

65523-0

65523-0

No. 65523-0-I

IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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ROBERT RUSSELL, an individual,

Respondent,

vs.

DEBRA LYNN MAAS,

Appellant,

and

DOES 1 through 10; ROE COMPANIES XI through XX,

Defendants.



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BRIEF OF RESPONDENT

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## **ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- I. Did the superior court properly strike the Request for Trial *de novo* when Maas stated under oath that she did not ask for nor direct anyone to file the request, Maas is the only named defendant in this case, and MAR 7.1 requires that a Request for Trial *de novo* be requested by the "aggrieved party"?
- II. Under MAR 7.1, should the court uphold the Order granting attorney fees and costs when Maas did not improve her position on the Trial *de novo* and she did not respond or object to the motion for attorney fees and costs?
- III. Under RAP 2.4 and 2.5, did Maas fail to timely appeal when the Notice of Appeal was not filed until 74 days after the Order striking the Trial *de novo* request and the Order awarding fees and costs does not incorporate the Order striking the Trial *de novo*?

## **STATEMENT OF THE CASE**

### **Substantive Facts**

This is a personal injury case where plaintiff was injured on defendant's property. CP 2-3. While staying temporarily at the Maas residence, plaintiff Russell was helping out by doing some painting of the exterior of the Maas house. CP 2. On February 1, 2005, Russell was up on a ladder, painting the exterior, in an area next to a raspberry bush. While on the ladder, it became unstable and Russell began to fall. CP 2.

Hidden in the bush was a piece of iron bar, several feet long and approximately 1 inch in diameter. The iron bar was being used to stake the

raspberry bush. CP 2. Russell fell onto the bar, sustaining a puncture wound to the back of his right upper thigh. CP 2.

### **Procedural Facts**

#### **A. Motion to Strike Trial *de Novo* Request**

A lawsuit was filed and the case was placed into MAR. CP 1-4, 19-20. On December 8, 2009, the MAR award in favor of Russell was filed by the arbitrator. CP 20. On December 18, 2009, a Request for Trial *de novo* was filed by Maas' attorney. CP 21.

Through Russell, it became known to plaintiff's counsel that defendant Maas had not sought the Trial *de novo*, but that it had been filed by her attorney, Brown, at the direction of Maas' insurer Allstate. CP 33. As a result, Brown was contacted and asked to withdraw the *de novo* request, or a motion to strike would be filed. CP 52.

Brown did not withdraw the request, so Russell's counsel wrote and asked for a convenient date on which to take Maas' deposition. CP 54. Brown responded by suggesting that a Declaration be drawn up for Maas' signature, instead of having her deposition taken. CP 56-57. That Declaration was drafted by Russell's counsel, with Brown's assistance. CP 56-57. Maas, however, ultimately decided not to sign the Declaration, and so her deposition was noted. CP 58, 60-71.

At Maas' deposition, every substantive question posed by Russell's counsel was objected to by Brown, who also instructed his client not to answer each of those questions based on attorney-client privilege. CP 64-69. The deposition was suspended. CP 69. Russell then filed a motion to strike the Trial *de novo* request. CP 32-43.

In the motion to strike, Russell argued that the request for Trial *de novo* should not have been filed because it had not been requested by the "aggrieved party," defendant Maas, but rather by her attorney, Brown. CP 33-37. Russell further argued that Maas' attorney did not have standing to request the Trial *de novo* as he was not an aggrieved party. CP 35-37.

Maas' counsel filed a response brief stating that Brown had authority to request the Trial *de novo*. CP 72-82. Maas' Declaration attached to the Response Brief stated only that "I do not object to the request for trial de novo...." CP 83-84. It did not affirmatively state that she requested the Trial *de novo*. CP 83-84.

The trial court held a hearing on March 26, 2010, and ordered Maas to appear. RP 1-28. At the hearing, Judge Yu stated she was addressing "a factual inquiry as to who is it that filed the request for Trial *de novo*. Was it an insurance company who's not a named party, was it Ms. Maas or was it somebody else." RP 17:15-18. At the hearing, Maas was placed under oath, and Russell's counsel, Boddy, and Judge Yu

questioned Maas regarding whether she had requested the Trial *de novo*.

(RP 15, 18-21.)

Boddy questioned Maas as follows:

Boddy: At any time since you learned of the arbitrator's decision in this case has it been your personal desire to have this case appealed and put in front of a jury?

