

COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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DEPUTY

No. 38824-3-II

IN THE COURT OF APPEALS

DIVISION II

STATE OF WASHINGTON

SUSUAN HORTON-RUSHTON, Appellant,

vs.

ROBERT TRENT, et al., Respondent.

OPENING BRIEF OF APPELLANT

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INTRODUCTION

Susan Horton-Rushton has appealed from the Pierce County Superior Court's decision to deny her right to a trial de novo, under MAR 7.1.

The trial court entered an order striking Ms. Rushton's trial de novo request, on the basis that the arbitrator's decision was binding, pursuant to the Uniform Arbitration Act, RCW 7.04A. However, the arbitration in this case was not subject to, or governed in any respect, by the Uniform Arbitration Act. Rather, the arbitration in this case was exclusively governed, from start to finish, by the Mandatory Arbitration Rules, RCW 7.06.

The Respondent, Robert Trent, waived any right or claim to binding arbitration, when he ignored Ms. Rushton's demand for private arbitration, pursuant to contract. As a result, Ms. Rushton was forced to file a claim in Superior Court, and the case proceeded under the Mandatory Arbitration Rules. Neither the Uniform Arbitration Act, nor any other arbitration rules, were applied during the entire course of the arbitration, except the Mandatory Arbitration Rules.

Even if the Uniform Arbitration Act were applicable in this case, the arbitration award should be vacated, because the arbitrator exceeded his authority, by issuing a ruling contrary to law (RCW 7.04A.230(1)(d)),

and due to misconduct by the arbitrator, prejudicing Ms. Rushton's rights. (RCW 7.04A.230(1)(b)(iii)).

ASSIGMENTS OF ERROR

1. The Pierce County Superior Court, Hon. Susan Serko, committed error by comingling arbitration statutes, RCW 7.06 and RCW 7.04A, absent any agreement of the parties, to negate Ms. Rushton's right to a trial de novo under the Mandatory Arbitration Rules.

ISSUE PRESENTED: Can a trial court mix and match arbitration statutes to create a custom set of arbitration rules, and apply the binding arbitration requirement of RCW 7.04A to negate the right to trial de novo under RCW 7.06 (MAR 7.1), absent agreement by the parties, when any contractual right to binding arbitration has been waived?

2. The Pierce County Superior Court, Hon. Susan Serko, committed error by enforcing a contractual binding arbitration requirement in favor of Robert Trent, when Mr. Trent clearly waived any contractual right to binding arbitration he may have otherwise had.

ISSUE PRESENTED: (a) Did Robert Trent waive his contractual right to binding arbitration? (b) If a party to a contract with an arbitration clause has waived the contractual right to binding arbitration, can the Court enforce the right to binding arbitration thereafter?

3. The trial court committed error by failing to apply the doctrine of judicial estoppel to preclude Mr. Trent's application of the Uniform Arbitration Act, after the arbitration had been governed under the Mandatory Arbitration Rules through the conclusion of the arbitration.

4. If Mr. Trent's contractual right to binding arbitration is enforceable, the Pierce County Superior Court, Hon. Susan Serko, committed error by failing to vacate the arbitrator's award, because the arbitrator (a) exceeded his authority, by issuing a ruling contrary to law (RCW 7.04A.230(1)(d)); and (b) engaging in misconduct prejudicing the rights of Ms. Rushton. (RCW 7.04A.230(1)(b)(iii))

ISSUES PRESENTED: (a) Is an arbitrator's decision binding, if the arbitration award is based on an error of law, or an erroneous application of law? (b) Does an arbitrator commit prejudicial misconduct, if the arbitrator engages in a private and exclusive conference with one of the parties to the arbitration, immediately after the conclusion of the arbitration hearing?

5. The trial court committed error by failing to recognize that Ms. Rushton did not waive her constitutional right to a jury trial.

STATEMENT OF THE CASE

Appellant, Susan Horton-Rushton (as Buyer) and Respondent Robert Trent (as Seller) entered into a real estate purchase and sale agreement for the purchase of a new construction home, in October of 2005. CP 147. Construction of the home was completed in June of 2006, and Ms. Rushton moved into the home shortly thereafter. Ms. Rushton's home flooded in November of 2006, initiating the dispute in this case. CP 4 ¶¶ 3.6 - 3.7.

