

FILED

JAN 02 2013

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 306208 and 311775

WHITMAN COUNTY CAUSE NO. 10-2-00293-4

IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION III

GARRETT RANCHES, LLC
A Washington Limited Liability Company
Respondent

v.

LARRY HONN FAMILY, LLC
A Washington Limited Liability Company
Appellant

RESPONDENT'S BRIEF

Will Ferguson, WSBA 40978
Of Attorneys for Respondent
LIBEY & ENSLEY, PLLC

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III. STATEMENT OF THE CASE

On September 14, 2010, Larry Honn Family, LLC (hereinafter “Appellant Honn”) and Garrett Ranches, LLC (hereinafter “Garrett Ranches”) entered into a Cash Rent Farm Lease with Option to Purchase (hereinafter “Lease” or “Option to Purchase”). CP 278-84. Incorporated by reference in the Lease was a sample contract of sale. CP 285-87. A dispute then arose between Appellant Honn and Garrett Ranches (collectively “Parties”) and the Parties proceeded to arbitration in December, 2010. CP 1-5.

The arbitrators (hereinafter the “Arbitration Panel”) handed down an Arbitration Award (hereinafter the “2010 Arbitration Award”) on December 28, 2010. CP 1-5. The Arbitration Panel found that the Lease was enforceable, the Option to Purchase was enforceable, and that the Parties were to mutually agree upon terms of the contract of sale by January 1, 2012. CP 1-5. On January 28, 2011, the Whitman County Superior Court (hereinafter “Superior Court”) through the Honorable David Frazier confirmed the 2010 Arbitration Award in an Order Confirming Arbitration Award (hereinafter “Order Confirming 2010 Arbitration Award”). CP 6-7. Neither party appealed the Order Confirming 2010 Arbitration Award.

The Parties did not reach an agreement on the terms of the contract

of sale after the 2010 Arbitration Award, so on November 7, 2011, Garrett Ranches filed a Notice of Arbitration Hearing, setting arbitration for December 9, 2011. CP 290-91. On November 23, 2011, Garrett Ranches filed an Amended Notice of Arbitration Hearing, setting the arbitration for December 22, 2011. CP 295-96.

On November 28, 2011, Appellant Honn sent a Notice of Termination of Cash Rent Farm Lease with Option to Purchase to Garrett Ranches (hereinafter the "November 28 Notice of Termination"). CP 26-27. The November 28 Notice of Termination set forth seven "material breaches" of the Lease. CP 26-27. The so-called "material breaches" included wind damage to an irrigation wheel line and destruction of a telephone box. CP 26-27.

On December 6, 2011, Garrett Ranches filed an Amended Notice of Arbitration, which notified all Parties that one of the issues to be decided by the Arbitration Panel was whether Garrett Ranches violated the terms of the Lease. CP 297-98. Garrett Ranches disputed whether it committed any violations of the Lease. CP 45, 48, 52-53. Further dispute arose between the Parties and Garrett Ranches filed a Second Amended Notice of Arbitration Hearing, adding the issues of Appellant Honn's contempt of the 2010 Arbitration Award, water rights, and Garrett Ranches' request for a depreciation schedule. CP 299-300. On December

15, 2011, Appellant Honn mailed an Amended Notice of Termination of Cash Rent Farm Lease with Option to Purchase (hereinafter the “December 15 Amended Notice of Termination”). CP 31. The December 15 Amended Notice of Termination restated the seven alleged “material breaches”, but stated that termination was effective on the date of the notice. CP 31. Appellant Honn mailed the December 15 Amended Notice of Termination just seven days before arbitration was set to take place. CP 23, 33.

On December 21, 2011, just one day before arbitration was scheduled to take place, Appellant Honn filed its Motion to Stay Arbitration and Motion for Order to Shorten Time (hereinafter “Motion to Stay” and “Motion to Shorten Time”, respectively). CP 61-63, 64-66. The Appellant Honn’s Motion to Shorten Time was denied on December 22, 2011, and the Parties proceeded to Arbitration on December 22, 2011. CP 190, 319-20.

On December 28, 2011, the Arbitration Panel notified counsel that it would postpone its decision until Appellant Honn was able to bring a timely motion to stay arbitration. CP 319-20. The Lease required the Arbitration Panel to decide the issues presented to them within 30 days of the Arbitration Panel’s appointment. CP 283.

Pursuant to the Arbitration Panel’s request that Appellant Honn’s

arguments be heard, on December 30, 2011, Garrett Ranches filed a Motion to Compel Arbitration and for Award of Attorney Fees and Costs (hereinafter “Motion to Compel”) and Notice of Hearing, setting the hearing for January 13, 2012. CP 141-69, 303-04. On January 6, 2012, Appellant Honn re-noted its Motion to Stay Arbitration. CP 305-06, 61-63. On January 11, 2012, Appellant Honn filed its response to Garrett Ranches’ Motion to Compel Arbitration. CP 170-72.

On January 13, 2012, the Superior Court granted Garrett Ranches Motion to Compel Arbitration but denied the Motion insofar as the award of attorney fees, which the Superior Court held was a matter for the Arbitration Panel. CP 188-89. The Superior Court denied Appellant Honn’s Motion to Stay. CP 188-89

On January 19, 2012, the Arbitration Panel issued an Arbitration Award (hereinafter 2012 Arbitration Award). CP 190-204. On February 3, 2012 the Superior Court signed the Order on Motion to Compel and Garrett Ranches filed its Motion for Order Confirming Arbitration Award (hereinafter “Motion to Confirm”). CP 188-89, 205-08. On February 3, 2012, Appellant Honn filed its first “Notice of Appeal Re: Order on [Motion to Compel].” CP 230. That same day, Appellant Honn also filed a “Motion for Stay of [the Order on Motion to Compel]”. CP 309-313. On February 8, 2012, Appellant Honn filed its “Corrected Notice of Appeal

Re: Order on Motion to Stay Arbitration, Motion to Compel Arbitration, and For Attorney Fees.” CP 236-238.

On February 10, 2012, the Superior Court entered an Order Confirming Arbitration Award, which confirmed the 2012 Arbitration Award. CP 241-42. Appellant Honn filed no objection to the confirmation of the 2012 Arbitration Award. On February 15, 2012, the Superior Court entered an “Order: Granting Stay Pending Appeal and Setting Supersedeas Bond”, which stayed the order compelling arbitration. CP 314-15.

