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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON

BY _____
DEPUTY

No. 42971-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

Appellants,

vs.

ALBERT FALSETTO and CHARMAINE M.
FALSETTO, husband and wife

Respondents.

BRIEF OF RESPONDENTS

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I. ISSUE

Does a trial court err in confirming an arbitration award which reveals no error on the face of the award?

II. STATEMENT OF THE CASE

This case arose out of a dispute between Appellants, ROD NELSON AUTO CENTER and ROD NELSON, and Respondents, ALBERT and CHARMAINE FALSETTO, involving repairs to a motor home. The parties agreed to submit the dispute to contractual arbitration pursuant to Chapter 7.04A RCW.¹

The arbitration was conducted on June 27-28, 2011, in Longview, Cowlitz County, Washington. Respondents alleged five causes of action against Appellants: (1) Violation of the Washington Automotive Repair Act (“ARA”), Chapter 46.71 RCW; (2) Violation of the Washington Consumer

¹ In pertinent part, the parties’ arbitration agreement provided:

II. Consent to Arbitration.

Plaintiffs and Defendants hereby irrevocably consent to having the above claims decided by final and binding arbitration.

III. Issues to be Arbitrated.

The arbitrator is empowered to decide all issues between the parties including those issues of liability, damages and any award of attorney fees and/or costs pursuant to the law of the state of Washington.

Protection Act (“CPA”), Chapter 19.86 RCW; (3) Breach of Contract; (4) Negligent Bailment, and (5) Conversion. (CP 29, page 4, lines 10-12.) The arbitrator considered the briefing and evidence submitted by the parties, took testimony, heard argument and, on July 19, 2011, issued his award. (CP 29.)

The arbitrator concluded that Appellants violated the ARA and the CPA in providing a work order which contained “neither a ‘total amount authorized’ or even an estimate reflecting what [Appellants] believed to be the agreement.” (CP 29, page 3, lines 17-19.) On the breach of contract issue, the arbitrator found:

[Appellant’s violation of the ARA] directly lead [sic] to failure of the parties to realize that they had two quite different understandings of the terms and conditions of their ‘oral’ agreement. Further, it is the very situation that the enactment of the statute was meant to address.

(CP 29, page 3, lines 19-20.) After considering all the evidence presented, the arbitrator found:

The [Respondents] have paid significantly more for the project than [sic] they had expected including the re-work of items done by the [Appellants’] shop . . . and parts supplied, not returned, and unused.

(CP 29, page 4, lines 15-17.) Respondents were awarded \$3,600 to complete the contracted work, \$960 to correct work improperly performed, \$824.31 for

unreturned parts, and \$3,000.00 as treble damages under the CPA. (CP 29, page 4, lines 17-22.) In contrast, Appellants were awarded \$3,048.21 for unpaid parts and labor. (CP 29, page 5, lines 1-5.)

With regard to the negligent bailment claim, the arbitrator concluded:

While in the possession of [Appellants] the evidence shows that the RV was broken into by a third party and damage was done to it. The [Respondents] seek a total of \$407.93 for the replacement of a door lock and cleaning to the interior of the RV. The parties disagree as to whether [Appellants] took adequate steps to safe-guard the RV. However, the entry into [the] RV and the resulting damage is evidence that the steps taken by [Appellants], whatever they might have been, were not sufficient, and after the fact the RV was placed in a fenced area and no more damage occurred. The [Respondents] are entitled to their damages.

