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No. 82311-1

IN THE SUPREME COURT
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CLERK OF SUPREME COURT
STATE OF WASHINGTON

MICHAEL BROOM; KEVIN BROOM; and ANDREA BROOM,

Respondents,

v.

MORGAN STANLEY DW INCORPORATED and KIMBERLY ANNE
BLINDHEIM,

Petitioners.

RESPONDENTS' ANSWER TO PETITION FOR REVIEW

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ORIGINAL

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I. IDENTITY OF RESPONDENTS

Respondents Michael Broom, Kevin Broom, and Andrea Broom (“Brooms”), are the adult children of John R. (“Dick”) Broom, and as claimants below in arbitration assert claims for losses resulting from mismanagement of their deceased father’s investment account.

II. ISSUE PRESENTED FOR REVIEW

The Brooms do not present any issue for review, and request that review be DENIED.

III. STATEMENT OF THE CASE

A. Introduction and Case Overview

This is a claim in arbitration against an inexperienced broker and the brokerage house for mismanagement of funds and failure to supervise. The Brooms seek damages for a drop in the value of their elderly father’s investment account from \$2.2 to \$0.6 million during the last two years of his life. CP 18-24, 33-45. Seven of the Brooms’ eight State law claims were dismissed based on the arbitrators’ ruling, reflected on the face of the Award, that they were barred by the statute of limitations. CP 10.¹ The King County Superior Court vacated and sent

¹ The Brooms’ Consumer Protection Act claim was dismissed on non-statute of limitations grounds, and their Rule 10b-5 claim was dismissed on Federal statute of

the matter back for arbitration before a new panel, based on Washington Supreme Court authority holding that the statute of limitations does not apply in arbitration. On September 2, 2008, the Court of Appeals, Division One, affirmed in an unpublished decision.

The issues for which review is requested are: (1) whether the longstanding “error of law on the face of the award” standard should be reconsidered; and (2) whether *Thorgaard* and *City of Auburn*, which held that arbitration is not a “suit” or “action” to which the statute of limitations applies, should be reconsidered. There is no conflict of authority on either issue; Division One properly applied this Court’s precedents. Nor is there any burning issue of public interest requiring Supreme Court intervention. Indeed, this case arises under the now-repealed Washington Arbitration Act (“WAA”) because the claim was filed before 2006. CP 9. Therefore, any holding the Court might make regarding the standard of review in arbitration under the old WAA has little significance, and its applicability to the new Revised Uniform Arbitration Act (“RUAA”) would be purely dicta. The Court should not reach out to overrule years of precedent under the WAA in what is probably the last WAA case that will ever come before it.

limitations grounds. CP 10-11, 51, 150, 234-35. The Brooms thereafter abandoned those claims. CP 536 n.1; 562-63.

As for the limitations issue, MSDW's claim that this leaves parties open to stale claims is not accurate. Parties are always free to **provide by contract** for a limitation period to apply to their arbitrations. It is undisputed in this case that the parties did so by incorporating a six-year limitation. NASD Rule 10304(a), CP 455. There is no substantial public interest in imposing technical statute of limitations defenses on arbitrations, which are intended to be simpler, less formal proceedings, especially when the parties remain free to contract for such limitations.

B. Statement of Facts

The Brooms accept the non-argumentative portions of Morgan Stanley DW, Inc.'s ("MSDW") Statement of the Case, and also point this Court to the neutral Statement of Facts in Division One's unpublished decision (Petition for Review, App. 1-11) ("Unpublished Opinion").²

² Assertions about the meaning of *Malted Mousse, Thorgaard, City of Auburn, or International Firefighters*, Pet. for Rev. at 6-7, are purely argumentative, and are not adopted by the Brooms. MSDW's arguments that the Brooms conceded application of the statute of limitation, or raised too late their principal argument that statutes of limitations do not apply in arbitration, Pet. for Rev. at 3-4, are not adopted by the Brooms, and do not accurately reflect what occurred. As even MSDW has recognized, the face of the final award clearly states that all claims other than the Consumer Protection Act claim were dismissed "on the grounds that the claims were barred by the applicable statute of limitations." Pet. for Rev. at 5 (*quoting*, CP 10). The final award further discloses that the Arbitrators ruled on the **merits** of the Motion for Reconsideration ("neither the substance of the motion [for reconsideration] nor its exhibits impacted in any way the Panel's prior decisions in this matter," *Unpublished Opinion* at 3 (*quoting*, CP 11)), so the Arbitrators obviously did not find that the issue of applicability of the statute of limitations was untimely. Since the Arbitrators were satisfied with the timeliness of all issues and considered them on the merits, it would not be proper for the Courts to take a different view.

