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No. 64439-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AMY RIMOV, a single woman,

Respondent,

v.

MARY SCHULTZ, a single woman,

Appellant.

REPLY BRIEF

Mary E. Schultz, WSBA #14198
Appellant Pro Se
Mary Schultz Law, P.S.
111 S. Post Street, Suite 2250
Spokane, WA 99201
Telephone: (509) 458-2750
Fax: (509) 458-2730
mary@mschultz.com

Philip A. Talmadge, WSBA #6973
Co-Counsel for Appellant
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
Telephone: (206) 574-6661
Fax: (206) 575-1397
phil@tal-fitzlaw.com

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A. INTRODUCTION

In her response, Rimov does not dispute that arbitration is binding, even where both parties did not understand or intend that their arbitration is binding. *Godfrey v. Hartford Cas. Ins. Co.,* 142 Wn.2d 885, 16 P.3d 617 (2001). She does not dispute that if the arbitrator's November 13, 2008 arbitration ruling is binding, then her action must be dismissed, nor does she dispute that RCW 7.04A.060(1) defines a valid and irrevocable agreement to arbitrate. Similarly, she does not dispute that any claim of lack of agreement to arbitrate must be made by the time of the commencement of the hearing, or such a claim is waived. RCW 7.04A.230(1)(c). And she does not dispute that there is no statute of limitations on Schultz's ability to confirm an arbitrator's favorable award. RCW 7.04A.220.

Rimov's argument is simply this, and *only* this—if arbitration was not intended to be binding, then it was not an arbitration under Washington's Arbitration Act, RCW 7.04A ("UAA"). This flies directly in the face of the *Godfrey* decision, which holds that not only is nonbinding arbitration "arbitration," but it is binding.

Accepting Rimov's theory nullifies the UAA as interpreted by the *Godfrey* court. It means that a party losing at arbitration—whether

believed to be binding or nonbinding—may simply say they never agreed to arbitrate in the first place—that their intent was to obtain "advisory opinions" or to engage in "presettlement negotiations."

Such revisionist reasoning in arbitration is precluded by *Godfrey* and by RCW 7.04A.060, which renders binding and irrevocable any "written agreement" to arbitrate. The statute leaves nothing to chance in defining an irrevocable agreement as established once "an agreement contained in a record" to submit to arbitration any existing ... controversy arising between the parties ...." exists. RCW 7.04A.060(1).

Under the UAA, it is the "agreement contained in a record" that binds the parties. Here, the irrevocable agreement contained in the record to arbitrate a specific issue was made on February 18, 2008, via Rimov's confirmation. CP 254. And once arbitration occurred without objection, the result was binding. RCW 7.04A.150, 7.04A.230(1)(c). The trial court's ruling accepting the theory that a losing party in an arbitration can change the nature of the arbitration by calling it merely "advisory," and get a "do over" must be reversed, and Rimov's claims dismissed.

B. RESPONSE TO STATEMENT OF THE FACTS[1]

[1] Rimov's statement of the case is replete with argument, contrary to RAP 10.3(a)(5), RAP 10.3(b) and should be disregarded by this Court.

Rimov's assertion that the parties intended to use the process of arbitration to obtain "an advisory opinion" or engage in a "prelude to settlement negotiations" is *nowhere* to be found in any written record of the correspondence between the parties, with the arbitrator, or in the arbitration ruling. The evidence she cites as support of this proposition is that very correspondence *confirming the agreement to arbitrate*. *See* Br. of Resp't at 7. The February 18, 2008 letters contain *no* reference to settlement negotiations or advisory opinions. To the contrary, Rimov confirms "non-binding arbitration before Judge Donohue in a summary judgment fashion with no live witnesses with regard to the enforceability of the Settlement Agreement and Release." CP 212. (This same document is found at CP 254, as cited in the Brief of Appellant).

