No. 92655-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS NO. 71855-0-I

TRACI TURNER,

Appellant-Petitioner,

v.

VULCAN, INC., et al.,

Respondents.

REPLY ON PETITION FOR REVIEW

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SUMMARY OF REPLY

In its Answer to Traci Turner's Petition for Review, Vulcan raises new issues relying on distortions and misstatements of the record. Turner replies to these new issues as follows:

1. Are the facts on Vulcan's motions to compel undisputed?

No. Petitioner Traci Turner vigorously disputed the facts on Vulcan's motions to compel. Under the Federal Arbitration Act (FAA), 9 U.S.C. § 4 (which Vulcan invokes exclusively in its favor), the court was required, but failed, to apply summary judgment standards, including viewing the facts in the light most favorable to Turner. With the facts disputed, the court should have proceeded to (or remanded for) a "trial" or evidentiary hearing. Turner did not "forfeit" the statutory right to a hearing under Section 4. Review of the lower courts' rulings is de novo.

2. Did the Superior Court (Judge Heller) reject Turner's arguments "on the merits," including the contention that Vulcan's arbitration provision was procedurally unconscionable?[1]

No. Judge Heller did not rule on unconscionability or the merits of Turner's arguments against the orders compelling arbitration. Rather, he concluded that the arbitrator's denial of Turner's request for a continuance did not meet the highly deferential standard for vacation under the FAA.

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[1] Answer, at 6 (Judge Heller "confirmed the award in all respects on the merits"); *id.* at 18.

3. Did Turner waive a challenge to the award of attorney fees to Vulcan on remand?

No. Not only did Turner preserve her challenge by opposing the last-minute request for remand, and appealing from the Superior Court's erroneous confirmation of remanded, re-segregated attorney fees, but the Court of Appeals directly addressed the issue. Review is de novo.

REPLY ARGUMENT

A. Turner Is Entitled To A Hearing On The Disputed Facts In Vulcan's Motions To Compel.

Throughout its Answer, for the first time, Vulcan claims its version of the facts in this record is undisputed,[2] that Turner was not entitled to a hearing, or she "forfeited" that right. To the contrary, Turner disputed the facts throughout these proceedings, and repeatedly requested discovery, which requests were denied. She asked the courts for a proper hearing applying summary judgment standards, which would have led to denial of the motions to compel or a trial on the disputed facts and gateway issue whether Vulcan's arbitration clause was unconscionable. She never received one.

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[2] *E.g.,* Answer, at 10-11 (Turner's evidence that she was forced to sign the arbitration provision under threat of termination is "factually inaccurate"); *id.* at 14-16 (*e.g.,* "Turner *had* a reasonable opportunity to consider the GBA's straightforward terms.").

Specifically, Turner emphatically and consistently disputed the facts as applied to the arbitration provision Vulcan "urgently" required her to sign, or lose her position on Paul Allen's Executive Protection team. She argued that summary judgment standards applied and repeatedly sought discovery on the issues. *E.g.*, CP 585-86, 622-23, 643, 1574-86, 1592-1603, 1783-1803.

Turner's request for a summary judgment hearing before Judge Oishi was rejected. CP 75-79, 95-96; 4032-33. *Turner I* was voluntarily dismissed, CP 174-75, and the rulings therein have no precedential value. Turner's Br. (Ct. App.), 41-42; Turner's Reply/Response (Ct. App.), 13-17.

Judge Benton denied Turner's motion to compel depositions, CP 1713-14, granted Vulcan's motion for a protective order, CP 1710-12, and improperly applied issue and claim preclusion to Judge Oishi's orders in the voluntarily-dismissed case. CP 2210-13. Judge Benton also did not hold a hearing with summary judgment standards on disputed facts.

Section 4 of the FAA, 9 U.S.C. § 4, mandates a "trial" where "the making of the arbitration agreement" is at issue:

> If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. If no jury trial be demanded by the party alleged to be in default, ... the court shall hear and determine such issue.

