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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON

No. 66557-0-I

2011 JUL 25 PM 1:10

COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

DENISE V. ENGSTROM,

Petitioner,

vs.

REBECCA HARDESTEN,

Respondent.

RESPONDENT'S RESPONSE BRIEF

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I. INTRODUCTION

Rebecca Hardesten is the Respondent and was the Defendant in Superior Court. She is represented by her attorney Debora A. Dunlap.

II. ISSUES PRESENTED

1. Whether the Court should strike references to evidence and material that was not presented to the judge who ruled on the orders being appealed here?
2. Whether the Trial Court abused its discretion when it struck the declarations of Appellant's Attorney and Defendant Hardesten obtained in violation of RPC 4.2 preventing an attorney from communicating with a represented party?
3. Whether the Trial Court abused its discretion when it denied Ms. Engstrom's Motion to Strike the Request for a Trial De Novo when the request fully complied with the requirements of RCW 7.06.050 and MAR 7.1(a)?

III. STATEMENT OF THE CASE

This case stems from a low-speed automobile accident that Petitioner submitted to Mandatory Arbitration. Following Arbitration, the Respondent, through her attorney, timely filed a de novo appeal which Petitioner does not contest. (CP 114-15) At the time, Ms. Hardesten was represented by Philip Welchman, who filed the de novo request along with the certificate of service within 20 days of the arbitration award being filed. Id. This request properly identified that Rebecca Hardesten (defendant below) requested a trial de novo from the award filed by the

arbitrator on October 6, 2010, and was substantially in the form provided by MAR 7.1(a). Id. As a result of the compliance with MAR 7.1(a), the arbitration award was sealed by the superior court and the case was set on the trial calendar.

Without the knowledge or consent of her attorney, during the month of November 2010, Ms. Hardesten had direct contact with Petitioner's counsel, John Williams, regarding the case. (CP 102-03) Based on the record it is unclear what the first communication between Ms. Hardesten and Attorney Williams was or how it was initiated. Id. Regardless, rather than cease communicating with Ms. Hardesten, as is required by the Rules of Professional Conduct, Attorney Williams proceeded to engage in several conversations with a represented party and even obtained a declaration of Ms. Hardesten that he subsequently attempted to use to her detriment. The Trial Court ruled:

COURT: It is clear to me that you have engaged in prohibitive contact with a represented individual not only once, but numerous times, and have submitted a declaration that she has signed to the Court when she was represented in violation of the RPCs.

(Verbatim Report of Proceedings "VP", pg. 8 lns. 10-14).

It is undisputed that Ms. Hardesten's attorney had no knowledge of these communications and certainly did not consent to them. (CP 74-75, 288-290). It is also undisputed that Ms. Hardesten's attorney, Phillip

Welchman had not withdrawn or been terminated by Ms. Hardesten at the time that she communicated with Attorney Williams regarding this case.

Id.

Having engaged in several ex parte communications with a represented individual, as well as securing a declaration of the individual to the represented party's detriment, Attorney Williams then moved the superior court to strike Ms. Hardesten's request for a trial de novo. (CP 101-11). In support of the motion Attorney Williams filed his own declaration as well as the declaration of Ms. Hardesten which he had impermissibly obtained. (CP 112-13). The declaration of Attorney Williams set forth that he communicated with Ms. Hardesten on multiple occasions, one of which resulted in Attorney Williams drafting and obtaining a signed declaration from Ms. Hardesten on his pleading paper. (CP 103).

Ms. Hardesten's former attorney was shocked by the fact that Attorney Williams had communicated with his client without first obtaining his permission.

Respondent through present counsel¹ moved to exclude the declarations of Attorney Williams and Ms. Hardesten that were obtained in violation of RPC 4.2 and to disqualify Attorney Williams from further

¹ Present counsel did not appear until after the motion to strike trial de novo was filed and served.

representation of Ms. Engstrom. (CP 50-57). Respondent also asked for sanctions against Petitioner for the frivolous motion and flagrant violations of the RPCs.² Both motions were heard by Judge Joseph Wilson on December 17, 2010. (CP 41-46).

For the first time on appeal Appellant makes an assertion that there was some prejudice caused by the motion to shorten time and consider the motion to strike declarations of Attorney Williams and Ms. Hardesten that were obtained in violation of RPC 4.2. It is noted that the record is devoid of any objection on the record at the hearing on December 17, 2010, or in the Clerk's Papers and therefore cannot be heard for the first time on appeal. Smith v. Shannon, 100 Wash.2d 26, 37, 666 P.2d 351 (1983); RAP 2.5.

Judge Wilson was so shocked by Petitioner's egregious conduct that he awarded a \$3,000 sanction based on the frivolity of the Appellant's motion and violation of CR 11 by Attorney Williams. As Judge Wilson advised Attorney Williams:

THE COURT: I think given the comments that you just indicated to me, I don't really think you really have an appreciation of the violation that you have engaged in or a complete understanding of what the nature of the law is in regards to the relationship between the insurer and the insured and what obligation each has under the contract as

² Present defense counsel substituted only days before the motion with insufficient time to locate and secure their own declaration of Ms. Hardesten to oppose the motion to strike trial de novo.

formulated between the two of them. CR 11 sanctions are appropriate. Your pleadings are unfounded, not based on law, not based on fact, not based in a good faith effort to change the law or public policy...

So I'm denying that [disqualification] motion without prejudice. It may be that the bar association is going to have a different opinion about that and that can be – that's why I'm denying it without prejudice.

