

NO. 36196-5-II

IN THE COURT OF APPEALS FOR THE
STATE OF WASHINGTON

DIVISION II

TTMI CONSTRUCTION, INC.
Respondent

vs.

WALTER F. FOTO
Appellant

APPELLANT'S BRIEF

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ASSIGNMENT OF ERROR

A. APPELLANT WALTER F. FOTO BELIEVES THAT THE HONORABLE JUDGE ROSANNE BUCKNER ERRED AS A MATTER OF LAW WHEN SHE RULED BY WRITTEN ORDER ON MARCH 16, 2007, THAT SHE DID NOT HAVE THE AUTHORITY TO OVERTURN OR AMEND THE DECISION OF AMERICAN ARBITRATION ASSOCIATION ARBITRATOR WILLIAM L. BASS.

1. Did Arbitrator William L. Bass in his initial decision of January 12, 2007 (CP 48 & 49) err in his calculation of the award amount by making a mathematical error with respect to the interest added to the award?
2. Did Arbitrator William L. Bass in his decision of January 12, 2007 err by requiring the Appellant Walter F. Foto to pay an arbitration fee of \$750 within 5 days of the date of the decision when the American Arbitration Association Administrator in charge of the case had previously ruled that no such fee was necessary?
3. Did Arbitrator William L. Bass in his amended award of February 21, 2007 (CP 60) err in increasing the amount of the award to the plaintiff/respondent to \$11,704.92?
4. Does the Court have the authority under RCW 7.04A.240 to modify the award and amend the award of the Arbitrator William L. Bass entered on January 12, 2007 and February 21, 2007?
5. Did the Court err in awarding attorney fees to the Respondent in its order of March 16, 2007?
6. Is the Appellant entitled to an award of reasonable attorney fees for this appeal?

INTRODUCTION

This appeal involves a request by appellant Walter F. Foto that the decision of the Honorable Rosanne Buckner of the Pierce County Superior Court be reversed and that the case be remanded for further proceedings. The case involves Judge Buckner's refusal to amend or set aside an arbitration decision which was rendered pursuant to RCW 7.04. The underlying issues on appeal are whether or not the arbitrator's decision was sustainable. The remaining issue was whether or not Judge Buckner had the authority to overturn that arbitration decision. In her ruling she lacked the jurisdiction to do so despite the fact that she felt an error had occurred. Appellant Walter F. Foto believes that an error did occur in the arbitrator's decision and that Judge Buckner had the authority to amend or set aside the award.

STATEMENT OF THE CASE

During 2005, the Respondent TTMI Construction, Inc. entered into a contract with Appellant Walter F. Foto for the purpose of constructing tenant improvements on a dental office for the Appellant. A complaint arose about the performance of the parties wherein essentially, the Appellant failed to make the final payment for the work

constructed by the Respondent, claiming that Respondent had failed to complete its tasks in accordance with the contract. The respective positions of the parties are set forth in the Respondent's complaint and the Appellant's answer and counterclaim. (CP 1-11 and CP 12-14). The initial litigation in this case then ensued.

Pursuant to the terms of the written contract (CP 7-11), there was a designation that disputes were to be arbitrated in accordance with AAA arbitration rules. Pursuant to that contract clause, the matter was transferred to arbitration by order dated March 20, 2006. (CP 15-17).

During the process of preparing for arbitration, the issue arose as to whether the claims of the Appellant Walter F. Foto would be treated as a set off against the complaint amount complained for by the Appellant, or whether they would be treated by AAA as a counterclaim thereby requiring the payment of an additional filing fee. In light of that question arising, Appellant's counsel submitted a letter dated November 15, 2006, (CP 67) requesting clarification for that issue directly from the American Arbitration Association. Five days later, on November 20, 2006, the AAA responded indicating that no such filing fee was necessary. See CP 56, the email from Nancy J.

Simon of the American Arbitration Association. Thereafter the matter was heard by Arbitrator William L. Bass who rendered his decision on January 12, 2007. (CP 47 & 48). The decision of Arbitrator Bass was to award a portion of each party their respective claim. Essentially the Respondent was awarded \$1,429.90 of its claim and the Appellant was awarded \$825.00 of his claim. However, Arbitrator Bass then awarded \$1,185.00 interest to the Respondent on its portion of the claim but failed to award interest to the Appellant on his portion of the claim despite the fact that both were based upon the same contract and conduct which occurred at the same time. The Arbitrator then awarded 75% of Respondent's attorney fees to the Respondent and 27% of Appellant's attorney fees to the Appellant. In addition, the Arbitrator included the following sentences:

The parties will each bear their own AAA fees. TTMI has already paid its AAA fee (verify this) Foto shall pay its required counterclaim AAA fee in the amount of \$750.00 within 5 business days of this award and shall not be entitled to its counterclaim or to obtain the associated recovery of attorney fees unless said fees are paid. The parties shall each pay one-half of the arbitrator's fee. (CP 49).

