No. 35601-5-II

STATE OF WASHINGTON COURT OF APPEALS
DIVISION TWO

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DIVISION II
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STATE OF WASHINGTON
DEPUTY

DONALD C. KING

Appellant,

v.

THE HUDSON COMPANY, INC.

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Hudson Company, Inc., ("Hudson") a Washington general contractor, performed extensive remodeling services for King's log cabin on Bainbridge Island, but was not paid as agreed. Hudson was awarded its due and its lien was ordered foreclosed by a court order confirming an arbitration award. King appeals.

King egregiously misleads the Court as to the nature and extent of the arbitrator's prior contract with Hudson's counsel and seeks vacation of the decision confirming the award on the claim of arbitrator bias.

King misleads the Court as to the applicable law, the standard for review, and improperly seeks a re-opening of a decision properly submitted to the arbitrator.

King's appeal should be denied, the court below affirmed, and Hudson should be awarded its costs and reasonable attorney's fees on appeal.

King's counsel should be subject to sanctions for his attempts to misstate the underlying facts, often without citation to the record.

II. STATEMENT OF THE CASE

The Hudson Company, Inc. was hired to improve a Bainbridge

Island log home into a rental investment property. [C.P. 14.] The parties' written contract provided for payment to be an a time and materials basis. [C.P. 124 and 228.] There was more work done than the owner could afford. [C.P. 49.] A lien was timely filed and suit was timely commenced to foreclose it. [C.P. 3 - 10.] The owner, Mr. King, chose to engage in exhaustively vigorous discovery before moving the court to enforce the contract's alternative dispute resolution provisions. [C.P. 64 - 67.] The trial court stayed the action on February 17, 2006, while mediation and then, if needed, arbitration occurred [C. P. 172 and 173.]

Noted Seattle attorney and frequent "neutral," Donald Logerwell, was selected to be the mediator [C.P. 116 and 220.] More than a month before the April 11, 2006, mediation, Mr. Logerwell disclosed in writing that he knew and had worked with both counsel in the past. [C.P 120 and 224.]

Mr. King's property agent, Barbara Nelson, was late to the mediation by two hours [C.P. 116-117; 220-221] While waiting for Ms. Nelson to appear, both counsel spoke with the arbitrator about his prior contacts with them [C.P. 117 and 221.] Mr. Logerwell disclosed having

acted as a neutral on past matters presented by Mr. King's counsel [C.P. 117 and 221] and that Hudson's counsel once spoke with him on Kalakaua Avenue, in Honolulu, in December 1980, while he had been jogging [C.P. 117 and 221.] Mr. Logerwell also pointed out that Hudson's counsel had represented a woman in the 1980s who, several years later, had become Mr. Logerwell's wife (in the late 1990s, well after representation had ended). [C.P. 117 and 221; *see, also* C.P. 122-123 and 226-227.]

No one objected to these "water cooler" disclosures. [C.P. 117 and 221.] Finally, Mr. King's agent arrived and the mediation occurred, but without settling the dispute. [C.P. 117 and 221.] Before the mediation ended on April 11, 2006, Mr. Logerwell was jointly selected to continue as the parties' arbitrator. [C.P. 117 and 221.]

More than a month before the arbitration occurred, Mr. Logerwell confirmed his prior disclosures by letter to both counsel:

> "Finally, to confirm the information relayed to you *prior to, and during*, the mediation and referenced in the last paragraph of the Agreement,[1] I wish to document my disclosures as follows:
>
> 1. Shawn Hicks: I have served as a neutral on at least two occasions in matters where Shawn was representing one of the parties - one was an

[1] Copy not in this record.

> arbitration and the other a mediation. There may have been others but I recall only these two.
>
> 2. Tom Dreiling: Tom represented a friend of mine in a bankruptcy related matter some time in the mid 1980s - that friend became my wife in 1997. I also have a vague recollection that I served as a mediator for Tom at some point in time, many years ago, but have no better recollection than that.
>
> If either of you or your clients has any questions regarding these disclosures, please let me know. I'll be happy to provide what information I can, but, at present, the details in this letter contain my full recollection.

[C.P. 122 and 226, emphasis supplied.]

Neither counsel objected to Mr. Logerwell's disclosures [C.P. 117 and 221.] Hudson's counsel has had no social relationship with Mr. Logerwell. [C.P. 117 and 221.]

