

No. 40623-3-II
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

SHERRI LYNN TANSON, MONKEY BEAN, LLC, Appellants

vs.

DUGOUT BROTHERS, INC., BRAD CARPENTER AND LUCINDA
(CINDY) CARPENTER, Respondents

OPENING BRIEF OF APPELLANTS

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I. ASSIGNMENTS OF ERROR

1. The Trial Court erred in refusing to enforce the parties' agreed order to submit to trial by referee under Chapter 4.48 RCW, an alternative dispute resolution procedure.

II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. Whether the parties were bound by their agreed order to submit to trial by referee?

2. Whether the trial court had authority to decline to enforce the agreed order to submit to trial by referee?

III. STATEMENT OF THE CASE

This is an appeal from a decision of the trial court refusing to enforce an agreed order to submit to trial by referee under Chapter 4.48 RCW. Although beyond the scope of this appeal, a word of background might be helpful. In the underlying case, Plaintiff Sherri Lynn Tanson (“Tanson”) asserts claims against Defendants Dugout Brothers, Inc., Brad Carpenter and Lucinda (Cindy) Carpenter (“Carpenter”) primarily for violation of the Washington Franchise Investment Protection Act (Chapter 19.100 RCW) in connection with their sale of a Forza Coffee franchise to her. *See generally* RP (4/12/2010) 3-5. The case was scheduled to begin trial on Monday, April 12, 2010—its third scheduled start date. Report of Proceedings (RP) (4/12/2010) 3-9. After Judge Susan Serko (Judge Serko) sent the parties to the Pierce County Superior Court Administration Office to “trail” for an available judge and courtroom, the parties mutually agreed to waive their right to trial before Judge Serko and to, instead, submit to ADR in the form of a trial by referee pursuant to Chapter 4.48 RCW. Counsel for both parties jointly drafted and both parties and their respective counsel signed the agreed order and Judge Serko then signed it.

Within hours after signing the agreed order, Carpenter, through his same counsel, reneged on the agreement and Judge Serko subsequently refused to enforce the agreed order.

Judge Serko had previously set the case for trial to begin on Monday, April 12, 2010. On that day, as on multiple previous trial dates, Judge Serko was unavailable because of another case. RP (4/8/10) 8. Judge Serko sent the parties to the Court Administration Office to “trail,” a Pierce County procedure where the parties scheduled for trial wait several days for an available courtroom and judge before returning to the assigned judge for another trial setting. Id. Although Judge Serko was optimistic that a courtroom would open up, she noted that the parties “would get credit” for trailing and if a courtroom did not become available on Monday, April 12, 2010 she would schedule the case for yet another trial date in September or October, 2010. RP (4/8/10) 8-10.

Before proceeding to Administration to sign in for “trailing,” Mr. Misner, attorney for Carpenter, suggested the parties agree to a trial by referee pursuant to Revised Code of Washington (RCW) Chapter 4.48. Clerk’s Papers (CP) 34, 38. Mr. Misner explained that by agreeing to a trial by referee the parties could guarantee a certain trial date and select a retired judge with “experience in complex cases.” CP 38. Most

importantly, Mr. Misner stressed that, unlike arbitration, a trial by referee preserved the parties' right to appeal. *Id.*

After a brief discussion, the parties and their respective counsel and Mr. Robert Felker, a retired attorney and friend of Tanson went to the Pierce County Law library to research the governing statute and discuss their options. CP 38, 43. After consulting the statute, Mr. Bundy and Mr. Misner jointly drafted a document titled "Order Re Trial before Referee" on Mr. Bundy's computer. CP 43. Mr. Misner then took the document into another room to discuss it with his clients. CP 34, 43. After discussing it with Mr. Bundy, Tanson signed the agreement. CP 43; *see* CP 2. Ms. Tanson understood that the agreement was a binding contract. CP 34. Under the terms of the bargain, Tanson would receive a certain trial date before an experienced and respected judge in exchange for surrendering her place in line and for assuming the risk that a court might not honor the right to appeal provided by the statute. CP 34, 43; RP (4/16/2010) 6-7.

Mr. Misner had two lengthy consultations with his client in a separate area of the library, which took so long that Tanson became concerned that if they did not reach agreement shortly, she would not be able to register with the court administrator and would forfeit her place on

the “trailing” calendar. CP 34. Finally, beginning to lose patience, Mr. Felker went to the door of the room where Mr. Misner and his client were meeting and asked Mr. Misner if his client was going to sign the agreement or if Tanson should return to court administration and get in line for a courtroom and judge. CP 43. Mr. Misner replied that his client was going to sign and a few minutes later returned with the signed agreement. CP 34, 43. Counsel for both parties returned to Judge Serko’s courtroom and jointly presented the order. CP 34, 38, 43. The court corrected the date and signed the agreed order. CP 34, 38, 43; *see* CP 1-2.

