

65249-4

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NO. 652494

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MARY CUMMINGS, JAMES DOUGHERTY and PAUL SAUVAGE,

Respondents,

vs.

BUDGET TANK REMOVAL & ENVIRONMENTAL SERVICES, LLC,

Appellant.

**AMENDED REPLY BRIEF OF APPELLANT BUDGET TANK
REMOVAL & ENVIRONMENTAL SERVICES, LLC**

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MISCELLANEOUS

Rev. Unif. Arb. Act § 10, cmt. 5 (2000)4

I. ARGUMENT IN REPLY

The arbitration award contains facial errors that support vacation. Both parties agree that misapplication of law or misstatement of a rule of law are facial errors supporting vacation. *See Resp. Brief*, p. 20. Budget has demonstrated multiple misapplications of the law or mistakes as to the rule of law. Where facial error exists, courts “shall” vacate the award.

The limited review for facial error is considered essential to arbitration in Washington. Parties may not waive the essential review, as the Supreme Court recently held in *Optimer Int’l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, __ P.3d __ (2011). On appeal, Dougherty concedes that this Court must review the full 42-page document which is the “award.” *Resp. Brief*, p. 22. Because of the multiple facial errors underlying the \$1,598,939.30 award, this Court should reverse and vacate. Additionally, because the consolidation order exceeded the trial court’s authority, this Court on *de novo* review should reverse and vacate. And, the trial court’s improper addition to the arbitral award should be reversed.

Dougherty urges deference to the arbitrator. But the UAA does not require deference. To the contrary, Budget is entitled to review and vacation for facial errors.

Dougherty also suggests that one cannot tell from the award if the arbitrator misunderstood the law. This suggestion fails where the

arbitrator's award is extensive and detailed. This Court can tell that (1) the damages awarded were not liquidated and therefore did not warrant prejudgment interest, (2) the arbitrator found that Dougherty communicated his timeline *after* the contract was executed and performance underway, preventing the award of delay damages, (3) the damages were based on a new business insufficiently certain to support lost profits, (4) CPA liability was improper under settled Washington law, and (5) the arbitrator's construction of the contract violated Washington's settled rules of construction. All of these errors support vacation.

A. The Trial Court's Consolidation Order That Exceeded Its Authority Under the UAA Warrants Reversal

Washington courts do not permit judicial interference with arbitration in excess of those specific powers provided courts in the UAA. The trial court's consolidation order exceeded its authority and must be reversed. This Court has the authority to review that decision *de novo*. Because all four requirements of the statute were not all satisfied, the trial court had no authority to order consolidation. Contrary to Dougherty's unsupported argument, Budget does not concede lack of prejudice by the consolidation. Nor would it be permissible for this Court to sustain the trial court's action in excess of its authority, where harm is presumed.

1. The Consolidation Order Is Reviewable

This Court should reject Dougherty's argument that this Court cannot review the consolidation order. *See Resp. Brief*, p. 13. The argument relies on the Uniform Arbitration Act's enumeration of orders from which appeal may be *immediately* taken. *See* RCW 7.04A.280(1). The UAA does not prevent this Court from reviewing trial court actions that prejudicially affect the final judgment pursuant to RAP 2.4(b). Here, an appeal of right under RCW 7.04A.280(1)(c) and (f) and RAP 2.2 existed upon the trial court's denial of the motion to vacate and confirmation of the award which reduced the award to judgment. The appeal is proper. This Court can review all prejudicial orders, including the prior order to consolidate which was not immediately appealable.¹ The UAA specifically incorporates appellate rules and procedures in subsection two of RCW 7.04A.280, stating, "An appeal under this section must be taken as from an order or a judgment in a civil action." RCW 7.04A.280(2). This specifically makes RAP 2.4(b) applicable.

