

No. 691147

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

KEVIN BRUCE HENDRICKSON,

Appellant/Husband,

vs.

JONA HENDRICKSON,

Respondent/Wife.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE WILLIAM L. DOWNING

BRIEF OF RESPONDENT/WIFE

STOKES LAWRENCE, P.S.

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I. INTRODUCTION

Kevin Hendrickson (“Husband”) attempts in this appeal to have this court overturn an Order on a Motion for Reconsideration which was untimely filed, not procedurally compliant, and not substantively warranted. Husband was sanctioned by the trial court below for his attempt to remove the arbitrator from this case. Husband does not appeal the sanction. However, his appeal continues in the same vein of seeking relief that is neither factually or legally justified. We ask that the reviewing court reject the relief requested by Husband and affirm the trial court’s Order on Motion for Reconsideration.

II. FACTS

Kevin Hendrickson (“Husband”) and Jona Hendrickson (“Wife”) entered into a Property Settlement Agreement (“PSA”) resolving the issues attendant to their marital dissolution. The PSA provided that certain enumerated issues be arbitrated within 90 days by Lawrence Besk and further provided that Mr. Besk arbitrate “all issues arising out of this agreement, concerning interpretation, implementation and enforcement.” (CP 138-155, Ex. A, ¶10.1) A primary issue to be arbitrated concerned Husband’s running of the parties business while their divorce was pending and his potential self-dealing. (CP 197-224)

The PSA required Husband to provide an accounting of the business to Wife within 30 days, and it was this accounting that would be the foundation document for Wife’s analysis of the business operations that would then be the subject of the arbitration. (CP 197-224) Husband

never provided the accounting. **(CP 197-224)** As a result of Husband's own failure to comply with the PSA, Wife's case could not be timely prepared and the arbitration could not go forward in the 90 days specified. **(CP 197-224)** Neither party raised the issue of the passing of the 90 days until the arbitrator ruled on the issues surrounding the sale of the commercial property located at 15 Ave NE. **(CP 197-224)** The parties were required by the PSA to sell certain properties and divide the proceeds. **(CP 197-224)** Husband refused to cooperate with the sale of one property (located at 15th Ave NE) requiring Mr. Besk ultimately to appoint a Special Master to sign the necessary real estate documents. **(CP 197-224)** As Wife filed her motion to have the arbitrator's ruling in this regard confirmed by the trial judge, The Honorable William Downing, Husband fired off a number of motions seeking the following relief: to stay entry of the arbitrator's order regarding appointment of the special master; to conduct a de novo review of the arbitrator's decision; to remove the arbitrator; and to vacate the PSA and dissolution decree. **(CP 36-55; 65-76; 138-155)** The primary basis asserted for the removal of the arbitrator was bias, incompetence, and collusion with opposing counsel. **(CP 36-55; 138-155)** The secondary basis was that the arbitrator had no authority to arbitrate the 14 enumerated issues in the PSA because 90 days had elapsed and the arbitration had not occurred. **(CP 36-55; 138-155)** Husband had previously raised this issue with the arbitrator; the arbitrator had determined that his authority had not terminated and that the

arbitration (of the 14 issues) could not be held until the accounting was completed. (CP 360-392)

Judge Downing scheduled oral argument on the motions filed by both sides due to the “troubling” accusations made by Husband’s counsel. The hearing was held on May 16, 2012. Judge Downing denied the relief sought by Husband, awarded the relief sought by Wife, ordered that Husband and his attorney, Tamara Chin (also his attorney in this appeal), had violated CR 11, and requested further briefing on attorney’s fees. (CP 451-452; 448-450)

Thereafter, Husband filed a Motion for Reconsideration with the court on May 30, 2012. (CP 473-477) This motion was bare bones and appeared to be only partially drafted. (CP 473-477) It contained no facts or arguments that were intelligible. This motion was not served on Wife or her counsel. To be timely, Husband’s brief needed to be filed by May 29, 2012. Thereafter, on June 1, Husband filed another Reconsideration brief that was, in fact a complete brief. (CP 480-495) It was in this second and untimely brief that Husband first raised the issue that he now relies upon: that Mr. Besk’s extending the period for the arbitration was an impermissible “modification” of the parties’ agreement. Wife objected to the late filed Motions for Reconsideration. (CP 496-539)

