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No.: 67845-1-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

MATHEW STAVE and JANE DOE STAVE, and the marital

community composed thereof,

Defendants/Appellant,

and

DEBORAH HUTMACHER and PHILIP HUTMACHER, and the marital
community composed thereof,

Defendants,

v.

CAROL HOWSON,

Plaintiff/Respondent.

2012 JUN 13 AM 10:00

COURT OF APPEALS DIV I
STATE OF WASHINGTON

BRIEF OF RESPONDENT

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ORIGINAL

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I. INTRODUCTION

Respondent Carol Howson (“Howson”) respectfully requests that the Court of Appeals affirm the Superior Court’s order permitting the MAR Arbitrator to award her separate MAR limits against each defendant in this action. Howson’s claim against defendant Deborah Hutmacher should be assessed separately from her claim against defendant Matthew Stave for purposes of determining arbitrability under RCW §7.06.020.

II. RESPONSE TO ASSIGNMENT OF ERROR

Howson has not identified error that would justify reversing the Superior Court. The Superior Court correctly ruled that RCW §7.06.020 permits separate MAR limits for each separate claim brought in one action.

III. STATEMENT OF THE CASE

A. Facts of the accident

This case involves two separate motor vehicle accidents and two at-fault drivers. On July 20, 2008, Howson was struck by Deborah Hutmacher (hereinafter “Hutmacher”). On December 23, 2009, Howson was involved in another motor vehicle accident with Appellant Matthew Stave (hereinafter “Stave”). CP 53-56. Howson suffered injuries in each accident. Id.

On January 24, 2011, Howson filed this lawsuit against both Hutmacher and Stave for her damages proximately caused by each accident. *Id.* Howson filed one lawsuit against both Hutmacher and Stave to benefit from the efficiency of a single judicial proceeding and to avoid an “empty chair” defense at trial. CP 41-45. For purposes of mandatory arbitration, Howson has agreed to waive any claim for damages in excess of \$50,000 against Hutmacher. Howson has also agreed to waive any claim for damages in excess of \$50,000 against Stave. *Id.* Despite Appellant’s assertion, Hutmacher and Stave are not joint and severally liable for Howson’s damages. CP 25-29.

B. Procedural Background

Howson hereby adopts the Procedural Background as set forth in Appellant’s Opening Brief and incorporates the same herein.

IV. ARGUMENT

A. Monetary Limit Under RCW §7.06.020 Applies to Each Claim, Not Each Action.

The meaning of a statute is a question of law subject to de novo review on appeal. *Dep’t of Labor and Indus. v. Gongyin*, 154 Wash.2d 38, 44, 109 P.3d 816 (2005) (citing *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wash.2d 543, 555, 14 P.3d 133 (2000)). When

interpreting statutes, courts should not rewrite explicit and unequivocal language. *In re Estate of Black*, 153 Wn.2d 152, 162, 102 P.3d 796 (2004). Courts must assume that the legislature meant exactly what it said and must apply the statute as written. *State v. Roggenkamp*, 153 Wn.2d 614, 625, 106 P.3d 196 (2005). A court should not construe a statute as the legislature could have but did not phrase it. *See Hansen v. City of Everett*, 93 Wn. App. 921, 929, 971 P.2d 111, *rev. denied*, 138 Wn.2d 1009 (1999).

Under the plain reading of the statute, arbitrability under RCW §7.06.020(1) is determined by assessing whether a “claim” for money judgment is in excess of \$50,000.00, not whether an “action” for money judgment is in excess of \$50,000.00. RCW §7.06.020(1) provides:

(1) All civil actions, except for appeals from municipal or district courts, which are at issue in the superior court in counties which have authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts **a claim** in excess of fifteen thousand dollars, or if approved by the superior court of a county by two-thirds or greater vote of the judges thereof, up to fifty thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration.

RCW §7.06.020(1) (emphasis added).

Howson’s action includes a claim against Hutmacher for damages proximately caused by the July 20, 2008 accident and a claim against

Stave for damages proximately caused by the December 23, 2009 accident. For purposes of mandatory arbitration, Howson has agreed to waive any claim for damages in excess of \$50,000 against Hutmacher. Howson has also agreed to waive any claim for damages in excess of \$50,000 against Stave. Howson brought one action to benefit from the efficiency of a single judicial proceeding and to avoid an “empty chair” defense at trial. Her purpose in bringing one lawsuit is consistent with the legislative purpose behind mandatory arbitration: judicial economy and to lessen court congestion.

