NO. 9-7359-8

SUPREME COURT
OF THE STATE OF WASHINGTON

Cause No. 77871-4-I

SIMEON J. OSBORN and MONICA OSBORN, and the marital community composed thereof,

Plaintiffs/Respondents,

v.

MICHAEL CALLAHAN and ROBIN CALLAHAN, individually and the marital community composed thereof,

Defendants/Appellants.

ON APPEAL FROM DIVISION I, COURT OF APPEALS
OF THE STATE OF WASHINGTON

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

SMYTH & MASON, PLLC
Jeffrey A. Smyth, WSBA #6291
Shaunta M. Knibb, WSBA #27688
1000 Second Avenue, Suite 3000
Seattle, WA 98104
(206) 621-7100

Attorneys for Plaintiffs/Respondents
Simeon J. Osborn and Monica Osborn

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I. INTRODUCTION

The Petition for Review attacks fundamental policies of finality underlying arbitration. Petitioners ("Callahan") ask this court to ignore existing law governing arbitration. Arbitration is intended to be final and binding, and a court's oversight of that process is limited. Callahan's claim of a violation of due process, moreover, does not convert this case into an opinion ripe for review by this Court. There is no conflict between Division One's opinion and that of another division; nor is there is a conflict with an opinion of this Court. Nor does Callahan's due process argument rise to the level of an issue of substantial public interest or present a significant question of constitutional law. Petitioner had notice and an opportunity to present all of his arguments both to the arbitrator and then to the superior court. He was afforded full due process of the law.

Moreover, at every stage of this proceeding, the arbitrator, the superior court, and the court of appeals, properly applied existing law governing arbitrations. What petitioner advocates now is a deviation from that law. If Callahan wants to change the law, then he must seek legislative change. The Petition for Review should be denied.

II. RESTATEMENT OF ISSUES PRESENTED FOR REVIEW

A. Whether the superior court's confirmation of the arbitration award was proper where there is no evidence on the face of the award to show that the arbitrator exceeded his authority.

B. Whether denial of a motion to vacate is proper where the statutory basis for the vacation must appear on the face of the arbitration award.

C. Where parties to a contract agree to arbitrate their disputes privately, but do not contractually require any specific procedures or rules to govern the arbitration process, and where the legislature in RCW 7.04A.150 has afforded the arbitrator with wide discretion, do the parties to an arbitration have a constitutional right to a full evidentiary hearing?

III. RESTATEMENT OF THE CASE

A. Osborn Files Suit and Callahan Countersues for Misappropriation of Artwork

Simeon Osborn loaned Michael Callahan money. Callahan did not pay it back. CP 1, 2-5. Osborn filed suit. CP 1. Callahan filed an answer alleging offset as a defense and several counterclaims including conversion of artwork. CP 7-13. Before the ink dried on his initial answer, Callahan filed an amended answer that did not include the conversion claim or mention the artwork. CP 196-203; Op. at 2, n.1.

B. Settlement and Appointment of Arbitrator with Full Discretion to Resolve Disputes about the CR 2A Agreement

Callahan and Osborn mediated the dispute before retired King County Superior Court Judge Bruce W. Hilyer and settled the case. The settlement agreement [CP 232] memorializes several promises by Callahan including use of a confession of judgment and mutual release for all claims. It also appointed Judge Hilyer as arbitrator "should any issue or dispute arise regarding the performance, interpretation or enforcement of this agreement." CP 232. No specific procedures or rules governing the arbitration were included in the settlement agreement. CP 232.

C. Arbitration to Enforce the Settlement Agreement: Callahan Does Not Object or Ask for Reconsideration of the Arbitration Award

Osborn prepared a notice of settlement, and asked Callahan to approve it before filing it with the court, which he did. CP 133, 139-145, 217-219. The Notice of Settlement states: "Notice is hereby given that all claims against all parties in this action have been resolved." CP 140-142 (emphasis added).

Callahan refused to sign the confession of judgment proposed by Osborn. CP 271-275. Osborn invoked the arbitration clause in the settlement agreement, and requested the arbitrator to order Callahan to perform by signing the confession of judgment. CP 248-252. The Notice

of Initiation of Arbitration states in part:

> A dispute has arisen regarding respondents' execution of a confession of judgment . . . . Petitioners have proposed a form of confession of judgment that conforms to the law and to the terms of the settlement. Respondents have proposed a form of confession of judgment which substantially exceeds what is necessary to accomplish the settlement, materially misstates the settlement and the facts of the case, and is inconsistent with Washington law.

CP 248.

The arbitrator held a telephone hearing with Callahan (pro se) and Osborn (through counsel) and ordered the parties to provide him with written submissions, including a proposed form of confession of judgment, on which he would make a determination. CP 228. Callahan did not object to this procedure. CP 37-47, 153-163. Both parties complied with the order and provided their submissions to the arbitrator. CP 133-151, 153-163. That the result of these submissions could be an immediate decision by the arbitrator is evidenced in Osborn's submission, which closed with the following statement: "Osborn and Callahan have each submitted a form of confession of judgment to you, from which you can fashion an appropriate form to effectuate the settlement." CP 134-135.

On October 11, 2017, the arbitrator issued an arbitration award, in which he made the following findings:

1. [A] "CR2A" settlement agreement dated September 8, 2017, was negotiated and signed by and on behalf of all parties, in which the parties appointed the undersigned to act as arbitrator and authorized the arbitrator to resolve any issues regarding the performance, interpretation and enforcement of the settlement.

2. The underlying lawsuit included counterclaims against petitioners Osborn and a third party complaint against Osborn Machler, PLLC, including claims and affirmative defenses for offset, breach of contract, breach of fiduciary duty, claims related to ownership of artwork, and for an accounting.

2.[sic] An issue has arisen between the parties regarding the form and execution of a confession of judgment. Respondent Callahan also contends that certain of his claims against petitioner Osborn were left unresolved by the settlement agreement. While the CR2A does not explicitly mention Osborn Machler, PLLC, it was clearly intended to resolve all claims including claims against Osborn Machler, PLLC, and that was clearly explained by the undersigned to Mr. Callahan.

* * * *

4. Pursuant to my preliminary order, both forms of confession of judgment have been submitted to me to decide the form of confession of judgment best conforming to the CR2A settlement agreement.

CP 263-264 (emphasis added).

The arbitration award found that the confession of judgment delivered to Callahan by Osborn "best conforms with the terms of the CR 2A settlement," and directed Callahan (both husband and wife) to execute the confession before a notary. CP 264. The arbitration award concludes

as follows:

> All claims by respondent Callahan against petitioner Osborn, including without limitation claims against the law firm of Osborn Machler and claims related to the ownership of artwork, were fully and finally settled and compromised by the CR2A settlement agreement.

CP 264. Callahan did not request that the arbitrator reconsider the ruling.

D. King County Superior Court Confirms the Arbitration Award and Denies Callahan's Motion to Vacate

Callahan did not execute the confession of judgment. On November 13, 2017, after notice to Callahan and a hearing, the King County Superior Court confirmed the arbitration award. Callahan did not appear at that hearing. CP 280-282.

Osborn then filed a motion to enforce the arbitration award and for an order commanding Callahan to perform (sign the confession of judgment). CP 83-89. Callahan moved for an order vacating or modifying the arbitration award. CP 53-82. Oral argument on both motions was held on December 7, 2017. RP 12-13; CP 184. Callahan appeared pro se. RP 4, 8-13; CP 184. He admitted that the issues had been adequately briefed. RP 8. The court granted the motion to enforce the arbitration award and denied Callahan's motion to vacate. RP 12-13; CP 176-179, CP 180-182, CP 184. Callahan appealed.

