

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

09 DEC 29 PM 4:17

No. 82311-1

BY RONALD R. CARPENTER

CLERK
SUPREME COURT OF THE STATE OF WASHINGTON

MICHAEL BROOM, KEVIN BROOM and ANDREA BROOM,

Plaintiffs/Respondents,

v.

MORGAN STANLEY DW INC., and KIMBERLY ANNE BLINDHEIM,

Defendants/Petitioners.

AMICUS CURIAE BRIEF OF WASHINGTON STATE ASSOCIATION
FOR JUSTICE FOUNDATION

George M. Ahrend
WSBA #25160
P.O. Box 2149
Moses Lake, WA 98837
(509) 764-8426

Bryan P. Harnetiaux
WSBA #5169
517 E. 17th Ave.
Spokane, WA 99203
(509) 624-3890

On Behalf of
Washington State Association for Justice Foundation

FILED
SUPREME COURT
STATE OF WASHINGTON
2009 JAN -7 P 2:52
BY RONALD R. CARPENTER
CLERK

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	5
IV. SUMMARY OF ARGUMENT	5
V. ARGUMENT	7
A. Background Regarding Arbitration As Alternative To The Civil Justice System.	7
B. Statutes of Limitation Are Inapplicable To Arbitration Absent Agreement Of The Parties.	11
C. As Construed By This Court, Former RCW 7.04.160(4) Permits Judicial Review Of Arbitration Awards For Errors Of Law Appearing On the Face of the Award.	14
VI. CONCLUSION	18
APPENDIX	

TABLE OF AUTHORITIES

Cases	Pages
<u>Auburn v. King County</u> , 114 Wn.2d 447, 788 P.2d 534 (1990)	4,6,11-13
<u>Barnett v. Hicks</u> , 119 Wn.2d 151, 829 P.2d 1087 (1992)	8
<u>Boyd v. Davis</u> , 127 Wn.2d 256, 897 P.2d 1239 (1995)	14,16-17
<u>Broom v. Morgan Stanley DW Inc.</u> , 2008 WL 4053440 (Wn.App., Div. I, Sept. 2, 2008), <i>review granted</i> , 165 Wn.2d 1040 (2009)	passim
<u>Carey v. Herrick</u> , 146 Wash. 283, 263 P. 190 (1928)	15
<u>Davidson v. Hensen</u> , 135 Wn.2d 112, 954 P.2d 1327 (1998)	11-12,14,17
<u>Federated Servs. Ins. Co. v. Estate of Norberg</u> , 101 Wn.App. 119, 4 P.3d 844 (2000); <i>review denied</i> , 142 Wn.2d 1025 (2001)	14-16
<u>Federal Way v. Koenig</u> , 167 Wn.2d 341, 217 P.3d 1172 (2009)	17
<u>Fisher v. Allstate Ins. Co.</u> , 136 Wn.2d 240, 961 P.2d 350 (1998)	14,17
<u>Godfrey v. Hartford Cas. Ins. Co.</u> , 142 Wn.2d 885, 16 P.3d 617 (2001)	7
<u>International Ass'n of Fire Fighters v. Everett</u> , 146 Wn.2d 29, 42 P.3d 1265 (2002)	4,6,11-12
<u>Johnson v. Morris</u> , 87 Wn.2d 922, 557 P.2d 1299 (1976)	17

<u>Malted Mousse Inc. v. Steinmetz</u> 150 Wn.2d 518, 79 P.3d 1154 (2003)	2,16-17
<u>MBNA America Bank, N.A. v. Miles</u> 140 Wn.App. 511, 164 P.3d 514 (2007); <i>review denied</i> , 163 Wn.2d 1040 (2008)	9
<u>McKee v. AT&T Corp.</u> 164 Wn.2d 372, 191 P.3d 845 (2008)	10
<u>Northern State Constr. Co. v. Banchemo</u> 63 Wn.2d 245, 386 P.2d 625 (1963)	5,14
<u>Price v. Farmers Ins. Co.</u> 133 Wn.2d 490, 946 P.2d 388 (1997)	7-8
<u>Safeco Ins. Co. v. Barcom</u> 112 Wn.2d 575, 773 P.2d 56 (1989)	10
<u>Son Shipping Co. v. De Fosse & Tanghe</u> 199 F.2d 687, 689 (2d Cir. 1952)	13
<u>In re Stranger Creek & Tributaries in Stevens County</u> 77 Wn.2d 649, 466 P.2d 508 (1970)	17
<u>Thorgaard Plumbing & Heating Co. v. King County</u> 71 Wn.2d 126, 426 P.2d 828 (1967)	8,11-13
Rules and Statutes	
9 U.S.C., §§ 1 <u>et seq.</u> (FAA)	4
Ch. 7.04 RCW	passim
Ch. 7.04A RCW	3,17
Ch. 7.06 RCW	3
Ch. 19.86 RCW	2
Laws of 2005, ch. 433	3

RCW 4.16.040(1)	10
RCW 4.16.130	4,11
RCW 7.04.010	8-9,12
RCW 7.04.020	7
RCW 7.04.030	8, 12
RCW 7.04.040	9-10
RCW 7.04.040(1)	8
RCW 7.04.040(4)	9
RCW 7.04.060	8-10
RCW 7.04.110	8
RCW 7.04.120	8
RCW 7.04.130	8
RCW 7.04.150	7, 9
RCW 7.04.160	7, 14
RCW 7.04.160(4)	passim
RCW 7.04.170	7
RCW 7.04.180	9
RCW 7.04.220	8
RCW 7.04A.230(1)(d)	17
RCW 7.04A.900	3

RCW 7.04A.901	17	...
RCW 7.04A.903	3	...
RCW 18.27.080	11	...
RCW 36.45.010	12	...
RCW 36.45.030	11-12	...
RCW 49.48.030	4,11	...