Had the legislature intended to limit the amount of Howson’s claims against both Hutmacher and Stave to \$50,000 in the aggregate under RCW §7.06.020(1), the statute would have been written to say, “All civil actions...where no party asserts *claims* in excess of fifteen thousand dollars...are subject to mandatory arbitration.” However, the fact that the statute specifies “a claim” in the singular instead of “claims” in the plural suggests that the legislature intended for the monetary limit to apply to each separate claim within an action, and not to all claims in the aggregate. Here Appellant asks the Court to change the words “a claim” to “claims.” Yet, the Court must construe the statute as written, not as it could have been written. *See Hansen*, 93 Wn. App. at 929.

The issue of arbitrability of claims under RCW §7.06.020 was addressed in *Christensen v. Atl. Richfield Co.*, 130 Wn. App. 341, 343, 122 P.3d 937 (2005), which involved 27 plaintiffs, each asserting one claim against one defendant in one action. In *Christensen*, 22 out of 27 plaintiffs agreed to waive their claims for damages in excess of \$35,000¹ and sought mandatory arbitration. *Id.* The trial court denied these plaintiffs transfer into mandatory arbitration, and the plaintiffs appealed. On appeal, the defendant argued that the parties who waived claims exceeding \$35,000 were not eligible for mandatory arbitration, because not all plaintiffs to the action so waived. *Id.* The Court agreed:

[T]he plaintiffs in the Christensen group are parties to one action. That action is subject to mandatory arbitration only if all parties have waived their claims to damages in excess of \$35,000. They have not.

Christensen, 130 Wn. App. at 345. Under this holding, if any individual claim in one action exceeds the monetary threshold, the case will not be transferred into mandatory arbitration, regardless of the existence of otherwise arbitrable claims.

While *Christensen, supra*, did not specifically address the issue in this case (whether the claims of one plaintiff against multiple defendants

¹ The applicable MAR limit in *Christensen* was \$35,000.00.

are considered separately in assessing arbitrability), the Court did find that the monetary limit under RCW §7.06.020 applied to each claim separately, not to the entire action in the aggregate. Thus, the *Christensen* case was not arbitrable, because not all plaintiffs had waived their claims, not because the aggregation of plaintiffs' claims exceeded \$35,000.00.

The *Christensen* Court also cited to a portion § 76.3 of the Washington Practice Civil Procedure Handbook, in support of its holding:

“The word ‘claim’ is not defined in chapter 7.06 or the MAR. It has been assumed, and the language of the statute seems to imply, that each separate claim of each party is considered individually in assessing arbitrability; there is no aggregation of claims.” KARL B. TEGLAND AND DOUGLAS J. ENDE, 15A WASH. PRACTICE: CIVIL PROCEDURE HANDBOOK, § 76.3 at 466 (2005).

This source clarifies that "RCW 7.06.020 authorizes arbitration in cases where no party asserts 'a claim' in excess of the monetary threshold." TEGLAND, *supra*, § 76.3 at 467. In other words, no one claim may exceed \$35,000.

These passages mean that in an action, there may be many claims to damages that together might exceed \$35,000. But it is not the damages in the aggregate that a court considers. It is each claim to damages that must not exceed \$35,000. What these passages do not say is that each individual claim may be subject to arbitration even if other claims in the lawsuit exceed \$35,000. To the contrary, Tegland remarks: “[I]f any individual claim exceeds the monetary threshold, the case will not be transferred to the

mandatory arbitration calendar regardless of the existence of otherwise arbitrable claims.” TEGLAND, *supra* § 76.3 at 463.

Christensen, 130 Wn. App. at 346 (emphasis added).

