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DIVISION II, COURT OF APPEALS  
OF THE STATE OF WASHINGTON

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LARRY NELSON and the marital community  
composed of Larry and Barbara Nelson,

Plaintiffs/Respondents

v.

WESTPORT SHIPYARD, INC.; J. ORIN EDSON  
and CHARLENE EDSON; and DARYL  
WAKEFIELD and KIM WAKEFIELD,

Defendants/Appellants

ON APPEAL FROM GRAYS HARBOR COUNTY SUPERIOR COURT  
(Hon. F. Mark McCauley)

APPELLANTS' PETITION FOR REVIEW

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## I. IDENTITY OF PETITIONER

Defendants and Appellants Westport Shipyard, Inc., J. Orin and Charlene Edson, and Daryl and Kim Wakefield (collectively "Defendants" or "Appellants") petition for the relief set forth below.

## II. COURT OF APPEALS DECISION

Appellants' petition for review of the published decision terminating review entered August 7, 2007 (the "Decision") by Division II of the Court of Appeals. A copy of the Decision is attached as Exhibit A of the Appendix to this Petition.<sup>1</sup>

## III. STATEMENT OF ISSUE PRESENTED FOR REVIEW

This case involves fundamental principles of federal arbitration law and their primacy under the Supremacy Clause of the United States Constitution. The question presented is: Where the parties enter into an agreement that contains an arbitration provision, and one party challenges the enforceability of the agreement as a whole, who must hear the challenge to the enforceability of the agreement as a whole in the first instance, the arbitrator or the trial court? The United States Supreme Court, in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), answered that inquiry emphatically: the arbitrator. The Court of Appeals, however, refused to apply Buckeye, employing a strained reading to distinguish this case on its facts. The Decision flatly contravenes a

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<sup>1</sup>The Decision currently is available at 2007 WL 2274469; the official Washington Reporter pagination has not yet been issued. This Petition cites to the Decision in its Westlaw format.

long line of United States Supreme Court precedent, and federal and state case law, which strongly favors finding arbitrability. If the Decision is allowed to stand, Washington's arbitration jurisprudence will be contrary to United States Supreme Court precedent and inconsistent with other state courts that have considered and applied Buckeye. This result warrants review under RAP 13.4(b)(4) (involving issues of substantial public interest).

#### IV. NATURE OF THE CASE AND DECISION BELOW

A. Westport Shipyard, Inc. Permits Plaintiff to Purchase Shares of the Company Subject to the Buyback and Arbitration Provisions of the Buy-Sell Agreements and the 2004 Shareholders Agreement.

Defendant and Appellant Westport Shipyard, Inc. ("Westport") is engaged in the business of manufacturing and selling semi-production motoryachts throughout the United States and internationally, and has offices in Washington and Florida. The current shareholders are Defendants and Appellants J. Orin Edson and Daryl Wakefield.

In late 1998, Westport and its then-shareholders agreed to allow Larry Nelson ("Mr. Nelson" or "Plaintiff"), an employee of Westport, to become a shareholder. See Defendants' Motion to Compel Arbitration, at 2 (CP 31). Over the next three years, Mr. Nelson purchased 460 shares, or approximately two percent, of Westport stock, for a total price of \$327,833. Id. (CP 31); Plaintiff's First Amended Complaint for Damages, and Amended Complaint and Information on Quo Warranto ("First Amended Complaint") (CP 19). In doing so, Mr. Nelson agreed in three separate Buy-Sell Agreements that he was required to sell his shares back to Westport in the event his employment was terminated. See December 17, 1998 Buy and Sell

Agreement at 1 (CP 56); December 8, 2000 Buy and Sell Agreement, at 1 (CP 59); December 17, 2001 Buy and Sell Agreement at 1 (CP 64).

In 2004, Mr. Nelson, together with his wife, the other shareholders at that time (Mr. Edson, Mr. Richard Rust together with his wife), and Daryl Wakefield, a Westport employee, together with his wife, executed a Shareholders Agreement ("2004 Shareholders Agreement"). See 2004 Shareholders Agreement, at 2 (CP 45). Under Section 2.3 of the 2004 Shareholders Agreement, Westport's three employee shareholders (Mr. Nelson, Mr. Wakefield and then-employee Richard Rust) agreed to sell their shares of Westport common stock back to Westport, upon the occurrence of any one of several events, including: (1) termination of employment with Westport, or (2) an "unresolvable difference" amongst the shareholders. Id. (CP 45). Section 6.5 of the 2004 Shareholders Agreement provided for mandatory arbitration of "disputes among any of the parties arising out of this Agreement." Id. at 9 (CP 52).

Mr. Nelson understood and agreed to the buyback requirements that attached to the Westport shares he was permitted to acquire. Declaration of Larry Nelson in Support of Plaintiff's Opposition to Motion to Compel Arbitration ("Nelson Decl."), ¶ 5 at 2 (CP 110). Mr. Nelson also understood and agreed that all of his shareholder agreements "required" arbitration of matters arising out of the agreement. Id., ¶ 19 at 5 (CP 113).

B. Mr. Nelson's Breach of the 2004 Shareholders Agreement, and Appellants' Request for Arbitration.

Following the termination of Mr. Nelson's employment in June 2005, Westport notified him that it was exercising its right under the 2004 Shareholders Agreement to buy back his shares. See 6/24/05 Letter from Westport to Plaintiff (CP 116-17). Westport tendered \$1,086,570 to Mr. Nelson for his 460 shares. Id. Mr. Nelson refused to accept the tendered payment or to deliver his share certificates back to Westport. Declaration of Mary Welk in Support of Defendants' Motion to Compel Arbitration, ¶ 7 at 3 (CP 42). In response, Westport notified Mr. Nelson of its intent to commence arbitration, as provided under Section 6.5 of the 2004 Shareholders Agreement. See Nelson Decl., ¶ 20 at 5-6 (CP 113-14).

In August 2005, the other shareholders invoked the "unresolvable difference" provision of the 2004 Shareholders Agreement, and Westport again gave Mr. Nelson notice of exercise of its right to purchase his shares. See 8/17/05 Letter from Westport to Plaintiff (CP 417). Mr. Nelson again refused to accept payment or deliver back the share certificates evidencing his shares. See Declaration of James Sanders at 2 (CP 410).

C. Procedural History of the Dispute Giving Rise to the Appeal.

1. Mr. Nelson Files Suit; Appellants Move to Stay Litigation and Compel Arbitration of His 2004 Shareholders Agreement Claims. Despite being given notice of Westport's intent to arbitrate, Plaintiff filed a lawsuit against Defendants claiming, inter alia, he was not bound by the 2004 Shareholders Agreement (in particular, the provisions requiring him to sell his shares back to Westport). See generally First Amended Complaint

(CP 16-29). Plaintiff also alleged breach of contract, breach of fiduciary duty, minority shareholder oppression, tortious interference with business/contract expectancy, and that Westport had discriminated against him in violation of the Washington Law Against Discrimination. Id. Defendants then sought a stay of Plaintiff's "shareholder claims arising under the parties' 2004 Shareholders Agreement," and sought to compel arbitration of those claims, as required under the 2004 Shareholders Agreement.<sup>2</sup> See Defendants' Motion to Stay and Compel Arbitration at 1 (CP 30).

2. The Trial Court Denies Appellants' Motion to Stay and Compel Arbitration, Leaving the Door Open for a Renewed Motion. The trial court issued a letter ruling denying Appellants' Motion to Stay and Compel Arbitration, concluding that the "type of claims" raised by Mr. Nelson in this action did not "arise out of" the 2004 Shareholders Agreement, and thus were not subject to mandatory arbitration "[a]t this stage" of the litigation. See October 31, 2005 Letter Ruling (CP 131-32). The trial court's order, however, left the door open for Appellants to renew their motion. See Order Denying Appellants' Motion to Stay Litigation and Compel Arbitration filed on November 10, 2005 (CP 133-35).<sup>3</sup>

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<sup>2</sup>The claims to be arbitrated are: the enforceability of the buyback provision in Section 2.34 of the 2004 Shareholders Agreement, whether Plaintiff breached his obligation to sell back his shares under the 2004 Shareholders Agreement, the calculation of the buyback price in accordance with the formula in Section 2.4 of the 2004 Shareholders Agreement, and Westport's claim for repayment by Plaintiff of excess distributions for quarterly estimated tax payments.

<sup>3</sup>At the trial court and on appeal, the parties disagreed over the import of language in the trial court's letter ruling and subsequent written order that the  
(continued . . .)

3. The United States Supreme Court Issues Its BUCKEYE Decision; Appellants Renew Their Motion to Compel Arbitration, Which the Trial Court Denies. Appellants engaged in limited discovery, including deposing Mr. Nelson in January and February 2006, to explore the factual bases for his challenge to the 2004 Shareholders Agreement. See Excerpts of Nelson Depositions (CP 343-44). In February 2006, the United States Supreme Court issued its decision in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006). In that case, a party challenged the enforceability of a contract as a whole that contained an arbitration provision but did not challenge the arbitration provision itself. See 126 S. Ct. at 1208. The Supreme Court in Buckeye held that, unless the "challenge is to the arbitration clause itself, the issue of a contract's validity is considered by the arbitrator in the first instance." Id. at 1209.

Following Plaintiff's deposition and the Supreme Court's issuance of its Buckeye decision, Appellants renewed their Motion to Compel Arbitration. See Defendants' Motion to Compel Arbitration or, in the Alternative, for Leave to File an Amended Answer with Counterclaims ("Motion to Compel Arbitration") (CP 390-408). The trial court denied the renewed motion. See Order Denying Motion to Compel Arbitration and

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court was denying the motion to compel "[a]t this stage" of the litigation. The Court of Appeals rejected Mr. Nelson's challenge to the timeliness of Defendants' appeal arising out of this dispute over the meaning of the trial court's language and that ruling is not at issue in this Petition. See Decision, n.5.

Granting Leave to File Amended Answer with Counterclaims (CP 503-04).

Appellants sought relief from the Court of Appeals.

D. The Court of Appeals Rejects BUCKEYE's Express Holding, Concluding that Plaintiff's Challenge to the Enforceability of the 2004 Shareholders Agreement as a Whole Should Be Heard by the Trial Court.

The Court of Appeals affirmed the trial court's refusal to compel arbitration of the enforceability of the 2004 Shareholders Agreement, identifying a number of reasons for its decision. Calling the Buckeye holding "overly-broad," the Court of Appeals found that Buckeye would not apply to the facts presented here. The Court of Appeals concluded the United States Supreme Court could not have intended its "sweeping" pronouncement to apply to contracts with so-called "narrow" arbitration provisions. Decision, \*6. The Court of Appeals also concluded that Washington rather than federal law applied because the 2004 Shareholders Agreement contained a Washington choice-of-law provision and because Westport is a closely-held corporation. Id.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. The Court of Appeals Applied an Untenably Narrow Reading of Binding United States Supreme Court Precedent Applying the Federal Arbitration Act to Cases Governed by that Federal Law.

The Court of Appeals acknowledged that the United States Supreme Court's holding in Buckeye was "sweeping," but then presumed it should read Buckeye narrowly as a matter of "judicial caution and precision," citing State v. Frost, --- Wn.2d ---, 161 P.3d 361, 367 (2007). Decision, \*\*5, 6. This proposition is contrary to longstanding principles

regarding the scope of United States Supreme Court precedent governing federal law, and the Court of Appeals' reliance on Frost is inapposite.

Decisions of the United States Supreme Court regarding federal law are binding on the lower courts, including state courts applying federal law. E.g., Planned Parenthood of Se. Penn. v. Casey, 947 F.2d 682, 691 (3rd Cir. 1991), aff'd in part and rev'd in part on other grounds, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992). This judicial paradigm furthers uniformity and discourages inconsistency based on the diverse requirements of state court decisions that may vary widely when construing federal law. E.g., Southern Ry. Co. v. Prescott, 240 U.S. 632, 639-40, 36 S. Ct. 469, 60 L. Ed. 836 (1916). Our state Supreme Court has long recognized this fundamental jurisprudential doctrine. See, e.g., Oregon-Washington R. & Nav. Co. v. C. M. Kopp, Co., 12 Wn.2d 146, 152, 120 P.2d 845 (1942) (When the "question presented is one of federal law, . . . the decisions of the [S]upreme [C]ourt of the United States are controlling." citing Southern Ry.)).

Moreover, in applying this rule, a state appellate court is bound by both the result and the reasoning of the controlling Supreme Court decisions: "Our system of precedent or stare decisis is thus based on adherence to both the reasoning and result of a case, and not simply to the result alone." Planned Parenthood, 947 F.2d at 692 (emphasis added). As the Ninth Circuit stated when applying this fundamental principle in Hart v. Massanari, 266 F.3d 1155 (9th Cir. 2001):

Obviously, binding authority is very powerful medicine. A decision of the Supreme Court will control that corner of the law unless and until the Supreme Court itself overrules or modifies it. Judges of the inferior courts may voice their criticisms, but follow it they must.

