

No. 35601-5-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

DONALD & JANE DOE KING

Appellant,

v.

HUDSON COMPANY, INC.

Respondent.

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STATE OF WASHINGTON
DEPUTY
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COURT OF APPEALS
DIVISION II

BRIEF OF APPELLANT

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ORIGINAL

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I. INTRODUCTION

This appeal arises out of a dispute regarding work on a log cabin. The contract between the parties provided that should there be a dispute, that the dispute would be submitted to mediation and arbitration. The contract provided that with respect to any dispute, that the **“parties will bear the cost of their own attorneys’ fees and expenses arising from any and all disputes mediated or arbitrated under this provision.”** The parties submitted their dispute to mediation and arbitration.

Before the arbitration commenced, the arbitrator disclosed that counsel for the Hudson was once the attorney for the arbitrator’s wife. During the arbitration, the appellant learned that Hudson’s counsel and the arbitrator have socialized with each other many times over the past twenty years and that they visited with each other on the beach in Hawaii. That relationship was not disclosed in a timely manner. The arbitrator had a bias in favor of Hudson’s counsel.

At the conclusion of the arbitration, the arbitrator entered an award for the respondent, awarding \$53,707.50 in attorneys fees to Hudson. The arbitrator exceeded his authority because the agreement granting authority to arbitrate prohibited the arbitrator from awarding either party attorneys fees.

The trial court confirmed the arbitration award, and the trial court denied appellants motion to vacate the arbitration award.

II. ASSIGNMENTS OF ERROR

(A) Assignments of Error

1. The trial court erred when it confirmed the arbitration award, awarding attorneys fees to Hudson.

2. The trial court erred when it denied King's Motion to Vacate the arbitration award.

(B) Issues Pertaining to Assignment of Error

1. Whether an arbitrator exceeded the arbitrator's powers under RCW 7.04A.230 by awarding attorneys fees, when the agreement granting authority to the arbitrator expressly precludes the arbitrator from awarding attorneys fees to either party. (Assignment of Error Number 1 and 2).

2. Whether under RCW 7.04A.230 the arbitrator has the authority to "expunge lawful provisions agreed to and negotiated by the parties" by awarding attorneys fees, when the agreement granting authority to the arbitrator expressly precludes the arbitrator from awarding either party attorneys fees. (Assignment of Error Number 1 and 2).

3. Whether under RCW 7.04A.240 the trial court was required to correct an arbitration award to the extent the arbitrator made an award for attorneys fee when the arbitration contract had provided that attorneys fees

would not be awarded to either party for an mediation or arbitration.

(Assignment of Error Number 1 and 2).

4. Whether under RCW 7.04A.230, the arbitrator was evidently partial to an opposing attorney, when the opposing attorney was also the attorney for the arbitrator's wife, the arbitrator and opposing attorney have attended many social events over the past twenty years, and the arbitrator and opposing attorney socialized on the beach in Hawaii? (Assignment of Error Number 2).

5. Whether the arbitrator is presumed to have been evidentially partial under RCW 7.04A.120 when the arbitrator failed to disclose before the arbitration commenced that the arbitrator and the opposing attorney have attended many social events over the past twenty years, and the arbitrator and opposing attorney socialized on the beach in Hawaii? (Assignment of Error Number 2).

III. STATEMENT OF THE CASE

In the fall of the year 2004, Donald C. King ("King") acquired property on Bainbridge Island. CP 14.

In March 2005, King entered into an agreement with The Hudson Company ("Hudson") for Hudson to perform improvements to a log cabin on King's property. CP 15 Hudson prepared the form of the contract for Hudson's work on King's property. CP 15 and 19.

Hudson's contract with King contained an arbitration and mediation provision at ¶ 9 of the contract. CP 19. That paragraph states:

9. Disputes and Remedies.

Any dispute between the parties shall be resolved through the Seattle office of Judicial Dispute Resolution, LLC (JDR) using a two-step process. The first step will involve any effort by the parties to settle the dispute by agreement, with JDR providing mediation services in accordance with its ordinary practices. The second step, if mediation fails, will involve binding arbitration of the dispute, conducted in accordance with JDR's applicable rules. **The parties will bear the cost of their own attorneys' fees and expenses arising from any and all disputes mediated or arbitrated under this provision, and the parties will share equally in the fees charged by JDR.**

Hence, should there be a dispute and an arbitration, the parties agreed that the arbitrator did not have the authority to award attorneys fees, but rather, that each party "**will bear the cost of their own attorneys' fees and expenses arising from any and all disputes mediated or arbitrated under this provision.**"

The contract also had a provision at ¶ 11 regarding "Progress Payments." That paragraph regarding progress payments included the following language:

. . . In the in the event of default and payment is not made withing three (3) days, owner will pay all costs of collection including attorneys fees. Past due balances will be assessed at 1½ % interest per month until balance is paid in full.

CP 19. By its terms, the progress payment paragraph was limited to a

progress payment default when there is no dispute or arbitration. Should there be a dispute for which an arbitration is necessary, then such a dispute would be governed by the “Disputes and Remedies” portion of the contract at ¶ 9.

In June 2005, Hudson finished his work. Hudson claimed that King owed Hudson more than \$37,000, plus interest, but King disputed that claim. CP 16. Hudson and King also had disputes regarding delays in the work by Hudson, Hudson’s double markups for profit and overhead, Hudson’s failure to give credit for all payments to Hudson, insufficient backup for the labor hours and labor rate charged by Hudson, and defective work by Hudson. CP 16. Despite repeated demand, Hudson refused to provide supporting documents for his invoices to King. CP 16.

On October 17, 2005, Hudson commenced an action against King. CP 1.

On February 17, 2006, the trial court entered an order staying the action, “pending mediation and arbitration as required by the contract between the plaintiff and defendant.” CP 99. In February 2006, the parties agreed to use Donald Logerwell serving as the mediator. CP 220.

