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NO. 55867-6

**COURT OF APPEALS FOR DIVISION I
STATE OF WASHINGTON**

THE STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS,
in its own capacity, and as assignee of claims of University Mechanical
Contractors, Inc., Bergelectric Corporation, and Pacific Construction
Systems, Inc.

Appellant,

v.

FLUOR DANIEL, INC. a foreign corporation, and FIREMAN'S FUND
INSURANCE COMPANY, a foreign corporation,

Respondents.

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COURT OF APPEALS
DIVISION I
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APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

I.	ASSIGNMENT OF ERROR.....	1
II.	ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.....	1
III.	STATEMENT OF THE CASE.....	1
IV.	SUMMARY OF ARGUMENT.....	3
V.	STANDARD OF REVIEW.....	4
VI.	ARGUMENT	4
	A. Washington Statutory and Case Law Suggests That Prejudgment Interest is Not Available.....	5
	1. Washington’s Statutes Regarding Interest Awards Following Jury Verdicts Suggest That Interest Awards Between Verdict And Judgment Are Disfavored.	6
	2. <i>Moses Lake</i> supports the conclusion that prejudgment interest is appropriate only after a ruling on appeal.	9
	B. The Superior Court’s award of prejudgment interest is not allowed under RCW 7.04.170, an exclusive list of permissible modifications of an arbitration award.....	13
VII.	CONCLUSION	15

TABLE OF AUTHORITIES

Cases

<i>Boyd v. Davis</i> , 127 Wn.2d 256, 897 P.2d 1239 (1995).....	14
<i>Campbell v. Saunders</i> , 86 Wn.2d 572, 546 P.2d 922 (1976).....	4
<i>Channel v. Mills</i> , 61 Wn. App. 295, 810 P.2d 67 (1940)	6
<i>City of Moses Lake v. International Association of Firefighters, Local 2052</i> , 68 Wn. App. 742, 847 P.2d 16 (1993).....	9, 10, 11, 12
<i>Dayton v. Farmers Insurance Group</i> , 124 Wn.2d 277, 876 P.2d 896 (1994).....	13
<i>Larsen v. Farmers Insurance Company</i> , 80 Wn. App. 259, 909 P.2d 935 (1996).....	6
<i>Price v. Farmers Insurance Company of Washington</i> , 133 Wn.2d 490, 946 P.2d 388 (1997).....	11
<i>State v. Campbell</i> , 125 Wn.2d 797, 888 P.2d 1185 (1995).....	4
<i>Westmark Properties, Inc. v. McGuire</i> , 53 Wn. App. 400, 766 P.2d 1146 (1989).....	13, 14
<i>Weyerhaeuser Company v. Commercial Union Insurance Company</i> , 142 Wn.2d 654, 15 P.3d 115 (2001).....	9

Statutes

RCW 4.56.110	7, 8, 9
RCW 4.56.110(4)	8, 12
RCW 4.56.115	7, 8, 9, 12
RCW 41.56.430	10
RCW 41.56.450	10, 11

RCW 7.04	6, 10, 11
RCW 7.04.150	3, 4
RCW 7.04.160-70	11
RCW 7.04.170	1, 3, 13, 14

Other Authorities

Woerner, V., Annotation, <i>Date of Verdict or Date of Entry of Judgment Thereof as Beginning of Interest Period on Judgment</i> , 1 A.L.R.2d 479, §7 (2005)	7
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I. ASSIGNMENT OF ERROR

The trial court erred by awarding Fluor Daniel, Inc., Respondent, prejudgment interest on the arbitration award for the period spanning the date of award to entry of judgment.

II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. When Washington statutory and case law precludes interest awards for the period between the rendering of a verdict and entry of judgment, did the Superior Court err in awarding prejudgment interest for the period between an arbitration award and entry of judgment?
2. When the Superior Court adds prejudgment interest to an arbitration award that does not provide for prejudgment interest, has it exceeded its limited review authority under RCW 7.04.170?