E. The Court of Appeals Properly Applies the Facial Legal Standard

On March 18, 2019, the Court of Appeals issued its unpublished opinion denying Callahan's appeal. The court found that Callahan did not identify any facial legal error in the arbitrator award and held that the face of the arbitration award "exhibits no erroneous or mistaken application of law." Op. 7-8. The court also rejected Callahan's claim of violation of due process noting that Callahan did not request a hearing or object to the procedure, and that the arbitrator did not deny any request to consider evidence. The court noted that arbitrators are afforded broad discretion by statute: "RCW 7.04A.150(1) states the arbitrator may conduct the arbitration in such manner as the arbitration considers appropriate so as to aid in the fair and expeditious disposition of the proceeding." Op. at 8.

Callahan asked for reconsideration, arguing the Court of Appeals applied the wrong standard of review, and that due process was denied by both the arbitrator and superior court. Osborn opposed the motion. On May 20, 2019, the Court of Appeals denied the motion for reconsideration, and also denied Osborn's request for attorney fees.

Thirty-one (31) days after the denial of the motion for reconsideration, Callahan filed an untimely petition for review. He then filed a motion to extend time to file in an attempt to correct this fatal error.

Osborn opposed the motion arguing that the excuses Callahan claimed for the late filing should be rejected, and asked that the petition for review be denied. That motion is pending.

IV. ARGUMENT WHY REVIEW SHOULD BE DENIED

A. Division One Followed Well Established Law By Applying the Proper Standard of Review to Determine if the Arbitration Award Should Be Vacated.

Arbitration awards are set aside only in narrowly defined instances. Barnett v. Hicks, 119 Wn.2d 151, 153-54 (1992); Kempf v. Puryear, 87 Wn. App. 390, 393 (1997); see also Boyd v. Davis, 127 Wn.2d 256, 262-263 (1995). RCW 7.04A.230 governs motions to vacate and enumerates the limited grounds for vacation as follows:

> (1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:
>
> (a) The award was procured by corruption, fraud, or other undue means;
>
> (b) There was:
>
> i. Evident partiality by an arbitrator appointed as a neutral;
>
> ii. Corruption by an arbitrator;
>
> iii. Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
>
> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement; refused

> to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
>
> (d) An arbitrator exceeded the arbitrator's powers; . . . .

The party seeking to vacate an arbitration award bears the burden of showing that the statutory grounds have been satisfied. Cummings v. Budget Tank Removal & Environmental Services, LLC, 163 Wn. App. 379, 388 (2011).

Appellate review of an arbitrator's award is limited to the same standard. Salewski v. Pilchuck Veterinary Hosp., Inc., 189 Wn. App. 898, 903 (2015). Judicial review thus "is confined to the question of whether any of the statutory grounds for vacation exist." Salewski, 189 Wn. App. at 903-904 (quoting Cummings, 163 Wn. App. at 388).

Callahan has made a variety of arguments regarding the arbitration process, what occurred at the mediation, and in discovery in the underlying dispute. The essence of these claims is that the arbitrator exceeded his powers. To vacate an award on this ground, the error must appear "on the face of the award." Salewski, 189 Wn. App. at 904 (quoting Federated Servs. Ins. Co. v. Personal Representative of Estate of Norberg, 101 Wn. App. 119, 123 (2000)). This is a very narrow ground for review in keeping with the policy of finality underlying arbitrations:

> The "facial legal error standard is a very narrow ground for vacating an arbitral award." It does not extend to a potential legal error that depends on the consideration of the specific evidence offered or to an indirect sufficiency of the evidence challenge. Courts are not permitted to conduct a trial de novo when reviewing the award, they "do not look to the merits of the case, and they do not reexamine evidence." "'The error should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages.'"

Salewski, 189 Wn. App. at 904 (citations and footnotes omitted).

Callahan has not identified any error on the face of the award. Instead, he insists that judicial review includes looking beyond the award to evidence related to what he was told at mediation and what he learned or did not learn during discovery. This is contrary to existing law and does not provide a proper basis on which this Court should grant review.

1. Allegations of Fraud Do Not Change the Limited Judicial Review of Arbitration Awards

Given the limited judicial review available to a claim that an arbitrator exceeded his or her powers, Callahan attempts to cast his claim as one involving fraud in the procurement of the arbitrator award. He then tacks onto this argument that in such instances he was entitled to a full evidentiary hearing at arbitration.

This argument is not supportable. First, the "fraud" allegation is not about the arbitration award itself; rather, it concerns the settlement –

that Callahan did not know about the artwork issue until after settlement (despite the allegations in his initial Answer).

Second, the facial legal review standard applies to this ground for vacation as illustrated by Seattle Packaging Corp. v. Barnard, 94 Wn. App. 481, 972 P.2d 577 (1999). There, the court, applying former RCW 7.04.160, was asked to determine whether perjury during an arbitration hearing constitutes fraud. The court adopted the following three part test applied by federal courts when interpreting Section 10 of the Federal Arbitration Act (9 U.S.C. § 10), which also provides for vacation of an arbitral award produced by fraud:

> For an alleged fraud, including perjury, to constitute grounds for vacatur, the moving party must establish the existence of fraud by clear and convincing evidence; the fraud must not have been discoverable upon the exercise of due diligence before the close of the arbitration hearing; and the moving party must demonstrate that the fraud materially related to an issue of consequence in the arbitration.

Barnard, 94 Wn. App. at 487 (citing Bonar v. Dean Witter Reynolds, Inc., 835 F.2d 1378, 1383 (11th Cir. 1988)). Although the court in Barnard reviewed some of the evidence of perjury over concerns that the arbitration panel did not reopen the arbitration to "hear" the "new" evidence, it still applied the facial legal error test. Id. at 488-89, 494. The court ultimately found that the movants were "unable to demonstrate from

the face of the award that the arbitrators placed any weight whatsoever on the challenged testimony. The amount of the award reflects that the arbitrators may very well have rejected the allegedly perjured testimony, . . ." Id. at 494 (emphasis added).

Callahan has not satisfied this test, much less established fraud in the procurement of the arbitration award by clear and convincing evidence. He also was not prevented from raising issues relating to the artwork, and in fact did so, both in the mediation and arbitration. See CP 37, 39-41, 264 (paras. 2 & 6). In this respect the facts of Barnard differ from the evidence here.

Likewise, unlike Barnard, here the arbitrator was fully advised by Callahan of this factual dispute and Callahan's position was considered. CP 37-41, 153-163. The arbitration award itself speaks of "artwork" in general and not in terms individual pictures, and concludes that the mediation subsumed all claims relative to artwork as a whole. CP 263-264. In sum, Callahan has not shown that the arbitration award itself was procured by fraud, which is the statutory requirement for judicial review.

2. Splitting of Causes of Action Is Prohibited.

Ignoring his defense of offset, Callahan argues that the artwork claim was not part of the underlying lawsuit and therefore was not settled.

The artwork, however, is referenced in the Answer to Amended Complaint and Counterclaims, which was filed *twice* by Callahan (see CP 7, 11, 204, 212). And, while for unknown reasons, it was not included in the Amended Answer, the affirmative defense of offset remained. That defense was settled along with all other claims and defenses when Callahan signed the CR 2A agreement.

