IN THE SUPREME COURT OF THE STATE OF NEVADA

FIELDEN HANSON ISAACS MIYADA ROBISON YEH, LTD., Appellants, v. DEVIN CHERN TANG, M.D., SUN ANESTHESIA SOLUTIONS, a Nevada Corporation, DOE Defendants I-X Respondents.	Supreme Court No. 78358 District Court No. A-18-783054-C **APPELLANT'S OPENING BRIEF**

APPEAL

from the Eighth Judicial District Court, Clark County
The Honorable Timothy Williams, Department XVI, District Judge
District Court Case No. A-18-783054-C

******

APPELLANT'S OPENING BRIEF

******

Michael N. Feder
Nevada Bar No. 7332
Gabriel A. Blumberg
Nevada Bar No. 12332
DICKINSON WRIGHT PLLC
8363 West Sunset Road, Suite 200
Las Vegas, NV 89113
Tel: (702) 550-4400
Fax: (844) 670-6009
Attorneys for Appellant

DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. Fielden Hanson Isaacs Miyada Robison Yeh, Ltd. ("Fielden Hanson") is a wholly owned subsidiary of USAP of Nevada (Isaacs), PLLC, which is managed by U.S. Anesthesia Partners, Inc. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Current counsel for Fielden Hanson

Michael N. Feder, Esq.
Nevada Bar No. 7332
mfeder@dickinsonwright.com
Gabriel Blumberg, Esq.
Nevada Bar No. 12332
gblumberg@dickinsonwright.com
DICKINSON WRIGHT PLLC
8363 W. Sunset Road, Suite 200
Las Vegas, Nevada 89113
Tel: (702) 550-4400
Fax: (844) 670-6009

Previous counsel for Fielden Hanson

John H. Cotton, Esq.
Nevada Bar No. 5268
jhcotton@jhcottonlaw.com
John H. Cotton & Associates
7900 W. Sahara Avenue, Suite 200
Las Vegas, Nevada 89117
Tel: (702) 832-5909
Fax: (702) 832-5910

Counsel for Dr. Devin Chern Tang, M.D. ("Tang") and Sun Solutions Anesthesia ("Sun" and together with Dr. Tang, "Respondents")

Martin A. Little, Esq.
Nevada Bar No. 7067
mal@h21aw.com
Ryan T. O'Malley, Esq.
Nevada Bar No. 12461
rto@h21aw.com
HOWARD & HOWARD PLLC
3800 Howard Hughes Pkwy., Suite 1000
Las Vegas, NV 89169
Tel: (702) 257-1483
Fax: (702) 567-1568

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

I. JURISDICTIONAL STATEMENT

(a) This Court has jurisdiction pursuant to NRAP 3A(b)(3) because this appeal relates to a district court order denying an injunction.

(b) The district court entered its order denying Fielden Hanson's Motion for Preliminary Injunction on February 5, 2019 and notice of entry of said order was filed on February 8, 2019. Fielden Hanson timely appealed the order denying preliminary injunction on March 11, 2019.

II. ROUTING STATEMENT

This matter is presumptively assigned to the Supreme Court pursuant to NRAP 17(a)(9) because it originated in business court. This matter also should be retained by the Supreme Court pursuant to NRAP 17(a)(11) because it involves a question of first impression involving statutory interpretation and NRAP 17(a)(12) because it involves a question of statewide public importance as a principal issue.

III. STATEMENT OF ISSUES

Whether the district court erred by denying Fielden Hanson's request for a preliminary injunction based on its conclusions that:

(a) the subject non-competition provision in the employment agreement "fails to designate facilities or a geographic boundary where Dr. Tang is prohibited from working and/or soliciting business with any specificity;"

(b) the district court "does not have authority to 'blue pencil' the Non-Competition Clause of the Employment Agreement because the amendment to NRS

Chapter 613, more particularly NRS 613.195(5), does not apply retroactively to agreements entered into prior to the enactment of the amendment, which agreements are governed by *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 376 P.3d 151 (2016);" and/or

(c) the parties' contractual agreement to permit bluelining of the subject non-competition provision is unenforceable.

IV. STATEMENT OF THE CASE

This appeal arises out of a former Fielden Hanson employee's decision to breach the non-competition terms of his employment agreement and utilize the goodwill and relationships he developed through his employment with Fielden Hanson to begin competing with Fielden Hanson in the same medical facilities where its anesthesiologists practice.

