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NO. 68303-9-1

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

CHRISTINA LINDSTROM,

Respondent,

vs.

MARK EMERY and JANE DOE EMERY, Husband and Wife, and the community
thereof,

Appellants.

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable Linda C. Krese, Judge
Honorable Susan C. Gaer, Commissioner

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

	Page
I. NATURE OF THE CASE	1
II. ASSIGNMENTS OF ERROR	1
III. ISSUES PRESENTED	2
IV. STATEMENT OF THE CASE	3
V. ARGUMENT	6
A. STANDARDS OF REVIEW	6
B. THE COURT ERRED IN ENTERING JUDGMENT ON THE ARBITRATION AWARD	6
1. The Right to a Trial Cannot Be Abridged by an Additional, Ministerial Local Rule Provision	7
2. The Language of the Local Rule Is Ambiguous and Does Not Require the Harsh Remedy of Dismissal of the Trial De Novo	13
3. The Denial of a Trial De Novo at an Ex Parte Hearing Without Notice Violates Procedural Due Process	15
C. THE TRIAL COURT IMPROPERLY DECLINED TO HEAR THE MERITS OF EMERY’S MOTIONS FOR RECONSIDERATION AND REVISION	18
VI. CONCLUSION	22
 APPENDIX A Findings of Fact and Conclusions of Law (CP 96-97)	
 APPENDIX B Judgment Pursuant to SCLMAR 7.2(b) (CP 93-95)	

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Agrilink Foods, Inc. v. State, Dep't of Revenue</i> , 153 Wn.2d 392, 103 P.3d 1226 (2005).....	13
<i>Buckner, Inc. v. Berkey Irrigation Supply</i> , 89 Wn. App. 906, 951 P.2d 338, <i>rev. denied</i> , 136 Wn.2d 1020 (1998).....	20
<i>Casper v. Esteb Enterprises, Inc.</i> , 119 Wn. App. 759, 82 P.3d 1223 (2004).....	14
<i>Cerrillo v. Esparza</i> , 158 Wn.2d 194, 142 P.3d 155 (2006).....	13
<i>Faraj v. Chulisie</i> , 125 Wn. App. 536, 105 P.3d 36 (2004).....	16
<i>Geschwind v. Flanagan</i> , 121 Wn.2d 833, 854 P.2d 1061 (1993).....	16
<i>Heaney v. Seattle Municipal Court</i> , 35 Wn. App. 150, 665 P.2d 918 (1983), <i>rev. denied</i> , 101 Wn.2d 1004 (1984)	17
<i>In re Detention of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999).....	20, 21
<i>In re Saltis</i> , 94 Wn.2d 889, 621 P.2d 716 (1980)	12
<i>King County v. Williamson</i> , 66 Wn. App. 10, 830 P.2d 392 (1992).....	17
<i>Lund v. Benham</i> , 109 Wn. App. 263, 34 P.3d 902 (2001), <i>rev. denied</i> , 146 Wn.2d 1018 (2002)	6
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997).....	8
<i>Parry v. Windermere Real Estate/East, Inc.</i> , 102 Wn. App. 920, 10 P.3d 506 (2000), <i>rev. denied</i> , 143 Wn.2d 1015 (2001)	7, 8
<i>Scannell v. City of Seattle</i> , 97 Wn.2d 701, 648 P.2d 435, 656 P.2d 1083 (1982).....	14
<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).....	16

<i>Sorenson v. Dahlen</i> , 136 Wn. App. 844, 149 P.3d 394 (2006).....	6, 8, 9, 10, 11, 14
<i>State v. McEnroe</i> , ___ Wn.2d ___, ___ P.3d ___ (June 28, 2012).....	7
<i>Wilson v. Horsley</i> , 137 Wn.2d 500, 974 P.2d 316 (1999)	16
<i>Wilson v. Olivetti North America, Inc.</i> , 85 Wn. App. 804, 934 P.2d 1231, <i>rev. denied</i> , 133 Wn.2d 1017 (1997).....	11, 12

Other Jurisdictions

<i>Cleveland Bd. of Educ. v. Loudermill</i> , 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).....	15
--	----

Constitutions

CONST. art. I, § 3	16
CONST. art. I, §21	16

Statutes

RCW 2.24.050	20
RCW 4.56.110(3)(b).....	4, 11
RCW 19.52.025	4, 11

Rules and Regulations

CR 37(b)(2).....	14
CR 55	16
CR 55(a)(3).....	16
CR 59	17, 19
CR 59(b).....	19
CR 83	7, 17

