

**FILED: February 16, 2022**

IN THE COURT OF APPEALS OF THE STATE OF OREGON

SCOTT A. MCKEOWN,  
Petitioner-Respondent,

v.

LAURIE G. MCKEOWN,  
Respondent-Appellant,

and

ROSALYN MCKEOWN-ICE et al.,  
Respondents below.

Multnomah County Circuit Court  
18CV13348

A168800

Gregory F. Silver, Judge.

Argued and submitted on April 20, 2021.

Julie A. Smith argued the cause for appellant. On the briefs were Wendy M. Margolis and Cosgrave Vergeer Kester LLP.

Robert J. McGaughey argued the cause for respondent. Also on the brief was McGaughey & Erickson.

Before Mooney, Presiding Judge, and Lagesen, Chief Judge, and DeVore, Senior Judge.\*

DeVORE, S. J.

Affirmed.

\*Lagesen, C. J., *vice* DeHoog, J. pro tempore.

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**DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS**

Prevailing party: Respondent

- No costs allowed.  
 Costs allowed, payable by Appellant.  
 Costs allowed, to abide the outcome on remand, payable by
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1 DeVORE, S. J.

2 Laurie McKeown appeals from a general judgment for petitioner Scott  
3 McKeown confirming an arbitration award that, in part, determined that Laurie is no  
4 longer a general partner in the McKeown Family Limited Partnership.<sup>1</sup> Laurie assigns  
5 error to the trial court's order denying her motion to vacate the arbitration award. She  
6 contends that the arbitrator exceeded her powers when granting Scott's cross-motion for  
7 summary determination.<sup>2</sup> She argues that the arbitrator lacked authority because the  
8 arbitrator purportedly failed to comply with arbitration rules that required the arbitrator to  
9 have conferred by telephone with the parties on the suitability of Scott's cross-motion for  
10 summary determination before going on to receive arguments, hold a hearing, and decide  
11 the issues presented. Rejecting the same argument and others, the trial court concluded  
12 that the arbitrator had not exceeded her powers. We agree with the trial court's  
13 conclusion, and we affirm.

14 The dispositive facts are procedural and undisputed. In 1994, the parties'  
15 mother created the McKeown Family Limited Partnership to manage real estate  
16 investments. Scott McKeown, Laurie McKeown, and Rosalyn McKeown-Ice are siblings  
17 and were general partners in the partnership. Scott undertook the primary responsibility  
18 of managing partnership assets. In 2016, Scott filed a complaint in circuit court against

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<sup>1</sup> Like the parties do, we refer to them by their first name for convenience.

<sup>2</sup> ORS 36.705(1)(d) provides that, upon a petition, the court shall vacate an award made in an arbitration proceeding if "[a]n arbitrator exceeded the arbitrator's powers."

1 Laurie, Rosalyn, and the McKeown Family Limited Partnership, alleging that the  
2 partnership agreement had been modified by conduct, alleging that Laurie had failed to  
3 fulfill her duties as a general partner, and seeking declaratory relief that Laurie should no  
4 longer be a general partner in the partnership.

5           The partnership agreement contained a general arbitration clause,  
6 providing:

7           "Unless otherwise provided herein, any dispute, claim or controversy  
8 arising out of or relating to this agreement shall, upon the request of any  
9 party involved, be submitted to and settled by arbitration in accordance  
10 with the commercial rules of the American Arbitration Association \* \* \*.  
11 The decision made pursuant to such arbitration shall be binding and  
12 conclusive on all parties involved[.]"

