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NO. 101780-4

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THE SUPREME COURT OF WASHINGTON

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HENRY E. GOSSAGE,  
Petitioner,

v.

REALITY HOMES, INC., a Washington corporation;  
SAVINGS ACCOUNT NUMBER 70003287315; THOMAS  
FANCHER and "JANE DOE" FANCHER, married adults,  
including any marital estate; JAMIE HANKEL and "JANE  
DOE" HANKEL, married adults, including any marital estate;  
LOWELL HANKEL, JR. and "JANE DOE" HANKEL, JR.,  
married adults, including any marital estate,  
Respondents.

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RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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## TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES PRESENTED FOR REVIEW.....	2
III.	STATEMENT OF THE CASE.....	3
IV.	ARGUMENT .....	8
	A.    The Lower Courts’ Decisions Do Not Conflict with Existing Law. ....	10
	B.    The Trial Court Appropriately Struck Petitioner’s Request for Trial de Novo and Properly Awarded Reasonable Attorney Fees and Costs to Respondents. ....	12
V.	CONCLUSION .....	14

## TABLE OF AUTHORITIES

### CASES

<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 829 P.2d 1087 (1992) .....	10, 11
<i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 16 P.3d 617 (2001) .....	10, 11
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 79 P.3d 1154 (2003) .....	10, 11, 12
<i>Mendez v. Palm Harbor Homes, Inc.</i> .....	14
<i>Optimer Int'l, Inc. v. RP Bellevue, LLC</i> , 170 Wn.2d 768, 246 P.3d 785 (2011) .....	10, 11
<i>Perez v. Mid-Century Ins. Co.</i> , 85 Wn. App. 760, 934 P.2d 731 (1997) .....	14
<i>Right-Price Recreation LLC v. Connells Prairie Cmty. Council</i> , 146 Wn.2d 370, 46 P.3d 789 (2002) .....	8

### STATUTES

chapter 7.04 RCW (1943).....	10, 11
chapter 7.04A RCW.....	11
chapter 7.06 RCW.....	12

### RULES

CR 11 .....	14
RAP 13.4(b) .....	passim

RAP 18.1.....	7
Superior Court Civil Arbitration Rule 7.1(a).....	13

## I. INTRODUCTION

Petitioner's request for review stems from Pierce County Superior Court Judge Thomas P. Quinlan's February 18, 2022 Order Striking Plaintiff's Request for Trial De Novo and Awarding Defendant's Attorney's Fees and Costs ("Order Striking Trial De Novo"). The trial court struck Petitioner's request for trial de novo upon Respondents' motion because the parties' construction contract included a provision calling for binding arbitration of disputes and waiving each party's right to a trial de novo.

The Court of Appeals, Division II, considered Petitioner's arguments and affirmed the trial court's Order Striking Trial De Novo. Petitioner raises nothing new in his untitled pleading which this Court is treating as a petition for discretionary review (the "Petition"). The Petition includes Petitioner's same complaints as his Opening Brief to the Court of Appeals, including irrelevant arguments regarding alleged delays, workmanship, and violation of Washington's Consumer

Protection Act. Petitioner raised these complaints for the first time on appeal, and they are beyond the scope of his Notice of Appeal. Ultimately, Petitioner fails to demonstrate why the Court of Appeals' Unpublished Opinion affirming the trial court's Order Striking Trial De Novo is subject to review under RAP 13.4(b), and therefore, this Court should deny Petitioner's request for discretionary review.

## **II. ISSUES PRESENTED FOR REVIEW**

1. A petition for review will be accepted by the Supreme Court only if the Court of Appeals' decision is in conflict with a decision of the Supreme Court or a published decision of the Court of Appeals; a significant question of law under the state or federal Constitution is involved; or the petition involves an issue of substantial public interest that should be determined by the Supreme Court. In this case, Petitioner argues mistakenly that the Court of Appeals' decision conflicts with Supreme Court decisions and offers no other basis for review.

Should the Supreme Court deny Petitioner's request for discretionary review?