Maas: I've —on a personal level I've gone back and forth. My own conclusion is I'm not sure that I care. I was hoping a decision would have been made or would have been accepted but it's not and I accept that.

Boddy: I'm unclear. You accept the arbitrator's decision?

Maas: I —

Boddy: Or you accept the *de novo* request?

Maas: Both

Boddy: Is a substantial part of your concern about these issues that you — that you personally are concerned that if you did not agree to the trial *de novo* request that you would lose your coverage with Allstate?

Maas: That is a question that I have.

Boddy: So at that time and before the trial *de novo* request was filed, was that your instigation?

Maas: Can you rephrase the question?

Boddy: **Did you request a trial *de novo*? Did you do that? Did you want that?**

Maas: **I did not do that.** But did I — I don't know how to answer the second question. It was—I **did not direct anyone to make that to happen.**

RP 19:8 – 20:8. (emphasis added)

Immediately after Boddy completed asking questions, Judge Yu questioned Ms. Maas:

Judge Yu: I have a question at this point in light of that and it's because I'm concerned and I want to phrase this very carefully.

Is it your concern, Ms. Maas, that if you were to do something else other than where we are today that you would lose your insurance coverage?

Ms. Maas: I don't know and it's a concern that I don't know.

RP 20:25 – 21:7.

Judge Yu then gave the following oral ruling:

After considering all of this and recognizing that there really is no true clear direction for this court, the only question that I believe I have to answer at this point is who is the aggrieved party and that seems pretty obvious that it's Ms. Maas. And having reviewed all of these materials as well as listening and seeing her today, **I'm not persuaded that she is the individual who made the decision to file this trial de novo. So I'm going to go ahead and grant the motion and I'm striking the request for a trial de novo.**

RP 24:22 – 25:6. (emphasis added)

Judge Yu signed the order striking the Trial *de novo* request on March 26, 2010. CP 94-95.

B. Award of Attorney Fees and Costs

Russell then filed a motion for award of attorney fees and costs pursuant to MAR 7.3. CP 96-107. Maas did not file a response brief. CP 149, 150. On May 13, 2010, the court entered an order awarding Russell fees and costs incurred subsequent to Maas filing the Trial *de Novo* Request under MAR 7.3, noting that Maas had not opposed the motion for fees. CP 150-152. The court awarded the \$50,000.00 arbitration award, \$1,431.68 in costs, and \$24,450.00, in fees, for a total of \$75,881.68. CP 150-152.

C. Untimely Filing of Notice of Appeal

On June 8, 2010, Maas filed the Notice of Appeal. CP 154-160. The Notice of Appeal was filed 74 days after the Trial *de novo* was stricken on March 26, 2010. Although the appeal was filed within 30 days of the Order granting attorney fees and costs entered on May 13, 2010, the May 13 Order did not in any way incorporate the Order from March 26, 2010. CP 150-152.

On June 9, 2010, Russell filed Respondent's Objection to the Notice of Appeal with the Court of Appeals requesting that the appeal be stricken as untimely. *Ob. to Notice of Appeal*. On June 29, 2010, Clerk Richard Johnson issued a letter stating that the Notice of Appeal appeared to be untimely filed and so scheduled a motion to dismiss the Appeal.

*Mot. to Dismiss Appeal.* Subsequently, Commissioner Neel issued an order stating the Notice of Appeal was timely. *Order re Notice of Appeal.*

On August 9, 2010, Russell filed a Motion to Modify Ruling, requesting that the Corrected Notation Ruling of Commissioner Neel be reversed. *Mot. to Modify.* On September 21, 2010, the motion was denied. *Order Denying Mot. to Modify.* This case then proceeded on appeal.

### **SUMMARY OF THE ARGUMENT**

Russell respectfully requests that the Court of Appeals affirm the trial court's judgment. The trial court properly entered the Order striking the Trial *de novo* request and properly entered the Order awarding the arbitration award and plaintiff's costs and attorney fees.

The trial court properly struck the Trial *de novo* request as it was not requested by an aggrieved party. MAR 7.1 states that an aggrieved party has a right to file for a Trial *de novo*. As the only named defendant in the case, Maas is the only person or entity with standing to file the Trial *de novo* request. As Maas did not request or direct the filing of the Trial *de novo*, the request was not filed by the aggrieved party. Filing a Trial *de novo* request is a substantive right and Maas, not her attorney, was the only person authorized to request a trial under MAR 7.1.