ER 904	4
FED. R. CIV. P. 38(b)	12
MAR 6.3	16
MAR 7.1	10, 22
MAR 7.1(a).....	8
MAR 7.3	11
RAP 5.2(e)	21
SCLCR 7(b)(2)(K).....	19
SCLCR 40(c)(1).....	4, 7, 11, 13, 14, 17
SCLMAR 6.3	16
SCLMAR 7.2(b)	4, 7, 10, 15, 17

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I. NATURE OF THE CASE

This appeal arises from the dismissal of defendant's requested trial de novo after defendant did not confirm the trial date pursuant to a local rule. At an ex parte hearing and without notice to defendant, the court commissioner improperly dismissed the case and entered judgment on the arbitrator's award. The trial court compounded this error by then failing to consider the motions for reconsideration and revision filed by defendant. This Court should strike the findings of fact and conclusions of law, reverse the judgment, and remand the case for a trial de novo.

II. ASSIGNMENTS OF ERROR

1. The court commissioner erred in issuing her findings of fact and conclusions of law which concluded that the arbitration award should be entered as a judgment because defendant had failed to confirm the trial pursuant to a local rule. (CP 96-97) As to the separate Findings of Fact and Conclusions of Law, the commissioner erred in:¹

- A. Entering finding of fact 8;
- B. Entering finding of fact 9;
- C. Entering conclusion of law 1;
- D. Entering conclusion of law 2.

¹ A copy of these findings and conclusions is set forth in Appendix A hereto.

2. The court commissioner erred in entering judgment on the arbitrator's award where defendant failed to confirm the trial pursuant to local rules. (CP 93-95)²

3. The trial court erred in declining to hear defendant's motion for reconsideration on the order entering judgment on the arbitration award. (RP 3-5)

4. The trial court erred in declining to rule on the merits of defendant's motion for revision on the entry of judgment on the arbitration award. (CP 10-11)

III. ISSUES PRESENTED

1. Did the court commissioner commit reversible error by entering findings of fact and conclusions of law and judgment on the arbitration award pursuant to a local rule provision that abridged defendant's right to a trial de novo? (Pertaining to Assignments of Error Numbers 1 and 2)

2. Did the court commissioner commit reversible error by entering findings of fact and conclusions of law and judgment on the arbitration where he relied on an ambiguous local rule to apply an unduly harsh sanction? (Pertaining to Assignments of Error Numbers 1 and 2)

² A copy of this judgment, which incorporates the findings and conclusions by reference.

3. Did the court commissioner commit reversible error and violate due process by entering judgment on the arbitration award at an ex parte hearing without notice? (Pertaining to Assignments of Error Numbers 1 and 2)

4. Did the trial court commit reversible error in failing to substantively consider Emery's motions for reconsideration and revision where Emery properly brought them before the court? (Pertaining to Assignments of Error Numbers 3 and 4)

IV. STATEMENT OF THE CASE

Plaintiff Christina Lindstrom was involved in an automobile accident with defendant Mark Emery on September 8, 2004. (CP 137) Lindstrom filed a lawsuit in Snohomish County Superior Court on September 4, 2007. (CP 135-42) The matter was transferred to mandatory arbitration, and the arbitrator awarded Lindstrom \$50,000 on June 1, 2010. (CP 126-28, 143) Emery filed a request for a trial de novo on June 14, 2010. (CP 123-25)

The parties then actively prepared for trial. The case was originally set for February 8, 2011, but the parties stipulated to continue the trial to May 31, 2011. (CP 117-18, 121-22) The parties stipulated to move the trial date again, this time to January 10, 2012. (CP 59, 70, 115-

is set forth in Appendix B hereto.

16) The Superior Court issued a Notice of Trial Setting and Certificate of Trial Confirmation confirming the January 10, 2012, trial date. (CP 113-14) A month before the trial, Emery filed a Witness and Exhibit List and submitted a Notice of Intent to Offer Documents Under ER 904. (CP 108-09, 110-12) Emery also filed his Objection to Plaintiff's ER 904 Submissions on December 15, 2011. (CP 104-07) Lindstrom issued trial subpoenas for several witnesses. (CP 65-67)

Six days before trial, Lindstrom contacted the court administrator's office, and learned that Emery had not confirmed the trial date. (CP 98-99) Without notice to Emery, Lindstrom moved for entry of judgment on the arbitration award. (CP 27, 74, 100-03) At an ex parte hearing on January 5, 2012, the court commissioner entered findings of fact and conclusions of law. (CP 96-97) The commissioner concluded that the arbitration award should be converted into a judgment against Emery in the amount of \$50,000 because Emery failed to confirm the trial date as required by SCLCR 40(c)(1). (CP 97) On January 5, 2012, the commissioner then entered a Judgment Pursuant to SCLMAR 7.2(b) which awarded Lindstrom \$50,000 at a 12% per annum interest rate.³ (CP

³ Pursuant to RCW 4.56.110(3)(b) and RCW 19.52.025, the correct interest rate for January 2012 is 5.250%.

