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STATE OF WASHINGTON
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NO. 70729-9-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

PERRY JAY JONES, III,

APPELLANT

v.

KAREN M. JONES,

RESPONDENT

RESPONDENT'S BRIEF ON APPEAL

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ORIGINAL

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I. INTRODUCTION

Dr. Jones and Karen Jones were married for 38 years. They attempted to mediate their dissolution action with The Honorable Steve Scott (Ret.) and ultimately agreed to forego trial and reach resolution through binding, private arbitration. They agreed to submit to Judge Scott “*all financial issues*” to “*binding arbitration*” and further agreed that “the manner in which arbitration would be conducted” would be determined by Judge Scott. Judge Scott issued an arbitration ruling. Dr. Jones did not like the ruling and resisted all of Karen’s effort to reduce the ruling to final documents. After multiple post-arbitration hearings, before both the Arbitrator and the Superior Court, including the confounding request for a “trial de novo”.¹ the Arbitration Award was confirmed and the Superior Court entered final dissolution documents. The Superior Court pursuant to RCW 7.04A awarded Karen all *post-arbitration* fees and costs incurred in the multiple motions that followed the Arbitration ruling.

Dr. Jones continues his futile challenge to the Arbitration ruling in this appeal. He unsuccessfully tries to frame the issues on appeal in an attempt to avoid the very narrow facial legal error standard for vacating an

¹ VRP Page 11, line 16

arbitral award. He invites this Court to examine the evidence before the arbitrator, the arbitrator's factual findings and legal conclusions and to vacate the Arbitration Award on that basis.

Dr. Jones fails to meet his burden. He cannot establish facial legal error and the Superior Court's entry of final documents should be affirmed on appeal. Karen should be awarded all fees and costs incurred in this post-arbitration appeal as she was by the Superior Court below in all post-arbitration hearings.

II. COUNTER STATEMENT OF THE CASE

Dr. Jones and Karen were married for 38 years. There were no minor children of their marriage at the time of their divorce, though Dr. Jones does have an illegitimate son as a result of an extramarital affair, born in 2009. **CP 656.**

Karen filed for divorce in April 2012. The parties mediated with the Honorable Steve Scott (Ret.) on January 11, 2013 and February 7, 2013. At the conclusion of the January 11 mediation, the parties agreed to conduct one more mediation, and if the case had not settled, the remaining issues would be resolved via binding arbitration. The January 11 agreement states in relevant part:

The parties agree that the resolution of the allocation of the parties' remaining assets and liabilities and the determination of spousal maintenance, will be mediated, and if not settled at mediation, arbitrated by Judge Steve Scott, Ret. no later than March 11, 2013. Judge Scott shall determine the manner in which the arbitration shall be conducted. The mediation and arbitration costs and the costs for appraisals shall be paid from the funds on deposit in escrow. JDR rules of arbitration shall apply, not the rules of evidence in arbitration. **CP 7**

The second mediation was held on February 7, 2013. Some issues were settled but the larger financial issues were not. The parties signed two additional documents pertaining to arbitration. The first is the Stipulation and Agreed Order to Strike Trial Date and Submit Issues to Binding Arbitration. That document provides in relevant part:

Transfer of All Disputed Issues to Binding Arbitration. All financial issues shall be determined in binding arbitration before the Hon. Steve Scot (Ret.) at Judicial Dispute Resolution as Arbitrator pursuant to RCW 7.04A. and the CR2A Agreement signed by the parties on January 11, 2013.

CP 76-77

The other document signed on February 7, 2013 during the second mediation reflected the issues that the parties had agreed upon. It provides in full:

The parties agree to the following:

An overall 50/50 division of assets and liabilities

Each party shall be awarded their Schwab IRA

Dr. Jones is awarded:

His disability policies to cancel to maintain as he so chooses;

The stamps and postcards at a total appraised value of \$16,081.50

The rock and gem collection at a value of \$5,000;
The etchings and engravings at a value of \$2,000;
The guns, outdoor gear and watercraft at a value of \$10,000;
The tie making machine at a value of \$3,000;
The tie making inventory at a value of \$3,000;
The parties shall pay the following debts from community funds:
Munko invoice dated 2/6/13
Kessler outstanding invoice;
America Express outstanding balance;
US Bank Personal LOC;
Nordstrom Credit Card
Alaska Airlines Visa Credit Card