A few hours later, Judge Serko’s clerk contacted the parties and explained that Judge Serko wanted certain clarifications relating to Chapter 4.48 RCW and requested a telephone conference. CP 38. During the off the record conference, Mr. Misner announced that the defendants wanted to “withdraw their consent” to the order. CP 39. Contradicting both his earlier explanation and the joint research regarding trial by referee, Mr. Misner claimed the defendants were withdrawing consent because they were concerned that a trial by referee would limit their right

to appeal.¹ Id. Mr. Bundy pointed out the statute and case law held that decisions of the referee were subject to full appellate review and that Tanson had given up her place on the trailing calendar based on the agreement. Id. After a brief discussion, Judge Serko announced she was “pulling the case back in” and would schedule a trial for February or March, 2011. Id. Mr. Bundy objected and Judge Serko invited him to appear in court three days later on April 16, 2010, to make a record regarding her decision. Id.

Mr. Bundy promptly filed a motion for an order enforcing agreement to submit to trial by referee. See CP 3-44. Judge Serko, without objection from Mr. Misner, elected to consider the motion on April 16, 2010.² See CP 45-47.

At the hearing, Mr. Bundy noted that usually a signed court order is “effective for better or worse” until one of the parties files a motion to

¹The preservation of full appellate rights is the defining feature of trial by referee under Chapter 4.48 RCW. See *Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087, 1091 (1992).

² Although Judge Serko’s scheduling prevented him from serving the motion in accordance with Pierce County Court Rules, Mr. Bundy did serve the motion on Mr. Misner and scheduled it for a week later in case the court or Mr. Misner wanted time to consider or respond. Mr. Misner did not object or request additional time to respond and Judge Serko verbally denied the motion. See RP (4/16/2010) 3-15.

reconsider or modify the order. RP (4/16/2010) 4. Judge Serko clarified that the order had been filed but she would not enforce it because she was not satisfied that the parties understood that agreeing to a trial by referee may affect their right to appeal. RP (4/16/2010) 5. She explained that she had been involved in a complex civil trial when the order was presented and that she signed the agreement without looking up the statute or inquiring if the parties understood the process to which they were agreeing. RP (4/16/2010) 4-7. She stressed that the “error” was hers and not the parties. RP (4/16/2010) 5.

Mr. Bundy objected to Judge Serko’s refusal to enforce the agreed order, emphasizing that both parties had ample time to discuss the agreement before signing it and stressing Tanson’s reliance on the agreement. RP (4/16/2010) 6-7, 9. Mr. Bundy explained, in detail, to Judge Serko that the Trial By Referee Statute is nearly identical to the language of the Arbitration statute and that under controlling law, the use of the word “shall” by the legislature made enforcement of the agreed order mandatory. RP (4/16/2010) 8-9. The trial court denied the motion and Tanson now appeals that denial. CP 49, 59-60.

IV. SUMMARY OF ARGUMENT

It is black letter law that valid contracts should be enforced. If the party seeking to enforce the contract establishes the required elements and the party seeking to avoid enforcement fails to demonstrate any reason why the court should declare the contract void, the trial court must enforce the contract even if the contract creates a harsh bargain for either party. Because the parties entered into a valid contract by signing the agreed order and Carpenter presented no grounds to support voiding the contract, the trial court erred in refusing to enforce the agreed order.

Additionally, the Trial by Referee statute requires the trial court to order the case to reference when both parties agree. The trial court erred by refusing to enforce the agreed order because the governing statute gave the court no such discretion.

By refusing to enforce a valid contract and order the case to trial by referee, the trial court exceeded its authority and acted against well established contract law. It also left Tanson with the detriment of the agreement while depriving her of the bargained for benefit. Tanson asks this court to correct these errors, reverse the trial court's order denying plaintiffs' motion to enforce order to submit to trial by referee, and order the case to trial by referee under the terms of the original agreed order.

V. ARGUMENT

A. THE TRIAL COURT ERRED IN REFUSING TO ENFORCE THE AGREEMENT TO SUBMIT TO TRIAL BY REFEREE BECAUSE THE AGREEMENT WAS A VALID CONTRACT

1. The Agreement Was a Valid Contract

Washington law requires that valid contracts be enforced. *Black v. National Merit Insurance Co.*, 154 Wn. App. 674, 689, 226 P.3d 175, 183 (2010). Although a court may decline to enforce a contract for unconscionability, fraud, or the violation of an important public policy, the foundation of contract law rests on the principle that “one is bound by the contract which he voluntarily and knowingly signs.” *National Bank of Washington v. Equity Investors*, 81 Wn.2d 866, 912-13, 506 P.2d 20, 36 (1973). Once the parties form a contract, “it is black letter law...that parties to a contract shall be bound by its terms.” *Alder v. Fred Lind Manor*, 153 Wn.2d 331, 344, 103 P.3d 773, 781 (2004). The party asserting the contract bears the burden of proving each essential element of the contract. *Bogle & Gates, PLLC v. Holly Mountain Resources*, 108 Wn. App. 557, 560, 32 P.3d 1002 (2001). The essential elements of a

contract are: legal subject matter and parties, consideration, mutuality of obligation, and clear terms and conditions. *Id* at 561, 32 P.3d 1002.