(VP, pg. 12:9-18 and 9:8-11)

Judge Wilson was particularly troubled by the number of prohibited contacts which Attorney Williams had with Ms. Hardesten.

(VP, pg. 8 lns. 10-14).

Seeing the writing on the wall, Attorney Williams appropriately withdrew from the case on December 20, 2010. However, the case was transferred to new counsel, Mark Olson, who shares office space with Attorney Williams. (CP 33-40).

Picking up right where Attorney Williams left off, Appellant continues to try and utilize the very same information that Judge Wilson found to be prohibited and in violation of RPC 4.2 and had struck from the record. (See CP 112-13). With Judge Wilson's opinions at the motions it was expected Attorney Williams would understand the gravity of his actions such that when the case was transferred to a new attorney for the Appellant, that Attorney Williams would shield and not pass on the

improper evidence that had been obtained. Unfortunately, that was not the case.

Instead, Appellant's new counsel decided to take it further. Appellant sought to compel answers to Requests for Admission seeking to delve into the attorney-client relationship and inquire into the communications which Attorney Welchman had with his client regarding the request for the trial de novo. (CP 20-22). As would be expected, Ms. Hardesten's attorney objected, asserting the attorney-client privilege to prevent disclosure of the privileged communications which occurred. (CP 266-71). This was followed by another misguided effort to bring another motion to strike the request for trial de novo which Judge Wilson had already denied.

The commissioner for the superior court granted Appellant's request to compel answers to the Requests for Admission. (CP 6-7). Respondent immediately moved the Superior Court to revise the order to compel. (CP 201-07). Superior Court Judge David Kurtz considered the motion for revision and reversed the commissioner's decision "based upon the 12/47/10 ruling by Judge Wilson, Plaintiff's Motion to Compel Answers to Second Requests for Admission is REVISED and the Motion to Compel Answers to Second Requests for Admission is now hereby DENIED." (CP 2). The reasoning was because the Requests for

Admission were irrelevant due to Judge Wilson's prior order rejecting Appellant's Motion to Strike Trial De Novo. Id.

Of note, Appellant has only appealed the two orders which were entered by the Trial Court on December 17, 2010. (CP 33-40). These are the only two orders that were accepted for review. At the hearing the Trial Court considered the following documents related to Appellant's request to strike the trial de novo request:

1. Plaintiff's Motion to Strike Defendants' Request for Trial De Novo; Motion for Entry of Judgment Pursuant to Arbitration Award; And Motion for Award of Attorney's Fees and Costs; (CP 101-111)
2. Response to Plaintiff's Motion to Strike De Novo, Entry of Judgment and Motion for Attorney's Fees and Costs; (CP 58-71).
3. Declaration of Debora Dunlap in Support of Defendants' Response and attachments thereto; (CP 78-100)
4. Declaration of Philip Welchman. (CP 288-290).
(CP 36).

These were the only documents considered by the Trial Court because it had stricken the declarations of Attorney Williams and Rebecca Hardesten because they were obtained in violation of RPC 4.2. (CP 38-

40).

Judge Wilson also considered Ms. Hardesten's Motion to Strike Declarations of Rebecca Hardesten and John M. Williams from Consideration in the Plaintiff's Motion to Strike Defendants' Request for Trial de Novo, Entry of Judgment Pursuant to Arbitration Award, and Motion for Award of Attorney's Fees and Costs and the Declaration of Debora A. Dunlap filed in support of that motion. (CP 39).

Judge Wilson found that the two declarations "contain information improperly obtained from the defendant by John M. Williams in impermissible ex parte contact when Ms. Hardesten was represented by counsel who was not present." (CP 39). As a result the two declarations were stricken from the record. Id.

On appeal, Appellant seeks to place material filed in subsequent hearings before this Court for consideration. A separate motion to strike that material will be brought before the Court. Respondent notes it too designated documents that were considered at subsequent hearings. However, those documents were only submitted if the Court decides to consider material filed in those subsequent hearings, which Respondent believes it should not.

IV. ARGUMENT

A. Documents That Were Not Before Judge Wilson On

December 17, 2010 Must Be Excluded

“[A] record on appeal may not be supplemented by material which has not been included in the trial court record.” Sneidgar v. Hoddersen, 114 Wn.2d 153, 164, 786 P.2d 781 (1990). See also Jacob’s Meadow Owners Ass’n v. Plateau 44 II, LLC, 139 Wn.App. 743, 754-55, 162 P.3d 1153 (2007) (“It is our task to review a ruling on a motion for summary judgment based on the precise record considered by the trial court.”).

An analogous rule is RAP 9.12 which states:

On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court.

The rule is clear, evidence which was not before the trial court will not be considered on review. Id. Green v. Normandy Park, 137 Wn. App. 665, 678, 151 P.3d 1038 (2007) (“It is the appellate court’s task to review a ruling on a motion for summary judgment based solely on the record before the trial court.”). This rule explicitly applies to summary judgment motions, but the same reasoning should be applied to Appellant’s motion to strike trial de novo as it would have similar effect as a summary judgment motion since it is essentially a dispositive motion that would terminate review of the case.

Appellant is only appealing the December 17, 2010 orders. Therefore she is limited on appeal to the record that was before the trial court when that issue was addressed. Id. As the court order denying Appellant's motion to strike de novo identifies, Judge Wilson only considered the following documents: (1) Petitioner's Motion to Strike Defendants' Request for Trial De novo, (2) Response to Plaintiff's Motion to Strike De Novo, (3) Declaration of Debora A. Dunlap in Support of Defendants' Response, and (4) Declaration of Phillip Welchman. (CP 36) The only other documents which were submitted were the declaration of John Williams and Rebecca Hardesten which were stricken from the record by Judge Wilson. (CP 39).

