

FILED
Court of Appeals
Division III
State of Washington
8/20/2018 11:59 AM

No. 35767-8

COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

In re: the Arbitration of

BARNES, INC.,

Appellant,

v.

MAINLINE ROCK & BALLAST, INC.,

Respondent.

REPLY BRIEF OF APPELLANT BARNES, INC.

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A. INTRODUCTION

Mainline Rock & Ballast, Inc.’s (“Mainline”) brief highlights the errors of the trial court in refusing to vacate an arbitration award that contained many facial legal errors. In a split decision, the majority arbiters misapplied basic principles of contract law, failed to settle the central issue in the dispute, and ignored the language of mandatory attorney fee and interest provisions in the parties’ contract. These many errors, appearing on the face of the decision, warrant vacating the award.¹ Mainline’s attempts to argue otherwise fail.

B. REPLY ON STATEMENT OF THE CASE

Mainline cannot escape the clear facts of this case. Barnes drilled and blasted 15.8 million tons of rock at the Torrance quarry for Mainline. CP 20. On April 7, 2017, Mainline sold the assets of the Torrance operation to a third party. CP 53. The sale included millions of tons of material *owned by Barnes* that had accumulated onsite over the years; Barnes blasted every

¹ Barnes discussed the standard for overturning an arbitral award in its opening brief. Barnes br. at 8-10 (citing *e.g.*, *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 237, 236 P.3d 182, 184–85 (2010) (Our Supreme Court has “repeatedly articulated a rule that explicitly includes facial errors of law as grounds for vacation.”)). Other jurisdictions, including the federal courts, have noted that an arbitration award must be reversed when it shows a “manifest disregard of the law.” *See, e.g.*, *Bosack v. Soward*, 586 F.3d 1096, 1104 (9th Cir. 2009), *cert. denied*, 559 U.S. 938 (2010); *WSC/2005 LLC v. Trio Ventures Associates*, 75, 2018 WL 3629441 at *4 (Md. July 30, 2018) (applying uniform arbitration act). This Court should reverse the arbitral award due to its facial legal errors and because the panel manifestly disregarded the law.

ton of that material. CP 6. The sale of that material to Vulcan belies the arbitration panel's apparent belief that it was commercially unsellable.

Mainline is wrong when it states that Barnes never expressed an interest in the materials it blasted which remained onsite. Mainline br. at 2. Pursuant to the parties' work orders executed under a fully integrated Master Blasting Agreement ("MBA") "Barnes retain[ed] the Drilling and Blasting interest in by-products stockpiled on-site to be sold at a later date." *See, e.g.*, CP 31. The MBA states "Mainline agrees to pay for *all materials* sold and invoiced, in full, within 20 days of the end of the month in which the rock is sold and invoiced." CP 23. Additionally, any "[i]nventories carried beyond the termination of the master blasting agreement" (for example, upon sale of the quarry) were to be "purchased and paid for in 5 years of termination *by Mainline*" if not otherwise sold to a third party. *Id.* (emphasis added). Thus, the sale of the site and all materials stockpiled on it triggered Mainline's duty to pay Barnes for the materials Barnes blasted that remained onsite. There was no reason to bring up the materials earlier until the site was sold, triggering Barnes's right to seek payment for its ownership interest in the materials remaining onsite. CP 23, 31.

Mainline admits that its sale of the quarry included "all stockpiled commercially sellable aggregate inventory" onsite. Mainline br. at 7. Yet,

Mainline failed in its duty to accurately measure such materials as they accumulated onsite. CP 5, 41, 53. Mainline originally offered to pay Barnes \$2.8 million for the accumulated materials, based on drone surveys it conducted which identified many tons of stockpiled materials. CP 34. Inexplicably, Mainline changed its mind sometime before arbitration and offered just \$908,586, claiming for the first time that the materials onsite were “waste materials.”² CP 5, 53. The dissenting arbiter correctly noted that these tactics by Mainline showed a lack of good faith. CP 42.

At an impasse, the parties invoked the arbitration clause in the MBA specifically to determine the “quantity of stockpiled materials” onsite. CP 35. Mainline does not dispute this fact, or the fact that the arbitration panel failed to answer this central question in the dispute. The arbitration panel also failed to award attorney fees and late fees (interest) on the award it made, despite mandatory provisions for attorney and late fees in the MBA. These errors warrant reversal as discussed below.³

² The term “waste materials” exists nowhere in the MBA or subsequent work orders. Although not controlling for interpreting the written terms of the parties’ fully executed contract, even the Letter of Understanding (“LOU”) stated that “most of the rejects” would be commercially sellable. CP 20. This only highlights the “bad faith” of Mainline in attempting to exclude the many tons of materials onsite as “not commercially sellable.” *See* CP 42 (dissenting arbiter noting the lack of good faith in Mainline’s misrepresentations).