Here, all parties were competent to contract as they were all adult and neither insane nor intoxicated. The legality is established because the agreement is specifically authorized by statute. Chapter 4.48 RCW. The promise is described in the title of the document (agreement to submit to trial by referee) as well as in the body of the agreed order. *See* CP 1-2. The terms are explicitly stated within the agreed and the consideration is obvious. *Id*.

a. The Agreement Had Legal Subject Matter and Parties.

Because a valid contract requires a meeting of the minds, all parties to a contract must have the mental capacity to form a reasonable perception of the nature and terms of the contract. *Page v. Prudential Life Insurance Co. of America*, 12 Wn.2d 101,108, P.2d 527 (1942). In Washington, parties are presumed competent and the party seeking to void the contract must prove lack of capacity by clear cogent and convincing evidence. *Johnson v. Perry*, 20 Wn.App 696, 703, 582 P.2d 886 (Div. I 1978).

As Carpenter presented no evidence that he lacked mental capacity at the time he signed the agreement, this court may presume he acted with a reasonable understanding of the agreement. Similarly, Carpenter presented no evidence that the subject matter of the agreement was illegal. The agreement simply authorized the parties to pursue an alternative dispute resolution process explicitly prescribed by statute. Because the agreement was regarding legal subject matter and between competent parties, it is a valid contract and should be enforced.

b. The Agreement Was Supported by Adequate Consideration.

“Consideration is any act forbearance, creation, modification or destruction of a legal relationship, or return promise given in exchange.” *King v. Riverland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994). Unless the consideration is “so inadequate as to constitute constructive fraud,” a court will not relieve a party of even a bad bargain by refusing to enforce the contract. *Emberson v. Hartley*, 52 Wn.App 597, 601, 762 P.2d 364 (Div. II 1988). Washington courts have held that the surrender of a legal claim, right to trial or right to appeal is valid consideration. *National Bank of Washington v. Myers*, 75 Wn.2d 287, 298, 450 P.2d 477 (1969).

Here, both parties relinquished their right to pursue a judicial resolution of their case in exchange for the other party's promise to submit to trial by referee. Tanson gave up her right to secure a spot on the "trailing calendar" and Carpenter gave up his right to seek a continuance to prepare for trial. Both parties gained the benefit of a firm trial date before a known and trusted retired judge. Both parties assumed some risk of proceeding under an unfamiliar statutory scheme. Because of the significant risks involved, both parties reviewed the statute and their rights to appeal. CP 34, 38. Refusing to enforce the contract simply because Carpenter regrets the bargain would leave Tanson with the detriment (giving up her place in the "trailing" calendar) without the bargained for benefits of the agreement.

c. The Agreement had Mutuality of Obligation

Without other consideration, a valid contract requires mutuality of obligation, where all parties only exchange a promise for a promise. *Benchmark Land Co v. City of Battle Ground*, 94 Wn.App 537, 543-44, 972 P.2d 944, 948 (Div. II 1999) quoting *Lande v. South Kitsap School District*, 2 Wn. App. 468, 477, 469 P.2d 982, 988 (Div. II 1970) ("it is elementary contract law that unless both parties are bound by a mutual promise or consideration, neither is bound"). Absent other consideration,

a contract where one party agrees to perform without return performance from the other party is illusory and a court will not enforce it. See *Larkins v. St. Paul and Tacoma Lumber Co.*, 35 Wn.2d 711, 721-22, 214 P.2d 700, 705-06 (1950); *Omni Group, Inc. v. Seattle-First Nat. Bank*, 32 Wn. App 22, 24-25, 645 P.2d 724, 729 (Div. I 1982).

Under the terms of the agreed order, both Tanson and Carpenter agreed to waive their rights to a trial before Judge Serko and instead submit to a trial by referee. In this case, not only are the parties' contractual obligations mutual but the terms for their obligation (submitting to a trial by referee) are identical. Even if the agreed order were not supported by other consideration including Tanson's surrender of her right to possible trial in April 2010 and Carpenter's receipt of additional time to prepare for trial, the parties would still be bound and the agreed order would still be supported by the mutual promises given by Tanson and Carpenter, namely to submit to a trial by referee.

d. The Agreement Contained Clear and Definite Terms

Finally, a valid contract requires clear and definite terms. *Andrus v. State Dept. of Transp.*, 128 Wn.App 895, 898-99, 117 P.3d 1152, 1154 (Div. II 2006). A court will find that the terms are sufficiently clear if they provide a basis for determining breach and for giving appropriate remedy.

