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## I. SUMMARY OF REPLY

The central issue on appeal is whether a trial court may proceed to conduct a trial de novo where the proof of service for the Request for Trial de Novo is filed forty (40) days after the Arbitration Award was filed, and the Request for Trial de Novo was not served upon two (2) parties of record.

The Kennedys admit the following relevant facts:

- Steven M. Bobman appeared as attorney of record for Sandra and Jack Kennedy (hereinafter the Kennedys) and SK Landscape, LLC, on September 3, 2009. Brief of Respondents at p. 6. Scott and Mary Kennedy appeared and represented themselves pro se. *Id.*;
- The Arbitration Award was filed March 5, 2010. *Id.*;
- Counsel for the Kennedys electronically filed a Request for Trial de Novo and a Note for Trial Setting and For Sealing Arbitration Award on March 22, 2010. *Id.*;
- The Certificate of Service filed by the Kennedys states that the Request for Trial de Novo was delivered on March 23, 2010 to Nicole Bolan, attorney for the Incubator, and the Pierce County Superior Court Arbitration Department. *Id.* at p. 7. There is no allegation or evidence that the Request for Trial de Novo was sent to the pro se parties, Scott and Mary Kennedy. *Id.*;

- At the hearing to dismiss the Request for Trial de Novo, the Kennedys argued that counsel for the Incubator was automatically electronically served with the Request for Trial de Novo when it was filed (no citation to the record provided). *Id.* In reply, the Incubator submitted evidence that there was no proof that its counsel was electronically served with the Request for Trial de Novo and the Note for Trial Setting. *Id.*;
- At the hearing on the motion for reconsideration, Mr. Bobman indicated he was representing Scott and Mary Kennedy, therefore it was not necessary to send them a copy of the Request for Trial de Novo. *Id.* at p. 8.

The uncontroverted facts establish that no proof of service for the Request for Trial de Novo was filed until forty (40) days after the Arbitration Award was filed, and that the Request for Trial de Novo was not served upon Scott and Mary Kennedy, two parties of record. Therefore, the trial court erred in refusing to dismiss the Request for Trial de Novo.

## II. ARGUMENT

- A. **THE PROOF OF SERVICE FOR THE REQUEST FOR TRIAL DE NOVO IS DEFECTIVE BECAUSE IT WAS NOT FILED WITHIN 20 DAYS OF THE ARBITRATION AWARD, NOR DOES IT DEMONSTRATE THAT ALL**

**PARTIES WERE SERVED WITH THE REQUEST FOR TRIAL DE NOVO.**

The trial court committed reversible error in denying the Incubator's motion to dismiss the Kennedys' Request for Trial de Novo, where no proof of service of the Request for Trial de Novo was filed until forty (40) days after the Arbitration Award was filed, and the only proof of service on file does not state that all parties were served with the Request for Trial de Novo. RP (4/16/2010) 3-8; CP 298-299, 306-308.

This court reviews the trial court's application of the mandatory arbitration rules de novo. *Christensen v. Atlantic Richfield Co.*, 130 Wn. App. 341, 344, 122 P.3d 937 (2005).

**1. Local Mandatory Arbitration Rules supplement, and do not replace, the State Civil Rules and statutes governing mandatory arbitrations.**

Respondents argue that they were not required to file proof of service of the Request for Trial de Novo within twenty (20) days of the filing of the Arbitration Award, as the requirement is found only in the State Mandatory Arbitration Rule (MAR 7.1(a)), and not in the Mandatory Arbitration statute (RCW 7.06 et seq) or Pierce County Local Mandatory Arbitration Rules (PCLMAR 7.1). Respondents' Brief, p. 8-10. However, while Local Mandatory Arbitration Rules may *supplement* the State Mandatory Arbitration Rules, local rules do not *supplant* the State rule

requiring proof of service of the request for trial de novo be filed within twenty (20) days of the Arbitration Award. RCW 7.06.030; *Nevers v. Fireside, Inc.*, 133 Wn.2d at 809; CR 83; MAR 7.1(a).

RCW 7.06.030 states that the Supreme Court shall adopt rules to implement the mandatory arbitration of civil actions under that chapter. RCW 7.06.030. Rules adopted by the Supreme Court “are interpreted as though they were drafted by the Legislature.” *Nevers v. Fireside, Inc.*, 133 Wn.2d at 809. Therefore, MAR 7.1(a), which is adopted by the Supreme Court, is authorized by the arbitration statute and is interpreted as though it was drafted by the Legislature. RCW 7.06.030; *Nevers v. Fireside, Inc.*, 133 Wn.2d at 809.

