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DIVISION II

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STATE OF WASHINGTON
BY
DEPUTY

No. 35797-6-II

COURT OF APPEALS, DIVISION II
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 THE SUPERIOR COURT OF
AND FOR PIERCE COUNTY

The Honorable John A. McCarthy, Judge

RESPONDENT'S BRIEF

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ORIGINAL

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I. INTRODUCTION

For the reasons stated herein, this Court should affirm the trial court's rulings cited in Appellants' Opening Brief and remand this case back for the re-trial that this Court, Division II, previously ordered.

II. COUNTER-STATEMENT OF ISSUES

1. Whether the Superior Court properly struck Defendants' withdrawal of their Request for Trial de Novo when there is no authority that allowed Defendants to file such document, particularly after the trial de novo occurred?
2. Whether the Court properly struck and denied Defendants' motion to enter judgment on the arbitration award when Defendants have waived any right they might have previously had to withdraw their request for a trial de novo?
3. Whether this case must be again remanded for trial when Defendants have waived any right they may have had to withdraw their request for trial de novo?

III. COUNTER-STATEMENT OF FACTS

The collision, which was the subject of this case, occurred on April 6, 1998 when Plaintiff Lea Hudson was rear-ended by Defendant Hapner who was driving a truck at the time for his employer, Defendant Matthew Norton. (CP 76) This case was filed on October 19, 1999 and subsequently submitted for Mandatory Arbitration on February 15, 2000. (CP 9, 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.* The defense filed a Request for a Trial de Novo on December 7, 2000. (CP 9) Trial was subsequently set for November 13, 2001. (CP 77) After Plaintiff advised the Defendants of Lea's ongoing treatment, Defendants moved to exclude the evidence, or in the alternative, continue the trial date. (CP 77-78) Trial was then continued to October 8, 2002. However, as no courtroom was available on that date, the trial date was subsequently continued again and then finally proceeded on April 9, 2003. *Id.*

Trial lasted nearly a week (April 9, 10, 14, and 15, 2003). Plaintiff presented the testimony of four lay witnesses: the Defendant, Clifford Hapner; Plaintiff Lea Hudson; Plaintiff's friend, Doris Thomas; Plaintiff's mother, Doris Walker (via videotaped preservation deposition), as well as testimony of her treating physician, Johnnie Cummings, M.D. (via two videotaped preservation depositions). (Respondent's First Designation of Clerk's Papers)

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>

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; Respondent's First Designation of Clerk's Papers) Defendants then 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. *Id.*

On July 18, 2003, the Defendants filed an appeal in this case seeking a new trial. Holding that the defense doctor's testimony was improperly excluded at trial, the Court of Appeals reversed and remanded the case for a new trial as requested by Defendants. 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 from this Court was filed on March 23, 2006. (Respondent's First Designation of Clerk's Papers)

Due to the chronic nature of Plaintiff's low back injuries, her pain has only worsened since this case was tried before a jury three years ago. In that time, she has undergone numerous epidural injections, presented to numerous neurosurgeons and had additional hospitalizations and testing. (CP 29-30) Following the remand in this case, defendant requested supplemental discovery from Plaintiff, and on August 9, 2006, Defendants filed a motion to compel the same. (CP 24-26) In response, Plaintiff provided her supplemental responses, as well as stipulations/authorizations, so that

Defendant could obtain Plaintiff's medical records and billing, as well as employment records. (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 moved to have the Withdrawal stricken and objected to the Notice for Presentation of Judgment. (CP 6-70) On December 15, 2006, the Court granted Plaintiff's Motion to Strike and ordered that the case proceed to trial. (CP 102-104) Defendants filed a Motion for Discretionary Review and this Court subsequently granted review. (CP 105-11; RP 12/15/06)

IV. ARGUMENT

A. INTRODUCTION

Appellants argue that the Superior Court erroneously struck their withdrawal of their Request for trial de novo and further argue that as they are the party that originally filed the Request, they have a unilateral right to withdraw it at any point in time without limitation. Such arguments ignore the fact that the trial de novo has already occurred and the fact that Appellants previously asked this Court, Division II, to provide them a second trial (which is essentially a third adjudication of this matter), which this Court did.

