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COURT OF APPEALS
DIVISION II

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No. 35308-3-II

STATE OF WASHINGTON
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DIVISION II, COURT OF APPEALS
OF THE STATE OF WASHINGTON

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' REPLY BRIEF

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I.

SUMMARY OF REPLY

Plaintiff's brief is telling more by what it omits than by what it addresses.

First, plaintiff remains unable to escape the dispositive effect of the United States Supreme Court's decision in Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), on the arbitrability question that is before this Court for resolution. In Buckeye, the Supreme Court made clear that challenges to the validity of an agreement as a whole are for an arbitrator to decide. Plaintiff has made repeated statements that his challenge is to the validity of the 2004 Shareholders Agreement as a whole. Under Buckeye, that challenge must be decided by an arbitrator, not by the trial court.

Second, plaintiff utterly ignores the provision in the 2004 Shareholders Agreement requiring him to sell his shares "upon an unresolvable difference" among the shareholders. Plaintiff's obligations under this buyback provision plainly "arise out of" the 2004 Shareholders Agreement, and therefore are subject to arbitration.

Third, plaintiff's rehash of his "untimely appeal" and "waiver" claims, already rejected twice by this Court, should be rejected again. The trial court, in its October 31, 2005 order, plainly intended to allow defendants to revisit the question of arbitration. When he denied

defendants' August 2005 motion to compel arbitration, the trial judge specifically and in his own handwriting confirmed that the denial was only "at [that] stage of the litigation." Defendants were entirely within their rights to reopen the question of arbitration, based on both new evidence and the issuance of the Buckeye decision by the United States Supreme Court. Defendants timely appealed the trial court's August 10, 2006 order, which finally and unequivocally denied defendants' motion to compel arbitration.

II.

RESTATEMENT OF MATERIAL FACTS

This case presents a straightforward legal issue: whether the enforceability of an agreement between the parties, which contains a provision requiring arbitration of all disputes "arising out of" that agreement, should be determined in the first instance by the arbitrator or by the trial court. Plaintiff's highly argumentative¹ Statement of the Case ignores the facts that are central to the resolution of this issue. Appellants submit the following restatement of the undisputed, relevant facts that actually bear on this issue:

¹A party's statement of the case must be a "fair statement of the facts and procedure relevant to the issues presented for review, without argument." RAP 10.3(a)(5) (emphasis added). Plaintiff's statement of the case is riddled with argumentative statements in violation of RAP 10.3(a)(5). This sort of "laissez-faire" legal briefing falls far below the high standards of professionalism" the court expects. Hurlbert v. Gordon, 64 Wn. App. 386, 401, 824 P.2d 1238 (1992).

- Mr. Nelson signed the 2004 Shareholders Agreement, which, in Section 6.5, contains an arbitration clause that requires that all disputes "arising out of" the Agreement are to be submitted to arbitration for resolution.² See 2004 Shareholders Agreement, at 9 (CP 52).

- Under Sections 2.3 and 2.4 of the 2004 Shareholders Agreement, Mr. Nelson agreed to sell back his shares of Westport common stock to Westport, at one and one-half times the company's net book value, upon the occurrence of certain events. See 2004 Shareholders Agreement, at 2 (CP 45-46):

- The requirement to sell back Westport stock could be triggered by termination of Mr. Nelson's employment (Section 2.3.4), but could also be triggered in the event of an "unresolvable difference" among the shareholders (Section 2.3.3). Id. A majority vote of the then current shareholders would determine which shareholder would be bought out. Id. (CP 45).

- Mr. Nelson confirmed in his August 5, 2005 sworn declaration that he understood and agreed to the buyback requirements that attached to the Westport shares he was permitted to acquire.

²The three previous Buy and Sell Agreements plaintiff signed also had arbitration provisions, requiring arbitration where "necessary to carry out the terms and conditions" of those agreements. December 17, 1998 Buy and Sell Agreement at 2 ("1998 Agreement") (CP 57); December 18, 2000 Buy and Sell Agreement ("2000 Agreement"), at 2 (CP 60); December 17, 2001 Buy and Sell Agreement ("2001 Agreement") at 2 (CP 65).

Declaration of Larry Nelson in Support of Plaintiff's Opposition to Motion to Compel Arbitration ("Nelson Decl."), ¶ 5 at 2 (CP 110) (Mr. Nelson swearing: "I understood that they did not want me to be able to leave the company and keep my stock. I understood and agreed to those terms").

