**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

May 19, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

## NOTICE

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**No. 97-0135**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT I**

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**PEYTON A. MUEHLMEIER,**

**PLAINTIFF-APPELLANT-**
**CROSS-RESPONDENT,**

**JAMES A. HUMMERT AND**
**JAMES D. HUMMERT,**

**INTERVENING PLAINTIFFS-**
**APPELLANTS-CROSS-RESPONDENTS,**

**V.**

**LINDA TUFFEY, LINDA TUFFEY LIFE TRUST,**
**ELSIE A. LUEDTKE MARITAL TRUST AND**
**EDWARD O. LUEDTKE GRANDCHILDREN'S TRUST,**

**DEFENDANTS-RESPONDENTS-**
**CROSS-APPELLANTS.**

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APPEAL and CROSS-APPEAL from a judgment of the circuit court for Milwaukee County: MICHAEL D. GUOLEE, Judge. *Affirmed.*

Before Wedemeyer, P.J., Schudson and Curley, JJ.

WEDEMEYER, P.J. Peyton A. Muehlmeier, James A. Hummert and James D. Hummert (Muehlmeier-Hummert) appeal from a judgment of the circuit court affirming an arbitration decision entered against them in favor of Linda Tuffey, Linda Tuffey Life Trust, Elsie A. Luedtke Marital Trust and Edward O. Luedtke Grandchildren's Trust (Luedtke). Luedtke cross-appeals claiming the circuit court erred in denying it attorney's fees.

Muehlmeier-Hummert raises four issues of error: (1) whether the trial court applied the wrong standard of review in affirming the arbitrator's award; (2) whether the arbitrator erred as a matter of law in concluding that Luedtke was not estopped from pursuing this claim; (3) whether the arbitrator failed to apply a six-year statute of limitations to certain challenged business activities; and (4) whether the trial court erred in misapplying the 12% interest rule under § 814.04(4), STATS., to the amount of the arbitration award.

Luedkte, in the cross-appeal, claims the trial court erred in failing to award attorney's fees pursuant to a Standstill Agreement existing between the parties.

Because the arbitrator committed no error of law; because the burden of proof was not met to sustain an acquiescence-estoppel defense; because the statute of limitations defense was waived and because § 814.04(4), STATS., does apply to arbitration awards, we affirm the judgment. With respect to the cross-appeal, because the Standstill Agreement was not intended to provide attorney's fees for circuit court review of the award, we affirm.

## I. BACKGROUND

This appeal involves a partnership and the fiduciary relationship that existed between partners. The essential facts giving rise to the appeal are not in dispute. In 1962, Edward O. Luedtke, now deceased, Peyton A. Muehlmeier and James A. Hummert entered into a business relationship that began with the construction and operation of the Kenosha Midway Motel. In subsequent years, at least nine other major hotel-related businesses and ancillary endeavors were established. The form of the business ownership varied to suit the general financial needs of the three participants but inevitably, the businesses were operated as a jointly-owned partnership enterprise. Luedtke, Muehlmeier and Hummert considered themselves equal participants.

On January 27, 1972, an agreement was executed by them memorializing their relationship as a partnership. The agreement provided that each party owned a one-third interest and all profits and losses were to be shared equally. Pertinent to this appeal, the agreement established that any two partners could bind the third in any matter or form necessary for the purpose of operating the partnership and licensing the trademark name, "Midway Motor Lodge." The agreement also authorized each partner to designate any individual of full age to be his successor in the partnership upon the partner's death. In default of this power, the personal representative or trustee of the deceased partner could make such selection.

Up to this time, a separate business named Sandco, Inc., equally owned by Luedtke, Muehlmeier and Hummert, managed the business of the Midway chain at a charge of 3-4% of gross revenues.

Sometime in 1972, Luedtke invested in an Albert Pick Hotel in the State of Georgia without the involvement of either Muehlmeier or Hummert. This

action angered the latter two. On October 16, 1973, Muehlmeier and Hummert formed a partnership named Midway Motor Lodge Service Company ("Service Company") to succeed the activity of Sandco. They excluded Luedtke. The purpose of the partnership was to take over management of all of the motor lodge facilities owned by the three partners. A new twenty-year management agreement, with options to renew for each of the facilities, was signed by Muehlmeier and Hummert on behalf of the Service Company and also for each of the lodging facilities. Luedtke's signature did not appear on any of the management agreements. Under this new relationship, the management fee was increased to 10% of gross sales and later to 13%. The agreements provided for the performance of a full range of management services.

In 1983, a disagreement arose among the partners over the future course of the enterprises. In the process, it was discovered that a disparity existed in the sums of money taken from the various enterprises by the individual partners. To rectify this imbalance, an equalization of payments program was instituted which satisfied all three partners. Commencing, however, sometime after January 1, 1984, Muehlmeier and Hummert entered into a series of transactions through businesses owned by them alone, to provide services to the various facilities jointly owned by the three-man partnership. It is the nature and consequences of these activities that is the major source of this appeal.

