

No. 68417-5-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

Choong H. Lee, DMD, PLLC, a Professional Limited Liability
Company and CH LEE, PLLC, a Professional Limited Liability
Company,

Appellants,

vs.

Thaheld/Lee-01, LLC, a Washington Limited Liability Company, and
Johann Thaheld, believed to be an unmarried resident of Washington,

Respondents.

BRIEF OF RESPONDENTS THAHELD/LEE-01, LLC AND
JOHANN THAHELD

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I. SUMMARY OF APPEAL

The Appellant is a Whatcom County dentist's company. The Respondent is Mr. Thaheld's one-man company. The two contracted together so that Respondent's company could provide management/business services to the dentist. When the Appellant dentist determined he could obtain the services for less money, he unilaterally terminated the contract. A lawsuit was filed by the dentist to void the contract to avoid liability for breach.

The Appellant dentist brought a motion for summary judgment for a ruling that the contract was void as a matter of law because it allegedly violated state statute. The trial court denied the motion—the contract was not facially void and questions of fact exist as to the contract's actual application. The trial court's denial is on appeal under discretionary review.

Respondent Thaheld requests this court to uphold the trial court, deny the appeal, and allow the parties to proceed to trial on the merits.

This appeal must address the changing reality of the practice of dentistry (and all of medicine) in the face of the huge business and management demands that are placed upon our health care providers although they are not trained (or paid) to

meet these demands.

II. ASSIGNMENTS/ISSUES OF ERROR.

The trial court committed no error in denying the Plaintiffs' motion for summary judgment.

III. STATEMENT OF THE CASE

A. The Parties

Appellant is the two small Whatcom County dental practices of dentist Choong H. Lee (collectively referred to as "Lee"). Lee struggled to manage the administrative and business demands of his practice, so he sought help with those aspects.

Respondent is Johann Thaheld and his one-man dental practice management company (collectively referred to as "Thaheld"). Mr. Thaheld is a college professor, accountant, and lawyer. He does not have any other dental practice management companies or contracts with other dentists. He has no employees.

Over the years, Thaheld has developed significant expertise in dental practice management. Additionally, his training as a CPA provided him with the diverse skills to implement effective administrative practices to support the complicated professional

field of dentistry.¹

B. Dental Practice Management.

Dentists, like doctors, face increasing administrative and insurance obligations. Dental practices are businesses that have employees and all the administrative burdens that come with employees. On top of that, there are the bureaucratic demands of interfacing with insurance companies to approve services and provide payment. But dentists are trained as health care providers, not business people. In the last 20 years, the profession has undergone an important evolution to address this ever growing problem: dentists hire service companies to increase efficiency, manage staff, coordinate insurance requirements, and implement and monitor effective billing, financial and cost accounting. This leaves the dentist able to perform the dental services and obtain the maximum amount of return from his/her efforts.²

Importantly, dentists only generate revenue when performing dental services. As set forth in Mr. Thaheld's declaration, a significant portion of the dentists in this state, and across the country, use dental practice management companies to help them

¹ Clerk's Papers ("CP") 167-69.

² CP 167-70.

out.³

C. Lee In Need of Dental Practice Management.

Lee purchased his Bellingham dental practice in 2005 and his Blaine practice in 2010. Lee was struggling to administer both practices while performing dentistry. At about the same time, Thaheld was working with Dr. Jeanette Carroll, DDS (“Carroll”) as she was looking to purchase dental practices. Lee and Thaheld became acquainted when Carroll engaged Thaheld to evaluate Lee’s practices for purchase. Following Thaheld’s analysis, Lee and Carroll negotiated the sale of Lee’s practices to Carroll in July 2010.⁴

Lee and Carroll signed all of the documents required for a sale.⁵ The intent was for Carroll to buy the practice and then hire Thaheld to assist her with practice management.⁶

In the due diligence review, Thaheld and Lee discussed the dental practice management model and Thaheld’s plans to address the administrative burdens of Lee’s practices. After this, Lee backed out of the contract with Carroll. Presumably, he was

³ CP 170.

⁴ CP 171-81.

⁵ CP 171-223 (a Purchase and Sale Agreement, a Promissory Note in the sum of \$645,000, a Non-Engagement Letter, a Commercial Lease, and an Employment Agreement).

impressed with Thaheld's approach and wanted to cut Carroll out of her ownership. Lee and Carroll signed a Termination Agreement ending their relationship.⁷

The day after terminating the agreements with Carroll, Lee asked Thaheld to sign a service agreement for his practices. So in July 2011, Lee hired Thaheld's LLC to provide practice management, administrative management, accounting services, and non-dentistry consulting for Lee's Practices.⁸

D. The Services Agreement.

The Thaheld's LLC and Lee executed the service agreement (the "Agreement")⁹ right after Lee revoked his agreements with Carroll. The intent and effect of the Agreement was to have Thaheld perform the administrative and accounting tasks and to consult on practice efficiency. Furthermore, the Agreement provided continuity and stability to the business operations as Dr. Lee acquires more dental practices, which would increase his administrative needs. The Agreement provides that:

- Lee continues to own everything, except licenses for software and data that Thaheld's LLC must control to be

⁶ Id.

⁷ Id.

