101780-4

SUPREME COURT
OF THE STATE OF WASHINGTON

HENRY EUGENE GOSSAGE, an individual,
Appellant
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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treated as a PETITION FOR REVIEW

Henry Eugene Gossage
Pro se Veteran
Appellant
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I. PARTIES AND RELEVANT BACKGROUND

The parties to this proceeding are Appellant Henry E. Gossage ("HG"), and Respondent Reality Homes, Inc., et al. ("Reality"). Reality constructed a new home for the home owner HG, located in Grays Harbor County in the City of Ocean Shores.

HG is the appellant before Division II of the Court of Appeals and home owner where this appeal has its origins in a dispute over the respective obligations of the parties under the May 2016, New Home Builder Construction Contract (Contract) and its amendments.

Numerous issues were raised before the Court of Appeal below: whether a party in a building consumer contract agreement and its amendments can waive arbitration and the limited right to review under Washington Arbitration Act (RCW 7.06 and 7.04A), where the claim for damages exceed $100,000.

Before a controversy arises (RCW 7.04A,040(2)), Reality's stipulated amendments within its Contract to its benefit by incorporating mandatory binding arbitration, waiving the right to request de nova review/appeal, attorney fees and costs on appeal, and other issues in violation of Washington Consumer Protection Act.

II. INTRODUCTION/DISCUSSION

Three issues why this Court should grant review:

1. HG is entitled to right to de nova review or appeal from the Arbitrators decision/award?
2. Whether the amendment in Reality's contract waives HG right to judicial review from an Arbitrator's decision/award before a controversy arises?
3. Whether any amendments within the Contract HG entered before a dispute arises is void and unenforceable?
4. Whether Reality's contract amendments violate Washington Consumer Protection Act?

The disputed repair damages were estimated to exceed the mandatory civil arbitration

$100,000 limit and therefore arbitration was not required by Contract or Washington Statute. In the Statement of Arbitrability filed January 27, 2021, in Pierce County Superior Court stated the claim exceeds the statutory $100,000 limit requiring mandatory arbitration. The amendment within the Contract required mandatory arbitration. The underlying dispute was arbitrated pursuant to a mandatory arbitration provision in the Contract amendment, designed by Reality before construction and before any controversy arose that might be subject to an agreement to arbitrate.

Reality is the new home construction builder, where this appeal has its origins in its dispute over defective and timeliness construction (within in 150 days). Where the Reality designed this construction Contract with amendments and building plans had a Contract obligation to provide HG with a completed defective and/or dangerous (mold free) free home with a construction completion within the time frame agreed upon in Reality's Contract amendment. This new home was defective with a bowed roof, presence of mold, and not constructed to specific designed engineering agreed plans and modifications.

This appeal is taken from the Superior Court Striking and denying HG Motion for de nova review/appeal for a new trial from the Superior Court Arbitrator decision/award and related reconsideration, including awarding Reality fees and costs. The Superior Court did not consider any substantive or timeliness issues raised HEG's original Grays Harbor County Complaint for Damages, Request for Trial de Nova, and Motion for Reconsideration.

HEG is a veteran and proceeding in the Superior Court Pro se, judicial bias might be implicated towards the unrepresented litigant, when the Superior Court reverses itself midstream contrary to RCW 7.06.050, RCW 7.06.070, and Granting Reality's Motion to Strike and

awarding attorney fees/costs under Reality's Inequitable or "unconscionable contract" provisions. The Superior Court without comment granted Reality's Motion Strike HG de nova review/appeal as frivolous and awarding fees and costs to Reality, hence this appeal is taken to the Court of Appeals.

For the purpose of arbitration or trial, where the damages exceed the statutory $100,000 limit, which statute is controlling Chapter 7.06 RCW or 7.04A RCW? Whether arbitration is mandatory for damages that exceed the $100,000 statutory limit and whether the arbitrator decision/award is appealable with a request for new trial? The issues on appeal are whether a party in a Contract amendment can waive or forfeit the right to arbitration or the right to review "before a controversy arises that is subject to an agreement to arbitrate" (RCW 7.04A.040(2), under the Constitution, Washington Arbitration Act (Chapter 7.06 or 7.04A RCW, the "ACT"), Washington Consumer Protection Act (19.86 RCW, "WCPA"):

1. whether either party may waive their right to de nova review/appeal of an Arbitration Decision/Award;
2. whether mandatory arbitration is required for damages in excess of $100,000 and may be waived by Contract amendment, RCW 7.04A.040 or RCW7.06;
3. whether the arbitrator's decision/award shall be final, binding, and non-appealable;
4. whether the amendments within the Contract are voidable and unenforceable;
5. whether Reality violated Washington Consumer Protection Act 19.86 RCW;
6. whether either party is entitled to equitable fees costs.

