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Division I
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Motion for Extension of Time pending

97359-8

NO. 77871-4-1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION ONE

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

Respondent,

v.

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

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Veronica Alicea-Galvan, Judge

APPELLANT'S PETITION FOR REVIEW BY SUPREME COURT

Michael Callahan
Pro Se

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IDENTITY OF PETITIONER

Petitioner: Michael Callahan, Esq., Pro Se Appellant below

CITATION TO COURT OF APPEALS DECISION

Petitioner requests review of the Court of Appeals' order filed on March 18, 2019 in appellate Case No. 77871-4-1 wherein his appeal was denied, as well as review of the order denying Petitioner's Motion for Reconsideration filed on May 20, 2019.

ISSUES PRESENTED FOR REVIEW

1. Whether a party to an arbitration is entitled to an arbitration hearing with the attendant due process rights of notice, the ability to present evidence and to cross-examine witnesses.

2. Whether a party to arbitration is entitled to an evidentiary hearing in the Superior Court being asked to confirm/vacate the arbitration award when it is alleged that the settlement reached in mediation and confirmed in arbitration (without a hearing) was based upon a fraud committed in discovery in the underlying case and included releases never discussed or agreed to for "unknown" and "unasserted" claims.

3. Whether a fraud committed in discovery, only learned of **after** a settlement was reached based upon that fraud, can be used as the basis to overturn a settlement in mediation or an award in arbitration even though it is not evident on the face of the Award.

4. Whether a Court must vacate an arbitration award where it is uncontroverted that broad releases for "unknown" and "unasserted" claims were added into the Award where the CR2a provided for only a settlement of the claims made in the pending litigation and where it is uncontroverted that further/broader releases were never even discussed.

STATEMENT OF THE CASE

Attorney Osborn filed suit for sums he alleged were owed from business dealings with his client, Callahan. Callahan counterclaimed for offsets and for the Osborn's theft of three specific pieces of artwork Osborn had taken during his representation of Callahan from a much larger inventory of art owned by Callahan. During discovery Osborn was asked about all transactions and admitted only to having the three pieces of art – but nothing else. (CP 66) The lawsuit was submitted to mediation and a settlement was reached ***covering only the claims in the lawsuit***, all as set forth in a CR2A. (CP 217 and 137)

Days after the mediation, while Osborn's counsel was preparing further settlement documents, Callahan learned that Osborn had stolen two additional pieces of art not disclosed in discovery. Callahan thus refused to sign the Confession of Judgment because it contained much broader releases than just the claims in the lawsuit (as agreed to in the CR2A) – namely, releases of unasserted or unknown claims -- so Osborn submitted the matter to arbitration with the same mediator. (CP 125, 137) The material issue of whether there was a settlement of additional "unknown" or "unasserted" claims in the mediation was clearly a factual dispute that required an evidentiary hearing under the law.

The Arbitrator immediately called for a telephonic "pre-hearing" conference and at that time ordered the parties to simultaneously submit "3-5 page letters" setting forth the issues. Two days after receipt, ***without a hearing***, without the chance to submit evidence, cross-examine witnesses or even an opportunity to respond to the other side's unsworn "letter", the arbitrator issued an Award. Over Callahan's objection, the

Superior Court confirmed the Award ***without an evidentiary hearing***. This appeal followed and the Court of Appeals affirmed, based upon an erroneously narrow standard of review, limited to the face of the Award. Callahan filed a timely Motion for Reconsideration which was denied on May 20, 2019 without setting forth a reason.

ARGUMENT

A. Reasons Review is Requested. Petitioner asks that review be accepted for each and any of the following reasons:

1) The decision of the Court of Appeals, which allowed an Arbitration Award to be confirmed without an evidentiary hearing in arbitration or in the Superior Court, is in conflict with the statutes governing arbitration and in conflict with Washington case law that mandates basic due process in arbitration. See for example *Conard v. University of Washington*, 62 Wash. App. 664, 814 P.2d 1242 (1991), reversed on other grounds, 119 Wn.2d 519, 834 P.2d 17 (1992)

2) A significant question of law arises under the Washington State and U.S. constitutions when basic due process is denied in arbitration and then in the Superior Court confirming the award, because a party has no opportunity to present evidence or cross examine witnesses where that party is denied an evidentiary hearing at both stages. *5th and 14th Amendments to the U.S Constitution* and *Article 1, Section 3 of the Washington State Constitution*.

