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NO. 65469-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

VALERIE MILLER, a married woman,
Respondent,

vs.

JEAN SANDLAND and JOHN DOE SANDLAND, wife and husband, and their
marital community,
Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Andrea Darvas, Judge

BRIEF OF APPELLANTS

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I. NATURE OF THE CASE

The Washington Constitution says, “The right of trial by jury shall remain inviolate.” Yet the trial court deprived a defendant of a jury in a trial de novo after mandatory arbitration, even though the defendant had filed a jury demand and fee in full compliance with CR 38(b). The trial court did so on the ground that King County LMAR 7.1 requires a party to file and serve a jury demand within 14 calendar days *after* a trial de novo request is served, even if a party has *previously* filed a jury demand and fee in full compliance with CR 38(b).

II. ASSIGNMENTS OF ERROR

The trial court erred in—

- A. Entering the Judgment Summary and Judgment on Verdict [sic] filed on May 12, 2010;
- B. Granting plaintiff’s motion to confirm bench trial de novo;
- C. As to the separate Findings of Fact and Conclusions of Law entered on May 12, 2010¹—

- 1. Entering finding of fact 1;
- 2. Entering finding of fact 2;
- 3. Entering finding of fact 3;

¹ A copy of these findings and conclusions is set forth in Appendix A hereto.

4. Entering finding of fact 4;
5. Entering finding of fact 5;
6. Entering finding of fact 6;
7. Entering finding of fact 7;
8. Entering finding of fact 8;
9. Entering finding of fact 9;
10. Entering finding of fact 10;
11. Entering finding of fact 11;
12. Entering finding of fact 12;
13. Entering finding of fact 13;
14. Entering finding of fact 14;
15. Entering finding of fact 15;
16. Entering finding of fact 16;
17. Entering finding of fact 17;
18. Entering finding of fact 18;
19. Entering finding of fact 19;
20. Entering conclusion of law 1;
21. Entering conclusion of law 2;
22. Entering conclusion of law 3;

D. As to the findings of fact and conclusions of law set forth in the Judgment Summary and Judgment on Verdict [sic] filed on May 12, 2010:²

1. Entering finding of fact 1;
2. Entering finding of fact 2;
3. Entering finding of fact 3;
4. Entering finding of fact 4;
5. Entering finding of fact 5;
6. Entering finding of fact 6;
7. Entering finding of fact 7;
8. Entering finding of fact 8;
9. Entering finding of fact 9;
10. Entering finding of fact 10;
11. Entering conclusion of law 1;
12. Entering conclusion of law denominated # 3;
13. Entering conclusion of law denominated # 4;
14. Entering conclusion of law denominated # 6.

² A copy of these findings and conclusions is set forth in Appendix B hereto.

III. ISSUES PRESENTED

A. Is a party who timely files a jury demand request before the matter is submitted to mandatory arbitration required to file a second jury demand because there is a request for a trial de novo? (Assignments of Error A-D)

1. Does King County Superior Court LMAR 7.1(b) violate Wash. Const. art. I, § 21, to the extent it requires a party who has already filed a jury demand and jury trial fee to file a second demand and fee upon filing a request for trial de novo?

2. Does LMAR 7.1(b) conflict with CR 38(b)?

B. Did the defendant here lose her right to a jury trial? (Assignments of Error A-D)

1. By checking the “IS NOT being filed” box on the Request for Trial De Novo form, did defendant’s counsel waive her client’s right to a jury trial where defendant had filed a jury demand before the case went to mandatory arbitration?

2. By checking the “IS NOT being filed” box on the Request for Trial De Novo form, is defendant estopped from having a jury decide the trial de novo?

C. Was it reversible error to deny defendant a jury trial? (Assignments of Error A-D)

1. Is the denial of the right to a jury trial prejudicial in and of itself?

2. If not, was the denial of the right to a jury trial prejudicial because a jury could have reached different conclusions than the trial court judge due to significant conflicts in the evidence?

D. Was the trial court's award to plaintiff of a share of her attorney fees under *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998), contrary to *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001), *Matsyuk v. State Farm Fire & Cas. Co.*, 155 Wn. App. 324, 229 P.3d 893 (2010), and *Weismann v. Safeco Insurance Co.*, 157 Wn. App. 168, 236 P.3d 240 (2010)? (Assignment of Error A, C-D)

IV. STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS.

Eighty-six-year-old defendant/appellant Jean Sandland was driving her 1994 Ford Ranger pickup to a medical appointment when she got lost. She pulled into a QFC parking lot and got out to ask for directions from plaintiff/respondent Valerie Miller, who was there to go shopping. (Exs. 10, 20 pp. 7, 14, 17-18, 33; I RP 44-45)

The pickup was on a slope and began to roll slowly backwards. (Exs. 10, 20 p. 22; I RP 46, 49, 85; II RP 94) Mrs. Sandland returned to the vehicle and tried to stop it. (Exs. 10, 20 p. 23; II RP 96)

In the meantime, a car driven by Ian Price had entered the parking lot. The pickup's back end was headed toward Price's vehicle. Because there was an Escalante in front of Price and a minivan behind him, he could not get completely out of the way. (II RP 90-93)

Price saw the two women. He saw Mrs. Sandland in her slowly rolling pickup, with only her left leg hanging out. He saw plaintiff run to the back of the pickup and try to push on its tailgate and then run to the post on the driver's side of the pickup and push on that. (II RP 94-96, 99-100)

Price believed plaintiff was trying to prevent the pickup from colliding with his vehicle. (II RP 100) He later characterized her actions as "daring" and said that once it became clear that pushing on the tailgate would not stop the truck, it seemed unreasonable for her to try to stop it by pushing on the post. (II RP 102-03)

Mrs. Sandland's pickup continued to roll back. Its tailgate first hit the front driver's side panel of Price's car, near the front bumper. This nudged the vehicle to the side, allowing the pickup to continue to roll. Just before the pickup hit her, plaintiff moved to the outer part of the open driver's side door of the pickup. The pickup came to a rest with plaintiff between its open driver's-side door and Price's vehicle. (II RP 93, 96-98)

Mrs. Sandland pulled her pickup forward, allowing plaintiff to get out between the two vehicles. (II RP 104-05) Price asked her if she was all right. Her first response was to say she did not know why she had done what she did. (II RP 106) She then said she was okay. (I RP 70; II RP 108) Plaintiff then went into the grocery store to do her shopping and to call the police. (I RP 51-52; II RP 11)

Plaintiff had a longstanding lower back problem. She had intended to go to her chiropractor that day anyway, so when she went, she had him also look at her neck, middle back, and upper right arm. (I RP 55-56) She also had a bruised left lower calf. (I RP 55)

Three months later, plaintiff's neck and middle back pain had resolved itself. (I RP 57) She was still complaining, however, of pain in her upper right arm/shoulder area even at trial. (I RP 57-63)

B. STATEMENT OF PROCEDURE.

On August 20, 2008, plaintiff sued Mrs. Sandland and her husband for damages. (CP 3-5) Defendants answered and alleged comparative negligence, among other affirmative defenses. (CP 6-8)

On May 4, 2009, the defense filed a jury demand and paid the statutory fee. (CP 10)

Within a few weeks, plaintiff filed a statement of arbitrability under the mandatory arbitration rules. (CP 11-13) The case went to

mandatory arbitration. The arbitrator awarded plaintiff \$31,456.50 (CP 21-22)

Within 20 days of the filing of the arbitration award, Mrs. Sandland filed a request for trial de novo. The request was made on a form similar to that prescribed by the King County Superior Court³ and read (CP 14-15):

Please take notice that the aggrieved party Jean and Gary Sandland, requests a Trial De Novo from the arbitration award filed on December 2, 2009.

