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No. 68309-8-I

THE COURT OF APPEALS
DIVISION I
STATE OF WASHINGTON

WEST CONSULTANTS, INC., *Appellant*

v.

CAROLYN E. DAVIS, an individual dba ADVANCED ENTERPRISE SYSTEMS and "A&E" SYSTEMS as a Washington sole proprietorship; DELTEK SERVICES, INC., a Delaware corporation; DELTEK SYSTEMS, INC., a Delaware corporation; DELTEK CORP., a Delaware corporation; DELTEK INC., a Delaware corporation; and DELTEK PARTNERS, a purported Washington partnership, Respondents

BRIEF OF APPELLANT

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APPENDIX

A. Opinion of Court of Appeals Denying Discretionary Review

1. Introduction

This is an appeal by WEST Consultants, Inc., of a lower court ruling that shocked all parties concerned, except Respondent Deltek. While the lower court did not disclose its reasoning in its opinion dismissing Appellant WEST Consultants, Inc. (“WEST”) claims against the Respondent Deltek, Inc. (“Deltek”), the error in this case becomes glaring when the harsh result is viewed in light of public policy that protects persons in our state from exploitation purely for profit.

Individuals and businesses in Washington State deserve protection from foreign corporations that come to our state with products to sell. Foreign corporations, like Deltek, “partner up” with local businesses like A&E Services, which has been providing software support in Bellevue for some 30 years, and have existing relationships with “targeted” small business customers. Then, these foreign corporations, jointly market their products and their local partner’s support services to local customers. Deltek’s business plan is to exploit their customers for profit with no post-sale customer service responsibilities. They leave the client and their Washington based business partner with full post-sale responsibility. They employ a “bait and switch” technique to accomplish this. They have a point-of-sale Purchase Contract with venue in King County Washington. Then, several months later, when the customer seeks delivery of the

product, they use a "cram down" type of "click wrap" contract with a different venue clause that allows them to avoid all post-sale customer responsibility.

We recognizes the policy of enforcing "click wrap" agreements to help software companies to keep their costs at manageable levels, but in this case, Deltek has "held itself out" as a local partner of Bellevue based A&E Services. Deltek admitted it was a partnership, in writing. The Washington legislature has codified liability as a partner based on what is communicated to customers under its "purported partner" statute under RCW 25.05.135.

By statute, Detlek is jointly and severally liable for all obligations of its partners and is bound by its partnership agreements including the Purchase Contract. The failure of the lower court to recognize this partnership and the statutory implications was fatal error. By recognizing this partnership and its importance in Respondent's marketing scheme, it is only fair to impose liability and in this case, joint and several liability under RCW 25.05.125 is warranted, but more importantly, enforcement of the venue clause contained in the Purchase Contract is central to this appeal and we ask this Court to reverse this lower court error.

2. Assignments of Error

West assigns the following errors of the Trial Court for Review:

a. The lower court erred in granting Deltek's motion to dismiss WEST'S claims for improper venue when in fact, Deltek's own purchase contract stated that all claims would be brought in King County, Washington.

b. The lower court failed to give the proper effect to factual admissions by Deltek that it was a partner with fellow defendant, Bellevue based A&E Systems and that this partnership relationship was a key marketing strategy that gave Deltek access to its targeted customers, including WEST.

c. The lower court failed to apply Washington partnership law under RCW 25.05.135 to bind both partners, including Deltek, to the obligations contained in the Purchase Agreement dated March 28, 2008, the "point of sale" contract. This was the contract that WEST relied on when it advanced \$30,000 to Deltek and its partner for the purchase of the software. It contained the all-important venue clause establishing King County WA as the court of venue. The lower court failed to recognize this contract as an obligation of all of the partners, including Deltek.

d. In failing to apply Washington partnership law, the lower court erroneously failed to place the burden on Deltek of proving that King County was not the proper forum.

e. Also, in failing to apply Washington partnership law, the court improperly allowed Deltek to unilaterally modify the prior contract by means of a purported “click wrap” licensing agreement.

f. Even if the lower court did not err in failing to apply Washington partnership law, it erred in not recognizing that Deltek was a party to the Purchase Contract since it was listed as such on the contract, provided its own terms in the body of the contract, and was paid its full purchase price on execution of the contract.

g. The lower court improperly focused exclusively on the licensing agreement with a Fairfax County, Virginia venue clause and improperly placed the burden on WEST to prove that venue should be anywhere other than in Fairfax County, Virginia.

h. The lower court ignored the public policy goals of our state’s Consumer Protection Act and of the Revised Uniform Partnership Act.

i. The lower court erred in awarding Deltek attorney’s fees and costs incurred in defending the suit by WEST in King County

Superior Court since the award was based on the erroneous dismissal of WEST'S claims for improper venue.