Splitting of causes of action is prohibited under Washington law:

> "This court from early years has dismissed a subsequent action on the basis that the relief sought could have and should have been determined in a prior action. The theory on which dismissal is granted is variously referred to as res judicata or splitting causes of action."

Schoeman v. New York Life Ins. Co., 106 Wn.2d 855, 859 (1986). Any counterclaims that Callahan had against Osborn concerning artwork had to be raised in the Answer or were waived. See Civil Rule 8 (matters "constituting an avoidance" must be pleaded); Civil Rule 13(a) (compulsory counterclaims). He cannot settle those claims and then revive them in another lawsuit.

B. No Requirement for a Full Evidentiary Hearing.

The Court of Appeals correctly observed that RCW 7.04A.150 does not require the full evidentiary hearing that Callahan demands. Op. at 8. Moreover, Callahan did not request a hearing, and the record

establishes that the parties anticipated that the arbitrator would rule upon receipt of the parties' submissions. CP 134-135; CP 153-163.

The arbitration procedure followed in this instance was consistent with RCW 7.04A.150, which authorizes the arbitrator to "conduct the arbitration in such a manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding."[1] In the unique context present here where the arbitrator was also the mediator of a consummated CR 2A settlement agreement, it is "fair" to assume that the arbitrator carries with him or her into the arbitration intimate knowledge of the facts and arguments of all parties to the dispute. This includes concessions such as those made by Mr. Callahan during the negotiation process. To ignore this reality is to exalt form over substance.

The arbitrator knew about and understood Callahan's position regarding allegedly stolen artwork as is evidenced by his findings in the arbitration and Callahan's submittal to the arbitrator. The issue here is whether that decision would have been different if during the mediation the arbitrator had known that there were six paintings instead of four.

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[1] Petitioners' reliance on Davidson v. Henson, 135 Wn.2d 112 (1998), and Boyd v. Davis, 127 Wn.2d 256 (1995), for the proposition that the *current* arbitration act, Chapter 7.04A RCW, requires a hearing is misplaced. Both decisions were decided under statutes which have been repealed.

Callahan's argument that the subsequent discovery of two additional paintings mandates a "full evidentiary hearing" reexamining the nature and scope of the CR 2A settlement agreement makes no sense and he has made no showing as to how any other evidence or testimony could have aided the arbitrator in his decision.

Callahan asks this Court to draw a distinction between the "pre-hearing" that Judge Hilyer convened and the "full evidentiary hearing" Callahan demands. Callahan argues that if there is a "pre-hearing" then perforce there must be a subsequent evidentiary hearing. In the present context, this is a distinction without a difference. Callahan clearly treated his submittal to the arbitrator as his evidentiary presentation. He set forth his entire case in detail. CP 37-49, 153-163. The only distinction between what Callahan submitted to the arbitrator and a formal evidentiary presentation is the absence of a sworn declaration on the last page. That distinction, in this unique context, cannot justify reversal of the Court of Appeals opinion and vacation of the arbitration award.

C. There Was No Violation of Due Process

Arbitrations are a creature of contract between the parties. As a result, it is not expected or anticipated that the technical strictures imposed

by court rules and the like will always be followed. This was aptly noted by this Court in Barnett v. Hicks, 119 Wn.2d 151 (1992):

> Arbitration can be casually structured. Tombs v. Northwest Airlines, Inc., 83 Wn.2d 157, 161, 516 P.2d 1028 (1973) (arbitrators are not expected or required to always follow the strict and technical rules of law); Thorgaard Plumbing & Heating Co. v. County of King, 71 Wn.2d 126, 132, [*156] 426 P.2d 828 (1967) (arbitration depends for its existence and for its jurisdiction upon the parties having contracted to submit to it, and upon the arbitration statute); Northern State Constr. Co. v. Banchero, 63 Wn.2d 245, 248, 386 P.2d 625 (1963) (although arbitration is in the nature of a judicial inquiry, the standards of judicial conduct and efficiency to which arbitrators are held are markedly different from those imposed on judicial officers).
>
> * * * *
>
> The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned. Thorgaard, at 131. The object is to avoid what some feel to be the formalities, the delay, the expense and vexation of ordinary litigation. Thorgaard, at 132. Immediate settlement of controversies by arbitration removes the necessity of waiting out a crowded court docket. Comment, The 1943 Washington Arbitration Act, 22 Wash. L. Rev. 117, 118 (1947).

Barnett, 119 Wn.2d at 151, 155-56, 160. The case cited by Callahan, Conard v. Univ. of Wash., 62 Wn. App 664 (1991), is factually distinguishable and does not stand for the proposition that a right to a hearing exists in every instance. Rather, it involves a loss of a government entitlement based on conduct of a student-athlete. It does not involve

arbitration or a settlement of a claim, leaving only enforcement of the settlement as the issue before the arbitrator, as is the case here.

In this respect, Callahan's argument displays a fundamental misunderstanding about due process. Due Process does not grant parties an inherent right to present argument or oral testimony and it does "does not require any particular form or procedure." Rivers v. Conference of Mason Contractors, 145 Wn.2d 674, 697 (2002); In re Dependency of R.L., 123 Wn. App. 215, 222 (2004); Hanson v. Shim, 87 Wn. App. 538, 551 (1997). The only requirement is that a party receive proper notice and an opportunity to present his or her position. Rivers, 145 Wn.2d at 697.

Callahan presented his position to the arbitrator and the arbitrator considered it. CP 153-163, 263-264. Given the nature of the dispute, Callahan's defense of offset asserted in the underlying lawsuit, and the nature of the arbitrator's unique knowledge of the mediation, the process invoked by the arbitrator (to which neither party objected) is all that due process required. Callahan's due process allegations simply do not provide a basis for vacation of the arbitration award.

D. An Evidentiary Hearing Was Not Required Before the Superior Court Ruled on the Motion to Vacate

Callahan argues that the superior court should have held an evidentiary hearing before ruling on the motion to vacate. In doing so, he

relies on case law concerning enforcement of a settlement agreement. This is misguided. Callahan could have, but did not request an evidentiary hearing, which constitutes waiver. Enforcement of the CR 2A agreement was also not the issue before the court. Rather, the only issue before the court was whether to confirm or vacate the arbitration award, which review as discussed above, is limited to the statutory grounds set forth in RCW 7.04A.230.

Seattle Packaging Corp. v. Barnard, 94 Wn. App. 481 (1999), cited by Petitioner, does not support a contrary result. Barnard was decided under former RCW 7.04.160, which provided for notice and hearing before vacating an arbitration order. The current chapter 7.04A RCW does not require a hearing, and in any case, Callahan was given the opportunity to appear and argue before the court.

E. This Appeal Does Not Involve an Issue of Substantial Public Interest or a Significant Question of Constitutional Law

Arbitration is a private dispute mechanism. It is not intended or expected to include all the safeguards and procedures available in a court of law. It is often used to gain a final decision swiftly and with less expense. Yet, Callahan claims the arbitral process will lose public support if a full evidentiary hearing is not held in each arbitration. Plainly this ignores what arbitration is and what our legislature has deemed necessary

to safeguard the arbitral process by its adoption of Chapter 7.04A, RCW. In other words, a recognition of judicial deference toward arbitral awards by narrowly limiting review of arbitration awards.

What Callahan advocates is a change to that law that will undermine arbitration's policy of finality and the efficacy of arbitration itself. S&S Constr., Inc. v. ADC Props., LLC, 151 Wn. App. 247, 254 (2009) (Washington public policy strongly favors the finality of arbitration awards). This is not the proper forum for that change. If Callahan seeks to amend or rescind Chapter 7.04A, RCW, he must do so through the Legislature. In short, the petition does not present an issue of substantial public interest or raise a significant question of constitutional law, and should be denied.