93-95) The commissioner reserved the issue of attorney fees and costs for a future hearing. (CP 95)

On January 6, 2012, Emery filed a Motion for Reconsideration. (CP 73-92) Emery submitted two declarations in support of the motion. (CP 68-69, 70-72) The declarations noted that Emery's counsel had properly confirmed the earlier trial date in May of 2011, but due to illness of counsel and staff, his attorney had mistakenly failed to confirm the January 2012 trial date. (*Id.*) At the date and time the trial was to commence (January 10, 2012, at 9:00 a.m.), the parties appeared before the trial judge. (CP 62; RP 1-2) The court declined to hear the motion for reconsideration because it was not brought before the commissioner who had issued the order. (RP 3-5; CP 27-28)

Emery then filed a Motion for Revision of the Commissioner's Ruling on January 23, 2012, and noted it for the Civil Motions Judge's Calendar. (CP 24-25, 26-58) Lindstrom's response to the motion for revision did not address the merits of the motion. Instead, Lindstrom argued that Emery had not properly noted the first motion for reconsideration, and that the motion for revision was filed after the allotted time frame. (CP 15-21) The court determined that the motion for revision was not timely filed and issued an order denying the motion. (CP 10-11)

Emery timely filed an appeal seeking review of the findings of fact and conclusions of law, the judgment, and the order denying the motion for revision. (CP 1-9)

V. ARGUMENT

A. STANDARDS OF REVIEW.

The application of the court rules to the facts of this case involves an issue of law that requires a de novo review by this Court. *See Sorenson v. Dahlen*, 136 Wn. App. 844, 850, 149 P.3d 394 (2006). Rulings on motions for reconsideration are reviewed for abuse of discretion. *Lund v. Benham*, 109 Wn. App. 263, 266, 34 P.3d 902 (2001), *rev. denied*, 146 Wn.2d 1018 (2002). “A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons.” *Lund*, 109 Wn. App. at 266.

B. THE COURT ERRED IN ENTERING JUDGMENT ON THE ARBITRATION AWARD.

The court commissioner improperly relied on a ministerial local rule provision to deny Emery his right to a jury trial after mandatory arbitration. The language of this local rule is ambiguous and did not require the harsh remedy of dismissal of the trial de novo. Finally, the ex parte hearing afforded by the local rule violated Emery’s procedural due process.

1. The Right to a Trial Cannot Be Abridged by an Additional, Ministerial Local Rule Provision.

In moving to enter judgment on the arbitration award, Lindstrom relied on Snohomish County's local mandatory arbitration rules.

If the party who requested the trial de novo fails to confirm the trial, or fails to appear at trial, then the opposing party may obtain a judgment on the arbitrator's award with no further notice. If the party opposing the request for trial de novo fails to appear at trial, then the trial shall proceed as in any default.

SCLMAR 7.2(b). Lindstrom further relied on Snohomish County's local civil rules.

It shall be the duty of each attorney of record or party pro se in a case set for trial to jointly or separately confirm, no sooner than 12 noon of the first court day of the week and no later than 12 noon of the last court day of the week two weeks prior to the trial date, in such written or electronic form as approved by the court. The court may strike the trial date and may impose sanctions and/or terms against the parties or counsel for failure to so confirm, including dismissal of the case.

SCLCR 40(c)(1).

Generally, under CR 83 superior courts may adopt local rules that are not inconsistent with the Rules of Civil Procedure.⁴ "A local rule that restricts a valuable right granted by a statewide civil rule conflicts with

⁴ In *State v. McEnroe*, ___ Wn.2d ___, ___ P.3d ___ (June 28, 2012), the Supreme Court held: "GR 7(b) provides that '[a]ll local rules shall be consistent with rules adopted by the Supreme Court.' See also GR 31(d)(2). To the extent LGR 15 is inconsistent with this holding, we disapprove." (Slip op. at 14 n.7)

such rule and cannot be given effect.” *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 928, 10 P.3d 506 (2000), *rev. denied*, 143 Wn.2d 1015 (2001).

Following mandatory arbitration, an aggrieved party is entitled to have the trial court conduct a trial de novo only after meeting two requirements: 1) the request for a trial de novo must be timely filed and served; and 2) proof of service must be timely filed. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 812, 947 P.2d 721 (1997). A party’s failure to strictly comply with both steps is fatal to a request for a trial de novo. *Id.* at 811. If a party fails to strictly comply, a trial court’s authority is limited to entering a judgment on the arbitrator’s decision and award. *Id.* at 811-12.

