

NO. 38063-3
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STACIE DILL and CRAIG DILL,

Plaintiffs/Respondents,

vs.

MICHELSON REALTY COMPANY, a Missouri corporation doing
business as THE COVE AT FISHER'S LANDING APARTMENTS;
and EQUITY RESIDENTIAL PROPERTIES MANAGEMENT
CORP., a Delaware corporation,

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN NICHOLS

BRIEF OF RESPONDENTS

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RESPONSE TO ASSIGNMENT OF ERROR

Defendants and appellants have not set out any Assignment of Error. They have stated, however, that the issue associated with the Assignment of Error is whether the trial court erred by entering judgment on a Mandatory Arbitration Award in excess of \$76,000.00 by calling part of the award damages and part of the award attorneys' fees. From this plaintiffs and respondents Stacie Dill and Craig Dill (the Dills) conclude that defendants intend to assign error to the trial court's entry of judgment in this matter.

The Dills respond that the trial court did not err by entering its judgment. Plaintiffs further state the following issues for appeal:

1. In a mandatory arbitration proceeding, can the arbitrator award damages and attorney's fees that will total more than \$50,000?
2. Is MAR 1.2 a substantive or procedural rule?
3. Can the attorney fees awarded to plaintiffs in this matter be considered damages?
4. Can defendants question the award of the mandatory arbitrator by a means other than seeking *trial de novo* as allowed by RCW 7.06.050(1) and MAR 7.1?

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STATEMENT OF THE CASE

On March 9, 2007, the Dills filed suit against defendants Michelson Realty Company and Equity Residential Properties Management Corp. They alleged that they leased an apartment and storage garage at an apartment complex owned by Michelson Realty Company and managed by Equity Residential Properties Management Corp. The complaint further alleged that the Dills had placed items of personal property into a storage garage and that defendants' agents had disposed of and/or destroyed valuable items of personal property in violation of statute. The Dills sought damages of \$75,000.00 for the loss of their property; \$50,000.00 for emotional distress; and award of attorney's fees and cost pursuant to RCW 59.18. (CP 1-6). Defendants answered and denied the substantive allegations of the complaint. (CP 7-9)

In Clark County Superior Court, the process for moving a case to trial or mandatory arbitration requires a party to submit a "Notice to Set for Trial" on a form the court prescribes. Clark County Local Rule 40(b)(1). The approved form contains a section entitled "Statement of Arbitrability."¹ This portion of the form lets the court know if the matter

¹ The form is set out in the Appendix. It is available on the website of the Clark County Superior Court. Therefore, judicial notice of the form is appropriate. ER 201(b); *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1996).

should go to mandatory arbitration. The form requires the party to check the box or boxes that apply. The choices are:

- This case is subject to arbitration because the sole relief sought is a money judgment and it involves no claim in excess of \$50,000.00, exclusive of attorney fees, interest, and costs.
- The undersigned contends that its claim exceeds \$50,000.00, but for purposes of arbitration waives any claim in excess of \$50,000.00.
- This case is **NOT** subject to mandatory arbitration because:
 - a. _____The claim and/or counterclaim exceeds \$50,000.00.
 - b. _____Relief other than a money judgment is sought.
 - c. _____This case is an appeal from lower court.

On October 29, 2007, the Dills completed and submitted their “Notice to Set for Trial.” Their pleading conformed to the approved form. They selected the second choice on the form’s “Statement of Arbitrability.”

The matter then proceeded to mandatory arbitration. On April 24, 2008, Arbitrator Stephen Kinman issued an award that set the Dills’ damages at \$45,000.00. He also stated that the Dills would be entitled to an award of attorney’s fees. (CP 10-12) On May 29, 2008, he made another award that allowed the Dills attorney’s fees of \$27,300.00 and litigation costs of \$975.55 for a total of \$28,275.55. (CP 13-16)

Defendants sought *trial de novo* but then dismissed that request. (CP 35) The Dills sought entry of judgment on Mr. Kinman’s award.

Defendants objected on the basis that the sum of damages, attorney's fees, and costs exceeded \$50,000.00. (CP 26-34)

On June 27, 2008, the trial court entered judgment in favor of the Dills consisting of \$45,000.00 of damages; \$30,300.00 in attorney's fees; and \$975.55 in costs. (CP 51-52) The additional \$3,000.00 of attorney's fees stemmed from work done by counsel for the Dills subsequent to Mr. Kinman's award. (CP 40-42) The total amount of the judgment, including attorney's fees and costs, was \$76,275.55.

Defendants then appealed. (CP 63-65)

ARGUMENT

Assignment of Error: The Trial Court Did Not Err by Granting Judgment.

I. Introduction.

The arbitrator awarded damages of \$45,000.00 and attorney's fees and litigation costs totaling \$28,275.55. The trial court awarded an additional \$3,000.00 for work done subsequent to the arbitrator's award. The total judgment therefore exceeded \$50,000.00. The trial court did not err in entering this judgment because the sum for attorney's fees and costs are not included when determining the Mandatory Arbitration ceiling. In any event, Defendants cannot appeal from the Court's decision because they withdrew their request for *trial de novo*.

