

65249-4

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No. 65249-4-I

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

Mary Cummings, James Dougherty and Paul Sauvage,

Respondents,

v.

Budget Tank Removal & Environmental Services, LLC,

Appellant.

BRIEF OF THE RESPONDENTS
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COURT OF APPEALS
DIVISION ONE
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I. INTRODUCTION

Jim Dougherty and Dr. Paul Sauvage planned to build an office building on a former gas station site in the Ballard neighborhood of Seattle. They had several prospective tenants, including Banner Bank as the anchor tenant and financing source for the project. They hired Budget Tank Removal & Environmental Services, LLC, to remove the underground fuel-storage tanks and, ultimately, to remediate (excavate and replace) petroleum-contaminated soil discovered on the site. They signed Budget's standard-form remediation contract, which obligated them to pay \$155 per ton of contaminated soil removed and trucked away for disposal. Soil was "contaminated" under the contract if it contained concentrations of contaminants greater than 30 parts per million, the cleanup standards specified in the Model Toxics Control Act (MTCA).

Budget construed its contract as authorizing it to rely exclusively upon a field screening tool called a photoionization device (PID) to determine whether soils were sufficiently contaminated to require removal. But the contract contained confusing and inconsistent provisions regarding whether Budget would also use companion "performance sampling" (laboratory analysis) to confirm the PID's

readings. Unbeknownst to Dougherty and Sauvage, the PID provides readings too crude and inaccurate to be relied upon to determine whether soil is contaminated under the MTCA standard. Budget's exclusive reliance on the PID placed Dougherty, Sauvage and other consumers at grave risk of overcharges due to needless removal of clean soils. Indeed, after estimating there were only 139 tons of contaminated soil on the site for a total estimated cleanup cost of \$21,545 plus tax, Budget ended up exceeding that estimate by more than 25 times, removing 3,525 tons of soil and invoicing Dougherty and Sauvage for \$638,997.88. Furthermore, Budget's unexcused delays caused Dougherty and Sauvage to lose their prospective tenants and financing.

Budget's contract provided that any dispute would be resolved by binding arbitration. After Dougherty and Sauvage paid \$100,000 on the invoice, Budget commenced arbitration to recover the balance. Dougherty and Sauvage counterclaimed for their losses. The arbitrator agreed that Budget had misled Dougherty and Sauvage into believing it would test soils reliably and remove only what was necessary. The arbitrator found that 28-41% of the soil removed by Budget was not contaminated. He found a CPA violation and a breach of contract and

awarded Dougherty and Sauvage their lost profits, increased costs, attorney's fees and costs.

Budget now seeks relief from the outcome of this binding arbitration. The appeal is a transparent attempt to relitigate the merits, contrary to the Uniform Arbitration Act and the public policy underpinnings of that statute. The Court should affirm the judgment in all respects and award Dougherty and Sauvage their attorney's fees and costs on appeal.

II. STATEMENT OF THE CASE

A. Dougherty and Sauvage Contracted with Budget for Cleanup of Contaminated Soil, Executing Budget's Standard -Form Agreement.

Budget was in the business of removing underground fuel storage tanks, remediating petroleum contaminated soil, and providing associated environmental consulting services. Mr. Dougherty and Dr. Sauvage are individuals who were developing a commercial project in the Ballard neighborhood of Seattle. CP 181. Budget entered into an agreement with Dougherty and Sauvage on February 22, 2008. CP 172. Budget's standard -form contract obligated the customer to pay only for removal and disposal of "contaminated" soil, plus amounts of "uncontaminated" soil "incidentally...removed." CP 184, 189. The

contract was specific regarding the meaning of “contaminated,” specifying the Model Toxic Control Act - Method A cleanup standard.” CP 182-83. The contract stated that Budget would only remove and dispose of “contaminated” soil:

[Budget will stockpile] clean overburden soils...on-site via dump trucks. The on-site trackhoe will then excavate contaminated soil and place it into a dump truck. The contaminated soil will be taken to a certified waste facility for disposal. ... Budget will use and implement the Model Toxics Control Act – Method A standard cleanup level for all contaminants identified at the Project Site.

CP 182.

The contract contained “confusing and inconsistent provisions” as to whether Budget was to use laboratory testing, known as “performance sampling,” during the excavation process to determine whether soils met the specified contamination threshold. CP 194. The contract provided that Budget would use the PID for field screening purposes until contamination levels dropped below 30 ppm unless the customer requested performance sampling in writing, for an additional charge:

Budget will use the MiniRae 2000 photoionization detector for field screening purposes to determine what soil is contaminated at levels exceeding 30 ppm of total petroleum hydrocarbons. Budget will take performance soil samples when Budget’s field screening instruments

indicate to Budget that the petroleum hydrocarbons in the soil have dropped below the 30 ppm cleanup level or when Customer requests, in writing and at the Customer's expense, that Budget take additional performance soil samples.

CP 182. But other provisions of the contract suggested that companion performance sampling would be used, including the following provisions identified and quoted by the arbitrator:

“Budget will conduct soil testing to determine the concentrations of actionable total petroleum hydrocarbons (TPH) *for all contaminated soil removed from the Project Site.*”

“Budget will use and implement the Model Toxics Control Act – Method A standard cleanup level *for all contaminants* identified at the Project Site. *Budget will analyze the contaminants utilizing* the NWTPH-Gx and BTEX by 8021B *laboratory analyses.*”

CP 189-191 (emphasis added).

B. Budget Excavated and Invoiced Dougherty and Sauvage for More than 25 Times What it Estimated, Much of Which was for Unnecessary Removal of Soil.

Budget construed its contract as permitting it to rely exclusively upon the PID to determine contamination levels during excavation unless a customer requested and paid for performance soil samples. CP 194. Budget made little or no use of performance sampling during remediation, but relied upon the PID. CP 194.