- Mr. Nelson also stated under oath that he understood and agreed that all of the agreements he signed "required" arbitration of matters arising out of the agreements and his challenge is not to the enforceability of the arbitration clause by itself. Id., ¶ 19 at 5 (CP 113).

- After Mr. Nelson's employment was terminated in June 2005, Westport notified Mr. Nelson that it was exercising its rights under the 2004 Shareholders Agreement to buy back his shares at 1.5 times net book value based on the most recent audited financial statement, and tendered to Mr. Nelson \$1,086,570 in return for his 460 shares. See June 24, 2005 Letter from Westport to plaintiff. (CP 116-17.) Mr. Nelson refused the tender. Declaration of Mary Welk in Support of Defendants' Motion to Compel Arbitration, ¶ 7 at 3 (CP 42). He filed this lawsuit on June 24, 2005. (CP 1-15.)

- In July 2005, based on Mr. Nelson's refusal to abide by the terms of the 2004 Shareholders Agreement, 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 Westport 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 Mr. Nelson's shares. See August 17, 2005 Letter from Westport to plaintiff (CP 417). Mr. Nelson again refused to accept payment or deliver back the share certificates evidencing his shares, and is still in possession of 460 shares (slightly more than two percent) of the outstanding 21,540 shares. See Defendants' Motion to Compel Arbitration or, in the Alternative, for Leave to File Amended Answer With Counterclaims, at 2 (CP 391).

III.

ARGUMENT ON REPLY

A. Under the Controlling Authority of the United States Supreme Court's BUCKEYE Decision, the Enforceability of the 2004 Shareholders Agreement Must Be Decided in Arbitration.

Plaintiff admits he is challenging the validity of the 2004 Shareholders Agreement as a whole. "[E]ven assuming that the 2004 Shareholders Agreement is enforceable, which Mr. Nelson disputes, the scope of the arbitration clause is narrow." Respondent's Brief at 25 (emphasis added); see also First Amended Complaint, ¶¶ 3.24 (CP 22), 9.2, and 9.5 (CP 27) (claiming that defendant Edson's acts "render[] the Shareholders Agreement of 12/04 void and unenforceable"; and claiming that "[t]he [2004] Shareholders Agreement . . . should be declared invalid).

and set aside as void and unenforceable") (emphasis added). Moreover, plaintiff expressly acknowledged under oath that the arbitration clause itself was valid and applicable, as to "the specific matters in th[e] agreement [i.e., the 2004 Shareholders Agreement]." Nelson Decl., ¶ 19 (CP 113).

Under Buckeye, a challenge to the validity of the agreement as a whole is for the arbitrator to hear in the first instance. Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 1209, 163 L. Ed. 2d 1038 (2006); see also Nagrampa v. Mailcoups, Inc., 469 F.3d 1257, 1268-71 (9th Cir. 2006) (applying Buckeye, court hears specific challenges to the validity of the arbitration clause, but not challenges to the contract as a whole; efforts to invalidate the entire contract must be sent to arbitrator). To avoid Buckeye, plaintiff argues for distinguishing between "narrow" and "broad" arbitration clauses. See Respondent's Brief at 19-21. But there is no suggestion in Buckeye that its holding should be limited only to those agreements with "broad" arbitration clauses. Plaintiff cites no legal authority to support any such distinction. Other than pointing to the text of the arbitration clause at issue in Buckeye, plaintiff cannot identify any discussion in the opinion that would so limit its holding. See id. at 20. Nor would such a distinction be appropriate. The central question posed in Buckeye asks: "What is the party challenging -- the arbitration clause or the agreement as a whole?" If the

answer is that the challenge is to the agreement as a whole, as it is in this case, then under Buckeye, enforceability is for the arbitrator to decide, not the court. . . Whether the arbitration clause itself is deemed "narrow" or "broad" should have no bearing whatsoever on this issue, which concerns whether the enforceability challenge focuses specifically on the arbitration clause, or on the parties' agreement as a whole, of which the arbitration clause forms a part.

