

X

NO. 82409-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LEA HUDSON,

Petitioner,

vs.

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

Respondents.

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

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I. NATURE OF THE CASE

At defendants' request, a trial de novo after mandatory arbitration occurred. It resulted in a judgment against defendants. Division II reversed and remanded for a new trial because—at plaintiff's behest—the trial court had improperly excluded the defense expert. On remand, defendants withdrew their trial de novo request and offered to pay—in addition to the arbitration award—interest, attorney fees incurred in the trial court, and taxable costs.

But plaintiff, who had failed to request a trial de novo herself, sought to force a second trial by claiming defendants could not withdraw their trial de novo request. RCW 7.06.060 and MAR 7.3 authorize assessing reasonable attorney fees and costs against a party who voluntarily withdraws such a request. Division II ruled that defendants could withdraw their request.

II. ISSUES PRESENTED

A. Does the panel's holding that defendants could withdraw their trial de novo request present an issue of substantial public interest that this Court should review where—

- the Legislature and this Court have promulgated a statute and rule recognizing the right to withdraw such a request,

- defendant's successful appeal—necessitated by the trial court's adoption of plaintiff's erroneous evidentiary positions—nullified the first trial de novo,

- no one would file a trial de novo request expecting that any bad result could be overturned on appeal,

- plaintiff could have avoided the entire problem by timely filing her own trial de novo request,

- defendants not only offered to pay, consistent with RCW 7.06.060 and MAR 7.3, the arbitration award and attorney fees and costs incurred in the trial court, they also offered to pay interest, and

- plaintiff waited until her motion for reconsideration to ask for attorney fees on appeal when she did not prevail in the appeal?

B. Does the panel's holding that defendants could withdraw their trial de novo request conflict with *Nevers v. Fireside*, *Haywood v. Aranda*, or *Creso v Phillips*, where those cases did not even involve withdrawal of a trial de novo request, RCW 7.06.060, or MAR 7.3?

C. Does plaintiff's claim she is entitled to attorney fees and costs on appeal even though she did not prevail on appeal present an issue of substantial public interest that this Court should review, where plaintiff first made this claim in her motion for reconsideration of the panel's decision?

D. Does the panel's refusal to award plaintiff attorney fees and costs on appeal under the first sentence of MAR 7.3 conflict with *Tribble v. Allstate* where—

- the *Tribble* plaintiff had improved her position on trial de novo, but it is not yet known whether plaintiff here will do so, and
- plaintiff waited until her motion for reconsideration to ask the panel to award her fees and costs when she lost the appeal?

III. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Plaintiff/petitioner Lea Hudson and defendant/respondent Clifford Hapner were in a motor vehicle collision. A year later, plaintiff was in another collision, for which she visited the emergency room twice. (CP 76, 115)

B. STATEMENT OF PROCEEDINGS.

Plaintiff sued defendant and his employer, defendant/respondent Matthew Norton. (CP 114-17) At plaintiff's request, the case went to mandatory arbitration. (CP 113) At the time of arbitration, plaintiff had incurred \$3,328 in medical expenses that she said were related to the accident with defendant. The arbitrator awarded plaintiff \$14,538. (CP 9)

Defendants timely requested a trial de novo. (CP 118-19) Plaintiff did not.

At trial, plaintiff claimed neck and back pain and testified, over objection, that all her treatment was due to the accident with defendant. She obtained a \$292,298 verdict. Judgment for \$332,878.80 was entered, representing the verdict, plus costs and attorney fees. (CP 79, 152-56)

Defendants successfully appealed (“first appeal”). Division II ruled that the trial court had—at plaintiff’s urging—erroneously excluded the defense expert’s testimony. The court reversed and remanded for a new trial. *Hudson v. Hapner*, No. 30619-1-II (Wash. App. Apr. 12, 2005) (2005 WL 834433) (a copy of the opinion is at CP 76-86).

