

No. 38063-3

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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IDENTITY

THE COVE AT FISHER'S LANDING APARTMENTS et al

Appellants,

vs.

STACIE DILL and CRAIG DILL,

Respondents.

THE COVE AT FISHER'S LANDING REPLY BRIEF

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I. REPLY OVERVIEW

The issue presented on appeal is relatively straight forward. Whether the trial court has the authority to enter judgment on a mandatory arbitration award in excess of \$50,000?

The answer is clearly no. Our Legislature has limited mandatory arbitration to instances where the amount sought is less than \$50,000 exclusive of interest and costs. Any award beyond this amount was not within the purview of mandatory arbitration and could not be entered by the court.

In addition, attorney's fees that are awarded in litigation are classified as either an element of damages or as costs. As the statute providing the for attorney's fees to be awarded did not define the fees as costs, they must be considered to be an additional element of damage based upon a failure to comply with the RLTA statute.

This reasoning is consistent with past decisions of Division Two.

In addition to the judgment entered exceeding the statutory scope of mandatory arbitration, the Dills affirmatively waived all claims in excess of \$50,000. This waiver is binding on them as it is on the judgment which was entered. This provides an additional ground for this Court reversing the trial court's decision to confirm the arbitration award without reducing the judgment to comply with the statutory mandates.

Although in some respects a minor issue, Equity must point out that it was not the Dills who sought entry of judgment, but rather Equity who sought entry of judgment within the \$50,000 statutory limits of RCW 7.06 et. seq. (CP 26-34). The trial court denied the motion and entered judgment on the entire award of \$76,275.55. (CP 51-52).

Equity is seeking review of the trial court's error in entering judgment on amounts which exceeded the statutory authority of mandatory arbitration.

II. ARGUMENT AND ANALYSIS

A. Equity Is Only Appealing The Entry of Judgment Which Is Appealable Without Requesting A Trial De Novo

This is an appeal regarding entry of judgment in excess of \$50,000. Equity is not appealing the decision made by the arbitrator in this matter, nor attacking the arbitration award itself. Instead Equity is asking for review of the judgment which the Superior Court Judge entered in this matter. This decision can be appealed without requesting a trial de novo.

Direct appeals of a mandatory arbitration judgment are proper if "the appeal relates to a defect inherent in the judgment or the means by which the judgment was obtained." Cook v. Selland Const. Inc., 81 Wn.App. 98, 102, 912 P.2d 1088 (1996). The issue before this Court is whether the judgment entered was within the statutory authority of

mandatory arbitration. This is a defect which is inherent in the judgment as well as how the judgment was obtained. Therefore the judgment is subject to direct review.

Upon the motion for entry of judgment, the trial court was asked to enter judgment up to the jurisdictional limits of \$50,000 and then add costs pursuant to MAR 6.4. (CP 26-34). However, the court improperly entered judgment totaling \$76,275.55 which included \$72,300.00 in damages, an additional \$3,000 for attorney's fees incurred post arbitration and \$975.55 in costs. (CP 10-11, 13-14, 51-52). This entry was beyond the authority of RCW 7.06 et. seq. and is subject to review.

B. The Attorney's Fees Awarded Were An Element Of Damage

The attorney's fees the Dills recovered under the RLTA were an element of damage and therefore were subject to the \$50,000 statutory cap.

Attorney's fees allowed under a statutory scheme not identified as costs are considered additional damages. Brown v. Suburban Obstetrics & Gynecology, P.S., 35 Wn.App. 880, 884, 670 P.2d 1077 (1983). This was a central issue in Brown because whether the fees were costs or damages was determinative whether this Court could review the trial court's failure to award attorney's fees. Id.

As noted in Equity's opening brief, Brown involved a plaintiff seeking recovery for wages improperly withheld as well as attorney's fees under RCW 49.48.030. This Court held that attorney's fees which are not identified as costs in the statute are in fact additional damages based upon a failure to comply with the statute:

..[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.