In December 2016, Dr. Tang executed a Partner-Track Physician Employment Agreement ("Employment Agreement") as a condition of his continued employment with Fielden Hanson. *See* APP000029. The Employment Agreement included a non-competition provision prohibiting Dr. Tang from performing anesthesia or pain management services at any facility that he worked at while employed by Fielden Hanson for a period of two years after the end of his employment with Fielden Hanson (the "Non-Competition Clause"). APP000033 at ¶ 2.8.1.

Less than two years later, in the summer of 2018, Dr. Tang terminated his employment with Fielden Hanson and soon thereafter began violating the Non-Competition Clause by performing anesthesia and pain management services at several facilities he worked at during his tenure with Fielden Hanson. APP000310. As a result of Dr. Tang's conduct, Fielden Hanson filed its Complaint on October 18, 2018 and requested a preliminary injunction barring Dr. Tang from continuing to violate the Non-Competition Clause. *See* APP000014; APP000029. Dr. Tang filed an answer and opposition to the motion for preliminary injunction alleging that the Non-Competition Clause was void because the geographic restrictions were vague and unreasonable. *See* APP000093; APP000167.

After a hearing on Fielden Hanson's Motion for Preliminary Injunction, the district court entered its Order Denying Preliminary Injunction. APP000308. In its Order, the district court incorrectly concluded that the Employment Agreement: (1) "fails to designate facilities or a geographic boundary where Dr. Tang is prohibited from working and/or soliciting business with any specificity" and (2) "lacks any geographic limitation or qualifying language distinguishing the particular Facilities or customers to which it applies." APP000310-APP000311.

The district court then compounded its error by concluding that it "does not have authority to 'blue pencil' the Non-Competition Clause because the amendment to NRS Chapter 613, more particularly NRS 613.195(5), does not apply retroactively

to agreements entered into prior to the enactment of the amendment, which agreements are governed by *Golden Rd. Motor Inn, Inc. v. Islam*, 132 Nev. 476, 376 P.3d 151 (2016)." *Id.* Based on this legal conclusion, the district court refused to modify the Non-Competition Clause to reflect a specific geographic restriction it deemed to be reasonable. *Id.* Fielden Hanson appealed this decision and also filed a motion for reconsideration, which was denied. *See* APP000314; APP000569, APP000668.

V. STATEMENT OF FACTS

A. The Employment Agreement

Dr. Tang executed his Employment Agreement with Fielden Hanson in December 2016. *See* APP000029. The Employment Agreement contained the following Non-Competition Clause:

> In consideration of the promises contained herein, including without limitation those related to Confidential Information, except as may be otherwise provided in this Agreement, during the Term of this Agreement and for a period of two (2) years following termination of this Agreement, Physician covenants and agrees that Physician shall not, without the prior consent of the Practice (which consent may be withheld in the Practice's discretion), directly or indirectly, either individually or as a partner, joint venturer, employee, agent, representative, officer, director, member or member of any person or entity, (i) *provide Anesthesiology and Pain Management Services at any of the Facilities at which Physician has provided any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day* and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination; (ii) call on, solicit or attempt to solicit any Facility

> serviced by the Practice within the twenty-four month period prior to the date hereof for the purpose of persuading or attempting to persuade any such Facility to cease doing business with, or materially reduce the volume of, or adversely alter the terms with respect to, the business such Facility does with the Practice or any affiliate thereof or in any way interfere with the relationship between any such Facility and the Practice or any affiliate thereof; or (iii) provide management, administrative or consulting services at any of the Facilities at which Physician has provided any management, administrative or consulting services or any Anesthesiology and Pain Management Services (1) in the case of each day during the Term, within the twenty-four month period prior to such day and (2) in the case of the period following the termination of this Agreement, within the twenty-four month period prior to the date of such termination.

APP000033 at ¶ 2.8.1 (emphasis added).

At the time he entered into the Employment Agreement, Dr. Tang agreed that the Non-Competition Clause, including the geographic restriction, was reasonable:

> It is understood by and between the parties hereto that the covenants set forth in Sections 2.8 and 2.9 of this Agreement are essential elements of this Agreement, and that, but for that agreement of Physician to comply with such covenants, the Practice would not have agreed to enter into this Agreements. The Practice and Physician agree that the foregoing covenants are appropriate and reasonable when considered in light of the nature and extent of the business conducted by the Practice.

