

ORIGINAL

No. 78928-2

SUPREME COURT
OF THE STATE OF WASHINGTON

CAREY D. ERWIN, a single person, and
HEALTHCARE PROPERTIES, INC., a Washington corporation,

Respondents,

vs.

COTTER HEALTH CENTERS, a foreign corporation, and
JAMES F. COTTER, a single person,

Petitioners.

**SUPPLEMENTAL BRIEF OF RESPONDENTS
CAREY D. ERWIN & HEALTHCARE PROPERTIES, INC.**

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I. INTRODUCTION

Pursuant to RAP 13.7(d) and (e), this *Supplemental Brief* is submitted on behalf of the Respondents, Carey D. Erwin and Healthcare Properties, Inc. The result of the trial court and Court of Appeals should be affirmed (*i.e.*, that Respondents are entitled to commissions under the terms of the Consultant Agreement), even though in certain limited respects Respondents depart from the analysis of the Court of Appeals.

II. ARGUMENT AND ANALYSIS

a. The Consultant Agreement Contains a Valid Choice of Law Clause (Selecting Washington Law), which Renders a “Conflicts Analysis” Unnecessary.

Paragraph 7 of the Consultant Agreement provides, in relevant part: “Any dispute regarding the interpretation or enforcement of this Agreement shall by agreement of the parties be resolved in the State of Washington pursuant to its laws . . .” (Emphasis added.) Ex 8 (Consultant Agreement, p. 2, ¶7). Defendants acknowledge this provision to be an express choice of law clause. *See Petition for Review*, pp. 5-6; *Brief of Appellant*, p. 27. The issue is whether the choice of law is valid.

The Court of Appeals correctly determined, “The effectiveness of a choice of law provision must . . . be adjudicated before the chosen law is applied.” *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. 143, 152, n. 1, 135 P.3d 547 (2006).

In Washington, “An express choice of law clause in a contract will be given effect, as expressing the intent of the parties, so long as application of the chosen law does not violate the fundamental public policy of the forum state.” (Emphasis added.) *McGill v. Hill*, 31 Wn. App. 542, 547, 644 P.2d 680 (1982). (A copy of the *McGill* decision is included as Appendix A to this *Supplemental Brief*.) This standard (looking to the public policy of the “forum”) has been recognized and cited numerous times over the past 25+ years.¹

Not only was Washington contemplated as the “forum” state under the contract (*see* ¶7 of the Consultant Agreement), it is Washington that is the “forum” state of this lawsuit. Consistent with *McGill*, the parties’ choice of law (Washington) must be upheld unless defendants can demonstrate that applying Washington law will somehow violate Washington public policy. Defendants do not even attempt to make such a showing.

Instead, defendants contend the “required analysis” is that of *Restatement (Second) of Conflict of Laws* §187(2), ignoring entirely §187(1) which states, “The law of the state chosen by the parties to govern

¹ See e.g., *Truck Center Corp. v. General Motors Corp.*, 67 Wn. App. 539, 544, n. 3, 837 P.2d 631 (1992); *Sparling v. Hoffman Construction Co., Inc.*, 864 F.2d 635, 641 (9th Cir. 1988); *Digital Control Inc. v. Radioetecion Corp.*, 294 F. Supp. 2d 1199, 1204, n. 6 (W.D. Wash. 2003); *McGowan v. Pillsbury Co.*, 723 F. Supp. 530, 536 (W.D. Wash. 1989); *see also Corley v. Hertz Corp.*, 76 Wn. App. 687, 691, n. 4, 887 P.2d 401 (1994). *McGill* has even been cited by the California Supreme Court, albeit for a different proposition. See *Nedlloyds Lines B.V. v. Superior Curt of San Mateo County*, 3 Cal.4d 459, 834 P.2d 1148, 1154, n. 7 (1992).

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.” See *Reply Brief*, p. 9, n. 1. The parties included such an explicit provision in the Consultant Agreement, which fact was acknowledged by the Court of Appeals. See Ex. 8 (Consultant Agreement, p. 2, ¶7); *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. at 152; see also *Restatement*, §187, comment a. Therefore, and consistent with *McGill*, the analysis goes back to an evaluation of whether that express provision somehow violates a public policy of Washington, the forum state.

Notwithstanding, defendants ask the Court to apply §187(2)(b), which considers the public policy of the state whose law would apply if no express choice of law had been made, rather than that of the “forum” state.² Even under this scenario, defendants’ analysis is defective.

Defendants rely on *O’Brien v. Shearson Hayden Stone, Inc.*, 90 Wn.2d 680, 586 P.2d 830 (1978), in arguing that “Washington follows the *Restatement* in addressing conflicts of law questions.” (Emphasis added.) *Brief of Appellants*, p. 27, n. 5. The *O’Brien* decision does not go that far. Rather, the Court noted that §187 could be “useful . . .

² Defendants concede that the parties’ choice of Washington law was not “unreasonable.” As such, subsection (2)(a) of §187 does not apply, and defendants’ argument focuses on subsection (2)(b). *Brief of Appellants*, p. 29.

particularly in a case such as this which involves the question of usury.” (Emphasis added.) *O’Brien*, 90 Wn.2d at 685.³ The Court certainly did not explicitly adopt subdivision (2) of §187. Furthermore, Washington was the “forum” state, and the Court specifically considered whether the parties’ choice of law was “contrary to a fundamental policy of Washington.” *O’Brien*, 90 Wn.2d at 658-686. This is consistent with *McGill*.

McGill should be recognized as controlling, both to affirm the 25+ years of decisions thereunder and to uphold the parties’ choice of Washington law in this case (and their “expectation” of creating an enforceable relationship, which is addressed below). Because a valid choice of law exists, a “conflicts analysis” is unnecessary. *Mulcahy v. Farmers Ins. Co. of Wash*, 152 Wn.2d 92, 100, 95 P.3d 313 (2004).

b. Applying Washington Law, Plaintiffs Are Clearly Entitled to Recover Commissions Via a Lawsuit in Washington.

Defendants further contend that the Consultant Agreement is unenforceable even under Washington law. *See Petition for Review*, p.19; *Reply Brief*, pp. 19-21. Specifically, they argue that under Washington’s Real Estate Brokers and Salesperson Act (“REBSA”), RCW 18.85, *et seq.*,

³ This Court has previously recognized that different rules apply in the usury context, labeling usury law as “unusual.” *See Baffin Land Corp. v. Montecello Motor Inn, Inc.*, 70 Wn.2d 893, 899, 425 P.2d 623 (1967).

a party “can lawfully collect a commission only if licensed in the state in which the service is performed.” (Emphasis added.) *Brief of Appellants*, p. 25. This is simply not true.