(CP 29, page 2, lines 20-24.) The arbitrator inadvertently neglected to include these damages in the original award. (CP 31, page 2, lines 13-14.) This error was later corrected by letter ruling dated October 3, 2011. (CP 34, Ex. D.)²

The arbitrator did not specifically rule on the conversion claim. (CP 29.) However, the finding of an ARA violation led Appellants to release

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² The letter ruling also corrected a mathematical error.

their possessory lien on the motor home fifteen days after the award was issued.³

Initially, the amount of the damages awarded to Respondents, exclusive of attorney fees and costs, was calculated at \$9,472.27. (CP 29, page 4, lines 18-22.) Appellants were awarded \$3,048.21, for parts and labor. (CP 29, page 5, lines 1-5.) The arbitrator also ruled that Respondents were entitled to an award of attorney's fees and expenses as the prevailing party under Washington's Automotive Repair Act, RCW 46.71.035, and the Consumer Protection Act, RCW 19.86.90. (CP 29, page 5, lines 5-7.)

On subsequent motion, the arbitrator awarded Respondents' attorney fees of \$36,958.00 and costs of \$3,268.32. (CP 31.) Over Appellants' objections, the arbitrator awarded the entirety of Respondents' attorney fees, stating:

In the present case, the noncompliance [with the ARA] was [Appellants'] failure to provide a written estimate. As a result of this noncompliance with the statutory requirement, all the remaining issues arose.

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³ The Release of Lien, Cowlitz County Auditor's File No. 3441067, dated August 3, 2011, is not part of the record below. In the event that Appellants dispute the fact of the Release, Respondents will seek permission from the Court to make this document part of the appellate record, pursuant to RAP 10.3(a)(8).

(CP 31, page 1, lines 24-25.) The arbitrator further stated:

The only cause of action that the [Respondents] raised as a result of the [Appellants'] violation of the ARA on which they did not receive 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.

(CP 31, page 2, lines 10-12.)

The arbitrator denied a subsequent motion by Appellants to reduce the fee award. (CP 34, Ex. D.) However, by stipulation of the parties, the arbitrator did amend the damage award to \$8,880.17. (CP 34, Ex. D.)

Appellants thereafter filed a Motion to Vacate Arbitrator's Award with the Superior Court, contending that the arbitrator exceeded his powers in awarding all of Respondents' attorney fees. (CP 32.) After hearing, Commissioner David Nelson denied the motion. (CP 40.)

Respondents' Petition to Confirm Arbitration Award and for Judgment on the Award was filed on January 18, 2012. (CP 44.) The award was confirmed and Judgment was entered on the award on February 3, 2012. (CP 51, CP 52.) This appeal followed.

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III. ARGUMENT

A. Standard of Review on Appeal.

The sole issue on appeal is whether the superior court erred in confirming the arbitrator's award of attorney fees to Respondents. Appellate review of an arbitrator's award is strictly proscribed. Appellate scrutiny does not include review of an arbitrator's decision on the merits. *Beroth v. Apollo Coll., Inc.*, 135 Wn. App. 551, 559, 145 P.3d 386 (2006). An appellate court's review of an arbitrator's award is limited to that of the court which confirmed, vacated, modified, or corrected that award. *Cummings v. Budget Tank Removal & Env'tl. Services, LLC*, 163 Wn. App. 379, 388-89, 260 P.3d 220, 226-27 (2011). Courts may not vacate or modify an arbitrator's award in the absence of an error of law on the face of the award. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998). The burden of showing that such grounds exist is on the party seeking to vacate the award. *Pegasus Const. Corp. v. Turner Const. Co.*, 84 Wn. App. 744, 747-48, 929 P.2d 1200 (1997).

B. Judicial Review of an Arbitration Award is Limited to the Face of the Award.

Private arbitration in Washington State is governed exclusively by statute. *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 893, 16 P.3d 617

(2001). Having entered into the arbitration agreement and submitted their claims for resolution, the rights of the parties are controlled by Chapter 7.04A RCW. *Price v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 490, 496, 946 P.2d 388 (1997) (referencing former Chapter 7.04 RCW); *Northern State Constr. Co. v. Banchemo*, 63 Wn.2d 245, 249, 386 P.2d 625 (1963). Washington courts confer substantial finality on decisions of arbitrators rendered in accordance with the parties' contract and Chapter 7.04A RCW. *Rimov v. Schultz*, 162 Wn. App. 274, 253 P.3d 462 (2011); *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 202 P.3d 1009, *rev. denied*, 166 Wn.2d 1022 (2009); *Davidson v. Hensen*, 135 Wn.2d at 118; *Carpenter v. Elway*, 97 Wn. App. 977, 984, 988 P.2d 1009 (1999); *see also Boyd v. Davis*, 127 Wn.2d 256, 262, 897 P.2d 1239 (1995) ("Arbitration is attractive because it is a more expeditious and final alternative to litigation.").