On March 1, 2012, Appellant Honn filed its “Notice of Appeal Re: The February 10, 2012 Final Order Confirming the (1) February 3, 2012 Arbitration Award Regarding Option to Purchase and (2) January 28, 2011 Order Confirming Initial January 3, 2011 Arbitration Award Regarding Option To Purchase.” CP 243-44. The parties briefed their positions and Appellant Honn submitted its opening brief on May 14, 2012.

On June 4, 2012, the Arbitration Panel handed down its Supplement to Arbitration Award (hereinafter “Supplemental Award”), which decided only two things: 1. Awarded attorney fees to Garrett Ranches and 2. Set forth how much each party was to pay for the Arbitration Panel’s fees. CP 323-24.

On June 27, 2012, Garrett Ranches brought a Motion on the Merits, with an accompanying brief. On July 30, 2012, Appellant Honn

motioned this Court for an extension of time in a Motion for Extension of Time to File Supplemental Briefing and Continuance of [Garrett Ranches'] Motion to Affirm ("Motion for Extension"). In its Motion for Extension, Appellant Honn asked this Court for leave to bring a motion to vacate or modify the Arbitration Awards at the superior court level. On August 23, 2012, this Court granted an extension and leave to file the motion to vacate. On August 28, 2012, Appellant Honn filed its Motion to Vacate or Modify Arbitrators Award. CP 366.

On September 7, 2012, Garrett Ranches and Appellant Honn argued their positions on Appellant Honn's Motion to Vacate or Modify. CP 394-95. The Superior Court issued its oral ruling that day and entered its written Order Denying Defendant's Motion to Vacate or Modify Arbitration Award and Awarding Attorney Fees. CP 394-95. The Superior Court awarded Garrett Ranches \$750.00 in attorney fees for defending against Appellant Honn's Motion to Vacate or Modify. CP 394-95.

On or about October 5, 2012, Appellant Honn filed a Notice of Appeal Re: Order Denying Defendant's Motion to Vacate or Modify Arbitration Award and Awarding Attorney Fees under Cause No. 311775. CP 391-96. At the same time, Appellant Honn requested consolidation with the pending appeal (Cause No. 306208). On or about October 15,

2012, this Court granted consolidation of Cause Nos. 306208 and 311775 and ordered that all further briefing be submitted by one deadline.

On November 29, 2012, Court Commissioner McCown denied Respondent's Motions on the Merits and ordered that Respondent submit its briefing by December 31, 2012.

IV. STATEMENT OF THE ISSUES

- I. Did the Superior Court err by ordering the Parties to attend arbitration when the Appellant Honn's challenge to arbitration was that the entire Lease was void, rather than the arbitration clause was void?
- II. Did the Superior Court err by ordering the Parties to attend arbitration on the non-essential terms of the real estate sales agreement when the Arbitration Panel ruled in 2010 that there was a binding Option to Purchase?
- III. Did the Arbitration Panel err by providing for arbitration on the non-essential terms of the real estate sales agreement when the Arbitration Panel ruled in 2010 that there was a binding Option to Purchase and can Appellant Honn obtain review of the Arbitration Panel's 2010 decision?
- IV. Did the Superior Court err by refusing to vacate the 2012 Arbitration Award when the Appellant Honn brought the Motion to Vacate more than 90 days after the 2012 Arbitration Award was confirmed, the Appellant Honn failed to show that vacation was proper, and when an order denying a motion to vacate is not an appealable order?
- V. Did the Superior Court err by refusing to modify the 2012 Arbitration Award when the Appellant Honn brought the Motion to Modify more than 90 days after the 2012 Arbitration Award was confirmed, the Appellant Honn failed to show that modification was proper, and when an

order denying a motion to modify is not an appealable order?

- VI. Should Garrett Ranches be awarded attorney fees when the Lease provides for attorney fees to be awarded to the prevailing party and when applicable caselaw provides that Garrett Ranches should be awarded attorney fees?

V. STANDARD OF REVIEW

The question of arbitrability is reviewed de novo. Townsend v. Quadrant Corp., 153 Wash. App. 870, 878, 224 P.3d 818 (2009) aff'd on other grounds, 173 Wash. 2d 451, 268 P.3d 917 (2012). Whether a trial court exceeds its statutory authority is a question of law that is reviewed de novo. River House Development, Inc. v. Integrus Architecture, P.S., 167 Wash.App. 221, 230, 272 P.3d 289 (2012).

VI. ARGUMENT

- A. **The Superior Court's Decision to Order the Parties to Arbitration Should Be Upheld Because the Superior Court's Order Compelling Arbitration is Not an Appealable Order, the Superior Court Properly Referred the Matter to Arbitration, and Appellant Honn's Interpretation of the Lease is Patently Unsupported by Applicable Law.**

The Superior Court's decision to order the Parties to attend arbitration should be upheld for three reasons. First, Appellant Honn seeks to appeal an order compelling arbitration, which is not an appealable order under the Uniform Arbitration Act. Second, in light of Townsend,

the Superior Court properly referred the matter to arbitration because Appellant Honn argued against the enforceability of the entire Lease, not just the Arbitration Clause contained in the Lease. Finally, Appellant Honn's proposed reading of the Lease is patently unsupported by applicable law.

An order compelling arbitration is not an appealable order. Under the Uniform Arbitration Act (hereinafter "UAA") as adopted by Washington, an appeal may be taken only from:

- (a) An order denying a motion to compel arbitration;
- (b) An order granting a motion to stay arbitration;
- (c) An order confirming or denying confirmation of an award;
- (d) An order modifying or correcting an award;
- (e) An order vacating an award without directing a rehearing; or
- (f) A final judgment entered under this chapter.

RCW 7.04A.280. An order to proceed with arbitration is not appealable. All-Rite Contracting Co. v. Omev, 27 Wash.2d 898, 900, 181 P.2d 636 (1947). See also Teufel Const. Co. v. American Arbitration Ass'n, 3 Wash.App. 24, 25, 472 P.2d 572 (1970) (stating an order compelling arbitration is not final order, and, accordingly is not appealable).

