No. 1003064

Court of Appeals No. 81132-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON ON II

BOUNCE AND LASERTAG, LLC d/b/a PUMP IT UP, et al.,
Plaintiffs/Appellants,

v.

KENT EAST COMMERCIAL, LLC, et al,
Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT OF KING COUNTY, THE HONORABLE MICHAEL K. RYAN, PRESIDING

RESPONSE TO PETITION FOR REVIEW

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I. TABLE OF CONTENTS

III. ARGUMENT..... 1
A. Petitioners fail to address RAP 13.4 (b). 1
B. Petitioners fails to cite to the record. 2
C. Petitioners fail to support their argument regarding the Court of Appeals' use of a legal dictionary with any citation to authority. 2
D. Petitioners fail to support their argument regarding the Court of Appeals' failure to address their damages unrelated to lost profits with any citation to authority. 3
E. Petitioners fail to establish grounds under RAP 13.4 (b) regarding their argument concerning the 2006 Amendments to the Arbitration Act.....4
F. Petitioners fail to support their argument the Court of Appeals wrongly applied the Facial Legal Error Doctrine with any citation to authority, so it should not be considered. 5
G. The Court of Appeals did not err in relying on a legal dictionary to supply a term not defined by the parties. 7
H. Petitioners fail to support their argument regarding the Court of Appeals' remand of damage awards it did not address. 9
I. Petitioners fail to discuss the factors in RAP 13.4 (b) in their discussion why review should be accepted. 9
J. Respondents request an award of attorney fees if they prevail in this appeal. 10
IV. CONCLUSION.....11
V. CERTIFICATE OF MAILING 12

II. TABLE OF AUTHORITIES

Page(s)

Washington Cases

Allstate Ins. Co. v. Peasley,
131 Wn. 2d 420, 932 P. 2d 1244 (1997).....7
Cowiche Canyon Conservancy v. Bosley,
118 Wash.2d 801,828 P.2d 549 (1992).....2
Cummings v. Budget Tank Removal & Environmental Services, LLC,
163 Wn. App. 379, 388-89, 260 P. 3d 220 (2011).....5, 10
De Heer v. Seattle Post Intelligencer,
60 Wn. 2d 122, 126, 372 P. 2d 193 (1962).....2, 3, 9, 10
Fishburn v. Pierce County Planning and Land Services Department,
161 Wn. App. 452, 473, 250 P. 3d 146, *review denied,* 172 Wash.2d
1012, 259 P.3d 1109 011).....2
Forest Marketing Enterprises, Inc. v. State Department of Natural Resources, 125 Wn. App. 126, 132, 104 P. 3d 40 (2005).....8
Jacoby v. Grays Harbor Chair and Manufacturing Co.,
77 Wn. 2d 911, 919, 468 P. 2d 666 (1970).....7
Kelly v. Tonda,
198 Wn. App. 303, 316, 393 P. 3d 824 (2017).....2
Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa., 123 Wash.2d
678, 692, 871 P.2d 146 (1994).....3, 6, 7, 8
Mainline Rock and Ballast, Inc. v. Barnes, Inc.,
8 Wn. App. 2d 594, 608-09, 439 P. 3d 662 (2019).....4, 10
Marine Enterprises, Inc. v. Security Pacific Trading Corp.,
50 Wn. App. 768, 750 P. 2d 1290 (1988)..... 10
Roberts, Jackson & Associates v. Pier 66 Corp., 41 Wn. App. 64, 69,
702 P. 2d 137 (1985).....7
Serpanok Construction, Inc. v. Point Ruston, LLC, -- Wn. App.--,
495 P.3d 271 (2021).....5, 10
Salewski v. Pilchuck Veterinary Hospital, Inc., PS.,
189 Wn. App. 898, 904, 359 P. 3d 884 (2015).....4, 10
Shumway v. Payne, 184 Wash.2d 1017, 389 P, 3d 460, 462 (2015)....1, 9
Stuart v. American States Insurance Co., 124 Wn. 2d 814, 820-21,
953 P.2d 462 (1998).....3, 7, 8
Washington Professional Real Estate v. Young, 163 Wn. App. 800,
818, 260 P. 3d 991 (2011).....8

Statutes

RCW 4.84.330 10
RCW 7.04.160 10
RCW 7.04A.230 (1) 4, 5, 9, 10

Court Rules

GR 14.1 1
RAP 10.3 (a), (6) 2, 3, 9, 10
RAP 13.4 (b) 1, 4, 9
RAP 18.1 (j) 10

Other Authorities

AAA Rule R-47 ..... 5, 6

III. ARGUMENT

A. Petitioners fail to address RAP 13.4 (b).

RAP 13.4 (b) provides as follows:

> A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

RAP 13.4 (b) provides review will be accepted by the Court ***only*** if one or more of the four grounds listed therein is established. Therefore, it must be concluded the failure to establish any of the four grounds listed in RAP 13.4 (b) is fatal to a petition for review.