However, it is reversible error for a trial court to require that a party strictly comply with additional, ministerial requirements of a local rule in order for the trial court to conduct a trial de novo. *Sorenson*, 136 Wn. App. at 855. In *Sorenson*, the trial court struck defendant’s request for a trial de novo where he did not comply with a local rule for noting the trial date. *Id.* at 847-48. The trial court determined that there was no impermissible conflict between the local rule and MAR 7.1(a) because the local rule simply required a procedural step to be taken by a party wishing to assert a legal right. *Id.* at 853.

The Court of Appeals disagreed. It held that “[c]ertainly, complying with these local procedural requirements cannot be a condition that must be timely met in order for the trial court to conduct a trial de novo.” *Id.* at 854 (emphasis added). The Court of Appeals reversed the denial of defendant’s request for a trial de novo and held that the trial court had erred in ruling that a party must strictly comply with the local rule in order to receive a trial de novo. *Id.* at 855. The *Sorenson* Court noted that under the trial court’s reasoning, a party requesting a de novo trial in Kitsap County would have to meet at least three conditions: 1) timely filing of the request for trial de novo; 2) timely filing of proof of service; and 3) timely filing a correct note for trial. *Id.* at 853. However, the court noted that outside Kitsap County, a party would only have to meet the first two requirements. *Id.* The *Sorenson* Court determined that complying with the local procedural requirement cannot be a condition in order for the trial court to conduct a trial de novo. *Id.* at 854. The court held that, at the very least, substantial compliance with the local procedural requirements should be enough to proceed with a trial de novo. *Id.*

The *Sorenson* Court also addressed what remedy would be appropriate under the circumstances. It noted that the defendant did not act in bad faith, and the plaintiff was not injured or prejudiced. *Id.* at 857.

It determined that striking the trial de novo was an “unduly harsh result.” *Id.* The *Sorenson* Court also concluded that justice would not be served by dismissing the request for a trial de novo, and the trial court could have imposed other sanctions. *Id.* at 858. Finally, the *Sorenson* Court noted that dismissal under these circumstances did not serve the goals of mandatory arbitration of reducing congestion and delays in the courts because it actually led to the opposite result. *Id.* Ultimately, the appellate court reinstated defendant’s right to a trial de novo. *Id.*

The facts and circumstances of the case before this Court are closely aligned with those in *Sorenson*. In this case, Emery complied with the Rules of Civil Procedure and the Mandatory Arbitration Rules. He served and filed the request and proof of service within the 20-day time limitation set by MAR 7.1. (CP 123-25) Emery’s counsel inadvertently neglected to confirm the new trial date, an additional requirement added by the local rule, SCLMAR 7.2(b). There is no evidence that Emery acted in bad faith. Further, there is no evidence that Lindstrom was prejudiced by the oversight. Indeed, she confirmed the trial and was ready to proceed. (CP 65-67, 101) As in *Sorenson*, striking the trial de novo and entering judgment on the arbitration award was an “unduly harsh result.” *Id.* at 857. Other less severe remedies were available to correct the

procedural misstep. Accordingly, the commissioner's conclusions of law were improper.

Additionally, two of the commissioner's findings of fact were in error. First, the commissioner erred in finding that defendant did not confirm the trial according to SCLCR 40(c)(1). Also, plaintiff is not entitled to attorney fees and costs under MAR 7.3. Under MAR 7.3, a party will only be required to pay attorney fees if he fails to improve his position at trial compared to the arbitration award. Because judgment on the arbitration award was improperly entered by the commissioner, a determination about attorney fees under MAR 7.3 cannot be made until the de novo trial concludes.⁵

Central to the *Sorensom* Court's opinion is the notion that strict compliance with local rules is not necessary. "At the very least, substantial compliance with these local procedural requirements should be sufficient in order for the clerk to set a trial de novo." *Id.* at 854. In Washington, "[s]ubstantial compliance may be sufficient to satisfy procedural notice requirements if the other party has actual notice or if the service was reasonably calculated to give notice to the other party."

⁵ The commissioner also incorrectly stated that the interest rate in the judgment was 12%. (CP 93-94) Pursuant to RCW 4.56.110(3)(b) and RCW 19.52.025, the correct interest rate for January 2012 is 5.250%.

