



**TABLE OF CONTENTS**

I. RESPONSE TO MS. HORTON-RUSHTON'S STATEMENT OF THE ISSUES..... 1

II. INTRODUCTION / BRIEF SUMMARY OF THE ARGUMENT.....2

III. STATEMENT OF CASE ..... 3

    1. Brief Factual Background..... 3

    2. Procedural Facts and History..... 5

IV. AUTHORITY ..... 8

A. THE TRIAL COURT DID NOT ERR WHEN IT GRANTED MR. TRENT'S MOTION TO STRIKE ..... 8

    1. Standard Of Review..... 8

    2. Mr. Trent Did Not Waive His Contractual Right To Binding Arbitration ..... 9

        (a) *Arbitration Pursuant to the Act Can Not Be Waived* ..... 10

        (b) *Mr. Trent Outwardly Asserted His Right To Arbitrate Pursuant to the Contract*..... 11

    3. The Trial Court Did Not Unlawfully Mix And Match The Arbitration Statutes In Order To Negate Ms. Horton-Rushton's Right to A Trial De Novo ..... 14

        (a) *Arbitration in this Matter Commenced Under the Authority of the Act Not the MAR's and, Therefore, Ms. Horton-Rushton Never Had a Right to Trial De Novo*..... 15

(b)	<i>The Trial Court Did Not Exceed Its Jurisdiction by Mixing and Matching The Arbitration Statutes</i> .....	18
(c)	<i>The Procedures Set Forth By the MARs May Be Used In Arbitrations Governed By the Act</i> .....	20
4.	<u>The Doctrine Of Judicial Estoppel Did Not Apply</u> .....	22
5.	<u>Ms. Horton-Rushton Waived Her Right To A Jury Trial</u> .....	27
B.	THE TRIAL COURT DID NOT ERR WHEN IT DENIED MS. HORTON-RUSHTON’S MOTION TO VACATE THE ARBITRATION AWARD .....	29
1.	<u>Standard Of Review</u> .....	29
2.	<u>The Arbitrator Did Not Misapply The Law</u> .....	30
3.	<u>The Arbitrator Did Not Exhibit Partiality And Did Not Engage In Prejudicial Misconduct</u> .....	33
C.	MR. TRENT IS ENTITLED TO FEES ON APPEAL PURSUANT TO PAR 18.1 .....	36
V.	CONCLUSION.....	37

## TABLE OF AUTHORITIES

### Cases

<i>Abbs v. Georgie Boy Mfg., Inc.</i> , 60 Wn. App. 157, 160, 803 P.2d 14 (1991).....	9
<i>Alder v. Fred Lind Manor</i> , 153 Wn.2d 331, 342, 103 P.3d 733 (2005).....	17
<i>Arkinson v. Ethan Allen, Inc.</i> , 160 Wn.2d 535, 538-539, 160 P.3d 13 (2007).....	23
<i>Columbia Credit Union Comm. v. Columbia Community Credit Union</i> , 134 Wn. App. 175, 186, 139 P.3d 386 (2006).....	23
<i>Dahl v. Parquet and Colonial Hardwood Floor Co., Inc.</i> , 108 Wn. App. 403, 411, 30 P.3d 537 (2001).....	16, 18, 19, 21 ..... 22, 24, 29
<i>Detweiler v. J.C. Penny Casualty Ins. Co.</i> , 110 Wn.2d 99, 111, 751 P.2d 282 (1988).....	12, 13
<i>Expert Drywall, Inc. v. Ellis-Don Construction, Inc.</i> , 86 Wn. App. 884, 888 , 939 P.2d 1258 (1997).....	29, 30
<i>Finney v. Farmers Inc. Co.</i> , 21 Wn. App. 601, 620, 586 P.2d 519 (1978).....	12, 13
<i>Geo V. Nolte &amp; Co. v. Pieler Construction Co.</i> , 54 Wn.2d 30, 337 P.2d 710 (1959).....	11, 12
<i>Godfrey v. Hartford Casualty Insurance Company</i> , 142 Wn.2d 885, 894, 16 P.3d 617 (2001).....	16, 17, 28
<i>Harvey v. University of Washington</i> , 118 Wn. App. 315, 318, 76 P.3d 276 (2003).....	28
<i>JDFJ Corporation v. International Raceway, Inc.</i> , 97 Wn. App. 1, 7, 970 P.2d 343 (1999).....	27

<i>Kempf v. Puryear</i> , 87 Wn. App. 390, 393, 942 P.2d 375 (1997) .....	29, 34
<i>Marine Enterprises, Inc. v. Security Pacific Trading Corp.</i> , 50 Wn. App. 768, 774, 750 P.2d 1290 (1988).....	36
<i>McNeff v. Capistran</i> , 120 Wash. 498, 208 P. 41 (1922).....	12
<i>Millican of Washington, Inc. v. Wienker Carpet Service, Inc.</i> , 44 Wn. App. 409, 415-16, 722 P.2d 861 (1986).....	30
<i>Niemann v. Vaughn Community Church</i> , 154 Wn.2d 365, 375, 113 P.3d 463 (2005).....	9
<i>Northern State Constr. Co. v. Banchemo</i> , 63 Wn.2d 245, 249, 386 P.2d 625 (1964).....	15
<i>Pedersen v. Klinkert</i> , 56 Wn.2d 313, 321-22, 352 P.2d 1025 (1960).....	11
<i>Puget Sound Bridge &amp; Dredging Co. v. Frye</i> , 142 Wash. 166, 177, 252 P. 546 (1927).....	15
<i>Reeves v. McClain</i> , 56 Wn. App. 301, 311, 783 P.2d 606 (1989).....	36
<i>Save Columbia CU Committee v. Columbia Community Credit Union</i> , 134 Wn. App. 175, 186, 139 P.3d 386 (2006).....	23
<i>Skinner v. Holgate</i> , 141 Wn. App. 840, 847-48, 173 P.3d 300 (2007).....	23
<i>In Re the Parentage of Austin Smith-Bartlett</i> , 95 Wn. App. 633, 636, 976 P.2d 173 (1999).....	15, 16, 17 ..... 18, 19, 20
<i>Vaughn v Vaughn</i> , 23 Wn. App. 527, 531, 597 P.2d 932 (1979) .....	27

**Statutes**

RCW 7.04 .....	15, 19, 21
RCW 7.04A .....	9, 10, 15
RCW 7.04A.030.....	10, 11, 15, 16, 17
RCW 7.04A.030(2).....	10
RCW 7.04A.040(3).....	10, 11
RCW 7.04A.060.....	28
RCW 7.04A.070(1).....	26
RCW 7.04A.150(1).....	21, 24
RCW 7.04A.230-.240 .....	17
RCW 7.06 .....	11
RCW 7.06.020 .....	17
RCW 7.06.020(1).....	16

**Court Rules**

CR 59 .....	27
MAR 1.1 .....	6, 16, 17
MAR 1.2 .....	16, 17, 18
MAR 8.1 .....	6, 16, 18
MAR 8.1(a) .....	20
PCLMAR 1.1(a).....	16
PCLMAR 1.2 .....	17, 18
RAP 18.1 .....	2, 36, 38
RAP 18.1(a) .....	36

**I. RESPONSE TO MS. HORTON-RUSHTON'S STATEMENT OF THE ISSUES**

In the Opening Brief of Appellant, Ms. Horton-Rushton sets forth five Assignments of Error, when in fact Ms. Horton Rushton only presents two Assignments of Error for this Court's review.