The legislature cannot carve from judicial review trial court actions. Nor did it intend to. In RCW 7.04A.280(1), the legislature specified from what orders an immediate right of appeal lies. This is

¹ Though not required, Budget specifically noticed review of the consolidation order in its Notice of Appeal. CP 624, lines 7-8.

consistent with the comments to the uniform act, which note that “the policy behind Section 28(a)(1) and (2) [allowing immediate appeal from certain orders] is not to allow appeals of orders that result in delaying arbitration.” *Rev. Unif. Arb. Act* § 10, cmt. 5 (2000). The model act does not make any trial court action unreviewable in a subsequent appeal from an order identified in Section 28. The Washington act incorporates appellate rules and procedures. RCW 7.04A.280(2).

If the legislature were to attempt to exempt certain trial court rulings from judicial review, a separation of powers issue would exist. *See Putnam v. Wenatchee Med. Ctr.*, 166 Wn.2d 974, 216 P.3d 374 (2009) (legislature cannot eliminate a litigants’ rights pursuant to court rules); *Biber Partnership, P.C. v. Diamond Hill Joint Venture, LLC*, 960 A.2d 774, 776 note 1 (N.J. Super. 2008) (a portion of arbitration act “precluding appeals from a category of trial court orders may conflict with the Supreme Court’s exclusive authority over the administration and practice and procedure in all courts”).

This Court should read RCW 7.04A.280 harmoniously with RAP 2.4(b), avoiding constitutional implications. A consolidation order under the UAA is not immediately appealable pursuant to RCW 7.04A.280(1). The Court can review the decision in a subsequent appeal pursuant to RAP 2.4(b). In this way, arbitration is not delayed. This comports with the

policy not to delay arbitration that underlies RCW 7.04A.280(1), while not exempting certain trial court action from judicial review.

2. This Court Should Conclude on *De Novo* Review That the Statutory Requirements for Consolidation Were Not Met Because the Transactions Were Not “the Same” or “Related.”

This Court reviews *de novo* whether the trial court had authority to order consolidation. Budget does not complain about the trial court’s exercise of discretion *if* all four requirements were met. All four requirements were not met. The “similarity” of the claims and evidentiary efficiencies claimed by Dougherty are not relevant to whether the transactions were the same or related. This Court should reverse the consolidation order.

Dougherty mistakenly argues that Budget presents an issue reviewable for abuse of discretion. Dougherty focuses on the word “may” in RCW 7.04A.100(1). Dougherty also attempts to analogize the standard applicable to review of an order of consolidation under CR 42(a). *Resp. Brief*, p. 14. These standards do not apply to the issue Budget presents for appeal. Budget agrees that *if* the four requirements were met, the trial court had discretion to order consolidation. Budget disputes whether the discretionary decision was triggered by satisfaction of the four requirements. A legal issue concerning the trial court’s authority, or lack thereof, confronts this Court.

As articulated in *Perez v. Mid-Century Ins. Co.*, 85 Wn. App. 760, 934 P.2d 731 (1997) (cited in the Opening Brief, p. 21), the trial court's authority to intervene in the arbitral process by ordering consolidation will be narrowly construed. Dougherty does not refer to *Perez* or dispute that *Perez* compels a narrow judicial approach to a trial court's authority to "intervene[e] in the arbitration process." The Supreme Court reiterated these principles January 13, 2011 in its decision *Optimer Int'l, Inc. v. RP Bellevue, LLC*, 170 Wn.2d 768, ___ P.3d ___ (2011). In *Optimer*, the trial court enforced an agreement of the parties to waive the judicial review provided by the UAA. The Supreme Court reversed, holding that the trial court's enforcement of the parties' waiver of the review provisions was contrary to the arbitration act, which does not permit waiver. The Supreme Court reasoned that "arbitration in Washington is solely a creature of statute" and "parties are not free to either enlarge or diminish judicial review of arbitration awards established by statute." *Id.* at 771-72. "[P]arties entering into arbitration agreements agree to arbitrate subject to the statutory review provisions." *Id.* at 772. Here, Budget did not agree to arbitrate subject to consolidation not authorized by the UAA.

