

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

CASE NO. 49963-1-II

ANNETTE ATKINSON, a Washington Resident, et. al.,

Appellee,

vs.

BRIAN ROSE and JANE DOE ROSE, and their marital community, et. al,

Appellants.

APPELLANTS' REPLY TO APPELLEE'S RESPONSE BRIEF, RAP 10

James P. Ware, WSBA No. 36799
Courtney D. Bhatt, WSBA No. 46298
MDK LAW.
777 108th Avenue NE, Suite 2000
Bellevue, WA 98004
(425) 455-9610
Attorneys for Brian Rose

TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF THE CASE	2
A. No Extensive Litigation History Between Atkinson and Rose Relating to Woohoo.	3
B. WooHoo’s Operating Agreement Regarding Arbitration Applies to This Case	5
III. ARGUMENT.....	7
A. The Standard of Review of a Trial Court’s Denial of a Motion to Compel Arbitration is De Novo.....	8
1. Denial of the Motion to Compel Arbitration is Reviewed De Novo	8
i. Review of the Court’s Finding Rose Waived his Right to Arbitration is De Novo	8
ii. Whether Atkinson’s Claims are Arbitrable is Reviewed De Novo	9
iii. Review of the Denial of Rose’s Motion for Reconsideration is Reviewed for Abuse of Discretion	10
B. Rose Timely Invoked His Right to Arbitrate and Did not Engage in Extensive Litigation Conduct	10
1. Rose’s Failure to Invoke the Arbitration Clause Immediately does not Constitute a Waiver of his Right to Private Arbitration.....	10
2. Rose did not Take “Too Many Steps Down the Path of Litigation” Before he Sought to Invoke the Parties Arbitration Clause.....	12

3. The Trial Court Erroneously Found Atkinson's Claims Were Not Arbitrable	18
IV. CONCLUSION.....	20

TABLE OF AUTHORITY

	<u>Page</u>
Cases	
<i>W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco</i> , 47 Wn. App. 681, 736 P.2d 1100 (1987).....	3
<i>Romney v. Franciscan Med. Grp.</i> , 199 Wn. App. 589 (2017)	8
<i>Wiese v. CACH, LLC</i> , 189 Wn. App. 466, 358 P.3d 1213 (2015).....	8
<i>Mendez v. Palm Harbor Homes, Inc.</i> , 111 Wn. App. 446, 45 P.3d 594 (2002).....	9
<i>Rivers v. Wash. State Conference of Mason Contractors</i> , 145 Wn.2d 674, 41 P.3d 1175 (2002).....	10
<i>River House Dev., Inc. v. Integrus Architecture, PS</i> , 167 Wn. App. 221, 272 P.3d 289 (2012).....	10,13-14
<i>Schuster v. Prestige Senior Mgmt., LLC</i> , 193 Wn. App. 616, 376 P.3d 412 (2016).....	11,14
<i>Lake Wash. Sch. Dist. 414 v. Mobile Modules Northwest, Inc.</i> , 28 Wn. App. 59, 621 P.2d 791 (1980).....	12
<i>Romney v. Franciscan Medical Group</i> , 2017 WL 2952370 (Wash. App. 2017)	14
<i>Otis Housing Association v. Ha</i> , 165 Wn.2d 582, 201 P.3d 309 (2009).....	14
<i>Ives v. Ramsden</i> , 142 Wn. App. 369, 174 P.3d 1231 (2008).....	15

I. INTRODUCTION

Appellant, Brian Rose, presents the following in reply to Appellees' Responsive Brief. The trial court committed reversible error when it denied Rose's motion to compel arbitration. First, the arbitration clause does apply to Atkinson's Woohoo claims. Second, Rose did not waive his right to arbitration.

Furthermore, Rose's motion for reconsideration was not, as Atkinson alleges, simply an attempt to relitigate the initial ruling. Rose is not, as Atkinson asserts, solely required to offer newly discovered, new authority or another change in circumstances sufficient to justify altering the trial court's initial ruling on reconsideration. Moreover, CR 59(a) authorizes reconsideration if, inter alia, (1) Irregularity in the proceedings of the court, jury or adverse party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial...(7) That there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law.