III. ARGUMENT – REVIEW SHOULD BE DENIED

A. Review is Not Warranted of the “Error of Law” Standard

Application of the “error of law” standard of review does not conflict with prior decisions of this Court, RAP 13.4(b)(1), or involve an issue of substantial public interest that should be determined by this Court,” RAP 13.4(b)(4), and therefore review should be denied.

1. The “Error of Law” Standard Does Not Conflict with a Decision of This Court

The “error of law on the face of the award” standard of review for private arbitration awards is a narrow standard of review, consistently and repeatedly expressed by this Court as follows:

Arbitrators, when acting under the broad authority granted them by both the agreement of the parties and the statutes, become the judges of both the law and the facts, and, unless the award on its face shows their **adoption of an erroneous rule, or mistake in applying the law**, the award will not be vacated or modified.

Northern State Construction Co. v. Banchemo, 63 Wn.2d 245, 249-50, 386 P.2d 625 (1963) (emphasis added). This rule is firmly established by a long line of Washington cases.³

³ E.g., *Fisher v. Allstate Ins. Co.*, 136 Wn.2d 240, 252, 961 P.2d 350 (1998); *Davidson v. Hensen*, 135 Wn.2d 112, 118, 954 P.2d 1327 (1998); *Boyd v. Davis*, 127 Wn.2d 256, 263, 897 P.2d 1239 (1995); *Thorgaard Plumbing & Heating Co., Inc. v. County of King*, 71 Wn.2d 126, 134, 426 P.2d 828 (1967); *Carey v. Herrick*, 146 Wash. 283, 292, 263 P. 190 (1928); *Morrell v. Wedbush Morgan Securities, Inc.*, 143 Wn. App. 473, 485, 178 P.3d 387 (2008); *Beroth v. Appollo College, Inc.*, 135 Wn. App. 551, 559, 145 P.3d 386 (2006); *Kenneth W. Brooks Trust A v. Pacific Media, LLC*, 111 Wn. App. 393, 396, 44 P.3d 938 (2003); *Tolson v. Allstate Ins. Co.*, 108 Wn. App. 495, 497, 32 P.3d 289 (2001); *Federated Ins. Co. v. Estate of Norberg*, 101 Wn. App. 113, 123-24, 4 P.3d 844

In the face of this virtual mountain of authority, the claim that application of the “error of law on the face of the award” standard *conflicts* with a decision of this Court seems doubtful at best. MSDW points to *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003), which supposedly overruled the long line of authority cited above. The difficulty, as exhaustively demonstrated by the Unpublished Opinion at 5-7, is that *Malted Mousse* did not do this.

First, it is the express policy of the Washington Supreme Court that it will not overrule binding precedent *sub silentio*, *State v. Studd*, 137 Wn.2d 533, 548, 973 P.2d 1049 (1999), but the *Malted Mousse* decision nowhere states that it is overruling anything, let alone a line of authority extending back seventy-five years.

Second, *Malted Mousse* addressed **mandatory arbitration**, not **private arbitration**, so anything it said about the latter was pure *dicta*. *Malted Mousse, supra*, 150 Wn.2d at 526-27; *see, Unpublished Opinion* at 5-6, 7 & 7 n.4.

Third, one reason not to rely on *dicta* is that it tends to be sloppy. The *Malted Mousse dicta* is no exception, because it mistakenly attributes a view that “error of law” is no longer a good standard to the majority in

(2000); *Expert Drywall, Inc. v. Ellis-Don Constr., Inc.*, 86 Wn. App. 884, 888, 939 P.2d 1258 (1997); *Lindon Commodities, Inc. v. Bambino Bean Co., Inc.*, 57 Wn. App. 813, 816, 790 P.2d 228 (1990) (and cases cited therein).

Boyd, when in fact that was the view only of the minority, specifically rejected by the majority. *Malted Mousse, supra*, 150 Wn.2d at 526-27; *see, Unpublished Opinion* at 5-6; *Boyd, supra*, 127 Wn.2d at 263.

