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STATE OF WASHINGTON
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NO. 630474

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

EVERETT SHIPYARD, INC.,

Appellant,

v.

PUGET SOUND ENVIRONMENTAL CORP.,

Respondent.

APPELLANT'S REPLY BRIEF

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I. Introduction.

The sole issue before this Court is whether the Superior Court had subject matter jurisdiction over the parties when it issued its orders dismissing Puget Sound Environmental's case and awarding Everett Shipyard its attorneys' fees and costs. Puget Sound Environmental avoids this simple fact. Rather, Puget Sound Environmental restates its arguments relating to the merits of the trial court's original CR 41 dismissal of the suit brought against Everett Shipyard. The merits of the CR 41 dismissal order have not been appealed and are not properly before this Court.

Authority from Washington State, the U.S. Supreme Court, the Ninth Circuit, and other courts establish that the Superior Court retained subject matter jurisdiction over this matter when it granted dismissal of the case and awarded Everett Shipyard its fees and costs. The Superior Court erred when it vacated these orders on the basis of lack of subject matter jurisdiction. At all times from the filing of the civil suit through dismissal, the Court retained jurisdiction.

II. Counterstatement of Facts.

The AAA arbitration that was commenced in this case was terminated by AAA on an order of the arbitrator. CP 50, 52-54. Despite Puget Sound Environmental's statements to the contrary, the facts on the record are clear. Puget Sound Environmental was twice ordered to

participate in arbitration, and the arbitration was terminated, after a suspension, when Puget Sound Environmental refused to pay its required arbitration fees. As set forth in Everett Shipyard's Opening Brief, the timetable of events in connection with the terminated arbitration is as follows:

- October 4, 2006 Trial court enters Order Granting Defendant's Motion to Stay Proceedings and Compel Arbitration. CP 8-9.
- October 27, 2006 Everett Shipyard initiates AAA arbitration. CP 29, 33-38.
- November 7, 2006 Puget Sound Environmental moves to lift stay and set trial date instead of arbitrating. CP 16-19.
- November 21, 2006 Trial court enters second order compelling arbitration. CP 26-27.
- April 3, 2007 Everett Shipyard pays its share of AAA arbitration fees. CP 28-29, 42-44.
- April 24, 2007 AAA informs parties Puget Sound Environmental has not paid its share of arbitration fees. CP 46-47.
- May 14, 2007 AAA informs parties that the arbitration has been suspended at the order of the arbitrator. AAA also informs parties that "pursuant to the direction of the arbitrator" the case will be terminated if the required fees are not paid. CP 50.
- July 10, 2007 AAA informs parties that the arbitration has been terminated. CP 52-54, 156.

In its Order Granting Defendant's Motion to Stay Proceedings and Compel Arbitration, the Superior Court *stayed* the proceedings; it did not dismiss the case. In relevant part the Order reads:

It is FURTHER ORDERED that further proceedings in this case are **stayed** and the parties shall participate in arbitration pursuant to their contractual agreement to arbitrate all disputes before a single arbitrator under the rules of the American Arbitration Association.

CP 8-9 (emphasis added).

Importantly, the Superior Court did not dismiss or otherwise dispose of the suit, it was simply stayed. A "stay" is defined in Black's Law Dictionary 1413 (6th ed. 1991) as:

A stopping; the act of arresting a judicial proceeding by the order of the court...A stay is a suspension of the case or some designated proceedings within it. It is a kind of injunction with which a court freezes its proceedings at a particular point. (emphasis added)

Suspension of a case impliedly means retention of the case. A court's authority to issue a stay order emanates from its inherent power and the state constitution. *In the Matter of Koome*, 82 Wn.2d 816, 514 P.2d 520 (1973). See, also *King v. Olympic Pipeline*, 104 Wn. App. 338, 350, 16 P.3d 458 (2001) ("The court has inherent power to stay its proceedings where the interest of justice so requires. As Justice Cardozo observed, '[T]he power to stay proceedings is incidental to the power

inherent in every court to control the disposition of the causes on its docket...”)