The agreement between Ms. Rushton and Mr. Trent provided that any dispute arising from the agreement would be resolved by arbitration, according to the construction industry arbitration rules of the American Arbitration Association (AAA), or such other rules selected by the arbitrator. CP 156; CP 28. After settlement negotiations failed, Mr. Trent's attorney at the time, Gary Branfeld, agreed to accept service of a demand for arbitration, on behalf of Mr. Trent. CP 32.

Ms. Rushton paid the applicable fees to initiation arbitration through the AAA and served a demand for arbitration on Mr. Trent's attorney, Gary Branfeld. CP 33 - 36. Counsel for Ms. Rushton made a number of attempts to follow-up with Mr. Branfeld; however, neither Mr. Branfeld, nor Mr. Trent ever responded to Ms. Rushton's demand for arbitration through the AAA. CP 23 ¶¶ 3 - 4; CP 37 - 38.

In order to have her claims heard, Ms. Rushton filed suit in the Pierce County Superior Court, and Mr. Trent filed an answer. CP 1-7; CP 126 - 143. Mr. Trent's answer did not include an affirmative defense, or other claim that the dispute was subject to binding arbitration.

Thereafter, Ms. Rushton filed a statement of arbitrability, sending the case into arbitration pursuant to the Mandatory Arbitration Rules (RCW 7.06). CP 8 - 9.¹ Mr. Trent did not file an objection to application of the Mandatory Arbitration Rules, or otherwise demand that the case be subject to binding arbitration. PCLMAR 2.1. There was never any agreement between the Parties to waive Ms. Rushton's right to trial de novo under MAR 7.1, nor was there any agreement between the Parties to mix and match the requirements of RCW 7.06 and RCW 7.04A.

The entire course of the arbitration in this case was exclusively subject to, and governed by the Mandatory Arbitration Rules. (1) An arbitrator was selected and assigned pursuant to MAR 2.3, and PCLMAR 2.3. CP 42 - 45. (2) Discovery was conducted as limited by MAR 4.2. CP 50. (3) The parties submitted prehearing statements of proof pursuant to MAR 5.2. CP 54 and 56.

¹ It should be noted that Ms. Rushton's statement of arbitrability did not comply with the requirements of the Uniform Arbitration Act, RCW 7.04A.090(1), requiring description of the nature of the controversy and remedies sought.

(4) The arbitration hearing was conducted according to MAR 5.3, and the arbitrator's award specifically references the Mandatory Arbitration Rules, including the right to trial de novo under PCLMAR 7.1. CP 58. (5) Finally, after the arbitration was concluded and the arbitrator filed his award, the arbitrator requested compensation pursuant to PCLMAR 8.5. CP 60.

There was never a single reference to the rules of the Uniform Arbitration Act, throughout the entire course of the proceedings below, until Ms. Rushton filed a request for trial de novo under MAR 7.1. CP 16. Immediately thereafter, Mr. Trent filed a motion to strike the trial de novo request, which was granted. CP 18 – 21; CP 69 – 70. Judgment was entered on the arbitration award, February 27, 2009. CP 118 - 120.

After Ms. Rushton's request for trial de novo was stricken by the court below, subjecting Ms. Rushton to the arbitration rules of the Uniform Arbitration Act, Ms. Rushton filed a motion to vacate the arbitrator's award as contrary to law, and based on prejudicial misconduct of the arbitrator. CP 75 - 94. Ms. Rushton's motion to vacate the arbitration award was denied. CP 116 - 117. The arbitrator's erroneous ruling of law is contained in the record at CP 86, and discussed in more detail in the legal analysis below.

The basis of the arbitrator's prejudicial misconduct is described in the Declaration of Susan Horton-Rushton, at CP 90 - 91. Essentially,

after the arbitration hearing concluded at approximately 7:00 PM on October 30, 2008, the arbitrator and Mr. Trent engaged in a private conversation. Neither Ms. Rushton, Ms. Rushton's counsel, nor Mr. Trent's counsel were privy to the discussion.

Mr. Trent claims he did not have any substantive discussions with the arbitrator, but no one would know about the substance of his discussions with the arbitrator, other than himself and the arbitrator. CP 105 - 108. Mr. Trent's claim that Ms. Rushton could hear his conversation with the arbitrator, from a distance of 33 feet, is simply unreasonable. CP 112 - 113.

