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No. 35767-8

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

BARNES, INC., Appellant,

v.

MAINLINE ROCK & BALLAST, INC., Respondent,

On Appeal from Spokane County Superior Court
Cause No. 17-2-03345-1

Judge Tony Hazel

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
I. INTRODUCTION	1
II. ASSIGNMENTS OF ERROR	2
A. Assignment of error.	3
1. Whether the trial court properly determined that no statutory grounds exist under RCW 7.04A.230 to vacate the arbitration award.	3
B. Issues pertaining to assignments of error.	3
1. Whether Barnes failed to meet its burden to show an error of law on the face of the award concerning the arbitration panel’s use of the context rule to assist in the interpretation of the Master Blasting Agreement	3
2. Whether Barnes failed to meet its burden to show an error of law the face of the award concerning the arbitration panel’s determination that there was no substantially prevailing party in the arbitration proceeding.	3
3. Whether Barnes failed to meet its burden to show an error of law on the face of the award concerning the arbitration panel’s decision not to award any late fee or interest to Barnes. ...	4
III. STATEMENT OF THE CASE	4
IV. ARGUMENT	9
A. Standard of review: legal error on the face of the award.	10

B. The award was properly confirmed, as the arbitrators are permitted to consider evidence outside the Agreement as context to gain a clearer understanding of the intent of the parties.	12
C. The award was properly confirmed, as the arbitrators had the authority to determine that neither party substantially prevailed for purposes of awarding attorney’s fees.	17
D. The award was properly confirmed, as Barnes cannot establish an error on the face of the award regarding its claim for late fees or interest.	21
E. Mainline should be awarded its costs and attorney’s fees for the post-award proceedings before the trial court and the Court of Appeals.	22
V. CONCLUSION	23
Certificate of Service	25

TABLE OF AUTHORITIES

Cases

<i>Agnew v. Lacey Co-Ply</i> , 33 Wn.App. 283, 286, 654 P.2d 712 (1982)	19
<i>Barnett v. Hicks</i> , 119 Wn.2d 151, 153-54, 829 P.2d 1087 (1992) ...	10
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 668, 678–79, 801 P.2d 222 (1990)	12, 13, 16
<i>Beroth v. Apollo Coll., Inc.</i> , 135 Wn.App. 551, 557–59, 145 P.3d 386 (2006)	10, 11, 18
<i>Boyd v. Davis</i> , 127 Wn.2d 256, 263, 897 P.2d 1239 (1995)	10
<i>Broom v. Morgan Stanley DW Inc.</i> , 169 Wn.2d 231, 239, 236 P.3d 182 (2010)	11
<i>Cummings v. Budget Tank Removal & Env'tl. Servs., LLC</i> , 163 Wn.App. 379, 388, 260 P.3d 220 (2011)	10
<i>Davidson v. Hensen</i> , 135 Wn.2d 112, 119, 954 P.2d 1327 (1998) ..	11, 12
<i>Hearst Communications, Inc. v. Seattle Times Co.</i> , 154 Wn.2d 493, 503, 115 P.3d 262 (2005)	13, 16
<i>Kitsap Cty. Deputy Sheriff's Guild v. Kitsap Cty.</i> , 167 Wn.2d 428, 434, 219 P.3d 675 (2009)	10
<i>Lopez v. Reynoso</i> , 129 Wn.App. 165, 173, 118 P.3d 398 (2005), <i>review denied</i> , 157 Wn.2d 1003 (2006)	14
<i>McGinnity v. AutoNation, Inc.</i> , 149 Wn.App. 277, 286, 202 P.3d 1009 (2009)	22
<i>Morrell v. Wedbush Morgan Sec. Inc.</i> , 143 Wn.App. 473, 485-87, 178 P.3d 387 (2008)	18, 20-22