Wilson v. Olivetti North America, Inc., 85 Wn. App. 804, 810, 934 P.2d 1231 (1997). (citing *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980)), *rev. denied*, 133 Wn.2d 1017 (1997). The *Wilson* Court rejected strict compliance with the local rule which would have “exalt[ed] form over substance.” 85 Wn. App. at 810. The *Wilson* Court also noted the permissive language contained in FED. R. CIV. P. 38(b), and that “[b]ecause the right to a jury trial is a fundamental right guaranteed to the citizenry by the Constitution, courts should indulge every reasonable presumption against the waiver.” *Id.* at 809. Similarly in this case, Emery had a right to a jury trial, and the commissioner should have “indulge[d] every reasonable presumption against [the] waiver” before striking the trial and entering judgment on the arbitration award. *Id.*

Both parties in this case were actively preparing for trial. Emery had confirmed a prior trial date and had made preparations for trial, including necessary filings with the court. (CP 57, 59, 68, 71, 104-07, 108-09, 110-12) Lindstrom had confirmed the January 2012 trial date and was also prepared for trial. (CP 65-67, 101) Finally, the trial court had not stricken the case from its docket and was otherwise prepared for trial

to begin on the appointed date.⁶ Lindstrom had ample notice that Emery intended to proceed with trial on January 10, 2012. The trial court also had ample notice that Emery intended to proceed with trial. Particularly because Emery's fundamental right to a jury trial is at stake, the commissioner should have found that the substantial compliance was sufficient to allow the trial to proceed.

2. The Language of the Local Rule Is Ambiguous and Does Not Require the Harsh Remedy of Dismissal of the Trial De Novo.

The language of the local rules is not consistent with the decisions made by the commissioner. Generally, a statute or rule is ambiguous if it is "susceptible to two or more reasonable interpretations." *Cerrillo v. Esparza*, 158 Wn.2d 194, 201, 142 P.3d 155 (2006) (quoting *Agrilink Foods, Inc. v. State, Dep't of Revenue*, 153 Wn.2d 392, 396, 103 P.3d 1226 (2005)). The language of the local rule at issue in this case indicates that the trial may be "jointly or separately confirm[ed]." SCLCR 40(c)(1) (emphasis added). This ambiguous language does not clearly specify whether the parties should work together to submit a confirmation (such as is the case with joint status reports required by the courts). If the parties

⁶ This was not a situation, for example, in which the court, based on a lack of confirmation, believed that the parties did not intend to proceed and scheduled other matters instead. (CP 62; RP 2, 5) Assuming that the purpose of the local rules is to ensure that the parties and court are all prepared for trial, that was accomplished.

are required to confer and jointly submit a confirmation, it would be unjust to punish one party by dismissing a trial de novo and instating the arbitration award. Under this reading of a joint process, it would be contrary to the rule to allow one party to not pursue a joint confirmation and then take advantage of the situation if the other party fails to independently confirm.

Further, the commissioner misread the language of the rules and incorrectly applied the harshest remedy to the perceived violation. Under SCLCR 40(c)(1), the court may strike the trial date and may impose sanctions. Striking the trial date or imposing other sanctions are not mandatory. Certainly, the commissioner was not required to adopt the harshest sanction available (entering judgment after an ex parte hearing). Where a statute contains both the words “may” and “shall,” it is presumed that the Legislature intended to distinguish between them, with “shall” being construed as mandatory and “may” as permissive. *Scannell v. City of Seattle*, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982). There is no indication that the commissioner even considered less severe sanctions.⁷ *See Sorenson*, 136 Wn. App. at 858.

⁷ Analogously, in meting out discovery sanctions under CR 37(b)(2), a court imposing one of the “harsher” remedies must consider whether a lesser sanction would be sufficient. *See Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 768-69, 82 P.3d 1223 (2004).

SCLMAR 7.2(b) also contains language that is merely permissive and affords the court discretion to fashion alternate remedies. It states that the trial court may dismiss the trial de novo and enter judgment on the arbitration award if the trial is not properly confirmed. SCLMAR 7.2(b). Assuming that a sanction was even warranted after such a minor misstep, other less severe remedies might have been appropriate under the circumstances – for example, requiring Emery to pay Lindstrom’s fees associated with bringing the motion to enter the judgment on the arbitration award.

In this case, despite the permissive and ambiguous language of the local rules, the commissioner chose to employ the harshest remedy without affording defendant the opportunity to explain the failure to confirm the trial or argue in favor of a lesser sanction. It was unjust to deny Emery his right to a trial de novo based on ambiguous language and without considering lesser sanctions as authorized by the rules.

3. The Denial of a Trial De Novo at an Ex Parte Hearing Without Notice Violates Procedural Due Process.

The State may not deprive its citizens of a property interest without procedural due process. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Washington Courts have noted that the right to a trial de novo after mandatory arbitration is a

substantial right. *Faraj v. Chulisie*, 125 Wn. App. 536, 542, 105 P.3d 36 (2004). The right to a jury trial is inviolate. CONST. art. I, §21.⁸ The denial of the right to a trial de novo based on a local court rule and an ex parte hearing without notice violates the party's procedural due process. See CONST. art. I, § 3.