The reasoning in *Optimer* supports reversal of the consolidation order. Consolidation authority is necessarily solely a creature of statute. The rights to consolidation cannot be enlarged or diminished. The trial

court had no authority to compel consolidation of the arbitrations where the statutory requirements were not met. Reversal is warranted.

Dougherty does not dispute the premise of Budget's argument that consolidation is permissible only when all four prongs are met. While Dougherty argues that all four prongs were met, the record shows otherwise, especially with respect to the second prong. *See* RCW 7.04A.100(1)(b). The different customers' separate claims arose from independent, different transactions, not "the same transaction or series of related transactions." Dougherty argues that the statute is satisfied because the claims were similar, i.e., had "similar properties." *Resp. Brief*, pp. 16-17. Dougherty expands this to argue that "identical legal issues" were presented and efficiencies were gained in the presentation of evidence. *Resp. Brief*, pp. 17-18. These are not the factors authorizing consolidation. The statute does not permit consolidation for judicial economy generally or for claims that are simply similar. The statutory focus is whether *the transactions* were "the same" or "related." They were neither. Similar transactions are not related transactions

Dougherty argues without citation to controlling authority that this Court should construe the consolidation provision liberally in favor of consolidation. *See Resp. Brief*, p. 14, 18. This Court should reject this argument. Dougherty asserts that the UAA is remedial by relying on

general authority. *Id.* citing *Int'l Ass'n of Fire Fighters, Local 46 v. City of Everett*, 146 Wn.2d 29, 34, 42 P.3d 1265 (2002) (construing not the UAA but RCW 49.48.030). No Washington case holds that the UAA is remedial and should be liberally construed. The UAA itself does not provide for liberal construction. *Perez* and *Optimer* are UAA cases that favor a narrow construction regarding trial court intervention in the arbitral process. This Court should follow the principles of *Perez* and *Optimer*. The four prongs were not satisfied. The consolidation of these similar but not *related* claims exceed the trial court's authority.

3. This Court Should Reverse Despite Dougherty's "Harmless Error" Argument.

This Court should reject Dougherty's argument that it can affirm the trial court's act in excess of its statutory authority because Budget did not argue that the consolidation order prejudiced it. *See Resp. Brief*, pp. 15-16. Dougherty's argument fails for multiple reasons.

Dougherty's legal authority is off-point. For his argument that Budget must show prejudice from the trial court's order exceeding its authority, Dougherty cites a case establishing the standards for reversal of a consolidation order issued pursuant to CR 42. *See Resp. Brief*, p. 16, citing *Leader Nat'l Ins. Co. v. Torres*, 51 Wn. App. 136, 142, 751 P.2d 1252 (1988). This authority is unavailing because this case does not concern consolidation under CR 42. In addition, Budget does not

challenge the discretionary decision to consolidate, but challenges whether the trial court had authority to exercise its discretion.

The harmless error doctrine does not apply where the trial court exceeds its authority. Where a trial court exceeds its authority, “error occurs that can never be harmless.” *State v. Williams-Walker*, 167 Wn.2d 889, 902, 225 P.3d 913 (2010). Budget was prejudiced by being compelled to a consolidated arbitration not permitted under the UAA; the order in excess of authority cannot be harmless. No authority supports application of the harmless error doctrine to a civil case concerning, not evidentiary rulings, but erroneous construction of a statute.

Even if Dougherty had shown that the doctrine applies in these circumstances, which he has not, Dougherty has not shown that it is satisfied. “A harmless error is an error which is trivial, or formal, or merely academic, and was not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.” *In re Det. of Pouncy*, 168 Wn.2d 382, 391, 229 P.3d 678 (2010) (quoting *State v. Britton*, 27 Wn.2d 336, 341, 178 P.2d 341 (1947)). Dougherty has failed to show that the order exceeding the trial court’s authority was trivial, formal, or academic. The order prejudiced Budget’s substantial rights by forcing a consolidation beyond what the UAA permits. And, the order fairly can be considered to have affected the final outcome.