II. Scope of Review.

The issues presented in this case involve construction of RCW 7.06 and the Mandatory Arbitration Rules. These questions are matters of law requiring *de novo* review. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997); *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

III. The Mandatory Arbitration Ceiling Does Not Include Amounts Awarded for Attorney's Fees.

a. Relevant Statutes and Rules.

In 1979, the legislature allowed Mandatory Arbitration by enacting what has been codified as RCW 7.06. *Laws of Washington, 1979*, Chapter 103. In that enactment, the legislature directed the Supreme Court to adopt by rule procedures to implement Mandatory Arbitration of civil actions under RCW 7.06. RCW 7.06.030. The Supreme Court then promulgated the Mandatory Arbitration Rules to be effective July 1, 1980. MAR 8.3.

The statute discussing which claims are subject to mandatory arbitration is RCW 7.06.020. It has been amended on a number of occasions. At the time of the events giving rise to this suit, it read in pertinent part as follows:

All civil actions . . . which are at issue in the Superior Court and counties which have authorized arbitration, where the sole relief sought as a money judgment, and where no party asserts a claim in excess of \$15,000.00, or if approved by the superior court of a county by two-thirds or greater vote of the judges thereof, up to \$50,000.00, exclusive of interest and costs, are subject to mandatory arbitration.

The rule in the Mandatory Arbitration Rules governing this issue is MAR

1.2. At the time this dispute arose, it provided as follows:

A civil action, other than an appeal of limited jurisdiction, is subject to arbitration under these rules if the action is at issue in a superior court in a county which has authorized mandatory arbitration under RCW 7.06, if (1) the action is subject to mandatory arbitration as provided in RCW 7.06, (2) all parties, for purposes of arbitration only, waive claims in excess of the amount authorized by RCW 7.06, exclusive of attorney fees, interest and costs, or (3) the parties have stipulated to arbitration pursuant to Rule 8.1.

The judges of the Clark County Superior Court have allowed mandatory arbitration of claims up to \$50,000.00. LMAR 1.2(a). That means that the mandatory arbitration ceiling for our purposes is \$50,000.00.

The statute, RCW 7.06.020, allows for arbitration of claims less than \$50,000.00 exclusive of interest and costs. RCW 7.06.020(1). The rule, MAR 1.2, however, allows another category of cases to be subject to mandatory arbitration — actions where all parties, for purposes

of arbitration only, waive claims in excess of \$50,000.00 exclusive of attorney's fees and costs. The rule therefore allows a party to seek mandatory arbitration and receive a total recovery of greater than \$50,000.00 if the attorney's fees, interest and costs cause the recovery to be greater than \$50,000.00.

It has long been recognized that the combination of RCW 7.06.020 and MAR 1.2 requires that the mandatory arbitration ceiling be reckoned without consideration of attorney's fees, interest, or costs. Tegland, *Civil Procedure* 15 Wash.Prac. § 47.4. The Court so stated in *Mitchell v. Straith*, 40 Wn.App. 405, 698 P.2d 609 (1985). In that case, the Court noted that the plaintiff's claim for damages in the amount of \$7,197.10 was "properly assigned for arbitration" because the complaint sought no relief other than a money judgment of less than \$10,000.00 exclusive of attorney fees, interest, and costs. 40 Wn.App. at 413.

b. The Provisions of MAR 1.2 Must Govern.

i. Court Rules Supersede Inconsistent Procedural Statutes If No Harmonization is Possible.

As noted above the legislature specifically authorized the Supreme Court to promulgate rules governing mandatory arbitration. RCW 7.06.030. This direction was consistent with RCW

2.04.190. That statute gave the Supreme Court broad power to promulgate procedural rules. It provides as follows:

The supreme court shall have the power to prescribe, from time to time, the forms of writs and all other process, the mode and manner of framing and filing proceedings and pleadings; of giving notice and serving writs and process of all kinds; of taking and obtaining evidence; of drawing up, entering and enrolling orders and judgments; and generally to regulate and prescribe by rule the forms for and the kind and character of the entire pleading, practice and procedure to be used in all suits, actions, appeals and proceedings of whatever nature by the supreme court, superior courts, and district courts of the state. In prescribing such rules the supreme court shall have regard to the simplification of the system of pleading, practice and procedure in said courts to promote the speedy determination of litigation on the merits.

(Emphasis added.) The legislature also enacted RCW 2.04.200. That statute states that the rules that Supreme Court promulgates take precedence over conflicting statutes. It provides:

When and as the rules of courts herein authorized shall be promulgated all laws in conflict therewith shall be and become of no further force or effect.

