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State of Washington  
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COA NO. 365948

No. 98083-7

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

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EVETTE BURGESS,

Appellant,

v.

LITHIA MOTORS, INC.; BMW OF SPOKANE d/b/a CAMP  
AUTOMOTIVE, INC. d/b/a BMW OF SPOKANE,

Respondent.

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APPELLANT'S OPENING BRIEF

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## **I. INTRODUCTION.**

In answer to the trial court's certified question, Appellant Evette Burgess asks this Court to hold that the Superior Court continues to have jurisdiction over an ongoing action before it, even after the parties agree to arbitrate under a contract providing for such, and that where an employer materially breaches the procedural terms and guarantees of the arbitration contract, then the employee is entitled to rescind her agreement to arbitrate.

## **II. ASSIGNMENT OF ERROR.**

The trial court erred in holding that the Superior Court was "prohibited from addressing Plaintiff's argument as to alleged breaches by Lithia and the Arbitrator in the course of arbitration as it does not have jurisdiction to do so." *CP 612, Conclusion of Law 5.*

As a component of the above, the trial court erred in holding that "Washington law appears to prohibit the court from addressing Plaintiff's argument concerning breaches of the arbitration agreement that arose during the arbitration proceeding." *CP 612, Conclusion of Law 4.*

## **III. ISSUE CERTIFIED FOR REVIEW.**

The trial court has certified the following question:

Does the superior court have jurisdiction to address an employee's contractual breach argument based upon acts alleged in the course of binding arbitration, or is the superior court's jurisdiction in a contractual arbitration limited to issues

occurring before and after—but not during—the proceeding. Specifically, is the superior court's jurisdiction limited to ruling on whether there is an enforceable arbitration clause at the inception of arbitration and addressing the arbitration award at its conclusion?

*CP 613.*

#### **IV. STATEMENT OF THE CASE.**

Plaintiff Evette Burgess was employed by Defendant Lithia Motors, Inc. She was sexually harassed by two of her Spokane store managers to the point of requiring medical leave, and Lithia terminated her employment while she was on leave. *CP 3-23.* On January 17, 2018, Burgess filed a Complaint for Damages in the Spokane County Superior Court alleging that Lithia violated this state's law against discrimination in employment, RCW 49.60 et seq., and that is also violated this state's Family Leave Act, RCW 49.78 et seq. *Id.* She requested a jury. *CP 24.* On January 24, 2018, Lithia appeared in the Superior Court action through its counsel. *CP 26-27.*

Five days later, on January 29, 2018, Burgess served Lithia her First Set of Interrogatories and Requests for Production. *CP 87-88; 210-219 (Interrogatory and Production Requests).* Lithia insisted that it would apply Superior Court Civil Rules to the parties' processes, stating, "Until we have an e-service agreement in place, we'll use Civil Rules." *CP 87.*

Burgess thereupon mailed the interrogatories to Lithia. *CP 87*. Under the Civil Rules referenced by Lithia, Lithia was now required to respond to that discovery within 30 days, meaning by February 28, 2018. *CR 33, 34*.

On February 8, 2018, without moving for any stay of the Superior Court proceeding, Lithia sent Burgess a letter demanding that she arbitrate her claims. *CP 291-294*. Lithia attached a document which they alleged to be an arbitration agreement signed “on December 4, 2014.” *CP 292-294*. There is no signature on the document, nor is it dated. *Id.* Within the text, the document states:

“The claims outlined shall be submitted to and determined exclusively by binding arbitration under the Federal Arbitration Act, in conformity with the Federal Rules of Civil Procedure and Rules of Evidence.”

*CP 293*.

On February 14, 2018, Burgess responded to Lithia that this document could not be authenticated as signed or dated, and that it had certain problems, but that she would consider the arbitration process proffered. *CP 390*.<sup>1</sup>

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<sup>1</sup> Her counsel stated, “While this is an adhesion contract, it also appears generally to comport with the procedural and substantive requirements of validity, with one exception. The confidentiality/privilege clause relative to arbitration is

Lithia did not move under CR 12(b) to dismiss the Superior Court action for lack of jurisdiction over the subject matter of the action or the parties, nor did it move to dismiss the complaint for failure to state a claim upon which relief could be granted.<sup>2</sup> A motion making any of these defenses “shall be made before pleading if a further pleading is permitted.” *CR 12(b)*. On February 16, 2018, Lithia instead filed an Answer in the Superior Court. Lithia did *not* deny that the Superior Court had jurisdiction. *CP 29 at ¶ 1.7* (denying only that jurisdiction was proper “in Spokane County”). Lithia asserted that, as a “possible” defense, Burgess’s claims were subject to arbitration, stating:

Discovery and investigation may reveal that one or more of the following defenses may be applicable to this matter. Defendants therefore assert those *possible* defenses, reserving the right to amend them based on information and evidence acquired hereafter:

1. Plaintiff’s claims are subject to arbitration, pursuant to an Arbitration Agreement between Plaintiff and Defendant Lithia Motors, Inc., a true and correct of which is attached hereto as Exhibit 1 and incorporated by reference herein. The Court should compel Plaintiff to arbitrate her claims pursuant to that Agreement and should dismiss this action with prejudice or stay it pending the outcome of the arbitration.

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substantively unconscionable and must be severed.” *CP 390*, (emphasis added).

<sup>2</sup> CR 12 (b) states in relevant part: “Every defense, in law or fact, to a claim for relief in any pleading,....shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, ...”

*CP 40* (emphasis added).

No document is attached. *CP 28-43*. Even after pleadings were now closed, Lithia did not move under CR 12(c) for judgment on the pleadings, nor for an order compelling a binding arbitration.<sup>3</sup>

The thirty-day deadline for Lithia to answer Burgess's January 29, 2018 discovery pleadings came and went without Lithia providing answers or production, nor objections. Lithia did not file any motion for protection from that discovery. *See CR 26(c) (protective orders), CR 33 (interrogatories required to be answered within 30 days), CR 34 (requests for production required to be answered within 30 days)*.

On March 7, 2018 at 9:20 a.m., Burgess told Lithia that its answer and production were "now overdue," and requested a CR 26 conference. *CP 115*. Later that day, Lithia served a document on Burgess. The document contains no answers to interrogatories, no production, and no answers to production requests. The document does not have the Superior Court heading on it, nor the Superior Court case number. Lithia entitled its document "*In the Binding Arbitration.*" *CP 170-178*. None of the five interrogatories posed to Lithia were even referenced, nor were any of the

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<sup>3</sup> CR 12(c), in relevant part, allows a party to move for "Judgment on the Pleadings" as follows: "After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings."

fifteen requests for production. *Id.*

While Lithia had demanded that Burgess adhere to the “Civil Rules,” *CP 87*, its document violated CR 33 and 34. The document also violated the Federal Civil Rules of Procedure that Lithia’s Arbitration Agreement guaranteed Burgess, including FRCP 33 (*interrogatories required to be answered within 30 days*), and FRCP 34 (*requests for production required to be answered within 30 days*). FRCP 33 requires that “[T]he grounds for objecting to an interrogatory must be stated with specificity.” FRCP 34(b)(2)(B) requires a specific objections to each specific document requests.

Under the Federal Rules of Civil Procedure, any withholding of production is also “necessarily subject to Rule 26(b)(5)’s privilege log and Rule 26(c) protective order requirements.” *CP 132-136* (Burgess’s memorandum to the arbitrator via a reply); *CP 138-158* (Burgess’s Supplemental Memorandum to the Arbitrator detailing the chronology to that point and briefing waiver and protective order requirements); *and see CP 60* (Burgess’s later memorandum filed in the Superior Court in support of Burgess’s motion to terminate arbitration). Lithia’s March 7, 2018 document is entirely a boilerplate memorandum.

As Burgess would later brief for the arbitrator, boilerplate objections

are considered an abusive litigation practice. See *A. Farber & Partners, Inc. v. Garber*, 234 F.R.D. 186, 188 (C.D. Cal. 2006); *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142,1149 (9th Cir. 2005). Boilerplate objections include “broad relevancy objections, objections of “overly burdensome and harassing,” “assumes facts not in evidence,” and generic privacy concerns. *A. Farber*, 234 F.R.D. at 188. Such statements are considered *obstructive*. *Liguria Foods, Inc. v. Griffith Labs., Inc.*, 320 F.R.D. 168, 184–186 (N.D. Iowa 2017). “The problems with using boilerplate objections...run deeper than their form or phrasing. Their use obstructs the discovery process, violates numerous rules of civil procedure and ethics, and imposes costs on litigants that frustrate the timely and just resolution of cases.” *Id.*, citing *Jarvey, Boilerplate Discovery Objections*, 61 Drake L. Rev. at 916. Generalized objections are “inadequate and tantamount to not making any objection at all.” *Liguria*, at 185-186 (quote sources omitted). Boilerplate objections to Rule 34 demands also waive any further assertion of privilege. *Burlington N.*, 408 F.3d at 1149. Imposing waiver is particularly proper when the defendant is “a sophisticated corporate litigant...” *Id.* at 1149 (9th Cir. 2005). Failure to respond to the demanded document production within 30 days thus forfeits any valid objections to the requested document production, *including*

