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IN THE SUPREME COURT OF THE STATE OF MONTANA
Supreme Court Cause No. DA 25-0725

Endurance Dealer Services, LLC
Plaintiff/Appellant,

vs.

Mitchel Parrish,
Defendant/Appellee.

**APPELLANT ENDUURANCE’S
OPPOSITION TO APPELLEE
PARRISH’S MOTION TO
DISMISS**

Endurance Dealer Services, LLC (“Endurance”) opposes Appellee’s motion to dismiss Endurance’s appeal.

ISSUE

Should this Court interpret a contract provision to preclude appellate review of a district court decision confirming an arbitration award that was issued in violation of the Federal Arbitration Act when the provision is silent on that issue?

BACKGROUND

This case involves Appellee’s claim for coverage under a Vehicle Service Contract (“VSC”) purchased from Endurance. Endurance denied the claim. Appellee

then commenced arbitration pursuant to the arbitration clause in the VSC and received an award.

Endurance sought to vacate the award based primarily on the evident partiality of Appellee's party-appointed arbitrator, Domenic Cossi, Esq., who disclosed *after* the evidentiary hearing that Appellee sought representation from Cossi's firm for the same claim before filing the arbitration. Cossi's firm then referred Appellee to lawyers in Missoula, including his current counsel, and his current counsel then appointed Cossi as an arbitrator without disclosing their professional relationship or Cossi's prior interactions with Appellee. This nondisclosure created a reasonable impression of Cossi's partiality, forming the basis of Endurance's motion to vacate the award and this appeal.

ARGUMENT

At issue on this motion is the "Finality Clause" in Endurance's arbitration provision, which provides: "the outcome of the arbitration and the decision of the arbitrators shall be final and binding and cannot be reviewed or changed by, or appealed to, a court of law." Appellee's reliance on this provision is both misplaced and contrary to the plain language of the VSC.

1. The Finality Provision Does Not Apply to this Appeal

By its language, the Finality Clause addresses only whether "the outcome of the arbitration and the decision of the arbitrators" can be "reviewed or changed by,

or appealed to, a court of law.” That clause is not relevant here because Endurance is not appealing the outcome of the arbitration or the decision of the arbitrators. Endurance is appealing a decision of the District Court that denied Endurance’s motion to vacate under 9 U.S.C. § 10.

The rights Endurance will ask this Court to protect exist separate from the “outcome” of the arbitration or “decision” of the arbitrators. This distinction is significant because the cases cited by the District Court in *dicta*, and quoted by Appellee, do not support the assertion that the Finality Clause waives Endurance’s right to appeal the District Court’s denial of the motion to vacate. *Cf. MACTEC, Inc. v. Gorelick*, 427 F.3d 821 (10th Cir. 2005) (finding waiver existed under a provision that explicitly provided that the “[j]udgment upon the award...shall be final and nonappealable”); *Beckley Oncology Assocs. v. Abumasmah*, 993 F.3d 261 (4th Cir. 2021) (finding waiver of a right to appeal under a provision providing “[t]he decision of such arbitrator(s) shall be final and conclusive and enforceable *in any court of competent jurisdiction without any right of judicial review or appeal*”). The provisions in *MACTEC* and *Beckley* specifically address either an appeal of a judgment or an appeal from a court of competent jurisdiction. The Finality Clause does not. It discusses only an appeal of the decision of the arbitrators to a court of law, which is not at issue here.

2. Even if the Finality Clause Did Apply, Plaintiff's Interpretation is Unenforceable

As the Ninth Circuit Court of Appeals has recognized, “the statutory grounds for vacatur in the [FAA], may not be waived or eliminated by contract.” *In re Wal-Mart Wage & Hour Empl. Practices Litig. v Class Counsel & Party to Arbitration*, 737 F.3d 1262, 1268 (9th Cir. 2013). The *In re Wal-Mart* decision found that “[p]ermitting parties to contractually eliminate all judicial review of arbitration awards would not only run counter to the text of the FAA, but would also frustrate Congress’s attempt to ensure a minimum level of due process for parties to an arbitration.” *Id.* Judicial review providing basic safeguards and protecting litigants from abuse and due process violations are not subject to elimination by contract. *Id.*, at 1268. This logic applies equally to an individual’s right to appellate review, particularly when public interests are jeopardized. *See, e.g., Skaf v. Wyo. Cardiopulmonary Servs., P.C.*, 2021 WY 105 (2021) (acknowledging the existence of *In re Wal-Mart*, *MACTEC* and *Beckley* and refusing to deprive an individual of a right to an appeal because a “person may not generally waive a statutory or constitutional right enacted for the benefit of that person if public interests are jeopardized”).