In other words, since 2000, Reality designed and enforced/operated under this unconscionable consumer construction Contract with no right to appeal, forfeiting or waiving any consumer right to preclude judicial review of an arbitrator's decision under RCW 7.06.050, Washington Arbitrations Statute, the "ACT", RCW 7.04A et seq. (the "ACT"), and Consumer Protection Act, RCW 19.86 et seq. Reality's self-designed amendments within its Contract is a WCPA violation. This Court should take a closer look at Reality's Contract amendments, as it is detrimental to the consumer, specifically "before a controversy arises that is subject to an agreement to arbitrate" pursuant RCW 7.04A.040 non-waivable provisions and appeals under RCW 7.04A.280.

The Court of Appeal decision conflicts with the fundamental questions this Court decided, *Optimer Int'l., Inc. v. RP Bellevue, LLC,* 170 Wash.2d 768 (2011),

¶ 5 1. Does the Contract validly waive judicial review of an arbitration award?
¶ 6 2. Does the Contract entitle either party be awarded equitable fees and costs?

The decision from Division II is in direct conflict reached in this Court in:

A. *Optimer Int'l., Inc. v. RP Bellevue, LLC,* 170 Wash.2d 768 (2011), the Washington Supreme Court specifically held, "parties may not waive judicial review of arbitration awards under the WAA". Accordingly, the basis for the Trial Court's decision to STRIKE HEG's Request for Trial de Nova and Awarding those Fees and Costs to Reality is contrary to applicable law and Washington Supreme Court precedence.

B. *Optimer Int'l., Inc. v. RP Bellevue, LLC,* 151 Wn. App. 954 (2009): holding the right to review could not be waived by contract and applied to existing agreement to arbitrate; waiver of right to judicial review of arbitration decisions was invalid from inception; A contract is impaired by a statute which alters its terms, imposes new conditions or lessens its value; An `impairment is substantial if the complaining party relied on the supplanted part of the contract, and contracting parties are generally deemed to have relied on existing state law pertaining to interpretation and enforcement.

C. *Malted Mousse, Inc. v. Steinmetz,* 79 P.3d 1154, 1155 (Wash. 2003), the Washington Supreme Court specifically held under chapter 7.06 RCW sufficiently protects the

rights of small claimants and that trial de novo is the sole method to seek judicial review from mandatory arbitration.

D. *Godfrey v. Hartford Casualty Insurance Co.*, 142 Wash.2d 885, 896 (2001), "any efforts to alter the fundamental provisions of the Act by agreement are inoperative."

E. *Barnett v. Hicks*, 119 Wn.2d 151 (1992), the Washington Supreme Court held that the parties to an arbitration agreement could not modify the rights under the Act: Reality's efforts to define the nature and scope of review must fail. Litigants cannot stipulate to jurisdiction, nor can they create their own boundaries of review.

III. ASSIGNMENT OF ERROR

The Court of Appeals affirmed the Superior Court's granting Reality's Motion to Strike HG's December 27, 2021, Request for Trial de Nova/Appeal (RCW 7.06.050, RCW 7.04A.280) conflicts with this Court's decisions in *Optimer, Malted Mousse, Godfrey, and Barnett*. Nowhere does Washington statute deny HG a right to appeal an arbitrator decision/award, but only through Reality's Contract amendment and before a controversy arises (RCW 7.04A.040). The Court of Appeals proposition that Reality's Contract amendment supersedes legislative intent is unconscionable, void, and must be vacated.

