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NO. 66557-0-1

COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON

DENISE V. ENGSTROM, Petitioner,

v.

REBECCA HARDESTEN, Respondent.

APPELLANT'S OPENING BRIEF

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A. IDENTITY OF MOVING PARTY

Denise Engstrom, by and through her counsel of record, Mark G. Olson, appeal the decisions designated in Part B.

B. DECISIONS BELOW

Ms. Engstrom appeals the following decisions of the Snohomish County Superior Court, Hon. Joseph Wilson, entered December 17, 2010: 1) Order Denying Plaintiff's Motion to Strike Trial De Novo and imposing sanctions pursuant to CR 11; and 2) Order Granting Defendant's Motion to Strike Declarations of Williams and Hardeston.

C. ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in denying appellant's motion to strike defendant's Request for Trial de Novo following mandatory arbitration where the record reflects that the "aggrieved party" did not file or authorize to be filed the Request for Trial De Novo as mandated by MAR 7.1(a) and imposing monetary sanctions against attorney Williams pursuant to CR 11 for filing a motion that was well-grounded in fact and law?

2. Whether the trial court erred in striking the declarations of former plaintiff's counsel John M. Williams and defendant Rebecca Hardeston?

D. STATEMENT OF CASE

On March 8, 2007, Denise Engstrom was rear-ended by respondent Rebecca Hardesten. As a result of this collision, Ms. Engstrom sustained injuries to her neck, shoulders, and upper back. Rebecca Hardesten was insured by Unitrin Insurance Company. Upon the filing of this lawsuit, Rebecca Hardesten tendered her defense to Unitrin, which then assigned the law office of Freise & Welchman in Seattle to represent her at Unitrin's expense. The case was transferred to the Snohomish County Superior Court mandatory arbitration department and a damage award was issued in Plaintiff's favor following an arbitration hearing on October 5, 2010. Rebecca Hardesten was represented by attorney Philip Welchman from the office of Freise & Welchman. The Arbitrator filed his decision with the court on October 6, 2010. CP, at 13.

On October 22, 2010, pursuant to MAR 7.1(a), attorney Welchman filed a Request for Trial De Novo Sealing of the Award and Note for Trial Setting. The Request stated that, "A trial de novo from the award filed October 6, 2010 is requested by Defendant in this case, whose correct name is Rebecca Hardesten."¹

¹ Defendant's name changed during the course of litigation. Her correct last name is "Hardesten" as reflected in the Praecipe filed with the Clerk of the Court. CP, at 74.

Defendant Hardesten subsequently initiated contact with Plaintiff's counsel Williams by email on November 3, 2010 and advised him that she neither authorized nor consented to the Request for Trial De Novo filed on her behalf by Unitrin Insurance and did not want the case to proceed to trial. She further advised that she was seeking independent counsel. CP, at 44. Plaintiff's attorney Williams subsequently drafted and served Plaintiff's Second Requests for Admission on the two issues of defendant's authorization or consent to the Trial De Novo. Defense counsel Welchman objected to both questions on the basis of attorney-client privilege and declined to answer.

Upon receiving the objections to the Requests for Admission, plaintiff's counsel prepared a formal declaration from the defendant reiterating her November 3, 2010 email message: that she did not authorize Mr. Welchman to appeal the arbitration award by filing the Request for a Trial De Novo, and that she did not consent to it in any manner. Furthermore, she advised that she was seeking independent counsel and instructed Mr. Williams to feel free to contact her further. CP, at 18.

Asserting that defendant Hardesten, as the "aggrieved party", did not authorize or consent to the filing of the MAR appeal, plaintiff moved on December 8, 2010 to strike the Request for Trial De Novo and to allow

judgment on the arbitration award. CP, at 20. Two days after filing of the motion, defense counsel Welchman withdrew from the case, and Unitrin arranged for attorney Debora A. Dunlap to take his place. CP, at 31.

Plaintiff's motion to strike was heard on December 17, 2010 before the Honorable Joseph Wilson, Snohomish County Superior Court. However, before plaintiff's motion was considered, the Court allowed – on a motion shortening time – defense counsel's motion to strike the declarations of Hardesten (her own "client") and attorney Williams, and to impose sanctions under CR 11. CP, at 27. As defense counsel's motion was served only the day before the hearing, plaintiff's counsel Williams had no meaningful opportunity to respond. The Court decided that Hardesten and Williams' declarations were the result of improper communication pursuant to RPC 4.2 by attorney Williams, and struck both declarations. Stating its belief that an insurance company had the absolute right to control litigation and was in fact the true "client", the Court determined that plaintiff's motion to strike was not well grounded in fact or law and sanctioned plaintiff's counsel \$3,000, nearly twice the amount even requested by defense counsel. With both supporting declarations stricken, the Court proceeded to deny plaintiff's motion to strike the Request for Trial De Novo.

Appellant timely filed a Notice for Discretionary Review on both rulings on January 14, 2011. CP, at 43. Subsequent to hearing on the motion April 8, 2011, the matter was referred to a full panel of the Court of Appeals pursuant to RAP 17.2. On May 11, 2011, the Court of Appeals granted discretionary review so that the issues presented herein could be considered in conjunction with the appeal in Russell v. Maas, No. 65523-0-I. This appeal ensued.

E. ARGUMENT

1. THE COURT BELOW ERRED IN DENYING PLAINTIFF'S MOTION TO STRIKE DEFENDANT'S REQUEST FOR TRIAL DE NOVO BECAUSE DEFENDANT HARDESTEN DID NOT AUTHORIZE OR CONSENT TO THE FILING OF THE MAR APPEAL.

a. Plaintiff has standing to raise this issue.

The prevailing party in a Mandatory Arbitration Award has standing to challenge the “aggrieved party’s” compliance with the filing requirements of MAR 7.1(a). In this regard, a party has standing to raise an issue if it has a distinct and personal interest in the outcome of the case and can show it would benefit from the relief requested. *Bunting v. State*, 87 Wn. App. 647, 651 (1997); *Timberlane Homeowners Association v. Brame*, 79 Wn. App. 303, 307-308, *Review denied*, 129 Wn.2d. 1004 (1996); *Marriage of T*, 68 Wn. App. 329, 335 (1993). In this case,

Plaintiff's distinct and personal interest is in the damages award they received from the arbitrator. Similarly, Plaintiff can clearly show that she would benefit from this Court striking the Defendant's Request for Trial De Novo and reinstating the arbitrator's award since such a result would secure the arbitrator's award and allow the Plaintiff closure in this matter without incurring further litigation expenses.

- b. The "Aggrieved Party," Rebecca Hardesten, did not authorize or consent to the filing of the Request for Trial De Novo.

The central fundamental fact of defendant's MAR appeal is that the actual named defendant, Rebecca Hardesten, wrote an unsolicited email to plaintiffs' counsel John Williams on November 3, 2010, ten days following the filing of a Request for Trial De Novo on her behalf, in which she stated unequivocally:

I do not agree to a new trial.
I am not happy with these events, with my lawyers, or with Unitrin pursuing this further. . . .
I am consulting with third party attorneys, but feel free to contact me further as I do not wish to be represented by [Unitrin appointed attorney] Mr. Welchman.

Rebecca Hardesten (formerly Goodman).

CP, at 44, Exhibit 1.

The filing of an MAR appeal without the aggrieved party's authorization or consent provides ample basis for this Court to reverse the trial court and dismiss the Request for Trial De Novo.

MAR 7.1(a) requires strict compliance. *Vanerpol v. Schotzko*, 136 Wn. App. 504, (2007) (citing to *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815 (1997)). MAR 7.1(a) provides:

Service and Filing. Within 20 days after the arbitration award is filed with the clerk, **any aggrieved party** not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court... [emphasis added]

This provision unambiguously requires a Request for Trial De Novo to be filed by an "aggrieved party." Washington Courts have defined "aggrieved party" as one who is a party to the trial court proceedings and whose property, pecuniary, or personal rights were directly and substantially affected. *In re Hansen*, 24 Wn. App. 27, 35 (1979).

Non-aggrieved parties are not allowed to request a Trial De Novo under MAR 7.1(a). *Wiley v. Rehak*, 143 Wn.2d 339, 347 (2001). A Request for Trial De Novo filed by a non-aggrieved party is a nullity. *Id.* The *Wiley* case underscores the Washington Supreme Court's insistence upon strict compliance with the "aggrieved party" requirement in this rule. In *Wiley*, a Request for Trial De Novo was inadvertently filed in the name

of a party who had been earlier dismissed from the lawsuit. An attempt was made to amend the Request by adding the actual aggrieved defendant after the 20-day period had expired. The Court refused to allow the amendment stating:

This language indicates that the naming of the aggrieved party is a mandatory requirement. The word “shall” is an unambiguous term that generally imposes a mandatory duty.” *Wiley at 347.*

Wiley establishes that only an actual party to the lawsuit can be an “aggrieved party” for purposes of a Request for Trial De Novo. Unitrin Insurance Company cannot be considered an “aggrieved party” inasmuch as it has never been a party to the personal injury action brought by the Plaintiff. Only Defendant Hardesten qualifies as an “aggrieved party” for purposes of MAR 7.1(a). As Defendant Hardesten has admitted that she did not authorize or consent to the filing of the Request for Trial De Novo, no aggrieved party has satisfied the strict filing and service requirements of MAR 7.1(a). Accordingly, the Request for Trial De Novo should have been stricken.

Such an interpretation is consistent with the Supreme Court’s rules on the right to appeal of a trial court or state agency decision. As articulated long ago in *Sheets v. Benevolent and Protected Order of Keglers*, 34 Wn.2d 851, 210 P.2d 690 (1949), the Court stated that the

word “aggrieved” in a statute permitting appeal by an aggrieved party refers to a substantial grievance, a denial of some personal or property right, legal or equitable, or the imposition on a party of a burden or obligation and the right invaded must be immediate, not merely some possible or remote consequence.

The “aggrieved party” requirement in our state’s civil procedure was codified in 1976 with the adoption of the Rules of Appellate Procedure. See e.g. RAP 3.1: “Only an aggrieved party may seek review by the appellate court.” Applying this standard, the Court held that an “aggrieved party” entitled to appeal is one whose personal rights or pecuniary interests have been affected. *State v. Taylor*, 150 Wn.2d 599, 80 P.3d 605 (2003). The mere fact that one may be hurt in his feelings, or be disappointed over a certain result does not entitle him to appeal. *Id.*

Thus, because it is not the real party in interest whose personal rights or pecuniary interests have been affected by the modest MAR award in this matter, Unitrin Insurance has no independent right of appeal or to appeal in the name of its insured when its insured has flatly declared she does not want an appeal. The fact that its feelings may be hurt or that it is disappointed in the outcome does not convert Unitrin to an aggrieved party in a legal sense.

- c. The Rules of Professional Conduct invest Defendant Hardesten with the exclusive authority to make decisions regarding “substantive rights.” Defense counsel cannot validly request a Trial De Novo without the client’s express prior permission.

In filing the Request for Trial De Novo, Rebecca Hardesten’s counsel took action affecting her substantive right to decide whether or not to appeal the arbitrator’s decision without her consent. RPC 1.2(a) precludes lawyers from acting without their client’s authority:

A lawyer shall abide by a client’s decisions concerning the objectives of representation ... and shall consult with the client as to the means by which they are to be pursued.

