

COURT OF APPEALS,  
DIVISION II  
OF THE STATE OF WASHINGTON

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KERR CONTRACTORS, INC., LIBERTY MUTUAL GROUP INC., a/k/a SAFECO  
INSURANCE COMPANY OF AMERICA, Bond Nos. 6709272, 6709273, 5581430,

Appellants,

v.

DAN'S TRUCKING, INC.,

Respondent.

FILED  
COURT OF APPEALS  
DIVISION II  
2013 SEP 23 PM 2:15  
STATE OF WASHINGTON  
BY [Signature]

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**APPELLANT'S REPLY BRIEF**

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## **I. INTRODUCTION**

In its brief, respondent Dan's Trucking, Inc. fails to show that it and appellants Kerr Contractors, Inc., Liberty Mutual Group Inc., a/k/a Safeco Insurance Company of America, Bond Nos. 6709272, 6709273, 5581430 (collectively "Kerr") agreed to privately arbitrate their attorney fee dispute. Dan's Trucking makes some irrelevant arguments—such as its argument that this appeal will not benefit Kerr even if it prevails—which distract from the real issue, which is whether the arbitrator decided the attorney fees issue in the context of the MAR arbitration or in private arbitration. However, in applying the context rule, as the Court is required to do, it is clear that the parties intended for the attorney fees issue to remain in the MAR arbitration. Therefore, the Court should reverse the trial court's order striking Kerr's request for trial de novo and remand this matter for trial de novo.

## **II. ARGUMENT**

### **A. This Appeal Is Not Frivolous**

Dan's Trucking argues that "[t]his is a useless appeal, and can and should be denied on that ground alone." Respt.'s Brief, 4. Specifically, Dan's Trucking argues that "because the determination that Dan's Trucking is already the

prevailing party in this matter moots any possible benefit Kerr could have from this appeal.” Respt.’s Brief, 3–4. An appeal is frivolous ““if there are no debatable issues upon which reasonable minds might differ and it is so devoid of merit that there [is] no reasonable possibility of reversal.”” *Satterlee v. Snohomish County*, 115 Wn.App. 229, 237, 62 P.3d 896 (2002). To determine whether an appeal is frivolous the Court considers “in addition to the foregoing definition of ‘frivolous appeal,’ the following principles: RAP 2.2 gives a civil appellant the right to appeal, all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant, the record should be considered as a whole, and an appeal that is affirmed simply because the court rejects the arguments is not frivolous.” *Id.* at 237–38.

Here, Kerr’s appeal is clearly not frivolous. If the Court accepts Kerr’s argument that the parties’ attorney fee dispute was decided in the context of the MAR arbitration, then Kerr had the right to request trial de novo and the trial court erred in striking that request. Dan’s Trucking admits that the provision of the settlement agreement providing that “the arbitrator” will decide the attorney fees issue is silent as to whether he would decide the issue as a MAR or private arbitrator. Therefore, there is a “debatable issues upon which reasonable minds

might differ.” Further, the other factors the Court is required to consider in determining whether an appeal is frivolous all clearly weigh in Kerr’s favor.

Finally, if the Court finds the trial court erred, Kerr will prevail in this matter. What happens after that (*i.e.*, the result on trial de novo) is irrelevant to this appeal. Even if Kerr could not benefit from trial de novo, as Dan’s Trucking argues, it would not matter in the context of this appeal, which is simply a determination of whether the trial court erred in striking Kerr’s request. Kerr’s appeal is not frivolous and Dan’s Trucking’s arguments about the benefit to Kerr of this appeal and trial de novo should the Court reverse are irrelevant.

**B. Application of Context Rule to the Agreement Shows That the Parties Intended the Attorney Fees Issue to Remain in the Mar Arbitration.**

Dan’s Trucking admits that “[t]he emails striking the MAR arbitration and providing for arbitration on fees are silent on [the] issue” of “whether this was a continuation of the MAR arbitration or was a new arbitrations based on a separate contractual agreement to arbitrate the fee issue.” Respt.’s Brief, 1. However, Dan’s Trucking argues that “[e]ven if the fee arbitration term could be said to be ambiguous, that ambiguity was created by Kerr’s attorney (who drafted the settlement memorialization)” and therefore “[a]ny such ambiguity is to be

resolved against the drafter.” Respt.’s Brief, 6–7. While resolution of ambiguity against the drafter is a canon of construction, it is not the end of the analysis.