On July 22, 1991, Luedtke died. Shortly thereafter, Linda Tuffey, Luedtke's daughter and personal representative of the Luedtke estate, sought dissolution of the joint enterprises. For the purpose of sound business management of the various entities of the three partners, a Standstill Agreement was executed November 5, 1991, and later amended January 1, 1992. It provided that all claims relating to any of the businesses or entities that Tuffey sought to

dissolve would be handled through arbitration in the manner set forth in the agreement. It further provided that all decisions of the arbitrator would be final and binding on all parties to the agreement "except in event of an abuse of discretion or clear error in interpretation or application of substantive law." This provision appears in paragraph 3.2(1)(10), "Controlling Arbitration Procedures," Amendment No. 1 to the Standstill Agreement dated January 1, 1992.

In June 1992, the heirs and successors in interest to Luedtke elected, under the Standstill Agreement, to seek arbitration for claims they wished to file against Muehlmeier and Hummert and the various business entities covered by the Standstill Agreement. Eventually, evidentiary hearings were conducted in early 1994. On March 8, 1995, the arbitrator issued his opinion and decision.

The arbitrator found Muehlmeier and Hummert liable for breaching their fiduciary obligations and awarded the Luedtke heirs damages for misappropriation of funds relating to excessive management fees, hidden franchise fees, unshared rental income, and unshared add-on charges. Finally, the arbitrator granted the Luedtke heirs' request to dissolve the three-way partnership. Muehlmeier and Hummert moved for reconsideration. Except for revising the franchise fee recovery for a period subsequent to the equalization payment, the arbitrator denied the motion.[1]

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[1] The final award granted the claimants the following:

> a. $1,268,341 representing 1/3 of the "excess management and accounting fees" charged from 1984-1991 (plus 5% interest in the amount of $471,651 and continuing thereafter);
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> b. Franchise/license fees in the amount of $778,313 from January 1, 1984, through December 31, 1994 (plus 5% interest in the amount of $267,930 and continuing thereafter);

(continued)

Muehlmeier filed a motion in circuit court pursuant to § 788.13, STATS., to vacate or modify the final arbitration award. Hummert intervened to join Muehlmeier. Luedtke counter-moved, seeking confirmation in part and modification in part. The trial court denied all attempts to modify the arbitration award. It did, however, grant 12% interest on the award from the date of the arbitrator's final decision itself instead of from the date upon which the award was confirmed by the circuit court. An appeal and cross-appeal have now resulted.

## II. DISCUSSION

Muehlmeier-Hummert's appeal consists of four parts challenging: (1) the standard of review employed by the circuit court; (2) the findings of fact used to support the conclusion of a breach of fiduciary trust and whether Luedtke's actions constituted acquiescence to Muehlmeier-Hummert's actions thus constituting a bar to the claims brought by his heirs; (3) whether certain actions of Muehlmeier-Hummert are barred by a six-year statute of limitations; and (4) whether the circuit court properly applied § 814.04(4), STATS., the 12% interest rule to the award. We treat them in turn.

### A. STANDARD OF REVIEW

The Standstill Agreement executed by the parties to this appeal, provided that:

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> c. Rental income for a restaurant attached to the La Crosse Lodge in the amount of $301,816, representing net rent received by Muehlmeier and Hummert from a sublease from 1983 through 1994 (plus 5% interest in the amount of $92,168 and continuing thereafter); and
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> d. Certain "add on charges" in the amount of $34,795 (plus 5% interest in the amount of $8,646 and continuing thereafter).

> the decisions of the Arbitrator shall be in writing, containing findings of fact and conclusions of law (when appropriate to establish a basis for subsequent appeal or enforcement of the decision) and all such decisions shall be final and binding on all Parties, except in the event of an abuse of discretion or clear error in interpretation or application of substantive law.

Section 788.10(a) & (d), STATS., provides that on motion of any party to an arbitration, a circuit court must vacate an arbitration award when the arbitrator exceeded its powers. The standards, however, for deciding whether an arbitrator exceeded its authority are narrow in scope unless otherwise agreed. *See* ***Nicolet High Sch. Dist. v. Nicolet Educ. Ass'n***, 118 Wis.2d 707, 712, 348 N.W.2d 175, 178 (1984). The significant point is to assure that the parties received the arbitration they contracted for and not to substitute the court's judgment for that of the arbitrator. *See* ***City of Madison v. Madison Prof'l Police Officers Ass'n***, 144 Wis.2d 576, 585-86, 425 N.W.2d 8, 11 (1988).