Fourth, had *Malted Mousse* truly intended to overrule the long line of authority based on *Boyd*, it would have had to explain why this Court has continued to rely upon the “error of law” standard after *Boyd*, in cases such as *Fisher v. Allstate, supra*, 136 Wn.2d at 252, and *Davidson v. Hensen, supra*, 135 Wn.2d at 118. But of course it did not grapple with this, because its attention was elsewhere – on the issues really before it, which involved mandatory arbitration.

Fifth, “[t]he Legislature is presumed to be aware of judicial interpretation of its enactments,’ and where statutory language remains unchanged after a court decision the court will not overrule clear precedent interpreting the same statutory language.” *Riehl v. Foodmaker, Inc.*, 152 Wn.2d 138, 147, 94 P.3d 930 (2004) (quoting, *Friends of Snoqualmie v. King Cty. Boundary Rev. Bd.*, 118 Wn.2d 488, 496-97, 825 P.2d 300 (1992)). The “error on the face of the award” standard is based on the portion of the statute allowing vacatur when “the arbitrators exceeded their powers . . .” former RCW 7.04.160(4). *Boyd, supra*, 127 Wn.2d at 263; *Tolson v. Allstate, supra*, 108 Wn. App. at 497 (“One of the statutory grounds for vacating an award exists when the arbitrator has

'exceeded' his powers, as demonstrated by an error of law on the face of the award."); *Lindon Commodities, supra*, 57 Wn. App. at 816 ("For the court to vacate an award under subsection (4), the award, on its face, must show the adoption of an erroneous rule or mistake in applying the law."). Here, the Legislature allowed the WAA to stand unchanged from the date of the 1963 *Northern State* case reaffirming the error on the face standard under the WAA, until enactment of the RUAA in 2005. Furthermore, the Legislature carried forward in the RUAA the exact same authority to vacate if the award "exceeded the arbitrator's powers," RCW 7.04A.230(1)(d), and made no mention in the legislative history of any intent to alter or abolish the "error on the face of the award" standard. CP 447-53. Under these circumstances, *stare decisis* is especially strong, and mere *dicta* cannot *sub silentio* overrule the will of the Legislature.

There is no conflict, and therefore no basis for review of this issue under RAP 13.4(b)(1).

2. There is No Substantial Public Interest in Review of the "Error of Law" Standard

a. Overview of Policies Served by Existing Rule

The "error of law" standard is consistent with Washington's strong policy favoring arbitration, because it is applied by the Courts as a strictly narrow standard of review that respects the arbitrator's role as judge of the law and facts, accords "substantial finality" to the award, and

only results in vacatur in the rare case of a prejudicial total failure to apply the correct legal standard which is manifest on the face of the award. *E.g.*, *Davidson, supra*, 135 Wn.2d at 118; *Boyd, supra*, 127 Wn.2d at 263; *MacLean Townhomes v. Am. States Ins. Co.*, 138 Wn. App. 186, 189, 156 P.3d 278 (2007); *Brooks Trust, supra*, 111 Wn. App. at 396; *Federated Ins., supra*, 101 Wn. App. at 123-24. The “error of law” standard as applied in Washington rarely results in vacatur of awards, and does not unnecessarily intrude into the sphere properly entrusted to the arbitrators. Rather, the “error of law” standard strikes a necessary balance between respecting the sanctity of arbitration, and protecting parties against the absolute whim or caprice of the arbitrator.

MSDW’s proposed rule, under which the courts must close their eyes to blatant lawlessness on the face of an arbitration award, does not serve the public interest. The venerable “error of law” rule, which has stood the test of time over 75 years, strikes the right balance by protecting the right to arbitration, yet leaving open a safety valve against patently lawless decision-making. Without such a safety valve, public confidence in arbitration would diminish, and the process could be undermined.⁴

⁴ As MSDW notes, the U.S. Supreme Court appears to be going the other way, abandoning decades of precedent under the “manifest disregard of the law” standard, to now insist on strict construction of the FAA statutory grounds for review. *Hall Street Assocs. v. Mattel, Inc.*, 128 S.Ct. 1396 (2008). Whether it is wise public policy to

b. This is a Poor Test Case Because it Arises Under an Expired Statute

The “substantial public interest” standard requires, at a minimum, that the issue “has the potential to affect” a large number of persons who are not parties to the instant litigation. *State v. Watson*, 155 Wn.2d 574, 577, 122 P.3d 903 (2005). The issue presented in this case – whether “error of law on the face of the award” is the proper standard of review under the now-defunct WAA – does not have that potential, because it is unlikely that many more cases will arise under that Act. The WAA only applies to claims filed prior to January 1, 2006, RCW 7.04A.903, and because arbitration is a relatively speedy process, it is likely that the vast majority of such claims have already been resolved.

