

TABLE OF CONTENTS

Key

Verbatim Reports of Hearings: RP (September 19, 2008)
Clerk’s Papers: CP

| | <u>Page</u> |
|-------------------------|-------------|
| I. Assignments of Error | 1-3 |
| II. Summary of Argument | 3 |
| III. Facts | 4 |
| IV. Argument | 11 |
| V. Conclusion | 36 |

TABLE OF AUTHORITIES

Table of Cases

| | |
|---|--------------|
| <i>Bernsen v. Big Bend Elec. Co-op., Inc.</i> , 68 Wn. App. 427, 435, 842 P.2d 1047, 1052 (1993) | 13 |
| <i>Brown v. Johnson</i> , 109 Wn. App. 56, 58-9, 34 P.3d 1233 (2001) | 34 |
| <i>Buckeye Check Cashing, Inc. v. Cardegna</i> , 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006) | 8, 12, 14 |
| <i>CHD, Inc. v. Boyles</i> , 138 Wn. App. 131, 140, 157 P.3d 415, 419 (2007) citing <i>Farm Credit Bank v. Tucker</i> , 62 Wn. App. 196, 207, 813 P.2d 619 (1991) | 34 |
| <i>DAI v. Casarotto</i> , 517 U.S. 681, 688, 116 S. Ct. 1652, 134 L. Ed.2d 902 (1996) | 16 |

| | |
|--|----------------|
| <i>Davis v. General Dynamics Land Systems</i> , 152 Wn. App. 715, 718, 217 P. 3d 1191, 1192 (2009) | 11, 12, 14 |
| <i>Erwin v. Cotter Health Centers</i> , 161 Wn.2d 676, 700, 167 P.3d 1112, 1124 (2007) | 25 |
| <i>Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC</i> , ___ Wn. App ___, 230 P.3d 625, 633 (2010) | 22, 24 |
| <i>Guillen v. Contreras</i> , 147 Wn. App. 326, 334, 195 P.3d 90, 93 (2008) citing <i>Osborn v. Grant County</i> , 130 Wn.2d 615, 630, 926 P.2d 911 (1996) | 35 |
| <i>Marassi v. Lau</i> , 71 Wn. App. 912, 916, 859 P.2d 605 (1993) | 33, 35 |
| <i>McKee v. AT & T Corp.</i> , 164 Wn.2d 372, 383, 191 P.3d 845, 851 (2008) | 11, 15, 22, 27 |
| <i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wash. App. 446, 464, 45 P.3d 594 (2002) | 20 |
| <i>Pepe v. GNC Franchising, Inc.</i> , 46 Conn. Supp. 296, 300, 750 A.2d 1167, 1169 (2000) | 20 |
| <i>Riss v. Angel</i> , 131 Wn.2d 612, 633, 934 P.2d 669 (1997).... | 35 |
| <i>Satomi Owners Ass'n v. Satomi, LLC</i> , 167 Wn.2d 781, 797, 225 P.3d 213, 223 (2009) | 11, 12, 21 |
| <i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 858, 161 P.3d 1000 (2007) (citing <i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wn.2d 293, 301, 103 P.3d 753 (2004) | 12 |
| <i>Schnall v. AT & T Wireless Services, Inc.</i> , 168 Wn.2d 125, 131, 225 P.3d 929, 933 (2010) | 24 |
| <i>Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.</i> , 559 U.S. ----, 130 S.Ct. 1758, 1773-4, --- L.Ed.2d ---- (2010) | 15 |

| | |
|--|--|
| <i>Tacoma Northpark, LLC v. NW, LLC</i> , 123 Wn. App. At 84 citing <i>Meenach v. Triple E Meats, Inc.</i> , 39 Wn. App. 635, 640, 694 P.2d 1125, review denied, 103 Wn.2d 1031 (1985) | 34 |
| <i>Thompson v. Lennox</i> , 151 Wn. App. 479, 484, 212 P.3d 597, 599 (2009) | 36 |
| <i>Torgerson v. One Lincoln Tower, LLC</i> , 166 Wn.2d 510, 519, 210 P.3d 318, 323 (2009) | 18, 28, 29, 31 |
| <i>Townsend v. Quadrant Corp.</i> , 153 Wn. App. 870, 878, 224 P.3d 818, 824 (2009) | 11, 13, 15, 17, 20, 21, 22, 27, 31 |
| <i>Voicelink Data Services, Inc. v. Datapulse, Inc.</i> , 86 Wn. App. 613, 617-618, 937 P.2d 1158, 1160 – 1161 (1997) | 19 |
| <i>Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.</i> , 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed.2d 488 (1989) | 15 |
| <i>Woodall v. Avalon Care Center Federal Way, LLC</i> , 2010 WL 1875512, 11 (Wn. App. Div. 1, 2010) | 17, 20 |
| <i>Zuver v. Airtouch Communications, Inc.</i> , 153 Wn.2d 293, 318, 103 P.3d 753 | 12, 16, 28 |

Statutes

| | |
|-----------------------------|--------|
| RCW 4.84.330 | 33 |
| RCW 7.04 et. seq. | 12 |
| RCW 7.04A.060(2) | 15 |
| RCW 7.04A.060(2), (3) | 15, 27 |
| RCW 7.04A.070(1) | 17 |

| | |
|-------------------------|--------|
| RCW 19.100 et seq | 30 |
| RCW 19.100.180(J) | 30 |
| RCW 19.100.190 | 29 |
| RCW 19.100.190(3) | 29, 30 |

Rules and Regulations

| | |
|---------------|----|
| CR 8 (c)..... | 13 |
|---------------|----|

Other Authorities

| | |
|---------------------------|----|
| 9 U.S.C. § 2 | 12 |
|---------------------------|----|

I. ASSIGNMENTS OF ERROR

A) *Assignments of Error*

1. The court erred when, despite correctly enforcing the parties' agreement to arbitrate their disputes, the court exceeded its authority and decided certain issues which the parties agreed were within the disputes that would be resolved in arbitration.
2. The court erred in determining that the parties' forum selection clause was unconscionable and thereby unenforceable.
3. The court erred when, irrespective of an agreement to litigate disputes in Connecticut, the court ordered that arbitration must take place in Washington.
4. The court exceeded its authority erred in determining the enforceability of the parties' agreed choice of law clause.
5. The court erred in holding that of the parties' agreed choice of governing law clause was unenforceable.
6. The court exceeded its authority erred in determining the enforceability of the parties' agreed limitation on damages clause.
7. The court erred in holding that of the parties' agreed limitation on damages clause was unenforceable.