See also, e.g., Three Valleys Mun. Water Dist. v. E.F. Hutton & Co., 925 F.2d 1136, 1141 (9th Cir. 1991)[3] (court gives the party opposing a motion to compel arbitration "the benefit of all reasonable doubts and inferences that may arise"; "[i]f there is doubt as to whether such an agreement exists, the matter, upon a proper and timely demand, should be submitted to a jury"); *Adler v. Fred Lind Manor,* 153 Wn.2d 331, 350-51, 103 P.3d 773 (2004) (remand for resolution of factual questions on procedural unconscionability).

For example, in *Kwan v. Clearwire Corp.,* No. C09-1392JLR, 2012 WL 32380 (W.D. Wash. Jan. 3, 2012),[4] the court considered defendant's motion to compel arbitration and plaintiffs' motion to defer ruling on arbitration pending discovery. Neither party requested an evidentiary hearing, but the court had no difficulty applying the statute to order one: "[T]here are issues of fact with respect to these motions which

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[3] Vulcan repeatedly cited *Three Valleys* to the Superior Court. *E.g.,* CP 70, CP 88-90, CP 116; Turner's Reply/Response, 6.

[4] Copy provided with Petition for Review, under GR 14.1.

require an evidentiary hearing pursuant to the Federal Arbitration Act ..., 9 U.S.C. § 4." *Id.* at *1, *10, *12.[5]

Here, the Superior Court did not conduct a hearing or decide any facts on Vulcan's motions to compel arbitration. The Court of Appeals did not have the authority to decide disputed facts but nonetheless resolved them against Turner and in Vulcan's favor as a matter of law. This was clear legal error.

In any event, this Court reviews decisions on a motion to compel arbitration de novo.[6] *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)("The existence of an

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[5] The parties in *Kwan* stipulated to only one of several issues of fact: whether one plaintiff had assented to defendant's "Terms of Service" including an arbitration provision. *Id.* at *10. But there was no stipulation regarding remaining factual issues, including whether another plaintiff had notice of the Terms of Service. *See also, e.g., E.E.O.C. v. Fry's Elecs., Inc.*, No. C10-1562RSL, 2011 WL 666328, at *5 (W.D. Wash. Feb. 14, 2011) (proceeding "summarily to a trial"); *In re Park W. Galleries, Inc., Mktg. & Sales Practices Litig.*, No. 09-2076RSL, 2010 WL 3732910, at *2 (W.D. Wash. Sept. 17, 2010) ("There being a genuine issue of material fact regarding the formation of the contract, plaintiffs cannot be compelled to arbitrate this threshold issue."); *Guidotti v. Legal Helpers Debt Resolution, L.L.C.*, 716 F.3d 764 (3d Cir. 2013) (sufficient evidence that plaintiff did not agree to or intend to be bound by arbitration provision). Copies of GR 14.1 cases provided with Petition.

[6] Vulcan is incorrect in asserting that Turner did not previously raise her entitlement to a hearing. *See* Turner's Br., 9; Turner's Reply/Response, 17-19.

unconscionable bargain is a question of law for the courts")); *Adler*, 153 Wn.2d at 344; *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). Application of the law on de novo review clearly entitles Turner to a hearing on reversal of this case.

Based on its assumption that the facts are undisputed and were properly resolved in its favor, Vulcan argues this case is factually distinguishable from *Hill v. Garda, Brown, Romney,* and *Gorden.*[7] For the moment ignoring *Mayne v. Monaco Enterprises, Inc.*, No. 32978-0-III, -- Wn. App. --, 361 P.3d 264, 2015 WL 6689919 (Nov. 3, 2015), only later does Vulcan devote three pages to an attempt to distinguish this on-point case on its facts alone (Answer, at 16-18). Just as in *Mayne,* employer Vulcan presented Turner with a procedurally unconscionable arbitration provision during the course of her employment. On de novo review of Vulcan's motions to compel, viewing all facts and inferences in the light

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[7] *Hill v. Garda CL Nw., Inc.*, 179 Wn.2d 47, 308 P.3d 635 (2013) *cert. denied,* 134 S. Ct. 2821, 189 L. Ed. 2d 785 (2014); *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 264-65, 306 P.3d 948 (2013); *Romney v. Franciscan Med. Grp.*, 186 Wn. App. 728, 735, 349 P.3d 32, *review denied,* 184 Wn.2d 1004 (2015); *Gorden v. Lloyd Ward & Associates, P.C.*, 180 Wn. App. 552, 562-63, 323 P.3d 1074 (2014). Vulcan claims this case is factually like *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 268 P.3d 917 (2012).

most favorable to Turner, the arbitration provision was at a minimum procedurally unconscionable.

