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DIVISION II

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

Case No. 37557-5-II

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KENNETH VELDHEER and KAREN VELDHEER,  
husband and wife,  
Plaintiffs/Respondents,

v.

PREMIER COMMUNITIES, INC., a Washington State registered  
contractor; INSURANCE COMPANY OF THE WEST,  
Washington State Contractor's Bond No. 2174030,  
a foreign surety company; and, DEVELOPERS SURETY &  
INDEMNITY CO., Washington State Contractor's Bond No. 572746C,  
a foreign surety company,  
Defendants/Appellants.

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**APPELLANTS' REPLY BRIEF**

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## I. INTRODUCTION

This matter arises from an American Arbitration Association arbitration. In the arbitration, Respondents Kenneth and Karen Veldheer (the “Veldheers”) contended there were defects in the home they purchased subject to coverage under the 2-10 Home Buyers Warranty (the “Warranty”) provided through Appellant Premier Communities, Inc. (“Premier”). Premier challenged the existence of the defects. The arbitrator awarded damages to the Veldheers (the “Award”), but declined to award attorneys’ fees. The Superior Court confirmed the Award, independently awarding attorneys’ fees to the Veldheers.

Premier asserts three errors: (1) because the remedy of damages was waived in the Warranty, which limited the relief to repair of any defect determined to exist, the arbitrator had exceeded his authority by awarding damages; (2) based on the arbitrator’s express conclusion that the evidence was insufficient to explain the cause of the defect, the amount of damages awarded was entirely speculative; and (3) the Superior Court had no authority to award attorneys’ fees where the arbitrator had expressly declined to do so.

The Veldheers’ principal response to the first and second assignments of error is to assert the issues were not raised before the Superior Court. This is simply incorrect. Otherwise, the Veldheers’ arguments ignore the express language of the Warranty defining the remedies available to the arbitrator, and the explicit conclusions of the arbitrator in the Award.

The Veldheers' argument focuses almost exclusively on the attorneys' fee issue. In this regard, while citing to the same basic principal relied on by Premier that a Superior Court confirming an arbitration award is not allowed to go beyond the face of the award, the Veldheers argue that the Superior Court had the discretion to do exactly that.

## II. DISCUSSION

### A. **Did the Arbitrator Have the Authority to Award Damages and, if Not, Was it Error for the Superior Court to Confirm the Award?**

As Premier understands it, the Veldheers assert that this argument is precluded because the issue was not raised before the Superior Court. However, one of Premier's principal objections to confirmation of the Award was that the arbitrator lacked the authority to award damages. (See CP 428-437; CP 249-251). Beyond that, the Veldheers simply fail to address the issue.

The authority of the arbitrator is defined by the agreement to arbitrate, *Price v. Famers Ins. Co.*, 133 Wn.2d 490 at 495 FN 3, 946 P.2d 388 (1997) (“[P]arties are only bound to arbitrate those issues which *by clear language they have agreed to arbitrate*; arbitration agreements will not be extended by construction or implication”) (emphasis in original) and the arbitration rules specified in that agreement; *Northern State Constr. Co v. Banchemo*, 63 Wn.2d 245 at 249, 386 P.2d 625 (1963):

Arbitration is a statutory proceeding and the rights of the parties to it are controlled by statutes. We have now what amounts to a code of arbitration. RCW 7.04.020 *et seq.* There is no claim here or showing that the parties or arbitrators failed to comply with either the statutes or *the rules for arbitration adopted by agreement.*

(Emphasis added).

The Veldheers acknowledged before the Superior Court (*see* CP 446) that this arbitration was governed by the American Arbitration Association Home Construction Industry Arbitration Rules (“ARB”) 43: “The arbitrator may grant any legally available remedy or relief that the arbitrator deems just and equitable and within the scope of agreement of the parties.” (*See* CP 452-453). So, the scope of the relief available to the arbitrator is the relief available under the Warranty itself.

The Warranty at issue is explicit that the Homeowner has:

*[W]aived the right to seek damages* or other legal or equitable remedies ... under any other common law or statutory theory of liability ... Your only remedy ... is as provided under to [the Homeowner] under this express Limited Warranty.

