NO. 331750

WHITMAN COUNTY CAUSE NO. 10-2-00293-4

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

GARRETT RANCHES, LLC
a Washington Limited Liability Company
Respondents

v.

LARRY HONN FAMILY, LLC
a Washington Limited Liability Company
Appellants

APPELLANT HONN'S BRIEF

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II. STATEMENT OF THE CASE AND PROCEDURAL HISTORY

The appeal arises from an option contained in the parties Farm Lease with Option. (CP312-318) The option clause at paragraph 4 in the farm lease does not identify any consideration to support the option. (CP313) The body of the farm lease itself is silent as to what if any consideration was given to support the option. (CP312-318)

Due to the lack of consideration to support the option, the appellants on February 9, 2012 served notice upon the respondents that the option was being withdrawn. (CP333) No response was made by the respondent until May 5, 2014 when a letter from the respondents counsel was received indicating an intent to execute the option. (CP344)

Arbitration was ordered to determine if the option was supported by consideration and if the appellants had the right under Washington law to withdrawal the option. (Appendix "A")

The arbitration clause contained in the farm lease at paragraph 15 required each party to select an arbitrator and a 3rd neutral arbitrator to be chosen by the two chosen arbitrators. (CP317)

The respondent in an effort to "stack" the arbitration panel filed a motion pursuant to RCW7.04A.110 with the Superior Court to appoint the 3rd neutral arbitrator from a list of three of their proposed arbitrators.(CP5) The respondents motion for the appointment of a 3rd arbitrator was unsupported by any evidence or indication from the arbitrators that the process designated in the arbitration agreement had failed. (CP31-33)

The appellant filed an objection to the motion specifically arguing that the arbitrators had not indicated the process designated in the arbitration agreement had failed and further argued that their recommended 3rd arbitrator were inherently biased due to the recommendation by a party. (CP34-38

The respondent in nominating their second and third recommendation did not disclose in their motion that Mr. Esser was a former partner of the respondents counsel. (CP290) The respondent further failed to mention an ongoing social relationship of Mr. Gary Libey (respondent's counsel) Mr. Timothy Esser and Judge Fraizer. (CP292)

During the hearing for appointment of the 3rd neutral arbitrator, the court having specific knowledge of the partnership of Mr. Libey and Mr. Esser failed to disclose this information to the

appellants. (October 3, 2014. - VR 13-14) The court also failed to disclose the known social relationship between Mr. Libey, Mr. Esser and Judge Fraizer. (CP292)

The trial court appointed Mr. Timothy Esser as the third "neutral" arbitrator on October 16, 2014. (CP62)

The trial court intervened in the arbitration process without evidence from the arbitrators that the process had failed but relied solely upon the respondent's counsel's declaration. (CP32)

Following the October 3, 2014 hearing the appellants learned of Mr. Timothy Esser's former partnership with Mr. Gary Libey (respondent's counsel). (CP290) The respondent upon learning of the partnership filed an immediate motion for reconsideration on October 14, 2014. (CP45-49)

The appellants specifically argued that the appointment of Mr. Esser was a violation of the appearance of fairness. (October 14, 2014 - VR3), (CP 243)

Judge Fraizer knew that Mr. Esser and Mr. Libby were former partners but did not disclose that at the time of Mr. Esser;s appointment. Judge Fraizer stated at the February 13, 2015 hearing:

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14 ... At the time when I made the
15 appointment, didn't even think -- should have, should
16 have known -- "Yeah, he used to be in the Libey firm.
17 They were partners."
(February 13, 2015 - VR35)

The appellants also moved for disqualification of the Libey law firm as Mr. Libey had drafted the Farm lease and Option which were at issue and would be called as a witness by the appellants. (CP39-44)

The court on October 24, 2014 denied the motion for reconsideration and denied the motion for disqualification of the Libey Law firm. (CP135-136)

In choosing Mr. Esser as the 3rd neutral arbitrator Judge Fraizer admits that his choice of Mr. Esser was not how he normally handles such matters by stating at the October 24, 2014 reconsideration hearing:

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4 And normally, and I think I said this at
5 the time, if it's an issue of appointing a mediator or
6 appointing an expert or a guardian ad litem and it's
7 disputed, or an arbitrator, and one party says, "I
8 want such and such," and the other party disagrees, "I
9 don't want to appoint such and such" -- But Mr. Esser
10 was sitting right where this gentleman here is sitting
11 as you were arguing the case.
12 I'm very familiar with Mr. Esser. *Emphasis Added*
(October 24, 2014 - VR24), (CP264)

Judge Fraizer also indicated at the reconsideration hearing that normally he does not appoint an arbitrator that is disputed. But in this case Judge Fraizer does so in the face of a strenuous objection by the appellant. October 24, 2014 (VR 3-9) in so doing, the trial court left the matter of Mr. Esser's disqualification solely with Mr. Esser. (October 24, 2014 - VR 28), (CP268)

Judge Fraizer left the question of impartiality of Mr. Esser with him. Judge Fraizer in indicate that the Honns could challenge the appointment with the arbitration panel. (October 24, 2014 - VR 27-28), (CP267-268)

Judge Fraizer had nominated three (3) alternates to Mr. Esser that could have been named instead of Mr. Esser but he intentionally chose Mr. Esser knowing of the relationship with Mr. Libey. (October 24, 2014 - VR 28-29), (CP292)

On November 12, 2014 the appellant received an affidavit from a Ms Khani Taylor that indicated that Mr. Esser, Mr. Libey and Judge Fraizer are often seen together in Colfax Washington and are social friends. (CP225) The appellant did know at the time of Mr. Esser's appointment of the social relationship of Mr. Esser, Mr. Libey or Judge Fraizer. (CP292)

At the hearing on the appellant's motion for reconsideration Judge Fraizer was openly antagonistic towards the appellants and commented on the evidence going as far as indicating a lack of merit of the appellant's position and stated that he felt the appellants were barred by res judicata. (October 24, 2014 - VR 22-23) (CP262-263)

Following entry of the Order denying reconsideration the parties proceeded with arbitration.

On November 6, 2014 Mr. Esser's made his RCW 7.04A.120 disclosure which only indicated his former partnership which had already been raised at the reconsideration hearing (CP252)

The appellants moved the arbitration panel for an order allowing the deposition the respondent's CR 30(b)(6) designee and of Mr. Gary Libey as the drafter of the option which was denied. (Appendix "B"), (CP131-134)

In the Order denying discovery Mr. Esser indicated that he wanted the parties to file summary motions. (Appendix "B") By doing so Mr. Esser ensured that the appellants would not have the opportunity to question or inquire into a cross-examination of the respondent's representative prior to the arbitration decision.

