

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

KERR CONTRACTORS, INC., LIBERTY MUTUAL GROUP INC., a/k/a SAFECO  
INSURANCE COMPANY OF AMERICA, Bond Nos. 6709272, 6709273, 5581430,

Appellants,

v.

DAN'S TRUCKING, INC.,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
2013 JUL 31 PM 1:05  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPT. \_\_\_\_\_

APPELLANT'S BRIEF

Joseph A. Yazbeck, Jr., WSBA 32700  
D. Brent Carpenter, WSBA No. 46105  
Attorneys for Appellant  
Yazbeck, Cloran & Bowser, P.C.  
111 SW Columbia St., Ste. 650  
Portland, OR 97201-5841  
Tel: (503) 575-7622  
Fax: (503) 227-4866  
jay@ycblaw.com

P.M. 7-29-13

TABLE OF CONTENTS

	<u>Page</u>
I. <u>INTRODUCTION</u> .....	1
II. <u>ASSIGNMENT OF ERROR</u> .....	2
A. <u>Assignment of Error</u> .....	2
B. <u>Issues Pertaining to Assignment of Error</u> .....	2
III. <u>STATEMENT OF THE CASE</u> .....	3
IV. <u>ARGUMENT</u> .....	4
A. <u>Standard of Review</u> .....	4
B. <u>The Issue of Attorney Fees Remained Within     the Purview of the Mandatory Arbitration, and     Therefore Kerr Was Entitled to Request Trial     De Novo of the Arbitrator’s Attorney Fee     Decision</u> .....	5
V. <u>ATTORNEY FEES</u> .....	16

## TABLE OF AUTHORITIES

	<u>Page</u>
 <u>TABLE OF CASES</u>	
<i>Berg v. Hudesman</i> , 115 Wn.2d 657, 667, 801 P.2d 222 (1990)....	6,7,8,9
<i>Condon v. Condon</i> , 177 Wn.2d 150, 162, 298 P.3d 86 (2013).....	6
<i>Diamaco, Inc. v. Mettler</i> , 135 Wn.App. 572, 578, 145 P.3d 399 (Div. 1, 2006) .....	16
<i>Hearst Communications, Inc. v. Seattle Times Co. Hearst</i> , 154 Wn.2d 493, 503, 115 P.3d 262 (2005) .....	6,7,14
<i>William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett</i> [hereinafter <i>Hulbert</i> ], 159 Wn. App. 389, 399, 245 P.3d 779 (Div. 1, 2011) .....	7,8,9
<i>McGuire v. Bates</i> , 147 Wn.App. 751, 754, 198 P.3d 1038 (Div. 1, 2008) <i>rev'd</i> , 169 Wn.2d 185, 234 P.3d 205 (2010) .....	15
<i>Morello v. Vonda</i> , 167 Wn.App. 843, 848–49, 277 P.3d 693 (Div. 2, 2012) .....	4
<i>Sorenson v. Dahlen</i> , 136 Wn.App. 844, 850, 149 P.3d 394 (Div. 2, 2006) .....	4
<i>Tjart v. Smith Barney, Inc.</i> , 107 Wn.App. 885, 895, 28 P.3d 823 (Div. 1, 2001) .....	6
 <u>STATUTES/LAWS/RULES/CODES</u>	
LMAR 3.2 (c) .....	14
LMAR 4.4 .....	11
MAR 7.1 .....	1,25,12,14, 15
MAR 7.1(a) .....	3,12

RAP 18.1 .....	16
RCW 7.04A .....	2,4,5,6,11, 13,14,15
RCW 7.04A.060 .....	5
RCW 7.04A.060(2) .....	5
RCW 39.08.030 .....	16
RCW 60.28.021 .....	16

## I. INTRODUCTION

The issue in this appeal is whether appellants had the right to request trial de novo, pursuant to Superior Court Mandatory Arbitration Rules [hereinafter “MAR”] 7.1, of an arbitrator’s award of attorney fees. To answer this question, the Court must determine whether when parties to a mandatory arbitration settle the principal amount of a party’s claim and leave the amount of the attorney fee award to be decided by the court-appointed arbitrator, the matter is removed from the mandatory arbitration program as a matter of law. The Court should find that such matters are not removed from mandatory arbitration, and therefore appellants had the right to request trial de novo.