Id. at 1171 (emphasis added; citation omitted). Thus, when applying the Federal Arbitration Act ("FAA"), the Court of Appeals was required to apply Buckeye, which is the controlling Supreme Court precedent.

1. The Court of Appeals Refused to Apply BUCKEYE, in Derogation of Its Duty to Apply Controlling United States Supreme Court Precedent in Full Deference to the Scope of a Supreme Court Decision.

The Court of Appeals "respectfully conclude[d] that the United States Supreme Court did not intend the broad language of its Buckeye holding to apply to contracts narrower in scope like the 2004 Shareholders Agreement." See Decision, \*6. The panel's apparent distaste for the far-reaching implications of Buckeye is squarely at odds with its obligation to apply controlling Supreme Court law:

Binding authority within this regime cannot be considered and cast aside; it is not merely evidence of what the law is. Rather, caselaw on point is the law. If a court must decide an issue governed by a prior opinion that constitutes binding authority, the later court is bound to reach the same result, even if it considers the rule unwise or incorrect.

Hart, 266 F.3d at 1170 (emphasis the Court's).<sup>4</sup> The Court of Appeals was simply not free to substitute its judgment for that of the United States

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<sup>4</sup>This is especially true where, as here, the Supreme Court granted review to address a broad fundamental principle. As Professor Stephen Huber pointed out in his recent discussion of the import of Buckeye, the Supreme Court did not take the case to parse the nuances of contract language. Stephen K. Huber, The Arbitration Jurisprudence of the Fifth Circuit: Round IV, 39 Tex. Tech. L. Rev. 463, 471 (Spring 2007). Professor Huber noted the clarity and force of the Buckeye decision:

(continued . . .)

Supreme Court with regard to the reach of the express and broad holding in Buckeye.

2. The Court of Appeals' Reliance on STATE v. FROST Is Misplaced. The Washington State Supreme Court's decision in State v. Frost is inapposite and, in any event, cannot vitiate these bedrock federal stare decisis principles. Frost was not concerned with the precedential effect of binding United States Supreme Court authority interpreting a federal statute, but with the Court of Appeals presuming to rely on Washington State Supreme Court cases that had not considered the question that was before the Court of Appeals. See Frost, 161 P.3d at 367. Frost cannot and did not relieve the panel of its duty to follow controlling United States Supreme Court precedent when interpreting federal law and the FAA.

B. The Court of Appeals' Improperly Narrow Reading of and Refusal to Apply BUCKEYE Will Undermine the Strong Federal and State Policies Favoring Arbitration of Disputes.

The Court of Appeals decision has essentially turned the federal and state policies favoring arbitration on their heads. The FAA "create[s] a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act." Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); see also App. Op. Brief at 27-28 (citing cases). Washington has also

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(... continued)

While the reasoning and result in [Buckeye] are not surprising, it is one thing to reach this conclusion in the abstract and quite another to have the highest court in the land say so in such explicit terms.

Id. at 473 (emphasis added; internal footnote omitted).

adopted a strong public policy favoring arbitration. See, e.g., Zuver v. Airtouch Commc'ns, Inc., 153 Wn.2d 293, 301 n.2, 103 P.3d 753 (2004).

Consistent with these principles, courts have repeatedly held that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." See, e.g., Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25. Our Supreme Court in Zuver declared that "[c]ourts must indulge every presumption in favor of arbitration" Zuver, 153 Wn.2d at 301 (internal quotation marks and citation omitted). Yet, the Court of Appeals did just the opposite here: the panel construed every possible fact or ambiguity against arbitration. This improperly shifts the presumption from favoring arbitration to disfavoring it.

1. The FAA and Federal Law, Not State Court Decisions, Set Forth the Minimum Requirements for Enforceable Arbitration Agreements; State Courts Cannot Add Additional Limitations. The panel incorrectly focused on what language was not in the 2004 Shareholders Agreement. Decision, \*\*5-6. This is contrary to the FAA and the clear mandate that any ambiguities must be construed in favor of arbitration.<sup>5</sup> First, the FAA only requires that there is a written contract evidencing a transaction involving commerce. 9 U.S.C. § 2. The parties need not

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<sup>5</sup>Indeed, the policy favoring arbitration is so strong that typical contract interpretation rules may also yield. See, e.g., Chan v. Drexel Burnham Lambert, Inc., 178 Cal. App. 3d 632, 639, 223 Cal. Rptr. 838 (Cal. Ct. App. 1986) ("It follows then that ambiguities in an arbitration clause are to be resolved in favor of arbitration, notwithstanding the California rule that a contract is construed most strongly against the drafter." (citation omitted)).

specifically reference the FAA or enumerate which claims are subject to arbitration. As the United States Supreme Court held in Southland Corp. v. Keating, there "is nothing in the [FAA] indicating that the broad principle of enforceability is subject to any additional limitations under State law." 465 U.S. 1, 11, 104 S. Ct. 852, 79 L. Ed. 2d 1 (1984); see also Threlkeld v. Metallgesellschaft Ltd., 923 F.2d 245, 250 (2d Cir. 1991) (state law requirements that add more rigid requirements for enforceability of arbitration agreements are preempted as "they effectively reincarnate the former judicial hostility towards arbitration").<sup>6</sup> As the Third Circuit long ago observed, "the [FAA] is entitled to a construction which will accomplish its purpose, and should not be hedged about with imagined limitations." Donahue v. Susquehanna Collieries Co., 138 F.2d 3, 6 (3d Cir. 1943) (emphasis added).

Moreover, the panel's conclusion that the type of dispute to be arbitrated must be specifically identified in the arbitration clause flatly

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<sup>6</sup>See also, Huber, supra, n.4. Professor Huber emphasized that the Supreme Court accepted review to clarify once and for all that the FAA preempts state law principles that would otherwise limit or foreclose arbitration.

After [Buckeye], the FAA clearly preempts virtually all state law efforts to limit arbitration in transactions that have some relationship to interstate commerce, even cases heard by state courts applying state statutes.

Id. at 472 (emphasis added). "Apparently, the Court just wanted to clarify that state court proceedings did not provide a route to escaping arbitration for transactions subject to the FAA." Id. at 474. Plaintiff in this case long ago conceded that the FAA governs this dispute over arbitrability. See Plaintiff's Opposition to Motion to Stay Litigation and Compel Arbitration, p. 3 n.1 (CP 86).

contradicts the well established principle that "a contractual dispute is arbitrable unless it can be said 'with positive assurance' that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Kamaya Co. v. American Prop. Consultants, Ltd., 91 Wn. App. 703, 714, 959 P.2d 1140 (1998), rev. denied, 137 Wn.2d 1012, 978 P.2d 1099 (1999) (emphasis added; internal quotation marks altered; citations omitted). The panel's decision here is simply untenable given these very broad "pro-arbitration" principles, which are deeply rooted in both federal and state law.

2. The Court of Appeals' Decision Will Encourage Forum Shopping, a Result the United States Supreme Court Has Expressly Disapproved of When Fashioning Its Jurisprudence on Arbitration. The practical effect of the panel's decision is that a party who challenges the enforceability of an agreement with an arbitration provision in our state courts will be playing by different rules than a party who brings such a claim in federal court or in other state court jurisdictions. The United States Supreme Court sought to prevent such forum shopping when it proclaimed that the FAA applies in state courts as well as federal courts. Southland, 456 U.S. at 15. To hold otherwise, the Court reasoned, would "encourage and reward forum shopping." Id. Indeed, the Buckeye decision was designed to foreclose the possibility of forum shopping altogether. See, e.g., David A. Joffe, Extending the Severability Rule: Buckeye Check Cashing, Inc. v. Cardegna, 12 Harv. Neg. L. Rev. 549, 551 (Spring 2007) (the Buckeye decision resolved a split among the lower courts, "obviating the need for forum shopping among contracting

parties"). Washington courts should not permit parties to engage in otherwise prohibited forum shopping.

C. The Panel's Attempt to Distinguish BUCKEYE on Its Facts Is Similarly Untenable.

Despite recognizing the "sweeping" holding in Buckeye, the Court of Appeals inexplicably undertook to distinguish Buckeye on its facts, explaining that "in accordance with longstanding common law practice, we must read Buckeye's purported holding against its significantly different factual backdrop." Decision, \*5. The United States Supreme Court has rejected similar attempts to circumvent its precedents on a strained reading of facts.

Thurston Motor Lines v. Jordan K. Rand, Ltd., 460 U.S. 533, 103 S. Ct. 1343, 75 L. Ed. 2d 260 (1983), is illustrative. In that case, the United States Supreme Court granted certiorari to review a Ninth Circuit case interpreting an earlier Supreme Court decision, Louisville & Nashville Ry. v. Rice, 247 U.S. 201, 38 S. Ct. 429, 62 L. Ed. 1071 (1918). The Ninth Circuit attempted to distinguish the case at bar by citing factual differences from Rice that had no bearing on the high Court's previous ruling. Thurston, 103 S. Ct. at 534. The Supreme Court rejected the Ninth Circuit's reasoning, noting that there was no support for the appellate court's "novel interpretation" of the facts of the case, and that "[o]ther federal courts have had no difficulty in following the clear import of Rice." Id. at 534 (emphasis added). The Supreme Court determined that "the Court of Appeals has simply confused the factual contours of

Rice for its unmistakable holding." Id. at 535 (emphasis added); see also Hutto v. Davis, 454 U.S. 370, 372, 102 S. Ct. 703, 70 L. Ed. 2d 556 (1982) (granting certiorari and reversing where Court of Appeals "failed to heed" the controlling Supreme Court precedent).

The Court of Appeals here has done precisely what the Supreme Court forbade in Thurston Motor Lines: confused the factual contours of Buckeye for its unmistakable holding. The facts upon which the Court of Appeals seeks to distinguish Buckeye had no bearing on the Supreme Court's holding and do not render Buckeye inapplicable.

1. BUCKEYE's Expansive Holding in No Way Relied on Whether the Arbitration Clause at Issue in that Case Was "Narrow" Versus "Broad." The most significant flaw of the Court of Appeals' decision is its refusal to apply Buckeye because the arbitration clause at issue here is "narrow" and the clause in Buckeye was "broad." Decision, \*6. Yet other than citing to the arbitration provision at issue in Buckeye, the Supreme Court did not address or analyze the scope of the arbitration provision when laying out the express mandate that challenges to the agreement as a whole must be heard by the arbitrator. There is simply nothing in the Buckeye opinion that should have led the Division II panel to reason that the "breadth" or "narrowness" of the arbitration clause would determine whether Buckeye would apply.<sup>7</sup> Again, the panel

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<sup>7</sup>The panel concluded the arbitration provision in the 2004 Shareholders Agreement was "narrow" because it does not expressly state that challenges to the enforceability of the agreement as a whole must be arbitrated. Decision, \*5 (reasoning that this distinction between the two  
(continued . . .)

incorrectly concluded that if there was *any* question regarding whether the parties intended to arbitrate the court should find that they did not so intend. This is contrary to the principle that "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." See, e.g., Moses H. Cone Mem'l Hosp., 460 U.S. at 24-25.

2. The FAA Governs the 2004 Shareholders Agreement.

Appellants argued in their opening brief that the FAA applies "because of Westport Shipyard's extensive involvement in interstate commerce." App. Op. Brief at 19 n.10. Again, Plaintiff did not challenge this conclusion and indeed has conceded that the 2004 Shareholders Agreement was subject to the FAA. Plaintiff's Opposition to Motion to Stay Litigation and Compel Arbitration, p. 3 n.1 (CP 86). Nonetheless, the Court of Appeals, on its own initiative, determined that Buckeye and, by extension,

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(. . . continued)

arbitration provisions was "critical" to its holding). Buckeye will apply, however, even where an agreement does not specifically "call out" that challenges to the enforceability of the agreement as a whole must be arbitrated. See Lexington Marketing Group, Inc. v. Goldbelt Eagle, LLC, 157 P.3d 470, 478 (Alaska 2007).

The trial court's reasoning on the "broad" versus "narrow" point was similarly flawed. The trial court concluded, because the arbitration clause here is "narrow" and Buckeye involved a "broad" arbitration clause, that the parties did not agree to arbitrate any challenges to the enforceability of the 2004 Shareholders Agreement as a whole. See July 21, 2006 Letter Ruling (CP 498). Even pre-Buckeye, this analysis was incorrect. In Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458, 1461 (9th Cir. 1983), the arbitration provision was silent as to whether challenges to the enforceability of the agreement as a whole would be arbitrable. After concluding that the arbitration provision was narrow, the Ninth Circuit held that the provision would still encompass disputes relating to the "interpretation and performance of the contract itself." Id. at 1464.

federal law do not apply to the present dispute because the 2004 Shareholders Agreement contains a Washington choice-of-law provision and because the case involves a local, closely-held corporation. Decision, \*6. Particularly given that Plaintiff conceded before the trial court that the 2004 Shareholders Agreement was subject to the FAA, the Court of Appeals had no basis for determining otherwise.

