No. 104365-1

SUPREME COURT
OF THE STATE OF WASHINGTON

In re the Marriage of:

ROBERT W. COONEY,

Respondent,

and

HILLARY A. BROOKS,

Petitioner.

ANSWER TO PETITION FOR REVIEW

SMITH GOODFRIEND, P.S.

By: Valerie Villacin
WSBA No. 34515

1619 8th Avenue North
Seattle, WA 98109
(206) 624-0974

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATUTES

RULES AND REGULATIONS

I. INTRODUCTION

Review of Division One's unpublished opinion affirming the trial court's order denying arbitration is not warranted under RAP 13.4(b). The opinion does not raise any significant question of constitutional law because there is no right to have appellate courts address every issue raised by the parties on appeal. The opinion is consistent with the legislative intent underlying the Uniform Arbitration Act adopted by this state, as well as published appellate court decisions, recognizing that courts decide whether a party waives arbitration by engaging in litigation conduct that is inconsistent with an intent to arbitrate. Finally, the opinion holding that petitioner waived arbitration by seeking to arbitrate the same dispositive issue that she previously litigated, and lost, does not conflict with any published appellate court decisions.

This Court should deny review and award fees to respondent.

II. RESTATEMENT OF THE CASE

A. The parties' divorce decree incorporated their agreement attesting to "a full and complete disclosure of their assets" and included an arbitration provision.

In finalizing their divorce, respondent Robert Cooney and petitioner Hillary Brooks executed an agreement representing "under penalty of perjury that each has made a full and complete disclosure of any and all financial assets they own or control or have placed in the control of others (separate or community)." (CP 384) The agreement also contained a provision that "[a]ny dispute arising out of or in connection with this Agreement shall be resolved by binding arbitration." (CP 390)

Cooney was trustee of a trust for the benefit of his grandmother and her partner (CP 40), and also beneficiary of the trust instrument's revocable survivor's trust. (CP 42) Because both his grandmother and her partner were "alive [and] doing well" when the agreement was entered, Cooney did not disclose his beneficiary interest in the revocable

survivor's trust to Brooks, as he understood his beneficiary interest was not an asset, but "at best perhaps an expectation."[1] (CP 42-43, 55, 61) Brooks was, however, aware of the trust and that Cooney was both beneficiary and trustee, before the final divorce decree incorporating the parties' agreement was entered on July 13, 2021. (CP 16, 40, 85)

B. Over a year after the decree was entered, Brooks filed a CR 60 motion claiming Cooney failed to disclose his beneficiary interest in a revocable trust and its assets.

Cooney's grandmother and her partner both died in January 2022—six months after the parties' divorce was final. (CP 42-43, 151) In September 2022, Brooks filed a CR 60 motion seeking to vacate the decree that incorporated the parties' agreement. (CP 22) Brooks's motion was

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[1] Cooney's status as beneficiary of the survivor's trust did not vest until the last of the two settlors died. (*See* CP 128, 145, 852-53) While the settlors were alive, Cooney had no right to the property in trust and his contingent beneficial interest could have been revoked by the settlors at any time. (CP 853-54)

brought under "three different bases: [CR] 60(b)(11), [CR] 60(b)(4), and the CR 2A agreement." (CP 336)

Relying on the provision in the agreement "requiring full disclosure of all assets owned or controlled by the parties within the Agreement" (CP 80-81, 384), Brooks asserted that the agreement, as well as Cooney's fiduciary duties to her and the court, required him to disclose the trust and its assets. (CP 29-32, 78, 80, 336-38) Brooks claimed she would not have signed the agreement waiving future maintenance had Cooney disclosed the trust. (CP 35)

C. The trial court denied the CR 60 motion, concluding that Cooney's interest in the revocable trust was not an asset that he was required to disclose. Division One affirmed and this Court denied review.

