FILED
SUPREME COURT
STATE OF WASHINGTON
7/7/2025
BY SARAH R. PENDLETON
CLERK

FILED
Court of Appeals
Division I
State of Washington
7/7/2025 1:24 PM

No. 86951-5-I

Case #: 1043651

COURT OF APPEALS, DIVISION I,
OF THE STATE OF WASHINGTON

In re the Marriage of:

ROBERT W. COONEY,

Respondent,

and

HILLARY A. BROOKS,

Petitioner.

PETITION FOR REVIEW

Hillary A. Brooks
WSBA #012138
2900 NW Clearwater Dr.
#200-66
Bend, OR 97703
(503) 766-9991

Table of Contents

TABLE OF AUTHORITIES

Washington Cases

Washington Statutes

Rules and Regulations

Other Authorities

INTRODUCTION

For the first time, a Washington appellate court affirmed a trial court order deciding the merits of an arbitration dispute during an arbitrability determination, despite the UAA's prohibition against doing so. In ruling, the court disregarded the issues framed by the appellant for decision, including the trial court's lack of jurisdiction and that the requested relief, preclusion of claims, exceeded the scope of relief available during an arbitrability determination.

Accordingly, this petition involves the converse situation to that in *Dalton M*. There, the court of appeals exceeded the scope of the issues presented by the parties and decided issues the parties had not pursued on appeal. Here, because the appellate court failed to address the issues on which the appeal is premised and affirmed erroneously on grounds it had no jurisdiction to reach, it effectively denied the appellant an "appeal of right" before a neutral arbiter.

This Court should accept review.

A. IDENTITY OF PETITIONER

The petitioner is Hillary Brooks, the appellant below.

B. COURT OF APPEALS DECISION

Brooks asks this Court to review the decision of the Court of Appeals, Division I, filed on June 16, 2025 ("Op.") and reproduced in the appendix. While unpublished, it is accessible at 2025 WL 1684900.

C. ISSUES PRESENTED FOR REVIEW

1. Does a non-discretionary appellate court violate Washington's rule of party presentation in conflict with *Dalton M* when it affirms trial court orders without consideration of the appellant's issues on assignments of error, including those directed to the trial court's lack of jurisdiction, and by doing so, does the court effectively deny the appellant an "appeal of right"?

2. Can *Otis Housing* be interpreted to:

(a) find waiver by conduct in litigating an earlier dispute involving different claims, and if so, does the defense subsume res judicata in conflict with *Hisle* and *Kelso*?

(b) permit courts to decide the merits of a waiver by conduct defense in a dispute subject to the UAA in conflict with RCW 7.04A.060(3), vesting that authority in the arbitrator?

(c) permit courts to decide the merits of a dispute subject to the UAA during an arbitrability determination in conflict with RCW 7.04A.070(3), prohibiting merits consideration?

D. STATEMENT OF THE CASE[1]

1. This civil case for breach of contract subject to the Uniform Arbitration Act ("UAA") relates to an arbitration demand ("Demand") asserting breach of contract claims for non-disclosure of significant assets in a property settlement agreement ("PSA") initiated after litigation over the PSA's validity ("CR 60 action"). CP 464-507.

2. The claims could not be joined because the CR 60 action had to be litigated in the dissolution, and the Demand claims had to be arbitrated. Op. 5. CP 261:16-20.

3. The PSA requires arbitration for claims "arising out of or in connection with this Agreement". CP 486 (§ XIII). The husband has not disputed the validity and enforceability of the PSA or that the claims fall within the scope of the arbitration provision. CP 187-200, 414-27.

4. The PSA includes a non-waiver of contract terms

---

[1]A thorough discussion of the facts and procedural history relative to this proceeding can be found in the Brief of Appellant ("BA"), BA 6-20.

provision, including the agreement to arbitrate. CP 475 (¶ 2.6).

5. Although raised by the appellate court *sua sponte,* the PSA does not include an election of remedies provision. Op. 5, 8.

6. The husband challenged the arbitrability of the dispute by filing a motion in the closed dissolution, without serving the wife with process, asserting the CR 60 action precluded her from arbitrating the Demand. CP 183-258, 351-427 (refiled).

7. The wife objected to the husband's motion, including its filing in the closed dissolution, the failure to serve her with process, its failure to comply with RCW 7.04A.050(2), and its request for relief beyond the scope of court authority under RCW 7.04A. CP 259-315, 428-63 (in response to refiling).

8. Rather than limit review to the arbitrability determination as required by RCW 7.04A.070, the trial court precluded the wife's arbitration claims based on three grounds: res judicata, law of the case, and waiver (a defense the husband

had waived by twice failing to raise it). CP 269:7-10, 439:5-15, 618-21. The appellate court affirmed on waiver. Op. 1.

9. The PSA required disclosure of all assets. CP 471 (§1.9), 480:13-15 (§2.4). The husband did not fully disclose. CP 464-507. The Opinion cites portions from the CR 60 action, incorrectly stating that the wife did not explain the basis for the husband's ownership of undisclosed assets. *Compare* Op. CP 835-37 and Op. 11-12. The wife does not know why the court ignored the evidence proving the vesting of the husband's interest, only that it did. BA 6-11, 54-61. Nor did the court explain why it did not first interpret and then construe the husband's interest before ruling in the CR 60 action.[2] No court has decided the husband's interest in the undisclosed property because no court has considered or interpreted the final trust amendment that vested his interest. (CP 147, previously CP 717).

---

[2] As discussed in, *for e.g., Int'l Marine Underwriters v. ABCD Marine, LLC*, 179 Wn.2d 274, 281-82 ¶19, 313 P.3d 395 (2013) (discussing process of first interpreting and then construing legal documents); *In re Estates of Wahl*, 99 Wn.2d 828, 831, 664 P.2d 1250 (1983) (holding documents executed together are to be construed together); *Radliff v. Schmidt*, 27 Wn. App. 2d 205, 212 ¶18, 532 P.3d 622 (2023) (holding the court must determine intent from the language of estate documents as a whole).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

(1) By Affirming a Trial Court Order Without Considering the Issues Framed by the Appellant for Decision, an Appellate Court Effectively Denies an Appellant an "Appeal of Right"

Washington courts follow the rule of party presentation in which the appellate courts "decide only questions presented by the parties." *Dalton M, LLC v. North Cascade Trustee Serv., Inc.*, 2 Wn.3d 36, 50 ¶37, 534 P.3d 339 (2023). Under that rule, the parties "frame the issues for decision" and the courts are assigned "the role of neutral arbiter of matters the parties present." *Id*. Where 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. This issue warrants review under RAP 13.4(b)(1)-(4).

(a) The due process right to a fair trial is implicated where an appellate court fails to give effect to legislative intent in controlling statutes when ruling.

Non-discretionary appellate courts hear direct appeals or review as a matter of right ("appeal of right"). Wash. Const. art. IV, §30 RCW 2.06; RAP 2.1(a)(1), 2.4(a). The right to a fair trial in a fair tribunal is a fundamental right with constitutional protections. *State v. Moreno*, 147 Wn.2d 500, 507, 58 P.3d 265 (2002); U.S Cons. art. XIV, §1; Wash. Const. art. I, §3. The due process right to a fair trial is implicated where courts cross the line from neutral arbiter to advocate. *See Moreno*, 147 Wn.2d at 509-11.