Indeed, the decisions applying Buckeye reflect no interest whatever in the kind of "clause categorization" in which plaintiff would have this Court engage. . . In Nagrampa v. Mailcoups, Inc., 469 F.3d at 1269-71, the court did not even cite the text of the arbitration clause, which would have revealed whether it was applying Buckeye to a "broad" or "narrow" arbitration clause. . . Likewise in Martz v. Beneficial Montana, Inc., 332 Mont. 93, 98, 135 P.3d 790 (Mont. 2006), the court applied Buckeye and held that challenges to an agreement as a whole go to an arbitrator, with no discussion of whether the arbitration clause language was "broad" versus "narrow."

In sum, Buckeye mandates that plaintiff's challenge to the validity or enforceability of the 2004 Shareholders Agreement, along with defendants' claims that plaintiff has breached his obligations under the

2004 Shareholders Agreement, must be heard by an arbitrator. The trial court's erroneous ruling to the contrary should be reversed.³

B. In Focusing on the "Narrowness" of the Arbitration Clause in the 2004 Shareholders Agreement, Plaintiff Distorts the Fundamental Principles Applicable to the Federal Arbitration Act and Ignores the Controlling Case Law.

Plaintiff's analysis of the scope of the arbitration clause dedicates significant time to arguing that contract principles generally govern the scope of issues that may be subject to arbitration under the 2004 Shareholders Agreement. Respondent's Brief at 27-28. Plaintiff goes on to propose -- without citation to any authority -- that contract principles "control over the broad public policy preference for upholding alternative dispute resolution." Respondent's Brief at 29. But plaintiff again misses

³Compare Tacoma Narrows Constructors v. Nippon Steel-Kawada Bridge, Inc., No. 34901-1-II, 2007 WL 1192125 (Wash. Ct. App. Apr. 24, 2007) (court held that a challenge to the arbitrability of specific claims is to be determined by the court, not the arbitrator). Although, in Tacoma Narrows Constructors, this court affirmed the trial court's decision that the claims at issue were not arbitrable, that case did not involve any claim that the underlying agreement was unenforceable and is therefore inapposite. Here, while defendants agree that the court determines arbitrability of plaintiff's and defendants' claims regarding enforceability of the 2004 Shareholders Agreement, defendants are appealing the trial court's ruling because the trial court's determination of what was arbitrable in this case was incorrect under Buckeye and the FAA. Review of a trial court's decision to deny a motion to compel arbitration is de novo. See, e.g., Kruger Clinic Orthopaedics, L.L.C. v. Regence Blueshield, 157 Wn.2d 290, 298, 138 P.3d 936 (2006); Stein v. Geonerco, Inc., 105 Wn. App. 41, 45, 17 P.3d 1266 (2001). Plaintiff's brief does not challenge this standard of review.

the point. . . In a long line of cases, the courts have always been able to harmonize the two sets of principles.

As defendants pointed out in their opening brief, "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., Ltd. v. American Prop. Consultants, Ltd., 91 Wn. App. 703, 714, 959 P.2d 1140 (1998) (internal quotation marks altered). . . In the context of contracts with arbitration clauses, courts have historically and consistently 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. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); Zuver v. Airtouch Communications, Inc., 153 Wn.2d 293, 301, 103 P.3d 753 (2004) (mandating that "[c]ourts must indulge every presumption in favor of arbitration") (internal quotation marks and citation omitted). . . Thus, the great weight of authority mandates finding arbitrability.

1. The Ninth Circuit in MEDITERRANEAN Has Held That a "Narrow" Arbitration Clause Requires Arbitration of Claims Such as These. Plaintiff refers to Mediterranean Enterprises, Inc. v. Ssangyong Corp., 708 F.2d 1458 (9th Cir. 1983), only to argue that the arbitration clause in the 2004 Shareholders Agreement is "narrow." See Respondent's Brief at 32-33. . . That is, however, only the first step in the Mediterranean

analysis. In considering what claims were governed by its "narrow" arbitration clause (which in that case covered disputes "arising hereunder"), the Ninth Circuit ruled that breach of contract and fiduciary claims were subject to arbitration -- and affirmed the District Court order staying litigation of all other claims until resolution of the arbitrable claims. 708 F.2d at 1465. The court held that plaintiff's claims of "breach of the Agreement and breach of fiduciary duty created by the Agreement, clearly fall within the scope of the arbitration clause and are thus proper subjects for arbitration." Id. at 1464 (emphasis added). Plaintiff does not address this part of Mediterranean, and instead turns to unpublished and other nonbinding cases to try to avoid arbitration of his and defendants' arbitrable claims.

