

~~FILED~~
DEC 4 2007
CLERK OF SUPREME COURT
STATE OF WASHINGTON
[Signature]

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

No. 80672-1

2007 DEC -4 A 11:12

SUPREME COURT
OF THE STATE OF WASHINGTON
BY RONALD R. CARPENTER
CLERK

LARRY NELSON and the marital community
composed of Larry and Barbara Nelson,

Plaintiffs/Respondents

v.

WESTPORT SHIPYARD, INC.; J. ORIN EDSON
and CHARLENE EDSON; and DARYL
WAKEFIELD and KIM WAKEFIELD,

Defendants/Petitioners

ON PETITION FOR REVIEW FROM COURT OF APPEALS,
DIVISION TWO

REPLY TO ANSWER TO PETITION FOR REVIEW

Michael B. King
WSBA No. 14405
TALMADGE LAW GROUP PLLC
Attorneys for Appellants

Gail E. Mautner
WSBA No. 13161
D. Michael Reilly
WSBA No. 14674
Laura T. Morse
WSBA No. 34532
LANE POWELL PC
Attorneys for Appellants

Talmadge Law Group PLLC
18010 Southcenter Parkway
Tukwila, Washington 98188
Telephone: (206) 574-6661
Facsimile: (206) 575-1397

Lane Powell PC
1420 Fifth Avenue, Suite 4100
Seattle, Washington 98101
Telephone: (206) 223-7000
Facsimile: (206) 223-7107

TABLE OF CONTENTS

	<u>Page</u>
1. Authority for Reply	1
2. Summary of Reply	1
3. Brief Counterstatement of Facts	2
4. Procedural Background	5
5. Argument Why Plaintiff Fails to Satisfy the Requirements of RAP 13.4(b)	6
a. Plaintiff Fails to Meet the Requirements of RAP 13.4(b)(1)	6
b. Plaintiff Also Fails to Show How the Decision Is in Conflict with Any Decision of the Court of Appeals	6
(1) Plaintiff Cites No Conflicting Case Regarding Timely Appeal of Denials of Motions for Arbitration Involving a Series of Orders, Where Only the Final Order Is an Unequivocal and Final Denial	7
(2) Plaintiff Similarly Fails to Demonstrate a Conflict Between the Decision and Any Court of Appeals Cases Concerning a Party's Actions that May Be Inconsistent With an Intent to Arbitrate	9-10
6. Conclusion	12

TABLE OF AUTHORITIES

	<u>Page</u>
<u>CASES</u>	
<u>Buckeye Check Cashing, Inc. v. Cardegna</u> , 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006).....	4
<u>Herzog v. Foster & Marshall</u> , 56 Wn. App. 437, 783 P.2d 1124 (1989).....	2, 6, 8, 9
<u>Kinsey v. Bradley</u> , 53 Wn. App. 167, 765 P.2d 1329 (1989).....	11, 12
<u>Lake Wash. Sch. Dist. No. 414 v. Mobile Modules N.W., Inc.</u> , 28 Wn. App. 59, 621 P.2d 791 (1980).....	12
<u>Malott v. Randall</u> , 8 Wn. App. 418, 506 P.2d 1296 (1973).....	8, 9
<u>Malott v. Randall</u> , 83 Wn.2d 259, 517 P.2d 605 (1974)	8
<u>Naches Valley School District No. JT3 v. Cruzen</u> , 54 Wn. App. 388, 775 P.2d 960 (1989)	10
<u>Nelson v. Westport Shipyard, Inc.</u> , 140 Wn. App. 102, 163 P.3d 807 (2007)	1, 5
<u>Stein v. Geonerco</u> , 105 Wn. App. 41, 17 P.3d 1266 (2001).....	9

STATUTES AND COURT RULES

RAP 2.2(a)(3)	8
RAP 5.2(a).....	8
RAP 13.4(b).....	6, 10, 12
RAP 13.4(b)(1)	1, 2, 6, 12
RAP 13.4(b)(2)	1, 2, 7, 10, 12
RAP 13.4(d).....	1