CP 80

After two full days of mediation with the parties, the Arbitrator set a briefing schedule and conducted the arbitration on the pleadings and submissions. His ruling was issued March 18, 2013. **CP 1013-1021** Judge Scott addressed “all financial issues” raised by the parties, including Karen’s request to consider Dr. Jones’s expenditures on the extramarital affair and his illegitimate child marital waste or dissipation of assets. **CP 513-517.**

Karen moved to confirm the award, enter final dissolution documents and conclude the divorce. Dr. Jones attempted to prevent Karen from doing so. After many various motions to both the Arbitrator²

² On April 9, 2013, Judge Scott denied Dr. Jones’s motion to recuse or modify. Dr. Jones accused Judge Scott of violating the Arbitrator’s obligation of impartiality. Judge Scott concluded his “jurisdiction in this matter is concluded”

and the Superior Court, the matter finally came to conclusion with the Order entered July 8, 2013, which concluded all proceedings before the Superior Court Judge. **CP 384-386** That order provided, in part: “It is the intention of the Court this Order addresses all outstanding motions and requests for relief filed by either party to this Court prior to June 13, 2013.” **CP 385.**

Dr. Jones then filed this appeal.

III. RESPONSE TO ASSIGNMENT OF ERRORS AND ISSUES PRESENTED.

A. Response to Dr. Jones’s Assignments of Error 1 – 10.

The Superior Court did not error by denying Dr. Jones’s motion to vacate, denying the request for trial de novo, and confirming the arbitration award, entering the final orders and awarding to Karen post arbitration fees and costs pursuant to RCW 7.04A.

B. Response to Dr. Jones’s Issues Pertaining to Assignments of Error 1 – 7.

The Superior Court did not error by denying Dr. Jones’s motion to vacate, and denying the request.

and “any remaining issues would be properly addressed to the Superior Court.”
CP 115-177

C. Response to Dr. Jones's Issues Pertaining to Assignments of Error 1 – 7.

The Superior Court's confirmation of the Arbitration Award, denial of Dr. Jones's motion to vacate and award of post arbitration fees and costs was not error.

IV. ARGUMENT

A. Review of a Private, Binding Arbitration Award Is Limited; Dr. Jones Has The Burden to Establish An Error Of Law On The Face Of The Award.

Dr. Jones misconprehends the purpose of RCW 7.04A and the private agreements for binding arbitration; it is to resolve the issues, not to serve as a prelude or rehearsal for litigation. *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 403, 766 P.2d 1146 (1989 citing *Thorgaard Plumbing & Heating Co. v King Cy.*, 71 Wn.2d 126, 133, 426 P.2d 828 (1967); *Skagit Cy. v. Trowbridge*, 25 Wash. 140, 64 P. 901 (1901). This is why our courts confer substantial finality on decisions of arbitrators that are rendered in accordance with the parties' agreement and RCW 7.04A, *Rimov v. Schultz*, 162 Wn.App. 274, 279, 253 P.3d 462 (2011), citing *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998); *Carpenter v. Elway*, 97 Wn.App. 977, 984, 988 P.2d 1009 (1999).

Early this year, the Supreme Court explained the policy behind the very narrow and limited review of arbitration decisions.

Courts will only review an arbitration decision in certain limited circumstances, such as when an arbitrator has exceeded his or her legal authority. *Clark County Pub. Util. Dist. No. 1 v. Int'l Bhd. of Elec. Workers, Local 125*, 150 Wn.2d 237, 245, 76 P.3d 248 (2003). To do otherwise would call into question the finality of arbitration decisions and undermine alternative dispute resolution. *Id.* at 246, 247, 76 P.3d 248. This court has noted that “[w]hen parties voluntarily submit to binding arbitration, they generally believe that they are trading their right to appeal an arbitration award for a relatively speedy and inexpensive resolution to their dispute.” *Id.* at 247, 76 P.3d 248. Thus, a more extensive review of arbitration decisions “would weaken the value of bargained for, binding arbitration and could damage the freedom of contract.” *Kitsap County Deputy Sheriff's Guild v. Kitsap County*, 167 Wn.2d 428, 435, 219 P.3d 675 (2009).