Because arbitration is statutory, the appellate court's failure to give effect to legislative intent when ruling conflicts with this Court's authority. *Columbia Riverkeeper v. Port of Vancouver USA*, 188 Wn.2d 421, 435 ¶35, 395 P.3d 1031 (2017) (holding where a statute's meaning is plain on its face, courts "must give effect to that meaning as an expression of legislative intent."). In affirming, the appellate court failed to give effect to the plain language and ordinary meaning in RCW 7.04A.050(2) (imposing a mandatory process for initiating judicial review of arbitration disputes); RCW 7.04A.060(3) (vesting authority in the arbitrator to decide affirmative defenses); RCW

7.04A.070(1)/(2) (requiring a court to compel arbitration unless the court finds no enforceable agreement to arbitrate); RCW 7.04A.070(3) (prohibiting courts from considering the merits of a dispute during an arbitrability determination); RCW 7.04A.280(1)(a)/(b) (limiting appellate jurisdiction to review of orders denying a motion to compel or granting a motion to stay arbitration); and RCW 7.04A (containing no provision permitting courts to decide the merits of a dispute in actions brought under the UAA).

(b) *The due process right to a fair trial is implicated where the appellate court ignores the issues framed by an appellant for decision.*[3]

Because the issues the appellate court failed to address were material to the dispute and would have required reversal if considered, the wife is *actually prejudiced* by the court's failure to follow the rule of party presentation, effectively denying her an appeal of right.

Issue 1: The husband failed to invoke trial court

[3] The issues discussed are also applicable to the res judicata and law of the cases defenses. Op. 9 (fn 4).

jurisdiction under RCW 7.04A.050(2) by filing his motion challenging arbitrability in the closed dissolution and without service of process. BA 1-3, 26-27; Reply of Appellant ("RA") 1-6. *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc*., 154 Wn. App. 581, 585 ¶10, 225 P.3d 1035 (2010) (holding service of process is basic to personal jurisdiction). The wife objected to the husband's failure to comply with the statute. CP 260:23-24, 310:21-23, and 321:6-7. That failure left the court powerless to act. RA 4-6. *Godfrey v. Hartford Cas. Ins. Co*., 142 Wn.2d 885, 893, 16 P.3d 617 (2001) (holding that because arbitration is a statutory proceeding, both the rights of the parties and the power of the court are governed entirely by statute); and *Gates v. Homesite Ins. Co*., 28 Wn. App. 2d 271, 279 ¶19, 537 P.3d 1081 (2023) (holding orders entered without jurisdiction are void and must be vacated). In affirming the trial court's order despite the statutory violation, the court failed to give effect to legislative intent in conflict with *Columbia Riverkeeper*. Op. 1.

Issue 2: Neither the trial court (CP 618-21) nor the appellate court conducted an arbitrability determination as required by RCW 7.04A.070(1)/(2), RCW 7.04A.280(1)(a)/(b). Op. *throughout* (including no discussion of the statute, the arbitration provision, or whether the claims fell within its scope). BA 1-4, 20-21, 24-25, 31-32, 49-54; RA 1-3. Courts are required to order arbitration under RCW 7.04A.070(1)/(2) unless they find no enforceable agreement to arbitrate. *Heights at Issaquah Ridge, Owners Ass'n v. Burton Landscape Group, Inc*., 148 Wn. App. 400, 403 ¶5, 200 P.3d 254 (2009) (holding "[i]f the dispute can fairly be said to invoke a claim covered by the agreement, any inquiry by the courts must end."); and *Marriage of Pascale*, 173 Wn. App. 836, 838 ¶1, 295 P.3d 805 (2013) (holding courts must limit "inquiry to the question of whether [the] dispute falls within the scope of the parties' agreement to arbitrate"). The husband did not challenge the PSA's validity/enforceability or that the claims fall within its scope. CP 414-27. In affirming despite the statutory violation, the appellate court failed to give effect to legislative intent in conflict with *Columbia Riverkeeper*. Op. 1.

<u>Issue 3</u>: The trial court's order is void because it precludes

claims during an arbitrability determination, where consideration of merits is prohibited by RCW 7.04A.070(3). BA 1-5, 20-21, 29-31, 49-51; RA 1-3, 6, and 11-14. *Heights,* 148 Wn. App. at 403 ¶5 (holding courts resolve the threshold question of arbitrability without examination of the merits of the dispute); and *Pascale*, 173 Wn. App. at 843-44 ¶1 (holding "[w]here the parties have agreed to arbitrate a matter, a court must 'leave consideration even in the clearest cases to the arbitrator.'"). Because the appellate court affirmed a trial court order that violated RCW 7.04A.070(3), the court failed to give effect to legislative intent in conflict with *Columbia Riverkeeper; West v. Washington Dept. of Fish and Wildlife*, 21 Wn. App. 2d 435, 441 ¶16, 506 P.3d 722 (2022) (holding statutes are interpreted to "achieve a harmonious total statutory scheme"). Whether a party can prevail on an affirmative defense, such as waiver, goes to the merits of the dispute, not its arbitrability. *SVN Cornerstone, LLC v. N. 807, Inc.*, 10 Wn. App. 2d 72, 80 ¶19, 447 P.3d 220 (2019), *rev. denied*, 194 Wn. 2d 1018 (2020)

Issue 4: In precluding claims that could not have been joined, the Opinion conflicts with settled authority. Op. 1. BA 3-5, 21-22, 36-37, 47; RA 23-25. *Kelly-Hansen v. Kelly-Hansen*, 87 Wn. App. 320, 330-31, 941 P.2d 1108 (1997) (holding it cannot be said a matter should have been litigated earlier if it could not have been); *Guardado v. Guardado*, 200 Wn. App. 237, 242 ¶16, 402 P.3d 357 (2017) (actions to modify a decree must be filed in the dissolution); *Pascale*, 173 Wn. App. at 807 ¶1 (holding "[i]f it can fairly be said that the arbitration agreement covers the dispute, arbitration is required."); *Wiese v. Cach, LLC*, 189 Wn. App. 466, 479 ¶29, 358 P.3d 1213 (2015) (holding claims subject to arbitration must be arbitrated even if inefficiencies result); and *Berman v. Tierra Real Estate Group, LLC*, 23 Wn. App. 2d 387, 399-400 ¶29, 515 P.3d 1004 (2022) (holding waiver is disfavored, imposes a heavy burden, and is not subject to bright-line rules).

Issue 5: In affirming the trial court order based on a waiver defense where the parties contracted for non-waiver, the Opinion conflicts with this Court's decision in *Mike M. Johnson, Inc. v. County of Spokane*, 150 Wn.2d 375, 391-92, 78 P.3d 161 (2003) (holding because waiver by conduct requires unequivocal acts evidencing an intent to waive, a writing indicating an intent not to waive prevents such a finding). Op. 1. CP 475 (¶2.6); BA 4, 45; RA 29-30.

(c) An appellate court crosses the line to advocate when it inverts burdens of proof and presumptions in a manner that is outcome-determinative.