2. Plaintiff's Citations Do Not Support His Position on the Scope of Arbitrable Claims. As a threshold matter, pursuant to RAP 10.4, citation to unpublished opinions of the Washington appellate courts "is forbidden and citation to unpublished opinions of other jurisdictions is also inappropriate." Mendez v. Palm Harbor Homes, Inc., 111 Wn. App. 446, 473, 45 P.3d 594 (2002) (emphasis added). "The reliance upon unpublished opinions is a dubious practice at best." State v. Sparkman & McLean Co., 16 Wn. App. 402, 406, 556 P.2d 946 (1976). Even if such citations were permitted, the cases cited by plaintiff either bolster defendants' legal position or are distinguishable on their facts.

- Vetco Sales, Inc. v. Murphy, 2003 LEXIS 6925 (N.D. Tex. Apr. 23, 2003). This is an unpublished case from the Northern District of Texas. In Vetco, the defendant sought to arbitrate claims of breach of a Buyout Agreement that had no arbitration clause, by invoking the arbitration clause in a different contract, a Shareholder Agreement. The arbitration clause in the Shareholder Agreement provided for arbitration of issues "arising out of" the Shareholders Agreement. The district court in Vetco declined to graft the arbitration provision contained in the Shareholders Agreement onto the separate Buyout Agreement, which had no arbitration clause. Here, plaintiff's and defendants' claims arise out of a single agreement and defendants need not invoke a collateral agreement to be entitled to arbitration of those claims.

- Goodrich Cargo Systems v. Aero Union Corp., 2006 LEXIS 93680 (N.D. Cal. Dec. 14, 2006). This is an unpublished case from the Northern District of California. Like Vetco, the Goodrich defendant attempted to invoke an arbitration clause from one agreement to arbitrate issues that arose under a wholly separate agreement. The court held that only claims arising under the agreement with the arbitration clause would be subject to arbitration. This is plainly different from the present situation, where the arbitration clause is contained in the only applicable agreement -- the 2004 Shareholders Agreement -- and provides for arbitration of issues "arising out of" that Agreement.

- Slatnik v. Deutsche Bank, 2006 LEXIS 94836 (S.D. Cal. Mar. 15, 2006). This is an unpublished case from the Southern District of California, but one which plainly favors defendants' position. The court specifically acknowledged that "[t]he United States Supreme Court recently clarified [in Buckeye] that an arbitrator should decide the claim that a contract containing an arbitration provision is void for illegality." Slatnik reaffirmed the principle that, "[e]ven if enforcement of a mandatory arbitration agreement results in disputes that must be resolved in separate fora . . . the relevant federal law requires piecemeal resolution when necessary to give effect to an arbitration agreement." 2006 LEXIS 94836, at *11. (citing Moses H. Cone, 460 U.S. at 20 (internal quotation marks omitted)).

While at least a published decision, Davis v. Chevy Chase Fin. Ltd., 667 F.2d 160 (D.C. App. 1981), is perhaps the most surprising case that plaintiff cites. In Davis, to which plaintiff dedicates nearly three full pages of his brief, Chevy Chase argued that an arbitration clause which, by its own express terms, governed only the valuation of stock, should be extended to decide, in arbitration, whether the shareholder was required to sell back his shares. What distinguishes Davis from the present case is that the arbitration clause in Davis expressly covered only the value of the

shares.⁴ 667 F.2d at 166. Indeed, the Davis agreement did not contain any mandatory buyback provision, making its result entirely irrelevant to the facts of this case. Id. 165-66.

Here, the mandatory buyback provisions of Section 2.3.4 (employment termination) and Section 2.3.3 ("unresolvable difference") each require that plaintiff sell back his shares upon the happening of either triggering event. Both sections are subject to the arbitration clause in Section 6.5 of the 2004 Shareholders Agreement, which plaintiff agrees cover "the specific matters in that agreement." See August 5, 2005 Nelson Decl., ¶ 19 at 5 (CP 113). There can be no dispute that plaintiff's and defendants' claims regarding the obligations assumed under those provisions "arise out of" the 2004 Shareholders Agreement. Accordingly, whether those provisions are enforceable, and whether plaintiff is required to sell his Westport shares back to the company, must be arbitrated.

⁴By comparison, Section 6.5 of the 2004 Shareholders Agreement provides:

Arbitration. 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.

(CP 52) (emphasis added).

