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
Respondent

v.

LARRY HONN FAMILY, LLC
A Washington Limited Liability Company
Appellant

RESPONDENT'S BRIEF

Will Ferguson, WSBA 40978
Of Attorneys for Respondent
LIBEY & ENSLEY, PLLC

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III. STATEMENT OF THE CASE

The Cash Rent Farm Lease with Option to Purchase (hereinafter "Lease and Option"), and the interpretation thereof, is at the core of this case. CP 1-30. This case was heard on its first appeal in 2013, in Garrett Ranches, LLC v. Larry Honn Family, LLC, 177 Wash.App. 1014. The facts as recited in 177 Wash.App. 1014, do not need to be repeated here, but provide a factual and procedural backdrop for this case. The unreported decision resulted in the affirmation of the Whitman County Superior Court's decisions from the beginning of this case in 2010 until 2013. The affirmed decisions included two arbitration awards and one supplemental arbitration award.

Respondent Garrett Ranches (hereinafter "Garrett Ranches") began the third round of arbitration in 2014 by appointing an arbitrator and requiring Appellant appoint an arbitrator. CP 32. In the third round of arbitration, Garrett Ranches selected Read Smith. CP 32. Read Smith (hereinafter "Mr. Smith") had participated in the first two arbitrations and the supplemental arbitration. Honn Family, LLC (hereinafter "Appellant") appointed a new arbitrator, Frank Gebardt. CP 32. Appellant selected Frank Gebhardt ("Mr. Gebhardt") instead of the experienced arbitrator from the last two arbitrations and supplemental arbitration, Mr. Dave Gittins, because Appellant hadn't paid Mr. Gittens' fees. CP 32. Mr. Gebhardt

agreed to serve as Appellant's appointed arbitrator and communicated with Mr. Smith on selection of a third and final arbitrator. CP 32. Garrett Ranches filed its Motion and Declaration for Appointment of 3rd and Final Arbitrator on September 25, 2014. CP 1-33.

By September 23, 2014, Mr. Smith and Mr. Gebhardt were unable to decide on a third arbitrator. CP 7. Garrett Ranches recommended Mr. Dwayne Blankeship (hereinafter "Mr. Blankenship"), a non-lawyer, the final arbitrator from the prior arbitrations, while Appellant argued for the appointment of an attorney. CP 7-11. Garrett Ranches, based on the apparent deadlock between Mr. Smith and Mr. Gebhardt, moved for appointment of a 3rd and final arbitrator on September 24, 2014 (hereinafter "Motion for Appointment"). CP 31-33. Garrett Ranches requested that the Superior Court appoint Mr. Blankenship, as he was experienced in farming and ranching and knew all of the facts of the case. CP 32. Garrett Ranches submitted a Memorandum with its Motion for Appointment. CP 1-30.

On October 3, 2014, over Appellant's objection, the Superior Court held a hearing on Garrett Ranches' Motion for Appointment. RP 3:2-9. Appellant argued that there was no evidence of deadlock. October 3, 2014, Report of Proceedings Page 7, Lines 8-15 (October 3, 2014—RP 7:8-15). Appellant also argued for appointment of a Spokane-based arbitrator. CP 36. Appellant also argued that Mr. Blankenship was not a neutral arbitrator,

even though he had served on all of the prior Arbitration Panels and his integrity had not been questioned. RP 6-7:22-25, 1-3; RP 10:8-14. Appellant later in its argument agreed that the Mr. Smith and Mr. Gebhardt had not been able to select a third arbitrator: "Basically, what that e-mail did was basically says our understand----these arbitrators have---**haven't been able to pick** an—third, neutral arbitrator at that time, **which was true** and they're still working on it." RP 11:5-9. Appellant also added that it would be making a motion to disqualify Garrett Ranches' counsel, the law firm of Libey & Ensley, PLLC (hereinafter "Libey & Ensley"). RP 7-9.

The Superior Court denied Garrett Ranches' request to appoint Mr. Blankenship. October 3, 2014--RP 13:6-20. The Superior Court's reasoning was extensive and included its experience with a case spanning four years:

> If there's ever a case that has been over-litigated, I think it's this case. And oddly enough, the case is always in court, yet there's an arbitration clause in the lease. What I'm going to do on the issue of today, I'll call it the issue of the day, in anticipation, I appreciate, Mr. Lockwood, you've already tipped me off about the issue that we'll have coming up, and then I won't worry about the third issue that will probably be one or two weeks down the line. But I don't see where all of these motions do very much to get to the -- really, the important issue of resolve is the controversy that these two parties have. You've got the agreement for mediation.
>
> Both sides have appointed a mediator. It sounds to me like the mediators that have been appoint- -- excuse me, arbitrators, the two, have been unable to select the third, but apparently there's a dispute as to even that issue. **What I'm going to do today -- And I'm trying**

> **to expedite this so the controversy will be resolved. And I think I'm fighting everybody here, but it's my desire to get it resolved. I think that the parties would want to get the case resolved.** I'm going to refer it back to the two mediators. I'll enter an order directing it be referred back to the two -- and I mean arbitrators, not mediators – with the direction that they select the third arbitrator by, I'll say, the 17th of October.

October 3, 2014--RP 11-13:24-25;1-2. Leaving the decision in the hands of the two arbitrators, the Superior Court expanded its reasoning:

> And then if they have not selected or have a stalemate and put that in writing to both sides and haven't selected an arbitrator, the third, by that date, then I will appoint the third.

