

68472-8

68472-8

NO. 68472-8

COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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WILLIAM TWITCHELL, et ux.,

Appellant,

v.

MARY ANN B. KERRIGAN,

Respondent.

Appeal from Snohomish County Superior Court  
No. 10-2-10660-8

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**BRIEF OF RESPONDENT**

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## **I. INTRODUCTION**

Only cases “where the sole relief sought is a money judgment” and where no party asserts a claim in excess of \$50,000 are subject to MAR. This case stems from an unfortunate incident where the Defendant’s two dogs fatally injured Plaintiffs’ pet dog. Plaintiffs, who are a marital community, moved to put this case in MAR even though (1) they sought injunctive relief via a writ of abatement, and (2) they sought to claim aggregate damages of \$100,000.

The Trial Court recognized that Plaintiffs were seeking relief other than a money judgment and that they were seeking to make a claim in excess of \$50,000, and accordingly denied Plaintiffs’ motion to transfer to MAR. Defendant asks this Court to affirm that order.

## **II. RESPONSE TO ASSIGNMENTS OF ERROR**

The Trial Court committed no error when it denied Plaintiffs’ motion to transfer the case to arbitration and ordered that the case is only subject to MAR if the request for writ of abatement is dismissed with prejudice and if Plaintiffs limit their total arbitration claim to \$50,000.

## **III. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR**

- A. Per RCW 7.060.020(1), only cases “where the sole relief sought is a money judgment” and where no party asserts a claim in excess of \$50,000 are subject to MAR. Plaintiffs moved to put this case in

MAR even though they sought judgment for injunctive relief via a writ of abatement. Given that the “sole relief” sought by Plaintiffs was not “a money judgment,” was the Trial Court correct in declining to transfer the case to MAR?

B. Per RCW 7.060.020(1), only cases where no party asserts a claim in excess of \$50,000 are subject to MAR. Plaintiffs are a marital community suing regarding the death of their dog and regarding nuisance allegedly affecting enjoyment of their property, and they seek to claim aggregate damages of \$100,000. Given Plaintiffs’ failure to limit their claim for money damages to no more than \$50,000, was the Trial Court correct in declining to transfer the case to MAR.?

#### **IV. STATEMENT OF THE CASE**

This case arises from an incident on October 12, 2009, where two of the Defendant’s dogs, Baby and Teddy, escaped her property and fatally injured the Plaintiffs’ dog, Too Little.<sup>1</sup> The incident happened when Baby and Teddy broke through a fence in the back yard of Defendant’s property and escaped. That fence had been recently constructed by NWB Construction and had been certified as adequate by Snohomish County

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<sup>1</sup> CP 23: Declaration of Mary Ann Kerrigan at paragraph 2

inspector John Kosborn.<sup>2</sup>

After this unfortunate incident, Plaintiffs filed a complaint alleging that they were entitled to damages for the death of their dog, making nuisance allegations regarding barking by Defendant's dogs and other issues, and seeking injunctive relief in the form of a writ of abatement.<sup>3</sup> Defendant does not dispute that two of her dogs fatally injured the Plaintiffs' dog but does adamantly dispute the nuisance allegations and opposes the request for a writ of abatement.

Despite RCW 7.06.020(1)'s explicit limitation of cases subject to arbitration to those where, "the sole relief sought is a money judgment," Plaintiffs moved to transfer this case into MAR even though they sought injunctive relief, and Plaintiffs also sought to double the maximum amount at issue in arbitration from \$50,000 to \$100,000.<sup>4</sup> Defendant opposed that motion to transfer on the grounds that (1) the Plaintiffs' request for a writ of abatement precluded transfer to arbitration, and that (2) Plaintiffs' refusal to limit their claim to \$50,000 also precluded transfer to arbitration.<sup>5</sup>

The motion was heard on February 16, 2012, and Judge George

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<sup>2</sup> CP 23: Declaration of Mary Ann Kerrigan at paragraph 2

<sup>3</sup> CP 47-52: Amended Complaint

<sup>4</sup> CP 39-46: Plaintiffs' Motion to Conditionally Transfer Case to MAR

<sup>5</sup> CP 13-36: Defendant's Response To Plaintiff's Motion To Conditionally Transfer Case to MAR

Bowden issued an order denying Plaintiffs motion to transfer the case to MAR and providing that the case is only subject to MAR if the Plaintiffs' request for writ of abatement is dismissed with prejudice and if the Plaintiffs limit their total arbitration claim to no more than \$50,000.<sup>6</sup>

## V. ARGUMENT

- A. **The Trial Court correctly denied Plaintiffs' motion to transfer to MAR because the statute only allows for MAR in cases "where the sole relief sought is a money judgment," and here Plaintiffs sought injunctive relief via a writ of abatement in addition to seeking a money judgment.**

