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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

NO. 63743-6-I

SUPREME COURT
OF THE STATE OF WASHINGTON

PATRICK A. WILLIAMS and ANDREA HARRIS,
his wife, and ANDREA HARRIS as guardian for
ELENA-GENEVIEVE HARRIS, a minor child,
and JOSHUA HARRIS, a minor child,

Respondents,

vs.

FESSEHA K. TILAYE and JANE DOE TILAYE,
his wife and the marital community composed thereof,
and MAMUYE A. AYELEKA d.b.a.
ORANGE CAB 485 and JANE DOE AYELEKA,
his wife and the marital community composed thereof,

Appellants.

ANDREA HARRIS'S
PETITION FOR REVIEW
PURSUANT TO RAP 13.4(a)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii, iii

I. IDENTITY OF THE PETITIONER..... 1

II. ISSUES PRESENTED..... 1

III. STATEMENT OF THE CASE..... 2

A. Introduction..... 2

B. Background Facts..... 2

C. Procedure..... 3

IV. ARGUMENT IN SUPPORT OF REVIEW..... 8

1. The Court of Appeals Erred by Failing to Interpret RCW 4.84.280 According to Its Plain and Ordinary Meaning.. 10

2. The Court of Appeals Decision in Singer v. Etherington, supra. Should Be Overturned to the Extent It Holds That Mandatory Arbitration Proceedings Shall be Treated as the Original Trial and a Trial De Novo in Superior Court Is to be Considered an Appeal Invoking RCW 4.84.290..... 15

3. Harris Should Have Been Awarded a Multiplier Under the Lodestar Method on Her Cross-Appeal..... 19

4. Harris Should Be Awarded Reasonable Attorneys’ Fees for the Appeal..... 19

V. CONCLUSION..... 20

TABLE OF AUTHORITIES

Cases

Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001)..... 10

Burton v. Lehman, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005)..... 12

Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006)..... 10

Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007)..... 8,
11, 17

Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43
P.3d 4 (2002)..... 8, 10

Killian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002) 9

Kruger Clinic v. Regence Blueshield, 157 Wn.2d 290, 303, 138 p.3d 936
(2006)..... 12, 16

Malted Mousse Inc. v. Steinmetz, 150 Wn.2d 518, 528, 79 P.3d 1154
(2003)..... 18

Simpson Inv. Co. v. Dep't of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741
(2000)..... 13

Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990)... 1, 6, 9, 15,
16, 17, 18, 19, 20

State v. Cooper, 156 Wn.2d 475, 128 P.3d 1234 (2006).....9, 14

State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003)..... 9, 12, 16

State v. Moses, 145 Wn.2d 370, 374, 37 P.3d 1216 (2002)..... 8

Tingey v. Haisch, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007)..... 11

Statutes

RCW 4.84.010(7)..... 1, 2, 8, 12, 13, 14, 20
RCW 4.84.250..... 2, 4, 5, 10, 16, 20
RCW 4.84.260..... 4, 6
RCW 4.84.280..... 1, 2, 4-17, 19, 20
RCW 4.84.290..... 6, 8, 9, 15, 16, 17, 18, 19, 20
RCW 7.06..... 6, 7, 17
RCW 7.06.070..... 18

Rules

MAR 7.1..... 3
MAR 7.1(a)..... 17
MAR 7.1(b)..... 17
MAR 7.2(b)(1)..... 17, 18
MAR 7.2(c)..... 17
RAP 12.4..... 7
RAP 13.4(b)(1)..... 8
RAP 13.7(b)..... 19
RAP 18.1..... 20

Other Authorities

Black’s Law Dictionary (Deluxe 6th ed. 1997)..... 7, 11, 16
Laws of 1984, ch. 145, § 92..... 8, 13
Laws of 1983, ch. 282, § 1..... 14

I. IDENTITY OF THE PETITIONER

Andrea Harris, plaintiff in the trial court and respondent in the Court of Appeals (hereinafter “Harris”), asks this Court to accept review of the Court of Appeals’ decision filed on October 4, 2010, as well as the Court of Appeals’ Order Denying Motion for Reconsideration entered on November 3, 2010. The Court of Appeals’ decision of October 4, 2010, is unpublished. A copy of the unpublished opinion is in the Appendix at pages A-1 through A-11. A copy of the Order Denying Motion for Reconsideration is in the Appendix at p. A-12.

II. ISSUES PRESENTED

1. Whether the Court of Appeals erred when it concluded that the term “trial” as it appears in RCW 4.84.280 includes “mandatory arbitration,” where a related statute, RCW 4.84.010(7), as well as the plain meaning rule clearly shows the Legislature did not intend to include “mandatory arbitration” in the term “trial” under RCW 4.84.280.
2. Whether in holding that the trial de novo was the appeal for purposes of applying 4.84.290, the Court of Appeals’ reliance on Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990) was misguided.
3. Whether, if this Court accepts review and finds in favor of Harris, the Court should award Harris a multiplier on her attorney’s fees under the Lodestar.

III. STATEMENT OF THE CASE

A. Introduction

This case arises from a motor vehicle personal injury action where the trial court awarded Harris reasonable attorneys' fees pursuant to RCW 4.84.260 and .280 as the prevailing party after judgment was entered in her favor. The trial court rejected Defendant Fesseha Tilaye's (hereinafter "Tilaye") contention that the term "trial" as used in RCW 4.84.280 was meant to include "mandatory arbitration." On appeal, the Court of Appeals reversed, concluding that the term "trial" as used in RCW 4.84.280 was meant to include "mandatory arbitration."

Harris petitions for review by this Court based on the fact the Court of Appeals failed to give a plain and ordinary meaning to the term "trial" as used in RCW 4.84.280. More importantly, the Court of Appeals concluded that the term "trial" included "mandatory arbitration" despite the Legislature clearly differentiating the two terms in RCW 4.84.010(7). The use of the two terms in RCW 4.84.010(7) is a clear indication that the Legislature recognized the distinction between the two terms and intentionally omitted "mandatory arbitration" from RCW 4.84.280.

B. Background Facts

In the early morning of December 25, 2005, Harris was traveling to SeaTac airport. RP 245, 247. Her boyfriend at the time, Patrick

Williams (“Williams”), was driving and Harris was in the seat behind him with her two children seated next to her. RP 241, 246. There was water on the roadway. CP 575. As the car travelled south on I-5 in the far right lane, Harris saw an orange taxi cab driven by Tilaye pass very quickly in the far left lane. RP 249. As it passed, the cab swayed to the left, seeming to hit the concrete divider. *Id.* The cab then swayed back and forth across several lanes and collided with William’s car. RP 249-50, 328-32. As a result, Harris was injured. RP 251, 258, 264-68.

C. Procedure

Williams and Harris filed a complaint for negligence against Tilaye, the driver of the cab that struck them on Christmas day, and Mamuye Ayeleka (hereinafter “Ayeleka”), the registered owner of the cab. CP 3-7. Williams and Harris were represented at the time by attorney Robert D. Kelley (“Kelley”). CP 28, 539.

The case was transferred to mandatory arbitration pursuant to the parties’ stipulation and order. CP 24-26. The arbitrator held in favor of Tilaye and Ayeleka, stating that he was unable to find proximate cause. CP 31-32. After the arbitration, Kelley told Harris he was withdrawing from her case and declined to handle the trial de novo because of the substantial legal and financial risks of going to trial. CP 44, 539-40. Harris, as pro se, requested a trial de novo pursuant to MAR 7.1. CP 33-

34. After twenty or more attorneys declined to represent her, Harris was eventually able to convince attorney Patrick J. Kang, her current counsel (hereinafter "Kang"), to take her case on a contingency basis. CP 476, 487-90, 540.

On August 14, 2008, several months prior to the trial, Harris made an offer of settlement pursuant to RCW 4.84.280 in the amount of \$9,000.00. CP 493-94. Tilaye's insurer declined the settlement offer. CP 476.

The trial de novo began on May 4, 2009. CP 399. The case was tried to the bench with the Honorable Cheryl Carey presiding. CP 399. Ayeleka was voluntarily dismissed as a defendant at the very outset of the trial. RP 74-76, 407-08.

At the conclusion of trial, the trial court found in favor of Harris and against Tilaye. CP 800-01. The trial court awarded Harris \$20,512.00 as damages. CP 437-39. As the prevailing party, Harris requested reasonable attorney's fees and costs pursuant to RCW 4.84.260 and .280. CP 457-73.

