No. 96871-3

IN THE SUPREME COURT OF WASHINGTON

Thomas Anderson,

Appellant,

v.

Jennifer Jean Buksh and David Omar Buksh,

Respondents.

RESPONSE TO APPELLANT'S PETITION FOR REVIEW BY THE SUPREME COURT OF WASHINGTON

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I. INTRODUCTION

This case arises out of a minor rear end motor vehicle collision in August of 2013. The litigation was subsequently transferred into mandatory arbitration by the Appellant and an arbitration hearing was held on July 19, 2017 before arbitrator John Soltys. Mr. Soltys issued his award shortly thereafter in the amount of $6,609.66. This award was informally and then formally clarified by the Arbitrator to reflect offset of payments already made. The Court of Appeals (*Anderson v. Buksh*, 77543-0-I, 2019 WL 296119) affirmed the trial court by holding that he trial court acted within its authority in allowing the late amendment pursuant to MAR 6.2. Appellant appeals.

II. ASSIGNMENTS OF ERROR

Respondents do not assign error to the Court of Appeals' judgment in any of the assignments of error stated by the Appellant.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

Respondents submit the following Statement of Issues which more appropriately reflects the question before the Court:

1. Was the Court of Appeals correct in finding that the trial court was within its discretion to find that the Arbitrator's award was amended by court approval? **YES.**

IV. STATEMENT OF THE CASE

Mr. Soltys sent a copy of his award decision to the parties on July 20, 2017. Respondents filed a motion with the Arbitrator on July 26, 2017 to clarify and/or modify the award to account for the amount which Respondent's PIP carrier, State Farm, had already paid to Appellant's PIP carrier, Safeco, for the medical specials as offset had been plead as an affirmative defense. As Appellant claimed that he did not have electricity at this time, a paper copy of the motion was sent via USPS on the same day.

Within an hour of sending the motion to the arbitrator and before the mail could even be picked up for delivery to the Appellant, Mr. Soltys sent an email correspondence to the Respondents on July 26, 2017 saying that the Respondents were "correct" and that

> "Any payment on behalf of the defendant to the plaintiff (or his care providers) up to, but not exceeding, the amount I awarded to compensate the plaintiff for medical specials is a set off on the award. I hope that the defense will pay the plaintiff the amount of the judgment awarded minus the previously paid medical bills (again up to the amount awarded for medical specials) without the need for an amended award. If not, let me know so that I can file an amended award. Upon such payment, the plaintiff should satisfy the award."

As Appellant had previously alleged to not have electricity or email, a paper copy of this email correspondence was sent immediately to Appellant at his home address to avoid ex-parte contact with the Arbitrator. A check was requested from the Respondents' insurer for $4,526.38 - the amount of the arbitration award, minus the offset medical specials which had already been paid by Respondents' PIP carrier. This check was immediately tendered to the Appellant who promptly voided the check, returned it to the Respondents and responded that it was not for the correct amount and that it was not from the respondents themselves.

On August 15, 2017, Mr. Soltys filed the previously thought unnecessary order clarifying the arbitration award. Appellant moved to strike this order through the King County Superior Court, J. Veronica Galvan. He also simultaneously attempted to enter judgment against the Respondents. On September 6, 2017 Judge Galvan denied these motions and imposed CR 11 sanctions against the Appellant in the amount of $330.00.

On September 13, 2017, Appellant gave Respondents notice of his intent to enter judgment through the ex-parte department of King County Superior Court. Respondents immediately moved to strike the entry of the judgment but Judge Galvan was on recess until September 27, 2017 and

could not hear the motion. With this knowledge, Respondents immediately moved for a temporary restraining order to halt the entry of the ex-parte entrance of judgment until Judge Galvan had an opportunity to review the motion to strike on September 27, 2017. Appellant was notified of this emergency ex-parte hearing prior to the hearing and this fact was reflected in the declaration of Respondents' counsel. Commissioner Carlos Velategui entered an order granting the restraining order and noted that Appellant had noted his motion ex-parte **without oral argument** contrary to the local court rules and thus, the ex-parte department would not have heard the motion on September 18, 2017 regardless.

Respondents simultaneously filed and noted a motion to deposit the unclaimed funds with the Superior Court pursuant to CR 67. On September 27, 2017, Judge Galvan heard the motion to strike and the motion to deposit funds. Though properly noted and served, the Appellant did not appear to argue against either motion. As Appellant's motion was not going to be heard on the September 18, 2017 due to his deficient noting, the motion to strike was considered moot and not heard. The motion to deposit funds was heard and granted. A check for the amount of the arbitration award minus the offset was deposited with the Court.

A motion to withdraw funds from the deposited amount for the $330.00 in sanctions was filed, noted, timely served and subsequently heard by Judge Galvan who granted the motion.