1. A Trial De Novo is requested in this case pursuant to MAR 7.1 and LMAR 7.1.
2. The Arbitration Award shall be sealed pursuant to LMAR 7.1 and 7.2.
3. Filing fee of \$250.00 is attached.
4. Pursuant to LMAR 7.1(b), a Jury Demand
 IS NOT being filed by the aggrieved party. The non-aggrieved party has fourteen (14) calendar days from date of service of Request for Trial De Novo to file a Jury Demand.

....

³The King County Superior Court form is form #34 located at <http://www.kingcounty.gov/courts/scforms.aspx>. A copy of the form is contained in Appendix C.

Because Mrs. Sandland had *already* filed a jury demand and paid the fee therefor, the defense attorney checked the box that said that a jury demand “**IS NOT**” being filed. (CP 14, 26, 29) (italics added)

When the defense attorney discovered that plaintiff’s attorney thought that the trial would be a bench trial, she pointed out that she had filed a jury demand early on. She advised she would move to have a jury trial if the trial de novo were not calendared as a jury trial. Plaintiff’s attorney responded that he did not care either way and would not fight the issue. (CP 26, 29)

However, by March 9, 2010, plaintiff’s attorney had changed his mind. He wrote defense counsel that his client preferred a bench trial and that if there had been a jury trial, he would have put his medical expert on live rather than having him videotaped, as had already been done. (CP 35)

Less than a month before the scheduled trial, plaintiff filed a motion requesting a bench trial. (CP 17-20) She claimed that by checking the “IS NOT being filed” box on the trial de novo request, defense counsel had requested a bench trial, notwithstanding the earlier filed jury demand. (CP 17-20)

The trial court granted the motion and ordered a bench trial. (CP 68-70) The trial court’s order stated:

LMAR 7.1(b) requires that “[a]ny jury demand shall be filed and served by the appealing party along with the request for trial de novo . . . [and] [i]f no jury demand is timely filed, it is deemed waived.” The rule makes no exception for cases in which a party previously filed a jury demand before the case was transferred to mandatory arbitration. Defendant not only failed to demand a jury in compliance with LMAR 7.1(b), she also expressly noted on her Request for Trial De Novo that “a Jury Demand **IS NOT** being filed by the aggrieved party.” (emphasis in original).

In addition, trial in this case was scheduled for April 5, 2010. The plaintiff has demonstrated that she would be prejudiced if the court were to allow the trial to be heard by a jury at this late date, since she arranged for video preservation of her expert doctor’s testimony in reliance on the understanding that this case would be tried to the bench instead of to a jury.

(CP 68-69)

The defense moved to stay the trial, filed a notice of discretionary review to this court, and requested emergency discretionary review. (CP 71-85) The trial court ordered the trial stayed until April 6, 2010. (CP 323) This court denied discretionary review. A bench trial ensued.⁴

Plaintiff took the position that the rescue doctrine precluded her from being comparatively negligent. Mrs. Sandland admitted her own

⁴ By this time, Mrs. Sandland had passed away. The parties agreed that the caption would not be changed and that any recovery would be limited to her liability insurance proceeds. (I RP 4; CP 160) The defendants will be referred to collectively as “Mrs. Sandland.”

negligence but disputed that the rescue doctrine would absolve plaintiff of comparative fault. (I RP 11-12, 15-19)

The trial court found Mrs. Sandland liable and that the rescue doctrine precluded comparative negligence. (CP 160-61) The trial court awarded plaintiff \$8,456.50 in medical expenses and \$37,500 in general damages, for a total of \$45,956.50. (CP 160, 162) Because the trial de novo had not bettered the defense's position, plaintiff was awarded attorney fees and costs under RCW 7.06.060. (CP 162-66)

V. ARGUMENT

A. THE CONSTITUTIONAL RIGHT TO TRIAL BY JURY IS INVIOATE.

Article I, section 21, of the Washington State Constitution provides:

The right of trial by jury shall remain inviolate, but the legislature may provide . . . for waiving of the jury in civil cases where the consent of the parties interested is given thereto.

Thus, the right to a jury trial cannot be impaired by legislative or judicial action. *Geschwind v. Flanagan*, 121 Wn.2d 833, 840, 854 P.2d 1061 (1993).

To safeguard this constitutional right, the Washington Supreme Court has said:

An inviolate right "must not diminish over time and must be protected from all assaults to its essential guaranties." Moreover, any waiver of a right guaranteed by a state's

constitution should be narrowly construed in favor of preserving the right.

Wilson v. Horsley, 137 Wn.2d 500, 509, 974 P.2d 316 (1999) (citation omitted) (quoting *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 656, 771 P.2d 711, 780 P.2d 260 (1989)). Furthermore, the Court has held that the right to a jury trial is a substantial right that requires a client to specifically consent to a withdrawal. *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 305, 616 P.2d 1223 (1980).

1. Statutes and Civil Rules Recognize that the Right to Trial By Jury Is Inviolable.

CR 38(a) recognizes the constitutional right to a jury trial as follows:

The right of trial by jury as declared by article I, section 21 of the constitution . . . shall be preserved to the parties inviolate.

See Scavenius v. Manchester Port District, 2 Wn. App. 126, 128, 467 P.2d 372 (1970).

The mandatory arbitration statute, RCW ch. 7.06, also recognizes that the right to trial by jury is inviolate. RCW 7.06.050(1) provides:

. . . Within twenty days after such filing [of the arbitrator's award], 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. Such trial de novo **shall** thereupon be held, **including a right to jury, if demanded.**

(Emphasis added.) RCW 7.06.070 further provides:

No provision of this chapter may be construed to abridge the right to trial by jury.

2. Waiver.

Of course, in civil cases, the right to a jury trial is not absolute. *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 111 Wn. App. 586, 609, 49 P.3d 894 (2002), *rev. denied*, 148 Wn.2d 1020 (2003). Thus, the right to a jury trial may be waived. *Godfrey v. Hartford Casualty Insurance Co.*, 142 Wn.2d 885, 898, 16 P.3d 617 (2001).