There can be no dispute that Assignment of Error No. 1 relates only to the Superior Court's decision to compel arbitration. Appellant Honn's first two Notices of Appeal allege error with the Superior Court's

decision to compel arbitration. CP at 230-31, 236-37. Appellant Honn's 2nd Amended Statement of Arrangements contains the following statement of issues:

1. Trial court erred in failing to make findings of fact and conclusions of law;
2. Trial court erred in compelling arbitration to establish terms of the Real Estate Sale Agreement;
3. Trial court erred in failing to find that the parties no longer had a contractual relationship as a matter of law due to the Notice of Forfeitures of the parties farm lease.

CP at 316-17. The Washington Legislature has provided Appellant Honn and others who have been compelled to attend arbitration with tools to present their issues to a trial court and to appellate courts. *See* RCW 7.04A.230 (vacating award), 7.04A.220 (confirmation of award), and 7.04A.240 (modification or correction of award). Appellant Honn took advantage of none of these avenues to assert the issue it raises in Assignment of Error No. 1. Assignment of Error No. 1 fails because the assignment of error is based entirely on an order that cannot be appealed.

Even if Assignment of Error No. 1 is properly before this Court, this Court should affirm both the Superior Court's order compelling arbitration and order confirming the 2012 Arbitration Award because the issue is clearly controlled by Townsend v. Quadrant Corp., 153 Wash.App. 870, 224 P.3d 818 (2009) and Townsend v. Quadrant Corp., 173 Wash.2d 451, 268 P.3d 917 (2012). In Townsend v. Quadrant Corp.,

173 Wash.2d 451, 268 P.3d 917 (2012), the Washington Supreme Court held that if a litigant's challenge is to the validity of an entire agreement and not specifically to the arbitration clause contained therein, the matter should be referred to arbitration. Townsend, 173 Wash.2d at 458-60.

In Townsend, homeowners who had purchased homes from Quadrant Corporation sued Quadrant and its parent companies for fraud, negligence, negligent misrepresentation, rescission, and a declaration of unenforceability of an arbitration clause. Id. at 875. The PSA's signed by each of the homeowners contained the same arbitration clause. Id. The arbitration clause contained a broad mandatory arbitration provision:

Any controversy or claim arising out of or relating to this Agreement, any claimed breach of this Agreement, or any claimed defect relating to the Property, including, without limitation, any claim brought under the [CPA], (but excepting any request by Seller to quiet title to the Property) shall be determined by arbitration commenced in accordance with RCW 7.04[A].060.

Id. at 877. Quadrant moved to compel arbitration and its two parent companies moved for summary judgment seeking dismissal of all claims on the merits with prejudice. Id. The homeowners challenged the validity of the arbitration clause for unconscionability. Id. The trial court denied the parent companies' summary judgment motion and denied Quadrant's Motion to Compel. Id. After two more cases were consolidated with the action, Quadrant and its parent companies again moved to compel

arbitration. Id. Again the trial court denied the motions to compel arbitration and Quadrant and its parent companies appealed. Id. at 877-878.

On appeal, the homeowners argued that the PSA was unenforceable while Quadrant argued that an arbitrator, not a court, decides issues of enforceability of the underlying contract under the UAA. Id. at 878. Arbitrability is a question of law that appellate courts review de novo and the burden of proof is on the party seeking to avoid arbitration. Id.

Under RCW 7.04A.060(2), a court may entertain only a challenge to the validity of the arbitration clause itself, not a challenge to the validity of the contract containing the arbitration clause. Id. at 879-80 (citing McKee v. AT&T Corp., 164 Wash.2d 372, 394, 191 P.3d 845 (2008), stating that when the validity of the arbitration agreement itself is at issue, a court, not an arbitrator, must determine there was a valid agreement to arbitrate). The Court of Appeals in Townsend went on to note that in Pinkis v. Network Cinema Corp., 9 Wash.App. 337, 342, 512 P.2d 751 (1973), they had held that the statutory language of RCW 7.04A.060 did not permit the court to consider the general challenge to the contract. Id. at 880. In Pinkis, the plaintiff had challenged the validity of the entire contract on the basis of fraud in the inducement, not fraud in the

inducement of the arbitration clause itself. Id. (citing Pinkis, 9 Wash.App. at 342). The Court of Appeals reversed the trial court's denial of Quadrant's motion to compel arbitration. Id. at 890. The Court of Appeals held that when the validity of the entire agreement is challenged, rather than just the arbitration clause contained therein, arbitration of the disputes is proper. Townsend, 153 Wash.App. at 881.

The homeowners challenged Division I's holding and the Washington Supreme Court granted review in Townsend v. Quadrant Corp., 173 Wash.2d 451, 268 P.3d 917 (2012). The Washington Supreme Court went through similar analysis as Division I and came to the same conclusion: where a challenge is brought against the validity of an entire agreement, the question is properly for the arbitrator and where a challenge is brought specifically against the arbitration clause, the question is properly for the court. Townsend, 173 Wash.2d at 458-60. The court elaborated by delineating the various rulings in McKee, Buckeye, and Prima Paint. Id. In McKee, the proper holding was that where the challenge is to the arbitration clause and not the entire agreement, the matter was proper for the court. Townsend, 173 Wash.2d at 458. In Buckeye Check Cashing, Inc. v. Cardegna, 546 U.S. 440, 126 S.Ct. 1204 (2006), the U.S. Supreme Court held that where the challenge is to the entire agreement, rather than the arbitration clause alone, the matter is

properly for the arbitrator. Townsend, 173 Wash.2d at 458-59. Finally, Buckeye's precursor, Prima Paint Corp. v. Flood & Conklin Manufacturing Co., 388 U.S. 395, 87 S.Ct. 1801 (1967), mirrored the U.S. Supreme Court's holding in Buckeye that challenges to the validity of the entire agreement were for the arbitrator. Townsend, 173 Wash.2d at 458.

The Washington Supreme Court paid specific attention to the homeowners' argument that the PSA was a contract of adhesion and that the arbitration clause within was unenforceable. Id. at 459. More specifically, the homeowners argued that their claims for fraud arose independently of the PSA and that arbitration clause contained therein was unenforceable on such claims. Id. The court rejected the invitation to follow the homeowner's reasoning and stated that it was apparent that the homeowners "...have framed their claims pertaining to the arbitration clause and the PSA in a way that renders the two inseparable. In our view, **one could decide whether the arbitration clause is unenforceable only by deciding whether the PSA as a whole is unenforceable.**" Id. at 460 (emphasis added).

