

NO. 37092-1-II

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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S & S CONSTRUCTION, INC.,

Appellant,

v.

ADC PROPERTIES, LLC,

Respondent.

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**RESPONSE BRIEF OF ADC PROPERTIES, LLC**

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## I. INTRODUCTION

The trial court's Order Granting Motion to Confirm Arbitration Award and Denying Motion to Vacate Award entered on November 9, 2007 should be upheld. The arbitration award in the dispute between S&S Construction, Inc. ("S&S") and ADC Properties LLC ("ADC") should be confirmed because the timing of the award does not violate applicable law, the parties consented to the timing of the award and all relevant disclosures concerning the arbitrator were made nearly 85 days before the arbitrator's decision, without objection or question by S&S.

On June 25, 2007, the arbitrator rendered his decision in a detailed, 19-page memorandum in which he carefully considered the testimony of eleven witnesses and experts (*see* CP 30) and nearly 150 exhibits (comprising 500-1,000 pages of documents), including photograph exhibits, video footage, blueprints, schematics and demonstrative exhibits (*see* CP 285-86). Although this decision came 85 days after the conclusion of the hearing, the parties had asked for a reasoned, explained decision rather than a simple one-sentence award without explanation, which was likely to take longer to prepare. While it awaited the decision, S&S raised no objections to the potential for delay, nor did it advise the arbitrator that it expected the award to be rendered strictly within 30 days. Indeed, during the same 85-day time period, S&S asked the trial court to

extend the trial court's pending case schedule "to allow the arbitrator to render an arbitration award," undoubtedly in the hopes that the award would favor S&S. (CP 4-5; CP 11-12). It was only after the arbitrator rendered his 19-page decision—which S&S did not like—that S&S then resorted to complaining about the arbitrator's timing and disclosures.

The relevant, required disclosures concerning the arbitrator were also timely made. S&S concedes that long before the selection of the arbitrator, ADC's counsel informed S&S's counsel that he had conducted mediations with Mr. Cogan in the past. Mr. Cogan disclosed that 25 years ago he was an associate at a predecessor law firm of Davis Wright Tremaine LLP ("DWT") but left long before ADC's counsel started with that firm in a different office. Finally, S&S also acknowledges that it knew by the end of the arbitration hearing the Arbitrator had previously arbitrated a case years ago in which ADC's counsel represented another party. Because S&S failed to object at anytime during the 85-day period between the conclusion of the arbitration hearing and the decision of the arbitrator, it cannot now complain of the disclosures. Moreover, there is no absolutely no evidence of partiality in the 19-page decision.

Only after the arbitrator rendered his decision did S&S then file one post-arbitration submission after another, objecting to the merits of the decision, the timing of the decision and the impartiality of the arbitrator.

S&S argued for the next three months that portions of the arbitration should be reversed. Ironically, the arbitrator eventually did reverse certain rulings to the favor of S&S in a post-arbitration decision. S&S made no objection to that decision of the arbitrator. S&S continued its belated complaints about the arbitrator in its motion to the trial court to vacate the award. The trial court carefully considered these complaints, concluding that each could and should have been made much earlier in the proceedings, and that S&S's complaints thus had no merit due to its failure to raise the issues much earlier.

As the trial court determined, S&S's complaints about the Arbitrator were made far too late. In addition, S&S failed to meet its burden of proving partiality. Thus, S&S has had its day in court, and more. The trial court properly rejected its challenge to the arbitrator's decision, and the trial court decision should be upheld on appeal.

## **II. ISSUES**

1. Whether the trial court correctly concluded that Appellant's failure for over 85 days to pose any objection to the delay of the Arbitrator's decision ruling beyond 30 days after the end of the arbitration renders Appellant's objections to the delay untimely.

2. Whether the trial court correctly concluded that the long ago employment of the Arbitrator with the law firm now employing Respondent's counsel was not a ground to question the Arbitrator's impartiality.

3. Whether the trial court correctly concluded that the mere fact that the Arbitrator had conducted some other arbitrations where one party was represented by Respondent's counsel did not, alone or in combination with other facts, constitute grounds to question the Arbitrator's impartiality.

4. Whether the trial court correctly concluded that the fact that one of the owners of Respondent ADC Properties, Inc. had previously participated as an individual in the unsuccessful mediation of an unrelated dispute was not a "relationship" that affected the Arbitrator's impartiality.

5. Whether Appellant's arguments concerning the merits of the arbitration award must be rejected because there is no basis to consider them under RCW 7.04A.230 and RCW 7.04A.280.