As the authorities Kerr cited in its opening brief clearly hold, the Court must apply the context rule to the agreement to determine whether the parties agreed to resolve the fee issue pursuant to MAR or private arbitration. Pursuant to the context rule, “extrinsic evidence relating to the context in which a contract is made may be examined to determine the meaning of specific words and terms.” *Id.* at 399–400. Extrinsic evidence includes “the subject matter and objective of the contract, all the circumstances surrounding the making of the contract, the subsequent acts and conduct of the parties, and the reasonableness of the respective interpretations urged by the parties.” *William G. Hulbert, Jr. and Clare Mumford Hulbert Revocable Living Trust v. Port of Everett*, 159 Wn.App. 389, 399, 245 P.3d 779 (Div. 1, 2011).

First, the “subject matter and objective of the contract” was settlement of the parties’ dispute. CP 26–28. Second, the “circumstances surrounding the making of the contract” include the fact that this matter was already in mandatory arbitration and the settlement provision referring to “the arbitrator” referred to the court-appointed, mandatory arbitration arbitrator, Mr. Ching. Third, the “subsequent acts and conduct of the parties” were consistent with the fact that the

attorney fee issue remained within the purview of the mandatory arbitration. The parties continued with the mandatory arbitration arbitrator, Mr. Ching, as the arbitrator of the attorney fee issue. Notably, the parties did not discuss with Mr. Ching the purported change in his role from that of a court-appointed arbitrator pursuant to the MAR to that of a private arbitrator pursuant to RCW Chapter 7.04A.

Additionally, Kerr merely notified the arbitrator that the principal amount of plaintiff's claim had settled and that the issue of attorney fees was reserved for his determination, but *did not* notify the trial court's Arbitration Coordinator that the matter had settled, as is required by LMAR 4.4 when a matter is *completely* settled. LMAR 4.4; MAR 7.1. Further, Mr. Ching issued his award on the Court's mandatory arbitration award form, which informed Kerr it had the right to request trial de novo, and therefore Mr. Ching clearly saw his role in determination of the attorney fee issue as that of a court-appointed mandatory arbitration arbitrator. CP 21–22.

Fourth, in considering “the reasonableness of the respective interpretations urged by the parties” the Court should consider the fact that Dan's Trucking admits that there is *no provision* which *expressly* provides that the parties are submitting the attorney fee issue to private arbitration. Furthermore, Dan's

Trucking has failed to cite any authority for the proposition that settlement of the principal amount of a party's claim removes supplemental issues, such as the award of attorney fees, from the arbitrator's purview as a matter of law. Without an express agreement or action of law, the status quo was maintained, with Mr. Ching deciding the attorney fee issue in his capacity as a MAR arbitrator.

C. **The MAR and Local Rules Provide That the Arbitrator May Make Attorney Fees Decisions.**

Despite the fact that both the MAR and the local rules clearly provide that a MAR arbitrator may decide the issue of attorney fees, Dan's Trucking argues that "the determination of fees was not already an issue in MAR" and that "[f]ee requests are most often handled at time of entry of judgment by Superior Court rather than by the MAR arbitrator because not all fees have been incurred prior to the time for entry of judgment." Respt.'s Brief, 7.

The Thurston County Superior Court Local Rules for Mandatory Arbitration ("LMAR") expressly give the arbitrator authority to award attorney fees. LMAR 3.2(c). Further, MAR 7.1 expressly provides for trial de novo following award of attorney fees. MAR 7.1 (party may request trial de novo of "a decision on a timely request for costs or attorney fees") (emphasis added).

Thus, the rules specifically allow that a party may request trial de novo following an arbitrator's decision on fees. Whether this decision on fees follows

an arbitration hearing or the parties' settlement of claims would seem to be irrelevant.

