

No. 42971-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON  
COURT OF APPEALS

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RODNEY L. NELSON and JANE DOE NELSON,  
husband and wife, dba ROD NELSON AUTO  
CENTER, a Washington State sole proprietorship

Appellants

v.

ALBERT FALSETTO and CHARMAINE  
M. FALSETTO, husband and wife

Appellee

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APPELLANTS BRIEF

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By DARREL S. AMMONS  
Attorney for Appellants

WSBA # 18223  
DARREL S. AMMONS  
ATTORNEY AT LAW, P.L.L.C.  
1315 14<sup>th</sup> Avenue  
Longview, WA 98632  
Telephone: (360) 501-8090  
Fax: (360) 501-8064

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**A. ASSIGNMENTS OF ERROR**

1. The trial court erred in denying the Defendants Motion to Vacate Arbitration Award.

**B. ISSUE PRESENTED**

1. Should an arbitration award be vacated, where the arbitration award/decision on its face fails to segregate attorneys fees incurred for successful claims from attorneys fees incurred for unsuccessful claims?

**C. STATEMENT OF THE CASE**

Respondents brought five claims for relief (1) Violation of the Washington Automotive Repair Act ("ARA"); (2) Violation of the Washington Consumer Protection Act ("CPA"); (3) Breach of Contract; (4) Negligent Bailment; and (5) Conversion. Appellants brought a counterclaim for Breach of Contract/Quantum Meruit. CP 29, p. 4. The only claim wherein attorneys fees are allowed by law are the CPA and ARA claims. Appellants prevailed in a claim based upon Quantum Meruit. CP 29, p. 5. Respondents prevailed only in their ARA and CPA claims. CP 29, p. 4; CP 31, p. 2. The arbitrator made an award of attorney fees without segregating fees incurred for successful claims from attorneys fees incurred for unsuccessful claims. CP 31.

The Arbitrator awarded all of Respondents' fees even though Respondents lost on their Breach of Contract<sup>1</sup>, Negligent Bailment, and Conversion claims. CP 37. The Arbitrator even awarded Respondents' attorneys fees in losing their defense against Appellants' Quantum Meruit claim. CP 29; CP 31. Respondents were required to pay Appellants \$3,048.21 under Appellants' Quantum Meruit claim, but the Arbitrator required Appellants to pay Respondents' attorney fees despite losing. CP 29; CP 31.

On November 21, 2011, the Superior Court Commissioner entered an order denying the Appellants' Motion to Vacate the Arbitration Award. CP 40. On December 20, 2011, the Appellants filed a Notice of Appeal.

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<sup>1</sup> The Arbitrator's award concluded that the parties did not reach mutual agreement on a contract.

## D. ARGUMENT

### 1. UNDER RCW 7.04A.230(4), THE WASHINGTON ARBITRATION ACT, FACIAL LEGAL ERROR IS AN ACCEPTED BASIS FOR VACATING AN ARBITRATION AWARD.

In *Broom v. Morgan Stanley DW Inc*, 169 Wash.2d 231, 236, P.3d 182 (2010), the Supreme Court of Washington stated as follows:

Morgan Stanley focuses much of its argument on the statutory history of the WAA and the trial court's proper scope of review. But we previously addressed the scope of the trial court's review in *Boyd v. Davis*, 127 Wash.2d 256, 897 P.2d 1239 (1995), where we approved of facial legal error as an accepted basis for vacating an arbitral award. In *Boyd*, we suggested that such error indicates that the arbitrators exceeded their powers. 127 Wash.2d at 263, 897 P.2d 1239.

Our holding in *Boyd* was no outlier. We have repeatedly articulated a rule that explicitly includes facial errors of law as grounds for vacation. *Davidson v. Hensen*, 135 Wash.2d 112, 118, 954 P.2d 1327 (1998); *Boyd*, 127 Wash.2d at 263, 897 P.2d 1239 (1995); *State Constr. Co. v. Banchemo*, 63 Wash.2d 245, 249-50, 386 P.2d 625 (1963). The *Boyd* majority embraced the existing rule, whereby arbitrators "exceeded their powers," thus permitting vacation of the award. The *Boyd* concurrence correctly observed that this rule was originally adopted as an interpretation of Washington's 1925 arbitration act, which did include legal error as an explicit ground for vacation. *Boyd*, 127 Wash.2d at 266, 897 P.2d 1239 (Utter, J., concurring). The concurrence reasoned that we have improperly continued to apply this rule, ignoring the change in its statutory underpinnings. However, it is the *Boyd* majority that continues to guide us. Even after the enactment of the WAA, we have consistently approved of the *Boyd* rule, embracing facial legal error as a ground for vacation.

. . .