On April 11, 2006, the disputes were mediated by Donald Logerwell. CP 122 and 174. The mediation was not successful, so Mr. Logerwell offered to arbitrate the dispute. On April 11, 2006, the parties

agreed to use Mr. Logerwell as an arbitrator [CP 122 and 221], and that the arbitration would be governed by Chapter 7.04A RCW.

On May 9, 2006, the arbitrator disclosed that Hudson's counsel once represented a friend who later became the arbitrator's wife. CP 123 and 174. That disclosure by the arbitrator did not include a disclose that Hudson's counsel and the arbitrator had socialized with each other many times over the twenty years or that they visited each other on the beach in Hawaii. CP 164.

The arbitration was scheduled for June 13 and 14, 2006. CP 122 and 172. During the arbitration, King's counsel observed that the arbitrator was evidentially partial toward Hudson's counsel. CP 164. During the arbitration, counsel for King overheard the arbitrator and Hudson's counsel talking about social functions at which they participated together. CP 164. Hudson's counsel and the arbitrator also talked about how they had visited with each other on the beach in Hawaii. CP 164. Those social contacts were not disclosed in a timely manner to counsel for King. They were never disclosed in writing. At the arbitration, the arbitrator showed bias and favoritism toward Hudson's counsel. CP 164. Hence, the arbitrator had an evident partiality for Hudson's counsel, in violation of RCW 7.04A.230 (1) (b) (i).

Hudson's counsel admits that he had "water cooler" discussions

with the arbitrator about his encounter with the arbitrator on the beach in Hawaii. CP 221. Hudson's counsel, however, believes that "water cooler" discussion about the Hawaii encounter was during the mediation. CP 221. It is undisputed that the social relationships discussed between Hudson's counsel and the arbitrator at the "water cooler" were never disclosed to King in writing. Hudson's counsel admits that his relationship with the arbitrator goes back more than 20 years, to the early 1980s. CP 221.

On July 5, 2006, the arbitrator prepared an Award of Arbitrator. In that Award, Hudson was awarded the principal amount of \$21,616.34, plus \$3,446.60 for interest. CP 109.

The arbitration award included a "Brief Explanation of Award." CP 109, 110. It explained that:

Costs have been reduced by deducting the amounts Hudson paid for arbitrator and mediator fees which were, per the agreement of the parties, to be divided equally.

Even though the arbitrator correctly stated in the award that arbitrator and mediator fees were to be born equally by the parties (a reference to ¶ 9 of the contract), the arbitrator awarded Hudson \$53,707.50 in attorneys fees to Hudson. CP 109. That award of attorneys fees to Hudson was in violation the authority conveyed to the arbitrator in the contract, which states that at the arbitration each party "**will bear the cost**

of their own attorneys' fees and expenses arising from any and all disputes mediated or arbitrated under this provision." Having awarded attorneys fees to the plaintiff, in violation of the authority conferred in the contract, the arbitrator exceeded his powers under RCW 7.04A.230 (1) (d).

On July 13, 2006, Hudson filed a motion to confirm that arbitration award. CP 101. King opposed Hudson's motion because the award of attorneys fees exceeded the arbitrator's authority and was on a claim not submitted to the arbitrator, and also because of the arbitrator's evident bias for Hudson's counsel. CP 157, 163.

On July 21, 2006, the trial court confirmed the arbitration award, subject to a timely Motion to Vacate the Arbitration Award. CP 179-182. The trial court confirmed the award for attorneys fees despite the objection by King. CP 157.

On September 29, 2006, King timely filed a Motion to Vacate the Arbitration Award within 90 days after the King received the Arbitration Award. CP 183-188. RCW 7.04A.230 (2). Since the award for attorneys fees was for a claim not submitted to the arbitrator, the trial court was required to correct the award under RCW 7.04A.240 (1) (b).

On October 27, 2006, the trial court denied King's motion. CP 288

- 289.

King filed his Notice of Appeal on November 21, 2006. CP 290-297.

IV. ARGUMENT

A. THE ARBITRATOR EXCEEDED HIS AUTHORITY WHEN HE AWARDED ATTORNEYS FEES, IN VIOLATION OF THE AUTHORITY GRANTED TO THE ARBITRATOR IN THE AGREEMENT.

An award by an arbitrator must be vacated to the extent the award is in excess of the authority conferred to the arbitrator by the agreement establishing the authority to arbitrate. RCW 7.04A.230. This is particularly true where, as here, the agreement establishing the authority to arbitrate expressly prohibits the arbitrator from awarding attorneys fees, but the arbitrator violates that express prohibition. When an arbitrator makes an award on a claim not submitted to the arbitrator, then the trial court shall correct that award. RCW 7.04A.240. RCW 7.04A.230 (1) provides:

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

* * *

(d) An arbitrator exceeded the arbitrator's powers;

Similarly, RCW 7.04A.240 (1) (b) provides that the trial court shall correct an arbitration award when:

(b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted;

In this case, the parties had agreed that claims for attorneys fees would not be submitted to the arbitrator. CP 19. Instead, the parties had agreed that they “will bear the cost of their own attorneys’ fees and expenses arising from any and all disputes mediated or arbitrated.” CP 19. When the arbitrator awarded Hudson attorneys fees, the arbitrator not only exceeded his authority, but also he made an award on a claim that was not submitted to the arbitrator.

An arbitrator's powers are defined and limited by the agreement to arbitrate, and the arbitration award must not exceed the powers established by the agreement. *ACF Property Management, Inc. v. Chaussee*, 69 Wash. App. 913, 919, 850 P.2d 1387, *review denied*, 129 Wash. 2d 1019 (1993), *Agnew v. Lacey Co-Ply*, 33 Wash. App. 283, 287, 654 P.2d 712 (1982), *review denied*, 99 Wash. 2d 1006 (1983). “Arbitrators, when acting under the authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts and, unless the award on its face shows adoption of an erroneous rule, or mistake in applying the law, the award will not be vacated or modified.” *Cohen v. Graham*, 44 Wash. App. 712, 717, 722 P.2d 1388 (1986), *review denied*, 107 Wash. 2d 1033 (1987), quoting *Kennewick Educ. Ass'n v.*

Kennewick Sch. Dist. 17, 35 Wash. App. 280, 666 P.2d 928 (1983).

