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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 38824-3-II

IN THE COURT OF APPEALS

DIVISION II

STATE OF WASHINGTON

SUSUAN HORTON-RUSHTON, Appellant,

vs.

ROBERT TRENT, et al., Respondent.

REPLY BRIEF OF APPELLANT

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Respondent Robert Trent's primary argument in opposition to Ms. Rushton's appeal in this matter, regarding whether she has a right to trial de novo, is that "pursuant to RCW 7.04A.040(3), Mr. Trent can not waive whether the Act governs the agreement to arbitrate." Resp. Br. at 11. (*See also*, Resp. Br. at 14: "the Act provides the parties cannot waive the Application of the Act.") However, Mr. Trent misreads the statute he cites, and contradicts clear case law on the issue.

According to RCW 7.04A.040(1):

Except as otherwise provided in subsection (2) and (3) of this section, the parties to an agreement to arbitrate or to an arbitration proceeding may waive or vary the requirements of *this chapter* to the extent permitted by law.

Mr. Trent relies on RCW 7.04A.040(3) for his contention that the application of the Act itself cannot be waived. According to RCW 7.04A.040(3): "The parties to an agreement to arbitrate may not waive or vary the requirements of *this section*," and then goes on to list various other sections of the Act that cannot be waived, none of which pertain to binding arbitration, or preclude trial de novo. (emphasis added). Nevertheless, the application of that *section*, RCW 7.04A.040(3), presupposes that the arbitration is subject to the Uniform Arbitration Act in the first place. Otherwise, MAR 8.1, RCW 7.04A.030(3), and this Court's ruling in Dahl v. Parquet and Colonial Hardwood Floor Co., Inc., 108 Wn. App. 403, 410, 30 P.3d 537 (2001), would have no effect.

Pursuant to RCW 7.04A.030(3), the Uniform Arbitration Act, RCW 7.04A, *et seq.*, (UAA) "does not apply to any arbitration governed by chapter 7.06 RCW," *i.e.*, the Mandatory Arbitration Rules (MAR). Pursuant to this Court's ruling in Dahl, 108 Wn. App. at 410, "parties whose disputes are not subject to MAR may stipulate to adopt MAR piecemeal." *See also*, MAR 8.1(b): cases proceeding under the MAR by agreement of the Parties are subject to the MAR in their entirety, except by agreement of the parties in compliance with MAR 8.1(a).

Despite Mr. Trent's arguments to the contrary, this case was submitted to arbitration under the MAR by stipulation of the Parties, proceeded under the MAR, and concluded under the MAR, until the trial court's ruling that the right to trial de novo under MAR 7.1 did not apply to this case, due to the requirements of the UAA. CP 8-11; CP 39-44; CP 50-60; CP 69-70.¹ However, unlike the litigants in Dahl, the Parties in this case never expressly, or impliedly, agreed to exclude the application of MAR 7.1, right to trial de novo.

If Mr. Trent wanted to subject this case to binding arbitration under the UAA, after being served with the summons and complaint, Mr. Trent could have, and should have, filed a motion to compel arbitration under the UAA, pursuant to RCW 7.04A.070. In the alternative, after the

¹ Citations to Record are all respectively in compliance with MAR 2.3, 4.2, 5.2, 6.1, 6.2, 6.3, and PCLMAR 2.1, 2.3, 4.2, 5.2, and 6.1-6.3.

"statement of arbitrability" was filed in the Court below, pursuant to PCLMAR 2.1(a), Mr. Trent could have objected to the application of the MAR, by filing an objection under PCLMAR 2.1(b). Mr. Trent did neither, and the arbitration of this case proceeded under the MAR, after *Ms. Rushton* filed a statement of arbitrability, as required by PCLMAR 2.1(a).² CP 8-9.

Pursuant to MAR 2.1, cases are submitted to arbitration under the MAR, according to Local Rules. Under PCLMAR 2.1(a), a civil case is transferred to arbitration by filing a "statement of arbitrability." By agreement of the Parties, this case was transferred to arbitration pursuant to PCLMAR 2.1(a). *See*, CP 8-9. Contrast PCLMAR 2.1(a) with the requirements of RCW 7.04A.090, governing initiation of arbitration under the UAA.