RAP 17.2(a)(2)	5
RAP 17.7	5

1. Authority for Reply. Petitioners Westport Shipyard, Inc., J. Orin and Charlene Edson, and Daryl and Kim Wakefield (collectively "Defendants" or "Appellants") file this Reply to Plaintiff/Respondents' Answer to the Petition for Review. Appellants filed a Petition for Review of issues arising from Division II's opinion in Nelson v. Westport Shipyard, Inc., 140 Wn. App. 102, 163 P.3d 807 (2007) (the "Decision"). Plaintiff/Respondent's Answer to the Petition raised an issue not raised in the Petition: the issue of purported waiver of Appellants' right to appeal the trial court's August 10, 2006 Order denying Defendants' Motion to Compel Arbitration. Thus, pursuant to RAP 13.4(d), Appellants file this Reply to address only this new issue.

2. Summary of Reply. Plaintiff seeks review of the portion of the Decision that rejected his assertion that Appellants "had waived" their right to appeal the trial court's ruling. He cites RAP 13.4(b)(1) and (b)(2), which permit review of a Court of Appeals decision that is in conflict with (i) a decision of our Supreme Court, or (ii) another decision of the Court of Appeals, respectively. Answer to Petition for Review ("Answer") at p. 18. Plaintiff has not satisfied his burden of proving either of these grounds for review exists.

As a threshold matter, plaintiff fails to cite any case from this Court with which the Court of Appeals decision may be in conflict. The

only case in plaintiff's Answer that is identified as a Supreme Court case is Herzog v. Foster & Marshall, which plaintiff cites as 56 Wn.2d 437, 783 P.2d 1124 (1989). Herzog is actually a Court of Appeals decision, located at 56 Wn. App. 437, 783 P.2d 1124 (1989), and cannot serve as a basis for review under RAP 13.4(b)(1).

The Court of Appeals decisions plaintiff does cite are easily distinguishable from the facts present here: two prior orders that were not final orders denying motions to compel arbitration, followed by a third order, which was final, from which Appellants timely appealed. Moreover, plaintiff fails to cite a conflict with any case in which a court found waiver of appeal based on activity in the judicial forum in circumstances similar to those presented here. Accordingly, plaintiff fails to meet the standard for granting review set forth in RAP 13.4(b)(2).

3. Brief Counterstatement of Facts. Appellants provided in their Petition for Review a detailed statement of facts, including the procedural facts as may possibly relate to plaintiff's waiver arguments, and those facts will not be restated in detail here. Appellants, however, offer the following to highlight the facts relevant to plaintiff's waiver arguments:

Upon first learning of plaintiff's breach of the 2004 Shareholders Agreement (based on plaintiff's refusal to sell back his shares of Westport

Shipyard, Inc. stock as required by the Agreement), Defendants immediately notified plaintiff they were exercising their right to arbitrate. See Nelson Decl., ¶ 20 at 5-6 (CP 113-14).

Despite notice of Defendants' intent to arbitrate, plaintiff filed a lawsuit against Defendants, claiming, inter alia, he was not bound by the 2004 Shareholders Agreement (in particular, the provisions requiring him to sell his shares back to Westport), and raising numerous other claims. See generally First Amended Complaint (CP 16-29). In response, Defendants sought a stay of plaintiff's "shareholder claims arising under the parties' 2004 Shareholders Agreement," and sought to compel arbitration of those claims, as required under the 2004 Shareholders Agreement. See Defendants' Motion to Stay and Compel Arbitration at 1 (CP 30).

The trial court denied the motion to compel arbitration "at this stage of the litigation." See October 31, 2005 Letter Ruling (CP 131) and November 10, 2005 Order Denying Defendants' Motion to Stay Litigation and Compel Arbitration (CP 134). Defendants sought clarification of this ruling. See Defendant Westport Shipyard's Memorandum in Support of Its Motion for Clarification at 2 (CP 142). By subsequent letter ruling denying the Motion for Clarification, the Order denying arbitration "at this stage of the litigation" remained in place. See January 3, 2006 Order Denying Appellants' Motion for Clarification (CP 225-26).

As it was clear, after these two orders issued, that Defendants would need to engage in discovery before bringing a renewed motion to compel arbitration, Defendants engaged in limited discovery, taking (but not completing) the plaintiff's deposition, to ascertain the basis for his challenge to the enforceability of the 2004 Shareholders Agreement. See Excerpts of Nelson Depositions (CP 343-44).

