No. 102232-8

---

IN THE SUPREME COURT FOR THE
STATE OF WASHINGTON

No. 83693-5-I

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

---

APOLLONIA KWAN and WILLIAM KWAN, a married couple; JAS GROUP LLC, a Washington limited liability company; 8168 INVESTMENT LLC, a Washington limited liability company; and each of the foregoing derivatively on behalf of MOUNTLAKE VILLAGE LLC, a Washington limited liability company; and MOUNTLAKE 228 LLC, a Washington limited liability company,

Petitioners,

v.

ALAN B. CLARK and LYNN CLARK, a married couple; KYLE CLARK and NATALIE BRAGER, a married couple; GREENSPACE, INC., a Washington Corporation; GREENSTREET LLC, a Washington limited liability company; FIRST HILL PARTNERS LLC, a Washington limited liability company; FIRST HILL PROPERTIES LLC; a Washington limited liability company; MLV3-23258 LLC, a Washington limited liability company; MLT GALLERIA 228 LLC, a Washington limited liability company; EAST HILL SUMMIT LLC, a Washington limited liability company,

Respondents

---

# PETITION FOR REVIEW

---

George S. Treperinas, WSBA #15434
Daniel T. Hagen, WSBA #54015
Of KARR TUTTLE CAMPBELL
Attorneys for Petitioners

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

**CASES**

**STATUTES**



**TREATISES**

## I. IDENTITY OF PETITIONER

Petitioners are Apollonia Kwan; JAS Group LLC; and 8168 Investment LLC and each of the foregoing derivatively on behalf of Mountlake Village LLC and Mountlake 228 LLC, ("Petitioners"). Petitioners here were Respondents before the Court of Appeals.

## II. CITATION TO COURT OF APPEALS DECISION

Petitioners request review of the Court of Appeals, Division I (the "Court") unpublished opinion, *Kwan v. Clark*, No. 83693-5-I, 2023 Wash. App. LEXIS 697 (Ct. App. Apr. 10, 2023), which remanded the trial court's entry of judgment on behalf of Petitioners to strike prejudgment interest and apportionment of receivership costs.

## III. ISSUES PRESENTED FOR REVIEW

A. Whether review is appropriate where the decision to strike prejudgment interest is directly contrary to the Division I Court of Appeals decision in *Tolson v. Allstate Insurance Co.*,

108 Wn. App. 495, 32 P.3d 289 (2001), wherein the remedy for an ambiguity on the face of an Award is remand to the Arbitrator.

B. Whether review is appropriate where the Court of Appeals remand' to the trial court to strike prejudgment interest rather than remanding to the Arbitrator to resolve an ambiguity on the face of an Award undermines Washington's strong public policy in favor of arbitration, as well as parties' decision to submit disputes to arbitration.

C. Whether review is appropriate where the Court of Appeals interpretation of the provisions of RCW Ch. 7.60 in deciding to limit the trial court's authority to apportion receivership costs is an issue of substantial public interest, as such limitation is unsupported by law or statute and inappropriately circumscribes a receivership court's authority to manage a receivership.

## IV. STATEMENT OF THE CASE

Petitioners filed their complaint against Alan Clark and multiple of his entities on February 22, 2019 (the "Complaint").

CP 1-20. The Complaint alleged conversion, breach of contract, breach of fiduciary duties, quiet title with respect to disputed ownership of real property, the need for accounting, and constructive trust, among other relief. *Id.* Broadly speaking, the Complaint alleged that Alan Clark fraudulently induced the Petitioners to invest millions of dollars with Alan Clark to acquire several commercial real estate projects, over which Alan Clark exercised control the invested funds, and then Alan Clark diverted a significant portion of the invested funds to benefit only himself.

On February 26, 2019, Petitioners filed a Motion for an Order to Show Cause why a General Receiver Should not be Appointed over Respondent Entities Greenspace, Inc. ("Greenspace") and Greenstreet LLC ("Greenstreet"). CP 21-31. The Petitioners asserted that Greenspace and Greenstreet held title to real property or interests in entities holding title to real properties derived from Petitioners' invested funds either directly or indirectly where their funds had been diverted, that

these properties or interests were in danger of being lost or materially dissipated, and that Alan Clark and/or his entities appeared to be insolvent as they were not generally paying debts as they came due, jeopardizing the assets. CP 63-65.

At the conclusion of an evidentiary hearing, the trial court ordered that all of the disputed entities, which are the Respondent Entities and the Petitioner entities, be placed into general receivership (the "Receivership Order"). CP 675-91. In the final order entered by the trial court following submissions from the parties, the trial court concluded that "plaintiffs showed a probable right to or interest in the properties that are the subject of this action" and that "such properties are in the possession or under the control of the defendants and are in danger of being lost or materially injured or impaired." CP 678. The trial court further held that "other available remedies are inadequate." CP 679.

On July 9, 2019, the Clark Appellants and Kyle Clark Parties (with the exception of ARCA) filed a Joint Notice for

Discretionary Review of the Receivership Order. On November 20, 2019, the Court of Appeals denied Respondents' Motion for Discretionary Review. *See* Ruling on Discretionary Review, *Kwan v. Clark*, No. 80219-4-I, Nov. 19, 2019, CP 778.