At the conclusion of the two-day arbitration, Mr. Logerwell voiced some dismay that his ruling would probably be upsetting for one or both parties (and their counsel), but that deciding the case was what he was hired to do. [C.P. 117 and 221.]

The dispute was a typical construction case. The contractor sought payment for services provided and the owner disputed the value. [C.P. 117 and 221.]

The parties submitted all of their disputes to the arbitrator. One of

those disputes was whether Hudson was entitled to an award of its attorney's fees as authorized either under the lien statute, RCW 60.04.181(3), or under paragraph 11 of the parties' contract. [C.P. 128 and 232.] Hudson's arbitration brief devoted a section to this issue. [C.P. 145 and 249.]

Hudson argued, on brief, that its claim was a collection action not a construction dispute and therefore paragraph 11 of the contract controlled regarding the awardability of attorney's fees. Hudson also argued, on brief, that attorney's fees were allowed on lien cases arbitrated. [C.P. 145 and 249.]

King objected to the awardability of attorney's fees, asserting that paragraph 9 of the parties' contract controlled. [C.P. 273 and 275.]

What has not and cannot ever be disputed is that the awardability of attorney's fees was a part of the parties' dispute that was submitted to the arbitrator to decide.

Hudson prevailed at the arbitration. [C.P. 131-132 and 235-236.]

Citing RCW 60.04.181(3), the arbitrator awarded Hudson attorney fees ($53,707.50) and some of its costs ($1,540.15), and also said that the "court should now proceed to enter judgment based upon [the] award and

foreclose the lien." [C.P. 131 and 235.]

The July 5, 2006, award was intended as the full resolution of all claims and counterclaims. [C.P. 132 and 236.] The Hudson complaint had sought attorney's fees. [C.P. 6.] The King answer disputed Hudson's fee request but also sought the award of his own fees. [C.P. 11 - 13.]

Following the arbitration award, Hudson moved to confirm the arbitrator's award and for money judgment and the foreclosure of its lien. [C.P. 101 - 106.] The motion was noted for July 21, 2006. [C.P. 101.] For the first time, King claimed arbitrator impropriety in his opposition to the motion to confirm the award. [C.P. 158 and 164.]

It was in King's counsel's July 18, 2006, declaration that the first of many misrepresentations were made to the court about Mr. Logerwell's disclosures. Mr. Hicks' sworn declaration attempted to mislead the court that Hudson's counsel was (implying currently) representing Mr. Logerwell's wife. The exact language reads:

> After mediation, but before the arbitration, Donald Logerwell disclosed that he [sic] his wife was represented by Mr. Dreiling. [C.P. 164.]

Contrary to the King appellate brief, there is no sworn statement from anyone that Mr. Logerwell and Hudson's counsel "visited with each

other on the beach in Hawaii." [King opening brief, pps. 1, 6, 7 and 21.]

Hudson's counsel's reply declaration documented his prior contact with Mr. Logerwell and corrected Hicks' misstatements. [C.P. 116 - 119.]

The court confirmed the arbitrator's award on July 21, 2006, [C.P. 179 - 182] and entered a money judgment, including foreclosure of Hudson's lien. [C.P. 176 - 178.]

King moved to vacate the award and ***again*** misstated the extent and nature of Mr. Logerwell's prior contact with Hudson's counsel, implying Hudson's counsel was currently (using the present, not the past tense) attorney for Mr. Logerwell's wife. [C.P. 185, again at 186, 190 and 265.]

Again, Hudson's counsel documented Mr. Logerwell's pre-hearing disclosures and corrected the misstatements by King's counsel. [C.P. 220-260.]

Again, the court denied King's motion for relief. [C.P. 288 - 289.]

The factual misrepresentations continued in King's opening brief claiming, without citation to the record, to Mr. Logerwell and Hudson's counsel having "visited with each other on the beach in Hawaii." [Opening brief, ps. 1, 6, 7 and 21.] Later, King states without citation to the record

that the parties had agreed "that the arbitration would be governed by Chapter 7.04A RCW." [King opening brief, page 6.]

King also misleads the court, citing C.P. 221, that Mr. Logerwell's disclosures were during instead of before the mediation. [King opening brief, page 7.] C.P. 221 clearly states the disclosures were before not during the mediation.