RCW 7.06.020(1) explicitly limits cases subject to MAR to cases where "the sole relief sought is a money judgment:"

**7.06.020. Actions subject to mandatory arbitration--  
Court may authorize mandatory arbitration of  
maintenance and child support**

(1) All civil actions, except for appeals from municipal or district courts, which are at issue in the superior court in counties which have authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of fifteen thousand dollars, or if approved by the superior court of a county by two-thirds or greater vote of the judges thereof, up to fifty thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration. (emphasis added)

The present case is not subject to MAR because the sole relief sought is not a money judgment. Instead, in addition to a money judgment, the Plaintiffs' complaint seeks "judgment" for "a writ of abatement of nuisance:"

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<sup>6</sup> CP 5-6: Order Denying Plaintiffs' Motion To Conditionally Transfer Case To MAR

WHEREFORE, the Twitchells pray for judgment against Kerrigan as follows:

...

For a writ of abatement of nuisance;<sup>7</sup>

The Washington Supreme Court decision in *Grundy v. Thurston County*<sup>8</sup> makes it plain that abatement of an alleged nuisance is a type of injunctive relief:

An actionable nuisance is "whatever is injurious to health or indecent or offensive to the senses, or an obstruction to the free use of property, so as to essentially interfere with the comfortable enjoyment of the life and property." RCW 7.48.010. Any person whose property is injuriously affected or whose personal enjoyment is lessened by a nuisance may sue for damages and for injunctive relief to abate the nuisance. RCW 7.48.020.<sup>9</sup>

Plaintiffs' brief makes much of the argument that a writ of abatement can only be ordered after there has been a judgment that there was a nuisance, but that argument is irrelevant because the timing of the relief sought does not change the nature of the relief sought. By their complaint's seeking injunctive relief via a writ of abatement, Plaintiffs have sought "relief" beyond a money judgment such that this case is not subject to MAR under the plain language of RCW 7.060.020.

Because the Trial Judge was faithful to the plain language of the statute there are no grounds to hold that his order was in error.

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<sup>7</sup> CP 51: Amended Complaint at page 5

<sup>8</sup> 155 Wn.2d 1, 117 P.3d 1089 (2005)

<sup>9</sup> *Grundy*, 155 Wn.2d at 7

Further, Plaintiffs' reliance on *Mercier v. Geico Indem. Co.*<sup>10</sup> is misplaced because that case does not support Plaintiffs' attempt to avoid RCW 7.060.020's limitation of MAR cases to those "where the sole relief sought is a money judgment." Unlike the present situation, the *Mercier* case did not involve any request for injunctive relief and instead only concerned a controversy about money damages – in particular, it involved a dispute regarding the amount of UIM damages.<sup>11</sup>

In fact, the *Mercier* court itself reiterated that MAR applies only to cases where only a money judgment is sought, and explained why the MAR program is not designed for cases, like here, where a remedy other than a money judgment is sought:

Arbitration applies only to cases "where the sole relief sought is a money judgment...." Thus, by definition, arbitration does not apply to cases that seek, alone or in conjunction with other claims, remedies other than a money judgment. For example, actions to dissolve a marriage or to enjoin a party are not subject to arbitration under this statute....

The rationale for excluding claims other than for a money judgment is in keeping with the idea that mandatory arbitration is better suited for smaller and simpler claims. Claims seeking remedies other than money judgments are often complex and sometimes require continuing supervision by the court. The arbitration program was not designed for these kind of cases.<sup>12</sup>

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<sup>10</sup> 139 Wn. App. 891, 165 P.3d 375 (2007)

<sup>11</sup> *Mercier*, 139 Wn. App. at 897-898

<sup>12</sup> *Mercier*, 139 Wn. App. at 899-900 (quoting ALTENRATE DISPUTE RESOLUTION DESKBOOK section 2.3(1)(b) at 2-11)

The *Mercier* court then expressly classified the case before it as one where the only relief sought was a “monetary judgment” regarding what the insurer was liable to pay:

In this case the pleadings heralded a relatively small and simple action. Even though Mercier styled his lawsuit a “Complaint for Declaratory Judgment and Damages”, what he sought was a money judgment reflecting the bottom line amount (if any) that GEICO was obligated to pay him under the underinsured motorist provisions of his insurance contract.<sup>13</sup>

The present case is different. Plaintiffs Twitchell seek more than money damages. They seek injunctive relief in the form of a writ of abatement. *Mercier* demonstrates that the request for such injunctive relief precludes the present case from being transferred to MAR.