13 Based on that clause, the court ordered that the matter be arbitrated.

14           In arbitration, Scott filed a claim for dissolution of the partnership or, in the  
15 alternative, a declaration that Laurie was no longer a general partner by reason of waiver,  
16 abandonment, or estoppel. Laurie filed a motion for summary disposition under ORS  
17 36.665(2) and Rule 16 of the Rules of the Arbitration Services of Portland (ASP).<sup>3</sup> We  
18 note that ORS 36.665(2) provides:

19           "An arbitrator may decide a request for summary disposition of a  
20 claim or particular issue:

21           "(a) If all interested parties agree; or

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<sup>3</sup> As requested, we take judicial notice of the ASP Rules. The ASP rules can be found at [https://www.arbserve.com/pages/procedural\\_rules\\_14.htm#16](https://www.arbserve.com/pages/procedural_rules_14.htm#16) (accessed January 19, 2022).

1                   "(b) Upon request of one party to the arbitration proceeding, if that  
2 party gives notice to all other parties to the proceeding and the other parties  
3 have a reasonable opportunity to respond."

4 ASP Rule 16, which incorporates ORS 36.665(2), provides in relevant part:

5                   "An arbitrator, or panel of arbitrators, may allow a request for the  
6 summary disposition of a claim or a particular issue:

7                   "a. If all interested parties agree; or

8                   "b. Upon a ruling by the arbitrator(s) to decide the claim or issue in  
9 a summary manner.

10                   "If all interested parties have not agreed to a summary disposition,  
11 the requesting party shall file the request with the arbitrator(s) and serve it  
12 upon all interested parties. The request shall state whether the entire claim  
13 should be decided in a summary manner or set forth one or more specific  
14 issues that should be so decided. The request shall also explain why the  
15 matter should be decided in a summary manner and the request shall  
16 include a summary of the dispositive facts and the controlling law."

17                   "\* \* \* \* \*

18                   "The requesting party shall arrange a telephone conference among  
19 the affected parties (or their attorneys) and the arbitrator(s) during which  
20 the parties can argue their position on whether or not the matter should be  
21 decided in a summary fashion. Prior to the telephone conference, a party  
22 opposing the request may file with the arbitrator(s) an opposition statement  
23 (with or without supporting documents) and serve it on the requesting party  
24 and all other interested parties or their attorneys.

25                   "The arbitrator(s) must then rule on whether it is appropriate to hold  
26 a summary disposition hearing, and in making that decision the arbitrator(s)  
27 shall assess and balance the customary bifurcation versus single hearing  
28 factors and shall also consider the apparent merits of any party's position  
29 based upon any statement, affidavits or briefs filed by the parties or at oral  
30 argument. A ruling by the arbitrator(s) on the appropriateness of a  
31 summary resolution shall be determined after a telephone conference call  
32 involving the arbitrator(s) and all parties desiring to be heard, which  
33 conference call shall be arranged by the requesting party. The ruling shall  
34 be documented by a letter to the parties (copy to ASP)."

1 In her motion for summary determination, Laurie argued, first, that, even if Scott's factual  
2 allegations were taken as true, she could not lose her status as a general partner as a  
3 matter of law, and, second, that only a circuit court, and not an arbitrator, could dissolve a  
4 partnership.

5 Pursuant to ASP Rule 16, the parties conferred by telephone on the  
6 suitability of Laurie's motion for summary determination. All agreed. Scott indicated  
7 that his claims should also be decided by summary determination. Thereafter, Scott filed  
8 a cross-motion for summary determination. No additional telephone conference was held  
9 on the suitability of Scott's motion for summary determination. His motion urged denial  
10 of Laurie's motion and for "summary findings on undisputed issues of facts" determining  
11 that Laurie's conduct over 20 years had waived her right to participate as a general  
12 partner and that, due to "extreme partner dissention," the partnership should be dissolved.  
13 In support of his motion, he filed a declaration recounting, from his view, his struggles  
14 with Laurie's refusals to cooperate or participate in the business.

