Supreme Court No. 94857-7
Court of Appeals No. 75477-7-I

SUPREME COURT OF THE STATE OF WASHINGTON

SISTO ANDREW,

Appellant,

v.

OSG SHIP MANAGEMENT, INC.,

Respondent.

RESPONDENT'S ANSWER TO APPELLANT SISTO ANDREW'S PETITION FOR REVIEW

Noah S. Jaffe, WSBA # 43454
Chris P. Reilly, WSBA # 25585
Attorneys for Respondent OSG Ship Management, Inc.

NICOLL BLACK & FEIG PLLC
1325 Fourth Avenue, Suite 1650
Seattle, Washington 98101
(206) 838-7555

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I. INTRODUCTION

After having argued without persuasion to an arbitrator, trial judge, and Division 1 of the Court of Appeals, Mr. Andrew seeks to rehash his same arguments for a fourth time in this forum. Will the fourth time be the charm? No. The petition for review should be denied for many reasons – here are four good ones:

- First, Mr. Andrew does not meet the Court's criteria for granting review. The substantial public interests at stake in the case all weigh heavily against Mr. Andrew (and against granting review) – litigants should enjoy freedom to contract when negotiating settlement; litigants should not disturb the finality of a settlement agreement by unilaterally violating the agreement; and Courts should not encourage litigants to serially reargue the merits of adverse arbitration decisions. Because there is no public interest in disturbing these explicit, well-defined and dominant public policies, all of which weigh against Mr. Andrew's arguments, the petition should be denied.
- Second, this matter arises from an arbitration that resolved the merits of OSG's demand for specific performance of a term in a settlement agreement reached earlier with Mr. Andrew. If the petition is granted, this will be the third proceeding in which OSG has to defend an arbitration result against a collateral attack. As Judge Cox said in the

Division 1 opinion in acknowledging the narrow scope of review, "[t]o vacate an award because an arbitrator exceeded his or her powers, the error must appear on the face of the award." Mr. Andrew does not argue that the arbitrator was without power to order specific performance of a term of a settlement agreement that a plaintiff signed upon advice of counsel. If the arbitrator did not exceed his power in the arbitration decision, no review is available and the petition should be denied.

- Third, Mr. Andrew agreed, upon advice of counsel, to forego his U.S. Coast Guard merchant mariner document ("MMD"), among other terms, in exchange for a large amount of money, part of which was supposed to pay for his transition to a new career. Mr. Andrew's assertion that he was stripped of his career is inaccurate hyperbole for at least two reasons. First, there are seamen working all over the world who do not have a U.S. Coast Guard MMD. Second, Mr. Andrew, by his own admission, is currently medically unqualified to obtain an MMD. The settlement agreement at issue has no actual or hypothetical trade implications whatsoever. Because no trade is being restrained, the petition should be denied.
- Finally, Mr. Andrew keeps erroneously claiming that OSG would not be harmed if he were allowed to obtain an MMD

> so long as he agrees to not to work for OSG. The harm done to OSG if a seaman can claim to be totally disabled, obtain an outsized settlement based on that assertion (backed up by medical testimony), and then, shortly after cashing the check, assert that he was never disabled in an effort to renew his MMD, is obvious and self-evident. If condoned or allowed, his conduct gives license to fraud and demeans contracts between litigants.

Collectively, these reasons show that Mr. Andrew is not entitled to have his case reviewed in this Court and, even if review were granted, he is not entitled to relief. We urge the Court to deny review.

II. COUNTER STATEMENT OF THE CASE

The Court of Appeals (Division One) statement of facts attached to Mr. Andrew's Petition for Review at pages 2-4 of the decision are a fair recitation of the case facts.

III. ARGUMENT

To establish entitlement to discretionary review, Mr. Andrew must do more than argue that the arbitrator and appellate courts erred; he must show that the RAP 13.4(b) standards are met. He fails to do so.

