IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

SUSAN HORTON-RUSHTON, Appellant, v. ROBERT TRENT and JANE DOE TRENT, husband and wife, and the marital community comprised thereof, Respondents.	No. 38824-3-II UNPUBLISHED OPINION

Houghton, P.J. — Susan Horton-Rushton appeals the trial court's order striking her motion for a trial de novo and denying her motions to vacate an arbitration award and for reconsideration. She argues that (1) Robert Trent waived his right to binding arbitration, (2) judicial estoppel precluded his motion to strike, (3) the arbitrator erroneously applied the law, and (4) the arbitrator committed prejudicial misconduct. We affirm.

FACTS

In October 2005, Horton-Rushton (buyer) and Trent (seller) entered into a real estate purchase and sale agreement (contract) drafted by Horton-Rushton's agent for the construction and purchase of a new home. Horton-Rushton moved into the home after its June 26, 2006 completion. Her home flooded in November 2006, initiating this dispute.

The contract between the parties required dispute resolution through arbitration. It further specified that the arbitrator would use the Construction Industry Arbitration Rules of the

American Arbitration Association (AAA) "for the conduct of the arbitration" or other rules that the arbitrator deemed appropriate. Clerk's Papers (CP) at 156.

Horton-Rushton paid the applicable fees to initiate arbitration through AAA procedures and served a demand for arbitration on Trent's counsel. Her counsel attempted to follow up with Trent's counsel, but neither Trent nor his counsel ever responded to the AAA arbitration demand. Horton-Rushton then filed a complaint in superior court, and Trent filed an answer. In his answer, Trent asserted as an affirmative defense that the contract required arbitration of the dispute.

Horton-Rushton filed a statement of arbitrability. The statement specified that the dispute be subject to arbitration "[i]n accord with the parties' contract." CP at 8. The record does not reflect that the trial court ordered arbitration, but the trial court appointed an arbitrator in accordance with PCLMAR 2.3.[1]

E-mails between the parties indicate that they conducted discovery under former MAR 4.2 (2005) and that they submitted prehearing statements of proof under MAR 5.2. The arbitrator ruled in Trent's favor and awarded him attorney fees and contract costs, with a stipulated offset to compensate Horton-Rushton's costs of initially filing for AAA arbitration.

The arbitrator's award specifically referenced the right to trial de novo under PCLMAR 7.1. After the arbitration's conclusion, the arbitrator requested additional compensation under former PCLMAR 8.5 (2005).

[1] Superior courts may supplement the MARs with local rules, MAR 8.2. The PCLMARs supplement the MARs in Pierce County. We distinguish between them here where the record clearly indicates the parties referred to one or the other at various times.

Horton-Rushton filed a request for trial de novo. Trent responded by filing a motion to strike her request. The trial court granted Trent's motion because chapter 7.04A RCW precluded her trial de novo request.

Horton-Rushton moved for reconsideration of the trial court's order striking her trial de novo request. She also moved to vacate the arbitration award because it was based on (1) an erroneous application of law and (2) the arbitrator's prejudicial misconduct.

First, Horton-Rushton claimed that the arbitrator incorrectly determined that the contract's disputed phrase, " 'in order to meet engineering requirements such as grading and water Damage,' " was ambiguous. CP at 80. Second, she claimed that immediately after the arbitration hearing, the arbitrator and Trent engaged in a conversation in which their facial expressions and body language seemed "amicable and familiar." CP at 76. Horton-Rushton was present but did not hear the substance of the conversation.

Trent responded that the arbitrator objected to questioning by both parties' counsel during the arbitration, the arbitrator did not allow either party's counsel to press issues on which the arbitrator had already ruled, and that he (Trent) and the arbitrator did not discuss the arbitration during their conversation. The trial court denied both of Horton-Rushton's motions. It entered an award and judgment confirming the arbitration award and awarding additional attorney fees and costs added to the judgment. Horton-Rushton appeals.

ANALYSIS

Governing Arbitration Law

Horton-Rushton first contends that Trent waived his right to binding arbitration when he failed to respond to her initial AAA arbitration demand and participated without objection in arbitration proceedings governed by the MAR procedures. Trent responds that chapter 7.04A RCW, the Uniform Arbitration Act (UAA), governs private arbitration agreements; that arbitration under the UAA is binding; that RCW 7.04A.040(3) precludes any waiver of the UAA's application; and, in the alternative, that he did not waive binding arbitration by his actions.

Arbitration is a statutory proceeding. *In re Parentage of Smith-Bartlett*, 95 Wn. App. 633, 636, 976 P.2d 173 (1999). Thus, as a threshold matter, we determine de novo which statutes initially governed the arbitration between the parties. *Post v. City of Tacoma*, 167 Wn.2d 300, 308, 217 P.3d 1179 (2009).