This matter was transferred to mandatory arbitration and the parties settled the principal amount of plaintiff’s claim, but submitted the issue of attorney fees to the mandatory arbitration program arbitrator. Appellants Kerr Contractors, Inc., Liberty Mutual Group Inc., a/k/a Safeco Insurance Company of America, Bond Nos. 6709272, 6709273, 5581430 (collectively “Kerr”) filed a request for trial de novo of the arbitrator’s decision. Respondent Dan’s Trucking, Inc. moved to strike the request,

arguing that the parties had agreed to private arbitration of the attorney fees issue pursuant to RCW 7.04A, using the same arbitrator. Kerr argued that the attorney fee issue remained in the purview of the mandatory arbitration, and therefore it was entitled to request trial de novo pursuant to MAR 7.1. The trial court granted Dan's Trucking's motion. As will be shown below, the trial court erred in striking Kerr's request for trial de novo because the parties did not agree to private arbitration and the issue of attorney fees remained within the purview of the mandatory arbitration.

## **II. ASSIGNMENT OF ERROR**

### **A. Assignment of Error**

The trial court erred in granting Dan's Trucking's motion to strike Kerr's request for trial de novo.

### **B. Issues Pertaining to Assignment of Error**

Did the trial court err in striking Kerr's request for trial de novo when the parties did not agree to have the issue of Dan's Trucking's attorney fees submitted to private arbitration, but in fact had submitted the issue to the arbitrator whom had already been appointed under the trial court's mandatory arbitration program?

///

### **III. STATEMENT OF THE CASE**

Kerr was the general contractor on a Washington State Department of Transportation project a commonly known as SR 14, I-5 to 164<sup>th</sup> Avenue Interchange Paving. CP 6. Kerr hired Dan's Trucking to haul asphalt for the project. CP 6-7. During the course of Dan's Trucking's work, an accident occurred which resulted in damage to Dan's Trucking's trailer. CP 7. Additionally, a dispute arose between Dan's Trucking and Kerr regarding the per-hour rate for the asphalt hauling. *Id.* Dan's Trucking filed an action in Thurston County Superior Court bringing claims against Kerr for breach of contract and negligence. CP 5-8. The trial court transferred this matter to mandatory arbitration and assigned an arbitrator, Les Ching. CP 21-22. The parties settled the principal amount of Dan's Trucking's claim, but reserved the issue of the amount of its attorney fees to be determined by Mr. Ching. CP 29. Mr. Ching issued an Arbitration Award on September 14, 2012, awarding Dan's Trucking attorney fees. CP 21-22. The Arbitration Award is on a form provided by the trial court, entitled "MANDATORY ARBITRATION FORMS FOR ARBITRATORS." *Id.*; CP 39-40, 44. MAR 7.1(a) provides that an aggrieved party may request trial de novo within 20 days of the arbitrator's

award. Dan's Trucking did not contest the fact that Kerr timely filed a request for trial de novo. CP 30–33. However, Dan's Trucking filed a motion to strike Kerr's request, arguing that by settling the principal amount of its claim, the matter was removed from mandatory arbitration and the parties' agreement to have Mr. Ching determine the amount of Dan's Trucking's attorney fees was an agreement to private arbitration under RCW Chapter 7.04A. *Id.* Therefore, Dan's Trucking argued, Kerr could not appeal Mr. Ching's award, as Chapter 7.04A does not provide for trial de novo. *Id.* The trial court granted Dan's Trucking's motion and entered an order striking Kerr's request for trial de novo on December 3, 2012. CP 37–38.

#### **IV. ARGUMENT**

##### **A. Standard of Review**

The Court engages in de novo review of a trial court's grant of a motion to strike a request for trial de novo. *See Sorenson v. Dahlen*, 136 Wn.App. 844, 850, 149 P.3d 394 (Div. 2, 2006) (“We address the application of the court rules to the particular set of facts in this case, which is a question of law that we review de novo on appeal.”); *Morello v. Vonda*, 167 Wn.App. 843, 848–49, 277 P.3d 693 (Div. 2, 2012)

(“Interpretation of the [MARs] is a matter of law requiring ... de novo review.”)