In interpreting an attorney’s right to unilaterally run a case, the Courts have found that an attorney may not waive, compromise, or bargain away a client’s substantive rights² without the client’s authorization and consent. *Graves v. P.J. Taggers Company*, 94 Wn.2d. 298 (1980). As stated in *Graves* at page 303:

[...] an attorney is without authority to surrender a substantial right of a client unless special authority from his client has been granted him to do so [...] [This rule] assures that clients will be consulted on all important decisions if they so choose. [...]

² Some Courts refer to “substantive rights” and other Courts refer to “substantial rights.” For purposes of this brief, we will adopt “substantive rights.”

In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is *exclusively* that of the client ... [emphasis added]

The rule requiring client authorization when making decisions impacting substantive rights has been strictly enforced. In *Morgan*, an in-court settlement agreement was held to be invalid because, although the agreement was made in the presence of the client, the attorney did not have the client's informed consent to settle the matter. *Morgan v. Burks*, 17 Wn. App. 193 (1977).

Trial De Novo following arbitration is treated as an appeal. *Thomas – Kerr v. Brown*, 114 Wn. App. 554, 558 (2002) (“A trial de novo following arbitration is treated as an appeal.”). The right to appeal is a “substantive right” and courts agree that a Request for Trial De Novo also involves a substantive right. *See, e.g., Faraj v. Chulisie*, 125 Wn. App. 536, 542 (2004) (“*Chulisie's right to a trial de novo was a substantive right*”).

Additionally, it is irrelevant that Unitrin is paying Defendant Hardesten's attorney's bills. RPC 1.8(f) and RPC 5.4(c) expressly prohibit defense counsel from allowing Unitrin to dictate his professional

judgment. Instead, defense counsel must exclusively represent the insured party, Rebecca Hardesten, rather than the insurer, Unitrin.

As stated by the Supreme Court, RPC 5.4(c) prohibits an attorney hired by an insurer from allowing that employment to influence his or her professional judgment. *Tank v. State Farm Fire and Cas. Co.*, 105 Wn.2d 381, 383, 715 P.2d 1133 (1986). The Court reminded attorneys that they owe an “undeviating fidelity” to their clients and that no exceptions to that standard would be tolerated. This point is amplified by noted state insurance expert Thomas V. Harris: “As the attorney for an insured, defense counsel cannot intentionally, or unwittingly, allow the insurer to compromise her representation of the insured... [A]n attorney must be vigilant in identifying any potential conflicts of interest between the insurer and its insured. Any such conflicts must be resolved in favor of the insured.” Thomas V. Harris, *Washington Insurance Law* 17-11 (2nd ed. 2006).

In this case, defense counsel overstepped his authority with regard to one of Defendant Hardesten’s substantive rights, namely, her right as client to decide whether to appeal the arbitrator’s award. Such a decision, to be binding and enforceable, must be specifically authorized by the client, not the entity paying the client’s bills.

Further, any argument that Defendant Hardesten appeared through her attorney when the Request for Trial De Novo was filed is invalid. In *Trowbridge v. Walsh*, the defendants failed to appear at the arbitration but their attorney was present. 51 Wn. App. 727, 730 (1988). The court held that the defendants were allowed to request a trial de novo under MAR 7.1(a) because they had participated through their attorney at the arbitration. *Id.* The circumstances here, however, differ in two important respects.

First, the defendants in *Trowbridge* knew that there was an arbitration taking place; here, Defendant Hardesten had no idea that a Request for Trial De Novo was being filed on her behalf or that it required her consent. Secondly, the attorney in *Trowbridge* did not act in any way that impacted the defendant's substantive rights. Here, as explained above, by filing a Request for Trial De Novo, Defendant Hardesten's attorney made a unilateral decision to appeal the arbitrator's decision, thus impacting Defendant Hardesten's substantive rights.

Because Defendant Hardesten did not consent to the filing of the Request for Trial De Novo, and because the decision to appeal or to instead accept an arbitration award is a "substantive right," the Request in this case is invalid and must be stricken.

- d. The public policy underlying MAR 7.1 also mandates that this Request for Trial De Novo be stricken.

By enacting the Mandatory Arbitration Program set forth in RCW 7.06, the Washington Legislature intended to reduce court congestion and delays in hearing civil cases. *Nevers v. Fireside*, 133 Wn.2d 804, 815 (1997). In recognition of those goals, the Washington Supreme Court held that allowing substantial compliance, as opposed to strict compliance, with MAR 7.1 would subvert the Legislature's intent by contributing to increased delays. *Id.* Here, Unitrin's strategy is in direct opposition with the legislative intent behind the Mandatory Arbitration Program.

Unitrin had no intention of resolving this case in arbitration. Instead, Unitrin and its counsel sought to use the arbitration process to wear out the Plaintiff with a dress rehearsal of what would be the real performance in a trial de novo. Additionally, this would allow defense counsel to get a fuller look at the Plaintiff's case and its supporting evidence. This approach subverts the legislative purpose behind the Mandatory Arbitration Program and thus forms yet another basis for granting Plaintiff's motion.

- e. The trial court abused its discretion by imposing CR 11 sanctions against appellant's counsel.

The trial court not only erred in denying plaintiff's motion to strike defendant's Request for Trial de Novo when the "aggrieved party" obviously neither authorized nor consented to its filing in violation of MAR 7.1(a), the court compounded the problem by imposing harsh sanctions against attorney Williams pursuant to CR 11:

CR 11 sanctions are appropriate. Your pleadings are unfounded, not based on law, not based on fact, not based in a good faith effort to change the law or public policy. ***The request was for \$1,750, the amount awarded is \$3,000 in CR 11 sanctions.***

VRP, at 13, lines 15-19 (emphasis added). CP, at 84.

The trial court was mistaken on all three grounds: (1) the fundamental "law" is MAR 7.1(a), which requires that the "aggrieved party" file, authorize to be filed or otherwise consent to the filing of an appeal from mandatory arbitration; (2) the fundamental "fact" is that this aggrieved party made known in an unsolicited and unambiguous email to plaintiff's counsel that she did none of the above and was opposed to Unitrin Insurance continuing the litigation; and (3) the fundamental "public policy" being advanced is the integrity of the mandatory arbitration program itself.

The standard of appellate review for an award of CR 11 sanctions is abuse of discretion. *Biggs v. Vail*, 124 Wn.2d 193, 197, 876 P.2d 448 (1994); *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338-39, 858 P.2d 1054 (1993). Where the trial court is presented with a detailed declaration of counsel setting forth the factual and legal inquiry undertaken before filing the pleading, and the inquiry on its face appears to have been reasonable, the trial court abuses its discretion by imposing attorneys fees and expenses as a sanction under CR 11.

CR 11 addresses two types of filings: (1) those which are “not well grounded in fact and . . . warranted by . . . law”, and (2) those which are interposed for “any improper purpose”. *Hicks v. Edwards*, 75 Wn. App. 156, 876 P.2d 953 (1994) (Citing *Bryant v. Joseph Tree*, 119 Wn.2d 210, 217, 829 P.2d 1099 (1992); *Biggs v. Vail*, 124 W.2d 193, 876 P.2d 448 (1994)). The instant case deals with the first type, since the trial court made no finding that any of the filings were interposed for “any improper purpose.”

In *Bryant*, the Supreme Court established a two-part test for determining whether a filing is not well grounded in fact or law. A “pleading, motion or legal memorandum” may be subject to CR 11 sanctions if it is *both* (1) “baseless” and (2) signed without reasonable

inquiry. A filing is “baseless” if (a) not well grounded in fact, or (b) not warranted by (i) existing law or (ii) a good faith argument for the alteration of existing law. [Citations omitted; Italics in original.] *Hicks, supra*, at 163.

In *Bryant*, the Supreme Court stated that the “purpose behind CR 11 is to deter *baseless* filings and to curb abuses of the judicial system”, but not “to chill an attorney’s enthusiasm or creativity in pursuing factual or legal theories.” *Bryant, supra*, at 219. The Court went on to state:

Complaints which *are* “grounded in fact” and “warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law” are not “baseless” claims, and are therefore not the proper subject of CR 11 sanctions. The purpose behind the rule is to deter baseless filings, not filings which may have merit. . . .If a complaint lacks a factual or legal basis, the court cannot impose CR 11 sanctions unless it also finds that the attorney who signed and filed the complaint failed to conduct a reasonable inquiry into the factual and legal basis of the claim. . .

Bryant, supra, at 219-20.

Therefore, in order to show that CR 11 sanctions were unwarranted, appellant need only show either (1) that the filings were not “baseless”,or (2) that appellant’s counsel conducted a reasonable inquiry.

The first question is whether the filings were “baseless.” A filing is “baseless” if it is (a) not well grounded in fact, or (b) not warranted by either existing law or a good faith argument for the extension,

modification, or reversal of existing law. *Bryant*, at 219-20. Plaintiff's motion to strike defendant's request for trial de novo was clearly well grounded in fact where the individual defendant – the only “aggrieved party” – had send him an unsolicited email unequivocally stating that she did not authorize or consent to the filing of the pleading on her behalf.

The filings in this case were also warranted by existing law, and there is ample legal precedent from other trial courts in this state in support of her position. On similar facts, the King County Superior Court has entered orders granting plaintiff's motion to strike defendants' request for trial de novo. See *Eschbach v. Grimm*, King County Superior Court, No. 08-2-06863 KNT (Hon. Richard F. McDermott), order dated March 13, 2009; and *Russell v. Maas*, King County Superior Court, No. 07-2-39269-6 SEA (Hon. Mary I. Yu), order dated March 26, 2010.³

"The fact that a complaint does not prevail on its merits is by no means dispositive of the question of CR 11 sanctions." *Bryant*, supra, at 220. "*Bryant* makes clear that CR 11 sanctions should be limited to the minimum necessary, and should not be used as a fee-shifting mechanism." *Biggs*, supra, at 201 (citing *Bryant*, supra, at 220, 225). At the very least, even if appellant's filings are not warranted by existing law -- and appellant contends contends otherwise -- they are certainly warranted by a

³ This issue is presently before the Court of Appeals on appeal under Court of Appeals No. 65523-0-I

good faith argument for the alteration of existing law. None of the appellant's filings were "baseless", and respondents' motion for CR 11 sanctions should have been denied on that basis alone.

The second question under *Bryant, supra*, is whether the filings in question were signed without a reasonable inquiry into the law or the facts. *Bryant, supra*, at 219. If appellant's counsel conducted a reasonable inquiry, the trial court's imposition of CR 11 sanctions was unwarranted. "The reasonableness of an attorney's inquiry is evaluated by an objective standard." *Id.*, at 220 (Citing *Miller v. Badgley*, 51 Wn. App. 285, 299, 753 P.2d 530, *review denied*, 111 Wn.2d 1007 (1988)).

Plaintiff's counsel Williams made a reasonable inquiry into the facts by reviewing defendant Hardesten's unsolicited email and concluding that the jurisdictional requirement for an MAR appeal had not been met, namely the filing by an "aggrieved party." Thus even if this Court affirms the trial court, there is no basis for the imposition of CR 11 sanctions. The motion was grounded in fact, law, and the advancement of an important public policy.

2. THE COURT BELOW ABUSED ITS DISCRETION IN GRANTING DEFENDANT'S MOTION, ON AN ORDER SHORTENING TIME, TO STRIKE THE DECLARATIONS OF ATTORNEY WILLIAMS AND DEFENDANT HARDESTEN.

The only basis for the trial court's order striking the otherwise relevant declarations of plaintiff attorney John Williams and defendant Rebecca Hardesten was that they were the result of an improper communication between Mr. Williams and Ms. Hardesten.

