

**FILED**  
**Court of Appeals**  
**Division III**  
**State of Washington**  
**2/20/2019 4:04 PM**  
**COA NO. 365948**

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

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**EVETTE BURGESS,**

**Petitioner,**

**v.**

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

**Respondent.**

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**MOTION FOR DISCRETIONARY REVIEW**

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**I. IDENTITY OF PETITIONER.**

Evette Burgess, the Plaintiff in the underlying action in Spokane Superior Court Cause No. 18-2-00200-6, is the party moving for discretionary review.

**II. DECISION BELOW.**

Ms. Burgess seeks review of the order of the Hon. Timothy B. Fennessy entered on February 4, 2019 denying the Plaintiff's motion to vacate an arbitrator's order, terminate the arbitration, and issue a new Superior Court case scheduling order. The order is contained in Appendix 2, at Burgess Bates 00006-00011 (hereafter, e.g., "B6" only).

**III. ISSUE PRESENTED 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?

*App. 1, B10, ¶ 3.*

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

Plaintiff Evette Burgess was employed by Defendant Lithia Motors, Inc., and was sexually harassed by two of her Spokane store managers to the point of requiring medical leave. She was terminated while on leave. On January 17, 2018, Burgess filed a Complaint for Damages in the Spokane County Superior Court alleging Lithia's violation of this state's law against discrimination in employment, RCW 49.60 et seq., and this state's Family Leave Act, RCW 49.78 et seq. *App. 9, B311-332.*

Burgess served Lithia her First Set of Interrogatories and Requests for Production on January 29, 2018. *App. 4, B51; B174-183.* Lithia responded by letter on February 8, 2018 asserting that Burgess had signed an arbitration agreement with Lithia, and demanded arbitration. *App. 4, B255-258.* Lithia failed to respond to Burgess's First Set of Interrogatories and Requests for Production within the requisite thirty days allowed for responses under Civil Rules 33 and 34.

On March 7, 2018, Lithia then served Burgess a document entitled "Respondent's General Objections to Plaintiff's First Interrogatories and Requests for Production." *App. 4, B131 (transmittal); attaching B134-142 (Objection document); and B130 (email from Burgess's counsel confirming*

*Lithia's apparent refusal to answer discovery thereby*). Lithia used a document heading of "In the Binding Arbitration," and renamed the parties "Claimant" and "Respondent." *App. 4, B134*. The document contains a myriad of boilerplate objection paragraphs, which violate both state Civil Rules 33 and 34, and Federal Rules of Civil Procedure 33 and 34. The document objects to discovery under both state Civil Rules (CR) and the Federal Rules of Civil Procedure (FRCP). Burgess would thereafter engage in an unsuccessful months-long effort to obtain answers and production from Lithia to her first set of discovery. *App. 4, B102-122*. But under FRCP 33, once Lithia failed to respond to interrogatories within 30 days with specificity, then the Rule provide that objections are waived. *FRCP 33(b)(4)*. Under FRCP 34, once Lithia failed to respond to the demanded document production within 30 days, then Lithia also forfeited any valid objections to that document production, including any available assertions of privilege.<sup>1</sup>

Lithia produced what it claimed to be Burgess's arbitration agreement. *App. 4, B255-258*. If valid, the contract required Burgess to

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<sup>1</sup> Where a party fails to comply with production as demanded, a default analysis is applied, using the 30th day as the starting point. *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142,1149 (9th Cir. 2005). Any claim of privilege is also waived by failure to timely respond, and boilerplate objections to Rule 34 requests are insufficient to assert a privilege. *Id.* at 1149.

submit any dispute to arbitration under the Federal Arbitration Act,..." *Id.*, B257, at ¶ 2. The Federal Arbitration Act does not impose the Federal Rules of Civil Procedure on an arbitration proceeding,<sup>2</sup> but Lithia's contract guaranteed Burgess application of the Federal Rules of Civil Procedure. *Id.*, ¶ 2.

Burgess told Lithia that while some of the arbitration document was "considered substantively unconscionable," she would agree to arbitrate under its terms—that is, using the Federal Rules of Civil Procedure as contracted. *App. 4, B240, 242.* Lithia thereupon sent its arbitration agreement to the arbitrator. *Id.*, B242-243.