The pertinent language of RCW 4.84.260 states:

The plaintiff ... shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff ... as set forth in RCW 4.84.280.

RCW 4.84.280 states:

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purpose of determining attorneys' fees as set forth in RCW 4.84.250.

(Emphasis added).

Because Harris made an offer of settlement more than ten days before trial, and her recovery was more than the \$9,000 settlement offer she made pursuant to RCW 4.84.280, Harris contended that she was the prevailing party, entitling her to reasonable attorney's fees and costs.

In response, Tilaye contended that the "mandatory arbitration" was the "trial" under RCW 4.84.280, and the "trial de novo" was an "appeal," and since Harris failed to make her offer of settlement before the mandatory arbitration, she failed to comply with RCW 4.84.280; Thus, Tilaye claimed Harris was not entitled to recover reasonable attorneys' fees. CP 739-41. The trial court rejected Tilaye's contention and awarded Harris reasonable attorneys' fees of \$49,847.50, and statutory costs of \$1,372.68 for a total judgment of \$71,732.18. CP 800-02.

Tilaye appealed, and Harris cross-appealed. The cross-appeal related to the trial court's decision not to award her a multiplier on her attorney fees.

On appeal, among other issues, Tilaye again asserted that under RCW 4.84.280, the "mandatory arbitration" was the "trial" under RCW 4.84.280 and that the "trial de novo" was the "appeal" under RCW 4.84.290, and therefore, the trial court erred by awarding Harris reasonable attorneys' fees because Harris's offer of settlement was not made more than 10 days before the mandatory arbitration. The Court of Appeals agreed with Tilaye and reversed the trial court's award of attorneys' fees to Harris.

In reaching its decision, the Court of Appeals relied on Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990), concluding that the term "trial" as used in RCW 4.84.280 was meant to include mandatory arbitration proceedings under chapter 7.06 RCW.

A mandatory arbitration proceeding under chapter 7.06 RCW "is treated as the original trial" when applying RCW 4.84.290. The trial de novo is the appeal that makes RCW 4.84.290 applicable. Singer, 57 Wn. App. at 546. It follows that the arbitration is the proceeding in which the plaintiff must invoke RCW 4.84.260 in order to be deemed a prevailing party. The plaintiff can do this only by making an offer of settlement in the manner prescribed by RCW 4.84.280 – that is, at least 10 days before the arbitration that constitutes the "trial."

Harris, Slip Opinion, at p. 4 (Quotation marks original).

Based on its decision, the Court of Appeals declined to consider Harris's cross-appeal. Id. at 5.

Pursuant to RAP 12.4, Harris timely filed a Motion for Reconsideration, contending that the Court of Appeals' decision failed to give effect to the long line of Supreme Court precedents which require unambiguous statutes to be given their plain and ordinary meaning. A plain and ordinary meaning of "trial" can be found in the Black's Law Dictionary: "[a] judicial examination ... before a court that has jurisdiction." See Appendix at p. A-16. "Arbitration" is defined in the Black's Law Dictionary as "a process of dispute resolution in which a neutral third party (arbitrator) renders a decision...." See Appendix at p. 15.

Harris further contended that by concluding that "mandatory arbitration" under RCW 7.06 was a "trial" for purposes of applying RCW 4.84.280, the Court of Appeals "read into a statute matters that were not in it" and "created legislation under the guise of interpreting a statute;" both of which are explicitly prohibited by Supreme Court precedents. Nevertheless, the Court of Appeals denied Harris's motion for reconsideration.

Harris timely filed this Petition for Review.

IV. ARGUMENT IN SUPPORT OF REVIEW

This Court should grant review pursuant to RAP 13.4(b)(1) because the Court of Appeals' decision conflicts with this Court's decision in Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 9-10, 43 P.3d 4 (2002), as well as several other Supreme Court cases which require courts to give effect to the plain and ordinary meaning of a statute. See also Christensen v. Ellsworth, 162 Wn.2d 365, 373, 173 P.3d 228 (2007). The Court of Appeals' conclusion that "mandatory arbitration" is included in the term "trial" under RCW 4.84.280 not only ignores the ordinary meaning of "trial," but it also fails to give effect to the fact that in a related provision the Legislature amended RCW 4.84.010(7) to *add* the term "mandatory arbitration" next to the term "trial." See Laws of 1984, ch. 145, § 92, attached as Appendix at p. A-18.

When the Legislature amended RCW 4.84.280 in 1983, it added the language "at least ten days prior to trial." The following year, even though the Legislature recognized that "mandatory arbitration" was wholly distinct from "trial," as evidenced by the amendment to RCW 4.84.010(7), the Legislature declined to make similar changes to RCW 4.84.280, clearly expressing its intent that an offer of settlement must be made at least ten days prior to **trial**, not mandatory arbitration.

Moreover, by reading the language “mandatory arbitration” into RCW 4.84.280, the Court of Appeals’ decision also creates a conflict with this Court’s decision in State v. Cooper, 156 Wn.2d 475, 480, 128 P.3d 1234 (2006), wherein this Court stated, “Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.” It also conflicts with this Court’s decisions that courts are not to “read into a statute matters that were not in it,” creating “legislation under the guise of interpreting a statute.” Killian v. Atkinson, 147 Wn.2d 16, 20, 50 P.3d 638 (2002).

Furthermore, this Court should grant review because in reaching its opinion, the Court of Appeals relied on Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990), a case which held that the mandatory arbitration is to be considered the trial, and a trial de novo the appeal for purposes of applying RCW 4.84.290. This conclusion and the Court of Appeals’ reliance on Singer also conflicts with this Courts’ plain meaning rule, rendering portions of RCW 4.84.290 meaningless and superfluous. See State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (“Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.”).

1. The Court of Appeals Erred by Failing to Interpret RCW 4.84.280 According to Its Plain and Ordinary Meaning.

RCW 4.84.280 states:

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to *trial*. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorney's fees as set forth in RCW 4.84.250.

(Emphasis added).

When ascertaining the meaning of a statute, the court first looks to the language of the statute. Cerrillo v. Esparza, 158 Wn.2d 194, 201, 142 P.3d 155 (2006). “The court’s fundamental objective is to ascertain and carry out the Legislature’s intent, and if the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” Campbell & Gwinn, LLC, 146 Wn.2d at 9-10. “Courts should assume that the Legislature means exactly what it says.” Berger v. Sonneland, 144 Wn.2d 91, 105, 26 P.3d 257 (2001).

“Plain meaning is discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. An

undefined statutory term should be given its usual and ordinary meaning. Statutory provisions and rules should be harmonized whenever possible.” Christensen, 162 Wn.2d at 373. When a term has a well-accepted, ordinary meaning, a regular dictionary may be consulted to ascertain the term’s definition. Tingey v. Haisch, 159 Wn.2d 652, 658, 152 P.3d 1020 (2007). When a technical term is used in its technical field, the term should be given its technical meaning by using a “technical rather than a general purpose dictionary to resolve the term’s definition.” Id.

The Black’s Law Dictionary, p. 1504, (Deluxe 6th ed. 1997), defines “trial” as:

A *judicial examination* and determination of issues between parties to action, whether they be issue of law or fact, *before a court that has jurisdiction*. [Citation omitted]. A *judicial* examination, in accordance with law of the land, or a cause, either civil or criminal, of the issues between the parties, whether of law or fact, *before a court that has proper jurisdiction*.

(Emphasis added). On the other hand, “arbitration” is defined in the Black’s Law Dictionary, p. 105, (Deluxe 6th ed. 1997) as:

A *process of dispute resolution* in which a *neutral third party (arbitrator)* renders a decision after a hearing at which both parties have an opportunity to be heard.”

(Emphasis added).

The Court of Appeals erred when it failed to give the term “trial” as used in RCW 4.84.280 its usual and ordinary meaning by reading into

the statute the language “mandatory arbitration,” despite the fact that the ordinary meaning of “trial” and “mandatory arbitration” are not synonymous.

“Courts may not read into a statute meaning that is not there.” Burton v. Lehman, 153 Wn.2d 416, 422-23, 103 P.3d 1230 (2005). “Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous.” J.P., 149 Wn.2d at 450.

