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SUPREME COURT  
STATE OF WASHINGTON  
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NO. 101595-0

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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SARA MALVERN, a single woman,  
Petitioner,

vs.

MARK MILLER and "JANE DOE" MILLER, husband and wife and  
the marital community comprised thereof,

Respondent.

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APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT  
Honorable Anita L. Farris, Judge

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ANSWER TO PETITION FOR REVIEW

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REED McCLURE  
By Marilee C. Erickson  
WSBA #16144  
Attorneys for Respondent

**Address:**

Financial Center  
1215 Fourth Avenue, Suite 1700  
Seattle, WA 98161-1087  
(206) 292-4900

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## **I. NATURE OF THE CASE**

Plaintiff sued for injuries from a motor vehicle accident. Her attorney withdrew and plaintiff proceeded pro se. The lawsuit was transferred to civil arbitration. The arbitrator set a hearing date and notified the parties of the time and manner of the hearing. Two days before the scheduled hearing, plaintiff contacted the arbitrator by phone and e-mail and asked to continue the hearing. The arbitrator told plaintiff she must appear at the hearing. Her continuance request would be addressed at the hearing. Plaintiff did not appear for the arbitration hearing. She claimed that she was unable to connect to the arbitration hearing because of technology issues. Plaintiff did not telephone or e-mail the arbitrator the day of the hearing. The arbitrator issued an award for defendant because plaintiff did not participate in the hearing. Plaintiff retained counsel and filed a request for trial de novo.

The trial court granted defendant's motion to strike the trial de novo request finding plaintiff lacked good cause for

failing to appear at the hearing. The Court of Appeals affirmed. This Court should deny review.

## **II. ISSUES PRESENTED**

1. Should review be denied because plaintiff's Petition fails to establish any of the RAP 13.4(b) criteria for review and violates RAP 13.4(c) because it lacks record references and legal authority?

2. Should review be denied because the Court of Appeals correctly concluded that good cause under SCCAR 5.4 is reviewed for abuse of discretion?

3. Should review be denied because the Court of Appeals correctly concluded that failure to appear at an arbitration hearing without good cause constitutes a waiver of the right to trial by jury under SCCAR 5.4?

4. Should review be denied because the Court of Appeals correctly concluded the superior court did not abuse its discretion by finding that plaintiff lacked good cause for being absent from the arbitration hearing?

5. Should review be denied because the Court of Appeals correctly concluded that the arbitrator was not required to postpone the arbitration hearing or delay entry of the arbitration award when plaintiff failed to appear?

6. Should review be denied because the Court of Appeals correctly concluded that SCCAR 5.4 provides procedural due process?

## **II. STATEMENT OF THE CASE**

### **A. THE STATEMENT OF CASE FROM SECTION I OF THE COURT OF APPEALS' OPINION.**

Malvern alleges that on June 16, 2015, Mark Miller negligently operated a motor vehicle, striking a vehicle operated by Malvern. She alleges the collision caused physical and nonphysical damages. Malvern filed suit against Miller on June 12, 2018. Discovery was served on Malvern in October 2018. Effective November 16, 2018, Malvern's original attorney withdrew from representation. Malvern proceeded pro se. On January 1, 2019, Malvern failed to appear at a deposition, then on March 8, 2019, appeared for a deposition but refused to answer questions. In October 2020, the case was transferred to arbitration.

On December 3, 2020, the arbitrator sent a notice for arbitration and a letter to both Malvern and Miller's counsel by regular mail. The notice set the

arbitration for 9:00 a.m. on February 3, 2021 and included a SCCAR 5.4 admonition that “[a] party who fails to participate, without good cause, waives the right to a trial de novo.” That notice was not returned to sender. On January 21, 2020, after having heard no response from Malvern, the arbitrator contacted her prior counsel to obtain her phone number and e-mail address. The previously mailed notice and letter were sent to Malvern on that day. On January 27, 2021, the videoconference meeting invitation was sent to Malvern, and the arbitrator left Malvern a telephone message on her cell phone stating the need to respond.

