

COURT OF APPEALS
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STATE OF WASHINGTON
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NO. 35796-8-II

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II**

DOLORES MARQUEZ, Appellant

vs.

CASCADE RESIDENTIAL DESIGN, INC., Respondent

APPELLANT'S REPLY BRIEF

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ORIGINAL

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I. REPLY ARGUMENTS

A. INTRODUCTION

The Arbitration Award, dated August 28, 2006, and filed with the court on September 1, 2006, specifically states:

Further, Plaintiff is entitled to reasonable attorney's fees regarding the wage and commission claim awards, pursuant to RCW 49.48.030 and RCW 49.52.070

CP 12. In this appeal, there is no dispute that the arbitrator properly determined on August 28, 2006 that Ms. Marquez was statutorily entitled to her attorneys fees. Therefore, no further "motion for an award of attorneys fees" pursuant to PCLMAR 6.1(c)(1) was necessary. All that remained for Ms. Marquez to do was to submit an attorney fee affidavit for the purpose of determining the *amount* of her attorney fee award, which she ultimately did on October 5, 2006.

The respondent, Cascade Residential Design asserts, however, that Ms. Marquez should be denied her statutory right to attorneys fees because her attorney did not submit his attorney fee affidavit to the arbitrator within seven days of receiving the award. Cascade asserts that Ms. Marquez's appeal is frivolous based upon "the clarity of PCLMAR 6.1,

MAR 7.1, *Smukalla*¹ and *Malted Mousse*².” Respondent’s Brief at pp. 14 - 15. Yet, none of the case law authority cited by Cascade interprets PCLMAR 6.1(c)(1) to deny attorneys fees to a party who an arbitrator determines is *statutorily* entitled to them. In addition, the proper application of PCLMAR 6.1(c) is far from clear under the facts in this case. In any event, the public policy behind the legislative *requirement* that successful plaintiffs in wages cases be awarded their attorneys fees trumps the public policy behind the *local* arbitration rule at issue.

B. NONE OF THE CASES CITED BY RESPONDENT INTERPRET PCLMAR 6.1(C) TO DENY ATTORNEYS FEES TO A PARTY WHO AN ARBITRATOR DETERMINES IS STATUTORILY ENTITLED TO THEM

1. *Malted Mouse* Is Factually Distinguishable and Does Not Discuss PCLMAR 6.1(c).

Cascade relies heavily upon *Malted Mouse* for its position on appeal. The facts in *Malted Mouse*, however, are easily distinguished. More importantly, the *Malted Mouse* case does not even discuss PCLMAR 6.1(c). Nor does *Malted Mouse* discuss the timeliness of an attorney fee affidavit submitted after an arbitrator has already determined that a prevailing party in a mandatory arbitration is statutorily entitled to attorneys fees.

¹ *Smukalla v. Barth*, 73 Wn. App. 240, 868 P.2d 888 (1994).

² *Malted Mouse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003).

In *Malted Mouse*, the prevailing party in a mandatory arbitration made a timely motion for attorneys fees pursuant to the small claims statute, RCW 4.84.250. Unlike here, the arbitrator *denied* the prevailing party's motion in an amended award, explaining in a cover letter that the reason he denied attorneys fees was based upon his opinion that the small claim statute was unconstitutional. *Malted Mouse v. Steinmetz*, 150 Wn.2d 518, 522-523, 79 P.3d 1154 (2004). The prevailing party subsequently requested a trial de novo and sought judicial review solely of the arbitrator's denial of attorney fees. *Malted Mouse*, 150 Wn.2d at 523. The prevailing party, however, did not note the case for trial; seven months later, he requested an order vacating the amended award and awarding reasonable attorneys fees pursuant to RCW 7.04.160(4).³ The trial court denied the motion.

The prevailing party then appealed. The Court of Appeals reversed holding that the arbitrator's sua sponte declaration that RCW 4.84.250 is unconstitutional was a manifest procedural error and that the trial court should have treated the prevailing party's request for a trial de novo as an extraordinary writ challenging the arbitrator's refusal to follow the law. *Malted Mouse*, 150 Wn.2d at 524. The Supreme Court reversed

³ RCW 7.04.160(4) sets forth the grounds for vacating an arbitration award in a private arbitration and has no application to a mandatory arbitration pursuant to Chapter 7.06 RCW.

the Court of Appeals holding essentially that prevailing party's request for a partial trial de novo was ineffective. *Malted Mouse*, 150 Wn.2d at 534-535.