Vulcan further misrepresents as undisputed the fact that it provided "consideration" to Turner for its arbitration clause during the course of her employment, when its own witness, Human Resources Director Laura Macdonald, explicitly contradicts this. Macdonald testified the $25,516 bonus was not "consideration" for the arbitration clause. CP 2623, 3213 (110:1-5). The amount was based solely on a percentage of salary. CP 2851, 3212 (105:21-25).

B. The Superior Court (Judge Heller) Did Not Reject Turner's Claim of Procedural Unconscionability.

In its Answer to the Petition, Vulcan for the first time adds Judge Heller to the list of superior court judges it erroneously claims made substantive rulings on unconscionability. Vulcan falsely asserts Judge Heller decided unconscionability against Turner in granting her motion to vacate the arbitrator's award.[8] To the contrary, as both Judge Heller and the Court of Appeals clearly stated, the issues presented and resolved on the parties' cross-motions to vacate and confirm the arbitration award were:

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[8] Contrary to Vulcan's contention (Answer, at 6), the Superior Court never addressed the underlying "merits" of the dispute, but rather adhered to the FAA's standard of review, addressing the issues raised by Turner and set forth in the Memorandum Opinion.

> (1) whether the Arbitrator's refusal to grant a continuance of the arbitration hearing constituted 'misconduct' under the Federal Arbitration Act and (2) whether the award of $113,23[5] in attorneys' fees against Traci Turner should be vacated, either because it is 'completely irrational' or because it violates public policy.

CP 3583, 3592, 3598; *Turner v. Vulcan, Inc.,* No. 71855-0-I (slip op., Nov. 2, 2015), at 9 (Appendix A to Petition). The Superior Court never reached, much less rejected, Turner's position on procedural unconscionability of the arbitration clause.[9] Again, review is de novo in this Court. 9 U.S.C. § 4; *Saleemi, Zuver, Adler, McKee, Hill, supra.*

C. Turner Did Not Waive Her Challenge To The Superior Court's Confirmation of Remanded Re-segregated Attorney Fees.

In its Answer, Vulcan now claims Turner "forfeited" a challenge to Judge Heller's remand of attorney fees to the arbitrator. That is incorrect. Turner's Br., 23-24, 43-47.[10] Moreover, the argument is moot because the Court of Appeals expressly reviewed the issue. *Turner* slip op., at 21-25.

Vulcan asserts that by affirming the remanded fee award, the Court of Appeals rejected Turner's argument that the Employee Intellectual Property Agreement's (EIPA) fee-shifting clause was substantively

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[9] This includes the critically-disputed issue whether Turner had a "meaningful choice" in signing the GBA months into her employment, with its arbitration clause, "urgently", within 24 hours, under threat of termination. *But see* Answer, at 8; *Turner* slip op., at 15-16.

[10] Vulcan overlooks Turner's appeal from Judge Heller's confirmation of the remanded award.

unconscionable or against public policy. Answer, at 9 (citing *Turner,* at 23-25). To the contrary, the Court of Appeals affirmed the Superior Court's vacation of fees which the arbitrator had awarded because Vulcan "is not entitled to attorney fees in its defense against claims asserted under the WLAD and the MWA." *Turner,* slip op., at 24.

The Court of Appeals then affirmed the Superior Court's confirmation of improperly remanded, re-segregated attorney fees to Vulcan, applying the FAA standard of review instead of de novo review to the Superior Court's rulings. The Court of Appeals thus concluded Vulcan's work on two summary judgment motions was "not necessarily intertwined with statutory claims under the WLAD and the MWA." *Id.* at 25.