At 5:36 p.m. on February 1, 2021, Malvern called the arbitrator on his cell phone to request a postponement of the hearing. The arbitrator explained that she would need to bring her motion to continue at the time of the hearing on February 3, 2021, so that defense counsel could be included. At 5:41 p.m. on the same day, Malvern e-mailed the arbitrator and defense counsel, stating,

I will not be at the arbitration on 2/3/21. I have located an attorney and need a continuance of this arbitration in order to bring him up to speed. I apologize for the short notice. With all that is going on in the world today, it seems that I have had to bear the worst of it. This is truly of the utmost importance to me and I hope we find resolution as soon as possible now having both parties represented. Thank you.

The arbitrator responded to Malvern at 5:59 p.m. stating, “You will need to attend the scheduled hearing and make the request for continuance at that time.” At 8:41 a.m. the following morning, February 2, the arbitrator e-mailed Malvern again with defense counsel also included, stating, “As I explained to you when you called after 5 pm [y]esterday, you must attend the hearing on February 3 as scheduled. At that time, you may request a postponement in the hearing.”

Malvern did not appear at the hearing on February 3, 2021, at 9:00 a.m. The arbitrator waited 15 minutes before starting the hearing. Defense counsel moved for a defense award based on noncooperation. The arbitrator “explained to [defense counsel] that while I had planned to continue the hearing had plaintiff appeared as directed, the failure to cooperate made his motion proper for entry [of judgment].” The arbitrator sent his ruling to the Snohomish County Superior Court Arbitration Department, and mailed copies to the parties and the clerk at 12:16 p.m., three hours after the hearing. The arbitration award was filed by the Snohomish County clerk on February 5, 2021.

On February 23, 2021, attorney William Budigan filed a notice of appearance on behalf of Malvern. Budigan contacted Miller’s attorney and the arbitrator to request that the award be vacated and the matter reopened. The arbitrator stated that he believed he had no authority to vacate the award.

On February 23, 2021, Malvern filed a motion to set aside the default judgment, vacate the arbitration award, and reassign the matter to the arbitration



department. On February 24, 2021, Malvern filed a request for trial de novo and to seal the award. Miller filed a motion to strike Malvern's request for a trial de novo.

The superior court ordered a continuance of Malvern's motion to vacate the judgment on arbitration to allow discovery. Discovery was conducted, including interrogatories, requests for production and filing additional declarations. Malvern appeared for another deposition on June 14, 2021. The superior court heard the motions on September 10, 2021. On September 15, 2021, the superior court issued an order granting Miller's motion to strike Malvern's request for trial de novo and dismissing the case with prejudice.

*Malvern v. Miller*, 24 Wn. App. 2d 173, 175-78, 520 P.3d 1045 (2022) (footnote omitted).

**B. COURT OF APPEALS' OPINION.**

On October 31, 2022, the Court of Appeals, Division I, unanimously affirmed the superior court's order striking plaintiff's request for a trial de novo. *Malvern v. Miller*, 24 Wn. App. 2d 173, 520 P.3d 1045 (2022). The Court of Appeals concluded as follows:

- a. Whether there is “good cause” under SCCAR 5.4 is reviewed for abuse of discretion. 24 Wn. App. 2d at 178, ¶ 10.
- b. “The failure to appear at an arbitration hearing without good cause constitutes a waiver of the right to a trial by jury under SCCAR 5.4.” 24 Wn. App. 2d at 179, ¶ 12.
- c. “The superior court did not abuse its discretion when it found Malvern did not have good cause to be absent from the arbitration hearing on February 3, 2021.” 24 Wn. App. 2d at 179, ¶ 13.
- d. “In light of Malvern's failure to take steps to address known deficiencies in her connectivity, her failure to communicate with the arbitrator and the opposing party despite her demonstrated ability to do so, and the inconsistencies in her explanations, the superior court did not abuse its discretion in determining Malvern lacked good cause when she failed to

appear at the arbitration hearing”. 24 Wn. App. 2d at 181, ¶ 17.

e. Malvern's lack of communication supports the trial court's conclusion that she lacked good cause for her failure to appear. 24 Wn. App. 2d at 182, ¶ 18.

f. “The arbitrator was not required to postpone the hearing based on Malvern's e-mail request on February 1 or to delay entry of an award after she failed to appear.” “The arbitrator acted within his authority in making the award when he did, even though his doing so foreclosed allowing a subsequent hearing under SCCAR 5.4.” 24 Wn. App. 2d at 183, ¶ 21.

g. SCCAR 5.4 provides procedural due process because the rule permits arbitrators to allow a subsequent arbitration hearing before an award is made and the superior court to allow a trial de novo

after an award is made based on a good cause standard. 24 Wn. App. 2d at 184, ¶ 23.

