

67845-1

67845-1
HK

No. 67845-1-I

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

MATTHEW STAVE and JANE DOE STAVE, and the marital
community composed thereof

Defendants/Appellant,

and

DEBORAH HUTMACHER and PHILIP HUTMACHER, and the marital
community composed thereof;

Defendants,

vs.

CAROL HOWSON,

Plaintiff/Respondent.

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAY 17 AM 11:42

APPELLANT MATTHEW STAVE'S OPENING BRIEF

Richard S. Lowell, WSBA #16364
Magnuson Lowell, P.S.
8201 164th Ave. NE, Suite 200
Redmond, WA 98052
Telephone: 425-885-7500
Facsimile: 425-885-4119

Attorneys for Appellant Matthew
Stave and *Jane Doe* Stave

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
INTRODUCTION	1
ASSIGNMENT OF ERROR	1
STATEMENT OF THE CASE	2
Factual Background	2
Procedural Background	3
ARGUMENT	4
RCW §7.06.020 Applies to An Entire Action – Not Individual Claims	5
Howson’s Action Was Brought Jointly Against Both Defendants – Specifically Designed to Avoid an ‘Empty Chair’ Defense	8
Plaintiff’s Statutory Interpretation Results in a “Slippery Slope”	10
CONCLUSION	12

TABLE OF AUTHORITIES

CASES

<u>Christensen v. ARCO</u> , 130 Wn.App. 341, 122 P.3d 937 (2005)	5- 12
<u>In re Smith-Bartlett</u> , 95 Wn.App. 633, 976 P.2d 173 (1999)	4
<u>Mercier v. GEICO</u> , 139 Wn.App. 891, 165 P.3d 375 (2007), <i>rev. denied</i>	5, 11
<u>Perkins Coie v. Williams</u> , 84 Wn.App. 733, 929 P.2d 1215 (1997)	11

STATUTES

RCW §7.06.020	5
RCW §7.06.020(1)	1, 5, 6
RCW §7.06.040	12

RULES

RAP 2.3(b)(2)	1
CR 21	8
CR 42(b)	8

INTRODUCTION

This case raises an issue regarding the limit on the amount that can be awarded in mandatory arbitration (MAR) where a plaintiff brings a single action against two defendants for injuries the plaintiff allegedly sustained in two separate auto accidents. Statute, rule, case law and common sense support defendant Stave's position that MAR rules only allow an *action* in which claims are for damages less than \$50,000. However, the trial court erroneously ordered that plaintiff Howson may seek up to \$50,000 against each defendant (Howson and Hutmacher) in the same MAR hearing (in this case, for a total of up to \$100,000).

This matter is now before this Court on Discretionary Review; the Commissioner having apparently agreed that under RAP 2.3(b)(2), probable error exists which substantially alters the status quo or substantially limits Stave's freedom to act. Appellant Stave asks this Court to reverse the Trial Court's Order – an Order which effectively and improperly expanded the jurisdiction of an MAR arbitrator.

ASSIGNMENT OF ERROR

The Trial Court erred when it ruled that RCW §7.06.020(1) (mandatory arbitration statute) permits aggregating or tacking \$50,000 caps against multiple defendants in one "action."

STATEMENT OF THE CASE

Factual Background

This action arises as a result of two auto accidents in which Howson was involved – one on July 20, 2008 (**Accident 1: Hutmacher MVA**) and the other on December 23, 2009 (**Accident 2: Stave MVA**).¹ For purposes of the issue before this Court, Howson contends her “*claims against Hutmacher are separate from her claims against Stave.*”² But at the time of Accident 2, Howson was still actively treating for injuries allegedly caused by Accident 1. In fact, her first medical appointment after Accident 2 was an appointment she already had made to discuss treatment for Accident 1.³

1 See Complaint [CP 51 *et seq.*]

2 See [Howson’s] Motion to Permit MAR Arbitrator to Award Separate MAR Limits Against Each Defendant at p. 2, ll.5-6 [CP 42, *et seq.*]

3 *Q Okay. So at the time of the -- the time just before the 2009 accident, you -- all you were having was this little pinching thing. You weren't having any numbness --*

A Correct.

Q -- or anything like that?

And what type of treatment were you doing for it at that point?

