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No. 35890-9

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

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MAINLINE ROCK & BALLAST, INC.,

Appellant,

v.

BARNES, INC.,

Respondent.

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BRIEF OF RESPONDENT BARNES, INC.

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## A. INTRODUCTION

As detailed in the brief submitted by Barnes, Inc. (“Barnes”) in Cause No. 35767-8, this case arises out of a commercial dispute over Mainline Rock & Ballast, Inc.’s (“Mainline”) failure to pay Barnes for rock it blasted. The arbitration panel ruled that Mainline underpaid Barnes \$354,839.50 for work Barnes performed. But the panel committed several key errors in so ruling, vastly undervaluing the money owed to Barnes and failing to award fees to Barnes as the prevailing party. Barnes sought to vacate the award, and that issue is now on appeal to this Court.<sup>1</sup> In its appeal, Mainline argues that the trial court committed an abuse of discretion when it declined its permissive authority to award attorney fees for post-arbitration proceedings in the trial court. Mainline fails to show that the trial court abused its discretion in declining to award fees for that small part of the larger case.

## B. ASSIGNMENTS OF ERROR

Mainline admits that the only error it can point to is the failure of the trial court to exercise its discretionary authority to award fees. Mainline br. at 2-3. No error occurred where the trial court properly exercised its

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<sup>1</sup> The Clerk denied the parties’ joint motion to consolidate the two appeals by letter ruling on April 19, 2018. Though the clerk noted that the two cases would be “linked” and heard by the same panel. The linked appeal is No. 35767-8.

discretion.

### C. STATEMENT OF THE CASE

From 2004 to 2017, Mainline retained Barnes to drill and blast solid rock at a new quarry located in Torrance County, New Mexico. CP 20. On April 7, 2017, Mainline sold the assets of its 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, of which Barnes had blasted every ton. CP 6.

Mainline issued only \$908,586 as final payment to Barnes, excluding \$7,070,224.44 worth of material that remained onsite, suddenly claiming that the material was unsellable “waste and reject materials” that it considered outside the scope of the parties’ agreement.<sup>2</sup> CP 5-6, 53. According to Mainline, “Mainline believed it owed Barnes nothing further.” CP 53. Barnes demanded payment; Mainline refused and sought arbitration of the parties’ dispute. CP 34-36. Specifically, the parties disputed the quantity of stockpiled materials on hand for which Barnes should be paid. *Id.*

The arbitration panel, by a vote of 2-1, agreed with Barnes that

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<sup>2</sup> The dissenting arbiter correctly found that “it is clear the by-product in stockpile that was measured and excluded by Mainline was to be sold at a later date.” CP 42.

Mainline underpaid on its obligations under the contract, but it only awarded Barnes a total amount of \$354,839.50 for items other than the stockpiled rock. CP 38-42. The panel's split ruling did not answer the parties' central question of how much stockpiled material was onsite, nor did it award attorney fees and interest, despite the parties' mandatory attorney fee and interest provisions in their contract and the fact that Barnes received a \$354,839.50 judgment in its favor. *Id.*

Barnes timely moved pursuant to RCW 7.04A.230 in Spokane County Superior Court to vacate the arbitration award. CP 1-2. Mainline, realizing it had received a windfall from the shockingly low award,<sup>3</sup> moved pursuant to RCW 7.04A.220 to confirm the arbitration award. CP 45-46. The trial court denied Barnes's motion to vacate and confirmed the award. CP 138-40. Barnes appealed, and that case is being heard in conjunction with this case. CP 136-37 (No. 35767-8).

Mainline filed a motion for attorney fees and costs based on the post-arbitration proceedings in the trial court. CP 124-28. Mainline argued that it should be awarded fees pursuant to RCW 7.04A.250 for the post-arbitration proceedings. *Id.* Barnes responded and asked that the fees be denied or, alternatively, stayed because the underlying arbitration award

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<sup>3</sup> The dissenting arbiter would have awarded Barnes \$3,499,670.25. CP 41.

was still on appeal and therefore the question of who was the prevailing party was still at issue. CP 142-47. After both parties waived oral argument on the fee motion, the court exercised its discretion by denying Mainline's motion for fees, and now Mainline appeals. CP 151-54.

D. SUMMARY OF ARGUMENT

The trial court did not abuse its discretion in denying attorney fees to Mainline for post-arbitration proceedings in Superior Court. Under Washington's arbitration statute, a court is not required to award fees for post-arbitration proceedings, and the trial court did not abuse its discretion in this instance. Reversal is unwarranted.

E. ARGUMENT

(1) The Trial Court Did Not Abuse Its Discretion by Declining to Award Attorney Fees

Proceedings in the trial court arising out of arbitrations are governed by the Uniform Arbitration Act, Ch. 7.04A RCW. RCW 7.04A.250(3) states that a "court *may* add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made." (emphasis added). By specifically stating that a court "may" award attorney fees for a post-arbitration proceeding, the Legislature left the decision to the discretion of the trial judge. *Id.*; *see also*,

*e.g.*, *Matter of Parenting & Support of BA*, 1 Wn. App. 2d 1051, 2017 WL 6493304, at \*6 (2017) (declining to exercise the court’s discretion to award fees under RCW 7.04A.250(3)).