The stay order did not divest the Superior Court of subject matter jurisdiction. The only effect of the stay order was to temporarily halt civil proceedings. Everett Shipyard is aware of no reported case or other authority which stands for the proposition that a stay order ousts the court’s jurisdiction and Puget Sound Environmental cites no authority for this position. A stay is simply that, a temporary suspension of civil proceedings. It does not destroy a court’s subject matter jurisdiction or power to manage the case and no court anywhere has so held that a stay has that effect.

The facts of this case are that the AAA arbitration was **terminated** by order of the arbitrator. CP 52-54. The reason was Puget Sound Environmental’s failure to comply with court ordered arbitration. In doing so, Puget Sound Environmental violated the Superior Court’s orders to arbitrate.

In the May 14, 2007 letter to the parties, the AAA case manager stated:

As advised in our letter dated April 24, 2007, ***the arbitrator has suspended this matter*** as the deposits have not been paid pursuant to the Rules....***Pursuant to the direction of the arbitrator***, if deposits have not been made on or before June 14, 2007, we shall proceed to close our file.

CP 50 (emphasis added).

Further, in the July 10, 2007 letter, the AAA case manager wrote:

As advised in our previous letter *we are as of this date closing our files*. Please note that *the case file will be destroyed six (6) months after the date of this letter*.

CP 52-54 (emphasis added).

The arbitrator's direction was clear. The arbitration was first to be suspended unless and until the required fees were paid. If this did not take place, the arbitrator ordered termination. Puget Sound Environmental failed to respond during the suspension period. When Puget Sound Environmental did not pay its share of the required fees, the arbitrator's order took effect and the arbitration was terminated. AAA's "jurisdiction," for lack of a better term, was ended. Everett returned to the Superior Court to have the stay lifted and seek a remedy for the refusal to arbitrate.

Despite Puget Sound Environmental's unfounded contention to the contrary, Everett Shipyard consistently took the position before the trial court that the matter should be stayed pending arbitration. CP 1-7, CP 8-9. The order reflects a stay, not a dismissal. Everett Shipyard has never suggested in its pleadings or at any other time that by ordering arbitration the trial court was ousted of its inherent subject matter jurisdiction during the pendency of the arbitration.

III. Puget Sound Environmental Admits it Should be Bound by Arbitrator's Order.

Puget Sound Environmental admits in its brief that Everett Shipyard was entitled to move the Superior Court for dismissal. On pg. 16 of Puget Sound Environmental's opposition it states:

If Appellant wanted to move forward with arbitration and seek a default in the hearing, or establish that Respondent was wrongfully or negligently delaying arbitration, that would be up to Appellant. If Respondent felt that the allegations of wrongful delay before the arbitration was premature or improper, that was for Respondent to argue before the arbitrator. If the arbitration opinion went to Appellant, **or if arbitration was shown to be wrongfully frustrated by Respondent, Appellant would then be free to seek confirmation or a sanction of dismissal with the superior court.**

(emphasis added).

In Puget Sound Environmental's own words, the "arbitration was wrongly frustrated by Respondent." As set forth above, Puget Sound Environmental's position is that if it frustrated the arbitration, Everett Shipyard had the right to seek a sanction of dismissal with the Superior Court. This is precisely what took place.

Alternatively, even if the Superior Court was divested of subject matter jurisdiction when it entered the order staying proceedings pending arbitration (which it was not), it regained jurisdiction once the arbitrator issued his decision to terminate the arbitration. Puget Sound Environmental admits, as it must, that Superior Courts have subject matter

jurisdiction to confirm or vacate arbitration decisions. Here, the arbitrator directed the arbitration be terminated. This was a final decision that disposed of further proceedings in arbitration. Once this took place, by Puget Sound Environmental's own reasoning, the Superior Court regained subject matter jurisdiction.