A Before the second?

Q Yes.

A I was -- I had had some injections, and I was doing -- I had physical therapy, massage therapy, and some manipulations.

Q So you were actively treating at the time of the second accident, then?

A Yes.

Q And so what happened after the second accident? Where did you get -- what happened? What kind of treatment did you get then?

A Well, I had already had an appointment with -- and I was about ready, I think, to discuss what to do next for the pinching and stuff that wouldn't go away with Dr. Jutla, I believe.

And then I was seeing Dr. Franke again. I went back to Dr. Franke.

(Howson dep. at p. 33, ll. 4-25) (emphasis added) [CP 31; CP 37]

Howson has contended that her total claim is valued at \$235,000. She has made no attempt to segregate that total claim between the two accidents.⁴ Because of the apparent overlap in treatment and injury, Howson's Complaint suggests a claim of joint and several liability against Hutmacher and Stave.⁵ And Howson has readily acknowledged that she "*filed one lawsuit for damages against Stave and Hutmacher to benefit from the efficiency of a single judicial proceeding, to avoid an 'empty chair' defense, and to avoid inconsistent results.*"⁶

Procedural Background

Order Granting Extended Award Jurisdiction. Howson filed a Motion, seeking an Order in advance of arbitration, authorizing an arbitrator to award her up to \$50,000 against each defendant in a subsequent MAR arbitration.⁷ Hutmacher and Stave jointly opposed that Motion⁸; but the Motion was GRANTED by the Trial Court (Judge Kenneth L. Cowsert).⁹

Order Staying the Arbitration. Howson then submitted a Statement of

⁴ See Amended Response to Request for Statement of Damages [CP 38]

⁵ See Complaint [CP 53-56]

⁶ See Plaintiff's Opposition to Defendant Stave's Motion to Stay at p. 2, ll. 15-17 [CP 4]

⁷ See Motion to Permit MAR Arbitrator to Award Separate MAR Limits Against Each Defendant (dated 10/5/11) [CP 41 *et seq.*]; and Plaintiff's Reply re Motion to Permit MAR Arbitrator to Award Separate MAR Limits Against Each Defendant (dated 10/20/11) [CP 25 *et seq.*]

⁸ See Defendants' Joint Brief in Opposition to Plaintiff's Motion to Permit Separate MAR Limits (dated 10/18/11) [CP 30 *et seq.*]

⁹ See Order Permitting MAR Arbitrator to Award Separate MAR Limits Against Each Defendant (dated 10/25/11) [CP 22 *et seq.*]

Arbitrability – seeking appointment of an arbitrator. In response, Stave filed a Motion for Stay.¹⁰ Howson opposed the Motion for Stay.¹¹ The stay was GRANTED by the Trial Court (Judge Linda C. Krese). The Court allowed an arbitrator to be appointed, but stayed the arbitration and further proceedings pending a decision by the Court of Appeals.¹²

Order Granting Discretionary Review. Next, Stave sought discretionary review in this Court. Following briefing and oral argument, Commissioner Mary Neel GRANTED discretionary review on March 12, 2012.¹³ This review now follows.

ARGUMENT

Statutory interpretation of arbitration statutes – such as that presented here - are questions of law reviewed *de novo* on appeal.¹⁴

Mandatory Arbitration is a process created to quickly resolve disputes that have value less than \$50,000. It is a statutory system, designed to take relatively small and simple cases off the superior court's docket and resolve them quickly and

10 See Defendant Matthew Stave's Motion to Stay Proceedings Pending Appellate Review (dated 11/18/11) [CP 10 *et seq.*]

11 See Plaintiff's Opposition to Defendant Stave's Motion to Stay (dated 11/22/11) [CP 3 *et seq.*]

12 See Order Staying Proceedings Pending Appellate Review (dated 11/29/11) [CP 1 *et seq.*]

13 See Notation ruling by Commissioner Mary Neel entered 3/12/12

14 In re Smith-Bartlett, 95 Wn.App. 633, 636, 976 P.2d 173, 176 (1999).

inexpensively.¹⁵ Howson contends her suit does not fall within the \$50,000 limit – but seeks to creatively squeeze herself into the program so she can “have her cake and eat it, too.” Mandatory Arbitration exists for ‘**actions**’ in which claims are less than \$50k; not individual **claims**. In this case, Howson acknowledges that her combined **claims** may involve joint liability which exceeds \$50,000.

