No. 92338-8

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

MICROSOFT CORPORATION,

Petitioner,
v.

BELLA ACHARYA,

Respondent.

AMICUS CURIAE MEMORANDUM OF WASHINGTON DEFENSE TRIAL LAWYERS

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I. INTRODUCTION

Washington Defense Trial Lawyers (WDTL) is an association of civil defense attorneys. WDTL submits this *amicus curiae* memorandum in support of the petition for review filed by Microsoft Corporation with respect to the issue of whether a court that is ruling on a motion to enforce a forum-selection clause must accept the allegations in the pleadings as true even when those allegations are contrary to the undisputed evidence. There is a substantial public interest in providing clarity as to the appropriate scope of information properly considered by courts interpreting forum-selection clauses, including whether undisputed evidence that is contrary to the complaint's allegations should be considered.

Microsoft Corporation's Petition involves an issue of substantial public interest that should be determined by this Court. Accordingly, WDTL respectfully urges this Court to grant review under RAP 13.4(b)(4).[1]

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[1] In addition, review should be granted under RAP 13.4(b)(1) and (2) because the Court of Appeals' decision in *Acharya v. Microsoft Corp.*, 189 Wn. App. 243, 354 P.3d 908 (2015), is in conflict with this Court's decision in *Dix v. ICT Group, Inc.*, 160 Wn.2d 826, 834–35, 161 P.3d 1016 (2007), and decisions of the Court of Appeals. The supporting reasons are set forth in the petition and will not be repeated by WDTL.

II. IDENTITY AND INTEREST OF AMICUS CURIAE

WDTL, established in 1962, includes more than 750 Washington attorneys principally engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve its members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its members is through *amicus curiae* submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

III. STATEMENT OF THE CASE

WDTL adopts the Statement of the Case set forth in the Petition for Review.

IV. ARGUMENT

A. Review Should Be Granted Under RAP 13.4(b)(4)

1. Widespread Impact on Defendants

This Court should grant review because establishing a rule under which courts assess the applicability of a the parties' forum-selection clause based not only on one contracting party's unilateral characterization as set forth in a complaint but also on undisputed evidence contrary to the complaint's allegations is "an issue of substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4).

Where, as here, the undisputed evidence contradicts the allegations in a complaint, that evidence must be considered. The Court of Appeals' focus on the allegations "[a]s pleaded" in the complaint, dictates blind acceptance of key underlying facts as stated by one party to the dispute. *Acharya v. Microsoft Corp.*, 189 Wn. App. 243 ¶40, 354 P.3d 908 (2015). Such a ruling incentivizes plaintiffs to allege unproven and contradictory facts for the sole purpose of avoiding duly-negotiated and enforceable forum-selection clauses. It also unfairly punishes parties seeking to abide by contract terms that were mutually agreed upon in good faith long before the dispute arose.

2. A Similar Issue is Under Consideration by This Court in the Personal Jurisdiction Context

This Court granted review in *State v. LG Electronics, et al.*, Wash. No. 91391-9 (pending, oral argument 9/24/2015), which is a case involving whether a nonresident consumer electronics manufacturers had sufficient contacts with Washington to subject them to the personal jurisdiction of Washington courts.[2] WDTL filed an amicus brief in that

[2] The Issue is stated on this Court's webpage as follows: "Whether in an action under the Consumer Protection Act alleging a price-fixing conspiracy in the marketing of cathode ray tubes, defendant nonresident consumer electronics manufacturers had sufficient contacts with Washington to subject them to the personal jurisdiction of Washington courts."
http://www.courts.wa.gov/appellate_trial_courts/supreme/issues/notSet_S

case, which is under consideration by this Court, and in doing so made a point similar to the issue presented in this case: when a "defendant presents uncontradicted evidence that challenges the plaintiff's personal jurisdiction theory, the issue of jurisdiction should, at the very least, be the subject of an evidentiary hearing, but the trial court should not be entitled to ignore the defendant's evidence." DRI/WDTL Amicus Br. filed 8/25/15 in *State v. LG Electronics, et al.*, No. 91391-9, 2015 WL 5090190 **16-17; *id.* (citing cases that plaintiff's allegations should not be accepted if the defendant directly controverts them with evidence[3]). As the scope of evidence to be considered is recurring in various contexts, it follows that the issue is of substantial public interest sufficient to warrant review by this Court under RAP 13.4(b)(4).