III. STATEMENT OF THE CASE

In an attempt to resolve contract disputes associated with the construction of the Stafford Creek Corrections Center, the Washington State Department of Corrections (“DOC” or “Appellant”) and its general contractor for the project, Fluor Enterprises, Inc., f/k/a Fluor Daniel, Inc. (“Fluor” or “Respondent”), entered into a Partial Settlement and

Alternative Dispute Resolution Agreement (“Arbitration Agreement”) on November 1, 2004. CP 7. The Arbitration Agreement provided for the appointment of the arbitrator and the scope of arbitration. It also outlined the procedures for obtaining an enforceable award once the arbitrator had arrived at his decision:

Once the Arbitrator issues a decision, either party may submit the decision to the King County Superior Court in the action now pending. The parties agree the judgment to be entered will be in full and complete compliance with the decision of the Arbitrator. *Once said judgment is entered the judgment will be final and binding on Fluor and DOC.* Fluor and DOC each waive any and all rights to appeal the Arbitration Award.

CP 6, ¶8 (emphasis added).

Each party to the dispute brought several claims against the other and the damages both parties sought were unliquidated. CP 3. DOC and Fluor agreed to cap their recoverable damages in the arbitration at \$6,750,000 for DOC and \$7,500,000 for Fluor. CP 5, ¶5. The arbitrator listened to extensive testimony from both parties’ lay and expert witnesses as to liability and damages. On January 18, 2005, the arbitrator issued an award to Fluor in the amount of \$5,997,645, including a total of \$392,668 in sales tax.¹ CP 12. The arbitrator did not award prejudgment interest. *Id.*

On January 21, 2005, Fluor filed a motion in King County Superior Court for an order confirming the arbitration award and entry of

¹ Under the Arbitration Agreement, “Washington State Sales Tax in the amount of 8.2% shall be added by the Arbitrator to any amount awarded by Fluor.” CP 11.

judgment against DOC, as permitted under RCW 7.04.150. CP 13-17. In its motion, Fluor urged the Superior Court to add prejudgment interest at 12% per annum to the arbitration award from the date the arbitrator issued his decision, January 18, 2005, to the date the court was to enter the award, February 8, 2005. CP 14, 16. DOC opposed the request for prejudgment interest but the Superior Court decided in favor of Fluor and tacked \$43,380.22 (per diem rate of \$1,971.82) onto the arbitration award it entered into judgment. CP 38.

IV. SUMMARY OF ARGUMENT

This appeal focuses solely upon the Superior Court's decision to add prejudgment interest to the arbitration award from the date of the award to entry of judgment. DOC does not appeal the arbitration award itself. This Court should reverse the Superior Court's prejudgment interest award for two reasons. First, it has no authority under contract or statute to make such award. Second, by adding an additional amount to the arbitration award, the trial court ventured beyond the scope of its limited review under RCW 7.04.170.

The state of Washington is not liable for prejudgment interest unless provided by contract or statute. Neither the Arbitration Agreement nor the statutes governing interest on judgments provide for interest of the

type the Superior Court awarded. Further, the statutes limiting interest awards after jury verdicts specifically prohibit analogous interest awards.

The Superior Court also exceeded its scope of review under RCW 7.04.150. This statute limits the permissible modifications of an arbitration award by a reviewing court to three, none of which provide for interest awards. By adding interest for the period spanning the verdict and the entry of judgment, the Superior Court modified an arbitration award in a fashion prohibited by statute.

V. STANDARD OF REVIEW

Fluor's entitlement to prejudgment interest is a question of law. This court should review all issues of law *de novo*. *State v. Campbell*, 125 Wn.2d 797, 800, 888 P.2d 1185 (1995).

VI. ARGUMENT

The Superior Court's award of prejudgment interest in this case is atypical.² Typically, prejudgment interest is an issue in breach of contract cases involving liquidated damages. In those cases, the parties dispute liability, but not the amount of damages that resulted from the breach.

² Generally, Washington State is not liable for interest on judgments unless authorized by the express terms or reasonable construction of a statute. *Campbell v. Saunders*, 86 Wn.2d 572, 546 P.2d 922 (1976). However, DOC acknowledges that, when it entered into a contract for a public construction project, it waived its sovereign immunity to interest awards. *Architectural Woods, Inc. v. State*, 92 Wn.2d 521, 598 P.2d 1372 (1979).