“[A]n error is presumed prejudicial unless we conclude the error could not have rationally affected the verdict.” *State v. DeRyke*, 149 Wn.2d 906, 912, 73 P.3d 1000 (2003); *State v. Clark*, 143 Wn.2d 731, 775-76, 24 P.3d 1006 (2001). Budget is entitled to a presumption of prejudice.

If the harmless error doctrine applies, which it does not, Dougherty made no argument or showing of lack of harm to Budget assuming the consolidation order was in error. Dougherty merely argued that the consolidation order was not in error, so there is no prejudice. *See Resp. Brief*, pp. 16-19. Dougherty, therefore, has not supported his own argument that any error was harmless.

Dougherty conflates the fourth prong of the consolidation provision, which requires a balancing of the equities,² with whether an order to consolidate exceeding the trial court’s authority prejudiced Budget. The record reflects that Budget argued to the trial court that consolidation would prejudice it due to the timing of the different arbitrations, confusion of the factual and legal issues, logistics, demands on Budget’s sole practitioner attorney, and the unfairness of delay. *See CP 69-75*. Budget believes these prejudices did occur and did outweigh any

² RCW 7.04A.100(1)(d), the fourth prong, permits consolidation if “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.”

prejudice to Dougherty from a failure to consolidate. But Budget does not base its appeal on the fourth prong. That Budget declined to challenge the consolidation order under the fourth prong does not establish a concession of lack of prejudice *from the unauthorized consolidation*. Budget was prejudiced by being forced to arbitrate in consolidated proceedings that were not authorized under the UAA.

This Court should reverse and order a new arbitration between Dougherty and Budget.

B. This Court Should Reverse and Vacate the Award Due to Errors on Its Face

This detailed arbitration award is fully amenable to review for errors on the face. As this Court noted in *Federated Servs.*, an arbitrator can make his award more or less amenable to review under the arbitration act by the brevity or length of the award. *Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn. App. 119, 125, 4 P.3d 844 (2000). The award at issue, being lengthy and detailed, is one of the most reviewable that could come before this Court.

This Court reviews *de novo* for errors on the face. Dougherty does not dispute this standard. Dougherty concedes on appeal that the entire 42-page award is amenable to review, arguing that the trial court never confined its review otherwise. *Resp. Brief*, p. 22 (“The trial court did not

consider ‘only the last two pages of the 42-page award.’”). Before the trial court, Dougherty urged that the trial court confine its review to the last two pages. *See, e.g.*, CP 323, lines 21-22 (award is only statement of outcome); 325, lines 9-10 (“the ‘award’ begins on page 40” of the 42-page award). Because the parties no longer dispute this, the Court should review *de novo* the entire award for error. This court “shall” vacate where errors appear. RCW 7.04A.230(1)(d). Errors appear.

The errors are precisely the types of errors that have supported vacation in prior cases. Both “adoption of an erroneous rule” and a “mistake in applying the law” are proper subjects for vacation. *See Kennewick and Boyd* (cited in *Opening Brief* at p. 30). Dougherty directly acknowledges these as grounds for reversal. *Resp. Brief*, p. 20 (“[A]n arbitrator exceeds his powers if he adopts an erroneous rule or applies the law incorrectly.”). Dougherty argues that elements of the arbitrator’s decision that are not subject to review, constituting “the merits” of the decision. This is incorrect. Budget does not argue about the admissibility or weight of evidence, issues of credibility, or similar decisions within the purview of the arbitrator. As this Court said in *Federated*, “The dispute is about law, not evidence.” *Federated Servs. Ins. Co. v. Estate of Norberg*, 101 Wn. App. at 123. Budget set forth in its *Opening Brief* numerous mistakes applying the law and numerous adoptions of erroneous rules.