Notwithstanding that Brooks's claim that Cooney purportedly failed to disclose his beneficiary interest in the trust was a "dispute arising out of or in connection with this Agreement" (CP 390), neither party had sought to compel

arbitration. King County Superior Court Judge Sean O'Donnell denied Brooks' motion to vacate on November 2, 2022 (CP 84-87) on the grounds that "a contingent interest in a revocable trust is not an asset" that Cooney was obligated to disclose. (CP 85)

Brooks appealed (CP 709), asserting among other claims that Cooney had breached his "contractual warranties" (CP 791), and that by denying her motion Judge O'Donnell failed "to give effect to the representations and warranties in the parties' separation contract." (CP 730; *see also* CP 727, 750, 780-81, 783-84, 814, 830-31, 898) Brooks argued that Judge O'Donnell erred in finding Cooney's failure to disclose the trust and its assets was "not material" when she had "negotiated representations and a warranty from Cooney attesting under the penalty of perjury that he had disclosed everything." (CP 784)

Division One affirmed in an unpublished opinion in Cause no. 84720-1-I on November 27, 2023 (CP 842-64), holding that Cooney's beneficiary interest in the trust was not an asset that required disclosure: "Cooney's interest was uncertain to vest and he had no contractual right to enforce it," and thus "Cooney's contingent interest in the trust was an expectancy and not a property interest." (CP 854)

This Court denied Brooks' petition for review on April 9, 2024. (CP 934-35)

D. After appellate review of the CR 60 decision concluded, Brooks sought to arbitrate her claim that Cooney breached their agreement by failing to disclose his beneficiary interest in the revocable trust and its assets.

On April 22, 2024, less than two weeks after this Court denied review, Brooks demanded arbitration, asserting that the "matter concerns breach of contract and breach of the covenant of the implied duty of good faith and fair dealing relating to the PSA between" the parties. (CP

368) As she had argued in her CR 60 motion, Brooks again claimed that "Cooney failed to disclose assets pursuant to ¶ 4.2 that it was ultimately discovered he both owned and controlled prior to the execution of the PSA and entry of the decree . . . " (CP 370, emphasis omitted; *see* CP 384) Brooks claimed she was entitled to "damages" for the maintenance she claimed she would have received but for Cooney's purported nondisclosure. (CP 372)

E. The trial court denied Brooks's motion to compel arbitration, finding that she waived arbitration by litigating her claims in the CR 60 proceeding.

Before arbitration commenced, Cooney filed a motion in the superior court for a determination whether Brooks's contract claims were subject to arbitration in light of the earlier court proceedings, which had resulted in a final judgment that was affirmed on appeal. (CP 183) Brooks filed a cross-motion to compel arbitration and asked the court to strike Cooney's motion (CP 259),

claiming it was "defective," and a "miscaptioned, mis-noticed, and misfiled CR 12(b)(6) motion." (CP 263)

On May 29, 2024, King County Superior Court Judge Michael Scott ("the trial court") struck Cooney's motion because it "was not properly noted for consideration by the Chief Civil Judge and working copies were not provided to the Court as required by LCR 7." (CP 325) Therefore, the sole motion before the trial court was Brooks's motion to compel. The trial court ordered that Cooney's "contentions that arbitration of the alleged dispute is barred or otherwise inappropriate shall be briefed in opposition to [Brooks]'s motion." (CP 325-26)

The trial court denied Brooks's motion to compel arbitration. (CP 627-30) The trial court concluded that Brooks had waived her right to arbitrate her contract claims by litigating them in the CR 60 proceeding, and that her contract claims were also barred by res judicata and law of the case. (CP 628-29)

F. Division One affirmed the trial court's decision in an unpublished opinion.

Division One affirmed the trial court's order denying arbitration, holding that whether Brooks waived her right to arbitration by her litigation conduct was properly decided by the trial court (Op. 4) and "the trial court correctly ruled that Brooks waived her right to arbitrate by conduct inconsistent with that intent, i.e., electing to litigate in superior court and the court of appeal for two years." (Op. 8) The court declined to address whether res judicata or law of the case also precluded arbitration (Op. 8) because "denial of the motion to compel arbitration was warranted solely on the basis of waiver." (Op. 9, n. 4) The court awarded Cooney his fees on appeal under the fee provision of the parties' agreement, entitling the prevailing party to fees in any action or proceeding related to the agreement. (Op. 12-13; CP 376-77)

III. GROUNDS FOR DENIAL OF REVIEW

A. Review is not warranted because there is no constitutional right to have an appellate court address every issue raised on appeal.