forfeiting assertions of privilege. *Id.*

Meanwhile, the Superior Court continued processing Burgess's claims to trial. On April 13, 2018, the Hon. Timothy Fennesy set a status conference for both parties. *CP 44-45*. Lithia made no objection. With agreement of both parties, the trial court set a trial date on Burgess's claims for Jun 10, 2019. *CP 46* (Civil Case Schedule order dated May 15, 2018). Lithia posed no objection.

On July 10, 2018, one month short of a year before the Superior Court trial date, Burgess agreed to arbitrate with Lithia subject to the process Lithia had promised—use of 1) the Federal Arbitration Act, 2) the Federal Rules of Civil Procedure, and 3) the Federal Rules of Evidence. Lithia sent the arbitration agreement to the Arbitrator, and Burgess notified the Arbitrator as follows:

“Judge Kato, Thank you for the confirmation. Without commenting on the arbitration document as a whole, I did a quick review of the FAA, and agree to the FRCP and FRE requirements as listed.”

*CP 349*.

By July 2018, Lithia had still not answered Burgess's January 2018 first set of discovery. On July 23, 2018, Burgess told Lithia that if the answers and production were not returned within a week, she would contact the arbitrator. *CP 114*. Under FRCP 33 and 34, Lithia had long since

waived any objections or assertions of privilege. Answers and production were overdue, *without* the availability of any objection or privilege. Lithia responded that its lead counsel was “out of the office,” but “we are still gathering information and documents from our client that he will need to review.” *CP 113*. Lithia requested an extension to Monday, August 6, 2018. *CP 113*. By August 6<sup>th</sup>, Lithia provided no answers.

On August 8<sup>th</sup>, Burgess again wrote to Lithia, “John, we still have no answers.” *CP 112*. There was no response. The following day, Burgess requested the intervention of the arbitrator. *CP 111*. Burgess noted that she had served discovery “eight months ago on January 29, 2018,” and had unsuccessfully tried to informally handle the situation. *CP 111*. The response from Lithia was that its counsel was again “out of the office today and tomorrow.” *CP 110*.

On August 9<sup>th</sup> at 5:41 p.m., Lithia’s counsel wrote to the arbitrator, offering various claims and blames, but nowhere explaining why it had not answered the first set of discovery. *CP 107-109*. It made no claim of privilege. Instead, counsel wrote, “we will begin producing documents to you tomorrow.” *CP 108*. Lithia insisted the parties were operating under the Federal Rules of Civil Procedure. *CP 108*.

The arbitrator now notified both parties, **“We can talk about CRs**

**and FRCPs, but I will do what I deem reasonable.”** *CP 107, bold added.*

The arbitrator told Lithia, “See if you can get answers to Ms. Schultz by the 14<sup>th</sup>, as you indicated.” *CP 106.*

Lithia did not produce answers or production by August 14, 2018. Instead, on August 10<sup>th</sup>, it made certain unspecified documents available to Burgess through an electronic link, but with no accompanying pleading or explanation for what it was delivering. On August 14<sup>th</sup>, it delivered Burgess a document entitled, “*Respondent’s Objections and Responses.*” *CP 117-128.* It answered only those parts of the five interrogatories it decided to answer. As an example, it answered Interrogatory No. 2, but omitted the comparative salary information Burgess needed for her inquiry into disparate compensation. *CP 121-125.* Lithia produced *nothing* in response to fourteen out of the fifteen requests for production, providing only Lithia’s Employee Handbook in response to RFP 13. *CP 124.* To the remaining fourteen requests for production, Lithia stated that it “will produce,” but only subject to a protective order addressed to its satisfaction. *CP 118-126, Requests for Production 1-12, 14.* It provided no privilege log; Lithia simply stated that one “will be” provided. *Id.*

On August 15, 2018, Burgess filed a motion to compel. *CP 78-84.* She asserted that Lithia had failed to comply with FRCP 33 and 34. *CP 78,*

82. She sought FRCP 37(a)(1) and (b)(2) relief in the form of an order compelling answers, and awarding terms and sanctions. *CP 78*. A declaration lays out the history of trying to get cooperation from Lithia, noting, “Per Federal Rule of Civil Rule 37(a)(1), I have in good faith attempted to confer with the Defendant/Respondent Lithia's counsel since March 2018,” and detailing Lithia’s actions since that time. *CP 80-82*.

