Supreme Court No. 97193-5
Court of Appeals Nos. 35767-8
35890-9

THE SUPREME COURT OF WASHINGTON

In re: the Arbitration of

BARNES, INC.,

Petitioner,

vs.

MAINLINE ROCK & BALLAST, INC.,

Respondent.

INLAND PACIFIC CHAPTER OF THE ASSOCIATED BUILDERS & CONTRACTORS AMICUS CURIAE BRIEF

WILLIAM M. HUGHBANKS, WSBA #45562
CAMPBELL & BISSELL, PLLC
820 W. 7th Ave
Spokane, WA 99204
Telephone: (509) 455-7100
Attorneys for Inland Pacific Chapter of
the Associated Builders & Contractors.

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I. IDENTITY AND INTEREST OF AMICUS

The Inland Pacific Chapter of the Associated Builders & Contractors ("Inland Pacific ABC") is the local chapter of the National Associated Builders and Contractors, a construction industry association with sixty-nine chapters throughout the United States. Nationwide there are over 21,000 ABC members, including prime contractors, specialty contractors, material suppliers, equipment manufacturers, and professional service providers. Locally, the Inland Pacific ABC serves the interests of approximately 240 members who employ nearly 4,000 people in Eastern Washington and Northern Idaho. Combined, Inland Pacific ABC members perform an estimated $870 million dollars of business in Eastern Washington and Northern Idaho, including public works projects, private commercial projects, residential construction and/or professional services related to the construction industry.

The Inland Pacific ABC's primary goal is to advance the Merit Shop philosophy, encouraging fair and open competition for all contractors. The Inland Pacific ABC also advocates on issues relating to the improvement of the construction industry as a whole, including participating in legal matters which impact members and non-members alike.

Relevant to this matter, many Inland Pacific ABC members include arbitration clauses in their standard form contracts. These members also

routinely execute contracts with other contractors, suppliers, manufacturers, and service providers, both members and non-members alike, and oftentimes these contracts require the resolution of disputes through arbitration.

Because arbitration is such a common dispute resolution tool in the construction industry, the Inland Pacific ABC has a legitimate concern that *Mainline Rock & Ballast, Inc. v. Barnes Inc.*, 8 Wn. App.2d 594, 439 P.3d 662 (2019) will render future arbitrations awards immune from meaningful judicial review. As such, Inland Pacific ABC members and non-members alike may be dissuaded from using arbitration to resolve their disputes and elect to litigate their disputes in state or federal courts instead, thereby preserving their right to appeal erroneous decisions.

II. STATEMENT OF THE CASE

On April 16, 2019, Division III of the Court of Appeals issued its opinion in *Mainline Rock & Ballast, Inc. v. Barnes Inc.*, 8 Wn. App.2d 594, 439 P.3d 662 (2019). The facts giving rise to this case date back to 2004, when Mainline Rock & Ballast, Inc. ("Mainline"), a rock crushing, general contractor and development company, hired Barnes, Inc., a drilling and blasting contractor, to blast solid rock out of Mainline's new quarry in New Mexico. CP 20. At that time, the parties executed a letter of understanding ("LOU") which contained the terms of their contract. CP 20. Thereafter, the

parties commenced work to develop the quarry site before drilling, blasting and crushing rock to be sold. CP 4.

Under the LOU, the parties agreed that a certain amount of rock would be considered "reject" material, but nonetheless sold, mostly to railroads during the first year of operations. CP 20. The parties did not intend to stockpile a substantial amount of material at the quarry. CP 5. However, through the years Mainline stockpiled a substantial amount of material at the quarry, all of which was blasted by Barnes, crushed by Mainline and intended to be sold and Barnes compensated for. CP. 5, 34.