The Supreme Court has held that RCW 2.04.200 means exactly what it says. Where a rule of court is inconsistent with the procedural statute, the Court's rule making power is supreme. *Petrarca v.*

Halligan, 83 Wn.2d 773, 776, 522 P.2d 827 (1974). Nonetheless, apparent conflicts between a court rule and a statutory provision should be harmonized so that both the statute and the rule can both be given effect if possible. *State v. Ryan*, 103 Wn.2d 165, 178, 691 P.2d 197 (1984); *State v. Blilie*, 132 Wn.2d 484, 491, 939 P.2d 691 (1997).

The statutes that give effect to court rules over apparently conflicting statutes apply when the rules address matters of procedure as opposed to substance. Generally, substantive law prescribes norms for societal conduct and creates, defines, and regulates primary rights. By contrast, practice and procedural law pertains to the essential mechanical operations of the courts by which substantive law, rights, and remedies are effectuated. *State v. Smith*, 84 Wn.2d 498, 500, 527 P.2d 674 (1974); *State v. Robinson*, 153 Wn.2d 689, 702, 107 P.3d 90 (2005); *Christensen v. Ellsworth*, 162 Wn.2d 365, 374, 173 P.3d 228 (2007).

ii. Harmonization of RCW 7.06.020 and MAR 1.2 Is Possible.

There is no conflict between RCW 7.06.020 and MAR 1.2 that cannot be harmonized. In MAR 1.2, The Supreme Court allowed mandatory arbitration of claims where a party seeking damages believes the claim exceeds the allowable limit but is willing to waive recovery above the ceiling exclusive of attorney's fees, interest, and costs.

There is nothing in RCW 7.06.020 that prohibits mandatory arbitration under these circumstances. The statute simply provides that all civil actions shall proceed to mandatory arbitration where no party claims damages in excess of the amount authorized by the local Superior Court exclusive of interest and costs. In other words, by enacting MAR 1.2, the Supreme Court has simply allowed another category of case to be submitted to mandatory arbitration in the absence of any contrary legislative intent.

In short, MAR 1.2 and RCW 7.06.020 can easily coexist. The statute sets out a category of cases that can proceed to mandatory arbitration. The rule describes another category. Since the statute does not preclude the category allowed by the rule, the statute and the rule are not inconsistent with each other.

iii. If Harmonization Is Not Possible, MAR 1.2 Controls.

If MAR 1.2 conflicts with RCW 7.06.020, then MAR 1.2 controls. The rule governs because it is procedural in nature.

The Dills' substantive rights are set out in RCW 59.18.230(4). That statute prohibits a landlord from taking or detaining tenants' personal property without consent. It allows the tenant to recover

the value of the property the landlord retains and actual damages. It also allows the prevailing party in any action to recover costs of suit and a reasonable attorney's fee.

By contrast, the Mandatory Arbitration Rules are procedural. Specifically, MAR 1.2 guides solely whether the claim of a tenant aggrieved by a violation of RCW 59.18.230(4) will be heard by an arbitrator. The rule is clearly procedural since it deals with how rights are to be effectuated under the test of *State v. Smith, supra*. Simply stated, MAR 1.2 determines nothing more than who will hear the matter in the first instance, a mandatory arbitrator or the court. That question, of course, is one of procedure not substance.

Defendants have called the Court's attention to *Leslie v. Verhey*, 90 Wn.App. 796, 954 P.2d 330 (1998). That decision does not bear on the question of whether one of the Mandatory Arbitration Rules will supersede an apparently conflicting statute. In that case, the Court transferred a child support modification proceeding to mandatory arbitration. After the arbitration award, the mother sought *trial de novo*. The trial court concluded that she did not improve her position at trial and awarded the father attorney's fees pursuant to MAR 7.3. The Court of Appeals reversed and remanded. It held that the trial court erred by concluding that an award of attorney's fees were mandatory under MAR

7.3 as opposed to discretionary under the terms of RCW 26.09.140. 90 Wn.App. at 804-7.

Leslie v. Verhey, supra, has no bearing on our case because the statute and rule in that case both pertained to substantive rights. The substantive right in question was entitlement to attorney's fees. The statute allowed attorney's fees as a matter of discretion based upon certain considerations. By contrast, the rule allowed attorney's fees based on other considerations — a party's failure to improve his or her position on *trial de novo*. The Court chose to apply the statute.²

iv. Allowing Attorney's Fees to Increase a Mandatory Arbitration Award Beyond the Statutory Ceiling Is Consistent with the Purpose of Mandatory Arbitration.

It has long been recognized that mandatory arbitration serves two beneficial purposes. It reduces court congestion and resulting delays in hearing civil cases. *Nevers v. Fireside, Inc., supra*; *Christie-Lambert Van & Storage, Inc. v. McLeod*, 39 Wn.App. 298, 302, 693 P.2d 161 (1984), citing *Senate Journal*, 46th Legislature (1979), at

² In its opinion, the Court did not address RCW 7.06.060(1). That statute requires a court to assess costs and reasonable attorney's fees against the party that seeks *trial de novo* and fails to improve his or her position. Obviously, MAR 7.3 is consistent with RCW 7.06.060(1). The decision therefore resolved a conflict between two statutes that created conflicting substantive rights—not a conflict between a statute and a rule. The Court chose to apply the statute that was more specific in its view — the statute applicable to domestic relations matters.