On October 5, 2020, days before the scheduled trial date of October 12, 2020, the parties, including ARCA LLC ("ARCA"), entered into an Arbitration Agreement, Stipulation and Order for Arbitration ("the Stipulation"). CP 839-844; CP 1008. The Stipulation and Agreement submitted all claims by and against all parties in the Receivership, including claims by and against the Alan Clark Respondents, Petitioners, and ARCA. ARCA, through the Alan Clark Respondents' counsel Tousley Brain, had submitted to the trial court's jurisdiction by filing proofs of claim in the receivership (CP 1613-22), and later agreed to these claims being part of the binding arbitration in the Stipulation. CP 840-841.

The parties engaged in pre-arbitration motions practice before the Arbitrator to clarify and narrow the scope of the

Arbitrator's authority over the litigation. CP 1017-36. Both the Clark Respondents and Petitioners obtained requested relief during this process, striking certain claims and counterclaims from the parties' submitted statements of claims. CP 1038-42.

Arbitration commenced on January 11, 2021 and finished on March 16, 2021. CP 935. There were, in total, 17 days of arbitration. *Id.* The Arbitrator heard testimony from fourteen different witnesses and reviewed hundreds of pages of documents. *Id.* The Arbitrator submitted his initial draft Findings of Fact and Conclusions of Law to the parties on May 13, 2021. *Id.* The Arbitrator then entertained multiple rounds of objections and requests for clarification from Special Counsel for the Clark Respondent Entities, Clarks, and counsel for the Petitioners before finalizing and forwarding the 47-page Award directly to King County Superior Court Judge Samuel Chung on November 12, 2021. *Id.* The Award attached the Arbitrator's proposed form of judgment ("Proposed Judgment"), which was

incorporated into the Award by reference. *See* CP 985, ¶ 11; CP 994-1002.

On December 6, 2021, Petitioners filed a Motion to Confirm the Award with Judge Chung. CP 924-31. The Award and Arbitrator's Proposed Judgment were attached to the Declaration of Daniel T. Hagen filed alongside the Award. CP 939-1002. On December 13, 2021, Special Counsel for the Respondent Entities filed a Motion to Vacate the Arbitration Award. CP 1047-60. The Motion to Vacate argued that the Arbitrator made errors of law or otherwise exceeded his authority by ruling on claims by and against ARCA, piercing the corporate veil against the Clark Respondent Entities, and by making findings regarding responsibility for receivership fees and costs against the Clark and the Clark Respondent Entities. CP 1048. Special Counsel for Clark and the Clark Respondent Entities also filed an opposition to Petitioners' Motion to Confirm Arbitration Award on the same day. CP 1152-58.

Though Special Counsel for Clark and the Clark Respondent Entities challenged the worksheets incorporated into the Arbitrator's Award (and proposed judgment) as well as the apportionment of receivership fees and costs against Clark and the Clark Respondent Entities (*see* CP 1054-55; CP 1058-59), *neither the Motion to Vacate, nor the Opposition to the Motion to Confirm Arbitration Award challenged the prejudgment interest awarded by the Arbitrator as reflected in the Proposed Judgment*. *See* CP 995; ll. 13-20. On January 7, 2022, the trial court entered its orders denying Defendant Entities' Motion to Vacate Arbitration Award and granting Plaintiffs' Motion to Confirm Arbitration Award. CP 1368-71.

On February 17, 2022, Petitioners filed a notice of presentation of the proposed final judgment. CP 1465-66. The notice of presentation contained a redline of all adjustments and updates to the Arbitrator's Proposed Judgment. CP 1481-91. After Special Counsel for Clarks and the Clark Respondent Entities had been terminated by order of the trial court, the

present counsel for the Clarks filed objections to entry of the final judgment on February 22, 2022. CP 1492-1502. That submission included for the first time an objection to allocation of the costs of the receivership to themselves as well as to the prejudgment interest contained in the Judgment. CP 1496-97; 1499-1501. The trial court overruled the Respondents' objections and entered the final form of the Judgment. CP 1520-36.

Clark and the Clark Respondent Entities sought review before the Court of Appeals, Division I, of many, if not most of the orders entered by the trial court over the life of the case, but in their reply brief conceded most of their assignments of error prior to oral argument. The Court ultimately remanded to the trial court to remove prejudgment interest from the Judgment, as well as the court's apportionment of receivership costs against Clark and the Clark Respondent Entities. *See* Appx, at 1-9. Petitioners timely moved for reconsideration, which was denied on June 28, 2023. *See* Appx, at 10-11.

## V. ARGUMENT

### A. The Appropriate Relief for the Court's Ruling Is Remand.

Petitioners presented the following evidence to confirm that the Arbitrator intended prejudgment interest to apply to Judgment 1 in the final judgment. First, in the text of the Award itself, the Arbitrator's only express mention of prejudgment interest was in several instances where he ruled that it would ***not*** apply. *See* CP 983-84. This and the fact that he did not expressly rule that prejudgment should not apply to Judgment 1 supports Petitioners' position that the Arbitrator intended prejudgment interest to apply except where expressly noted to the contrary. Otherwise, noting such exceptions would be a surplusage.