Further, as stated in MAR 8.2, “[t]he arbitration rules may be *supplemented* by local superior court rules adopted and filed in accordance with CR 83.” MAR 8.2 (emphasis added). This is expressly acknowledged in the Pierce County Local Mandatory Arbitration Rules. PCLMAR 1.1. PCLMAR 1.1(a) provides that “the Mandatory Arbitration Rules, *as supplemented by these local rules*,” are not designed to address every question that may arise during an arbitration proceeding. PCLMAR 1.1(a). The Merriam-Webster Dictionary definition of “supplement” is “something that completes or makes an addition.” *Merriam-Webster Online Dictionary*, 2010, at <http://www.merriam->

webster.com/dictionary/supplement. Therefore, the MAR 7.1 requirement that proof of service of the Request for Trial de Novo be filed within twenty (20) days of the Arbitration Award has the force of a statute, and PCLMAR 7.1 is an addition to, not a replacement for, that requirement. RCW 7.06.030; *Nevers v. Fireside, Inc.*, 133 Wn.2d at 809; CR 83.

**2. Substantial compliance with MAR 7.1(a) is insufficient to grant a trial de novo.**

The Kennedys also argue that they substantially complied with MAR 7.1(a), and that the *Nevers* Court left the issue of substantial compliance with MAR 7.1(a) unresolved. Brief of Respondent, p. 12, 14. However, the *Nevers* Court specifically addressed the issue of substantial compliance and rejected it, holding:

Were we to conclude that the specific requirement of MAR 7.1 that copies of a request for trial de novo be served within 20 days of the filing of the arbitration award ***and that proof of that service*** be filed within that same period may be satisfied by ***substantial compliance***, we would be subverting the Legislature's intent by contributing, inevitably, to increased delays in arbitration proceedings.

*Nevers v. Fireside, Inc.*, 133 Wn.2d at 815 (emphasis added). Therefore, strict compliance with MAR 7.1(a), not substantial compliance, is required. *Id.*

**3. Scott and Mary Kennedy were not served with the Request for Trial de Novo.**

MAR 7.1(a) requires the requesting party to file proof that a copy of the Request for Trial de novo “has been served on all other parties appearing in the case.” MAR 7.1(a). The Kennedys admit Scott and Mary Kennedy were never served with the Request for Trial de Novo. RP (5/14/2010) 11; Brief of Respondents, p. 8, 15. Instead, the Kennedys argue that 1) Mr. Bobman represented Scott and Mary Kennedy; and 2) that Scott and Mary Kennedy had not participated in the case post-arbitration, and therefore it was not necessary that they be provided a copy. Brief of Respondents, p. 8, 15.

The record is unambiguous that Mr. Bobman represented only SK Landscape, LLC, Sandra Kennedy and Jack Kennedy, and that Scott and Mary Kennedy appeared pro se. CP 66-69, 224-225, 280, 306-307, 309, 345-346, 348. Therefore, the Kennedys were required to send a copy of the Request for Trial de Novo to Scott and Mary Kennedy, since they had appeared in the action. MAR 7.1(a); CP 66-69.

There is no authority to support the Kennedys’ argument that they were not required to provide Scott and Mary Kennedy a copy of the Request for Trial de Novo because they were not “contesting the arbitrator’s decision.” Brief of Respondent, p. 15. MAR 7.1(a) clearly states that the party requesting a trial de novo must file, within twenty (20)

days of the filing of the arbitration award, proof that the request has been served on all other parties *appearing* in the case. MAR 7.1(a). It does not state that the request must only be served on all other parties contesting the arbitrator's decision. MAR 7.1(a).

**B. ELECTRONIC FILING OF THE REQUEST FOR TRIAL DE NOVO HAS NO BEARING ON PROOF OF SERVICE.**

The evidence does not support any finding or ruling that the proof of service requirement was impacted by the electronic filing of the Request for Trial de Novo. CP 307 (Finding of Fact 4). The record unambiguously demonstrates that no proof of service, whether by electronic service or legal messenger, was filed by the Kennedys until April 14, 2010, which is forty (40) days after the Arbitration Award was filed. CP 298-299. The Certificate of Service filed on that date states only that a copy of the Request for Trial de Novo was delivered to counsel for the Incubator by legal messenger; nowhere does it mention or allege that the document was electronically served upon the Incubator's counsel. CP 298-299.

Further, the LINX document submitted by the Incubator's counsel shows all documents electronically served on the attorney for the Incubator for the period of January 1, 2010, to May 13, 2010, none of which are in the subject case. CP 344. Therefore, the record is

uncontroverted that the Request for Trial de Novo was electronically filed, but not electronically served upon the Incubator's counsel. CP 298-299, 344.