⁸ Id.

able to perform its functions. Agreement § 4.2.1;

- Lee has 100% unilateral control over all aspects of dentistry. Agreement §§ 2.4, 2.5, 3.4;
- Lee and Thaheld are to cooperate in the “office management” aspects of the business through a Policy Board (each of which is a member). Importantly, the Policy Board requires a majority vote to act. Since there are two members, if the two cannot agree, the Board cannot act to bind Lee. Thaheld cannot “veto” any decision on his own. Therefore, Lee always maintains final control over all operations. Agreement §§ 3.1-3.4;
- The Agreement is silent as to what happens if the Policy Board does not act, so Lee’s decisions continue to control;
- Thaheld shall not obtain any control over Lee’s practices that could be construed as unlawful. Agreement § 11.1;
- Thaheld is to be paid according to Article 7 of the Agreement.

Neither Lee nor Thaheld intended for Thaheld's LLC to own, operate, or maintain the practices, so the parties included specific express provisions prohibiting such:

⁹ CP 21-71 (copy of the Agreement).

- Thaheld is an independent contractor of Lee. Agreement, §§ 2.1, 11.2;
- Thaheld's duties are expressly limited to administrative and advisory duties. Agreement, Recital B; §§ 2.5, 3.4, 11.1;
- Thaheld's LLC is prohibited from owning assets of the practice. Agreement, 4.2.1;
- Lee controls all decisions. Lee explicitly controls all Dental Decisions and practically controls all other decisions because the 50/50 split of Policy Board prevents the Thaheld from making executive decisions without Lee's consent. Agreement, § 2.4, 2.5, 3.4;

As soon as the Agreement was signed, Thaheld dedicated all of his efforts to implementing practice management improvements—employees were re-assigned, scheduling of patients was revised, billing procedures were streamlined, accounts receivable collections were closely monitored and improved.¹⁰ These soon reaped significant benefits. Lee received significant financial benefit from Thaheld's work and expertise.¹¹

Lee was well aware of the terms of the Service Agreement since he had reviewed the benefits of dental practice management

services, which lead him to breach his sales contract with Carroll. Lee had no question that hiring Thaheld, unlike the deal with Carroll, did not involve a sale of his practices. Instead, it is merely a contract for Thaheld LLC to provide services.

E. Parties' Conduct Modifies the Agreement

After execution of the Agreement, Lee and Thaheld undertook to operate under the Agreement. There is no dispute that throughout the entire time, **Lee controlled 100% of all dental and patient decisions.** At no time has Lee even alleged that Thaheld's LLC directly or indirectly affected, let alone controlled, any patient care or Lee's professional decision making. To the contrary, the parties diverted from the terms of the Agreement and Lee continued to effectively control the details of the business management as well.

In October of 2010, Lee started to unilaterally make changes to the billing and financial allocation of costs between the Blaine and Bellingham practices and between hygienist and dentist.¹² Lee began discussing selling the Blaine practice to another dentist. This raised concern because the accounting changes Lee instituted

¹⁰ CP 173-175.

¹¹ CP 174-81.

¹² Id.

resulted in an inaccurate financial picture of the companies. While advising against these actions, Thaheld continued to work with Lee under these arrangements with the hope of reaching success.¹³ In addition, Thaheld was not paid pursuant to the Agreement. As set forth in Johann Thaheld's Declaration, minor payments were made with the understanding that deficiencies would be corrected later.¹⁴

In February of 2011, Lee decided he did not want to continue paying for Thaheld's work, so he unilaterally terminated the Agreement.¹⁵ Contrary to his current assertions, at the time Lee breached the Agreement, Lee claimed Thaheld's LLC was not performing **enough** of the administrative duties.¹⁶ Lee did not pursue termination of the Agreement according to its express provisions, including sections 8.2.2, 8.2.4. Lee did not request mediation pursuant to section 3.3. Lee has not disputed that his termination of the Agreement was a clear breach. Instead he has asserted that the Agreement is void-- after he continued to benefit from Thaheld's hard work and effort.

The reason for Lee's breach is that he believed he could obtain the administrative services cheaper elsewhere. Only after

¹³ Id.

¹⁴ Id.

¹⁵ CP 178-81.

his breach did Lee's counsel conceive of the legal concept of calling the Agreement void.

IV. ARGUMENT

A. Standard of Review.

The Court of Appeals reviews the trial court's denial of summary judgment de novo, and engages in the same inquiry as the trial court.¹⁷ The Court may only reverse the trial court's denial of summary judgment if no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law.¹⁸ A material fact exists when the outcome of the litigation depends on its resolution.¹⁹ All reasonable inferences are resolved against the moving party and this Court may only overturn the trial court's decision if reasonable persons could reach but one conclusion.²⁰

"In the contract interpretation context, '[s]ummary judgment is not proper if the parties' written contract, viewed in light of the parties' other objective manifestations, has two "or more"

¹⁶ CP 264 (text messages between Lee and Thaheld).

¹⁷ Seattle Police Officers Guild v. City of Seattle, 151 Wash. 2d 823, 830 (2004).

¹⁸ Id.

¹⁹ Id.

²⁰ Id.

reasonable but competing meanings.”²¹ On appeal, Lee presents an interpretation of the Agreement that contradicts its express terms. Lee asserts that Thaheld *could* implicitly affect Lee’s practice of dentistry. But the Agreement expressly prohibits Thaheld this.²² “Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.”²³ Undisputed evidence presented by Thaheld shows that the parties followed the provisions in the Agreement and Lee retained absolute and complete control over the dental practices at all times.