Muehlmeier-Hummert's first claim of error is based on the assertion that the circuit court incorrectly interpreted the standard of review set forth in the Standstill Agreement insofar as it relates to errors of law. This mandate, as set forth above, seems susceptible to easy application; yet, the parties obviously were not of one mind when it came to the precise meaning to be applied.

Muehlmeier-Hummert argues that the standard with regard to "clear error" is one of heightened judicial scrutiny, i.e., of broader scope. Thus, if the arbitrator's construction of the law is a plain mistake, sufficient ground exists to void the award. Luedtke counters that the parties did not contemplate that a reviewing court could overturn a legal conclusion of the arbitrator merely because "it was arguably wrong, maybe wrong or even probably wrong." Rather, the conclusion had "to be dead wrong." *See* ***Parts & Elec. Motors, Inc. v. Sterling***

***Elec. Inc.***, 866 F.2d 228, 233 (7th Cir. 1988).[2] We need not tarry over this distinction because as additional analysis within the remainder of this opinion will demonstrate, there was no error of law committed by the arbitrator. Because the arbitrator did not err, it is irrelevant whether the arbitration decision is subject to a "clear error" standard of review or a "dead wrong" standard of review.

B. FINDINGS OF FACT-CONCLUSIONS OF LAW

The duty to disclose is the hallmark of any fiduciary relationship. This duty is implicit from the very nature of a partnership relationship unless otherwise agreed. *See* BROMBERG AND RIBSTEIN ON PARTNERSHIPS § 6:07. Partners among themselves are fiduciaries. Thus, there are duties and restrictions imposed by reason of the fiduciary nature of the relationship. "Partners cannot act vis-à-vis each other as they can with third parties. The main elements of the partners' fiduciary duties are well recognized: utmost good faith, fairness, and loyalty." ***Id.*** at § 6:68. This fiduciary relationship "prohibits all forms of trickery, secret dealings and preference of self in matters relating to and connected with a partnership." ***Bakalis v. Bressler***, 115 N.E.2d 323, 327 (Ill. 1953).[3] These basic

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[2] When the trial court addressed this issue, it acknowledged, and correctly so, that there was no clear Wisconsin precedent stating whether parties to an arbitration may contract to establish the standard of review. It concluded that the "clear error" language contained in the Standstill Agreement "is essentially the same standard already used by the courts in reviewing arbitration decisions," that is, "manifest disregard" of the law. *See* ***Lukowski v. Dankert***, 184 Wis.2d 142, 149, 515 N.W.2d 883, 886 (1994).

[3] Judge Cardozo's famous dictum is noteworthy in establishing the theme by which to examine partnership fiduciary responsibility:

> Joint adventurers, like copartners, owe to one another … the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a

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principles find expression in our statute § 178.18, STATS., and as earlier articulated in ***Caveney v. Caveney***, 234 Wis. 637, 647, 291 N.W. 818, 822 (1940).

The keynote to our analysis is an examination of the arbitrator's findings of fact. At the outset, it logically flows from well-established precedent that when a court serves in an appellate capacity reviewing findings of fact, those findings will not be overturned unless they are clearly erroneous.[4] Under this standard, even though the evidence would permit a contrary finding, findings of fact will be affirmed on appeal as long as the evidence would permit a reasonable person to make the finding. *See* ***Noll v. Dimiceli's Inc.***, 115 Wis.2d 641, 643, 340 N.W.2d 575, 577 (Ct. App. 1983). An appellate court will search the record for evidence to support the trial court's findings of fact. *See* ***Becker v. Zoschke***, 76 Wis.2d 336, 347, 251 N.W.2d 431, 435 (1977). A trial court's findings of fact may be implicit from its rulings. *See* ***Schneller v. St. Mary's Hosp. Med. Ctr.***, 162 Wis.2d 296, 311-12, 470 N.W.2d 873, 878-79 (1991). If these standards are met, a trial court operating in a fact-finding capacity in the appropriate context, will not be adjudged to have erroneously exercised its discretion. Here, we deem these same rubrics of review to be applicable to the arbitrator's fact-finding function and will apply them throughout the balance of this opinion.

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> tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

*See* ***Meinhard v. Salmon***, 164 N.E. 545, 546 (N.Y. 1928) (citation omitted).

[4] The standard applied here should not be confused with the "any credible evidence" standard employed to review findings of an administrative agency's decision. *See* ***Princess House, Inc. v. DILHR***, 111 Wis.2d 46, 54-55, 330 N.W.2d 169, 173-74 (1983).

We turn now to the record and the results of the arbitration proceeding. After reviewing 2,500 pages of testimony and 117 exhibits in a highly contested proceeding, and after reviewing the same for the purposes of a motion for reconsideration, the arbitrator concluded that Muehlmeier-Hummert, individually or through its joint and respective entities, violated its fiduciary obligations to Luedtke. Muehlmeier-Hummert responds by claiming error of law on the part of the arbitrator in that the actions of Luedtke demonstrate estoppel, waiver, or laches based on his acquiescence in its actions as partners.