### **III. STATEMENT OF THE CASE**

#### **A. Parties and Construction Dispute.**

The underlying case involves a construction contract dispute between S&S, a construction contractor, and ADC, a single-purpose entity formed to build a dental clinic in Puyallup. CP 28-29. The dispute arose

out of S&S's September 2005 promise in a contract addendum to complete unfinished construction on the dental clinic by November 30, 2005 for a lump sum price of \$240,000 plus sales tax. CP 32; CP 222. ADC paid S&S over \$239,000<sup>1</sup>; however, construction was not finished by the completion date, and ADC contended the billings exceeded the amount owed. CP 32-36. S&S filed a lawsuit in state court claiming that it had not been paid all contract amounts and change orders. CP 369-75.

**B. Alternative Dispute Resolution Procedures.**

Although S&S commenced a state court action, the parties' contract was governed by a dispute resolution clause that required the parties to follow the following steps in the event of a dispute under the contract: first, engage in direct settlement discussions; second, engage in mediation; and third, arbitrate, if necessary. CP 414 ¶ 12.2-12.4; CP 389. Consequently, the disputes were referred to mediation and arbitration by the trial court. CP 3. The arbitration clause of the parties' agreement required the parties to file requests for mediation and claims for arbitration with the American Arbitration Association<sup>2</sup> ("AAA"). CP 414; CP 389.

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<sup>1</sup> In addition, ADC contends that it has paid an additional \$68,000 to subcontractors who have filed liens on ADC's dental office building when these subcontractors were not paid by S&S. CP 83; R. Farren Decl. ¶ 9.

<sup>2</sup> See [www.adr.org](http://www.adr.org)

Instead, the parties varied from this procedure, selecting their own mediators and arbitrators by mutual agreement. *See* CP 467-69.

S&S was represented by Jami K. Elison of Marson Elison PLLC; ADC was represented by Rhys M. Farren of DWT. In the course of considering potential mediators, ADC's counsel sent an email on October 13, 2006 to S&S's counsel, informing him that "I have used Stew Cogan for mediations. He's popular, expensive and hard to schedule, but he's very effective." CP 271. The parties instead agreed to use Joseph Calmes as their mediator. CP 467-69. A mediation was scheduled but Mr. Calmes's scheduling conflict required that he back out. CP 474, 478. S&S's counsel then demanded to proceed immediately to arbitration, and he proposed five potential arbitrators, including Stew Cogan. CP 480.

After an unsuccessful mediation with Mr. Calmes toward the end of January 2007<sup>3</sup>, Mr. Cogan was asked to serve as arbitrator in February 2007 (*see* CP 105) and the case was quickly set for arbitration pursuant to a court order requiring arbitration prior to March 30, 2007. CP 3. S&S objected to any continuance of the March 30 deadline, which put both parties and the Arbitrator on a tight timeline.

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<sup>3</sup> Mr. Calmes cancelled the first scheduled mediation due to an unexpected conflict. *See* CP 478; CP 474. The mediation date was rescheduled for a time in January 2007.

**C. The Arbitration Hearing.**

The arbitration hearing began March 27, 2007 in a conference room at DWT. CP 30. One of the two principal owners of ADC, Dr. Chan Han, recalled and described in detail the disclosures made by the Arbitrator the morning the arbitration hearing commenced. CP 238-241. When Dr. Han arrived and entered the conference room where the arbitration was held that morning, Dr. Han saw Mr. Cogan at the end of the table closest to the coffee/beverage station. CP 239 ¶ 5. He also saw Mr. Elison and Mr. Heilman (officer of S&S) in the room, and describes where each was standing, as well as the position in the room of the other witnesses present. *Id.* Dr. Han's awareness of the morning's events was heightened because this was his first experience with an arbitration proceeding or trial. CP 239 ¶ 5.

Mr. Cogan then noticed Dr. Han, acknowledged him and indicated his recollection that he had in the past conducted a mediation in an unrelated case where Dr. Han was a participant. CP 239. Dr. Han recalls:

I walked up and introduced myself to [Mr. Cogan] and reminded him that he had mediated a case for me . . . . At that point, Mr. Cogan remembered the case and stated that case was one of "very few that he could not resolve." I do not know whether he remembered our mediation before he saw me; however, there is no doubt in my mind

that upon seeing me Mr. Cogan recognized me and that his recognition of me also triggered his recollection of the prior mediation. Mr. Elison and Mr. Heilman were close enough to be able to hear everything that Mr. Cogan and I said to each other.

CP 239 ¶ 6. Dr. Han also remembered discussing where at table the parties at the arbitration would sit. *Id.*

Dr. Han also recalled specifically what the Arbitrator said next:

After we were all seated, Mr. Cogan introduced himself to everyone as the arbitrator and then he explained his role. He said that he had to state as a disclaimer that he worked for DWT a long time ago before Mr. Farren began working for DWT<sup>4</sup>, which Mr. Cogan said would have no bearing with this case and that he would be impartial. Continuing on, he also stated that he had mediated and arbitrated some cases with Mr. Farren<sup>5</sup> but not with Mr. Elison. Because Mr. Cogan had just recognized me and remembered our mediation before we all sat down, he also said to everyone present that he recently mediated a case that involved me<sup>6</sup>, and that I was also

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<sup>4</sup> Mr. Cogan was employed as an associate at one of DWT's predecessor law firms, Davis, Wright, Todd, Riese & Jones, from June 1976 to September 1978 and from April 1979 through September 1981. CP 180 n.3. Mr. Cogan left DWTR&J at least nine years before ADC's counsel began working at DWT in 1990. See CP 292 n.10.

