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No. 98083-7

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

EVETTE BURGESS,

Appellant,

v.

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

Respondents.

RESPONDENTS' RESPONSE BRIEF

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I. INTRODUCTION

The narrow issue on appeal is whether a party to a case that has been transferred to arbitration may seek interlocutory rescission of the arbitration agreement from the Superior Court. Washington and federal law prohibits interlocutory review of an arbitrator's rulings. The Superior Court in this matter correctly ruled that it lacked the authority to review the arbitrator's discovery ruling and hear a motion to terminate the arbitration.

Appellant seeks this Court's ruling on not only the certified question, but asks this Court to rule "where an employer materially breaches the procedural terms and guarantees of the arbitration contract, then the employee is entitled to rescind her agreement to arbitrate."¹ This question is not on appeal. In granting discretionary review, the Commissioner restated the certified question thusly:

[I]f the court has jurisdiction to terminate the arbitration, that decision should be made now rather than later.

The question of whether Lithia "materially breached" the arbitration agreement was not ruled on by the trial court, was not certified for appeal, and was not granted discretionary review. This Court should hold that the trial court correctly declined to decide Appellant's motion to rescind the arbitration agreement and terminate the arbitration based on the arbitrator's discovery rulings.

¹ Appellant's Brief at I, page 1.

II. RESPONSE TO ASSIGNMENT OF ERROR

Appellant argues the trial court erred in ruling that it lacked jurisdiction to review the arbitrator's discovery order. The trial court correctly ruled.

III. ISSUE CERTIFIED FOR REVIEW

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

Does the superior court have jurisdiction to address an employee's contractual breach argument based upon acts alleged in the course of binding arbitration, or is the superior court's jurisdiction in a contractual arbitration limited to issues occurring before and after -- but not during -- the proceeding. Specifically, is the superior court's jurisdiction limited to ruling on whether there is an enforceable arbitration clause at the inception of arbitration and addressing the arbitration award at its conclusion?

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

IV. STATEMENT OF THE CASE

It is not disputed that the parties agreed to arbitrate any employment disputes. Burgess was hired as an employee by Camp Automotive d/b/a BMW of Spokane, a wholly owned subsidiary of Lithia Motors, Inc., (hereinafter collectively referred to as "Lithia"). As a condition of Burgess's employment, Lithia required her to sign an arbitration agreement waiving her right to sue Lithia and agreeing to

binding arbitration under the Federal Arbitration Act (“FAA”) to resolve any disputes.²

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

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

² CP 292-294. The FAA is found at 9 U.S.C. § 1, *et. seq.*

³ CP 609-614, at 610.

⁴ *Id.*

⁵ *Id.* at 610-11.

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

⁷ CP 48-50.

⁸ CP 609-614 at 612, Conclusion of Law No. 4.

⁹ *Id.* at 613.

V. LEGAL AUTHORITY AND ARGUMENT

A. Standard of Review

The parties agree that this Court should review the certified question de novo.¹⁰ Appellant appears to request that this Court rule on the additional questions of whether or not discovery abuses occurred, whether the arbitrator exceeded his authority, and whether the arbitration agreement may be rescinded by her because of the alleged discovery matters. Appellant devotes twelve pages to recitation of the discovery dispute and the outcome of her motion below. These issues are not before this Court.

The trial court ruled as a matter of law that it lacked the authority to review the “Plaintiff’s argument concerning alleged breaches of the arbitration agreement that arose during the arbitration proceeding”.¹¹ The Court Commissioner granted review of the certified question, noting that “if the court has jurisdiction to terminate the arbitration, that decision should be made now rather than later.”¹² The trial court did not rule on the other issues now presented by Appellant, Appellant did not seek discretionary review of those issues, and the Commissioner did not grant discretionary review of those issues.

Lithia does not, therefore, agree with Appellant’s suggestion that this Court may determine whether Lithia and/or the arbitrator violated the

¹⁰ Appellant’s Brief at 16-17.

¹¹ CP 612, Conclusion of Law No. 4.

¹² Commissioner’s Ruling, CP 632-635, at page 4.

arbitration agreement, allowing rescission.¹³ The Court should decline to expand review to these unripe issues which were not certified by the trial court. The Scope of Review should be restricted to the certified question upon which review was granted.

B. Transfer to Arbitration Has Effect in Washington

Appellant seeks a decision allowing a litigant to abandon arbitration if discovery rulings are adverse to her. Washington law is clear, and it is not disputed, that the Superior Court retains jurisdiction over matters filed in the court, even after transfer to arbitration. It is the scope of the Superior Court's authority after a matter is transferred to arbitration that is at issue, as is made clear by the text of the certified question and by the Commissioner's grant of discretionary review. Despite this, Appellant provides factual support for the notion that Lithia did not dispute the Superior Court's jurisdiction. The facts and argument regarding the fact that the Superior Court had "jurisdiction" are irrelevant to this appeal.

