

82409-6

X

NO. 82409-6

(Court of Appeals No. 35797-6-II)

SUPREME COURT OF THE
OF THE STATE OF WASHINGTON

LEA HUDSON, individually,

Respondent,

v.

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

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
The Honorable Judge John McCarthy

RESPONDENT'S CORRECTED PETITION FOR REVIEW

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2009 JAN 30 PM 2:55

BY RONALD R. CARPENTER

CLERK

KARI I. LESTER, WSBA #28396
LAW OFFICES OF BEN F. BARCUS
& ASSOCIATES, P.L.L.C.
Attorneys for Appellants
4303 Ruston Way
Tacoma, Washington 98402
(253) 752-4444

ORIGINAL

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i-iii
I. IDENTITY OF PETITIONER	1
II. DECISION OF THE COURT OF APPEALS	1
III. ISSUES PRESENTED FOR REVIEW	1
IV. STATEMENT OF THE CASE	2
V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED ...	5
A. <u>DIVISION II'S DECISION ALLOWING A PARTY TO UNILATERALLY WITHDRAW ITS REQUEST FOR A TRIAL DE NOVO AFTER THE TRIAL DE NOVO, A SUBSEQUENT APPEAL AND FURTHER DISCOVERY UPON REMAND, CONFLICTS WITH CASELAW PROHIBITING "ABSURD RESULTS," VIOLATES THE PUBLIC POLICY BEHIND MANDATORY ARBITRATION, AND DIRECTLY CONFLICTS WITH THIS COURT'S RULING IN HAYWOOD V. ARANDA AND EQUITABLE PRINCIPLES.</u>	5
1. <u>NO AUTHORITY ALLOWS FOR UNILATERAL WITHDRAWAL OF A REQUEST FOR TRIAL DE NOVO AND DIVISION II'S RULING, WHICH LEADS TO IMPERMISSIBLE "ABSURD RESULTS," SHOULD BE REVERSED.</u>	5
2. <u>DIVISION II'S OPINION CONFLICTS WITH HAYWOOD</u>	12
3. <u>DIVISION II'S OPINION CONFLICTS WITH EQUITABLE DOCTRINES</u>	15

B.	<u>DIVISION II'S DENIAL OF ATTORNEY FEES AND COSTS TO PLAINTIFF ON EITHER AND/OR BOTH APPEALS DIRECTLY CONFLICTS WITH <i>TRIBBLE</i>, VIOLATES MAR 7.3, LEADS TO ABSURD RESULTS AND RUNS AFOUL OF PUBLIC POLICY</u>	22
VI.	CONCLUSION	25
VII.	APPENDIX	
A.	COURT OF APPEALS DECISION DATED JULY 8, 2008	
B.	COURT OF APPEALS RULING DENYING MOTION FOR RECONSIDERATION DATED OCTOBER 10, 2008	
C.	COURT OF APPEALS AMENDED RULING DENYING MOTION FOR RECONSIDERATION DATED OCTOBER 14, 2008	
D.	COURT'S OPINION DATED APRIL 12, 2005 - <i>HUDSON V. HAPNER</i> - 126 WN. APP. 1057 (2003)	

TABLE OF AUTHORITIES

CASES

WASHINGTON STATE CASES

Bowman v. Webster, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). 13

Buell v. City of Bremerton, 80 Wn.2d 518, 495 P.2d 1358 (1972) 17

Christie Lambert Van & Storage Co. v. McLeod, 39 Wn. App. 298, 693 P.2d 161 (1984) 8

City of Bellevue v. Hellenthal, 144 Wn.2d 425, 28 P.3d 744 (2001) 7

Clark County Pub. Util. Dist. No. 1 v. Wilkinson, 139 Wn.2d 840, 991 P.2d 1161 (2000) 17

Creso v. Phillips, 97 Wn. App. 829, 987 P.2d 137 (1999) 12, 13

Eserhut v. Heister, 62 Wn. App. 10, 812 P.2d 902 (1991) 24

Estate of Lapping v. Group Health Co-op. of Puget Sound, 77 Wn. App. 612, 892 P.2d 1116 (1995) 9

Felida Neighborhood Assoc. v. Clark County, 81 Wn. App. 155, 913 P.2d 823 (1996) 17

Hisle v. Todd Pacific Shipyards, Corp., 113 Wn. App. 401, 54 P. 3d 687 (2002) 15

Haywood v. Aranda, 97 Wn. App. 741, 987 P.2d 121 (1999) 12, 13

Haywood v. Aranda, 143 Wn.2d 231, 19 P.3d 406 (2001) 12, 14

Holst v. Fireside Reality, Inc. 89 Wn. App. 245, 948 P. 2d 858 (1997) .16

In re Littlefield, 61 Wash. 150, 112 P. 234 (1910) 5

Jackson v. Standard Oil Co. of California, 8 Wn. App. 83, 505 P.2d 139 (1972) 8

Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000) 13, 14

McRory v. Northern Ins. Co. of New York, 138 Wn.2d 550, 980 P.2d 736 (1999) 20

<i>Mueller v. Garske</i> , 1 Wn. App. 406, 461 P. 2d 886 (1969)	16
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997)	6, 7, 8, 12, 14
<i>Olympic Steamship Co. v. Centennial Insurance Co.</i> , 117 Wn.2d 37, 811 P.2d 673 (1991)	20
<i>Perkins Coie v. Williams</i> , 84 Wn. App. 733, 929 P.2d 1215 (1997) ..	8, 24
<i>Sorenson v. Dahlen</i> , 136 Wn. App. 844, 149 P.3d 394 (2006)	8
<i>State v. Kelly</i> , 60 Wn. App. 921, 808 P.2d 1150 (1991)	7
<i>State v. Wittenbarger</i> , 124 Wn.2d 467, 880 P.2d 517 (1994)	7
<i>Thomas-Kerr v. Brown</i> , 114 Wn. App. 554, 59 P.3d 120 (2002)	6, 8, 9
<i>Tribble v. Allstate</i> , 134 Wn. App. 163, 139 P.3d 373 (2006)	22, 23
<i>Vaughn v. Chung</i> , 119 Wn.2d 273, 830 P.2d 668 (1992)	7
<i>Walji v. Candyco, Inc.</i> 57 Wn. App. 284, 787 P.2d 946 (1990)	20
<i>Washington State Convention and Trade Center v. Allerdice</i> , 101 Wn. App. 25, 1 P.3d 595 (2000)	7
<i>Yoon v. Keeling</i> , 91 Wn. App. 302, 956 P.2d 1116 (1998)	23

RULES AND STATUTES

CR 1 9
CR 41 6, 8
MAR 1.3(b)(1) 6
MAR 7.1 5, 12, 14
MAR 7.3 4, 5, 6, 8, 9, 18, 21, 22, 23, 24
RALJ 10.2(c) 6
RAP 2.5(c)(2) 24
RAP 18.1 23, 24
RAP 18.2 6
RCW 7.06.050 5, 7
RCW 7.06.060 6, 8, 9, 21
RCW 7.06.060 21

OTHER AUTHORITIES

28 Am. Jur 2d *Estoppel* 69 at 696 (1966) 16
31 CJS, *Estoppel and Waiver* § 139 16

I. IDENTITY OF PETITIONER

Lea Hudson, Plaintiff in the trial court and Respondent in the Court of Appeals, seeks review of Division II's opinion designated in Part II below.

II. DECISION OF THE COURT OF APPEALS

Petitioner seeks review of the entirety of the decision filed on July 8, 2008, reversing the trial court's ruling striking Defendants' Withdrawal of their Request for Trial de Novo filed after nearly nine years of litigation, the actual trial de novo, and subsequent appeal. A copy of the July 8, 2008 Opinion is located in the Appendix at A1, the October 10, 2008 Order Denying Reconsideration is located in the Appendix at A2, and the October 14, 2008 Amended Order Denying Reconsideration is located at A3.

III. ISSUES PRESENTED FOR REVIEW

1. Whether Division II's decision allowing Defendants to unilaterally withdraw their Request for Trial de Novo after nearly nine years of litigation including the completion of a trial de novo, appeal, and subsequent discovery upon remand, conflicts with prior Supreme Court and Court of Appeals' opinions including *Creso v. Phillips* and *Haywood v. Aranda* and involves an issue of substantial public interest when the decision rewards the Defendants for their dilatory conduct, violates public policy, encourages mischief and delay, and leads to an absurd result?
2. Whether Division II's decisions denying Plaintiff attorney fees and costs in both the present appeal and prior appeal in this case violate MAR 7.3, directly conflict with Division I's opinion in *Tribble*, 134 Wn. App. 163, 174-75, 139 P.3d 373 (2006), lead to absurd results, and involve an issue of substantial public interest when Defendants did "not improve their position" from the arbitration award and Division II's opinion specifically provides that such fees and costs are Plaintiff's only legal remedy?

IV. STATEMENT OF THE CASE

This case arises from a collision that occurred on April 6, 1998 when Plaintiff Lea Hudson was rear-ended by Defendant Hapner. She filed her lawsuit on October 19, 1999 and submitted the case for Mandatory Arbitration on February 15, 2000. (CP 9, 76-77) The arbitration hearing was held on June 19, 2000, and on November 17, 2000, Lea received an award of \$14,537.97 (\$10,500.00 in General Damages and \$4,037.97 in Special Damages). *Id.* Hapner filed a Request for a Trial de Novo on December 7, 2000, and trial was set for November 13, 2001. (CP 9, 77) After Plaintiff advised Defendants of her ongoing treatment, Defendants moved to continue the trial date, and trial was continued to October 8, 2002. (CP 77-78)¹ As no courtroom was available, trial was continued again, finally proceeding on April 9, 2003. *Id.* Plaintiff traveled to Washington from Mississippi for both trial settings and incurred travel expenses for airfare and lodging, wage loss, and she expended considerable time. The jury rendered its decision on April 16, 2003 and awarded Plaintiff as follows:

<i>Past Economic Damages:</i>	
<i>Past Medical Billings:</i>	<u>\$ 17,548.00</u>
<i>Wage Loss:</i>	<u>\$ 3,000.00</u>
<i>Other Out-of-Pocket Expenses:</i>	<u>\$ 5,500.00</u>
<i>Future Economic Damages:</i>	<u>\$ 140,000.00</u>
<i>Past and Future Non-Economic Damages:</i>	<u>\$ 126,500.00</u>

¹ Defendants were aware in November 2001, less than one year after they filed their request for a trial de novo, that Lea's injuries had worsened extensively and her medical bills had increased significantly. (CP 121-150) At trial, Lea's medical billings **alone**, which increased to \$17,548.00 from approximately \$4,000.00, exceeded the arbitration award by over \$3,000.00. Defendants nevertheless opted not to withdraw their request for trial de novo, but rather proceed with the trial de novo.

The jury's verdict thus totaled \$292,298.00. (CP 80) On April 25, 2003, the Court granted Plaintiff \$1,624.80 in costs and \$38,965.25 in attorney fees for a total judgment of \$332,878.80. (CP 80, CP 153-163) Defendants moved for a New Trial, or in the alternative, Remittitur, which the Court denied. *Id.* A Supplemental Judgment, awarding \$4,935.00 in additional attorney fees to Plaintiff was then entered. (CP 157-63)

On July 18, 2003, Defendants filed an appeal, seeking reversal of various evidentiary rulings and a new trial. (CP 164-176) Holding the defense doctor's testimony was improperly excluded, Division II remanded the case for a new trial as requested by Defendants. (*See Appendix D*) The opinion, dated April 12, 2005, also provided direction to the trial court upon the retrial regarding other issues that had been appealed. (CP 76-85) A mandate was filed on March 23, 2006. (CP 185-96)

Due to the chronic nature of Lea's collision-related injuries, her pain has only worsened since this case was tried before a jury five and a half years ago. She has since undergone additional testing, hospitalizations, epidural injections and presented to numerous neurosurgeons. (CP 29-30) Following the remand in this case, Defendants requested supplemental discovery from Plaintiff, and on August 9, 2006, they filed a motion to compel the same. (CP 24-26) Plaintiff provided supplemental responses and authorizations so Defendants could obtain Plaintiff's records and billings. (CP 28-65)

On September 9, 2006, more than six years after Defendants first filed their Request for Trial de Novo, and after Plaintiff waited over two years to

get a courtroom for a trial, underwent a trial, fought an appeal and then updated her discovery responses as requested by the Defendants, Defendants filed a withdrawal of their Request for Trial de Novo and a Notice of Presentation of Judgment. (CP 1-5) Plaintiff objected and moved to strike the withdrawal, which the Court granted on December 15, 2006, ordering the case to proceed to trial. (CP 6-70, 102-104) Defendants filed a Motion for Discretionary Review, which Division II granted. (CP 105-11; RP 12/15/06)

On July 8, 2008, in a published opinion, Division II reversed and held that MAR 7.3 allows for unilateral withdrawal of a Request for Trial de Novo without time limitation, and despite the fact that Defendants allowed six years, a trial de novo and an appeal to pass, they did not waive that unilateral right. In addition, Division II denied Plaintiff any attorney fees or costs because Plaintiff was not the “prevailing” in the appeal. Chief Judge Van Deren authored an extensive dissent holding that the majority’s opinion encourages continued litigation merely as a defensive tactic and allows MAR 7.3 to become “a way station to more litigation, prolonging finality, and providing means of a significant delay solely controlled by one party.”