Rimov's statement of facts even asserts facts contrary to her written and detailed acknowledgements in 2007 of a very different situation between her and Schultz. *Compare* Br. of Resp't at 4-5 asserting characterizations such as "the family home" and "the couple's property," with CP 147-48, where Rimov confirms the separate nature of Schultz's home and all finances while Rimov and her children were allowed to reside there. Rimov's present claim that the Release was somehow "imposed" upon her is belied by the Release's language and her own legal

training. These very same arguments were all made by Rimov at the arbitration as grounds for invalidation of the Release, and were rejected. CP 285-86. Rimov's statement of facts here also includes the claim rejected at arbitration that Schultz had represented her as a lawyer, also rendering the Release invalid. *Compare* Br. of Resp't at 5 with CP 286.[2]

C. ARGUMENT

(1) Rimov's Claim of Lack of Agreement to Arbitrate Is Precluded under Washington Law

Rimov begins her brief by misstating the standard of review. While acknowledging that the existence of an agreement is a question of law subject to de novo review, br. of resp't at 8, she then asserts at page 9 of her brief that because Schultz brought a CR 12(b)(6) motion to dismiss her complaint, Rimov's testimony that she did not agree to arbitrate must be taken in a light most favorable to her as the nonmoving party. But the UAA prevents its nulllification in this fashion. Any claim that there is no

[2] Rimov essentially argues that her own writings do not mean what they say. In the 2008 arbitration, she claimed that her written acknowledgement in 2007 of facts contrary to her later claims was not what she meant. *Compare* CP 147-48 (Release fact section) with CP 285-86 (later position at arbitration). Her de novo complaint in the trial court asserted facts contrary to the same 2007 acknowledgements. She now claims that her written agreement to arbitrate in 2008 was not what she meant. Br. of Resp't at 11, 15. *But see,* CP 254. And she now adds the assertion that no arbitration occurred, in the face of an existing written arbitration ruling issued by an arbitrator. Br. of Resp't at 15. *But see,* CP 285-86.

In other words, Rimov believes that although she has had the benefit of

agreement to arbitrate is *not* taken in a light most favorable in a subsequent proceeding—such claim is *waived* in its entirety in any subsequent proceeding if it is not raised at the arbitration. RCW 7.04A.150(3); RCW 7.04A.230(1)(e).

And even were Rimov not expressly precluded by the plain statutory language of the UAA from arguing a "lack of agreement to arbitrate" long after the arbitration has concluded, she also ignores Washington's long-held rule that contracts are interpreted objectively, and do not depend on the subjective intent of the parties. *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503-04, 115 P.3d 262 (2005). A court does not interpret what was intended to be written but what was written. *Id.* The subjective intent of the parties is to be determined from the actual words they used. *Id.* And in so determining, a court must impute an intention corresponding to the reasonable meaning of the words used. *Id.* "We generally give words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly demonstrates a contrary intent." *Id.* The words in Rimov's confirmation of her agreement to arbitrate need no interpretation. CP 254.

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agreements, the agreements never existed.

Under the UAA, "arbitration" is a specific term with legal meaning. When the parties here unequivocally confirmed their agreement to "arbitrate," those words had meaning. CP 212-18; RCW 7.04A.060(1). An irrevocable agreement to arbitrate is defined by statute as "an agreement contained in a record" – i.e. an agreement which is in *writing*, not in someone's mind. RCW 7.04A.060(1).[3] This case falls squarely under the plain language of the UAA and *Hearst.*

Moreover, this usage was not limited to the parties' confirming correspondence of February 12 through February 14. CP 254-61. Indeed, no less than four lawyers and a retired judge agreed in writing to "arbitration," settled on the issue to be arbitrated and the procedure for the arbitration, presented and considered evidence, and issued and received an arbitration ruling. Every communication related to the proceeding named it "arbitration." If Rimov truly believed that proceeding was not arbitration, but some other amorphous proceeding for an "advisory opinion to promote settlement," then she failed to object to her own continued use of the phrase "arbitration," to Schultz's continued use of the

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[3] RCW 7.04A.060 states that:

> (1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the

phrase, to the arbitrator's continued use of it, and to the noting of an arbitration hearing. She failed to clarify on the record that the proceeding was not supposed to be an arbitration. She failed to move to vacate a written ruling both entitled and described within as an arbitration ruling, where the arbitrator identified the issue submitted to arbitration, and decided it.