8. The court erred when it did not award DAI its reasonable attorney fees and costs incurred in enforcing the parties' agreement to arbitrate disputes.
9. The court erred in confirming the arbitrator's award.
10. The court erred in awarding the plaintiffs' their post arbitration award attorney fess.

B) Issues Pertaining to Assignments of Error

1. Are agreements to arbitrate disputes favored?
2. Does the party seeking to avoid enforcement of an arbitration clause have both the burden of production of evidence and burden of persuasion?
3. Does a court exceed its authority under both state and federal law when, in considering a motion to enforce an arbitration clause, the court summarily decides matters that the parties agreed to resolve via arbitration and those matters are not germane to the narrow issue of enforcement of an arbitration clause?
4. Does a court err in determining that the parties' forum selection clause is unconscionable where there is no evidence that the clause would effectively deny the plaintiffs any real opportunity to litigate their claims?

5. Where an agreement to arbitrate is enforceable, are enforceability of contract clauses regarding limitation of damages, governing law and choice of forum issues beyond the authority to the court to decide where the parties have decided all disputes shall be resolved via arbitration?
6. Should a contract clause requiring an award of attorney fees and cost incurred in enforcing an arbitration clause be enforced where arbitration was so ordered?
7. Should an arbitration award be vacated where the trial court improperly ordered that the arbitrator ignore the parties' limitation of damages, governing law and forum selection clauses?
8. Should a court judgment granting of attorney fees incurred in confirming an arbitration award be vacated when the arbitration award was improperly confirmed.

II. SUMMARY OF ARGUMENT

Central to this appeal are three contracts between the parties. Each provides that “[A]ny dispute, controversy or claim arising out of this Agreement or the breach thereof shall be settled by arbitration.” CP 35 para 10a.; CP 51 para 10a.; & CP 65 para 10a. Irrespective of this

command language of the agreements, the trial court predetermined three non-arbitration contract provisions and then ordered that the remainder of the parties' disputes be decided in arbitration. CP 217-18. Thus, the court's fundamental error was that it improperly imposed its judgment on issues that only the arbitrator had the authority to decide. While the trial court did have the authority to determine if the arbitration clause was unconscionable, it made this determination without any supporting facts in the record which would support a determination of unconscionability.

III. FACTS

The defendant Doctor's Associates, Inc., a Florida Corporation, (hereafter DAI) is a franchisor for the Subway Sandwich Stores ®. Plaintiffs Waqas Saleemi and Farooq Sharyar are DAI franchisees for three separate Subway stores pursuant to three separate Franchise Agreements. CP 25-40, CP 41-57, CP 58-71. The first of these Agreements was executed in March, 2004. CP 58. The other two Agreements were signed approximately two years later in June, 2006.¹ CP 25 & 41.

¹ The last of these Agreements was signed on June 21, 2008. Paragraph 14 of that Agreement specifically provides that several provisions in all prior Agreements between the parties were amended to be consistent with the June 21, 2008 Agreement. Those amended provisions are identified by paragraph and subparagraph numbers. Of significance in this appeal is that Paragraph 10 (dispute resolution) and Subparagraphs 13 (governing law) and 17 (limitation on damages) of the prior Agreements were thereby amended to contain the same language as is in same number paragraphs contained in the June 21, 2008 Agreement. CP 38, para 14.

All three Agreements contain an identical dispute resolution paragraph that reads as follows:

10. ARBITRATION OF DISPUTES

a. *Any dispute, controversy or claim arising out of or relating to this Agreement or the breach thereof shall be settled by arbitration.* The arbitration shall be administered by an arbitration agency, such as the American Arbitration Association (“AAA”) or the American Dispute Resolution Center, in accordance with its administrative rules including, as applicable, the Commercial Rules of the AAA and under the Expedited Procedures of such rules or under the Optional Rules For Emergency Measures of Protection of the AAA. Judgment rendered by the Arbitrator may be entered in any court having jurisdiction thereof. The cost of arbitration will be borne equally by the parties. *The parties agree that Bridgeport, Connecticut shall be the site for all hearings held under this Paragraph 10,* and that such hearing shall be before a single arbitrator, not a panel, and neither party shall pursue class claims and/or consolidate the arbitration with any other proceedings to which we are a party. The parties will honor validly served subpoenas, warrants and court orders.

CP 35, CP 51, CP 65 (*Italic added.*).

On June 8, 2008, DAI sent a Termination of Franchise Agreements letter to the plaintiffs. The termination letter asserted that the plaintiffs violated the non-competition clause contained in paragraph 5.d of the respective Agreements. CP 73.

On August 20, 2008, DAI sent a demand for arbitration letter to the American Arbitration Association and to the plaintiffs. DAI sent an

Amended Demand for Arbitration on August 22, 2008. CP 75-6. The demand for arbitration sought a determination of whether the plaintiffs breached the Agreements by violating the above referenced non-competition clause. The relief DAI sought via arbitration included termination of the Agreements and damages. CP 76.

Six days later, on August 28, 2008, the plaintiffs filed a Complaint in Pierce County Superior Court. CP 1-4. The prayer for relief in their Complaint included a request for an order enjoining DAI from proceeding with the then pending arbitration. CP 3. DAI Answered and Counterclaimed that the court did not have authority to address the termination and damage issues raised in the plaintiffs Complaint because those issues were subject to contractually agreed upon mandatory, binding arbitration. Pursuant to the Agreements DAI was entitled to an award of reasonable attorney fees and costs incurred in compelling the plaintiffs to comply with the contracts' arbitration clauses. CP 6, ln 9-25, CP 7.

On September 10, 2008, DAI filed a Motion to Compel Arbitration. CP 8-9. That motion was supported by a Memorandum of Authorities and a Declaration (CP 10-78).

The plaintiffs then (on September 17, 2008) filed a Motion to Determine Arbitrability accompanied by a Memorandum in Opposition to Compel Arbitration. CP 80-206. The plaintiffs' sole argument against

arbitration was summed up in one sentence: “[I]n this case the arbitration agreements are wholly unenforceable because they are unconscionable.”

CP 83, ln 3-4.

The plaintiffs asserted that their agreements to arbitrate all disputes were unconscionable because of the following contractual provisions within the Agreements:

- 1) a limitation of damages clause, limiting both parties to \$100,000.00 in damages and other relief (CP 89 (see CP 38, 54, 68 – para 14));
- 2) the venue selection clause agreeing that all arbitration proceedings shall be held in Bridgeport, Connecticut (CP 83 ln 2-16 (see CP 35-6, 51-2, 66 – para 10 g.)); and
- 3) a choice of law provision agreeing to apply the laws of Connecticut for interpretation and enforcement of the Agreements (with the agreed exception that Connecticut franchise law is not applicable). (CP 89 ln 18-24 – CP 90 ln 1-17 (see CP 37, 53, 68 – para 13))².