In addition, Defendants' arguments defy logic, existing law, public policy, the intent of the legislature, and would lead to absurd results, as well as allow and promote the ability of parties to routinely and literally "gamble on the verdict." Even if Defendants previously had a right to withdraw their request for a trial de novo, they have long since waived such right and equitable principles further require the parties to proceed with the new trial that this Court ordered more than two years ago.

B. THE SUPERIOR COURT HAD BOTH JURISDICTION AND THE AUTHORITY TO STRIKE THE DEFENDANTS' WITHDRAWAL OF THEIR REQUEST FOR A TRIAL DE NOVO.

MAR 1.3(b)(1) states that "until a case is assigned to the arbitrator under rule 2.3, the rules of civil procedure apply." The converse is also true such that once a party files a request for trial de novo pursuant to MAR 7.1, the mandatory arbitration rules no longer apply and the rules of civil procedure are again the governing rules.¹ Therefore, the Superior Court had the authority to act and strike the Defendants' withdrawal of its request for trial de novo because as set forth below, the withdrawal was improper.

¹ Even once the case has been transferred to mandatory arbitration, the Court continues to maintain jurisdiction over the case. As stated by the Court in *Nevers*: Although we recognize the filing of the request and proof of service with the superior court is somewhat akin to filing a notice of appeal, it is not a step that invokes the superior court's jurisdiction. The court's jurisdiction is invoked upon the filing of the underlying lawsuit and it is not lost merely because the dispute is transferred to mandatory arbitration. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 812 n.4, 947 P.2d 721 (1997)

C. APPELLANTS FAIL TO CITE ANY AUTHORITY THAT ALLOWS THEM TO UNILATERALLY WITHDRAW THEIR REQUEST FOR TRIAL DE NOVO, PARTICULARLY AFTER THE TRIAL DE NOVO HAS ALREADY OCCURRED AND DEFENDANTS FURTHER APPEALED THE JURY'S VERDICT.

1. NO RULE OR STATUTE SPECIFICALLY AUTHORIZES A PARTY TO WITHDRAW ITS REQUEST FOR TRIAL DE NOVO OR DELINEATES THE PROCEDURE BY WHICH A PARTY COULD DO SO

MAR 7.1 provides 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 in the Superior Court, with proof that a copy has been served on all other parties.² RCW 7.06.050 corresponds to the court rule and provides that within 20 days of the arbitrator filing his decision and award with the clerk of the superior court (together with proof of service thereof on the parties), any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact.

MAR 7.3, which relates specifically to costs and attorney fees, is the only court rule that even mentions the possibility of withdrawal of a request for trial de novo:

² A "trial de novo" means "trial anew." See, *In re Littlefield*, 61 Wash. 150, 153 112 P. 234 (1910)

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

Similarly, RCW 7.06.060, is the only statute that discusses the potential of a withdrawal of a request for trial de novo, and provides in pertinent part:

- (1) The superior court shall assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo. *The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo if the withdrawal is not requested in conjunction with the acceptance of an offer of compromise.*

The basis of Defendants' argument is that their request for a trial de novo is a permissive appeal and like an appeal, they can withdraw such a request at any point they so desire. While it is true that an appeal is permissive such that a party is not mandatorily required to file it, and it has been stated by the Courts that a trial de novo following arbitration is treated as or is akin to an appeal, *see Thomas-Kerr v. Brown*, 114 Wn. App. 554, 558, 59 P.3d 120 (2002) and *Nevers*, 133 Wn.2d at 812 n.4, once a party files an appeal, or for that matter, a trial de novo, that party cannot unilaterally

dismiss the same absent the authority and permission of the Court. For example, a party who files an appeal from a Court of Limited Jurisdiction seeking review from Superior Court must first seek the permission of the Court. In that regard, RALJ 10.2(c), the rule regarding voluntary withdrawal of appeals in courts of limited jurisdiction states:

The superior court **may, in its discretion, dismiss an appeal on stipulation** of all the parties and, in criminal cases, the written consent of the defendant. The superior court **may, in its discretion, dismiss an appeal on the motion of a party who has filed a notice of appeal.** (Emphasis added)

RAP 18.2, the appellate rule regarding voluntary withdrawal of review similarly states:

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 of 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. (Emphasis added)

Even CR 41, which is the rule regarding whether the party who filed a lawsuit can dismiss its own action, provides limitations as to the party's ability to do so and states in pertinent part:

- (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.
- (3) **Counterclaim.** If a counterclaim has been pleaded by a defendant prior to the service upon him of plaintiff's motion for dismissal, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court.

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 court, apart from MAR 7.3 and RCW 7.06.060, no court rule or statute exists that discusses the ability of a party to withdraw its request for a trial de novo and Defendants have cited none. 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.³

³ Furthermore, contrary to this "implication," and as noted above, MAR 1.3(b)(1) indicates that once a case is no longer in the arbitration process, the civil rules, not the mandatory arbitration rules apply in a particular case.

Even assuming that the Mandatory Arbitration Rules govern and “impliedly” allow for a withdrawal of a request for a trial de novo, the rules and applicable statutes are silent on the procedure and/or any time limitations that apply to the withdrawal of a request for a trial de novo, and are therefore 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)

2. EVEN IF A PARTY IS “IMPLIEDLY” ALLOWED TO WITHDRAW ITS REQUEST FOR TRIAL DE NOVO, THERE ARE PRACTICAL AND LEGAL LIMITATIONS THAT MUST APPLY

In order to determine the meaning of a court rule or a statute, the Court applies the same basic principles: where the language being construed is unambiguous, the Court gives it its plain meaning; where it is ambiguous, and subject to more than one reasonable interpretation, the Court construes it to fulfill the drafter's intent. *Roberts v. Johnson*, 137 Wn.2d 84, 90-93, 969 P.2d 446 (1999); *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). As indicated above, the statute and court rule at issue in this case are both ambiguous as they are silent as to the procedure how or a time limitation when a party can withdraw its request for trial de novo.

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); *see also, King County Water Dist. v. City of Renton*, 88 Wn. App. 214, 227, 944 P.2d 1067 (1997)

Regarding the scope of the Court Rules, CR 1 states in pertinent part as follows:

These rules govern the procedure in superior court in all suits of a civil nature whether cognizable as cases in law or in equity with the exceptions stated in rule 81. **They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.**

Like all other court rules, the mandatory arbitration rules are 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. As reiterated in a recent opinion published by Division II, 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) (holding the trial court's rulings subverted the legislature's intent by contributing to increased delays in the arbitration proceedings and increased congestion in the courts)(citing *Nevers*, 133 Wn.2d at 815); (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. They were not intended to give an appealing party an unfettered ability to waste the court's judicial resources and withdraw the appeal of an award. If the Court were to accept Defendants' position that there is absolutely no time limitation whatsoever, 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.

Neither of the cases cited by Defendants, *Walji v. Candyco, Inc.* 57 Wn. App. 284, 787 P.2d 946 (1990) or *Thomas-Kerr*, 114 Wn. App. 554, are instructive for the issue here - whether a party can withdraw its Request for Trial de Novo **after** the Trial de Novo has occurred - because both of the opinions deal with withdrawal of requests for trial de novo/dismissals **before** the trial de novo proceeds.