Additionally, the court properly entered the Order upholding the arbitration award and awarding plaintiff's costs and attorney fees. RCW 7.06.060 mandates that the superior court shall assess costs and reasonable attorney fees against a party who appeals an arbitration award and fails to improve his or her position on the Trial *de novo*. Additionally, *Kim v. Pham*, 95 Wn. App. 439 (1999), holds that where a party's request for Trial *de novo* does not proceed to trial because of a failure to comply with MAR 7.1, the non-requesting party is entitled to recover his attorney's fees because the appealing party failed to improve his position. This Trial *de novo* request failed to improve Maas' position. Therefore, attorney fees and costs are warranted and the trial court properly entered the order awarding such fees.

Moreover, Maas did not object to the entry of the Order Awarding Plaintiff's Costs and Attorney Fees Pursuant to MAR 7.3 at the trial court level, and cannot raise the issue for the first time on appeal.

Furthermore, Maas's appeal regarding the Order striking the Trial *de novo* request was untimely as it was filed more than 30 days after that order was entered.

Russell requests that the case be remanded to the trial court so that judgment may be entered on the MAR Arbitration Award and Order

Granting Attorney Fees and Costs, and so that further attorney fees and costs incurred in responding to this appeal may be granted.

## ARGUMENT

I. THE SUPERIOR COURT ACTED PROPERLY WHEN IT STRUCK THE TRIAL *DE NOVO* REQUEST BECAUSE THE AGGRIEVED PARTY MAAS DID NOT REQUEST THE TRIAL *DE NOVO*.

A. Standard of Review

An appellate court reviews challenged factual findings for substantial evidence and legal questions *de novo*. *Tomlinson v. Puget Sound Freight Lines, Inc.*, 166 Wn.2d 105, 109 (2009). An appellate court reviews a trial court's findings of fact for substantial evidence in support of the findings; evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Merriman v. Cokeley*, 168 Wn.2d 627, 631 (2010). A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *Id.* A trier of fact is in the best position to determine factual issues and an appellate court may not substitute its judgment for that of the trial court. *Thorndike v. Hesperian Orchards, Inc.* 54 Wn.2d 570, 575 (1959).

The Superior Court made a factual determination that Maas herself did not request the Trial *de novo*, and the appellate court may not disturb

that finding because it is supported by substantial evidence. Because Maas did not direct anyone to file the Trial *de novo* Request, the trial court's determination that Maas did not request the Trial *de novo* is supported by substantial evidence and must stand on appeal. Other issues presented are issues of law and should be reviewed *de novo*.

B. As the Only Named Defendant, Maas is the Only Aggrieved Party, and She Did Not Authorize or Direct the Filing of the Request for Trial *de Novo*.

Maas' failure to comply with MAR 7.1 provides ample basis for this Court to dismiss the Request for Trial *de novo*. MAR 7.1 requires strict compliance. *Vanerpol v. Schotzko*, 136 Wn. App. 504, 508 (2007) (citing *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815 (1997)). MAR 7.1 provides:

(a) Service and Filing. Within 20 days after the arbitration award is filed with the clerk, **any aggrieved party** not having waived the right to appeal may serve and file with the clerk a written request for a trial *de novo* in the superior court... (emphasis added)

This provision unambiguously requires a Request for Trial *de novo* to be filed by an "aggrieved party." Washington Courts have defined "aggrieved party" as one who is a party to the trial court proceedings and whose property, pecuniary, or personal rights were directly and substantially affected. *In re Hansen*, 24 Wn. App. 27, 35 (1979).

Non-parties and non-aggrieved parties have no standing to request a Trial *de novo* under MAR 7.1(a). *Wiley v. Rehak*, 143 Wn.2d 339, 347 (2001). A Request for Trial *de novo* filed by a non-aggrieved party is a nullity. *Id.* The *Wiley* case underscores the Washington Supreme Court’s insistence upon strict compliance with the “aggrieved party” requirement.

In *Wiley*, a Request for Trial *de novo* was inadvertently filed in the name of a party who had been earlier dismissed from the lawsuit. An attempt was made to amend the Request by adding the actual aggrieved defendant after the 20-day period had expired. The Court refused to allow the amendment stating:

This language indicates that the naming of the aggrieved party is a mandatory requirement. The word “shall” is an unambiguous term that generally imposes a mandatory duty.