By July 23<sup>rd</sup>, Lithia had still not responded to the first set of discovery, nor moved to stay the superior court proceeding. Lithia would promise answers by a certain date, and the date would go by without response or explanation. *App. 4, B150-151; 153.*

On August 9<sup>th</sup>, Burgess sought the intervention of the Arbitrator to enforce the Federal Rules of Civil Procedure process against Lithia by a motion to compel. *App. 4, B153.* The Arbitrator began the arbitration by

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<sup>2</sup> See, e.g., *Morgan Keegan & Co., Inc. v. Grant*, CV0907369SJOFFMX, 2010 WL 11549681, at \*5 (C.D. Cal. June 30, 2010), *aff'd*, 497 Fed. Appx. 715 (9th Cir. 2012)(noting that federal court civil rules are not necessarily imposed on the arbitration proceeding; "rather, our responsibility is to ensure that the FAA's due process protections [have been] afforded.")

signaling that he may not enforce the Federal Rules of Civil Procedure, but would instead enforce a standard of what he deemed reasonable, stating, “OK we can talk about CRs and FRCPs, but I will do what I deem reasonable. ...” *App. 4, B71*. The Arbitrator then told Lithia to “see if you can get answers to Ms. Schultz by the 14<sup>th</sup> as you indicated...” *App. 4, B172*. Lithia did not get answers to Burgess by the 14<sup>th</sup>. Instead, on August 14<sup>th</sup>, Lithia served Burgess a pleading entitled “Respondent’s Objections and Responses to Claimant’s First Interrogatories and Requests for Production,” which, yet again, simply objects to nearly every interrogatory asked, and even where an answer is offered, doesn’t answer the interrogatory posed. *App. 4, B81-92*. Lithia told Burgess that it would produce responsive documents at some indefinite point in time, but only after Burgess agreed to a protective order that Lithia deemed satisfactory for its needs. *Id., at e.g., B84, RFP 5*. Lithia offered no privilege log identifying what responsive documents were being withheld. *Id., ref. RFP 5, stating, “A privilege log will be provided.”* Lithia’s behavior continued to violate FRCP 33 and 34.

On August 15, 2018, Burgess asked the Arbitrator to compel Lithia to properly answer interrogatories and produce documents per FRCP 37. *App. 4, B172 (email transmitting); and B42-49*. Burgess would ultimately

allege that Lithia was abusing the arbitration forum, and defeating the very purpose of arbitration. *App. 4, B221-222*. The Arbitrator failed to enforce the Federal Rules of Civil Procedure.

On Sept. 4<sup>th</sup> the Arbitrator told Burgess that she needed to “(come) to some common understanding” with Lithia. *App. 4, B245*. That never happened. On September 18, 2018, the Arbitrator thereupon issued an order on Burgess’s motion to compel. *App. 4, B225-227*. Eight months after Burgess served her first set of discovery, the Arbitrator denied Burgess her answers and her requested production as “moot.” *Id., B225*. It first held that Lithia’s answers to January 2018 discovery were not due until August 6<sup>th</sup>, which violates FRCP 33 and 34’s time requirements. *Id., B225*. It failed to apply Rule 33’s waiver or Rule 34’s default analysis. It then held that Lithia’s March 7<sup>th</sup> boilerplate memo full of general objections was a legitimate “answer” to Burgess’s discovery, in violation of federal rules, and federal discovery law such as *Burlington, supra. Id., B225*. It ignored Lithia’s failure to deliver answers even by the Arbitrator’s own “due date” of August 6<sup>th</sup>. *Id.* It held that Lithia’s August 14<sup>th</sup> boilerplate objection document also furnished “answers,” in violation of FRCP 33 and 34. Ultimately, the Arbitrator did not require Lithia to answer or produce anything. *Id., B225*. It accepted Lithia’s demand that

Burgess acquiesce to Lithia's idea of a protective order *before* it produced anything, and told Burgess to work it out with Lithia. *Id.*, B226.

Burgess thereupon asked the superior court to allow her to rescind her arbitration agreement, terminate her duty to arbitrate, and proceed on course for trial. *App. 6, B289-291 (motion); App. 5, B266-287 (memorandum)*. Burgess argued that both Lithia *and* the Arbitrator breached the arbitration agreement by refusing her the arbitration agreement's Federal Civil Rules of Procedure, and that by their breach of this material term, she was entitled to rescind her agreement to that process. *See Memo, App. 5, B266-287*. The superior court action remained ongoing, and set for trial on June 10, 2019. *Appendix 7, B293*.

The trial court denied Burgess's motion, holding that, as an issue of first impression, it did not have jurisdiction to address Burgess's request for contract rescission. *App. 2, B24-35*. It held that:

4. Washington law appears to prohibit the court from addressing Plaintiff's 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.

*App. 2, B19, ¶¶ 4, 5.*

It certified the issue to this Appellate Court. *Id.*, B00020.

Lithia never moved to dismiss Burgess' complaint in the superior court, nor did it move to stay the superior court's ongoing action pending arbitration. Lithia never moved the superior court to reconsider its May 2018 scheduling order, nor did it appeal that order. Trial on Burgess's statutory claims remained set in the superior court for June 10, 2019.