Over the course of the past eight years of litigation since Defendants filed their request for trial de novo, Plaintiff has incurred significant costs and attorney fees. Although Plaintiff was awarded some costs and fees by the trial court pursuant upon entry of judgment, **since July 25, 2003, Plaintiff has not received any additional award of attorneys fees or costs; rather she has been denied the same.** In fact, Division II not only denied

Plaintiff's request for fees in the original appeal, it actually granted costs to Defendants in the amount of \$3,673.25. (CP 185-196, Appendix D)

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. DIVISION II'S DECISION ALLOWING A PARTY TO UNILATERALLY WITHDRAW ITS REQUEST FOR A TRIAL DE NOVO AFTER THE TRIAL DE NOVO, A SUBSEQUENT APPEAL AND FURTHER DISCOVERY UPON REMAND, CONFLICTS WITH CASELAW PROHIBITING "ABSURD RESULTS," VIOLATES THE PUBLIC POLICY BEHIND MANDATORY ARBITRATION, AND DIRECTLY CONFLICTS WITH THIS COURT'S RULING IN HAYWOOD V. ARANDA AND EQUITABLE PRINCIPLES.

1. NO AUTHORITY ALLOWS FOR UNILATERAL WITHDRAWAL OF A REQUEST FOR TRIAL DE NOVO AND DIVISION II'S RULING, WHICH LEADS TO IMPERMISSIBLE "ABSURD RESULTS," SHOULD BE REVERSED.

MAR 7.1 and RCW 7.06.050 provide that within 20 days after the arbitration award is filed with the Superior Court Clerk, any aggrieved party who has not waived the right to appeal, may serve and file with the clerk a written request for a trial de novo, a "trial anew," in the Superior Court, with proof that a copy has been served on all other parties. *See, In re Littlefield*, 61 Wash. 150, 153 112 P. 234 (1910) MAR 7.3, which relates specifically to costs and attorney fees, and similarly, RCW 7.06.060, is the only rule or statute that even mentions the possibility of withdrawal of a request for trial and only state that "[t]he court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo."

Unlike in the circumstances of an appeal from a court of limited jurisdiction to the superior court, or from the superior court to the appellate

court², apart from MAR 7.3 and RCW 7.06.060, no court rule or statute exists that authorizes a party to, or delineates a procedure or timeline by which a party can, withdraw its request for a trial de novo.

Citing to *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), Division II interpreted MAR 7.3 to authorize a party to unilaterally – at any point – withdraw its request for a trial de novo. Contrary to *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 812 n.4, 947 P.2d 721 (1997), Division II refused to apply the civil rules, or case law regarding the interpretation of a rule or statute, to determine a time limitation and held that since no rule **disallows** a unilateral withdrawal, an open ended policy should apply.

Although the Court in *Thomas-Kerr*, 114 Wn. App. 554 noted in dicta at p. 560, note 16, that “Washington’s MAR do *impliedly* provide” a party the right to withdraw its request for trial de novo, the Court never cited any authority to support such a statement. Contrary to this “implication,” 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. Even assuming, for the sake of argument, however that the MAR govern and “impliedly” allow for a withdrawal of a request for a trial de novo, the rules and statutes are silent on the procedure and/or any time limitations that would apply to a withdrawal and are thus

² Once a party files an appeal, or a trial de novo in a case appealed from a court of limited jurisdiction, that party cannot unilaterally dismiss the same absent the authority and permission of the Court. See, e.g., RALJ 10.2(c) and RAP 18.2. See also CR 41.

ambiguous and susceptible to interpretation by the Court. *See, State ex rel. Washington State Convention and Trade Center v. Allerdice*, 101 Wn. App. 25, 1 P.3d 595 (2000)

In order to determine the meaning of an “ambiguous” court rule and/or a statute, the Court construes it to fulfill the drafter's intent. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). Court rules are to be interpreted in a manner that gives effect to the Supreme Court's intent and avoids **absurd** results. *See State v. Kelly*, 60 Wn. App. 921, 927, 808 P.2d 1150 (1991)(emphasis added). In interpreting a rule, the appellate courts strive to be faithful to the language and policy of both the individual rule at issue and the rules as a **whole**. *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992) The mandatory arbitration rules are likewise to be interpreted as though the legislature drafted them, *Nevers*, 133 Wn.2d at 809, and therefore, they too are construed according to their purpose. *State v. Wittenbarger*, 124 Wn.2d 467, 484, 880 P.2d 517 (1994).

The legislative history of RCW 7.06.050 explains that the “[e]xperience of other states indicates that [mandatory arbitration] is an effective method of reducing court congestion and also providing a fair but streamlined resolution of disputes involving small sums. Speed is gained both in setting a hearing date and actual trial time.” SHB 425, Bill Report, Feb. 8, 1979. The foremost goal of the statutes providing for mandatory arbitration and the court rules designed to implement these statutes is to “reduce congestion in the courts and *delays in hearing civil cases.*”

Sorenson v. Dahlen, 136 Wn. App. 844, 149 P.3d 394 (2006), (citing *Nevers*, 133 Wn.2d at 815 and Senate Journal, 46th Legislature (1979), at 1016-17).

A supplemental goal of the mandatory arbitration statute is to discourage **meritless** appeals. *Christie Lambert Van & Storage Co. v. McLeod*, 39 Wn. App. 298, 303, 693 P.2d 161 (1984)(emphasis added) That goal is reflected in RCW 7.06.060 and MAR 7.3, which require that attorney fees be assessed against a party who fails to improve his or her position as to an adverse party's claim at a trial de novo. To the extent this primary goal is achieved, **"everyone should obtain increased access to justice."** *Perkins Coie v. Williams*, 84 Wn. App. 733, 737, 929 P.2d 1215 (1997)(emphasis added) MAR 7.3 and RCW 7.06.060 were drafted to impose a disincentive for parties considering appealing an arbitration award - not to give an appealing party an unfettered ability to waste the court's judicial resources.

If Division II's published opinion holding that there is absolutely no time limitation whatsoever to the withdrawal of a de novo appeal stands, such interpretation would allow any unsuccessful party to a mandatory arbitration to appeal an award, and in the event the party did not "improve its position" at trial, it could voluntarily withdraw its appeal following trial and only pay the lesser arbitration award, attorney's fees and costs. Just as a party cannot dismiss its in own case pursuant to CR 41 once it has rested, or an arbitration award has been rendered, *see, e.g. Jackson v. Standard Oil Co. of California*, 8 Wn. App. 83, 103, 505 P.2d 139 (1972), *Thomas-Kerr*, 114 Wn. App. 554, a party cannot withdrawal its request for a trial de novo once a verdict has

been reached, much less a new trial is granted following a lengthy appeal. As pointed out in the dissent at p. 33, “[n]o other civil rule allows a party unilaterally to withdraw his or her case *after* the trial court has heard, and ruled on, the case.”

Contrary to Division II’s assessment, *Thomas-Kerr* is not applicable for the issue here because it concerns the withdrawal of request for trial de novo **before** the trial de novo occurred. However, the concurring opinion filed by Judge Schindler is instructive:

Court rules should not create a strategic advantage for one party over the other, and especially should not create an advantage from delay. The objective of mandatory arbitration is not just a less costly and more expeditious proceeding; it is also a fair resolution.

Thomas Kerr, 114 Wn. App. At 564. (Emphasis added)

Interpreting MAR 7.3 or RCW 7.06.060 to allow a **party to withdraw its request for a new trial after the new trial has actually occurred** not only creates a strategic advantage from delay for the appealing party, it would lead to an **unjust** and “**absurd result**,” which is not condoned by our courts. *See, e.g. Estate of Lapping v. Group Health Co-op. of Puget Sound*, 77 Wn. App. 612, 619, 892 P.2d 1116 (1995) CR 1 states that the civil rules “**shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.**”

Division II’s rationalizes its ruling by claiming that the goal of mandatory arbitration is actually served by its opinion because the lack of another trial will reduce court congestion. With all due respect to the Court,

this circular reasoning that is patently nonsensical. No purpose that the legislature intended with the creation of mandatory arbitration is served in this case when not only has the de novo trial occurred, the parties have undergone an appeal and are again before the Court proceeding to a second trial **at the defendants' request**. This ruling not only condones delays and the wasting of significant judicial, court and party resources in *this* case, but as it is a published opinion, it will have a severely negative impact on future cases and promote complete mischief by appealing parties who want to delay payment and finality. As stated by Judge Van Deren at page 26- 29:

The primary . . . goals [of the legislation] have not been met in this case . . . The majority reasons that its decision is consistent with the legislature's goal of reducing court congestion through mandatory arbitration. But the legislature's goal of reducing court congestion through less costly arbitration clearly has not been met in a case that has been in litigation for eight years. Moreover, permitting Hapner to now withdraw his request for a trial de novo allows him to engage in two meritless appeals, the first when he requested a trial de novo and the second when he appealed the result of that trial de novo to this court. This clearly contravenes the legislature's intent and is an absurd result that we should discourage. Furthermore, his request for a trial de novo has successfully delayed enforcement of the arbitration award for eight years. . . . **The majority's ruling encourages continued litigation by both parties merely as a defensive tactic.**

Division II also justifies its holding by suggesting that Defendants are in the same position had the trial de novo not occurred because “[its] reversal of the judgment returns the proceeding to the same posture.” In doing so, the Court ignores its previous ruling upon remand in this case:

We comment on additional issues that are likely to arise on retrial. Hapner argues that Exhibit 7 was relevant and admissible. . . . **In holding that Exhibit 7 was relevant and admissible for one purpose**, we do not necessarily hold that it was relevant and admissible for all purposes. . . . If Hudson produces such testimony at the retrial of this case, she may 'open the door' to character evidence that would otherwise be inadmissible; and if she does that, the trial court remains free to permit a proportional response. See ER 105. . . . The remaining issues are whether the trial court erred by admitting Dr. Cummings' testimony, by allowing Hudson to give an opinion on whether her injuries were caused by the accident, by permitting Hudson's counsel to use the spine model, and by awarding reasonable attorney fees to Hudson. **Dr. Cummings' testimony is admissible on retrial**, barring some new and significant objection, for it has been fully disclosed and satisfies ER 702 and 703. **Hudson may give a lay opinion on whether her injuries were caused by the accident**, so long as she follows ER 701, *Bitzan v. Parisi*, the Supreme Court's opinion in *Egede-Nisson v. Crystal Mountain*, and any other applicable law. **Hudson's counsel may use the spine model in closing so long as he first shows, through one of the doctors or otherwise, that it accurately depicts the relevant parts of the human body.**
P. 4 (Emphasis added)

This case was not one that could return to its original position as if the trial de novo had not occurred; it was not dismissed and then simply reversed on appeal. Rather, Defendants appealed numerous evidentiary issues and Division II specifically remanded it due to the reversal of only one of those issues. Division II addressed the remainder of the issues and specifically gave the trial court instructions as set forth above. If this case were truly reversible - as if no trial de novo ever occurred - then the trial court would have full discretion as to all evidentiary rulings, which, given the language above, is

not the case here. Also, as pointed out by the dissent at FN 6, p. 28, it was not Plaintiff's fault that the case was remanded.

This Court should accept review, reverse, and interpret the applicable rules and statutes to establish a bright-line rule that once the trial de novo has taken place, a party may not withdraw its request for a trial de novo.

2. DIVISION II'S OPINION CONFLICTS WITH HAYWOOD.

Division II's holding that *Creso v. Phillips*, 97 Wn. App. 829, 987 P.2d 137 (1999), *Haywood v. Aranda*, 97 Wn. App. 741, 987 P.2d 121 (1999) or *Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001) are not applicable in this case is incorrect and directly conflicts with the holdings of those cases. In *Creso*, the defendant filed a request for a trial de novo following an arbitration award in favor of the plaintiff. After a jury trial resulted in a verdict for the plaintiff in a lesser amount than the arbitration award, the plaintiff moved to set aside the judgment based upon the defendant's failure to properly comply with MAR 7.1 and file proof of service of the demand for trial de novo. The trial court denied the request and the Court of Appeals affirmed, holding that the Plaintiff could not raise the issue for the first time after the trial de novo had been held, but instead had to raise it **before the trial de novo commences**. The Court stated at p. 831:

The sole question is whether the failure to file proof of service of a demand for trial de novo must be raised before the trial de novo commences. The answer is yes. A party should not be permitted to gamble on the outcome of a trial, yet that would be the effect if we allow a party to raise, for the first time after trial, the failure to file proof of service as required by Nevers. A party could simply "sit on" the

opposing party's failure to file proof of service until the jury's verdict, and invoke such failure only if the verdict is less favorable than the arbitration award. (Emphasis added).