Further, "a generic choice-of-law provision is not an effective means by which to unequivocally exclude an otherwise arbitrable dispute from arbitration." Kamaya, 91 Wn. App. at 707 (ordering arbitration of fraud-in-the-inducement challenges to entire agreement, even where Japanese choice-of-law provision covered "essentially the entire agreement") (citing Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 59-60, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995)). Simply put, the choice of law provision tells the arbitrator what law to apply to the underlying dispute (in this case, enforceability of the entire 2004 Shareholders Agreement), it does not serve to take an agreement whose arbitrability is governed by the FAA out of the ambit of federal supremacy.

Finally, whether or not Westport is a closely-held company is in no way dispositive of whether the 2004 Shareholders Agreement is governed by the FAA. See Bosworth v. Ehrenreich, 823 F. Supp. 1175, 1179 (D.N.J. 1993) (court applied FAA to arbitration provision in shareholders agreement between the three equal co-owners of a closely held corporation that engaged in interstate commerce).

In short, courts have already considered and rejected the same grounds upon which the panel distinguished Buckeye. Review of the Court of Appeals decision is necessary to once again bring uniformity to the interpretation and application of federal arbitration law. The FAA and federal law, including Buckeye, govern the 2004 Arbitration Agreement. Plaintiff's challenge to the enforceability of the 2004 Shareholders Agreement as a whole should be heard by an arbitrator.

D. The Court of Appeals' Decision Is in Conflict with Other State Court Decisions Construing BUCKEYE.

Other state courts considering Buckeye have uniformly concluded that Buckeye applies when the challenge is to the agreement as a whole, not just the arbitration clause, and have rejected purported distinctions based on whether the arbitration clause itself was "broad" or "narrow." In Lexington Marketing Group v. Goldbelt Eagle, LLC, 157 P.3d 470 (Alaska 2007), the Alaska Supreme Court rejected a party's argument that the trial court, not an arbitrator, should hear a challenge to the enforceability of an agreement as a whole that contained an arbitration provision. The court specifically rejected the party's attempt to distinguish Buckeye on the grounds that the arbitration clause in Buckeye was broader than the arbitration clause at issue in Lexington:

[T]he Supreme Court's holding in Buckeye was broad. It was not predicated on a close reading of the agreement at issue in that case; the Court did not parse the language of the agreement, nor did it refer back to the language of the clause after initially quoting it. Instead, the Court relied on several broad principles. . . . Thus, regardless of whether the arbitration agreement at issue is identical to the agreement before the Court in Buckeye, the Court's holding applies.

Id. at 475 (emphasis added). The Alaska Supreme Court held that a court must construe any ambiguities about the scope of the arbitration clause in favor of arbitration, regardless of whether the arbitration clause is narrow or broad. The Court reversed and remanded for arbitration of the dispute over payment for services, which, the court concluded, were "arising under" the agreement and not collateral issues. Id. at 478.<sup>8</sup>

The Missouri Court of Appeals also applied Buckeye when it reversed and remanded for arbitration. In Kirby v. Grand Crowne Travel Network, LLC, 2007 WL 1732761 (Mo. Ct. App. June 18, 2007), the plaintiffs, an elderly couple, sought to avoid arbitration of their claims against defendant, who sold vacation club memberships. Id. at \*1. The court made clear its hostility towards the Buckeye decision, but nonetheless remanded for arbitration:

We are forced to reverse and remand with instructions to stay the proceedings pending arbitration. We do so reluctantly and "only because a higher authority than this Court has declared the law of the land on these issues."

Id. at \*2 (emphasis added) (citing Martz v. Beneficial Montana, Inc., 332 Mont. 93, 135 P.3d 790, 796 (Nelson, J., dissenting)).<sup>9</sup> The Court of Appeals here was required to reach the same conclusion, however

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<sup>8</sup>Appellants brought the language of Lexington to the attention of the Court of Appeals in a pre-argument Statement of Additional Authority and during oral argument. VRP (June 19, 2007) 15:18-21, 16:22-17:10, copy of the transcript attached as Exhibit B to the Appendix of this Petition.

<sup>9</sup>The Martz court applied Buckeye, and recognized "with certainty, if not enthusiasm" that "the United States Supreme Court made clear that arbitration, not court, is the proper forum for challenges to contracts as a whole where those contracts contain arbitration provisions." 135 P.3d. at 794.

grudgingly it might have done so. Its failure to do so gives rise to a lack of uniformity in national arbitration law requiring the attention of -- and correction by -- our state's Supreme Court.

VI. CONCLUSION

Appellants respectfully request that the Washington Supreme Court accept review of the Decision, for the reasons stated in this Petition.

RESPECTFULLY SUBMITTED this 6<sup>th</sup> day of September, 2007.

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# APPENDIX

1. **Exhibit A:** Nelson v. Westport Shipyard, Inc., 2007 WL 2274469  
(Wash. Ct. App. Aug. 7, 2007).

2. **Exhibit B:** Verbatim Report of Proceedings, Oral Argument  
before Division II of Washington Court of Appeals, June 19, 2007.

# APPENDIX EXHIBIT A

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Court of Appeals of Washington,

Division 2.

Larry NELSON, and the marital community  
composed of Larry and Barbara Nelson,  
Respondent,

v.

WESTPORT SHIPYARD, INC., a Washington  
corporation, j. orin edson, individually  
and his marital community composed of orin and  
Charlene edson; daryl  
wakefieLd, individually and his marital community  
composed of daryl and kim  
wakefield, Appellants.  
No. 35308-3-II.

Aug. 7, 2007.

**Background:** Shareholder, and former employee of, closely-held corporation brought action against the corporation, alleging disability discrimination, breach of implied contract of employment, wrongful withholding of wages, breach of fiduciary duties and minority shareholder oppression, tortious interference with a business expectancy, and duress, coercion and misrepresentation. The Superior Court, Grays Harbor County, F. Mark McCauley, J., denied corporation's motion to compel arbitration of those claims arising from the parties' shareholders agreement. Corporation appealed.

**Holdings:** The Court of Appeals, Hunt, J., held that: (1) shareholder's claim for duress, coercion and misrepresentation, which challenged enforceability of the parties' shareholders agreement that contained arbitration clause, was a matter for the court, not the arbitrator, to decide, and (2) shareholder's claim for breach of fiduciary duties and minority shareholder oppression was not subject to arbitration, except to the extent that the shareholder's claim included a dispute over the price at which he was required to sell back his shares to the corporation.

Affirmed in part, reversed in part, and remanded.

West Headnotes

**[1] Alternative Dispute Resolution**  199

25Tk199 Most Cited Cases

Shareholder's claim against closely-held corporation

for duress, coercion and misrepresentation, which challenged enforceability of the parties' shareholders agreement that contained arbitration clause, was a matter for the court, not the arbitrator, to decide, where shareholders agreement's arbitration clause required arbitration of only those disputes "arising out of" the agreement and did not expressly encompass disputes about the validity, enforceability or scope of the agreement as a whole.

**[2] Alternative Dispute Resolution**  143

25Tk143 Most Cited Cases

Shareholder's claim against closely-held corporation for breach of fiduciary duties and minority shareholder oppression was not subject to arbitration under arbitration clause of parties' shareholders agreement, which required arbitration of disputes "arising out of" the shareholders agreement, except to the extent that the shareholder's claim included a dispute over the price at which he was required to sell back his shares to the corporation following "unresolvable differences" between the shareholders; shareholders agreement was limited in scope to the acquisition, sale, and other transfer of corporation's shares.

**[3] Alternative Dispute Resolution**  213(5)

25Tk213(5) Most Cited Cases

Just as the Court of Appeals reviews the trial court's interpretation of any other contractual provision, the Court of Appeals reviews the trial court's determination of a dispute's arbitrability de novo.

**[4] Alternative Dispute Resolution**  143

25Tk143 Most Cited Cases

Like the trial court, the Court of Appeals looks to the language of the parties' agreement to determine the scope of the arbitration clause.

**[5] Alternative Dispute Resolution**  199

25Tk199 Most Cited Cases

**[5] Alternative Dispute Resolution**  200

25Tk200 Most Cited Cases

As a general rule, whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties.

\*808 Victoria Lynn Vreeland, Gordon Thomas Honeywell Malanca Peterson, Seattle, WA, James

Walter Beck, Gordon Thomas Honeywell, Tacoma, WA, for Respondent.

Gail Eileen Mautner, D. Michael Reilly, Lane Powell PC, Seattle, WA, Michael Barr King, Talmadge Law Group PLLC, Tukwila, WA, for Appellants.

HUNT, J.

\*\*1 ¶ 1 Westport Shipyards, Inc., a closely held corporation, appeals a pretrial superior court ruling denying its motion to compel arbitration of the shareholder claims included in employee-shareholder-director Larry Nelson's multi-claim lawsuit against Westport. As Westport notes, Nelson's six causes of action include a combination of shareholder-based and employee-based claims, including \*809 fiduciary breach and minority shareholder oppression. More specifically, in his sixth cause of action for duress, coercion, and misrepresentation, Nelson seeks to nullify the 2004 Shareholders Agreement, which contains an arbitration clause. Citing Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204, 163 L.Ed.2d 1038 (2006), Westport argues that, under their 2004 Shareholders Agreement with Nelson, "claims regarding enforcement or breach of the Shareholders Agreement, whether asserted by Mr. Nelson or Defendants, must be referred to arbitration for resolution." [FN1] Clerk's Papers (CP) at 392.

[FN1] Westport acknowledges that Nelson's claims not "arising out of" the 2004 Shareholders Agreement, including claims of oppression and breach of fiduciary duty, are not subject to arbitration and, therefore, remain before the trial court.

¶ 2 We hold that Buckeye does not apply to compel arbitration as broadly as Westport asserts, particularly with respect to Nelson's challenge to the validity of the 2004 Shareholders Agreement as a whole. But we do agree with Westport that the shareholders' "unresolvable difference" triggered the buy-sell provisions of the 2004 Shareholders Agreement; therefore, we hold that the price Westport must pay Nelson to buy back his shares is subject to arbitration under the Agreement. Accordingly, we affirm in part, reverse in part, and remand for arbitration of the repurchase price for Nelson's Westport shares under the 2004 Shareholders Agreement.

#### FACTS

#### I. Background

¶ 3 Westport Shipyards is a closely held Washington corporation that manufactures and sells motor-yachts. In 1983, Larry Nelson began working for Westport as a laminator. Over the years, he worked his way up to become Vice President, Director, and Chairman of the Board.

#### A. Shareholder Agreements

¶ 4 In 1998, Westport's shareholders, including J. Orin Edson and President Daryl Wakefield, offered Nelson the opportunity to become a shareholder. As part of the resulting 1998 Purchase Agreement, Nelson agreed to sell any shares he purchased back to Westport if his employment with the company ever ceased.

¶ 5 Over the next three years, Nelson continued to purchase additional shares of Westport. In both December 2000 and December 2001, Nelson and Westport executed two more Purchase Agreements. In total, Nelson paid \$327,833 to acquire 460 shares, approximately two percent, of Westport stock.

¶ 6 In 2004, Westport and Nelson executed a Shareholders Agreement, in which (1) Nelson agreed to sell his shares back to Westport "upon the unresolvable difference between shareholders," Section 2.3.3, CP at 45, or "upon the termination ... of [his] employment," Section 2.3.4, CP at 45; and (2) Westport agreed to repurchase Nelson's shares at the greater of either one and one-half times their book value or Nelson's original purchase price. This 2004 Shareholders Agreement stated, "[It] shall be governed by, and interpreted and construed under, the laws of the State of Washington." Section 6.4, CP at 52.

\*\*2 ¶ 7 This 2004 Shareholders Agreement also contained an arbitration clause, Section 6.5, which provided:

In the event of any *disputes among any of the parties arising out of this Agreement*, then such disputes shall be submitted to arbitration pursuant to the Commercial Arbitration Rules of the American Arbitration Association. In the event the parties to such dispute are unable to agree upon an arbitrator, then said Association shall submit a list of proposed arbitrators and the parties to such dispute shall alternately strike a name from such list until the final arbitrator remains, who shall be final and binding upon the parties. The cost of such arbitrator shall be born equally by the parties.

Section 6.5, CP at 52 (emphasis added). It is this 2004 Shareholders Agreement and its arbitration clause that precipitated the instant litigation.

**\*810.B. Nelson's Termination**

¶ 8 On April 29, 2005, Nelson experienced an undisclosed medical emergency. Nelson was then Westport's Chairman of the Board of Directors, Vice President of Administration, Secretary, and Registered Agent. Nelson continued to work at Westport full-time.

¶ 9 On May 7, 2005, Westport's majority shareholder, J. Orin Edson, raised the subject of early retirement with Nelson, referring to Nelson's medical problems. On May 18, Westport's President, Daryl Wakefield, told Nelson he was to take a paid leave of absence. Nelson told Westport he had no desire or plan to retire and there were no medical restrictions on his work activities. At a Special Meeting of the Board of Directors and Shareholders on June 8, Westport decided to terminate Nelson's employment. Wakefield notified Nelson in writing on June 17.