**V. ARGUMENT FOR REVIEW.**

**A. Review should be accepted under RAP 2.3(b)(4).**

RAP 2.3(b)(4) provides that discretionary review may be accepted where "(4) The superior court has certified, or all the parties to the litigation have stipulated, that the order involves a controlling question of law as to which there is substantial ground for a difference of opinion and that immediate review of the order may materially advance the ultimate termination of the litigation." That has occurred here, and this Court should accept review.

Review of the issue will not just advance the proper termination of the litigation, but it will clarify the law in an important area related to arbitration proceedings conducted by agreement of the parties within the context of an ongoing superior court action that is never stayed, nor dismissed.

**B. Arbitration is favored as a means to resolve disputes.**

Both state and federal law 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).

**C. This trial court did not lose jurisdiction over the superior court complaint when the Plaintiff agreed to arbitrate her claim under an arbitration agreement.**

There is some authority that the role of the superior court is envisioned as limited where an arbitration process is agreed upon. *In Verbeek Properties, LLC v. GreenCo Envtl., Inc.*, 159 Wn. App. 82, 87-88 (2010), the Appellate Court notes that the superior court's role is intended to be that of deciding "whether or not there is an enforceable agreement to arbitrate," and to determine if one party refused to arbitrate. If the court finds an enforceable agreement, "it shall order the parties to arbitrate." *Id.*, citing RCW 7.04A.070(1). But this role is not at issue here. Lithia was never required to move to compel the initiation of arbitration, because Burgess agreed to participate in the arbitration. 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 it cites to RCW 7.04.150-.170, and the latter were repealed effective January 1, 2006.

The first question presented in this appeal is not whether the superior court’s role is limited, but whether the superior court relinquishes jurisdiction altogether where an agreement to arbitrate is made in the course of an ongoing superior court litigation. It does not. Even an order staying superior court proceedings pending an arbitration is only a temporary suspension of the proceedings in court. *Everett Shipyard, Inc. v. Puget Sound Envtl. Corp.*, 155 Wn. App. 761, 769 (2010), 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. In fact, parties to a contract who agree to arbitrate “affirmatively invoke the jurisdiction of Washington courts to facilitate and enforce the arbitration.” *Everett Shipyard, Inc.*, 155 Wn. App. at 767, citing *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 896 (2001).

In this regard, the trial court’s order concluding that it had no jurisdiction to determine Burgess’s breach claim is error. The superior court never lost jurisdiction over Burgess’s claims, and in fact, it set trial on those claims for June 2019 without any objection from either party.

*App. 7, B293.* Review should be accepted, and the questions certified answered in favor of continuing jurisdiction in the superior court.

**D. The trial court has continuing jurisdiction to enforce an arbitration agreement's terms.**

The second “jurisdictional” question presented is whether the court can use its ongoing jurisdiction to enforce the arbitration agreement’s terms and guarantees as written under its enforcement powers. Review should be accepted and the question answered in the affirmative. Burgess’s agreement to arbitrate guaranteed her compliance with and application of the Federal Rules of Civil Procedure by both Lithia and the Arbitrator. *App. 4, B257, ¶ 2.* Both the superior court and the parties are given the specific authority to enforce an arbitration agreement: “(1) A court of this state having jurisdiction over the dispute and the parties *may enforce an agreement to arbitrate.*” RCW 7.04A.260. The phrase “may enforce an agreement to arbitrate,” as used in RCW 7.04A.260, is not able to be read only one way. The language can be read to enforce the agreement *to go into* an arbitration proceeding (an “agreement to arbitrate”), but it can also be read to mean to enforce the terms of that agreement as to the arbitration procedure; that is, to enforce the agreement that the employee receives the process of the Federal Rules of Civil

Procedure. Both RCW 7.04A.260's language and *Everett*'s jurisdictional holding allow Burgess to ask the superior court to *enforce* this arbitration agreement's guarantee of the Federal Rules of Civil Procedure to her, and even to thereby order Lithia to produce discovery. This is the superior court's statutory right to "enforce an agreement to arbitrate" under the plain terms of RCW 7.04A.260.

In this regard, review should be accepted, and Burgess's motion to vacate the Arbitrator's order deemed to be an enforcement action of the agreement to arbitrate, with the trial court accorded the statutory jurisdiction to determine that request.

**E. Rescission of an arbitration agreement is an enforcement of that agreement.**

Burgess also asked the court to rescind her agreement to arbitrate. The third jurisdictional question thus presented is whether rescission is enforcement of the agreement. The question should be answered in the affirmative. Rescission is a contract enforcement remedy. "It is black letter law of contracts that the parties to a contract shall be bound by its terms." *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 344 (2004). Where a breach 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). Rescission is *enforced* in equity, as “a just and equitable remedy under all the circumstances of the particular case.” *Peterson v. Boyd*, 46 Wn.2d 97, 99-100 (1955). “Contract 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).