### III. STATEMENT OF THE CASE

On May 19, 2016, Petitioner and Respondent Reality Homes, Inc. executed Reality Homes' Joint House Building Agreement (the "Contract") for the construction of a house on real property owned by Petitioner at 469 Kloshe Court SE, Ocean Shores, Washington.<sup>1</sup> Petitioner reviewed and signed the Contract, initialing each of the 18 sections.<sup>2</sup>

Section P of the Contract is a binding arbitration provision with language whereby each party waived its right to a trial de novo. Also, Section P provides that a party shall be entitled to an award of its attorneys' fees and costs if it must enforce the arbitration award. Petitioner initialed next to Section P, acknowledging his understanding and agreement to the clause.<sup>3</sup>

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<sup>1</sup> CP 31 – 34.

<sup>2</sup> CP 31 – 34.

<sup>3</sup> CP 31 – 34.

On November 10, 2020, after filing his Complaint initiating the underlying case, Petitioner's counsel executed a Stipulation to Arbitrate, which specifically referenced Contract Section P as the reason the parties were submitting their case for arbitration.<sup>4</sup> On January 27, 2021, Petitioner's counsel filed a Statement of Arbitrability with the Pierce County Superior Court, wherein Petitioner acknowledged that he waived the mandatory arbitration rules' dollar limit by signing the Contract.<sup>5</sup>

Pursuant to Contract Section P, the parties arbitrated the underlying matter on December 6, 2021.<sup>6</sup> Petitioner and his attorney attended the entire arbitration hearing. On December 8, 2021, the arbitrator, Gregory Wall, issued his award.<sup>7</sup>

On December 27, 2021, Petitioner filed his Request for Trial De Novo. On January 3, 2022, Respondents' counsel warned Petitioner's attorney that pursuing a trial de novo was

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<sup>4</sup> CP 113 – 115.

<sup>5</sup> CP 116.

<sup>6</sup> CP 116.

<sup>7</sup> Supplemental CP (Arbitration Award, entered December 8, 2021).



prohibited by the Contract, and that Respondents would seek an award of their attorney fees and costs if Petitioner persisted with his impermissible appeal.

On January 5, 2022, Petitioner’s attorney advised Petitioner as follows: “[Reality Homes] is correct that filing for a trial de novo will potentially expose you to sanctions under the terms of the contract. That is why I advised against it[.]”<sup>8</sup> Petitioner’s counsel further advised Petitioner that his Request for Trial De Novo “won’t get very far and you will just get sanctioned for doing so . . . .”<sup>9</sup>

On January 6, 2022, counsel for Petitioner filed his notice of withdrawal.<sup>10</sup> Pursuant to CR 71(c)(1), counsel’s withdrawal was not effective until January 16, 2022. On January 5, 2022, Respondents issued a check for the complete arbitration award, including the stipulated attorney’s fees and costs.<sup>11</sup>

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<sup>8</sup> CP 47.

<sup>9</sup> CP 47.

<sup>10</sup> CP 123 – 125.

<sup>11</sup> CP 21 – 30.

Respondents' counsel mailed a cover letter and the award check to Petitioner's attorney on January 13, 2022.<sup>12</sup> Through his attorney, Petitioner accepted and negotiated Respondents' January 5, 2022, payment of the arbitration award in full.<sup>13</sup>

As a purely administrative matter, on January 25, 2022, the trial court set a case schedule for Petitioner's trial de novo because Petitioner had filed his request within 20 days of the entry of the arbitrator's award.

On January 28, 2022, Respondents filed their Motion to Strike Request for Trial de Novo.<sup>14</sup> Petitioner filed his response on February 15, 2022.<sup>15</sup>

On February 18, 2022, after the case was administratively re-assigned, Judge Quinlan considered Respondents' Motion, on the pleadings, struck Petitioner's Request for Trial de Novo, and awarded Respondents their reasonable attorney fees and costs.<sup>16</sup>

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<sup>12</sup> CP 21 – 30.

<sup>13</sup> CP 21 – 30.

<sup>14</sup> CP 15 – 35.

<sup>15</sup> CP 32 – 42.

<sup>16</sup> CP 73 – 74.