3) Confidence in the arbitration process is founded upon the belief that a litigant will still receive basic due process, including the right to present evidence and cross examine witnesses. This is of substantial public interest because the arbitration process plays an important role in reducing the volume of cases in the courts and few would opt for arbitration without such basic guarantees.

4) The Superior Court's affirmation of an "Award" that included blanket releases of claims not submitted to mediation and thus not settled in mediation, violates Washington law, case law, and the due process clauses of the constitutions of the United States and Washington State. Not allowing such an injustice by applying a standard that restricts review to the "face of the Award" is of substantial public interest because there is a statute enacted which requires modification or correction of such an Award. If the Award is not modified or corrected the public will lose confidence in the arbitration system that relieves such a burden on the Courts.

B. The Lack of Any Hearing Violated Washington Statutes and Case Law

The settlement reached in mediation was based upon a fraud committed by attorney Osborn in the discovery process wherein he failed to disclose his theft of two additional pieces of art belonging to Callahan, his client. Because the theft was not discovered until after the mediation concluded, Callahan needed a forum to conduct discovery, present evidence and cross-examine witnesses to show that the settlement was entered into based upon Osborn's fraud. With no hearing conducted at all by the Arbitrator and no evidentiary hearing allowed in the Superior Court, the question must be asked: where was Callahan's chance to bring this fraud to light and have due process?

The arbitration statutes (cited infra) clearly contemplate due process in an arbitration hearing, but ***no such hearing was held***. Thereafter, under RCW 7.04A.230(1) and 7.04.160, an evidentiary hearing should have occurred in the Superior Court, but Callahan was denied that basic due process as well. On appeal, the review was then erroneously limited to the face of the Award, which, of course, did not refer to the fraud because there had been no hearing or other sworn testimony to present evidence of that fraud.

What was done procedurally in "arbitration" was improper and not supported by any statute. Instead of having a hearing, the Arbitrator requested a short, telephone "pre-hearing conference" and ordered 3-5 page letters be simultaneously submitted by each side to identify the issues. (CP 97) Based upon this request, Callahan contemplated that an actual hearing would then follow due to the fact that:

a) a ***hearing*** should follow a "***pre-hearing*** conference"

b) when "letters describing the issues" were requested to be submitted ***simultaneously***, it was not logical that such letters would substitute for an actual hearing because:
    i) the Arbitrator did not say so; and

ii) because they were limited in length to 3-5 pages; and

iii) because the order was to describe the issues, not present all of the evidence (in 3-5 pages) or brief the law; and

iv) because due process could not be had by such a procedure
- with no opportunity to present evidence/witnesses; and
- no opportunity to cross-examine and challenge the statements of the other side's "letter" or even conduct discovery. (Because Osborn's letter made false statements, the right to cross examine him to challenge his falsehoods was critical.)

The record reflects that Callahan had received only an email requesting a "***pre-hearing conference call***" from the Mediator's assistant. (CP 97)[1] It was at that pre-hearing call that the Mediator gave the parties a week to each submit a "3-5 page letter" describing the issues (as they were never raised in any form before the call), not submit evidence or fully brief the law. Nor did the Arbitrator advise that he would be ruling on just those unsworn letters. Callahan contemplated not only a hearing but some notice about the remaining procedure once the Arbitrator understood what the issues were that had arisen after mediation.

