

COURT OF APPEALS  
DIVISION II

No. 40623-3-II

10 DEC 14 PM 3:35

COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY Cn  
DEPUTY

---

---

SHERRI LYNN TANSON, MONKEY BEAN, LLC, Appellants

vs.

DUGOUT BROTHERS, INC., BRAD CARPENTER AND LUCINDA  
(CINDY) CARPENTER, Respondents

---

---

**REPLY BRIEF OF APPELLANTS**

---

---

Howard E Bundy, WSBA 11762  
Caroline B Fichter, WSBA 42554  
**BUNDY LAW FIRM PLLC**  
5400 Carillon Point  
Kirkland, WA 98033-7356  
425-822-7888  
bundy@bundylawfirm.com

## Table of Contents

Table of Contents.....	i
Table of Authorities.....	ii
I. STATEMENT OF THE CASE.....	1
II. SUMMARY OF ARGUMENT.....	4
III. ARGUMENT.....	6
A. Washington Law Requires The Trial Court to Enforce the Agreement to Submit to Trial by Referee.....	6
1. <i>There is No Authority that RCW 2.28.010 Justifies the Error of         Law in this Case.</i> .....	6
2. <i>RCW 2.28.010 Does Not Apply in this Case.</i> .....	8
3. <i>RCW 2.28.010 Does Not Render Chapter 4.48 RCW a Nullity.</i> .....	9
B. Carpenter Breached a Binding Contract to Submit to Trial by Referee. ....	11
1. <i>Carpenter Offers No Authority for Their Claim that the Agreed         Order is Not a Contract.</i> .....	11
2. <i>The Label Used By the Parties Does Not Determine Whether         There Is an Enforceable Contract.</i> .....	12
3. <i>There Was No Failure of Consideration that Excused         Carpenter’s Breach.</i> .....	15
4. <i>There is Full Appellate Review of a Decision by a Referee.</i> ..	16
C. Carpenters Lacked Any Justification To Breach Their Agreement.. .....	18
IV. CONCLUSION.....	21

## Table of Authorities

### Cases

<i>Barber v. Rochester</i> , 52 Wn. 2d 691, 328 P.2d 711 (1958).....	12
<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 829 P.2d 1087 (1992).....	8, 16
<i>Bogle &amp; Gates, PLLC v. Holly Mountain Resources</i> , 108 Wn. App. 557, 32 P.3d 1002 (2001).....	5, 14
<i>Emberson v. Hartley</i> , 52 Wn.App 597, 762 P.2d 364 (Div. II 1988) .....	9
<i>Fernandes v. Mockridge</i> , 75 Wn. App. 207, 877 P.2d 719 (1994).....	18, 20
<i>Harting v. Barton</i> , 101 Wn. App 954, 6 P.3d 91 (Div. III 2000) .....	18, 19
<i>Housing Authority of Sunnyside v. Sunnyside Valley Irrigation District</i> , 112 Wn.2d 262, 772 P.2d 473 (1989).....	9
<i>Muije v. Department of Social and Health Servs.</i> , 97 Wn.2d 451, 645 P.2d 1086 (1982).....	9
<i>National Bank of Washington v. Equity Investors</i> , 81 Wn.2d 886, 506 P.2d 20 (1973).....	18
<i>Scannell v. City of Seattle</i> , 97 Wn.2d 701, 648 P.2d 435 (1982).....	11
<i>Smith v. Skone &amp; Connors Produce, Inc</i> , 107 Wn.App. 199, 26 P.3d 981 (Div. III 2001).....	12
<i>State Liquor Control Bd. v. State Personnel Bd.</i> , 88 Wn.2d 368, 377, P.2d 195 (1977).....	10
<i>State v. Bryan</i> , 93 Wn.2d 177, 606 P.2d 1228 (1980) .....	10
<i>Torgerson v. One Lincoln Tower, LLC</i> , 166 Wn.2d 510, 210 P.3d 318 (2009).....	6
<i>Wilkinson v. Sample</i> , 36 Wn. App 266, 674, P.2d 187 (1983) .....	15

### Statutes

R.C.W. 2.28.010 .....	8
-----------------------	---

R.C.W. 4.48.010 .....	passim
R.C.W. 4.48.020 .....	11
R.C.W. 4.48.090 .....	8
R.C.W. 4.48.120(2).....	16

**Other Authorities**

American Heritage Dictionary of the English Language, 398 (4 <sup>th</sup> ed. 2006) .....	13
Black’s Law Dictionary, 318, (7 <sup>th</sup> ed. 1999).....	13
Enter TRB, Mike Misner, Washington Bar News, August 2010.....	17
Oxford English Dictionary, 912 (4 <sup>th</sup> ed.1978) .....	13
Random House Webster’s Unabridged Dictionary, 440 (2 <sup>nd</sup> ed. 2001) ...	13

## **I. STATEMENT OF THE CASE**

Although the respondents have not disputed any of the facts in the appellants' opening brief, a brief summary may be helpful. This appeal arose from a franchising dispute between Plaintiffs Sherri Lynn Tanson and Monkey Bean, LLC ( hereafter "Tanson") and Defendants Dugout Brothers, Inc., and Brad and Lucinda Carpenter (hereafter "Carpenter").

