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NO. _____
Court of Appeals Case No. 55867-6

SUPREME COURT OF THE STATE OF WASHINGTON

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.,

Respondent,

v.

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

Petitioners.

DEPARTMENT OF CORRECTION'S ANSWER TO PETITION FOR REVIEW

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I. SUMMARY

The Court should deny Fluor Daniel's ("Fluor") petition for review because Division One published a correct decision in an area of little import. At issue in this case is no more than $43,380.22 in interest on an arbitration award. The question presented – whether interest on an arbitration award under RCW 7.04 (repealed) begins to run as of the date of issuance of the award or only upon entry of judgment – was one of first impression in Washington. However, both statutory authority and Supreme Court case law existed in the directly analogous area of jury verdicts. Division One published a decision consistent with the rule for jury verdicts; interest does not begin to run until entry of judgment. It also stated that the parties could circumvent this common law rule by contractual agreement.

No issue of substantial public interest exists. The only entities directly affected by Division One's ruling are Fluor and the Department of Corrections ("DOC"). Because this rule mirrors the result in courtroom litigation, it does not shift expectations of people in arbitration. Further, because Division One clearly provided that parties can contractually agree to prejudgment interest, no ambiguity remains for the Supreme Court to resolve. Finally, even if it granted review, the Court would need to address a jurisdictional issue Division One did not decide in addition to the issue for which Fluor requests review.

No conflict with other court of appeals exists. Division One correctly concluded that the Division Three decision in *City of Moses Lake*

v. International Ass'n of Firefighters, Local 2052, 68 Wn. App. 742, 847 P.2d 16 (1993), is inapposite. That case did not deal with RCW 7.04, but involved a statutory scheme for resolving uniformed personnel labor disputes. Unlike RCW 7.04, this statute explicitly provides that the arbitration panel's decision will be final and binding.

No conflict with Supreme Court precedent exists. The court should not be persuaded by Fluor's attempt to portray Division One's narrowly written decision on the running of arbitration award interest as a wayward decision on contract interpretation. The decision contains neither explicit nor implicit reference to this issue.

II. STATEMENT OF ISSUES

1) Did the Court of Appeals err when it held that, in the absence of clear contractual language, interest on arbitration awards does not begin to run until entry of judgment.
2) Did the Superior Court err when it modified the arbitration award by adding prejudgment interest?

III. STATEMENT OF CASE

After arbitrator Jerry Hainline awarded Fluor $5,997,645, plus $392,668 in sales tax on January 18, 2005, Fluor requested an additional $43,380.22 in pre-judgment interest from the superior court. This relatively small figure represents the amount of interest accrued from the date of issuance of the arbitration award to the date of entry, which was only a 49-day period. Fluor's sole authority for its request was a Court of Appeals, Division Three, opinion interpreting statutes that govern labor

disputes of uniformed personnel. Fluor did not assert that interest was appropriate because liquidated damages were at issue in the arbitration. Fluor did not assert that this interest was due because the parties had so contracted. Fluor did not assert that this interest was due because it was provided by statute. And yet, over DOC's objections, the superior court granted Fluor's request for prejudgment interest.

Pursuant to the controlling arbitration agreement ("Agreement"), the parties had agreed to arbitration under RCW 7.04 (repealed).[1] This statute provides that any party may request the superior court to confirm, modify or vacate the arbitration award. RCW 7.04.150-.170. Indeed, in the Agreement, the parties provided for a process for obtaining a final and binding decision through superior court confirmation of the award:

> 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.

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[1] The Legislature replaced RCW 7.04 with the Uniform Arbitration Act ("UAA"), RCW 7.04A, last year. However, the UAA is not effective until June 2006; therefore, RCW 7.04 remains the controlling statute. The enactment of the UAA does not moot the issue Division One decided because the UAA similarly lacks a provision regarding post-judgment interest.