In *Walij, supra*, the **Plaintiff** lost its case in mandatory arbitration and thereafter **dismissed its own action** just **before trial** by filing a voluntary nonsuit pursuant to CR 41. Thus, the case had nothing to do with a party withdrawing a request for trial de novo following the actual trial. In relation to a Plaintiff’s ability to voluntarily dismiss its own case, the Court noted that

a voluntary dismissal could be taken **before the Plaintiff rested its case**, which the Court essentially found had not happened because the trial de novo had not yet occurred. However, the main issue before the Court was whether under CR 41 the defendant was entitled to fees under MAR 7.3 when the plaintiff did not go through with the trial. The Court held that since the Plaintiff dismissed its lawsuit, it did not “improve its position” and defendant was therefore entitled to fees pursuant to MAR 7.3. Interestingly, the language the Court uses in its holding actually supports Plaintiff’s position in this case:

The policy of MAR 7.3 is to foster acceptance of the arbitrator’s award and penalize unsuccessful appeals therefrom. An appeal resulting in a dismissal, even a voluntary one, is unsuccessful. **Taking a de novo appeal to trial involves substantial delay and expense to the prevailing party at arbitration.**

Id. at 290. (Emphasis added)

The statement by the Court that “[t]here is no meaningful difference between withdrawing an appeal and taking a voluntary nonsuit” was noted in the context of an award of fees, not as Defendants would suggest to this Court, i.e. that they have a mandatory right to withdraw their appeal at any point in time. The correlation was not made with respect to the issue in this case. Given that the present case was filed by Lea Hudson, Defendants were **never** entitled to a nonsuit pursuant to CR 41, so the comparison is not

applicable. Moreover, Defendants cannot claim they could dismiss their appeal of the arbitration award after the jury verdict was rendered, or dismiss their first appeal to this Court after the opinion was rendered.

Contrary to the decision in *Walij*, in *Thomas-Kerr*, 114 Wn. App. 554, the Court held that a **Plaintiff** could **not** take a voluntary nonsuit of a case pursuant to CR 41(a) following a mandatory arbitration. The two opinions, although both from Division I, actually appear to be in conflict. In *Thomas-Kerr*, the parties proceeded to mandatory arbitration after which the defendant filed a request for trial de novo. **Before the trial de novo occurred**, the defendant withdrew its request for trial de novo after learning the Plaintiff had undergone a surgery. The Court of Appeals held that because Plaintiff did not make her own request for a trial de novo, she did not preserve her right to an appeal and affirmed the trial court's entry of judgment on the arbitration award. Although *Thomas-Kerr* is not relevant because it concerns the withdrawal of request for trial de novo **before** the trial de novo occurred, 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 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)

Even if Defendants were to argue that allowing withdrawal of their request for trial de novo at this point serves the goal of mandatory arbitration because the lack of another trial will reduce court congestion, we are far past the point where that purpose is served. To allow the Defendants to withdraw their request for trial de novo in this case would allow a party to gamble on the verdict and allow the defendant to “squander” a week of the superior court's time, as well as the time, efforts and costs applied in the Court of Appeals, as well as those that are currently still ongoing. With seven (7) years having passed since the Defendants filed their request for trial de novo, Defendants cannot reasonably argue that allowing them to withdraw at this juncture will serve any purpose that the legislature intended with the creation of mandatory arbitration. This is particularly true 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.

D. APPLICABLE DOCTRINES INCLUDING WAIVER, EQUITABLE AND JUDICIAL ESTOPPEL, AND LACHES PRECLUDE DEFENDANTS FROM WITHDRAWING THEIR REQUEST FOR TRIAL DE NOVO

1. DEFENDANTS' WAIVED ANY RIGHT THEY MIGHT HAVE HAD TO WITHDRAW THEIR REQUEST FOR TRIAL DE NOVO

Defendants' argument that *Creso v. Phillips*, 97 Wn. App. 829, 987 P.2d 137 (1999) and *Haywood v. Aranda*, 97 Wn. App. 741, 987 P.2d 121 (1999) are not applicable in this case has no merit. 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, and after judgment was entered on the verdict, 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 based upon then recent case law (*Nevers*, 133 Wn.2d 804). The trial court denied the request and the Court of Appeals affirmed the decision, 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).