"The party opposing arbitration bears the burden of showing that the agreement is not enforceable." *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 797 ¶19, 225 P.3d 213 (2009). In holding "the trial court properly treated [the wife] as the proponent" of the non-dismissal of her claims, the court inverted the burden of proof from the husband to the wife. Opinion, 9 (fn. 3); BA 24. RCW 7.04A.070 provides that, whether proceeding under .070(1) or .070(2), the party resisting arbitration carries the burden of proving that arbitration should not be ordered. *Satomi*, 167 Wn.2d at 797 ¶19. In condoning an inversion of the burden of proof resulting from trial court error (BA 2, 12-14, 28-29), the appellate court failed to give effect to legislative intent in conflict with *Columbia Riverkeeper*. BA 26-

27; 49-54; RA 1-4. *French v. Gabriel*, 116 Wn.2d 584, 591-92, 806 P.2d 1234 (1991) (holding a party does not waive rights by responding to deficiencies in another party's motion); and *Skagit Surveyors and Engineers, LLC v. Friends of Skagit Co.,* 135 Wn.2d 542, 556, 958 P.2d 962 (1998) (holding a party cannot waive lack of subject matter jurisdiction because courts are powerless without it).

"[C]ourts must indulge every presumption 'in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.'" *Zuver v. Airtouch Comm., Inc.,* 153 Wn.2d 293, 301, 103 P.3d 753 (2004). BA 24; RA 15. While the appellate court acknowledged those presumptions, it did not adhere to them. *Compare* Opinion, at 4 and Opinion at 5 (fn. 2) ("Although [the wife] asserts that [the husband] waived [the waiver by conduct defense], '[w]e may affirm on any basis supported by the record whether or not the argument was made below.'").

By affirming a trial court order precluding claims based on a waiver defense, the appellate court did not make every presumption in favor of arbitration when it: 1) excused the husband's waiver of the defense despite his burden to prove arbitration should not be ordered and instead made presumptions in favor of affirming by overlooking that waiver (Op. 5 n.2, BA 12-14, 32-34); 2) ignored that the claims could not have been joined (BA 4, 21-22, 36-37, 47; RA 23-26); and 3) ignored that the parties contracted for non-waiver. CP 475 (§2.6); BA 45; RA 29-30.

(d) *An appellate court crosses the line to advocate when it sua sponte raises new theories to support a ruling.*

The appellate court raised issues that the husband did not, in conflict with *Dalton M*, 2 Wn.3d at 53 ¶¶43-44; RAP 12.1. One example was imposing an election of remedies on the wife. Op. 5, 8. Because the husband never raised the defense, he waived his right to do so. *French,* 116 Wn.2d at 589 (holding all defenses must be raised in a single motion). In any event, because the parties did not contract for an election and the appellate court acknowledged the cases involve different substantive rights (Op.

8), imposing an election conflicts with this Court's authority. CP 470-88, RA 31-34. *Civil Serv. Comm'n of the City of Kelso v. City of Kelso*, 137 Wn.2d 166, 177, 969 P.2d 474 (2000) (holding this court will not impose an election of remedies clause where the parties bargained for none).

Another example of advocacy in the Opinion is the alarming holding that if the wife wanted due process before her claims were precluded, she had to file her own complaint. Op. 9. BA 49-54. "The very purpose of arbitration is to avoid the courts insofar as the resolution of the dispute is concerned.... arbitration is a substitute for, rather than a mere prelude to, litigation." *Godfrey*, 142 Wn.2d at 892. By reversing presumptions and assigning the husband's burdens under RCW 7.04A.050(2) and RCW 7.04A.070(1)/(2) to the wife, the appellate court failed to give effect to legislative intent in conflict with *Columbia Riverkeeper*.

(e) *The appellate court denied the wife an "appeal of right" before a neutral arbiter in a manner that offends due process*.

The appellate court failed to fulfill its obligation to act as a neutral arbiter of the issues presented by the parties for decision. *Dalton M*, 2 Wn.3d at 50 ¶37. By affirming the trial court order without considering the wife's issues framed for decision, failing to give effect to legislative intent in controlling statutes, and acting as an advocate for affirmance, the appellate court effectively denied the wife an appeal of right.

That failure is more striking because this is a contract dispute, not a suit in equity. "It is black letter law of contracts that the parties to a contract shall be bound by its terms." *Zuver*, 153 Wn.2d at 302. To affirm, the appellate court effectively rewrote the parties' contract. When the PSA did not support an election of remedies, the court nonetheless applied one. Op. 5, 8. When the court wanted to find a waiver to affirm, it disregarded the PSA's non-waiver provision. CP 475 (¶2.6). Courts cannot, "based upon general considerations of abstract justice, make a contract for parties which they did not make for themselves." *Wagner v. Wagner*, 95 Wn.2d 94, 104, 621 P.2d 1279 (1980).

It is the public policy of Washington both to encourage divorcing parties to settle their disputes amicably and to resolve disputes through arbitration. RCW 26.09.070(1), RCW 7.04A. Yet, when the wife did that, Division 1 denied her a remedy in the CR 60 action, holding that by settling the dissolution rather than continuing to litigate, she waived the fiduciary duties her husband owed her. BA 6-11. Now, the same court denies her the remedies available under the contract, despite the legislature's preservation of the post-dissolution enforcement right. Denying the wife a remedy for doing what the legislature encouraged her to do is failing to give effect to legislative intent under both RCW 26.09.070(6) and RCW 7.04A, in conflict with *Columbia Riverkeeper*.

This court should accept review and hold that civil litigants in Washington are entitled to an "appeal of right" that complies with Washington's rule of party presentation to have the issues they frame for appeal decided by a neutral arbiter, even when the action is one the court disfavors.

(2) The Court of Appeals Misinterpreted *Otis Housing* and the Waiver by Conduct Defense in Four Significant Respects

The appellate court's interpretation of *Otis Housing Ass'n,* *Inc. v. Ha*, 165 Wn.2d 582, 201 P.3d 309 (2009), created four separate problems negatively impacting the consistency of the legal system: 1) the Opinion interprets *Otis Housing* as permitting courts to decide the merits of a dispute during an arbitrability determination in conflict with RCW 7.04A.070(3); 2) through its misinterpretation of *Otis Housing*, the Opinion significantly broadens the standard for a waiver defense by removing the requirement of the same legal issue; 3) the new standard is so overbroad it subsumes the res judicata defense; and 4) the Opinion changes the standard for who decides waiver by conduct in conflict with RCW 7.04A.060(3). These issues warrant review under RAP 13.4(b)(1)-(3).

(a) *Interpreting Otis Housing to permit courts to decide a waiver defense during arbitrability fails to give effect to the legislative intent in RCW 7.04A.070(3), prohibiting courts from doing so.*

Waiver is an affirmative defense to the arbitrability of a dispute. *Zuver*, 153 Wn.2d 301. RA 15. The resolution of an affirmative defense goes to the merits of the dispute, not the question of its arbitrability. *SVN Cornerstone*, 10 Wn. App. 2d at 80 ¶19. RCW 7.04A.070(3) prohibits courts from considering the merits of a dispute while deciding its arbitrability. Accordingly, *Otis Housing* cannot be interpreted, as the Opinion does, to permit claim preclusion during arbitrability determinations subject to RCW 7.04A. Op. 6-9. *West*, 21 Wn. App. 2d at 441 ¶16 (holding statutes are interpreted to "achieve a harmonious total statutory scheme"). Extrapolating *Otis Housing* as authorizing courts to decide the merits of waiver defenses during arbitrability determinations for actions subject to RCW 7.04A runs counter to its procedural facts. *Otis Housing* involved a motion to compel arbitration decided under the RUAA, the repealed predecessor of the UAA. *Otis Housing*, 165 Wn.2d at 588 (fn 2).