As the Brooms argued below and before the Court of Appeals, CP 538-40; *Brief of Respondents* at 10, and Division One properly found in its

follow the existing U.S. Supreme Court we leave to this Court, but it is certainly **not required** on an issue of **state law**, as the *Hall Street* decision itself recognizes:

In holding that §§ 10 and 11 provide exclusive regimes for the review provided by the statute, we do not purport to say that they exclude more searching review based on authority outside the statute as well. The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under **state statutory or common law, for example, where judicial review of different scope is arguable**. But here we speak only to the scope of the expeditious judicial review under §§ 9, 10, and 11, deciding nothing about other possible avenues for judicial enforcement of arbitration awards.

Hall Street v. Mattel, supra, 128 S.Ct. at 1406 (emphasis added).

Unpublished Opinion at 5 n.2, this case is governed by the superseded WAA, not by the RUAA, because the claim in arbitration was filed prior to January 1, 2006. CP 9, RCW 7.04A.903. Although the operative statutory language is the same, MSDW argued below that legislative history underlying Washington's RUAA demonstrates an intent to narrow the standard of review. CP 447-53, 514-20. The Brooms do not agree with this point, but it helps show why there is no issue of substantial public interest in re-examining the standard of review in this case. Anything that the Court might hold regarding the proper standard of review under the old WAA would be *dicta* with respect to the new RUAA. Even if there is a substantial public interest in re-examining the standard of review in arbitration (which we deny), that interest could only be in examining the issue under the currently applicable Washington statute – the RUAA. Because that statute does not even apply here, this is not the proper case to do so.

Indeed, this case's lack of "general public interest" has already been recognized by the panel that decided it, when it declined to order publication, and, by implication, by the legal community and MSDW, when they failed to move for publication under RAP 12.3(d) and (e).

B. Review is Not Warranted of the Established Rule that Statute of Limitations is Not Applicable in Arbitration

The rule applied by the trial court and affirmed by Division One, that the statute of limitations does not apply in arbitration, does not conflict with (but instead properly applies) prior decisions of this Court, and therefore review is not warranted under RAP 13.4(b)(1). Furthermore, because it furthers the purposes of arbitration as a non-technical alternative to litigation, and because the parties remain free to limit by agreement the time within which claims can be brought, it does not raise an “issue of substantial public interest that should be determined by this Court.” RAP 13.4(b)(4).

1. Not Applying the Statute of Limitations in Arbitration Does Not Conflict with a Decision of This Court

In 1967, this Court held that arbitration is not an “action” or “lawsuit” to which non-claim statutes apply. *Thorgaard, supra*, 71 Wn.2d at 130-32. *Thorgaard* explained that it was not necessary to file a claim within 90 days of injury to have a valid arbitration of a claim against the County, because an arbitration is not an “action” or a “lawsuit”:

It is clear that by using the word ‘action’ in the [non-claim statute] the legislature had a *lawsuit* in mind. . . .

If one intends to bring an action (e.g., a lawsuit) against a county, he must do so in the manner provided by RCW 36.45.010. **However, this has nothing to do with a statutory arbitration proceeding. . . .**

RCW 7.04 et seq. provides a means by which disputants may dispose of controversies **other than by an action in court**. They may resort to arbitration.

An arbitration proceeding is not had in a court of justice. It is not founded on the filing of a claim or complaint as they are generally understood. The very purpose of arbitration is to *avoid* the courts insofar as the resolution of the dispute is concerned. [Citation omitted.] It is a substitute forum designed to reach *settlement* of controversies, by extrajudicial means, *before* they reach the stage of an *action* in court.