¶ 10 Following Nelson's termination, Westport informed him that his termination had triggered its right under the 2004 Shareholders Agreement to repurchase his shares at one and one-half times their book value [FN2] and that it was exercising this right. Nelson rejected Westport's tendered payment of \$1,086,570, and he refused to sell his shares back to Westport.

FN2. Section 2.4 of the Agreement provided for Westport's repurchase of Nelson's shares at the greater of the price paid for the shares ... or one and one-half times the book value.

....  
based upon the latest annual audited financial statement the Corporation issued prior to the event giving rise to the Corporation's ... responsibility to purchase the shares.... The [Corporation's] independent certified public accountant's determination of book value shall be conclusive and binding on all parties.

CP at 46-47.

¶ 11 Two months later, the other Westport shareholders voted to require Nelson to sell back his shares, triggered by the "unresolvable difference" provision of the 2004 Shareholders Agreement. Nelson continued to refuse to tender his shares to

Westport for its repurchase.

¶ 12 In a letter from Wakefield, Westport then notified Nelson of its intent to commence arbitration "to enforce the terms of the Agreement and to require the sale of [his] 460 shares...." CP at 116.

**II. Lawsuit**

¶ 13 Nelson sued Westport in Grays Harbor County Superior Court. He alleged six causes of action, emanating from his general claim that Westport had illegally terminated his employment: (1) disability discrimination, seeking damages; (2) breach of implied contract of employment, seeking damages; (3) wrongful withholding of wages, seeking back pay; (4) breach of fiduciary duties and minority shareholder oppression; (5) tortious interference with a business expectancy; and (6) duress, coercion and misrepresentation, seeking to invalidate the 2004 Shareholders Agreement.

**\*3** ¶ 14 In August 2005, Westport moved to compel arbitration of Nelson's claims arising under the 2004 Shareholders Agreement. The trial court denied Westport's motion to compel arbitration "[a]t this stage." In an October 31 letter opinion, the court stated:

There is no indication that the parties agreed to arbitrate the type of claims set forth in the amended complaint. One cause of action challenges the validity of the Shareholders Agreement. I do not know if the claim has any merit, but I do conclude that such claim is not covered by the arbitration clause in the Shareholders Agreement.

CP at 132. Westport moved for clarification and asked the trial court to rule that Westport was not barred from arbitrating its breach of contract claim against Nelson. The trial court denied this motion and declined to clarify the scope of its order and letter opinion. Westport did not seek interlocutory appellate review of either of these two pre-trial rulings.

¶ 15 Westport then began discovery, including taking Nelson's deposition, and filed pretrial motions. During Nelson's deposition, Westport learned that Nelson was not claiming misrepresentation about the Westport shares buy back price formula, and that **\*811** he had agreed to the 2004 Shareholders Agreement arbitration provision.

¶ 16 During this period, the United States Supreme Court filed Buckeye, 546 U.S. 440, 126 S.Ct. 1204, holding that challenges to a contract containing an

arbitration clause, but not challenges to the clause itself separate from the underlying contract, must be arbitrated. Buckeye, 546 U.S. at 449, 126 S.Ct. 1204. Based on Buckeye and Westport's pretrial discovery of more details about Nelson's claims, Westport again moved to compel arbitration, emphasizing that it sought to compel arbitration of only those claims arising from the 2004 Shareholders Agreement, including Nelson's sixth cause of action--for duress, coercion, and misrepresentation--challenging the validity of the 2004 Shareholders Agreement. [FN3] Again, the trial court denied Westport's motion to compel arbitration. [FN4]

[FN3]. Westport did not seek to arbitrate Nelson's other causes of action, unrelated to the 2004 Shareholders Agreement, which included claims for wrongful termination, wage withholding, tortious interference with a business expectation, and breach of fiduciary duties and minority shareholder oppression (except to whatever extent these claims were being used as a means of avoiding enforcement of the Agreement).

[FN4]. The trial court's written order does not include findings of fact. Nor did the trial court issue an oral ruling from the bench.

### III. Appeal

¶ 17 Westport appealed the trial court's denial of its second motion to compel arbitration, arguing that Buckeye controls. Nelson moved to dismiss Westport's appeal, arguing that (1) the appeal was untimely because Westport had failed to appeal the trial court's earlier order denying its first motion to compel arbitration; and (2) Westport had waived its right to appeal because, after the trial court denied its motion to compel arbitration, Westport had engaged in discovery and had further litigated Nelson's claims.

¶ 18 Our court commissioner denied Nelson's motion to dismiss Westport's appeal. Our commissioner ruled that (1) Westport's failure to appeal the trial court's order denying Westport's first motion to compel arbitration did not bar Westport from bringing its second motion to compel because the trial court's first order had stated it was denying the motion "at this stage" of the litigation, implying that its order was not final; and (2) Westport's ongoing discovery did not operate to waive its right to appeal because this conduct was not inconsistent with Westport's intention to continue to seek arbitration.

\*\*4 ¶ 19 Nelson moved to modify our commissioner's denial of his motion to dismiss Westport's appeal. We denied Nelson's motion to modify. [FN5] Westport's appeal now proceeds on its merits.

[FN5]. Having previously denied Nelson's motion to dismiss Westport's appeal as untimely, we do not consider it again. See RAP 17.2(a)(2) and 17.7.

### ANALYSIS

¶ 20 Westport contends that the trial court erred in denying its motion to compel arbitration. Westport argues two primary grounds: (1) Buckeye requires that a challenge to the enforceability of an agreement containing an arbitration clause, like Nelson's sixth cause of action, as opposed to a challenge to the arbitration clause itself, is a matter for the arbitrator, and not the court, to decide; and (2) the trial court erred when it determined that the claims, counterclaims, and defenses arising out of the 2004 Shareholders Agreement, and related to Nelson's fourth cause of action, are not arbitrable.

¶ 21 Nelson responds that the trial court correctly ruled (1) the question of overall contract validity is for the courts, not an arbitrator, to decide; and (2) his claims did not fall under the 2004 Shareholders Agreement's "narrow" arbitration clause. We address each argument in turn.

#### I. Nelson's Sixth Cause of Action

[1] ¶ 22 We disagree with Westport that Buckeye controls and renders arbitrable Nelson's challenge to the 2004 Shareholders Agreement's validity.

#### A. Buckeye's Stated Holding

¶ 23 Buckeye was a retail business that cashed checks in exchange for a customer's \*812 personal check and payment of a fee. Each time Buckeye provided this service, the customer signed an agreement that contained the following arbitration provision:

By signing this Agreement, you agree that if a dispute of any kind arises out of this Agreement or your application therefore or any instrument relating thereto, then either you or we or third-parties involved can choose to have that dispute resolved by binding arbitration.

Any claim, dispute, or controversy ... arising from or relating to this Agreement ... or the validity, enforceability, or scope of this Arbitration

*Provision* or the entire Agreement, ... shall be resolved, upon the election of you or us or said third-parties, by binding arbitration.... This arbitration Agreement is made pursuant to a transaction involving interstate commerce, and shall be governed by the Federal Arbitration Act. Buckeye, 546 U.S. at 442-43, 126 S.Ct. 1204 (emphasis added).

¶ 24 Cardegna brought a putative class action against Buckeye in a Florida state court, challenging the validity of the entire Buckeye-customer agreement. Cardegna alleged that Buckeye charged usurious interest rates and, therefore, the whole agreement violated Florida lending and consumer-protection laws. Id. at 443, 126 S.Ct. 1204. Buckeye moved to compel arbitration under the agreement's arbitration clause. Ruling that a court, not an arbitrator, resolves a void contract claim *ab initio*, the trial court denied the motion. Id. The intermediate Florida appellate court reversed, holding that a question of the contract's legality should go to the arbitrator. The Florida Supreme Court reversed the appellate court, reasoning that "to enforce an agreement to arbitrate in a contract challenged as unlawful 'could breathe life into a contract that not only violates state law, but also is criminal in nature....' [Cardegna v. Buckeye Check Cashing, Inc.] 894 So.2d 860, 862 ( [Fla.] 2005) [citations omitted]." Buckeye, 546 U.S. at 443, 126 S.Ct. 1204.

\*\*5 ¶ 25 The United States Supreme Court granted certiorari, disagreed with Florida's trial court and Supreme Court, and pronounced a sweeping holding. Following its previous rationale in Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967), the Buckeye Court distinguished between a claim that a contract's arbitration clause was induced by illegality and a claim that the entire contract was induced by illegality. Buckeye, 546 U.S. at 445, 126 S.Ct. 1204. The Court noted:

[W]e held [in Prima Paint] that if the claim is fraud in the inducement of the arbitration clause itself ... the federal court may proceed to adjudicate it. But the statutory language does not permit the federal court to consider claims of fraud in the inducement of the contract generally.

Id. The Buckeye Court further stated:

[U]nless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance.... [T]his arbitration law applies in state as well as

federal courts.... [W]e conclude that because respondents challenge the Agreement, but not specifically its arbitration provisions, those provisions are enforceable apart from the remainder of the contract. The challenge should therefore be considered by an arbitrator, not a court.

Id. at 445-46, 126 S.Ct. 1204.

¶ 26 Westport is correct that, on the surface at least, this broad Buckeye language appears to control here. On closer reading, however, we note that Buckeye's underlying facts distinguish it from our case and, therefore, we hold that Buckeye does not control the facts here. [FN6]

FN6. See Sacher v. United States, 343 U.S. 1, 8, 72 S.Ct. 451, 96 L.Ed. 717 (1952) (distinguishing facts diminish precedential value). See also Floyd v. Dep't of Labor and Indus., 44 Wash.2d 560, 565, 269 P.2d 563 (1954).

#### B. Buckeye's Facts

¶ 27 In accordance with longstanding common law practice, we must read Buckeye's purported holding against its significantly different factual backdrop. First, the agreement at issue in Buckeye represented the \*813 entire relationship between the two parties--Buckeye's check-cashing service and its customer, limited to a single check-cashing transaction. Here, in contrast, Westport and Nelson had 22 years of ongoing employer-employee, corporation-shareholder, and corporation-director relationships, distinct from the narrow 2004 Shareholders Agreement at issue here, which, by its own terms, covers only the transfer of Westport shares.

¶ 28 Second, the arbitration provision in the Buckeye check-cashing customer agreement specifically provided for binding arbitration, "governed by the Federal Arbitration Act," Id. at 445-46, 126 S.Ct. 1204, (see 9 U.S.C. §§ 1-16), of two distinct types of disputes: (1) "[a]ny claim, dispute, or controversy ... arising from or relating to this Agreement," and (2) "[a]ny claim, dispute, or controversy ... arising from or relating to the validity, enforceability, or scope of this Arbitration Provision or the entire Agreement." Id. at 442-43, 126 S.Ct. 1204 (emphasis added).

¶ 29 In contrast, the 2004 Shareholders Agreement at issue here is much narrower and requires arbitration of only those disputes "arising out of this

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(Cite as: 163 P.3d 807, 2007 WL 2274469 (Wash.App. Div. 2))

Agreement." Unlike the arbitration provision in Buckeye, the 2004 Shareholders Agreement arbitration clause does not expressly encompass disputes about the validity, enforceability, or scope of the Agreement as a whole; nor does it encompass disputes about the validity, enforceability, or scope of the arbitration clause in particular. In our view, this distinction is critical to our holding that Buckeye does not apply here.

\*\*6 ¶ 30 In further contrast with the Buckeye customer agreement, the 2004 Shareholders Agreement at issue here expressly provides that (1) Washington state law governs the Agreement, including questions relating to its interpretation and construction; and (2) the Commercial Arbitration Rules of the American Arbitration Association govern disputes under the Agreement submitted to arbitration. Unlike the Buckeye agreement, the 2004 Shareholders Agreement nowhere mentions the Federal Arbitration Act.

¶ 31 Our Supreme Court recently warned us not to treat haphazardly as dispositive its rulings that do not "answe[r] the question presented in the case at bar." State v. Frost, --- Wash.2d ---, 161 P.3d 361, 367 (2007). In Frost, the Court addresses the conundrum facing lower courts trying to interpret the scope of a higher court's express language that appears, at first, to apply to a new case with seemingly analogous facts. In correcting both lower courts' misapprehension of its prior holdings, the Court notes:

Nothing in [our previous] opinion was directed toward answering the question presented in the case at bar. Yet, the trial court and the Court of Appeals treated this case as though it were dispositive.

Frost, 161 P.3d at 367. The Court further notes that, although there is language in both of its prior opinions "suggesting" the principles on which the lower courts relied, "these cases do not necessarily stand for the proposition" that the lower courts gleaned from these prior holdings. *Id.* Finally, the Frost Court "reject[s] the reading of [its two prior decisions] adopted below," "narrowly interpret[s] this precedent as applied to the present case," *id.* pronounces a new narrower application of its earlier ruling, and reverses the lower courts.

¶ 32 We apply similar judicial caution and precision here. We read the sweeping language of Buckeye's

overly-broad holding, together with the express broadly-inclusive arbitration provision in Buckeye's check-cashing customer agreement. And we respectfully conclude that the United States Supreme Court did not intend the broad language of its Buckeye holding to apply to contracts far narrower in scope like the 2004 Shareholders Agreement, whose arbitration clause lacks Buckeye's inclusion of contract-validity issues among those disputes expressly subject to arbitration.

