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King County No. 12-2-30441-0

Court of Appeals No. 69691-2

APPEAL COURT OF THE STATE OF WASHINGTON  
1ST DISTRICT

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DEANDRA GRANT  
Appellant,

v.

NATIONAL COLLEGE FOR DUI DEFENSE,

Respondent

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APPEAL FROM THE DISTRICT COURT FOR KING COUNTY  
THE HONORABLE THERESA B. DOYLE, DISTRICT COURT  
JUDGE

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APPELLANT'S REPLY BRIEF

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COURT OF APPEALS  
STATE OF WASHINGTON

TABLE OF CONTENTS PAGE

I. REPLY FACTS.....2

II. ARGUMENT/ POINTS AND AUTHORITIES.....3

A. THE ENTIRE ISSUE IS PROPER FORUM, WHICH WAS PROPERLY RAISED IN OPPOSITION TO RESPONDENT'S DECEPTIVE FORUM NONCONVENIENS MOTION, AND ALSO IN APPELLANT'S MOTION FOR RECONSIDERATION

B. APPELLANT DOES CHALLENGE THE FACTUAL FINDING OF THE COURT ON THE MOTION TO DISMISS FOR FORM NON CONVENIENS BECAUSE RESPONDENT MISLEAD THE COURT BY CLAIMING A FORUM THEY MANDATED THAT MEMBER CASES BE FILED IN IS INCONVENIENT.....5

C. RESPONDENT'S CHOICE OF INCORPORATION IN THE STATE OF WASHINGTON SUBSTANTIALLY WEIGHS IN FAVOR OF PERSONAL JURISIDICITION AND PRECLUDING THE APPLICAITON OF FORUM NONCONVENIENS.....7

D. RESPONDENT CANNOT CLAIM THAT OMITTING A MATERIAL FACT IN DIRECT CONTRADICTION TO THEIR ARGUMENTS IS AGGRESSIVE BECAUSE IT WAS A FRAUD UPON THE COURT MADE TO SECURE A FAVORABLE DETERMINATION IN VIOLATION OF RPC 8.4(c).....9

III. CONCLUSION.....11

TABLE OF AUTHORITIES

PAGE(S)

STATUTORY LAW

RPC 8.4(c).....10

CASE LAW

*Adachi v. Carlyle/Galaxy San Pedro L.P.*,  
595 F.Supp.2d 1147 (S.D.Cal.2009).....7

*American Lumbermen's Mutual Casualty Co v. Cochrane*,  
129 N.Y.S.2d 489 (Sup. Ct. N.Y. Cty),.....7

*Discipline of Simmerly*,  
174 Wn.2d 963 (2012).....10

*Dix v. ICT Group, Inc.*,  
160 Wn.2d 826 (2007).....4

*In re Disciplinary Proceeding Against Greenlee*,  
158 Wn.2d 259 (2006).....9

*Koster v. Lumbermens Mutual Casualty Co.*,  
330 U.S. 518 (1947).....8

*Newcomer v. Masini*,  
45 Wn. App. 284 (1986).....4

*Papendick v. Bosch*,  
410 A.2d 148 (Del.1979).....7

*Rotta v. Early Industrial Corp.*,  
47 Wn. App. 21 (1987).....4

*Sioux Falls Taxpayers Association v. City of Sioux Falls*,  
69 S.D. 93 (1942).....7

*State v. Dane*,  
89 Wn. App. 226 (1997).....5

*Thomson v. Continental Ins. Co.*,  
66 Cal.2d 738 (Cal. 1967).....8

*Thorp v. Thorp*,  
165 Wn. 255 (1931).....10

*Voicelink Data Service, Inc. v. Datapulse, Inc.*,  
86 Wn. App. 613 (1997).....4

*Woodhead v. Discount Waterbeds, Inc.*,  
78 Wn. App. 125 (1995).....10

I.

