No. 95801-7

THE SUPREME COURT

OF THE STATE OF WASHINGTON

MARK IPPOLITO,

Appellant,

v.

LEAH HENDERSON and JOHN DOE HENDERSON,

Respondents.

ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Cases

Regulations and Rules

I. INTRODUCTION

Respondent Leah Henderson respectfully requests this Court deny Appellant Mark Ippolito's petition for review of the April 3, 2018 published opinion of the Court of Appeals in *Ippolito v. Henderson*, 414 P.3d 609 (Wn.Ct.App. 2018). Contrary to Ippolito's contention, the decision is not in conflict with the prior opinion of the Washington Supreme Court (*Wiley v. Rehak,* 143 Wn.2d 339, 347 (2001), two prior opinions of the Court of Appeals (*Walji v. Candyco,* 57 Wash.App. 284, (1990) and *Nguyen v. Glendale Const. Co.*, 56 Wn.App. 196 (1989), or any other Supreme Court or Court of Appeals' opinion. Further, Ippolito does not allege the decision concerns a significant question of constitutional law or a substantial public interest, thus these conditions for review are not under consideration.

In *Ippolito*, the Court of Appeals unanimously affirmed the trial court's ruling prohibiting a voluntary dismissal. The majority opinion held that a plaintiff may not obtain a voluntary dismissal without prejudice *after* an arbitrator makes an award in mandatory arbitration. *Ippolito*, 414 P.3d at 610. The concurring opinion went further and concluded a plaintiff's right to obtain a voluntary dismissal is foreclosed even earlier—at the conclusion of "plaintiff's presentation of evidence *at the arbitration hearing*." *Id.* at 613 (emphasis theirs).

Here, Ippolito filed suit and transferred the matter into mandatory arbitration. An MAR arbitration award was entered and Ippolito requested a trial de novo. Before trial, however, Ippolito moved for voluntary dismissal under CR 41(a)(1)(B). The trial court denied the request and Ippolito appealed that denial.

The Court of Appeals found no error with the trial court's ruling. This holding is not in conflict with the three prior decisions specifically enumerated by Ippolito because:

(1) *Wiley v. Rehak* did not involve a voluntary dismissal under CR 41 and the Supreme Court was not asked to resolve whether the MARs foreclose a plaintiff from obtaining a voluntary dismissal following an arbitrator's award. Rather, the Supreme Court held that a plaintiff was entitled to attorney fees after an aggrieved defendant brought an unsuccessful, untimely trial de novo request. *Wiley*, 143 Wn.2d at 342, 348.

(2) *Walj v. Candyco* concerned whether a plaintiff had a right to a voluntary nonsuit under CR 41(a)(2) *without terms*. *Walji*, 57 Wash.App. at 286. As the trial court awarded attorney fees based on other grounds, the nonsuit issue was not analyzed by the Court of Appeals.

(3) *Nguyen v. Glendale Const. Co.* also involved an award of attorney fees following mandatory arbitration after the plaintiff requested

a trial de novo. *Nguyen*, 56 Wn.App. at 205. The issue of a voluntary dismissal was not at issue before the Court of Appeals.

If there is any "conflict" with the three specific decisions enumerated by Ippolito, it is with irrelevant and inapplicable dicta contained within those cases, not with their holdings. Thus, review of the holding herein is inappropriate.

II. ANSWER TO ISSUES PRESENTED FOR REVIEW

Ippolito does not raise any issue that meets the standards set forth in RAP 13.4(b). A petition for review may only be granted if the Court of Appeals' decision is in conflict with another Appellate or Supreme Court holding, or if the decision involves a significant question of law or an issue of substantial public interest. Ippolito does not claim that the decision involves a significant question of law or an issue of substantial public interest. Thus, the only issue presented is:

(1) Should this Court deny the Petition for Review because the decision does not conflict with any decision of the Supreme Court or any decision of the Court of Appeals?

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III. STATEMENT OF THE CASE

Ippolito filed suit alleging Henderson caused an automobile accident resulting in bodily injuries and damages. Ippolito transferred the matter into mandatory arbitration and the case was removed from the trial calendar. A hearing occurred and a MAR arbitration award was entered. Ippolito timely requested a trial de novo and the matter was placed back on the trial calendar. Before trial, however, Ippolito moved for voluntary dismissal under CR 41(a)(1)(B). The trial court denied Ippolito's motion. At trial, Ippolito presented no evidence and a directed verdict was entered. Ippolito then appealed the trial court's refusal to permit the voluntary dismissal without prejudice. *Ippolito*, 414 P.3d at 610.

The Court of Appeals unanimously affirmed the trial court's ruling prohibiting a voluntary dismissal. The majority opinion held that a plaintiff may not obtain a voluntary dismissal without prejudice after an arbitrator makes an award in mandatory arbitration. The concurring opinion went further and concluded a plaintiff's right to obtain a voluntary dismissal is foreclosed even earlier—at the conclusion of "plaintiff's presentation of evidence *at the arbitration hearing*." *Id.* at 613 (emphasis theirs).