The arbitrator's conclusion is based on findings of fact relating to four separate categories of business activities. Some of these findings we have already set forth in this opinion, and thus eschew reiteration. Other findings that we deem particularly significant to the arbitrator's conclusions and to the issues on appeal we now set forth.

Initially, we note the arbitrator's decision determined that the defining time span in the relationship between the three parties began shortly after the equalization agreement had been reached in late 1983. It concluded that the agreement affirmed the "simple partnership" form of their business relationship. This conclusion remains uncontroverted.

1. LA CROSSE MIDWAY RESTAURANT

The three partners each owned an equal one-third interest in the La Crosse Midway Motor Lodge Motel which housed a restaurant site. This facility was developed in 1972. From the outset, Luedtke expressed no interest in the restaurant. In 1980, Muehlmeier-Hummert and others took over the operation of the restaurant business, d/b/a Hoffman House. On March 1, 1982, the Hoffman House's lease expired and an entity known as Midway Motor Lodge of La Crosse

owned by Muehlmeier-Hummert continued to operate on a month-to-month basis paying a flat $38,000 per year rent. Under the previous lease with Hoffman House, the annual rent exceeded $65,000 in both 1981 and 1982. In 1983 Muehlmeier-Hummert, through its new entity, entered into a long term sub-lease with an operator known as Prokash. This lease was still in existence at the commencement of the arbitration. By its terms, Muehlmeier-Hummert collected a substantially higher rent; yet, still paid the lower flat fee to the partnership.

The arbitrator found that the simultaneous extension of the old lease at a reduced rate, while accepting the greatly enhanced rental income from the Prokash restaurant operation, evinced a "nonconcern with fiduciary responsibility toward Luedtke and a commitment to overreaching in derogation of that responsibility."

2. MANAGEMENT CONTRACT FEES

The arbitrator examined in great detail the management fees charged by Muehlmeier-Hummert. Extensive testimony was received in determining whether the management fee was reasonable from 1983 to the date of the arbitration proceeding. Expert opinion varied indicating reasonable rates range from 3-7% of gross revenues. The arbitrator acknowledged that under Wisconsin law parties who have unequal burdens in carrying on a business of a partnership, even though equal owners, may receive additional compensation from the partnership if an express agreement exists or an agreement to that effect can be implied. If, however, an agreement does not exist, compensation is limited to the reasonable value of the services. To appropriate more in the absence of an agreement is a breach of partnership fiduciary concepts. It is the charging partner's burden to show it has acted in a fair manner and to prove reasonableness.

The arbitrator found that Muehlmeier and Hummert did not provide evidence to show the fairness or reasonableness of their fees. In making this determination the arbitrator also found that 3.5% was reasonable.

Further application of the management contract, whether it was between the Service Company or Muehlmeier and Hummert as subcontractors or their wholly owned corporations, also required some fact-finding. The evidence showed that substantial amounts of annual premium refunds relating to Luedtke-owned motels or their personnel were retained by the Service Company or its subcontractors. The arbitrator found that insurance services were included in the management contract and, thus, there was no right to withhold these refunds. Similarly, the contract covered other add-on charges of sundry nature in the sum of $41,079 that should not have been charged against revenue.

3. FRANCHISE FEE DISTRIBUTION

The proper distribution of franchise fees was examined twice by the arbitrator. A significant element in this process was the reconciliation or equalization agreement reached by the partners in late 1983. As related earlier in this opinion, among other reasons precipitating this process was the discovery that the amount of money being withdrawn from the various enterprises by the partners was not equal.[5] Accountants were instructed as to which business activities were to be reviewed for equalization purposes. It is obvious from a perusal of the

[5] At this juncture in the partners' relationship, Hummert desired to sell certain assets of the total enterprise and sought a reconciliation of accounts in preparation for a sale. Muehlmeier opposed the move. He solicited and obtained Luedtke's support to block any sale. At the same time, Muehlmeier found reason to disagree with the equalization formula. In this regard Hummert and Luedtke agreed. The two-thirds rule prevailed. In the process, however, the disparity of withdrawals was revealed.

record, and as found by the arbitrator, that competing interests existed between the parties and a compromise was reached with no objection from any of the partners. For that reason, the arbitrator, upon reconsideration, decided that January 1, 1984, would be the beginning date for determining any redistribution of franchise fees instead of the earlier ordered 1973 date.[6]

4. ACQUIESCENCE-ESTOPPEL

During the motion for reconsideration and on appeal, Muehlmeier and Hummert continued to claim Luedtke knew full well at the time of the equalization agreement that 80% of the franchise fees collected were being paid to the Service Company and that Luedtke would receive only one-third of the remaining 20%. They argue that Luedtke, at the time, knew he had the right, ability, and opportunity to ask for an adjustment of the fees if he believed he was entitled to a full one-third share.

