No. 92655-7

SUPREME COURT OF
THE STATE OF WASHINGTON

No. 71926-2-1

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

TRACI TURNER,

Plaintiff/Appellant/Petitioner

vs.

VULCAN, INC., et al.,

Defendants/Respondents.

ANSWER OF RAY COLLIVER AND LAURA MACDONALD TO PETITION FOR REVIEW

GORDON TILDEN THOMAS
& CORDELL LLP
Jeffrey I. Tilden, WSBA #12219
Michael P. Brown, WSBA #45618
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154-1007
Attorneys for Defendants-
Respondents Ray Colliver and Laura
Macdonald.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

I. COURT OF APPEALS' DECISION

The unreported decision of the Court of Appeals was issued on November 2, 2015, and can be found at 2015 WL 6684259.

II. IDENTITY OF RESPONDENTS

This Answer is filed on behalf of Respondents Ray Colliver and Laura Macdonald, defendants in the trial court and respondents in the Court of Appeals.

III. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals err in holding that it was proper for the arbitrator to rule on Ms. Turner's challenge to the validity of an employment contract between herself and her former employer?

B. Did the Court of Appeals err in holding that Ms. Turner failed to demonstrate that the employment contract was procedurally unconscionable?

C. Did Ms. Turner fail to satisfy the requirement that she demonstrate actual prejudice?

IV. STATEMENT OF THE CASE

A. Proceedings Before Judge Oishi in *Turner I*.

1. Ms. Turner Signed a Guaranteed Bonus Agreement, Agreeing to Arbitrate in Exchange for Vulcan's Promise to Pay 125% of Her Target Bonus.

Ms. Turner was employed by Vulcan as an "Executive Protection Specialist" for nine months, from January 2011 until she resigned in

September 2011. CP 271. Executive Protection Specialists provide protection for Vulcan's Chairman, Paul Allen, and members of his family. CP 271. In July 2011, Ms. Turner signed a "Guaranteed Bonus Agreement" ("GBA") with Vulcan, pursuant to which: (1) Vulcan guaranteed that she would receive 125% of her "target" bonus (which was otherwise discretionary); and (2) in exchange, Ms. Turner released any then-existing claims she had against Vulcan and its agents and agreed to confidential arbitration for any claims she might have arising out of the GBA and/or her employment at Vulcan. CP 280-82. The guaranteed bonus for 2011 was more than $25,000, subject to proration if her employment ended during the year. CP 280.

2. Despite Her Agreement to Arbitrate Claims, Ms. Turner Brought Five Employment-Related Claims in Superior Court in *Turner I*.

In September 2011, Ms. Turner resigned and filed a lawsuit against Vulcan and several of its executives, including Ray Colliver and Laura Macdonald. CP 37-39. She brought claims for constructive termination, fraud, hostile work environment, "tort," defamation, gender discrimination, harassment and retaliation. *Id.* Vulcan promptly moved to enforce the GBA and compel arbitration of these indisputably employment-related claims. CP 62-72. Ms. Turner opposed the motion, arguing that the arbitration provision of the GBA should not be enforced

because of the scope of the arbitration clause, lack of consideration, lack of mutuality, procedural unconscionability and substantive unconscionability. CP 75-79.

3. Judge Oishi Ordered Ms. Turner to Pursue Her Claims in Arbitration.

On October 6, 2011 Judge Oishi entered an Order Granting Vulcan's Motion to Compel Arbitration. CP 95-96. Ms. Turner moved for reconsideration of that ruling, but then voluntarily dismissed *Turner I* before Judge Oishi could rule on that motion. CP 122-25.

B. Early Proceedings Before Arbitrator Cairns.

On December 11, 2011 Vulcan commenced an arbitration against Ms. Turner, bringing claims for, *inter alia*, breach of contract and for declaratory relief on the validity of Ms. Turner's release of claims in the GBA. CP 419-20. In that arbitration Ms. Turner counterclaimed against claimant Vulcan, and brought claims against Mr. Colliver and Ms. Macdonald as cross-respondents. Those claims included: (1) five of the claims that had been ordered to arbitration in *Turner I* (constructive termination, gender discrimination, hostile work environment, retaliation, and defamation); and (2) five "additional" claims arising from the same facts and circumstances (sexual orientation discrimination, age discrimination, intentional infliction of emotional distress, negligent

infliction of emotional distress, and willful withholding of wages). CP 38, 1060.

C. Ms. Turner Defied Judge Oishi's Order and Attempted Again to Avoid Arbitration by Filing a Duplicative Lawsuit—*Turner II*—in Superior Court.

In January 2012 Ms. Turner filed another lawsuit in Superior Court—*Turner II*. CP 1-20. The complaint simply repeated the five claims that had been ordered to arbitration in *Turner I*[1]; and asserted five additional claims arising from the same alleged facts[2].

D. Judge Benton Dismissed *Turner II* and Ordered All Claims to Arbitration.

Vulcan and the other defendants moved to have *Turner II* dismissed and the "new" claims ordered to arbitration. They argued that, under principles of res judicata, Judge Oishi's Order in *Turner I* was preclusive in two respects. First, claim preclusion prevented Ms. Turner from re-filing claims that she brought or should have brought in *Turner I*. Second, issue preclusion prevented Ms. Turner from re-litigating the issue

---

[1] Gender discrimination, constructive termination, retaliation, hostile work environment and defamation.

[2] Sexual orientation discrimination, age discrimination, intentional infliction of emotional distress, negligent infliction of emotional distress, and withholding of wages.

of the enforceability of the arbitration provision, after that issue had been "finally" decided by Judge Oishi. CP 250-61

Ms. Turner responded by seeking relief from Judge Oishi's Order under CR 60, and arguing (again) that the court should not compel arbitration because the GBA and/or its arbitration provision were unconscionable. CP 590-602. At an April 5, 2012, hearing, Judge Benton denied Ms. Turner's Rule 60 motion and held that Ms. Turner must continue to pursue in the ongoing arbitration the five claims in *Turner II* that simply repeated the dismissed claims from *Turner I*. CP 1483-88; 4239-40. With regard to the five "new" claims asserted in *Turner II*, Judge Benton asked for more briefing on the issues of preclusion and unconscionability. *Id.*

The parties provided additional briefing as requested. On June 8, 2012, Judge Benton issued an Order dismissing the five "new" claims on the grounds that they were precluded under principles of "res judicata and/or collateral estoppel," and on the alternative grounds that the arbitration agreement was "not procedurally or substantively unconscionable." Judge Benton order that these five claims be pursued, along with the five *Turner I* claims, in the pending arbitration. CP 2210-13.

E. After a Hearing At Which Ms. Turner Failed to Appear, the Arbitrator Ruled in Favor of Vulcan, Mr. Colliver and Ms. Macdonald.

In the arbitration proceedings, Vulcan, Mr. Colliver and Ms. Macdonald together moved for a declaration regarding the validity of the release of claims included in the GBA. They argued that, because the release was valid, it precluded all of Ms. Turner's claims to the extent they arose on or before the date the GBA was signed (July 26, 2011). Ms. Turner's counsel withdrew from the case, effective September 6, 2012. Ms. Turner proceeded *pro se* until October 17, 2012, when she announced that she was withdrawing from the arbitration. CP 3083.

On October 31, 2012 Arbitrator Cairns ruled that the release was in fact valid and enforceable, leaving Ms. Turner with only her claims that arose between July 26, 2011 (the effective date of the release) and September 2011 (when she resigned from Vulcan). After a one-day hearing on November 26, 2012, Arbitrator Cairns issued her Findings of Fact, Conclusions of Law and Interim Arbitration Award. CP 3094-3101. She dismissed all of Ms. Turner's claims with prejudice, on the grounds that they were not supported by evidence and had been rebutted by evidence presented by Vulcan, Mr. Colliver and Ms. Macdonald.

CP 2236.[3] Those rulings were then repeated in the Arbitrator's Final Award on March 7, 2013. CP 3117-20.

F. The Superior Court Confirmed the Arbitrator's Dismissal of Ms. Turner's Claims.

Vulcan, Mr. Colliver and Ms. Macdonald moved for confirmation of the award. CP 2214-21. With regard to the dismissal of her claims, Ms. Turner argued that the award should be vacated because the Arbitrator engaged in "misconduct" by refusing Ms. Turner's request for a four-month continuance to find new counsel after her prior counsel withdrew. CP 2597-2619, 3220-46, 4536. On October 30, 2013 Judge Bruce Heller entered an order rejecting Ms. Turner's "misconduct" argument and confirming the dismissal of Ms. Turner's claims. CP 3422-27.[4]

G. The Court of Appeals Affirmed the Superior Court's Order.

In an unpublished decision (the "Decision') the Court of Appeals affirmed the superior court's confirmation of the arbitration award. It held that: (1) Ms. Turner's attack on the enforceability of the arbitration clause was a challenge to the GBA "as a whole," and accordingly was in the

---

[3] Arbitrator Cairns also ordered that Ms. Turner refund a portion of bonus payments received from Vulcan, and pay certain attorney's fees. However, these portions of the award did not affect Mr. Colliver or Ms. Macdonald and so were not addressed by them in the Court of Appeals. They will not be addressed here.

[4] Judge Heller remanded the case to the arbitrator to reconsider her ruling regarding attorney's fees. Again, however, that part of the dispute does not involve Mr. Colliver or Ms. Macdonald.

province of the arbitrator, rather than the court, to decide; and (2) Ms. Turner's assertion—that the GBA was unconscionable—failed on the merits.

V. ARGUMENT AGAINST GRANTING REVIEW

"The party seeking to avoid arbitration has the burden to show that the arbitration clause is unenforceable." *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 602–03 (2013). Under the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1–14, arbitration agreements are "'valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.'" *Id.* at 603, 293 P.3d 1197 (quoting 9 U.S.C. § 2). Because both state and federal law favor arbitration, all presumptions are made in favor of arbitration. *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301 (2004).

A. The Court of Appeals Correctly Affirmed the Superior Court's Holding That the Arbitrator Should Decide Turner's Challenge to the Contract as a Whole.

Ms. Turner contends that she was entitled to a judicial determination of her unconscionability challenge in a Rule 56 proceeding, rather than a determination by the arbitrator. However, this Court has clearly held that the arbitrator must hear a challenge that implicates the validity of a "contract as a whole," while the court should decide challenges that are "only and specifically directed to an arbitration clause"

appearing in a contract. *See Townshend v. Quadrant Corp.*, 173 Wn.2d 451, 458 (2012) (quotations omitted). The Court of Appeals held that Ms. Turner's unconscionability challenge was directed "to the contract as a whole," and not specifically targeted at the arbitration clause contained in that contract. Decision at 12. In her Petition, Ms. Turner does not take issue with that well-reasoned conclusion. Petition at 9-12.[5]

Ms. Turner's tacit concession on this point, while understandable, is fatal to her Petition. She makes no attempt to distinguish *Townsend*, other than a passing and unsupported comment, at the end of a footnote, that the "situation" in this case is "entirely different" because Ms. Turner was an existing employee of Vulcan when she was presented with the GBA and allegedly given an ultimatum to sign it or lose her job. Petition at 10 n.8. The Court need not consider an argument presented in a footnote, *State v. N.E.*, 70 Wn. App. 602, 606 n. 3 (1993), nor need it consider a bare and conclusory assertion unsupported by citations to

---

[5] Ms. Turner's argument was that the *GBA* was procedurally unconscionable because she was instructed to sign it "under threat of termination." Petition at 2. That challenge implicates the GBA as a whole, not "only and specifically" the arbitration clause contained therein. *See Townsend*, 173 Wn.2d at 459-60 (unconscionability argument attacked agreement as a whole where it was based on alleged denial of a fair opportunity to read and consider its terms and alleged coercion).

authority or the record, *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809 (1992).