F. Respondents Are Entitled to an Award of Attorney Fees

Osborn preserved the right to an award of attorney fees in the Court of Appeals and was denominated the prevailing party. Op. at 9. Osborn submitted an Affidavit for Attorney's Fees on March 28, 2019, premised on RCW 7.04A.250(3). The court denied the application without explanation. Pursuant to RAP 18.1(j) and the authority cited above, this Court should award Osborn attorney fees in answering the Petition for Review and reverse the denial of their fee application before

the Court of Appeals.

V. CONCLUSION

The Petition for Review was untimely and does not satisfy the requirements of RAP 13.4(b). This Court should deny review and award respondents their fees in answering the petition.

Dated this 12th day of August, 2019.

SMYTH & MASON, PLLC

Jeff Smyth, WSBA #6291
Shaunta M. Knibb, WSBA #27688
Attorneys for Respondents

DECLARATION OF SERVICE

Heidi Brown under penalty of perjury under the laws of the State of Washington states and declares as follows:

On August 12, 2019, I caused the foregoing document described as *ANSWER TO PETITION FOR REVIEW* to be electronically filed with the Washington State Supreme Court and caused it to be served on the persons listed below in the manner shown:

Michael & Robin Callahan 7997 NE High School Road Bainbridge Island, WA 98110 (206) 240-9019 mctrustee@gmail.com	**[X] Via Email** **[X] Via U.S. Mail with Postage Prepaid** [ ] Via Messenger

Pro se Defendants/Petitioners

DATED at Seattle, Washington this 12th day of August, 2019.

s/ Heidi Brown
Heidi Brown
Legal Assistant to Smyth & Mason, PLLC

Appendix

FILED
3/18/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SIMEON J. OSBORN and MONICA OSBORN, and the marital community composed thereof, Respondents, v. MICHAEL CALLAHAN and ROBIN CALLAHAN, individually, and the marital community composed thereof, Appellants, OSBORN MACHLER, PLLC, a Washington professional limited liability company, Third Party Defendant.	No. 77871-4-I DIVISION ONE UNPUBLISHED OPINION FILED: March 18, 2019

SCHINDLER, J. — Michael Callahan and Robin Callahan appeal a superior court order denying the motion to vacate the arbitrator's award, entry of judgment on the award, and the award of attorney fees. We affirm.

FACTS

Simeon Osborn and Michael Callahan are attorneys and had been close friends since 1976.

On September 16, 2016, Osborn and his spouse Monica Osborn (collectively, Osborn) filed a lawsuit against Callahan and his spouse Robin Callahan (collectively, Callahan). The lawsuit alleged Callahan owed Osborn more than $700,000 in personal loans Osborn made to Callahan between 2007 and 2009.

On March 20, 2017, Callahan filed an answer and counterclaims against Osborn and the Osborn Machler PLLC law firm.[1] Callahan claimed he was entitled to offsets and asserted claims of breach of contract, breach of fiduciary duty, accounting, and conversion. Callahan alleged that while acting as his lawyer, Osborn learned about artwork Callahan held in a storage facility as collateral for a debt. Callahan alleged Osborn or his law firm misappropriated three works of art valued at approximately $3 million. The amended answer and counterclaims did not allege misappropriation of artwork.

In September 2017, the parties participated in a mediation and entered into a CR 2A settlement agreement. Callahan agreed to pay Osborn $315,000 "in full and final settlement of the lawsuit pending between them." The parties stipulated to a schedule of payments by Callahan, a significant reduction of the debt if Callahan paid early, and acceleration of the debt if Callahan did not make certain scheduled payments.[2] The parties agreed to execute a "confession of judgment" to secure payment of the debt and "[m]utual releases for all claims." The CR 2A agreement states the mediator, retired King County Superior Court Judge Bruce Hilyer, "is appointed as arbitrator should any

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[1] Three minutes after filing the answer and counterclaims on March 20, Callahan filed an amended answer and counterclaims. Callahan's attorney failed to serve the law firm as a third party defendant. At some point prior to the mediation, Callahan began representing himself pro se in this matter.

[2] The debt accelerated because Callahan made only the first payment required under the CR 2A agreement.

issue or dispute arise regarding the performance, interpretation or enforcement of this agreement."

With Callahan's consent, Osborn filed a notice of settlement, stating, "[A]ll claims against all parties in this action have been resolved."

Osborn's attorney drafted and sent a confession of judgment to Callahan. The confession of judgment addressed mutual releases as follows:

> The Settlement Agreement contemplates mutual releases of all claims, asserted or unasserted, known or unknown, and the dismissal of the lawsuit with prejudice. Such dismissal shall not however affect Osborn's rights to enter this Confession of Judgment upon the occurrence of Callahan's default in faithfully performing the obligations set forth in the Settlement Agreement.

Callahan objected to signing a release of "all claims, asserted or unasserted, known or unknown."

Osborn requested arbitration to resolve the dispute. At the direction of the arbitrator, Osborn and Callahan each provided a written submission and a proposed confession of judgment.

Callahan argued the parties agreed to settle only claims asserted in the pleadings and dismissal of the lawsuit. Callahan asserted that during discovery, he asked Osborn about "all dealings with the art" and in response, Osborn produced documentation related to four works of art. Callahan claimed that shortly after the mediation, he learned that Osborn had taken possession of two additional works of art that belonged to him with an "appraised value in the millions of dollars." Callahan submitted a confession of judgment that provided for "mutual releases between the parties of only the claims asserted in the pleadings and settled in the Settlement

Agreement, together with a dismissal of the lawsuit with prejudice of the subject lawsuit."

The arbitrator issued a two-page "Arbitrator's Award" that set forth findings and conclusions. The arbitrator concluded the confession of judgment submitted by Osborn conformed to the CR 2A agreement. The Arbitrator's Award sets forth the following findings and conclusions:

> FINDINGS
>
> 1. With regard to the lawsuit entitled Osborn v. Callahan, King County Superior Court Cause No. 16-2-22333-8 SEA, a "CR2A" settlement agreement dated September 8, 2017, was negotiated and signed by and on behalf of all the parties, in which the parties appointed the undersigned to act as arbitrator and authorized the arbitrator to resolve any issues regarding the performance, interpretation and enforcement of the settlement.
>
> 2. The underlying lawsuit included counterclaims against petitioners Osborn and a third party complaint against Osborn Machler, PLLC, including claims and affirmative defenses for offset, breach of contract, breach of fiduciary duty, claims related to ownership of artwork, and for an accounting.
>
> 2. [sic] An issue has arisen between the parties regarding the form and execution of a confession of judgment. Respondent Callahan also contends that certain of his claims against petitioner Osborn were left unresolved by the settlement agreement. While the CR2A does not explicitly mention Osborn Machler, PLLC, it was clearly intended to resolve all claims including claims against Osborn Machler, PLLC, and that was clearly explained by the undersigned to Mr. Callahan.
>
> 3. Respondent Callahan has failed and refused to sign the form of confession of judgment prepared by counsel for petition, and petitioner Osborn has refused to sign the form of confession of judgment prepared by Callahan.
>
> 4. Pursuant to my preliminary order, both forms of confession of judgment have been submitted to me to decide the form of confession of judgment best conforming to the CR2A settlement agreement.
>
> CONCLUSIONS AND AWARD
>
> 5. The form of confession of judgment submitted by petitioner Osborn, attached hereto as Exhibit "A" and incorporated herein by this reference, best conforms with the terms of the CR2A settlement, and I direct that respondents Michael Callahan and Robin Callahan,

husband and wife, forthwith execute that confession of judgment before a notary.