A. This Court Maintains a High Bar When Considering Review of a Purported Issue of Substantial Public Interest.

A Petition for Review will be accepted by this Court only:

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4(b). The sole basis on which Mr. Andrew relies to support his petition is the "substantial public interest" rationale under RAP 13.4(b)(4). Petition at 3. Accordingly, Mr. Andrew concedes that there is no conflict between the unanimous Court of Appeals decision here and any decision of this Court or of the Court of Appeals, and that the decision raises no significant question of constitutional law.

This Court has stated that "substantial public interest" under RAP 13.4(b)(4) refers to issues with "sweeping implications." *State v. Watson*, 155 Wn.2d 574, 578, 122 P.3d 903 (2005) (addressing a county prosecutor's sentencing memorandum). In granting the petition for review in *Watson*, this Court held that the case "presents a prime example of an issue of substantial public interest. The Court of Appeals holding, while affecting parties to this proceeding, also has the potential to affect every sentencing proceeding in Pierce County … where [a drug] sentence was or is at issue." *Id.* at 577. As a result, the Court noted that the decision "invites unnecessary litigation … creates confusion generally … [and] has the potential to chill policy actions taken by both attorneys and judges." *Id.* The factors bearing on review include: (1) the public or private nature of the question presented, (2) the desirability of an authoritative

determination that will provide future guidance to public officers, and (3) the likelihood that the question will recur. *In Re Silva,* 166 Wn.2d at 137 n. 1. This is a high standard for any petitioner to meet. Given the longstanding and well-recognized policy in favor of conferring finality on arbitrator decisions, Mr. Andrew bears a significant burden in showing whether, and how, the arbitrator's decision violates or otherwise implicates a substantial public interest.

Consistent with that burden, courts generally start by looking to statute or legislative action, as an appropriate basis for determining when a policy can be deemed explicit, well defined, and dominant. *See, e.g.*, *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 901, 28 P.3d 823 (2001) ("Washington courts have been hesitant to 'invoke public policy to avoid express contract terms absent legislative action.'") (citations omitted). Here, Mr. Andrew has been unable to cite to any statute that pertains to his circumstances or otherwise supports his assertion that the decisions by the arbitrator, trial court, or the Court of Appeals implicate a substantial public interest.

B. The Arbitration Decision Does Not Implicate a Substantial Public Interest and Does Not Merit Review.

1. The public interest in filling billets is not substantial and is not implicated by Mr. Andrew's settlement agreement.

Mr. Andrew's first argument is that the No Sail agreement violated the important public policy of "filling billets on merchant ships." Petition at 4. To support this argument, Mr. Andrew cites not to

any statute, but to history.com and the World War II casualty rate of merchant seaman, as well as a statement by President Franklin D. Roosevelt emphasizing the merchant marine's value to the national defense. Petition at 4. First, the public policies at play during World War II are likely distinguishable from today's policy concerns, for a number of reasons. "Public policy is not static, but may change as the relevant factual situation and the thinking of the times change." *Brown v. Snohomish Cty. Physicians Corp.*, 120 Wn.2d 747, 754, 845 P.2d 334 (1993) (citation omitted). Mr. Andrew falls well short of showing a substantial public interest is implicated by his personal inability to obtain an MMD.

Moreover, Mr. Andrew's specific and individualized circumstances have no bearing on the nation's defense interest. There is no evidence that his settlement agreement has any broader reach or impact on the industry at large or the national defense. And Mr. Andrew renders this entire argument moot in his own case, by his declaration that he currently cannot pass a union physical and thus cannot go to sea, even if he retains his credential in violation of the court order and settlement agreement. CP 70.