Robert Trent waived any contractual right to binding arbitration, or application of the Uniform Arbitration Act, when he (a) failed to respond to Ms. Rushton's demand for arbitration pursuant to contract, and (b) failed to object to application of the Mandatory Arbitration Rules, after Ms. Rushton filed her statement of arbitrability, subjecting this case to the Mandatory Arbitration Rules. Moreover, Ms. Rushton did not, at any time, knowingly, or voluntarily waive her constitutional right to a jury trial. CP 102 - 103.

Even if the Uniform Arbitration Act can be applied for the first time, after an arbitration under the Mandatory Arbitration Rules has concluded, the arbitrator's decision in this case should be vacated. The

arbitrator's decision is contrary to law, and the arbitrator's inappropriate conduct was prejudicial to the rights of Ms. Rushton.

LEGAL ANALYSIS AND ARGUMENT

- I. Robert Trent waived his contractual right to binding arbitration, and the trial court is prohibited from mixing and matching the provisions of the Uniform Arbitration Act, and the Mandatory Arbitration Rules, absent agreement of the Parties.

The Washington Supreme Court has specifically held: "[i]t is well established that an arbitration clause can be waived." Detweiler v. J.C. Penny Casualty Ins. Co., 110 Wn.2d 99, 111, 751 P.2d 282 (1988) (citing, Finney v. Farmers Ins. Co., 21 Wn. App. 601, 620, 586 P.2d 519 (1978)).

In Detweiler, 110 Wn.2d at 110 - 113, the insurer was entitled to have liability and damages issues determined by arbitration, but the insurer waived the contractual right to arbitration by its conduct. The injured party in that case, sued an insured driver. The insurance company was informed of the injured party's action against the driver and was kept informed of the progress of the litigation. However, the insurance company did not assert its contractual right to arbitration, until after the trial had concluded.

The Supreme Court held that "[u]nder these circumstances, the insurer waived its contractual right to arbitrate the liability and damages issues." Id. at 112. Thus, public policy favoring binding arbitration will

not require binding arbitration, if the right to binding arbitration has been waived. Id. at 112 - 113.

In the instant case, Robert Trent waived any right to binding arbitration, when he failed to respond to Ms. Rushton's demand for arbitration pursuant to contract. Ms. Rushton was forced to file an action in the Superior Court, in order to have her claims heard. Thereafter, Ms. Rushton filed a statement of arbitrability, pursuant to the Mandatory Arbitration Rules, and the case was then governed by the Mandatory Arbitration Rules, from start to finish.

Under the Mandatory Arbitration Rules, MAR 7.1, Ms. Rushton has a right to a trial de novo. Mr. Trent never asserted a contractual claim for binding arbitration, until after the arbitration had concluded, and an arbitration award was entered. The court below overstepped its authority, when the court precluded Ms. Rushton's request for trial de novo, suddenly shifting the applicable rules from RCW 7.06, to RCW 7.04A.

The trial court's order striking Plaintiff's request for trial de novo states that "pursuant to Chapter 7.04A RCW, Plaintiff [Ms. Rushton] is not entitled to a trial de novo and, therefore, Defendant's motion is granted and Plaintiff's Request for a Trial De Novo is stricken." CP 69 - 70.

According to the Uniform Arbitration Act, RCW 7.04A.030(3): the Act "does not apply to any arbitration governed by chapter 7.06

RCW." And, according to the Court of Appeals in Dahl v. Parquet and Colonial Hardwood Floor Co., Inc., 108 Wn. App. 403, 410, 30 P.3d 537 (2001), **the "superior court's authority to order mandatory arbitration is statutory and it cannot mix and match statutes by mandating binding arbitration**, but parties whose disputes are not subject to MAR may stipulate to adopt MAR piecemeal." (emphasis added).

The trial court's order striking Ms. Rushton's request for trial de novo in this case, is directly contrary to both the Court of Appeal's ruling in Dahl, 108 Wn. App. at 410, and RCW 7.04A.030(3).

The parties in the Dahl case specifically stipulated to govern their arbitration under the Mandatory Arbitration Rules, except for MAR 7.1. The parties in Dahl agreed, prior to the arbitration of their claims, that the arbitration would be binding, and there would be no right to trial de novo.

Not surprisingly, the Court of Appeals upheld the parties' agreement. However, the Court of Appeals also cautioned the trial courts, that while parties are free to stipulate to adopt MAR piecemeal, the trial court is not free to mix and match the provisions of RCW 7.06 and RCW 7.04A in its own discretion. Yet, that is precisely what the trial court has done in this case.