The question, as was stated by the trial court is: may a litigant seek termination of arbitration from the trial court based on arbitration orders and rulings? Washington law supports the conclusion that the answer is no:

The superior court may either confirm, vacate, modify, or correct an arbitration award for the specific reasons set

¹³ See, e.g., Appellant's Brief at 24-25. To the extent additional background regarding the discovery dispute is desired by the Court, please see Lithia's opposition to Burgess's motion to vacate, at CP 301-318.

forth in RCW 7.04.150–.170. (citation omitted). The superior court's authority is limited to these actions, and the court must confirm the award if it is not modified, vacated, or corrected. (citation omitted).¹⁴

As explained by the Washington Supreme Court, even the Superior Court's authority to review even a final arbitration award is limited:

Essentially, the question before this court is therefore whether a trial court reviewing an arbitral award is permitted to conduct a trial de novo. We have previously answered that question in the negative. We reaffirm that answer today.¹⁵

As the Superior Court may not review the arbitration award de novo, the trial court correctly concluded that it could not review the arbitrator's discovery rulings de novo so as to support a ruling that the arbitration agreement itself should be rescinded, terminating arbitration. An agreement to arbitrate has effect, and that effect is that the parties are subject to the decisions in the arbitration forum and may not seek de novo review of orders by the trial court. There is no Washington law that supports this result, and Appellant cites none.

C. Controlling Federal Arbitration Law Mandates the Same Result.

Here, the parties agreed that the arbitration would be governed by the rules enacted by the FAA. The FAA manifests a federal policy favoring arbitration agreements and is intended to facilitate streamlined

¹⁴ *Dayton v. Farmers Ins. Grp.*, 124 Wn.2d 277, 279–80, 876 P.2d 896 (1994).

¹⁵ *Boyd v. Davis*, 127 Wn.2d 256, 261–62, 897 P.2d 1239, 1241 (1995).

proceedings.¹⁶ Federal law governs the enforcement of arbitration agreements that are, like the one in this case, subject to the FAA.¹⁷ Federal law on this issue, therefore, controls the certified question presented by the trial court and regarding which review was granted.

The FAA allows courts to become involved in arbitration proceedings at only two stages.¹⁸ The first stage is “gateway” issues of arbitrability, such as whether a valid arbitration agreement exists.¹⁹ The second stage is at the end of the arbitration, at which point a court may confirm, vacate, or modify an award.²⁰ Judicial intervention at these stages is codified in the FAA itself.²¹

The Supreme Court of the United States has explained that allowing full legal and evidentiary appeals of arbitration awards would adversely impact what is supposed to be a streamlined process.²² To maintain “arbitration's essential virtue of resolving disputes straightaway,” courts may vacate an arbitration award “only in very unusual

¹⁶ *Savers Prop. & Cas. Ins. Co. v. Nat'l Union Fire Ins. Co.*, 748 F.3d 708, 717 (6th Cir. 2014).

¹⁷ *Southland Corp. v. Keating*, 465 U.S. 1, 16, 104 S. Ct. 852, 861 (1984); *Schuster v. Prestige Senior Mgmt., L.L.C.*, 193 Wn. App. 616, 627, 376 P.3d 412 (2016).

¹⁸ *Savers Prop. & Cas. Ins.*, 748 F.3d at 717.

¹⁹ *Id.*

²⁰ *Savers Prop. & Cas. Ins.*, 748 F.3d at 717.

²¹ *See, e.g.*, 9 U.S.C. §§ 3-4 (allowing courts to grant motions to stay judicial proceedings or to compel arbitration), §§ 9-11 (allowing for the confirmation, vacation, or modification of an arbitration award).

²² *Oxford Health Plans LLC v. Sutter*, — U.S. —, 133 S. Ct. 2064, 2068 (2013) (internal quotation marks omitted).

circumstances.”²³ As the Supreme Court has explained, “[i]f parties could take full-bore legal and evidentiary appeals, arbitration would become merely a prelude to more cumbersome and time-consuming judicial review process.”²⁴ As with review of arbitration awards under Washington law, courts reviewing arbitration orders under the FAA may not conduct de novo legal and evidentiary review.²⁵

The question, here, however, is whether the FAA authorizes judicial review of preliminary or interlocutory arbitration orders. The answer is no, the FAA does not authorize review of interlocutory orders. The circuit courts have concluded that it is “plainly improper” for a trial court to intervene in an arbitration proceeding,²⁶ and that “[r]eview comes at the beginning or the end, but not in the middle.”²⁷ Federal courts have rejected in clear terms the same claims that Appellant is making now – claims “that essentially go to the procedure of arbitration” and to “alleged unfairness.”²⁸

²³ *See, id.*

²⁴ *See, id.*

²⁵ *See id.* *See also Pizelo v. Heinemann*, 77448-4-I, 2019 WL 2343866, at *6 (Wash. Ct. App. June 3, 2019) (unpublished decision). In *Pizelo*, a Washington Court of Appeals similarly ruled that judicial review of an arbitration award governed by the FAA is limited to the narrow grounds set forth in 9 U.S.C. § 10(a).