First, Ms. Horton-Rushton argues the trial court erred by granting Mr. Trent's motion to strike her request for trial de novo. The issues presented by Ms. Horton-Rushton creating the trial court's error are: (i) whether Mr. Trent waived his contractual right to binding arbitration and if so, whether the trial court can enforce binding arbitration thereafter; (ii) whether the trial court unlawfully mixed and matched the arbitration statutes in order to negate the right to a trial de novo;<sup>1</sup> (iii) whether the trial court failed to apply the doctrine of judicial estoppel; and (iv) whether the court failed to consider Ms. Horton-Rushton's constitutional claim that she was denied her right to a jury trial.

Second, Ms. Horton-Rushton argues the trial court erred by denying her motion to vacate the arbitrator's award. The issues presented by Ms. Horton-Rushton to create the trial court's error are: (i) whether the arbitrator's decision was based on an error or erroneous application of the

---

<sup>1</sup> Ms. Horton-Rushton erroneously provides a disputed legal conclusion in her First Assignment of Error by assuming a contractual right to binding arbitration has been waived. Opening Brief of Appellant, p.2; Assignment of Error No. 1.

law; and (ii) whether the arbitrator exhibited partiality or engaged in prejudicial misconduct.

## **II. INTRODUCTION / BRIEF SUMMARY OF THE ARGUMENT**

The trial court's grant of Mr. Trent's motion to strike Ms. Horton-Rushton's request for a trial de novo and the trial court's denial of Ms. Horton-Rushton's motion to vacate the arbitration award should be affirmed. Mr. Trent also requests recovery of his attorneys' fees and costs on appeal pursuant to RAP 18.1

The trial court did not err by granting Mr. Trent's motion to strike Ms. Horton-Rushton's request for a trial de novo because: (i) Mr. Trent did not waive his right to binding arbitration pursuant to the Uniform Arbitration Act; (ii) the trial court did not unlawfully mix and match arbitration statutes; (iii) failure to apply the doctrine of judicial estoppel was not an abuse of discretion by the trial court; and (iv) the trial court properly denied Ms. Horton-Rushton's constitutional argument that she never intended to waive her right to a jury trial.

The trial court also did not err when it denied Ms. Horton-Rushton's motion to vacate the arbitration award because the trial court properly found the arbitrator did not exceed his powers and did not engage in partiality or misconduct prejudicial to Ms. Horton-Rushton.

### III. STATEMENT OF CASE

#### 1. Brief Factual Background.

Appellant Susan Horton Rushton (“Ms. Horton-Rushton”) and Respondents Robert Trent and Jane Doe Trent (“Mr. Trent”) entered into a Residential Purchase and Sale Agreement (“RESPA”) dated October 22, 2005, for the sale of real property located at 9801 100<sup>th</sup> Ave SW, Lakewood, Pierce County, Washington (“Property”). CP 136. The RESPA contemplated a new home to be constructed on the Property. CP 137. Mr. Trent contracted with Hi-Line Homes for the construction of the new home. CP 137.

Paragraph 7 of the Presale Addendum – Optional Clauses to the RESPA provides that “Buyer acknowledges that Seller will also landscape in order to meet engineering requirements such as grading and water drainage.” CP 155. Paragraph 8 of the Presale Addendum to the RESPA further provides, in part, the following warranty and exclusions:

- a. Seller warrants that all workmanship and materials furnished by it in the construction of the home shall be free from defects for a period of one (1) year from the date of substantial completion of the home. Seller agrees to correct any defects in the finished construction identified by Buyer in writing during the one year warranty. Buyer shall notify Seller promptly after the discovery of such conditions.

b. ... Seller's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by Seller, improper or insufficient maintenance, improper operation, or normal wear and tear under normal usage. ...

CP 160.

Hi-Line Homes finished the construction of Ms. Horton-Rushton's new home in June 2006 and the parties' real estate transaction closed on or about June 30, 2006. CP 138. Ms. Horton-Rushton moved into her new home shortly thereafter. CP 138.

Subsequent to Mr. Trent's sale of the new home to Ms. Horton-Rushton, Ms. Horton-Rushton's agent modified the final grade and drainage around the house by removal of soils and grass and placement of gravel over a largely impermeable plastic sheet, which was designed to serve as a weed barrier. CP 86. This impeded the drainage around the house. CP 86. Ms. Horton-Rushton agreed to hold Mr. Trent harmless for these modifications by entering into a Letter of Understanding dated June 23, 2006. CP 86; CP 139.

In November 2006, Ms. Horton Rushton's new home was subject to substantial flooding. CP 4. At this time, record breaking rains and catastrophic flooding from numerous sources exceeded the expectations and assumptions of both the parties. CP 86.

Despite the record breaking rains, the warranty exclusion for modifications not performed by Mr. Trent, and the express agreement by Ms. Horton-Rushton to hold Mr. Trent harmless for the modifications made by her agent, Ms. Horton-Rushton believes the flooding was due to inadequate and/or defective grading and water drainage performed by Mr. Trent and, therefore, demanded arbitration and filed a breach of contract action against Mr. Trent in Pierce County Superior Court. CP 1-7.

2. **Procedural Facts And History.**

This matter originally came before the trial court on the Verified Complaint filed by Ms. Horton-Rushton alleging breach of contract. CP 1-7. The contract at issue in this matter, signed by the parties, includes a pre-sale addendum providing all disputes shall be resolved by arbitration. CP 144. This formed the basis for one of Mr. Trent's affirmative defenses—that Ms. Horton-Rushton's claims were barred by estoppel because the parties' purchase and sale agreement required arbitration of any disputes that arise from the purchase and sale agreement. CP 140. In Mr. Trent's request for relief, Mr. Trent demanded that the claims be submitted to arbitration. CP 140.

On April 22, 2008, Ms. Horton-Rushton filed a Statement of Arbitrability stating this matter is subject to arbitration in accordance with the parties' contract. CP 8. The Statement of Arbitrability did not state

this matter is subject to arbitration in accordance with the Mandatory Arbitration Rules (MAR 1.1). CP 8. In fact, prior to filing the Statement of Arbitrability, Ms. Horton-Rushton's counsel and Mr. Trent's counsel engaged in email communication whereby Mr. Trent's counsel stated the matter was subject to arbitration pursuant to the parties' contract and Ms. Horton-Rushton's counsel agreed the matter was subject to arbitration, regardless of the amount of money in dispute. CP 189.

After Ms. Horton-Rushton filed the Statement of Arbitrability, the trial court clerk issued two Notices of Proposed Arbitrators. CP 145. The parties selected an arbitrator from the second list. CP 145.

While documents, such as a Prehearing Statement of Proof, were produced pursuant to the general procedures set forth under the Mandatory Arbitration Rules, at no time during the course of the arbitration proceedings did the parties stipulate to arbitrate under the authority of the Mandatory Arbitration Rules, pursuant to MAR 8.1.