106-107. It also allows parties to resolve smaller cases faster and at a substantially lower cost. *Mitchell v. Straith, supra*, 40 Wn.App. at 414.

The Mandatory Arbitration Rules are to be interpreted in accord with their purpose. *Nevers v. Fireside, Inc., supra*, 133 Wn.2d at 809. *Wiley v. Rehak, supra*. By enacting MAR 1.2, the Supreme Court sought to expand the number of cases that could be subject to mandatory arbitration. Clearly, the object was to reduce court congestion by doing so. *Marquez v. Cascade Residential Design, Inc.*, 142 Wn.App. 187, 189, 174 P.3d 151 (2007). If the total of attorney's fees and damages cannot exceed \$50,000.00, more aggrieved parties will forego mandatory arbitration. For example, a party suing on a \$49,000.00 promissory note containing a clause allowing attorney's fees to the prevailing party and who recognizes that the case will involve factual issues requiring a trial will avoid mandatory arbitration in order to recover all attorney's fees. Such a result will necessarily increase the burden on courts to hear and decide its cases. That result, obviously, would increase

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— not decrease — court congestion, a result at odds with the legislature’s purpose in providing for mandatory arbitration.³

If parties are deterred from seeking mandatory arbitration, their litigation costs will necessarily increase. That clearly could work to the detriment of parties in the same position as Defendants. Had the Dills achieved the same result in a trial, Defendants would have been required to pay a significantly larger amount in attorney’s fees. In short, Defendants’ position here is at odds with their interest.

v. The Legislature Has Acquiesced in MAR 1.2.

The legislature directed the Supreme Court to promulgate rules to govern mandatory arbitration in RCW 7.06.030. By doing so, it must be deemed to have recognized that those rules would take precedence over conflicting provisions in RCW 7.06. The legislature is presumed to have knowledge of existing statutes and existing case law

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³ This consideration is not hypothetical. It is difficult to get a civil case tried in an expeditious fashion in Clark County Superior Court notwithstanding the best efforts of the Superior Court judges and court personnel. This stems largely from the increased volume of criminal cases and their priority status. CrR 3.3(a)(2).

construing those statutes. *ATU Legislative Council of Washington v. State*, 145 Wn.2d 544, 552-54, 40 P.3d 656 (2002); *Bob Pearson Construction, Inc., v. First Community Bank of Washington*, 111 Wn.App. 174, 179, 43 P.3d 1261 (2002); *Savlesky v. State, Washington School for the Deaf*, 139 Wn.App. 245, 253, 136 P.3d 152 (2006). Its prior enactments include RCW 2.04.190 and RCW 2.04.200. Prior decisions interpreting those statutes include *State v. Smith, supra*. In light of these considerations, the legislature clearly gave the Supreme Court the ability to prescribe rules that would govern mandatory arbitration even if those rules would be seen as inconsistent with the language of RCW 7.06.

Furthermore, the legislature appears to be content to allow mandatory arbitration of cases meeting the requirements of MAR 1.2. The legislature has amended RCW 7.06.020 on several occasions. In 1985, it allowed local judges to raise the ceiling to \$15,000.00 by a majority vote or \$25,000.00 by a two-thirds vote. *Laws of 1985*, Chapter 265 §3. In 1987, it allowed two-thirds of the judges to raise the ceiling to \$35,000.00. *Laws of 1987*, Chapter 212 §101. In 2005, it allowed two-thirds of the judges to raise the ceiling to \$50,000.00. *Laws of 2005*, Chapter 472 §2. By contrast, MAR 1.2 was amended in 1984, prior to any of the statutory amendments. It was last amended on September 1, 1989, to add the word “only” in subsection (2). *Tegland Rules Practice* 4A

Wash.Prac. MAR 1.2. The legislature is also presumed to be familiar with rules promulgated by the Supreme Court. *Nationwide Insurance v. Williams*, 71 Wn.App. 336, 343, 858 P.2d 516 (1993); *State v. Crider*, 78 Wn.App. 849, 858-59, 899 P.2d 24 (1995). Its amendment of RCW 7.06.020 without prohibiting mandatory arbitration when a party waives claims in excess of the statutory ceiling exclusive of attorney's fees, interest, and costs means that the legislature acquiesced in allowing mandatory arbitration of cases of this type as allowed by MAR 1.2. *Baker v. Leonard*, 120 Wn.2d 538, 545, 843 P.2d 1050 (1993); *Pudmaroff v. Allen*, 138 Wn.2d 55, 64-65, 977 P.2d 574 (1999).

vi. Conclusion.