However, as pointed out in Petitioners' prior briefing, clear and explicit references to an entitlement to prejudgment interest on Judgment 1 are present in the Proposed Judgment, which was incorporated by reference into the Award. While the amount of awarded prejudgment interest was left blank, there can be little doubt the Arbitrator intended those blanks to be filled in.

Here too, having blank lines in the Proposed Judgment where the Arbitrator did not intend to award prejudgment interest would be illogical and surplusage. Indeed, there is no other explanation for the presence of blank lines for prejudgment interest (shown below) in the Proposed Judgment, which the Arbitrator himself approved.

| | |
|---|---|
| Prejudgment Interest on Judgment 1: | $_____ to KWAN through _____, 2021 to continue through judgment date;<br>$_____ to JAS through _____, 2021 to continue through judgment date;<br>$_____ to 8168 through _____, 2021 to continue through judgment date |
| Total Judgment 1 (Princ + Prejudg. Int.): | $_____ to KWAN through _____, 2021 to continue through judgment date;<br>$_____ to JAS through _____, 2021 to continue through judgment date;<br>$_____ to 8168 through _____, 2021 to continue through judgment date |

Excerpt from CP 995 (highlighting added).

The Court's conclusion and ruling that the Arbitrator did not award prejudgment interest disregards the incorporation by reference in the Award of the Proposed Judgment and further disregards the fact that there is neither an explicit provision in the body of the Award ***denying or granting*** prejudgment interest on Judgment 1. The Court of Appeals' conclusion that the Arbitrator intended zero prejudgment interest could only be

supported if the blanks were either not present at all or filled with "$0.00." It is inconceivable that the Arbitrator would have specifically indicated prejudgment interest was to be added to the Judgment 1 principal as he did ("Princ. + Prejudg. Int."), CP 995, if prejudgment interest was intended to be $0.

Petitioners firmly believe the Award and incorporated Proposed Judgment make the Arbitrator's intent to apply prejudgment interest to Judgment 1 clear. The Court's ruling on this issue should be overturned. At best, the Court's findings that "the arbitration award did not provide for these prejudgment interest amounts, nor did the trial court explain how these amounts were calculated" exposes an ambiguity in the Award.[1]

Assuming this Court finds that there is an ambiguity as to the Arbitrator's intent, the proper remedy is remand to the Arbitrator to clarify his intent. *See Tolson v. Allstate Insurance Co.,* 108 Wn. App. 495, 32 P.3d 289 (2001); *see also Snoqualmie*

[1] Support for calculation of prejudgment interest was addressed in the submissions prior to entry of Judgment. *See* CP 1515.

*Police Ass'n v. City of Snoqualmie*, 165 Wn. App. 895, 988 (2012). In Washington, public policy "strongly favors the finality or arbitration awards." *City of Snoqualmie*, 165 Wn. App., at 899. Great deference is afforded to arbitrators, and the arbitrator is "the final judge of both the facts and the law." *Id.* Where an arbitrator's award could be subjected to more than one interpretation, it is ambiguous. Under Washington law, deference to the arbitrator *requires* remand wherever the arbitrator's intent is not clear.

> We think however, that all of the foregoing cases accept the philosophy that **where the parties have elected to submit their disputes to arbitration, they should be completely resolved by arbitration, rather than only partially resolved. In some cases the carrying out of this philosophy will require remanding the matter to the arbitrators**.

*Id.* at 902 (citing *Hanford Atomic Metal Trades Council v. General Electric Co.*, 353 F.2d 302, 308 (9th Cir. 1965) (emphasis in original).

Even in cases where an award is only "latently" ambiguous, as opposed to "patently" ambiguous, remand is the appropriate remedy. "[E]ven if the ambiguity in this award could be classified as latent, we do not believe that Washington law would require such a narrow interpretation of the required remedy." *City of Snoqualmie*, 165 Wn. App., at 907. Further, based on Washington public policy and the strong presumption in favor of deference to arbitrators, there is "no distinction in remedy based on the degree of ambiguity in a particular case." *Id.*

To the extent provisions in an arbitrator's award can be viewed as inconsistent with one another, for example, if the Court were to conclude that references to prejudgment interest in the Proposed Judgment are contradicted by the failure to explicitly reference such interest elsewhere in the body of the award, remand is *still* the required remedy. *See Tolson*, 108 Wn. App., at 499 ("The award excluding damages for memory loss is inconsistent with some of the statements in the arbitrator's

letter, and consistent with others. . . . we reverse the trial court's denial of the motion to vacate and direct the trial court to seek clarification from the arbitrator.").

The Award in this case specifically states that the Proposed Judgment containing references to prejudgment interest "properly reflects this ruling and Award." CP 985. To the extent the Court believes that is incorrect, that would amount to an error of law on the face of the Award requiring remand. *See Tolson*, 108 Wn. App., at 499. To the extent the Arbitrator's intent is ambiguous, once again, remand is the required remedy. *See City of Snoqualmie*, 165 Wn. App. at 988. To the extent the Court has any doubts whatsoever about what the Arbitrator intended, the proper remedy is to remand to the Arbitrator. Otherwise, the Court is substituting its own judgment for that of the Arbitrator, in contravention of Washington State public policy. The Court's Opinion should be modified to grant appropriate relief and require remand to the Arbitrator on the important question of prejudgment interest, where the parties, the

trial court, and the Court of Appeals all have differing interpretations of the Award.