The legal errors are similar to those that have supported reversal in the five cases discussed in the Opening Brief: *Lindon Commodities* (arbitrator's mistaken belief that modification of a contract required new consideration), *Kennewick Educ. Ass'n* (arbitrator's mistaken belief that punitive damages were available in Washington), *Federated Servs.* (arbitrator's mistaken belief that plaintiff could recover for lost inheritance), *Tolson* (arbitrator may have made a mistake regarding which party had the evidentiary burden); and *Broom* (arbitrators' mistaken belief that statutes of limitations applied in arbitrations).

Budget established that the award demonstrates numerous facial errors regarding the substance and application of Washington law. Dougherty cannot salvage the award from the arbitrator's mistakes.

1. The Arbitrator's Demonstrated Mistake Awarding Prejudgment Interest on the Unliquidated Damages³

The award demonstrates facial errors regarding the arbitrator's award of \$184,702.23 in prejudgment interest on the delay damages. This Court easily should conclude that this demonstrates error. The arbitrator never directly addressed the liquidation issue, suggesting ignorance as to the Washington rule that damages must be liquidated to bear prejudgment

³ Regrettably, the Opening Brief heading V.B.4 mistakenly refers to "post-judgment" interest when "pre-judgment interest" is at issue and argued. This did not confuse Dougherty, who responded to the argument as to pre-judgment interest. *See Resp. Brief*, pp. 33-36.

interest. On every other issue that he considered, the arbitrator provided analysis. Dougherty's heading states that the arbitrator "determined" the damages to be liquidated. *See Resp. Brief*, p. 33. This miscasts the content of the award. The arbitrator did not address the issue whether the amounts were liquidated, and never labeled them as "liquidated." Dougherty cites to CP 205-06, which simply is that portion of the award where prejudgment interest is added without comment or justification.

The award demonstrates that the amounts were estimates, *i.e.*, sums not yet incurred and not able to be computed without some discretion. These are not the types of damages for which a plaintiff is entitled to prejudgment interest. Dougherty did not distinguish any of Budget's pertinent authorities such as *Prier*, *Hansen*, *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, *North Pac. Plywood* or *Maryhill Museum of Fine Arts*. The plain words in the award used to identify the sums on which the arbitrator awarded this prejudgment interest demonstrate that they were not liquidated, *i.e.*, increased construction costs that Dougherty **will incur**, **estimated** backfill costs, and a round number of \$70,000 for projected increased financing expenses should Dougherty get the development project going again, lost rents from an **anticipated** lease, lost rents based on **letters of intent** from tenants who had "previously indicated a willingness to participate in the [unrealized development]

project as tenants.” The arbitrator exercised discretion to determine the amount of delay damages. Prejudgment interest was improper.

At the very least, this Court should remand because it is very possible the arbitrator awarded prejudgment interest on these damages in contravention of Washington law. In *Tolson*, this Court reversed because inconsistencies within the award made it possible that the arbitrator had misapplied an evidentiary burden. Judge Becker explained for the unanimous panel, “Because the arbitrator's letter is internally inconsistent, it is legally erroneous on its face.” *Tolson*, 108 Wn. App. at 497. In reversing and remanding the award, Judge Becker explained that “the internal inconsistency amounts to an error of law on the face of the award.” *Id.* at 499. The panel reversed confirmation of the award directing the trial court “to seek clarification from the arbitrator” whether he found no memory loss attributable to the accident, which would justify reinstatement of the confirmation, or not, justifying vacation. *Id.*

The words used by the arbitrator blatantly signal that the amounts were unliquidated. At the very least, they strongly suggest that the arbitrator erred. Under *Tolson*, this supports vacation and remand.

2. The Arbitrator’s Demonstrated Mistake Awarding Impermissible Lost Profit Damages

The award demonstrates facial errors regarding permissible recovery of lost profits. The award of \$671,863 in lost profits mistakenly

dispenses with the requirement that lost profits be contemplated at the time of contracting, contravenes Washington's new business rule, and dispenses with the requirement that lost profits be established with reasonable certainty. Any of these mistakes supports vacation of the award as to lost profits.

