

IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

No. 36196-5-II

TTMI CONSTRUCTION, INC.,

Respondent,

vs.

WALTER F. FOTO, an individual,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON
IN AND FOR THE COUNTY OF PIERCE

Brief of Respondent

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I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. The trial court did not have authority to modify the arbitrator's award because the award is valid on its face and the court cannot re-examine the merits of the case. Assignments of Error 1 through 6.

B. Dr. Foto's remaining assignments of error are moot because the court cannot re-examine the merits of the case, and there was no mathematical error in the calculation of the award. Assignments of error 1, 2, and 3.

C. Because the court cannot re-examine the merits of the case the award of attorney fees to TTMI was appropriate, Dr. Foto's request for fees should be denied, and TTMI should be granted fees on appeal. Assignments of Error 5 and 6.

II. STATEMENT OF THE CASE

This appeal arises from Dr. Foto's failure to timely pay a counterclaim filing fee to the American Arbitration Association in a contractual binding arbitration proceeding. CP 40, 55. The underlying dispute arose when Dr. Foto refused to fully pay for work performed by TTMI Construction (hereinafter "TTMI") for tenant improvements to Dr. Foto's dental office. CP 1-11. TTMI sued Dr. Foto (and his landlord, who was later dismissed) to foreclose on a labor and material lien. *Id.* In turn,

Dr. Foto filed a counterclaim for breach of contract, and joined TTMI's bond company. CP 12-14; CP 18-21. The dispute was transferred to binding arbitration with the American Arbitration Association (hereinafter the "AAA") pursuant to the contract between the parties. CP 15-17.

Several months later, counsel for Dr. Foto wrote the AAA asking if he had to pay a counterclaim filing fee for his counterclaim, saying the counterclaim was, "more of an offset against the amount asked for by plaintiff than anything else." CP 58. At the time of counsel's inquiry, the regular AAA case manager was out of the office. CP 57. But another case manager preliminarily stated she did not believe a filing fee was required. *Id.* This preliminary response was not provided to counsel for TTMI. *Id.* Nine days later, the assigned case manager informed both parties that the issue of whether a counterclaim filing fee was required would be left for determination by the arbitrator. CP 97.

On January 12, 2007, the arbitrator issued an award granting each party some relief, with a net award to TTMI. CP 87-88. However, the relief granted Dr. Foto was conditioned on Dr. Foto paying his counterclaim filing fee within 5 business days of the award. CP 88; AAA Construction Industry Arbitration Rule R-4(b). On January 25, 2007, thirteen days later, Dr. Foto still had not paid the counterclaim filing fee.

CP 92. Therefore, TTMI filed a request with the arbitrator to amend the award disallowing Dr. Foto's counterclaim. CP 91-97. Dr. Foto eventually paid the filing fee on January 31, 2007. CP 41, 60. Then he filed his own motion to re-calculate the award based on perceived mathematical errors. CP 52-55. The arbitrator granted TTMI's motion to modify based upon Dr. Foto's failure to timely pay the filing fee, which in turn constituted a de facto denial of Dr. Foto's motion to re-calculate the initial award by making that issue moot. CP 40.

When TTMI attempted to enter judgment on the arbitration award, Dr. Foto once again asked for an award on his counterclaim and recalculation of the original arbitration award, this time directing his request to the superior court. CP 43-63. Once again, his requests were denied, and the superior court awarded TTMI additional fees. CP 67-71. This appeal follows.¹

III. ARGUMENT

- A. THE TRIAL COURT CORRECTLY CONFIRMED THE ARBITRATION AWARD BECAUSE THERE WAS NO MATHEMATICAL ERROR AND THE ISSUE OF PAYING FILING FEES WAS A DECISION FOR THE ARBITRATOR, NOT THE COURT.

1. No citation to the record is available because Appellant failed to designate the Notice of Appeal as required by RAP 9.6(b)(1)(A).

The first issue that needs to be addressed is what authority the trial court had following the issuance of a binding arbitration award. Because the trial court properly confirmed the arbitration award after finding no errors on the face of the award, the trial court decision should be affirmed.