After this case was submitted to arbitration under PCLMAR 2.1(a), an arbitrator was selected in compliance with MAR 2.3 and PCLMAR 2.3. CP 42-45. Discovery was conducted, as limited by MAR 4.2 and PCLMAR 4.2. CP 50. The Parties submitted prehearing statements of proof pursuant to MAR 5.2. CP 54 and 56.

² Mr. Trent's argument that he "clearly demanded arbitration in the trial court by asserting the requirement of arbitration pursuant to contract" is without merit. *Resp. Br.* at 13. Mr. Trent did not file for arbitration. *Ms. Rushton* did, according to the Mandatory Arbitration Rules, and not the Uniform Arbitration Act. CP 8-9.

At the conclusion of the arbitration, the arbitrator filed the arbitration award in the Pierce County Superior Court, pursuant to MAR 6.1 and PCLMAR 6.1. CP 58 (*also sent by Pierce County Superior Court Clerk's Office under seal*). **The right to trial de novo is clearly stated within the arbitration award itself:** "[i]f no party has sought a trial de novo within twenty (20) days after the filing of the arbitration award, a judgment on the award may be noted by any party for presentation to the Judge to whom the case is assigned (PCLMAR 6.3(a) & PCLMAR 7.1(b))."

If Parties to a contract with an arbitration clause submit the case to private, binding arbitration, pursuant to the UAA, then the case does not belong in Superior Court. Robert Trent seems to argue in response to this appeal, that under the UAA, the Superior Court does not have jurisdiction to try this case. However, Mr. Trent waived his right to private, binding arbitration, when he ignored Ms. Rushton's demand for arbitration through the American Arbitration Association (AAA). He again waived binding arbitration under the UAA, when he conceded to govern the arbitration of this case, under the MAR.

Filing and serving a trial de novo request in Superior Court "is 'not a step that invokes the superior court's jurisdiction. That court's jurisdiction is invoked upon the filing of the underlying lawsuit and it is not lost merely because the dispute is transferred to mandatory

arbitration." Sorenson v. Dahlen, 136 Wn. App. 844, 850-51 n.1, 149 P.3d 394 (2006) (quoting, Nevers v. Fireside, Inc., 133 Wn.2d 804, 812 n.4, 947 P.2d 721 (1997)). Therefore, when a lawsuit is filed in Superior Court, and then proceeds to arbitration under the MAR, the Superior Court maintains jurisdiction before, during, and after the arbitration. Contrast the procedure to initiate arbitration under the UAA, RCW 7.04A.090, which does not require the filing of an underlying lawsuit.

Mr. Trent's analogy of this case, to Godfrey v. Hartford Casualty Ins. Co., 142 Wn.2d 885, 16 P.3d 617 (2001) is misplaced, insofar as this case is fundamentally distinguishable. In Godfrey, the plaintiff filed a complaint, *alleging* applicability of the UAA. Superior Court proceedings were stayed, so that the parties could pursue private, binding arbitration, pursuant to contract. In fact, the Godfrey matter was specifically referred to arbitration as governed by the UAA. Godfrey, 142 Wn.2d at 890. No statement of arbitrability was filed in the superior court. The parties did not stipulate to the arbitration being governed by the MAR.

In Godfrey, the Washington Supreme Court reasoned that the purpose of the UAA was to resolve claims without going to court, and to encourage parties to submit to binding arbitration. Godfrey, 142 Wn.2d at 892 (*citing*, Boyd v. Davis, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995)). In contrast, this case involves a situation where Ms. Rushton attempted to resolve the case through private arbitration, subject to the UAA, but Mr.

Trent refused to submit to private arbitration, and failed to answer Ms. Rushton's demand for arbitration.