Following receipt of the affidavit of Khani Taylor the appellants sent a letter to Mr. Esser indicating that the appellant desired his recusal and allow the first named alternate to be appointed due to a violation of the appearance of fairness. (CP224) In response Mr. Esser sent the appellant an Order denying his recusal and failed to address the allegations contained in the Khani Taylor affidavit. (CP227) (CP225)

The appellant's arbitration summary motion was filed on the issue of lack of consideration to support the option. (Appendix "A") The respondents filed for summary judgment on the issue of res judicata as Judge Fraizer had indicated on (October 24, 2014 - VR 23), (CP263)

The arbitration panel filed its decision which was drafted by Mr. Esser finding for the respondent. (CP139-148) The arbitration decision was only signed by Mr. Smith and Mr. Esser with Mr. Gephardt dissenting. (CP149-151)

The appellant filed a motion to disqualification of Judge Fraizer due to his comments on the evidence and violation of the appearance of fairness doctrine. (CP228-292) Judge Fraizer denied the appellants motion. (CP381-382)

The appellants moved to vacate the arbitration award pursuant to RCW 7.04A.230(1)(b)(i) and (c) (CP152-227 and 293-351)

On April 3, 2015 the respondent moved the court for an Order of sale and appointment of a commissioner to sign the deed prior to executing the option. (CP384-392) The court did not enter an order of sale nor did it order the appointment of a commissioner however the court did award attorney fees to the respondent in bring the motion. (CP400-403)

1. **ASSIGNMENT OF ERROR NO. 1: The trial court made an Error of Law in violation of RCW 7.04A.110(1) by intervening in the arbitration process in violation of public policy by appointing a third 'neutral arbitrator" in the absence of any indication from the parties' selected arbitrators that they were deadlocked or were unable to select a "neutral arbitrator".**

The appellant believes that this is an issue of first impression for the court.

a. Standard Of Review

The review of the trial court's decision to appoint a 3rd neutral arbitrator pursuant to RCW 7.04A.110 is the de novo standard as it is applicable when the appellate court is in as good a position as the trial court to judge the evidence. All relevant evidence is in documentary form and the appellate court is able to substitute its

judgment for that of the trial court about the facts as well as Application, Southwest Wash. Prod. Credit Ass'n. v. Seattle-First Nat'l Bank, 19 Wash. App. 397, 406, 577 P.2d 589, 594 (1978), rev'd on other grounds, 92 Wash. 2d 30, 593 P.2d 167 (1979).

b. Interference With Arbitration Method

The appointment of a fair and unbiased 3rd "neutral arbitrator" by the court pursuant to RCW 7.04A.110 must only be allowed with clear evidence that the parties arbitration method had failed. Further, in tripartite arbitration due to the finality and limited review of arbitration decisions a 3rd neutral arbitrator must have the appearance and be fair and unbiased. The importance of a truly neutral arbitrator is apparent considering that the doctrine of common law arbitration states that the arbitrator is the final judge of both the facts and the law, and "no review will lie for a mistake in either." Clark County PUD No. 1, 150 Wash.2d at 245, 76 P.3d 248 (citing Dep't of Soc. & Health Servs. v. State Pers. Bd., 61 Wash. App. 778, 785, 812 P.2d 500 (1991)).

The Washington Supreme court held in Rodriguez v. Windermere Real Estate/Wall Street, Inc., 175 P.3d 604, 142 Wn.App. 833, 831 (2008) that:

Arbitration serves as a beneficial alternative to litigation

> that can provide a more expeditious and less expensive resolution of disputes. King County v. Boeing Co., 18 Wash.App. 595, 602, 570 P.2d 713 (1977). **But, arbitration can substitute for litigation only if we have confidence in the ability of the arbitrators to make fair, unbiased decisions. The choice of arbitrators has serious implications because: " arbitrators are, when acting under unlimited authority, ... final judges of both the law and the facts, and ... no review will lie for a mistake in either." Dep't of Soc. & Health Servs. v. State Pers. Bd., 61 Wash.App. 778, 785, 812 P.2d 500 (1991)**
> *Emphasis Added*

The arbitration process agreed to by the parties in the Farm Lease is a tripartite process where each party designates one arbitrator, and these two party arbitrators then agree on a third arbitrator who is presumably neutral. (CP317) The party's arbitration clause contained in paragraph 15 of the Farm Lease reads as follows:

> Arbitration: In the event any dispute shall arise between the parties, or with respect to this Lease, then and in that event the parties shall submit such issues to binding arbitration in accordance with R.C.W. 7.04A. Each party shall appoint one arbitrator, the two arbitrators shall appoint a third arbitrator, and the three arbitrators shall meet and decide any issues submitted to them within thirty (30) days of their appointment, which decision shall be final and binding on both parties. The arbitrators shall have all powers and duties as are set forth in R.C.W. Chapter 7.04A. Venue shall be in Whitman County Washington.
> (CP317)

In this case on October 3, 2014 the respondent brought a motion pursuant to RCW 7.04A.110 to have the trial court appoint a 3rd "neutral arbitrator" from their recommended individuals. (CP31-33).

RCW 7.04A.110 reads:

> (1) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed under the agreed method.
> (2) An arbitrator who has a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party may not serve as a neutral arbitrator.

The appellant objected indicating that the two arbitrators chosen by the parties pursuant to the arbitration agreement had presented nothing that indicated it was necessary for the trial court to appoint the 3rd "neutral arbitrator". (CP35)

On October 3, 2014 the appellant specifically argued a lack of evidence to support the need for the intervention of the court in the arbitration process.

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1 MR. LOCKWOOD: Thank you, your Honor.

Judge, as was indicated, there is a mechanism for appointing the third arbitrator in this case; that is, the arbitrator that Mr. Read (sic), who was chosen by the Garretts, and Mr. Gebhardt, the arbitrator that the Honns have picked, are to come together and they are to decide on who the third, neutral arbitrator is. I want to stress that. It's the third, neutral arbitrator.
At this point, Judge, you have no evidence in front of you that the arbitrators are in a deadlock. I have no indication of that. Now, I'm still under the impression that the two arbitrators are trying to decide who the third arbi- -- third, neutral arbitrator will be. And until the arbitrators give us some indication that they're in deadlock, I think we're way premature. *Emphasis Added* (October 6, 2014 - VR6),

The courts appointment of the "neutral arbitrator" was premature and unsupported by any evidence other than the declaration of respondent's counsel. (CP31-33) The trial court recognized the dispute as to the need to appoint the 3rd neutral arbitrator on October 3, 2014. (October 3, 2014 - VR12)

Judge Fraizer later at the motion for reconsideration acknowledged a lack of evidence existed as to the need for an appointment of a 3rd neutral arbitrator by stating:

As far as the court's designation of Mr. Esser, when that issue was brought before me, **really wasn't certain whether the two arbitrators that had been selected by the parties had been unable to reach an agreement. I think the two attorneys had a**

**1 disagreement on that issue. And I thought, "Oh,
2 they'll probably agree to the third arbitrator if we
3 put a deadline on it." Apparently they didn't.**
(October 24, 3014 - VR23-24)

The trial court's admitted "uncertainty" as to the need for the appointment of a 3rd arbitrator is clear error as it violated the plain meaning of RCW 7.04A.110(1). Had Judge Fraizer reviewed the materials submitted with the respondents' motion he would have found that there was no evidence from the selected arbitrators regarding a failed method of selecting the 3rd neutral arbitrator. (CP31-33)

The parties had a method established in there arbitration agreement and the court interfered with that agreed method.

The relevant part of RCW 7.04A.110(1) states:

(1) If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails.
Emphasis Added

There was no clear evidence that the arbitration method had failed to invoke RCW 7.04A.110(1). The court clearly violated the arbitration process absent evidence the arbitration method had failed. This intervention is a violation of public policy.