In reaching this conclusion, this Court looked to its past decision of Harold Meyer Drub v. Hurd, 23 Wn.App. 683, 598 P.2d 404 (1979). In Hurd the issue was whether the provision for attorney's fees in RCW 4.84.290 was an element of cost or damages. Id. at 686-87. If the attorney's fees were costs, then no appeal could be taken. It was recognized that statutes which consider attorney's fees to be a cost specifically so define the fees in the statute. Id. at 686 (referring to RCWs 4.84.010, -.030, -.080, and 12.20.060). This Court reasoned:

Had the legislature intended attorney's fees to be considered as part of the costs of an appeal brought under RCW 4.84.290, we presume the statute would have qualified the fee award provision accordingly. Without such a statutory qualification we are compelled to hold that attorney fees

authorized by RCW 4.84.290 are separate from statutory costs.

Id. at 687.

Similarly, here the attorney's fees awarded under the RLTA were not identified as costs. In fact the statute took great pains to ensure that attorney's fees were segregated from costs by providing that the Dills "may recover his costs of suit and a reasonable attorney's fee" based upon a violation of the RLTA. RCW 59.18.230.

The Dills fail to recognize the importance of the Brown decision and the issue addressed therein. Instead they argue that attorney's fees are only damages under the ABC rule or when fees are based upon a contractual indemnity provision. (Brief of Resp. at 17). Such a position is contrary to both Brown and Hurd as discussed above.

The cases of Wagner v. Foote, 128 Wn.2d 408, 908 P.2d 884 (1996) and Fiorito v. Goerig, 27 Wn.2d 615, 179 P.2d 316 (1947) as cited by the Dills provides no support for their position that the fees awarded here were costs. Wagner involved the reversal of a trial court awarding expert witness fees because there was no statutory or contractual provision authorizing the recovery. 128 Wn.2d at 416. The Supreme Court emphasized that attorney's fees and expert fees are not "costs" as provided in RCW 4.84 or any other applicable statute and therefore could not be

awarded. Id. at 416-17. This supports Equity's argument that the fees awarded here were not a cost.

Fiorito, too offers no support for plaintiff's contention that attorney's fees awarded here should be classified as a cost of litigation. Fiorito stands for the proposition that trial courts cannot award attorney's fees or litigation expenses absent a contractual provision or statutory authorization. 27 Wn.2d at 619-20. This opinion does not address the issue raised in Brown and Hurd which hold that attorney fees awarded under similar statutory schemes are an element of damages rather than costs.

RCW 4.84.250 is but one example where the legislature has classified a fee award as a cost:

[I]n any action for damages where the amount pleaded by the prevailing party ... exclusive of costs, is [ten thousand] dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees.

RCW 4.84.250 (emphasis added). The legislature's failure to qualify the fee award as a cost renders the fee an element of damage. See Brown, 35 Wn.App. at 884.

Contrary to the Dill's assertion, St. Paul Fire and Marine Insurance Co. v. Hebert Construction, Inc., 450 F.Supp.2d 1214, 1234-35

(W.D.Wash. 2006) provides no guidance here. St. Paul involved a determination whether attorney's fees awarded in a settlement fall under the "additional payments' provisions" of an insurance policy as "costs taxed." Id. at 1217. This case provides no guidance because the fees were analyzed looking at the language of the insurance policy in dispute. Id. at 1233-35. The issue before this Court is whether the attorney's fees awarded under the RLTA are costs or an element of damages. These are two separate questions and therefore the St. Paul's decision offers no guidance to this Court.

The Wlasiuk v. Whirlpool Corp., 76 Wn.App. 250, 884 P.2d 13 (1994) case too provides no useful guidance. Wlasiuk considered whether the pending issue of the amount of attorney's fees to be awarded in the matter postpones the finality of a judgment already entered for purposes of an appeal. Id. at 255. Division One did not address whether the fees were an element of cost or damages. Id. Instead the court looked to the factors articulated in Nestegard v. Investment Exchange Corp., 5 Wash.App. 618, 489 P.2d 1142 (1971) to determine whether the pending attorney's fee award affected the finality of the initial judgment. Wlasiuk, 76 Wn.App. at 255. In Wlasiuk the court found that the open issue of the amount of attorney's fees did not affect finality because the fees had already been granted with only the amount to be determined. Id.

This reasoning provides no guidance here. The issue before this Court is not whether the initial arbitration award was final; the issue is whether the fees awarded were an element of damages or a cost.

As discussed above, attorney's fees awarded under the RLTA are an element of damage and therefore are subject to the statutory cap of \$50,000. The trial court erred by entering judgment in excess of the \$50,000 statutory cap available in mandatory arbitration.

