

FILED  
COURT OF APPEALS  
DIVISION II

No. 38110-9

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STATE OF WASHINGTON  
BY     *Pro*      
DEPUTY

**IN THE COURT OF APPEALS, DIVISION II,  
OF THE STATE OF WASHINGTON**

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DAVIS, GREG, individually,  
Appellant,

vs.

GENERAL DYNAMICS LAND SYSTEMS, A TEXAS  
CORPORATION LICENSED TO DO BUSINESS IN WASHINGTON;  
KENNETH "KEN" SHARKEY AND "JANE DOE" SHARKEY; AND  
JEFFERY "JEFF" TAYLOR AND "JANE DOE" TAYLOR,  
Respondents.

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APPELLANT'S REPLY BRIEF

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**THADDEUS P. MARTIN, LLC**  
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Of Attorneys for Appellant

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**A. Argument in Reply**

**1. The Plain Language of the Dispute Resolution Policy Agreement Creates Temporal Limits to Its Application and Greg Davis Was Not an Employee of GDLS During Any Times Relevant to His Amended Complaint so Therefore He Was Not Subject to GDLS' Dispute Resolution Policy**

Washington follows the “objective manifestation theory” of contracts. *Hearst Communs., Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). To determine the intent of the parties to a contract a court must focus, “on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *Id.* (citing *Max L. Wells Trust v. Grand Cent. Sauna & Hot Tub Co. of Seattle*, 62 Wn.App. 593, 602, 815 P.2d 284 (1991)). The court looks at the “reasonable meaning of the words used” to ascribe the parties’ intentions. *Id.* (citing *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburgh, Pa.*, 123 Wn.2d 678, 684, 871 P.2d 146 (1994)). “Thus, when interpreting contracts, the subjective intent of the parties is generally irrelevant if the intent can be determined from the actual words used.” *Id.* at 503-04 (**emphasis added**) (citing *City of Everett v. Estate of Sumstad*, 95 Wn.2d 853, 855, 631 P.2d 366 (1981)). Courts should give words in a contract, “their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent.” *Id.* (citing

*Universal/Land Constr. Co. v. City of Spokane*, 49 Wn.App. 634, 637, 745 P.2d 53 (1987)). A court should not, “interpret what was intended to be written but what was written.” *Id.* (citing *J.W. Seavey Hop Corp. of Portland v. Pol-lock*, 20 Wn.2d 337, 348-49, 147 P.2d 310 (1944)).

Defendants attempt to gloss over the plain language of the contract entered into between plaintiff and GDLS – the “Dispute Resolution Policy Agreement for New Hires” (“DRP”). Defendants attempt to demonstrate an intent on the part of GDLS that is not supported by the plain language of the contract. The contract states, in pertinent part:

...I agree to the exclusive resolution of all claims arising out of or relating to my application for employment, employment, or termination of employment by the terms of the company’s dispute Resolution Policy (“DRP”)...

CP 42 (**emphasis added**). The ordinary, usual, and popular meaning of this language is clear.

The time that plaintiff worked as a contractor for Contract Professionals, Inc. does not fall within the time periods plainly listed in the agreement for new hires. The agreement clearly lays out *temporal limits* to the applicability of the DRP. It applies to claims that arise from the *time* the employee applies for employment, through the *time* of the employee’s employment, and then through the *time* of the employee’s termination of employment. It is no coincidence that these times are

arranged in chronological order – from earliest to latest. An employee applies for a job, works for the employer, and eventually ceases to work for the employer. Plaintiff's claims do not relate to the time that he applied for employment with GDLS. Plaintiff's claims do not relate to the time that he was employed by GDLS. Nor do plaintiff's claims relate to the time of his termination from GDLS. Plaintiff's claims do not fall under the agreement.

Nevertheless, defendants invite the court to look at GDLS' alleged subjective intent of having the agreement cover claims that relate to a time *before* a person applies for employment and *before* a person is actually employed by GDLS (and, in fact, a time when the person is actually employed by another company). This reading is contrary to the plain language of the agreement. Even if the plain language of the contract were susceptible to these two different readings, it should be construed against the drafter – GDLS. *Guy Stickney, Inc. v. Underwood*, 67 Wn.2d 824, 410 P.2d 7 (1966) (contract language subject to interpretation is construed most strongly against the party who drafted it).