This situation is similar to entering a default judgment against a party who has failed to plead or defend pursuant to CR 55. However, even under CR 55, the party against whom a default is sought is entitled to notice if he has appeared in the case. CR 55(a)(3). Further, an ex parte hearing is not contemplated under the Mandatory Arbitration Rules if no trial de novo is requested. MAR 6.3. Likewise, under SCLMAR 6.3, even if neither party requests a trial de novo in Snohomish County, a judgment can only be entered after a five-day notice to the other party. It

⁸ The right of trial by jury shall remain inviolate, but the legislature may provide . . . for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

CONST. art. I, §21. Thus, the right to a jury trial cannot be impaired by legislative or judicial action. *Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993).

To safeguard this constitutional right, the Washington Supreme Court has said:

An inviolate right "must not diminish over time and must be protected from all assaults to its essential guaranties." Moreover, any waiver of a right guaranteed by a state's constitution should be narrowly construed in favor of preserving the right.

Wilson v. Horsley, 137 Wn.2d 500, 509, 974 P.2d 316 (1999) (citation omitted) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)).

is arbitrary and unjust that the rules would provide that no notice is necessary for entry of judgment where one of the parties actually had appeared in the case and properly requested a trial de novo. Indeed, even under SCLCR 40(c)(1) – which was one of the rules relied upon by the commissioner in her findings of fact – an ex parte hearing without notice is not authorized. (CP 97)

In this case, the local rule allows for an ex parte hearing, even though the defendant has appeared and fully participated in the case. SCLMAR 7.2(b). This represents a fundamental inconsistency between the Civil Rules and the local rule – the rules are “so antithetical that it is impossible as a matter of law that they can both be effective.” *Heaney v. Seattle Municipal Court*, 35 Wn. App. 150, 155, 665 P.2d 918 (1983), *rev. denied*, 101 Wn.2d 1004 (1984). The right to notice of a hearing on a dispositive issue (particularly a default judgment) is a valuable right granted to the litigants, and the local rule directly conflicts with and abridges that right. *See King County v. Williamson*, 66 Wn. App. 10, 830 P.2d 392 (1992) (a local mandatory arbitration rule conflicted with the time frames set by CR 59). Local rules must be ignored by the court if they are inconsistent with the Civil Rules. *Id.* at 12, 14; CR 83.

The ex parte hearing, as set forth in SCLMAR 7.2(b), denied Emery his procedural due process. Emery had appeared and participated

in the litigation process during the arbitration and leading up to the trial. It was improper to deny him the right to a trial without the chance to participate in the default hearing. Further, the ex parte provision of the local rule was inconsistent with the Civil Rules and should be ignored.

C. THE TRIAL COURT IMPROPERLY DECLINED TO HEAR THE MERITS OF EMERY'S MOTIONS FOR RECONSIDERATION AND REVISION.

Upon learning of the ex parte order entering judgment on the arbitration award, Emery filed his Motion for Reconsideration to Set Aside Judgment the next day, January 6, 2012. (CR 73-92) Emery's counsel was aware that the trial court had not received a motion to strike the trial, and he sought to argue the motion for reconsideration at the appointed time for trial to begin. (CR 71) The trial court even commented that the entry of the judgment by a commissioner at an ex parte hearing without notice was "unusual" and questioned the commissioner's authority to do so.⁹ (RP 3) However, the trial court indicated that it was unable to hear the motion for reconsideration because it was not brought before the commissioner who stamped the order. (CP 28; RP 3-5) The court invited Emery to bring a motion to reconsider with

⁹ "THE COURT: Right. A little unusual. I've never seen that before. I'm not even sure, actually, that the Commissioner had the authority to enter that judgment." (RP 3)

the commissioner or bring a motion to the Superior Court to revise the commissioner's order. (*Id.*) Per the court's instructions, Emery filed his Motion for Revision of Commissioner's Ruling Pursuant to SCI.CR 7(b)(2)(K) on January 23, 2012. (CP 26-58)

Unquestionably, Emery's first motion was filed within the 10-day time frame set for reconsideration motions by CR 59(b).¹⁰ At the court's direction, Emery then restyled the motion from "reconsideration" to "revision," and he refiled what is basically the same motion two weeks later. The substance of the motions and the relief sought remained consistent. The hearing was noted for and held on February 3, 2012. (CP 12, 24-25) This was within the 30-day limit set by CR 59(b). The trial court ignored that the motion for reconsideration was filed and argued within the proper time frame, and it did not rule on the merits. Instead, the trial court focused its ruling on the perceived late filing of the motion for revision. (CP 10-11)

The second filing was timely because it relates back to the first motion filed with the court. The arguments are substantially the same. The relief sought is substantially the same. For all intents and purposes,

¹⁰ CR 59 requires that a motion for reconsideration must be filed "not later than 10 days after the entry of judgment." CR 59(b).