Petitioner moved for reconsideration.<sup>17</sup> After considering the record, the trial court denied Petitioner's Motion for Reconsideration.<sup>18</sup>

Petitioner perfected his Notice of Appeal with Division II of Washington's Court of Appeals on March 16, 2022. On May 27, 2022, Appellant filed his 25-page Opening Brief. Respondents responded, filing their brief on July 1, 2022.

The Court of Appeals rendered its decision without oral argument on January 10, 2023, affirming the trial court's Order Striking Trial De Novo and awarding Respondents their reasonable attorney fees and costs pursuant to RAP 18.1 and the parties' Contract for enforcing the arbitration award. Respondents filed their Affidavit of Fees and Expenses on January 18, 2023. Petitioner then moved for reconsideration of the Court of Appeals decision, which was denied.

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<sup>17</sup> CP 70 – 72, CP 75 – 78.

<sup>18</sup> CP 130.

#### IV. ARGUMENT

Discretionary review is an extraordinary procedure that should be granted in only extraordinary cases.<sup>19</sup> This case is not extraordinary. Petitioner presents this Court with the same arguments that the trial court and the Court of Appeals each rejected twice. Petitioner offers nothing new, novel, of public or constitutional importance, and there is no conflict between the lower courts' holdings and existing case law. This Petition only serves to unnecessarily drive-up litigation costs by revisiting settled law and should be denied.

Pursuant to RAP 13.4(b), a petition for review will be accepted by the Supreme Court only:

- (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or

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<sup>19</sup> See *Right-Price Recreation LLC v. Connells Prairie Cmty. Council*, 146 Wn.2d 370, 380, 46 P.3d 789 (2002).

- (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals;  
or
- (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.<sup>20</sup>

Petitioner attempts to identify three issues in his “Assignment of Error” section: (1) the trial court’s Order Striking Trial De Novo conflicts with existing case law; (2) Respondents’ Motion to Strike Appellant’s Request for Trial De Novo was untimely and frivolous; and that (3) Respondents should not be awarded their reasonable attorney fees and costs for enforcing the arbitration award. Considering the requirements for review by the Supreme Court contained in

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<sup>20</sup> RAP 13.4(b)(1)-(4).

RAP 13.4(b), and Petitioner's stated assignments of error and their analysis, the Petition does not contain any basis for the Supreme Court to grant review of the Court of Appeals' Unpublished Opinion.

**A. The Lower Courts' Decisions Do Not Conflict with Existing Law.**

Because Petitioner's Petition lacks an "Argument" section, Respondents interpret the Petition as relying on four cases to contend that the lower Courts' decisions conflict with existing law.<sup>21</sup> However, as the Court of Appeals and the plain text of the respective cases state, there is no conflict between the holdings of the lower courts and the existing law.

*Optimer Int'l, Inc. v. RP Bellevue, LLC* deals with the former chapter 7.04 RCW (1943) and did not address trial de novo at all. Also, in *Barnett v. Hicks*, the issue involved former

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<sup>21</sup> *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 246 P.3d 785 (2011); *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 16 P.3d 617 (2001); *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003); and *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992).

chapter 7.04 RCW (1943) and the limited judicial review contemplated by that prior statute. Neither case addresses an alleged trial de novo entitlement under the current chapter 7.04A RCW. Petitioner cannot reasonably deny that chapter 7.04A RCW controlled the arbitration of this dispute as a private arbitration agreement. Accordingly, *Optimer* and *Barnett* are not relevant to this Court's analysis.

Petitioner appears to rely on *Godfrey v. Hartford Cas. Ins. Co.* for the proposition that any agreement attempting to alter the "Act" would render that agreement inoperative. Petitioner's cherry-picked quotations from *Godfrey*, when taken in full context, reveal once again that this case involved former chapter 7.04 RCW which has no relevance to the Contract at issue here. In fact, the Court itself in its decision states, "Under the Act [former 7.04 RCW], there is no such thing as a trial de novo."<sup>22</sup> Petitioner's reliance on *Malted Mousse, Inc. v. Steinmetz* is equally misguided. *Malted Mousse, Inc.* concerns

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<sup>22</sup> *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d at 895 (2001).