### B. A Receivership Court Has Equitable Authority to Apportion Costs.

The Court held that a receivership court, which is a court of equity, is prohibited from apportioning receivership costs on the party causing the need for a justified receivership. However, such a holding, if maintained, would strip receivership courts of common law powers they have held for over a hundred years.

Washington courts have "broad discretion over receiverships". *Bero v. Name Intelligence, Inc.*, 195 Wn. App. 170, 175, 381 P.3d 71, 74 (2016). Courts have the power "to dispose of the receivership property" and "in the absence of statutory limitations, the receivership court has broad discretion in determining the manner of disposition of receivership property." *Walton v. Severson*, 100 Wn.2d 446, 452, 670 P.2d 639, 642 (1983) (emphasis added) (citing 2 R. Clark, RECEIVERS § 509(a), at 820 (3d ed. 1959) ("A court of chancery is bound by

no strict forms unless prescribed by statute, but looks to the substance of things and strives to best promote the interests of all concerned.")).

The Court's Opinion relies on a misreading, that RCW 7.60.290(5) "specifically limits the court's authority in apportioning costs of the receivership." *Clark*, No. 83693-5-I, 2023 Wash. App. LEXIS 697, at *8. However, the quoted text of the statute contains no such limitation, stating only that the costs of receivership *may* be assessed as a sanction against a person who wrongfully procures a receivership. As the language makes clear, the statute is permissive, and therefore does not "specifically limit" anything. It simply clarifies a power that already exists, and provides that procedurally, a party may allege wrongful receivership at the time of termination of the receivership and may be entitled to a sanction if such wrongful intent can be proved. *See* RCW 7.60.290(5). Such a sanction is independent of a court's equitable authority to apportion fees as it sees fit.

*Umpqua Bank v. Shasta Apts., LLC*, 194 Wn. App. 685, 695 (2016), cited in the Opinion, fully supports Petitioners' position. In *Umpqua*, the Court cited to the Legislature's stated intent that the receivership statute provides procedures "applicable to proceedings in which property of a person is administered by the courts of this state for the benefit of creditors." *Id.* Thus, *Umpqua* makes clear that the receivership statute presupposes the Court's equitable authority to impose and administer receiverships—it does not *create* that power.

The petitioner in *Umpqua* argued that because the receivership statute did not specifically entitle a secured creditor to a deficiency judgment, such a judgment was impermissible, pointing to chapter 7.60 RCW's "silence on the issue of a deficiency judgment." *Id.* at 693. The Umpqua Court disagreed, holding that "the plain language of the Receivership Statute does not expressly permit or preclude a secured creditor. . . from pursuing a deficiency judgment." *Id.* at 695. Citing to the Legislature's intent, the Court held that "if the legislature had

wanted to preclude a deficiency judgment after a receiver's sale under the Receivership Statute, it would have included that language in the statute." *Id.* At 696.

The erroneous arguments and reasoning by the petitioner in *Umpqua* are analogous to those made by the Respondents and relied upon by the Court of Appeals. Here, the Court of Appeals reasoned that because the receivership statute does not expressly grant the receivership court the authority to apportion fees, the Legislature must have intended to preclude such apportionment. However, cases citing the principal that "Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded" are not on point. *See Clark*, No. 83693-5-I, 2023 Wash. App. LEXIS 697, at *7. These cases (including *Landmark Dev. Inc. v. City of Roy*, 138 Wn.2d 571 (1999); *Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1*, 77 Wn.2d 94, 98, 459 P.2d 633 (1969)) as well as the cases cited therein for the same principle, all involve powers arising from statutes. But a receivership court's equitable powers arise from equity and the

common law, not any statute. RCW Ch. 7.60 simply sets forth procedures "applicable" to existing receivership actions, and as demonstrated by *Umpqua*, does not comprehensively wipe away the Court's existing equitable authority by omission.

If the Court of Appeals ruling here is allowed to stand, it could be used by debtors in receivership to contest *any* administrative action taken by a receivership court that is not expressly authorized under the statute. Such an outcome could cause a flood of litigation and would be inconsistent with the Legislature's intent to create "more comprehensive, streamlined, and cost-effective procedures applicable to [receivership] proceedings." *Umpqua*, 194 Wn. App., at 695.

### C. Out of State Authority Supports Petitioners' Position.

There is a substantial body of out-of-state caselaw explicitly holding that receivership courts may apportion fees between parties in receivership. These cases uniformly authorize apportionment against a party where a defendant's actions made it necessary for the appointment of a receiver or where equity

otherwise requires apportionment. *See e.g.*, *Geer v. Finn,* 196 Mich. 738, 163 N.W. 20 (1917) (holding that in the absence of a statute restricting the trial court's equitable powers, the trial court had the authority to apportion costs of receivership on the wrongdoer causing the need for receivership); *Brock v. Rudig*, 69 Ind. App. 190, 197, 119 N.E. 491 (1918) (holding that "the courts exercise large discretion in determining who shall pay the expenses of receiverships, and assess the same against the fund, or against either party, or apportion them, according to the justice and equity of each case" and citing cases); *Hous. Prod. Co. v. Taylor*, 33 S.W.2d 202, 204 (Tex. Civ. App. 1930) ("Though the expenses of the receivership must be paid from the funds in the hands of the receiver, the general rule is that these expenses should come from the party whose wrongful act made the appointment of the receiver necessary in order to preserve the property during the litigation.").