It is clear to me that you have engaged in prohibitive contact with a represented individual not only once but numerous times, and have submitted a declaration that she has signed to the Court when she was represented, in violation of the RPCs.

In addition to the trial court's mistaken statement that attorney Williams had engaged in "numerous" communications, its finding of impropriety was based upon a fundamental misperception and or misinterpretation of the communication.

First, the communication was unsolicited email from the defendant herself stating that she neither authorized nor consented to the MAR appeal filed in her name.

Second, Mr. Williams' initial response was to serve Requests for Admission that, if properly responded to by defense counsel, would have yielded the same information. Instead, defense counsel asserted the dubious objections based upon attorney-client privilege.

Third, to the extent any attorney-client privilege was involved, the privilege was voluntarily and knowingly waived by the defendant herself at least to the extent of the content of the email. The attorney-client privilege only applies to communications that are intended by the party to be confidential. *Seattle Northwest Sec. Corp. v. Sdg Holding Co.*, 61 Wn. App. 725 (1991). Furthermore, communications which an attorney must make public, or are made for that purpose, are not confidential and not privileged. *Green v. Fuller*, 159 Wash. 691, 695, (1930). Papers and documents are not privileged if a third party knows they exist, or the contents are accessible to the public. *Id.*; *State v. Sullivan*, 60 Wn.2d 214, 217 (1962); *Seattle Northwest Sec. Corp. supra*. Therefore, if the communication is intended to be disclosed to others, it is not protected by the attorney-client privilege. *Sullivan, supra*, at 217-18.

In this case the communication at issue was expressly intended NOT to be kept confidential. Where a trial *de novo* request is filed, the result of an attorney's consultation and communication with a client is expressly intended to be made public -- in the form of the *de novo* request itself. But in this case, defense counsel is trying to hide behind an unprivileged communication to prevent the underlying facts from emerging -- that Unitrin wanted this *de novo*, not Ms. Hardesten.

Furthermore, given Ms. Hardesten's statements in her email that she was "consulting with third party attorneys" and that she did "not wish to be represented by [Unitrin appointed attorney] Mr. Welchman" and encouraging plaintiff's counsel to "feel free to contact [her] further", it is questionable whether an attorney-client relationship even existed at the time Mr. Welchman was asserting the privilege.

Finally, to the extent that any attorney client privilege attaches to the RFAs sought by plaintiff, the privilege was waived by defendant Hardesten herself in the unsolicited email to plaintiff's former counsel referenced above. It is beyond dispute that the attorney – client privilege belongs to the *client* – not the insurance company and certainly not to the insurance defense attorney. *Olson v. Haas*, 43 Wn. App. 484, 718 P.2d 1 (1986). Ms. Hardesten made a decision to make her point of view known about the MAR appeal, and the insurance company and its counsel have no basis to try to put the genie back in the bottle.

The situation presented by defendant's unsolicited email is analogous to that in *In re Users System Services, Inc.*, 22 S.W.3d 331, 42 Tex. Sup. Ct. J. 836 (1999), wherein the Texas Supreme Court – applying the same ethical standards as RPC 4.2 – ruled that an attorney representing an opposing party was free to communicate with an opposing party in

litigation where that opposing party initiated the contact and stated that he was no longer represented by the opposing counsel of record.

This Court should therefore reverse the trial court's abuse of discretion in striking the declarations of John Williams and Rebecca Hardesten.

F. CONCLUSION

Defendant Hardesten, not Unitrin, is the only "aggrieved party" in this case as contemplated under MAR 7.1(a). Defendant Hardesten did not authorize or consent to the filing of the Request for Trial de Novo. Unitrin should not be allowed to force their insured, without her permission, to submit to a jury trial by cavalierly rejecting an otherwise binding decision of a duly-appointed arbitrator.⁴ Nor should Unitrin be permitted to expose its insured to a potential judgment in excess of her insurance policy limits without her express permission.⁵ It should not be surprising that Rebecca Hardesten did not give her consent to this appeal since she has nothing to

⁴ Rebecca Hardesten does not even live in Snohomish County but instead resides in Whatcom County.

⁵ Plaintiff is mindful of MAR 7.2(b)'s prohibition against disclosing the amount of an arbitration award prior to the conclusion of the trial de novo. Plaintiff feels it is appropriate, however, to inform the court that the damages awarded by the arbitrator would consume more than 78% of Rebecca Hardesten's insurance coverage. It is unknown whether Ms. Hardesten was fully informed of her potential excess exposure prior to the filing of Unitrin's Request for Trial De Novo.

gain and everything to lose while attending a three to four day jury trial sixty miles away from her home.

Accordingly, Plaintiff requests that this Court reverse the decisions of the Snohomish County Superior Court and reinstate the declarations of Williams and Hardesten, reverse the imposition of CR 11 sanctions, and strike defendant's Request for Trial De Novo. Finally, Plaintiff requests that the Court award her attorneys fees and costs as provided by MAR 7.3.

RESPECTFULLY SUBMITTED this 23rd day of June, 2011.

A handwritten signature in black ink, appearing to read "Mark G. Olson". The signature is written in a cursive, flowing style.

Mark G. Olson, WSBA # 17846
Attorney for Appellant Denise Engstrom

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KING COUNTY
SUPERIOR COURT CLERK
KENT, WA

Hon. Richard McDermott

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

**KELLY ESCHBACH and ERIC ESCHBACH, wife
and husband and the marital community
comprised thereof,**

Plaintiffs,

vs.

**AMY GRIMM and JOHN DOE GRIMM, wife and
husband, and the marital community comprised
thereof,**

Defendants.

NO: 08-2-06863-3 KNT

**PLAINTIFFS' MOTION TO
STRIKE DEFENDANTS'
REQUEST FOR TRIAL DE NOVO
AND ALLOW JUDGMENT TO BE
ENTERED ON THE
ARBITRATION AWARD**

Plaintiffs Kelly and Eric Eschbach respectfully move the Court as follows:

I. RELIEF REQUESTED

Pursuant to MAR 7.1, Plaintiffs respectfully move the Court to enter an Order granting the following relief:

- (1) Striking Defendant's Request for Trial De Novo and reinstating the MAR arbitration award issued in this matter on December 22, 2008; and
- (2) Allowing Plaintiffs by subsequent motion to submit their claim for attorneys fees and costs pursuant to RCW 7.08.060 and MAR 7.3 when entering judgment upon the arbitration award.

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ORIGINAL

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II. STATEMENT OF UNDISPUTED FACTS

On February 25, 2005, Kelly Eschbach was rear-ended by the Defendant Amy Grimm. As a result of this collision, Ms Eschbach sustained injuries to her neck, shoulders, and upper back. Amy Grimm was insured by GEICO Insurance Company. Upon the filing of this lawsuit, Amy Grimm tendered her defense to GEICO who then assigned the law office of Mary E. Owen & Associates in Seattle to represent her at GEICO's expense. The case was transferred to the King County Superior Court mandatory arbitration department and a damage award was issued in Plaintiffs' favor following an arbitration hearing on December 19, 2008. Amy Grimm did not attend the arbitration hearing in person nor did she participate by telephone but she was represented by counsel Matthew Kennedy from the office of Mary E. Owen & Associates. The Arbitrator filed his decision with the court on December 23, 2008.

On January 7, 2009, GEICO staff counsel Matthew Kennedy filed a Request for Trial De Novo. The Request stated that, "Defendant GRIMM, requests a trial de novo from the award filed December 23, 2008." However, Defendant Grimm did not authorize her attorneys to file this Request on her behalf. Defendant Grimm admitted that she did not consent to the filing of an appeal when she was deposed on February 18, 2009, and gave the following testimony¹:

Q. Showing you what's been marked as Exhibit Number 3, this was a pleading filed by your attorney. It's called a request for trial de novo, which is another way of saying that you have appealed the decision by the arbitrator. Were you made aware of that?

A. Yes.

Q. And did they do that with your consent?

MR CROWLEY: Objection; calls for attorney-client-privileged discussions. I'm going to direct you not to respond to that.

THE WITNESS: Okay.

¹ Amy Grimm Deposition, p. 27, 13 – p. 28, 23.

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1 Q. What I want to know is: Did you consent? I'm not asking for any
2 conversation that you had with any attorneys. As we sit here today, was this
3 appeal filed with your consent?

4 A. I won't respond to that question. Do you want me to? What am I
5 supposed to say?

6 MR. CROWLEY: We can probably get you a response, if you'll give me a
7 second.

8 MR. DAVIS: No, I want it now, without a conference at this point. If
9 you're going to stand on your objection, fine. I'm not asking for anything that's
10 protected by attorney-client privilege. I'm simply asking her today, regardless of
11 input from others, whether this appeal was filed with her permission and consent.

12 MR. CROWLEY: Okay.

13 MR. DAVIS: So you can decide whether you're going to allow her to
14 answer the question or not.

15 MR. CROWLEY: And you would prefer that I not speak with her about
16 that issue?

17 MR. DAVIS: No. It was a question pending, and I want an answer.

18 MR. CROWLEY: Okay. Go ahead and respond.

19 A. No.

20 MR. DAVIS: Thank you.

21 III. ISSUE STATEMENTS

- 22 1. Whether the Request for Trial De Novo filed by Defendant Grimm's counsel should be
23 stricken and the Arbitration Award reinstated when:
- 24 a. The Request was filed by defense counsel hired by GEICO;
 - 25 b. The Request was filed without the permission or consent of Defendant Amy
Grimm; and
 - c. The Rules of Professional Conduct, Washington case law, and the Rules of Civil
Procedure require that a Request for Trial De Novo be authorized by the client.
2. Whether Plaintiffs should be awarded their post-arbitration legal fees and expenses
incurred in opposing the Request for Trial De Novo.

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IV. EVIDENCE RELIED UPON

In support of this motion, Plaintiffs rely upon:

1. Excerpts from the Deposition of Amy Grimm taken on February 18, 2009
2. Declaration of Mark W. Davis

V. ARGUMENT

A. THIS COURT SHOULD STRIKE THE REQUEST FOR TRIAL DE NOVO BECAUSE DEFENDANT GRIMM DID NOT AUTHORIZE OR CONSENT TO THE FILING OF THIS APPEAL.

1. Plaintiff has standing to raise this issue.

The prevailing party in a Mandatory Arbitration Award has standing to challenge the "aggrieved party's" compliance with the filing requirements of MAR 7.1(a). In this regard, a party has standing to raise an issue if it has a distinct and personal interest in the outcome of the case and can show it would benefit from the relief requested. *Bunting v. State*, 87 Wn.App. 647, 651 (1997); *Timberlane Homeowners Association v. Brame*, 79 Wn.App. 303, 307-308, *Review denied*, 129 Wn.2d. 1004 (1996); *Marriage of T*, 68 Wn.App. 329, 335 (1993). In this case, Plaintiffs' distinct and personal interest is in the damages award they received from the arbitrator. Similarly, Plaintiffs can clearly show that they would benefit from this Court striking the Defendants' Request for Trial De Novo and reinstating the arbitrator's award since such a result would secure the arbitrator's award and allow the Plaintiffs closure in this matter without incurring further litigation expenses.