These mistakes are facially apparent. This Court need not sift through evidence or attempt to weigh evidence in order to recognize the error. To the contrary, the errors are plain in the arbitrator's discussion of these damage awards. Dougherty attempts to argue that the award of damages was within the arbitrator's authority "and his conclusion and computation of damages is not reviewable under RCW 7.04A.230(1)(d)." *Resp. Brief*, p. 33. This argument flatly is contradicted by *Kennewick* and *Federated Servs.*, which require vacation of improper damage awards.

The award is improper because, as the award states, Dougherty did not communicate his time requirements to accommodate his anchor tenant until *after* the contract was executed and performance underway. CP 202. Lost profits are only awardable where such communications occur *before* contracting. This is plain error.

The award also is improper under the new business rule. Dougherty disputes the viability of the new business rule, *see Resp. Brief*, pp. 30-31, but both parties rely on *Larsen v. Walton Plywood Co.*, 65

Wn.2d 1, 390 P.2d 677 (1964), *mod.* 396 P.2d 879 (1965), which is good law. *See also* *Tiegs v. Watts*, 135 Wn.2d 1, 17, 954 P.2d 877 (1998) (summarizing lost profit rules established in *Larsen*).

Dougherty cites *Eagle Group, Inc. v. Pullen*, a case not on point because it concerned the best evidence rule and an entity in business for two years. *Eagle Group, Inc. v. Pullen*, 114 Wn. App. 409, 58 P.3d 292 (2002). The *Eagle* court noted that “when the plaintiff can also establish a profit history, as Eagle did here, expert testimony is not the only evidence of lost profits.” *Id.* at 419. Dougherty had no profit history.

Larsen provides that while expert testimony can sometimes establish lost profits of a new business, the expert opinion “must be based upon tangible evidence rather than upon speculation and hypothetical situations.” *Larsen*, 65 Wn.2d at 19. In *Larsen*, the court reduced portions of the lost profit award, finding the expert testimony too speculative. *Id.* at 19-20. Here, the award of lost profits also was based on speculation.

Dougherty argues with no citation to authority that “the new business rule has no place in the commercial leasing context.” *Resp. Brief*, p. 31. The Court should reject this unsupported argument. The confines of the new business rule articulated in *Larsen* exactly apply to this situation, especially where the real estate, development and commercial leasing markets plunged during the time period at issue. Dougherty also cites no

pertinent authority to support his argument that lost profit damages that would be too uncertain to be recovered under a breach of contract theory could be recovered under a CPA claim. *See Resp. Brief*, pp. 32-33. The same standard should apply.

This Court should reverse and vacate because the award of \$671,853 in lost profits represents a misapplication of Washington law.

3. The Arbitrator's Demonstrated Mistake Imposing CPA Liability for Breach of a Professional Standard, and Finding Causation Satisfied under the CPA Where the "Deceptive Act" Plainly Did Not Cause the Delay Damages.

The award demonstrates facial errors regarding Washington CPA law. The award demonstrates the arbitrator's mistaken belief that breach of the implied standard of care of an environmental consultant is a CPA violation. This contravened Washington law set forth in *Nguyen v. Doak Homes, Inc.*, and *Ramos v. Arnold*. As *Ramos* explains, claims directed to the competence and strategies of a professional are exempt from the CPA. The arbitrator's disapproval of the removal strategies in the contract, i.e. use of the PID to screen to contamination, and implied imposition of a higher standard, does not support CPA liability as a matter of law. Additionally, it is hard to fathom that Budget acted deceptively by failing to perform to the industry standard of an environmental consultant when the contract is completely silent on such a standard. The arbitrator

explained in the award that he *implied* the industry standard into the contract. The arbitrator misapplied Washington law when it found a deceptive act based on Budget's failure to screen to the implied standard of an environmental consultant, a duty on which the contract was silent. Budget disclosed how it would, and did, screen. No CPA claim lies.