Keystone Land and Development Co. v. Xerox, Inc., 152 Wn.2d 171, 178, 94 P.3d 945, 949 (2004). Washington courts do not lightly void contracts for indefinite terms and look to the parties' intent to contract. *Platts v. Army*, 46 Wn.2d 122, 126, 278 P2d 657, 660 (1955).

Challenges to contracts for indefinite terms tend to arise in three situations: 1) where the parties have agreed to a term but left it vague; 2) where the parties are silent as to a material term; or 3) where the parties have agreed to agree later as to a material term. Calamari & Perillo, Contracts § 2-9 at 51 to 65 (5th ed. 2003). The final type of challenge is different from agreements where the parties agree to use reasonable efforts to reach agreement (such as an arbitration agreement in which the parties agree on mutually select an arbitrator). *Id.* at 61-63. In those circumstances, the contract imposes a duty to negotiate in good faith as to the term and failure to do so may be breach. *Id.*

Here, the agreement stipulated all material terms. It identified the governing statute, named the referee, described a selection process if an alternative referee was needed, and explicitly reserved the right to appeal promised under the trial by reference statute. *See* CP 1-2

Where the parties have formed a valid contract, the court should not substitute its judgment for the parties but rather should enforce the

contract as the parties made it. *Rand, McNally Co. v. Hartfanft*, 32 Wn. 378, 383, 73 P. 401 (1903). In this case, the contracting parties were competent business people represented by experienced counsel who chose to submit to alternative dispute resolution, a legal process prescribed by statute. In exchange for their agreement, both parties gave up their right to a bench trial and recorded their agreement in the agreed order which described the process and parties for the trial before referee. Because the agreement was between competent parties, involved legal subject matter, required performance from all parties and explicitly stated all material terms, this court should hold the parties to their bargain and enforce the terms of the valid contract.

2. The Agreement had No Defects That Might Make it Unenforceable.

The only exceptions that the Washington courts recognize for not enforcing contracts are unconscionability, fraud in the inducement or the violation of an important policy. *See, e.g., Alder, supra, Rutter v. BX of Tri-Cities, Inc*, 60 Wn. App 743, 747, 806 P.2d 1266 (1991). None of these are at issue here. In fact, Carpenters did not even make such claims in the trial court.

a. *The Agreement Was Not Unconscionable*

A contract may be either procedurally or substantively unconscionable. *Alder, supra* 153 Wn.2d at 348. The key inquiry is whether the party claiming unconscionability lacked meaningful choice in agreeing to the contract or its terms. *Torgerson v. One Lincoln Tower, LLC.*, 166 Wn.2d 510, 519, 210 P.2d 318 (2009).

Procedural unconscionability occurs when a contract is presented in such a way as to deprive one party of the opportunity to evaluate and agree to its terms. *Id.*, See *Mckee v AT & T Corp.*, 164 Wn.2d 372, 402, 191 P.3d 845 (2008) (service contract was procedurally unconscionable where contract was not provided until 10 days after service began and where continued use of service after changes to contract was acceptance of new terms regardless of consumer's actual knowledge of changes). Here, Carpenter was an experienced and sophisticated businessman who entered the agreement with the advice of counsel. CP 38. Carpenter's attorney, Misner also signed the agreement. CP 2. As the *National Bank* court said, "the [appellant] had ample opportunity to examine the contract in as great a detail as he cared, and [if] he failed to do so for his own personal reasons, he cannot be heard to deny that he executed the contract, and that he is bound by it." *National Bank, supra* 81 Wn.2d 866 at 912-13. In this

case, Carpenter's counsel researched, drafted and reviewed the contract with his client. CP 38. Carpenter had a lengthy consultation with counsel before signing the 297 word agreement . CP 8, 34. Because all parties had ample time to review the document and consult with counsel, the agreed order is not procedurally unconscionable.