**B. The Issue of Attorney Fees Remained Within the Purview of the Mandatory Arbitration, and Therefore Kerr Was Entitled to Request Trial De Novo of the Arbitrator’s Attorney Fee Decision.**

The settlement agreement reached by the parties contained no express term that mandated private arbitration pursuant to RCW Chapter 7.04A. Indeed, the agreement itself, the circumstances surrounding the making of the agreement, the parties subsequent acts and conduct, and the reasonableness of the respective interpretations urged by the parties clearly demonstrate that the parties did not agree to private arbitration of the attorney fee issue pursuant to RCW Chapter 7.04A, but that the attorney fee issue remained in mandatory arbitration. Therefore, Kerr had the right to request trial de novo pursuant to MAR 7.1.

RCW 7.04A.060 provides that parties may agree to privately arbitrate their disputes. The statute further provides that it is the role of a court to “decide whether an agreement to arbitrate exists or a controversy is subject to an agreement to arbitrate.” RCW 7.04A.060(2) (emphasis added). In other words, in this case the trial court was required to decide whether an agreement to private arbitration pursuant to RCW Chapter

7.04A existed. The settlement agreement contained a provision that the parties would allow “the arbitrator” to decide the issue of attorney fees. Dan’s Trucking argues that this agreement is one to submit the attorney fee issue to private arbitration, pursuant to RCW Chapter 7.04A. Kerr argues that the parties arrived at no such agreement, but simply left the issue of the amount of attorney fees to the court-appointed arbitrator, subject to the MAR.

In Washington, “determining the intent of the parties is paramount in settlements.” *Condon v. Condon*, 177 Wn.2d 150, 162, 298 P.3d 86 (2013). To determine intent, “contracts, including agreements to arbitrate, are interpreted under the context rule enunciated in *Berg v. Hudesman*.” *Tjart v. Smith Barney, Inc.*, 107 Wn.App. 885, 895, 28 P.3d 823 (Div. 1, 2001) (citing *Berg v. Hudesman*, 115 Wn.2d 657, 667, 801 P.2d 222 (1990)). The context rule enunciated in *Berg* was clarified in the Washington Supreme Court’s decision in *Hearst Communications, Inc. v. Seattle Times Co. Hearst*, 154 Wn.2d 493, 503, 115 P.3d 262 (2005). In *Hearst*, the court reaffirmed that “Washington follows the objective manifestation theory of contract interpretation, under which courts attempt to ascertain the intent of the parties ‘by focusing on the objective

manifestations of the agreement, rather than on the unexpressed subjective intent of the parties.” *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett* [hereinafter *Hulbert*], 159 Wn.App. 389, 399, 245 P.3d 779 (Div. 1, 2011). 399 (citing *Hearst*, 154 Wn.2d at 503). *Hearst* provides that courts “‘impute an intention corresponding to the reasonable meaning of the words used,’ and words are given their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates otherwise.” *Id.* Pursuant to the context rule, “extrinsic evidence relating to the context in which a contract is made may be examined to determine the meaning of specific words and terms.” *Id.* at 399–400. The *Berg* court held that extrinsic evidence includes “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, and the reasonableness of the respective interpretations urged by the parties.” *Id.* at 400; *Berg*, 115 Wn.2d at 667. However, extrinsic evidence may not, be used to “‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’ ” *Id.* at 400. Additionally, “extrinsic evidence of a party's subjective, unilateral intent as to the contract's meaning is not admissible.” *Id.*

The terms of the settlement agreement are contained in the June 25, 2012 email from Kerr's attorneys to Dan's Trucking's attorney, in which Kerr offered to settle the matter on the following terms:

1. Payment from Kerr to Dan's of \$3,971.38; and
2. Fees in an amount to be determined by the arbitrator;
3. In exchange for dismissal.

CP 28. On June 26, 2012, Dan's Trucking accepted the offer of settlement.

