IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Supreme Court No. 92338-8

(Court of Appeals No. 71420-1-I)

MICROSOFT CORPORATION,

Petitioner,

v.

BELLA ACHARYA,

Respondent.

RESPONDENT'S OMNIBUS ANSWER TO BRIEFS OF AMICI CURIAE

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I. INTRODUCTION

Pursuant to RAP 10.3(f) and Commissioner Burton's letter to counsel of November 19, 2015, Respondent Bella Acharya respectfully submits this omnibus answer to the briefs of amici curiae (1) the Association of Washington Business ("AWB"), *infra* § II.A; (2) the Chamber of Commerce of the United States of America ("CC"), *infra* § II.B; and (3) the Washington Defense Trial Lawyers ("WDTL"), *infra* § II.C.

Rule of Appellate Procedure 10.6(b) allows briefs of amicus curiae where "additional argument is necessary on [] specific issues." The amici briefs filed in support of Microsoft Corp.'s Petition for Review ("Petition"), however, provide no relevant, original, or necessary analysis, and instead either superficially reiterate Microsoft Corp.'s flawed theories or argue points that Microsoft Corp. did not raise in the Petition. Indeed, CC does not even mention the core argument set forth in Acharya's Answer to Petition for Review ("Answer to Petition"); i.e., that Microsoft Corp. is relying on a purported error by the Court of Appeals from which it benefited; specifically, the "inference that Microsoft was Acharya's employer at the time of the alleged discriminatory actions." App. at 6.

Critically, all three amici curiae ignore the conclusion the Court of Appeals actually drew from its inference that Microsoft Corp. was Acharya's employer: "Microsoft is thus ***entitled*** to invoke the provisions of the

employment contract ... [and] Microsoft was ***entitled*** to assert a defense based on that forum selection clause." *Id.* (emphasis added). In other words, Microsoft Corp. lost on appeal despite the Court of Appeals' "presumption" that it was "entitled" to rely on the forum selection clause contained in an employment contract between Acharya and non-party Microsoft Global Resources GmbH ("MGR").

As to AWB and WDTL, each of their briefs pays cursory attention to Acharya's Answer to Petition by arguing that Microsoft Corp.'s "ability to enforce the [MGR-Acharya employment agreement] has nothing to with the identity of Acharya's employer." AWB Br. at 8; WDTL Br. at 7. This is demonstrably incorrect. It also ignores the fact that the only conclusion the Court of Appeals drew from the alleged identity of Acharya's employer was that Microsoft Corp. had the right to invoke the forum selection clause in the first place. If the Court of Appeals had concluded MGR was Acharya's true employer—as AWB and WDTL claim it should have—then the forum selection clause would have been wholly irrelevant and Microsoft Corp. would have lost on appeal anyway.

Microsoft Corp.'s Petition should be denied.

II. ARGUMENT

A. Answer to the Association of Washington Business

AWB attempts to sidestep Microsoft Corp.'s weak analysis by por-

traying Acharya's decision to sue Microsoft Corp., rather than MGR, as a mere contrivance. "A plaintiff may not avoid a forum-selection clause by suing only a related non-party." AWB Br. at 8. This may be a correct statement of the law, but it is irrelevant. It is true that if Acharya had sought redress for misconduct by ***MGR***, she could not have avoided the forum selection clause by suing Microsoft Corp. (the "related non-party" to the forum selection clause). But that is not what Acharya did. Acharya sued Microsoft Corp. for the acts and omissions of ***Microsoft Corp.'s*** Redmond-based employees. *See* CP 32-57; *see also* Answer at 7-8. Her claims are brought against Microsoft Corp. as her joint employer under Washington law. *See* Answer at 15-16.[1]

AWB further argues:

> This Court should not allow parties to pick and choose which clause to an agreement will apply and which they will ignore in any particular case. Businesses and employees need to be able to count on a consistent interpretation and application of legally negotiated employment agreements.

AWB Br. at 9. Acharya agrees that no party should be allowed to selectively enforce an employment contract and that predictability is important.

[1] WDTL separately argues that Microsoft Corp. can invoke the forum selection clause because Microsoft Corp. qualifies as a third party beneficiary to the MGR contract. WDTL Br. at 8. Even if this were true (and it is not, *infra* § II.C), this does not change the fact that Acharya is suing Microsoft Corp. for Microsoft Corp.'s misconduct. Thus, even if Microsoft Corp. was merely a third party beneficiary of the MGR-Acharya contract—and not Acharya's joint employer—public policy would still dictate that Acharya be allowed to enforce the WLAD against one of this State's largest employers.

Acharya sued Microsoft Corp. for Microsoft Corp.'s own misconduct. In response, Microsoft Corp. sought dismissal by "selectively" invoking the benefit of the forum selection clause in the MGR-Acharya contract while also disclaiming any associated employment responsibilities through a corporate shell game. CP 71-99. Microsoft Corp.'s effort to wield the MGR-Acharya contract as both a sword and shield does not warrant review of the opinion below.