Washington's mandatory arbitration statute, chapter 7.06 RCW. This case was never subject to statutory mandatory arbitration; rather, the parties contractually agreed to arbitrate any disputes. Accordingly, *Malted Mousse, Inc.* is completely inapplicable to Petitioner's case, and it does not serve as a basis to grant review.

None of the lower courts' decisions regarding this action conflict with any existing law. Petitioner completely fails to not only argue specific points of the alleged legal conflict, he continues to rely on cases with no relevance to the current law controlling his arbitration with Respondents.

**B. The Trial Court Appropriately Struck Petitioner's Request for Trial de Novo and Properly Awarded Reasonable Attorney Fees and Costs to Respondents.**

Petitioner complains that the trial judge improperly heard Respondents' Motion to Strike Request for Trial de Novo because it was not filed within 20 days of the award, without citation or support for such argument. The Court of Appeal's January 10, 2023 Unpublished Opinion identifies exactly why Petitioner's theory is incorrect: "[Respondents'] motion to strike



cannot reasonably be construed as an appeal or cross appeal of the arbitration award; it was a direct response to [Petitioner's] request for a trial de novo.”

Respondents never challenged the arbitration award, instead paying the award on January 13, 2023. Because Respondents' Motion to Strike Request for Trial de Novo was not a challenge to the arbitration award or request for a trial de novo, Respondents' Motion to Strike Request for Trial de Novo was not subject to Superior Court Civil Arbitration Rule 7.1(a)'s 20-day filing deadline. Petitioner's argument makes little sense, is contrary to law, and is not a basis for discretionary review under RAP 13.4(b).

Additionally, the lower courts awarded Respondents their reasonable attorney fees and costs for enforcing the arbitration award that Petitioner improperly challenged. Respondents relied on Contract Section P, the same section that Petitioner initialed then acknowledged and relied on in setting the dispute for arbitration.

As such, there is no basis for CR 11 sanctions against Respondents who have prevailed at every turn of this case since Petitioner challenged the binding arbitration award. Petitioner makes no legitimate argument for why the Supreme Court should review any of the awards of attorney fees and costs against him in this litigation, and importantly, Petitioner fails to demonstrate how the attorney fee awards trigger review under RAP 13.4(b). Accordingly, the Supreme Court should deny Petitioner's request for discretionary review.

## V. CONCLUSION

Washington courts favor arbitration. "There is a strong public policy in Washington State favoring arbitration of disputes."<sup>23</sup> The parties' Contract, Section P, is intended to allow for a cost-efficient means of resolving disputes. Petitioner agreed to the term, relied on the term, but now ignores the term. Petitioner's repeated resuscitation of the same ill-conceived

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<sup>23</sup> *Mendez v. Palm Harbor Homes, Inc.*, 111 Wn. App. at 454 (2002), citing *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997).

arguments undermines the very public policy supporting binding arbitration. Both lower courts have rejected Petitioner's arguments which are based on incorrect readings of cases regarding completely different laws than the current law at issue here. There is no valid reason why the Supreme Court should accept discretionary review of this case, and therefore, this Court should deny Petitioner's request for review.

**Respectfully Submitted** this 5<sup>th</sup> day of April 2023.

**LEDGER SQUARE LAW, P.S.**

By: 

L. Clay Selby, WSBA #26049  
Grady R. Heins, WSBA #54262  
*Attorneys for Respondents*

*I certify that this motion contains  
2181 words, in compliance with  
RAP 18.17.SW*

## CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below, I caused to be served the foregoing document on the following persons and in the manner listed below:

Henry Gossage P. O. Box 1102 Ocean Shores, WA 98569	<input checked="" type="checkbox"/> U.S. First Class Mail, postage prepaid <input type="checkbox"/> Via Legal Messenger <input type="checkbox"/> Overnight Courier <input checked="" type="checkbox"/> Electronically via email <input type="checkbox"/> Facsimile
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DATED this 5th day of April 2022 at Tacoma, Washington.



Amy Jean Shackelford, PP, PLS  
Legal Assistant to Grady R. Heins

**LEDGER SQUARE LAW, P.S.**

**April 05, 2023 - 11:58 AM**

**Transmittal Information**

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