Here, Appellant Honn's challenge is to the entire Lease, not the arbitration clause. In its argument at the hearing on the Motion to Compel, the Appellant Honn argued "[t]he Lease agreement terminates as a matter of law...", "...the Lease [has] expired as a result of the Notice of

Forfeiture”, and “[t]here is no contract (lease) between the parties.” CP at 58. On appeal, Appellant Honn argues “the effect of the Notice of Termination of the Farm Lease was the automatic termination of the Farm Lease by the clear language of the Lease itself.” Brief of Appellant at 8. Appellant Honn does not argue that the arbitration clause in and of itself is terminated. Instead, Appellant Honn argues that the arbitration clause is incidentally terminated because the entire Lease is terminated. Brief of Appellant at 12. Just as in Townsend, one could decide whether the arbitration clause in this case is unenforceable only by deciding whether the Lease as a whole is unenforceable.

“Unless the court finds that there is no enforceable agreement to arbitrate, it *shall* order the parties to arbitrate.” RCW 7.04A.070 (emphasis added). Washington has a public policy favoring arbitration. Godfrey v. Hartford Casualty Ins. Co., 142 Wash.2d 885, 892, 16 P.3d 617 (2001).

The Superior Court effectively referred the entire matter to arbitration and determined that there was a duty to arbitrate. CP at 241-42, 217-18, 220. In its decision to compel arbitration, the Superior Court noted:

...I’m denying the motion to stay here because you do have a dispute as to whether there’s been a breach. And I don’t feel, because of that, that it’s appropriate for the Court to automatically accept the argument that it’s--the Lease is terminated. And then

you have the language there, “any dispute”. So you’re stuck with the arbitration.

CP at 220. The result in this case was that the Superior Court referred the matter to arbitration and the Arbitration Panel found no violation of the Lease and therefore the lease was enforceable, even under Appellant Honn’s interpretation. CP at 194, Paragraph 2.9.

Appellant Honn’s assignment of error is clearly controlled by Townsend and its associated cases. Appellant Honn challenges the validity of the entire Lease, not specifically the validity of the arbitration clause. The Superior Court’s decision to compel arbitration should be affirmed.

Finally, Assignment of Error No. 1 fails because Appellant Honn’s proposed reading of the Lease is patently illogical and is unsupported by basic contract law. The Arbitration Panel found no violation of the Lease. Therefore, even if this Court passes on the interpretation of the Lease, this court should still uphold the result because the Arbitration Panel found no violation of the Lease. If there is no violation of the Lease, then even under Appellant Honn’s reading of the Lease, the arbitration was proper.

Alternatively, permitting Appellant Honn to unilaterally interpret the Lease to avoid its bargained-for agreement would be to allow

Appellant Honn to avoid meaningful review of its allegations that Garrett Ranches breached the Lease.

Appellant Honn's interpretation of the Lease would work a forfeiture. "Equity abhors a forfeiture...conditions of forfeiture must be substantial before they will be enforced in equity." Esmieu v. Hsieh, 20 Wash.App. 455, 460, 580 P.2d 1105 (1978) (internal citations omitted). Appellant Honn argues that the Lease gives it the sole ability to interpret what constitutes a failure to carry out a covenant, when such a failure occurs, and what the effect of said failure is. What the Lease actually does is create a condition precedent to issuance of a notice of termination. The condition precedent is failure to carry out any of the covenants and if that condition is alleged and there is a dispute over that condition, then arbitration will resolve the matter.

Taken to its full extent, Appellant Honn's argument implies that once notice of termination is served there can never be any dispute over any of the terms of the Lease because the Lease no longer exists. Appellant Honn supports this by its interpretation of one word, "reinstate". Brief of Appellant at 9. Under Appellant Honn's interpretation, once notice of termination is given, the Lease vanishes and then is somehow brought back from the ether if Garrett Ranches remedies the breach, whether real or imagined. But such an interpretation is contrary to logic

and standard contract interpretation. Simply because an agreement is breached does not mean that the agreement vanishes into thin air. The agreement still applies to regulate dispute resolution, attorney fees, enforcement, and any other manner of topics included in the particular agreement.

The Lease in this case, even if breached (which the Arbitration Panel found was not the case), still regulates dispute resolution, attorney fees, and venue, among other things. The arbitration clause in this case wasn't just limited to the Lease. Even if Appellant Honn's interpretation of the Lease is correct, the clear intent of the Parties was to arbitrate any dispute, not just those disputes relating to the Lease. CP at 283. "Language [in a contract] will be given the meaning which best gives effect to the intention of the parties." Patterson v. Bixby, 58 Wash.2d 454, 458, 364 P.2d 10 (1961). "A contract should be interpreted as a whole, making the over-all meaning and purpose controlling." Id. "Every portion of a contract should be interpreted so as to carry out, if possible, the over-all purpose." Id. at 459. The court in Patterson also noted:

where one construction would make a contract unreasonable, and another, equally consistent with its language, would make it reasonable, the interpretation which makes it a rational and probable agreement must be adopted.

Id. Here, Appellant Honn's interpretation would make the Lease unreasonable and the other interpretation would make the Lease reasonable because it takes into consideration the full breadth of the Lease and the intent behind it. The Parties bargained for a dispute resolution provision that was contemplated to encompass all of their disputes and certainly to encompass a dispute over whether one party violated the terms of the Lease. Appellant Honn proposes a patently absurd reading of the Lease and its Assignment of Error No. 1 should be dismissed.

B. The Superior Court's Decision to Compel Arbitration should be Upheld Because the Order Compelling Arbitration is Not an Appealable Order, the Time for Appeal of the 2010 Arbitration Award has Long Passed, Appellant Honn Raises Several Issues for the First Time on Appeal, and the Superior Court did not Err when it Held that the Parties must Arbitrate Issues Related to an Option to Purchase and Real Estate Agreement.

