

FILED
Court of Appeals
Division III
State of Washington
3/18/2019 2:21 PM
COA NO. 365948

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

EVETTE BURGESS,

Petitioner,

v.

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

Respondent.

RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR
DISCRETIONARY REVIEW

John M. Silk, WSBA #15035
Gabriella Wagner, WSBA# 42898
Lisa C. Neal, WSBA# 25686
WILSON SMITH COCHRAN DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
(206)623-4100
(206)623-9273 facsimile
Attorneys for Respondent Lithia Motors

TABLE OF CONTENTS

I. IDENTITY OF RESPONDENT.....1

II. DECISION BELOW.....1

III. ISSUES PRESENTED.....2

 1. Whether discretionary review of the certified question is available under RAP 2.3(b)(4), given that the jurisdictional question has not been shown to be a controlling question of law?.....2

 2. Whether discretionary review of the certified question is available under RAP 2.3(b)(4), given that there is no difference of opinion regarding the trial court’s authority?.....2

 3. Whether discretionary review of the certified question is available under RAP 2.3(b)(4), given that deciding this issue now will not materially advance the ultimate termination of the litigation.....2

IV. STATEMENT OF THE CASE.....2

V. LEGAL ARGUMENT.....4

 a. Grounds for review.....4

 b. Whether discretionary review is available under RAP 2.3(b)(4), given that the scope jurisdictional question has not been shown to be a controlling question of law?.....4

 c. Whether discretionary review is available under RAP 2.3(b)(4), given that there is no difference of opinion regarding the scope of jurisdictional question certified?.....5

 d. Whether discretionary review is available under RAP 2.3(b)(4), given that deciding this issue now will not

materially advance the ultimate termination of the
litigation?.....10

VI. CONCLUSION.....12

TABLE OF AUTHORITIES

CASES

Adler v. Fred Lind Manor, 153 Wn.2d 331, 103 P.3d 773 (2004) 11

Admiral Ins. Co. v. United States Dist. Court, 881 F.2d 1486 (9th Cir.
1989) 9

Barnett v. Hicks, 119 Wn.2d 151, 829 P.2d 1087 (1992) 6

Bartusch v. Oregon State Bd. of Higher Educ., 131 Wn. App. 298, 126
P.3d 840 (2006) 10

Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co., 671 F.3d
635 (7th Cir. 2011) 6

Boone v. City of Seattle, noted at 193 Wn. App. 1042, 2016 WL 1735487
(unpublished) 12

Clipse v. Michels Pipeline Const., Inc. 154 Wn. App. 573, 225 P.3d 492,
496 (2010) 8

Everett Shipyard, Inc. v. Puget Sound Envtl. Corp. 155 Wn. App. 761, 231
P.3d 200 (2010) 7

Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co., 304 F.3d 476
(5th Cir. 2002) 7

Herzog v. Foster & Marshall, Inc., 56 Wn. App. 437, 443, 783 P.2d 1124
(1989) 12

Minehart v. Morning Star Boys Ranch, Inc., 156 Wn. App. 457, 232 P.3d
591, *rev. denied*, 169 Wn.2d 1029 (2010) 10

<i>Right-Price Recreation, LLC v. Connells Prairie Cmty. Council</i> , 146 W.2d 3780, 46 P.3d 789 (2002).....	4
<i>Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.</i> , 748 F.3d 708 (6th Cir. 2014).....	5, 6
<i>Schuster v. Prestige Senior Mgmt., L.L.C.</i> , 193 Wn. App. 616, 376 P.3d 412 (2016).....	5
<i>Southland Corp. v. Keating</i> , 465 U.S. 1, 16, 104 S. Ct. 852 (1984);.....	5
<i>State v. Howland</i> , 182 Wn.2d 1008 (2015).....	10, 11
<i>Stein v. Geonerco, Inc.</i> , 105 Wn. App. 41, 17 P.3d 1266 (2001)	12
<i>T.S. v. Boy Scouts of Am.</i> , 157 Wn.2d 416, 138 P.3d 1053 (2006).....	9
<i>Verbeek Properties, LLC v. GreenCo Envtl., Inc.</i> , 159 Wn. App. 82, 246 P.3d 205 (2010).....	6

RULES

RAP 2.2(a)(3).....	11
RAP 2.3(b) (1) (2).....	10, 11
RAP 2.3(b)(4).....	1, 3, 4, 8, 10
9 U.S.C. §§ 3-4.....	6
9 U.S.C. §§ 9-11.....	6

I. IDENTITY OF RESPONDENT

Respondent Lithia Motors, Inc., BMW of Spokane d/b/a Camp Automotive Inc., d/b/a BMW of Spokane (“Lithia Motors”) opposes Petitioner’s motion for discretionary review.