Reality's "Motion to Strike" was procedurally barred on timeliness, failed to present an arguable basis for relief with no meritorious value, was frivolous from inception, and was designed to do nothing more than to harass and obtain additional fees and costs from the pro se litigant, HG right on review. Reality's argument failed on the good faith basis in law or in fact. *In re Pers. Restraint of Khan*, 89657-7 (Wash. 2015); *See Neitzke v. Williams*, 490 U.S. 319, 325 (1989),

> "[none] of the legal points [are] arguable on their merits."
> "By logical extension, a complaint, containing as it does both factual allegations and legal conclusions, is frivolous where it

lacks an arguable basis either in law or in fact."

HG "Request for de Nova Review/Appeal" was timely filed from the arbitrator decision/award was not frivolous.

Reality should not receive any fees or costs, since Reality is the losing party in arbitration and has requested approximately $22,000+ for fees and costs in HG arbitration appeal. HG is the prevailing party in arbitration, where HG's entire attorney fees and costs in arbitration amounted to approximately $15,000, excluding the damage award. HG appealed the arbitrator decision/award and has received $0.00. The Superior Courts granted Reality fees and costs on its "Motion to Strike" HG appeal as frivolous, having no right to appeal. Whereas Reality "Motion to Strike" was frivolous from inception and used the Court as a mechanism to enrich its litigation war chest.

The Court of Appeals held HG's de nova review/appeal is not frivolous (RCW 7.06.050, RCW 7.04A.280) and denied Reality request for fees and costs from the Superior Court from its "Motion to Strike", therefore Reality's "Motion to Strike" must be frivolous, and holding HG has a right to de nova review/appeal. HG is entitled to equitable fees and costs and has a substantial right to the same equitable fees and costs as the opposition (FRCP 11). *See* Jeremy D. Spector, Awarding Attorney's Fees to Pro Se Litigants Under Rule 11, Michigan Law Review Vol. 95, Issue 11 (1997). Reality Contract amendment was designed to seek attorney fees and costs to bully and deter the homeowner from pursuing equitable relief from the Court from the Arbitrator decision by padding Reality's wallet at the expense of the homeowner. The touchtone in Rule 11 is to deter this type of contract enforcement by offending party for abusive litigation policy and practices and ensure an equitable effective system court operation for both litigants by sending a

clear and effective message to the offending party. The court has the power to require a party to "pay terms or compensatory damages" caused by a "frivolous appeal." RAP 18.9(a), or frivolous motion CR11. "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Fay v. N.W. Airlines, Inc.,* 115 Wash.2d 194, 200-01 (1990).

The Contract was designed to misrepresent conditions to the unknowing homeowner before a controversy arises that is subject to an agreement in violation of Washington's Consumer Protection Act, right to appeal/de nova review, and Washington Arbitration Acts (RCW 7.06 and 7.04A). It's obvious from the amendments within the Contract, Reality experienced these types of controversies, by adding bad faith Contract amendments for the benefit for Reality to deter or bully the homeowner before a controversy arises.

III. CONCLUSION

The right to judicial review or appeal of an arbitration decision/award as unappealable by any party cannot be waived or forfeited. *Optimer Int'l., Inc. v. RP Bellevue, LLC,* 170 Wash.2d 768 (2011). The Court of Appeals has acted as the Legislature, "the rights of the parties are governed and controlled by statutory provisions." *Godfrey v. Hartford Casualty Ins. Corp.,* 142 Wn.2d 885, 893 (2001). The Court of Appeals has abrogated the law by Contract and does not have discretion to deny or grant any right that's not granted by statute.

The Supreme Court has never addressed the abrogation of the law by contract, setting forth contractors like Reality, imposing restrictions favoring the contractor in their contract amendments in violation of Washington Consumer Protection Act. For this and the above-

mentioned reasons, the Court of Appeals has deviated from Supreme Court precedence and this Court should Grant Review on all Henry Gossage's claims and issues and remand to the Superior Court for trial on all Henry Gossage's Issues and Claims.

1) Reality is not entitled to a substantial windfall in any fees or costs.

2) HG is entitled to equitable fees or costs that Reality has requested as a deterrence in securing a fair and equitable effective system, sending a clear message to the offending party under Rule 11 or assessing a fine payable to the Court as an alternative. As a basis, the Court only needs to review what the opposing counsel is seeking for litigation compensation. *See* Rynkiewicz v. Jeanes Hospital, No. 86-5209, 1987 WL 7842 (E.D.Pa. March 11, 1987); *Affirmed* 862 F.2d 310 (CA3 1988).