In 2008, the parties executed a Master Blasting Agreement ("MBA"). CP 22-32. The MBA contained an integration clause, stating the MBA "[...] is intended by the parties to be the final, complete and exclusive statement of their agreement relating to the matters herein." CP 29. The MBA also stated that Barnes was subject to any subsequent work orders issued. CP 22-32. These work orders specifically stated that Barnes owned the rock by-product that was stockpiled on the quarry and which would be sold by Mainline at a later date. CP 31.

On April 7, 2017, Mainline sold the quarry and assets thereon to Vulcan Materials Corp., including the stockpiles owned by Barnes. CP 6, 53. Mainline had two aerial drone surveys performed of the stockpiled material and determined there was 2.8 million tons of material owned by

Barnes on site. CP 34. Mainline then offered to pay Barnes $2.8 million for the stockpiles. CP 34. However, on May 17, 2017, Mainline tendered a check for $905,596 to Barnes as final payment, claiming the remainder of the material onsite was waste and Mainline refused to pay Barnes for such material. CP 5, 53.

Pursuant to the MBA, the parties submitted the dispute to arbitration before a three-person arbitration panel. CP 28, 35. The arbitration panel ultimately decided, by a 2-1 vote, that Barnes is only entitled to an additional $354,839.50. CP 38-42. While not explicitly stated, it is clear the majority based its decision on agreements between Barnes and Mainline which pre-date the MBA, despite the MBA's merger clause. CP 38-40. In stark contrast, the sole dissenting arbitrator wrote the following in a separate opinion:

> Only the Master Blasting Agreement dated June 1, 2008, the work authorizations dated June 1, 2008, and the Amendment dated June 1, 2016 apply to this dispute, previous letters of understanding or other correspondence are superseded by [the MBA] and are not relevant."

CP 41-42. The dissenting arbitrator goes on to state that he would have awarded Barnes an additional $3,499,670.25 based on the terms of the MBA and subsequent work orders. *Id.*

Thereafter, Barnes filed a motion in Spokane County Superior Court to vacate the arbitrators' award. The Superior Court denied the motion and, instead, affirmed the arbitration award. CP 114-116. Barnes then appealed the Superior Court's decision to Division III of the Court of Appeals. CP 136-141. In a published opinion, the Appellate Court affirmed the Superior Court's decision, holding that no error of law existed on the face of the arbitrator's award and that a reviewing court may not examine the underlying contract to determine whether the arbitrator committed error. *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App.2d 594, 608-09, 439 P.3d 662, 670-71 (2019).

Barnes now seeks discretionary review from this Court and the Inland Pacific ABC submits this *amicus curie* brief pursuant to RAP 10.6, encouraging this Court to accept review and reverse the decision of the Division III Court of Appeals.

III. ARGUMENT

A. The Appellate Court's Ruling Effectively Eliminates Any Meaningful Review of an Arbitration Decision.

The Appellate Court's ruling in *Mainline Rock & Ballast, Inc. v. Barnes Inc.* effectively eliminates a party's ability to seek judicial review of an arbitrator's decision because it prohibits a reviewing court from reviewing anything but the arbitrator's award. *Mainline*, at 608, 439 P.3d at 670.

Under RCW 7.04A.230, a court's authority to vacate an arbitrator's award is limited to unusual scenarios such as, corruption, fraud, partiality, misconduct and, as in this case, an arbitrator exceeding his or her powers. *See* RCW 7.04A.230; *Davidson v. Hansen*, 135 Wn.2d 112, 118-19, 954 P.2d 1327, 1330-31 (1998) (authority for judicial review of an arbitrator's award is narrowly construed). Washington courts have previously recognized that where an error of law appears on the face of the arbitrator's decision, the arbitrator is deemed to have exceeded their authority for the purposes of RCW 7.04A.230(1)(d). *Broom v. Morgan Stanley DW, Inc.* 169 Wn.2d 231, 239-40, 236 P.3d 182, 184 (2010).