In addition, the panel ruled it was error to exclude medical records showing that plaintiff had sought medical care at least 12 times during an 18-month period after her second accident. (CP 79, 83-84) The records showed that although she had complained of various ailments, only once had she complained about her back and not about her neck at all. (CP 83) The panel said the exhibit “tended to disprove [plaintiff’s] claim of back pain.” (CP 83) This Court denied review. *Hudson v. Hapner*, 156 Wn.2d 1008, 132 P.3d 146 (2006).

On remand, after additional discovery, defendants gave notice of withdrawal of their trial de novo request. (CP 1, 25-26) They also sought to present a judgment *against them and in favor of plaintiff*. (CP 2) The proposed judgment was for the sum of (1) the arbitration award, (2)

attorney fees incurred in the trial court before the first appeal was filed, (3) taxable costs, (4) prejudgment interest on the principal judgment from the filing of the trial de novo request, and (5) an as yet undetermined amount of “attorney fees incurred by plaintiff’s attorneys subsequent to the mandate returning this matter to the Superior Court.” (CP 3-5)

Instead, the trial court struck the withdrawal, effectively requiring the parties to go through at least a second trial de novo. (CP 102-04)

Division II granted discretionary review and reversed (“second appeal”). *Hudson v. Hapner*, 146 Wn. App. 280, 187 P.3d 311 (2008). Plaintiff moved for reconsideration. For the first time in the second appeal, she argued that (1) she was entitled to attorney fees and costs on appeal even though she was not the prevailing party and (2) the opinion in the first appeal be modified to award her attorney fees and costs incurred in the first appeal that she lost as well. The panel denied the motion.

IV. ARGUMENT

This Court does not review just any case. One or more RAP 13.4(b) criteria must be present. Although plaintiff relies on RAP 13.4(b)(1), (2), and (4), none of these criteria exists here. There is no reason for this Court to review.

A. THE TRIAL DE NOVO WITHDRAWAL IS NOT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THIS COURT SHOULD REVIEW.

A party unhappy with a mandatory arbitration award may file a request for trial de novo. RCW 7.06.050(1); MAR 7.1(a). The request may be voluntarily withdrawn, but the party withdrawing it runs the risk that the trial court may assess it with the other side's reasonable attorney fees and costs. RCW 7.06.060(1); MAR 7.3; *see Walji v. Candyco, Inc.*, 57 Wn. App. 284, 289-90, 787 P.2d 946 (1990).

If a party withdraws a trial de novo request, trial will not occur unless the other party also timely filed a trial de novo request. *See Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002). Absent such a request from the latter, judgment on the arbitration award must be entered. But if the non-withdrawing party has also filed a timely trial de novo request, that party's right to a trial de novo is preserved. *Id.* at 561.

Thus, plaintiff here could have ensured there would be a trial de novo—something she presumably would have wanted, given that she claimed her condition worsened after the arbitration. (Brief of Respondent 20) If she had filed a timely request, the second trial de novo would have occurred regardless of defendants' withdrawal of their request, and this appeal would never have happened. *Thomas-Kerr*, 114 Wn. App. at 561.

But plaintiff did not file a trial de novo request. Instead, she wants this Court to rectify her error.

Plaintiff claims there is no unilateral right to withdraw a request for trial de novo. Wrong. RCW 7.06.060(1) provides:

... The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.

MAR 7.3 also provides:

... The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo.

Why would the Legislature and this Court authorize a penalty for unilateral withdrawal of a trial de novo request if unilateral withdrawals were impossible? RCW 7.06.060(1) and MAR 7.3 would be completely meaningless if, as plaintiff claims, there is no unilateral right to withdraw a trial de novo request. Statutes and rules are not construed to render them superfluous or meaningless. *See State v. Bash*, 130 Wn.2d 594, 602, 925 P.2d 978 (1996); *State v. W.W.*, 76 Wn. App. 754, 757, 887 P.2d 914 (1995). Thus, plaintiff's complaint that *Thomas-Kerr* "never cited any authority to support" the statement that the MAR's imply that a party has a right to withdraw a trial de novo request is baseless. (Petition 6)

Nor does RCW 7.06.060(1) or MAR 7.3 place time limits. That they do not does not render them "ambiguous", as plaintiff claims. *See*

State v. Lively, 130 Wn.2d 1, 14, 921 P.2d 1035 (1996) (no ambiguity where statute was merely silent).

