No. S147190

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

RAYMOND EDWARDS II,

Plaintiff and Appellant,

vs.

ARTHUR ANDERSEN, LLP,

Defendant and Respondent.

After a Decision by the Court of Appeal
Second Appellate District, Division Three, Case No. B178246
Los Angeles Superior Court Case No. BC 294853
Andria K. Richey, Judge Presiding

ANSWER TO THE AMICUS BRIEF OF CALIFORNIA EMPLOYMENT LAW COUNCIL AND ACTIVISION, INC.

LAW OFFICES OF RICHARD A. LOVE
Richard A. Love, SBN 61944
Beth A. Shenfeld, SBN 116223
11601 Wilshire Boulevard, Suite 2000
Los Angeles, California 90025-1756
(310) 477-2070 / Facsimile (310) 477-3922

GREINES, MARTIN, STEIN & RICHLAND LLP
Marc J. Poster, SBN 48493
Robin Meadow, SBN 51126
5700 Wilshire Boulevard, Suite 375
Los Angeles, California 90036-3626
(310) 859-7811 / Facsimile (310) 276-5261

Attorneys for Plaintiff and Appellant
RAYMOND EDWARDS II

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (Continued)

INTRODUCTION

The law of noncompetition agreements "is a sea – vast and vacillating, overlapping and bewildering. One can fish out of it any kind of strange support for anything, if he lives so long." (*Arthur Murray Dance Studios of Cleveland v. Witter* (Ohio 1952) 105 N.E.2d 685, 687.)

The California Employment Law Council and Activision, Inc. ("CELC") have gone fishing. In their amicus brief, they have reeled in some of that "strange support" for their position that, under California law, if a noncompetition agreement "is narrowly tailored to the surrounding circumstances and leaves a substantial portion of the market available, it falls outside [of Business and Professions Code] Section 16600." (CELC Brief, p. 2.)[1]

A thoughtful reading of the California cases, however, contradicts CELC's position. Outside of express statutory exceptions, California law has never upheld restraints – narrow or otherwise – on the right to practice one's trade or profession. A bright-line rule is a good thing when it comes to a right so fundamental as the right to earn a living. CELC's proposed case-by-case, fuzzy-line rule would only encourage employers to push the envelope of "narrowness," discourage unsophisticated employees from exercising their rights, and invite unproductive litigation.

Similarly, there is no support for CELC's position that releases of "any and all" claims must be interpreted to mean "some but not other" claims.

---

[1] CELC and Activision do not speak for all employers, of course. Some employers realize that noncompetition agreements are not only illegal but contrary to their best interests in the long run. (See, e.g., the amicus brief of St. Jude Medical, S.C., Inc., Pacesetter, Inc. and Advanced Bionics Corporation, filed May 23, 2007, in support of plaintiff's position.)

In this answer, plaintiff Raymond Edwards II explains each of these points.

LEGAL ARGUMENT

I. CELC MISREADS CALIFORNIA LAW; BUSINESS AND PROFESSIONS CODE SECTION 16600 DOES NOT PERMIT SOME NONCOMPETITION AGREEMENTS; IT VOIDS THEM ALL AS CONTRARY TO PUBLIC POLICY.

CELC's amicus brief is premised on notions that section 16600 endorses noncompetition agreements that either "leave[] a substantial portion of the market available" to the employee (CELC Brief, p. 2) or "tend more to promote than restrain trade" (CELC Brief, p. 10).

These premises are wrong, and the California cases relied on by CELC don't hold otherwise. As plaintiff has explained in his Answer Brief on the Merits (at pp. 16-18, 22-24, 31) – and as the briefs of amici curiae Law Professors and Writers of Learned Treatises (at pp. 6-12) and St. Jude Medical, S.C., Inc., Pacesetter, Inc., and Advanced Bionics Corporation (at pp. 9-22) have explained – the California cases relied on by CELC involve issues beyond plain competition; they involve such distinct issues as protection of trade secrets or prevention of unfair competition by means of unlawful solicitation of a former employer's other employees.

CELC essentially asks the Court to adopt the Ninth Circuit's version of noncompetition law in place of actual California law. With all due respect to the Ninth Circuit, that court has in the past misread California law. Indeed, a subsequent Ninth Circuit decision has admitted as much. (*International Business Machines Corp. v. Bajorek* (9th Cir. 1999) 191 F.3d 1033, 1041 [noting that the narrow restraint exception has been rejected by

modern California cases, but "[w]e are not free to read California law without deferring to our own precedent on how to construe it"].)