APP000035 at ¶ 2.10.

Furthermore, Dr. Tang consented to entry of injunctive relief to enforce the Non-Competition Clause and agreed that if a court ever determined that any portion of the Non-Competition Clause was unreasonable, such court must enforce the remainder of the Non-Competition Clause and revise the offending provision in order to render it enforceable:

> Physician agrees that if any restriction contained in this Section 2.8 is held by any court to be unenforceable or unreasonable, a lesser restriction shall be severable therefrom and may be enforced in its place and the remaining restrictions contained herein shall be enforced independently of each other. In the event of any breach by Physician of the provisions of the Section 2.8, the Practice would be irreparably harmed by such a breach, and Physician agrees that the Practice shall be entitled to injunctive relief to prevent further breaches of the provisions of this Section 2.8, without need for the posting of a bond.

APP000034 at ¶ 2.8.3.

> If any provision or subdivision of this Agreement, including, but not limited to, the time or limitations specified in or any other aspect of the restraints imposed under Sections 2.8 and 2.9 is found by a court of competent jurisdiction to be unreasonable or otherwise unenforceable, any such portion shall nevertheless be enforceable to the extent such court shall deem reasonable, and, in such event, it is the parties' intention, desire and request that the court reform such portion in order to make it enforceable. In the event of such judicial reformation, the parties agree to be bound by Sections 2.8 and 2.9 as reformed in the same manner and to the same extent as if they had agreed to such reformed Sections in the first instance.
>
> Without limiting other possible remedies to the Practice for the breach of the covenants in Sections 2.8 and 2.9, Physician agrees that injunctive or other equitable relief shall be available to enforce the covenants set forth in Sections 2.8 and 2.9, such relief to be without the necessity of posting a bond, case, or otherwise.

APP000035 at ¶ 2.10.

B. Non-Competition Facilities

During his employment with Fielden Hanson, Dr. Tang provided services at the following medical facilities (the "Non-Competition Facilities"): Desert Springs Hospital, Durango Outpatient, Flamingo Surgery Center, Henderson Hospital,

Horizon Surgery Center, Institute of Orthopaedic Surgery, Las Vegas Surgicare, Mountain View Hospital, Parkway Surgery Center, Sahara Outpatient Surgery Center, Seven Hills Surgery Center, Southern Hills Hospital, Specialty Surgery Center, Spring Valley Medical Center, St. Rose- De Lima Campus, St. Rose- San Martin Campus, St. Rose- Siena Campus, Summerlin Hospital, Sunrise Hospital, Tenaya Surgical Center, Valley Hospital, and Valley View Surgery Center. *See* APP000003 at ¶ 12.

C. Dr. Tang Violates the Non-Competition Clause

Dr. Tang terminated his employment with Fielden Hanson in June of 2018. APP000310. After ceasing his employment with Fielden Hanson, Dr. Tang continued to work as an anesthesiologist in Clark County and performed anesthesia services at Non-Competition Facilities including Southern Hills Hospital and St. Rose Dominican Hospital – San Martin Campus. APP000005 at ¶ 23; APP000169 at ¶ 23.

VI. SUMMARY OF THE ARGUMENT

The district court committed multiple reversible errors when it refused to enforce the parties' agreed-upon Non-Competition Clause. First, the district court erred by finding that the Non-Competition Clause failed to provide a reasonable geographic boundary. Contrary to the district court's clearly erroneous finding, the record reveals that the Non-Competition Clause contains a narrowly tailored

geographic restriction precluding Dr. Tang from working at the particular facilities he serviced—i.e. the Non-Competition Facilities—on behalf of Fielden Hanson during the specified two-year period.

Second, the district court committed further error when it refused to blueline the Non-Competition Clause and enforce a modified version of the Non-Competition Clause. Both the parties' Employment Agreement and Nevada law, in particular NRS 613.195(5), required the district court to blueline the Non-Competition Clause to render it reasonable and enforce the revised version of the Non-Competition Clause.

These critical errors by the district court resulted in it improperly denying Fielden Hanson's request for a preliminary injunction and mandate reversal of the district court's erroneous order.

