

No. 35797-6-II

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

10/23/03
COURT OF APPEALS
DIVISION II
07 AUG 14 PM 2:03
STATE OF WASHINGTON
BY [Signature] DEPUTY

LEA HUDSON,

Respondent,

vs.

CLIFFORD and "JANE DOE" HAPNER, individually, and as a marital community
composed thereof, and MATTHEW NORTON, a Washington corporation,

Appellants.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable John A. McCarthy, Judge

BRIEF OF APPELLANTS

Address:
Two Union Square
601 Union Street, Suite 1500
Seattle, WA 98101-1363
(206) 292-4900

REED McCLURE
By Marilee C. Erickson
Terry J. Price
Attorneys for Appellants

1021 Regents Blvd.
Fircrest, WA 98466
(253) 272-8400

RICHARD JENSEN & ASSOCIATES
By Beth A. Jensen
Attorneys for Appellants

ORIGINAL

TABLE OF CONTENTS

	Page
I. NATURE OF THE CASE.....	1
II. ASSIGNMENTS OF ERROR	1
III. ISSUES PRESENTED.....	2
IV. STATEMENT OF THE CASE.....	2
A. BACKGROUND.....	2
V. ARGUMENT.....	4
A. STANDARD OF REVIEW.....	4
B. EITHER PARTY HAS THE RIGHT TO UNILATERALLY WITHDRAW THE TRIAL DE NOVO REQUEST.....	4
C. BECAUSE A PARTY HAS A UNILATERAL RIGHT TO WITHDRAW, THE OTHER PARTY WANTING A TRIAL DE NOVO MUST FILE ITS OWN REQUEST.....	6
D. A TRIAL DE NOVO IS AN APPEAL, WHICH IS PERMISSIVE, NOT MANDATORY	8
1. A Trial De Novo Is an Appeal.....	8
2. An Appeal Is Permissive, Not Required	10
E. THE MARS DO NOT ANTICIPATE ANY OTHER CONDITION FOR WITHDRAWAL OF TRIAL DE NOVO REQUEST THAN PAYMENT OF ATTORNEY FEES	11
F. PLAINTIFF’S RELIANCE ON <i>CRESO</i> AND <i>HAYWOOD</i> DOES NOT REQUIRE A DIFFERENT RESULT	14
VI. CONCLUSION	15

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Blueshield. v. Washington State Office of Ins. Com'r</i> , 131 Wn. App. 639, 128 P.3d 640 (2006).....	10
<i>Cresco v. Phillips</i> , 97 Wn. App. 829, 987 P.2d 137 (1999), <i>aff'd by</i> <i>Haywood v. Aranda</i> , 143 Wn.2d 231, 19 P.3d 406 (2001).....	14, 15
<i>Do v. Farmer</i> , 127 Wn. App. 180, 110 P.3d 840 (2005).....	13
<i>Haywood v. Aranda</i> , 143 Wn.2d 231, 19 P.3d 406 (2001).....	14, 15
<i>Manius v. Boyd</i> , 111 Wn. App. 764, 47 P.3d 145 (2002).....	4
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997).....	6
<i>Singer v. Etherington</i> , 57 Wn. App. 542, 789 P.2d 108, 802 P.2d 133 (1990).....	9
<i>Sorenson v. Dahlen</i> , 136 Wn. App. 844, 149 P.3d 394 (2006).....	6, 13
<i>State v. Davis</i> , 133 Wn.2d 187, 943 P.2d 283 (1997).....	10, 11
<i>Thomas-Kerr v. Brown</i> , 114 Wn. App. 554, 59 P.3d 120 (2002).....	6, 7, 9, 10, 15
<i>Valley v. Hand</i> , 38 Wn. App. 170, 684 P.2d 1341, <i>rev. denied</i> , 103 Wn.2d 1006 (1984).....	8, 9
<i>Vanderpol v. Schotzko</i> , 136 Wn. App. 504, 150 P.3d 120 (2007).....	4
<i>Walji v. Candyco, Inc.</i> , 57 Wn. App. 284, 787 P.2d 946 (1990).....	5, 12, 13