In April 2006, based on plaintiff's deposition testimony and on the United States' Supreme Court's recent issuance of Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S. Ct. 1204, 163 L. Ed. 2d 1038 (2006), Defendants renewed their motion to compel arbitration. An alternative motion for partial summary judgment on the issue of plaintiff's pre- and post-formation challenges to the 2004 Shareholders Agreement was noted to be argued immediately following the motion to compel arbitration. See Defendants' Motion to Compel Arbitration (CP 390) and Praecipe to File Motion for Partial Summary Judgment (CP 231), setting hearings for both motions on April 17, 2006. Defendants noted, both in their briefing and at the outset of oral argument, that a favorable ruling granting their motion to compel arbitration, would moot the motion for partial summary judgment.

On August 10, 2006, the trial court issued an order denying Defendants' April 17, 2006 renewed Motion to Compel Arbitration.

(CP 503-04). The August 10 Order did not include the "at this stage of the litigation" proviso. Id. There is no dispute that Defendants filed their Notice of Appeal less than 30 days later, on September 1, 2006. See Notice of Appeal (CP 506).

4. Procedural Background. Plaintiff filed a Motion to Dismiss Appellants' appeal, making the very same arguments he makes here. A Commissioner at Division II denied plaintiff's motion, concluding (1) the August 10, 2006 Order was the only order that "unequivocally denied Westport Shipyard's motion to compel arbitration," and (2) "Westport Shipyard's actions [in the litigation] are not inconsistent with its motion to compel arbitration." See Ruling Denying Motion to Dismiss Appeal (on file). A panel of judges at Division II denied plaintiff's Motion to Modify the Commissioner's ruling. See Order Denying Motion to Modify (on file). In the Decision, the panel refused to entertain plaintiff's waiver arguments, observing that "[h]aving previously denied Nelson's motion to dismiss Westport's appeal as untimely, we do not consider it again," citing RAP 17.2(a)(2) and 17.7. Nelson v. Westport Shipyard, Inc., 140 Wn. App. 102, 163 P.3d 807, 811 n.5 (2007). Plaintiff now rehashes his waiver arguments in his Answer to Appellants' Petition for Review.

5. Argument Why Plaintiff Fails to Satisfy the Requirements of RAP 13.4(b).

a. Plaintiff Fails to Meet the Requirements of RAP 13.4(b)(1). As discussed above, plaintiff does not cite any case from this Court that the Decision is purportedly in conflict with. Herzog is a Court of Appeals case. Herzog v. Foster & Marshall, 56 Wn. App. 437, 783 P.2d 1124 (1989). Thus, plaintiff fails to demonstrate grounds for granting review pursuant to RAP 13.4(b)(1).¹

b. Plaintiff Also Fails to Show How the Decision Is in Conflict with Any Decision of the Court of Appeals. Plaintiff's arguments on the waiver issue are nothing more than a recitation of fundamental principles of arbitration and appeals. Plaintiff points to nothing in the Decision that actually conflicts with these generic principles.

What plaintiff all but ignores is that he makes his arguments in the highly unusual context of a trial court issuing three orders in response to motions to compel arbitration. In the first, the trial court interlineated in his own hand that the court's denial of Defendants' first motion to compel arbitration was "at this stage of the litigation" only. November 10, 2005

¹ It is unclear whether this was a scrivener's error on plaintiff's part. Plaintiff mistakenly cited Herzog as a Supreme Court case in his Motion to Dismiss (pp. ii, 12). He alternately referred to the case as a Supreme Court and a Court of Appeals case in his Motion to Modify (pp. ii, 10, 19) and Respondent's Brief (pp. ii, 16, 24).

Order Denying Defendants' Motion to Stay Litigation and Compel Arbitration (CP 133-35). Upon motion for clarification, the trial court simply denied the motion, leaving in full effect the "at this stage of the litigation" order. See Order Denying Motion for Clarification (CP 225-26). What plaintiff fails to come to grips with is that the only final order -- and, thus, the only appealable order -- denying arbitration was the trial court's August 10, 2006 Order. Plaintiff fails to cite any case that addresses this unusual procedural situation, and cannot satisfy his burden of showing the Decision is in conflict with any other applicable Court of Appeals decision. The cases plaintiff cites regarding waiver based on Defendants conducting limited discovery are similarly inapposite.