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to the Washington State Association for Justice (WSAJ). WSAJ Foundation is the new name of Washington State Trial Lawyers Association Foundation (WSTLA Foundation), a supporting organization to the Washington State Trial Lawyers Association (WSTLA), now renamed WSAJ. These name changes were effective January 1, 2009.

WSAJ Foundation, which operates the amicus curiae program formerly operated by WSTLA Foundation, has an interest in the rights of injured persons and consumers seeking legal redress, including redress by means of arbitration.

II. INTRODUCTION AND STATEMENT OF THE CASE

This appeal involves two issues: whether arbitration awards under the Washington Arbitration Act, Ch. 7.04 RCW (WAA), can be reviewed for legal error appearing on the face of the award, and whether statutes of limitations applicable to “actions” also apply in this type of arbitration proceeding. The underlying facts are drawn from the unpublished Court of Appeals’ opinion, and the briefing of the parties. See Broom v. Morgan Stanley DW Inc., 2008 WL 4053440 (Wn.App., Div. I, Sept. 2, 2008),

review granted, 165 Wn.2d 1040 (2009); Morgan Stanley Br. at 3-14; Broom Br. at 2-11; Morgan Stanley Pet. For Rev. at 2-7; Broom Ans. to Pet. For Rev. at 1-3; Morgan Stanley Supp. Br. at 2-6.

For purposes of this amicus curiae brief, the following facts are relevant: Michael, Kevin and Andrea Broom (Broom) brought claims against Morgan Stanley DW Inc. and broker Kimberly Anne Blindheim (Morgan Stanley) for mismanaging their deceased father's investment account. Broom asserted several claims against Morgan Stanley, including negligence, breach of contract, breach of fiduciary duties, misrepresentation, failure to supervise, violation of state and federal securities laws, and violation of the Washington Consumer Protection Act, Ch. 19.86 RCW (CPA). The claims were submitted to arbitration in accordance with the brokerage agreement between their father and Morgan Stanley. The arbitration panel dismissed all claims except for the CPA claim on statute of limitations grounds, and the arbitration award recites this basis for dismissal. See Morgan Stanley Pet. For Rev. at 4-5.¹

Broom filed a complaint and motion to vacate the arbitration award in superior court on grounds that the dismissal of the claims on statute of limitations grounds was an error of law. The superior court granted the

¹ The CPA claim was later dismissed on other grounds, and does not appear to be at issue on review. See Morgan Stanley Pet. For Rev. at 5.

motion to vacate and remanded the claims for a hearing before a new arbitration panel.

In an unpublished decision, Division I of the Court of Appeals affirmed the superior court. The court rejected Morgan Stanley's argument that the arbitration award was not subject to judicial review for legal error under the WAA.² Morgan Stanley argued that dicta in Malted Mousse Inc. v. Steinmetz, 150 Wn.2d 518, 526-27; 79 P.3d 1154 (2003), involving the Washington Mandatory Arbitration Rules, Ch. 7.06 RCW (MAR), suggested that judicial review of Ch. 7.04 RCW arbitration awards for legal error is improper because it is derived from the text of a statute that has long-since been repealed. The Court of Appeals rejected this argument, concluding that although the "error of law" phraseology is not carried forward in the WAA, Washington courts have continued to review arbitration awards for errors of law appearing on the face of the award. See Broom, 2008 WL 4053440 at *3 & n.3 (collecting cases). This standard of judicial review is based on RCW 7.04.160(4), which provides

² The WAA has been repealed and replaced by the Revised Uniform Arbitration Act, codified at Ch. 7.04A RCW (RUAA). See Laws of 2005, ch. 433. The RUAA took effect January 1, 2006. See RCW 7.04A.900 & .903. The Court of Appeals noted that the RUAA is inapplicable here because Broom's notice of claim commencing the arbitration was submitted on September 22, 2005. See Broom, 2008 WL 4053440 at *2 & n.2. This is not questioned by the parties on review, see Morgan Stanley Supp. Br. at 7, and this amicus curiae brief assumes that Ch. 7.04 RCW governs this case.

that an award may be vacated “[w]here the arbitrators exceeded their powers.” See Broom at *3 & n.3.³

The Court of Appeals also rejected Morgan Stanley’s argument that statutes of limitation apply to arbitration. Morgan Stanley acknowledged that Auburn v. King County, 114 Wn.2d 447, 788 P.2d 534 (1990), holds that the catch-all statute of limitations—which applies to an “action for relief,” RCW 4.16.130—does not apply to arbitration. However, Morgan Stanley argued that International Ass’n of Fire Fighters v. Everett, 146 Wn.2d 29, 42 P.3d 1265 (2002), undermined or limited Auburn and related cases because the Court held that RCW 49.48.030—providing for the recovery of attorney fees “[i]n any action in which any person is successful in recovering judgment for wages or salary”—applied to arbitration. The Court of Appeals rejected Morgan Stanley’s argument because whether an arbitration is deemed a judicial “action” depends on the context, and the context here is more akin to Auburn than Fire Fighters. See Broom at *4.