“The purpose of RCW 7.06 authorizing mandatory arbitration in certain civil cases is primarily to alleviate the court congestion and reduce the delay in hearing civil cases.” *Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 302, 693 P.2d 161 (1984). Prohibiting a party who files a trial de novo request from withdrawing it is antithetical to this purpose. By attempting to force a second trial de novo¹—made necessary solely because of the erroneous arguments plaintiff persuaded the trial court to accept during the first trial, plaintiff seeks to create more congestion and delay, not less. As the panel recognized, “no amount of past delay justifies future delay.” 146 Wn. App. at 288.

RCW 7.06.060(1) and MAR 7.3’s second sentence provide a penalty to discourage abuse of the right to withdraw a trial de novo request: the trial court may award reasonable attorney fees and costs against the withdrawing party. Although the purpose of this provision is to deter requests made solely to delay enforcement of the arbitration award, the fee/cost award is not limited to where the trial de novo request

¹ There is no guarantee a second trial de novo would not result in yet another appeal.

was made for delay. *Nguyen v. Glendale Construction Co.*, 56 Wn. App. 196, 207, 782 P.2d 1110 (1989), *rev. denied*, 114 Wn.2d 1021 (1990).

It is true MAR 7.3's second sentence makes a fee award discretionary upon withdrawal of a trial de novo request. But defendants here volunteered to pay the arbitration award, attorney fees for the first trial, attorney fees since the mandate after the first appeal, costs, and prejudgment interest from the filing of the trial de novo request. (CP 3-5) Thus, plaintiff's complaints that "since [the trial de novo], Plaintiff has not received any additional award of attorney fees or costs; rather she has been denied the same", "[p]laintiff has not received any compensation whatsoever for this collision", and that "no prejudgment interest was assessed" on the arbitration award are misleading.² (Petition 4, 19, 20)

Plaintiff claims, "MAR 1.3(b)(1) indicates that once a case is no longer in the arbitration process—i.e. once a party has filed a Request for a trial de novo, the civil rules, not the MAR apply in a particular case."³ (Petition 6) What civil rules? CR 41 by its own terms applies only to a

² The dissent's claim that plaintiff lost the use of the arbitration award money, accruable interest, and legal fees is thus also without foundation. *See* 146 Wn. App. at 299.

³ The rule provides:

(1) Generally. Until a case is assigned to the arbitrator under rule 2.3, the rules of civil procedure apply. After a case is assigned to the arbitrator, these arbitration rules apply except where an arbitration rule states that a civil rule applies.

plaintiff's seeking voluntary dismissal of his or her own claims. That rule says nothing about a party withdrawing a trial de novo request.

Furthermore, MAR 1.3(b)(1) does not mean that once a party files a request for trial de novo, none of the MAR's have any application. Otherwise, such rules as MAR 7.2 (procedure after request for trial de novo) and MAR 7.3 (attorney fees and costs) would be meaningless.

Contrary to what plaintiff and the dissent claim, a party would not be able to gamble by withdrawing his or her trial de novo request if the trial de novo returned a bad result. Since a trial de novo is “conducted *as though no arbitration proceeding had occurred*”, once such a trial occurs and the trier of fact has returned a verdict or findings and conclusions, the losing party's only recourse is a motion under CR 50, 59 or 60. *See Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 528, 79 P.3d 1154 (2003) (quoting MAR 7.2(b)(1)) (emphasis by the court).