Assignment of Error No. 2 contains three arguments, all of which fail. First, Appellant Honn argues the Superior Court should not have compelled arbitration because the Lease had been terminated and therefore the Option to Purchase had been terminated as well. Brief of Appellant at 15. Second, Appellant Honn argues that the Superior Court should not have compelled arbitration on the establishment of terms of the sale because to do so would be to illegally create the terms for a contract. Brief of Appellant at 15. Finally, Appellant Honn argues that the Superior Court erred by compelling arbitration of the terms of the sale because

arbitration of those terms was outside the scope of the arbitration clause contained in the Lease. Brief of Appellant at 18-19.

Appellant Honn's first, second, and third arguments fail because Appellant Honn is assigning error to the Superior Court's order compelling arbitration. An order compelling arbitration is not an appealable order. See RCW 7.04A.280. The same rules that apply to Assignment of Error No. 1 apply here. The error alleged is that the Superior Court erred in compelling arbitration. Brief of Appellant at 15, 17, 18. This claim of error fails because even if there were an error, the order compelling arbitration is not one from which an appeal may be taken.

Appellant Honn's second and third arguments fail because it raises the arguments for the first time on appeal. "Generally, appellate courts will not entertain issues raised for the first time on appeal." River House Development, 167 Wash.App. at 230. "The appellate court may refuse to review any claim of error which was not raised in the trial court." RAP 2.5(a). See also Kenneth W. Brooks Trust v. Pacific Media, LLC, 111 Wash.App. 393, 396-97, 44 P.3d 938 (2002) (a court will not review the validity of an arbitration award if the issue is raised for the first time on appeal).

Appellant Honn at no time in its argument to the Superior Court raised the issues represented by arguments two and three. Out of three pages of argument that the Arbitration Panel attached to the 2012 Arbitration Award, Appellant Honn raised neither issue. CP at 198-200. Out of approximately fifty-six pages of argument, declaration, and supporting documents, Appellant Honn again raised neither issue. CP at 8-63. Appellant Honn completely failed to object to the confirmation of the arbitration award when it had the opportunity to do so. In fact neither issue was raised by Appellant Honn until it submitted its brief on May 14, 2012. See Brief of Appellant at 15.

Appellant Honn's argument number two is an attempt to bootstrap its way into review of the 2010 Arbitration Award. However worded, the argument is an attempt to reach into the 2010 Arbitration Award by asking this Court to declare the Arbitration Panel's retention of jurisdiction as a violation of the law. The 2010 Arbitration Award is not appealable because the time for appeal has long passed. An appeal from an order confirming an arbitration award "must be taken as from an order or a judgment in a civil action." RCW 7.04A.280(2). Except as otherwise provided, "a notice of appeal must be filed with the trial court within...30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed..." RAP 5.2(a).

Finally, the Superior Court's decision to compel arbitration did not violate "long standing law in Washington that a court cannot create terms for a contract." Brief of Appellant at 17. See also Appellant's Supplemental Assignment of Error and Additional Authority at 9 (citing Pettaway v. Commercial Automotive Service, Inc., 49 Wn.2d 650, 306 P.2d 219 (1957)).

Pettaway involved a challenge to a jury instruction, a jury's finding of a complete and enforceable contract, and the measure of damages on a breach of contract claim and a conversion claim. Id. at 653, 655. The jury in Pettaway found that even though the parties didn't write down their agreement, the "arrangements between them were not too indefinite to constitute a binding legal contract for the sale and purchase of an automobile." Id. at 653. The Washington Supreme Court affirmed the giving of the jury instruction and concluded that the jury arrived at a proper decision, namely that there existed a legally-sufficient contract. Id. More importantly, the Washington Supreme Court held that neither a jury nor a court may create terms of a contract if any *element essential* to the contract has been omitted or is incapable of ascertainment...." Id. (emphasis added).

In this case, the Arbitration Panel in 2010 held that the essential elements of a contract were present and there was a binding Option to

Purchase and all that remained to be done was to agree on how the Option to Purchase would be exercised. CP at 4. In other words, all of the legally-required pieces were there to find a binding sale. “An option to purchase property is a contract wherein the owner...agrees with another person that the latter shall have the privilege of buying the property within a specified time upon the terms and conditions expressed in the option.” Whitworth v. Enitai Lumber Co., 36 Wash.2d 767, 770, 220 P.2d 328 (1950). The Arbitration Panel’s retention of jurisdiction was not to create a binding contract where none existed; the binding contract was already in existence. CP at 4.

Appellant Honn’s third and final argument is that Appellant Honn had no duty to arbitrate the terms of the Real Estate Sales Agreement because there was no dispute and “disputes” were the only things that Appellant Honn’s agreed to arbitrate under the Lease. Brief of Appellant at 18. This argument fails for failure to raise it in the Superior Court, as noted above, and because a plain reading of the arbitration clause in the Lease shows that the terms of the sale were encompassed by the arbitration clause.

The arbitration clause in the Lease states that in the event of “any dispute”, the Parties shall submit to binding arbitration. CP at 283, 19. Clearly there was a dispute or there wouldn’t have been a second round of

arbitration. Appellant Honn admits that “[t]he parties could not agree to the terms of a real estate sale agreement....”, but then turns around nearly 15 pages later and claims that there was no dispute. Brief of Appellant at 3, 18.

C. The Arbitration Panel did not err by providing for Arbitration on the non-essential Terms of a Real Estate Sale Agreement and Appellant Honn cannot obtain review of the 2010 Arbitration Award Because the Time for Appeal of the Issue has Long Passed, Appellant Honn Raises the Issue for the First Time on Appeal, and The Arbitration Panel did not make an Error of Law.

Assignment of Error No. 3 is much like its Assignment of Error No. 2, except that instead of focusing on the Superior Court’s action of ordering arbitration, Appellant Honn focuses on the Arbitration Panel’s decision in the 2010 Arbitration that if the Parties could not agree on the non-essential terms of the Real Estate Agreement, the Parties were to return to arbitration. Appellant Honn makes this argument while ignoring that the *proper* way to bring the Arbitration Panel’s alleged error to the Superior Court’s attention was to bring a Motion to Vacate in 2010 or to contest the confirmation of the 2010 Arbitration Award.

There are numerous insurmountable barriers to Assignment of Error 3, all of which are addressed in this Section C and in Section D, *infra*.

Assignment of Error No. 3 is untimely because the Appellant Honn

is attempting to appeal the confirmation of an arbitration award from two years ago (December, 2010). CP at 243-44.

