

68472-8

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Washington State Court of Appeals
Division I



Docket No. 68472-8

Snohomish Cy. Sup. Ct. Cause No. 10-2-10660-8

WILLIAM TWITCHELL, et ux.,

Plaintiffs-Petitioners,

-against-

MARY ANN B. KERRIGAN,

Defendant-Respondent.

APPELLANTS' BRIEF

ORIGINAL

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I. ASSIGNMENTS OF ERROR

1. Refusing to transfer matter to mandatory arbitration unless the Twitchells aggregated their individual claims at \$50,000 and dismissed with prejudice any request for a warrant of abatement.

Issues Pertaining to Assignments of Error

- Did the trial court err by finding the matter nonarbitrable where Mr. Twitchell and Mrs. Twitchell sought to combine their claims at \$100,000 (i.e., \$50,000 each)?
- Did the trial court err by finding that a post-judgment motion for a warrant of abatement under RCW 7.48.020 made the matter nonarbitrable?

II. STATEMENT OF THE CASE

As more fully described in the *Amended Complaint (CP 47-52)*, the Twitchells suffered years of sleepless nights, depression, anxiety, feelings of helplessness, fear of bodily harm and property damage from nuisance barking, blaring radios, nefarious odors, verbal abuse, harassment, and trespasses by neighbor Defendant Kerrigan and her numerous Rottweilers, culminating in the violent death of their beloved, thirteen-year-old, female Yorkshire Terrier named Two Little. On Oct. 12, 2009, Two Little was set upon by two of Defendant's numerous

Rottweilers breaking into the Twitchells' fenced backyard and killing her before Mrs. Twitchell's very eyes.

In addition to the acute incident of Oct. 12, 2009, for which the Twitchells have requested damages related to, *inter alia*, Two Little's intrinsic value and burial expenses, Mr. and Mrs. Twitchell each separately seek general damages related to Defendant's interference with the peaceful and quiet enjoyment of their realty and personalty, as well as mental anguish arising from Defendant's alleged acts and omissions. Thus, while the Twitchells jointly owned Two Little, they each raise separate personal injury claims.

In the *Amended Complaint*, the Twitchells raise ten causes of action, none of which invoked the Uniform Declaratory Judgment Act (Ch. 7.24 RCW), the Injunction Act (Ch. 7.40 RCW), or CR 65. Instead, in the prayer, the Twitchells sought economic and noneconomic damages, interest, fees, costs, and the post-judgment relief of a "writ of abatement of nuisance" per RCW 7.48.020.

The Twitchells alone have identified nearly five dozen fact witnesses who would be called to testify at trial. Given the already clogged court system, a jury trial would take at least a week and would likely be bumped at least once by the criminal calendar and other competing civil actions.

For purposes of expeditiously resolving this matter, the Twitchells were prepared to waive damages over \$50,000 each. Counsel attempted to reach a stipulation with respect to arbitrability. Having failed, per SCLMAR 2.2, the Twitchells asked the court to dispose of the above issues pertaining to the single assignment of error. On Feb. 16, 2012, Judge George N. Bowden refused to transfer the matter to MAR unless the Twitchells dismissed their request for a warrant of abatement with prejudice and limited their combined damages to no more than \$50,000, instead of \$50,000 each. **CP 5-6.**

III. ARGUMENT

On both issues, the scope of appellate review in interpreting a trial court's application of the MAR is *de novo*. *Christensen v. Atlantic Richfield Co.*, 130 Wash.App. 341, 344 (II, 2005). In this case, the court must interpret SCLMAR 1.1, MAR 1.2, and RCW 7.06.020(1).

A. Each Plaintiff May Claim Up to \$50,000

The Mandatory Arbitration Rules provide that:

The purpose of mandatory arbitration of civil actions under RCW 7.06, as implemented by the Mandatory Arbitration Rules (MAR), is to provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes involving claims of fifty thousand dollars (\$50,000.00) or less, exclusive of attorney's fees, interest and costs, ...