In the case at bar, the legislature chose only to include “trial” in RCW 4.84.280, when stating “Offers of settlement shall be served on the adverse party ... at least ten days prior to trial.” “Trial” is a judicial examination before a court that has jurisdiction, whereas “mandatory arbitration” is a dispute resolution process mandated by statute that is before a neutral third party called an arbitrator. See Kruger Clinic v. Regence Blueshield, 157 Wn.2d 290, 303, 138 p.3d 936 (2006) (Recognition by this Court that “arbitration” is a form of alternative dispute resolution, similar to mediation, used as an alternative to litigation in court).

Unlike RCW 4.84.280, the Legislature in RCW 4.84.010(7) explicitly used both terms, “trial” and “mandatory arbitration” in the same

provision, allowing a prevailing party to recover the expense of deposition transcripts. Subsection (7) of RCW 4.84.010 reads:

To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at *trial* or at the *mandatory arbitration* hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

See RCW 4.84.010(7).

By explicitly using both the words “trial” and “mandatory arbitration” in RCW 4.84.010(7), the legislature clearly recognized and acknowledged the distinction between a “trial” and “mandatory arbitration.” See Simpson Inv. Co. v. Dep’t of Revenue, 141 Wn.2d 139, 160, 3 P.3d 741 (2000) (Where “different words are used in the same statute, it is presumed that a different meaning was intended to attach to each word.”). More importantly, the explicit addition of “mandatory arbitration” to RCW 4.84.010(7) as part of the “1984 Court Improvement Act” amendments, despite the fact the former statute already contained the word “trial,” proves the Legislature clearly intended these terms to have independent meanings. See Laws of 1984, ch. 145, § 92, attached as Appendix at p. 18. Accordingly, the Legislature clearly intended that the prevailing party should be allowed to recover the expense of deposition transcripts whether they be used at trial or at mandatory arbitration. Id.

On the other hand, the Legislature never added the language “mandatory arbitration” to RCW 4.84.280. It is clear by the Legislature’s omission that it did not intend to include “mandatory arbitration” in RCW 4.84.280. “Where the Legislature omits language from a statute, intentionally or inadvertently, this court will not read into the statute the language that it believes was omitted.” Cooper, 156 Wn.2d at 480. The legislative history of RCW 4.84.280 shows that the Legislature intended the statute to apply to “trials” only, and thus never amended the statute to include “mandatory arbitration.” See Laws of 1983, ch. 282 § 1, attached as Appendix at p. A-19.

When the Legislature amended RCW 4.84.280 in 1983, it added the language “at least ten days prior to trial.” The following year, even though the Legislature recognized that “mandatory arbitration” was wholly distinct from “trial,” as evidenced by the “1984 Court Improvement Act” amendment to RCW 4.84.010(7), the Legislature declined to make similar changes to RCW 4.84.280. This omission clearly expresses the legislature’s intent that an offer of settlement must be made at least ten days prior to **trial**, not mandatory arbitration.

The Court of Appeals erred in ruling that the mandatory arbitration in this case was the “trial” for purposes of RCW 4.84.280. It read into the statute language that did not exist and failed to carry out the Legislature’s

intent by denying Harris her reasonable attorney's fees, even though she was the prevailing party under RCW 4.84.280.

2. The Court of Appeals Decision in Singer v. Etherington, supra., Should Be Overturned to the Extent It Holds That Mandatory Arbitration Proceedings Shall be Treated as the Original Trial and a Trial De Novo in Superior Court Is to be Considered an Appeal Invoking RCW 4.84.290.

In concluding that mandatory arbitration is the “trial” for purposes of applying RCW 4.84.280, the Court of Appeals relied upon Singer v. Etherington, 57 Wn. App. 542, 789 P.2d 108 (1990). Singer involved interpreting RCW 4.84.290, an attorneys’ fee statute for prevailing parties on appeal.

The Singer court held that “a mandatory arbitration proceeding is treated as the original trial when applying RCW 4.84.290,” and “[a] trial de novo in superior court is actually an appeal, making RCW 4.84.290 applicable.” Id., at 546. In reaching this conclusion, the Singer court clearly failed to give a plain and ordinary meaning to “appeal,” as it appeared in RCW 4.84.290. However, a request for a trial de novo in superior court after mandatory arbitration is not an “appeal” under RCW 4.84.290. The Singer decision and the Court of Appeals’ reliance on Singer directly conflicts with this Court’s precedents, requiring that statutes be interpreted according to their plain and ordinary meaning.

The ordinary meaning of “appeal” as used in the Black’s Law Dictionary, p. 96, (Deluxe 6th ed. 1997), is “[r]esort to a superior (i.e. appellate) court to review the decision of an inferior (i.e. trial) court or administrative agency.” See Appendix at p. A-14. Mandatory arbitration is not an “inferior court” or an “administrative agency.” It is a process of dispute resolution similar to mediation. See Kruger Clinic, 157 Wn.2d at 303.

More importantly, the Singer court’s contention that after mandatory arbitration, a trial de novo in superior court is an “appeal” renders portions of RCW 4.84.290 meaningless and superfluous, conflicting with this Court’s decisions that interpretations of statutes should not render any portions meaningless or superfluous. See State v. J.P., 149 Wn.2d 444, 450, 69 P.3d 318 (2003). RCW 4.84.290 reads:

If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any, for the purpose of applying the provisions of RCW 4.84.250.

In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.

Under the Singer court's interpretation, the "trial" described in RCW 4.84.280 refers to mandatory arbitration and the "appeal" refers to the trial de novo in superior court. However, if this interpretation was correct, the language "PROVIDED, That *if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party*" as set forth in RCW 4.84.290 would be rendered meaningless and superfluous under the context of a trial de novo. To wit, once a trial de novo is requested, the superior court cannot order the parties to re-arbitrate (i.e. re-trial) as described in the statute. (Emphasis added). "Statutory provisions and rules should be harmonized whenever possible." Christensen, 162 Wn.2d at 373.

The mandatory arbitration rule allows any aggrieved party to request a trial de novo in the superior court. MAR 7.1(a). "When a trial de novo is requested ... *the case shall be transferred from the arbitration calendar* in accordance with rule 8.2 in a manner established by local rule." MAR 7.1(b) (Emphasis added). "The trial de novo shall be conducted as though no arbitration proceeding had occurred." MAR 7.2(b)(1). At trial, whether by bench or jury, parties are strictly prohibited from referencing the arbitration award. Id. "The relief sought at a trial de novo shall not be restricted by RCW 7.06, local arbitration rule, or any prior waiver or stipulation made for purposes of arbitration." MAR 7.2(c).

The plain language in the mandatory arbitration rules indicates that when a party requests a trial de novo in superior court, the trial proceeds “as though no arbitration proceeding occurred.” Clearly, this is at odds with the Singer court’s interpretation of RCW 4.84.290, on which the Court of Appeals relied. A superior court adjudging a trial de novo simply *cannot* order the parties to re-arbitrate.

Furthermore, this Court’s decision in Malted Mousse Inc. v. Steinmetz, 150 Wn.2d 518, 528, 79 P.3d 1154 (2003), supports the contention that the superior court cannot order the parties to re-arbitrate from a trial de novo. The Malted Mousse Court made it clear: when a party requests a trial de novo after mandatory arbitration under RCW 7.06, the “trial de novo is ‘conducted *as though no arbitration proceeding had occurred.*’” Id. at 528 (quoting MAR 7.2(b)(1) (original emphasis)).

We believe the trial de novo process is exactly what the rule says it is: a trial conducted as if the parties never proceeded to arbitration. The entire case begins anew. *The arbitral proceeding becomes a nullity, and it is relevant solely for purposes of determining whether a party has failed to improve his or her position, in which case attorney fees are mandated.*”

Id. (Emphasis added).

Even RCW 7.06.070, the mandatory arbitration statute, seems to indicate the superior court cannot order the parties to re-arbitrate once a

trial de novo is requested. The statute provides that “[n]o provision of this chapter may be construed to abridge the right to trial by jury.”

Yet under the Singer court’s interpretation, the trial de novo is the “appeal” for purposes of RCW 4.84.290. If this were the case, RCW 4.84.290 would allow the superior court to order the parties to re-arbitrate. Because the superior court on a trial de novo *cannot* order the parties to re-arbitrate, the Singer interpretation would render portions of RCW 4.84.290 meaningless and superfluous. Accordingly, this Court should overturn Singer to the extent that it holds “a mandatory arbitration proceeding is treated as the original trial when applying RCW 4.84.290,” and “[a] trial de novo in superior court is actually an appeal, making RCW 4.84.290 applicable.”