Budget does not dispute that *Carlile v. Harbor Homes*, 147 Wn. App. 193, 194 P.3d 280 (2008), a case cited by Dougherty (*see Resp. Brief*, pp. 28-29), provides that a contractor can be liable under the CPA for an affirmative misrepresentation. The award simply reveals none. There is no affirmative misrepresentation in this case according to the facts found by the arbitrator and detailed in the award. The arbitrator implied terms to find breach of contract (in contradiction of the terms selected by the parties). The implied term is not an affirmative misrepresentation supporting CPA liability.

The arbitrator also misapplied Washington law to find causation under the CPA for delay damages. The misapplication of law is apparent on the plain facts in the award. The arbitrator found that because Budget used the PID to screen for soil contamination, Budget over-excavated and over-billed. CP 200. The arbitrator found that the excavation took 7 days. CP 201. The work was performed between March 14 to May 30, 2008. CP 201. The arbitrator found Budget responsible for delay damages from

the multi-month project. CP 201-03. These facts demonstrate arbitral error in holding that the multi-month delay was causally related to the over-excavation. Only 7 days of digging was required. The over-excavation could not have caused the multi-month delay.

This Court should reverse and remand for vacation of the CPA liability. At the least, under *Tolson* the inconsistency and illogic of the award warrants vacation and remand.

4. The Arbitrator's Demonstrated Mistake Regarding Contract Interpretation and Imposition of Contract Liability.

The award demonstrates facial errors regarding Washington contract law. The award demonstrates the arbitrator's mistaken belief that (1) specific terms of a contract do not control over general terms, and (2) performance to an industry standard not specified in the contract could be implied over the precise description of performance set forth in the contract. In contravention of settled Washington law summarized in *Adler*, *Equilon Enters.*, and *Seattle Prof'l Eng'g.*, the arbitrator rewrote the parties' contract. The award plainly describes how the arbitrator dispensed with the contract language to "imply" the standards upon which he premised breach of contract liability. The arbitrator impermissibly "foisted upon the parties a contract they never made." The UAA requires this Court correct this plain mistake through vacation.

Dougherty attempts to argue that the contract is ambiguous and

that this Court should defer to the arbitrator's construction. *Resp. Brief*, pp. 25-26. This argument fails. As detailed in the award, the arbitrator wrote out of the contract the unambiguous language providing for two instances in which performance soil samples were to be taken:

Budget will use the MiniRae 2000 photoionization detector ["PID"] 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. . . .**

CP 190 (emphasis added). The arbitrator's conclusion that Budget breached the contract by failing to take performance soil samples at other times not specified in this paragraph represents legal error.

While Dougherty argues that review of the arbitrator's decision regarding the contract claim should be off limits, *Resp. Brief*, p. 22, the *Lindon* case demonstrates that it is not. The appellate court in *Lindon* ordered vacation of the award because the arbitrator gave improper effect to the contract when it failed to recognize the parties' modification. *Lindon*, 57 Wn. App. at 816.

Dougherty urges that a Division II case *S&S Constr., Inc. v. ADC Properties, LLC*, 151 Wn. App. 247, 261, 211 P.3d 415 (2009), prevents reversal for errors that concern contract interpretation. *See Resp. Brief*, p. 22. The case does not so hold. The *S&S Constr.* court concluded that

there were no errors on the face of the award. The decision does not reveal whether the contract language urged on the court was apparent on the face of the award, as it is in this case. Likely, the contract was submitted separately from the award, which would be one explanation for the result. The *S&S Constr.* decision does not state a rule that facial errors support vacation except for those errors concerning contract construction. Washington law carves no exception for certain types of legal errors. All errors apparent on the face of the award, including errors of contract construction, require vacation. If *S&S Constr.* can be read to the contrary, this Court should not follow it.

