67951-1

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No. 67951-1-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

VAHIT SAYLIK

Petitioner,

v.

DAVID WALKER and JANE DOE WALKER, husband and wife,

Respondents.

BRIEF OF RESPONDENTS

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I. PROCEDURAL HISTORY

On October 15, 2008, Saylik filed the present lawsuit against Walker arising from a minor vehicle-bicycle collision that occurred in a driveway on July 3, **2006**. (CP 253-256).

This appeal stems from a net mandatory arbitration award of August 2010 in favor of Petitioner ("Saylik") for approximately $300. Saylik was awarded $1,651.00 ($1,359.80 in medical specials were paid prior to litigation on behalf of plaintiff). Saylik filed a de novo appeal of the mandatory arbitration award.

Respondent ("Walker") submitted two separate notices of trial attendance for Saylik in January 2011 (CP 101) and again in October 2011 (CP 107).

Days before trial on October 30, 2011, Mr. Chabuk, counsel for Saylik, moved for a protective order in an effort to quash the previously filed Notices of Trial Attendance, indicating in a declaration that his client was unavailable for trial because Saylik was still residing in Turkey, while relying upon evidence in the record from 2010. Saylik also simultaneously moved the court to allow Saylik's deposition transcript to be read into the record as his case in chief. The *Motion for Protective Order* and request to allow Saylik's deposition to be entered in lieu of live trial testimony were both denied.

Due to Mr. Chabuk's October 30th declaration informing the court Saylik would not be attending trial (despite the notices of trial attendance), and the fact that Saylik was residing in Turkey at the time of trial, a *Motion for Bond Pursuant to RCW 4.84.210* was filed by Walker on November 1, 2011. (CP 161-170). The *Motion for Bond Pursuant to RCW 4.84.210* was responded to by Saylik, heard, and granted. Alleviating the timing of the motion, the trial court generously allowed Saylik ninety (90) days to comply with the order. Thereafter, the bond was undisputedly not paid within ninety (90) days of the order, despite Saylik's various attempts at an interlocutory appeals process. The case was dismissed for failure to comply with the trial court's order.

This interlocutory appeal[1] of the trial court's order requiring Plaintiff post a bond was deemed a discretionary appeal and was dismissed via the Appellate Court's Decision of February 8, 2012.

The Court of Appeals has allowed the originally filed discretionary appeal to proceed as a matter of right now that final judgment has been entered.

II. COUNTERSTATEMENT OF THE CASE

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[1] On November 21, 2011, Saylik filed a *Notice of Appeal of Plaintiff to Court of Appeals Division I* and *Notice for Motion* and *Motion and Declaration on the Merits*. On December 9, 2011, Commissioner Neel denied Saylik's *Motion and Declaration on the Merits* as procedurally improper. In the meantime, Saylik filed a *Motion for Discretionary Review* on December 5, 2011.

Saylik's *Complaint for Damages* pled that he was a resident of Snohomish County, Washington. In addition, Saylik responded in discovery in November 2008 that he was a resident of Bothell, WA and did not supplement that response. (CP 94).

On or about September 25, 2009, Appellant's counsel, Mr. Chabuk, declared in support for his request to continue the trial date that Saylik would remain overseas for "several months" declaring:

> Mr. Saylik had to travel to overseas and cannot be in this area for trial in October, 2009. Mr. Saylik used to live with his son in Everett, Washington. And his son had to go overseas on an extended medical leave from his employment. And the plaintiff Mr. Saylik had to follow his son to remain overseas ***for several months***. Therefore, Mr. Saylik respectfully requests a continuance of the trial until past February 2010.

(CP 94, Sub No. 10).

In January 2010, after three notices of deposition, a *Motion to Compel* plaintiff's deposition was filed. Mr. Chabuk indicated in correspondence that Saylik would be in Turkey for "several weeks" and a "couple months" and indicated he did not "yet" have a "definite return date." In Mr. Chabuk's Declaration in Response to the *Motion to Compel* discovery in January 2010, he states, "*Mr. Saylik had to travel to overseas for extended period of time and is not in good health*" and again referenced an "*extended medical leave*" of Saylik's son. (CP 223).

