

No. 70162-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

Janice Lind, Petitioner,
v.
State Farm Mutual Automobile Insurance Company, Respondent

PETITIONER'S BRIEF

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A. Assignments of error

Assignments of Error

1. The trial court erred in entering the order of February 19, 2013, denying Petitioner's motion for an order to MAR arbitrator.
2. The trial court erred in concluding that RCW 7.06 limits an arbitrator's authority where the parties stipulate to arbitration.
3. The trial court erred in concluding that Petitioner's waiver of claims in excess of \$50,000 for purposes of arbitration precluded the arbitrator from entering an award up to \$50,000.

Issues Pertaining to Assignments of Error

1. Where parties stipulate to arbitration under the mandatory arbitration rules, does the mandatory arbitration statute preclude the arbitrator from entering a net award up to \$50,000 after deduction of offsets? (Assignments of Error 1 and 2).
2. Where parties stipulate to mandatory arbitration of a claim involving gross damages above \$50,000, and the plaintiff later files a court form that waives "any claim in excess of \$50,000," does the filing preclude the arbitrator from entering an award up to \$50,000 after deducting offsets? (Assignments of Error 1 and 3).

B. Statement of the Case

The facts relevant to this appeal are undisputed. Petitioner Janice Lind (“Lind”) is an individual who suffered severe and permanent injuries in an automobile accident in 2007 (“Accident”). Clerk’s Papers (CP) at 2. Lind was stopped at a red light and was rear-ended by another driver. CP at 20. Lind has alleged she has incurred over \$90,000 in medical expenses related to the Accident, which amount does not include compensation for pain and suffering, emotional distress, and impairment of her ability and capacity to enjoy life. CP at 20.

Respondent, State Farm Mutual Automobile Insurance Company (“State Farm”) is an insurance company doing business in Washington. CP at 1, 6. State Farm accepted premiums and issued a policy (“Policy”) covering Lind at the time of the Accident. CP at 2, 6. The Policy included underinsured motor vehicle bodily injury (UIM) coverage up to \$100,000 and personal injury protection (PIP) coverage up to \$35,000. CP at 28. The Policy provides that State Farm’s UIM liability is limited to the lesser of (1) \$100,000, or (2) the insured’s damages less third party payments and PIP payments. CP at 21-22, 30-31. The Policy also contains a “sue us” clause if insured and insurer cannot agree on the

amount of compensatory damages the insured is legally entitled to recover. CP at 30.

Prior to this action being filed, Lind settled her claim against the negligent driver for his insurance policy limits of \$25,000. CP at 20. State Farm also paid \$35,000 for medical expenses under the PIP coverage of the Policy. CP at 21. This action arose when State Farm disputed the amount it was obligated to pay Lind under her UIM coverage. CP at 3. Lind commenced this suit for benefits under her UIM policy in an amount up to the available policy limit of \$100,000. CP at 21.

On July 23, 2012, the parties agreed by stipulation to submit the case to arbitration under the superior court mandatory arbitration rules. CP at 10. Based solely on the stipulation, the trial court entered an order jointly presented by both parties ordering the case transferred to arbitration. CP at 11. Neither the stipulation nor the order address the amount in controversy or impose any limits on the arbitrator's authority to enter an award. CP at 10-11.

Approximately six weeks later, Lind's attorney filed a paper titled "Statement of Arbitrability" ("Statement"), based on what appears to be a court form,¹ along with a copy of the July 24, 2012 stipulation and order,

¹ The Statement contains preprinted statements with check boxes, and contains administrative language below the signature line, including the following:

which had already been entered. CP at 12-13, 15. On the Statement, Lind's attorney checked a box indicating "the undersigned contends that its claim exceeds \$50,000 exclusive of attorney fees, interest and cost [sic], but for the purposes of arbitration only, waives any claim in excess of \$50,000." CP at 12.