³ The Court of Appeals also held that Morgan Stanley waived any claim that the Federal Arbitration Act, 9 U.S.C. §§1 *et seq.* (FAA), preempts the WAA. See Broom at *2. While Morgan Stanley discusses the FAA in its petition for review, the framing of the issues and the argument do not raise the preemption issue. See Morgan Stanley Pet. For Rev. at 1-2 (statement of issues); *id.* at 5, 7 (discussing FAA); see also Morgan Stanley Supp. Br. at 5, 9 (discussing FAA). This amicus curiae brief assumes that the FAA does not govern here, as determined by the Court of Appeals.

Ultimately, the Court of Appeals upheld vacation of the arbitration award dismissing Broom's non-CPA claims on statute of limitations grounds, and remanded for rehearing before a new arbitration panel. See Broom at *5. Morgan Stanley filed a petition for review, raising both the scope of judicial review of arbitration awards and the applicability of statutes of limitation in arbitration proceedings governed by Ch. 7.04 RCW. This Court granted review.

III. ISSUES PRESENTED

1. Whether former RCW 7.04.160(4) permits judicial review of arbitration awards for errors of law appearing on the face of the award?
2. Whether arbitrations under Ch. 7.04 RCW are subject to statutes of limitations?

IV. SUMMARY OF ARGUMENT

Re: Judicial Review Of Arbitration Awards

Former RCW 7.04.160(4), which provides for vacatur “[w]here the arbitrators exceeded their powers,” permits judicial review of arbitration awards for legal errors appearing on the face of the award, and has been so construed at least since this Court’s decision in Northern State Constr. Co. v. Banchemo, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963). In the intervening 46 years, Washington courts have consistently applied this standard of judicial review under the WAA. Under governing rules of

statutory construction, this interpretation became part of RCW 7.04.160(4) as if it were originally included in the provision by the Legislature. This construction is neither incorrect nor harmful, and it should not be overruled. Judicial relief is appropriate in limited circumstances where the face of the arbitration award reveals a palpable misunderstanding of the law that is outcome-determinative. Lack of relief under such circumstances would be inimical to the arbitrators' clear intent to follow the law in resolving the dispute.

Re: Applicability Of Statutes Of Limitation To Arbitration

An arbitration under Ch. 7.04 RCW is not an "action" to which Washington statutes of limitation are applicable, and this Court's decision in Auburn, supra, is controlling. The Court's decision in Fire Fighters, supra, involving fee-shifting in wage claims, is distinguishable because it involves a labor arbitration, which is specifically excluded from the WAA. Statutes of limitations do not apply to controversies submitted to arbitration under Ch. 7.04 RCW unless the parties consent to be bound by them in their arbitration agreement.

V. ARGUMENT

A. Background Regarding Arbitration As Alternative To The Civil Justice System.

When a superior court adjudicates common law or statutory actions for relief, it is exercising its plenary or general jurisdiction, and it is the arbiter of facts and law. This is not the case when parties consent to remove their dispute from the civil justice system and have it resolved in private arbitration under Ch. 7.04 RCW, Washington's "code of arbitration." See Godfrey v. Hartford Cas. Ins. Co., 142 Wn.2d 885, 889 & 894, 16 P.3d 617 (2001) (describing WAA as code of arbitration); id. at 897 (stating parties in arbitration "agree to waive their right to have their disputes resolved in the court system"). Arbitrations are special proceedings. The Legislature has limited judicial review to the grounds provided by statute, and on review the court cannot invoke its power as a court of general jurisdiction. See RCW 7.04.160.⁴

A more limited original jurisdiction is conferred on the district and superior courts under Ch. 7.04 RCW. See RCW 7.04.020. Jurisdiction is restricted to confirming the arbitration award, see RCW 7.04.150; vacating the award on specified and limited grounds, see RCW 7.04.160; or modifying or correcting the award, again on specified and limited grounds,

⁴ As noted above, Ch. 7.04 RCW has been repealed. See supra n.2. The text of the WAA in effect at the time of repeal is reproduced in the Appendix to this brief.

see RCW 7.04.170. See also Price v. Farmers Ins. Co., 133 Wn.2d 490, 498, 946 P.2d 388 (1997) (stating “the jurisdiction of the superior court is limited by the nature of the special statutory proceeding”). Appellate jurisdiction is similarly limited. See RCW 7.04.220; see also Barnett v. Hicks, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992) (stating “in the case of an appeal from an arbitrator’s award, an appellate court is strictly proscribed from the traditional full review”).

Arbitration is completely different than an action in court, and the WAA distinguishes between an arbitration and an action. See Thorgaard Plumbing & Heating Co. v. King County, 71 Wn.2d 126, 131-33, 426 P.2d 828 (1967). The subject of an arbitration is not described in the parlance of the civil justice system (i.e., an action or claim for relief). Rather, the WAA speaks in terms of a “controversy.” See RCW 7.04.010, .060. Any controversy “which may be the subject of an action” is subject to arbitration, indicating that arbitration is an alternative to pursuing an action or claim for relief through the civil justice system. See RCW 7.04.010. To this end, when the controversy is simultaneously the subject of an action in court and an arbitration, the court action may be stayed pending the completion of arbitration. See RCW 7.04.030. The WAA only incorporates court procedures to a limited extent, and the fact that the Legislature considered it necessary to do so confirms the fundamental