The decision was rendered January 12, but not transmitted to

the parties until January 16, 2007. Thereafter on February 1, 2007, the Appellant filed a motion with the Arbitrator consistent with RCW 7.04A.200 requesting a modification of the award to correct the perceived mathematical error. (CP 52-55). The Appellant pointed out to the Arbitrator that had the interest been properly calculated, that is if the Appellant's set off award of \$825.00 was subtracted from the initial Arbitration Award of \$1,429.90, the net award on the contract balance would have been \$604.90. This would have reduced the Respondent's net award of contract balance and interest to \$1,622.65; would have reduced their attorney fees and costs and would have lowered the net award to the Respondent to \$5,804.05. The calculation of those amounts are described in more detail in the Appellant's request for modification of the award found at CP 52-55, and in particular page 53. That request in no way changed the underlying amount of the award but simply recalculated the award applying interest more appropriately.

By the time the motion was filed on February 1, 2007, the \$750 administrative fee required by the Arbitrator had been paid despite the fact that Appellant felt that this issue had been properly addressed by the AAA administrators and that no such fee was due. In order to

avoid having the request for modification summarily dismissed, the fee was paid although it was not paid within 5 days. See page 3 of the Appellant's request for modification found at CP 64.

Thereafter, on February 21, 2007, Arbitrator William L. Bass entered an order modifying his previous award and raising the award to the Respondent to \$11,704.92. In his ruling, despite the fact that the administrative fee had been paid, the Arbitrator ruled that none of the set offs or attorney fees previously awarded to the Appellant would be sustained and effectively giving the Respondent its full award as requested.

On March 9, 2007, the Appellant filed a motion and affidavit seeking modification or correction of the award and asking that the judgment be entered pursuant to RCW 7.04A in the amount of \$5,804.05. The matter was heard by the Honorable Judge Rosanne Buckner on March 16, 2007, who entered an order (CP 67-68) confirming the February 21, 2007 ruling of Arbitrator Bass, awarding an additional \$500.00 in attorney fees and contained the following statement:

The court having heard the defendant's motion to correct or modify the award, the court concludes that it was improper for

the American Arbitration Association to require an additional filing fee and condition defendant's offset on the payment of that fee, but the court further concludes that it does not have jurisdiction to overturn the Arbitrator's decision and the decision is confirmed. (CP 67-68).

This appeal ensued.

ARGUMENT

1. Did Arbitrator William L. Bass in his initial decision of January 12, 2007 (CP 48 & 49) err in his calculation of the award amount by making a mathematical error with respect to the interest added to the award?

The answer to this issue is "yes" the Arbitrator did make an error. If the Court exams the calculation of the award found on the second page of the January 12, 2007, award (CP 48) the Court will see that it was determined that the contract balance was \$1,429.90.

The Court will also see that at the same time, the Arbitrator awarded the Appellant \$825.00 of its claim. The proper calculation of the award to the Respondent should have been just subtracting these two amounts, leaving a balance of \$604.90. That is the sum upon which interest should have been calculated. If the award is allowed to stand in its current forum, the Respondent receives the benefit of an interest calculation on its entire award rather than on the net

award, despite the fact that the Arbitrator clearly deducted \$825.00 from that award.

The problem is exacerbated because in his award, Arbitrator Bass then calculates the amount of attorney fees each side should receive based upon what percentage of their overall claims they achieved. Because the interest was improperly added to the contract balance before deducting the offset, it artificially increased the percentage of Respondent's award, driving up the attorney fees and costs award as well. The calculation is a very straightforward mathematical calculation which was laid out in detail for the Arbitrator's benefit in the request for modification filed by the Appellant. (CP 52-55). It seems very apparent therefore that initial decision of Arbitrator Bass was erroneous simply because of this mathematical miscalculation. The proper amount of the award should have been \$5,804.05 in favor of the Respondent.

The modification or correction of the award was sought under the provisions of RCW 7.04A.200. That statute states in part:

RCW 7.04A.200. Change of an Award by Arbitrator.