SCLMAR 1.1(a) (emphasized).

Under MAR 1.2, a civil action is subject to arbitration if: (1) the action is subject to mandatory arbitration as provided in Ch. 7.06 RCW; (2) all parties, for purposes of arbitration only, waive claims in excess of the amount authorized by Ch. 7.06 RCW, exclusive of attorney fees, interest and costs; or (3) the parties have stipulated to arbitration pursuant to MAR 8.1.

Under RCW 7.06.020(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 or costs, are subject to mandatory arbitration.

RCW 7.06.020(1) (emphasis added).

Civil actions are subject to mandatory arbitration, not claims. Action means “judicial proceeding.” *Black’s Law Dictionary*, at 31 (8th ed. 2004). Each “party” to this action, Mr. and Mrs. Twitchell, has “a claim” against Defendant, both of which were brought in one “civil action” to benefit from the efficiency of a single judicial proceeding decided by an arbitrator. Significantly, for purposes of arbitration, neither of the Twitchells asserts any claim for damages in excess of \$50,000. Under these facts, where two parties each are willing to waive a claim in excess of \$50,000, the matter is arbitrable up to \$100,000.

1. Washington Practice.

The *Washington Practice Civil Procedure Handbook* confirms this:

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.**

Karl B. Tegland and Douglas J. Ende, 15A Wash. Practice: Civil Procedure Handbook, *Multiple Claims*, § 76.3 (2011-2012)(emphasized). In other words, no one claim may exceed \$50,000. In this case, the Twitchells may each assert a claim for damages as long as each individual claim does not exceed \$50,000. That they are married or the Defendant may characterize their claims as joint against her is irrelevant.

Tegland specifically noted that claims are considered separately even when those asserted by multiple plaintiffs (here, husband and wife) against a single defendant are joint. If the Twitchells were only seeking money damages for the value of a single piece of community property, for instance

a car, it would be sensible to regard the civil action as one involving a single claim (i.e., the economic value of the vehicle) and not permit double recovery by allowing the husband to obtain his own judgment for the vehicle's value and the wife to do likewise (e.g., \$10,000 to husband for 2005 VW Golf and \$10,000 to wife for same vehicle).

Here, however, the Twitchells seek not just the intrinsic value of Two Little, but injuries personal to husband and wife arising from not just Two Little's violent death but harassment mediated through Defendant herself and her dogs, including years of barking, blaring radios, nefarious odors, property damage, and invasion sounding in torts of nuisance, IIED, conversion, and trespass. CP 48-49, 52 ¶¶ 7-12, 19-22, 27, 29-30, 33-35. While outdated and chauvinistic laws used to treat the wife as an adjunct to the husband, only in whom and by whom could all her claims be raised, today matrimony does not subjugate one spouse to another, nor require one spouse's permission for the other to sue, nor unify spouses into one legal person in whom all personal injuries join for purposes of MAR.

2. Loss of Consortium and Motor Vehicle Analogies.

Even with respect to personal injury to the one spouse, two claims exist as the deprived spouse may have a claim against the tortfeasor for loss of consortium, while the impaired spouse would have his own claim against the tortfeasor for the underlying injury. *See Green v. A.P.C.*, 136 Wn.2d 87,

101 (1998)(loss of consortium is separate, not derivative, claim (citing *Reichelt v. Johns-Manville Corp.*, 107 Wn.2d 761, 773 (1987)(spouse suffering bodily injury is “impaired spouse” and spouse suffering loss of services and society is “deprived spouse”)).