3) HG has a Constitutional and statutory right to appeal or "Request for trial de Nova" from the Arbitrator Award.

4) Vacate Reality's Motion to Strike "HEG Request for Trial de Nova"

5) Vacate Reality's Request for Fees and Costs

6) Remand for trial on the Merits with fees and costs.

7) HEG should be awarded equitable attorney and expert witness fees and costs as the complainant from inception and to defend this "Request for Trial de Nova", as a sanction remedy under CR11.

8) HEG-Reality Consumer Construction Contract amendments is an unconscionable Contract, violating Washington Consumer Protection Act and Washington State Supreme Court precedence.

9) Reality has operated under its designed Consumer Construction Contract from inception, conflicting with the State Supreme Court.

10) Anything else this Court deems just and fair.

March 5, 2023

Respectfully submitted,

/s/

Henry Eugene Gossage
Veteran Pro se, Petitioner

March 5, 2023

Respectfully submitted,
/s/Henry Eugene Gossage
Henry Eugene Gossage
Veteran Pro se, Petitioner
Chapter Service Officer-Tumwater Chapter 41
Disabled American Veterans

CERTIFICATE OF COMPLIANCE

This brief is in compliance to RAP 18.17, 2302 Words, 12 pt, Times Roman and double spaced.

CERTIFICATE OF SERVICE

I certify that I electronically filed in through the ***Court of Appeals Division II E-Filing Portal and E-Mail*** and served Reality Homes (Leland Clay Sarby Jr., Grady Heins) respondents on March 5, 2023,
/s/ Henry Eugene Gossage
Henry Eugene Gossage
P.O. Box 1102
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HENRY GOSSAGE - FILING PRO SE

March 05, 2023 - 12:03 AM

Filing Motion for Discretionary Review of Court of Appeals

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Washington State
Court of Appeals
Division Two

January 10, 2023

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

HENRY GOSSAGE, an adult individual, Appellant, v. REALITY HOMES, Inc., a Washington corporation; SAVINGS ACCOUNT NUMBER 7000328315; 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, married adults, including any marital estate, Respondent(s).	No. 57120-0-II UNPUBLISHED OPINION

GLASGOW, C.J.—Henry Gossage contracted with Reality Homes Inc. to build his home. Following construction, Gossage claimed there were numerous construction defects and filed a lawsuit against Reality for breach of contract and violation of the Consumer Protection Act, chapter 19.86 RCW. The dispute moved to arbitration pursuant to a binding arbitration provision in the construction contract. An arbitrator awarded Gossage partial damages, as well as statutory fees and costs.

Gossage filed a motion for a trial de novo, which Reality moved to strike based on language in the construction contract waiving each party's right to a trial de novo. The trial court granted Reality's motion, struck Gossage's request for a trial de novo, and awarded Reality attorney fees and costs. Gossage appeals, and we affirm.

FACTS

Gossage and Reality, a home construction company, entered into a contract that included a disputes and arbitration clause. The clause provided, in relevant part, that any lawsuit must be filed in Pierce County Superior Court and "decided according to the Mandatory Arbitration Rules of Pierce County." Clerk's Papers (CP) at 34. The contract further provided that the arbitration award would be final, and the parties waived their rights to postarbitration trial de novo:

> Each party hereby expressly waives a jury trial . . . . The arbitrator's award shall be final and binding, [judgment] may be entered thereon in any court having jurisdiction, and both parties each waive their right to file any appeal for a trial de novo, thus assuring the cost-effective finality of any decision rendered. In the event a party fails to proceed with arbitration or fails to comply with the arbitrator's award, the other party is entitled to costs and expenses of suit, including a reasonable attorney's fee, for having to compel arbitration or defend or enforce the award.

Id.

Construction of the home was completed, and Gossage began living in the home in early 2018. Thereafter, Gossage began alleging numerous construction defects. Ultimately, in December 2019, Gossage filed a lawsuit in superior court against Reality. Gossage claimed that Reality was responsible for numerous defects in the home and breached the construction contract. The parties stipulated that Gossage's claims were subject to arbitration pursuant to the contract. The arbitrator awarded Gossage $10,500 plus $1,365 in statutory costs and fees.