Muehlmeier-Hummert further claims that Luedtke was well aware of the system of management it employed and had been given or had ready access to all financial information upon which to determine the fairness of the management. It was well known that the Service Company and later the two management companies to which the Service Company had subcontracted management responsibilities, were performing services for all Midway Motor Lodges regardless of ownership interests. Thus, they argue Luedtke cannot be excused for not asserting the rights and remedies available to him. They argue his acquiescence constituted estoppel as a matter of law, and bars the heirs' claims.

[6] The end of 1983 (the time of equalization) was also used as the date to determine all of the other award amounts.

"To give rise to an estoppel by silence or inaction, there must be a right and an opportunity to speak and an obligation or duty to do so." ***Mortgage Assocs., Inc. v. Monona Shores, Inc.***, 47 Wis.2d 171, 185, 177 N.W.2d 340, 349 (1970). "An estoppel is not created unless the party against whom it is urged had full knowledge of the facts, or unless the act of such party … induced the party claiming the estoppel to take action to his prejudice in reliance thereon." ***Caveney***, 234 Wis. at 650, 291 N.W. at 824.

A different trier of fact could very well have come to those necessary findings of fact to reach the conclusions of law advocated by Muehlmeier-Hummert. That alternative, however, is not the test. *See* ***Noll***, 115 Wis.2d at 643, 340 N.W.2d at 577.

To the contrary, it seems clear from the record that the ownership of the Service Company and its activities were not a subject for discussion in the equalization process. Consequently, the arbitrator found there was no "convincing evidence … that Luedtke voluntarily agreed to the propriety of a two-way Muehlmeier-Hummert division of excessive management fees or an 80% retention of the franchise fees thereafter." The evidence "does not disclose that there was a sudden adoption of fair fiduciary practices by Muehlmeier and Hummert as of January 1984, nor was there a commitment to honor inter-partner fiduciary responsibilities thereafter." These findings were based on evidence that both Muehlmeier and Hummert brought family members into the business, and they subcontracted to themselves the work that was to be performed by the Service Company under the twenty-year contract in which Luedtke had no voice. The subcontracts were prepared to be signed not only on behalf of the Service Company and the subcontracting partner, but also the owners of the properties to be managed. Muehlmeier and Hummert signed on behalf of the Service Company

and the owners, but no signature by Luedtke was ever obtained even though the documents were prepared to include his signature. Furthermore, Luedtke rejected a 1985 modification in the formula for sharing franchise fees which reduced his share by 40%. Muehlmeier-Hummert achieved this change regardless. Lastly, the two agreed that each of them should receive an additional separate accounting fee of $19,500 per entity annually.

Muehlmeier and Hummert claimed that their split management techniques produced greater efficiency and benefits to the individual business enterprises. The arbitrator found, however, that no evidence was offered to substantiate the claim as to the Luedtke jointly owned businesses.

After examining the various documents, summaries and accounting reports submitted at both the initial hearing and on the motion for reconsideration, the arbitrator found that Muehlmeier-Hummert, in the operation of its respective management companies, franchise company and service company, had so "co-mingled charges, service, income and expenses as to create a labyrinth incapable of discrete disassembly." As succinctly expressed by the arbitrator:

> [W]hen one or two partners undertake to provide a service for a partnership which involves others not engaging in the service, it is their responsibility to see to it that the service performed is rendered on the fairest terms available as the market allows. It is the charging partners' burden to show that they have so acted in a fair manner. When they also co-mingle those services and the various expenses incurred to perform them with services performed on behalf of other entities in which the partnership ownership interests are different, they must be able to show that they have not charged one for the benefit of others.

The arbitrator concluded that because of the mode of operation of these enterprises, i.e. a partnership, a fiduciary responsibility existed between the parties

that transcended all other considerations regardless of relative degrees of knowledge and that Muehlmeier-Hummert breached that obligation. In the record is evidence to defeat the argument that Luedtke functioned within this business framework with full knowledge and access to understandable financial documents. There were occasions from which it can be inferred that Luedtke resisted Muehlmeier-Hummert's overreaching, but recognized the significance of the two-thirds majority control just as did Muehlmeier-Hummert at the time of the equalization agreement. The arbitrator specifically found that whatever disclosure existed, it was insufficient to constitute the knowledge necessary for estoppel by acquiescence. From our review, we conclude there is a reasonable basis in the record for these findings of historical and ultimate facts to support the conclusions reached. The arbitrator committed no error of law.

C. STATUTE OF LIMITATIONS

Muehlmeier-Hummert's next claim of error is that the arbitrator should not have included in his award of damages items occurring more than six years prior to the date of the first Standstill Agreement. In particular, Muehlmeier-Hummert refers to the refusal to dismiss claims of reimbursement of items occurring between January 1, 1984, and November 5, 1985, which is six years prior to the date of the first Standstill Agreement.