The relevant statute is RCW 18.85.100, which is entitled “License required--Prerequisite to suit for commission.” There is no requirement within the statute that a litigant must hold a license in any other state besides Washington. Likewise, there is no Washington precedent whereby the statute is construed to require a license in another state. It is a Washington statute and, as such, regulates only “acts” within Washington. *See* RCW 18.85.100, ¶1.

In the instant case, plaintiffs (1) are Washington residents; (2) at all material times had a valid Washington broker’s license; (3) performed a “good deal” of the brokerage services in Washington; and (4) sued in a Washington court. CP 28 (F/F #1); CP 37 (C/L #10) (both of which are unchallenged on appeal). Plaintiffs are clearly in compliance with REBSA. It follows that plaintiffs are entitled to sue in Washington.

Arguing otherwise, defendants focus on the phrase “duly licensed” within the second paragraph of RCW 18.85.100, suggesting that this requires, under Washington law, that the person suing for commissions in this state must be licensed in every state where work was performed. *See Reply Brief*, pp. 20-21. Not only does RCW 18.85.100 not so provide,

such analysis is contrary to *Nelson v. Kaanapali Properties, Inc.*, 19 Wn. App. 893, 578 P.2d 1319 (1978). (A copy of the *Nelson* decision is included as Appendix B to this *Supplemental Brief*.)

In *Nelson*, a contractor licensed in Washington was allowed to sue in Washington, even though his services were rendered in a state where he did not have a license (Hawaii). *Nelson*, 19 Wn. App. 895-900. The statutes at issue were RCW 18.27.020 and 18.27.080, which are equivalent to RCW 18.85.100 in the instant case. *See and compare*, RCW 18.85.100; RCW 18.27.020 & .080. Most notably, subsection .080, entitled “Registration prerequisite to suit,” requires a plaintiff to prove “that he was a duly registered contractor and held a current and valid certificate of registration . . .” (Emphasis added.) *Nelson*, 19 Wn. App. at 895 (citing RCW 18.27.080).⁴ The defendants argued that the contractor’s suit was barred because the contractor performed services in Hawaii without a Hawaii license. *See Nelson*, 19 Wn. App. at 895. This is equivalent to defendants’ argument in the instant case that the phrase “duly licensed” (RCW 18.85.100, ¶2) requires plaintiffs to have broker licenses in

⁴ This Court has acknowledged the similarities between the Contractor Registration Act (RCW 18.27, *et seq.*) and REBSA (RCW 18.85, *et seq.*), and has utilized analogous contractor decisions when interpreting REBSA. *See e.g., Williamson, Inc. v. Calibre Homes, Inc.*, 147 Wn.2d 394, 399-401, 54 P.3d 1186 (2002) (based in part on *Murphy v. Campbell Investment Co.*, 79 Wn.2d 417, 486 P.2d 1080 (1971)).

California and Texas. The defendants' argument was rejected in *Nelson*, with the court stating:

The desire of the parties at the time of contracting was to create an enforceable contract. Kaanapali expected the work to be performed and Nordic Tile expected to be paid Consideration of the expectation interest of the parties would weigh heavily in upholding the validity of the contract against the interests and public policy of Hawaii.

Nelson, 19 Wn. App. at 898. Such argument should be rejected here, as well. Plaintiffs have a valid Washington license and should not be denied access to a Washington court.

Defendants try to distinguish *Nelson* on the basis that the contract in *Nelson* did not include an express choice of law. *See Reply Brief*, p. 15. In fact, it is unreasonable to suggest that the presence of an express choice of law provision in the instant case would make the holding in *Nelson* inapplicable. To the contrary, it bolsters plaintiffs' argument that Washington law should apply. If *Nelson*, without an express choice of law provision, upholds the right of a local licensed contractor to sue in Washington for work performed in Hawaii, then the presence of an express choice of law provision in the instant case makes plaintiffs' argument even more compelling.

Defendants' "duly licensed" argument is also contrary to the substance of the *Restatement*:

. . . the place of performance can bear little weight in the choice of the applicable law when (1) at the time of contracting it is either uncertain or unknown, or when (2) performance by a party is to be divided more or less equally among two or more states with different local law rules on the particular issue.

Restatement, §187, comment e, ¶7. In the instant case, both circumstances existed.

At the time it was signed, the Consultant Agreement did not explicitly recite the properties to which it applied. The Camlu facilities and the Texas facilities (which include the two Abilene facilities at issue in this lawsuit) were added via “Addendum A.” *See Brief of Respondents*, pp. 19-20. The California facilities were not originally contemplated and were never specifically written into the contract. Rather they were added pursuant to the “other healthcare related property(ies)” clause. *See Ex 8* (Consultant Agreement, p. 4, ¶21). It was also contemplated that properties in Oklahoma might be added to the contract. CP 32-33 (F/F #21).

As things evolved, plaintiffs’ performance spanned several states, including Washington. Defendants now argue that plaintiffs had to comply with the different licensing laws of each state. However, the above-quoted portion of the *Restatement* says otherwise. In a case such as this, the “place of performance” is not the determinative factor. This is consistent with *Nelson*, and it is inconsistent with defendants’ argument.

Defendants have also impliedly argued that plaintiffs must rely upon *In re Stoddard's Estate*, 60 Wn.2d 263, 373 P.2d 116 (1962), in order to prevail. See *Brief of Appellants*, pp. 45-47. The *Stoddard* case allowed a broker without a Washington license to sue in Washington. The restrictions of RCW 18.85 did not apply because none of the brokerage “acts” occurred in Washington. *Stoddard*, 60 Wn.2d at 265-267. By contrast, if any of the “acts” occurred within Washington, which is the present situation, then a prerequisite to suing in Washington is that the party must hold a Washington license. See RCW 18.85.100, ¶2. Plaintiffs do not need to rely on *Stoddard* because they have a valid Washington license. CP (F/F #1).

c. If the Choice of Law Clause Is Invalidated, the Parties’ “Expectation” of Creating an Enforceable Relationship Should Be Upheld. As Before, this Requires Washington Law to Be Applied.

While unnecessary to the resolution of this case, plaintiffs should prevail even if the choice of law clause in the Consultant Agreement is invalidated. In *Mulcahy v. Farmers Ins. Co. of Washington*, 152 Wn.2d at 100, the Court stated: “In the absence of an effective choice of law by the parties, the validity and effect of a contract are governed by the law of the state having the most significant relationship with the contract.” While the Court noted that §188 of the *Restatement* provides a summary of the factors to be applied, it went on to say that “the expectations of the parties

to the contract may significantly tip the scales in favor of one jurisdiction's laws being applied over another's." (Emphasis added.) *Mulcahy*, 152 Wn.2d at 101. The "expectation" factor has particular application to the instant case.