Mr. Trent, having waived his right to private, binding arbitration, Ms. Rushton then filed a complaint in Superior Court, and a statement of arbitrability pursuant to PCLMAR 2.1(a), subjecting the case to the MAR, rather than the UAA. Mr. Trent did not file an objection to the application of the MAR, pursuant to PCLMAR 2.1(b), or a demand for the arbitration to be governed by the UAA, pursuant to RCW 7.04A.070. This case was governed by the MAR, and the Parties did not have any form of agreement to preclude MAR 7.1, such as the litigants in the Dahl³ case.

The essence of Mr. Trent's argument is that, where parties contract to submit disputes concerning their agreement to arbitration, the UAA applies not matter what, and binding arbitration cannot be waived, under any circumstances. In support of this argument, Mr. Trent cites Godfrey for the proposition that the UAA amounts to a "code of arbitration." 142 Wn.2d at 894. However, Mr. Trent fails to cite the rest of the Godfrey Court's holding on the issue.

In context, the Godfrey Court held that the UAA amounts to a "code of arbitration . . . governing the conduct of an arbitration, unless a more specific statutory enactment on arbitration applies," such as RCW

³ 108 Wn. App. 403, 410, 30 P.3d 537 (2001).

7.06. Godfrey, 142 Wn.2d at 894 and n.1 (citing the statutory predecessor of RCW 7.04A.030, which specifically states that the UAA does not apply to arbitrations governed by the MAR, RCW 7.06). The Court goes on to specify that the UAA "does not contemplate nonbinding arbitration," unless the arbitration is governed by another set of Rules that allow for trial de novo, such as the MAR. Id.

Godfrey was a case in which the litigants specifically stipulated to proceed with arbitration governed by the UAA. The Parties in this case, however, agreed to proceed with their arbitration governed by the MAR, and did not agree to preclude MAR 7.1. Nonetheless, waiver of a right to trial by jury must be narrowly construed. Wilson v. Horsley, 137 Wn.2d 270, 288, 858 P.2d 199 (1993). It must have been done knowingly, voluntarily, and intelligently. City of Bellevue v. Acrey, 103 Wn.2d 203, 207, 691 P.2d 957 (1984).

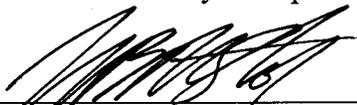
The Supreme Court in Godfrey found that an insurance company, which has an arbitration clause subject to the UAA within its own form agreement, waived the right to a jury trial. 142 Wn.2d 898. In this case, Ms. Rushton signed a standard form MLS real estate purchase and sale agreement, but had no idea she could be waiving her right to a jury trial. CP 156; CP 102-103. In contrast, Mr. Trent signed the same agreement, but refused to submit to private arbitration pursuant to the contract term at issue. CP 23 ¶¶ 3-4; CP 37-38. It is patently unreasonable, unfair, and

unjust, that Ms. Rushton should be subject to binding arbitration under the UAA, when Mr. Trent refused to honor the contractual term, and as a result, she filed suit and proceeded with her arbitration under the MAR.

The Pierce County Superior Court's decision to suddenly require this case be governed by the UAA, after the case had been governed by the MAR from start to finish, without any agreement between the Parties to preclude trial de novo, should be reversed, and this case should be remanded to proceed with Ms. Rushton's trial de novo. The decision of the Superior Court is contrary to case law (Dahl, 108 Wn. App. at 410), contrary to statute (RCW 7.04A.030(3)), and contrary to sound reason.

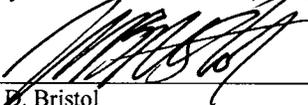
Even if the Court finds this case is subject to the UAA, the arbitrator's decision should be vacated, as contrary to well settled principles of contract interpretation, and/or due to prejudicial misconduct by the arbitrator.

RESPECTFULLY SUBMITTED THIS 18th day of September, 2009.


Justin D. Bristol, WSNB 29820
Attorney for Appellant

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 with this document by courier delivery at 1201 Pacific Avenue, Suite 1200, Tacoma, Washington, on September 18, 2009.


Justin D. Bristol

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