In the instant case, however, defendants' successful appeal resulted in reversal of the verdict and remand for new trial. When a new trial is granted, “the case stands as if there had been no trial.” *Legal Adjustment Bureau v. West Coast Const. Co.*, 153 Wash. 509, 513, 280 P. 2 (1929). Plaintiff and the dissent ignore that *the trial de novo here was rendered a nullity by the first appeal.*

No one would file a trial de novo request anticipating that any bad result could be overturned on appeal. Appeals are not only expensive⁴ and time consuming, but the odds of reversal are slim. The abuse that plaintiff and the dissent predict simply would not occur.

Plaintiff's argument that there really is no new trial because the panel's evidentiary rulings deprived the trial court of "full discretion" is baseless. (Petition 11) While the trial court generally has wide discretion in making evidentiary rulings, that discretion is not unbridled. See *In re Parentage of Jannot*, 110 Wn. App. 16, 22, 37 P.3d 1265 (2002), *aff'd*, 149 Wn.2d 123, 65 P.3d 664 (2003). The fact that the panel affirmed some of the trial court's evidentiary rulings but reversed others simply means the reversed rulings were an abuse of discretion and never should have been made in the first place.

Plaintiff argues that the MAR's were meant to discourage meritless appeals. The defense agrees. But defendants' first appeal was meritorious, not meritless—defendants prevailed, getting the judgment against them reversed and obtaining a new trial. And plaintiff cannot show that the original trial de novo request was meritless—*no one* knows

⁴ In addition to the costs and attorney fees expended in an appeal, a judgment debtor who appeals must post a supersedeas bond in the amount of the judgment plus expected interest, costs, and attorney fees if the judgment creditor will not agree to refrain from executing on the judgment during the pendency of the appeal. RAP 8.1(b)-(c).

how the first trial would have turned out had the trial court not adopted plaintiff's erroneous evidentiary positions.

Plaintiff's real motivation has nothing to do with lessening court congestion, discouraging meritless appeals, or reducing delay. Nor does it have anything to do with prejudice—defendants offered to pay her reasonable attorney fees and costs plus interest in addition to the arbitration award, and—as will be discussed *infra*, in both appeals, plaintiff failed to timely ask for attorney fees on appeal *if she lost the appeal*.

Rather, plaintiff seeks to force the parties to go through at least one more trial because—in her words—“[s]he has since [since the first jury trial] undergone additional testing, hospitalizations, epidural injections and presented to numerous neurosurgeons.”⁵ (Petition 3; *see also* Petition 19) ***But this would have occurred even if there had never been a trial de novo request. Had there been no trial de novo request, plaintiff would not have been compensated for these alleged additional damages.***

All plaintiff had to do to guard against the possibility that her condition would worsen after the arbitration was to file her own trial de

⁵ If plaintiff's condition did indeed worsen, it did not do so because of the trial de novo request or withdrawal.

novo request. Had she done so, she would have ensured that a trial de novo would occur, regardless of what defendants did.

B. THE PANEL'S DECISION DOES NOT CONFLICT WITH *NEVERS* OR *HAYWOOD*.

Plaintiff claims the panel's decision somehow conflicts with *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997), *Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001), and *Haywood's* companion case, *Creso v. Philips*. But those cases did not even involve a voluntary withdrawal of a trial de novo request and thus are inapposite.

Nevertheless, plaintiff claims that contrary to *Nevers*, "Division II refused to apply the civil rules, or case law regarding the interpretation of a rule or statute, to determine a time limitation" (Petition 6) But Division II here did just what *Nevers* did—construed a court rule to ensure that no part was rendered superfluous.

Nevers construed MAR 7.1(a), which provides:

Within 20 days after the arbitration award is filed with the clerk, any aggrieved party . . . may serve and file with the clerk a written request for a trial de novo in the superior court *along with proof that a copy has been served* upon all other parties appearing in the case.