On June 19, 2012, Judge Downing denied the Motions for Reconsideration and awarded sanctions and attorney’s fees as a joint and several obligation of Husband and Ms. Chin. (CP 635-640) Judge Downing ruled that the motions seeking, *inter alia*, the removal of the

arbitrator were not “well grounded in fact and law” and were “interposed for an improper purpose” all in violation of CR11. **Id.**

III. ARGUMENT

A. Husband’s Appeal is Procedurally Flawed.

1. Husband’s Motion for Reconsideration Was Untimely Filed.

Pursuant to CR 59(b), “[a] motion for . . . reconsideration shall be filed not later than 10 days after the entry of the judgment, order, or other decision.” Under CR 6, entitled “Time,” in computing periods of time prescribed by the Court Rules, if a period of time is less than 7 days, one counts only Court/business days and not the weekends/holidays, but a period of time greater than 7 days is computed using all calendar days. The King County Local Court Rules relative to motions for reconsideration refer back to CR 59. *See* LCR 59 and LCR 7(b)(6).

Given the Court Rules governing Motions for Reconsideration, Husband’s Motion for Reconsideration of the May 16, 2012 hearing was due 10 calendar days from the date of the hearing, counting all days, not just business days. Ten calendar days ends on Saturday, May 26, 2012. Given Sunday and the Memorial Day holiday on Monday, the Motion needed to be filed by **no later than Tuesday, May 29, 2012.**

As noted herein, Husband’s Motion for Reconsideration was not filed until June 1, 2013. Based on the procedural defect of the Husband’s untimely filing and the lack of any substantive ruling on his untimely presented arguments, Husband’s requested relief on appeal should be rejected.

2. *Husband's Untimely Motion for Reconsideration Contained Improper Briefing*

In Husband's second, untimely filed Motion for Reconsideration, he raises for the first time on reconsideration, facts, legal arguments, and authority he never timely raised in the underlying motion, but which he certainly could have made. (CP 480-495)

For an issue to be preserved for appellate review, it must have been raised in a substantive fashion and adjudicated in the trial court. Absent any indication in the record that the husband advanced this particular claim at the trial court level, it cannot be considered on appeal. *Marriage of Studebaker*, 36 Wn. App. 815, 818, 677 P.2d 789 (1984); *see also* RAP 2.5(a); *Lindblad v. Boeing Co.*, 108 Wn. App. 198, 207, 31 P.3d 1 (2001) (declining to review issue, theory, argument, or claim of error not presented at the trial court). The purpose of this rule requiring preservation of error is to afford the trial court an opportunity to correct alleged errors, thereby avoiding unnecessary appeals and retrials. *Demelash v. Ross Stores, Inc.*, 105 Wn. App. 508, 527, 20 P.3d 447, *rev. denied*, 145 Wn.2d 1004 (2001).

Husband had ample opportunity to make his flawed arguments before the trial court in his underlying motions. Instead, he sought to present these new arguments for the first time in his untimely reconsideration request, presumably for the time-worn purpose of padding the court file for this appeal. Therefore, Husband should be excluded from presenting new, yet certainly available, evidence for the first time in his untimely Motion for Reconsideration which form the basis for this appeal.

CR 59 is clear that a motion for reconsideration is not an open invitation to reargue a case. No new evidence or arguments should be considered after conclusion of a trial/motion, except in limited and spelled out circumstances, none of which exist here. CR59. And the law is clear that post-decision, parties should not be given another opportunity to submit additional evidence that they simply neglected to present at trial. See e.g., *Meridian Minerals Company v. King County*, 61 Wash.App. 195, 810 P.2d 31 (1991).