Thorgaard, supra, 71 Wn.2d at 130 (boldface added; italics in original).⁵

The holding of *Thorgaard* is supported by the statutory language of both the Washington arbitration statutes, and the Washington statutes of limitation. *Thorgaard* relied upon the WAA's former RCW 7.04.030, which requires a court in which an arbitrable action is pending to stay the action in favor of arbitration, to hold that "RCW 7.04.030 makes it clear that there is a difference between an action and an arbitration proceeding

⁵ A number of other jurisdictions are in accord with Washington's rule that the statute of limitations does not apply in arbitration. *NCR Corp. v. CBS Liquor Control, Inc.*, 874 F. Supp. 168, 172 (S.D. Ohio 1993), *aff'd*, 43 F.3d 1076 (6th Cir.), *cert. den.*, 516 U.S. 906 (1995) ("the effect of a statute of limitations is to bar an action at law, not arbitration"); *Skidmore, Owings & Merrill v. Connecticut Gen. Life Ins. Co.*, 197 A.2d 83, 84 (Conn. 1963) ("Arbitration is not a common-law action, and the institution of arbitration proceedings is not the bringing of an action under any of our statutes of limitations."); *Lewiston FF Assn. v. City of Lewiston*, 354 A.2d 154, 167 (Me. 1976) ("Arbitration is not an action at law and the statute [of limitations] is not, therefore, an automatic bar to the Firefighters' recovery."); *Peggy Rose Rev. Trust v. Eppich*, 640 N.W.2d 601, 608 (Minn. 2002) ("arbitration is not the bringing of an action under any of our statutes of limitation" (internal quote omitted)); *Har-Mar v. Thorsen & Thorshov, Inc.*, 218 N.W.2d 751, 754-55 (Minn. 1974) ("Based upon the special nature of arbitration proceedings and both the statutory and common-law meaning of the term 'action,' we feel compelled to hold that [the statute of limitations] was not intended to bar arbitration of Thorsen's fee dispute solely because such claim would be barred if asserted in an action in court.").

. . .” *Thorgaard, supra*, 71 Wn.2d at 131-32. Similarly, the RUAA scrupulously refers to the arbitration as a “proceeding”, not an “action” or a “suit”, RCW 7.04A.040(1), .070(2), .080(1), .090(1), .100, .110, .120(1), .150, .160, .180, .190(2), .200, .220, .230, distinguishes between a “judicial proceeding” and an “arbitration proceeding”, RCW 7.04A.060(4), .070(5), (6), .140(4), and further distinguishes between an “arbitration proceeding” and a “civil action”. RCW 7.04A.080(2). Indeed, the RUAA states: “All laws compelling a person under subpoena to testify and all fees for attending a judicial proceeding, a deposition, or a discovery proceeding as a witness apply to an arbitration proceeding **as if the controversy were the subject of a civil action** in this state.” RCW 7.04A.170(6) (emphasis added); *see also*, .210(1), (2), (3). In enacting these provisions, the Legislature clearly recognized that arbitrations are **not** “judicial proceedings” or “civil actions”, and that in the absence of positive law, the procedures applicable to civil actions **do not apply to arbitrations**. Significantly, there is no provision in the WAA or RUAA making statutes of limitation applicable to arbitration proceedings.

The general Washington statutes of limitation bar “actions”, not “arbitration proceedings”. RCW 4.16.005 (“Except as otherwise provided in this chapter, . . . **actions** can only be commenced within the periods provided in this chapter after the cause of action has accrued.”).

The specific limitation applicable to securities claims provides that “[n]o person may **sue** under this section more than three years after” certain specified events. RCW 21.20.430(4)(b). Under *Thorgaard*, arbitration is neither an “action” nor a “lawsuit” for purposes of technical time limitation statutes, *Thorgaard, supra*, 71 Wn.2d at 130, and therefore Division One’s decision is fully consistent with *Thorgaard*.

In *City of Auburn v. King County*, 114 Wn.2d 447, 788 P.2d 534 (1990), this Court made this express with regard to **statutes of limitation**, holding that “[t]he trial court correctly concluded that the statute of limitations by its language does not apply to arbitration.” *Id.* at 450. The view of *Thorgaard* and *City of Auburn* that arbitration is the opposite of a judicial action also finds support in US Supreme Court precedent:

The full-faith-and-credit statute requires that federal courts give the same preclusive effect to a State's *judicial proceedings* as would the courts of the State rendering the judgment, **and since arbitration is not a judicial proceeding**, we held that the statute does not apply to arbitration awards.