The trial court’s denial of summary judgment must be affirmed.

B. Trial Court Denial was Correct on Two Grounds.

The trial court’s denial of summary judgment was correct on two separate grounds. First and foremost, the express terms of the Agreement, as a matter of law, do not violate applicable state

²¹ Renfro v. Kaur, 156 Wash. App. 655, 661 (2010) (quoting Go2Net, Inc. v. C I Host, Inc., 115 Wash.App. 73, 83, 60 P.3d 1245 (2003); Hall v. Custom Craft Fixtures, Inc., 87 Wash.App. 1, 9, 937 P.2d 1143 (1997)).

²² See Agreement, §§ 2.4, 2.5, § 3.4, 11.1, 11.2.

²³ Tanner Electric Cooperative v. Puget Sound Power & Light Co., 128 Wash. 2d

statutes. Second, facts show the parties did not create an unlawful relationship, and that they modified the terms of Agreement by removing any provisions of the contract that could have possibly violated statute. Affirmation of the trial court is appropriate on either ground.

C. Agreement Is Valid as a Matter of Law.

1. Lee's Claim of Invalidity Is Limited. To justify his undisputed breach of the Agreement, Lee is now asserting that the Agreement is facially void for violating RCW 18.32.675(1)—the illegal practice of dentistry.

The Agreement specifically provides that Lee continues to own the entire practice and that Lee continues to have absolute control over all facets of the practice of dentistry. Lee alleges the Agreement violates the statute not because Thaheld did affect the practice of dentistry, but because the Agreement might **implicitly** allow Thaheld's LLC to practice dentistry in violation of RCW 18.32.020(3):

A person practices dentistry, within the meaning of this chapter, who [...] (3) owns, maintains, or operates an office for the practice of dentistry[...]

The Agreement is clear that Lee owns all aspects of the practice.

656, 674 (1996).

So, Lee is limited to establishing that Thaheld (through the Agreement) somehow operates an office of dentistry. However, under the Agreement this is not possible because all Dental Decisions are in the exclusive authority of Lee. Section 3.4 is clear:

Notwithstanding the preceding section or any other provisions of this Agreement to the contrary, all Dental Decisions (defined below) will be made solely by the **dentist members** of the Policy Board, provided that the non-dentists of the Policy Board may participate in the analysis and discussion process.²⁴

More significantly, Lee never alleges that Thaheld's LLC did, or could have, practiced dentistry. Lee does not allege that he intended to give Thaheld authority to practice dentistry. Nor does Lee ever allege that the actual result of the service Agreement was to so constrain Lee by its terms that Lee's ability to practice dentistry independently and professionally was affected in any way.

2. No Evidence of Thaheld Practice of Dentistry, or the Ability to Do So. There are no allegations of Thaheld control of Dental Decisions because none occurred and such is prohibited by the Agreement:

- (a) Internal management, control, and financing, including compensation of dentists, is sole and

²⁴ Emphasis added; see also Agreement, §§ 2.4, 2.5, 11.1, 11.2.

exclusive responsibility of Lee. Agreement, § 2.4.

(b) Lee is solely responsible for all control and supervision of Dental Care; provision of Dental Care is performed in the dentists' sole discretion; the Service Company shall not perform any act or service that may constitute the practice of dentistry.

Agreement, § 2.5.

(c) Service Company is prohibited from making any Dental Decisions. Agreement, § 3.4.

(d) Service Company shall not exercise control over or interfere in any manner with Providers' provision of Dental Care; Agreement shall not be construed to permit Service Company to engage in the practice of dentistry; Service Company is only permitted to provide non-dental administrative services.

Agreement, § 11.1.

(e) Service Company is an independent contractor and there is no employer/employee, partnership, or joint venture between the parties; Service Company cannot exercise control or direction over the manner or method in which Lee performs his duties.

Agreement, § 11.2.

These express provisions are incompatible with Lee's arguments that the Agreement is facially illegal. When Lee asserts this ambiguity, he cannot argue that the Court must not review extrinsic evidence supporting the legality of the relationship. See section D.2., below.

3. *Service Agreement Facially Valid Based Upon Case Law.*

The undisputed facts in this case must be contrasted with the limited holdings in prior cases addressing the applicable statute. Those distinctions establish the validity of the Agreement.

The statutes in question were adopted by our legislature prior to 1943. The legitimate public interest for these restrictions is to protect the public from unlicensed persons affecting patient care.

The foundation of the concern is:

One who practices a profession is responsible directly to his patient or his client. Hence he cannot properly act in the practice of his vocation as an agent of a corporation or business partnership whose interests in the very nature of the case are commercial in character.²⁵

Our courts have struggled with this for decades. Each analysis of what is illegal maintenance or control required a detailed factual

²⁵ State ex. Rel. Standard Optical Co. v. Superior Court for Chelan County, 17 Wn. 2d. 323, 332, 135 P.2d. 839, 843 (1943) (citing Ezell v. Ritholz, 198 S.E. 419,

analysis to determine the actual purpose and effect of the relationship upon independent decision making by the dentist.