<i>Phillips Bldg. Co., Inc. v. An</i> , 81 Wn.App. 696, 702, 704, 915 P.2d 1146 (1996)	17, 18, 20
<i>Powell v. Rinne</i> , 71 Wn.App. 297, 301, 857 P.2d 1090 (1993)	19
<i>Saleemi v. Doctor's Associates, Inc.</i> , 166 Wn. App. 81, 98, 269 P.3d 350, 359 (2012), <i>aff'd</i> , 176 Wn.2d 368, 292 P.3d 108 (2013)	23
<i>Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.</i> , 189 Wn.App. 898, 904, 359 P.3d 884 (2015), <i>review denied</i> , 185 Wn.2d 1006, 366 P.3d 1243 (2016)	11
<i>Westmark Properties, Inc. v. McGuire</i> , 53 Wn.App. 400, 404, 766 P.2d 1146 (1989)	21, 22
<u>Statutes</u>	
RCW 7.04A.210(2)	19
RCW 7.04A.230	3, 23
RCW 7.04A.250(3)	22, 23
<u>Other Authorities</u>	
RAP 18.1	23

I. INTRODUCTION

This case arises from a payment dispute under a commercial services agreement, which was resolved in accordance with the arbitration agreement between the parties. The Appellant, Barnes, Inc. (“Barnes”), was unhappy with the result of the arbitration award, which rejected Barnes’ interpretation of the payment terms of the agreement. Barnes now seeks to undermine the strong public policy in favor of the finality of arbitration by asking this Court to re-determine the merits of the case, which is not a permissible scope of review.

Respondent, Mainline Rock & Ballast, Inc. (“Mainline”), and Barnes are parties to a Master Blasting Agreement (“Agreement”), in which Barnes agreed to provide drilling and blasting services for Mainline at certain quarry sites. This particular dispute relates to a site in Torrance, New Mexico, that was owned and operated by Mainline between 2004 and 2017.

In April 2017, Mainline sold its Torrance rock quarry operation. Under the terms of the Agreement and the specific Work Order Authorizations for the Torrance site, Mainline agreed to pay Barnes based on the quantity of commercially sellable rock products stockpiled at the quarry site at the time of sale.

Within the time specified in the Agreement, Mainline issued payment to Barnes for the amount that Mainline believed to be owed to Barnes, based on surveys of the stockpiled materials at the time of sale. However, for the first time in approximately 13 years of operations at the site, Barnes took the position that it should be paid for the entire volume of materials blasted at the site, regardless of whether the material was commercially sellable rock material or waste/reject material (i.e., dirt) or was to be used to reclaim the property at the conclusion of the mining operation (i.e., not intended for sale).

Due to Barnes' unreasonable demand for several million dollars for every ounce of material disturbed on the site, Mainline had to initiate arbitration under the Agreement to settle the dispute over final payment for commercially sellable rock products remaining at the site at the time of the sale of the quarry operation.

Mainline was largely successful in the arbitration, limiting the final accounting of sellable rock material to less than 5% of the amount Barnes was demanding from Mainline.

Mainline accepted the results of the arbitration award and immediately paid Barnes the amount of the award. Barnes gladly accepted Mainline's payment but then filed a motion to vacate the award, asking the trial court to re-determine the merits of the arbitration panel's decision.

The motion to vacate was properly denied because there was no error of law on the face of the award to justify vacating the decision, and this appeal followed. Barnes' appeal continues to invite this Court to look past the face of the award and to re-determine the merits of the case, which is not a permissible scope of review. Barnes' appeal should be denied, and the trial court's order confirming the arbitration award should be affirmed.

II. ASSIGNMENTS OF ERROR

A. Assignment of error.

1. Whether the trial court properly determined that no statutory grounds exist under RCW 7.04A.230 to vacate the arbitration award.

B. Issues pertaining to the assignment of error.

1. Whether Barnes failed to meet its burden to show an error of law on the face of the award concerning the arbitration panel's use of the context rule to assist in the interpretation of the Master Blasting Agreement. (Assignment of Error No. 1)

2. Whether Barnes failed to meet its burden to show an error of law the face of the award concerning the arbitration panel's determination that there was no substantially prevailing party in the arbitration proceeding. (Assignment of Error No. 1)

3. Whether Barnes failed to meet its burden to show an error of law on the face of the award concerning the arbitration panel's decision not to award any late fee or interest to Barnes. (Assignment of Error No. 1)

III. STATEMENT OF THE CASE

Mainline is engaged in the business of developing and operating rock quarries to produce and sell ballast, a rock material used as the footing or base for railroad tracks. Between 2004 and 2017, Mainline owned and operated a rock quarry in Torrance, New Mexico. CP 81. The main purpose of the Torrance site was to provide ballast for purchase by BNSF railway. CP 20.