VII. ARGUMENT

A. Standard of Review

This Court reviews district court decisions denying preliminary injunctions under an abuse of discretion standard. *Univ. & Cmty. Coll. Sys. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004). "A decision that lacks support in the form of substantial evidence is arbitrary or capricious and, therefore, an abuse of discretion." *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 72-73, 270 P.3d 1259, 1262 (2012). Furthermore, "[a]n abuse of discretion can occur when the

district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016).

This Court, however, reviews questions of law de novo, even in the context of an appeal from a preliminary injunction. *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015) (citing *Boulder Oaks Cmty, Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 403, 215 P.3d 27, 31 (2009)); *see also State, Dep't of Bus. & Indus., Fin. Institutions Div. v. Nevada Ass'n Servs., Inc.*, 128 Nev. 362, 366, 294 P.3d 1223, 1226 (2012). Questions of statutory construction and application are questions of law and therefore are reviewed de novo. *See Nevadans for Prop. Rights v. Sec'y of State*, 122 Nev. 894, 901, 141 P.3d 1235, 1240 (2006) (holding that when the underlying issues in the motion for preliminary injunction "involve[ ] questions of statutory construction, including the meaning and scope of a statute, we review . . . those questions de novo.").

B. The Non-Competition Clause is Reasonable

The district court abused its discretion in determining that the Non-Competition Clause is unreasonable. "Nevada law allows for the enforcement of reasonable restrictive covenants in employment agreements, and recognizes that a valid, restrictive covenant may be enforced by way of temporary and permanent injunctive relief." *Accelerated Care Plus Corp. v. Diversicare Mgmt. Servs. Co.*,

2011 WL 3678798, at *3 (D. Nev. Aug. 22, 2011) (citing NRS 613.200). Broad geographic restrictions are reasonable "so long as they are roughly consonant with the scope of the employee's duties." *Id.* (imposing temporary injunctive relief after finding non-compete clause reasonable and enforceable with no geographic scope because it prohibited employees from working in a similar position with a similar or competitive business). Geographic restrictions also are reasonable when they are limited to areas serviced by the employer. *Ellis v. McDaniel*, 95 Nev. 455, 596 P.2d 222, 224 (Nev.1979); *Farmer Bros. Co. v. Albrecht*, 2011 WL 4736858, at *2 (D. Nev. Oct. 6, 2011) (granting preliminary injunction where non-compete prohibited former employee from working "in the geographical area served by [Plaintiff's] Las Vegas, Nevada office.").

These same standards apply to anesthesiologists because the "medical profession is not exempt from a restrictive covenant provided the covenant meets the tests of reasonableness." *Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967) (citing *Foltz v. Struxness*, 215 P.2d 133 (Kan.1950) (area of 100 miles for a period of ten years); *Cogley Clinic v. Martini*, 253 Iowa 541, 112 N.W.2d 678 (1962) (25 mile radius for three years); *Lovelace Clinic v. Murphy*, 76 N.M. 645, 471 P.2d 450 (1966) (county limits and three years)). This is because the "substantial risk of losing patients to an employee is itself an adequate basis for a reasonably designed restraint." *Id.*

Here, the Non-Competition Clause contains a reasonable geographic restriction aimed at precluding Dr. Tang from performing anesthesia or pain management services at any medical facility where he provided those same services while employed by Fielden Hanson (the Non-Competition Facilities). This narrowly tailored restriction is directly tied to Dr. Tang's work for Fielden Hanson and seeks to protect Fielden Hanson's goodwill and established business relationships with medical facilities that Dr. Tang became familiar with by working for Fielden Hanson.

Rather than imposing broad territorial restrictions, the Non-Competition Clause only restricts Dr. Tang from performing anesthesia services at the 22 specified Non-Competition Facilities Dr. Tang worked at while employed by Fielden Hansen. As a result, not only can Dr. Tang continue to work in the field of anesthesiology while in compliance with the Non-Competition Clause, he can also do so at numerous other locations within Clark County, Nevada, and elsewhere, including medical facilities adjacent to Non-Competition Facilities.