Assignment of Error No. 3 alleges error on the part of the Arbitration Panel when it retained jurisdiction back in 2010. An appeal from an Order Confirming an Arbitration Award “must be taken as from an order or a judgment in a civil action.” RCW 7.04A.280(2). Except as otherwise provided, “a notice of appeal must be filed with the trial court within...30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed...” RAP 5.2(a).

The 2010 Arbitration Award was handed down on December 28, 2010 and confirmed by the Superior Court on January 28, 2011. CP at 1-7. To aid its bootstrapping into the 2010 Arbitration Award, the Appellant Honn states that the order confirming the 2012 Arbitration Award contained wording that it was a final order on the Option to Purchase and the Purchase and Sale Agreement. Brief of Appellant at 19. The wording from the Order is actually “[t]his constitutes a final order on the issue of the Option to Purchase and Sale Contract, & all other matters raised at arbitration.” CP at 249. Somehow, Appellant Honn seems to believe that this wording permits appellate review of an award that was handed down and confirmed over one year ago.

The Arbitration Panel reserved jurisdiction via the 2010 Arbitration Award and it is therefore the confirmation of the 2010 Arbitration Award that should have been appealed if Appellant Honn had error to assign. CP at 4.

Even if Appellant Honn were permitted to issue and assign error to the 2010 Arbitration Award, Appellant Honn raises the issue of arbitrability of the sale terms for the first time on appeal. “Generally, appellate courts will not entertain issues raised for the first time on appeal.” River House, 167 Wash.App. at 230. “The appellate court may refuse to review any claim of error which was not raised in the trial court.” RAP 2.5(a).

Appellant Honn had an opportunity to raise this appeal at both hearings before the Superior Court, but failed to do so. Appellant Honn completely failed to object to the confirmation of the 2012 Arbitration Award on February 10, 2012. Appellant Honn also failed to raise this issue at the hearing to compel arbitration on January 13, 2012. The Arbitration Panel’s retention of jurisdiction over the terms of the sale was not raised by Appellant Honn until it submitted its brief on May 14, 2012. Brief of Appellant at 15.

Even if this Court is inclined to entertain Appellant Honn’s assignment of error that the Arbitration Panel or the Superior Court erred

by providing that the Parties could return to arbitration to receive the non-essential terms of the Real Estate Agreement, this Court should still dismiss Appellant Honn's assignment of error because Washington law is clear that supplying the non-essential terms is permissible. Appellant Honn argues that the Arbitration Panel made an error of law and "clearly ignored Washington case law in creating terms of the Real Estate Sale Agreement." Brief of Appellant at 21.

Non-essential terms of a sale can be set by a court or by an arbitration panel. In Valley Garage, Inc. v. Nyseth, 4 Wash.App. 316, 481 P.2d 17 (1971), the owner of real estate entered into a lease which contained an option to purchase for a reasonable price representing the fair market value of the property as agreed by the parties. If the parties could not agree, then the sales price would be established by arbitration. Id. at 317.

The lessee gave notice of his election to exercise the option and the owners/lessors refused to sell. A lawsuit followed, and the trial court ordered the owners/lessors to sell for a cash payment. The decision was upheld by the Court of Appeals. Id. at 320.

The owners/lessors claimed that the failure of the lease to indicate whether the sale would be cash or credit, who provides title insurance, if any, who pays the excise tax, whether the taxes were prorated, the date of

possession, the time for performance and the disposition of encumbrances, if any, should defeat the action for specific performance and render the contract unenforceable. Id. at 318.

The owners/lessors contended that the contract was too indefinite to support specific performance. Id. An agreement is considered to be sufficiently definite and certain if its provisions are capable of being reduced to certainty or of being made certain by the aid of legal presumptions or evidence of established customs. Id. at 318-19.

The Nyseth court ruled that the contract was sufficiently definite and that the remaining non-essential terms, such as encumbrances, time of performance, payment of excise tax, time for possession, and method of purchase (cash or credit) were supplied by legal presumptions and evidence of established customs. Id. at 319-20. The Nyseth court's principal ruling was that "the contract contains the essential elements of a cash sale. It contains a description of the property subject to sale and a method for the determination of a price which may be specifically enforced." Id. at 318. See also Wetherbee v. Gary, 62 Wash.2d 123, 126-28, 381 P.2d 237 (1963).

McEachren v. Sherwood & Roberts, Inc., a case cited by Appellant Honn, does not support its own position. In fact, the Court of Appeals in McEachren, held as follows:

In order for there to be a contract, there must be a “meeting of the minds” on the essential terms of the agreement. Even where an agreement might be too indefinite on its terms to be specifically enforced, it may be certain enough to constitute a valid contract, the breach of which may give rise to damages.

The minds of Agnew, Watkins, and Wells all met on the **essential terms** of their contract. Wells agreed to convey her entire interest in the 140 acre farm, by a date certain, in return for \$625,000 from Agnew and Watkins. Given the scope of the transaction, the question of the control of the hay during the rental period was not an essential term of this contract. The trial court's award of damages was appropriate.

McEachren v. Sherwood & Roberts, Inc., 36 Wash. App. 576, 579-80, 675 P.2d 1266, 1268 (1984) (emphasis added) (internal citations omitted). Notably, Washington has moved away from the older doctrine of “meeting of the minds” and has adopted the objective theory of contracts where the court looks at the outward manifestation of assent made to the other party.¹ Hearst Communications, Inc. v. Seattle Times Co., 154 Wash.2d 493, 503-504, 115 P.3d 262 (2005). The McEachren case does not stand for the proposition that a court or arbitration panel cannot set the non-essential terms of a contract; it stands for the unremarkable proposition that there must be an agreement on the *essential terms* for a contract to exist.

¹ Mutual assent is the current term for the concept of “meeting of the minds”. See Wetherbee v. Gary, 62 Wash.2d 123, 381 P.2d 237 (1963). See also Yakima County Fire Protection District No. 12 v. City of Yakima, 122 Wash.2d 371, 858 P.2d 245 (1993). Mutual assent cannot be based on subjective intent, but instead must be founded upon an objective manifestation of mutual intent on the essential terms of the promise.