In the process of generating ballast, the crushing operation also creates by-product aggregate materials as well as waste materials. The by-products are materials such as 7/8" chips, 1/4" minus, and crusher fines and are commercially sellable rock products for use in road construction and other infrastructure projects. CP 51. The waste material produced, also known as rejects, generally consists of dirt materials that are screened out during the crushing process. *Id.* The waste or reject materials generated at the Torrance site were not sellable in the market area and were generally stockpiled for later use in reclamation of the pit areas at the quarry. CP 51, 81.

Beginning in 2004, Barnes began providing drilling and blasting at the Torrance site based on a letter of understanding transmitted by Barnes to Mainline. CP 20, 81. Subsequently in 2008, Mainline and Barnes executed the Master Blasting Agreement. CP 22-30. The Agreement outlines the basic terms and conditions for the drilling and blasting to be performed by Barnes and states that Barnes is to provide “Drilling and Blasting services to Mainline...at Mainline locations...” (Agreement, ¶ 1.a). CP 22. The Agreement does not provide for specific terms and conditions for services performed at specific locations, as it is to be further specified through work orders. *Id.* The term of the Agreement was 3 years, which could be mutually renewed by the parties. (Agreement, ¶ 2). CP 22. The Agreement further states that Barnes is only to be paid for “rock” materials blasted when Mainline is able to sell the materials to a third party:

9. Payment Terms: Unless otherwise noted herein, Mainline agrees to pay for all *materials sold and invoiced*, in full, within 20 days of the end of the month in which the *rock is sold and invoiced*. . . .

(Agreement, ¶ 9) (italics added). CP 23.

Effective as of June 1, 2008, Mainline and Barnes entered into a Work Order Authorization for the Torrance location (“2008 Work Order”). CP 31. The 2008 Work Order was issued pursuant to the

Agreement and thereby incorporated into the Agreement. The 2008 Work Order began on its effective date and was to be continued “as needed.” (2008 Work Order, ¶ 6). CP 31.

The 2008 Work Order established that Barnes would be paid for its drilling and blasting services based upon a unit price per ton of rock material *sold*. Significantly, both parties agreed that Barnes would only be paid based on the actual quantity of rock materials *measured and sold* by Mainline, rather than the amount blasted by Barnes. (2008 Work Order, ¶ 7). CP 31. This required that all of the commercial by-product materials had to be *sellable* material; Barnes would not be compensated for waste or reject materials that were not commercially sellable rock materials.

In 2016, the parties executed a subsequent and updated Work Order (the “2016 Work Order”). CP 44. The terms remained essentially the same between the 2008 Work Order and the 2016 Work Order, except that the 2016 Work Order created two different prices for materials. The first was “Drilling and Blasting 2016 (includes non-rail by product).” (2016 Work Order, ¶ 5, Item No. 1). CP 44. This item was for ballast material Mainline could sell to BNSF that would be blasted by Barnes, and it also included rock by-product that could be sold as commercial aggregate products for delivery by truck. The second item was “commercial by-product by rail to CSA + Vulcan.” (2016 Work Order, ¶

5, Item No. 2). CP 44. This item was for rock by-product blasted by Barnes and sold by Mainline as commercial aggregate products that could be sold and delivered in large volumes by rail car.

Between 2004 and 2017, Barnes drilled and blasted for Mainline, and Mainline paid Barnes based on the blasted materials actually sold. CP 53, 81. This included both ballast sold to BNSF and commercial by-product rock materials sold to other third parties. Throughout their nearly 13 year course of dealing, Mainline had never paid Barnes for reject or waste material and Barnes had never made such a request or took a position that Barnes was to be paid for waste or reject material. CP 53, 81.

In 2016, Mainline was approached by a third party regarding the purchase of the Torrance quarry. The purchase included all stockpiled commercially sellable aggregate inventory. The sale was completed on April 7, 2017. CP 53.

Mainline attempted to negotiate with Barnes as to the final quantity for the stockpiled commercially sellable by-product inventory. During the negotiations, Mainline tendered payment to Barnes for the amount Mainline believed it owed (\$908,596.00) based on three independent surveys of the stockpiled materials. Negotiations were unsuccessful due to Barnes' unreasonable demand to be paid for all materials—including all

waste and reject materials—and Mainline was forced into arbitrating the dispute per the terms of the Agreement. (Agreement, ¶ 25). CP 53.