Yet, under *Mainline Rock & Ballast, Inc.* if a well-intentioned arbitrator issues a decision they could not have reached but for an error of law (*i.e.,* stating the arbitrators considered agreements which pre-date a contract containing a valid merger clause), a reviewing court is nonetheless prohibited from examining the underlying contract to determine whether an error of law exists and, *ipso facto*, determining whether an arbitrator exceeded their authority in considering the prior agreements. *Mainline* at 609, 439 P.3d at 670. The practical effect of the *Mainline Rock & Ballast* decision is that a party cannot prove an arbitrator exceeded its powers under RCW 7.04A.230(1)(d), unless the arbitrator(s) provide a detailed narrative stating how the arbitrator(s) reached their decision. *Mainline* at 610-11, 439

P.3d at 671. Additionally, in contract dispute where an arbitrator states their decision is based upon a specific provision in the contract, a court is prohibited from reviewing the language of that provision unless it is quoted in the arbitrator's award. *Mainline* at 610-11, 439 P.3d at 671.

The Appellate Court goes on to explain an arbitrator can even improve its chances for court to confirm their award by not providing any analysis or reasoning whatsoever for its award, and instead, merely state who the arbitrator finds in favor of and how much in damages they are entitled to, if any. *Id.* at 614, 439 P.3d at 673[1]. If an arbitrator were to issue such an

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[1] While the *Mainline Rock & Ballast* Court attempts to provide guidance on how parties can protect itself from this practice (*i.e.,* inserting language in the arbitration clause that an arbitrator must provide a detailed and reasoned decision) in practice this would do little remedy the issue. Parties must still show a facial error on the arbitrator's award before a reviewing court may vacate pursuant to RCW 7.04A.230(1)(d). *Broom* at 40, 236 P.3d at 184. What constitutes a "detailed and reasoned" arbitration award is up for interpretation and, pursuant to *Mainline Rock & Ballast*, a reviewing court is still prohibited from looking beyond an arbitration award to determine whether the award contains sufficient detail and reasoning. *Mainline* at 596, 439 P.3d at 664.

award, it would be extremely difficult, if not impossible, for a party to vacate the award under RCW 7.04A.230, no matter how obvious or egregious any error might be. As a result, parties who believe the arbitrator made a critical mistake of fact or law in issuing their award will lose all faith in the arbitration process and be reluctant, if not outright refuse, to agree to arbitration in the future.

As set forth below, this is expected to have a wide-ranging impact on Inland Pacific ABC members and others in the construction industry.

B. Construction Industry Entities will opt to Litigate Disputes Instead of Voluntarily Submitting their Disputes to Arbitration.

If *Mainline Rock & Ballast* is affirmed, litigation will appear as a more attractive option for resolving disputes, particularly in complex construction matters where substantial sums of money are involved. In turn, Washington courts' policy of encouraging voluntary arbitration would be weakened because the safeguards provided under RCW 7.04A.230 have been eliminated from all but the rarest of circumstances.

Washington state courts have often touted the benefits of arbitration because parties can avoid "[...] the formalities, delay, expense and vexation of litigation in court." *Davidson v. Hensen*, 135 Wn.2d 112, 118954 P.2d 1327, 1330 (1998); *see also Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d

1239, 1242 (1995) (encouraging parties to submit disputes to arbitration is an increasingly important objective). *Mainline* at 614, 439 P.3d at 673.

However, the *Mainline Rock & Ballast* decision will likely have a detrimental impact on parties' incentive to submit their disputes to arbitration. This case demonstrates how exceedingly difficult, if not impossible, it is to obtain judicial review of an arbitrator's decision where evidence of a clear error of law exists. Moreover, *Mainline Rock & Ballast* states exactly what an arbitrator may do to insulate its award against judicial review (*i.e.,* simply state who prevails and how much, if any, damages are awarded). *Mainline* at 614, 439 P.3d at 673. Simply put, if an arbitrator issues an award which a party believes to be clearly erroneous and there is no method by which to correct that error, a party will lose faith in the arbitration process and refuse to use arbitration in the future.