This fact is critical here because the district court stated it would have determined the Non-Competition Clause was reasonable had its geographic restriction been specifically limited to Clark County. APP000198. Tellingly, the Non-Competition Clause at issue here is far less restrictive than the hypothetical Clark County limitation endorsed by the district court because Dr. Tang can still

practice anesthesiology in Clark County at any other facility. Thus, the district court abused its discretion by arbitrarily and capriciously concluding the Non-Competition Clause was unreasonable and unenforceable.

C. NRS 613.195(5) Applies and Governs this Action

Even if this Court does not conclude that the district court abused its discretion in declaring the Non-Competition Clause unreasonable, reversal is still warranted because the district court committed reversible error by failing to apply NRS 613.195(5). This statutory provision provides:

> ***If an employer brings an action to enforce a noncompetition covenant*** and the court finds the covenant is supported by valuable consideration but contains limitations as to time, geographical area or scope of activity to be restrained that are not reasonable, impose a greater restraint than is necessary for the protection of the employer for whose benefit the restraint is imposed and impose undue hardship on the employee, ***the court shall revise the covenant to the extent necessary and enforce the covenant as revised.*** Such revisions must cause the limitations contained in the covenant as to time, geographical area and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than is necessary for the protection of the employer for whose benefit the restraint is imposed.

NRS 613.195(5) (emphasis added). Accordingly, to the extent that the district court found that the Non-Competition Clause was unreasonable, it was required to modify the provision to be reasonable and enforce the provision as modified.

1. The Plain Language of NRS 613.195(5) Requires it Be Applied in Any Action Brought After its Enactment

NRS 613.195(5)'s plain language clearly establishes that it applies in any matter where an employer commences an action after enactment of the statute to enforce a covenant not to compete. *Pub. Employees' Ret. Sys. of Nevada v. Gitter*, 133 Nev. 126, 131, 393 P.3d 673, 679 (2017) ("[W]hen a statute's language is plain and its meaning clear, the courts will apply that plain language."); *see also Jennifer L. v. Eighth Jud. Dist. Ct.*, 131 Nev. 254, 258, 351 P.3d 694, 696 (2015) (citing *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010)) ("When a statute is clear and unambiguous, we give effect to the plain and ordinary meaning of the words and do not resort to the rules of construction."). As such, the statute applies here because Fielden Hanson commenced the lawsuit after the effective date of NRS 613.195(5), June 3, 2017. *See United States ex rel. Chovanec v. Apria Healthcare Group, Inc.*, 606 F.3d 361, 365 (7th Cir. 2010) ("One 'brings' an action by commencing suit.").

This conclusion is buttressed by this Court's decision when addressing a similar situation of whether to apply a newly enacted statute retroactively in *Picetti v. State*, 124 Nev. 782, 793–94, 192 P.3d 704, 712 (2008). In *Picetti*, this Court was tasked with determining whether NRS 484.37941 applies to a defendant who committed the complained of act prior to the statute's enactment but sought to use its protections during a case after its enactment. *Id.*; *see also* NRS 484.37941 (""An

offender who enters a plea of guilty or nolo contendere to a violation of NRS 484.379 or NRS 484.379778 that is punishable pursuant to paragraph (c) of subsection 1 of NRS 484.3792 may, at the time he enters his plea, apply to the court to undergo a program of treatment."). In interpreting the statute, this Court concluded that the plain language of the statute mandated that it apply to anyone entering a plea after the statute's effective date, even if the defendant had committed the alleged crime and been charged prior to the enactment of the statute, because the critical event triggering the statute was pleading, not any underlying action. *Id.*

This Court later reaffirmed the *Picetti* decision in *Stromberg v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe*, 125 Nev. 1, 5–6, 200 P.3d 509, 511 (2009), wherein this Court reiterated it need not look any further than the plain language of the statute to conclude it must apply to all offenders pleading guilty on or after July 1, 2007. *Stromberg v. Second Judicial Dist. Court of State ex rel. Cty. of Washoe*, 125 Nev. 1, 5–6, 200 P.3d 509, 511 (2009).

Here, as in *Picetti* and *Stromberg*, NRS 613.195(5)'s plain language clearly establishes that its application turns on when an employer brings an action to enforce a non-competition agreement rather than when the employer entered into the non-competition agreement. Thus, the district court committed a reversible error of law by instead interpreting the statute to apply only to agreements entered after the statute was enacted regardless of when the employer filed its enforcement action.