After a three-day arbitration before a panel of three arbitrators, a majority of the panel determined that the \$7.5 million amount claimed by Barnes was excessive and that Barnes was only entitled to an additional payment of \$354,839.50. CP 80-84. The arbitration panel also concluded that neither party was deemed to have substantially prevailed, in which case, neither party received an award of attorney’s fees. CP 81. The panel also chose not to award Barnes any late fee or interest on the disputed payment amount. CP 82.

Immediately after the award was issued, Mainline tendered payment of the full amount of the award, and Barnes negotiated the check. CP 88-91, 93. Despite accepting payment of the award amount, Barnes filed a motion to vacate the award, asking the trial court both to consider evidence outside the face of the award and to re-determine the merits of the panel’s decision. CP 3-16. Mainline opposed the motion to vacate and filed its own motion to confirm the arbitration award. CP 45-48, 49-61.

Following oral argument, the trial court denied Barnes’ motion to vacate the award and granted Mainline’s motion to confirm the award. CP 114-116. Barnes has appealed the trial court’s decision. CP 136-141.

IV. ARGUMENT

In its Statement of the Case, Barnes makes a number of assertions about the course of dealings between the parties that are purported to be factually supported in the record. (See Brief of Appellant, p. 2-4) However, many of these statements are unsupported and argumentative, with the only source being Barnes' brief in support of its motion to vacate the award. More importantly, most of these statements are not contained in the arbitration award. The significance of the lack of such statements in the arbitration award is that these unsupported and argumentative statements cannot form the basis to vacate the award, because a reviewing court is not permitted to look behind the face of the award and re-determine the merits of the case.

Looking solely at the face of the arbitration award, Barnes cannot sustain its burden to demonstrate any error of law by the panel. There is nothing in the award which shows any error of law with respect to: (a) the panel's consideration of evidence of the context surrounding the formation and performance of the Agreement; (b) the panel's determination that neither party substantially prevailed; and (c) the panel's determination to deny any further relief to Barnes (such as late fees or interest). In the absence of any error of law on the face of the award, the trial court

properly confirmed the award. This Court should affirm the trial court's decision.

A. Standard of review: legal error on the face of the award.

Review of an arbitration award at the trial court and on appeal is limited to statutory grounds. *Barnett v. Hicks*, 119 Wn.2d 151, 153-54, 829 P.2d 1087 (1992); *see also Beroth v. Apollo Coll., Inc.*, 135 Wn.App. 551, 557-58, 145 P.3d 386 (2006). A reviewing court will not review the merits of the decision of the arbitrators; rather, a reviewing court's action is "strictly limited to the statutory bases for confirmation, vacation, modification or correction." *Barnett*, 119 Wn.2d at 156.

Courts will only review an arbitration decision "in very limited circumstances, such as when an arbitrator has exceeded his or her legal authority." *Kitsap Cty. Deputy Sheriff's Guild v. Kitsap Cty.*, 167 Wn.2d 428, 434, 219 P.3d 675 (2009). Arbitrators are deemed to have exceeded their authority by a "mistaken application of the law" or when the face of the arbitration award exhibits an "erroneous rule of law". *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). "The burden of showing that such grounds exist is on the party seeking to vacate the award." *Cummings v. Budget Tank Removal & Env'tl. Servs., LLC*, 163 Wn.App. 379, 388, 260 P.3d 220 (2011).

“To determine whether vacation of the arbitrator's award is appropriate . . . the court considers only the face of the award.” *Beroth*, 135 Wn.App. at 559. The court is not to consider the evidence that was before the arbitrator nor the merits of the case. *Davidson v. Hensen*, 135 Wn.2d 112, 119, 954 P.2d 1327 (1998). Additionally, if there is no error on the face of the award, it cannot be vacated. *Beroth*, 135 Wn.App. at 559. “[T]he facial legal error standard is a very narrow ground for vacating an arbitral award . . . [C]ourts may not search the arbitral proceedings for *any* legal error; courts do not look to the merits of the case, and they do not reexamine evidence.” *Broom v. Morgan Stanley DW Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010) (emphasis in original). The facial error “should be recognizable from the language of the award, as, for instance, where the arbitrator identifies a portion of the award as punitive damages in a jurisdiction that does not allow punitive damages.” *Salewski v. Pilchuck Veterinary Hosp., Inc., P.S.*, 189 Wn.App. 898, 904, 359 P.3d 884 (2015), *review denied*, 185 Wn.2d 1006, 366 P.3d 1243 (2016) (citations omitted).