difference between arbitration and an action in court. See e.g. RCW 7.04.040(1) (service); RCW 7.04.110 (subpoenas); RCW 7.04.120 (depositions); RCW 7.04.130 (interim relief). The WAA imposes its own time limits. For example, if notice of intention to arbitrate has been served as provided in RCW 7.04.060, the responding party has 20 days to serve a notice of motion to stay arbitration in order to contest the existence or validity of the arbitration agreement. See RCW 7.04.040(4). After an arbitration award has been made, the parties have three months to serve a notice of motion to vacate, modify or correct the award, see RCW 7.04.180, and one year to apply to the court for an order confirming the award, see RCW 7.04.150. These time limits are akin to statutes of limitations. See MBNA America Bank, N.A. v. Miles, 140 Wn.App. 511, 513-14, 164 P.3d 514 (2007) (stating “[t]he three-month period established by former RCW 7.04.180 is considered a statute of limitations”), *review denied*, 163 Wn.2d 1040 (2008).

Notably, the WAA does not incorporate any statutes of limitation applicable in court actions, and it places no time limit on either the initiation of arbitration or a motion to compel arbitration. See RCW 7.04.060 (notice of intention to arbitrate); RCW 7.04.040 (motion to compel arbitration).

Arbitration under the WAA is based on written agreement. See RCW 7.04.010 (providing “[t]wo or more parties may agree in writing to submit to arbitration”). Within the limits of what is conscionable or otherwise enforceable under contract law, parties may agree upon governing time limits or incorporate a limitations period or periods into their arbitration agreement. See McKee v. AT&T Corp., 164 Wn.2d 372, 399, 191 P.3d 845 (2008) (stating “[g]enerally, parties can shorten the applicable statute of limitations by contract unless a shorter time frame is unreasonable or prohibited by statute or public policy.”).

In the absence of agreed-upon time limits, the only statute of limitations that this Court has intimated may apply to a WAA arbitration is the six-year statute applicable to written contracts, RCW 4.16.040(1). Cf. Safeco Ins. Co. v. Barcom, 112 Wn.2d 575, 579-84, 773 P.2d 56 (1989) (applying six-year written contract statute of limitations to demands for arbitration under uninsured motorist insurance arbitration provisions). This statute of limitations relates only to the threshold issue of enforcing the written agreement to arbitrate. It does not relate to the underlying controversy that is the subject of the arbitration. The limitations period only begins to run from the date that a party breaches the agreement to arbitrate, and the non-breaching party has six years thereafter in which to seek to compel arbitration. See id., 112 Wn.2d at 583-84.

While the written contract statute of limitations may be relevant in determining whether a party has timely invoked arbitration under RCW 7.04.040 and .060, statutes of limitations are otherwise inapplicable to the controversies that the parties have agreed to resolve in this alternate forum, as explained below:

B. Statutes Of Limitation Are Inapplicable To Arbitration Absent Agreement Of The Parties.

The arbitration itself is not an action in court, and statutes of limitation which apply to such actions are therefore inapplicable to controversies submitted to arbitration. On three occasions, this Court has held that an arbitration under Ch. 7.04 RCW is not an action. See Thorgaard, 71 Wn.2d at 131-33 (holding that arbitration is not an “action” for purposes of a pre-suit notice of claim statute, former RCW 36.45.030); Auburn, 114 Wn.2d at 450 (holding that arbitration is not an “action” for purposes of a statute of limitations, RCW 4.16.130); Davidson v. Hensen, 135 Wn.2d 112, 126-27, 954 P.2d 1327 (1998) (holding that arbitration is not an “action” for purposes of the contractor registration statute, RCW 18.27.080; relying on Thorgaard).

The only arguably contrary decision is Fire Fighters v. Everett, 146 Wn.2d at 37-41 (holding that a labor arbitration is an “action” for purposes of the wage-claim fee-shifting statute, RCW 49.48.030; distinguishing

(Thorgaard). Morgan Stanley relies on Fire Fighters in arguing that the arbitrators properly dismissed Broom's claims based on statutes of limitation. See Morgan Stanley Supp. Br. at 15-18.

Fire Fighters is distinguishable from Thorgaard, Auburn, Davidson, and this case, principally because it involves a labor arbitration rather than an arbitration subject to Ch. 7.04 RCW. See Fire Fighters, 146 Wn.2d at

32. The WAA specifically excludes labor arbitrations: “[t]he provisions of this chapter shall not apply to any arbitration agreement between employers and employees or between employers and associations of employees[.]” RCW 7.04.010. This a key basis on which Fire Fighters distinguished Thorgaard. See Fire Fighters at 38 (stating Thorgaard was based on “the differences between bringing an action and submitting a case to arbitration as well as the specific purposes of both RCW 36.45.010 and chapter 7.04 RCW”); id. at 39 (stating Thorgaard “was construing the language [of] RCW 36.45.010 and RCW 7.04.030”); id. at 40 (agreeing with argument that “it is improper to import the definition of ‘action’ from Thorgaard because Thorgaard addressed completely different statutory

schemes”): In distinguishing Thorgaard in this way, the Court did not undermine its reasoning or precedential value.⁵ Under Thorgaard, a pre-suit notice of claim statute, related to the claimant’s ability to bring an action in court, was held inapplicable to arbitration on this basis. See 71 Wn.2d at 129-30. The Court quoted RCW 36.45.030 to the effect that no action shall be maintained on any claim for damages until it has been presented to the board of county commissioners, and described this requirement as “a condition precedent to a right of action against the county.” See id. at 130. As used in this statute, “[a]n action is a prosecution in a court,” and “[i]t is clear that the legislature had a lawsuit in mind.” See id. “[T]his has nothing to do with a statutory arbitration proceeding.” See id.