In summary, MAR 1.2 allows a party to seek mandatory arbitration by waiving claims over \$50,000.00 exclusive of attorney's fees, interest, and costs. That necessarily means that a mandatory arbitrator can award damages of \$50,000.00 or less together with attorney's fees, interest, and costs in any amount. That proposition further leads to the conclusion that the arbitrator's total award can exceed the \$50,000.00 ceiling if the damages component is less than \$50,000.00. That is precisely what occurred in this case. For that reason, the trial court did not err by entering judgment in an amount greater than \$50,000.00.

IV. Attorney's Fees Are Not Damages.

Defendants claim that attorney's fees are really damages and therefore subject to the \$50,000.00 ceiling. This argument has no merit.

Attorney's fees can be recovered as damages. For example, if the wrongful act or omission of party A causes party B to be exposed to or involved in litigation with party C, B can recover from A the attorney's fees incurred in the litigation with C. *City of Seattle v. McCready*, 131 Wn.2d 274, 931 P.2d 156 (1997); *Manning v. Loidhamer*, 13 Wn.App. 766, 538 P.2d 136 (1975); *Dauphin v. Smith*, 42 Wn.App. 491, 713 P.2d 116 (1986); *Rustlewood Association v. Mason County*, 96 Wn.App. 788, 981 P.2d 7 (1999). Attorney's fees are also recoverable as damages based upon a contractual indemnity provision. *Jacob's Meadow Owners Association v. Plateau 44 II, LLC*, 139 Wn.App. 743, 759, 162 P.3d 1153 (2007). When attorney's fees are claimed as damages, the trier of fact must find that they were incurred and that they are reasonable. If the trier of fact is a jury, those damages must be part of its verdict. *Jacob's Meadow Owners Association v. Plateau 44 II, LLC, supra*, 139 Wn.App. at 760.

Attorney's fees can also be awarded as a litigation expense. This can occur, however, only when there is a statute, contractual provision, or recognized ground in equity allowing for such an award. *Fiorito v. Goerig*, 27 Wn.2d 615, 619-20, 179 P.2d 316 (1947); *Wagner v. Foote*,

128 Wn.2d 408, 416, 908 P.2d 884 (1996). When attorney's fees are sought as litigation expenses, the trial court determines the award under the methodology set out in *Bowers v. Transamerica Title Insurance Company*, 100 Wn.2d 581, 675 P.2d 193 (1983).

In this case, the Dills had no entitlement to attorney's fees as damages. They made no such claim in their complaint. The fees were not incurred in some other litigation to which they were exposed by virtue of Defendants' taking their property. There was also no indemnity agreement that applied. Therefore, the attorney's fees that they were awarded were not damages.

The Dills sought and obtained attorney's fees as a litigation expense under the terms of RCW 59.18.230(4) that provides as follows:

(4) The common law right of the landlord of distress for rent is hereby abolished for property covered by this chapter. Any provision in a rental agreement creating a lien upon the personal property of the tenant or authorizing a distress for rent is null and void and of no force and effect. Any landlord who takes or detains the personal property of a tenant without the specific written consent of the tenant to such incident of taking or detention, and who, after written demand by the tenant for the return of his personal property, refuses to return the same promptly shall be liable to the tenant for the value of the property retained, actual damages, and if the refusal is intentional, may also be liable for damages of up to one hundred dollars per day but not to exceed one thousand dollars, for each day or part of a day that the tenant is deprived of his property. The prevailing party

may recover his costs of suit and a reasonable attorney's fee.

(Emphasis added) This language shows that the attorney's fee entitlement is an expense of litigation. The language of the statute also shows that attorney's fees are not damages. If the legislature wanted to classify the attorney's fee award as damages, it would have said so in the statute as follows:

. . . Any landlord who takes or detains the personal property of a tenant without the specific written consent of the tenant to such incident of taking or detention . . . shall be liable to the tenant for the value of the property retained and actual damages to include a reasonable attorney's fee. . .

By allowing attorney's fees to the prevailing party, the legislature confirmed that it regarded attorney's fees as a litigation expense, not damages. A landlord who might successfully resist in a tenant's claim is able to recover attorney's fees under the terms of the statute.

The arbitrator's award also confirms that attorney's fees were litigation expenses and not damages. Mr. Kinman first awarded \$15,000.00 for replaceable personal property and \$30,000.00 for irreplaceable personal property. (CP 19-20) He awarded attorney's fees as a litigation expense, not as additional damages. (CP 22-23)

The trial court also understood that attorney's fees were not damages. Its judgment included damages of \$45,000.00. It then set out

attorney's fees and costs separately, not as part of the damage award. (CP 54-55)

Defendants premise their argument on *Brown v. Suburban Obstetrics & Gynecology, P.S.*, 35 Wn.App. 88, 670 P.2d 1077 (1983). In that case, an employee sued his employer for unpaid wages. The trial court allowed him that relief but refused to grant attorney's fees as might be allowed by RCW 49.48.030. The employee appealed from this ruling. The employer contended that the issue was not appealable because there can be no appeal from a determination of costs, relying on *Snohomish County v. Boettcher*, 66 Wn.2d 351, 402 P.2d 505 (1965) and *Judges of the Everett District Court v. Hurd*, 85 Wn.2d 329, 534 P.2d 1025 (1975). Citing *Harold Myer Drug v. Hurd*, 23 Wn.App. 683, 598 P.2d 404 (1979), the Court rejected this argument on the basis that attorney's fees were not costs under the terms of the statute applicable in that case, RCW 49.48.030. It then determined that the trial court had erred in denying the employee his attorney's fees. In the course of the opinion, the court noted that "Dr. Brown seeks attorney's fees as additional damages for defendant's failure to comply" with the applicable statute. 35 Wn.App. at 884. That is the sole mention of attorney's fees amounting to damages in the entire opinion. There is no holding or even dictum that an award of attorney's fees amounts to damages.