REPLY FACTS

Remarkably, Respondent National College for DUI Defense ("Respondent") has chosen to use red herring arguments and attempts to change or justify the facts that they chose to be a Washington Corporation and have previously successfully imposed a forum selection and choice of law clause on its members for any litigation arising from its interaction with members as being in Washington and King County. Respondent even goes to the extent of creating its own statement of issues to rewrite history and repudiating their own forum selection clause as being "alleged." It is a little late to repudiate your own website statements after you have been embarrassed by the fact that your trial court arguments are 180 degrees contradictory, and that have successfully misled the court that it is "inconvenient" to litigate in a state and county previously mandated. Now Respondent further try to assert that if their misleading the court was discovered later in the litigation, it somehow gets the whiteout treatment, or incredibly claims it has no relation to forum nonconveniens..Also, their choice of incorporating in Washington that gives them resident status is the elephant in the living room that they refuse to discuss.

II.

POINTS AND AUTHORITIES/ARGUMENT

A.

THE ENTIRE ISSUE IS PROPER FORUM, WHICH WAS PROPERLY RAISED IN OPPOSITION TO RESPONDENT'S DECEPTIVE FORUM NONCONVENIENS MOTION, AND ALSO IN APPELLANT'S MOTION FOR RECONSIDERATION

Respondent tries for several pages of their brief to argue that proper forum for this case is somehow a "new issue", and that forum nonconveniencis is a different issue. Appellant properly preserved the issue of their forum selection and choice of law clause that is conspicuously raised on their website, and has no limitations on its application. Forum selection and forum nonconveniencis are inextricably intertwined. Respondent's argument that their forum selection clause that they are now repudiating is unrelated to forum nonconveniencis. Their chosen language says otherwise as to "arising from or related to membership" Certification of a DUI Certified Specialist arises from and is related to membership.

8. GOVERNING LAW AND JURISDICTION.

"Membership in the College shall be governed by the laws of the State of Washington. Exclusive jurisdiction and venue **for any dispute arising from or related to membership in the College** shall be resolved by litigation under the laws of the State of Washington, in the King County Superior Court, Kent Regional Justice Center, Kent,

Washington, and shall be the exclusive jurisdiction and venue." (CP 407)

"[A] forum-selection clause is presumptively valid and enforceable and the party resisting it has the burden of demonstrating that it is unreasonable." See *DIX v. ICT Group, Inc.*, 160 Wn.2d 826, 831 (2007). "[A]bsent evidence of fraud, undue influence, or unfair bargaining power, courts are reluctant to invalidate forum selection clauses..." *Voicelink Data Service, Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 617 (1997).

With forum selection clause and forum nonconveniens being inextricably intertwined, and Respondent's deliberate concealment of it and arguments contrary to it, the issue was properly raised on reconsideration. See *Newcomer v. Masini*, 45 Wn. App. 284, 287 (1986), [issue may be preserved during motion for reconsideration.], "Even though the key words 'equitable subrogation' do not expressly appear in the complaint or the motion for reconsideration, we conclude the issue was sufficiently raised and preserved in the motion for reconsideration." accord, *Rotta v. Early Industrial Corp.*, 47 Wn. App. 21, 24-25 (1987)

Whether Respondent's deception of this court as to its forum selection clause was done during an opposition to a motion to dismiss or on a motion for reconsideration, the mendacity of

their decision to omit this fact in order to try win an argument does not go away.

In effect, Respondent has created a scenario where they could effectively never be held accountable in a court of law. When a party files in another jurisdiction other than Washington, they would point to the forum selection clause on their website to argue dismissal. Whereas here the case is filed in Washington, they claim an inconvenient forum because they have a satellite office with two clerical employees in Alabama. That is an impermissible "heads I win, tails you lose" proposition. See *State v. Dane*, 89 Wn. App. 226, 241 (1997)

B.