CP 27, 31. This constitutes the parties' complete agreement.

In applying of the "context rule" enunciated by the Washington Supreme Court in *Berg*, courts may examine "extrinsic evidence relating to the context in which a contract is made" in order "to determine the meaning of specific words and terms." *Hulbert*, 159 Wn.App. at 399-400. As also stated above, extrinsic evidence includes "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, and the reasonableness of the respective interpretations urged by the parties." *Berg*, 115 Wn.2d at 667.

Here, in applying the context rule, the Court should consider extrinsic evidence to determine the meaning of "[f]ees in an amount to be

determined by the arbitrator.” Doing so is appropriate in this case because the extrinsic evidence is not used to “‘show an intention independent of the instrument’ or to ‘vary, contradict or modify the written word.’” *Hulbert*, 159 Wn.App. at 400. That is, the Court’s consideration of extrinsic evidence in this matter would be in order to determine the meaning of the “specific words and terms” contained in the settlement agreement. Additionally, the extrinsic evidence is not being presented to show a “party’s subjective, unilateral intent as to the contract’s meaning.” In other words, the evidence is not being presented to demonstrate Kerr’s subjective intent as to the meaning, but what the words and terms in the agreement reasonably mean.

Regarding the first of the *Berg* categories of extrinsic evidence, the “subject matter and objective of the contract” was settlement of the parties’ dispute. CP 26–28. In other words, the parties were seeking to dispose of this matter in its entirety and the most efficient means of doing this was simply to let the court-appointed arbitrator decide the issue.

Second, the “circumstances surrounding the making of the contract” make clear that the parties intended to have the mandatory arbitration arbitrator decide the attorney fees issue. To summarize the

circumstances, the trial court had transferred the matter to mandatory arbitration subject to the MAR and had assigned Mr. Ching as the arbitrator, with an arbitration hearing scheduled for June 28, 2012. CP 26. On June 27, 2012, on the eve of the hearing, the parties settled the matter, agreeing that “the arbitrator” (*i.e.*, Mr. Ching) would decide the issue of attorney fees. CP 26–28. Thus, the settlement agreement must be viewed in light of the fact that the matter was already in mandatory arbitration and “the arbitrator” was the court-appointed, mandatory arbitration arbitrator, Mr. Ching.

Third, the “subsequent acts and conduct of the parties” are consistent with the fact that the attorney fee issue remained within the purview of the mandatory arbitration. As stated above, the parties continued with the mandatory arbitration arbitrator, Mr. Ching, as the arbitrator of the attorney fee issue. Kerr’s attorney emailed Mr. Ching on June 27, 2012 and informed him that “the parties have settled this matter” and needed to cancel the arbitration hearing. CP 29. However, Kerr’s attorney continued, “as part of the settlement, the parties have agreed that you will decide the amount of attorney fees awarded to Dan’s.” *Id.*

There was *no discussion* with Mr. Ching of the purported change in

his role from that of a court-appointed arbitrator pursuant to the MAR to that of a private arbitrator pursuant to RCW Chapter 7.04A. Presumably, if the parties had agreed to private arbitration under Chapter 7.04A, they would have at least informed Mr. Ching of that fact. Furthermore, the parties made no additional payment to Mr. Ching for his services, beyond that which they had made to him pursuant to the rules of mandatory arbitration, nor did they discuss with Mr. Ching whether additional payment would be required.

Additionally, consistent with the fact that the parties had not completely settled the mandatory arbitration, Kerr merely notified the arbitrator that the principal amount of plaintiff's claim had settled and that the issue of attorney fees was reserved for his determination. Notably, Kerr *did not* notify the trial court's Arbitration Coordinator that the matter had settled, as is required by LMAR 4.4 when a matter is *completely* settled. LMAR 4.4 ("If a case is settled after it has been assigned to an arbitrator, it shall be the duty of the attorneys or of any party appearing pro se to notify the court and arbitrator promptly of the settlement. Notice of settlement shall be in writing to the Arbitration Coordinator within 10 court days of the settlement, with a copy to the arbitrator and the assigned judge.")