Rose has alleged that the trial court abused its discretion and based its decision on untenable grounds when it denied Rose's Motion for Reconsideration because the evidence in this case clearly shows that the arbitration clause in the Woohoo Enterprises, LLC ("Woohoo") Operating Agreement did apply to Atkinson's Second and Third Causes of Action,

and that Rose did not waive his right to arbitration. Paragraph 5.5(a) of Woohoo Enterprises' Operating Agreement states that if the members encounter a deadlock regarding the business's activities, they must either mediate or arbitrate the dispute. Atkinson and Rose were in a deadlock, as the Operating Agreement defines the term, because they could not agree how to move forward in a cohesive manner. Further, Atkinson and Rose clearly were in a deadlock when Atkinson could not agree to a mediator for the WooHoo claims prior to filing the lawsuit. Rose did not waive his right to arbitration because he timely filed a motion to compel arbitration, well before extensive litigation of the WooHoo claims occurred.

Accordingly, the trial court committed reversible error when it determined that the arbitration clause did not apply to Atkinson's claims and that Rose had waived his right to arbitration.

II. STATEMENT OF THE CASE

Preliminarily, neither party disputes the language of the arbitration clause of the parties' contract. In her appeal, Atkinson is asking the court to determine the underlying merits of a dispute in Sections A. and B. of the Statement of Facts¹, something Washington courts explicitly prohibit when determining the arbitrability of an issue. Instead, Washington courts utilize the following four guiding principles when determining whether the

¹ Atkinson Response, at p. 3-8.

parties agreed to submit a dispute to arbitration: 1) the duty to submit a matter to arbitration arises from the contract itself; 2) the question of whether parties have agreed to arbitrate a dispute is a judicial one unless the parties clearly provide otherwise; 3) a court should not determine the underlying merits of a dispute in determining the arbitrability of an issue; and 4) arbitration of disputes is favored by the courts. **W.A. Botting Plumbing & Heating Co. v. Constructors-Pamco**, 47 Wn. App. 681, 683, 736 P.2d 1100 (1987).

The trial court erred by ruling that the dispute is outside the scope of the arbitration clause, and that Rose waived his right to arbitration. Rose sought to enforce the private arbitration clause because Atkinson's second and third causes of action relate specifically to the power dynamic between Rose and Atkinson as members and co-managers of Woohoo Enterprises, LLC. In particular, Paragraph 5.5(a) of Woohoo Enterprises' Operating Agreement states that if the members encounter a deadlock regarding the business's activities, they must either mediate or arbitrate the dispute.

A. No Extensive Litigation History Between Atkinson and Rose Relating to Woohoo.

In Section A of the Statement of Facts, Atkinson is asking the court to determine the underlying merits of the dispute², something Washington courts explicitly prohibit. Whether Rose improperly or unilaterally removed Atkinson as a signer from the WooHoo account is a question of law and fact, goes to the underlying merits of this case, and not at issue in this appeal. What is relevant is whether Rose waived his right to private arbitration by extensively litigating. Rose has not, as Atkinson alleges, engaged in active litigation relating to WooHoo Claims.

Contrary to Atkinson's characterization of the discovery that has transpired in this action, the parties have not engaged in extensive discovery regarding Atkinson's claims that relate to Woohoo Enterprises. To the contrary, the lion's share of discovery in which the parties have engaged related specifically to the partnership dispute, not Atkinson's specific dispute with Rose regarding the operations and management of Woohoo Enterprises, LLC. The depositions that were conducted were of Rose, Beardsley, and Atkinson combined, and lasted less than three full days. Thus, Rose has not, as Atkinson alleges, actively litigated this case.

Rose's Motion to Disqualify Atkinson's counsel is not indicative of active litigation of the underlying case or Woohoo claims. Instead, it

² See *Generally* Atkinson Response at p. 6-8.

was a necessary first step that Rose would have taken regardless of whether this case been in arbitration or litigation.

Regarding discovery of Atkinson's claims relating to Rose and WooHoo, Rose has not, as Atkinson claims, engaged in extensive discovery concerning all aspects of this case. In Rose's first set of requests for admissions, the questions asked were cursory and not extensive.³ In their first set of interrogatories, Rose's requested information pertaining to WooHoo and Atkinson's WooHoo Claims were minimal, and not extensive, as Atkinson claims. Accordingly, reversal and remand is appropriate.