<sup>5</sup> ADC's counsel recalled only one prior arbitration with Mr. Cogan serving as arbitrator, occurring approximately seven years ago. CP 315.

<sup>6</sup> Counsel for ADC also submitted a detailed explanation of the facts and circumstances surrounding this prior mediation. See CP 243-71. It was well known to S&S and its counsel that ADC's counsel used Mr. Cogan on other mediations. CP 245 ¶ 7. In one mediation, Dr. Han was involved. In that prior case, *Virk v. Han*, opposing counsel recommended using Mr. Cogan to mediate the dispute. CP 244 ¶ 4. *Virk v. Han* did not involve the Puyallup dental office building or partnership. CP 244 ¶3. Opposing counsel

represented by Mr. Farren in that mediation, but that the prior mediation with me would have no bearing on this arbitration since it was unrelated and dealt with different matters. Mr. Cogan reiterated that he would be impartial.

CP 240 ¶ 9.

At that point, the Arbitrator asked if anybody had any questions regarding his previous involvements with DWT or other cases. CP 241. No one spoke. *Id.* Then he asked if anybody had any questions regarding the proceedings about the arbitration. *Id.* Again, no one spoke. *Id.* Finally, the Arbitrator asked Mr. Elison to give plaintiff's opening statement. *Id.* During the entire arbitration, neither S&S nor its counsel objected on the basis of the disclosures made or asked any questions.

S&S acknowledges that certain disclosures were made prior to the conclusion of the arbitration hearing. First, Mr. Elison does not dispute that *prior* to the arbitration, ADC's counsel disclosed that he had mediated with Mr. Cogan previously. CP 171. Mr. Elison also concedes that *prior* to the arbitration, the Arbitrator disclosed prior mediations with ADC's counsel. CP 171 ¶ 3; RP 16:9-12 ("I knew that Mr. Farren and Mr. Cogan

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in that case also confirmed that there was no connection between the facts in that case and the present dispute between ADC and S&S. CP 245 ¶5, *Ex. D.* Thus, the S&S v. ADC case was completely unrelated to the *Han v. Virk* case, Dr. Han had no "relationship" with Mr. Cogan, and there were no facts supporting a claim of partiality as a result of this prior mediation. CP 245. Dr. Han testified that Mr. Cogan mentioned an unrelated mediation involving Dr. Han at the outset of the arbitration hearing. CP 240.

knew each other, had done mediations,”). Mr. Heilman testified that during the Arbitrator’s opening remarks, “[Mr. Cogan] stated that he knew Rhys Farren but had never worked with Mr. Elison before.” CP 175 ¶ 5. Mr. Heilman also testified that he concluded at the end of the hearing that the Arbitrator and ADC’s counsel had arbitrated before because he heard Mr. Cogan compliment ADC’s counsel by saying “well done, ‘as always’.” CP 173 ¶ 2.<sup>7</sup> Mr. Heilman also heard the ensuing conversation—that Mr. Cogan was not clear on how many arbitrations he had with Mr. Farren, but that Mr. Farren corrected him. CP 173-74. Mr. Elison concedes that he learned that Mr. Cogan previously worked for DWT “during the evidentiary hearing.” CP 171 ¶ 4.

The Arbitrator noted Mr. Heilman’s statement that Mr. Cogan disclosed at the outset that “he knew Mr. Farren,” but expressed confidence that his disclosures were much more detailed than that. CP 180 n.4. Mr. Cogan said that disclosures in some form were made both to lawyers at the first telephone conference and to all participants present at the commencement of the arbitration hearing. CP 178 n.1. Mr. Cogan also noted that it would be entirely inconsistent with his practice to disclose that he had worked as a mediator for one counsel (as is

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<sup>7</sup> ADC’s Counsel also recalls Mr. Cogan complimenting Mr. Elison on his trial performance. CP 315.

undisputed) but not disclose that he had also served as an arbitrator as well. CP 178 n.1; CP 180.

**D. S&S's Conduct After The Conclusion of The March 27-April 5 Hearing and After Learning of The Disclosures.**

The arbitration hearing concluded on April 5, 2007. CP 30. The parties had requested a “reasoned decision” from the Arbitrator rather than a simple statement of an award number. RP 6:5-8; CP 82; CP 285; CP 288; Second Suppl. CP, at 2.