3. *Husband's Errors Should be Rejected as They Are Raised For the First Time on Review*

RAP 2.5(a) states that an appellate court “may refuse to review any claim of error which was not raised in the trial court.” The application of RAP 2.5(a) is a matter of the reviewing court’s discretions. *Obert v. Envtl. Research & Dev. Corp.*, 112 Wn.2d 323, 333, 771 P.2d 340 (1989). This Court should employ RAP 2.5(a) to ignore any purported errors raised by Husband. The superior court record is clear. Husband’s Motion for Reconsideration which is the basis for the errors now asserted by the trial court, was untimely filed and violated CR59. **(CP 480-495)** Therefore, the issues and claims of error Husband pursues on appeal are ones that were not timely or properly raised below. Husband’s only *timely filed* Motion for Reconsideration was not *timely served* upon Wife. Therefore, the errors raised by Husband in his appeal are raised for the first time on review. His request for review should be denied and the trial court’s ruling affirmed.

B. Husband's Appeal is Substantively Flawed.

Husband's appeal also fails on substantive grounds. Pursuant to Washington Law, the arbitrator has the authority to decide allegations of waiver, delay, or other defenses to the arbitrability of a contract. Furthermore, the Husband's arguments that the trial court and/or the arbitrator changed or otherwise modified the PSA fails because the PSA was neither changed nor modified.

1. The Arbitrator Has Authority to Decide Allegations of Waiver, Delay, or Other Defenses to Arbitrability

Husband claims that the arbitration provision in Section VIII of the PSA is effectively void and Mr. Besk has no further authority to arbitrate the enumerated 14 issues because the intended arbitration did not occur within 90 days. He makes this claim despite the fact that ¶10.1 of the PSA grants the arbitrator authority to arbitrate all issues relative to the PSA. In other words, the Husband claims that the right to arbitration under Section VIII of the PSA is now waived.

Husband's argument fails because pursuant to the U.S. Supreme Court and under Washington law, the arbitrator has the authority to decide questions of procedural arbitrability. As stated by the U.S. Supreme Court in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S. Ct. 588, 154 L.Ed.2d, 491 (2002), the question of whether a time limitation for arbitration contained in the arbitration agreement had expired was a question for the arbitrator to decide. In the *Howsam* matter, the issue was

whether lack of compliance with a six-year arbitration time limit negated the agreement to arbitrate. *Id.* Division I of the Washington Court of Appeals stated that issues “concerning the procedural prerequisites to arbitration,” should be resolved by the arbitrator. *Heights at Issaquah Ridge, Owners Association v. Burton Landscape Group, Inc.*, 148 Wash.App 400, 405-406, 200 P.3d 254, 257 (2009), *citing Yakima County Law Enforcement Officers Guild v. Yakima County*, 133 Wash. App. 281, 287-288, 135 P.3d 558 (2006)(*internal references omitted*). Specifically, “[t]he arbitrator should decide “allegations of waiver, delay, or a like defense to arbitrability. *Id.*

In *Heights*, the sole issue before the court was whether there was a valid present agreement to arbitrate where there was a 21-day notice requirement in the contract for the enforceability of the arbitration clause, and the time frame of the notice requirement was allegedly not met. *Id. at 404, 256.* The Appellate Court, Division I, found that the plain language of the contract showed the parties clear intent to submit all disputes relating to the contract to arbitration. *Id. at 407, 257.*

Moreover, the court found, citing *Zuver v. Airtouch Commc'ns, Inc.*, 153 Wash.2d 293, 301, 103 P.3d 753 (2004) (*internal citations omitted*): “[c]ourts must indulge every presumption in favor of the arbitration, whether the problem at hand is the construction of the contract

language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Id.* A defense to the arbitrability of an issue is a procedural matter concerning the merits of a particular matter and should be decided by the arbitrator. *Id.* at 258, 407. If the reviewing court “can fairly say that the parties’ arbitration agreement covers the dispute, the inquiry ends because Washington strongly favors arbitration.” *Davis v. Gen. Dynamics Land Sys.*, 152 Wn.App 715, 718, 217 P.3d 1191 (2009); *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn.App. 446, 454, 45 P.3d 594 (2002). Any doubts regarding the applicability of the arbitration agreement “should be resolved in favor of coverage.” *Heights*, 148 Wn.App at 405 (citing *Peninsula Sch. Dist. No. 401 v. Pub. Sch. Emps. of Peninsula*, 130 Wn.2d 401, 413-14, 924 P.2d 13 (1996)). This very holding was confirmed by Division I of this court on February 25, 2013 in *In re Marriage of Pascale*, 68103-6 (Wash.App. Div. I Feb 25, 2013).