B. WooHoo's Operating Agreement Regarding Arbitration Applies to This Case.

Once again, Atkinson is asking the court to determine the underlying merits of the dispute in Section B of the Statement of Facts⁴, something Washington courts explicitly prohibit. Whether or not Rose unlawfully or unilaterally removed Atkinson as a signer from the WooHoo account is a question of law, and goes to the underlying merits of this case. These issues are not pertinent to this appeal. Thus, any and all references which ask the court to determine the underlying merits of this case in "Section B. WooHoo's Operating Agreement Regarding Arbitration" of

³ CP 324.

⁴ See *Generally* Atkinson Response at p. 6-8.

Atkinson's Response should be disregarded in its entirety. What is relevant in this appeal is 1) whether the parties agreed to arbitrate, 2) whether the second and third causes of action relate specifically to the power dynamic between Rose and Atkinson as members and co-managers of WooHoo Enterprises, LLC and the related actions rose to a deadlock within the meaning of the arbitration agreement, 3) and whether Rose waived his right to private arbitration.

First, the parties had a valid arbitration agreement. Neither party disputes the unambiguous arbitration clause in Article V of the Operating Agreement. Article V of the Operating Agreement discusses member voting.⁵ Paragraph 5.5(a) states, in relevant part, that "Deadlock occurs when members, after negotiations, cannot reach an agreement. At such time members agree to; [sic]

- a. enter binding mediation or arbitration.
- b. If there is failure to reach an agreement through arbitration or mediation, members may file a request for decision by the appropriate court."⁶

Second, a deadlock occurred when, after failing to agree to a mediator to discuss their differences, Atkinson filed the lawsuit. The plain language of the operating agreement did not require that Rose and Atkinson have a formal meeting to discuss their differences. Nor did the

⁵ CP 231.

⁶ CP 605.

operating agreement require that they do so. Instead, the operating agreement only required that they have a conversation, regardless of the medium used to communicate, to see if they could resolve their difference. That occurred here, and in fact, it was Rose's understanding that he and Atkinson were setting up mediation when Atkinson filed suit. The trial court abused its discretion by adopting Atkinson's position that because Rose did not call a formal vote, the deadlock clause did not apply. Because Atkinson and Rose encountered a deadlock as that term is used in the operating agreement, the trial court erred when it found that the arbitration clause found Woohoo's Operating Agreement did not apply to Atkinson's second and third causes of action.

Third, Rose did not waive his right to private arbitration. The evidence shows Rose did followed the terms of the arbitration agreement by first attempting to mediate the case. Without giving him an opportunity to resolve the dispute via mediation, Atkinson filed a lawsuit. Rose raised arbitration as a defense in his pleadings, and any delay that may have occurred was minimal, and not indicative of waiver.

As such, reversal and remand is appropriate, with the instructions to submit Atkinson's Second and Third Causes of Action to Private Arbitration.

III. ARGUMENT

A. The Standard of Review of a Trial Court’s Denial of a Motion to Compel Arbitration is De Novo

1. Denial of the Motion to Compel Arbitration is Reviewed De Novo.

i. Review of the Court’s Finding Rose Waived his Right to Arbitration is De Novo.

In her Response, Atkinson appears to attempt to argue that the standard of review for the denial of motion to compel arbitration is a mixed question when an issue of implied waiver is involved in the denial. First, the Court of Appeals has already determined “[w]e review a waiver determination de novo.” **Romney v. Franciscan Med. Grp.**, 199 Wn. App. 589, 602 (2017). Further, historically Washington courts reviewed whether a litigant waived his or her right to private arbitration *de novo*.⁷ Even if Atkinson’s analysis that the issue of implied waiver within the context of an arbitration clause was a mixed question of law and fact, there is no conflicting evidence here. The parties agree as to what discovery was conducted and only disagree at the proper adjective to describe the scope of the discovery. Further, the parties do not dispute that the only motion in which Rose participated—and in fact the only motion filed in the action—was the motion to disqualify Atkinson’s counsel.

⁷ **Wiese v. CACH, LLC**, 189 Wn. App. 466, 480, 358 P.3d 1213 (2015)(stating under federal law the ultimate issue of whether arbitration was waived is reviewed *de novo*);

Accordingly, this appeal does not present a mixed question of law and fact.

ii. Whether Atkinson's Claims are Arbitrable is Reviewed De Novo.