#### **IV. ARGUMENT**

This Court only accepts review if one or more RAP

13.4(b) criteria exist:

A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

The Petition does not explain how the Court of Appeals' decision meets any of the RAP 13.4 criteria for review. The decision does not meet any criteria for review. The Court of Appeals correctly decided the case and the Petition for Review should be denied.

**A. THE PETITION IS DEFICIENT AND DOES NOT EXPLAIN WHY REVIEW IS WARRANTED.**

This Court accepts review only when the decision meets RAP 13.4(b) criteria. RAP 13.4(c)(7) requires that a Petition contain “[a] direct and concise statement of the reason why review should be accepted under one or more of the tests established in section (b), with argument.” Plaintiff has failed to provide any statement of why the case fits the RAP 13.4(b) criteria. RAP 13.4(c)(6) requires references to the record. A Petition must comply with RAP 10.3 requirements for briefs. RAP 13.4(e). RAP 10.3(a)(6) requires legal authority and record references. The Petition has no record references. Plaintiff has not cited a single legal authority in her Petition.

The “Issues Presented for Review” discuss only superior court rulings. (Petition at 1-4) Petitioner does not identify any issues from the Court of Appeals’ decision. And Division I’s decision does not conflict with any decision of this Court or any Court of Appeals’ decision.

This case does not involve a significant question of constitutional law or any issue of substantial public interest that should be determined by this Court. Review should be denied.

**B. DIVISION I CORRECTLY DECIDED THAT THE SUPERIOR COURT PROPERLY CONCLUDED PLAINTIFF LACKED GOOD CAUSE FOR FAILING TO APPEAR AT THE ARBITRATION HEARING.**

The Petition should be denied because Division I correctly decided the case. The superior court's order striking the trial de novo request was a discretionary ruling. The superior court was deciding whether plaintiff had good cause for failing to appear at the arbitration hearing. Based on the record and the determination that plaintiff's claims that she could not contact the arbitrator by any means were not credible, the superior court properly exercised its discretion. (CP 11)

Plaintiff argues "[t]echnological difficulties caused by the technology not intentionally set up by the owner of the technology is 'good cause.'" (Petition at 10) Presumably plaintiff means that because she did not intentionally create the technology difficulties and she actually had technological

difficulties on the day of the arbitration hearing, she had good cause for not appearing at the arbitration hearing. This argument ignores the fact that plaintiff was advised nearly two months before the arbitration hearing that she should notify the arbitrator about any “technology problem” regarding an e-mail for a Zoom link. (CP 159) Plaintiff did not plan ahead. And then when she had problems on the day of the hearing, she stopped her efforts to contact the arbitrator.

The arbitrator made extra efforts to contact plaintiff prior to the arbitration hearing. He obtained plaintiff’s phone number and e-mail address from plaintiff’s prior counsel. (CP 156) The arbitrator then e-mailed plaintiff the December 3, 2020, hearing notice. (CP 35, 156, 239-40) The arbitrator e-mailed the Zoom link to plaintiff. (*Id.*) The arbitrator also telephoned plaintiff and left a voicemail. (CP 156) Plaintiff obviously received some of the communications because two days before the arbitration, plaintiff telephoned the arbitrator. (CP 156) During that phone call, plaintiff asked the arbitrator to postpone the hearing. The

arbitrator told plaintiff she needed to bring a motion for continuance at the hearing. (CP 156) There is no indication that plaintiff ever mentioned any technology problems to the arbitrator during that phone call.

Less than 10 minutes after the phone call, plaintiff e-mailed the arbitrator and defense counsel stating that she would not be at the February 3, 2021, hearing. Plaintiff's e-mail wrote that she had found an attorney and needed a continuance. (CP 160) Plaintiff's February 1, 2021, e-mail did not mention anything about any technology problems.