The case was set for trial in April 2010 but on the morning of trial, Pierce County Superior Court Judge Susan Serko "bumped" the case from the trial calendar because she was hearing another case. Report of the Proceedings (RP) (4/8/10) 8. This was the third time Judge Serko had rescheduled the trial based on judicial unavailability. Judge Serko sent the parties to Court Administration to "trail," a Pierce County procedure where parties bumped from trial wait for an available courtroom before court administrators set another trial date. *Id.* Judge Serko said that if a courtroom did not become available the parties "would get credit" for trailing and she would set the case for trial in September or October, 2010. RP (4/8/10) 8-10.

Instead of signing up for "trailing," Mr. Misner (Misner) counsel for the Carpenters suggested that the parties agree to a trial by referee. Clerk's Papers (CP) 34, 38. Misner explained that a trial by referee had

three advantages; 1) the parties could pick a guaranteed trial date; 2) the parties could select a judge with experience in complex cases; and 3) the parties could appeal the referee's ruling in the same manner and for the same reasons as they could seek appeal from a traditionally litigated case.

Id.

Both parties detoured from Court Administration to research the trial by referee process and consult with counsel. CP 38, 43. Together, Misner and Mr. Bundy (Bundy), counsel for Tanson, drafted an agreement to submit to trial by referee (agreement). Tanson signed the agreement and waited while Carpenter had a lengthy consultation with Misner. Tanson became concerned that if Carpenter did not sign the agreement shortly they would lose the opportunity to wait on the "trailing" calendar and asked Misner if she should go to Court Administration. CP at 34, 43. A few minutes later, Misner returned with a signed agreement, which both attorneys signed and then presented to Judge Serko, who signed the order. CP 34, 38, 43; *see* CP 1-2.

A few hours later, Judge Serko contacted both parties in an off the record telephone conference and expressed concern that a trial by referee would limit the appellate rights of the parties. CP 38. In a stunning reversal of his earlier statements to Bundy and Tanson, Misner claimed

that he too had concerns about appellate rights and that he was withdrawing his clients' consent to the agreement. CP at 39. Bundy objected and pointed out that the Tanson had given up her place on the "trailing" calendar in exchange for the agreement and that the law, confirmed by the parties' legal research, and consistent with Misner's statements to Tanson guaranteed a full appeal from a trial by referee. *Id.* Over Tanson's objections, Judge Serko announced she was setting the agreed order aside and would schedule the case for a trial date in February or March of 2011, several months after the date Tanson would have been given if she signed on to the "trailing" calendar. *Id.*

Tanson filed a motion to enforce the agreed order. *See* CP 3-44. On April 16, 2010, Judge Serko denied the motion. RP (4/16/2010) 4. She stated that the order had been filed but she would not enforce it based on her concerns regarding appellate rights. RP (4/16/2010) 4. Again, Tanson objected, noting that she relied on the agreement when she gave up her spot on the trailing calendar and that the right to appeal was assured by both statute and case law. CP 30-35. Tanson further pointed out to Judge Serko that Chapter 4.48 R.C.W. made enforcement of the agreed order mandatory. CP 10-11. Tanson now appeals the denial of her motion to enforce the agreed order. CP 49, 59-60.

## II. SUMMARY OF ARGUMENT

Tanson's request that this court reverse the trial court's denial of her motion to enforce the agreed order and direct the case to trial by referee rests on two fundamental principles. First, that the trial court judge erred by refusing to enforce the Trial Before Referee statute; and second, that parties are bound by the terms of their contract.

Carpenter claims that Judge Serko's denial of Tanson's motion based on her own concerns about the parties' appellate rights was justified under a general administrative statute RCW 2.28.010, which empowers judges to regulate their courtrooms in a manner that promotes justice. Carpenter has cited no authority for their assertion that RCW 2.28.010 has any possible applicability in this case. Even assuming that RCW 2.28.010 had anything to do with this case, not only is Carpenter's interpretation of the statute hopelessly broad and dangerously vague, because it would justify any error of law so long as the judge did it pursuant to her general authority under RCW 2.28.010 to regulate the behavior of people in her court room," but it would flout the bedrock principles of statutory construction. First, where two statutes conflict, a specifically applicable statute modifies a more general statute. Here, the trial court's general authority created by RCW 2.28.010, if it was relevant at all, was modified

by the specific provisions of the trial by referee statute, Chapter 4.48 RCW. Second, when the legislature uses the word “shall” to direct a court’s behavior, it intended to create a mandatory duty to act. Here, the legislature made their intent clear by writing “The court **shall** order all or any of the issues in a civil action, whether fact or law, or both, referred to a referee upon the written consent of the parties.” R.C.W. 4.48.010 (emphasis added). Under the statute , once the parties agree to trial by referee the trial court ‘s only authority is to order the case to trial by referee. Any other reading would create judicial discretion where the legislature intended none.