The district court's interpretation finds no support in the statute and thus must be overturned.

2. NRS 613.195(5) Should Be Applied Retroactively

The district court also erred by concluding that NRS 613.195(5) does not apply retroactively. *See* APP000311. This Court has confirmed that the presumption in favor of prospective application of statutes "does not apply to statutes that do not change substantive rights and instead relate solely to remedies and procedure." *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 179–80, 162 P.3d 148, 154–55 (2007). Indeed, in cases where the statute relates to remedies and procedure, "a statute will be applied to any cases pending when it is enacted." *Id.* This principle was stated over a century ago by this Court in *Truckee River General Electric Co. v. Durham*, 38 Nev. 311, 149 P. 61 (1915), and was recently reiterated in *Holdaway-Foster v. Brunell*, 130 Nev. 478, 330 P.3d 471 (2014).

In *Brunell*, this Court was tasked with determining whether the Full Faith and Credit for Child Support Orders Act, enacted in 1994, could be applied retroactively to orders entered in 1989 and 1992. *Brunell*, 130 Nev. at 482. This Court observed that the statute at issue was "silent as to whether it applies retroactively" and, as such, stated it "must look to the purposes behind the Act, which we conclude mandate retroactive application." *Id.* This Court determined that the Act had three purposes: (1) to facilitate enforcement of orders among states; (2) discourage

continuing interstate controversies over child support; and (3) avoid jurisdictional competition and conflict among state court orders. *Id.*

In addressing the first purpose, this Court concluded that a "strict prospective application would frustrate the Act's purpose because the very issues that Congress designed the Act to resolve would persist" regarding orders entered prior to the Act's enactment. *Id.* In addressing the second purpose, this Court found that, without retroactivity, enforcing orders would be made "more difficult because orders entered before the Act's effective date would be subject to different procedural rules than those entered after that date." *Id.* Lastly, in addressing the third purpose, this Court concluded that the Act was "remedial in nature because it was designed to assist in collecting past child support arrears." *Id.* Based on these conclusions, this Court found that the "Act must be retroactively applied." *Id.*

The reasoning applied in *Brunell* applies equally here to NRS 613.195(5).

a. Failure To Apply NRS 613.195(5) to the Non-Competition Clause Would Create an Absurd Result

A strict prospective application of NRS 613.195(5) would undoubtedly frustrate the statute's purpose of overturning *Golden Road* and requiring district courts to enforce bluelined versions of non-compete agreements rather than wholly voiding non-compete agreements. *See* APP000478 ("a specific lawsuit came forth in which an entire noncompete agreement was thrown out because one portion of it was excessive. Section 1, subsection 5 would allow a court to keep the good parts

of a noncompete agreement and toss out or renegotiate the excessive parts"); *see also id.* ("Another provision this bill contains is bluelining. If a court of law finds that provisions in the noncompete agreement are invalid, it can strike out the invalid components but leave in what is valid."). Indeed, if NRS 613.195(5) were not applied in this case, the exact problem the Legislature sought to fix—courts wholly nullifying otherwise valid non-compete agreements due to one unreasonable provision—would persist. *See id.*

Additionally, the failure to apply NRS 613.195(5) to the Employment Agreement would be particularly troubling here because it contravenes the parties' stated intent in the Employment Agreement of permitting a court to blueline any offending provisions of the Non-Competition Clause. *See* APP000034 at ¶ 2.8.3. Thus, at the time the parties entered into the Employment Agreement, they both agreed and expected that a court would blueline the Non-Competition Clause to the extent any portion of it was deemed unreasonable. These same expectations were then codified in NRS 613.195(5). *See* NRS 613.195(5). The district court's decision to ignore NRS 613.195(5) and the parties' contract produced an unreasonable and absurd result. *See Anthony Lee R. v. State*, 113 Nev. 1406, 1414, 952 P.2d 1, 6 (1997) ("statutory language should not be read to produce absurd or unreasonable results."); *see also Las Vegas Police Protective Association Metro, Inc. v. District Court*, 122 Nev. 230, 130 P.3d 182 (2006) (citing *McKay v. Bd. of Supervisors*, 102

Nev. 644, 648, 730 P.2d 438, 441 (1986)) (a court should not apply a statute in a manner that would "violate[] the spirit of the act" or produce "absurd or unreasonable results"); *State v. Glusman*, 98 Nev. 412, 425, 651 P.2d 639, 648 (1982) ("The words of a statute should be construed, if reasonably possible, so as to accommodate the statutory purpose"); *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 887 (1988) ("When interpreting a statute, we resolve any doubt as to legislative intent in favor of what is reasonable, as against what is unreasonable").