II. DECISION BELOW

The Petitioner Evette Burgess seeks discretionary review of the trial court’s February 4, 2019 Order Denying Plaintiff’s Motion to Vacate an Arbitrator’s Order and Terminate Arbitration and Certifying Matter for Appeal.¹

The trial court’s rulings were correct. Having found that Burgess agreed to submit employment disputes to arbitration, and having found that Burgess thereafter agreed to transfer the instant dispute to arbitration, the trial court declined to overrule the arbitrator’s discovery ruling, or to remove the matter from arbitration at Burgess’s unilateral request. The trial court properly declined to allow Burgess to forum shop.

The trial court certified the following issue for immediate review under RAP 2.3(b)(4):

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

¹ Petitioner’s Appendix (“Appx.”) 1 at Burgess Bates 00006-00011 (hereafter “Burgess X” only).

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?

The answer to the specific question is yes. The applicable law is clear: once a matter is transferred to arbitration, the trial court's authority is limited to confirming, vacating, or modifying (as allowed under the contract or statute) the arbitration award. The trial court properly declined to review the arbitrator's actions during the litigation.

III. ISSUES PRESENTED

1. Whether discretionary review of the certified question is available under RAP 2.3(b)(4), given that the jurisdictional question has not been shown to be a controlling question of law?
2. Whether discretionary review of the certified question is available under RAP 2.3(b)(4), given that there is no difference of opinion regarding the trial court's authority?
3. Whether discretionary review of the certified question is available under RAP 2.3(b)(4), given that deciding this issue now will not materially advance the ultimate termination of the litigation?

IV. STATEMENT OF THE CASE

Burgess was hired as an employee by Camp Automotive d/b/a BMW of Spokane, a wholly owned subsidiary of Lithia Motors, Inc., (hereinafter collectively referred to as "Lithia"). As a condition of Burgess's employment, Lithia required her to sign an arbitration agreement waiving her right to sue Lithia and agreeing to binding arbitration under the Federal Arbitration Act ("FAA") to resolve any disputes.²

² Burgess 6-7.

Despite having agreed to the arbitration forum for disputes, Petitioner filed her claim against Lithia in the Superior Court. After Petitioner filed suit, Lithia demanded arbitration, and Petitioner agreed to arbitrate her claims.³ The parties jointly selected the Honorable Kenneth Kato, a retired appellate judge, to serve as Arbitrator.⁴ As required by the arbitration contract, the arbitration went forward under the Federal Rules of Civil Procedure.⁵

Thereafter, Petitioner moved to compel discovery, and Judge Kato denied the motion on September 18, 2018.⁶ Petitioner then filed in the Superior Court a Motion to Vacate the Arbitrator's Order Denying Discovery, Terminate Arbitration and Issue a Case Scheduling Order.⁷ The trial court denied the motion, finding that "Washington law appears to prohibit the court from addressing [litigation disputes] that arose during the arbitration proceeding."⁸ In its order, the court certified the matter for review under RAP 2.3(b)(4).⁹

³ *Id.* at 7.

⁴ *Id.*

⁵ *Id.* at 8.

⁶ *Id.* Lithia does not agree with Petitioner's argument regarding the underlying discovery dispute, but the details of that dispute are irrelevant to the issue before the Court.

⁷ *Id.*

⁸ *Id.* at 9, Conclusion of Law No. 4.

⁹ *Id.* at 10.

V. LEGAL ARGUMENT

a. Grounds for review.

Petitioner reports that the trial court certified the question set out above under RAP 2.3(b)(4), but fails to provide any factual or legal support for immediate review. Review is allowed only if all three criteria for certification are present.¹⁰ Even if all three requirements were satisfied, review is discretionary.¹¹ Discretionary review is disfavored, because it lends itself to piecemeal, multiple appeals.¹² As discussed below, the trial court's ruling does not meet the three criteria found in RAP 2.3(b)(4). Petitioner's motion should be denied.

b. Whether discretionary review is available under RAP 2.3(b)(4), given that the scope of jurisdiction question has not been shown to be a controlling question of law?

The requisite "controlling question of law" has not been shown. Petitioner is incorrect that whether the trial court had the authority to overrule the arbitrator is the "controlling question of law." The forum in which the underlying dispute is heard will not affect the outcome of the case. The substantive rights of the parties are unaffected by the forum. As such, the question of where the dispute is heard is not a controlling question of law.