Respondent also appropriately moved to strike the additional declaration of Attorney Williams filed on January 19, 2011. (CP 272-79) Therefore that issue is preserved for this Court to consider to the extent necessary for this motion.

B. The Declarations Of Attorney Williams And Rebecca Hardesten Were Obtained In Gross Violation Of RPC 4.2 Preventing An Attorney From Contacting A Represented Party Regarding The Pending Litigation And Thus The Order To Strike Was Proper

Trial Court orders excluding evidence at hearings and trial are reviewed for an abuse of discretion:

We review a trial court's decision to admit or exclude

evidence for abuse of discretion. An abuse of discretion occurs if “discretion [is] manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.”

City of Kennewick v. Day, 142 Wn.2d 1, 5, 11 P.3d 304 (2000) (quoting State v. McDonald, 138 Wash.2d 680, 696, 981 P.2d 443 (1999)). Judge Wilson’s order striking the two declarations certainly cannot be said to rise to the level of an abuse of discretion.

Washington rules are unambiguous, and prohibit attorneys from communicating with a represented party pursuant to RPC 4.2:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

See also Smith v. Orthopedics Intern., LTD., P.S., 170 Wn.2d 659, 244 P.3d 939 (2010) (Finding contact with a treating physician through the doctor’s attorney to be impermissible contact); In re Disciplinary Proceeding Against Haley, 156 Wn.2d 324, 126 P.3d 1262 (2006); Matter of Firestorm 1991, 129 Wn.2d 130, 916 P.2d 411 (1996) (Holding that ex parte contact with an expert is prohibited); Loudon v. Mhyre, 110 Wn.2d 675, 759 P.2d 138 (1988) (Holding that ex parte contact with a treating physician despite the waiver of the physician-patient privilege is prohibited).

Judge Wilson clearly understood this issue when he issued his ruling:

It is clear to me that you have engaged in prohibitive contact with a represented individual not only once but numerous times, and have submitted a declaration that she has signed to the Court when she was represented, in violation of the RPCs.

(VP, pg. 8 lns. 10-14).

Appellant argues that Attorney Williams received an unsolicited email from Ms. Hardesten and that somehow cleanses the taint. (App. Brief at 20). However, such does not justify his having considered or relied upon the email in anyway, shape or form, when he contacted her electronically through email or by telephone.

The official comments to RPC 4.2 clearly articulates Attorney Williams's obligation to ensure Ms. Hardesten was not represented when he engaged in contact with her:

[3] The Rule applies even though the represented person initiates or consents to the communication. A lawyer must immediately terminate communication with a person if, after commencing communication, the lawyer learns that the person is one with whom communication is not permitted by this Rule.

[6] A lawyer who is uncertain whether a communication with a represented person is permissible may seek a court order. A lawyer may also seek a court order in exceptional circumstances to authorize a communication that would

otherwise be prohibited by this Rule, for example, where communication with a person represented by counsel is necessary to avoid reasonably certain injury.

See also In re Disciplinary Proceedings Against Carmick, 146 Wn.2d 582, 598, 48 P.3d 311 (2002) (“Where there is a reasonable basis for an attorney to believe a party may be represented, the attorney's duty is to determine whether the party is in fact represented.”).

While Ms. Engstrom argues that her prior attorney, Mr. Williams, may have been lead to believe that Ms. Hardesten was seeking new counsel, such does not obviate the fact that Ms. Hardesten did not advise she had terminated Welchman’s representation of her. At best she advised she was consulting with other counsel to determine her rights. It is a statement of the obvious, but until Mr. Welchman’s representation was terminated, he was Ms. Hardesten’s counsel of record and Ms. Hardesten was a represented party.

As the comments make abundantly clear, any confusion created by Ms. Hardesten’s contact with Attorney Williams triggered the necessity for Attorney Williams to call Ms. Hardesten’s attorney to verify and confirm the relationship had in fact been terminated. Id.

Making Attorney Williams’ conduct even more egregious is the fact that Ms. Hardesten was an unsophisticated individual who did not understand the impact of her comments or fully appreciated her rights at

the time she was speaking with Attorney Williams. This clearly distinguishes Appellant's citation to the Texas decision of In re users System services, Inc., 22 S.W.3d 331, 42 Tex. Sup. Ct. J. 836 (1999).

In the Texas case, the represented individual was a sophisticated businessman who not only initiated contact, but specifically advised that he had in fact terminated his attorney and was proceeding pro se. Such a representation is a far cry from what happened here where Ms. Hardesten at best said she was consulting with attorneys because she was **considering** retaining new counsel. She did not say she had terminated Attorney Welchman and was proceeding pro se. Even if she had, Attorney Williams should have terminated the contact and inquired of Attorney Welchman whether he had in fact been terminated or whether he was still representing Ms. Hardesten.

There is no excuse; Attorney Williams was on notice that Ms. Hardesten had not yet terminated her attorney. While there may have been questions regarding her rights and duties, Attorney Welchman was still representing Ms. Hardesten and Attorney Williams had an obligation to either obtain a court order or consent of Ms. Hardesten's counsel prior to engaging in any communication with Ms. Hardesten. RPC 4.2.