On February 13, 2013, Lind's attorney filed a Motion for an Order to MAR Arbitrator to Issue Net Award with supporting memorandum and declaration (collectively, the "Motion"). CP at 17-26. Seeking to clarify for the MAR arbitrator the scope of his authority, Lind requested an order explicitly authorizing the arbitrator to issue a net award of up to \$50,000 after deduction of contractual offsets. CP at 17, 25. Lind did not argue that the Statement was filed by mistake, at the direction of a court clerk employee. CP at 17-26. In fact, the Motion said nothing about the Statement at all. CP at 17-26. It is not clear from the Motion whether Lind's attorney even knew that the Statement had been filed by his office. CP at 17-26. The Motion did assume that the MAR arbitrator in this case is limited to making a net award of \$50,000, not because of any waiver,

The STATEMENT OF ARBITRABILITY shall be filed on a form prescribed by the court by the date indicated on the CASE SCHEDULE After the deadline has passed, the STATEMENT OF ARBITRABILITY may be filed only by leave of court."

CP at 13.

but because of the “jurisdictional amount” set forth in RCW 7.06.

CP at 17, 19, 21-22.

State Farm opposed the Motion. CP at 42-45. State Farm alleged that Lind unilaterally transferred the case into mandatory arbitration by filing the Statement in September 2012, while also conceding that both parties stipulated to mandatory arbitration in July 2012.² CP at 43. State Farm framed the issue as whether the arbitrator had authority to enter a gross award in excess of \$50,000, before deduction of offsets. CP at 43. State Farm argued such an order would be improper on two grounds. First, the mandatory arbitration statute does not allow arbitrators to enter awards in excess of \$50,000. CP at 44-45. Second, State Farm argued that Lind waived damages in excess of \$50,000. CP at 45.

The trial court denied the Motion. CP 49-50. The court concluded that

pursuant to RCW 7.06 and the Notice [sic] of Arbitrability filed by plaintiff, plaintiff has waived any claim for damages in excess of the jurisdictional limits of \$50,000. Accordingly, this court finds that the arbitrator does not have authority to enter a

² State Farm attached the court’s Stipulation and Order of July 24, 2012 as Exhibit 1 to its supporting declaration. CP at 35-37. That document shows the court transferred this case to arbitration on July 24, 2012, six weeks before Lind filed her Statement. CP at 37, 39. State Farm’s opposition brief and supporting declaration do not explain how Lind could have unilaterally transferred the case to arbitration six weeks after the court did so based on the stipulation of the parties. CP 33-45.

gross award in excess of the jurisdictional limits and then to apply offsets.

CP at 50. It is not clear from the order whether the stated limitation on the arbitrator's authority is based on RCW 7.06, the Statement, or both. The court's only finding of fact supporting its conclusion that a waiver occurred was the Statement. The court's order contained no discussion of the burden of proof or legal standard applicable to a claim of waiver.

C. Argument

This case comes down to a simple distinction between damages and awards in the context of mandatory arbitration. The briefing of these issues below was exceedingly confused. CP at 19-25, 42-45.

Understandably, this appears to have caused some confusion on the part of the trial court. CP at 49-50. Fortunately, this court may start fresh, as the issues on appeal can be reviewed de novo.

1. Standard of Review

The trial court's interpretation of arbitration statutes are questions of law reviewed de novo. *In re Smith-Bartlett*, 976 P.2d 173, 95 Wn. App. 633, 636 (Div. 3 1999). Claims of waiver are a mixed question of law and fact. But where the parties do not dispute the facts, the question is one of law for the court, which is reviewed de novo. *Brundridge v. Fluor Federal Services, Inc.*, 191 P.3d 879, 164 Wn.2d 432, 441 (2008).

2. RCW 7.06 does not limit the arbitrator's authority to make an award here

Below, Lind argued that an arbitrator may find gross damages above \$50,000, deduct offsets, and then enter a final award up to \$50,000. CP at 23-24. State Farm assumed, without explanation, that offsets can only be deducted after a final award is entered. CP at 43-45. State Farm also assumed that such awards cannot exceed the statutory “jurisdictional limit” of \$50,000 even in stipulated arbitrations like this one. CP at 43-45. State Farm repeatedly cited the “jurisdictional limit” of \$50,000 without analysis. CP at 43-45. The court agreed with State Farm, citing RCW 7.06 as one basis for its conclusion and adopting the language of State Farm’s proposed order word for word. CP at 46-47. The statute imposes no such limits.

a. The statutory threshold for mandatory arbitration does not apply where parties stipulate to arbitration under the MARs.