Substantive unconscionability consists of one party agreeing to manifestly unfair terms. Courts voiding a contract for unconscionability may describe the terms as "shocking to the conscience" "monstrously harsh" or "exceedingly callous." *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1985); Mckee, *supra* at 398-399; *See also M.A. Mortenson Co. v Timberline Software Corp.*, 140 Wn.2d 568, 587, 998 P.2d 305 (2000) (quoting *Brower v. Gateway 2000 Inc.*, 246 AD.2d 246, 254, 676 NYS. 2d 569 (1998)) (mandatory arbitration clause requiring use of French arbitration company, payment of non-refundable advance, travel fees, and payment of losing party's legal fees substantively unconscionable), and *Johnson v. Cash Store*, 116 Wn. App. 833, 326, 68 P.3d 1099 (2003) (Pay day loan agreement setting interest rate at 608% substantively unconscionable). Here, both parties agreed to participate in a trial by referee, a form of alternative dispute resolution with a full right of appeal. Because the terms of the contract offered a substantial and identical benefit to both parties, the agreed order is not substantively

unconscionable. In addition, it was a contract specifically authorized by statute. RCW 4.48.010.

b. The Agreement was not Fraudulently Induced.

A court may also void a contract for fraud in the inducement, which occurs when one party entices the other party to agree to the contract by concealing or misrepresenting key facts. *Skagit State Bank v. Rasmussen*, 109 Wn.2d 377, 384, 745 P.2d 37 (1987), citing Restatement (Second) of Contracts § 164(1) (1981); *See Kruger v. Readi Brew Corp.*, 9 Wn. App. 322, 326, 511 P.2d 1485 (Div. I 1973) (Buyer could void contract for fraud where beverage distributor misrepresented relationship with convenience store chain to induce contract); *Algee v. Hillman Inv. Co.*, 12 Wn.2d 672, 675, 123 P.2d 332 (1942) (Buyer entitled to void contract for land sale where seller exaggerated land's size). In this case, not only is there not a suggestion of fraud but the idea of trial by referee was first presented by Mr. Misner, counsel for Carpenter. CP 38.

c. The Agreement Does not Violate an Important Public Policy

Finally, a court may void an otherwise valid contract because it violates an important public policy. *Hammock v. Hammock*, 144 Wn. App. 805, 808, 60 P.3d 63 (Div. II 2003) (Property division agreement that

required parent to waive right to child support void as against public policy); *See also Fallahzadeh v. Ghorbanian*, 119 Wn.App 596, 598, 82 P.2d 684 (Div. I 2004) (lease agreement between landlord and dental practice that created an illegal partnership between professional and non professional void as against public policy). In this case, not only does the agreement to submit to trial by referee not violate an important public policy, it is specifically authorized by statute (RCW 4.48.010) and it affirms Washington's strong public policy of resolving legal disputes through alternative dispute resolution. *See Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995).

Washington law favors the use of alternative dispute resolution (ADR) when the parties agree to it. *Boyd, supra* 127 Wn.2d at 262 (Noting that "encouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our evermore litigious society"). *See, e.g., Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 765, 934 P.2d 731 (1997) (recognizing a strong public policy in Washington favoring arbitration of disputes); *Clearwater v. Skyline Constr. Co.*, 67 Wn. App. 305, 314, 835 P.2d 257 (1992), *review denied*, 121 Wn.2d 1005, 848 P.2d 1263 (1993) (same). *See also Munsey v. Walla Walla College*, 80 Wn. App. 92, 94-95, 906 P.2d 988 (1995) (recognizing the strong public policy favoring arbitration of

disputes and noting arbitration eases court congestion, provides an expeditious method of resolving disputes and is generally less expensive than litigation); *accord King County v. Boeing Co.*, 18 Wn. App. 595, 602-03, 570 P.2d 713 (1977) (and cases cited therein). In an en banc ruling, the Washington Supreme Court noted that “the very purpose of arbitration is to avoid the courts, insofar as the resolution of the dispute is concerned. The object is to avoid what some feel to be the formalities, the delay, the expense and the vexation of ordinary litigation. Immediate settlement of controversies by an arbitrator removes the necessity of waiting out the crowded court docket.” *Barnett v. Hicks*, 119 Wn.2d 151, 160, 829 P.2d 1087 (1992). The form of ADR prescribed in Chapter 4.48 RCW (trial by referee) may be different but the underlying principles are the same. By enforcing the agreement, this court would allow the parties to settle their dispute efficiently, in front of a judge with the time and experience to devote to a complex trial and would avoid the risk of having their trial further delayed. Further, it would contribute to a reduction in trial court congestion and reduce the cost to taxpayers—in a trial by referee, the parties pay the referee. RCW 4.48.100(3).

This is not a case of unconscionability, fraud, or a violation of public policy. Carpenters did not even allege such bases in the trial court proceeding. This is merely a case where the appellants had second

thoughts about the agreement they had signed a few hours earlier. By requesting leave of the court to withdraw their consent, Carpenters sought and effectively received court approval to breach their contract. If Carpenters entered into the agreement in bad faith, they should be held to their bargain. If they entered into the agreement in good faith, then they received the benefit of their bargain. Tanson fully performed her obligation by removing herself from the trailing calendar but the Carpenters have not performed their obligations under the agreement.