State v. Boren. In Boren,²⁶ Mr. Boren, was a non-dentist who actually *owned* a practice. He executed a conditional sales contract to allow a dentist to purchase the practice over time. The dentist made monthly payments on the purchase price balance, while Boren drew a salary and bonus as an employee.²⁷ The dentist had no real ownership of the practice, but was at the mercy of Boren, the non-dentist owner. The court recognized the agreement only provided the dentist with illusory ownership and control of the practice.

Unlike *Boren*, Service Company has no ownership interest. Further, Lee has undisputed control over all Dental Decisions and control of all business decisions through the Policy Board.

Fallahzadeh v. Ghorbanian. In Fallahzadeh,²⁸ a dentist and a non-dentist tried to form a partnership for the express purposes of jointly purchasing and operating a dental practice. When their attorney advised them the non-dentist could not be an owner, they contrived to purchase the real property as tenants-in-

424 (S.C. 1938)).

²⁶ State v. Boren, 36 Wn.2d. 522, 219 P.2d 566 (1950).

²⁷ Id., at 523-24.

common and execute a lease to the practice. The dentist then purported to purchase the practice, but the non-dentist signed a \$200,000 personal guaranty for payment on the practice, and was employed as a “manager” for \$5,000 per month.

The rent was 50 percent of “net profits”, which were defined as all profits after deducting ordinary business expenses but, oddly, before deducting the mortgage payment and the non-dentist’s salary.²⁹ The court recognized that the dentist only had illusory control and ownership through what was essentially a conditional sales contract. Further, the non-dentist asserted unilateral control over the practice by routinely executing loan transfers from the practice to his personal accounts, alleged embezzlement, and attempting to evict the practice as its landlord. After a three day trial where the court took testimony as to the actual operation of the arrangement and the true extent of control asserted by the non-dentist, the court found the non-dentist’s level of control to be akin to ownership and therefore unlawful.

With Lee, there was no contrived deal, but instead a clear

²⁸ Fallahzadeh v. Ghorbanian, 119 Wn. App. 596 (2004).

²⁹ The unique definition of “net profits” essentially gave the non-dentist a controlling interest in the practice, like a conditional sales contract, and the dentist was like an employee of the non-dentist. This is different than tying an arm’s-length payment to true “net profits”, which is a payment based on value added by the service provider.

independent contractor agreement. Lee knows the difference—he opted for the independent contractor relationship with Thaheld’s LLC instead of a true sale to Dr. Carroll.³⁰ Further, Lee maintains all control over Dental Decisions and Thaheld through the Policy Board.

Engst v. Orthalliance, Inc. Appellant Lee’s brief relies heavily upon the Engst case,³¹ which is an unpublished federal district court case involving a large services and ownership corporation that contracted with many orthodontists. Orthalliance was the Delaware corporation that required multiple different types of contracts with the orthodontists:

- Purchase and sale agreements where the orthodontists **transferred ownership of assets** of the practice to Orthalliance.
- Consulting and business service agreements, giving Orthoalliance unilateral control over all business aspects of the practices (control of the physical office facilities and equipment, personnel, payroll, business systems, procedures, forms, purchasing and

³⁰ CP 171-74.

³¹ Engst v. Orthalliance, Inc., No. C01-1469 (W.D. Wash. March 1, 2004) (CP 74-89).

inventory, accounting and financial reporting, legal services, and payment and disbursement of funds).

- An assignment of all of the accounts receivable to Orthalliance: Orthalliance would collect from the patients, pay all the payables and then pay to the orthodontists their earnings only after the corporation deducted its share.
- Employment agreements for all orthodontists for 5 years that involved non-compete agreements, exclusive services to Orthalliance, and third party beneficiary status to Orthalliance so they could sue on the employment agreements.
- Personal guaranties from the orthodontists in favor of Orthalliance.

None of that exists here. Most notably, Lee owns all assets, employs all staff, receives all payments, pays all of the bills, and retains no employment restrictions over dentists.³² Thaheld simply assisted Lee with completing these tasks-- it never took over control.

Importantly, there is no employment agreement with Lee.

This is in direct contrast with Engst, where the court found:

[Orthalliance] itself has asserted that it, as a third-party beneficiary, may enforce the terms of the employment agreements between the Orthodontists and their respective Orthodontic Entities, particularly the covenant not to compete contained therein.³³

In other words, the orthodontists were really just employees of the services corporation. By no stretch of the imagination does the Agreement make Lee an “agent of the corporation”. Lee states:

Perhaps most shockingly, the agreement effectively turns Dr. Lee into an indentured servant by prohibiting him from quitting his practice without Thaheld’s permission during the Agreement’s 40 year term.³⁴

This is untrue, as there is no employment contract with Lee.³⁵

Furthermore, the section of the Agreement Lee cites is intended to require that Lee or his successors ensure there is always a *dentist* in charge of the clinics (as opposed to a non-dentist) in the event Lee sells his clinics to a dentist who chooses to continue with the services Agreement. This does not grant any control of the practice to Thaheld. That doomsday mischaracterization of the Agreement is typical of the inaccuracy of Lee’s argument.

³² See Agreement § 9.4.2, CP 44 (employees are “at-will”, except those disclosed in Schedule 9.4.2, CP 60, which is blank).

³³ Engst, Order at 7, CP 80.

³⁴ Brief of Appellant, at 16 (citing Agreement §§ 5.1(b); 8.1).