This was recognized by Judge Wilson who ruled:

The remedy for [improper contact], as indicated even in the

case yesterday, I believe is to strike that declaration and have the Court not consider it. That's the proper remedy. It's improperly in front of me. It was obtained in violation of the RPCs. It was information that would not be in front of me but for your violation of the RPCs. The Motion to Strike the declaration is granted.

(VP, pg. 8 lns. 14-21).

Attorney Williams' conduct violated RPC 4.2 and his declaration as well as the declaration of Ms. Hardesten were properly excluded. It certainly is not an abuse of discretion for Judge Wilson to have granted the order.

Exacerbating the RPC violation, Attorney Williams then shared the information with the subsequent attorney who now represents Appellant, in violation of CR 26 which provides in relevant part:

If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; and must take reasonable steps to retrieve the information if the party disclosed it before being notified. Either party may promptly present the information in camera to the court for a determination of the claim.

CR 26(b)(6). Once Attorney Williams was aware of the claim of privilege he was not to disseminate the information to anyone until the issue had been ruled upon by the Court. The issue was resolved and Judge Wilson

clearly advised the information was improperly obtained and it should not have been disseminated to Appellant's current attorney. While CR 26(b)(6) applies specifically to discovery material, it should equally apply to the information Appellant's attorney obtained when he contacted a represented party without authorization from the party's attorney.

C. The Court Must Protect Ms. Hardesten's Right To A Jury Trial

It is undisputed that the Request for Trial De Novo filed on behalf of Ms. Hardesten complied with all of the requirements of MAR 7.1(a) and RCW 7.06.050. These requirements are (1) the request must be filed within 20 days of the arbitrator filing the arbitration award, (2) the request is filed by an aggrieved party, and (3) proof that a copy of the request was served on all counsel. MAR 7.1(a).

It is undisputed that this is what occurred here, and Judge Wilson expressly recognized this on the record at the December 17, 2010 hearing. (VP, pg. 11 lns. 7-11).

Appellant's argument can be summarized as follows: without evidence that Ms. Hardesten expressly asked for the trial de novo to be filed, it must be stricken. However, such a position is not supported by the law or facts. Furthermore, Appellant's assertion that the trial de novo request was filed because of, or at the request of, Ms. Hardesten's

insurance company is speculative and without any basis in fact or in the record.

This is nothing more than Appellant's misguided effort to place additional hurdles or barriers on a party requesting a trial de novo/appeal than is set forth in the text of either RCW 7.06.050 or MAR 7.1 which provide in pertinent part:

Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. Within twenty days after such filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact. Such trial de novo shall thereupon be held, including a right to jury, if demanded.

RCW 7.06.050(1).

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 along with proof that a copy has been served upon all other parties appearing in the case.

MAR 7.1(a)

These provisions are clear and simply require (1) an aggrieved party, (2) who to files a request for a trial de novo, (3) within 20 days of the arbitration award being filed, along with (4) proof of service on all other parties. MAR 7.1(a). This occurred here.

Respondent notes that the rule is devoid of any requirement that

the aggrieved party personally sign the request or that the attorney verifies that the client affirmatively requested the appeal to be filed. If that was a requirement, then the legislature or the Supreme Court would have written such into the rule as is included in Pierce County Local Rule 40(g)(2) for continuance of a trial date:

If an attorney moves for a continuance of the trial date under this subsection, the motion shall not be considered unless it is *signed by both the attorney and the client* or it contains a certification from the attorney that the client has been advised of the motion to continue the trial dates as well as the basis for the motion *and that the client agrees* with the motion to continue.

(Emphasis added). Because such language was not included in the statute or rule, it must be presumed such was not intended. See State v. Kintz, 169 Wn.2d 537, 549-50, 238 P.3d 470 (2010) (emphasizing “the rule of statutory interpretation prohibiting courts from adding words or clauses to an unambiguous statute[s] when the legislature has chosen not to include that language.”).

Furthermore Washington only requires express authority from the client in limited circumstances. See Graves v. P.J. Taggares Co., 94 Wn.2d 298, 304-05, 616 P.2d 1223 (1980) (attorney cannot waive the client’s right to a jury trial without express authority from the client); Ashcroft v. Powers, 22 Wn. 440, 443, 61 P. 161 (1900) (attorney cannot accept service of process without express authority of client); Grossman v.

Will, 10 Wn.App. 141, 516 P.2d 1063 (1973) (attorney cannot compromise or settle a claim without express authority from client). None of these situations apply here.

The consequences of reading a requirement into the rules that the party requesting a trial de novo affirmatively request their attorney, in advance of the pleading being filed, to appeal the arbitration could have grave consequences. What happens if the party who is aggrieved suffers a serious injury preventing their communicating their desires to their attorney prior to the 20 day window elapsing? As Appellant argues, the aggrieved party would be forced to accept the award because their attorney would not have the authority to file such a request on their behalf.

Also consider the plaintiff who is evicted from their residence because of money troubles and also has his or her telephone disconnected. In such a situation the plaintiff's attorney may not be able to contact the individual and would be unable to request a trial de novo on the individual's behalf until after receiving permission from the client.

Such a result also would lead to a deposition after every trial de novo to inquire whether the individual requested the trial de novo or not, as well as who made the decision to appeal. Such an invasion of the attorney-client relationship was certainly not contemplated by MAR 7.1. This could also lead to a similar result after each notice of appeal that is

filed from a trial court decision. Will the parties to an appeal be subject to depositions and additional discovery regarding whether the request to file an appeal or notice of discretionary review was requested by the party? Will parties be issuing Requests for Production to produce letters mailed from the attorney to the client verifying the discussion that were had? This is truly a slippery slope that was not intended by MAR 7.1(a).