Moreover, to the extent that Ms. Turner makes any "argument" here, it is entirely circular. *Townsend* holds that an unconscionability challenge that goes to the contract as a whole must be heard by the arbitrator. Ms. Turner argues that *Townsend* does not apply here because she was effectively coerced into signing the GBA, that is, because the GBA as a whole is unconscionable. Far from distinguishing *Townsend*, Ms. Turner's "coercion" argument is what brings her case squarely within its holding. *See Townshend*, 173 Wn.2d at 460 (unconscionability challenge is for arbitrator to decide where one can rule on the challenge "only by deciding whether the agreement as a whole is unenforceable").[6]

Finally, Ms. Turner argues that the court was required to decide her challenge to the validity of an arbitration agreement because the parties to the GBA did not "clearly and unmistakably" delegate such challenges to the arbitrator. Petition at 10. The clear-and-unmistakable

---

[6] Ms. Turner's citations to *Hill v. Garda*, 178 Wn.2d 47, 53 (2013) and *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 377 (2013) are unavailing, because in each of those cases the challenge was specifically directed at the arbitration/dispute resolution provisions of the contract, and not the contract as a whole.

delegation principle does not apply where, as here, the unconscionability challenge goes to the contract as a whole, rather than the arbitration clause specifically. *See Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 449 (2006); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 400 (1967).

In contrast to this case, two of the cases Ms. Turner cites for this proposition involved challenges made "only and specifically" to the arbitration *clauses* contained in contracts. *See Brown v. MHN Gov't Services, Inc.*, 178 Wn.2d 258, 264-65 (2013) (plaintiff challenged five provisions in the arbitration clause appearing in a "provider services" agreement); *Gorden v. Lloyd Ward & Associates, P.C.*, 180 Wn. App. 552, 558 (2014) (plaintiff challenged two aspects of arbitration clause appearing in client services agreements between themselves and attorneys). In the third case cited by Ms. Turner, *Romney v. Franciscan Med. Group*, 186 Wn. App. 728, 735 (2014), the Court of Appeals observed the general rule that courts decide whether arbitration agreements are unconscionable. However, it appears that neither party in that case argued that the plaintiff's challenge should be decided by the arbitrator, and the court did not mention, let alone discuss the *Buckeye/Prima Paint* rule followed by this Court in *Townsend*, that challenges to the contract as a whole are decided by the arbitrator rather

than the court. *Id. Romney* is not authority for a proposition that the court neither discussed nor decided. *Kucera v. Dep't of Trans.*, 140 Wn.2d 200, 220 (2000) (noting courts "do not rely on cases that fail to specifically raise or decide an issue.") (quotations omitted).

B. The Court of Appeals Correctly Held That Ms. Turner's Unconscionability Arguments Were Meritless.

As an alternative holding, the Court of Appeals addressed the merits of Ms. Turner's unconscionability challenge to the GBA, and correctly rejected it. In her Petition Ms. Turner does not take issue with the Court of Appeals' rejection of her argument that the GBA was substantively unconscionable. With regard to procedural unconscionability, the Court of Appeals correctly observed that, while Ms. Turner argues that she was given only 24 hours to understand the terms of the GBA, she admits that she didn't even bother to *read* the GBA once before signing—she simply flipped to the final page and signed it. Decision at 15. Ms. Turner can hardly claim that 24 hours was an "unconscionably" inadequate amount of time to read an agreement, when she didn't take *one minute* to read it before executing it. *See Dreher v. Eskco, Inc.*, 2009 WL 2176060 at *16 (S.D. Ohio July 21, 2009) ("the fatal weakness in Plaintiff's assertion of procedural unconscionability is the fact that she did not read the whole Employment Agreement before

signing it. Because she failed to read the whole agreement, no issue regarding the meaning or substance of the arbitration provision arose prior to Plaintiff agreeing to the terms of the Employment Agreement as conclusively established by her signature . . . [a party] cannot be excused from complying with the arbitration provision if it simply failed properly to read the contract") (quotations omitted); *Crawford Professional Drugs, Inc. v. CVS Caremark Corp.*, 748 F.3d 249, 265 (5th Cir. 2014) (plaintiff cannot claim arbitration agreement is procedurally unconscionable after choosing not to read it before signing).

The Court of Appeals also correctly rejected Ms. Turner's argument, that the GBA was *necessarily* unconscionable merely because she faced the threat of losing her job if she did not sign it. Decision at 16, *citing Romney*, 186 Wn. App. at 739-40 (the fact that a contract is presented as a condition of employment does not make it procedurally unconscionable; inquiry is whether the plaintiff had a "meaningful choice" in deciding whether or not to sign, and an employee has the ability to reject the agreement an "choose employment elsewhere"). Ms. Turner argues that the Decision conflicts with *Mayne v. Monaco Enterprises, Inc.*, 361 P.3d 264, 268 (Wn. App. 2015), where the Court of Appeals held that procedural unconscionability was demonstrated when an employer presented a nine-year veteran employee with an arbitration agreement and

explicitly informed him he would be fired if he did not sign. However, the Decision here is entirely consistent with *Mayne*.

In finding the arbitration agreement procedurally unconscionable, the *Mayne* court explicitly relied on the fact that the employee was not given *any* additional consideration for his agreement to the arbitration provision. *Id.* Indeed, the court observed that such arbitration agreements would *not* be unconscionable where the employee is "offered *some incentive as consideration*" for agreeing to arbitration. *Id.* at 269 (emphasis added). Here, Ms. Turner was plainly given "additional consideration" for her agreement to sign the GBA, in the form of a guarantee that she would receive a $25,000 "bonus" that, in the absence of the executed GBA, was entirely discretionary. CP 280-83.

Further, in *Mayne* the employer explicitly made signing the agreement a condition of employment, and told the plaintiff he would be fired if he did not sign. *Mayne*, 361 P.3d at 260. Here, by sharp contrast, Ms. Turner relies solely on the allegation that she "*believed* [she] would be retaliated against and ultimately fired" if she did not sign the agreement. CP 623 (emphasis added). A party's subjective belief is not evidence of unconscionability. *See THI of New Mexico v. Patton*, 2012 WL 112216 at *22 (D.N.M. Jan. 3, 2012) ("Nor is Ms. Barry's mere subjective feeling of not being free to decline arbitration terms enough to

demonstrate procedural unconscionability.") (quotations omitted).

C. Ms. Turner Failed to Satisfy the Requirement That She Demonstrate Prejudice Resulting From the Order Compelling Arbitration.

Ms. Turner did not seek immediate review of either Judge Oishi's or Judge Benton's orders compelling arbitration. As such, to prevail on this appeal, she must demonstrate not only that those orders were made in error, but also that she suffered prejudice as a result of that error. *Saleemi*, 176 Wn.2d at 380 ("We join the emerging consensus of courts and hold that a party who fails to seek discretionary review of an order compelling arbitration, must show prejudice as a condition of relief from the arbitration award. This approach promotes prime purposes of arbitration, speed and convenience, while allowing the truly aggrieved party to obtain relief."). "Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Id.* (citations omitted).

In the Court of Appeals, Ms. Turner addressed this requirement only in passing, and came nowhere close to satisfying it. Appendix A at 26. Ms. Turner's sole argument addressed to this central issue is this casual reference:

> To the extent that it is necessary to show prejudice from the Order [compelling arbitration], the harm is evident in the "daunting," "shocking," "overly-harsh" $113,325 in [attorney's] fees against Turner . . .

Id. However, the arbitrator's award of attorney's fees in that amount came *after* the arbitration ended. Ms. Turner does not even attempt to explain how her ability to advance her interests *during* the arbitration were prejudiced by an attorney's fee award that came afterward.[7] Indeed, Ms. Turner would have faced the very same liability for attorney's fees under her contract with Vulcan, had her claims proceeded in court rather than arbitration. There was no prejudice.

Elsewhere in her brief Ms. Turner referred to the high cost of AAA and arbitrator's fees. But she did not even *argue* that being billed for these fees prevented her from presenting her case to the arbitrator. In fact, Ms. Turner's ability to proceed in the arbitration was never affected by the arbitration fees, and Vulcan ultimately paid for *all* of those fees. CP 3039-42. Ms. Turner also referred to her attorney's withdrawal from the case during the arbitration and her inability to retain new counsel. However, there is no indication whatsoever that these obstacles arose *because* the dispute was in arbitration rather than in superior court, or that Ms. Turner would not have faced the same challenges with respect to securing counsel in a judicial forum.

---

[7] The award was later reduced, on remand to the arbitrator, to $39,524.50. CP 3986.

In light of Ms. Turner's complete failure to show prejudice, the Court of Appeals could and should have affirmed the superior court even if, *arguendo*, Ms. Turner had demonstrated that the orders were made in error. *Saleemi*, 176 Wn.2d at 380.

VI. CONCLUSION

Ms. Turner fails to establish any basis for this Court to exercise discretionary review. Mr. Colliver and Ms. Macdonald respectfully request that the Court deny Ms. Turner's Petition.

RESPECTFULLY SUBMITTED this 4th day of January, 2016.

GORDON TILDEN THOMAS & CORDELL LLP
Attorneys for Respondents Ray Colliver and Laura Macdonald

By _____
Jeffrey I. Tilden, WSBA #12219
Michael P. Brown, WSBA #45618
1001 Fourth Avenue, Suite 4000
Seattle, Washington 98154
Telephone: (206) 467-6477
Facsimile: (206) 467-6292
Email: jtilden@gordontilden.com
mbrown@gordontilden.com

CERTIFICATE OF SERVICE

On the 4th day of January, 2016, I caused to be served upon the following, at the address stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Rebecca J. Roe Kathryn Goater Schroeter Goldmark & Bender 810 Third Avenue, Suite 500 Seattle, WA 98104 roe@sgb-law.com goater@sgb-law.com	☐ Via Hand Delivery ☐ Via U.S. Mail ☒ Via Email
Harry H. Schneider, Jr. Kevin J. Hamilton Joseph M. McMillan Perkins Coie, LLP 1201 Third Avenue, Suite 4800 Seattle, WA 98101 HSchneider@perkinscoie.com KHamilton@perkinscoie.com JMcMillan@perkinscoie.com	☐ Via Hand Delivery ☐ Via U.S. Mail ☒ Via Email

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

DATED at Seattle, Washington, this 4th day of January, 2016.

Cathy L. Swanson, Legal Assistant

APPENDIX A

NO. 71855-0-I

COURT OF APPEALS,
DIVISION I
OF THE STATE OF WASHINGTON

TRACI TURNER,

Appellant,

v.

VULCAN, INC., et al.,

Respondents.

Appeal from the Superior Court of Washington
for King County

Cause No. 12-2-03514-8 SEA

BRIEF OF APPELLANT TRACI TURNER

REBECCA J. ROE, WSBA #7560
KATHRYN GOATER, WSBA#9648
SCHROETER GOLDMARK & BENDER
810 Third Avenue, Suite 500
Seattle, Washington 98104
206/622-8000

CARLA TACHAU LAWRENCE, WSBA #14120
(Of Counsel)

TABLE OF CONTENTS

APPENDICES

APPENDIX A	-	Guaranteed Bonus Agreement
APPENDIX B	-	Employee Intellectual Property Agreement (Turner 2010)
APPENDIX C	-	Order Granting Defendant Vulcan Inc.'s Motion To Compel Arbitration And To Stay Proceedings, Judge Patrick Oishi, King County Cause No. 11-2-32744-2 SEA, Dated October 6, 2011
APPENDIX D	-	Order Compelling Plaintiff To Arbitrate Claims And Staying Proceedings, Judge Monica J. Benton, King County Cause No. 12-2-03514-8-SEA, dated June 8, 2012
APPENDIX E	-	Employee Intellectual Propriety Agreement (2012)
APPENDIX F	-	Findings of Fact, Conclusions of Law and Interim Arbitration Award, Arbitrator Carolyn Cairns, American Arbitration Association Employment Arbitration Tribunal, Case No. 75 166 00410 11 DWPA, dated December 21, 2012
APPENDIX G	-	Memorandum Opinion, Judge Bruce E. Heller, King County Cause No. 12-2-03514-8-SEA, dated September 27, 2013
APPENDIX H	-	Amended Findings of Fact, Conclusions of Law and Interim Arbitration Award, Arbitrator Carolyn Cairns, American Arbitration Association Employment Arbitration Tribunal, Case No. 75 166 00410 11 DWPA, dated January 30, 2014
APPENDIX I	-	Order Denying Plaintiff's Motion For Award of Attorneys' Fees, King County Cause No. 12-2-03514-8 SEA, Judge Bruce E. Heller, dated April 1, 2014.