² Plaintiffs asserted that other provisions of the Agreements were unconscionable. CP 87 ln 13 – CP 88 ln 1; CP 90 ln 18 – CP 94 ln 7. However, there is no indication that the trial court considered these arguments or that those arguments influenced the courts subsequent order. RP 17, ln 6-23; CP 217-8. Consequently, those arguments are not addressed here.

DAI filed a reply Memorandum on September 18, 2008. CP 210-15. Relying on *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), DAI argued that in addressing a motion to enforce an agreement to arbitrate the trial court's authority was limited to determining whether the arbitration clause, in isolation, was enforceable. If the court determined that the arbitration clause was to be enforced, the force and effect of the other terms of the contract, and the contract as a whole, were matters solely for the arbitrator's consideration. CP 211, ln 5-15.

The Motion to Compel Arbitration was heard on September 19, 2008. The court ordered the plaintiff to submit to arbitration. However, the court ruled that the agreements to arbitrate in the State of Connecticut were unconscionable and thereby unenforceable. The court further held, without explanation, that the arbitration shall be "...in Washington under Washington law, with no limitation on damages." CP 217-8. RP (Sept 19, 2008) pg 17, ln 6-22. Although the court ordered that the plaintiffs were required to proceed to arbitration, the court did not award DAI its reasonable attorney fees and costs incurred in enforcing the agreements to have all disputes resolved via arbitration.

The matter then proceeded to arbitration in Tacoma, Washington under Washington law with no limitation on damages. The arbitrator

awarded the plaintiffs \$230,000.00 in compensatory damages, \$161,536.00 for attorney's fees and \$32,837.96 for costs. CP 222.

DAI then moved to vacate the arbitration award because, pursuant to the trial court's improper orders, the arbitration award was improperly determined based upon Washington law, conducted in the State of Washington, and improperly exceeded the limitation of damages set forth in the Agreements.³ CP 234, ln 21-4 – CP 235, ln 1-2. In the supporting memorandum DAI again asserted that the trial court acted *ultra vires* when it decided issues that were beyond the narrow issue of enforceability of the agreements to arbitrate all of the parties' disputes. CP 298- 301 ln.7.

On February 12, 2010, the court entered an order confirming the arbitration award. DAI filed a Notice of Appeal on February 17, 2010. On February 22, 2010 the plaintiffs filed a motion for award of post arbitration attorney fees and costs. On March 19, 2010 the court entered a judgment against DAI for attorney fees in the amount of \$6,453.33. DAI filed an Amended Notice of Appeal pertinent thereto on March 24, 2010.

To the extent that the trial court ordered the plaintiffs to proceed to arbitration, its order was proper and is a not subject of this appeal.

However, DAI respectfully submits that for the reasons argued below, the

³ DAI also asserted the arbitrator improperly awarded pre-judgment interest. CP 235, para 4. The court agreed and vacated that portion of the arbitration award. CP 317-8. This issue is not a matter on appeal.

trial court erred when it determined the enforceability of a contractual limitation on damage clause, choice of law provision or the choice of venue agreement. Those matters were disputes that the parties contractually agreed would be determined in arbitration – not by the trial court. Further, to the degree that those three issues directly related to the narrow issue of unconscionability of the arbitration clauses (if at all), the plaintiffs failed to present factual evidence sufficient for a court to conclude that those clauses were unconscionable or were otherwise unenforceable.

Thus, the trial court's order voiding the Agreements' limitation on damages, venue and choice of law clauses should be reversed. The award of the arbitrator should be vacated and the parties should be required to resubmit all of their disputes to arbitration as contractually agreed, without the improper predetermination of these issues by the trial court. Further, the court's order awarding the plaintiffs' post arbitration attorney fees should be reversed and DAI should be awarded its reasonable attorney fees and costs incurred in enforcing the parties' agreement to arbitrate all disputes. Those fees and costs should include both the amounts that DAI incurs in this court and the amounts it has incurred at the trial court level.

IV. ARGUMENT

1. *Standard of Review is de novo*

Arbitrability of a dispute is a question of law that is reviewed de novo. *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797, 225 P.3d 213, 223 (2009); *Townsend v. Quadrant Corp.*, 153 Wn. App. 870, 878, 224 P.3d 818, 824 (2009); *Davis v. General Dynamics Land Systems*, 152 Wn. App. 715, 718, 217 P.3d 1191, 1192 (2009).

When the validity of an agreement to arbitrate is challenged, courts apply ordinary state contract law. General contract defenses such as unconscionability may invalidate arbitration agreements. Unconscionability is also a question of law we review de novo.

McKee v. AT & T Corp., 164 Wn.2d 372, 383, 191 P. 3d 845, 851 (2008) (citations omitted).

Other than the award of attorney fees, the only pertinent issue in this case is the validity of the arbitration agreements. The plaintiffs' sole assertion to invalidate the arbitration clauses was unconscionability. Therefore, *de novo* is the correct standard of review here.

2. *Enforcement of Arbitration Agreements is Strongly Favored.*

The validity of the arbitration clauses in this case is governed by the *Federal Arbitration Act* and Washington State's *Uniform Arbitration Act*. Both statutes reflect a strong policy for enforcement of agreements to

resolve disputes via arbitration. The applicable law only requires parties to arbitrate when they have so agreed. The statutes require that courts enforce privately negotiated agreements to arbitrate in the same manner that the courts enforce other contracts - in accordance with the contract terms and subject to standard contract defenses. 9 U.S.C. § 2 (“a written provision in ... a contract to settle by arbitration a controversy ... arising out of such contract ... shall be valid, irrevocable, and enforceable save upon any grounds as exist at law or in equity for the revocation of any contract.”); RCW 7.04 et. seq.; *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d at 798; *Davis v. General Dynamics Land Systems*, 152 Wn. App. 715, 718, 217 P.3d 1191, 1192 (2009); *Scott v. Cingular Wireless*, 160 Wn.2d 843, 858, 161 P.3d 1000 (2007)(citing *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301, 103 P.3d 753 (2004)).

3. Burden of Proof is on the Party Seeking to Avoid Enforcement of an Agreement to Arbitrate.

Irrespective of the defense or objection raised, our courts are required to indulge every presumption in favor of enforcement of an arbitration agreement. *Zuver v. Airtouch Communications, Inc.*, 153 Wn. 2d at 302.