Emery's first motion was one for "revision" because it sought to have the trial court review and set aside the commissioner's ruling to enter judgment on the arbitration. Indeed, had the trial court allowed Emery to simply cross out the word "reconsideration" and insert the word "revision," RCW 2.24.050 would have been satisfied.¹¹ As it was, Emery still satisfied RCW 2.24.050 because the "revision" filing relates back to the timely first "reconsideration" filing. The revision motion specifically referenced the prior filing and explained why a second motion was being filed on the same issues but with a different title. (CP 27-28)

In *Buckner, Inc. v. Berkey Irrigation Supply*, 89 Wn. App. 906, 912, 951 P.2d 338, *rev. denied*, 136 Wn.2d 1020 (1998), a party filed a motion for reconsideration within 10 days of the judgment but did not note the matter for hearing at that time. The court found that the noting of the motion primarily serves to prompt the court to hear or consider the motion, but the ultimate timing of the court's consideration of the motion is at the court's discretion. *Id.* at 915. There was nothing to suggest that the failure to timely note a motion deprives the trial court of the power to hear and decide it. *Id.*; see also *In re Detention of Turay*, 139 Wn.2d 379,

¹¹ RCW 2.24.050 requires that a motion for revision of a decision of a court commissioner shall be filed "within ten days after the entry of any order or judgment."

391, 986 P.2d 790 (1999) (failing to properly “note” a motion for a new trial for the hearing does not affect the timing for appeals under RAP 5.2(e)).

The *Turay* Court explained the court’s preference to allow substantial compliance and avoid having issues decided on procedural technicalities:

When this court made major revisions to the rules of civil procedure in 1967, it had as a goal the elimination of “many procedural traps now existing in Washington practice” and minimization of “technical miscarriages of justice inherent in archaic procedural concepts once characterized by Vanderbilt as ‘the sporting theory of justice.’” *Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 766, 767, 522 P.2d 822 (1974) (quoting in part FOREWORD TO CIVIL RULES FOR SUPERIOR COURT, 71 Wn.2d xxiii, xxiv (1967)). In keeping with this mandate, Washington’s appellate courts have strived to elevate substance over form, and decide cases on their merits . . . “the civil rules contain a preference for deciding cases on their merits rather than on procedural technicalities” . . . the “present rules were designed to allow some flexibility in order to avoid harsh results” . . . “whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form”[.]. Furthermore, in *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980), we held that substantial compliance with procedural rules is sufficient because “‘delay and even the loss of lawsuits [should not be] occasioned by unnecessarily complex and vagrant procedural technicalities.’” (alteration in original) (quoting *Curtis Lumber*, 83 Wn.2d at 767).

139 Wn.2d at 390-91 (some citations omitted).

Similarly in this case, Emery’s original filing notified the court about the issues, and the hearing was held within the time constraints of

the rules. The trial court improperly declined to hear these motions on their merits and essentially elevated form over substance. Emery's substantial compliance with the filing and hearing of the motion – whether it is deemed to be one for reconsideration or revision – was sufficient for the trial court to hear and rule upon the substance of that motion. The trial court abused its discretion by denying the motion on erroneous and hypertechnical grounds.

VI. CONCLUSION

Emery complied with the requirements of MAR 7.1 for obtaining a trial de novo after arbitration. The court commissioner strictly applied an ambiguous local rule to add an additional hurdle. The commissioner ignored Emery's substantial compliance with the rules, and denied Emery his right to a trial de novo. The trial court then compounded the error by refusing to substantively rule on Emery's motions to correct the errors. Emery requests that this Court reverse the entry of judgment and strike the findings of fact and conclusions of law. The case should be remanded for the trial that Emery properly requested. In the alternative, this Court should remand the matter to the trial court to hear and rule on the substance of Emery's motion for reconsideration/revision.

DATED this 20th day of June, 2012.

REED McCLURE

By Michael Budelsky
Michael N. Budelsky WSBA #35212
Attorneys for Appellants

060349.099372/346325

FILED

2012 JAN -5 AM 10: 17

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15139714

SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH

CHRISTINA LINDSTROM,
A single person,

Plaintiff,

vs.

MARK EMERY and JANE DOE EMERY,
Husband and Wife, and the community
thereof,

Defendants.