Although facially it appears that the arbitrator based its decision on four grounds, we deem that the prime basis for the arbitrator's determination was waiver and we shall therefore examine this issue of error in that context.[7]

The manner of conducting an arbitration proceeding is left largely within the control of the parties and the arbitrator. ***Layton School of Art & Design v. WERC***, 82 Wis.2d 324, 342 n.18, 262 N.W.2d 218, 227 n.18 (1978). The amended Standstill Agreement specifically provided "the Arbitrator shall have all the legal and equitable powers of a civil court in the State of Wisconsin." More specifically, the amended Standstill Agreement allows:

> (1) the arbitration proceedings may be commenced at any time by a Party filing a written notice of claim with the Arbitrator and counsel for the other Parties generally identifying the claim(s) being asserted, which notice of claim may thereafter be amended from time to time consistent with the rules governing amendment of pleadings in civil actions under Wisconsin's rules of civil procedure … with any amendment more than six (6) months following the filing of the initial arbitration complaint to be made only with leave granted by the Arbitrator.

We interpret this to mean that an arbitrator has all the procedural powers granted to trial courts by statute unless otherwise provided in the Standstill Agreement.

The statute of limitations is an affirmative defense which a defendant bears the burden of raising. This affirmative defense must be raised in a pleading or by a motion or be deemed waived. *See* ***Robinson v. Mount Sinai***

[7] The other three bases that are mentioned in passing are: (1) the statute of limitations does not apply to arbitration proceedings; (2) the statute of limitations does not apply to an action for accounting between partners; and (3) an agreement to arbitrate is tantamount to an acknowledgment that the statute of limitations should not apply.

***Med. Ctr.***, 137 Wis.2d 1, 16-17, 402 N.W.2d 711, 717 (1987).[8] The record reflects that in July 1992, pursuant to the provisions of the Standstill Agreement, Luedtke filed a demand for arbitration. As a result of a status conference held in July 1992, the parties were required to file statements of issues and responses. Luedtke filed its statement of issues. Muehlmeier-Hummert responded and was later afforded several extensions to file formal responsive pleadings. The answer eventually contained three counterclaims and fourteen separate affirmative defenses, but no mention was made of a statute of limitations defense. Shortly before the initial hearing on February 14, 1994, Muehlmeier-Hummert raised the defense for the first time. Muehlmeier-Hummert explained its tardiness on the ground that it could not discern from Luedtke's pleadings that any claims more than six years old were being asserted.

The arbitrator rejected this argument specifically finding that paragraphs I-4 and II-5 of the demand for arbitration set forth claims relating back to 1983-84.[9] The record supports the conclusion that the findings are not clearly

[8] Muehlmeier-Hummert, as part of its statute of limitations defense against its affirmative obligation to plead the statute, points to four cases: ***Sporleder v. Hermes***, 162 Wis.2d 1002, 471 N.W.2d 202 (1991); ***Holtzman v. Knott.***, 193 Wis.2d 649, 533 N.W.2d 419 (1995); ***Shannon v. Shannon***, 150 Wis.2d 434, 442 N.W.2d 25 (1989), and ***Utschig v. McClone***, 16 Wis.2d 506, 114 N.W.2d 854 (1962) as a basis for its claim that the running of the statute confers a vested property right to be free from extinguished claims which cannot be waived. We have examined these cases and fail to see their applicability. Muehlmeier-Hummert also argues that the Rules of Civil Procedure simply do not apply to arbitration actions. In doing so, Muehlmeier-Hummert overlooks the very procedural provisions it bargained for in Sec. 3.2(a)(6) of the amended Standstill Agreement.

[9] The pertinent provisions of this document provided:

> I-4. As a result of the Master Agreement and the related dealings and arrangements between Hummert, Muehlmeier and Luedtke, a special relationship of trust and confidence developed such that Hummert and Muehlmeier owed the fiduciary duties (including those of utmost good faith and fair dealing) with respect to all matters in which Luedtke had any interest or which would affect the interests of Luedtke or the Claimants relating to

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erroneous. Thus, there is a reasonable basis to conclude that Muehlmeier-Hummert should have known about the claims and that by failing to timely assert the statute of limitations, waived the defense. The arbitrator committed no error of law.