International Union of Operating Engineers, Local 286, 176 Wn.2d 712, 720-721, 295 P.3d 736 (2013)

Dr. Jones also asks this Court to do precisely what was reversed in *International Union of Operating Engineers*. In that case, the trial court vacated the arbitration decision and imposed a different remedy. *Id.* at 739. On appeal, the Court of Appeals affirmed the trial court’s decision to vacate the award and held that the trial court exceeded its authority by creating a new remedy. The Supreme Court granted review, stating:

We find no authority that would allow a trial court to impose its own remedy for a vacated arbitration decision. Therefore, we take this opportunity to clarify that a trial court vacating an arbitration decision

cannot impose its own remedy; instead it should remand to the arbitrator for further proceedings.

.

We also clarify that a trial court vacating an arbitration decision may not impose its own remedy.

International Union of Operating Engineers, 176 Wn.2d 712, 725–726.

Dr. Jones argues there are grounds to vacate under RCW 7.04A.230(1)(b)(i) (evident impartiality by an arbitrator appointed as a neutral), 7.04A.230(1)(b)(ii) (Corruption by an arbitrator) 7.04A.230(1)(c) (conducted the hearing contrary to RCW 7.04A.150) and RCW 7.04A.230(1)(d) (Arbitrator exceeded the arbitrator’s powers.) As is explained below, Dr. Jones cannot meet his burden of proof in establishing grounds for vacating the arbitration award. *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn.App. 813, 816, 790 P.2d 228 (1990) (Party challenging the award bears the burden of proof.)

B. Dr. Jones Cannot Show Judge Scott Acted With Partiality or Engaged In Misconduct.

Dr. Jones miscomprehends the purpose of RCW 7.04A and the private agreements for binding arbitration; it is to resolve the issues, not to serve as a prelude or rehearsal for litigation.

The root of Dr. Jones’s allegation of impartiality or misconduct is his dissatisfaction with the Arbitration Award. Receiving an adverse

ruling is not the test for partiality, nor is unfavorable evidentiary rulings, including the refusal to accept certain evidence. *Kempf v. Puryear*, 87 Wn.App. 390, 393, 942 P.2d 375 (1997). Evident impartiality may be found when there is a relationship or circumstance that bears on the question of impartiality creating a reasonable inference of the presence of bias or the absence of impartiality, but only if the complaining party shows existing prejudice from the arbitrator's nondisclosure. *Hanson v. Shim*, 87 Wn.App. 538, 547, 943 P.2d 322 (1997).

Dr. Jones fails to describe conduct which is impartial or an undisclosed relationship which could raise the inference of bias. Instead he challenges the award, asserts it is unfair to him, and asks this Court to conclude Judge Scott violated his obligation of impartiality.

Dr. Jones also fails to show his rights were prejudiced by Judge Scott. Dr. Jones sought a continuance to submit information from his physician and time to do so was allowed by Judge Scott. **CP 84-85**

C. Dr. Jones's Argument Judge Scott Did Not Properly Conduct the Arbitration is Unfounded.

The agreements to arbitrate state "Judge Scott shall determine the manner in which the arbitration shall be conducted." **CP 7** Judge Scott set a briefing schedule which was altered at Dr. Jones's request. **CP 84-85**

Judge Scott decided to consider the issues on the pleadings. Not only did Dr. Jones agree to vest the Arbitrator with the authority to conduct the arbitration hearing in whatever manner the Arbitrator decided when Dr. Jones agreed to arbitrate; he never requested a live hearing, or any other manner in which to present evidence. This argument is without merit.

D. Dr. Jones's Final Argument To Vacate the Award Is The Arbitrator Exceeded His Authority; This Claim Is Without Merit Under Washington Law.

1) Dr. Jones has the burden to establish error of law on the face of the award.