Statutes

RCW 7.06.0605, 11

RCW 11.96A.200.....10

RCW 35A.14.210.....10

RCW 50.32.02010

Rules and Regulations

CR 41(a)(2)12

MAR 6.214

MAR 7.17, 14

MAR 7.34, 5, 7, 11, 12, 13, 15

RAP 3.110

060349.098917/162129

I. NATURE OF THE CASE

This case presents a narrow legal issue for this Court: whether the Mandatory Arbitration Rules place any other restriction on a party who withdraws a request for trial de novo than payment of the opposing party's attorney fees and costs. The answer is no.

This is the second time this case has come before this court. After arbitration, but before the trial de novo was held, the trial court excluded the expert witness of Mr. Hapner and Matthew Norton Company.¹ Mr. Hapner appealed after trial. This Court reversed and remanded.² Mr. Hapner conducted additional discovery, and then moved to withdraw the trial de novo request. The trial court denied the motion. This Court's Commissioner granted appellant's motion for discretionary review to present this issue for appellate review.

II. ASSIGNMENTS OF ERROR

The trial court erred in:

1. Striking Defendant's Withdrawal of Request for Trial De Novo. (CP 102-04)

¹ For ease of the reader, the defendants will be referred to in the singular or as "Mr. Hapner."

² This Court's unpublished opinion in this matter was Cause No. 30619-1-II consolidated with 30742-1-II in *Hudson v. Hapner*, 126 Wn. App. 1057 (2005), *rev. denied*, 156 Wn.2d 1008 (2006).

2. Striking Defendant's Notice of Presentment. (CP 102-04)
3. Failing to Enter Defendant's Judgment on Arbitration Award. (CP 102-04)

III. ISSUES PRESENTED

A. Did the superior court err by striking Mr. Hapner's Withdrawal of Defendant's Trial de Novo Request? (Assignment of Error 1)

B. Did the superior court err by striking Mr. Hapner's Presentation of Judgment on the arbitration award with the attorney fees from the trial and appeal? (Assignment of Error 2)

C. Did the superior court err by failing to enter Judgment on the Arbitration Award as requested by Mr. Hapner? (Assignment of Error 3)

IV. STATEMENT OF THE CASE

A. BACKGROUND.

This case arises from a motor vehicle accident. Mr. Hapner rear-ended plaintiff's car while driving his employer's truck. (CP 76) In October 1999 plaintiff sued. (CP 77) A year later, in November 2000, the case went to mandatory arbitration. (*Id.*) The arbitrator awarded plaintiff \$14,538 in damages. (*Id.*) Mr. Hapner timely requested a trial de novo. (*Id.*)

Before trial, the superior court excluded Mr. Hapner's expert witness. (CP 79) The case was tried to a jury in April 2003. (*Id.*) The jury found for the plaintiff. (CP 80) Mr. Hapner appealed. (*Id.*) This Court held that the trial court's errors constituted reversible error. (CP 83) This Court reversed and remanded. (CP 76)

On remand, Mr. Hapner served additional discovery on Plaintiff. (CP 28-65) The discovery responses were signed on August 29, 2006. (CP 50) Right after responses were received, Mr. Hapner filed a Notice of Voluntarily Withdrawal of Request for Trial De Novo. (CP 1) He also filed a Notice of Presentment to have the court enter judgment on the arbitration award. (CP 2-5) The judgment included the arbitration award, along with interest and taxable costs, as well as attorneys fees incurred by plaintiff at trial, related to the supplemental judgment, and a blank line for attorneys fees since the mandate. (*Id.*)

Plaintiff moved to strike the voluntary withdrawal of the trial de novo. (CP 6-22, 68-70) Plaintiff argued that Mr. Hapner had waived his right to withdraw the trial de novo request. (CP 14-20)

On December 15, 2006, the superior court struck Mr. Hapner's Withdrawal of Trial de Novo Request and the Notice of Presentment. (CP 102-04) The court did not enter judgment on the arbitration award. (*Id.*)

This Court's commissioner granted discretionary review. This appeal follows.