3. Harris Should Have Been Awarded a Multiplier Under the Lodestar Method on Her Cross-Appeal.

The Court of Appeals declined to address Harris’s cross-appeal due to its decision regarding the attorneys’ fees. If this Court reverses the Court of Appeals’ decision and reinstates the trial court’s decision awarding Harris attorney’s fees under RCW 4.84.280, this Court should also consider the multiplier issue addressed in Harris’s cross-appeal.

4. Harris Should Be Awarded Reasonable Attorneys’ Fees for the Appeal.

Harris should be awarded reasonable attorneys’ fees and costs for

the appeals pursuant to RCW 4.84.250, 4.84.290 and RAP 18.1.

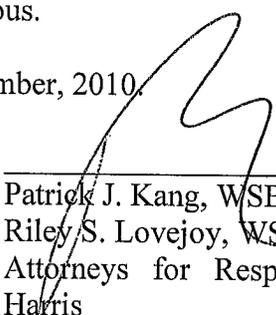
V. CONCLUSION

This Court should grant review because the Court of Appeals' decision conflicts with this Court's precedents requiring courts to give effect to the plain and ordinary meaning of statutes.

The Court of Appeals' conclusion that "mandatory arbitration" was included in the term "trial" under RCW 4.84.280 not only ignored the ordinary meaning of "trial," but it failed to recognize that in 1984, the Legislature *explicitly revised* a related statute (RCW 4.84.010(7)) to include "mandatory arbitration," where the term "trial" was already present. This illustrates that the Legislature clearly recognized the distinction between the two proceedings and purposefully omitted "mandatory arbitration" from RCW 4.84.280.

Finally, this Court should grant review because the Court of Appeals' reliance on Singer v. Etherington, *infra.* is misguided insofar as it conflicts with the plain meaning of RCW 4.84.290 and renders portions of the statute meaningless and superfluous.

DATED this 2nd day of December, 2010.



Patrick J. Kang, WSBA #30726
Riley S. Lovejoy, WSBA #41448
Attorneys for Respondent Andrea
Harris

CERTIFICATE OF SERVICE

I certify that on the 3rd day of December 2010, I caused a true and correct copy of Respondent Andrea Harris's Petition for Review to be served on the following in the manner indicated below:

VIA EMAIL AND HAND DELIVERY

Philip Meade
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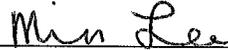
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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: December 3, 2010 at Bellevue, Washington.



Min Lee

APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

PATRICK A. WILLIAMS and ANDREA
HARRIS, his wife, and ANDREA
HARRIS as guardian for
ELENA-GENEVIEVE HARRIS, a minor
child, and JOSHUA HARRIS, a minor
child,

Respondents/
Cross-Appellants,

v.

FESSEHA K. TILAYE and JANE DOE
TILAYE, his wife, and the marital
community composed thereof, and
MAMUYE A. AYELEKA d.b.a. ORANGE
CAB 485 and JANE DOE AYELEKA,
his wife, and the marital community
composed thereof,

Appellants/
Cross-Respondents.

No. 63743-6-I
(consolidated w/63885-8-I)

DIVISION ONE

UNPUBLISHED OPINION

FILED: October 4, 2010

BECKER, J. – This appeal primarily concerns RCW 4.84.260, under which attorney fees will be awarded to a plaintiff who has made a formal offer of settlement before “trial” and then recovers more than the amount offered. The “trial” in this case was a mandatory arbitration. The trial de novo that followed was an appeal. The plaintiffs made offers to settle before the trial de novo, but after the arbitration. Because these offers were not made before “trial,” they did not secure the statutory right to attorney fees. The attorney fee awards are

A-1

No. 63743-6-1/2

reversed. We affirm the court's decision to include the cost of future treatment in the damages awarded to plaintiff Harris.

The litigation arose from a collision on December 25, 2005. Appellant Fesseha Tilaye lost control while driving a taxi and hit a car driven by Patrick Williams. Andrea Harris and her two children were in the car with Williams. All four suffered pain and soft tissue damage and received treatment from Dr. Marisa DeLisle, a chiropractor. They filed a personal injury lawsuit alleging Tilaye's negligence.

On December 14, 2007, the superior court transferred the case to mandatory arbitration under chapter 7.06 RCW. On March 28, 2008, an arbitration award was filed in Tilaye's favor, the arbitrator having been unable to find proximate cause. The plaintiffs timely requested a trial de novo in superior court.

On May 20, 2008, Williams offered to settle for \$3,900. On August 14, 2008, Harris offered to settle for \$9,000. Their offers were made pursuant to RCW 4.84.280. The offers were not accepted.

The trial de novo began on May 4, 2009. The case was tried to the bench. The two children settled before trial.

After a four day trial, the court ruled in favor of Harris and Williams. The judgment for Harris was in the amount of \$20,512. This included \$10,000 in general damages and special damages of \$10,512. The judgment for Williams was in the amount of \$7,852, including \$3,000 in general damages and special damages of \$4,852. As the amounts awarded exceeded the amounts for which

Harris and Williams had offered to settle, they moved for an award of reasonable attorney fees under RCW 4.84.260 and .280. Over Tilaye's objection that the offers of settlement should have been made before the arbitration in order to be timely, the court found both plaintiffs were prevailing parties and awarded them attorney fees under RCW 4.84.250. The award of attorney fees to Williams was \$25,722. The award of attorney fees to Harris was \$49,847.50.

Tilaye appeals. In addition to his argument that the attorney fee awards were unauthorized, he contends the court erred by including the cost of future treatment in the special damages awarded to Harris. Harris cross-appeals the court's denial of her request for a multiplier in the award of attorney fees.

Tilaye's codefendant, taxi owner Mamuye Ayeleka—voluntarily dismissed by the plaintiffs on the first day of the trial de novo—appeals the court's refusal of his request for attorney fees as a prevailing party under RCW 4.84.250.

ATTORNEY FEES

In an action for damages where the amount pleaded by the prevailing party is \$10,000 or less, the prevailing party is entitled to an award of reasonable attorney fees. RCW 4.84.250. The plaintiff shall be deemed the prevailing party when the recovery, exclusive of costs, "is as much as or more than the amount offered in settlement by the plaintiff." RCW 4.84.260. Offers of settlement must be served on the adverse party at least ten days prior to "trial." RCW 4.84.280. If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying RCW 4.84.250. RCW 4.84.290. The

issue in this case is how to apply the above cited statutes in a case that begins with a mandatory arbitration. The answer is found in Singer v. Etherington, 57 Wn. App. 542, 547, 789 P.2d 108, 802 P.2d 133 (1990). A mandatory arbitration proceeding under chapter 7.06 RCW "is treated as the original trial" when applying RCW 4.84.290. The trial de novo is the appeal that makes RCW 4.84.290 applicable. Singer, 57 Wn. App. at 546. It follows that the arbitration is the proceeding in which the plaintiff must invoke RCW 4.84.260 in order to be deemed a prevailing party. The plaintiff can do this only by making an offer of settlement in the manner prescribed by RCW 4.84.280—that is, at least 10 days before the arbitration that constitutes the "trial."

Harris and Williams contend that Singer is no longer good law after Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518, 79 P.3d 1154 (2003). The court in Malted Mousse was asked to decide whether a party to a mandatory arbitration under chapter 7.06 RCW could appeal only the attorney fee portion of the arbitration award. The court's answer was no; the only way to appeal an erroneous ruling from mandatory arbitration is through a trial de novo of all the issues. Malted Mousse, 150 Wn.2d at 529. The court stated that trial de novo must be "conducted as though no arbitration proceeding had occurred" and that once trial de novo is granted, "the entire case begins anew." Malted Mousse, 150 Wn.2d at 528 (emphasis omitted), quoting MAR 7.2(b)(1). These statements, on which Harris and Williams rely, do not address whether a mandatory arbitration proceeding is the "trial" for purposes of the fee statutes at issue here. That issue simply was not in the case. Thus we conclude that

Malted Mousse does not overturn Singer, even implicitly. To the contrary, Malted Mousse recognizes that trial de novo under chapter 7.06 RCW is an appeal.