October 3, 2014--RP 13:2-6. Instead of appointing Mr. Blankenship as the default arbitrator, as Garrett Ranches had requested, the Superior Court went another route:

> What I'm going to do, if these two mediators cannot -- I've got mediation on the mind --these two arbitrators can't come to an agreement as to the third arbitrator, I am going to appoint right there Mr. Esser, who was suggested. But Mr. Ferguson said we need an arbitrator with stability and common sense and patience. I'm going to appoint Mr. Esser because of stability and common sense and, I think, 40 years of law practice in Whitman County and I know he has extensive experience in contract law and in farm law and a great deal of common sense and -- but I'm not appointing him because he has patience. **I'm appointing him because I know him very well and he has no patience. And this is a case that needs someone that isn't going to put up with the garbage that this Court has been presented with, with frivolous motions and all of the procedural background. It needs somebody that's going to get in with the other two arbitrators, be fair, impartial, and aggressively seek to get a decision entered that'll be fine.**

October 3, 2014--RP 13-14:16-25;1-10. The Superior Court made it clear that it was not appointing a final arbitrator at that time, but was leaving it up to the arbitration process until the two appointed arbitrators had in fact proven that they were deadlocked:

> So, I'll give the other, the two existing arbitrators a chance. If they can't get it done in two weeks and they can't agree, then everyone's stuck with Mr. Esser. And so that's where I'll leave it. We'll see you probably in the near future, Counsel. I'll let you do an order to this effect, that someone needs to make sure, maybe both of you make sure, that the order gets immediately to these existing arbitrators so they can work on seeing if they can. And if they know it's Mr. Esser, they might work very hard to come to an agreement. I'm joking on that.

October3--RP 14:11-22. By October 16, 2014, the Superior Court entered an Order Re: Appointment of Arbitrator. CP 62-63. The Order deferred to the two arbitrators and required them to select a third arbitrator by October 17, 2014. CP 62-63.

However, two days before the Superior Court entered the Order Re: Appointment of Arbitrator, Appellant filed its Motion and Declaration in Support of Disqualification of the Law Firm of Libey & Ensley, PLLC. CP 39-44. That same day, October 14, 2014, Appellant filed its Motion for Reconsideration and Objection to Appointment of Timothy Esser as Third Arbitrator Pursuant to RCW 7.04A.110. CP 45-49. Accompanying the motion was Declaration of J. Gregory Lockwood in Support of Motion for Reconsideration and Objection to Appointment of Timothy Esser as a Third

Arbitrator Pursuant to RCW 7.04A.110. CP 50-61. Garrett Ranches responded to the motion for reconsideration, disqualification of the firm of Libey & Ensley, and Appellant's objection to appointment of Mr. Esser. CP 64-125.

The Superior Court entertained all of the motions and responses on October 24, 2014. October 24, 2014--RP3:2-7.

The Superior Court reiterated its desire for expediency in this matter:

> All right. Well, here's what I'm going to do as far as the issue of the motion to reconsider the appointment of Mr. Esser. Now, you have a case here that has gone on for a long time, and my frustrations, and I think I've expressed those frustrations, you have a lease, you have an agreement between two limited liability farm corporations. We know the lease has an option to purchase; it also has an arbitration clause. People normally enter into arbitration agreements as a means of settling their disputes for two reasons: Expediency, to save time, to have -- not have to go through the delays that they're involved in, setting cases for trial and going into court; and economy, to save expenses.

October 14—RP 20:9-22. On Appellant's motion to disqualify the firm of Libey & Ensley, the Superior Court explained carefully why it was denying the disqualification:

> It's gone through arbitration, it's come to court, it's been confirmed, it's been appealed, it's back here again, and the Honns lost. Now here we are with another request for arbitration. It relates to whether there was consideration, as I understand it, the issue for the arbitration agreement. I now have a couple motions concerning the selection of a third arbitrator And now, after all of this time, a motion to disqualify what I'll call the Libey -- that's Libey (ly-bee), not Libey

(lib-ee) -- law firm here. On that issue, number one, on both issues, parties have agreed to arbitration. And I think from everything that I've read here, it is highly, extremely unlikely, from a realistic, practical standpoint and from a legal standpoint, that Mr. Libey will be a witness in the arbitration. I'mhaving trouble wrapping my head around that.

The facts that have been identified by the Honns here that he'll testify to, as I see it, have been obtained and are obtainable through other witnesses, other sources, and that's a factor to consider. Doesn't even appear that they're in dispute and/or many of these are privileged and wouldn't be admissible anyway. So, I am not going to grant the motion to disqualify, at this time, the Libey law firm. And if I were, that would probably make quick work of the second issue, which concerns Mr. Esser here. But additionally, you know, I think it's highly likely -- I have to determine the likelihood of Mr. Libey being a witness in the case and the rule, I think it's highly likely that, when the matter goes before the panel of arbitrators and they're presented with the law, I think it's highly likely that, from a legal standpoint, this case in arbitration isn't going to go very far because I think -- and it's not my decision to make except as it pertains to the likelihood of there being any witnesses -- that case is going to get thrown out of arbitration if the law is applied, because there was a arbitration already on the very subject that's being disputed here, the lease and an offer to or an option to purchase. And maybe the specific issue that's now raised, consideration, wasn't raised then – should have -- I think the issue's res judicata here. And I'm only deciding that -- It's not my decision to make. That's up to the arbitrators. These parties have agreed to arbitration. But I don't think you're going to have any witnesses. That's my legal analysis based on everything that I have seen here. So, no, I'm not going disqualify the Libey firm here. Now, we do an arbitration, you agreed to arbitration, so if the arbitrators see you later on, "Oh, Libey may be a witness or is going to be a witness and this -- the facts that he could testify to aren't obtainable elsewhere," then the issue then can be renewed before the arbitrators. Again, they've agreed to arbitration and this isn't the issue. What evidence is presented at arbitration, that's up to the arbitrators, not to this court.