Saylik's deposition was finally taken via webcam while Saylik was in Turkey.

On January 11, 2010, Saylik was served with a *Notice of Trial Attendance for Plaintiff Vahit Saylik.* (CP 101).

The matter subsequently went to mandatory arbitration on August 13, 2010, with Appellant's testimony submitted via deposition transcript only. Saylik was assessed liability in the incident and was awarded a total amount of damage of $1,651 ($1,359.80 of which was previously paid medical bills). Saylik subsequently filed a *Request for Trial de Novo* of the $1,651 award.

Thereafter, communication from counsel made it unclear as to where Saylik was *permanently* residing until shortly before the November 8, 2011, trial date. On October 20, 2011, as the parties were readying for trial, counsel for Saylik informed Walker that Saylik was still in Turkey, did not intend to attend trial, and stated his intent to submit Saylik's deposition in lieu of live testimony. (CP 184-185). Counsel for Walker offered to stipulate to telephonic testimony, but the offer was refused. (CP 177, 181, 189, 198).

No evidence was provided from Saylik regarding his current whereabouts or extenuating circumstances that would affect his ability to testify telephonically, despite Walker's request to provide factual

background or information regarding any extenuating circumstances relating to Saylik's unavailability. (CP 189, 191)

On October 21, 2011, in response to this statement of intent and to eliminate any confusion relating to the Notice of Trial Attendance served prior to mandatory arbitration, counsel for Walker caused to be served on counsel for Saylik a second *Notice of Trial Attendance for Plaintiff Vahit Saylik.* (CP 107, CP 174).

In response to the ***second*** *Notice of Trial Attendance for Plaintiff Vahit Saylik* as well as Walkers' *Motions in Limine*, Saylik filed a *Motion for Protective Order re: Trial Attendance of Vahit Saylik; and for Sanctions* on October 31, 2011. This motion sought to quash the notice of trial attendance and allow testimony by deposition transcript alone. (CP 158-160). This motion was supported by sworn declaration of counsel and not by any sworn declaration from Saylik. No declarations from Saylik have been filed in support of the various motions for continuance or unavailability.

Mr. Chabuk confirmed in his *Declaration of Ahmet Chabuk in Support of Motion to Shorten Time; For Protective Order and for Sanctions* dated October 30, 2011 (CP 140), that Saylik was in Turkey and that for some unexplained reason it was an unreasonable hardship for him to provide telephonic testimony at the time of trial. (CP 142).

Much of the declaration discussed evidence of where Saylik had resided back in January of 2010, nearly two years prior to the trial date. This declaration was the first formal indication that Appellant refused to attend trial, even telephonically, as was offered by and agreeable to Respondent Walker.

At that point, it was confirmed that Saylik was residing out of the country at the time of trial and it also became apparent Walker had the potential to be determined the prevailing party and awarded attorneys' fees in the event Saylik did not testify. Walker would have no way of collecting a judgment for fees against an out of country plaintiff in the event Walker was ultimately determined to be the prevailing party.

Therefore, on November 1, 2011, Walker filed and served (via fax and e-mail, with subsequent service by mail) a *Motion for Bond Pursuant to RCW 4.84.210* seeking a bond in the amount of $7,500 should Saylik fail to better his position at trial so as to give rise to an award of attorneys' fees to Walker. (CP 161-170). At that point, the motion was warranted, given the potential for Walker to ultimately be determined to be a prevailing party and awarded attorneys' fees.

Both motions were heard on November 8, 2011, before Honorable George N. Bowden. At hearing, Judge Bowden denied Saylik's motion for a protective order, ruling that Saylik shall appear at

trial in person, telephonically, or via webcam. (CP 76). Judge Bowden granted Walkers' motion for a bond, setting a bond amount of $5,000 to be paid within 90 days or the matter would be dismissed. (CP 77). As a result of these rulings, the trial was continued to March 20, 2012.