In this matter, though no loss of consortium claim has been made, the logic applied to these facts presents a stronger factual position, for instead of Mr. Twitchell claiming a derivative injury as the deprived spouse in asserting a marital loss of consortium claim related to the Defendant’s victimization of Mrs. Twitchell as the impaired spouse, both the Twitchells suffered nonderivative (i.e., original) injuries coalescing in their individual claims for distress, anguish, and lost enjoyment of life, realty, and personalty against a common Defendant, who victimized each of them directly. If Mr. Twitchell could bring a separate loss of consortium claim as the deprived spouse for up to \$50,000 and Mrs. Twitchell her own claim for \$50,000 as the impaired spouse, on what basis could the court refuse Mr. and Mrs. Twitchell to each seek \$50,000 as impaired spouses?

A motor vehicle accident analogy also facilitates understanding. If a tortfeasor crosses the center line and hits a sedan head-on, injuring the driver, front-seat passenger, and two rear-seated passengers, all four plaintiffs would have a claim against a common defendant. If each plaintiff waived damages beyond \$50,000, then the defendant would be on the hook in MAR for up to

\$200,000. Here, Defendant's acts and omissions collided with the peace and quiet enjoyment of the Twitchells on their property. Like the occupants of the vehicle, the Defendant faces tort liability for the consequences that befall each plaintiff.

3. *Christensen*.

The Court is not to consider damages in the aggregate. Division II cited Tegland approvingly in this respect, *Christensen v. Atlantic Richfield Co.*, 130 Wash.App. 341, 346 (2005), stating, “[i]t is each claim to damages that must not exceed \$35,000,” the MAR limit in 2005, distinguishing “claim” from “action” and that:

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.

Id. *Christensen* involved twenty-seven plaintiffs. Twenty-two waived claims over \$35,000, but five did not. Because five plaintiffs' claims exceeded \$35,000, the appeals court affirmed the order denying transfer to MAR. Here, two plaintiffs exist and each is willing to waive damages over the current \$50,000 limit. *Christensen* pointedly supports the Twitchells' interpretation and Judge Bowden erred in rejecting it.

Illogic would prevail if each plaintiff could elect to file his or her claim against the defendant in a separate action, put each case into

arbitration, and then obtain a \$50,000 award against that defendant, but would penalize the same plaintiffs should they pursue a more judicially efficient mechanism by joining the two suits together. The argument set forth by the Defendant (i.e., cap both claims at \$50,000 aggregate) would create a greater burden on the already strained resources of the courts in this county and around Washington State.

B. Viability of Postjudgment Motion for Warrant of Abatement Does Not Render Action Nonarbitrable

The warrant of abatement is a post-judgment remedy not obtainable before or at time of judgment. RCW 7.48.020 provides, with emphasis added:

Who may sue — Judgment for damages — Warrant for abatement — Injunction.

Such action may be brought by any person whose property is, or whose patrons or employees are, injuriously affected or whose personal enjoyment is lessened by the nuisance. **If judgment be given** for the plaintiff in such action, **he or she may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue to the sheriff to abate** and to deter or prevent the resumption of such nuisance. Such motion shall be allowed, of course, unless it appear on the hearing that the nuisance has ceased, or that such remedy is inadequate to abate or prevent the continuance of the nuisance, in which latter case the plaintiff may have the defendant enjoined.

RCW 7.48.200 provides, with emphasis added:

Remedies.

The remedies against a public nuisance are: Indictment or information, a civil action, or abatement. The remedy by indictment or information shall be as regulated and prescribed in this chapter. **When a civil action for damage is resorted to, the practice shall conform to RCW 7.48.010 through 7.48.040.**

RCW 7.48.200 and RCW 7.48.020 characterize the nuisance claim as a “civil action for damage” that, once reduced to judgment, permits the post-judgment remedy of a warrant of abatement, obtainable by motion only. Accordingly, an arbitrator has authority to determine whether the Twitchells proved their claims of nuisance and award up to \$50,000 in money damages to each. Should no party request a trial *de novo*, the Twitchells (if they prevail) may file a motion for judgment on the arbitrator’s award per MAR 6.3. Once the court enters judgment, the Twitchells can, per RCW 7.48.020, move the court for a warrant of abatement. Nothing in Ch. 7.48 RCW and the MAR prevents the Twitchells from placing this matter into arbitration while reserving the right to move for a warrant of abatement after judgment on award. Illuminating this analysis is *Mercier v. GEICO Indem. Co.*, 139 Wash.App. 891, 903 (I, 2007), abrogated o.g., *Little v. King*, 147 Wash.App. 883 (I, 2008).

