochhalter, WSBA #43124
Attorney for Petitioner

CERTIFICATE OF SERVICE

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I certify, under penalty of perjury under the laws of the State of Washington, that on November 5, 2012, I caused to be served a true copy of the foregoing document, by the method indicated below, and addressed to each of the following:

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DATED this 5th day of November, in Olympia, Washington.


 M. Katy Kuchno
 Paralegal to Jon E. Cushman
 & Kevin Hochhalter