Further, whether the arbitration clause applies to Atkinson's claims is reviewed *de novo*. **Mendez v. Palm Harbor Homes, Inc.**, 111 Wn. App. 446, 453, 45 P.3d 594 (2002).

In this case, the court must review *de novo* the trial court's interpretation of Paragraph 5.5 of the Operating Agreement. 5.5 states:

“Deadlock occurs when members, after negotiations, cannot reach an agreement. At such time members agree to;

- a. Enter binding mediation or arbitration.
- b. If there is a failure to reach an agreement through arbitration or mediation, members may file a request for decision by the appropriate court.
- c. Costs associated with any of the above will become the responsibility in the form of a note payable to the company by the non-prevailing party, or as determined by appropriate court [sic].”⁸

The parties do not dispute the language of this arbitration clause. Rose and Atkinson clearly agreed to “mediate or arbitrate” their disputes related to the operation and management of Woohoo Enterprises, LLC. Atkinson undoubtedly believed that Rose should have first sought her vote before attempting to raise High Washington's monthly rent and any action taken related to her access to the company's bank account.

⁸ CP 605.

iii. Review of the Denial of Rose's Motion for Reconsideration is Reviewed for Abuse of Discretion.

The grant or denial of a motion for reconsideration is inherently a discretionary decision by the trial court. **Rivers v. Wash. State Conference of Mason Contractors**, 145 Wn.2d 674, 684, 41 P.3d 1175 (2002).

B. Rose Timely Invoked His Right to Arbitrate and Did not Engage in Extensive Litigation Conduct.

Whether a movant has waived his right to private arbitration is not determined by a single action but rather the totality of the actions prior to the movant's invocation of his right to private arbitration. To determine whether a claimant has waived his right to private arbitration, the Court will consider whether the movant took too many steps down the path of litigation. **River House Dev., Inc. v. Integrus Architecture, PS**, 167 Wn. App. 221, 224, 272 P.3d 289 (2012). Thus the party opposing arbitration must show that the movant's actions are inconsistent with an intent to arbitrate the matter. **Id.** at 237.

1. Rose's Failure to Invoke the Arbitration Clause Immediately does not Constitute a Waiver of his Right to Private Arbitration.

Contrary to Atkinson's assertions, Rose timely invoked arbitration in this case. In her responsive brief, Atkinson appears to argue that Rose waived his right to private arbitration when he "failed to invoke arbitration

when this case was commenced.”⁹ In support of her position, Atkinson cites to **Schuster v. Prestige Senior** Management for the proposition that a ten-month delay constitutes waiver.¹⁰ See **Schuster v. Prestige Senior Mgmt., LLC**, 193 Wn. App. 616, 376 P.3d 412 (2016). However, Atkinson fails to reconcile the fact that in **Schuster** the movant waited 18 months to compel arbitration. **Schuster** 193 Wn. App. at 626. Further, the non-moving party, the Schusters, objected to the motion because they had incurred considerable legal costs during discovery that, had they known the matter was to be decided before the National Arbitration Forum, they would not have incurred. **Id.** In fact, the portion of the opinion Atkinson cites to is not an actual finding by the Court. Instead, the Court is merely paraphrasing a statement made by the Third Circuit. Notably, the Third Circuit was not concerned with the interpretation of Washington law as the case on review was from the Eastern District of Pennsylvania. Instead of holding that a ten-month delay of bringing a motion to compel arbitration, the *Schuster* Court found that under the Federal Arbitration Act, waiver occurs when a party delays enforcement of an arbitration clause for 18 months, engages in active motions practice, and engages in exhaustive discovery. **Id.** at 645-48.

⁹ Atkinson’s Response Brief, at p. 13

¹⁰ **Id.** at p. 14.

Washington Courts have held that delays longer than ten-months did not constitute the movant's right to compel private arbitration. For example, in **Lake Wash. Sch. Dist.**, the Court of Appeals held that a 1-year delay did not constitute waiver. **Lake Wash. Sch. Dist. 414 v. Mobile Modules Northwest, Inc.**, 28 Wn. App. 59, 621 P.2d 791 (1980). The court acknowledged that "a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time." *Lake Wash. Sch. Dist.*, at 64. Ultimately though, the court in **Lake Wash. Sch. Dist.** and **Schuster** both acknowledged that a delay alone does not show that a movant waived his or her right to private arbitration.