*Wiley* at 347.

*Wiley* establishes that only an actual party to the lawsuit can be an “aggrieved party” for purposes of a Request for Trial *de novo*. Allstate Insurance Company, Ms. Maas’ insurer and the one at whose insistence Maas’ attorney filed the *de novo* request, is not an “aggrieved party” inasmuch as it has never been a party to the personal injury action brought by Russell. Only Maas qualifies as an “aggrieved party” for purposes of MAR 7.1(a).

C. The Rules of Professional Conduct Invest Maas with the Exclusive Authority to Make Decisions Regarding “Substantive Rights,” and Counsel Cannot Validly Request a Trial *de Novo* Without the Client’s Express Prior Permission.

In filing the Request for Trial *de novo*, Maas’ counsel took action affecting her substantive right to decide whether or not to appeal the arbitrator’s decision without her consent. RPC 1.2(a) precludes lawyers from acting without their client’s authority:

A lawyer shall abide by a client’s decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.

In interpreting an attorney’s right to unilaterally run a case, the Courts have found that an attorney may not waive, compromise, or bargain away a client’s substantive rights<sup>1</sup> without the client’s authorization and consent. *Graves v. P.J. Taggers Co.*, 94 Wn.2d. 298 (1980). As stated in *Graves* at page 303:

[...] an attorney is without authority to surrender a substantial right of a client unless special authority from his client has been granted him to do so [...] [This rule] assures that clients will be consulted on all important decisions if they so choose. [...] In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to

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<sup>1</sup> Some Courts refer to “substantive rights” and other Courts refer to “substantial rights.” For purposes of this brief, we will adopt “substantive rights.”

make decisions is *exclusively* that of the client ... [emphasis added]

The rule requiring client authorization when making decisions impacting substantive rights has been strictly enforced. In *Morgan*, an in-court settlement agreement was held to be invalid because, although the agreement was made in the presence of the client, the attorney did not have the client's informed consent to settle the matter. *Morgan v. Burks*, 17 Wn. App. 193 (1977).

Trial *de novo* following arbitration is treated as an appeal. *Thomas – Kerr v. Brown*, 114 Wn. App. 554, 558 (2002) The right to appeal is a “substantive right” and courts agree that a Request for Trial *de novo* also involves a substantive right. *See, e.g., Faraj v. Chulisie*, 125 Wn. App. 536, 542 (2004) (“*Chulisie's right to a trial de novo was a substantive right*”).

Additionally, it is irrelevant that Allstate is paying Maas' attorney's bills. RPC 5.4(c) expressly prohibits defense counsel from allowing Allstate to influence his professional judgment. Instead, defense counsel must exclusively represent the insured party, Maas, rather than the insurer, Allstate.

It is clear in the case at bar that Maas' counsel overstepped an attorney's authority with regard to one of Maas' substantive rights;

namely, her right as client to decide whether to appeal the arbitrator's award. Such a decision, to be binding and enforceable, must be specifically authorized by the client, not the entity paying the client's bills.

Further, any argument that Maas appeared through her attorney when the Request for Trial *de novo* was filed is invalid. In *Trowbridge v. Walsh*, 51 Wn. App. 727, 730 (1988), the defendants failed to appear at the arbitration but their attorney was present. The court held that the defendants were allowed to request a trial *de novo* under MAR 7.1 because they had participated through their attorney at the arbitration. *Id.*

The difference in our case is that the attorney in *Trowbridge* did not act in any way that impacted the defendants' substantive rights. In fact, the attorney in *Trowbridge* was, presumably, acting in concert with his client's wishes by presenting the client's case at arbitration. Here, as explained above, by filing a Request for Trial *de novo*, Maas' attorney made a unilateral decision to appeal the arbitrator's decision, thus impacting Maas' substantive rights, and not acting in accordance with his client's directives. That is not allowed.

Additionally, although the Court and other parties are entitled to rely upon authority of an attorney representing a client, an attorney is not allowed to bargain away a client's substantive rights. *Lane v. Brown & Haley*, 81 Wn. App. 102, 108, *rev. denied* 129 Wn.2d 1028 (1996). In

*Lane*, the attorney was determined to have not bargained away substantive rights when he neglected to investigate possible sources of notice evidence, choosing instead to rely on an erroneous legal theory. *Id.* As discussed, a client's right to pursue a Trial *de novo* is a substantive right.