Robert Trent failed to respond to Ms. Rushton's demand for arbitration through the AAA, pursuant to contract. Mr. Trent thereby waived his right to binding arbitration pursuant to contract. Ms. Rushton submitted this case to arbitration, pursuant to the Mandatory Arbitration Rules, without objection from Mr. Trent. Thereafter, the case was governed by the Mandatory Arbitration Rules from start to finish.

Despite public policy favoring binding arbitration, it is contrary to law for the trial court to suddenly apply the Uniform Arbitration Act for the first time, after the arbitration has been completed and the arbitration award has been filed. **Moreover, it is simply unjust that Mr. Trent should be allowed to ignore his contractual obligation to submit to private, binding arbitration, and then be allowed to benefit from the same contractual term after the case has concluded.**

Unlike the litigants in Dahl, *supra*, Ms. Rushton and Mr. Trent did not agree to mix and match the arbitration statutes. In fact, Mr. Trent stipulated to have the arbitration governed under the Mandatory Arbitration Rules, when he failed to object to application of the Mandatory Arbitration Rules in the first place. *See*, PCLMAR 2.1(b); *see also*, MAR 2.2.

II. The Doctrine of Judicial Estoppel Precluded Robert Trent's Motion to Strike Ms. Rusthon's Trial De Novo Request.²

"Judicial Estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Arkinson v. Ethan Allen, Inc., 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007).³ The doctrine of judicial estoppel seeks to avoid inconsistency and duplicity in judicial proceedings. Cunningham v. Reliable Concrete Pumping, Inc., 126 Wn. App. 222, 225, 108 P.3d 147 (2005).

The essence of judicial estoppel is that (1) the party to be estopped must be asserting a position inconsistent with an earlier position; (2) the party seeking estoppel must have relied on, and been misled by, the other party's first position; and (3) it appears unjust to allow the estopped party to change positions. Columbia Credit Union Comm. v. Columbia Community Credit Union, 134 Wn. App. 175, 186, 139 P.3d 386 (2006).⁴

Other factors in equity may also be considered to guide the court's decision. *See, e.g.*, Markley v. Markley, 31 Wn.2d 605, 614-15, 198 P.2d 486 (1948). Also significant for consideration of whether to apply judicial estoppel is "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the

² CP 63 - 65

³ *citing*, Bartley-Williams v. Kendall, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006).

⁴ *citing*, Falkner v. Foshaug, 108 Wn. App. 113, 124 n.36, 29 P.3d 771 (2001).

opposing party if not estopped." New Hampshire v. Maine, 532 U.S. 742, 750-51, 121 S. Ct. 1808 (2001).⁵

In granting Robert Trent's motion to strike Ms. Rushton's request for trial de novo, the trial court failed to apply the doctrine of judicial estoppel to preclude Mr. Trent's motion. Mr. Trent proceeded throughout the entire course of the arbitration in this case, under the Mandatory Arbitration Rules. Not once during the course of the arbitration, did Mr. Trent ever insist on application of the Uniform Arbitration Act, nor did he ever refer to the Act, until after the arbitration award was entered, and Ms. Rushton filed her request for trial de novo under MAR 7.1.

Mr. Trent's inconsistent position allowed him to derive the benefit of the Uniform Arbitration Act (i.e., no available trial de novo), while also reaping the benefits of the Mandatory Arbitration Rules (e.g., no cost to Mr. Trent for the arbitration). By granting Mr. Trent's motion to strike Ms. Rushton's trial de novo request, on the basis that the Uniform Arbitration Act requires binding arbitration, the court below created inconsistency and duplicity in the proceedings.

Judicial estoppel should have applied to preclude Mr. Trent's application of the Uniform Arbitration Act, after the entire course of the arbitration was conducted under the Mandatory Arbitration Rules. Mr.

⁵ quoting , Edwards v. Aetna Life Ins. Co., 690 F.2d 595, 599 (6th Cir. 1982).

Trent stipulated to have this case governed by the Mandatory Arbitration Rules. The arbitration in this case was never governed by the Uniform Arbitration Act, nor did Mr. Trent ever insist on application of the Act.