3. Statement of the Case

WEST is an environmental engineering firm with approximately 200 clients located primarily in the states of Washington, Oregon, and California. (CP 49) WEST is a California corporation authorized to do business in Washington as a foreign corporation with its principal place of business located at 12509 Bel-Red Road Suite 100, Bellevue, Washington, 98005. (CP 1). For the most part, WEST has no clients, and conducts no business in the eastern half of the country. In particular, WEST has no business presence in the State of Virginia. (CP 49)

WEST uses computer software to handle its business accounting needs, including billings. (CP 50) Prior to 2005, WEST used an accounting software product known as Wind2 FMS, which it purchased from A&E Systems. (CP 49) In 2005, the company that produced the Wind2 FMS was acquired by Deltek. (CP 49) As part of this transaction, Deltek and A&E Systems announced that they had become "partners." (CP 49-50)

On or about March 28, 2008, WEST entered into a contract (the "Purchase Contract") with Deltek and A&E Systems to purchase a new version of Deltek's accounting software known as DVS. (CP 50) Under

the Purchase Contract, Deltek provided the software and A&E provided the support services. (CP 50) The Purchase Contract bears on its face a logo stating “Deltek Partner”, and specifically states that “per Deltek, Inc., all orders are final. No orders can be returned or exchanged.” (CP 67) The contract provided that “[t]his agreement shall be governed by the laws of the State of Washington and venue for any suit will be in King County, Washington.” (CP 50)

WEST paid approximately \$30,000 to Deltek and A&E for the DVS, including support services. (CP 50). Two months later, when attempting to install the software, WEST discovered that it did not work. West never was able to use the product it had purchased. (CP 51). WEST sought reimbursement. Settlement talks failed. WEST initiated suit against the partners. Deltek moved to dismiss. For the first time WEST learned that Deltek maintained that its liability, if any, to WEST was governed by a separate software license, distinct from the March 28, 2008 Purchase Contract, which unilaterally changed the terms of the Purchase Contract. (CP 35). According to Deltek, WEST accepted the terms of the license during the process of attempting to install the software. (CP 36). The software license purports to require that any dispute about the use of the software be litigated in Virginia and governed by Virginia law. (CP 38). It also disclaims all warranties and provides for a full refund of the

purchase price if the software is not used. (CP 37). WEST's employee, Hans Hadley, who installed the software, never saw this agreement and was not aware that it existed. (CP 52). WEST never used the software and it never went live.

4. Procedural History of the Case

WEST initiated this action in King County Superior Court on or about March 22, 2010, by filing a complaint which alleged that Deltek and its partners had violated the Washington State Consumer Protection Act and product warranties of fitness for a particular purpose. (CP 1). Relying on the terms of the purported software license agreement, Deltek moved under CR 12(b)(3)¹ to dismiss the action for improper venue. (CP 34). WEST opposed the motion to dismiss, arguing among other things that the relationship between WEST and Deltek was governed by the March 28, 2008 Purchase Contract calling for venue in King County. (CP 53). This was the only contract that WEST and its legal counsel were aware of at that time. On May 25, 2010, the trial court granted Deltek's motion, and dismissed WEST's claims against Deltek without prejudice. (CP 76). On June 16, 2010, the trial court granted Defendant's Order Setting Attorneys' Fees in a written opinion that gave some clues about the basis for the granting of Defendant's motion to dismiss and the error

¹ Motion was improperly noted by Deltek counsel as a non-dispositive motion without oral argument under King County LR 7 which turned out well strategically for Deltek.