The arbitrator sent two e-mails to plaintiff explaining that she needed to attend the arbitration hearing. (CP 160, 161)

Plaintiff never advised the arbitrator, either before or after the arbitration hearing, that she had connectivity problems. She did not communicate with the arbitrator on the day of the hearing or in the days following the hearing to explain that she had been unable to connect to the Zoom link. Plaintiff did not telephone the arbitrator about it. Plaintiff did not e-mail the arbitrator about



it. (CP 43-44, 124, 156-57) She simply chose not to do anything. Plaintiff concluded “it was pointless.” (CP 198) She lacked good cause for her failure to appear or participate.

Plaintiff argues that her lack of communication after the morning of the arbitration hearing is irrelevant because once the arbitrator made the award nothing would change the outcome. (Petition at 7) Plaintiff’s argument ignores that she had the opportunity for a good cause determination. The good cause determination was conducted by the superior court. (CP 10-11)

Plaintiff seems to justify the cessation of efforts to contact the arbitrator by asserting that she expected to receive the arbitrator’s decision on her continuance motion in the mail. (Petition at 8) She asserts that she made the continuance motion two days before the arbitration hearing. Plaintiff asserts that the arbitrator said he would rule on the continuance motion at the hearing. (Petition at 8) Plaintiff omits key facts. The arbitrator told plaintiff three times that she must appear for the arbitration

hearing. (CP 156, 160-61) The arbitrator told plaintiff the continuance motion had to be made at the hearing. (*Id.*)

The Court of Appeals correctly affirmed the superior court. Nothing about this case requires this Court's review.

**C. THE COURT OF APPEALS' DECISION IS CONSISTENT WITH WASHINGTON APPELLATE DECISIONS.**

The Court of Appeals' decision is consistent with Washington appellate decisions. A litigant can waive a jury trial right by failing to act. For example, a party who does not comply with CR 38 waives the right to jury trial. *Ford Motor Co. v. Barrett*, 115 Wn.2d 556, 563, 800 P.2d 367 (1990). Failing to appear at an arbitration hearing without good cause waives one's right to a jury trial. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 412-13, 936 P.2d 1175 (1997). Plaintiff waived her right to jury trial when she did not appear at the arbitration and lacked good cause for her failure to appear.

The Court of Appeals' assessment of the superior court's discretionary ruling is consistent with Washington appellate decisions. Discretion is abused when the decision is manifestly

unreasonable, made on untenable grounds or for untenable reasons. *In Re Welfare of M.R.*, 200 Wn.2d 363, 376, 518 P.3d 214 (2022); *State v. Griffin*, 173 Wn.2d 467, 473, 268 P.3d 924 (2012). As explained in the Court of Appeals' decision and in this Answer, the superior court's order was based on reasonable and tenable grounds. This Court should deny review.

## V. CONCLUSION

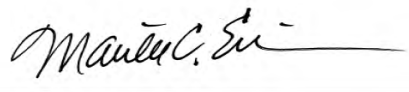
This case has not met any of the criteria of RAP 13.4(b) for review. The Petition for Review should be denied.

## CERTIFICATE OF COMPLIANCE

I certify that the Answer to Petition for Review contains 2,768 words.

Dated this 17th day of February 2023.

**REED McCLURE**

By   
**Marilee C. Erickson** WSBA  
**#16144**  
**Attorneys for Respondent Mark**  
**Miller**

## CERTIFICATE OF SERVICE

I hereby certify that on February 17, 2023, a copy of the following document was served on counsel below via the Washington State Appellate Court's Electronic Filing Portal:

Answer to Petition for Review

William C. Budigan  
Budigan Law Firm  
2601 42nd Avenue W  
Seattle, WA 98199-3011  
[info@budiganlaw.com](mailto:info@budiganlaw.com)

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

Dated this 17th day of February, 2023, at Orange Beach,  
Alabama.



Kate McBride

063060.000253/1523666

**REED MCCLURE**

**February 17, 2023 - 3:54 PM**

**Transmittal Information**

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