In this case, both parties agree that the damages at issue in the arbitration were unliquidated and Fluor does not seek prejudgment interest for the period prior to the arbitration award. Nevertheless, the Superior Court awarded prejudgment interest for the period between the arbitrator's ruling and the entry of judgment.

The Superior Court's prejudgment interest award should be reversed for two reasons. First, the trial court's prejudgment interest is inconsistent with Washington statutory and case law regarding the application of interest following jury verdicts that should apply by analogy to arbitration awards. And second, by adding an additional amount to the award, the trial court exceeded its limited authority to review an arbitration award.

A. Washington Statutory and Case Law Suggests That Prejudgment Interest is Not Available.

The Superior Court's prejudgment interest award conflicts with Washington statutes addressing interest awards in the context of jury verdicts. These statutes explicitly limit interest awards for the period between verdict and judgment to the rare situation in which entry of judgment is directed on appeal. No Washington case has addressed the interest issue presented here, much less provided a conclusion supporting the Superior Court's award.

1. Washington's Statutes Regarding Interest Awards Following Jury Verdicts Suggest That Interest Awards Between Verdict And Judgment Are Disfavored.

While Washington statutory and case law is silent on whether interest is available for the period spanning the arbitration decision to entry of judgment, significant authority does exist in the analogous jury trial context. Like juries, arbitrators are finders of fact that also apply the law to the facts. The very role of the arbitrator is as substitute for the jury. Further, both a jury verdict and an arbitration award lack the force of law until entered into judgment.

Indeed, this court has previously recognized the similarities between arbitration awards and jury verdicts. In *Larsen v. Farmers Insurance Company*, 80 Wn. App. 259, 265-66, 909 P.2d 935 (1996), this court evaluated whether collateral estoppel applied to an issue decided in an arbitration award that had not been reduced to judgment. The court held that until an arbitration award is entered by a court "it is, in our view, more akin to a jury verdict or a trial court's memorandum opinion or oral decision, determinations which are not considered equivalent to a judgment." *Larsen* at 266 (quoting *Channel v. Mills*, 61 Wn. App. 295, 299-300, 810 P.2d 67 (1940)). The court also observed that this analogy was explicitly recognized by the statute that preceded the current version of the arbitration statute, RCW 7.04. *Id.* It necessarily followed,

according to the court, that like a jury verdict an arbitration award is not a final and binding decision.³

Because arbitration awards are analogous to jury verdicts, the court should look to the law regarding interest awards after jury verdicts for guidance. Unless provided by statute, interest is generally unavailable to the prevailing party in a jury trial for the period between the pronouncement of the jury's decision and the entry of judgment by the court. *See generally* Woerner, V., Annotation, *Date of Verdict or Date of Entry of Judgment Thereof as Beginning of Interest Period on Judgment*, 1 A.L.R.2d 479, §7 (2005). In Washington, the legislature specifically prohibited the award of interest dating back to the jury verdict unless the entry of judgment has been directed by an appellate court. RCW 4.56.110; RCW 4.56.115.

RCW 4.56.115 limits the interest awards on tort actions in which the State is a defendant. Under this provision, computation of interest for judgments against the State for *tortious conduct* begins upon entry of judgment:

Judgments founded on the tortious conduct of the state of Washington or of the political subdivisions, municipal

³ Fluor understood that the arbitration award was not to be final and binding when it entered into the Arbitration Agreement. Under the agreement, "[o]nce said judgment is entered the judgment will be final and binding on Fluor and DOC." CP 6, ¶8. If the parties had intended for the arbitration award to be final and binding before entry of judgment this provision would be unnecessary.

corporations, and quasi municipal corporations of the state, whether acting in their governmental or proprietary capacities, shall bear interest *from the date of entry* at two percentage points above the equivalent coupon issue yield.... In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

RCW 4.56.115 (emphasis added).

Contract disputes are not addressed in this provision.