Then, on March 13, 2012, the trial court ordered the Appellant's Complaint dismissed via Order of Dismissal because Appellant failed to post the bond as an out of county plaintiff pursuant to RCW 4.84.210 and RCW 4.84.230 within 90 days of the November 8, 2011 Order.

Thereafter, defendant moved for entry of Judgment as prevailing party pursuant to Mandatory Arbitration Rule 7.3 because the dismissal resulted in a failure by the Appellant to improve his position from the $1,651.00 arbitration award. (CP 49-70). The Court granted this order and judgment entered in favor of Walker as prevailing party. (CP 1-3)

III. COUTERSTATEMENT OF ISSUES.

1. Is it an abuse of discretion or legal error for a trial court judge to require a plaintiff residing outside the United States to appear telephonically or via webcam in a disputed liability case where two Notices of Trial Attendance have been served upon the plaintiff by the opposing party?

2. Is it an abuse of discretion or legal error for a trial court judge to require a plaintiff residing outside the United States to post a

$5,000 bond pursuant to RCW 4.84.210, allowing ninety days to do so, when the defendant has the potential to be ruled the prevailing party and thereby entitled to a judgment against plaintiff for attorneys' fees?

3. Is it an abuse of discretion or legal error for a trial court to dismiss an action after the party subjected to paying a bond pursuant to RCW 4.84.210 fails to do so in the reasonable 90 day time period allowed for payment of said bond?

4. Is it an abuse of discretion or legal error for a trial court to award prevailing party attorneys' fees pursuant to MAR 7.3 to the defendant when the plaintiff failed to improve his position at the trial court?

IV. LEGAL ARGUMENT

A. Standard of Review

As pled by Saylik, the trial court's granting of the motion for bond, granting Saylik's motion in limine regarding Saylik's trial attendance (via phone or webcam), and denial of Saylik's motion for protective order attempting to quash the notice of trial attendance are reviewed under an abuse of discretion standard.

The trial court abuses its discretion only when its decision is manifestly unreasonable, or based upon untenable grounds or reasons.[2]

A trial court's decision with respect to the application of judicial estoppel is reviewed for abuse of discretion.[3] "A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons."[4]

B. Trial Court Did not Abuse Discretion in Denial of Motion for Protective Order and Grant of Motion for Saylik's Trial Attendance Telephonically

A plaintiff in a personal injury case where liability is in dispute when two Notices of Trial Attendance have been served should not, as a matter of law, be entitled to submit only deposition testimony to the jury.

No legal authority was submitted for the proposition that a plaintiff who relocated out of the country was allowed to submit his discovery deposition pursuant to CR 32 in lieu of live trial attendance when Notices of Trial Attendance were provided. Washington cases involving CR 32(a)(3)(B) deal with witnesses, and primarily expert witnesses, not a party to an action upon which a Notice of Trial Attendance was served.

Exceptional circumstances do not exist that would justify presenting deposition testimony when oral testimony is available. Courts

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[2] *Kleyer v. Harborview Med. Ctr.*, 76 Wash.App. 542, 545, 887 P.2d 468 (1995) (superseded by statute on unrelated issue).

[3] *Arkison v. Ethan Allen, Inc.*, 160 Wash.2d 535, 538, 160 P.3d 13 (2007).

[4] *Noble v. Safe Harbor Family Pres. Trust*, 167 Wash.2d 11, 17, 216 P.3d 1007 (2009).

favor live testimony. Saylik has absented himself from these proceedings for an unknown reason and with no explanation of extenuating circumstances. This is not a basis under CR 32 to substitute his deposition testimony for in-person testimony.