I. Mercier.

In *Mercier*, plaintiff sued his insurance company for UIM benefits. The arbitrator Mr. Bradshaw awarded \$36,000 in damages but the superior court entered judgment for \$1000 after applying a \$35,000 setoff for benefits received from the other driver's insurance. The arbitrator refused to make what he contended was a declaratory judgment – viz., insurance coverage issues – and restricted his ruling to the total collision damages only. Neither party filed a request for a trial *de novo*. *Mercier* moved for judgment on the award in full sum of \$36,000. GEICO sought an offset, and the court granted it, entering judgment for \$1000. Division I found no error, concluding the trial court properly entered judgment per RCW 7.06.050(2) and simultaneously fulfilled its obligation under MAR 1.3 to decide matters the arbitrator placed beyond the scope of arbitration.

This result followed although the appeals court found the arbitrator did have authority to decide the coverage issue, notwithstanding that *Mercier* titled the lawsuit *Complaint for Declaratory Judgment and Damages*. This is because *Mercier* nonetheless sought a money judgment reflecting the bottom line GEICO had to pay by contract. Citing M. Wayne Blair, author of the *WSBA Deskbook* on Ch. 7.06 RCW, the court agreed that while the arbitrator could have decided the coverage question, because he felt unauthorized to decide it, the coverage issue “must be referred to the court.” Thus, the trial judge had the authority to resolve the undecided issues. *Id.*, at 900-901.

The Twitchells do not contend that an arbitrator has authority to issue a warrant of abatement. Indeed, RCW 7.48.020 makes this impossible since it requires a post-judgment (i.e., post judgment on award) motion explicitly brought before a judge. Nothing in Ch. 7.48 RCW, however, requires that civil actions for damages arising from nuisance be only triable before a judge and not an arbitrator. Accordingly, the arbitrator in this case would do as Mr. Bradshaw did in *Mercier*, referring any post-judgment relief issues to the court, yet retaining plenary jurisdiction to decide the damage award to be entered against the Defendant on the basis of nuisance. If the Defendant wishes to avoid the post-judgment warrant of abatement, she can simply request a trial *de novo* or oppose the motion following the judgment on award. In contrast to *Mercier*, where the declaratory judgment on insurance coverage was integral to calculating the final judgment against GEICO, the final money judgment for statutory nuisance under Ch. 7.48 RCW does not rely at all on, nor mandate, issuance of a warrant of abatement.

Had RCW 7.48.020 not treated the writ of abatement as a post-judgment form of relief achievable only by motion, but instead as a separate cause of action to be resolved before or at time of judgment – e.g., a UDJA judgment, TRO, preliminary or permanent injunction – then absent waiver or withdrawal of such injunctive relief, the matter would not be arbitrable. Because the legislature chose not to treat warrants of abatement like

declaratory judgments and injunctions by predicating issuance of the warrant on the movant having previously secured a civil judgment for damages on the theory of nuisance, the general MAR bar to arbitration of civil actions including declaratory or injunctive relief simply does not apply.

2. MAR 6.3 vis-à-vis RCW 7.48.020.

While RCW 7.06.020 provides that civil actions “where the sole relief sought is a money judgment” are subject to mandatory arbitration, for purposes of this motion, emphasis lies with the word “money,” not “relief.” The Twitchells are only seeking a money judgment, not a declaratory judgment or a judgment for a permanent injunction. A postjudgment warrant of abatement is not a “judgment” contemplated by MAR 6.3, which states:

Judgment. If within the 20-day period specified in rule 7.1(a) no party has properly sought a trial *de novo*, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of arbitration for entry as the final judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but it is not subject to appellate review and it may not be attacked or set aside except by a motion to vacate under CR 60.

