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DIVISION II

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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.

Petitioner's Reply Brief

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1. Introduction

The Academy asks this Court to turn the law of contracts on its head and hold that alleged oral terms are the ultimate expression of the parties' intent despite the existence of a writing which the parties both signed and intended to govern their relationship. The Academy argues, in essence, that it made a mistake and used a written contract with incorrect boilerplate terms. The Academy asks this Court torewrite the contract to reflect what, in hindsight, the Academy realizes it wished the contract said.

But written contracts have meaning. Parties are held to the written terms, even when their agreements are partly oral. Under well-settled principles of contract law in Washington State, this Court must look first to the written terms of the employment agreement. Under both the parol evidence rule and the context rule, extrinsic evidence that contradicts the written terms is incompetent and inadmissible to change the written terms.

The Academy's extrinsic evidence of additional consideration clearly contradicts the written term that no additional consideration was intended by the parties other than continued employment. No matter what negotiations or preliminary agreements occurred, they culminated with the parties signing a written agreement that clearly stated that continued employment was the only consideration for the non-competition clause. That is the best objective manifestation of the parties' intent. It cannot be contradicted by extrinsic evidence. This Court should reverse and grant summary judgment in McKasson's favor.

2. Summary of Argument

The Academy fails to show any dispute of material fact to preclude summary judgment. The parties do dispute whether McKasson received additional management or income opportunities contemporaneously with the signing of the employment agreement. However, this factual dispute is not material because it does not affect the outcome of the litigation. The Academy fails to show how this factual dispute could affect the outcome under the applicable law.

The written employment agreement is the best objective manifestation of the parties' intent. Under Washington law, extrinsic evidence is inadmissible to contradict the terms of a written contract. The Academy's extrinsic evidence of alleged additional consideration cannot be used to invalidate or rewrite the written terms of the employment agreement. Continued employment was the only consideration for the non-competition clause. As a matter of law, continued employment is insufficient and the non-competition clause is unenforceable.

The Academy's arguments regarding additional training and accident or mutual mistake come too late. These arguments were not raised in the trial court. They are not supported by any evidence in the record.

3. Argument

3.1 The Academy Fails to Show Any Dispute of Material Fact to Preclude Summary Judgment.

There are no disputed issues of material fact to preclude summary judgment in McKasson's favor. There is a factual dispute, which the trial court noted—but it is not material. *See Schmitt v. Langenour*, 162 Wn. App. 397, 404, 256 P.3d 1235 (2011) ("A 'material fact' is one on which the outcome of the litigation depends, in whole or in part.").

In its most basic form, the dispute is whether the Academy provided additional benefits contemporaneously with the signing of the employment agreement. The Academy alleges that it promised to give McKasson a management role and additional income opportunities in conjunction with the agreement. (CP at 26.) McKasson denies receiving any improvement in his employment contemporaneously with signing the agreement. (CP at 9, 17.) The issue of integration (full or partial) hinges on the resolution of this dispute.

McKasson demonstrated in his opening brief that this dispute is immaterial. The outcome of the litigation will be the same regardless of whose version of the facts is correct. Even if the written contract was only a partial integration of the complete agreement of the parties, and even if the Academy did intend to give McKasson a management role and additional opportunities in connection with the agreement, "they failed to express that intent within the agreement they wrote." *See Hearst Commc'ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 510, 115 P.3d 262 (2005). In fact, the written

agreement expressly denies any additional consideration for the non-competition clause:

> The consideration for Employee's agreement under this Section 2 is the execution of this Agreement by Employer and Employer's agreement hereunder to employ Employee. **No additional consideration for Employee's post-termination competition agreement hereunder is intended by the parties…**

(CP at 13 (emphasis added).)

The alleged additional consideration directly contradicts the written terms of the employment agreement. (*See* Brief of Petitioner at 14-15.) Under both the parol evidence rule and the context rule, the Academy's extrinsic evidenceis incompetent and inadmissible to contradict the written terms of the agreement. *See Hearst*, 154 Wn.2d at 503; *Berg v. Hudesman*, 115 Wn.2d 657, 669-70, 801 P.2d 222 (1990). The courts enforce what was actually written, not what might have been intended to be written. *Hearst*, 154 Wn.2d at 504.

