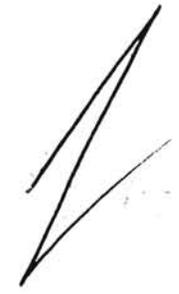


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No. 70664-1



COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

LANGDON HALL LAND, LLC,

Plaintiff/Appellant,

v.

LANGDON HALL, INC.; ALBERT RUMPH; JAMES MCCLAIN AND
JOHN FRANKENFELD,

Defendants/Respondents

REPLY BRIEF OF APPELLANT LANGDON HALL LAND, LLC

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I. INTRODUCTION

McClain's attempt to defend the trial court's decision should be rejected. Respectfully, the trial court erred as a matter of law in granting the motion to vacate the judgment, and that order should be reversed.

While there are other substantial grounds to set aside the trial court's ruling, to reverse, this Court need go no further than the unique facts of this case establishing McClain's waiver of the claimed lack of subject matter jurisdiction.

McClain begins by overstating his argument that subject matter jurisdiction can never be waived. Certainly that is the general rule as it relates to proceedings in a trial court. But that is not the rule when it comes to the narrow procedural issue of the ministerial confirmation of arbitration awards.

Indeed, although McClain claims that subject matter jurisdiction is never waivable, his own cases do not stand for that proposition. Rather, the out-of-state caselaw—which McClain himself argues is highly persuasive as to the Uniform Arbitration Act—holds that subject matter jurisdiction *is* waivable when it comes to a proceeding to confirm an arbitration award. Here, McClain did not timely seek to set aside the judgment. Rather, although he was on actual notice of entry of judgment,

and although he had retained counsel who had appeared in the action, McClain allowed the judgment to be entered without objection. McClain then deliberately waited about five years before raising the issue, so as to let the four year statute of limitations applicable in Florida for filing arbitration awards to expire. Langdon relied on the entry of judgment in Washington, and did not pursue confirmation of the arbitration award in Florida—because it already had reduced the arbitration award to a judgment here. McClain now asks the Court to reward his behavior by finding the Washington judgment void.

McClain's arguments fare no better on the merits. Washington's arbitration statute simply does not say what McClain argues – that Washington courts, as a matter of law, lack jurisdiction to confirm arbitration awards that were entered in other states. McClain admits that his argument requires the Court to read between the lines of the Act, but if the Legislature had meant to cut off jurisdiction in this manner it would have said so, particularly given the controlling *Hidden* case, which squarely holds that Washington courts have jurisdiction to enter a judgment on an arbitration award from another state. In other words, if the Washington legislature had intended to overrule the *Hidden* case, it would have said so. But it did not. Finally, McClain also cannot account

for the fact that Florida law, too, permits out-of-state confirmation of arbitration awards. If the State of Florida is not offended, where is the harm in allowing a Washington court, which otherwise had jurisdiction over McClain, who does business here, to enter the judgment?

McClain's arguments with regard to the Federal Arbitration Act are even less convincing and again underscore the need for reversal. So desperate is McClain that he argues—contrary to decades of U.S. Supreme Court precedent—that a lending transaction between Washington and Florida entities is somehow not “interstate commerce.” But that position is belied by literally legions of cases. McClain's other argument is a reaching claim that the language of the arbitration clause in the underlying agreement conferred exclusive jurisdiction on Florida courts to confirm the award, but that theory is contracted by the plain language of the parties' agreement, which contains no such limitation.

There is no dispute that McClain owes Langdon the money at issue and McClain has no challenge to the merits of the arbitration award. Langdon comported with existing caselaw when it confirmed the award in Washington. This Court should not strain to find the ministerial confirmation of an arbitration award invalid, so that McClain can escape all liability on the debt. That position is manifestly unfair as well as

legally mistaken, and should be rejected. The Court should reverse the trial court's order vacating the judgment.

II. REBUTTAL STATEMENT OF THE CASE

Several false or misleading statements by McClain, though not directly germane to this appeal, deserve correction. First, McClain has no evidence that Langdon is the "alter ego" of Mr. Bredvik. Mr. Bredvik is Langdon's manager, but Langdon is an investment entity serving a number of individuals whose investments were lost due to McClain's embezzlement scheme.