involved. (CP 121). WEST filed a timely notice of appeal on June 18, 2010. (CP 123). By letter dated July 8, 2010, this Court noted for hearing the question of whether the trial court's decision is reviewable as a matter of right, or in the alternative should be subject to discretionary review. On September 16, 2010, this Court held that the decision of the Trial Court to dismiss Deltek without prejudice was not appealable as a matter of right at that time, and in the alternative, would not grant discretionary review.²

Prior to the trial scheduled for September of 2011, WEST settled and dismissed its claims against the remaining defendant, A&E Systems. (CP 142). On January 25, 2012, the trial court entered a final judgment (CP 179), and on February 9, 2012, WEST appealed that judgment to Division I of the Washington State Court of Appeals. (CP 181).

5. Argument

- a. The Trial Court committed error in concluding that Deltek and A&E were not partners. Both were bound by the Purchase Contract dated March 28, 2008, and the terms and conditions of this contract which included the King County venue clause which governed the relationship.

The Purchase Contract dated March 28, 2008, was the point-of-sale contract and was the only contract that existed at the time and had not been modified. Any attempts by Deltek to unilaterally modify the terms and conditions of the Purchase Contract were null and void. The trial

² See Opinion of Court of Appeals attached hereto as Appendix A

court committed error in concluding that Deltek is not bound by the March 28, 2008 Purchase Contract calling for venue in King County. (CP 76). As noted, prior to the execution of that contract, Deltek held itself out to be A&E Systems “partner.” (CP 65). The contract itself includes the “Deltek Partner” logo, and states that “Per Deltek, Inc. all orders are final. No orders can be returned or exchanged.” (CP 67).

Pursuant to RCW 25.05.055, whenever two or more persons "carry on as co-owners a business for profit," a partnership is formed, "whether or not the persons intend to form a partnership." Any agreement to form a partnership (including amendments thereto) does not have to be in writing and can be oral or merely implied. RCW 25.05.005. A partnership is presumed if the person receives a share of the profits of a business." (RCW 25.05.055(3))

In re Thornton's Estate, 81 Wash.2d 611 (1972), the Court found that a woman established a prima facie case of implied partnership because she jointly contributed her labor to the cattle and farming enterprise, she shared in the decision making concerning the enterprise; and, necessarily, she benefited jointly from the profits. The Court in *Thornton* also stated:

“The existence of a partnership depends upon the intention of the parties. That intention must be ascertained from all of the facts and circumstances and the actions and conduct of the parties. While a contract of partnership, either expressed or implied, is essential to the creation of the partnership relation, it is not

necessary that the contract be established by direct evidence. The existence of the partnership may be implied from circumstances, and this is especially true where, as here, the evidence touching the inception of the business and the conduct of the parties throughout its operation, not only tends to show a joint or common venture, but is in the vein inconsistent with any other theory. It is well settled that no one fact or circumstance will be taken as the conclusive test. Where, from all the competent evidence, it appears that the parties have entered into a business relation combining their property, labor, skill and experience, or some of these elements on the one side and some on the other, for the purpose of joint profits, a partnership will be deemed established.”

The court has also considered whether the parties were working towards the same goals, understandings and interests, and whether their conduct is consistent with a partnership or partnership principles. *Kintz v. Read*, 28 Wash.App.73 (1981). RCW 25.05.130 authorizes suits against "any or all of the partners in the same action, or in separate actions."

Plaintiff WEST had been a long-time customer of Co-Defendant A&E which provided support for WEST's Wind2 FMS accounting software. (CP 49). In 2005, Wind2 FMS was acquired by Deltek, in a strategic acquisition that included the FMS software and its list of 3,000 customers across the US & Canada. (CP 49). At \$30,000 per customer, this represented a potential of \$90,000,000 in revenues to Defendant Deltek. As a part of this strategic acquisition, Defendant Deltek and A&E became "partners." Attached are multiple emails and website pages by both A&E and Deltek admitting to and representing themselves as

“Partners”. (CP 57-67). These are party admissions. One document is a letter dated March 12, 2007, from Anne Jensen, Deltek’s Director of Account Management, that touted the “partnership” with A&E and went on to falsely state that, “Deltek will continue to provide you with any technical support you need.” In fact, Deltek stopped all support for the FMS, “forcing” its customers to upgrade to Deltek’s new DVS product. (CP 50). Deltek admitted they were partners with A&E.