Another instructive case is *S. Cal. Sunbelt Developers, Inc. v. Banyan Ltd. P'ship*, 8 Cal. App. 5th 910, 214 Cal. Rptr.

3d 719 (2017). In *Sunbelt*, the appellate court determined that trial courts have the authority to award a prevailing party, rather than the receivership estate, receivership fees. *Sunbelt*, 8 Cal. App. 5th at 915. The Sunbelt case arose from twenty years of complex litigation involving multiple, separate lawsuits. *Id.* Ultimately, the appellate court determined that the trial court "correctly determined certain parties on both sides of this multi-phase litigation were prevailing parties entitled to costs." *Id.* at 917.

The trial court initially found that it "lacked jurisdiction to consider allocating the receiver fee as a cost to the prevailing party." *Id.* at 923. However, the appellate court overturned the trial court's decision on allocating receivership fees and noted that "courts may also impose the receiver costs on a party who sought the appointment of the receiver *or* 'apportion them among the parties, depending upon circumstances.'" *Id.* at 922 (emphasis added) (citing *Baldwin v. Baldwin*, 82 Cal. App. 2d 851, 856, 187 P.2d 429, 432 (1947) (citing 45 AMERICAN

JURISPRUDENCE 224)). Moreover, "[c]ourts are vested with broad discretion in determining who is to pay the expenses of a receivership, and the court's determination must be upheld in the absence of a clear showing of an abuse of discretion." *Id.* (citing *City of Chula Vista v. Gutierrez*, 207 Cal. App. 4th 681, 686, 143 Cal. Rptr. 3d 689, 692 (2012)).

The *Sunbelt* court also stated that trial courts have discretion to determine whether "there are equitable circumstances warranting the defendant paying the costs and expenses of receivership rather than the receivership estate." *Id.* at 928. For example, there may be instances where it would be "manifestly . . . inequitable and unjust" to impose the costs of receivership on a certain party. *Id.* at 929 (emphasis in original). Likewise, a trial court may impose receivership costs on a party acting with "malice" or "wrongful purpose." *Id.* In sum, the appellate court found: "trial courts have the authority to require a party, rather than the receivership estate, to pay the receiver's fee." *Id.* at 930.

## VI. CONCLUSION

Based on the foregoing argument and authority, the Court of Appeals erred by 1) finding that the Arbitrator did not intend to award prejudgment interest where explicit references to such interest are in the proposed form of judgment incorporated into the Award; 2) remanding to the trial court rather than to the Arbitrator to resolve an apparent ambiguity on the face of the award; and 3) misreading and misapplying RCW 7.60.290(5) to strip receivership courts of equitable administrative powers; and 3) The Supreme Court should take up review, and reverse the Court of Appeals with respect to these issues.

*I certify that this document contains 3,862 words, in compliance with RAP 18.17.*

Dated, this 28th day of July, 2023.

*/s Daniel T. Hagen*
George S. Treperinas, WSBA #15434
Bruce Leaverton, WSBA # 15329
Daniel T. Hagen, WSBA #54015
Of KARR TUTTLE CAMPBELL

Attorneys for Petitioners
Apollonia and William
Kwan, JAS Group LLC
and 8168 Investment LLC

CERTIFICATE OF SERVICE

I, Annaliese K. Sier, hereby certify that on the 28th day of July, 2023, I caused to be served true and correct copies of the foregoing to the following persons via the Court of Appeals electronic filing system:

Kyle Clark (kyle@arcaau.com)
7434 SE 71st Street
Mercer Island, WA 98040

Alan Clark (alan@arcaau.com)
7434 SE 71st Street
Mercer Island, WA 98040

Lynne Clark (lynnemclark@hotmail.com)
7434 SE 71st Street
Mercer Island, WA 98040

Scott B. Henrie (shenrie@williamskastner.com)
Williams Kastner & Gibbs, PLLC
601 Union Street, Suite 4100
Seattle, WA 98101
Attorneys for Petitioners

Stuart P. Kastner (spkastner@gmail.com)
Stuart P. Kastner, PLLC
701 Fifth Avenue, Suite 5500
Seattle, WA 98104
Receiver

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 28th day of July, 2023 at Seattle, Washington.

*s/ Annaliese K. Sier*
Annaliese K. Sier,
Legal Assistant

# Appendix A

FILED
4/10/2023
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

APOLLONIA KWAN and WILLIAM KWAN, a married couple, KW&A LLC, a Washington limited liability company, JAS GROUP LLC, a Washington limited liability company, 8168 INVESTMENT LLC, a Washington limited liability company, and each of the foregoing derivatively on behalf of MOUNTLAKE VILLAGE LLC, a Washington limited liability company, and MOUNTLAKE 228 LLC, a Washington limited liability company,

Respondents,

v.