³ Mainline attempts to make hay out of the fact that Barnes negotiated the check Mainline offered pursuant to the arbitration award. *See* Mainline br. at 8. This is an

C. ARGUMENT

(1) The Award Should Be Vacated Because of the Errors in Law on the Face of the Award

Mainline incorrectly argues that Barnes cannot show “any error of law by the panel.” Mainline br. at 9. As discussed at length in Barnes’s opening brief, the arbitration award contains clear errors of law in that the majority ignored basic principles of contract law. *See* Barnes br. at 10-14. The panel disregarded the MBA’s clear and fully integrated terms and subsequent work orders, choosing instead to rely on the LOU drafted years before the MBA and subsequent work orders. CP 39. That facial error ignores the rule in Washington that contracts must be interpreted based on the objective manifestation of the parties’ intent as set forth in the parties’ agreement, rather than their subjective intent manifested in extrinsic evidence. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). This is especially true when a contract contains an integration clause, as here; any terms or conditions that are not contained in the final integrated agreement *must be disregarded*. *Lopez v. Reynoso*, 129 Wn. App. 165, 171, 118 P.3d 398 (2005), *review denied*, 157

irrelevant, misleading insinuation that somehow Barnes is estopped from seeking to vacate the award. Barnes informed Mainline that it accepted the check as a “partial payment” for monies owed, CP 93, and Mainline cites no authority for its insinuation that somehow Barnes is prevented from seeking the full amount it is owed for the work it performed on behalf of Mainline. *See, e.g.*, RAP 2.5(b) (acceptance of benefits). There is no dispute that Mainline significantly underpaid Barnes.

Wn.2d 1003 (2006). Mainline’s attempts to dodge these clear rules fail.

(a) Mainline Relies Superseded Authority for the Incorrect Proposition That Extrinsic Evidence Supplants the Clear Terms of the Parties’ Written Agreement

Mainline argues that the panel properly considered extrinsic evidence to interpret the parties’ intent, relying on *Berg v. Hudesman*, 115 Wn.2d 657, 668, 801 P.2d 222 (1990). Mainline br. at 16. *Berg* has been superseded by subsequent caselaw, as expressly recognized by the Supreme Court in *Hearst*. 154 Wn.2d at 503-04. There the Supreme Court wrote:

Our holding in *Berg* may have been misunderstood as it implicates the admission of parol and extrinsic evidence. We take this opportunity to acknowledge that Washington continues to follow the objective manifestation theory of contracts. Under this approach, we attempt to determine the parties’ intent by focusing on the objective manifestations of the agreement, rather than on the unexpressed subjective intent of the parties. We impute an intention corresponding to the reasonable meaning of the words used...We do not interpret what was intended to be written but what was written.

Id. (citations omitted). The Court went on to clarify that “extrinsic evidence may be used only to determine the meaning of specific words in the agreement.” *Id.* at 509. Extrinsic evidence is “irrelevant” to show the parties’ “desire” or intent in forming the contract. *Id.*

Here, the arbitration panel committed a facial error in law when it used extrinsic evidence not to merely clarify the meaning of specific words,

but to interpret “the unit price negotiated between the parties.” CP 39. It looked to course of conduct and a LOU that existed years before the fully integrated MBA to determine the alleged “purpose” behind the agreement and whether or not the parties intended to include “reject material” in the unit price. *Id.* It ignored the clear language in the MBA and work orders showing that Barnes retained a right to be paid for the materials stockpiled onsite, either as the material was sold or by Mainline itself upon termination of the MBA. *See, e.g.,* CP 31. The arbitration panel’s disregard for this language in favor of extrinsic evidence was a clear error of law warranting reversal.

It goes without saying that if extrinsic evidence can only be used to “determine the meaning of specific words” in a contract, it cannot be used to impute words into a contract that do not exist at all. But this is what Mainline tries to do, classifying the millions of tons of material onsite as “waste” material despite that word never occurring in the MBA, work orders, or even LOU. There is nothing to show that Mainline did not receive an economic benefit from this material when it sold the quarry to a third party. Rather, Mainline admits that the sale included the material onsite, Mainline br. at 7, and it initially offered \$2.8 million to Barnes for the stockpiled material before reclassifying it as “waste” product in a bad faith attempt to avoid payment. CP 34, 42. This Court should not be deceived

by Mainline's tactics to distort the clear language of the MBA and work orders.