Washington courts are reluctant to intervene in the arbitration process deferring with good reason to public policy and

statutory mandate. Perez v. Mid-Century Ins. Co., 934 P.2d 731, 85 Wn.App. 760 (1997)

If the intervention into the arbitration process is truly a violation of public policy as stated in Perez, Id this court has authority to review the arbitration decision under Kitsap County Deputy Sheriff's Guild v. Kitsap County, 167 Wn.2d 428, 436, 219 P.3d 675, (2009) which held:

> **We now join the federal and other state courts in adopting the narrow public policy exception to enforcing arbitration decisions.** *Emphasis Added*

Based on the lack of evidence from the parties' selected arbitrators indicating that the arbitration process had failed the court improperly interfered in the adaptation process by appointing the 3rd neutral arbitrator. This case should be remanded for re-arbitration with a new arbitration panel,

2. ASSIGNMENT OF ERROR NO. 2: The trial court committed error by appointing Mr. Esser over the objection of the appellant and failing to disclose the known relationship between Mr. Libey, Mr. Esser and Judge Fraizer which are all violations of the Appearances of fairness Doctrine.

a. Standard Of Review

The review of the trial court's decision to appoint a 3rd neutral arbitrator pursuant to RCW 7.04A.110 is the de novo standard as it

is applicable when the appellate court is in as good a position as the trial court to judge the evidence. All relevant evidence is in documentary form and the appellate court is able to substitute its judgment for that of the trial court about the facts as well as application, Southwest Wash. Prod. Credit Ass'n. v. Seattle-First Nat'l Bank, 19 Wash. App. 397, 406, 577 P.2d 589, 594 (1978), rev'd on other grounds, 92 Wash. 2d 30, 593 P.2d 167 (1979).

b. Appointment Of Mr. Esser As 3rd Neutral Arbitrator

The respondent in their motion for the appointment of a 3rd neutral arbitrator nominated three individuals as a "neutral arbitrator". (CP5) The appellant objected to respondent's recommended "neutral arbitrators" arguing it was unfair on its face to have a party's recommended "neutral arbitrator" be appointed. (CP35-36)

The appellant specifically objected at the October 3, 2014 hearing to any nominated 3rd neutral arbitrator by either party due to the chance of bias.

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4 And they've also nominated a couple other
5 attorneys here in Whitman County. And I think, by
6 definition, you start having individuals nominated by
7 a party, they're not a -- they're not a neutral
8 arbitrator.

(October 3, 2014 - VR7)

The respondent had recommended Mr. Timothy Esser as a "neutral arbitrator" as just another attorney from Whitman County. (CP5) The appellant was unaware of who Mr. Esser was at the time of his appointment or the social relationship with the respondents counsel at the time of the appointment. (CP262)

Judge Fraizer admitted at the motion for reconsideration hearing that he knew of the Esser and Libey partnership but did not disclose it Judge Fraizer stated:

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17 So, even though he was -- his name was
18 thrown out by one of the parties, I thought -- and he
19 was sitting right there -- "Yeah, perfect." And I
20 still think that that's the case here. I was aware
21 that -- I was aware but I don't think I thought about
22 the fact that he had previously been Mr. Libey's
23 partner ...
(October 24, 20014 - VR26)

Judge Fraizer later at the February 13, 2015 then indicates he didn't think about the prior partnership but should have:

35

14 ... At the time when I made the
15 appointment, didn't even think -- should have, should
16 have known -- "Yeah, he used to be in the Libey firm.
17 They were partners."
(February 13, 2015 - VR35)

At the October 24, 2014 reconsideration hearing Judge Fraizer acknowledged that the appointment of Mr. Esser was clearly outside of the court's normal procedure by stating:

24

4 And normally, and I think I said this at
5 the time, if it's an issue of appointing a mediator or
6 appointing an expert or a guardian ad litem and it's
7 disputed, or an arbitrator, and one party says, "I
8 want such and such," and the other party disagrees, "I
9 don't want to appoint such and such"
(October 24, 2014 - VR24)

But in this case the court did appoint Mr. Esser over the objection of the appellant. Why was this arbitration different from all the other cases Judge Fraizer has in his court?

This interference by the court allowed the respondent's selected arbitrator, Mr. Reed to set back do nothing and the respondent's nominated 3rd neutral arbitrator Mr. Esser would be appointed. Thus, successfully stacking the arbitration panel, in favor of the respondent.

It was later learned that the court knew of the social relationship between Mr. Esser and Mr. Libey and failed to disclose it.

Unknown to the appellants at the time of the October 3, 2014 hearing, Judge Fraizer, Mr. Esser and Mr. Libby were frequently

seen together socializing in Colfax, Washington. (CP225) At the October 3, 2014 hearing the respondent and the court both failed to mention the issue of the Esser and Libey partnership nor did either mention the ongoing social relationship between Judge Frazier, Mr. Esser and Mr. Libey. (October 3, 2014 - VR11-15), (CP5)

The trial court knowingly appointed Mr. Esser as the 3rd "neutral arbitrator" having specific knowledge of the prior partnership of Mr. Esser and Mr. Libey which would likely affect the impartiality of the arbitrator. Judge Fraizer's appointment of Mr. Esser in light of the court's nondisclosure is clearly a violation of the Appearance of Fairness Doctrine.

Recently Division II addressed Washington's appearance of fairness doctrine in State v. Witherspoon, 286 P.3d 996 (2012) in which they held at page 1004:

> Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent, disinterested observer would conclude that the parties obtained a fair, impartial, and neutral hearing. State v. Gamble, 168 Wash.2d 161, 187, 225 P.3d 973 (2010) (citing State v. Bilal, 77 Wash.App. 720, 722, 893 P.2d 674 (1995)). " ' **The law goes farther than requiring an impartial judge; it also requires that the judge appear to be impartial.' "** State v. Post, 118 Wash.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992) (quoting State v. Madry, 8 Wash.App. 61, 70, 504 P.2d 1156 (1972))

The existence of the ongoing social relationship between Mr. Libey, Mr. Esser and Judge Fraizer clearly established the existence of a basis for bias. Supporting evidence is Mr. Essers failure to make any denial of the relationship. (CP222-227) Further Judge Fraizer does not deny the social relationship but rather argues around it. At the February 13, 2015 hearing he states:

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23As far as that affidavit from -- or
24 declaration or whatever it was, that person better
25 check her facts here because there is a lot of
39
1 inaccuracies with respect to that. **And even if it**
2 were true, it's, I don't feel, grounds for me to
3 recuse myself in this particular case, or grounds for
4 Mr. Esser to be disqualified.
5When I made my decision on the issue of
6 appointment of Esser, I referred the issue, "Bring it
7 up with Esser. He may know a lot more about it than I
8 do. And if he feels recusal is necessary, he can."
(February 13, 2015 - VR38-39)

Judge Fraizer made it clear that no set of facts would disqualify Mr. Esser. There was nothing fair or neutral in the appointment of Mr. Esser.

Further, in State v. Rowe, 93 Wash.2d 277, 284, 609 P.2d 1348 (1980) the court stated that arbitrary and capricious actions are defined as a willful and unreasoning action, without consideration and in disregard of facts and circumstances. Here

Judge Fraizer not only disregarded but failed to disclose known negative facts regarding the relationship between himself, Mr. Libey and Mr. Esser.

The court should vacate the appointment of Mr. Timothy Esser as the parties neutral arbitrator and remand for a new arbitration proceeding.