Review of Division One's unpublished opinion is not warranted under RAP 13.4(b)(3) based on Brooks's claim that "[w]here an appellate court affirms a trial court order without considering the issues framed by an appellant, it effectively denies the appellant an 'appeal of right' in a manner that offends due process." (*See* Petition 7-19, 28) First, there is no constitutional right to an appeal in a civil case in which only property or financial interests are threatened. *In re Grove*, 127 Wn.2d 221, 239-40, 897 P.2d 1252 (1995).

Second, there is no constitutional right to have a court address every issue raised by the parties on appeal as this Court recognized in *Hall v. Am. Nat. Plastics, Inc.*, 73 Wn.2d 203, 437 P.2d 693 (1968). After this Court in *Hall* disposed of an appeal "on points and issues not raised by

either party," it noted that it might be urged that "this has deprived appellant of his rights on appeal." 73 Wn.2d at 205. This Court concluded that it did not because "courts of review are not obliged to decide all issues raised by the parties, but only those which are determinative." *Hall*, 73 Wn.2d at 205.

Accordingly, Brooks was not "denied an appeal of right" (Petition 7, 28) because Division One did not address every issue she raised. "Principles of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented." *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 307, ¶40, 174 P.3d 1142 (2007) (quoted source omitted); *see, e.g., Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 165-66, 795 P.2d 1143 (1990) (declining to address issues raised by respondent on cross-appeal because they were "irrelevant"); *Hoberg v. City of*

Bellevue, 76 Wn. App. 357, 363, 884 P.2d 1339 (1994) (declining to review "claimed procedural errors" because they were "unnecessary" to its decision).

Courts "need not decide all issues posed by the parties, only those necessary to a proper result." *Griffin v. W. RS, Inc.*, 143 Wn.2d 81, 88, 18 P.3d 558 (2001). Therefore, when only certain issues are "dispositive," the court need not address the other issues that are presented. *Christiano v. Spokane Cnty. Health Dist.*, 93 Wn. App. 90, 93-94, 969 P.2d 1078 (1998) (declining to address what "may appear [to be] the initial issue" because another issue was "dispositive"), *rev. denied*, 163 Wn.2d 1032 (1999).

Here, the "dispositive issues" for a proper resolution of Brooks's appeal from the order denying arbitration were: 1) did the trial court have authority to decide whether Brooks waived arbitration by her litigation conduct in the CR 60 proceeding; and 2) did the trial court properly decide that Brooks had waived arbitration. Once Division

One decided those issues in the affirmative, it was unnecessary for the court to address the other issues raised by Brooks.

For instance, Division One did not have to address Brooks's argument that Cooney did not properly invoke the trial court's jurisdiction by filing his motion "in the closed dissolution and without service of process" (Petition 9-10) when, as the court noted, the "trial court struck Cooney's motion on Brooks's request. The only motion pending before the court was Brooks's motion to compel." (Op. 9, n. 3)

Division One also did not have to address whether RCW 7.04A.070 required the trial court to compel arbitration based on the existence of an agreement to arbitrate (Petition 10-12) beyond holding that "the right to arbitrate under an agreement may be waived by conduct inconsistent with any other intent . . . " (Op. 4, citing *Otis Hous. Ass'n, Inc. v. Ha*, 165 Wn.2d 582, 588, ¶8, 201 P.3d

309 (2009)) Because a party can waive the right to arbitrate by electing to litigate, the mere existence of an agreement to arbitrate does not require a court to compel arbitration under RCW 7.04A.070. *See, e.g.*, *Otis Housing,* 165 Wn.2d at 588, ¶8; *Detweiler v. J.C. Penney Cas. Ins. Co.*, 110 Wn.2d 99, 110, 751 P.2d 282 (1988); *Jeoung Lee v. Evergreen Hosp. Med. Ctr.*, 195 Wn.2d 699, 708, ¶24, 464 P.3d 209 (2020) (all denying arbitration when party waived contractual right to arbitrate by their litigation conduct).