October 14—RP 21-23:11-25;1-20. The next matter for the Superior Court to rule on was whether it would reconsider the appointment of Mr. Esser, an appointment that became abundantly clear, given that Appellant was admitting deadlock:

> [When the issue of appointment was] brought before me, really wasn't certain whether the two arbitrators that had been selected by the parties had been unable to reach an agreement. I think the two attorneys had a disagreement on that issue. And I thought, "Oh, they'll probably agree to the third arbitrator if we put a deadline on it." **Apparently they didn't.** And normally, and I think I said this at the time, if it's an issue of appointing a mediator or appointing an expert or a guardian ad litem and it's disputed, or an arbitrator, and one party says, "I want such and such," and the other party disagrees, "I don't want to appoint such and such" -- But Mr. Esser was sitting right where this gentleman here is sitting as you were arguing the case. I'm very familiar with Mr. Esser. He's had a lot of cases before this court, and I think he's been a lawyer -- he was a year ahead of me. No, he was in my class in law school. Didn't even know him in law school, but he was in my class, so he's been a lawyer almost 40 years and I'm aware of that. And I'm aware of the issues in this case, procedural hassling that has taken place. And I think Mr. Ferguson indicated he should be appointed because he has patience, something to that effect. No, he doesn't. He doesn't have any patience. That's what caught my attention. And because I don't feel that when parties agree to settle their disputes through a procedure that involves, or is designed to involve, economy and saving time, to have a patient trier of fact that's going to listen to all kinds of frivolous and irrelevant procedural issues, I don't feel benefits the parties to the litigation. And I'm, again, familiar with Mr. Esser. He's got broad experience, but particularly in contract law, in civil litigation, in agricultural law, in farm leases litigation, and I know him to be very knowledgeable and a person that has the unique skill of focusing on the real issues, identifying the real issues, cutting through the irrelevant and the frivolous, and he has an amazing ability to do in one hour what would take me and a lot of lawyers and whatnot, he can do in an hour what some of us it takes eight hours. And he's extremely independent. So, even though he was --

his name was thrown out by one of the parties, I thought -- and he was sitting right there -- "Yeah, perfect." And I still think that that's the case here. I was aware that -- I was aware but I don't think I thought about the fact that he had previously been Mr. Libey's partner and he had been, I'm sure I'm -- I think Mr. Ferguson was in the firm at the time. I didn't know how long ago that was; I'm hearing now it was five years ago. And the evidence here is that he wasn't in that firm at the time the lease that's in dispute here was drafted. And since whenever the dissolution of the partnership or whatever it was, the separation, occurred, maybe one reason I didn't immediately remember that Libey and Esser were partners is that I don't know how many cases they've come in here and had pretty good knock-down, drag-out fights and it hasn't affected their ability to advocate against one another very zealously for the positions of their parties here. So, you know, and then I think how often this -- We have a small community. So is Spokane. I mean, I know judges in Spokane, lawyers in Spokane, and I don't know how often that a lawyer from a Spokane law firm gets elevated to one of the courts, Superior Court. 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 and they base their decisions not on who the lawyers are but what are the facts of the case and what's the law that applies. And we don't have a case here where the arbitrator went from the firm to -- or one of the lawyers, to the position of arbitrator. There was a "divorce," I think I heard the term. I don't know what happened there. It doesn't matter. So, I am not going to -- I don't think there's any legal basis at this point for -- I'm not going to disqualify or reconsider my designation of Mr. Esser. Now, he does have some duties and one is to be fair and impartial. Just because the two attorneys here, the two sides, picked an arbitrator, they've got a duty to be independent. You've selected, essentially, a judge. And the person that each side selects, I'm sure you think that there's some advantage that you may have as a result of that. But their role is to be neutral, fair, impartial, and independent, and they have a legal duty to do that, all three them, even the ones that each of you have selected here, and they have other duties. So, again, I don't think there's any legal basis to disqualify Mr. Esser. I'm not going to do that. I think he is particularly suited to be an arbitrator in this particular case. But, by the same token, I'm going to not bar or prohibit Mr. Lockwood or the Honns here from challenging him

> in the arbitration process or inquiring as to whether he feels he should -- he has any question as to his impartiality. And he may elect to recuse for, among other reasons that I've heard here, I'm hearing he may have -- his present firm, someone from his present firm, he or Mr. Sandberg, may have not represented the Garrett side but represented the Honns. So, he may say, "Hey, I can't because I know something special about the Honns or something that might affect my ability to be fair." So, I'm not disqualifying him, but it might be an issue to raise to him in the process of arbitration. And because of the possibility he may recuse, and I think that might be a real possibility here for the reasons I've stated, was an association in there, with both sides, I think, to expedite things, rather than have you make motions, spend more money, come back before the court with more argument on, "Well, Esser can't do it, appoint somebody else," I'm going to appoint some alternates. So, if Esser -- if he recuses himself or gets disqualified by the arbitration panel, I'm going to appoint as first alternate attorney Rusty McGuire, again experienced, a lot of farm experience. He practices in Whitman County, has offices in Whitman County on a part-time basis, and he has a main office in Davenport. He's got, like, seven offices, his firm. And he has ag. expertise and lease expertise, farm lease, and he grew up on a farm. Second, similar circumstance, he's remotely situated in Garfield, Washington, Stephen Bishop. He'd be the second. If Esser recuses, McGuire can't do it or won't do it, I'll appoint Stephen Bishop because he's not out and about and he's not a litigator, with a lot of farm experience, even raises apples himself. And then third alternate, Howard Neill, who I was thinking of in the back of my mind when you were asking for me to appoint someone last time. Same reason: a lot of experience and Whitman County farm experience and lease experience. So, I'm trying to keep you gentlemen out of court, get you to arbitration, so keeping Esser with three alternates. And not that I don't like seeing the two of you or tired of this case, but I feel sorry for your clients. They need to get to the merits and not spend a lot of money on all of these procedural issues.

October 24, 2014—RP 23-29:23-25.

When Appellant failed to have Mr. Esser removed by the Superior Court, it attempted to persuade Mr. Esser to remove himself. CP 474-477.

Mr. Esser disclosed his prior relationship with Garrett Ranches' counsel. CP 222. Appellant then submitted an affidavit from an individual named Khani Taylor (hereinafter the "Affidavit"). CP 225. The Affidavit provided no background as to who Khani Taylor was or if she had any personal dealings with Mr. Esser or anyone from the firm of Libey & Ensley. CP 225. In response to the affidavit, Mr. Esser stood by his decision. CP 227.

The parties proceeded to arbitration, each moving for summary judgment. CP 512-513; 533. The majority of the Arbitration Panel denied Appellant's motion for summary judgment, entering a lengthy and reasoned decision. CP 533-546. The Arbitration Panel granted Garrett Ranches motion for summary judgment, again supporting the Arbitration Panel's decision and reasoning. CP 533-546. On January 27, 205, the Arbitration Panel issued its ruling and Award (hereinafter "Arbitration Award"). CP 533-546.