To take this argument one step further, the Washington legislature has codified liability as a partner based on what is communicated to customers under its “purported partner” statute at RCW 25.05.135. Moreover, under established Washington law, a party that holds itself out to be a “partner” of another *is liable under contracts executed by the other partner in the furtherance of their common business.* RCW 25.05.135 of Washington’s Revised Uniform Partnership Act pertains to the Liability of a purported partner and states as follows:

(1) If a person, by words or conduct, purports to be a partner, or consents to being represented by another as a partner, in a partnership or with one or more persons not partners, the purported partner is liable to a person to whom the representation is made, if that person, relying on the representation, enters into a transaction with the actual or purported partnership. If the representation, either by the purported partner or by a person with the purported partner's consent, is made in a public manner, the purported partner is liable to a person who relies upon the purported partnership even if the purported partner is not aware of being held out as a partner

to the claimant. If partnership liability results, the purported partner is liable with respect to that liability as if the purported partner were a partner. If no partnership liability results, the purported partner is liable with respect to that liability jointly and severally with any other person consenting to the representation.

(2) If a person is thus represented to be a partner in an existing partnership, or with one or more persons not partners, the purported partner is an agent of persons consenting to the representation to bind them to the same extent and in the same manner as if the purported partner were a partner, with respect to persons who enter into transactions in reliance upon the representation.”

Consequently, application of the clear terms of this statute to the facts of this case show that Deltek and A&E were in deed partners. It is clear that Washington law intends to protect parties such as WEST from such tactics by foreign corporations that profit at the expense of its small business citizens. This Court is urged to recognize the harsh results that occurred as a result of the actions of the lower courts. This Court is also encouraged to take action on this appeal to correct an injustice and enforce the intentions of our legislature and the intentions of the parties as represented by the Purchase Contract dated March 28, 2008, most notably, its all-important venue provisions.

- b. Even if the lower court did not commit error in failing to apply Washington partnership law, it committed error in not recognizing that Deltek was a party to the Purchase Contract.

It is black letter law that when a partner acts within the scope of the partnership business, the partner expands liability. *See* William

Callison & Maureen A. Sullivan, Partnership Law and Practice: General and Limited Partnerships § 8:1 (1992) (the agency power is implied in the partnership relationship, and as long as the relationship continues, every partner may act within the scope of the partnership business and thereby risk the partnership's assets and create liability for his or her copartners). RCW 25.05.100 provides each partner is an agent of the partnership for the purpose of its business. RCW 25.04.150 states that all partners are liable jointly and severally for everything chargeable to the partnership under RCW 25.04.130 and 25.04.140; and jointly for all other debts and obligations of the partnership

Deltek was a party to the Purchase Contract. It was signed by its authorized representative with A&E. It is clear from the face of the Purchase Contract that Deltek authorized it. (CP 67). Deltek was listed on the contract and provided its own terms in the body of the contract. Deltek solicited WEST'S business and profited from WEST'S acceptance of the Purchase Contract. Deltek ratified the Purchase Contract by accepting the money.

It was clearly error for the trial court to hold that Deltek was not bound by the venue provision of the March 28, 2008 Purchase Contract.

- c. The lower court improperly focused exclusively on the licensing agreement with a Fairfax County, Virginia venue clause and improperly placed the burden on WEST to prove that venue should be anywhere other than in Fairfax County, Virginia.

The goal of interpreting a written contract is to ascertain the parties' mutual intent. *U.S. Life Credit Life Ins. Co. v. Williams*, 129 Wn.2d 565, 569, 919 P.2d 594 (1996). And courts harmonize clauses that seem to conflict in an attempt to interpret the contract in a manner that gives effect to all of the contract's provisions. *Lloyd Nishikawa v. U.S. Eagle High, LLC*, 138 Wn.App. at 841 (2007). When construing a written contract, courts apply the following principles: (1) The parties' intent controls, (2) the parties intent is ascertained from reading the contract as a whole, and (3) ambiguity will not be read into a contract that is otherwise clear and unambiguous. *Mayer v. Pierce County Medical Bureau, Inc.*, 80 Wn.App. at 416 (1995).