MAR 6.3 (2011). In prefacing, “**If judgment be given** for the plaintiff **in such action**, he or she may, in addition to the execution to enforce the same, on motion, have an order allowing a warrant to issue ...,” RCW 7.48.020 (emphasized) does not confuse the warrant itself as relief obtained as part of the civil action that resulted in judgment. Because a warrant of abatement

cannot be issued as part of any judgment in a civil action, whether litigated through MAR or at trial, but follows entry of the final money judgment, the trial court erred finding that the Twitchells' reserved right to seek a postjudgment warrant of abatement rendered their case nonarbitrable.

The Twitchells could have just as easily deleted Para. C in the *Prayer* of their *Amended Complaint* ("writ of abatement of nuisance"), taken the matter through to money judgment and, then, filed a post-judgment motion for hearing on the warrant of abatement per RCW 7.48.020. No statute of limitations or any other defense would nullify the Twitchells' right to post-judgment relief in the form of a warrant of abatement even if they failed to request the writ in the complaint. Accordingly, the Defendant has seized upon Para. C as an unripe and superfluous red herring given that the abatement warrant is available only after entry of final judgment. *See* RCW 7.48.020. Prayer in a complaint is not a jurisdictional prerequisite. Indeed, below the Twitchells offered to simply strike Para. C from the *Amended Complaint* while expressly reserving the right to file a post-judgment motion as a matter of right under RCW 7.48.020. **CP 9:18-22.**

The Twitchells anticipate the Defendant will raise the following issues in her response brief.

3. Identity of Judge Hearing RCW 7.48.020 Motion.

*With respect to the assertion that the judge deciding whether to issue the warrant must also have presided over the nuisance trial, no statute or rule requires the judge hearing the post-judgment RCW 7.48.020 motion be the trial judge since the grounds for issuance of the warrant turn not solely on entry of judgment for historical (i.e., pre-suit) nuisance, but evidence of ongoing nuisance contemporaneous with filing the post-judgment motion to “abate and to deter or prevent the resumption of such nuisance.” RCW 7.48.020 (emphasized). Further, the Defendant may oppose the motion by demonstrating that the nuisance “has ceased.” *Id.* In other words, judgment neither disposes of nor mandates issuance of the warrant, but requires additional findings upon hearing. Furthermore, if tried by jury, the jury (not the judge) would make factual findings of nuisance, and the warrant judge would not have the authority to disturb those findings even if she pleased.*

4. Fulfilling MAR’s Mandate.

Contrary to the assertion that placing this matter into MAR would undermine the system’s objectives, the proposal to move this case into MAR furthers the alleviation of court congestion and reducing delay by avoiding a lengthy jury trial and, instead, allows a competent arbitrator to determine whether the Twitchells have proved nuisance sufficient for entry of judgment, a claim based on actions prior to the date of filing the lawsuit. Upon judgment on the arbitrator’s award, the Twitchells could elect to file a

post-judgment RCW 7.48.020 motion. Or they may not. Their election cannot be known until after judgment is rendered. Where mandatory arbitration rules are construed in accordance with the legislative purpose of reducing congestion and delay, *Holt v. Gambill*, 123 Wash.App. 685 (III, 2004), error would prevail were this court to embrace Defendant's application of RCW 7.06.020 and MAR 1.2 to these facts.

Hence, they should not be barred from mandatory arbitration based on a condition subsequent, where that condition is final judgment, and when, even if the condition occurs, they are not obligated to seek that relief. In short, they need not make an election to obtain a post-judgment warrant of abatement before transfer to mandatory arbitration, or risk waiving that right. The matter of the warrant is not yet ripe for adjudication. But when and if it does become ripe, it will require a later court proceeding per RCW 7.48.020. Whether tried by jury or arbitrator, there will be a subsequent motion hearing where a judge, not a jury, will decide its merit. Undeniably, MAR will expedite bringing the matter to judgment, dispensing with Defendant's objection.