In comparing the facts in *Malted Mouse* with the facts here, it should first be noted that, in *both* cases, the prevailing party made a timely request for attorneys fees. In *Malted Mouse*, the plaintiff requested attorneys fees four days after receiving the arbitration award. Here, the plaintiff requested attorneys fees in her arbitration brief submitted *before* the arbitration and *at the arbitration itself*. The critical *difference* between the two cases is that, in *Malted Mouse*, the arbitrator *denied* the prevailing party's request for attorneys fees pursuant to RCW 4.84.250; whereas here, the arbitrator found that Ms. Marquez *was entitled to attorneys fees* pursuant to RCW 49.48.030 and RCW 49.52.070. *See* CP 12.

In *Malted Mouse*, PCLMAR 6.1(c) was not at issue because the prevailing party timely requested attorneys fees pursuant to subsection (1) and the arbitrator denied fees in an amended award pursuant to subsection (4). Notably, the *Malted Mouse* case did not even discuss PCLMAR 6.1(c). There, the issue was whether a party could request a trial de novo only of the portion of the arbitrator's decision denying an award of attorneys fees to the prevailing party. *Malted Mouse* has no application here because (1) it did not involve the interpretation of PCLMAR 6.1(c),

and (2) Ms. Marquez never sought a trial de novo solely on the issue of attorneys fees.

2. The *Perkins Coie*⁴ Case is Similarly Distinguishable and Does Not Discuss PCLMAR 6.1(c)⁵

Like in *Malted Mouse*, the central issue in the *Perkins Coie* case was whether a party who arbitrates claims under the mandatory arbitration rules may request a trial de novo of less than all the issues that were arbitrated, which of course they may not. Here, however, Ms. Marquez did not request a trial de novo of less than all the issues arbitrated. Rather, she sought to have the superior court determine the *amount* of her attorney fee award after timely requesting them from the arbitrator, and after the arbitrator found that she was statutorily entitled to them.

The *Perkins Coie* case does not discuss the timeliness of a request for attorneys fees at or after an arbitration. It does not discuss a request by a prevailing plaintiff in an arbitration that the *court* rather than the arbitrator determine the *amount* of the attorneys fees, when the arbitrator has already determined that the plaintiff is statutorily entitled to them.

⁴ *Perkins Coie v. Williams*, 84 Wn. App. 733, 929 P.2d 1215, *review denied*, 132 Wn.2d 1013, 940 P.2d 654 (1997).

⁵ Respondent also cites *Nvers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997) and *Newton v. Legarsky*, 97 Wn. App. 375, 984 P.2d 417 (1999), but neither of these cases deal with the timeliness of a request for attorneys fees during or after a mandatory arbitration, and neither of them involve the interpretation of PCLMAR 6.1(c). Therefore, neither of these cases are applicable here.

Nor does the *Perkins Coie* case involve PCLMAR 6.1(c) or any analogous rule. Therefore it has no application to the facts here.

3. In *Smukalla*, the Prevailing Defendant Was Not Entitled to Attorneys Fees Pursuant to RCW 4.84.250 and Did Not Request Them from the Arbitrator Under Any Theory

In *Smukalla*, the plaintiff noted the case for arbitration stating her claim was \$35,000 or less. The defendant prevailed at the arbitration but did not seek attorneys fees from the arbitrator on *any* theory. *Smukalla v. Barth*, 73 Wn. App. 240, 868 P.2d 888 (1994). Neither party requested a trial de novo. *Three months after* the arbitrator filed his award, the defendant obtained entry of judgment on the award which judgment awarded him \$125 in costs *and no attorneys fees*. Then, *one month later*, the defendant moved for attorneys fees in superior court based on RCW 4.84.185 and RCW 4.84.250-RCW 4.84.290. Although neither party cited PCLMAR 6.1, the superior court denied attorneys fees concluding that the arbitrator no longer had jurisdiction to consider the attorney fee request, and concluding that it could not consider the merits of the defendant's motion because it had not tried the case nor heard the testimony.

The *Smukalla* court concluded the defendants' claim for attorneys fees under RCW 4.84.250 was without merit because the defendant was not a prevailing party as defined by RCW 4.84.270. The *Smukalla* court

concluded that defendant's claim for attorneys fees based upon RCW 4.84.185⁶ was barred by PCLMAR 6.1, although neither party cited this rule to the superior court. *Smukalla*, 73 Wn. App. at 242-243.

Like *Malted Mouse*, the *Smukalla* case is easily distinguishable on its facts. There, the prevailing defendant did not request attorneys fees at the arbitration itself or afterwards within the 7 days provided by PCLMAR 6.1(c)(1). Not only that, the defendant in *Smukalla* did not make his first request for fees until a month *after* a judgment was entered on the arbitration award, which was *three months* after it was filed.⁷ Here, in sharp contrast, Ms. Marquez made her request for fees to the arbitrator, *at the arbitration itself*. When she submitted her attorney fee affidavit to the court, it was *before* any judgment had been entered on the award, and it was consistent with RCW 49.48.030, which specifically states:

⁶ Notably, pursuant to RCW 4.84.185, an award of attorneys fees is discretionary with the trial court, unlike RCW 49.48.030, and RCW 49.52.070, which provides for a *mandatory* award of attorneys fees to a prevailing plaintiff in a wage case.