In this case, Rose first attempted to negotiate (mediate) the WooHoo claims in December 2015. After some time, Atkinson would not agree to mediate and Atkinson filed the lawsuit. Settlement discussions still occurred after Atkinson filed suit. Rose timely requested arbitration through his Motion to Compel Private Arbitration. Prior to the motion, Rose's actions did not show an intent to relinquish his right to private arbitration. The request was made within a reasonable time. A ten-month delay in this case is not indicative of waiver. Accordingly, reversal and remand is proper.

2. Rose did not Take "Too Many Steps Down the Path of Litigation" Before he Sought to Invoke the Parties Arbitration Clause.

Rose did also did not waive his right to private arbitration because neither he nor Atkinson engaged in extensive litigation prior to the motion to compel arbitration. Atkinson cites to **River House Dev.**, 167 Wn. App. at 231 to argue that Rose “took to many steps down the path of litigation and too few down the path of arbitration to reasonably claim that [his] conduct was consistent with a continuing right to arbitrate.”¹¹ This argument is misplaced, and the facts in **River House** differ. In **River House**, the plaintiff filed suit and engaged in litigation but later requested arbitration. The court held that the plaintiff waived its right to arbitration when that party attended a status conference in person with the assigned judge, agreed to a case schedule and trial date, exchanged trial witness lists with the opposing party, participated in formal discovery and motion practice regarding discovery, and represented to the court that it was preparing for trial.

Here, unlike the parties in **River House**, the parties are not even close to being prepared for trial, and neither party has represented to the court that it was preparing for trial. No trial witness lists have been exchanged. In fact, the case was recently moved to Track II-litigation, and no motion practice regarding discovery has since taken place. Moreover, the court in **River House** held that waiver of a contractual right to

¹¹ Atkinson Reply at p. 14.

arbitration is disfavored and a party alleging waiver has a heavy burden of proof. **River House Dev, supra**, 167 Wn. App. 221, 237, 272 P.3d 289 (2012). Atkinson has not met this heavy burden of proof.

Furthermore, Atkinson’s misplaced citation to **Schuster**, 193 Wn. App. at 633 to assert that Rose’s “active litigation” paired with “failure to raise arbitration in one’s answer,”¹² is inconsistent with the facts of this case. First, Rose has not engaged in active litigation. Second, unlike the movant in **Schuster**, Rose did not fail to raise arbitration in his answer. To the contrary, Rose timely and appropriately raised Arbitration in his Answer to Affirmative Defenses to the Third Amended Complaint.

Atkinson also cites to **Romney v. Franciscan Medical Group**, 2017 WL 2952370 at *8 (Wash. App. 2017) to assert that “delay amounts to prejudice where there is no good excuse for it” and that “Rose should have spoken up sooner and clearly—before Atkinson expended major “time, energy, and resources” in court.¹³ Markedly, this assertion is misplaced because under Washington law, prejudice is not a factor when analyzing whether a party has waived the arbitration clause. **Otis Housing Association v. Ha**, 165 Wn.2d 582, 201 P.3d 309 (2009)(“The court did not mention any requirement that the nonmoving party assert or show prejudice. Thus, Washington law may reject prejudice as an element of

¹² Atkinson Response, at p. 15.

¹³ Atkinson Response, at p. 15.

arbitration waiver.”) Although Washington courts do not require that the party opposing arbitration show prejudice, Atkinson would not have been prejudiced had the trial court granted Roses’ motion to compel arbitration. Indeed the parties only recently agreed to a case schedule and trial is not scheduled until June 2018. There is nothing that would prevent Atkinson from utilizing the discovery that had been performed in this matter to prepare for private arbitration and there is no law of the case issues this matter could present in private arbitration.