The arbitration was held on October 30, 2008. CP 145. The Arbitrator issued a letter ruling on October 31, 2008. CP 86-87. The Arbitrator's letter set forth the Arbitrator's finding that the "pertinent contractual provision is vague and ambiguous". CP 86. The Arbitrator found the parties' contract did not provide for any specific type of grading and drainage engineering and Mr. Trent complied with all grading and

drainage requirements set forth by the municipal authorities. CP 86. The Arbitrator's letter also directed the parties to address the issue of recoverable attorneys' fees, including the offset of fees Mr. Trent agreed to provide to compensate Ms. Horton-Rushton for her costs incurred for filing a previous arbitration demand with the American Arbitration Association. CP 87.

After receiving supporting declarations and argument, the Arbitrator subsequently entered the Arbitration Award on November 19, 2008. CP 88. The Arbitration Award was filed with the trial court on November 21, 2008. CP 88. The Arbitration Award names Mr. Trent as the prevailing party and grants Mr. Trent his attorney's fees in the amount of \$15,000.00, less a stipulated offset of \$1,450.00, for a net award of \$13,550.00, plus statutory costs. CP 88.

On November 26, 2008, Ms. Horton-Rushton filed a Request for Trial De Novo. CP 16. Mr. Trent filed a Motion for Order Striking Plaintiff's [Ms. Horton-Rushton] Request for Trial De Novo, and a Motion for Order Confirming Arbitration Award on December 4, 2008. CP 18-21; CP 181-184. On December 12, 2008 the trial court entered an Order Striking Plaintiff's [Ms. Horton-Rushton] Request for a Trial De Novo. CP 69-70.

On December 22, 2008, Ms. Horton Rushton filed a Motion for Reconsideration of the court's Order dated December 12, 2008, and a Motion to Vacate. CP 72-73. Ms. Horton-Rushton also filed a Motion to Vacate Arbitration Award and an (*alternative*) Motion for Additional Offset of Fees and Costs on January 15, 2009. CP 75-94; CP 200-210.

The trial court entered an Order Denying Plaintiff's [Ms. Horton-Rushton] Motion for Reconsideration, Motion to Vacate, and Motion for Additional Fees on January 23, 2009.

On January 23, 2009, the trial court also entered an Order Confirming Arbitration Award and Awarding Additional Attorneys' Fees and Costs to be added to Judgment. CP 114-115. The Judgment on Arbitration Award and on Additional Attorneys' Fees and Costs was entered by the trial court on February 27, 2009. CP 118-120.

Ms. Horton-Rushton filed her Notice of Appeal to this Court on January 30, 2009. CP 228-234.

#### IV. AUTHORITY

##### A. **THE TRIAL COURT DID NOT ERR WHEN IT GRANTED MR. TRENT'S MOTION TO STRIKE.**

###### 1. **Standard Of Review.**

By granting Mr. Trent's motion to strike Ms. Horton-Rushton's request for trial de novo, the trial court effectively found Ms. Horton-

Rushton was not entitled to a trial de novo after the October 31, 2008, arbitration of this matter. Considering Mr. Trent's and Ms. Horton-Rushton's contractual obligation to arbitrate their disputes, whether Ms. Horton-Rushton is entitled to a trial de novo is essentially a question of whether the Uniform Arbitration Act, Chapter 7.04A RCW, governs the October 31, 2008, arbitration.

The interpretation and application of a statute to a particular set of facts is a question of law. *Abbs v. Georgie Boy Mfg., Inc.*, 60 Wn. App. 157, 160, 803 P.2d 14 (1991). Questions of law are reviewed de novo. *Niemann v. Vaughn Community Church*, 154 Wn. 2d 365, 375, 113 P.3d 463 (2005).

2. **Mr. Trent Did Not Waive His Contractual Right To Binding Arbitration.**

Ms. Horton-Rushton asserts the trial court erred in granting Mr. Trent's motion to strike Ms. Horton-Rushton's request for trial de novo because Mr. Trent waived the right to proceed with binding arbitration by failing to respond to Ms. Horton-Rushton's initial demand for arbitration pursuant to the parties' contract. Opening Brief of Appellant, p. 9. To the contrary, Mr. Trent did not waive his right to arbitration pursuant to their contract because: (i) Washington's Uniform Arbitration Act, Chapter 7.04A RCW (the "Act"), expressly prohibits a party from waiving the applicability of the Act when parties have a contractual obligation to

arbitrate disputes; and (ii) Mr. Trent's consistent demand for arbitration pursuant to the parties' contract does not meet the requirements of common law waiver of a party's right to arbitrate a dispute.

*(a) Arbitration Pursuant To The Act Can Not Be Waived.*

Chapter 7.04A RCW, Washington's Uniform Arbitration Act, governs agreements to arbitrate. RCW 7.04A.030. RCW 7.04A.030(2) provides that after July 1, 2006, the Act governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006. RCW 7.04A.040(3) states the parties to an agreement to arbitrate may not waive the requirements of RCW 7.04A.030. More specifically, RCW 7.04A.040(3) provides the following:

**The parties to an agreement to arbitrate may not waive or vary the requirements of this section or RCW 7.04A.030 (1)(a) or 2), 7.04A.070, 7.04A.140, 7.04A.180, 7.04A.200 (3) or (4), 7.04A.220, 7.04A.230, 7.04A.240, 7.04A.250 (1) or (2), 7.04A.901, 7.04A.903, section 50, chapter 433, Laws of 2005, or section 51, chapter 433, Laws of 2005.**

(emphasis added).

The Presale Addendum to Ms. Horton-Rushton and Mr. Trent's states:

**REMEDIES – ARBITRATION**

The parties intend that any construction related disputes or controversies arising out of this Agreement be speedily resolved. Accordingly, the parties agree that any

construction-related dispute, claim, or controversy relating to this Agreement and arising during the course of construction **shall be resolved by arbitration.**

CP 156 (emphasis added). Based on the Presale Addendum, it has been undisputed by the parties that Ms. Horton-Rushton's and Mr. Trent's contract contains an agreement to arbitrate. Because Ms. Horton-Rushton and Mr. Trent entered into a contract that includes an agreement to arbitrate, the Act, not Chapter 7.06 RCW and the Mandatory Arbitration Rules (collectively, "MARs"), governs the agreement to arbitrate. RCW 7.04A.030. Additionally, pursuant to RCW 7.04A.040(3), Mr. Trent can not waive whether the Act governs the agreement to arbitrate. Therefore, because the arbitration in this matter was initially governed by the Act, Mr. Trent cannot unilaterally waive application of the Act in favor of application of the MARs.

*(b) Mr. Trent Outwardly Asserted His Right To Arbitrate Pursuant To The Contract.*

Washington courts have held that "the parties to a contract having an arbitration clause may waive it; and a party does so by failing to invoke it in the trial court when an action is commenced against him on the contract." *Pedersen v. Klinkert*, 56 Wn. 2d 313, 321-22, 352 P.2d 1025 (1960) (citing *Geo. V. Nolte & Co. v. Pieler Construction Co.*, 54 Wn. 2d

30, 337 P.2d 710 (1959); *McNeff v. Capistran*, 120 Wash. 498, 208 P. 41 (1922)).

Ms. Horton-Rushton cites *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)) as analogous cases to support her assertion that Mr. Trent waived his right to arbitration by conduct. However, the facts in both *Detweiler* and *Finney*, while analogous to each other, are clearly distinguishable from the facts in this matter.