CELC's, and the Ninth's Circuit's, position depends on an assortment of rulings cobbled together from a few California cases that involve either no noncompetition agreement or a noncompetition agreement that encompasses more than just a restraint on the right to practice one's business, trade or profession.[2] We briefly reiterate what CELC misunderstands about these inapposite cases:

- *Gordon v. Landau* (1958) 49 Cal.2d 690, was a trade secrets case. The Court upheld an employee's agreement not to use confidential customer lists. (*Id*. at p. 694 ["a list of such customers is a valuable trade secret and [] plaintiffs were damaged by defendant's unlawful use thereof"].) CELC contends that the Court's trade secrets holding was not the dispositive factor because the Court also stated that the contract did not prevent the former employee from carrying on his business. (CELC Brief, p. 6.) The case cannot fairly be read that way. The trade secrets violation clearly was the factor that motivated the Court to reverse the judgment in favor of the former employee. Indeed, if CELC's reading of the case were correct, the Court would not have mentioned the trade secrets violation at all.

- *King v. Gerold* (1952) 109 Cal.App.2d 316, was an unfair competition case. No employee was involved. The court upheld a

---

[2] CELC's brief is also chock full of unsubstantiated factual assertions. It informs us that "[n]ormally," despite having procured a general release from departing employees, "employers fully comply with their obligation to indemnify employees for expenses incurred in the course of their employment. . . ." (CELC Brief, p. 2.) That has not been plaintiff's experience in this case. Nor has the good faith of employers been demonstrated by the facts of actual cases referred to in the amicus briefs of Kastner Banchero LLP (at pp. 6-10) and St. Jude, etc., et al. (at pp. 2-3, fn. 1).

provision in a license to produce trailers designed by the licensor that, on termination of the license, the licensee would not continue to produce trailers of the licensor's design. The licensee could continue to manufacture trailers, just not trailers that violated the plaintiff's design rights.

- *Boughton v. Socony Mobil Oil Co.* (1964) 231 Cal.App.2d 188, was a real property case. Again, no employee was involved. The court upheld a restriction on the use of real property contained in a contract for the sale of the property.

- *Loral Corp. v. Moyes* (1985) 174 Cal.App.3d 268, involved a former corporate executive's breach of a negotiated termination and stock buy-out agreement that included his promise not to lure corporate employees away from his former company to work for his new company. (*Id.* at pp. 273-274.) The agreement did not limit the executive's right to work for the new company or to compete for his old company's business. The issue on appeal was whether the executive's agreement not to raid employees from his former company was valid, and the court held it was valid because employee raiding was equivalent to violation of a trade secret or unfair competition. (*Id.* at p. 279 ["This does not appear to be any more of a significant restraint on his engaging in his profession, trade or business than a restraint on solicitation of customers or on disclosure of confidential information"].)

If there is dicta in *Loral* that would support CELC's plea for a non-statutory "narrow restraint" exception to section 16600, both prior and subsequent California case law over the past century makes clear there is no

such exception. (*Chamberlain v. Augustine* (1916) 172 Cal. 285, 289 ["The statute makes no exception in favor of contracts only in partial restraint of trade"]; *Morris v. Harris* (1954) 127 Cal.App.2d 476, 478 [same]; *Golden State Linen Service, Inc. v. Vidalin* (1977) 69 Cal.App.3d 1, 12 [section 16600 bars limited territorial restraints on employment]; *Hill Medical Corp. v. Wycoff* (2001) 86 Cal.App.4th 895, 900-901 [limited territorial restrictions on employment are void; "California codified its public policy and rejected the common law 'rule of reasonableness' in 1872, upon the enactment of the Civil Code"]; *Metro Traffic Control, Inc. v. Shadow Traffic Network* (1994) 22 Cal.App.4th 853, 860 ["section 16600 prohibits the enforcement of Metro's noncompete clause except as is necessary to protect trade secrets"]; and see *Scott v. Snelling and Snelling, Inc.* (N.D.Cal. 1990) 732 F.Supp. 1034, 1042 [no "rule of reason" exception for limited territorial restrictions on competition; "California courts have been clear in their expression that section 16600 represents a strong public policy of the state which should not be diluted by judicial fiat"; the statute "should be interpreted as broadly as its language reads"].)