IV. Tjart v. Smith Barney, Inc. Compels Reversal of the Superior Court Vacation Order.

In *Tjart v. Smith Barney, Inc.*, 107 Wn. App. 885, 28 P.2d 823 (2001) a Superior Court's dismissal for failure to arbitrate was affirmed by this Court. The material facts of that case are directly on point with this case. The Superior Court entered an order both staying proceedings and compelling arbitration. After Tjart failed to arbitrate, the Superior Court dismissed her complaint, holding:

Smith Barney maintained that she was bound by her agreements to arbitrate and the trial court entered an order staying the proceedings and compelling arbitration. After she failed to arbitrate, the trial court dismissed her complaint. On appeal, Tjart argues that her statutory discrimination claims should not be subject to arbitration. We affirm, because the Shearson Application is an enforceable agreement to arbitrate.

Id. at 889 (emphasis added). In *Tjart*, the Superior Court was not divested of subject matter jurisdiction by the stay order and had authority to issue an order dismissing the case. This is a controlling decision.

Puget Sound Environmental attempts to distinguish the holding in *Tjart* on the basis that arbitration in that case had been delayed for a longer period of time than in this case. This Court did not base its decision in *Tjart* on the length of time the arbitration was delayed. Rather, it found that the agreement to arbitrate was enforceable and a sanction of dismissal to be proper once arbitration was refused. Once having made this determination, this Court affirmed dismissal for Tjart's refusal to arbitrate. There is no suggestion in the holding of *Tjart* that the Superior Court was required to engage in a reasonableness determination before dismissing the case. Rather, this Court held that dismissal after a failure to arbitrate per court order was appropriate.

Applying Puget Sound Environmental's reasoning that the Superior Court lost subject matter jurisdiction after the order staying proceedings leads to absurd results. It would mean that every act of the Superior Court after the October 4, 2006 Order Granting Defendant's Motion to Stay Proceedings and Compel Arbitration was void for lack of subject matter jurisdiction. This would include Puget Sound Environmental's own Motion To Lift Stay of Proceedings and For Trial Date. CP 16. At the time it filed its Motion to Lift Stay, Puget Sound Environmental did not challenge the Superior Court's subject matter

jurisdiction. To the contrary, it affirmatively sought action from the Court in the form of re-setting the trial date and continuing the proceedings.

Following Puget Sound Environmental's reasoning that the Superior Court lost subject matter jurisdiction after ordering a stay (which it did not) would mean the Superior Court's no authority to enter its Order Denying Plaintiff's Motion to Lift Stay and Granting Defendant's Cross-Motion to Compel Arbitration and Impose Sanctions. CP 26-27. Puget Sound Environmental, however, did not challenge this order. Rather, it paid the sanctions imposed by the Superior Court and proceeded to arbitration.

More importantly, applying Puget Sound Environmental's contention that a Superior Court loses subject matter jurisdiction after staying proceedings and ordering arbitration would mean that the Court would lose its power to control the actions of the parties after staying the case. Such a result flies in the face of the Court's inherent authority to manage its docket. *In the Matter of Koome*, 82 Wn.2d 816, 514 P.2d 520 (1973). It would result in exactly the type of abuse of process present here. Puget Sound Environmental, after being twice ordered to participate in arbitration, defied the order. Such conduct directly contravenes the Superior Court's orders compelling arbitration, but Puget Sound Environmental contends the Court has no authority to force it to comply

with those orders. The fact is that Puget Sound Environmental believes it can ignore the Court's orders with impunity.

In addition to its inherent power and its constitutional authority, the Superior Court is statutorily authorized to enter orders regarding proceeding before it at all times. RCW 2.28.010. In part, this statute reads:

Every court of justice has power -- (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein.