The plaintiffs here do not deny that they entered into the subject Agreements. Instead, they seek to avoid enforcement of the arbitration clause based upon allegations that “... the arbitration agreements are wholly unenforceable because they are unconscionable.” CP 83, ln 3-4. Thus, the plaintiffs assert the affirmative defense of unconscionability as a basis to avoid enforcement of a contractual obligation. CR 8 (c). As with all affirmative defenses, the burden of proving unconscionability is on the party who asserts the same. *Bernsen v. Big Bend Elec. Co-op., Inc.*, 68 Wn. App. 427, 435, 842 P.2d 1047, 1052 (1993). The burden is applicable to both the presentation of evidence and the burden of persuasion.

Even more directly on point here is the well established principle that the burden of proof is upon the party who seeks to avoid enforcement of an agreement to submit disputes to arbitration. *Townsend v. Quadrant Corp.*, 153 Wn. App. at 878. Consequently, here the plaintiffs have the burden to overcome the governing presumption in favor of enforcement of arbitration agreements.

4. *Arbitration Agreement are Enforced Independently of Other Contract Terms and the Contract as a Whole.*

Courts must consider the validity of an agreement in isolation of the other contract terms. Thus, where the arbitration clause within a contract is not itself separately induced by fraud, that clause will be

enforced even if the entire contract that contained the arbitration clause was not otherwise enforceable. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006).

We review questions of arbitrability de novo and determine the arbitrability of the dispute by examining the arbitration agreement between the parties. If we can fairly say that the parties' arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration.

Davis v. General Dynamics Land Systems, 152 Wn. App. 715 at 718 (citations to authority omitted).

If the arbitration clause is enforceable, all other disputes subject to the parties' agreement to arbitrate must be determined by arbitration. RCW 7.04A.060 sets forth the decision-making authority for both the courts and arbitrators:

- (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.
- (2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.
- (3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

Thus, where there is a challenge to the enforceability of an arbitration agreement clause, the court must determine that issue in isolation. RCW 7.04A.060(2). If that clause is not enforceable, then the remaining contract disputes are resolved by proceeding to trial in court. If the arbitration clause is enforceable, the court does not have the authority to determine any other dispute which the parties agreed to arbitrate.

Accordingly, if a party makes a discrete challenge to the enforceability of the arbitration clause, a court must determine the validity of the clause. If the court finds as a matter of law that the arbitration clause is enforceable, all issues covered by the substantive scope of the arbitration clause must go to arbitration. RCW 7.04A.060(2), (3). If the court finds as a matter of law that the arbitration clause is not enforceable, all issues remain with the court for resolution, not with an arbitrator.

Townsend v. Quadrant Corp., 153 Wn. App. 881; *McKee v. AT & T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008).

Arbitration agreements are a matter of contract. The arbitrator's authority is derived from an agreement to arbitrate. A court's authority to resolve disputes is correspondingly limited. It is the parties' expectations and intentions expressed in their contracts that control. Parties are free to structure their arbitration agreements as they see fit. *Stolt-Nielsen S. A. v. AnimalFeeds Int'l Corp.*, 559 U.S. ___, 130 S.Ct. 1758, 1773-4, ___ L.Ed.2d ___ (2010) ("private agreements to arbitrate are enforced according to their terms" quoting *Volt Information Sciences, Inc. v.*

Board of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 479, 109 S. Ct. 1248, 103 L. Ed.2d 488 (1989) and *citing DAI v. Casarotto*, 517 U.S. 681, 688, 116 S. Ct. 1652, 134 L. Ed.2d 902 (1996).

Thus, it is not for the courts to decide what should and should not be arbitrated. Here, the parties agreed that “[A]ny dispute, controversy or claim arising out of this Agreement or the breach thereof shall be settled by arbitration.” The plaintiffs’ arguments regarding the enforceability of limitation on damages, the controlling law and the proper forum clauses indisputably all arise out of the Agreements. They are therefore matters that the parties agreed to arbitrate. Consequently, the trial court did not have the authority to decide these disputes because in doing so it improperly violated the parties’ agreement in substituting its judgment for that of a decision maker chosen by the parties.

5. *The Party’s Agreement to Arbitrate is not Unconscionable.*

As discussed above, courts are to consider and decide the narrow question of the validity of an agreement to arbitrate clause without deciding the issues that the parties agreed to resolve in arbitration.

Agreements to arbitrate are subject to contract enforcement defenses such as fraud, duress, or unconscionability. *Zuver v. Airtouch Communications, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753, 759 (2004).

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement *is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.* (Italic added).

RCW 7.04A.060; *Townsend v. Quadrant Corp.*, 153 Wn. App. 878-9.

RCW 7.04A.070(1) compels the court to “summarily” determine a motion to compel arbitration:

On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. *If the refusing party opposes the motion, the court shall proceed summarily to decide the issue.* Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate. (Italic added).

Woodall v. Avalon Care Center Federal Way, LLC, 2010 WL 1875512, 11 (Wn. App. Div. 1, 2010).

Here, “unconscionability” is the only defense the plaintiffs have raised to enforcement of the arbitration clauses. CP 83, ln 3-4.

Unconscionability is divided into two categories – substantive and procedural (discussed below).

...[S]ubstantive unconscionability involves cases “ ‘where a clause or term in the contract is ... one-sided or overly harsh....’ ” However, such unfairness must truly stand out. “ ‘Shocking to the conscience’, ‘monstrously harsh’, and

“exceedingly calloused” are terms sometimes used to define substantive unconscionability.’

Torgerson v. One Lincoln Tower, LLC, 166 Wn.2d 510, 519, 210 P.3d 318, 323 (2009) (citations to quotations omitted). The inattention to the terms of a contract or misguided judgment on the part of a party to a contract does not make a clause unconscionable. *Id.* at 521 (2009).

6. *The Party’s Forum Selection Clause is not Substantive Unconscionable.*

Plaintiffs appear to assert that because they would incur increased costs in arbitrating at the venue (Connecticut) designated in the forum selection clause in the Agreements, the enforcement of such a clause would be overly harsh and unjust. CP 86 – CP 87 ln 4.

In Washington, a forum selection clause, even one with a remote forum, is presumed valid and will be enforced unless the party challenging the clause clearly demonstrates that enforcement would be so unjust as to essentially deprive a party of meaningful opportunity to litigate their claims.