¹⁰ RAP 2.3(b) (review may be granted only where criteria are present).

¹¹ *Id.*

¹² *Right-Price Recreation, LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 3780, 380, 46 P.3d 789 (2002).

c. Whether discretionary review is available under RAP 2.3(b)(4), given that there is no difference of opinion regarding the scope of jurisdiction question certified?

Even if the scope of the trial court's authority were a controlling question of law, there is no demonstrated difference of opinion regarding whether or not the trial court may weigh in during the arbitration to review the arbitrator's rulings. As concluded by the trial court:

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.¹³

Neither the trial court, nor Petitioner, provided any contrary case authority that would support not following this general rule. It should be recalled that the parties agreed that the arbitration would be governed by the rules enacted by the FAA. The FAA manifests a federal policy favoring arbitration agreements, and is intended to facilitate streamlined proceedings.¹⁴ Federal law governs the enforcement of arbitration agreements that, like the one in this case, are subject to the FAA.¹⁵ Federal law on this issue, therefore, controls the question presented by the trial court.

¹³ Burgess 9, Conclusion of Law 3.

¹⁴ *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 717 (6th Cir. 2014).

¹⁵ *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S. Ct. 852, 861, (1984); *Schuster v. Prestige Senior Mgmt., L.L.C.*, 193 Wn. App. 616, 627, 376 P.3d 412 (2016).

The FAA allows courts to become involved in arbitration proceedings at only two stages.¹⁶ The first stage is “gateway” issues of arbitrability, such as whether a valid arbitration agreement exists.¹⁷ The second stage is at the end of the arbitration, at which point a court may confirm, vacate, or modify an award.¹⁸ Judicial intervention at these stages is codified in the FAA itself.¹⁹

Although the FAA is silent on the issue of interlocutory appeal, the federal circuit courts are not. The circuit courts have concluded that it is “plainly improper” for a trial court to intervene in an arbitration proceeding,²⁰ and that “[r]eview comes at the beginning or the end, but not in the middle.”²¹ Federal courts have therefore rejected in clear terms the same claims that Petitioner is making now – claims “that essentially go to

¹⁶ *Savers Prop. & Cas. Ins.*, 748 F.3d at 717.

¹⁷ *Savers Prop. & Cas. Ins.*, 748 F.3d at 717. *See also Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87-88, 246 P.3d 205 (2010) (court may confirm whether an enforceable agreement to arbitrate exists and enforce it).

¹⁸ *Savers Prop. & Cas. Ins.*, 748 F.3d at 717; *see also Barnett v. Hicks*, 119 Wn.2d 151, 156-57, 829 P.2d 1087 (1992) (court may only confirm, vacate, modify or correct an arbitrator’s award).

¹⁹ *See, e.g.*, 9 U.S.C. §§ 3-4 (allowing courts to grant motions to stay judicial proceedings or to compel arbitration), §§ 9-11 (allowing for the confirmation, vacation, or modification of an arbitration award).

²⁰ *Savers Prop. & Cas. Ins.*, 748 F.3d at 718.

²¹ *Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.*, 671 F.3d 635, 638 (7th Cir. 2011).

the procedure of arbitration” and to “alleged unfairness.”²² Before an arbitration award has been issued, there is “no authority under the FAA for a court to entertain such challenges.”²³

Petitioner implies that Washington courts have allowed a trial court’s intervention into an arbitration proceeding, citing to *Everett Shipyard, Inc. v. Puget Sound Envtl. Corp.*²⁴ In *Everett Shipyard*, however, the trial court first dismissed the superior court case because the arbitrator had closed the arbitration for lack of funds, then vacated the dismissal because it believed it lacked subject matter jurisdiction. The court of appeals simply confirmed Washington law providing that the superior court determines arbitrability; transfers the matter to arbitration and stays any claims that have been transferred; and later confirms, modifies, corrects or vacates the award.²⁵ As such, the trial court had jurisdiction over the matter, including the authority to dismiss the case. This authority does not support grant of Petitioner’s motion.

²² *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 488 (5th Cir. 2002).

²³ *Gulf Guar. Life Ins.*, 304 F.3d at 488.

²⁴ 155 Wn. App. 761, 769, 231 P.3d 200 (2010).

²⁵ *Everett Shipyard*, 155 Wn. App. at 767. Petitioner seems to argue that that fact that the trial court failed to stay the suit pending arbitration somehow overrides Washington and federal law. No authority for this notion is cited, and Lithia asks the Commission to reject the argument.