Thus, this Court should conclude that NRS 613.195(5) applies retroactively in order to avoid an improper, absurd result that would frustrate the Legislature's purpose in enacting the statute as well as the parties' agreement and expectation when entering into the Employment Agreement.

b. NRS 613.195(5) Must Be Applied Retroactively To Ensure Uniform Application of the Law

Second, this Court's concern in *Brunell* regarding the same agreement being subjected to different procedural rules simply because it was signed at different times would be borne out if NRS 613.195(5) were not applied retroactively. For example, an employee who signed a non-compete agreement in December 2016 and terminated his employment in June 2018 (Dr. Tang) would be subjected to a wholly different set of procedural mechanisms than an employee who signed the same exact non-compete agreement after enactment of NRS 613.195(5) in July 2017 and

terminated his employment in June 2018. This result is the exact unjust outcome the *Brunell* Court sought to avoid when ruling in favor retroactive application of such statutes.

c. NRS 613.195(5) Relates Solely to Remedies and Procedure

Finally, NRS 613.195(5) applies retroactively because it does "not change substantive rights and instead relate[s] solely to remedies and procedure." *Valdez v. Employers Ins. Co. of Nevada*, 123 Nev. 170, 179–80, 162 P.3d 148, 154–55 (2007). By its plain terms, NRS 613.195(5) does not change any of the substantive rights of the parties to a non-competition agreement. It is still the law of Nevada, as it was prior to the enactment of the statute, that an employer has the right to enforce a non-competition agreement and an employee that enters into such an agreement has the right not to be subject to unreasonable restrictions. *See Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793 (1967) ("The medical profession is not exempt from a restrictive covenant provided the covenant meets the tests of reasonableness"); *Jones v. Deeter*, 112 Nev. 291, 296, 913 P.2d 1272, 1275 (1996) ("The amount of time the covenant lasts, the territory it covers, and the hardship imposed upon the person restricted are factors for the court to consider in determining whether such a covenant is reasonable"); *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. Adv. Op. 61, 422 P.3d 1238, 1241 (2018) ("In order to establish that a party is likely to succeed in enforcing a noncompete agreement for the purpose of a preliminary injunction,

the court must look to whether the terms of the noncompete agreement are likely to be found reasonable at trial . . . ."). After the enactment of NRS 613.195(5), however, the remedies available to parties and the procedures to be followed in an action to enforce a non-competition agreement changed.

First, NRS 613.195(5) altered the remedies available to each party to a non-compete agreement. Prior to the statutory change, the remedy available to an employee that proved a restriction was unreasonable was the nullification of that agreement. *See Golden Road*, 132 Nev. 488. However, NRS 613.195(5), clarified that the appropriate remedy was the reformation of the particular restriction and enforcement of the modified restriction as opposed to voiding the entirety of the non-compete agreement.

Similarly, prior to the enactment of NRS 613.195(5), an employer that sought to enforce a non-compete agreement containing just one unreasonable provision was deprived of any remedy. In contrast, under NRS 613.195(5), an employer is now entitled to a remedy in the form of the enforcement of a modified provision. In each case, however, the substantive rights of the parties have been preserved—the employee is free from unreasonable restrictions while the employer receives the benefit of its bargain—while only the remedial scheme has changed.

Second, NRS 613.195(5) is procedural in nature because it merely sets forth the procedure courts should implement when an employer seeks a remedy for a prior

employee's breach of a non-compete agreement. This is confirmed by the plain language of the statute, which begins by noting it only applies "[i]f an employer brings an action to enforce a noncompetition covenant." NRS 613.195(5). This prefatory clause signals that the statute informs courts of the *procedure* to follow when asked to enforce a non-compete agreement. The remainder of NRS 613.195(5) then lays out the *procedure*, which only comes into effect upon a determination that a provision in the non-compete is unreasonable, providing that "the court *shall* revise the covenant to the extent necessary and enforce the covenant as revised."[1] *Id.* (emphasis added).

