NO. 331750

WHITMAN COUNTY CAUSE NO. 10-2-00293-4

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

GARRETT RANCHES, LLC
a Washington Limited Liability Company
Respondents

v.

LARRY HONN FAMILY, LLC
a Washington Limited Liability Company
Appellants

APPELLANT HONN'S REPLY BRIEF

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The appellant response to the reply of the respondent as follows:

1. The Superior Court interfered with the arbitration Process.

The respondent has failed to identify any evidence in the record from the parties two chosen arbitrators, Mr. Smith and Mr. Ghephardt that indicates they were unable to select a third neutral arbitrator. As argued to the trial court by the appellant there was no evidence of a failed arbitration method or process other than the self-serving statements of Mr. Ferguson the counsel for the respondent. (CP 37)

It was also argued that the respondent's attempt to appoint the 3rd neutral arbitrator was an attempt to manipulate the adaptation panel. (CP 37)

Mr. Ferguson's declaration was nothing more than argument of counsel which is not evidence. Drolesbaugh v. Market Operating Corp., 24 P.2d 627, 174 Wash. 299 (1933)

More importantly the trial court knew that there was no evidence to support such a claim of a failed arbitration process and was well aware the appellants were asserting that specific objection. October 24, 2014 hearing transcript page 23-24:

23
21 As far as the court's designation of

22 Mr. Esser, **when that issue was brought before me,**
23 really wasn't certain whether the two arbitrators that
24 had been selected by the parties had been unable to
25 reach an agreement. I think the two attorneys had a
24
1 disagreement on that issue.
(October 24, 2014 – RP 23-24)

Judge Frazier in unmistakable terms admitted the lack of evidence needed to support the appointing of a third arbitrator by stating stated "really wasn't certain either the two arbitrators that had been selected by the parties had been unable to reach an agreement." (October 24, 2014 RP 23)

Washington law is equally clear in that the arbitration process must be followed unless shown to have failed.

RCW 7.04A.110 as previously stated reads:

> (1) **If the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails.** If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed under the agreed method. *Emphasis's Added*

The legislative use of the term "must be followed" gives the court no discursion to appoint the third neutral arbitrator unless "the method fails".

The respondent did not present any evidence to the trial court that the arbitration method had "failed" nor has the respondent reframed evidence of a "failed method" to this reviewing court. (CP32-33)

The respondent argues that the trial court did not interfere in the arbitration process by giving the parties a deadline to appoint a neutral arbitrator was somehow evidence of a failed method. All that did was remove any responsibility for the arbitrators to continue with their process, as a third arbitrator had been named. All they had to do was nothing. That appears to have been the respondents' intended effect based upon the relationship of the trial judge, respondent's counsel and the court appointed arbitrator.

The respondent's argument of some kind of a waiver by the appellants due to the same issue not being argued on reconsideration is misplaced and unsupported by any case law. As pointed out to this court the appellant's reconsideration was based upon newly discovered evidence of potential bias of Mr. Esser the court appointed neutral arbitrator. At the hearing on reconsideration it was discovered the court knew of the potential bias and failed to disclose it to the appellant.

As discussed at the February 13, 2015 hearing:

11

18 THE COURT: I knew, but, quite frankly, I
19 didn't think of it because they haven't been partners
20 for some time.
21 MR. LOCKWOOD: I --
22 THE COURT: You brought up the
23 reconsideration yesterday.
24 MR. LOCKWOOD: I understand. We filed a
25 motion for reconsideration and we said, you know,

12

1 nothing else, that the problem -- an arbitration, we'd
2 have a three-panel arbitration where we have to have a
3 neutral arbitrator. A neutral arbitrator is
4 absolutely essential because, you know, all -- you
5 have to have two people and you control the
6 arbitration.
(February 13, 2015 - RP 11-12)

Further, the appellant specifically objected to the appointment of Mr. Esser as he was specifically nominated by the respondent. At the time the respondent first nominated Mr. Esser the true extent of the Libey – Esser relationship was not disclosed and was unknown to the appellant.