The ruling in *Heights* is applicable in the Hendrickson matter where we have a PSA which, on its face, shows the parties’ clear intent to arbitrate all issues relative to the agreement. See ¶10.1 of the PSA. Husband’s argument that the delay in the arbitration beyond the expected 90 days extinguished the arbitrator’s authority to resolve the enumerated 14 issues is without merit.

Consistent with *Heights*, this is a procedural issue that should be

decided by the arbitrator. In this case, the arbitrator decided this issue and ruled he had ongoing authority to resolve all issues in the PSA, including the enumerated 14 issues, once the prerequisite accounting was completed. The trial court confirmed this ruling. This court should affirm.

2. *Husband's Appeal Serves to Further an Improper Purpose*

The litigation between Husband and Wife has been exceedingly contentious, made even more so by the fact that Husband and his counsel, Tamara Chin, are romantically and sexually involved. Judge Downing stated in his June 2012 Order that Husband was “simply a disgruntled litigant”, but he stated:

An attorney, on the other hand, acting as a professional and lacking the direct personal interest of the litigant should bring a capacity for objective judgment to his or her job. It is one thing for a client to mutter a scurrilous allegation; it is quite another for that allegation to become enshrined in a publicly filed legal pleading signed by a member of the bar.

(CP 635-640)

And further, in a footnote to the June 2012 Order, Judge Downing stated:

The Court is constrained to note its earlier rejection of a motion to disqualify respondent's counsel due to her personal relationship with her client, a situation with the potential to interfere with her professional duties.

(CP 635-640)

The trial court understood what was going on in this case with the motions filed attempting to halt the sale of real property and have the

arbitrator (Mr. Besk) removed from this case, having entered rulings to which Husband objected. In his June 2012 Order, Judge Downing found the following:

The respondent, Mr. Hendrickson, and his counsel have at no time presented any actual evidence to support the requested findings of “collusions,” “financial liaisons,” “self-dealing” and “bias.” The Court would categorically reject any suggest that circumstantial evidence is adequate to support respondent’s accusations . . .

(CP 635-640)

Judge Downing further found:

Having reviewed all the materials put before the Court, including the respondent’s Motion for Reconsideration, the Court would now find that the respondent’s counsel violated CR11 in certifying that the affirmative motions to vacate and to remove were well grounded in fact and law and were not being interposed for an improper purpose. Accordingly, imposition of a sanction is appropriate to deter those now before the Court and other from making such baseless filings.

(CP 635-640)

As a result, the trial court ordered sanctions against Husband and his attorney in the amount of \$6,200 (payable to Wife and to the arbitrator). **(CP 635-640)** Husband is now perpetuating this bad behavior to this court by attempting to appeal orders on motions not filed in compliance with the court rules (CR59) and not timely filed. Husband should not be allowed to continue to bully, intimidate and drain the resources of Wife. He should get no further with this appellate court than he got with Judge Downing and the arbitrator, Lawrence Besk.

3. *The Court has Statutory Authority to Extend the Power to Arbitrate*

Pursuant to RCW 7.04A.190, when a specific time period is identified to issue an arbitration ruling and that time period passes, the parties either have to agree to a new time period or seek a court order to extend the time period. Although the facts in Hendrickson are not identical to the situation contemplated by RCW 7.04A.190, the situations are similar and the reasoning of the statute should be applied by analogy. In this case, a specific time period was identified to hold an arbitration. That time period passed due to the conduct of the Husband. After creating the delay, the husband then tried to take advantage of the delay, by getting rid of the arbitrator who had by that point ruled against him on other issues. The court had the authority to extend the deadline to arbitrate so that the parties' intentions to resolve their issues in arbitration were not frustrated.