A hearing on the motion to compel occurred, but the date of that hearing is not reflected in arbitrator’s order. *CP 261-263*. The Declaration of Burgess’s counsel later filed in the Superior Court lists her pleadings before the arbitrator. *CP 74*. On August 27, 2018, in what appears to be right before the hearing, Lithia emailed Burgess and the Arbitrator a “privilege log.” *CP 220-225 (Declaration of Mary Schultz), 295-300 (privilege log)*. Burgess moved to strike the document, asserting a violation of FRCP 26(c)’s protective order process, which Lithia had long since waived; and asserting FRCP 34(b)(3)’s waiver. *CP 226,229*. Lithia was also asserting “privileges” that are not recognized by the Federal Civil Rules of Procedure (FRCP) or the Federal Rule of Evidence (FRE). *CP 230*.<sup>4</sup> FRE 501 applies state law privileges—“in a civil case, state law governs

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<sup>4</sup> FRCP 26(1) states that “Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant any party's claim or defense ...” *Fed. R. Civ. P. Rule 26*.

privilege regarding a claim or defense for which state law supplies the rule of decision.”<sup>5</sup> Without reference to any state privilege, Lithia now asserted objections such as “confidential,” “personal,” “relevance,” and “proprietary information.” *CP 298-299*. These are not privileges, but only reasons why Lithia might have earlier sought a protective order under FRCP 26(c). Only one actual privilege was claimed. On four requests, attorney-client and work product privilege was asserted, which is recognized by CR 26(b)(4), but which had already been waived by Lithia’s failing to timely answer production demands. *CP 295, 298, 300*.

By August 27<sup>th</sup>, with its now new “privilege log,” Lithia had refused to respond to discovery *fourteen* times. *CP 221-222, and see CP 139-144 (detailing by chronology Lithia’s first 13 refusals)*.

By September 7, 2018, Burgess asserted that Lithia’s behavior “defeats the purpose of this arbitration process.” *CP 257*. She offered *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. 446, 454, 45 P.3d 594 (2002), *as amended* (Jun. 6, 2002), where this state’s courts recognize that corporations committing employees to such agreements can abuse those processes to “preclude a litigant ... from effectively vindicating her ...

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<sup>5</sup> Privileges are strongly disfavored in federal practice. *Am. Civil Liberties Union of Mississippi, Inc. v. Finch*, 638 F.2d 1336, 1344 (5th Cir. 1981), citing *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974).

statutory rights in the arbitral forum.” *CP 257: 13-21; Mendez*, 111 Wn. App. at 451.

The arbitrator issued his order on September 18, 2018. *CP 261-263*. After recognizing that the Federal Rules of Civil Procedure applied by agreement, *CP 262*, ¶ 3, the arbitrator failed to apply Rule 26(c), 33, or 34’s waiver, nor federal law’s “boilerplate” prohibitions. The arbitrator denied Burgess’s motion to compel as “moot.” The arbitrator held that Lithia’s March 7, 2018 “General Objection” document preserved objections and privileges. *CP 262, ref. CP 170-178*. The order does not mention boilerplate. It held that Lithia’s non-specific production of August 10<sup>th</sup> and its “answers” provided August 14, where only one request for production was answered, were an acceptable response. *CP 261*. It granted Lithia the right to a protective order. *CP 262*. It granted Lithia the right to continue to withhold document production, because “Counsel are instructed to try one more time (to determine the wording of a protective order), and, if unable, the arbitrator shall be notified and the wording of the protective order shall be decided.” *CP 262*. It then sent Burgess back to “negotiate” with Lithia over how she might ever get her answers.