In failing to address RCW 7.04A.070(3) altogether, the Opinion identifies no language in *Otis Housing* creating a carve-out from the statute for a waiver defense. Nor did the legislature demonstrate that intent when enacting RCW 7.04A.070(3) and failing to use language to that effect. Courts must give effect to legislative intent as expressed through the plain language and ordinary meaning of the statute. *Columbia Riverkeeper*, 188

Wn.2d at 435 ¶35. Moreover, the Opinion does not explain why the trial court could decide the merits of the waiver defense, while acknowledging it could not determine the merits of the res judicata and law of the case defenses. Op. 9 (fn 4).

(b) *Interpreting Otis Housing to find waiver where only factual (not legal) issues are the same conflicts with Wiese and Verbeek.*

The Opinion misinterprets *Otis Housing* and *Verbeek Properties, LLC v. Greenco Environmental, Inc*., 159 Wn. App. 82, 91-92 ¶29, 246 P.3d 205 (2010) to change the legal standard for waiver, broadening the defense to apply any time two actions involve the same factual issues. Op. 5-8. Following its decision in *Verbeek*, Division 1 decided *Wiese*, which explicitly holds the waiver defense applies only where the claims (both legal and factual issues) are the same.

> [A] party only invokes the judicial process to the extent it litigates a specific claim it subsequently seeks to arbitrate. [O]nly prior litigation of the same legal and factual issues as those the party now wants to arbitrate results in waiver of the right to arbitrate.

Wiese, 189 Wn. App. at 480 ¶32 (citations removed). To support that holding, *Wiese* cited both *Otis Housing* and *Verbeek*. *Weise* at ¶32. Accordingly, the wife's discussion of waiver, including citation of *Wiese* and *Verbeek* as imposing a "same claims" requirement that prevents waiver here, is consistent with Division 1's interpretation of the waiver defense post-*Otis Housing*. RA 26-29. The appellate court's interpretation, which omits discussion of *Wiese* and requires only the same factual issues, conflicts with those authorities. Op. 5.

(c) *Interpreting waiver as requiring only the same facts subsumes the res judicata defense in conflict with Hisle and Kelso.*

To find a waiver under the Opinion's interpretation of *Otis Housing* requires only an affirmative answer to the question: Did you already litigate the same factual issue? Op. 6-9. In precluding the wife's breach of contract claims based on waiver, the Opinion holds, "it is immaterial that [the wife] asserted different claims and legal theories in her CR 60 motion than she did in her demand for arbitration." *Id.* at 8. Under the settled authority of this Court, asserting different claims involving different legal theories in two actions, even where the claims arise from the same factual event, does not give rise to claim preclusion. BA

39-43, 47-48; RA 19-26, 31-34. *Hisle v. Todd Pacific Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108 (2004) (holding no res judicata between actions challenging a contract's validity and seeking damages for its breach); *Kelso*, 137 Wn.2d at 175 (holding no res judicata where claims apply different legal standards and arise from independent obligations). The same legal scenarios would now be subject to a waiver, effectively swallowing res judicata whole and conflicting with the entire body of Washington law relating to the defense.

The Opinion identifies no language in *Otis Housing* supporting a waiver between cases involving "different claims and legal theories". The party in *Otis Housing* did not challenge that the claims were the same; only that the available relief differed, so the issue of different claims was not before the Court. *Otis Housing*, 165 Wn.2d at 587 ¶7. *Otis Housing* cannot be interpreted to apply a waiver where claims differ. Just as this Court does not overrule decisions *sub silentio*, it must be presumed it does not dispense with entire defenses *sub silentio* either, particularly a defense like res judicata so grounded in law that it predates the formalization of common law. *State v. Lupastean*, 200 Wn.2d 26, 40 ¶31, 513 P.3d 781(2022) (holding "[w]here we have expressed a clear rule of law ... we will not—and should not—overrule it sub silentio. To do so does an injustice to parties who rely on this court to provide clear rules of law.").

(d) *The Opinion blurs the distinction between two different types of waiver by conduct, one resolvable by the court and the other resolvable by the arbitrator.*

The Opinion takes a special exception, that from *River House Dev. Inc. v. Integrus Arch., P.S.,* 167 Wn. App. 221, 272 P.3d 289 (2012), and makes it the general rule for all waiver by conduct cases having any association with litigation. Op. 6-8. That interpretation conflicts with RCW 7.04A060(3), which vests the arbitrator with the authority to decide affirmative defenses. *Yakima County Law Enforcement Officers Guild v. Yakima County,* 133 Wn. App. 281, 288 ¶19, 135 P.3d 558 (2006). RA 26-29.

In the *River House* context, there is only one case (the case before the court) and one set of claims (the claims being litigated in that case). *River House*, 167 Wn. App. at 228-229 ¶14. Thus, the *River House* context does not require a merits inquiry to determine whether a party has, in fact, already litigated a matter involving the same claims. Instead, the inquiry is different—did the party take too many steps down the litigation path before seeking to arbitrate, a question better answered by the court where the litigation has been ongoing. *Id.* at 224 ¶2, 235 ¶33.

However, in this case, the wife never attempted to litigate her arbitration claims (CP 464-507), and the husband's defenses pertain to her conduct in litigating the earlier CR 60 action (CP 618-21), not to her delay in raising arbitration in the Demand. Waiver from litigating an earlier dispute, pre-litigation conduct (as regards the litigation before the court in which the waiver claim is asserted), is discussed in *Verbeek,* 159 Wn. App. at 91-92 ¶29. RA 26-29. Unlike *River House*, in *Verbeek* situations, there are two cases and two sets of claims; thus, there can be no assumption that the claims are the same, requiring the arbitrator to decide the defense under RCW 7.04A.060(3). *Id.* at 84 ¶1, 91-92 ¶29; *Yakima,* 133 Wn. App. at 288 ¶19.

To take a special exception not factually or procedurally relevant to this proceeding and elevate it to the general case in conflict with the controlling statute and other Division 1 authority is to take an axe to the legislative intent in RCW 7.04A.060(3), where a surgical knife to excise the special exception will suffice. Where multiple reasonable interpretations of a statutory exception are available, courts "are directed to adopt the narrowest of the alternatives." *Columbia Riverkeeper*, 188 Wn.2d at 435-36 ¶36.

This court should accept review to correct the appellate court's interpretation of *Otis Housing* as permitting courts to decide the merits of a dispute during an arbitrability determination in conflict with RCW 7.04A.070(3), to correct its over broadening of the waiver defense as requiring only factual similarity (subsuming the res judicata defense), and to correct its law change in conflict with RCW 7.04A.060(3) on who decides a waiver defense where the complained-of conduct is litigating an earlier dispute, not waiting too long in a single case to raise arbitration.

(3) Correcting Opinions Rendered *per incuriam* is Crucial for Maintaining the Integrity and Consistency of the Legal System

If the court of appeals could have fairly affirmed with a transparent analysis of the issues raised by the wife in conformity with Washington's rule of party presentation and without misinterpreting *Otis Housing*, it would have done so. Instead, in *per incuriam* fashion to avoid scrutiny, including the likelihood of this Court taking review, it does quietly what it cannot do out loud while loudly threatening the principles of *stare decisis* and consistency in the application of law. In the process, it denied the wife an appeal of right in a manner that offends due process, it rewarded misconduct, and it overstepped legislative intent, violating the separation of powers and this Court's settled authority imposing guardrails to prevent such violations.

F. CONCLUSION

This Court should grant review.

This document contains 4,987 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 7th day of July 2025.