This Court accepted review of *Creso, supra*, along with *Haywood v. Aranda*, 97 Wn. App. 741, and upheld the Courts' respective refusals to set aside the judgments on jury verdicts in *Haywood v. Aranda*, 143 Wn.2d 231, 19 p.3d 406 (2001), stating:

The plaintiffs' approach, in short, would serve to increase congestion in our trial courts by allowing a party to await the outcome of the trial de novo before deciding whether to object to what he or she already knows—that their opponent did not file proof of service. **If we were to adopt that reasoning, we would be coming down on the side of needless trials, wasting of judicial resources, and the unnecessary expenditure of funds for attorney fees and costs. We would also be violating the principle that procedural rules should be interpreted to eliminate procedural traps and to allow cases to be decided on their merits.** *Haywood*, 143 Wn.2d at 238. (Emphasis added)

The *Haywood* Court compared the defendant's failure to timely file proof of service of their request for trial de novo to **waivable procedural defects**, not a "defense" as characterized by Division II in this case. The doctrine of waiver – "the intentional and voluntary relinquishment of a known right"—applies to **all rights or privileges** to which a person is legally entitled - not just defenses. *Bowman v. Webster*, 44 Wn.2d 667, 669, 269 P.2d 960 (1954). Citing *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000), this Court held that a defect in filing a request for trial de novo could be **waived**:

. . . [T]he plaintiff in each of these cases waived the right to object to the defendants' failure to file proof that they had timely served their request for a trial de novo by not raising the objection before trial. We reach that conclusion because the record reveals that each plaintiff **knew or should have known**, before the trial de novo commenced, that the defendant had failed to file proof of service of the trial de novo request and that this failure constituted a violation of MAR 7.1(a) as that rule was construed in *Nevers*. Nevertheless, they proceeded to present their case to a jury and acquiesced in the jury's deliberation on a verdict. It was only after the jury reached a verdict that each plaintiff considered less favorable than the decision of the arbitrator that any objection was voiced. Unquestionably, this conduct is inconsistent with the present assertion of each plaintiff that the superior court lacked jurisdiction to conduct the trial de novo because proof of service of the trial de novo request was not filed. *Haywood*, 153 Wn.2d at 240-41.

As noted in *Haywood*, 143 Wn.2d 231 and *Lybbert*, *supra*, common law waiver can occur in two ways. "It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior." *Lybbert*, 141 Wn.2d at 39, 1 P.3d 1124 "It can also occur if the defendant's counsel has been dilatory in asserting the defense." *Id*

Division II distinguished *Haywood* and wrongly held that the doctrine of waiver is inapplicable in a case wherein a party voluntarily withdraws its request for trial de novo post jury verdict versus (like in *Haywood*) when a party moves to strike another party's request for trial de novo post jury verdict for non-compliance. While the "shoe is on the other foot" in this case, the Supreme Court's application of the doctrine of waiver is just as relevant. "The doctrine of waiver is sensible and consistent with ... our modern day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.'" *Id*. "What is good for the goose, is good for the gander," and if a party can waive its right to

claim a defect as to a mandatory process by proceeding through a trial de novo, a party can likewise waive a potential “implied” ability to withdraw a request for trial de novo by proceeding through a trial de novo.

The doctrine of waiver therefore precludes Defendants from withdrawing their request for trial de novo. Here, Defendants knew of Lea’s worsened condition and significantly increased medical billings before the trial de novo occurred, and they not only proceeded with the trial, but they appealed the verdict. The assertion of withdrawal is entirely inconsistent with these actions and even further inconsistent with proceeding with further discovery upon remand. There can be no reasonable argument made that the Defendants have not been “dilatory” in asserting their withdrawal when both the trial de novo and appeal have passed and **Defendants originally filed their request for trial de novo 7 years ago** - Division II even agreed.

3. DIVISION II’S OPINION CONFLICTS WITH EQUITABLE DOCTRINES.

The doctrines of equitable estoppel, judicial estoppel, and laches, which Division II incorrectly summarily dismissed as inapplicable, also prevent the Defendants from withdrawing their request for trial de novo.

Generally, the doctrine of judicial estoppel prevents a party from taking a factual position that is inconsistent with his or her factual position in previous litigation. *See Hisle v. Todd Pacific Shipyards, Corp.*, 113 Wn. App. 401, 416, 54 P. 3d 687 (2002). As a very basic concept, judicial estoppel prevents the party from taking a factual position that is inconsistent

with his or her factual position in previous litigation. *Holst v. Fireside Reality, Inc.* 89 Wn. App. 245, 259, 948 P. 2d 858 (1997).

As noted in 31 CJS, Estoppel and Waiver § 139: under the rule, principle, or doctrine to be nominated as “judicial estoppel”, or “judicial quasi estoppel”:

. . . during the course of litigation a party is not permitted to occupy or assume inconsistent and contradictory positions and the parties to litigation are necessarily bound to the position they assume therein. This principle is sometime expressed in the language of the rule or maxim that, “one cannot blow both hot and cold”. . . Unlike equitable estoppel, which focuses on the relationship between the parties, judicial estoppel focuses on the relationship between the litigant and the judicial system. The purpose or function of judicial estoppel is to protect the integrity of the judicial process or the integrity of courts rather than to protect litigants from alleging improper or subsequent conduct by their adversaries. The doctrine of judicial estoppel, sometimes referred to as the doctrine of preclusion of inconsistent positions is invoked to prevent a party from changing their position over the course of judicial proceedings when such positional changes would have an adverse impact on the judicial process. Judicial estoppel estops a party to play fast and loose with the Courts or to trifle with judicial proceedings.

As noted in *Mueller v. Garske*, 1 Wn. App. 406, 409, 461 P. 2d 886 (1969), citing to 28 Am. Jur 2d *Estoppel* 69 at 696 (1966), “A party is not permitted to maintain inconsistent positions in judicial proceedings. It is not strictly a question of estoppel as it is a rule of procedure based on **manifest justice and on consideration of orderliness, regularity, and expedition in litigation.**” (Emphasis added)

Similarly, the doctrine of equitable estoppel requires that: (1) a party sought to be estopped has made an admission or statement or acted in such a manner that is inconsistent with his or her later claims; (2) the other party reasonable relied upon such admission, statement, or act, and (3) the other party would suffer injury if the party to be estopped were allowed to contradict his own earlier admission, statement or act. *Id.*

The equitable doctrine of laches is also applicable. Laches is the “implied waiver arising from knowledge of existing conditions and acquiescence in them.” *Felida Neighborhood Assoc. v. Clark County*, 81 Wn. App. 155, 162, 913 P.2d 823 (1996) (citing *Buell v. City of Bremerton*, 80 Wn.2d 518, 522, 495 P.2d 1358 (1972)). “Laches consists of two elements: (1) inexcusable delay and (2) prejudice to the other party from such delay.” *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848, 991 P.2d 1161 (2000)

For 7 years, the Defendants’ actions were entirely inconsistent with any intention to withdraw a request for trial de novo. For two and a half years following their request for trial de novo, Defendants engaged in ongoing discovery. They moved to continue the trial date after learning that Plaintiff had ongoing medical expenses, engaged in preservation depositions conducted by Plaintiff, and went through an entire trial. When Judgment was entered for Plaintiff, Defendants moved for a new trial and subsequently appealed to the Court of Appeals. After the case was remanded, Defendants requested additional supplemental discovery from Plaintiff and even moved

to compel the same only a month before filing the Notice of Withdrawal of their Request for Trial de novo. Every action Defendants have taken since December 2000 has been inconsistent with their filing the withdrawal.

The prejudice to Plaintiff is clear. Plaintiff has now been involved in 8 additional years of litigation in this case due to the defense's dilatory filing of their notice of withdrawal and the delay in that regard. In addition to ongoing attorney fees and numerous costs that she has accrued, Lea's medical bills have gained substantial interest, she has been forced to expend monies and time to fly out to Washington from Mississippi at least twice for trials in this case, and she has had to comply with all the court rules and case schedules. She also received a substantial verdict from the jury. Equity and justice require that Defendants be bound to the position they maintained for 7 years and have to undergo the trial they have twice requested.

Division II wrongly and inequitably holds that Plaintiff has been fairly compensated for Defendants' dilatory action and states at page 4:

Hudson's remedy under MAR 7.3 is the original arbitration award, interest, and attorney fees and costs. She does not demonstrate that this remedy is inadequate, so we need not further consider her equitable claims.

The Court further states:

MAR 7.3 provides Hudson a remedy tailored precisely to the problem; it compensates Hudson for any costs arising from the delay without exacerbating that delay by forcing the parties to go to trial.

Finally, the Court states at note 5 on page 14

[F]ees, costs, and interest *are* guaranteed in this case because Hapner conceded his responsibility to pay them in his notice of presentment. So, contrary to the dissent's contentions, Dissent at 319, 320, Hudson will receive interest on the original arbitration award and compensation for all the fees and costs she expended in defending this trial de novo appeal.

These statements are inaccurate, and the Court does not address **any** of the harm that is not compensated by the original arbitration award, interest, and attorney fees and costs. Plaintiff's current *legal* remedy as held by the Court of Appeals, the original arbitration award plus Plaintiff's attorney fees and litigation costs awarded by the trial court until July 25, 2003, is inadequate and inequitable.

Plaintiff has not received any compensation whatsoever for this collision that occurred over ten (10) years ago. She has been specifically denied any award of attorneys fees or costs for the past five (5) years of litigation since Defendants first filed their appeal and has incurred significant attorney fees and costs for both appeals; there has also been an additional 5 years of delayed payment of the fees and costs that were actually assessed by the trial court. Further, she was actually assessed \$3,673.25 in fees and costs that she has to pay Defendants. Plaintiff's medical billings have increased significantly, and as demonstrated in her responses to interrogatories (after the appeal), they are continuing to increase and she will need surgery for her low back. She has not received any money whatsoever from Defendants to pay for her bills, or the interest or collection fees her she has incurred as a

result of her medical bills that are still outstanding because of Defendants' 10 years of litigation delay tactics. She has had to expend significant costs, i.e. travel and lodging expenses, as well as lost wages, in order to fly out for two trial settings and also deal with the ongoing litigation for the past eight years.

With all of these harms that Lea has suffered, it cannot be reasonably argued only a \$14,537.97 arbitration award (for which no prejudgment interest was assessed) and \$43,891.25 in attorney fees and \$1,624.80 in costs are adequate available legal remedies available to Lea for the past 9 years of vexatious litigation. (See, CP 153-56) The attorney fees and costs awarded to Lea are only that - partial reimbursement for the attorneys' time and expended costs; they are not payment or compensation for Lea's injuries. Therefore, given that Lea's medical billings at trial exceeded the arbitration award by at least \$3,000 and she has incurred additional fees and costs for the past five-plus years of litigation, the reality is that Lea will actually owe significant sums of money in an admitted liability case.

“[M]ore than just money is at stake,” and litigation includes not only the out-of-pocket expense of pursuing such action, but also the time, delays, and “vexatiousness” it necessarily entails. See, *McRory v. Northern Ins. Co. of New York*, 138 Wn.2d 550, 980 P.2d 736 (1999); *Olympic Steamship Co. v. Centennial Insurance Co.*, 117 Wn.2d 37, 52, 811 P.2d 673 (1991) As stated in *Walji v. Candyco, Inc.* 57 Wn. App. 284, 290, 787 P.2d 946 (1990), “The policy of MAR 7.3 is to foster acceptance of the arbitrator's award and

penalize unsuccessful appeals therefrom. **Taking a de novo appeal to trial involves substantial delay and expense to the prevailing party at arbitration.**” Lea has had to expend incredible time, effort and emotion in order to deal with all the demands of the litigation process, including being deposed, time spent answering discovery requests, and time spent in trial.

Division II’s opinion summarily dismisses and fails to acknowledge or consider any emotional harm that Lea has necessarily suffered in 8 years of litigation since Defendants filed their request for trial de novo, or the time or the out-of-pocket expenses that a Plaintiff incurs that are not compensable by either RCW 4.84 et. seq., MAR 7.3, or RCW 7.06.060 such as travel, wage loss and lodging expenses and time in litigation related to the trial de novo. It further fails to consider the loss of the use of money that Lea could have applied to her medical billings and therefore not incurred interest or collection fees for the same.