(Emphasis added). This Court determined that because the rule requires service and filing of a trial de novo request "along with proof that a copy has been served" within 20 days, proof of service must be filed within the same time frame. Similarly, the panel here decided that because MAR 7.3

authorizes a fee/cost award upon voluntary withdrawal of a trial de novo request, voluntary withdrawal of such a request is permitted.

Defendants in this case had a right to a trial de novo. *Malted Mousse*, 150 Wn.2d at 531. Plaintiff is claiming defendants waived their right to waive their right to trial de novo, but has cited no authority that one can waive a right to waive a right.

Moreover, “waiver is the ‘intentional and voluntary relinquishment of a known right.’” *Mutual of Enumclaw Insurance Co. v. USF Insurance Co.*, 164 Wn.2d 411, 426 n.10, 191 P.3d 866 (2008) (quoting *Panorama Residential Protective Association v. Panorama Corp.*, 97 Wn.2d 23, 28, 640 P.2d 1057 (1982)). Implied waiver requires unequivocal acts or conduct evidencing an intent to waive; intent will not be inferred from doubtful or ambiguous factors. *Jones v. Best*, 134 Wn.2d 232, 241, 950 P.2d 1 (1998).

Thus, *Haywood* and *Creso* held that a party could not wait until after a trial de novo to object that the trial de novo request had not been timely filed when the objecting party knew or should have known of this defect before trial de novo. 143 Wn.2d at 233. Here although plaintiff claims the defense knew about her worsened condition before the first trial, there is no evidence why defendants withdrew their trial de novo

request. Plaintiff's and the dissent's attributing bad motives to the defense is sheer speculation.

Further, even if change in plaintiff's condition was a reason, plaintiff herself claims "her pain has only worsened" since the first trial. (Petition 3) Defendants could not have known this at the time of the first trial. There is no unequivocal act or conduct evincing an intent to waive, let alone an intentional and voluntary relinquishment of a known right.

C. THE PANEL'S DECISION DOES NOT CONFLICT WITH EQUITY.

Mandatory arbitration is a creature of statute. *See* RCW ch. 7.06; *cf. Godfrey v. Hartford Casualty Insurance Co.*, 142 Wn.2d 885, 900, 16 P.3d 617 (2001) (contractual arbitration is creature of statute). Yet, plaintiff claims the panel's decision "conflicts with equitable doctrines." (Petition 15) Even if the panel's decision did (which it does not), that is not a criterion for discretionary review.

In any event, "an equitable remedy is an *extraordinary*, not ordinary, form of relief" that should be granted "only when there is a showing that a party is entitled to a remedy and the remedy at law is inadequate." *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, 146 P.3d 1172 (2006) (emphasis added). Indeed, "a court cannot grant equitable relief when a statute provides specific relief." *In re Marriage of Barber*, 106 Wn. App. 390, 393, 23 P.3d 1106 (2001). *Cf. Harbor Enterprises, Inc. v.*

Gudjonsson, 116 Wn.2d 283, 290-91, 803 P.2d 798 (1991) (waiver and laches inapplicable to statutory right to disqualify judge even posttrial).

Since RCW 7.06.060 and MAR 7.3 not only recognize that a trial de novo request can be withdrawn, but also specify the relief available, equity is not available. As the panel recognized, plaintiff's remedy is the arbitration award, interest, attorney fees, and costs. 146 Wn. App. at 290.

Moreover, "[e]quity aids the vigilant, not those who slumber on their rights." *Leschner v. Department of Labor & Industries*, 27 Wn.2d 911, 927, 185 P.2d 113 (1947). Plaintiff could have ensured herself a trial de novo by making her own trial de novo request. *Thomas-Kerr*, 114 Wn. App. at 561. By not doing so, she slept on her rights.