(emphasis added); MAR 7.1 (“Any aggrieved party not having waived the right to appeal may request a trial de novo . . . within 20 days after the arbitrator files proof of service of the later of: (1) the award or (2) a decision on a timely request for costs or attorney fees.”) (emphasis added). In other words, while the matter had settled as to the principal amount of plaintiff’s claim, it had not settled completely and was still subject to mandatory arbitration.

Finally, Mr. Ching’s actions show that it was his understanding that he continued to function as a court-appointed mandatory arbitration arbitrator. That is, he issued his award on the Court’s mandatory arbitration award form. CP 21–22. The award form used by Mr. Ching mirrors MAR 7.1(a), providing:

Twenty days after the award has been filed with the clerk, if no party has sought a trial de novo, the prevailing party, on notice to all parties may present to the Assigned Judge a judgment on the arbitration award for entry as final judgment in this case.

*Id.* (emphasis added). Thus, Mr. Ching clearly saw his role in determination of the attorney fee issue as that of a court-appointed mandatory arbitration arbitrator, as he instructed Kerr that it had the right to request trial de novo.

Fourth, courts consider “the reasonableness of the respective interpretations urged by the parties.” The only reasonable interpretation of the settlement agreement is that the parties agreed to have the mandatory arbitration arbitrator decide the issue of attorney fees. That is, the attorney fee issue remained within the purview of the mandatory arbitration.

It is inarguable that there is *no provision* which *expressly* provides that the parties are submitting the attorney fee issue to private arbitration.<sup>1</sup> This dispute boils down to whether Mr. Ching continued in his role as a mandatory arbitration arbitrator or whether the settlement agreement transformed his role into that of a private arbitration arbitrator. In essence, Dan’s Trucking argues that the legal effect of settling the principal amount of its claim and leaving the issue of attorney fees to the court-appointed arbitrator is to submit the attorney fees issue to private arbitration. However, Dan’s Trucking has not cited any authority, nor has Kerr found any authority, for the proposition that settlement of the principal amount of a party’s claim removes supplemental issues, such as the award of attorney fees, from the arbitrator’s purview as a matter of law. In other words, there

---

<sup>1</sup> An express provision could have easily provided, for example, “Fees in an amount to be determined by the arbitrator, pursuant to RCW Chapter 7.04A.”

is no reasonable basis for Dan's Trucking's interpretation of the settlement agreement.

As the *Hearst* court held, courts must “‘impute an intention corresponding to the reasonable meaning of the words used,’ and words are given their ordinary, usual, and popular meaning unless the agreement as a whole clearly demonstrates otherwise.” Given that Mr. Ching was the mandatory arbitration arbitrator, and there is no express provision in the settlement agreement which provides that Mr. Ching was to conduct arbitration of the attorney fee issue pursuant to RCW Chapter 7.04A, the only “reasonable meaning of the words used” is that in deciding the attorney fee issue, Mr. Ching continued to act as a mandatory arbitration arbitrator.

Kerr's interpretation of the settlement is supported by the Thurston County Superior Court Local Rules for Mandatory Arbitration (“LMAR”), which expressly give the arbitrator authority to award attorney fees.

LMAR 3.2(c) (“An arbitrator has the authority to . . . [a]ward attorney's fees as authorized by these rules, by contract or by law.”) Further, MAR 7.1 expressly provides for trial de novo following award of attorney fees.

MAR 7.1 provides that:

Any aggrieved party not having waived the right to appeal may request a trial de novo . . . within 20 days after the arbitrator files proof of service of the later of: (1) the award or (2) a decision on a timely request for costs or attorney fees.

MAR 7.1 (emphasis added); *McGuire v. Bates*. *McGuire v. Bates*, 147 Wn.App. 751, 754, 198 P.3d 1038 (Div. 1, 2008) *rev'd*, 169 Wn.2d 185, 234 P.3d 205 (2010) (parties settled matter, arbitrator decided the issue of attorney fees, and the plaintiff requested trial de novo, which both Division 1 and the Supreme Court evidently found she had the right to do). In other words, the drafters of MAR 7.1 specifically allowed that a party may request trial de novo following an arbitrator's decision on fees. Whether this decision on fees follows an arbitration hearing or the parties' settlement of claims would seem to be irrelevant.