Although in its opinion, Division II stated that “to the extent that Hapner may have been ‘dilatory’ in withdrawing the request, MAR 7.3 provides a remedy in the form of fees and costs,” as noted above, Lea has been denied her request for fees and costs by Division II in both appeals. It is clear that based upon all of these monetary considerations for which Ms. Hudson has not been compensated or summarily denied, she does not have an “adequate legal remedy” and the equitable doctrines of waiver, laches, judicial and/or equitable estoppel should be applied in this case to estop

Defendants from being allowed to withdraw their request for trial de novo.

As eloquently stated by Judge Van Deren in her dissent:

Here, Hapner, the non-prevailing party, received the trial de novo he requested, appealed for and was granted a second trial, engaged in extensive discovery before the first trial and after his appeal, and used the eight-year post-arbitration period to eventually decide he did not want a trial de novo after all. The unfair advantage to Hapner and unfair detriment to Hudson, who can never be made whole, are obvious. Hudson lost the use of the money awarded in 2000, lost all accruable legal interest, incurred legal and expert fees and costs with no guarantee of reimbursement, and has been forced to endure discovery, trial, and two appeals. It is hard to imagine a case that more dictates judicial estoppel for abuse of the legal system, particularly under a rule designed to deter exactly Hapner's conduct.

This Court should review and reverse Division II consistent with Judge Van Deren's dissent and the arguments cited herein.

B. DIVISION II'S DENIAL OF ATTORNEY FEES AND COSTS TO PLAINTIFF ON EITHER AND/OR BOTH APPEALS DIRECTLY CONFLICTS WITH *TRIBBLE*, VIOLATES MAR 7.3, LEADS TO ABSURD RESULTS AND RUNS AFOUL OF PUBLIC POLICY.

Division II's opinion creates complete inconsistencies within the law that cannot be reconciled, are counter to applicable court rules and interpretive case law, and lead to absurd inequitable results. Contrary to its own holding as noted above, which cites Plaintiff's legal remedy as attorney fees and costs pursuant to MAR 7.3, Division II denied Plaintiff attorney fees and costs for this appeal. The Court also previously denied Plaintiff her attorney fees in the prior appeal in this case. The conundrum that Division

II has created with its July 8, 2008 opinion must be remedied. By allowing Defendants to withdraw their request and then not even granting Plaintiff fees consistent with MAR 7.3, the Court's opinion has actually rewarded the Defendants' dilatory action and the result is "absurd," in complete contravention of all statutory principles and certainly the legislative intent behind mandatory arbitration, particularly when the Court indicates that an award of attorney fees and all costs is Ms. Hudson's only legal remedy. *See State v. Kelly*, 60 Wn. App. 921, 927, 808 P.2d 1150 (1991); *See, e.g. Estate of Lapping v. Group Health Co-op. of Puget Sound*, 77 Wn. App. 612, 619, 892 P.2d 1116 (1995) Further, Division II's opinion is in direct conflict with Division I's opinion in *Tribble v. Allstate*:

Finally, Tribble requests attorney fees and costs on appeal pursuant to RAP 18.1 and MAR 7.3 . . . **The prevailing party is the one who has an affirmative judgment rendered in its favor at the conclusion of the entire case.** . . . Allstate contends, with no citation to authority, that Tribble must prevail on the issues in this appeal in order to be entitled to fees on appeal pursuant to MAR 7.3. Nothing in the rule dictates such a result. Indeed, Allstate's position is contrary to the purpose of MAR 7.3, which is to discourage meritless appeals from arbitration awards "and to thereby reduce court congestion." . . . Accordingly, because Allstate has failed to improve its position as measured against the arbitrator's award, Tribble is entitled to her attorney fees and costs on appeal provided she complies with RAP 18.1(d).

Tribble, 134 Wn. App. 163, 174-75, 139 P.3d 373 (2006) (Emphasis added)(citations omitted) See also *Yoon v. Keeling*, 91 Wn. App. 302, 306, 956 P.2d 1116 (1998) (a party entitled to attorney's fees under MAR 7.3 at

the trial court level is also entitled to attorney's fees on appeal if the appealing party again fails to improve its position).

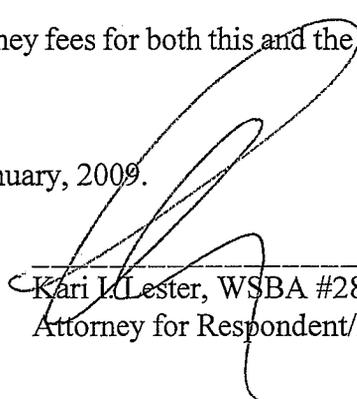
Therefore, consistent with MAR 7.3 and her request pursuant to RAP 18.1, Plaintiff requests that this Court accept review and reverse Division II and award Plaintiff all of her reasonable attorney fees and costs relating to the present appeal. In addition, Plaintiff requested in her Motion for Reconsideration that Division II review its decision in its opinion of April 25, 2005 and modify it pursuant to RAP 2.5(c)(2), which states that “the appellate court may at the instance of a party review the propriety of an earlier decision of the appellate court in the same case and, **where justice would best be served**, decide the case on the basis of the appellate court's opinion of the law at the time of the later review.” *See also, Eserhut v. Heister*, 62 Wn. App. 10, 812 P.2d 902 (1991)

Defendants simply cannot have it both ways and come out ahead in a case with admitted liability and nearly eight (8) years of wasted meritless litigation; the result would be completely inequitable and unjust. Defendants have clearly not “improved their position” since they filed their Request for a Trial de Novo on December 7, 2000, and therefore, they are liable to Plaintiffs for all fees and costs incurred by her since that time. *See Perkins Coie v. Williams*, 84 Wn. App. 733, 743, 929 P.2d 1215 (1997)

VI. CONCLUSION

It is respectfully requested that this Court accept review of all issues, reverse Division II's decision of July 8, 2008, remand this case back to the Superior Court for the new trial ordered by Division II's opinion of April 12, 2005, and award Plaintiff her attorney fees for both this and the prior appeal in this case.

DATED this 28th day of January, 2009.



Kari L. Lester, WSBA #28396
Attorney for Respondent/Petitioner

APPENDIX “A”

H

Court of Appeals of Washington, Division 2.

Lea HUDSON, individually, Respondent,

v.

Clifford and "Jane Doe" HAPNER, individually and the
marital community composed thereof; and Matthew
Norton, a Washington corporation, Appellants.

No. 35797-6-II.

July 8, 2008.

Background: Tortfeasor who rear-ended another vehicle requested trial de novo after mandatory arbitration resulted in award against him of \$14,538. A jury awarded the victim \$292,298 and motorist appealed. The Court of Appeals remanded for new trial. Tortfeasor filed notice of voluntary withdrawal of request for trial de novo, seeking judgment on the arbitration award, which victim opposed. The Superior Court, Pierce County, John A. McCarthy, J., granted victim's motion to strike judgment presentment and tortfeasor appealed.

Holdings: The Court of Appeals, Armstrong, J., held that:

(1) tortfeasor had implied right to voluntarily withdraw trial de novo request without court permission;
(2) Mandatory Arbitration Rules (MARs) did not preclude tortfeasor from voluntarily withdrawing trial de novo request after trial judgment was reversed on appeal;
(3) tortfeasor did not "waive" right to voluntarily withdraw trial de novo request by proceeding to trial; and
(4) victim had adequate remedy for tortfeasor's withdrawal of trial de novo request that precluded application of equitable estoppel.

Reversed and remanded.

Van Deren, C.J., dissented and filed opinion.

West Headnotes

[1] Alternative Dispute Resolution 25T 374(7)25T Alternative Dispute Resolution25TII Arbitration25TII(H) Review, Conclusiveness, and
Enforcement of Award25Tk366 Appeal or Other Proceedings for
Review25Tk374 Scope and Standards of Review25Tk374(7) k. Questions of Law or Fact.Most Cited CasesInterpreting the Mandatory Arbitration Rules (MARs) is
a matter of law reviewed de novo.**[2] Alternative Dispute Resolution 25T 350**25T Alternative Dispute Resolution25TII Arbitration25TII(H) Review, Conclusiveness, and
Enforcement of Award25Tk350 k. In General. Most Cited CasesMandatory Arbitration Rule governing costs and fees for
trial de novo provided tortfeasor with implied right to
voluntarily withdraw his request for trial de novo after
adverse arbitration award without court permission; rule
referred to costs after voluntary withdrawal rather than
after dismissal by the court, and allowing voluntary
withdrawal was consistent with purpose of mandatory
arbitration to relieve court congestion. MAR 7.3.

[3] Alternative Dispute Resolution 25T ↪350

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk350 k. In General. Most Cited Cases

Tortfeasor was not precluded by Mandatory Arbitration Rules from voluntarily withdrawing request for trial de novo after jury trial with a verdict for victim that exceeded the arbitration award; judgment on the verdict was reversed on appeal and remanded for new trial that left the parties in the same position they were in prior to trial. MAR 7.3.

[4] Courts 106 ↪82

106 Courts

106II Establishment, Organization, and Procedure

106II(F) Rules of Court and Conduct of Business

106k82 k. Modification, Amendment, Suspension, or Disregard of Rules. Most Cited Cases
Appellate court will not add to or subtract from the clear language of a rule, even if it believes that the legislature intended something else but did not adequately express it, unless the addition or subtraction of language is imperatively required to make the rule rational.

[5] Estoppel 156 ↪68(4)

156 Estoppel

156III Equitable Estoppel

156III(B) Grounds of Estoppel

156k68 Claim or Position in Judicial Proceedings

156k68(4) k. Defense or Objection Inconsistent with Previous Claim or Position in General.

Most Cited Cases

Pleading 302 ↪78

302 Pleading

302III Responses or Responsive Pleadings in General

302III(A) Defenses in General

302k78 k. Necessity for Defense. Most Cited

Cases

A defendant waives an affirmative defense where (1) asserting the defense is inconsistent with the defendant's prior behavior, or (2) the defendant has been dilatory in asserting the defense.

[6] Alternative Dispute Resolution 25T ↪350

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk350 k. In General. Most Cited Cases

Tortfeasor who sought trial de novo after adverse mandatory arbitration did not waive right to later voluntarily withdraw trial request by proceeding to trial; request for trial de novo was not a "defense" to the arbitration award but a procedural right to take unilateral action that the Mandatory Arbitration Rules (MARs) permitted him to do, and judgment was reversed on appeal, which left the parties in the same position they were in prior to trial. MAR 7.3.

[7] Alternative Dispute Resolution 25T ↪350

25T Alternative Dispute Resolution

25TII Arbitration

25TII(H) Review, Conclusiveness, and Enforcement of Award

25Tk350 k. In General. Most Cited Cases

Car accident victim who prevailed in mandatory arbitration had adequate remedy for tortfeasor's voluntary withdrawal of his request for trial de novo, which precluded equitable estoppel of right to withdraw request, where governing rule provided remedy for added time and expense of trial preparation by awarding, in addition to arbitration award, interest and attorney fees and costs. MAR 7.3.

18 Equity 150 ↪ 43

150 Equity

150I Jurisdiction, Principles, and Maxims

150I(B) Remedy at Law and Multiplicity of Suits

150k43 k. Existence of Remedy at Law and

Effect in General. Most Cited Cases

Equitable remedies are extraordinary forms of relief, available only when an aggrieved party lacks an adequate remedy at law.

*312 Elizabeth Ann Jensen, Attorney at Law, Fircrest, WA, Marilee C. Erickson, Reed McClure, Seattle, WA, for Appellants.

Benjamin Franklin Barcus, Kari Ingrid Lester, Ben F. Barcus & Associates PLLC, Tacoma, WA, for Respondent.

ARMSTRONG, J.

¶ 1 We granted discretionary review to consider whether a party who requests a trial de novo after arbitration, obtains an unfavorable judgment at trial, and then successfully appeals that judgment may, before the second trial, withdraw his request for the trial de novo. Because the policy behind Mandatory Arbitration Rule (MAR) 7.3 requires us to favor the original arbitration award over continued litigation, we hold that the party may withdraw the request; therefore, we reverse the trial court's order striking the withdrawal of the trial de novo request and we remand for entry of judgment on Clifford Hapner's notice of presentment.

FACTS

¶ 2 In 1998, Clifford Hapner drove his vehicle into the rear of Lea Hudson's vehicle. Hudson sued Hapner, his wife, and his employer, Matthew Norton Corporation,^{FN1} and the case went to mandatory arbitration. The arbitrator awarded Hudson \$14,538 in damages, after which Hapner timely requested a trial de novo under RCW 7.06.050(1). In 2003, a jury awarded Hudson \$292,298. Hapner appealed, arguing successfully that the trial court improperly excluded his expert's testimony. We remanded for a new *313 trial. Hudson v. Hapner, No. 30619-1-II, 2005 WL 834433, at *5 (Wash.Ct.App. April 12, 2005).