Division One also did not need to address whether the trial court purportedly erred in precluding claims from arbitration that could not have been joined in the CR 60 proceeding (Petition 12-13, 16) when the court held the "dispositive issue in both [the CR 60 proceeding and her arbitration demand] is the same." (Op. 8, emphasis omitted)

Finally, Division One did not have to address whether a "non-waiver" provision in the parties' agreement precluded the trial court from finding that Brooks waived arbitration (Petition 13-14, 16, 18) when Brooks did not make this argument in the trial court.[2] "RAP 2.5(a) generally provides that the appellate court may refuse to review any claim of error which was not raised in the trial court." *Marriage of Wixom*, 182 Wn.2d 1022, ¶4, 353 P.3d 632 (2015).

Division One's unpublished opinion addressing only those issues that were "dispositive" to its decision affirming the trial court's order denying arbitration does not conflict with *Dalton M, LLC v. N. Cascade Tr. Servs., Inc.*, 2 Wn.3d 36, 534 P.3d 339 (2023) (Petition 7, 16), in which this Court reversed a decision by Division Three because it raised a new issue *sua sponte* to affirm the trial court's fee award

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[2] Brooks only cited to the "non-waiver" provision in the trial court in arguing that she "could not have waived full disclosure" of assets. (CP 451)

based on an unpled claim that depended on "factual allegations that were never presented in or proved to the trial court." 2 Wn.3d at 40, ¶5.

Division One did not affirm the trial court's order denying arbitration by resolving an issue not raised by either party. (Petition 16-19) Whether Brooks waived her right to arbitrate by electing to litigate was addressed by both parties in their merits briefs in the Court of Appeals. While Brooks claims Cooney "never raised the defense" of waiver in the trial court (Petition 16), she relies on Cooney's stricken motion. As Division One noted, "the only motion pending before the [trial] court was Brooks's motion to compel" (Op. 9, n. 3)—which Cooney opposed for, among other reasons, waiver. (CP 416-20)

In holding that Brooks waived her right to arbitrate by "electing to litigate in the superior court and the court of appeals for two years" (Op. 8), Division One did not *sua sponte* "impose an election of remedies clause where the

parties bargained for none." (Petition 17) Whether a party waives arbitration depends on if that party "elects to litigate instead of arbitrate." *Otis Housing,* 165 Wn.2d at 588, ¶8; *Lee*, 195 Wn.2d at 705. Because the issue of waiver was squarely before the court, it did not "cross the line to advocate" (Petition 17) by holding Brooks waived arbitration when "she elected to file a CR 60 motion rather than invoke her right to arbitration" and "then elected to pursue an appeal." (Op. 5)

B. Review is not warranted because Division One's unpublished opinion is consistent with published appellate court opinions recognizing that courts decide whether a party's litigation conduct waived arbitration.

Review of Division One's unpublished opinion is also not warranted under RAP 13.4(b)(1), (2) because the opinion is wholly consistent with published appellate court opinions from this Court and all three divisions of the Court of Appeals recognizing that courts decide whether an agreement to arbitrate is waived by litigation conduct. (Op.

4, citing *River House Dev. Inc. v. Integrus Architecture, P.S.*, 167 Wn. App. 221, 232, ¶26, 272 P.3d 289 (2012) (Div. III 2012)) *See, e.g., Jeoung Lee v. Evergreen Hosp. Med. Ctr.,* 195 Wn.2d 699, 708, ¶24, 464 P.3d 209 (2020); *Steele v. Lundgren*, 85 Wn. App. 845, 860, 935 P.2d 671 (Div. I 1997), *rev. denied*, 133 Wn.2d 1014 (1997); *Saili v. Parkland Auto Ctr., Inc.*, 181 Wn. App. 221, 228, ¶20, 329 P.3d 915 (Div. II 2014), *rev. denied*, 181 Wn.2d 1015 (2014) (all affirming decisions by trial courts denying arbitration on the basis of waiver due to litigation conduct).[3]

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[3] The United States Supreme Court has also recognized that notwithstanding policies favoring arbitration, it is courts that decide whether a party has waived arbitration by electing to litigate in *Morgan v. Sundance, Inc.*, 596 U.S. 411 (2022). "When a party who has agreed to arbitrate a dispute instead brings a lawsuit," without objection by defendants who "engage in months, or even years of litigation . . . before deciding they would fare better in arbitration. When that happens, the *court* faces a question: Has the defendant's request to switch to arbitration come too late?" *Morgan,* 596 U.S. at 413 (emphasis added).