TABLE OF AUTHORITIES

Page

Cases

Table of Authorites, continued

Page

Table of Authorites, continued

Page

Rules

Statutes

Page

Other Authorities

Miscellaneous

I. INTRODUCTION

This case illustrates the danger of arbitration in employment actions when the employer uses the process not for inexpensive and expeditious resolution of disputes, but to circumvent employees' statutory and constitutional rights. Appellant Traci Turner began these proceedings by filing statutory employment and wage claims against Respondent Vulcan[1][1] in court. But based on an unconscionable arbitration clause, Vulcan pursued Turner in arbitration, obtaining a judgment of a little more than $5,000 against her (for reimbursement of relocation expenses). Following this small recovery, Vulcan received an attorney fees award of $113,325 --more than 20 times the judgment, effectively punishing this employee for bringing suit--later vacated by the court as unconscionable and in violation of public policy. In this appeal ...In this appeal, Turner contends the superior court erred in granting Vulcan's motion to compel arbitration without ruling the arbitration provision unconscionable. In addition, Turner appeals the attorney fees award granted by the arbitrator on remand, as it is based on claims arising out of the same facts and law as the previously vacated award.

Vulcan's arbitration tactics provide a case study of companies using confidential arbitrations to bully employees and shield their

[1] Respondents are Vulcan, Inc., Paul Allen, Ray Colliver and Laura Macdonald (collectively "Vulcan").

misconduct from public view. There are legitimate and even constitutional separation of powers concerns about "the independence of the administrative framework under which arbitration is conducted. The notion that justice may be fairly and effectively dispensed under the auspices of a private corporation whose legal rights are at issue should strike reasonable people as absurd." Thomas J. Stipanowich, *The Arbitration Fairness Index,* 60 U. Kan. L. Rev. 985, 989 (2012).[2]

> [T]here are concerns about arbitrators, the individuals whose decisions—awards—are largely immune to judicial reversal for errors of law or fact and hence more ironclad than court judgments or jury verdicts.

Id. at 990 (footnotes omitted; citing studies, articles, cases).[3]

These concerns became realities in this case. Accordingly, Appellant Traci Turner asks the Court to reverse the superior court's order compelling arbitration, on the grounds that the arbitration agreement is

---

[2] *See also id.* at 987-88, 998-99 (2012) (employees have little or no idea what arbitration entails; many believe there is no point in trying to avoid or alter arbitration provision or that "privacy enshroud[s] these processes"; there is little or no evidence that companies "promote or incentivize conscious choices regarding arbitration."); *e.g.,* Lisa Blomgren Amsler, *Combating Structural Bias in Dispute System Designs That Use Arbitration: Transparency, the Universal Sanitizer,* 6 Y.B. On Arb. & Mediation 32, (2014) (corporations have such vast economic power that employees are generally unable to evade arbitration clauses); George Padis, *Arbitration Under Siege: Reforming Consumer and Employment Arbitration and Class Actions*, 91 Tex.L.Rev. 665, 667-68 (2013).

[3] Pres. Obama ordered corporations receiving federal contracts over $1 million may not require workers to arbitrate Title VII or sexual assault claims. http://publicjustice.net/content/slate-story-obamas-federal-worker-rules#sthash.juweky9p.dpuf. A study of 4,000 arbitrations (2003-07) showed employees claiming discrimination won about 21% of the time, as opposed to 50-60 % in court, where damages averaged 5 times higher (other studies). *Id.*; Colvin, *An Empirical Study of Employment Arb.,* http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1586&context=articles.

procedurally and substantively unconscionable (though it need only be one or the other), and therefore unenforceable. It is also an involuntary waiver of Turner's right to a jury trial. In addition, Turner requests reversal of the court's order confirming the arbitrator's attorney fees to Vulcan on remand, and reversal of the order denying attorney fees to Turner for prevailing in overturning the previous fees award in her statutory employment and wage case.

II. ASSIGNMENTS OF ERROR

Appellant Traci Turner assigns error to the following:

1. The superior court's Order Compelling Plaintiff To Arbitrate Claims And Staying Proceedings in King County Superior Court Case No. 12-2-03514-8 SEA (June 8, 2012) (*Turner II*), CP 4027-30 (Appendix D). Reversal of this Order would result in vacation of all subsequent orders and the Final Judgment, and remand to the superior court for trial.

2.(a) The court's confirmation of the arbitrator's award of $39,524.50 in attorney fees to Vulcan, CP 3985-88, when the court had previously vacated the arbitrator's attorney fees award to Vulcan as violating public policy and unconscionable, CP 3978-3997.

(b) The superior court's denial of Turner's motion for attorney fees for prevailing in vacating the $113,235 fees award to Vulcan, CP 3976-77.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

1.(a) When unconscionability is a gateway dispute that the court, not the arbitrator, must decide, and the arbitration clause was procedurally and substantively unconscionable, did the superior court err in concluding, contrary to Washington law and the undisputed facts, that the arbitration clause was conscionable? (Assignment of error 1; de novo.)

(b) Did the superior court err in giving preclusive effect to a previous order compelling arbitration in Turner's first lawsuit, when the first court never decided unconscionability and thus also erred in compelling arbitration based on the unconscionable clause? (Assignment of error 1; de novo.)

(c) Does enforcement of the GBA's arbitration clause violate Turner's constitutional right to a jury trial and the constitutional separation of powers doctrine? (Assignment of error 1; de novo.)

2. When the issues on employer Vulcan's summary judgment motions were based on a common core of facts and related legal theories in Turner's statutory employment and wage claims, and the court concluded the arbitrator's award of attorney fees to Vulcan is unconscionable and a violation of public policy, is the arbitrator's subsequent fees award to Vulcan also unconscionable and a violation of public policy, so that the superior court erred in confirming that award?

(Assignment of error 2(a); de novo).

3. Is Turner entitled to attorney fees on prevailing in her court action to vacate the $113,325 attorney fees award to employer Vulcan in arbitration? (Assignment of error 2(b); de novo.)

4. Is Turner entitled to attorney fees for this appeal?

IV. STATEMENT OF THE CASE

Turner is a former employee of Vulcan, Inc. She served on the Executive Protection (EP) team at Vulcan from January to September 2011. CP 584. The EP team provides personal protection to Paul Allen, his sister Jody Allen, and Jody Allen's children. CP 642. At the start of her employment on January 17, 2011, Turner signed an Employee Intellectual Property Agreement (EIPA). CP 2359-63, 2601 (Appendix B). In signing, she agreed to keep information confidential–particularly trade secrets, inventions, patents, and the like. CP 2359-63, 2602.

Buried in the EIPA's discussion of inventions, patents, and trade secrets was a sentence under the heading, "Miscellaneous," that in any lawsuit arising out of "my employment ..., including any alleged tort or statutory violation, the prevailing party shall recover their reasonable costs and attorneys fees". CP 2362. Thus, on her second day on the job, Turner was asked to sign a document containing illegal and unenforceable

provisions, *i.e.,* awarding a prevailing employer attorney fees and costs in a discrimination or wage claim, in direct violation of Washington law. CP 3593-98 (Appendix G).

Turner joined the Vulcan EP team at a time of chaos and hostility. Owner Paul Allen and his sister Jody were involving team members in unethical and illegal activities. CP 584, 2602. Tension between the Allens and their protection team came to a head in the summer of 2011, when ten members threatened legal action against Vulcan. The claims were mediated in July 2011. CP 2602-03. While the settlement process was ongoing, Vulcan presented remaining EP team members, including Turner, with a Guaranteed Bonus Agreement (GBA). CP 280-82 (Appendix A). The agreement had two discrete provisions. First, employees would "waive any potential claims against Vulcan and its affiliates." Second, employees agreed to confidential arbitration of all future claims. In return, *i.e.,* "consideration," employees were guaranteed a heretofore discretionary bonus at the end of the year. CP 280-82.

Turner was eligible to receive $25,156 as a guaranteed bonus for signing the GBA. CP 280. The "consideration" provided was for the waiver of claims. CP 3213.[4] The amount had no relationship to any claims Turner was giving up, nor was it determined that any portion was

[4] Excerpts of Deposition of Vulcan Human Resources Director Laura Macdonald.

"consideration" for the arbitration clause. CP 2623, 3213. The amount was based solely on a percentage of salary. CP 2851, 3212 (105:21-25).

At the direction of Human Resources Director Laura Macdonald, Director of Security Kathy Leodler presented the GBA to Turner in person on July 26, 2011. CP 585, 622, 643. Leodler had been "tasked" by Macdonald to require the EP team members to sign the confidential arbitration agreement. CP 643. Leodler had been told Paul Allen would not allow anyone around him who had not signed one (CP 643), and she so informed Turner. CP 585. As the lead on his protection detail, Turner could not perform her duties without signing. *Id.* Though the "agreement" gave her the right to consult counsel, it was illusory: she was given a 24-hour turnaround time. CP 585, 622. Turner believed she would be fired if she did not sign. CP 585, 623. Turner signed the GBA, telling Leodler she knew she had no choice but to sign or lose her job. CP 585, 643.

Turner did not understand the meaning of the terms and had no idea about arbitration, its rules or costs. CP 585-86. She was not told she was waiving her right to a jury trial. She was not told she was agreeing to significant arbitration fees that were many times higher than superior court filing fees. She was not told that if the arbitrator were wrong on the law, she would have no right to appeal the arbitrator's mistakes or disregard of the law. She was not told that in a confidential arbitration, she could talk

to no one about her case, nor could she disclose what anyone said under oath in her arbitration to compare their testimony in another proceeding. *Id.*

Executing the GBA did not mend the fractured relationship between EP team members and Vulcan executives. Instead, the environment became increasingly hostile, to the point of being unbearable. In September 2011, in addition to the turmoil surrounding the EP team, Turner had complained to HR about gender discrimination. CP 2603, 586. She experienced retaliation for her complaint and was constructively discharged on September 23, 2011. CP 160-162, 586, 2603.

• ***Turner I.*** On September 26, 2011, Turner filed a lawsuit for claims arising out of her employment. The claims were constructive discharge, fraud, hostile work environment, tort, defamation, gender discrimination, harassment and retaliation. CP 160-62. The case was assigned to King County Superior Court Judge Patrick Oishi. The next day, on September 27, 2011, Vulcan filed a Motion to Compel Arbitration, CP 62-72, premised on its argument, repeatedly and vigorously made, that the only decision before the court was whether an arbitration agreement existed covering the claims. Vulcan argued: the case must be ordered into arbitration if there was an offer, acceptance, and consideration; Turner's signature on the GBA constituted a final binding agreement; and the court

must "summarily" order arbitration. CP 69. All issues concerning the arbitration agreement's enforceability and unconscionability were to be decided by the arbitrator, represented Vulcan. No discovery was necessary or appropriate because Turner signed the GBA; only the fact of her signature and that it covered matters arising from her employment were relevant. CP 69-70.

Turner filed a declaration outlining the duress and coercion she experienced in Vulcan's procuring the GBA. CP 622-23. Vulcan argued those issues were for arbitrator, not the court. CP 62-72. Turner maintained the issue of unconscionability of the arbitration clause required discovery, she had not knowingly and voluntarily waived her right to a jury trial, and the motion should be treated as one for summary judgment. CP 75-79. In reply, Vulcan reiterated that each of Turner's arguments challenging the enforceability rather than the existence of the agreement was to be decided by the arbitrator. CP 87. Vulcan argued that validity of the agreement, claims of duress, coercion, unconscionability, or confusion are determined by the arbitrator. CP 87-90.