Subsequent to the hearing appointing Mr. Esser as the neutral arbitrator, it was discovered that Mr. Esser was in a former long-term partnership with Mr. Libey. That discovery was the basis for the appellant's motion for reconsideration.

The Order of the trial court for the appointment of Mr. Esser as a third neutral arbitrator should be vacated and this matter

remanded to allow the parties agreed arbitration method to continue forward to choose the third neutral arbitrator.

2. The Superior Court violated the Appearance of Fairness Doctrine by appointing Mr. Esser because of potential bias.

As the respondent stated on pages 16-17 in their brief:

> "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person IG10wS and understands all the relevant facts." rd. (citing Tatham, 170 16 Wash.App. at 96, 283 P.3d 583). "The party must produce sufficient evidence demonstrating actual or potential bias, such as personal or pecuniary interest on the part of the judge; mere speculation is not enough."

The issue of potential bias by the trial court was argued.

As argued at page 8 of the February 13, 2015 hearing:

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> 1 up, like I said, that I put them all before the Court,
> 2 things that were said in Court, the affidavit that we
> 3 received from a non-party indicating what appears to
> 4 be kind of a social relationship between Mr. Esser,
> 5 Mr. Libey, and they've seen, your Honor, the judge
> 6 with them, as well, this is during times when the case
> 7 is going.
> (February 13, 2015 - RP 8)

The potential bias was brought to the attention of the trial court and instead of addressing the bias issue the trial court became defensive and condescending to the appellant's counsel.

Judge Frazier responded at the February 13, 2015 hearing at page 37-39:

37

22 There is some kind of an affidavit as far
23 as Mr. Libey, Mr. Esser, and myself having lunch,
24 sounds like about every day. I probably shouldn't
25 disclose this because this is going to upset

38

1 Mr. Lockwood and the Honns, but, you know, I do know
2 Mr. Libey so well that I know he doesn't eat lunch. I
3 know what he does at noon. Well, he might eat lunch,
4 but I don't know where he eats it; it isn't with me.
5 Might be with Mr. Esser, but I don't think so because
6 he walks down the street with a gym bag every noon.
7 It's a small community. I can see it out the window.
8 And maybe as I walk to lunch sometimes with other
9 people, he's in the group and walks along. He goes to
10 that gym down here and he works out every day.
11 And I don't know when -- Yeah, I've had
12 lunch with Mr. Libey. I don't know when. I was
13 having lunch with other lawyers today and he came in
14 because one of the people there was a former Superior
15 Court judge, he came in to speak to him. So what?
16 And when this case gets appealed and my decision gets
17 appealed, you might want to ask the panel, some of the
18 judges, "Have you ever had breakfast or lunch with
19 Judge Frazier, the judge whose decision you're going
20 to review?" Or if it goes on to the Supreme Court,
21 ask that panel of Supreme Court justices the same
22 thing.
23 As far as that affidavit from -- or
24 declaration or whatever it was, that person better
25 check her facts here because there is a lot of

39

1 inaccuracies with respect to that. **And even if it**
2 were true, it's, I don't feel, grounds for me to
3 recuse myself in this particular case, or grounds for
4 Mr. Esser to be disqualified. *Emphasis added*
(February 13, 2015 - RP 37.39)

The trial court never denied the allegations contained in the affidavit of Ms. Taylor but rather attempted to explain it away and concluded with "even if it were true". If it were true as it appears the trial judge should not be openly socializing with opposing counsel and the 3rd neutral arbitrator he appointed. Under these facts it is a high probability if not a certainty the case was discussed. This is inappropriate and violates the appearance of fairness doctrine. It is requested that this court vacate the appointment of Mr. Esser as the third neutral arbitrator and remand for the arbitrators to appoint the neutral arbitrator under the party's arbitration clause.

