

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

HUDSON COMPANY, INC.,
Respondent,

v.

DONALD C. KING and JANE DOE KING,
HUSBAND AND WIFE AND THE
MARITAL COMMUNITY COMPOSED
THEREOF,
Appellants.

No. 35601-5-II

UNPUBLISHED OPINION

Van Deren, A.C.J. -- Donald C. and Jane Doe King appeal the trial court's denial of their motion to vacate an arbitrator's award to Hudson Company, Inc. for \$25,062.94 for contract damages, \$53,707.50 for attorney fees, \$1,540.15 for costs, and \$633.68 for interest to date of judgment, totaling \$80,944.27. King¹ argues that the trial court erred in not vacating the arbitration award because (1) the arbitrator was impermissibly partial to Hudson Company and (2) the arbitrator exceeded his authority by awarding attorney fees when the parties used arbitration to resolve their disputes. We affirm.

¹ We refer to the appellants as King.

FACTS

I. Construction Contract

Hudson Company entered into a contract with Donald C. King to remodel King's Bainbridge Island property. Barbara Nelson, King's agent, authorized the construction work to begin on December 16, 2004, and signed the construction contract (Contract) on March 1, 2005. The Contract contained an arbitration provision and two provisions concerning attorney fees.

Under paragraph 9, the Contract provided:

9. Disputes and Remedies

Any dispute between the parties shall be resolved through the Seattle office of Judicial Dispute Resolution, LLC (JDR) using a two-step process. The first step will involve an effort by the parties to settle the dispute by agreement, with JDR providing mediation services in accordance with its ordinary practices. The second step, if mediation fails, will involve binding arbitration of the dispute, conducted in accordance with JDR's applicable rules. *The parties will bear the cost of their own [attorney] fees and expenses arising from any and all disputes mediated or arbitrated under this provision;* and the parties will share equally in the fees charged by JDR.

Clerk's Papers (CP) at 54 (emphasis added).

The Contract also provided, under the heading "Progress Payments" in paragraph 11, that:

As long as Owner makes all payments required under this Agreement, Contractor shall claim no lien against Premises. In the event of default and payment is not made within three (3) days, *owner will pay all costs of collection including attorney fees.* Past due balances will be assessed at 1½ % interest per month until balance is paid in full.

CP at 54 (emphasis added).

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II. Construction Lien and Litigation

On June 1, 2005, Hudson Company placed a claim of lien on King's property for unpaid construction services. Hudson Company claimed a lien amount of "\$37,372.60 plus interest, reasonable [attorney] fees and taxable costs." CP at 10.

On October 7, Hudson Company sued King, claiming King had not paid for the remodel project as agreed and still owed Hudson Company \$37,372.60 plus interest. Hudson Company contended that it had requested mediation/arbitration as the Contract required but King was uncooperative, evasively refusing to schedule a timely mediation. In addition, Hudson Company asserted that it was entitled to reasonably incurred attorney fees under RCW 60.04.181.

King answered Hudson Company's complaint raising ten affirmative defenses, including that Hudson Company's claim was subject to mandatory mediation and arbitration. King also counterclaimed, alleging, among other things, that Hudson Company breached the Contract, failed to enter into mediation/arbitration, and performed defective workmanship.

On February 7, 2006, King moved to stay the proceeding pending the contractually required arbitration and mediation under paragraph 9 of the Contract. Hudson Company responded that King waived the arbitration provision by refusing to participate in mediation and by invoking the judicial civil litigation discovery process. Further, it argued that if required to

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mediate, the parties should be ordered to mediate under Kitsap County Local Rule 87.² Hudson Company also argued that King's actions forced it to incur considerable attorney fees.

The trial court granted the order staying the action "pending mediation and arbitration as required by the contract between the plaintiff and defendant effective March 10, 2006." CP at 100. The court also ordered the "[p]arties [to] explore an inexpensive alternative to JDR for mediation." CP at 100.

III. Mediation and Arbitration

Instead of using JDR, the parties selected Donald Logerwell as the mediator. Before the mediation, Logerwell disclosed in an e-mail correspondence, which was forwarded to both counsel for King and counsel for Hudson Company, that he was looking "forward to working with two lawyers (Tom Dreiling [counsel to Hudson Company] and Shawn Hicks [counsel to King]) whom *I've known and worked with in the past.*" CP at 120 (emphasis added). The mediation process was not successful.

The parties then selected Logerwell to continue to serve as their arbitrator.³ On May 9, Logerwell wrote to the parties to confirm the details of the upcoming arbitration under the "Agreement Regarding Binding Arbitration which we all signed on April 11, 2006."⁴ CP at 174.