Additionally, Carpenter contends that the agreement was not a contract and if the agreement were a contract, their revocation of “consent,” otherwise known as breach, was justified based on their concerns regarding appellate rights. Both claims are entirely without merit. Despite the Carpenters’ assertions to the contrary based upon some mysterious and unsupported distinction between an “agreement” and a “contract”, the agreement at issue was a valid contract because it contained each of the required contractual elements: legal subject matter and parties; consideration; mutuality of obligation; and clear terms and conditions. *Bogle & Gates, PLLC v. Holly Mountain Resources*, 108 Wn. App. 557, 561, 32 P.3d 1002, 1004 (2001). Additionally, second thoughts

regarding the wisdom of an agreement are not and have never been sufficient grounds to excuse a party's contractual breach. *Torgerson v. One Lincoln Tower, LLC*, 166 Wn.2d 510, 521, 210 P.3d 318 (2009). Carpenter, through counsel, suggested a trial by referee, drafted the agreement and signed it after extensive consultation with counsel. They had ample opportunity to consider the effect of their actions and should be held to their contractual obligations, namely to submit to a trial by referee.

### **III. ARGUMENT**

#### **A. Washington Law Requires The Trial Court to Enforce the Agreement to Submit to Trial by Referee**

##### ***1. There is No Authority that RCW 2.28.010 Justifies the Error of Law in this Case.***

The plain language of the trial by referee statute mandates a trial court to order a case to proceed to trial by referee whenever all parties consent to it. R.C.W. 4.48.010. However, Carpenter argues that Judge Serko's refusal to comply with the statute and enforce the agreed order for trial by referee under Chapter 4.48 RCW is supported by her "inherent power" to enforce order in proceedings in her courtroom under RCW

2.28.010<sup>1</sup>. Brief of Respondent (BR) at 4. The Carpenters fail to provide any reasoning or any authority as to why the general power to regulate events and behavior in the courtroom abrogates the trial court’s mandatory duty to order this case to trial by referee in the face of a binding agreement of the parties. Nothing in RCW 2.28.010 gives any indication that the Legislature intended it to trump all other statutes—and specifically not Chapter 4.48 RCW, which makes entry and enforcement of an order compelling trial by referee mandatory when the parties agree to it. No court has construed RCW 2.28.010 as superseding a court’s responsibility to enforce a mandatory statute providing for alternative dispute resolution upon consent of the parties.

---

---

<sup>1</sup>RCW 2.28.010 states: “Every court of justice has power -- (1) To preserve and enforce order in its immediate presence. (2) To enforce order in the proceedings before it, or before a person or body empowered to conduct a judicial investigation under its authority. (3) To provide for the orderly conduct of proceedings before it or its officers. (4) To compel obedience to its judgments, decrees, orders and process, and to the orders of a judge out of court, in an action, suit or proceeding pending therein. (5) To control, in furtherance of justice, the conduct of its ministerial officers, and of all other persons in any manner connected with a judicial proceeding before it, in every matter appertaining thereto. (6) To compel the attendance of persons to testify in an action, suit or proceeding therein, in the cases and manner provided by law. (7) To administer oaths in an action, suit or proceeding pending therein, and in all other cases where it may be necessary in the exercise of its powers or the performance of its duties.”

**2. RCW 2.28.010 Does Not Apply in this Case.**

RCW 2.28.010 generally authorizes a court to manage its court room and control proceedings before it, enforce its orders and ensure courtroom discipline. R.C.W. 2.28.010. The statute does not authorize a court to revoke an order and does not empower a court to independently assess and “protect” the appellate rights of one of the parties.<sup>2</sup> Such questions are addressed in other portions of the Washington Civil Rules that are not applicable and have not been cited by any party herein. Under Carpenter’s interpretation, a trial court could reverse any order based solely on its general power to promote order in its court room. *See* RB at 4. Such broad authority would be inherently unjust, would undermine the finality of judicial rulings and an adversarial system of justice and, in this case, would deprive Tanson of her rights under the trial by referee statute.