"The parties can be assumed to have intended that the provisions of the contract would be binding upon them." *Restatement*, §187, comment *e*, ¶4; *accord* §188, comment *b*, ¶5; *Nelson*, 19 Wn. App. at 898. In the instant case, this is not simply an "assumption." The explicit terms of the Consultant Agreement readily evidence that the parties wanted to create an enforceable relationship and tried diligently to do so.

Defendants "expressly acknowledge[d] that they [we]re not knowingly entering into an agreement which is illegal." Ex 8 (Consultant Agreement, p. 2, ¶9). Defendants "agree[d] to waive" any provision of law "that would allow for a contest of fees" based on the fact that plaintiffs are not licensed in any state other than Washington. Ex 8 (Consultant Agreement, p. 2, ¶9). The parties "expressly acknowledge[d]" that they were not entering into "a typical listing agreement." Ex 8 (Consultant Agreement, p. 2, ¶10). Consistent with this, plaintiffs were prohibited from advertising the facilities "for sale," or "listing" the facilities in any sort of listing service. Ex 8 (Consultant Agreement, p. 3, ¶¶16-17). In addition, the parties documented plaintiffs' specific expertise

and experience in the field of senior health care transactions. Ex 8 (Consultant Agreement, p. 2, ¶10, p. 3, ¶15).

Furthermore, the national nature of the senior health care market, the specific federal regulatory requirements applicable to it, and the practical qualifications of those working within it molded the expectations of the parties. It is unlikely that defendants would have consummated any business with Ensign (the tenant for both the Camlu and California facilities) absent those principles, and it was upon those principles that the Consultant Agreement was based. As noted by the Court of Appeals: “Erwin had both expertise and industry-wide contacts across state borders. Cotter wanted to take advantage of both that expertise and those contacts to extricate himself from what had proved to be very unfavorable lease arrangements with Camlu.” *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. at 150.

Of further significance, defendants paid commissions to plaintiffs on the closing of the Camlu facilities. Those commissions were paid upon the very Consultant Agreement that is at issue in this matter. CP 33 (F/F #34); Exs 38-39; *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. at 147-148. The Camlu facilities are located in Texas. As with California, plaintiffs did not have a broker’s license in Texas. Nevertheless,

defendants paid commissions to plaintiffs. That situation is no different than the one now before this Court.

Yet, defendants argue that “legality” must be determined based on the law of the state where plaintiffs’ services were performed (*i.e.*, Texas and California). Not only is this inconsistent with the parties’ original “expectation” of creating an enforceable contract, it is inconsistent with Washington law.

Looking to the Restatement (Second), Conflicts, s 196 (1969), where the importance of the place of performance is discussed, it appears that in personal service contracts the local law of the place of performance should be applied “unless, with respect to a particular issue, some other state has a more significant relationship . . . in which event the local law of the other state will be applied.” Comment d, following s 196, delineates the circumstances wherein the local law of the state where services are to be rendered should not be applied:

On occasion, a state which is not the place where the contract requires that the services, or a major portion of the services, should be rendered will nevertheless, with respect to the particular issue, be the state of most significant relationship to the transaction and the parties and hence the state of applicable law. This may be so, for example, when the contract would be invalid under the local law of the state where the services are to be rendered but valid under the local law of another state with a close relationship to the transaction and the parties. In such a situation, the local law of the other state should be applied unless the value of protecting the expectation of the parties by upholding the contract is outweighed in the particular case by the interest of the state where the services are to be performed in having its invalidating rule applied.

(Emphasis added.) *Nelson*, 19 Wn. App. at 897-898. As stated by the Court of Appeals: “We conclude that the interests of the parties are best

served by leaving them exactly where they placed themselves—litigating this dispute in Washington [pursuant to the parties’ chosen law of Washington].” (Emphasis added.) *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. at 154.

Washington is a “state with a close relationship to the transaction and the parties.” Pursuant to §187, comment *f*, a “substantial relationship” exists when the state is “where one of the parties is domiciled or has his principal place of business.” Plaintiffs are Washington residents and have a Washington license for their business. CP 28 (F/F #1) (which is unchallenged on appeal). A “substantial relationship” also exists when the state is “where performance by one of the parties is to take place.” *Restatement*, §187, comment *f*, ¶2. A “good deal” of plaintiffs’ brokerage services occurred in Washington. CP 37 (C/L #10) (which is also unchallenged on appeal). It follows that the state of Washington had a “substantial relationship” to the transaction.

It is respectfully submitted that, in the particular context of this case, the parties’ “expectation” outweighs any interest California might express in having its licensing statutes applied. In fact, this is consistent with the decision of *Cochran v. Ellsworth*, 12 Cal. App. 429, 272 P.2d 904 (1954), wherein the court noted:

“The purpose of the [licensing] statute was to protect landowners from the fictitious claims of real estate dealers who actually never sold the land they claimed to sell and never earned the commissions for which they were claimants; but it was never the intention of the Legislature to protect the real estate owner against legitimate claims for services which he authorized in writing, and which were honestly rendered.”

Therefore courts will frown upon efforts to avoid payment of a just claim merely because an agreement was signed in a place requiring a license.

(Emphasis added.) *Cochran*, 12 Cal. App. at 437 (in part quoting *Howell v. North*, 93 Neb. 505, 140 N.W. 779, 780 (1913)). It follows that Washington law should be applied, even if the choice of law clause is invalidated and a “conflicts analysis” is undertaken.

d. The Specialized “Consultant” Services Offered by Plaintiffs Are Fundamentally Different than Traditional Real Estate “Broker” Services. However, Plaintiffs Are Not Trying to “Evade” REBSA.

Defendants also accuse plaintiffs of trying to “evade” REBSA. *Petition for Review*, p. 13. To the contrary, as emphasized several times herein, plaintiffs had a valid Washington broker’s license at all material times. Far from trying to “evade” REBSA, plaintiffs are properly licensed under REBSA and in full compliance with it. This is not a case where a party without a Washington license is trying to sue in Washington.⁵

⁵ In oral argument before the Court of Appeals, defendants suggested Mr. Erwin had little connection to Washington, moving back into the state just a short time before the Consultant Agreement was executed. In fact, Mr. Erwin has been licensed as a real estate broker in Washington since 1992, and Healthcare Properties has been a Washington corporation since approximately 1996. RP 10-11.