⁷ This was a judgment that the defendant himself procured pursuant to MAR 6.3, which specifically states:

If within 20 days after the award is filed no party has sought a trial de novo under rule 7.1, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of the 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 attached or set aside except by a motion to vacate under CR 60*.

MAR 6.3 (emphasis added).

In any action in which any person is successful in recovering judgment for wages or salary owed to him, reasonable attorney's fees, *in an amount to be determined by the court*, shall be assessed against said employer or former employer.

Based upon the clear and plain language of this statute, it was reasonable for Ms. Marquez to believe that her attorney fee affidavit should be submitted to the court for determination of the *amount* of the fees, once the arbitrator determined that she was statutorily entitled to them.

Because the facts in *Smukalla* are easily distinguishable, this case should not control the outcome here. In *Smukalla*, the prevailing defendant's only potential basis for fees, RCW 4.84.185, was based upon a statute in which an award of fees would have been *discretionary* with the arbitrator, whereas, here the arbitrator was statutorily *required* to award fees to a prevailing plaintiff. In *Smukalla*, the prevailing party did not request attorney fees at the arbitration, did not request them within seven days of the arbitration, and then procured a final judgment without requesting attorneys fees. Here, Ms. Marquez requested and was found to be entitled to attorneys fees in the initial arbitration award itself. She sought to have the court determine only the *amount* of fees based upon the plain language of RCW 4.84.030.

4. The *Trusley*⁸ Case Is Factually Distinguishable and Does Not Discuss PCLMAR 6.1(c).

In *Trusley*, a Yakima County case, the arbitrator dismissed the plaintiff's breach of contract claim, but denied the defendant's claim for attorneys fees pursuant to the frivolous claim statute, RCW 4.84.185. Neither party requested a trial de novo. Two months after the arbitrator's decision, the prevailing defendant moved in superior court for judgment on the arbitrator's award and asked the court to award attorneys fees under RCW 4.84.250 based upon an offer of settlement to the plaintiffs before the arbitration hearing. *Trusley v. Statler*, 69 Wn. App. 462, 849 P.2d 1234 (1993). The *Trusley* court concluded that the defendant was limited to judgment on the arbitration award because the defendant did not request that the arbitrator award attorney fees pursuant to RCW 4.84.250. *Trusley*, 69 Wn. App. at 464.

Notably, there is no mention in the *Trusley* case of a Yakima County local court rule analogous to PCLMAR 6.1(c)(1), and thus, this case should have no application here. Like the *Malted Mouse* and the *Smukalla* cases, the *Trusley* case is also easily distinguished on its facts. In *Trusley*, the prevailing defendant never requested the arbitrator to award fees pursuant to RCW 4.84.250. Here, on the other hand, Ms.

⁸ *Trusley v. Statler*, 69 Wn. App. 462, 849 P.2d 1234 (1993).

Marquez specifically requested that the arbitrator award her fees pursuant to RCW 49.48.030 and RCW 49.52.070, and, more importantly, the arbitrator found that she was entitled to them.

C. **PCLMAR 6.1(c) LACKS CLARITY; CONSIDERATIONS OF PUBLIC POLICY REQUIRE THAT THE AMBIGUITY BE RESOLVED IN FAVOR OF AN AWARD OF ATTORNEYS FEES TO MS. MARQUEZ**

Cascade asserts that Ms. Marquez's appeal is frivolous based upon the "clarity" of PCLMAR 6.1(c). Based upon the factual circumstances here, however, the proper application of the rule is far from clear. In light of the ambiguity of PCLMAR 6.1(c) and the competing public policies at stake, the ambiguity should be resolved in favor of an award of attorneys fees to Ms. Marquez.

Subsection (1) of the rules states that any "motion" for an award of attorney fees must be submitted to the arbitrator within seven days of receipt of the award. It does not address the situation where the request for attorney fees was made at the arbitration itself, and the arbitrator has already concluded in the initial award that the prevailing party is statutorily entitled to attorneys fees. In this circumstances, a motion for an award of attorneys fees would be entirely superfluous. All that is required is that the prevailing party submit an attorney fee affidavit so that the *amount* of the award can be determined. The local rule as well as the

MARs are silent on whether an attorney fee affidavit should be submitted to the court or the arbitrator. The plain language of RCW 49.48.030 makes the proper interpretation of PCLMAR 6.1(c) even more ambiguous where it states that the *amount* of attorneys fees are to be determined *by the court*.