Respectfully submitted,

/s/ Hillary A. Brooks

Hillary A. Brooks
2900 NW Clearwater Dr.
#200-66,
Bend, OR 97703
(503) 766-9991

Petitioner

APPENDIX

FILED
6/16/2025
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ROBERT W. COONEY, Respondent, v. HILLARY A. BROOKS, Appellant.	No. 86951-5-I DIVISION ONE UNPUBLISHED OPINION

CHUNG, J. — Hillary Brooks appeals from the trial court's denial of her motion to compel arbitration of her claims against her former spouse, Robert Cooney. The trial court determined that arbitration was prohibited by res judicata and law of the case and that Brooks had waived her right to arbitrate. We agree that Brooks waived her right to arbitrate through her litigation conduct. Accordingly, we affirm the trial court and award Cooney his attorney fees.

FACTS

This is the second appeal arising from the parties' dissolution. Our opinion in the prior appeal presented the underlying facts in this case, which we repeat only as necessary. In re Marriage of Cooney & Brooks, No. 84720-1-I (Wash. Ct. App. Nov. 27, 2023) (unpublished), https://www.courts.wa.gov/opinions/pdf/847201.pdf. During the parties' dissolution proceeding, Brooks moved to compel discovery of trust documents after Cooney testified in his deposition that he was the trustee for his grandmother's trust. Cooney, slip op. at 2. "On April 30, 2021, the trial court granted Brooks's motion to compel and ordered Cooney to produce responsive documents within 30 days." Id. at 3. On May 25, before Cooney's production deadline, the parties signed a Civil Rule (CR) 2A separation contract and property settlement agreement. Id.

Over one year later, Brooks filed a motion to vacate the dissolution decree under CR 60(b)(4) and (b)(11). Brooks alleged that the decree "was procured by fraud, misrepresentation, or other misconduct because Cooney hid that he was the 'sole beneficiary' of his grandmother's trust" and that "Cooney's failure to divulge information about the trust was a violation of his fiduciary duty to disclose all assets to her during dissolution proceedings." Id. at 4-5 (footnote omitted). Brooks based these claims on her alleged discovery in July 2022 of tax records from Placer County, California, and Skagit County, Washington, as well as bank accounts held by the trust. Cooney, slip op. at 5. The trial court denied the motion and Brooks appealed. Id.

This court affirmed the trial court's denial of the motion to vacate. Id. at 2. We summarized our analysis as follows:

> Contrary to Brooks's contention, the trust created a 'mere expectancy' rather than a property interest, and therefore, Cooney did not breach his fiduciary duty by failing to disclose it. Although Cooney should have disclosed the trust in the spirit of transparency—and was required to disclose it in response to Brooks's initial discovery requests—Brooks's knowledge of Cooney's beneficiary status and her subsequent signing of the CR 2A agreement days before Cooney's deadline to produce the trust documents eliminated the requirement that Cooney disclose his interest in the trust. Moreover, the court did not err by not explicitly considering whether the trust interest affected Cooney's economic circumstances because the court found that the interest was immaterial to the parties' settlement agreement.

Id. at 6.

After this court issued its opinion, Brooks served Cooney with a demand for arbitration of her claims of "breach of contract and breach of the covenant of the implied duty of good faith and fair dealing relating to" the CR 2A agreement, asserting that "Cooney did not make the contractually-required disclosures" about his grandmother's trust and his "control" thereof. As in her CR 60 motion, Brooks alleged she discovered this information "[b]eginning July 2022."[1] Cooney then filed a motion in superior court to have Brooks's claims declared not arbitrable based on res judicata and the law of the case. Brooks moved to strike Cooney's motion and simultaneously moved to compel arbitration. The court struck Cooney's motion and directed him to respond to the motion to compel.

Following oral argument from the parties, the trial court ruled that Brooks's claims were not arbitrable and denied her motion. The court also ruled that Brooks's demand for arbitration "is based on (1) the same subject matter, (2) the same cause of action, (3) the same persons or parties, and (4) the same quality of persons for or against whom the decision is made as did a prior adjudication." The court also concluded that Brooks's

> Demand for Arbitration is barred by waiver by [Brooks] by litigating the CR2A in the CR 60 motion, and is barred by law of the case and res judicata, as the issues on which her demand for arbitration are based were previously decided by Washington Court of Appeals Div. 1.

The trial court awarded Cooney attorney fees in the amount of $6,076.00 for having to oppose the demand for arbitration.

Brooks appeals.

[1] Although Brooks asserts that the claims she wished to arbitrate were based on new evidence, her demand for arbitration does not reflect this.

ANALYSIS

I. Waiver of Arbitration

"We review a trial court's denial of a motion to compel arbitration de novo." Cox v. Kroger Co., 2 Wn. App. 2d 395, 403, 409 P.3d 1191 (2018). The right to arbitrate under an agreement may be waived by "conduct inconsistent with any other intent and 'a party to a lawsuit who claims the right to arbitration must take some action to enforce that right within a reasonable time.' " Otis Hous. Ass'n, Inc. v. Ha, 165 Wn.2d 582, 588, 201 P.3d 309 (2009) (quoting Lake Wash. Sch. Dist. No. 414 v. Mobile Modules Nw, Inc., 28 Wn. App. 59, 64, 621 P.2d 791 (1980)).

Brooks asserts that the trial court did not have the authority to determine whether she had waived her right to arbitration. "An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable." RCW 7.04A.060(3). However, contrary to Brooks's assertion, whether a party has waived their right to arbitration by choosing to litigate is a decision for the court, rather than the arbitrator. River House Dev. Inc. v. Integrus Architecture, P.S., 167 Wn. App. 221, 232, 272 P.3d 289 (2012) ("For multiple reasons, we hold that litigation-conduct waiver should be an issue for the court.").

"Courts must indulge every presumption in favor of arbitration, whether the problem at hand is the construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability." Verbeek Properties, LLC v. GreenCo Env't., Inc., 159 Wn. App. 82, 87, 246 P.3d 205 (2010). The party alleging waiver has the burden to overcome this presumption. River House, 167 Wn. App. at 237.

"Nevertheless, we will find waiver if the facts support such a finding." Saili v. Parkland Auto Ctr., Inc., 181 Wn. App. 221, 225, 329 P.3d 915 (2014).

The trial court ruled that Brooks waived her right to arbitrate by litigating the validity of the CR 2A agreement in her CR 60 motion and subsequent appeal.[2] We agree. When Brooks learned of Cooney's alleged nondisclosure of assets in July 2022, she elected to file a CR 60 motion rather than invoke her right to arbitration. Brooks admitted in her declaration that she opted for this course of action because of shorter time limits under CR 60 compared to bringing a separate breach of contract claim. When the trial court denied her motion, Brooks then elected to pursue an appeal. At no time during this process did Brooks announce her intent to pursue arbitration. It was only after Brooks lost on appeal that she attempted to invoke the arbitration clause in the CR 2A agreement.

Brooks asserts that her decision to litigate her CR 60 motion cannot constitute waiver of her right to arbitrate because the claims she brought in the earlier motion differ from those she seeks to arbitrate. Specifically, Brooks points to her differing requests for relief: whereas in the CR 60 motion, she sought to vacate the CR 2A agreement, she now seeks to enforce the CR 2A agreement through claims for breach of contract and breach of the duty of good faith and fair dealing. In support of her argument, Brooks relies upon our decision in Verbeek, 159 Wn. App. 82.