The purposes of RCW 4.84.250–.290 are to encourage out-of-court settlements, penalize parties who unjustifiably bring or resist small claims, and enable parties to pursue meritorious small claims without seeing the award swallowed up by the expense of paying an attorney. Beckmann v. Spokane Transit Auth., 107 Wn.2d 785, 788, 733 P.2d 960 (1987). Treating the arbitration proceeding as the “trial” furthers these purposes. It creates an incentive for both sides to settle before going to the considerable expense of a full arbitration hearing.

Because Harris and Williams did not comply with the statutory requirement of serving their offers of settlement 10 days before “trial,” they did not successfully invoke the statutory scheme. They were not entitled to attorney fees for the “trial” before the arbitrator; they were not entitled to attorney fees for the appeal (i.e., the trial de novo) in superior court; and they are not entitled to attorney fees for their appeal in this court. This conclusion makes it unnecessary for us to address any of the other fee-related issues in the appeal by Tilaye and the cross appeal by Harris.

Ayeleka concedes that if Harris and Williams did not invoke RCW 4.84.250–.280, that statute does not authorize an award of attorney fees to him. We accept his concession and deny his appeal as well.

FUTURE TREATMENT COSTS

Tilaye also contends the court erred by allowing Dr. DeLisle to testify that Harris would continue to suffer damages in the future as a result of the collision when her opinion on this topic was not properly disclosed in answers to interrogatories.

The answers Harris provided in December 2007 stated that she had received chiropractic treatments from Dr. DeLisle for six months. Harris itemized the cost of these treatments and other related medical expenses, totaling \$6,032. She said she had suffered neck, shoulder, and muscle pain as the result of the collision and these conditions had "improved very much, but did not completely heal." Asked in interrogatory 24 to state the nature, duration, and estimated cost of any future care or additional treatment that she had been advised might be necessary, Harris answered, "Dr. DeLisle recommended further treatments." At her deposition on March 6, 2008, Harris testified she had not seen Dr. DeLisle since May 24, 2006.

The discovery cutoff date was February 2, 2009. On February 24, 2009, Harris returned to Dr. DeLisle for another examination. On Wednesday, April 27, 2009, Dr. DeLisle advised counsel for Harris that based on her most recent examination of Harris, she recommended further treatment. She detailed the length of the recommended treatment and its estimated cost. Two days later, Harris filed her trial brief stating that "Harris will also request future medical expenses as the evidence will show that she needs future treatments to resolve her continuing neck and shoulder pain. Dr. DeLisle will testify at the trial to

support Plaintiff's future treatment evidence." When the trial began the following week, Tilaye objected that Dr. DeLisle should not be permitted to give testimony about the future treatment because of the late disclosure. He had just been advised on the first day of trial about the examination that occurred on February 24.

The court allowed Dr. DeLisle to include the topic of future treatment in her testimony, reserving Tilaye's objection for later resolution. Dr. DeLisle described her diagnosis and treatment of Harris during the six months after the accident, ending in May 2006. At that time, she had recommended ongoing treatment for Harris to sustain the improvement in her condition, but Harris could not afford it. Harris had come back recently, in February 2009, complaining of intermittent neck pain and headaches. Dr. DeLisle testified that she reexamined Harris to determine the state of her cervical spine. In a new X-ray, she saw that the curve within Harris's neck was "fairly consistent with the last film that I did take," but she did see a change in one of the vertebrae and the growth of scar tissue, which she attributed to the fact that Harris did not continue treatment as recommended in 2006. Dr. DeLisle recommended 10 months of further chiropractic treatment, at a cost of \$4,480, to resolve the neck pain and get Harris back to preaccident status.

When the court later returned to the issue of admissibility of this testimony, Tilaye argued that the evidence of future treatment costs should be excluded because Harris had failed to supplement her interrogatory answers as required by CR 26(e) once the examination in February 2009 made the original answers

no longer complete. He asked the court to exclude the evidence as a willful discovery violation and unfair surprise. The court denied this request, reasoning that Tilaye should not have been surprised to hear about the need for more treatment:

In this particular case, the interrogatories indicated they did plan on calling a health-care provider. The health-care provider was the only expert that was called. There hadn't been a laundry list of other folks. No surprises there.

The health-care provider did state and indicate that Ms. Harris was going to need continuing treatment. Ms. Harris herself testified that, in fact, she had not completely healed

The court awarded Harris \$4,480 in damages as the cost of future treatment. Tilaye contends the court erred in refusing to exclude Dr. DeLisle's testimony about future damages and that the remedy is to deduct \$4,480 from the judgment for Harris.

"A trial court's determination regarding whether to impose discovery sanctions under CR 26 is reviewed for abuse of discretion." Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc., 143 Wn. App. 345, 360, 177 P.3d 755, review denied, 164 Wn.2d 1032 (2008). An abuse of discretion occurs if the trial court decision is manifestly unreasonable or based on untenable grounds. Mayer v. Sto Indus., Inc., 156 Wn.2d 677, 684, 132 P.3d 115 (2006).

A party must seasonably update a response to an interrogatory asking about the substance of the testimony an expert witness is expected to give. CR 26(e). The duty arises when the party obtains information upon the basis of which the party "knows that the response though correct when made is no longer

true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." CR 26(e)(2)(B). The duty to supplement is the duty of the party, not just her attorney, and so the fact that Harris failed to inform her attorney about her recent visit to Dr. DeLisle in February 2009 does not factor into the analysis. A violation of the discovery rules may be deemed willful or intentional if done without a reasonable excuse. Hampson v. Ramer, 47 Wn. App. 806, 812, 737 P.2d 298 (1987). Sanctions may be imposed for failure to supplement as the rule requires. CR 26(e)(4). Exclusion of evidence, though a harsh remedy, is not an abuse of discretion if the violation substantially prejudices the opponent's ability to prepare for trial. Hampson, 47 Wn. App. at 812-13. On the other hand, where substantial prejudice does not result from a failure to disclose, it is not an abuse of discretion to refuse to exclude the evidence. In re Estate of Foster, 55 Wn. App. 545, 779 P.2d 272 (1989), review denied, 114 Wn.2d 1004 (1990).

Tilaye argues that in the absence of an updated answer to interrogatory 24, he was entitled to assume Dr. DeLisle would not give testimony supporting an award of damages for future treatment. He contends he was prejudiced because when he learned the testimony would include an estimate of the costs of future treatment, it was too late to depose Dr. DeLisle on this topic and too late to retain an expert who might have been able to contradict Dr. DeLisle's findings.

There is no doubt that the failure to update answers to interrogatories concerning the anticipated testimony of an expert witness can be so prejudicial as to justify exclusion of the testimony. Cases cited by Tilaye are illustrative,

including Hampson as well as Port of Seattle v. Equitable Capital Group, Inc., 127 Wn.2d 202, 209-10, 898 P.2d 275 (1995), superseded on other grounds by rule as stated in Ashley v. Hall, 138 Wn.2d 151, 978 P.2d 1055 (1999). But in this case, the trial court had a tenable basis for concluding that Tilaye was not unfairly surprised. The answers Harris gave initially put Tilaye on notice that she was not completely healed and that Dr. DeLisle recommended further treatment. The cost of the treatment Harris had already received from Dr. DeLisle indicated the likely range of any future cost. Dr. DeLisle's testimony about what she saw during the more recent visit was consistent with the information she had previously provided; it did not represent a changed diagnosis.

Tilaye's decision not to retain his own expert witness to challenge Dr. DeLisle on causation and damages was understandable given the nature of the case as a relatively small claim. But he knew future treatment was a possibility, and he fails to demonstrate convincingly that he would have made a different decision if he had been informed there was a specific estimate of \$4,480 as the cost of future treatment. We conclude the trial court did not abuse its discretion in admitting and considering the challenged testimony.

The judgment awarding damages to Harris, including future damages, is affirmed. The judgments awarding attorney fees to Harris and Williams are

No. 63743-6-1/11

reversed. The denial of Ayeleka's motion for attorney fees is affirmed.

Becker, J.

WE CONCUR:

Spencer, J.

Dupe, C. S.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

PATRICK A. WILLIAMS and ANDREA)
HARRIS, his wife, and ANDREA)
HARRIS as guardian for)
ELENA-GENEVIEVE HARRIS, a minor)
child, and JOSHUA HARRIS, a minor)
child,)

Respondents/
Cross-Appellants,)

v.)