3. ASSIGNMENT OF ERROR NO.3: The trial court committed error by the denial of appellant's motion for reconsideration of the order appointing Mr. Timothy Esser as the 3rd neural arbitrator.

a. Standard Of Review

A trial court's denial of a motion for reconsideration is also reviewed for an abuse of discretion. Davies v. Holy Family Hosp., 144 Wn.App. 483, 497, 183 P.3d 283 (2008) (quoting Kleyer v. Harborview Med. Ctr. of Univ. of Wash., 76 Wn.App. 542, 545, 887 P.2d 468 (1995)).

A manifest abuse of discretion is a decision manifestly unreasonable or exercised on untenable grounds or for untenable reasons. It is one that no reasonable person would have made. See, e.g., In re Marriage of Rink, 18 Wash.App. 549, 554, 571 P.2d 210 (1977).

The Washington Supreme court in State v. Dye, 309 P.3d

1192, 178 Wn.2d 541 (Wash. 2013) stated the test for abuse of discretion at page 548:

> II. Abuse of Discretion
>
> A trial court abuses its discretion only if any of the following is true: (1) The decision is " manifestly unreasonable," that is, it falls " outside the range of acceptable choices, given the facts and the applicable legal standard" ; (2) The decision is " based on untenable grounds," that is, " the factual findings are unsupported by the record" ; or (3) The decision is " based on untenable reasons," that is, it is " based on an incorrect standard or the facts do not meet the requirements of the correct standard

b. Denial Of Reconsideration

The appellant following the appointment of Mr. Esser filed for reconsideration of the appointment of Mr. Timothy Esser. (CP45-49) The motion for reconsideration was based upon the discovery by the appellant that Mr. Esser was former partner of respondent's counsel Mr. Gary Libey. (CP280-290)

In response to the motion for reconsideration Judge Fraizer admitted in his oral ruling on October 24, 2014 that he was uncertain for the need to appoint a third arbitrator .

Judge Fraizer stated:

23

21 As far as the court's designation of
22 Mr. Esser, when that issue was brought before me,
23 **really wasn't certain whether the two arbitrators that**
24 had been selected by the parties had been unable to

25 reach an agreement. I think the two attorneys had a

24

1 disagreement on that issue. And I thought, "Oh,
2 they'll probably agree to the third arbitrator if we
3 put a deadline on it." Apparently they didn't.
(October 24, 2014 - VR23-24), (CP 263-264)

This clearly indicates the lack of evidence to support the court appointing a 3rd neutral arbitrator under RCW 7.04A.110(1) and interfering with the parties agreed arbitration method.

Judge Fraizer further, in his October 24, 2014 oral ruling on the motion for reconsideration, attempted to explain a basis for the appointment of Mr. Esser. Judge Fraizer states:

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14 this -- We have a small community. So is Spokane. I
15 mean, I know judges in Spokane, lawyers in Spokane,
16 and I don't know how often that a lawyer from a
17 Spokane law firm gets elevated to one of the courts,
18 Superior Court. Sometimes some of the big firms, I
19 know they kind of have a lull for a certain period of
20 time, a couple years, they flat out won't hear any
21 cases, there'll be disclosure, and they -- Former
22 partners hear cases of former partners and they base
23 their decisions not on who the lawyers are but what
24 are the facts of the case and what's the law that
25 applies. *Emphasis Added*
(October 24, 2014 - VR23-24), (CP 263-264)

The court's reasoning is misplaced in light of the court's ability to name three other disinterested attorneys who could serve as "alternate" neutral arbitrators and who were not former partners and a social friend of Mr. Gary Libey.

Judge David Frazier stated in his October 24, 2014 oral ruling:

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13 So, I'm not disqualifying him, but it
14 might be an issue to raise to him in the process of
15 arbitration. And because of the possibility he may
16 recuse, and I think that might be a real possibility
17 here for the reasons I've stated,
...

23 So, if Esser -- if he recuses himself or
24 gets disqualified by the arbitration panel, I'm going
25 to appoint as first alternate attorney Rusty McGuire,

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7 Second, similar circumstance, he's
8 remotely situated in Garfield, Washington, Stephen
9 Bishop. He'd be the second. If Esser recuses,
10 McGuire can't do it or won't do it, I'll appoint
11 Stephen Bishop
...
14 And then third alternate, Howard Neill,
15 who I was thinking of in the back of my mind when you
16 were asking for me to appoint someone last time.
Emphasizes Added
October 24, 2014 - VR28-29), (CP 268-269)

If the court's comments were sincere "And because of the possibility he may recuse, and I think that might be a real possibility here for the reasons I've stated" The court would have appointed one of the three alternates named by Judge Fraizer.

The trial court committed error and abused its discretion in failing to grant the appellants' motion for reconsideration as the trial

court knew the motion to appoint the 3rd neutral arbitrator lacked evidence from the parties two chooses arbitrators that the arbitration method had failed. (CP 1-30) The trial court further knew the appellants had discovered the conflict caused by Mr. Esser being a farmer partner of Mr. Libey. (CP 50-61) And further, the trial court had three (3) other named attorneys it had available as alternates to Mr. Esser. (October 24, 2014 - VR28-29), (CP 268-269) And still further the appointment of Mr. esser was over the strong objection of the appellants. (October 3, 2014 - VR 6-11) All of this in light of the court going outside of its normal practice in appointing arbitrators as stated on October 24, 2014:

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> **4 And normally, and I think I said this at**
> **5 the time, if it's an issue of appointing a mediator or**
> **6 appointing an expert or a guardian ad litem and it's**
> **7 disputed, or an arbitrator, and one party says, "I**
> **8 want such and such," and the other party disagrees, "I**
> **9 don't want to appoint such and such"**
> ***Emphasizes Added***
> (October 24, 2014 - VR24)

4. ASSIGNMENT OF ERROR NO.4: The trial court committed error in its denial of appellant's motion for recusal of Judge Fraizer.

The appellants, Honn Family Trust, LLC., moved the court for an order of disqualification of Judge Frazier and that he recuse himself for violation of the "Appearance of Fairness Doctrine"

a. Standard of Review

A reviewing court reviews a trial court's recusal decision for an abuse of discretion. Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wash.App. 836, 840, 14 P.3d 877 (2000). A trial court abuses its discretion when its decision is manifestly unreasonable or is exercised on untenable grounds or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wash.2d 12, 26, 482 P.2d 775 (1971).

b. Denial of Motion for Reconsideration

In this case Judge Fraizer has clearly shown his bias and a violation of the Appearance of Fairness Doctrine which is evidenced by his comments at the October 24, 2014 hearing.

At the October 24, 2014 hearing the court was making a determination on two of the appellant's motions. (1) Motion for reconsideration and objection to Mr. Timothy Esser as a third arbitrator and (2) Motion to disqualify the Libby law Firm as Mr. Libey was a potential witnesses, due to him drafting the option agreement. However Judge Fraizer knew the issue was consideration for the option and not the arbitration agreement but intentionally failed to address the actual issue in dispute.