An arbitrator is the judge of both the facts and the law of a case. *Davidson v. Hensen*, 85 Wn.App. 187, 192, 933 P.2d 1050 (1997), *citing Northern State Construction Co. v. Banchemo*, 63 Wn.2d 245, 249, 386 P.2d 625 (1963). Following arbitration, the trial court only has the authority to confirm, vacate, modify or correct the award. RCW 7.04A.220; *Davidson v. Hensen*, 85 Wn.App. 187, 192, 933 P.2d 1050 (1997), *citing Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992).

In deciding whether to confirm, vacate, modify or correct an award, the court can only look at the face of the award. *Davidson v. Hensen*, 85 Wn.App. 187, 192, 933 P.2d 1050 (1997), *citing Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). In looking at the face of the award, the reviewing court cannot conduct a trial de novo or, “search the four corners of the document to discern the parties’ intent.” *Price v. Farmer’s Insurance Company of Washington*, 133 Wn.2d 490, 497, 946 P.2d 388 (1997). Further, the arbitrator’s statement explaining his award

does not constitute part of the award that can be judicially reviewed. *Luvaas Family Farms v. Ferrell Family Farms*, 106 Wn.App. 399, 404-405, 23 P.3d 1111 (2001); *Hanson v. Shim*, 87 Wn.App. 538, 546, 943 P.2d 322 (1997). These same standards apply to the appellate court as well as the trial court. *Kenneth W. Brooks Trust A v. Pacific Media, LLC*, 111 Wn.App. 393, 397, 44 P.3d 938 (2002).

1. The court cannot review the damage award in this case because there was no mathematical miscalculation on the face of the arbitration award.

In a situation similar to the one presently before the court, a prevailing party in an arbitration appealed confirmation of the award arguing the arbitrator's award was improper because it used the wrong measure of damages. *Kenneth W. Brooks Trust A v. Pacific Media, LLC*, 111 Wn.App. 393, 44 P.3d 938 (2002). In affirming the trial court, the court of appeals held that, "...look[ing] beyond the face of the award to determine if [plaintiff] is entitled to more damages," is exactly what reviewing courts are not allowed to do. *Kenneth W. Brooks Trust A*, 111 Wn.App. at 397.

In the present case Dr. Foto relies upon RCW 7.04A.240 to argue the award should be modified because of a mathematical error in the award of damages. Appellant's Brief, p. 13. But as is evident from the

decision in *Kenneth W. Brooks Trust A*, there is a difference between a mathematical error on the face of an award, and applying an incorrect methodology in arriving at an award. The first can be corrected, the second cannot. The term used in the statute is “mathematical miscalculation.” RCW 7.04A.240. That would be an error such as, “2 + 2 = 6.” There is no such “mathematical miscalculation” in the present case. CP 40. The award the court can look at, without going beyond the four corners of the award or looking at the reasoning of the arbitrator, is:

The net total recovery to TTMI \$ 11,704.92, which is summarized as follows:

TTMI Claim Award	=	\$ 2,614.90
TTMI Attorney’s Fee Award @75%	=	\$ 8,032.50
TTMI Costs Award @ 75%	=	\$ 1,057.52
 Total TTMI Award	 =	 \$11,704.92

CP 40. There are no mathematical miscalculations in this award. Rather, like the plaintiff in *Kenneth W. Brooks Trust A*, Dr. Foto is asking the court to use a different method for calculating damages. Such decisions are beyond the scope of judicial review. *Kenneth W. Brooks Trust v. Pacific Media, LLC*, 111 Wn.App. 393, 44 P.3d 938 (2002); *Hanson v. Shim*, 87 Wn.App. 538, 549, 943 P.2d 322 (1997).

2. The trial court correctly declined to address the issue of whether Dr. Foto timely paid a counterclaim filing fee to

the AAA.

Next, Dr. Foto argues that the court should review the arbitrator's decision to disallow his counterclaim based upon his failure to timely pay a filing fee after being ordered to do so. Citing RCW 7.04A.240(1)(b), Dr. Foto argues this issue was not submitted to the arbitrator and therefore he exceeded his authority. Such a conclusion is contradicted by Dr. Foto's own submissions to the AAA.