In addition to the federal law precluding immediate appeal, a Washington decision not cited by Petitioner supports denial of her motion. In *Clype v. Michels Pipeline Const., Inc.*,²⁶ the Washington Court of Appeals declined review under RAP 2.3(b)(4) of a question regarding a contract at issue in the underlying litigation, noting the issue “does not warrant discretionary review as a controlling question of law.”²⁷ Getting into the details on whether or not the parties or the arbitrator are complying with the arbitration agreement is similarly not a controlling question of law.

Further, Petitioner’s argument that because the trial court retains jurisdiction over the case, and was initially authorized to enforce any arbitration agreement, it retained the authority to review the arbitrator’s discovery order in order to “enforce” the arbitration agreement lacks support. No authority is cited for this proposition. If Petitioner is correct, every decision by an arbitrator is subject to immediate interlocutory review. Such a result would complicate and make more expensive what is contemplated as a more streamlined process. Lithia asks the Commissioner to reject this argument.

Finally, Petitioner contends that her request for rescission of the arbitration agreement itself also falls within the trial court’s authority because it has to do with “enforcement” of the arbitration agreement.

²⁶ 154 Wn. App. 573, 225 P.3d 492, 496 (2010).

²⁷ *Clype*, 154 Wn. App. at 580.

First, Petitioner never argued for rescission before the trial court transferred the matter to arbitration, and it is too late to do so now in order to escape what Petitioner evidently views as an unfavorable forum.

Second, even if Petitioner had provided this Court with authority supporting her argument that the trial court may intervene to review matters of rescission of the arbitration contract, Petitioner does not really argue for rescission. Petitioner's claim here is really that the arbitrator is not enforcing the Civil Rules or that Lithia is not complying with the Civil Rules.

The fact that Petitioner does not argue for rescission is illustrated by Petitioner's Statement of the Case, where Petitioner argues: 1) the parties agreed that the Federal Rules of Civil Procedure would apply; and 2) the arbitrator has failed to apply those rules to the discovery dispute. Petitioner seeks review of a discovery order, not the remedy of rescission.

Petitioner does not even attempt to argue that the limited circumstances allowing interlocutory review of discovery orders are present here.²⁸ Lithia urges the Court to restrict its consideration to the Rule's requirements, including whether there is any difference of opinion.

²⁸ See, e.g., *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989) (granting petition for writ of mandamus from order compelling defendant to producing allegedly privileged documents); *T.S. v. Boy Scouts of Am.*, 157 Wn.2d 416, 423, 138 P.3d 1053 (2006) (interlocutory review granted regarding discovery order that allegedly violated third parties' constitutional rights).

There is no difference of opinion on whether the trial court was authorized to review the arbitrator’s discovery order – it was not. Absent such a “difference of opinion”, the requirements of RAP 2.3 (b)(4) are not satisfied, and review is premature.

d. Whether discretionary review is available under RAP 2.3(b)(4), given that deciding this issue now will not materially advance the ultimate termination of the litigation?

The trial court finally concluded that appealing both the authority question and the ultimate arbitration decision appealed at the same would be wasteful.²⁹ Streamlining a case is not sufficient grounds for interlocutory review.³⁰ For example, in *Minehart v. Morning Star Boys Ranch, Inc.*³¹ the court of appeals declined to review a myriad of evidentiary rulings despite the potential for a “wasted trial.”³²

Similarly, when considering discretionary review under RAP 2.3(b)(2) in *State v. Howland*, a commissioner of the Supreme Court has

²⁹ Burgess 9-10, Conclusion of Law 6.

³⁰ See, e.g., *Minehart v. Morning Star Boys Ranch, Inc.*, 156 Wn. App. 457, 462, 232 P.3d 591, *rev. denied*, 169 Wn.2d 1029 (2010) (applying parameters of RAP 2.3(b) to case to determine whether the alleged error’s certainty had the requisite impact on the litigation to allow interlocutory review); see also *Bartusch v. Oregon State Bd. of Higher Educ.*, 131 Wn. App. 298, 303, 126 P.3d 840 (2006) (interlocutory review accepted under RAP 2.3(b)(1) and (2) regarding personal jurisdiction).

³¹ 156 Wn. App. 457, 232 P.3d 591, *review denied*, 169 Wn.2d 1029 (2010).