IV. ARGUMENT — REVIEW SHOULD BE DENIED BECAUSE NO CONFLICT EXISTS

A petition for review will be accepted by the Supreme Court only if one of four conditions are met:

> (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 decision of another division 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. RAP 13.4(b).

None of these conditions are met. The Court of Appeals' decision is not in conflict with any decision of the Washington Supreme Court or the Court of Appeals, and Ippolito does not contend that the issue here involves a significant question of law or an issue of substantial public interest.

A. *Ippolito* Is Not In Conflict With a Decision of the Supreme Court

As recognized by the Court of Appeals in *Ippolito*, the issues in *Wiley v. Rehak*, 143 Wn.2d 339, 347 (2001) did not involve a voluntary dismissal under CR 41(a)(1): the Supreme Court "was not asked to resolve . . . whether the MARs foreclose a plaintiff from obtaining a voluntary dismissal following an arbitrator's award." *Ippolito*, 414 P.3d at 612.

Rather, the "Supreme Court held that a plaintiff was entitled to attorney fees after an aggrieved defendant brought an unsuccessful, untimely trial de novo request." *Id.* Even Ippolito acknowledges that the issue in *Wiley* was attorney fees: "In the Supreme Court decision in *Wiley v. Rehak*, the Washington Supreme Court noted that attorney fees may be awarded pursuant to MAR 7.3 where the appealing plaintiff voluntarily dismisses a de novo appeal prior to trial[.]" *Petition* at p. 6-7.

Wiley does not involve the issue presented here and does not conflict with the *Ippolito* decision.

B. *Ippolito* Is Not In Conflict With Other Decisions of the Court of Appeals

Walji is not in conflict with the *Ippolito* decision. In *Walji*, the lawsuit was sent to mandatory arbitration and the arbitrator made an award in favor of the defendant. Plaintiff requested a trial de novo. *Walji*, 57 Wash.App. at 286. Among other strategies, just before trial, plaintiff moved for voluntary dismissal under CR 41(a)(1)(B). The trial court denied the motion on the grounds that plaintiff had rested at the conclusion of its opening case.[1] Plaintiff did *not* appeal the order of dismissal. *Id.* Rather, on appeal, the issue before the court was whether plaintiff had a

[1] The grounds for denying the motion for voluntary dismissal under CR 41(a)(1)(B) are the same grounds found in the concurring opinion in *Ippolito v. Henderson.*

right to a voluntary nonsuit under CR 41(a)(2) *without terms*.[2] *Id.* However, since the trial court awarded attorney fees based on other grounds (the lease and MAR 7.3), the issue was not analyzed. *Id.*

Here, the Court of Appeals quickly disposed of Ippolito's misapplication of the *Walji* opinion by responding, "[b]ut *Walji* stated without any analysis that a voluntary dismissal was available following mandatory arbitration because its holding focused upon whether the dismissal should be with or without terms." *Ippolito*, 414 P.3d at 612. Like *Wiley*, there is no conflict.

Ippolito cites to, but does not analyze how *Nguyen* allegedly conflicts with *Ippolito*. Similar to *Walji*, *Nguyen* involved an award of attorney fees following mandatory arbitration after the plaintiff request a trial de novo. *Nguyen*, 56 Wn.App. 196 at 205. The issue of a voluntary dismissal was not at issue.

The issue presented here—whether a plaintiff may obtain a voluntary dismissal under CR 41(a)(1) after an arbitrator makes an award in mandatory arbitration—was decided in *Thomas-Kerr v. Brown*, 114 Wn.App. 554, and reaffirmed in *Ippolito*. None of the decisions cited by Ippolito are in conflict with these decisions.

[2] Unlike CR 41(a)(1), in which dismissals are mandatory, CR 41(a)(2) controls permissive dismissals.

C. A Concurring Opinion's Conflicting Analysis Is Not a Condition for Acceptance of Review

The Petition relies on the concurring opinion's alternative analysis (arriving at the same conclusion that Ippolito was not entitled to a voluntary dismissal under CR 41(a)(1)(B) following an arbitrator's award) for support that a conflict exists in case law. Extensive argument on the merits of the *Thomas-Kerr* decision is made by Ippolito. However, alternative analysis in a concurring opinion is not a basis for review. RAP 13.4(b). Moreover, if the analysis proposed in the concurring opinion were applied here, Ippolito's right to an involuntary dismissal under CR 41(a)(1)(B) would be cut-off at an earlier stage—after Ippolito rested his arbitration case, not after the award was entered. Thus, even under the analysis in the concurring opinion, Ippolito still would not get the relief he seeks.

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V. CONCLUSION

Respondent Leah Henderson respectfully requests this Court deny the Petition for Review because it is not in conflict with other decisions of this Court or the Court of Appeals.

DATED: June 6, 2018.

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CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

I certify under penalty of perjury of the laws of Washington that I caused to be delivered the following document to all parties or their attorneys of record on June 6, 2016, as follows:

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