V. ARGUMENT

Under the Mandatory Arbitration Rules ("MARs"), if a party voluntarily withdraws a trial de novo request, the only consequence is that he might be required to pay the other party's attorneys fees. MAR 7.3. There is no restriction placed on when the voluntary withdrawal must occur. Mr. Hapner followed the MAR requirements. The superior court erred when it struck the request to withdraw the trial de novo, and failed to enter the judgment on the arbitration award.

A. STANDARD OF REVIEW.

This Court interprets the Mandatory Arbitration Rules as a matter of law reviewed de novo. *Vanderpol v. Schotzko*, 136 Wn. App. 504, 507, ¶6, 150 P.3d 120 (2007); *Manius v. Boyd*, 111 Wn. App. 764, 766-67, 47 P.3d 145 (2002).

B. EITHER PARTY HAS THE RIGHT TO UNILATERALLY WITHDRAW THE TRIAL DE NOVO REQUEST.

A party's right to unilaterally withdraw a trial de novo request appears in both the MAR and the mandatory arbitration statute. The arbitration rules state, "The court may assess costs and reasonable attorney fees against a party who *voluntarily withdraws* a request for a trial de

novo.” MAR 7.3 (emphasis added). The same is true under the arbitration statute. *See* RCW 7.06.060 (similar language to MAR 7.3).

This is a right without qualification. Neither the MARs nor the arbitration statutes limit this right to withdraw. Just the opposite, the Court of Appeals affirmed that the right to withdraw a trial de novo request has no time limits in *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990).

In that case, the contract between the parties required mandatory arbitration to settle disputes. 57 Wn. App. at 286. The plaintiffs lost at arbitration and filed a request for trial de novo. *Id.* Just before trial, the plaintiffs moved to amend their complaint. *Id.* The trial court denied and the plaintiffs moved for voluntary nonsuit. *Id.* The trial court awarded MAR 7.3 attorney fees to the defendant from the period of time after the arbitration to the plaintiff’s voluntary nonsuit. *Id.* Plaintiffs objected. 57 Wn. App. at 289.

After affirming the attorney fees award, the court stated, “There is *no meaningful difference* between withdrawing an appeal [the trial de novo request, *see below*] and taking a voluntary nonsuit. Voluntary nonsuits may come shortly after service before discovery even starts, or may come after days of trial before a jury.” 57 Wn. App. at 290 (emphasis added). Therefore, under *Walji*, the defendant in the present case was not

limited to a particular time period for filing the voluntary withdrawal of the trial de novo request.

This explicit lack of limitation is also consistent with the goals of the MARs, to reduce court congestion and reduce delays. *See Sorenson v. Dahlen*, 136 Wn. App. 844, 858, 149 P.3d 394 (2006) (foremost goal for mandatory arbitration is to reduce court congestion and delays in civil hearings) (*quoting Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997)) (additional citations omitted). Thus, the present defendant had the right to unilaterally withdraw his trial de novo request without being limited to a particular time in the litigation.

C. BECAUSE A PARTY HAS A UNILATERAL RIGHT TO WITHDRAW, THE OTHER PARTY WANTING A TRIAL DE NOVO MUST FILE ITS OWN REQUEST.

Division I's opinion in *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), further examined this right to unilaterally withdraw a request for trial de novo and controls the outcome in this case.

The *Thomas-Kerr* facts are strikingly similar to the ones in the present case. In that case, plaintiff sued for injuries from an automobile accident. 114 Wn. App. at 556. Plaintiff transferred the case to mandatory arbitration and received an award. Defendant filed a request for a trial de novo. 114 Wn. App. at 556-57.

After learning of plaintiff's upcoming surgery, defendant filed a notice voluntarily withdrawing the trial de novo request. *Id.* The plaintiff objected and in the alternative moved for a voluntary nonsuit. *Id.* The trial court granted the motion for withdrawal. *Id.*³ Plaintiff appealed.