At the time of the arbitrator’s order directing Burgess to go back and negotiate with Lithia, the only answers Lithia had provided were its

incomplete answers to five interrogatories on August 14, 2018; and one document in response to one request for production. *CP 75, ref. CP 117-128; RFP 13.*

**The Superior Court.**

On September 25, 2018, Burgess moved in the Superior Court to rescind her agreement to arbitrate, on grounds that Lithia had breached its agreement to conform to the Federal Rules of Civil Procedure as contracted for, and that the Arbitrator equally refused to apply those Rules. She asked that the court enter an order terminating the arbitration, and discharging her from any arbitration obligation. *CP 48-49, 57-71.*

Trial remained set in the Superior Court for June 10, 2019. *CP 46.*

As an issue of first impression, the trial court held that it did not believe it had the jurisdiction to address Burgess's request for contract rescission. *CP 609-614.* It wrote:

- i. Plaintiff does not dispute that she agreed to the contractual arbitration process.
- ii. Plaintiff contends that the arbitration contract guaranteed her the Federal Rules of Civil Procedure discovery processes as a material part of her agreement. Plaintiff further contends that Lithia and the Arbitrator failed to adhere to the Federal Rules of Civil Procedure, and that Lithia's failure to adhere to the Federal Rules and the Arbitrator's failure to enforce those rules is a material breach of that arbitration contract and allows her to rescind that contract and proceed in the Superior Court.

- iii. Plaintiff does not argue waiver-she argues the right to rescind. She argues that Lithia's behavior was obstructive, went to the root of and fundamental fairness of the arbitration agreement, and constituted a failure to substantially perform the arbitration agreement, which is cause to rescind the agreement.”

*CP 611-612.*

The Court then concluded:

1. Washington case law addresses primarily cases that have to do with waiver of an arbitration clause. Arbitration clauses are enforceable in Washington State, and they have been enforced in a number of different circumstances; however there are also circumstances wherein arbitration clauses are, and performance thereunder, are waived by actions of a party.
2. The arbitration clause in this case is enforceable.
3. The law does not contain a case that is precisely on point. Washington law indicates that once a party enters arbitration, then whether or not that arbitration agreement is violated or is followed is the decision of the arbitrator; this court can rule initially whether or not there is, in fact, an arbitration clause, which there is in this case, and then can address the arbitration award on the other end.
4. Washington law appears to prohibit the court from addressing Plaintiffs argument concerning alleged breaches of the arbitration agreement that arose during the arbitration proceeding.
5. This superior court is therefore prohibited from addressing Plaintiffs argument as to alleged breaches

by Lithia and the Arbitrator in the course of arbitration as it does not have jurisdiction to do so.”

*CP 612-613.*

The court denied Burgess’s motion to discharge her arbitration duty and rescind her agreement to arbitrate, but certified the issue to this Court:

7. The motion must therefore be denied but the question is sufficiently important that this court will certify this to the Court of Appeals to address.
8. This order involves a controlling question of law as to which there is substantial ground for a difference of opinion and immediate review of the order may materially advance the ultimate termination of the litigation. RAP 2.3 (b)(4).

*CP 613.*

The question posed is:

Does the superior court have jurisdiction to address an employee's contractual breach argument based upon acts alleged in the course of binding arbitration, or is the Superior Court’s jurisdiction in a contractual arbitration limited to issues occurring before and after—but not during—the proceeding. Specifically, is the superior court's jurisdiction limited to ruling on whether there is an enforceable arbitration clause at the inception of arbitration and addressing the arbitration award at its conclusion?

*CP 613.*

## V. ARGUMENT.

### A. Standard of Review.

Whether a trial court had jurisdiction is a question of law to be

reviewed de novo. *City of Spokane v. Spokane County*, 158 Wn.2d 661, 681, 146 P.3d 893 (2006). The meaning of a statute is also a question of law reviewed de novo. *State v. Taylor*, 427 P.3d 656, 658 (Wash. Ct. App. 2018), *review denied*, 192 Wn.2d 1019, 433 P.3d 809 (2019).

**B. Washington precedent allows an employer to commit an employee to arbitration under the Federal Arbitration Act in order to get a job.**

The state of Washington has a strong public policy against discrimination in the workplace. A statutory act, Washington’s Law Against Discrimination (WLAD), at RCW 49.60 et seq., implements that policy. *Roberts v. Dudley*, 140 Wn.2d 58, 66, 993 P.2d 901, 906 (2000), as amended (Feb. 22, 2000), quoting *Marquis v. City of Spokane*, 130 Wn.2d 97, 109, 922 P.2d 43 (1996). The purpose of this state’s law against discrimination “is to deter and to eradicate discrimination in Washington” which has been recognized as “a policy of the highest priority.” *Roberts v. Dudley*, 140 Wn.2d at 66, quoting *Marquis*, 130 Wn.2d at 109. At the same time, both state and federal law also strongly favor arbitration and require all presumptions to be made in favor of arbitration. *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 603 (2013), citing *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wn.2d 293, 301 (2004). This state’s

appellate courts have approved of employers committing employees to arbitration of discrimination claims in exchange for work. *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 343–44, 103 P.3d 773(2004), referencing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 27–28, 111 S.Ct. 1647, 114 L.Ed.2d 26 (1991).