Modification of a contract by subsequent agreement of the parties arises out of the parties' intention and requires a meeting of the minds. *Wagner v. Wagner*, 95 Wash.2d 94, 103, 621 P.2d 1279 (1980). Mutual assent generally requires a valid offer and acceptance. *Saluteen-Maschersky v. Countrywide Funding Corp.*, 105 Wash.App. 846, 851, 22 P.3d 804 (2001). There must be consideration separate from that of the original contract for a valid contract modification. *Wagner*, 95 Wash.2d at

103, 621 P.2d 1279. *Dragt v. Dragt/DeTray, LLC*, 163 Wash.2d 1042, 187 P.3d 269 (2008) (holding that contract modification requires meeting of the minds and separate consideration).

On the face of the Purchase Contract, Deltek was bound by its terms and subject to its provision calling for venue in King County, Washington. This sales contract governed the actual transfer of the software from A&E and Deltek to WEST. This contract spelled out the exact terms of the deal in a manner that was clear and recognizable to WEST. WEST relied upon this contract in agreeing to purchase the Vision software because this contract gave a complete account of the parties obligations. The Purchase Contract spelled out exactly what they were paying for, what warranties were being provided, if any, and how they would address any problems with the product or services they were purchasing.

Two months later, Deltek provided WEST with instructions on how it could download the software it had purchased on its website but included in these instructions was a proviso that basically said, “if you want what you purchased, you have to agree to new terms, and they including VENUE IN VIRGINIA AND VIRGINIA LAW GOVERNS.” This was a unilateral attempt to modify the existing Purchase Agreement. As such, it was without effect, because there never was a meeting of the

minds between all parties, such that would allow a modification of the existing contract. Further, there was never additional consideration given by Deltek to WEST. Two months had passed. All that was left to perform under the Purchase Contract was delivery by Deltek. The essential elements of a contract modification under Washington law were not met by Deltek, and thus, the contract was never modified.

The venue clause in the Purchase Contract is in direct contrast to the venue provision of the licensing agreement. Venue was first established in the software Purchase Agreement, which established venue in King County, Washington. This was an essential term that WEST relied upon to purchase the software from the partnership and cannot be unilaterally modified because there was no meeting of the minds, nor was there any additional consideration offered by Deltek, or accepted by WEST. Unfortunately, the trial court failed to properly identify the Purchase Contract as the primary contract with venue in King County, Washington.

While the order dismissing the claims against Deltek was issued on May 25, 2010 (CP 76), the lower court rendered a separate written opinion on Deltek's motion for attorney fees and costs. (CP 121) In this opinion, the court did not even mention the Purchase Contract and its venue provision and exclusively focused on the later licensing agreement

and its Fairfax County Virginia clause. In its only reference to the lower court decision on the motion to dismiss, the court said, “The issue before the court is not complex, although complexity was slightly enhanced by plaintiff’s consideration argument that did not take into consideration the specific rules that apply to purchase and use of software, forcing some additional briefing in defendants’ reply” (CP 122).

This clearly shows that the lower court was erroneously swayed by the “click wrap” rules rather than the enforceability of the terms and conditions of the Purchase Contract. It also showed that the lower court improperly placed the burden on WEST to demonstrate that venue was established in the purchase and sale agreement, rather than in the subsequent licensing agreement.

- d. The lower court ignored the public policy goals of our state’s Consumer Protection Act and of the Revised Uniform Partnership Act.

Washington’s Consumer Protection Act at RCW 19.86 (the “CPA”) is intended to protect its citizens from unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

The trial court’s error substantially limited WEST’s freedom to act. Based on the March 28, 2008 Purchase Contract, WEST had a right to litigate its dispute with Deltek in King County Superior Court. By

requiring WEST to proceed against Deltek in Virginia under Virginia law, the trial court has negated the right of WEST to pursue its claims against Deltek.