In *Agnew v. Lacey Co-ply*, 33 Wn. App. 283, 654 P.2d 712 (1982), the court vacated that portion of the arbitrator's award where the arbitrator exceeded his authority by refusing to award attorneys fees, when the contract had required the award of attorneys fees to the prevailing party. In that case, the court held that an arbitration award may be vacated where the arbitrator exceeded his powers, when the contract required an award of prevailing party attorneys fees. The court in that case stated that neither the court nor the arbitrator have the authority to “expunge lawful provisions agreed to and negotiated by the parties.” Since an arbitrator exceeds their powers by failing to award attorneys fees to a prevailing party when required to do so by the arbitration agreement, it follows that an arbitrator exceeds their powers by awarding attorneys when prohibited from doing so under the arbitration agreement. In *Agnew*, the court stated:

We do not believe that this language, agreed to by both parties PRIOR to arbitration, gave the arbitrators discretion with regard to an award of attorney's fees, except for the amount of the award. Indeed, because the parties agreed on the matter prior to arbitration, there was nothing left for the arbitrators to decide except the amount. The question of whether or not attorney's fees should be awarded to the prevailing party was not an issue submitted to the tribunal for arbitration with the other claims and disputes; having already been decided by the parties by agreement, it was not arbitrable. To hold otherwise would require us to ignore the express language of a contract, something that courts may not do. *Wagner v. Wagner*, 95 Wn.2d 94, 621 P.2d 1279 (1980). A court may not create a contract for the parties which they did not

make themselves. It may neither impose obligations which never before existed, nor expunge lawful provisions agreed to and negotiated by the parties. *Wagner v. Wagner*, supra; *Farmers Ins. Co. v. Miller*, 87 Wn.2d 70, 549 P.2d 9 (1976).

Since an arbitrator exceeds their powers by failing to award attorneys fees to a prevailing party when required to do so by the arbitration agreement, it follows that an arbitrator exceeds their powers by awarding attorneys when prohibited from doing so under the arbitration agreement.

An analysis by the court about whether an arbitrator “exceeded the arbitrator’s powers” is different from requesting a review regarding the merits of an award. A review of the merits of an arbitration award is generally not permitted beyond the face of the arbitration award. *Barnett v. Hicks*, 119 Wash. 2d 151, 153, 829 P.2d 1087 (1992); *Westmark Properties, Inc. v. McGuire*, 53 Wash. App. 400, 402, 766 P.2d 1146 (1989).

In Washington, courts have reviewed the scope of an arbitrator’s authority *de novo*. Many courts in Washington have held that when reviewing the authority of the arbitrator to rule on certain issues, review of the arbitrator’s authority as to those issues is reviewed *de novo*. See also *Mountaineer Gas Co. v. Oil, Chem. & Atomic Workers Int’l Union*, 76 F.3d 606, 608 (4th Cir. 1996) (holding that under the Federal Arbitration

Act, the question of whether the arbitrator exceeded the scope of his authority *de novo*).

In *Sullivan v. Great Am. Ins. Co.*, 23 Wn. App. 242, 246, 594 P.2d 454 (1979), the court held that:

An agreement for the submission of a dispute to arbitration defines and limits the issue to be decided. The authority of the arbitrator is wholly dependent upon the terms of the agreement of submission. The arbitration award must concern only those matters included within the agreement for submission and must not exceed the powers established by the submission.

The opinion in *Sullivan* was with approval in *Price v. Farmers Insurance Co.*, 133 Wash.2d 490, 946 P.2d 388 (1997). In *Price*, the court held that “any action by the arbitration panel beyond that which is submitted is subject to vacation by the court,” citing *Allstate Ins. Co. v. Horn*, 24 Ill. App. 3d 583, 321 N.E. 2d 285, 292 (1974) (arbiter had power to determine only those issues contained within arbitration provision and consequently arbiter had no authority to determine coverage question and award was properly vacated by the trial court). In *Price*, the court stated that jurisdictional limitations on the scope of arbitration are recognized in at least 16 other states, and that Washington also recognizes jurisdictional limitations in general on the scope of arbitration. Although *Price* involved the authority of an arbitrator in cases of insurance coverages, the *Price* decision is clear that an arbitration award must be vacated as to matters

that exceed the submission of authority established by the agreement.

Likewise, the court in *ACF Property Management, Inc. v. Chaussee*, 69 Wn. App. 913, 919, 850 P.2d 1387, *review denied*, 129 Wash. 2d 1019 (1993) reviewed the award of attorneys fees *de novo*. The court in *ACF* held that an arbitrator exceeds their powers when the arbitrator rules on matters (such as attorneys fees in this case) that exceed the terms of the agreement establishing arbitration. The court in *ACF* held that:

The authority of the arbitrator is wholly dependent upon the terms of the agreement of submission. The arbitration award must concern only those matters included within the agreement for submission and must not exceed the powers established by the submission.

ACF, 69 Wn.App. at 919.

RCW 7.04A.210(2) only authorizes the arbitrator to award attorneys fees only when authorized by law or by the agreement. That statute provides that:

(2) An arbitrator may award attorneys' fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

Here, the lien statutes permit an award of attorneys fees. RCW 60.04.181. Although the lien statutes permit an award of attorneys fees, the parties mutually agreed that notwithstanding that right, each party “**will**

bear the cost of their own attorneys' fees and expenses arising from any and all disputes mediated or arbitrated under this provision."

Courts in other jurisdictions have held that an arbitrator exceeds their powers when the arbitrator awards attorneys fees that are precluded by the agreement. In Idaho, its supreme court recently held an arbitration panel exceeded their authority by awarding attorneys fees when the contract had provided that each party bear its own attorneys fees. *Moore v. Omnicare, Inc.*, 118 P.3d 141, 141 Idaho at 816 (2005). In that case, even though there was a statutory basis for an award of attorneys fees, the agreement of the parties had stated that:

Each party in any arbitration proceeding commenced hereunder shall bear such party's own costs and expenses (including expert witness and attorneys' fees) of investigating, preparing and pursuing such arbitration claim.