In both *Detweiler* and *Finney*, the parties who were found to have waived their right to arbitration were insurers who failed to timely demand arbitration as provided for in the insurance policy. *Detweiler*, 110 Wn. 2d at 111-12; *Finney*, 21 Wn. App. at 620. More specifically, in *Detweiler*, the court held the insurer waived its rights to arbitrate the liability damage issues when the insurer was notified of the insured's personal injury action against an uninsured motorist and was apprised of the status of the litigation and the trial date, but failed to demand arbitration until after judgment was entered against the insurer. *Detweiler*, 110 Wn. 2d at 111-12. In *Finney*, just like the insurer in *Detweiler*, the insurer waited until after the conclusion of the insured's case against the uninsured motorists to demand arbitration. *Finney*, 21 Wn. App. at 619-620.

Unlike the insurers in *Detweiler* and *Finney*, Mr. Trent did not wait until the conclusion of trial to demand arbitration. In fact, this matter never went to trial, it went directly to arbitration. Therefore, *Detweiler* and *Finney* are inapplicable to this matter and Mr. Trent clearly did not waive his right to arbitration.

Additionally, contrary to Ms. Horton-Rushton's assertions, Mr. Trent outwardly demanded arbitration pursuant to their contract. While Mr. Trent's former counsel did fail to respond to Ms. Horton-Rushton's initial demand for arbitration through the American Arbitration Association ("AAA"), Mr. Trent clearly demanded arbitration in the trial court by asserting the requirement of arbitration pursuant to their contract as both an affirmative defense and as a relief requested in Mr. Trent's answer to Ms. Horton-Rushton's complaint in this matter. CP 140.

Furthermore, Mr. Trent's current counsel<sup>2</sup> clearly conveyed the intent to arbitrate pursuant to Mr. Trent's and Ms. Horton-Rushton's contract through email communication to Ms. Horton-Rushton's counsel dated April 21, 2008, stating:

For your convenience, I have attached a form Statement of Arbitrability that includes a provision that states that arbitration is pursuant to the parties' contract and that

---

<sup>2</sup> While not relevant to this proceeding, Mr. Trent was represented by other counsel when Ms. Horton-Rushton made the initial arbitration demand.

neither party waives any claim in excess of \$50,000.00.

Please let me know at your earliest convenience if you would be willing to file the attached Statement of Arbitrability or your own Note for Arbitration/Statement of Arbitrability tomorrow.

CP 192 (emphasis added). On April 21, 2008, Ms. Horton-Rushton's counsel responded, in part, by stating: "This email will confirm that we have agreed to file the statement of arbitrability tomorrow." CP 192. Consistent with the email communication, on April 22, 2008, Ms. Horton-Rushton filed a Statement of Arbitrability stating this matter is subject to arbitration in accordance with the parties' contract with the trial court. CP 8.

Therefore, because the Act provides the parties can not waive the Application of the Act and because Mr. Trent's clearly asserted his right to arbitrate this matter pursuant to his and Ms. Horton-Rushton's contract in the trial court, the trial court correctly ruled that Mr. Trent did not waive his right to arbitration pursuant to the Act.

3. **The Trial Court Did Not Unlawfully Mix And Match The Arbitration Statutes In Order To Negate Ms. Horton-Rushton's Right To A Trial De Novo.**

Ms. Horton-Rushton asserts the trial court erred in granting Mr. Trent's motion to strike Ms. Horton-Rushton's request for trial de novo by unlawfully mixing and matching the statutory provisions of the Act and the MARs. Opening Brief of Appellant, p. 10. This assertion is flawed

because it mistakenly assumes arbitration in this matter commenced pursuant to the MARs because Ms. Horton-Rushton filed an action in Pierce County Superior Court and a statement of arbitrability thereafter. However, because this matter was subject to arbitration pursuant to the contract at issue in this matter, the authority and statutory requirements of Washington's Uniform Arbitration Act were automatically invoked. Because arbitration is subject to the Act, the trial court did not exceed its jurisdiction by striking Ms. Horton-Rushton's request for a trial de novo.

**(a) *Arbitration In This Matter Commenced Under The Authority Of The Act Not The MARs And, Therefore, Ms. Horton-Rushton Never Had A Right To Trial De Novo.***

“Arbitration is a statutory proceeding. Both the rights of the parties and the power of the court are governed entirely by statute.” *In re the Parentage of Austin Smith-Bartlett*, 95 Wn. App. 633, 636, 976 P.2d 173 (1999) (citing *Northern State Constr. Co. v. Banchemo*, 63 Wn. 2d 245, 249, 386 P.2d 625 (1963); *Puget Sound Bridge & Dredging Co. v. Frye*, 142 Wash. 166, 177, 252 P.546 (1927)).<sup>3</sup> As stated above, Chapter 7.04A RCW, Washington's Uniform Arbitration Act, governs agreements to arbitrate. RCW 7.04A.030. The Act “amounts to a “code of arbitration” governing the conduct of arbitration in Washington, unless a

---

<sup>3</sup> Cases presented with decisions prior to January 1, 2006, cite the former Act, Chapter 7.04 RCW. Chapter 7.04 RCW was repealed and Chapter 7.04A RCW took effect on January 1, 2006. The code provisions cited have not substantively changed.

more specific statutory enactment on arbitration applies.” Once an issue is submitted to arbitration, the Act applies. *Godfrey v. Hartford Casualty Insurance Company*, 142 Wn. 2d 885, 894, 16 P.3d 617 (2001).

The Act does not apply to arbitration governed by the MARs. RCW 7.04A.030. *See also* MAR 1.1 (These rules do not apply to arbitration by private agreement or to arbitration under other statutes, except by stipulation under rule 8.1).<sup>4</sup> Rather, arbitration governed by the MARs is court-mandated arbitration of civil actions for money judgments under \$50,000. RCW 7.06.020(1); MAR 1.2; PCLMAR 1.1(a); *see also Smith-Bartlett*, 95 Wn. App. at 636-37.

Furthermore, public policy favors binding arbitration, “which is to provide a substitute not a prelude to litigation.” *Dahl v. Parquet and Colonial Hardwood Floor Co., Inc.*, 108 Wn. App. 403, 411, 30 P.3d 537 (2001). When ambiguity arises with respect to whether the parties have invoked the Act or the MARs, strong public policy favors binding arbitration pursuant to the Act. *Id.* at 412. “Courts must indulge every presumption “in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver,

---

<sup>4</sup> The parties did not stipulate to arbitration under the auspices of the MARs, pursuant to MAR 8.1. CP 145. Once the Statement of Arbitrability, pursuant to the parties’ contract, was filed by Ms. Horton-Rushton, Mr. Trent proceeded to arbitration.

delay, or a like defense to arbitrability.’’ *Adler v. Fred Lind Manor*, 153 Wn. 2d 331, 342, 103 P.3d 773 (2005) (emphasis added).

The Act does not contemplate non-binding arbitration as provided by the MARs. *Godfrey*, 142 Wn. 2d at 894. Accordingly, under the Act, there is no such thing as a trial de novo; rather, review in the trial court is limited to vacation of the award or modification or correction of the award.’’ *Id.* at 895-96; RCW 7.04A.230-.240.