Judge Fraizer stated at the October 24, 2014 hearing:

21

11 It's gone through arbitration, it's come
12 to court, it's been confirmed, it's been appealed,
13 it's back here again, and the Honns lost. Now here we
14 are with another request for arbitration. **It relates**
15 to whether there was consideration, as I understand
16 it, the issue for the arbitration agreement.
(October 24, 2014 - VR20-21), (CP202-203)

The court clearly stated its dislike for the appellant's motions to obtain a fair and neutral 3rd arbitrator. The court further knowingly misstated the issue. The issue for arbitration was a lack of consideration to support the option not as the court indicated the arbitration agreement. (Appendix "A")

Judge Fraizer further stated at the October 24, 2014 hearing:

22

9 ... **So, I am not going to grant the**
10 motion to disqualify, at this time, the Libey law
11 firm. And if I were, that would probably make quick
12 work of the second issue, which concerns Mr. Esser
13 here.
14 But additionally, you know, I think it's
15 highly likely -- I have to determine the likelihood of
16 Mr. Libey being a witness in the case and the rule, I
17 think it's highly likely that, when the matter goes
18 before the panel of arbitrators and they're presented
19 with the law, I think it's highly likely that, from a
20 legal standpoint, this case in arbitration isn't going
21 to go very far because I think -- and it's not my
22 decision to make except as it pertains to the
23 likelihood of there being any witnesses -- that case
24 is going to get thrown out of arbitration if the law
25 is applied, because there was a arbitration already on

23

1 the very subject that's being disputed here, the lease

2 and an offer to or an option to purchase.
3 And maybe the specific issue that's now
4 raised, consideration, wasn't raised then -- should
5 have -- I think the issue's res judicata here. And
6 I'm only deciding that -- It's not my decision to
7 make. That's up to the arbitrators. These parties
8 have agreed to arbitration. But I don't think you're
9 going to have any witnesses.
Emphasizes Added
(October 24, 2014 - VR22-23), (CP204-205)

Judge Fraizer makes it abundantly clear by commenting on the evidence and indicating the arbitrators should dismiss the appellants affirmative defense based on what Judge Fraizer feels is res judicata. Based on these comments the appellant could not have a fair and impartial review of issues raised at any objection to the arbitration award.

Additionally, on or about November 13, 2014 the appellant received an affidavit from a Ms. Khani Taylor. (CP225) In Ms Taylor's affidavit she disclosed that she had observed Mr. Libby and Mr. Esser and Judge Fraizer having lunch frequently at the local restaurants in Colfax Washington. As stated above this social relationship between the court and both Mr. Esser and Mr. Libby was never disclosed by Judge Fraizer.

The affidavit of Ms. Taylor created grave concerns and confirmed the appellant's earlier concerns expressed to the court

and questioned the court's impartiality.

In reply to the affidavit of Ms Taylor at the appellants motion for disqualification on February 13, 2015 Judge Fraizer stated:

37

22 There is some kind of an affidavit as far
23 as Mr. Libey, Mr. Esser, and myself having lunch,
24 sounds like about every day. I probably shouldn't
25 disclose this because this is going to upset

38

1 Mr. Lockwood and the Honns, but, you know, I do know
2 Mr. Libey so well that I know he doesn't eat lunch. I
3 know what he does at noon. Well, he might eat lunch,
4 but I don't know where he eats it; it isn't with me.
5 Might be with Mr. Esser, but I don't think so because
6 he walks down the street with a gym bag every noon.
7 It's a small community. I can see it out the window.
8 And maybe as I walk to lunch sometimes with other
9 people, he's in the group and walks along. He goes to
10 that gym down here and he works out every day.
11 And I don't know when -- Yeah, I've had
12 lunch with Mr. Libey. I don't know when. I was
13 having lunch with other lawyers today and he came in
14 because one of the people there was a former Superior
15 Court judge, he came in to speak to him. So what?
16 And when this case gets appealed and my decision gets
17 appealed, you might want to ask the panel, some of the
18 judges, "Have you ever had breakfast or lunch with
19 Judge Frazier, the judge whose decision you're going
20 to review?" Or if it goes on to the Supreme Court,
21 ask that panel of Supreme Court justices the same
22 thing.
(February 13, 2015 - VR37-38)

Judge Fraizer commenting on the affidavit of Ms. Taylor never contradicted it. In fact he confirmed the allegations. Judge Fraizer did go as far as indicating that Ms. Taylor should check her

facts as ther are inaccuracies but just as Mr. Esser he never indicates what is inaccurate. Judge Fraizer stated:

38
23 As far as that affidavit from -- or
24 declaration or whatever it was, that person better
25 check her facts here because there is a lot of
39
1 inaccuracies with respect to that. **And even if it**
2 were true, it's, I don't feel, grounds for me to
3 recuse myself in this particular case, or grounds for
4 Mr. Esser to be disqualified.
Emphasis Added
(February 13, 2015 - VR-38-39)

As Judge Fraizer indicated "And even if it were true, I don't feel, grounds for me to recues myself in this particular case".

Why is this particular case different that his other cases? Judge Fraizer also indicated that he normally recuses himself when recusal motions are filed. Judge Fraizer stated :

42
16 So, I'm, number one, denying the motion to
17 recuse. And, quite frankly, under circumstances where
18 I am asked or requested to recuse myself from a case,
19 I almost invariably, whether I agree there's a good
20 reason or not, heck with it, I'll recuse myself. I
21 don't have any vested interest in any cases. You
22 don't think I'm going to be fair, you get another
23 judge. **But, you know, I'm not going to do it here**
24 because I don't see any merit to the argument.
Emphasizes Added
(February 13, 2015 - VR42)

Judge Fraizer as he states treated this case differently.

Judge Fraizer sees no merit in the appellants following concerns:

- Judge Fraizer's negative comments regarding the appellants procedural motions to obtain a fair and neutral 3rd arbitrator, which were denied;
- Judge Fraizer's negative comments regarding the appellants affirmative deference of lack of consideration to support the option due to a lack of merit;
- Judge Fraizier's comments that the arbitrators should disposes of this case by stating " in arbitration isn't going to go very far because I think" due to the appellant's affirmative deference being barred by res judicata;
- Judge Fraizer's non disclosure of his social relationship with Mr. Libey and Mr. Esser.
- Judge Fraizier's non disclosure of the prior partnership of Mr. Libey and Mr. Esser.
- Judge Fraizier's appointment of Mr. Esser as the 3rd neutral arbitrator over the objections of the appellant's when the court states it would normally not do so
- Judge Fraizer's on reconsideration forcing Mr. Esser on the appellants as the neutral 3rd arbitrator, and at the same hearing naming three other acceptable attorneys only if Mr.

Esser recused himself.

Judge Fraizer states he would normally recuse himself if a motion for recusal is filed. As he states

> " And, quite frankly, under circumstances where I am asked or requested to recuse myself from a case, **I almost invariably, whether I agree there's a good reason or not**, heck with it, I'll recuse myself" (February 13, 2015 - VR42)

In this case he states there is no merit in the appellant's motion and declines to recuse himself. Why does Judge Fraizer treat this case different than that of other cases when he recuse himself **whether he agree there's a good reason or not. What's different here is that we have long time social friends.**

All of the above creates an appearance of impartiality. Washington case law goes farther than requiring an impartial judge; it also requires that a judge appear to be impartial. State v. Post, 118 Wash.2d 596, 618, 826 P.2d 172, 837 P.2d 599 (1992)

The appellants were required to bring their objections to the arbitration confirmation and motion to vacate before Judge Fraizer who had previously indicated his negative feeling toward the appellant's case. (CP 205)

The acts and non disclosure of Judge Fraizer support the test to determine whether his impartiality might reasonably be

questioned. These are all objective in nature. And satisfy the test as set forth in. Smith v. Behr Process Corp., 113 Wash.App. 306, 340, 54 P.3d 665 (2002)

Based upon Judge Fraizer;s accrual and apparent bias and impartiality this matter should be remanded for a new arbitration hearing before a new trial judge.