The Supreme 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). Regarding the Plaintiffs' position that they should be able to move to dismiss a request for trial de novo for non-compliance following a jury trial, the Supreme Court held:

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 Supreme Court compared the defendant's failure to timely file proof of service of their request for trial de novo to waivable procedural defects. The Court referred to *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000) and held that a defect in filing a request for trial de novo could be waived. In finding that the Plaintiffs in *Haywood* had in fact waived

any defects in the Defendant's request for trial de novo, the Supreme Court stated:

We are satisfied that the Court of Appeals did not err in holding that the 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 (citing *Romjue v. Fairchild*, 60 Wn. App. 278, 281, 803 P.2d 57, *review denied*, 116 Wn.2d 1026, 812 P.2d 102 (1991)). "It can also occur if the defendant's counsel has been dilatory in asserting the defense." *Lybbert*, 141 Wn.2d at 39, 1 P.3d 1124 (citing *Raymond*, 24 Wn. App. at 115, 600 P.2d 614). As the Supreme Court explained in *Lybbert*, "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.’” *Lybbert*, 141 Wn.2d at 39, 1 P.3d 1124 (quoting CR 1).

Defendants argue that *Haywood* and *Creso* are not applicable because it was the Plaintiffs trying to claim defects with the manner in which the Defendants sought a trial de novo post jury verdict in those cases versus the Defendant trying to withdraw its request for trial de novo post jury verdict. Defendants miss the point. While it is true that the “shoe is on the other foot” in this case, the Supreme Court’s application of the doctrine of waiver is just as relevant here. “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.

In the present case, the doctrine of waiver applies to the Defendants’ course of action and precludes them from withdrawing their request for trial de novo. The defendants knew of Lea Hudson’s worsened condition before the trial de novo occurred, and they not only proceeded with the trial, but they appealed the verdict. The assertion of the withdrawal is entirely inconsistent with proceeding through a week long trial and appealing the case to the Court

of Appeals, then proceeding with further discovery after a new trial was granted. 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**.

Although it is anticipated that Defendants will argue that Division II’s reversal and remand puts them back in the same position as if there never had been a trial de novo, that is simply not accurate, and there is no authority that would support such a specious argument. Division II has **ordered** a remand of this case and a new trial and has actually provided instructions to the parties in its opinion about how to proceed upon the retrial based upon Defendants’ own assignments of error regarding evidentiary rulings in the trial de novo. Division II’s prior opinion and remand in this case does not vitiate the trial de novo that already occurred, or the four and a half years from the time the verdict was entered in that trial de novo. In any event, Defendants have waived any right they might have had to withdraw their request for trial de novo.

2. EQUITABLE DOCTRINES ALSO PRECLUDE DEFENDANTS FROM WITHDRAWING THEIR REQUEST FOR A TRIAL DE NOVO

The doctrines of equitable estoppel, judicial estoppel, and laches 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”. Some authorities have refused to recognize the doctrine or have held that it should be cautiously applied. 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) that 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) that the other party reasonable relied upon such admission, statement, or act, and (3) that 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) (citing *Brown v. Continental Can Co.*, 765 F.2d 810, 814 (9th Cir.1985)).

For the past seven (7) years, the Defendants' actions have been 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, they engaged in preservation depositions conducted by Plaintiff, and went through an entire trial. Then, after Judgment was entered in favor of the Plaintiff, Defendants moved for a new trial and subsequently appealed the case to the Court of Appeals, again asking the Court of Appeals for a new trial, which this Court granted. After the case was remanded to the Superior Court, the 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. Therefore, every action Defendants have taken since December 2000 has been inconsistent with their filing such a withdrawal of their Request for Trial de novo.