The detriment to WEST is more than just the additional cost and inconvenience of having to litigate its claims in a court on the other side of the country. A Virginia court that accepted this litigation would apply Virginia law, rather than the law of the State of Washington, since this is what the Licensing Agreement required. Under Virginia law, WEST's Consumer Protection Act claims against Deltek would be time barred. Virginia's analogue to the Washington State Consumer Protection Act is codified at Va. Code Ann. § 59.1-204, which provides in pertinent part that any action "shall be commenced within two years after . . . accrual." A cause of action for breach of contract accrues when the breach occurs³, and a cause of action for misrepresentation, deception, or fraud accrues when the injury is discovered or should have been discovered.⁴ Because WEST's CPA causes of action against Deltek accrued at the latest by May, 2008, they would be time barred under Virginia law.

By contrast with Virginia, Washington provides more protection for consumers and businesses with CPA claims. In particular, under RCW 19.86.120, the statute of limitations for CPA claims is four years.

³ Va. Code Ann. § 8.01-230.

⁴ Va. Code Ann. § 8.01-249

Any action to enforce a claim for damages under RCW 19.86.090 shall be forever barred unless commenced within four years after the cause of action accrues. . . .

Since claims under the Washington CPA accrue when the cause of action is discovered, and WEST discovered its causes of action against Deltek in May, 2008, its claims are not time-barred under Washington law.⁵

The harshness of the lower court result was evidenced by a declaration of Richard D. Seward, attorney for WEST (CP 173) which stated the after conducting due diligence into the feasibility of pursuing claims against Deltek in Virginia, that it was concluded that pursuing such claims in either state or federal court in Virginia would be cost prohibitive, leaving Deltek completely exonerated, but for this appeal.

e. The Trial Court committed error in awarding attorney's fees and costs to Defendant Deltek.

RCW 4.28.185(5) states that in the even the defendant is personally served outside the state on causes of action enumerated in this section, and prevails in the action, there may be taxed and allowed to the defendant as part of the costs of defending the action a reasonable amount to be fixed by the court as attorneys' fees. The award granted to Deltek was only authorized by statute if the error had not occurred on the ruling granting Deltek's motion to dismiss. This award should be reversed if WEST

⁵ See, e.g., *Mayer v. Sto Industries, Inc.*, 123 Wash. App. 443, 98 P.3d 116 (Div. 2 2004).

prevails on this appeal.

7. Conclusion

This is an appeal of a lower court ruling where the error becomes glaring when the harsh result is viewed in light of public policy in this state that protects consumers and businesses from unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. These acts have been declared unlawful.

Washington businesses deserve protection from any business that engages in unfair or deceptive acts in this state. In order for this protection to be made effective against out-of-state entities, such entities must not be allowed to avoid litigation in this state by means of unilaterally imposed venue clauses. They “partner up” with local businesses that have existing relationships with their "targeted" small business customers. Then they jointly market their products to these “partners” exploiting their customers. They take their profits out of Washington with no post-sale customer service responsibilities within the state of Washington. They leave the client and their Washington based business partner with full post-sale responsibility. They employ a “bait and switch” technique, relying on the tendency of courts to enforce “click wrap” agreements to help software companies to keep their costs at manageable levels, but in this case, the facts are compelling. Deltak "held

itself out" as a local partner of Bellevue based A&E Services. Deltek admitted it was a partnership, in writing. The Washington legislature has "codified" liability as a partner based on what is communicated to customers under its "purported partner" statute.

By statute, Detlek is jointly and severally liable and bound by its partnership agreements including the Purchase Agreement. The failure of the lower court to recognize this partnership and the statutory implications was fatal error.

For all of the foregoing reasons, the Court should overturn the trial court's decision to dismiss WEST's claims against Deltek for improper venue and vacate the order awarding attorney's fees and costs to Deltek.

Submitted this 4th day of May, 2012



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APPENDIX A

*The Court of Appeals
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SEP 16 2010

CASE #: 65625-2-1

West Consultant's Inc., Appellant v. Deltek Services Inc. et al, Respondents

Counsel:

The following notation ruling by Commissioner James Verellen of the Court was entered on September 10, 2010 :

"West Consultants, Inc. (West) filed an appeal of the trial court order dismissing West's claims against Delteck, Inc., Deltek Services, Inc., Deltek Corp. and Deltek Partners (collectively Deltek) based on improper venue. The dismissal is without prejudice, and West's claims against Carolyn Davis d/b/a A&E Systems (A&E), remain for litigation.