Petitioners fail to mention, let alone establish, any of the grounds listed in RAP 13.4 (b). Therefore, Petitioners' Petition for Review should be denied. *Shumway v. Payne*, 184 Wash.2d 1017, 389 P, 3d 460, 462 (2015) (Unpublished; cited as persuasive under GR 14.1).

B. Petitioners fails to cite to the record.

Petitioners' discussion of facts in its Introduction (Petition p. 1-6) fails to contain a single citation to the record and its Statement of the Case contains only one such citation at page 13. Petitioners' unsupported factual assertions should therefore not be considered. RAP 10.3 (a) (6); *Cowiche Canyon Conservancy v. Bosley,* 118 Wash.2d 801, 809, 828 P.2d 549 (1992); *Fishburn v. Pierce County Planning and Land Services Department*, 161 Wn. App. 452, 473, 250 P. 3d 146, *review denied,* 172 Wash.2d 1012, 259 P.3d 1109 (2011).

C. Petitioners fail to support their argument regarding the Court of Appeals' use of a legal dictionary with any citation to authority.

In their Introduction, Petitioners complain about the Court of Appeals' use of a legal dictionary. Petition, p. 7-8. Petitioners repeat their argument regarding the Court of Appeals' reference to a legal dictionary in their Petition at pages 15-18. Petitioners cite no authority that such use of a legal dictionary is improper. Petitioners' argument should therefore not be considered. RAP 10.3 (a) (6); *De Heer v. Seattle Post Intelligencer*, 60 Wn. 2d 122, 126, 372 P. 2d 193 (1962) ("*Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.*").

To the extent it merits consideration, Petitioners' argument against the Court of Appeals' use of a legal dictionary is contrary to Washington decisions which sanction the use of legal dictionaries. *See, e.g., Lynott v. National Union Fire Ins. Co. of Pittsburgh, Pa.,* 123 Wash.2d 678, 692, 871 P.2d 146 (1994); *Stuart v. American States Insurance Co.,* 124 Wn. 2d 814, 820-21, 953 P.2d 462 (1998).

Moreover, the contract's use of a term such as consequential damages supports the Court of Appeals' use of a legal dictionary. In *Lynott*, the court found it appropriate in interpreting the meaning of "acquisition" in an insurance policy exclusion to rely upon the definition of that term in a legal dictionary. 123 Wash.2d 692; *Stuart v. American States Insurance Co.,* 124 Wn. 2d 814, 820-21.

D. Petitioners fail to support their argument regarding the Court of Appeals' failure to address their damages unrelated to lost profits with any citation to authority.

Petitioners complain the Court of Appeals failed to address the Arbitrator's award of damages unrelated to lost profits. Petition, p. 18-19. Petitioners fail to support their argument with any citation to authority, so their argument should not be considered. RAP 10.3 (a) (6); *De Heer v. Seattle Post Intelligencer*, 60 Wn. 2d 126.

E. Petitioners fail to establish grounds under RAP 13.4 (b) regarding their argument concerning the 2006 Amendments to the Arbitration Act.

Petitioners fail to establish which, if any, ground in RAP 13.4 (b) supports their argument concerning the effect of the 2006 Amendments to the Arbitration Act. Petition, p. 19-20. Petitioners steadfastly advocate their interpretation of RCW 7.04A.230 (1) (d) as precluding application of the error of law standard. *Id.* However, in the majority opinion in *Mainline Rock and Ballast, Inc. v. Barnes, Inc.*, 8 Wn. App. 2d 594, 608-09, 439 P. 3d 662 (2019), the court interpreted RCW 7.04A.230 (1) (d) to allow application of the error of law standard. "*...Based on RCW 7.04A.230 (1) (d), arbitrators are deemed to have exceeded their authority when the face of the arbitration award exhibits an erroneous rule of law...*" This interpretation harmonizes the 2006 legislative change in adopting RCW 7.04A.230 (1) (d) with prior cases cited in that decision.

In *Salewski v. Pilchuck Veterinary Hospital, Inc., PS.*, 189 Wn. App. 898, 904, 359 P. 3d 884 (2015), the Court's discussion of the facial error standard followed its quotation of RCW 7.04A.230 (d). Implicit in the Court's decision is recognition the facial error standard applies to RCW 7.04A.230.