The statute relied upon by Dr. Foto refers to "claims," not procedural issues. The statute says judicial review of an arbitrator's award is limited to confirmation, modification, correction or vacation if, "the arbitrator has made an award on a *claim* not submitted to the arbitrator...." RCW 7.04A.240(1)(b). Whether Dr. Foto was required to pay a filing fee is not a "claim." It is a procedural issue subject to the rules of the AAA. AAA Construction Industry Arbitration Rule R-4(b) (attached as Appendix A); CP 92. The rule provides,

If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included with these rules.

Id. Contrary to Dr. Foto's argument, the arbitrator's decision on this issue complied with the AAA's rules on filing counterclaims. But even if the

AAA violated its own procedural rule by requiring a filing fee for a counterclaim, "...violation of any such conditions need not necessarily coincide with a statutory ground for vacation of an award." *St. Paul Insurance Companies v. Lusic*, 6 Wn.App. 205, 208, 492 P.2d 575 (1971) *review denied* (failure of arbitrator to disclose possible conflict of interest as defined by AAA rules was not basis to challenge award); *See also Hanson v. Shim*, 87 Wn.App. 538, 943 P.2d 322 (1997) (arbitrator who did not disclose he was formerly an associate at firm representing one of the parties was not a basis for setting aside the award).

Further, contrary to his arguments here in the Court of Appeals, Dr. Foto did submit the issue of paying the filing fee to the AAA. CP 97. He glosses over the fact that he requested a decision from the AAA on this issue and tries to focus on the preliminary response to his question dated November 21, 2006. CP 51, 57. He does not point out that the November 21, 2006, response was not issued by the normal case manager, that the response was not provided to opposing counsel, or that the response was superseded by the normal case manager upon her return from vacation. CP 51, 57, 97. The assigned AAA case manager told both parties that Dr. Foto's request for waiver of the counterclaim filing fee would be referred to the arbitrator. CP 97.

This case would not be before the court had Dr. Foto complied with the arbitrator's ruling. Dr. Foto argues he had no chance to pay the filing fee because he was only given five days to pay the fee and he didn't get a copy of the decision until four days after it was written. But the timing of the transmittal of the award had nothing to do with Dr. Foto's untimely payment of the fee. Instead, the fee was not paid timely because, as conceded by his legal counsel, "It was simply an oversight by defense counsel that it would not have been paid within the allotted time." CP 101. Further, this is not a situation where Dr. Foto failed to pay the filing fee on the sixth, seventh, or even the eighth day after the award. He paid the filing fee a full fifteen days after he admits receiving the award. CP 45.

Dr. Foto also argues the arbitrator's decision with regard to the filing fee should be modified because Judge Buckner made a finding that it was improper for the AAA to require the filing fee (apparently not recognizing that the fee was required by rule, that the response to Dr. Foto's request was made by a case manager without authority or notice to TTMI, and that the decision was superseded a few days later by the case manager). But that finding by the trial court is not relevant. In the words of the Court of Appeals, findings by the trial court upon confirmation of an

arbitration award are “superfluous” since the controversy is decided by the arbitrator. *Olympian Stone Co. v. MacDonald Construction Company*, 1 Wn.App. 410, 414-415, 461 P.2d 589 (1969).

The *Luvaas* case relied upon by Dr. Foto does not change the analysis either. *Luvaas Family Farms v. Ferrell Family Farms*, 106 Wn. App. 399, 23 P.3d 1111 (2001). In that case the arbitrator awarded punitive damages. In setting aside the judgment, the Court of Appeals found that an arbitrator could not make an award in violation of Washington’s public policy against awarding punitive damages. In contrast, the Court of Appeals has upheld an award to a party that was not legally entitled to an award, to wit: an unregistered contractor. *Davidson v. Hensen*, 85 Wn.App. 187, 933 P.2d 1050 (1997). In the *Davidson* case, between the time of the arbitration hearing and the award, the defendants discovered the plaintiff was not registered as a contractor as required by law. Defendants asked for permission to reopen the arbitration to present the newly discovered evidence. The arbitrator refused. Defendants appealed, arguing plaintiff was not legally entitled to the judgment. In upholding entry of judgment on the arbitration award, the Court of Appeals observed not only that ruling in defendants’ favor would require looking behind the award, but that procedural issues like this were in the

discretion of the arbitrator. *Id.* at 194-195. Similarly, the issue of whether and when Dr. Foto should pay a counterclaim filing fee is properly a decision for the arbitrator. The trial court was correct in declining to look behind the arbitrator's award on this issue.