The plaintiff argued on appeal that the defendant could not unilaterally withdraw his request for trial de novo. *Id.* The Court of Appeals disagreed.

The court's analysis began by noting that the word "any" in MAR 7.1 (*any* aggrieved party may file a request) has been construed as "every" and "all." 114 Wn. App. at 560. Applying that, the court stated, "Thus, any aggrieved party, including Thomas-Kerr, was on notice that the party must file a request for trial de novo to preserve the right to a jury trial." *Id.* The court then held, "[W]hen one party files, then withdraws its request for trial de novo, the other party must have timely filed its own request for a trial de novo to preserve its right to appeal an arbitrator's decision." 114 Wn. App. at 561.

Thomas-Kerr controls. Just as in that case, the present defendant had the right to withdraw the trial de novo request when he chose. The

³ The trial court also awarded plaintiff reasonable attorney fees pursuant to MAR 7.3. 114 Wn. App. at 557. The defendant in the instant case concedes that attorney fees are owed to this plaintiff under the same rule. This is not disputed.

plaintiff, if she wanted the trial, had to have filed her own request, which she did not. The trial court erred by striking the withdrawal.

The trial court made an obvious error by granting the plaintiff's motion to strike defendant's voluntary dismissal of his trial de novo request. The error would force the parties to go forward with the trial, yielding useless litigation and a likely future appeal. Correcting the obvious error now would avert a waste of judicial resources at the trial and appellate levels. This Court should reverse and remand for entry of judgment on the arbitration award.

D. A TRIAL DE NOVO IS AN APPEAL, WHICH IS PERMISSIVE, NOT MANDATORY.

A trial de novo is an appeal from arbitration. As such, it is permissive, not mandatory. Requiring the defendant to proceed with a permissive appeal is contrary to law.

1. A Trial De Novo Is an Appeal.

Washington courts have long held that trial de novo is an appeal. In *Valley v. Hand*, 38 Wn. App. 170, 684 P.2d 1341, *rev. denied*, 103 Wn.2d 1006 (1984), plaintiff was awarded judgment in small claims court. Defendant appealed to superior court. 38 Wn. App. at 171. Plaintiff won again, but the superior court determined he was limited to the damages award from the small claims court proceeding. *Id.* The superior court

held that plaintiff was not entitled to attorney fees on appeal. *Id.* Plaintiff appealed to the Court of Appeals. *Id.*

The appellate court examined the nature of the superior court proceedings. The court stated, “While a trial de novo is ‘treated just as actions originally commenced in the Superior Court,’ and the appellant is entitled to a ‘full and independent judicial, evidentiary, and factual review,’ *it remains an appeal.*” 38 Wn. App. at 172 (citations omitted, emphasis added).

This was echoed in *Singer v. Etherington*, 57 Wn. App. 542, 546, 789 P.2d 108, 802 P.2d 133 (1990), where the court held, “A trial de novo in superior court is actually an appeal” In resolving the issue in that case (attorney fees after arbitration), the court stated, “A mandatory arbitration proceeding is treated as the original trial when applying [the attorneys fees statute]. The trial de novo is the appeal.” *Id.*

Twelve years later, in *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), the court reaffirmed that the trial de novo is not the primary adjudication, but the appeal. In that case, after the defendant withdrew the request for trial de novo, the plaintiff argued that her fundamental constitutional rights to be heard were violated. 114 Wn. App. at 561. The court disagreed. The court held that the plaintiff’s right to be heard was at the arbitration, which was an adjudication on the merits. 114

Wn. App. at 562. Her rights were not abridged by defendant's withdrawal of the request for trial de novo.