Although not cited to in *Christensen*, *supra*, § 76.3, in its entirety, actually addresses the exact issue before this Court:

RCWA 7.06.020 authorizes arbitration in cases where no party asserts “a claim” in excess of the monetary threshold. The word “claim” is not defined in chapter 7.06 or the MAR. It has been assumed, and the language of the statute seems to imply, that each separate claim of each party is considered individually in assessing arbitrability; there is no aggregation of claims. This principal should apply to original claims, counterclaims, cross-claims, and third party claims, as well as to multiple joined claims. See CR 8 & CR 18. Thus, for example, if a plaintiff asserts a claim for \$35,000, and the defendant asserts a counterclaim for \$25,000, the case is arbitrable even though the total of the two claims exceeds the \$50,000 threshold. Claims are considered separately even if claims asserted by multiple plaintiffs against a single defendant are joint, **or claims of a single plaintiff against multiple defendants involve joint liability.**

TEGLAND, 15A Wash. Prac., Handbook Civil Procedure § 76.3 (2011-2012 ed.) (emphasis added).

Under *Christensen*, *supra*, and TEGLAND, *supra*, Howson’s claim against Hutmacher should be assessed separately from her claim against Stave for purposes of arbitrability under RCW §7.06.020.

Howson should be entitled to separate MAR limits (up to \$50,000.00 against each of the defendants) in mandatory arbitration.

B. There is No Slippery Slope Because the Doctrine of Res Judicata Determines the Number of “Claims” in One Action for Purposes of RCW §7.06.020

Howson’s injuries were caused by two accidents occurring over one year apart, wherein each at-fault driver was a separate proximate cause of her injuries. She is seeking separate MAR limits for the damages she sustain from each accident, not separate MAR limits for each element of her damages.

The word “claim” is not defined in chapter 7.06 or the MAR. However, for purposes of claim preclusion, Washington courts define the parameters of a claim under the doctrine of *res judicata*.² The purpose of *res judicata* is to prevent a party from relitigating claims already determined, and prevent the separate litigation of claims which arose from the same transaction and occurrence. *Bordeaux v. Ingersoll Rand*, 71 Wn.2d 392, 396 (1967). “[I]t is well-settled law in this state, as it seems to be universally elsewhere in common-law states and countries, that a

² To establish a defense of *res judicata* in a subsequent action, there must be a concurrence of identity in four respects: (1) of subject matter; (2) of cause of action; (3) of persons and parties; and (4) in the quality of the persons for or

claimant will not be permitted to split a single claim or cause of action which he [or she] might possess [O]ne tort creates but one cause of action, though different items of damage may result from such tort.” *Sprague v. Adams*, 139 Wn. 510, 515 (1926) (citations omitted).

Defining a “claim” under the traditional principles of *res judicata* eliminates the “slippery slope” or claims splitting that Appellant suggests would happen under RCW §7.06.020 if the Appeals Court upholds the trial court’s order:

The general doctrine is that the plea of *res judicata* applies, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belongs to this subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

Sanwick v. Puget Sound Title Ins. Co., 70 Wn.2d 438, 441 (1967) (citing *Currier v. Perry*, 181 Wash. 565 (1935)); *See also Mirin v. State of Nevada*, 547 F.2d 91, (9th Cir. 1976) *cert. den.*, 432 U.S. 906 (1977) (claims which could have been raised, but were not, are barred); *McCain v. Apodaca*, 793 F.2d 1031, 1034 (9th Cir.1986) (new legal theory or remedy does not prevent court from applying *res judicata*). This doctrine ensures

against whom the claim is made. *Hilltop Terrace Homeowners’ Ass’n v. Island*, 126 Wn.2d 22 (1995); *Hayes v. City of Seattle*, 131 Wn.2d 706 (1997).

the finality of judgments. *In Re Marriage of Shoemaker*, 128 Wn.2d 116 (1995).

Washington jurisprudence has long defined the parameters of a claim under the doctrine of *res judicata*. Whether an action has more than one claim subject to the monetary limits under RCW §7.06.020 should be determined under the principles of *res judicata*, which would eliminate the “slippery slope” of claims-splitting different items of damages that Appellant warns this Court against. In this case, two separate torts were committed by two separate tortfeasors resulting in damages to Howson. Even if those damages overlap to some extent, Howson still has two separate claims under the doctrine of *res judicata*. Therefore, if Howson would have been able to file separate actions on each of her asserted claims without running afoul of *res judicata* principles, then each of those claims should be treated as a separate claim under RCW §7.06.020.

