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No. 38063-3

FILED
COURT OF APPEALS
DIVISION II

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

THE COVE AT FISHER'S LANDING APARTMENTS, et. al.

Appellants,

vs.

STACIE DILL and CRAIG DILL,

Respondents.

THE COVE AT FISHER'S LANDING APPELLATE BRIEF

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I. ISSUE PERTAINING TO ASSIGNMENT OF ERROR

- A. Whether the trial court erred by entering judgment on a mandatory arbitration award in excess of \$76,000 by calling part of the award damages and part of the award attorney's fees.

II. OVERVIEW

Mandatory arbitration is a forum limited to awarding \$50,000 in damages exclusive of interest and costs. Despite this cap, the arbitrator awarded \$45,000 in property loss and then awarded an additional \$27,300 in attorney's fees and \$975.55 in costs upon plaintiff's Residential Landlord Tenant Act claim.

After argument of counsel, the trial court entered judgment on both awards against the defendants as well as additional attorney's fees for a total arbitration award of \$76,275.55. This amount exceeds the statutory cap available in Mandatory Arbitration and therefore this Court is asked to reverse the trial court's entry of judgment and order the trial court to enter judgment in compliance with the statutory cap of \$50,000 along with statutory costs as provided by statute.

At most the arbitrator had authority to enter an award for \$50,000 plus the \$975.55 in costs which the arbitrator found to have been reasonably incurred in arbitration. This position is further strengthened by

the Dill's affirmative waiver of all claims in excess of \$50,000 in their Statement of Arbitrability.

III. UNDISPUTED FACTS

On March 9, 2007, Craig and Stacie Dill ("the Dills") filed a complaint in Clark County Superior Court against the Cove at Fisher's Landing Apartments ("the property"), the apartment complex where they were residing. CP 1-7. The Dills alleged the property violated the Residential Landlord Tenant Act ("RLTA") by improperly disposing of several items of personal property which were stored in a garage. Id.

For reasons which are not material to this appeal, the property denied that they had acted improperly by cleaning the garage and disposing of the items which had been found therein. CP 7-9.

The Dills valued the lost property in excess of \$75,000. CP 4. They also asserted claims for emotional distress in excess of \$50,000 as well as attorney's fees and costs. CP 5.

On or about October 31, 2007, the Dills filed a Statement of Arbitrability in which the Dill's acknowledged that their claim was valued in excess of \$50,000 but for purposes of availing themselves to the Mandatory Arbitration forum they stipulated:

[Their] claim exceeds \$50,000, but for purposes of arbitration, waives any claim in excess of \$50,000.

CP at 49-50.

This was an express waiver of “any claims” over \$50,000. There was no reservation of rights or stipulation to allow attorney’s fees in excess of \$50,000. It was an express waiver of any and all claims in excess of the proscribed limit.

Arbitration was conducted in April, with the initial arbitration award filed on April 28, 2008. CP 10-12. An amended award was filed on May 30, 2008, awarding the plaintiff \$45,000 for the lost property as well as an additional \$27,300 in attorney’s fees and \$975.55 in costs for a total award of \$73,275.55. CP 13-14.

The property moved to enter judgment against itself for the statutory maximum of \$50,000 exclusive of interest and costs on June 19, 2008. CP 26-34. It was argued that the arbitrator had exceeded his authority by awarding attorney’s fees in excess of his statutory authority and therefore the Court should enter an award to the statutory maximum as well as add the appropriate statutory costs. Id. The Dills argued the statutory limit was exclusive of costs and attorney’s fees. CP 35-39.

On June 26, 2008, the trial court ruled in favor of the Dills and entered judgment totaling over \$76,000. CP 51-52.

The property timely filed a notice of appeal on July 22, 2008, requesting this Court reverse the trial court's entry of judgment and remand for entry of \$50,000 plus interest and costs as provided by RCW 7.06.020. CP 53-55.

IV. AUTHORITY AND ARGUMENT

A. The Standard Of Review Is De Novo

Whether attorney's fees is an element of damages or an element of costs under RCW 7.06.020 is a question of statutory construction and is therefore reviewed by this court de novo. Johnson Forestry Contracting, Inc. v. Washington State Department of Natural Resources, 131 Wn.App. 13, 23, 126 P.3d 45 (2005).