2. The "Aggrieved Party," Amy Grimm, did not authorize or consent to the filing of the Request for Trial De Novo.

The Defendant's failure to comply with MAR 7.1 provides ample basis for this Court to dismiss the Request for Trial De Novo. MAR 7.1 requires strict compliance. *Vanerpol v. Schotzko*, 136 Wn. App. 504, (2007) (citing to *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815 (1997)). MAR 7.1(a) provides:

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1 (a) Service and Filing. Within 20 days after the arbitration award
2 is filed with the clerk, any aggrieved party not having waived the
3 right to appeal may serve and file with the clerk a written request
4 for a trial de novo in the superior court... [emphasis added]

5 This provision unambiguously requires a Request for Trial De Novo to be filed by an "aggrieved
6 party." Washington Courts have defined "aggrieved party" as one who is a party to the trial
7 court proceedings and whose property, pecuniary, or personal rights were directly and
8 substantially affected. *In re Hansen*, 24 Wn.App. 27, 35 (1979).

9 Non-aggrieved parties are not allowed to request a Trial De Novo under MAR 7.1(a).
10 *Wiley v. Rehak*, 143 Wn.2d 339, 347 (2001). A Request for Trial De Novo filed by a non-
11 aggrieved party is a nullity. *Id.* The *Wiley* case underscores the Washington Supreme Court's
12 insistence upon strict compliance with the "aggrieved party" requirement in this rule. In *Wiley*, a
13 Request for Trial De Novo was inadvertently filed in the name of a party who had been earlier
14 dismissed from the lawsuit. An attempt was made to amend the Request by adding the actual
15 aggrieved defendant after the 20-day period had expired. The Court refused to allow the
16 amendment stating:

17 This language indicates that the naming of the aggrieved party is
18 a mandatory requirement. The word "shall" is an unambiguous
19 term that generally imposes a mandatory duty." *Wiley* at 347.

20 *Wiley* establishes that only an actual party to the lawsuit can be an "aggrieved party" for
21 purposes of a Request for Trial De Novo. GEICO cannot be considered an "aggrieved party"
22 inasmuch as it has never been a party to the personal injury action brought by the Plaintiffs.
23 Only Defendant Grimm qualifies as an "aggrieved party" for purposes of MAR 7.1(a). As
24 Defendant Grimm has admitted that she did not authorize or consent to the filing of the Request
25 for Trial De Novo, no aggrieved party has satisfied the strict filing and service requirements of
MAR 7.1(a). Accordingly, the Request for Trial De Novo should be stricken.

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1 3. The Rules of Professional Conduct invest Defendant Grimm with the exclusive authority
2 to make decisions regarding "substantive rights." Defense counsel cannot validly
3 request a Trial De Novo without the client's express prior permission.

4 In filing the Request for Trial De Novo, Amy Grimm's counsel took action affecting her
5 substantive right to decide whether or not to appeal the arbitrator's decision without her consent.
6 RPC 1.2(a) precludes lawyers from acting without their client's authority:

7 A lawyer shall abide by a client's decisions concerning the
8 objectives of representation ... and shall consult with the client as
9 to the means by which they are to be pursued.

10 In interpreting an attorney's right to unilaterally run a case, the Courts have found that an
11 attorney may not waive, compromise, or bargain away a client's substantive rights² without the
12 client's authorization and consent. *Graves v. P.J. Taggers Company, 94 Wn.2d. 298 (1980).*

13 As stated in *Graves* at page 303:

14 [...] an attorney is without authority to surrender a substantial right
15 of a client unless special authority from his client has been
16 granted him to do so [...] [This rule] assures that clients will be
17 consulted on all important decisions if they so choose. [...] In
18 certain areas of legal representation not affecting the merits of the
19 cause or substantially prejudicing the rights of a client, a lawyer is
20 entitled to make decisions on his own. But otherwise the authority
21 to make decisions is *exclusively* that of the client ... [emphasis
22 added]

23 The rule requiring client authorization when making decisions impacting substantive
24 rights has been strictly enforced. In *Morgan*, an in-court settlement agreement was held to be
25 invalid because, although the agreement was made in the presence of the client, the attorney
did not have the client's informed consent to settle the matter. *Morgan v. Burks, 17 Wn.App.*
193 (1977).

Trial De Novo following arbitration is treated as an appeal. *Thomas – Kerr v. Brown, 114*
Wn.App. 554, 558 (2002) ("A trial de novo following arbitration is treated as an appeal."). The

² Some Courts refer to "substantive rights" and other Courts refer to "substantial rights." For purposes of this brief, we will adopt
"substantive rights."

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1 right to appeal is a "substantive right" and courts agree that a Request for Trial De Novo also
2 involves a substantive right. See, e.g., *Faraj v. Chulisie*, 125 Wn.App. 536, 542 (2004)
3 (*"Chulisie's right to a trial de novo was a substantive right"*).

4 Additionally, it is irrelevant that GEICO is paying Defendant Grimm's attorney's bills.
5 RPC 5.4(c) expressly prohibits defense counsel from allowing GEICO to influence his
6 professional judgment. Instead, defense counsel must exclusively represent the insured party,
7 Amy Grimm, rather than the insurer, GEICO.

8 It is clear in the case at bar that defense counsel overstepped an attorney's authority
9 with regard to one of Defendant Grimm's substantive rights, namely, her right as client to decide
10 whether to appeal the arbitrator's award. Such a decision, to be binding and enforceable, must
11 be specifically authorized by the client, not the entity paying the client's bills.

12 Further, any argument that Defendant Grimm appeared through her attorney when the
13 Request for Trial De Novo was filed is invalid. In *Trowbridge v. Walsh*, the defendants failed to
14 appear at the arbitration but their attorney was present. 51 Wn.App. 727, 730 (1988). The court
15 held that the defendants were allowed to request a trial de novo under MAR 7.1 because they
16 had participated through their attorney at the arbitration. *Id.* The circumstances here, however,
17 differ in two important respects.

18 First, the defendants in *Trowbridge* knew that there was an arbitration taking place; here,
19 Defendant Grimm had no idea that a Request for Trial De Novo was being filed on her behalf or
20 that it required her consent. Secondly, the attorney in *Trowbridge* did not act in any way that
21 impacted the defendants' substantive rights. Here, as explained above, by filing a Request for
22 Trial De Novo, Defendant Grimm's attorney made a unilateral decision to appeal the arbitrator's
23 decision, thus impacting Defendant Grimm's substantive rights.

1 Because Defendant Grimm did not consent to the filing of the Request for Trial De Novo,
2 and because the decision to appeal or to instead accept an arbitration award is a "substantive
3 right," the Request in this case is invalid and must be stricken.

4 4. The public policy underlying MAR 7.1 also mandates that this Request for Trial De Novo
5 be stricken.

6 By enacting the Mandatory Arbitration Program set forth in RCW 7.06, the Washington
7 Legislature intended to reduce court congestion and delays in hearing civil cases. *Nevers v.*
8 *Fireside*, 133 Wn.2d 804, 815 (1997). In recognition of those goals, the Washington Supreme
9 Court held that allowing substantial compliance, as opposed to strict compliance, with MAR 7.1
10 would subvert the Legislature's intent by contributing to increased delays. *Id.* Here, GEICO's
11 strategy is in direct opposition with the legislative intent behind the Mandatory Arbitration
12 Program.

13 GEICO had no intention of resolving this case in arbitration. Instead, GEICO and its
14 counsel sought to use the arbitration process to wear out the Plaintiffs with a dress rehearsal of
15 what would be the real performance in a trial de novo. Additionally, this would allow defense
16 counsel to get a fuller look at the Plaintiffs' case and its supporting evidence. This approach
17 subverts the legislative purpose behind the Mandatory Arbitration Program and thus forms yet
18 another basis for granting Plaintiffs' motion.

19 **B. PLAINTIFFS SHOULD BE AWARDED THEIR LEGAL FEES INCURRED**
20 **SUBSEQUENT TO THE FILING OF DEFENDANT'S TRIAL DE NOVO REQUEST**

21 Plaintiffs further request that this Court award them their legal fees and costs for the
22 period subsequent to the filing of GEICO's unauthorized Request for Trial De Novo pursuant to
23 RCW 7.06.060 and MAR 7.3. RCW 7.06.060 provides that "The superior court shall assess
24 costs and reasonable attorneys' fees against a party who appeals the award and fails to
25 improve his or her position on the trial de novo." MAR 7.3 contains the exact same directive.
Where a party's request for trial de novo does not proceed to trial because of a failure to comply

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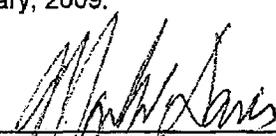
1 with MAR 7.1, the non-requesting party is entitled to recover his attorney's fees because the
2 appealing party failed to improve his position. *Wiley*, 143 Wn.2d at 348. Accordingly, the
3 Plaintiffs should recover their attorney's fees upon striking the improper Request for Trial De
4 Novo. An itemized summary of post-appeal attorneys' fees together with a Cost Bill will be
5 presented to the court in a subsequent motion to enter Judgment on the Arbitration Award.

6 **VI. CONCLUSION**

7 Defendant Grimm, not GEICO, is the only "aggrieved party" in this case as contemplated
8 under MAR 7.1(a). Defendant Grimm did not authorize or consent to the filing of the Request for
9 Trial de Novo. GEICO should not be allowed to force their insured, without her permission, to
10 submit to a jury trial by cavalierly rejecting an otherwise binding decision of a duly-appointed
11 arbitrator.³ Nor should GEICO be permitted to expose its insured to a potential judgment in
12 excess of her insurance policy limits without her express permission.⁴ It should not be surprising
13 that Amy Grimm did not give her consent to this appeal since she has nothing to gain and
14 everything to lose including her time away from her young children while attending a three to
15 four day jury trial fifty miles away from her home.

16 Accordingly, this Court should strike the Request for Trial De Novo, reinstate the
17 arbitrator's award, and allow Plaintiffs by subsequent motion to file their MAR 7.3 request for
18 attorneys fees and costs.

19 DATED this 27th day of February, 2009.

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21 
22 _____
23 Mark W. Davis, WSBA #11002
24 of CURRAN LAW FIRM, P.S.
25 Attorneys for Plaintiffs

24 ³ Amy Grimm does not even live in King County but instead resides in Thurston County.

25 ⁴ Plaintiffs are mindful of MAR 7.2(b)'s prohibition against disclosing the amount of an arbitration award prior to the conclusion of the trial de novo. Plaintiffs feel it is appropriate, however, to inform the court that the damages awarded by the arbitrator would consume more than 70% of Amy Grimm's insurance coverage. It is unknown whether Ms. Grimm was fully informed of her potential excess exposure prior to the filing of GEICO's Request for Trial De Novo.

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Counsel for ~~PLAINTIFF~~ shall promptly mail a copy of this order to all other counsel involved.

HONORABLE RICHARD F. McDERMOTT

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

KELLY ESCHBACH and ERIC ESCHBACH, wife and husband and the marital community comprised thereof,

Plaintiffs,

vs.

AMY GRIMM and JOHN DOE GRIMM, wife and husband, and the marital community comprised thereof,

Defendants.

NO. 08-2-06863-3 KNT

ORDER GRANTING PLAINTIFFS' MOTION TO STRIKE DEFENDANTS' REQUEST FOR TRIAL DE NOVO

THIS MATTER having come on regularly for hearing before the undersigned Judge of the above-entitled court without oral argument, on Plaintiff's Motion to Strike Defendant's Request for Trial De Novo and Allow Judgment to be Entered on the Arbitration Award, and the Court having read this motion, and having reviewed all pleadings and documents on file herein, now, therefore, it is hereby

It is hereby ORDERED:

1. Plaintiffs' motion to strike Defendants' Request for Trial De Novo and allow judgment to be entered on the mandatory arbitration award is GRANTED.