Prior efforts to require more strict compliance with MAR 7.1 resulted in the Nevers v. Fireside, 133 Wash.2d 804, 947 P.2d 721 (1997) decision. The strictness of the proof of service requirement that struck that de novo, and numerous others, was only relaxed by subsequent decisions of the court of appeals after MAR 7.1 was amended on September 1, 2001. See Splattstoesser v. Scott, 159 Wn.App. 332, 246 P.3d 230 (2011). This Court should not follow that path. The legislature, or a rules change in MAR 7.1, must be the avenue sought to heighten the requirements for filing a request for a trial de novo.

D. Ms. Hardesten's Rights Were Protected

Respondent agrees with Appellant that the right to request a Trial De Novo is a substantive right that the attorney does not have the ability, or right, to waive without the express consent of their client. However, it is there that Appellant's train of thought makes a detour and defies logic.

Appellant argues that Attorney Welchman's filing of the Request

for Trial De Novo waived Ms. Hardesten's right to accept the arbitration award. Such an argument makes no sense because after the Request for Trial De Novo is filed Ms. Hardesten still has the ability to withdraw such a request and could ask the Court to enter judgment on the arbitration award at any time. Thomas-Kerr v. Brown, 114 Wn.App. 554, 59 P.3d 120 (2002). Ms. Hardesten has not done so. Without waiving attorney-client privilege, Respondent can represent that she has no intention of asking for the trial de novo to be withdrawn. Instead there is a clear intention of proceeding to a jury trial.

The only way for any of Ms. Hardesten's rights to be waived is if her attorney failed to file the Request for a Trial De Novo within the 20 day window because then she would be foreclosed from appealing the arbitration award at a later date.

This means that even if Ms. Hardesten did not speak with her attorney prior to the filing of the request for a trial de novo, her attorney would have an affirmative obligation to act to preserve her right to a jury trial in order to prevent his client from losing a substantive right. As our Supreme Court noted in Graves v. P.J. Taggers Company, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980) (“[An attorney] has no authority to waive any substantial right of his client. Such waiver, to be binding upon the client, must be specially authorized by him.”).

The substantive right implicated here is the right to a jury trial, and the only way to violate that duty would have been for defense counsel to have failed to preserve this right by failing to file a request for a trial de novo. In other words, absent hearing to the contrary, Ms. Hardesten's attorney had an affirmative obligation to protect her right to an appeal by filing the request for trial de novo.

According to Appellant, in the situation where an attorney has not had an opportunity to speak with their client, or was unable to communicate due to the client being unavailable due to vacation or some Act of God that prevented communication, the attorney would be prohibited from filing a trial de novo request on the part of their client. Such is clearly not the law in Washington.

E. Attorney Welchman Had The Authority To Request The Trial De Novo On Ms. Hardesten's Behalf

Appellant fails to recognize the import of RPC 1.4 on the filing of the de novo request which provides an attorney with the authority to act on behalf of their client:

[A] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.

This is further reflected by the common law of Washington that clearly finds the actions of an attorney to be binding on party. Rivers v. Washington State Conference of Masons Contractors, 145 Wn.2d 674,

679, 41 P.3d 1175 (2002) (“Absent fraud, the actions of an attorney authorized to appear for a client are binding on the client at law and in equity. The “sins of the lawyer” are visited upon the client.”). See also RCW 2.44.010 (attorney has the authority to bind clients in any proceeding).

This was further explained in Clay v. Portik, 84 Wn.App. 553, 929 P.2d 1132 (1997) where the defendant argued that the Non-Resident Motorist Statute required the signature of the plaintiff himself and therefore was violated because the attorney signed the affidavit of compliance on the “plaintiff’s” behalf:

Portik also claimed the affidavit of compliance was insufficient because Clay's attorney signed it on Clay's behalf instead of having Clay sign it personally. He contrasts the statute's reference to the “plaintiff's affidavit of compliance,” with its later reference to the “affidavit of the plaintiff's attorney” showing due diligence to serve the defendant personally. RCW 46.64.040. As Portik notes, the Legislature's use of different words in a statute often indicates a different intent. *In re Swanson*, 115 Wash.2d 21, 27, 793 P.2d 962, 804 P.2d 1 (1990). But such is not the case here.

First, we note that the term “plaintiff” was used in the original statute that the Legislature enacted in 1961, but the term “plaintiff's attorney” was not added until 10 years later when the Legislature amended the proviso. Laws of 1971, Ex.Sess., ch. 69, § 1. The term plaintiff has generally been accepted as referring to the plaintiff personally or the plaintiff's counsel because an attorney has full power to represent her client in all matters of practice. *Furman v. Bon Marche*, 71 Wash. 238, 239-40, 128 P. 210 (1912); see

Martin, 111 Wash.2d at 474, 760 P.2d 925 (discussing the same statute, the court noted, without comment, that “Plaintiff’s attorney filed an affidavit of compliance ...”). An attorney appearing on behalf of her client is her client’s representative and is presumed to speak and act on her behalf. *State v. Peeler*, 7 Wash.App. 270, 274, 499 P.2d 90 (1972) (counsel’s signature on statement consenting to separation of jury without client’s signature is binding). Accordingly, an attorney’s procedural acts accomplished in the regular conduct of her client’s case are considered those of her client and are binding on her client. *Peeler*, 7 Wash.App. at 274, 499 P.2d 90.