Judicial estoppel does not apply for other reasons. Often used when a debtor in bankruptcy does not list a claim as an asset but tries to pursue it post-bankruptcy,⁶ the doctrine protects the integrity of the judicial process, not the interests of the party seeking to impose it. See *Miller v. Campbell*, 164 Wn.2d 529, 544, 192 P.3d 352 (2008). Thus, a "core factor" in whether the doctrine applies is "whether 'judicial

⁶ See, e.g., *Skinner v. Holgate*, 141 Wn. App. 840, 173 P.3d 300 (2007); *McFarling v. Evaniski*, 141 Wn. App. 400, 171 P.3d 497 (2007); *Bartley-Williams v. Kendall*, 134 Wn. App. 95, 138 P.3d 1103 (2006); *DeAtley v. Barnett*, 127 Wn. App. 478, 112 P.3d 540 (2005), *rev. denied*, 156 Wn.2d 1021, *cert. denied*, 549 U.S. 820 (2006); *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 108 P.3d 147 (2005).

acceptance of an inconsistent position in a later proceeding would create “the perception that either the first or the second court was misled””. *Id.* at 539 (quoting *Arkison v. Ethan Allen, Inc.*, 160 Wn.2d 535, 538-39, 160 P.3d 13 (2007)).

Plaintiff does not even discuss this core factor. And even if the trial de novo request were inconsistent with the withdrawal, the withdrawal could not create the perception the trial court was misled. The defense was serious about its trial de novo request—it went through the first trial. Through no fault of the defense, the trial court committed reversible error, entitling the defense to a new trial. That the defense then elected not to exercise its right to a new trial did not mislead the court.

Moreover, plaintiff concedes the doctrine requires that a party have taken a factual position inconsistent with his factual position in previous litigation. (Petition 15) The defense did not take an inconsistent factual position. It simply withdrew its trial de novo request, as it was entitled to do under RCW 7.06.060(1) and MAR 7.3.

In addition, “[j]udicial estoppel applies ‘only if a litigant’s prior inconsistent position benefited the litigant or was accepted by the court.’” *Cunningham v. Reliable Concrete Pumping, Inc.*, 126 Wn. App. 222, 230-31, 108 P.3d 147 (2005). As the panel recognized, defendants did not benefit by their trial de novo request, because their successful appeal

“return[ed] the proceeding to the same posture as if [the trial] had not [occurred].” 146 Wn. App. at 287. For the same reason, there was no acceptance by the court.

Equitable estoppel does not apply either. Plaintiff admits that one criterion for equitable estoppel is that she have reasonably relied upon the admission, statement, or act that is inconsistent with later claims. (Petition 17) Even if she had relied on defendants’ trial de novo request, that reliance would not have been reasonable since plaintiff could have filed her own trial de novo request to ensure that her right to a trial de novo was preserved. *Thomas-Kerr*, 114 Wn. App. at 561.

Furthermore, plaintiff cannot establish she would be harmed. No one can tell what the result of a second trial would have been. This is particularly so because at a second trial (unlike the first trial), the defense expert would have testified and evidence that plaintiff had spent 18 months complaining about ailments other than the ones she attributes to the accident in question would have been admitted. Thus, plaintiff’s claim that “[t]he prejudice to Plaintiff is clear” because, among other things, she “also received a substantial verdict from the jury” is frivolous.⁷ (Petition

⁷ Plaintiff also claims she was prejudiced because “she has had to comply with all the court rules and case schedules.” (Petition 18) The defense, like all litigants, also had to comply with the court rules and case schedules.

18) That verdict was overturned on appeal. And, in lieu of the second trial, the defense offered to pay not only the arbitration award plus attorney fees and costs, but also the prejudgment interest.

Nor does laches apply. Plaintiff correctly states the doctrine is an “implied waiver arising from knowledge of existing conditions and acquiescence in them.” *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972). But plaintiff ignores *Buell*’s further explanation:

The elements of laches are: (1) knowledge or reasonable opportunity to discover on the part of a potential plaintiff that he has a cause of action against a defendant; (2) an unreasonable delay by the plaintiff in commencing that cause of action; (3) damage to defendant resulting from the unreasonable delay.