^{FN1} For convenience, we refer to all defendants collectively as "Hapner."

¶ 3 After remand, Hapner obtained further discovery about Hudson's ongoing medical treatment and expenses arising from the accident. He then filed a notice of voluntary withdrawal of his request for trial de novo. He also filed a notice of presentment for the court to enter judgment on the arbitration award along with (1) interest, (2) attorney fees incurred by Hudson at trial and on appeal, and (3) taxable costs. Hudson moved to strike Hapner's withdrawal of his trial de novo request, arguing that Hapner had waived his right to withdraw his request. The trial court granted Hudson's motion, striking Hapner's presentation of judgment and withdrawal of request for trial de novo. We granted Hapner's motion for discretionary review.

ANALYSIS

[1] ¶ 4 Any party to an arbitration proceeding may file a request for a trial de novo in the superior court within 20 days after the arbitrator files his decision. RCW

7.06.050(1); MAR 7.1(a). If the party voluntarily withdraws his request for a trial de novo, the court may impose costs and reasonable attorney fees against him. RCW 7.06.060(1); MAR 7.3.^{FN2} Hapner argues that under these rules, he had a right to unilaterally withdraw his request for a trial de novo at any time, conceding that in doing so he must pay Hudson's fees and costs. Interpreting the MARs is a matter of law that we review de novo. Manius v. Boyd, 111 Wash.App. 764, 766-67, 47 P.3d 145 (2002).

FN2. The applicable language in these statutes and MARs is virtually identical, so for convenience we refer only to the MARs.

A. Unilateral Withdrawal

¶ 5 The parties first dispute whether a party who has requested a trial de novo may unilaterally withdraw that request. Hapner relies on Thomas-Kerr v. Brown, 114 Wash.App. 554, 559 n. 16, 59 P.3d 120 (2002), in which Division One held that MAR 7.3 provides an implied right to unilaterally withdraw a request for a trial de novo. Hudson responds that Thomas-Kerr was erroneously decided and that a party may withdraw his request for a trial de novo only with court permission. She reasons that because a trial de novo is treated as an appeal, see Singer v. Etherington, 57 Wash.App. 542, 546, 789 P.2d 108 (1990), we should import the court permission requirement from the Rules of Appellate Procedure (RAPs) and the Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJs).^{FN3}

FN3. Both RAP 18.2 and RALJ 10.2(c) provide that upon the appellant's motion, the court may dismiss the appeal "in its discretion."

[2] ¶ 6 Hudson's argument is not persuasive. First, the RAPs and RALJs apply only to those proceedings

designated in RAP 1.1 and RALJ 1.1(a), respectively, and the present case does not fall within the scope of either rule. Second, had the Supreme Court and legislature intended a similar permission requirement for withdrawing a trial de novo request, they would have included such language in MAR 7.3. See City of Kent v. Beigh, 145 Wash.2d 33, 45, 32 P.3d 258 (2001) (where the legislature uses certain statutory language in one instance and different language in another, there is a difference in legislative intent). In addition, use of the word "withdraws" in MAR 7.3, which denotes an action by a party, instead of "dismissal" (an action by the court), demonstrates that the party who initiated the trial de novo has control of its continuation.

¶ 7 Furthermore, allowing the requesting party to withdraw is most consistent with the legislature's clear preference for resolving disputes through arbitration rather than through judicial proceedings. See Nevers v. Fireside, Inc., 133 Wash.2d 804, 809, 947 P.2d 721 (1997) (as with any other court rule, court construes the mandatory arbitration rules in accord with their purpose). The purpose of mandatory arbitration is to reduce court congestion of civil cases. Malted Mousse, Inc. v. Steinmetz, 150 Wash.2d 518, 526, 79 P.3d 1154 (2003). Specifically, MAR 7.3 is intended to encourage parties to accept the arbitrator's award by penalizing unsuccessful appeals from them. *314 Walji v. Candyco, Inc., 57 Wash.App. 284, 290, 787 P.2d 946 (1990).

¶ 8 As Division One stated in Do v. Farmer, 127 Wash.App. 180, 187, 110 P.3d 840 (2005), "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 [trial] 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.

Do, 127 Wash.App. at 187, 110 P.3d 840. As Hapner states, “[He] chose the ‘carrot’ ” by withdrawing his trial de novo request. Br. of Appellant at 13.

¶ 9 In contrast, Hudson's proposal to nullify the original arbitration award and force a trial would accomplish the opposite of what the legislature intended: continued contribution to court congestion. Hudson does not have any *right* to a trial de novo merely because Hapner requested one; to the contrary, for Hudson to preserve her right to a trial de novo, she must have filed her own request within the 20-day period prescribed in MAR 7. 1. Thomas-Kerr, 114 Wash.App. at 560, 59 P.3d 120. We hold that Hapner had a right under MAR 7.3 to unilaterally withdraw his request for a trial de novo.

B. Time Limitation

¶ 10 Hudson argues nonetheless that even if MAR 7.3 authorizes unilateral withdrawal of a request for a trial de novo, the rule is ambiguous as to the procedures for doing so. She urges us to interpret the rule to include a time limit on withdrawals where a trial de novo has actually occurred. Hapner responds that his right to withdraw has no time limits. ^{FN4}

FN4. Hapner relies on Walji v. Candyco, Inc., 57 Wash.App. 284, 787 P.2d 946. Walji addressed a different issue: whether a *plaintiff* who had lost at arbitration, requested a trial de novo, then moved for a voluntary nonsuit under CR 41(a) could avoid paying fees and costs under MAR 7.3 because it had not technically “withdrawn” it. Walji, 57 Wash.App. at 290, 787 P.2d 946. The court found “no meaningful difference between withdrawing an appeal and taking a voluntary nonsuit,” and held that

depending on the circumstances, fees and costs could be appropriate because “[v]oluntary nonsuits may come shortly after service before discovery even starts, or may come after days of trial before a jury.” Walji, 57 Wash.App. at 290, 787 P.2d 946; see generally CR 41(a)(1)(B) (plaintiff entitled to dismissal without prejudice “at any time before plaintiff rests at the conclusion of his opening case”). However, Thomas-Kerr, 114 Wash.App. at 563, 59 P.3d 120, has since held that MAR 6.3 prohibits a plaintiff from nonsuiting a case after an arbitrator's decision, so Walji is not helpful.

[3][4] ¶ 11 We are, like the Supreme Court in Ingram v. Dep't of Licensing, 162 Wash.2d 514, 526, 173 P.3d 259 (2007), wary of reading into rules restrictions that are not there or promulgating additional rules under the guise of interpreting them. (Citing Dep't of Licensing v. Cannon, 147 Wash.2d 41, 57-58, 50 P.3d 627 (2002)). We therefore will not add to or subtract from the clear language of a rule, even if we believe that the legislature intended something else but did not adequately express it, unless the addition or subtraction of language is imperatively required to make the rule rational. Ingram, 162 Wash.2d at 526, 173 P.3d 259 (quoting Cannon, 147 Wash.2d at 57, 50 P.3d 627).

¶ 12 Hudson cites general principles of fairness and efficiency for her proposal that a party may not withdraw his request for a trial de novo after “the” trial de novo has occurred. She argues that a contrary rule would allow a party to complete the trial, obtain a verdict, and then withdraw the request if he has not improved his position. This argument is flawed because it assumes that Hapner has received the benefit of his request for a trial de novo. He has not; although a trial has occurred, our reversal of the judgment returns the proceeding to the same posture as if it had not. See Weber v. Biddle, 72 Wash.2d 22, 28, 431 P.2d 705 (1967); cf. 15A Karl B. Tegland and Douglas J. Ende, Washington Practice: Civil Procedure § 67.18, at 514 (2007) (if trial court dismisses plaintiff's

case but is reversed on appeal, case simply proceeds as if it were never dismissed). Hapner therefore did not *315 use the trial de novo to “gamble on the outcome” by obtaining a binding verdict and then withdrawing if it is less favorable than the original arbitration award. Contrast *Creso v. Philips*, 97 Wash.App. 829, 831, 987 P.2d 137 (1999) (failure to file proof of service is waived unless raised before the trial de novo commences), *aff'd by Haywood v. Aranda*, 143 Wash.2d 231, 233, 19 P.3d 406 (2001). There is no outcome for Hapner to compare with the arbitration award because the verdict was vacated.

¶ 13 Nor should the fact that Hapner pursued the appeal affect his right to withdraw under MAR 7.3. Had he not prevailed, he would indeed be bound by the jury's verdict from the first trial. But it is simply not Hapner's fault that the first trial was tainted by a reversible error outside his control. If the error in the first trial had been Hapner's fault, we would not have reversed. See *City of Seattle v. Patu*, 147 Wash.2d 717, 720, 58 P.3d 273 (2002) (doctrine of invited error prevents parties from benefiting from an error they caused at trial).

¶ 14 Finally, Hudson argues that Hapner should not be able to withdraw his request for a trial de novo because his decision to complete an entire trial and a lengthy appeal is contrary to the policy of MAR 7.3 to reduce delays in civil cases and waste of judicial resources. We agree that the law frowns on the use of procedural tactics to substantially delay the resolution of cases on the merits. See, e.g., CR 1 (superior court civil rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action”); Rules of Professional Conduct (RPC) 3.1 and 3.2. But Hudson disregards that MAR 7.3 provides Hudson a remedy tailored precisely to the problem; it compensates Hudson for any costs arising from the delay ^{FNS}without exacerbating that delay by forcing the parties to go to trial. Hudson justifies her proposal that the parties continue to consume judicial resources in litigation by asserting that they are “far past the point where [preventing court congestion] is served.” Br. of Resp't at 16. We disagree; no amount of past delay

justifies future delay.

FN5. The dissent suggests that fees and costs under MAR 7.3 are not an adequate remedy because they are discretionary, not “guarantee[d].” Dissent at 319. This argument is not persuasive for two reasons. First, the fact that MAR 7.3 fees are discretionary does not mean that a trial court's decision to award them may be unprincipled or would not be reviewable by this court. See *Oltman v. Holland Am. Line USA, Inc.*, 163 Wash.2d 236, 243, 178 P.3d 981 (2008) (discretionary rulings by trial court generally reviewed under abuse of discretion standard). Second, fees, costs, and interest are guaranteed in this case because Hapner conceded his responsibility to pay them in his notice of presentment. So, contrary to the dissent's contentions, Dissent at 319, 320, Hudson will receive interest on the original arbitration award and compensation for all the fees and costs she expended in defending this trial de novo appeal.

C. Waiver

¶ 15 Hudson argues that Hapner waived his right to withdraw his request for a trial de novo, relying on *Haywood*, 143 Wash.2d at 240-41, 19 P.3d 406.

[5] ¶ 16 A defendant waives an affirmative defense where (1) asserting the defense is inconsistent with the defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense. *Haywood*, 143 Wash.2d at 239, 19 P.3d 406 (quoting *Lybbert v. Grant County*, 141 Wash.2d 29, 39, 1 P.3d 1124 (2000)). In *Haywood*, the defendants requested a trial de novo after arbitration, and the plaintiffs' affirmative “defense” was the defendants' failure to file proof of service of their request for a trial de novo under MAR 7.1(a). *Haywood*, 143 Wash.2d at 239, 19 P.3d 406. The plaintiffs knew of the

defendants' delinquency from the beginning yet waited until after the jury verdict (which was less favorable to them than the original arbitration award) to object. Haywood, 143 Wash.2d at 240, 19 P.3d 406. The Supreme Court held that the plaintiffs' presentation of the case to the jury and acquiescence to the jury's deliberation was inconsistent with their later assertion that the trial court lacked jurisdiction over the case. Haywood, 143 Wash.2d at 240, 19 P.3d 406. The plaintiffs could not "simply 'sit on' the [defense] ... until the jury's verdict, and invoke such [defense] only if the verdict is less favorable than the arbitration award." *316 Haywood, 143 Wash.2d at 240, 19 P.3d 406 (quoting Creso, 97 Wash.App. at 831, 987 P.2d 137).

[6] ¶ 17 The situation here is distinguishable. First, Hapner's right to withdraw his request for a trial de novo is not a "defense" in the post-arbitration context where the defendant initiates the trial de novo proceeding. Rather, the right to withdraw the request under MAR 7.3 is a procedural right to take unilateral action. See Thomas-Kerr, 114 Wash.App. at 559 n. 16, 59 P.3d 120. While the plaintiffs' submission of the case to the jury in Haywood may be "inconsistent" with a belief that the court lacks jurisdiction, there is no such inconsistency here, where the applicable rules not only contemplate that the requesting party may change his mind but also encourage the party to do so. MAR 7.3; see Do, 127 Wash.App. at 187, 110 P.3d 840. And, to the extent that Hapner may have been "dilatatory" in withdrawing the request, MAR 7.3 provides a remedy in the form of fees and costs. Hapner did not waive his right to withdraw.