In *Moore*, the court held that since the contract precluded an award of attorneys fees, the arbitration panel exceeded their authority by awarding attorneys fees.

In New York, the court in *CBA Industries, Inc. v. Circulation Management, Inc.*, 578 N.Y.S.2d. 234 (2d Dept. 1992) held that the arbitrator exceeded their authority by awarding attorneys fees when prohibited from doing so under the arbitration agreement. In that case, like this one, the arbitration provision expressly provided that "the expense

of the arbitration shall be borne equally by the parties to the arbitration, provided that each shall pay for and bear the cost of its own experts, evidence and legal counsel.” *Id.* (emphasis added). In *CBA Industries*, the court found that this provision in the arbitration agreement “constituted an express limitation on the arbitrator’s power” to award attorneys’ fees to the prevailing party. *Id.* at 235.

In Tennessee, the court in *D&E Construction Co., Inc. v. Denley Co., Inc.*, 38 S.W.3d 513 (Tenn. 2001) the vacated an award for attorneys fees when the contract in that case did not authorize the recovery of attorneys fees. In *D&E Construction*, the court stated that “where there is no provision in the contract for attorney fees or there was not a part of the demand for arbitration which was submitted to them that the arbitrators exceeded their authority and that the award will be vacated.” Instead of vacating the award in its entirety, the court only vacated the attorneys fee portion of the arbitration award.

In Pennsylvania, the court held that the arbitrator exceeded his authority in assessing arbitration costs against the City because the agreement had provided that arbitration costs will be shared equally between the two sides. *City of Philadelphia v. City of Philadelphia, Fraternal Order of Police, Lodge No. 5*, 717 A.2d 609 (Pa. Cmwlth. 1998); see also *Hamada v. Westcott*, 74 P.3d 33, 102 Haw. 210, (Hawaii

2003) (holding that the arbitrator did not have authority to award attorneys fees because the contract did not authorize recovery of attorneys fees, so trial court erred when it failed to vacate that portion of the award.)

In this case, on July 20, 2006, King objected to the confirmation of the arbitration award to the extent of the award of attorneys fees. CP 157. Despite that objection, the trial court confirmed the entire arbitration award, subject to a timely motion to vacate the award. CP 179.

On September 29, 2006, King timely filed a motion to vacate the arbitration award with respect to the award of attorneys fees to Hudson in violation of promises in their contract. CP 183-188.

On October 27, 2006, the court denied King's Motion to Vacate. CP 288 - 289. The trial court erred when it denied King's Motion.

Therefore, the trial court erred both when it confirmed the arbitrator's award of attorneys fees to Hudson, and when it denied King's motion to vacate the arbitrator's award for attorneys fees. Under RCW 7.04A.240, the trial court was required to correct the arbitration's award of attorneys fees, but the trial court failed to do so. This court should reverse that order denying King's Motion to Vacate the Arbitration Award, and remand to the trial court for the vacation of the arbitration award to the extent of the attorneys fees awarded to Hudson.

B. THE ARBITRATOR WAS EVIDENTLY PARTIAL TO HUDSON'S ATTORNEY, SO THE AWARD MUST BE VACATED.

When an arbitrator is evidently partial to one party, the arbitration award must be vacated. RCW 7.04A.230 (1) provides:

(1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:

(a) The award was procured by corruption, fraud, or other undue means;

(b) There was:

(i) Evident partiality by an arbitrator appointed as a neutral;

(ii) Corruption by an arbitrator; or

(iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;

Hanson v. Shim, 87 Wn.App. 538 (1997) is instructive, but not controlling. In *Hanson*, the court interpreted now repealed arbitration statutes, Chapter 7.04 RCW. In *Hanson*, the arbitrator had a 20-year old and distant relationship with one firm. In *Hanson*, there was no duty to disclose that relationship, but under RCW 7.04A.120, arbitrators are now required to disclose those relationships. As to that old relationship in *Hanson*, the court stated that there was no inference of bias arising from the undisclosed distant relationship, but under RCW 7.04A.120 (5), an arbitrator's failure to disclose a relationship will result in a presumption that the arbitrator acted with "with evident partiality." In *Hanson*, decided under the old arbitration statutes, RCW 7.04.160 had provided that a court

could not vacate an award unless the court is “satisfied that substantial rights of the parties were prejudiced thereby.” When the legislature enacted RCW 7.04A.230, the legislature did not include that language in RCW 7.04A.230. Instead, RCW 7.04A.120 (5) requires the court to presume “evident partiality” when the arbitrator fails to disclose relationships.

RCW 7.04A.120 (1) (b) provides that an arbitrator has a duty to disclose:

(b) An existing or past relationship with any of the parties to the agreement to arbitrate or the arbitration proceeding, their counsel or representatives, witnesses, or the other arbitrators.

RCW 7.04A.120 (5) provides that:

(5) An arbitrator appointed as a neutral who does not disclose a known, direct, and material interest in the outcome of the arbitration proceeding or a known, existing, and substantial relationship with a party is presumed to act with evident partiality under RCW 7.04A.230(1)(b).

Thus, the arbitrator in this case was required to disclose past and existing relationships with Hudson’s counsel both before a mediation and arbitration. If the arbitrator fails to disclose an existing relationship, then it is presumed that the arbitrator acted with evident partiality. RCW 7.04A.120 (5).

The Federal Arbitration Act also contains a provision providing that an arbitration award may be vacated when “there was evident

partiality or corruption in the arbitrators.” 9 U.S.C. § 10 (a) (2). In 1968, the United States Supreme Court arguably settled any debate over the standard for showing “evident partiality” in the case of *Commonwealth Coatings Corp. v. Continental Casualty. Co.*, 393 U.S. 145 (1968). In *Commonwealth Coatings Corp.*, the court held that arbitrators must disclose any dealings that might “create the impression of possible bias,” regardless of whether there is actual bias. *Id.* at 149. Comparing arbitrators to judges, Justice Black noted that there is no basis for refusing to apply the same standards of impartiality and disclosure to arbitrators as are mandated for judges. *Id.* at 148. To the contrary, Justice Black instructed courts to be even more “scrupulous” of arbitrators than judges because arbitrators, unlike judges, are given “free reign” and are not subject to appellate review. *Id.* at 148-149.