3. The Superior Court did err when it denied Appellant's Motion for Reconsideration

The respondent asserts no basis was identified for the motion for reconsideration. However, the respondent fails to note the following argument to the trial court by the appellant following the discovery of Mr. Esser's relationship with Mr. Libey the respondent's counsel. At page 5 of the October 24, 2014 hearing on the motion for reconsideration appellant stated:

5

10 Mr. Esser, I come to find, was
11 a former law partner for Mr. Libey and they practiced
12 over here in Colfax for a number of years. Mr. Esser

13 moved down to Pullman. Likewise, Mr. Libey's law firm
14 and he, they continued to practice together down
15 there. Now, Mr. Esser eventually formed his own
16 partnership with another attorney and that other
17 attorney was also with the Libey law group for a
18 while.
19 So, we're dealing with Mr. Esser's
20 relationship with the Libey law firm which has gone on
21 for a number of years. And what's being argued is,
22 "Well, he wasn't a part of this law firm at the time
23 we were doing this negotiation." That may be.
24 However, because they have a longstanding relationship
25 and I think that there's at least an appearance that,

6

1 you know -- I don't know if Mr. Esser and Mr. Libey
2 continue to be good friends, you know, if they go
3 fishing, play cards, what, I don't know. All I know
4 is that they've had this existing relationship for a
5 number of years and that to nominate him as a neutral
6 third arbitrator, I think, is -- goes against, you
7 know, the -- you know, at least the appearance of
8 impropriety (sic). So, we're asking that the Court
9 reconsider its decision on Mr. Esser.
(October 24, 2014 - RP 5-6)

Judge Frazier refused to reconsider his decision following the appellant's production of evidence of potential bias. Judge Frazier stated at the October 24, 2014 hearing on the motion for reconsideration at pages 25-26:

25

17 So, even though he was -- his name was
18 thrown out by one of the parties, I thought -- and he
19 was sitting right there -- "Yeah, perfect." And I
20 still think that that's the case here. I was aware
21 that -- I was aware but I don't think I thought about
22 the fact that he had previously been Mr. Libey's
23 partner and he had been, I'm sure I'm -- I think

24 Mr. Ferguson was in the firm at the time. I didn't
25 know how long ago that was;

26

13 So, you know, and then I think how often
14 this -- We have a small community. So is Spokane. I
15 mean, I know judges in Spokane, lawyers in Spokane,
16 and I don't know how often that a lawyer from a
17 Spokane law firm gets elevated to one of the courts,
18 Superior Court. **Sometimes some of the big firms, I**
19 know they kind of have a lull for a certain period of
20 time, a couple years, they flat out won't hear any
21 cases, there'll be disclosure, and they -- Former
22 partners hear cases of former partners and they base
23 their decisions not on who the lawyers are but what
24 are the facts of the case and what's the law that
25 applies.
(October 24, 2014 - RP25-26)

Respondents' counsel and Judge Frazier both knew of the Libey and Esser relationship, at the courts initial hearing on the respondent's motion for the court to appoint a 3rd neutral arbitrator. However, both failed to mention the relationship. It was kept from the appellant. When the potential bias was brought to the trial court's attention it disregarded the appellants' concerns indicating:

> **"Sometimes some of the big firms, I know they kind of have a lull for a certain period of time, a couple years, they flat out won't hear any cases, there'll be disclosure, and they – Former** partners hear cases of former partners"
> (October 24, 2014 - RP26)

The court talks about disclosure – however the court chose not to disclose the Libey–Esser relationship and neither did the

respondent when both knew and appears to have attempted to keep that from the appellants.

The motion for reconsideration should have been granted and Mr. Esser should have been removed as the 3rd neutral arbitrator. This is inappropriate as the court knowingly appointed a 3rd neutral arbitrator over the appellant's objections based on evidence of a potential bias.