APPELLANT DOES CHALLENGE THE FACTUAL FINDING OF THE COURT ON THE MOTION TO DISMISS FOR FORM NON CONVENIENS BECAUSE RESPONDENT MISLEAD THE COURT BY CLAIMING A FORUM THEY MANDATED THAT MEMBER CASES BE FILED IN IS INCONVENIENT

This court must ask a material and dispositive questions of Respondent. Why do they have a forum selection clause stating a member's case must be filed in Washington and in King County if they are claiming it to be inconvenient for them? The trial court's ruling was based upon Respondent's concealment of the material fact that they had a forum selection clause mandating that all

litigation about members must be filed in Washington State and King County. The trial court's statement that there is "no connection" would have been manifestly different had the court known of Respondents forum selection clause mandated on members, stating that its scope was "**for any dispute arising from or related to membership in the College.** (CP 407)

Respondent's only slightly veiled attempt to turn the appeal based on the motion to dismiss as instead being based on the motion for reconsideration (of which nothing other than "denied" was stated in the order) has not gone unnoticed. Making only cursory arguments about the motion to dismiss that the appeal is based on, they instead turn to try to turn it into an appeal based on a motion for reconsideration, hoping to keep out of focus their mendacity of claiming inconvenience of a forum they have mandated on its members. And of course, if any member filed in their own home state other than Alabama (of which Respondent has two clerical employees who make no decisions on certification decisions), they would then claim the case had to be filed in Washington.

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C.

RESPONDENT'S CHOICE OF INCORPORATION IN THE STATE OF WASHINGTON SUBSTANTIALLY WEIGHS IN FAVOR OF PERSONAL JURISDICTION AND PRECLUDING THE APPLICATION OF FORUM NON CONVENIENS.

The other elephant in the living room is Respondent's choice of incorporation in Washington state. A corporation is a resident of the state of its incorporation. See *Adachi v. Carlyle/Galaxy San Pedro L.P.*, 595 F.Supp.2d 1147, 1150 (S.D.Cal.2009). See also *Sioux Falls Taxpayers Association v. City of Sioux Falls*, 69 S.D. 93, 7 N.W.2d 136, 139 (1942), [a corporation is a resident of the state in which it was incorporated], accord, *American Lumbermen's Mutual Casualty Co v. Cochrane*, 129 N.Y.S.2d 489, 491 (Sup. Ct. N.Y. Cty.), "A corporation is a resident of the state which creates it."

Respondent's incorporation in Washington itself is sufficient to confer personal jurisdiction over this case on the issue of forum nonconveniens. See *Papendick v. Bosch*, 410 A.2d 148, 152 (Del.1979). "Forum nonconveniens has only an extremely limited application to a case where, as here, the plaintiff is a bona fide resident of the forum state...A determination that a plaintiff is domiciled here would ordinarily preclude granting the defendant's motion for dismissal on the ground of Forum nonconveniens.'

*Thomson v. Continental Ins. Co.* 66 Cal.2d 738, 742 (Cal. 1967).

The approach taken in most federal courts is to consider a litigant's residence in the forum state as highly significant, tending to weight the balance of convenience in his favor, but not conclusive. See *Koster v. Lumbermens Mutual Casualty Co.*, 330 U.S. 518, 525 (1947).

Further, Respondent attempts to distinguish their forum selection clause based on language that does not exist in it. Nothing in Respondent's forum selection clause states that it is not applicable to certification issues. It states, "**for any dispute arising from or related to membership in the College.**" (CP 407). Certification as a DUI Defense Specialist is directly related to membership.

Respondent mislead the trial court about it being "inconvenient" to have a lawsuit filed against them in King County Washington when their website mandates that they be filed there. Further, because of their choice of incorporation in Washington, Respondent has also submitted to personal jurisdiction in that jurisdiction and venue.

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D.

RESPONDENT CANNOT CLAIM THAT OMITTING A METEERIAL FACT IN DIRECT CONTRADICTION TO THEIR ARGUMENTS IS AGGRESSIVE ADVOCACY BECAUSE IT WAS A FRAUD UPON THE COURT MADE TO SECURE A FAVORABLE DETERMINATION IN VIOLATION OF RPC 8.4(c)

Respondent's counsel showed intent to deceive when, knowing of its incorporation status and its all inclusive forum selection clause mandating Washington state and King County as the only place in which litigation could be filed against them, argued to this court that it was an inconvenient forum.