This Court should reverse and vacate for the improper effect the arbitrator gave the soil removal contract in contravention of settled Washington law on contract construction.

C. The Trial Court's Addition to the Award in Contravention of the Plain Language of the Award Warrants Reversal: It Was Not the Mere Correction of a Mathematical Error

The record does not support Dougherty's argument that the trial court's addition to the award and judgment was a permitted correction. The trial court amended the judgment to add additional interest in the amount of \$23,301.83 in contradiction of the plain language of the award. The arbitrator's award provided interest, describing the interest as "inclusive of pre-award interest." CP 211. When Dougherty moved the

trial court for the additional amounts, Dougherty did not move for relief under RCW 7.04A.200(4) or ask for “correction.” CP 121 (asking for confirmation under RCW 7.04A.220); CP 473-72 (asking for amendment of the judgments to add additional interest with citation only to CR 54). When the trial court unilaterally awarded *pre-award interest*, it never indicated that it was correcting the award pursuant to RCW 7.04A.200(4). CP 563-64. This Court should reject Dougherty’s *post hoc* justification that the additional award was a mere correction, and reverse.

Dougherty admits that the interim award is not of record and was not before the trial court when it ruled. *See Resp. Brief*, p. 36, note 36. Dougherty then improperly attempts to rely on documents filed in supplemental proceedings. *Id.* (referring to records from the dismissed consolidated appeal, which records were filed two months after the trial court action at issue). When it amended the judgments, the trial court possessed an insufficient record on which to “correct” the award, was never asked to “correct” the award, and never indicated that the additional amounts were a correction.

Such a “correction” would be impermissible under the trial court’s statutory authority. Dougherty fails to address *Dayton v. Farmers Ins. Group*, 124 Wn.2d 277, 280, 876 P.2d 896 (1994), which Budget cited in its Opening Brief. In *Dayton*, the prevailing party upon confirmation of an

arbitral award requested that the trial court confirm the award *and add attorney fees to it*. *Dayton*, 124 Wn.2d at 279-80. The Supreme Court ruled that the failure to award fees is not the type of “correction” permitted by Washington’s arbitration act. *Id.* at 280. The trial court has no authority to correct such an “oversight.” *Id.* “The court does not have collateral authority to go behind the face of an award and determine whether additional amounts are appropriate.” *Id.* In *Dayton*, reversal was appropriate where the trial court had “exceeded its authority in awarding the attorney fees.” *Id.*

Dayton controls here. While Dougherty argues that failure to award additional pre-award interest was an “oversight,” it is not a proper subject of correction by the trial court under the statutory scheme. *Dayton* directs that the trial court cannot reach back in time and add additional amounts to the award. It is not for the trial court to decide if additional amounts should have been awarded.

Dougherty argues that the trial court had the authority to include in a calculation of prejudgment interest “the entire amount from the date of the award to the date of the judgment.” *Resp. Brief*, p. 37. But this is not what the trial court did. The trial court did not limit itself to interest “from the date of the award,” but added interest *pre-dating* the award. This Court should reverse the addition of pre-award interest of \$23,301.83.

II. CONCLUSION

This Court should reverse on *de novo* review for facial errors in the lengthy arbitration award. Dougherty concedes that the full award is subject to scrutiny for errors in application or statement of law. The UAA mandates reversal for facial errors. Budget has shown facial errors of the type that have supported reversal in numerous precedents. As *Optimer* instructs, Washington courts must recognize their duty under the UAA to conduct review for facial error and vacate where appropriate. This is an appropriate case for vacation and remand to a new arbitrator.

The Court need not reach review of the award itself because Dougherty's case was impermissibly consolidated with another customer's. The trial court had no authority to consolidate the arbitrations where the transactions were not the same or related transactions. This Court should reverse, vacate, and remand for a new arbitration.

Finally, the trial court erred when it added prejudgment interest to the award in clear contravention of *Dayton*.

Respectfully submitted this 11th day of March, 2011.

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