Gossage then filed a request for trial de novo. Reality moved to strike Gossage's request and sought attorney fees and costs. Reality argued that the arbitration award was final and binding under the contract and that Gossage had waived his right to a trial de novo. Reality sought an award for attorney fees and costs for enforcing the arbitration award.

Gossage responded to the motion to strike arguing that it was untimely, that the contract was unconscionable and obtained by fraud, and that Gossage should be awarded sanctions. The superior court granted Reality's motion and entered an order striking Gossage's request for a trial de novo and awarding Reality attorney fees and costs.

Gossage appeals.

ANALYSIS

I. TIMELINESS

As an initial matter, Gossage argues that Reality's motion to strike his request for a trial de novo was untimely. Gossage characterizes Reality's motion as an appeal or cross appeal of the arbitration award and argues it therefore should have been filed within 20 days of the award. Reality's motion to strike cannot reasonably be construed as an appeal or cross appeal of the arbitration award; it was a direct response to Gossage's request for a trial de novo. Gossage's argument that Reality's motion to strike was untimely fails.

II. ISSUES NOT ON APPEAL

Gossage also makes several arguments that are not properly before us on appeal. He alleges that "[Judge] Quinlan lacked judicial authority to supersede [Judge] Swartz and dismiss [Gossage's] right" to request a trial de novo. Br. of Appellant at 5. There is nothing in the record on appeal of any decision by Judge Swartz. Accordingly, we do not address this argument further.

Gossage also attempts to argue the merits of his claims that Reality breached the Consumer Protection Act and breached the construction contract due to the alleged defects in the home. The merits of these claims are not properly before us. The trial court did not reach these claims before striking Gossage's request for a trial de novo. That decision—not the merits of Gossage's

underlying dispute with Reality—is the subject of this appeal. We do not address these arguments further.

III. TRIAL DE NOVO

The primary issue on appeal is whether the trial court erred when it struck Gossage's request for a trial de novo based on the express language in the contract waiving the right to trial de novo. We hold that the trial court did not err.

Washington public policy favors binding arbitration. '"[A]rbitration is a substitute for, rather than a mere prelude to, litigation.'" *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001) (quoting *Thorgaard Plumbing & Heating Co. v. King County*, 71 Wn.2d 126, 131-32, 426 P.2d 828 (1967)). "Washington courts confer substantial finality on decisions of arbitrators rendered in accordance with the parties' contract and the arbitration statute." *Rimov v. Schultz*, 162 Wn. App. 274, 279, 253 P.3d 462 (2011). Consistent with this policy, judicial review of an arbitration award is exceedingly limited. *Dahl v. Parquet & Colonial Hardwood Floor Co.*, 108 Wn. App. 403, 407, 30 P.3d 537 (2001).

Parties may agree to arbitrate to resolve their disputes, and arbitration by agreement is different from mandatory arbitration. Arbitration by agreement is governed by the Uniform Arbitration Act, chapter 7.04A RCW. That statute allows judicial review of an arbitration award only in limited circumstances, and the statute does not contain a right to trial de novo. RCW 7.04A.230, 240.

In contrast, mandatory arbitration applies to certain civil cases, and mandatory arbitration is subject to trial de novo in superior court. RCW 7.06.010, .020, .050. Mandatory Arbitration Rules (MARs) govern the procedures for mandatory arbitrations. MAR 1.2. In addition, parties

engaging in arbitration by agreement may agree to the processes established in those rules. MAR 1.2, 8.1.

Here, the parties' contract provided that any dispute would be resolved through final and binding arbitration. The parties also stipulated that arbitration would be subject to the MARs. The contract expressly stated that "[t]he arbitrator's award shall be final and binding . . . and both parties each waive their right to file any appeal for a trial de novo, thus assuring cost-effective finality of any decision rendered." CP at 34.

Gossage argues that the waiver of the right to appeal by trial de novo was invalid under Washington law and that he is entitled to a trial de novo despite the contract language. Gossage relies on *Optimer International Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, 246 P.3d 785 (2011) and *Barnett v. Hicks*, 119 Wn.2d 151, 829 P.2d 1087 (1992).