The Award was thirteen pages in length and included the legal bases for the Award. CP 533-546. Only one Arbitrator, Appellant's appointed arbitrator, Mr. Gebhardt, dissented. CP 546.

On January 29, 2015, Garrett Ranches moved for confirmation of the Arbitration Award. CP 137-151. At hearing, Appellant argued a violation of RCW 7.04A.230, but not RCW 7.04A.120. CP 152-227; 293-351.

At the same time the Superior Court decided whether or not to confirm the Arbitration Award, Appellant brought a Motion for Disqualification of Judge David Frazier for Violation of Washington's Appearance of Fairness Doctrine and Supporting Declaration. CP137-151.

The Superior Court decided both the issue of confirmation and recusal. February 13, 2015, 2015—RP 44. The Superior Court entered an Order Confirming Arbitration Award from 3rd Arbitration on February 13, 2015. CP 364-378. This Appeal followed.

IV. STATEMENT OF THE ISSUES

I. Did the Superior Court err by not appointing a 3rd arbitrator until deadlock had been shown?

II. Did the Superior Court err by appointing Mr. Esser when the arbitration required an experienced attorney, familiar with the law in this case?

III. Did the Superior Court err by denying Appellant's Motion for Reconsideration when the Motion for Reconsideration was unsupported?

IV. Did the Superior Court err by refusing to recuse itself after Appellant failed to show any grounds for recusal?

V. Did the Superior Court err by confirming the 3rd Arbitration Award under RCW 7.04A.120(1)(b) when Appellant claimed that Mr. Esser had failed to disclose a relationship?

VI. Did the Superior Court err by confirming the 3rd Arbitration Award when Appellant claimed without proof that the 3rd Arbitrator was biased?

VII. Did the Superior Court err by confirming the 3rd Arbitration Award when it refused to permit Appellant to relitigate the issues that were litigated before the Arbitration Panel?

VIII. Should Garrett Ranches be awarded attorney fees when the Lease provides for attorney fees to be awarded to the prevailing party and when applicable caselaw provides that Garrett Ranches should be awarded attorney fees?

V. STANDARD OF REVIEW

Review of a trial court's selection or appointment of an arbitrator is likely the same review of a trial court's decision on a motion to compel arbitration; de novo. Rodriguez v. Windermere Real Estate/Wall Street, Inc., 142 Wash.App. 833, 836, 175 P.3d 604 (Div. 1, 2008). However, no cases were found on the direct question of review of a court's appointment of a specific arbitrator.

A trial court's decision whether or not to recuse herself is reviewed to determine if the decision was manifestly unreasonable or based on untenable reasons or grounds. Kok v. Tacoma School Dist. No. 10, 179 Wash.App. 10, 23, 317 P.3d 481 (Div. 2, 2013).

A trial court's denial of reconsideration is reviewed for abuse of discretion. Davies v. Holy Family Hospital, 144 Wash.App. 483, 497, 183 P.3d 283 (Div. 3, 2008).

An appellate court's review of an arbitrator's award is confined to the same scope as the trial court's review and absent an error of law on the

face of the arbitrator's award, the reviewing court will not vacate or modify the award. Kenneth W. Brooks Trust v. Pacific Media, LLC, 111 Wash.App. 393, 44 P.3d 938 (Div. 3, 2002).

VI. ARGUMENT

1. The Superior Court did not interfere with the arbitration process because the Superior Court did not appoint an Arbitrator until after deadlock had been shown.

The Superior Court did interfere the arbitration process. The Superior Court appointed a third arbitrator only after deadlock had been shown.

RCW 7.04A.110(1) provides:

> **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 added). The method for selecting the 3rd arbitrator is contained in Paragraph 15 of the Lease:

> In the event any dispute shall arise between the parties, or with respect to this Lease, then and in that event the parties shall submit such issues to binding arbitration in accordance with R.C.W. 7.04A. Each party shall appoint one arbitrator, the two arbitrators shall appoint a third arbitrator, and the three arbitrators shall meet and decide any issues

> submitted to them within thirty (30) days of their appointment, which decision shall be final and binding on both parties. The arbitrators shall have all the powers and duties as are set forth in R.C.W. Chapter 7.04A. Venue shall be in Whitman County, Washington.

CP 2. Garrett Ranches moved for appointment of an arbitrator because the two arbitrators selected by the parties had become deadlocked. CP 1-33. The Court did not officially appoint Mr. Esser until after Appellant was allowed to bring a motion for reconsideration. Mr. Esser was appointed at the hearing on October 24, 2014, after the deadline had passed for the two initial arbitrators to come to an agreement.

On October 24, 2014, the Superior Court noted that the selection process had indeed come to a deadlock:

> And I thought, 'Oh, they'll probably agree to the third arbitrator if we put a deadline on it.' Apparently they didn't.

October 24, 2014--RP 24:1-3.

The Superior Court did not appoint an arbitrator on October 3, 2014. All the Superior Court did based upon Garrett Ranches' Motion for Appointment of 3rd and Final Arbitrator was to defer to the two Arbitrators in selection of a 3rd Arbitrator. Only after the two Arbitrators had shown that they were deadlocked by failing to select a 3rd, did the Superior Court intervene.

Appellant's Assignment of Error No. 1 should also fail due to waiver. Appellant waived and abandoned this argument for two reasons.

First, it failed to raise the argument on reconsideration and failed to raise the argument again in later proceedings, including when it moved to vacate the 3rd Arbitration Award. Second, Appellant suggested its own final arbitrator. October 24, 2014—RP 11-12.

The Superior Court did not interfere with the selection of the third arbitrator. The selection process had failed, the arbitrators became deadlocked, and the Superior Court only intervened after deadlock became apparent. The Appellant's first assignment of error should be dismissed.

2. The Superior Court did not violate the Appearance of Fairness Doctrine by appointing Mr. Esser because Mr. Esser possessed no actual or potential bias.