Finally, in addition to the statute’s express language limiting cases subject to MAR to those “where the sole relief sought is a money judgment,” there are also at least four additional reasons for rejecting the piecemeal procedure advocated by Plaintiffs where an arbitrator would first determine if Plaintiffs had proved damages under a nuisance theory, and thereafter a court would make a determination on abatement.

First, that piecemeal procedure would be contrary to the public policy behind the MAR statute.

Implicit in the *Mercier* court’s statement that the MAR program is not designed for cases seeking other than money relief and in the

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<sup>13</sup> *Mercier*, 139 Wn. App. at 900

statute's plain language restricting MAR cases to only those "where the sole relief sought is a money judgment" is the policy choice that injunctive relief, which could force a person to take certain actions and impinge on that person's freedom, should only flow from proceedings fully under the control and oversight of an elected judge as opposed to an arbitration conducted by an unelected lawyer.

This case illustrates the importance of that policy choice and the prejudice that Defendant could face if that choice is ignored. The facts before the Trial Court show that Plaintiffs are hostile toward Defendant Kerrigan, and that they seek to restrict Ms. Kerrigan's actions and personal freedom via a writ of abatement.

That hostility is exemplified by Deborah Twitchell's post incident statements where she threatened to kill Ms. Kerrigan and her dogs,<sup>14</sup> and is further illustrated by Plaintiffs' actions in drafting, circulating, and presenting a 1-23-10 petition to Snohomish County which contained inflammatory language against Defendant including the allegations that "She exhibits total disregard for human life and injury towards her neighbors," and that "she has displayed and continues to display grotesque

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<sup>14</sup> CP 24: Kerrigan Declaration at paragraph 4.

self indulgence and complete utter disdain for the law and safety of her neighbors.”<sup>15</sup>

The Plaintiffs’ intention to restrict Ms. Kerrigan’s actions and personal freedom is demonstrated by the requests made in the petition that Ms. Kerrigan be permanently prevented from owning or operating a kennel in Snohomish County and all other counties in Washington State.<sup>16</sup> It is unknown how much restriction on Defendant’s freedom would ultimately be sought under the guise of a writ of abatement, but it is clear that Defendant faces the prospect of an attempt to make her take specific actions and to limit her personal freedom and ability to own dogs. When issues of freedom, as opposed to only money, are on the table then a case is not properly subject to MAR.

Second, the piecemeal procedure proposed by Plaintiffs is untenable because the judge deciding whether to issue a writ of abatement would not have heard the evidence establishing any nuisance and showing the extent of any nuisance. It would be unfair and prejudicial to have a judge who never heard the evidence in the case impose injunctive relief that could impact on the scope of Ms. Kerrigan’s personal freedom.

Third, that piecemeal procedure would be inefficient and contrary to the MAR statute’s objective to alleviate court congestion and reduce

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<sup>15</sup> CP 24: Kerrigan Declaration at paragraph 4

<sup>16</sup> CP 24: Kerrigan Declaration at paragraph 5

delay.<sup>17</sup> The procedure advocated by Plaintiffs would be inefficient and contrary to those objectives because it would create a situation where there would both be an arbitration and then a later Court proceeding.

Fourth, that piecemeal procedure would be untenable and unfair because it would taint the decision of whether to de novo (with that decision's inherent risks of becoming liable for attorney fees) with the prospect that a failure to de novo could result in a judge who heard no evidence regarding the nuisance claim entering a writ of abatement of uncertain scope.

**B. Plaintiffs' motion to transfer to MAR should be denied because the statute only allows for MAR in cases where no party asserts a claim in excess of \$50,000 and Plaintiffs seek to claim damages over \$50,000.**

Plaintiffs have cited secondary sources and the Division Two case of *Christensen v. Atlantic Richfield Co.*<sup>18</sup> for the proposition that the present case is within the range of amounts subject to MAR even though Plaintiffs ask to claim up to \$100,000. But Plaintiffs' argument in that respect should be rejected, and Plaintiffs' request for damages of up to an aggregate amount of \$100,000 should be found to preclude transfer to MAR for at least three reasons.

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<sup>17</sup> See *Fernandes v. Mockridge*, 75 Wn. App. 207, 211, 877 P.2d 719 (1994) (holding that the statute authorizing mandatory arbitration in certain civil cases is intended primarily to alleviate court congestion and reduce delay)

<sup>18</sup> 130 Wn. App. 341, 122 P.3d 937 (2005)

First, Plaintiffs' argument should be rejected because the arbitration statute should be read to cap the total amount at issue in any one civil action to a maximum of \$50,000. As set forth above, RCW 7.060.020 only allows for arbitration in cases "where no party asserts a claim in excess of ... fifty thousand dollars." The Court of Appeals (Division I) in the *Mercier v. Geico Indemn. Co.*<sup>19</sup> case held that "MAR is a statutory system designed to take relatively small and simple cases off the superior court's docket and resolve them quickly and inexpensively." That policy to resolve "small" cases supports an interpretation that the language of the statute should be read to cap the maximum amount at issue in any MAR arbitration to a total amount of no more than \$50,000.