Respondent counsel's statement in their motion shows their deceptive intent and mendacity.

"In short there is not one scrap of paper or one potential witness in this case (including Plaintiff herself) located in Washington and it will be extremely burdensome for everyone involved for this case to be litigated in Washington. Conversely, all of the documents are located in Alabama, and the person with actual personal knowledge regarding those books and records is located in Alabama as well. Thus, the convenience factors weigh strongly in favor of this litigation taking place in Alabama, not Washington." (Defendant's Motion to Dismiss, p. 17-19, 18:22-19:1)

Respondent's President is located in Seattle, Washington, and neither of their clerical employees in satellite office in Alabama are involved in decisions of who obtains certification.

That is done by the Regents and Fellows. See NCDD Regents and Fellows, available at <http://www.ncdd.com/regentsandfellows.php>

"Attorneys may not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation." RPC 8.4(c). RPC 8.4(c) is intended to protect the public from lawyers who manifest dishonesty, fraud, deceit, or misrepresentation in all their permutations, directly or otherwise. See *In re Disciplinary Proceeding Against Greenlee*, 158 Wn.2d 259, 271 (2006).

"Under RPC 8.4(c) and (l), an attorney is generally prohibited from making misrepresentations." *Discipline of Simmerly*, 174 Wn.2d 963, 982 (2012). Misleading the court by false claims, justifies the trial court's conclusion that the actions amounted to an abuse of judicial process. See *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn. App. 125, 131 (1995).

Arguing to the trial court that a forum that they selected by incorporating and further mandating a forum selection clause for Washington State and King County, and then arguing for its inconvenience was misleading the court to secure a favorable determination, and that determination should be vacated just on that basis. A fraud on the court warrants vacating a final order. See *Thorp v. Thorp*, 165 Wn. 255, 258 (1931).

III.

CONCLUSION

Based on the foregoing, this court should reverse the dismissal of this case based upon personal jurisdiction and forum nonconveniens, and remand for a trial on the merits.

Dated this 9 day of June, 2013

A handwritten signature in black ink, appearing to read 'Okorie Okorochoa', is written over a horizontal line.

Okorie Okorochoa, Esq.

Attorney for Appellant

Deandra Grant

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2 **AFFIDAVIT RE PROOF OF SERVICE**

3 **WASHINGTON COURT OF APPEALS**

4 STATE OF CALIFORNIA, LOS ANGELES COUNTY --

5  
6 I am employed in the County of Los Angeles, State of California. I am over the age of 18  
7 years and am not a party to the within action. My business address is 3940 Laurel Canyon Blvd.  
8 Suite 1038 Studio City, CA 91604. On June 9, 2013, I served the foregoing document(s)  
described as:

9 **APPELLANTS REPLY BRIEF**

10 on the interested parties in this action as follows: by placing a true copy thereof enclosed in  
sealed envelopes addressed as follows:

11 **SEE ATTACHED SERVICE LIST**

12  
13 XXXXXXXXBY MAIL: I am readily familiar with this firm's practice of collection and  
14 processing correspondence for mailing with the United States Postal Service. Under that  
15 practice, it would be deposited with the U.S. Postal Service on that same day with postage  
16 thereon fully prepaid at a Postal Service collection box at is 3940 Laurel Canyon Blvd. Suite  
17 1038, Studio City, CA 91604 in the ordinary course of business. The envelope was sealed and  
placed for collection that same day following ordinary business practices, addressed to the above  
attorney

18  
19 I declare under penalty of perjury under the laws of the State of California and the State  
of Washington, that the foregoing is true and correct.

20 .  
21 Executed on June 9, 2013, at Studio City, California.

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23 Okorie Okorochoa, Esq.  
24 Attorney for Plaintiff

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