(CP 304) (Bold emphasis in original; italic emphasis added). The sole remedy provided under the Warranty is: “The Builder [Premier] ... shall have the option to repair, replace or pay [the Homeowner] the reasonable cost of repair of any covered Defect...” (CP 305). Whether the Builder completes the repairs, or pays someone else to complete the repairs, the objective of the remedy provision in the Warranty is to ensure a covered defect is repaired.

How should this be applied in terms of the Award? The Award at issue is CP 391-394. In pertinent part, the Award states:

There was no dispute in the hearing that water was actually migrating through the foundation wall at the cold joint and where the sewer drain penetrates the foundation wall. ***There was no evidence introduced at the hearing which effectively explained the cause of this water intrusion.*** The arbitrator notes that Sec 1807-4 of the IBC requires

It is also worth considering that, to order the defect be repaired, the cause of the defect need not be established. Again, the Warranty allocates the cost of repair of a defect to the Builder. The Builder can be ordered to repair a defect even if the cause of the defect requires further investigation.

The Veldheers have pointed to no language in the ARB rules or in the Warranty, and have cited to no authority, suggesting that the arbitrator was within his authority to ignore the express limitation to contractual remedies in the controlling arbitration rule or the expressly limited remedy in the Warranty itself to award damages. The Award was clearly outside the authority of the arbitrator under the parties' arbitration agreement and controlling arbitration rules. Confirmation of the Award was clearly error.

**B. Is There an Error of Law on the Face of the Award Where the Award Itself Establishes that the Veldheers Failed to Meet Their Burden on Causation and Damages.**

The Veldheers first assert that this issue was not raised before the Superior Court. This is simply incorrect. The following argument was submitted to the Superior Court by Premier on the Motion to Confirm:

In this same regard, the most peculiar part of the Arbitration Award is that, while the Arbitrator found that water in the crawl space was a deficiency: "There was no evidence introduced at the hearing that effectively explained the cause of this water intrusion." (*See* 3/12/08 Brain Dec. Ex. 6 at p. 2). The Arbitrator nevertheless awarded \$33,000 for the cost of repairing the deficiency. How can you possibly liquidate the cost of curing a deficiency when you do not know the cause?

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As Premier understands the Veldheers' argument, the award of damages is asserted to be appropriate because it constitutes a reasonable estimate of the dollar amount of the loss. Bear in mind, this is as to a defect the cause of which the Veldheers' own expert could not testify and, as to repairs which have not been undertaken *possibly* relating to drainage systems which are underground and, therefore, not observable without further investigation.

Nevertheless, in describing the evidentiary standard, the Veldheers leave out some critical language. "Damages need not be proven with mathematical certainty, but must be supported by evidence that provides a reasonable basis for estimating the loss *and does not amount to mere speculation or conjecture.*" *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 840, 786 P.2d 285 (1990)(emphasis added). An award of damages is not reasonable if based on speculation or conjecture.

What the Award actually states is as follows:

There was no evidence introduced at the hearing which effectively explained the cause of this water intrusion. ... It appears that the water intrusion results from ineffective waterproofing of the cold joint and sewer pipe penetrations, possibly in conjunction with inadequacies in the footing drain system.

(CP 392-393). The question the Veldheers fail to address is, if you cannot tell what the cause of the problem is, how can you reasonably estimate what the problem is going to cost to repair? The simple fact of the matter is that you cannot, and the award of damages is speculative and contrary to law from the face of the Award.

Corollary to this is the issue of causation. The Veldheers bore the burden of proving by a preponderance of the evidence that the damages were proximately caused by the defect. If the Award states explicitly that the evidence was inadequate to establish the cause of the problem, how could the arbitrator have possibly found the causation requisite to support the award of damages?

**C. The Superior Court had no Authority to Award Attorneys' Fees.**

Despite the Veldheers efforts to complicate the issue, the issue here is really simple and resolved under controlling principles of law which the Veldheers do not contest. The Veldheers' basic argument is that the award of attorneys' fees by the Superior Court was within the scope of the Superior Court's authority because: "Awarding attorneys fees under a statute or contract is a matter of discretion *with the trial court...*" (Response at p. 4) (emphasis added).

In this case, however, the Superior Court was not the "trial court." The "trial court" was the arbitrator.

Paragraph 25 of the parties' Purchase and Sale Agreement provides:

This Agreement provides that all disputes between you and [S]eller will be resolved by BINDING ARBITRATION. THIS MEANS THAT YOU AND THE SELLER EACH GIVE UP YOUR RIGHT TO GO TO COURT to assert or defend rights under this Agreement...