Id. Indeed, laches is an affirmative defense that must be pled. CR 8(c). None of its elements are present here.

Even if laches could be adapted to the withdrawal of a trial de novo request, it would still not apply here. When defendants filed their request, they had no reason to believe the trial de novo would not resolve the parties’ dispute. They could not have foreseen plaintiff would have persuaded the trial court to make erroneous evidentiary rulings that would necessitate an appeal. Further, as discussed *supra* in connection with the equitable estoppel argument, plaintiff has not been harmed by any delay.

D. THE PANEL'S FEE DECISION DOES NOT CONFLICT WITH *TRIBBLE* OR PRESENT AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST.

Plaintiff also complains the panel's refusal to award her fees on appeal despite her not prevailing conflicts with *Tribble v. Allstate* and presents an issue of substantial public importance this Court should review.⁸ Wrong again.

In the Court of Appeals, plaintiff claimed attorney fees under the first sentence of MAR 7.3 based on the fact that she had been awarded attorney fees and costs in the trial court "because Mr. Hapner failed to improve his position in the trial de novo." (Brief of Respondent 25) But the appeal resulted in a reversal of the trial court judgment and a remand for new trial. Consequently, it was impossible to tell whether Mr. Hapner would improve his position in the trial de novo.

Consequently, this appeal is different than *Tribble v. Allstate Property and Cas. Ins. Co.*, 134 Wn. App. 163, 139 P.3d 373 (2006). *Tribble* was an underinsured motorist case. In a trial de novo requested by the defendant insurer after mandatory arbitration, the trial court judge entered judgment on a jury verdict that was greater than the plaintiff

⁸ Plaintiff claims the panel "allow[ed] Defendants to withdraw their request [for trial de novo] and then [did] not even grant[] Plaintiff fees consistent with MAR 7.3." (Petition 23)

insured's policy limits. Division I reduced the judgment to policy limits, but the reduced judgment was still greater than the arbitration award.

Consequently, even though the plaintiff there had not prevailed on appeal, the insurer had not improved its position on the trial de novo. Plaintiff asked for attorney fees and costs on appeal under the first sentence of MAR 7.3 even though she had not prevailed on appeal. Division I ruled she was entitled to them.

The panel's decision here does not conflict with *Tribble*. The *Tribble* appeal had only one of two possible outcomes: either the judgment on the trial de novo would be affirmed or it would be reduced to policy limits. Either way, the insurer would not have improved its position from what had been awarded against it in the mandatory arbitration. In contrast, in the instant case, the second appeal did not resolve whether defendant improved his position in the trial de novo since Division II reversed plaintiff's judgment and remanded for a new trial.

Moreover, plaintiff here asked for attorney fees on appeal *only if she won the appeal*:

[U]pon affirming the trial court's rulings, this court must assess reasonable attorney fees and costs as the appellants/defendants have again failed to improve their position on appeal.

(Respondent's Brief 25) (italics, boldface added; capitalization in original omitted) She said over and over again that she sought fees and costs on appeal *only if she prevailed in the appeal*:

Upon prevailing in this appeal and pursuant to MAR 7.3 and RAP 18.1(b), she respectfully requests an award of reasonable fees and costs expended in defending this appeal.

An award of attorney fees is proper pursuant to MAR 7.3 *upon success* on a [sic] appeal. . . .

In addition, it is respectfully requested that this Court assess an award of actual attorney fees and costs against Defendants for their *frivolous* appeal

(Respondent's Brief 25-26) (emphasis added; footnote omitted). Of course, if the appeal had been frivolous, plaintiff would have won the appeal.