**D. Dan's Trucking's Arguments Regarding Neglect on the Part of Kerr's Attorney Are Irrelevant and Prejudicial.**

Dan's Trucking claims that this matter was decided in its favor by two judges at two different hearings. Respt.'s Brief, 2. In fact, at the first hearing, Dan's Trucking's motion to strike was unopposed because Kerr's attorney was not present at the hearing due to a problem with Kerr's attorney's mail which caused him to not receive the motion. Dan's Trucking attempts to re-hash these issues before the Court, but allegations regarding neglect on the part of Kerr's attorney are inappropriate and irrelevant to this appeal and, furthermore, have already been decided in Kerr's favor by the trial court (*i.e.*, it granted Kerr's motion to set aside the "first" motion to strike.) There is simply no reason to bring these issues up with the Court, other than to prejudice Kerr.

**E. Kerr Is Entitled to Attorney Fees If it Prevails.**

Dan's Trucking argues that if it prevails, Kerr is not entitled to recover its attorney fees. It argues—without citation to authority—that RCW 39.08.030 and RCW 60.28.030 “are not ‘two-way streets’” meaning that “[s]uccessful claimants are entitled to recover their fees,” but “[o]pponents of claimants, who successfully

defeat a claim, are not.” Respt.’s Brief, 8. However, RCW Chapter 60, one of the chapters under which Dan’s Trucking seeks attorney fees, provides that:

The court may allow the prevailing party in the action, whether plaintiff or defendant, as part of the costs of the action, the moneys paid for recording the claim of lien, costs of title report, bond costs, and attorneys’ fees and necessary expenses incurred by the attorney in the superior court, court of appeals, supreme court, or arbitration, as the court or arbitrator deems reasonable.

RCWA 60.04.181(3) (emphasis added); *Pacific Continental Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 387–88, 273 P.3d 1009 (2012) (Court denied Bank attorney fees, but did not because bank was not the lien claimant, but simply because it did not prevail on appeal). In other words, if Kerr prevails, it is entitled to recover its attorney fees.

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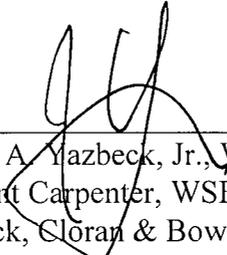
### III. CONCLUSION

For the reasons stated above and in Kerr's opening brief, Kerr respectfully requests that the Court reverse the trial court's order striking Kerr's request for trial de novo and remand this matter for trial de novo.

DATED this 19 day of September, 2013.

Respectfully submitted,

YAZBECK, CLORAN & BOWSER, PC



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**DAN'S TRUCKING (Respondent/Plaintiff)**  
v.  
**KERR CONTRACTORS, INC., ET AL. (Appellants/Defendants)**  
**Division II Court of Appeals Case No. 44342-2-II**  
**Thurston County Superior Court Case No. 11 2 02341 6**

**CERTIFICATE OF SERVICE**

1. My name is Carl V. Anderson. I am a citizen of the United States, over the age of eighteen (18) years, a resident of the State of Oregon, and am not a party to this action.

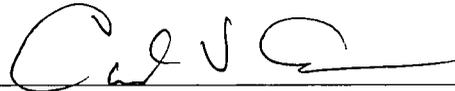
2. On the 20<sup>th</sup> day of September 2013, a true and correct copy of the foregoing **APPELLANT'S REPLY BRIEF** was delivered via email and United States Postal Service, postage prepaid, to the following attorneys and filed via regular mail with Division II Washington Court of Appeals:

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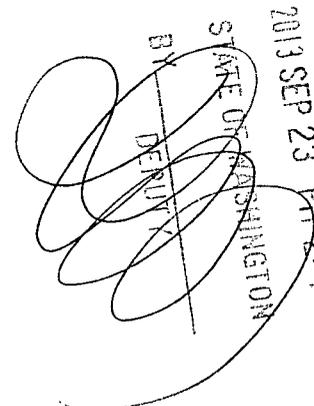
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**I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.**

Dated: September 20, 2013  
At: Portland, Oregon.



Carl V. Anderson, Legal Assistant  
Office of Attorneys for Kerr Contractors, Inc, and  
Liberty Mutual Group, Inc., aka Safeco Insurance  
Company of America



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**CERTIFICATE OF SERVICE**