Thus, the settlement agreement, the circumstances surrounding its making, the parties subsequent acts and conduct, and the reasonableness of the respective interpretations urged by the parties clearly demonstrate that the parties did not agree to private arbitration of the attorney fee issue pursuant to RCW Chapter 7.04A, but that the issue remained in mandatory arbitration, and therefore Kerr had the right to request trial de novo pursuant to MAR 7.1.

## **V. ATTORNEY FEES**

RAP 18.1 provides that the Court may award reasonable attorney fees if applicable law grants the party the right to recover reasonable attorney fees. Here, Dan's Trucking was awarded fees as prevailing party pursuant to RCW 39.08.030 and RCW 60.28.021, and those statutes provide a basis for an award of attorney fees to Kerr if it prevails on its appeal. CP 150–151; *See Diamaco, Inc. v. Mettler*, 135 Wn.App. 572, 578, 145 P.3d 399 (Div. 1, 2006) (trial court awarded attorney fees to subcontractor pursuant to RCW 39.08.030 and RCW 60.28.021 and prime contractor and surety appealed, requesting attorney fees, but court denied all fee requests as “neither party substantially prevails”). Therefore, if Kerr prevails, it is entitled to its attorney fees incurred on appeal.

## **VI. CONCLUSION**

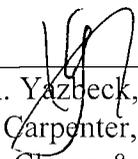
As shown above, Kerr had the right to request trial de novo because determination of attorney fee issue took place in mandatory arbitration, from which appeal is allowed. It is obvious from the record that the parties did not even discuss—much less agree—to private arbitration pursuant to RCW Chapter 7.04A, but were merely continuing with mandatory arbitration process. Thus, the trial court erred by granting Dan's Trucking's motion to strike Kerr's request for trial de novo.

Therefore, Kerr respectfully requests that the Court reverse the trial court's order and remand this matter for trial de novo.

DATED this 29th day of July, 2013.

Respectfully submitted,

YAZBECK, CLORAN & BOWSER, PC



---

Joseph A. Yazbeck, Jr., WSBA No. 32700  
D. Brent Carpenter, WSBA No. 46105  
Yazbeck, Cloran & Bowser, P.C.  
1300 SW Fifth Avenue, Suite 2750  
Portland, OR 97201-5617  
jay@ycblaw.com  
(503) 575-7622  
Fax: (503) 227-4866  
Attorneys for Appellant

DAN'S TRUCKING (Respondent/Plaintiff)

v.

KERR CONTRACTORS, INC., ET AL. (Appellants/Defendants)

Division II Court of Appeals Case No. 44342-2-II

Thurston County Superior Court Case No. 11 2 02341 6

**CERTIFICATE OF SERVICE**

1. My name is Carl V. Anderson. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Oregon, and am not a party to this action.

2. On the 29<sup>th</sup> day of July 2013, a true and correct copy of the foregoing **APPELLANT'S BRIEF** was delivered via email and United States Postal Service, postage prepaid, to the following attorneys and electronically filed with Division II Washington Court of Appeals:

Ben D. Cushman  
Cushman Law Offices, PS  
924 Capitol Way South, Suite 203  
Olympia, WA 98501  
Fax:360-956-9795  
bencushman@cushmanlaw.com  
Counsel for Plaintiff

Guy M. Bowman  
Attorney General of Washington  
Transportation & Public Construction Div.  
7141 Cleanwater Drive, SW  
Olympia, WA 98504-0113  
Fax:586-6847  
GuyB1@atg.wa.gov  
Counsel for Washington State

**I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

Dated: July 29, 2013  
At: Portland, Oregon.



Carl V. Anderson, Legal Assistant  
Office of Attorneys for Kerr Contractors, Inc, and  
Liberty Mutual Group, Inc., aka Safeco Insurance  
Company of America

FILED  
COURT OF APPEALS  
DIVISION II  
2013 JUL 31 PM 1:05  
STATE OF WASHINGTON  
BY

**CERTIFICATE OF SERVICE**