Mr. Dougherty communicated to Budget that the remediation work needed to be completed in a timely manner to accommodate his and Sauvage's prospective anchor tenant and financing source, Banner Bank. CP 202. Budget performed its remediation work on Dougherty and Sauvage's site on seven work days, but those days "unreasonably and inexplicably" spanned a period of two and one-half months. CP 201-02. Budget had provided an estimate that it would clean up 139 tons of soil at a cost of \$21,545. CP 184. Budget proceeded to remove 3,525 tons of soil and invoice Dougherty and Sauvage \$638,997.88. CP 184. Dougherty and Sauvage paid \$100,000 toward that invoice. CP 185.

More than one-third of the soil removed was not contaminated above the MTCA cleanup level specified in the contract. CP 196. Expert testimony established that Budget's testing method was unreliable. The PID is a wand device which gives only a crude reading on whether vapors are present. Although the device may be suitable to determine whether soils are entirely free of petroleum contamination, it is unreliable as a tool to measure whether contamination levels exceed the MTCA cleanup standard. CP 192.

C. Dougherty and Sauvage Suffered Substantial Monetary Losses From Budget's Over-Excavation and Delay.

The cleanup site was being developed by Dougherty and Sauvage as commercial property, for which they had secured financing and located an anchor tenant (Banner Bank). CP 201. Dougherty and Sauvage had informed Budget principal John Veeder of the need to conclude the project on an expedited basis and had obtained his assurances. CP 202. Because of the over-excavation and lengthy delay in Budget's completion of the soil removal and delivery of the promised report, Dougherty and Sauvage lost their financing, their anchor tenant and other entities who had signed leases or letters of intent to lease part of the finished project. CP 202. They incurred lost rents, increased financing expense, and additional expenses to obtain adequate environmental reports and to correct deficiencies in Budget's work at the site. CP 203-206.

D. Budget Made an Arbitration Claim for Payment of its Full Invoice, and Dougherty and Sauvage Counterclaimed for Their Losses.

The parties' contract included binding arbitration as the sole method of dispute resolution. CP 172. After Dougherty and Sauvage paid \$100,000 of Budget's invoice, Budget initiated arbitration to recover the balance. Dougherty and Sauvage counterclaimed for breach

of contract and violation of the CPA, among other things. CP 172. Dougherty and Sauvage jointly moved with another customer, Mary Cummings, to have their pending arbitrations consolidated. Ms. Cummings' agreement with Budget contained the same language. She had suffered the same type of over-excavation and over-billing in her transaction with Budget, having received an invoice that exceeded Budget's estimate by eight times. CP 3, 185-186.

In support of the joint motion, the moving parties gave a sampling of the evidence they intended to submit to the arbitrator regarding Budget's practices, indicating that at least nine other customers had received invoices far exceeding Budget's estimates. CP 3, 11. The superior court granted consolidation. CP 119-20.

E. The Arbitrator Issued an Award Supported by a Detailed Statement of His Reasoning.

Arbitrator Thomas J. Brewer ruled that Budget committed unfair and deceptive acts and practices in violation of the CPA in its dealings with Dougherty and Sauvage, including (1) in its contractual undertakings to its customers and (2) in its actual practices relating to over-excavation of soil not contaminated above the MTCA cleanup standard. CP 191. The arbitrator ruled that Budget's use of its standard-form contract "with any customers not technically trained or

qualified to understand the substantial limitations of soil screening carried out by use of the PID” constituted an unfair or deceptive act and practice in trade and commerce that had the capacity to deceive a substantial portion of the public. CP 191. The arbitrator found that more than 20 customers besides Dougherty, Sauvage, and Cummings had similar experiences with Budget. CP 185.

The arbitrator found that the various conflicting contract provisions regarding the soil testing methodologies were unfair and deceptive. The contract created a reasonable expectation that the customer was obligated to pay only for removal of “contaminated” soils plus small amounts of other soils “incidentally...removed,” yet Budget did not disclose that it construed the contract as obligating the consumer to pay for all soils removed, even large amounts of uncontaminated soil, placing the customer at “grave risk of overcharges for hauling away soils falling below the MTCA standard.” CP 193-194.

The arbitrator found that the contract was unfair and deceptive insofar as it could be construed, as Budget did, to allow Budget to rely exclusively on the PID during remediation and to use performance sampling only upon the customer’s written request. CP 194. This is

because, while the PID could give a “relatively crude reading on whether vapors are present indicating petroleum contamination, and thus may be a suitable tool to use for assessing whether a site is entirely free of petroleum contamination,” the PID “is an unreliable tool to measure whether particular contamination levels are above or below the MTCA cleanup standard.” CP192. The arbitrator found that most consumers would not know this, and that Dougherty and Sauvage “had no prior technical or scientific training familiarizing them with the capabilities, or limitations, of the PID.” CP 185, 193 n.6.

Addressing the parties’ breach of contract claims, the arbitrator found that Budget breached its contract for the same reasons the CPA was violated: Budget’s billing for removal of excessive amounts of uncontaminated soil. The arbitrator also found that Budget had delayed in its performance without a plausible excuse and that Dougherty and Sauvage had suffered losses as a result of that delay. CP 200-202.

F. The Superior Court Confirmed the Relief Awarded by the Arbitrator.

At the conclusion of the hearing, the arbitrator found that Budget had violated the CPA and breached its contract with Dougherty and Sauvage and awarded damages totaling \$1,338,301.07. CP 205-206. The arbitrator found that while Budget had over-billed Dougherty

and Sauvage significantly, it was still owed \$296,000.00 on the unpaid invoice and he offset that amount against Dougherty and Sauvage's damages, resulting in a net damage award to Dougherty and Sauvage of \$1,042,301.00. To that amount the arbitrator added attorney's fees and costs incurred by Dougherty and Sauvage, totaling \$529,970.06, under the authority of both the CPA and the parties' agreement. CP 208-210.

