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**Court of Appeals**  
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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 REPLY BRIEF**

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## I. SUMMARY.

The Federal Arbitration Act’s “Savings Clause,” 9 U.S.C. § 2, is enforceable as written. The statute allows for revocation of an agreement to arbitrate “upon such grounds as exist at law or in equity for the revocation of any contract.” Applied here, Burgess may thus revoke her agreement to arbitrate where Lithia has materially breached the agreement’s terms in its performance of the agreement, as where a breach of contract is sufficiently significant, it excuses the other party’s performance and justifies rescission of the contract.<sup>1</sup> Because rescission is a remedy for the failure in the performance of a contract, and because the contract imposed continuing performance in the form of adherence to the Federal Rules of Civil Procedure, then the remedy necessarily continues to be available during both parties’ performance of the contract.

Lithia’s response to the FAA’s savings clause is to pretend it doesn’t exist. The statute is not referenced in Lithia’s table of authorities, its brief contains no citation to the statute, and Lithia’s only discussion of the statute is to acknowledge that it poses a major problem for Lithia’s argument. Lithia states that, if applied as written, as Burgess urges, the statute would result in a conclusion that “directly conflicts with all case authority on the issue, as

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<sup>1</sup> *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 724-25 (2012).

discussed above.” *Brief at 11* (emphasis in original). That is not true. None of Lithia’s authority discusses the Savings Clause. If the Savings Clause means what it says, then it grants Burgess the right to rescind her agreement to arbitrate, and it grants the Superior Court the right, the continuing authority and the obligation to grant her that contact remedy for Lithia’s failure of performance. To hold otherwise would require this court to construe the FAA Savings Clause so narrowly as to *alter* its plain meaning, and to substantively change the nature of contract remedies for failure of performance. Burgess’s appeal should be granted.

A. **Lithia acknowledges that it made no effort to suspend the Superior Court proceeding while the parties arbitrated.**

Lithia uses the phrase “transfer to arbitration.”<sup>2</sup> No such transfer order exists. To the contrary, after Burgess filed her Superior Court action, Lithia never moved to dismiss Burgess’s Superior Court action, nor to stay nor to suspend it. Lithia continued to participate in and accept the Superior Court’s status conferences and dates (CP 44-45), and Lithia participated in the issuance of a case scheduling order, with an agreed trial date in the Superior Court forum of June 10, 2019. (CP 45). All such actions and orders

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<sup>2</sup> *See, e.g.*, Response Brief at Paragraph III (arguing that “once a matter is transferred to arbitration, the trial court’s authority is limited to confirming, vacating, or modifying...the arbitration award...”), *and see Id.* at p. 5, Section B heading, stating, “Transfer to Arbitration Has Effect in Washington.”

confirm the parties' agreement to continue the Superior Court's jurisdiction. The parties voluntarily agreed to arbitrate *without* dismissing Burgess's superior court action. There was no "transfer" of that action anywhere.

**B. Lithia's response fails to address the FAA Savings Clause.**

The Federal Arbitration Act's Savings Clause, 9 U.S.C § 2, states in relevant part:

".....an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

Burgess's agreement to arbitrate under the Federal Civil Rules of Procedure is thus revocable under contract law defenses. Lithia's response pretends the Savings Clause doesn't exist. Lithia's only reference to the Savings Clause is to acknowledge that it poses a major problem for Lithia's argument. Lithia summarily argues that Burgess's construction of the statute by applying its plain terms would result in a conclusion that "directly conflicts with **all** case authority on the issue, as discussed above." *Brief* at 11, (emphasis in original). None of the federal (and even state) authorities offered by Lithia discuss the FAA's Savings Clause. Burgess's reading of the Savings Clause does not conflict with anything.

C. **Lithia’s statutory construction conflates three different concepts-  
-Burgess is not asking the Superior Court to intervene in her  
arbitration, nor is she appealing an award; she is asking to  
rescind her agreement and proceed to trial in the Superior Court  
as scheduled.**

Lithia asserts that Washington state law limits a superior court’s authority to either confirming, vacating, modifying, or correcting an arbitration award. Lithia cites to “RCW 7.04.150 – 1.70” which are repealed. *Response brief* page 6. The Arbitration Act is now at RCW 7.04A, et seq.