Thus, NRS 613.195(5) undoubtedly is a remedial and procedural statute that should be applied retroactively to the Employment Agreement Dr. Tang executed.

D. The Employment Agreement Required the District Court to Blueline the Non-Competition Clause

This Court also should reverse the district court's order because the district court abused its discretion in failing to adhere to the parties contractually agreed upon provision mandating bluelining of any unreasonable provision in the Non-Competition Clause. *See Hansen v. Edwards*, 83 Nev. 189, 192, 426 P.2d 792, 793

[1] NRS 613.195(5) also requires that the Non-Competition Clause be supported by consideration. This has always been a requirement of all contracts and therefore does not alter or change the substantive rights of the parties. Furthermore, Dr. Tang has never contested that there was sufficient consideration for the Non-Competition Clause in this matter. *See* APP000093; APP000350; APP000571.

(1967) (holding that Nevada "has an interest in protecting the freedom of persons to contract, and in enforcing contractual rights and obligations."). Here, consistent with NRS 613.195(5), the parties explicitly and unambiguously agreed and requested the court to blueline the Non-Competition Clause if the court found any portion of it to be unreasonable. *See* APP000035 at ¶ 2.10. This provision mirrors Nevada's public policy in favor of enforcing non-compete agreements and the purpose behind the enactment of NRS 613.195(5). As such, this Court should require that the Employment Agreement be enforced in accordance with Nevada's longstanding principle allowing parties to contract around default rules. *See, e.g.*, *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 412, 254 P.3d 617, 621 (2011); *Farmers Ins. Group v. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994).

VIII. CONCLUSION

Based on the foregoing, Fielden Hanson respectfully requests that this Court reverse the district court's erroneous decision denying Fielden Hanson's request for a preliminary injunction because: (1) the Non-Competition Clause was reasonable and therefore should have been enforced as drafted; (2) the district court erred in refusing to apply NRS 613.195(5), a statute which requires district courts to blueline unreasonable provisions in non-compete agreements and enforce the revised provisions in any action filed after June 3, 2017; and/or (3) the district court failed to enforce the terms of the Employment Agreement requiring the district court to

blueline any unreasonable provision in the Non-Competition Clause and enforce the modified version of the Non-Competition Clause by way of a preliminary injunction.

Respectfully submitted this 13th day of December 2019.

DICKINSON WRIGHT PLLC

Michael N. Feder, Nevada Bar No. 7332
Email: mfeder@dickinson-wright.com
Gabriel Blumberg, Nevada Bar No. 12332
Email: gblumberg@dickinson-wright.com
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210
Tel: (702) 550-4400
Fax: (844) 670-6009
Counsel of Record for Appellant

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of Nev. R. App. P. 32(a)(4), the typeface requirements of Nev. R. App. P. 32(a)(5) and the type style requirements of Nev. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016, font size 14-point, Times New Roman. I further certify that this brief complies with the page- or type-volume limitations of Nev. R. App. P. 32(a)(7) because, excluding the parts of the brief exempted by Nev. R. App. P. 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more, and contains 5363 words. Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular Nev. R. App. P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada

...

...

...

Rules of Appellate Procedure.

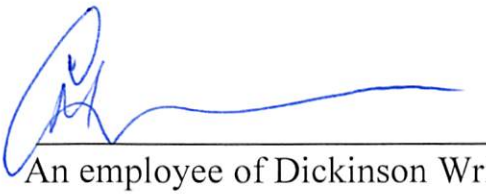
Respectfully submitted this 13th day of December 2019.

DICKINSON WRIGHT PLLC

Michael N. Feder, Nevada Bar No. 7332
Email: mfeder@dickinson-wright.com
Gabriel Blumberg, Nevada Bar No. 12332
Email: gblumberg@dickinson-wright.com
8363 West Sunset Road, Suite 200
Las Vegas, Nevada 89113-2210
Tel: (702) 550-4400
Fax: (844) 670-6009
Counsel of Record for Appellant
Signed in Clark County, Nevada

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 13th day of December 2019, I submitted the foregoing **APPELLANT'S OPENING BRIEF** for filing via the Court's eFlex electronic filing system.



An employee of Dickinson Wright PLLC

LVEGAS 86488-1 337989v1