1) On motion to an arbitrator by a party to the arbitration proceeding, the arbitrator

may modify or correct an award:

(a) upon the grounds stated in RCW 7.04A.240(1)(a) or (c);

RCW 7.04A.240(1)(a) provides as follows:

1) Upon motion filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of the arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, the court shall modify or correct the award if:

(a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

The Appellant asserts that the decision of Arbitrator Bass constitutes an evident mathematical miscalculation and that a modification is appropriate under RCW 7.04A.200 and 7.04A.240.

It is clear under Washington law that the reviewing court has a very limited scope of review over arbitration decisions. The court may only confirm, vacate, modify, or correct an arbitration award according to the statutory basis. Luvaas Family Farms v. Ferrell Family Farms, 106 Wash.App. 399, 23 P.3d 1111 (2001). The remedy being sought here is simply the modification of an award.

2. Did Arbitrator William L. Bass in his decision of January 12, 2007 err by requiring the Appellant Walter F. Foto to pay an arbitration fee of \$750 within 5 days of the date of the decision when the American Arbitration Association Administrator in charge of the case had previously ruled that no such fee was necessary?

It was error for Arbitrator Bass to condition his award on the payment of an additional administrative fee. That issue was not before him.

The authority of the arbitrator to act is limited to those issues which are presented to him or her for review. Luvaas Family Farms v. Ferrell Family Farms, 106 Wash.App. 399, 23 P.3d 1111 (2001). In the Luvaas case, supra., the reviewing court ruled that because the arbitrator had ruled on certain provisions which had not been submitted to him, the portion of the arbitrator's award which exceeded his authority should not have been confirmed. Division III of the Court of Appeals in that decision specifically ruled that the trial court erred in confirming the award.

In the current case, the precise issue of whether such a fee was appropriate had been raised prior to the arbitration taking place and there had been a specific ruling by the case administrator that no such fee was to be paid. The administrator's correspondence relative

to that was not equivocal. It did not suggest that the arbitrator should make that decision. The administrative decision was that no such fee was necessary and that should have ended the inquiry on that issue. Nothing thereafter gave the arbitrator the authority to change that decision.

The decision is even more onerous given the way in which it was applied. Although the arbitrator made his decision on January 12, 2007, it was not transmitted to the parties until a fax transmittal was sent by the American Arbitration Association on January 16, 2007. This essentially gave the Appellant virtually no time to comply with the order. In due course, the order would have had to have been received, reviewed, transmitted to client and complied with all in a time frame which precluded any serious consideration of the merits of the decision. Additionally, despite the fact that the fee in question had been paid by the time the arbitrator was requested to review his decision for mathematical error, he simply ignored the payment and in his amended decision granted the Respondent everything it had asked for.

3. Did Arbitrator William L. Bass in his amended award of February 21, 2007 (CP 60) err in increasing the amount of the award to the plaintiff/respondent to \$11,704.92?

In his award, Arbitrator Bass indicated that the \$750.00 filing fee was to be paid within 5 days. However, he goes on to say that Appellant "shall not be entitled to its counterclaim or to obtain the associated recovery of attorney fees unless the fees are paid." The order does not specifically state that the Appellant is not entitled to his counterclaims or recovery of fees and costs if the \$750.00 is not paid within 5 days, the award simply states that in order to get those items, the fee must be paid. The 5 day requirement and the requirement that the fees be paid are separate and distinct. The award does not say that the sanction for failing to file the \$750.00 within 5 days is to forever bar the Appellant from recovering that sum which he is entitled to recover. As the matters currently stand before the Court, the Appellant has filed the fee, albeit late, and has still been denied the benefit of the setoff as well as costs and attorney fees. This type of procedural issue is far beyond what was submitted to the arbitrator for review.

4. Does the Court have the authority under RCW 7.04A.240 to modify the award and amend the award of the Arbitrator William L. Bass entered on January 12, 2007 and February 21, 2007?

RCW 7.04A.240 specifically grants the trial court to make such

an amendment or modification. RCW 7.04A.240 provides as follows:

Modification or Correction of Award.

1) Upon motion filed within ninety days after the movant receives notice of the award in a record under RCW 7.04A.190 or within ninety days after the movant receives notice of the arbitrator's award in a record on a motion to modify or correct an award under RCW 7.04A.200, the court shall modify or correct the award if:

(a) There was an evident mathematical miscalculation or an evident mistake in the description of a person, thing, or property referred to in the award;

(b) The arbitrator has made an award on a claim not submitted to the arbitrator and the award may be corrected without affecting the merits of the decision upon the claims submitted;

In this case, the matter presented to Judge Buckner revolved around the original motion for reconsideration in which a mathematical error was claimed. Subsection (a) of the statute given Judge Buckner the authority to rule on the motion to modify or correct an award when it is based upon a mathematical error. In this case, the mathematical error was compounded by the subsequent ruling of Arbitrator Bass who, based upon a matter not before him, increased the award inappropriately.