In the case before this Court, there was an objective agreement on the essential terms. Appellant Honn's agreed to grant Garrett Ranches an Option to Purchase. The Option contained the price terms of the purchase and sale, the land to be conveyed, and the time period in which the Option could be exercised. CP at 279. The Arbitration Panel in 2010 rightly decided that the contract was enforceable between Appellant Honn and Garrett Ranches. CP at 1-5. Appellant Honn's argument to the contrary, brought almost two years later, fails on the facts and the law.

Finally, the Arbitration Panel did not create any new lease terms. The Lease provided that the Arbitration Panel was to resolve disputes. CP at 19. Garrett Ranches and Appellant Honn had a dispute regarding some trash left on the Property before Garrett Ranches leased the Property. The Arbitration Panel ruled that Garrett Ranches could remove the trash if Appellant Honn did not remove the trash within 30 days of the Award. This is hardly the creation of a new lease term and certainly touches on the merits of the case. Courts will not disturb an award on its merits and the evidence before the arbitration panel will not be considered by the reviewing court. See Westmark Properties, Inc. v. McGuire, 53 Wash.App. 400, 402, 766 P.2d 1146 (1989). An additional dispute between the parties arose over some equipment on the Property, but this, like the issue of cleaning up the trash, is a matter of the merits of the case.

D. The Superior Court’s Refusal to Vacate the 2012 Arbitration Award should be Affirmed because the Order Denying Defendant’s Motion to Vacate or Modify is not an Appealable Order, the Appellant Honn’s Motion to Vacate was untimely and none of the Statutory Reasons for Vacation Apply.

Appellant Honn’s consolidated appeal under Cause No. 311775, is an appeal of the Superior Court’s denial of Appellant Honn’s Motion to Vacate or Modify the 2012 Arbitration Award. CP at 391-95. Under the Uniform Arbitration Act (hereinafter “UAA”) as adopted by Washington, an appeal may be taken only from:

- (a) An order denying a motion to compel arbitration;
- (b) An order granting a motion to stay arbitration;
- (c) An order confirming or denying confirmation of an award;
- (d) An order modifying or correcting an award;
- (e) An order vacating an award without directing a rehearing; or
- (f) A final judgment entered under this chapter.

RCW 7.04A.280. An order denying a party’s motion to vacate or modify an arbitration award is clearly not an appealable order under the UAA. If the language of a statute “is unambiguous, we give effect to that language and that language alone because we presume the legislature says what it means and means what it says. State v. Costich, 152 Wash. 2d 463, 470, 98 P.3d 795, 798 (2004). Had the legislature intended to provide for appeals stemming from the *denial* of a motion to vacate or modify, it

would have said so. Instead, the legislature provided that an order which vacates an award without directing a rehearing could be appealed. Furthermore, if the superior court orders a modification or correction of the award, then the aggrieved party can appeal. The Superior Court's Order denying both the Motion to Vacate and Motion to Modify is not an appealable order under the UAA. Appellant Honn's appeal under Cause No. 311775 is not properly before this Court and should be dismissed.

Even if Appellant Honn's Appeal is properly before this Court, this Court should find that the Superior Court did not err when it denied Appellant Honn's Motion to Vacate because Appellant Honn's Motion was untimely under RCW 7.04A.230.

Generally, a motion to vacate must be filed within 90 days after the movant receives notice of an award. RCW 7.04A.230(2). "The three-month period established by [RCW 7.04A.230] is considered a statute of limitations." MBNA Am. Bank, N.A. v. Miles, 140 Wash. App. 511, 514, 164 P.3d 514, 515 (2007). "Its purpose is to expedite finality of the arbitration process consistent with the overall objective of speedy resolution of disputes." Id. at 514 (internal quotations omitted).

Appellant Honn's Motion to Vacate or Modify was denied because it was untimely. Appellant Honn brought its Motion to Vacate or Modify on August 28, 2012. CP 366. Far more than 90 days had passed since

Appellant Honn received notice of the 2012 Arbitration Award. In fact, 90 days from the 2012 Arbitration Award would have been approximately April 19, 2012. By that time, Appellant Honn had already obtained a stay of the 2012 Arbitration Award and filed its first round of Notices of Appeal, all while representing to this Court and to the Superior Court that the 2012 Arbitration Award was final for purposes of appeal. Appellant Honn's Motion to Vacate or Modify is an attempt to use the Supplemental Award to bootstrap its way into challenging the 2012 Arbitration Award and even the 2010 Arbitration Award, by arguing against the law of the case.

Finally, the Superior Court did not err when it denied Appellant Honn's Motion to Vacate because Appellant Honn failed to prove any of the statutory grounds for vacation of the 2012 Arbitration Award.

The party seeking to vacate an award has the burden of proof. McGinnity v. AutoNation, Inc., 149 Wash. App. 277, 282, 202 P.3d 1009 (2009). To obtain an order vacating an arbitration award, a movant must allege one of the factors set forth in RCW 7.04A.230. "In the absence of an error of law on the face of the award, the arbitrator's award will not be vacated or modified." Id. "Arbitration is a statutorily recognized special proceeding, and the rights of the parties are controlled by chapter 7.04A RCW." Id. at 281-82. "In the absence of an error of law on the face of the

award, the arbitrator's award will not be vacated or modified.” Id. at 282. Accordingly, Washington courts confer substantial finality on decisions of arbitrators rendered in accordance with the parties' contract and chapter 7.04A RCW. Id.

Appellant Honn alleges that the Superior Court should have vacated the 2012 Arbitration Award because the arbitration was not postponed. Appellant Honn’s Supplemental Assignment of Error and Additional Authority at 11-14.

RCW 7.04A.230(1)(c) states that the court shall vacate an award if “[a]n arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement...or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding.”

Appellant Honn’s argument was that the arbitration should be completely forbidden, not postponed. And, unlike what Appellant Honn alleges, there was a postponement of the Arbitration Panel’s decision until the Superior Court passed on arbitrability.

Appellant Honn fails to mention that the Arbitration Panel went so far as to deliberately postpone its decision until the Superior Court had passed definitively on arbitrability. CP at 319-20. The Superior Court

passed on arbitrability and only then did the Arbitration Panel issue its award. CP at 190-204.

Therefore, to say that the Superior Court or the Arbitration Panel erred in not postponing the arbitration is to fatally ignore the fact that the arbitration was, for all intents and purposes, delayed in accordance with Appellant Honn's wishes. Accordingly, the Superior Court's denial of Appellant Honn's Motion to Vacate should be affirmed.