The very purpose of arbitration is to avoid the courts. It is designed to settle controversies, not serve as a prelude to litigation.

Westmark Props., Inc. v. McGuire, 53 Wn. App. 400, 402, 766 P.2d 1146 (1989). A confirmation action is no more than a motion for an order to render judgment on the award previously made by the arbitrator. *Thorgaard Plumbing & Heating Co.*, 71 Wn.2d 126, 132, 426 P.2d 828 (1967).

Ordinarily, the court exercises a mere ministerial duty to reduce the award to judgment. *Id.*

Any party to the proceeding “may file a motion with the court for an order confirming the award, at which time the court shall issue such an order unless the award is modified or corrected under RCW 7.04A.200 or 7.04A.240 or is vacated under RCW 7.04A.230.” RCW 7.04A.220. Judicial review of an arbitration award is strictly limited to the referenced sections of the Washington Arbitration Act. *S&S Const., Inc. v. ADC Properties LLC*, 151 Wn. App. 247, 211 P.3d 415, *published at* 149 Wn. App. 1065, *review denied*, 168 Wn.2d 1002 (2009).

Appellants’ sole assignment of error is that the arbitrator exceeded his powers in violation of RCW 7.04A.230(1)(d). To prevail on this theory, the arbitrator’s award on its face must show adoption of an erroneous rule or mistake in applying the law, otherwise the award may not be vacated or modified. *Cummings v. Budget Tank Removal & Env’tl. Services, LLC*, 163 Wn. App. at 388-89; *Harris v. Grange Ins., Ass’n*, 73 Wn. App. 195, 868 P.2d 201 (1994).

Arbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts, and, unless the award on its face shows their adoption of an erroneous

rule, or mistake in applying the law, the award will not be vacated or modified. . . .

Northern State Constr. Co. v. Banchemo, 63 Wn.2d at 249-50. The party challenging confirmation bears the burden of proving clear error on the face of the award. *Boyd v. Davis*, 127 Wn.2d at 263. The error must be recognizable from the language of the award. See *Kennewick Educ. Ass'n v. Kennewick Sch. Dist. No. 17*, 35 Wn. App. 280, 282, 666 P.2d 928 (1983). The trial court does not have collateral authority to go behind the face of the award. *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994); *Boyd v. Davis*, 127 Wn.2d at 262-63 (trial court is not permitted to conduct a trial de novo upon confirmation).

C. There is No Error on the Face of the Award.

Appellants contend that the face of the arbitrator's award reveals an error of law because it does not segregate the attorney fees awarded to Respondents between successful and unsuccessful claims. This argument fails for two reasons: (1) An award of unsegregated attorney fees is warranted where all claims are related, and (2) Respondents did in fact substantially prevail on all claims presented.

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1. An arbitrator is not required to segregate attorney fees between related successful and unsuccessful claims.