RCW §7.06.020 Applies to an Entire Action – Not Individual Claims.

RCW 7.06.020(1) (emphasis added) provides as follows:

*All civil **actions**, except for appeals from municipal or district courts, which are at issue in the superior court in counties which have authorized arbitration, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of fifteen thousand dollars, or if approved by the superior court of county by two-thirds or greater vote of the judges thereof, up to fifty thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration.*

The only way to reasonably interpret this statute is to limit the arbitrator’s award jurisdiction to \$50,000.

The only Washington case that, tangentially, addresses this issue is a Division 2 decision: Christensen v. ARCO. In Christensen, there were numerous individual *plaintiffs* that sued ARCO in one singular lawsuit – and thereafter, most of them sought mandatory arbitration. Their argument was that each of their respective claims was less than the MAR jurisdictional limit. The Court of Appeals

¹⁵ Mercier v. GEICO, 139 Wn.App. 891, 899, 165 P.3d 375, 379 (2007), *rev. denied*.

actually decided the case on the easiest of the potential oppositions: that not all of the plaintiffs waived claims over the MAR limit.¹⁶

Although that decision makes sense – when we look further into the decision, more clarifying statements by the court support Stave’s position, here. Christensen not only upheld the denial of mandatory arbitration, but also upheld the trial court’s refusal to segregate the claims and allow the 22 plaintiffs who were willing to waive larger claims to have their matters heard in mandatory arbitration.

Christensen held that the focus of the MAR statute is on the word “action” and not the word “claim.” The appellate court based its decision on no less than three statutory interpretation doctrines:

- Grammar:

“Under basic principles of grammar, however, ‘civil actions’ is the subject of the sentence found at RCW 7.06.020(1). ‘[A]re subject to mandatory arbitration’ is the predicate phrase, which is the part of the sentence that contains a verb and makes an assertion about the subject. In other words, it is the ‘action,’ not each individual claim that is subject to mandatory arbitration.”¹⁷

- Definition:

“‘[A]ction’ means ‘judicial proceeding.’ [Citation omitted]. The Christensen group joined their claims to benefit from one judicial proceeding – one civil action to be decided by one judge.”¹⁸

¹⁶ There were 27 plaintiffs in the Christensen action. Only 22 were willing to waive claims in excess of the MAR limit. Christensen v. ARCO, 130 Wn.App. 341, 343, 122 P.3d 937 (2005).

¹⁷ Christensen, *supra* at 344–45, 122 P.3d at 938, *emphasis added* [internal citations to The Chicago Manual of Style omitted].

¹⁸ *Id.* at 345, 122 P.3d at 939 [internal citation to Black’s Law Dictionary omitted].

- Legislative Intent:

*“[W]e attempt to give effect to the legislature’s intent and purposes. To achieve this goal, we consider the statute as a whole, give effect to the statutory language, and compare related statutes. Similarly, we interpret mandatory arbitration rules consistent with their purpose.”*¹⁹

Mandatory Arbitration applies only where all claimants have waived potential recovery in excess of the MAR limits in the action. Here, Howson does not appear willing to waive any potential award in excess of \$50,000 in the “action.” She contends she wants to waive any potential award in excess of \$50,000 for each “claim.” But Christensen instructs that for MAR to apply, the *claimant* must waive damages in excess of the MAR limit for the claimant’s action – not for claimant’s individual claims against multiple defendants.

Similarly, in reaching its decision, the Christensen court also assigned importance to the fact that the plaintiffs had elected to join 27 claims to benefit from a single proceeding and a decision by a single judge. Here, Howson has done the same. She has sued both Hutmacher and Stave in the same action (seeking and accepting the attendant benefits of having done so) – with an expectation that her case will be decided by the same trier of fact (judge, jury or arbitrator).