C. MAR 1.2 Is In Conflict With RCW 7.06

The statute is unambiguous, mandatory arbitration is limited to claims of up to \$50,000 exclusive of interest and costs:

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). The statute makes no allowance for expanding this limit by excluding attorney's fees from the calculation. If the legislature intended this limit to be exclusive of attorney's fees it certainly would have done so as it has in the past.

The district court limit set forth in RCW 3.66.020 of \$75,000 is but one example:

If the value of the claim or the amount at issue does not exceed seventy-five thousand dollars, exclusive of interest, costs, and attorneys' fees, the district court shall have jurisdiction.

Regarding the jurisdiction of the district court, the legislature specifically addressed the issue of attorneys' fees and its relationship to the statutory limit of the forum. *Id.* It stands contrary to reason to believe that the legislature intentionally inserted this language here but simply forgot to mention it in the mandatory arbitration statutes.

The issue of attorney's fees can be a considerable issue and will not be read into a statute absent specific legislative intent to do so. *See State ex rel. Thingpen v. City of Kent*, 64 Wn.2d 823, 826, 394 P.2d 686 (1964) ("This court cannot read into a statute language which we conceive the legislature has omitted."). By failing to specifically exclude attorney's fees from the calculation of mandatory arbitration limits the legislature has implicitly included them unless the fees fall under the category of costs.

Therefore MAR 1.2 expands the scope as drafted by the legislature by carving out an additional exemption for attorney's fees. This is an increase in the scope of cases which may be subject to mandatory arbitration which is not contemplated by RCW 7.06.020 and therefore the

rules are in conflict.

D. RCW 7.06 Prevails Over MAR 1.2

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

The mandatory arbitration statutes create a substantive right for litigants. RCW 7.06.020 is a substantive rule because it provides the vehicle for when mandatory arbitration is available. This is a jurisdictional issue and is analogous to the limits placed on courts of limited jurisdiction such as the current \$75,000 limit placed on district courts of the State. RCW 3.66.020. *See also State v. Uthoff*, 45 Wn.App. 261, 266, 724 P.2d 1103 (1986) (“The jurisdiction of courts of limited jurisdiction must clearly appear in a statute, and the enlargement or abridgement of the statutorily created territorial jurisdiction of the justice courts similarly must be clearly set forth.”).

The Dills agree that a statute controls over a conflicting court rule when the right conferred is substantive. *Leslie v. Verhey*, 90 Wn.App. 796, 954 P.2d 330 (1998). Compelling a party to go through arbitration rather than proceed directly to trial affects a substantive right. In fact it affects a Constitutional right. *See* Washington Constitution art. I, § 21 (preserving the right to a jury trial).

Any argument that the jurisdictional limits of mandatory arbitration are procedural is not well taken. Mandatory arbitration is a special proceeding adopted by the legislature in 1979 and codified as RCW 7.06 et. seq. *Laws of Washington*, 1979, Chapter 103. The intent of the law was to reduce congestion in the courts for cases which fall below the statutorily mandated limit. *Id.* However, the procedure was not to be applied to all cases, only those cases which (currently) involve claims for damages of under \$50,000 exclusive of interest and costs. RCW 7.06.020. This section was amended as recently as May 13, 2005, to increase the limits of mandatory arbitration from \$35,000 to \$50,000. *Laws of Washington*, 2005, Chapter 472. It is important to note that the Legislature did not add attorney's fees to the list of exemptions from the \$50,000. Instead it was decided to maintain the same language exempting only "interest and costs" from the statutorily set limit. *Id.*

Mandatory arbitration is a special proceeding which was created by the legislature for use in cases where the claims alleged are under \$50,000:

A court's general jurisdiction of the case is the right to exercise judicial power over that class of cases, and such jurisdiction extends to all controversies which may be brought before a court within the legal bounds of rights and remedies. Limited or special jurisdiction, on the other hand, is jurisdiction

which is confined to particular cases, or which can be exercised only under the limitations and circumstances prescribed by the statute.

Griffith v. City of Bellevue, 130 Wn.2d 189, 197, 922 P.2d 83(1996).

Mandatory arbitration falls under this definition because it is a class of actions which can only be exercised when the request is for a money judgment under \$50,000 as set forth in RCW 7.06 et. seq. A statement of the obvious, but jurisdiction which is granted by the legislature cannot be enlarged beyond the grant of authority. “Special or limited jurisdiction is jurisdiction limited to certain subject matter. Special jurisdiction cannot be enlarged ‘beyond the express letter of the grant’ in the statute conferring authority on the court.” Id.