Regardless of whose version of the facts is correct, the outcome under the law is the same. The written terms of the employment agreement prevail over any contradictory extrinsic evidence. Continued employment is the only consideration for the non-competition clause. Without additional consideration, the clause is unenforceable as a matter of law.

In response, the Academy does not explain how this factual issue could be material. It simply states, without support, that it is a dispute that affects the outcome. (Brief of Respondent at 14.) The Academy goes so far

as to claim that the facts are undisputed in its favor. (*See, e.g.*, Brief of Respondents at 6 ("There is no dispute that the consideration was provided."), 7 ("undisputed mutual intent of the parties").) Such claims are untrue. McKasson testified that he received no improvement in his employment status at the time of signing the written employment agreement. (CP at 9.) He did not receive any increase in pay until the fourth quarter of 2009, six months after signing the agreement. (*See* CP at 17.) McKasson also presented the written contract itself as the best evidence of the parties' intent. (CP at 11-16.)

However, as shown above and in McKasson's opening brief, this dispute is immaterial and should not have precluded summary judgment in McKasson's favor. It does not affect the outcome of the litigation. Even if the written contract is only a partial integration, the Academy's evidence of alleged additional consideration is incompetent and inadmissible to contradict the clear written terms of the employment agreement, as a matter of law. The non-competition clause is unenforceable. This Court should reverse and grant summary judgment in McKasson's favor.

3.2 This Court Cannot Rewrite the Contract Based on Extrinsic Evidence.

Under Washington contract law, a written contract is the best objective evidence of the parties' intent. Courts focus on the objective manifestations of intent in the written contract. *Hearst*, 154 Wn.2d at 503. The Academy has never contended—until now—that the written contract was anything less than a partial integration—*i.e.*, the parties' final expression

of those terms it contains. *See Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). Except for boilerplate integration clauses, the written terms of a contract always prevail over contradictory additional terms suggested by extrinsic evidence. *See Berg v. Hudesman*, 115 Wn.2d at 670 ("terms not included in the writing may be proved by extrinsic evidence provided that the additional terms are not inconsistent with the written terms."); *Lopez v. Reynoso*, 129 Wn. App. 165, 172, 118 P.3d 398 (2005) (disregarding a boilerplate integration clause and requiring that additional terms not contradict the terms of the writing).

The Academy suggests that the Court is free to disregard any boilerplate language that contradicts its extrinsic evidence. (Brief of Respondents at 7, 15.) This turns the law of contracts on its head. The case the Academy cites, *South Kitsap Family Worship Ctr. v. Weir*, 135 Wn.App. 900, 907, 146 P.3d 935 (2006), clearly applies only to false *integration clauses.* *Id.* at 907 ("An agreement may be only partially integrated, notwithstanding a full integration clause, if the clause is false boilerplate"). *South Kitsap* is consistent with settled contract law, which allows the courts to consider extrinsic evidence in making the preliminary determination of whether a contract is fully or partially integrated. *See Emrich v. Connell*, 105 Wn.2d 551, 556, 716 P.2d 863 (1986). However, once that determination is made, the court must apply the parol evidence rule to exclude all extrinsic evidence that is inconsistent with the written terms. *Id.* Courts look first to the written terms and exclude any inconsistent extrinsic evidence, not the other way around. The written terms prevail.

For the first time, the Academy calls the contract "a limited writing which was clearly deficient with respect to the parties [sic] actual agreement." (Brief of Respondents at 7.) The Academy claims that the alleged additional consideration was accidentally left out of the writing. (*See Id.* at 6 ("the consideration was not expressly incorporated in the writing").) The Academy asks this court to rewrite the contract to contradict the express written terms. This is something the court cannot do. *Hearst*, 154 Wn.2d at 510.

Contrary to the Academy's arguments, consideration is explicitly addressed in the written contract. The contract expressly states that the only consideration for the non-competition clause is the employment agreement itself. (CP at 13.) The employment agreement does not change McKasson's wages, provide any management authority, income opportunities, training, or term of employment. (*See* CP at 11-16.) The contract expressly states that no additional consideration for the non-competition clause was intended by the parties. (CP at 13.) There is no way to reconcile these written terms with the additional terms proposed by the Academy.

Written contracts have meaning. Parties are held to the written terms, even when their agreements are partly oral. This was the Academy's contract. McKasson was an at-will employee, presented by his employer with a written agreement to sign. (CP at 9.) This Court should not allow the Academy to repudiate the plain language of its own written contract to substitute contradictory terms based on inadmissible extrinsic evidence. *See Lopez*, 129 Wn. App. at 175-76 (Sweeney, A.C.J., dissenting).