Particularly in the commercial context, the enforcement of forum selection clauses serves the salutary purpose of enhancing contractual predictability. See *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 516, 94 S.Ct. 2449, 2455-56, 41 L.Ed.2d 270 (1974). Nevada, like Washington, requires enforcement of forum selection clauses unless they are “unreasonable and unjust.” Compare *Kysar v. Lambert*, 76 Wash. App. 470, 484, 887 P.2d 431, 440 (1995), review

denied, 126 Wn.2d 1019, 894 P.2d 564 (1995) with Tandy Computer Leasing v. Terina's Pizza Inc., 105 Nev. 841, 784 P.2d 7, 8 (1989) (both citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 472 n. 14, 105 S.Ct. 2174, 2181 n. 14, 85 L.Ed.2d 528 (1985)). This is consistent with the test set forth by the U.S. Supreme Court. See Burger King, 471 U.S. at 472 n. 14, 105 S.Ct. at 2181 n. 14; M/S Bremen v. Zapata Off-Shore Co., 407 U.S. 1, 10, 92 S.Ct. 1907, 1913, 32 L.Ed.2d 513 (1972) (a forum selection clause is prima facie valid and should be enforced unless the challenger clearly shows enforcement would be “unreasonable and unjust”). Thus, even where a forum selection clause establishes a remote forum for resolution of conflicts, “the party claiming [unreasonableness] should bear a heavy burden of proof.” M/S Bremen, 407 U.S. at 17, 92 S.Ct. at 1917. See also Restatement (Second) Conflict of Laws § 80, comment c (1989 rev.) (“[t]he burden of persuading the court that stay or dismissal of the action would be unfair or unreasonable is upon the party who brought the action”); Pelleport Investors, Inc. v. Budco Quality Theatres, Inc., 741 F.2d 273, 280 (9th Cir.1984) (“[a]bsent some evidence submitted by the party opposing enforcement of the clause to establish fraud, undue influence, overweening bargaining power, or such serious inconvenience in litigating in the selected forum so as to deprive that party of a meaningful day in court, the provision should be respected as the expressed intent of the parties”).

Voicelink Data Services, Inc. v. Datapulse, Inc., 86 Wn. App. 613, 617-618, 937 P.2d 1158, 1160 - 1161 (1997).

Connecticut law on enforcement of forum selection clauses is very much in accord with Washington law.

The Pepes' [a franchisee] contention that the forum selection clause should not be enforced because it is a contract of adhesion is equally unavailing. “The general rule is that where a person of mature years and who can

read and write, signs or accepts a formal written contract affecting his pecuniary interests, it is his duty to read it and notice of its contents will be imputed to him if he negligently fails to do so” *Ursini v. Goldman*, 118 Conn. 554, 562, 173 A. 789 (1934). This rule is fully applicable to forum selection clauses. *Phoenix Leasing, Inc. v. Kosinski*, 47 Conn.App. 650, 654-55, 707 A.2d 314 (1998). There is no evidence of any fraud or artifice sufficient to overcome this rule here. The forum selection clause, quoted above, is clear and unambiguous that actions brought by the franchisee must be brought in Pennsylvania. See *Effron v. Sun Line Cruises, Inc.*, 67 F.3d 7, 9 (2d Cir.1995).

Pepe v. GNC Franchising, Inc., 46 Conn. Supp. 296, 300, 750 A.2d 1167, 1169 (2000).

It is true that an arbitration agreement may be substantively unconscionable where the cost to arbitrate is, as a practical matter, exculpatory. *Woodall v. Avalon Care Center Federal Way, LLC*, 2010 WL 1875512 at 8.; *Townsend v. Quadrant Corp.*, 153 Wn. App. 883; *Mendez v. Palm Harbor Homes, Inc.*, 111 Wash. App. 446, 464, 45 P.3d 594 (2002).

In *Mendez* Mendez presented admissible evidence setting out his economic situation and the cost of arbitration. From that evidence the court held that the over all cost of arbitration (filing fee of \$2,000.00) presented a real barrier to Mendez litigating a relatively small pecuniary claim (\$1,500). *Id.* at 465, 471.

The plaintiffs here have presented no such evidence. There is no

evidence in the record of any extra expense that the plaintiffs would except to incur in an arbitration conducted in Connecticut. Plaintiffs failed to produce any evidence from which the trial court could compare the cost of conducting arbitration in Washington as opposed to Connecticut. There is no evidence of the plaintiffs' economic worth. Plaintiffs did not put into evidence any comparison of the cost of arbitration versus the value of their claim.

Therefore, Plaintiffs failed to meet the heavy burden of proof necessary to show that the agreed upon arbitration forum selection clause was so “[S]hocking to the conscience”, “monstrously harsh”, and “exceedingly calloused” to overcome the strong presumption in favor of enforcement of a forum selection clause. *Townsend v. Quadrant Corp.*, 153 Wn. App. 883; *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 815-816. Thus, the court erred concluding that the forum selection clause is unconscionable. CP 217, ln. 18-20.

7. The Parties' Choice of Law Clause is not within the authority of the court to decide and is not Substantively Unconscionable.

Plaintiffs argue that the Agreements' choice of governing law provisions is unconscionable. CP 90, ln 14- 17. Although the trial court did not provide any articulated basis, it apparently agreed with the

plaintiffs when it required arbitration proceed “under Washington law.”
CP 218, ln 4-3; RP (Sept 19, 2008) pg 17, ln 6-22.

Choice of law is a question of law that is subject to *de novo* review. *Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC*, ___ Wn. App ___, 230 P.3d 625, 633 (2010).

The plaintiffs’ challenge to the enforceability of the Agreements’ choice of governing law provisions is certainly a dispute or controversy relating to the Agreements. Thus, it is a matter that is within the scope of arbitration clauses. CP 51, para 10 a. Plaintiffs have not demonstrated, or even argued, that the choice of law provisions are so entwined with the arbitration clause that resolution of this issue is necessary to the court’s limited and discrete role of evaluating enforceability of the parties’ agreements to arbitrate their disputes. Therefore, for the reasons articulated above, the trial court erred in pre-determining enforcement of the choice of governing law clause as that issue should be resolved by the arbitrator. RCW 7.04A.060 (2) (3); *Townsend v. Quadrant Corp.*, 153 Wn. App. 881; *McKee v. AT & T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008).

In any event, irrespective of the court’s authority to decide the issue, the plaintiffs’ argument that the choice of governing law

provision is unconscionable is without merit. Plaintiffs argue “[T]his choice of law provision is a blatant attempt to evade provision of FIPA (Washington’s Franchise Investment Protection Act – RCW 19.100 et seq.), and makes the arbitration clause unconscionable.”