³⁵ See Agreement § 9.4.2, CP 44-45, and Schedule 9.4.2, CP 60 (the schedule of employment contracts is blank and there is no employment contract in the

OCA Inc. v. Hassel.³⁶ This case is extremely similar to Engst: Large nationwide conglomerate (OCA) contracted with individual orthodontists. Large conglomerate controlled 100% of all business practices, owned all the hard assets (leasing them to the doctors), and had complete control of all of the billing, revenue receipts, and disbursements. In short, the large conglomerate owned everything, controlled all aspects of the business, controlled all the money, and dictated the practices. When undertaking its analysis, the court set the standard for legality as follows:

In determining whether an illegal business relationship between a licensed dentist and a corporation exists, courts consider two factors in tandem: (1) the extent to which the corporation exercises control over the practice's operations; and (2) the nature of the payment scheme between the practice and the corporation.³⁷

OCA controlled all aspects of the practices operations. More significantly, the payment scheme gave absolute control to OCA—it billed for all the services, it collected all the income, it decided what bills were paid and when and controlled the practices' bank accounts. The orthodontists had absolutely no voice in any of the financial affairs. The coupling of this absolute control and the profit

record).

³⁶ OCA, Inc. v. Hassel, 389 B.R. 469 (E.D. La 2008) (cited by Lee).

³⁷ Id. at 476

sharing provisions led the bankruptcy court to conclude the contract was void.

Such provisions do not exist here—Lee controlled all of the billings, collected all of accounts receivable, and controlled all of the disbursements. And though the Service Agreement had provision for payment from profits, it was nothing akin to OCA, **and was never paid.**

The Service Agreement is utterly unlike the multiple written contracts (including employment contracts) in Engst and OCA, which gave *carte blanche* authority and control to the corporate conglomerates. These differences eliminate even the claim that the relationship might result in giving so much control to Thaheld that he might be able to affect Dental Decisions.

4. *The Service Agreement Is Facially Valid.* Based upon the undisputed facts, the service Agreement is facially valid under RCW 18.32.020. Sections 2.4, 2.5, 3.4, 11.1, and 11.2 of the Agreement expressly prohibit the interpretations of the Agreement that Lee puts forth in his brief (that he believes it should be facially invalid).

D. This Matter Is Not Resolvable on Summary Judgment Because of Questions of Material Fact.

When reviewing the Orthalliance contracts, the Engst court found:

On its face, the case at bar does not appear to present a situation in which there is any impermissible entanglement between the Orthodontists and [Orthalliance].³⁸

The District Court made this statement despite being faced with far more onerous contracts that actually conveyed ownership interest and control to the non-dentist corporation.³⁹ The District Court did so knowing that the factual questions of contract application would dictate the legality of the true relationship. The trial court in this case must engage in a factual inquiry to, as the District Court put it, “closely scrutinize the effect and purpose of the agreements between the parties, rather than limiting its scrutiny to the four corners of the contracts themselves”.⁴⁰ This is why the trial court was correct in denying summary judgment—a factual inquiry is required to evaluate the true legality of the relationship of the parties.

It was not until the Engst court performed a detailed factual inquiry into the *de facto* “purpose and effect” of the parties’

³⁸ Engst, at 7, CP 80.

³⁹ Engst, at 2-3, CP 75-76 (orthodontists transferred their tangible assets and goodwill to Orthalliance; Orthalliance was a third-party beneficiary to long-term employment contracts; orthodontists could not work for another facility).

relationship that it found the web of contracts and agreements gave Orthalliance ownership of the assets and such a wide scope of control as to make the relationship illegal. Lee's argument that the Agreement is "facially" illegal is contrary to the *de facto* relationship between Lee and the Thaheld's LLC.

1. Lee Argues An Interpretation of the Agreement That Contradicts Its Express Terms. Lee argues that "the Service Agreement's *raison d'être*" is to give the Service Company a stake in the Lee Dental Practices."⁴¹ However, the text appearing within the four corners of the Agreement does not support that conclusion. The cornerstones of the parties' relationship are:

- (a) Internal management, control, and financing, including compensation of dentists, is the sole and exclusive responsibility of Lee. Agreement, § 2.4.
- (b) Lee is solely responsible for all control and supervision of Dental Care; provision of Dental Care is performed in the dentists' sole discretion; Thaheld shall not perform any act or service that may constitute the practice of dentistry. Agreement, § 2.5.

⁴⁰ Engst, at 7-10, CP 80-83 (citing generally, Boren, supra; Ghorbanian, supra; Morelli v. Ehsan, 110 Wash.2d 555, 756 P.2d 129 (1988)).

⁴¹ Brief of Appellant at 23.

(c) Thaheld is prohibited from making any Dental Decisions. Agreement, § 3.4.

(d) Thaheld shall not exercise control over or interfere in any manner with Lee's provision of Dental Care; the Agreement shall not be construed to permit Thaheld to engage in the practice of dentistry; Thaheld is only permitted to provide non-dental administrative services. Agreement, § 11.1.

(e) Thaheld's LLC is an independent contractor and there is no employer/employee, partnership, or joint venture between the parties; Thaheld cannot exercise control or direction over the manner or method in which Lee performs his duties. Agreement, § 11.2.

These express provisions are incompatible with Lee's arguments that the Agreement is facially illegal.