15 In response, Laurie, joined by Rosalyn (hereafter the sisters), filed a  
16 response memorandum opposing Scott's cross-motion. The sisters disputed, as a matter  
17 of law, any basis to dissolve the partnership, and they disputed Scott's claim of waiver,  
18 abandonment, or estoppel as to Laurie's rights as a general partner. They did not,  
19 however, proffer any specific factual evidence to contravene Scott's declaration. They  
20 did not argue that the cross-motion was not properly the subject of summary  
21 determination due to a dispute of fact. And, they did not object that Scott or the arbitrator

1 had failed to arrange for a teleconference pursuant to ASP 16 to discuss the suitability of  
2 Scott's motion for summary determination.

3           The arbitrator rendered a decision on the cross-motions. She first found  
4 that the sisters had agreed that summary determination was appropriate "as there are no  
5 disputed issues of fact." *See* ORS 36.665(2)(a) (summary determination where parties  
6 agree); ASP 16(a) (same). Next, the arbitrator determined that the partnership's  
7 arbitration clause was broad, allowing consideration of the claim of dissolution of the  
8 partnership but concluded that Scott had not proved that it was no longer practicable to  
9 carry on the partnership and so he had not proved a sufficient basis to justify dissolution.  
10 Finally, the arbitrator determined that Laurie had failed to act in good faith and fair  
11 dealing in communicating and cooperating with other partners for 21 years despite  
12 substantial effort from Scott to persuade her to do so. Therefore, the arbitrator concluded  
13 that Laurie's conduct constituted an unequivocal waiver of the requirement for changes in  
14 the partnership agreement to be written and a waiver of her status as a general partner.  
15 The decision denied dissolution but declared Laurie to no longer be a general partner.

16           The sisters filed a motion asking the arbitrator to reconsider the decision.  
17 They argued that the arbitrator "exceed[ed] the requested *motions*," but did not argue that  
18 the arbitrator exceeded her *powers*. (Emphasis added.) They argued that the parties had  
19 not briefed the concept of good faith and fair dealing, which the arbitrator had employed  
20 in construing the partnership agreement and then used to support a conclusion that Laurie  
21 had waived her role as general partner. They did not argue that Scott or the arbitrator had

1 failed to conduct a prehearing telephone conference to determine the suitability of Scott's  
2 cross-motion for summary determination. They did argue that they were surprised at a  
3 decision on the evidence, that they would have offered evidence, and that the matter  
4 should be reopened for submission of contrary evidence.

5           In an order on reconsideration, the arbitrator repeated that the parties had  
6 agreed per ASP Rule 16 that all claims were appropriate for summary determination.  
7 The arbitrator recited that the filings raised the issues whether Laurie satisfied her  
8 fiduciary duties as a partner and whether she had abandoned or waived her status as a  
9 general partner. Finally, the arbitrator reiterated that the undisputed evidence that was  
10 submitted showed that Laurie's failure to participate in the partnership constituted an  
11 abandonment and waiver of her status as a general partner. The arbitrator denied  
12 reconsideration.

13           Scott filed a motion in circuit court to confirm the arbitration award. The  
14 sisters filed a motion to vacate the award. They first argued that the arbitrator exceeded  
15 her "powers" based on the parties' submissions for summary determination. That is, they  
16 argued that "Laurie specifically reserved the right to challenge any and all factual  
17 allegations after resolution of the legal questions." They argued that the motions  
18 authorized the arbitrator only to decide an issue of law. For the first time in any part of  
19 the proceedings to date, Laurie tendered to the circuit court a new declaration with her  
20 explanation of her participation in the partnership over the years.

1           In apparent reliance on that declaration, the sisters argued that the award  
2 should be vacated pursuant to ORS 36.705(1)(c) because the arbitrator "refused to  
3 consider evidence that [was] material to the controversy."<sup>4</sup> In argument on the motion to  
4 vacate, Laurie conceded that, in the telephone conference with the arbitrator on her  
5 motion for summary determination, the parties had agreed that the matter was suitable for  
6 summary determination, but Laurie argued that, after Scott filed his cross-motion for  
7 summary determination, the arbitrator failed to conduct another telephone hearing about  
8 the suitability of summary determination on *his* motion. As a result, she argued, she was  
9 surprised by the arbitrator's summary determination and was denied the opportunity to  
10 provide contrary evidence.