Prevailing on a motion to vacate a private arbitration award is an uphill battle. *Cummings v. Budget Tank Removal & Env'tl. Servs., LLC*, 163 Wn.App. 379, 382, 260 P.3d 220 (2011). ("Rarely is it possible to have an arbitration award vacated for error of law on the face of the award...") The party seeking to vacate the award bears the burden of proof. *Hanson v. Shim*, 87, Wn.App. 538, 546, 943 P.2d 322 (1997). The burden is on Dr. Jones to prove clear error on the face of the award. *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). This means it is obvious from the language of the Award that the Arbitrator exceeded the scope of authority, i.e. arbitrating issues not before the Arbitrator or there

is an error of law of the face of the Arbitration Award. RCW 7.04A. *McGinnity v. AutoNation, Inc.*, 149 Wn.App. 277, 280, 202 P.3d 1009 (2009).

To determine if the Arbitrator decides issue not before him, the Court examines the arbitration agreement and any documents reflecting the charge to the Arbitrator. *Hanson v. Shim*, 87 Wn.App. 538, 546, 943 P.2d 322 (1997), *review denied*, 134 Wn.2d 1017, 958 P.2d 313 (1998). An example of an obvious legal error is if the Arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages. *Federated Servs. Ins. Co. v. Pers. Representative of the Estate of Norberg*, 101 Wn.App. 119, 124, 4 P.3d 844 (2000).

The “face of an Arbitration Award” is only that portion of the Arbitrator’s ruling that is the outcome. Where an Arbitrator also provides a statement of reasons behind the outcome, this statement is not considered part of the “Award” and is not reviewed by the Court. *McGinnity*, 149 Wn.App. at 280; *Lindon Commodities, Inc. v. Bambino Bean*, 57 Wn.App. 816, 790 P.2d 228 (1990); *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 403, 766 P.2d 1146 (1989).

The definition of what is considered the “award” is narrow and

does not include the Arbitrator's statements. This is true even if the statements and the actual award are in the same single document; the portion of the document considered by this Court is confined to the part reflecting the actual outcome.

In *Westmark*, the Arbitrator wrote a three-page letter stating on the last page "plaintiff is entitled to judgment against defendants in the sum of \$24,789.92 by way of reimbursement" and "balance due to plaintiff for management fees is offset by shortfall in rentals." The *Westmark* Court held only this part of the document was "the face of the Arbitration Award" which was reviewed for clear error. The Court described the other parts of the letter as "random observations about the case in general and about some of the evidence." *Westmark*, 53 Wn.App. at 403. *Accord*, *Lent's, Inc., v Santa Fe Engineers, Inc.*, 29 Wn.App. 257, 265, 628 P.2d 488, (1981). (Two letters from Arbitrator not considered part of the Arbitration Award).

Here, this Court does not review the Arbitrator's letter which purportedly explains the award. The Court also does not consider the evidence presented to the Arbitrator. *Lindon*, 57 Wn.App. at 816. ("The evidence before the arbitrator will not be considered."); *accord Westmark*,

53 Wn.App. at 403.

Most importantly, the Court does not review the Arbitrator's decision on the merits; it is not a de novo review, *Barnett v. Hicks*, 119 Wn.2d 151, 153-54, 157, 829 P.2d 1087 (1992). This is why the Court does not consider the evidence presented to the Arbitrator. *Lindon*, 57 Wn.App. at 816. ("The evidence before the arbitrator will not be considered."); accord *Westmark*, 53 Wn.App. at 403.

Therefore, the argument Judge Scott's letter of explanation demonstrates that he considered "fault" when making his award, cannot be reconciled with the case law holding that the Court does not consider this letter because it is not the Arbitration Award nor can it be reconciled with the case law holding that this Court does not review the evidence presented to the arbitrator.

2) Judge Scott's scope of authority was to decide "all financial issues" and the Award is within this scope.

The scope of the Arbitration is set forth in the documents the parties signed on January 11, 2013 and on February 7, 2013. (The January 11, 2013 CR2A Agreement, the Stipulated Order and the document listing various agreements, both signed on February 7, 2013. **CP 7, 76-77 and 80.**

These documents provide the scope of the arbitration and the Arbitrator's authority. They provide for *all financial issues* to be determined in binding arbitration and the arbitration to be conducted as Judge Scott determines.