But Lithia agrees that employment cases are subject to the Federal Arbitration Act. *Respondent’s Brief*, pp. 6-7. Lithia agrees that the Federal law controls the certified question. *Id.* Lithia seems to be arguing that 9 U.S.C. §2 must be construed to apply only at the contract formation stage as a basis for validity or invalidity, and not again until review of a final arbitration ruling. If so, then the argument is wrong. To reach such an erroneous conclusion, one must conflate three different issues--1) judicial review of an arbitration award, which is statutorily limited (9 U.S.C. §§ 9-11); 2) “intervention” in an ongoing arbitration proceeding, which remains somewhat undefined, but presumes the arbitration will continue subject to the directives from a court (as an example, interlocutory review of an interim

award); and 3) rescission of an agreement to arbitrate within an existing Superior Court action, which is controlled by 9 U.S.C. § 2 and state contract defenses. This appeal does not concern the first two processes. It concerns the third process—the right to rescind a valid agreement to arbitrate based upon material breach of the agreement by Lithia during its performance of the arbitration contract, and to rescind within an existing Superior Court action that continued to proceed on track towards trial without objection. In this regard, this appeal is controlled by the statutory construction of 9 U.S.C. § 2 and state contract defenses.

Lithia’s conflation of the first and second issues above is evident in its argument that e.g., “The circuit courts have concluded that it is ‘plainly improper’ for a trial court to intervene in an arbitration proceeding, and that ‘[r]eview comes at the beginning or the end, but not in the middle.’” *Response Brief* at p. 8. These are two different concepts. Lithia’s “no intervention” argument is cited to *Savers Prop. & Cas. Ins. Co. v. Nat’l Union Fire Ins. Co.*, 748 F.3d 708, 718 (6th Cir. 2014). Its judicial review argument is cited to *Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.*, 671 F.3d 635, 638 (7th Cir. 2011). In the latter, within the context of judicial review of an arbitration award, a court may not review the

fairness of the arbitration procedure. *Id.*, citing *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 488 (5th Cir. 2002).

*Savers*, however, shows how the “no intervention” directive applies to review of an arbitrator’s award, because the concept is applied to a requested review of an “interim award” of an arbitrator in an independent arbitration proceeding entered into before any court action was filed. In *Savers*, the parties entered into a private arbitration. There was no Superior Court action. The arbitration resulted in an interim award on merits issued by the arbitrator. The arbitrator then set a procedural process to achieve the final award. The state court complaint was filed in a Michigan state court “seeking to vacate the Interim Final Award” on grounds of fairness. *Id.* at 713. *Savers* found that judicial review of an interim arbitration award equates to an interlocutory review of a final award and applied the statutory narrow scope of review accordingly. *Id.* at 718. *Savers* does not concern the facts here. It does not involve a request for rescission of an agreement to arbitrate based upon the other party’s failure to perform the arbitration contract.

The limited application of *Savers* is best seen in its cite to, e.g., *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 & n. 4 (2d Cir.1980), for the proposition that a district court “should not hold itself

open as an appellate tribunal during an ongoing arbitration proceeding, since applications for interlocutory relief result only in a waste of time, the *interruption of the arbitration proceeding*, and delaying tactics in a proceeding that is supposed to produce a speedy decision.” *Savers* at 718, emphasis added, and also citing *Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co. of Pittsburg, PA*, 748 F.3d 708, 718 (6th Cir. 2014). Burgess is not trying to “interrupt” an arbitration proceeding, she is asking to rescind her agreement to arbitrate based upon material breach of the performance required so she can move forward to her trial, with the trial date already set by the Superior Court. *CP 44-46*.

Importantly, as to a court’s “gatekeeping” on initial arbitrability, and its review of the final award at the conclusion of the arbitration proceeding (9 U.S.C. §§ 9-11), *Savers* notes, “[B]etween these two stages, however, the laws are largely silent with respect to judicial review.” *Id.* at 717. Even this comment perceives the issue as one of “judicial review,” not rescission. Burgess is not asking for judicial review of an arbitrator’s interim or final award under 9 U.S.C. §§ 9-11. She asks to rescind her agreement to arbitrate based upon Lithia’s flawed contract performance of its continuing obligation to comply with the Federal Civil Rules of Procedure, and she did so long before any award is reached.