Division One's unpublished opinion holding that "whether a party has waived their right to arbitration by choosing to litigate is a decision for the court, rather than arbitrator" (Op. 4) is also consistent with the intent underlying the Uniform Arbitration Act (UAA), codified in RCW ch. 7.04A. (Petition 20-22) As RCW 7.04A.901 states that "in applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it," this Court has approved consideration of the official comments by the drafters of the UAA in construing the courts' authority under RCW 7.04A.060(3), which provides that a "court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate." *Townsend v. Quadrant Corp.*, 173 Wn.2d 451, 456-57, ¶11, 268 P.3d 917 (2012).

As reflected in the comments, "[w]aiver is one area where courts, rather than arbitrators, often make the decision as to enforceability of an arbitration clause . . . It is also a matter of judicial economy to require that a party, who pursues an action in a court proceeding but later claims arbitrability, be held to a decision of the court on waiver." *River House*, 167 Wn. App. at 234, ¶31 (quoting Uniform Arbitration Act (UAA) (2000) §6, comment 5).

Consistent with these comments, the weight of both federal and state authority "treat litigation-conduct waiver as an issue for the court rather than an issue for the arbitrator." *River House*, 167 Wn. App. at 235, ¶32*; see Am. Gen. Home Equity, Inc. v. Kestel*, 253 S.W.3d 543, 551-52 (Ky. 2008) ("Questions of litigation-conduct waiver are best resolved by a court"); *Perry Homes v. Cull*, 258 S.W.3d 580, 588 (Tex. 2008) ("when waiver turns on conduct in court, the court is obviously in a better position to decide whether it amounts to waiver"), *cert. denied*, 555

U.S. 1103 (2009) (both cited in *River House*, 167 Wn. App. 2d at 235-36, ¶¶32, 33).

Having the court decide whether a party has waived arbitration by their litigation conduct does not run afoul of RCW 7.04A.070(3) (Petition 20-22, 27), which prohibits courts from denying arbitration "because the claim subject to arbitration lacks merit or grounds for the claim have not been established." As Division One recognized, "ruling that Brooks waived her right to arbitration did not require the trial court to examine the merits of Brooks's claim." (Op. 9) Instead, "the determination of waiver examines a party's conduct, not the merits of the underlying claims." (Op. 9)

"Allowing the court to decide this issue of arbitrability comports with the separability doctrine because in most instances waiver concerns only the arbitration clause itself and not an attack on the underlying contract." *River House*, 167 Wn. App. at 234, ¶31 (quoting UAA §6, comment 5). "As waiver by litigation conduct goes

solely to the arbitration clause rather than the whole contract, consistency suggests it is an issue for the courts." *Perry Homes,* 258 S.W.3d at 589. Rather than the merits of the dispute, the court considers whether a party's conduct *in court* is inconsistent with an intent to arbitrate under that provision. "Contracting parties would expect the court to decide whether one party's conduct before the court waived the right to arbitrate." *Perry Homes,* 258 S.W.3d at 588 (quoted source omitted).