Second, Mr. Bredvik's errors of youth 20 years ago (for an activity that is in the process of being legalized in this state) are wholly irrelevant to this motion, or to the larger question of whether Landgon's investors should be able to recover the embezzled funds from McClain. McClain is simply attempting to smear Mr. Bredvik's character, which is not only impermissible under ER 404, but is another indication of the lack of merit of McClain's underlying argument. Beyond that, Mr. Bredvik simply did not have anything to do with the subject matter of this appeal. The relevant facts only involve actions taken by the parties' attorneys.

Third, Langdon did not misrepresent anything to the trial court. As

one basis for venue, Langdon's complaint stated that a guarantee, which was part and parcel of the investment transaction at issue, was signed by McClain in King County (as the notary's stamp confirms). CP 379. But in any event, the statement in Langdon's complaint is immaterial to any jurisdictional issues. Venue was clearly proper in King County because McClain purports to be a nonresident of Washington, and Langdon was based in King County. See CP 236-37; CR 82(a)(3) (venue for a suit against a nonresident may lie in "any county where the Plaintiff resides"). And even if venue was somehow defective, venue is a non-jurisdictional issue that has no bearing on issues currently on appeal. See *Shoop v. Kittitas Cnty.*, 149 Wn.2d 29, 37, 65 P.3d 1194, 1198 (2003) (defect in venue does not eviscerate subject matter jurisdiction).

Fourth, Langdon was not "forum shopping" by bringing this action in Washington. Confirmation of an award is a cut-and-dried process, and McClain can point to no difference in law between the jurisdictions that might have given Langdon an advantage in Washington (again, McClain has yet to raise *any* defense to the substance of the award). The reason Langdon filed confirmation actions in both Florida and Washington is because McClain had absconded, and Langdon was attempting to find McClain wherever it could. See CP 336. There is neither an iota of

evidence in the record of purported forum shopping, nor an explanation of how Langdon could hope to benefit from filing the judgment in Washington rather than Florida. Indeed, a point not addressed by McClain is that once entered, the judgment could, pursuant to the Full Faith and Credit Clause and the Uniform Enforcement of Foreign Judgments Act, effectively be filed and enforced anywhere in the United States, regardless of whether the judgment originated in Washington or Florida.

III. ARGUMENT

A. McClain's Motion Was Untimely

Langdon's opening brief explained that McClain's motion to vacate was untimely under RCW 4.28.200 (which imposes a one year time limit on challenges to a judgment when service was by publication, and by implication service by mail), as well as CR 60(b) (which requires a motion for relief from judgment be brought within a "reasonable time"). McClain responds by arguing categorically that there is never a time limit for challenges based on a lack of subject matter jurisdiction, but his authorities do not support that claim.

McClain cites *Dougherty*, a case from this Court, for the proposition that "a judgment entered upon an appeal adjudicated in the

wrong county is void, and subject to vacation at any time, even if the erroneous choice of forum is not raised as an issue until long after judgment.” *Dougherty v. Dep't of Labor & Indus. for State*, 112 Wn. App. 322, 332, 48 P.3d 390, 395 (2002).

But the Washington Supreme Court *reversed* this Court on that exact point, holding that the location of a case is *not* a defect in subject matter jurisdiction. *Dougherty v. Dep't of Labor & Indus. for State of Washington*, 150 Wn.2d 310, 316, 76 P.3d 1183, 1186 (2003) (“While location determines venue, the ‘location of a transaction or a controversy usually does not determine subject matter jurisdiction.’... Unless mandated by the clear language of the statute, we generally decline to interpret a statute's procedural requirements regarding location of filing as jurisdictional.”).¹ Thus, the final holding of *Dougherty* supports Langdon, not McClain.

Not only does McClain’s authority fail to support his proposition, but out-of-state caselaw regarding the Uniform Arbitration Act, which McClain argues is strongly persuasive, explicitly holds otherwise.