One month after the arbitration hearing, the parties had not received a decision from the arbitrator. On May 3, 2007, S&S and ADC signed a Stipulation and Order Continuing Trial Date that was entered by the trial judge. CP 4-10. In this first Stipulation—made 28 days after the conclusion of the arbitration—S&S agreed that the pending trial date should be continued to June 6 “to allow time for the arbitrator to render an arbitration award.” CP 5. S&S made no objection to either the timing or the disclosures.

Nearly two months after the arbitration hearing, the parties had still not received a decision from the arbitrator. On June 6, 2007, S&S and ADC signed a *second* Stipulation and Order Continuing Trial Date that was also entered by the trial judge<sup>8</sup>. CP 11-17. In this *second*

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<sup>8</sup> At one of these hearings, counsel for both parties discussed whether they needed to contact the arbitrator’s office to see whether it would be appropriate for both parties to

Stipulation—made 62 days after the conclusion of arbitration—S&S represented and agreed that the pending trial date should be continued, this time to July 26, “to allow time for the arbitrator to render an arbitration award.” CP 12. S&S made no objection to either the timing of the decision or the disclosures.

On June 25, 2007, the Arbitrator rendered his decision in a 19-page memorandum (the “Memorandum Decision”). CP 28-47. As of this date—a full 85 days after the date of the arbitration hearing—S&S had not objected to either the timing of the decision or the disclosures made at or before the conclusion of the arbitration hearing.

In the Memorandum Decision, the Arbitrator carefully considered each of the eleven witnesses and experts who testified (*see* CP 30), as well as the introduction of nearly 150 exhibits (comprising 500-1,000 pages of documents), together with photograph exhibits, video footage, blueprints, schematics and demonstrative exhibits (*see* CP 285-86). The Arbitrator found in favor of S&S on its claims but did not award all damages

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submit any additional summaries (which might also prompt the arbitrator to conclude the arbitration decision). CP 316 ¶ 10. ADC’s counsel’s office contacted Leslie Lamb, Mr. Cogan’s assistant for this purpose. *Id.* No contact was made directly with the arbitrator. *Id.* Ms. Lamb responded in a return message that no further submissions were necessary. *Id.* This communication is also described in a response by the Arbitrator in a letter, dated August 28, 2007, in which he carefully addresses the late accusations regarding the Arbitrator’s integrity and notes that the Arbitrator had *ex parte* scheduling communications with both counsel’s offices, the communication described above, and in exchanging pleasantries from time during the course of the hearing. CP 219-20. The Arbitrator confirmed that there were no *ex parte* communications where any issue of substance was discussed. CP 220.

requested. *Id.* The Arbitrator also found in favor of ADC on some of its construction defect claims. *Id.*

After receiving the Memorandum Decision, S&S's counsel objected to the timing and disclosures for the first time on June 29, 2007—four days after the date of the Memorandum Decision and 89 days after the conclusion of the arbitration hearing. CP 138. S&S's objection took the form of a two page paper entitled "Objection" that S&S's counsel sent to the trial court file but did not note for hearing. *See id.*

Over the next two months, S&S proceeded to re-argue the merits of the case decided in the Memorandum Decision. Between June 29, 2007 and September 28, 2007, S&S submitted a series of letters demanding that the Arbitrator reconsider his decision, enter other relief in S&S's favor, or withdraw<sup>9</sup>. *See* CP 197 (summary of post-hearing submissions). The Arbitrator responded carefully and deliberately to each of S&S's objections regarding timeliness and disclosures. CP 177-83; CP 196-201. On September 28, 2007, the Arbitrator adjusted certain of his decisions in

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<sup>9</sup> In one letter, dated August 14, 2007, S&S argued that "R-18 expressly provides a disqualification remedy within the arbitration forum. When an arbitration proceeding is administered by the AAA, disqualification decisions are made by AAA, either upon its own initiative or the objection of a party. R-18(b)." CP 164. S&S did not avail itself of the AAA or request disqualification from the AAA pursuant to R-18 at anytime during the three-month period prior to entry of the Arbitration Award on September 28, 2007 or the subsequent confirmation of the Arbitration Award on November 9, 2007.

S&S's favor and directed that an award be prepared for his signature. *See* CP 196-201.

The Arbitrator signed an Arbitration Award on September 28, 2007, which award was filed with the trial court on October 26, 2007. CP 60-64. He awarded S&S \$161,678.60 on its claims against ADC, and he awarded ADC \$113,429.42 on its claims for construction defects against S&S. CP 63. ADC filed a Motion to Confirm Arbitration Award, which S&S opposed. CP 81-85. S&S also filed a separate Motion to Vacate Arbitration Award. S&S objected on the basis of timeliness of the Memorandum Decision and Arbitration Award and the alleged lack of disclosures. The trial court considered, and rejected, these arguments, and entered an Order Granting Motion to Confirm Arbitration Award and Denying Motion to Vacate Award on November 9, 2007, which decisions are the subject of this appeal. CP 352-55.