Subsection (4) of PCLMAR 6.1(c) states that if the arbitrator awards fees, the arbitrator “shall” file an amended award. Subsection (6) provides that the time for appeal of the arbitrator’s decision in any case where attorneys fees “have been timely requested” shall not start to run until the service and filing of the amended award or the denial thereof. Here, there can be no doubt that attorneys fees were timely requested where they were requested *at the arbitration*, which was prior to the expiration of the seven day deadline in subsection (1). Thus, the time to appeal the arbitrator’s decision could not begin to run until the filing of the amended award. The arbitrator, however, never filed an amended award as required by subsection (4) of PCLMAR 6.1(c). Instead, the arbitrator effectively vacated his initial award when he refused to determine the amount of attorneys fees to which Ms. Marquez was entitled. Because the arbitrator failed to comply with PCLMAR 6.1(c)(4), and failed to comply with the trial court’s order, the trial court erred by refusing to overrule the arbitrator’s order dated October 30, 2006.

Given the ambiguity of the *local* mandatory arbitration rule, and the clear legislative intent behind RCW 49.48.030 and RCW 49.52.070, this Court should consider the competing public policies at issue. The legislative intent behind RCW 49.48.030 and RCW 49.52.070 is to ensure that employees with small wages claims can afford to pursue them. *See International Association of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002) (one of primary purposes of remedial statutes like RCW 49.48.030 is to allow employees to pursue claims even though the amount of recovery may be small);⁹ *Brandt v. Impero*, 1 Wn. App. 678, 682, 463 P.2d 197 (1969) (purpose of RCW 49.52.070 in granting attorney fees was to prevent wrongful withholding of wages even if amount withheld is small). On the other hand, the purpose of the mandatory arbitration rules is to reduce congestion in the courts and delays in civil hearings. *Malted Mouse*, 150 Wn.2d at 526 (citing *Nvers v. Fireside, Inc.*, 133 Wn.2d at 815).

Here, the legislative intent behind RCW 49.48.030 and RCW 49.52.070 will be thwarted if Ms. Marquez is denied her right to attorneys fees. The fees she expended at the arbitration and on this appeal will well exceed her recovery of \$10,642.17 if she is not entitled to an award of her

⁹ In the *Fire Fighters* case, our supreme court concluded that interpreting RCW 49.48.030 to include arbitration proceedings would not affect Washington's policy favoring arbitration, *Fire Fighters*, 150 Wn.2d at 50-51.

attorneys fees. Instead of allowing Ms. Marquez to pursue her small but valid claim for wages, the superior court's decision will have created the situation where Ms. Marquez was required to spend more in attorneys fees than she was able to recover.

On the other hand, the purpose of the mandatory arbitration rules will not be effected if this court interprets PCLMAR 6.1(c) such that the trial court's judgment entered without an award of attorneys fees must be reversed. The purpose of reducing congestion in the courts and the delay of civil cases has already been served by requiring this case be submitted to mandatory arbitration. There should be no question that the state legislative policy behind the attorney fee provisions in the wage statutes should trump the public policy behind Pierce County's *local* rule. To hold otherwise, would be an extreme case of putting form over substance. *See Pybas v. Paolino*, 73 Wn. App. 393, 869 P.2d 427 (1994) (the current state of the law is to interpret rules and statutes to reach the substance of matters so that substance prevails over form); *Weeks v. Chief of State Patrol*, 96 Wn.2d 893, 896, 639 P.2d 732 (1982) (court of appeals properly extended the time for filing a notice of appeal in order to serve the ends of justice and addressed the merits of the controversy, even though the timely notice of appeal was filed with the court of appeals rather than the superior court).

II. CONCLUSION

Based upon the foregoing, Ms. Marquez respectfully requests that this court reverse the judgment of the trial court and its decision refusing to overturn Arbitrator Lindstrom's refusal to follow the court's previous order to determine the *amount* of attorneys fees. This case should be remanded to the arbitrator to determine the *amount* of fees to which Ms. Marquez is entitled. Once Arbitrator Lindstrom files an amended award, each party should then have 20 days to request a trial do novo. Pursuant to RCW 49.48.030 and RCW 49.52.070, Ms. Marquez should be awarded her attorneys fees for having to bring this appeal.

DATED this 13th day of June, 2007.


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CERTIFICATE OF SERVICE

I hereby certify that on the 14 day of June, 2007, I caused a copy of the original of **Appellant's Reply Brief** to be delivered to the below listed at their respective addresses:

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