Lithia's cite to *Pizello v. Heinemann*, 2019 WL 234866 (Wash. Ct. of Appeals, June 3, 2019) also addresses judicial review of an arbitration award as governed by the FAA's 9 U.S.C. 10(a). Similarly, *Traveler's Ins. Co. v. Davis*, 490 F.2d 536, 539 (3rd Cir. 1974) discusses the permissible scope of review of an arbitrator's award following a petition made to the court asking to vacate an award of the arbitrator. *Luff v. Ryan*, 128 F. Supp. 105, 108 (D.D.C 1955) also concerns an appeal from findings made in a private arbitration. In *Aviall, Inc. v. Ryder Sys., Inc.*, 110 F.3d 892, 895 (2d Cir. 1997), a party filed a complaint seeking a declaration of certain rights within the arbitration after findings and rulings were made by an arbitrator in a private arbitration, In *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d at 480, appeal was taken of the district court's dismissal of a complaint. The decision revolves around whether the moving party had waived its right to arbitrate, not rescission. *Gulf Guarantee* notes that "Under the FAA, jurisdiction by the courts to intervene into the arbitral process prior to issuance of an award is very limited." *Id* at 486. But it does not go on to address 9 U.S.C. § 2, because contract rescission was not at issue.

In sum, precedent addressing the judicial review of an arbitrator's award is not determinative here. Burgess moves to rescind her agreement

to arbitrate within her ongoing Superior Court action because Lithia and the arbitrator materially breached the arbitration agreement's performance requirements. The FAA's savings clause, 9 U.S.C. § 2, allows her to seek that rescission.

**D. The plain meaning of terms is used in construing the FAA Savings Clause. The right to revoke or rescind necessarily continues through the performance of the contract.**

Lithia does not dispute that the state law controls construction of the Federal statute. *See Burgess Opening Brief at page 23*. In this state, if a statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent. *State, Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9–10, 43 P.3d 4, 9 (2002). The plain meaning is “derived from what the Legislature has said in its enactments, but that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Id.* at 11. If, after this inquiry, the statute remains susceptible to more than one reasonable meaning, the statute is ambiguous and it is appropriate to resort to aids to construction, including legislative history. *Id.* at 12.

In construing the FAA’s Savings Clause, this Court would be controlled only by United States Supreme Court precedent. On “matters of federal law, we are bound by the decisions of the United States Supreme Court (citing to *Homes Ins. Co.*)...Decisions of the federal circuit courts are ‘entitled to great weight’ but are not binding.” *W.G. Clark Const. Co. v. Pac. Nw. Reg’l Council of Carpenters*, 180 Wn.2d 54, 62, 322 P.3d 1207, 1210–11 (2014); see also *Home Ins. Co. of New York v. N. Pac. Ry. Co.*, 18 Wn.2d 798, 808, 140 P.2d 507 (1943) (holding that “the construction placed upon a federal statute by the inferior federal courts, while entitled to great weight by the courts of this state, is not binding upon them.”).

Lithia has produced no Supreme Court precedent construing the FAA’s savings clause which limits the language of 9 U.S.C § 2 to “gateway” or “review” proceedings. Lithia presents no federal circuit ruling that so limits that statute.

By its plain terms, 9 U.S.C. § 2 does not limit Burgess’s right to revoke or rescind her agreement to arbitrate at only the stage whereby she may be directed to arbitrate. Revocation or rescission of a contract is a remedy for flawed performance of the contract. Rescission “excuses the other party’s performance and justifies rescission of the contract.” 224 *Westlake, LLC*, 169 Wn. App. at 724-25. Because of this, revocation or

rescission remain available as contract remedies through the performance of the contract. Indeed, the question of material breach of a contract may *only* be able to be determined in the performance of the contract. The plain terms of the FAA Savings Clause allowing for revocation are thus not properly limited to only the formation stage or to judicial review. Burgess necessarily retains her right to revoke or rescind a contract for Lithia's material breach of the arbitration agreement during its flawed performance of its continuing contract obligations under the plain terms of the FAA Savings Clause.