The Court of Appeals analyzed these facts and held that MAR 6.2 requires arbitrators to amend an award within 14 days of filing and service or upon a party's application to superior court to amend but that an arbitrator may file an amended award after the 14-day deadline if approved by the court. The Court of Appeals found that the trial court approved the late amendment by denying Appellant's motion to strike the amended award after hearing his argument based on the same issue of timeliness. The Court of Appeals reasoned that as the arbitrator had intended the award to offset the previous payment to Appellant and he amended the award within a month, there was no reason to determine that the court erred in allowing the late amendment.

V. ARGUMENT

1. Standards of Review

Even if the precise question we must answer is not perfectly articulated by the parties, the Court has a duty to determine the extent of appellate review. *Barnett v. Hicks*, 119 Wn.2d 151, 154, 829 P.2d 1087

(1992). The review of the application of a court rule or law to the facts is done de novo. *Wiley v. Rehak*, 143 Wn.2d 339, 343, 20 P.3d 404 (2001).

2. Neither the Trial Court nor the Court of Appeals Violated the Court Rules, Washington Law, or the Rights of the Appellant When They Rendered their Respective Decisions

We interpret the mandatory arbitration rules as though they were drafted by the legislature, and we construe these rules consistent with their purpose. *Wiley* at 343. Our review of the application of a court rule or law to the facts is de novo. *Id.*

a. The Trial Court

In this case, when the Arbitrator filed his clarified award the Appellant filed a motion to strike this award. CP 31-47. The Respondent sent the response to the Appellant via ABC Legal Messenger which he alleges in his brief served the wrong papers **but** also sent the documents via USPS as a failsafe.[1] CP 70-71. Judge Veronica Galvan subsequently denied this motion. CP 123-124.

One of the assignments of error argued to the Court of Appeals was that RCW 7.04A does not apply to RCW 7.06 Mandatory Arbitration

[1] Earlier in the arbitration proceedings, the Arbitrator ordered Respondent's counsel to send everything to Appellant via USPS without any signature, tracking information or return receipt requested due to Appellant's living situation; living in the middle of a national forest in Oregon. See *Appendix A*.

hearings, which even if true does not change the outcome of this case or the decision of the trial court. The "primary goal of the statutes providing for mandatory arbitration (RCW 7.06) and the [Mandatory Arbitration Rules] that are designed to implement that chapter is to 'reduce congestion in the courts and delays in hearing civil cases.'" *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997) (quoting *Perkins Coie v. Williams*, 84 Wn.App. 733, 737, 929 P.2d 1215, *review denied*, 132 Wn.2d 1013, 940 P.2d 654 (1997)).

Appellant cites *Malted Mousse, Inc. v. Steinmetz* as proof as to the inflexibility of the arbitration award once filed but *Malted Mousse* deals with the appeal of an adverse award to the Superior Court rather than through the statutory trial de novo method. Here, there was no intention for either party to appeal the **finding**, only to clarify the arbitrator's award so that payment could be made in the correct amount – which the Arbitrator succeeded in doing within 6 days of filing the award.

The Arbitrator made his intent known to the parties informally **within an hour of receiving the motion to clarify**. CP 61-69, Ex. A. It is argued that in this case, the motion was never even heard and the clarification was done *sua sponte* by the Arbitrator. The Arbitrator specifically told the parties to allow for the offset in determining the final amount of the

arbitration award. *Id.* The Appellant was sent a copy of the email from the Arbitrator that same day via USPS. CP 61-69, Ex. B. Appellant was sent the email as a paper copy because he had notified the parties that he no longer had electricity of internet and therefore could not accept electronic service. CP 28. With this clarification directly from the Arbitrator and the subsequent notice sent to the Appellant, there seemed no reason for Respondents to file a request for trial de novo. Appellant chose to not take advantage of this provision despite having knowledge of the award, the clarification from the Arbitrator and the time limit imposed on him. The Appellant was subsequently sent a check for the amount of the award minus the offset as instructed by the Arbitrator but to the surprise of the Respondents, it was voided and returned because (1) it was not from the Respondents themselves and (2) because it was not for the amount in the award. CP 61-69, Ex. C.

It is argued here that given the Arbitrator's communication of his intent for the award, the award was for all intents and purposes amended within the 14-day time limit pursuant to MAR 6.2 and solidified by the later filing. Thus, the Court did not err in denying the Appellant's motion to strike the amended arbitration award.

b. The Court of Appeals

The Court of Appeals did not err for much the same reasons that the trial court was free from error in its decision. The Court of Appeals reasoned that under MAR 6.2, an arbitrator may make such an amendment "either within 14 days after filing and service of the award or later, *only if allowed by the court.*" *Anderson* at 3. The Court of Appeals determined that the trial court was within its discretion to approve the late amendment by denying the Appellant's motion to strike the amended award after hearing his argument based on the same issue of timeliness. *Id.*

3. The Trial Court Did Not Err in Denying the Appellant's Motions to Enter Judgment

The review of the application of a court rule or law to the facts is de novo. *Wiley* at 343.