But when employment discrimination claims are to be arbitrated, the Federal Arbitration Act (FAA) applies and preempts any state law to the contrary. *Adler* at 334. The Washington Uniform Arbitration Act (UAA) does not apply to an arbitration agreement between employers and employees or between employers and associations of employees. *RCW 7.04A.030*; and see § 49:215. *Washington, 12 Emp. Coord. Labor Relations § 49:215*, referencing *RCW 7.04A.030*. Lithia’s agreement to arbitrate therefore applied the FAA.

An arbitration agreement removes the employee’s right to a jury trial on statutory and policy claims. *Adler*, 153 Wn.2d at 340–41. An arbitration agreement also removes the civil rules procedures, because under the FAA, an arbitrator need not comply with the Federal Rules of Civil Procedure. “Arbitrators need provide only a fundamentally fair hearing.” *Voltage Pictures, LLC v. Gulf Film, LLC*, 2018 WL 2110937, at \*6 (C.D. Cal. Apr. 17, 2018), citing *Morgan Keegan & Co., Inc. v. Grant*, 2010 WL

11549681, at \*11 (C.D. Cal. June 30, 2010) (citing *Weber v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 455 F. Supp. 2d 545, 553 (N.D. Texas 2006)). But parties may contract to apply the Federal Rules of Civil Procedure and the Federal Rules of Evidence. The written provisions of the contract control:

*A written provision in any ...contract evidencing a transaction involving commerce to settle by arbitration a controversy ... or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.*

*See 9 U.S.C. § 2, (emphasis added).*

The FAA thus allows parties to an arbitration contract considerable latitude to choose what law governs some or all of its provisions. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 468, 193 L. Ed. 2d 365 (2015). Lithia agreed by contract that any arbitration process would conform to the Federal Rules of Civil Procedure. Lithia was bound by its contract's terms. *Adler*, 153 Wn.2d at 344; *9 U.S.C. § 2*.

**C. The trial court had continuing “jurisdiction” to enforce the Arbitration Agreement’s provisions.**

The trial court held that it was “prohibited from addressing Plaintiff’s argument as to alleged breaches by Lithia and the Arbitrator in the course of arbitration as it does not have jurisdiction to do so.” *CP 612*,

*Conclusion of Law 5.* But the Superior Court had subject matter jurisdiction over the claim, and any motion therein filed. Subject matter jurisdiction “simply refers to the court, in which a party files a suit or a motion, being the correct court for the type of suit or character of a motion.” *Matter of Estate of Reugh*, 35737-6-III, 2019 WL 3917560, at \*14 (Wash. Ct. App. Aug. 20, 2019). The critical concept in determining whether a court has subject matter jurisdiction is the “type of controversy.” *Id.* Superior courts have original jurisdiction in cases in equity, and in all cases at law “in which the demand or the value of the property in controversy amounts to three thousand dollars...” *Washington Constitution article IV, section 6.* Lithia never denied that the Superior Court had jurisdiction over Burgess’s claims. *CP 29 at 1.7.* It never moved to dismiss per CR 12(b); instead, it filed an Answer asserting that the case was “subject to arbitration.” *CP 40, at para. 1.* This was only a “possible” defense, it said. *CP 40.* Lithia never affirmatively pled lack of jurisdiction, as required by CR 12(b). It never filed a CR 12(b) motion to dismiss the complaint, nor did it move to stay the Superior Court action pending arbitration. Lithia, instead, fully participated in the case status conference, and never objected to the issuance of a case scheduling order setting the matter for trial in June 2019. *CP 44-46, CP 246* (Docket

summary). Burgess's claim continued proceeding in the Superior Court unchallenged. The Superior Court thus gained, and never lost, subject matter jurisdiction of the case. "If the type of controversy is within the subject matter jurisdiction, then all other defects or errors go to something other than subject matter jurisdiction." *Matter of Estate of Reugh*, 2019 WL 3917560, at \*14.