Id. (emphasis added). Pursuant to the statute, the Superior Court here retained the authority and power to compel obedience to its orders requiring arbitration. Puget Sound Environmental's position is directly contrary to the statutory grant of authority in the Superior Court to enforce its orders. It is also contrary to the fact that even after dismissal, (as opposed to a mere stay) the Superior Court retains subject matter jurisdiction and authority over a case for such purposes as ruling on CR 59 or CR 60 motions. Following Puget Sound Environmental's reasoning to its logical conclusion would mean that a Superior Court would be powerless to hear such motions once it stayed a case and ordered arbitration. Such a result is contrary to the weight of controlling authority,

and contrary to the Superior Court's inherent, constitutional, and statutory powers.

V. Supreme Court Case Law Mandates Reversal of Vacation Order.

In *The Anaconda v. American Sugar Co.*, 322 U.S. 42, 64 S.Ct. 863, 88 L.Ed. 1117 (1943), the Supreme Court found subject matter jurisdiction remained with the trial court after a case was stayed pending arbitration. Puget Sound Environmental ignores *The Anaconda* in its opposition brief. The holding of *The Anaconda* is directly on point. In that case the U.S. Supreme Court held that a Superior Court is not divested of subject matter jurisdiction after it orders a stay and arbitration:

The section obviously envisages action in a court on a cause of action and does not oust the court's jurisdiction of the action, though the parties have agreed to arbitrate.

Id., at 44 (emphasis added).

The Superior Court erred when it vacated its prior orders and the vacation order should be reversed.

VI. Persuasive Ninth Circuit Authority Mandates Reversal of Vacation Order.

The rule in the Ninth Circuit is that a district court retains jurisdiction over a dispute at all times, even during the period in which the parties are attempting to arbitrate. In *Morris v. Stanley*, 942 F.2d 648 (9th

Cir. 1991)¹ the Ninth Circuit held that a trial court retains subject matter jurisdiction after entering an order staying proceedings and compelling arbitration. In that case, the appellant challenged the district court's subject matter jurisdiction to enter a Rule 41 dismissal after a case had been stayed and arbitration ordered. The court held:

A rule 41(b) motion, like the attachment action in *Anaconda*, is precisely the kind of issue that remains within the jurisdiction of the court. Appellees here did not seek district court interference with the process of arbitration, but rather sought a decision on a question regarding their rights as federal court litigants. The question of a rule 41(b) dismissal, like that of an attachment, is wholly outside the scope of the arbitration process and is, fundamentally, an issue within proper federal jurisdiction.

Id. at 654 (underlining added).

In *Morris*, the Ninth Circuit analyzed four separate objections to the district court's ruling; 1) that the Rule 41 dismissal was improper; 2) that the district court had no jurisdiction to dismiss the state claims already submitted for jurisdiction; 3) the court was without jurisdiction to dismiss federal claims; and 4) the court had no jurisdiction to enter a clarifying order. Id., at 651. After disposing of the objections to the impropriety of the Rule 41 dismissal, the court turned its attention to the jurisdictional

¹ Because Fed. R. Civ. P. 41 and 60, and CR 41 and 60, are substantially identical, Washington courts may use cases analyzing the federal rule as authority. *State v. Ramos*, 124 Wn. App. 334, 339, 101 P.3d 872 (2004).

questions. As set forth above and in more length in Everett Shipyard's Opening Brief, the holding in *Morris* was that the trial court retained subject matter jurisdiction at all times.

The court recognized that allowing parties to avoid court-ordered arbitration would result in parties refusing to arbitrate at all:

Rather, the court was asked to dismiss the entire action because, after more than two years, it was clear plaintiffs had no intention of going forward with the arbitration in good faith. The question was not one of arbitration mechanics, but of the sanctity of the process itself. If plaintiffs could simply refuse to go forward and the district court was without power to influence that choice, the opportunity to undermine a valid agreement to arbitrate would be enormous.