Even the Appellant admits that Howson could have filed two lawsuits. Appellant’s Opening Brief, p. 10. The parties are different and the torts are different, even if Howson’s injuries from each accident

overlap.³ Therefore, this action has two “claims,” each subject to the monetary limits in mandatory arbitration.

C. Hutmacher and Stave are not Joint and Severally Liable Under RCW 4.22.070(1)

To the extent that the Appellant assumes Howson seeks joint liability from Hutmacher and Stave, he is wrong. See Appellant’s Opening Brief, p. 8. This case involves two different car accidents occurring a year and a half apart and two different tortfeasors. Appellant misunderstands the joint and several liability statute. This is not a case where both defendants were acting in concert in causing plaintiff’s injuries. RCW 4.22.070(1)’s joint and several liability does not apply to two tortfeasors committing separate torts a year and a half apart:

(1) In all actions involving fault of more than one entity, the trier of fact shall determine the percentage of the total fault which is attributable to every entity which caused the claimant's damages . . . The liability of each

³ See e.g., *Greengo v. Public Employees Mut. Ins. Co.*, 135 Wn.2d 799, 813-814, 959 P.2d 657 (1998) (“We have previously considered situations involving two or more collisions to determine whether there were two or more ‘accidents’ for insurance purposes. Where there were two collisions, we look to see if each has its own proximate cause. If so then there are two accidents. As an Illinois court explained, ‘A majority of foreign courts have concluded that the number of occurrences is determined by referring to the cause or causes of the damage (the ‘cause’ theory), as opposed to the number of individual claims or injuries (the ‘effect’ theory).’ *Illinois Nat’l Ins. Co. v. Szczepkowitz*, 185 Ill.App.3d 1091, 542 N.E.2d 90, 92, 134 Ill.Dec. 90 (1989). Washington follows the cause theory.”)

defendant shall be several only and shall not be joint except:

(a) A party shall be responsible for the fault of another person or for payment of the proportionate share of another party where both were acting in concert or when a person was acting as an agent or servant of the party.

RCW 4.22.070(1)(a) (emphasis added).

Washington's joint and several liability statute is narrowly construed and liability between multiple defendants are "several only," unless one of the narrow exceptions applies. It would be an error of law to hold Stave jointly liable for medical bills incurred a year and a half before his accident with Howson and incurred as a result of the accident with Hutmacher. Joint and several liability does not apply in this case.⁴

V. CONCLUSION

The trial court order ought to be affirmed. Under the plain reading of RCW §7.06.020(1), Howson is entitled to the monetary limit for each of her claims. Under current case law and the Washington Practice, the monetary limit under RCW §7.06.020(1) is to be applied to each claim separately in an action, not to all claims in the aggregate. Under the

⁴ Howson agrees that when joint and several liability applies in a case, only one claim for damages is being asserted by the plaintiff. Therefore, the monetary

doctrine of *res judicata*, Howson has two claims in this action, one against Hutmacher for the July 20, 2008 accident and one against Stave for the December 23, 2009 accident. Therefore, she should be entitled to seek up to \$50,000 each from Hutmacher and Stave in mandatory arbitration.

Dated this 12th day of June, 2012.

Respectfully submitted,



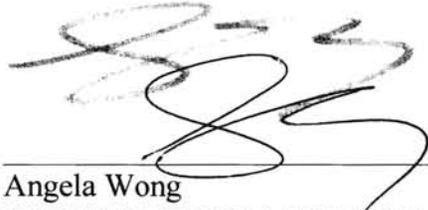
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CERTIFICATE OF SERVICE BY MESSENGER

I hereby certify under penalty of perjury under the laws of the State of Washington that on June 12, 2012, the foregoing was delivered to ABC Legal Messenger Services with instructions to serve the foregoing document on the following parties by June 13, 2012:

Richard Lowell Magnuson Lowell 8201 164th Ave NE, Suite 200 Redmond, WA 98052 Attorney for Appellant Stave	Katie Jones Attorney at Law 901 5 th Avenue, Suite 830 Seattle, WA 98164 Attorney for Defendant Hutmacher
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limit for one claim for damages under joint and several liability should be \$50,000.00 in mandatory arbitration.



Dated June 12, 2012.

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