The arbitrator found that many of the losses Dougherty and Sauvage suffered were liquidated and he accordingly awarded pre-judgment interest on those amounts, running from the dates the losses were incurred by Dougherty and Sauvage. CP 205-206.

Dougherty and Sauvage moved in superior court to confirm the arbitration award, while Budget opposed confirmation and moved to vacate the award. CP 213-28. The superior court confirmed the award and entered judgment for Dougherty and Sauvage's in the amount of \$1,598,939.30. CP 437-39, 446-48. Because the arbitrator had failed to adjust the pre-judgment interest to reflect the passage of time between its interim and final arbitration award, the court subsequently granted Dougherty and Sauvage's motion to amend the judgment to add those amounts, resulting in the judgment from which Budget takes its appeal. CP 563-69.

III. ARGUMENT

A. Standard of Review

This court's review of the arbitrator's award "is limited to that of the court which confirmed, vacated, modified or corrected that award." *Pegasus Constr. Corp. v. Turner Constr. Co.*, 84 Wn. App. 744, 747, 929 P.2d 1200 (1997), citing *Barnett v. Hicks*, 119 Wn.2d 151, 157, 829 P.2d 1087 (1992). The court's review is confined to the question of whether any of the statutory grounds for vacation exist, and the burden of showing that such grounds exist is on the party seeking to vacate the award. *Pegasus Constr.*, 84 Wn. App. at 747-48.

B. Public Policy Favors Arbitration.

Washington law favors the use of alternative means of resolving disputes, such as arbitration. *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1988). The Washington Supreme Court has recognized that "[e]ncouraging parties voluntarily to submit their disputes to arbitration is an increasingly important objective in our ever more litigious society." *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." *Id.* Washington courts have thus given substantial finality to arbitrators' decisions and will not review the merits of an arbitration award. *Davidson*, 135 Wn.2d at 118. As a

remedial statute,¹ Washington's Uniform Arbitration Act is to be construed liberally to fulfill its beneficial purposes of facilitating expeditious and final resolution of disputes. *See Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002) (holding that a remedial statute should be construed liberally to effectuate its purpose).

C. The Consolidation Order Is Not Appealable. Even if the Order Were Appealable, the Superior Court Did Not Abuse Its Discretion, and Any Error Was Harmless Because Budget Concedes There Was No Prejudice.

The UAA vests the superior court with authority, upon motion, to consolidate separate arbitration proceedings. RCW 7.04A.100. The superior court's decision on consolidation is not appealable. *See* RCW 7.04A.280(1). The UAA lists the specific court orders from which an appeal may be taken, in addition to a final judgment. *Id.* An order consolidating separate proceedings is not one of them. *Id.* Therefore, this Court lacks authority to consider Budget's appeal from the consolidation order.

Even if the consolidation order were appealable, there was no reversible error. The UAA provides that a court "may" consolidate

¹ A remedial statute is one that relates to practice, procedures, and remedies. *Am. Discount Corp. v. Shepherd*, 160 Wn.2d 93, 99, 156 P.3d 858 (2007).

separate arbitration proceedings. RCW 7.04A.280(1). Use of the term “may” in a statute to describe the court’s authority generally confers discretion. *Marriage of Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010). Interpreting the UAA as conferring discretion upon the superior court is consistent with the official comments to the Uniform Act, which state that this section “gives courts discretion to consolidate separate arbitration proceedings.” Uniform Arb. Act, § 10, cmt. 3, 7 U.L.A. 39 (2000). It is also consistent with the “substantial discretion” afforded trial courts in deciding whether to consolidate civil actions under CR 42(a). *W.R. Grace & Co. v. State*, 137 Wn.2d 580, 590, 973 P.2d 1011 (1999) (affirming consolidation under CR 42(a)). A decision on consolidation is reversed “only upon a showing of abuse [of discretion] and that the moving party was prejudiced.” *Id.*, quoting *Leader Nat’l Ins. Co. v. Torres*, 51 Wn. App. 136, 142, 751 P.2d 1252 (1988) (affirming denial of consolidation under CR 42(a) because no prejudice was shown), *aff’d*, 113 Wn.2d 366, 779 P.2d 722 (1989); *see also State v. O’Neal*, 126 Wn. App. 395, 418, 109 P.3d 429 (2005) (affirming convictions of separate defendants tried in a consolidated case because no prejudice was asserted). Accordingly, this Court’s

review is limited to whether the superior court abused its discretion in consolidating the proceedings.²

Budget concedes it was not prejudiced by consolidation. In arguing that “[t]wo of the [four] necessary elements for consolidation were not satisfied,” *Opening Brief* at 17, Budget concedes that the remaining elements were satisfied, and thus concedes that the “[p]rejudice resulting from a failure to consolidate [was] *not* outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation [*i.e.*, Budget].” RCW 7.04A.100(1)(d) (emphasis added). Although Budget mentions in its Statement of Facts that it argued to the superior court that it would be prejudiced by consolidation, *Opening Brief* at 10,³ Budget does not

² A deferential standard of review is particularly appropriate when the superior court’s decision involves the kind of weighing of parties’ interests required by RCW 7.04A.100(1)(d)—that is, whether the “prejudice resulting from a failure to consolidate is not outweighed by the risk of undue delay or prejudice to the rights of or hardship to parties opposing consolidation.” *Cf. Detention of Post*, __ Wn.2d __, 241 P.3d 1234, 1242 (2010) (holding, in the context of ER 403, that “issues of unfair prejudice and confusion of the issues are best addressed in the first instance by the trial court, subject to review for abuse of discretion”).