Mandatory arbitration is a creature of statute and court rule. Civil actions in the superior court of King County, where the sole relief sought is a money judgment, and where no party asserts a claim in excess of fifty thousand dollars, exclusive of interest and costs, are subject to mandatory arbitration. RCW 7.06.010, .020 (2005); *Mercier v. GEICO Indem. Co.*, 165 P.3d 375, 139 Wn. App. 891, 895 (Div. 1 2007), *abrogation on other*

grounds recognized by 198 P.3d 525, 527-28, 147 Wn. App. 883 (Div. 1, 2008). By authorizing mandatory arbitration in certain civil cases, the legislature intended primarily to alleviate court congestion and reduce delay in hearing cases. *Fernandes v. Mockridge*, 877 P.2d 719, 75 Wn. App. 207, 211 (Div. 1 1994).

Chapter 7.06 RCW does not define the scope of the arbitrator's authority in cases in mandatory arbitration; instead, the legislature called on the Washington Supreme Court to implement procedures for mandatory arbitration by rule. RCW 7.06.030 (1979). Those rules provide that a civil action is subject to arbitration under the mandatory arbitration rules: (1) if it falls within the claim threshold of RCW 7.06.020; (2) if all parties waive claims in excess of the statutory threshold; or (3) if the parties stipulate to such arbitration. Superior Court Mandatory Arbitration Rule ("MAR") 1.2. Thus, parties may stipulate to arbitrate a civil matter under the MARs, even though the claims are not subject to mandatory arbitration under RCW 7.06.020 because they exceed the statutory threshold amount. MAR 1.1 and 8.1 (1980); *cf. Neff v. Allstate Ins. Co.*, 855 P.2d 1223, 70 Wn. App. 796, 798 (Div. 1 1993) (noting that parties in stipulating to arbitration agreed that arbitrator had authority to enter award above statutory threshold).

This extension of the mandatory arbitration system is purely a creation of the court rules; chapter 7.06 RCW is silent regarding stipulated arbitration of non-mandatory claims under the MARs. Courts interpret the rules of mandatory arbitration strictly to effectuate their purpose of reducing court congestion. *Dill v. Michelson Realty Co.*, 219 P.3d 726, 152 Wn. App. 815, 819 (Div. 2 2009). Making the mandatory arbitration procedure available to non-mandatory cases is consistent with the legislature's purpose of reducing court congestion. State Farm's assumption that the "jurisdictional amount" of RCW 7.06 applies to stipulated arbitrations under MAR 1.2(3) would severely limit the number of cases submitted to MAR arbitration by stipulation, which does not effectuate the legislature's purpose.

There are no "jurisdictional limits" on the amount an arbitrator may award under the MARs. This concept appears in one court decision without analysis. *See, e.g., Neff v. Allstate Ins. Co.*, 855 P.2d 1223, 70 Wn. App. 796, 798 (Div. 1 1993) (noting that parties stipulated that the arbitrator's "jurisdictional limit" be raised above the statutory threshold). The term appears more often in cases analyzing the jurisdiction of courts of limited jurisdiction. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Avery*, 57 P.3d 300, 114 Wn. App. 299 (Div. 3 2002) (holding small claims court had jurisdiction over claim within its "jurisdictional limit"). But the term

is misleading when applied to arbitration under the MARs, which does not have its own separate jurisdiction. A case transferred to MAR arbitration remains under the jurisdiction of the superior court in all stages of the proceeding. MAR 1.3. Accordingly, there is no “jurisdictional limit” imposed by statute on the arbitrator here which would preclude her from considering gross damages in excess of \$50,000.³

State Farm’s arguments below invoking the “jurisdictional amount” were disingenuous. If State Farm believed this case fell within the statutory threshold of RCW 7.06.020, it was under an obligation pursuant to LMAR 2.1 to file a statement of arbitrability. Instead, it stipulated to arbitration in which the arbitrator “may grant any relief which could have been granted if the case were determined by a Judge.” LMAR 8.1. State Farm should not now be allowed to argue that the statutory threshold somehow applies to limit any award an arbitrator may make in this case.