Id. at 653 (underlining added). This is precisely the result that has occurred here. Puget Sound Environmental has failed to arbitrate and contends that the Superior Court was powerless to compel it to do so. *Morris* is persuasive authority that the Superior Court erred when it found it lacked subject matter jurisdiction to order CR 41 dismissal.

VII. The Merits of the Superior Court's CR 41 Dismissal is not before this Court.

The propriety of the Superior Court's CR 41 dismissal and award of fees and costs to Everett Shipyard is not before this Court. What is solely before this Court is whether the Superior Court erred in granting Puget Sound Environmental's CR 60 motion on the sole basis of lack of

subject matter jurisdiction. Puget Sound Environmental attempts to distinguish the holding in *Morris* from the instant case by focusing on the *Morris* court's analysis of the specific facts that supported the conclusion that the Rule 41 dismissal was appropriate. Puget Sound Environmental then attempts to establish that under a similar analysis dismissal was not appropriate here.

Puget Sound Environmental's arguments relating to *Morris* simply revisit the merits of the CR 41 dismissal. Whether or not the original CR 41 dismissal was appropriate, however, is not the issue before this court. The dismissal order was never timely appealed on the merits. The only basis for the Superior Court's CR 60 vacation order was its erroneous conclusion that it lacked subject matter jurisdiction. The Superior Court concluded:

PSE's challenge to subject matter jurisdiction is well taken. Solely on the basis of lack of subject matter jurisdiction, this Court vacates its orders of November 9, 2007 and November 28, 2007 as set forth in its Order entered January 2, 2009 over ESY's objection.

CP 156 (emphasis added). The merits of the CR 41 dismissal were not before the Superior Court and are not properly before this court.

The holdings of *The Anaconda* and *Morris* are clear. The reasoning of these cases leads to the inescapable conclusion that the Superior Court had subject matter jurisdiction when it entered its orders

dismissing the case and awarding fees and costs to Everett Shipyard. It was legal error to vacate those orders.

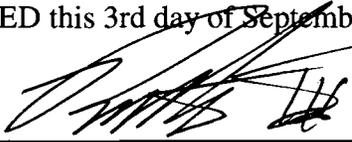
VIII. Everett Shipyard is Entitled to its Fees on Appeal.

Pursuant to RAP 18.1, and RAP 14.1 - 14.6, Everett Shipyard is entitled to an award of its fees and costs on appeal, in addition to the fees and costs awarded by the Superior Court. The contract between Everett Shipyard and Puget Sound Environmental contained a provision entitling the prevailing party in any arbitration or legal action to payment for all costs and expenses, including legal fees and interest at one and one-half percent (1.5%) per month.

Should the vacation order be reversed, Everett Shipyard would be the prevailing party on appeal and entitled to an award of its fees and costs on appeal as the prevailing party under the terms of the contract. It requests permission to submit its fees and costs petition after decision.

RESPECTFULLY SUBMITTED this 3rd day of September, 2009.

By: _____


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CERTIFICATE OF SERVICE

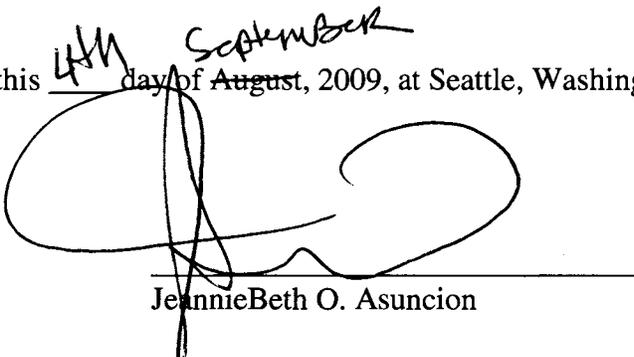
The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing RESPONDENT'S REPLY BRIEF on the following individuals in the manner indicated:

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- Via U.S. Mail
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SIGNED this 4th day of September, 2009, at Seattle, Washington.



JeannieBeth O. Asuncion