Chapter 7.06 RCW allows trial courts to impose mandatory arbitration of civil suits for small claims. RCW 7.06.010-.020(1). The MARs govern these arbitration proceedings, and they do not apply to private arbitration agreements, such as the one here, unless the parties stipulate otherwise. MAR 1.1. If the parties so stipulate, the dispute is subject to the MARs in its entirety, except for further stipulations regarding the conduct of the arbitration proceedings. MAR 8.1.[2]

[2] MAR 8.1 provides:

> (a) Generally. No agreement or consent between parties or lawyers relating to the conduct of the arbitration proceedings, the purport of which is disputed, will be regarded by the arbitrator unless the agreement or consent is made at the arbitration hearing, or unless the agreement or consent is in writing and signed by the lawyers or parties denying the same.
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> (b) To Arbitrate Other Cases. The parties may stipulate to enter into arbitration under these rules in a civil matter that would not otherwise be subject to

Conversely, the UAA[3] governs private agreements to arbitrate. RCW 7.04A.030. "This form of arbitration depends on contractual agreement rather than the amount in controversy." *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 526, 79 P.3d 1154 (2003). RCW 7.04A.230 governs judicial review of contractually agreed arbitration awards and does not contain a right to trial de novo.[4] Thus, contractually agreed arbitration substitutes for litigation. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 892, 16 P.3d 617 (2001). Parties cannot contractually

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> arbitration under rule 1.2. A case transferred to arbitration by stipulation is subject to the arbitration rules in their entirety, except as otherwise agreed under section (a).

[3] Cases decided before January 1, 2006, cite the former UAA, which the legislature repealed. Laws of 2005, ch. 433. Chapter 7.04A RCW, the current UAA, took effect on January 1, 2006. RCW 7.04A.900. The statutory provisions on which these cases relied have not materially changed.

[4] RCW 7.04A.230 provides:

> (1) Upon motion of a party to the arbitration proceeding, the court shall vacate an award if:
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> (a) The award was procured by corruption, fraud, or other undue means;
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> (b) There was:
>
> (i) Evident partiality by an arbitrator appointed as a neutral;
>
> (ii) Corruption by an arbitrator; or
>
> (iii) Misconduct by an arbitrator prejudicing the rights of a party to the arbitration proceeding;
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> (c) An arbitrator refused to postpone the hearing upon showing of sufficient cause for postponement, refused to consider evidence material to the controversy, or otherwise conducted the hearing contrary to RCW 7.04A.150, so as to prejudice substantially the rights of a party to the arbitration proceeding;
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> (d) An arbitrator exceeded the arbitrator's powers;
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> (e) There was no agreement to arbitrate, unless the person participated in the arbitration proceeding without raising the objection under RCW 7.04A.150(3) not later than the commencement of the arbitration hearing; or
>
> (f) The arbitration was conducted without proper notice of the initiation of an arbitration as required in RCW 7.04A.090 so as to prejudice substantially the rights of a party to the arbitration proceeding.

submit disputes to arbitration to determine if it goes well for their position before seeking to litigate. *Godfrey*, 142 Wn.2d at 897.

For example, in *Dahl v. Parquet & Colonial Hardwood Floor Co.*, 108 Wn. App. 403, 405, 30 P.3d 537 (2001), the parties' contract provided that the MARs would govern arbitration of any disputes. But they also invoked binding arbitration under the former UAA. *Dahl*, 108 Wn. App. at 405.

On appeal, Division One noted that the former UAA did not restrict the parties' ability to contract regarding the selection of arbitrators or the procedures by which the arbitration was conducted. *Dahl*, 108 Wn. App. at 410. Thus, it reasoned that no basis in law or public policy prevented parties who contractually agreed to binding arbitration from utilizing MAR procedures for selecting an arbitrator and otherwise conducting the proceedings.[5] *Dahl*, 108 Wn. App. at 410. It further concluded that strong public policy in favor of arbitration finality dictated resolution of any ambiguity in favor of binding arbitration under the former UAA, especially when the party seeking invalidation of an agreement for binding arbitration drafted the agreement.

[5] Horton-Rushton cites a footnote in *Dahl* for the proposition that the trial court here improperly mixed and matched arbitration statutes. But the *Dahl* footnote cites *Smith-Bartlett*. In *Smith Bartlett*, (1) the parenting plan dispute arose under a statute expressly granting judicial authority to impose arbitration, (2) the statute expressly granted the right of judicial review of such arbitration, (3) the court imposed such arbitration, and (4) the parties agreed to use the MAR. 95 Wn. App. at 637-38. Division Three held that the trial court improperly mixed and matched arbitration statutes by further ordering that the arbitration would be binding, which was inconsistent with the governing statute, the mandatory nature of the arbitration, and the trial de novo right inherent in both. *Smith-Bartlett*, 95 Wn. App. at 638-39. It expressly distinguished between such an arbitration and binding arbitration arising from a voluntary agreement between the parties. *Smith-Bartlett*, 95 Wn. App. at 636-38. Here, the parties voluntarily agreed to arbitrate, the trial court did not impose arbitration, and no mandatory arbitration statute containing a trial de novo right governs. *Smith-Bartlett* does not apply here.