³ In the superior court, Budget asserted consolidation would result in confusion, delay payment of amounts owed to Budget, and overwhelm its attorney. But these assertions were not supported by facts and, moreover, did not materialize. First, the arbitrator’s decision indicates no confusion. Second, the arbitrator found Budget was not owed anything. Even if Budget was owed money, the Dougherty arbitration was delayed only three months, and delay in payment could have been addressed through an award of interest. Finally, the ability and resources of Budget’s chosen counsel was not a proper consideration in assessing potential prejudice.

argue that any actual prejudice resulted.⁴ Absent prejudice, any error in consolidating the proceedings was harmless. *See Torres*, 51 Wn. App. at 142.

In any event, there was no error because the superior court did not abuse its discretion in finding that all elements of RCW 7.04A.100(1) were satisfied, including the two elements Budget disputes.

First, the superior court did not abuse its discretion in concluding that Budget's transactions with Dougherty and Cummings were "related transactions" under RCW 7.04A.100(1)(b). Budget calls this conclusion "legally wrong under the UAA." *Opening Brief* at 20. But, as authority, Budget cites a dictionary definition of the transitive verb form of "related," *Opening Brief* at 19 n.3, when that term is used as an adjective, not a verb, in subsection 100(1)(b). In its adjective

Indeed, none of the potential prejudice asserted by Budget was of the type contemplated under RCW 7.04A.100(1)(d). The official comments to the Uniform Act state that the rights of parties that might be prejudiced by consolidation "would normally deemed to include arbitrator selection procedures, standards for the admission of evidence and rendition of the award, and other express terms of the arbitration agreement." Uniform Arb. Act, § 10, cmt. 3, 7 U.L.A. 31 (2000). Budget has never asserted any potential prejudice relating to the terms of the arbitration agreement.

⁴ Any attempt by Budget to argue prejudice in its Reply Brief would come too late. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (argument and authority first raised in reply brief is too late to warrant consideration); RAP 10.3(c).

form, “related” means “having relationship” or “having similar properties.” WEBSTER’S 3D NEW INT’L DICTIONARY 1916 (1981). Thus, consistent with liberal construction of the UAA, the superior court properly considered that the two transactions had common facts, including that in each transaction Budget (1) used virtually identical contracts; (2) relied almost exclusively on the PID during excavation, rather than performance sampling; (3) was alleged to have removed large quantities of soil not contaminated under MTCA standards; and (4) invoiced the customers for amounts much higher than the estimates provided before starting work.

Second, these common facts and others gave rise to identical legal issues and, thus, a possibility of conflicting decisions in separate proceedings. RCW 7.04A.100(1)(c). This is demonstrated by the fact that much of the arbitrator’s analysis in his awards in the Dougherty and Cummings cases is similar or identical. *Compare* CP 145-64 with CP 180-99. The arbitrator concluded that Budget had breached its contracts with Dougherty and Cummings and had violated the CPA in precisely the same manner in each transaction. *See id.* Had the cases not been consolidated, two arbitrators could have rendered inconsistent decisions regarding the meaning of Budget’s contract or whether

Budget's use of its contract violated the CPA. Budget cites no authority for its assertion that the UAA required a possibility that all parties (not just Budget) might be subjected to conflicting decisions before the court could exercise its discretion to consolidate. The UAA does not expressly contain such a requirement and, liberally construing the statute, this Court should not hold that it does.

In addition, the superior court properly considered the efficiencies that would be gained because many of the same witnesses would be called and much of the same testimony and evidence introduced in each proceeding. *See* CP 115-17, 119. The arbitrator's awards show this was borne out in at least two ways.

First, the awards to Dougherty and Cummings indicate there was expert testimony pertinent to the arbitrator's conclusion in both cases that Budget removed significant amounts of uncontaminated soil. *See* CP 157-59 (Cummings); 192-95 (Dougherty).

Second, to prevail on their CPA claims, Dougherty and Cummings were required to show that "additional plaintiffs have been or will be injured in exactly the same fashion." *Michael v. Mosquera-Lacy*, 165 Wn.2d 595, 604, 200 P.3d 695 (2009), quoting *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778,

790, 719 P.2d 531 (1986). Thus, the arbitrator accepted evidence, relevant to both cases, that “demonstrated a general pattern...in which more than twenty other Budget customers experienced final invoices grossly exceeding Budget’s original estimated invoice amounts[.]” CP 185. On this point, the testimony of Dougherty and Cummings themselves was pertinent in both cases. The arbitrator stated in the Dougherty award: “For example, Budget’s cleanup cost estimate to Mary Cummings, the Claimant in the other arbitration consolidated for hearing with the present case under the Consolidation Order, was \$43,344, but its actual invoices on that job totaled \$364,523.90—a multiple of approximately eight.”⁵ CP 185.

In sum, the consolidation order is not appealable, but even if it were, there was no abuse of discretion, and any error was harmless because Budget has claimed no prejudice from consolidation.