It was neither the trial court’s obligation nor its privilege to “(take) those steps she thought were necessary to protect the appellate rights of

---

<sup>2</sup> In denying the plaintiff’s motion to enforce the trial court explained that given “the concerns of the parties [regarding] the terms of appeal...I’m not satisfied...that there are absolute appellate rights that would emanate from a trial by referee.” RB at 6. The trial court’s explanation not only suggests a direct involvement with the case of one of the parties beyond what is appropriate for an impartial trier of fact but it substantively misstates the law. Both RCW 4.48 and case law grant any party full appellate rights from a trial by referee. R.C.W. 4.48.090, *Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087, 1091 (1992).

the parties.” Respondents’ Memorandum in Opposition to Plaintiffs’ Notice of Appeal (RM) at 8. The parties signed the contract with representation and advice from counsel. It is black letter law that a trial court may not re-write or refuse to enforce the contract of the parties because of its perception that one of the parties struck what, for them, may have been a bad bargain. *Emberson v. Hartley*, 52 Wn.App 597, 601, 762 P.2d 364 (Div. II 1988). RCW 2.28.010 does not mitigate that principle.

**3. RCW 2.28.010 Does Not Render Chapter 4.48 RCW a Nullity.**

Even if RCW 2.28.010 applied, it must be interpreted in light of the trial by referee statute, Chapter 4.48 RCW, which specifically directs a trial court to order a case to trial by referee upon agreement of the parties. R.C.W. 4.48.010. When assessing two possibly contradictory statutes, Washington courts apply the general/specific rule of statutory interpretation which holds that the legislature intends “a specific statute to prevail over a more general statute, especially where the specific statute is more recently adopted.” *Housing Authority of Sunnyside v. Sunnyside Valley Irrigation District*, 112 Wn.2d 262, 267, 772 P.2d 473 (1989), citing *Muije v. Department of Social and Health Servs.*, 97 Wn.2d 451, 453, 645 P.2d 1086 (1982).

In this case, the trial by referee statute must prevail because not only is it the more recent expression of the legislature's intent but because only Chapter 4.48 specifically addresses a trial court's obligations in the face of a consent to trial by referee. Chapter 4.48 RCW mandates a trial court to order a case to trial by referee upon agreement of the parties. The statute provides:

The court **shall** order all or any of the issues in a civil action, whether fact or law, or both, referred to a referee upon the written consent of the parties which is filed with the clerk.

R.C.W. 4.48.010 (emphasis added).

Washington courts have repeatedly held that, absent contrary legislative intent, the word "shall" in a statute imposes a mandatory duty. *State v. Bryan*, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980), quoting *State Liquor Control Bd. v. State Personnel Bd.*, 88 Wn.2d 368, 377, 561 P.2d 195 (1977). This presumption is strengthened when the legislature uses both "shall" and "may" in same statute as the legislature did when it drafted the trial by referee statute.<sup>3</sup> *Scannell v. City of Seattle*, 97 Wn.2d

---

<sup>3</sup> For a more detailed discussion of the mandatory nature of Chapter 4.48 please refer to Appellant's response brief to respondents' opposition to appealability 12-14.

701, 704, 648 P.2d 435, 438 (1982); *Compare* R.C.W. 4.48.010 with R.C.W. 4.48.020.

Here, the parties agreed to submit to trial by referee and presented the court with an agreed order to that effect. At that point under the statute, the trial court's sole obligation (and sole authority) was to order the matter to trial by referee.

**B. Carpenter Breached a Binding Contract to Submit to Trial by Referee.**

***1. Carpenter Offers No Authority for Their Claim that the Agreed Order is Not a Contract.***

In an incredible assertion without citation of authority, Carpenter claims that the agreed order for trial by referee was not a contract but rather “an agreement to utilize alternative dispute resolution.” RB at 10. They blithely assert that “there is nothing in fact or law” which hold such an agreement is a contract. RB at 10. They helpfully note that the “elements of a contract include subject matter, parties, [a] promise, terms and price or consideration” but then they make the amazingly circular leap to conclude that “none of those elements are present in this case since there was no contract in the first place.” *Id.* Finally, Carpenter claims that even if the agreed order were a contract “the potential loss of all appellate

rights would be similar to a failure of consideration in a breach of contract case.”<sup>4</sup> *Id.* Carpenter does not elaborate as to what the effects of being “similar to” a failure of consideration would be but one may assume they would claim such a failure excuses their breach.