Washington courts have recognized that a timely objection to a neutral arbitrator is necessary. S & S Const., Inc. v. ADC Properties LLC, 151 Wn.App. 247 , 267, 211 P.3d 415, (2009) In this case the appellant objected prior to and throughout Mr. Esser's appointment, The appellant specifically objected prior to any decision being made by Mr. Esser. Further the objections occurred while court named alternates were available. The trial court named three alternates to Mr. Esser at the appellant's motion for reconsideration hearing on October 24, 2014 at pages 28-29 the court stated:

28

21 on, "Well, Esser can't do it, appoint somebody else,"
22 I'm going to appoint some alternates.
23 So, if Esser -- if he recuses himself or
24 gets disqualified by the arbitration panel, I'm going
25 to appoint as first alternate attorney Rusty McGuire,

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1 again experienced, a lot of farm experience. He
2 practices in Whitman County, has offices in Whitman
3 County on a part-time basis, and he has a main office
4 in Davenport. He's got, like, seven offices, his
5 firm. And he has ag. expertise and lease expertise,
6 farm lease, and he grew up on a farm.
7 Second, similar circumstance, he's
8 remotely situated in Garfield, Washington, Stephen
9 Bishop. He'd be the second. If Esser recuses,
10 McGuire can't do it or won't do it, I'll appoint
11 Stephen Bishop because he's not out and about and he's
12 not a litigator, with a lot of farm experience, even
13 raises apples himself.
14 And then third alternate, Howard Neill,
15 who I was thinking of in the back of my mind when you
16 were asking for me to appoint someone last time. Same
17 reason: a lot of experience and Whitman County farm
18 experience and lease experience.
(October 24, 2014 - RP 28-29)

Any of the court named alternates would have been acceptable to the appellant as they were not former partners or in a social relationship with the respondent's counsel. It is proper that this court vacate the appointment of Mr. Esser as the third neutral arbitrator and remand for the arbitrators to appoint the neutral arbitrator under the party's arbitration clause.

4. The Superior Court erred in declining to recuse itself.

Judge Frazier having commented on the evidence telegraphed to the world what his decision would be if it came before him for approval of the arbitration decision or other motions.

Judge Frazier stated at page 23 of the October 24, 2014 hearing transcript:

23

3 And maybe the specific issue that's now
4 raised, consideration, wasn't raised then -- should
5 have -- I think the issue's res judicata here. And
6 I'm only deciding that -- It's not my decision to
7 make. That's up to the arbitrators. These parties
8 have agreed to arbitration. **But I don't think you're**
9 going to have any witnesses. That's my legal analysis
10 based on everything that I have seen here. So, no,
Emphasis Added.
(October 24, 2014 RP 23)

Judge Frazier's comment on the evidence as to **res judicata was surprisingly the same issue the respondent raised in their summary judgment motion as noted in Mr. Esser's decision.** (CP 536)

In addition to comments on the evidence, the affidavit indicating the court's ongoing social relationship with respondent's counsel and Mr. Esser, created real doubts as to the trial court ability to be fair and impartial. It further explained why the court appointed a former partner of the respondent over the strenuous objection of the appellant. Judge Frazier stated: at page 42 of the February 13, 2015 hearing transcript on the motion for recusal:

42

16 So, I'm, number one, denying the motion to
17 recuse. And, quite frankly, under circumstances where

18 I am asked or requested to recuse myself from a case,
19 I almost invariably, whether I agree there's a good
20 reason or not, heck with it, I'll recuse myself. I
21 don't have any vested interest in any cases. You
22 don't think I'm going to be fair, you get another
23 judge. But, you know, I'm not going to do it here
24 because I don't see any merit to the argument.
(February 13, 2015 - RP 42)

In this case Judge Frazier refused to recuse himself when he admits he normally does when faced with a request with or without a good reason. However, in this case where evidence was presented to the court in the form of an affidavit, indicating an ongoing social relationship with the respondent's counsel and the alleged 3rd neutral arbitrator he found the request has no merit.

It appears the trial court intended to ensured finality to the arbitration favorable to the Libey law firm. It is requested this court reverse Judge Frazier's refusal to recuse himself and request a reassignment and the case be remand for the arbitrators to appoint the neutral arbitrator under the parties arbitration clause and proceed to a unbiased arbitration.