If any unexpressed intention existed, it was Rimov's responsibility to correct it. Her present position could easily have been formalized prior to and during the arbitration. *Wilson Court Ltd. Partnership v. Tony Maroni's, Inc.*, 134 Wn.2d 692, 710, 952 P.2d 590 (1998). If she did not intend a certain result, she "should have said so." *Id.*

Finally, Washington law is unambiguous after *Godfrey* that if the parties pursue an "arbitration," it falls under the UAA. Rimov acknowledges that *Godfrey* prohibits nonbinding arbitration, and that arbitration is binding. Br. of Resp't at 12. But she then claims that this is only because the parties in *Godfrey* intended binding arbitration. This is not true. The primary holding of the case is that a mutually intended "non-binding" arbitration is still binding under Washington law. 142 Wn.2d at 891-94. Rimov then asserts that the facts here are materially

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agreement is valid, enforceable, and irrevocable except upon a ground

different than those in *Godfrey*. But she misstates the facts in that case. She argues that the *Godfrey* parties "undeniably intended to forego the judicial forum for arbitration." Br. of Resp't at 8. She is mistaken. The parties in *Godfrey* specifically agreed that arbitration would *not* be binding, as they agreed that either party could demand a trial de novo within 60 days. 142 Wn.2d at 890. But upon one side invoking that "nonbinding" clause, the Supreme Court confirmed that regardless of the parties' mutual beliefs and their written *contract* to allow trial de novo, their arbitration was nevertheless binding. *Id.* at 893-94. This is the exact situation in this case.[4]

In sum, the existence of an agreement to arbitrate is controlled by *Godfrey* and by RCW 7.04A.060, .150(3), and .230(1)(e). In light of the continued use by all participants of the legal term "arbitration" to describe the proceeding, Rimov cannot claim at this late date that it was something else.

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that exists at law or in equity for the revocation of contract.

[4] Rimov contends that a contrary ruling means that parties may not seek "advisory opinions." She is wrong. Parties cannot seek "informal" opinions through an arbitration because that procedure is binding. *Godfrey*, 142 Wn.2d at 893-894. And once an agreement to arbitrate is reached as defined under RCW 7.04A.060, then any claim of lack of agreement to arbitrate thereafter must be made on the record at the time of any arbitration, or it is waived. RCW 7.04A.150, .230(1)(e). Both the statutory language and the precedent are plain.

(2) The Record Supports that Rimov Did Not Claim Lack of Agreement to Arbitrate Because She Intended a Favorable Result to Bind Schultz.

The use of arbitration to obtain only a wholly nonbinding advisory opinion is precluded by *Godfrey.* Moreover, Rimov intended arbitration to bind Schultz. Rimov's counsel is experienced. Rimov's counsel clearly created a binding arbitration under RCW 7.04A.060, by confirming in writing the parties' agreement to arbitrate. CP 254, 261. He pointedly proposed a summary judgment procedure. CP 254. And immediately prior to the proffered "non-binding" arbitration, Rimov's counsel noted via email only two days before the arbitration proceeding that if the arbitration ruling were favorable to Rimov, it would "necessitate trial" on Rimov's claims. CP 270.[5] In other words, Rimov never objected to "arbitration" because she intended to impose a favorable arbitration ruling on Schultz as binding, and go direct to "trial." *Id.* She misjudged. The arbitrator ruled that the Release was valid. CP 285-86.

Given her intent to bind Schultz, Rimov's current protestations that binding arbitration would somehow be unfair are baseless.

[5] The email from the Rimov's counsel stated: "I don't care who proceeds first on Monday. Either way, we will argue that the (Release) agreement is not enforceable as a matter of law and/or that there are triable issues precluding its enforcement by summary judgment, *in effect necessitating a trial.*" CP 270 (emphasis added).

(3) Rimov Fails to Address the Statutes Precluding Her Making from an Untimely Claim of "Lack of Agreement to Arbitrate."