Other courts have confirmed that the Court in *Brown v. Suburban Obstetrics & Gynecology, P.S., supra*, did not hold that attorney's fees amount to damages. *St. Paul Fire and Marine Insurance Co v. Hebert Construction, Inc.*, 450 F.Supp.2d 1214, 1234-35 (W.D.Wash. 2006); *Wlasiuk v. Whirlpool Corp*, 76 Wn.App. 250, 254, 884 P.2d 13 (1994).

The attorney's fees awarded by the arbitrator and the Court were litigation expenses. They were not damages. Therefore, they are not subject to being included for the purposes of calculating mandatory arbitration ceiling.

V. The Dills Did Not Waive the Right to Recover More than \$50,000.00 Inclusive of Attorney's Fees and Costs.

A party seeking to move a matter to trial or arbitration in Clark County Superior Court must file a Notice to Set for Trial on a form the Court prescribes. Clark County LR 40(b)(1). The form includes a section entitled "Statement of Arbitrability." That section gives three choices. First, a party can indicate that the claim is suitable for mandatory arbitration because the sole relief sought is a money judgment involving no claim in excess of \$50,000.00, exclusive of attorney's fees, interest, and costs. A party can also respond by waiving claims in excess of \$50,000.00 for purposes of arbitration. Finally, a party can state that the claim is not

suitable for mandatory arbitration because a claim exceeds \$50,000.00; relief other than a money judgment is sought; or the case is an appeal from a lower court.

The Dills selected the second option. They contended that their claim exceeded \$50,000.00. However, they waived claims in excess of that amount for purposes of arbitration.

Defendants claim that the Dills' election on the Notice to Set for Trial amounted to a waiver of a recovery in excess of \$50,000.00 inclusive of any attorney's fees they might be awarded. This argument ignores the context in which the election was made and the nature of waiver.

A waiver is the intentional and voluntary relinquishment of a known right or such conduct as warrants the inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating the intent to waive. It is a voluntary act that implies choice, by the party, to dispense with something of value or to forego some advantage. The right, advantage, or benefit must exist at the time of the alleged waiver. The one against whom waiver is claimed must have actual or constructive knowledge of the existence of the right. He or she must intend to relinquish such right, advantage, or benefit; and his or her actions must be inconsistent with any other intention than to waive them. *Bowman v. Webster*, 44 Wn.2d 669, 269 P.2d

960 (1954); *State ex rel. Cornell v. Lane*, 110 Wn.App. 328, 41 P.3d 486 (2002). Under this test, waiver is absent here.

In the context of mandatory arbitration, the waiver of claims in excess of \$50,000.00 refers to the principal of the claim only. This is made clear by MAR 1.2(2) and *Mitchell v. Straith, supra*. The rule allows a party to proceed to mandatory arbitration if that party waives claims in excess of \$50,000.00 exclusive of interest, costs, and attorney fees. The Dills' election on the trial setting notice must be interpreted in this fashion.

The Dills were required to utilize the form approved by Clark County Superior Court. Unfortunately, that form does not exactly follow the language of MAR 1.2. It allows for arbitration where the amount of the claim is less than \$50,000.00 exclusive of attorney's fees, interest, and costs. It also allows a party to waive claims over \$50,000.00 and proceed to mandatory arbitration. On the other hand, MAR 1.2 allows for arbitration if the action is subject to arbitration under the terms of RCW 7.06.020—if the claim is less than \$50,000.00 exclusive of interest and costs—or if a party waives claims over \$50,000.00 exclusive of attorney's fees, interest, and costs. What the form does show, however, is that Clark County Superior Court does not include attorney's fees in computing the mandatory arbitration ceiling.

The form was adopted pursuant to Clark County LR 40. This rule cannot conflict with statutes or rules enacted by the Supreme Court. CR 83; MAR 8.2. A local rule will not apply to the extent that a conflict exists. *Harbor Enterprises v. Gudjonsson*, 116 Wn.2d 283, 803 P.2d 798 (1991). However, a conflict exists only when the two rules are so antithetical that it is impossible as a matter of law that both can be effective. *Heaney v. Seattle Municipal Court*, 35 Wn.App. 150, 155, 665 P.2d 918 (1983); *King County v. Williamson*, 66 Wn.App. 10, 830 P.2d 392 (1992). Once again harmonization is possible. If the second choice allowed under Statement of Arbitrability is construed to allow waiver of claims above \$50,000.00 exclusive of attorney's fees, costs, and interest, there is no conflict. When that interpretation is applied, the Dills selection of the second choice means only that they waived damage claims over \$50,000.00, and that the waiver did not include attorney's fees.