It is with great deference that courts apply the facial legal standard. In fact, as of 2010, Washington courts were noted as having applied “the facial legal error standard carefully, vacating an award based on such error in only four instances.” *Broom*, 169 Wn.2d at 239. Further, “Washington

courts have given substantial finality to arbitrator decisions rendered in accordance with the parties' contract . . .” and Washington’s Uniform Arbitration Act located at 7.04A *et seq.* *Davidson*, 135 Wn.2d at 118.

Based on the arbitration award in this case, the trial court properly concluded that the issues raised by Barnes did not rise to the high standard articulated by Washington courts to vacate an award.

B. The award was properly confirmed, as the arbitrators are permitted to consider evidence outside the Agreement as context to gain a clearer understanding of the intent of the parties.

Barnes’ first argument for vacating the award hinges upon the arbitrators’ consideration of a Letter of Understanding dated July 27, 2004 as part of the overall context of interpreting the meaning of terms in the Agreement and Work Orders. Barnes argues that it was a clear error of law for the panel to consider this letter. However, Washington law does not preclude a trier of fact from considering the context in which an Agreement is formed, as Washington follows the “context rule” in the interpretation of contracts. *Berg v. Hudesman*, 115 Wn.2d 657, 678–79, 801 P.2d 222 (1990) (disregarding the plain meaning rule and expressly adopting the “context rule as the applicable rule for ascertaining the parties' intent and interpreting written contracts.”). The context rule allows a fact finder to determine the intent of the parties by:

“ . . . viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties.”

Berg, 115 Wn.2d at 667 (quoting *Stender v. Twin City Foods, Inc.*, 82 Wn.2d 250, 254, 510 P.2d 221 (1973)).

Barnes argues that the context rule has been gutted by subsequent case law, but the authority cited by Barnes does not support this argument. In *Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 115 P.3d 262 (2005), the Washington Supreme Court clarified the purposes for which extrinsic evidence could be used under the context rule, but it did not restrict the use of extrinsic evidence for the purpose of determining the meaning of specific words and terms used in a written contract or to assist the trier of fact in understanding the reasonableness of respective interpretations advocated by the parties. *See Hearst Communications, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005) (stating that extrinsic evidence cannot be used to show an intention independent of the instrument or to vary, contradict or modify a written contract).

Similarly, Barnes cites to *Lopez v. Reynoso*, 129 Wn.App. 165, 118 P.3d 398 (2005) for the proposition that terms and conditions not contained in a final integrated agreement must be disregarded. (Brief of Appellant, p. 12) However, in *Lopez*, the Court of Appeals held that

consideration of extrinsic evidence was admissible to show that an integration clause was not valid because it did not give effect to the actual agreement of the parties, as evidenced by the context in which the agreement was formed. *Lopez v. Reynoso*, 129 Wn.App. 165, 173, 118 P.3d 398 (2005), *review denied*, 157 Wn.2d 1003 (2006).

In this case, there was a dispute between the parties over the interpretation of the payment terms of the Agreement and the Work Orders. As set forth in its brief, Barnes argues that the Agreement states that payment will be made for “rock Barnes blasted.” (Brief of Appellant, p. 12). However, neither the Agreement nor the Work Orders state as much. Instead, both documents specifically state that payment will be made for rock *sold* by Mainline. (Agreement, ¶ 9, at CP 23; 2008 Work Order, ¶ 7, at CP 31) In addition, the Agreement and Work Orders expressly state that payment would only be made for commercially sellable “rock” products or “commercial by-product” (i.e., not for waste or reject materials). (Agreement, ¶ 9, at CP 23; 2016 Work Order, Item 2, at CP 44)

In light of this limiting language in the Agreement and Work Orders, the panel had to determine the parties’ intent with respect to such terms as “rock” and “by-product stockpiled on-site to be sold” and “commercial by-product” material. To assist in interpreting the