5. Unfairness and Prejudice in light of Wilson.

With respect to Defendant's contention of unfairness, the court should look fondly upon any procedure that can route time-consuming cases through MAR. Per *Fernandes v. Mockridge*, 75 Wash.App. 207 (I, 1994),

the judicial council said MAR 2.2 “gives the judge authority to deal with maneuvers designed to keep a case out of the arbitration system.” *Id.*, at 211. The Twitchells seek to effectuate the intent of the legislature and judicial council, Defendant’s maneuvering notwithstanding. That MAR fee-and-cost penalties may be exacted upon the nonprevailing appellant requesting a trial *de novo* has bold consequences for all parties, for if the arbitrator finds no nuisance, the only way the Twitchells could obtain the warrant would be through a trial *de novo*.

Of course, Defendant’s contention is predicated on the unfounded presumption that the trial judge would be the same as the motions judge. Snohomish County Superior Court does not individually calendar and track civil cases. Furthermore, were a jury demand filed, it would not matter whether the trial judge heard the evidence regarding the nuisance claim since it would be the jury’s findings that govern, not the bench’s observations. And, as noted above, issuance of the warrant does not turn on any specific trial findings except simply the conclusion of law that the defendant engaged in statutory nuisance.

In addressing Defendant’s third concern of unfairness, she essentially disputes the availability of post-arbitration relief not sought or obtained in arbitration itself. Relevant in this regard is *Wilson v. Horsley*, 137 Wn.2d 500 (1999)(en banc), where the Supreme Court, at 507 fn. 3, refused to state

“that a party may never amend the pleadings following arbitration,” citing MAR 7.2(c). In affirming the trial court’s denial of the motion to amend post-arbitration, it recognized the prudent reasoning offered below:

The trial court denied Horsley’s motion because allowing amendment after arbitration “would be grossly unfair” and would prejudice Wilson. ... The court recognized that the amendments proposed by Horsley would substantially change the case being tried from that which was brought before the arbitrator, thus making the evaluation of costs and attorney fees under MAR 7.3 problematic. Further, allowing Horsley to raise these issues after arbitration would deprive Wilson of the opportunity to have the issues resolved at arbitration. In addition, the court concluded that granting leave to amend would be contrary to the Mandatory Arbitration Rules’ purpose of reducing the volume of litigation.

Id., at 507. None of the concerns raised in *Wilson* exists for Defendant here, since (a) whether arbitrated or tried by bench or jury, the warrant would only issue by post-judgment motion, could not be conclusively resolved at arbitration because the warrant’s issuance turns explicitly on post-judgment grounds, and would not require a second trial; (b) no unfairness or prejudice would befall the Defendant as she would still defend against identical facts and claims in arbitration or trial, and she would retain all rights to oppose the post-judgment motion for the warrant of abatement; and (c) the issuance of the warrant of abatement has no bearing on evaluating prevailing party costs and fees under MAR 7.3 because the warrant only issues post-judgment (i.e., no request for trial de novo was made).

IV. CONCLUSION

This court should permit the Twitchells to place the matter into MAR seeking in aggregate \$100,000 and reserving the right to move the court post-judgment for a warrant of abatement. In short, the arbitrator will not be asked to do anything outside her authority. As in all MAR matters, she will hear the evidence, determine if the Twitchells met their burden, and enter a monetary award. Thereafter, the court will enter judgment on that award and take up any RCW 7.48.020 motion should the Twitchells elect to file one.

Dated this Mar. 27, 2012

ANIMAL LAW OFFICES

Digitally signed by Adam P. Karp
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Mar. 27, 2012, after 5 p.m., I caused a true and correct copy of the foregoing, to be served upon the following person(s) in the following manner:

[x] Email (stipulated)

Greg Worden
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