Of course, Christensen is somewhat different from the present case – in that Christensen involved a case of multiple *plaintiffs* and a singular *defendant*; whereas

¹⁹ *Id.* at 343-44, 122 P.3d at 938 [internal Washington Supreme Court citations omitted].

the present case involves a singular *plaintiff* with multiple *defendants*. Certainly, each of the 22 plaintiffs could argue that their respective claims were within the MAR limit. But Christensen stands for the proposition that as long as the plaintiff's action seeks damages in excess of the MAR limits, MAR is not available.

In one important aspect, though, the present case is similar to Christensen. After all, the potential remedy in both is the same. Specifically, had a Christensen-plaintiff wished to have the case heard in Mandatory Arbitration, that plaintiff need only have either brought a separate action initially, or sought severance (CR 21) or a separate trial/arbitration (CR 42(b)).

In the present case, to avail herself of \$50,000 MAR caps against each defendant, Howson merely needed to either file separate lawsuits against Hutmacher and Stave, or seek a severance of her claims against Hutmacher and Stave. She has not been inclined to do so – because either action would leave both Hutmacher and Stave with respective ‘empty chair’ defenses.

Howson’s Action Was Brought Jointly Against Hutmacher and Stave – Specifically Designed to Avoid an ‘Empty Chair’ Defense

To get around the obvious problem posed by the holding in Christensen, Howson suggests that her action is really two completely separate claims against two completely separate defendants – joined purely for judicial economy. Even if this was somehow dispositive, it’s not true. Howson’s complaint seeks joint liability.

This makes sense, since Howson was still treating for injuries from Accident 1 at the time of Accident 2. Recall, she testified that when she went to a doctor after Accident 2, she was actually attending a previously scheduled appointment she had with the doctor to address injuries from Accident 1. There are obvious segregation issues involved in this case.

And Howson has acknowledged as such by conceding that she joined the Hutmacher and Stave in this one action to avoid an “empty chair” defense. An “empty chair” defense is a non-issue when claims are truly separate.

In light of the apparent segregation issues present (*i.e.*, the fact that Howson was still treating for Accident 1 at the time of Accident 2), the trial court’s Order places a potentially impossible burden on the arbitrator. Assuming overlap of injuries and treatment, what should the arbitrator do if specific segregation is impossible? If the parties are joined, an arbitrator could arguably find joint responsibility for the accidents and allow Hutmacher and Stave to ‘work it out.’ Howson can seek all of her recovery from one defendant, and that defendant can seek contribution from the other.

But here, the trial court’s order ignores the fact that segregation difficulties are probable – that shared responsibility for some injuries/damages are likely. Consider a hypothetical in which an arbitrator decides Accident 1 is solely responsible for \$10,000; Accident 2 is solely responsible for \$40,000; and Accidents

1 and 2 are jointly responsible for \$50,000 (because the arbitrator cannot segregate the damages). What happens now? In light of the court's ruling, what the arbitrator is limited to awarding \$50,000 per defendant. How is the joint \$50,000 split? And if it is truly a joint responsibility, could Howson seek 'joint responsibility' monies from Hutmacher – leaving Hutmacher to pay more than \$50,000 (despite the trial court's order)?

If Howson wants to bring MAR claims against Hutmacher and Stave, and be subject to a \$50,000 cap for each, then Howson need only agree to segregate her claims. Howson can easily pursue one lawsuit solely against Hutmacher and the other solely against Stave. She can, then, simply place each action into Mandatory Arbitration. But as Howson acknowledges, separating the actions would remove her strategic advantage of avoiding an empty chair defense.

Plaintiff's Statutory Interpretation Results in a "Slippery Slope"

Imagine the burden Howson's interpretation would place on our judicial system. Any plaintiff – with multiple related and unrelated claims against different and varying parties – could join them into one lawsuit. What if we had the reverse of the Christensen case – one plaintiff and 22 defendants over which the plaintiff has 22 separate claims? Such a plaintiff could, then, allege that each individual claim is less than \$50,000, and force a seven-figure lawsuit to be decided by an attorney in mandatory arbitration. Do we truly think our legislature was anticipating that an

attorney in a mandatory arbitration setting would be given the authority to award over a million dollars?