In fact, the facial legal error standard is a very narrow ground for vacating an arbitral award. When judicial review is limited to the fact of the award, the purposes of arbitration are furthered while obvious legal error is avoided. But courts may not search the arbitral proceedings for any legal error; courts do not look to the merits of the case, and they do not re-examine evidence. Despite arguments to the contrary, the facial legal error standard does not permit courts to conduct a trial de novo when reviewing an arbitration award. *Boyd*, 127 Wash.2d at 262, 897 P.2d 1239. Through the years, our courts have applied the facial legal error standard carefully, vacating an award based on such error in only four instances, one of which was the case below.

. . .

We hold that facial legal error falls within former RCW 7.04.160(4) as one instance in which arbitrators exceed their powers and that it is valid ground to vacate an arbitration award.

In the present case, as will be discussed in paragraph 2 herein below, it is a valid ground to vacate an arbitration award where the award contains a legal error on the face of the award.

**2. THE ARBITRATION AWARD, ON ITS FACE, FAILS TO SEGREGATE THE ATTORNEY'S FEES INCURRED BETWEEN SUCCESSFUL AND UNSUCCESSFUL CLAIMS BY THE RESPONDENTS.**

Regarding the appropriate method for calculating an attorney's fee award available to a successful Consumer Protection Act claimant, the Court of Appeals has stated as follows:

The Washington Supreme Court summarized the two-step process courts use to calculate attorney fees available to a successful CPA claimant:

Attorneys' fees ... under RCW 19.86.090 are calculated as follows: (1) establishing a "lodestar" fee by multiplying a reasonable hourly rate by the number of hours reasonably expended on theories necessary to establish the elements of a Consumer Protection Act cause of action; and (2) adjusting that lodestar up or down based upon the contingent nature of success (risk) and in exceptional circumstances, based also on the quality of work performed. The burden of justifying any deviation from the lodestar rests on the party proposing such alteration.

To determine the hours reasonably expended in litigation, the court must discount hours spent on unsuccessful claims, duplicated effort, or otherwise unproductive time.

Whether attorney fees are reasonable is a question of fact and the trial court is accorded broad discretion in fixing their amount. A trial court's attorney fee award will be overturned only for manifest abuse of discretion.

*Sing v. John L. Scott, Inc.*, 83 Wash.App. 55, 920 P.2d 589 (1996).

Similarly the court in *Kastanis v. Educational Employees Credit Union*, 122 Wash.2d 483, 859 P.2d 26 (1993), commented on the segregation of attorney's fees between successful and unsuccessful claims as follows:

Finally, EECU charges that the trial court erred in refusing to award attorney's fees to plaintiff for only the one claim on which she prevailed. Plaintiff sued EECU under four separate causes of action: marital status discrimination, wrongful discharge, sex discrimination, and intentional infliction of emotional distress. She recovered only under the claim of marital status discrimination. The trial court

declined EECU's request to award plaintiff only those attorney's fees attributable to her successful claim.

This court has held that a plaintiff can be required to segregate its attorney's fees between successful and unsuccessful claims that allow for the award of fees. *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 743-44, 733 P.2d 208 (1987); *Blair v. WSU*, 108 Wash.2d 558, 572, 7409 P.2d 1379 (1987). If the claims are unrelated, the court should award only the fees reasonably attributable to the recovery. *Blair*, at 572, 740 P.2d 1379. In *Blair*, the trial court found that the evidence presented and the attorney's fees incurred for the plaintiffs' successful and unsuccessful claims were inseparable. This court agreed and upheld the trial court's decision that the plaintiffs were entitled to all fees awarded. *Blair*, at 572, 740 P.2d 1379.

Here, the trial court made no express finding that plaintiffs successful and unsuccessful claims were inseparable. Plaintiff prevailed only on one claim out of four. It does not appear that her successful and unsuccessful claims were inseparable, or that it would have been unnecessarily complex for her to have segregated her requests for attorney's fees among her four claims. Accordingly, we hold that the trial court erred in refusing to award plaintiff attorney's fees only for her successful claim of marital status discrimination.

In *Nordstrom, Inc. v. Tampourlos*, 107 Wash.2d 735, 733 P.2d 208 (1987), the Court of Appeals remanded the case for re-determination of reasonable attorney's fees in a Consumer Protection Act claim. In rendering its opinion, the court stated in part as follows:

Furthermore, a number of issues were litigated at trial and on appeal besides the Consumer Protection Act violation. Tampourlos had brought an action against Nordstrom for its

alleged breach of the lease, and there were claims of damaged equipment and property from both sides. It again would give Nordstrom an unfair benefit to award it attorney fees for these aspects of the suit, when they had nothing to do with the Consumer Protection Act violations.