Additionally, while arbitration can *potentially* be less expensive than litigation, it is by no means inexpensive. Each party will still spend a substantial amount in attorney's fees and costs to prepare their case for arbitration, possibly pay a fee to an organization like the American Arbitration Association for using one (or more) of its approved arbitrators, and pay for their share of the cost for the arbitrator(s) to hear their case and rule on the matter. These costs add up quickly, sometimes to the point where difference in cost between arbitration and litigation is negligible. When

weighing the potentially similar costs of arbitration vs. litigation, along with the nearly impossible burden a party must meet to obtain judicial review of an arbitrator's decision, these factors weigh strongly against arbitration.

In light of the decision in *Mainline Rock & Ballast*, the Inland Pacific ABC expects many of its members, as well as others in the construction industry, will remove arbitration clauses from their contracts and opt to litigate their disputes instead. The risk a party takes by forfeiting their right to a meaningful review of an arbitrator's decision is simply too high. Overall this will be detrimental to the construction industry because, in some instances, having an arbitrator that is familiar with the construction industry can be very helpful.

C. An Arbitrator's Dissent Should be Part of the "Award" for the Purpose of Determining Whether a Facial Error Exists.

An arbitrator's dissenting opinion should be considered a part of the "award" which a reviewing court may analyze in determining whether a facial error exists.

During oral argument to Division III of the Court of Appeals, Barnes urged the *Mainline Rock & Ballast* court to consider the minority arbitrator's dissenting opinion as part of the "award" for determining whether a facial error exists. *Mainline* at 612, 439 P.3d at 672. However, the court declined to address the issue because, in the court's opinion, the dissenting opinion

would not change its ultimate conclusion. *Id.* The *Mainline Rock & Ballast* court also noted that no previous Washington or foreign case had squarely addressed the issue of whether a dissenting arbitrator's opinion may be considered by a reviewing court. *Id.*

The Inland Pacific ABC urges this Court to address this issue now and rule that an arbitrator's dissenting opinion is a part of the "award" and should be considered by a reviewing court. The reasoning is, as the *Mainline Rock & Ballast* court noted, parties may benefit from having a detailed and reasoned arbitration decision. *Id.* at 614, 439 P.3d at 673. The *Mainline Rock & Ballast* court also noted that a hazard exists in Washington's arbitration laws, wherein an arbitration panel can improve their chance of court confirmation by only stating which party the arbitrators find in favor of and how much, if any, damages are awarded. *Id.*

Dissenting opinions, while not determinative of the arbitration award, may provide additional details and reasoning regarding the panel's decision, which may be beneficial to a party. More importantly, however, a detailed and reasoned dissent would assist a court in conducting a meaningful review and mitigate the hazard of an arbitration panel insulating their award from judicial review by simply stating who they found in favor of and by how much. For this reason, the Inland Pacific ABC requests this

Court accept review and hold an arbitrator's dissenting opinion be included in the "award" a reviewing court considers.

IV. CONCLUSION

In sum, the *Mainline Rock & Ballast* decision creates a nearly insurmountable burden for obtaining judicial review of an arbitrator's award. This decision will likely have broad negative effects on Inland Pacific ABC members, and the construction industry as a whole, because companies have additional incentive to replace their arbitration clauses with a provision requiring disputes be resolved by litigation, thereby preserving their right to appeal decisions which they believe to be erroneous. This will undoubtably increase costs for all parties involved, drag out disputes longer than may be warranted and impose an additional burden on an already overburdened court system. For these reasons, the Inland Pacific ABC respectfully requests this Court accept review of this matter.

DATED this 11th day of July, 2019.

WILLIAM M. HUGHBANKS, WSBA #45562
CAMPBELL & BISSELL, PLLC
820 W 7th Ave.
Spokane, WA 99204
Telephone: (509) 455-7100
Attorneys for Inland Pacific Chapter of the
Associated Builders & Contractors

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CAMPBELL & BISSELL, PLLC

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