Finally, Atkinson’s reliance on **Ives v. Ramsden** is not instructive in this matter.¹⁴ To aide her position, Atkinson cites to **Ives** for the proposition that a party waived arbitration when he “answered the complaint, engaged in extensive discovery, deposed witnesses, submitted and answered interrogatories and otherwise prepared for trial.”¹⁵ **Ives v. Ramsden**, 142 Wn. App. 369, 174 P.3d 1231 (2008). Notably absent from Atkinson’s discussion of **Ives** is the fact that the movant, Ramsden, litigated the matter for three years and four months before he sought to invoke his right to private arbitration. **Ives**, 142 Wn. App. at 384. Rose did not wait until the “eve of trial” to compel private arbitration. Nor did he wait three years and four months before he sought private arbitration.

¹⁴ Atkinson’s Response, at p. 15.

¹⁵ Id.

Accordingly, **Ives** is not persuasive and does not lend support to affirmation of the lower court's decision.

There has not been extensive litigation of the WooHoo Claims between Atkinson and Rose. The parties engaged in initial discovery. While counsel in this matter clearly disagree as to the proper adjective to describe the breadth of discovery, such deliberations do not evidence that Rose waived his right to arbitration. Further, no trial date or deadlines were set until well after this appeal was filed. Currently, the trial date is June 2018. Notably, Atkinson never sought to set the trial date and it was set only after Rose and the other defendants moved to have the matter placed on a litigation track. Other than the initial discovery, no further litigation has been performed in this matter. The simple fact is that Rose never took actions prior to his motion to compel arbitration that indicated he clearly placed the Woohoo dispute on a path towards trial. Instead, Rose was served with the Second Amended Complaint, filed a motion to disqualify counsel, and then engaged in initial discovery. Notably, from the time that Rose was served with the Second Amended Complaint and he filed his motion to compel arbitration, no trial deadlines lapsed because a trial date had not been set. Further, as noted previously the vast majority of discovery concerned the terms and parameters of the parties'

partnership agreement, not the dispute between Rose and Atkinson regarding the operations and management of Woohoo Enterprises.

Since this case was moved to Track II-Litigation on May 19, 2017, no further pleadings, dispositive motions, or any other hearings related to Atkinson's Second and Third Cause of Action related to the WooHoo claims have occurred. In fact, the only motions practice that has occurred since the denial of Rose's Motion to Compel Private Arbitration was that he amended his counterclaims to add claims related to Woohoo Enterprises—in order to avoid any statute of limitations issues—and the motion to place the overall matter on the Track-II litigation schedule. There has been no extensive litigation history of the WooHoo claims between Atkinson and Rose.

After the trial court denied Rose's motion for reconsideration, Rose amended the counterclaims to add claims he had against Atkinson for her actions in the management of Woohoo Enterprises, LLC. Rose brought his claims at that point in time because he feared that the court of appeals may not decide the matter before the statute of limitations on his claims expired. Nothing more. While Atkinson may consider the deposition of Rose and Michelle Beardsley to be "extensive", Rose's deposition did not last a full day.

Additionally, Rose filed the motion to compel arbitration well before any extensive discovery commenced. In fact, the lion's share of discovery in which the parties have engaged related specifically to the partnership dispute, not Atkinson's specific dispute with Rose regarding the operations and management of Woohoo Enterprises, LLC. Only three depositions, which lasted three full days, have occurred. Contrary to Atkinson's assertions, litigation in this matter is in fact currently stagnant as the case was recently moved to Track-II litigation.

Rose's actions do not justify a finding a waiver. As such, reversal and remand is appropriate.

3. The Trial Court Erroneously Found Atkinson's Claims Were Not Arbitrable.

In her reply, Atkinson erroneously asserts that "no negotiations or even discussions between the parties took place regarding Rose's unilateral actions that form the basis of Atkinson's claims."¹⁶ That is false. Prior to Atkinson's initiation of the lawsuit, Rose attempted to mediate the matter.¹⁷ Section 5.5(a) of the WooHoo Operating Agreement states: "Deadlock occurs when members, after negotiations, cannot reach an agreement." At the time, the WooHoo members (in this case, Atkinson and Rose) were first instructed to enter binding mediation or arbitration in

¹⁶ Atkinson's Response Brief, p. 12.

¹⁷ VR 7:6-8:6.

the event of a deadlock. Negotiation is defined as “discussion aimed at reaching an agreement.”