Lee asserts that numerous other clauses of the Agreement must be interpreted as giving ownership and control of Lee's practices to Thaheld's LLC.⁴² However, Lee's interpretation of those clauses conflicts with a plain reading of sections 2.4, 2.5, 3.4, 11.1, and 11.2. The court must harmonize clauses that seem to

⁴² Brief of Appellant at 5-8.

conflict in order to give effect to all the contract's provisions.⁴³

Lee's arguments to interpret the contract contrary to the Agreement's express terms violates the basic principles of contract interpretation and create the obligation for the court to analyze the facts supporting contract creation, intention and application—prohibiting resolution at summary judgment. The trial court recognized this and was correct in denying the motion.

2. Ambiguity/Conflicting Provisions Must Be Resolved By "Context Rule" Review of Extrinsic Evidence. Here it is undisputed that, pursuant to the Agreement, the parties did not agree or intend to give control to Thaheld. It is also undisputed that they did comply with sections 2.4, 2.5, 3.4, 11.1, and 11.2—Lee retained ownership and control, especially of all Dental Decisions. To the extent there is conflict within the Agreement, the trial court must engage in analysis under the "context rule". Lee asks the Court to ignore extrinsic facts and find that Lee and Thaheld's contractual intent is in direct conflict with express provisions 2.4, 2.5, 3.4, 11.1, and 11.2—despite the fact that the parties adhered to these provisions religiously.

Washington's context rule of contract interpretation requires a

⁴³ Certain Underwriters at Lloyd's London v. Travelers Prop. Cas. Co. of Am., 161

factual inquiry, including review of:

- (1) The subject matter and objective of the contract;
- (2) All circumstances surrounding its formation;
- (3) The subsequent acts and conduct of the parties;
- (4) The reasonableness of the respective interpretations advocated by the parties;
- (5) Statements made by the parties in preliminary negotiations, and;
- (6) Usage of trade and course of dealings.⁴⁴

Undisputed evidence shows Thaheld followed through with the objective of the contract: He collaborated with Lee to train administrative staff, assist with scheduling, improve the accounting system, make recommendations regarding staffing and compensation, and manage receivables, payables, and payroll.⁴⁵ Text messages between Lee and Thaheld confirm that Lee remained in control of all aspects of the practice, including hiring and staffing,⁴⁶ dealing with customer service,⁴⁷ banking and bill paying,⁴⁸

Wash. App. 265, 278 (2011).

⁴⁴ Tjart v. Smith Barney, Inc., 107 Wash. App. 885, 895-96 (2001).

⁴⁵ CP 174-78.

⁴⁶ CP 224-240.

⁴⁷ CP 249.

⁴⁸ CP 248, 251, 253.

management of staff,⁴⁹ insurance claims,⁵⁰ pricing,⁵¹ ordering supplies and services⁵².

Lee argues this evidence must be ignored as extrinsic evidence that varies or contradicts the written word.⁵³ Lee is incorrect because this evidence does not vary or contradict the contract; it shows that the subsequent actions of the parties were in adherence to sections 2.4, 2.5, 3.4, 11.1, and 11.2. It is clear that Lee and Thaheld intended for these provisions govern the relationship.

When a court uses extrinsic evidence to interpret a contract, summary judgment is appropriate if only one reasonable meaning can be drawn from the extrinsic evidence.⁵⁴ The extrinsic evidence shows that the Policy Board never made any decisions and Lee supervised and directed all of Thaheld's work. This is incompatible with Lee's interpretation of the Agreement—that it required Thaheld to unlawfully control Lee's practices.

"In discerning the parties' intent, subsequent conduct of the

⁴⁹ CP 250.

⁵⁰ CP 250.

⁵¹ CP 249-50, 255-56.

⁵² CP 257-59.

⁵³ Appellant's Brief at 21-23. See also § 4, below, regarding oral modification of a contract.

⁵⁴ Spectrum Glass Co., Inc. v. Pub. Util. Dist. No. 1 of Snohomish County, 129 Wash. App. 303, 311-12 (2005).

contracting parties may be of aid, and the reasonableness of the parties' respective interpretations may also be a factor in interpreting a written contract."⁵⁵ Lee argues that the provisions designating Thaheld's duties should be read as transferring control or ownership to Thaheld's LLC, but that is unreasonable. Under the written provisions, Lee retained ultimate authority, even when specific tasks were delegated to Thaheld. If a contract has two or more reasonable meanings when viewed in context, a question of fact is presented.⁵⁶

"Contractual language also must be interpreted in light of existing statutes and rules of law."⁵⁷ The written Agreement is clear that neither party intended to grant impermissible control to Thaheld. The Agreement must be presumed to be lawful, given a reasonable interpretation, and interpreted with reference to the subsequent lawful actions of the parties.

Lee also argues that the Agreement is fully integrated,⁵⁸ but

⁵⁵ Berg v. Hudesman, 115 Wash.2d 657, 668, 801 P.2d 222 (1990).

⁵⁶ Chatterton v. Business Valuation Research, Inc., 90 Wash.App. 150, 155, 951 P.2d 353 (1998) (citing In re Marriage of Boisen, 87 Wash.App. 912, 920–21, 943 P.2d 682 (1997)); Bort v. Parker, 110 Wash. App. 561, 575 (2002).