At 12 of her brief, Rimov argues that Schultz's entire appeal is based on *Godfrey*. In fact, Schultz's appeal is also based on the plain language of the UAA in RCW 7.04A.060, which defines an irrevocable agreement to arbitrate and precludes a losing party to an arbitration from claiming lack of agreement to arbitrate after they fail to object to arbitration *at the commencement of the scheduled arbitration.* RCW 7.04A.150(3); RCW 7.04A.230(1)(e).

Rimov mentions RCW 7.04A.060 only twice. She first acknowledges that a binding agreement to arbitrate is effected under a statutory definition that is "quite informal." Br. of Resp't at 10-11. The only other reference to the statute is her summary claim that "the parties never agreed to arbitrate any issue. *See* RCW 7.04A.060. Br. of Resp't at 12. She thus argues, without any authority, that parties' subjective intent controls over the statutory definition of an agreement to arbitrate. *Id.* at 11. This is contrary to the plain language of RCW 7.04A.060, which defines as irrevocable her February 2008 agreement to submit the parties' issue to arbitration. RCW 7.04.060; CP 254. Her argument of subjective and unexpressed intent is also contrary to *Hearst*.

Rimov also fails to address RCW 7.04A.150, and RCW 7.04A.230(1)(e), *both* of which require her to make any claim of lack of agreement to arbitrate at the commencement of the arbitration hearing, or the objection is waived. She does not mention RCW 7.04A.150 at all, which details the process of an arbitration proceeding. And she mentions RCW 7.04A.230(1)(e) only once, summarily stating, contrary to the statutory language, that the statute does not require her to raise her objection at the arbitration. Br. of Resp't at 16. Her reasoning is that the proceeding was "not an arbitration" and therefore the entire UAA does not apply. *Id.*

Rimov attempts to distinguish *MBNA America Bank, N.A. v Miles,* 140 Wn. App. 511, 164 P.3d 514 (2007), *review denied,* 163 Wn.2d 1010 (2008) making the claim that she is not bound to object to arbitration under RCW 7.04A.230(1)(e) (and under RCW 7.04A.150 presumably, although she fails to acknowledge the latter statute). Her argument is that the *MBNA America Bank N.A.*, parties agreed to "arbitrate," and here, she never did. Br. of Resp't at 15-17. Again, Rimov's distinction denies the existence of her own writings, the irrevocable agreement to arbitrate she created under RCW 7.04A.060, and her failure to object to the process of arbitration, which waived such a claim. RCW 7.04A.150, .230(1)(e).

Rimov also claims that in *MBNA*, "there was an actual arbitration and an actual arbitration award," whereas here, there was allegedly neither. This is contrary to record. The existence of an arbitration proceeding here, and the award from that proceeding, is confirmed by a written arbitration ruling. CP 285-86.

(4) The Proceeding before Judge Donohue Was an Arbitration.

Rimov offers no explanation for her claim that the proceeding before Judge Donohue was not an arbitration. Br. of Resp't at 15-16.

Under the UAA, an arbitration proceeding can take many forms. *See* RCW 7.04A.150. The process is essentially what the parties want it to be.[6] Here, by Rimov's proposal, the procedure was to be in "summary

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[6] RCW 7.04A.150 states:

> (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....
>
> (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. .....

judgment fashion with no live witnesses." The arbitration was to determine the validity of the Release. CP 254. This is fully in compliance with the process of an arbitration under RCW 7.04A.150. And that process is precisely what occurred. CP 285-86. The arbitrator rendered an award after that arbitration. CP 285-86.

Rimov argues that if Schultz "believed" the decision to be an arbitration award, Schultz must have taken steps to "reduce the award to judgment," citing "RCW 7.04A." First, Schultz's "belief" is not at issue. Even where both parties believe arbitration is nonbinding, they are wrong. *Godfrey,* 142 Wn.2d at 894-95. Moreover, RCW 7.04A.220 does not require a prevailing party to confirm an award. Finally, the arbitration ruling was the final award. An "award" is simply the record of the ruling. *See* RCW 7.04A.190 and *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989) (holding that an award "consists of a statement of the outcome," and is sufficient if it settles the issue presented to the arbitrator, which is all that the arbitrator is empowered to decide). The issue arbitrated here was the validity of the Release, not damages.