Appellant argues that there should have been mandatory entry of judgment after the 20 days after the filing of the award had expired. The Respondents do not disagree with his interpretation of the law, however Appellant has more than once failed to follow the *procedures* which govern that law and that is where the Respondents believe that Appellant is at fault, not the Court.

In the initial attempt to enter judgment, Appellant did not note a separate motion to enter judgment through the Ex Parte Department but rather cobbled it together with his motion to strike the amended arbitration award before Judge Galvan. CP 31-47. Respondents argued that the motion should have been separate from the motion to strike and not embedded within. CP 52-60. Appellant was sent this response via USPS and ABC Messenger on August 31, 2017. CP 70-71. A judgment on an award shall be presented to the Ex Parte Department, by any party, on notice in accordance with MAR 6.3. King County LMAR 6.3.

On his second attempt to enter judgment, Appellant noted the matter in Ex Parte but did not note it for in-person presentation as required by the local rules and as such Commissioner Velategui struck Appellant's noted hearing for September 18, 2017. CP 152.

Appellant argues through his Appendices 1-4 that the matter should have been submitted through the clerk rather than in person but Appendix 1 is simply a printout of the front page of the King County Clerk's webpage; Appendices 2 and 3 do not contain any information about presenting an Arbitrator's award for judgment; and Appendix 4 is a printout of the Mandatory Arbitration web page. Appellant's Brief, Appx. 1-4. Appendices 2-3 make reference to "Default Judgment," "Order

Extending Judgment" and "Order Confirming Arbitration Agreed/Stipulated" - none of which are the entry of a judgment on an Arbitration award.

King County has a local rule which specifically states how judgments on arbitration award are to be handled: "judgments on Arbitration awards shall be presented to the Ex Parte and Probate Department with notice to the other parties." KCLCR 40.1(b)(2)(E). "Matters required to be noted for hearing in the Ex Parte and Probate Department must be presented by the parties in person at the time of the noted hearing. Matters may not be noted in the Ex Parte and Probate Department for hearing without oral argument." KCLCR 40.1(b)(5)(A). The purpose of rules of court is to provide necessary governance of court procedure and practice. GR 9(a)(6). Failure to comply with the rules of court is directly contrary to the aims of the creation of the rules themselves: governance of court procedure and practice. The rules need to be taken more seriously. See *Lancaster v. Perry*, 127 Wn.App. 826, 113 P.3d 1 (2005).

Both of Appellant's attempts to enter judgment failed because of Appellant's inattention to the local rules not because of judicial error.

4. The Court Did Not Err in Imposing Sanctions on the Appellant

The standard of appellate review for CR 11 sanctions is the abuse of discretion standard. *Washington State Physicians Ins. Exch. & Ass'n* at 338–39.

The imposition of a CR 11 sanction is not a judgment on the merits of an action. *Biggs v. Vail*, 124 Wn.2d 193, 198, 976 P.3d 448 (1994). The question becomes whether it was manifestly unreasonable or based on untenable grounds. *Id* at 197; *Watson v. Maier*, 64 Wn.App. 889, 896, 827 P.2d 311, *review denied*, 120 Wn.2d 1015, 844 P.2d 436 (1992). Imposition requires the determination of a collateral issue: whether the [party] has abused the judicial process, and, if so, what sanction would be appropriate. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 396, 110 S.Ct. 2447, 110 L.Ed.2d 359 (1990).

It was argued in the motion for the imposition of sanctions that the reasons for the request were that Appellant's motion dealt with (1) the usage of Oregon law to determine the outcome where no such thing could occur and (2) the false statement by the Appellant in his pleadings that he had no knowledge of the subrogation payment to his insurance carrier by Respondent's carrier despite his acknowledgement of this fact during the arbitration hearing and the fact that a representative of the carrier was

present during the hearing and affirmatively confirmed this payment in his presence. CP 52-60. The Court decided in its discretion that only 2 of the 2.9 hours spent by Respondents' counsel in reviewing and responding to the adjudged-frivolous motion to strike should be compensated as a sanction for his disingenuous arguments. CP 61-69.

The Court did not exceed its discretion in that its sanction was not based on facts in evidence which were unreasonable or based on untenable grounds as required by the *Biggs* standard.

5. The Court Did Not Err in Granting the Temporary Restraining Order

The review of the application of a court rule or law to the facts is de novo. *Wiley* at 343.