²⁶ *Savers Prop. & Cas. Ins.*, 748 F.3d at 718 (citation omitted).

²⁷ *Blue Cross Blue Shield of Massachusetts, Inc. v. BCS Ins. Co.*, 671 F.3d 635, 638 (7th Cir. 2011).

²⁸ *Gulf Guar. Life Ins. Co. v. Connecticut Gen. Life Ins. Co.*, 304 F.3d 476, 488 (5th Cir. 2002).

In *Gulf Guaranty Life Insurance Company v. Connecticut General Life Insurance Company*,²⁹ for example, a litigant sought judicial intervention and rescission of the arbitration agreement based on the conduct of the other litigant during the arbitrator selection process.³⁰ The suit was dismissed, and the Fifth Circuit Court of Appeals affirmed the dismissal.³¹ Before an arbitration award has been issued, the court held, there is “no authority under the FAA for a court to entertain such challenges.”³²

Similarly, in *Aviall, Inc. v. Ryder Systems, Inc.*,³³ the Second Circuit Court of Appeals held that the FAA “does not provide for pre-award removal of an arbitrator” regardless of the claims.

In *Michaels v. Mariforum Shipping, S.A.*,³⁴ the district court was petitioned to review and vacate an interim award, and the Second Circuit Court of Appeals held:

[T]he district court should have dismissed [the party’s] petition for vactur [of the preliminary arbitration ruling] on the ground that it lacked power to review this interlocutory award.³⁵

In *Travelers Ins. Co. v. Davis*,³⁶ a litigant sought judicial review of the arbitrators’ ruling on whether uninsured benefits could be “stacked”.³⁷

²⁹ 304 F.3d 476 (5th Cir. 2002).

³⁰ *Gulf*, 304 F.3d at 488.

³¹ *Id.* at 492.

³² *Gulf*, 304 F.3d at 488.

³³ 110 F.3d 892, 895 (2d Cir. 1997). *See also Florasynth, Inc. v. Pickholz*, 750 F.2d 171, 174 (2d Cir. 1984).

³⁴ 624 F.2d 411, 415 (2d Cir. 1980).

³⁵ *Michaels*, 624 F.2d at 415.

³⁶ 490 F.2d 536 (3rd Cir. 1974).

The court determined that the arbitrator's ruling could not be reviewed by the district court.³⁸ Another court noted that “[C]ourts generally should not entertain interlocutory appeals from ongoing arbitration proceedings.”³⁹

In *Luff v. Ryan*,⁴⁰ an arbitration panel refused to adopt the findings of a previous arbitrator. A party filed suit, complaining that the panel had no authority to act because it refused to acknowledge the finding of the initial arbitrator.⁴¹ The district court noted that the FAA does not “provide for judicial review of preliminary rulings of an arbitration board prior to making of its award.”⁴²

In this case, Appellant sought judicial review of a discovery order, sought vacation of that order, and sought an order rescinding the arbitration agreement due to the alleged actions by Lithia and the arbitrator. The lack of authority for interlocutory review means the Superior Court in this case had no authority to review the arbitrator's discovery order. The Superior Court correctly identified this limitation of its powers.

³⁷ *Davis* 490 F.2d at 541.

³⁸ *Id.* at 541-542.

³⁹ *Quixtar, Inc. v. Brady*, 328 Fed. Appx. 317, 320 (6th Cir. 2009). *See also; Hall Steel Co. v. Metalloyd Ltd.*, 492 F. Supp.2d 715, 717-18 (E.D. Mich. 2007); *Luff v. Ryan*, 128 F. Supp. 105, 109 (D.D.C. 1955).

⁴⁰ 128 F. Supp. 105 (D.D.C. 1955).

⁴¹ *Luff*, 128 F. Supp. at 107.

⁴² *Id.* at 109.