RCW 4.56.110 outlines the rate and computation of interest for judgments involving contract disputes generally. When not provided by the terms of the contract, the interest in a contract dispute is also to be determined from the date of entry of judgment:

. . . judgments shall bear interest *from the date of entry* at the maximum rate permitted under RCW 19.52.020 on the date of entry thereof. In any case where a court is directed on review to enter judgment on a verdict or in any case where a judgment entered on a verdict is wholly or partly affirmed on review, interest on the judgment or on that portion of the judgment affirmed shall date back to and shall accrue from the date the verdict was rendered.

RCW 4.56.110(4) (emphasis added).

The unambiguous language of the first sentence in RCW 4.56.110(4) makes clear that, in a contract dispute, interest shall be computed “from the date of entry” of judgment in superior court. *See Weyerhaeuser Company v. Commercial Union Insurance Company*, 142

Wn.2d 654, 687, 15 P.3d 115 (2001) (refusing to award interest for the period between verdict and entry of judgment and noting that RCW 4.56.110 requires interest to be computed beginning on the date of entry of judgment). While the second sentence allows for computation of interest dating back to the jury verdict, such an approach is permitted only when the court has been directed to enter judgment after appeal. Read together, RCW 4.56.110 and 4.56.115 reveal the legislative intent not to authorize a court to provide for interest awards between verdict and entry of judgment in breach of contract actions against the State.

Because an arbitrator's ruling is functionally equivalent to a jury verdict, it can be inferred from the legislature's unwillingness to permit interest dating back to the jury verdict that such an award should similarly be prohibited following arbitration decisions. As with jury verdicts, the court only has the power to award interest dating back to the arbitrator's ruling when the court of appeals has directed it to enter the verdict.

2. *Moses Lake* supports the conclusion that prejudgment interest is appropriate only after a ruling on appeal.

As mentioned above, no Washington case law squarely addresses the interest issue presented in this case. Yet, Fluor argued below that *City of Moses Lake v. International Association of Firefighters, Local 2052*, 68 Wn. App. 742, 847 P.2d 16 (1993), supports the Superior Court's award of prejudgment interest following the arbitrator's decision. CP 25-27. To

the contrary, this case supports the conclusion that arbitration awards are like jury verdicts and interest is not provided as of their issuance unless the trial court's entry of judgment was directed by the appellate court.

Moses Lake involved the narrowly-tailored collective bargaining dispute statute, RCW 41.56.450, as opposed to the arbitration statutes, RCW 7.04, et al., at issue in the instant case. RCW 41.56.450 provides for efficient resolution of disputes between uniformed employees and their employers with the overarching purpose of preventing strikes in public-safety related professions. RCW 41.56.430.⁴ Uniformed labor disputes are resolved by an "interest arbitration panel," an entity akin to an administrative decision-making body. *Id.* Once the panel has heard the case and issued its ruling, the decision "shall be final and binding upon both parties, subject to review by the superior court upon the application of either party solely upon the question of whether the decision of the panel was arbitrary or capricious." *Id.*

In *Moses Lake*, the International Association of Firefighters ("IAF") and the City of Moses Lake ("City") disagreed about several

⁴ The full text of RCW 41.56.430 provides: "The intent and purpose of chapter 131, Laws of 1973 is to recognize that there exists a public policy in the state of Washington against strikes by uniformed personnel as a means of settling their labor disputes; that the uninterrupted and dedicated service of these classes of employees is vital to the welfare and public safety of the state of Washington; that to promote such dedicated and uninterrupted public service there should exist an effective and adequate alternative means of settling disputes."

issues in their collective bargaining agreement, including salaries, and sought relief through an arbitration panel, as required by RCW 41.56.450. After the arbitration panel awarded relief favoring IAF, the City appealed the decision to the Superior Court. The Superior Court held that the arbitration panel's decision was not arbitrary and capricious, but declined to award prejudgment interest as of the date of the arbitration panel's decision. The Court of Appeals, Division Three, affirmed on the merits, but reversed the Superior Court's refusal to award IAF prejudgment interest.

A comparison of the role of the superior court in RCW 41.56.450 to its role in RCW 7.04, et seq., the arbitration statute at issue in the instant case, reveals why *Moses Lake* supports the State's position. In the interest arbitration context, the superior court acts as an appellate body, reviewing the arbitration panel's otherwise "final and binding" decision. In contrast, the superior court is not an appellate body under RCW 7.04, et seq. Rather, its role is to provide the arbitration decision the weight of a court order through entry of judgment. As such, its powers to vacate or modify the award are expressly limited to a few narrow circumstances that must reveal themselves on the "face of the award." *Price v. Farmers Insurance Company of Washington*, 133 Wn.2d 490, 496-7, 946 P.2d 388 (1997); RCW 7.04.160-70.