Agreement and Work Orders and in evaluating the competing interpretations offered by Barnes and Mainline as to these terms, the panel appropriately considered the course of dealings between the parties to help define the parties' intent, stating:

The majority concludes that the unit price negotiated between Mainline and Barnes in June 2008 was inclusive of anticipated reject material. *This conclusion is supported by the parties' course of performance and treatment of reject material from the time the quarry was established in 2004 up through the sale to Vulcan in April 2017.* In particular, by letter dated July 27, 2004, Barnes specifically noted that its negotiated unit price was inclusive of anticipated reject material. Barnes re-affirmed this understanding in its February 7, 2006 letter. Accordingly, the unit price Barnes negotiated and agreed to in June 1, 2008 Work Order Authorization (i.e., \$0.87/tom) was inclusive of anticipated reject material. This was the purpose for having a unit price based on tons sold as opposed to a contract based on solid cubic yards blasted.

(Award, Summary ¶ 1) (emphasis added). CP 81. While the panel considered the July 2004 Letter of Understanding as part of the overall course of conduct, it was only one fact in a litany of facts considered by the panel as part of the context of the overall Agreement.

Contrary to Barnes' argument, the panel was allowed to consider this evidence even though there is an integration clause in the Agreement. The Washington Supreme Court has found that "[a]greements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish . . . the meaning of the writing,

whether or not integrated...” *Berg*, 115 Wn.2d at 668 (*quoting* Restatement (Second) of Contracts § 214(c)).

Additionally, the court in *Berg* held that “extrinsic evidence is admissible as to the entire circumstances under which the contract was made, as an aid in ascertaining the parties' intent.” *Berg*, 115 Wn.2d at 667. Here, the arbitration panel relied upon the course of dealings to help determine what Mainline’s and Barnes’ intentions were when they ultimately agreed upon the method of compensation in the Torrance Work Orders. The panel determined that the parties, based in part on their previous dealings, understood that all compensation was to be for commercially sellable rock materials and that the price paid to Barnes was inclusive of reject materials (i.e., Barnes would not be paid a separate price for reject materials).

Furthermore, there is nothing on the face of the award to suggest that the panel relied upon the July 2004 Letter of Understanding to alter or vary the terms of the Agreement, as Barnes has argued. Instead, the panel relied upon evidence of the course of performance to assist in interpreting the language in the Agreement and the Work Orders. Consideration of this evidence is permissible under Washington law and does not constitute error on the face of the award. *Hearst*, 154 Wn.2d at 503 (stating that extrinsic evidence can be used to help define specific terms or words).

Because it was not an error of law for the panel to consider evidence outside the Agreement to help discern the parties' intent and because there is no evidence that the panel used the extrinsic evidence to alter or vary the terms of the Agreement or Work Orders, Barnes' did not meet its burden to demonstrate an error of law on the face of the award. The trial court properly denied Barnes' motion to vacate the award on this basis, and the decision should be affirmed.

C. The award was properly confirmed, as the arbitrators had the authority to determine that neither party substantially prevailed for purposes of awarding attorney's fees.

Barnes' second argument for vacating the award rests upon the fact the panel determined that neither party was entitled to attorney's fees because neither party substantially prevailed. Barnes argues that it is the prevailing party simply because it obtained a net award, but a net award does not necessarily equate to being a prevailing party. "If both parties prevail on major issues, however, there may be no prevailing party. In such situations, neither party is entitled to an attorney fee award. Accordingly, when both parties to an action are afforded some measure of relief and there is no singularly prevailing party, neither party may be entitled to attorney fees." *Phillips Bldg. Co., Inc. v. An*, 81 Wn.App. 696, 702, 915 P.2d 1146 (1996) (citations omitted).

As previously stated, a reviewing court is only to consider the face of the award and is not to look to the merits when determining if the award should be vacated. *Beroth*, 135 Wn.App. at 559. The arbitration award states:

With regard to both parties' request for an award of attorney's fees and costs, the majority concludes that, **while both parties prevailed in part, neither party is the prevailing party for the purpose of awarding attorney's fees and costs. Therefore, the majority makes no award of attorney's fees and costs in favor of either party despite having made a monetary award to Barnes.** Mainline and Barnes will share equally in the costs of the arbitration.