The Superior Court did not violate the Appearance of Fairness Doctrine by appointing Mr. Esser.

A judicial proceeding satisfies the appearance of fairness doctrine if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. Kok v. Tacoma School Dist. No. 10, 179 Wash.App. 10. 24, 317 P.3d 481 (Div. 2, 2013) (citing Tatham v. Rogers, 170 Wash.App. 76, 96, 283 P.3d 583 (2012)). "The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that a reasonable person knows and understands all the relevant facts." Id. (citing Tatham, 170

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." Id.

Appellant's Assignment of Error No. 2 should be dismissed for two reasons. First, nothing in Washington law prohibits a party from nominating a 3rd arbitrator when the two initial arbitrators have reached a deadlock. Second, Appellant made no showing of real or potential bias. The totality of Appellant's showing was an unreliable Affidavit of an unidentified person and a full disclosure by Mr. Esser. Mr. Esser stated that he had, several years ago, been a member of the firm of Libey & Ensley. CP 64, 222. Mr. Esser had no pecuniary interest in the firm of Libey & Ensley. CP 64, 222. Mr. Esser was not a member of the firm of Libey & Ensley when the Lease and Option in this case was drafted. CP 64-65. Mr. Esser had never had any contact with members of Garrett Ranches or any of the members of Appellant. CP 222. Mr. Esser had not represented Garrett Ranches in any proceeding. CP 222. Mr. Esser had, however, represented the son of the principle members of Appellant. CP 222.

A reasonable person would conclude that Appellant received a fair, impartial, and neutral arbitration hearing and decision. Appellant's Second Assignment of Error should be dismissed because there was no violation of

the Appearance of Fairness Doctrine.

3. The Superior Court did not err when it denied Appellant's Motion for Reconsideration because Appellant did not support its Motion for Reconsideration.

Reconsideration is only available for a moving party when it can show one of the limited grounds for reconsideration of a court's decision. See WA CR 59(a).

Appellant does not cite the specific rule it claims the Superior Court violated. Appellant's argument is entirely devoid of law and is made out of pure accusations.

Without citing to a specific ground for reconsideration contained in WA CR 59, Appellant's argument should fail. However, Appellant appears to be arguing WA CR 59(a)(1) (Brief of Appellant at 30, asking "Why is this case any different?", indicating irregularity). The argument seems to be a restatement of Appellant's argument that the Superior Court should not have appointed Mr. Esser and that the Superior Court should have recused itself. Alternatively, the Appellant could be arguing that the Superior Court erred by interfering in the arbitration process. However, as argued above, in Subsection 1, the Superior Court did not interfere in the arbitration process.

Assuming that Appellant cited sufficient grounds for reconsideration, Appellant's core argument is that the Superior Court

should not have appointed Mr. Esser. Insofar as this is Appellant's argument, it is simply a restatement of its Assignments of Error No. 1 & 2, see Subsection 1 & 2, above.

Appellant provides no legal argument or factual support that would allow Garrett Ranches to adequately respond beyond guessing at Appellant's argument. Appellant's Assignment of Error No. 3 should be denied.

4. The Superior Court correctly declined to recuse itself because the Superior Court was impartial and Appellant did not present any law or facts which would indicate that the Superior Court should recuse itself.

The Superior Court was correct in not recusing itself. At the hearing on February 13, 2015, to decide the issue of recusal, Appellant cited two cases, neither of which dictated the result it wanted. In Tatham v. Rogers, 170 Wash.App. 76, 103, 283 P.3d 583 (Div. 3, 2012), the Court of Appeals found that a trial judge's service as alternate attorney in fact for a party's lawyer, authorizing the judge to personally 'have all the powers of an absolute owner' as to the person's assets and liabilities is critical both because of its nature and its currency." Tantham involved a property distribution between two former cohabitants, Dr. Tantham and Mr. Rogers. Id. at 81. Dr. Tantham's lawyer was Ms. Bierbaum. Id. at 84. Feeling as though he had been slighted, Mr. Rogers instructed a personal investigator

to determine whether there was a connection between the trial judge and Ms. Bierbaum. Id. The investigator discovered a list of connections ranging from the fact that the judge had been business partners with Ms. Bierbaum to political connections between the two of them. Id. at 85. However, "[s]tanding alone, the past professional relationship between the judge and Ms. Bierbaum and the personal and political dealings between them during that relationship and in the several years that followed would probably not require the judge's disqualification...." Id. at 103. Instead, it was the judge's pecuniary interest as Ms. Bierbaum's alternate attorney in fact that caused the Court of Appeals to decide that the appearance of fairness doctrine had been violated. Here, there are no facts even close to the ones presented in Tatham.

In State v. Witherspoon, 171 Wash.App. 271, 286 P.3d 996 (Div. 2, 2012) a defendant convicted of second degree robbery challenged his conviction on a multitude of frivolous grounds, including that the trial court violated the appearance of fairness doctrine by making comments, evidencing a potential bias. Id. at 287-88. The alleged violative statement was that "before becoming a judge, he may have defended Witherspoon in a past, unrelated proceeding." Id. at 287. The Court of Appeals resoundingly rejected the defendant's allegation, stating that the defendant

"fails to provide sufficient evidence to overcome the presumption that the trial court performed its functions without bias or prejudice." Id. at 289.

The test for impartiality is an objective one and is stated as "whether the judge's impartiality might reasonably be questioned...." Id. at 288. Importantly, there is a presumption that the court performed its functions without bias or prejudice. Id. at 289. Bare oral assertions do not amount to a violation of the appearance of fairness doctrine. Id.