Finally, in King's opening brief at page 20, counsel misleads the court by implying Hudson's counsel and Mr. Logerwell had attended social functions together. The sworn declarations of Hudson's counsel clearly state he had no social relationship with Mr. Logerwell. [C.P. 117 and 221.]

These misrepresentations are not mere trifles, nor can Mr. Logerwell even be allowed to respond. RCW 7.04A.140(4).[2] These misrepresentations are egregious, violative of CR 11 and RCW 4.28.185, should be stricken and subject King's counsel to sanctions and attorney's fees for having to be addressed.

Counsel seems to adopt the view that "a lie told often enough

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[2] Assuming, arguendo, RCW 7.04A applies.

becomes the truth.[3] Justice requires a scrupulous honesty with the court, not the exaggerations and helpful embellishments of an overly zealous advocate.

III. COUNTER-STATEMENT OF ISSUES

A. RCW 7.04 not 7.04A governs this case.

B. The standard for reviewing an arbitrator's decision is whether the matter decided was properly before the arbitrator.

C. Litigants may not wait until receiving an adverse decision before claiming arbitrator disclosures constituted bias.

D. Misstatement of facts in appellant's brief should be sanctioned.

E. Hudson is entitled to an award of its fees on appeal.

IV. Argument

A. RCW 7.04 not 7.04A governs this case.

Washington's new arbitration act, RCW 7.04A took effect January 1, 2006. RCW 7.04A.010 *et seq.* 2005 c 433 §51. Since the parties' agreement to arbitrate was entered into before January 1, 2006 [C.P. 124-130 and 228-234], and the arbitration occurred before July 1, 2006 [C.P. 122 and 226], the new arbitration statute does not govern. RCW

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[3] Quote usually attributed to Vladimir Lenin.

7.04A.030(1) and (2).

The briefing below, at various places, referred to both the new and the old statute. Hudson correctly pointed out that the old statute applied in its October 17, 2006, brief to the court. [C.P. 283 at 286.] This brief will point out any relevant differences between the two statutes, but only where it could arguably affect the standard of review or possibly the outcome.

B. <u>The standard for reviewing an arbitrator's decision is whether the matter decided was properly before the arbitrator</u>.

King admits that the matters submitted to the arbitrator included all of the payments Hudson claimed due. [Opening brief, page 5], which included attorney's fees as allowed in any lien foreclosure suit litigated or arbitrated. RCW 60.04.181(3). *See*, original Complaint at C.P. 6. King also admits that the parties' written contract had two applicable contract provisions that dealt with attorney's fees, paragraphs 9 and 11. [Opening brief, p. 4.] King cannot properly ask this court to re-decide the award of attorney's fees to Hudson if deciding that issue was properly before the arbitrator. If the arbitrator had the power to decide the issue, his holding is not reviewable on appeal.

RCW 7.04.160(4) allows vacation of an award:

> (4) Where the arbitrators exceeded their

> powers, or so imperfectly executed them that a final and definite award upon the subject matter was not made.

RCW 7.04A.230(1)(d) allows vacation of an award more simply if:

> (d) An arbitrator exceeded the arbitrator's powers.

RCW 7.04.160(4) governs, but the result is no different whichever statute applies.

Here, a claimant like Hudson in a lien foreclosure action is statutorily allowed to be awarded its reasonable attorney's fees whether the dispute is litigated or arbitrated. RCW 60.04.181 (3) reads:

> (3) The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of the title report, bond costs, and attorney's fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, *or arbitration*, as the court or arbitrator deems reasonable. Such costs shall have the priority of the class of lien to which they are related, as established by subsection (1) of this section. [emphasis supplied]

According to the face of the arbitrator's award, this was the authority relied upon for granting Hudson its fees. [C.P. 131, 180 or 235.]

King argues that the parties' contract precluded awarding statutorily allowed attorney's fees because of King's interpretation of the interplay of paragraphs 9 and 11 in the contract. [Contract appended to

King's opening brief. *See, also* Opening brief, pps. 4, 13-14.] The arbitrator had the entire contract before him, heard testimony regarding the nature of the dispute, accepted briefing on the attorney's fee issue and ruled on the issue citing RCW 60.04.181(3) as the basis for his decision. [C.P. 131, 180 or 235.] The matter of attorney's fees having been squarely submitted for decision by the arbitrator, the decision is not reviewable. It was within his power to decide.