As set forth in Section IV.A.2(a) above, the Presale Addendum to Mr. Trent’s and Ms. Horton-Rushton’s contract undisputedly contains an agreement to arbitrate. Therefore, pursuant to RCW 7.04A.030, because the parties contracted for arbitration, arbitration of this matter has been governed by the Act from the commencement of the litigation. Because the Act does not provide for a trial de novo, Ms. Horton-Rushton never had a right to a trial de novo and, therefore, the trial court did not err by granting Mr. Trent’s motion to strike Ms. Horton-Rushton’s request for trial de novo.

Contrary to the assertion of Ms. Horton-Rushton, the MARs were not invoked by merely initiating this lawsuit and filing a statement of arbitrability. The MARs do not apply to this matter because: (i) the parties had an agreement to arbitrate (MAR 1.1); (ii) the monetary amount in dispute was not less than \$50,000 (RCW 7.06.020; MAR 1.2; PLCMAR

1.2); (iii) the parties did not waive their right to damages in excess of \$50,000 (MAR 1.2); (iv) the parties did not enter into a stipulation to arbitrate under the MARs (MAR 8.1); and (v) the trial court did not order arbitration (*see Smith-Bartlett*, 95 Wn. App. at 639).

Furthermore, the Statement of Arbitrability filed by Ms. Horton-Rushton clearly provided that arbitration in this matter was pursuant to the parties' contract. CP 8. Moreover, should the Court find that Ms. Horton-Rushton can circumvent binding arbitration pursuant to a contract she entered by merely initiating this lawsuit and filing a statement of arbitrability, the Court would be setting a precedent that would enable any party subject to a contractual agreement to arbitrate to be able to escape their contractual obligation of binding arbitration.

Therefore, because Ms. Horton-Rushton and Mr. Trent entered into a contract that provided for the arbitration of disputes and the Act governed the parties' arbitration from the beginning, Ms. Horton-Rushton is not entitled to a trial de novo following the agreement to arbitrate their dispute. The court did not err in granting Mr. Trent's motion to strike Ms. Horton-Rushton's request for trial de novo.

***(b) The Trial Court Did Not Exceed Its Jurisdiction By Mixing And Matching The Arbitration Statutes.***

Because of Ms. Horton-Rushton's mistaken assumption that arbitration in this matter commenced pursuant to the MARs rather than the

Act, Ms. Horton-Rushton misconstrues the *Dahl* court's reference to *Smith-Bartlett* where the *Smith-Bartlett* court states 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 and adopt MAR piecemeal." *Dahl*, 108 Wn. App. at 410 (citing *Smith-Bartlett*, 95 Wn. App. at 637-39). The trial court in this matter did not unlawfully mix and match arbitration statutes like the trial court in *Smith-Bartlett*.

In *Smith-Bartlett*, the court ordered the parties to arbitrate the parties' dispute regarding visitation. *Smith-Bartlett*, 95 Wn. App. at 635. The court order further set forth the parties' were to use the procedures of the MARs and were to be legally bound by the decision. *Id.* In support of the trial court's order striking the appellant's request for a trial de novo, the respondent in *Smith-Bartlett* argued the agreement to arbitrate ordered binding, mandatory arbitration pursuant to the Act and the parties intended the MARs to be no more than a procedural guide to the conduct of the arbitration itself. *Id.* at 638.

The court disagreed with respondent's argument and held the following:

The order that the arbitration be binding and subject to RCW 7.04 is beyond the power of the court. The superior court cannot mix and match the arbitration rules from

different statutes, because its jurisdiction to mandate arbitration is statutory. *Banchero*, 63 Wash.2d at 249, 386 P.2d 625.

*Id.* at 639. The court further held, “only the parties, not the court, can subject themselves to the restrictive provisions of RCW 7.04.” *Id.* (citing MAR 8.1(a)).

Unlike the court in *Smith-Bartlett*, the trial court in this matter did not order Mr. Trent and Ms. Horton-Rushton to arbitrate their dispute, thus requiring arbitration to be governed by the MARs. Therefore, when the trial court found Ms. Horton-Rushton was not entitled to a trial de novo, the trial court did not exceed its jurisdiction. Rather, the trial court’s order was merely an acknowledgement that contractual arbitration in this matter was governed by the Act, not the MARs. The trial court in this matter did not unlawfully mix and match arbitration statutes like the trial court in *Smith-Bartlett*.

(c) ***The Procedures Set Forth By the MARs May Be Used In Arbitrations Governed By the Act.***

Ms. Horton-Rushton asserts because the parties used MAR procedures throughout the arbitration proceedings and Mr. Trent did not object to the procedures, Mr. Trent stipulated to have the MARs govern the arbitration. Opening Brief of Appellants, p. 11. However, there is no authority precluding the use of the MARs in arbitrations governed by the

Act; in contrast, the Act provides the arbitrator with the discretion to choose the manner of conduct of the arbitration proceedings.

The Act provides the “arbitrator may conduct the arbitration in such manner as the arbitrator considers appropriate so as to aid in the fair and expeditious disposition of the proceeding.” RCW 7.04A.150(1). The Act “neither prescribes the means by which parties must select their arbitrator(s) nor the procedures by which their arbitration hearing must be conducted.” *Dahl*, 108 Wn. App at 405-06. The parties to binding arbitration may agree to use the procedures of the American Arbitration Association, some other similar organization, or the MAR procedures. *Id.* at 411. By using the MAR procedures, the parties “do not automatically remove themselves from binding arbitration under chapter 7.04.” *Id.*

In addition to the Act expressly authorizing the Arbitrator to choose the manner of conduct of the arbitration, Ms. Horton-Rushton and Mr. Trent’s contract also provided the Arbitrator with discretion to choose the manner of conduct for the arbitration. More specifically, the arbitration provision in the parties’ contract provides as follows:

The arbitrator shall use the Construction Industry Arbitration Rules of the American Arbitration Association for the conduct of the arbitration, **or such other rules as the arbitrator in his or her sole discretion deems more appropriate.**

CP 156 (emphasis added).

Therefore, pursuant to both the Act and Ms. Horton-Rushton's and Mr. Trent's contract, as well as the parties' course of performance, the Arbitrator in this matter was provided with the discretion to choose to conduct the arbitration proceeding in accordance with MAR procedures. Because the Arbitrator is provided with the discretion to conduct the arbitration proceedings pursuant to MAR procedures, Mr. Trent had no need to object to the use of the MAR procedures.

Furthermore, by making the assertion that Mr. Trent's failure to object to the use of MAR procedures was a stipulation to have the arbitration be governed by the MARs, Ms. Horton-Rushton clearly fails to see the distinction between determining what statute governs the authority for the arbitration and what statute governs the procedures of the arbitration. As previously set forth, because Ms. Horton-Rushton's and Mr. Trent's contract provides disputes are to be resolved by arbitration, the contract automatically invokes the jurisdiction and authority of the Act, not the MARs. "Once the parties contractually agree to binding arbitration, neither of them can say the arbitration is not binding after all." *Dahl*, 108 Wn. App. at 411.