The Ninth Circuit has adopted the “appearance of bias” standard for “evident partiality” that was articulated by Justice Black in *Commonwealth Coatings. Schmitz v. Zilveti*, 20 F.3d 1043, 1046 (9th Cir. 1994). In *Schmitz*, the Ninth Circuit held that evident partiality exists when “undisclosed facts show a reasonable impression of partiality.” In *Schmitz*, the arbitrator failed to disclose that his law firm previously had represented the parent company of one of the parties to the arbitration.

In this case, it is undisputed that the arbitrator made no disclosures

before the mediation. Instead, about one month before the arbitration, the arbitrator disclosed in writing that Hudson's counsel was once the attorney for a woman who later became the arbitrator's wife. CP 122 and 174.

During the arbitration, counsel for King overheard the arbitrator and Hudson's counsel talking about social functions at which they participated together. CP 164. Hudson's counsel and the arbitrator also talked about how had visited with each other on the beach in Hawaii. CP 164. Those social contacts were not disclosed in a timely manner to counsel for King. They were never disclosed in writing. At the arbitration, the arbitrator showed bias and favoritism to Hudson's counsel. CP 164.

Hudson's counsel admits that he had "water cooler" discussions with the arbitrator about his encounter with the arbitrator on the beach in Hawaii. CP 221. Hudson's counsel, however, believes that "water cooler" discussion about the Hawaii encounter was during the mediation. CP 221. Hudson's counsel did not deny that during the arbitration, he and the arbitrator also spoke about their having attended social functions together.

That partiality by the arbitrator was evident not only by the conduct during the hearing, but also by the bias in the arbitration award. That partiality was demonstrated by the award of \$53,707.50 for Hudson's

attorneys fees.

Therefore, the trial court erred when it denied King's Motion to Vacate Arbitration Award. This court must reverse that order and remand the dispute for a new arbitration before a different arbitrator.

V. CONCLUSION

The parties had agreed that they "will bear the cost of their own attorneys' fees and expenses arising from any and all disputes mediated or arbitrated." CP 19. That agreement both limited the authority of the arbitrator and limited the claims that were submitted to the arbitrator. When the arbitrator awarded Hudson attorneys fees, the arbitrator exceeded the authority given him in the agreement, and he made an award on a claim that was not submitted to the arbitrator. Since the award for attorneys fees was for a claim not submitted to the arbitrator, the trial court was required to correct the award under RCW 7.04A.240 (1) (b).

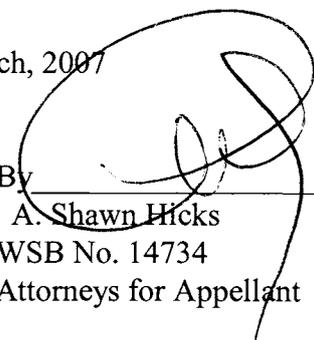
This court should reverse the orders confirming the arbitration award for attorneys fees and denying King's motion to vacate for those attorneys fees. This court should remand to the trial court for entry of an order correcting the award of attorneys fees to Hudson.

The arbitrator was required to disclose past and existing relationships with Hudson's counsel both before the mediation and the arbitration. RCW 7.04A.120 (1) (b). Since the arbitrator failed to disclose

the extent of his relationship with Hudson's counsel, the court must presume that the arbitrator acted with evident partiality.

This court should reverse the orders confirming the arbitration award and denying King's motion to vacate due to the evident partiality of the arbitrator. This court should remand to the trial court for entry of an order vacating the entire arbitration award. This court should remand the dispute for a new arbitration before a different arbitrator.

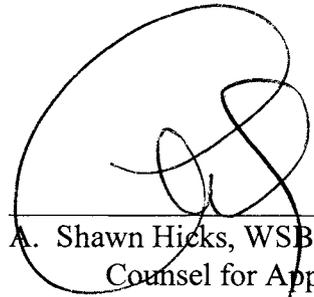
DATED this 1 day of March, 2007

By 
A. Shawn Hicks
WSB No. 14734
Attorneys for Appellant

CERTIFICATE OF SERVICE BY MAIL

I certify that I mailed, or caused to be mailed, a copy of the foregoing BRIEF OF APPELLANT postage paid, via U.S. mail, on the 1 day of March, 2007, to the following counsel of record at the following address:

Counsel for Respondent:
Thomas R. Dreiling
Attorney at Law
999 Third Ave., STE 3800
Seattle, WA 98104


A. Shawn Hicks, WSBA # 14734
Counsel for Appellant

FILED
COURT OF APPEALS
DIVISION II
07 MAR -2 PM 1:54
STATE OF WASHINGTON
BY _____
DEPUTY

Construction Agreement

Owner: KING PROPERTY MANAGED BY BARBARA NELSON

Project Address: 14709 SUNRISE, BAINBRIDGE IS, WA 98110

The Owner, as identified above, and The Hudson Company, Inc. (THC, Inc.) as Contractor agree as follows:

1. Description of Work

THC, Inc. shall perform the work described as follows: (the "Work"):

AS DETERMINED BY OWNER TRAU AGENT BARBARA NELSON

2. Contract Amount

The Owner shall pay THC, Inc. in current funds the following amount (hereinafter, the "Contract Amount"):

TIME AND MATERIALS

Contract price is good for thirty (30) days from the date of this Agreement. The Contract Amount does not include Washington State Sales Tax, which the Owner shall pay separately to THC, Inc. with each progress payment and final payment under this Agreement in accordance with the provision of the Washington Administrative Code, WAC 458-20-197.

If sales tax is not applicable, the Owner shall provide the Contractor with the necessary sales tax exemption certificates.