¹ Similarly, McClain’s other case, *Angelo Property*, involves jurisdiction in unlawful detainer, which is a statutory creation with different jurisdictional limitations that are not relevant here. *Angelo Property Co., LP v. Hafiz*, 167 Wn. App. 789, 812, 274 P.3d 1075, 1087 (2012), *review denied*, 175 Wn.2d 1012, 287 P.3d 594 (2012).

Specifically, Illinois² courts construing the UAA have flatly held that the failure to timely assert a subject matter jurisdiction objection to the confirmation of an arbitration award *does* result in a waiver:

Usually, subject matter jurisdiction cannot be waived; however, the court in *DHR International, Inc. v. Winston & Strawn*, 347 Ill.App.3d 642, 649, 283 Ill.Dec. 253, 807 N.E.2d 1094, 1100 (2004) held that an objection to subject matter jurisdiction was waived when a party failed to object to proceedings at the trial court where subject matter jurisdiction was based on section 16 of the Uniform Arbitration Act. 710 ILCS 5/16 (West 2002). Liberty Mutual failed to object to subject matter jurisdiction in the trial court and the issue is therefore waived.

Costello v. Liberty Mut. Fire Ins. Co., 376 Ill. App. 3d 235, 238-39, 876 N.E.2d 115, 119 (2007).

As explained in *DHR*, this is because, when state legislatures enacting the UAA created the jurisdictional standards for arbitration confirmation, those legislatures could and did condition the lack of jurisdiction on a timely objection by the Defendant:

In creating rights and duties unknown at common law, the legislature was free to limit the circuit courts' jurisdiction over arbitration matters. However, the [Illinois] supreme court's reference in *Chicago Southshore & South Bend R.R.* to the objection suggests that it views the Uniform Arbitration Act as creating "justiciable matter" over which

² McClain's primary case regarding the UAA is also from Illinois. *See Chicago Southshore & S. Bend R.R. v. N. Indiana Commuter Transp. Dist.*, 184 Ill. 2d 151, 703 N.E.2d 7 (1998).

the circuit court has original jurisdiction under the Illinois Constitution of 1970 and that a failure to comply with a jurisdictional limit may be the subject of an objection, but does not by itself divest the circuit court of that jurisdiction.

DHR, 347 Ill. App. at 257 (citations omitted).³

Assuming for the sake of argument that King County lacked subject matter jurisdiction, it follows that McClain's failure to timely raise that lack of subject matter jurisdiction waived that objection. Had McClain acted timely and been able to successfully dispute jurisdiction, Langdon would simply confirm the award in Florida without any dispute regarding the statute of limitations. Now, due to McClain's delay, McClain contends that the award cannot be confirmed anywhere and is useless (which Langdon disputes). McClain should not be rewarded for his lack of diligence, or deliberate attempt to take advantage. But that is exactly what he is asking this Court to do.

In addition, Langdon's opening brief cited state Supreme Court caselaw employing RCW 42.8.200's predecessor statute to reject

³ It is commonplace for legislatures to impose "jurisdictional" requirements for statutory causes of action. *See, e.g., Gradillas v. Hughes Aircraft Co.*, 407 F. Supp. 865, 869 (D. Ariz. 1975) (the receipt of a right-to-sue letter from the EEOC is a jurisdictional prerequisite for a Title VII discrimination action). Just as a legislature is free to impose requirements on a plaintiff to establish jurisdiction, the legislature is free to impose requirements on a defendant to challenge jurisdiction.

jurisdictional challenges that were brought more than one year after a judgment. *Bruhn v. Pasco Land Co.*, 67 Wash. 490, 492, 121 P. 981, 982 (1912); *Smith v. Stiles*, 68 Wash. 345, 350, 123 P. 448, 450 (1912). McClain's Court of Appeals cases do not stand for the proposition he advocates, but even if they did, this Court cannot overrule the still-good Supreme Court precedent.

Finally, McClain also ignores the rule that, in a conflict between two provisions of law, the more specific provision generally controls. *See, e.g., Muije v. Dep't of Soc. & Health Servs.*, 97 Wn.2d 451, 453, 645 P.2d 1086, 1087 (1982). To the extent McClain cites a general common law rule allowing challenges based on subject matter jurisdiction at any time, RCW 4.28.200, which imposes a one year deadline specific to cases with service by publication, should control.