4. **The Doctrine of Judicial Estoppel Did Not Apply.**

Ms. Horton-Rushton asserts the court erred in granting Mr. Trent's motion to strike Ms. Horton-Rushton's request for trial de novo by failing

to apply the doctrine of judicial estoppel.<sup>5</sup> Opening Brief of Appellant, p. 13. The court did not abuse its discretion by failing to apply the doctrine of judicial estoppel because Mr. Trent never asserted a position inconsistent with an earlier position, but rather, Mr. Trent outwardly asserted his right to binding arbitration pursuant to the contract both prior to and after the arbitration proceedings.<sup>6</sup>

Mr. Trent agrees with Ms. Horton-Rushton's recitation of the elements of judicial estoppel: (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. Opening Brief of Appellant, p. 12 (citing *Columbia Credit Union Comm. V. Columbia Community Credit Union*, 134 Wn. App. 175, 186, 139 P.3d 386 (2006))<sup>7</sup>.

As previously discussed in Section IV.A.2(b), contrary to Ms. Horton-Rushton's assertions, Mr. Trent never stipulated to arbitration

---

<sup>5</sup> It should be noted, this argument is effectively the same as Ms. Horton-Rushton's argument of waiver.

<sup>6</sup> While the standard of review for whether the trial court erred in granting Mr. Trent's motion to strike Ms. Horton-Rushton's request for trial de novo is de novo, it should be noted that whether the trial court erred by not applying the doctrine of judicial estoppel is generally reviewed for abuse of discretion. *Skinner v. Holgate*, 141 Wn. App. 840, 847-48, 173 P.3d 300 (2007) (citing *Arkinson v. Ethan Allen, Inc.* 160 Wn. 2d 535, 538-539, 160 P.3d 13 (2007)).

<sup>7</sup> This citation is inaccurate and should be *Save Columbia CU Committee V. Columbia Community Credit Union*, 134 Wn. App. 175, 186, 139 P.3d 386 (2006).

pursuant to the MARs; rather, Mr. Trent outwardly demanded arbitration pursuant to their contract. Mr. Trent clearly demanded arbitration in the trial court by asserting the requirement of arbitration pursuant to their contract as both an affirmative defense and as a relief requested in Mr. Trent's answer to Ms. Horton-Rushton's complaint in this matter. CP 140. Additionally, Mr. Trent's counsel conveyed Mr. Trent's intent to arbitrate pursuant to Mr. Trent's and Ms. Horton-Rushton's contract through email communication to Ms. Horton-Rushton's counsel dated April 21, 2008, providing a draft statement of arbitrability stating that "arbitration is pursuant to the parties' contract and that neither party waives any claim in excess of \$50,000.00."<sup>8</sup> CP 192.

It also must be reiterated, that nothing in the Act precludes arbitration proceedings to follow MAR procedures. *Dahl*, 108 Wn. App at 405-06. Additionally, it is within the discretion of the arbitrator to follow MAR procedures. RCW 7.04A.150(1).

Therefore, because Mr. Trent outwardly asserted his right to binding arbitration pursuant to his and Ms. Horton-Rushton's contract from the outset of this litigation and because there is no authority

---

<sup>8</sup> There is no evidence or clarification in the record to show that prior to and during the course of the arbitration proceedings, Ms. Horton-Rushton's intent was to arbitrate this matter pursuant to the authority of the MARs. In fact, the record clearly shows Ms. Horton-Rushton's intent to arbitrate this matter pursuant to the parties' contract, which is governed by the Act.

prohibiting the application of the MARs to arbitration proceedings governed by the Act, Mr. Trent's opposition to Ms. Horton-Rushton's request for a trial de novo at the conclusion of arbitration is not inconsistent with his previous position. Mr. Trent has consistently asserted the position that arbitration of this matter is pursuant to the contract.

Ms. Horton-Rushton further asserts it would be inequitable to allow this matter to proceed under the Act because Ms. Horton-Rushton incurred costs for filing the initial arbitration demand through the AAA, and was then "forced" to file this lawsuit after Mr. Trent did not respond to Ms. Horton-Rushton's initial demand for arbitration through the AAA. However, Ms. Horton-Rushton fails to disclose to this court that the Arbitration Award compensates Ms. Horton-Rushton for her costs and fees in filing the initial arbitration demand. Mr. Trent stipulated to an offset of his attorney's fees award in the amount of one thousand four hundred and fifty dollars (\$1,450.00) in order to compensate Ms. Horton-Rushton for her costs and fees, and the Arbitration Award reflects this offset. CP 189-190.

Furthermore, Ms. Horton-Rushton was not forced to file this lawsuit. Ms. Horton-Rushton could have chosen an alternative option to

filing this lawsuit. The Act provides the following alternative course of action for Ms. Horton-Rushton:

On motion of a person showing an agreement to arbitrate and alleging another person's refusal to arbitrate pursuant to the agreement, the court shall order the parties to arbitrate if the refusing party does not appear or does not oppose the motion. If the refusing party opposes the motion, the court shall proceed summarily to decide the issue. Unless the court finds that there is no enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

RCW 7.04A.070(1). RCW 7.04A.070(1) is a statutory remedy Ms.

Horton-Rushton clearly overlooked prior to filing this lawsuit. If Ms.

Horton-Rushton would have followed the course of action provided for by the Act, Ms. Horton-Rushton would have mitigated some of the expenses she is currently asserting are unjust.

Therefore, because Mr. Trent has exhibited a consistent position with regard to the arbitration in this matter being pursuant to Mr. Trent's and Ms. Horton-Rushton's contract, because Ms. Horton-Rushton has been compensated for the demonstrated costs and fees she incurred in filing the initial arbitration demand, and because Ms. Horton-Rushton failed to mitigate her expenses of filing this lawsuit, it was not an abuse of discretion for the trial court to not apply the doctrine of judicial estoppel.

5. **Ms. Horton-Rushton Waived Her Right to a Jury Trial.**

Ms. Horton-Rushton asserts she never intended to waive her constitutional right to a jury trial when she executed the contract at issue in this matter. Opening Brief of Appellant, p. 24. The trial court did not err by denying Ms. Horton-Rushton's constitutional argument because it was untimely presented to the trial court. Furthermore, even if Ms. Horton-Rushton did timely present this constitutional argument to the trial court, her argument is without merit.

First, Washington courts have held CR 59 does not permit a plaintiff to "suddenly propose a new theory of the case." *JDFJ Corporation v. International Raceway, Inc.*, 97 Wn. App. 1, 7, 970 P.2d 343 (1999) (citing *Vaughn v. Vaughn*, 23 Wn. App. 527, 531, 597 P.2d 932 (1979) (holding, "the post-trial discovery of a new theory of recovery is not sufficient reason to either grant a new trial or reconsider a previously entered judgment pursuant under CR 59[.]")). Therefore, the trial court did not err by denying Mr. Horton-Rushton's argument regarding waiver because, as Ms. Horton-Rushton concedes, Ms. Horton-Rushton failed to bring this argument before the trial court during the December 12, 2008, hearing. CP 96.