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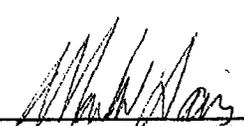


1 2. Plaintiffs' are further given leave to present by subsequent motion Judgment on the
2 Arbitration Award together with an application for costs and attorneys fees pursuant to
3 R.C.W. 4.84.010 and MAR 7.3.

4
5 DONE IN OPEN COURT this 13th day of March, 2009.

6 
7 HONORABLE RICHARD F. McDERMOTT
8

9 Presented By

10 
11 _____
12 Mark W. Davis, WSEA #11002
13 Of CURRAN LAW FIRM, P.S.
14 Attorney for Plaintiffs
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KING COUNTY
SUPERIOR COURT CLERK
E-FILED

CASE NUMBER: 07-2-39269-6 SEA

Honorable Mary Yu
Hearing Date: March __, 2010
Without Oral Argument

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

ROBERT RUSSELL, an individual,

Plaintiff,

vs.

DEBRA LYNN MAAS, Does 1 through 10, Roe
Companies XI through XX,

Defendants.

No. 07-2-39269-6 SEA

MOTION TO STRIKE DEFENDANT'S
REQUEST FOR TRIAL *DE NOVO*; TO
ALLOW JUDGMENT TO BE
ENTERED UPON MAR AWARD;
AND FOR SANCTIONS

Plaintiff Robert Russell respectfully move the Court as follows:

I. RELIEF REQUESTED

Pursuant to MAR 7.1, Plaintiff respectfully moves the Court to enter an Order
granting the following relief:

- (1) Striking Defendant's Request for Trial *de novo* and reinstating the MAR arbitration award issued in this matter on December 8, 2009; and
- (2) Allowing Plaintiff by subsequent motion to submit his claim for attorneys fees and costs pursuant to RCW 7.06.060 and MAR 7.3 when entering judgment upon the arbitration award.
- (3) Granting Plaintiff's Request for sanctions against defense counsel for improperly instructing his client to refuse to answer deposition questions.

MOTION TO STRIKE *DE NOVO* REQUEST - 1

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APP C

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II. STATEMENT OF FACTS

This is a personal injury case where plaintiff was injured on defendant's property.

While staying temporarily at the Maas residence, plaintiff Russell was, on February 1, 2005, helping out by doing some painting of the exterior of the Maas house. At one point on February 1, 2005, Russell was up on a ladder, painting the exterior, in an area next to a raspberry bush. While on the ladder, it became unstable and Russell began to fall into the bush.

Hidden in the bush was a piece of iron bar, several feet long and approximately 1 inch in diameter. The iron bar was being used to stake the raspberry bush. Russell fell onto the bar, sustaining a puncture wound to the back of his right upper thigh. *Declaration of Brian K. Boddy*, Exhibit 1.

Lawsuit was filed and the case was placed into MAR. On December 8, 2009, the MAR award, in favor of plaintiff, was filed by the arbitrator. On December 18, 2009, a Request for Trial *de novo* was filed by defendant's attorney. *Boddy Dec.*, Exh. 2.

Through the plaintiff, it became known to plaintiff's counsel that defendant Maas had not sought the trial *de novo*. As a result, defense counsel Brown was contacted and asked to withdraw the *de novo* request, or this motion would be filed. *Boddy Dec.*, Exh. 3. Mr. Brown did not withdraw the request, so plaintiff's counsel wrote and asked for a convenient date on which to take Ms. Maas' deposition. *Boddy Dec.*, Exh. 4. Mr. Brown responded by suggesting that a Declaration be drawn up for Ms. Maas' signature, instead of having her deposition taken. That Declaration was drafted by plaintiff's counsel, with Mr. Brown's assistance. *Boddy Dec.*, Exh. 5. Ms. Maas, however, ultimately decided not to sign the Declaration, and so her deposition was noted.

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At the deposition, every substantive question posed by plaintiff's counsel was objected to by Mr. Brown, who also instructed his client not to answer each of those questions based on attorney-client privilege. *Boddy Dec.*, Exh. 6. This motion results.

III. ISSUE STATEMENTS

1. Whether the Request for Trial *de novo* filed by Defendants counsel should be stricken and the Arbitration Award reinstated when:
 - a. The Request was filed by defense counsel hired by Allstate Insurance;
 - b. The Request was filed without the permission or consent of Defendant Debra Maas; and
 - c. The Rules of Professional Conduct, Washington case law, and the Rules of Civil Procedure require that a Request for Trial *de novo* be authorized by the client/"aggrieved party".
2. Whether Plaintiffs should be awarded their post-arbitration legal fees and expenses incurred in opposing the Request for Trial *de novo*.
3. Whether defense counsel's objections and instructions to his client not to answer deposition questions is sanctionable conduct.

IV. EVIDENCE RELIED UPON

In support of this motion, Plaintiffs rely upon:

1. Declaration of Brian K. Boddy, with Exhibits;
2. Records and files herein

V. AUTHORITY AND ARGUMENT

The *de novo* request in this case was filed against the wishes of defendant Debra Maas. It was done solely on the basis of her insurer's demands, and everybody involved in this case knows it. Because our court rules require that the "aggrieved party" request the trial *de novo*, the request in this case should be stricken.

1
2 **A. THIS COURT SHOULD STRIKE THE REQUEST FOR TRIAL DE NOVO**
3 **BECAUSE DEFENDANT MAAS DID NOT AUTHORIZE OR CONSENT TO**
4 **THE FILING.**

5 1. Plaintiff has standing to raise this issue.

6 The prevailing party in a Mandatory Arbitration Award has standing to challenge the
7 “aggrieved party’s” compliance with the filing requirements of MAR 7.1(a). In this regard,
8 a party has standing to raise an issue if it has a distinct and personal interest in the outcome
9 of the case and can show it would benefit from the relief requested. *Bunting v. State*, 87
10 Wn.App. 647, 651 (1997); *Timberlane Homeowners Association v. Brame*, 79 Wn.App. 303,
11 307-308 (rev. denied, 129 Wn.2d. 1004 (1996)); *Marriage of T*, 68 Wn.App. 329, 335
12 (1993).

13 In this case, Plaintiff’s distinct and personal interest is in the damages award he
14 received from the arbitrator. Similarly, Plaintiff can clearly show that he would benefit from
15 this Court striking the Defendant’s Request for Trial *de novo* and reinstating the arbitrator’s
16 award since such a result would secure the arbitrator’s award and allow the Plaintiff closure
17 in this matter without incurring further litigation expenses.

18 2. The “Aggrieved Party,” Debra Lynn Maas, did not authorize or consent to the
19 filing of the Request for Trial *de novo*.

20 The Defendant’s failure to comply with MAR 7.1 provides ample basis for this Court
21 to dismiss the Request for Trial *de novo*. MAR 7.1 requires strict compliance. *Vanerpol v.*
22 *Schotzko*, 136 Wn. App. 504, (2007) (citing *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815
23 (1997)). MAR 7.1 provides:

24 (a) Service and Filing. Within 20 days after the arbitration
25 award is filed with the clerk, **any aggrieved party** not having
26 waived the right to appeal may serve and file with the clerk a
27
28

1 written request for a trial *de novo* in the superior court...
2 [emphasis added]

3 This provision unambiguously requires a Request for Trial *de novo* to be filed by an
4 "aggrieved party." Washington Courts have defined "aggrieved party" as one who is a party
5 to the trial court proceedings and whose property, pecuniary, or personal rights were directly
6 and substantially affected. *In re Hansen*, 24 Wn.App. 27, 35 (1979).

8 Non-aggrieved parties are not allowed to request a Trial *de novo* under MAR 7.1(a).
9 *Wiley v. Rehak*, 143 Wn.2d 339, 347 (2001). A Request for Trial *de novo* filed by a non-
10 aggrieved party is a nullity. *Id.* The *Wiley* case underscores the Washington Supreme
11 Court's insistence upon strict compliance with the "aggrieved party" requirement.
12

13 In *Wiley*, a Request for Trial *de novo* was inadvertently filed in the name of a party
14 who had been earlier dismissed from the lawsuit. An attempt was made to amend the
15 Request by adding the actual aggrieved defendant after the 20-day period had expired. The
16 Court refused to allow the amendment stating:
17

18 This language indicates that the naming of the aggrieved party
19 is a mandatory requirement. The word "shall" is an
unambiguous term that generally imposes a mandatory duty.

20 *Wiley at 347.*

21 *Wiley* establishes that only an actual party to the lawsuit can be an "aggrieved party"
22 for purposes of a Request for Trial *de novo*. Allstate Insurance Company, Ms. Maas' insurer
23 and the one at whose insistence defendant's attorney filed the *de novo* request, cannot be
24 considered an "aggrieved party" inasmuch as it has never been a party to the personal injury
25 action brought by the Plaintiff. Only Defendant Maas qualifies as an "aggrieved party" for
26 purposes of MAR 7.1(a). Defense counsel will produce no evidence that Maas authorized or
27
28

1 consented to the filing of the Request for Trial *de novo*, in fact, his actions at her depositions
2 clearly reflect an intention to hide the true information -- that Allstate wanted this *de novo*,
3 defendant Maas did not. Accordingly, the Request for Trial *de novo* must be stricken.
4

- 5 3. The Rules of Professional Conduct invest Defendant Maas with the exclusive
6 authority to make decisions regarding "substantive rights." Defense counsel
7 cannot validly request a Trial *de novo* without the client's express prior
8 permission.

9 In filing the Request for Trial *de novo*, Maas's counsel took action affecting her
10 substantive right to decide whether or not to appeal the arbitrator's decision without her
11 consent. RPC 1.2(a) precludes lawyers from acting without their client's authority:

12 A lawyer shall abide by a client's decisions concerning the
13 objectives of representation ... and shall consult with the
14 client as to the means by which they are to be pursued.

15 In interpreting an attorney's right to unilaterally run a case, the Courts have found
16 that an attorney may not waive, compromise, or bargain away a client's substantive rights¹
17 without the client's authorization and consent. *Graves v. P.J. Taggers Company, 94 Wn.2d.*
18 *298 (1980).* As stated in *Graves* at page 303:

19 [...] an attorney is without authority to surrender a substantial
20 right of a client unless special authority from his client has
21 been granted him to do so [...] [This rule] assures that clients
22 will be consulted on all important decisions if they so choose.
23 [...] In certain areas of legal representation not affecting the
24 merits of the cause or substantially prejudicing the rights of a
25 client, a lawyer is entitled to make decisions on his own. But
26 otherwise the authority to make decisions is *exclusively* that of
27 the client ... [emphasis added]

28 ¹ Some Courts refer to "substantive rights" and other Courts refer to "substantial rights." For purposes of this brief, we will
29 adopt "substantive rights."