#### IV. ARGUMENT

##### A. Review of the Trial Court's Order is Governed By RCW 7.04A.

Arbitration in Washington is a statutory procedure governed by the Washington Uniform Arbitration Act, RCW 7.04A ("the Statute"); and judicial review of arbitration awards is strictly limited to the grounds set forth in the statute. *Northern State Constr. Co. v. Banchemo*, 63 Wn.2d

245, 249, 386 P.2d 625 (1963); *Barnett v. Hicks*, 119 Wn.2d 151, 156-57, 829 P.2d 1087 (1992).

A trial court may only vacate, modify or correct an award on the grounds enumerated by the Statute, and only where such grounds appear on the face of the award. *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 402, 766 P.2d 1146 (1989); RCW 7.04A.230-240. The only grounds for appeal of a trial court order also are enumerated in the Statute. RCW 7.04A.280; *Barnett*, 119 Wn.2d at 157.

Appellate review is limited to review of the decision of the trial court confirming the award. *Expert Drywall, Inc. v. Ellis-Don Const., Inc.*, 86 Wn.App. 884, 888, 939 P.2d 1258, *rev. denied* 134 Wn.2d 1011, 954 P.2d 276 (1997). Appellate review is further limited to whether statutory grounds exist to vacate the award, regardless of whether there were any violations of the rules of the American Arbitration Association. *St. Paul Ins. Companies v. Lusic*, 6 Wn.App. 205, 208, 492 P.2d 575 (1971), *rev. denied*, 80 Wash.2d 1009, (1972). The burden of proof is on the party seeking to vacate the award. *Schreifels v. Safeco Ins. Co.*, 45 Wn.App. 442, 445, 725 P.2d 1022 (1986).

**B. Exceeding the Time Period for Issuance of the Arbitrator's Decision in the AAA Construction Industry Arbitration Rules is Not Grounds for Vacating an Arbitration Award under Ch. 7.04A RCW.**

Appellant's claim that the Arbitrator's failure to render a decision within 30 days of the conclusion of the arbitration trial deprived the Arbitrator of jurisdiction over the matter must be determined, if at all, under RCW 7.04A.230(1)(d), which allows an arbitration award to be vacated if the arbitrator exceeded his powers. Although Appellant urges that the award should have been vacated for failure to adhere to the 30-day decision time frame described in AAA Construction Industry Arbitration ("AAA-CIA") Rule R-42, Appellant has cited to no provision of the Statute requiring an award within 30 days, nor to other authority which would support its claim that the AAA-CIA timeframe rule controls. Indeed, the available authority supports only the conclusion that the trial court properly rejected this claim.

In *Beroth v. Apollo College*, 135 Wn.App. 551, 145 P.2d 386 (2006), a case cited by Appellant, Division III of the Court of Appeals affirmed a trial court's denial of a motion to vacate an arbitration award, finding that there was no basis in the Statute to disturb the award. In reaching its decision, the court declared:

Arbitration is favored in Washington as an expeditious means of resolving conflicts

without involvement of the courts....It is designed to settle controversies, not to serve as prelude to litigation....Judicial review of an arbitration decision is entirely statutory....*While an arbitration agreement may control what issues are to be arbitrated, once the issues are submitted to arbitration, the proceeding itself is governed by statute.*

135 Wn.App. at 557 (emphasis added) (internal citations and quotation omitted). Appellant seeks on this appeal to elevate what is essentially a procedural rule of the American Arbitration Association (“AAA”) to the status of controlling authority that Appellant would have trump the provisions of the Washington Uniform Arbitration Act. Washington courts do not accord this status to AAA rules. *St. Paul, id.*; *see also, Godfrey v. Hartford Casualty Ins. Co.*, 142 Wn.2d 885, 897, 897 n.8, 16 P.3d 617 (2001) (litigants cannot create their own boundaries of review; parties to arbitration agreement cannot fundamentally alter provisions of Statute.) Although Washington courts may consider the provisions of relevant AAA rules in the course of interpreting the Statute, any decision concerning whether grounds to vacate an arbitration award must be made based only upon the Statute. *St. Paul, id.* at 208-09; *Godfrey, id.*

AAA-CIA rule R-42 states that “the award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing of the

hearing . . . .” This rule does not exist in isolation however, and Appellant ignores other rules that are also relevant to the timeliness issue Appellant raises:

R-38 Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-54 Interpretation and Application of Rules. The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator’s powers and duties. . . . Either an arbitrator or a party may refer a question [under these rules] to the AAA for a final decision. All other rules shall be interpreted and applied by the AAA.

Rule R-38 provides that where a party believes that an arbitrator has failed to follow the AAA-CIA rules, that party is required by the rules to raise the objection to the arbitrator as soon as the party becomes aware of the alleged inconsistency. Here, Appellant raised no concern or objection to the Arbitrator when the 30<sup>th</sup> day following the hearing came and went. To the contrary, Appellant waited patiently together with Respondent for the Arbitrator’s ruling without raising any objection to alleged untimeliness of the Arbitrator’s decision. In fact, Appellant twice stipulated in writing to the trial court that more time in the trial schedule was required in order to give the Arbitrator time to render a decision. CP 4-10; CP 11-17.