ALAN B. CLARK and LYNN CLARK, a married couple, KYLE CLARK and JANE DOE CLARK, a married couple, GREENSPACE INC., a Washington corporation, GREENSTREET LLC, a Washington limited liability company, FIRST HILL PARTNERS LLC, a Washington limited liability company, FIRST HILL PROPERTIES LLC, a Washington limited liability company, EAST HILL SUMMIT LLC, a Washington limited liability company, and ARCA, a Washington limited liability company,

Appellants,

No. 83693-5-I

DIVISION ONE

UNPUBLISHED OPINION

MLV3-23258 LLC, a Washington limited liability company, MLT GALLERIA 228 LLC, a Washington limited liability company,

Defendants,

STUART P. KASTNER, PLLC, as Receiver,

Respondent.

MANN, J. — Alan and Lynn Clark and various entities owned or controlled by the Clarks (Clark entities, collectively Clarks)[1] appeal an arbitration award and judgments entered ancillary to a receivership action brought by respondents Apollonia and William Kwan, JAS Group LLC, and 8168 Investment LLC (collectively, Kwan group). The Clarks contend that the trial court improperly awarded prejudgment interest and erred in apportioning all costs of the receivership on one party contrary to chapter 7.60 RCW. We remand to strike prejudgment interest on Judgment 1 and the apportionment of receivership costs. We otherwise affirm.[2]

I.

In February 2019, the Kwan group sued the Clarks[3] over investments by the Kwan group in three real property investments formed by the Clarks.[4] The Kwan group

[1] The Clark entities include: Greenspace Inc., Greenstreet LLC, First Hill Partners LLC, First Hill Properties LLC, MLV3-23258 LLC, MLT Galleria 228 LLC, and East Hill Summit LLC.

[2] In their opening brief, the Clarks assigned error to several grounds related to the receivership, including appointment of the receiver and actions taken by the receiver to appoint and terminate special counsel. In their reply brief, the Clarks concede that these issues are not properly before this court at this time.

[3] The Kwan Group also named Kyle Clark and Natalie Brager (Jane Doe Clark) in the complaint. No argument or briefing was filed on behalf of judgment debtor Kyle Clark, Natalie Brager, and their marital community. They concede the appeal.

[4] The properties and related investment entities were: (1) 23120 56th Avenue West, Mountlake Terrace owned by Mountlake Village LLC; (2) 906 and/or 910 Boylston Avenue, Seattle, owned by

alleged conversion, breach of implied and express contract, breach of fiduciary duties, quiet title, an accounting, and constructive trust. The Kwan group also requested the appointment of a general receiver.

The Kwan group moved for an order to show cause why a general receiver should not be appointed over two of the Clark entities: Greenstreet LLC, and Greenspace Inc. The motion asserted that the Kwan group held title to properties or interest in danger of being lost or materially dissipated and that the Clarks were insolvent and unable to pay debts. The trial court entered an order for a forensic accounting of the alleged investment entities, enjoined all parties from transferring or encumbering assets in the dispute, and continued the hearing on the appointment of a receiver pending a preliminary accounting and evidentiary hearing.

After an evidentiary hearing, the trial court ordered that all of the disputed entities be placed into a general receivership and appointed Stuart Kastner as the receiver. The court determined that "[the Kwan group] have shown a probable right to or interest in the properties that are subject of this action" and that "such properties are in the possession or under the control of the [Clarks] and in danger of being lost or materially injured or impaired."

The parties entered into an arbitration agreement, stipulation and order for arbitration. The agreement submitted all claims by and against all parties in the receivership. A 17-day arbitration was held before Judge John P. Erlick, ret. The

---

Greenspace; and (3) 22802 44th Avenue W, Mountlake Terrace, owned by Mountlake 228 LLC. The Kwan group are members of Mountlake Village LLC and Mountlake 228 LLC.

arbitrator issued its final 47-page findings of fact and conclusions of law on November 12, 2021 (arbitration award). The arbitration award included a proposed final judgment.

The Kwan group moved the trial court for an order confirming the arbitration award. The Clarks moved to vacate or modify the arbitration award. The trial court denied the Clarks' motion to vacate and instead granted Kwan group's motion to confirm the arbitration award. The Kwan group then noted for presentation a proposed final judgment containing redlines of all adjustments and updates to the arbitrator's proposed judgment. The Clarks objected to the allocation of the costs of the receivership to themselves, and the award of prejudgment interest in the judgment. The trial court entered the final judgment as proposed by the Kwan group.

The Clarks appeal.

II.

The Clarks argue that the trial court erred in awarding prejudgment interest because the arbitration award did not award prejudgment interest. We agree as to Judgment 1, not Judgment 2.

"Judicial scrutiny of an arbitration award is strictly limited; courts will not review an arbitrator's decision on the merits." Westmark Props., Inc. v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). A trial court may not award prejudgment interest where the same was not made by the arbitrator. Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 170-71, 273 P.3d 965 (2012). Adding prejudgment interest is part of the merits of the controversy in the arbitration, therefore, it is "forbidden territory for a court" confirming the award. Elcon Constr., Inc., 174 Wn.2d at 170-71.

Consistent with the arbitration award, the final judgment included two separate judgments. Judgment 1 was entered against Alan and Lynn Clark and the Clark entities and awarded $414,026 to Kwan, $1,614,026 to the JAS group, and $1,796,410 to 8168 Investments. These amounts track the arbitration award. The trial court also awarded prejudgment interest on Judgment 1 "from sale dates through February 25, 2022, to continue through judgment date" at $144,468.93, $338,967.56, and $414,339.44 respectively. The arbitration award did not provide for these prejudgment interest amounts, nor did the trial court explain how these amounts were calculated.