1 The rule requiring client authorization when making decisions impacting substantive
2 rights has been strictly enforced. In *Morgan*, an in-court settlement agreement was held to
3 be invalid because, although the agreement was made in the presence of the client, the
4 attorney did not have the client's informed consent to settle the matter. *Morgan v. Burks*, 17
5 Wn.App. 193 (1977).
6

7 Trial *de novo* following arbitration is treated as an appeal. *Thomas – Kerr v. Brown*,
8 114 Wn.App. 554, 558 (2002) (“A trial *de novo* following arbitration is treated as an
9 appeal.”). The right to appeal is a “substantive right” and courts agree that a Request for
10 Trial *de novo* also involves a substantive right. See, e.g., *Faraj v. Chulisie*, 125 Wn.App.
11 536, 542 (2004) (“*Chulisie's right to a trial de novo was a substantive right*”).
12

13 Additionally, it is irrelevant that Allstate is paying Defendant Maas's attorney's bills.
14 RPC 5.4(c) expressly prohibits defense counsel from allowing Allstate to influence his
15 professional judgment. Instead, defense counsel must exclusively represent the insured
16 party, Maas, rather than the insurer, Allstate.
17

18 It is clear in the case at bar that defense counsel overstepped an attorney's authority
19 with regard to one of Defendant Maas's substantive rights, namely, her right as client to
20 decide whether to appeal the arbitrator's award. Such a decision, to be binding and
21 enforceable, must be specifically authorized by the client, not the entity paying the client's
22 bills.
23

24 Further, any argument that Maas appeared through her attorney when the Request for
25 Trial *de novo* was filed is invalid. In *Trowbridge v. Walsh*, 51 Wn.App. 727, 730 (1988),
26 the defendants failed to appear at the arbitration but their attorney was present. The court
27
28

1 held that the defendants were allowed to request a trial *de novo* under MAR 7.1 because they
2 had participated through their attorney at the arbitration. *Id.*
3

4 The difference in our case is that the attorney in *Trowbridge* did not act in any way
5 that impacted the defendants' substantive rights. Here, as explained above, by filing a
6 Request for Trial *de novo*, Maas's attorney made a unilateral decision to appeal the
7 arbitrator's decision, thus impacting Defendant's substantive rights. That is not allowed.
8

9 Because Defendant Maas did not consent to the filing of the Request for Trial *de*
10 *novo*, and because the decision to appeal or to instead accept an arbitration award is a
11 "substantive right," the Request in this case is invalid and must be stricken.

12 4. The public policy underlying MAR 7.1 also mandates that this Request for
13 Trial *De novo* be stricken.

14 By enacting the Mandatory Arbitration Program set forth in RCW 7.06, the
15 Washington Legislature intended to reduce court congestion and delays in hearing civil
16 cases. *Nevers v. Fireside*, 133 Wn.2d 804, 815 (1997). In recognition of those goals, the
17 Washington Supreme Court held that allowing substantial compliance, as opposed to strict
18 compliance, with MAR 7.1 would subvert the Legislature's intent by contributing to
19 increased delays. *Id.* Here, Allstate's strategy is in direct opposition with the legislative
20 intent behind the Mandatory Arbitration Program.
21

22 Allstate likely had no intention of resolving this case in arbitration. Instead, Allstate
23 sought to use the arbitration process to wear out the Plaintiffs with a dress rehearsal of what
24 would be the real performance in a trial *de novo*. This would allow defense counsel to get a
25 complete look at the Plaintiffs' case and its supporting evidence. This approach subverts the
26
27
28

1 legislative purpose behind the Mandatory Arbitration Program and thus forms yet another
2 basis for granting Plaintiff's motion.
3

4 **B. PLAINTIFFS SHOULD BE AWARDED THEIR LEGAL FEES INCURRED**
5 **SUBSEQUENT TO THE FILING OF DEFENDANT'S TRIAL DE NOVO**
6 **REQUEST**

7 Plaintiff further requests that this Court award them their legal fees and costs for the
8 period subsequent to the filing of Allstate's unauthorized Request for Trial *de novo*,
9 pursuant to RCW 7.06.060 and MAR 7.3. RCW 7.06.060 provides that "The superior court
10 shall assess costs and reasonable attorneys' fees against a party who appeals the award and
11 fails to improve his or her position on the trial *de novo*." MAR 7.3 contains the exact same
12 directive.

13 Where a party's request for trial *de novo* does not proceed to trial because of a failure
14 to comply with MAR 7.1, the non-requesting party is entitled to recover his attorney's fees
15 because the appealing party failed to improve his position. *Wiley, supra*, 143 Wn.2d at 348.
16 Accordingly, the Plaintiffs should recover their attorney's fees upon striking the improper
17 Request for Trial *de novo*. An itemized summary of post-appeal attorneys' fees together
18 with a Cost Bill will be presented to the court in a subsequent motion to enter Judgment on
19 the Arbitration Award.
20
21

22 **C. DEFENSE COUNSEL'S OBJECTIONS AND INSTRUCTIONS NOT TO**
23 **ANSWER DEPOSITION QUESTIONS WERE IMPROPER BECAUSE THE**
24 **ATTORNEY-CLIENT COMMUNICATIONS AT ISSUE WERE NOT**
25 **INTENDED TO BE CONFIDENTIAL.**

26 Most attorneys and judges instinctively flinch when someone comes near an
27 attorney/client communication. Not all communications, however, are privileged. The
28

1 attorney-client privilege only applies to communications that are intended by the party to be
2 confidential. *Seattle Northwest Sec. Corp. v. Sdg Holding Co.*, 61 Wn. App. 725 (1991).
3

4 Furthermore, communications which an attorney must make public, or are made for
5 that purpose, are not confidential and not privileged. *Green v. Fuller*, 159 Wash. 691, 695,
6 (1930). Papers and documents are not privileged if a third party knows they exist, or the
7 contents are accessible to the public. *Id.*; *State v. Sullivan*, 60 Wn.2d 214, 217 (1962);
8 *Seattle Northwest Sec. Corp. supra*. Therefore, if the communication is intended to be
9 disclosed to others, it is not protected by the attorney-client privilege. *Sullivan, supra*, at
10 217-18.
11

12 In this case the communication at issue was expressly intended NOT to be kept
13 confidential. Where a trial *de novo* request is filed, the result of an attorney's consultation
14 and communication with a client is expressly intended to be made public -- in the form of
15 the *de novo* request itself. But in this case, Mr. Brown is trying to hide behind an un-
16 privileged communication to shield the underlying facts to emerge -- that Allstate wanted
17 this *de novo*, not Ms. Maas. The actions here are a violation of the RPC's cited above, and
18 also a violation of CR 30 in making objections and instructions not to answer deposition
19 questions.
20

21 Because of those violations, plaintiff is asking for \$1,000.00 in sanctions against Mr.
22 Brown. This request is not made lightly. Not only were the instructions not to answer made
23 improperly and relating to communications that were not privileged in the first place, but the
24 questions plaintiff's counsel posed at the deposition related solely to statements Mr. Brown
25 had previously had a hand in drafting. As shown in the attached emails between plaintiff's
26 counsel and Mr. Brown, the first attempt to get at the pertinent information was done
27
28

29 MOTION TO STRIKE *DE NOVO* REQUEST - 10

BODDY LAW FIRM
3724 Lake Washington Blvd
Kirkland, Washington 98033
425-893-8989 Telephone
425-893-8712 Fax

1 through a Declaration drafted by plaintiff's counsel for Ms. Maas, and reviewed by Mr.
2 Brown. *Boddy Dec.*, Exhibit 5.
3

4 Specifically, in an email on January 26, 2010, Mr. Brown reviewed the Declaration
5 and responded to the draft language as follows:

6 Brian,

7 Please take out "nor did I authorize him to do so" and I will forward it to my client.
8 The first part of the sentence says the same thing without setting forth a legal
9 conclusion. In fact, you have the same issue covered several other times also. You
10 have enough without the quoted phrase. If this creates an issue for you, please call
me to discuss, otherwise I will send the declaration as amended once you resend it. .

11 Thanks.

12 Mike

13 So, after helping draft the language of the Declaration on January 26th, less than
14 month later Mr. Brown refused to let his client address any of the factual statements that he
15 had helped draft. Thus, the deposition of Ms. Maas was a complete waste of time and
16 expense. Mr. Brown had indicated at no time prior to the deposition that there would be any
17 issues of privilege raised in the deposition.
18

19 Which brings us to the more technical reason that Mr. Brown should be sanctioned in
20 this case. Every one of the questions posed to Ms. Maas in her deposition had been
21 carefully framed to seek out only what her personal position was as to this *de novo*
22 request. Not a single question sought any communication between her and her attorney.
23 Every question sought only to discover what her personal intentions and desires were
24 relative to the *de novo* request. *Boddy Dec.*, Exhibit 6.
25
26

27 Objections by Mr. Brown and instructions not to answer these specific questions
28 were unquestionably improper and interposed for improper purposes. The questions clearly

1 had nothing to do with any attorney-client communication and, as is common knowledge,
2 the underlying facts are never privileged. *McCormick on Evidence*, §93.

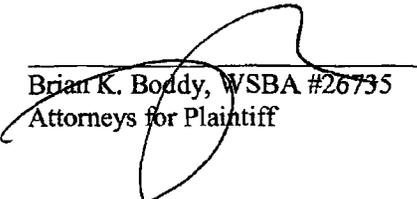
3
4 **VI. CONCLUSION**

5 Defendant Maas, not Allstate, is the only "aggrieved party" in this case as
6 contemplated under MAR 7.1(a). Maas did not authorize or consent to the filing of the
7 Request for Trial *de novo*. Allstate cannot be allowed to force their insured, without her
8 permission, to submit to a jury trial by cavalierly rejecting an otherwise binding decision of
9 a duly-appointed arbitrator.

10
11 Nor should Allstate be permitted to expose its insured to a potential judgment in
12 excess of her insurance policy limits without her express permission. It should not be
13 surprising that Maas did not give her consent to this appeal since she has nothing to gain and
14 everything to lose including her time away from her work and family while attending a three
15 to four day jury trial.

16
17 Accordingly, this Court should strike the Request for Trial *de novo*, reinstate the
18 arbitrator's award, and allow Plaintiffs by subsequent motion to file their MAR 7.3 request
19 for attorneys fees and costs. Mr. Brown, in addition, should be sanctioned the amount of
20 \$1,000.00 for improperly instructing his client not to answer at her deposition.

21
22
23 RESPECTFULLY SUBMITTED this 24th day of Feb., 2010.

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26 
27 Brian K. Boddy, WSBA #26735
28 Attorneys for Plaintiff

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Honorable Mary Yu
Hearing Date: March 12, 2010
Without Oral Argument

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

ROBERT RUSSELL, an individual,

Plaintiff,

No. 07-2-39269-6 SEA

vs.

DEBRA LYNN MAAS, Does 1 through 10, Roe
Companies XI through XX,

Defendants.

ORDER GRANTING PLAINTIFF'S
MOTION TO STRIKE DEFENDANT'S
REQUEST FOR TRIAL *de novo*; TO
ALLOW JUDGMENT TO BE
ENTERED UPON MAR AWARD;
AND FOR SANCTIONS

THIS MATTER having come on before the above-entitled Court upon motion by the
plaintiff and the Court being advised in the premises and having reviewed the following:

1. Plaintiff's Motion;
2. Declaration of Brian k. Boddy, with Exhibits;
3. Response Brief from defendant;
4. Reply Brief from plaintiff;
5. trial argument
6. The testimony of Ms. Maas



ORDER ON PLAINTIFF'S MOTION
TO STRIKE TRIAL *de novo* REQUEST - 1

BODDY LAW FIRM
3724 Lake Washington Blvd
Kirkland, Washington 98033
425-893-8989 Telephone
425-893-8712 Fax

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It is NOW, THEREFORE, ORDERED, ADJUGED AND DECREED that:

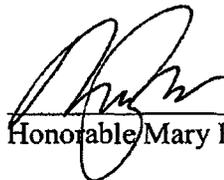
1. Plaintiff's Motion To Strike Defendant's Request for Trial *De Novo* is hereby GRANTED;

~~2. Plaintiff's Motion To Allow Judgment to be Entered upon MAR award and to seek attorney fees is hereby GRANTED, and~~ (M)

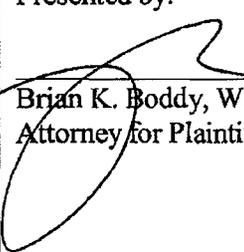
~~3. Plaintiff's Motion for Sanctions in the amount of \$1,000.00 is hereby GRANTED.~~ Denied (M)
(M)

DONE IN OPEN COURT this 26 day of March, 2010.