B. Answer to the Chamber of Commerce of the United States

CC's amicus brief principally advocates for this Court to review an issue beyond the scope of the Petition. To be clear, Microsoft Corp. has asked this Court to consider a narrow question:

> Whether, in ruling on a motion to enforce a forum-selection clause, a court must accept allegations in the pleadings as true when they are contrary to undisputed evidence properly considered on the motion.

Pet. at 2. Instead of addressing that issue, CC improperly asks this Court to reconsider the Court of Appeals' decision not to adopt the United States Supreme Court's forum selection clause analysis in *Atlantic Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas*, 134 S. Ct. 568, 187 L. Ed. 2d 487 (2013) ("*Atlantic Marine*"). CC Br. at 7-9. CC critiques the Court of Appeals for distinguishing *Atlantic Marine* in a way that (according to CC) suggests that an employer and employee could never have an

"arms-length" transaction. *Id.* at 9. CC suggests that this Court should correct the lower court's mistake and adopt *Atlantic Marine*. *Id.*[2]

Microsoft Corp. did not raise this issue in the Petition. Indeed, the Petition does not cite once to *Atlantic Marine*. Accordingly, CC's argument is inappropriate and should be disregarded. *See* RAP 13.7(b) ("If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in the motion for discretionary review."); RAP 10.2(b) (amicus brief must address "issues involved in the review"); *State v. Collins*, 121 Wn.2d 168, 178, 847 P.2d 919 (1993) ("RAP 13.7(b) limits the issues to be reviewed by this court to those "'raised in ... the petition for review and the answer.'").[3]

Separately, CC conducted a superficial review of the Petition's argument that the Court of Appeals erred by misapplying the standard in *Dix v. ICT Grp., Inc.*, 60 Wn.2d 826, 161 P.3d 1016 (2007). CC Br. at 5-7. For the reasons stated in Acharya's Answer to Petition, this is incorrect: The

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[2] Microsoft argued to the Court of Appeals that *dicta* in *Atlantic Marine*—a nonbinding Supreme Court decision regarding the transfer of federal cases under a valid forum selection clause—supported dismissal of Acharya's state court claims under the WLAD and Washington common law, and required her case be litigated (if at all) in Switzerland. For a plethora of reasons, that argument failed, and the Court of Appeals properly rejected it. App. at 7-9.

[3] The Court has, at times, exercised discretion to consider issues beyond the letter of the Petition in order to "serve the ends of justice." *Tuerk v. State, Dep't of Licensing*, 123 Wn.2d 120, 124, 864 P.2d 1382 (1994). Yet, the Court does so only when related issues are later raised by the parties, as in a supplemental brief. *See id.* It is never appropriate for a non-party to seek expansion of the issues on review, particularly a discrete and ancillary issue such as whether to adopt *Atlantic Marine*. *See* RAP 10.2(b).

reasoning and conclusions of the Court of Appeals do not conflict with *Dix*. Answer at 9-14.

C. Answer to the Washington Defense Trial Lawyers

WDTL presents three primary arguments. ***First***, as a matter of public policy, WDTL argues that the Court should accept review because the issue of plaintiffs alleging "unproven and contradictory facts" to defeat a motion to dismiss is of "substantial public interest." WDTL Br. at 1-3. WDTL argues that where "undisputed evidence contradicts the allegations in the complaint, that evidence must be considered." *Id.* at 3. WDTL's argument fails (1) as a matter of Washington public policy (and, indeed, under the Washington State Constitution), (2) as a matter of appellate court policy, and (3) as applied to the underlying facts here.

The principle of open access to the courts is a cornerstone of constitutional law in Washington. *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 979, 216 P.3d 374 (2009) ("The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.") (quoting *Marbury v. Madison,* 5 U.S. (1 Cranch) 137, 163, 2 L. Ed. 60 (1803)); *Putman*, 166 Wn.2d at 979 ("The people have a right of access to courts; indeed, it is 'the bedrock foundation upon which rest all the people's rights and obligations.'")

(quoting *John Doe v. Puget Sound Blood Ctr.*, 117 Wn.2d 772, 780, 819 P.2d 370 (1991)). Indeed, even after the United States Supreme Court decided to raise the federal pleading threshold, Washington courts declined to follow those changes, citing Washington's preference for access to the judicial system based on "notice" pleading. *McCurry v. Chevy Chase Bank, FSB*, 169 Wn.2d 96, 102, 233 P.3d 861 (2010). In other words, to the extent WDTL has identified a matter of "public interest," it weighs decisively in the opposite direction and supports the Court of Appeals' conclusion.

Moreover, as a practical matter, WDTL's argument proves too much: If every case a defense lawyer believed should be dismissed were an issue of "substantial public interest" destined for the Washington Supreme Court, Washington's appellate court system would break down. Indeed, the system is designed to avoid precisely such an outcome. A defendant does not have the right to an appeal from a trial court order denying her motion to dismiss. RAP 2.2(a). Absent discretionary, interlocutory review, appeals are reserved for later stages of the litigation—even where certain facts weigh against the allegations in a plaintiff's complaint.