3. Payment

A payment of 10,000 is made by the Owner to THC, Inc at the time of execution of this agreement and will be held by THC, Inc. as a retainer to be credited to the final billing. Periodic billings will be submitted to the Owner during construction. Payment to THC, Inc. will be made within 3 days of receipt of invoice.

10035

4. Contractor's Responsibilities

A. Performance of Work

Provided Owner pays to the Contractor the Contract Amount specified herein in accordance with the terms and conditions of this Agreement, THC, Inc. will provide all tools, construction equipment and subcontracted items Contractor deems reasonably necessary for the performance of the Work.

B. Compliance with Laws

THC, Inc. will give all notices and comply with all laws, ordinances and codes legally enacted at the date of execution of this Agreement, which govern the proper execution of the Work.

C. Safety Precautions

THC, Inc. shall take necessary precautions for the safety of the subcontractors of the Work and shall comply with all applicable provisions of federal, state and municipal safety laws to prevent accidents or injury to persons on, about or adjacent to the Project site.

D. Maintenance of Project Site

THC, Inc. shall keep the Project site and the surrounding areas reasonably free from waste materials or rubbish caused by the operations; the premises in a broom clean condition. At the completion of the Work, THC, Inc. shall promptly remove all waste materials and rubbish about the Project site, as well as its tools equipment and surplus materials. The Contractor will not be responsible for personal injury or property damage sustained by third parties that enter the job site without direct authorization from the Contractor. The Owner shall be responsible for clearing the construction area of all personal property and pets and for maintaining a Standard Form Policy of Homeowners Insurance during the entire Agreement term.

5. Owner's Responsibilities

A. Payment for the Work

The Owner will make in a timely manner all payments due THC, Inc. under this Agreement.

B. Project Information

The Owner shall promptly provide all information regarding the Project reasonably required by THC, Inc. for performance of the Work, including without limitation all necessary surveys describing the physical characteristics, soils reports and locations, and a legal description, and THC, Inc. shall be entitled to rely upon the accuracy and the completeness thereof.

C. Decision-Making

The Owner and its design professional shall promptly (and in no event more than forty-eight (48) hours after THC, Inc.'s request) render all decisions, interpretations and clarifications that are required in connection with the Project. Failure to render such decisions, interpretations and clarification promptly shall entitle THC, Inc. to day for day extension of the time for performance.

D. Professional Services

In the event a situation arises during construction that requires the services of an architect, structural engineer, electrical engineer, or other consultant, such services shall be promptly procured by the Owner at the Owner's expense.

E. Premises

The Contractor shall provide a safe working environment on the job site and shall provide safe and proper facilities for the inspection of the work by the Owner, the Owner's architect or designer and persons authorized by the Contractor.

F. Contractor's Authorized Representatives

The Owner agrees that all communications to THC, Inc. shall only be made to Thomas Hudson and acknowledges that no other employee, officer, or subcontractor has any authority to receive communications from the Owner or to make any representations, statements or agreements on behalf of THC, Inc.

G. Concealed Conditions

Should THC, Inc. encounter concealed or unknown conditions in the performance of the Work that are at variance with the conditions indicated by the Design Documents or other information provided by the Owner or that otherwise differ from those ordinarily encountered and generally recognized as inherent in work of the character provided for in this Agreement, the Contract Amount and the time for performance shall be equitably adjusted.

6. Building Codes

In the event that the Contractor and Owner enter the Agreement before the Contractor's receipt of the approved plans from the building department, the contact price and estimated time of the completion may be increased, in which event either the Contractor or the Owner shall be relieved of further obligation if the increase is greater than two percent (2%). The Contractor shall complete the work according to the Project documents identified in this Agreement. If a building department has issued the approved drawings, both the Contractor and the Owner may rely upon those approved drawings as conforming to all applicable regulations and building codes of the jurisdictional building authority. In the event that the building department or other governmental agency requires revision(s) of any work within the scope of the Agreement, or in the event that the Contractor uncovers or discovers defects or problems with an existing structure of

building site which should be corrected in order to conform to safety requirements, building codes, or accepted construction practices, the Contractor will advise the Owner of any required changes or modifications in the Work. The Owner may authorize the Contractor to perform such work according to the section of the Agreement dealing with Change Orders. The Contractor is not responsible for any special inspections, analyses or reports that are not ordinarily provided for by a building inspector.

7. Commencement and Completion Dates

Upon the execution of the Agreement, Contractor shall submit Owner's specifications and plans to the applicable Building Department of Construction and Land Use, together with any required application fees, in application for a building permit for the Work. Contractor shall diligently pursue such building permit. Customer shall pay in advance all permit costs and fees and shall be responsible for all architectural fees. Contractor agrees to commence the construction work within twenty-one (21) days after receipt of the building permit, and receipt of notice from the Owner to proceed with the work. The Contractor will proceed with the work and obtain inspections and approval from the applicable building authority in a commercially expeditious manner, unless delayed by an unforeseen availability of necessary labor or materials, restricted access to the work site, delays in communication with the Owner or the Project architect, inclement weather, insufficient or unworkable drawings, changes in the work or other causes beyond the control of the Contractor. The work shall be deemed "completed" under this section when is substantially completed (although minor items not affecting habitability may remain to be performed), and when the permit has the final signature by the building inspector. The estimated time to complete the work, once work has begun, shall be 11/4 from commencement.

8. Changes in the Project

The Owner, without invalidating this Agreement, may order changes in the Project within the general scope of this Agreement consisting of additions, deletions or other revisions, the Contract Amount, and the time of performance being equitably adjusted accordingly. The Owner may order work on a verbal basis. In which case, absent a written agreement to the contrary, if THC, Inc. proceeds with such work, such work shall be performed on a time and materials basis and will include 15% Contractor's Overhead and Profit. Verbal work orders will be included on a change order, as soon as possible, and will become part of the Agreement. THC, Inc. may elect not to proceed with any change in the Project unless such change is expressly authorized in writing by the Owner and provides for an acceptable adjustment in the Contract Amount and the time for performance.