Judgment 2 was entered against Kyle Clark and Natalie Brager (Clark) and awarded Mountlake 228 LLC $103,448. This also tracks the arbitration award. The trial court also awarded prejudgment interest of "$24,521.43 [ ] through February 25, 2022 and accruing thereafter." This followed the arbitration award which included prejudgment interest: "respondents Clark owe $103,000 plus prejudgment interest at the statutory rate of 5.25% from the time of payment of these funds to Kyle Clark on the sale of the HandyMart property to Mountlake 228." The arbitrator's worksheet also reflected prejudgment interest for Judgment 2.

The Kwan group argues that "with the exception of some specific amounts and time period specified in the [arbitration award], the Arbitrator did award prejudgment interest to Respondents." The Kwan group cites several of the arbitrator's findings—but none of the cited references include an award of prejudgment interest. The Kwan group also cites the arbitrator's proposed form of judgment as evidence of an award of prejudgment interest—but the proposed form leaves blank any amount for prejudgment

interest on Judgment 1. In contrast, the proposed form of judgment for Judgment 2 includes a specific amount owed for prejudgment interest.[5]

The Kwan group argues that the arbitration award states which values do not receive prejudgment interest, and so because the arbitrator provided a place for prejudgment interest on the proposed worksheet, it was proper for the trial court to award prejudgment interest on values not specifically excluded. This is incorrect.

A trial court cannot impose prejudgment interest not imposed in the arbitration award. Elcon Constr., Inc., 174 Wn.2d at 170-71. The arbitrator specifically included prejudgment interest on unpaid consulting fees. While the arbitrator also determined specific awards do not receive prejudgment interest, the exclusion of that statement elsewhere does not create a right for the trial court to impose prejudgment interest. The trial court's imposition of prejudgment interest in Judgment 1 contributes to the merits of the controversy and is outside the trial court's authority. Elcon Constr., Inc., 174 Wn.2d at 170-71. We remand to strike prejudgment interest on Judgment 1.

III.

The Clarks argue that the trial court exceeded its authority by apportioning all costs of the receivership on them in conflict with chapter 7.60 RCW. We agree.[6]

Statutory interpretation is a question of law that we review de novo. Beal Bank, SSB v. Sarich, 161 Wn.2d 544, 547, 167 P.3d 555 (2007). The court's goal is to

[5] The Kwan group also argues that the arbitrator intended to impose prejudgment interest because the award states that these calculations would be required "to be updated through the time any judgment is entered on this Ruling." That is misleading. The award states, "[t]he financial analyses of the investments, claims and offsets as to the Claimants, Clarks and Respondent Entities contained in Exhibits 1 though Exhibit 4 attached, to be updated through the time any judgment is entered on this Ruling." The arbitrator is not referring to prejudgment interest specifically.

[6] The Clarks also argue the issue of apportionment of costs was not submitted to arbitration. Because we conclude that the apportionment conflicted with statute, we do not address the Clarks' claim that the issue was not submitted to arbitration.

determine the legislature's intent. Birgen v. Dep't of Lab. & Indus., 186 Wn. App. 851, 857, 347 P.3d 503 (2015). To do so, we look to the "plain language of the statute and consider the meaning of the provision at issue, the context of the statute, and related statutes." Umpqua Bank v. Shasta Apts., LLC, 194 Wn. App. 685, 693, 378 P.3d 585 (2016). If the statute is unambiguous, we apply the plain language meaning. Birgen, 186 Wn. App. at 857-58.

"[W]e generally decline to read into the statute what is not there." Umpqua Bank, 194 Wn. App. at 693-94. We do not include words where the legislature chose not to and we construe the statute assuming the legislature meant exactly what it said. Birgen, 186 Wn. App. at 858. "Legislative inclusion of certain items in a category implies that other items in that category are intended to be excluded." Landmark Dev., Inc. v. City of Roy, 138 Wn.2d 561, 571, 980 P.2d 1234 (1999) (quoting Bour v. Johnson, 122 Wn.2d 829, 836, 864 P.2d 380 (1993)). "Where a statute specifically designates the things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim expressio unius est exclusio alterius—specific inclusions exclude implication." Landmark Dev., Inc., 138 Wn. 2d at 571 (quoting Wash. Nat. Gas Co. v. Pub. Util. Dist. No. 1, 77 Wn. 2d 94, 98, 459 P.2d 633 (1969)).

RCW 7.60.055 gives the trial court broad discretion over receiverships:

> [T]he court in all cases has exclusive authority over the receiver, and the exclusive possession and right of control with respect to all real property and all tangible and intangible personal property with respect to which the receiver is appointed, wherever located, and the exclusive jurisdiction to determine all controversies relating to the collection, preservation, application, and distribution of all the property, and all claims against the

> receiver arising out of the exercise of the receiver's powers or the performance of the receiver's duties.

But, RCW 7.60.290(5) specifically limits the court's authority in apportioning costs of the receivership:

> If the court determines that the appointment of the receiver was wrongfully procured or procured in bad faith, the court may assess against the person who procured the receiver's appointment (a) all of the receiver's fees and other costs of the receivership and (b) any other sanctions the court determines to be appropriate.

