FILED
Court of Appeals
Division II
State of Washington
5/2/2018 2:38 PM

No. 95801-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MARK IPPOLITO,

Appellant,

v.

LEAH HENDERSON and JOHN DOE
HENDERSON, husband and wife and their
marital community property,

Respondents.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable Susan Serko, Judge

PETITION FOR REVIEW OF MARK IPPOLITO

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I. IDENTITY OF PETITIONER

Plaintiff/Appellant Mark Ippolito seeks review of the Division II decision identified *infra*.

II. COURT OF APPEALS DECISION

The Plaintiff/Appellant seeks review of the decision of the Washington Court of Appeals, Division II, in *Ippolito v. Henderson,* -- Wn.App. --, -- P.3d -- (2018), which decision was published on April 3, 2018.

III. ISSUES PRESENTED FOR REVIEW

1. Is the Court of Appeals decision in *Thomas-Kerr*[1] applicable in the present matter given that the Plaintiff in *Thomas-Kerr* did not request a trial de novo following arbitration and that Court's opinion was based entirely upon MAR 6.3 which is not at issue in the present matter?
2. Is a Plaintiff who requests a trial de novo following arbitration permitted to, subsequently, nonsuit his case pursuant to CR 41(a)(1)(B) as indicated by prior opinions of the Washington Supreme Court and

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[1] ***Thomas-Kerr v. Brown*, 114 Wn.App. 554, 59 P.3d 120 (2002).**

the Washington Courts of Appeal?

IV. STATEMENT OF THE CASE

On January 28, 2014, Mark Ippolito was involved in a motor vehicle accident with Leah Henderson in Tacoma, Washington. Mr. Ippolito suffered bodily injuries as a result of this collision. CP 1-4

On September 12, 2014, Mr. Ippolito filed suit against Ms. Henderson in Pierce County Superior Court. CP 1-6

On January 23, 2015, Mr. Ippolito submitted the matter to mandatory arbitration as required by RCW 7.06 *et seq.* (Appendix #1)

On August 31, 2015, Mr. Ippolito timely filed and served a request for a trial *de novo* of the mandatory arbitration award. (Appendix #2)

On September 12, 2016, Mr. Ippolito timely filed and served a motion for voluntary nonsuit pursuant to CR 41(a)(1)(B). In support of this motion, Mr. Ippolito also referred the trial court to the Court of Appeals decision in *Walji v. Candyco*[2]. CP 7-8

On September 15, 2016, Ms. Henderson filed a Response to Mr. Ippolito's motion for nonsuit in which Ms. Henderson argued that Mr.

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[2] 57 Wn.App. 284, 787 P.2d 946 (1990).

Ippolito's pretrial motion for nonsuit should be denied pursuant to the Court of Appeals decision in *Thomas-Kerr* as follows:

> **Here, however, the plaintiff filed a *de novo* appeal following entry of an arbitration award in Defendant's favor. As Division I of our Court of Appeals has succinctly ruled in *Thomas-Kerr v. Brown*, 114 Wn.App. 554, 59 P.3d 120 (2002), plaintiff may no longer obtain a voluntary dismissal under CR 41.**
>
> CP 9-13

On September 16, 2016, Mr. Ippolito filed a Reply to Ms. Henderson's response in which Mr. Ippolito disputed Ms. Henderson's interpretation of the *Thomas-Kerr* decision. CP 14-18 In his response, Mr. Ippolito pointed out that in the *Thomas-Kerr* decision, defendant Brown had filed a request for trial *de novo* of an arbitration award, but plaintiff Thomas-Kerr had not requested a trial *de novo* of the award. CP 15-16 Mr. Ippolito's Reply brief further pointed out that the defendant in *Thomas-Kerr* (Brown) withdrew his request for trial *de novo* unilaterally prior to trial and the trial court then ordered that the arbitration award was final pursuant to MAR 6.3 because plaintiff Thomas-Kerr had not timely requested a trial *de novo* of the arbitration award. CP 15-16