D. Other Equitable Doctrines

¶ 18 Hudson also argues that the equitable doctrines of equitable estoppel, judicial estoppel, and laches preclude Hapner from withdrawing his request for a trial de novo.

[7][8] ¶ 19 Equitable remedies are extraordinary forms of

relief, available only when an aggrieved party lacks an adequate remedy at law. Sorenson v. Pyeatt, 158 Wash.2d 523, 531, 146 P.3d 1172 (2006). Here, Hudson's remedy under MAR 7.3 is the original arbitration award, interest, and attorney fees and costs. She does not demonstrate that this remedy is inadequate, so we need not further consider her equitable claims.

¶ 20 In sum, we hold that Hapner was entitled to withdraw his request for a trial de novo under MAR 7.3. We therefore reverse the trial court's order striking Hapner's withdrawal of his trial de novo request. And because a trial court is bound to enter judgment on an arbitration award in the absence of a request for a trial de novo, RCW 7.06.050(2), we remand for entry of judgment on Hapner's notice of presentment together with Hudson's fees and costs under MAR 7.3.

E. Attorney Fees

¶ 21 In her brief and citing to RAP 18.1, Hudson requests attorney fees under MAR 7.3. She also requests sanctions under RAP 18.9(a), arguing that Hapner's appeal is frivolous and "an affront to the justice system." Br. of Resp't at 27. Because Hudson is not the prevailing in this appeal, we deny both requests.

¶ 22 We reverse and remand for entry of judgment on Hapner's notice of presentment after calculating MAR 7.3 fees and costs.

I concur: BRIDGEWATER, J.
VAN DEREN, C.J. (dissenting).

¶ 23 I respectfully dissent. The majority holds that Hapner had a right to unilaterally withdraw his request for a trial de novo at any time and suggests that Hudson's only recourse to avoid this result was to move for trial de novo within 20 days of the arbitrator's decision. Majority at 313-314.

¶ 24 Once again, a rule that is supposed to reduce court congestion of civil cases, Malted Mousse, Inc. v. Steinmetz, 150 Wash.2d 518, 526, 79 P.3d 1154 (2003), and intended to encourage parties to accept an arbitrator's decision by penalizing unsuccessful appeals, Walji v. Candyco, Inc., 57 Wash.App. 284, 290, 787 P.2d 946 (1990), has resulted in protracted litigation. See e.g., Wiley v. Rehak, 143 Wash.2d 339, 342-43, 20 P.3d 404 (2001); Haywood v. Aranda, 143 Wash.2d 231, 234-35, 19 P.3d 406 (2001); Nevers v. Fireside, Inc., 133 Wash.2d 804, 807-09, 947 P.2d 721 (1997); Christie-Lambert Van & Storage Co. v. McLeod, 39 Wash.App. 298, 301-02, 309, 693 P.2d 161 (1984).

I. Legislative Intent Is Not Achieved

¶ 25 The majority opines that its result furthers the legislative goal of decreasing court congestion and delays in civil litigation. Majority at 313-314, 314-315. I respectfully disagree. "When interpreting statutory language, our goal is to carry out" the legislature's intent. *317 Simpson Inv. Co. v. Dep't of Revenue, 141 Wash.2d 139, 148, 3 P.3d 741 (2000). "In ascertaining this intent, the language at issue must be evaluated in the context of the entire statute." Simpson, 141 Wash.2d at 149, 3 P.3d 741. We derive the legislative intent from the statute's plain language and ordinary meaning; however, we must "avoid unlikely, absurd, or strained results." Berrocal v. Fernandez, 155 Wash.2d 585, 590, 121 P.3d 82 (2005) (internal quotation marks omitted) (quoting Burton v. Lehman, 153 Wash.2d 416, 423, 103 P.3d 1230 (2005)).

¶ 26 The primary goal of the legislation authorizing mandatory arbitration in certain civil cases is to reduce court congestion, to reduce costs, and to allow civil claims to be heard without delay. See Malted Mousse, 150 Wash.2d at 526, 79 P.3d 1154; Christie-Lambert Van, 39 Wash.App. at 302, 693 P.2d 161; 1 Senate Journal, 46th Leg., Reg. Sess., at 1016-17 (Wash.1979).

The legislative history of the statute explains that the "[e]xperience of other states indicates that [mandatory arbitration] is an effective method of reducing court congestion and also providing a fair but streamlined resolution of disputes involving small sums. Speed is gained both in setting a hearing date and actual trial time."

Perkins Coie v. Williams, 84 Wash.App. 733, 737, 929 P.2d 1215 (1997) (alteration in original) (quoting S.B. Rep. on Substitute H.B. 425, 46th Leg., Reg. Sess. (Wash.1979)). These goals have not been met in this case because the majority's resolution allows Hapner to withdraw his request for a trial de novo nine years after the case was filed in October 1999, eight years after asking for a trial de novo in December 2000, and five years after receiving one in April 2003.

¶ 27 "A supplemental goal of the mandatory arbitration statute is to discourage meritless appeals." Wiley v. Rehak, 143 Wash.2d 339, 348, 344, 20 P.3d 404 (2001) (quoting Perkins Coie, 84 Wash.App. at 737-38, 929 P.2d 1215). RCW 7.06.060 and MAR 7.3 reflect this goal because they permit the trial court to assess attorney fees against a party who fails to improve her position at a trial de novo. Wiley, 143 Wash.2d at 348, 20 P.3d 404. The purpose of these rules, which permit the trial court to award fees and costs when the opposing party either (1) requests a trial de novo and then does not advance his or her position in trial or (2) withdraws his or her request for a trial de novo, "is to deter such requests made solely to delay enforcement of the award." Christie-Lambert Van, 39 Wash.App. at 302, 693 P.2d 161 (citing Judicial Council Comment, MAR 7.3).

¶ 28 The majority and Hapner rely on Thomas-Kerr v. Brown, 114 Wash.App. 554, 559 n. 16, 59 P.3d 120 (2002), to allow Hapner the right under MAR 7.3 to unilaterally withdraw his request for a trial de novo after

the trial court heard the case de novo and we remanded for a second trial. Majority at 313-314. But *Thomas-Kerr* is distinguishable. In *Thomas-Kerr*, Alva Thomas-Kerr and Fredrick Brown were involved in an automobile collision and following mandatory arbitration, Brown requested a trial de novo. Before the trial occurred, Brown withdrew his request for a trial de novo. *Thomas-Kerr*, 114 Wash.App. at 556-57, 59 P.3d 120. Here, however, Hapner did not withdraw his request until after the trial de novo, after we remanded the case for a second trial, and after additional discovery following remand.^{FN6} See *Hudson v. Hapner*, noted at 126 Wash.App. 1057, 2005 WL 834433, at *5, review denied, 156 Wash.2d 1008, 132 P.3d 146 (2006).

^{FN6}. The majority notes that our remand for a new trial did not result from Hapner's trial errors. Majority at 314-315. But we reversed and remanded because of the trial court's error, not because of error by either party. *Hudson v. Hapner*, noted at 126 Wash.App. 1057, 2005 WL 834433, at *3, review denied, 156 Wash.2d 1008, 132 P.3d 146 (2006).

¶ 29 The majority reasons that its decision is consistent with the legislature's goal of reducing court congestion through mandatory arbitration. Majority at 313-314. But the legislature's goal of reducing court congestion through less costly arbitration clearly has not been met in a case that has been in litigation for eight years. Moreover, permitting Hapner to now withdraw his request for a trial de novo allows him to engage in two meritless appeals, the first when he requested a trial de novo and the second when he *318 appealed the result of that trial de novo to this court. This clearly contravenes the legislature's intent and is an absurd result that we should discourage. See *Tingev v. Haisch*, 159 Wash.2d 652, 669, 152 P.3d 1020 (2007). Furthermore, his request for a trial de novo has successfully delayed enforcement of the arbitration award for eight years.

¶ 30 The majority's ruling encourages continued litigation by both parties merely as a defensive tactic.^{FN7} A litigant who runs the risk of an appealing party freely walking away from a request for a trial de novo after engaging in additional trial litigation for eight years is faced with a Hobson's choice—appeal just to have an appeal in place many years later, or gamble that the appealing party will be equitably estopped from abandoning a case after causing the other party to go through a full trial, an appeal, and discovery before and after the appeal. Malpractice worries can force both parties to appeal arbitration awards, thereby eviscerating the intent and benefit of the arbitration rule. When a party cannot rely on enforcement of the opposing party's decision to either accept the arbitrator's decision or live with its own decision to ask for a trial de novo and litigate over the course of eight years, MAR 7.3 becomes a way station to more litigation, prolonging finality, and providing a means of significant delay solely controlled by one party.

^{FN7}. The majority reasons that Hapner did not use the trial de novo to gamble on the outcome because we vacated the jury's verdict and granted the relief Hapner requested on appeal. Majority at 314-315. But Hapner has been able to delay paying Hudson's damages and in the process has forced her to incur more expense while he conducted extended discovery. In addition, the majority notes that if Hapner had not prevailed on appeal, he would have been bound by the jury's verdict from the first trial. Majority at 314-315. The majority's reasoning in fact encourages parties to appeal on the “chance” or “gamble” that we or another higher court will overturn the result of their trial de novo.

II. Civil Rules Should Apply

¶ 31 When a party requests a trial de novo, the case is transferred to the superior court's civil docket and, necessarily, the superior court's civil and local rules then

apply. See, e.g., MAR 7.1(b); MAR 7.2(b); MAR 8.2; Wilson v. Horsley, 137 Wash.2d 500, 506, 974 P.2d 316 (1999) (“The question of what issues may be added to the trial de novo is governed by the Civil Rules.”); Sorenson v. Dahlen, 136 Wash.App. 844, 851-52, 149 P.3d 394 (2006), *amended on recons.*, 136 Wash.App. at 859, 149 P.3d 394 (2007); Stevens v. Gordon, 118 Wash.App. 43, 51, 74 P.3d 653 (2003). Moreover, a trial de novo is an appeal. See Thomas-Kerr, 114 Wash.App. at 558, 59 P.3d 120; 1 Senate Journal, 46th Leg., Reg. Sess., at 1017 (Wash.1979). Therefore, I would apply the civil rules to this case.

¶ 32 But the majority reasons that if the legislature or the Washington Supreme Court intended that a party's right to withdraw its request for a trial de novo exists only before trial, or only before it finishes presenting its evidence at trial, they could have used language similar to that in CR 41(a)^{FN8} or RAP 18.2^{FN9}. Majority at 313. Rather *319 than allowing the withdrawal of a request for trial de novo following trial and appeal, the better approach is that established rules of civil procedure govern the trial de novo process. Furthermore, “[i]n the absence of an explicit statement in the statute or the legislative history” about the purposes of a statute or a rule, we may consider other statutes concerning the same subject matter in our statutory construction of the statute or rule. Christie-Lambert Van, 39 Wash.App. at 302, 693 P.2d 161.

FN8. CR 41(a) provides:

(1) *Mandatory*. Subject to the provisions of rules 23(e) and 23.1, any action shall be dismissed by the court:

(A) By Stipulation. When all parties who have appeared so stipulate in writing; or

(B) By Plaintiff Before Resting. Upon motion of the plaintiff at any time before plaintiff rests at the conclusion of his opening case.

(2) *Permissive*. After plaintiff rests after his opening case, plaintiff may move for a voluntary dismissal without prejudice upon good cause shown and upon such terms and conditions as the court deems proper.

But compare Walji, 57 Wash.App. at 287, 787 P.2d 946 (noting a party has “a right to a voluntary nonsuit without terms until it rested its case in the trial de novo”), *with* Thomas-Kerr, 114 Wash.App. at 562, 59 P.3d 120 (noting that while a case is under arbitrator's review, the plaintiff may withdraw under CR 41, but after the arbitrator's decision, the plaintiff must seek permission to withdraw).

FN9. RAP 18.2 provides:

The appellate court on motion may, in its discretion, dismiss review of a case on stipulation of all parties and, in criminal cases, the written consent of the defendant, if the motion is made before oral argument on the merits. The appellate court may, in its discretion, dismiss review of a case on the motion of a party who has filed a notice of appeal, a notice for discretionary review, or a motion for discretionary review by the Supreme Court. Costs will be awarded in a case dismissed on a motion for voluntary withdrawal of review only if the appellate court so directs at the time the motion is granted.