Appellant cites to *Hooters of Am., Inc. v. Phillips*⁴³ as supportive of her argument that the trial court may review arbitration conduct. This decision does not discuss rescinding an arbitration agreement based on the arbitrator's interim rulings or a party's actions.⁴⁴ Instead, the decision involved the question of whether the arbitration agreement was enforceable at the outset, the "gateway issue", and therefore has no bearing on the question before this Court.⁴⁵

Appellant also discusses decisions under the FAA allowing for revocation of the arbitration agreement.⁴⁶ As with the *Hooters* decision, these decisions all involve the initial review of the agreement, and a trial court's decision on enforcement of that agreement at the *outset* of litigation.⁴⁷

Finally, Appellant argues that because the FAA contains a savings clause allowing defenses that are not enumerated in the statute, interlocutory review of the arbitration agreement is allowed. That conclusion directly conflicts with all case authority on the issue, as discussed above. The FAA prohibits interlocutory review of non-award orders by the arbitrator, and the Superior Court in this case correctly declined to decide Appellant's motion.

⁴³ 173 F.3d 933 (4th Cir. 1999).

⁴⁴ *Hooters*, 173 F.3d at 940.

⁴⁵ *Id.* at 935.

⁴⁶ Appellant's Brief at 22-23.

⁴⁷ See, e.g., *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 109 S. Ct. 1248, 1256 (1989); *Gandee v. LDL Freedom Enterprises, Inc.*, 176 Wn.2d 598, 610, 293 P.3d 1197 (2013); *Hooters of Am., Inc. v. Phillips*, 173 F.3d 933, 938 (4th Cir. 1999).

D. Appellant's Request for Rescission from This Court is Not Ripe for Review.

As discussed above, the issue certified by the trial court, and the issue regarding which review was granted, was whether the trial court had the authority to vacate the arbitrator's discovery ruling and rescind the arbitration agreement. The trial court did not decide whether Appellant should be allowed to rescind the arbitration agreement. As such, Appellant did not move for discretionary review of that issue, the Commissioner did not grant review of that issue, and this Court may not hear that issue.⁴⁸ The Court of Appeals should decline the invitation to preempt the Superior Court regarding Appellant's rescission arguments.

E. Rescission Not Available.

Despite the issue not being ripe for review, Lithia will take this opportunity to briefly comment on Appellant's discussion regarding rescission. Appellant does not argue that any condition or term in the arbitration agreement is unconscionable; instead she argues that the arbitrator's and Lithia's alleged failures to follow the Federal Rules of Civil Procedure during that arbitration comprised a breach of the arbitration agreement, allowing rescission.

⁴⁸ Appeals may be brought regarding decisions of the trial court. RAP 2.2 (Decisions of the Superior Court that May be Appealed); RAP 2.3 (Decisions of the Trial Court Which May be Reviewed by Discretionary Review).

Lithia agrees that a contract to arbitrate is construed in the same manner as any other contract.⁴⁹ Washington common law does provide the equitable remedy of rescission where a material breach “substantially defeats” a primary function of an agreement.⁵⁰ The trial court must find a “material breach” of the contract has occurred to support rescission.⁵¹ A material breach is one that is “serious enough to justify the other party in abandoning the contract ... one that substantially defeats the purpose of the contract.”⁵²

For the remedy of rescission to be available here, the agreement to apply the rules of a particular forum would have to be found to be “material” to the essence of the contract.⁵³ As admitted by Appellant, this is a question of fact. Appellant does not provide any evidence that she entered into the arbitration agreement in order to gain application of the Federal Rules of Civil Procedure to any dispute; instead, it is clear that she entered into the agreement for the purpose of becoming employed by Lithia. The remedy of rescission will be unavailable in the event the Superior Court reviews the matter.

⁴⁹ See *DIRECTV, Inc. v. Imburgia*, --- U.S. ---, 136 S. Ct. 463, 468 (2015).

⁵⁰ *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 724, 281 P.3d 693, 707 (2012).

⁵¹ *Park Ave. Condo. Owners Ass'n v. Buchan Devs., LLC*, 117 Wn. App. 369, 383, 71 P.3d 692, 75 P.3d 974 (2003).

⁵² *Park Ave.*, 117 Wn. App. at 383 (2003) (footnote omitted), quoting 6A Washington Practice: Washington Pattern Jury Instructions: Civil 302.03, at 127 (1997).

⁵³ *Colorado Structures, Inc. v. Ins. Co. of the W.*, 161 Wn.2d 577, 588–89, 167 P.3d 1125, 1131 (2007).

VI. CONCLUSION

For the reasons stated above, the Court should deny Appellant
Evette Burgess's appeal.

DATED and respectfully submitted this 9th day of October, 2019.

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CERTIFICATE OF SERVICE

The undersigned certifies, under penalty of perjury under the laws of the State of Washington, that on the below date I caused to be filed with Division III of the Court of Appeals of the State of Washington, and arranged for service of true and correct copies of the foregoing Respondent's Response Brief upon the following:

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s/ Alicia Ossenkop
Legal Secretary

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