³ Because Lind’s claim never fell under the statutory threshold for mandatory arbitration, the court need not reach the question of the arbitrator’s authority in mandatory cases in order to rule in Lind’s favor here.

b. *Where the parties stipulate to arbitration under the MARs, there is no limit on the amount or calculation of an award.*

The arbitrator has authority to “determine the facts, decide the law, and make an award.”⁴ MAR 3.2(a)(7). The rules do not cap the amount of any award the arbitrator may make, or prescribe or limit how the arbitrator may arrive at that amount. *Cf.* MAR 6.1 (providing the award shall determine all issues raised by the pleadings, including a determination of damages). For example, the arbitrator can, and should, determine the issue of offsets. *Mercier v. GEICO Indem. Co.*, 165 P.3d 375, 139 Wn. App. 891, 901 (Div. 1 2007), *abrogation on other grounds recognized by* 198 P.3d 525, 527-28, 147 Wn. App. 883 (Div. 1, 2008); *cf.* MAR 3.2(b) (offsets not listed among issues reserved for trial court). In King County, if a case not otherwise subject to mandatory arbitration is transferred to arbitration by stipulation, the arbitrator may grant any relief which could have been granted if the case were determined by a Judge. King County Local Rules for Mandatory Arbitration (LMAR) 8.1. The arbitrator’s authority carries with it considerable discretion, which arbitrators should exercise without hesitation. LMAR 1.1. Here, State Farm stipulated to arbitration without any limits on the arbitrator’s authority with regard to the calculation and amount of the award, CP at 15,

⁴ “Award” is not defined by chapter 7.06 RCW, the MARs or the local MARs. The statutes governing civil procedure use various undefined terms, including “verdict,” “award” and “amount of recovery.” *Compare* RCW 4.44.450 *with* RCW 4.56.260.

even though the rules arguably allow for such modifications in stipulated cases. MAR 8.1(b).

c. Even if a MAR arbitrator's authority is limited to making awards up to the statutory threshold, such an award may be "net" of deductions and offsets.

Even if this court were to find in the statute or rules a jurisdictional limit on a MAR arbitrator's authority to enter awards exceeding \$50,000, the MAR arbitrator has authority to enter an award up to \$50,000 based on gross damages above \$50,000, after deducting set-offs and offsets. This court held as much in *Mercier v. GEICO Indemnity Company*:

We see nothing in RCW 7.06 or the rules that would have prevented the arbitrator from reading the contract, admitting evidence of insurance limits, giving GEICO appropriate credit for the payments Mercier had already received, and coming up with a net award upon which the superior court could have entered judgment without further ado.

165 P.3d 375, 139 Wn. App. 891, 905 (Div. 1 2007), *abrogation on other grounds recognized by* 198 P.3d 525, 527-28, 147 Wn. App. 883 (Div. 1, 2008). This holding is not dicta. The court analyzed the issue fully in order to address GEICO's contention that only the court can consider coverage issues and apply offsets after the arbitrator's award. *Id.* at 896. The facts are indistinguishable from this case and therefore *Mercier* is binding on the result here.

3. Lind's Statement of Arbitrability Did Not Waive a Net Award up to \$50,000

The court below found that for purposes of arbitration, Lind waived any claim for damages in excess of \$50,000, and that this waiver effectively limited the authority of the arbitrator to find damages in excess of that amount and then to deduct offsets prior to entering an award. CP at 50. These conclusions were based on State Farm's paper-thin waiver argument and are in error.