5. ASSIGNMENT OF ERROR NO. 5: The 3rd neutral arbitrator appointed by the court failed to make disclosures as required under RCW 7.04A.120(1)(b)

a. Standard of review

Issues of statutory interpretation are questions of law, and are reviewed de novo. Optimer Int'l, Inc. v. RP Bellevue, LLC, 170 Wash.2d 768, 771, 246 P.3d 785 (2011).

b. Mr. Esser's failure to disclose and violation of RCW 7.04A.120(1)(b)

RCW 7.04A.120(1)(b) states:

> (1) Before accepting appointment, an individual who is requested to serve as an arbitrator, after making a reasonable inquiry, shall disclose to all parties to the agreement to arbitrate and arbitration proceeding and to any other arbitrators any known facts that a reasonable person would consider likely to affect the impartiality of the arbitrator in the arbitration proceeding, including:
>
> (b) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or

representatives, witnesses, or the other arbitrators.

Mr. Esser had a duty to disclose his ongoing social friendship with Mr. Libey the respondent's counsel.

The RCW 7.04A.120 disclosure made on November 6, 2014 by Mr. Esser only identified the prior partnership of Mr. Libby the respondent's counsel which was the basis of the appellant's motion for reconsideration. (CP222), (CP50-61) The disclosure by Mr. Esser made no reference to an ongoing social relationship with Mr. Libby. (CP225) The appellant received an affidavit of Ms. Taylor indicating a non-disclosed social relationship between Mr. Libby and Mr. Esser. (CP225) In learning of Mr. Esser's social relationship with Mr. Libby the appellant sent a letter to Mr. Esser indicating that he should recuse himself as this creates an issue as to the appearance of fairness, (CP224) In response Mr. Esser sent an Order denying his recusal and completely failed to address or deny any of the facts as stated in the affidavit of Ms. Taylor. (CP227)

The failure to disclose the relationship with Mr. Libby and the failure to address the issues raised in the Taylor affidavit are clear violations of RCW 7.04A.120(1)(b) and the arbitration decision

should be vaated and remanded for a impartial arbitration.

6. ASSIGNMENT OF ERROR NO. 6: The trial court erred in confirming the arbitration award due to violation of RCW 7.04A.230(1)(b)(i)

a. Standard Of Review

A superior court's authority in arbitration proceedings generally is limited. It can only confirm, vacate, modify, or correct the arbitration award. Munsey v. Walla Walla College, 80 Wn.App. 92, 95-96, 906 P.2d 988 (1995)

An appellate court's review of an arbitration award is limited to the court that confirmed, vacated, modified, or corrected that award. Pegasus Constr. Corp. v. Turner Constr. Co., 84 Wn.App. 744, 747, 929 P.2d 1200 (1997).

However, an appellate court's review is de novo of the trial court's decision to confirm or vacate an arbitration award. Leibsohn Property Advisors Inc. v. Colliers International Realty Advisors (USA), Inc., 69445-6-I (2013), Fid. Fed. Bank. FSB v. Durga Ma Corp., 386 F.3d 1306, 1311 (9th Cir. 2004).

b. Violation Of RCW 7.04A.230(1)(b)(i)

Impartiality is imperative in a neutral arbitrator in a tri-panel arbitration as that arbitrator casts the deciding vote.

RCW 7.04A.230(1)(b)(i) provides: "the court shall vacate an

award if: (b) There was (1) Evident partiality by an arbitrator appointed as a neutral."

Established case law holds that under this statue, an arbitrator has a general duty to disclose a circumstance or relationship that bears on the question of impartiality where that relationship or circumstance creates a reasonable inference of the presence of bias or the absence of impartiality. Hanson v. Shim, 87 Wn. App. 538, 943 P.2d 322 at 547.

In this case the trial court appointed the neutral arbitrator Mr. Timothy Esser following his recommendation by the respondent and over the opposition of the appellant. (CP34-38) The trial court and respondent knew of Mr. Esser's relationship with Mr. Garry Libby the attorney for the respondent but both failed to disclose this to the appellant. (CP292)

Under Washington case law an arbitrator is the final judge of the law and the facts. Dep't. of Soc. Health Servs. v. State Pers. Bd., 61 Wn. App. 778, 785,812 P.2d 500 (1991) as such the appearance of fairness doctrine applies.

The appellants had asserted that the appointment of Mr. Timothy Esser and the refusal to reconsider the appointment at the October 24, 2014 hearing for reconsideration was a violation of

Washington's appearance of fairness doctrine. October 24, 2014 (VR3)

In Tatham v. Rogers, 283 P.3d 583, 170 Wn.App. 76 (2012) the court held at page 81 as follows:

> Washington's appearance of fairness doctrine not only requires a judge to be impartial, it also requires that the judge appear to be impartial. State v. Finch, 137 Wash.2d 792, 808, 975 P.2d 967 (1999).

At the time of the initial hearing the respondent was unaware of the relationship between Mr. Esser and Mr. Libey. (CP292) However the appointed 3rd neutral arbitrator Mr. Esser did not disclose this fact. (CP222) Rather all Mr. Esser disclosed on November 6, 2014 was his former partnership with Mr. Libey which was raised earlier at the October 24, 2014 motion for reconsideration. (CP50-61)

That information was the basis for the motion for reconsideration filed by the appellants.

On November 6, 2014 Mr. Esser sent a letter to the parties regarding his Disclosure of Arbitrator pursuant to RCW 704A.120. Mr. Esser indicated only that he was a former partner of Mr. Libey which was known at that time and the subject of the appellant's objection to his appointment at the hearing for reconsideration.

(CP222)

Mr. Esser intentionally failed to disclose when the partnership had ended which is still unknown as of this date. Mr. Esser intentionally failed to address any ongoing social relationship with Mr. Libey (respondent's counsel). These critical omissions are clear violations of RCW 704A.120 as stated above.

On November 14, 2014 the appellant sent a letter to Mr. Esser regarding an affidavit received from a Ms. Khani Taylor. (CP224) In Ms Taylor's affidavit she disclosed the ongoing social relationship of Mr. Libby, Mr. Esser and Judge Fraizer, having seen all three frequent local restaurants together. (CP225) These social activities with both Mr. Libby and Judge Fraizer were not disclosed as required under RCW 704A.120. This information was brought to Mr. Esser's attention. (CP224)

The affidavit of Ms. Taylor created grave concerns about having a fair arbitration and confirmed the appellant's earlier concerns expressed to the court. The appellants requested Mr. Esser recuse himself in light of the disclosure so that one of the alternate named attorneys could be appointed. (CP224)

On November 17, 2014 Mr. Esser submitted an Arbitrator's Order to the appellant denying the request for recusal. (CP227) In

his order Mr. Esser did not deny his social relationship with Mr. Libby and Judge Fraizer nor did he address the appellants concerns raised by Ms. Taylor's affidavit. (CP225)

Nor did Mr. Esser's Order indicate why the social relationship with Mr. Libby and Judge Fraizer was not in his November 6, 2014 Disclosure of Arbitrator as required by RCW 704A.120. (CP222)

Mr. Esser not addressing the concerns raised by the affidavit of Ms. Taylor confirmed the appellant's fears of bias and precluded any further inquiry as Judge Fraizer left the recusal issue in Mr. Esser's hands. (October 24, 2014 - VR 28)

The intentional omission by Mr. Esser regarding his relationship with Mr. Libby and Judge Fraizer created a reasonable inference of the presence of bias or the absence of impartiality as RCW 7.04A.230(1)(b)(i) was designed to protect. Judge Fraizer stated:

39

22 Esser apparently was asked to recuse, he
23 refused to recuse, and I haven't heard anything here
24 today that I feel would be grounds to vacate the
25 arbitrators' decision because he participated in that

40

1 particular proceeding here.
(February 13, 2015 - VR39-40)

The failure of the court to vacate the arbitration award after

the disclosure of Mr. Esser's refusal to recuse himself is an error and the arbitration award should be vacated by this court and remanded for a new arbitration hearing with an unbiased neutral arbitrator.