(1) Plaintiff Cites No Conflicting Case Regarding Timely Appeal of Denials of Motions for Arbitration Involving a Series of Orders, Where Only the Final Order Is an Unequivocal and Final Denial. Again, RAP 13.4(b)(2) requires a conflict between the decision sought to be reviewed and other Court of Appeals decisions. When the cited cases do not even address the issue at hand, plaintiff cannot reasonably suggest there is a conflict between two cases for purposes of granting review.

- Malott v. Randall, 8 Wn. App. 418, 506 P.2d 1296 (1973).

Appellants do not dispute that Malott stands for the axiomatic principle that the time for filing a notice of appeal is a jurisdictional step. Id. at 423. The Decision does not hold to the contrary. Appellants timely filed their Notice of Appeal from the August 10, 2006 Order on September 1, 2006, well within the time for filing provided in RAP 5.2(a). See Notice of Appeal (CP 506). Malott did not concern itself with a series of orders, or address which order of a series was "final" for purposes of appeal; it only addressed a single final order, and thus there is no conflict between Malott and the Decision.²

- Herzog v. Foster & Marshall, 56 Wn. App. 437, 783 P.2d 1124 (1989). "The only issue presented [in Herzog was] whether the trial court's order denying a motion to stay judicial proceedings and compel arbitration is appealable as of right under RAP 2.2(a)(3)." Id. at 440. In Herzog, the appellants filed both a notice of appeal and a notice for

²Tellingly, plaintiff does not mention that the Supreme Court granted review of the Court of Appeals' grant of a motion to dismiss the appeal as untimely in Malott. This Court reversed the Court of Appeals, reinstating the appeal as timely, where procedural anomalies contributed to the alleged untimely filing. See Malott v. Randall, 83 Wn.2d 259, 263, 517 P.2d 605 (1974). While not dispositive of the waiver issue present here, this Court recognized in its Malott decision that unique circumstances sometimes require reaching unique conclusions. Id. (limiting narrow holding "confined to the facts which hopefully are unique and unlikely to occur again").

discretionary review. Id. at 435. The Herzog court concluded that an order denying arbitration is appealable as of right. Id. at 445. Again, Appellants do not dispute this proposition: Appellants filed a timely notice of appeal, not a notice for discretionary review. (CP 506). Just as in Malott, the Herzog court was not dealing with multiple orders, and certainly not an order that contained the judge's caveat that he was only denying the motion to compel "at this stage of the litigation." Again, plaintiff fails to show a contradiction between the Decision and the Court of Appeals' decision in Herzog.

- Stein v. Geonerco, 105 Wn. App. 41, 17 P.3d 1266 (2001). Just like Herzog, Stein stands for the principle that an order denying a motion to compel is immediately appealable. Id. at 44. Just as in Malott and Herzog, Stein involved a single, unequivocal denial of a motion to compel arbitration. Plaintiff's reference to the "immediate appealability" of an order denying a motion to compel in Stein begs the question of whether an order that specifically leaves the door open to a renewed motion to compel is a "final" order for purposes of appealability -- a question none of the cases cited by plaintiff address. See Answer, p. 18.

(2) Plaintiff Similarly Fails to Demonstrate a Conflict Between the Decision and Any Court of Appeals Cases Concerning a Party's Actions that May Be Inconsistent With an Intent to

Arbitrate. Here again, plaintiff paints with a broad brush, citing cases that discuss generic principles regarding arbitration, but ignores the significant factual distinctions between those cases and the Decision here. Even a quick review of the cited cases reveals that no conflict exists, as required by RAP 13.4(b)(2).