The Court issued a temporary restraining order barring the entry of judgment ex parte for exactly two weeks from September 13, 2017 until September 27, 2017 when a show cause hearing was scheduled. CP 150-151. The petition for the order was made ex-parte pursuant to the local court rules. KCLCR 65(b); CR 65(b). Notice of the entry was given to the Appellant by email. CP 138-140. Appellant obviously had email access by this time per his email responses to Respondents' counsel on the day of entry, less than 2 hours before presentation of the petition. CP 132-134.

Commissioner Velategui issued this order after being informed that Judge Galvan's court was on recess and was unable to hear the Respondent's motion to strike the entrance until September 27, 2017. Appellant was immediately sent a copy of all from the temporary restraining order via email and the declaration of service was filed that same day pursuant to CR 5(b). CP 148-149.

A preliminary injunction serves the same general purpose as a temporary restraining order to preserve the status quo until the trial court can conduct a full hearing on the merits. *Northwest Gas Association v. Washington Utilities and Transportation Commission*, 141 Wn.App. 98, 168 P.3d 443 (2007), *rev. denied*, 163 Wn.2d 1049, 187 P.3d 750 (2008). At a preliminary injunction hearing, the movant need not prove, and the trial court does not reach or resolve, the merits of the issues underlying the three requirements for permanent injunctive relief. *Tyler Pipe Indus. v. Dep't of Revenue*, 96 Wn.2d 785, 793, 638 P.2d 1213 (1982). Instead, the trial court considers only the likelihood that the movant will ultimately prevail at a trial on the merits by showing (1) that he has a clear legal or equitable right, (2) that he reasonably fears will be invaded by the requested action and (3) the action will result in substantial harm. *Tyler Pipe* at 792–93.

The issuing Court was shown evidence that if judgment was entered before the trial court could review the motion to strike, harm could come to the financial wellbeing of the Respondents. Under *Tyler Pipe*, there was no need for the Respondents to have proved or for the issuing Court to have reached the merits of the case underlying because the *status quo* should have been maintained until the trial Court could hear the motion still pending during its recess.

Therefore, since the status quo needed to be maintained to keep financial harm from coming to the Respondents should the judgment have been entered prior to the hearing of the motion, the Court did not exceed its discretion in issuing the temporary restraining order for the 14 days that it existed.

6. No Rule or Statute Absolutely Requires Litigants to Arbitrate

Appellant argues in § E.3 of his petition that "Arbitration is Not Mandatory in King County" but argues that RCW 7.06.010 requires litigants to arbitrate their matters when their case is filed in a county with populations greater than 100,000. He further posits that the King County Local Rule LMAR 2.1 conflicts with RCW 7.06.010 and that this "allows both parties to escape it by just doing nothing." This argument is logically, factually, and legally incorrect.

King County LMAR 2.1(a) states in pertinent part that "[a] party **believing a case to be suitable for mandatory arbitration** pursuant to MAR 1.2 shall file a statement of arbitrability upon a form prescribed by the Court before the case schedule deadline." KCLMAR 2.1(a) (emphasis added). RCW 7.06.010 authorizes the Superior Courts to utilize mandatory arbitration when those cases fall within the definition of cases subject to civil arbitration as defined by RCW 7.06.020(1). RCW 7.06.010

There is no mechanism which absolutely requires that parties ***must*** litigate their matters. This is because in Superior Court, a Court of Unlimited Jurisdiction, the valuation of any case is simultaneously *zero* and *infinity* until a trier of fact determines or the parties themselves agree upon the true value of the case. Only in Courts of Limited Jurisdiction would an amount be capped by statute: $5,000.00 in Small Claims Court and $100,000.00 in District Court. Appellant had every opportunity to NOT file a Statement of Arbitrability if he felt either (1) that his case would exceed the statutory MAR limits or that (2) he was not satisfied with the state of the KCLMAR. He chose on his own volition to submit to the Arbitration Department and the KCLMAR. He cannot now argue that the statutes are in conflict with each other when there is no evidence of conflict even under a plain text reading of the laws.

VI. CONCLUSION

Respondents respectfully request that the Court DENY Appellant's petition and thus uphold the decisions of the trial court, the Superior Court commissioner, and the Court of Appeals. There is sufficient evidence for each ruling and verifiable reasons for their issuance.

Respectfully Submitted this 15th day of April, 2019.

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DYNAN & ASSOCIATES, P.S.

April 15, 2019 - 5:06 PM

Transmittal Information

Filed with Court:	Supreme Court
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Appellate Court Case Title:	Thomas Anderson v. Jennifer Jean Buksh and David Omar Buksh
Superior Court Case Number:	16-2-18992-0

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