**2. The Label Used By the Parties Does Not Determine  
Whether There Is an Enforceable Contract.**

Regardless of whether the parties labeled it a “contract” or an “agreement”, the agreed order was binding obligation and undertaking between the parties. A court determines whether a contract exists by determining if the contractual elements (including subject matter, parties, promise, terms and consideration) are present, not by asking what the parties called the document. *Smith v. Skone & Connors Produce, Inc*, 107 Wn. App. 199, 206-07, 26 P.3d 981,984-85 (Div. III 2001). As Tanson explained in her opening brief, the agreed order to submit to trial by

---

<sup>4</sup> For this proposition it appears Carpenter cites the case of *Barber v. Rochester*,—without providing a pin cite. To the extent that the Barber case even addresses the issue of failure of consideration, it is in the context of an election of remedies. The case holds that remedies must be inconsistent before an election of remedies is required. *Barber v. Rochester*, 52 Wn. 2d 691, 694, 328 P.2d 711, 713 (1958). Nothing in the case support the proposition for which Carpenter appears to cite it.

referee contained every contractual element.<sup>5</sup> Accordingly, Tanson asks this court to determine that the agreed order was a binding contract and direct the trial court to order the case to trial by referee.

Carpenter's attempt at lexicological hair splitting by distinguishing between a "contract" and an "agreement" subverts the basic legal definition of contract as well as modern English. Black's Law Dictionary defines the word contract as "an *agreement* between two or more parties that is enforceable or otherwise recognizable under law." Black's Law Dictionary, 318, (7<sup>th</sup> ed. 1999) (emphasis added). Similarly, the American Heritage Dictionary, Webster's Unabridged Dictionary and the Oxford English dictionary define a contract respectively as "an *agreement*...especially one that is written and enforceable;" "an *agreement*...for the doing or not doing of something;" and "a mutual *agreement*." American Heritage Dictionary of the English Language, 398 (4<sup>th</sup> ed. 2006) (emphasis added); Random House Webster's Unabridged Dictionary, 440 (2<sup>nd</sup> ed. 2001) (emphasis added); Oxford English Dictionary, 912 (4<sup>th</sup> ed.1978) (emphasis added). The agreed order was a binding contract between the parties regardless of whether the parties refer

---

<sup>5</sup> See Brief of Appellants at 10-15

to it as a contract, an agreed order, or “an agreement to utilize an alternative dispute resolution.” Under Carpenter’s reasoning, any agreement would be unenforceable unless the document was titled a “contract”. Such an outcome is ridiculous. In Washington courts, contracts are judged not by the heading of their documents but by the presence of their contractual elements.

The contract in this case had every required element. The essential elements of a contract are: competent parties, legal subject matter, consideration, mutuality of obligation, and clear terms and conditions. *Bogle, supra*, 108 Wn. App. at 561, 32 P.3d at 1004. Here, all parties were competent to contract. Not only is the agreement legal but it is specifically authorized by statute. Chapter 4.48 RCW. The promise is described in the title of the document (agreement to submit to trial by referee) as well as in the body of the agreed order. *See* CP 1-2. The terms are explicitly stated within the agreed order and the consideration was the parties’ mutual promise to submit to a trial by referee. *Id.* This court should reverse the trial court’s denial of the appellants’ motion and hold the parties to their bargain by enforcing the terms of a valid contract.

**3. *There Was No Failure of Consideration that Excused  
Carpenter's Breach.***

Carpenter's claim that if the agreement was a contract they were "well within their rights" to breach the agreed order because their consent was based on the assumption that they would have the right to a full appeal and Judge Serko questioned if that right existed. RB at 12. According to the Carpenters, these concerns amount to a failure of consideration and excuse their breach of contract. RB at 10.

Failure of consideration may be grounds for rescission when "one who has either given or promised to give some performance fails without his fault to receive in some material respect the agreed exchange for that promise." *Wilkinson v. Sample*, 36 Wn. App 266, 273-74, 674, P.2d 187, 192 (1983) (quoting 6 S. Williston, Contracts § 814, at 17-19 (3d ed. 1962)). In *Wilkinson*, the seller of a business failed to take steps required by the contract to transfer the goodwill of the business to the buyer. *Id* 36 Wn. App. at 266-69, 674 P.2d at 187-90. Carpenter's claim that "potential loss of all appellate rights" goes to a material aspect of the contract and entitles the them to breach their agreement. Assuming that appellate rights were a material condition of the agreement, Carpenter's argument fails because the trial by referee statute, Washington case law and the

respondents own counsel have explicitly stated that decisions of a referee are subject to full appellate review. In addition, if it constitutes anything, the perceived risk of loss of appellate rights is the fault of Carpenter and their counsel—not the fault of Tanson or any other person. They suggested the trial by referee procedure to Tanson and Carpenter had lots of opportunity to consult with counsel before signing.

***4. There is Full Appellate Review of a Decision by a Referee.***

The trial by referee statute specifically states that “any decisions of a referee...may be reviewed in the same manner as if the decision was made by the court.” R.C.W. 4.48.120(2). In an *en banc* ruling, the Washington Supreme Court noted that “the primary distinction between [a trial before referee] and arbitration is that the decisions based on the former are appealable to an appellate court in the same manner as any other general trial court judgment.” *Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087, 1091 (1992). The Court further held that “appellate review of a referee’s report is the same as a final judgment from a trial court, i.e. full appellate review.” *Id.*

Carpenter’s alleged concern regarding appellate review is even more questionable in light of a Letter to the Editor by their Counsel, Mr.