Defendants further contend, incorrectly, that “The Court of Appeals erred in holding that the consulting agreement does not fall within the requirements of REBSA.” *Petition for Review*, p. 12. Nowhere in the opinion does the Court of Appeals make that holding. Rather, the Court identified the policy underlying licenses schemes such as REBSA and then noted that, “Car[e]y D. Erwin lives and does business in Washington state where he has been a licensed real estate broker since 1992,” and that, “In Washington . . . the policy of REBSA is satisfied by proof of a valid real estate broker’s license.” *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. at 154, 146.

One must also acknowledge the distinction between a senior health care “consultant” and a traditional real estate “broker.” Senior health care transactions are a niche field. Consultants must have a working knowledge of industry trends, welfare surveys, Medicaid and Medicare cost reports, labor utilizations, operational licenses, and industry-specific accounting principles. As testified by V. Ray Lavender, himself a senior health care consultant, there are a limited number of “players” in the field. It takes years for a would-be consultant to learn the industry and develop a nationwide “network” of contacts. *See e.g.*, RP 16-34, 282-292, 306-307, 316-320; CP 28 (F/F #2), CP 31 (F/F #20); *accord Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. at 153-154. The trial court found that it is

“impracticable for a consultant to be licensed in every state where he might do business.” CP 38 (C/L #11).⁶

e. The Consultant Agreement Is Not “Illegal.” Defendants’ Waiver of the Licensing Schemes of California and Texas (Via ¶9) Is Effectively Redundant Because Washington Law Applies.

Defendants also argue that, “The choice of law clause cannot determine whether the Agreement is illegal,” and that, “the purported waiver creates a contract that is unlawful and/or unenforceable from its inception.” *Reply Brief*, pp. 7, 16. Certainly, the choice of law clause does not determine legality/illegality. That determination is made by applying the chosen law. In that plaintiffs have previously demonstrated that the choice of law clause is valid, the question of legality/illegality must be answered under Washington law.

If the “local” law of Washington applies, the licensing statutes of California and Texas do not. REBSA does not incorporate the licensing requirements of other states, and defendants have presented nothing to suggest that the language of the Consultant Agreement violates the public policy of Washington. Under paragraph 9, defendants agreed “to waive any such provision [of law] that would allow for a contest of fees” based

⁶ Despite being designated as a conclusion of law, plaintiffs submit C/L #11 also contains fact-based findings. *See Brief of Respondents*, p.22, n.6 (citing *Inland Foundry Co. Inc. v. Dept. of L&I*, 106 Wn. App. 333, 341, 24 P.3d 424 (2001)). The finding of “impracticability” is a finding of fact. By contrast, the degree to which this affects application of REBSA is a question of law.

on plaintiffs not being licensed anywhere other than Washington. Ex 8 (Consultant Agreement, p. 2, ¶9). No such provision exists within Washington law. REBSA only requires a Washington license.

Defendants argue that, “Parties cannot agree by contract to waive statutes and regulations,” relying upon California Bus. & Prof. Code §10136 and Texas Occ. Code §1101.351. *Reply Brief*, p. 16. This argument presupposes that these statutes apply to the contract. In fact, these statutes do not apply. The parties chose Washington law, and that choice was valid. It follows that the licensing schemes of California and Texas do not apply and can thus be “waived.”

In this regard, it should be noted that the practical effect of defendants’ argument is to “put the cart before the horse” in addressing the question of legality/illegality prior to addressing which state’s law applies. The legality of a contract or transaction cannot be determined in a vacuum. Rather, the applicable law must first be determined. *See Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. at 152, n. 1. The law is then applied so as to determine legality/illegality.

f. Even If a “Conflicts Analysis” Is Undertaken, Washington Law Should Be Applied. This Lawsuit Does Not Offend the Public Policy of California or Texas, and Those States Do Not Have the “Most Significant” Connection to this Contract.

Even under defendants’ approach (*i.e.*, starting with the issue of legality/illegality, and applying a “conflicts analysis” despite the parties’ choice of Washington law), plaintiffs urge that the Court of Appeals should be confirmed. A “good deal” of plaintiffs’ brokerage services occurred in Washington, where plaintiffs are domiciled and licensed. CP 28 (F/F #1); CP 37 (C/L #10) (both of which are unchallenged on appeal). These “contacts” with Washington speak to elements (c) and (e) of §188. However, and significant to the instant case, “[t]he approach is not to count contacts, but rather to consider which contacts are most significant.” *Nelson*, 19 Wn. App. at 897 (quoting *Baffin*, 70 Wn.2d at 900).

Against this standard, Washington, rather than California, has the “most significant” connection to this contract. The parties chose Washington law and Washington as the forum. “In multi-state transactions, certainty and predictability are likely to be enhanced when the parties chose the law that governs the validity of their own contract.” *Erwin v. Cotter Health Centers, Inc.*, 133 Wn. App. at 151 (citing *Restatement* §187, comment *e*). *Nelson* is again instructive: “To deny plaintiff a recovery would transform this socially desirable registration act,

designed primarily to protect the public from irresponsible contractors, into an unwarranted shield for the avoidance of a just obligation.” *Nelson*, 19 Wn. App. at 899. This principle applies with even greater force to the instant case, given the parties’ “expectation” and extensive efforts to create an enforceable relationship.⁷

g. Plaintiffs Could Not Simply Have “Associated” with a Licensed California or Texas Broker.

Finally, Defendants have argued that, “if it was ‘impractical’ for [plaintiffs] to be licensed in California and Texas, then [they] should have associated with a local, properly licensed broker.” *Petition for Review*, p. 16; *Brief of Appellants*, p. 26. This argument is legally and factually inaccurate.

An out-of-state broker cannot simply “associate” with a local broker, and then perform brokerage services himself or under the local broker. In fact, an unlicensed party cannot perform any “act” within the scope of the statutes and still have access to the California or Texas courts. *See* Cal. Bus. & Prof. Code §10131 (“does or negotiates to do one or more of the following acts for another or others”); Tex. Occ. Code §1101.004

⁷ Furthermore, California courts “frown upon efforts to avoid payment of a just claim merely because an agreement was signed in a place requiring a license.” *Cochran*, 12 Cal. App. 429. Like REBSA, California’s statutes restrict a party without an in-state license from “bring[ing] or maintain[ing] any action in the courts of this State.” (Emphasis added.) Cal. Bus. & Prof. Code, §10136. This lawsuit (in Washington for recovery of a “just claim”) does not offend the public policy of California (or Texas).

("directly or indirectly performs . . . any act described"); *see also* Cal. Bus. & Prof. Code §10136; Tex. Occ. Code §1101.806(b).