All of Washington law is consistent with this position. In fact, no case since the 1943 amendments to the arbitration statute goes any further to examine the merits of an arbitrator's decision than to determine if the matter decided was properly before the arbitrator.

(1) Finality favored.

There is a strong public policy in Washington state favoring arbitration. *Perez v. Mid-Century Ins. Co.,* 85 Wn.App. 760, 765 (1997). It is the preferred means of settling disputes without litigation, leaving the arbitrator the final "judge" of the law and the facts. *Davidson v. Hensen,* 85 Wn. App. 187, 192 (1997), *aff'd*, 135 Wn.2d 112 (1998). The purpose of arbitration is to avoid the formalities, the expense and the delays of the court system. *Perez, supra*, at 765-766. Arbitration is also intended to

avoid the "vexation of ordinary litigation." *Barnett v. Hicks*, 119 Wn.2d 151, 160 (1992).

Washington courts confirm substantial finality to arbitrator decisions done within the scope of the parties' agreement. This policy is reflected in our court's long-held view that judicial review of an arbitration award is limited to the face of the award. *Boyd v. Davis* 127 Wn.2d 256, 263 (1995).

Judicial review of an arbitration award does not include a review of the merits of the case. *Barnett v. Hicks, supra,* at 157. Evidence submitted to the arbitrator is not reviewed by the court. *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn. App. 813, 816 (1990). The court may not review factual claims nor determine the validity of the provisions of contract, except in determining the powers given to the arbitrator. *M.L. Park Place Corp. v. Hedreen*, 71 Wn. App. 727, 740 (1993).

(2) The key cases.

In *Boyd v. Davis, supra,*[4] the parties sold and bought an ophthalmologist's practice using five separate but related written

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[4] Not cited at all in King's opening brief, although mentioned by Hudson in the briefing below. [C.P. 212, 284-286.]

agreements. Following an arbitration the trial court improperly re-examined the five agreements to discern the parties' intentions. The appellate courts reversed, holding this kind of *de novo* review improper. *Boyd,* 75 Wn. App. 23 (1994); *affirmed* 127 Wn.2d 256 (1995). The trial court exceed its power by re-examining issues properly within the province of the arbitrator:

> . . . that court cannot search the four corners of the contract to discern the parties' intent . . . [*Boyd*, 127 Wn.2d at 263.]

A most helpful analysis in the *Boyd* concurring opinion clarifies that reviewing an arbitrator's decision has not been on an "error of law" standard since 1943. The earlier, 1922 arbitration statute did have that standard. *Boyd*, 127 Wn.2d at 266.

The *Boyd* concurring opinion explains that since 1943 the trial court is limited to determining if the arbitrators exceeded their powers, not whether the trial court would decide the issue differently. Since 1943, that statute has not allowed a review on the merits.

> The current statute is substantially different. Rather than allowing for exception to the arbitrator's award when the arbitrator "committed error in fact or law.," Rem. Comp. Stat. § 424(2) (1922), the current statute allows for application for an

> order vacating the award only where "the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made." RCW 7.04.160(4). This section does not contain a provision providing for vacation of an arbitrator's award based upon an error of law. For this reason, all cases referring to the "error in fact or law" language contained in the former statute are neither persuasive nor controlling authority for our holding in this case.
>
> The language concerning arbitrators' "errors of law" was eliminated when RCW 7.04.160 was adopted by the Legislature in 1943. We have affirmed in *Barnett v. Hicks,* 119 Wn.2d 151, 829 P.2d 1087 (1992), that the scope of review for arbitral decisions is very narrow and does not include review of the merits of the case. We also noted that our review is strictly limited to statutory grounds. *Barnett*, at 156. *See also Puget Sound Bridge*, 142 Wash. at 177 ("there is in this state no such thing as a common law arbitration. . . the proceeding is wholly statutory"). This court should not resurrect the language of an old statute to give meaning to body of law specifically rejected through repeal by the Legislature.

Id. at 267-268 (emphasis added).

In *Barnett, supra*, the court held that review of an issue submitted to arbitration is strictly limited to the grounds in RCW 7.04.160 ["exceeded their powers . . .] and .170 ["awarded on a matter not

submitted"]. *Barnett*, 119 Wn.2d at 153-154.