No.: 07-2-07275-4

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER having come before the Court on the motion of the Plaintiff for entry of judgment pursuant to SCLRMAR 7.2(b), and the Court having reviewed the pleadings and other documents in the Court file, the Court makes the following:

FINDINGS OF FACT

1. The Plaintiff filed this action on September 4, 2007.
2. The Defendants appeared by counsel on September 12, 2007.
3. The Defendants responded to the complaint on September 24, 2007.
4. This matter was arbitrated pursuant to the rules of Mandatory Arbitration on May 25, 2010.

FINDINGS OF FACT AND CONCLUSIONS OF LAW
-- Page 1 of 2

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36

- 1 5. The arbitration award to the Plaintiff in the amount of \$50,000 was signed on June
2 1, 2010.
- 3 6. The Defendants requested a Trial De Novo on June 9, 2010.
- 4 7. This matter was set for trial on January 10, 2012.
- 5 8. The Defendants have failed to confirm the trial as required by SCLCR 40(c)(1).
- 6 9. Plaintiff is entitled to attorney fees and costs incurred by the Plaintiff will be set at
7 future court hearing.
- 8

9 THE COURT having made the preceding FINDINGS OF FACT, THE COURT
10 MAKES THE FOLLOWING:

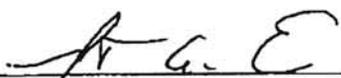
11 **CONCLUSIONS OF LAW**

- 12 1. Entry of Judgment is appropriate pursuant to SCLMAR 7.2(b).
- 13 2. The Arbitration award filed in June of 2010 should be converted into a Judgment in
14 favor of the Plaintiff and against the Defendants in the amount of \$50,000.
- 15 3. The amount of Plaintiff's attorneys fees and costs is reserved for future court
16 hearing.

17
18 Dated this 5 day of January, 2012


Judge/Commissioner

19
20 Presented by:

21 
22 Patrick A. Eason, WSBA#28428
23 the Eason Law Firm, P.S.
24 Attorneys for Plaintiff

25 *FINDINGS OF FACT AND CONCLUSIONS OF LAW*
-- Page 2 of 2

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2012 JAN -5 AM 10: 17

SONYA KRASKI
COUNTY CLERK
SNOHOMISH CO. WASH



CL15139711

SUPERIOR COURT OF WASHINGTON
COUNTY OF SNOHOMISH

CHRISTINA LINDSTROM,
A single person,

Plaintiff,

vs.

MARK EMERY and JANE DOE EMERY,
Husband and Wife, and the community
thereof,

Defendants.

No.: 07-2-07275-4

JUDGMENT PURSUANT TO SCLMAR
7.2(b)

THIS MATTER having come on regularly for hearing before the undersigned
Judge/Commissioner of the above-entitled court, and the court being fully advised in the
premises, now makes the following judgment:

I. JUDGMENT SUMMARY

- a. Judgment Creditors: CHRISTINA LINDSTROM
- b. Judgment Debtors: MARK EMERY and JANE DOE EMERY, husband and wife
- c. Principal Judgment Amount: \$50,000.00
- d. Interest to Date of Judgment: n/a
- e. Interest Rate after Judgment: 12% per annum
- f. Attorney's Fees: Reserved for future hearing
- g. Costs: Reserved for future hearing

JUDGMENT PURSUANT TO SCLMAR 7.2(b)
Page 1 of 3

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APPENDIX B

37

- 1 h. Other Recovery Amount Reserved for future hearing
2 i. Attorney for Judgment Creditors: Rachelle Marie Eason
Patrick A. Eason
3 j. Attorney for Judgment Debtors: the Eason Law Firm, P.S.
Dietrich Biemiller

4
5 **II. HEARING**

6 2.1 Date. This matter came before the court on the date set forth below.

7 2.2 Appearances. Plaintiffs appeared by and through their counsel, Patrick A. Eason of
8 the Eason Law Firm, P.S. The Defendants did not appear as no notice is required pursuant to
9 SCLMAR 7.2(b).

10 2.3 Purpose. To rule on Plaintiff's motion for entry of judgment pursuant to SCLMAR
11 7.2(b).

12 **III. ORDER OF JUDGMENT**

13 3.1 Judgment. Defendants have failed to confirm for trial after requesting a trial de
14 novo and judgment against them is appropriate under SCLMAR 7.2(b).

15 **IV. ADJUDICATION**

16 ON THE BASIS OF THE FOREGOING, IT IS ORDERED, ADJUDGED AND
17 DECREED AS FOLLOWS:

18 1. That the Findings of Fact and Conclusions of Law entered separately on this
19 date are hereby incorporated by reference.

20 2. Plaintiffs are awarded judgment against Defendants as set forth in the Judgment
21 Summary above. Said sums shall accrue interest at twelve percent (12%) per annum from the
22 date hereof until paid.
23
24

25 **JUDGMENT PURSUANT TO SCLMAR 7.2(b)**
Page 2 of 3

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