Additionally, if Appellant sought to challenge the failure to comply with R-42, AAA-CIA rule R-54 calls for that objection to be brought before either the Arbitrator, or the AAA. Because Appellant failed to timely raise its objection to lack of strict compliance with R-42 to either, its opportunity to do so has passed by virtue of R-38, and there is no case law cited by Appellant that the Court of Appeals has authority under the Statute to adjudicate such an objection now.<sup>10</sup>

The sole case cited by Appellant in support of its argument regarding the alleged contract strict enforceability of the 30-day time frame is *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 386, 78 P.3d 161 (2003) (hereinafter “*Johnson*”). In *Johnson*, the Court addressed whether protest and claim procedures, and specifically claim notice procedures, that were made expressly mandatory by the parties’ contract should be strictly enforced. *Johnson* at 378-380, 386. In particular, the provisions at issue in *Johnson* were predicated to the substantive claim brought to arbitration, and the contract expressly made

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<sup>10</sup> Although *Lent’s Inc. v. Santa Fe Engineers, Inc.*, 29 Wn.App. 257, 262, 628 P.2d 488 (1981) (a case not cited by Appellant) appears to conclude that AAA rules might control over the Statute, the Washington Supreme Court more recently has expressly disapproved that conclusion, and reaffirmed that the Statute, and not the AAA rules, controls. *Godfrey v. Hartford Casualty Ins. Co.*, 142 Wn.2d 885, 897 n.8, 16 P.3d 617 (2001) (expressly disapproving *Keith Adams & Assocs. V. Edwards*, 3 Wn.App. 623, 477 P.2d 36 (1970), upon which *Lent’s* relies).

full compliance with the provisions a condition precedent to judicial relief.

*Id.* at 380.

In contrast, here the AAA rule relied upon by Appellant is not related to the substance of the parties' dispute, nor is it a rule that relates to bringing a claim under the contract to arbitration, nor is it any prerequisite to judicial relief. The only reference to AAA-CIA rules is not even in the contract itself; rather, it is located in an add-on page to the contract labeled "Dispute Resolution Menu." Supp. CP 389. The parties checked an option for binding arbitration which provides:

Binding Arbitration shall be pursuant to the current Construction Industry Arbitration Rules of the American Arbitration Association *unless the parties mutually agree otherwise.*

Supp. CP 389. The Binding Arbitration menu option checked by the parties then described arbitration procedures which it is undisputed that the parties did not follow. *See* CP 467-69 (case not referred to AAA).

In addition, AAA rule R-42 states on its face that the parties may agree to vary the 30-day time frame. The record evidence is clear that both parties allowed the 30<sup>th</sup> day following the last arbitration trial day to pass without any remark or protest as to the fact that the decision had not been issued. CP 4-10; CP 11-17. The record is also clear that Appellant's counsel stipulated to changes in the trial court schedule in order to allow

the Arbitrator more time for a decision, thus waiving the 30-day time frame. *Id.*

Although Appellant asserts that adherence to the 30-day time frame “is critical” and that “the arbitrator had no power to issue an award after 30 days,” Appellant cites no legal authority in support of these propositions, *see* Appellant’s Br., 16-17. It is settled that an appellate court should refuse to consider any arguments on appeal that are unsupported by citations to legal authority. *See, e.g., State v. Lord*, 117 Wash.2d 829, 853, 822 P.2d 177 (1991), *cert. denied*, 506 U.S. 856, 113 S.Ct. 164, 121 L.Ed.2d 112 (1992); RAP 10.3(a)(6). On this basis alone, this Court should decline to address Appellant’s timeliness arguments. Furthermore, Appellant’s conduct at the time the parties were awaiting the decision was completely inconsistent with the claim that the arbitrator lost jurisdiction over the case on the 31<sup>st</sup> day following the conclusion of the arbitration trial. CP 4-10; CP 11-17.

This Court should reject Appellant’s contention that failure to strictly follow a procedural rule of the AAA, especially where the parties acquiesced in deviating from the procedure, should be a basis to overturn an arbitration award under RCW 7.04A.280.