The Kwan group procured the receiver's appointment, not the Clarks. It therefore follows that the Clarks, as the defendants in the action, could not procure the receivership wrongfully or in bad faith. RCW 7.60.290 is unambiguous. The legislature determined that full costs of the receivership may be imposed on one party if the receivership was procured wrongfully or in bad faith. Because the Clarks did not procure appointment of the receiver, the trial court erred in apportioning the cost of the receiver against the Clarks. We remand to strike the court's apportionment of receivership costs.

IV.

The Kwan group argues that because the Clarks' appeal is frivolous, they are entitled to reasonable attorney fees and costs on appeal. We disagree.

RAP 18.9(a)[7] authorizes this court to order a party who files a frivolous appeal to pay terms or compensatory damages to the harmed party. An appeal is frivolous "if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so

[7] The Kwan group also includes RAP 18.1, however, they do not brief what applicable law grants the award of attorney fees or costs.

devoid of merit that there is no possibility of reversal." Advocates for Responsible Dev. v. W. Wash. Growth Mgmt. Hr'gs Bd., 170 Wn.2d 577, 580, 245 P.3d 764 (2010). The Clarks successfully demonstrated that the trial court erred in awarding prejudgment interest when the arbitrator did not and that the trial court exceeded its authority in apportioning all receivership costs on the Clarks. We decline to award attorney fees.

We remand to strike prejudgment interest on Judgment 1 and the apportionment of receivership costs. We otherwise affirm.

Mann, J.

WE CONCUR:

Chung, J.

Dwyer, J.

FILED
6/28/2023
Court of Appeals
Division I
State of Washington

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

APOLLONIA KWAN and WILLIAM KWAN, a married couple, KW&A LLC, a Washington limited liability company, JAS GROUP LLC, a Washington limited liability company, 8168 INVESTMENT LLC, a Washington limited liability company, and each of the foregoing derivatively on behalf of MOUNTLAKE VILLAGE LLC, a Washington limited liability company, and MOUNTLAKE 228 LLC, a Washington limited liability company,

Respondents,

v.

ALAN B. CLARK and LYNN CLARK, a married couple, KYLE CLARK and JANE DOE CLARK, a married couple, GREENSPACE INC., a Washington corporation, GREENSTREET LLC, a Washington limited liability company, FIRST HILL PARTNERS LLC, a Washington limited liability company, FIRST HILL PROPERTIES LLC, a Washington limited liability company, EAST HILL SUMMIT LLC, a Washington limited liability company, and ARCA, a Washington limited liability company,

Appellants,

No. 83693-5-I

DIVISION ONE

ORDER DENYING MOTION FOR RECONSIDERATION

MLV3-23258 LLC, a Washington limited liability company, MLT GALLERIA 228 LLC, a Washington limited liability company,

Defendants,

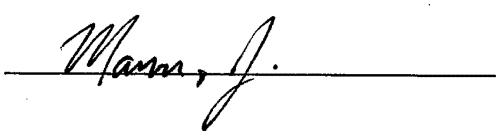
STUART P. KASTNER, PLLC, as Receiver,

Respondent.

Respondents Apollonia Kwan, JAS Group LLC, and 8168 Investment LLC moved to reconsider the court's opinion filed on April 10, 2023. Appellants[1] filed an answer to the motion. The panel has determined that the motion for reconsideration should be denied. Therefore, it is

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:



[1] The appellants include: Alan B. Clark and Lynne Clark, a married couple, GREENSPACE INC., a Washington corporation, GREENSTREET LLC, a Washington limited liability company, FIRST HILL PARTNERS LLC, a Washington limited liability company, FIRST HILL PROPERTIES LLC, a Washington limited liability company, EAST HILL SUMMIT LLC, a Washington limited liability company, and ARCA, a Washington limited liability company.

**KARR TUTTLE CAMPBELL**

**July 28, 2023 - 3:13 PM**

**Transmittal Information**

| | |
|---|---|
| **Filed with Court:** | Court of Appeals Division I |
| **Appellate Court Case Number:** | 83693-5 |
| **Appellate Court Case Title:** | Apollonia Kwan, et al., Respondents v. Alan B. Clark, et al., Appellants |

**The following documents have been uploaded:**

- 836935_Other_20230728151239D1686292_6338.pdf
  This File Contains:
  Other - Petition for Review
  *The Original File Name was Petition for Review Supreme Court of WA.pdf*

**A copy of the uploaded files will be sent to:**

- bleaverton@karrtuttle.com
- djlawpllc@gmail.com
- dlevitin@williamskastner.com
- gtreperinas@karrtuttle.com
- rmoreau@karrtuttle.com
- shenrie@williamskastner.com
- spkastner@gmail.com

**Comments:**

---

Sender Name: Sandy Watkins - Email: swatkins@karrtuttle.com
**Filing on Behalf of:** Daniel Tristan Hagen - Email: dhagen@karrtuttle.com (Alternate Email: asier@karrtuttle.com)

Address:
701 5th Avenue
Ste. 3300
Seattle, WA, 98104
Phone: (206) 224-8238

**Note: The Filing Id is 20230728151239D1686292**