The *Christensen* case could be read otherwise, but it is a Division II case and Division I has not entered a similar decision. Accordingly, this court should rely on Division I's holding in *Mercier* that MAR is designed for relatively small cases to rule that the total amount at issue in an arbitration procedure is limited to \$50,000 and that, accordingly, the present case is not subject to MAR.

Further, a bright line interpretation of the statute to cap the total amount at issue in any MAR case would have the advantage of promoting clarity. By contrast, if Plaintiffs' invitation to set a separate \$50,000 limit

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<sup>19</sup> 139 Wn. App. 891, 165 P.3d 375 (2007)

for each distinct claim is taken to its logical conclusion, that would result in an illogical situation where Plaintiffs could seek to inflate the MAR jurisdictional limit by arguing that each plaintiff is entitled to a separate \$50,000 limit for each separate “claim” made in the lawsuit. For example, Plaintiffs’ complaint here sets out 10 separate “claims.”<sup>20</sup> Interpreting the MAR statute to apply the \$50,000 limit to each claim could lead to the unreasonable result of an MAR proceeding with potential damages of up to \$1,000,000. (10 claims x 2 plaintiffs = 20 x \$50,000).

Second, Plaintiffs’ request for damages of up to an aggregate amount of \$100,000 should be rejected because the Twitchells’ status as a marital community distinguishes this case from *Christensen*. The *Christensen* case involved a situation where a group of 27 separate parties filed a single suit against Atlantic Richfield alleging damages from the use of home heating oil, and then 22 of those parties sought to transfer their claims to MAR, and where the Court rejected that transfer when five of those parties did not waive claims over \$35,000.

The present case is different from *Christensen* in that the Twitchells are a married couple suing for damages resulting from the death of their jointly owned pet dog and suing for damages and a writ of abatement regarding alleged nuisance affecting the Twitchells in their

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<sup>20</sup> CP 51: Amended Complaint at page 5

enjoyment of the marital home.<sup>21</sup> The prayer for relief in the Twitchells' complaint does not seek separate judgment and relief for Mr. and Ms. Twitchell but instead seeks a joint judgment against Ms. Kerrigan stating, "WHEREFORE, the Twitchells pray for judgment against Kerrigan as follows..."<sup>22</sup>

Because they are a marital community seeking damages for injury to a dog owned by the marital community and seeking nuisance damages and injunctive relief regarding a residence owned by the marital community, this Court should treat Plaintiffs as having a single claim under the MAR statute. Therefore, the Court should apply the \$50,000 limit to the Plaintiffs' total claim, and should affirm the Trial Court's order.

Third, the discussion in Plaintiffs' Appellants' Brief about whether loss of consortium in motor vehicle cases is direct or derivative is not relevant to the issue of whether Plaintiffs should be allowed to double the \$50,000 jurisdictional MAR limit. The *Green v. A.P.C.*<sup>23</sup> and *Reichelt v. Johns-Manville Corp.*<sup>24</sup> cases do not address the issue of whether a marital couple can exceed the \$50,000 MAR limit in a suit based on nuisance

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<sup>21</sup> CP 51: Amended Complaint at page 5

<sup>22</sup> CP 51: Amended Complaint at page 5

<sup>23</sup> 136 Wn.2d 87, 960 P.2d 912 (1998)

<sup>24</sup> 107 Wn.2d 761, 733 P.2d 530 (1987)

allegations regarding the couple's marital property and death of a family pet.

## VI. CONCLUSION

In this case, there are two and separate and independent grounds upon which this Court may and should affirm the Trial Court's decision to deny Plaintiffs' motion to transfer the case into MAR.

First, Plaintiffs' motion was properly denied because, per RCW 7.06.020, only cases "where the sole relief sought is a money judgment" are subject to MAR, and here Plaintiffs seek the injunctive remedy of writ of abatement of nuisance in addition to a judgment for money damages. Second, the Plaintiffs' decision to seek damages over \$50,000 provided a separate and independent ground to properly deny Plaintiffs' motion to transfer the case to MAR. This Court should affirm the Trial Court's order.

DATED THIS 23<sup>rd</sup> day of April, 2012.

**BARRETT & WORDEN, P.S.**



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CERTIFICATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on April 23<sup>rd</sup>, 2012, I caused service of the foregoing Brief of Respondents by email and mail, to:

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