II. CELC'S PROPOSED REVISION OF CALIFORNIA LAW BY ADOPTION OF A CASE-BY-CASE ANALYSIS OF NONCOMPETITION AGREEMENTS WOULD DEFEAT THE BENEFICIAL PURPOSES OF SECTION 16600.

Ironically, CELC's amicus brief demonstrates the near-complete uselessness of a "narrow restraint" standard. CELC proposes a multi-part test for the validity of each noncompetition agreement on a case-by-case basis, founded on "the actual text of the contract and the surrounding circumstances" and measured by four additional factors, each of which is in

turn broken into subparts, and which, just in summary, fill nearly an entire page, single spaced. (CELC Brief, p. 12.)

CELC's proposed multi-part standards would be unworkable. They are rife with undefined and undefinable weasel words such as "modest limitations," "reasonably limited restrictions," and "overall positive or negative impact." (*Ibid.*) Inventive counsel could extend or shrink these vague concepts to fit almost any situation.

A multi-part, case-by-case test would offer fertile ground for other mischief as well. For example, while CELC pays lip service to California's rejection of the "inevitable disclosure" doctrine that employers have unsuccessfully attempted to use to prevent employees with knowledge of trade secrets from seeking any other employment in the same industry (CELC Brief, p.16 [acknowledging that *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1462-1463, rejected the doctrine]), CELC's proposed "confidential information/unlawful conduct" factor would resurrect that doctrine by factoring in "How essential is the provision to protecting against the employee's ability to place the information at risk?" (CELC Brief, p. 12). This would extend beyond actually preventing misuse of trade secrets and would prohibit the mere possibility of misuse of trade secrets – a euphemism for the banned inevitable-disclosure doctrine.[3]

Sometimes a bright line rule is essential. (*Elden v. Sheldon* (1988) 46 Cal.3d 267, 277.) This is one of those times.

On the public policy front, CELC professes concern about protecting an employer's investment in human capital. (CELC Brief, pp. 13-16.)

---

[3] CELC also seeks to revive and extend the inevitable-disclosure doctrine by allowing "the parties to negotiate their affairs from the beginning with a complete understanding and agreement as to their expectations and limitations." (CELC Brief, p. 16, fn. 6.) The notion that the typical prospective employee can negotiate on a level playing field with his or her prospective employer is highly illusory.

CELC forgets that the employee pays for that capital by devoting himself or herself to the employer's enterprise as the capital accumulates.[4] Moreover, the human-capital argument loses all force when the employer also insists that the employee serve at will and without job security. The employer expects the employee's loyalty, but promises none in return.[5]

In any event, the human-capital argument would enable virtually any employer to justify a noncompetition agreement on grounds that the employee learned something during his or her employment, even if it were only entry-level skills that anyone would learn holding almost any job. (See the amicus brief of California Employment Lawyers Association, at pp. 7-8, enumerating some of the types of employment in which employers have attempted to extract promises of post-employment noncompetition – including such honorable but not skill-intensive occupations as janitors, garbage collectors, and night watchmen.)

CELC's only legitimate concerns about potential misconduct by former employees are properly addressed by California's trade secrets and unfair competition laws, not section 16600. There is no need or

---

[4] See Stone, *Knowledge at Work: Disputes Over the Ownership of Human Capital in the Changing Workplace* (2002) 34 Conn. L. Rev. 721, 754 ("when human capital development is part of what an employee is promised in the employment deal, it must then be concluded that the resulting human capital so obtained belongs to the employee").

[5] See Arnow-Richman, *Bargaining for Loyalty in the Information Age: A Reconsideration of the Role of Substantive Fairness in Enforcing Employee Noncompetes* (2001) 80 Or. L. Rev. 1163, 1209, 1218 ("The problem for employers, however, is how to encourage dedication and above-average performance while simultaneously telling employees they have no guarantee of continued employment and may be terminated for any reason" and "since noncompetes do not contractually define any other aspect of the employment relationship, they create no legal obligation on the part of the employer to fulfill any of its own commitments . . .").

justification for the Court to rewrite section 16600 and add a complex and easily manipulated "narrow restraint" exception.

III. FORCING AN EMPLOYEE TO RELEASE "ANY AND ALL" CLAIMS IS A WRONGFUL ACT WHEN THE EMPLOYEE MAY HAVE A CLAIM FOR INDEMNIFICATION UNDER LABOR CODE SECTION 2802.