² Kitsap County Local Rule 87 provides for actions eligible for court-sponsored mediation and arbitration: "(1) Any complex civil matter may be mediated under these rules. . . . (2) Mandatory arbitration or family law type cases may not be mediated under these rules. Except as otherwise set forth in (a) above, only matters specified by the court or by rule shall be referred to mediation under these rules."

³ The record on appeal contains no information about mediation. These facts are gathered circumstantially from an e-mail from Hudson Company's counsel's paralegal confirming mediation for April 11, 2006, and from Logerwell's letter on May 9, 2006. At oral argument, the parties admitted that they did not use JDR.

⁴ The April 11, 2006, agreement is not contained in the appellate record.

He stated:

Finally, to *confirm the information relayed to you prior to, and during, the mediation and referenced in the last paragraph of the Agreement*, I wish to document my disclosures as follows:

1. Shawn Hicks: I have served as a neutral on at least two occasions in matters where Shawn was representing one of the parties—one was an arbitration and the other a mediation. There may have been others but I recall only these two.

2. Tom Dreiling: Tom represented a friend of mine in a bankruptcy related matter some time in the mid 1980's—that friend became my wife in 1997. I also have some vague recollection that I served as a mediator for Tom at some point in time, many years ago, but have no better recollection than that.

CP at 174-75 (emphasis added). The parties arbitrated their dispute on June 13 and 14 and Logerwell issued his arbitration award on July 5, 2006.

Logerwell (1) ordered King to pay Hudson Company \$25,062.94, which included interest until July 5, as contractual damages, (2) determined that judgment should be entered based on his award and the lien should be foreclosed, and (3) ordered King to pay Hudson \$53,707.50 in attorney fees and \$1,540.15 in costs under RCW 60.04.181(3).

On July 13, Hudson Company moved to confirm the July 5 arbitration award, enter monetary judgment, and foreclose the lien. King opposed the motion, arguing that the trial court should deny Hudson Company's award of attorney fees and, for the first time, that Logerwell was not impartial and exceeded his powers.

In addition, Hicks submitted a declaration stating, under penalty of perjury:

After the mediation, but before the arbitration, Donald Logerwell disclosed that he his [sic] wife was represented by Mr. Dreiling. . . . During the arbitration, I heard Mr. Logerwell visit in a very friendly fashion with his old friend, Tom Dreiling. They talked about how they had socialized with each many times of [sic] the many years that they have known each other. The[y] mentioned that they once saw each other in Hawaii. I became increasingly concerned that Mr. Logerwell was evidentially partial to Mr. Dreiling, and his client, to the prejudice of me and my client.

CP at 164.

Dreiling, responded under penalty of perjury:

3. By email from defense counsel on February 17, 2006, I was informed the defense's "first choice" for a neutral was Donald Logerwell.⁵ My client accepted him and the parties scheduled a mediation for April 11, 2006.

4. On February 23, 2006, Mr. Logerwell advised that he knew and had worked with both counsel before. Defense counsel received a copy of his email February 27, 2006. . . .

5. The defense representative, Barbara Nelson, was at least two hours late to the April 11, 2006, mediation. Before the mediation actually got started, Mr. Logerwell, defense counsel and I spoke about our prior mutual dealings. Mr. Logerwell told me he had been a mediator and arbitrator on matters presented by Mr. Hicks in the past. Mr. Logerwell also told Mr. Hicks that, long ago, I had successfully collected a debt for a women who Mr. Logerwell *subsequently* married. Mr. Logerwell also recalled that my wife and I saw Mr. Logerwell jogging on Kalakaua Avenue, in Honolulu, in approximately December of **1980** and that the three of us briefly spoke on that occasion. I can recall that Mr. Logerwell was in Hawaii for a deposition. I was in Hawaii as a speaker at a WSBA annual convention.

6. Neither Mr. Hicks nor I voiced any concern about these "water cooler" discussion before the mediation began.

. . . .

8. **Before** the arbitration occurred, Mr. Logerwell wrote to both counsel (May 9, 2006) and confirmed his prior disclosures of having had contact in the past with both counsel. . . .

9. Neither Mr. Hicks nor I voiced any concern about these written disclosures.

10. I have had no social relationship with Mr. Logerwell.

11. It is my recollection that I concluded my collection matter for the woman he *subsequently* married in 1988.

CP at 116-17.

The trial court confirmed the arbitrator's award, but it granted King leave to bring a motion to vacate confirmation of the award. On September 29, King moved to vacate the arbitration award, alleging that "Logerwell exceeded his powers by awarding [attorney] fees that were expressly precluded under the terms of the [Contract] and [that Logerwell] showed evident

⁵ This e-mail is not a part of the appellate record.

partiality.” CP at 183.