D. The Superior Court Properly Limited Its Review to the Face of the Award.

Consistent with the policy of giving substantial finality to arbitrators’ decisions, judicial review of arbitration awards is strictly

⁵ Similarly, in the Cummings award, the arbitrator stated: “For example, Budget’s cleanup cost estimate to Dougherty and Sauvage, the Claimant in the other arbitration consolidated for hearing with the present case under the Consolidation Order, was \$21,545, but its actual invoices on that job totaled \$638,997.88—a multiple of approximately thirty.” CP 150.

limited to the grounds set forth in the UAA, chapter 7.04A RCW. *Davidson*, 135 Wn.2d at 118. The superior court's authority is "exceedingly limited," and, the court must confirm the award if none of the statutory bases exists to vacate, modify, or correct it. *Id.* at 118-19. One of the statutory grounds for vacating an award is that the arbitrator exceeded his powers. RCW 7.04A.230(1)(d). Under Washington law, an arbitrator exceeds his powers if he adopts an erroneous rule or applies the law incorrectly.⁶ *Broom v. Morgan Stanley DW, Inc.*, 169 Wn.2d 231, 239, 236 P.3d 182 (2010), citing *Boyd*, 127 Wn.2d at 262; see also *McGinnity v. AutoNation, Inc.*, 149 Wn. App. 277, 285, 202 P.3d 1009 (2009). The moving party bears the burden of proof, and the error must be obvious from the face of the award. *Davidson*, 135 Wn.2d at 118; *McGinnity*, 149 Wn. App. at 282.

⁶ Washington's approach is inconsistent with that of other states as discussed in the official comments to the Uniform Act, which note that "[s]tates have rarely addressed 'manifest disregard of the law'...as grounds for vacatur." Uniform Arb. Act, § 23 cmt. C-4, 7 U.L.A. 85 (2000). The comments state that the drafting committee's reasons for omitting manifest legal error as a basis for vacatur from the RUAA included "the dilemma in attempting to fashion unambiguous, 'bright line' tests." *Id.* at 86, cmt. C-5. The Act as adopted in Washington provides, "In applying and construing this uniform act, consideration must be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it." RCW 7.04A.901. Nevertheless, Washington courts have continued to review arbitration awards for manifest legal error on the face of the award. See *Broom*, 169 Wn.2d at 236 & n.2 (adhering to the rule that facial legal error indicates that the arbitrator exceeded his powers, which remains a ground for vacating an award under the revised statute).

The facial legal error standard is a very narrow ground for vacating an arbitral award. *Broom*, 169 Wn.2d at 239. In reviewing for legal error on the face of the award, courts do not look to the merits of the case nor do they reexamine evidence. *Id.*; *see also McGinnity*, 149 Wn. App. at 282 (“Appellate scrutiny does not include review of an arbitrator’s decision on the merits, which would defeat the purpose of arbitration.”). “A statement of reasons for the award is not part of the award.” *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 403, 766 P.2d 1146 (1989).

Washington courts have vacated or upheld on appeal the vacation of an award based on facial legal error in only four instances. *Broom*, 169 Wn.2d at 239 n.3, citing *Broom*; *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 32 P.3d 289 (2001); *Federated Services Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 4 P.3d 844 (2000); and *Lindon Commodities, Inc. v. Bambino Bean Co.*, 57 Wn. App. 813, 790 P.2d 228 (1990). Examples of facial legal error thus include where the arbitrator dismissed claims under a statute of limitations when none applied (*Broom*); where the arbitrator rendered an internally inconsistent award that indicated the burden of proof had been reversed (*Tolson*); where the arbitrator awarded damages for loss of prospective

inheritance, which are not recoverable by statute in a wrongful death survival action (*Federated*); and where the arbitrator imposed a requirement of consideration to modify a sales agreement, contrary to statute (*Lindon*).

In each case where the court vacated an award, it did not review the merits, the evidence, or the arbitrator's reasoning, but held that the face of the award demonstrated that the arbitrator had ruled contrary to a statute or established legal principle. *See Boyd*, 127 Wn.2d at 260 (distinguishing *Lindon*). The courts have refused to review issues that require consideration of the merits or the arbitrator's reasoning, such as whether the arbitrator interpreted a contract correctly. *See id.* at 263; *S&S Constr., Inc. v. ADC Properties, LLC*, 151 Wn. App. 247, 261, 211 P.3d 415 (2009) (refusing to "review contract language and make conclusions in opposition to those the arbitrator made").

Here, the superior court was correct in concluding it could not review the issues Budget raised without looking behind the face of the award. *See RP (3/16/2010) 25*. The court did not consider "only the last two pages of the 42-page award." *Opening Brief* at 25. Consistent with the case law, Judge Kallas stated, "[R]eview is limited to the face of the award." *RP (3/16/2010) 24*. She continued, "That means to me

it's the outcome, not the reasoning, not the merits.” *Id.* And she concluded, “In looking at the outcome here, the issues that are raised in the motion go beyond that. They ask this court to go beyond the face of it. I do not have the authority to do that[.]” *Id.* at 25. As further demonstrated in the remainder of this brief, the issues Budget raises on appeal—(1) whether the arbitrator correctly interpreted the contract, (2) whether Budget committed an unfair or deceptive act or practice under the CPA, (3) whether Dougherty and Sauvage proved their lost profits with reasonable certainty, and (4) whether Dougherty and Sauvage’s damages were liquidated for purposes of awarding prejudgment interest—all would have required the court to look behind the face of the award. Accordingly, this Court should reject Budget’s appeal and affirm the judgment.

E. The Arbitrator did not “Rewrite the Contract” but Interpreted and Construed Its Terms Consistent with Established Principles.

The arbitrator gave effect to the parties’ agreement, rather than re-writing it. The arbitrator found that the contract obligated Dougherty and Sauvage to pay only for removal of “contaminated” soils (*i.e.*, those exceeding the MTCA threshold), plus “incidental” amounts of clean soil. CP 191-94. Budget asks this Court to disregard the

arbitrator's interpretation and find that "[t]he contract identified the PID as the device that would be used to determine the level of contamination in soil" and that Dougherty and Sauvage were obligated to pay for every ton of soil removed in reliance upon the PID alone. *Opening Brief* at 31. But the arbitrator's interpretation of the contract's meaning does not fall within the "facial legal error" standard for an arbitrator exceeding his powers under RCW 7.04A.230(1)(d). *Boyd*, 127 Wn.2d at 260; *S&S Constr.*, 151 Wn. App. at 261.