McClain deliberately sat on his purported jurisdictional argument for five years and only raised it after the four year statute of limitations in Florida supposedly ran. The Court should hold that under the unique facts of this case plainly demonstrating bad faith and prejudice, the rule cited in *DHR and Costello* should be followed, and the Court should hold that McClain waived his purported jurisdictional challenge to the ministerial confirmation of the arbitration award and the entry of judgment.

B. In Any Event, Confirmation was Proper Under Washington State Law

McClain's argument under the Washington Uniform Arbitration Act is that this Court should read into the Act something it does not say: that Washington courts lack subject matter jurisdiction to confirm arbitration awards entered out of state. But all the Act actually says is that Washington courts have exclusive jurisdiction to confirm arbitration awards where the parties agreed to arbitrate *in Washington*. See RCW 7.04A.260 ("An agreement to arbitrate providing for arbitration *in this state* confers exclusive jurisdiction on the court to enter judgment on an award under this chapter.") (emphasis added). That is simply not the same thing as saying Washington courts cannot confirm awards where the parties have agreed to arbitrate in a different state, and have where parties have further agreed that judgment can be entered in a state different from the state where the arbitration was conducted.

McClain's argument is particularly unconvincing in light of the *Hidden* case, which specifically held that an arbitration award entered in Oregon could be confirmed in Washington. *Equity Group, Inc. v. Hidden*, 88 Wn. App. 148, 943 P.2d 1167 (1997). McClain's only rejoinder is that *Hidden* (which predated the UAA) was overruled by the claimed implicit

rule in the UAA that Washington courts cannot confirm out-of-state arbitrations. But “the legislature is presumed to know the case law construing statutes and to act consistently with such law unless it *clearly* intends otherwise.” *Bob Pearson Const., Inc. v. First Cmty. Bank of Washington*, 111 Wn.App. 174, 179, 43 P.3d 1261, 1263 (2002) emphasis added) (citing *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 888, 652 P.2d 948, 952 (1982)). McClain points to nothing in the text of the statute, or the legislative history, that evinces such “clear” intent. Courts “will not assume that the legislature would affect a significant change in legislative policy by mere implication,” but that is exactly what McClain asks the Court to do here. *Ahten v. Barnes*, 158 Wn.App. 343, 357, 242 P.3d 35, 42 (2010). In summary, McClain’s argument that the Legislature implicitly overruled *Hidden* cannot be sustained.

Nor is McClain’s conclusion compelled by policy considerations. In keeping with principles of comity, under the Uniform Arbitration Act framework, states have the authority to determine where arbitrations held within their borders may be confirmed. Washington, for example, provides that this state’s courts have exclusive jurisdiction over that matter. But other states, including Florida during the relevant time period,

continue to allow interstate confirmations. *See Lewis & Peat Coffee, Inc. v. Condor Grp., Inc.*, 588 So. 2d 316, 317 (Fla. Dist. Ct. App. 1991).

Thus from a comity perspective, the proper inquiry is whether the state where the arbitration was held has asserted exclusive jurisdiction to confirm. Florida, clearly, did not (*id.*), so Washington courts would not impinge on Florida's authority by confirming an award entered in Florida.

Finally, McClain's attempt to shore up his reading of a Washington statute by citing out-of-state cases fails because those cases are distinguishable even under the laws of their respective states. *Chicago Southshore*, involved a dispute between a municipal corporation in Indiana, and an Indiana-based railroad. *Chicago Southshore & S. Bend R.R. v. N. Indiana Commuter Transp. Dist.*, 184 Ill. 2d 151, 152, 703 N.E.2d 7, 8 (1998).