However, as DAI explicitly expressed to the court, the choice of law provision in the Agreements, clearly excludes the application of Connecticut franchise law for franchises located outside of that state.

This agreement will be governed by and construed in accordance with the substantive laws of the State of Connecticut, without reference to its conflicts of law, except as may otherwise be provided in this agreement. *The parties agree any franchise law or business opportunity law of the State of Connecticut, now in effect or adopted or amended after the date of this Agreement, will not apply to franchises outside of Connecticut.*

CP 37, para 13.

There is no other choice of law provision in the Agreements. Therefore, other than agreeing that Connecticut franchise law will not apply, there is no agreement between the parties pertaining to the governing franchise law. Where parties have not specified which law will govern a dispute the court is required to apply the law of the most significant relationship to the

contract.

[A]bsent a choice of law by the contractual parties, the validity and effect of a contract are governed by the law of the state which has the most significant relationship to the contract.....”

Freestone Capital Partners L.P. v. MKA Real Estate Opportunity Fund

I, LLC, ___ Wn. App ____, 230 P.3d 625, 632-33 (2010). Because

Washington is the only state other Connecticut than that has any significant relationship to the Agreements and by agreement Connecticut’s franchise law is not applicable, Washington franchise law (FIPA) is applicable per the parties’ Agreements. Therefore, contrary to the plaintiffs’ assertion, DAI did not engage in any attempt to evade the application of FIPA.

As to non FIPA issues, the parties’ choice of governing law must be honored. Consistent with this state’s policy of enforcing contract provisions whenever possible, the parties’ contractual choice of law agreement is generally enforced. ***Schnall v. AT & T Wireless Services, Inc.***, 168 Wn.2d 125, 131, 225 P.3d 929, 933 (2010).

The “[p]rime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.” RESTATEMENT § 187 cmt. e. “These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In

this way, certainty and predictability of result are most likely to be secured.”

Erwin v. Cotter Health Centers, 161 Wn.2d 676, 700, 167 P.3d 1112, 1124 (2007).

In enforcing the parties’ choice of governing law the *Erwin* court relied upon and quoted the *Restatement* section 187 as follows:

“ § 187. Law of the State Chosen by the Parties

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.”

Id., at 694-5.

In the plaintiffs' choice of law argument (CP 89 ln 17- CP 90 ln 17), they did not identify any issue other than the application of FIPA, which DAI agrees will govern any franchise law related contract disputes. CP 18 ln 3-9. Because the plaintiff did not identify any other (non-FIPA) choice of law dependant issues they again failed to meet their required burden of proof. Therefore, it was improper for the trial court to select which state's laws would apply to this dispute.

Thus, even if the trial court was within its authority in deciding this issue, it erred in requiring Washington substantive law to govern all issues before the arbitrator. CP 218 ln 4; RP, Pg 17, ln 12-13.

8. Enforceability of the Limitation on Damages clause is an Issue for Determination by the Arbitrator and is not Unconscionable.

Plaintiffs argue that the Limitation on Damages clause found in paragraph 17 of the Agreements is unconscionable. That clause provides:

17. LIMITATION ON DAMAGES. EACH PARTY HEREBY WAIVES, WITHOUT LIMITATION, ANY RIGHT IT MIGHT OTHERWISE HAVE TO ASSERT A CLAIM FOR AND TO RECOVER LOST PROFITS AND OTHER FORMS OF CONSEQUENTIAL, INCIDENTAL, CONTINGENT, PUNITIVE AND EXEMPLARY DAMAGES FROM THE OTHER EXCEPT AS PROVIDED HEREIN. EACH PARTY'S LIABILITY SHALL BE LIMITED TO ACTUAL COMPENSATORY DAMAGES. ACTUAL COMPENSATORY DAMAGES SHALL BE THE GREATER OF (1) \$100,000.00 OR (2) AT YOUR (plaintiffs) SOLE OPTION, ALL AMOUNTS PAID TO US (DAI) FOR FRANCHISE FEES AND

ROYALTIES OR THIS AGREEMENT FOR UP TO THREE YEARS PRECEDING THE DATE OF ANY AWARD HEREIN. IF YOU (plaintiffs) CHOOSE OPTION 2, WE (DAI) WILL ALSO REPURCHASE YOUR EQUIPMENT, PURCHASED THROUGH US, AT A DISCOUNTED VALUE USING THE FIVE YEAR, STRAIGHT LINE METHOD OF CALCULATION. EACH PARTY ACKNOWLEDGES THAT IT HAS HAD A FULL OPPORTUNITY TO CONSULT WITH COUNSEL CONCERNING THIS WAIVER AND THAT THIS WAIVER IS INFORMED, VOLUNTARY, INTENTIONAL, AND NOT THE RESULT OF UNEQUAL BARGAINING POWER.

CP 38, 54 & 68-9 (bold print and capitalization original).

Again, the trial court found that the arbitration clauses were themselves enforceable. CP 218 ln 3. Plaintiffs did not appeal from that decision, and it is therefore, not on appeal.

The limitation of damages issue is a matter within the scope of the arbitration clause which specifically includes “any dispute or controversy” arising out of the Agreements. Therefore, the enforceability of the contractual limitation on damages clause is a matter that must be decided by the arbitrator rather than by the trial court. RCW 7.04A.060(2), (3). *Townsend v. Quadrant Corp.*, 153 Wn. App. 881; *McKee v. AT & T Corp.*, 164 Wn.2d 372, 383, 191 P.3d 845 (2008). The trial court acted beyond its authority in determining that the agreed limitation of damages clause was void prior to, or as a condition of, ordering the case to arbitration.

Even if deciding the limitation of damages issue was within the court's authority, it erred in declaring that Agreement provision void. As with all contractual provisions, an agreed limitation on remedies clause is enforceable by the courts because it is axiomatic that parties to a contract are bound by its terms. Here, the contractual provision limiting remedies is not unconscionable and therefore it must be enforced. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 517, 210 P.3d 318, 322 (2009).

Like all other contractual provisions, limitation on remedy clauses is subject to affirmative defenses such as unconscionability. Plaintiffs here assert that the above limitation of damages is void because it is "substantively unconscionable." CP 89 ln 16. A question of whether a limitation on remedies is unconscionable is a question of law that is reviewed *de novo*. *Id.*, at 517.