Vulcan noted this as a six-day motion, and the court decided it without a hearing. On October 6, 2011, Judge Oishi ordered the matter to arbitration. CP 95-96. His order reflects that he considered the declaration of Nicole Stansfield (Vulcan HR), which simply authenticated that Turner

signed the GBA. CP 270-72. Judge Oishi interlineated that he considered Turner's declaration and that he declined to treat the motion as a dispositive motion under CR 56 because it had not been noted or pled as such. CP 95-96. Turner moved for reconsideration, alleging substantive and procedural unconscionability. CP 98-103. She was again met with Vulcan's insistence that the existence of the GBA meant arbitration was required, and all issues of procedural and substantive unconscionability were to be decided by the arbitrator. CP 117-118. While the motion for reconsideration was pending, Turner took a nonsuit because the parties were participating in a mediation. CP 127.

- **Vulcan's Arbitration Notice.** On December 14, 2011, Vulcan filed Notice of Intent to Arbitrate, bringing ten claims against Turner. CP 139-40.[5] The first five claims were variations on the theme that Turner violated the EIPA confidentiality provision by threatening to reveal private information. But the only "threat" by Turner was to file a lawsuit.[6] Vulcan alleged breach of the EIPA, anticipatory breach of the EIPA, breach of the duty of loyalty to act at all times solely for Vulcan's benefit, and breach of confidential relationships. Vulcan claimed violation of the

---

[5] Vulcan first claimed 3 arbitrators were needed, though later settled for one. CP 146.

[6] Vulcan apparently believes the EIPA prevents an employee from filing a lawsuit at all. The GBA contained no exception to the "gag" provision for discussions with attorneys. CP 12, § D. The provision allowing the employee to have counsel review the agreement reminded the employee that the attorney must agree to be bound by the confidentiality terms. CP 13, § G.

Computer Fraud and Abuse Act, apparently for sending email correspondence to her home email. CP 418. Vulcan asserted four "claims" that were in reality defenses, and asked for a declaratory award that it had no liability for any employment claim, fraud, defamation, or any conduct before the July 26, 2011 Release. CP 419-20. Vulcan ultimately dismissed all claims except one, CP 2548, pursuing only its claim for repayment of the prorated relocation bonus plus interest ($5,025.81). CP 419. However, with a "loser pays" provision buried in the EIPA, Vulcan can and did run up enormous legal fees with which to threaten Turner and chill her exercise of her legal rights.

Upon Vulcan's filing its arbitration Notice, the American Arbitration Association (AAA) immediately billed Turner a $10,200 initial fee and $4,000 as a final fee. CP 2425. These administrative fees did not include the arbitrator's fee, to be billed at $450 per hour. CP 2427.

- ***Turner II*–Motion To Compel Arbitration (Judge Benton).** On January 27, 2012, with new counsel, Turner filed five additional claims in King County Superior Court that she had not brought in her first complaint, including wage and age discrimination claims. CP 182-85. *Turner II* was assigned to Judge Monica Benton for hearing on Vulcan's motion to dismiss. Vulcan argued all claims in both cases arose out of "a common nucleus of underlying facts, allegations, and claims." CP 2002.

Indeed, Vulcan asserted Turner should have brought all the claims in *Turner II* earlier and she was impermissibly "splitting" her causes of action. CP 2007-08.

During the weeks leading up to the April 5, 2012 hearing, Vulcan vigorously resisted discovery, specifically on the question what would have happened to Turner's employment if she had refused to sign the GBA's arbitration clause. After having argued to Judge Oishi that his decision to compel arbitration did not determine the enforceability or unconscionability of the arbitration clause, but rather solely its existence, Vulcan pivoted to portray Judge Oishi's ruling as a decision that the GBA's arbitration clause was not unconscionable. CP 1991. Alternatively, Vulcan continued to argue all unconscionability decisions should be made by the arbitrator. CP 2008-09. For this reason, Vulcan told Judge Benton, discovery sought by Turner was unnecessary, since the arbitrator would fully and fairly litigate unconscionability. CP 4233-34. Finally, Vulcan asserted the evidence showed neither procedural nor substantive unconscionability. CP 1991.

By February 2012, Turner had received bills in excess of $20,000 for her portion of arbitration fees. CP 2454. Turner's counsel started asking Vulcan to pay the entire arbitration fees in March 2012. CP 2430. Vulcan steadfastly refused. CP 2430.

• **Hearing Before Judge Benton.** The April 5, 2012 hearing in front of Judge Benton was remarkable for the disingenuousness in Vulcan's representations of the case history. Initially, Vulcan continued the argument made to Judge Oishi:

> The decision for the court: Two things: Did a contract exist? And second, does it cover this particular subject matter?

CP 4139.

> Once the court has decided that a contract exists and that the subject matter is covered, the case goes to arbitration, and the arbitrator decides such questions as enforceability.

CP 4139.

> We all agree there's a contract. Its legal effect is hotly disputed ... the debate about its avoidance is ... resolved by the arbitrator.

CP 4214-15.

Vulcan then proceeded to argue all Turner's concerns about unconscionability could and should have been presented to Judge Oishi in October 2011. After conceding it was significantly different if Turner was told she would lose her job in the event she did not sign the GBA, as opposed to a subjective belief she would be fired (CP 4129), Vulcan argued to Judge Benton:

> That's a question that the court should have considered, could have considered, probably would have considered back in October if it was presented.

CP 4129. Judge Benton expressed concern about the arbitration fee issue. CP 4220. Incredibly, yet again Vulcan claimed:

> Turner should have raised the issue in front of Judge Oishi with competent evidence so he could have considered alleviating Turner of the responsibility for fees.

CP 4222.[7]

Turner argued that the confidentiality provision was substantively unconscionable because, among other reasons, it denied her access to relevant evidence. CP 4201-02. Vulcan urged that the "confidential" condition attached to the arbitration meant only that it was private, and the arbitrator could choose not to enforce confidentiality. CP 4134-35. Again, Vulcan flatly misrepresented the procedural history:

> To be very clear, Judge Oishi could have taken a look at the unconscionability issue and severed that provision of the contract[.]

CP 4181.[8]

The confidentiality of the proceedings, coupled with the lack of discovery, permitted Vulcan to grossly distort the facts and make contradictory representations during the proceedings. But the circumstances of signing the GBA were critical disputed issues: what was Turner told would happen if she did not sign? Turner had submitted a

[7] In the same breath, Vulcan maintained that because she had paid the first fee of $900, obviously she could pay. CP 4221.

[8] Vulcan argued Judge Benton, as an equivalent, non-reviewing court, could not consider unconscionability "a second time." *Id.*

declaration that she believed she would lose her job if she did not sign the GBA, and that her direct supervisor, Kathy Leodler, said she had 24 hours to decide. CP 622. Leodler confirmed in her declaration that she told Turner she would be out of job if she did not sign, and she may have told Turner she had 24 hours. CP 643.

Vulcan submitted the declaration of Laura Macdonald,[9] accusing Leodler of being "highly misleading" in: (1) reporting she may have given Turner a 24-hour turnaround and (2) reporting that Macdonald instructed her to require EP team members to sign the GBA. CP 814-15. Macdonald's carefully crafted declaration, not subject to testing through a deposition, denied she instructed Leodler to have employees sign the agreement, and claimed Leodler did not report to her and Macdonald did not exercise authority over Leodler. Macdonald acknowledged asking Leodler to forward the GBA to Turner, but stated she did not give a 24-hour turnaround. CP 815. She did not, nor could she, dispute what Leodler said to Turner. Rather, Vulcan insinuated Leodler was either lying or did not have authority to represent to Turner that she needed to sign the GBA, and quickly.

However, when Macdonald was deposed in the other four EP-Vulcan cases on June 5, 2012, she acknowledged working with Vulcan

[9] Both Macdonald and Leodler were executive management.

attorneys on the GBA, she gave the GBAs to Leodler to have signed (CP 3213), Vulcan counsel conveyed a sense of "urgency" to Macdonald and Leodler (CP 3213-14), and Macdonald told Leodler to convey urgency to sign to the EP team. CP 3215. Macdonald did not think she gave a 24-hour turnaround but knew she relayed there was "absolutely a sense of urgency" they get the GBAs signed. CP 3213. Though Macdonald claimed it was "undecided" what would happen to those who refused to sign the document, she admitted no one declined to sign. CP 3214, 3216.

Before Judge Benton, Vulcan argued Judge Oishi's "careful consideration" (CP 2009) of the conscionability issue was "res judicata" as to unconscionability, should she even reach that issue. Vulcan's "evidence" of this "careful consideration" was the fact that Judge Oishi handwrote two sentences in the Order. CP 2035. Neither interlineation remotely suggests he considered or decided unconscionability. The Order does not mention unconscionability at all. CP 4032-33 (Appendix C).

Following the April 5th hearing, Judge Benton requested supplemental briefing on the issue of "arbitrability." Vulcan continued to oppose depositions, and in fact successfully moved to preclude them. CP 1713-14. Vulcan again argued Judge Oishi's October 6, 2011 Order was "res judicata" and "collaterally estopped" Judge Benton from addressing arbitrability. CP 1504-05. Vulcan maintained procedural

unconscionability was reserved for the arbitrator. CP 1506-7. Vulcan contended substantive unconscionability could be determined based on affidavits about Turner's financial ability to pay arbitration fees, and the substantive unconscionability of the confidentiality provision was not before the court. CP 1507-08.[10]

Turner argued the arbitration agreement was procedurally unconscionable because it was presented in a take-it-or-leave-it fashion and she had no meaningful choice or opportunity to understand the rights waived by signing. [11] CP 1783-95. She contended the arbitration agreement was substantively unconscionable because of the confidentiality provision which limited an employee's access to the relevant facts (CP 1795-97), contained non-mutual legal remedies favoring Vulcan (CP 1798-99), improperly purported to waive statutory rights (CP 1799-1801), and contained impermissible fee-splitting (CP 1801-03). Turner provided a declaration of her assets, corroborated by her bank's declaration that she was unemployed and not receiving unemployment compensation, had bank balances of about $32,000, had been billed by AAA a $10,200 filing fee and additional $20,250 for her

[10] Turner contended that Paul and Jody Allen's intimate involvement with creating and implementing the binding confidential arbitration agreement and the consequences of not signing were critical issues. CP 1574-75.

[11] Judge Benton denied Turner's motion to compel depositions on 4-28-12. CP 1713-14.

half of the arbitrator's fees, and that she could not afford this arbitration.[12] CP 1813, 1822, 1824-25.

On June 8, 2012, Judge Benton entered an order sending all Turner's claims to arbitration on the basis that Judge Oishi's order was "res judicata and/or collateral estoppel" "and on the basis that the parties' written agreement is not procedurally or substantively unconscionable or otherwise unenforceable." CP 2210-13. Judge Benton made no findings of fact regarding procedural or substantive unconscionability.

• **Arbitration Proceedings.** Having advocated the policy favoring arbitration as an inexpensive and expeditious way to resolve claims, and armed with an opponent who already could not afford fees, Vulcan set out to make the arbitration proceeding as expensive as possible. Although four other legal proceedings involving the same witnesses were underway (CP 2606-07), Vulcan specifically spurned Turner's request to participate in, and have access to, relevant evidence being gathered in those other proceedings. CP 3260. Vulcan also impeded access to witnesses by warning Turner's counsel that Vulcan employees would not agree to discovery interviews in lieu of depositions. CP 2912-13.