¶ 33 Thus, I would hold that the established civil rules apply to Hapner's late request to withdraw his request for a trial de novo. No other civil rule allows a party unilaterally to withdraw his or her case *after* the trial court has heard, and ruled on, the case. See CR 41(a); RAP 18.2. Thus, a logical conclusion is that the legislature and the Supreme Court intended that the civil rules concerning withdrawal of claims apply to a party's withdrawal of the trial de novo request. The civil rules, before a case is transferred to mandatory arbitration, generally do not apply. *Wiley*, 143 Wash.2d at 346, 20 P.3d 404. Although we have recognized that the claims may not be amended under the civil rules for a trial de novo from arbitration, *Wiley*, 101 Wash.App. at 204, 2 P.3d 497, when a case is transferred back to the trial court on a perfected trial de novo, the trial court necessarily manages the case under the civil rules. Thus, the trial court had the authority to deny dismissal of Hapner's untimely request for a trial de novo.

III. Compensation for Delay Is Not Guaranteed

¶ 34 The majority also assumes that Hapner must compensate Hudson for any costs arising from the eight-year delay due to Hapner's desire to have a first trial, an appeal asking for a second trial, and to engage in discovery before trial and after a successful appeal. Majority at 315, 316. But because fees and costs under MAR 7.3 are discretionary, there is no guarantee that Hudson can ever be made whole. MAR 7.3. The only fair and reasonable remedy at this stage is to require that the parties remain in the forum Hapner chose in 2000.

IV. Waiver Should Apply

¶ 35 The majority also assumes that a full trial, an appeal asking for a second trial, and additional discovery following appeal are distinguishable from the plaintiffs' conduct in *Haywood*, 143 Wash.2d 231, 19 P.3d 406. Majority at 315-316. In *Haywood*, the defendants

requested a trial de novo following arbitration, but failed to properly file proof of service with the trial court. After the jury rendered a verdict for substantially less than the plaintiffs were awarded by the arbitrator, the plaintiffs moved to vacate the jury verdict because the defendants failed to properly file proof of service. *Haywood*, 143 Wash.2d at 233-34, 19 P.3d 406. The trial court, this court, and the Washington State Supreme Court held that the plaintiffs waived any objection to the defendants' failure to properly file proof of service "by not registering the objection before the trial de novo commenced." *Haywood*, 143 Wash.2d at 235, 19 P.3d 406.

¶ 36 The majority opines that Hapner's right to withdraw his request for a trial de novo is distinguishable from *Haywood* because it is not a defense, but rather a procedural right. Majority at 315-316. But the doctrine of waiver applies to procedural rules as well. See *Haywood*, 143 Wash.2d at 239-240, 19 P.3d 406. Moreover, we have consistently upheld that long-standing "principle that procedural rules should be interpreted to eliminate procedural traps and to allow cases to be decided on their merits." *Haywood*, 143 Wash.2d at 238, 19 P.3d 406. I respectfully disagree with the majority and would find that, similar to *Haywood*, Hapner's request to withdraw his trial de novo request now is inconsistent with his former position requesting, participating in, and appealing a trial de novo. See Majority at 315-316. I further disagree with the majority and do not believe that MAR 7.3 encourages a party to change his or her mind about requesting a trial de novo after trial has occurred. See Majority at 315-316. Hapner was dilatory in seeking to withdraw his request*320 for a trial de novo six years after his request and on the heels of a favorable appellate ruling vacating the jury's verdict awarding Hudson substantially larger damages than had the arbitrator. And MAR 7.3 does not guarantee a remedy for Hapner's dilatory action in the form of fees and costs. See Majority at 315-316. Therefore, I would hold that Hapner waived his right to withdraw his request for a trial de novo here. See *Haywood*, 143 Wash.2d at 239, 19 P.3d 406.

V. Alternatively, Judicial Estoppel Should Apply

¶ 37 Notwithstanding that the majority's holding creates a result incompatible with legislative intent, thereby dictating that the trial court's ruling be affirmed, I would alternatively invoke the doctrine of judicial estoppel, an equitable doctrine that we may invoke at our discretion, to prevent Hapner from "asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Arkison v. Ethan Allen, Inc., 160 Wash.2d 535, 538, 160 P.3d 13 (2007) (quoting Bartley-Williams v. Kendall, 134 Wash.App. 95, 98, 138 P.3d 1103 (2006)); *see also* New Hampshire v. Maine, 532 U.S. 742, 750, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); Skinner v. Holgate, 141 Wash.App. 840, 847, 173 P.3d 300 (2007).

¶ 38 "The doctrine serves three purposes: (1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time." Skinner, 141 Wash.App. at 847, 173 P.3d 300. The judicial estoppel doctrine "protect[s] the integrity of the judicial process by prohibiting parties from deliberately changing positions according to the exigencies of the moment." Skinner, 141 Wash.App. at 849, 173 P.3d 300.

[Although not exclusive, t]hree core factors guide a trial court's determination of whether to apply the judicial estoppel doctrine: (1) whether "a party's later position" is "clearly inconsistent with its earlier position"; (2) whether "judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled"; and (3) "whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped."

Arkison, 160 Wash.2d at 538-39, 160 P.3d 13 (internal quotation marks omitted) (quoting New Hampshire, 532 U.S. at 750-51, 121 S.Ct. 1808); *see also* Skinner, 141 Wash.App. at 848, 173 P.3d 300.

¶ 39 Here, Hapner's position is clearly inconsistent with the position he maintained from 2000 until 2007. Hapner wanted a trial de novo after the arbitrator's decision. Now, after that trial de novo and his subsequent appeal, Hapner wants to withdraw his request for a trial de novo and enforce the arbitrator's decision. Hapner derives an unfair advantage and imposes an unfair detriment on Hudson if he is not estopped from doing so. Because Hapner objected to entry of a judgment in 2000 on the arbitration award, interest has not accrued for lack of such a judgment, and Hudson's arbitration award is significantly diminished by the passage of time. It has now been eight years since the arbitration award. Loss of the use or interest on that money prevents Hudson from being made whole by now entering a judgment on the original amount. The lack of a full legal remedy by reversion to the 2000 award now calls for equitable relief.

¶ 40 Here, Hapner, the non-prevailing party, received the trial de novo he requested, appealed for and was granted a second trial, engaged in extensive discovery before the first trial and after his appeal, and used the eight-year post-arbitration period to eventually decide he did not want a trial de novo after all. The unfair advantage to Hapner and unfair detriment to Hudson, who can never be made whole, are obvious. Hudson lost the use of the money awarded in 2000, lost all accruable legal interest, incurred legal and expert fees and costs with no guarantee of reimbursement, and has been forced to endure discovery, trial, and two appeals. It is hard to imagine a case that more dictates judicial estoppel for abuse of the legal system, particularly under a rule designed to deter exactly Hapner's conduct.

*321 ¶ 41 For all of the above reasons, I dissent and would return the case to the trial court for the second trial

187 P.3d 311
187 P.3d 311

Page 13

that we previously ordered.

Wash.App. Div. 2,2008.
Hudson v. Hapner
187 P.3d 311

END OF DOCUMENT

APPENDIX “B”

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LEA HUDSON, individually,

Respondent,

v.

No. 35797-6-II

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

ORDER DENYING MOTION TO
RECONSIDER

Appellants.

FILED
COURT OF APPEALS
08 OCT 10 AM 8:16
STATE OF WASHINGTON
BY g
CLERK

APPELLANTS move for reconsideration of the Court's decision terminating review,
filed **July 8, 2008**. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bridgewater, Armstrong, Van Deren

DATED this 10th day of October, 2008.

FOR THE COURT:

Van Deren, C.J.
CHIEF JUDGE

Elizabeth Ann Jensen
Attorney at Law
1021 Regents Blvd
Fircrest, WA, 98466-6030

Benjamin Franklin Barcus
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA, 98402-5313

Marilee C. Erickson
Reed McClure
Two Union Square
601 Union St Ste 1500
Seattle, WA, 98101-1363

Kari Ingrid Lester
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA, 98402-5313

APPENDIX “C”

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

LEA HUDSON, individually,

Respondent,

v.

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

Appellants.

No. 35797-6-II

AMENDED ORDER DENYING
MOTION TO RECONSIDER

FILED
COURT OF APPEALS
DIVISION II
08 OCT 14 PM 3:24
STATE OF WASHINGTON
BY CLERK

RESPONDENT moves for reconsideration of the Court's decision terminating review,
filed **July 8, 2008**. Upon consideration, the Court denies the motion. Accordingly, it is

SO ORDERED.

PANEL: Jj. Bridgewater, Armstrong, Van Deren

DATED this 4th day of October, 2008.

FOR THE COURT:

Van Deren, C.J.
CHIEF JUDGE

Elizabeth Ann Jensen
Attorney at Law
1021 Regents Blvd
Fircrest, WA, 98466-6030

Benjamin Franklin Barcus
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA, 98402-5313

Marilee C. Erickson
Reed McClure
Two Union Square
601 Union St Ste 1500
Seattle, WA, 98101-1363

Kari Ingrid Lester
Ben F. Barcus & Associates PLLC
4303 Ruston Way
Tacoma, WA, 98402-5313

APPENDIX “D”

Westlaw

Not Reported in P.3d
Not Reported in P.3d, 126 Wash.App. 1057, 2005 WL 834433 (Wash.App. Div. 2)
2005 WL 834433 (Wash.App. Div. 2)

Page 1

HHudson v. Hapner
Wash.App. Div. 2, 2005.

NOTE: UNPUBLISHED OPINION, SEE RCWA
2.06.040

Court of Appeals of Washington, Division 2.
Lea HUDSON, individually, Respondent,
v.
Clifford and 'Jane Doe' HAPNER, individually, and as
a marital community composed thereof, and Matthew
Norton, a Washington Corporation, Appellants.
No. 30619-1-II.

April 12, 2005.

Appeal from Superior Court of Pierce County; Hon. John
A. McCarthy, J.

Marilee C. Erickson, Reed McClure, Seattle, WA,
Elizabeth Ann Jensen, Attorney at Law, Fircrest, WA, for
Appellants.
Benjamin Franklin Barcus, Kari Ingrid Lester, Ben F.
Barcus & Associates PLLC, Tacoma, WA, for
Respondent.

UNPUBLISHED OPINION

MORGAN, A.C.J.

*1 Lea Hudson sued Clifford Hapner and his employer,
Matthew Norton Corporation,^{FN1} after being rear-ended by
a truck Hapner was driving in the course of his

employment. The trial court excluded Hapner's medical
evidence, the jury awarded about \$300,000, and Hapner
brought this appeal. We reverse and remand for new trial.

FN1. For convenience, we hereafter refer to both
defendants as 'Hapner.'

On April 6, 1998, Hapner rear-ended Hudson while
driving a truck for his employer, Norton. Hudson went by
ambulance to the emergency room, where she was treated
for shoulder, neck, and back pain. She attended nine
physical therapy sessions between April 9 and July 23,
1998, but according to her therapist continued to
experience back pain and leg numbness under certain
conditions.

Hudson later had more problems with her back. In April
1999, about a year after the accident in question here, she
was in another rear-end collision for which she visited the
emergency room twice. In August 1999, her back 'went
out,' and she was seen at a regional medical center in
Mississippi, where she was then living. In June 2000, her
back 'went out' again, and she was seen in Mississippi. In
January 2001, her back 'went out' again, and she was seen
in Mississippi by Dr. Johnnie Cummings, who
hospitalized her and ran six days of tests that showed a
protruding lumbar disk. A neurosurgeon diagnosed
'{c}hronic recurrent lumbar strain with associated
mild central L4 and L5 disk prominence,'^{FN2} and
recommended conservative treatment without surgery.

FN2. Clerk's Papers (CP) at 751

In October 1999, Hudson sued Hapner. In November
2000, a mandatory arbitration hearing was held, the
arbitrator awarded Hudson \$14,538, and Hapner timely

requested a trial de novo. In January 2001, the trial court ordered that Hudson disclose her 'primary witnesses' by May 8, 2001; that Hapner disclose his 'primary witnesses' by June 5, 2001; that each furnish a witness list by October 9, 2001; and that trial begin on November 13, 2001.

Meanwhile, each side had submitted interrogatories to the other. Hudson responded to Hapner's by listing various treatment providers. Hapner responded to Hudson's by stating, 'Defendant has not made a decision on experts at this time. Defendant reserves the right to supplement this response at a later date.'^{FN3}

FN3, CP at 232.

Hudson promptly notified Hapner of her January 2001 hospitalization, but she did not submit the resulting bills and medical records until at least October 18, 2001. On or after that date, she named Dr. Cummings as an expert whom she expected to call at trial.