Subsection (b) of the above quoted statute gives the Court further authority to modify or correct an award when the arbitrator has made that award on a claim not submitted to the arbitrator, if the award can be corrected without affecting the merits of the decision. The merits of the decision were to award each party a portion of their claims. That does not change when Judge Buckner is requested to correct a math error and to prevent Arbitrator Bass from improperly increasing his award based upon an issue which was not presented to him.

It is difficult to imagine a situation in a court setting in the State of Washington where a judge would rule that failure to pay an administrative fee within five days constitutes an absolute bar to the recovery of an amount already awarded. In interpreting the authority granted to arbitrators, the appellate courts of Washington have ruled that when an arbitrator fashions a remedy that would not be fashioned by a trial court, that decision can be modified. In the case of Kennewick Education Association v. Kennewick School District, 35 Wash.App. 280, 656 P.2d 928 (1983), Division III of the Court of Appeals affirmed a trial court's decision not to grant judgment consistent with an arbitrator's award. The arbitrator in that case had

awarded punitive damages and the trial court held:

I would hold that the arbitrator had not authority to award punitive damages in any amount under the laws of the state of Washington and that it would be a strange situation indeed where an arbitrator would be allowed to fashion punitive damages and for this court which could not had this matter been heard by a court, could not have awarded punitive damages and this court then affirm an arbitrator's award of punitive damages. Kennewick, p. 282

Although the language is somewhat strained, the trial court affirmed in its decision not to grant the arbitrator's award which did something that the trial court felt it would not have done. In this case, Judge Buckner stated in her written and oral decisions that she disagreed with the requirement that the \$750.00 fee be paid. She stated:

While I do agree with you Mr. Froehling that you have an argument there that the award should not have been conditioned upon a payment of the counterclaim fees because you did not have that letter from the American Arbitration Association. However, I do not believe this court can overrule or de novo make a decision in this regard so I will confirm the award. I am willing to give you a finding if that is what you want so that you can do an appeal in this regard . . . (RP page 2,

lines 5-13).

As emphasized elsewhere, the Appellant is not seeking a review of the underlying findings of the arbitrator with respect to the amount of the contract damages awarded to the parties. That would clearly be beyond the authority of Judge Buckner to address. However, the matters such as the miscalculation of interest and the fact that the arbitrator exceeded his authority by ordering the \$750.00 administrative filing fee, is clearly within Judge Buckner's scope of review and it was error for her to rule to the contrary.

5. Did the Court err in awarding attorney fees to the Respondent in its order of March 16, 2007?

The award of attorney fees on March 16, 2007, was based solely upon the Respondent prevailing on the motion to modify the award. The Court reverses that motion, the award of attorney fees should be reversed as well.

6. Is the Appellant entitled to an award of reasonable attorney fees for this appeal?

Reasonable attorney fees are provided for in the contract which is the subject of this litigation. In the event the Appellant prevails on the issues presented for review by the Court, Appellant seeks attorney fees consistent with the contract and the provisions of

RAP 18.1. If the ruling is in Appellant's favor, an affidavit of fees and expenses will be provided in accordance with RAP 18.1(d) within ten days after the filing of the decision.

CONCLUSION

In conclusion, the Appellant seeks reversal of Judge Buckner's ruling with a remand to Judge Buckner for further proceedings consistent with this Court's ruling. Specifically, Appellant requests that this Court rule that Judge Buckner does have the authority under RCW 7.04A.240 to review the issue of interest calculations, the award of an administrative filing fee by the arbitrator, and the subsequent modification of the arbitrator's award based upon the failure to pay the administrative fee.

Respectfully submitted this 21st day of August, 2007.



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Attorney for Appellant

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

TTMI Construction, Inc.)	
	Respondent) NO. 36196-5-II
)	
vs.)	DECLARATION OF
)	SERVICE BY MAIL
Walter F. Foto, an individual)	
	Appellant)
_____)	

I declare under penalty of perjury under the laws of the State of Washington as follows:

I mailed a true copy of the Appellant's Brief to:

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BETTY HENDRICKS

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