Indeed, even had Lithia moved for an order suspending the Superior Court action while arbitration was underway, which it did not, any order staying superior court proceedings pending an arbitration would have been only a "temporary suspension of the proceedings" in court. *Everett Shipyard, Inc. v. Puget Sound Env'tl. Corp.*, 155 Wn. App. 761, 767, 231 P.3d 200 (2010) at 769, citing *In re the Matter of Koome*, 82 Wn.2d 816, 819 (1973). Even during a stay, "the superior court still retains jurisdiction over the case." *Id.*, citing *RCW 7.04A.260*.

The trial court thus erred in holding that it had no "jurisdiction" to determine Burgess's motion.

The trial court may have been concerned with, not jurisdiction to determine, but authority to determine. *See, e.g., Estate of Reugh*, 19 WL 3917560, at \*15. In *Verbeek Properties, LLC v. GreenCo Env'tl., Inc.*, 159 Wn. App. 82, 87 (2010), the Court states that the Superior Court's "role" is

intended to be limited to “whether or not there is an enforceable agreement to arbitrate.” *Id. Verbeek* held that the trial court “exceeded its authority by ruling on the procedural issue.” *Id.* at 89. But it was addressing the UAA’s RCW 7.04A.090. The UAA does not apply to Lithia’s arbitration agreement. *RCW 7.04A.030*. The FAA applies to this arbitration, and it preserves equitable contract remedies.

Under the FAA, an arbitration agreement is enforceable, “save upon such grounds as exist at law *or in equity for the revocation of any contract.*” 9 U.S.C. § 2, *and see Gandee*, 176 Wn.2d at 603 (emphasis added). Arbitration is a matter of contract. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011) (quotation source omitted). Courts must enforce such agreements “according to their terms.” *Id.*, citing *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 478, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). The FAA’s 9 U.S.C. § 2 includes a savings clause. “The final phrase of § 2,...permits arbitration agreements to be declared unenforceable ‘upon such grounds as exist at law or in equity for the revocation of any contract.’ This saving clause permits agreements to arbitrate to be invalidated by ‘generally applicable contract defenses, such as fraud, duress, or unconscionability,’” *Id.* The contract “revocation” defenses referenced

generally apply at the formation stage, but the statute does not limit contract defenses to the formation stage. The statute allows for defenses that “exist in law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Washington court must therefore apply the FAA savings clause as written; it may not read into the FAA savings clause what is not there. *See, e.g., In re Marriage of Ruff & Worthley*, 198 Wn. App. 419, 425, 393 P.3d 859 (2017), citing to *In re Custody of Smith*, 137 Wn.2d 1, 12, 969 P.2d 21, 26–27 (1998), *aff’d sub nom. Troxel v. Granville*, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000) and *Automobile Drivers & Demonstrators Union Local 882 v. Department of Retirement Sys.*, 92 Wash.2d 415, 421, 598 P.2d 379 (1979).<sup>6</sup> This Court must determine contract defenses under Washington contract law. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. at 468. The interpretation of a contract is ordinarily a matter of state law to which courts defer. *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. at 468.

There is no precedent in Washington that distinguishes arbitration contracts from anything other than being “on equal footing with all other contracts.” *See, e.g., DIRECTV, Inc. v. Imburgia*, 136 S. Ct. at 468. In Washington, rescission is an equitable contract remedy. *Jespersen v. Clark*

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<sup>6</sup> In *Barnett v. Hicks*, 119 Wn.2d 151, 156–57 (1992), this state’s Supreme Court held that “[A] superior court may *only* confirm, vacate, modify or correct an arbitrator’s award;” but *Barnett* cites to RCW 7.04.150-.170, repealed effective January 1, 2006. The FAA applies to discrimination claims.

*Cty.*, 199 Wn. App. 568, 582, 399 P.3d 1209 (2017). Rescission is an equitable remedy “in which the court attempts to restore the parties to the positions they would have occupied had they not entered into the contract.” *Bloor v. Fritz*, 143 Wn. App. 718, 739 (2008). Where a breach of contract is sufficiently significant, “it excuses the other party's performance and justifies rescission of the contract.” *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 724-25 (2012), citing to *Park Ave. Condo. Owners Ass'n v. Buchan Devs., LLC*, 117 Wn. App. 369, 383 (2003), and *6A Washington Practice: Washington Pattern Jury Instructions: Civil 302.03*, at 127 (1997).