Next, even if the trial court considered this new argument presented by Ms. Horton-Rushton, Ms. Horton-Rushton's argument lacks

merit because Ms. Horton-Rushton voluntarily submitted herself to the jurisdiction of the Act and waived her right to a trial by jury by executing the contract at issue in this matter and more specifically, by initialing the Presale Addendum that specifically sets forth “the parties agree that any construction-related dispute, claim, or controversy relating to this Agreement and arising during the course of construction shall be resolved by arbitration.” CP 185. Moreover, it is undisputed that Ms. Horton-Rushton filed the April 22, 2008 Statement of Arbitrability—which specifically acknowledged that this matter was to proceed to arbitration pursuant to the parties’ contract. CP 8.

It is well-settled by both statute and case law that the requirement to arbitrate is contractual in nature and agreements to arbitrate are valid, supported by public policy, and enforceable. RCW 7.04A.060; *Harvey v. University of Washington*, 118 Wn. App. 315, 318, 76 P.3d 276 (2003). Washington courts have held that by contractually agreeing to arbitrate a dispute, a party voluntarily submits itself to the jurisdiction of the Act and waives the right to a trial by jury. See *Godfrey*, 142 Wn. 2d at 898 (emphasis added).

Therefore, by initialing the Presale Addendum and executing the contract at issue in this matter, Ms. Horton-Rushton contractually agreed to arbitrate any dispute arising out of the contract. By contractually agreeing

to arbitrate, Ms. Horton-Rushton voluntarily submitted her self to the jurisdiction of the Act and waived her right to a trial by jury.

Based on the undisputed facts that the contract in this matter requires arbitration of Ms. Horton-Rushton's and Mr. Trent's disputes and Ms. Horton-Rushton filed a statement of arbitrability setting forth the arbitration in this matter was pursuant to the parties' contract, the Court correctly applied the law by finding the Act, not the MARs, governed the arbitration and Ms. Horton-Rushton is not entitled to a trial de novo.

**B. THE TRIAL COURT DID NOT ERR WHEN IT DENIED MS. HORTON-RUSHTON'S MOTION TO VACATE THE ARBITRATION AWARD.**

1. **Standard Of Review.**

Judicial review of an arbitration award is exceedingly limited. *Dahl*, 108 Wn. App. at 407. Judicial review of an arbitration award does not include review of the merits. *Kempf v. Puryear*, 87 Wn. App. 390, 393, 942 P.2d 375 (1997). Ms. Horton-Rushton has the burden to show that grounds for vacation of the Arbitration Award exist. *Expert Drywall, Inc. v. Ellis-Don Construction, Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258 (1997). The basis for the vacation must appear on the face of the award and Ms. Horton-Rushton must demonstrate prejudice from the alleged misconduct to merit relief. *Id.*

The trial court did not err by denying Ms. Horton-Rushton's motion to vacate the Arbitrator's Award because Ms. Horton-Rushton is unable to show the Arbitrator engaged in misconduct prejudicing her rights or the arbitrator exceeded his powers.

2. **The Arbitrator Did Not Misapply The Law.**

Ms. Horton-Rushton asserts the Arbitrator exceeded his powers by misapplying the law with respect to contract interpretation by finding the underlying contractual provision regarding landscaping and engineering requirements was vague and ambiguous because the provision did not set forth specific engineering requirements. Opening Brief of Appellant, p. 20.

In order to show the arbitrator exceeded his powers, the Arbitration Award on its face must show this misapplication of the law. *Expert Drywall, Inc. v. Ellis-Don Construction, Inc.*, 86 Wn. App. at 888. The October 31, 2008, letter ruling issued by the Arbitrator does not show the misapplication of the law; rather, the letter ruling reflects that the Arbitrator correctly applied the law with regard to contract interpretation and the "engineering requirement" provision to the facts, as presented by the testimony of the witnesses. CP 86-87.

Mr. Trent agrees with Ms. Horton-Rushton's recitation of the rule of law regarding contract interpretation and ambiguous terms - a contract

is ambiguous when the language is susceptible of more than one meaning.

*Millican of Washington, Inc. v. Wienker Carpet Service, Inc.*, 44 Wn. App. 409, 415-16, 722 P.2d 861 (1986).

Just as the Arbitrator stated in the October 31, 2008 letter ruling, the contractual provision at issue does not provide for specific grading and drainage engineering requirements. CP 86. More specifically, the contract provides as follows:

7. LANDSCAPING. Seller agrees to landscape the Property in a manner consistent with the appearance of the neighborhood and the new home. Buyer acknowledges that Seller will also landscape in order to meet engineering requirements such as grading and water drainage. Buyer acknowledges that matters of landscaping have been delegated to Seller's sole discretion.

CP 160 (emphasis added).

Absent the express explanation of the specific engineering requirements to be met, one could argue the engineering requirements are based on the building or development code requirements set forth by the permitting agency, such as the City of Lakewood in this matter. In the alternative, one could possibly argue, as Ms. Horton-Rushton has, the provision requires one to consult with a geotechnical engineer without regard to the requirements set forth by the permitting agency.

Clearly, the language set forth in the disputed contractual provision could have more than one meaning and, therefore, as correctly determined

by the Arbitrator, the contractual provision is vague and ambiguous.

Thus, the Arbitrator did not misapply the law.

Ms. Horton-Rushton argues because the City of Lakewood has no engineering requirements for grading and water drainage with respect to the property at issue, the Arbitrator's interpretation of the contract term renders the obligation meaningless and illusory. Opening Brief of Appellant, p. 22. It should be noted that if the City of Lakewood did have specific code provisions with respect to engineering for grading and water drainage, this contractual terms would not be illusory.<sup>9</sup> In other words, if the form Multiple Listing Service contract at issue in this matter included property within a jurisdiction that provided for specific engineering requirements, Ms. Horton-Rushton's argument, that the Arbitrator rendered the contractual provision illusory, would be unfounded.

As clearly stated by the Arbitrator in his October 31, 2008 letter ruling, the contractual provision at issue did not specify the type of engineering requirements that were to be met for grading and water drainage. Because the contractual provision could be interpreted to require a specific set of standards to be followed, such as the code requirements set forth by the local jurisdiction, or could be interpreted to

---

<sup>9</sup> The Arbitrator did hear testimony from a representative of Lakewood's Public Works Department on this very issue. CP 86.

require the consultation of an engineer, it is clear that the contractual provision may have more than one meaning. Therefore, consistent with the law regarding interpretation of contracts, the Arbitrator did not misapply the law in finding the contractual provision regarding engineering requirements was vague and ambiguous.

3. **The Arbitrator Did Not Exhibit Partiality And Did Not Engage In Prejudicial Misconduct.**

Ms. Horton Rushton asserts the trial court erred in denying her motion to vacate the Arbitrator's Award because the Arbitrator engaged in misconduct. Ms. Horton-Rushton's assertions are based on her own Declaration filed with the trial court, which provides she observed the Arbitrator favoring Mr. Trent during the arbitration hearing and alleges the Arbitrator engaged in *ex parte* contacts with Mr. Trent after the conclusion of the arbitration hearing. CP 91-92. Ms. Horton-Rushton's assertions are inaccurate and fail to show that her rights were prejudiced.

Ms. Horton-Rushton's assertion that the Arbitrator favored Mr. Trent during the arbitration hearing is an inaccurate observation that is likely influenced by the unfavorable decision she received. Throughout the course of the arbitration hearing, the Arbitrator objected to questioning by both Ms. Horton-Rushton's and Mr. Trent's counsel and did not allow

either parties' counsel to continue to press issues on which the Arbitrator had already ruled. CP 105-06.