FESSEHA K. TILAYE and JANE DOE)
TILAYE, his wife, and the marital)
community composed thereof, and)
MAMUYE A. AYELEKA d.b.a. ORANGE)
CAB 485 and JANE DOE AYELEKA,)
his wife, and the marital community)
composed thereof,)

Appellants/
Cross-Respondents.)

No. 63743-6-I
(consolidated w/63885-8-I)

ORDER DENYING MOTION
FOR RECONSIDERATION

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2010 NOV -3 PM 2:23

Respondent/Cross-Appellant Andrea Harris having filed a motion for reconsideration of the opinion filed October 4, 2010, and the court having determined that said motion should be denied; Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

DONE this 3rd day of November, 2010.

FOR THE COURT:

Becker, J.
Judge

A-12

BLACK'S LAW DICTIONARY®

Definitions of the Terms and Phrases of
American and English Jurisprudence,
Ancient and Modern

By

HENRY CAMPBELL BLACK, M. A.

SIXTH EDITION

BY

THE PUBLISHER'S EDITORIAL STAFF

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A-13

Apostille, or appostille /əpóstəl/. L. Fr. An addition; a marginal note or observation. A standard certification provided under the Hague Convention of 1961 for purpose of authenticating documents for use in foreign countries.

Apostles. In English admiralty practice, a term borrowed from the civil law, denoting brief dismissory letters granted to a party who appeals from an inferior to a superior court, embodying a statement of the case and a declaration that the record will be transmitted.

Apostoli /əpóstələy/. In civil law, certificates of the inferior judge from whom a cause is removed, directed to the superior. *See* Apostles.

Apostolus /əpóstələs/. A messenger; an ambassador, legate, or nuncio.

Apotheca /əpəθiýkə/. In the civil law, a repository; a place of deposit, as of wine, oil, books, etc.

Apparator /əpərəýtər/. A furnisher or provider. Formerly the sheriff, in England, had charge of certain county affairs and disbursements, in which capacity he was called "*apparator comitatus*" (apparator for the county), and received therefor a considerable emolument.

Apparent. That which is obvious, evident, or manifest; what appears, or has been made manifest. That which appears to the eye or mind; open to view; plain; patent. In respect to facts involved in an appeal or writ of error, that which is stated in the record. *See also* Appear on face.

Apparent agency. *See* Agency.

Apparent authority. In the law of agency, such authority as the principal knowingly or negligently permits the agent to assume, or which he holds the agent out as possessing. Such authority as he appears to have by reason of the actual authority which he has. Such authority as a reasonably prudent man, using diligence and discretion, in view of the principal's conduct, would naturally suppose the agent to possess. *Finnegan Constr. Co. v. Robino-Ladd Co.*, 354 A.2d 142, 144. Such authority as a principal intentionally or by want of ordinary care causes or allows third person to believe that agent possesses. *Lewis v. Michigan Milers Mut. Ins. Co.*, 154 Conn. 660, 228 A.2d 803, 806. It includes the power to do whatever is usually done and necessary to be done in order to carry into effect the principal power conferred.

The power to affect the legal relations of another person by transactions with third persons, professedly as agent for the other, arising from and in accordance with the other's manifestations to such third persons. *Restatement, Second, Agency* § 8.

Apparent danger. As used with reference to the doctrine of self-defense in homicide, means such overt actual demonstration, by conduct and acts, of a design to take life or do some great personal injury, as would make the killing apparently necessary to self-preservation. *See* Self defense.

Apparent defects. Those defects in goods which can be discovered by simple inspection; *see* U.C.C. § 2-605.

Also, may refer to title defects which appear on the record. *See* Patent; Patent defect.

Apparent easement. *See* Easement.

Apparent heir. One whose right of inheritance is indefeasible, provided he outlives the ancestor. To be contrasted with presumptive heir whose claim to inheritance is defeated on the birth of an heir closer in relationship to the ancestor, though at a given point in time the heir presumptive is entitled to the inheritance.

Apparent necessity. *See* Apparent danger.

Apparitor /əpərəýtər/. In old English law, an officer or messenger employed to serve the process of the spiritual courts and summon offenders.

In the civil law, an officer who waited upon a magistrate or superior officer, and executed his commands.

Apparlement /əpárl(ə)mənt/. In old English law, resemblance; likelihood; as apparlement of war.

Apparura /əpərúrá/. In old English law, the apparura were furniture, implements, tackle, or apparel.

App. Ct. Appellate Court.

Appeal. Resort to a superior (*i.e.* appellate) court to review the decision of an inferior (*i.e.* trial) court or administrative agency. A complaint to a higher tribunal of an error or injustice committed by a lower tribunal, in which the error or injustice is sought to be corrected or reversed. *Board of Ed. of Cleveland City School Dist. v. Cuyahoga County Bd. of Revision*, 34 Ohio St.2d 231, 298 N.E.2d 125, 128. There are two stages of appeal in the federal and many state court systems; to wit, appeal from trial court to intermediate appellate court and then to Supreme Court. There may also be several levels of appeal within an administrative agency; *e.g.* appeal from decision of Administrative Law Judge to Appeals Council in social security case. In addition, an appeal may be taken from an administrative agency to a trial court (*e.g.* from Appeals Council in social security case to U.S. district court). Also, an appeal may be as of right (*e.g.* from trial court to intermediate appellate court) or only at the discretion of the appellate court (*e.g.* by writ of certiorari to U.S. Supreme Court). Provision may also exist for joint or consolidated appeals (*e.g.* Fed.R.App.P. 3) and for cross appeals (where both parties to a judgment appeal therefrom).

Appeal was also the name formerly given to the proceeding in English law where a person, indicted of treason or felony, and arraigned for the same, confessed the fact before plea pleaded, and *appealed*, or accused others, his accomplices in the same crime, in order to obtain his pardon. In this case he was called an "approver" or "prover," and the party appealed or accused, the "appellee."

See also Consolidated appeal; Courts of Appeals, U.S.; Cross appeal; Interlocutory appeal; Interlocutory Appeals Act; Limited appeal.

Appealable order. A decree or order which is sufficiently final to be entitled to appellate review, as con-

A-14

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Arbitrary and capricious. Characterization of a decision or action taken by an administrative agency or inferior court meaning willful and unreasonable action without consideration or in disregard of facts or law or without determining principle. *Elwood Investors Co. v. Behme*, 79 Misc.2d 910, 361 N.Y.S.2d 488, 492. *See also*, Rational basis test.

Arbitrary power. Power to act according to one's own will; especially applicable to power conferred on an administrative officer, who is not furnished any adequate determining principle. *Fox Film Corporation v. Trumbull*, D.C.Conn., 7 F.2d 715, 727.

Arbitrary punishment. That punishment which is left to the decision of the judge, in distinction from those defined by statute. *See* Sentence.

Arbitration /árbitréyshən/. A process of dispute resolution in which a neutral third party (arbitrator) renders a decision after a hearing at which both parties have an opportunity to be heard. Where arbitration is voluntary, the disputing parties select the arbitrator who has the power to render a binding decision.

An arrangement for taking and abiding by the judgment of selected persons in some disputed matter, instead of carrying it to established tribunals of justice, and is intended to avoid the formalities, the delay, the expense and vexation of ordinary litigation. *Wauregan Mills Inc. v. Textile Workers Union of America*, A.F.L.-C.I.O., 21 Conn.Sup. 134, 146 A.2d 592, 595. Such arbitration provisions are common in union collective bargaining agreements.

The majority of the states have adopted the Uniform Arbitration Act.

Agreements to arbitrate have been declared to be valid and fully enforceable by statute. 9 U.S.C.A. § 2.

An organization that provides arbitration services is the American Arbitration Association (*q.v.*).

See also Alternative dispute resolution; Conciliation; Mediation; Mediation and Conciliation Service; Reference.

Compulsory arbitration is that which occurs when the judgment of one of the parties is enforced by statutory provisions. Examples of such are state statutes requiring compulsory arbitration of labor disputes involving public employees. *See* Arbitration clause.

Final offer arbitration. In this type of arbitration, the arbitrator must choose the final offer of either one party or the other and is, therefore, not permitted to compromise.

Final and grievance arbitration distinguished. Inter-union arbitration involves settlement of terms of a contract between the parties as contrasted with grievance arbitration which concerns the violation or interpretation of a contract. *School Committee of Boston et al. v. Boston Teachers Union et al.*, 363 N.E.2d 485.

Free arbitration is by mutual and free consent of the parties.