Even in a case where the trial judge's spouse had represented one of the parties in a case, the appearance of fairness doctrine is not violated. Kok v. Tacoma School Dist. No. 10, 179 Wash.App. 10, 23, 317 P.3d 481 (Div. 2, 2013). In Kok, the estate of Samnang Kok sued the school district after Kok had been shot in the hallway at Foss High School. Id. at 13. The trial court dismissed the action and the estate appealed, claiming among other things, that the trial judge should have recused herself because her husband had represented the school district in the past. Id. The Court of Appeals rejected the estate's claim that the appearance of fairness doctrine had been violated, stating that neither the trial judge nor her spouse had any interest in the outcome of the case. Id. Furthermore, the Court of Appeals stated that a 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.** Id. at 24 (emphasis added). Here,

the Superior Court literally had no personal or pecuniary interest in the outcome of this case. Neither the Superior Court's income nor its future income nor any business interest is at all impacted by this case. For that matter, the Superior Court had no pecuniary or personal interest in the appointment of any particular arbitrator. The Superior Court Judge in this case never practiced or had any business relationship with Mr. Esser, Mr. Ferguson, Libey & Ensley, PLLC, or counsel for Appellant. Finally, Mr. Esser has no business relationship (and hasn't had one for over half a decade now) with Libey & Ensley, PLLC. What this boils down to is neither Mr. Esser nor the Superior Court had a dog in the fight.

What the caselaw under the appearance of fairness doctrine says is that the judiciary may not be unfairly biased or potentially biased against a *party*. The key here is the word "party". Even the case Appellant claims supplies the test for appearance of fairness, requires that the bias be for or against a party. Smith v. Behr Process Corp., 113 Wash.App. 306, 340, 54 P.3d 665 (Div. 2, 2002).

There are only two parties to this action, Garrett Ranches, LLC and Appellant. The Superior Court had no connection to either of the two LLCs or their members.

The flagship of the Appellant's argument of apparent bias is that the Superior Court commented on the legal issue of res judicata and therefore

showed bias. Brief of Appellant at 28. Appellant's factual support is that the Superior Court *sua sponte* selected res judicata as a means of defeating Appellant's arguments. Brief of Appellant at 28. Appellant claims that the Superior Court originated the idea of res judicata and everyone seemed to followed its lead. Garrett Ranches had, since before the third round of arbitration began, claimed that the issues raised by Appellant had already been decided. CP 3-4, 7-11. Whether one calls the principles res judicata or issue preclusion, the facts show that the Superior Court did not decide the issue and did not come up with the concept in an attempt to sway anyone, let alone any of the Arbitrators, none of whom appeared at the hearing on October 24, 2014. February 13, 2015—RP 42:2-4. The Superior Court addressed Appellant's accusation that the Superior Court had impermissibly commented on the case. February 13, 2015—RP 40-42.

Appellant's Assignment of Error No. 4 should be dismissed. The Superior Court did not impermissibly comment on the case and thus there was no showing of bias or impropriety. There was no showing of bias or impropriety and certainly the Appearance of Fairness Doctrine was not violated in this case.

5. Mr. Esser did not fail to disclose any relationships and Mr. Esser's judgment was not biased against Appellant.

Appellant argues that the Superior Court should not have confirmed the Arbitration Award because Mr. Esser failed to make proper disclosures under RCW 7.04A.120. Appellant failed to argue a violation of RCW 7.04A.120 (governing factual disclosures by arbitrators) to the Superior Court. "Generally, issues not raised before the trial court will not be considered on appeal." Fuqua v. Fuqua, 88 Wash. 2d 100, 105, 558 P.2d 801, 804 (1977). Appellant did not claim a violation of RCW 7.04A.120 before the Superior Court.

Even if Appellant had properly objected and raised this issue at the trial court level, Mr. Esser didn't violate RCW 7.04A.120. "Our courts have declined to adopt such a comprehensive disclosure requirement for arbitrators." Hanson v. Shim, 87 Wash. App. 538, 546-47, 943 P.2d 322, 326-27 (1997). "Not every relationship is a disclosable relationship." Id. at 547. "A general duty to disclose exists when the relationship or circumstance creates a reasonable inference of the presence of bias or the absence of impartiality." Id. "Such an inference is created when an arbitrator has had a relatively recent association with a law firm representing a party and a continuing relationship with the firm on other matters." Id.

"Even when such an inference exists, the complaining party must show the existence of prejudice from the nondisclosure. Id. (emphasis added).

Mr. Esser disclosed his past relationship with the firm of Libey & Ensley. CP 222. The Superior Court knew of the prior relationship and rightly concluded that Mr. Esser had made the disclosure and that the prior relationship was not sufficient to disqualify Mr. Esser. February 13, 2015--RP 35-36.

In S&S Construction v. ADC Properties, LLC, S & S argued that "[j]ustifiable doubt" as to partiality existed because the arbitrator in that case was "formerly an attorney with the same law firm representing [ADC]," previously served as an arbitrator for ADC's counsel, and previously served as mediator for one of ADC's principal members. S&S Construction v. ADC Properties, LLC, 151 Wash. App. 247, 258, 211 P.3d 415, 421 (2009). S & S offered no case law supporting its assertions nor did it show prejudice resulting from those relationships. Id. at 259.

The S&S arbitrator's relationship with one of the firms was "far too remote, and commonplace, to be considered a conflict." Id. "[The Arbitrator] worked for [the firm's] predecessor law firm, Davis Wright Todd Reise & Jones from approximately June 1976 through September 1978, and again from approximately April 1979 through September 1981. More than 25 years elapsed between [arbitrator's] employment with the

firm, and this arbitration. This connection, which [the arbitrator] disclosed to both parties, is clearly inadequate to prove, or infer, impropriety on [the arbitrator]'s behalf." Id. ((See also Hanson, 87 Wash.App. at 542 (court held that arbitrator's **undisclosed** prior employment—only two years—with same firm representing one of the parties, twenty years past, was not grounds for vacation of arbitration award)).