An unsegregated fee award does not establish error. In fact, it is often appropriate. It is well-settled that attorney fees need not be segregated where it is determined that the various claims in the litigation are “so related that no reasonable segregation of successful and unsuccessful claims can be made.” *Mayer v. City of Seattle*, 102 Wn. App. 66, 80, 10 P.3d 408 (2000) (quoting *Hume v. Am. Disposal Co.*, 124 Wn.2d 656, 673, 880 P.2d 988 (1994)). “[W]here an action consists of related claims a plaintiff who has won substantial relief should not have his or her award of attorneys’ fees reduced simply because the court did not adopt each claim raised.” *Winans v. W.A.S., Inc.*, 52 Wn. App. 89, 101, 758 P.2d 503, 510 (1988) *aff’d*, 112 Wn.2d 529, 772 P.2d 1001 (1989) (citing *Hensley v. Eckerhart*, 461 U.S. 424, 440, 103 S.Ct. 1933, 1943, 76 L.Ed.2d 40 (1983)). To the contrary, it is only where an unsuccessful claim is “distinct in all respects from [the] successful claims” that segregation of the attorney fee award is in order. *Hensley*, at 440, 103 S.Ct. at 1943 (request for attorneys’ fees under Civil Rights Attorney’s Fees Awards Act of 1976, 42 U.S.C. 1988). There is no certain method of determining when claims are “related” or “unrelated.” *Hensley*, at 437 n. 12, 103 S.Ct. at 1941 n. 12.

“[T]he proper focus is whether the plaintiff has been successful on the central issue as exhibited by the fact that he has acquired the primary relief sought.” [*Taylor v. Sterrett*, 640 F.2d 663, 669 (5th Cir.1981)]. And the United States Supreme Court in *Hensley* properly notes that in many cases “[m]uch of counsel’s time will be devoted generally to the litigation as a whole, making it difficult to divide the hours expended on a claim-by-claim basis.” *Hensley*, 461 U.S. at 435, 103 S.Ct. 1933.

Chuong Van Pham v. City of Seattle, Seattle City Light, 159 Wn.2d 527, 548, 151 P.3d 976, 986 (2007).

Appellants’ reliance upon *Kastanis v. Educ. Employees Credit Union*, 122 Wn.2d 483, 859 P.2d 26, 36 (1993) *amended*, 122 Wn.2d 483, 865 P.2d 507 (1994), is misplaced. *Kastanis* did not involve judicial review of an arbitration award but, instead, a trial court judgment. Noting that the trial court “made no express finding that plaintiff’s successful and unsuccessful claims were inseparable,” the Washington Supreme Court reversed an award of unsegregated attorney fees. *Id.* at 502.

However, unlike trial courts, arbitrators are not required to enter findings of fact and conclusions of law. *Barnett v. Hicks*, 119 Wn.2d 151, 156, 829 P.2d 1087, 1091 (1992) (interpreting RCW 7.04.010 et seq.); *see also Hatch v. Cole*, 128 Wash. 107, 109, 222 P. 463, *aff’d*, 130 Wash. 706, 226 P. 1119 (1924); *Bachelor v. Wallace*, 1 Wash. Terr. 107, 108–09 (1860)

(findings of fact and conclusions of law not required and need not be stated separately); *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. at 403. As such, the arbitrator in the present case was not required to expressly state why he did not segregate fees and the absence of an explicit finding on the issue is not error.

The other decisions cited by Appellants, *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 733 P.2d 208 (1997), and *Sing v. John L. Scott, Inc.*, 83 Wn. App. 55, 72, 920 P.2d 589, 599 (1996), also involved appeals from a trial court, not contractual arbitration, and are equally distinguishable. Notably, Appellants fail to advise the court that *Sing* was reversed by the Washington Supreme Court in *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 948 P.2d 816 (1997). Regardless, the overturned Court of Appeals decision does not support Appellants' position. The court specifically recognized that an unsegregated attorney fee award is appropriate where, as here, "no reasonable means exist for segregating the non-recoverable costs from the recoverable costs." *Sing v. John L. Scott, Inc.*, 83 Wn. App. at 73-74.

Lastly, in *Nordstrom, Inc. v. Tampourlos*, the Supreme Court merely affirmed that segregation of attorney fees between successful and unsuccessful claims may be appropriate where the claims are *unrelated*.