C. The Issue of Whether the "Unresolvable Difference" Provision Triggered Plaintiff's Obligation to Sell Back His Shares Plainly "Arises out of" the 2004 Shareholders Agreement and Must Be Heard by an Arbitrator.

Plaintiff makes the remarkable assertion that "[n]othing in th[e] lawsuit involves any dispute over the matters of substance covered in the [2004 Shareholders] Agreement." Respondent's Brief at 45. That argument ignores both the employment termination provision in Section 2.3.4 and the "unresolvable difference" provision in Section 2.3.3. Plaintiff's suggestion that his termination from employment at Westport is the only basis for Westport's right to buy back his shares⁵ ignores the second ground Westport invoked to trigger the buyback provision: Section 2.3.3 of the 2004 Shareholders Agreement, which expressly provides that the buyback provision is triggered "upon the unresolvable difference between shareholders." See 2004 Shareholders Agreement at 2 (CP.45).

Plaintiff fails to acknowledge the existence of Section 2.3.3, and omits that section from his discussion of those issues that are "covered" by the 2004 Shareholders Agreement. Indeed, plaintiff does not once cite or refer to Section 2.3.3 in his 50 page brief. Nor does plaintiff acknowledge that, on August 17, 2005, Westport notified plaintiff that the majority of shareholders had determined that an "unresolvable difference existed

⁵Respondent's Brief at 42 ("Here, the arbitration clause does not encompass the issue of whether the events giving rise to the repurchase of shares has occurred, i.e., whether the 'termination' was lawful").

between [plaintiff] and the other shareholders of Westport," and that Westport was exercising its rights under Section 2.3.3 of the 2004 Shareholders Agreement to buy back plaintiff's shares. . . See August 17, 2005 Letter from D. Wakefield to L. Nelson (CP 417). . . That basis for triggering the buyback provision is separate and apart from the equally enforceable "termination from employment" provision, and plaintiff has offered no explanation as to: . . . (1) why defendants' claim under Section 2.3.3 does not "arise out of" the 2004 Shareholders Agreement, or (2) how his argument that only the trial court can rule on enforceability of Section 2.3.4 (an argument that defendants dispute) has any impact on the arbitrability of whether he breached his obligations under Section 2.3.3. . . Plaintiff's omission of any discussion whatsoever of Section 2.3.3 speaks volumes, plainly indicating plaintiff's knowledge that the "unresolvable difference" provision also triggered Westport's buyback rights and also clearly "arises out of the" 2004 Shareholders Agreement, an issue that must be heard by an arbitrator.

D. By Entering Into an Agreement With an Arbitration Clause, Plaintiff Has Already Agreed to Waive His Right to a Jury Trial on Arbitrable Claims.

Citing the Washington Arbitration Act ("WAA") and Washington's Constitution, plaintiff makes lofty arguments about his inviolate right to a jury and suggests that arbitration of the arbitrable claims would "erase Mr. Nelson's right to a jury under the Washington Arbitration Act."

Respondent's Brief at 49. Yet plaintiff has already agreed that the Federal Arbitration Act ("FAA"), not the WAA, applies to his claim. See Plaintiff's Opposition to Motion to Stay Litigation and to Compel Arbitration, p. 3 n.1 (CP 86). Moreover, plaintiff testified that he knew claims arising out of the 2004 Shareholders Agreement would be subject to arbitration, and not to a jury trial. Nelson Decl., ¶ 19 at 5 (CP 113). Finally, courts consistently send claims to arbitration, even where facts relevant to nonarbitrable claims overlap with facts relevant to arbitrable claims. See, e.g., Mediterranean, 708 F.2d at 1461 (citing District Court's ruling that breach of contract and breach of fiduciary claims were subject to arbitration -- staying litigation of all other claims until resolution of the arbitration); see also Godfrey v. Hartford Cas. Ins. Co., 142 Wn. 2d 885, 898, 16 P.3d 617 (2001) (insurer waived right to jury trial by agreeing to arbitrate disputes with its insured). Plaintiff concedes he agreed to arbitrate "matters in that agreement" (CP 113); he cannot now be heard to complain about his jury trial rights pertaining to those matters.

E. Defendants' September 1, 2006 Appeal From the Trial Court's August 10, 2006 Order Denying Their Motion to Compel Arbitration Was Timely.

Defendants agree with plaintiff that appellate jurisdiction requires a timely appeal.⁶ See Respondent's Brief at 14; see also RAP 5.2.