C. Review is not warranted because Division One's unpublished opinion holding that petitioner waived arbitration by seeking to arbitrate the same dispositive issue that she previously litigated, and lost, does not conflict with any published appellate court decisions

Review of Division One's unpublished opinion holding Brooks waived her right to arbitrate by electing to litigate in the CR 60 proceeding is not warranted under RAP 13.4(b)(1), (2) because it does not conflict with any published appellate court decisions. Contrary to Brooks's

assertion, the court did not "misinterpret" this Court's decision in *Otis Housing*, and "significantly broaden the standard for a waiver defense." (Petition 20-25) *Otis Housing* supports Division One's holding that Brooks engaged in conduct inconsistent with an intent to arbitrate by choosing to litigate the same dispositive issue in the earlier CR 60 proceeding and thus waived her right to arbitrate. (Op. 8)

In *Otis Housing*, petitioner was party to a rental agreement containing a "purchase option" and arbitration clause. After petitioner stopped paying rent, respondent brought an unlawful detainer action. During a show cause hearing in the unlawful detainer action, the court rejected petitioner's argument that the lease agreement was converted to a purchase and sale agreement because it had exercised the purchase option. After the court awarded possession of the property to defendant, petitioner filed a separate action against defendant to compel arbitration of

its claim that it had exercised the option to purchase, which the trial court denied. *Otis Housing,* 165 Wn.2d at 586, ¶4.

This Court affirmed the trial court's decision on the grounds of waiver, and in doing so rejected petitioner's argument "that it waived no rights because the show cause hearing in an unlawful detainer action is limited to resolving questions of possession." *Otis Housing*, 165 Wn.2d at 588, ¶7. This Court held that regardless "whether it was appropriate for the parties to raise, or the court to consider, the purchase option," when petitioner "defended the unlawful detainer action by raising as a defense ***the very same issue*** it now seeks to arbitrate: whether the option to purchase had been properly exercised," they waived the right to arbitrate. *Otis Housing*, 165 Wn.2d at 588, ¶7 (emphasis added). "Having lost that issue, it may not later seek to relitigate the same issue in a different forum." *Otis Housing*, 165 Wn.2d at 588, ¶8.

Division One properly relied on *Otis Housing* in holding that by electing to litigate the same dispositive issue in the earlier CR 60 proceeding—"whether Cooney had a property interest in his grandmother's trust that he was obligated to disclose during the dissolution proceeding"—Brooks waived the right to arbitrate. (Op. 8) Therefore, "[h]aving lost that issue," Brooks cannot "seek to relitigate the same issue in a different forum" by demanding arbitration. (Op. 8, citing *Otis Housing*, 165 Wn.2d at 588, ¶8 alterations in quotes omitted).

Division One did not misinterpret *Otis Housing* to permit consideration of "claim preclusion during arbitrability determinations." (Petition 21) To the contrary, the court specifically declined to address whether the trial court properly denied arbitration based on res judicata, as Brooks's waiver of her right to arbitrate alone supported the trial court's decision. (Op. 8; Op. 9, n. 4) Instead, consistent with this Court's decision in *Otis Housing,* in

deciding waiver (Op. 8), the court considered whether Brooks raised "the very same issue" she "now seeks to arbitrate" in the earlier CR 60 proceeding. 165 Wn.2d at 588, ¶7.

Division One also did not misinterpret *Otis Housing* "to change the legal standard of waiver . . . to apply any time two actions involve the same factual issues." (Petition 22-25) By holding that Brooks waived her right to arbitrate by electing to litigate the same dispositive issue that she sought to arbitrate, Division One did not rely solely on the similarity of the "factual issues" in Brooks's CR 60 motion and arbitration demand. "[W]hether Cooney had a property interest in his grandmother's trust that he was obligated to disclose during the dissolution proceeding" (Op. 8) is a factual issue *and* legal issue—as Brooks recognized in her earlier appeal in the CR 60 proceeding, where she argued that whether Cooney's beneficiary interest in the trust was "property" under RCW 26.09.080

requiring disclosure was a legal issue requiring de novo review. (CP 756-57)

As Division One recognized, and the record supports, Brooks raised the same factual and legal issues in her arbitration demand as she had in her CR 60 motion. The only difference is Brooks's CR 60 motion included additional claims that were not raised in her arbitration demand.[4] However, the claim regarding Cooney's alleged failure to make the "contractually-required disclosures" that was raised in both the CR 60 proceeding and Brooks's arbitration demand involved the same factual and legal issues. (*Compare* CP 369-70 *with* CP 337-38; *see also* CP 29, 35, 80-81, 727, 740-41, 780-81, 791, 814, 830-31, 861,

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[4] By noting that "Brooks asserted different claims and legal theories in her CR 60 motion than she did in her arbitration demand" (Op. 8), Division One did not hold the two proceedings "involve different substantive rights." (Petition 16) The court was merely acknowledging that Brooks raised other grounds in her CR 60 motion that she did not raise in her arbitration demand, such as fraud and misrepresentation under CR 60(b)(4).