The parties in *Barnett* attempted to expand the scope of appellate review to treat the arbitration as though it was a superior court trial. *Id.* at 160. The court held the scope of review could not be expanded by agreement. *Id.* at 163.

King attempts to do the same in this case. In King's opening brief, counsel argues *without record citation,* that the parties' contract paragraph 9 superseded RCW 60.04.181(3) and that contract paragraph 11 should be ignored. [Opening brief at pages 4 - 5, 10 and 14 - 15.] King needs this court to de-select what was submitted to the arbitrator to decide in order to argue that the arbitrator exceeded his power. This is a mere tautology.

King's argument is:

1. The arbitrator had to ignore RCW 60.04.181(3); and

2. The arbitrator had to ignore paragraph 11 of the contract (because both gave him authority to award attorney's fees); and

3. The arbitrator could only apply paragraph 9 regarding fees sought; and therefore,

4. The arbitrator exceeded his authority by allowing fees under either RCW 60.04.181(3) or paragraph 11 of the contract.

Steps 1 and 2 are factually and legally wrong. Hence, so are Step 3 and the conclusion (Step 4). But there is no other way for King to get to Step 4 than to set up false statements 1, 2 and 3.

Proper submission of the issue to the arbitrator is the key, *not* what was presented and decided below. Here, the lien statute and all of the contract provisions were properly before the arbitrator. The review by the court of appeals ends here. The order affirming the arbitration award [C.P. 179 - 182] and the order denying King's motion to vacate the award [C.P. 288-289] must be affirmed.

Agnew v. Lacy Co-Ply, 33 Wn. App. 283 (1982), (*review denied* 1983), is initially cited by King for the proposition that an arbitration award must not exceed the arbitrator's powers in the agreement. [Opening brief at p. 10.] Then King misunderstands the *Agnew* holding and how it applies here. [Opening brief at p. 11.] In *Agnew,* the arbitrator refused to enforce an unambiguous and mandatory attorney's fee clause in the parties' contract. The failure to follow the contract exceeded the arbitrator's powers. RCW 7.04.160 and .170. *Id.* at 290 - 291.

In *Agnew*, the contract was absolutely clear. The prevailing party was mandatorily entitled to an award of attorney's fees. *Id.* at 285. In our

case, the contract is not so clear. Our contract has two paragraphs, one that does not allow fees and one that does: paragraphs 9 and 11. [Contract is appended to the King opening brief.] Unlike *Agnew*, our contract does not mandate fees to the prevailing party ***unless*** there has been a three-day default in payment. (paragraph 11 can be found at C.P. 128 and 232, as well as appended to King's opening brief.) Therefore, unlike *Agnew*, our arbitrator had the power to decide this issue, based on factual findings that are not reviewable on appeal. Our arbitrator simply had the power to award or not award fees in this dispute. It was a genuine aspect of the parties' dispute, genuinely disputed in the pleadings and submitted at the arbitration hearing that gave the arbitrator the power to rule one way or the other. In *Agnew*, there was no attorney's fee dispute in controversy. The arbitrator was powerless to deny the prevailing party its fees. So, in *Agnew*, when the arbitrator denied fees to the prevailing party, he violated his power grant.

King similarly misunderstands the holding in *ACF Property Management v. Chausee*, 69 Wn. App. 913 (1993); (*review denied* 1993) [King opening brief at p. 14.] In *ACF*, the arbitration agreement limited the arbitrator's power to a maximum of $200,000 for all claims. Just like

in *Agnew, supra*, the arbitrator had nothing to decide on this issue. His power was undisputedly limited to $200,000. Exceeding it exceeded his power and voided the award. Again, there was no contest if the contract limitation was contradicted by some other contract provision. In our case, paragraphs 9 and 11 presented a genuine issue properly submitted to the arbitrator to decide and is therefore not subject to review on appeal.

King cites out-of-state cases that do not use our arbitration statutes, are not lien foreclosure cases, do not have similar contract clauses, and, still, would not mandate any different result here.

(3) Foreign cases cited are inapposite.

King cites foreign authority, ***none*** of which would suggest this award should be vacated. Each case either has a single contract provision regarding attorney's fees (unlike ours that has two provisions - one allowing and one not allowing attorney's fees), or has no statutory authority to award fees.