3) The Arbitration Award Is A Nine-Page Document With No Error Of Law

Though Judge Scott provided a letter to the parties with the stated purpose of helping the parties understand the Award, the Court does not review the letter to determine if there is a basis to vacate or modify; it is only the portion of the ruling that is the outcome which this Court reviews. *Westmark*, 53 Wn.App. at 400.

Exhibit A to the Award is the spreadsheet listing assets, values, and each party's award. **CP 1016-17**. Values are listed as agreed upon on February 7, and for those not agreed upon, at the value determined by Judge Scott. Page Two of Exhibit A of the Award lists the debts to be paid from the blocked account at the amounts stated. Exhibits B and C of the Award list specific personal property awarded to Karen with the rest awarded to Dr. Jones. **CP 1018-1021**.

4) The Inclusion of Dr. Jones's Pre-distribution Is Not An Error of Law On the Face Of The Award.

Dr. Jones's argument on the pre-distribution aspect of the Award is convoluted as well as incorrect. He claims Judge Scott made a legal error when he listed a portion of his award as a "Pre-distribution/Lisa expenses." The legal error supposedly is that Judge Scott decision was based upon "fault" or was somehow punishing Dr. Jones for the fact he had a child with another woman during the marriage. This is not the basis of the award.

Dr. Jones again misconprehends the scope of the Court's review of the Arbitration Award. At the outset, this Court should not examine the underlying reasons for the property award or the calculation. However, if the Court does so, the issue before this Court is whether Washington recognizes the principle of marital waste or dissipation of assets. There is no question this is well-recognized in Washington and repaying the community for waste is not considered injecting fault into a property award. . " *In re Clark*, 13 Wn. App. 805, 809, 538 P.2d 145, *review denied*, 86 Wn. 2d 1001 (1975); *In re Marriage of Whilte*, 105 Wn.App. 263, 927 P.2d 679 (1996); *In re Marriage of Williams*, 84 Wn.App. 263, 927 P.2d 679 (1996), *review denied*, 131 Wn.2d 1025 (1997); *In re*

Steadman, 63 Wn. App. 523, 527, 821 P.2d 59 (1991).

Steadman is particularly instructive as the Court explained the distinction between “moral” fault and economic “fault”.

We agree with the Clark court's interpretation of "marital misconduct". The historical background supports the conclusion that the facts here do not involve "marital misconduct" as contemplated by the statute. Under the prior statute the court could consider the "merits of the parties" in apportioning property. Laws of 1949, ch. 215, § 11, p. 701. Trial courts did so, considering cruelty or infidelity, for instance. Indeed, the appellate courts had to limit abuse of this factor. The "merits", as used in those cases, clearly refers to immoral conduct within the marital relation. The Legislature wished to eliminate such considerations and did so by providing that the court may not consider "marital misconduct" in dividing property. Thus, marital misconduct refers to substantially the same conduct previously considered in evaluating the "merits" of the parties. Based upon this history we find that the "marital misconduct" which a court may not consider under RCW 26.09.080 refers to immoral or physically abusive conduct within the marital relationship and does not encompass gross fiscal improvidence, the squandering of marital assets or, as here, the deliberate and unnecessary incurring of tax liabilities. In shaping a fair and equitable apportionment of the parties' liabilities the trial court was entitled to consider whose "negatively productive conduct" resulted in the tax liabilities at issue.

Steadman, 63 Wn. App. 527-258 (citations and footnotes omitted.)

The Arbitrator did not punish Dr. Jones for the birth of his son or the extramarital affair. The Arbitrator concluded it was not fair to require Karen to devote her share of community assets to this conduct. The Arbitrator determined the amount of money spent prior to separation by

Dr. Jones and included that value in the property being distributed between the parties. Thus, there is no legal error and the Court's review ends and the Award is confirmed.