Further, in *Cummings v. Budget Tank Removal & Environmental Services, LLC,* 163 Wn. App. 379, 388-89, 260 P. 3d 220 (2011), the Court discussed RCW 7.04A.230 (d) and the facial error standard:

> One of the statutory grounds for vacating an award exists when the arbitrator has "exceeded the arbitrator's powers." RCW 7.04A.230(d); *Federated Servs. Ins. Co. v. Pers. Representative of Estate of Norberg*, 101 Wash. App. 119, 123, 4 P.3d 844 (2000), *review denied*, 389 142 Wash.2d 1025, 21 P.3d 1150 (2001). This ground for vacation is available only if the alleged error appears "on the face of the award":

In *Serpanok Construction, Inc. v. Point Ruston, LLC,* -- Wn. App.--, 495 P.3d 271, at 282 (2021) (Unpublished text, cited as persuasive under GR 14.1), the court considered the facial legal error standard continued to apply to review under RCW 7.04A.230.

Mainline Rock, Salewski, Cummings and *Serpanok Construction* support application of the facial error standard to RCW 7.04A.230 (1) (d).

F. Petitioners fail to support their argument the Court of Appeals wrongly applied the Facial Legal Error Doctrine with any citation to authority, so it should not be considered.

Petitioners argue the Court of Appeals wrongly applied the Facial Legal Error Doctrine. Petition, p. 21-22. Petitioners argue under AAA Rule 47, the arbitrator had authority to grant any relief he deemed just and equitable. *Id.* Petitioners advocate an interpretation of AAA Rule R-47 that confers unfettered discretion upon the arbitrator, thereby rendering the

word "equitable" in the Rule a useless appendage. Washington courts will not adopt an interpretation that renders language meaningless. *Kelly v. Tonda,* 198 Wn. App. 303, 316, 393 P. 3d 824 (2017).

Petitioners also steadfastly refuse to recognize AAA Commercial Arbitration Rule R-47 (a) requires that the relief granted by the arbitrator must be "*..within the scope of the agreement of the parties*...." CP 238. Thus, even the AAA Commercial Rules recognize the arbitrator's decision to afford a remedy or relief he or she deems just and equitable must also be consistent the parties' agreement, including Paragraph 5 of the Arbitration Rider or Paragraph 35f of the Lease Agreement. Thus, there is no escape from the requirement the arbitrator's decision must comport with Washington law. And by following a New York case, there is no question that the arbitrator failed to follow Washington law. CP 23.

Petitioners argue there is no authority authorizing courts to resort to legal dictionaries when parties to a lease fail to define terms by themselves. Petition, p. 22. To the contrary, Washington courts allow a court to resort to dictionaries, even legal dictionaries, to supply the definition of a term not defined by the parties themselves. *See Lynott,* 123 Wn. 2d 692.

G. The Court of Appeals did not err in relying on a legal dictionary to supply a term not defined by the parties.

Petitioners argue the meaning of an undefined term in a lease can be supplied by reference to a Standard English Dictionary. Petition, p. 24. Respondents do not dispute the court may resort to such a dictionary. But that does not exhaust the realm of possibilities to supply definition to an undefined term. Courts may also resort to legal dictionaries. *See, Lynott,* 123 Wn. 2d 692; *Stuart v. American States Insurance Co.*, 124 Wn. 2d 820-21. Here, resort to a legal dictionary is a logical choice when a court is interpreting a legal document such as a lease.

Petitioners invoke the doctrine of *contra proferentium*, citing *Allstate Ins. Co. v. Peasley*, 131 Wn. 2d 420, 424, 932 P. 2d 1244 (1997). Petition, p. 24. In *Peasley*, the Court recognized the rule that "*If an ambiguity is found in an exclusionary clause, the ambiguity is strictly construed against the insurer...*" Here, Petitioners do not identify an ambiguity. Nor does this case involve insurance. Petitioners' reliance upon *Peasley* is misplaced.

Substantial Washington authority recognizes *contra proferentium* as a doctrine of last resort. *See Jacoby v. Grays Harbor Chair and Manufacturing Co.*, 77 Wn. 2d 911, 919, 468 P. 2d 666 (1970) (*"The rule should not be applied until called into play by an ambiguity."*).

In *Roberts, Jackson & Associates v. Pier 66 Corp.*, 41 Wn. App. 64, 69, 702 P. 2d 137 (1985), the court concluded intent of the parties was determined by viewing the contract as a whole, the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties to the contract, and the reasonableness of respective interpretations advocated by the parties, and if after viewing the contract in this manner, the intent of the parties can be determined, there is no need to resort to the rule that ambiguity be resolved against the drafter.