Waiver is essentially a matter of intention. *Dombrosky v. Farmers Insurance Company of Washington*, 84 Wn.App. 245, 255, 928 P.2d 1127 (1996). And, as noted above, any acts alleged to constitute a waiver must be inconsistent with any other intention. Defendants cannot demonstrate an intention on the part of the Dills to waive a recovery in excess of \$50,000.00 inclusive of attorney's fees for the reasons stated above. Furthermore, if they indeed intended to recover less than \$50,000.00

inclusive of attorney's fees, they would not have sought such an award after receiving Mr. Kinman's initial damage determination.

In short, the Dills' election must be construed to relate only to their principal damage claims and to nothing else.

VI. Defendants Cannot Raise This Issue Because They Dismissed Their Request for *Trial De Novo*.⁴

The essence of defendants' argument is that Mr. Kinman, the mandatory arbitrator, should not have awarded damages, costs, and attorney's fees totaling more than \$50,000.00. Defendants therefore complain of an error made by Mr. Kinman. Defendants cannot raise this issue because they dismissed their request for *trial de novo*.

If a party finds fault with a mandatory arbitration award for any reason, the sole avenue of relief open to that party is *trial de novo*. Conversely, if no party has timely sought *trial de novo* after the arbitrator has made the award, the trial court is required to enter judgment on that

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⁴ The Dills did not raise this issue before the trial court. Their failure to do so does not matter. A trial court decision may be affirmed on any theory established by the pleadings and supported by the proof. *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984); *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 493, 933 P.2d 1036 (1997); *Stieneke v. Russi*, 145 Wn.App. 544, 560, 190 P.3d 60 (2008).

award. It cannot revise the arbitrator's decision in any way. *Malted Mousse, Inc., v. Steinmetz*, 150 Wn.2d 518, 529, 79 P.3d 1154 (2003); *Trusley v. Statler*, 69 Wn.App.462, 464, 849 P.2d 1234 (1993); *Kim v. Pham*, 95 Wn.App. 439, 443, 975 P.2d 544 (1999); *Marquez v. Cascade Residential Design, Inc., supra*. This result follows from MAR 6.3, which provides:

If within 20 days after the award is filed no party has sought a trial de novo under Rule 7.1, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of arbitration for entry as the final judgment. A judgment so entered is subject to all provisions of law relating to judgments in civil actions, but is not subject to appellate review and it may not be attacked or set aside except by motion to vacate under CR 60.

The Mandatory Arbitration Rules must be strictly construed. Their precise terms must be given effect. *Nevers v. Fireside, Inc., supra*, 133 Wn.2d at 811. Since the trial court entered judgment on the award after Defendants dismissed their request for *trial de novo*, the trial court correctly followed the direction in MAR 6.3 by entering judgment in accordance with the arbitration award. Its doing so was not error.

Defendants appear to contend that Mr. Kinman erred by awarding damages and attorney's fees the total of which exceeded \$50,000.00. They appear to categorize his decision as a "manifest procedural error" because it amounts to an award beyond what they claim to be the

monetary ceiling for mandatory arbitration. Even if Mr. Kinman's decision was incorrect for that reason, the trial court could not correct it once Defendants had dismissed their *trial de novo* request. A court cannot revise the decision made by a mandatory arbitrator on the basis that the decision amounts to "manifest procedural error." *Malted Mousse, Inc. v. Steinmetz, supra*, 150 Wn.2d at 530-32.

Malted Mousse v. Steinmetz, supra, bears some similarities to our case in that it concerns questions of attorney's fees. In that case, the amount claimed as damages was less than \$10,000.00. The arbitrator found in favor of the defendant, Mr. Steinmetz. The ruling may have entitled Mr. Steinmetz to attorney's fees under RCW 4.84.250 *et seq.* The arbitrator determined, *sua sponte*, that the statute was unconstitutional and denied him attorney's fees. 150 Wn.2d at 523. Mr. Steinmetz sought a "partial *trial de novo*" challenging that determination alone. At length, he moved for an order confirming the arbitration award and an order awarding him attorney's fees. The trial court denied the motion. The Court of Appeals reversed. It held that the arbitrator's action amounted to "manifest procedural error" that the trial court could correct. It remanded the case to the trial court with directions to further remand to the arbitrator to determine an appropriate attorney's fee award for Mr. Steinmetz. *Malted Mousse, Inc., v. Steinmetz*, 113 Wn.App. 157, 162-63, 52 P.3d 555

(2002). The Supreme Court reversed the Court of Appeals and affirmed the trial court's decision. It held that Mr. Steinmetz could not obtain "partial *trial de novo*." Since he had not sought full *trial de novo*, the Superior Court was limited to entering judgment on the award.