There is no *pro hac vice* status for real estate brokers. In-state activities would need to be performed, rather than simply overseen, by the local broker. This is no solution because, as explained above, traditional "brokers" do not have the industry knowledge and contacts to facilitate a senior health care transaction. The practical reality is that this "niche" industry cannot operate under defendants' analysis. Defendants should not be allowed to use the statutes of California and Texas, in this Washington-based lawsuit, as "an unwarranted shield for the avoidance of a just obligation." *Nelson*, 19 Wn. App. at 899; *accord Cochran*, 12 Cal. App. at 437.

III. CONCLUSION

The result of the trial court and Court of Appeals should be affirmed (*i.e.*, that plaintiffs are entitled to commissions under the terms of the Consultant Agreement). Plaintiffs request costs and attorneys' fees pursuant to RAP 14.1 and 18.1, as well as paragraph 5 of the contract.

DATED this 3rd day of April, 2007.



JAMES S. BERG (WSBA #7812)
D. R. (ROB) CASE (WSBA #34313)
Larson Berg & Perkins PLLC
Attorneys for Respondents

DECLARATION OF SERVICE

I, CHERYL I. BRICE, do hereby declare and state: On this day, in
Yakima, Washington, I sent to:

Mr. Charles K. Wiggins
Wiggins & Masters, P.L.L.C.
241 Madison Avenue North
Bainbridge Island, WA 98110

Mr. James E. Montgomery, Jr.
12175 Network Drive
San Antonio, TX 78249

a copy of this document by U.S. Priority Mail, postage prepaid. I certify
under penalty of perjury under the laws of the State of Washington that
the foregoing is true and correct.

SIGNED at Yakima, Washington, on April 3, 2007.



CHERYL I. BRICE

APPENDIX

- A. *McGill v. Hill*, 31 Wn. App. 542, 644 P.2d 680 (1982)
- B. *Nelson v. Kaanapali Properties, Inc.*, 19 Wn. App. 893, 578 P.2d 1319 (1978)

[No. 9135-2-I. Division One. April 15, 1982.]

MARTHA L. MCGILL, *Appellant*, v. ALBERT HILL,
Respondent.

- [1] **Divorce and Dissolution — Separation Agreement — Construction of Agreement — In General.** The construction and application of a validly executed separation agreement are matters of law.
- [2] **Conflict of Laws — Contracts — Choice of Law — Effect.** A contract provision expressing the parties' intention that the agreement be governed by the law of another jurisdiction will be given effect unless application of the chosen law would violate a fundamental public policy of this state. Absent a specific intent expressed to the contrary, such a choice of law applies only to substantive law, not to conflicts rules. Whether the chosen jurisdiction would have recognized the parties' desire to apply the law of this state is not determinative.
- [3] **Partition — Nature — In General.** An action for partition of jointly owned property is equitable in nature.

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[4] **Estoppel — Elements — In General.** Equitable estoppel requires that a party rely on an act or statement of another party and a resulting injustice if the other party is permitted to repudiate his act or statement.

Nature of Action: The plaintiff sought partition of employment benefits of her former husband, claiming the benefits were owned by the parties as tenants in common. Prior to their divorce, the parties had entered into a separation agreement dividing property. The agreement stated that it would be governed by Pennsylvania law.

Superior Court: The Superior Court for King County, No. 79-2-02528-3, Lloyd W. Bever, J., entered a summary judgment on July 18, 1980, in favor of the defendant husband.

Court of Appeals: Holding that Pennsylvania law applied and that under such law the separation agreement disposed of the assets in question, the court *affirms* the judgment.

J. Richard Quirk, for appellant.

Gordon Livengood, for respondent.

RINGOLD, J.—Martha McGill appeals the summary judgment of dismissal granted by the trial court in favor of Albert Hill. We affirm.

The parties were married in Kansas in September 1948. During the marriage Hill was employed at various Boeing Company locations and the Hills resided in the following places:

9/48 — 7/49	Wichita, Kansas
7/49 — 10/49	Seattle, Washington
10/49 — 4/63	Wichita, Kansas
4/63 — 8/66	Metairie, Louisiana
8/66 — 8/67	Wichita, Kansas
8/67 — 11/75	Bellevue, Washington
11/75 — 8/77	Westchester, Pennsylvania

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On December 23, 1976, Hill filed a complaint for divorce in Pennsylvania. On May 19, 1977, following negotiations during which both parties were represented by counsel, the parties signed a separation agreement. McGill then answered the complaint and counterclaimed asking for divorce on the grounds of indignities. Following the appointment of a Master on the motion of the wife, pursuant to Pennsylvania law, testimony was taken at a hearing attended only by McGill and her counsel, although Hill was given notice. The Master entered findings of fact and conclusions of law, and recommended that a decree of divorce be granted on the grounds alleged in the counterclaim. The decree of divorce was entered August 19, 1977.

On August 20, 1979, McGill filed a complaint against her former spouse for division of property in King County Superior Court. She claimed that neither the divorce decree nor the separation agreement disposed of certain employment benefits, consisting of retirement and savings plans, earned by Hill at Boeing while the parties resided in community property jurisdictions during the course of the marriage. She further claimed that under Washington law the Boeing benefits, of unknown value, were now owned by the parties as tenants in common and asked for judgment in the amount of one-half of their value.¹ Both parties moved for summary judgment. In support of his motion, Hill introduced the separation agreement and evidence that the Boeing benefits were the subject of negotiation at the time of the divorce. He argued that the separation agreement disposed of all of the parties' property, including the Boeing benefits. McGill did not attack the validity of the separation agreement, but contended that the Boeing benefits were not disposed of by that document. On July 18, 1980,

¹McGill later amended her complaint to add another cause of action, alleging that she was still entitled to monthly maintenance even though she had remarried and the separation agreement provided otherwise. In her Notice of Appeal McGill assigned error to the dismissal of this claim, but presented no argument on appeal. We decline to reach this issue. See *Farman v. Farman*, 25 Wn. App. 896, 611 P.2d 1314 (1980).

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the trial court entered an order granting Hill's motion, denying McGill's motion, and dismissing the action with prejudice. This appeal follows.

[1] Absent disputed facts, the construction of the separation agreement becomes a matter of law. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 580 P.2d 617 (1978). The issue on appeal is, therefore, whether the separation agreement disposed of the Boeing benefits. McGill argues that it did not and that the benefits are now owned by the parties as tenants in common, citing *Witzel v. Tena*, 48 Wn.2d 628, 295 P.2d 1115 (1956). Hill argues that under the separation agreement, McGill gave up all her rights in property "arising out of the marital relationship."