6. All claims by respondent Callahan against petitioner Osborn, including without limitation claims against the law firm of Osborn Machler PLLC and claims related to the ownership of artwork, were fully and finally settled and compromised by the CR2A settlement agreement.

The arbitrator attached the confession of judgment submitted by Osborn and directed Callahan to "execute that confession of judgment before a notary."

Callahan did not execute the confession of judgment. On November 13, 2017, Osborn obtained a superior court order confirming the Arbitrator's Award.

Callahan filed a motion in superior court to modify or vacate the Arbitrator's Award. As he previously argued to the arbitrator, Callahan claimed (1) he entered into the settlement based on deceptive information Osborn provided in discovery and (2) the settlement agreement contemplated a release of only the claims expressly asserted in the pleadings.

Osborn filed a motion to enforce the arbitration award. The superior court denied Callahan's motion to modify or vacate the arbitration award and granted the motion to enforce the Arbitrator's Award.

Callahan did not comply with the court order enforcing the Arbitrator's Award. The court entered judgment on the award and an order awarding attorney fees and costs.

ANALYSIS

Callahan contends the court erred by enforcing the Arbitrator's Award, entering the confession of judgment, and awarding attorney fees.

Washington courts accord substantial finality to the decision of an arbitrator rendered in accordance with the parties' agreement and Washington's uniform

arbitration act, chapter 7.04A RCW. Davidson v. Hensen, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). Judicial review of arbitration awards is controlled by statute and permits vacation of an arbitration award only upon specific grounds enumerated in RCW 7.04A.230.[3] Such review is extremely limited and does not encompass a review of the merits of the case. Boyd v. Davis, 127 Wn.2d 256, 267-68, 897 P.2d 1239 (1995) (Utter, J., concurring). Absent an error of law on the face of the award, the trial court will not modify or vacate it. Boyd, 127 Wn.2d at 263. "[C]ourts may not search the arbitral proceedings for any legal error; courts do not look to the merits of the case, and they do not reexamine evidence." Broom v. Morgan Stanley DW, Inc., 169 Wn.2d 231, 239, 236 P.3d 182 (2010).[4] Accordingly, "[r]arely is it possible to have an arbitration award vacated for [obvious] error of law on the face of the award." Cummings v. Budget Tank Removal & Envtl. Servs., LLC, 163 Wn. App. 379, 382, 260 P.3d 220 (2011).

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[3] RCW 7.04A.230(1) provides:

Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was:

(i) Evident partiality by an arbitrator appointed as a neutral;

(ii) Corruption by an arbitrator; or

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(d) An arbitrator exceeded the arbitrator's powers;

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or

(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

[4] Emphasis in original.

Likewise, "in the case of an appeal from an arbitrator's award, an appellate court is strictly proscribed from the traditional full review." Barnett v. Hicks, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992). Our review of an arbitrator's award is confined to a review of the decision by the court that confirmed, vacated, modified, or corrected that award. Expert Drywall, Inc. v. Ellis-Don Constr., Inc., 86 Wn. App. 884, 888, 939 P.2d 1258 (1997).

Callahan claims the arbitrator exceeded his authority by adding terms to the CR 2A agreement. Callahan contends (1) there was no evidence the parties contemplated, much less agreed to, a mutual release of all claims, including those unknown to the parties and unasserted in the pleadings and (2) the arbitrator ignored his claim that he was induced to settle because Osborn provided false or misleading information in discovery.

An arbitrator exceeds his or her powers within the meaning of RCW 7.04A.230(1)(d) when the arbitration award exhibits a facial legal error. Broom, 169 Wn.2d at 240. The error, if any, must be recognizable from the language of the award. Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg, 101 Wn. App. 119, 124, 4 P.3d 844 (2000). Where, as here, the Arbitrator's Award sets forth the arbitrator's factual findings and conclusions, we consider any issues of law evident in those findings and conclusions as part of the "face of the award." Cummings, 163 Wn. App. at 389.

Callahan fails to identify any facial legal error in the Arbitrator's Award. The arbitrator resolved a dispute "regarding the form and execution of a confession of judgment." The arbitrator considered and rejected Callahan's claim that certain claims

were "left unresolved by the settlement agreement." The arbitrator concluded the confession of judgment drafted by Osborn conformed to the CR 2A agreement that resolved "[a]ll claims," including and "without limitation" the claims "related to the ownership of artwork." We conclude the face of the Arbitrator's Award exhibits no erroneous or mistaken application of law.

Callahan also contends the arbitrator erred by resolving the dispute based on written submissions without a full evidentiary hearing, depriving him of his right to due process. The statute Callahan cites, RCW 7.04A.150, does not require an evidentiary hearing.

RCW 7.04A.150(1) states the arbitrator "may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding." The record does not show that Callahan requested an arbitration hearing, objected to the procedure, or that the arbitrator denied any request to consider evidence. Callahan fails to establish a violation of his constitutional right to due process.

Callahan also claims the court erred by refusing to modify the arbitration award to exclude his spouse because she did not sign and was not a party to the CR 2A agreement. But the CR 2A settlement agreement states the agreement is "between Mr. and Mrs. Michael Callahan ('Callahan') and Mr. and Mrs. Osborn ('Osborn')." Both Callahan and Osborne signed and entered into the CR 2A agreement on behalf of the marital community.

Callahan argues the superior court erred in awarding attorney fees to Osborn because the parties did not incur fees as a result of a "contested arbitration" and the CR 2A agreement did not include a fee provision.

RCW 7.04A.250(3) allows the trial court to award the "prevailing party to a contested judicial proceeding" reasonable fees. Because there were contested judicial proceedings following entry of the arbitration award and Osborn prevailed in those proceedings, he was entitled to reasonable attorney fees.

Callahan also challenges the amount of the attorney fee award. We review the reasonableness of an award of attorney fees for an abuse of discretion. Rettkowski v. Dep't of Ecology, 128 Wn.2d 508, 519, 910 P.2d 462 (1996). Osborn's attorney submitted a detailed fee request that set forth the time spent by two attorneys on various tasks related to responding to the motion to vacate, enforcing the arbitration award, and securing the judgment. Osborn requested $15,240 in attorney fees and the court awarded a total of $10,000 in fees and costs. Callahan's conclusory assertion that the amount of fees was unwarranted fails to demonstrate an abuse of discretion.

Osborn seeks an award of attorney fees on appeal. Osborn is the prevailing party on appeal. Subject to compliance with RAP 18.1(d), we grant the request under RCW 7.04A.250(3).[5]

[5] Although Callahan suggests the arbitrator was biased, he points to nothing beyond his disagreement with the arbitrator's ruling to support the claim. In evaluating partiality, we do not look to the merits of the arbitrator's decision or the evidence. See Broom, 169 Wn.2d at 239.

We affirm the superior court order denying the motion to vacate the Arbitrator's Award, entry of the judgment on the award, and the award of attorney fees.