9. Disputes and Remedies

Any dispute between the parties shall be resolved through the Seattle office of Judicial Dispute Resolution, LLC (JDR) using a two-step process. The first step will involve an effort by the parties to settle the dispute by agreement, with JDR providing mediation services in accordance with its ordinary practices. The second step, if mediation fails, will involve binding arbitration of the dispute, conducted in accordance with JDR's applicable rules. The parties will bear the cost of their own attorneys' fees and expenses arising from any and all disputes mediated or arbitrated under this provision; and the parties will share equally in the fees charged by JDR.

10. Notice to Owner

THC, Inc. is registered with the State of Washington, registration number HUDSO**038JZ as a general contractor and has posted with the state a bond of \$6,000.00 for the purpose of satisfying claims against the Contractor for negligent or improper work or breach of contract in the conduct of the Contractor's business. The expiration date of the Contractor's registration is April 9, 2006, and is renewed annually. This bond may not be sufficient to cover a claim that might arise from work done under this Agreement. If the Contractor or subcontractor does not pay any supplier, employee, or subcontractor, your property may be liened to force payment. UPON REQUEST from Owner, Contractor will furnish lien releases or proof of payments, prior to acceptance of final payment. This request shall be made in writing to Contractor 30 days prior to submittal of Final Payment. The Contractor is required to provide you with further information about lien release documents if you request it. General information is also available from the Department of Labor and Industries.

11. Progress Payments

The Owner shall pay progress payment to the Contractor during the progress of the job. The Contractor shall periodically invoice the Owner for progress payments of the work completed. The Owner will make progress payment to the Contractor within three (3) days of the Owner's receipt of the Contractor's invoice for the progress payment. During this three (3) day period the Owner shall review the correctness of the invoice, the progress of work and conformance with the Agreement documents, and identify any concerns, which the Owner may have to the Contractor. The Owner shall note any observable work that does not appear to conform to the Agreement documents or which appears to otherwise defective and shall bring it to the Contractor's attention in writing. There shall be no retainage and no holdback from any of the progress payments, except as the Owner and the Contractor shall jointly agree may be withheld in a specific amount for a specific item of work. Notwithstanding the foregoing, Owner shall pay in advance without deduction or retainage all permit costs and fees upon demand by Contractor. As long as Owner makes all payments required under this Agreement, Contractor shall claim no lien against Premises. In the event of default and payment is not made within three (3) days, owner will pay all costs of collection including attorney fees. Past due balances will be assessed at 1½ % interest per month until balance is paid in full.

12. Final Payment

Payment of the entire unpaid balance of the Contract Amount, together with increases or decreases in the Contract Amount due to change orders, shall be paid by the Owner to the Contractor within three (3) days following the Contractor's submission of the final invoice to the Owner. Prior to submission of the final invoice, Contractor shall request a written punch list from Owner. There shall be one punch list that is signed by both Contractor and Owner. THC, Inc. shall perform all corrective work identified on the Owner's punch list, unless THC, Inc. considers item(s) on the punch list unreasonable. If THC, Inc. does consider a punch list item(s) to be unreasonable, THC, Inc. shall so notify the Owner. THC, Inc. and the Owner shall make best efforts to resolve the dispute within seven (7) days. Absent agreement, the dispute will be resolved using the procedure described in Paragraph 8. At the time the punch list is presented to Contractor from Owner, a mutually agreed upon dollar amount will be withheld from Final Payment until such a time as all punch list items are completed. The Final Invoice shall be tendered when the applicable Building Department has done the final sign off of the Building Permit, and upon final completion of all Work required under the Agreement with the exception of the punch list. There shall be no holdback or retainage for warranty items.

13. Construction Hours

Construction hours shall be Monday through Friday between the hours of 8 am and 6 pm unless otherwise mutually agreed upon between the Owner and Contractor.

14. Interest

Any accrued balance owing and unpaid to the Contractor shall bear interest at a rate of 1½ % per month. The balance shall be calculated on the balance owing and unpaid, regardless of whether or not that balance is liquidated or unliquidated.

15. Allowances

An allowance constitutes a dollar value of the contract price, which has been set aside for the purpose of financing a distinct portion of the Work, such as light fixtures, floor coverings, etc. The Owner has reviewed the allowance amounts for consistency with the Owner's expectations regarding quality and expense of the allowed item. The allowance is not an estimate. The Owner shall pay a markup to the contractor on such overage for that item at the same rate stated in the Change Order section for a markup on material costs. If the cost of a particular item is less than the value assigned in the Agreement, the residual will constitute a credit to the Owner, and will result in a decrease in the amount of the final payment of the Agreement.

16. Warranty

The Contractor warrants that all labor and material, potential lien claimant against the Owner's property upon completion of the work and following final payment by the Owner to the Contractor. The Contractor warrants that all work will be performed in a commercially responsible manner and that there will be no defects in workmanship. The Contractor states that materials supplied by suppliers, manufacturers and subcontractors to the project are warranted only to the extent that the suppliers or manufacturers of those materials provide a warranty. Warranty work is defined as work that becomes non-operational or dysfunctional following occupancy or use by the Owner. The warranty is valid for a period of twelve (12) months from the Agreement date. The Contractor warrants that it will perform all necessary labor to repair or replace all defective work at no cost to the customer, and will expeditiously act in good faith to secure replacement product under warranty of others, as stated above. Any warranty work performed by the Contractor does not extend the warranty period any further than what was previously stated in terms of months or years from the date of the Agreement. The warranty is void if a person or company other than the Contractor performs or re-performs any work within the scope of the Agreement.

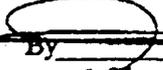
17. Entire Agreement

This Agreement constitutes the final expression of the entire agreement of parties and supersedes any prior agreements or understandings among them, oral or written, all of which are hereby cancelled. This Agreement may not be modified or amended except by written agreement of both parties.

A. Right of Rescission

Owner may cancel this transaction at any time prior to midnight of the third business day after the date of transaction and upon such rescission a refund of any down payment shall be returned to the Owner.