But perhaps most importantly, the settlement agreement at issue here arose first and foremost out of *Mr. Andrew's own representation* that he was permanently disabled. The notion that he would be unable to resume his work as a merchant mariner was not one posed, promulgated, or even fully believed by OSG, but instead was one that Mr. Andrew

himself insisted on, and supported with testimony from his treating and consulting physicians and a vocational expert. CP 7. Indeed, OSG was highly skeptical of Mr. Andrew's assertions of permanent disability, and was reluctant to agree to a settlement award based on that assertion. CP 8. When OSG did finally agree to pay Mr. Andrew $525,000 in settlement, its willingness to pay was premised on Mr. Andrew's corresponding willingness to stand by his assertion of permanent disability, reflected by his agreement to relinquish his MMD. CP 8. And OSG's settlement payment reflected not only its acceptance of Mr. Andrew's permanent disability, but was also intended to pay for his retraining in another field, and for his diminution in future income caused by his permanent disability. CP 10. In other words, the settlement agreement here arose from Mr. Andrew's own insistence that he had lost his ability to continue to "fill billets," and his willingness to stand by that assertion, as the basis for receiving greater settlement amount. There is no substantial public interest in filling billets with permanently disabled seamen.

2. Mr. Andrew's "restraint of trade" argument was considered and properly rejected by the arbitrator and the Court of Appeals.

Mr. Andrew's next argument, and the closest he comes to offering any legislative evidence in support of his public policy argument, is his suggestion that the No Sail provision violates public policy by virtue of being an "unlawful restraint of trade." Petition at 4-5. This argument is

based on the plain language of RCW 19.86.030, and is an argument he raised at arbitration, at the superior court, at the Court of Appeals, and again now in his Petition for Review. That statute simply provides: "Every contract, combination, in the form of trust or otherwise, or conspiracy in restraint of trade or commerce is hereby declared unlawful." RCW 19.86.030.

That statutory provision is contained in Washington's Consumer Protection Act, and is an adoption of language in the federal Sherman Antitrust Act. RCW 19.86.030; *See State v. Black*, 100 Wn.2d 793, 799, 676 P.2d 963 (1984). It was devised and adopted with the goal of protecting consumers from anti-competitive market influences like price-fixing. *See*, *e.g.*, *Id*. at 799-800; *State v. LG Elecs., Inc.*, 186 Wn.2d 169, 186, 375 P.3d 1035 (2016) (involving "an intentional conspiracy to fix prices in violation of RCW 19.86.030"). Mr. Andrew has failed to identify any cases applying his restraint of trade argument to the context in this case, involving a freely negotiated settlement agreement term and having no bearing on the broader marketplace or consumer protection. Indeed, he concedes the closest existing case law on this principle generally involves the context of non-compete agreements or confidentiality agreements, which are not at issue here. Petition at 5.

For example, Mr. Andrew cited to the case of *Sheppard v. Blackstock Lumber Co.*, 85 Wn.2d 929, 540 P.2d 1373 (1975), both here and in his argument below. But this is precisely the kind of case that the arbitrator considered and ultimately deemed inapplicable and readily

distinguishable. The Arbitrator's Decision discussed that distinction: "The cases cited by Mr. Andrew concern restrictive covenants in employment agreements and not settlement agreements." CP 15. *Sheppard* concerned an employer's anti-competitive provision contained in a profit-sharing retirement plan, and a circumstance where the employee went on to directly compete against the former employer for customers and business. *Id*. at 933. In short, it involved circumstances that impacted a broader marketplace, impacted consumers, and involved direct competition between an employer and its former employee. The provision in Mr. Andrew's case, by contrast, arose in a mutually negotiated settlement agreement (throughout the negotiation of which, Mr. Andrew enjoyed advice of counsel), and Mr. Andrew and OSG were not, and could never be, competitors. Indeed, the arbitrator weighed these very considerations in response to Mr. Andrew's arguments below, concluding:

> 7. The No Sail provision is not an unenforceable restraint on trade in violation of RCW 19.86.030. While the language of this statute is broad, the term "restraint on trade" refers to conduct which makes markets less competitive and injures consumers. This provision was a negotiated term in a settlement agreement which reflected one party's position that he could never return to work at sea, and for which provision he received substantial compensation from the other party. Both Washington and federal maritime strongly favor settlement which establishes the controlling public policy here. The enforcement of this provision has no anti-competitive impact, nor are consumers adversely affected. Andrew and OSG are not competitors, but parties to a settlement agreement.