Dr. Jones asks this Court to examine Judge Scott's underlying reasons for determining that Dr. Jones received a pre-distribution of community funds. This is precisely what *Mike's Painting* stands for in holding the Arbitrator's reasons for the decision are not examined upon a motion to vacate. It is sufficient if the concept of dissipation of assets or waste resulting in the pre-distribution is allowed under Washington law in dissolutions. *Mike's Painting, Inc. et al. v. Carter Welsh, Inc.* 95 Wn.App 64, 68, 975 P.2d. 532 (1999),

Relying on *Marriage of Kaseburg*, 126 Wn.App. 546, 108 P.3d 1278 (2005), Dr. Jones contends that characterization of community funds spent by a party which the tribunal determines to be waste, or asset dissipation or improperly spending community funds post-separation as "pre-distribution" is not a recognized legal principle. Dr. Jones urges Kaseberg establishes that such a characterization, which has no operative effect other than determining an amount which is to be credited against any award granted to the offending party, is the same as distributing an

asset that no longer exists. This is not the holding of Kaseburg as applied to community funds spent on waste or dissipation of assets.

Under Dr. Jones's theory, a party who sells community real estate or personal property and then spends all the funds cannot be "credited" with a pre-distribution at trial when making a division of assets. The Court should review the face of the award and conclude Judge Scott's ruling on the pre-distribution arising from the dissipation of assets is a recognized principle under Washington law.

E. The Fees and Costs Incurred Post Arbitration Were Properly Awarded to Karen.

Karen presented evidence to the Superior Court of all of the fees and costs she incurred post arbitration arising from all of the proceedings, and Dr. Jones's resistance of confirmation of the Arbitration Award. **CP 124-135**. The Superior Court, pursuant to RCW 7.04A.250 awarded these to Karen. This is not error.

F. The Final Orders Entered By The Superior Court Are Proper.

After the Arbitration Award was issued, the Arbitrator referred the matter to the Superior Court. The parties presented competing final orders and the Superior Court entered those proposed by Karen.

On appeal, Dr. Jones asks this Court for a line by line review of the final documents and requests this Court enter different orders. The problem Dr. Jones faces is that the orders entered by the Superior Court do not change the Arbitration Award.

G. Judgment Entered Post Decree Should Not Be Changed.

After the decree was entered, Karen obtained a judgment when she brought a motion enforcing the provisions of the Decree. **CP 467-470.** This judgment was properly entered as it was based upon Dr. Jones's failure to comply with the financial obligations set forth in the Decree of Dissolution.

H. Fees and Costs on Appeal.

Karen should be awarded all fees and costs incurred in this appeal pursuant to RCW 7.04A.250 (2) and (3). That statute provides in relevant part a "court may allow reasonable costs of the motion and subsequent judicial proceedings." The Superior Court awarded post-arbitration fees and costs to Karen. Not only should that ruling be affirmed, Karen requests this Court to consider the appeal a "subsequent judicial proceeding" and award fees and costs incurred herein upon her compliance with RAP 18.1. *Cf. McGinnity v. AutoNation, Inc*, 149

Wn.App. 277, 202 P.3d 1009 (2009); *Saleemi v. Doctor's Associates, Inc.*, 166 Wn.App. 81, 269 P.3d 350 (2012).

V. CONCLUSION.

An appeal from a private agreement for binding arbitration under RCW 7.04A. is very limited. If there is no legal error on the face of the Arbitration Award and no evidence of partiality of the Arbitrator, the Award will not be vacated or modified. The Superior Court refused to review the evidence presented to the Arbitrator and confirmed the Arbitration Award. Dr. Jones fails to meet his burden in establishing the narrow statutory grounds to vacate an arbitration award.

This Court, too, should decline Dr. Jones's invitation to review the pleadings and documents submitted to the Arbitrator and review the evidence, facts and conclusions and legal rulings that form the basis for the division of assets and liabilities and award of maintenance. The Superior Court's orders should be affirmed.

Karen should be awarded all fees and costs incurred in this appeal pursuant to RCW 7.04A.250. The Superior Court awarded post-arbitration fees and costs and we ask this Court to do so as well.

Dated this 21st day of February, 2014.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief by Respondent by legal messenger, on February 21, 2014 to Andrea Gilbert at Lawrie & Gilbert PLLC, 4111 E. Madison Street, Suite, 107, Seattle, WA 98112.



Elaine Larsen

NO. 70729-9-1

COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

PERRY JAY JONES, III,

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v.

KAREN M. JONES,

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RESPONDENT'S BRIEF ON APPEAL

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