WE CONCUR:

FILED
5/20/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SIMEON J. OSBORN and MONICA OSBORN, and the marital community composed thereof, Respondents, v. MICHAEL CALLAHAN and ROBIN CALLAHAN, individually, and the marital community composed thereof, Appellants, OSBORN MACHLER, PLLC, a Washington professional limited liability company, Third Party Defendant.	No. 77871-4-I DIVISION ONE ORDER DENYING APPELLANT'S MOTION FOR RECONSIDERATION AND RESPONDENT'S REQUEST FOR ATTORNEY FEES

Appellant Michael Callahan filed a motion for reconsideration of the opinion filed on March 18, 2019. Respondents Simeon and Monica Osborn filed an answer to the motion and a request for an award of attorney fees. A majority of the panel has determined that appellant's motion for reconsideration and respondents' request for attorney fees should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration and the request for attorney fees is denied.

FOR THE COURT:

Judge

§ 7. Witnesses before arbitrators; fees; compelling attendance

The arbitrators selected either as prescribed in this title or otherwise, or a majority of them, may summon in writing any person to attend before them or any of them as a witness and in a proper case to bring with him or them any book, record, document, or paper which may be deemed material as evidence in the case. The fees for such attendance shall be the same as the fees of witnesses before masters of the United States courts. Said summons shall issue in the name of the arbitrator or arbitrators, or a majority of them, and shall be signed by the arbitrators, or a majority of them, and shall be directed to the said person and shall be served in the same manner as subpoenas to appear and testify before the court; if any person or persons so summoned to testify shall refuse or neglect to obey said summons, upon petition the United States district court for the district in which such arbitrators, or a majority of them, are sitting may compel the attendance of such person or persons before said arbitrator or arbitrators, or punish said person or persons for contempt in the same manner provided by law for securing the attendance of witnesses or their punishment for neglect or refusal to attend in the courts of the United States.

(July 30, 1947, ch. 392, 61 Stat. 672; Oct. 31, 1951, ch. 655, § 14, 65 Stat. 715.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 7, 43 Stat. 884.

AMENDMENTS

1951—Act Oct. 31, 1951, substituted "United States district court for" for "United States court in and for", and "by law for" for "on February 12, 1925, for".

§ 8. Proceedings begun by libel in admiralty and seizure of vessel or property

If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 8, 43 Stat 884.

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

(July 30, 1947, ch. 392, 61 Stat. 672.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 9, 43 Stat. 885.

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired, the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5.

(July 30, 1947, ch. 392, 61 Stat. 672; Pub. L. 101–552, § 5, Nov. 15, 1990, 104 Stat. 2745; Pub. L. 102–354, § 5(b)(4), Aug. 26, 1992, 106 Stat. 946; Pub. L. 107–169, § 1, May 7, 2002, 116 Stat. 132.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 10, 43 Stat. 885.

AMENDMENTS

2002—Subsec. (a)(1) to (4). Pub. L. 107–169, § 1(1)–(3), substituted "where" for "Where" and realigned margins in pars. (1) to (4), and substituted a semicolon for

period at end in pars. (1) and (2) and "; or" for the period at end in par. (3).

Subsec. (a)(5). Pub. L. 107–169, § 1(5), substituted "If an award" for "Where an award", inserted a comma after "expired", and redesignated par. (5) as subsec. (b).

Subsec. (b). Pub. L. 107–169, § 1(4), (5), redesignated subsec. (a)(5) as (b). Former subsec. (b) redesignated (c).

Subsec. (c). Pub. L. 107–169, § 1(4), redesignated subsec. (b) as (c).

1992—Subsec. (b). Pub. L. 102–354 substituted "section 580" for "section 590" and "section 572" for "section 582".

1990—Pub. L. 101–552 designated existing provisions as subsec. (a), in introductory provisions substituted "In any" for "In either", redesignated former subsecs. (a) to (e) as pars. (1) to (5), respectively, and added subsec. (b) which read as follows: "The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5."

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration—

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 11, 43 Stat. 885.

§ 12. Notice of motions to vacate or modify; service; stay of proceedings

Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 12, 43 Stat. 885.

§ 13. Papers filed with order on motions; judgment; docketing; force and effect; enforcement

The party moving for an order confirming, modifying, or correcting an award shall, at the time such order is filed with the clerk for the entry of judgment thereon, also file the following papers with the clerk:

(a) The agreement; the selection or appointment, if any, of an additional arbitrator or umpire; and each written extension of the time, if any, within which to make the award.

(b) The award.

(c) Each notice, affidavit, or other paper used upon an application to confirm, modify, or correct the award, and a copy of each order of the court upon such an application.

The judgment shall be docketed as if it was rendered in an action.

The judgment so entered shall have the same force and effect, in all respects, as, and be subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

(July 30, 1947, ch. 392, 61 Stat. 673.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 13, 43 Stat. 886.

§ 14. Contracts not affected

This title shall not apply to contracts made prior to January 1, 1926.

(July 30, 1947, ch. 392, 61 Stat. 674.)

DERIVATION

Act Feb. 12, 1925, ch. 213, § 15, 43 Stat. 886.

PRIOR PROVISIONS

Act Feb. 12, 1925, ch. 213, § 14, 43 Stat. 886, former provisions of section 14 of this title relating to "short title" is not now covered.

§ 15. Inapplicability of the Act of State doctrine

Enforcement of arbitral agreements, confirmation of arbitral awards, and execution upon judgments based on orders confirming such awards shall not be refused on the basis of the Act of State doctrine.

(Added Pub. L. 100–669, § 1, Nov. 16, 1988, 102 Stat. 3969.)

CODIFICATION

Another section 15 of this title was renumbered section 16 of this title.

§ 16. Appeals

(a) An appeal may be taken from—

(1) an order—

(A) refusing a stay of any action under section 3 of this title,

(B) denying a petition under section 4 of this title to order arbitration to proceed,

(C) denying an application under section 206 of this title to compel arbitration,

(D) confirming or denying confirmation of an award or partial award, or

RCW 7.04A.150

Arbitration process.

(1) The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding. The authority conferred upon the arbitrator includes the power to hold conferences with the parties to the arbitration proceeding before the hearing and to determine the admissibility, relevance, materiality, and weight of any evidence.

(2) The arbitrator may decide a request for summary disposition of a claim or particular issue by agreement of all interested parties or upon request of one party to the arbitration proceeding if that party gives notice to all other parties to the arbitration proceeding and the other parties have a reasonable opportunity to respond.

(3) The arbitrator shall set a time and place for a hearing and give notice of the hearing not less than five days before the hearing. Unless a party to the arbitration proceeding interposes an objection to lack of or insufficiency of notice not later than the commencement of the hearing, the party's appearance at the hearing waives the objection. Upon request of a party to the arbitration proceeding and for good cause shown, or upon the arbitrator's own initiative, the arbitrator may adjourn the hearing from time to time as necessary but may not postpone the hearing to a time later than that fixed by the agreement to arbitrate for making the award unless the parties to the arbitration proceeding consent to a later date. The arbitrator may hear and decide the controversy upon the evidence produced although a party who was duly notified of the arbitration proceeding did not appear. The court, on request, may direct the arbitrator to promptly conduct the hearing and render a timely decision.

(4) If an arbitrator orders a hearing under subsection (3) of this section, the parties to the arbitration proceeding are entitled to be heard, to present evidence material to the controversy, and to cross-examine witnesses appearing at the hearing.

(5) If there is more than one arbitrator, all of them shall conduct the hearing under subsection (3) of this section; however, a majority shall decide any issue and make a final award.

(6) If an arbitrator ceases, or is unable, to act during the arbitration proceeding, a replacement arbitrator must be appointed in accordance with RCW **7.04A.110** to continue the hearing and to decide the controversy.

[2005 c 433 § 15.]

RCW 7.04A.230

Vacating award.