⁶Defendants do not agree with plaintiff's characterization of the defendants' timing of filing the appeal. Plaintiff repeatedly claims that defendants waited until the trial court denied their Motion for Partial
(continued ...)

However, in order to avoid the inevitable result of applying Buckeye to his arbitrable claims "arising out of" the 2004 Shareholders Agreement, plaintiff again carts out the same argument regarding an alleged untimely appeal. That argument is no more meritorious now than when this Court rejected it twice before.

1. Plaintiff's Counsel Conceded That the Trial Court's November 10, 2005 Denial of the Motion to Compel Arbitration Was "Without Prejudice." Judge McCauley's October 31, 2005 letter ruling expressly stated he was denying defendants' motion to stay litigation and compel arbitration "[a]t this stage" (CP 131). Plaintiff's counsel then sent a letter to Judge McCauley attaching two proposed orders. See November 8, 2005 Letter from V. Vreeland to Honorable Judge F. Mark McCauley (CP 666). In her letter, plaintiff's counsel expressly acknowledged that the trial court's ruling was "without prejudice." Id.

(... continued)

Summary Judgment before filing a notice of appeal. See Respondent's Brief at 13, 18-19. That statement is misleading. The trial court entered its orders denying the April 2006 Motion to Compel Arbitration and denying Partial Summary Judgment Re Declaratory Relief on the same day. Compare Order Denying Motion to Compel Arbitration and Granting Motion for Leave to File Amended Answer with Counterclaims, filed August 10, 2006 (CP 503) with Order Denying Defendants' Motion for Partial Summary Judgment, filed August 10, 2006 (CP 500). Defendants moved with all alacrity to timely file their notice of appeal of the denial of the Motion to Compel Arbitration, filing their Notice of Appeal more than a week before the deadline. Compare Order Denying Motion to Compel Arbitration and Granting Motion for Leave to File Amended Answer with Counterclaims, filed August 10, 2006 (CP 503) with Notice of Appeal, filed September 1, 2006 (CP 506).

(CP. 666) (emphasis added). Yet now plaintiff completely reverses course and claims that the trial court's November 10, 2005 Order Denying Defendants' Motion to Stay Litigation and Compel Arbitration ("November 10, 2005 Order") (CP. 133-35) was a final order from which defendants were required to appeal. Basic principles of judicial estoppel should prevent plaintiff from asserting such a contradictory position. See, e.g., Garrett v. Morgan, 127 Wn. App. 375, 379, 112 P.3d 531 (Div. II 2005) ("Judicial estoppel precludes a party from gaining an advantage by asserting one position before a court and then later taking a clearly inconsistent position before the court"). Plaintiff conceded the November 10, 2005 Order was "without prejudice," and he cannot now retract that admission to fashion a claim of an untimely appeal.

2. The Trial Court, by Its Own Handwritten Interlineation, Authorized Defendants to Renew Their Motion to Compel Arbitration. As discussed above, plaintiff's counsel provided the trial court with two proposed forms of order, one that included the "at this stage of the litigation" language proposed by defendants and one that did not. Id. (CP. 667-70). Plaintiff's counsel suggested to the trial court that the handwritten interlineation "seem[ed] to emphasize one phrase in [the October 31] letter opinion which may or may have not been the Court's intention." (CP. 666). Judge McCauley, however, adopted defendants' proposed "at this stage of the litigation" language, consistent with his letter

ruling, and added it in his own handwriting to the form of order as entered. See Order Denying Appellants' Motion to Stay Litigation and Compel Arbitration filed on November 10, 2005. (CP.134). Judge McCauley's handwritten proviso left the door open for defendants to renew their motion to compel arbitration at a later date, after further development of the facts relevant to arbitration, and was wholly consistent with plaintiff's acknowledgment that the trial court's ruling was "without prejudice." Id.

3. Plaintiff's Reading of "at This Stage of the Litigation" Is Contrary to the Law and Strains Logic. Plaintiff urges that the trial court "clearly intended" that "at this stage of the litigation" meant that only after the court or jury decided whether the 2004 Shareholders Agreement is enforceable, and then determined whether plaintiff was lawfully terminated, could Westport renew its motion to compel arbitration on the "limited issue" of the value of the stock.⁷ Respondent's Brief at 17. As a threshold matter, as discussed above, plaintiff's assertion that the question of enforceability of the 2004 Shareholders Agreement is for the trial court or jury is patently wrong. See Section A, supra (discussing Buckeye).

