IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SHERRI LYNN TANSON, MONKEY BEAN, LLC, a Washington corporation, Appellants, v. DUGOUT BROTHERS, INC., a Washington corporation; BRAD CARPENTER and LUCINDA (CINDY) CARPENTER, husband and wife; ROBERT GREGG HUTCHINS; BILLIE JOE HUTCHINS; ROBERT G. HUTCHINS, PS, Respondents.	No. 40623-3-II UNPUBLISHED OPINION

Quinn-Brintnall, J. — Sherri Lynn Tanson appeals from an order denying her motion to enforce an agreement to submit to trial by referee under RCW 4.48.010. Tanson claims that the trial court erred in invalidating a legally binding contract between the parties and lacked authority to refuse to enforce the referee order because the statute makes enforcement mandatory. We agree that the provisions of RCW 4.48.010 are mandatory when both parties consent in writing to a trial by referee. Accordingly we reverse the trial court's decision and remand with directions for the trial court to order a trial by referee.

Facts

In February 2008, Tanson sued Dugout Brothers, Inc. and Brad and Lucinda Carpenter (collectively, Dugout) for violating the Washington Franchise Investment Protection Act[1] in connection with Tanson's 2006 purchase of a Forza Coffee Company franchise. On April 12, 2010, the parties appeared in court for their third trial date setting, having twice been unable to get a courtroom because of court congestion. After conferring, the parties mutually agreed, in writing, to forgo a trial and use a referee as provided in ch. 4.48 RCW. That agreement provided:

> The parties hereby stipulate and agree that trial of this matter shall be heard as a trial by reference pursuant to RCW 4.48, said trial shall be conducted by The Honorable Donald Thompson (Retired). If Judge Thompson is unable to serve, the parties shall agree to cooperate in the selection of an alternative referee in the scheduling of a trial date as soon as reasonably possible. The parties agree that all rights of appeal of all issues herein shall be preserved. All existing orders shall remain in full force and effect until resolution of this cause of action by the Referee. The parties agree that this proceeding shall be a trial by reference and not an arbitration and that all issues shall be reviewable upon appeal pursuant to the Civil Rules and Rules of Appellate Procedure.

Clerk's Papers at 1. The trial court signed the order that same day. The next day, the trial court had a conference call with the parties in which it expressed its concern about the order it had signed and whether the parties truly had full appeal rights.

On April 16, the parties again appeared in court and the trial court described the telephone conference call and observed, "At that point, it appeared to me that there was not consent on the part of the defendants to transfer the matter to trial by referee." Report of Proceedings (Apr. 16, 2010) at 4. The trial court explained that it signed the order believing that it was sending the parties to binding arbitration. Dugout's counsel then asked the trial court to withdraw the order

[1] Ch. 19.100 RCW.

based on his client's misunderstanding of the scope of appeal and to set a trial date of February or March 2011. The trial court agreed. On May 7, 2010, the trial court signed an order denying the plaintiff's motion for an order enforcing the agreement to submit to trial by referee. Tanson appeals.

Discussion

Generally, we review a trial court's decision on how a case is to be heard for an abuse of discretion. CR 38-39.

> A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds; this standard is also violated when a trial court makes a reasonable decision but applies the wrong legal standard or bases its ruling on an erroneous view of the law. *State v. Dixon*, 159 Wn.2d 65, 75-76, 147 P.3d 991 (2006) (quoting *State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003)); *State v. Hudson*, 150 Wn. App. 646, 652, 208 P.3d 1236 (2009). When we review whether a trial court applied an incorrect legal standard, we review de novo the choice of law and its application to the facts in the case. *State v. Haney*, 125 Wn. App. 118, 123, 104 P.3d 36 (2005); *State v. Whelchel*, 97 Wn. App. 813, 817, 988 P.2d 20 (1999), *review denied*, 140 Wn.2d 1024, 10 P.3d 405 (2000); *see State v. Carlyle*, 84 Wn. App. 33, 35-36, 925 P.2d 635 (1996).

State v. Lamb, No. 39849-4-II, 2011 WL 4036096, at *4 (Wash. Ct. App. 2011). But when the trial court commits an alleged error of law, we review it de novo. *Id.* at *4, n.7. And if we find an error of law, we consider the trial court's interpretation untenable and therefore an abuse of discretion. *Id.* at *4, n.7.

RCW 4.48.010 provides for a trial by referee upon the written consent of the parties involved:

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

RCW 4.48.120(2) provides for appellate review of the referee's decision: "The decision of a referee entered as provided in this section may be reviewed in the same manner as if the decision was made by the court."

Comparing the arbitration statutes, ch. 7.04A RCW, to the trial by referee statutes, ch. 4.48 RCW, our Supreme Court observed in *Barnett v. Hicks*, 119 Wn.2d 151, 153-54, 829 P.2d 1087 (1992), "[I]f it was an arbitration proceeding, review is controlled entirely by RCW 7.04 which restricts review in the trial court and on appeal to grounds contained in RCW 7.04.160-.170. If it were a trial before a referee there would be full appellate review. RCW 4.48.120(2)."

> Thus, in the case of an appeal from an arbitrator's award, an appellate court is strictly proscribed from the traditional full review. RCW 7.04.220 does not alter this proscription.
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> Appellate review of a trial before a referee is not so limited. . . . Consequently, appellate review of a referee's report is the same as from a final judgment from a trial court, *i.e.*, full appellate review. *See* RAP 2.2(a)(1)."

Bennett, 119 Wn.2d at 157.

We disagree with Tanson that once presented with the stipulation, the trial court had a mandatory duty to order a trial by referee. Implicit in this statute is that the trial court will first determine if there is mutual consent. But here, the trial court misunderstood the scope of appellate review in finding that mutual consent did not exist. The trial court gave no other reasons for finding a lack of consent and Dugout offers none. Hence, we conclude that the record contains no basis to support the trial court's determination that consent did not exist and, therefore, the trial court had a mandatory obligation[2] to order a reference hearing.

[2] Presumptively, the word "shall" in a statute is imperative and creates a duty rather than confers discretion. *Crown Cascade, Inc v. O'Neal*, 100 Wn.2d 256, 261, 668 P.2d 585 (1983). Dugout presents no authority showing a contrary legislative intent as to RCW 4.48.010.

There was no lawful basis for the trial court's concern that the parties had not consented and its misunderstanding of the parties' appeal rights appears to be the only factor qualifying Dugout's consent. Therefore, its decision not to enforce the agreement was based on untenable reasons and fails to survive under the proper standard of review. *Lamb*, 2011 WL 4036096, at *4 n.7. Accordingly, we reverse, remand, and order the trial court to enforce the agreement to proceed to trial by referee.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

QUINN-BRINTNALL, J.

We concur:

HUNT, P.J.

JOHANSON, J.