(b) Mainline Incorrectly Argues That the Panel Did Not Consider Extrinsic Evidence

Mainline contradicts itself when arguing that the LOU should have supplanted the terms of an integrated contract executed years later. In one instance Mainline argues that it was not “a clear error of law for the panel to consider [the LOU],” then, inexplicably, Mainline argues that “there is nothing on the face of the award to suggest that the panel relied on the [LOU] to alter or vary the terms of the agreement.” Mainline br. at 12, 16. Mainline is wrong, and its misrepresentation of the record, in contradiction to its prior argument, is disingenuous.

The award clearly states on its face that the panel used the LOU to supplant the terms of the MBA. The majority wrote:

The majority concludes that the unit price negotiated between Mainline and Barnes in June 2008 was inclusive of anticipated reject material. This conclusion is supported by the parties' course of performance and treatment of reject material from the time the quarry was established in 2004 up through the sale to Vulcan in April 2017. *In particular by letter dated July 27, 2004*, Barnes specifically noted that its negotiated unit price was inclusive of anticipated reject material.

CP 39 (emphasis added). The dissenting arbiter further highlighted the majority's reliance on the LOU, noting:

Only the Master Blasting Agreement dated June 1, 2008, the work authorization 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 agreement and are not relevant.*

...

Mainline did not negotiate in good faith with Barnes when they determined that a portion of the by-product could not be sold at a later date, rather they measured it and completely excluded it. *This is a violation of the agreement both written and as intended.*

CP 42 (emphasis added). As noted in Barnes's opening brief, this reasoning of the arbiters on the panel is "considered as part of the face of the award." *Cummings v. Budget Tank Removal & Env't'l Servs., LLC*, 163 Wn. App. 379, 389, 260 P.3d 220, 226 (2011). Thus, the face of the award shows a clear legal error in that the panel ignored basic principles of contract law, discussed *supra*. Mainline's misrepresentation of the record speaks to the weakness of its argument and is consistent with its bad faith practices below.

(c) Mainline Shows That the Panel Committed a Facial Error by Failing to Address the Central Issue in the Dispute

As noted by the dissenting arbiter in the passage above, the arbitration panel failed, on the face of the award, to resolve the central issue in the dispute – how much stockpiled material remained onsite. CP 42. Mainline does not dispute that this was the reason for the arbitration. Mainline also cannot dispute that it originally offered Barnes \$2.8 million

based on drone surveys showing that 2.8 million tons of “commercially sellable materials” remained onsite.⁴ CP 34. Rather, Mainline distorts the discussion, claiming that some materials were commercially sellable and others were “waste” without confronting the fact that the panel never ruled on the quantity of the stockpiled materials.

The award does not mention “waste” materials or specify their quantity. Nor does it discuss the drone surveys or quantity blasted, as the dissenting arbiter points out. Rather, the majority focused on deciding proper “unit prices,” and, as noted in detail by the dissenting arbiter, never reached the central question of the dispute. CP 39, 42. This utter failure to resolve the key dispute warrants vacation of the arbitration award. *See Garrett Ranches LLC v. Larry Honn Family LLC*, 192 Wn. App. 1048, 2016 WL 791094, *review denied*, 186 Wn.2d 1004 (2016) (noting that it may be grounds for vacation if arbiters “so imperfectly executed [their powers] that a final and definite award upon the subject matter submitted to them was not made”).⁵

⁴ As discussed in Barnes’s opening brief, Barnes felt that the tonnage blasted was a better estimate, especially because Mainline failed in its obligations to keep track of the tonnage on site. *See* Barnes br. at 14.

⁵ In *Garrett*, this Court quoted from a prior version of RCW 7.04.160(4). This Court noted that the statute had been amended, dropping the language quoted above, but “assume[d] without deciding, that the rule remains viable” that an arbitration panel exceeds its powers when it fails to make a “final and definite award on the subject matter submitted to them.” *Id.*

The bottom line here is that the parties agreed in the MBA that Barnes was to be paid for blasted rock accumulated onsite. Barnes blasted and owned an interest in tons of rock onsite, and Mainline sold that rock to Vulcan. The panel erred in not awarding Barnes compensation according to the MBA and subsequent work orders for that blasted rock.