B. EVEN IF THE COURT DOES REVIEW THE ARBITRATOR'S AWARD, THERE WAS NO ERROR BECAUSE (1) THE CALCULATIONS COMPLAINED OF BY DR. FOTO NO LONGER FORM THE BASIS OF THE AWARD, AND (2) EVEN IF THEY DID, THE METHOD OF CALCULATION IS NOT ERRONEOUS.

1. Dr. Foto's complaints about the award calculation are moot because Dr. Foto did not timely pay his counterclaim filing fee.

The "mathematical errors" complained of by Dr. Foto are contained in the arbitrator's initial award dated January 12, 2007. CP 48-49. No judgment was entered on that award. CP 67-71. Dr. Foto never filed a motion to enter judgment on the original award. That award was modified by the arbitrator pursuant to AAA rules. CP 40. For the reasons set forth in section III(A)(2) of this brief, the court cannot review the reasons why the arbitrator decided to modify the award. *See also Price v. Farmers Insurance Company of Washington*, 133 Wn.2d 490, 496-497, 946 P.2d 388 (1997). The court can only look at the final award itself to determine if entry of judgment was appropriate. *Davidson v. Hensen*, 85

Wn.App. 187, 194, 933 P.2d 1050 (1997). Once the arbitrator amended his award on February 21, 2007, the award of January 12, 2007, became meaningless and the issue raised by Dr. Foto is now moot.

2. The method of calculating the initial award used by the arbitrator is no less valid than the method advanced by Dr. Foto, and without citation to contrary authority, it should not be overturned or modified.

For all of the reasons set forth above, the court should not get to the merits of Dr. Foto's argument. However, even if the court does address the merits of Dr. Foto's argument, the trial court should be affirmed. Dr. Foto's original disagreement with the arbitrator's award of January 12, 2007, is that the arbitrator calculated interest on TTMI's award before applying the set-off instead of after applying the set-off.

Assignment of Error 1. For the reasons stated in the preceding section of this brief, this issue does not matter anymore because the award of January 12, 2007, no longer exists.

Nevertheless, Dr. Foto cites no authority to support his argument that the setoff must be applied prior to calculating interest. Either side could probably argue several reasons why *logically* one method of calculating damages may be superior to the other. But this is an issue of *how* to calculate damages, not an issue of whether there was a

miscalculation of damages. Compare RCW 7.04A.240(1)(a) and Kenneth W. Brooks Trust A v. Pacific Media, LLC, 111 Wn.App. 393, 44 P.3d 938 (2002). So even if the January 12, 2007, arbitration award were at issue, the court could not look behind the award itself to second-guess which method the arbitrator should have used in arriving at the award. *Id.*

Regardless, TTMI believes the arbitrator's method for calculating the award makes logical sense. It is because unlike TTMI's claim, Dr. Foto's claim was not liquidated. *Department of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 161 P.3d 372 (2007). Dr. Foto never pled a specific amount of damages. CP 12-14, 18-21. Because his claim was not liquidated, Dr. Foto was not entitled to any pre-judgment interest on his award. *Department of Corrections v. Fluor Daniel, Inc.*, 160 Wn.2d 786, 161 P.3d 372 (2007). Maybe the arbitrator also believed it was inappropriate to reduce TTMI's interest award on a liquidated claim by an unliquidated amount Dr. Foto did not prove until the arbitration (at which time the set-off was applied). CP 48-49.

Finally, Dr. Foto's argument that this method of calculating the initial award artificially inflated TTMI's attorney fee and cost award is not supported by the record. CP 48-49. At arbitration TTMI requested \$3,509.30, inclusive of interest. CP 49; *Compare* CP 4, paragraph 3.6.

The arbitrator only awarded 75% of that request, and therefore awarded 75% of TTMI's attorney fees and costs. Any benefit that could have run to TTMI because of this method of calculation would have been offset by the fact the arbitrator in turn awarded Dr. Foto 27% of his fees and costs, which would have been deducted from TTMI's award had Dr. Foto paid his filing fee.