However, “waiver of the right to jury trial ‘must be voluntary, knowing, and intelligent.’” *Godfrey*, 142 Wn.2d at 898 (quoting *City of Bellevue v. Acrey*, 103 Wn.2d 203, 207, 691 P.2d 957 (1984)). “[W]aiver of the right to jury . . . should not be taken lightly, and certainly not inferred except by express written agreement or a stipulation on the record by counsel.” *Jones v. Sisters of Providence*, 93 Wn. App. 727, 734, 970 P.2d 371 (1999) (quoting *Cabral v. Sullivan*, 961 F.2d 998, 1003 (1st Cir. 1992)), *aff’d*, 140 Wn.2d 112, 994 P.2d 838 (2000).

Waiver can occur through inaction. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 413, 936 P.2d 1175 (1997). For example, CR 38(d) explains that a jury trial can be waived by the failure to comply with the CR 38(a) requirements for making a jury demand:

The failure of a party to serve a demand as required by this rule, to file it as required by this rule, and to pay the jury fee required by law in accordance with this rule, constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

B. MRS. SANDLAND WAS ENTITLED TO A JURY TRIAL.

1. Mrs. Sandland Made a Proper Jury Demand.

CR 38(b) prescribes how a demand for a jury trial must be made:

At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law.

While the right to a jury trial can be waived by failure to comply with CR 38(b), *see* CR 38(d), there is no dispute here that Mrs. Sandland complied with CR 38(b). The jury demand was filed and served before the case was called to be set for trial and the jury fee was paid. (CP 10) Plaintiff has never claimed otherwise.

2. LMAR 7.1(b) Violates WASH. CONST. ART. I, § 21, in This Case.

In ruling that Mrs. Sandland had waived her right to a jury trial, the trial court relied on King County Local Rule, LMAR 7.1(b). That rule provides:

Any jury demand shall be served and filed by the appealing party along with the request for trial de novo, and by a non-appealing party within 14 calendar days after the

request for trial de novo is served on that party. If no jury demand is timely filed, it is deemed waived.

(Emphasis added.) Because Mrs. Sandland did not serve and file a jury demand with her request for trial de novo, the trial court held that she had failed to comply with this local rule. (CP 68-69)

Thus, the trial court essentially held that when a party timely files a jury demand and jury trial fee before a case is assigned to mandatory arbitration, that demand somehow becomes null and void if the party subsequently files a request for trial de novo. According to the trial court, in such a situation, the party must file *a second* jury demand and jury trial fee along with the trial de novo request. If this is what LMAR 7.1(b) requires, it violates WASH. CONST. art. I, § 21.

Indeed, RCW 7.06.070 provides:

No provision of this chapter may be construed to abridge the right to trial by jury.

Accordingly, in mandatory arbitration, “the availability of a jury trial de novo to redetermine the arbitrator's conclusions preserve[s] the right protected by article 1, section 21.” *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 652, 771 P.2d 711, 780 P.2d 260 (1989). By depriving a mandatory arbitration participant of the jury trial previously demanded and paid for, LMAR 7.1(b) violates article 1, section 21.

3. LMAR 7.1(b) Conflicts with CR 38(b).

Even if LMAR 7.1(b) were consistent with WASH. CONST. art. I, § 21, reversal and remand for a new trial are still required because LMAR 7.1(b) conflicts with CR 38(b). CR 38(b) provides:

At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law. . . .

(Emphasis added.) There is no dispute that Mrs. Sandland complied with CR 38(b).

That the case here went to mandatory arbitration did not invalidate the earlier jury demand Mrs. Sandland had filed under CR 38(b). MAR 7.2(b)(1) provides:

The trial de novo shall be conducted as though no arbitration proceeding had occurred.

(Emphasis added.) Thus, the case proceeds as if there had been no arbitration. If arbitration had never occurred, there would have been no question that Mrs. Sandland would have been entitled to a jury trial.

LMAR 7.1(b), however, requires a party who has already timely filed a jury demand and fee pursuant to CR 38(b) to file yet a second jury demand and fee when that party files a request for trial de novo from mandatory arbitration. Thus, LMAR 7.1(b) conflicts with CR 38(b) and thus is invalid.

CR 83(a) declares, “Each court by action of a majority of the judges may from time to time make and amend local rules governing its practice not inconsistent with these rules.” A local rule is inconsistent with a Civil Rule when it is “so antithetical that it is impossible as a matter of law that they can both be effective.” *Sorenson v. Dahlen*, 136 Wn. App. 844, 853, 149 P.3d 394 (2006) (quoting *Heaney v. Seattle Municipal Court*, 35 Wn. App. 150, 155, 665 P.2d 918 (1983), *rev. denied*, 101 Wn.2d 1004 (1984)).

Under CR 38(b), a party exercises his or her right to a jury trial by timely filing a jury demand with the required fee. The party seeking a jury trial need do no more.

But under LMAR 7.1(b), a party who files a request for a trial de novo in King County Superior Court after mandatory arbitration must file a jury demand and fee with the trial de novo request, ***even if that party had earlier filed a timely jury demand and fee.*** In other words, LMAR 7.1(b) nullifies CR 38(b) where the party requesting a trial de novo request has already filed a jury demand and fee under CR 38(b).

LMAR 7.1(b) conflicts with CR 38(b) under the circumstances of this case. A new trial before a jury is required.

4. Mrs. Sandland Did Not Lose Her Constitutional Right to a Jury Trial Because Her Counsel Checked a Box.

Article I, section 21, authorizes the Legislature to provide “for waiving of the jury in civil cases where the consent of the parties interested is given thereto.” The Legislature’s authority is coextensive with the judiciary’s as to when a party will be deemed to have impliedly waived the right to a jury trial in a civil case. *See Sackett v. Santilli*, 146 Wn.2d 498, 508, 47 P.3d 948 (2002). In addition, an individual has a right to waive the privilege expressly. *See Nielson v. Spanaway General Medical Clinic*, 85 Wn. App. 249, 255-56, 931 P.2d 931 (1997), *aff’d*, 135 Wn.2d 255, 956 P.2d 312 (1998).

Not filing a second jury demand and fee with her trial de novo request did not waive Mrs. Sandland’s right to a jury trial.

a. There Was No Intentional or Voluntary Relinquishment of a Known Right.

The trial court decided that defense counsel’s checking the following box precluded Mrs. Sandland from having a jury trial (CP 77):

4. Pursuant to LMAR 7.1(b), a Jury Demand

- IS NOT** being filed by the aggrieved party. The non-aggrieved party has fourteen (14) calendar days from date of service of Request for Trial De Novo to file a Jury Demand.

(CP 14) Defense counsel, however, explained that she had checked the box because she had *previously* filed a jury demand and thus was not filing a second demand with the de novo trial request, as required by LMAR 7.1(b). (CP 26, 28)

“[A]ny waiver of a right guaranteed by a state’s constitution should be narrowly construed in favor of preserving the right.” *Wilson v. Horsley*, 137 Wn.2d 500, 509, 974 P.2d 316 (1999).