Without further contact, and **instead of holding a hearing, the Arbitrator immediately issued an "Arbitration Award."** This eliminated due process because there was no opportunity to present evidence or for the parties to respond or rebut the others' simultaneous submission. (CP 97) The Award did not address the improprieties cited by Callahan and ignored his claim of Osborn's fraudulent discovery responses that induced the settlement. (CP 97) At no time since Callahan was fraudulently induced to

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[1] "On September 22, 2017 I received an email that only said:
'Judge Hilyer (ret) has requested a pre-hearing conference call in the above- referenced arbitration next week. He has the following availability next week: Thursday, September 28th at 12:00 (noon); or Friday, September 29th at 12:30pm. Please respond with your availability for the pre-hearing conference call in this case.'" (CP 97)

settle in mediation has he had a chance to conduct discovery, submit evidence or cross-examine witnesses about the stolen art and false, sworn statements in discovery. (CP 97) Nor was he afforded the opportunity in the Superior Court to have an evidentiary hearing which would have revealed these falsehoods or the fact that the mediated settlement was limited to the claims in the lawsuit and did not include the release of "unknown" or "unasserted" claims -- something that was never discussed in mediation and is not in the CR2a settlement agreement. The significance of the added releases is that Osborn would be released from liability for his theft of the two additional pieces of art belonging to his client.

To be clear, the two opposing "letters" submitted were not under oath and included no evidence. (CP 133) Just two days after receiving the "letters" the Arbitrator issued his written Award without a hearing, without sworn testimony, and without a chance to even object to the procedure, because it was never explained.

The Arbitrator's surprise procedure triggered RCW 7.04A.230(1)(c) which ***requires*** ("shall") ***the Superior Court to vacate*** an award if an arbitrator "refused to consider evidence material to the controversy ***or otherwise conducted the hearing*** contrary to RCW 7.04A.150…" Clearly, this statute contemplates that there be an arbitration "hearing" or, in the only statutory alternative, some procedure is agreed upon by the parties – thus giving the parties a chance to object. Even with this clear statutory instruction, neither a hearing or an agreement were present in this matter. Since no notice was given that there would be no hearing to follow the pre-hearing conference, there was no chance for Callahan to object. Inherently, the erroneous procedure employed by the Arbitrator and sanctioned by the Superior Court was based on a "refusal

to consider evidence material to the controversy." However, relief should also have been afforded Callahan under *RCW 7.04A.240* where an award **must** be corrected or modified if:

> (1) Upon motion filed within ninety days after the movant receives notice of the award . . . the court ***shall modify or correct*** the award if:…
> (b) The arbitrator has ***made an award on a claim not submitted to the arbitrator*** and the award may be corrected without affecting the merits of the decision upon the claims submitted; or
> (c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

In this case the Award covered "unknown" and "unasserted" claims not submitted to mediation, not in the CR2a settlement agreement, and never even discussed at the mediation. The Superior Court should have modified or corrected the Award as Osborn did not even controvert Callahan's declaration that these releases were never even discussed at the mediation.

This Court of Appeals held that "The statute Callahan cites, RCW 7.04A.150, does not require an evidentiary hearing." (It did not make the distinction of whether ***any*** hearing was required, but clearly none was held, evidentiary or otherwise, which would have allowed Callahan to rebut Osborn's simultaneous, unsworn "letter" in arbitration.) Because the arbitration statutes clearly contemplate some opportunity to present evidence, and such approach is confirmed in the Superior Court's remedial statute (cited *supra*, requiring the vacation of an award if the arbitrator "refused to consider evidence") the Court of Appeals simply got this one wrong.

The Court of Appeals error was based upon its reading of RCW 7.04A.150(1) entitled "Arbitration process", which states in relevant part that:

> The arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate <u>so as to aid in the fair and expeditious disposition of</u>

> <u>the proceeding</u>."

But a hearing is clearly contemplated as part of the "proceeding" because the statute further states:

> 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.

Despite this statutory mandate, no hearing was held and no conference was held with the parties to even discuss the evidence, and then no opportunity was given to submit evidence.

It is logical that if the legislature did not intend for there to be a hearing, then they would not have provided for the "summary disposition of a claim or particular issue" only under explicit conditions – the primary one being the "***agreement of all interested parties***…" (See *RCW 7.04A.150(2)*) In the case at bar that agreement was not asked for or obtained.

The statute is also clear that in the absence of such an agreement, *RCW 7.04A.150(3)* requires that "[t]he arbitrator <u>shall</u> set a time and place for a hearing..." and yet the arbitrator here failed to do so.