Ms. Rushton relied on Mr. Trent's representations regarding application of the Mandatory Arbitration Rules, by incurring additional fees and costs associated with filing a request for trial de novo, and a jury demand. It is unjust to allow Mr. Trent to derive a dual benefit from the Mandatory Arbitration Rules and the Uniform Arbitration Act, while requiring Ms. Rushton to withstand a dual detriment from the same inconsistent application of the governing arbitration rules.

Mr. Trent did not respond to Ms. Rushton's initial demand for arbitration through the AAA. Ms. Rushton incurred fees and costs to prepare and serve the demand, and then incurred additional fees and costs to file a complaint in Superior Court, and to file the statement of arbitrability. Ms. Rushton paid the costs to proceed in this case under the Mandatory Arbitration Rules. Therefore, she should be allowed to have a trial de novo, consistent with the Mandatory Arbitration Rules.

III. Even if the trial court's post-arbitration application of the Uniform Arbitration Act was appropriate, despite the case having been governed by the Mandatory Arbitration Rules from start to finish, under the Uniform Arbitration Act, the arbitrator's award in this case must be vacated.

A. Misconduct and Evident Partiality by the Arbitrator.

Under RCW 7.04A.230, upon motion of a party to an arbitration, the court "shall" vacate an arbitration award if there is evidence of partiality by the arbitrator, or if the arbitrator committed misconduct prejudicing the rights of a party to the arbitration proceeding. RCW 7.04A.230(1)(b).

The arbitration hearing in this case took place on October 30, 2008, beginning at 10:00 AM and ending just short of 7:00 PM. Throughout the course of the arbitration hearing, it was abundantly evident that the arbitrator favored Robert Trent in several respects. *See* CP 90 - 91, ¶ 2. Nevertheless, what happened after the arbitration hearing concluded was highly improper. Immediately after the conclusion of the arbitration hearing, the arbitrator conferred privately with Robert Trent. Counsel for Mr. Trent was not a party to this *ex parte* conference. CP 91, ¶ 3.

The substance of the arbitrator's conference with Mr. Trent is unknown, but their facial expressions and body language seemed amicable and familiar. Mr. Trent does not deny speaking privately with the arbitrator, but he claims they did not discuss anything important. CP 105 - 108; *See also*, CP 112 - 113. Nonetheless, their conversation could not be overheard. After speaking for approximately five minutes, Mr. Trent and the arbitrator shook hands, and the arbitrator exited the building.

The arbitrator did not similarly confer with Ms. Rushton. Therefore, Ms. Rushton's right to a fair and impartial proceeding was prejudiced by the arbitrator's inappropriate *ex parte* communication.

B. The Arbitrator Exceeded the Arbitrator's Powers, by Entering an Arbitration Award Based on Clearly Erroneous Conclusions of Law and/or Misapplication of Law.

Pursuant to RCW 7.04A.230(1)(d), an arbitration award shall be vacated where the arbitrator exceeds the arbitrator's powers. "Either an erroneous rule of law or a mistaken application thereof is a ground for vacation or modification under the statute." Expert Drywall, Inc. v. Ellis-Don Construction, Inc., 86 Wn. App. 884, 888, 939 P.2d 1258 (1997).⁶ Any error of law subject to review must either appear on the face of the arbitrator's award, or in any paper delivered along with the award. Boyd v. Davis, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995).⁷ In order to ascertain the governing law in dispute, the Court may review a contract term underlying the disputed point of law. Boyd, 127 Wn.2d at 260 - 61.⁸

⁶ *citing*, Boyd v. Davis, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). In Expert Drywall, 86 Wn. App. at 889, the Appellant challenged the arbitrator's ruling on an issue of law as erroneous. The Court of Appeals, Div. I, agreed with the arbitrator's conclusion of law, but on different grounds than those articulated by the arbitrator.

⁷ *citing*, School Dist. 5 v. Sage, 13 Wn. 352, 356 - 57, 43 P. 341 (1896).