Arbitration Acts. Federal and state laws which provide for submission of disputes to process of arbitration, including labor grievances and disputes of public employees. An example of a federal Act is Title 9, U.S.C.A. § 1 *et seq.* which governs settlement of disputes involved in maritime transactions and commerce under federal statutes. Most states have arbitration acts, many of which are patterned on the Uniform Arbitration Act. The purpose of such acts, in general, is to validate arbitration agreements, make the arbitration process effective, provide necessary safeguards, and provide an efficient procedure when judicial assistance is necessary.

Arbitration and award. An affirmative defense to the effect that the subject matter of the action has been settled by a prior arbitration. Fed.R. Civil P. 8(c).

Arbitration board. A panel of arbitrators appointed to hear and decide a dispute according to rules of arbitration. *See e.g.* American Arbitration Association.

Arbitration clause. A clause inserted in a contract providing for compulsory arbitration in case of dispute as to rights or liabilities under such contract; *e.g.* disputes arising under union collective bargaining agreement, or disputes between consumer and retailer or manufacturer. The purpose of such clause is to avoid having to litigate disputes that might arise.

Arbitration of exchange. This takes place where a merchant pays his debts in one country by a bill of exchange upon another. The business of buying and selling exchange (bills of exchange) between two or more countries or markets, and particularly where the profits of such business are to be derived from a calculation of the relative value of exchange in the two countries or markets, and by taking advantage of the fact that the rate of exchange may be higher in the one place than in the other at the same time. *See* Arbitrage.

Arbitrator. A neutral person either chosen by the parties to a dispute or appointed by a court, to hear the parties claims and render a decision. Many arbitrators are members of the American Arbitration Association. *See also* Referee; Umpire.

Arbitrium /arbitriyəm/. The decision of an arbiter, or arbitrator; an award; a judgment.

Arbitrium est iudicium /arbitriyəm èst juwdishiyəm/. An award is a judgment.

Arbitrium est iudicium boni viri, secundum æquum et bonum /arbitriyəm èst juwdishiyəm bównay váray, səkándəm íkwəm èt bównəm/. An award is the judgment of a good man, according to justice.

Arbor civilis /árber sívələs/. A genealogical tree.

Arbor consanguinitatis /árber kònsængwiniyétyəs/. A table, formed in the shape of a tree, showing the genealogy of a family; *e.g.* the *arbor civilis* of the civilians and canonists.

Arbor finalis /árber fónéyləs/. In old English law, a boundary tree; a tree used for making a boundary line.

A-15

predecessor in legal interest therein has tortiously placed there, if the actor, having acquired his legal interest in the thing with knowledge of such tortious conduct or having thereafter learned of it, fails to remove the thing. Restatement, Second, Torts, § 161.

Intrusions upon, beneath, and above surface of land.

(1) Except as stated in Subsection (2), a trespass may be committed on, beneath, or above the surface of the earth. (2) Flight by aircraft in the air space above the land of another is a trespass if, but only if, (a) it enters into the immediate reaches of the air space next to the land, and (b) it interferes substantially with the other's use and enjoyment of his land. Restatement, Second, Torts, § 159.

Liability for intentional intrusions on land. One is subject to liability to another for trespass, irrespective of whether he thereby causes harm to any legally protected interest of the other, if he intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove. Restatement, Second, Torts, § 158.

Trespass to try title. The name of the action used in several of the states for the recovery of the possession of real property unlawfully withheld, from an owner who has a right of immediate possession, with damages for any trespass committed upon the same by the defendant. A procedure by which rival claims to title or right to possession of land may be adjudicated, and as an incident partition may also be had when the controversy concerning title or right to possession is settled. It is different from "trespass *quare clausum fregit* (see *above*)," in that title must be proved. See also Ejectment.

Trespass vi et armis /tréspas váy èt árməs/. Trespass with force and arms. The common-law action for damages for any injury committed by the defendant with direct and immediate force or violence against the plaintiff or his property. See Mawson v. Vess Beverage Co., Mo.App., 173 S.W.2d 606, 613.

Trespasser. One who has committed trespass. One who intentionally and without consent or privilege enters another's property. One who enters upon property of another without any right, lawful authority, or express or implied invitation, permission, or license, not in performance of any duties to owner, but merely for his own purpose, pleasure or convenience. *Mendoza v. City of Corpus Christi, Tex.App. 13 Dist., 700 S.W.2d 652, 654.*

Innocent trespasser. See that title.

Joint trespassers. Two or more who unite in committing a trespass.

Trespasser ab initio /tréspəsər əb ənɪʃ(i)yow/. Trespasser from the beginning. A term applied to a tort-feasor whose acts relate back so as to make a previous act, at the time innocent, unlawful; as if he enter peaceably, and subsequently commit a breach of the peace, his entry is considered a trespass.

Trestornare /tréstərnəriy/. In old English law, to turn aside; to divert a stream from its course. To turn or alter the course of a road.

Tresviri /trɪzvərɪy/. Lat. In Roman law, officers who had the charge of prisons, and the execution of condemned criminals.

Tret /trét/. An allowance made for the water or dust that may be mixed with any commodity. It differs from tare (q.v.).

Trethinga /trɪθɪŋə/. In old English law, a trithing; the court of a trithing.

Treyt /tréyt/tríyt/. Withdrawn, as a juror. Written also treat.

Tria capita /tráyə káepətə/. In Roman law, were *civitas, libertas, and familia*; i.e., citizenship, freedom, and family rights.

Trial. A judicial examination and determination of issues between parties to action, whether they be issues of law or of fact, before a court that has jurisdiction. *Tittsworth v. Chaffin, Mo.App., 741 S.W.2d 314, 317.* A judicial examination, in accordance with law of the land, of a cause, either civil or criminal, of the issues between the parties, whether of law or fact, before a court that has proper jurisdiction.

See also Bifurcated trial; Civil jury trial; Examining trial; Fair and impartial trial; Mini-trial; Mistrial; Speedy trial; Trifurcated trial.

Bench trial. See *Trial by court or judge, below.*

New trial. A re-examination in the same court of an issue of fact, or some part or portions thereof, after the verdict by a jury, report of a referee, or a decision by the court. See Fed.R.Civil P. 59; Fed.R.Crim.P. 33. See *Trial de novo, below.* See also Motion for new trial; Plain error rule; Venire facias de novo.

Nonjury trial. See *Trial by court or judge, below.*

Public trial. A trial held in public, in the presence of the public, or in a place accessible and open to the attendance of the public at large, or of persons who may properly be admitted. The Sixth Amendment, U.S. Const., affords the accused the right to a speedy and "public" trial. See, however, *Trial by news media, below.*

Separate trial. See that title.

Speedy trial. See that title.

State trial. See State.

Trial at nisi prius /tráy(ə)l àt náysay práyəs/. The ordinary kind of trial which takes place at the nithing, assizes, or circuit, before a single judge.

Trial balance. In bookkeeping, a listing of debit and credit balances of all ledger accounts. The listing is generally taken at end of an accounting period to check as to whether all entries have been made in both debit and credit accounts, though such listing need not show accuracy of accounts if an error has been made in both the debit and credit entry.

A-16

IN THE LEGISLATURE
of the
STATE OF WASHINGTON



CERTIFICATION OF ENROLLED ENACTMENT

SUBSTITUTE SENATE BILL NO. 4430

Chapter 258, Laws of 1984

48th Legislature
Regular Session

EFFECTIVE DATE: June 7, 1984
Except: Sections 1 through 210,
511, 601 through 808, & 901
take effect on July 1, 1984;
Sections 501 through 510 &
512 through 524 take effect on
January 1, 1985; Sections 301
through 405 take effect on July
1, 1985.

Passed the Senate February 8, 19 84

Yeas 41

Nays 0

Passed the House February 24, 19 84

AS Amended

Yeas 95

Nays 0

CERTIFICATE

March 2, 1984 - The Senate
concurred in the House
amendments and passed the
bill as amended by the
House.
Yeas 47 Nays 1

I, Sidney R. Snyder, Secretary of the Senate of the
State of Washington do hereby certify that the attached
is enrolled Substitute Senate Bill No. 4430 as
passed by the Senate and the House of Representatives
on the dates hereon set forth.


Secretary of the Senate

A-17

court may hold sessions in such of the following cities, as may be designated by rule: Seattle, Everett, Bellingham, Tacoma, Vancouver, Spokane, Yakima, Richland, Wenatchee, and Walla Walla.