In *Washington Professional Real Estate v. Young*, 163 Wn. App. 800, 818, 260 P. 3d 991 (2011), the court concluded "...a *reviewing court should not resort to the rule of interpretation that construes an agreement against its drafter unless the intent of the parties cannot otherwise be determined...*"

In *Forest Marketing Enterprises, Inc. v. State Department of Natural Resources*, 125 Wn. App. 126, 132, 104 P. 3d 40 (2005), after quoting *Roberts, Jackson & Associates v. Pier 66 Corp., supra,* the court concluded "*we need not construe the contract viewing the contract as a whole and in context, we can determine against DNR.*"

Petitioners argue the Court of Appeals, instead of following the rules of contract interpretation cited by Petitioners, instead resorted to a legal

dictionary to define consequential damages. Petition, p. 25. To the contrary, the Court acted well within its authority under *Lynott,* 123 Wash.2d 692 and *Stuart v. American States Insurance Co.*, 124 Wn. 2d 820-21.

H. Petitioners fail to support their argument regarding the Court of Appeals' remand of damage awards it did not address.

Petitioners argue, without citation to authority, that the Court of Appeals remanded the entire arbitration award for rehearing before an arbitrator, including the arbitrator's award of $25,000 in miscellaneous damages, $11,171 for discovery abuses and award of related attorney fees. Petition p. 26. Petitioners fail to support their argument with any citation to authority, so their argument should not be considered. RAP 10.3 (a) (6); *De Heer v. Seattle Post Intelligencer*, 60 Wn. 2d 126.

I. Petitioners fail to discuss the factors in RAP 13.4 (b) in their discussion why review should be accepted.

In their argument why review should be accepted, Petitioners once again make no attempt to argue which factors in RAP 13.4 (b) they have satisfied. Petition, p. 26-29. Petitioners' failure to satisfy one or more factors in RAP 13.4 (b) is fatal to their Petition for Review. *Shumway v. Payne,* 184 Wash.2d 1017, 389 P, 3d 460, 462 (2015).

Petitioners complain once again about the Court of Appeals' use of legal dictionaries. Petition, p. 27-28. Once again, Petitioners fail to

support their argument with citation to authority as required by RAP 10.3 (a) (6). Petitioners argument should therefore not be considered. *De Heer v. Seattle Post Intelligencer*, 60 Wn. 2d 126.

Petitioners also argue the Court should take review to address the deleted second phrase of former RCW 7.04.160 (4) in the current Amended RCW 7.04A.230 (1) (d). Petition, p. 28. Petitioners again fail to address the *Mainline Rock, Salewski, Cummings* and *Serpanok Construction* decisions, which support application of the facial error standard to RCW 7.04A.230 (1) (d).

Petitioners again revisit their argument regarding the need to affirm those portions of the Arbitration Award not related to the issue of awarding lost profits to Petitioners. Petition, p. 29. Once again, Petitioners fail to support their argument with citation to authority as required by RAP 10.3 (a) (6). Petitioners argument should therefore not be considered. *De Heer v. Seattle Post Intelligencer*, 60 Wn. 2d 126.

J. Respondents request an award of attorney fees if they prevail in this appeal.

In the event they prevail against this petition for review, Respondents request an award of reasonable attorney fees on appeal, pursuant to Paragraph 27 of the Lease Agreement, RCW 4.84.330, RAP 18.1 (j) and

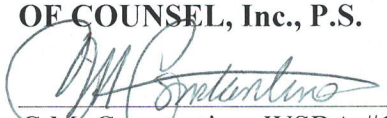
Marine Enterprises, Inc. v. Security Pacific Trading Corp., 50 Wn. App. 768, 773-74, 750 P. 2d 1290 (1988).

VI. CONCLUSION

Respondents ask the Court to deny the Petition for Review and to award them their reasonable attorney fees incurred in responding to the Petition for Review.

Respectfully submitted,

OF COUNSEL, Inc., P.S.



C.M. Constantine, WSBA #11650
Of attorneys for Respondents
I certify pursuant to RAP 18.17 (c) (10), the foregoing document is comprised of 2,260 words.

V. CERTIFICATE OF MAILING

The undersigned does hereby declare that on October 26, 2021, the undersigned delivered a copy of RESPONSE TO PETITION FOR REVIEW filed in the above-entitled case and served on the following individual(s) via the manner indicated below.

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DATED this 26th day of October, 2021 at Tacoma Washington.

By: _____
C. M. Constantine

OF COUNSEL INC PS

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