Like a pre-suit notice of claim, a statute of limitations also relates to the ability to pursue an action in court, and is therefore inapplicable to controversies submitted to arbitration. In Thorgaard, the Court relied on a statute of limitations case in reaching its result. See 71 Wn.2d at 131 & n.4 (citing Son Shipping Co. v. De Fosse & Tanghe, 199 F.2d 687, 689 (2d Cir. 1952)). After Thorgaard, the Court confirmed that a statute of limitations does not apply to arbitration. See Auburn, 114 Wn.2d at 450.

⁵ As Broom points out, Fire Fighters is also distinguishable because it involves a remedial statute subject to a liberal construction rather than a statute of limitations defense. See Broom Supp. Br. at 8-10.

There is no reason why the Court should reach a different result in this case.

C. As Construed By This Court, Former RCW 7.04.160(4) Permits Judicial Review Of Arbitration Awards For Errors Of Law Appearing On The Face Of The Award.

For the reasons stated in § B, supra, dismissal of an arbitrable controversy on statute of limitations grounds is legal error. This error appears on the face of the arbitration award. See Morgan Stanley Pet. For Rev. at 4-5. The remaining question is whether judicial review is available for legal error appearing on the face of the award.

Former RCW 7.04.160(4) provides for vacatur “[w]here the arbitrators exceeded their powers.” Under this Court’s precedent, this language encompasses errors of law appearing on the face of the arbitration award. See Boyd v. Davis, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995). In Boyd, the five-Justice majority opinion held:

the face of the arbitral award alone does not exhibit an erroneous rule of law or a mistaken application of law. Therefore, no support exists for Petitioner’s position that the arbitrator exceeded his power within the meaning of RCW 7.04.160(4) when he rendered the award.

Id.; see also Fisher v. Allstate Ins. Co., 136 Wn.2d 240, 252, 961 P.2d 350 (1998) (citing Boyd); Davidson, 135 Wn.2d at 118 (same); Banchero, 63 Wn.2d at 248-50 (quoting language of RCW 7.04.160 and reviewing for legal error appearing on the face of the award); Federated Servs. Ins. Co.

v. Estate of Norberg, 101 Wn.App. 119, 123, 4 P.3d 844 (2000) (stating

“[o]ne of the statutory grounds for vacating an award exists when the

arbitrators have ‘exceeded their powers,’ as demonstrated by an error of

law on the face of the award”); citing RCW 7.04.160(4), *review denied*,

142 Wn.2d 1025 (2001).

The rationale for permitting judicial review of errors of law

appearing on the face of the arbitration award was explained by this Court

in an early case involving common law arbitration, which was otherwise

governed by Idaho law. See Carey v. Herrick, 146 Wash. 283, 292-93, 263

P. 190 (1928). The Court allowed judicial review for errors of law on the

face of the award, as an exception to the rule that arbitrators are

customarily the final judges of both the law and the facts:

If the arbitrator recite in his award that in determining the result he followed a certain method or a certain rule of law, it will be presumed that it was so set out that if there is error it may be corrected. For it becomes apparent that if there is a mistake in applying the law or the facts under the method used and set out, the award is not what the arbitrator intended to make.

Id., 146 Wash. at 292.

While this rationale is related to common law arbitration, it may

explain why limited review of errors of law on the face of the award

continues to be allowed under RCW 7.04.160(4). See Estate of Norberg,

101 Wn.App. at 124-25. Arbitrators may want to facilitate judicial review

of their award, especially in cases involving novel legal issues and a dearth of authority. See id. Otherwise, it is clear that arbitrators have the ability to insulate their award from such scrutiny by declining to specify the legal basis for their decision on the face of the award. See id. at 124 (describing arbitrators' ability to "make their award more or less susceptible to judicial review"). Here, an outcome-determinative legal issue is evident on the face of the arbitration award, and it is understandable why the arbitrators may have wanted to expose this determination to judicial review.

Regardless of the rationale for judicial review of legal errors on the face of an arbitration award, Morgan Stanley urges that the standard is unjustified under the language of RCW 7.04.160(4), and that this Court has recognized as much in recent opinions. See Morgan Stanley Supp. Br. at 7-14. This argument is not based on any holding by this Court. Instead, Morgan Stanley relies on the four-Justice concurring opinion in Boyd, which unsuccessfully urged disavowal of what it described as the "error of law/face of the award' doctrine" because it originated under an arbitration statute that predated the WAA. See 127 Wn.2d at 266 (Utter, J., concurring). The Boyd majority disagreed. See id. at 263.