Defendants filed a *trial de novo* notice but then later dismissed that request. The dismissal precluded them from questioning the amount of Mr. Kinman's award. For that reason alone, the judgment must be affirmed.

STATEMENT REQUIRED BY RAP 18.1

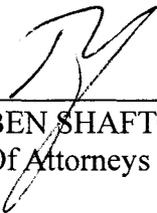
The Dills set out this section of the Brief to comply with RAP 18.1(b). They request attorney's fees on appeal. As indicated above, RCW 59.18.230(4) allows them to recover those fees since they have prevailed. Where a statute or contract allows an award of attorney's fees at trial, an appellate court has authority to award fees on appeal. *Schmidt v. Behr Process Corp*, 113 Wn.App. 306, 347, 54 P.3d 665 (2002); *Bloor v. Fritz*, 143 Wn.App. 718, 753, 180 P.3d 805 (2008). For that reason, the Dills should be awarded their attorney's fees and costs on appeal.

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CONCLUSION

The trial court did not err by granting judgment consistent with the arbitration award. Its judgment should be affirmed, and the Dills should be awarded their attorney's fees and costs on appeal.

RESPECTFULLY SUBMITTED this 26 day of Dec,
2008.



BEN SHAFTON, WSB #6280
Of Attorneys for Dills

APPENDIX

Clark County Superior Court Form for Setting Trial

SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

_____)	
)	Cause No. _____
Plaintiff(s),)	
)	
vs.)	NOTICE TO SET FOR TRIAL
)	AND STATEMENT OF
)	ARBITRABILITY
)	
_____)	Assigned Judge _____
)	
Defendant(s).)	

TO THE CLERK, SUPERIOR COURT ADMINISTRATION AND ALL ATTORNEYS AND PARTIES
PER LIST BELOW:

I. NOTICE TO SET FOR TRIAL

- 1.1 Nature of Case: _____ Trial Length: _____ days
- 1.2 _____ Non-Jury _____ Jury/6 person _____ Jury 12 person
- 1.3 Trial Setting Consideration: _____
- 1.4 Accelerated Setting Requested - No Settlement Conference will be scheduled (applies only to Domestic Relations cases meeting all the following criteria):
 - _____ No non-party witnesses
 - _____ No custody/visitation issues
 - _____ Trial time 1-3 hours

II. STATEMENT OF ARBITRABILITY

- 2.1 _____ This case is subject to arbitration because the sole relief sought is a money judgment and it involves no claim in excess of \$50,000, exclusive of attorney fees, interest, and cost.
- 2.2 _____ The undersigned contends that its claim exceeds \$50,000 but for the purposes of arbitration, waives any claim in excess of \$50,000.
- 2.3 _____ This case is NOT subject to arbitration because:
 - (a) _____ The claim and/or counterclaim exceeds \$50,000.
 - (b) _____ Relief other than a money judgment is sought.
 - (c) _____ Case is an appeal from a lower court.

III READINESS CERTIFICATION

I hereby certify: **(must be completed)**

- 3.1 That an Answer/Response to Petition was filed on _____.
- 3.2 That all discovery has been or will be completed before settlement conference in domestic cases/trial in non-domestic cases; and
- 3.3 That all counsel and/or Pro Se parties have been served with a copy of this notice.

I UNDERSTAND THAT THE COURT MAY IMPOSE TERMS AND SANCTIONS UPON A PARTY OR COUNSEL WHO IS NOT PREPARED TO PROCEED TO SETTLEMENT CONFERENCE OR TRIAL ON THE ASSIGNED DATE IN ACCORDANCE WITH LOCAL RULE 40 (b)(5) AND CR 40 (d) AND (e).

INSTRUCTIONS:

- 1. Type names and addresses of all attorneys and/or pro se parties below.
- 2. Serve all other parties.
- 3. File original with County Clerk, and **copies with the Court Administrator and the assigned Department.**

Signed: _____

Date: _____

Typed Name: _____

Attorney for: _____

WSBA #: _____

TYPE NAMES AND ADDRESSES OF ALL ATTORNEYS AND/OR PRO SE PARTIES

[]	[]
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NO. 38063-3
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STACIE DILL and CRAIG DILL,

Plaintiffs/Respondents,

vs.

MICHELSON REALTY COMPANY, a Missouri corporation doing
business as THE COVE AT FISHER'S LANDING APARTMENTS;
and EQUITY RESIDENTIAL PROPERTIES MANAGEMENT
CORP., a Delaware corporation,

Defendants/Appellants.

APPEAL FROM THE SUPERIOR COURT

HONORABLE JOHN NICHOLS

AFFIDAVIT OF MAILING

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Attorney for Respondents
Caron, Colven, Robison & Shafton
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Vancouver, WA 98660
(360) 699-3001

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STATE OF WASHINGTON
BY *cm*
DEPUTY

COURT OF APPEALS
DIVISION II