³² *Minehart*, 156 Wn. App. at 462.

noted that review was not appropriate unless the decision appealed would “have immediate effect outside the courtroom.”³³ As explained by the Court of Appeals in *Howland*:

[W]here a trial court’s action merely alters the status of the litigation itself or limits the freedom of a party to act in the conduct of the lawsuit, even if the trial court’s action is probably erroneous, it is not sufficient to invoke review under RAP 2.3(b)(2).³⁴

Here, of course, the trial court’s order did not affect anything outside the courtroom, but rather maintained the status quo, precluding immediate appeal.

In fact, should this court remand to the trial court and direct it to rule on Petitioner’s motion to vacate the arbitration agreement, that order will be immediately appealable as of right regardless of the decision.³⁵ The grant of Petitioner’s motion below will be immediately appealable, as it will terminate the proceeding in arbitration.³⁶ Similarly, Washington courts have held that review of a court’s denial of a motion to compel arbitration or stay the litigation pending arbitration is allowed under RAP 2.2(a)(3) when the trial court’s ruling effectively terminates the arbitration

³³ *State v. Howland*, 182 Wn.2d 1008, *3 (2015) (denying review on other grounds).

³⁴ 180 Wn. App. 196, 206-07, 321 P.3d 303 (2014), *review denied*, 182 Wn.2d 1008 (2015).

³⁵ *See, e.g., Adler v. Fred Lind Manor*, 153 Wn.2d 331, 340-41, 103 P.3d 773 (2004) (order compelling party to arbitrate appealable under RAP 2.3(b)(2)).

³⁶ *See Adler*, 153 Wn.2d at 340-41.

proceeding.³⁷ Therefore, rather than materially advancing the litigation, reviewing this issue now will guarantee another round of procedural appeals before the merits may be addressed. It is clear that no benefit would result from immediate review, and the Petitioner's motion should be denied.³⁸

VI. CONCLUSION

For the reasons stated above, the Court should deny Petitioner Evette Burgess's Motion for Discretionary Review.

DATED and respectfully submitted this 18th day of March, 2019.

By: s/ Lisa C. Neal
John M. Silk, WSBA #15035
Gabiella Wagner, WSBA# 42898
Lisa C. Neal, WSBA# 25686
WILSON SMITH COCHRAN
DICKERSON
901 Fifth Avenue, Suite 1700
Seattle, WA 98164
(206)623-4100
(206)623-9273 facsimile
Attorneys for Respondent Lithia
Motors
Electronic mail: l.neal@wscd.com

³⁷ See, e.g., *Stein v. Geonerco, Inc.*, 105 Wn. App. 41, 4--45, 17 P.3d 1266 (2001) (denial of motion to compel arbitration precluded arbitration); *Herzog v. Foster & Marshall, Inc.*, 56 Wn. App. 437, 443, 783 P.2d 1124 (1989) (denial of motion to stay litigation pending arbitration effectively precluded arbitration).

³⁸ See *Boone v. City of Seattle*, noted at 193 Wn. App. 1042, 2016 WL 1735487 at *1 (2016) (unpublished) (where not clear what benefit would result from immediate review, review should not have been granted).

CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed with Division III of the Court of Appeals of the State of Washington, and arranged for service of true and correct copies of the foregoing RESPONDENT'S RESPONSE TO PETITIONER'S MOTION FOR DISCRETIONARY REVIEW upon the following:

VIA electronic ECF filing

Mary Schultz
Mary Schultz Law, P.S.
2111 E. Red Barn Ln.
Spangle, WA 99031-5005
Mary@Mschultz.com

Dated this 18th day of March, 2019.

s/ Alicia Ossenkop
Legal Secretary

WILSON SMITH COCHRAN DICKERSON

March 18, 2019 - 2:21 PM

Transmittal Information

Filed with Court: Court of Appeals Division III
Appellate Court Case Number: 36594-8
Appellate Court Case Title: Evette Burgess v. Lithia Motors, et al
Superior Court Case Number: 18-2-00200-6

The following documents have been uploaded:

- 365948_Other_20190318141909D3197752_9094.pdf
This File Contains:
Other - Respondent's Response to Motion for Discr Review
The Original File Name was Respondents Response to Petitioners Motion for Disc Review.pdf

A copy of the uploaded files will be sent to:

- Mary@mschultz.com
- jay@wscd.com
- phares@wscd.com
- silk@wscd.com
- wagner@wscd.com

Comments:

Sender Name: Lisa Neal - Email: L.Neal@wscd.com
Address:
901 5TH AVE STE 1700
SEATTLE, WA, 98164-2050
Phone: 206-452-8970

Note: The Filing Id is 20190318141909D3197752