In addition, the prejudice to Plaintiff is clear. Plaintiff has been involved in seven (7) years of litigation in this case due to defense's dilatory filing of their notice of withdrawal and the delay in that regard. In addition

to the ongoing attorney fees and numerous costs that she has accrued, her 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 (as the case was bumped once) and she has had to comply with all the court rules and case schedules. In addition, she received a substantial verdict from the jury, albeit the verdict was overturned due to an evidentiary issue.

Equity and justice require that Defendants be bound to the position they have maintained for the past seven (7) years and therefore, this Court must remand this case again for the retrial it previously ordered.

**V. REQUEST FOR ATTORNEY FEES AND COSTS
PURSUANT TO MAR 7.3 AND RAP 18.1**

**A. UPON AFFIRMING THE TRIAL COURT'S RULINGS, THIS COURT
MUST ASSESS REASONABLE ATTORNEY FEES AND COSTS AS
THE APPELLANTS/DEFENDANTS HAVE AGAIN FAILED TO
IMPROVE THEIR POSITION ON APPEAL**

Ms. Hudson was awarded reasonable attorney fees and costs at trial pursuant to MAR 7.3 because Mr. Hapner failed to improve his position in the trial de novo⁴. Upon prevailing in this appeal and pursuant to MAR 7.3

⁴ The jury's verdict, totaling \$292,298.00, was \$277,760.03 greater than the arbitration award in this case.

and RAP 18.1(b), she respectfully requests an award of reasonable fees and costs expended in defending this appeal.⁵

An award of attorney fees is proper pursuant to MAR 7.3 upon success on a appeal, as well as in the superior court. *See, Kim v. Pham*, 95 Wn. App. 439, 446-47, 975 P.2d 544 (1999), *review denied*, 139 Wn.2d 1009, 994 P.2d 844 (1999); *Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001); *Stevens v. Gordon*, 118 Wn. App. 43, 74 P.3d 653 (2003)

In addition, it is respectfully requested that this Court assess an award of actual attorney fees and costs against Defendants for their frivolous appeal pursuant to RAP 14.2, 18.1 and 18.9. *See, e.g. Eugster v. City of Spokane*, 121 Wn. App. 799, 91 P.3d 117 (2004) Under RAP 18.9, an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there is no reasonable possibility of reversal. *State ex rel Quick-Ruben v. Verharen*, 136 Wn.2d 888, 905, 969 P.2d 64 (1998); *Streater v. White*, 26 Wn. App. 430, 613 P.2d 187 (1980); *Johnson v. Jones*, 91 Wn. App. 127, 955 P.2d 826 (1998).

⁵ MAR 7.3 then states:

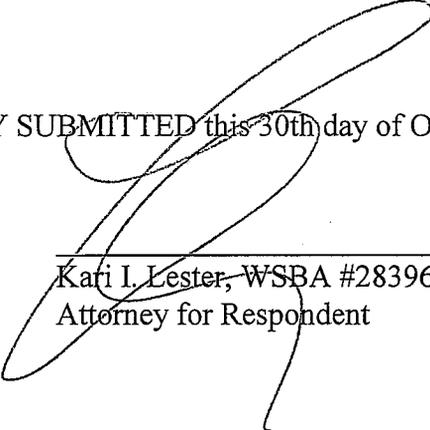
The court *shall* assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo. "Costs" means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

The relief that the Defendants are seeking in this case is an affront to the justice system. Plaintiff respectfully requests that this Court order Defendants to pay Plaintiff reasonable attorney fees and costs on appeal.

VI. CONCLUSION

For the reasons stated above, the trial court's rulings should be affirmed, and Plaintiff should be awarded additional fees and costs on Appeal pursuant to MAR 7.3.

RESPECTFULLY SUBMITTED this 30th day of October, 2007.



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