When the parties agreed to submit their disputes to binding arbitration, they empowered the arbitrator to make final decisions regarding the meaning of the contract itself. Neither the arbitrator's interpretation of the contract nor his finding that Budget exceeded the scope of work by removing more than 1,000 tons of soil that was not "contaminated" is subject to review.

Even if the arbitrator's interpretation of the contract were reviewable, the arbitrator committed no legal error. Courts must read contracts as a whole and give effect to all provisions. *Berg v. Hudesman*, 115 Wn.2d 657, 669, 801 P.2d 222 (1990); *Richens v. Mick*, 69 Wn.2d 781, 420 P.2d 202 (1966). Ambiguities are construed against

the drafter. *Lynott v. Nat'l Union Fire Ins. Co.*, 123 Wn.2d 678, 690, 871 P.2d 146 (1994).

Budget asks the court to give effect only to certain contract provisions and ignore others. The arbitrator identified confusing and inconsistent provisions regarding the soil testing methods Budget would use. The contract stated that Budget would use the PID for “field screening purposes,” but that Budget would “conduct soil testing to determine the concentrations of actionable total petroleum hydrocarbons (TPH) for all contaminated soil removed from the Project Site” and that it would “analyze the contaminants utilizing...laboratory analyses.” CP 182, 190-91. The arbitrator properly considered all provisions of the contract, not just those on which Budget relied, and construed the ambiguities against the drafter, Budget. In deciding the contract required Budget to use periodic performance sampling to confirm the PID’s readings, the arbitrator properly relied upon expert testimony regarding industry standards to conclude that the PID is inadequate and unreliable to determine whether soils are contaminated above the MTCA threshold. *See Berg*, 115 Wn.2d at 669-70 (parol evidence admissible to explain even unambiguous contract terms); *Brown v. Poston*, 44 Wn.2d 717, 720, 269 P.2d 967 (1954) (trial court

properly considered expert testimony to determine the meaning of ambiguous technical terms of a contract). The arbitrator did not err in his interpretation of the contract.

F. The Arbitrator Did Not Err in Concluding that Budget's Use of Its Standard-Form Contract with Dougherty and Sauvage Was Unfair and Deceptive Under the CPA.

In addition to finding a breach of contract, the arbitrator found Budget violated the CPA. CP. 206-207. The CPA prohibits unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce. To establish a claim for violation of the CPA, a plaintiff must prove:

(1) an unfair or deceptive act or practice, (2) occurring in the conduct of trade or commerce, (3) impacting the public interest, and (4) proximately causing injury to the plaintiff in his or her business or property.

Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 917, 32 P.3d 250 (2001), citing *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785-93, 719 P.2d 531 (1986). On appeal, Budget disputes only the first element, contending that the arbitrator erred in concluding it committed an unfair or deceptive act or practice. Like the issue of breach of contract, whether Budget committed an unfair or deceptive act or practice under the CPA goes to the merits of the case and is thus not reviewable on the face of the award.

Even if the arbitrator's finding of an unfair or deceptive act or practice were reviewable, Budget contends the arbitrator erroneously based that finding on a mere failure to comply with industry standards, citing *Nguyen v. Doak Homes*, 140 Wn. App. 726, 167 P.3d 1162 (2007), and *Ramos v. Arnold*, 141 Wn. App. 11, 169 P.3d 482 (2007). Neither case supports Budget's position. In fact, *Nguyen* held that failure to meet industry standards may be evidence of a deceptive act or practice where it was part of a deception of the consumer. 140 Wn. App. at 734. The plaintiffs, second owners of a home, had no contract with the defendant builder and alleged no deception. *Id.* *Ramos* merely held that the CPA addresses only the entrepreneurial or commercial aspects of professional services, not the substantive quality—again, no deception was alleged. 141 Wn. App. at 20 (quality of a market appraisal was outside CPA's scope).

This Court distinguished both *Nguyen* and *Ramos* in *Carlile v. Harbour Homes, Inc.*, 147 Wn. App. 193, 194 P.3d 280 (2008). *Carlile* involved claims that a developer made affirmative representations of quality and workmanship to original purchasers and then failed to construct homes that those standards. 147 Wn. App. at 198. The plaintiffs also alleged that the developer's failure to disclose known

defects was unfair and deceptive under the CPA. *Id.* at 211-12. This Court reversed a summary judgment dismissal of the CPA claim, concluding the record established that the developer's "plainly deficient construction, together with its affirmative representations of high quality and workmanship, constitute[d] an unfair or deceptive practice." *Id.* at 214. The Court reasoned that these facts were distinguishable from *Nguyen* because the developer did not merely fail to meet industry standards but failed to conform to its affirmative representations of quality and workmanship. The Court distinguished *Ramos* because a claim of deception goes beyond the substantive quality of services. *Id.* at 213-14.

The facts here were akin to *Carlile*, not *Nguyen* or *Ramos*. As in *Carlile*, here the CPA violation was not a mere failure to meet industry standards. The arbitrator ruled that the contract provided Budget would act as an environmental consultant. CP 193. Thus, insofar as the contract could be construed as Budget did, to permit exclusive reliance on the PID during excavation, the contract misled customers to believe that use of the PID without companion performance sampling was reliable and consistent with industry standards observed by such consultants. CP 193. As a result, the

arbitrator properly concluded that Budget's use of its contract with customers not familiar with the PID's limitations, such as Dougherty and Sauvage, was unfair and deceptive. There was no error.

G. The Arbitrator Did Not Err in Determining that Dougherty and Sauvage Proved their Lost Profits with Sufficient Certainty or in Awarding Lost Profits as Damages under the Contract and the CPA.

