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STATE OF WASHINGTON
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No. 97193-5

SUPREME COURT
OF THE STATE OF WASHINGTON

In re: the Arbitration of

BARNES, INC.,

Petitioner,

v.

MAINLINE ROCK & BALLAST, INC.,

Respondent.

ANSWER OF BARNES, INC. TO *AMICUS CURIAE* MEMORANDUM

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A. INTRODUCTION

The Inland Pacific Chapter of the Associated Builders & Contractors ("ABC") has submitted an *amicus curiae* memorandum urging this Court to grant review of Division III's published opinions.

As ABC pointedly notes in its memorandum, those opinions are contrary to this Court's precedents on judicial review of arbitral awards. RAP 13.4(b)(1). By their extremely restrictive approach to what reviewing courts may consider on judicial review, Division III's opinions undercut the legislative intent that arbitral awards are subject to appropriate, but narrow, judicial review. Division III's precedential opinions will ultimately deter parties from considering arbitration as a viable alternate dispute resolution mechanism. RAP 13.4(b)(4).

B. STATEMENT OF THE CASE

Barnes, Inc. ("Barnes") will not repeat the statement of the case in its petition at 2-7, but three facts bear emphasis.

First, largely unmentioned either by Division III or Mainline Rock & Ballast, Inc. ("Mainline") in its answer, Barnes *owned* all the blasted rock stockpiled at the Torrance, New Mexico site. CP 31. Nevertheless, Mainline sold the Torrance site and the blasted rock owned by Barnes to Vulcan Materials Corporation ("Vulcan"). CP 53. Mainline has never accounted for its decision to convert materials belonging to Barnes or the

value it received from Vulcan for that converted blasted rock belonging to Barnes.

Second, according to Division III, op. at 17-18, it could not consider anything but the arbitration award itself (and then only the views of the majority of the arbitration panel at that – op. at 20). Notwithstanding its assertion that it could not consider the underlying materials like the parties' 2004 letter of understanding ("LOU"), the master blasting agreement ("MBA"), or the subsequent work orders, Division III considered those materials throughout its opinion, *e.g.*, op. at 2-6.

C. ARGUMENT[1]

(1) Division III's Decisions Are Inconsistent with This Court's Precedents on the Scope of Judicial Review of Arbitral Awards Meriting Review under RAP 13.4(b)(1)

As the ABC memorandum notes, Division III's published opinions fly in the face of this Court's decisions on the scope of judicial review of an arbitral award. ABC br. at 9. ABC is correct.

Mainline attempted in its answer to Barnes' petition for review to argue that this Court's precedents somehow support Division III's novel

[1] Barnes has confined its answer to the impact of Division III's published opinions on the arbitration process generally rather than the specific facial errors of the arbitrators in this case. Mainline's response on those issues, however, answer at 11-19, only demonstrates how the arbitration majority erred on the face of its award, failing to even accomplish the specific obligation the arbitration was to address – the quantity of rock blasted by Barnes and taken by Mainline. Pet. at 13-22.

conclusion that in determining whether an error appeared on the face of an arbitral award, the reviewing court may not consider either the underlying document like an insurance policy or contract on which the award is based. Answer at 5-10. But this Court's precedents that it cites do not support Division III's extreme position on judicial review.

Indeed, Division III itself acknowledged that in *Broom v. Morgan Stanley DW, Inc.*, 169 Wn.2d 231, 236 P.3d 182 (2010) and in *Boyd v. Davis*, 127 Wn.2d 256, 897 P.2d 1239 (1995), this Court analyzed language in the underlying contracts in the process of judicial review.

Moreover, from a practical standpoint, no reviewing court can determine on judicial review if an arbitrator's ruling was facially erroneous without assessing the parties' contract, insurance policy, or the like. Indeed, if an arbitrator violated a constitutional provision, statute, regulation, or ordinance in rendering her/his award, no reviewing court would be foreclosed from looking at such authorities that set the legal parameters for the decision. It is *no different* for a contract. Review is merited. RAP 13.4(b)(1).

(2) Division III's Decisions Severely Curtailing Legitimate Judicial Review of Facial Errors in Arbitral Awards Has Profound Public Policy Implications for Arbitration in Washington Meriting Review under RAP 13.4(b)(4)

ABC makes clear in its memorandum at 8-13 that Division III's

published opinions will have a powerful *adverse* effect on parties' decisions to utilize arbitration as an alternate dispute resolution mechanism in Washington. As ABC, whose members routinely utilize arbitration in their contracts, ABC br. at 4-5, bluntly observed, Division III's decision "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." *Id.* at 8. ABC notes that construction industry firms will simply opt not to arbitrate disputes. *Id.* at 11-13. Review is merited under RAP 13.4(b)(4) of such a profoundly impactful decision.

Division III's opinions ultimately constitute bad public policy running contrary to the Legislature's intent in enacting the Uniform Arbitration Act, RCW 7.04A, and this Court's decisions approving of arbitration.[2] *E.g.*, *Boyd*, 127 Wn.2d at 262; *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998).

Division III claimed that to consider anything other than the arbitral award itself would necessarily entail "an intricate review of the merits of the case, and conflicts with the goal of avoiding extensive and expensive litigation." Op. at 18. However, as ABC cogently observes in its

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[2] Mainline had no real response in its answer to the similar points on the public impact of Division III's published opinions on arbitration offered in the Barnes petition at 11-12.

memorandum at 9-11, Division III's published opinions actually eviscerate judicial review of arbitral awards. The Legislature intended judicial review of arbitral awards to occur under appropriately narrow circumstances. RCW 7.04A.230. But Division III's approach simply shuts the door on any judicial check on arbitrator misconduct or error. Such a result will require rational parties to rethink the alleged benefits of arbitration, which, as ABC points out, has increasingly become just as expensive and time consuming as traditional litigation. ABC br. at 12-13. Review of such an extreme deference to arbitrators by Division III requires review. RAP 13.4(b)(4).[3]

D. CONCLUSION

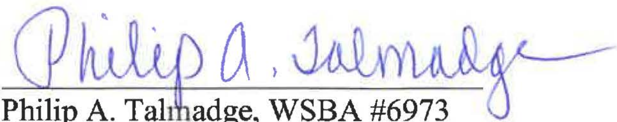
As ABC's *amicus* memorandum confirms, Division III's published opinions are contrary to this Court's traditional interpretation of judicial review of arbitral awards, and create tremendous practical problems for judicial review of such awards, ultimately deterring use of arbitration.

This Court should reverse the trial court's order and vacate the arbitral award. Costs on appeal, including reasonable attorney fees, should be awarded to Barnes.

[3] And, if anything, the concurrence's proposed deference to arbitrator decision-making is even more extreme than the majority, suggesting that RCW 7.04A.230 legislatively overruled this Court's longstanding *Boyd* decision.

DATED this 13th day of August, 2019.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the **Answer of Barnes, Inc. to *Amicus Curiae* Memorandum** in Supreme Court Cause No. 97193-5 to the following:

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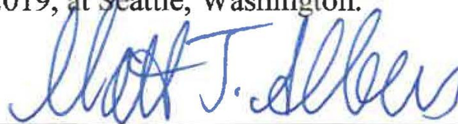
I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 13, 2019, at Seattle, Washington.



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Barnes, Inc. Answer to Amicus Curiae Memorandum

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