Id. at 560-61. Division Two rejected the defendant’s arguments and found that because the attorney had the authority to act on his client’s behalf the affidavit of compliance was satisfactory and therefore reversed the trial court’s dismissal of the claims based on the statute of limitations. Id. at 561-62.

Similarly here, the term “aggrieved party” is satisfied by the signature of the aggrieved party’s attorney on the individual’s behalf and Attorney Welchman had the authority to sign the Request for Trial De Novo, file it with the Trial Court, and make the document binding on his client.

Such an interpretation is consistent with other statutes that provide appellate relief and have no requirement that the party themselves sign or affirmatively made the request in advance of the petition being filed. E.g. RCW 2.24.050 (revision of a commissioner’s ruling); RCW 34.05.514,

.530 (petition for review under the Administrative Procedures Act); and RCW 51.52.050 (appeal of Board of Industrial Appeals decision). Not one of these “appeals” require the party to personally sign one of those petitions. Instead the petition is made by the attorney.

While it is certainly hoped that attorneys and their clients are on the same page at all times, the fact there might have been some miscommunication is not grounds for striking a de novo request, especially when there is the specter of undue influence because opposing counsel has had prohibited contact with a represented party outside of the presence of counsel. In any event, Appellant’s recourse is under RCW 2.44.030 which provides:

The court, or a judge, may, on motion of either party, and on showing reasonable grounds therefor, require the attorney for the adverse party, or for any one of several adverse parties, to produce or prove the authority under which he or she appears, and until he or she does so, may stay all proceedings by him or her on behalf of the party for whom he or she assumes to appear.

RCW 2.44.030 (gender neutral language added and became effective July 22, 2011). Therefore at best Appellant could have asked for proof to be presented that the attorney had the authority to represent Ms. Hardesten, not the authority to delve into the decision making process. See also RCW 2.44.020 (allowing the trial court to relieve a party from actions their attorney engaged in without authority); State v. Superior Court in and for

Clallam County, 151 Wn. 413, 276 P. 98 (1929) (“Having been entered into by the attorneys of record, the presumption is that it was within their authority to so stipulate, and the burden of course is upon the party seeking to be relieved.”).

F. The Trial De Novo Request Was Filed By An Aggrieved Party

The Request for Trial De Novo was filed on behalf of Respondent, Rebecca Hardesten. Appellants concede she is an aggrieved party. Despite this, Appellants seek to speculate, without any basis in fact, that the De Novo Request was filed on behalf of UNITRIN, Ms. Hardesten’s insurer.

While the insurance company *may* have had some input on the decision to appeal, any assertion regarding the amount of input or extent of their involvement is rank speculation and must be rejected. To the extent there is any issue regarding the defense of this matter, such an issue is a contractual one between Ms. Hardesten and her insurer and is not one that can be raised by the Appellant here as Ms. Engstrom does not have standing to assert the contractual rights of Ms. Hardesten.

Appellant claims Wiley v. Rehak, 143 Wn.2d 339, 20 P.3d 404 (2001) stands for the proposition that a non-aggrieved party cannot request a trial de novo. Respondent agrees that the case stands for the proposition

that a de novo request filed on behalf of a non-aggrieved party is not valid. However, Wiley is limited in its application. In Wiley, there were multiple defendants, two of whom had no award made against them. Id. at 342. After arbitration, counsel for the defendants filed a request for trial de novo but identified the defendants who had no award entered against them listed as the “aggrieved party.” Id. Plaintiffs moved to strike the de novo request on the basis that the named party was not aggrieved because they had been previously dismissed. Id. As a result, defendants moved to amend the notice in the name of the actual aggrieved defendants and the trial court allowed the defendants to file an amended notice of trial de novo which related back to the date of the first filing. Id. at 342-43. Division Two reversed and the Supreme Court accepted review. Id. at 343.

Our Supreme Court emphasized that the Mandatory Arbitration Rules were to be strictly construed and substantial compliance was insufficient. Id. at 344. The Court went on to clarify that it was a mandatory element for the trial de novo notice to identify the aggrieved party on whose behalf the appeal was being taken and to list that individual in the notice. Id. at 345. Because the notice that was filed in the name of a dismissed defendant who was not aggrieved, our Supreme Court found the notice to be defective and mandated striking of the trial de

novo. Id.

Here there is no question that the request for trial de novo properly identified Rebecca Hardesten as the aggrieved party who was seeking review against Denise Engstrom. (CP 114). As a result, the strict compliance mandates of Wiley were met here.

However, it should be noted that Division Three in Splattstoesser v. Scott, 159 Wn.App. 332, 246 P.3d 230 (2011) opined that the September 1, 2001 amendment³ to MAR 7.1(a) eliminated the strict compliance standard and found that so long as the request substantially complied with the form included in MAR 7.1 that the request for trial de novo would be proper. Id. at 338.

In Splattstoesser, the question was whether the trial court abused its discretion when it found that a trial de novo request that misnamed the aggrieved party to substantially complied with MAR 7.1.⁴ In fact, Division One found the following to sufficiently comply with the requirements:

The demand had the correct court caption and file number.
The demand told the clerk exactly what was desired—a
trial de novo from the September 28, 2009 award. *It was*

³ Wiley v. Rehak was decided on March 29, 2001, approximately six months prior to the amendment changing MAR 7.1(a) to a substantial compliance standard.