As Richard Boe, one of Rose’s attorneys stated at the hearing on motion for reconsideration, Rose put a 30-day notice to change the rent.¹⁸ On January 1, 2016 a three-day notice was given by him for High Washington to pay the increased rent.¹⁹ Atkinson’s attorney at the time called Mr. Boe and asked him to get together and meet.²⁰ At this time, Atkinson did not file the lawsuit. On January 13, 2016 Atkinson’s attorney and Rose’s attorney met, and discussed, rather than litigate at that point, to have a cooling-off period where they would seek to mediate the dispute Atkinson and Rose had regarding the management and operations of Woohoo Enterprises, along with other issues related to the overall partnership to operate recreational marijuana businesses.²¹ While attempting to select a mediator, Atkinson filed the lawsuit.²² Notably, Atkinson believed that mediation was appropriate initially and only elected to file suit after Rose did not agree to the mediator Atkinson proposed. As such, these actions illustrate that the claims fall squarely within the prevue of paragraph 5.5(a).

¹⁸ VR 7:7-8.

¹⁹ *Id.*

²⁰ *Id.* at 7:13-14.

²¹ *Id.* at 7:15-18.

²² *Id.* at 7:19-20.

Critically, the operating agreement does not require that Rose and Atkinson have a formal meeting to discuss their differences in order for a “deadlock” to arise. The parties are only required to have a conversation to see if they can resolve their differences. That conversation happened between the parties’ attorneys as discussed above, and it was Rose’s understanding that he and Atkinson were setting up mediation when Atkinson filed suit.

Because Atkinson and Rose encountered a deadlock as that term is using in the operating agreement, the trial court erred when it found that the arbitration clause found Woohoo’s Operating Agreement did not apply to Atkinson’s second and third causes of action. As such, reversal and remand is proper.

IV. CONCLUSION

The facts of this case and the Washington statutory and caselaw support a finding that the parties have a binding arbitration agreement and that Rose did not waive his right to arbitration. The trial court abused its discretion because there was no substantial evidence to support a finding that the WooHoo Operating Agreement’s arbitration clause is inapplicable and that Rose waived his right to arbitration.

For these reasons and for the reasons and authority stated above, the trial court’s decisions should be reversed and the matter should be

remanded to the trial court to issue an order consistent with this Court's determination.

Respectfully submitted this 28 day of August, 2017.

MDK Law

/s/ James P. Ware

JAMES P. WARE, WSBA# 36799
COURTNEY D. BHATT, WSBA# 46298
MDK Law
777 108th Ave NE, Suite 2000
Bellevue, WA 98004
Telephone: (425) 455-9610
Fax: (425) 455-1170
jware@mdklaw.com
cbhatt@mdklaw.com
Attorneys for Appellant

DECLARATION OF SERVICE

I certify that on August 28, 2017 I caused a true and correct copy of the Appellant's Reply Brief to be served upon the Appellee and necessary parties via counsel in the manner indicated below:

Attorney for Appellee

John Rapp

Hilary Bricken

Daniel P. Harris

Alison Margaret Malsbury

600 Steward St Ste 1200

Seattle, WA 98101-3160

Jfs.rapp@gmail.com

hilary@harrisbricken.com

dan@harrisbricken.com

alison@harrisbricken.com

Via Email and Division II's eservice system

Dated August 28, 2017.

/s/ James P. Ware

James P. Ware
(425) 455-9610

MDK LAW

August 28, 2017 - 2:04 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 49963-1
Appellate Court Case Title: Annette Atkinson, et al, Respondents v. Brian Rose, et ux, et al, Appellants
Superior Court Case Number: 16-2-00288-1

The following documents have been uploaded:

- 0-499631_Briefs_20170828140327D2659144_2172.pdf
This File Contains:
Briefs - Appellants Reply
The Original File Name was 2017.08.28 Reply Brief FINAL.pdf

A copy of the uploaded files will be sent to:

- alison@harrisbricken.com
- dan@harrisbricken.com
- hilary@harrisbricken.com
- jfs.rapp@gmail.com
- jware@mdklaw.com
- mark@mdklaw.com

Comments:

Sender Name: Courtney Bhatt - Email: cbhatt@mdklaw.com
Address:
777 108TH AVE NE STE 2000
BELLEVUE, WA, 98004-5146
Phone: 425-455-9610

Note: The Filing Id is 20170828140327D2659144