(2) The Panel Exceeded Its Powers by Ignoring Contractually Mandated Attorney Fees

The arbitration panel exceeded its powers by failing to award contractually mandated attorney fees to Barnes who received a judgment for \$354,839.50, which it never would have received had it not arbitrated under the contract. Importantly, Mainline does not dispute that when it tendered Barnes a final payment of \$908,586 prior to arbitration, it “believed it owed Barnes nothing further.” *See Barnes br.* at 17. Of course, Mainline cannot dispute that fact as it is a direct quote from Mainline’s own pleadings. CP 53. Thus, *any* amount Barnes recovered above Mainline’s final payment at arbitration was a win for Barnes and a loss for Mainline. Mainline had no counterclaim, no cross claim, and sought no monetary relief for itself. Thus, the only question as to whether Barnes prevailed at arbitration is whether it recovered money above and beyond what Mainline considered its final payment; in receiving a significant award in its favor, Barnes prevailed.

Mainline is thus wrong when it argues that fees were properly withheld because “both parties prevail[ed] on major issues.” Mainline br. at 17 (quoting *Phillips Bldg. Co., Inc. v. An*, 81 Wn. App. 696, 702, 915 P.2d 1146 (1996)). Mainline confuses the fact that Barnes recovered less than it sought for the notion that both parties prevailed on major issues. As discussed in Barnes’s opening brief, a party “prevails” under a contractual fee provision if it recovers a judgment in its favor even if the judgment is for an amount of damages lower than the party sought. Barnes br. at 18 (citing, e.g., *Silverdale Hotel Assocs. v. Lomas & Nettleton Co.*, 36 Wn. App. 762, 774, 677 P.2d 773, *review denied*, 101 Wn.2d 1021 (1984); *Martinez v. City of Tacoma*, 81 Wn. App. 228, 914 P.2d 86, *review denied*, 130 Wn.2d 1010 (1996); *Piepkorn v. Adams*, 102 Wn. App. 673, 687, 10 P.3d 428 (2000)). Indeed, the very definition of prevailing party in Washington is “the party in whose favor final judgment is rendered.” RCW 4.84.330; *Riss v. Angel*, 131 Wn.2d 612, 633, 934 P.2d 669 (1997). Mainline has no response for this controlling caselaw, and its confusion over the definition of prevailing party is evident by its reliance on *Phillips*.

In *Phillips*, a contractor and client arbitrated a dispute over the construction of a motel. 81 Wn. App. 698. The contractor sued for \$1.2 million, alleging “unpaid balance, work interference, economic compulsion, and quantum meruit.” *Id.* The client “counterclaimed...for

misrepresentation, breach of contract, defective construction, and breach of warranty” seeking “approximately \$980,000 in damages.” *Id.* The arbiters awarded the client “\$15,288.00” but also ordered them to discharge some liens on the project which would have benefited the contractor. *Id.* at 699. The court declined to award fees since both parties prevailed on several of the various claims/counterclaims and both were provided some relief. *Id.* at 699. Division II held that fees were properly withheld because both parties prevailed on major claims. *Id.* at 704.

Phillips does not control this case. Mainline brought no counterclaim and sought no money judgment or other relief. It simply thought it “owed nothing further” than the money it already paid Barnes. The arbitration panel disagreed, awarded Barnes a significant sum of \$354,839.50 *which it never would have recovered had it not arbitrated pursuant to the contract.* Yet the arbitration panel declined to award fees despite the mandatory fee shifting provision. As discussed in Barnes’s opening brief, this is reversible error appearing on the face of the award pursuant to *Agnew v. Lacey Co-Ply*, 33 Wn. App. 283, 289-90, 654 P.2d 712, 715 (1982), *review denied*, 99 Wn.2d 1006 (1983). *See* Barnes br. at 15-20.

Importantly, the *Phillips* court cited *Agnew* favorably and repeated its holding that “[a]rbitrators may exceed their authority by failing to award

attorney fees to the prevailing party under an arbitration agreement.” 81 Wn. App. at 701. That is exactly what happened here where the arbitration panel failed to award attorney fees to Barnes, the only party who prevailed on any claim or recovered any money as a result of the arbitration. Not only did the panel exceed its authority, but it committed a facial error of law by ignoring Washington law regarding the definition of prevailing party, another grounds for reversal. *Broom*, 169 Wn.2d at 237.

Mainline is also incorrect that a decision on fees would require a court to look behind the face of the award. *See* Mainline br. at 20. The issue of fees is not only plainly outlined in the parties’ contract, it is plain on the face of the award that fees should have been awarded. The award references in several areas the fact that the prevailing party is entitled to fees pursuant to the parties’ contract. CP 39, 42.