This directly contradicts Washington law that such a "carve out" or segregation is improper on claims relating to the same fact pattern, particularly where they are "primarily ... statutory" employment and wage claims,[11] as Judge Heller and the Court of Appeals noted. CP 3594;

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[11] *E.g., Hume v. Am. Disposal Co.,* 124 Wn.2d 656, 672, 880 P.2d 988 (1994); *Dice v. City of Montesano,* 131 Wn. App. 675, 690, 128 P.3d. 1253 (2009) ("Where attorney fees are only recoverable on some of a party's claims, the award must properly reflect a segregation of the time spent on the varying claims. The court must separate time spent on theories essential to the successful claim and time spent on theories relating to other causes of action. *Hume,* ...at 673.... If the court finds that claims are so related that segregation is not reasonable, then it need not

Turner, slip op. at 1. Affirming the remanded fee award also violates Judge Heller's proper initial decision, CP 3594-98, and Vulcan's own admission below that all of Turner's claims arose from a common core of facts.[12]

Instead of addressing the core question of improper segregation between statutory and nonstatutory matters, Vulcan contends the direct prohibition of fee-shifting in employment and wage cases which this Court reiterated in *LaCoursiere v. CamWest Development, Inc.,* 181 Wn.2d 734, 747-49, 339 P.3d 963 (2014) is somehow distinguishable because the employee's claim in that case was grounded exclusively in the Wage Rebate Act and did not challenge the employment agreement. Vulcan ignores that it was the employer who sought attorney fees under the employment agreement. The Court refused to allow such recovery, even though the employee's WRA claim was dismissed. It is not necessary for

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segregate the attorney fees."); Turner's Reply/Response, 39-41. The theories and facts on Vulcan's partial summary judgment motions were not reasonably segregable. The remanded award of attorney fees violates public policy, as Judge Heller initially and properly held.

[12] *E.g.,* Vulcan argued Turner's claims "share a common nucleus of underlying facts, allegations, and claims" and "**all her claims arose from or related to events alleged to have occurred in the course of her employment at Vulcan.**" CP 254-55 (emphasis added). Vulcan is judicially estopped from taking an inconsistent position on appeal. *Harris v. Fortin,* 183 Wn. App. 522, 526-30, 333 P.3d 556 (2014); Turner's Reply/Response, at 10, 26.

an employee to attack the employment contract in order to invoke the statutory prohibition against fee-shifting.

This Court could not have been clearer in pronouncing in *LaCoursiere* and previous cases that an employer cannot contractually circumvent the statutory prohibition against fee-shifting in employment and wage cases. Under employment and wage statutes, "'reasonable attorney fees and costs are available only to prevailing employees.'" *Id.* at 748 (citing and quoting *Walters v. AAA Waterproofing, Inc.*, 151 Wn. App. 316, 321-22, 211 P.3d 454 (2009) (FAA employment/wage case) and *Brown v. MHN Gov't Servs., Inc.*, 178 Wn.2d 258, 274-75, 306 P.3d 948 (2013) (FAA employment case));[13] *LaCoursiere,* at 749 (Gonzalez, J., concurring: "[i]t would frustrate the broad remedial purpose of the act to allow an employer to override the clear statutory system by contract.").

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[13] "We have previously held that **mandatory attorney fee shifting provisions in employment contracts are unconscionable where the legislature authorizes only prevailing employees to collect attorney fees**. *See Brown ...*, [at] 274-75 (2013) (holding that a mandatory fee shifting provision in an employment agreement is unconscionable under a similar statute because it was 'a significant deterrent to employees contemplating initiating an action to vindicate their rights'); *see also Walters,* 151 Wn.App. at 325 (holding that in the context of the WRA, 'a reciprocal attorney fees provision is unconscionable')." *LaCoursiere,* at 748 (emphasis added).

Turner directly violates *LaCoursiere* and other cases prohibiting fee-shifting to an employee in statutory employment and wage claim cases.

CONCLUSION

Turner asks this Court to accept review of the Court of Appeals' decision for all the reasons provided in her Petition.

RESPECTFULLY SUBMITTED this 2nd day of February, 2016.

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CERTIFICATE OF SERVICE

On the 2nd day of February, 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.

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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 2nd day of February, 2016.

s/ Darla Moran
Darla Moran
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Attached for filing in the above matter is Appellant-Petitioner's Reply on Petition for Review. Thank you.

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