Whether Dougherty and Sauvage proved their lost profits with sufficient certainty depends on the evidence presented to the arbitrator, which is not before this court. The arbitrator's award discusses the lost profits established by the evidence but does not describe (much less append) the evidence the arbitrator considered nor does it describe how the damage amounts were calculated. As a result, this issue cannot be reviewed on the face of the award. Budget states that "[i]mproper damage awards require vacation of arbitration awards," but cites two decisions that are distinguishable because the errors were apparent from the face of the award where the arbitrator awarded unauthorized damages: *Kennewick Educ. Ass'n v. Kennewick Sch. Dist.*, 35 Wn. App. 280, 666 P.2d 928 (1983) (arbitrator designated portion of award as punitive damages when such damages were not available), and *Federated Services*, 101 Wn. App. 119 (arbitrator awarded lost

prospective inheritance, not recoverable by statute). No similar circumstances exist here; an award of lost profits was an available remedy.

Even if the award of lost profits were reviewable, no error is apparent from the face of the award. Lost profits are recoverable if “(1) they are within the contemplation of the parties at the time the contract was made, (2) they are the proximate result of the defendant’s breach, and (3) they are proven with reasonable certainty.” *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 15, 390 P.2d 677 (1964). If the available evidence is sufficient to afford a “reasonable basis for estimating his loss,” the plaintiff is not denied a recovery because the exact amount of damage cannot be ascertained. *Lundgren v. Whitney’s, Inc.*, 94 Wn.2d 91, 98, 614 P.2d 1272 (1980), citing *Larsen*, 65 Wn.2d at 16.

In *Larsen*, the Washington Supreme Court modified the so-called new business rule and held that “[l]ost profits will not be denied merely because business is new if factual data is available to furnish a basis for computation of probable losses.” 65 Wn.2d at 17 (citations omitted); see *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 418, 58 P.3d 292 (2003) (discussing *Larsen*’s departure from the traditional approach). For instance, lost profits may be awarded based on expert

testimony alone so long as it is based upon tangible evidence. *Id.* at 17, 19. The weight to be given the testimony is for the trier of fact to determine. *Id.* at 18. “Where the fact is well established that profits would have been made and the difficulty in proving their amount is directly caused by the defendant’s breach, a greater liberality is permitted in making estimates and drawing inferences.” *Id.* at 17 (citations omitted).

The new business rule has no place in the commercial leasing context. The rationale for the new business rule is that proving lost profits is speculative “where a plaintiff is conducting a new business with labor, manufacturing and marketing costs unknown.” *Larsen*, 65 Wn.2d at 16. Because none of these concerns arises in the case of even a new leasing enterprise that has leases or other firm commitments in place, the new business rule should not apply. Nevertheless, Budget argues that a lease with Banner Bank, described at one point in the award as “anticipated,” and letters of intent from other prospective tenants were an insufficient basis to award lost profits. But the arbitrator found that Budget caused Dougherty and Sauvage to “lose Banner Bank as an anchor tenant...[and] to lose business with other entities that had previously indicated willingness to participate in the

project as tenants[.]” CP 202. Regardless of whether some or all the prospective tenants had executed leases or only letters of intent, which is not even clear from the award, the arbitrator was persuaded that those commitments were sufficiently firm to justify an award of lost profits. As the trier of fact, the arbitrator was entitled to make that determination. *See Larsen*, 65 Wn.2d at 18.

Budget argues it was error to award lost profits because such damages were not contemplated “at the time the contract was made,” emphasizing that the arbitrator based his finding that time was of the essence on post-agreement communications. But there is no inconsistency on the face of the award; the arbitrator did *not* find that lost profits were *not* contemplated at the time the contract was made. *See Tolson*, 108 Wn. App. at 499. Moreover, the arbitrator awarded the delay damages not only under the contract but under the CPA, which does not limit the types of compensable damages. Indeed, awards of delay damages under the CPA have been upheld. *See Keyes v. Bollinger*, 31 Wn. App. 286, 294, 640 P.2d 1077 (1982) (holding damages for construction defects and damages occasioned by such delays were compensable under CPA); *see also Banuelos v. TSA Wash.*,

Inc., 134 Wn. App. 607, 614, 141 P.3d 652 (2006) (affirming award of interest for loss of use of funds due to delay).

The arbitrator concluded that Budget's performance significantly delayed Dougherty and Sauvage's completion of their project and that numerous losses and increased expenses resulted. The award of proximately caused damages was within his authority and his conclusion and computation of such damages is not reviewable under RCW 7.04A.230(1)(d).

H. The Arbitrator Did Not Err in Determining that Dougherty and Sauvages' Damages Were Certain and Liquidated for Purposes of Awarding of Prejudgment Interest.

Prejudgment interest will be awarded where the amount claimed is liquidated or determinable by computation with reference to a fixed standard contained in a contract, without relying on opinion or discretion. *Hansen v. Rothaus*, 107 Wn.2d 468, 472, 730 P.2d 662 (1986).

The character of a claim determines whether it is liquidated. *State v. Fluor-Daniel, Inc.*, 160 Wn.2d 786, 790, 161 P.3d 372 (2007). A claim is "liquidated" if "the evidence furnishes data which, if believed, makes it possible to compute the amount with exactness, without reliance on opinion or discretion." *Hansen*, 107 Wn.2d at 472,

citing *Prier v. Refrigeration Eng'g Co.*, 74 Wn.2d 25, 32, 442 P.2d 621 (1968).

The issue is not whether the damages were disputed by the parties. “[T]he existence of a dispute over the whole or part of the claim should not change the character of the claim from one for a liquidated, to one for an unliquidated, sum[.]” *Scoccolo Constr. Inc. v. City of Renton*, 158 Wn.2d 506, 519, 145 P.3d 371 (2006).