⁴ The defendant's attorney used a form trial de novo request and failed to place the correct name of the defendant in the section identifying the aggrieved party. Instead the attorney had the name of a client in a previous case whose name was not properly substituted. 159 Wn.App. at 334.

signed by counsel of record for the defendant. The demand was identified as coming from the defendant. The only error was in the ensuing listing of “Simon Larson” as the defendant.

Id. at 338-39 (emphasis added).

Division Three emphasized that based on the current amendment to MAR 7.1, the decision of the trial court to accept the request for trial de novo is reviewed on an abuse of discretion standard. Id. at 338. Because there was no confusion regarding what was requested, i.e. the clerk of the court was not misled by the error and opposing counsel was not misled because he moved to dismiss the requests, the form filed was found to be in substantial compliance with MAR 7.1 and the de novo request was found to be proper. Id. at 339.

Even if strict compliance was required, the Respondent’s request filed in this matter facially complies with all requirements of MAR 7.1. Under the relaxed standard articulated in Splattstoesser Appellant’s arguments become frivolous. See also Trowbridge v. Walsh, 51 Wn.App. 727, 755 P.2d 182, (1988) (rejecting plaintiff’s argument that a defendant who fails to appear at a MAR hearing and only appears through counsel precludes the party from later filing a request for a trial de novo). The Respondent’s request was filed on behalf of an aggrieved party and the Motion to Strike Trial De Novo was properly denied.

G. Appellant's Assertion The Insurance Company Filed The Request For A Trial De Novo Is Without Basis In Fact Or Evidence

Appellant has no evidence that it was an insurance company that made the decision to file the trial de novo. It is frankly more probable the advice of defense counsel in this minor impact litigation was followed that led to the filing of the de novo. While Ms. Hardesten's insurance company may have provided input to Attorney Welchman, the tactical recommendation that was made was the defense attorney's alone to make.

However, even if the insurance company had directed a request for the trial de novo, under the insurance policy at issue in this case, Ms. Hardesten would have been required to cooperate with the request for trial de novo under her contractual obligation to "Cooperate with **us** and assist **us** in any matter concerning a claim or suit." (CP 85). The insurance policy at issue and in place at the time of the accident also provided under Coverage A – Liability Coverage that: "We will defend any suit or settle any claim for these damages **we** think appropriate." (CP 87) (emphasis in original).

As this Court is well aware, an insurance policy is a written contract between the insured and the insurer. Sears, Roebuck & Co. v. Hartford Acc. & Indemnity Co., 50 Wn.2d 443, 449, 313 P.2d 347 (1957); Vandivort Constr. Co. v. Seattle Tennis Club, 11 Wn.App. 303,

310, 522 P.2d 198 (1974). Insurance contracts are to be interpreted to give effect to the intent of the parties, Thomas v. Grange Ins. Ass'n, 5 Wn. App. 820, 822, 490 P.2d 1316 (1971) Where language is unambiguous, it will be enforced. Quadrant Co. Am. States Ins. Co., 154 Wn.2d 165, 171, 110 P.3d 733 (2005). Therefore, with this unambiguous policy language, the insured had a duty to cooperate with the insurance company in deciding how to proceed with the litigation and defend the suit. If the insurance company asked the defendant to appeal the de novo request in order to further the defense of the claim, Ms. Hardesten had a contractual obligation to cooperate with such a request. See Paxton Nat. Ins. Co. v. Brickajlik, 513 Pa. 627, 522 A.2d 531 (1987) (finding insured refusal to sign third-party complaint to be a breach of the cooperation clause).

Appellant's assertions interfere with Ms. Hardesten's contractual obligations and it is for this reason that contact between an attorney and a represented party is prohibited by RPC 4.2.

Furthermore, if there was a belief that the insurance company was placing its interests above those of their insured, then Ms. Hardesten would have her right to pursue a bad faith lawsuit. However, such would only be applicable if there was a likelihood of excess exposure and the insurance company placed its interests above those of their insured. This

is not an excess case and in any event such a claim could only be asserted by the Respondent. Appellant has no standing to make such an argument.

H. An Insurance Company Has A Contractual Right To Control Litigation

As Judge Wilson aptly noted in his oral ruling on December 17, 2010, an insured has a contractual obligation to cooperate in the defense of the action, including proceeding with an appeal if it is deemed to be in the best interest of the insured and the insurer. (VP, pg. 6 ln. 20 to pg. 7 ln. 6).

This right to control has been recognized by Washington courts and has been upheld because of the insurance company's obligation to pay/indemnify their insured:

[C]ontrol of the defense is vitally connected with the obligation to pay. It cannot be imagined that an insurance carrier, Federal in this case, would permit an insured to control the defense of a tort claim for the first 10 months and then voluntarily pay the ultimate judgment. If the Gamel interests were not protected by their insurance policy with Federal, they had the right to arrange for the initial investigation, settlement negotiations (sic) and the conduct of the law suit

TransAmerica Ins. Co. v. Chubb and Sons, Inc., 16 Wn.App. 247, 251, 554 P.2d 1080 (1977).

Such only makes sense, this is because an insurance company has an interest in limiting their payments to reasonable amounts. A person

who is indemnified has no interest other than in terminating the litigation so long as they do not have to contribute to the ultimate resolution. This fiduciary relationship is another aspect which Appellant fails to consider because it is the insurance company who is ultimately paying the award. As a result they have a pecuniary interest in the result and outcome of the matter to ensure that the funds are being paid appropriately. Appellant's argument to the contrary is plain wrong.