¶ 33 Moreover, the Buckeye Court pronounced its holding under circumstances prompting it to note that Buckeye's check-cashing service involved interstate commerce and that federal law applied, even if contrary to state law, under the express terms of \*814 Buckeye's customer agreement. [FN7] Again, such is not the case here. Our case involves a local, closely held corporation, and the terms of the 2004 Shareholders Agreement expressly provide that Washington state law applies.

FN7. Similarly, the cases on which Westport relies and which the Buckeye Court cited, Prima Paint, 388 U.S. 395, 87 S.Ct. 1801, and Southland Corp. v. Keating, 465 U.S. 1, 104 S.Ct. 852, 79 L.Ed.2d 1 (1984) arise from very different facts and they include issues of interstate commerce, which put them squarely under the Federal Arbitration Act. 9 U.S.C. §§ 1-16.

¶ 34 Accordingly, we hold that (1) because Buckeye is distinguishable on its facts, the language of its broadly stated holding does not control here; (2) therefore, Buckeye does not require the parties' dispute over the enforceability of the 2004 Shareholders Agreement to go to arbitration; and (3) the trial court correctly ruled that the court, not the arbitrator, should resolve the parties' disputes about the enforceability of the 2004 Shareholders Agreement in general and Nelson's sixth cause of action--for duress, coercion, and misrepresentation--in particular.

## II. Nelson's Fourth Cause of Action

\*\*7 [2] ¶ 35 In contrast with Nelson's sixth cause of action, his fourth cause of action--for breach of fiduciary duties and minority shareholder oppression--does not challenge the 2004 Shareholders Agreement's validity. Rather, Nelson's fourth cause of action requires us to determine whether the 2004 Shareholders Agreement's arbitration clause covers

his claims for fiduciary breach or minority shareholder oppression.

¶ 36 We hold as a matter of law that, in general, the 2004 Shareholders Agreement does not cover disputes over fiduciary breach or minority shareholder oppression. But we also hold that, to the extent that Nelson's fourth cause of action includes a dispute over the price at which he must sell back his shares to Westport following a triggering event, [FN8] this dispute "aris[es] out of" the [2004 Shareholders] Agreement and, therefore, this price dispute is subject to arbitration under section 6.5 of the Agreement.

FN8. At oral argument, Nelson acknowledged what is evident from the record—that there was, and is, an "unresolvable difference between shareholders" over the legality and propriety of his termination from employment. We note that this dispute, though subject to resolution by the trial court, nevertheless triggers the 2004 Shareholders Agreement Buy-Sell Provisions. And it is the triggering of the Buy-Sell Provisions that precipitated the dispute over the price that Westport must pay Nelson to buy back his shares under the Agreement.

#### A. Standard of Review

[3][4] ¶ 37 Just as we review the trial court's interpretation of any other contractual provision, we review the trial court's determination of a dispute's arbitrability de novo. See, e.g., *In re Bubble Up Delaware, Inc.*, 684 F.2d 1259, 1264 (9th Cir.1982). Like the trial court, we look to the language of the agreement to determine the scope of the arbitration clause. *Drake Bakeries, Inc. v. Local 50, Am. Bakery & Confectionery Workers Int'l*, 370 U.S. 254, 256, 82 S.Ct. 1346, 8 L.Ed.2d 474 (1962); *Mediterranean Enter. v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir.1983).

[5] ¶ 38 *Mediterranean* supports the general rule that whether and what the parties have agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties. See, e.g., *John Wiley & Sons v. Livingston*, 376 U.S. 543, 546-47, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). The parties' chosen language provides the basis for this determination. [FN9] Similarly, in *Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge*, 138 Wash.App. 203,

156 P.3d 293 (2007), we recently addressed whether the court or an arbitrator should resolve the parties' dispute over the scope of a specific dispute resolution provision, which included arbitration, and whether particular disputes were subject to arbitration under this provision. In affirming the trial court's ruling denying a motion to compel arbitration, we cited and applied the general rule of arbitrability: Whether and what the parties have \*815 agreed to arbitrate is an issue for the courts to decide unless otherwise stipulated by the parties. *Tacoma Narrows Constructors*, 138 Wash.App. 203, 156 P.3d 293.

FN9. We note, however, that although *Mediterranean* is helpful in determining whether portions of Nelson's fourth cause of action fall under the 2004 Shareholders Agreement arbitration clause, *Mediterranean* is immaterial to resolving the question of whether a trial court should generally submit disputes of contract validity to the arbitrator.

¶ 39 As with the broad language of *Buckeye's* holding and *Mediterranean*, we read our *Tacoma Narrows Constructors* holding narrowly against the factual backdrop of that case. And, as we note above, the *Tacoma Narrows Constructors* parties' contract contained an explicit dispute-resolution provision allowing the general contractor to exclude from arbitration certain disputes related to disputes being litigated in court. As with the *Buckeye* agreement and arbitration provision, the language of the *Tacoma Narrows Constructors* contract and its explicit arbitration provision distinguish that case from the one before us. Thus, we do not apply *Tacoma Narrows Constructors*, as Nelson advocates, to allow the trial court to determine, in the first instance, whether the repurchase price of Nelson's Westport stock is subject to arbitration under the 2004 Shareholders Agreement. Instead, we apply the plain language of the 2004 Shareholders Agreement, including its arbitration clause.

B. 2004 Shareholders Agreement Arbitration Clause \*8 ¶ 40 Because our review is de novo, we must determine whether the 2004 Shareholders Agreement arbitration clause, to which Nelson and Westport agreed, covers disputes about breach of fiduciary duties and minority shareholder oppression. In so doing, we look to the plain language of the arbitration clause itself, which says that it applies to disputes "arising out of this Agreement."

¶ 41 The 2004 Shareholders Agreement embodies the parties' intentions for the transfer of Westport shares. It covers no other relationship between the parties, and it does not purport to cover their employment and other business relationships. Instead, the Agreement (1) limits the transferability of Westport shares; (2) includes the original purchase price for shares held by current Shareholders, including Nelson; and (3) includes a provision whereby Westport has the right to repurchase shares in the event any shareholder terminates employment or there is an unresolvable difference between shareholders. It is undisputed that there is an unresolvable difference between shareholders. [FN10]

FN10. Accordingly, we need not address the alternative triggering event under the 2004 Shareholders Agreement, Nelson's termination from employment, which Nelson argues was unlawful and, therefore, not a legitimate trigger to activate the Buy-Sell Provision of the Agreement.

¶ 42 The 2004 Shareholders Agreement does not grant any additional shareholder rights. Nor does it define the Board of Directors' duties towards shareholders in general or Nelson in particular. Rather, by its own terms, the Agreement is limited in scope to the acquisition, sale, and other transfer of Westport shares.

¶ 43 Accordingly, we hold that the 2004 Shareholders Agreement arbitration clause does not generally encompass Nelson's fourth cause of action for the Directors' breach of fiduciary duties and minority shareholder oppression except to the extent this cause of action includes the price that Westport must pay Nelson to buy back his shares. Applying the plain language of the 2004 Shareholders Agreement, we hold (1) the parties' unresolvable differences triggered the buy-sell provision of the Agreement, Section 2.3.3, CP at 45; (2) insofar as Nelson disputes the purchase price that Westport tendered for his shares, Section 2.4, CP at 46, this dispute is one "arising under the Agreement," Section 6.5, CP 52; and (3) therefore, the dispute over the price at which Nelson must sell his shares to Westport is subject to arbitration under Section 6.5 of the Agreement. CP at 52. We further hold that none of Nelson's other claims are subject to arbitration under this Agreement; instead, the trial court will resolve those claims.

¶ 44 Accordingly, we affirm in part, reverse in part, and remand for arbitration of the price at which Nelson must sell his shares back to Westport under the 2004 Shareholders Agreement.

We concur: BRIDGEWATER, P.J., and QUINN-BRINTNALL, J.

163 P.3d 807, 2007 WL 2274469 (Wash.App. Div. 2)

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# APPENDIX EXHIBIT B

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WASHINGTON STATE COURT OF APPEALS

DIVISION II

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LARRY NELSON and BARBARA NELSON, )  
 Plaintiffs/Respondents, ) Appeal No. 35308-3-II  
 )  
 vs. ) Grays Harbor Superior  
 ) Case No. 05-2-00802-1  
 WESTPORT SHIPYARD, INC. et al., )  
 Defendants/Appellants. )

**CERTIFIED COPY**

ORAL ARGUMENT

June 19, 2007

Transcribed by: Marjorie Jackson, CETD  
 Court-Approved Transcriptionist  
 Notary Public

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THE PRESIDING COURT: CARROLL C. BRIDGEWATER, JR.

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1 June 19, 2007

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4 JUDGE BRIDGEWATER: We do have devices that  
5 blow things up instead of using charts. And so you may  
6 proceed at your peril.

7 MR. KING: Well, at least right now it's not  
8 crackling. I was reminded of old fashioned LP's popping  
9 away.

10 I'm going to try to reserve eight minutes, by  
11 the way.

12 May it please the Court, my name is Michael  
13 King from the Talmadge Law Group. And along with Gail  
14 Mautner from Lane Powell, who is with me at counsel  
15 table, I'm here on behalf of the defendant and

16 appellant, Westport Shipyard, along with the several  
17 individual defendants who have been sued as well by  
18 their former Westport colleague, the plaintiff and  
19 respondent, Larry Nelson.

20 Now, this appeal involves the oft-occurring  
21 question of whether a trial court has erred in refusing  
22 to order an arbitration pursuant to a contractual  
23 agreement calling for arbitration of certain disputes.

24 In this case, Judge Mark McCauley of Grays  
25 Harbor Superior Court denied the defendants' motion to

1 arbitrate certain claims, counterclaims and defenses  
2 pursuant to the arbitration clause of a shareholders  
3 agreement to which all of the parties subscribed.

4 Judge McCauley's denial of arbitration is  
5 subject to de novo review by this court. And today I  
6 intend to focus on the two issues we believe should be  
7 dispositive of that review.

8 The first issue is the impact of the United  
9 States Supreme Court's recent holding in Buckeye Check  
10 Cashing vs. Cardegna.

11 JUDGE HUNT: Before you --

12 MR. KING: Yes, Your Honor.

13 JUDGE HUNT: -- go down that road, I have some  
14 threshold questions.

15 MR. KING: Yes, Your Honor.

16 JUDGE HUNT: This is what's bothering me here.  
17 I'm wondering -- what I'm wondering is, the triggering  
18 events under the -- under the shareholder agreement --

19 MR. KING: Yes.

20 JUDGE HUNT: -- the triggering events for  
21 requiring Nelson to sell his shares --

22 MR. KING: Yes.

23 JUDGE HUNT: -- a couple that you're focusing  
24 on here. One is his termination from employment and the  
25 other has to do with this unresolvable --

1 MR. KING: Differences, yes.

2 JUDGE HUNT: Okay, all right. What my question  
3 is, whether or not he was wrongfully -- his lawsuit  
4 seems to focus primarily on wrongful termination,  
5 whether it's because of medical reasons or whatever,  
6 he's worked there for a long time and then he is terminated  
7 after he has medical problems. Whether or not he's  
8 wrongfully terminated hasn't been decided yet.

9 MR. KING: Agreed.

10 JUDGE HUNT: And I know that in your brief  
11 you're saying -- you're not asking for arbitration of  
12 anything that relates to that, but my question is: If  
13 we don't know yet whether he's rightfully or wrongfully  
14 terminated and, therefore, we don't know whether or not  
15 the shareholder agreement for selling his shares is  
16 triggered, is it not premature to talk about arbitration  
17 at this point?

18 MR. KING: No, it's not.

19 Your Honor, I'm going to flip the sequence of  
20 events. Instead of talking about Buckeye first, I'm  
21 going to turn to this question --

22 JUDGE HUNT: I --

23 MR. KING: -- of arising under --

24 JUDGE HUNT: -- have got some Buckeye questions  
25 later, yeah.

1 MR. KING: -- because I think that goes to the  
2 heart of the matter.

3 Moreover, I'm going to go to this point, which  
4 this chart explores and which talks about the issues for  
5 arbitration versus the issues for trial. And you have a  
6 small version of this chart. It's not a question of  
7 prematurity at all, Your Honor.

8 Here is the situation. Fundamentally, we're  
9 saying we want arbitration of these three areas:

10 Westport's claims for Nelson's breach of the  
11 2004 shareholders agreement. Remember, Westport says  
12 we believe that the conditions, 2.3.3, Unresolvable  
13 Differences, and 2.3.4, Termination, have been  
14 triggered. So we want arbitration to determine that you  
15 need to return the shares to us, and there is the  
16 valuation process.

17 Now, Mr. Nelson challenges the enforceability  
18 of 2004 shareholders agreement. So logically, the  
19 challenge to the enforceability is going to be at issue  
20 in the arbitration as well.