In Verbeek, we held that the property owner's earlier attempt to have a lien dismissed as frivolous under RCW 60.04.081(1) did not demonstrate waiver of its right

---

[2] Although Brooks asserts that Cooney waived this argument, "[w]e may affirm on any basis supported by the record whether or not the argument was made below." Bavand v. OneWest Bank, 196 Wn. App. 813, 825, 385 P.3d 233 (2016) (citing First Bank of Lincoln v. Tuschoff, 193 Wn. App. 413, 422, 375 P.3d 687 (2016)).

to arbitrate its multiple claims against the contractor. 159 Wn. App. at 91. Brooks takes this holding to mean that a party waives its right to arbitrate only by asserting identical causes of action. Brooks misconstrues our opinion. As we stated in Verbeek, "A party who has litigated certain *issues* and lost 'may not later seek to relitigate the same issue in a different forum.' " Id. at 90 (quoting Otis Housing Ass'n, 165 Wn.2d at 588) (emphasis added). The only issues raised by the property owner's motion to dismiss a frivolous lien were "whether the work GreenCo performed on Verbeek's property was an improvement on real property and whether the lien was timely filed." Id. at 91. By contrast, the claims the property owner sought to litigate raised issues about whether the contractor completed the work it agreed to perform, whether the contractor misrepresented its qualifications, and whether the contractor was liable under state law concerning toxic waste sites. Id. at 91-92. Because the legal issues addressed in the lien litigation were distinct from the issues governing the newly asserted claims, there could be no waiver of the right to arbitrate.

Our Supreme Court's opinion in Otis Hous. Ass'n, further demonstrates that the determination of waiver does not merely "consider the face of the pleadings for identical claims," as Brooks suggests in her reply briefing. There, a housing association had a lease with a purchase option. 165 Wn.2d at 585. The owners sued for unlawful detainer, and the association defended by arguing that it had successfully exercised the purchase option. Id. at 585-86. The unlawful detainer court rejected the defense and ruled that the option had expired. Id. at 586. Shortly thereafter, the housing association filed an action to compel arbitration under the option agreement. Id. The trial court declined to compel arbitration, finding that the option agreement had lapsed and, with it, the right to arbitration. Id.

The Supreme Court declined to decide whether the option agreement had lapsed, but instead concluded that the housing association had waived its right to arbitrate by raising the purchase option as a defense in the unlawful detainer action. Id. at 587. Notably, the court rejected the association's argument that "it waived no rights because the show cause hearing in an unlawful detainer action is limited to resolving questions of possession and the judge lacked the authority to compel arbitration." Id. That the association could not bring an affirmative claim for relief in the unlawful detainer action was immaterial to the question of waiver. Id. at 587-88. Rather, the court held that the association waived its right to arbitrate by "raising as a defense the very same *issue* it now seeks to arbitrate: whether the option to purchase had been properly exercised." Id. at 588 (emphasis added).

This case is more akin to Otis Hous. Ass'n than Verbeek. In her CR 60 motion, Brooks argued that Cooney owned and/or controlled property held by his grandmother's trust and that, by failing to disclose this "property interest" during the dissolution, he had committed fraud and made material misrepresentations warranting vacation of the final decree of dissolution and the CR 2A agreement. In her reply on the motion, Brooks additionally argued that Cooney's failure to disclose constituted a breach of the CR 2A agreement. On appeal, Brooks argued that "the court erroneously concluded that Cooney's interest in the trust was not a 'property' interest" required to be disclosed in the dissolution and that the trial court erred by finding that she knew about the trust before signing the CR 2A agreement. Cooney, slip op. at 6, 16. We rejected those arguments. Id.

In her demand for arbitration, Brooks asserts that Cooney breached the CR 2A agreement and the attendant duty of good faith and fair dealing by failing to make the "contractually-required disclosures" concerning his grandmother's trust. Brooks further asserts that disclosure was contractually required because Cooney "both owned and controlled" property held by his grandmother's trust and that "his control of the assets alone as Successor Trustee triggered the disclosure requirement." As in Otis Hous. Ass'n, where it was immaterial that the housing association did not seek affirmative relief in the unlawful detainer action, but raised a defense, similarly, here, it is immaterial that Brooks asserted different claims and legal theories in her CR 60 motion than she did in her demand for arbitration. The dispositive *issue* in both is the same—whether Cooney had a property interest in his grandmother's trust that he was obligated to disclose during the dissolution proceeding. Brooks chose to litigate that issue in the CR 60 motion and subsequent appeal. Just as in Otis Hous. Ass'n, "[h]aving lost that issue, [she] may not later seek to relitigate the same issue in a different forum." 165 Wn.2d at 588.

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 appeals for two years. Because we hold that Brooks waived her right to arbitrate, we need not decide whether res judicata or the law of the case also precluded arbitration of Brooks's claims.

II. Due Process and Appearance of Fairness

Brooks asserts that the trial court violated her right to due process by dismissing her claims on their merits, rather than merely declining to allow arbitration and issuing a case schedule to allow litigation on the merits.[3] This argument fails for two reasons.

First, the determination of waiver examines a party's conduct, not the merits of the underlying claims. See Otis Hous. Ass'n, 165 Wn.2d at 588 (arbitration may be waived by "*conduct* inconsistent with any other intent") (emphasis added). Thus, ruling that Brooks waived her right to arbitration did not require the trial court to examine the merits of Brooks's claim.[4]

Second, there were no pending claims for the trial court to allow Brooks to litigate. For the trial court to issue a case schedule, as Brooks now asserts was constitutionally necessary, Brooks would first need to file a complaint. See KING COUNTY SUPER. CT. LOCAL CIVIL RULE 4(a). However, Brooks never filed a complaint in superior court. Instead, Brooks filed her motion to compel arbitration in the pre-existing dissolution action. Upon determining that she waived her right to arbitration, there was nothing left for the trial court to adjudicate in the existing action. Brooks received all the process she was due on her motion to compel arbitration.

Brooks also claims that the trial court violated the appearance of fairness because she "was unfairly castigated at oral argument," the trial court struck her

[3] Brooks also asserts that the trial court improperly realigned the parties and forced her to disprove Cooney's motion. However, the trial court struck Cooney's motion upon Brooks's request. The only motion pending before the court was Brooks's motion to compel. As Brooks filed the motion, the court properly treated her as the proponent.

[4] To the extent that the trial court's determination that the arbitration was barred by res judicata or law of the case addressed the merits of Brooks's claims, any error is harmless, as denial of the motion to compel arbitration was warranted solely on the basis of waiver.

pleadings, treated her as the motion proponent, “conducted a prohibited merits determination,” and dismissed her claims. We disagree.

“Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing.” In re Marriage of Meredith, 148 Wn. App. 887, 903, 201 P.3d 1056 (2009) (citing State v. Bilal, 77 Wn. App. 720, 722, 893 P.2d 674 (1995)). We presume the trial court performs its functions without bias or prejudice. Id. (citing Wolfkill Feed & Fertilizer Corp. v. Martin, 103 Wn. App. 836, 840, 14 P.3d 877 (2000)). In support of her assertion that she was “unfairly castigated at oral argument,” Brooks points solely to the trial court’s admonishment to her for not submitting working copies of her motion to shorten time. This admonishment was immediately followed by the trial court similarly admonishing Cooney’s counsel for failing to submit working copies. Rather than violating the appearance of fairness, the trial court’s admonishments demonstrate that it treated both parties fairly and equally.