B. MAR Arbitrators Are Limited To Awarding \$50,000

The MAR system is a creature of statute and receives its authority from RCW 7.06, et. seq.

RCW 7.06.020 expressly limits the authority of an arbitrator to make awards "up to fifty thousand dollars, exclusive of interest and costs." This jurisdictional limit is further reinforced by LMAR 1.2 which provides that "The amount of claims subject to arbitration shall not exceed \$50,000." (emphasis added).

It is the plain language of RCW 7.06.020 which this Court is asked to interpret:

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 and costs, are subject to mandatory arbitration.

RCW 7.06.020(1) (emphasis added).

This language should be distinguished from RCW 3.66.020 which delineates the authority of Washington's district courts. RCW 3.66.020 authorizes district courts to adjudicate claims which do "not exceed seventy-five thousand dollars, exclusive of interest, costs, and attorney's fees." If the legislature intended to provide MAR arbitrators with the discretion to award attorney's fees in excess of the \$50,000 limit then they very easily could have so provided as it did for our district courts.

It seems a statement of the obvious, but damages in excess of the statutory limit are not subject to mandatory arbitration except by stipulation of the parties. Fernandes v. Mockridge, 75 Wn.App. 207, 877 P.2d 719 (1994).

This is because the MAR process and MAR arbitrators are a creation of statute. As such, it would be an anomalous result for a creature

of statute to reach beyond the power conveyed by the very statute that was the origin of creation. That is such an axiomatic statement as to require no authority for support; however, the courts are clear that creations of statute are limited in power to that originally conveyed:

...[T]he power and authority... is limited to that which is expressly granted by statute or necessarily implied therein.

Washington Independent Tele. Ass'n v. Telecommunications Ratepayers, 75 Wn.App. 356, 363, 880 P.2d 50 (1994) (Specifically discussing the question of whether an administrative agency may exceed the scope of power conveyed to it in the statute that created the agency in the first place).

The Dills asserted that they had claims in excess of \$50,000, but for purposes of arbitration agreed to waive all claims in excess of \$50,000. This was ostensibly to comply with LMAR 2.1(b) which provides:

If a party asserts that its claim exceeds \$50,000 or seeks relief other than a money judgment, the case is not subject to arbitration except by stipulation.

The Dills complied with this section by agreeing to waive all claims in excess of \$50,000. They did not reserve any rights or enter into any stipulation with the defendants to allow the arbitrator to award attorney's fees above and beyond the statutory limits. CP 50.

If such a provision had been included in plaintiff's statement of arbitrability the defendant may have objected to such a transfer and moved to keep the case in Superior Court with a right to a jury trial.

Any argument from the Dills that they did not know their attorney's fees would be so excessive and therefore they could not know whether their attorney's fees would exceed statutory limits has no bearing on this matter. If the plaintiff realized that they were incurring costs and expenses that took them above and beyond the statutory limits then it was their obligation to petition the Superior Court for an order transferring the case out of arbitration and back to the Superior Court. This is made clear by MAR 2.2 which provides that the Superior Court has express authority to determine whether a claim falls within the \$50,000 limit and order a case either into or out of arbitration.

A reading of the statute as the Dills would have read essentially allows a MAR arbitrator unfettered discretion to award upwards of \$150,000 so long as they called \$50,000 damages and \$100,000 attorney's fees. Such was not the intent of the legislature or they would have included the term "attorney's fees" in the grant of authority. It would be a strained reading of the statute to believe the legislature had accidentally omitted such a material term from the statute.

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C. **“Costs” Under RCW 7.06 Do Not Include Attorney’s Fees**

When a statute provides for the recovery of “costs” the term is the equivalent of expenses and does not include attorney’s fees:

It is a well settled rule that apart from the sums allowable and taxed as costs, there can be no recovery under the facts of the case at bar of attorneys’ fees or accountants’ fees as costs. The term ‘costs’ is synonymous with the term ‘expense.’ Costs are allowances to a party for the expense incurred in prosecuting or defending a suit, and the word ‘costs’ in the absence of statute or agreement does not include counsel fees; in other words, counsel fees are not costs or recoverable expenses incurred in prosecuting or defending a suit, either in suits in equity or actions at law.