21 And then the third thing we want dealt with is  
22 Westport's claim for unjust enrichment. We say that the  
23 disbursements, the quarterly distributions for the periods  
24 2005 through 2007, were overpayments.

25 We are not asking for Nelson's claim for

1 damages based on disability, discrimination, wrongful  
2 termination, wage withholding, or this panoply of  
3 tortious interference, oppression of minority  
4 shareholders, breach of fiduciary duty, breach of  
5 covenant of good faith and fair dealing, to be  
6 arbitrated. Those will be tried afterwards.

7 Now, the argument is being made here, oh, but  
8 if you arbitrate these things, there may be an impact on  
9 what happens to the trial down the line. Well, that's  
10 possible. We don't know. We are not asking for these  
11 damage claims to be arbitrated, but I'm going to be --

12 JUDGE QUINN-BRINTNALL: I don't think that's  
13 the question. The question is, without knowing whether  
14 there was a rightful termination, how can you conduct the  
15 arbitration? And the arbitration doesn't kick in until  
16 you know whether there was a rightful or wrongful  
17 termination unless you go under the unresolvable  
18 differences clause.

19 MR. KING: No, Your Honor.

20 The question of whether there was a termination  
21 that properly triggered the obligation of Mr. Nelson to  
22 turn back over his shares and to have them valued is a  
23 defense to our contention that the condition under the  
24 contract has been satisfied. Remember, the shareholders  
25 agreement says that disputes arising out of the contract

1 are subject to arbitration. The contention by  
2 Mr. Nelson that we are not entitled to the return of the  
3 shares and we're not entitled to that valuation process  
4 because the contractual condition has not been satisfied  
5 is, I submit, a dispute that arises out of the  
6 agreement.

7 The shareholders agreement says that in the  
8 event of a termination, Mr. Nelson is obligated to  
9 return his shares. There is an important relational  
10 purpose served here for this closely-held corporation,  
11 the control of these shares.

12 Mr. Nelson says, well, you're making this  
13 assertion, but, in fact, you don't have a valid  
14 termination, the condition that the contract lays out  
15 has not been satisfied.

16 Well, that is a dispute arising out of the  
17 contract. He's saying a contractual condition has not  
18 been satisfied.

19 JUDGE HUNT: Is there also an employment  
20 contract that is not part of this record that explains  
21 when you can terminate or not, or is it because it's  
22 such a small corporation they don't have something like  
23 that?

24 MR. KING: There is not a written employment  
25 agreement in the record. The record does not explore --

1 the record before you does not explore the circumstances  
2 surrounding it.

3 I will tell you it is my understanding that the  
4 contention that there was an employment agreement  
5 and there was essentially an elimination of Westport's  
6 right to terminate at will had been eliminated by some  
7 combination of oral representations and conduct, et  
8 cetera, et cetera. That is the gist of the wrongful  
9 termination claim.

10 There is not a written contract that has been  
11 put here. Certainly Mr. Nelson hasn't put a written  
12 contract before you that says, "And I can't be  
13 terminated except for cause X, Y or Z."

14 JUDGE HUNT: The reason I ask that is I'm just  
15 trying to figure out whether -- it seems like the  
16 shareholder agreement is fairly narrow. It talks  
17 about -- it focuses on transferability of shares, what  
18 happens to different people's shares, how you acquire,  
19 how you transfer, et cetera.

20 It doesn't focus on other types of contractual  
21 agreements, such as terms of employment, et cetera, et  
22 cetera. And so what I think you're saying is that  
23 because the triggering event is termination of Nelson's  
24 employment, somehow that would bring into the  
25 arbitration clause under the shareholder agreement

1 whether or not the termination has happened to  
2 trigger --

3 MR. KING: Well, we're not trying to bring it  
4 in. It's Mr. Nelson who's bringing it in. It's  
5 Mr. Nelson who's alleging that the shareholders  
6 agreement needs to be declared invalid. It's  
7 Mr. Nelson who's contending that the formation of --

8 JUDGE HUNT: I understand that. I'm not  
9 talking about that particular point.

10 MR. KING: All right. It's Mr. Nelson who was  
11 saying that we don't have a bona fide termination under  
12 the contract, that his termination is in bad faith.  
13 He's been terminated; his job is done.

14 JUDGE HUNT: Right. And you're saying it  
15 doesn't make any difference whether it's in bad faith,  
16 good faith. The fact that he's terminated absolutely  
17 triggers the shareholder agreement and he has to sell  
18 his shares back.

19 MR. KING: Your Honor, I'm not -- actually,  
20 Westport is not taking the position that, for purposes  
21 of arbitration, it doesn't matter whether we did it in  
22 good faith or bad faith. Mr. Nelson says he has a  
23 dispute whether the contract condition has been  
24 satisfied. Mr. Nelson's theory is that we haven't got a  
25 bona fide termination because he was wrongfully

1 terminated.

2 Mr. Nelson is free to put those defenses in  
3 front of the arbitrator. He's free to say, you know,  
4 their stated reason for terminating me, that we had a  
5 difference of opinion, that my methods no longer fit  
6 with the needs of the corporation, that I wasn't doing  
7 my job in light of this growing corporation's needs,  
8 those are all bogus. Those are false reasons. The real  
9 reason I was fired is they were using what I say is my  
10 heart condition and they were tossing me out, and that's  
11 disability discrimination and that's wrongful, et  
12 cetera, et cetera.

13 He's free to put those arguments in front of  
14 the arbitrator and to litigate them if he chooses to  
15 litigate them. He's free not to put them in front of  
16 the arbitrator, but if he doesn't have anything that he  
17 puts in front of the arbitrator to suggest that we  
18 didn't have a bone bona fide termination, that the  
19 contract condition wasn't satisfied, well, then we're  
20 going to have a short arbitration. We will quickly have  
21 a determination by the arbitrator we're entitled to a  
22 return of the shares. We will have a valuation of those  
23 shares pursuant to the formula. We will work out this  
24 issue of the distributions.

25 And then, when those claims are done, we

1 submit, then we would turn to the trial and we would  
2 deal with everything that's left. But the suggestion  
3 that his defense, when he says there wasn't a bona fide  
4 termination, this contract condition hasn't been  
5 satisfied, his suggestion that a failure of a  
6 contractual condition for reasons X, Y and Z is not a  
7 dispute arising out of the contract. I mean, I just  
8 think this argument is legally absurd. It's not a  
9 question of narrow or broad.

10 JUDGE QUINN-BRINTNALL: If he were to prevail  
11 on the issue that he had been discriminated against and  
12 wrongfully terminated for that basis and the remedy was  
13 reinstatement, though, that would alter substantially  
14 what was going on in the arbitration. And that does not  
15 necessarily arise out of the contract.

16 MR. KING: I'm sorry. Were you saying that if  
17 we were to prevail in front of the arbitrator and the --

18 JUDGE QUINN-BRINTNALL: No. I'm saying that if  
19 he prevails at trial that his termination was  
20 discriminatory in violation of the state law and he had  
21 to be reinstated, then that condition wouldn't exist at  
22 the arbitration.

23 MR. KING: But that goes to the question of  
24 sequence. The question of sequencing is not in front of  
25 you. You don't deny the right to arbitrate. Remember,

1 what the -- what the judge has said here is: You don't  
2 get to arbitrate.

3 JUDGE HUNT: Yes.

4 MR. KING: You don't --

5 JUDGE HUNT: But did he say "not yet" or  
6 "ever"?

7 MR. KING: No. He said we don't get to  
8 arbitrate because the question of whether the  
9 shareholders agreement is invalid is for the court, not  
10 the arbitrator. That's the Buckeye decision. And he's  
11 wrong about that.

12 JUDGE HUNT: Except in Buckeye, Buckeye's  
13 arbitration clause actually says, questions about the  
14 validity of the agreement, the contract at issue there  
15 are subject to arbitration. And --

16 MR. KING: Well, that goes to the question --

17 JUDGE HUNT: -- your clause here doesn't say  
18 that.

19 MR. KING: You're absolutely right. And it's  
20 completely irrelevant, because it's not the language of  
21 the agreement in Buckeye that drives the decision in  
22 Buckeye.

23 I was going to make two points about Buckeye.  
24 I was going to talk about the language of the Buckeye  
25 decision itself. And then I was going to cut to the

1 chase and say, you don't have to take my word for it  
2 about the breadth of the holding of Buckeye. You can  
3 look at the Alaska Supreme Court decision which we  
4 submitted as an additional authority yesterday. This  
5 case came down on May 7th after the briefing was  
6 completed. This is the Lexington Marketing Group case.  
7 I'll just quote the language for you.

8 "The Supreme Court's holding in Buckeye was  
9 broad. It was not predicated on a close reading of the  
10 agreement at issue in that case. The Court did not  
11 parse the language of the agreement, nor did it refer  
12 back to the language of the clause after initially  
13 quoting it. The Court relied on several broad  
14 principles."

15 Those are those three propositions that are  
16 stated in the Buckeye case analyzing the development of  
17 the law in this field.

18 And then the Alaska Supreme Court concludes:

19 "Regardless of whether the arbitration  
20 agreement at issue is identical to the agreement before  
21 the court in Buckeye, the court's holding applies".

22 And here's the problem with the plaintiff's  
23 argument in this case about saying that Buckeye turns on  
24 the language of the contract. The problem is, you'll  
25 end up with forum shopping. And here's why. Because

1 under the Federal Arbitration Act, Section 4 tells a  
2 federal district court: Thou shalt not hold back any  
3 issue except a challenge to the validity of the  
4 arbitration agreement itself. So in the federal  
5 district court, it has long since -- courts -- it's long  
6 since been established *Prima Paint*, et cetera, that only  
7 a challenge to the validity of the arbitration agreement  
8 itself can be held back by the district court.

9 If you adopt the plaintiff's reading of *Buckeye*  
10 and you say, oh, it depends upon the language of the  
11 contract, what you will end up with is forum shopping  
12 because state court judges will be free to make a call.  
13 They will be able to look at the language of the  
14 agreement and they will be able to say, oh, well, here  
15 the language of the agreement is such that the parties  
16 have expressly agreed to submit validity of the contract  
17 to the arbitrator. That's the driver of *Buckeye*.

18 Federal district court is not going to be free  
19 to make that call. The statutory language in *Prima*  
20 *Paint* forecloses it. So you're going to have forum  
21 shopping.

22 The United States Supreme Court's decision in  
23 *Southland Corporation*, which is one of two decisions  
24 that the United States Supreme Court says in *Buckeye*  
25 established the three governing propositions, in

1 Southland Corporation, Justice Burger's opinion for the  
2 court condemned precisely that result: We may not have  
3 forum shopping. These things have got to come out the  
4 same, whether the case is in state court or whether the  
5 case is in federal court. And I think that's the kind  
6 of analysis that animated the reasoning of the United --  
7 of the Alaska Supreme Court in the Lexington case, of  
8 the Montana Supreme Court in the Martz case, which we  
9 cited in our briefing. It doesn't turn on the language  
10 of the agreement.

11 Here you have got a dispute about whether  
12 contractual conditions are satisfied. The defense to  
13 our right to have the shares back now is a claim of a  
14 lack of a bona fide termination. Fine. The arbitrator  
15 decides that. That is a dispute arising out of the --  
16 out of the shareholders agreement. And whether that  
17 shareholders agreement is valid, that is for the  
18 arbitrator, too. That's what Buckeye stands for.

19 The last question asked was: What about  
20 sequencing?

21 The answer to sequencing, I submit, Your Honor,  
22 is simply this: We didn't have a decision about  
23 sequencing. And what needs to go first is the  
24 arbitration, because if you say, well, if the  
25 arbitration might have an adverse impact on the trial,

1 therefore, the trial goes first, you're flying in the  
2 face of the principle that we must have a policy that  
3 favors arbitration.

4 And I will refer the Court to Robinson vs.  
5 Hamed, 62 Wn. App 92. It is not in the  
6 briefs. I found it preparing for this argument. It  
7 squarely states that concerns about state jury trial  
8 rights, et cetera, are irrelevant. If an arbitrator  
9 decides fact issue X and that fact issue determination  
10 is fatal to the claims that were reserved for trial, too  
11 bad. Collateral estoppel applies. So the arbitration  
12 should go first and the disputes arising out of the  
13 shareholders agreement need to be resolved. And we have  
14 got disputes that are arising out of the shareholders  
15 agreement. A contention that a condition has not been  
16 satisfied, a contractual condition, is a dispute arising  
17 under the agreement. And the challenge to the validity  
18 of the overall shareholders agreement, that's been  
19 resolved by Buckeye. That's for the arbitrator, too.

20 I know I have gone a bit over my time. I'm  
21 going to reserve the balance, if there are no further  
22 questions.

23 And how much do I have left?

24 THE BAILIFF: Five minutes.

25 MR. KING: Thank you very much.

1 JUDGE BRIDGEWATER: You may adjust the height  
2 of the podium of the (inaudible).

3 MR. BECK: Good morning. May it please the  
4 Court, my name is James Beck, along with Victoria  
5 Vreeland, who is not able to attend today -- she's  
6 attending a funeral -- represent the respondents, Larry  
7 and Barbara Nelson.