D. IMPOSITION OF INTEREST

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> the MML System. In addition, Hummert and Muehlmeier (as partners of Luedtke) are accountable as fiduciaries under Section 178.18, Wis. Stats.
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> ….
>
> II-5. Hummert and Muehlmeier agreed among themselves to split up the management of the various lodges within the MML System, including those of the Ventures. In doing so, they agreed directly or indirectly that their respective Management Companies could make charges to the Ventures for management, accounting and other services (collectively "Fees") substantially in excess of prevailing market rates for comparable services from other sources. Until about 1983, when Hummert and Muehlmeier each formed their Management Companies, they agreed the Ventures would be charged 10% of gross revenues as a management fee by the Service Company and thereafter they decided among themselves that such fee (which would include accounting type services) would be 13% gross revenues. When they formed their respective Management Companies in about 1983, Hummert and Muehlmeier then agreed among themselves to have the Service Company subcontract management services for the Ventures with one or the other of the Management Companies and the management fees where [sic] then revised to exclude accounting services in the base fee, which was reduced to approximately 7% of gross room revenues. Subsequent thereto, the Service and/or Management Companies have charged annual accounting fees to each Venture of approximately $19,000 per year in addition to the 7% management fee, which substantially exceeds the market rate for such services. Without any consent or approval from Luedtke and without any documentation to substantiate a change to the terms of the management relationship, Hummert and Muehlmeier agreed and caused the Service and/or Management Companies to increase the annual accounting fees charged to the Ventures to approximately $22,450 per year.

Lastly, Muehlmeier-Hummert claims the circuit court erred by imposing 12% interest to run from the date of the final arbitration award, April 12, 1996. The arbitrator, by its Final Arbitration Damage Award, held open the question whether Luedtke was entitled to more than the 5% pre-award interest that the arbitrator granted. The issue thus presented to the circuit court upon affirming the award was what date should be used in determining 12% interest under § 814.04(4), STATS. In determining taxable costs, the pertinent language of the subsection reads: "INTEREST ON VERDICT. Except as provided in s. 807.01(4), if the judgment is for the recovery of money, interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered shall be computed by the clerk and added to the costs."

The basis for this claim of error is explained as follows. Section 814.04(4), STATS., is located in a chapter of the statutes entitled "COURT COSTS AND FEES", which is applicable only to proceedings in circuit courts, *see* § 801.01(2), STATS., i.e. in all civil actions and special proceedings. Section 814.04(4) is entitled "INTEREST ON VERDICT" and thus is evidently intended to cover that time period between the actual determination of the rights of the parties by the jury, judge or special master and the date upon which that determination has been reduced to recordable written form and entered as a judgment. In contrast, an arbitration award is not enforceable by legal process until confirmed.

A judgment may not be entered until a circuit court has ruled upon the merits of the request to confirm, modify or correct the award. We are not persuaded.[10]

Under § 801.01(1), STATS., proceedings in courts are divided into actions and special proceedings. "Actions" as used in Chapters 801 to 847 includes "Special Proceedings" unless otherwise provided. The scope of Chapters 801 to 847 includes procedure and practice in circuit courts in all civil actions and special proceedings whether cognizable as cases at law, in equity or of statutory origin unless otherwise provided. *See* § 801.01(2), STATS. Arbitration under Chapter 788 is a proceeding of statutory origin and we deem it a "Special Proceeding," thus subject to the calls of Chapter 801 to 847.

Section 814.04(4), STATS., is denominated as a subsection dealing with "INTEREST ON VERDICT." The construction and interpretation of statutory language contained in a paragraph is not necessarily determined by the descriptive title it bears. *See* ***Aiello v. Village of Pleasant Prairie***, 206 Wis.2d 68, 73, 556 N.W.2d 697, 700 (1996) (text must control over title). Past decisions construing the statute and the content and context of the wording are more determinative. The subsection itself is general in nature relating to interest. *See* ***Weiland v. DOT***, 62 Wis.2d 456, 461-62, 215 N.W.2d 455, 458 (1974). It permits as an item of costs "interest at the rate of 12% per year from the time of verdict, decision or report until judgment is entered." *See* § 814.04(4).

[10] Muehlmeier-Hummert cites ***Kleinke v. Farmers Coop. Supply & Shipping***, 202 Wis.2d 138, 147, 549 N.W.2d 714, 717 (1996) for the proposition that any award of a cost which is not specifically authorized by a statute is reversible error. The issue in ***Kleinke*** was a pre-trial mediation fee. The court held that a mediator could not be considered a referee under § 814.04(2), STATS. We distinguish this case in that, here, for the purposes of determining the time value of money owed, an award is the functional equivalent of a verdict.

The circuit court, in granting Luedtke's request, reasoned:

> While the meaning of "decision or report" hasn't been determined by case law, it would appear from the statute the fact a decision is being made is the important part, and not who is making the decision. The face of the statute does not make a requirement that the decision or report come only out of a judicial proceeding, and indeed decisions and reports are more likely to come from other forums than the courtroom.