On September 19, 2016, the trial court in the present matter denied Mr. Ippolito's motion for pretrial voluntary nonsuit pursuant to CR 41 (a)(1)(B)

and further ordered that Mr. Ippolito was required to either go to trial on September 21, 2016, or withdraw his request for trial *de novo*. CP 19

On September 21, 2016, a bench trial was held at which Mr. Ippolito rested without presenting evidence. CP 21

On October 21, 2016, the trial court herein signed Findings of Fact and Conclusions of Law in which the trial court held, *inter alia*, that "*Thomas-Kerr v. Brown*, 114 Wn.App. 554, 59 P.3d 120 (2002) controlled over CR 41(a)(1)(B) and that plaintiff's remedy was a withdrawal of his trial *de novo* request." CP 21

On November 3, 2016, Mr. Ippolito filed a Notice of Appeal herein of the trial court's denial of his Motion for Voluntary Nonsuit, and the subsequent judgment and award of fees and costs following trial. CP 25-34

On January 4, 2018, the Court of Appeals issued an opinion denying Mr. Ippolito's appeal and affirming the trial court's denial of his motion for voluntary dismissal.

In reaching this decision, the three-judge panel was divided in its analysis regarding the legal basis for the decision. Two of the judges (J.J. Johanson and Melnick) held that the issue was controlled by the ruling in *Thomas-Kerr*. However, the third judge (A.C.J. Maxa) held, in a concurring opinion, that *Thomas-Kerr* did not apply to the facts of the present matter.

Nonetheless, A.C.J. Maxa joined in the ruling based upon his *sua sponte* analysis of a legal argument which had not been raised by either Party.

V. ARGUMENT

A. THE SUPREME COURT SHOULD GRANT REVIEW PURSUANT TO RAP 13.4(b)(2) BECAUSE THE DIVISION II OPINION IN *IPPOLITO* IS IN DIRECT CONFLICT WITH THE SUPREME COURT OPINION IN *WILEY V. REHAK*[3] AND THE DIVISION I OPINIONS IN *WALJI V. CANDYCO* AND *NGUYEN V GLENDALE CONST. CO.* [4]

In the present matter, two of the Court of Appeals judges appear to have based their opinion almost entirely upon the Division I decision in *Thomas-Kerr*. However, as noted by A.C.J. Maxa in his concurring opinion, the ruling in *Thomas-Kerr* "has no application in this case".

The issue before the Court in *Thomas-Kerr* was whether a Plaintiff who had failed to request a trial *de novo* following arbitration was, thereafter, allowed to move for voluntary dismissal pursuant to CR 41(a).

The *Thomas-Kerr* Court held that a Plaintiff who has not filed a request for trial *de novo* following mandatory arbitration, is not thereafter allowed to move for voluntary dismissal pursuant to CR 41(a).

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[3] 143 Wn.2d 339, 20 P.3d 404 (2001).

[4] 56 Wn.App. 196, 782 P.2d 1110 (1989).

Although the Court's ruling in *Thomas-Kerr* was narrowly tailored to the specific facts of that case as referenced above, two of the Court of Appeals judges in the present matter have broadly interpreted that opinion as to prevent any plaintiff from obtaining a voluntary dismissal following arbitration, even where the plaintiff has timely requested a trial *de novo* following arbitration.

As noted by A.C.J. Maxa in his concurring opinion, this is an improper interpretation and application of the Court's opinion in *Thomas-Kerr*:

> **"Relying on MAR 6.3 makes no sense here, where Ippolito filed a request for trial de novo and did not withdraw it. Because the ruling in *Thomas-Kerr* was based on MAR 6.3, it has no application in this case."**

In the present matter, unlike the plaintiff in *Thomas-Kerr*, Mr. Ippolito filed a timely request for trial *de novo* of the arbitration award. Therefore, Mr. Ippolito was not subject to the limitations of MAR 6.3, entitled "Judgment on Award", which only applies when an arbitrator's award has resulted in a judgment.