(CP 223) (Emphasis in original). Section VII of the Warranty provides that: "Any and all claims, disputes or controversies between the homeowner, Builder, Warranty Insurer and/or HBW [the warranty

company] shall be settled by binding arbitration.” (CP 305). This expressly includes, “without limitation, any claim of breach of contract, negligent or intentional misrepresentation or nondisclosure in the inducement, execution or performance of any contract, including this arbitration agreement, and breach of any alleged duty of good faith and fair dealing...” (CP 305). The sole forum for resolving any dispute between the parties was arbitration. ***The arbitrator was the trial court.***<sup>2</sup>

The Superior Court here was in effect, an appellate court with very limited grounds for review under *Price v. Famers Ins. Co.*, 133 Wn.2d 490 at 496-497, 946 P. 2d 388 (1997):

The confirming court does not have collateral authority to go behind the face of the award or to determine whether additional award amounts are appropriate. Nor is a trial court permitted to conduct a trial de novo upon confirmation or search the four corners of the document to discern the parties’ intent. Although a party may apply to the court to confirm an arbitration award, that is not the same as bringing an original action to obtain a monetary judgment. A confirmation action is no more than a motion for an order to render judgment on the award previously made by the arbitrators pursuant to contract. If the court does not modify, vacate, or correct the award, the court exercises a mere ministerial duty to reduce the award to judgment.

Simply put, the Superior Court had no independent discretion to award attorneys’ fees outside of statutory limitations that the Superior Court could only modify, vacate or confirm the Award. The Superior Court clearly acted outside the scope of this limited authority.

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<sup>2</sup> The delegation of dispute resolution to the arbitrator is comprehensive. The filing of the Superior Court proceeding was an obvious attempt to end-run the arbitration process.

If you look at the portion of the Superior Court ruling on fees cited by the Veldheers (Response at p. 11), the Superior Court states: “I don’t believe the arbitrator had before him the issue of attorneys’ fees.” This is a rather astounding conclusion in light of the express provision of the award. At CP 391, the arbitrator notes that the Veldheers were seeking an award of fees. Moreover, the arbitrator expressly declined to award fees: “Claimants’ request for an award of attorney fees is denied.” (CP 393 at Section E).

The Veldheers then attempt to finesse this issue by asserting that the arbitrator “did not award – nor did he decline to award – any fees or costs” pursuant to the contract provision allowing fees “incurred in enforcing this arbitration agreement.” (Response at p. 10). However, attempting to go beyond the explicit language of the Award to assert some unstated basis for decision by the arbitrator is simply prohibited.

In this regard, the case is very similar to *Phillips Building Co., Inc. v. An*, 81 Wn. App 696, 915 P.2d 1146 (1996). In *Phillips*, the arbitrator had declined to award attorneys’ fees to either party. The Superior Court refused to modify the award to allow attorneys’ fees and one of the parties appealed because it concluded “that it was reasonable to conclude that the arbitration panel determined that neither side had prevailed.” *Id.* at 703 FN 5. The Court of Appeals concluded:

It is clear that the arbitrators considered the issue of attorney’s fees and, presumably, determined that neither party prevailed. After issuing the award, the arbitrators denied the Ans subsequent motion for attorney fees as the prevailing party, stating again that each party shall bear its own attorney fees and costs. We are not allowed to go

behind the face of the award to determine the merits of that decision.

*Id.* at 704. On the face of the Award here, the arbitrator declined to award fees. To determine that the arbitrator's decision involved less than all of the bases for a fee award would require that the Superior Court "go behind the face of the award to determine the merits of that decision."

The Superior Court then goes on to construe the Warranty as allowing an award of fees apparently making his own conclusion as to who was the prevailing party. This is exactly what the Court of Appeals said a Superior Court could not do in *Phillips*. These issues were not within the purview of the Superior Court because the construction of the agreement and/or the characterization of the prevailing party were issues solely for the arbitrator.

The claims against the bonding companies do not change anything. RCW 18.27.040 provides, in pertinent part: "The bond shall be conditioned that the applicant will pay ... all amounts that may be adjudged against the contractor by reason of breach of contract including improper work in the conduct of the contracting business." In other words, the bonding company is responsible only to the extent that the contractor, in this case Premier, is determined to have a payment obligation. That issue can only be litigated in an arbitration under the Warranty as to which the determination of the arbitrator is final and binding. What did the arbitrator say? "At the hearing, the Claimant also asserted entitlement to attorneys' fees under Chap. 18.27 RCW. The

arbitrator determines that an award of attorneys' fees pursuant to that statute is not warranted in this arbitration." (CP 393 at Section E).