And then here's the additional rub. If just one of the 22 defendants is not happy with the MAR result, that defendant can appeal – and all of the defendants are dragged through a trial *de novo*, even though, arguably, their claims are not linked.²⁰ This hardly seems like a process designed to deal with relatively small and simple cases, and resolve them quickly and inexpensively.²¹

But Howson insists she's entitled to up to \$50k per *claim*. If that's so, then consider a two-car accident case of disputed liability. A plaintiff contends her Mercedes was totaled and that she was seriously injured. Under Howson's theory, that plaintiff could have her case heard in mandatory arbitration and split up her various *claims* against the defendant: \$50,000 for her property damage claim; \$50,000 for her general damages injury claim; \$50,000 for her wage loss claim; etc. Is that really what our legislature had in mind when it set up the MAR program?

Or perhaps a plaintiff in an injury case will split claims based on theories: \$50,000 for a negligence claim; \$50,000 for a negligent infliction of emotional distress claim; etc.

Or perhaps a plaintiff in a breach of contract action is owed \$5000/month – and hasn't been paid for 5 years (thus being owed a total of \$300,000). Under

²⁰ See, e.g., Perkins Coie v. Williams, 84 Wn.App. 733, 735-36, 929 P.2d 1215, 1217 (1997)

²¹ Mercier, *supra*.

Howson's theory, that plaintiff can bring one lawsuit alleging 60 separate monthly breaches of \$5000 each – so that the \$300k case could be heard in mandatory arbitration.

As the Court intimated in Christensen, are these scenarios the kind of situations our legislature had in mind when setting up the MAR program to deal with relatively small and simple cases that can be resolved quickly and inexpensively? Stave suggests not. Consider that to be qualified to handle one of these supposedly smaller and less complicated matters, our legislature determined that an MAR arbitrator need only have a minimum of five (5) years of experience as an attorney.²² Had our legislature felt comfortable having relatively junior attorneys sit on mandatory arbitration matters involving six-figure claims (or even larger claims), it would have provided so.

CONCLUSION

If Howson wants to bring MAR claims against Hutmacher and Stave, and be subject to a \$50k cap for each, she need only agree to segregate her claims. In other words, Howson can have one lawsuit solely against Hutmacher and the other solely against Stave. She can, then, easily place each into Mandatory Arbitration. It seems likely that Howson won't want to do this – because it would allow Hutmacher to point the finger at Stave; and vice versa. And of course, that is exactly why the trial

22 RCW §7.06.040

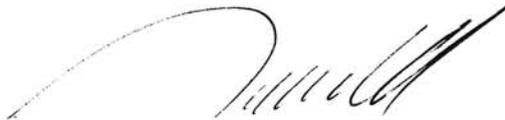
court's decision must be reversed. Howson's action is not made up of separate, divided claims against Hutmacher and Stave. It seeks joint liability against both. In essence, her motion seeks to gain MAR treatment for a \$100,000 action. Had our legislature wanted attorneys to sit on mandatory arbitration matters involving six- or seven-figure claims, it would have provided so.

Stave asks the Court to hold that – except for awards for fees, interest, and costs – arbitrators in Mandatory Arbitration are limited to making awards not to exceed \$50,000. Stave asks this Court to Reverse the trial court's Order to the contrary, and remand the case back to the trial court for further proceedings.

Dated this 15th day of May, 2012.

Respectfully submitted,

MAGNUSON LOWELL P.S.



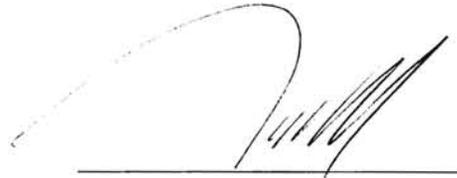
Richard S. Lowell, WSBA #16364
Attorneys for Petitioner Matthew Stave
8201 164th Ave. NE, Suite 200
Redmond, WA 98052
425-885-7500

CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on the 15th day of May, 2012, I caused to be served a true and correct copy of the foregoing Appellant Matthew Stave's Opening Brief via ABC Legal Messenger and addressed to the following:

Angela Wong
WONG, BAUMAN LAW FIRM PLLC
1900 West Nickerson Street, Suite 209
Seattle, WA 98119
Attorney for Plaintiff Howson

Katie A. Jones
Attorney at Law
901 5th Avenue, Suite 830
Seattle, WA 98164
Attorney for Defendant Hutmacher



FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2012 MAY 17 AM 11:42