No judge of the court shall be entitled to per diem or mileage for services performed at either his legal residence or the headquarters of the division of the court of which he is a member. The court may establish rules supplementary to and not in conflict with rules of the supreme court.

Sec. 92. Section 367, page 201, Laws of 1854 as last amended by section 7, chapter 45, Laws of 1983 1st ex. sess. and RCW 4.84.010 are each amended to read as follows:

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums by way of indemnity for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

- (1) Filing fees;
- (2) Fees for the service of process;
- (3) Fees for service by publication;
- (4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;
- (5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;
- ((6)) (5) Statutory attorney and witness fees; and
- ((7)) (6) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions

When the prevailing party in district court is entitled to recover costs as authorized in RCW 4.84.010 in a civil action ((before-a-justice-of-the-peace)), the ((justice)) judge shall add the amount thereof to the judgment; in case of failure of the plaintiff to recover or of dismissal of the action, the ((justice)) judge shall enter up a judgment in favor of the defendant for the amount of his costs; and in case any party so entitled to costs is represented in the action by an attorney, the ((justice)) judge shall include ((aa)) attorney's fees of twenty-five dollars as part of the costs: PROVIDED, HOWEVER, That the plaintiff shall not be entitled to such attorney fee unless he obtains, exclusive of costs, judgment in the sum of five dollars or more.

NEW SECTION. Sec. 90. There is added to chapter 3.30 RCW a new section to read as follows:

All references to justices of the peace in other titles of the Revised Code of Washington shall be construed as meaning district judges. All references to justice courts or justice of the peace courts in other titles of the Revised Code of Washington shall be construed as meaning district courts.

Sec. 91. Section 4, chapter 221, Laws of 1969 ex. sess. as amended by section 1, chapter 41, Laws of 1971 and RCW 2.06.040 are each amended to read as follows:

The court shall sit in panels of three judges and decisions shall be rendered by not less than a majority of the panel. In the determination of causes all decisions of the court shall be given in writing and the grounds of the decisions shall be stated. All decisions of the court having precedential value shall be published as opinions of the court. Each panel shall determine whether a decision of the court has sufficient precedential value to be published as an opinion of the court. Decisions determined not to have precedential value shall not be published. Panels in the first division shall be comprised of such judges as the chief judge thereof shall from time to time direct. Judges of the respective divisions may sit in other divisions and causes may be transferred between divisions, as directed by written order of the chief justice. The

A-18

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LG:mnc S-2457/83 p--1

Code Reviser

1 Senate Committee Amendment to
2 Substitute House Bill No. 116
3 By Committee on Judiciary

CR83B
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4 Strike everything after the enacting
5 clause and insert the following:

-2457
:1

6 "Sec. 1. Section 4, chapter 84,
7 Laws of 1973 as amended by section 3,
8 chapter 94, Laws of 1980 and RCW
9 4.84.280 are each amended to read as
10 follows:

PART A
:1

11 Offers of settlement shall be
12 served on the adverse party in the
13 manner prescribed by applicable court
14 rules at least ten days prior to
15 trial. Offers of settlement shall
16 not be served until thirty days after
17 the completion of the service and
18 filing of the summons and complaint
19 ~~((in-an-action-filed-in-superior~~
20 ~~court))~~. Offers of settlement shall
21 not be filed or communicated to the
22 trier of the fact until after
23 judgment, at which time a copy of
24 said offer of settlement shall be
25 filed for the purposes of determining
26 attorneys' fees as set forth in RCW
27 4.84.250."

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APR 15 1983 . ADOPTED

A-19

RCW 4.84.010

Costs allowed to prevailing party — Defined — Compensation of attorneys.

The measure and mode of compensation of attorneys and counselors, shall be left to the agreement, expressed or implied, of the parties, but there shall be allowed to the prevailing party upon the judgment certain sums for the prevailing party's expenses in the action, which allowances are termed costs, including, in addition to costs otherwise authorized by law, the following expenses:

(1) Filing fees;

(2) Fees for the service of process by a public officer, registered process server, or other means, as follows:

(a) When service is by a public officer, the recoverable cost is the fee authorized by law at the time of service.

(b) If service is by a process server registered pursuant to chapter 18.180 RCW or a person exempt from registration, the recoverable cost is the amount actually charged and incurred in effecting service;

(3) Fees for service by publication;

(4) Notary fees, but only to the extent the fees are for services that are expressly required by law and only to the extent they represent actual costs incurred by the prevailing party;

(5) Reasonable expenses, exclusive of attorneys' fees, incurred in obtaining reports and records, which are admitted into evidence at trial or in mandatory arbitration in superior or district court, including but not limited to medical records, tax records, personnel records, insurance reports, employment and wage records, police reports, school records, bank records, and legal files;

(6) Statutory attorney and witness fees; and

(7) To the extent that the court or arbitrator finds that it was necessary to achieve the successful result, the reasonable expense of the transcription of depositions used at trial or at the mandatory arbitration hearing: PROVIDED, That the expenses of depositions shall be allowed on a pro rata basis for those portions of the depositions introduced into evidence or used for purposes of impeachment.

[2009 c 240 § 1; 2007 c 121 § 1; 1993 c 48 § 1; 1984 c 258 § 92; 1983 1st ex.s. c 45 § 7; Code 1881 § 505; 1877 p 108 § 509; 1869 p 123 § 459; 1854 p 201 § 367; RRS § 474.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

Attorney fee in appeals from board of industrial insurance appeals: RCW 51.52.130, 51.52.132.

Process server fees: RCW 18.180.035.

A-20

RCW 4.84.250

Attorneys' fees as costs in damage actions of ten thousand dollars or less — Allowed to prevailing party.

Notwithstanding any other provisions of chapter 4.84 RCW and RCW 12.20.060, in any action for damages where the amount pleaded by the prevailing party as hereinafter defined, exclusive of costs, is seven thousand five hundred dollars or less, there shall be taxed and allowed to the prevailing party as a part of the costs of the action a reasonable amount to be fixed by the court as attorneys' fees. After July 1, 1985, the maximum amount of the pleading under this section shall be ten thousand dollars.

[1984 c 258 § 88; 1980 c 94 § 1; 1973 c 84 § 1.]

Notes:

Court Improvement Act of 1984 -- Effective dates -- Severability -- Short title -- 1984 c 258: See notes following RCW 3.30.010.

Effective date -- 1980 c 94: "This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect May 1, 1980." [1980 c 94 § 6.]

A-21

RCW 4.84.260

Attorneys' fees as costs in damage actions of ten thousand dollars or less — When plaintiff deemed prevailing party.

The plaintiff, or party seeking relief, shall be deemed the prevailing party within the meaning of RCW 4.84.250 when the recovery, exclusive of costs, is as much as or more than the amount offered in settlement by the plaintiff, or party seeking relief, as set forth in RCW 4.84.280.

[1973 c 84 § 2.]

A-22

RCW 4.84.280

Attorneys' fees as costs in damage actions of ten thousand dollars or less — Offers of settlement in determining.

Offers of settlement shall be served on the adverse party in the manner prescribed by applicable court rules at least ten days prior to trial. Offers of settlement shall not be served until thirty days after the completion of the service and filing of the summons and complaint. Offers of settlement shall not be filed or communicated to the trier of the fact until after judgment, at which time a copy of said offer of settlement shall be filed for the purposes of determining attorneys' fees as set forth in RCW 4.84.250.

[1983 c 282 § 1; 1980 c 94 § 3; 1973 c 84 § 4.]

Notes:

Effective date -- 1980 c 94: See note following RCW 4.84.250.

A-23

RCW 4.84.290

Attorneys' fees as costs in damage actions of ten thousand dollars or less — Prevailing party on appeal.

If the case is appealed, the prevailing party on appeal shall be considered the prevailing party for the purpose of applying the provisions of RCW 4.84.250: PROVIDED, That if, on appeal, a retrial is ordered, the court ordering the retrial shall designate the prevailing party, if any, for the purpose of applying the provisions of RCW 4.84.250.

In addition, if the prevailing party on appeal would be entitled to attorneys' fees under the provisions of RCW 4.84.250, the court deciding the appeal shall allow to the prevailing party such additional amount as the court shall adjudge reasonable as attorneys' fees for the appeal.

[1973 c 84 § 5.]

A-24