RCW 7.04A.150(4) then describes the due process that Callahan was deprived of by the improper summary disposition: ***"the parties to the arbitration proceeding <u>are entitled</u> to be heard, to present evidence material to the controversy, and to cross-examine witnesses...."*** The procedures employed by the Arbitrator did not afford Callahan the basic due process to which he was ***entitled*** by this statute. ***This due process is guaranteed to the parties to the arbitration "proceeding", not just parties to an arbitration "hearing."*** Again, this is evident in the fact that *RCW 7.04A.150(1), supra*,

makes it clear that a "hearing" is just part of the "proceeding"

The net effect of the Court of Appeals' interpretation of the arbitration process statute is that an Arbitrator can decide a matter without a hearing and without an agreement for summary disposition by the parties. Worse, this means that the due process safeguards of the statute are only in effect **if** there is a hearing or an agreement for summary disposition.

Petitioner Callahan respectfully requested that the Court of Appeals reconsider its ruling because the safeguards of the statute they cite (and the statute itself) would be unnecessary and superfluous under that interpretation. The legislature installed these safeguards to encourage a fair and equitable arbitration process that litigants would willingly employ and this Court has affirmed these safeguards in the case law cited infra. The Court of Appeals decision is contrary to this case law. If all an arbitrator needs to do is **not** have a hearing and summarily issue an award that says so little that no error of law can be found on its face, then none of the legislated safeguards mean anything and there is nothing a party can do about it.

In *Conard v. University of Washington*, 62 Wash. App. 664, 814 P.2d 1242 (1991), reversed on other grounds, 119 Wn.2d 519, 834 P.2d 17 (1992), the Court explored the essential elements of procedural due process:

> The next question is how much process is due. [Citations omitted] We must balance competing interests of an efficient and reasonable administrative process with the ***[respondent's] right to a meaningful hearing***. [Citation omitted] ***Clearly, at least notice and an opportunity to be heard are required***. In addition, the [respondent] must be given a written copy of any information on which the . . . recommendation is based ***in time to prepare to address that information at the hearing***. The [respondent] should be given the opportunity ***to present and rebut evidence***, and the hearing must be conducted by an objective decision maker. (***emphasis added***)

Without these minimum safeguards, any process is meaningless and Callahan was not given the process that was due and called for by statute and case law. The impact of such a ruling could be devastating to the public's confidence in the arbitration system, one that relieves an enormous burden on the courts just in terms of the reduction of the number of cases. Simply, who would leave the court system in favor of a process that does not guarantee basic due process? The answer: very few litigants, if any.

C. The Court Below Employed an Incorrect Standard of Review Relative to the Hearing Process

An appellate court's role "in reviewing an arbitration award is to ensure that the hearing process comports with the broad contours of procedural fairness. To this end, the court is directed to consider narrowly circumscribed allegations of misconduct." *Seattle Packaging Corp. v. Barnard*, 94 Wn. App. 481, 487, 972 P.2d 577 (1999). Specifically, that review "'is confined to the question of whether any of the statutory grounds for vacation exist.'" *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn. App. 898, 903-04, 359 P.3d 884 (2015) (quoting *Cummins v. Budget Tank Removal & Envtl. Servs., LLC*, 163 Wn. App. 379, 388, 260 P.3d 220 (2011)), *review denied*, 185 Wn.2d 1006 (2016). RCW 7.04A.230(1), sets out the grounds on which a court shall vacate an award:

> (a) The award was procured by corruption, fraud, or other undue means;
> (b) There was:
> (i) Evident partiality by an arbitrator appointed as 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.

An appellate court reviewing the decisions below must apply the "same standard applicable in the court which confirmed, vacated, modified or corrected that award." *Salewski*, 189 Wn. App. at 903. Despite the applicable statutes and prior case law, the Court of Appeals looked only to the face of the Award and ruled that Callahan was not entitled to a hearing at any stage.

Clearly the scope of review varies according to the statutory ground asserted for vacating an arbitration award. But it is only where a party argues for vacating an award because the arbitrator exceeded his powers (RCW 7.04A.230(1)(d)), that claim should be reviewed under the "facial legal error standard" -- where the issue must be apparent from the face of the award. *Salewski*, 189 Wn. App. at 904. Where, as here, a party contends that an arbitration award has been secured through fraud (RCW 7.04A.230(1)(a)):

> [C]ourts must necessarily review enough of the evidence submitted to the arbitrator[] to determine whether clear and convincing evidence exists that [fraud] was committed with respect to a material issue of consequence in the proceedings and that substantial rights of a party have been prejudiced thereby. *Seattle Packaging*, 94 Wn. App. at 487-88.