**C. The Arbitrator’s Disclosures Were Sufficient, and the Trial Court Correctly Refused to Find that Arbitrator Deviated from the Requirements for Impartiality.**

The grounds for vacation of an arbitrator’s award include RCW 7.04A.230(1)(i), “evident partiality by an arbitrator appointed as a neutral.” Washington courts hold that under this standard, there is a general duty to disclose a circumstance or relationship that bears on the question of impartiality where the circumstance or relationship creates a reasonable inference of the presence of bias or the absence of impartiality. *Hanson v. Shim*, 87 Wn.App. 538, 547, 943 P.2d 322 (1997). However, “not every relationship is a disclosable relationship.” *St. Paul Ins. v. Lusic*, 6 Wn.App. at 209. A potential inference of lack of impartiality may be created where an arbitrator has a *relatively recent* association with a law firm representing a party and a continuing relationship with the firm on other matters. *Hanson* at 538. Even when such an inference exists, the party seeking to vacate the award must show the existence of prejudice from the nondisclosure. *Id.*

Appellant appears to contend that whether Mr. Cogan failed to make adequate disclosures should be judged primarily by the standard of AAA-CIA Rules R-17 and R-18. *See* Appellant’s Br. 18-19. No authority is cited by Appellant justifying reliance on the AAA standard over the statutory standard, nor does Appellant cite to any authority applying or

interpreting the AAA standard. Appellant's assertion that the facts of this case are sufficient to support a presumption of partiality, Appellant's Br. at 18, likewise is not supported by any citations to authority, nor any legal analysis. As discussed above, appellate courts should refuse to consider any arguments on appeal that are unsupported by citations to legal authority. RAP 10.3(a)(6); *State v. Lord, id.* Even more importantly, several Washington cases are directly at odds with Appellant's contentions, and support only the conclusion that the trial court correctly rejected such contentions.

In *St. Paul Ins. Co. v. Lusic*, the court considered a challenge to an arbitration award where the parties' contract referred to the AAA arbitration rules. 6 Wn.App. at 576. In that case, the court explained:

The parties to an arbitration agreement may surround themselves with such procedural safeguards as they deem necessary and define the powers of the arbitrator, but violation of any such conditions need not necessarily coincide with a statutory ground for vacation of an award. Thus, our review is limited to whether or not there was a violation of any of the statutory provisions regulating the vacation of awards.

In reviewing the appeal before it, the court in *St. Paul* held that the focus must be on the standards of the Statute:

Obviously, we are not at this point concerned with whether or not [the

arbitrator] complied with each and every admonitory declaration or unofficial pronouncement of the AAA or whether or not [the arbitrator's] interpretation of such admonitions or pronouncements coincides with the interpretation placed upon them by any official of the AAA itself. *Ballantine Books, Inc. v. Capital Dist. Co.*, 302 F.2d 17 (2<sup>nd</sup> Cir. 1962). Rather, we are concerned with whether or not the [challenged] relationship ... was a necessarily disclosable relationship [under the Statutory grounds].

6 Wn.App. at 578. The court determined that the fact that the arbitrator was a member and served on the Board of Governors of the same professional organization as one party's counsel, was not a disclosable relationship, and the arbitrator's failure to disclose the facts to appellant was not grounds to vacate the arbitration award.

Similarly, in *Hanson*, the court held that the fact that the arbitrator did not disclose that for two years in the distant past (approximately two decades past) he was employed by the same law firm as Hanson's counsel was not grounds for vacation of the arbitration award in favor of Hanson. 87 Wn.App. at 542. The court determined that no inference of bias arose from the prior relationship. *Id.* at 548. The court further determined that the appellant's failure to object or investigate further when the prior association was brought to light during the arbitration proceeding was fatal to appellant: "[A challenger of the award] cannot wait to see whether the

award is favorable before raising a challenge [to the arbitration] that it was aware of before the award was entered.” *Id. See also, Goble v. Central Security Mut. Ins. Co.* 260 N.E.2d 860, 863 (1970).

Here, as in *Hanson*, Appellant seeks to overturn the arbitration award on the ground that Mr. Cogan was employed by DWT prior to the time that ADC’s counsel, Mr. Farren, was employed there. The time gap, and the fact that Mr. Cogan and Mr. Farren were not employed at DWT during the same time, renders Appellant’s argument powerless under the *Hanson* standard. Furthermore, it is undisputed that even though Mr. Cogan disclosed at the beginning of the arbitration trial that he had worked briefly, years past, for DWT, S&S’s counsel did nothing to object at that time, and nothing to make further inquiries regarding the scope or nature of any continuing relationship between Mr. Cogan and Mr. Farren, or ADC. To the contrary, it is undisputed that S&S’s first objection to the arbitrator came *after* the parties received an arbitration decision which was against S&S. *Compare* CP 28-47 *with* CP 138. S&S seeks to do precisely what the court in *Hanson* declared was improper – waiting to see whether the award is favorable to it before deciding whether to object to the Arbitrator.

In *Schreifels v. Safeco Insurance Co.*, the appellants complained that one of a three-person panel of arbitrators failed to disclose that he and

his law firm had in been involved in prior and continuing representation of party insurance companies on unrelated matters, and that the arbitrator's firm was involved in a then-on-going defense of an insured of one of the party insurance companies. 45 Wn.App. 442, 443. The court found that the complainant was in possession of information sufficient to provide them with knowledge of the disputed relationships, and that even if some duty to disclose had not been fully carried out, the appellants had failed to demonstrate any prejudice to their "substantial rights" as a result of the alleged failure to disclose. *Id.* at 448-49.