Dahl, 108 Wn. App. at 412.

We find *Dahl* instructive. First, the current UAA does not preclude parties to contractual arbitration agreements from using MAR procedures. Instead, RCW 7.04A.110(1) provides only that

> [i]f the parties to an agreement to arbitrate agree on a method for appointing an arbitrator, that method must be followed, unless the method fails. If the parties have not agreed on a method, the agreed method fails, or an arbitrator appointed fails or is unable to act and a successor has not been appointed, the court, on motion of a party to the arbitration proceeding, shall appoint the arbitrator. The arbitrator so appointed has all the powers of an arbitrator designated in the agreement to arbitrate or appointed under the agreed method.

Here, under the contract Horton-Rushton drafted, the parties expressly agreed to arbitrate. By default, the UAA applied and the arbitration was binding. The arbitration provision did not specify procedures for appointment of an arbitrator. Rather, it specified the use of AAA rules or other rules the arbitrator deemed appropriate for "the conduct of the arbitration." CP at 156. Appointment of the arbitrator under MAR procedures was consistent with RCW 7.04A.110(1).

Likewise, although the parties used MAR procedures to govern the arbitration, this was consistent with both the UAA and the parties' contract. Under such circumstances and in light of the strong public policy in favor of finality of arbitration, we do not construe any ambiguity resulting from using MAR procedures as a waiver of binding arbitration by Trent. We resolve any ambiguity in favor of binding arbitration and against Horton-Rushton, the drafter.

A. Horton-Rushton's Waiver

Horton-Rushton argues that she did not waive her constitutional right to a jury trial by entering into a contract containing an arbitration provision. Trent responds that entering into such a contract waives the right to jury trial.

Parties in private arbitration generally waive their right to a jury trial. *Malted Mousse*, 150 Wn.2d at 526. Horton-Rushton contractually agreed to private arbitration of disputes arising from the parties' contract. She waived her right to a jury trial.

B. Trent's Waiver

Horton-Rushton further argues that Trent waived his right to binding arbitration by failing to respond to her initial AAA arbitration demand, by forcing her to file suit in the trial court, and by asserting a claim for binding arbitration after the arbitration had already concluded. Trent responds that arbitration under the contract was binding and that he asserted his demand for arbitration under the contract before arbitration proceedings began.

Horton-Rushton cites *Detweiler v. J.C. Penny Casualty Insurance Co.*, 110 Wn.2d 99, 751 P.2d 282 (1988), for support. But in that case, our Supreme Court found waiver of binding arbitration where the party had notice of the trial court proceedings on disputed issues but failed to demand arbitration until after judgment was entered. *Detweiler*, 110 Wn.2d at 111-12.

Here, no trial ever occurred and Trent requested arbitration under the parties' contract in his answer, before any arbitration proceedings began. By statutory default, arbitration under the contract bound the parties. *Detweiler* does not apply here. Furthermore, as Trent correctly notes, Horton-Rushton could have compelled arbitration under the parties' contract without filing

this lawsuit. *See* RCW 7.04A.070(1). Although we disapprove of Trent's initial lack of responsiveness to arbitration requests, we do not find waiver under these circumstances.

Judicial Estoppel

Horton-Rushton further contends that judicial estoppel precluded Trent's motion to strike her trial de novo request because the motion was inconsistent with his participation in arbitration using MAR procedures and because Horton-Rushton incurred fees and costs associated with filing and service of the initial AAA arbitration demand, the complaint in this case, the statement of arbitrability, and her trial de novo request. Trent responds that his position remained consistent because he asserted his right to binding arbitration under the contract, the parties may apply MAR procedures in binding arbitration, Horton-Rushton was compensated for costs associated with the initial AAA arbitration demand, and she was not forced to file this lawsuit.