The separation agreement provided that upon entry of a divorce decree McGill would get the house, the car and all personal and household property except for nine items of personal property, which went to Hill, and the family silver, which would be held for the parties' daughter. The agreement also contained the following provisions:

BACKGROUND

A. Differences have arisen between Husband and Wife as a result of which they have been living separate and apart from each other and now desire by this Agreement to settle all financial and property rights between them; and

B. Husband and Wife respectively acknowledge that before signing this Agreement they have been fully advised by separate counsel . . . as to their rights and obligations, have read carefully and understand the terms of this Agreement, and have fully assented to this Agreement believing it to be just and fair.

TERMS

Now, THEREFORE, in consideration of the mutual promises hereinafter set forth, the parties, intending to be legally bound, mutually agree as follows:

13. Except as herein otherwise provided, Husband and Wife each hereby releases and forever discharges the other of and from all actions, causes of action, claims, rights, liabilities or demands whatsoever in law or in

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equity which either ever had or now has against the other, except any cause of action for divorce. . . . No [divorce decree] shall in any way affect any of the terms hereof and this Agreement shall survive any such decree.

14. Wife does hereby remise, release, quitclaim and forever discharge Husband and his estate of and from any and every claim of any nature and kind whatsoever, including but not limited to any claim arising out of the marital relationship or any alleged business relationship or any constructive or implied trust that she now has or may hereafter have against Husband, or in and to and against his property, . . . except only the rights accruing to Wife under this Agreement.^[2]

16. Husband and Wife shall, at any time and from time to time hereafter, execute and deliver any and all instruments and documents required to give full force and effect to the provisions of this Agreement.

18. This Agreement shall be interpreted under the law of the Commonwealth of Pennsylvania.

19. Wife recites that counsel representing her was selected by her without any interference or suggestion by Husband, that she has complete confidence in her counsel, that she has consulted with him and that she has discussed and been advised by her counsel as to the nature of her rights and obligations herein, that she has the ability to and does understand the terms hereof, that she is satisfied they are fair, just and reasonable, that she desires to proceed in accordance with the terms hereof and that she consents hereto of her own volition and on advice of counsel, intending and desiring to be permanently bound hereby.

Under Washington law, a separation agreement must adequately identify the assets and put the parties on notice that the assets exist; the mutual release provisions of the agreement before us would be considered boilerplate language insufficient to dispose of the Boeing benefits. See *Yeats v. Estate of Yeats, supra*. Under Pennsylvania law,

²A similar clause, No. 15, pertains to the husband's release of the wife from all claims "in and to and against her property."

Hill argues, just the contrary is true. See *McGannon v. McGannon*, 241 Pa. Super. 45, 359 A.2d 431 (1976). The threshold issue, therefore, is which state's law should be used in determining whether the agreement disposed of the Boeing benefits. Hill points to the Pennsylvania choice of law clause in the agreement and argues that Pennsylvania law should apply. McGill agrees that the parties chose Pennsylvania law, but theorizes that since a Pennsylvania court would apply Pennsylvania law where a contract remedy is pursued in Pennsylvania, see *Silvestri v. Slatowski*, 423 Pa. 498, 224 A.2d 212 (1966); *Gillan v. Gillan*, 236 Pa. Super. 147, 345 A.2d 742 (1975), Washington courts should apply Washington law where the remedy is pursued in Washington.

[2] We find no support for McGill's assertion that we should apply Washington law to the interpretation of the terms of a contract which contains an express choice of Pennsylvania law. The cited Pennsylvania cases are inapposite, the issue in those cases being the enforceability of certain terms in a separation agreement rather than their interpretation. The court in *Silvestri* applied the law of the forum, expressly stating: "We are not here concerned with the validity or construction of the contract or related questions, which would necessitate the application of conflict of laws principles." 423 Pa. at 501, 224 A.2d at 215. Furthermore the agreements at issue in these cases do not contain a choice of law clause. Absent relevant authority, we cannot apply Washington law here by merely citing Pennsylvania's application of its own law, as McGill would have us do. The solution to choice of law problems depends on more than mere symmetry.

We therefore turn to general conflict of laws principles. An express choice of law clause in a contract will be given effect, as expressing the intent of the parties, so long as application of the chosen law does not violate the fundamental public policy of the forum state. See *Whitaker v. Spiegel, Inc.*, 95 Wn.2d 661, 623 P.2d 1147, 637 P.2d 235 (1981). In the absence of a contrary intent, a choice of law

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clause refers only to the local law of the state, not to the conflicts rules. Restatement (Second) of Conflict of Laws § 187(3) (1971). The parties here provided for interpretation of their contract under the laws of Pennsylvania. We find no indication that they intended the agreement to be interpreted under the laws of any other state. To interpret the agreement under Washington law, as McGill proposes, "would serve to defeat the basic objectives, namely those of certainty and predictability, which the choice-of-law provision was designed to achieve." *Id.*, comment *h* at 569. The agreement must be interpreted according to Pennsylvania rules of construction.

Pennsylvania is not a "community property" state. While we find no cases dealing with the precise situation before us, we note that Pennsylvania courts give great effect to mutual releases in separation agreements:

In the instant case, the separation agreement entered into by the parties is a model of detail and clarity. Included are, *inter alia*, (1) a mutual release and discharge of all rights, claims, demands or causes of action between the parties; (2) a waiver by each party of any and all rights to share in the estate of the other party which might otherwise result from the marital relationship; (3) a clause entitled "Acceptance by Wife" . . . As former Chief Justice Bell asked . . . "[c]ould any language be clearer?"

(Citations omitted.) *McGannon v. McGannon*, *supra*, 241 Pa. Super. at 48-49, 359 A.2d at 433. Under Pennsylvania law, separation agreements are binding on the parties "if they are entered into without fraud or coercion, are reasonable, and have been actually carried into effect in good faith." *Olivieri v. Olivieri*, 242 Pa. Super. 457, 464 n.4, 364 A.2d 361, 364 (1976); *Commonwealth ex rel. McClenen v. McClenen*, 127 Pa. Super. 471, 193 A. 83 (1937); *Commonwealth v. Richards*, 131 Pa. 209, 18 A. 1007 (1890). Absent fraud, a waiver or release in a separation agreement supported by consideration is binding and serves as a bar to a future action for support. *Commonwealth ex rel. Jablonski v. Jablonski*, 179 Pa. Super. 498, 118 A.2d 222 (1955). A

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separation agreement is a bargain between the parties "for complete personal and economic freedom from one another." *McGannon v. McGannon, supra*, 241 Pa. Super. at 49-50, 359 A.2d at 433.