5. Mr. Esser failed to disclose relationship with Mr. Libey and the court.

The respondent alleges that here was full disclosure by Mr. Esser in his letter on November 6, 2014. CP 222. The disclosure by Mr. Esser disclosed no additional information than what had

been discovered by the appellants which was the basis for the appellant's motion for reconsideration and objection to Esser's appointment as a neutral arbitrator,

Shortly after Mr. Esser's November 6, 2014 letter an affidavit was delivered to my office indicating an undisclosed ongoing social relationship with the respondent's counsel. (CP225). Upon receiving the affidavit the appellant sent Mr. Esser a letter with a copy of the affidavit requesting he allow one of the alternate arbitrators named by the trial court to serve. (CP224) In response, Mr. Esser issued an Order denying his recusal based upon his November 6, 2014 letter. (CP227) Mr. Esser never addressed the concerns raised in the appellant's letter nor the attached affidavit.

The respondent and Mr. Esser intentionally withheld any information regarding his continued relationship with Mr. Libey the respondent's counsel.

Mr. Esser's intentional nondisclosure or explanation of the ongoing social relationship with Mr. Libey is a basis for vacating the arbitration award pursuant to RCW 7.04A.120 (1)(b). It is requested this court vacate the arbitration award and remand for the party nominated arbitrators to appoint a 3rd neutral arbitrator under the party's arbitration clause and proceed to a unbiased arbitration.

6. The Superior Court erred when it confirmed the Arbitration Award

As argued by the appellant, that in order to preserve the integrity of the arbitration process, a fare and impartial neutral arbitrator is required. This is due to the acknowledge difficulty in reviewing arbitration awards. This was the grounds for the appellant's objection to Mr. Esser appointment as the neutral arbitrator in the face of available alternates.

The respondent states that the trial court did not have the authority to review the arbitration award. However, arbitration awards are reviewable as in this case by the trial court on statutory grounds or due to clear error on the face of the award. McGinnity v. AutoNation, Inc., 149 Wn.App. 277, 292, 202 P.3d 1009 (2009)

The 3rd neutral arbitrator (Mr. Esser) wrote the arbitration decision. It was approved by Mr. Smith, the respondent's other nominated arbitrator. The third arbitrator Mr. Ghephardt filled a decent to Mr. Esser's decision.

As argued by the appellant, the trial court did not address the issue of material facts in dispute at the arbitration summary judgment hearing. The respondent failed to address this issue as well.

The errors on the face of the award as argued to the trial court by the appellant and the bias of appellant's arguments raised as to Mr. Esser was sufficient for the trial court to vacate the award. However, Judge Frazier failed to review any of the appellant's arguments related to errors on the face of the award, simply stating in the February 13, 2015 ruling on Page 43 of the transcript:

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8 And the bottom line, the arbitrators made a
9 decision, and it's undisputed from the record I have,
10 a legal decision. So, why keep litigating at this
11 level? If you disagree, appeal. You can have
12 reconsiderations and another judge and more
13 arbitrations or you can get the issue in an efficient,
14 effective manner to the Court of Appeals.
15 I'm not going to recuse myself. I'm going
16 to deny the motion to vacate the arbitration
17 decision.
(February 13, 2015 RP 43)

Judge Fraizer knowingly pushed this matter to the court of appeals well aware of the limited review of arbitration decisions and is so doing failing to address errors raised to the trial court,

7. Conclusion

Parties enter into arbitration agreements with the expectation of a fair and unbiased arbitration if necessary. In this case the trial court ensured an unfair and biased arbitration panel by violating the agreed arbitration process and appointing a neutral arbitrator

nominated by the respondent. This bias was recognized early in the process by the appellant with objections being made throughout the process.

It is respectfully requested that the court vacate the trial court's appointment of Mr. Esser as the neutral arbitrator and remand for further arbitration proceeding consistent with the party's arbitration agreement.

Dated this 7th day of August, 2015.

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CERTIFICATE OF SERVICE

I, LORRIE HODGSON, do declare that on August 7, 2015, I caused to be served a copy of the foregoing APPELLANT HONN'S REPLY BRIEF to the following listed party(s) via the means indicated:

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DATED August 7, 2015.

LORRIE HODGSON