There, unlike in this case, the losing party at the arbitration timely⁴ filed a court challenge in Indiana as specified in the contract, while the winning party attempted to confirm the award in Illinois, where the arbitration had actually been held. *Id.* at 153. The Court's decision was based in part on the losing party's status as an Indiana municipal

⁴ As noted above, Illinois courts have ruled that a party waives any subject matter jurisdiction defects in the confirmation of an arbitration award if that party does not timely assert its rights. *See Costello*, 376 Ill. App. at 235.

corporation, which, for obvious reasons, militates in favor of confirmation in that state where that governmental entity existed. *Id.* at 155. But no such considerations exist here because neither Langdon nor McClain were state or municipal government entities. Finally, the Illinois court relied on caselaw from Indiana providing that the right to Indiana confirmation was not waived under that state's laws. *Id.* at 157. Here, in contrast, the law of the place of arbitration—Florida—did not require an award to be confirmed in state.

As another example, in *Marsh*, urged by McClain as useful to this Court, the Missouri court ruled that it *did* have jurisdiction to confirm an award, because the arbitration was held in Missouri. *State ex rel. Tri-City Const. Co. v. Marsh*, 668 S.W.2d 148 (Mo. Ct. App. 1984). That is consistent with Washington's law saying arbitrations in Washington must be confirmed in Washington, but sheds no light on the question of whether Washington courts can confirm an award entered in another state.

McClain's opposition simply does not address the fact that the *Hidden* case is directly on point and is controlling. Nothing provided by McClain establishes that the Washington Legislature intended to overrule that decision when it adopted changes to the arbitration statute. At most, McClain makes an argument that the statute is ambiguous, but even if so,

he fails in his burden of showing by a clear indication that the Legislature was acting to overrule the *Hidden* case.

C. Confirmation was Proper Under the Federal Arbitration Act

As explained in Langdon's opening brief, even if the state arbitration statute could be read as foreclosing jurisdiction here, the Federal Arbitration Act would then control and would still require a reversal. Washington courts are cognizant of the FAA, and when they conclude it applies, they hold it "clearly preempt[s] any state law to the contrary." *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2004) (FAA preempted state law provision guaranteeing a judicial forum); *see also Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn. 2d 781, 806, 225 P.3d 213, 228 (2009) (same).

When it applies, the FAA gives the force of law to the parties' agreement as to where an award may be confirmed:

"If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title.

9 U.S.C. § 9 (emphasis added). Since the parties did not restrict the venue of confirmation to Florida, the confirmation was valid under controlling federal law.

McClain makes a number of unavailing arguments to the contrary. First, he makes the remarkable claim that the transaction at issue, an investment by a Washington entity (Langdon) in a Florida entity (Langdon Hall, Inc., the Florida assisted living business operated by McClain and his cronies) is somehow not “interstate commerce” within the FAA’s purview. However, the federal act applies to any transaction that Congress could regulate under the Commerce Clause of the U.S. Constitution. *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56, 123 S. Ct. 2037, 2040, 156 L. Ed. 2d 46 (2003); *accord Satomi* 167 Wn.2d at 798. As decades of Supreme Court authority has made clear, Congress’ regulatory power over commerce extends to nearly all forms of economic activity, even those that would seem to be confined to a single state. *See Wickard v. Filburn*, 317 U.S. 111, 63 S. Ct. 82, 87 L. Ed. 122 (1942) (farmer’s production of wheat for his personal consumption was “interstate commerce” subject to regulation).

Given the incredibly broad reach of the Commerce Clause, there is simply no credible argument that the transaction here is not “interstate

commerce.” McClain claims, without explanation, that this was an “intrastate” transaction. But that is belied by the plain language of the investment agreement:

STOCK PURCHASE AND SUBSCRIPTION AGREEMENT (“this Agreement”) dated December 30, 2005, by and among LANGDON HALL, INC. a *Florida* Corporation (“Company”), LANGDON HALL LAND, LLC, a *Washington* limited liability company...

CP 346 (emphasis added). McClain, who guaranteed this transaction, also claims he is and was a resident of Nevada (CP 129), adding yet another state to the mix. Despite McClain’s desperate attempts to deny it, it is self-evident that this was an *interstate* commercial transaction.