> 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....

RCW 7.04A.150.

See ACF Property Management, Inc. v. Chaussee, 69 Wn. App. 913, 918-19, 850 P.2d 1387, *review denied,* 122 Wn.2d 1019 (1993) (confirming that only the issues agreed to be arbitrated are the proper subject of arbitration). Thus, once the Release was ruled to be valid, nothing further was necessary. CP 285-86. The award precluded further claims by Rimov. CP 149, 150-51.

Rimov argues that she did not "agree to waive her rights to a jury trial." *See* Br. of Resp't at 8. Rimov never *had* a right to a jury trial on her claims. Meretricious relationship claims are determined by the family law courts at bench trials. *See, e.g., Vasquez v. Hawthorne*, 145 Wn.2d 103, 106, 33 P.3d 735 (2001). Second, Rimov had already "waived her right to a jury trial" when she signed the 2007 Release agreement precluding such claims. Rimov understands this, because her own brief acknowledges that the validity of the Release had to be determined before the matter could proceed. Br. of Resp't at 1.

Moreover, Rimov did not "waive" any trial. She herself proposed the summary disposition format of RCW 7.04A.150(2) as to the Release's validity, and as noted above, she fully intended to bind Schultz to a trial had she prevailed at the arbitration. CP 270.

(5) Schultz Is Entitled to Her Attorney Fees on Appeal.

Rimov does not dispute Schultz's right to fees both under the contract and under statute for the necessary defense of an arbitration ruling, and the underlying Release. RAP 18.1.

D. CONCLUSION

The trial court here allowed Rimov, as the losing party in an arbitration, to deny the plain meaning of her own words, letters, and documents, to deny the arbitration agreement she had with Schultz, and to deny the written arbitration ruling on the issue she agreed to submit to arbitration. That arbitration ruling forecloses Rimov from bringing her present claims.

This Court should reverse the trial court's order and dismiss Rimov's complaint. The arbitration ruling should be confirmed. The trial court should be directed to award fees and costs at the trial court level to Schultz for defending both the arbitration ruling and the Release. Schultz should be awarded her fees and costs on appeal.

DATED this 27th day of August, 2010.

Respectfully submitted,

Mary E. Schultz (per authorization)

Mary E. Schultz, WSBA #14198
Appellant Pro Se
Mary Schultz Law, P.S.
111 S. Post Street, Suite 2250
Spokane, WA 99201
Telephone: (509) 458-2750
Fax: (509) 458-2730
mary@mschultz.com

Philip A. Talmadge

Philip A. Talmadge, WSBA #6973
Co-Counsel for Appellant
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188-4630
Telephone: (206) 574-6661
Fax: (206) 575-1397
phil@tal-fitzlaw.com

DECLARATION OF SERVICE

On said day below I e-mailed and deposited in the U.S. Mail a true and accurate copy of the following document: Reply Brief in Court of Appeals Cause No. 64439-4-I to the following:

Amy Rimov
221 W. Main Street, Suite 200
Spokane, WA 99201

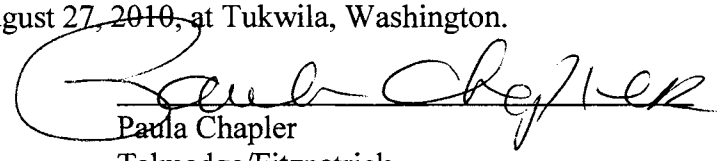
Mary E. Schultz
Mary Schultz Law, P.S.
111 S. Post Street, Suite 2250
Spokane, WA 99201

Ross P. White
Matthew W. Daley
Witherspoon, Kelley, Davenport & Toole, P.S.
422 West Riverside Avenue, Suite 1100
Spokane, WA 99201

Original sent by ABC Legal Messengers for filing with:
Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101-1176

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 27, 2010, at Tukwila, Washington.



Paula Chapler
Talmadge/Fitzpatrick