A limitation on remedies clause has been held to be unconscionable where the provision effectively denied a party any meaningful remedy irrespective of the breach by the other party. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293 318, 103 P.3d 753). However, the limitation on damages clause here is not one sided, designed to unilaterally favor DAI or, to drastically limit the plaintiffs' right to vindicate a breach. Instead, the clause provides a cap on damages at

“actual compensatory damages” of \$100,000 or in the franchisee’s sole discretion an amount equal to three years of franchise fees and royalties that plaintiffs paid to DAI. The damage limitation clause is applicable equally to both parties irrespective of which party is found to have breached the contract. Thus, the limitation on damages clause here is not unconscionable. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d at 521-2.

Plaintiffs also argue that the limitation on damages clause is against public policy because, they argue, it “contravenes RCW 19.100.190 (3).” CP 89, ln. 6-8. This argument is based on the plaintiffs’ apparent misreading of the statute.

In relevant part RCW 19.100.190 provides:

(2) Any person who sells or offers to sell a franchise in violation of this chapter shall be liable to the franchisee or subfranchisor who may sue at law or in equity for damages caused thereby for rescission or other relief as the court may deem appropriate. In the case of a violation of RCW 19.100.170 rescission is not available to the plaintiff if the defendant proves that the plaintiff knew the facts concerning the untruth or omission or that the defendant exercised reasonable care and did not know or if he had exercised reasonable care would not have known of the untruth or omission.

(3) The suit authorized under subsection (2) of this section may be brought to recover the actual damages sustained by the plaintiff and the court may in its discretion increase the award of damages to an amount not to exceed three times the actual damages sustained: PROVIDED, That the

prevailing party may in the discretion of the court recover the costs of said action including a reasonable attorneys' fee.

By its terms RCW 19.100.190(3) is not relevant to all breach of contract claims made by a franchisee. Instead by specific reference to subsection (2), RCW 19.100.190(3) is only applicable to “Any person who sells or offers to sell a franchise in violation of this chapter (RCW 19.100 et seq.)” There is no assertion in this case that DAI sold or offered to sell a franchise to the plaintiffs in violation of FIPA. Instead, the plaintiffs’ Complaint asserts that DAI improperly attempted to terminate their franchises in contravention of RCW 19.100.180(J). CP 2, ln 2-13. Therefore, RCW 19.100.190(3) is not pertinent to the plaintiffs’ argument that the limitation of damages clause is unconscionable.

9. *The Agreements are not Procedural Unconscionable.*

Procedural unconscionability involves brazen unfairness in the bargaining process resulting in a distinguished lack of meaningful choice, as opposed to substantive unconscionability which pertains to unfairness of the terms or results. *Id.*, at 518.

Procedural unconscionability is the lack of meaningful choice, considering all the circumstances surrounding the transaction including the manner in which the contract was entered, whether each party had a reasonable opportunity to understand the terms of the contract, and whether the important terms were hidden in fine print. The three factors

should not be applied mechanically without regard to whether in truth a meaningful choice existed.

Townsend v. Quadrant Corp., 153 Wn. App. at 883-4.

Procedural unconscionability often involves an analysis of whether a contract is one of adhesion. Determination of “adhesion” depends on three primary considerations: (1) is the contract on standard printed form; (2) was prepared by one party and submitted to the other on a take it or leave it basis; and (3) was there no equality of bargaining power between the parties? However, an adhesion contract is not necessarily unconscionable. *Id.*, at 883-4. The true lack of a meaningful choice is at the heart of the issue. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d at 519.

Here, there can be no serious issue of procedural unconscionability. The franchise disclosure process is long and detailed. It requires the franchisee to actively answer questions and to read a thick prospectus. The franchisees in this case purchased not one, but three of these franchises, going through the same process on each occasion. The plaintiffs’ first Agreement was executed two years before they signed the last two franchise Agreements. The language in sections 10(a), 13 and 17 (the clauses that are the subject of this appeal) in the first Agreement, are identical to the same sections in the last two Agreements. Compare CP 35

para 10 a; CP 37, para 13; and, CP 38, para 17 with CP 51 and CP 65 para 10 a; CP 53 and CP 68, para 13; and CP 54 and CP 68-9, para 17. Thus, the plaintiff had more than two years to consider the effect of the challenged terms of the Agreements prior to entering into the last two contracts.

Further, the terms in question were not buried in a muddle of fine print. The terms are prominently displayed in, at minimum, the same size print as the other provisions of the Agreements. Each clause is clearly labeled in bold print. In fact, the text of the Limitation on Damages clauses is printed in all capitalized letters and in bold print.

This case involves three franchise stores acquired over a two year period. Therefore, the plaintiffs had ample time, experience and opportunity to comprehend the Agreements' terms. Thus, this is not akin to an employment contract situation where the need to earn a living may overwhelm a party's meaningful choice thereby supporting closer court scrutiny. Instead, the plaintiffs here cannot fairly be said to have lacked meaningful choice or opportunity to review the subject contract terms. Therefore, their procedural unconscionability arguments are without merit.

10. DAI is Entitled to an Award of Attorney fees.

In Washington, parties to litigation may only recover attorney fees where allowed by a statute, contract, or some well-recognized principle of

equity. *Id.*, at 520. Here, Section 10 e of the Agreements provides for an award of attorney fees incurred by a party in court actions to enforce the arbitration clauses:

If prior to an Arbitrator's final decision, either we (DAI) or you (plaintiffs) commence and action in any court of a claim that arises out of or relates to this Agreement (except for the purpose of enforcing the arbitration clause or as otherwise permitted by this Agreement), that party will be responsible for the other parties expenses of enforcing the arbitration clause, including court costs, arbitration filing fees and other costs and attorney's fees.

CP 35, 51, & 65, para 10 e.

The underlying purpose of a fee-shifting contractual provision is to discourage litigious conduct, promote common sense resolution of disputes and to restore a wronged contractual party to the full benefits of the bargain. See *Marassi v. Lau*, 71 Wn App. 912, 918, 859 P.2d 605, 608 (1993).

RCW 4.84.330 provides:

In any action on a contract or lease entered into after September 21, 1977, where such contract or lease specifically provides that attorney's fees and costs, which are incurred to enforce the provisions of such contract or lease, shall be awarded to one of the parties, the prevailing party, whether he is the party specified in the contract or lease or not, shall be entitled to reasonable attorney's fees in addition to costs and necessary disbursements.

Attorney's fees provided for by this section shall not be subject to waiver by the parties to any contract or lease which is entered into after September 21, 1977. Any

provision in any such contract or lease which provides for a waiver of attorney's fees is void.

As used in this section “prevailing party” means the party in whose favor final judgment is rendered.

