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STATE OF WASHINGTON
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No. 92338-8

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MICROSOFT CORPORATION,

Petitioner,

v.

BELLA ACHARYA,

Respondent.

FILED
20 2015
CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

BRIEF OF *AMICUS CURIAE*
ASSOCIATION OF WASHINGTON BUSINESS SUPPORTING THE PETITION FOR REVIEW

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I. INTRODUCTION

The Association of Washington Business "AWB" supports the review of the Court of Appeals' published opinion in *Acharya v. Microsoft Corp.*, __Wn. App__,354 P.3d.908 (2015). The Court of Appeals failed to follow legal precedent and instead has chosen to accept the pleadings of Bella Acharya as true, ignoring the undisputed facts when addressing the underlying forum-selection clause.

This court in *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 835, 161 P.3d 1016 (2007) stated that "[i]n assessing a forum selection clause for enforceability, the court does not accept the pleadings as true," but that the party seeking to avoid enforcement of the clause must "present evidence to justify nonenforcement." *Id. at* 835. It is a basic legal tenet that a lower court must follow the precedent of the higher court. In this case, the Court of Appeals failed to follow the legal precedent set by this Court in *Dix*.

Allowing the Court of Appeals decision to stand would allow a plaintiff to avoid enforcement of a valid forum-selection clause through clever pleading, regardless of the actual facts. Under the logic of the Court of Appeals decision, a plaintiff can nullify an agreement by simply alleging "as fact" that they filed in a proper venue, that the events at issue

occurred in Washington, or that the forum-selection clause was obtained by coercion or fraud. Businesses that have spent time and money negotiating forum-selection clauses in their contracts will see the value of their bargaining erased as a result of this procedural ruling, even though they negotiated these contracts in full compliance with Washington law.

The Court may accept review of a decision of the Court of Appeals where "the petition involves an issue of substantial public interest that should be determined by the Supreme Court." RAP 13.4(b)(4). The Court may also grant review when an opinion is in conflict with precedent, supporting review under RAP 13.4(b)(1)-(2). AWB contends that the failure of the Court of Appeals to follow legal precedent is an issue of substantial public interest.

The AWB respectfully requests the Court grant review of the Court of Appeals decision.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

AWB is the state's largest general business membership organization and represents over 8,000 businesses from every industry sector and geographical region of the state. AWB member businesses range from large to small and collectively employ over 750,000 people in Washington. AWB is an umbrella organization which also represents over

100 local and regional chambers of commerce and professional associations. AWB frequently appears in this and other courts as amicus curiae on issues of substantial interest to its statewide membership.

AWB members spend substantial time and money negotiating employment agreements. Many of these agreements will contain a forum-selection clause. Businesses and employees rely on the consistent application of the law to these clauses. To allow the Court of Appeals decision to stand will result in these clauses having no value even though they are legally negotiated and accepted by all parties. AWB members have a vested interest in the outcome of this matter.

III. ISSUES OF CONCERN TO *AMICUS CURIAE*

Among the issues presented in the Petition for Review, this memorandum seeks to address:

1. Did the Court of Appeals err in ruling on the forum-selection clause when it accepted the plaintiff's allegations as true when the undisputed facts contradicted them?
2. Did the Court of Appeals err when it failed to follow legal precedent?

IV. STATEMENT OF THE CASE

AWB adopts and joins in the Statement of the Case in the Petition for Review of Microsoft Corporation.

V. ARGUMENT

A The Court of Appeals failed to follow controlling precedent of the Washington Supreme Court when determining if a forum-selection clause was valid.

As was pointed out in Microsoft's Petition for Review, the Court of Appeals failed to follow this Court's ruling in *Dix v. ICT Grp., Inc., 160 Wn.2d 826, 835, 161 P.3d 1016 (2007)*. In *Dix*, this court ruled that "[i]n assessing a forum selection clause for enforceability, the court does not accept the pleadings as true," but that the party seeking to avoid enforcement of the clause must "present evidence to justify nonenforcement." *Id.* at 835. This would require the trial court and, in this case, the Court of Appeals to look to the undisputed facts of the case regarding the forum-selection clause.

Instead, the Court of Appeals ruled as if all the facts regarding the forum-selection clause pleaded by Bella Acharya were true even though they were contrary to the underlying undisputed facts. This is in complete contradiction to the ruling in *Dix*. This court recognized that it is important to determine the validity of a forum-selection clause when ruling on a motion to dismiss. This would require the court to look to the underlying facts to determine if the forum-selection clause was valid.

This Court recognized that you cannot simply rely on what the non-moving party's pleadings state as fact when reviewing forum-selection clauses. It requires further scrutiny to determine if the matter is in the proper forum. Otherwise, any plaintiff can plead facts that are not supported by the evidence and the court would have to treat them as true. The case would have to be fully litigated before it could be dismissed on the basis of an improper forum. This would render any legally negotiated forum-selection clause moot.