The District Court’s ruling is at odds with the FAA and Montana law, and jeopardizes the due process rights of parties to arbitrations throughout the state by, among other things:

- Failing to apply the “reasonable impression of partiality” standard set forth in *Schmitz v. Zilvetti*, 20 F.3d 1043 (9th Cir. 1994) when analyzing 9 U.S.C. § 10(A)(2) and the existence of evident partiality; and
- Failing to apply *Wells Fargo Bank v. Talmage*, 2007 MT 45 (2007) when interpreting Appellee’s deviation from the terms of the arbitration agreement.

Excusing these failures (among others)¹ would mean any arbitrator, whether selected by a consumer or company, can ignore the duty to disclose relationships with the parties and their counsel until after the hearing on the merits. Even if the relationships would have disqualified the arbitrator from the beginning, there would be no consequence. This would discourage the use of arbitration in its entirety.

3. Non-Appealability Language Should Not Be Enforced When the Arbitration is Tainted by Corruption, Fraud, or Partiality

Endurance’s appeal is rooted in the fairness of the arbitration process itself, which was tainted by, at a minimum, the perception of prejudice and deprivation of due process. Courts addressing this issue have maintained basic guardrails for arbitration where the appeal relates to “corruption, fraud, or partiality.” *Communs. Consultant, Inc. v Nextel Communs. of the Mid-Atlantic, Inc.*, 146 F App’x 550, 553

¹ The formatting limitations in M. R. App. P. 16 required Endurance to limit its discussion of the impact of the District Court’s decision. For this reason, Endurance requests that this motion not be decided until the appeal has been fully briefed.

(3d Cir. 2005). The Eleventh Circuit, for example, holds that an arbitration agreement stating an award is “binding, final, and non-appealable” does not waive appellate review. Such an agreement “simply means that parties have agreed to relinquish their right to appeal the merits of their dispute; it does not mean the parties relinquish their right to appeal an award resulting from an arbitrator’s abuse of authority, bias, or manifest disregard for the law.” *Rollins, Inc. v. Black*, 167 Fed. App’x 798, 799 n. 1 (11th Cir. 2006).

State courts have adopted this rationale “regardless of whether the parties contractually agreed to waive such review.” *Heartland Surgical Specialty Hosp., LLC v Reed*, 48 Kan App 2d 237, 243 (2012).

4. Appellee’s Remaining Contentions Do Not Support Dismissal

Appellee cites several cases addressing the enforcement of an agreement to arbitrate and compelling arbitration, but cites no precedent allowing parties to contract away the right to an appeal in this context. An agreement to arbitrate is not the same as a party’s waiver of judicial review of the arbitration under the FAA, which as outlined above, courts have limited parties’ ability to do. *In re Wal-Mart*, 737 F.3d at 1268; *Skaf v*, 2021 WY 105.

5. Appellee’s Motion is Defective

Appellee’s moving papers do not include a statement that “opposing counsel has been contacted concerning the motion and whether opposing counsel objects to the motion,” in violation of M. R. App. P. 16. His motion should be denied.

DATED this 8th day of January 2026.

HALL & EVANS LLC

By: /s/ T. Thomas Singer

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CERTIFICATION OF COMPLIANCE

Pursuant to Rule 11 and Rule 16 of the Montana Rules of Appellate Procedure, I certify that Appellant's Opposition to Appellee's Motion to Dismiss is printed with a proportionately spaced Times new Roman text typeface of 14 points, is double spaced and except for footnotes, quoted and indented material, headings, the Statement of the Issues, the Table of Contents, and the Table of Authorities; and the word count calculated by Microsoft Word is 1246 words, excluding certificate of service, certificate of compliance, title page, Table of Contents, and Table of Authorities.

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CERTIFICATE OF SERVICE

I, T. Thomas Singer, hereby certify that I have served true and accurate copies of the foregoing Response/Objection - Response to Motion to Dismiss to the following on 01-08-2026:

Lincoln Palmer (Attorney)
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Electronically signed by Jaime Easley on behalf of T. Thomas Singer
Dated: 01-08-2026