**E. The title of this state's statutory savings clause addresses the validity of an agreement to arbitrate. The FAA does not so limit its savings clause.**

This state's arbitration act also has a "savings clause." An agreement to submit a controversy to arbitration is valid, enforceable, and irrevocable "except upon a ground that exists at law or in equity for the revocation of a contract." RCW 7.04A.060 (1). In *Weidert v. Hanson*, 178 Wn.2d 462, 465, 309 P.3d 435, 436-37 (2013), this state's Supreme Court notes the similarities with the FAA--"The Federal Arbitration Act provides the same," citing to 9 U.S.C. § 2. *Id.* *Weidert* seems to define the phrase "as exists at law or in equity" only within the context of an invalidity determination,

however, discussing how the phrase refers to “general contract defenses such as fraud, duress, or unconscionability, which may be applied to *invalidate* arbitration agreements without violating the federal arbitration mandate.” *Id.*, (emphasis added), citing *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 813–14, 225 P.3d 213 (2009) (quoting 9 U.S.C. § 2). But both *Weidert* and *Satomi Owners Ass'n* address the “invalidation” of agreements, not rescission based on material breach in performance. As noted in the foregoing section, the contract remedies of revocation and rescission necessarily remain available through the performance of a contract, as they are precisely suited for material breach arising during that performance. 224 *Westlake, LLC*, 169 Wn. App. at 724-25. *Weidert* does not address the revocation language in this context. Indeed, a Texas Appellate Court in *Hudson Ins. Co. v. BVB Partners*, 13-15-00163-CV, 2015 WL 6758540, at \*3 (Tex. App. Nov. 5, 2015) notes that the *Weidert* Court “did not actually analyze the scope of the arbitration provision.”

Moreover, when *Weidert* equates the state savings clause to the FAA’s clause, noting that “Washington law provides substantially the same,” while that may be generally correct as to the content of the statute, it is not correct as to the statutory titles. Statutory titles can be limiting or expansive. General titles are given a liberal construction, but a restrictive

title “is one where a particular part or branch of a subject is carved out and selected as the subject of the legislation.” *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 633, 71 P.3d 644, 650 (2003) (quote sources omitted). A restrictive title expressly limits the scope of the act to that expressed in the title. *Id.*, quoting from *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205.

This state’s savings clause arguably appears under a limiting title-- “validity of agreement to arbitrate.” *RCW 7.04A.060*. But the FAA savings clause’s title is more general, and thus more expansive. While the FAA statute references validity, it also adds “enforcement of agreements to arbitrate” to its title. Rescission or revocation is an enforcement remedy arising during performance of the contract, and it excuses further performance. *224 Westlake, LLC*, 169 Wn. App. at 724-25.

An expansive reading of the FAA title, along with the plain meaning of its content, is also supported by the nature of a contract and defenses to a contract. “While the FAA expresses a strong federal policy in favor of arbitration, the purpose of Congress in enacting the FAA was to make arbitration agreements as enforceable as other contracts, but not more so.” *Ostroff v. Alterra Healthcare Corp.*, 433 F. Supp. 2d 538, 542

(E.D. Pa. 2006), citing *Cap Gemini Ernst & Young, U.S., L.L.C. v. Nackel*, 346 F.3d 360, 364 (2d Cir.2003).

The FAA Savings Clause is uniquely tailored to address the kind of problematic contract situation that occurred here. This is an employee who agreed to arbitrate in good faith notwithstanding a valid existing superior court action. She agreed to arbitrate contingent on the contract's guarantee of the Federal Rules of Civil Procedure and thereby the continued performance by Lithia of and adherence to the Federal Rules of Civil Procedure during the arbitration. *CP 349*. Lithia agreed to this to obtain its arbitration. It would be inequitable to allow Lithia to demand that its employee adhere to a contract Lithia claims exists, and then itself repeatedly violate that very contract in its own performance, and encourage an arbitrator to do the same. This is where the contract remedies of revocation and rescission arise. Burgess asked the trial court to terminate her own obligation for future performance of the arbitration contract because Lithia had breached and continued breaching its continuing obligations under the contract. The FAA uniquely provides Burgess the very relief she seeks, and the savings clause should be applied as written. Burgess's agreement to arbitrate remained "revocable" throughout the required performance of the arbitration contract.

## **II. CONCLUSION.**

Burgess's appeal should be granted. The trial court should be directed that it has the jurisdiction to hear Burgess's argument for rescission of her arbitration agreement, and that the behavior evidenced forms a proper basis for rescission and excuses Burgess from further performance of her arbitration agreement.

DATED this 2<sup>nd</sup> day of December, 2019.

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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 December 2, 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 2<sup>nd</sup> day of December, 2019.

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