C. DR. FOTO'S REQUEST FOR FEES SHOULD BE DENIED AND TTMI SHOULD BE AWARDED ITS FEES AND COSTS ON APPEAL.

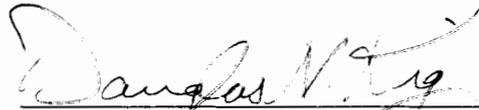
Attorney fees on appeal are permitted if applicable law permits them. RAP 18.1. In the present case the prevailing party is entitled to fees and costs under the contract. CP 3, 12, 40, 48-49. Fees are also authorized by the arbitration statute because Dr. Foto is contesting confirmation of the award. RCW 7.04A.250(3). The only basis Dr. Foto advances for setting aside the \$500 fee award to TTMI below is if Dr. Foto prevails on appeal. However, for the reasons set forth in this brief, the trial court decision should be affirmed. Further, if the trial court is affirmed, TTMI will be the prevailing party and should be awarded its costs and fees on appeal pursuant to the parties' contract, RCW 7.04A.250(3), and RAP 18.1. In that event, TTMI asks for permission to submit a cost and fee bill pursuant to RAP 18.1(d).

IV. CONCLUSION

For the reasons set forth above, TTMI respectfully requests that the trial court decision be affirmed, and that TTMI be awarded its fees and costs on appeal.

RESPECTFULLY SUBMITTED this 13 day of September, 2007.

BLADO KIGER, P.S.



DOUGLAS N. KIGER, WSBA #26211
Attorney for TTMI Construction, Inc.

CERTIFICATE OF SERVICE *JM*

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the 14th day of September, 2007, she placed with ABC Legal Messengers, Inc. an original Brief of Respondent/Cross Appellant and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties and their counsel of record:

Attorney for Appellant, Walter F. Foto:

ANTONI H. FROEHLING
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Puyallup, WA 98372

DATED this 14th day of September, 2007, at Tacoma, Washington.

BLADO KIGER, P.S.

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APPENDIX

A

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Construction Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least \$500,000, exclusive of claimed interest, arbitration fees and costs. Parties may also agree to use these procedures in cases involving claims or counterclaims under \$500,000, or in nonmonetary cases. The Procedures for Large, Complex Construction Disputes shall be applied as described in Sections L-1 through L-4 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Construction Disputes.

(d) All other cases shall be administered in accordance with Sections R-1 through R-55 of these rules.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices.

R-3. National Roster of Neutrals

In cooperation with the National Construction Dispute Resolution Committee the AAA shall establish and maintain a National Roster of Construction Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Initiation under an Arbitration Provision in a Contract

(a) Arbitration under an arbitration provision in a contract shall be initiated in the following manner.

(i) The initiating party (the "claimant") shall, within the time period, if any, specified in the contract(s), give to the other party (the "respondent") written notice of its intention to arbitrate (the "demand"), which demand shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the amount involved, if any, the remedy sought, and the hearing locale requested.

(ii) The claimant shall file at any office of the AAA two copies of the demand and two copies of the arbitration provisions of the contract, together with the appropriate filing fee as provided in the schedule included with these rules.

(iii) The AAA shall confirm notice of such filing to the parties.

(b) A respondent may file an answering statement in duplicate with the AAA within 15 calendar days after confirmation of notice of filing of the demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of the answering statement to the claimant. If a counterclaim is asserted, it shall contain a statement setting forth the nature of the counterclaim, the amount involved, if any, and the remedy sought. If a counterclaim is made, the party making the counterclaim shall forward to the AAA with the answering statement the appropriate fee provided in the schedule included with these rules.

(c) If no answering statement is filed within the stated time, respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

(d) When filing any statement pursuant to this section, the parties are encouraged to provide descriptions of their claims in sufficient detail to make the circumstances of the dispute clear to the arbitrator.

R-5. Initiation under a Submission

Parties to any existing dispute may commence an arbitration under these rules by filing at any office of the AAA two copies of a written submission to arbitrate under these rules, signed by the parties. It shall contain a statement of the matter in dispute, the names and addresses of the parties, any claims and counterclaims, the amount involved, if any, the remedy sought, and the hearing locale requested, together with the appropriate filing fee as provided in the schedule included with these rules. Unless the parties state otherwise in the submission, all claims and counterclaims will be deemed to be denied by the other party.

R-6. Changes of Claim