(Award, Summary ¶ 5) (emphasis added). CP 81. As the panel found that both parties had prevailed in part and that neither party was the prevailing party, the award remains facially valid.

A court is "not allowed to go behind the face of the award to determine the merits of that decision." *Phillips*, 81 Wn.App. at 704. Where the prevailing party cannot be determined from the face of the award, the court may not modify the award to include attorney's fees. *Id.* Furthermore, the court cannot substitute its judgment for that of the panel. Arbitrators have the power to decide the issue of attorney's fees, even if they do so wrongly, where the parties have agreed that all claims shall be submitted to arbitration. *Morrell v. Wedbush Morgan Sec. Inc.*, 143 Wn.App. 473, 487, 178 P.3d 387 (2008). A court cannot undergo a

contract analysis without going behind the face of the award to analyze the contract language; Washington law does not allow such a correction. *Id.*

Lastly, Washington's Arbitration Act, codified at RCW 7.04A *et seq.*, specifically allows for the discretionary award of attorney's fees, where permitted by law:

An arbitrator *may* award attorneys' fees and other reasonable expenses of arbitration if such an award is authorized by law in a civil action involving the same claim or by the agreement of the parties to the arbitration proceeding.

RCW 7.04A.210(2) (emphasis added). The use of "may" within a statute allows the decision-maker to exercise discretion. *Powell v. Rinne*, 71 Wn.App. 297, 301, 857 P.2d 1090 (1993). Nothing in the statute requires the arbitrators to award attorney's fees as a part of their award.

Barnes' reliance on *Agnew v. Lacey Co-Ply*, 33 Wn.App. 283, 654 P.2d 712 (1982) is misplaced for a number of reasons. First, *Agnew* was decided years before the adoption of RCW 7.04A.210(2), which clearly makes the award of attorney's fees by arbitrators a discretionary act, not a mandatory act. Second, the facts in *Agnew* are distinguishable from the present case, as there was no dispute as to who was the prevailing party because the arbitration panel did not find for the claimant on any issue (unlike the present case, where the panel expressly found for Mainline on a number of disputed issues). *See Agnew v. Lacey Co-Ply*, 33 Wn.App.

283, 286, 654 P.2d 712 (1982) (stating that the arbitrators “denied all” of the claimant’s claims); *cf. Phillips*, 81 Wn.App. at 703-04 (distinguishing *Agnew* and holding that a net award in favor of one party was insufficient to determine a prevailing party because the court could not determine the value of other disputed issues from the face of the award). Finally, the analysis of *Agnew* has been called into question in *Morrell v. Wedbush Morgan Sec. Inc.*, *supra*. Specifically, the *Morrell* court questioned the authority of the reviewing court to look behind the award and to decide an issue arising under the contract, when the issue of attorney’s fees was submitted to the arbitrators for determination. *Morrell*, 143 Wn.App. at 487 (stating that the “*Agnew* court thereby corrected what it perceived as an arbitrators’ legal mistake in a manner that Washington law does not permit.”)

In this case, the issue of attorney’s fees was submitted to the arbitration panel to decide. The panel considered the evidence and issues before it and rendered a decision concerning prevailing party, finding none. As neither party was deemed to be the prevailing party and the panel is allowed to exercise its discretion in awarding attorney’s fees, Barnes failed to meet its burden to demonstrate an error of law on the face of the award with respect to attorney’s fees. Therefore, the trial court order denying Barnes’ motion to vacate should be affirmed.

D. The award was properly confirmed, as Barnes cannot establish an error on the face of the award regarding its claim for late fees or interest.

Barnes' final contention for vacating the award rests upon the panel's decision not to award a late fee or interest to Barnes. However, "a trial court has no collateral authority to go behind the face of an arbitration award and determine whether additional amounts are appropriate. *Morrell*, 143 Wn.App. at 485. In *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 766 P.2d 1146 (1989), the Court of Appeals determined that the trial court erred when it determined pre-judgment interest should be added to an award. "Inasmuch as the court was foreclosed from going behind the face of award, it had no basis for determining whether the amount awarded met the test for prejudgment interest; this was part of the merits of the controversy, forbidden territory for a court." *Westmark Properties, Inc. v. McGuire*, 53 Wn.App. 400, 404, 766 P.2d 1146 (1989).