11           The circuit court observed that the question--whether the sisters were truly  
12 deprived of an opportunity to give evidence--was "one issue." The "other issue" was the  
13 arbitrator's alleged failure to comply with ASP Rule 16 with regard to a prehearing  
14 telephone conference. As to that issue, the circuit court prompted the sisters to concede  
15 that they had failed to raise compliance with ASP Rule 16 before the arbitrator--both in  
16 their motion to reconsider and earlier when responding to Scott's cross-motion. The court

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<sup>4</sup> In part, ORS 36.705(1)(c) provides that the court shall vacate an award made in the arbitration proceeding if

"[a]n arbitrator \* \* \* refused to consider evidence material to the controversy or otherwise conducted the hearing contrary to ORS 36.665 so as to prejudice substantially the rights of a party to the arbitration proceeding[.]"



1 considered the sister's failure, when seeking the court's review on a motion to vacate, to  
2 be "similar" to a party's failure to preserve an issue by raising it in a trial court then  
3 seeking appellate review.

4           After further colloquy, the circuit court determined that the arbitrator did  
5 not exceed her powers in this case. The court noted that, at best, Laurie's opening motion  
6 for summary determination had a footnote indicating that she did not concede the factual  
7 allegations of Scott's arbitration claim and asserted that she "reserved the right" to  
8 challenge them. But, the court noted that, when Scott filed his cross-motion based on his  
9 view of the facts, Laurie had an opportunity to respond and did respond "in a fair amount  
10 of detail," albeit with legal arguments. The court observed that it was "logical for the  
11 arbitrator to believe that she knew and was proceeding on what the parties had agreed on  
12 for her to decide in a summary fashion." The court rejected the sisters' claim that they  
13 had been denied the opportunity to respond to Scott's cross-motion with contrary facts.  
14 The court concluded that there was no legal basis to vacate the award.

15           On appeal as noted, Laurie assigns error to the denial of the sisters' motion  
16 to vacate the award. She argues that the arbitrator exceeded her powers, within the  
17 meaning of ORS 36.705(1)(d), by resolving fact-based issues without the parties' prior  
18 agreement or without compliance with ASP Rule 16's requirement for a prehearing  
19 telephone conference on Scott's cross-motion. Absent a second telephone conference,  
20 and given their footnote's "reservation," she argues that they did not need to have offered  
21 facts to contravene Scott's factual account. She does not directly address the circuit

1 court's conclusion that they had an opportunity to contravene Scott's factual allegations  
2 when responding to his cross-motion. Instead, she characterizes the circuit court's denial  
3 of their motion to vacate as based *solely* on a "preservation of error rationale." That, she  
4 says, was an error because ORS 36.705(1)(d), concerning the arbitrator's authority, does  
5 not require a party to preserve the error in the underlying arbitration proceeding.

6 Scott responds that, given the broad arbitration clause of the partnership  
7 agreement and the parties' submissions, the arbitrator had authority to resolve the parties'  
8 claims. We agree.

9 As a preliminary matter, we note that, on appeal, Laurie does not pursue the  
10 sisters' argument below that the arbitration award should be vacated under  
11 ORS 36.705(1)(c), where an arbitrator has refused to consider evidence material to the  
12 controversy so as to prejudice substantially the rights of a party. Nor does she dispute the  
13 trial court's point that they had an opportunity to present evidence contrary to Scott's  
14 narrative at the time he claimed the facts were undisputed and offered his cross-motion  
15 for summary determination.<sup>5</sup> Instead, she argues that she did not know to offer contrary  
16 evidence because the arbitrator surprised the sisters by rendering a decision that the  
17 arbitrator was not authorized to have done.