(i) *Allstate Ins. v. Horn.*

At page 13, King cites *Allstate Ins. Co. v. Horn*, 321 N.E.2d 285, 292 (Ill. 1974). In this uninsured motorist case involving a statute of limitations issue, the court held that under the Illinois UIM statutes the

arbitrator did not have the power to decide coverage issues. Our case is governed by both the contract and RCW 60.04.181(3). The Illinois case is inapplicable to our facts.

(ii) *CBA Industries v. Circulation Management.*

At pages 15 and 16 of his opening brief, King cites *CBA Industries, Inc. V. Circulation Management, Inc.*, 578 NYS.2d 234 (1992). Here a purchase agreement had only one clause about attorney's fees - that each side would bear its own. Our contract has two provisions - one allowing and one not allowing attorney's fees *and* in our case fees are also statutorily allowed. RCW 60.04.181(3).

(iii) *Moore v. Omnicare.*

At page 15, King cites *Moore v. Omnicare*, 118 P.3d 141 (Id. 2005). Here a purchase agreement and an employment agreement had clauses that provided the parties would strictly bear their own attorney's fees. There was no reference in the contracts to an exception for fees awardable under Idaho's wage statute, so they could not be granted. Our contract does have a provision allowing for the award of fees. *Moore* simply is factually different.

(iv) *City of Philadelphia v. Police Lodge No. 5.*

At page 16, King cites *City of Philadelphia v. City of Philadelphia Fraternal Order of Police Lodge No. 5*, 717 A.2d 609 (PA 1998). This labor grievance arbitration says nothing about the award of attorney's fees.

(v) *D&E Construction v. Denley.*

At page 16, King cites *D&E Construction Co. Inc. v. Denley Co., Inc.*, 58 S.W.3rd 513 (TN 2001). This construction contract dispute had a contract that had no provision whatsoever about the awardability of attorney's fees. Therefore, the award of fees was vacated. Our contract does have provision allowing for the award of fees. *D&E* is simply factually different.

(vi) *Hamada v. Wescott*

At pages 16 - 17, King cites *Hamada v. Wescott*, 74 P.3d 33 (HA 2003). Neither the purchase agreement nor any Hawaiian statute allowed for attorney's fees. In fact, the contract said each party would bear their own. This case, again, is factually unlike our case. We have statutory and contractual authority for the award of attorney's fees.

King cannot ignore paragraph 11 of the contract which does allow for attorney's fees, cannot ignore RCW 60.04.181(3) which does allow for

attorney's fees (even in an arbitration), cannot ignore that King himself sought attorney's fees [C.P. 13] and, therefore, cannot successfully argue that the issue of awarding attorney's fees was not properly before the arbitrator.

(4) The Federal Arbitration Act is irrelevant.

The Federal Arbitration Act (9 U.S.C. § 1 - 16) was designed to ensure judicial enforcement of privately made arbitration agreements. *Todd v. Venwest Yachts, Inc.* 127 Wn. App. 393, ¶ 6 (2005). Neither party disputes the order staying the state court contact claim and lien foreclosure while ADR proceeded. [C.P. 99 - 100.] The holdings of FAA cases are irrelevant to this dispute. Under state or federal law, it is King's burden to establish evident partiality. 9 U.S.C. § 10(A)(2), RCW 7.04.160(2), RCW 7.04A.230(1)(b)(i). King has wholly failed to meet his burden.

C. <u>Litigants may not wait until receiving an adverse decision before claiming arbitrator disclosures constituted bias</u>.

King does not claim the amount of the damages that were awarded constituted error. Instead, King repeatedly misstates the record and claims evident partiality of the arbitrator nullifies the award. [Opening brief, pps. 1, 5, 6, 18 and 20.] King distinguishes the old arbitration statute as requiring a lesser disclosure standard. [Opening brief at p. 17.] But, as

noted at pages 9 - 10 of this brief, that is the standard that applies here. Whichever set of statutes applies, the arbitrator fully, fully complied.

(1) The two arbitration standards for disclosure.

RCW 7.04.160(2), which governs this case, would vacate an award based on "evident partiality or corruption . . . "

RCW 7.04A.230(1)(b)(i) would vacate an award based on "evident partiality."

The standards are figuratively identical.