Morgan Stanley also notes that in Malted Mousse, 150 Wn.2d at 526-27, the Court described Boyd as rejecting review of errors of law

appearing on the face of an arbitration award. However, this passage in Malted Mousse cites the Boyd concurrence (at 267-68), rather than the majority opinion. As recognized by the Court of Appeals below, the statement in Malted Mousse is both dicta and an incorrect characterization of the holding in Boyd. See Broom, 2008 WL 4053440 at *3. Following its decision in Boyd, the Court has continued to uphold limited judicial review for errors of law appearing on the face of an arbitration award. See Broom at *3; see also Davidson, 135 Wn.2d at 118; Fisher, 136 Wn.2d at 252. Under governing rules of statutory construction, the Court's interpretation of the language of RCW 7.04.160(4) to encompass this standard of review is part of this provision as if it were originally enacted by the Legislature. See Johnson v. Morris, 87 Wn.2d 922, 927, 557 P.2d 1299 (1976) (stating "[i]t is a fundamental rule of statutory construction that once a statute has been construed by the highest court of the state, that construction operates as if it were originally written into it").⁶ The Legislature is presumed to have been aware of this construction and did not amend RCW 7.04.160(4) before its repeal. See Federal Way v. Koenig, 167 Wn.2d 341, 348, 217 P.3d 1172 (2009)

⁶ Whether the same standard of review should also obtain under a similar provision of the RUA, see RCW 7.04A.230(1)(d), is not before the Court in this case. The RUA has a unique rule of construction codified in the act, see RCW 7.04A.901, which is worthy of full briefing in a proper case.

(stating “[t]his court presumes that the legislature is aware of judicial interpretations of its enactments and takes its failure to amend a statute following a judicial decision interpreting that statute to indicate legislative acquiescence”)

No other grounds for overruling the Court’s construction of RCW 7.04.160(4) have been advanced in this case. See In re Stranger

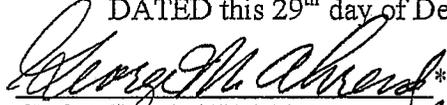
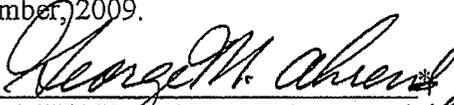
Creek & Tributaries in Stevens County, 77 Wn.2d 649, 653, 466 P.2d 508 (1970) (articulating incorrect and harmful test for overruling precedent).

The construction of the statute should not be considered either incorrect or harmful because arbitrators may be deemed to exceed their powers wherever the face of an arbitration award reveals a palpable misunderstanding of a legal issue that the arbitrators considered outcome determinative. Any other result would be inimical to the arbitrators’ expressed intent to follow the law in resolving the dispute.

VI. CONCLUSION

The Court should adopt the analysis advanced in this brief and resolve this appeal accordingly.

DATED this 29th day of December, 2009.


GEORGE M. AHREND

for BRYAN P. HARNETIAUX, with authority

On behalf of WSAJ Foundation

*Brief transmitted for filing by email; signed original retained by counsel.

APPENDIX

RCW 7.04.010. Arbitration authorized

Two or more parties may agree in writing to submit to arbitration, in conformity with the provisions of this chapter, any controversy which may be the subject of an action existing between them at the time of the agreement to submit, or they may include in a written agreement a provision to settle by arbitration any controversy thereafter arising between them out of or in relation to such agreement. Such agreement shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

The provisions of this chapter shall not apply to any arbitration agreement between employers and employees or between employers and associations of employees, and as to any such agreement the parties thereto may provide for any method and procedure for the settlement of existing or future disputes and controversies, and such procedure shall be valid, enforceable and irrevocable save upon such grounds as exist in law or equity for the revocation of any agreement.

[1947 c 209 § 1; 1943 c 138 § 1; Rem. Supp. 1947 § 430-1.]

RCW 7.04.020. Applications in writing—How heard—Jurisdiction

Any application made under authority of this chapter shall be made in writing and heard in a summary way in the manner and upon the notice provided by law or rules of court for the making and hearing of motions or petitions, except as otherwise herein expressly provided.

Jurisdiction under this chapter is specifically conferred on the district and superior courts of the state, subject to jurisdictional limitations.

[1982 c 122 § 1; 1943 c 138 § 2; Rem. Supp. 1943 § 430-2.]

RCW 7.04.030. Stay of action pending arbitration

If any action for legal or equitable relief or other proceedings be brought by any party to a written agreement to arbitrate, the court in which such action or proceeding is pending, upon being satisfied that any issue

involved in such action or proceeding is referable to arbitration under such agreement, shall, on motion of any party to the arbitration agreement, stay the action or proceeding until an arbitration has been had in accordance with the agreement.

[1943 c 138 § 3; Rem. Supp. 1943 § 430-3.]

**RCW 7.04.040. Motion to compel arbitration—Notice and hearing—
Motion for stay**

(1) A party to a written agreement for arbitration claiming the neglect or refusal of another to proceed with an arbitration thereunder may make application to the court for an order directing the parties to proceed with the arbitration in accordance with their agreement. Eight days notice in writing of such application shall be served upon the party alleged to be in default. Service thereof shall be made in the manner provided by law for service of a summons in a civil action in the court specified in RCW 7.04.020. If the court is satisfied after hearing the parties that no substantial issue exists as to the existence or validity of the agreement to arbitrate or the failure to comply therewith, the court shall make an order directing the parties to proceed to arbitrate in accordance with the terms of the agreement.

(2) If the court shall find that a substantial issue is raised as to the existence or validity of the arbitration agreement or the failure to comply therewith, the court shall proceed immediately to the trial of such issue. If upon such trial the court finds that no written agreement providing for arbitration was made or that there is no default in proceeding thereunder, the motion to compel arbitration shall be denied.

(3) Either party shall have the right to demand the immediate trial by jury of any such issue concerning the validity or existence of the arbitration agreement or the failure to comply therewith. Such demand shall be made before the return day of the motion to compel arbitration under this section, or if no such motion was made, the demand shall be made in the application for a stay of the arbitration, as provided under subsection

(4)(a) hereunder.