Vulcan filed its first request for a partial summary judgment

[12] She had an IRA valued at $103,756.90. CP 1824.

regarding Turner's defamation "counterclaim"[13] on May 14, 2012. CP 2433-35. Turner objected, based on the increased cost of filing multiple motions and her lack of opportunity for relevant discovery. CP 2436-37. The arbitrator granted leave to file. CP 2442. On July 6, 2012, Vulcan requested permission to file a second summary judgment motion on the enforceability of the Release provision in the GBA. CP 2438. In requesting permission, Vulcan asserted:

> At this point, we believe the issue is settled–the Guaranteed Bonus Agreement has been determined valid and enforceable by the court in ordering Ms. Turner (twice) to submit her claims to AAA arbitration. Having argued unsuccessfully before the Superior Court that the Guaranteed Bonus Agreement was procedurally unconscionable, substantively unconscionable, legally invalid, and therefore unenforceable, we believe Ms. Turner is now estopped from seeking a contrary ruling in arbitration.

CP 2439.[14] Vulcan had thus completed its duplicitous circle, first by arguing unconscionability was not an issue for the superior court, and then the opposite before the arbitrator—that both judges had decided unconscionability against Turner.

Turner opposed more partial summary judgment motions, citing the lack of opportunity for discovery. Her counsel outlined relevant depositions that needed to occur, several of which were already scheduled.

---

[13] Turner's claims in court became counterclaims in response to Vulcan's demand for arbitration.

[14] *But see* CP 4129, 4215, 4220, 4222, *supra*, pages 13-14.

CP 2444. Many were taking place during this precise time period in the other four cases. CP 2606-07. The arbitrator permitted the motion in order to eliminate the bulk of Turner's case, without permitting discovery (CP 2795 ¶45); and the arbitrator denied Turner's request for a continuance for discovery or to obtain counsel. CP 2534.[15]

In the subsequent superior court proceedings to confirm/vacate, Judge Heller found it a close question whether the arbitrator's ruling denying a continuance deprived Turner of fundamental fairness and rose to the level of misconduct meriting vacation of the arbitration award:

> [Turner] was placed at a severe disadvantage in having to resist Vulcan's partial summary judgment without legal representation. For example, she could not have been expected to know that the legal standards applicable to enforcement of releases may be distinct from an unconscionability analysis and that perhaps a different approach from the briefing in *Turner I* and *Turner II* was required.... The fact that other former Vulcan employees with legal representation were successful in resisting the same partial summary judgment before another arbitrator is troubling.

CP 3591 (Appendix G). Judge Heller ultimately concluded the denial of the continuance was not "misconduct" under the FAA's narrow standard of review. CP 3592.

Faced with continuing and mounting arbitration bills, Turner sent AAA notice she was withdrawing her counterclaims. CP 2536. Vulcan,

---

[15] The $39,524.50 in fees associated with these two motions were again levied by the arbitrator on remand and are the subject of this appeal.

determined to proceed against Turner, then switched course and decided to pay all fees. CP 2461.[16] The arbitrator found against Turner on all her counterclaims and for Vulcan on its one claim for the relocation bonus. CP 4012-19.

- **Vulcan Circumvents The Purposes Of Arbitration And Chills Turner's Right To Bring Statutory Claims.** This case vividly demonstrates the chilling effect of Vulcan's arbitration process on an employee: Vulcan ignored, delayed, or circumvented legitimate discovery obligations; switched positions on who decides unconscionability, and misrepresented to the second judge that the first one had already resolved it in a preclusive ruling; refused to pay arbitration fees and drove them up with motions. Once safely in arbitration, and not before (CP 262-64), Vulcan raised the "loser pays" provision buried within its EIPA under "Miscellaneous".

But lest the Court have any question whether Vulcan's strategy of making arbitrations unworkable and unjust for employees is mere coincidence, the EIPA in use since January 2012 puts all doubt to rest. CP

[16] In November 2012, Vulcan had to file a "motion to clarify" under the AAA rules to get AAA to transfer fees to Vulcan (CP 2452-58) – this in the face of no opposition. AAA nonetheless continued to send Turner invoices into December 2012 for $23,634.96. CP 2464.

3203 (Appendix E).[17] This EIPA sharply limits an employee's right to discovery, knowing Vulcan will have exclusive access to all the witnesses and discovery it needs, while employees will have no ability to conduct any investigation outside formal discovery because everyone is bound by the EIPA's confidentiality. [18] Vulcan's 2012 EIPA purports to contractually obligate employees to the harsh, unfair process Vulcan imposed in Turner's arbitration. It practically declares Vulcan's purpose in requiring arbitration is to strip employees of any conceivable ability to obtain justice–not to promote fair, inexpensive, or expeditious resolution of claims.

- **Vulcan Seeks And Recovers Attorney Fees.** Following Turner's withdrawal from arbitration (Oct. 17, 2012), Vulcan proceeded only on its claim for a portion of the relocation bonus, abandoning all other

---

[17] This EIPA contains a long list of unconscionable, unenforceable arbitration provisions designed to eliminate employees' ability to bring claims against Vulcan by circumventing arbitration's legitimate purposes: Vulcan will reimburse the employee to the extent the arbitration filing fee exceeds the cost of filing a lawsuit in a court in King County, Wash., yet ignores that arbitrator fees are the major cost of arbitration. This EIPA remains silent on whether Vulcan would pay those fees under an "employer promulgated plan," so it can continue to drive employees away from bringing claims by leading them to believe they will have to advance $25,000-$30,000 to arbitrators. As in *Turner*, to maximize arbitration expenses to the employee, the 2012 EIPA provides that an unlimited number of pre-trial motions can be filed (contrary to AAA Rule 27, though otherwise adopting AAA Rules). Employees "agree" to cut off even the narrow court review under the FAA, limiting appeal of the award to a 15-day motion for reconsideration, purportedly binding and nonappealable. There is absolute secrecy regarding evidence, discovery, testimony, the decision and award. The "loser pays" section (still under "Miscellaneous") remains. CP 3204 (Appendix E).

[18] The EIPA limits the parties to 4 half-day depositions, 10 interrogatories including subparts, and 10 RFPs, and denies depositions or testimony by Paul or Jody Allen or family members, no matter how integral they may be to the employee's claim.

allegations from December 2011. Vulcan then sought and succeeded in obtaining $113,325 in attorney fees for its activities in forcing *Turner II* into arbitration or alternatively for partial summary judgment motions.

• **Superior Court Vacates The Attorney Fee Award.** Turner brought most of her claims under the Washington Law Against Discrimination (WLAD), RCW 49.60, *et. seq.*, and improper wage withholding. RCW 49.46, 49.48, and 49.52, *et seq.*; CP 438-40. As Judge Heller recognized, those statutes prohibit an employer from obtaining attorney fees for prevailing against an employee. CP 3593-98 (Appendix G).

On Turner's motion to vacate the arbitration award, Judge Heller reversed the arbitrator's ruling that Vulcan could be awarded fees for prevailing on a motion to compel arbitration of largely statutory claims. CP 3592-98. Judge Heller decided an award of fees to an employer for compelling arbitration on statutory claims violated public policy because it would chill an employee's challenge to even the most onerous and illegal arbitration clauses, such as the Vulcan arbitration provisions:

> [T]he prospects of having to pay attorneys' fees to an employer successful in compelling arbitration will almost certainly have a chilling effect on an employee contemplating a court action to challenge the conscionability of an arbitration agreement and/or vindicate her statutory rights.

CP 3597. Vulcan then requested remand to the arbitrator to determine whether she awarded fees for the partial summary judgment motions. CP

4539-65. Judge Heller remanded. CP 3483-85. On remand, Turner pointed out the fees were a result of Vulcan's determined effort to drive up costs by bringing multiple motions from a single common set of facts. CP 3436-38. Nonetheless, the arbitrator granted Vulcan's motion for $39,524.50 in fees. CP 3522-24 (Appendix H). The superior court confirmed this arbitration award. CP 2346-47.

Turner then sought attorney fees for having vindicated Turner's statutory rights by vacating a large portion of the illegal fee award. CP 3640-3700. Judge Heller denied the request. CP 3976-77. Turner timely appealed.

V. ARGUMENT

A. Standard Of Review: De Novo On All Issues.

1. Orders Granting Motion To Compel. This Court reviews trial court decisions on a motion to compel arbitration de novo. *Saleemi v. Doctor's Associates, Inc.*, 176 Wn.2d 368, 375-78, 292 P.3d 108 (2013) (citing *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 302, 103 P.3d 753 (2004)).

2. Unconscionability Of Arbitration Clause. "The existence of an unconscionable bargain is a question of law for the courts." *Zuver,* at 302-03 (2004); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773 (2004). The court reviews this legal question de novo. *McKee v. AT*

& T Corp., 164 Wn.2d 372, 383, 191 P.3d 845 (2008); *Hill v. Garda CL Nw., Inc.,* 179 Wn.2d 47, 53, 308 P.3d 635 (2013), *cert. denied,* 134 S. Ct. 2821 (2014).

3. Constitutionality Of Jury Trial Waiver. The Court reviews constitutional challenges de novo, including whether an arbitration agreement violates the right to a jury trial under article I, section 21 of the Washington Constitution. *Adler*, at 360-61.

4. Arbitrator's Award (Attorney Fees). The Court reviews de novo a trial court's decision whether an arbitrator's fees award violates public policy. *International Union of Operating Engineers v. Port of Seattle,* 176 Wn.2d 712, 721, 295 P.3d 736 (2013).

B. The Order Compelling Arbitration Is Erroneous Because The Arbitration Clause Is Unconscionable.

In Washington, an arbitration agreement "is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract." *Saleemi,* 176 Wn.2d at 375. This includes "gateway" contract defenses such as unconscionability. *E.g., Hill,* at 53; *McKee,* at 383 ("General contract defenses such as unconscionability may invalidate arbitration agreements.").

Turner has the right to judicial review of the trial court's decision compelling arbitration. *Saleemi,* at 375-76. To the extent that it is

necessary to show prejudice from the Order (*id.* at 380-81), the harm is evident in the "daunting", "shocking", "overly-harsh" $113,325 in fees against Turner in violation of public policy, CP 3597-98, necessitating her successful motion to vacate, and now this appeal for the remaining, still erroneous award.

Courts, not arbitrators, determine the threshold issue whether an arbitration clause is valid and enforceable. *Saleemi,* at 376; *Hill,* at 53; *McKee,* at 404 (citing *Buckeye Check Cashing, Inc. v. Cardegna,* 546 U.S. 440, 445, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006)). As the Washington Supreme Court articulated in *Hill:*

> " '[A]rbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.'" ... To that end, we have recognized our authority to decide "'gateway dispute[s].'" .... These types of disputes go to the validity of the contract and are preserved for judicial determination, as opposed to arbitrator determination, unless the parties' agreement clearly and unmistakably provides otherwise. ... Unconscionability is one such gateway dispute.

Hill, at 53 (citations omitted). "Unconscionability is a 'gateway dispute' that courts must resolve because a party cannot be required to fulfill a bargain that should be voided." *Id.* at 54 (*citing Zuver,* at 302-03).

The reason courts, not arbitrators, determine arbitrability, is to avoid exactly what happened here – a costly, improper proceeding pitting

a wealthy corporation against an individual employee on an uneven playing field:

> If a court compels arbitration without deciding the validity of the arbitration clause, a party may be forced to proceed through a potentially costly arbitration before having the opportunity to appeal. This is particularly a concern where an arbitration clause imposes all or some of the costs of arbitration on the disfavored party.

Id. at 54. In this case, *Hill*'s prediction came true: Vulcan (a multi-billion-dollar corporation) forced Turner (unemployed, unable to afford counsel or defend herself pro se against Vulcan's lawyers) to undergo an increasingly expensive arbitration, knowing fees would be imposed on her.

In *Brown v. MHN Gov't Servs., Inc.,* 178 Wn.2d 258, 275, 306 P.3d 948 (2013), as in *Hill,* the Washington Supreme Court concluded the contract at issue (a "Provider Services" agreement containing an arbitration provision) did not clearly and unmistakably delegate the issue of arbitrability to the arbitrator:

> A threshold dispute as to whether an arbitration agreement is unconscionable is ordinarily a decision for the court and not the arbitrator. ... Here, the issue of arbitrability has not been clearly and unmistakably delegated to the arbitrator on the face of the contract. Therefore, it is proper for us to determine the enforceability of the arbitration agreement.