The primary factors of judicial estoppel are whether (1) the nonmoving party's "later position is clearly inconsistent with the [party's] earlier position"; (2) "judicial acceptance of the second position would create a perception that either the first or second court was misled by the party's position"; and (3) "the party asserting the inconsistent position would obtain an unfair advantage or imposes an unfair detriment on the opposing party if not estopped." *Ashmore v. Estate of Duff*, 165 Wn.2d 948, 951-52, 205 P.3d 111 (2009). These factors are not exhaustive, "but help guide a court's decision." *Ashmore*, 165 Wn.2d at 952. We review a trial court's decision whether to apply judicial estoppel for abuse of discretion. *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d at 535, 538, 160 P.3d 13 (2007). A trial court abuses its discretion when it bases its decision on untenable or unreasonable grounds. *Arkison*, 160 Wn.2d at 538.

First, Trent initially requested arbitration under the parties' contract, which was binding by statutory default. His request to strike Horton-Rushton's trial de novo request comported with this position. Furthermore, he stipulated in the arbitration award to recompense her for her costs and fees incurred from filing the AAA arbitration demand. Finally, as he correctly notes, she could have compelled arbitration under the parties' contract without filing this lawsuit and later motions. *See* RCW 7.04A.070(1). The trial court did not abuse its discretion by declining to apply judicial estoppel.

Motion to Vacate

Horton-Rushton further contends that the trial court erred by denying her motion to vacate the arbitration award because the arbitrator exceeded his powers by erroneously applying the law. She also asserts that the arbitrator committed prejudicial misconduct. Again, we disagree.

We limit our review of an arbitration award to the provisions of RCW 7.04A.230. The statute provides that a court may vacate an arbitration award if the arbitrator exceeded his or her powers or there was misconduct by the arbitrator prejudicing the rights of a party to the arbitration. RCW 7.04A.230(1)(b)(iii), (d).

First, any error of law supporting vacating the award must appear on the face of the arbitrator's award or in any paper delivered with the award. *Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995). But we may not extend our review to discern the parties' intent or interpret contracts underlying the merits of the dispute beyond determining the governing law, because such an act is essentially a trial de novo. *Boyd*, 127 Wn.2d at 261-62.

Horton-Rushton invites us to review the arbitrator's conclusion that the contractual phrase "engineering requirements" was ambiguous. Appellant's Br. at 22. In doing so, she asks us to interpret the parties' contract using evidence extrinsic to the arbitrator's award. We decline to do so. The trial court did not err in denying her motion to vacate.

Second, the arbitrator's interaction with Trent did not rise to the level of prejudicial misconduct. In *Kempf v. Puryear*, 87 Wn. App. 390, 393, 942 P.2d 375 (1997), Division Three held that, because the complaining party had the opportunity to participate in the arbitration proceedings and did not object to the claimed misconduct at the time, assertions that the arbitrators refused to hear certain evidence, refused cross-examination, did not swear witnesses, and had ex parte contacts with both parties did not require vacating an arbitration award.

Here, Horton-Rushton participated in the arbitration and did not object to the alleged misconduct at the time. Furthermore, the alleged ex parte contact occurred in a public place where she was present at the time and, presumably, able to join in if she wished. Her argument fails.

ATTORNEY FEES

Trent requests attorney fees and costs on appeal under terms authorized in the contract. RAP 18.1 allows attorney fees on appeal if applicable law authorizes them. Here, the contract provided, "If Buyer or Seller institutes suit against the other concerning this Agreement, the prevailing party is entitled to reasonable attorneys' fees and expenses." CP at 150.

Apparently, Horton-Rushton filed a chapter 7 bankruptcy petition. Trent seeks post-bankruptcy petition attorney fees and costs associated with this appeal because they were not

discharged as part of the bankruptcy proceedings. We agree.

In re Ybarra, 424 F.3d 1018 (9th Cir. 2005), controls this issue. In *Ybarra*, the bankruptcy debtor filed her lawsuit prepetition, but revived it postpetition after its dismissal. 424 F.3d at 1020; *In re Clarkson*, 377 B.R. 283, 288 (Bankr. W.D. Wash. 2007). The trial court entered a judgment against her that included attorney fees and costs. *Ybarra*, 424 F.3d at 1021. The Ninth Circuit Court of Appeals held that there was no discharge of the postpetition attorney fees and costs, reasoning that the debtor voluntarily " 'return[ed] to the fray' " by taking affirmative postpetition action to litigate prepetition claims. *Ybarra*, 424 F.3d at 1026-27 (quoting *Siegel v. Federal Home Loan Mortgage Corp.,* 143 F.3d 525, 533 (9th Cir. 1998)).

Here, Horton-Rushton filed her notice of appeal on January 30, 2009. According to the statement of additional authority, she filed for bankruptcy on or about September 23, 2009. But she continues to litigate this matter postpetition. By doing so, she returned to the fray. Therefore, under *Ybarra*, Trent is entitled to postpetition attorney fees and costs, and we award him those fees and costs on appeal.

Affirmed.

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.

Houghton, P.J.

We concur:

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Hunt, J.

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Quinn-Brintnall, J.