Finally, the determination of what constitutes reasonable attorney fees should not be accomplished solely by reference to the number of hours which the law firm representing the successful plaintiff can bill. In a case such as this one, in which settled case law indicated that an unfair trade name infringement constitutes a Consumer Protection Act violation, there is a great hazard that the lawyers involved will spend undue amounts of time and unnecessary effort to present the case. Therefore, the trial court, instead of merely relying on the billing records of the plaintiff's attorney, should make an independent decision as to what represents a reasonable amount for attorney fees. The amount actually spent by the plaintiff's attorney may be relevant, but it is in my way dispositive.

Karl B. Tegland, author of various sections in the

*Washington Practice* series, commented on the segregation of fees

as follows:

In a case involving multiple claims, the court should award attorney fees only on the claims for which attorney fees are authorized. If the plaintiff recovers on some claims for which attorney fees are authorized and on some claims for which attorney fees are not authorized, the court should limit the award accordingly.

The same principle applies to defendants who prevail on some claims but not others. Attorney fees should be awarded for a successful defense against claims when attorney fees are authorized for such a defense, but not for defending against other claims in the same case.

When the law allows attorney fees on some claims but not others, as described in the two preceding paragraphs, the court may dispense with a segregation of fees if the claims are so related and intertwined that no reasonable segregation of time spent on the various claims can be made.

Similarly, in a case involving multiple claims, the court may limit a party's recovery of attorney fees to fees attributable to the claims upon which the party prevailed. The determination turns on whether the claims were separable or inseparable, with the burden apparently being on the party claiming higher fees on the basis that the claims are inseparable.

If a case involves multiple claims and the method of calculating the award differs among the claims because of differences in applicable statutes, the court should segregate the hours spent on the various claims to the extent possible.

14A Wash.Prac., Civil Procedure § 37:16.

Washington law requires the segregation of attorney's fees for successful claims from unsuccessful claims to arrive at the appropriate attorney's fees award.

In the present case, Respondents brought five claims for relief. They prevailed on only two of the claims for relief: violation of the Washington Automotive Repair Act and violation of the Washington Consumer Protection Act. The Respondents did not prevail on breach of contract, negligent bailment or conversion

claims. In fact, the Appellants prevailed on its claim for damages based upon Quantum Meruit.

The "Arbitrator's Decision – Attorney's Fees" states in part as follows:

The Defendants' in their Objection states that the *KYLE, supra* case stands for the position that the ward of fees is "limited" to the amount incurred pursuing the ARA/CPA claims. The portion of the *KYLE, supra* decision being relied on by the Defendants is contained in the FACTS section of the decision is not the basis of the ANALYSIS portion of the case or any ruling made by the Court of Appeals. The only cause of action that the Plaintiffs raised as a result of the Defendants' violation of the ARA on which they did not receive a damage award was the claim of conversion and loss of use/enjoyment. In reviewing the billing presented, I can not determine any specific entry or amount being billed on that issue. It may be included in one of the many conferences between attorney and client listed, but it is not defined as such.

The arbitrator's decision regarding attorney's fees fails to segregate the Respondents successful claims from the three unsuccessful claims. The arbitration award on its face includes attorney's fees for all five claims brought by the Respondents. The arbitration award failed to properly follow the law by not requiring Respondents to segregate attorney's fees claims for only the two successful claims. The Respondents had the burden to submit a proper fee application, segregating attorney's fees for successful claims from unsuccessful claims. It is apparent on the face of the

arbitration award that Respondents included attorney's fee billings for all claims based upon the amount of their attorney's fee bill for a case that was resolved through an arbitration without trial. The award, in excess of \$37,000, necessarily included attorney time spent on all five theories, including three theories on which the Respondents did not prevail.

Because the arbitration award displays legal error on its face, the arbitration award regarding attorney's fees should have been vacated by the superior court.

#### **E. CONCLUSION**

The trial court erred in denying the Motion to Vacate the Arbitration Award. The Appellants respectfully request that the matter be remanded to the trial court with instructions requiring the segregation of attorney's fees for successful claims from unsuccessful claims.

Dated: March 19, 2012

Respectfully Submitted,



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Darrel S. Ammons  
WSBA #18223  
Attorney for Appellants

NO. 42971-3-II

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RODNEY L. NELSON and  
JANE DOE NELSON, husband  
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AUTO CENTER, a Washington  
State sole proprietorship,

Appellants,

v.

ALBERT FALSETTO and  
CHARMAINE M. FALSETTO,  
husband and wife,

Respondents.

DECLARATION OF SERVICE

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BY \_\_\_\_\_

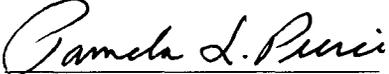
I, Pamela L. Pierce, declare as follows:

On March 19, 2012, I sent by United States mail, first class  
postage prepaid a true and correct copy of the Appellant's Brief, to  
the address listed below:

Adam C. Guenther  
Walstead Mertsching  
P.O. Box 1549  
Longview, WA 98632

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

DATED 3-19-12, at Longview, Washington.

  
Pamela L. Pierce