With these considerations in mind, we consider the undisputed facts before the court. McGill does not attack the validity of the agreement, nor does she suggest fraud. She was represented by counsel, advised of her rights and obligations, and agreed to be permanently bound by the agreement. The record before the trial court indicates that the Boeing benefits were factors in the negotiation process. In a letter from McGill's attorney to Hill's just prior to execution of the separation agreement appears: "I want you to know that I have had a great deal of difficulty in getting Mrs. Hill to agree to the above proposal. She has strong feelings concerning the savings investment plan at Boeing to which she feels she is definitely entitled to one-half . . ."

Under these circumstances, we are convinced that the Pennsylvania courts would hold as a matter of law that the agreement vested sole ownership of the Boeing benefits in Hill, *McGannon v. McGannon, supra*, and would dismiss this action. The reference in the mutual release provisions to claims against property would be read as intending to vest sole ownership of all unspecified property in the name of the owner of record. The record owner of the Boeing benefits was Hill.

[3, 4] We hold, as well, that McGill is equitably estopped from asserting any rights in the Boeing benefits. An action for partition is equitable in nature. *Cummings v. Anderson*, 94 Wn.2d 135, 614 P.2d 1283 (1980). The requirements of equitable estoppel were set out in *Witzel v. Tena, supra* at 632:

For the doctrine to be applicable, there must be (1) acts, statements, or admissions inconsistent with a claim subsequently asserted, (2) action or change of position on the part of the other party in reliance upon such acts, statements, or admissions, and (3) a resulting injustice to such other party, if the first party is allowed to contradict

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or repudiate his former acts, statements, or admissions. *Kessinger v. Anderson*, 31 Wn. (2d) 157, 196 P. (2d) 289 (1948).

Here McGill released Hill from all further claim against all property arising from the marital relationship, and received substantial consideration in return. She does not contest the validity of the agreement. The record indicates that the Boeing benefits were taken into consideration in negotiating the separation agreement, and were left out of that agreement because Pennsylvania practice does not require inclusion. To allow McGill to now assert a claim against marital property given up in Pennsylvania would work an injustice against Hill, who, under Pennsylvania law, had the expectation of gaining "complete personal and economic freedom" from his former spouse.

The trial court did not err in dismissing the action on Hill's motion for summary judgment. The judgment of dismissal is affirmed.

SWANSON and CALLOW, JJ., concur.

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[No. 5095-1. Division One. May 1, 1978.]

GERALD E. NELSON, *Appellant*, v. KAA NAPALI
PROPERTIES, ET AL, *Respondents*.

- [1] **Conflict of Laws — Personal Service Contracts — Place of Performance — Public Policy.** The place of performance will be given great weight in determining which law governs the relationship of the parties, but when the law of the place of performance would invalidate the contract and the law of another state with a close relationship to the action and the parties would uphold the agreement, the public policies of the two jurisdictions will be examined and weighed against the justified expectations of the parties.
- [2] **Conflict of Laws — Contracts — Licenses — Contractor Registration — Performance in Foreign Jurisdiction.** A personal service contract entered into in this state will be governed by Washington law where it is enforceable in this state but not enforceable under the contractor registration requirements of the other jurisdiction, the parties justifiably expected an enforceable contract, enforcement is consistent with the contractor registration policies of both jurisdictions, and enforcement will serve the Washington policy of providing a forum for its residents for resolving adjudicable issues.

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Nature of Action: A specialty contractor sought damages for extra expenditures incurred in performing a contract in a foreign jurisdiction. The defendant sought to recover the cost of completing the contract.

Superior Court: The Superior Court for King County, No. 807637, Howard J. Thompson, J., dismissed the plaintiff's claim on September 30, 1976, on the basis that the plaintiff was not licensed as a contractor in the place where the work was performed.

Court of Appeals: Holding that the place of performance is not conclusive as to application of law to personal service contracts, and that the public policy of both jurisdictions required application of Washington law, the court *reverses* the summary judgment and *remands* for further proceedings.

Oles, Morrison, Rinker, Pickel, Stanislaw & Ashbaugh and Sam E. Baker, Jr., for appellant.

Henry L. Skidmore, for respondents.

RINGOLD, J.—Nelson is a specialty subcontractor, doing business as Nordic Tile Company, residing in the state of Washington. Nordic Tile at all relevant times was a registered contractor in the state of Washington under the contractor's registration act, RCW 18.27.

The defendant, Kaanapali Properties, is a joint venture between Kaanapali Realty, Inc., a Washington corporation, and West Maui Properties, Inc., a Hawaiian corporation. Both corporations are controlled by Richard Hadley, a Seattle resident involved in land development and construction business. Kaanapali, as owner and general contractor, commenced construction of a 360-unit condominium project in Maui, Hawaii, consisting of two multi-story towers.

In November 1974, Nordic Tile was requested to provide a quotation for installation of teak parquet flooring in the condominium units. Agreement was reached and work

commenced, the formal subcontract being signed by Nelson and Hadley in December 1974. After conclusion of the installation, a dispute arose regarding which of the parties should bear the cost of extra workers required by an accelerated work schedule and of extra expenditures allegedly required as a result of Kaanapali's failure to maintain work schedules and to coordinate the progress of the work.

Nordic Tile's complaint seeks to recover damages for breach of contract and misrepresentation. Kaanapali counterclaimed for its cost of completing Nordic Tile's work in excess of the contract price. As an affirmative defense to Nordic Tile's complaint for damages, Kaanapali alleges that Nordic Tile, unlicensed in Hawaii as a contractor, is thereby barred from bringing suit on the contract by virtue of the applicability of Hawaii law. On that theory summary judgment was granted below, and this appeal arises from the dismissal of Nordic Tile's complaint.

We hold that the trial court erred in granting the motion for summary judgment and accordingly reverse.

ISSUE

Was the trial court correct in holding that a subcontractor residing and registered under the Washington contractor's act was precluded by the contractor's licensing act of the state of Hawaii from maintaining a cause of action for breach of contract in the state of Washington?

STATUTES

HAWAII REVISED STATUTE:

§ 444-9 Licenses required. No person within the purview of this chapter shall act, or assume to act, or advertise, as general engineering contractor, general building contractor, or specialty contractor without a license previously obtained under and in compliance with this chapter and the rules and regulations of the contractors license board.

§ 444-22 Civil action. The failure of any person to comply with any provision of this chapter shall prevent such person from recovering for work done, or materials or supplies furnished, or both on a contract or on the

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basis of the reasonable value thereof, in a civil action, if such person failed to obtain a license under this chapter prior to contracting for such work.