The arbitrator found specifically that all damages were liquidated as of July 1, 2008, except backfill costs, which were liquidated as of July 1, 2009. CP 205-206. The record on appeal does not demonstrate the evidentiary basis for that finding, nor was the arbitration award required to do so. Arbitrators are required neither to retain nor file evidence. *Federated Svcs. Ins.Co. v. Estate of Norberg*, 101 Wn. App. 119, 124, 4 P.3d 844 (2000) Moreover, the fact that the standard for an award of prejudgment interest is that the amount be calculable with “reasonable certainty” by definition means that the arbitrator’s exercise of discretion cannot be reviewed under a “facial legal error” standard. The face of the award reflected that the arbitrator applied the proper legal standard in awarding prejudgment interest, and

the superior court properly chose not to disturb it. It follows that the evidentiary bases for their determinations are not subject to review.

Nevertheless, the face of the award shows that the arbitrator awarded damages of the type that generally are liquidated and can be computed with exactness—that is, lost rents and construction costs incurred. Claims for lost profits, construction costs, and the like are liquidated where, as was the case in the arbitration at issue here, they can be determined with exactness. *Prier*, 74 Wn.2d at 34-35 (affirming award of interest on *construction costs* incurred to repair defects); *Hunt-Wesson Foods, Inc. v. Marubeni Alaska Seafoods, Inc.*, 23 Wn. App. 193, 197, 596 P.2d 666 (1979) (affirming award of interest on *lost profits* from buyer’s breach of contract to purchase goods); *Kelly v. Schorzman*, 3 Wn. App. 908, 915, 478 P.2d 769 (1970) (affirming award of interest on *lost profits* of prospective tenant denied possession of agricultural land).

Budget argues that interest was not awardable on backfill costs described by the arbitrator as “estimated.” *See* CP 206. The use of the term “estimated” is not explained in the award, but the arbitrator’s finding that those damages were liquidated as of July 1, 2009, indicates the arbitrator found they had been incurred and were proven based on

evidence more specific than an “estimate.” *See Equity Group, Inc. v. Hidden*, 88 Wn. App. 148, 158, 943 P.2d 1167 (1997) (holding arbitrator’s factual determination was not subject to challenge on appeal).

I. The Superior Court had the Authority to Amend the Judgment to Correct a Mathematical Error, Consistent with the Arbitrator’s Award.

Budget takes issue with the trial court’s amendment of the judgment to adjust the amounts of prejudgment interest included in the judgment. The arbitrator issued an interim award on December 3, 2009. CP 171. After hearing from the parties on the issue of attorney’s fees and costs, the arbitrator issued his Final Award on February 8, 2010. CP 171-212. The interim award had calculated damages, including prejudgment interest through December 3, 2009 and after application of the offset, as \$1,042,301.00⁷. In the Final Award, the arbitrator made the same damage award, even though two months had passed. CP 205-207. The arbitrator simply neglected to increase the amounts of prejudgment interest to reflect the additional amounts

⁷ The interim award in its entirety is not part of the record in this matter. However, certain pages from the interim award are in the record, at CP 183-186 of the consolidated appeal in the matter, Number 65748-8-I. Comparing CP 184 in that matter to CP 207 in the instant matter, it is obvious that the arbitrator failed to adjust the prejudgment interest amount when he modified the interim award to include attorney’s fees and costs and issued the Final Award.

accruing between the interim and Final awards, although the Award makes clear he intended prejudgment interest to apply from the dates specified on each damage line item to the “present.” CP 205.

The superior court had the authority to include in its calculation of prejudgment interest the entire amount from the date of the award to the date of the judgment. The court merely corrected the arbitrator’s obvious oversight in his failure to update the prejudgment interest award calculation when he issued the Final Award 61 days later.

The superior court had the authority to remand the award to the arbitrator to correct this mathematical calculation. RCW 7.04A.200 (4). The fact that Judge Kallas made the calculation herself and included it in the Amended Judgment was not error, it was judicial economy. This Court should not disturb the arbitration award on these grounds, as it will lead only to unnecessary delay to require the remand to the arbitrator to conduct the same calculations.

J. Attorney’s Fees and Costs are Awardable on Appeal Pursuant to the CPA and the Parties’ Agreement.

Pursuant to RAP 18.1, Dougherty and Sauvage request this Court award them the attorney’s fees and costs they incurred on appeal. A party who establishes a violation of the CPA is entitled to an award

of attorney's fees and costs. *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 163-164, 795 P.2d 1143 (1990).

The language of the CPA establishes the entitlement to a fee award:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020 . . . may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee.

RCW 19.86.090. The award of costs of suit to one injured by a violation of the CPA is intended to be mandatory, in contrast to an award of exemplary damages, which the court "may, in its discretion" award. *Id.*

The parties' agreement also provided for an award of attorney's fees and costs prevailing in a dispute arising under the agreement. CP 208. Both the CPA and the parties' agreement were the basis of the arbitrator's award of attorney's fees and costs to Dougherty and Sauvage. Under the same authority, this Court should award Dougherty and Sauvage the expenses incurred on this appeal.

IV. CONCLUSION

Budget has raised no issue reviewable on the face of the award. Even if any of the issues Budget raises were reviewable and had merit, none would require that the arbitration award be vacated. Instead, the proper remedy would be to remand with instructions to have the arbitrator clarify or modify the award as appropriate. RCW 7.04A.200(4); *see Tolson*, 108 Wn. App. at 499 (remanding and directing the trial court to seek clarification from arbitrator of apparently inconsistent award). This Court should affirm the judgment below and award Dougherty and Sauvage the attorney's fees and costs incurred in responding to this appeal.

RESPECTFULLY SUBMITTED this 28th day of January, 2011.

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