7. ASSIGNMENT OF ERROR NO. 7: The Trial Court Committed Error By Confirming The Arbitration Award Which Was Granted By Summary Judgment With Material Issues Of Fact In Dispute And Misapplied The Law As To Res Judicata

a. Standard Of Review

An appellate court's review is de novo of a trial court's decision to confirm or vacate an arbitration award. Leibsohn Property Advisors Inc. v. Colliers International Realty Advisors (USA), Inc., 69445-6-I (2013), Fid. Fed. Bank. FSB v. Durga Ma Corp., 386 F.3d 1306, 1311 (9th Cir. 2004).

b. The Issue Of Consideration Was A Material Fact In Dispute And The Arbitrators Should Not Have Grated Summary Judgment.

The following facts were argued to Judge Fraizer on the motion to vacate the award:

- The neutral arbitrator Mr. Esser requested that the parties file for summary judgment in his November 18, 2014 Order denying appellants request for discovery depositions. (Appendix "B") As a result of the above Order the parties

filed for summary judgment in the arbitration.

- The appellant filed for summary judgment based on the affirmative defense of withdrawal of the option due to lack of supporting consideration. (Appendix "A") The appellant's arbitration summary motion was based upon the ruling in Whitworth v. Enitai Lumber Co., 36 Wn.2d 767, 220 P.2d 328 (Wash. 1950) 770 – 771 where the court held:

  > An option to purchase property is a contract wherein the owner, in return for a valuable consideration, agrees with another person that the latter shall have the privilege of buying the property within a specified time upon the terms and conditions expressed in the option. **If no consideration passes, the transaction resolves itself into a mere offer which may be withdrawn by the optionor at any time Before acceptance by the optionee.** *Emphasis Added*

- There was no dispute as to the time line and that the appellants withdrew the option prior to the option being exercised. (CP305-309)
- Charlotte Honn on behalf of the appellants submitted evidence and declarations at arbitration copies of which were provided to Judge Fraizer to support the motion to vacate the arbitration award. (CP305-351)
- In Mrs. Honn's declaration she clearly indicated that there was no consideration paid in exchange for the option.

(CP307) Further, Judge Fraizer for the motion to vacate was provided a copy of excerpts from Mr. Frank Garrett's deposition conducted on December 14, 2010. (CP300-303) Mr. Frank Garrett (respondent) is one of the signees of the Farm Lease and Option. (CP312-318) Mr. Frank Garrett stated in his deposition at page 14:

> "And I also interjected that for compensation for putting up the hay, we would be interested in an option to purchase" (CP301)

Mr. Frank Garrettt was very clear in his deposition that neither Larry Honn nor Charlotte Honn respond to the offer for the option, as such there was no agreement. (CP302-303)

More importantly, this confirms that the farm lease was not consideration for the option. There were no contravening declarations submitted by the respondent at the arbitration summary hearing or motion to vacate arbitration award except that of respondent's counsel.

The arbitration decision on the issue of consideration written by Mr. Esser in error found that there was consideration based upon mutual promises (CP370) In so doing Mr. Esser did not just deny the appellant's motion but granted summary judgment to the respondent as the non-moving party, (CP370)

The Appellant specifically argued in its briefing that the declarations submitted at arbitration created an issue of material fact. (CP295)

Judge Fraizer made no comment nor did he reference the issue of material facts being in dispute in his February 13, 2015 oral decision. He simply stated:

43

8 And the bottom line, the arbitrators made a
9 decision, and it's undisputed from the record I have,
10 a legal decision. So, why keep litigating at this
11 level? If you disagree, appeal. You can have
12 reconsiderations and another judge and more
13 arbitrations or you can get the issue in an efficient,
14 effective manner to the Court of Appeals.
15 I'm not going to recuse myself. I'm going
16 to deny the motion to vacate the arbitration
17 decision. And I'm going to grant the order confirming
18 the arbitration award, which in effect, I believe,
19 brings an end to this case at this level, at this
20 time.
(February 13, 2015 - VR43)

Additionally, Judge Fraizer made no attempt to look at the issue of mutual promises as consideration. Judge Fraizer was provided with copies of the lease and option which do not reference consideration for the option nor does the option provision reference any consideration. (CP312-318) The option provision simply states:

Option to Purchase: During the term of this

> Lease, the Lessor hereby grants to the Lessee an option to purchase the Property for the sum of Four hundred thousand ($400,000.00). The Lessee may exercise this option at any time during this Lease upon 30 days' written notice. If the Lessee exercises this option, then the parties shall execute a Contract of Sale in such form as is attached hereto as Exhibit "A". Any crops growing on the Property at the time of closing shall be included as part of the Property.
> (CP313)

The trial court clearly committed error as the law on summary judgments is abundantly clear in that a motion for summary judgment will be granted only if after viewing the pleadings, depositions, admissions and affidavits, and all reasonable inferences that may be drawn therefrom in the light most favorable to the nonmoving party, it can be stated as a matter of law that (1) there is no genuine issue as to any material fact, (2) all reasonable persons could reach only one conclusion, and (3) the moving party is entitled to judgment. LaPlante v. State, 85 Wn.2d 154, 531 P.2d 299 (1975); Wilber Dev. Corp. v. Les Rowland Constr., *Inc.*, 83 Wn.2d 871, 523 P.2d 186 (1974); McDonald v. Murray, 83 Wn.2d 17, 515 P.2d 151 (1973); Ciminski v. Finn Corp., 13 Wn. App. 815, 537 P.2d 850 (1975).

The evidence reviewed by Judge Fraizer indicated that Mrs. Charlotte Honn appellant put the issue of consideration for the

option in question. (CP305-351) Further, Mr. Frank Garrett, respondent also put the issue of consideration for the option in question. (CP301), (CP300-303) As such issues of material fact were in dispute as to consideration for the option. Judge Fraizer should have vacated the summary judgment arbitration award due to clear error.

c. Res Judicata Does Not Apply As Lack Of Consideration Is An Affirmative Defense To The Respondents Claim For Specific Performance Of The Option.

The respondent alleged res judicata as the basis for its summary motion. (CP370) Judge Fraizer had previously commented on the evidence and had indicated that he thought res judicata applied in his oral decision on. (CP263)

Mr. Esser in his decision in error intentionally misstated the issue stating that the issue of a valid option should have been brought earlier in a prior arbitration. (CP372) The actual issue on appeal as Mr. Esser was aware was whether the appellants had a right to withdraw the option due to a lack of consideration to support the option. (Appendix "A") Mr. Esser's decision indicated that the appellants were barred as the claim of lack of consideration for the option should have been raised in a prior arbitration. (CP372)

As argued to Judge Fraizer in the motion to vacate the arbitration award, the issue of lack of consideration was not a claim but rather an affirmative defense. (CP296) Washington Superior Court Rule 8(c) clearly identifies lack of consideration as an affirmative defense.