4. *The Property Settlement Agreement Has Not Been Modified*

On appeal, Husband argues based on the false premise that the PSA has been modified by the trial court or by the Arbitrator, which it has not. This is the argument Husband first made in his untimely filed and improperly asserted Motion for Reconsideration.

Based solely on ¶10.1 of the PSA, Mr. Besk's authority to arbitrate all issues under the PSA, including the 14 enumerated issues in Section VIII, is ongoing. (CP 138-155, Ex. A, ¶10.1) The fact that the arbitration has not concluded in 90 days as expected by the parties is due solely to the actions of the Husband and should have no effect on the ongoing jurisdiction of Mr. Besk. As discussed herein in Section B.1. of this brief,

on February 25, 2013, Division I of this court in *In re Marriage of Pascale*, 68103-6 (Wash.App. Div. I Feb 25, 2013) found that if the court can fairly say that the parties' arbitration agreement covers a particular dispute, then arbitration is required because Washington strongly favors arbitration. And that any doubts regarding the applicability of an agreement to arbitrate should go in favor of arbitration. *Id.* To do so is not a modification of the agreement to arbitrate.

The Hendrickson matter is analogous to the dispute in *Pascale*. In both cases there exists a broad grant of authority to arbitrate all disputes incident to a settlement agreement. Consistent with *Pascale*, this court should confirm the trial court's ruling.

1. Clarification Would Be Appropriate, Though Unnecessary

As detailed in this brief, there have been no modification of the PSA. Similarly, there has been no need to clarify the PSA. Regardless, if this court finds that the trial court made any adjustments to the PSA, those adjustments are limited to clarifications, not modifications.

The trial court may clarify an agreement to spell out rights already given. *Rivard v. Rivard*, 75 Wash.2d 415, 418, 451 P.2d 677 (1969). The trial court here, at most, simply clarified the PSA to confirm the fact that the arbitration provision in ¶10.1 of the PSA (granting broad arbitration power) supersedes the provision in Section VIII (granting narrower arbitration power). This is perfect example of a clarification. Consistent with the court's finding in *In re Marriage of Pascale*, 68103-6 (Wash.App. Div. I Feb 25, 2013), any doubts regarding the applicability of

an agreement to arbitrate should be go in favor of arbitration. In the Hendrickson matter we have a clear grant of authority to arbitrate all issues incident to the PSA. The trial court ruled that the PSA requires arbitration of the 14 issues in the PSA. This court should confirm.

5. *Other Arguments from Appellant are Non-Instructive*

Section “C” of Husband’s briefing contains a mish-mash of legal arguments, some with legal authority and some without. These varied arguments are non-instructive to the court as discussed below.

The Hendrickson matter is distinguished from the cases cited by Husband in Section C of his brief by the facts alone. Each of the cases offered by Husband is instances where a dispute has arisen regarding the interpretation of one provision in a contract. In this matter, there are two separate provisions, one of which grants the arbitrator broad encompassing authority, and one which grants the arbitrator limited authority. In reconciling these two provisions, the court must interpret the settlement agreement as a whole; specific provisions may not be ignored in favor of others. *Wagner v. Wagner*, 95 Wn.2d 94, 101, 621, P.2d 1279, 1283 (1980). As a whole and reading the two arbitration provisions in the Hendrickson agreement together, the court should find that the broader grant of authority encompasses and expands the narrower grant.

Similarly, *S.J. Agnew v. Lacey Co-Ply*, 33 Wash.App. 283, 654 P.2d 712 (1983) is also distinguishable on the facts alone. In that case, the question was whether an arbitration clause that included a mandatory award of attorney fees to the prevailing party could be altered by the

arbitrator. *Id at 288, 715*. In that case there was only one provision at issue and the provision itself contained the language “shall be entitled.” In the Hendrickson matter, the phrasing of the narrow arbitration power included direction that the 14 enumerated issues “**will** be arbitrated by Lawrence Besk within ninety (90) days . . . ” This is in stark contrast to the language in the following sentence which uses the word “shall” when requiring that each party have access to, store, and produce various records. The word “shall” is understood to be mandatory, not permissive in contracts. *Id at 289, 715 (internal citations removed)*. The word “will,” as used in the Hendrickson PSA, should be distinguished from “shall” since, based on the face of the agreement alone, the parties’ differentiated between the obligations to arbitrate the issues within 90 days (“will”) which depended on numerous outside factors, including the parties’ obligations, the arbitrator’s availability, etc., and the obligation of the parties themselves (“shall”) to follow the terms of the agreement. In this case the “will” should be read to be an expectation, rather than a requirement. That expectation would be subject to interpretation and enforcement in arbitration pursuant to the broad arbitration power granted in Paragraph 10.1.