Both employers and employees have come to rely on forum-selection clauses. They provide a clear process and set of laws that will be applied to a particular contract. These clauses are part of the negotiation process in which both parties spend time and money negotiating an agreement. Ultimately the final contract, as in this case, is reviewed and accepted by all parties. Allowing one party to arbitrarily change the agreement through unsupported pleadings undermines the entire process. It ignores the value given by both parties for each negotiated provision of the contract. *Id.* at 834.

To allow the Court of Appeal to ignore the *Dix* decision opens up the possibility that any party can arbitrarily select a forum no matter how infinitesimal the connection is to the underlying agreement. This can

harm both the employer and the contractor who each rely in the consistent application of the contract. To rule otherwise would be to open all parties to unnecessary time and costs when parties file in the wrong forum.

Businesses and individuals rely on continuity in the contract; it creates a level playing field for all parties involved. If a business or individual does not like the contract, they can negotiate a different agreement or decide to not do business with the other party. To do what the Court of Appeals did in this matter would break such continuity and have a negative impact on business in Washington.

The Court of Appeals decision threatens to make "forum-selection clauses" inconsequential. What will result? Parties might as well ignore them, as the Court of Appeals effectively did in its opinion – making no effort to determine what the clause says, since its language can so easily be circumvented.

AWB requests that this Court grant the Petition for Review based on the Court of Appeals' failure to follow legal precedent.

B. The Court of Appeals erred when it failed to look to the underlying facts to determine if the forum-selection clause should be enforced.

Had the Court of Appeals actually analyzed the underlying facts, it would have found that the plaintiff in this case chose to spend four years

living in London and working for a European subsidiary of Microsoft. In order to do that, the plaintiff voluntarily took the job with MGR that is the basis of this dispute. As part of that job acceptance, she signed an employment agreement that she negotiated and had opportunity to review prior to signing. The employment agreement included a forum-selection clause in which she agreed to resolve any employment-related disputes in the Swiss courts.

Ignoring the forum-selection clause, the plaintiff chose to sue Microsoft in Washington State. The Court of Appeals declined to enforce the forum-selection clause, but it did acknowledge that the forum-selection clause is presumptively valid and enforceable and that the party resisting it has the burden of demonstrating that it is unreasonable.

Yet the Court of Appeals still ruled that it was required to "presume that Microsoft, a Washington corporation, was Acharya's employer at the time of the alleged wrongful conduct," because that is what Acharya pleaded, even though the undisputed evidence showed that Microsoft Corporation was not her employer at any relevant time.

Based on this incorrect presumption, the Court of Appeals determined that enforcement of the clause would be contrary to public

policy because it would prevent a Washington plaintiff from enforcing Washington law.

In an effort to complicate the matter and obscure the significance of the Court of Appeals' decision, Acharya argues, in the Answer to the Petition for Review, that her claims are against Microsoft Corporation, while the employment agreement was with MGR. She says that "[i]f the Court of Appeals had not presumed Acharya's employment status, the forum selection clause in Acharya's contract with non-party MGR would have no bearing on this dispute." (Answer 2; see *id.* at 19-20.) This ignores the fact that Microsoft Corporation's ability to enforce the agreement has nothing to do with the identity of Acharya's employer.

The forum-selection clause applies to *any* "dispute . . . arising under, out of, or in relation" to the contract, whether or not that dispute is with MGR, and it is reasonable to deem Microsoft Corporation a third-party beneficiary of the agreement with its subsidiary. A plaintiff may not avoid a forum-selection clause by suing only a related non-party. *See, e.g., Holland Am. Line, Inc. v. Wärtsilä N.A., Inc.*, 485 F.3d 450, 456-57 (9th Cir. 2007); *Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993); *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th

Cir. 1988); *see also McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 315, 890 P.2d 466 (1995) (applying the same rule to arbitration clauses).

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. If this decision is allowed to stand, then Washington businesses would have to assume that forum-selection clauses are likely not enforceable. This uncertainty would undermine any legitimate employment agreement, potentially making the risk to hire individuals too great. The decision is bad for both business and employees. AWB request that this Court grant the Petition and revers the Court of Appeals decision.

VI. CONCLUSION

For the reasons stated above, AWB urges this Court to grant the petition.

DATED this 10th day of November, 2015.

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Subject: Microsoft v. Acharya Supreme Court No. 92338-8 - Motion and Brief of Amicus Curiae of AWB

Dear Clerk:

Please find attached for filing in the above-referenced matter, electronic copies of the following documents:

- Motion for Leave to file Memorandum of Amicus Curiae of AWB
- Brief of Amicus Curiae of AWB
- Declaration of Service

By copy of this e-mail, electronic service to counsel of record is made. In addition, hard copies have been sent via US mail.

Please let me know if there is any difficulty opening the .pdf files. Thank you

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