(4) In order to raise an issue as to the existence or validity of the arbitration agreement or the failure to comply therewith, a party must set forth evidentiary facts raising such issue and must either (a) make a

motion for a stay of the arbitration. If a notice of intention to arbitrate has been served as provided in RCW 7.04.060, notice of the motion for the stay must be served within twenty days after service of said notice. Any issue regarding the validity or existence of the agreement or failure to comply therewith shall be tried in the same manner as provided in subsections (2) and (3) hereunder; or (b) by contesting a motion to compel arbitration as provided under subsection (1) of this section.

[1943 c 138 § 4; Rem. Supp. 1943 § 430-4.]

RCW 7.04.050. Appointment of arbitrators by court

Upon the application of any party to the arbitration agreement, and upon notice to the other parties thereto, the court shall appoint an arbitrator, or arbitrators, in any of the following cases:

- (1) When the arbitration agreement does not prescribe a method for the appointment of arbitrators.
- (2) When the arbitration agreement does prescribe a method for the appointment of arbitrators, and the arbitrators, or any of them, have not been appointed and the time within which they should have been appointed has expired.
- (3) When any arbitrator fails or is otherwise unable to act, and his successor has not been duly appointed.
- (4) In any of the foregoing cases where the arbitration agreement is silent as to the number of arbitrators, three arbitrators shall be appointed by the court.

Arbitrators appointed by the court shall have the same power as though their appointment had been made in accordance with the agreement to arbitrate.

[1943 c 138 § 5; Rem. Supp. 1943 § 430-5.]

RCW 7.04.060. Notice of intention to arbitrate—Contents

When the controversy arises from a written agreement containing a provision to settle by arbitration a controversy thereafter arising between

the parties out of or in relation to such agreement, the party demanding arbitration shall serve upon the other party, personally or by registered mail; a written notice of his intention to arbitrate. Such notice must state in substance that unless within twenty days after its service, the party served therewith shall serve a notice of motion to stay the arbitration, he shall thereafter be barred from putting in issue the existence or validity of the agreement or the failure to comply therewith.

[1943 c 138 § 6; Rem. Supp. 1943 § 430-6.]

RCW 7.04.070. Hearing by arbitrators

The arbitrators shall appoint a time and place for the hearing and notify the parties thereof, and may adjourn the hearing from time to time as may be necessary, and, on application of either party, and for good cause, may postpone the hearing to a time not extending beyond the date fixed for making the award.

All the arbitrators shall meet and act together during the hearing but a majority of them may determine any question and render a final award. The court shall have power to direct the arbitrators to proceed promptly with the hearing and determination of the controversy.

[1943 c 138 § 7; Rem. Supp. 1943 § 430-7.]

RCW 7.04.080. Failure of party to appear no bar to hearing and determination

If any party neglects to appear before the arbitrators after reasonable notice of the time and place of hearing, the arbitrators may nevertheless proceed to hear and determine the controversy upon the evidence which is produced before them.

[1943 c 138 § 8; Rem. Supp. 1943 § 430-8.]

RCW 7.04.090. Time of making award—~~Extension~~—~~Failure to make award when required~~

If the time within which the award shall be made is not fixed in the

arbitration agreement, the award shall be made within thirty days from the closing of the proceeding, unless the parties, in writing, extend the time in which that award may be made. If the arbitrator fails to make an award when required, the court, upon motion and hearing, shall order the arbitrator to enter an award within the time fixed by the court, and may impose sanctions or terms deemed reasonable by the court. Failure to make an award within the time required shall not divest the arbitrators of jurisdiction to make an award or to correct or modify an award as provided in RCW 7.04.175.

[1985 c 265 § 1; 1943 c 138 § 9; Rem. Supp. 1943 § 430-9.]

RCW 7.04.100. Representation by attorney

Any party shall have the right to be represented by an attorney at law in any arbitration proceeding or any hearing before the arbitrators.

[1943 c 138 § 10; Rem. Supp. 1943 § 430-10.]

RCW 7.04.110. Witnesses—Compelling attendance

The arbitrators, or a majority of them, may require any person to attend as a witness, and to bring with him any book, record, document or other evidence. The fees for such attendance shall be the same as the fees of witnesses in the superior court. Each arbitrator shall have the power to administer oaths.

Subpoenae shall issue and be signed by the arbitrators, or any one of them, and shall be directed to the person and shall be served in the same manner as subpoenae to testify before a court of record in this state. If any person so summoned to testify shall refuse or neglect to obey such subpoenae, upon petition authorized by the arbitrators or a majority of them, the court may compel the attendance of such person before the said arbitrator or arbitrators, or punish said person for contempt in the same manner now provided for the attendance of witnesses or the punishment of them in the courts of this state.

[1943 c 138 § 11; Rem. Supp. 1943 § 430-11.]

RCW 7.04.120. Depositions

Depositions may be taken with or without a commission in the same manner and upon the same grounds as provided by law for the taking of depositions in suits pending in the courts of record in this state.

[1943 c 138 § 12; Rem. Supp. 1943 § 430-12.]

7.04.130. Order to preserve property or secure satisfaction of award

At any time before final determination of the arbitration the court may upon application of a party to the agreement to arbitrate make such order or decree or take such proceeding as it may deem necessary for the preservation of the property or for securing satisfaction of the award.

[1943 c 138 § 13; Rem. Supp. 1943 § 430-13.]