The trial court’s conclusion that it had no jurisdiction to determine Burgess’s breach claim is error, because the Superior Court had continuing jurisdiction over the claim, and because the FAA savings clause applies the equitable remedies of state contract law to an arbitration contract, which allows for rescission upon a material breach of performance.

**D. Burgess should have been entitled to rescission. The Federal Civil Rules of Procedure process were a material term of her agreement to arbitrate.**

The FAA applies state law contract defenses and equitable remedies, and Washington contract law discharges a party from their duty to perform

where the other party engages in material breach; material breach allows for rescission. *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. at 724-25.

“It is black letter law of contracts that the parties to a contract shall be bound by its terms.” *Adler*, 153 Wn.2d at 344. If the breach is material, the promisee has an election: “He or she may treat the breach as a failure of a condition that excuses further performance, and thus terminate the contract.” *Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588–89, 167 P.3d 1125, 1131 (2007). Where a breach is material or goes to the root or essence of the contract, it follows that substantial performance has not been rendered, and further performance by the other party is excused. *DC Farms, LLC v. Conagra Foods, Lamb Weston, Inc.*, 179 Wn. App. 205, 220-21 (2014). The materiality of a breach, including the issue of substantial performance, is a question of fact. *Id.*

Lithia *and* the arbitrator’s refusal to conform to the Federal Rules of Civil Procedure and the Federal Rules of Evidence were a material breach of the arbitration contract. Burgess agreed to arbitrate given “FRCP and FRE requirements as listed.” *CP 349*. The procedural guarantees of this arbitration contract are unique, bargained for, specific, and a material term of the agreement. Burgess only agreed to arbitrate with their use,

she specifically sought to apply them, she briefed them, she briefed the arbitrator on FRCP waiver and default mechanisms, and she briefed the inadequacy and abusive nature of boilerplate objections. *CP 147-157*. Conversely, Lithia ignored everything about FRCP 26(c), 33, and 34. Lithia deviated from the Rules, advocated for deviation from, and invited the arbitrator to deviate from, FRCP 26(c), 33 and 34. The arbitrator was also bound to conform to the Federal Rules of Civil Procedure and the Federal Rules of Evidence. *CP 293*. But on Lithia's urging, the arbitrator made no mention of the relevant rules in his order, no mention of FRCP discovery process, no mention of FRCP 26(c)'s protection order process, no mention of Rule 33 or Rule 34's waiver, and no mention of the prohibition against "boilerplate objections." *CP 261-263*. The arbitrator accepted "relevance" as a valid *privilege* assertion, and ordered Burgess to work with Lithia on a protective order. The arbitrator's conduct thus also materially breached the terms of the agreement to arbitrate by failing to accord Burgess the contracted process "in conformity with the (FRCP and FRE)." Burgess was entitled to be excused from her performance of the agreement. *224 Westlake, LLC*, 169 Wn. App. at 724-25.

Federal Courts have enforced rescission as an equitable contract remedy. In *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 940 (4th Cir.

1999), the federal court allowed an employee to rescind their agreement to arbitrate when the employer acted in bad faith to defeat the “prompt and economical resolution of (her) claims,” which it held to be the very purpose of the arbitration process. The Court concluded that the employer also violated “the contractual obligation of good faith.” *Id.* Rescission is a recognized contract remedy for breach, and should have been allowed here.

In sum, the Superior Court retained the jurisdiction to determine Burgess’s motion to rescind her agreement to arbitrate, the FAA allows for equitable contract defenses, and Washington contract law allows for the equitable defense of rescission in circumstances of material breach. Burgess should have been allowed her remedy.

## VI. CONCLUSION.

This Court should answer the certified question(s) as follows:

Does the superior court have jurisdiction to address an employee's contractual breach argument based upon acts alleged in the course of binding arbitration? *Yes.*

Is the superior court's jurisdiction in a contractual arbitration limited to issues occurring before and after—but not during—the proceeding. *No.*

Specifically, is the superior court's jurisdiction limited to ruling on whether there is an enforceable arbitration clause at the inception of arbitration and addressing the arbitration award at its conclusion? *No.*

*CP 613.*

This Court should grant this appeal.

DATED this 26<sup>th</sup> day of August, 2019.

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**/s/Mary Schultz**

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that she is a person of such age and discretion as to be competent to serve papers, and that on the 26<sup>th</sup> day of August, 2019, she electronically filed the foregoing document with the Court of Appeals, Division III, and thereby served a copy to the following individuals:

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**DATED** this 26<sup>th</sup> day of August, 2019.

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