2. An Appeal Is Permissive, Not Required.

Although it seems intuitive, an appeal is not mandatory. It is permissive. For instance, RAP 3.1 states, "Only an aggrieved party *may* seek review by the appellate court." (Emphasis added.) The word "may" is permissive and nonbinding. *Blueshield. v. Washington State Office of Ins. Com'r*, 131 Wn. App. 639, 650, ¶25, 128 P.3d 640 (2006). See also RCW 11.96A.200 (interested party *may* seek appellate review of final order, judgment, or decree in probate and trust proceedings); RCW 50.32.020 (applicant for unemployment compensation *may* file an appeal from a determination or redetermination; "such appeal, *unless withdrawn*, shall be treated as an appeal from such redetermination") (emphasis added); RCW 35A.14.210 (filing of notice of appeal shall stay decision of county annexation review board until appeal is adjudicated *or withdrawn*).

Although a criminal matter, *State v. Davis*, 133 Wn.2d 187, 943 P.2d 283 (1997) is instructive on the issue that an appeal is not required. In that case, a criminal defense attorney moved the court to withdraw from representation of three offenders on appeal. She determined there were no nonfrivolous issues being raised to the appellate court. The court agreed with counsel's evaluation of the cases, permitted her to withdraw, and

dismissed the appeals. 133 Wn.2d at 192. If an appeal was clearly not mandatory in a criminal case where liberty is at stake, it cannot be said to be mandatory in civil matters.

Therefore, because the trial de novo is a permissive appeal, a party seeking to withdraw his/her request should be permitted to do so without restriction. As outlined below, the MARs permit the trial de novo request to be withdrawn without restriction to timing, provided that the court considers whether the party who prevailed at arbitration is entitled to attorney fees.

E. THE MARs DO NOT ANTICIPATE ANY OTHER CONDITION FOR WITHDRAWAL OF TRIAL DE NOVO REQUEST THAN PAYMENT OF ATTORNEY FEES.

The only mention of withdrawal of a trial de novo request in the MARs appears as follows:

The court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on trial de novo. *The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo.* "Costs" means those costs provided for by statute or court rule. Only those costs and reasonable attorney fees incurred after a request for a trial de novo is filed may be assessed under this rule.

MAR 7.3 (emphasis added). This is essentially the same as the statutory language. See RCW 7.06.060 (court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for trial

de novo if withdrawal is not requested in conjunction with acceptance of offer of compromise). Other than the fees provision, this right is without qualification.

In *Walji v. Candyco, Inc.*, 57 Wn. App. 284, 787 P.2d 946 (1990), the court addressed a nearly identical issue, voluntary nonsuit. In that case, plaintiffs filed a lawsuit to enforce a commercial lease. 57 Wn. App. at 286. The dispute was subject to mandatory arbitration. *Id.* Plaintiffs lost. *Id.*

Just before trial, plaintiffs moved to amend their complaint based on newly discovered evidence. *Id.* The court denied the motion. *Id.* The court also denied a continuance. *Id.* The court, however, permitted the plaintiffs to take a nonsuit under what is now CR 41(a)(2), which states that a plaintiff may move for a voluntary dismissal after resting his opening case. *Id.*

Although the issue before the court was whether the trial court erred by granting attorney fees under MAR 7.3, the court addressed the withdrawal of the suit. The appellate court held:

The policy of MAR 7.3 is to foster acceptance of the arbitrator's award and penalize unsuccessful appeals therefrom. . . . The court should have discretion to penalize a dismissing party under these circumstances. *There is no meaningful difference between withdrawing an appeal and taking a voluntary nonsuit.*

57 Wn. App. at 290 (emphasis added). The court further held, “Voluntary nonsuits may come shortly after service before discovery even starts, or may come after days of trial before a jury.” *Id.* Hence, because withdrawing an appeal and taking a voluntary nonsuit have no “meaningful difference,” by analogy a party also has great latitude when he/she chooses to withdraw a trial de novo request.