Pursuant to CR 43, nonresident parties may be compelled to attend trial in state by service of a notice to attend on local counsel and the trial court has authority to enforce the notice to attend trial.[5] In vacating the trial court's order striking the notice of trial attendance, the court in *Campbell* holds under CR 43(f)(1) that nonresident parties may be "compelled" to attend trial by service of a notice to attend on local counsel.[6] The testimony of an adverse party was the primary issue in *Campbell* and the court held:[7]

> A party to an action or proceeding shall not be precluded from examining the adverse party as a witness at the trial. The testimony of a party at the trial may be rebutted by adverse testimony. If a party refuses to attend and testify at the trial, his complaint, answer or reply may be stricken out, and judgment taken against him, and he may also, in the discretion of the court, be proceeded against as in other cases of contempt; provided that this rule shall not be construed so as to compel any person to answer any question where such answer may tend to incriminate himself.

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[5] *Esparza v. Skyreach Equipment, Inc.* 103 Wash.App. 916, 15 P.3d 188, rev. den. 144 Wn.2d 1004 (2000) and *Campbell v. A. H. Robins Co., Inc.*, 32 Wash.App. 98, 645 P.2d 1138 (1982).

[6] *Campbell,* supra, at 106.

[7] 32 Wn.App 98, 104, 645 P.2d 1138 (1982).

When the proponent of the testimony and the deponent are the same, the proponent bears the burden of demonstrating to the trial court that the proponent has not procured his own absence from the trial.[8] The issue is whether a plaintiff residing far enough away so as to be unavailable under CR 32 "procures his own absence" when he chooses to voluntarily not appear for trial without any declaration or offer of proof as to meeting the criteria of CR 32(a)(3)(C) regarding age, illness or infirmity. No such proof or even explanation has been provided to justify Saylik's unavailability even by telephone at the time of trial (as opposed to January 2010).

The evidence presented by counsel deals with Saylik's residence and situation two years ago. Mr. Chabuk's declaration provided that Saylik is in Ankara, Turkey, but it lacked any showing of how he

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[8] *Clarendon Trust v. Dwek*, 970 F.2d 990, 36 Fed. R. Evid. Serv. 183, 23 Fed. R. Serv. 3d 740 (1st Cir. 1992). A party who procures his or her own absence from the trial by choosing to leave the country out of fear of being arrested as an illegal alien is not eligible to invoke the rule allowing for the admission of deposition testimony, particularly where the plaintiff makes scant effort to make other arrangements to appear temporarily for trial or to make him- or herself available for remote testimony. *Garcia-Martinez v. City and County of Denver,* 392 F.3d 1187, 66 Fed. R. Evid. Serv. 59 (10th Cir. 2004). It has been held that a trial court is allowed "a reasonable discretion" in determining whether the provisions of this rule have been satisfied, so as to allow the reading of a deposition. *Phelps Roofing Co. v. Johnson,* 368 S.W.2d 320 (Ky.1963). In this case, there was evidence that Mauney was in Japan and that he had been denied a visa to return to this country for the trial. We do not believe the trial judge abused his discretion in allowing the use of his pre-trial deposition.

obtained that personal knowledge or when it was obtained. There is no declaration in support of the contention that Saylik is otherwise unable to testify on his own behalf. The unavailability of the deponent is to be determined at the time his deposition is offered into evidence.[9] Federal courts, when applying the 100-mile limitation of FRCP 32(a)(3)(B), determine the proximity of the witness to the place of trial as of the time at which the deposition is offered, not two years prior.

Legal authority is contrary to the relief requested by Saylik. The trial court did not abuse its discretion to disallow the admission of the deposition into evidence under CR 32 in lieu of live testimony.[10] CR 32(a)(3) provides that when certain defined instances of unavailability exist, a trial court may admit a witness's deposition as a substitute for his testimony.[11]

In *Sutton v. Shufelberger*,[12] the court held that a party seeking to introduce the deposition of a witness is required to make a showing that due diligence was exercised in attempting to procure the attendance of

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[9] *Sutton v. Shufelberger*, 31 Wn.App. 579, 643 P.2d 920(1982), citing *Mills v. Dortch,* 142 N.J.Super. 410, 361 A.2d 606 (1976).

[10] *See Hammond v. Braden,* 16 Wash.App. 773, 776, 559 P.2d 1357 (1977).