Before Division One, DOC argued that the superior court's award of interest was reversible for either of two reasons. First, an arbitration award is not a fully liquidated amount prior to entry of judgment. Because it could still be confirmed, modified or vacated under RCW 7.04, an arbitration award is like a jury verdict (an area in which both statutory authority and Washington Supreme Court case law exists) and interest should not begin to run until entry of judgment. Second, by adding interest to an arbitration award, the superior court exceeded its limited jurisdiction under RCW 7.04.160. This provision of the arbitration statute provides an exclusive list of the grounds for modification and awarding interest is not among them. RCW 7.04.160.[2]

In response, without citing a single case on interpretation of contract language, Fluor raised a new argument – the parties had contractually agreed that the arbitration award would be final and binding. Fluor also continued to rely almost exclusively upon *Moses Lake*, 68 Wn. App. 742, the Division Three uniformed-personnel labor dispute case it had cited below as controlling precedent.

In reversing the superior court's interest award, Division One abstained from deciding DOC's jurisdictional issue and adopted DOC's jury verdict analogy. The court stated in a footnote "[n]othing in our decision prevents parties to an arbitration agreement from mutually agreeing that interest shall run from the date of the arbitration decision."

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[2] For a more detailed discussion of this argument, see DOC's Opening Brief, pp. 13-15, and Reply Brief, pp. 12-14.

By so deciding, the court implicitly rejected Fluor's argument that the parties had contractually provided for prejudgment interest.
argument

IV. ARGUMENT

A. No Substantial Public Interest Exists For Discretionary Review Under RAP 13.4(b)(4).

The court should not find a substantial public interest exists for the review of Division One's decision because the ruling does not alter the expectations of parties engaging in arbitration under RCW 7.04. When evaluating whether a substantial public interest is at issue, the court should consider the number of people whose expectations might be altered. If the decision will shift a vast number of people's contractual expectations, a substantial public interest may exist. In contrast, if the decision will alter few parties' contractual expectations, an incorrect decision has less impact.

In this case, Division One's ruling is relevant to an extremely limited number of potential parties to arbitration. Division One provided a bright-line rule for parties to use when entering into arbitration agreements. Interest accrual begins on arbitration awards issued under RCW 7.04 only upon entry of judgment. *State of Washington Dep't of Corrections v. Fluor Daniel, Inc.*, 130 Wn. App. 629, 630, 126, P.3d 52 (2005). If parties want interest to begin running earlier, they need only clearly state their intention in the arbitration agreement. *Id.* at 632, fn. 6.

The only parties whose expectations could possibly be altered are those who entered into an arbitration agreement and whom had not yet already reached resolution of their case before Division One's decision. The period between the signing of an arbitration agreement and the resolution of the case is typically short. Therefore, the number of agreements that parties entered into without the benefit of Division One's decision and for whom the issue of interest on the award is outstanding is extremely limited.

Even for this very small subset of arbitrating parties, Division One's ruling is likely consistent with their expectations. Arbitration by definition is alternative dispute resolution; a less formal venue that substitutes for the courtroom. Parties who choose arbitration expect the same or similar rules and procedures to apply as in court. For example, arbitrators can compel attendance of witnesses and take depositions. RCW 7.04.110-120.

Expectations regarding interest in the two venues would similarly run parallel. When parties subject themselves to a court decision, interest does not begin to run on a judgment until the court enters judgment. RCW 4.56.110(4); RCW 4.56.115; *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 676, 15 P.3d 115 (2000). Parties involved in arbitration have no reason to believe a different rule would apply. Therefore, Division One's decision that interest does not run on an arbitration award until entry of judgment is completely in-step with litigants' generally held expectations.

Even if the court thought this case presented an issue of substantial public interest, it may not even reach the issue decided by Division One. While Division One chose not to address DOC's jurisdictional issue – whether the superior court exceeded its authority under RCW 7.04.160 by modifying the arbitration award – it is properly preserved for Supreme Court review. If the court agreed with DOC that the superior court did not have jurisdiction to grant interest on a RCW 7.04 arbitration award, it would not even reach the question Division One addressed.

B. No Conflict Exists With Another Decision of The Court of Appeals to Support Discretionary Review Under RAP 13.4(b)(2).

As explained by a unanimous Division One, its decision is consistent with Division Three's decision in *Moses Lake*, 68 Wn. App. 742. In that case, Division Three did not even consider the arbitration statute, RCW 7.04, at issue before Division One. Rather, the issue before Division Three was an interpretation of RCW 41.56.450, which provides for arbitration of labor disputes involving uniformed personnel.