Further support for this is found in the DRP itself. Section 4.1.1 of the DRP provides, in pertinent part:

The Arbitration Process applies to, and is intended to completely and finally resolve, any controversy, dispute or claim, including the arbitrability of any controversy,

dispute or claim, between an employee not represented by a labor union and the Company *which arises out of or relates to the employment relationship* and which is based on a legally protected right.

CP 53 (**emphasis added**). This language clearly limits the applicability of the arbitration process to claims that arise out of or relate to the employment relationship. For every employment relationship there must be a time when it begins. For most employment relationships there is then a time when it continues, and a time when it ends. There is no employment relationship before or after these times. Plaintiff had no employment relationship with GDLS at the time his claims arose because he was an independent contractor employed by Contract Professionals, Inc.

The common law distinguishes between employees and independent contractors, based primarily on the degree of control exercised by the employer/principal over the manner of doing the work involved. *Marquis v. City of Spokane*, 130 Wn.2d 97, 110, 922 P.2d 43 (1996) (citing *Fardig v. Reynolds*, 55 Wn.2d 540, 544, 348 P.2d 661 (1960); *Phillips v. Kaiser Aluminum & Chem. Corp.*, 74 Wn. App. 741, 749 fn. 23, 875 P.2d 1228 (1994)). The distinction is important because whether one is an employee of another or an independent contractor affects numerous legal issues, including, e.g., vicarious liability on behalf

of an employer. One can guess what GDLS' position would have been with respect to plaintiff's status as an employee if he had injured a third party while in the course and scope of his employment with Contract Professionals, Inc. They would be quick to claim that he was an independent contractor and not an employee.

Defendants prefer to focus on the language in the second paragraph of the agreement that provides for the type of claims that are covered, including, e.g., torts, discrimination claims, etc. This language is irrelevant to the issue of whether the agreement covers claims that arose prior to plaintiff's employment with GDLS. Just because the agreement covers the *type* of claim that plaintiff brought does not in any way affect whether the claim arose during the covered *time*.

**2. Questions of Arbitrability Are Also Limited to Claims Arising Out of the Employment Relationship and Therefore are Not Subject to the DRP**

Since the agreement does not cover plaintiff's claims it also does not govern questions of arbitrability related to claims that do not arise out of the employment relationship. Defendants selectively quote the Dispute Resolution Handbook when they argue that all questions of arbitrability are to be decided by an arbitrator. Defendants' argument can only be made by ignoring the plain language in the handbook. In support of their argument that the question of arbitrability is itself arbitrable, the

defendants quoted the first half of the following paragraph. Defendants did not quote the emphasized text below:

The Arbitration Process applies to, and is intended to completely and finally resolve, any controversy, dispute or claim, including the arbitrability of any controversy, dispute or claim, *between an employee not represented by a labor union and the Company which arises out of or relates to the employment relationship and which is based on a legally protected right.*

CP 53 (**emphasis added**). As explained above, plaintiff's claims do not arise out of or relate to the employment relationship because they arose before there was an employment relationship between plaintiff and defendant. Plaintiff only agreed to arbitrate claims relating to his application for employment, employment, or termination of employment so questions of arbitrability of claims outside those temporal limits are not arbitrable.

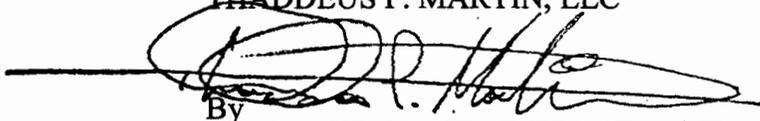
#### **B. Conclusion**

The courts must decide the issue of who decides arbitrability and the court must decide if the facts, as alleged in Davis' complaint, are subject to arbitration.

For the reasons stated above, defendants' motion to dismiss should have been denied. The Court of Appeals should reverse the lower court and remand this matter for a jury trial.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of March 2009.

THADDEUS P. MARTIN, LLC

A handwritten signature in black ink, appearing to read "Thaddeus P. Martin", is written over a horizontal line. The signature is stylized and somewhat cursive.

By

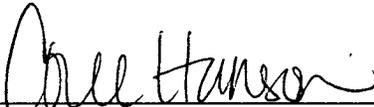
Thaddeus P. Martin, WSBA 28175  
Attorney for Plaintiff

**CERTIFICATE OF SERVICE**

I hereby certify that I am not a party to this action and that I placed for service on counsel of record the foregoing document via email followed by legal messenger, consistent with a prior agreement of the parties on the 6<sup>th</sup> day of March, 2009.

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