To demonstrate prejudice in this context, a party "must show that the fraud prevented him or her from fairly and fully presenting his or her case or defense." *Id*. at 487. With a prima facie showing of such misconduct, the court is empowered to assess evidence, including new evidence not presented to the arbitrator. *Id*. at 487. Where, there was no arbitration hearing and then no evidentiary hearing (in the Superior Court) after raising

the issue, there should have been no choice but for the Court of Appeals to reverse. The Court of Appeals was *not* limited to the face of the order in reviewing the many other grounds presented by Callahan below, in the cross motions to confirm/vacate/modify the award, including:

1) fraud in discovery in the underlying case which served as an inducement to enter the settlement; and
2) an improper expansion of the releases to include "unknown" and "unasserted" claims; and
3) Arbitrator's bias; and
4) a lack of due process because of no actual hearing; and
5) a failure to follow the notice mandates of the statute.

The Superior Court needed only to determine if Callahan made a prima facie case, which he clearly had (and which was uncontroverted by Osborn). If so, then evidentiary hearing(s) were required to have been held (in arbitration and in the Superior Court). This standard is there to ensure procedural fairness, *Seattle Packaging*, 94 Wn. App. at 487, and thus this part of the review "'is confined to the question of whether any of the statutory grounds for vacation exist.'" *Salewski*, 189 Wn. App. at 903-04 (quoting *Cummings*, 163 Wn. App. at 388). Questions of law are reviewed de novo. *Ang v. Martin*, 154 Wn.2d 477, 481, 114 P.3d 637 (2005). *PacifiCorp Envtl. Remediation Co. v. Dep't of Transp.*, 162 Wn. App. 627, 662, 259 P.3d 1115 (2011) (quoting *Quality Rock Prods., Inc. v. Thurston County*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007)).

Even the cases cited by Osborn in the appeal show that a review of the arbitration award by the Court below (and here) is <u>not</u> limited to the face of the award. Osborn cited *Davidson v. Henson* 135 Wn.2d 112 and *Boyd v. Davis*, 127 Wn.2d 256, but mischaracterized both decisions. In each, the Court specifically acknowledged the RCW provisions setting forth the grounds for judicial vacation of an arbitrator's award. The

Davidson Court even lists the applicable provisions, stating:

> "The Davidsons' contentions are governed by the provisions of RCW 7.04.160 pertaining to judicial vacation of an arbitrator's award. RCW 7.04.160 states:
>
> 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(l).

Nowhere in the authorizing statute cited in *Davidson* are the grounds for vacating an award limited to those found on the face of the award.

What was sought on appeal was a review of the lower court's refusal to vacate the award based upon the evidence presented of the fraud in discovery which induced the settlement, the arbitrator's exceeding the power given to him by adding releases not contained in the settlement agreement, and the failure to have an arbitration hearing after a "pre-hearing conference" whereby Appellant could present evidence on these issues and cross-examine witnesses. The Court of Appeals should have looked at the entirety of

what the Superior Court saw to see if there was error. What was clearly asked of the Court below was to vacate the award based upon the evidence presented, *including the conflicting, added releases in the Award*, and the denial of due process when no hearing was held and no "summary disposition" was requested or agreed to. The statute provides for this remedy and, by the nature of the reasons set forth for vacating, requires extrinsic evidence. The Court of Appeals did not follow these statutory mandates.

D. Under The Proper Standard of Review, the Errors Are Obvious

Applying the foregoing review standards, error is apparent because Callahan has shown that many of the statutory grounds for vacation exist, as the standard is explained in case law. *Salewski*, 189 Wn. App. at 903-04. Callahan presented declarations and argument on each of the specific grounds to the Superior Court. (CP 21, 53, 171) Callahan explained how his claims touch each of the statutory grounds for vacation or modification and those were the grounds on which any reviewing Court should base its decision. The Superior Court failed to identify what grounds it considered, if any, choosing instead to just rely on the arbitrator's award. The Court of Appeals then limited its review to the face of the Award. However, Appellant clearly met the burden of showing that statutory grounds for vacation exist and Osborn did not even controvert those grounds. *Salewski*, 189 Wn. App. at 904.