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was:

(i) Evident partiality by an arbitrator appointed as a neutral;

(ii) Corruption by an arbitrator; or

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

(c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW **7.04A.150**, so as to prejudice substantially the rights of a party to the arbitration proceeding;

(d) An arbitrator exceeded the arbitrator's powers;

(e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW **7.04A.150**(3) not later than the commencement of the arbitration hearing; or

(f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW **7.04A.090** so as to prejudice substantially the rights of a party to the arbitration proceeding.

(2) A motion under this section must be filed within ninety days after the movant receives notice of the award in a record under RCW **7.04A.190** or within ninety days after the movant receives notice of an arbitrator's award in a record on a motion to modify or correct an award under RCW **7.04A.200**, unless the motion is predicated upon the ground that the award was procured by corruption, fraud, or other undue means, in which case it must be filed within ninety days after such a ground is known or by the exercise of reasonable care should have been known by the movant.

(3) In vacating an award on a ground other than that set forth in subsection (1)(e) of this section, the court may order a rehearing before a new arbitrator. If the award is vacated on a ground stated in subsection (1)(c), (d), or (f) of this section, the court may order a rehearing before the arbitrator who made the award or the arbitrator's successor. The arbitrator must render the decision in the rehearing within the same time as that provided in RCW **7.04A.190**(2) for an award.

(4) If a motion to vacate an award is denied and a motion to modify or correct the award is not pending, the court shall confirm the award.

[**2005 c 433 § 23.**]

RCW 7.04A.250

Judgment on award—Attorneys' fees and litigation expenses.

(1) Upon granting an order confirming, vacating without directing a rehearing, modifying, or correcting an award, the court shall enter a judgment in conformity with the order. The judgment may be recorded, docketed, and enforced as any other judgment in a civil action.

(2) A court may allow reasonable costs of the motion and subsequent judicial proceedings.

(3) On application of a prevailing party to a contested judicial proceeding under RCW **7.04A.220**, **7.04A.230**, or **7.04A.240**, the court may add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made.

[2005 c 433 § 25.]

1998 Rev. Code Wash. (ARCW) § 7.04.160

1998 Washington Code Archive

ANNOTATED REVISED CODE OF WASHINGTON > TITLE 7. SPECIAL PROCEEDINGS AND ACTIONS > CHAPTER 7.04. ARBITRATION

§ 7.04.160. Vacation of award -- Rehearing

In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud or other undue means.

(2) Where there was evident partiality or corruption in the arbitrators or any of them.

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.

(5) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).

An award shall not be vacated upon any of the grounds set forth under subdivisions (1) to (4), inclusive, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.

Where an award is vacated, the court may, in its discretion, direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the agreement for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

History

1943 c 138 § 16; Rem. Supp. 1943 § 430-16.

End of Document

Superior Court Civil Rules

CR 8
GENERAL RULES OF PLEADING

(a) Claims for Relief. A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross claim, or third party claim, shall contain (1) a short and plain statement of the claim showing that the pleader is entitled to relief and (2) a demand for judgment for the relief to which the pleader deems the pleader is entitled. Relief in the alternative or of several different types may be demanded.

(b) Defenses; Form of Denials. A party shall state in short and plain terms the defenses to each claim asserted and shall admit or deny the averments upon which the adverse party relies. If a party is without knowledge or information sufficient to form a belief as to the truth of an averment, the party shall so state and this has the effect of a denial. Denials shall fairly meet the substance of the averments denied. When a pleader intends in good faith to deny only a part or a qualification of an averment, the pleader shall specify so much of it as is true and material and shall deny only the remainder. Unless the pleader intends in good faith to controvert all the averments of the preceding pleading, the pleader may make his denials as specific denials of designated averments or paragraphs, or the pleader may generally deny all the averments except such designated averments or paragraphs as the pleader expressly admits; but, when the pleader does so intend to controvert all its averments, the pleader may do so by general denial subject to the obligations set forth in rule 11.

(c) Affirmative Defenses. In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fault of a nonparty, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitation, waiver, and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

(d) Effect of Failure To Deny. Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading To Be Concise and Direct; Consistency.

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleadings or motions are required.

(2) A party may set forth two or more statements of a claim or defense alternately or hypothetically, either in one count or defense or in separate counts or defenses. When two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements. A party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal or on equitable grounds or on both.

All statements shall be made subject to the obligations set forth in rule 11.

(f) Construction of Pleadings. All pleadings shall be so construed as to do substantial justice. The adoption of this rule shall not be considered an adoption or approval of the forms of pleading in the Appendix of Forms approved in rule 84, Federal Rules of Civil Procedure.

[Adopted effective March 1, 1974; amended effective September 18, 1992; April 28, 2015.]

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Superior Court Civil Rules

CR 13
COUNTERCLAIM AND CROSS CLAIM

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if

(1) at the time the action was commenced the claim was the subject of another pending action, or

(2) the opposing party brought suit upon the pleader's claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this rule.

(b) Permissive Counterclaims. A pleading may state as a counterclaim any claim against an opposing party not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

(c) Counterclaim Exceeding Opposing Claim. A counterclaim may or may not diminish or defeat the recovery sought by the opposing party. It may claim relief exceeding in amount or different in kind from that sought in the pleading of the opposing party.

(d) Counterclaim Against the State. These rules shall not be construed to enlarge beyond the limits now fixed by law the right to assert counterclaims, or to claim credits against the State or an officer or agency thereof.

(e) Counterclaim Maturing or Acquired After Pleading. A claim which either matured or was acquired by the pleader after serving the pleading may, with the permission of the court, be presented as a counterclaim by supplemental pleading.

(f) Omitted Counterclaim. When a pleader fails to set up a counterclaim through oversight, inadvertence, or excusable neglect, or when justice requires, the pleader may by leave of court set up the counterclaim by amendment.

(g) Cross Claim Against Coparty. A pleading may state as a cross claim any claim by one party against a coparty arising out of the transaction or occurrence that is the subject matter either of the original action or of a counterclaim therein or relating to any property that is the subject matter of the original action. Such cross claim may include a claim that the party against whom it is asserted is or may be liable to the cross claimant for all or part of a claim asserted in the action against the cross claimant.

(h) Joinder of Additional Parties. Persons other than those made parties to the original action may be made parties to a counterclaim or cross claim in accordance with the provisions of rules 19 and 20.

(i) Separate Trials; Separate Judgment. If the court orders separate trials as provided in rule 42(b), judgment on a counterclaim or cross claim may be rendered in accordance with the terms of rule 54(b), even if the claims of the

opposing party have been dismissed or otherwise disposed of.

(j) Setoff Against Assignee. The defendant in a civil action upon a contract express or implied, other than upon a negotiable promissory note or bill of exchange, negotiated in good faith and without notice before due, which has been assigned to the plaintiff, may set off a demand of a like nature existing against the person to whom the defendant was originally liable, or any assignee prior to the plaintiff, of such contract, provided such demand existed at the time of the assignment thereof, and belonging to the defendant in good faith, before notice of such assignment, and was such a demand as might have been set off against such person to whom the defendant was originally liable, or such assignee while the contract belonged to defendant.

(k) Other Setoff Rules. (Reserved. See RCW 4.32.120 through 4.32.150 and RCW 4.56.050 through 4.56.075.)

[Adopted effective July 1, 1967; amended effective April 28, 2015.]