However, even if the Arbitrator's interaction with Mr. Trent's counsel was seemingly more "amicable," this manner of interaction by the Arbitrator still does not rise to a level of misconduct prejudicing the right of Ms. Horton-Rushton. In *Kempf v. Puryear*, because the complaining party had the opportunity to participate in the arbitration proceedings, the Court refused to find the arbitrators engaged in misconduct despite the allegations that the arbitrators refused to hear certain evidence, refused cross-examination, did not swear witnesses, and had *ex parte* contacts with both parties. *Kempf v. Puryear*, 87 Wn. App. at 393.

In this matter, Ms. Horton-Rushton was given the opportunity to, and Ms. Horton-Ruston did, fully participate in the arbitration hearing. Ms. Horton-Rushton had the opportunity to be heard, the opportunity to present evidence, and the opportunity to provide witness testimony. Therefore, the Arbitrator's conduct during the arbitration hearing did not give rise to misconduct sufficient to vacate the Arbitration Award.

With regard to the alleged *ex parte* contacts, Ms. Horton-Rushton's recollection of the interaction between the Arbitrator and Mr. Trent after the conclusion of the arbitration hearing is mistaken, sensationalized, and,

similar to her observations during the arbitration hearing, likely influenced by the negative decision she received.

It is undisputed that the Arbitrator and Mr. Trent engaged in conversation after the conclusion of the arbitration hearing while in the lobby. CP 106. However, this conversation was merely an exchange of pleasantries and did not include communication substantive to the arbitration hearing. CP 106. Rather, the conversation included a discussion of the current weather and the direction of the Arbitrator's commute. CP 106. Ms. Horton-Rushton was present at all times during the course of the conversation between the Arbitrator and Mr. Trent, and Ms. Horton-Rushton was in the position to be able to listen to the conversation and even join in the conversation should she desire to do so. CP 106.

Because the conversation engaged in between the Arbitrator and Mr. Trent was not a private conversation and did not include substantive communication regarding the arbitration hearing, the conversation does not rise to a level of misconduct prejudicing Ms. Horton-Rushton's rights.

Therefore, because the Arbitrator did not misapply the law and did not engage in misconduct prejudicing Ms. Horton-Rushton, the trial court did not err in denying Ms. Horton-Rushton's motion to vacate the Arbitrator's Award.

C. **MR. TRENT IS ENTITLED TO FEES ON APPEAL PURSUANT TO RAP 18.1.**

Pursuant to RAP 18.1, Mr. Trent requests his attorneys' fees and costs incurred on appeal. As set forth in RAP 18.1(a), if applicable law grants to a party the right to recover attorney fees or expenses on review, the party must request the fees and expenses as provided in this rule.

Paragraph "q" of the parties' contract provides the following:

**Attorneys' Fees.** If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses.

CP 149. On January 23, 2009, the trial court entered an Order Confirming Arbitration Award and Awarding Attorneys' Fees and Costs to be Added to Judgment awarding Mr. Trent his attorneys' fees and costs for defending the arbitration award. CP 114-115. Ms. Horton-Rushton does not dispute the award of attorneys' fees and costs to Mr. Trent in this appeal.

Therefore, Mr. Trent has a contractual right to recover his attorneys' fees and costs of defense, not only at the trial court but on appeal before this Court. *Reeves v. McClain*, 56 Wn. App. 301, 311, 783 P.2d 606 (1989)(contractual provision for award of attorney fees at trial supports award of attorney fees on appeal); *Marine Enterprises, Inc. v. Security Pacific Trading Corp.*, 50 Wn. App. 768, 774, 750 P.2d 1290 (1988). Mr. Trent requests fees on appeal.

## V. CONCLUSION

The trial court did not err by granting Mr. Trent's motion to strike Ms. Horton-Rushton's request for a trial de novo. First, Mr. Trent did not waive his right to binding arbitration pursuant to the Uniform Arbitration Act because: (i) when parties contractually agree to arbitrate, the application of the Uniform Arbitration Act can not be waived; and (ii) Mr. Trent did not waive his right to arbitration by conduct because he consistently maintained the position that arbitration in this matter was pursuant to his and Ms. Horton-Rushton's contract. Second, the trial court did not unlawfully mix and match arbitration statutes, the trial court's decision properly acknowledged the Uniform Arbitration Act governed the arbitration in this matter and that procedures set forth by the Mandatory Arbitration Rules may be used within arbitrations governed by the Uniform Arbitration Act. Third, it was not an abuse of discretion by the trial court to not apply the doctrine of judicial estoppel because, again, Mr. Trent maintained the consistent position that the arbitration in this matter was to be pursuant to the contract. Finally, the trial court did not err by denying Ms. Horton-Rushton's constitutional argument that she never intended to waive her right to a jury trial by executing the contract at issue in this matter. Ms. Horton-Rushton did not timely submit this argument to the trial court and it is well-settled by both statute and case law that by

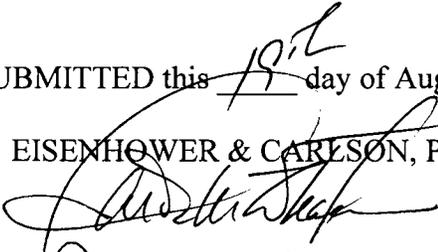
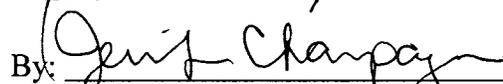
contractually agreeing to arbitrate a dispute, Ms. Horton-Rushton voluntarily submitted herself to the jurisdiction of the Uniform Arbitration Act and waived her right to a jury trial.

The trial court did not err when it denied Ms. Horton-Rushton's motion to vacate the Arbitration Award. As judicial review of an arbitration award is exceedingly limited, the trial court properly found the Arbitrator did not exceed his powers by finding the contractual "engineering requirement" to be a vague and ambiguous term. Additionally, the trial court properly found the Arbitrator did not engage in partiality or misconduct prejudicial to Ms. Horton-Rushton.

For the foregoing reasons, Mr. Trent respectfully requests this Court affirm the trial court's decision in this matter. Should the Court affirm the trial court's decisions, Mr. Trent requests an award of his attorneys' fees and costs on appeal pursuant to RAP 18.1.

RESPECTFULLY SUBMITTED this 19<sup>th</sup> day of August, 2009.

EISENHOWER & CARLSON, PLLC

By:   


Jason M. Whalen, WSBA # 22195  
Jennifer Champagne, WSBA # 38798  
Attorneys for Respondents

**CERTIFICATE OF SERVICE**

I am legal assistant at the law firm of Eisenhower & Carlson, PLLC, am over the age of 18, and otherwise competent to testify.

On the 19<sup>th</sup> day of August, 2009, I caused to be delivered via legal messenger, a true and correct copy of the foregoing Opening Brief of Respondents to counsel of record for the Appellant, at the following address:

Justin Bristol  
McFerran, Burns & Stovall, P.S.  
3906 South 74th Street  
Tacoma, WA 98409

  
Kimberly S. Ruger

COURT OF APPEALS  
DIVISION II  
09 AUG 19 PM 3:35  
STATE OF WASHINGTON  
BY  DEPUTY