⁸ In Boyd v. Davis, the Washington Supreme Court found that the contract at issue in that case was "silent with respect to the issues in dispute." However, the Boyd Court recognized the necessity to refer to a contract term in order to ascertain the governing law, citing several cases as authority: ML Park Place Corp. v. Hedreen, 71 Wn. App. 727, 738, 862 P.2d 602 (1993) (*the court examined an arbitration clause*); Marine Enters., Inc. v. Security Pac. Trading Corp., 50 Wn. App. 768, 775 - 76, 750 P.2d 1290 (1988) (*the court scrutinized a contract clause regarding production*); Kennewick Educ. Ass'n v. Kennewick Sch. Dist. 17, 33 Wn. App. 280, 282, 666 P.2d 928 (1983) (*the court referred to a contract clause making the governing law that of Washington*); Agnew v. Lacey Co-Ply, 33 Wn. App. 283, 288-89, 654 P.2d 712 (1982) (*the court looked to the contract's attorney fees clause*); Moen v. State, 13

In Lindon Commodities, Inc. v. Bambino Bean Co., Inc., 57 Wn. App. 813, 790 P.2d 228 (1990), the Court ruled that an arbitrator had exceeded the arbitrator's powers, by making an erroneous ruling on an issue of law. The arbitrator's award stated that there had been no evidence of consideration for a contract modification, respecting the sale of goods.

Under RCW 62A.2-209, contract modifications for the sale of goods need no consideration to be binding. The Lindon Commodities Court, therefore, reversed the arbitration award (and the trial court's affirmation of the arbitration award) and remanded the case. 57 Wn. App. at 816. Thus, upon deciding that the arbitrator in the case at bar rendered his decision based on an incorrect conclusion of law and/or misapplication of law, this Court should vacate the arbitrator's award and remand this case. CP 75 – 94; CP 116 – 117.

1. Law of Contract Interpretation:

"Generally, whether a written contract is ambiguous is a question of law." Millican of Washington, Inc. v. Wienker Carpet Service, Inc., 44 Wn. App. 409, 415-16, 722 P.2d 861 (1986).⁹ "[A] contract is not ambiguous simply because the parties suggest opposing meanings." W.M.

Wn. App. 142, 145, 533 P.2d 862 (1975) (*the court reviewed a contract clause granting the plaintiff extra construction costs*).

⁹ *citing*, Boeing Airplane Co. v. Firemen's Fund Indem. Co., 44 Wn.2d 488, 496, 268 P.2d 654 (1954), and McGary v. Westlake Investors, 99 Wn.2d 280, 285, 661 P.2d 971 (1983).

Dickson Co. v. Pierce County, 128 Wn. App. 488, 494, 116 P.3d 755 (2005).¹⁰

A contract term is ambiguous if the language of the contract term is susceptible of more than one meaning. Millican of Washington, Inc., 44 Wn. App. at 415-16. However, "[a]mbiguity will not be read into a contract where it can reasonably be avoided." Martinez v. Miller Industries, Inc., 94 Wn. App. 935, 944, 974 P.2d 1261 (1999).¹¹ **"Contracts must be construed to avoid rendering contractual obligations illusory."** Quadrant Corp v. American States Ins. Co., 154 Wn.2d 165, 184, 110 P.3d 733 (2005) (*emphasis added*).¹²

Undefined contract terms are to be generally construed according to their "plain, ordinary, and popular meaning." W.M. Dickson Co., 128 Wn. App. at 493.¹³ When a court examines a contract, it must read it as the average person would read it; it should be given a practical and reasonable, rather than a strained or forced construction, leading to absurd

¹⁰ *citing*, Martinez v. Miller Industries, Inc., 94 Wn. App. 935, 944, 974 P.2d 1261 (1999).

¹¹ *quoting*, McGary, 99 Wn.2d at 285.

¹² *citing*, Taylor v. Shigaki, 84 Wn. App. 723, 730, 930 P.2d 340 (1997) ("*the court will not give effect to interpretations that would render contract obligations illusory*").

¹³ *citing*, Kitsap County v. Allstate Ins. Co., 136 Wn.2d 567, 567, 964 P.2d 1173 (1998), *and* Boeing Co. v. Aetna Casualty & Surety Co., 113 Wn.2d 869, 877, 784 P.2d 507 (1990).

results. Forest Marketing Enterprises, Inc. v. WA Dept. of Natural Resources, 125 Wn. App. 126, 132, 104 P.3d 40 (2005).¹⁴

Under the objective theory of contract interpretation, "[t]he goal of contractual interpretation is to determine and effectuate the parties' mutual intent . . . unexpressed impressions are meaningless when attempting to ascertain the mutual intention of the parties." Santos v. Dean, 96 Wn. App. 849, 854, 982 P.2d 632 (1999).¹⁵

"If a contract term is ambiguous, the doubt created by the ambiguity will be resolved against the one who prepared the contract." Forest Marketing, 125 Wn. App. at 132.¹⁶ However, Washington courts "do not always construe ambiguous contracts against the drafter." Id.