Because Maas did not direct the filing of the Request for Trial *de novo*, and because the decision to appeal or to instead accept an arbitration award is a "substantive right," the Request in this case is invalid and must be stricken.

D. The Public Policy Underlying MAR 7.1 Mandating Strict Compliance Also Requires that the Order Striking the Request for Trial *de Novo* Be Upheld.

By enacting the Mandatory Arbitration Program set forth in RCW 7.06, the Washington Legislature intended to reduce court congestion and delays in hearing civil cases. *Nevers v. Fireside*, 133 Wn.2d 804, 815 (1997). In recognition of those goals, the Washington Supreme Court held that allowing substantial compliance, as opposed to strict compliance, with MAR 7.1 would subvert the Legislature's intent by contributing to increased delays. *Id.* Here, Allstate's strategy is in direct opposition with the legislative intent behind the Mandatory Arbitration Program.

Allstate likely had no intention of resolving this case in arbitration. Instead, Allstate sought to use the arbitration process to wear out the Plaintiffs with a dress rehearsal of what would be the real performance in

a trial *de novo*. This would allow defense counsel to get a complete look at the Plaintiffs' case and its supporting evidence. This approach subverts the legislative purpose behind the Mandatory Arbitration Program and thus forms yet another basis for granting Plaintiff's motion.

E. The Court Properly Questioned Maas Regarding Whether She Requested the Trial *de Novo* as the Communications at Issue were Not Intended to be Confidential and the Court Only Requested Maas' Personal Opinion.

Attorney-client privilege applies only to communications that are intended by the party to be confidential. *Seattle Nw. Sec. Corp. v. Sdg Holding Co.*, 61 Wn. App. 725 (1991). Communications which an attorney must make public, or are made for that purpose, are not confidential and not privileged. *Green v. Fuller*, 159 Wash. 691, 695, (1930). Papers and documents are not privileged if a third party knows they exist, or the contents are accessible to the public. *Id.*; *State v. Sullivan*, 60 Wn.2d 214, 217 (1962); *Seattle Nw. Sec. Corp. supra*. Therefore, if the communication is intended to be disclosed to others, it is not protected by the attorney-client privilege. *Sullivan, supra*, at 217-18.

In this case the communication at issue was expressly intended to be disclosed to others. Where a Trial *de novo* request is filed, the result of an attorney's consultation and communication with a client is expressly intended to be made public -- in the form of the *de novo* request itself.

Furthermore, the questions posed to Maas had been carefully framed to seek out only what her personal position was as to the *de novo* request. Not a single question sought any communication between her and her attorney, but sought only to discover what her personal intentions and desires were relative to the *de novo* request. The underlying facts of an attorney-client communication are not privileged. *McCormick on Evidence*, §93. Therefore, even if Maas discussed a Trial *de novo* Request with her attorney, her personal position regarding whether she wanted to file the *de novo* request is not privileged.

II. THE ORDER AWARDING ATTORNEY FEES AND COSTS TO RUSSELL SHOULD BE UPHeld BECAUSE MAAS DID NOT IMPROVE HER POSITION ON THE TRIAL *DE NOVO* AND SHE DID NOT OPPOSE THE ENTRY OF THE ORDER.

A. Maas Failed to Improve Her Position on the Trial *de Novo* Because She Owes the Same Amount of Damages After Filing the Request.

“The superior court shall assess costs and reasonable attorneys’ fees against a party who appeals the award and fails to improve his or her position on the trial *de novo*.” RCW 7.06.060; MAR 7.3. Where a party’s request for trial *de novo* does not proceed to trial because of a failure to comply with MAR 7.1, the non-requesting party is entitled to recover his attorney’s fees because the appealing party failed to improve his position.

*Kim v. Pham*, 95 Wn. App. 439 , 445-446 (1999). *Wiley v. Rehak*, 143 Wn.2d 339, 348.

Although this case did not proceed to a Trial *de novo*, it is not required in order for the court to award fees under this rule. This court affirmed an award of attorney fees in a virtually identical case in *Kim v. Pham*, 95 Wn. App. 439 (1999). In *Kim*, Pham’s Request for Trial *de novo* was stricken because Pham did not file the required written proof of service. In language controlling the instant case, Division I said that:

MAR 7.3 does not directly address the instant case because it was neither adjudicated on the trial *de novo* nor was Pham's request “voluntarily” withdrawn. Although not explicitly stated, we interpret MAR 7.3 as requiring a mandatory award of attorney fees when one requests a trial *de novo* and does not improve their position at trial because they failed to comply with requirements for proceeding to a trial *de novo* such as MAR 7.1(a).