CP 15. Mr. Andrew has offered no support for an argument that his freely-negotiated settlement agreement constitutes an unlawful restraint of trade, let alone one that implicates a substantial public interest.

3. Mr. Andrew is not entitled to any special protection or deference as a seaman, where he had able legal and medical counsel throughout settlement negotiations.

Mr. Andrew suggests, at the opening of his argument, that he, like all merchant seaman, should be afforded special protections from the courts, Petition, 4, consistent with the heightened protection afforded to seamen by the courts, based on a general, historical reputation for profligacy. This argument has no application here. Mr. Andrew negotiated and entered into his settlement agreement, not as a disadvantaged party in need of protection from the court, but with the advice and input from his treating and consulting physicians, a vocational expert, and an experienced maritime attorney. CP 7, 9. He had every opportunity to understand the language and terms of any settlement agreement, and was free to reject any such agreement and proceed to trial if he did not wish to be bound by its terms. CP 9. Instead, he chose to sign the settlement agreement, he did so freely and voluntarily, and he received a significant sum of money in return. *Id*.

C. Even if Mr. Andrew's Public Policy Arguments were Valid or Appropriately Raised and Considered Here, They are Outweighed by Countervailing and More Clearly Defined Public Policy Arguments that Support the Arbitrator's Decision.

As laid out in detail above, Mr. Andrew has failed to show any substantial public interest that has been violated by his settlement agreement or the arbitrator's decision enforcing it. Moreover, there are actually several substantial, explicit, and well-defined public policy arguments that support the arbitrator's and the Court of Appeals' decisions in this case and erode Mr. Andrew's argument for relief.

First, as briefly addressed above, courts afford heightened deference to arbitrator's decisions, and adopt a corresponding reluctance to disturb arbitration awards. This deference is consistent with the policy favoring judicial economy; arbitration is a tool intended to help parties *avoid* the courts, and should not serve as a prelude to litigation. *Westmark Props., Inc. v. McGuire*, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). There is a similar public policy interest in the finality of settlement, which the arbitrator recognized as the controlling policy here. CP 15; *see Jain v. State Farm Mut. Auto. Ins. Co.*, 130 Wn.2d 688, 693, 926 P.2d 923 (1996) ("[T]he law favors private settlement of disputes, and, accordingly, releases are given great weight in establishing the finality of the settlement."). Despite these policies, and despite the apparent ease that first the arbitrator and then the trial court had in upholding the terms of the parties' freely negotiated settlement agreement, Mr. Andrew has treated the arbitrator's award as a prelude to

appellate litigation, undermining the purpose of the parties' settlement and arbitration agreement.

Second, the courts' deference to an arbitrator's decision also arises from the long-recognized public policy in favor of affording parties the freedom to contract. "Washington courts are loath[ ] to interfere with the rights of parties to contract as they please between themselves." *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn. App. 898, 909, 359 P.3d 884 (2015) (citation omitted). "It is not the role of the court to enforce contracts so as to produce the most equitable result. The parties themselves know best what motivations and considerations influenced their bargaining, and, while '[t]he bargain may be an unfortunate one for the delinquent party, ... it is not the duty of courts of common law to relieve parties from the consequences of their own improvidence....'" *Id*., (quoting *Watson v. Ingram*, 124 Wn.2d 845, 852, 881 P.2d 247 (1994)) (alterations in original).

Mr. Andrew appears here as a party who regrets a settlement provision for which he once freely negotiated and which served as the essential basis for his receipt of $525,000 in settlement funds. But now, having spent the funds, his argument that he should not be bound by the agreement's terms bears no equitable weight. This Court need not, and should not, step in to modify the contract or otherwise relieve him of the consequence of his own negotiation. This is particularly true here where, given Mr. Andrew's actions, doing so would produce a *less* equitable result, not a more equitable one. The arbitrator aptly recognized that

allowing Mr. Andrew to both breach the settlement agreement while simultaneously retaining the settlement money would constitute unjust enrichment. CP 14-15.