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<sup>5</sup> In her reply brief, she argues that, after the arbitration decision, the sisters could not offer belated evidence, because Scott prevailed on his argument to the arbitrator that arbitration rules did not permit such reconsideration.

1 Laurie's appeal, asserting that the arbitrator exceeded her powers, turns  
2 upon the proper construction of ORS 36.705(1)(d). As noted, that statute provides:

3 "Upon petition to the court by a party to an arbitration proceeding,  
4 the court shall vacate an award made in the arbitration proceeding if:

5 \* \* \* \* \*

6 "(d) An arbitrator exceeded the arbitrator's powers[.]"

7 Contrary to the Laurie's assumption, a question of the "arbitrator's powers" is not a  
8 question like appellate review of a trial court ruling involving rule of trial court  
9 procedure. Instead, "[t]he starting point in considering the extent of an arbitrator's  
10 powers is whether the parties agreed to arbitrate and, if so, the contours of the dispute that  
11 they agreed to arbitrate." *Couch Investments, LLC v. Peverieri*, 359 Or 125, 130, 371  
12 P3d 1202 (2016).

13 In this case, there is no dispute that the partnership agreement contains an  
14 arbitration clause providing that "any dispute, claim, or controversy arising out of or  
15 relating to the agreement shall, upon the request of any party involved, be submitted to  
16 and settled by arbitration [.]" That clause is not the sort of an arbitration clause that is  
17 restricted to specific matters. As the circuit court observed, that is a "broad" arbitration  
18 clause. Unless the parties otherwise acted to narrow the scope of arbitration, that clause  
19 gave the arbitrator authority to resolve the parties' controversy. There is no dispute that  
20 Scott's initial complaint in circuit court involved claims that arose out of the partnership  
21 and were properly ordered to be arbitrated. And, finally, there is no dispute that, once in  
22 arbitration, the sisters initiated summary determination to reject Scott's claims as a matter

1 of law and Scott responded with a cross-motion to accept those claims as valid, based,  
2 among other things, on his view of the facts. As the trial court found, those  
3 circumstances gave the arbitrator the power to make the arbitration award.

4 Laurie's argument that the arbitrator exceeded her power by making a  
5 summary determination without holding a second prehearing telephone conference under  
6 a rule of arbitration procedure is fundamentally mistaken. Her argument presupposes a  
7 misunderstanding of an arbitrator's powers as that term is used in ORS 36.705(1)(d). A  
8 reflection on the past construction of that statute reveals that misunderstanding.

9 In *Brewer v. Allstate Insurance. Co.*, 248 Or 558, 561, 436 P2d 547 (1968),  
10 the Oregon Supreme Court addressed review of an arbitrator's authority under a former  
11 statute, *former* ORS 33.320(4) (1967), which provided that an arbitration award shall be  
12 set aside if an arbitrator exceeded the arbitrator's powers. At issue there was an  
13 arbitrator's critical determination that a claimant bore the burden of proving that an  
14 offending driver was uninsured. The court recognized that arbitrators were vested with  
15 the power to decide both the law and the facts submitted to them. *Id.* at 561. Reflecting  
16 the court's limited review of the arbitrator's decision, the court stated:

17 "The arbitrator acts within the bounds of his authority not only when he  
18 decides a question of law correctly according to judicial standards, but also  
19 when he applies the law in a manner which a court would regard as  
20 erroneous. \* \* \* Neither a mistake of fact or law vitiates an award."

21 *Id.* at 561-62 (internal quotation marks omitted). The *Brewer* court recognized that an  
22 arbitrator may erroneously impose the burden of proof upon the wrong party, but errors  
23 of that kind are a part of the cost of employing the arbitration method of decision-making.