We affirm the trial court's decision to reinstate the arbitrator's award and grant Kim's request for attorney fees on appeal.

*Id.* at 446-447.

Similarly to *Kim*, this case did not proceed to a jury trial; rather, the Request for Trial *de novo* was stricken by the Court. As with Pham in *Kim*, MAR 7.1(a) is the exact same provision that Maas failed to comply with and was the basis for the Court’s Order Striking the *de novo* Request.

Maas owed the same amount to Russell in damages today as she did on the day the Arbitration Award was filed. Thus, she did not “improve her position” by filing the Trial *de novo* request. This Court should uphold the award of reasonable attorney fees and costs in the present case.

B. The Order Granting the Arbitration Award was Not Improper per MAR 6.3

Maas states that an arbitration award cannot be entered per MAR 6.3 if a party files a *de novo* request. (*Br. of Ap., 18.*) However, MAR 6.3 states in part

If within 20 days after the award is filed no party has sought a trial *de novo* under rule 7.1, the prevailing party on notice as required by CR 54(f) shall present to the court a judgment on the award of arbitration for entry as the final judgment.

MAR 6.3 refers to judgment on the award; not an order granting the arbitration award. Judgment has not yet been entered in this case as the Notice of Appeal was filed before Russell entered the judgment.

Therefore, the order granting the award was not improper per MAR 6.3.

C. Maas Did Not Object to the Order Granting the Arbitration Award and Awarding Fees and Costs and May Not Raise the Issue for the First Time on Appeal.

The appellate court may refuse to review any claim of error which was not raised in the trial court. *RAP 2.5(a)*. A party may raise only lack

of trial court jurisdiction, failure to establish facts upon which relief may be granted, and manifest error affecting a constitutional right in order to raise the issue for first time in the appellate court. *RAP 2.5(a)*.

Maas did not object or respond to “Plaintiff’s Motion for Award of Attorney Fees and Costs Pursuant to MAR 7.3,” and the Order was entered on May 13, 2010. This is not an issue of lack of jurisdiction, failure to establish facts, or a manifest error affecting a constitutional right that may be raised for the first time on appeal. This is simply an order granting an arbitration award and fees. As Maas did not object to the motion, she has waived her right to raise the issue on appeal.

III. MAAS DID NOT TIMELY APPEAL BECAUSE SHE DID NOT FILE THE APPEAL WITHIN 30 DAYS OF THE ORDER STRIKING THE TRIAL *DE NOVO* REQUEST AND THE ORDER REGARDING FEES DOES NOT INCORPORATE THE ORDER STRIKING THE TRIAL *DE NOVO*.

A notice of appeal must be filed with 30 days after the entry of the decision of the trial court that the party filing the notice wants reviewed. *RAP 5.2(a)*. A necessary prerequisite to appellate jurisdiction is the timely filing of the notice of appeal. *Brower v. Pierce County*, 96 Wn. App. 559, 562 (1999).

A. Maas Did Not Timely Appeal the Order Striking the Trial *de Novo* Request Because She Did Not File the Appeal Within 30 Days of that Order, and the Order Granting Attorney Fees and Costs did Not Extend the Time to File an Appeal.

A timely notice of appeal of a trial court decision relating to attorney fees and costs does not bring up for review a decision previously entered in the action that is otherwise appealable unless a timely notice of appeal has been filed to seek review of the previous decision. *RAP 2.4(b)*.

*Ron & E Enterprises Inc.* clarifies the standard stating:

“RAP 2.4(b) allows a timely appeal of a trial court's attorneys' fees decision, but makes clear that such an appeal does not allow a decision entered before the award of attorney fees to be reviewed (i.e. it does not bring up for review the judgment on the merits) unless timely notice of appeal was filed on *that* decision.”

*Ron & E Enters., Inc. v. Carrara, LLC*, 137 Wn. App. 822, 825 (2007).