Where the parties enter into a valid contract, a court “does not have the power to make a new agreement...or to relieve [even] a hard or oppressive bargain.” *McKelvie v. Hackney*, 58 Wn.2d 23, 30, 360 P.2d 746 (1961). The bargain in this case, submitting to trial by referee was neither hard nor oppressive, but even if it had been the trial court was without power to grant relief. It was a valid contract that in fairness and justice, must be enforced.

B. THE TRIAL COURT LACKED AUTHORITY TO REFUSE TO ENFORCE THE AGREED ORDER

The statute authorizing parties to agree to trial by referee provides, in relevant part, as follows:

The court **shall** order all or any of the issues in a civil

action, whether fact or law, or both, referred to a referee upon the written consent of the parties which is filed with the clerk.

RCW 4.48.010 (emphasis added).

An appellate court reviews statutory construction de novo. *State v. Wentz*, 149 Wn.2d 342, 346, 68 P.3d 282 (2003). The court's primary duty in interpreting statutes is to determine and implement the legislature's intent. *State v. J.P.*, 148 Wn.2d 444, 450, 69 P.3d 218 (2003). If the statute's meaning is clear, the court may look only to the statutory language to determine legislative intent. *Wentz*, supra, 149 W.2d at 346. The court must give words in a statute their plain and ordinary meaning unless a contrary intent is evidenced in the statute. *In re Estate of Little*, 106 Wn2d 269, 283, 721 P.2d 950 (1986). Washington courts have repeatedly held that the word "shall" is presumptively imperative and creates a duty. *Crown Cascade, Inc v. O'Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983), *State v. Q.D.*, 102 Wn.2d 19, 29, 685 P.2d 557 (1984) (citing *State v. Bryan*, 93 Wn.2d 177, 183, 606 P.2d 1228 (1980), *Erection Co. v. Department of Labor and Industries*, 121 Wn.2d 513, 518, 852 P.2d 288 (1993). Absent contrary legislative intent, the word "shall" in a statute imposes a mandatory requirement. *Bryan*, supra, 93 Wn.2d at 183, 606 P.2d 1228 (quoting *State Liquor Control Bd. v. State Personnel Bd.*, 88

Wn.2d 368, 377, 561 P.2d 195 (1977). Where the legislature uses both “shall” and “may” within the same statute, Washington courts hold that the legislature intended the words to have two different meanings: “shall” being mandatory and “may” being discretionary. *Erection Co, supra.* at 518; *see also State v. Bartholomew*, 104 Wn.2d 844, 848, 710 P.2d 196 (1985).

Here, the statute clearly mandated the trial court to order the case to trial by referee, it reads “The court *shall* order any or all of the issues in a civil action referred to a referee upon the written consent of the parties.” RCW 4.48.010 (emphasis added).³ Meanwhile, in the next section of the statute, the legislature used the permissive word, “may,” when authorizing (but not mandating) the trial court to order trial by referee of specific issues of fact at the request of one party (without the other’s consent). RCW 4.48.020. The use of “shall” and “may” in sequential sections of the statute indicates a clear legislative intent the former would mandate action from the trial court while the latter would permit a discretionary action. Because both parties signed a contract and agreed order to submit to trial by referee, the trial court in this case lacked statutory authority to do

³ A complete copy of Chapter 4.48 RCW is included as Appendix A to this brief.

anything other than to order the case to trial by referee as agreed. Having entered the agreed order, the court was bound to enforce it.

VI. CONCLUSION

The valid agreed order to submit to trial by referee should be enforced. The parties agreed to submit to trial by referee after careful research and consultation with their attorneys. Not only was their agreement in accordance with statute but it reflects Washington public policy which favors the quick, affordable, and just resolution of litigation through ADR.

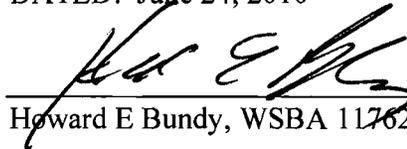
If this court upheld the trial court's ruling and refused to enforce the contract, it would deny Tanson the benefit of her agreement and condone Carpenter's breach. Tanson would be left with the detriment, a missed opportunity for a speedy trial, but would not receive the promised benefit of her agreement.

Conversely, by enforcing the agreed order, this court would be providing Tanson the benefit she bargained for, namely a certain trial date before an experienced referee. Enforcing the contract would impose no additional detriment on the Carpenters, as they would be obligated to do no more than they agreed to when they signed the agreed order. Finally, by reversing the trial court's ruling and enforcing the order, this court

would reaffirm the principle that valid contracts will be enforced and affirm the public policy of encouraging ADR when the parties have agreed to it—as mandated by R.C.W 4.48.010.

Tanson respectfully asks this Court to reverse the decision of the trial court that refused to enforce the agreed order (CP 59-60) and to order the parties to proceed to trial by referee consistent with the agreed order and Chapter 4.48 R.C.W.