Under RCW 41.56.450, such disputes shall be decided by an arbitration panel, whose 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 and capricious.

RCW 41.56.450 (emphasis added). After the arbitration panel issued its decision, the City of Moses Lake appealed to the superior court. *Id.* at 743-44. The superior court affirmed, but did not provide interest for the period prior to its decision. *Id.* at 745. The City again appealed and Division Three affirmed the merits of the panel's decision, but reversed the superior court's decision on interest. *Id.* at 743-44. It held that interest should begin to run as of the date of the award because the arbitrator panel's award was final and binding:

> the City was under a duty to raise the firefighters' salaries in the amount specified, subject only to review as provided in RCW 41.56.450.

Id.

Division One found this outcome to be no different from what happens under the statutes governing jury verdicts. The only time interest accrues from the date of a jury verdict as opposed to entry of judgment is when a court is directed to enter judgment or when judgment is affirmed after appellate review. RCW 4.56.110(4); RCW 4.56.115. Because the superior court in *Moses Lake* acted in an appellate capacity by affirming the arbitration panel's decision, Division Three's award of interest accruing from the date of the arbitration panel's decision replicated what would occur under the jury verdict statutes.

Fluor states that because Division Three did not cite to RCW 4.56.110 or RCW 4.56.115, the appellate position of the superior court under RCW 41.56.450 was irrelevant to the court's decision.

Petition For Review at 13. The language from *Moses Lake* quoted above tells the opposite story. RCW 41.56.450 provides that the arbitration panel's decision is final and binding, "subject to review by the superior court" under the arbitrary and capricious standard. *Supra* at 8. The court's holding was that upon issuance of the arbitration panel's decision, the City was under a duty to raise it, "subject to review as provided under RCW 41.56.450." *Supra* at 7. The parallel structure between the statute and the court's holding suggests that the court found that the City had a duty to raise the firefighter's salary as of the date of the arbitration award because RCW 41.56.450 provides that the arbitration panel's decision was "final and binding."

If any conclusion can be drawn from the explicit language of the court in *Moses Lake*, it is that the appellate position of the superior court under RCW 41.56.450 was the key reason for Division Three's award of prejudgment interest. Therefore, Division Three's decision is consistent with the interest accrual rule under the jury verdict statutes and Division One's decision below.

Not only is Division One's decision consistent with court of appeals case law, it is consistent with precedent from this court on prejudgment interest. In *Kiessling v. NW. Greyhound Lines, Inc.*, 38 Wn.2d 289, 229 P.2d 335 (1951), this court held that interest on a jury verdict award does not begin to run until entry of judgment. *Id.* at 297. The court felt that because CR 59(a) provides post-verdict procedures for both adjustment and vacation of the award under limited circumstances,

the verdict is not fully liquid prior to entry of judgment. *Id.* Division One found the reasoning of this case to be equally applicable to RCW 7.04 arbitration awards, which also are subject to post-award modification or vacation. Because Division One's decision is in harmony with prejudgment interest precedent, no grounds for review exists under RAP 13.4(b)(2).

C. No Conflict Exists With a Decision of the Washington Supreme Court to Support Review Under RAP 13.4(b)(1).

Nor is Division One's opinion a departure from contract law precedent. Fluor failed to cite a single case on the issue of contractual language interpretation before Division One. Nevertheless, Fluor now attempts to paint this case as a gross deviation from contract law. Division One did not analyze the underlying arbitration agreement, much less provide a rule on contract interpretation. Contrary to Petitioner's assertions, nothing in the language of the decision supports a conclusion that Division One rejected the "objective manifestation theory of contracts," as reaffirmed by the Supreme Court in *Hearst Communications, Inc. v. Seattle Times Co.,* 154 Wn.2d 493, 115 P.3d 262 (2005).[3]

The argument Fluor made below was that language within the arbitration agreement revealed the parties' intention for the arbitration award to be final and binding. Respondents' Brief at 6. In footnote six of Division One's decision, the court implicitly rejects this argument. Regardless of the argument's merits, the only parties affected by Division

[3] Fluor refers to this case as ***First*** *Communications v. Seattle Times Co..*

One's particular interpretation of the arbitration agreement language are Fluor and DOC. Now motivated by a desire for Supreme Court review, Fluor attempts to broaden the scope of this narrow decision.