⁵⁷ Bort v. Parker, 110 Wash. App. 561, 575 (2002); Tanner Electric Coop., 128 Wash.2d at 674, 911 P.2d 1301 (citing 3 Arthur L. Corbin, Contracts § 551, at 198 (1960); see also State v. Farmers Union Grain Co., 80 Wash.App. 287, 292, 908 P.2d 386 (1996) ("Parties are presumed to contract with reference to existing statutes").

⁵⁸ Appellant's Brief at 22.

it is not. The Agreement does not address what happens when the Policy Board fails to take action, as occurred here. The parties continued on with Lee in full control of the practice, in full compliance with sections 2.4, 2.5, 3.4, 11.1, and 11.2,⁵⁹ while Thalheld performed his duties at Lee's direction.

Lee introduces no evidence that the extrinsic evidence of the parties' conduct contradicts any provision of the Agreement. Instead, Lee's arguments at best create ambiguity and raise per se material issues of fact.

3. *Facts Show the Lawful Relationship Between the Parties.*

The Agreement directs that major business decisions be reviewed and approved by the Policy Board. The Policy Board cannot act without an affirmative vote of Dr. Lee. However, in this case, the Policy Board did not actually take any official action. The Agreement is silent as to what happens if the Policy Board does not make an effort to act and is not integrated as to that issue, although actual Board disagreements can be resolved by mediation.⁶⁰

Mr. Thaheld's declaration makes it very clear that both

⁵⁹ CP 171-81 (Thaheld's descriptions of Lee's decision making and continued control over the practice); CP 224-71 (text messages supporting Thaheld's description of Lee's continued ownership and control).

parties agree Dr. Lee retains control in the absence of action by the Policy Board that would delegate duties to the Thaheld's LLC. Dr. Lee hired and fired employees, re-assigned employees, changed accounting and billing practices, ignored the advice of the lawyers, took over deposits and banking, and altered the allocation of income and expenses between Blaine and Bellingham and between dentists and hygienist. While the Agreement allows the Policy Board to make these decisions—if Dr. Lee is in agreement--Thaheld could not obstruct Lee. Thaheld instead continued to provide services according to Lee's directions.

The unilateral control maintained by Lee shows the purpose and effect of the Agreement raise absolutely no concern that Lee was intended to be an employee or agent of Thaheld's LLC.

4. Parties Orally Modified the Agreement to Limit Thaheld Control. The parties acted in ways that were materially different from the Agreement:

First, Dr. Lee asserted unilateral control over most all of the business decisions: Unilateral consideration of closing Blaine, then selling Blaine, then saving Blaine, and his change of focus from

⁶⁰ Agreement § 3.3.

owning additional practices to selling everything.⁶¹ Thaheld acquiesced to Lee's continued control over administrative tasks that were supposed to be delegated to Thaheld's LLC. The depth of the differences in the parties' true relationship vis a vis the Agreement evidences modification of the parties' contract that further limited Thaheld's actual and possible control of the practice.

Second, Lee did not pay Thaheld per the contract. Lee raises concern regarding the provision for payment to Thaheld as an illegal ability to control (share of net profits). But as noted by Thaheld, his LLC was never paid the agreed upon amount: a total of \$23,600 for the seven full months of service versus \$70,000 under the Agreement (and certainly no net profits). This diversion from the contract shows that Thaheld's actual remuneration could, in no possible manner, have affected Dental Decisions. Further it raises series questions of fact exist as to why this occurred, whether there was a meeting of the minds, and how this material change altered the parties true relationship (did Thaheld become a mere employee?)

So the actions of the parties did continue to conform to the express contractual prohibitions that Thaheld's LLC could not own,

⁶¹ CP 177-81.

operate, or maintain the dental practices and only furthered Lee's absolute and unilateral control over both the dentistry and the business. These modifications by the parties amounted to an amendment of the Agreement. The terms and extent of these oral modifications are material to the question of the legality of the ultimate contract. A contract can always be modified.⁶² There are multiple material questions of fact regarding both the effect and purpose of the amended/revised Agreement that the parties forged after it was signed.

5. *The Court Must Scrutinize Lee's Intent.* The Court cannot ascertain the parties' actual relationship in a summary proceeding, but we do know this: It was not some alleged illegality that motivated Dr. Lee. Lee changed his mind, as his text messages to Mr. Thaheld show:

Hey johann. I have to let u know that I now have no plan to own any more practices. This whole service company thing has been stressing me out too much. I honestly don't think it's possible.⁶³

I have an idea how to restructure or unscrew our service co because it's not going to work as we thought initially.⁶⁴

⁶² P.N.W. Group A v. Pizza Blends, Inc., 90 Wash. App. 273, 277-79 (1998); Kelly Springfield Tire Co. v. Faulkner, 191 Wash. 549 (1937).

⁶³ CP 261 (text messages from Lee to Thaheld).

⁶⁴ CP 261.