In this case there was full disclosure. Mr. Esser submitted a letter on November 6, 2014, outlining the facts. CP 222. Appellant then submitted an affidavit insinuating that Mr. Esser had not disclosed a personal relationship with Mr. Libey. CP224-25. Mr. Esser addressed the affidavit in his Order Denying Request for Recusal on November 17, 2014. CP227. Clearly, Mr. Esser discounted the truthfulness of the facts in the affidavit. Even the Superior Court addressed the Affidavit with appropriate skepticism:

> There is some kind of an affidavit as far as Mr. Libey, Mr. Esser, and myself having lunch, sounds like about every day. I probably shouldn't disclose this because this is going to upset Mr. Lockwood and the Honns, but, you know, I do know Mr. Libey so well that I know he doesn't eat lunch. I know what he does at noon. Well, he might eat lunch, but I don't know where he eats it; it isn't with me. Might be with Mr. Esser, but I don't think so because he walks down the street with a gym bag every noon. It's a small community. I can see it out the window. And maybe as I walk to lunch sometimes with other people, he's in the group and walks along. He goes to that gym down here and he works out every day. And I don't know when -- Yeah, I've had lunch with Mr. Libey. I don't know when. I was having lunch with other lawyers today and he came in because one

> of the people there was a former Superior Court judge, he came in to speak to him. So what? And when this case gets appealed and my decision gets appealed, you might want to ask the panel, some of the judges, "Have you ever had breakfast or lunch with Judge Frazier, the judge whose decision you're going to review?" Or if it goes on to the Supreme Court, ask that panel of Supreme Court justices the same thing. **As far as that affidavit from – or declaration or whatever it was, that person better check her facts here because there is a lot of inaccuracies with respect to that**. And even if it were true, it's, I don't feel, grounds for me to recuse myself in this particular case, or grounds for Mr. Esser to be disqualified. When I made my decision on the issue of appointment of Esser, I referred the issue, "Bring it up with Esser. He may know a lot more about it than I do. And if he feels recusal is necessary, he can." And I'm Frustrated here. I wanted to avoid further time, further expense, further hearing, further legal fees. So, okay, "If he recuses...," and I, off the top of my head, named off a lot of other people and tried to give a little bit of consideration in the quick matter that I did it, so other -- they might have some expertise in this area and could there be any possible grounds that they might not be able to serve in a fair manner, again trying to keep these people -- save you some money, keep you out of court and give myself some time to get the work I need to get done and not have to continually relitigate the same types of cases. **Esser apparently was asked to recuse, he refused to recuse, and I haven't heard anything here today that I feel would be grounds to vacate the arbitrators' decision because he participated in that particular proceeding here.**

February 13, 2015—RP 37-39 (emphasis added).

Appellant claims error because neither Mr. Esser nor the Superior Court went line by line and allegation by allegation in an attempt to refute what is clearly an unsupported affidavit. Brief of Appellant at 34, 38. But doing so was unnecessary because neither Mr. Esser nor the Superior Court gave the affidavit any credibility. Appellant made no showing that Mr. Esser failed to disclose anything. The Superior Court did not err in

confirming the Arbitration Award. Appellant's Assignment of Error No. 5 should be dismissed.

6. The Superior Court did not err when it confirmed the 3rd Arbitration Award because Appellant made no showing of partiality on the part of Mr. Esser.

There was no showing of partiality by Mr. Esser; the Superior Court did not err in confirming the Award.

RCW 7.04A.230(1)(b)(i) provides: "the court shall vacate an award if: (b) There was (1) Evident partiality by an arbitrator appointed as a neutral." Subsection (1)(b)(i) states that an arbitration award may be vacated upon a showing of evident partiality by an arbitrator appointed as a neutral.

All of the relevant evidence indicates that Mr. Esser was and remained neutral, giving Appellant the opportunity to raise and argue its issues; even entertaining a motion for recusal supported by an Affidavit that Appellant did not disclose to Garrett Ranches until well after the motion. Appellant levels an accusation that Mr. Esser was biased in favor of Mr. Libey of the law firm of Libey & Ensley, PLLC. Mr. Libey was not a party to this action and does not represent Garrett Ranches in this matter. Though Appellant leveled accusations, it pointed to nothing in the record that indicated either partiality or the reasons for partiality, such as a pecuniary interest.

To support its argument that the 3rd Arbitration Award be vacated under Subsection (1)(b)(i), Appellant cites, Hanson v. Shim, 87 Wn.App.538, 943 P.2d 322 (Div. 1, 1997), but ignores both the ruling in the case and the facts. The ruling was that the arbitration award in Hanson was not one that should be vacated simply because the arbitrator had been an associate of the law firm representing a party. Id. at 548. In Hanson, the arbitrator had been an associate of the firm representing a party in the arbitration. Id. The arbitrator did not disclose the fact. Id. When the party found out about the prior association, the party did not object and waited for the arbitration award before objecting. Id. After an unfavorable award came down from the arbitrator, the party objected. Id. The Court of Appeals stated that the moving party had to prove four things: that the award was subject to vacation, a continuing relationship existed, that the lack of disclosure impacted the award, and that the prior association between the arbitrator and the firm impacted the award. Id. The party in Hanson could show none of those things and the Court of Appeals upheld confirmation of the arbitration award. Id. Appellant is unable to show any of the three factors and was unable to prove any of the three factors to the Superior Court. Appellant's Assignment of Error No. 6 should be dismissed because Appellant made no showing that Mr. Esser was partial to either party in this case.

7. The Superior Court did not err when it confirmed the 3rd Arbitration Award because the Arbitration Award contained no facial errors.

Appellant does not state which provisions of RCW 7.04A.230 the Superior Court violated by confirming the Arbitration Award. However, the gist of Appellant's argument seems to be that the Arbitration Panel committed an error on the face of the Award, which would mean a violation of RCW 7.04A.230(1)(d). Brief of Appellant 40.

There was no error of law or fact appearing on the face of the Arbitration Award. A superior court may vacate an arbitration award if: "[a]n arbitrator exceeded the arbitrator's powers...." RCW 7.04A.230(1)(d).