Fiorito v. Goerig, 27 Wn.2d 615, 179 P.2d 316 (1947).¹

This interpretation is reinforced by the RCW 7.06.060 which provides for the recovery of costs and attorney’s fees for a party who files a trial de novo and fails to better their position on appeal. In subsection two our legislature defined what was meant by the term “costs and attorney’s fees”. This section clearly indicates our legislature considered the two items to be separate and distinct. If the legislature in drafting this section intended the word “costs” to include attorney’s fees then this

¹ Although this is a 1947 case, but is still good law and has been recently cited with approval for this issue in the Supreme Court case of Wagner v. Foote, 128 Wn.2d 208, 416 (1996) and by Division Three in Magnussen v. Tawney, 109 Wn.App. 272, 175 (2001).

section would not have included the term attorney's fees as that would render the added words redundant.

Moreover, CR 54(d), which is the Civil Rule relating to judgments and costs, clarifies that attorney's fees are separate from costs. This rule states that costs under this provision are defined by RCW 4.84 and even has separate subsections, one for costs as well as another subsection identifying the treatment of attorney's fees. CR 54(d). If costs were the same as attorney's fees there would be no need to have separate subsections distinguishing the treatment of costs from attorney's fees.

CR 68, another rule which discusses the awarding of "costs" under an offer of judgment, provides further guidance here. Washington case law has been consistent in holding that the term "costs" does not include attorney's fees unless the statutory provision or contract specifically identifies attorney's fees as costs:

CR 68 and *Tippie* do not speak to the determination of prevailing party for the purpose of awarding attorney fees because CR 68 is a cost-shifting device, not a fee-shifting device. Attorney fees are not included in the "costs" that can be shifted under CR 68, unless the governing statute specifically defines attorney fees as costs.

Eagle Point Condominium Owners Ass'n v. Coy, 102 Wn.App. 697, 9 P.3d 898 (2000). See also Sims v. Kiro, Inc., 20 Wn.App. 229, 238, 580

P.2d 642 (1978) (“The term ‘costs’ has been interpreted as not including attorney’s fees and expert witness fees.”).

Costs do not include attorney’s fees unless the statutory provision or award of attorney’s fees so classify them. The RLTA provides that attorney’s fees are separate from costs and therefore the trial court erred entering an award in excess of the statutorily set limits.

D. Attorney’s Fees Under The RLTA Are An Element of Damage

In the present matter the Dills were allowed to recover attorney’s fees under RCW 59.18.230(4) which provides that “the prevailing party may recover his costs of suit AND a reasonable attorney’s fee.” (emphasis added) The statute indicates that attorney’s fees are separate from costs under this statutory provision. If attorney’s fees were costs the statute would have been written – recover costs of suit “which include” a reasonable attorney’s fee.

Attorney’s fees are separate from costs because they are awarded as an added element of substantive damages to the plaintiff. This is exemplified in this Court’s opinion of Brown v. Suburban Obstetrics & Gynecology, P.S., 35 Wn.App. 880, 670 P.2d 1077 (1983).

The plaintiff in Brown sought their attorney’s fees for proving a violation of statute. Id. at 882. In Brown, as in the case at bar, the statute at issue (recovery of back wages) provided recovery of attorney’s fees as a

component of damages to a successful plaintiff proving a violation of the statute. Id. at 884. This Court was tasked with characterizing the nature of attorney's fees and costs when made available specifically as an element of damages for a violation of a statute and had to decide whether such costs and fees were substantive damages or "statutory" costs and fees.

That was a critical distinction in that case because if attorney's fees were "substantive damages" the plaintiff had not properly preserved the record for consideration of them on appeal and the Court of Appeals would not entertain argument on the subject. If they were merely statutory costs (in the context of costs and fees available in every case, i.e., the filing fee, cost of service, etc.) then the plaintiff need not have preserved the issue for consideration on appeal and the Court of Appeals would entertain argument on the subject.

This Court held that fees and costs, when specifically provided as a remedy upon proof of a violation of a statute, constitute an additional substantive element of damage sustained for a violation of the statute itself; they are not the same class of statutory "costs and fees" available under RCW 4.84.010:

..[A]ny award of attorney's fees sought under (the statute) is not sought as part of the costs of this action; rather (they are)

additional damages for defendant's failure to
comply with RCW 49.48.010.