Consistent with the public policy favoring freedom of contract, it bears noting that there are many other contexts where parties are free to negotiate the relinquishment of analogous and equivalent rights. Indeed, Judge Andrus, in confirming the arbitrator's decision, considered this very line of reasoning: "The Court does not find that there's any public policy precluding someone in the course of negotiating a settlement agreement to relinquish rights to engage in a specific type of profession. One could negotiate to give up a law license. One could negotiate to give up a physician's license. And the Court does not see that this is in any way different than those types of relinquishments…." RP 16:1-7. This practice and Washington's approval of it corroborates the fact that there is no clearly defined public policy against a party's right to freely contract for the relinquishment of employment rights.

D. The Record Does Not Support Mr. Andrew's Statements and Characterizations.

We are reluctantly compelled to set the record straight regarding unsupported statements and characterizations in Mr. Andrew's Petition for Review. Mr. Andrew overstates his situation in two regards when he states that he has been deprived of his "chosen occupation." Petition at 4. As the Court of Appeals recognized, Mr. Andrew was required to surrender his MMD and not seek renewal for 25 years. Petition at A-6.

Mr. Andrew implies that such action deprives him of his "chosen occupation." Nothing in the record suggests that a seaman needs a U.S. Coast Guard MMD to work on the merchant ships of the world, most of which are unregulated by the U.S. Coast Guard. *See* 46 U.S.C. §§ 7301, *et seq*. (regarding the issues and regulation of Merchant Marine Documents). Further, the only relevant information in the record about Mr. Andrew's eligibility for an MMD (without regard to the settlement agreement) is that he is medically ineligible. CP 70. Mr. Andrew has not been deprived of his "chosen profession."

In support of his restraint of trade argument (and by way of offering to rewrite the settlement agreement provision at issue), Mr. Andrew states that OSG cannot show any harm if Mr. Andrew was allowed to serve on a ship operated by a different company. Petition at 9. The harm done to OSG if a seaman can claim to be totally disabled, obtain an outsized settlement based on that assertion (backed up by medical testimony), and then, shortly after cashing the check, assert that he was never disabled in an effort to renew his MMD, is obvious and self-evident. If condoned or allowed, Mr. Andrew's conduct gives license to fraud and demeans contracts between litigants.

IV. CONCLUSION

Mr. Andrew's Petition for Review should be denied because it does not satisfy the Court's review criteria for granting review. Further, Mr. Andrew does not meet the narrow circumstances in which a court will review an arbitration decision. However characterized, this is a case

of Mr. Andrew's regret for signing a settlement agreement that he purposefully violated soon after receiving the substantial settlement funds. An arbitrator, trial judge, and appellate court have already reviewed his arguments and found him unworthy of relief. We urge the Court to deny review.

Respectfully submitted this 25th day of August, 2017.

NICOLL BLACK & FEIG PLLC

/s/ Noah S. Jaffe
Noah S. Jaffe, WSBA # 43454
Chris P. Reilly, WSBA # 25585
Attorneys for Respondent OSG Ship Management, Inc.

CERTIFICATE OF SERVICE

I certify that on the 25th day of August, 2017, I caused a true and correct copy of the foregoing document to be served on the following in the manner indicated below:

Attorney for Appellant Sisto Andrew:
John Merriam, WSBA #12749
Law Office of John Merriam
Attorneys for Plaintiff
4005 20th Avenue West, Suite 110
Seattle, WA 98199
Telephone: (206) 729-5252
[ ] E-Mail (john@merriam-maritimelaw.com)
[X] Via ECF

DATED this 25th day of August, 2017.

/s/ Noah S. Jaffe
Chris P. Reilly, WSBA # 25585
Noah S. Jaffe, WSBA # 43454
Attorneys for Respondent OSG Ship Management, Inc.

NICOLL BLACK & FEIG

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