Because the superior court in *Moses Lake* was acting in an appellate capacity when reviewing the arbitration panel's decision, its award of prejudgment interest is consistent with the statutes limiting interest awards dating back to the jury verdict. The court awarded prejudgment interest for the period during which the parties appealed the arbitration panel decision. Similarly, as outlined above, the statutes regarding interest on judgments limit interest awards dating back to the jury verdict to judgments entered after an appeal. See RCW 4.56.110 (4) and RCW 4.56.115 ("where a court is direct on review to enter judgment . . . interest . . . shall date back to and shall accrue from the date the verdict was rendered.") The common intention is to make whole the party that had to wait for an appellate ruling before receiving payment on an otherwise "final and binding" award. However, when neither party appeals, no interest is awarded for the period between the award and entry of judgment.

IAF in *Moses Lake* had an enforceable decision as of the day of the arbitration panel's decision; therefore any withholding of payment from that date forward was wrongful and prejudgment interest was appropriate for the period of the appeal. In contrast, Fluor had an unenforceable award until the Superior Court entered the award on February 8, 2004.

DOC has not appealed this award and its entry into judgment;⁵ therefore, the Superior Court's award of prejudgment interest was inappropriate.

B. The Superior Court's award of prejudgment interest is not allowed under RCW 7.04.170, an exclusive list of permissible modifications of an arbitration award.

A superior court's limited review of an arbitration award does not allow for tacking on prejudgment interest. *Westmark Properties, Inc. v. McGuire*, 53 Wn. App. 400, 766 P.2d 1146 (1989); *see also Dayton v. Farmers Insurance Group*, 124 Wn.2d 277, 279-80, 876 P.2d 896 (1994) (superior court did not have the power to award attorneys' fees that were not provided in the arbitration award). RCW 7.04.170 provides three exclusive situations that permit the modification of an arbitration award:

In any of the following cases, the court shall, after notice and hearing, make an order modifying or correcting the award, upon the application of any party to the arbitration:

(1) Where there was an evident miscalculation of figures, or an evident mistake in the description of any person, thing or property, referred to in the award.

(2) Where the arbitrators have awarded upon a matter not submitted to them.

(3) Where the award is imperfect in a matter of form, not affecting the merits of the controversy. The order must modify and correct the award, as to effect the intent thereof.

RCW 7.04.170. The Washington Supreme Court has clarified that "unless the award on its face shows [the arbitrator's] adoption of an erroneous

⁵ Under the terms of the Arbitration Agreement, it cannot be appealed. CP 6, ¶8.

rule, or mistake in applying the law, the award will not be vacated or modified.” *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995).

In *Westmark*, the Court of Appeals, Division Two, examined the propriety of a superior court’s award of prejudgment interest during a confirmation hearing when the arbitrator had failed to make such an award. The appellate court held that prejudgment interest could not be awarded when the arbitrator failed to so provide:

Inasmuch as the court was foreclosed from going behind the face of [sic] award, it had no basis for determining whether the amount awarded met the test for prejudgment interest; this was part of the merits of the controversy, forbidden territory for a court.

Westmark, 127 Wn.2d at 404.

In its request for an award of prejudgment interest, Fluor did not contend and the court did not allege sua sponte that the arbitrator committed any of the errors listed in RCW 7.04.170. Further, as in *Westmark*, the arbitrator declined to award prejudgment interest. By adding the \$43,380.22 in prejudgment interest to the award, the Superior Court exceeded its limited authority for modification under RCW 7.04.170 and entered into the “forbidden territory” of the arbitrator’s jurisdiction.

VII. CONCLUSION

For the foregoing reasons, appellant respectfully requests that the court reverse the trial court's award of prejudgment interest on the underlying arbitration award.

RESPECTFULLY SUBMITTED this 26th day of May, 2005.



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