Further, although the trial court technically struck Brooks’s motion to file an overlength brief, the court noted that it read everything brought to the court’s attention, including Brooks’s overlength brief and reply. And, as discussed above, the trial court did not realign the parties, conduct a merits determination, or dismiss any of Brooks’s claims. In sum, Brooks fails to overcome the presumption that the trial court acted fairly and without bias.

III. Motion for Sanctions and Motion to Disqualify Counsel

After submitting her reply brief, Brooks filed a motion for sanctions under RAP 18.9(a) against Cooney for:

> (1) maintaining frivolous positions on appeal; (2) maintaining a right to affirmance precluding Brooks' Demand claims based on the CR 60 proceeding in which Cooney concedes he committed misconduct; (3) failing to correct false statements of law and fact made by counsel on Cooney's behalf; and (4) committing and attempting to commit fraud on this Court.

A court may award sanctions under RAP 18.9 against a party "who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with" court rules.

Brooks has not demonstrated any basis for this court to impose sanctions against Cooney. As we affirm the trial court's ruling in Cooney's favor, Cooney's arguments in his response brief cannot be considered frivolous. And it is not misconduct for respondent's counsel to advance a different interpretation of a case than the one held by appellant or to omit citations to factually dissimilar cases.[5]

Finally, Brooks's assertion that counsel made false statements and attempted to commit fraud is based on her incorrect assumption that an affidavit of change of trustee demonstrated his ownership of the trust.[6] This court held in the prior appeal that a nearly identical affidavit filed in California did *not* demonstrate an ownership interest in the trust:

> Brooks argues on appeal that Cooney's interest had vested because he later became sole trustee and "settlor." Brooks appears to rely on a single sentence from an affidavit of change of trustee, which states,
>
> > The name(s) of the settlor(s) of the Trust is (are): Robert W. Cooney, Successor Trustee

[5] Brooks devotes much of her motion for sanctions to her argument that Cooney's motion for an order to declare Brooks's claims non-arbitrable was without merit. Cooney's motion was stricken by the trial court, and that order has not been challenged on appeal. Brooks provides no authority supporting an award of sanctions by this court for conduct that occurred solely in the trial court.

[6] Brooks states in her motion for sanctions that "the December 2020 affidavit is incontrovertible evidence that Cooney knew he owned and controlled assets before the parties entered the PSA and Cooney had used the affidavit to successfully transfer assets to himself as owner." She further contends that "because Cooney's defenses rest entirely on the CR 60 result, which in turn rests on his concededly false claim of a revocable interest uncertain to vest, the false statements are material to this appeal."

> But the document also refers to Carmelina and Peter as “previous trustees”—not “previous settlors”—and Brooks does not explain how Cooney could become a co-settlor of the trust without a modification of the trust instrument. We disagree with Brooks’s argument that a change in successor trustee resulted in a vested interest.

Cooney, slip op. at 12 n.4. Brooks’s argument that Cooney’s reliance on our prior opinion somehow amounts to misconduct is disingenuous at best.

Brooks’s motion to disqualify Cooney’s counsel is similarly disingenuous. In her motion, Brooks asserts that there is a conflict of interest between Cooney and his counsel because his response to her motion for sanctions “asks, among other terms, that they be held jointly and severally liable for compensatory damages arising from litigation misconduct.” Cooney’s response to Brooks’s motion for sanctions contains no such request. Instead, Cooney’s response contends that sanctions are warranted only against Brooks. There is no conflict of interest between Cooney and his counsel.

We deny both Brooks’s motion for sanctions and her motion to disqualify counsel. We also deny Cooney’s request for sanctions.

IV. Attorney Fees

Brooks contends that the trial court erred by awarding attorney fees to Cooney. The sole basis for her argument is her assertion that the trial court should have granted her motion to compel arbitration. Because the trial court correctly denied Brooks’s motion to compel, it did not err by awarding attorney fees to Cooney.

Both Brooks and Cooney request an award of fees on appeal. RAP 18.1 allows us to award reasonable attorney fees or expenses “[i]f applicable law grants to a party the right to recover” such attorney fees or expenses. The CR 2A agreement signed by the parties states that “[i]n any action or proceeding relating to this Agreement, whether for specific enforcement, damages or other remedy, the prevailing Party shall be entitled to an award of reasonable attorney fees, expert fees, or other costs reasonably incurred in such action or proceeding." Cooney is the prevailing party in this appeal and is therefore entitled to an award of fees. Because Brooks is not the prevailing party, we decline her request for an award of fees.

We award Cooney reasonable fees in responding to this appeal and to Brooks's motions on appeal under RAP 18.1, contingent upon his compliance with the applicable procedural requirements.

Affirmed.

Chung, J.

WE CONCUR:

Birk, J.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of the ***Petition for Review*** in Court of Appeals, Division I Cause No. 869515-1 to the following:

Evyn Kuske
Wechsler Becker,
LLP
701 Fifth Avenue, Suite 4550
Seattle, WA 98104

Valerie A. Villacin
Catherine W. Smith
Smith Goodfriend
PS 1619 8th Ave N
Seattle, WA 98109-3007

Original electronically delivered via appellate portal to: Court of Appeals, Division I
Clerk's Office

I declare under penalty of perjury under the laws of the State of Oregon and the United States that the foregoing is true and correct.

DATED: July 7, 2025, at Bend, Oregon.

/s/ Hillary A. Brooks
Hillary A. Brooks

HILLARY ANNE BROOKS

July 07, 2025 - 1:24 PM

Transmittal Information

Filed with Court:	Court of Appeals Division I
Appellate Court Case Number:	86951-5
Appellate Court Case Title:	Robert W. Cooney, Respondent v. Hillary A. Brooks, Appellant

The following documents have been uploaded:

- 869515_Petition_for_Review_20250707125652D1877850_7227.pdf
  This File Contains:
  Petition for Review
  The Original File Name was PFR FOR FILING.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- cate@washingtonappeals.com
- egk@wechslerbecker.com
- valerie@washingtonappeals.com

Comments:

Sender Name: Hillary Brooks - Email: hillarybrooks@icloud.com
Address:
2900 NW Clearwater Dr., Ste. 200-66
Bend, OR, 97703-9412
Phone: (503) 766-9991

Note: The Filing Id is 20250707125652D1877850

FILED
SUPREME COURT
STATE OF WASHINGTON
7/10/2025 1:42 PM
BY SARAH R. PENDLETON
CLERK

No. 1043651

THE SUPREME COURT OF THE
STATE OF WASHINGTON

In re the Marriage of:

ROBERT W. COONEY,

Respondent,

and

HILLARY A. BROOKS,

Petitioner.

APPENDIX SUPPLEMENT

Hillary A. Brooks
WSBA #012138
2900 NW Clearwater Dr.
#200-66
Bend, OR 97703
(503) 766-9991

U.S. CONSTITUTION

AMENDMENT XIV

Passed by Congress June 13, 1866. Ratified July 9, 1868.

Note: Article I, section 2, of the Constitution was modified by section 2 of the 14th amendment.

Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

WASHINGTON CONSTITUTION

PREAMBLE

We, the people of the State of Washington, grateful to the Supreme Ruler of the universe for our liberties, do ordain this constitution.

ARTICLE I

SECTION 3 PERSONAL RIGHTS. No person shall be deprived of life, liberty, or property, without due process of law.