Mrs Mulvihill
Appeared by
phone (M)


Honorable Mary I. Yu

Presented by:


Brian K. Boddy, WSBA #26735
Attorney for Plaintiff


Mike Brown WSBA
14282

22 S.W.3d 331
Supreme Court of Texas.

In re USERS SYSTEM SERVICES, INC., USSI
Computer Services, Inc., and Ron Landreth, Relators.

No. 98-0806. Argued Feb. 10, 1999. Decided
June 24, 1999. Rehearing Overruled Sept. 23, 1999.

Computer companies and their principal sued former company president and other defendants for breach of contract, tortious interference with business relations, and other claims. After learning that plaintiffs' counsel met with president at president's request, other defendants moved for sanctions, requesting that plaintiffs' counsel be disqualified for violating professional responsibility anticontact rule. The 285th District Court, Bexar County, Pat Priest, J., denied motion. Defendants sought mandamus relief. The San Antonio Court of Appeals, 974 S.W.2d 97, conditionally granted writ. Thereafter, plaintiffs sought mandamus relief against Court of Appeals. The Supreme Court, Hecht, J., held that rules of professional responsibility did not preclude plaintiffs' attorney from meeting with the president at president's request.

Writ conditionally granted.

Baker, J., filed concurring opinion.

West Headnotes (5)

1 **Attorney and Client** — Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent

Rules of professional responsibility did not preclude plaintiffs' attorney from meeting with an opposing party at that party's request, even though party's attorney had not official withdrawn his appearance, where prior to meeting, party provided plaintiffs' attorney with letter stating that he was no longer represented by any attorney. State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App., Art. 10, § 9, Rules of Prof.Conduct, Rule 4.02.

2 Cases that cite this headnote

2 **Attorney and Client** — Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent

Rule of professional responsibility forbidding communication with a person a lawyer knows has legal counsel does not require an attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person. State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App., Art. 10, § 9, Rules of Prof.Conduct, Rule 4.02.

3 Cases that cite this headnote

3 **Attorney and Client** — Relations, Dealings, or Communications with Witness, Juror, Judge, or Opponent

Blanket rule that communication concerning litigation is not allowed if a party's former lawyer has not withdrawn his appearance is not required by rule of professional responsibility forbidding communication with a person a lawyer knows has legal counsel. State Bar Rules, V.T.C.A., Government Code Title 2, Subtitle G App., Art. 10, § 9, Rules of Prof.Conduct, Rule 4.02.

8 Cases that cite this headnote

4 **Mandamus** — Time to Sue, Limitations, and Laches

Mandamus relief, which is largely controlled by equitable principles, may be denied a party for lack of diligence.

12 Cases that cite this headnote

5 **Mandamus** — Time to Sue, Limitations, and Laches

A court need not afford mandamus relief to a dilatory party even if an opposing party does not assert lack of diligence as a ground for denying relief.

7 Cases that cite this headnote

Attorneys and Law Firms

*332 Luther H. Soules, III, Robinson C. Ramsey, Rebecca Simmons, Stephen B. Rogers, Brad L. Sklencar, San Antonio, for Relators.

Michael Lamoine Holland, Mark J. Cannan, San Antonio, for Respondent.

Opinion

Justice HECHT delivered the opinion of the Court, in which Chief Justice PHILLIPS, Justice ENOCH, Justice OWEN, Justice ABBOTT, Justice O'NEILL, and Justice GONZALES joined.

Rule 4.02(a) of the Texas Disciplinary Rules of Professional Conduct states:

In representing a client, a lawyer shall not communicate or cause or encourage another to communicate about the subject of the representation with a person, organization or entity of government the lawyer knows to be represented by another lawyer regarding that subject, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.¹

The issue in this original mandamus proceeding is whether a lawyer should be disqualified from continuing to represent a litigant in a civil case for meeting with an opposing party, at the party's request, if prior to the meeting the party stated that he was no longer represented by counsel, but his former attorney had not moved to withdraw from the case. A divided court of appeals, sitting en banc, conditionally granted mandamus relief directing the district court to order counsel disqualified in these circumstances.² We disagree and therefore direct the court of appeals not to issue its writ.

I

USSI Computer Services, Inc., Users System Services, Inc., and their principal, Ron Landreth, (collectively "USSI") sued USSI's former president, Donald Ray Frazier, two former vice presidents, Eugene M. McKeown and Sandra S. Shaffar, and a former customer, News America Publishing, Inc., in August 1993 for breach of contract, tortious interference with business relations, and other claims. (USSI has sued others not involved in the matter before us, and we do not include

them in referring to "the defendants".) USSI alleged that for years it had provided software systems and computer services to News America, but that after Frazier, McKeown, and Shaffar left USSI, the three went to work for News America and systematically began to destroy USSI's business relationship with News America. USSI was represented by lawyers at the firm of Akin, Gump, Strauss, Hauer & Feld, including Karen Gulde. Defendants were all represented by Mark Cannan.

In May 1995, nearly twenty-one months after suit was filed, Landreth telephoned Frazier to propose a meeting at Akin Gump's offices to discuss their differences *333 in the litigation. Frazier accepted. (Landreth also called Shaffar, but she refused to discuss the lawsuit with him.) At the meeting, Frazier presented Gulde with a letter referencing the pending litigation, which stated:

Dear Ms. Gulde:

This is to inform you that I desire to meet with you today to discuss the above-referenced lawsuit without the assistance of counsel. Prior to meeting with you, I decided to terminate my representation by Mark Cannan. Therefore, I hereby state that I am no longer represented by any attorney in this matter, and I do not desire to be represented by counsel in connection with my discussions with you, Ron Landreth, and any of the attorneys for Plaintiffs in this case.

Sincerely,

s/ Donald Ray Frazier

Based on this letter, Gulde agreed to participate in the discussions between Frazier and Landreth. During the meeting, Frazier gave Landreth a handwritten statement describing certain events leading up to News America's limiting its relationship with USSI. Landreth and Gulde did not reach a settlement with Frazier at the meeting, but later that day Gulde filed a nonsuit of all USSI's claims against him.

Neither Gulde nor Landreth ever attempted to contact Cannan—either before meeting with Frazier, or after nonsuiting him—to ask whether he was aware that Frazier had terminated his representation. In fact, Cannan did not know because Frazier had never spoken with him about the matter. Even when Cannan called Frazier about the nonsuit, Frazier did not tell him that he wanted to terminate their relationship. Thus, the court file reflects that Cannan was Frazier's counsel of record when the nonsuit was filed. Not until January 1996, while deposing Landreth, did Cannan learn of the May

meeting, Frazier's letter to Gulde, and Frazier's handwritten statement.

Cannan took no immediate action in response to Landreth's testimony. In June, USSI supplemented its interrogatory answers to identify Frazier as one of its expert witnesses. In July, Cannan again deposed Landreth, who reconfirmed his earlier testimony concerning his meeting with Frazier. Then, in August, a little more than four months before a January 1997 trial setting, defendants News America, McKeown, and Shaffar moved to sanction USSI by disqualifying the Akin Gump firm from representing USSI further, based on Gulde's violation of Rule 4.02(a). At the hearing on the motion, Cannan complained specifically that he had not been contacted before the meeting with Frazier. "Frankly," Cannan told the court, "we [he and Akin Gump] are in the same building. I rather suspect that if a phone call had been made and Frazier took the elevator for two or three floors to my office and told me, 'You're fired, I'm gonna go talk to these people,' everything would have been copacetic, I suppose...." At the conclusion of the hearing, the district court denied defendants' motion.

Defendants petitioned the Court of Appeals for the Fourth District of Texas for mandamus relief. A panel of the court issued an opinion conditionally granting a writ of mandamus. On rehearing en banc, the court issued a new opinion reaching the same conclusion, but over the dissent of three of the seven Justices.³ The court reasoned that the Landreth-Frazier meeting "at the law firm in the presence of a firm attorney can only be interpreted as an encouragement" of communications prohibited by Rule 4.02.⁴ The court was concerned that Frazier made the decision to defect to USSI's side of the lawsuit without benefit of counsel.⁵ The court was also troubled that Cannan's responsibilities as *334 counsel of record under Rules 8 and 10 of the Texas Rules of Civil Procedure could not be terminated by Frazier's letter to Gulde but only by notice to the trial court, which was not given, so that Cannan remained Frazier's counsel of record during the meeting with Landreth and Gulde.⁶ Relying principally on Formal Opinion 95-396 of the American Bar Association Committee on Ethics and Professional Responsibility,⁷ the court concluded that "the spirit of [Rule 4.02] requires the ethical lawyer to avoid such communications when in a litigation setting for as long as counsel for that other party has not officially withdrawn from representation."⁸ Deciding that Akin Gump's conduct had harmed not only the defendants but the legal profession by placing Cannan "in the untenable

position of attacking a former client and accusing opposing counsel of unethical behavior in front of a jury",⁹ the court held that mandamus relief was necessary to direct the district court to order Akin Gump disqualified from representing USSI.¹⁰ The dissent, stressing that Frazier had made his decision to terminate Cannan freely and had not complained that Landreth or Gulde had taken advantage of him, argued that Gulde did not violate Rule 4.02.¹¹

We granted USSI's petition for mandamus relief against the court of appeals and set the case for oral argument.¹²

II

As we said recently in *In re EPIC Holdings, Inc.*, "[w]e have repeatedly observed that '[t]he Texas Disciplinary Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, but they do provide guidelines and suggest the relevant considerations.'"¹³ Technical compliance with ethical rules might not foreclose disqualification, and by the same token, a violation of ethical rules might not require disqualification. Here, however, the parties and the lower courts have all focused the issue of whether Akin Gump should be disqualified from representing USSI on Rule 4.02; hence, so do we.

1 Rule 4.02 forbids a lawyer from communicating with another person only if the lawyer *knows* the person has legal counsel in the matter. Before meeting with Frazier, Gulde knew he was represented by Cannan, but after Frazier gave Gulde his letter, there is no evidence that Gulde knew Frazier was represented by anyone. Defendants do not argue that Gulde had any reason to disbelieve Frazier. The one possible ambiguity in Frazier's letter—that prior to the meeting he had "decided" to terminate Cannan's representation, not that he had actually done it—is resolved by his unequivocal statement in the letter, "I am no longer represented by any attorney in this matter, and I do not desire to be represented by counsel in connection with my discussions with you".