Discretionary decisions, such as this one, are reviewed on appeal for an abuse of discretion. *Gilmore v. Jefferson Cty. Pub. Transp. Benefit Area*, 190 Wn.2d 483, 415 P.3d 212, 218 (2018). Thus, Mainline has the burden to show that the order is “manifestly unreasonable or based on untenable grounds.” *Id.* (quotation omitted). “A reviewing court may not find abuse of discretion simply because it would have decided the case differently – it must be convinced that no reasonable person would take the view adopted by the trial court.” *Id.* (quotation omitted).

Mainline fails to show that no reasonable trial court would have declined to award it fees. Barnes prevailed at arbitration, by securing a \$374,839.50 judgment against Mainline that it never would have received had it not arbitrated under the agreement. Even after the post-arbitration litigation, Barnes received a significant judgment in its favor. Moreover, Barnes filed a notice of appeal of the underlying dispute before Mainline’s fee motion was heard. CP 136-41. Thus, the issue of who prevailed post-arbitration was (and still is) contested when the trial court ruled on the fee motion. That is why Barnes asked the court to deny the motion or alternatively stay the matter while the underlying dispute was heard. CP

145. But the court determined that a stay was not the proper course of action, perhaps because the post-arbitration litigation was such a minor part of the actual dispute pending before this Court. Even if this Court would have handled the matter differently, Mainline fails to show that no reasonable person would have denied it fees.

Mainline reaches to find an abuse of discretion, claiming that the trial court made some mistake and/or mischaracterized the proceeding as a request for fees by both parties. Mainline br. at 6. But the trial court made no mistake. Barnes specifically requested attorney fees in its response to Mainline's motion for fees, CP 142, thus the issue of both parties' fees *was* before the court. The Court considered both arguments and declined to exercise its permissive authority to award fees. That was not an abuse of discretion.

(2) The Trial Court Did Not Abuse Its Discretion Where Much of Mainline's Efforts Were Optional

The trial court did not abuse its discretion by failing to award Mainline fees where Mainline's post-arbitration litigation was largely optional. Mainline was not required to file a motion for an order confirming the award. RCW 7.04A.220 states that a party to arbitration "*may* file a motion with the court for an order confirming the award." (emphasis added). And pursuant to RCW 7.04A.230 "[i]f a motion to vacate an award

is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.” RCW 7.04A.230. Thus, Mainline never needed to file a motion to confirm the award. Either the award would have been valid without an affirmative order from the court, or the award would have been confirmed upon the denial of Barnes’s motion to vacate.

Likewise, Mainline’s actions were not necessary under the terms of the parties’ agreement that provided for attorney fee shifting. The agreement reads, “If an action at law or in equity (including arbitration) is necessary to enforce or interpret the terms of this Agreement, the prevailing party shall be entitled to reasonable attorney fees.” CP 29. Mainline’s discretionary decision to move to confirm a judgment against itself was not “necessary to enforce or interpret” the terms of the agreement. This was an optional motion made by Mainline to secure the windfall it received from the split arbitration panel. The true controversy had already been appealed by the time the trial court considered Mainline’s motion for fees, so the question of who prevailed in interpreting the agreement was still undecided. The trial court did not abuse its discretion in refusing to award fees for an optional and insignificant part of the case.

#### F. CONCLUSION

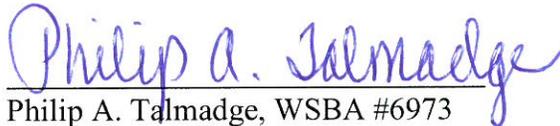
The trial court did not abuse its discretion in refusing to award attorney fees for post-arbitration litigation. The law does not compel the

trial court to award fees, and the underlying controversy was already on appeal to this Court the trial court considered the fee motion. The trial court properly exercised its discretion by denying fees for an ancillary, optional matter, while the real controversy of who prevailed on the contract claim is before this Court on a related case.

This Court should affirm the trial court's ruling denying Mainline fees, but if it agrees with Barnes in Cause No. 35767-8 that it is entitled to fees in connection with the arbitration award it received, any fees incurred by Barnes in this matter should be recoverable in Cause No. 35767-8.

DATED this 20th day of July, 2018.

Respectfully submitted,



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DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Brief of Respondent Barnes, Inc.* in Court of Appeals, Division III Cause No. 35890-9-III to the following:

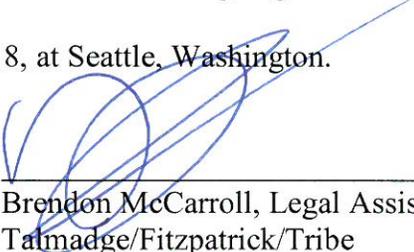
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

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

  
\_\_\_\_\_  
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