Nordstrom, 107 Wn.2d at 743-44. Specifically, the *Nordstrom* court noted that it would be unfair to award attorney fees for aspects of the suit that “had nothing to do with the Consumer Protection Act violations.” *Nordstrom, Inc. v. Tampourlos*, at 743-44.

Here, there is no suggestion on the face of the award that the arbitrator did not determine Respondents’ claims all related to the same fact pattern and/or were otherwise sufficiently related to support an unsegregated fee award. In fact, the arbitrator expressly found that all of Respondents’ claims had everything to do with the Appellants’ violation of the ARA and *per se* violation of the CPA. (CP 31, page 1, lines 24-25.) He stated that “all the remaining issues arose” from these violations. He came to this conclusion after reviewing the pre-arbitration discovery, reviewing the briefing of counsel, and listening to the live testimony at hearing. The Washington Arbitration Act does not authorize the trial court to second guess the arbitrator’s apparent conclusion that the various legal theories and work related thereto were inextricably intertwined and it was correct to decline to do so.

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2. Respondents substantially prevailed on all claims presented.

Additionally, a review of the award reveals that Respondents did in fact prevail on each of their five claims. Appellants do not dispute that Respondents prevailed on the primary claims based upon violations of the ARA and CPA. Oddly, despite the plain language of the arbitration award, they do dispute whether Respondents prevailed on their claim of negligent bailment. Again, the award provides:

While in the possession of [Appellants] the evidence shows that the RV was broken into by a third party and damage was done to it. The [Respondents] seek a total of \$407.93 for the replacement of a door lock and cleaning to the interior of the RV. The parties disagree as to whether [Appellants] took adequate steps to safe-guard the RV. However, the entry into [the] RV and the resulting damage is evidence that the steps taken by [Appellants], whatever they might have been, were not sufficient, and after the fact the RV was placed in a fenced area and no mor damage occurred. The [Respondents] are entitled to their damages.

(CP 29, page 2, lines 20-24.) Similarly, Respondents substantially prevailed on their breach of contract claim and were awarded \$3,600 for completion of the agreed work, \$960 for the redoing of improperly performed repairs, and \$824.31 for unreturned parts, for total contract damages of \$5,384.31. Thus, Respondents' breach of contract award was significantly more than the \$3,048.21 Appellants were awarded on their counterclaim.

Respondents' conversion claim was based primarily upon the Appellants' assertion of a possessory lien upon the motor home. While the arbitrator did not award separate damages on the claim, it is clear Respondents prevailed. A lien cannot be asserted by a mechanic who is in violation of the ARA. *See, Campbell v. Seattle Engine Rebuilders & Remfg.*, 75 Wn. App. 89, 876 P.2d 948 (1994). RCW 46.71.041 states:

A repair facility that fails to comply with [the written price estimate section of the statute] is barred from asserting a possessory or chattel lien for the amount of the unauthorized parts or labor upon the motor vehicle or component.

Once again, there is no dispute that Appellants violated the ARA. Thus, the lien of November 24, 2010 was, *ipso facto*, an unlawful conversion of Plaintiffs' property regardless of the amount of damages awarded. As a result of the arbitrator's decision, Appellants were compelled to release the lien fifteen days after the award was issued.

Thus, Respondents substantially prevailed on each one of their five claims against Appellants. Since each claim arose out of the same set of facts, the arbitrator's award of attorney fees was appropriate. *See, e.g., Ethridge v. Hwang*, 105 Wn. App. 447, 461, 20 P.3d 958 (2001) ("[T]he court is not required to artificially segregate time in a case, such as this one, where the claims all relate to the same fact pattern, but allege different bases

for recovery”) (citing *Blair v. Washington State University*, 108 Wn.2d 558, 572, 740 P.2d 1379 (1987)). See, also, *Bloor v. Fritz*, 143 Wn. App. 718, 747, 180 P.3d 805, 821-22 (2008).