"One of the statutory grounds for vacating an award exists when the arbitrator has "exceeded the arbitrator's powers." Cummings v. Budget Tank Removal & Envtl. Servs., LLC, 163 Wash. App. 379, 388, 260 P.3d 220, 226 (2011). "This ground for vacation is available only if the alleged error appears "on the face of the award...." Id. at 389. "Rarely is it possible to have an arbitration award vacated for error of law on the face of the award...." Id. at 382. "Limiting judicial review to the face of the award is a shorthand description for the policy that courts should accord substantial finality to arbitrator decisions." Id. at 389 (citing Davidson v. Hensen, 135 Wash.2d 112, 118, 954 P.2d 1327 (1998)). "**In deciding a motion to**

vacate, a court will not review the merits of the case, and ordinarily will not consider the evidence weighed by the arbitrators." Id. (citing Davidson, 135 Wash.2d at 119) (emphasis added). "The error should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages." Id. **"An arbitrator's** opinion or **statement of reasons for the decision is not part of the award that the court considers when examining the face of the award.**" Hanson, 87 Wash. App. at 549 (emphasis added).

"Generally, we do not review alleged substantive errors in an arbitration award. S & S Const., Inc. v. ADC Properties LLC, 151 Wash. App. 247, 261, 211 P.3d 415, 423 (2009) (citing Davidson, 135 Wash.2d at 119 (reviewing court cannot generally address the underlying merits of an arbitration award)). "In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified." Id. (citing Davidson, 135 Wash.2d at 118).

There are no errors on the face of the Arbitration Award. Appellant asks this Court to review Mr. Esser's interpretation of the Lease and Option. Brief of Appellant at 43, 45. "[Appellate courts do] not review an arbitrator's interpretation of contracts." Cummings, 163 Wash. App. at 389-90.

Nowhere in Section 230 is a Superior Court permitted to scrutinize an arbitration to the point of permitting the parties to relitigate issues of summary judgment.

Even if the Arbitration Award is reviewable on the two issues of law raised by Appellant, the Arbitration Award should still have been confirmed by the Superior Court. Appellant claims that the Arbitration Panel erred when it ruled as a matter of law that Appellant could not withdraw the Option. Brief of Appellant at 41-42. However, separate and distinct consideration is not required; Washington law does not require independent consideration for the Option in this case. Valley Garage v. Nyseth, 4 Wash.App 316, 481 P.2d 17 (1971); CP 533-537. In this case, the Option was integrated into the Lease and no further consideration was necessary. Because there was supporting consideration, the Option could not be withdrawn. Id. The Arbitration Panel did not err in concluding that Appellant could not withdraw the Option.

Appellant also claims that the Arbitration Panel should not have held that res judicata applies because failure of consideration is an affirmative defense. Brief of Appellant at 46. The Arbitration Panel correctly concluded that res judicata applied to this case. See CP 537-540. Res judicata applied and barred Appellant's claim that it validly withdrew the Option. Garrett Ranches argued as much in its Motion for Summary

Judgment, Order Requiring Sale & Attorney Fees and Garrett Ranches' Brief in Support of Summary Judgment, Order Requiring Sale & Attorney Fees. CP 512-525. See Karlberg v. Otten, 167 Wash.App. 522, 280 P.3d 1123 (2012). Res judicata applies to this case and prevents Appellant's assertion that it could withdraw the Option because a party is required to bring forth every "point which properly belonged to the subject of the litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." Karlberg, 167 Wash.App. at 532. This case has gone through three full arbitration hearings and one supplemental hearing. The Arbitration Panel correctly granted summary judgment because there was no genuine issue of material fact that Appellant could have and should have raised its arguments regarding consideration, well before this arbitration. The Arbitration Panel's conclusion was that Appellant failed to raise the issue of independent consideration and withdrawal of the Option.

Appellant invites a reviewing court to do exactly what it won't and shouldn't do: review the merits of the case. The error that Appellant is claiming to be facial is that the Arbitration Panel ruled on the merits in a way that didn't favor Appellant. That is not reviewable. Appellant's Seventh Assignment of Error should be dismissed.

8. Garrett Ranches Should Be Awarded Attorney Fees on Appeal.

Garrett Ranches should be awarded attorney fees because the Lease provides that the prevailing party shall be entitled to attorney fees. "If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court." RAP 18.1(a). "In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties." Thompson v. Lennox, 151 Wash.App. 479, 484, 212 P.3d 597 (2009). "Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well." Id.

Attorney fees are available to the prevailing party in this case. Paragraph 16 of the Lease provides for attorney fees for Garrett Ranches:

> In the event either or both parties shall be reasonably required to retain an attorney to enforce any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney's fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

CP at 283. Indisputably, Garrett Ranches has been required to obtain an attorney. Litigation in this case has gone on since November of 2010. CP

at 274-76. Garrett Ranches has had to enforce the provisions of the Lease in two rounds of arbitration, numerous court hearings, and this appeal. The entire dispute in this case stems from Appellant's refusal to abide by the terms of the Lease and Option. If this Court dismisses the Assignments of Error, Garrett Ranches will be the prevailing party. "In general, a prevailing party is one who receives an affirmative judgment in his or her favor." Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wash.App. 64, 68, 975 P.2d 532 (1999). The prevailing party on appeal is entitled to attorney fees. Kofmehl v. Steelman, 80 Wash.App. 279, 286, 908 P.2d 391 (1996). Garrett Ranches should be deemed the prevailing party in this appeal and should be awarded attorney fees.

VII. CONCLUSION

For the reasons stated herein, Garrett Ranches respectfully requests that the Superior Court's decisions be affirmed and Appellant's appeal be dismissed. Garrett Ranches also respectfully requests attorney fees and costs in this matter.

DATED this 04 day of July, 2015.

Will Ferguson, WSBA 40978

Libey & Ensley, PLLC
Of Attorneys for Garrett Ranches/Respondent

CERTIFICATE OF SERVICE

I, WILL FERGUSON, do declare that on July 10, 2015, I caused to be served a copy of the foregoing Brief on the Merits to the following party via U.S. Mail (in duplicate), facsimile, and electronic mail:

J. Gregory Lockwood
Attorney for Appellant
Law Office of J. Gregory Lockwood, PLLC
522 West Riverside Avenue, Suite 420
Spokane, WA 99201

WSBA No. 20629
(509) 624-8200 (phone)
(509) 623-1491 (fax)
E-Mail: jgregorylockwood@hotmail.com

Dated this 10th day of July, 2015.

WILL FERGUSON