“Waiver is defined as the ‘intentional or voluntary relinquishment of a known right.’” *Wilson*, 137 Wn.2d at 510 (quoting BLACK’S LAW DICTIONARY 1580 (6th ed. 1990)). Defense counsel did not intentionally or voluntarily relinquish her client’s right to a jury trial.

b. Checking the Box and Signing the Form Did Not Constitute Waiver of a Jury Trial.

Indeed, merely checking a box or signing a form is insufficient to waive such an important constitutional right. *Clark v. Falling*, 92 Wn. App. 805, 965 P.2d 644 (1998), and *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 10 P.3d 506 (2000), *rev. denied*, 143 Wn.2d 1015 (2001), demonstrate why.

In *Clark*, the plaintiff filed with the trial court a confirmation of joinder form. A local rule required that the plaintiff confer with all other parties, and then file the form with various boxes on the form checked to

assert certain facts about the status of the case. One of the boxes plaintiff checked said that “[a]ll parties have been served or have waived service.” 92 Wn. App. at 812-13.

The defendant had asserted insufficient service of process in her answer as an affirmative defense. Plaintiff claimed that by acquiescing in the confirmation of joinder, defendant had waived that defense.

This court disagreed. Noting that waiver is the intentional abandonment or relinquishment of a known right, this court said that waiver had to be shown by “unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive.” 92 Wn. App. at 812-13 (quoting *Mid-Town Ltd. Partnership v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268, *rev. denied*, 122 Wn.2d 1006 (1993)). Because the form at most admitted that the defendant had been served, but did not say that service was timely or sufficient, there was no waiver. 92 Wn. App. at 813.

Here, the form at most stated that a jury demand “IS NOT being filed.” The form did not say that a jury demand “has not been filed” or “was not filed” or “had never been filed.” It did not even say that the jury demand “was being withdrawn” or that a jury “was being waived.” Consequently, there was no waiver.

Parry supports Mrs. Sandland’s position even more strongly than *Clark*. As in *Clark*, the defendant there raised insufficiency of process as an affirmative defense in its answer. Plaintiff subsequently filed a confirmation of joinder that, as in *Clark*, indicated that all parties had been served or had waived service. The case differed from *Clark*, however, in that the defense attorney in *Parry* did not just acquiesce in the confirmation, but affirmatively approved it.

Nevertheless, this court ruled that there was no waiver, saying “it would defy logic to hold that a party’s properly preserved defense is waived merely by signing a form required by local rule for case scheduling and management”, which was “not a pleading”, and did “not constitute a stipulation within the meaning of CR 2A.” 102 Wn. App. at 928-29.

Here, it defies logic to hold that Mrs. Sandland’s properly filed jury demand was waived merely because defense counsel subsequently signed a form and checked a box pursuant to a local rule—

- that fails to take into consideration a legitimate, previously filed jury demand,
- whose purpose appears to be for case scheduling and management, and
- that is not a pleading or a stipulation.

The defense simply did not waive its constitutional right to a jury trial. A new trial before a jury is necessary.

5. Mrs. Sandland Is Not Estopped To Have a Jury Trial.

In depriving the defense of a jury trial, the trial court also ruled that plaintiff would otherwise be prejudiced because she had videotaped an expert whom she would have presented live had there been a jury trial. (CP 69) But while a fundamental constitutional right as the right to trial by jury can be *waived*, neither plaintiff nor the trial court has cited any authority that a party can be deprived of that fundamental constitutional right by *estoppel*.

As will be discussed, even if estoppel could apply, it would not apply here because the elements for judicial and equitable estoppel are not present. Moreover, even if, as the trial court found, plaintiff had been prejudiced by arranging to tape her expert's deposition, the appropriate remedy would have been to assess the extra cost against Mrs. Sandland, not take the draconian measure of depriving her of her constitutional right to a jury trial.

a. Judicial Estoppel Does Not Apply.

Even if estoppel could apply, it would not apply here. The core factors of judicial estoppel are:

“(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.’”

Miller v. Campbell, 164 Wn.2d 529, 539, 192 P.3d 352 (2008). As discussed *supra*, defense counsel’s checking the “IS NOT being filed” box and not filing a second jury demand and fee are not “clearly inconsistent” with her earlier jury demand and fee. Defense counsel believed that the earlier demand and fee were still in force.

Second, how could there be a perception that the court was misled? There is no evidence that the trial court paid any attention to the first jury demand until plaintiff moved for a bench trial.

Third, plaintiff does not contend that Mrs. Sandland would have obtained an unfair advantage. Although the trial court did say that plaintiff had been “prejudiced” because she arranged to videotape her medical expert’s deposition in the belief there would have been a bench trial, this was not an unfair detriment.

Plaintiff’s counsel learned that defense counsel expected that the trial would be before a jury just before the deposition was taken. At the time, he decided it did not matter to him whether the trial was before a jury or the court, so the videotaped deposition proceeded. It was only four

days *later* that plaintiff's attorney changed his mind and claimed he would not have videotaped the deposition had he known there would be a jury trial. If there were any "unfair detriment", plaintiff's counsel had only himself to blame.

b. Equitable Estoppel Does Not Apply.

Equitable estoppel does not apply either. Equitable estoppel is imposed when:

[(1)] an admission, statement, or act inconsistent with a claim afterward asserted; [(2)] action by another in reasonable reliance on that act, statement, or admission; and [(3)] injury to the party who relied if the court allows the first party to contradict or repudiate the prior act, statement, or admission.

Robinson v. City of Seattle, 119 Wn.2d 34, 82, 830 P.2d 318, *cert. denied*, 506 U.S. 1028 (1992). Equitable estoppel is not favored and must be proven by clear, cogent, and convincing evidence. *Id.*

There is no clear, cogent and convincing evidence that any admission, statement, or act of the defense vis-à-vis a jury trial was inconsistent with a claim afterward asserted. As discussed *supra*, defense counsel checked the "IS NOT being filed" box because she had *already* filed a jury demand and fee.

Nor could there be clear, cogent, and convincing evidence that any reliance by plaintiff on the checked "IS NOT being filed" box was *reasonable*. Plaintiff's attorney was on notice that a prior jury demand

had been filed. There had been no withdrawal of that demand by the defense and, indeed, there could not be without consultation with plaintiff's counsel because CR 38(d) provides:

A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

The checked "IS NOT being filed" box simply advised plaintiff's counsel that defense counsel was not *then* filing a jury demand. It did not signal that the previous jury demand was no longer valid. If plaintiff's counsel had any question about whether the defense was still seeking a jury trial, he should have asked.

Finally, there is no clear, cogent, or convincing evidence of injury to plaintiff. As discussed *supra*, even though plaintiff's counsel became aware of the issue shortly before his medical expert's videotaped deposition, he then said whether it was a jury or a bench trial did not matter. (CP 26) It was not until four days later that he claimed he would not have videotaped her medical expert's deposition and would have instead called him as a live witness had she known there would be a jury trial. (CP 35)

C. REVERSAL AND REMAND FOR A JURY TRIAL IS REQUIRED.

Of course, error at trial is not reversible unless it is prejudicial. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983). As will be discussed, depriving Mrs. Sandland of the jury trial that was her

constitutional right was prejudicial as a matter of law. And even if it were not, requiring a bench trial rather than a jury trial resulted in actual prejudice to Mrs. Sandland.