Interpretation of a contract term is accomplished first and foremost by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of a contract, and the reasonableness of respective interpretations advocated by the parties. If, after applying this analysis, the meaning of an otherwise seemingly ambiguous contract term can be determined, then "there is no need to resort to the rule that ambiguity be resolved against the drafter." Id. at

¹⁴ *quoting*, Allstate Ins. Co. v. Hamonds, 72 Wn. App. 664, 667, 865 P.2d 560 (1994).

¹⁵ *citing*, Hall v. Custom Craft Fixtures, Inc., 87 Wn. App. 1, 9, 937 P.2d 1143 (1997); *quoting*, Lynott v. National Union Fire Ins. Co., 123 Wn.2d 678, 684, 871 P.2d 146 (1994).

¹⁶ *quoting*, Felton v. Menan Starch Co., 66 Wn.2d 792, 797, 405 P.2d 585 (1965).

132-33.¹⁷ Under this analysis, in Forest Marketing, *supra*, the Washington Court of Appeals, Div. II, interpreted a seemingly ambiguous contract term, in a manner that favored the drafting party.

2. Application of Contract Interpretation Law to the Facts in this Case.

In the case at bar, the contract term at issue required Robert Trent to landscape the property he sold to Ms. Rushton, "in order to meet engineering requirements such as grading and water drainage." CP 160 ¶ 7. The arbitrator determined that this contract term was "ambiguous," and construed the term against Ms. Rushton as the "drafter" of the contract.¹⁸ CP 86.

It was not disputed that shortly after Ms. Rushton purchased the property at issue from Mr. Trent, the property was subject to substantial flooding. It was also not disputed that Mr. Trent *never* consulted with an engineer regarding landscaping, grading, or water drainage issues. However, the arbitrator found that the contractual obligation to ensure engineering requirements for grading and water drainage was "ambiguous," because:

(1) the contract language did not specify what *kind* of grading and water drainage engineering requirements were necessary; (2) the contract

¹⁷ quoting, Roberts, Jackson & Assoc. v. Pier 66 Corp., 41 Wn. App. 64, 69, 702 P.2d 137 (1985).

¹⁸ The contract at issue was a standard form MLS real estate purchase and sale agreement. Ms. Rushton's real estate agent faxed the final draft to Mr. Trent's agent for execution. CP 86 ¶ 2.

referenced only "landscaping," rather than "site preparation," and even if the contract had referenced site preparation, (3) Mr. Trent fulfilled the contractual requirement, because he "complied with all grading and drainage requirements set forth by the municipal authorities." CP 86 - 87.

The arbitrator's decision in this case is not only contrary to law, it leads to an absurd result, and renders the contract term at issue of no effect. The contract specifically references "engineering requirements" with respect to grading and water drainage. The contract is quite clear that Mr. Trent was responsible to "landscape" the property to meet "engineering requirements" with respect to "grading and water drainage." What other kind of "engineering requirements" could possibly be intended by the contract term, remains a mystery.

The arbitrator failed to read the contract term as the ordinary person would read it, using the ordinary meaning of "engineering requirements" for grading and water drainage. According to the arbitrator, it would make no difference what kind of engineering requirements were intended under the contract term. There may as well have been no engineering requirements at all, since Mr. Trent didn't bother to consult with any kind of engineer on the issue of grading and water drainage.

The arbitrator's apparent requirement that the term "site preparation" would need to be included to clarify the supposed ambiguity, makes no sense. The arbitrator refers to a term that is not in the contract, in order to render the express language of the contract ambiguous. The

arbitrator then goes on to reference additional language that is not in the contract, respecting municipal code requirements, which serves to render the express contractual language meaningless. Essentially, the arbitrator creates the ambiguities himself, by inserting language into the contract that isn't there.

The express contractual language states that Mr. Trent was solely responsible to ensure that the property was landscaped to meet "engineering requirements" for grading and water drainage. The contract does not state that Mr. Trent is required to landscape the property sufficient to meet "municipal code requirements" for grading and water drainage.

Nevertheless, the arbitrator is quite correct that Mr. Trent complied with the municipal code requirements. It is undisputed that the municipal code at issue (Lakewood Municipal Code) has no engineering requirements for grading and water drainage, with respect to the property Mr. Trent sold to Ms. Rushton. CP 82.