Here, Appellant S&S argues that the association of the arbitrator in the distant past with the same firm now employing ADC's counsel (prior to the time ADC's counsel even attended law school), together with the arbitrator's past service as an arbitrator in a few cases where ADC's counsel was involved, and in one unrelated case as a mediator where a party now a principal of ADC was involved, was information that the arbitrator failed to disclose, and that casts allegedly "justifiable doubt" upon the arbitrator's impartiality.

The record is clear, however, that Appellant knew of or learned of each of these circumstances either prior to or during the arbitration trial. *See* RP 16:9-12; CP 171; CP 173 ¶ 2; CP 173-74; CP 175; CP 178 n.1; CP 180 n.4; CP 238-41. Appellant did not object to the relationships at that

time, nor attempt to investigate them further. Only after Appellant received a decision against it, did Appellant begin to complain of the relationships. (*See*, Second Supp. Cp. at 2.) Appellant has not alleged, nor did it introduce any evidence supporting, any actual prejudice to Appellant from these circumstances. Even without determining whether the challenged relationships were subject to some disclosure obligation, this Court should reject Appellant's claims, because Appellant failed to raise its objections at the time when it became aware of the relationships. In both *Hanson* and *Schreifels*, the courts held that such objections must be brought to the attention of the arbitrator when the party first learned of the facts, or first became aware of circumstances calling for further investigation.<sup>11</sup>

In addition to the fact that Appellant has waived any right it might otherwise have had to challenge the impartiality of the Arbitrator, the facts advanced are insufficient to establish the requisite doubt as to the Arbitrator's conduct. Under the cases discussed above, the past contacts between the Arbitrator and the law firm representing Respondent ADC are too remote and too commonplace to be considered grounds to question the

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<sup>11</sup> Appellant also ignores R-18(b), which provides: "*R-18(b)* Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified [for partiality or lack of independence under R-18(a)], and shall inform the parties of its decision, which decision shall be conclusive." Strictly followed, the AAA rules seem to require that any question of partiality be referred to the AAA, which Appellant did not do.

Arbitrator's impartiality. The involvement of Mr. Cogan in a past unsuccessful mediation involving one of the individuals now acting as an owner of ADC likewise under the governing cases discussed above is too remote and insignificant a contact to have affected the impartiality of the Arbitrator in this matter. Even were such contacts sufficient to create some inference of partiality, there is no evidence of any prejudice to Appellants from the alleged failure to disclose. *Hanson*, 87 Wn.App. at 327; *Perez v. Mid-Century Insurance Co.*, 85 Wn.App. 760, 767-68, 934 P.2d 731 (1997).

**D. Appellant's Dissatisfaction with the Outcome of the Arbitration is Not Grounds to Vacate the Arbitration Award.**

Appellant's final argument is that the Arbitrator's award should be overturned because of substantive errors in the decision. *See* Appellant's Br., 19-23. The Statute does not permit vacation of an arbitration award because the losing party is dissatisfied with how the arbitrator evaluated the credibility of the witnesses, or how the arbitrator interpreted the contract. *See* RCW 7.04A.230; *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998) (reviewing court cannot generally address the underlying merits of an arbitration award). The purpose of arbitration is to give the arbitrator final authority over such matters. *Hanson*, 87 Wn.App. at 545-46. Here, the arbitrator issued a highly detailed ruling, and

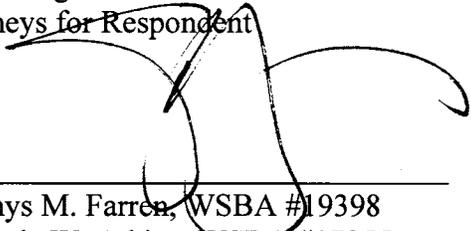
carefully considered the testimony of each witness and the merits of each party's arguments. That Appellant disagrees with the Arbitrator's conclusions on these matters does not provide a basis under the Statute for relief on appeal. There is no basis on this appeal to review the merits of the award. RCW 7.04A.230, .280.

#### V. CONCLUSION

For all of the above reasons, Respondent requests that the decision of the trial court affirming the arbitration award be affirmed.

RESPECTFULLY SUBMITTED this 18 day  
of June, 2008.

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**CERTIFICATE OF SERVICE**

I hereby certify that I am over the age of 18 and not a party to this matter, and that I have made arrangements for service on June 18<sup>th</sup>, 2008, via the method indicated below, of a true and correct copy of the foregoing **RESPONSE BRIEF OF ADC PROPERTIES, LLC** in connection with the above-referenced matter, upon the following:

Jami K. Elison WSBA #31007  
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DATED this 18<sup>th</sup> day of June, 2008.

  
Lynn D. Riggs