[11] *Hammond,* 16 Wash.App. at 774-75, 559 P.2d 1357.

[12] 31 Wash.App. 579, 643 P.2d 920 (1982).

the witness at trial.[13] The court stated, "*In the absence of such a showing the refusal to permit the introduction of the deposition is not an abuse of discretion.*"[14] It also held that CR 32(a) "is predicated upon the unavailability of the deponent-witness to testify at trial."[15]

The factual support for such a contention is also lacking. No evidence was submitted from Saylik himself at the time of trial. In fact, since his deposition in January of 2010, nothing from Saylik via deposition, testimony, or supplementation to his discovery responses has been received.

The defense proposed an alternative agreement to in lieu of personal trial attendance to have Saylik testify telephonically to avoid the unduly burdensome travel from Turkey for his personal injury trial. Saylik's counsel refused it without any indication from his client why it was not feasible. The proffered agreement to allow plaintiff to testify telephonically to avoid the travel burden has been refused out of hand without explanation.

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[13] See also *Palfy v. Rice,* 473 P.2d 606 (Alaska 1970); 8 C. Wright & A. Miller, Federal Practice s 2146 (1970).

[14] *Sutton, supra,* at 585.

[15] Id., citing *Vannoy v. Pacific Power & Light Co.,* 59 Wash.2d 623, 369 P.2d 848 (1962).

In *Esparza v. Skyreach Equipment, Inc.*,[16] the court concluded that the trial court did not err in refusing to quash a Notice of Trial Attendance sent to the defendant's corporate president. In an attempt to show his trial attendance and travel from Alberta, Canada was not necessary and was burdensome, the witness himself submitted a declaration stating he had no personal knowledge regarding the incident in question. Despite this, the court ruled the trial court did not err. The court ruled that under CR 43 (f)(1), nonresident parties may be 'compelled' to attend trial in Washington by service of a notice to attend on local counsel."[17] The court in *Esparza* held that CR 43(f)(1) required a party to be examined at the instance of any adverse party and allowed the court to protect a party to allow testimony by phone or videotape subject to CR 32.[18] The appellate court upheld the trial court's requirement that the party attend trial, despite the claimed burden.[19]

The court discussed whether trial attendance required a showing of necessity based on the relevant information the witness could offer.

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[16] 103, Wn. App. 916, 15 .P.3d 188, rev. den. 144 Wn.2d 1004 (2000).
[17] Id, citing *Campbell v. A.H. Robins Co., Inc.*, 32 Wash.App. 98, 107, 645 P.2d 1138 (1982).
[18] *Esparza, supra,* at 922-23.
[19] Id.

In the case at hand, the party was a personal injury plaintiff in a disputed liability case. His testimony was necessary and Walker was entitled to cross examine him at trial.

The courts in Washington have held that under CR 43(f)(1), nonresident parties may be "compelled" to attend trial in Washington by service of a notice to attend on local counsel. This "compulsion" does not require service of a subpoena or involve the trial court in a direct exercise of the subpoena power over a nonresident. The "compulsory" power of a CR 43(f) notice to appear depends rather on the power of the court over the parties to the action, and the expectation that a party faced with sanctions will exercise its own power over its managing agents. A party is already subject to the jurisdiction of the court.

In conclusion, the trial court was legally and factually supported in its ruling to deny plaintiff's motion to quash the Notice of Trial Attendance and allow the plaintiff's deposition transcript to be read to the jury in lieu of the plaintiff's live testimony. No evidence was presented to justify Saylik's failure to participate in his own trial to justify application of CR 32(a)(3)(B) or (C).

C. Court's Grant of Motion for Bond Pursuant to RCW 4.84.210 Was Proper.

RCW 4.84.210 states, in part, "When a plaintiff in an action... resides out of the county...security for the costs and charges which may be awarded against such plaintiff may be required by the defendant." When so required by the court in an amount deemed sufficient security, the proceedings are stayed until the bond is filed with the clerk. The statute does not have a time frame or set forth any temporal limitations for when the request for bond can be brought.