CR 8(c) states:

> (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. *Emphasis Added*

As an affirmative defense the issue of consideration for an option is properly raised when the option is attempted to be executed. The lack of consideration and withdraw of the option is a defense to the respondent's claim for specific performance. The appellant had no duty to raise the issue of lack of consideration and the withdrawal of the option until the option is attempted to be exercised, as until then there is no dispute.

The parties' arbitrations agreement applied only to disputes between the parties. (CP317) Until a dispute arose there was no duty to arbitrate contrary to the arbitration decision, pursuant to the arbitration clause. (CP317)

However, Judge Fraizer did not review this issue or analyze the issue as he had already prejudged this issue at the October 24, 2014 hearing by stating:

22

20 ... this case in arbitration isn't going
21 to go very far because I think -- and it's not my
22 decision to make except as it pertains to the
23 likelihood of there being any witnesses -- that case
24 is going to get thrown out of arbitration if the law
25 is applied, because there was a arbitration already on

23

1 the very subject that's being disputed here, the lease
2 and an offer to or an option to purchase.
3 And maybe the specific issue that's now
4 raised, consideration, wasn't raised then – should
5 have -- I think the issue's res judicata here.
(October 24, 2014 - VR22-23), (CP 204-205)

Additionally, the decent to the arbitration award supports the appellant's argument on both lack of consideration and res judicata which was completely ignored by Judge Fraizer. (CP376-378)

Judge Fraizer combed error in not finding the arbitration decision was in error on its face as res judicata did not apply in this case. The arbitration award should be vacated and remanded for a new arbitration

of the party's' dispute.

III. CONCLUSION

The trial court committed error in appointing Mr. Timothy Esser as a 3rd neutral arbitrator due to his close relationship, including a former partnership and ongoing social interaction with respondents counsel. This appointment was unnecessary as three alternated were named by the court. Further, error was committed by Judge Fraizer's refusal to recuse himself and confirmation of the arbitration award. The arbitration process was biased and this bias was knowingly aided by the trial court.

It is respectfully requested that the court reverse the order confirming the arbitration award and remand for a new arbitration with a new set of arbitrators and trial judge.

Dated this 20th day of May, 2015.

Law Office
J. Gregory Lockwood, P.L.L.C.

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421 W. Riverside Ave., Suite 960
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Phone: (509) 624-8200
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Attorney for Appellant

CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on May 20, 2015, I caused to be served a copy of the foregoing APPELLANT HONN'S BRIEF to the following listed party(s) via the means indicated:

Will Morgan Ferguson
Libey, Enslee & Nelson, PLLC
409 N Main Street
PO Box 619
Colfax, WA 99111-0619

WSBA No. 40978
(509) 397-4345
(509) 397-3594 fax
will.ferguson@lenlawyers.com

X	U.S. MAIL
	FACSIMILE
	HAND DELIVERY
	ELECTRONIC DELIVERY

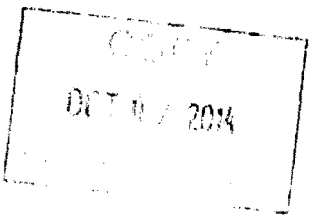
DATED May 20, 2015.

LORRIE HODGSON

APPENDIX

GARRETT FARMS, LLC
v.
LARRY HONN FAMILY, LLC

Case No. 13-30251



SUPERIOR COURT OF WASHINGTON COUNTY OF WHITMAN

GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY LLC, a Washington limited liability company, Defendant.	NO. 10-2-00293-4 NOTICE OF DEFENDANT'S DISPUTED ISSUES FOR ARBITRATION

The defendant by and through its attorney of record J. Gregory Lockwood herby gives

NOTICE OF DEFENDANT'S DISPUTED ISSUES FOR ARBITRATION

It is requested that the arbitration penal determine the following specific disputes between the parties regarding the option to purchase:

1. What was the consideration paid by Garret Ranches, LLC to the Honn Family Trust, LLC in exchange for the option to purchase;

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J. Gregory Lockwood, PLLC
421W. Riverside, Ste. 960
Spokane WA 99201
Telephone: (509) 624-8200
Facsimile: (509) 623-1491

2. Was there adequate consideration paid by Garret Ranches, LLC to the Honn Family Trust, LLC in exchange for the option to purchase;

3. What is the legal effect of the consideration or lack of consideration paid Garret Ranches, LLC to the Honn Family Trust, LLC in exchange for the option to purchase;

4. Did the Honn Family Trust, LLC have a right pursuant to Washington case law to withdraw the Option to purchase; and

5. Was the Honn Family Trust, LLC's withdrawal of the option to purchase executed prior to the Garret Ranches, LLC notice of intent to exercise the option to purchase?

LAW OFFICE OF
J. GREGORY LOCKWOOD, PLLC

J. GREGORY LOCKWOOD,
WSBA No. 20629
Attorney for Defendant

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Facsimile: (509) 623-1491

CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on September 26, 2014, I caused to be served a copy of the foregoing to the following listed party(s) via the means indicated:

Will Morgan Ferguson
Libey, Enslee & Nelson, PLLC
409 N Main Street
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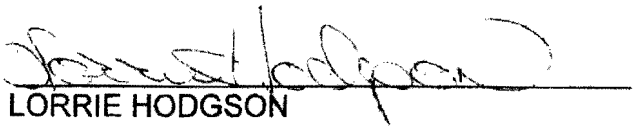

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In Re Arbitration of: GARRETT RANCHES, LLC, a Washington limited liability company, Plaintiff, v. LARRY HONN FAMILY, LLC, a Washington limited liability company, Defendant.	ORDER ON MOTIONS

A hearing was held before the three Arbitrators November 17, 2014, on the motion by the Honns to depose Gary Libey and to take a CR 36(b)(6) deposition of Garrett Ranches, LLC.

After reviewing the documentation provided by both parties, listening to the argument of counsel and then consulting among themselves, the Arbitrators' decision is:

1. The motion to depose Gary Libey is denied.
2. The motion to take a CR 36(b)(6) deposition of Garrett Ranches, LLC is deferred.
3. The arbitration agreement provides that the arbitration decision should be reached within thirty (30) days. Nevertheless, the Arbitrators are willing to extend that time as necessary. Having reviewed all of the material furnished by both parties it appears the Honns argue that as a matter of law a lease with option to buy requires specific consideration in support of the option and that no such consideration is disclosed from the written agreement nor was consideration given for the option. If this is accurate, the Honn's position perhaps could be established by a dispositive motion.

On the other hand, Garrett Ranches, LLC argues that the previous arbitration awards, confirmed by the Superior Court and the Court of Appeals, upheld the validity of the option which necessarily precludes litigation or re-litigation of the consideration issue raised by the Honns. In other words, if Garrett's position is accurate, it would appear it could be established by dispositive motion.

Therefore, the parties are requested to each file any dispositive motion they assert supports their position on or before December 1st. Replies to each other's position shall be filed by December 10th. The Arbitrators will then consult among themselves whether to invite oral argument or to proceed to decide the motions on the materials filed.

DATED: This 18th day of November 2014.

By _____
Timothy Esser, Arbitrator

Approved:

By _____
Frank Gebhardt, Arbitrator