1. Deprivation of the Constitutional Right to a Jury Trial Is Prejudicial.

The right to a jury trial is a fundamental constitutional right. *Vanderpol v. Schotzko*, 136 Wn. App. 504, 510, 150 P.3d 120 (2007). Consequently, when this right is denied, there is prejudice as a matter of law.

Indeed, the Washington Supreme Court has explained:

The right to a jury trial, when such exists, is a substantial right, and a denial thereof is prejudicial error.

Reed v. Reeves, 160 Wash. 282, 286, 294 P. 995 (1931); *see also Northern Life Insurance Co. v. Walker*, 123 Wash. 203, 212 P. 277 (1923). Thus, when a party has a right to a jury trial, but the trial court holds a bench trial instead, the appellate court must reverse and remand for a new trial before a jury. *Reed*, 160 Wash. at 286; *Walker*, 123 Wash. at 219.

2. Mrs. Sandland Has Suffered Actual Prejudice.

Even if the denial of a jury trial was not, in and of itself, prejudicial, Mrs. Sandland has suffered actual prejudice by not having a jury decide the case.

The evidence on both liability and damages was in substantial conflict. On liability, the trial court accepted plaintiff's argument that the rescue doctrine applied. (CP 160-61, Conclusions of Law 2-3) The rescue doctrine permits an injured rescuer to sue the party that caused the danger that required the rescue. *McCoy v. American Suzuki Motor Corp.*, 136 Wn.2d 350, 355, 961 P.2d 952 (1998).

Plaintiff's theory was that she was trying to rescue Mrs. Sandland. (I RP 9, 11-12; CP 249) A person claiming the protection of the rescue doctrine must prove the following:

(1) the defendant was negligent to the person rescued and such negligence caused the peril or appearance of peril to the person rescued; (2) the peril or appearance of peril was imminent; (3) a reasonably prudent person would have concluded such peril or appearance of peril existed; and (4) the rescuer acted with reasonable care in effectuating the rescue.

McCoy, 136 Wn.2d at 355-56. Although the defense admitted that Mrs. Sandland had been negligent for not making sure her car was in park and braked (I RP 15), it disputed that the remaining three rescue doctrine requirements existed. (I RP 16-19)

For example, there was evidence from which a jury could conclude that a reasonable person would not have believed that such a peril or appearance of peril existed. Plaintiff claimed that she thought that both of Mrs. Sandland's feet were outside the pickup, that Mrs. Sandland was

being dragged by the momentum of the pickup, and that Mrs. Sandland would fall and be run over by her own vehicle. (I RP 68) But Mrs. Sandland denied she was only part way into her vehicle and testified she had gotten into its seat. (Exs. 10, 20 p. 23) If a jury were to believe Mrs. Sandland, there would have been no risk that the vehicle would have dragged her or run over her.

There was also evidence from which a jury could conclude that any appearance of peril or actual peril to Mrs. Sandland was not imminent. Plaintiff herself said that a couple of minutes elapsed between the time Mrs. Sandland's truck started rolling backwards and when plaintiff was injured. (I RP 49-50) Everyone agreed that the truck was rolling *slowly*. (I RP 66, 85; II RP 94; Exs. 10, 20 pp. 27, 31) From this testimony a jury could find that even if Mrs. Sandland's feet had initially been outside the pickup, she had time to completely get into the vehicle.

And finally, there was evidence from which a jury could conclude that plaintiff did not act with reasonable care in effectuating the rescue. Price testified that once it became clear that plaintiff could not stop Mrs. Sandland's pickup by pushing on its tailgate, it was unreasonable for her to try to stop it by pushing on the pickup's post. (II RP 103) Further, upon questioning from her own attorney, plaintiff gave the following testimony (I RP 51):

Q. And so what were you trying to do?

A. I didn't have a plan, I was just going to her to see if I could help.

In other words, plaintiff injected herself into a dangerous situation without any idea whatsoever of how she could possibly assist Mrs. Sandland. A jury could conclude that plaintiff was not exercising reasonable care in effectuating a rescue and was at least partially at fault. *See Annot.*, 75 A.L.R.4th 875, 876-81 (1990 & Supp. 2003).

Indeed, a jury could conclude that plaintiff was not trying to effectuate a rescue of Mrs. Sandland at all. Although plaintiff denied that she had been trying to push back either vehicle to prevent a collision (I RP 66, 85-86), Price—the driver of the car that Mrs. Sandland's pickup eventually hit—testified that he believed plaintiff had been pushing the pickup to stop it before it collided with him. (II RP 102-04, 109) Dr. Hayes, the defense medical expert, also testified that at her examination of plaintiff, plaintiff told her that she had placed her body between the two vehicles to try to stop the impact. (II RP 10) If a jury believed Price's and Dr. Hayes' testimony, it could conclude that no reasonable person would think that plaintiff was trying to rescue Mrs. Sandland.

In addition, the evidence as to damages was conflicting. Plaintiff's medical expert, Dr. Brzusek, testified that the accident had resulted in

plaintiff's *deltoid* muscle being pulled off the bone and that this injury was permanent. (CP 230-32)

In contrast, the defense medical expert, Dr. Hayes, opined that plaintiff had fully recovered from the accident and that her ongoing complaints about arm pain were not connected with the accident. (II RP 25-26, 81-82) Dr. Hayes performed an independent medical examination of plaintiff in addition to reviewing her accident-related medical records. (II RP 6-7) She found some tenderness in plaintiff's *deltoid* but noted that plaintiff's medical records for her treatment after the accident focused on her neck, back, and *biceps*, not the deltoid, leading Dr. Hayes to believe that the deltoid problem was not accident-related. (II RP 13-17, 81-82) She testified that had plaintiff torn her *deltoid* off the bone, as her expert had testified, there would have been swelling, hematoma, and very severe pain, and afterwards, atrophy, weakness, and scar tissue in the muscle. (II RP 19-20) Yet Dr. Hayes found no evidence of any of this. (II RP 19-21)

In sum, had a jury heard this case, it could have reached a completely different conclusion than the trial judge did. A new trial before a jury is required.

D. A PLAINTIFF WHO RECEIVES PIP BENEFITS FROM DEFENDANT'S INSURANCE POLICY IS NOT ENTITLED TO MAHLER FEES.

The trial court's denial of Mrs. Sandland's fundamental right to a jury trial requires reversal and remand for a new trial. But even if this court disagrees, the judgment must still be modified downward. As will be discussed, the trial court erred in deducting a pro rata share of plaintiff's attorney fees from Mrs. Sandland's credit for medical expenses paid by her insurance carrier.