Both parties again filed their earlier declarations from the hearing to confirm the arbitration award. Hudson Company opposed King’s motion to vacate arguing, among other things, that there was no evident partiality on the part of Logerwell and that Logerwell properly interpreted paragraphs 9 and 11 of the Contract in awarding Hudson Company attorney fees.

The court invited additional briefing on the applicable standards of review for a motion to vacate an arbitrator’s award.⁶ The trial court then denied King’s motion to vacate the arbitration award and refused to award Hudson Company attorney fees for resisting King’s motion to vacate the award.

King appeals.

ANALYSIS

I. Applicable Arbitration Statute and Challenge to Arbitrator’s Impartiality

Initially, King and Hudson Company disagree about which version of the arbitration statutes govern their contract, former chapter 7.04 RCW (1943) or chapter 7.04A RCW, effective in 2006. We briefly address this issue, but it is not determinative in resolving the parties’ disputes.

A. Applicable Arbitration Statute

During the 2005 legislative session, the legislature adopted the Revised Uniform Arbitration Act (RUAA). Laws of 2005, ch. 433. It repealed former chapter 7.04 RCW, the former uniform arbitration act, and enacted the RUAA as chapter 7.04A RCW. The chapter sets out when the RUAA governs arbitration agreements.

- (1) Before July 1, 2006, this chapter governs agreements to arbitrate entered into:
 - (a) On or after January 1, 2006; and

⁶ Again, the record on appeal does not contain this order. This fact is gathered from circumstantial evidence in Hudson Company’s supplemental briefing.

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(b) Before January 1, 2006, if all parties to the agreement to arbitrate or to arbitration proceedings agree in a record to be governed by this chapter.

(2) On or after July 1, 2006, this chapter governs agreements to arbitrate even if the arbitration agreement was entered into before January 1, 2006.

RCW 7.04A.030. Here, the parties entered into the Contract before January 1, 2006, and they completed arbitration by June 14, 2006. Thus, by the plain statutory language, the RUAA only applies to the parties' arbitration proceedings "if all parties to the agreement to arbitrate or arbitration proceedings agree[d] in a record to be governed by" the RUAA. RCW 7.04A.030(1)(b).⁷

The record does not contain the April 11, 2006, agreement regarding binding arbitration, where the parties allegedly agreed to arbitrate under the RUAA,⁸ although the arbitrator entered his arbitration award under the heading, "IN PRIVATE ARBITRATION UNDER R.C.W. Ch. 7.04A." CP at 109.

When King contested the arbitration award, both parties, with one exception, briefed the arbitration issues by referring only to chapter 7.04A RCW, not former chapter 7.04 RCW. The sole exception was Hudson Company's supplemental brief, the final brief submitted to the trial

⁷ King argues that this court should interpret the phrase "agreement to arbitrate" not to mean the Contract, but rather the parties' agreement to arbitrate entered into with the arbitrator on April 11. We do not address the statutory interpretation issue because the result does not depend on the version of the arbitration statute that applies to this case.

⁸ King apparently lost this agreement and could not obtain a copy. On appeal, he asked us to consider his declaration concerning the April 11, 2006, agreement and e-mails where he asks Hudson Company's counsel and Logerwell for a copy of the agreement. We denied that motion.

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court, in which it addressed the “Impact of New Statute.” CP at 286. There, it stated: “The new arbitration statutes became effective January 1, 2006, and, according to RCW 7.04A.030, do not apply to this case. However, the only difference in the new statute that relates to a motion to vacate an award eliminates presently unimportant language.” CP at 286.

The trial court did not rule which statute applied. Whether there was an agreement to arbitrate under the RUAA involves resolving factual issues that we will not decide on appeal. Because we do not believe the version of the arbitration act dictates the result of the opinion, we do not further analyze which chapter applied here.⁹

B. Challenge to Arbitrator’s Impartiality

King alleges that Logerwell was partial to Hudson Company because he did not fully disclose his relationship with Dreiling. “Arbitration is a preferred means of settling disputes without litigation, in which an arbitrator is the judge of both the law and the facts. A trial court’s limited authority to confirm, vacate, modify, or correct an arbitration award arises from statute.” *Hanson v. Shim*, 87 Wn. App. 538, 545, 943 P.2d 322 (1997) (footnote omitted); *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998) (arbitration is statutory proceeding; the rights of the parties to it are controlled by statutes and their contract).