Id. at 884.

Therefore, the statutory provision under which the Dills were awarded attorney's fees considered the fees to be an element of damages, not costs. As stated above, if attorney's fees were to be awarded as an element of cost then the statute would have so provided. RCW 3.66.020, the grant of authority to our district courts best exemplifies this as in that case our legislature specifically stated the \$75,000 authority is exclusive of interest, costs, and attorney's fees. The MAR statute has no such provision. Instead the statute simply provides for \$50,000 in authority exclusive of interest and costs.

The arbitrator did not have authority to award in excess of \$50,000 and thus all amounts exclusive of interest and costs in excess of \$50,000 must be stricken from the award.

E. RCW 7.06.020 Prevails Over MAR 1.2

Any argument of the Dills that MAR 1.2 provides discretionary authority for an arbitrator to award attorney's fees in excess of \$50,000 fails.

MAR 1.2 does provide that a case may proceed to arbitration if "all parties, for purposes of arbitration only, waive claims in excess of the

amount authorized by RCW 7.06, exclusive of attorney's fees, interest and costs." However, this provision is in conflict with both LMAR 1.2 as well as RCW 7.06.020 as detailed above.

When there is a conflict between a statute and a court rule, which controls is determined by looking to whether the right conferred is substantive or procedural. Leslie v. Verhey, 90 Wn.App. 796, 954 P.2d 330 (1998). If the rule is substantive then the statute controls, if the right is procedural then the court rule prevails. Id.

In Leslie, Division One had to determine whether there was a conflict between RCW 26.09.140 and MAR 7.3 in the awarding of attorney's fees as part of a child support modification proceeding and the following trial de novo. Id. at 799. RCW 26.09.140 governs costs and attorney's fee awards in domestic relationships and provides that the awarding of fees is a discretionary matter for the trial court while MAR 7.3 provides a mandatory fee requirement. Id. at 805-06. Division One reversed the trial court's award of attorney's fees holding a judgment to pay costs and attorney's fees to be a substantive right and therefore the statute prevailed over the MAR. Id. at 806.

Similarly here, the grant of authority by RCW 7.06.020 is substantive because it affects authority of the arbitrator to award damages and in this case the additional damage of attorney's fees above the

statutory amounts. Therefore, the statutory grant of authority controls over MAR 1.2.

F. The Dills Waived All Claims in Excess of \$50,000

Regardless of how this Court rules on the above argument, plaintiff is estopped from recovering of any amount in excess of \$50,000 because of their affirmative waiver. In the Statement of Arbitrability, the Dills asserted:

The undersigned contends that its claim exceeds \$50,000, but for purposes arbitration (sic), waives any claim in excess of \$50,000.

CP 50.

They did not waive claims in excess of \$50,000 exclusive of interest, costs, and attorney's fees. They waived "any claim" which exceeded \$50,000. Such is an affirmative waiver of any such amounts and therefore no amount in excess of \$50,000 should have been awarded.

V. CONCLUSION

The trial court erred in entering judgment in excess of \$50,000. This amount exceeded the authority approved by the legislature and therefore must be reversed for entry of judgment which conforms to RCW 7.06.020.

Additionally, the Dills waived all claim in excess of \$50,000. Therefore pursuant to this express waiver, all claims – of which attorney's fees for violation of the RLTA was one – are waived and this Court should remand for entry of judgment for \$50,000.

DATED this 17th day of November, 2008.

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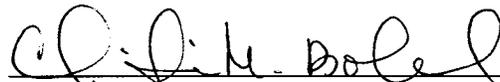
DIVISION TWO

THE COVE AT FISHER'S)	
LANDING APARTMENTS, et. al.)	No. 38063-3 – II
)	
Appellants,)	
)	CERTIFICATE OF
v.)	MAILING
)	
CRAIG and STACIE DILL,)	
)	
Respondent.)	
_____)	

I, Christina Boland, swear under oath and the penalty of perjury of the laws of the State of Washington that on November 17, 2008, I deposited with Federal Express, next day delivery, the Cove at Fisher's Landing's Appellate Brief and this certificate of mailing, to the above captioned Court and mailed a copy to the attorney of record for the appellant on the same day.

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Dated this 17th day of November, 2008


Christina M. Boland

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