But even if the transaction was somehow “intrastate,” *i.e.*, between only Florida residents, it would *still* be within the reach of the FAA as long as there might be some hypothetical secondary effect on interstate commerce. Financial transactions, virtually by definition, are considered to have a sufficient relationship to interstate commerce. *See Citizens Bank*, 539 U.S. at 57-58 (“Although the debt-restructuring agreements were executed in Alabama by Alabama residents, they nonetheless satisfy the FAA’s ‘involving commerce’ test... No elaborate explanation is needed to make evident the broad impact of commercial lending on the

national economy or Congress' power to regulate that activity pursuant to the Commerce Clause.”).

Next, McClain argues that Langdon somehow waived the FAA by mentioning the state arbitration act in its complaint to confirm the arbitration award. But that misstates how the state and federal acts interact. It is not an either/or proposition: both laws apply to arbitration provisions relating to interstate commerce, and only in the event of a conflict does the federal act preempt the state act. *See New England Energy Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4 (1st Cir. 1988) (“We note first that, even when federal law applies to an arbitration agreement, the Federal Arbitration Act has never been construed to preempt all state law on arbitration.”). In other words, those portions of the UAA that are not preempted by contrary provisions of the FAA still apply to this dispute, so a general reference to the UAA does not mean that Langdon somehow waived any claim that the FAA applies.

McClain could have brought those issues into focus in 2008 had he simply objected to the entry of judgment on jurisdictional grounds. But, as discussed extensively above, he chose to sit on those claims for strategic purposes, and only now suggests to this Court that the parties are not subject to the requirements of the Federal Arbitration Act.

Finally, McClain tries to argue that, in the contract, the parties submitted to the *exclusive* jurisdiction of Florida courts, precluding application of 9 U.S.C. § 9 to the Washington confirmation. But that is emphatically not what the agreement says:

Judgment upon the award rendered by the arbitrator(s) may be entered *in any court* having *in personem* and subject matter jurisdiction. Buyer and each Shareholder hereby submit to the *in personem* jurisdiction of the Federal and State courts in Hillsborough County, for the purpose of confirming any such award and entering judgment thereon.

CP 364, at ¶ 10.5 (emphasis added).

As noted in Langdon’s opening brief, it is black-letter law that where an agreement states that particular forum is available, but contains no limiting language (such as “exclusive jurisdiction of Florida courts” or “may be confirmed only in Florida”) the reference to that forum is considered permissive, and does not preclude bringing the action elsewhere. As the Ninth Circuit explained:

Here, the plain meaning of the language is that the Orange County courts shall have jurisdiction over this action. The language says nothing about the Orange County courts having exclusive jurisdiction. The effect of the language is merely that the parties consent to the jurisdiction of the Orange County courts. Although the word “shall” is a mandatory term, here it mandates nothing more than that the Orange County courts have jurisdiction. Thus, Supreme cannot object to litigation in the Orange County Superior Court on the ground that the court lacks personal

jurisdiction. Such consent to jurisdiction, however, does not mean that the same subject matter cannot be litigated in any other court. In other words, the forum selection clause in this case is permissive rather than mandatory.

Hunt Wesson Foods, Inc. v. Supreme Oil Co., 817 F.2d 75, 77 (9th Cir. 1987). McClain ignores this rule, and simply tries to argue that the “any court” language, which is clearly inconsistent with his reading, does not exist.

In summary: even if there was an issue as to subject matter jurisdiction under state law, which there isn't to begin with, all it would mean is that the Federal Arbitration Act applies because this was plainly a transaction touching on interstate commerce. When the FAA applies, it permits confirmation in any court provided for in the parties' agreement. Since the arbitration clause here also says “any court,” McClain's argument that Florida was the only possible venue for confirmation is precluded by federal law.

IV. CONCLUSION

For the reasons stated above, the trial court erred when it entered an order vacating the previous judgment. This Court should reverse and reinstate the judgment.

RESPECTFULLY SUBMITTED this 4th day of December, 2013.

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DECLARATION OF SERVICE

The undersigned certifies under the penalty of perjury, under the laws of the State of Washington, that on December 4, 2013, I caused the service of the foregoing pleadings on each and every attorney of records herein:

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