Under the Federal Arbitration Act (FAA) as well, equitable contract remedies are allowed. An arbitration agreement is enforceable, “save upon such grounds as exist at law *or in equity for the revocation of any contract.*” *Gandee*, 176 Wn.2d at 603 (emphasis added), citing to 9 U.S.C. § 2. The FAA thus grants the court the equitable ability to revoke a contract.

*Everett Shipyard, Inc.*, is an example of a de facto rescission, but in that instance, the rescission was done by the arbitrator. The *Everett* arbitrator found that a material breach of the arbitration agreement by one party was cause to close the arbitration. *Id.*, 155 Wn. App. at 769. Closure is de facto rescission—it places the parties back into the position they

were in before the agreement. The defendant then duly moved to dismiss the pending lawsuit in the superior court, and was granted that relief. The case shows that “closing the arbitration” is an enforcement remedy, and thus the superior court, per RCW 7.04A.260, would have the same continuing jurisdiction to similarly enforce the agreement to arbitrate by closing that process.

The question of whether rescission qualifies as enforcement action under RCW 7.04A.260 should be accepted for review and answered in the affirmative.

**F. This State’s UAA allows parties to contract for specific terms and processes within an arbitration. Those terms may be enforced by the superior court.**

The Uniform Arbitration Act’s RCW 7.04A.040 allows parties to contract for specific processes within their arbitration. “(1) Except as otherwise provided in subsections (2) and (3) of this section, the parties to an agreement to arbitrate or to an arbitration proceeding may waive or vary the requirements of this chapter to the extent permitted by law.” RCW 7.04A.040(1). As the material example in this appeal, the UAA does not require an arbitrator to comply with civil rules of procedure. RCW 7.04A.150. Instead, “(1) The arbitrator may conduct the arbitration in such

manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding.” *Id.* The Federal Arbitration Act also does not require compliance by the Arbitrator with the Federal Rules of Civil Procedure in an arbitration proceeding.<sup>3</sup> But Lithia and Burgess contractually modified this provision under either and/or both Acts. Lithia and Burgess agreed that the Federal Rules of Civil Procedure were to apply. *App. 4, B256-257, ¶ 2.* This is a contractual modification which is enforceable under RCW 7.04A.040 and RCW 7.04A.260. Once modified, the parties to the contract are bound by its terms. *Adler v. Fred Lind Manor*, 153 Wn.2d at 344. Because this arbitration contract contains specific guarantees of process, then the superior court may enforce those processes through its statutory authority. Review should be accepted, and this Appellate Court should so hold.

**G. The superior court’s enforcement authority of contract terms is critical to its obligation to ensure that litigants retain the constitutional process due them under their arbitration agreement.**

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<sup>3</sup> See, e.g., *Morgan Keegan & Co., Inc. v. Grant*, CV0907369SJOFFMX, 2010 WL 11549681, at \*5 (C.D. Cal. June 30, 2010), *aff’d*, 497 Fed. Appx. 715 (9th Cir. 2012)(noting that federal court civil rules are not necessarily imposed on the arbitration proceeding; “rather, our responsibility is to ensure that the FAA’s due process protections [have been] afforded.”)

Substantive and procedural unconscionability concepts apply to agreements to arbitrate. *See Zuver v Airtouch Communications Inc.*, 153 Wn. 2d 293, 303 (2004). Substantive due process bars arbitrary and wrongful conduct, “notwithstanding the fairness of the implementing procedures.” *State v. Beaver*, 184 Wn.2d 321, 332 (2015), citing *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992). Procedural due process requires that actions be implemented in a “fundamentally fair manner.” *State v. Beaver*, 184 Wn.2d. at 332, citing *United States v. Salerno*, 481 U.S. 739, 746 (1987). It is therefore consistent with the superior court’s ongoing jurisdiction over arbitration proceedings that the court enforce guaranteed procedural due process under the Federal Rules of Civil Procedure for which the employee contacted. Where that “process due” is violated, then rescission is warranted to enforce that agreement under the contract, as well as under procedural and substantive due process grounds. Review should be accepted, and this Court should so hold.

**H. Discretionary review should be accepted of this jurisdictional enforcement issue.**

The trial court’s holding that it has no jurisdiction to entertain a motion for enforcement of an arbitration agreement, including rescission, for the adverse party and Arbitrator’s breach of that agreement is a significant

issue of law that should be determined by this Appellate Court. The trial court has certified this jurisdictional question per RAP 2.3(b)(4), and Petitioner Burgess respectfully requests that these important questions be determined.

**CONCLUSION.**

Appellant Evette Burgess respectfully requests that this Court accept discretionary review.

DATED this 20<sup>th</sup> day of February, 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 20<sup>th</sup> day of February, 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 20<sup>th</sup> day of February, 2019.

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