In *White Coral Corporation v. Geyser Giant Clam Farms, LLC*,[20] the trial court's ruling requiring the bond and dismissing the action after the plaintiff failed to post the bond was upheld.

Saylik attempts to use a case from 1888 for the proposition that Walker waived his right to the bond. This case is not applicable to the factual circumstances contained in this matter because Walker did not learn until correspondence of October 20, 2011, and through declaration of counsel October 31, 2010, that his client was permanently residing outside the country at the time of trial, despite the residence as pled in the Complaint, Saylik's responses to discovery, and former declaration of counsel stating he had to "travel" to Turkey for an "extended" stay.

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[20] 145 Wn. App. 862 (2008).

The Motion for Bond was filed the *next day* after receiving reliable evidence in the form of counsel's declaration that Saylik resided out of the country at the time of trial.

As for the timing of the motion, a court may consider any motion on the day of the trial. Plaintiff did not ask for a continuance of the motion and responded to the motion. Saylik did not indicate to the court any prejudice as a result of the timing of the motion. In fact, Plaintiff's own motion for a protective order was heard on shortened time three court days prior to trial by agreement. Moreover, the declaration of service does indicate that the motion was faxed and e-mailed two days prior to the mailed copy. The trial court was within its discretion to hear the matter and rule. Walker had a year and ten months to bring a motion to quash the original Notice of Trial Attendance (dates January 11, 2010) and he failed to do so.

In *Bank of America, N.T. & S.A. v. Hubert,* the trial court denied a motion to amend a pleading made the day of a hearing on summary judgment motions made by both parties because of the "late point" at which the motion was made.[21] The Supreme Court held that the denial of the motion to amend was **not** an abuse of discretion on two alternative

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[21] *Bank of America, N.T.& S.A. v. Hubert,* 153 Wn.2d 102, 122, 101 P.3d 409 (2004).

grounds, first, that the motion was made on the day of hearing; and second, that it lacked a factual basis.[22]

Finally, to remedy any potential prejudice faced by the plaintiff, the judge allowed the trial date to be continued (rather than the plaintiff's Complaint stricken) so that he could make himself available to testify telephonically. The trial judge further allowed for an additional *ninety (90)* days for the bond to be posted. Thus, the allegation that Walker was not entitled his right to request a bond due to the delay in requesting it was effectively neutralized by allowing three months leave to comply with the trial court's ruling.

D. Conclusion

Judge Bowden affirmed the expectation that Saylik would be present (whether in person, telephonically, or by webcam) for direct and cross examination at his own personal injury trial where liability was disputed and notice of trial attendance was provided. Rather than imposing a harsher sanction of striking plaintiff's Complaint, which it had the authority to do for Saylik's failure to appear or participate at the time of trial, Judge Bowden did not abuse his discretion in allowing plaintiff to proceed pursuant to the notice via telephone or webcam. Saylik has at each step failed to put forward any evidence as to why a

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[22] *Id.* at 122, 101 P.3d 409.

telephonic appearance or appearance by webcam is prejudicial, arbitrary or capricious. This requirement was fair.

Likewise, the expectation that a plaintiff seeking trial de novo should post a bond where he has no ties to this country is also reasonable and fair. Noting that Saylik apparently had no ties left to this country and did not even intend to be present at his own personal injury trial, Walker sought a bond in order to cover their attorneys' fees in case Saylik failed to better his position from that obtained at arbitration. Judge Bowden followed RCW 4.84.210 in setting a bond amount where the trial was a de novo appeal triggering the potential for an award of attorneys' fees and allowing Saylik ninety (90) days to fulfill it. Judge Bowden further followed RCW 4.84.230 in dismissing the matter for failure to post the bond.

Such orders were justified, not outside the accepted and usual course of judicial proceedings, and were not legal error or abuse of discretion. Judge Bowden's orders in this matter should be affirmed.