D. Request for Fees and Expenses on Appeal.

Pursuant to RAP 8.1, Respondents respectfully request an award of reasonable attorney fees and expenses on appeal. In general, attorney fees are available on review on the same grounds on which they are available in the trial court. Reasonable attorney fees may be claimed where provided for by contract, statute, or recognized ground in equity. *Western Stud Welding, Inc. v. Omark Indus., Inc.*, 43 Wn. App. 293, 716 P.2d 959 (1986). Where a statute allows for the award of attorney fees to the prevailing party at trial, it is interpreted to allow for the award of attorney fees to the prevailing party on review as well. See, e.g., *Puget Sound Plywood, Inc. v. Mester*, 86 Wn.2d 135, 542 P.2d 756 (1975).

RCW 7.04A.250(3) provides in pertinent part:

On application of a prevailing party to a contested judicial proceeding under [the Washington Arbitration Act], the court may add . . . attorneys’ fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made.

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This provision applies to appellate proceedings. *See, e.g., McGinnity v. AutoNation, Inc.*, 149 Wn. App. at 286. In addition, it has been recognized that the Consumer Protection Act provides grounds for the award of attorney's fees on appeal. *Evergreen Collectors v. Holt*, 60 Wn. App. 151, 157, 803 P.2d 10, 13 (1991); *Wilkinson v. Smith*, 31 Wn. App. 1, 15, 639 P.2d 768, *review denied*, 97 Wn.2d 1023 (1982). Further, the Automotive Repair Act provides in relevant part:

In an action to recover for automotive repairs the prevailing party may, at the discretion of the court, recover the costs of the action and reasonable attorneys' fees.

RCW 46.71.035. For the same reasons justifying the arbitrator's award of attorney fees below, Respondents are properly awarded reasonable fees and expenses incurred on appeal.

IV. CONCLUSION

Appellants have failed to identify any error on the face of the arbitration award because none exists. The law does not require an arbitrator to specify the basis for his award. However, even if the Court were to look beyond the face of the award the inescapable conclusion is that the arbitrator had many potential justifications to award all of Respondents' attorney fees: (1) they prevailed on the central issues in dispute, the ARA and CPA claims;

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BY DEPUTY

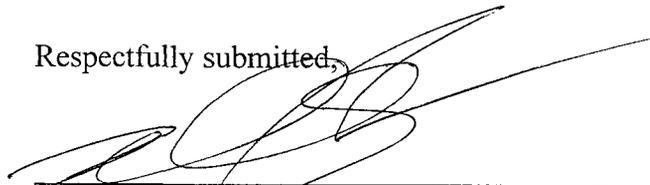
(2) all of Respondents' claims arose from the ARA and CPA violations;
(3) each cause of action related to the same fact pattern; (4) no reasonable
means exist for segregating the non-recoverable costs from the recoverable
costs; and/or (5) they prevailed on each one of the five causes of action

forwarded. Thus, the trial court properly confirmed the arbitration award.

Respondents respectfully request that the trial court be affirmed and
that Respondents be awarded reasonable fees and expenses on appeal.

DATED: May 28, 2012.

Respectfully submitted,



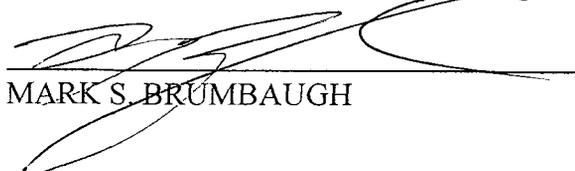
MARK S. BRUMBAUGH, WSBA #21547
Of Attorneys for Respondents

CERTIFICATE

I certify that on this day I caused a copy of the foregoing BRIEF OF
RESPONDENTS to be personally delivered, to Appellants' attorney,
addressed as follows:

Darrel S. Ammons
Attorney at Law, P.L.L.C.
1315 - 14th Avenue
Longview, WA 98632

DATED this 28 day of May 2012, at Longview, Washington.



MARK S. BRUMBAUGH