Dean Witter Reynolds, Inc. v. Byrd, 470 U.S. 213, 222 (1985) (italics in original; bold added). Nor is the post-arbitration proceeding in Superior Court for confirmation or vacatur of an arbitration award an **action**. Instead, it is treated as a civil motion. RCW 7.04A.220, .230(1), (2); *Davidson v. Hensen, supra*, 135 Wn.2d at 127; *Thorgaard, supra*, 71

Wn.2d at 132. Similarly, this Court recently held that “the limited judicial review under the WAA” does not constitute “judicial remedies” within the meaning of an insurance regulation. *Kruger Clinic Orthopaedics, LLC v. Regence Blueshield*, 157 Wn.2d 290, 304-05, 138 P.3d 936 (2006).

Both this Court and the Legislature are well committed to the distinction between a claim in arbitration, and a judicial action or lawsuit.

MSDW attempts to avoid the force of *Thoregaard* and *City of Auburn* by arguing that “[t]he Court did not hold that arbitrators could not apply statutes of limitation to claims advanced in arbitration.” PR at 17 (emphasis in original). As just quoted, the Court held “that the statute of limitations by its language **does not apply to arbitration.**” *City of Auburn, supra*, 114 Wn.2d at 450 (emphasis added). Therefore, if an arbitrator applies it in arbitration, the arbitrator is acting **contrary to law**. MSDW’s argument is pure semantics.

Against all this, MSDW relies upon *International Ass’n of Firefighters v. City of Everett*, 146 Wn.2d 29, 42 P.3d 1265 (2002), a case involving attorneys’ fees under a wage statute, to claim that a conflict exists with this Court’s precedents. There is no conflict. Rather than rejecting the rule of *Thorgaard*, the Court in *Firefighters* **accepted and**

relied upon it, but held that whether an arbitration is deemed a judicial action depends on the **legal context in which the question arises**:

In determining whether an arbitration is an exercise of a judicial function, we have noted that “[a]rbitration has been viewed as both nonjudicial or the exercise of a judicial function depending upon the context of the question.” [*Grays Harbor Cty. v. Williamson*, 96 Wn.2d 147] at 152, 634 P.2d 296 [1981]. For example, in the context of due process, arbitration must meet the same requirements as a traditional judicial action. *Id.* at 152-53, 634 P.2d 296. **But when dealing with the nature of arbitration itself, “it has been deemed a substitute for judicial action.”** *Id.* at 153, 634 P.2d 296 (citing *Thorgaard*, 71 Wn.2d at 131-32, 426 P.2d 828).

Firefighters, supra, 146 Wn.2d at 37-38 (emphasis added). The context in which the issue arose in *Firefighters* was whether fees would be awarded under RCW 49.48.030 to a union that successfully recovered unpaid wages for two employees. *Id.* at 32-34. In light of “Washington’s ‘long and proud history of being a pioneer in the protection of employee rights,’” *id.* at 35 (quoting, *Drinkwitz v. Alliant Techsystems, Inc.*, 140 Wn.2d 291, 300, 996 P.2d 582 (2000)), and the fact that RCW 49.48.030 is a remedial statute liberally construed to benefit employees, *Firefighters, supra*, 146 Wn.2d at 35, the legal context was very different in *Firefighters* than in *Thorgaard* (non-claim statute) or *City of Auburn* (statute of limitation), and very different from this case (statute of limitation), so a different result was reached. *Id.* at 40-41. Nothing in *Firefighters* states or implies that it constitutes an overruling or even a

limitation on *Thorgaard's* or *City of Auburn's* holding in the context of *time limits on claims*.⁶ Because the context here is exactly like the context in *City of Auburn* and *Thoregaard*, Division One correctly applied those precedents to find that this arbitration was not a judicial action or lawsuit for limitation purposes.⁷

2. The Petition Raises No Issue of Substantial Public Interest

The fact that the non-applicability of the statute of limitations to arbitration has been settled by two Supreme Court precedents, *City of Auburn, supra*, 114 Wn.2d 447 (1990), and *Thorgaard, supra*, 71 Wn.2d 126 (1967), is strong evidence that there is no issue of first impression here that rises to the level of an issue of substantial public interest. This is especially true since the Legislature – the primary instrument for

⁶ Once again, MSDW's argument is premised on *sub silentio* overruling of Supreme Court precedent, which is contrary to Washington Supreme Court policy. *State v. Studd, supra*, 137 Wn.2d at 548.