C. Husband Intentionally Delayed the Arbitration and Now Seeks to Avoid Arbitration based on His Own Delay

The sole reason the arbitration on the outstanding 14 enumerated issues did not occur within 90 days is due to husband’s obstreperous behavior, the sort of which is obvious from the underlying Motions. **(CP 36-55; 65-76; 138-155)** His actions there, as well as here, are

interposed solely because husband wished to escape the clear terms of the PSA. The arbitrator did not allow that to occur, the trial court did not allow that to occur, and this court should not allow it to occur.

The Husband's failed to comply with the terms of the PSA relative to the intended arbitration within 90 days. The PSA required Husband to provide accountings of the businesses that he operated and to timely provide business records to Wife so that she could create her own accounting. Husband's duties to provide these items was a necessary precursor before any arbitration could occur to resolve the financial issues. Were an arbitration to have occurred without the accounting and the documents, Husband would have been rewarded for his failure to comply with the agreement and his obfuscation techniques. The arbitrator refused to do this, wanting instead to decide the case on its merits, based on his ongoing authority over all issues relative to the PSA.

Husband caused the delay which made it impossible to arbitrate the outstanding 14 issues within 90 days. He should be denied his latest attempt to use his own breach and delay to remove Mr. Besk as arbitrator.

D. Husband Provides No Reasonable or Equitable Remedy

Husband's appeal provides no reasonable or equitable remedy should this court find that the arbitrator has no authority to decide the 14 enumerated issues. If the issues cannot be arbitrated, how are the issues resolved? Would jurisdiction return to the King County trial court and to Judge Downing for trial over the unresolved issues in the dissolution? If

not that, then what? Do the issues remain unresolved in perpetuity? May either party file a separate action?

If the court effectively voids the arbitration provision, it will leave a rat's nest of issues to untangle. Mr. Besk was named as arbitrator to resolve all of these issues. He understands the factual and legal background necessary to resolve all further issues as originally contemplated by the parties. To send these issues elsewhere is contrary to the parties' intent in their negotiated settlement.

E. This Court Should Award The Wife Attorney Fees.

This court should award the wife her attorney fees. This court has discretion to award attorney fees after considering the relative resources of the parties and the merits of the appeal. RCW 26.09.140; *Leslie v. Verhey*, 90 Wn. App. 796, 954 P.2d 330 (1998), *rev. denied*, 137 Wn.2d 1003 (1999). The underlying order which Husband now appeals included sanctions against husband and his attorney because the motion was brought for an improper purpose. Husband continues his improper purposes, which include guardianship and other actions now brought in Snohomish County, through this appeal. He should not now be rewarded.

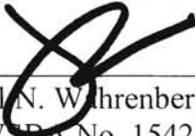
Moreover, this court should award attorney fees to the wife because she has the need for her fees to be paid and the husband has the ability to pay. RAP 18.1; RCW 26.09.140 (court may award fees considering the financial resources of the parties on any appeal).

IV. CONCLUSION

This court should affirm the trial court's fact-based discretionary decisions challenged by the husband on appeal, and award attorney fees to the wife for having to respond to his appeal.

Dated this 21st day of February, 2013.

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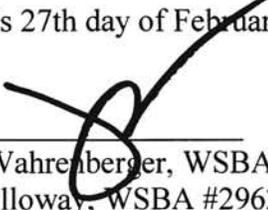
CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 27th Day of February 2013, I caused a true and correct copy of the foregoing Brief of Respondent/Wife to be mailed first class, postage pre-paid to the following counsel of record:

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Dated this 27th day of February, 2013, at Seattle, King County, WA.

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