An alternative analysis leads to the same conclusion: that there should have been an evidentiary hearing. Genuine issues of material fact as to a party's assent to a settlement agreement preclude enforcement of that settlement agreement. *Cruz v. Chaves*. 186 Wash. App. 913, 347 P.3d 912 (2015). If the nonmoving party raises a genuine issue of material fact, a court abuses its discretion if it enforces a settlement agreement without

first holding an evidentiary hearing to resolve the disputed issues of fact. *Cruz* summarizes the law as follows:

> "'The trial court follows summary judgment procedures when a moving party relies on affidavits or declarations to show that a settlement agreement is not genuinely disputed.' *Condon v. Condon,* 177 Wash.2d 150, 161–62, 298 P.3d 86 (2013). The trial court must view the evidence in the light most favorable to the nonmoving party and 'determine whether reasonable minds could reach but one conclusion.' *Ferree,* 71 Wash.App. at 44, 856 P.2d 706. '[I]f the nonmoving party raises a genuine issue of material fact, a trial court abuses its discretion if it enforces the agreement without first holding an evidentiary hearing to resolve the disputed issues of fact.' *Brinkerhoff,* 99 Wash.App. at 697, 994 P.2d 911. "

Osborn did not submit declarations that actually oppose the genuine material facts at issue, raised in the Declarations of Michael Callahan in the motions to vacate. Even so, no evidentiary hearing was held when Callahan swore under oath that he did not agree to (or even discuss) a settlement of "unknown" or "unasserted" claims.

CONCLUSION

Callahan asks that his petition be granted so this honorable Court can find that he was entitled to a hearing in arbitration and/or in the Superior Court, and reverse the lower court's ruling. Allowing it to stand would be contrary to the statutory law, case law, and the constitutions of Washington and the United States, all of which guarantee basic due process. In the alternative, Callahan requests that this honorable Court order that the Award be modified to remove the releases pertaining to "unknown" or "unasserted" claims as required by RCW 7.04A.240 -- for the reason that it is uncontroverted that they were never discussed in mediation or the CR2a settlement.

Dated: June 19, 2019

Respectfully submitted,

Michael Callahan, Petitioner

APPENDIX

A. Constitutional Basis for Due Process Claims

The *Fifth Amendment of the United States Constitution* guarantees that:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

The *Fourteenth Amendment of the United States Constitution* adds:

> "...nor shall any State deprive any person of life, liberty, or property, without due process of law."

The *Washington State Constitution, Article 1, Section 3* provides:

> "No person shall be deprived of life, liberty, or property, without due process of law."

B. Statutes Relevant to the Issues Presented for Review

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.

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.

RCW 7.04A.240

Modification or correction of award.

(1) Upon motion 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, the court shall modify or correct the award if:

(a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

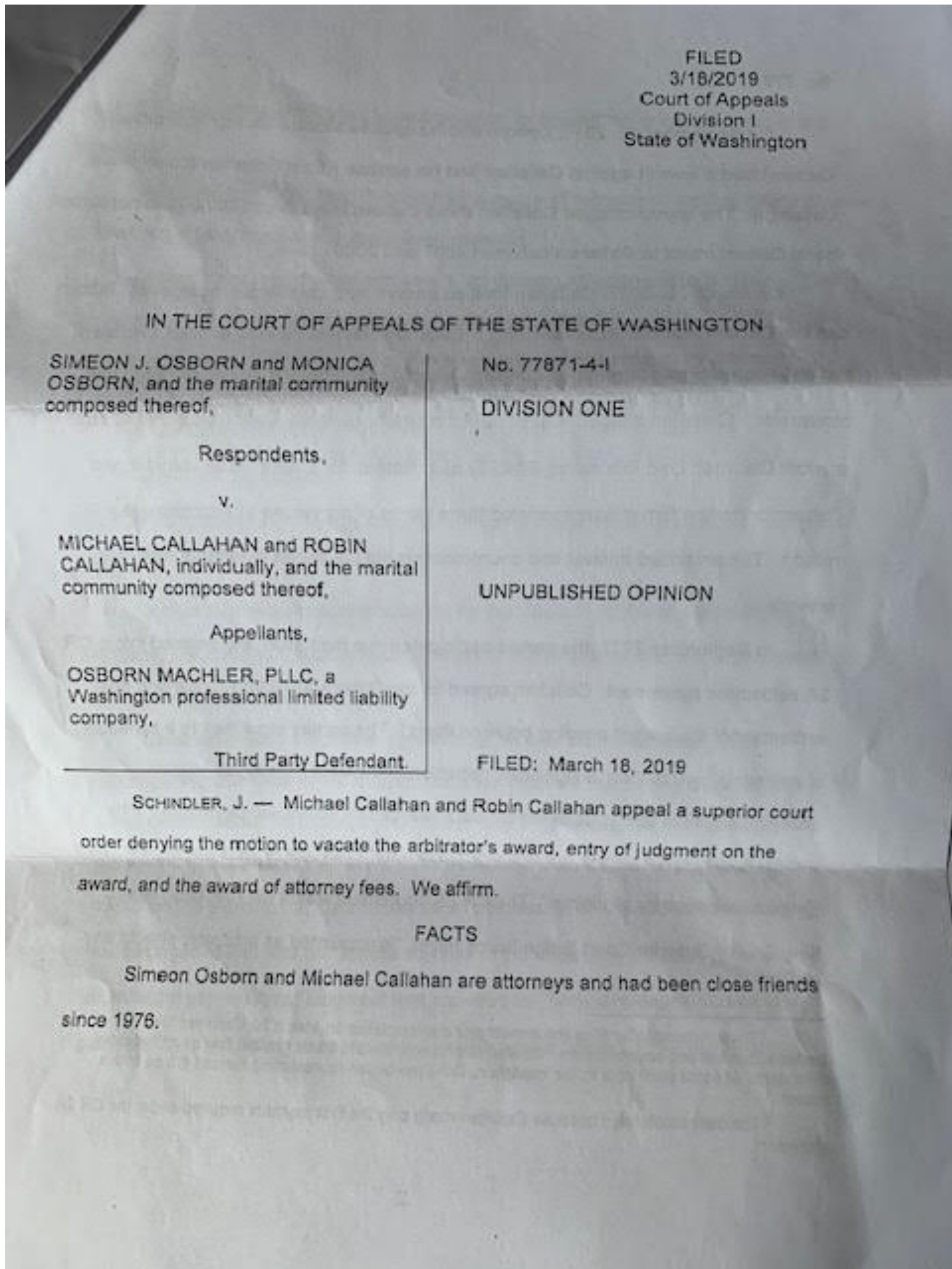
(b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or

(c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

(2) If a motion filed under subsection (1) of this section is granted, the court shall modify or correct and confirm the award as modified or corrected. Otherwise, the court shall confirm the award.

(3) A motion to modify or correct an award under this section may be joined with a motion to vacate the award.

C. Copies of Court of Appeals' Decisions



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

[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

No. 77871-4-I/4

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,

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> 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]

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[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.

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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.

Schindler, J

WE CONCUR:

Mann, J. Appelwick, CJ

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

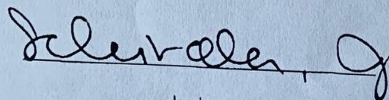
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

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

Michael Callahan, Petitioner

June 20, 2019

Filed with Court: Supreme Court thru Court of Appeals, Division I

Appellate Court Case No: 77871-4

Appellate Case Title: Simeon J. Osborn & Monica Osborn, Resps
v.
Michael & Robin Callahan, Apps

Superior court Case No: 16-2-22333-8

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Bainbridge Island, WA 98110
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MICHAEL CALLAHAN - FILING PRO SE

June 20, 2019 - 9:25 AM

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Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	77871-4
Appellate Court Case Title:	Simeon J. Osborn & Monica Osborn, Resps v. Michael Callahan & Robin Callahan, Apps
Superior Court Case Number:	16-2-22333-8

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