But plaintiff lost the appeal. *She did not ask for fees in the event she lost the appeal until she moved to reconsider.* (Respondent's Brief 25-27) That is too late. *1515-1519 Lakeview Boulevard Condominium Association v. Apartment Sales Corp.*, 146 Wn.2d 194, 203 n.4, 43 P.3d 1233 (2002). Indeed, RAP 18.1(b) required that plaintiff set forth the correct legal basis for her claim of attorney fees *in her respondent's brief*:

RAP 18.1 provides for reasonable attorney fees if a party is entitled to them under applicable law. But RAP 18.1 requires the party to devote a section of its brief to identifying the *applicable law* relied on in its request for fees. RAP 18.1(b). This requirement is mandatory. *Wilson Court Ltd. P'ship v. Tony Maroni's, Inc.*, 134

Wn.2d 692, 710 n.4, 952 P.2d 590 (1998); *Phillips Bldg. Co. v. An*, 81 Wn. App. 696, 705, 915 P.2d 1146 (1996). . . . Argument and citation to authority are necessary to advise us of the *appropriate grounds* for an award of attorney fees. *Austin v. U.S. Bank of Wash.*, 73 Wn. App. 293, 313, 869 P.2d 404 (1994).

Department of Labor & Industries v. Kaiser Aluminum & Chemical Corp., 111 Wn. App. 771, 788, 48 P.3d 324 (2002) (emphasis added).

Thus, it was hardly surprising that the panel ruled that because she was “not the prevailing [party] in this appeal”, she was not entitled to fees and costs on appeal. 146 Wn. App. at 290. Because this Court generally does not review issues not timely raised in the Court of Appeals, there is no reason to review here. *See State v. Clark*, 124 Wn.2d 90, 104-05, 875 P.2d 613 (1994), *overruled on other grounds*, *State v. Catlett*, 133 Wn.2d 355, 945 P.2d 700 (1997).

Plaintiff also reiterates a claim she made for the first time in her motion to reconsider the panel’s decision—that she be awarded fees for the first appeal, which she also lost and in which this Court denied review. Again, this Court will not review arguments made for the first time in a motion for reconsideration to the Court of Appeals. *1515-1519 Lakeview Boulevard*, 146 Wn.2d at 203 n.4.

Moreover, this Court has explained:

Under the doctrine of “law of the case,” as applied in this jurisdiction, the parties, the trial court, and this court are

bound by the holdings of the court on a prior appeal until such time as they are “authoritatively overruled.” Such a holding should be overruled if it lays down or tacitly applies a rule of law which is clearly erroneous, and if to apply the doctrine would work a manifest injustice to one party, whereas no corresponding injustice would result to the other party if the erroneous decision should be set aside.

Greene v. Rothschild, 68 Wn.2d 1, 10, 402 P.2d 356, 414 P.2d 1013 (1965) (citation omitted). Given how difficult it is to overcome the “law of the case” doctrine, this Court should not assist plaintiff where she failed to even ask for modification of the first appeal’s decision, let alone for attorney fees on appeal even if she lost, until she moved to reconsider.

Plaintiff cites to RAP 2.5(c)(2). But this Court has held:

Despite the apparent permissiveness of the language of the rule, this court and the courts of appeals in the years since the adoption of RAP 2.5(c) have adhered to the standards set forth in *Greene*, requiring that an appellate court may reconsider only those decisions that were clearly erroneous and that would work a manifest injustice to one party if the clearly erroneous decision were not set aside.

State v. Worl, 129 Wn.2d 416, 425, 918 P.2d 905 (1996). Given that the first appeal did not resolve the question of whether defendant had improved his position on trial de novo, plus plaintiff’s failure to timely ask for what she now claims, there is no issue of substantial public interest this Court should review.

V. CONCLUSION

Plaintiff had the means to avoid the situation she finds herself in now. She failed to exercise those means. Now she asks this Court to save her from her own failure. That is not the purpose of discretionary review.

None of the criteria for discretionary review exist. This Court should deny review.

DATED this 23rd day of January 2009.

REED McCLURE

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