The trial court may vacate the arbitration award if the arbitrator was evidently partial. *See*

⁹ King argues that Hudson Company should be judicially estopped from claiming former chapter 7.04 RCW applies because he claims that Hudson Company never made that argument to the trial court. Reply Br. of Appellant at 10-11. “Judicial estoppel is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position.” *Arkison ex rel. Carter v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538, 160 P.3d 13 (2007) (quoting *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 98, 138 P.3d 1103 (2006)). But in his brief, King neglects to inform us of Hudson Company’s argument in its supplemental memorandum to the trial court. Because we do not believe the version of the uniform arbitration act that applies dictates the result, we do not decide this issue.

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RCW 7.04A.230(1)(b)(i); former RCW 7.04.160(2).¹⁰ But the stated standard of review of an arbitrator's award for evident partiality is one of first impression for this court. Although Washington courts have decided the issue, they have not articulated the standard of review that they applied in cases where one of the parties alleged that the arbitrator was partial.¹¹ But decisions from other jurisdictions have expressly addressed this issue, concluding that review of an arbitrator's conduct for evident partiality is a question of law that courts review de novo.

Aaron v. Illinois Farmers Ins. Group, 590 N.W.2d 667, 669 (Minn.App. 1999); *Pirsig v. Pleasant Mound Mut. Fire Ins. Co.*, 512 N.W.2d 342, 343 (Minn.App. 1994); *Thomas v. City of North Las Vegas*, 122 Nev. 82, 127 P.3d 1057, 1067 (2006); *Borst v. Allstate Ins. Co.*, 291 Wis. 2d 361, 384, 717 N.W.2d 42 (2006); *DeBaker v. Shah*, 194 Wis. 2d 104, 112, 533 N.W.2d 464 (1995). Based on the weight of authority, we will review de novo whether Logerwell was evidently partial.

¹⁰ RCW 7.04A.230(1)(b)(i) provides: "the court shall vacate an award if: . . . (b) There was: (1) Evident partiality by an arbitrator appointed as a neutral." Former RCW 7.04.160(2) provides: "the court shall after notice and hearing make an order vacating the award . . . (2) Where there was evident partiality or corruption in the arbitrators or any of them."

¹¹ See *Northern State Const. Co. v. Banchemo*, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963) (arbitration awards may be vacated only on statutory grounds); *Hanson v. Shim*, 87 Wn. App. 538, 545-48, 943 P.2d 322 (1997) (the party seeking vacation must prove that the arbitrator violated one of limited statutory grounds for vacation of an award, the reviewing court only considers the face of the award); *Schreifels v. Safeco Ins. Co.*, 45 Wn. App. 442, 444-49, 725 P.2d 1022 (1986) (same); *St. Paul Ins. Cos. v. Lusia*, 6 Wash. App. 205, 208-15, 492 P.2d 575 (1971) (The trial court must determine whether one of the limited statutory grounds exist to vacate the award.).

Under both former chapter 7.04 RCW and chapter 7.04A RCW, a party who challenges the impartiality of an arbitrator must do so in a timely manner, i.e., upon learning of any basis of partiality and before the arbitrator makes a decision. RCW 7.04A.120(4) (“If the arbitrator did not disclose a fact as required by subsection (1) or (2) . . . upon timely objection of a party, an award may be vacated.”); *Hanson*, 87 Wn. App. at 548 (Under former chapter 7.04 RCW, a party who knows of potential conflict, even when that conflict is disclosed during arbitration, cannot wait to see whether the award is favorable to him before raising a challenge that he was aware of before the arbitrator made the award.).

It is undisputed that Logerwell disclosed that he had previously worked with both attorneys before mediation, disclosed his specific relationships with both attorneys, and disclosed Hudson Company’s attorney’s former representation of Logerwell’s wife prior to the commencement of the arbitration. It is also undisputed that King did not protest Logerwell’s continued service until after Logerwell entered his arbitration award in favor of Hudson Company. We hold that King’s delay is fatal to his claim that the arbitration award should be vacated based on Logerwell’s lack of impartiality and that the trial court did not err in denying his motion to vacate the award.

II. Arbitrator’s Scope of Authority to Award Attorney Fees and Review of Award

King also asks us to vacate the arbitrator’s award of attorney fees to Hudson Company. King argues that Logerwell exceeded his authority by impermissibly awarding Hudson Company attorney fees because the parties had agreed that the claims for attorney fees would not be submitted to the arbitrator under paragraph 9 of the Contract and that the trial court erred by not

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¹² Former chapter 7.04 RCW and chapter 7.04A RCW contain similar provisions about vacating an arbitration award based on an arbitrator exceeding their power. Former RCW 7.04.160