RCW 4.84.330’s language is mandatory. The statute does not allow for an exercise of discretion in deciding whether to award fees. The only discretion is as to the amount. *CHD, Inc. v. Boyles*, 138 Wn. App. 131, 140, 157 P.3d 415, 419 (2007) citing *Farm Credit Bank v. Tucker*, 62 Wn. App. 196, 207, 813 P.2d 619 (1991). *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. 73, 84, 96 P.3d 454, 460 (2004); *Brown v. Johnson*, 109 Wn. App. 56, 58-9, 34 P.3d 1233 (2001) (Where a tort action is based on a contract that is central to the dispute and the contract contains an attorney fees provision, the prevailing party is entitled to an award of attorney fees). In this case, the Agreement states that the party who commences action in court to determine issues that are subject to agreed resolution by arbitration “... will be responsible for the other parties’ expenses of enforcing the arbitration clause, including court costs, arbitration filing fees and other costs and attorney’s fees.” Consequently, an award of attorney fees to the “prevailing party” is mandatory.

The “prevailing party” is the party in whose favor final judgment is rendered. RCW 4.84.330; *Tacoma Northpark, LLC v. NW, LLC*, 123 Wn. App. at 84 citing *Meenach v. Triple E Meats, Inc.*, 39 Wn. App. 635,

640, 694 P.2d 1125, review denied, 103 Wn.2d 1031 (1985). In Washington, “[T]he general rule in determining who is the 'prevailing party' for the purpose of awarding attorney fees is the 'substantially prevailing' or 'net affirmative judgment' rule, which defines the prevailing party as the one who receives an affirmative judgment in his or her favor.” *Marassi v. Lau*, 71 Wn. App. 912, 916, 859 P.2d 605 (1993); See also *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997).

In blatant disregard of the agreement to arbitrate any disputes, the plaintiffs filed this case in Pierce County Superior Court seeking to bar arbitration. CP 1-4. DAI’s Answer and sole purpose for bringing its motion to compel arbitration was to seek a court order requiring the plaintiffs to submit their claims to arbitration. CP 5-7; CP 8-9; CP 12, ln 6 - CP19. Enforcement of the agreement to arbitrate was the primary issue before the court.

Although the trial court improperly pre-determined issues, it did order that the plaintiffs submit their claims to arbitration. CP 217-8. “However, when there is one primary issue, the party prevailing on that issue is entitled to its costs and fees as the “prevailing party” even though the party lost on another issue.” *Guillen v. Contreras*, 147 Wn. App. 326, 334, 195 P.3d 90, 93 (2008) citing *Osborn v. Grant County*, 130 Wn.2d 615, 630, 926 P.2d 911 (1996). Consequently, DAI received an affirmative

order on the primary issue - enforcing the arbitration clause. DAI is thereby the “prevailing party” entitled to an award of attorney fees and costs incurred in enforcing the arbitration clauses at the trial court level.

DAI requested an award of its attorney fees. CP 7, ln 1- 7 & 10-11; CP 8 ln. 22-3; CP 19, ln 15-17. However, irrespective of DAI’s contractual and statutory rights, the court failed to award DAI any of its attorney fees incurred in enforcing the arbitration clauses. It is therefore respectfully submitted that this matter should be returned to the trial court for the trial court to properly consider and award reasonable attorney fees to DAI.

Where such fees and costs are allowable at trial, the prevailing party may recover the same on appeal as well. *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597, 599 (2009). Therefore, DAI is also entitled to an award of its reasonable attorney fees and costs incurred in this appeal.

V. CONCLUSION

There is no dispute that the trial court acted properly when it ordered the plaintiffs to submit its claims to arbitration. However, the court improperly usurped the arbitrator authority when it decided to void the limitation on damages, choice of venue and governing law clauses set forth in the Agreements. These issues were all matters within the

substantive scope of the arbitration clause that included any disputes arising out of the Agreements. And, in any event, none of the contract clauses in question were either substantively or procedurally unconscionable. The court's improper voiding of these clauses prior to arbitration incorrectly set the law case for the arbitrator.

Therefore, because the arbitration was conducted per court order on improper legal grounds curtailing the arbitrator from enforcing the contracts as written, it is respectfully submitted that the court's order confirming the arbitrator's award (CP 323) must be reversed and the award vacated. Likewise, the court's order awarding the plaintiffs their attorney's fees and costs incurred in confirming the arbitrators' award (CP 348-9) should also be reversed.

Further, this case should be remanded with instructions to the trial court to award to DAI the reasonable attorney's fees and costs it incurred in enforcing the arbitration clauses. Finally, DAI respectfully requests that this court award its reasonable attorney fees and costs incurred in this appeal.

////

////

////

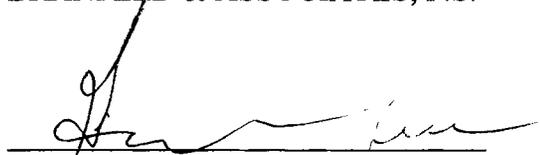
Dated this 14 day of June, 2010.

KRAM, JOHNSON, WOOSTER
& McLAUGHLIN, P.S.



Garold E. Johnson, WSBA #13286
Attorneys for Appellant

BRANFELD & ASSOCIATES, P.S.



Gary H. Branfeld, WSBA #6537
Attorneys for Appellant

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

WASHINGTON STATE COURT OF APPEALS
DIVISION II

DOCTOR'S ASSOCIATES, INC., a Florida corporation,

Appellant,

vs.

WAQAS SALEEMI, a single man, and FAROOQ SHARYAR, a single man,

Respondents.

Court of Appeals No. 40351-0-II

CERTIFICATE OF SERVICE

FILED
COURT OF APPEALS
10 JUN 16 PM 2:17
STATE OF WASHINGTON

I, Dawne M. Rowley, hereby certify that I am over the age of 18 years and not a party to the within action; my business address is and I am employed by Kram, Johnson, Wooster & McLaughlin, P.S., 1901 South "I" Street, Tacoma, Washington 98405. On the 16th day of June, 2010, a true and correct copy of **Brief of Appellant** was delivered to:

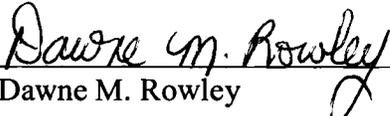
by the following method:

Law Offices of Douglas D. Sulkosky
Douglas D. Sulkosky
1105 Tacoma Avenue S
Tacoma, WA 98402

Personal delivery

I hereby certify under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Tacoma, Washington this 16th day of June, 2010.


Dawne M. Rowley

ORIGINAL