REVISED CODE OF WASHINGTON:

RCW 18.27.020 Registration required—Partnerships, joint ventures—Penalties. (1) It shall be unlawful for any person to submit any bid or do any work as a contractor until such person shall have been issued a certificate of registration by the state department of labor and industries.

RCW 18.27.080 Registration prerequisite to suit. No person engaged in the business or acting in the capacity of a contractor may bring or maintain any action in any court of this state for the collection of compensation for the performance of any work or for breach of any contract for which registration is required under this chapter without alleging and proving that he was a duly registered contractor and held a current and valid certificate of registration at the time he contracted for the performance of such work or entered into such contract.

THE SIGNIFICANT RELATIONSHIP TEST

The trial court determined that the most significant contact in the instant case was the factor of performance in Hawaii, and that, therefore, the Hawaii law should apply. Our resolution of the significant contacts analysis indicates that Washington law should apply.

The controlling authority in this state is *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 70 Wn.2d 893, 425 P.2d 623 (1967), where the court abandoned the *lex loci contractus* rule.

In *Baffin* the court, drawing on the work of the drafters of the Restatement (Second) of Conflicts, adopts the significant relationship test, saying: "The basic rule is that the validity and effect of a contract are governed by the local law of the state which has the most significant relationship to the contract". *Baffin*, at 900.

The factors which are to be considered as significant, the court listed as follow:

- (1) In the absence of an effective choice of law by the parties, consideration will be given to the following

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factors, among others, in determining the state with which the contract has its most significant relationship:

- (a) the place of contracting,
- (b) the place of negotiation of the contract,
- (c) the place of performance,
- (d) the situs of the subject matter of the contract,
- (e) the domicile, residence, nationality, place of incorporation and place of business of the parties,
- (f) the place under whose local law the contract will be most effective.

Baffin Land Corp. v. Monticello Motor Inn, supra at 901. The trial court held that Hawaii law should govern because that is where the work was done.

[1] In determining the weight to be given the various factors in *Baffin*, the court said "[t]he approach is *not* to count contacts, but rather to consider which contacts are most significant". *Baffin*, at 900. The court indicates that the most significant contact in a contract for the rendition of services is that state where the contract requires that the services be performed. *Baffin*, at 902. Looking to the Restatement (Second) of Conflicts § 196 (1969), where the importance of the place of performance is discussed, it appears that in personal service contracts the local law of the place of performance should be applied "unless, with respect to a particular issue, some other state has a more significant relationship . . . in which event the local law of the other state will be applied." Comment *d*, following section 196, delineates the circumstances wherein the local law of the state where services are to be rendered should not be applied:

On occasion, a state which is not the place where the contract requires that the services, or a major portion of the services, should be rendered will nevertheless, with respect to the particular issue, be the state of most significant relationship to the transaction and the parties and hence the state of the applicable law. This may be so, for example, when the contract would be invalid under the local law of the state where the services are to be rendered but valid under the local law of another state

with a close relationship to the transaction and the parties. In such a situation, the local law of the other state should be applied unless the value of protecting the expectation of the parties by upholding the contract is outweighed in the particular case by the interest of the state where the services are to be performed in having its invalidating rule applied.^[1]

Restatement (Second) of Conflicts, *supra*.

In personal service contracts the Restatement rule appears to be that when the expectation interest of the parties outweighs the policy of the performance state in applying its invalidating rule, the local law of the place of performance should not apply. Washington law not only supports this position, but requires consideration of the public policies of both Hawaii and Washington. In *Pottlatch Fed. Credit Union v. Kennedy*, 76 Wn.2d 806, 810, 459 P.2d 32 (1969) the court states:

Certainly an identification of contacts is meaningless without consideration of the interests and public policies of potentially concerned states and a regard as to the manner and extent of such policies as they relate to the transaction in issue. These competing policies must also be weighed against the justified expectations of the parties.

The desire of the parties at the time of contracting was to create an enforceable contract. KAAPALI expected the work to be performed and Nordic Tile expected to be paid and to make a profit. Consideration of the expectation interest of the parties would weigh heavily in upholding the validity of the contract against the interests and public policy of Hawaii.

[2] The policy interest of Hawaii is expressed by the Department of Regulatory Agencies, rules and regulations for the Contractor's License Board, Title 7, ch. 8, § 1.2:

¹The final draft of Restatement (Second) of Conflicts § 188 (1969), listing the significant factors, excluded (1)(f) "the place under whose local law the contract will be most effective," the rule of validation as adopted by the *Baffin* court. In our opinion, Comment *d* to section 196 is a more precise application of the validation concept.

The Board interprets the primary intent of the Legislature in creating the Contractors License Board to be the protection of the public health, safety and general welfare, in dealing with persons engaged in the construction industry, and the affording to the public of an effective and practical protection against the incompetent, inexperienced, unlawful and unfair practices of contractors with whom they contract. All rules, regulations or orders adopted by the Board shall be interpreted and construed in light of the policies announced herein.

The public policy of the State of Washington is set forth in RCW 18.27.140: "[T]o afford protection to the public from unreliable, fraudulent, financially irresponsible, or incompetent contractors." The policy interest of both states is substantially the same. In *Andrews Fixture Co. v. Olin*, 2 Wn. App. 744, 749-50, 472 P.2d 420, 423 (1970), the court expanded upon this state's policy:

Courts have not insisted on literal compliance with a contractor registration law where the party seeking to escape his obligation has received the full protection which the statute contemplates. . . .

. . . . To deny plaintiff a recovery would transform this socially desirable registration act, designed primarily to protect the public from irresponsible contractors, into an unwarranted shield for the avoidance of a just obligation.

Thus a policy consideration is that of providing Washington residents a forum for the resolution of an adjudicable issue. The Hawaii statute, if applied, would deny to Nordic Tile access to any court for resolution of this question. While Hawaii can control access to its courts, it should not as a matter of policy be able to control access to Washington courts, which have jurisdiction, for resolution of a dispute primarily between Washington domiciliaries.

DECISION

The significance of the place of contracting, the domicile and residence of the parties (except one member of the Kaanapali joint venture), the expectation interests of the parties, and the policy of Washington in providing a forum

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far outweigh the significance of the place of performance and the public policy of Hawaii in applying its rule. Washington law applies.

The judgment is reversed for further proceedings in accordance with this opinion.

WILLIAMS and CALLOW, JJ., concur.

Reconsideration denied June 6, 1978.

Review dismissed by Supreme Court August 30, 1978.