RCW 7.04.140. Form of award—Copies to parties

The award shall be in writing and signed by the arbitrators or by a majority of them. The arbitrators shall promptly upon its rendition deliver a true copy of the award to each of the parties or their attorneys.

[1943 c 138 § 14; Rem. Supp. 1943 § 430-14.]

RCW 7.04.150. Confirmation of award by court

At any time within one year after the award is made, unless the parties shall extend the time in writing, any party to the arbitration may apply to the court for an order confirming the award, and the court shall grant such an order unless the award is beyond the jurisdiction of the court, or is vacated, modified, or corrected, as provided in RCW 7.04.160 and 7.04.170. Notice in writing of the motion must be served upon the adverse party, or his attorney, five days before the hearing thereof. The validity of an award, otherwise valid, shall not be affected by the fact that no motion is made to confirm it.

[1982 c 122 § 2; 1943 c 138 § 15; Rem. Supp. 1943 § 430-15.]

RCW 7.04.160. Vacation of award—Rehearing

In any of the following cases the court shall after notice and hearing make an order vacating the award, upon the application of any party to the arbitration:

(1) Where the award was procured by corruption, fraud or other undue means.

(2) Where there was evident partiality or corruption in the arbitrators or any of them.

(3) Where the arbitrators were guilty of misconduct, in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence, pertinent and material to the controversy; or of any other misbehavior, by which the rights of any party have been prejudiced.

(4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a final and definite award upon the subject matter submitted was not made.

(5) If there was no valid submission or arbitration agreement and the proceeding was instituted without either serving a notice of intention to arbitrate, as provided in RCW 7.04.060, or without serving a motion to compel arbitration, as provided in RCW 7.04.040(1).

An award shall not be vacated upon any of the grounds set forth under subdivisions (1) to (4), inclusive, unless the court is satisfied that substantial rights of the parties were prejudiced thereby.

Where an award is vacated, the court may, in its discretion, direct a rehearing either before the same arbitrators or before new arbitrators to be chosen in the manner provided in the agreement for the selection of the original arbitrators and any provision limiting the time in which the arbitrators may make a decision shall be deemed applicable to the new arbitration and to commence from the date of the court's order.

[1943 c 138 § 16; Rem. Supp. 1943 § 430-16.]

RCW 7.04.170. Modification or correction of award by court

In any of the following cases, the court shall, after notice and hearing, make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(2) Where the arbitrators have awarded upon a matter not submitted to them.

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy. The order must modify and correct the award, as to effect the intent thereof.

[1943 c 138 § 17; Rem. Supp. 1943 § 430-17.]

RCW 7.04.175. Modification or correction of award by arbitrators

On application of a party or, if an application to the court is pending under RCW 7.04.150, 7.04.160, or 7.04.170, on submission to the arbitrators by the court under such conditions as the court may order, the arbitrators may modify or correct the award upon the grounds stated in RCW 7.04.170 (1) and (3). The application shall be made, in writing, within ten days after delivery of the award to the applicant. Written notice thereof shall be given forthwith to the opposing party, stating that objections, if any, must be served within ten days from the notice. The arbitrators shall rule on the application within twenty days after such application is made. Any award so modified or corrected is subject to the provisions of RCW 7.04.150, 7.04.160, and 7.04.170 and is to be considered the award in the case for purposes of this chapter, said award being effective on the date the corrections or modifications are made. If corrections or modifications are denied, then the award shall be effective as of the date the award was originally made.

[1985 c 265 § 2.]

RCW 7.04.180. Notice of motion to vacate, modify, or correct award—Stay

Notice of a motion to vacate, modify or correct an award shall be served upon the adverse party, or his attorney, within three months after a copy of the award is delivered to the party or his attorney. Such motion shall be made in the manner prescribed by law for the service of notice of a motion in an action. For the purposes of the motion any judge who might make an order to stay the proceedings, in an action brought in the same court, may make an order to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award.

[1943 c 138 § 18; Rem. Supp. 1943 § 430-18.]

RCW 7.04.190. Judgment—Costs

Upon the granting of an order, confirming, modifying, correcting or vacating an award, judgment or decree shall be entered in conformity therewith. Costs of the application and of the proceedings subsequent thereto, not exceeding twenty-five dollars and disbursements, may be awarded by the court in its discretion.

[1943 c 138 § 19; Rem. Supp. 1943 § 430-19.]

RCW 7.04.200. Judgment roll—Docketing

Immediately after entering judgment, the clerk must attach together and file the following papers, which constitute the judgment roll:

- (1) The agreement; the selection or appointment, if any, of an additional arbitrator, or umpire; and each written extension of the time, if any, within which to make the award.
- (2) The award.
- (3) Each notice, affidavit or other paper used upon an application to confirm, modify or correct the award, and a copy of each order of the court upon such an application.
- (4) A copy of the judgment.

The judgment may be docketed as if it was rendered in an action.

[1943 c 138 § 20; Rem. Supp. 1943 § 430-20.]

RCW 7.04.210. Effect of judgment

The judgment so entered has the same force and effect, in all respects as, and is subject to all the provisions of law relating to, a judgment in an action; and it may be enforced as if it had been rendered in an action in the court in which it is entered.

[1943 c 138 § 21; Rem. Supp. 1943 § 430-21.]

RCW 7.04.220. Appeal

An appeal may be taken from any final order made in a proceeding under this chapter, or from a judgment entered upon an award, as from an order or judgment in any civil action.

[1943 c 138 § 22; Rem. Supp. 1943 § 430-22.]