Brown, at 264-65 (citation omitted). *See also, e.g., Gorden v. Lloyd Ward & Associates, P.C.,* 180 Wn. App. 552, 562-65, 323 P.3d 1074 (2014)

(unconscionability is for the court); *McKee,* at 383–84 (same). The GBA does not provide "clearly and unmistakably" that the issues of unconscionability and enforceability are for the arbitrator rather than the court. It is completely silent as to who decides arbitrability.[19]

The "clearly and unmistakably" standard, however, leaves employees vulnerable to employers' highly foreseeable revision of their arbitration clauses to delegate all decisions in arbitration to the arbitrator, just as Vulcan has done in its 2012 EIPA. Accordingly, Turner requests that the Court close this loophole to prevent Vulcan and similarly aggressive employers from contracting around the court's non-delegable authority to decide whether an arbitration agreement is unconscionable or otherwise unenforceable.

In response, Vulcan will contend, as it argued before Judge Oishi and intermittently before Judge Benton, that all issues of the arbitration clause's enforceability and conscionability were to be decided by the arbitrator, and the only question before the court was whether Turner signed the document to create a supposedly binding arbitration agreement.

---

[19] Perhaps the best illustration of this point comes from comparing the July 2011 GBA to Vulcan's 2012 EIPA (CP 3200-05), App. E, blatantly circumventing Washington law by dumping every conceivable procedural step and every possible issue in any dispute into arbitration, including discovery, appeal, and other matters described above, virtually immunizing the entire process from judicial review. *See* 9 U.S.C. § 10 (extremely deferential standard of review of arbitration award). The EIPA signed by Turner earlier in 2011 is silent as to arbitration. CP 609, App. B.

CP 69, 251-54, 1900-01, 1991, 2009.[20] They will cite the simple fact the GBA contained another provision (the Release of Claims).

That is not the test under the FAA or Washington law. In *Saleemi,* the corporate defendant (franchisor) argued, as Vulcan claimed here,[21] that *Buckeye* precluded the court from deciding any issue beyond whether there was an enforceable agreement to arbitrate the dispute:

> We can find no such statement in *Buckeye. Buckeye* holds that the question of whether the whole *contract,* as opposed to the arbitration provision, is void [is] for the arbitrator, not the court. ... [Plaintiffs] are not challenging the contract as a whole, only the enforceability of a few of its dispute resolution provisions.
>
> ...
>
> While we agree with DAI that courts' authority is limited once the parties have agreed to submit their claims to arbitration, **it is for the courts to determine whether the agreement to arbitrate is valid and enforceable based on general contract principles.**

Saleemi, 176 Wn.2d at 377-78 (emphasis added).

---

[20] *But see* CP 1991-2009, 4222 (arguing Oishi Order was final, preclusive, and resolved unconscionability). Turner submits that Vulcan was and is judicially estopped from arguing, inconsistent with its position before Judge Oishi, that all issues were decided by him. *Harris v. Fortin*, 71649-2-I, 2014 WL 4411006 (Wn. App., Sept. 8, 2014). Judicial estoppel precludes a party from asserting one position in a court proceeding (before Judge Oishi) and later seeking an advantage by taking a clearly inconsistent position (before Judge Benton, Judge Heller, or this Court). *Id.,* at *2. The factors are (1) whether the later position is clearly inconsistent with the earlier one (as discussed above, it is); (2) whether Judge Benton's acceptance of the inconsistent position before her would create the perception that either Judge Oishi or Judge Benton was misled (Vulcan misled Judge Benton to believe Judge Oishi had considered unconscionability and his Order had preclusive effect); and (3) whether Vulcan would derive an unfair advantage (it did, in Judge Benton's Order) or an unfair detriment is imposed on Turner (the same Order) if Vulcan is not estopped. *Id.* at *2.

[21] CP 1850, 1854, 1876, 1902-03, 1930, 1999, 2002, 2008, 2114.

Likewise, in *McKee,* 164 Wn.2d at 394, the Court held that plaintiffs' challenge to an arbitration clause was "sufficiently discrete to be decided by the court". *McKee* concluded the arbitration agreement was "substantively unconscionable and therefore unenforceable" because, among other things, it required confidentiality (like the GBA). *Id.* at 398-99. In contrast to *McKee,* in *Townsend v. Quadrant Corp.,* 173 Wn.2d 451, 459, 268 P.3d 917 (2012), the Court noted that in *McKee,* it had "distinguished *Buckeye* on the basis that the challenges raised therein related only and specifically to the arbitration clause, whereas in *Buckeye* the challenge was directed to the contract as a whole rather than simply to the arbitration clause." *Townsend,* at 458-59. There, plaintiff-homeowners challenged the entire multi-page Purchase & Sale Agreement of which the arbitration clause was a minor piece; their claims were "so wrapped into their general allegations regarding the PSA that both issues must be decided by an arbitrator under *Prima Paint* and *Buckeye.*" *Townsend,* at 459.

> [T]he Homeowners have framed their claims pertaining to the arbitration clause and the PSA in a way that renders the two inseparable. In our view, one could decide whether the arbitration clause is unenforceable only by deciding whether the PSA as a whole is unenforceable.

Id. at 460. As in *Saleemi* and *McKee,* in contrast to *Townsend*, Turner made a discrete challenge to the unconscionability of the GBA's

arbitration clause, not the entire agreement. [22] Judge Oishi and subsequently Judge Benton seemingly accepted Vulcan's arguments that all issues were for the arbitrator once the court found Turner had signed the document. The court did not examine, as it is required to do, the gateway issue whether the arbitration clause was unconscionable, even though the Washington Supreme Court had long before declared a similar confidentiality term in an arbitration provision to be substantively unconscionable. *Zuver v. Airtouch Commc'ns, Inc.,* 153 Wn.2d 293, 314-15, 103 P.3d 753 (2004). This alone makes the Order compelling arbitration reversible legal error.

As discussed below, Judge Benton also erroneously gave Judge Oishi's order preclusive effect on unconscionability. However, Judge Benton made no findings, and her legal conclusions are flatly erroneous. Turner asks this Court to reverse Judge Benton's Order compelling arbitration, and conclude as a matter of law, the arbitration clause is substantively or procedurally unconscionable.

---

[22] She attempted to demonstrate this without the benefit of discovery and evidence which was entirely in Vulcan's possession and control. While the factual reasons the arbitration clause was unconscionable overlap with the reasons the Release was unenforceable, their enforceability presents distinct legal issues, as Judge Heller recognized, CP 3591, and he was troubled that other Vulcan employees had defeated a similar dispositive motion on the Release. *Id.,* CP 3196. The arbitrator also understood there were "[d]isputes of fact and credibility as to the circumstances involved in signing the Agreement". CP 3090, 3586.

C. The Arbitration Clause Is Substantively And Procedurally Unconscionable.

Either substantive or procedural unconscionability is enough to void a contract. *Hill,* 179 Wn.2d at 55 (citing *Adler,* 153 Wn.2d at 347). Here, the arbitration clause in the GBA is both.[23]

1. Substantive Unconscionability. "[A] term is substantively unconscionable where it is overly or monstrously harsh, is one-sided, overly harsh, shocks the conscience, or is exceedingly calloused." *Hill,* at 55 (quoting *Gandee v. LDL Freedom Enters., Inc.*, 176 Wn.2d 598, 603, 293 P.3d 1197 (2013)). "A provision in an arbitration agreement may be substantively unconscionable if it effectively undermines an employee's ability to vindicate his statutory rights." *Walters v. A.A.A. Waterproofing, Inc.,* 151 Wn. App. 316, 321, 211 P.3d 454 (2009) (citing *Adler,* at 355); *Hill,* at 55-58 (substantively unconscionable terms pervaded arbitration agreement, requiring its invalidation); *Gandee,* at 604-08 (same, including "loser pays" attorney fees).

The arbitration provision, as applied by the arbitrator, has three provisions that are substantively unconscionable: (a) the confidentiality

---

[23] *See* Marissa Dawn Lawson, *Judicial Economy at What Cost? An Argument for Finding Binding Arbitration Clauses Prima Facie Unconscionable,* 23 Rev.Litig. 463, 465 (2004) (proposing that courts hold binding arbitration clauses prima facie unconscionable).

provision, (b) the "loser pays" provision (incorporated into the GBA via the EIPA),[24] and (c) the unilateral right granted to Vulcan only, to escape arbitration and to seek relief from state or federal court.

(a) Confidentiality Provisions Are Substantively Unconscionable. The Washington Supreme Court held in 2004, well before Turner began working at Vulcan, that a confidentiality provision such as the one in the GBA's arbitration clause is substantively unconscionable. *Zuver*, at 314-15. In an individual statutory context (such as employment), a confidentiality provision "undermines an employee's confidence in the fairness and honesty of the arbitration provision and thus, potentially discourages that employee from pursuing a valid discrimination claim." *Zuver*, at 315. " '[I]n the context of individual statutory claims, a lack of public disclosure may systematically favor companies over individuals.'" *Id.* at 314 (citation omitted).

> The effect of the provision here benefits only Airtouch. As written, the provision hampers an employee's ability to prove a pattern of discrimination or to take advantage of findings in past arbitrations.

Id. at 315. Four years later, in *McKee,* the Court confirmed:

> A confidentiality clause in a contract of adhesion is a one-sided provision designed to disadvantage claimants and may even help conceal consumer fraud. Confidentiality

[24] It was not until after the court proceedings compelling arbitration that Vulcan argued the EIPA entitled it to attorney fees, and convinced the arbitrator to read the EIPA's loser pays fees clause into the GBA's arbitration agreement. *See* CP 262-64 (requesting fees under CR 11 and RCW 4.84.185).

> unreasonably favors repeat players such as AT&T. ... Secrecy conceals any patterns of illegal or abusive practices. It hampers plaintiffs in learning about potentially meritorious claims and serves no purpose other than to tilt the scales in favor of AT&T. ... It ensures that AT&T will "accumulate[] a wealth of knowledge" about arbitrators, legal issues, and tactics. ... Meanwhile, consumers are prevented from sharing discovery, fact patterns, or even work product, such as briefing, forcing them to reinvent the wheel in each and every claim, no matter how similar.
>
> Washington has a strong policy that justice should be administered openly and publicly.... Under our constitution, "[j]ustice in all cases shall be administered openly." CONST. art. I, § 10. Secrecy breeds mistrust and, potentially, misuse of power. ... We hold that the confidentiality provision before us is substantively unconscionable.

Id., 164 Wn.2d at 398-99 (citations omitted.) *See also In re Checking Account Overdraft Litig.*, 718 F. Supp. 2d 1352, 1359 (S.D. Fla. 2010) (following *Zuver*).[25]

(b) Loser Pays Clauses Are Substantively Unconscionable. Judge Heller commented that this Court in *Walters* and the Washington Supreme Court in *Gandee* held unconscionable "loser pays" provisions that were "substantially similar, if not identical" to the one in the GBA. CP 3595, App. G (citing *Walters*, 151 Wn. App. at 324-25; *Gandee*, 176 Wn.2d at 606).[26]

---

[25] "Defendant's one-sided access to information would similarly discourage a plaintiff from bringing a suit. KeyBank would have the benefit of knowing what happened in past arbitrations while Plaintiff would not. ... Even if future plaintiffs could learn the outcome of this arbitration, Plaintiff would still be denied information regarding previous arbitrations ...."

[26] In *Adler*, the Court stated the arbitration clause's mandatory "loser pays" provision

> Because the "loser pays" provision serves to benefit only Freedom and, contrary to the legislature's intent, effectively chills Gandee's ability to bring suit under the CPA, it is one-sided and overly harsh. Therefore, we hold it to be substantively unconscionable.