⁷ MSDW relies upon *McKee v. AT&T Corp.*, 191 P.3d 845 (2008), to argue that this Court recognizes that arbitrators should apply statutes of limitations. But the limitation period at issue in *McKee* was not a statutory limitation, but a **contractual limitation** that shortened the regular statutory provision. *Id.* at 849. The key issue was whether AT&T's arbitration agreement was unconscionable, because it eliminated class actions, punitive damages and attorneys fees, required secrecy in proceedings, and shortened the statutory limitation period. *Id.* at 849-51. In this context, this Court said: "arbitrations can (and often should) be conducted openly and without secrecy, apply **appropriate** statutes of limitations, award damages (both compensatory and punitive), and award attorney fees." *Id.* at 857 (emphasis added). That has nothing to do with a general statement that statutory limitations apply in arbitration. It only focuses on whether a contractual shortening bears on the question of unconscionability. Furthermore, by limiting the statement to "appropriate" statutes of limitation, the *McKee* language is completely consistent with this case. For example, in this very case, the Federal limitation period may have applied to the Federal claim, because the rule of *Thorgaard* does not purport to

expression of public policy – has acquiesced in this Court’s rulings without amending the WAA on this issue, and without indicating an intent to change this rule when it enacted the RUAA.

MSDW argues that the Unpublished Decision “undermines the important policy in favor of relieving parties of the burden of facing stale and untimely claims.” PR at 9. This fails to account for the fact that the parties remain free to provide for an appropriate limitation period in their agreement to arbitrate, and such a contractual limitation is consistent with the purpose of arbitration to enforce the agreement of the parties. Furthermore, this argument ignores the plain evidence of record that the parties agreed to the application of NASD Rule 10304(a), which provides that “[n]o dispute, claim, or controversy shall be eligible for submission to arbitration under this Code where six (6) years have elapsed from the occurrence or event giving rise to the act or dispute, claim or controversy.” CP 455. Thus, the parties to this very case set a six-year limit on claims, and the courts must presume that they were the best judges of “stale” claims in this context.

MSDW further argues that the Unpublished Decision “calls into question” the application in arbitration of numerous substantive statutory

address federal law. Similarly, if the parties contractually agree that a particular statute of limitations will apply, that would be an “appropriate” statute of limitation.

remedies that authorize the aggrieved party to file an “action” or “suit”.⁸ PR at 10. This argument is completely undermined by *Firefighters, supra*, 146 Wn.2d 29, which allows recovery of statutory attorneys fees in arbitration by holding that whether arbitration is or is not an “action” depends on the context. *Id.* at 37-38. Furthermore, it has long been established that the mere fact that rights of action are created by statute does not prevent them from being arbitrated. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 627-28 (1985). But while substantive statutory rights are preserved in arbitration, a party who agrees to arbitration cannot expect to carry over the same procedural rules:

By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum. It trades the procedures and opportunity for review of the courtroom for **the simplicity, informality, and expedition of arbitration.**

Id. at 628 (emphasis added). There is no offense to public policy when technical defenses such as the statute of limitations are lost on the road to arbitration; indeed, the public policy in favor of arbitration is served:

[Arbitration] is in a forum selected by the parties in lieu of a court of justice. The object is to avoid, what some feel to be, the formalities, the delay, the expense and vexation of ordinary litigation. It depends for its existence and for its jurisdiction upon the parties having contracted to submit to it, and upon the arbitration statute.

⁸ This argument is predicated on the unwarranted assumption that this Unpublished Decision may be cited as precedent. *But see*, GR 14.1.

Thorgaard, supra, 71 Wn.2d at 132. **Because the statute of limitations is itself a potential vexatious formality**, the rule of *Thorgaard* and *City of Auburn* accords with the policy of NASD arbitration to avoid technicalities. CP 168-69 (Securities Industry Association President testifies before Congress that NASD arbitration gives “[a]ggrieved customers . . . what . . . they really want: their ‘day in court’ . . . in sharp contrast to court proceedings where a significant percentage of claims are dismissed . . . on technical, or procedural grounds . . . [including] statute of limitations bars.”).

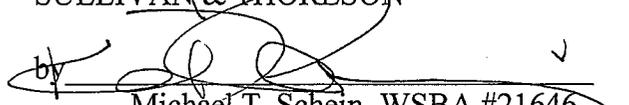
MSDW has failed to demonstrate any issue of substantial public interest in re-examining the rule of *Thorgaard* and *City of Auburn*, and therefore the Petition for Review should be denied.

IV. CONCLUSION

For all the foregoing reasons, the Petition for Review should be DENIED.

Dated at Seattle, WA, this 30th day of October, 2008.

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