Mrs. Sandland's insurance company paid plaintiff's medical expenses in the amount of \$8,680.90. (CP 111, 114-49) The parties agreed that the trial court should credit the defense with \$8,680.90 against the damages judgment for the medical expenses previously paid. (CP 112, 152) However, at plaintiff's request, the court deducted from the credit a pro rata share of plaintiff's attorney fees pursuant to *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998). (CP 152, 165) In *Mahler*, the court ruled that where a claimant recovers his or her insurer's personal injury protection (PIP)⁵ interest from a fully insured tortfeasor, the insurer owes the claimant a pro rata share of his or her attorney fees because the claimant has created a common fund for the insurer's benefit.

⁵ PIP coverage includes coverage for medical expenses. See RCW 48.22.100.

Deducting *Mahler* fees from the credit against the judgment here was error. The judgment here was against Mrs. Sandland, not her insurance company. Where, as here, the tortfeasor's insurer pays benefits to the claimant, the tortfeasor is entitled to a credit in the amount of those benefits because the benefits are not a collateral source.⁶ See *Lange v. Raef*, 34 Wn. App. 701, 664 P.2d 1274 (1983). There is no rule of law that says the tortfeasor is thereby liable to the claimant for a pro rata share of the claimant's attorney fees. Cf. *Norris v. Church & Co.*, 115 Wn. App. 511, 517, 63 P.3d 153 (2002) (tortfeasor not liable for attorney fees).

Even if the judgment here were against Mrs. Sandland's insurance company, the result would be the same because a tortfeasor's insurer is not liable for a pro rata share of the claimant's attorney fees where that insurer pays the claimant PIP or medical benefits.

Weismann v. Safeco Insurance Co., 157 Wn. App. 168, 236 P.3d 240 (2010), and *Matsyuk v. State Farm Fire & Casualty Co.*, 155 Wn. App. 324, 229 P.3d 893 (2010), are illustrative. In these cases, panels in both Divisions I and II held that a claimant who had received PIP payments from the tortfeasor's insurer had not created the common fund

⁶ "Under the collateral source rule, a tortfeasor may not reduce damages, otherwise recoverable, to reflect payments received by a plaintiff from a collateral source, that is, a source independent of the tortfeasor." *Lange*, 34 Wn. App. at 704 (emphasis added).

necessary to require the insurer to pay a pro rata share of the claimant's attorney fees.

Weismann and *Matsyuk* reaffirmed the result in *Young v. Teti*, 104 Wn. App. 721, 16 P.3d 1275 (2001). In that case, the trial court credited PIP benefits paid to an injured passenger by a negligent driver's insurer against the judgment against the driver. The passenger claimed she was entitled to deduct from that credit a pro rata share of her attorney fees under *Mahler*.

Division II ruled that the passenger was not entitled to *Mahler* fees because she had "not create[d] a fund to benefit, or to reimburse, anyone other than herself." 104 Wn. App. at 725 (emphasis omitted).

By deducting a share of plaintiff's attorney fees from the credit for medical expenses paid by Mrs. Sandland's insurer, the trial court failed to comply with *Weismann*, *Matsyuk*, *Teti*, and *Lange*. Even if this court affirms the denial of a jury trial, the amount of the judgment must be recalculated to credit the entire amount paid for medical expenses without deduction for any of plaintiff's attorney fees.

VI. CONCLUSION

Mrs. Sandland has a constitutional right to a jury trial. She preserved that right by timely filing a jury demand and fee in full

compliance with CR 38(b). A local rule could not deprive Mrs. Sandland of that constitutional right.

The trial de novo should have been tried before a jury, not the judge. This court should reverse and remand for a new trial before a jury. At the very least, the judgment should be reduced because Mrs. Sandland is not liable for so-called “Mahler” fees.

DATED this 30th day of September, 2010.

REED McCLURE

By Pamela A. Okano
Pamela A. Okano **WSBA #7718**
Attorneys for Appellants

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MAY 13 2010

Law Office of Sharon J. Bitcon

Honorable Andrea Darvas

**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

VALERIE MILLER,

Plaintiff,

vs.

JEAN SANDLAND,

Defendant.

No. 08-2-28495-6 KNT

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

THIS CAUSE comes before the court following trial which began on April 6, 2010 and ended on April 7, 2010. Having reviewed all pretrial submissions, documentary evidence admitted at the time of trial, having heard testimony of witnesses, and argument of counsel, the court makes the following:

FINDINGS OF FACT

1. Valerie Miller is a 47 year old married woman residing in Kent, Washington. At the time of the incident at issue in this case Valerie Miller was 44 years of age.

2. Defendant Jean Sandland is now deceased. At the time of the incident at issue in this case, Jean Sandland was an 86 year old woman residing in Maple Valley, Washington.

FINDINGS OF FACT AND CONCLUSIONS OF LAW - I

Judge Andrea Darvas
King County Superior Court
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1
2 3. On December 3, 2007 Jean Sandland had a morning medical appointment at a
3 clinic in Kent, Washington. On her way to the appointment she became lost. She turned
4 into the Kent QFC to seek directions. As she entered the parking lot of the QFC she
5 proceeded the wrong way in the driving aisle and parked her vehicle in the wrong direction
6 in relation to the lines in the parking stalls. She parked close to a sidewalk that is adjacent to
7 the QFC parking lot. Ms. Sandland opened the door of her 1994 Ford Ranger truck and got
8 out to ask for directions.
9

10 4. On Monday, December 3, 2007 Valerie Miller also traveled to the Kent QFC.
11 As Ms. Miller walked on the sidewalk adjacent to the Kent QFC parking lot, she saw Jean
12 Sandland standing close to her truck. Jean Sandland asked Valerie Miller for directions.
13 Valerie Miller stopped to give Jean Sandland directions.
14

15 5. As Valerie Miller was starting to give directions she saw Ms. Sandland's
16 truck start to move forward toward the curb of the sidewalk. Valerie Miller told Jean
17 Sandland her truck was moving forward. The curb stopped the motion of the truck.
18

19 6. Afer being informed her truck was rolling forward, Jean Sandland reached
20 into her truck with her upper body and did something to the truck, which caused it to begin
21 rolling backward. At least one, and possibly both of Ms. Sandland's feet remained outside
22 of her vehicle as her truck began rolling backward. The QFC parking lot where Ms.
23 Sandland's truck was parked is on incline such that the natural tendency of a vehicle,
24 without being in gear and without having the brake on, will be to roll.
25

26 7. As Valerie Miller observed Ms. Sandland's truck roll backward, it appeared
27 to Valerie Miller Ms. Sandland was in danger of being dragged, and/or in danger of falling
28

29 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 2

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1 and being struck by her own truck, since at least one of Ms. Sandland's feet was on the
2 ground, outside of the truck. Valerie Miller reasonably perceived that Ms. Sandland was in
3 imminent danger, and she therefore reacted to try to help Ms. Sandland. Valerie Miller left
4 the sidewalk and ran toward Jean Sandland and the open door of her truck.
5