SECTION 30 RIGHTS RESERVED. The enumeration in this Constitution of certain rights shall not be construed to deny others retained by the people.

WASHINGTON STATUTES

Complete Chapter | **RCW Dispositions**

Chapter 2.06 RCW

COURT OF APPEALS

Sections

NOTES:

Commissioners of the court of appeals: ***Rules of court:*** *CAR 16.*

Court of appeals reports: RCW ***2.32.160****,* ***40.04.100****, and* ***40.04.110****.*

Washington court reports commission: RCW ***2.32.160****.*

Complete Chapter | **RCW Dispositions**

Chapter 7.04A RCW

UNIFORM ARBITRATION ACT

Sections

RCW 7.04A.050

Application to court.

(1) Except as otherwise provided in RCW **7.04A.280**, an application for judicial relief under this chapter must be made by motion to the court and heard in the manner and upon the notice provided by law or rule of court for making and hearing motions.

(2) Notice of an initial motion to the court under this chapter must be served in the manner provided by law for the service of a summons in a civil action unless a civil action is already pending involving the agreement to arbitrate.

[**2005 c 433 s 5**.]

RCW 7.04A.060

Validity of agreement to arbitrate.

(1) An agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except upon a ground that exists at law or in equity for the revocation of contract.

(2) The court shall decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.

(3) An arbitrator shall decide whether a condition precedent to arbitrability has been fulfilled and whether a contract containing a valid agreement to arbitrate is enforceable.

(4) If a party to a judicial proceeding challenges the existence of, or claims that a controversy is not subject to, an agreement to arbitrate, the arbitration proceeding may continue pending final resolution of the issue by the court, unless the court otherwise orders.

[**2005 c 433 s 6**.]

RCW 7.04A.070

Motion to compel or stay arbitration.

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

(2) On motion of a person alleging that an arbitration proceeding has been initiated or threatened but that there is no agreement to arbitrate, the court shall proceed summarily to decide the issue. If the court finds that there is an enforceable agreement to arbitrate, it shall order the parties to arbitrate. If the court finds that there is no enforceable agreement, it may not order the parties to arbitrate.

(3) The court may not refuse to order arbitration because the claim subject to arbitration lacks merit or grounds for the claim have not been established.

(4) If a proceeding involving a claim referable to arbitration under an alleged agreement to arbitrate is pending in court, a motion under this section must be filed in that court. Otherwise a motion under this section may be filed in any court as required by RCW **7.04A.270**.

(5) If a party files a motion with the court to order arbitration under this section, the court shall on just terms stay any judicial proceeding that involves a claim alleged to be subject to the arbitration until the court renders a final decision under this section.

(6) If the court orders arbitration, the court shall on just terms stay any judicial proceeding that involves a claim subject to the arbitration. If a claim subject to the arbitration is severable, the court may sever it and limit the stay to that claim.

[**2005 c 433 s 7**.]

RCW 7.04A.280

Appeals.

(1) An appeal may be taken 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.
(2) An appeal under this section must be taken as from an order or a judgment in a civil action.

[**2005 c 433 s 28**.]

RCW 26.09.070

Separation contracts.

(1) The parties to a marriage or a domestic partnership, in order to promote the amicable settlement of disputes attendant upon their separation or upon the filing of a petition for dissolution of their marriage or domestic partnership, a decree of legal separation, or declaration of invalidity of their marriage or domestic partnership, may enter into a written separation contract providing for the maintenance of either of them, the disposition of any property owned by both or either of them, the parenting plan and support for their children and for the release of each other from all obligation except that expressed in the contract.

(2) If the parties to such contract elect to live separate and apart without any court decree, they may record such contract and cause notice thereof to be published in a legal newspaper of the county wherein the parties resided prior to their separation. Recording such contract and publishing notice of the making thereof shall constitute notice to all persons of such separation and of the facts contained in the recorded document.

(3) If either or both of the parties to a separation contract shall at the time of the execution thereof, or at a subsequent time, petition the court for dissolution of their marriage or domestic partnership, for a decree of legal separation, or for a declaration of invalidity of their marriage or domestic partnership, the contract, except for those terms providing for a parenting plan for their children, shall be binding upon the court unless it finds, after considering the economic circumstances of the parties and any other relevant evidence produced by the parties on their own motion or on request of the court, that the separation contract was unfair at the time of its execution. Child support may be included in the separation contract and shall be reviewed in the subsequent proceeding for compliance with RCW 26.19.020.

(4) If the court in an action for dissolution of marriage or domestic partnership, legal separation, or declaration of invalidity finds that the separation contract was unfair at the time of its execution, it may make orders for the maintenance of either party, the disposition of their property and the discharge of their obligations.

(5) Unless the separation contract provides to the contrary, the agreement shall be set forth in the decree of dissolution, legal separation, or declaration of invalidity, or filed in the action or made an exhibit and incorporated by reference, except that in all cases the terms of the parenting plan shall be set out in the decree, and the parties shall be ordered to comply with its terms.

(6) Terms of the contract set forth or incorporated by reference in the decree may be enforced by all remedies available for the enforcement of a judgment, including contempt, and are enforceable as contract terms.

(7) When the separation contract so provides, the decree may expressly preclude or limit modification of any provision for maintenance set forth in the decree. Terms of a separation contract pertaining to a parenting plan for the children and, in the absence of express provision to the contrary, terms providing for maintenance set forth or incorporated by reference in the decree are automatically modified by modification of the decree.

(8) If at any time the parties to the separation contract by mutual agreement elect to terminate the separation contract they may do so without formality unless the contract was recorded as in subsection (2) of this section, in which case a statement should be filed terminating the contract.

[2008 c 6 s 1010; 1989 c 375 s 4; 1987 c 460 s 6; 1973 1st ex.s. c 157 s 7.]

NOTES:

Part headings not law—Severability—2008 c 6: See RCW 26.60.900 and 26.60.901.

DECLARATION OF SERVICE

On said day below I electronically served a true and accurate copy of ***Appendix Supplement*** in Supreme Court Cause No. 1043651 to the following:

Evyn Kuske
Wechsler Becker,
LLP
701 Fifth Avenue, Suite 4550
Seattle, WA 98104

Valerie A. Villacin
Catherine W. Smith
Smith Goodfriend
PS 1619 8th Ave N
Seattle, WA 98109-3007

Original electronically delivered via appellate portal to: Supreme Court Clerk's Office

I declare under penalty of perjury under the laws of the State of Oregon and the United States that the foregoing is true and correct.

DATED: July 10, 2025, at Bend, Oregon.

/s/ Hillary A. Brooks
Hillary A. Brooks

HILLARY ANNE BROOKS

July 10, 2025 - 1:42 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	104,365-1
Appellate Court Case Title:	Robert W. Cooney v. Hillary A. Brooks

The following documents have been uploaded:

- 1043651_Other_20250710132927SC621014_6450.pdf
  This File Contains:
  Other - Appendix Supplement
  The Original File Name was For Filing Appendix Supplement.pdf

A copy of the uploaded files will be sent to:

- andrienne@washingtonappeals.com
- cate@washingtonappeals.com
- egk@wechslerbecker.com
- valerie@washingtonappeals.com

Comments:

Sender Name: Hillary Brooks - Email: hillarybrooks@icloud.com
Address:
2900 NW Clearwater Dr., Ste. 200-66
Bend, OR, 97703-9412
Phone: (503) 766-9991

Note: The Filing Id is 20250710132927SC621014