3.3 Issues of Additional Training and Accident or Mistake Were Not Raised In the Trial Court.

This Court should decline to address issues not raised by the Academy in the trial court. *See* RAP 2.5(a). There is no evidence in the record supporting the Academy's new claims of accident or mutual mistake (addressed above) or of additional training.

The Academy raises for the first time the notion that the alleged additional consideration included additional training. However, the Declaration of Brian Johnson is clear that McKasson was trained prior to the signing of the employment agreement. (CP at 26.) Mr. Johnson makes no mention of additional training as part of the alleged additional consideration. (CP at 26.) Nevertheless, the Academy attempts to bootstrap onto *Wood v. May*, 73 Wn.2d 307, 438 P.2d 587 (1968), by claiming that, "[i]n exchange for the non-compete agreement, Johnson allowed McKasson to *use his learned training.*" (Brief of Respondents at 12 (emphasis added).)

In *Wood v. May*, a master horseshoer and his new apprentice entered into a written employment agreement with a non-competition clause, in which the master agreed to teach the apprentice the art of horseshoeing. *Wood*, 73 Wn.2d at 308. Over the course of the next two years after signing the agreement, the apprentice made substantial progress in his training and was soon doing much of the work on his own. *Id.* There was no question in that case that the promised training, initiated immediately after the agreement was signed, was adequate consideration for the non-competition clause. *Id.* at 310-11; *Labriola v. Pollard Group, Inc.*, 152 Wn.2d 828, 834, 100 P.3d 791

(2004) ("consideration exists if the Employee enters into a noncompete agreement when he or she is first hired").

This case is much different. The apprentice had no training prior to signing the employment agreement; McKasson had been working at the Academy for five years and was fully trained before Mr. Johnson ever approached him about entering a non-competition agreement. (CP at 26.) The master trained the apprentice after the agreement was signed; here, there is no evidence that the Academy either promised or delivered any additional training after the agreement was signed. The master's promise to train the apprentice was contained in the written employment agreement; here, the written agreement does not promise additional training or any other new or additional obligation to McKasson. (*See* Brief of Petitioner at 8-9.) There is no factual parallel between the present case and *Wood*.

The written employment agreement provides no consideration beyond continued employment. A non-competition agreement entered five years after employment has commenced is valid only when there is independent consideration contemporaneous with the agreement. *Labriola*, 152 Wn.2d at 830. "There is no consideration when one party is to perform some additional obligation while the other party is simply to perform that which he promised in the original contract." *Id.* at 834. The written agreement imposes on McKasson the additional obligation of the non-competition clause but imposes no new obligations on the Academy. Under *Labriola*, there was no consideration for the non-competition clause. This Court should grant summary judgment in McKasson's favor.

4. Conclusion

The written employment agreement clearly excludes any possibility of additional consideration for the non-competition clause. Regardless of whether the contract is fully or only partially integrated, extrinsic evidence is inadmissible to contradict the written terms of the agreement. The Court cannot disregard or rewrite those written terms. The factual dispute over integration is thus immaterial. There is only one conclusion: there was no consideration for the non-competition clause. It is unenforceable as a matter of law. McKasson is entitled to summary judgment on this issue. This Court should reverse, grant summary judgment in McKasson's favor, declaring the non-competition clause unenforceable, and remand to the trial court for further proceedings.

Respectfully submitted this 3rd day of January, 2013.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury under the laws of the State of Washington, that on January 3, 2013, I caused to be served a true copy of the foregoing document,by the method indicated below, and addressed to each of the following:

original:	Court of Appeals Division II 950 Broadway, #300 Tacoma, WA 998402 253-593-2806	____ U.S. Mail, Postage Prepaid _XX_ Legal Messenger _____ Overnight Mail _____ Facsimile _____ Electronic Mail
copy:	C. Scott Kee Rodgers Kee & Pearson, P.S. 324 West Bay Drive NW, Ste 201 Olympia, WA 98502	____ U.S. Mail, Postage Prepaid _XX_ Legal Messenger _____ Overnight Mail _____ Facsimile _XX_ Electronic Mail

DATED this 3rd day of January, 2013, in Olympia, Washington.

M. Katy Kuchno
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