6
7 8. Just before Jean Sandland's truck started to roll backward Ian Price entered
8 the QFC parking lot, going in the correct direction. There was a vehicle in front of Mr. Price
9 and a vehicle behind Mr. Price in the aisle. In his peripheral vision, Mr. Price saw Jean
10 Sandland's truck rolling backward and he saw two women. Mr. Price observed the rear of
11 the truck was on the collision course with the front left quarter panel of his vehicle. Mr.
12 Price tried to back up as far as he could, but he was unable to back up far enough to avoid a
13 collision.
14

15 9. As Ms. Sandland's truck continued to roll backward, with the door open, and
16 at least one of Ms. Sandland's feet outside the truck on the parking lot, Valerie Miller was
17 between the Sandland open door and Mr. Price's stopped vehicle. Valerie Miller testified
18 that just before she would have been pinned between the two vehicles, she pushed off the
19 front of Mr. Price's vehicle with her right arm to get out of harm's way. Mr. Price testified
20 that he believes that Ms. Miller in fact did get pinned between his stopped car and Ms.
21 Sandland's backward-rolling pickup truck.
22

23 10. The time that elapsed from the initiation of Ms. Sandland's truck rolling
24 backward to the vehicles coming to rest was quite short – perhaps 10-15 seconds.
25
26
27

28 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 3
29

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1
2 11. In allowing her truck to roll backward, and ultimately to collide with Ian
3 Price's car, defendant Jean Sandland was negligent. Her attorney acknowledged as much at
4 trial.

5 12. Plaintiff Valerie Miller's perception that Ms. Sandland was in imminent
6 danger was reasonable under the circumstances. Ms. Miller reacted near-instantaneously, in
7 what she perceived to be an emergency, to try to prevent injury to Ms Sandland. Under the
8 circumstances as they existed at the time(s) in question, Ms. Sandland's actions were
9 reasonable.
10

11 13. As a direct and proximate result Ms. Sandland's negligence, and her attempt
12 to rescue Ms. Sandland from what she reasonably perceived to be imminent peril, Valerie
13 Miller sustained bodily injuries, which included strain/sprain injuries to her neck, mid back
14 and low back. She also sustained an injury to her right arm.
15

16 14. It has been over two years since Valerie Miller injured her right arm on
17 December 3, 2007. She continues to have right arm pain, which varies from a low grade of
18 pain to occasionally a high level following certain activities involving lifting or pulling, or
19 using the computer, although she has not sought any further treatment since completing
20 physical therapy in June of 2008.
21

22 15. Valerie Miller is right hand dominant. Since the injury, Valerie Miller has
23 somewhat less strength in her right arm, and avoids or minimizes some of her previous
24 activities that cause pain in her right arm since her injury.
25

26 16. The court finds that Valerie Miller was a credible witness.
27

28 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 4
29

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1
2 17. To address the injuries Valerie Miller sustained in the December 3, 2007
3 collision she treated with the following medical providers and incurred the following
4 medical bills:

Dates of Service	Provider	Cost
12/3/2007 to 3/5/2008	Life Quest Chiropractic	\$4,851.00
1/2/2008 to 1/16/2008	Jing Yang Richard, L.Ac.	\$460.00
4/7/2008	Arthur Lew, M.D.	\$119.70
4/14/2008 to 6/23/2008	Apple Physical Therapy	\$1,749.00
5/22/2008	Valley Diagnostic Imaging Services	\$1,276.80
TOTAL		\$8,456.50

12 Plaintiff has proved by a preponderance of the evidence that the treatment Valerie Miller
13 received and the charges for them were reasonable and necessary.

15 18. Reasonable compensation for Ms. Miller's claim for noneconomic damages
16 (past and future) is \$37,500.

17 19. The parties have agreed, despite the death of Jean Sandland, that the caption
18 need not be changed in this case, and that any judgment will be paid outside of the Estate of
19 Jean Sandland from liability insurance coverage that Jean Sandland had available to her at
20 the time of the incident at issue.

22 Based on the foregoing Findings of Fact the court now makes the following:

23 **CONCLUSIONS OF LAW**

- 24
- 25 1. This court has jurisdiction over the parties and the subject matter.
 - 26 2. Under the so-called "rescue doctrine", the defendant is liable for the injuries
27 Ms. Sandland sustained on December 3, 2007, because 1) the defendant admits (and the

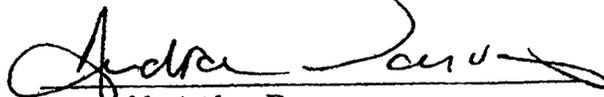
28 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 5

29 **Judge Andrea Darvas**
King County Superior Court
Maleng Regional Justice Center
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1 evidence supports the admission) that she was negligent; 2) Ms. Sandland's negligence in
2 allowing her vehicle to roll backward while she was partially inside, and partially outside of
3 her vehicle, was a proximate cause of peril, or what would appear to be to a reasonable
4 person under the circumstances to be peril to Ms. Sandland's person; 3) the peril, or reason-
5 able appearance of peril, was imminent; and 4) Ms. Miller's reaction in attempting to
6 provide aid to Ms. Sandland was reasonable under the circumstances.
7

8
9 3. While, with the benefit of hindsight, Ms. Miller's actions may not have been
10 the most prudent possible, Ms. Miller is entitled to have her conduct judged according to the
11 standard of a reasonable person confronted with a sudden emergency not of her own
12 making, having to decide instantly how to avoid injury to Ms. Sandland. See WPI 12.02.
13 This court finds that under this standard, Ms. Miller's actions were reasonable. Certainly,
14 the defendant has failed to prove by a preponderance of the evidence, that Ms. Miller's
15 actions in attempting to save Ms. Sandland from peril were unreasonable, or a failure to
16 exercise ordinary care under the circumstances. For these reasons, the court declines to
17 assign any comparative fault to the plaintiff.
18

19 DONE IN OPEN COURT this ¹¹ day of ^{May} ~~April~~, 2010.

20
21 
22 Honorable Andrea Darvas
23

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28 FINDINGS OF FACT AND CONCLUSIONS OF LAW - 6
29

Judge Andrea Darvas
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MAY 13 2010

Law Office of Sharon J. Bitcon

Honorable Andrea Darvas
May 4, 2010 Hearing
Without Oral Argument

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

Valerie Miller, a married woman,
Plaintiff

No. 08-2-28495-6 KNT

vs.