8 There's two issues before the court from the  
9 respondents' perspective.

10 The first was not touched on in the initial  
11 argument, but it's whether, as a procedural matter, this  
12 case should be heard on the merits or whether it was  
13 waived by the failure to immediately appeal a decision  
14 not compelling arbitration.

15 JUDGE HUNT: Could you just skip over that one  
16 and focus on the other arguments first and then wait and  
17 see if we have time for that?

18 MR. BECK: Certainly, Your Honor.

19 The second issue is, assuming the merits are  
20 reached in the case, whether Judge McCauley erred in  
21 three times denying the motions to compel arbitration.  
22 He did not, for a number of reasons.

23 Now, when we're analyzing the questions of who  
24 should decide what and when, the first issue that there  
25 seems to be confusion on is, who decides the scope of

1 the agreement and what is arbitrable and what is  
2 not arbitrable. That is squarely the court unless the  
3 arbitration agreement clearly states otherwise. This  
4 arbitration agreement does not state that. This court  
5 held in April in the Tacoma Narrows case that exact same  
6 proposition.

7 So Judge McCauley did just that. He looked at  
8 this contract and determined what was and what was not  
9 arbitrable. And he determined correctly that the case,  
10 which is not anything that arises from this narrow  
11 shareholders agreement, but arises from statutory causes  
12 of action and years and years of different actions and  
13 activities and promises, is what this case is about.

14 When looking at the decision of how you're  
15 going to interpret this agreement and whether or not to  
16 favor or enforce arbitration, Westport suggests that  
17 that arbitration is great and it should be done at all  
18 costs. If there's any ability to read the contracts  
19 such that arbitration should occur, you should do that.  
20 But that skips over the bedrock principle that that  
21 whole concept is built upon.

22 The most important and first principle is:  
23 Parties should not be forced to arbitrate issues they  
24 didn't agree to arbitrate. You don't get to the second  
25 policy considerations of whether arbitration should be

1 favored until you decide, factually, did the parties  
2 agree to arbitrate this case. Here they did not.

3 Now, when you're looking at this arbitration  
4 agreement, the court determined that it was very narrow.  
5 And I don't believe that that's really something that's  
6 being contested on appeal. It has language that's  
7 arising from language which has been construed by plenty  
8 of courts, including the Mediterranean case and others,  
9 that is extremely narrow. What does that mean? The  
10 only things that are arbitrable are the things that are  
11 directly arising out of that agreement. Nothing  
12 collateral can be decided by the arbitrator when you  
13 have a narrow arbitration agreement like the one in this  
14 case.

15 What we have here is a request to have  
16 arbitration on this narrow provision, basically taking  
17 the tail and wagging the dog. They want to have  
18 something that the parties never contemplated or  
19 intended would be the deciding forum for such an  
20 important case for fundamental rights be decided by this  
21 shareholder agreement.

22 JUDGE HUNT: Before you go forward, I would  
23 like you to back up for a moment to when you were citing  
24 the Tacoma Narrows case, in which I'm intimately  
25 familiar, having spent many hours on the case. I'm

1 wondering why Tacoma Narrows would apply here, because  
2 at issue in the Tacoma Narrows case was a specific  
3 provision in this arbitration section that said certain  
4 disputes were not subject to arbitration if they touched  
5 or concerned or related to some other ongoing  
6 litigation -- there were so many different parties --  
7 but some other ongoing litigation. It looked like the  
8 parties in that arbitration agreement said they would  
9 lift those types of agreements out of arbitration and  
10 stick them with the litigation in the court.

11 And so what I'm trying to figure out is, why  
12 that more -- the fairly narrow ruling, I think, would  
13 apply here where you don't have much of an arbitration  
14 clause. It just says, you know, arising from this  
15 contract or this shareholder agreement.

16 MR. BECK: Right, Your Honor. The Tacoma  
17 Narrows case, it sets out one of a couple general,  
18 fundamental principles.

19 One is the question of who decides whether a  
20 claim is arbitrable. And it really comes into the  
21 Buckeye case, which has been a focal point of this  
22 briefing from Westport. And so that's, in part, why. And  
23 I'm going to put up on the ELMO here just a --

24 JUDGE BRIDGEWATER: Did Judge McCauley use the  
25 Buckeye case?

1 MR. BECK: He did. In his letter ruling, I  
2 believe it was in April of 2006, he considered the  
3 Buckeye case and determined that it wasn't on point for  
4 the very reason the Tacoma Narrows case was discussed.

5 Looking at the language -- this is the language  
6 of the Buckeye case. And so what Judge McCauley said is  
7 they've taken this new Supreme Court case and said that  
8 an arbitrator should decide first, all of this. And  
9 look particularly at the language, and it explicitly  
10 states that an arbitrator is to determine the validity,  
11 enforceability, discovery. And so the Tacoma Narrows  
12 case stands for the proposition, basically, that if you  
13 don't have a contract like this, the judge should be  
14 deciding it.

15 In Buckeye, there was no discussion about the  
16 language of the contract in this payday loan customer  
17 contract, because it was a moot point, it was obvious.  
18 The court is not going to say, hey, you know, maybe  
19 there is a situation where the arbitrator should not be  
20 deciding the scope because it said it patently there.

21 JUDGE HUNT: So, are you suggesting that the --  
22 the holding of Buckeye is pretty broad. It doesn't say  
23 anything about the specific language that I was asking  
24 about earlier that you're pointing to here. So you're  
25 saying that we have to look at this fairly broadly

1 worded holding of Buckeye but read it against the  
2 backdrop of the specific arbitration provisions in that  
3 case?

4 MR. BECK: Yes, Your Honor, and that's what you  
5 do with --

6 JUDGE HUNT: And not take it literally as the  
7 holding as it's written?

8 MR. BECK: You have to -- whenever -- correct,  
9 Your Honor. Whenever you're interpreting an appellate  
10 decision, you have to look at the holding of the case in  
11 light of the facts before the court. And just because  
12 they don't say something, especially something as  
13 obvious as this, doesn't mean it's not a fundamental  
14 piece.

15 A hypothetical. Let's say that, as Westport  
16 suggests, the arbitration agreement, the text of it  
17 doesn't matter. First, that runs totally counter to the  
18 bedrock principle that people are only going to be  
19 forced to litigate things that they contracted to  
20 litigate.

21 Secondly, what happens if you have an  
22 arbitration agreement that explicitly says the opposite  
23 of this? What if it says the arbitrator shall not  
24 decide issues of enforceability? What's going to happen  
25 then? Are they going to still have the arbitrator

1 decide it just because that's what Buckeye says?

2 No. You have to look at the first -- the first  
3 place to start is the agreement.

4 JUDGE QUINN-BRINTNALL: Mr. Beck, I understand  
5 your argument in regards to the wrongfulness of the  
6 termination very clearly. I do not understand it in  
7 terms of unresolvable differences. There are those two  
8 bases on which they can force the sale of the stock, as  
9 I understood it, under the agreement. And I don't see a  
10 dispute that there are unresolvable differences between  
11 the two. Why can't the sale of the stock go forward  
12 under the arbitration agreement?

13 MR. BECK: Well, the reason it can't is --  
14 right now it's because they're trying to turn this case  
15 basically on its head.

16 JUDGE QUINN-BRINTNALL: I understand they're  
17 trying to make the wrongful termination a defense and  
18 have that litigated in the arbitration, but I don't  
19 understand why the unresolvable differences portion  
20 can't go and they can't force the sale, under this  
21 agreement, of stock owned by someone who signed this  
22 agreement who doesn't want to work with these guys  
23 anymore and they don't want to work with him anymore.

24 MR. BECK: He does want to work with them.

25 JUDGE QUINN-BRINTNALL: Well --

1 MR. BECK: I mean, that's --

2 JUDGE QUINN-BRINTNALL: -- they don't want to  
3 work with him anymore, so that's an unresolvable  
4 difference regarding the ownership of the company and  
5 the shares of stock, independently of whether he was  
6 wrongfully terminated or they discriminated against him  
7 or whatever the other claims are.

8 MR. BECK: Well, the first question -- I would  
9 resist that -- the first question is, looking at the  
10 elements in the complaint that was brought in this  
11 action, that's the focal point of the question.

12 JUDGE QUINN-BRINTNALL: No, that's not the  
13 focal point of the question. The focal point of the  
14 question is the agreement to sell the shares on two  
15 conditions: One, the termination, but also on  
16 unresolvable differences.

17 Why doesn't that stand as an arbitrable action  
18 now, wholly ripe, independently of his other claims?

19 MR. BECK: Well, two reasons, Your Honor.

20 The first is the fact that Mr. Nelson has  
21 brought a claim for declaratory relief that the  
22 shareholder agreement is invalid. That is a -- the  
23 question that Judge McCauley ruled squarely on was not  
24 something that the arbitration agreement and the  
25 shareholder agreement left to be arbitrated. Therefore,

1 it's something that's going forward in the trial court.

2 If it turns out that the declaratory judgment  
3 action is in Mr. Nelson's favor, then that  
4 unreconcilable differences provision would not have the  
5 effect that you have described, and so that's the exact  
6 reasoning that Judge McCauley had.

7 JUDGE HUNT: So let's assume he loses the  
8 declaratory judgment and the shareholder agreement is  
9 valid.

10 MR. BECK: And I believe, if that hypothetical  
11 were to occur, I think that is what Judge McCauley  
12 envisioned in his first order where he said: At this  
13 stage of the litigation I'm going to deny the motion to  
14 compel arbitration. The idea being that determining  
15 some of the collateral issues that an arbitrator is not  
16 entitled to decide, if those conditions precedent should  
17 occur one way or the other, then there, perhaps, if  
18 necessary, will be a need to have arbitration of some  
19 issues. Judge McCauley has to be able to manage his  
20 docket and decide how a case should go forward.

21 JUDGE HUNT: Even if -- if the case -- if it  
22 went forward to arbitration based on the trigger of  
23 unresolvable differences and eventually your client  
24 prevailed at trial, couldn't he be compensated with  
25 damages?

1 MR. BECK: Your Honor, interestingly, that  
2 exact question was asked by Judge McCauley back on  
3 August 8, if you look at the verbatim report of  
4 proceedings. He just frankly and squarely asked defense  
5 counsel: If this case were to go to arbitration, would  
6 you try to use any of the findings in that to eliminate  
7 any of the claims in this lawsuit, which he later ruled  
8 don't arise from the agreement.

9 And defense counsel conceded that he could not  
10 make that stipulation on the record. And so that was  
11 the very issue that he was bearing in mind in deciding  
12 the sequencing of this.

13 The arbitration agreement hasn't become ripe  
14 yet, because the conditions precedent to it haven't  
15 occurred. The declaratory judgment action, if it's  
16 rendered in Mr. Nelson's favor, will moot points or  
17 determine the points about the unreconcilable  
18 differences. And this also comes --

19 JUDGE QUINN-BRINTNALL: Mr. Beck, are you  
20 seriously saying that there are no unreconcilable  
21 differences? I understand the argument that the  
22 agreement may not be valid and enforceable, but what  
23 evidence is there that there are not unresolvable  
24 differences between the parties?

25 MR. BECK: And that's not the argument that I'm

1 making, is that they're not at ends. I think it's  
2 patently clear to everyone at this point they are not on  
3 the same page.

4 JUDGE QUINN-BRINTNALL: Well, I thought you  
5 said that the condition precedent had occurred and you  
6 focused on the termination and the unresolvable  
7 differences.

8 MR. BECK: I guess I would say there are two  
9 condition precedents (sic). One would be the  
10 determination of whether there was a termination. And  
11 the second would be the declaratory judgment decision.

12 JUDGE QUINN-BRINTNALL: So you're saying --

13 MR. BECK: Because that's --

14 JUDGE QUINN-BRINTNALL: -- the second on the  
15 enforceability?

16 MR. BECK: Right, that's something that's before  
17 the trial court.

18 But the Court shouldn't even get to these  
19 issues because procedurally they litigated that very  
20 issue. Westport filed a motion for summary judgment on  
21 the issue of declaratory judgment relief, and they lost.  
22 A party can waive their right to compel arbitration if  
23 they act inconsistently.

24 Here -- well, let me back up for a second. If  
25 you compare this case to a case where the court has

1 determined that a party waived a right to enforce  
2 arbitration through litigation conduct, the facts of  
3 this case are more severe. In the Naches School  
4 District case cited in our brief, a situation where an  
5 association of retired teachers sued the school district  
6 because they weren't getting compensated for vacation or  
7 time that had accrued, the association moved to  
8 arbitrate, and the trial court said, okay, yes, you can  
9 arbitrate. But three teachers filed a motion for  
10 summary judgment claiming that they were owed the  
11 compensation on the merits of the issue. And the court  
12 of appeals there said, even though we're going to let  
13 the association go to arbitration, three teachers,  
14 because you filed a motion for summary judgment on the  
15 merit, you waived.