a. Procedural Context for the Statement of Arbitrability

The facts underpinning the court's waiver finding are undisputed, but this court should consider procedural context when considering whether a waiver occurred as a matter of law. The procedures for accomplishing a transfer to MAR arbitration are governed by local rule. MAR 2.1. The court is authorized to determine on its own motion whether the case is subject to mandatory arbitration. MAR 2.2. In King County, to facilitate the court's determination of arbitrability, any party that believes the case to be suitable for mandatory arbitration must file a statement of arbitrability upon a form prescribed by the court by the date indicated on the case schedule. King County Local Rules for Mandatory Arbitration (LMAR) 2.1. After the deadline has passed, the statement of arbitrability may be filed only by leave of court. LMAR 2.1. For claims in which the parties stipulate under MAR 8.1 to MAR arbitration, the

statutory threshold and the amount in controversy are irrelevant; the transfer to arbitration only requires court approval. LMAR 2.1(d). In such cases, there is no requirement to file a statement because the court need not make a determination of arbitrability.

b. Legal Standards Applicable to Waiver

Waiver is an affirmative defense upon which the party asserting it has the burden of proof. *See* CR 8(c); *Fulle v. Boulevard Excavating, Inc.*, 582 P.2d 566, 569, 20 Wn. App. 741 (Div. 1 1978). Waiver requires an element of knowledge and intent. *Id.*

A waiver is the intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right. It may result from an express agreement or be inferred from circumstances indicating an intent to waive. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. . . . He must intend to relinquish such right, advantage, or benefit; and his actions must be inconsistent with any other intention than to waive them.

Rhodes v. Gould, 576 P.2d 914, 19 Wn. App. 437, 441 (Div. 2 1978).

c. Lind's Filing Does Not Waive an Award of \$50,000 After Deduction of Offsets

Below, State Farm argued the Statement of Arbitrability was a waiver, without any discussion, analysis or authority. CP at 45. The sole fact upon which the trial court based its conclusion that a waiver occurred

was the Statement. CP at 50. The court did not discuss whether the Statement constituted a waiver by express agreement or implied from conduct. CP at 50. In briefing, neither party attempted to explain the filing of the Statement. Neither RCW 7.06 nor the MARs define “claim.”

The “claim” in arbitration could be the amount of the final award sought by the plaintiff. Since the burden to prove waiver is on State Farm, any ambiguity should be construed in Lind’s favor. Moreover, nothing in the record suggests that Lind had the requisite intention to waive her claims against State Farm above \$50,000 before deduction of offsets. At the outset of the suit, those offsets already totaled \$60,000. CP at 20. Waiving damages in excess of \$50,000 before deduction of offsets would mean that Lind would gain nothing from submitting her claim to arbitration, since the arbitrator’s maximum award of \$50,000 would be less than State Farm’s offsets. Further, the Statement was filed after the parties stipulated to arbitration and the court had already ordered the case transferred. Lind had nothing to gain by waiving her claim for a net award up to \$50,000 after deduction of offsets. Finally, the filing was procedurally abnormal. The Statement has no purpose where, as here, the parties stipulate to MAR arbitration under MAR 8.1. Under the MARs, the statement of arbitrability’s sole purpose is to assist the court in making a determination of whether a case is subject to mandatory arbitration under

chapter 7.06 RCW. Once a case has been transferred by stipulation, the court no longer has any reason to make a determination of arbitrability and the statement is superfluous.

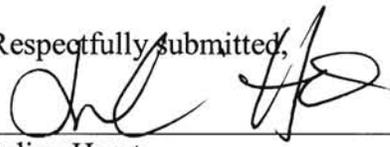
Under these circumstances, the Statement by itself is insufficient to support the court's legal conclusion that Lind intended to waive an award up to \$50,000 after deduction of offsets.

D. Conclusion

Petitioner requests that this court rule that neither RCW 7.06 nor Petitioner's Statement limits the arbitrator's authority to make a net award up to \$50,000 after deduction of offsets, vacating the trial court's order refusing to authorize the MAR arbitrator to make such an award, and remanding the matter for resumption of the arbitration process. If the court finds that either RCW 7.06 or Petitioner's Statement does limit the arbitrator's authority, Petitioner requests the court remand this matter to the trial court so that she may request the Statement be withdrawn pursuant to LMAR 2.1.

November 18, 2013

Respectfully submitted,



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