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[3] DRI/WDTL Amicus Br. filed 8/25/15 in *State v. LG Electronics, et al.*, No. 91391-9, 2015 WL 5090190 *16: "In deciding a challenge to personal jurisdiction under Fed. R. Civ. P. 12 (b)(2), a court may consider evidence presented in affidavits. *Doe v. Unocal Corp.*, 248 F.3d 915, 922 (9th Cir.2001). Although the plaintiff need only demonstrate facts that, if true, would support jurisdiction, the court need not accept the plaintiff's allegations if the defendant directly controverts them with evidence. *Id.; Mavrix Photo, Inc. v. Brand Technologies, Inc.*, 647 F.3d 1218, 1223 (9th Cir. 2011). Further, where material facts are controverted or where a more satisfactory showing of the facts is necessary, the trial court, in its discretion, may order jurisdictional discovery. *Boschetto v. Hansing*, 539 F.3d 1011, 1020 (9th Cir. 2008)."

3. Consideration of Evidence Outside of the Complaint – Application of the "Four Corners" Rule

In its underlying decision, the Court of Appeals strictly limited its consideration of the critical underlying circumstances to a version the facts according to "the claims alleged" in the complaint "[a]s pleaded" by the plaintiff. *Acharya v. Microsoft Corp.*, 189 Wn. App. 243 ¶¶40-41, 354 P.3d 908 (2015). The only other circumstance where such a "four corners" rule, under which courts are limited to accepting facts set forth in a complaint despite undisputed facts outside of the complaint, is in the evaluation of an insurer's duty to defend an insured who has been sued by a claimant. *See Expedia, Inc. v. Steadfast Ins. Co.*, 180 Wn.2d 793, 803-04, 329 P.3d 59, (2014), *as corrected* (Aug. 6, 2014).

The reason that a "four corners" rule has been adopted in the insurance context is because the duty to defend is a primary benefit of an insurance contract between an insurer and an insured. *See Truck Ins. Exch. v. VanPort Homes, Inc.*, 147 Wn.2d 751, 760, 58 P.3d 276 (2002) (citing *Safeco Ins. Co. of Am. v. Butler,* 118 Wn.2d 383, 392, 823 P.2d 499 (1992)). The duty to defend is triggered if the insurance policy conceivably covers the claimant's allegations against the insured. *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53, 164 P.3d 454 (2007). In order to assess "conceivable coverage" and avoid limiting the insured's

potential benefits under its insurance policy, insurers (and courts) are required to liberally construe any ambiguity in the claimant's complaint against the insured in favor of triggering the insurer's duty to defend its insured. *See Truck Ins. Exch.*, 147 Wn.2d at 760.

The contract at issue between Acharya and Microsoft Corporation is not an insurance policy, and the complaint is not subject to construction principles that favor one party over another. Even though the allegations in the complaint were crafted by Acharya herself, the Court of Appeals construed them in her favor in the face of undisputed evidence to the contrary. Whether the "four corners" rule—which is in force to require insurers to provide policy benefits to insureds faced with alleged liability to claimants—should be applied to interpret a forum-selection clause is "an issue of substantial public interest" that should be determined by this Court under RAP 13.4(b)(4).

B. The Forum-Selection Clause Necessarily Governs

As a final matter, it is important for this Court to focus on Microsoft Corporation's ability to enforce the forum-selection agreement that depends upon principles of contract law, as opposed to identity of Acharya's employer. To the extent that these issues are conflated in Acharya's Answer to the Petition for Review, WDTL provides the following discussion to assist this Court.

Acharya's Answer to the Petition states: "If the Court of Appeals had ***not*** presumed Acharya's employment status, the forum selection clause in Acharya's contract with non-party MGR [Microsoft Global Resources GmbH] would have no bearing on this dispute." Answer to PFR, at 2 (emphasis in original); *see id.* at 19-20. That argument confuses two distinct questions: (1) whether Microsoft Corporation was Acharya's employer, and (2) whether Microsoft Corporation is entitled to enforce the forum-selection clause in Acharya's employment agreement with MGR. Those questions are unrelated: Microsoft Corporation's ability to enforce the agreement is a product of contract law and has nothing to do with the identity of Acharya's employer.