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Rules of Appellate Procedure

RAP 13.4
DISCRETIONARY REVIEW OF DECISION TERMINATING REVIEW

(a) How to Seek Review. A party seeking discretionary review by the Supreme Court of a Court of Appeals decision terminating review must serve on all other parties and file a petition for review or an answer to the petition that raises new issues. A petition for review should be filed in the Court of Appeals. If no motion to publish or motion to reconsider all or part of the Court of Appeals decision is timely made, a petition for review must be filed within 30 days after the decision is filed. If such a motion is made, the petition for review must be filed within 30 days after an order is filed denying a timely motion for reconsideration or determining a timely motion to publish. If the petition for review is filed prior to the Court of Appeals determination on the motion to reconsider or on a motion to publish, the petition will not be forwarded to the Supreme Court until the Court of Appeals files an order on all such motions. The first party to file a petition for review must, at the time the petition is filed, pay the statutory filing fee to the clerk of the Court of Appeals in which the petition is filed. Failure to serve a party with the petition for review or file proof of service does not prejudice the rights of the party seeking review, but may subject the party to a motion by the Clerk of the Supreme Court to dismiss the petition for review if not cured in a timely manner. A party prejudiced by the failure to serve the petition for review or to file proof of service may move in the Supreme Court for appropriate relief.

(b) Considerations Governing Acceptance of Review. A petition for review will be accepted by the Supreme Court only:

(1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

(2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or

(3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or

(4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

(c) Content and Style of Petition. The petition for review should contain under appropriate headings and in the order here indicated:

(1) Cover. A title page, which is the cover.

(2) Tables. A table of contents, with page references, and a table of cases (alphabetically arranged), statutes, and other authorities cited, with reference to the pages of the brief where cited.

(3) Identity of Petitioner. A statement of the name and designation of the person filing the petition.

(4) Citation to Court of Appeals Decision. A reference to the Court of Appeals decision which petitioner wants reviewed, the date of filing the decision, and the date of any order granting or denying a motion for reconsideration.

(5) Issues Presented for Review. A concise statement of the issues presented for review.

(6) Statement of the Case. A statement of the facts and procedures relevant to the issues presented for review, with appropriate references to the record.

(7) Argument. A direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.

(8) Conclusion. A short conclusion stating the precise relief sought.

(9) Appendix. An appendix containing a copy of the Court of Appeals decision, any order granting or denying a motion for reconsideration of the decision, and copies of statutes and constitutional provisions relevant to the issues presented for review.

(d) Answer and Reply. A party may file an answer to a petition for review. A party filing an answer to a petition for review must serve the answer on all other parties. If the party wants to seek review of any issue that is not raised in the petition for review, including any issues that were raised but not decided in the Court of Appeals, the party must raise those new issues in an answer. Any answer should be filed within 30 days after the service on the party of the petition. A party may file a reply to an answer only if the answering party seeks review of issues not raised in the petition for review. A reply to an answer should be limited to addressing only the new issues raised in the answer. A party filing any reply to an answer must serve the reply to the answer on all other parties. A reply to an answer should be filed within 15 days after the service on the party of the answer. An answer or reply should be filed in the Supreme Court. The Supreme Court may call for an answer or a reply to an answer.

(e) Form of Petition, Answer, and Reply. The petition, answer, and reply should comply with the requirements as to form for a brief as provided in rules 10.3 and 10.4, except as otherwise provided in this rule.

(f) Length. The petition for review, answer, or reply should not exceed 20 pages double spaced, excluding appendices, title sheet, table of contents, and table of authorities.

(g) Reproduction of Petition, Answer, and Reply. The clerk will arrange for the reproduction of copies of a petition for review, an answer, or a reply, and bill the appropriate party for the copies as provided in rule 10.5.

(h) Amicus Curiae Memoranda. The Supreme Court may grant permission to file an amicus curiae memorandum in support of or opposition to a pending petition for review. Absent a showing of particular justification, an amicus curiae memorandum should be received by the court and counsel of record for the parties and other amicus curiae not later than 60 days from the date the petition for review is filed. Rules 10.4 and 10.6 should govern generally disposition of a motion to file an amicus curiae memorandum. An amicus curiae memorandum or answer thereto should not exceed 10 pages.

(i) No Oral Argument. The Supreme Court will decide the petition without oral argument.

[Originally effective July 1, 1976; amended effective September 1, 1983; September 1, 1990; September 18, 1992; September 1, 1994; September 1, 1998; September 1, 1999; December 24, 2002; September 1, 2006; September 1, 2009; September 1, 2010; December 8, 2015; September 1, 2016.]

Rules of Appellate Procedure

RULE 18.1
ATTORNEY FEES AND EXPENSES

(a) Generally. If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.

(b) Argument in Brief. The party must devote a section of its opening brief to the request for the fees or expenses. Requests made at the Court of Appeals will be considered as continuing requests at the Supreme Court, except as stated in section (j). The request should not be made in the cost bill. In a motion on the merits pursuant to rule 18.14, the request and supporting argument must be included in the motion or response if the requesting party has not yet filed a brief.

(c) Affidavit of Financial Need. In any action where applicable law mandates consideration of the financial resources of one or more parties regarding an award of attorney fees and expenses, each party must serve upon the other and file a financial affidavit no later than 10 days prior to the date the case is set for oral argument or consideration on the merits; however, in a motion on the merits pursuant to rule 18.14, each party must serve and file a financial affidavit along with its motion or response. Any answer to an affidavit of financial need must be filed and served within 7 days after service of the affidavit.

(d) Affidavit of Fees and Expenses. Within 10 days after the filing of a decision awarding a party the right to reasonable attorney fees and expenses, the party must serve and file in the appellate court an affidavit detailing the expenses incurred and the services performed by counsel.

(e) Objection to Affidavit of Fees and Expenses; Reply. A party may object to a request for fees and expenses filed pursuant to section (d) by serving and filing an answer with appropriate documentation containing specific objections to the requested fee. The answer must be served and filed within 10 days after service of the affidavit of fees and expenses upon the party. A party may reply to an answer by serving and filing the reply documents within 5 days after the service of the answer upon that party.

(f) Commissioner or Clerk Awards Fees and Expenses. A commissioner or clerk

will determine the amount of the award, and will notify the parties. The determination will be made without a hearing, unless one is requested by the commissioner or clerk.

(g) Objection to Award. A party may object to the commissioner's or clerk's award only by motion to the appellate court in the same manner and within the same time as provided in rule 17.7 for objections to any other rulings of a commissioner or clerk.

(h) Transmitting Judgment on Award. The clerk will include the award of attorney fees and expenses in the mandate, or the certificate of finality, or in a supplemental judgment. The award of fees and expenses, including interest from the date of the award by the appellate court, may be enforced in the trial court.

(i) Fees and Expenses Determined After Remand. The appellate court may direct that the amount of fees and expenses be determined by the trial court after remand.

(j) Fees for Answering Petition for Review. If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation and filing of the timely answer to the petition for review. A party seeking attorney fees and expenses should request them in the answer to the petition for review. The Supreme Court will decide whether fees are to be awarded at the time the Supreme Court denies the petition for review. If fees are awarded, the party to whom fees are awarded should submit an affidavit of fees and expenses within the time and in the manner provided in section (d). An answer to the request or a reply to an answer may be filed within the time and in the manner provided in section (e). The commissioner or clerk of the Supreme Court will determine the amount of fees without oral argument, unless oral argument is requested by the commissioner or clerk. Section (g) applies to objections to the award of fees and expenses by the commissioner or clerk.

[Amended to become effective December 29, 1998; December 5, 2002; September 1, 2003; September 1, 2006; September 1, 2010]

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