This court set a motion to determine appealability. West responded, asking this court to grant discretionary review.

West entered into a contract with A&E to purchase a new version of a Deltek software product. The agreement between West and A&E includes a provision that "[t]his agreement shall be governed by the laws of the State of Washington and venue for any suit will be in King County, Washington." The agreement with A&E also provides that no express warranties are given by A&E regarding the Deltek software, any implied warranties are disclaimed, any warranties for the software are given directly by Deltek, Inc. and that West "will look solely to Deltek, Inc. in regard to such warranties.

West installed the new software on a file server in one of West's offices. During installation, the terms of the Deltek License Agreement appeared on the computer screen followed by options to accept or not accept the terms of the agreement. The person installing could complete the installation only by selecting to accept the terms of the License Agreement. The License Agreement contains warranty disclaimer provision and provides that the licensee agrees to bring any cause of action "relating in whole or in part to the Agreement only in either [a state or Federal court located in] Virginia."

West filed its complaint in King County Washington asserting claims against A&E and Deltek for breach of implied warranties and violation of the Consumer Protection Act. The trial court granted Deltek's motion to dismiss the claims against Deltek based on improper venue.

West filed its notice of appeal.

In the absence of a CR54(b) determination and findings, the trial court ruling dismissing the claims against Deltek but not A&E is not appealable as a matter of right. RAP 2.2(d).

Discretionary review is available only if:

(1) The superior court has committed an obvious error which would render further proceedings useless;

(2) The superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act;

(3) The superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by an inferior court or administrative agency, as to call for review by the appellate court; or

(4) The superior court has certified, or that all parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation.

RAP 2.3(b).

West contends that it demonstrates probable error that substantially alters the status quo. West offers several arguments on the merits of the dismissal, arguing for example because Deltek has represented in various contexts that A&E is a partner of Deltek, Deltek is bound to the terms of the agreement signed by A&E containing the King County venue provision. But even assuming there is a debatable issue about the validity of the License Agreement venue provision, West fails to establish that the order dismissing the claims against Deltek without prejudice substantially alter the status quo or substantially impair the freedom of a party to act as required for RAP 2.3(b)(2).

The Taskforce comments reflect that RAP 2.3(b)(2) narrowly applies “primarily to orders pertaining to injunctions, attachments, receivers, and arbitration.”^[1] In his authoritative law review article on discretionary review, Supreme Court Commissioner Geoffrey Crooks recognizes that the Taskforce comments can be read as drawing a line between rulings that only impact the internal workings of a lawsuit versus rulings that have an impact external to the litigation.^[2] The ruling dismissing the claims against Deltek without prejudice does not have an impact external to the litigation and does not substantially alter the status quo for purposes of RAP 2.3(b)(2).

The strict standards for discretionary review are not satisfied.

Therefore, it is
ORDERED that the motion for discretionary review is denied.”

James Verellen
Court Commissioner

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

ssd

^[1] See Task Force Comment to RAP 2.3.

^[2] Geoffrey Crooks, Discretionary Review of Trial Court Decisions Under the Washington Rules of Appellate Procedure, 61 Wash. L. Rev. 1541, 1546 (1986) (“A trial court action then arguably would not qualify for review under RAP 2.3(b)(2) if it merely altered the status of the litigation itself or limited the freedom of a party to act in the conduct of the lawsuit. An error affecting the internal workings of the lawsuit would be reviewable only if ‘obvious’ and, as required by RAP 2.3(b)(1), only if it truly rendered further proceedings useless.”).

CERTIFICATE OF SERVICE

I certify that on May 4, 2012 I sent a copy of the attached Brief of Appellant via email PDF attachment to Nicole Tadano and Stellan Keehnel of DLA Piper LLP, attorneys for Respondents, at nicole.tadano@dlapiper.com. Nicole and Stellan have previously agreed to accept service of pleadings in this matter by email.

Dated this 4th day of May, 2012.

By: 
Richard D. Seward