V. NO BASIS FOR AWARD OF FEES TO SAYLIK; FEES AWARDED TO WALKER WERE PROPER

Saylik's request for attorneys' fees should be denied. Saylik requests fees based on the underlying trial court motions. He cites no basis for an award of fees. To the contrary, Walker has incurred

additional attorneys' fees and costs responding to Saylik's previous trial de novo where he failed to improve his position and improper interlocutory appeal.

At every step, counsel for Saylik has requested fees, costs, sanctions, and alleged Walker's exercise of filing motions that the court ultimately *granted* was an "abuse of process." Sanctions are not the appropriate result for serving a Notice of Trial Attendance upon a plaintiff in a personal injury matter without any knowledge of extenuating circumstances that would prevent the plaintiff from attending trial or testifying telephonically.

Walker was entitled to fees as the prevailing party due to Saylik's failure to improve upon the arbitration award. The court followed MAR 7.3 which requires that those costs and fees "shall" be assessed and awarded against a party who appeals the award and fails to improve the party's position on the trial de novo. Thus, Respondent Walker was entitled to an award of fees for costs and fees incurred after Appellant's filing of the request for trial de novo.[23] The attorneys' fees awarded by the trial court to Walker were proper and required by statute.

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[23] MAR 7.3. Please note that fees incurred as a result of Saylik's filing of the earlier interlocutory appeal were not requested at the hearing for fees and were not awarded. Only fees incurred at the trial court level proceedings were requested and awarded.

Fees and costs awarded were also sufficiently supported in the record by declaration of counsel. Evidence at the trial court supported the conclusion that the fees awarded were reasonable and necessary in terms of the number of hours spent, the type and category of work performed, the reasonable and customary hourly rate(s) charged (utilizing associate level rates) in Snohomish County for the type of work performed. The judgment and trial court's award of fees to Walker should also be affirmed.

VI. WALKER' REQUESTS ATTORNEYS' FEES ON APPEAL

Pursuant to MAR 7.3, RAP 18, Walker is now requesting fees incurred in the interlocutory appeal in addition to fees and costs incurred in the appeal as a matter of right in addition thereto. Walker is requesting that these fees be awarded and RAP 18.9, RCW 4.84.185 under a frivolous appeal standard.[24]

DATED this 13th day of November, 2012.

ANDERSON HUNTER LAW FIRM, P.S.

By _____
Megan Masonholder, WSBA #29495
Rebecca J. Guadamud, #39718
Attorneys for Respondents

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[24] *Delaney v. Canning*, 84 Wash.App. 498, 929 P.2d 475 (1997).

DECLARATION OF SERVICE/MAILING

State of Washington)
)
County of Snohomish)

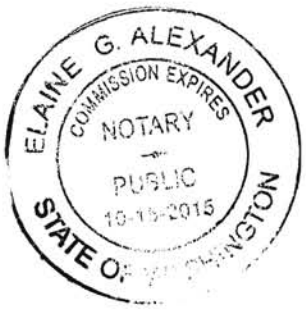
Linda Nelson, being first duly sworn, upon oath, deposes and says: That on the 14th day of November, 2012, I mailed a copy via U.S. mail, postage prepaid thereon, the BRIEF OF RESPONDENTS to attorney for Petitioner: Ahmet Chabuk, Attorney at Law, 11663 Ivy Lane NW, Silverdale, WA 98383; and on November 14, 2012, provided a copy of BRIEF OF RESPONDENTS to ABC Legal Messengers to be served/hand delivered to attorney for petitioner, Ahmet Chabuk, Attorney at Law, 11663 Ivy Lane NW, Silverdale, WA. on November 15, 2012.

On November 14, 2012, I also provided to ABC Legal Messengers, the original and copy of said BRIEF OF RESPONDENTS to be filed with the Court of Appeals, Division I, One Union Square Building, 600 University Street, Seattle, WA. 98101 on November 15, 2012.

Linda Nelson

Linda Nelson, Legal Assistant

Subscribed and sworn to before me this 14th day of November, 2012.



Elaine G. Alexander

Notary Public in and for the State of Washington, residing at: Arlington

Commission Expires: 10-15-15