Gandee, at 606 (citing *Adler*, at 354-55, *Walters*, at 316). In *Brown,* the Washington Supreme Court similarly ruled a loser pays provision unconscionable:

> In *Walters,* [this Court] held that mandatory fee shifting provisions in arbitration agreements are unconscionable where the Washington Minimum Wage Act provides that only a prevailing employee would be entitled to recover costs and fees. The risk of having to pay the employer's expenses and fees was a significant deterrent to employees contemplating initiating an action to vindicate their rights....
>
> Mandatory fee shifting provisions in arbitration agreements are substantively unconscionable where the Washington Minimum Wage Act provides that only a prevailing employee would be entitled to recover costs and fees. We find the fee shifting provision substantively unconscionable.

Id. at 274-75 (citing *Walters,* at 321-22). This was true even though not all plaintiff's claims were under the Washington Minimum Wage Act, and though the agreement provided California law applied. As with the confidentiality provision, it is a straightforward application of law to hold Vulcan's EIPA loser pays provision, read into the GBA's arbitration clause, is substantively unconscionable.

---

was substantively unconscionable because it undermined an employee's statutory right to an award of attorney fees upon prevailing. *Adler,* at 354–55.

(c) Unilateral Litigation Option Clauses Are Substantively Unconscionable. The arbitration provision's option for Vulcan only "to seek emergency injunctive relief in court" is also substantively unconscionable because it is "so 'one-sided and 'overly harsh' as to render it unconscionable." *Zuver,* 153 Wn.2d at 318-19 & n.18;[27] *Hill,* 179 Wn.2d at 55-56.[28] Vulcan argued to the superior court that this unilateral right was meaningless because employees also had such a right. The Court in *Hill* rejected a similar argument that the challenged provision was "not really a limitation." *Id.* at 56 n.4. If the provision is bilateral, the employer drafting it should explicitly say so. Here, Vulcan, does not.[29]

(d) Conclusion. The Court should reverse the order compelling arbitration and hold, as a straightforward matter of Washington law, that the confidentiality, loser pays, and unilateral injunctive relief clauses are substantively unconscionable, and render the arbitration clause unenforceable. These terms pervade the arbitration clause. Severing them would significantly alter the tone of the arbitration clause and the nature of

---

[27] (Unilateral remedies limitation provision in arbitration agreement was substantively unconscionable because it "blatantly and excessively favors the employer in that it allows the employer alone access to a significant legal recourse".)

[28] (Time limitation on back pay damages was unconscionable "in that it unfairly favors [employer] by significantly curbing what an employee could recover against [employer] compared to what the employee could recover under a statutory wage and hour claim".)

[29] If Vulcan intended that the agreement give or recognize that employees such a right but did not draft the provision bilaterally, then it is also procedurally unconscionable.

the arbitration Vulcan contemplated in drafting it. The entire arbitration clause must be invalidated. *Hill,* at 58; *Gandee,* at 607.

2. Procedural Unconscionability.

> "The procedural element concerns the manner in which the contract was negotiated, focusing on oppression or surprise." ... "Procedural unconscionability has been described as the lack of a meaningful choice, considering all the circumstances surrounding the transaction including [t]he 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 a maze of fine print."

Gorden v. Lloyd Ward & Associates, P.C., 180 Wn. App. 552, 563, 323 P.3d 1074 (2014) (citations omitted). In *Gorden,* debtors signed an agreement containing an attorney retainer agreement with an arbitration clause which provided, among other things, that venue was in Texas under Texas law. Despite an attorney-client relationship, the debtors were never informed the consequences of agreeing to arbitration. In *Brown,* the arbitration agreement was procedurally unconscionable because it was ambiguous concerning which set of AAA rules applied. *Id.,* 178 Wn.2d at 267.[30]

In this case, Vulcan never gave Turner a meaningful choice whether or not to agree to arbitration (not to mention paying Vulcan's

[30] Much like Vulcan has changed positions on arguments and who pays fees, the defendant in *Brown* "changed its position several times regarding which set of AAA rules is appropriate. This further supports [plaintiffs'] argument that the ambiguity in the arbitration agreement has resulted in procedural surprise." *Id.* at 268.

attorney fees in the event that she lost in arbitration, hidden in the EIPA). The preprinted, take-it-or-leave-it agreement states: "You are entitled to seek the advice of your own counsel before executing this agreement." CP 282. That was an intentionally false statement given the 24-hour turnaround. The evidence Turner presented, and more evidence revealed in the other EP team members' cases, showed the entire team would lose their jobs if they did not sign the GBA "urgently". CP 3212-16.

Every other aspect of the "agreement" was similarly unbalanced. Vulcan had a battery of attorneys and Human Resources personnel, including Laura Macdonald, reviewing and proposing the document while Turner had no such option. *E.g.,* CP 3212-16. Vulcan managers and lawyers are highly-educated professionals. Turner was a bodyguard facing loss of her job if she did not sign in 24 hours. But the court did not consider any of this and never actually resolved Turner's procedural unconscionability claim.

Moreover, the arbitration clause was procedurally unconscionable because there was no consideration. *Labriola v. Pollard Group*, Inc., 152 Wn.2d 828, 834, 100 P.3d 791 (2004) (non-competition agreement imposed after employment commenced was unenforceable unless supported by consideration other than continued employment). The only evidence in the record is from Macdonald that the guaranteed bonus was

for the Release of Claims. No one at Vulcan testified that any portion of the bonus was consideration for agreeing to arbitration. All the witnesses with knowledge of the origins of the GBA bonus amounts, as well as any evidence that same amount was for agreeing to arbitration, are within Vulcan's control.

For all these procedural surprises, oppression, and lack of meaningful opportunity, the arbitration clause should be held procedurally unconscionable as a matter of law.

D. Enforcement Of The Arbitration Agreement Violates Turner's Constitutional Right To A Jury Trial.

In *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 360-61 (2004), the Court recognized that "by knowingly and voluntarily agreeing to arbitration, a party implicitly waives his right to a jury trial by agreeing to an alternate forum, arbitration." But to waive the right to jury trial under article I, section 21 of the Washington Constitution in an agreement to arbitrate, the employee's consent must be knowing and voluntary. *Id.* In *Adler,* the parties disputed evidence regarding the employee's waiver, so the Court remanded. As in this case, the employee contended the employer's representative threatened to fire him if he refused to sign the arbitration agreement:

> [D]isputes still remain about the manner in which Adler entered into the arbitration agreement with Fred Lind Manor. Consequently, we decline to hold here that Adler knowingly and voluntarily entered into the arbitration agreement with Fred Lind Manor. On remand, if the trial court concludes that Fred Lind Manor's representative threatened to fire him if he refused to sign the agreement despite the fact he raised concerns with its terms or indicated a lack of understanding, then the evidence here would not support Fred Lind Manor's claim that Adler knowingly and voluntarily agreed to arbitration, and thus implicitly waived his right to a jury trial.

Id. at 361, 364. Here, even though Turner never had the opportunity to conduct discovery to prove she did not knowingly and voluntarily waive her right to a jury trial,[31] the evidence that exists shows she was threatened with the "urgent" requirement to sign the GBA or lose her job, and had no meaningful choice other than sign, and no reasonable opportunity to understand the terms, consult an attorney, or learn the difference between arbitration and court. Upholding the arbitration clause would violate Turner's right to a jury trial on her claims. *See, e.g., Mandatory Binding Arbitration and the Demise of the Seventh Amendment Right to A Jury Trial*, 16 Ohio St. J. on Disp. Resol. 669, 733 (2001) ("when an arbitration clause is being used to deny persons the Seventh Amendment jury trial right they otherwise would have had, it is unconstitutional for courts to enforce such a clause.")

---

[31] The right to discovery too is constitutional, included in the right of open access to courts. *Putman v. Wenatchee Valley Med. Ctr.,* 166 Wn.2d 974, 979, 216 P.3d 374 (2009). Turner was not told and could not know the arbitration agreement would mean losing the right to discovery.

E. Delegation Of Court's Powers To Arbitrators Violates Separation Of Powers.

Turner also contends the Legislature's adoption of the FAA governing employment arbitrations, with its extremely narrow judicial review, violates the separation of powers doctrine by delegating what should be court powers to a private individuals. The Washington Supreme Court and others have held certain types of arbitration unconstitutional when they violate a federal or state prohibition on private delegation. *See, e.g., State ex rel. Everett Fire Fighters Local No. 350 v. Johnson*, 46 Wn.2d 114, 121, 278 P.2d 662 (1955) (municipal charter provision requiring firefighter contract disputes to be arbitrated was an unconstitutional delegation of legislative authority).[32] *See also Putman v. Wenatchee Valley Med. Ctr.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009) ("If the activity of one branch threatens the independence or integrity or invades the prerogatives of another, it violates the separation of powers"; internal citations omitted).

---

[32] *Hays County Appraisal Dist. v. Mayo Kirby Springs, Inc.*, 903 S.W.2d 394, 397 (Tex. Ct. App. 1995) (invalidating use of mandatory binding arbitration to determine property taxes in part on separation of powers grounds); *City of Sioux Falls v. Sioux Falls Firefighters Local 814*, 234 N.W.2d 35, 37-38 (S.D. 1975) (a statute mandating arbitration of police and firefighter labor disputes was unconstitutional delegation of legislative power). *See generally* Harold J. Krent, *Fragmenting the Unitary Executive: Congressional Delegations of Administrative Authority Outside the Federal Government*, 85 Nw. U. L. Rev. 62, 64-65 (1990) (all private delegations are inconsistent with separation of powers doctrine).

F. The Order Compelling Arbitration in *Turner I* Did Not Preclude Claims Alleged In *Turner II.*

Judge Benton's Order erroneously states that the claims in *Turner II* were barred by "res judicata and/or collateral estoppel". CP 3566. Both res judicata and collateral estoppel were never for the court; they are procedural matters for the arbitrator. *Yakima Cnty. v. Yakima Cnty. Law Enforcement Officers Guild,* 157 Wn. App. 304, 325-28, 237 P.3d 316 (2010). But even if the court could decide these affirmative defenses,[33] Vulcan had the burden of proving the requirement, common to both, that there was a prior final judgment on the merits. *Pederson v. Potter,* 103 Wn. App. 62, 67, 11 P.3d 833 (2000) (res judicata "requires a final judgment on the merits."); *State Farm,* at 304 (collateral estoppel requires prior final judgment on merits; question is "always whether the party to be estopped had a full and fair opportunity to litigate the issue."). Judge Oishi's Order was not final. Turner voluntarily dismissed that action. She certainly never had a "full and fair opportunity" to litigate the gateway issue whether the arbitration agreement was unconscionable.

This Court in *Yakima County* rejected a similar res judicata argument in proceedings involving an arbitration: "[e]ven if" the court could decide res judicata, *id.* at 330, the arbitrated claims on which the

---

[33] *Jumamil v. Lakeside Casino, LLC,* 179 Wn. App. 665, 680, 319 P.3d 868 (2014); CR 8(c); *State Farm Mut. Auto. Ins. Co. v. Avery,* 114 Wn. App. 299, 304, 57 P.3d 300 (2002).

County sought preclusive effect against the Guild were not barred by the doctrine, in part because the deputy involved in the proceedings (later represented by the Guild) had voluntarily dismissed those claims: "The issues were not decided because Ms. Bartleson voluntarily dismissed that appeal in favor of filing the civil suit for discrimination." *Id.* at 328. The deputy's prior proceedings neither raised nor resolved the claims in the Guild's grievance. *Id.* at 331.

G. The Attorney Fees Award To Employer Vulcan Violates Public Policy.

The arbitrator's fee award of $39,524 on remand is void against public policy because the contractual provision on which it is based (in the EIPA's Miscellaneous section) is substantively unconscionable and violates public policy, for all the reasons set forth above and in Judge Heller's Memorandum Opinion.