DATED: June 24, 2010



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APPENDIX

Appendix A

Chapter 4.48 RCW (Trial Before Referee)

Chapter 4.48 RCW**Trial before referee****RCW Sections**

- 4.48.010 Reference by consent -- Right to jury trial -- Referee may not preside -- Parties' written consent constitutes waiver of right.
- 4.48.020 Reference without consent.
- 4.48.030 To whom reference may be ordered.
- 4.48.040 Qualifications of referees.
- 4.48.050 Challenges to referees.
- 4.48.060 Trial procedure -- Powers of referee -- Referee to provide clerical personnel.
- 4.48.070 Referee's report -- Contents -- Evidence, filing of, frivolous.
- 4.48.080 Proceedings on filing of report.
- 4.48.090 Judgment on referee's report.
- 4.48.100 Compensation of referee -- Trial expense -- Obligation of parties, when.
- 4.48.110 Referee's proposed report -- Copies -- Objections, etc. -- Request for hearing -- Final report -- Additional items to be filed -- Exception -- Copies.
- 4.48.120 Termination of referral -- Judgment -- Review of referee's decision.
- 4.48.130 Notice of trial before referee.

4.48.010**Reference by consent — Right to jury trial — Referee may not preside — Parties' written consent constitutes waiver of right.**

The court shall order all or any of the issues in a civil action, whether of fact or law, or both, referred to a referee upon the written consent of the parties which is filed with the clerk. Any party shall have the right in an action at law, upon an issue of fact, to demand a trial by jury. No referee appointed under this chapter may preside over a jury trial. The written consent of the parties constitutes a waiver of the right of trial by jury by any party having the right.

[1984 c 258 § 512; Code 1881 § 248; 1854 p 168 § 206; RRS § 369. Formerly RCW 4.44.100, part, and 4.48.010.]

Notes:

Rules of court: Cf. CR 38(a).

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.020

Reference without consent.

Where the parties do not consent, the court may upon the application of either party, direct a reference in all cases formerly cognizable in chancery in which reference might be made:

(1) When the trial of an issue of fact shall require the examination of a long account on either side, in which case the referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein; or,

(2) When the taking of an account shall be necessary for the information of the court, before judgment upon an issue of law, or for carrying a judgment or order into effect; or,

(3) When a question of fact other than upon the pleadings shall arise, upon motion or otherwise, in any stage of the action; or,

(4) When it is necessary for the information of the court in a special proceeding.

[1984 c 258 § 513; Code 1881 § 249; 1877 p 51 § 253; 1869 p 61 § 253; 1854 p 168 § 207; RRS § 370.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.030

To whom reference may be ordered.

A reference may be ordered to any person or persons not exceeding three, agreed upon by the parties. If the reference is not agreed to by the parties, the court may appoint one or more persons, not exceeding three.

[1984 c 258 § 514; Code 1881 § 250; 1877 p 51 § 254; 1869 p 61 § 254; 1854 p 168 § 208; RRS § 371.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.040

Qualifications of referees.

A person appointed by the court as a referee or who serves as a referee with the consent of the parties shall be:

(1) Qualified as a juror as provided by statute.

(2) Competent as juror between the parties.

(3) A duly admitted and practicing attorney.

[1984 c 258 § 515; Code 1881 § 251; 1877 p 51 § 255; 1859 p 61 § 255; 1854 p 169 § 209; RRS § 372.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.050

Challenges to referees.

If a referee is appointed by the court, each party shall have the same right to challenge the appointment. Challenges shall be made and determined in the same manner and with like effect as in the formation of juries, except that neither party shall be entitled to a peremptory challenge.

[1984 c 258 § 516; Code 1881 § 252; 1877 p 52 § 256; 1869 p 61 § 256; RRS § 373.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.060

Trial procedure — Powers of referee — Referee to provide clerical personnel.

(1) Subject to the limitations and directions prescribed in the order of reference, the trial conducted by a referee shall be conducted in the same manner as a trial by the court. Unless waived in whole or in part, the referee shall apply the rules of pleading, practice, procedure, and evidence used in the superior courts of this state. The referee shall have the same power to grant adjournments, administer oaths, preserve order, punish all violations thereof upon such trial, compel the attendance of witnesses, and to punish them for nonattendance or refusal to be sworn or testify, as is possessed by the court.

(2) A referee appointed under RCW 4.48.010 shall provide clerical personnel necessary for the conduct of the proceeding, including a court reporter.

[1984 c 258 § 517; Code 1881 § 253; 1877 p 52 § 257; 1869 p 62 § 257; 1854 p 169 § 210; RRS § 374.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.070

Referee's report — Contents — Evidence, filing of, frivolous.