Sorry to tell u johann but I don't think I can continue the service company. It doesn't make any sense to me.⁶⁵

Lee stated he did not think Thaheld's LLC was involved *enough*, then that he did not like the cost of the deal and wanted to save money:

My conclusion is the service company failed to do what it prmised to do n I actually had to do a lot more managing than ever before. Also I can't afford to loosing any more qualified employees including mason.⁶⁶

I've been doing all the marketing n most of the office managing n I believe it's the way should b.⁶⁷

Can't pay u 3600/ month as an in house CPA any more.⁶⁸

Lee also wanted out of the Agreement because he had lined up a purchaser for the Blaine clinic.⁶⁹ Lee may terminate the agreement, but these are not legitimate reasons to declare a contract void, especially when Lee had obtained the benefit of the Thaheld's work:

Courts will not allow themselves to be used for the purpose of conferring benefits upon litigants who plead the illegality of a contract into which they entered, when there has been a part performance of

⁶⁵ CP 264.

⁶⁶ CP 261.

⁶⁷ Id.

⁶⁸ CP 269.

⁶⁹ CP 262.

the contract, and when the relative positions of the contracting parties have been changed.⁷⁰

Thaheld turned down teaching another class at Western Washington University so he could dedicate more time to Lee's practices.⁷¹ It would be inappropriate to void the Agreement to the benefit of Lee and detriment of Thaheld, merely because Lee decided to "unscrew" the deal.

E. The Courts Must Recognize Changes to the Practice of Dentistry.

Washington's case law interpreting RCW 18.32.020 is based upon concepts of medicine and dentistry dating back before dental insurance, Medicare, Medicaid, limited reimbursement, overwhelming governmental regulation, integrated dental practices, information technology, and employee benefits. Larger corporations have assimilated the vast majority of medicine in our state. Why does that happen and why is that legal?

Mr. Thaheld has addressed this issue as it relates to dentistry. Dental Practice Management Companies are the standard for the industry to address all of the economic and insurance pressures facing dentists. These relationships allow the

⁷⁰ Parker v. Tumwater Fam. Prac. Clinic, 118 Wash. App. 425, 434 (2003) (quoting In re Field's Estate, 33 Wash. 63, 78, 73 P. 768 (1903)).

dentist to stay economically viable and focus on the care of patients. The Agreement is not unlike others in the industry. It is not illegal in today's world.

Additionally, consider dental and medical insurance companies or the new national health care law recently adopted. They control all aspects of dental and medical care.⁷² Does this regime make all health care providers a mere "agent of the corporation"? Or has the employment and business landscape changed in a manner that requires judicial acknowledgement that dentists need outside help to manage the non-dentistry portions of their practices?

The Court must consider the huge change in the business aspects of dentistry and the health care delivery system as context in interpreting the Agreement. To define the illegality of ownership, maintenance and operation of dentistry practice, the justice system must recognize that the needs of our society are much more complicated than seventy years ago. This has altered what can be considered illegal versus economically necessary. And the case law based upon outdated views of our modern needs must be

⁷¹ CP 266.

⁷² Who the health care provides may see as patients (the Medicare all-in requirement), what procedures they can and cannot undertake, what they can bill,

replaced with modern understanding of the dental profession.

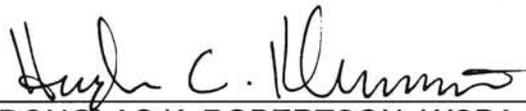
As such, the denial of summary judgment must be affirmed and the matter must be remanded to the trial court to address the questions of fact and the status of the realities of dental practice today.

V. CONCLUSION

The Court should affirm the trial court's denial of Lee's motion for summary judgment.

Respectfully submitted this 11th day of March, 2013.

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HUGH C. KLINEDINST, WSBA #41738

Attorneys for Respondents Thaheld/Lee-01 &
Johann Thaheld

and then regardless of what they bill, what they will be paid.

**IN THE COURT OF APPEALS OF THE STATE
OF WASHINGTON, DIVISION ONE**

Choong H. Lee, DMD, PLLC, a
Professional Limited Liability
Company and CH LEE, PLLC, a
Professional Limited Liability
Company
Appellants,

vs

Thaheld/Lee-01, LLC, a
Washington Limited Liability
Company, and Johann Thaheld,
believed to be an unmarried
resident of Washington,
Respondents.

Case No. 68417-5-1

DECLARATION OF
SERVICE

*Filed
WA
3-12-13
KW*

I, Veronica Vande Kamp, hereby certify as follows:

I am employed in the County of Whatcom, State of Washington. I am over the age of 18 and not a party to the within action. My business and place of employment is Belcher Swanson

Law Firm, PLLC, 900 Dupont Street, Bellingham, Washington 98225.

On the date set forth below, I served the following documents on the interested parties in this action in the manner described below and addressed as follows:

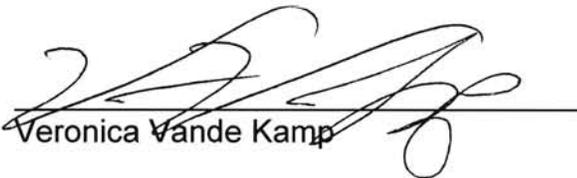
PARTY/COUNSEL	DELIVERY INSTRUCTIONS
Jeffrey P. Fairchild Ivan M. Stoner Adelstein, Sharpe, & Serka, LLP 400 N Commercial Street Bellingham, WA 98225	<input checked="" type="checkbox"/> By Hand Delivery

1. Brief of Respondents Thaheld/Lee-01, LLC and Johann Thaheld;

2. Declaration of Service.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 11th day of March, 2013 at Bellingham, Washington.


Veronica Vande Kamp