The decision cannot be broadened. It contains no discussion of contract interpretation nor does it implicitly take a position on the issue. Division One discusses the facts of the case in three short paragraphs. *Fluor Daniel*, 130 Wn. App. at 629. While, the court does quote paragraph eight of the arbitration agreement, the rest of the opinion is almost entirely focused on the non-contractual issue of whether arbitration awards are the equivalent of jury verdicts in the context of prejudgment interest. The only exception is footnote six where the court clarifies that its decision does not prevent contractual agreement that interest will run as of the issuance of the arbitration award. The most that could implicitly be read into this statement is that the court does not think paragraph eight is an agreement on interest accrual.

Even if Division One had explicitly issued an opinion interpreting paragraph eight, its rejection of Fluor's argument was correct. If anything can be gleamed from the "objective manifestation" of the Agreement, it is that the parties intended for the arbitration award to be unenforceable prior to entry of judgment. Paragraph eight of the Agreement states:

> [o]nce 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 4, ¶8 (emphasis added). Under this provision, whichever party prevailed in arbitration could enter the award into judgment.[4] However, until judgment is entered, the award is not final and binding. Until the award is final and binding (i.e., enforceable), it is not fully liquid and not subject to interest accrual.

Fluor's strained interpretation of the last sentence of paragraph eight of the arbitration agreement leads to absurd results and contradicts their position before the superior court. The last sentence of paragraph eight of the Agreement is merely language commonly used to clarify that the merits of the award are unreviewable. According to Fluor, when the parties waived their right to appeal the arbitrator's decision, they also waived their rights to request a modification or vacation of the decision under RCW 7.04. Under this interpretation, DOC and Fluor waived the right under RCW 7.04.160 to correct any miscalculations by the arbitrator. They would also have waived their right under RCW 7.04.170 to request vacation if evidence of fraud surfaced. Fluor's position that the parties desired such unjust results is untenable.

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[4] Both parties had asserted claims for damages in arbitration; therefore, the arbitrator could have awarded DOC a money judgment which DOC could then enter into judgment. *Partial Settlement And Alternative Dispute Resolution Agreement,* ¶5, CP at 5.

Indeed, before the superior court, Fluor recognized the superior court's limited scope of review under RCW 7.04 stating in its Motion For Order Confirming Arbitration Award that "Fluor is entitled to have the Award confirmed because none of the exceptions set forth in the statute apply." CP at 15. Because it is unreasonable to think that the parties intended for the ridiculous outcomes that would follow, Division One rightly rejected Fluor's distorted interpretation of paragraph eight of the Agreement.

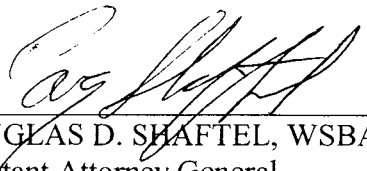
Division One correctly rejected Fluor's suggestion that the parties had agreed to prejudgment interest in the Agreement. However, it did not provide any explicit or implicit analysis of the rules of contract interpretation, much less language that suggests a break with prior precedent. No grounds exist under RAP 13.4(b)(1) for Supreme Court review.

V. CONCLUSION

None of the grounds for discretionary review under RAP 13(4) are present. The appeal below involved a small sum of money and few, if any, other parties' expectations regarding the accrual of interest on arbitration awards are affected. Further, the decision is entirely consistent with extensive Washington case law on the running of interest after a jury award. No other appellate court has even addressed the issue of interest accrual on arbitration awards under RCW 7.04, much less issued a conflicting decision. Finally, the issue decided by the court cannot be broadened to stand for a break from Washington contract law.

Division One published a correct decision in an area of significance to very few. The decision is in line with Washington statutory and common law precedent regarding interest awards. The Supreme Court need not review it.

RESPECTFULLY SUBMITTED this 9th day of February, 2006.



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