Misner, published in the August edition of the Washington Bar News. In his letter, Misner advocates greater use of trials by referee, emphasizing that it “has all the features of a superior court trial including the entry of findings of facts and conclusions of law *with full review on appeal.*” Enter TRB, Mike Misner, Washington Bar News, August 2010 (emphasis added). A copy of Misner’s letter is attached as Exhibit A.

Apparently, Carpenters were concerned about their appellate rights in April, when they breached the agreed order, in August when they filed their Respondent’s Memorandum in Opposition to Plaintiffs’ Notice of Appeal, and in November when they filed their Brief of Respondent (they labeled it a “Reply Brief”) but not in July when Misner wrote his letter to the editor. This court should reject the Carpenter’s transparent attempt to justify their breach of the agreement to submit to a trial by referee by claiming concern for their appellate rights. Not only are their alleged concerns unjustified in light of the plain language of the statute and *Barnett*, but they have failed to cite to any authority to support their claim that second thoughts alone excuse breaching a contract.

**C. Carpenters Lacked Any Justification To Breach Their Agreement.**

The foundation of contract law rests on the principle that “one is bound by the contract which he voluntarily and knowingly signs.” *National Bank of Washington v. Equity Investors*, 81 Wn.2d 886, 912-13, 506 P.2d 20, 36-37 (1973). Carpenter does not dispute that they knowingly and voluntarily signed the agreed order but claims they should not be bound by the agreement because of their “reservations” regarding appellate rights. RB at 7.

In furtherance of their position, Carpenter relies on two Washington cases, *Hartling v. Barton* and *Fernandes v. Mockridge*, which respectively stand for the propositions that a party can waive their rights to mediate by failing to invoke a mediation agreement in pleadings and that a trial judge has authority to sanction a party for excessive attempts to avoid mandatory arbitration. RB 8-9; *Hartling v. Barton*, 101 Wn. App 954, 6 P.3d 91 (Div. III 2000); *Fernandes v. Mockridge*, 75 Wn. App. 207, 877 P.2d 719 (1994). Neither case speaks to the trial by referee process, provides any supporting authority for the Carpenter’s claim that a party’s second thoughts excuse breach, or empowers a judge to remove a case

from trial before a referee after the parties have filed an agreement or consent.

In *Harting*, the Court of Appeals found that a party to a mediation agreement waived her right to mediate by failing to invoke the agreement in the pleadings. *Harting, supra*, 101 Wn.App. at 962, 6 P.3d at 95-96. Carpenter is correct that a party's rights are subject to waiver but they are patently incorrect to argue that waiver applies here. Tanson has repeatedly and vigorously asserted her right to a trial by referee. She brought a motion to enforce the agreement and when the trial court denied her motion, she brought this appeal.

The Carpenters claim that *Fernandes* supports their argument that a judge "has broad discretion in administering the alternative dispute resolution process" including, apparently, the authority to determine jurisdiction, her own authority, and the best interest of the parties.<sup>6</sup> RB at 9. Even assuming, for the sake of argument only, that a case involving the Mandatory Arbitration Rules has any applicability to this case, vesting such authority in a superior court judge would not only subvert the power

---

<sup>6</sup> The Carpenters claim that *Fernandez* and the Mandatory Arbitration Rules cited therein allow Judge Serko to "determine that her court has jurisdiction over the case and that it will not be transferred to alternative dispute resolution if there is any doubt as to the appellate rights of the parties."

of the Washington Legislature to make laws, the ability of any statute to direct judicial action and the responsibility of an attorney to represent their clients, but it would also stretch the court's ruling in *Fernandes* beyond recognition. *Fernandes* authorized a trial court to address and possibly sanction parties who pursue excessive legal maneuvering to keep a case out of mandatory arbitration—in that case making an unsupportable demand for damages in excess of the MAR threshold. *Fernandes supra*, 75 Wn. App. 207, 213, 877 P.2d 719 (1994) ). Nowhere does it suggest that a trial judge has the authority to remove a case from trial by referee after the parties entered into a valid agreement.

Finally, the Carpenter's claim their "reservations" and Judge Serko's determination that "her court has jurisdiction over this case...and that it will not be transferred to alternative dispute resolution if there is any doubt as to the appellate rights of the parties" justify their breach. RB at 9. Neither factor excuses the Carpenters' breach of the agreement or authorizes the trial court to refuse to enforce it. The Washington Legislature explicitly directed trial court judges to submit a case to trial by referee where the parties consent. Similarly, Washington case law clearly

defines the conditions under which a party may withdraw consent or breach an agreement.<sup>7</sup> The misgiving of either party is not one of them.