The arbitrator has interpreted the contract term at issue, in a manner that renders the contractual obligation completely meaningless and illusory. The arbitrator's written opinion leads to an absurd result. He uses terminology not found within the text of the contract, as a means of rendering the express language of the contract "vague and ambiguous." CP 86.

Even if the contract term at issue could reasonably be construed as ambiguous, the arbitrator's decision is based on an incorrect application of law. Before determining that an allegedly ambiguous contract term should be construed against Ms. Rushton as the "drafter," the arbitrator was required to analyze the intent of the parties and the reasonableness of their interpretations, considering the context of the contract as a whole. Only after these factors are considered, does the law resort to the rule that "ambiguity is resolved against the drafter." Forest Marketing, 125 Wn. App. at 132.

IV. Ms. Rushton did not waive her constitutional right to a trial by jury.¹⁹

Both the United States Constitution, and Article I § 21 of the Washington State Constitution guarantee the right to a trial by jury. Although this constitutional guarantee can be waived, "waiver of the right to a jury trial 'must be voluntary, knowing, and intelligent.'" Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 898, 16 P.3d 617 (2001).²⁰ The right to a jury trial is so elementary to our system of jurisprudence, a litigant's opportunity to present her case to a jury should not be denied unless the right is validly waived. Christensen v. Grant County Hosp. Dist. No. 1, 152 Wn.2d 299, 324, 96 P.3d 957 (2004).²¹

¹⁹ CP 96 - 97.

²⁰ quoting, City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

²¹ citing, Godfrey, 142 Wn.2d at 898.

Ms. Rushton never intended to waive her constitutional rights, when she signed the contract at issue in this case, in October of 2005. She did not know she was waiving her constitutional right to a jury trial. CP 102 - 103. She could not have known she would be waiving her right to a trial by jury, as there is no contractual language to indicate she would be waiving such an important constitutional right.

Public policy cannot trump constitutional rights. The effect of the trial court's ruling in this case, striking Ms. Rushton's request for trial de novo, is that public policy in favor of binding arbitration is so strong, litigants can easily and unintentionally waive their constitutional rights; but, under no circumstances is it possible for litigants to waive a *contractual* right to binding arbitration.

CONCLUSION

Robert Trent waived any contractual right to binding arbitration under the Uniform Arbitration Act, when he (1) failed to respond to Ms. Rushton's demand for private arbitration through the AAA; and (2) failed to object to conducting the arbitration in this case under the Mandatory Arbitration Rules, which provide for the right to trial de novo. MAR 7.1

The trial court is prohibited from mixing and matching the provisions of the Uniform Arbitration Act, and the Mandatory Arbitration Rules, for the purpose of precluding trial de novo, absent an agreement of

the parties. Furthermore, Ms. Rushton did not waive her constitutional right to a jury trial. Therefore, the trial court's ruling in this case, striking Ms. Rushton's request for trial de novo, and entering judgment on the arbitration award, should be reversed. Ms. Rushton should be granted trial de novo, consistent with the Mandatory Arbitration Rules, MAR 7.1.

Even if the Uniform Arbitration Act were applicable to preclude trial de novo in this case, despite the fact that the case was exclusively governed by the Mandatory Arbitration Rules, from beginning to end, the arbitrator's award must be vacated. The arbitrator exceeded his authority, by issuing a ruling that is clearly contrary to law. Moreover, the arbitrator committed misconduct, prejudicial to the rights of Ms. Rushton, by conferring privately with Robert Trent, after the arbitration hearing concluded.²²

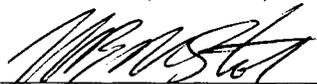
RESPECTFULLY SUBMITTED THIS 20th day of July, 2009.


Justin D. Bristol, WSNB 29820
Attorney for Appellant

COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
DEPUTY

DECLARATION OF SERVICE

Undersigned hereby declares, subject to penalty of perjury under the laws of the State of Washington, that counsel for Respondent, Terry Brink, was served by courier delivery at 1201 Pacific Avenue, Suite 1200, Tacoma, Washington, on July 20, 2009.


Justin D. Bristol

²² Attorney fees and costs should be awarded to the prevailing party, pursuant to contract, at the conclusion of this matter, including fees and costs expended for this appeal. CP 50 ¶ q; Brown v. Johnson, 109 Wn. App. 56, 34 P.3d 1233 (2001).