In order to provide Barnes the relief it seeks, the trial court or this Court would be required to look behind the face of the award and determine whether Barnes presented the arbitration panel with the necessary evidence to establish both factual and legal entitlement to an award of a late fee or interest. However, a reviewing court is precluded from reconsidering the merits of the dispute or from determining that

amounts not awarded by the panel should later be awarded. *Westmark*, 53 Wn.App. at 404; *Morrell*, 143 Wn.App. at 487.

In this case, the award clearly states that “[a]ny and all further claims or requests for relief of any type by either Mainline or Barnes in this arbitration are denied with prejudice.” CP 82. The issue of interest and late fees was thus considered by the panel and denied; therefore, no further award or consideration is necessary, as the panel did not go outside its authority and the award remains facially valid. The trial court’s order denying Barnes’ motion to vacate should be affirmed.

E. Mainline should be awarded its costs and attorney’s fees for the post-award proceedings before the trial court and the Court of Appeals.

RCW 7.04A.250(3) provides for an award of attorney’s fees and litigation expenses for post-award proceedings:

On application of a prevailing party to a contested judicial proceeding under ... 7.04A.230 [vacation of arbitration award]..., the court may add to a judgment confirming, vacating without directing a rehearing, modifying, or correcting an award, attorneys' fees and other reasonable expenses of litigation incurred in a judicial proceeding after the award is made.

RCW 7.04A.250(3). Washington courts have awarded fees under RCW 7.04A.250(3) to the prevailing party, where that party was required to either vacate or confirm an arbitration award in opposition to the other party. *See McGinnity v. AutoNation, Inc.*, 149 Wn.App. 277, 286, 202

P.3d 1009 (2009); *Saleemi v. Doctor's Associates, Inc.*, 166 Wn.App. 81, 98, 269 P.3d 350 (2012), *aff'd*, 176 Wn.2d 368, 292 P.3d 108 (2013) (“Accordingly, we award Saleemi attorney fees and costs under RCW 7.04A.250 to be determined upon his compliance with RAP 18.1.”)

Furthermore, the Agreement provides for an award of costs and attorney’s fees. (Agreement, ¶ 29). CP 29.

Mainline has been compelled to respond to Barnes’ motion to vacate the arbitration award and the sequent appeal of the denial of Barnes’ motion. Under RAP 18.1(a) and (b), Mainline requests that it be awarded its costs and attorney’s fees incurred at the trial court and on appeal for these post-award proceedings, pursuant to RCW 7.04A.250(3) and Paragraph 29 of the Agreement.

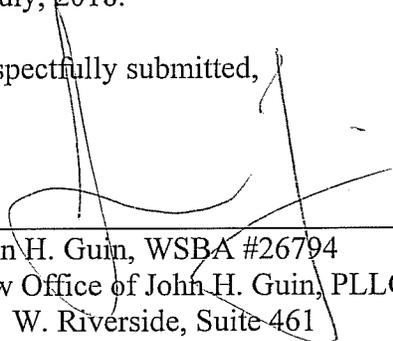
V. CONCLUSION

The trial court properly denied Barnes’ motion to vacate the arbitration award and properly entered an order confirming the award. Barnes failed to meet its burden to show an error of law on the face of the award. Furthermore, Barnes improperly invited the trial court to look behind the face of the award to re-determine the merits of the case, which a reviewing court is specifically prohibited from doing on a motion to vacate under RCW 7.04A.230.

This Court should affirm the trial court's order denying Barnes' motion to vacate the arbitration award. Costs for all post-award proceedings at the trial court and the Court of Appeals, including reasonable attorney's fees, should be awarded to Mainline.

DATED this 20th day of July, 2018.

Respectfully submitted,



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CERTIFICATE OF SERVICE

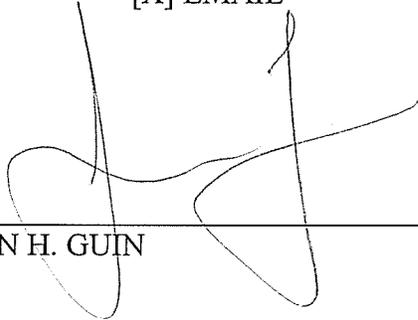
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