#### IV. CONCLUSION

Tanson asks this court to reverse the trial court's denial of appellant's motion to enforce the order to submit to trial by referee and remand this case to with instructions to order the parties to comply with their agreement to submit to trial by referee. Reversal and remand is the only outcome supported by the bedrock principles of contract law and by the trial by referee statute, Chapter 4.48 RCW.

Here, Carpenter entered into an agreement to submit to trial by referee after careful research and consultation with counsel. In reliance on their agreement, Tanson gave up her right to a place on the trailing calendar and a trial date in Fall 2010. Contract law promises Tanson, that she will receive the benefit of her bargain--a trial by referee--regardless of any bargainer's remorse from the Carpenters. Additionally, the trial by referee statute promises Tanson that her agreement will be honored by

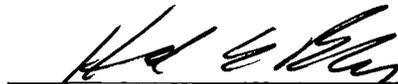
---

<sup>7</sup> For a complete discussion of the possible excuses for breach and why none apply in this matter please see Brief of Appellants at 15-18.

directing a trial judge to order any civil matter to reference upon agreement of the parties.

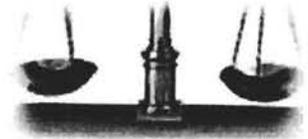
By reversing the trial court, this court would be affirming the clear legislative intent of the trial by referee statute and the fundamental principle that a party to a contract is bound by its terms. Enforcing the contract would impose no additional burden on Carpenters, as they would be obligated to do no more than what they agreed to when they signed the agreed order. Finally, by enforcing the agreed order, this court would be providing Tanson the benefit she bargained for, a certain trial date before an experienced referee capable of handling a complex case.

DATED: December 13, 2010

  
Howard E Bundy, WSBA 11762

  
Caroline B Fichter, WSBA 42554

**BUNDY LAW FIRM PLLC**  
5400 Carillon Point  
Kirkland, WA 98033-7356  
425-822-7888  
bundy@bundylawfirm.com  
Attorneys for Appellant (Tanson)



myWSBA.org
Lawyer Directory
MCLE Activity Search
Find Legal Help
Job Opportunities
Access to Justice

Pro Bono Opportunities
MCLE Website
Ethics Opinions

Admissions
Bar Leadership
Board of Governors
Committees
Diversity
Law Students
Sections
Young Lawyers

FAQs
WSBA Store
Bar News
Events Calendar
Law Links
Contact Us

Bar News Archives

Home > For the Media > Publications > Bar News

July 2010

SEARCH [input field] GO

SITE INDEX

Letters to the Editor

Bar News welcomes letters from readers. We do not run letters that have been printed in, or are pending before, other legal publications with overlapping readership. Letters must be no more than 250 words in length, and e-mailed to letterstotheeditor@wsba.org or mailed to: WSBA, Attn. Bar News Letters to the Editor, 1325 Fourth Ave., Ste. 600, Seattle, WA 98101-2539. Bar News reserves the right to edit letters. Bar News does not print anonymous letters, or more than one submission per month from the same contributor.

Be true to your school

Soon to be Harvard 5, Yale 3, Columbia 1 . . . .

"One of the most obvious ways to ensure equality is to make sure our future lawyers . . . represent the diversity of our society." ("Is Justice Blind?," May 2010 Bar News, p. 16) What an irony it is that at the same time that the WSBA is announcing the winners of its diversity essay contest, none other than our first African American president blows the diversity concept clean out of the water. When President Obama had on his short list for Supreme Court justice a female judge graduate of the University of Texas Law School (Judge Diane Wood, 7th Circuit), he chose instead to replace the only non-Ivy League law school graduate on the Court with a Harvard Law School graduate. The president, diversity notwithstanding, chose whom he wanted, whatever his reasons. We should all follow the president's lead.

It is time for the legal profession to get out of social engineering. "Diversity" is a lazy person's way of making the justice system appear to be fair. It is the sheep's clothing around the affirmative action wolf. We all can and should become more aware of cultural variations while remembering that in law (just as in medicine) there comes a point where the law (or medicine) is what it is no matter what the client's (or patient's) cultural background is.

Let's get back to the concept of excellence regardless of personal characteristics. Our society and our legal system can afford nothing less.

William R. Clarke, Richland

Voting with your dollars

In his letter to the editor (May 2010 Bar News), Raymond Takashi Swenson makes a logical argument for privately funded group speech, subject to marketplace dynamics — a typical libertarian view. He does not address the current lack of public space individuals have to conduct free speech, which functions to shut out individual voices, creating a dangerous

homogeneity in times of chaos and confusion. This is deadly enough to democracy, yet there is a graver issue that deserves our attention: the dual nature of money in politics. Money is a resource capable of being aggregated, and therefore useful in measuring support for an issue or candidate. But, it is also a medium for exchange.