DATED this 26 day of FEBRUARY, 2005.

By 
Thomas A. Hudson, The Hudson Company, Inc.

By Barbara Nelson, Property Manager

Date: Bainbridge Island Army Resorts.

By March 1, 2005

Date: ROI Commercial Real Estate, Inc.

16003 148th ave NE
Woodinville, WA 98072

425-488-5852

425-483-0394 FAX

RECEIVED

2006

IN PRIVATE ARBITRATION UNDER RCW 70A.05
R.C.W. Ch. 7.04A

In the Matter of the Arbitration Between

The Hudson Company, Claimant

-and-

Donald C. King, Respondent

AWARD OF ARBITRATOR

I, THE UNDERSIGNED ARBITRATOR, having been designated in accordance with the arbitration agreement entered into by the parties dated April 11, 2006 and having duly heard the proofs and allegations of the parties hereby, AWARD, as follows:

1. Award of Contractual Damages: Respondent, Donald C. King ("King"), shall pay to claimant, The Hudson Company ("Hudson"), the sum of twenty five thousand sixty two and 94/100 dollars (\$25,062.94) which is the amount due and owing on the contract between the parties including interest to July 5, 2006.

2. Lien Notice and Foreclosure: Hudson has timely filed a notice of lien and a lien foreclosure action in the Kitsap County Superior Court under caption The Hudson Company, Inc., plaintiff, v. Donald C. King and Jane Doe King, husband and wife and the marital community composed thereof, No. 05-2-02440-4. Prior to the commencement of the work under the contract between the parties, Hudson provided King with a timely Preliminary Notice to Customer under RCW 18.27.114 with text that was substantially in the form specified in that section. The Court should now proceed to enter judgment based upon this award and foreclose the lien.

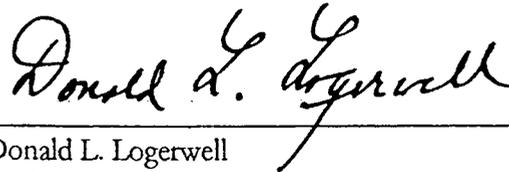
3. Attorney's Fees and Costs: King shall also pay to Hudson the sum of fifty three thousand seven hundred seven and 50/100 dollars (\$53,707.50) in attorney's fees and one thousand five hundred forty and 15/100 dollars (\$1,540.15) in costs pursuant to RCW 60.04.181(3).

TD

4. Brief Explanation of Award: At the conclusion of the hearing, the parties requested that I provide a brief explanation of my award. This explanation is not part of the award nor is it equivalent to findings of fact or conclusions of law. The detailed computation of the amounts awarded is set forth in the attached spreadsheet. Some of the amounts awarded are the same as those claimed by Hudson, some are not, some additional items have been added. For example, the invoice dated April 29, 2005 has been reduced due to discrepancies in the time billed on the dates indicated on the spreadsheet. Computations of interest have also been revised to take into account the deposit which King paid at the beginning of the project and to bring the interest calculation up to the date of the award. Costs have been reduced by deducting the amounts Hudson paid for arbitrator and mediator fees which were, per the agreement of the parties, to be divided equally.

5. Full Settlement of All Claims: This Award is in full settlement of all claims and/or counterclaims submitted in this arbitration. All claims and/or counterclaims not specifically granted in this Award are hereby denied.

Signed this 5th day of July, 2006 in Seattle, Washington.



Donald L. Logerwell
Arbitrator

	Amount	Paid/Credits	Difference	Credits	Balance
Deposit		\$10,000.00	(\$10,000.00)		(\$10,000.00)
01/25/05	\$325.16	\$325.16	\$0.00		(\$10,000.00)
01/25/05	\$1,716.18	\$1,716.18	\$0.00		(\$10,000.00)
03/03/05	\$22,347.19	\$22,347.19	\$0.00		(\$10,000.00)
3/17/2005	\$12,055.73	\$12,055.73	\$0.00		(\$10,000.00)
		\$1,019.19	(\$1,019.19)	1024045	(\$11,019.19)
		\$67.97	(\$67.97)	1023220	(\$11,087.16)
		\$5.68	(\$5.68)	1023025	(\$11,092.84)
		\$163.92	(\$163.92)	P & O adjst.	(\$11,256.76)
		\$108.08	(\$108.08)	WSST adjst.	(\$11,364.84)
3/29/2005	\$26,797.33	\$26,797.33	\$0.00		(\$11,364.84)
4/18/2005	\$34,192.51	\$35,700.00	(\$1,507.49)		(\$12,872.33)
4/29/2005	\$17,536.12		\$17,536.12		\$4,663.79
3/17/2005			(\$240.00)	Note 1 below	\$4,423.79
3/29/2005			(\$420.00)	Note 1 below	\$4,003.79
4/18/2005			(\$240.00)	Note 1 below	\$3,763.79
4/29/2005			(\$185.75)	Note 1 below	\$3,578.04
Interest	\$762.12	\$0.00	\$762.12		\$4,340.16
5/18/2005	\$23,143.97	\$0.00	\$23,143.97		
		\$3,903.20	(\$3,903.20)	22123	
		\$407.24	(\$407.24)	1029488	
		\$100.40	(\$100.40)	1033487	
		\$57.98	(\$57.98)	1033527	
		\$18.26	(\$18.26)	1033536	
		\$18.98	(\$18.98)	1033970	
		\$675.90	(\$675.90)	P & O adjst.	
		\$445.64	(\$445.64)	WSST adjst.	
		\$103.52	(\$103.52)	1036715	
		\$88.81	(\$88.81)	1036974	
		\$28.84	(\$28.84)	P & O adjst.	
		\$19.02	(\$19.02)	WSST adjst.	
Net 5/18			\$17,276.18		\$21,616.34
Interest	\$3,446.60		\$3,446.60		
Total Contractual Damages					\$25,062.94
Attorney's Fees					\$53,707.50
Costs					\$1,540.15
Note 1: Deductions from April 29 invoice for labor billing errors					