16 Here we have a step further than that.  
17 Westport talked about forum shopping, but that is what  
18 we have here. They filed a motion for summary judgment.  
19 They lost on the merits. And then they filed their  
20 notice of appeal. They had a right to appeal the  
21 decision not to compel arbitration, irrespective of what  
22 was written by the judge at the time, and they didn't do  
23 it. Instead they litigated the case for almost a year  
24 and got a ruling on the merits on the very issue of the  
25 enforceability of this agreement.

1           It would be manifestly unfair to allow them to  
2     have a second bite at the apple with an arbitrator on a  
3     claim that they have already litigated.

4           JUDGE QUINN-BRINTNALL: Well, wait a minute. I  
5     thought they just filed a motion for summary judgment  
6     and the summary judgment was denied, the declaratory  
7     judgment action wasn't granted.

8           MR. BECK: No, it was their motion on the  
9     merits asking for summary judgment --

10          JUDGE QUINN-BRINTNALL: Was denied.

11          MR. BECK: -- was denied.

12          JUDGE QUINN-BRINTNALL: So it has to go to  
13     trial --

14          MR. BECK: Correct.

15          JUDGE QUINN-BRINTNALL: -- to determine whether  
16     it's enforceable.

17          MR. BECK: Correct. But they got a feeling of  
18     how things were going to work on that issue. They got a  
19     ruling from the courts on the merits of the case. It  
20     wasn't a procedural --

21          JUDGE QUINN-BRINTNALL: But why is the original  
22     order appealable when it is not a final order? It  
23     simply says "not at this time."

24          MR. BECK: Because he didn't grant their motion  
25     to compel arbitration. If he had --

1 JUDGE QUINN-BRINTNALL: But he didn't finally  
2 deny it, so it's not a final ruling that's appealable as  
3 a matter of right. They could have sought discretionary  
4 review, but it wouldn't have been appealable as a right.

5 MR. BECK: If a judge refuses to compel  
6 arbitration, it is a decision. That decision in  
7 refusing would be one that is appealable as a matter of  
8 right.

9 JUDGE QUINN-BRINTNALL: But he said right in  
10 the order "at this time," so he did not finally deny the  
11 motion to arbitrate that ruling. It was only -- I mean,  
12 you say sequencing isn't the issue, but --

13 MR. BECK: Well, what would happen if this was  
14 the case, Your Honor? If -- presume they didn't file  
15 that motion and just put it to the side because they  
16 didn't get a ruling on it that was affirmative. They  
17 didn't ask for one to say, hey, either, say we can or  
18 cannot go to arbitration right now because we  
19 want (sic).

20 Well, then, what they did in essence was  
21 litigate the case for about a year and get rulings and  
22 conduct discovery and file three motions for summary  
23 judgment before they moved to compel arbitration again  
24 for the third time. So if that wasn't a final decision,  
25 then they didn't move to compel arbitration and get a

1 final decision. They're obligated at the outset, if you  
2 want to enforce your arbitration agreement, to get a  
3 final decision early on before you've conducted  
4 litigation and got rulings and appeal that.

5 JUDGE QUINN-BRINTNALL: What is your -- there  
6 is plenty of authority that you have to raise the  
7 arbitration issue, but where is your authority that you  
8 have to get a final ruling from the trial court when the  
9 trial court says "at this time." It doesn't issue a  
10 final ruling.

11 MR. BECK: Well, it just logically would derive  
12 from the other rulings. Herzog and so forth says that  
13 you have an immediate right to appeal a denial of a  
14 motion for arbitration, (inaudible) arbitration. Here,  
15 the motion was denied, even though it was without

16 prejudice and said they could bring it back later --

17 JUDGE QUINN-BRINTNALL: But that doesn't make  
18 it appealable under our rules. It doesn't make it a  
19 final order.

20 MR. BECK: The arbitration -- deciding when an  
21 arbitration is appealable is something that's -- it's an  
22 interpretation from the RAPs anyhow, as far as whether  
23 that is a specific type of claim that can go forward  
24 right away or has to wait.

25 The reasons behind allowing for immediate

1 appeal of a denial of arbitration is that the litigant  
2 would have to go through all the expenses of a trial and  
3 you would lose the efficiencies of arbitration. So the  
4 policy considerations and why you would have an  
5 immediate right to appeal would be spun on their head,  
6 thrown to the side, if you did not require that this  
7 issue was decided early on.

8 JUDGE QUINN-BRINTNALL: Well, those are policy  
9 considerations for consideration by this court in  
10 granting or denying a motion for discretionary review.  
11 That doesn't change whether the trial court issued a  
12 final order or not.

13 MR. BECK: Your Honor, I guess my point would  
14 be --

15 JUDGE QUINN-BRINTNALL: I'm taking you to the  
16 side -- just continue with your argument.

17 JUDGE BRIDGEWATER: Well, I have a conceptual  
18 difficulty with this argument.

19 Number one, you've raised it before. Our  
20 commissioner ruled on it. You asked for -- and a motion  
21 to modify the commissioner's ruling. We denied that.  
22 Why is this occurring at this stage? Why do you feel  
23 that you can raise it at this stage?

24 MR. BECK: A decision on a motion to dismiss,  
25 in my understanding, would be different than a question

1 that the merits of the case the court might want to  
2 consider. So a decision as to whether or not it's been  
3 waived is something that we have a right to appeal if we  
4 wanted to take it up further or what have you. Merely  
5 denying it on a preliminary basis to begin with on a  
6 motion to dismiss should be different than being able to  
7 argue it.

8 The court concluded that it wasn't viable  
9 sufficiently, black and white, to dismiss the case on  
10 those grounds. There is no precedent that I'm aware of  
11 that prohibits us from raising it on the grounds in the  
12 appeal itself for a reason why the case should not go  
13 forward. It should be dismissed. You would never have  
14 a decision in a published case on a question like that  
15 if you were prohibited from raising it during the  
16 briefing.

17 So, in essence, Judge McCauley considered this  
18 carefully. He ruled three times that the claims in the  
19 lawsuit are not arising from the contract, they're  
20 statutory, they're different. And he denied their  
21 motion to compel arbitration. His decision should be  
22 affirmed.

23 Thank you.

24 JUDGE QUINN-BRINTNALL: How much time will  
25 remain for rebuttal?

1 THE BAILIFF: Five minutes, Your Honor.

2 JUDGE HUNT: I have one question before you --  
3 but I will make it fast, okay.

4 Near the end of his argument, he was talking  
5 about, I think he was saying that because you brought a  
6 motion for summary judgment in the trial court, then you  
7 therefore waived your contention that some of these  
8 issues should be arbitrable, so could you please respond  
9 to that first.

10 MR. KING: Absolutely.

11 First of all, we didn't appeal the first ruling  
12 because it was expressly not final. It was contemplated  
13 that we were going to go forward --

14 JUDGE HUNT: You don't need to waste your time.

15 MR. KING: -- with some discovery. Then we did  
16 the discovery. And we brought that motion for partial  
17 summary judgment based on the admissions we felt we had  
18 gotten from Mr. Nelson in his deposition about his fraud  
19 in the inducement claim, but that motion was made  
20 expressly conditional. We were renewing our motion to  
21 arbitrate, based both on Buckeye and the admissions we  
22 thought we had gotten in the deposition, but Buckeye was  
23 first and foremost.

24 And we told the judge, if you grant us  
25 arbitration based on the developments in the law, don't

1 decide our motion for summary judgment. That is  
2 squarely in our briefing papers. It should go to the  
3 arbitrator because that would be the core of the  
4 question of fraudulent inducement of the shareholders  
5 agreement, a challenge to the validity of the  
6 shareholders agreement as a whole. We did not come in  
7 and litigate something and then try to turn around and  
8 get the benefits of arbitration. We said, don't decide  
9 our motion if you're going to send this to arbitration  
10 based on what we think is the change of the law. There is  
11 no waiver.

12 Now, what I want to start with is the series of  
13 the questions about the unresolvable differences issue.  
14 First of all, we have gotten a very important admission  
15 today. You have been told they can't deny that we have  
16 unresolvable differences. Their only defense to  
17 arbitration under that independent clause of the  
18 contract is now admitted to be nothing more than the  
19 claim that the whole shareholders agreement is invalid,  
20 which takes you right to Buckeye. But we have got an  
21 admission of unresolvable differences. It is an  
22 independent basis for our contractual right to get those  
23 shares back and to do the valuation. And the only  
24 fallback is this contention, well, the whole  
25 shareholders agreement is invalid.

1           And I want to emphasize the importance of this  
2 clause in the contract. And if you read Mr. Nelson's  
3 declaration, he actually basically admits it. It's  
4 important to the effective management of this  
5 closely-held corporation. We can't have this kind of  
6 unresolvable differences among these shareholders at the  
7 top executive level. It is an extremely important  
8 contractual right to Westport. We are not trying to  
9 frustrate his attempt to have a trial on, as Judge Hunt  
10 phrased it, "the claim for damages."

11           We are trying to get these vital issues of  
12 shareholder rights out of the way. Now --

13           JUDGE BRIDGEWATER: Is Buckeye limited by the  
14 facts in Buckeye, as counsel suggests, that because  
15 Buckeye depends on their arbitration language, that it  
16 should not apply to us because it's anathema to our  
17 consideration?

18           MR. KING: I think that's too narrow a reading  
19 of Buckeye for two reasons, Your Honor.

20           First of all --

21           JUDGE BRIDGEWATER: Well, you have to admit  
22 that Buckeye is pretty strange in light of the  
23 remainder -- I mean, our precedent in how you decide  
24 validity, who decides it.

25           MR. KING: Well, actually not, because, first

1 of all, at the federal level, the question of validity  
2 of the contract as a whole that contains an arbitration  
3 clause is an issue that's been for the arbitrator since  
4 Prima Paint. And I was pointing out in the opening  
5 argument, Section 4 of the Arbitration Act pretty well  
6 says: Federal judges don't have a choice. They've got  
7 to send a challenge to the agreement as a whole to the  
8 arbitrator.

9 The reason Buckeye is important is that it  
10 closed the loop. It closed the loop on the state side.  
11 In between, you have Southland Corporation, and  
12 Southland Corporation says we're not going to let states  
13 displace our federal approach for some public policy  
14 reason of the states because that will encourage forum  
15 shopping.

16 Now, all Buckeye does is it closes the loop.  
17 It says, you look at these three propositions, and it's  
18 basically saying, same principle applies for a dispute  
19 over arbitration that's governed by the Federal  
20 Arbitration act in the state court as in the federal  
21 court, because otherwise you would end up with forum  
22 shopping.

23 I agree, if you wanted to take a very narrow  
24 approach to Buckeye, you could say, well, the contract  
25 says that challenges to the validity of the overarching

1 agreement are for the arbitrator.

2 But as the Alaska Supreme Court pointed out,  
3 that's not what the United States Supreme Court is  
4 trying to tell us. As the Montana Supreme Court pointed  
5 out, that's not what the United States Supreme Court is  
6 trying to tell us. They didn't take this case to decide  
7 it on the basis of the particularities of the language.  
8 And we know that, because if you adopt that rule, you  
9 will create forum shopping, which is exactly what  
10 Southland Corporation, the in-between case between Prima  
11 Paint and Buckeye, says you may not do.

12 Now, there were a lot of questions about the  
13 Tacoma Narrows case. I think we can pretty much take  
14 that off of the table. That wasn't the Buckeye case,  
15 that wasn't a question about what -- that wasn't about a  
16 challenge to the validity of the overarching agreement,  
17 never mind the arbitration agreement itself.

18 The bottom line here is -- and if I can just  
19 sum up -- the bottom line here is, at the very least,  
20 you now have an admission that the unresolvable  
21 difference clause of this contract, which triggers our  
22 right to get back these shares, that the only defense to  
23 that is the demand for an invalidation of the overall  
24 shareholders agreement. And if we're right about  
25 Buckeye and that goes to arbitration, and all of this

1 needs to be done first in order to vindicate the  
2 policies favoring arbitration -- national, federal  
3 policies that are supreme under the supremacy clause.

4 Thank you.

5 JUDGE BRIDGEWATER: Thank you very much.

6 The next case?

7 (Conclusion of proceedings.)

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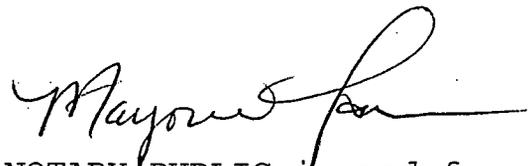
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C E R T I F I C A T E

STATE OF WASHINGTON )  
 )  
COUNTY OF SNOHOMISH )

I, the undersigned, under my commission as a Notary Public in and for the State of Washington, do hereby certify that the foregoing recorded statements, hearings and/or interviews were transcribed under my direction as a transcriptionist; and that the transcript is true and accurate to the best of my knowledge and ability; that I am not a relative or employee of any attorney or counsel employed by the parties hereto, nor financially interested in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and seal this 31<sup>st</sup> day of August 2007.



NOTARY PUBLIC in and for  
the State of Washington,  
residing at Lynnwood.

My commission expires 4-27-10.



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