We share the essence of this induction and add more. First, an arbitrator's award is analogous to a verdict in that it determines a certain sum of money subject to revision by motion to affirm, modify or reverse just as monetary parts of a verdict are subject to affirmance, modification or reversal in motions after verdict. Second, under the statutory scheme of Chapter 788, an arbitrator's award is not enforceable until it is affirmed by a circuit court just as a verdict is of no effect until judgment is entered upon it. As a verdict is a prerequisite to a judgment, so is the award to a judgment of affirmance. Both an award and a verdict can be part and parcel of the same generic process leading to a money judgment. But for differences of nomenclature for the purposes of resolving this issue, a verdict and an award stand on the "same all fours." Statutory construction, logic and common sense lead us to conclude that an arbitrator's award is an analogue of a jury verdict and appropriately can be considered included in the 12% provision of § 814.04(4), STATS.

## CROSS-APPEAL

Luedtke claims trial court error in failing to award it attorney's fees in accord with the provision of the Standstill Agreement for its defense to the motion to modify or vacate the arbitrator's award. In deciding this issue the circuit court noted:

> Clearly, costs may be recovered for enforcement of the agreement. But it doesn't follow that costs may be recovered for attempts to enforce the arbitration award, especially when the review of the award was expressly contemplated by the agreement. Bringing the award for judicial review is not a violation of the agreement and there has been no need or attempt to enforce the terms of the agreement.

Luedtke argues that the Agreement provided for recovery of costs, expenses and attorney's fees incurred to enforce the award. The Agreement specifically calls for an arbitration decision and that the decision would be final and binding on the parties. Because Muehlmeier-Hummert challenged the final and binding nature of the award, Luedtke argues he is entitled to recover additional costs and fees to successfully enforce the binding nature of the arbitrator's decision. We are not convinced.

This issue of error centers on the language of the Standstill Agreement paragraph Ml.6 dated November 5, 1991, which reads: "All costs, expenses and reasonable attorneys fees … incurred by either party to successfully enforce this Agreement shall be paid by the unsuccessful party …." Central to the circuit court's decision was its determination that there was no ambiguity about the word "Agreement." We agree. The agreement referred to is the Standstill Agreement requiring arbitration proceedings in the event of a conflict between the parties.

Because standards of review were set forth within the agreement, clearly judicial review was contemplated by the parties. In the present context

"Enforcement of the Award" is by no stretch of the imagination equivalent to the "Enforcement of the Agreement." This claim of error fails.

*By the Court.*—Judgment affirmed.

Recommended for publication in the official reports.

**No. 97-0135(CD)**

SCHUDSON, J. *(concurring in part; dissenting in part).* I agree with the majority's decision on the appeal. I disagree, however, with its decision on the cross-appeal.

The Agreement states that the arbitrator's "decisions shall be final and binding on all Parties, except in the event of an abuse of discretion or clear error in interpretation or application of substantive law." It also states, "All costs, expenses and reasonable attorneys fees … incurred … to successfully enforce this Agreement shall be paid by the unsuccessful party …." The trial court, and now the majority, view the former provision as one that "expressly contemplated" judicial review. I disagree.

The fact that the Agreement *allowed for the limited possibility of judicial review* of the arbitrator's decision does not mean that the Agreement anticipated or contemplated a virtually automatic review. The provision limited such potential review to "an abuse of discretion or clear error in interpretation or application of substantive law." More importantly, even in the event of a judicial review of such a subject, the Agreement unambiguously provides that the party challenging the arbitrator's decision would *only* be relieved of responsibility for the opposing party's costs and attorney's fees *if the challenge were successful*. To clarify:

The first provision: the arbitrator's "decisions are final and binding."

The second provision: "except in the event of an abuse of discretion or clear error …."

This second provision does *not* say, "except in the event of *a claim of* an abuse of discretion or clear error …." And with good reason. Consistent with the parties' mutual and contractual interest in the finality of their arbitrator's decisions, they certainly did not contemplate that enforcement of those decisions should be delayed by any challenge on any subject, or a frivolous or unsuccessful challenge on a specified subject. Instead, they limited the subjects for potential judicial review, *and further provided* that "in the event of an abuse of discretion or clear error in interpretation or application of substantive law," the prevailing party who succeeded in establishing such abuse or error certainly should not have to pay the other party's costs and attorney's fees.

If, however, the challenging party failed to establish abuse or error, that party necessarily failed to come within the "except" portion of the provision – i.e., the "event of an abuse of discretion or clear error" never occurred. That is precisely what we have here. Muehlmeier-Hummert failed to establish any abuse or error. Luedtke prevailed. Thus, under the Agreement, Luedtke is entitled to recover costs and attorney's fees incurred in litigation to enforce the Agreement.[11]

Accordingly, on the cross-appeal, I respectfully dissent.

[11] The trial court, and now the majority, also attempt to draw a distinction between the arbitrator's "award" and the Agreement. This makes no sense. The Agreement states that the arbitrator's "decisions shall be final and binding …." Quite obviously, the arbitrator's "award" is among the arbitrator's "decisions."