E. The Superior Court's Refusal to Modify the 2012 Arbitration Award should be Affirmed because the Order Denying Appellant Honn's Motion to Modify is not an Appealable Order, Appellant Honn's Motion to Modify was untimely, and none of the Statutory Bases for Modification Apply.

Appellant Honn does not appear to offer any argument to support its appeal of the Superior Court's denial of the modification aspect of its Motion to Vacate or Modify. However, if this Court is inclined to entertain the issues relating to the request for modification, Garrett Ranches respectfully submits the following argument.

This Court should affirm the Superior Court's denial of the Motion to Modify on three grounds. First, as argued above, appeal of the Superior Court's denial of the Motion is not an appealable order under RCW 7.04A.280. Second, the Motion was untimely under RCW 7.04A.240. Third, the Superior Court properly denied the Motion because none of the statutory bases for modification apply to this case.

A court may modify or correct an award if there was an evident mathematical miscalculation or mistake, the arbitrators made an award on a claim that was not submitted and the award can be corrected without affecting the merits of the decision of claims properly submitted, or the award is imperfect in a matter of form not affecting the merits. RCW 7.04A.240(1). The remedy, if there is a statutory ground for modification, is for a court to modify the arbitration award and confirm it as modified. If no modification is needed, the court must confirm the award. RCW 7.04A.240(2).

A motion to modify an arbitration award must be brought within 90 days of a party's receipt of notice of the award. RCW 7.04A.240(1). The burden of showing that statutory grounds exist is on the party seeking to modify the arbitration award. Morrell v. Wedbush Morgan Sec. Inc., 143 Wash. App. 473, 482, 178 P.3d 387 (2008).

First, like the Motion to Vacate, the Motion to Modify was brought more than 90 days since notice of the 2012 Arbitration Award. In actuality, Appellant Honn did not and does not seek a modification of the Supplemental Award, which was handed down on June 4, 2012. CP 323-24, 366-67. Instead, Appellant Honn sought to modify the 2012 Arbitration Award, which was handed down on January 19, 2012 and confirmed on February 10, 2012. 90 days had long passed from the time

the 2012 Award was handed down before Appellant Honn finally brought its Motion to Vacate or Modify. CP 323-24, 366-67.

Finally, modification of an award requires that there be some kind of mathematical or factual error or if the arbitrators decided a matter that was not brought before them. Modification or correction is available if:

- (a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;
- (b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted; or
- (c) The award is imperfect in a matter of form not affecting the merits of the decision on the claims submitted.

RCW 7.04A.240. “Arbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts, and, unless the award on its face shows their adoption of an erroneous rule, or mistake in applying the law, the award will not be vacated or modified.” N. State Const. Co. v. Banchemo, 63 Wash. 2d 245, 249-50, 386 P.2d 625, 628 (1963).

In this case, the amount awarded by the Arbitration Panel in the Supplemental Award appears to be within a reasonable range of what was requested by Garrett Ranches, there appear to be no formal or factual errors, and all issues decided by the Arbitration Panel were issues submitted to and addressed by the Arbitration Panel. CP 69-85, 190-95.

F. Garrett Ranches Should Be Awarded Attorney Fees on Appeal.

Garrett Ranches should be awarded attorney fees because the Lease provides that the prevailing party shall be entitled to attorney fees. “If applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expenses as provided in this rule, unless a statute specifies that the request is to be directed to the trial court.” RAP 18.1(a). “In Washington, a prevailing party may recover attorney fees authorized by statute, equitable principles, or agreement between the parties.” Thompson v. Lennox, 151 Wash.App. 479, 484, 212 P.3d 597 (2009). “Generally, if such fees are allowable at trial, the prevailing party may recover fees on appeal as well.” Id.

Attorney fees are available to the prevailing party in this case.

Paragraph 16 of the Lease provides for attorney fees for Garrett Ranches:

In the event either or both parties shall be reasonably required to retain an attorney to enforce any of the provisions of this Lease, the prevailing party in any such enforcement proceedings shall have awarded to them attorney’s fees and costs to the extent reasonably incurred, in addition to such other relief as exists under the provisions of this Lease or by operation of law. Venue shall be in Whitman County, Washington.

CP at 283. Indisputably, Garrett Ranches has been required to obtain an attorney. Litigation in this case has gone on since November of 2010. CP

at 274-76. Garrett Ranches has had to enforce the provisions of the Lease in two rounds of arbitration, numerous court hearings, and this appeal. The entire dispute in this case stems from Appellant Honn's refusal to abide by the terms of the Lease. If this Court dismisses the Assignments of Error, Garrett Ranches will be the prevailing party. "In general, a prevailing party is one who receives an affirmative judgment in his or her favor." Mike's Painting, Inc. v. Carter Welsh, Inc., 95 Wash.App. 64, 68, 975 P.2d 532 (1999). The prevailing party on appeal is entitled to attorney fees. Kofmehl v. Steelman, 80 Wash.App. 279, 286, 908 P.2d 391 (1996). Garrett Ranches should be deemed the prevailing party in this appeal and should be awarded attorney fees.

VII. CONCLUSION

For the reasons stated herein, Garrett Ranches respectfully requests that the Superior Court's decisions be affirmed and Appellant Honn's consolidated appeals be dismissed. Garrett Ranches also respectfully requests attorney fees and costs in this matter.

DATED this 31st day of December, 2012.



Will Ferguson, WSBA 40978
Libey & Ensley, PLLC
Of Attorneys for Garrett Ranches/Respondent

CERTIFICATE OF SERVICE

I, WILL FERGUSON, do declare that on December 31, 2012, I caused to be served a copy of the foregoing Brief on the Merits to the following party via U.S. Mail (in duplicate), facsimile, and electronic mail:

J. Gregory Lockwood
Attorney for Appellant
Law Office of J. Gregory Lockwood, PLLC
522 West Riverside Avenue, Suite 420
Spokane, WA 99201

WSBA No. 20629
(509) 624-8200 (phone)
(509) 623-1491 (fax)
E-Mail: jgregorylockwood@hotmail.com

Dated this 31~~st~~ day of December, 2012.



WILL FERGUSON