Allowing insurance companies to direct an individual to appeal a matter protects the public because it allows insurance companies to lower their rates. If inflated settlements or verdicts were paid simply because the insured did not want to appeal, insurance rates would likely see a steep increase that is not in the consumer's best interest, especially when they have contractually agreed to allow the insurance company to direct and pay for the defense.

I. CR 11 Sanctions Were Properly Awarded

Appellant's underlying motion was both frivolous and based on wrongfully obtained information. The standard of review of the trial court's award of CR 11 sanctions is an abuse of discretion. Washington State Physicians Ins. Exchange & Ass'n v. Fisons Corp., 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). "An abuse of discretion occurs only when no reasonable person would take the view that the trial court adopted."

Building Industry Ass'n of Wash. v. McCarthy, 152 Wn.App. 720, 745, 218 P.3d 196 (2009).

CR 11 is applicable when pleadings, motions and legal memoranda are either (1) not well grounded in fact, warranted by existing law or a reasonable extension, modification or extension of existing law, or (2) if the pleading is signed to cause unnecessary delay or needlessly increase the cost of litigation. Bryant v. Joseph Tree, Inc., 119 Wn.2d 210, 217, 829 P.2d 1099 (1992).

Appellant was sanctioned for offering declarations and argument in violation of RPC 4.2 and CR 11 to the superior court because Respondent complied with the mandates of MAR 7.1. Judge Williams ruled Attorney Williams' submissions were "unfounded, not based on law, not based on fact, not based in a good faith effort to change the law or public policy." (VP, at pg. 12 lns. 15-18)

Respondent is shocked Appellant continues to offer the very same evidence that was previously excluded and then takes it a step further by offering additional evidence that was never presented or considered by Judge Wilson to begin with. Such submissions show a fundamental lack of understanding of an attorney's obligations under the Rules of Professional Conduct and demonstrate why Judge Wilson needed to issue the stern sanction of \$3,000. Apparently that sanction alone was

insufficient because Appellant continues to make the same unfounded arguments without any basis in law or fact, nor a good faith effort to change the law or public policy.

The offering of several orders from King County Superior Court over the past two years does not justify the conduct which occurred here. Respondent's counsel has several orders in its own possession denying motions to strike de novo for the same reasons. Submission of such orders to this court should have no influence on the facts at issue and it is not evidence or information considered by the trial judge who orders are being appealed here.

In addition, there is no evidence that Attorney Williams relied on those decisions in filing the pleadings which he did as they were never identified to Judge Wilson. In fact, attached to the appendix to Petitioner's Motion for Discretionary Review is the first these orders have even been mentioned by Appellant's new counsel. Second, the orders attached to Appellant's Brief do not involve a case where the attorney engaged in ex parte contact with a represented party in violation of RPC 4.2. Third, the orders relied upon some admissible evidence, when Appellant's did not because the declarations were stricken. There was no abuse of discretion or error by Judge Wilson.

The above analysis regarding the impropriety of Attorney

Williams' conduct will not be regurgitated here, but is incorporated by reference. His filings of his declaration as well as the submission of the declaration of Rebecca Hardesten were groundless and sanctionable. He not only contacted, but elicited a declaration from a represented party without the consent of counsel. He then used that declaration to Ms. Hardesten's detriment. That is gross misconduct that should be subject to a harsh sanction, and a referral to the Bar Association. Acknowledging the egregiousness of his conduct, Attorney Williams promptly paid the sanction and withdrew as counsel of record.

Appellant also fails to recognize that the sanction was not issued solely because she moved to Strike the Trial De Novo. Instead it was due to the gross violations of CR 11 and the RPCs for contacting a represented party and securing a declaration to that party's detriment without the advise of counsel. Frankly, the sanction may not have been harsh enough because Appellant seems determined to exacerbate the problem with this appeal.

Judge Wilson did not abuse his discretion in entering the sanction order.

J. Additional Attorney's Fees Are Warranted

Appellant's conduct continues to violate RPC 4.2 and is in bad

faith. Respondent asks for attorney's fees for Appellant's ongoing efforts to delay this case and prevent a decision on the merits. As a result, Respondent should be entitled to additional attorney's fees for this appeal in light of CR 11 as well as the prevailing party on appeal.

V. **CONCLUSION**

Respondent filed a Request for Trial De Novo that complied with all of the mandates of MAR 7.1. The request was filed within 20 days, and substantially and even strictly complied with the form set forth in MAR 7.1(a). As a result, there were no grounds for striking the request and Appellant's motion was properly denied by the Trial Court. If Ms. Hardesten desired to strike the request, she could have done so at anytime. The fact that she has not demonstrates that she is on board with the appeal and has agreed to the current course of action, even with new counsel working with her.

Appellant's conduct of engaging in repeated contact with a represented party violated RPC 4.2. The declarations based on that contact were properly stricken by the trial judge and Appellant's attorney was appropriate sanctioned for that contact.

The orders of the Trial Court striking the declarations of Attorney Williams and Ms. Hardesten as well as the order denying Appellant's motion to strike trial de novo should be affirmed.

While the Court should deny Appellant's motion based on the foregoing reasons, because Respondent's counsel did not have sufficient time in advance of the December 2010 hearing to obtain a declaration from Ms. Hardesten, if the Court was to remand the decision to the trial court, additional time must be provided for counsel to secure a declaration from her client advising of the authority to proceed with the request for trial de novo.

DATED this 22nd day of July, 2011.

McGAUGHEY BRIDGES DUNLAP, PLLC

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