Allowing voluntary withdrawal is in keeping with the goals of mandatory arbitration, reducing court congestion and delays in hearing civil cases. *Sorenson v. Dahlen*, 136 Wn. App. 844, 858, ¶36, 149 P.3d 394 (2006). *See also Do v. Farmer*, 127 Wn. App. 180, 187, ¶13, 110 P.3d 840 (2005) (purpose of MAR 7.3 is to discourage meritless appeals and thereby reduce court congestion). The *Do* court explained further,

MAR 7.3 uses both a stick and a carrot to accomplish its goal. First, the rule threatens mandatory attorney fees for any party who requests a trial de novo but does not improve its position. Next, it offers the party an incentive to withdraw its request, with the possibility of avoiding attorney fees at the discretion of the court. Both the stick and the carrot are directed at the party requesting the trial de novo, attempting to influence its choices in the hope of reducing court congestion.

Id. Mr. Hapner chose the “carrot,” to withdraw his trial de novo appeal with only the possible attorney fees penalty. The court erred by striking the request rather than just awarding plaintiff her fees.

F. PLAINTIFF'S RELIANCE ON *CRESO* AND *HAYWOOD* DOES NOT REQUIRE A DIFFERENT RESULT.

Plaintiff is expected to rely again on *Cresco v. Phillips*, 97 Wn. App. 829, 987 P.2d 137 (1999), *aff'd* by *Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001) and *Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001) for support. Plaintiff's reliance is misplaced. None of these case applies here.

Creso and *Haywood* did not involve a party who voluntarily withdrew a request for trial de novo. Instead, those cases involved alleged defects in the trial de novo requests. Plaintiffs had prevailed in mandatory arbitration and were issued awards. The defendants filed requests for trial de novo. In *Creso*, the request was premature because the arbitrator had failed to file proof of service pursuant to MAR 6.2. In *Haywood*, the defendant had failed to file proof of service pursuant to MAR 7.1. The cases proceed to trial. The jury awarded plaintiffs less than the mandatory arbitration awards. After obtaining these results, plaintiffs moved to strike the allegedly defective de novo requests. The Court of Appeals and the Supreme Court held the plaintiffs had waived any objection by proceeding to the trial.

This case differs vastly from *Creso* and *Haywood*. Mr. Hapner voluntarily withdrew his de novo request. Such an action is clearly

contemplated in the rules. MAR 7.3. Unlike the plaintiffs in *Creso* and *Haywood*, Mr. Hapner had no challenge to the trial de novo request. Those cases do not support the superior court's order striking Mr. Hapner's voluntary withdrawal.

VI. CONCLUSION

The superior court erred when it struck Mr. Hapner's Withdrawal of Request for Trial de Novo and did not enter judgment on the arbitration award. Trial de novo after arbitration is a permissive appeal. It can be withdrawn without restriction. The only limitation is consideration of whether attorney fees are owed the party that prevailed at arbitration.

The court's opinion in *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), controls the outcome of the present case. The *Thomas-Kerr* opinion clearly demonstrates that the party seeking the trial de novo may withdraw it at any time. The superior court erred when it disregarded controlling case law and would not strike defendant's withdrawal of trial de novo request.

DATED this 13TH day of AUGUST, 2007.

REED McCLURE

By


Marilee C. Erickson **WSBA #16144**
Terry J. Price **WSBA #31523**
Attorneys for Appellants

060349.098917/161097

addressed to the following parties:

Kari I. Lester / Ben Barcus
Law Offices of Ben F. Barcus &
Associates, P.L.L.C.
4303 Ruston Way
Tacoma, WA 98402

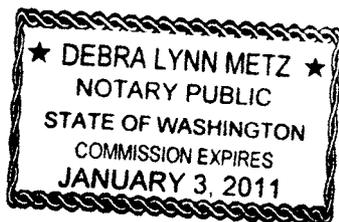
Elizabeth A. Jensen
Richard Jensen & Associates
1021 Regents Blvd.
Fircrest, WA 98466-6030

DATED this 13th day of August, 2007.

Sara Leming
Sara Leming

SIGNED AND SWORN to before me on 8-13-07 by

Sara A. Leming.



Debra Lynn Metz
Print Name: Debra Lynn Metz
Notary Public Residing at Tacoma
My appointment expires: 1-3-2011