The fact that the award itself mentions that the prevailing party is entitled to attorney fees distinguishes this case from *Morrell v. Wedbush Morgan Securities Inc.*, 143 Wn. App. 473, 476, 178 P.3d 387 (2008), a Division II case relied on by Mainline. Mainline br. at 18-20. In *Morrell*, a contract contained a unilateral fee provision that was “nowhere mentioned in the [arbitration] award.” *Id.* at 487. Thus, the court determined it would necessarily have to look behind the face of the award to decide the fee issue. *Id.* at 487-88. Moreover, the court noted that both parties prevailed on

several of the major claims, and the ultimate award was reduced significantly because the party who received the award failed to mitigate its damages.⁶ *Id.*

Here, the fee provision appears clearly on the face of the award. There is no doubt that the prevailing party was entitled to fees pursuant to the parties' contract. Yet the panel disregarded the law cited *supra* regarding the definition of prevailing party. In doing so the panel exceeded its powers pursuant to *Agnew* and *Phillips*, and the award should be corrected to include attorney fees at arbitration and on appeal.

(3) The Arbitration Panel Erred in Failing to Order a Late Fee/Interest on the Award in Barnes's Favor

Mainline fails to dispel the fact that the panel committed a facial error by failing to award contractually mandated late fees of 1.5 percent per month for every month that Mainline did not pay Barnes the correct amount. Mainline cites a Division II case from 1989 for the proposition that a court may not award "prejudgment interest" when reviewing an arbitration award.

⁶ *Morrell* was further complicated by choice of law issues – *i.e.*, whether California or Washington law governed the dispute – and the issue of a unilateral fee provision which is unenforceable as written pursuant to Washington law. 143 Wn. App. at 488 (citing *Marine Enter., Inc. v. Sec. Pac. Trading Corp.*, 50 Wn. App. 768, 772, 750 P.2d 1290 (1988)). These complications are not present here, which is a run of the mill contract dispute between two businesses with a fair and bargained for fee provision. By failing to enforce the fee provision – an error that appears plainly on the face of the award – the arbitration panel frustrated the policy behind such contractual terms and rewarded Mainline for underpaying on its obligations. *See Barnes br.* at 18-23.

Mainline br. at 21 (citing *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 766 P.2d 1146 (1989)). *Westmark* has no bearing on this case.

Mainline's reliance on *Westmark* is misplaced for two reasons. First, in that case the Superior Court reviewed an arbitration award to determine whether it "met the test for prejudgment interest" – *i.e.* whether it met the statutory definition for interest on judgments found in RCW 4.56.110. It did not deal with contractual late fee provisions, as is the case here. Second, more recent precedent shows that a court may consider interest when reviewing arbitration awards, if the parties' contract provides for an award of interest. In *State Department of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 795, 161 P.3d 372 (2007), the Supreme Court made it clear that the "goal of contract interpretation is to carry out the intent of the parties as manifested, if possible, by the parties' own contract language." Thus, the Supreme Court looked to "the words the parties used" in the contract to determine whether interest should have been awarded by an arbitration panel. *Id.*

Here, too, the obvious intent of the parties was to impose a 1.5 percent late fee in the form of interest. CP 23. At its most basic, the parties' MBA required the imposition of late fees if Mainline failed to timely pay *all* sums due to Barnes. The panel concluded that Mainline failed to pay on time, yet refused to impose the mandatory late fee. The panel erred on the

face of its award by failing to award this penalty, clearly bargained for and agreed to by the parties. By failing to do so, Mainline was rewarded for underpaying on the contract. This clearly erroneous and unjust result exceeded the arbiters' powers pursuant to *Agnew, supra* and cannot stand.

D. CONCLUSION

Mainline's arguments fail. The trial court should have vacated the arbitration award. The arbitrators ignored contract law and failed to settle the central dispute between the parties. Moreover, the panel had a duty to follow the contract terms on fees and interest and to award Barnes attorney fees and a late fee/interest, but it failed to do so, misapplying clear authority.

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.

DATED this 20th day of August, 2018.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Reply Brief of Appellant Barnes, Inc.* in Court of Appeals, Division III Cause No. 35767-8-III to the following:

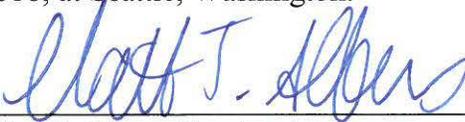
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 20, 2018, at Seattle, Washington.



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August 20, 2018 - 11:59 AM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 35767-8
Appellate Court Case Title: Mainline Rock & Ballast, Inc. v. Barnes, Inc.
Superior Court Case Number: 17-2-03345-1

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