2 Having no reason to doubt Frazier's statement, Gulde was not required to call Cannan before talking with Frazier. Rule 4.02 does not require an attorney to contact a person's former attorney to confirm the person's statement that representation has been terminated before communicating with the person. Confirmation *335 may be necessary in some circumstances before an attorney can determine whether a person is no longer represented, but it is not required by Rule 4.02 in every situation, and for good reason. The attorney may

not be able to provide confirmation if, as in this case, he and his client have not communicated. And while a client should certainly be expected to communicate with his attorney about discontinuing representation, the client in some circumstances may have reasons for not doing so immediately. Frazier, for example, may not have wanted his co-defendants to know of his decision to meet with Landreth and Gulde for fear that they might try to dissuade or deter him. But whether he had a good reason or not, Frazier was not required to tell Cannan that their relationship was terminated before Gulde could meet with Frazier without violating Rule 4.02. A client can discharge an attorney at any time, with or without cause.¹⁴ Of course, a client's delay in telling his attorney that his representation has terminated may have other consequences. The client may be liable for work the lawyer continues to do for him, not realizing that his services have been terminated.¹⁵ The client may also be bound by the attorney's actions done in the good faith belief that he continued to represent the client.¹⁶

Nor is the client's right to terminate the relationship limited by the attorney's responsibilities to a court as counsel of record for the client. Rule 8 of the Texas Rules of Civil Procedure makes a party's "attorney in charge" "responsible for the suit as to such party",¹⁷ and Rule 10 specifies when and how counsel may withdraw.¹⁸ But neither rule speaks to the client's right to terminate the representation or requires that notice first be given to the court. On the other hand, the procedure prescribed by Rule 12 for requiring an attorney to show his authority to act for a party¹⁹ presupposes the possibility that an attorney can be counsel of record for a party he is not authorized to represent. The rules contemplate that authorization may not have existed or may cease before the attorney has withdrawn from the case.

3 None of the cases cited by the court of appeals support its conclusion that a communication with a person who has terminated his lawyer's services unbeknownst to that lawyer violates Rule 4.02, and defendants point us to no other cases. In each of the cases cited an attorney communicated with a party who was at the time represented by counsel. The only other authority offered for disqualification is Formal Opinion 95-396 of the American Bar Association Committee on Ethics and Professional Responsibility.²⁰ That opinion states the following rule:

When contact is initiated by a person who is known to have been represented by counsel in the matter but who declares

that the representation has been or will be terminated, the communicating lawyer should not proceed without *336 reasonable assurance that the representation has in fact been terminated[.]²¹

The opinion then explains:

Of course, any represented person retains the right to terminate the representation. In the event that such a termination has occurred, the communicating lawyer is free to communicate with, and to respond to communications from, the former represented person....

As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether she has been informed of the discharge. The communicating lawyer may also choose to inform the person that she does not wish to communicate further until he gets another lawyer.

There are some circumstances where the communicating lawyer may need to go beyond determining that the person has discharged her lawyer.... [I]f retained counsel has entered an appearance in a matter, whether civil or criminal, and remains counsel of record, with corresponding responsibilities, the communicating lawyer may not communicate with the person until the lawyer has withdrawn her appearance.²²

We agree, of course, that confirmation of termination of representation may be a "sensible course" in many instances, but that does not make it a prerequisite to communication in every instance under Rule 4.02. We disagree, for reasons already explained, that communication concerning litigation is not allowed if a party's former lawyer has not withdrawn his appearance. The ABA opinion cites authority for other statements but none for this one.

Accordingly, we conclude on the record before us that Akin Gump cannot be disqualified for violating Rule 4.02 because it did not violate that rule. Even if Akin Gump violated the "spirit" of the rule, as the court of appeals suggested,²³ Gulde's actions did not cause any prejudice that would require disqualification. The court of appeals reasoned that "confidential information has likely been disclosed to an opposing party".²⁴ The court may have had in mind that Frazier might have disclosed to Gulde information his co-

defendants could claim to be privileged. Although as we said in *In re Meador*, "there are situations where a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified, even though the lawyer was not involved in obtaining the information",²⁵ defendants have not met *Meador*'s requirements for showing this case to be such a situation. The court of appeals also reasoned:

should Frazier be permitted to testify on behalf of the plaintiffs at trial, the defense is placed in the untenable position of attacking a former client and accusing opposing counsel of unethical behavior in front of a jury. All of this will do harm to the legal profession in the eyes of the public and particularly in the eyes of those citizens performing their civic duty as members of the jury in this case.²⁶

But as long as Frazier chooses to align with USSI, the conflict with defendants cannot be avoided by disqualifying Akin Gump. And as we have already concluded, Akin Gump has not behaved unethically in *337 meeting with Frazier. In sum, the prejudice identified by the court of appeals either does not exist or is not grounds for disqualification. As Cannan told the district court, if only he had been told of Frazier's decision before the meeting, "everything would have been copacetic".

4 5 Finally, we note that defendants did not move to disqualify Akin Gump until almost seven months after they learned of the meeting between Frazier and Gulde. Mandamus relief, which is largely controlled by equitable principles, may be denied a party for lack of diligence.²⁷ In *Rivercenter Associates v. Rivera*, we held that a party's unexplained four-month delay in asserting its rights showed a lack of diligence that made mandamus relief unwarranted.²⁸ Cannan argues that he delayed in filing a motion to disqualify Akin Gump until after Landreth's deposition was reconvened because he did not want to accuse Akin Gump of unethical conduct before giving Landreth an opportunity to amend or augment his testimony about the meeting. USSI does not argue, and the district court did not find, that defendants were dilatory in moving to disqualify. A court need not afford mandamus relief to a dilatory party even if an opposing party does not assert lack of diligence as a ground for denying relief. But since Cannan has offered some explanation of the delay, and the record on the issue is unclear, we do not address the matter of diligence.

* * * * *

We conclude that the court of appeals abused its discretion in issuing its Order dated March 11, 1998, in Cause No. 04-96-00810-CV, conditionally granting writ of mandamus and directing the district court to withdraw its order denying defendants' motion for sanctions and to issue an order disqualifying Akin Gump from representing USSI. Given our conclusion, we are confident that the court of appeals will promptly vacate its order and deny News America relief. Our writ of mandamus will not issue unless that confidence proves misplaced.

Justice BAKER filed a concurring opinion.

Justice HANKINSON did not participate in the decision.

Justice BAKER, concurring.

I agree with the Court's conclusion that the trial court did not abuse its discretion, and that the Court should mandamus the court of appeals for holding to the contrary. However, I believe that News America's waiver is a more viable theory upon which the trial court could have based its decision. Here, the Court recognizes that we need not afford mandamus relief to a dilatory party, even if an opposing party does not assert lack of diligence as a ground for denying relief. But the Court decides not to consider waiver because "Cannan has offered some explanation of the delay, and the record on the issue is unclear...."

However, on the evidence presented, the trial court could have concluded that News America was dilatory and, under its discretionary authority, the trial court could have disregarded Cannan's explanation of the delay. Accordingly, I concur in the Court's judgment.

Disqualification is a severe remedy. See *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex.1990); *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex.1989). In considering a motion to disqualify, the trial court must adhere to an exacting standard to prevent a party from using a motion to disqualify as a dilatory trial tactic. See *338 *Spears*, 797 S.W.2d at 656; *Coker*, 765 S.W.2d at 399. One of the requirements of that exacting standard is that a party who does not file a motion to disqualify opposing counsel in a timely manner waives the complaint. See *Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex.1994); *Vaughan v. Walther*, 875 S.W.2d 690, 690 (Tex.1994); *HECI Exploration*

Co. v. Clajon Gas Co., 843 S.W.2d 622, 628 (Tex.App.-Austin 1992, writ denied).

In determining whether a party has waived a complaint, the reviewing court should consider the time period between when the conflict becomes apparent to the aggrieved party and when the aggrieved party moves to disqualify. See *Vaughan*, 875 S.W.2d at 690-91; *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex.App.-Waco 1995, orig. proceeding). A seven-month delay between the discovery of a potential disciplinary rule violation and the filing of a motion to disqualify based on that potential violation has been held untimely. See, e.g., *Vaughan*, 875 S.W.2d at 690 (six and one-half month delay untimely); see also *Enstar Petroleum Co. v. Mancias*, 773 S.W.2d 662, 664 (Tex.App.-San Antonio 1989, orig. proceeding)(a four-month delay untimely).

News America learned of Frazier's communication with Akin Gump on January 24, 1996. News America did not file its motion to disqualify until August 20, 1996, almost seven months later. The time lapse in this case supports a ruling based on waiver and such a ruling was within the trial court's discretion. See *Vaughan*, 875 S.W.2d at 690; *Enstar*, 773 S.W.2d at 664.

Here, the record supports the trial court's decision based on News America's waiver of its right to urge the disqualification because its motion was untimely. Accordingly, I believe the Court's judgment setting aside the court of appeals' order is appropriate. Therefore, I concur in the Court's judgment.

Parallel Citations

42 Tex. Sup. Ct. J. 836

Footnotes

- 1 TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a), *reprinted in* TEX. GOV'T CODE , tit. 2, subtit. G app. A (1998) (TEX. STATE BAR R. art. X, § 9).
- 2 *In re News America Publ'g, Inc.*, 974 S.W.2d 97 (Tex.App.-San Antonio 1998, orig. proceeding), and accompanying Order dated March 11, 1998, in Cause No. 04-96-00810-CV.
- 3 974 S.W.2d 97.
- 4 *Id.* at 101.
- 5 *Id.* at 104.
- 6 *Id.* at 104.
- 7 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).
- 8 974 S.W.2d at 101.
- 9 *Id.* at 105.
- 10 *Id.*
- 11 *Id.* at 106 (Green, J., dissenting).
- 12 42 TEX. SUP.CT. J. 160, 163 (Dec. 3, 1998).
- 13 *In re EPIC Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex.1998) (quoting *National Medical Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 132 (Tex.1996) (citing *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex.1995) (per curiam); *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex.1990); and *Ayres v. Canales*, 790 S.W.2d 554, 556 n. 2 (Tex.1990))).
- 14 *Hume v. Zuehl*, 119 S.W.2d 905, 907 (Tex.Civ.App.-San Antonio 1938, writ ref'd) (“[T]he client has the absolute right to discharge the attorney and terminate the relation at any time even without cause, no matter how arbitrary his action may seem”); see also TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15 cmt. 4 (“A client has the power to discharge a lawyer at any time, with or without cause....”).
- 15 See *Hume*, 119 S.W.2d at 907; see also TEX. DISCIPLINARY R. PROF'L CONDUCT 1.15 cmt. 4.
- 16 See *Biggs v. United States Fire Ins. Co.*, 611 S.W.2d 624 (Tex.1981) (holding that an agent acting within the scope of his apparent authority binds the principal as though the agent actually possessed such authority); see also RESTATEMENT (SECOND) OF AGENCY § 119 cmt. c (1958) (noting that revocation of the agent's authority is effective when the agent learns or has reason to know of the revocation).
- 17 TEX.R. CIV. P. 8.
- 18 TEX.R. CIV. P. 10.
- 19 TEX.R. CIV. P. 12.
- 20 ABA Comm. on Ethics and Professional Responsibility, Formal Op. 95-396 (1995).
- 21 *Id.* (initial uppercase letters omitted).
- 22 *Id.*

In re Users System Services, Inc., 22 S.W.3d 331 (1999)

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- 23 974 S.W.2d at 101.
- 24 *Id.* at 105.
- 25 968 S.W.2d 346, 351 (Tex.1998).
- 26 974 S.W.2d at 105.
- 27 *Rivercenter Assocs. v. Rivera*, 858 S.W.2d 366, 367 (Tex.1993).
- 28 *Id.*; see also *Vaughan v. Walther*, 875 S.W.2d 690, 691 (Tex.1994) (per curiam) (holding that a motion to disqualify was untimely when it was filed over six months after the grounds were known).

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DECLARATION OF SERVICE

I, the undersigned, certify under penalty of perjury under the laws of the State of Washington that on this day I caused to be delivered via legal messenger the foregoing **APPELLANT'S OPENING BRIEF** to the following parties:

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DATED this 23rd day of June, 2011.

LAW OFFICES OF MARK G. OLSON

A handwritten signature in cursive script, reading "Dianne Marlow", written over a horizontal line.

Dianne Marlow
Paralegal