The jurisdictional grant of authority in mandatory arbitration is no more a procedural rule than is the \$75,000 jurisdictional limit of our district courts. Procedural rules are those related to the time limits for performing various duties such as those outlined in MAR 7.1 which sets a time limit on filing a de novo review. *See Kim v. Pham*, 95 Wn.App. 439, 444, 975 P.2d 544 (1999) (finding the timing and service requirements of MAR 7.1 to be procedural). Whether the \$50,000 limit of mandatory arbitration is inclusive or exclusive of attorney’s fees deals with the jurisdiction of the MAR forum. Whether one falls in or out of the forum’s

jurisdiction is substantive. On the other hand, the timing for making a request or when a party is deemed to have waived such a claim would be a procedural rule.

This interpretation is in agreement with other grants of authority by the legislature to the State's administrative bodies. See Bostain v. Food Exp., Inc., 159 Wn.2d 700, 715, 153 P.3d 846 (2007) (“[R]ules that are inconsistent with the statutes they implement are invalid.”).

The grant of authority by RCW 7.06.020 is a substantive rule because it is the rule granting jurisdictional authority over the MAR process. Therefore, the statutory grant of authority controls over MAR 1.2. The Dill's citation to Mitchell v. Straith, 40 Wn.App. 405, 698 P.2d 609 (1985) is not dispositive of this issue. In Mitchell, the court simply made a reference to MAR 1.2. There was no discussion whether MAR 1.2 was in conflict with RCW 7.06.020 as that issue was not raised in that proceeding as it is here. In addition, the fees at issue in Mitchell were the result of a contractual agreement versus a statutory provision which requires a different analysis.

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

It is undisputed the Dills waived their right to recover any claim in excess of \$50,000:

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

CP 50 (emphasis added).

They now argue that they used a form approved by the Court and therefore did not waive attorney's fees. (Brief of Resp. at 21-24). Such an argument fails because their waiver was to all claims. This was an affirmative waiver which was drafted on the pleading paper of their attorney. They could have amended the language as needed to include "waives any claim in excess of \$50,000 exclusive of attorney's fees, interest and cost." However, they did not. They simply waived all claims in excess of \$50,000.

That the language drafted does not utilize the necessary verbiage "exclusive of attorney's fees" is fatal to their request to allow for a judgment which includes amounts in excess of \$50,000 with the exception of statutory costs which are statutorily allowed. RCW 7.06.020(1).

The Dills knew they would be requesting attorney's fees from the outset. Attorney fees were specifically identified in their Complaint as specific damages which they were seeking to recover under the RLTA. (CP 6). They even identified the statutory provisions regarding this aspect of their claim. Id.

Therefore, even if MAR 1.2 were to be applied here, the Dills would have been required in their waiver to specifically identify “attorney’s fees” as being exempt. They did not and therefore waived their right to any claim in excess of \$50,000 which includes attorney’s fees.

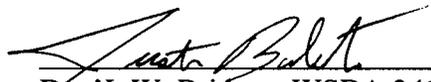
III. CONCLUSION

The trial court erred in entering judgment in excess of \$50,000. The statutory grant of authority approved by the legislature makes no allowance for exempting attorney’s fees from this calculation and therefore the judgment entered must be reversed for entry of judgment in conformity with RCW 7.06.020.

Moreover, the Dills’ waiver of all claims in excess of \$50,000 requires that the judgment entered be reversed for conformity therewith. Pursuant to this express waiver, all claims – of which attorney’s fees for violation of the RLTA was one – are waived and this Court must remand for entry of judgment for \$50,000 plus statutory costs of \$975.55.

DATED this 28th day of January, 2009.

McGAUGHEY BRIDGES DUNLAP, PLLC



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DIVISION TWO

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

I, Justin E. Bolster, swear under oath and the penalty of perjury of the laws of the State of Washington that on January 28, 2009, I caused to be delivered by ABC legal messenger, the Cove at Fisher's Landing's Reply Brief and this certificate of mailing, to the above captioned Court and mailed a copy to the attorney of record for the respondent by Federal Express next day delivery on the same day.

To: Mr. Ben Shafton
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Dated this 28th day of January, 2009


Justin E. Bolster

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