The Veldheers then asserts that "the arbitrator was entirely proper in refusing to award costs and attorneys' fees to the Veldheers *in the arbitration.*" (Response at p. 9) (emphasis in original). However, Section VII of the Warranty goes on to state:

This arbitration provision shall inure to the benefit of, and be enforceable by, the Builder's subcontractors, agents, vendors, suppliers, design professionals, insurers and *any other person alleged to be responsible for any defect in or to the subject home...*

(CP 305-306) (emphasis added). In short, as "other persons responsible for any defect," the bonding companies would be both entitled to enforce and be bound by the arbitration provision, as well as any decision of the arbitrator. Once again, the only place these claims could have been asserted is in the arbitration.

However, it should be noted that the decision of the Superior Court to award attorneys' fees was not based on Chap. 18.27 RCW. It was based on a re-interpretation of the fee language in the Warranty. Whatever the basis, the conclusion that the Superior Court exceeded its authority under the arbitration statute is simply inescapable.

### III. CONCLUSION

Starting with the remedy issue, the problem with the way the arbitrator dealt with this situation really is most damaging to the interests of the Veldheers. In arguing that the award of attorneys' fees should be upheld, the Veldheers have asserted, "every dollar that they spent in this

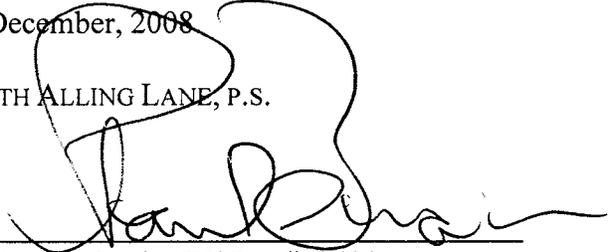
action and on this arbitration will be one less dollar that they will have to spend on repairs for their house...” (CP 463). If the arbitrator had simply done what the Warranty provided, and ordered Premier to repair the defect, we would not be in this situation. There would have been no room for argument about Premier’s obligation, and the defect would have been repaired.

The Veldheers’ assertion is nothing more than a naked plea for the Superior Court to ignore the law and the limitations on the authority of a Superior Court and confirm the arbitration award out of sympathy. However, the Veldheers are simply the authors of their own misfortune. But for the fact that the Veldheers sought relief other than to just have Premier fix the problem, we would not be here. One can only wonder whether the Veldheers’ real objective here was to simply extract money rather than see a resolution of the defect in their home. Moreover, it was the Veldheers who elected to file a lawsuit which only the disingenuous would characterize as consistent with the arbitration provision governing the rights of the parties, running up the attorneys’ fees necessary to resolution. That the Veldheers should now complain about the amount of attorneys’ fees they have incurred in light of this conduct is a little amazing.

Nevertheless, for the reasons stated above, Appellants respectfully submit that the decision of the Superior Court confirming the Award and awarding fees should be reversed and the matter remanded with direction that the Award be vacated.

DATED this 15th day of December, 2008

SMITH ALLING LANE, P.S.

By: 

Paul E. Brain, WSBA #13438

Attorneys for Defendants/Appellants

**CERTIFICATE OF SERVICE**

I hereby certify that I have this 15th day of December, 2008, served a true and correct copy of the foregoing document upon counsel of record, via the methods noted below, properly addressed as follows:

***Attorneys for Plaintiffs/Respondents:***

Clydia J. Cuykendall	<input checked="" type="checkbox"/>	Hand Delivered
Cushman Law Offices, P.S.	<input type="checkbox"/>	U.S. Mail (first-class, postage prepaid)
924 Capitol Way South	<input type="checkbox"/>	Overnight Mail
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	<input type="checkbox"/>	Email ( <a href="mailto:cjcuyken@cushmanlaw.com">cjcuyken@cushmanlaw.com</a> )

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 15th day of December, 2008, at Tacoma, Washington.

A handwritten signature in black ink, appearing to read "Paul D. ...", is written over a horizontal line. The signature is somewhat stylized and includes a large loop.

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