1 *Id.* at 562. The court explained, "The principal purpose of arbitration is to avoid  
2 litigation. If the arbitrator's award is subject to extensive judicial control, this purpose is  
3 largely frustrated." *Id.* The court concluded that, although it might seem preferable to  
4 impose the burden of proof on the insurer, the arbitrator's determination was "not so  
5 grossly erroneous as to strike at the heart of the decision-making process." *Id.* at 563.  
6 Thus, the trial court had erred in vacating the arbitration award. *Id.*; *see also* 3000  
7 *Investment Corp. v. Teed*, 313 Or App 619, 620, 494 P3d 378 (2021) (following *Brewer*  
8 standard).

9           In *Nieto v. City of Talent*, we repeated the explanation that "the grounds for  
10 obtaining the vacation of an [arbitration] award are extremely narrow in comparison with  
11 the scope of review available to litigants in court." *Nieto v. City of Talent*, 295 Or App  
12 625, 629, 436 P3d 82 (2019) (quoting *Vasquez-Lopez v. Beneficial Oregon, Inc.*, 210 Or  
13 App 553, 568, 152 P3d 940 (2007) (brackets in *Nieto*)). In *Nieto*, involving review of a  
14 referee's decision under the standard of ORS 36.705(1), we determined that the court  
15 does not review the decision "simply because the decision was predicated on an error of  
16 law; rather, the error must relate to the referee's *authority*." *Id.* at 629 (emphasis in  
17 original); *see also* *Portland Firefighters' Assn v. City of Portland*, 267 Or App 491, 499,  
18 341 P3d 770 (2014) (the court will not second-guess whether the arbitrator is right or  
19 wrong on the disputed issues presented in arbitration).

20           In this case, Laurie's objection that Scott or the arbitrator had failed to  
21 initiate a prehearing teleconference on the suitability of Scott's motion for summary

1 determination is, at worst, merely an alleged error of procedure under the Laurie's view of  
2 ASP Rule 16.<sup>6</sup> That objection is not more than the ordinary, alleged error of fact or law  
3 that is not cognizable as a matter of review of the "arbitrator's powers" under  
4 ORS 36.705(1)(d). The perceived procedural error in arbitration does not implicate the  
5 arbitrators' authority to render an arbitration decision. *See Brewer*, 248 Or at 562-63  
6 (arbitrator's alleged error in allocating burden of proof); *Nieto*, 295 Or App at 629-30  
7 (referee's alleged error in statutory analysis or consideration of evidence). Such an  
8 objection "is not reviewable" and is not grounds to vacate an award under  
9 ORS 36.705(1)(d). *Brewer*, 248 Or at 562.

10           Finally, we return to the preliminary observation that Laurie does not  
11 challenge on appeal the trial court's finding that the sisters had an opportunity to respond  
12 with facts contrary to Scott's cross-motion. Laurie does not assert that the arbitrator  
13 refused to consider evidence material to the determination, which had been offered, so as  
14 to prejudice substantially her rights. *See* ORS 36.705(1)(c) (refusal of evidence as  
15 grounds to vacate). Considering all of that together with the procedural objection raised,  
16 we cannot conclude that the arbitration decision was so grossly erroneous as to strike at

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<sup>6</sup> Incidentally, Laurie's objection disregards the prior prehearing teleconference that was conducted on the sisters' motion and Scott's statement that he would offer a cross-motion for summary determination. Laurie's objection disregards the arbitrator's role in interpreting arbitration rules. *See* ASP Rule 38 (ASP rules to be interpreted and applied by the arbitrator) [https://www.arbserve.com/pages/procedural\\_rules\\_14.htm#38](https://www.arbserve.com/pages/procedural_rules_14.htm#38) (accessed January 19, 2022). And, her objection disregards the arbitrator's finding that the parties had jointly agreed to summary determination.

1 the heart of the decision-making process. *See Brewer*, 248 Or at 563. Instead, the  
2 objection raised on appeal is not of the sort subject to judicial review. *Id.* at 562.  
3 (describing "judicial review in the strictest possible limits").

4 For those reasons, we conclude that the trial court did not err in denying the  
5 sisters' motion to vacate or granting Scott's motion to confirm the award.

6 Affirmed.