⁷Plaintiff did not raise the argument that any arbitration can only go forward after a trial on the nonarbitrable claims in response to defendants' April 2006 Motion to Compel Arbitration. Thus, that argument is not properly before the Court in this appeal. RAP 2.5(a); Sorrel v. Eagle Healthcare, Inc., 110 Wn. App. 290, 296, 38 P.3d 1024 (2002) (confirming that appellate court will not consider issues not raised at the trial court). Indeed Judge McCauley was never asked to rule -- nor did he rule -- on the order of the proceedings. He denied arbitration altogether. That is the only issue on appeal.

Tellingly, plaintiff cites no authority in support of his "no renewed motion to compel arbitration until after a trial" claim. The theory is woven from whole cloth and finds no factual support in the record or in the case law. Indeed, the only citation to the record in nearly three pages of argument in plaintiff's brief on this point is to the August 8, 2005 and January 3, 2006 Verbatim Reports of Proceedings. Respondent's Brief at 17. Not surprisingly, nothing in these excerpts indicate that the trial court ruled or even hinted that defendants were not to be allowed to renew their motion for arbitration until after a trial on the nonarbitrable claims.

Plaintiff's conspicuous failure to cite any authority for his preferred order of the proceedings is not surprising, as that argument is contrary to case law construing the FAA. See, e.g., Dean Witter Reynolds v. Byrd, 470 U.S. 213, 218, 105 S. Ct. 1238, 84 L. Ed. 2d 158 (1985) ("By its terms, the [Federal Arbitration] Act leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed") (emphasis in original). This is true even where an action includes arbitrable and nonarbitrable claims arising out of the same transaction. Where such claims are intertwined factually and legally, the Federal Arbitration Act requires courts to compel arbitration of the arbitrable claims when one of the parties files a motion to compel arbitration, "even where the result would be the possibly

inefficient maintenance of separate proceedings in different forums." Byrd, 470 U.S. at 217; accord, Fisher v. A.G. Becker Paribas Inc., 791 F.2d 691, 697 (9th Cir. 1986); see also Moses H. Cone, 460 U.S. at 20 (Federal Arbitration Act "requires piecemeal resolution when necessary to give effect to an arbitration agreement") (emphasis in original). This Court should reject plaintiff's unsupported argument to the contrary.

4. Plaintiff's Reading of "at This Stage of the Litigation" Is Inconsistent With the Trial Court's Rulings and Actions. Judge McCauley created his own order in November 2005, declining to utilize either of the ones submitted to him on counsel's respective pleading paper. Had he intended that there would be no arbitration until after trial on the nonarbitrable claims, he could have written so. When defendants moved for clarification in December 2005, the trial court did not once say or include in its January 2006 Order anything that would indicate it was denying the Motion for Clarification because it intended the "at this stage of the litigation" language in the November 10, 2005 Order to mean that defendants could not renew their motion to compel arbitration until after trial on the nonarbitrable claims. In fact, when plaintiff asked for fees on the Motion for Clarification, defendants' counsel argued they had acted in good faith bringing the motion; the trial court agreed and denied the fee request. See VRP (Jan. 3, 2006) 10:4-18.

Finally, when defendants moved to compel arbitration in April 2006 ("April 2006 Motion to Compel"), the trial court permitted extensive oral argument on the merits of the motion. . See VRP. (Apr. 17, 2006) 26:1-33:5. In response, plaintiff's counsel did not argue that the motion was improper, because the trial court's previous order prohibited a renewed motion to compel arbitration until after the trial. . Instead, plaintiff's counsel simply claimed that "there [were] no new arguments." . See VRP. (Apr. 17, 2006) 33:8-11. The trial court pointed to the Buckeye case saying, "I guess they are saying there's this new Supreme Court case." . See VRP. (Apr. 17, 2006) 33:13-14. If the trial court -- or even plaintiff's counsel -- believed this new development was not sufficient to justify a renewed motion to compel, neither the court nor counsel said a word about it.⁸

F. Defendants Did Not Waive Their Right to Arbitrate by Engaging in Discovery.

Plaintiff rehashes another argument this Court has twice rejected. Plaintiff claims that defendants waived their right to arbitrate by engaging