The evidence relied upon by the Kennedys as proof of electronic service was the Filing Notification from the Pierce County Superior Court LINX System. CP 294. However, the Filing Notification does not state that the Request for Trial de Novo was delivered to the Incubator or its counsel, it simply states that the document was received by the Pierce County Clerk's Office. CP 294. Further, that Filing Notification was never filed until April 14, 2010, the same day the Certificate of Service was filed, forty (40) days after the Arbitration Award. CP 294. Therefore, the Filing Notification is not proof of service, nor was it filed within twenty (20) days of the Arbitration Award. MAR 7.1(a); CP 294.

Finally, GR 30 provides that "parties may electronically serve documents on other parties of record only by agreement." GR 30. In this case, there is no evidence that counsel for the Incubator agreed to accept electronic service of documents in the case. Therefore, electronic service of the Request for Trial de Novo, even if accompanied by timely filing of proof of electronic service, would have been ineffective. GR 30.

It is not the mere filing of the Request for Trial de Novo within twenty (20) days of the Arbitration Award that perfects the request for trial

de novo; the additional filing of the proof of service within twenty (20) days is an absolute requirement. *Nevers v. Fireside, Inc.*, 133 Wn.2d at 815. Therefore, whether the Request for Trial de Novo was electronically filed has no bearing if the proof of service was not timely filed as well. *Id.*; MAR 7.1(a).

**C. THE TRIAL COURT'S JURISDICTION TO CONDUCT A TRIAL DE NOVO IS NOT AT ISSUE, AS THE OBJECTION WAS RAISED PRIOR TO TRIAL.**

Finally, the Kennedys argue that failure to file the proof of service within twenty (20) days of the arbitration award is not jurisdictional, and therefore the parties should proceed to trial. Brief of Appellants, p. 13, 17. However, this misstates the court's ruling in *Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001). In *Haywood*, the issue was whether the failure to file proof of service of the request for trial de novo within twenty (20) days of the arbitration award was jurisdictional, and therefore the issue could be raised for the first time *after* the trial de novo was conducted. *Id.* The *Haywood* Court held that failure to file the proof of service was not jurisdictional, and therefore the matter could not be raised for the first time *after* the trial de novo. *Id.* at 237. The *Haywood* Court specifically compared that issue to the issue in *Nevers*, which was not a jurisdictional issue as the objection was raised before the trial de novo:

‘The issue before us is whether the MAR 7.1(a) requirement that proof of service be filed within 20 days of the date the arbitration award is filed is mandatory and thus a condition precedent to obtaining a trial de novo. If it is, failure to strictly comply with that requirement is fatal to a request for trial de novo and the superior court's authority is limited to entering a judgment upon the arbitrator's decision and award.’

We then concluded:

‘We are of the view that timely filing of a request for trial de novo of an arbitrator's decision in court ordered arbitration is necessary for the superior court to conduct a trial de novo... It follows, we believe, that the requirement in MAR 7.1(a) that proof of service of copies of the request for trial de novo be filed is also a prerequisite to obtaining a trial de novo.... **[I]t is only when there has been timely service and filing of proof of that service, that the court may conduct a trial de novo. Both steps must be taken, and on this the rule is unambiguous.**’

*Id.* at 236-237; citing *Nevers v. Fireside, Inc.*, 133 Wn.2d at 811-12

(emphasis added). As in *Nevers*, the Incubator filed an objection to the Kennedys’ failure to timely file proof of service well before the trial de novo was conducted. CP 272-277, 281-288. Therefore, the issue of jurisdiction is irrelevant, and the trial court’s authority is limited to entering judgment on the Arbitration Award. *Haywood v. Aranda*, 143 Wn.2d at 237; *Nevers v. Fireside, Inc.*, 133 Wn.2d at 811-12.

**D. THE INCUBATOR IS ENTITLED TO ITS ATTORNEY'S FEES INCURRED AFTER THE ARBITRATION AWARD AS THE KENNEDYS FAILED TO IMPROVE THEIR POSITION AT TRIAL.**

A party who requests a trial de novo but fails to improve its position in the trial court must pay attorney's fees to the non-appealing party from the date of the request for trial de novo. MAR 7.3; RCW 7.06.060. In *Kim v. Pham*, the requesting party failed to file proof of service of the request for trial de novo within twenty (20) days of the arbitration award, so the request for trial de novo was denied. *Kim v. Pham*, 95 Wn. App. 439, 446-7, 975 P.2d 544, *review denied*, 139 Wn.2d 1009, 994 P.2d 844 (1999). The non-appealing party was awarded attorney's fees pursuant to MAR 7.3, as the appealing party failed to improve its position. *Id.*

In this case, if the court reverses the decision of the trial court and denies the Kennedys' Request for Trial de Novo, the Kennedys failed to improve their position in the trial court, and the Incubator is entitled to its attorney's fees incurred after the Request for Trial de Novo was filed. *Id.*