The report of a referee appointed by the court under RCW 4.48.020 shall state the facts found, and when the order of reference includes an issue of law, it shall state the conclusions of law separately from the facts. The referee shall file with the report the evidence received upon the trial. If evidence offered by either party shall not be admitted on the trial and the party offering the same excepts to the decision rejecting such evidence at the time, the exceptions shall be noted by the referees and they shall take and receive such testimony and file it with the report. Whatever judgment the court may give upon the report, it shall, when it appears that such evidence was frivolous and inadmissible, require the party at whose instance it was taken and reported, to pay all costs and disbursements thereby incurred.

[1984 c 258 § 518; Code 1881 § 254; 1877 p 52 § 258; 1869 p 62 § 258; 1854 p 169 § 210; RRS § 375.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.080

Proceedings on filing of report.

The report of a referee appointed by the court under RCW 4.48.020 shall be filed with the clerk within twenty days after the trial concludes. Either party may, within such time as may be prescribed by the rules of court, or by special order, move to set the same aside, or for judgment thereon, or such order or proceeding as the nature of the case may require.

[1984 c 258 § 519; 1957 c 9 § 3; Code 1881 § 255; 1877 p 52 § 259; 1869 p 62 § 259; RRS § 376.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.090

Judgment on referee's report.

The court may affirm or set aside the report of a referee appointed under RCW 4.48.020 either in whole or in part. If it affirms the report it shall give judgment accordingly. If the report be set aside, either in whole or in part, the court may make another order of reference as to all or so much of the report as is set aside, to the original referees or others, or it may find the facts and determine the law itself and give judgment accordingly. Upon a motion to set aside a report, the conclusions thereof shall be deemed and considered as the verdict of the jury.

[1984 c 258 § 520; Code 1881 § 256; 1877 p 52 § 260; 1869 p 62 § 260; RRS § 377.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c

(d) The final written report containing the findings of fact and conclusions of law by the referee and the judgment of the referee.

(4) The presiding judge of the superior court may allow the referee to file the final written report under subsection (3) of this section without any of the items listed in subsection (3) (a) through (c) of this section. However, the presiding judge shall require the referee to file those items if a timely notice of appeal of the judgment is filed.

(5) When the referee files the written report under subsection (3) of this section, the referee shall also mail to each party a copy of the report.

[1984 c 258 § 521.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.120

Termination of referral — Judgment — Review of referee's decision.

(1) Upon receipt by the clerk of the court of the final written report filed under RCW 4.48.110, the referral of the action shall terminate and the presiding judge of the superior court shall order the judgment contained in the report entered as the judgment of the court in the action. Subsequent motions and other post trial proceedings in the action may be conducted and disposed of by the referee upon order of the presiding judge, in the discretion of the presiding judge, or may otherwise be assigned by the presiding judge.

(2) The decision of a referee entered as provided in this section may be reviewed in the same manner as if the decision was made by the court.

[1984 c 258 § 522.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

4.48.130

Notice of trial before referee.

(1) If an action is to be tried by a referee appointed under RCW 4.48.010, at least five days before the date set for the trial the referee shall advise the clerk of the court of the time and place set for the trial. The clerk shall post in a conspicuous place in the courthouse a notice that includes the names of the parties to the action, the time and place set for the trial, the name of the referee, and a statement that the proceeding is being held before a referee agreed to by the parties under chapter 4.48 RCW.

(2) A person interested in attending a trial before a referee appointed under RCW 4.48.010 [4.48.010] is

entitled to do so as in a trial of a civil action in superior court. Upon request by any person, the referee shall give the person notice of the time and place set for the trial.

[1984 c 258 § 523.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

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STATE OF WASHINGTON
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No. 40623-3-II
COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON

SHERRI LYNN TANSON, MONKEY BEAN, LLC, Appellants

vs.

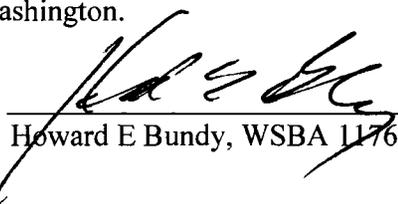
DUGOUT BROTHERS, INC., BRAD CARPENTER AND LUCINDA
(CINDY) CARPENTER, Respondents

Declaration of Service
OPENING BRIEF OF APPELLANTS

The undersigned declares under penalty of perjury under the laws of the State of Washington that, on the below date, I sent by delivery (ABC Legal Services) a true copy of the Opening Brief of Appellants together with a true copy of the Report of Proceedings and of the Clerk's Papers to:

Michael Misner
3007 Judson St
Gig Harbor WA 98335-1219

Dated June 24, 2010 at Kenmore, Washington.


Howard E Bundy, WSBA 11762