The new statute, RCW 7.04A.120, codifies disclosure duties but still requires a timely objection to the continued appointment or service. RCW 7.04A.120(3).

(2) What the record shows about arbitrator disclosures *before* the arbitration.

- Before the mediation, Mr. Logerwell disclosed knowing both counsel [C.P. 120 and 224];

- Before the mediation occurred, due to the delayed arrival of King's agent by two hours, both counsel and the arbitrator disclosed the two key matters King now emphasizes:

  (a) Hudson's counsel saw Mr. Logerwell jogging on Kalakaua Avenue in Honolulu in 1980 [C.P. 117]; and
  (b) Hudson's counsel had *decades earlier* represented a woman whom Mr. Logerwell later married [C.P. 117]

- After the mediation occurred and without *any* objection by King, Mr. Logerwell was jointly selected to be arbitrator [C.P. 117]

- Before the arbitration, Mr. Logerwell wrote both counsel confirming the *prior* disclosure that Hudson's counsel had long earlier represented a woman whom he (Logerwell) had later married [C.P. 117; 122-123 and 226-227.]

- Neither counsel objected to any disclosure before the arbitration [C.P. 117]; and

- Hudson's counsel has had no social relationship with Mr. Logerwell [C.P. 117].

(3) What King erroneously claims as facts.

- When characterizing Hudson's counsel's prior representation of a woman Mr. Logerwell later married, King consistently makes the record sound as though the representation continued to the present and/or occurred while the two were married. C.P. 164: "his wife was represented by Mr. Dreiling." C.P. 185: "The plaintiff's attorney is also the attorney for Donald Logerwell's wife. C.P. 185: ". . . is also the attorney for the arbitrator's wife." C.P. 185: ". . . represents Mr. Logerwell's wife.

- Claims without citation to the record that Mr. Logerwell and Hudson's attorney met on a Hawaiian beach. [Opening brief, pps. 1, 6, 7 and 21.]

- Claims without citation to the record that Hudson had finished his [sic] work. [Opening brief, p. 5.] This wrongly implies that work was not stopped due to nonpayment.

(4) The case law requirements to establish misconduct by an arbitrator.

The party seeking to vacate an arbitrator's award bears the burden of proof. *Keen v. IFG Leasing Co.,* 28 Wn. App. 167, 175 (1980).

The kind of misconduct must be egregious to vacate an award. Accepting unsworn testimony ***and*** holding ex parte meetings with the parties ***and*** refusing to hear certain evidence ***and*** refusing cross-examination is ***not sufficient*** misconduct to vacate an award, especially absent timely objections. *Kempf v. Puryear*, 87 Wn. App. 390 (1997).

Note that the objections to Mr. Logerwell's disclosures were ***first*** asserted by King ***after*** receipt of the adverse ruling. [C.P. 158 and 164.]

An arbitrator failing to disclose a prior law firm association with the prevailing party's counsel, even after affirmatively asserting before the arbitration that there were no disclosable conflicts of interest, was still not enough to vacate an award. *Hanson v. Shim*, 87 Wn. App. 538 (1997).

In *Hanson*, the arbitrator failed to disclose he had been a member of the plaintiff's counsel's law firm some 20 years earlier. *Id.* at 543. The information came out during the arbitration but the arbitration continued to its conclusion without objection or further inquiry on the subject. The plaintiff was awarded $1,760,000, plus interest. Only after the award was

issued did the losing party object. The court held there was no duty to disclose such a remote relationship ***and*** there was no showing of prejudice[5] from non-disclosure ***and*** the objector cannot wait until after an unfavorable award to object. *Id.* at 547-548.

King admits that the *Hanson* case applies to RCW 7.04 arbitrations. [Opening brief at p. 18.] Assuming, *arguendo*, that a 20-year old relationship with one counsel would now have to be disclosed, the irrefutable facts in our case show that they *were disclosed*. The statements to the contrary in King's brief are deliberate misstatements of the facts. For example, please note the following *untrue* statement:

> [Hudson's counsel and the arbitrator] visited on the beach in Hawaii [Opening brief at pps. 1, 6, 7 and 21.]

There is no support for this statement in the record, yet it is often repeated with apparent intent to mislead.

Hanson, supra, is still good law and it controls in this case.