The forum-selection clause in Acharya's employment agreement with MGR applies to "[a]ny dispute, controversy or claim arising under, out of or in relation" to the contract *and* its "conclusion" or termination. CP 192. While the parties disagree about who Acharya's employer was while she was working in Europe, there is no dispute that her claims "aris[e] . . . in relation" to her employment in Europe and not in Washington. By its terms, the forum-selection clause necessarily governs all of Acharya's claims in this litigation.

Acharya emphasizes that her claims are against Microsoft Corporation, while the employment agreement was with MGR. But any

claim she may have against Microsoft Corporation is still covered by the forum-selection clause, which applies without limitation to *any* "dispute . . . arising under, out of, or in relation" to the contract, whether or not that dispute is with MGR. Although Microsoft Corporation was not a party to the employment agreement, it easily qualifies as a third-party beneficiary of Acharya's promise to sue only in Europe. *See Key Development Inv., LLC v. Port of Tacoma*, 173 Wn. App. 1, 29, 292 P.3d 833 (2013) (status as a third-party beneficiary requires that the benefit "be a direct result of performance within the parties' contemplation"). Microsoft Corporation is sufficiently closely related to MGR, its subsidiary, that it would make no sense to read the broadly worded forum-selection clause in Acharya's employment agreement with MGR not to apply to employment claims asserted against Microsoft Corporation.

It is settled law that a plaintiff may not side-step an otherwise valid forum section 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). Where, as here, the "alleged conduct of the non-parties is . . . closely related to the contractual relationship," then "the forum selection clause applies to all defendants." *Manetti-Farrow, Inc. v. Gucci Am., Inc.*, 858 F.2d 509, 514 n.5 (9th Cir. 1988); *accord Roby v. Corp. of Lloyd's*, 996 F.2d 1353, 1360 (2d Cir. 1993); *Tate & Lyle Ingredients Ams., Inc. v.*

Whitefox Techs. USA, Inc., 98 A.D.3d 401, 401, 949 N.Y.S.2d 375, 376 (N.Y. App. Div. 2012). Washington courts have applied a similar rule to arbitration agreements, holding that "even when it is not explicitly provided for in an arbitration agreement, some nonsignatories can compel arbitration . . . under normal contract and agency principles." *McClure v. Davis Wright Tremaine*, 77 Wn. App. 312, 315, 890 P.2d 466 (1995). That principle is fully applicable here, and it allows Microsoft Corporation to enforce Acharya's forum-selection clause even though Microsoft Corporation was not her employer.

Contrary to Acharya's argument, therefore, the Court of Appeals' decision to accept the truth of the allegations in the complaint—and, accordingly, to presume that Microsoft Corporation was Acharya's employer—did not "benefit[] Microsoft." Answer to PFR, at 19. Instead, that decision was critical to the Court's determination that the forum-selection clause was unenforceable. In particular, the Court's ultimate conclusion that enforcement of the clause would be contrary to public policy because it would "prevent[] a Washington plaintiff from enforcing Washington law" turned on the identity of Acharya's employer and the location of the alleged misconduct. *See Acharya v. Microsoft Corp.*, 189 Wn. App. 243 ¶28, 354 P.3d 908 (2015).

As Microsoft Corporation's ability to enforce the agreement is a product of contract law and has nothing to do with the identity of Acharya's employer, these issues should be considered separately as part of this Court's consideration of whether review should be granted.

V. CONCLUSION

For the reasons set forth herein and in the petition and underling briefing filed by Microsoft Corporation, WDTL respectfully requests that this Court grant review because whether a forum-selection clause should be assessed based upon allegations as set forth in a complaint drafted by one contracting party is "an issue of substantial public interest that should be determined by the Supreme Court" under RAP 13.4(b)(4).

RESPECTFULLY SUBMITTED this 10th day of November, 2015.

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DECLARATION OF SERVICE

I hereby certify, that on the date below, the foregoing was served on the following individuals via email as previously agreed:

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At the request of Mr. Estes and Ms. White, attached please find Washington Defense Trial Lawyers' Amicus Letter Application and Amicus Curiae Memorandum with regard to the above-referenced matter. These documents are being filed by Stewart A. Estes, WSBA No. 15535, sestes@kbmlawyers.com, (206) 623-8861, and Melissa O'Loughlin White, WSBA No. 27668, mwhite@cozen.com, (206) 340-1000.

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