JUDGMENT SUMMARY AND
JUDGMENT ON VERDICT

Jean Sandland and John Doe Sandland, wife and
husband, and their marital community

Defendants

JUDGMENT SUMMARY

- 1. Judgment Creditor. Valerie Miller.
- 2. Judgment Debtor. Jean Sandland, separately, and Jean Sandland and John Doe Sandland, husband and wife, and their marital community.
- 3. Principal Judgment Amount: \$40,938.99
- 4. Miscellaneous:
 - a. Attorney's Fees incurred after appeal MAR 7.3 (with 1.5 lodestar multiplier) \$33,885.00
 - b. Statutory fees and costs \$ 844.02

JUDGMENT SUMMARY AND JUDGMENT ON
VERDICT - 1

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Kirkland, Washington 98033
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c.	Costs Incurred after appeal MAR 7.3	\$ 1,949.70
e.	Total Fees and Costs, Taxable Included	\$ 77,617.71
f.	Other Recovery Amounts:	None
5.	Total Judgment: This amount shall bear interest at 5.25% simple.	\$ 77,617.71
6.	Attorney for Judgment Creditor:	Patrick A. Trudell 3724 Lake Washington Blvd NE Kirkland, WA 98033 (425) 822-2200

THIS CAUSE comes before the court on plaintiff's motion for judgment on verdict. Having entered initial Findings of Fact and Conclusions of Law, and being fully the court makes the following:

FINDINGS OF FACT

1. This is an automobile collision personal injury case stemming from an automobile collision that occurred in the Kent QFC parking lot on December 3, 2007.
2. Counsel for plaintiff has represented her on a contingent fee basis. Counsel for plaintiff has advanced costs as authorized by the Rules of Professional Conduct.
3. Counsel for plaintiff has been trying cases at the King County Superior Court since 1986. Most of counsel's initial trial experience was family law trials which were bench cases. More recently counsel has tried personal injury actions which are generally jury trials. ~~The~~ reasonable hourly rate for an attorney of the ability of counsel for plaintiff is \$300 per hour. This hourly rate does not take into account the additional risk of a contingent fee case.

JUDGMENT SUMMARY AND JUDGMENT ON VERDICT - 2

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2 4. Initially this case was arbitrated through the King County Superior
3 Court Mandatory Arbitration Rules. A mandatory arbitration award issued on December 2,
4 2009. The total arbitration award was \$31,456.50.

5 5. Defendant requested a trial de novo of the arbitration award pursuant
6 to King County Mandatory Arbitration Rules. The case was then set for a bench trial before
7 the court to begin on Tuesday, April 6, 2010.

8
9 6. At the time of trial the court believed it was possible the trial could
10 take through April 8, 2010.

11 7. As a result of efficiency of counsel, the trial took ^{two} ~~three~~ days and
12 concluded on April 7, 2010.

13 8. The court found favor of plaintiff in the amount of \$45,956.50. This
14 was more than the mandatory arbitration amount for which a de novo review was sought.

15
16 From the foregoing Findings of Fact, the court now makes the following:

17 **CONCLUSIONS OF LAW**

18 1. An automobile collision in King County, giving rise to personal
19 injuries, may be adjudicated at the King County Superior Court. It is proper to adjudicate
20 the personal injury case by way of mandatory arbitration. The jurisdiction limit in
21 mandatory arbitration is \$50,000.

22
23 *FF 9* In a personal injury case when an attorney represents a client by way
24 of pure contingent fee, the attorney risks recovering no fees or limited fees in the event of no
25 recovery or minimal recovery. The risk of no or minimal recovery makes the case less
26 desirable.
27

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2
3 3. Counsel for plaintiff in this case has been a trial lawyer since the mid
4 1980s. Given his background the court recognizes a reasonable hourly rate for his legal
5 services is \$300 per hour. A lodestar multiplier is necessary to take into account the
6 additional risks of a contingent fee case.

7
8 4. Following mandatory arbitration award, request for trial de novo,
9 there is no jurisdiction limit at the time of the trial de novo.

10 ~~efficiency of counsel the case took less time to try than estimated by the court.~~ *FF 10* Trial in this case was expeditiously conducted. ~~As a result of~~
11 ~~efficiency of counsel the case took less time to try than estimated by the court.~~ *ST*

12 6. The court returned a verdict of \$45,956.50. This was more than the
13 arbitration award for which de novo review was sought. Washington law provides counsel
14 for plaintiff is entitled to attorney's fees given the amount of judgment following trial de
15 novo. A combination of the contingent nature of this case, the significant risk of an
16 insufficient recovery, and the efficiency of counsel make it reasonable for the court to apply
17 a multiplier of 1.5 to the lodestar attorney fee calculations. Defendants' insurer shall receive
18 an offset of \$5,017.51 for payment of Ms. Miller's medical bills prior to trial, minus pro rata
19 share of attorney's fees and costs, pursuant to Washington law. Total judgment is
20 \$40,938.99.
21

22 ACCORDING, IT IS ORDERED:

23 1. Principal Judgment Amount. Plaintiff, Valerie Miller, is hereby
24 awarded judgment against defendants, Jean Sandland, separately, and Jean Sandland and
25 John Doe Sandland, wife and husband and their marital community in the amount of
26 \$40,938.99.
27

28
29 JUDGMENT SUMMARY AND JUDGMENT ON
VERDICT - 4

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SUPERIOR COURT OF WASHINGTON, COUNTY OF KING

vs. Plaintiff(s),
Defendant(s).

NO.

**REQUEST FOR TRIAL DE NOVO
AND FOR CLERK TO SEAL
ARBITRATION AWARD (RTDNSA)**
(Clerk's Action Required)

Please take notice that the aggrieved party _____,
requests a Trial De Novo from the award filed _____, 20____.

- 1. A Trial De Novo is requested in this case pursuant to MAR 7.1 and LMAR 7.1.
- 2. The Arbitration Award shall be sealed pursuant to LMAR 7.1 and 7.2.
- 3. Filing fee of **\$250.00** is attached
- 4. Pursuant to LMAR 7.1(b), a Jury Demand

IS being filed and served upon all parties at the same time as the filing of this Request for Trial De Novo by the undersigned as the aggrieved party.

IS NOT being filed by the aggrieved party. The non-aggrieved party has fourteen (14) calendar days from date of service of request for Trial De Novo to file a jury demand.

THE REQUEST FOR TRIAL DE NOVO SHALL NOT REFER TO THE AMOUNT OF THE AWARD. DO NOT ATTACH A COPY OF THE AWARD

Dated: _____, 20____ Signed: _____ WSBA#

Attorney for:

Typed Name:

FILE, TOGETHER WITH PROOF OF SERVICE, WITH THE CASHIER'S SECTION IN THE CLERK'S OFFICE, KING COUNTY COURTHOUSE OR KENT REGIONAL JUSTICE CENTER. SERVE COPIES ON ALL PARTIES AND ARBITRATION DEPARTMENT, ROOM E-219, KING COUNTY COURTHOUSE, 516 THIRD AVENUE, SEATTLE, WA 98104.

IMPORTANT: NOTICE TO PARTIES

The Court will assign an accelerated trial date. A request for trial may include a request for assignment of a particular trial date or dates, PROVIDED that the date or dates requested have been agreed upon by all parties and are between 60 and 120 days from the date the Request for Trial De Novo is filed.

(Agreed date: _____)

For cases originally governed by KCLCR 4, the Court will mail to all parties a Notice of Trial Date together with an Amended Case Schedule, which will govern the case until the Trial De Novo.

TYPE NAMES AND ADDRESSES OF ALL ATTORNEYS