876-77, 897-98) Accordingly, the court's opinion does not conflict with *Verbeek Props., LLC v. GreenCo Environmental, Inc.*, 159 Wn. App. 82, 246 P.3d 205 (2010) and *Wiese v. Cach, LLC*, 189 Wn. App. 466, 358 P.3d 1213 (2015), which Brooks asserts hold that the litigation waiver defense only applies "where the claims (both legal and factual issues) are the same." (Petition 22)

Nor does the opinion conflict with *Verbeek* based on Brooks's erroneous assertion that *Verbeek* stands for the proposition that waiver of arbitration can only be established if the arbitration demand is made during an "ongoing" litigation. (Petition 26-27) There is no rule that waiver of arbitration can only occur when the arbitration demand is made during ongoing litigation. To the contrary, whether waiver of arbitration has occurred due to a party's litigation conduct "necessarily depends upon the facts of the particular case and is not susceptible to bright line rules." *River House Dev. Inc. v. Integrus Architecture,*

P.S., 167 Wn. App. 221, 237, ¶39, 272 P.3d 289 (2012) (quoted source omitted).

While Division One in *Verbeek* held that plaintiff did not waive arbitration by seeking to remove a lien against their property recorded by defendant in an earlier separate proceeding. The court's decision was not because a party can never waive arbitration by litigating in an earlier action separate from the action in which the arbitration demand is made. Instead, the *Verbeek* court held there was no waiver because the issues plaintiff "seeks to arbitrate in the present suit are different" from those issues raised by plaintiff in the earlier action. *Verbeek,* 159 Wn. App. at 91, ¶29. The *Verbeek* court held plaintiff did not waive arbitration because the court that ruled on plaintiff's motion to remove the lien "was not asked to, and was not authorized to find facts or make conclusions of law pertaining to the breach of contract and related claims Verbeek now seeks to arbitrate." 159 Wn. App. at 92, ¶30;

see also Wiese, 189 Wn. App. at 480-81, ¶33 (no waiver when issues raised in previous debt collection actions were "separate and distinct" from the civil conspiracy, CPA, and CAA claims that plaintiff sought to arbitrate).

In this case, Division One concluded "the dispositive issue in both" the earlier CR 60 proceeding and the arbitration demand "is the same," therefore, it properly held that Brooks waived arbitration.

D. This Court should award attorney fees incurred in answering this petition to respondent.

Division One awarded attorney fees to Cooney under the terms of the parties' agreement. (Op. 12-13; CP 376-77) This Court should likewise award Cooney fees incurred in answering this petition on the same grounds. *See* RAP 18.1(j).

IV. CONCLUSION

This Court should deny review.

I certify that this answer is in 14-point Georgia font and contains 4,804 words, in compliance with the Rules of Appellate Procedure. RAP 18.17(b).

Dated this 14th day of August, 2025.

SMITH GOODFRIEND, P.S.

By: */s/ Valerie A. Villacin*
Valerie A. Villacin
WSBA No. 34515

Attorney for Respondent

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on August 14, 2025, I arranged for service of the foregoing Answer to Petition for Review, to the Court and to the parties to this action as follows:

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Evyn G. Kuske Wechsler Becker LLP 701 5th Avenue, Suite 4550 Seattle, WA 98104-7088 egk@wechslerbecker.com	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail
Hillary A. Brooks 2900 NW Clearwater Drive # 200-66 Bend, OR 97703 hillarybrooks@icloud.com	____ Facsimile ____ Messenger ____ U.S. Mail __X__ E-Mail

DATED at Everett, Washington this 14th day of August, 2025.

/s/ Victoria K. Vigoren
Victoria K. Vigoren

SMITH GOODFRIEND, PS

August 14, 2025 - 3:25 PM

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