In early November 2001, Hapner moved to exclude Dr. Cummings' testimony or, in the alternative, for a medical examination under CR 35 and postponement of the trial. Although the trial court declined to exclude Dr. Cummings' testimony, it granted a CR 35 examination and continued the trial, first to October 8, 2002, and later to April 9, 2003. Hapner never arranged for a CR 35 examination. In August 2002, however, he named Dr. Robert H. Colfelt, a neurologist, as an expert whom he expected to testify about Hudson's injuries and treatment. He also summarized Dr. Colfelt's testimony as follows:

*2 No report has been furnished.

Dr. Colfelt has been consulted regarding and is expected

to testify regarding his opinions about what injuries plaintiff sustained as a result of the accident in question and what treatment was reasonable and necessary. The substance of the facts and opinions to which Dr. Colfelt is expected to testify are, in summary, that plaintiff sustained cervical, thoracic and lumbar strains in the accident in question; that she was recovered from those injuries around July 1998 and that the treatment received through July 1998 was reasonable and necessary and any treatment thereafter was not necessitated by the accident in question.

A summary of the grounds for Dr. Colfelt's opinions are his review of plaintiff's medical records, films and his training and experience.

Dr. Colfelt's qualifications are set forth in the attached Curriculum Vitae. {FN4}

FN4, CP at 550.

In October 2002, Hudson requested a report from Dr. Colfelt. She stated that 'if there is no such report, then please advise accordingly, and we will likely schedule the deposition of Dr. Colfelt as soon as possible.'^{FN5} Hapner advised that Dr. Colfelt had not prepared a report and that Hudson should schedule a deposition.

FN5, CP at 239.

In March 2003, Hudson requested a report from Dr. Colfelt and asserted that failure to supply one was a violation of CR 35(b). Hapner did not respond.

On April 9, 2003, the first day of trial, Hudson moved to exclude Dr. Colfelt's testimony and Hapner moved to exclude Dr. Cummings' testimony. Each claimed that the

other had violated CR 26(b)(5). The trial court granted Hudson's motion but denied Hapner's.

before the accident. The trial court denied the motion.

Also on April 9, Hudson moved to exclude evidence of injuries suffered after the April 1998 accident, including any suffered in the April 1999 accident.^{FN6} The trial court granted the motion, except that it admitted evidence of injuries resulting from either the April 1998 or the April 1999 accident.

*3 During closing arguments, Hudson's counsel used a model of a spine to illustrate his comments. Hapner objected for lack of foundation, but the trial court overruled.

FN6. Hudson also moved to exclude injuries or conditions suffered before the April 1998 accident. The trial court granted that motion in a ruling that Hapner does not now contest.

On April 16, 2003, the jury awarded Hudson \$292,298. On April 25, 2002, the trial court added \$38,965.25 in reasonable attorney fees and \$1,624.80 in costs.^{FN7}

FN7. See MAR 7.3; RCW 7.06.060; RCW 4.84.030; RCW 4.84.330.

During trial, Hudson testified that she had not had problems with her back or neck before April 1998, and that she had experienced ongoing neck and back pain thereafter. When her counsel asked whether her treatment was due to the April 1998 accident, Hapner objected, the trial court overruled, and Hudson answered yes. When her counsel asked whether she would have sought treatment but for the accident of April 1998, Hapner objected, the trial court overruled, and Hudson answered no.

In May 2003, Hapner moved for a new trial. The trial court denied the motion and ordered Hapner to pay an additional \$4,935 in reasonable attorney fees.

During trial, Hapner offered medical records identified as Exhibit 7. The records showed that Hudson had sought medical attention on at least twelve occasions between July 1999 and January 2001. She had complained about toothache, sore throat, congestion, asthma and wheezing, rash, insect bites, and intestinal problems, but not about pain in her neck and back. When Hudson objected to Exhibit 7, the trial court ruled it irrelevant.

Hapner now appeals. He argues that the trial court erred by excluding Dr. Colfelt's testimony, by excluding Exhibit 7, by admitting Dr. Cummings' testimony, by allowing Hudson to opine about the cause of her own injuries, and by permitting Hudson's counsel to use the model of a spine. Hudson seeks reasonable attorney fees on appeal. Finding the first issue dispositive, we reverse and remand.

I.

On April 14, 2003, Hapner renewed his motion to exclude Dr. Cummings' testimony. He argued that Dr. Cummings could not opine on causation if his opinion was based only on Hudson's statement that she had not had 'pain like this'

Hapner argues that the trial court erred by excluding Dr. Colfelt's testimony. He claims that he 'fully complied with CR 26 and {PC}LR 5,^{FN8} and that even if he did not fully comply, exclusion was too severe a sanction.

FN8. Br. of Appellant at 18.

CR 35(b) requires a report, but only when an examination has been performed under CR 35(a). CR 26(b)(5)(A) requires a summary but not a report. It permits the party who seeks discovery to follow up the summary by taking a deposition. It states:

(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion, and to state such other information about the expert as may be discoverable under these rules.

(ii) A party may, subject to the provisions of this rule and of rules 30 and 31, depose each person whom any other party expects to call as an expert witness at trial. { ^{FN9} }

^{FN9}. PCLR 5(d)(3) generally parallels CR 26. It requires ‘{a} summary of the expert’s anticipated opinions and the basis therefore and a brief description of the expert’s qualifications or a copy of curriculum vitae if available.’ It was not mentioned or relied on by the trial court, so we omit it from the text.

In this case, Hapner was not required to furnish a report because Dr. Colfelt never examined Hudson under CR 35.

Hudson argues that Hapner’s summary was inadequate to meet the requirements of CR 26(b)(5)(A)(i), in part because it merely stated that his opinions would be based on medical records. Given that a doctor can testify at trial based solely on medical records,^{FN10} however, the proponent of such a doctor must be able to summarize by stating that the doctor will rely on medical records.^{FN11} Although the opponent can argue that the

records provide an unreliable basis, the argument goes to weight rather than admissibility. We conclude that Hapner adequately summarized Dr. Colfelt’s testimony for purposes of CR 26(b)(5)(A)(i).

^{FN10}. See ER 703; *In re Young*, 122 Wash.2d 1, 58, 857 P.2d 989 (1993); *Walker v. State*, 121 Wn.2d 214, 218, 848 P.2d 721 (1993); *Engler v. Woodman*, 54 Wn.2d 360, 363, 340 P.2d 563 (1959); Advisory Committee’s Note to FRE 703, 56 FRD 183, 283-84; 5B Karl B. Tegland, *Washington Practice: Evidence Law and Practice* sec. 703.5, at 209 (1999) (physician may base testimony on ‘numerous sources, including statements by the patient and relatives, reports and opinions by nurses, hospital records, laboratory reports, x-rays, and the like’).

^{FN11}. This assumes, as is the case here, that both sides know what records are being referred to.

In ruling this way, we do not hold or suggest that Hudson was not entitled to more detailed information. She certainly was but to obtain it, she had to depose Dr. Colfelt under CR 35(b)(5)(A)(ii). Hapner complied with CR 26(b)(5)(A)(i), and the trial court erred by excluding Dr. Colfelt’s testimony.

*4 We would reach the same result even if we were to assume that Hapner failed to comply with CR 26. *Burnet v. Spokane Ambulance*^{FN12} holds that a trial court has broad discretion when selecting sanctions for discovery violations.^{FN13} It also, however, structures the exercise of that discretion. Thus:

^{FN12}. 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

FN13. Burnet, 131 Wn.2d at 494; Mayer v. Sto Indus., Inc., 123 Wn.App. 443, 98 P.3d 116 (2004).

FN17. Burnet, 131 Wn.2d at 494.

When the trial court 'chooses one of the harsher remedies allowable under CR 37(b), ... it must be apparent from the record that the trial court explicitly considered whether a lesser sanction would probably have sufficed,' and whether it found that the disobedient party's refusal to obey a discovery order was willful or deliberate and substantially prejudiced the opponent's ability to prepare for trial. { FN14}

FN14. Burnet, 131 Wn.2d at 494 (quoting Snedigar v. Hodderston, 53 Wn.App. 476, 487, 768 P.2d 1 (1989)); see also Mayer, 123 Wn.App. at 454-55.

In the final analysis, the trial court must impose the least severe sanction that will suffice. FN15

FN15. MacDonald v. Korum Ford, 80 Wn.App. 877, 884, 912 P.2d 1052 (1996).

In this case, the trial court failed to follow Burnet in at least three ways. First, it did not consider or address 'whether a lesser sanction would probably have sufficed.' FN16 Second, it did not consider or address whether Hapner's alleged violation 'was willful or deliberate.' FN17 Third, as already seen, it erroneously reasoned that Hapner had not adequately summarized Dr. Colfelt's opinions and the basis therefor. Holding that Dr. Colfelt's testimony was improperly excluded, we reverse and remand for new trial.

FN16. Burnet, 131 Wn.2d at 494.

II.

We comment on additional issues that are likely to arise on retrial. Hapner argues that Exhibit 7 was relevant and admissible. Under ER 401, evidence is relevant if it has 'any tendency' to prove or disprove a fact of consequence to the action. Hudson claimed back pain from April 6, 1998, until the time of trial. Her back pain or lack thereof was a fact of consequence to the action. Exhibit 7 showed that from July 1999 to January 2001, she sought medical help twelve times, mentioning back pain only once. Exhibit 7 tended to disprove her claim of back pain, and it was relevant and admissible for that purpose.

In holding that Exhibit 7 was relevant and admissible for one purpose, we do not necessarily hold that it was relevant and admissible for all purposes. FN18 Assuming no more than is shown in the record presently before us, it may not have been admissible, for example, to show that Hudson was a whiner, complainer, or hypochondriac, as those purposes would violate ER 404(a)'s proscription against character evidence. But ER 404(a)'s restriction can be waived under some circumstances, including where a plaintiff testifies or suggests that he or she is the type of person who rarely seeks medical attention even when sick or in pain. If Hudson produces such testimony at the retrial of this case, she may 'open the door' to character evidence that would otherwise be inadmissible; and if she does that, the trial court remains free to permit a proportional response.

FN18. See ER 105.

III.

The remaining issues are whether the trial court erred by admitting Dr. Cummings' testimony, by allowing Hudson to give an opinion on whether her injuries were caused by the accident, by permitting Hudson's counsel to use the spine model, and by awarding reasonable attorney fees to Hudson. Dr. Cummings' testimony is admissible on retrial, barring some new and significant objection, for it has been fully disclosed and satisfies ER 702 and 703. Hudson may give a lay opinion on whether her injuries were caused by the accident, so long as she follows ER 701,^{FN19} *Bitzan v. Parisi*,^{FN20} the Supreme Court's opinion in *Egede-Nisson v. Crystal Mountain*,^{FN21} and any other applicable law. Hudson's counsel may use the spine model in closing so long as he first shows, through one of the doctors or otherwise, that it accurately depicts the relevant parts of the human body.^{FN22} Hudson's claim of reasonable attorney fees on appeal is denied, and her claim of reasonable attorney fees at trial must abide the outcome. Any remaining issues need not be reached.

Anderson, 64 Wn.App. 353, 359-60, 824 P.2d 509 (1992) (even for medical negligence, expert testimony is not always required). Under Washington's Rules of Evidence, which took effect in 1979, lay testimony on causation is admissible if it complies with ER 602 or ER 701, and sufficient if a rational trier of fact taking all the evidence in the light most favorable to the plaintiff could find causation by a preponderance of the evidence.

FN22.ER 901; State v. Mitchell, 56 Wn.App. 610, 613, 784 P.2d 568 (1990); 5 Karl B. Tegland, *Washington Practice: Evidence Law and Practice* sec. 402.25 (1999).

*5 Reversed and remanded for new trial.

FN19. See *State v. Kunze*, 97 Wn.App. 832, 850, 988 P.2d 977 (1999), review denied, 140 Wn.2d 1022 (2000); *State v. Carlson*, 80 Wn.App. 116, 123-24, 906 P.2d 999 (1995).

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

FN20. 88 Wn.2d 116, 558 P.2d 775 (1977).

We concur: ARMSTRONG and VAN DEREN, JJ.
Wash.App. Div. 2, 2005.
Hudson v. Hapner

FN21. 93 Wn.2d 127, 137, 606 P.2d 1214 (1980). We reject Hapner's reliance on a single paragraph from this court's opinion in *Egede-Nisson*, 21 Wn.App. at 144, because the Supreme Court's subsequent opinion in the same case substantially modifies or overrules that paragraph. 93 Wn.2d at 137-38. We also reject Hapner's assertion that under *O'Donoghue v. Riggs*, 73 Wn.2d 814, 824, 440 P.2d 823 (1968), only expert testimony is admissible to prove medical causation. *O'Donoghue* held that medical testimony is sometimes required, not that it is always required. Cf. *Van Hook v.*

Not Reported in P.3d, 126 Wash.App. 1057, 2005 WL 834433 (Wash.App. Div. 2)

END OF DOCUMENT