In *Optimer*, the Washington Supreme Court explained that the parties could not waive or alter by agreement the limited judicial review available under former chapter 7.04 RCW (1943), the precursor to chapter 7.04A RCW. 170 Wn.2d at 772-73. But *Optimer* does not address entitlement to a more expanded judicial review in the form of trial de novo. *Id.* The *Optimer* court did not address trial de novo at all.

In *Barnett*, the parties entered into an agreement for private arbitration but subsequently sought full judicial review by recharacterizing the arbitration as a hearing before a referee. The Supreme Court rejected the parties' post hoc characterization of the proceeding, held it was an arbitration, and noted that former RCW 7.04.160 (1943) limited judicial review of arbitration decisions. *Barnett*, 119 Wn.2d at 160-61. The court held that the parties improperly attempted to expand the boundaries of review beyond that conferred in the former statute. *Id*. at 161. Like the

Optimer court, the *Barnett* court allowed only the limited judicial review available under former chapter 7.04 RCW where the parties arbitrated by agreement. *Id*. at 163. Thus, neither *Optimer* nor *Barnett* is helpful here.

This case is most comparable to *Dahl*, 108 Wn. App. at 407. In *Dahl*, Division One of this court addressed a contract that limited judicial review rather than expanded or altered it. There the court held that parties could stipulate to binding arbitration under former chapter 7.04 RCW to be conducted under the procedures found in the MARs and still waive their right to trial de novo. 108 Wn. App. at 403. The court emphasized that permitting parties to utilize the procedures of the MARs without automatically removing themselves from binding arbitration comports with the public policy that favors binding arbitration and the finality of disputes. *Id*. at 411.

The reasoning of *Dahl* applies here. The contract language is clear that the parties intended to subject their disputes to binding arbitration. It is equally clear that they intended to waive any right to trial de novo and considered an arbitrator's decision to be final and binding. This is no less true because the parties also agreed to otherwise use the MARs. As was the case in *Dahl*, this conclusion "comports with the public policy that favors binding arbitration, which is to provide a substitute not a prelude to litigation and to provide a means whereby parties can achieve finality in the resolution of their disputes and avoid court congestion as well as the delays, expense and vexation of ordinary litigation." *Id.* Moreover, the "strong public policy favoring finality of arbitration dictates that any ambiguity with respect to which statute the parties have invoked—[former] chapter 7.04 or chapter 7.06 RCW—be resolved in favor of binding arbitration under [former] chapter 7.04 RCW." *Id*. at 412.

Accordingly, we hold that the trial court did not err by granting Reality's motion to strike Gossage's request for a trial de novo because the contract in this case was for final and binding arbitration and the parties were not entitled to a trial de novo.

Gossage attempts to avoid the binding ramifications of the contract by arguing that the contract is unconscionable and unenforceable. It is unclear whether Gossage contends the contract is procedurally or substantively unconscionable. "Procedural unconscionability applies to impropriety during the formation of the contract; substantive unconscionability applies to cases where a term in the contract is alleged to be one-sided or overly harsh." *Burnett v. Pagliacci Pizza, Inc.*, 196 Wn.2d 38, 54, 470 P.3d 486 (2020). Gossage's unconscionability argument seems to be primarily based on his belief that Reality breached the contract by defectively constructing the home. But Reality's performance is not before us on appeal.

ATTORNEY FEES AND COSTS

Gossage argues that we should award him CR 11 sanctions because Reality's motion to strike below was frivolous. We disagree.

Reality argues that it is entitled to attorney fees and costs pursuant to RAP 18.9(a) because Gossage's appeal is frivolous. Although Gossage did not prevail, his appeal was not frivolous and Reality is not entitled to attorney fees on this basis.

Reality also argues it is entitled to attorney fees and costs pursuant to RAP 18.1 and the terms of the contract. The parties' contract provides that either party is entitled to reasonable attorney fees and costs for enforcing an arbitration award. Accordingly, we award Reality reasonable attorney fees and costs for enforcing the arbitration award including appellate attorney fees and costs in an amount to be determined by a commissioner of this court.

We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Glasgow, C.J.

We concur:

Maxa, J.

Veljacic, J.