(emphasis in original)

In *Ron & E Enterprises, Inc.*, the superior court granted a summary judgment motion dismissing Carrara's claims on July 8, 2005. On August 9, 2005, the trial court granted Ron & E's motion for attorney fees and costs, and on September 22, 2005, the court entered judgment ordering Carrara to pay the attorney fees granted to Ron & E by the August 9 order. On October 21, 2005, Carrara filed a Notice of Appeal of the July 8 order Granting Ron & E's Motion for Summary Judgment and the September 22 Judgment Granting Defendant's Motion for Fees and Costs. *Id* at 824-825. The appellate court ultimately dismissed the appeal of the summary judgment, stating that Carrara had until August 8, 2005, to

file a notice of appeal of the judgment; 30 days after summary judgment had been granted. The appeal of the summary judgment was untimely as Carrara did not file the appeal until October 21, 2005. *Id.* at 826. The court did state that Carrara's appeal of the award of fees was timely, but that Carrara could not couch the appeal of the summary judgment order in its appeal of attorney fees. *Id.*

Similarly to Carrara in *Ron & E*, Maas did not file a Notice of Appeal of the March 26, 2010, Order striking the Trial *de novo* request within 30 days of that order. Instead, as did Carrara, Maas waited until after the May 13, 2010, order granting attorney fees and costs was entered to file the Notice of Appeal. The Order striking the Trial *de novo* request was entered on March 26, 2010, and the Notice of Appeal was not filed until June 8, 2010; 74 days after. Therefore, even though Maas did file the Notice of Appeal within 30 days of the May 13, 2010, Order regarding fees, she did not file it within 30 days of the Order striking the Trial *de novo* request.

As with Carrara in *Ron & E*, Maas may not couch her appeal of the motion to strike the Trial *de novo* request in her appeal of the order granting attorney fees and costs. Therefore, even if the court determines that the notice of appeal of the May 13, 2010, order was timely, Maas' Notice of Appeal of the Order striking the Trial *de novo* request was not.

The appeal of the Order striking the Trial *de novo* request should therefore be dismissed as untimely.

B. Filing a Notice to Appeal the Order Striking the Trial *de Novo* Within 30 Days of the Order Awarding Fees and Costs Does Not Extend the Time to Appeal that Issue Because the Order Regarding Fees Does Not Incorporate Any Part of the Order to Strike.

Appeal must be filed within 30 days of a final, appealable order.

*Dix v. ICT Group, Inc.* 125 Wn. App. 929, 933 (2005), reconsideration denied, review granted 155 Wn.2d 1024, affirmed 160 Wn.2d 826.

In *Dix*, AOL contended that Ms. Dix and Mr. Smith's appeal was untimely because it had been filed on February 17, 2004, more than 30 days after the court had entered a letter opinion on January 5, 2004. *Dix at* 933. The letter opinion was later incorporated into a final judgment, entered on January 23, 2004. *Id.* The court ruled that the final, appealable order was the January 23 order that incorporated the January 5 opinion letter, and therefore, the notice of appeal was timely as it was filed within 30 days of that order. *Id.*

Contrary to *Dix*, where the order incorporated the opinion letter and then became the final appealable order, the court's May 13, 2010, order regarding fees did not incorporate the March 26, 2010, order striking the Trial *de novo*. Therefore, the order striking the Trial *de novo* request was the final, appealable order. In order to be timely, Maas would have

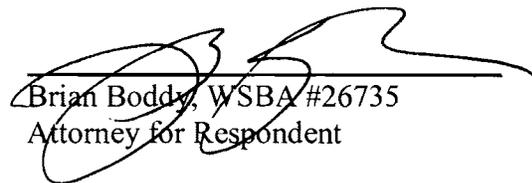
had to file an appeal within 30 days of the March 26 order to strike. Filing a Notice to appeal the Order striking the Trial *de novo* within 30 days of the Order awarding fees and costs does not extend the time to appeal the issue because the Order regarding fees does not incorporate any part of the Order to Strike.

Maas did not file her Notice of Appeal within 30 days of the decision of the order striking the Trial *de novo* request and no exception applies that would allow her to file outside of the 30 days. Therefore, the appeal was not timely.

#### **PRAYER FOR RELIEF**

For the reasons explained above, respondent Robert Russell respectfully requests that the Court of Appeals affirm the trial court's judgment. Russell requests that the case be remanded to the trial court so that judgment may be entered on the MAR Arbitration Award and Order Granting Attorney Fees and Costs, and that further attorney fees and costs incurred in responding to this appeal may be granted.

Respectfully submitted this 13<sup>th</sup> day of January, 2011.

  
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Attorney for Respondent