King's arguments of arbitrator bias are fallacious and without valid record citation. The record is so irrefutably clear about Mr. Logerwell's

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[5] The prejudice must be ***shown*** to have impacted the award. *Hanson, supra,* at 548 *citing Schreifels v. Safeco Ins. Co.,* 45 Wn. App. 442, 449 (1986). The prejudice element is still part of our statute: RCW 7.04A.230(1)(b)(iii) and (c).

disclosures that King's counsel should be sanctioned. *See*, § **D** below.

In the unlikely event that this court believes a response from Mr. Logerwell would be instructive, and if this court believes RCW 7.04A.140(4)(b) does or should apply, then Hudson would suggest the court, *sua sponte*, ask Mr. Logerwell for a clarifying declaration.

D. <u>Misstatements of fact in appellant's brief should be sanctioned.</u>

Hudson has pointed out numerous misstatements in appellant's opening brief. They are cumulative, serious, impugn the arbitrator's reputation, waste valuable court resources, result in increased attorney's fees for Hudson to have to respond, and are designed to mislead the court with a hope that the confusion will result in a reversal or remand. Sanctions are appropriate *Lynn v. Ready*, 136 Wn. App. 295, ¶¶ 45 - 46 (2006); *see, also,* CR 11 and RCW 4.84.185.

RAP 10.3(a)(5) requires factual statements be referenced by citation to the record. Failing to comply with RAP 10 gives the court the power to impose sanctions on a party or counsel. RAP 10.7. Sanctions may be imposed on the court's own initiative or by motion. Hudson requests that at least the appellant's brief be stricken and a new one

submitted without factual misstatements and that an appropriate monetary sanction be imposed on counsel.

E. <u>Hudson is entitled to attorney's fees on appeal</u>.

Rule 18.1 applies. The applicable law grants Hudson the right to recover its reasonably incurred attorney's fees pursuant to RCW 60.04.181(3). Hudson will submit an appropriate affidavit detailing its fees and expenses incurred pursuant to RAP 18.1(d).

Since fees were allowed by the arbitrator, the appellate court should ordinarily do the same, if the matter is affirmed. *Keen v. IFG Leasing,* 28 Wn. App. 167, 176 (1980).

Since attorney's fees are awardable under either paragraph11 of the contract or under the lien statute, the court of appeals has the authority to award additional fees on appeal. *Rosellini v. Banchero*, 83 Wn.2d 268 at 274-275 (1974).

V. <u>CONCLUSION</u>

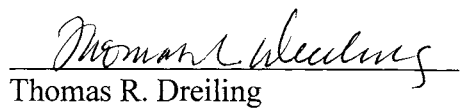
The arbitrator's award was not due to "evident partiality." The awardability of attorney's fees to the prevailing party was properly within the arbitrator's power to decide. The timing of claimed partiality having come only after an adverse result and the numerous exaggerations or

misstatements in the record clearly support affirming the arbitrator's award in favor of Hudson.

King's briefing so misstates the facts and is so devoid of proper record citation that sanctions are warranted.

Hudson is entitled to its attorney's fees and expenses incurred when this matter is affirmed.

DATED this 12 day of March, 2007.



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DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

No. 35601-5-II

STATE OF WASHINGTON COURT OF APPEALS
DIVISION TWO

DONALD C. KING

Appellant,

v.

THE HUDSON COMPANY, INC.

Respondent.

DECLARATION OF SERVICE

Thomas R. Dreiling
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Thomas R. Dreiling, under penalty of perjury under the laws of the State of Washington, certifies and states as follows:

1. I am the attorney for the respondent, have personal knowledge of the following information, and am competent to testify to same.

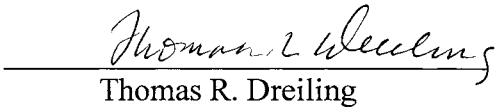
2. On this day a copy of the Brief of Respondent was sent via ABC Legal Messenger to the attorney for appellant, A. Shawn Hicks, at the following address:

A. Shawn Hicks
ATTORNEY AT LAW
800 Fifth Avenue
STE 3825
Seattle, WA 98104

for delivery the same or the next business day.

3. The original of the brief plus one copy was sent to the Court of Appeals on the same day via ABC Legal Messenger.

Signed under penalty of perjury under the laws of the State of Washington on this 13 day of March, 2007.



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