CELC fears that if a general release of "any and all claims" is found to violate public policy in one respect, "Plaintiffs' counsel throughout the State of California will contend that if a release is against public policy the release is totally void." (CELC Brief, pp. 3-4.) But that is unfounded speculation. Plaintiff does not take that position in this case. None of the amicus briefs in his support have either. And, contrary to CELC's assertion, the Court of Appeal did not either. What the Court of Appeal condemned as violative of public policy was not a negotiated settlement of an existing claim for employment benefits under section 2802, but rather "*forcing* an employee to waive his or her statutory rights" under that section. (Slip Opinion, p. 31 [emphasis added] citations omitted.)

As CELC concedes, in the typical case "the employee will not have the faintest idea what claims cannot be released as matter of law." (CELC Brief, p. 19.) The burden therefore should be on the employer to ensure that releases do not purport to release rights that cannot lawfully be released. If it is "impossible to list all claims which cannot be waived" (CELC Brief, p. 19), then the employer should at least provide in the release that it is not intended to release claims that cannot lawfully be released. That would at least water down the *in terrorum* effect of a general release. And if, as in this case, the employer is on notice that the employee may have a claim for indemnification for employment related expenses pursuant

to section 2802, the employer should expressly identify that claim as not subject to the release. Forcing an employee to waive future rights under section 2802 is one of the wrongful acts that plaintiff asserts as the basis of his claim for interference with prospective economic advantage.

Finally, CELC suggests that "release agreements should be written as simply as possible." (CELC Brief, p. 21.) But clarity, not mere simplicity, must be the primary goal. If simplicity results in confusion and leads employees unnecessarily to refrain from exercising their statutory rights, then simplicity should not be the paramount goal.

IV. THERE IS NO REASON TO LIMIT THIS COURT'S DECISION TO PROSPECTIVE APPLICATION ONLY.

CELC asks that any rulings by this Court that there is no narrow restraint exception to section 16600, or that a general release of future rights under section 2802 violates public policy, should be prospective only. (CELC Brief, pp. 17, 23.)

There is no reason to limit the Court's decision in this way. While statutes that adopt *new* substantive rules are presumed to act prospectively (*Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 242-243), section 16600 has been on the books in almost identical form since 1872. This Court confirmed that the statute means what it says more than ninety years ago, in 1916. (*Chamberlain v. Augustine*, *supra*, 172 Cal. at p. 289 ["The statute makes no exception in favor of contracts only in partial restraint of trade"].) Labor Code sections 2802 and 2804 have been on the books since 1937. Employers have had seventy years to draft releases that comply with those laws.

Case law, on the other hand, is presumed to act retrospectively. (*Peterson v. Superior Court* (1982) 31 Cal.3d 147, 151-152.) Plaintiff is

not seeking "dramatic changes" in the law, as CELC asserts. (CELC Brief, p. 17.) And even if there were some uncertainty in California law before now (there was none) "[r]eplacing chaos with certainty need not be reserved for the future only." (*Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 367.)

CONCLUSION

CELC's fishing expedition has netted nothing but arguments that should be thrown back.

CELC offers no explanation how any noncompetition agreement would "tend more to promote than restrain trade." (CELC Brief, p. 23.) The Legislature thought otherwise when it adopted section 16600 in 1872, and it has continued to think so ever since. The statute should be given its plain meaning rather than muddied with a judicially-created and undefinable test of "narrowness."

Similarly, CELC has no explanation how a release of "any and all" claims can reasonably be interpreted to mean "some but not all" claims. Public policy prohibits an employer from forcing an employee to release claims that cannot lawfully be released.

Dated: June ___, 2007

LAW OFFICES OF RICHARD A. LOVE
Richard A. Love
Beth A. Shenfeld

GREINES, MARTIN, STEIN & RICHLAND LLP
Marc J. Poster
Robin Meadow

By_____
Marc J. Poster, Esq.

Attorneys for Plaintiff and Appellant
RAYMOND EDWARDS II

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204 (c)(1), the attached Answer To Amicus Brief Of California Employment Law Council And Activision, Inc. was produced using 13-point Times New Roman type style and contains 2,773 words not including the tables of contents and authorities, caption page, signature blocks, or this Certification page, as counted by the word processing program used to generate it.

Dated: June ___, 2007

LAW OFFICES OF RICHARD A. LOVE

GREINES, MARTIN, STEIN & RICHLAND LLP

By_____
Marc J. Poster, Esq.