- Naches Valley School District No. JT3 v. Cruzen, 54 Wn. App. 388, 775 P.2d 960 (1989). Unlike the school teachers who waived their arbitration rights by bringing a summary judgment motion on defendant's liability after the association (acting on their behalf) brought a summary judgment motion on arbitration, Appellants did not waive their right to arbitrate by bringing a motion for partial summary judgment at the same time as their renewed Motion to Compel Arbitration. Here, Appellants clearly stated that granting the Motion to Compel Arbitration would moot a decision on the partial summary judgment motion, as that issue belonged in arbitration. Reply in Support of Motion for Partial Summary Judgment Re Declaratory Relief at 1 (CP 422). There was no such companion motion to compel arbitration in Naches.³

³The only other motion for partial summary judgment filed by defendants was a successful motion to dismiss a plainly nonarbitrable punitive damages claim. See Defendants' Motion to Dismiss Plaintiff's Claim for Punitive Damages (CP 598-606) and Order Granting Defendants' Motion to Dismiss Plaintiff's Claim for Punitive Damages (CP 648-49).

- Kinsey v. Bradley, 53 Wn. App. 167, 765 P.2d 1329 (1989). In Kinsey, the court did indeed find that the party moving for arbitration (Shearson American Express) had waived its rights by acting inconsistently with an intent to arbitrate. Id. at 171-72. However, in Kinsey, Shearson admitted that it engaged in "extensive" motions practice for two-and-a-half years and obtained dismissal of most of Kinsey's claims. Id. at 172. And Shearson aggressively litigated in the trial court for those 2-1/2 years prior to filing any motion to compel arbitration. Id. The Kinsey court concluded: "During all of [this extensive motions practice], Shearson never sought arbitration even though its own agreement provided for it. It is evident Shearson manifested a clear intent to utilize the judicial process rather than seek non-judicial resolution of arbitrable issues." Id. (emphasis added).

Here, in circumstances dramatically different from those in Kinsey, Defendants engaged in only limited discovery (starting but not completing one deposition). And, unlike in Kinsey, Defendants repeatedly attempted to exercise their right to arbitrate even before the complaint was filed. Indeed, if anything, plaintiff has complained that Defendants have demanded arbitration too many times. See Plaintiff's Memorandum in Opposition to Defendants' Motion to Compel Arbitration Or Leave to File Amended Answer with Counterclaims (CP 464) ("[The Buckeye] case

does not justify this third motion to compel arbitration."). The Decision does not run afoul of Kinsey's observation that failure to demand arbitration during pretrial proceedings may evince a willingness to seek judicial rather than arbitral remedies. Kinsey, 53 Wn. App. at 170.

- Lake Wash. Sch. Dist. No. 414 v. Mobile Modules N.W., Inc., 28 Wn. App. 59, 621 P.2d 791 (1980). This is perhaps the most puzzling citation in support of plaintiff's waiver argument. In Lake Washington School District, the court found no waiver when the defendant engaged in limited use of deposition discovery consistent with its use in arbitration prior to bringing a motion to compel arbitration after a three month delay. Id. at 64. This case directly supports rather than conflicts with the Decision's ruling on waiver, and cannot be grounds for granting review of plaintiff's waiver argument.

6. Conclusion. Plaintiff has utterly failed to carry his burden of showing a conflict under either RAP 13.4(b)(1) or (b)(2). This Court should deny plaintiff's request for review of his waiver arguments, as he fails to comply with the requirements of RAP 13.4(b).

RESPECTFULLY SUBMITTED this 4th day of December, 2007.

TALMADGE LAW GROUP PLLC LANE POWELL PC

By Michael B. King
Michael B. King
WSBA No. 14405
Attorneys for Appellants

By Gail E. Mautner
Gail E. Mautner
WSBA No. 13161
D. Michael Reilly
WSBA No. 14674
Laura T. Morse
WSBA No. 34532
Attorneys for Appellants

CERTIFICATE OF SERVICE

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2007 DEC -4 A 11: 12

I declare under penalty of perjury under the laws of the State of Washington that on December 3, 2007, I served true and complete copies of the Motion for Extension of Time to File Answer to Petition for Review by U.S. mail on the individuals and law firms listed below:

Victoria L. Vreeland, Esq.
James Beck, Esq.
Gordon Thomas Honeywell
Malanca Peterson & Daheim, PLLC
600 University Street, Suite 2100
Seattle, WA 98101-4185

DATED this 3rd day of December, 2007.


Angelina de Caracena