In any event, WDTL's policy argument does not correspond with Acharya's complaint and the factual record. WDTL's silence on this point is telling. Acharya's complaint alleges that Microsoft Corp. is liable as her

employer under the WLAD. CP 44-45. Acharya pairs this allegation with the following unrefuted facts: Microsoft Corp. employees based in Redmond facilitated her transition to Europe; managed, and controlled her group; supervised and controlled her direct manager, Olivier van Duüren; and handled every aspect of her complaints regarding discrimination and retaliation. CP 283-291. As explained in Acharya's Answer to Petition, these facts, and others, establish that Microsoft Corp. was, at a minimum, Acharya's joint employer. *See, e.g., Becerra v. Expert Janitorial, LLC*, 332 P.3d 415, 421 (Wash. 2014) (joint employment relationship analyzed under the "economic reality" test, which takes into consideration any factors the court deems "relevant to its assessment of the economic realities"); *c.f. Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 72, 244 P.3d 32 (2010), *aff'd*, 174 Wn.2d 851, 281 P.3d 289 (2012) ("whether a defendant is a plaintiffs' joint employer is a mixed question of law and fact and is properly a question for the jury").

Second, WDTL argues that Acharya had no choice but to sue MGR in conformity with the terms of her employment contract with MGR because that contract purportedly applies to "[a]ny dispute, controversy, or claim arising under, out of or in relation to this Employment Agreement." WDTL Br. at 7 (citing CP 192). This argument misconstrues and misapplies the plain language of Acharya's MGR employment agreement, twice

over. Logically, the clause applies to "any dispute" between Acharya and MGR. If Acharya had a personal injury claim against an MGR co-worker, certainly she would not be required to sue MGR, even if the malfeasance occurred within the scope of her employment. Moreover, Acharya's complaint against Microsoft Corp. does not "arise under" the employment agreement. Her claims are against Microsoft Corp.—a non-signatory to the MGR-Acharya employment contract—for Microsoft Corp.'s separate and distinct violations of Washington law.

Alternatively, WDTL raises the argument (unstated by Microsoft) that Microsoft should qualify as a third party beneficiary to Acharya's MGR employment contract. WDTL Br. at 8. This is incorrect. As this Court has explained, the "creation of a third-party beneficiary contract requires that the parties ***intend*** that the promisor assume a direct obligation to the intended beneficiary at the time they enter into the contract." *Del Guzzi Const. Co., Inc. v. Global Nw., Ltd., Inc.*, 105 Wn. 2d 878, 886, 719 P.2d 120 (1986 (italics modified from original). "The 'intent' which is a prerequisite . . . is not a desire or purpose to confer a particular benefit upon him, nor a desire to advance his interests, but an *intent that the promisor shall assume a direct obligation to him . . . .*" *Id.* (italics in original). Microsoft Corp. had the opportunity to receive the benefit of a "direct obligation" from Acharya but it required her to "resign" and sign a new con-

tract with MGR. CP 286, 140-41. In signing that contract, Acharya did not confer upon Microsoft Corp. (from which she had just "resigned") a promise to sue it in Switzerland, where neither she nor it (nor Microsoft Corp. for that matter) has ever been located.[4]

Third, WDTL cursorily asserts that the appellate court's decision to accept the truth of Acharya's allegations "did not benefit Microsoft," WDTL Br. at 9, but instead favored Acharya because the finding was "critical" to the court's conclusion that enforcement of the clause would violate Washington public policy. *Id.* This completely ignores that Microsoft Corp. could never have invoked the forum selection clause at all without the benefit of the Court of Appeals' "presumption."[5]

No matter how the issue is framed, Microsoft Corp. and amici curiae are fundamentally complaining about analysis by the Court of Appeals that favored Microsoft Corp. None of the three amici curiae persuasively argues otherwise. Under such circumstances, review would be futile and a waste of judicial resources. The Petition should be denied.

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[4] WDTL then asserts that Acharya cannot "side-step" by suing "only a related non-party." WDTL Br. at 8. For this proposition, WDTL cites only cases in which a plaintiff sued both a contracting party and a non-contracting party for, primarily, the contracting party's misconduct (or conduct plainly covered by the contract). As explained above, *supra* § II.A, this is not what Acharya did.

[5] WDTL also argues that the Court should accept the Petition because the Court this year granted a Petition in a personal jurisdiction case. WDTL Br. at 3-4. Even if this were a reason to accept the Petition (it is not), the case WDTL identifies concerns a completely unrelated issue; i.e., the sufficiency of contacts necessary to bring a foreign defendant within the personal jurisdiction of Washington's courts. That issue has no bearing here. Microsoft Corp. is a Washington entity based in Redmond, Washington.

DATED this 21st day of December, 2015.

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DECLARATION OF SERVICE

On December 21, 2015, I caused to be served a true and correct copy of the foregoing document upon counsel of record, at the address stated below, via the method of service indicated:

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

DATED this 21st day of December, 2015, at Seattle, Washington.

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Respectfully submitted in the above-referenced appeal is **Respondent's Omnibus Answer to Briefs of Amici Curiae**. The persons submitting this Brief are Avi J. Lipman (WSBA No. 37661) and Jerry R. McNaul (WSBA No. 1306), whose email addresses are: alipman@mcnaul.com and jmcnaul@mcnaul.com.

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