**E. THE INCUBATOR IS ENTITLED TO AN AWARD OF FEES AND COSTS ON APPEAL.**

RAP 18.1 provides for an award of costs and fees on appeal if otherwise permitted by applicable law. RAP 18.1(a). This court has authority to award fees on appeal where a statute or contract allows an

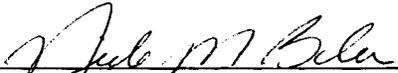
award of attorney's fees at trial. *Bloor v. Fritz*, 143 Wn. App. 718, 753, 180 P.3d 805 (2008). In the present case, attorney's fees and court costs should have been awarded to the Incubator when the Kennedys failed to improve their position after filing the Request for Trial de Novo. MAR 7.3; RCW 7.06.060. In addition, the LLC Leases provide that the prevailing party is entitled to an award of attorney's fees. CP 30, 45. As a result, fees and costs are authorized on appeal. RCW 4.84.330; RCW 7.06.060; RAP 18.1(a); MAR 7.3; *Bloor v. Fritz*, 143 Wn. App. at 753. The Incubator requests permission to file an affidavit of fees and costs pursuant to RAP 18.1(d) following the decision on this appeal.

### III. CONCLUSION

The Incubator requests that this court reverse the trial court's decision denying the Incubator's motion to dismiss the Kennedy's Request for Trial de Novo, and/or the trial court's decision denying the Incubator's motion for reconsideration regarding the same. Further, the Incubator requests fees and costs on appeal as the prevailing party.

Respectfully submitted this 24 day of January, 2011.

**BLADO KIGER BOLAN, P.S.**

  
\_\_\_\_\_  
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CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the \_\_\_ day of January, 2011, she placed with ABC Legal Messengers, Inc. an original Reply Brief of Appellants and Certificate of Service for filing with the Court of Appeals, Division II, and true and correct copies of the same for delivery to each of the following parties or their counsel of record:

Attorneys for Respondents, Sandra Kennedy and Jack Kennedy, and SK Landscape, LLC:

Steven M. Bobman  
8701 45<sup>th</sup> Street West  
University Place, WA 98466

And placed in the US Mail, postage pre-paid, at Tacoma, Washington, true and correct copies of the same for delivery to each of the following parties:

Pro se parties:

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DATED this 24<sup>th</sup> day January, 2011, at Tacoma, Washington.

**BLADO KIGER BOLAN, P.S.**

  
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# Appendix A

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West's Revised Code of Washington Annotated

Title 7. Special Proceedings and Actions (Refs & Annos)

Chapter 7.06. Mandatory Arbitration of Civil Actions (Refs & Annos)

West's RCWA 7.06.030

7.06.030. Implementation by supreme court rules

Currentness

The supreme court shall by rule adopt procedures to implement mandatory arbitration of civil actions under this chapter.

**Credits**

[1979 c 103 § 3.]

Notes of Decisions (5)

Current through Laws 2011, chapters 1 and 2

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## Appendix B

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GENERAL CIVIL RULE 83  
LOCAL RULES OF COURT

(a) Adoption. Each court by action of a majority of the judges may from time to time make and amend local rules governing its practice not inconsistent with these rules. Local rules shall be numbered and indexed in a manner consistent with the numbering and index system for the Civil Rules.

(b) Filing with the Administrator for the Courts. Local rules and amendments become effective only after they are filed with the state Administrator for the Courts in accordance with GR 7.

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# Appendix C

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RULE 8.2  
LOCAL RULES

The arbitration rules may be supplemented by local superior court rules adopted and filed in accordance with CR 83.

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## Appendix D

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West's Revised Code of Washington Annotated

Pierce County

Superior Court

Local Rules of the Superior Court for Pierce County

Part IV. Mandatory Arbitration Rules (Pclmar)

I. Scope and Purpose of Rules

Pierce County Local Mandatory Arbitration Rules, PCLMAR 1.1

PCLMAR 1.1. Application of Rules--Purpose and Definitions

Currentness

**(a) Purpose.** The purpose of mandatory arbitration of civil actions under RCW 7.06, as implemented by the Mandatory Arbitration Rules, is to provide a simplified and economical procedure for obtaining the prompt and equitable resolution of disputes involving claims of \$50,000 or less. The Mandatory Arbitration Rules, as supplemented by these local rules, are not designed to address every question which may arise during the arbitration process, and the rules give considerable discretion to the arbitrator. The arbitrator should not hesitate to exercise that discretion. Arbitration hearings should be informal and expeditious, consistent with the purpose of the statutes and rules.

**(b) "Director" Defined.** In these rules, "Director" means the Clerk of the Pierce County Superior Court.

**Credits**

[Adopted effective June 1, 1990; amended on an emergency basis effective August 1, 2005.]

Current with amendments received through 10/1/10

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