With the ability to make unlimited contributions, corporations and extremely wealthy individuals may purchase the incomparable power of the government to further private ends. When politicians offer their public trust and authority for bid, all types of unprincipled, self-interested people will rise to the highest levels of government. Money will have pushed aside ethical, thoughtful, socially conscious, or publicly minded politicians. The big engine of government will be put to work furthering private interests over public ones.

Speech, although capable of aggregation, is not also a medium for exchange. Rather than censoring any group's speech, we should foster expanded public space in the media for individual use, distribute the costs of political campaigns democratically, and investigate the manner in which money is delivered and applied in politics, so that money is never used there as a medium for exchange.

*A.E. McLaughlin, Spokane*

### **Corporations are like rivers**

A letter to the editor in the May Issue of *Bar News* ("In praise of free speech," p. 7) takes issue with my letter to the editor appearing in the April issue and deserves a response. To adopt a stance of what amounts to Constitutional Fundamentalism fails to understand that the true preservation of constitutional rights demands an awareness of the impact of collective powers on individual freedoms. To equate the collective power of government in a representative democracy with that of mere business entities shows a lack of trust that governments can be responsive and trustworthy. The regulation of such private entities because of their power to sway campaigns for judicial and other elective offices through the expenditure of large amounts of money is reasonable and serves to enhance debate by equalizing voices.

In any case, to assume that corporations speak with a single voice representing the collective views of their stockholders is unwarranted. Corporations are not static entities in this investment climate. Short-term ownership and stock trades makes them more like a river in constant motion.

The richness of political discourse lies in variety and not in volume. To accept reasonable regulation by the government of election contributions in the interest of individual and minority voices and to recognize the very real power wielded by collective entities to jeopardize the democratic process is simply realism as opposed to a naive absolutism that wishes to conflate all political speech regardless of the fictional personhood of the collective entity.

*Thomas Mengert, Keyport*

### **Enter TBR**

Access to justice for our clients is a concern for all attorneys and judges. Each day cases are "bumped" that have been pending for years because of court congestion. In response, attorneys have been using ADR as a means by which our clients' cases can be concluded. The two most common ADR methods are mediation and arbitration (RCW 7.04). Both

have limitations. Mediation requires parties to compromise and find common ground — a goal which is sometimes unattainable. Arbitration doesn't worry about common ground, but has limited rights of appeal.

Enter TBR — Trial Before Referee. (RCW 4.48).

While TBR does not permit a jury trial, it has all of the other features of a superior court trial including the entry of Findings of Fact and Conclusions of Law with full review on appeal. Temporary orders in divorce cases could be heard by telephone with the referee rather than having to note up a hearing before a commissioner. Discovery motions could be brought before the referee in a PI case. Will contests could be heard by the referee before all of the heirs die.

The forms needed for TBR are found at 10 Washington Practice §53 and the WSBA Family Law Deskbook §56.8. There is only one case, *Barnett v. Hicks*, 119 Wn.2d 151 that discusses TBR versus arbitration.

Think of TBR as the third leg of the ADR stool. TBR can be considered by attorneys, judges and court clerks as a possible ADR alternative for concluding our client's cases in a timely manner.

*Mike Misner, Gig Harbor*

Last Modified: Wednesday, June 30, 2010

[Contact Information](#)

[Disclaimer and Copyright Notice](#) | [Privacy Policy](#)

COURT OF APPEALS  
DIVISION II

No. 40623-3-II

10 DEC 14 PM 3:35

COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON

STATE OF WASHINGTON  
BY CS  
DEPUTY

---

---

SHERRI LYNN TANSON, MONKEY BEAN, LLC, Appellants

vs.

DUGOUT BROTHERS, INC., BRAD CARPENTER AND LUCINDA  
(CINDY) CARPENTER, Respondents

---

---

**Declaration of Service**

**REPLY BRIEF OF APPELLANTS**

---

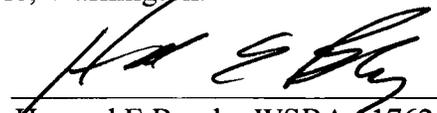
---

The undersigned declares under penalty of perjury under the laws of the State of Washington that, on the below date, I sent by delivery (ABC Legal Services) a true copy of the Reply Brief of Appellants to:

Michael Misner  
3007 Judson St  
Gig Harbor WA 98335-1219

On the same day, I sent a copy by email to Mr. Misner at:  
mike@misnerlaw.com.

Dated December 13, 2010 at Kenmore, Washington.

  
Howard E Bundy, WSBA 11762