⁸Defendants concede that the trial court did not agree with their assessment that Buckeye changed the legal landscape. . However, plaintiff's emphasis on the trial court's August 10, 2006 Order holding that Buckeye does not apply to this case misses the point. The point is that the trial court's earlier ruling left open the possibility that defendants could make such an argument in a renewed motion prior to a trial on the nonarbitrable claims, and the trial court did in fact entertain the motion and consider both Buckeye and the new evidence from plaintiff's deposition.

in discovery and filing motions in the trial court. Plaintiff's characterization of defendants' actions is misleading. First, the only deposition defendants took prior to filing their April 2006 Motion to Compel Arbitration was that of plaintiff Larry Nelson. Indeed, it was plaintiff's own deposition testimony that formed one of the two grounds upon which defendants based their April 2006 Motion to Compel Arbitration. See April 2006 Motion to Compel at 9 (CP 398).

Defendants did engage in other discovery after filing the April 2006 Motion to Compel Arbitration -- but only because there were still nonarbitrable claims present in the case, and the trial court had not yet ruled on the Motion to Compel Arbitration, and a trial date was being set. Plaintiff's mantra that trial must move forward on the nonarbitrable claims demonstrates that defendants were forced to engage in discovery in order to prepare for trial. Although defendants filed a motion for partial summary judgment on plaintiff's declaratory relief claim, (CP 235-36), defendants did so in the event the trial court denied their motion to compel arbitration, which was heard and ruled upon at the same time. Defendants' counsel unequivocally stated at oral argument on the April 2006 Motion to Compel Arbitration: "Those other motions [for partial summary judgment and to amend to add counterclaims] are alternative motions. Those other motions are what we would ask the Court to do if you do not grant the

motion to compel arbitration." . See VRP. (Apr. 17, 2006) 43:7-10 (emphasis added).⁹

Finally, plaintiff omits the fact that nearly four months passed between the time defendants filed their motion to compel arbitration and the trial court's ruling. Compare April 2006 Motion to Compel Arbitration dated April 10, 2006 (CP 390) with Order Denying Motion to Compel Arbitration and Granting Motion for Leave to File Amended Answer with Counterclaims, filed August 10, 2006 (CP 503).¹⁰ With no ruling and a trial date looming, defendants had no choice but to engage in discovery, and did not waive their right to arbitration by doing so. See Adler v. Fred Lind Manor, 153 Wn.2d 331, 362, 103 P.3d 773 (2004) (rejecting suggestion of waiver, because defendant raised arbitration defense in its initial answer and promptly moved to compel arbitration).

IV.

CONCLUSION

Plaintiff has provided nothing in his brief that undermines defendants' appeal. The trial court erred by ruling that it, not an arbitrator,

⁹Defendants also brought a successful motion for partial summary judgment on the issue of punitive damages under RCW 49.60 -- a clearly nonarbitrable claim. See Defendants' Motion to Dismiss Plaintiff's Claim for Punitive Damages (CP 598-606).

¹⁰Interestingly, plaintiff accuses defendants of bringing motion after motion to compel arbitration while also accusing them of acting inconsistently with an intent to arbitrate. Surely, plaintiff cannot have it both ways.

should determine the enforceability of the 2004 Shareholders Agreement. The trial court also erred when it ruled that no claims, counterclaims or defenses were subject to arbitration. Defendants respectfully ask this Court to reverse the erroneous rulings and remand for immediate arbitration of the arbitrable claims.

RESPECTFULLY SUBMITTED this 25th day of April, 2007.

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I, Ernestine L. Jobity, certify and declare under penalty of perjury as follows:

1. I am now and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen years, not a party to the above-captioned action, and competent to testify as a witness.

2. I am employed with the law firm of Lane Powell PC, 1420 Fifth Avenue, Suite 4100, Seattle, Washington.

3. On the 25th day of April 2007, declarant caused the following document(s):

Appellants' Reply Brief

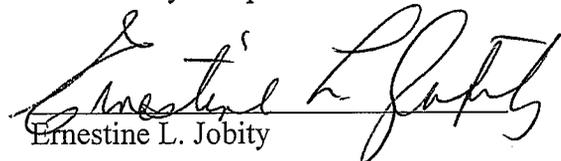
to be delivered to the following person(s) as indicated:

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Via Legal Messenger

I hereby declare under penalty of perjury that the foregoing is true and correct.

Executed at Seattle, Washington this 25th day of April 2007.


Ernestine L. Jobity