In remanding the question of an alternative basis for fees,[34] the court directed the arbitrator to "clarify whether she has already addressed Vulcan's alternative request for fees" "based on work performed in connection with" Vulcan's summary judgment motions to dismiss Turner's defamation claim and to enforce the Release portion of the GBA. CP 4067. On remand, the arbitrator granted Vulcan fees for that work

[34] The remand occurred in response to a request from Vulcan in its Notice of Presentation of its Proposed Order to Judge Heller. CP 4539-4565.

based on the same EIPA loser pays provision, reasoning these fees were incurred in connection with non-statutory claims. CP 3986-87.[35] This ruling, confirmed by the superior court, is contrary to all applicable law and should be vacated for the same reasons stated here and in the Memorandum Opinion.[36] The only difference is that, whereas Judge Heller ruled the arbitrator could not "carve out" an exception from the statutory prohibition against awarding fees to a prevailing employer (WLAD and wage laws) for moving to compel the employee to arbitrate, here the arbitrator carved out an exception for Vulcan's work on two partial summary judgment motions involving claims arising from Turner's employment with Vulcan. CP 3594-95. "The statute authorizing an award of attorney fees to a prevailing employee may not be superseded by an agreement between employee and employer to permit either prevailing party to recover attorney fees" because that would be substantively

---

[35] The arbitrator rejected Turner's objection that Vulcan could have presented evidence at the arbitration instead of bringing these unnecessary motions (*see* CP 3434-38), particularly without Turner present to defend against a fees provision not even in the arbitration clause. CP 3987. "In considering whether a fee is 'reasonable' the trial court must also consider whether those fees and expenses could have been avoided or were self-imposed." *MacDonald v. Korum Ford,* 80 Wn. App. 877, 891, 912 P.2d 1052 (1996).

[36] CP 3594. Judge Heller followed *Gandee* and *Walters,* and rejected Vulcan's argument that *Zuver* allows a reciprocal "loser pays" provision in an employment arbitration. CP 3596. *Brown* too distinguished *Zuver* (provision was permissive). As Judge Heller pointed out, *Gandee* eliminates any argument that *Zuver* approves a bilateral loser-pays provision: CP 3596-97; *Gandee,* at 606. Also in *Zuver* there was no evidence of the effect of the loser pays provision on the employee, CP 3597 (*citing Zuver,* at 319), whereas the award here resulted in a "daunting amount" of fees imposed on Turner. *Id.*

unconscionable. 25 David K. DeWolf, Keller W. Allen, Darlene Barrier Caruso, *Wash. Prac., Contract Law And Practice* § 17:7 (2d ed. 2013) (discussing *Brown*). Yet circumventing the employment and wage statutes' prohibition against fees to the employer is exactly what the arbitrator allowed on remand.

Indeed, the few cases that Vulcan cited to the court for its theory that it could segregate work on defamation and enforceability of the Release have no bearing on this Washington statutory employment and wage lawsuit.[37] In such actions, where " 'the plaintiff's claims for relief ... involve a common core of facts or [are] based on related legal theories,'" a lawsuit cannot be "'viewed as a series of discrete claims'" and, thus, the claims should not be segregated in determining an award of fees. *Fiore v. PPG Indus., Inc.,* 169 Wn. App. 325, 352, 279 P.3d 972 (2012) (citations omitted); *Pham v. City of Seattle, Seattle City Light,* 159 Wn.2d 527, 547, 548 n.7, 151 P.3d 976 (2007); *Hume v. Am. Disposal Co.,* 124 Wn.2d 656, 673, 880 P.2d 988 (1994). Indeed, in *Brown,* the Court refused to shift fees to a prevailing defendant though only "some of the underlying claims f[e]ll under the Washington Minimum Wage Act." *Id.* at 274.

In fact, Washington courts look to federal courts' interpretation of

[37] CP 4543. *Boguch v. Landovere Corp.,* 153 Wn. App. 595, 224 P.3d 795 (2009) and *Pearson v. Shubach,* 52 Wn. App. 716, 723, 763 P.2d 834 (1988) did not involve statutory employment or wage claims, but segregation of contract versus tort claims. *See also* CP 3443-47 (no authority on "segregation").

federal civil rights law, in particular that regarding recovery of fees for civil rights suits. *Blair v. Washington State University,* 108 Wn.2d 558, 572, 740 P.2d 1379 (1987). This case is based entirely on Turner's employment at Vulcan. As Vulcan argued to Judge Benton, all allegations in the arbitration arose out of "a common nucleus of underlying facts, allegations, and claims". CP 2002.[38] Vulcan is judicially estopped from making assertions of fact inconsistent with that position, which it took before Judge Oishi as well. *See* n. 26, *supra.*

In ruling on Vulcan's summary judgment motion regarding the Release, the arbitrator relied on pleadings submitted by both parties in *Turner I* and *Turner II* "addressing the enforceability of the" GBA "both its arbitration provision and in its entirety." CP 2541-43. Her Order demonstrates the allegations in that motion arose out of the same statutory employment and wage claims. *Id.*

The arbitrator's exception (confirmed by the court) for fees on the two summary judgment motions creates a dangerous loophole for employers like Vulcan, which the Court should firmly close. As the Washington Supreme Court stated in *McKee,* at 404, "[c]ourts will not be easily deceived by attempts to unilaterally strip away consumer protections and remedies by efforts to cloak the waiver of important rights

[38] *See also* CP 4030 (Benton: all claims considered related to Turner's employment).

under an arbitration clause." An award of fees to Respondent Vulcan for any of its efforts spent defending against any of Turner's claims in this case violates public policy because it chills employees from pursuing their statutory claims. The remaining fee award should be vacated.

H. Turner Is Entitled To Her Attorney Fees For Prevailing In Overturning Fees Awarded To Vulcan.

Turner prevailed in superior court in this statutory wage and employment case by obtaining the court's order vacating the arbitrator's attorney fees award to a prevailing employer, in violation of public policy. RCW 49.60.030(2) entitles Turner to her attorney fees for vacating the initial award in court. "As a general rule, fees incurred **while litigating an entitlement to fees** are recoverable under remedial statutes such as the WLAD." *Johnson v. State, Dep't of Transp.,* 177 Wn. App. 684, 695, 313 P.3d 1197 (2013) (emphasis added),[39] *review denied,* 179 Wn.2d 1025 (2014). "A party who substantially prevails on appeal is entitled to an award for attorney fees on appeal." *Collins v. Clark Cnty. Fire Dist. No. 5,* 155 Wn. App. 48, 104-05, 231 P.3d 1211 (2010) (citing *Day v. Santorsola,* 118 Wn. App. 746, 770–71, 76 P.3d 1190 (2003)).

A plaintiff in Washington employment cases "prevails" under the WLAD when she succeeds on any significant issue and achieves some benefit in bringing the suit. *Blair,* at 572 (citing *Hensley v. Eckerhart,* 461

[39] Citing, *e.g., Fisher Props., Inc. v. Arden–Mayfair, Inc.,* 115 Wn.2d 364, 378, 798 P.2d 799 (1990); *Steele v. Lundgren,* 96 Wn. App. 773, 781, 982 P.2d 619 (1999).

U.S. 424, 433, 103 S.Ct. 1933 (1983)). As Judge Heller noted, status as a prevailing party is determined on the outcome of the case as a whole, including "matters decided after judgment on the merits". *Jenkins by Jenkins v. State of Mo.,* 127 F.3d 709, 714 (8th Cir. 1997). The statute is construed broadly. *Wheeler v. Catholic Archdiocese of Seattle,* 124 Wn.2d 634, 642-43, 880 P.2d 29 (1994); *Blair,* at 570. If neither party wholly prevails, "then the determination of who is a prevailing party depends upon who is the substantially prevailing party, and this question depends upon the extent of the relief afforded to the parties." *Collins,* at 104-05 (quoting *Day,* at 770–71). "'[A] plaintiff prevails when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff.'" *Parmelee v. O'Neel,* 168 Wn.2d 515, 522, 229 P.3d 723 (2010) (citations omitted). Here, Vulcan obtained a small judgment of $5,696.63 without any defense from Turner, whereas Turner vacated an attorney fees award against her of about 20 times that amount, $113,325, against this forcefully-defended corporation. Turner's relief has materially altered the legal relationship between the parties, modified Vulcan's behavior in a way that directly benefits her, as well as employees involved in disputes with Vulcan in the future. Vulcan can never recover attorney fees for prevailing against its employees in these claims arising out of employment. "[I]n cases involving the law against discrimination,

heavy reliance on the degree of success may constitute an abuse of discretion." *Steele,* 96 Wn. App. at 784-85. Such a rule of proportionality would undermine the purpose of these remedial statutes, making it difficult if not impossible for employees to obtain redress from the courts. *Id.* Here, interpreting Vulcan to be the prevailing party would turn the statutory policy on its head, rewarding the employer for running the employee out of court as well as the arbitration and then pursuing her on a small claim. Turner, in contrast, is entitled to her attorney fees for prevailing in overturning the "daunting", "shocking" award of fees to Vulcan based on an unconscionable provision which violates public policy. Turner also seeks her attorney fees incurred in this appeal, under RAP 18.1, RCW 49.60 *et seq.,* and RCW 49.46, 49.48, RCW 49.52, *et seq. Collins,* at 104-05.

VI. CONCLUSION

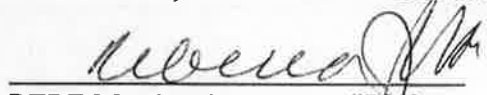
Vulcan presented agreements to Turner that it knew or should have known contained illegal provisions: The EIPA had an illegal loser pays provision, and the GBA contained an illegal confidentiality provision coupled with arbitration, placing judicial review out of reach, while reserving to itself the right to obtain judicial relief. One reason Vulcan does this is to intimidate employees' exercise of their rights under Washington employment law by telling them they may have to pay

Vulcan's bills–knowing that is false. Or Vulcan may intend to convince arbitrators that the loser pays "contract" trumps employee's rights. This error of law by an arbitrator is reviewable under such a high standard that it may not be vacated. Third, Vulcan could be loading up unconscionable provisions to use as bargaining chips in negotiating procedures that will remain permeated with unfairness.

The last option is all the more dangerous when Vulcan, by revising its current EIPA arbitration provision, explicitly provides all decisions about procedural and substantive unconscionably are specifically reserved to the arbitrator. This practice undermines discrimination and wage laws protecting employees, as occurred here, and is contrary to public policy. The Order compelling arbitration should be reversed, the arbitration clause found substantively and procedurally unconscionable, and the matter sent to King County Superior Court for trial. The attorney fees award to Vulcan should be reversed, and Turner awarded her fees for prevailing in vacating Vulcan's fees and on appeal.

RESPECTFULLY SUBMITTED this 15th day of September, 2014.

SCHROETER, GOLDMARK & BENDER



REBECCA J. ROE, WSBA #7560
KATHRYN GOATER, WSBA #9648

Of Counsel:
CARLA TACHAU LAWRENCE, WSBA #14120
Counsel for Appellant Traci Turner

CERTIFICATE OF SERVICE

On the 15th day of September, 20014, I caused to be served upon the following, at the addresses stated below, via the method of service indicated, a true and correct copy of the foregoing document.

Harry H. Schneider, Jr. Kevin J. Hamilton Joseph M. McMillan Perkins Coie LLP 1201 Third Ave., Suite 4800 Seattle, WA 98101-3099 HSchneider@perkinscoie.com KHamilton@perkinscoie.com JMcMillan@perkinscoie.com	☒ Via Hand Delivery – ABC Legal ☐ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email
Jeffrey I. Tilden, WSBA #12219 Jeffrey M. Thomas, WSBA #21175 Michael P. Brown, WSBA #45618 Gordon Tilden Thomas & Cordell, LLP 1001 Fourth Ave., Suite 4000 Seattle, WA 98154 jtilden@gordontilden.com jthomas@gordontilden.com	☒ Via Hand Delivery – ABC Legal ☐ Via U.S. Mail, 1st Class, Postage Prepaid ☐ Via CM/ECF System ☐ Via Overnight Delivery ☐ Via Facsimile ☒ Via Email

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

DATED at Seattle, Washington, this 15th day of September, 2014.

Darla Moran
Legal Assistant