In the Supreme Court decision in *Wiley v. Rehak*, the Washington Supreme Court noted that attorney fees may be awarded pursuant to MAR 7.3 where an appealing plaintiff voluntarily dismisses a de novo appeal prior

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to trial, as illustrated in the following excerpt from the *Wiley* opinion:

> **A supplemental goal of the mandatory arbitration statute is to discourage meritless appeals." *Perkins Coie*, at 84 Wash.App. at 737-38, 929 P.2d 1215. "That goal is reflected in RCW 7.6.060 and MAR 7.3, which require that attorney fees be assessed against a party who fails to improve [his or] her position as to an adverse party's claim at a trial de novo." *Id*, at 738, 929 P.2d 1215.**
>
> **A full trial need not occur and fees may be awarded following a summary judgment or voluntary dismissal, or when the appellant voluntarily withdraws the notice for a trial de novo. *Perkins Coie*, 84 Wash.App. at 743, 929 P.2d 1215.[5]**

Division I of the Washington Courts of Appeal has also repeatedly held that voluntary nonsuit is permitted following a request for trial de novo as noted in the following excerpt from that Court's opinion in *Walji*:

> **The court's recent decision in Nguyen v. Glendale Construction Co., Inc., is controlling. The award of attorney fees under MAR 7.3 after a voluntary nonsuit was affirmed as being within the discretion of the trial court.[6]**

The *Ippolito* matter is akin to the *Walji* case in which the Court noted that:

> **"There is no meaningful difference between withdrawing an**

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[5] ***Wiley*, at 348.**

[6] ***Walji*, at 289 (citing *Nguyen v. Glendale Construction Co., Inc.*, 56 Wn.App. 196, 782 P.2d 1110 (1989))**

appeal and taking a voluntary nonsuit."[7]

In *Walji*, the facts were set out by the Court as follows:

> **Plaintiff requested trial de novo after it lost mandatory arbitration. At trial de novo plaintiff took voluntary nonsuit, and the Superior Court, King County, Edward Heavy, J., entered judgment requiring plaintiff to pay attorneys fees to defendant.**[8]

In the present matter, as in *Walji*, Mr. Ippolito requested a trial *de novo* following mandatory arbitration. Then, as in *Walji*, Mr. Ippolito filed a motion for voluntary nonsuit pursuant to CR 41(a)(1)(B) prior to trial.

The trial court in *Walji* erroneously denied the plaintiff's motion for nonsuit under CR 41(a)(1)(B), but did allow the plaintiff to take a nonsuit under CR 41(a)(2). In making this ruling, the trial court in *Walji* opined that the plaintiff could not move for nonsuit pursuant to CR 41(a)(1)(B) after requesting a trial de novo of the arbitration award.

The Court of Appeals in *Walji* reversed the trial court holding that "a 'trial de novo' under the mandatory arbitration statute, RCW 7.06.050, is

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[7] ***Walji*, at 290 (citing *Nguyen v. Glendale Construction Co., Inc.*, 56 Wn.App. 196, 206-208, 782 P.2d 1110 (1989).**

[8] ***Walji*, at 284.**

conducted as if no arbitration had occurred."[9] Therefore, the Court of Appeals noted, the plaintiff had a right to a voluntary nonsuit pursuant to CR 41(a)(1)(B). However, the Court of Appeals in *Walji* found that the trial court's error was harmless because, despite its erroneous analysis, the trial had court awarded attorney fees based upon MAR 7.3 and not upon CR 41(a)(2).[10]

Finally, the Court in *Walji* specifically noted that the "award of attorney fees under MAR 7.3 after a voluntary nonsuit was within the discretion of the trial court" in the same way as an award of attorney fees following withdrawal of a request for trial *de novo*. Therefore, an award of attorney fees under MAR 7.3 applies equally to a motion for voluntary nonsuit following a request for trial de novo and a withdrawal of a request for trial de novo.

As the foregoing analysis illustrates, the Court of Appeals decision in *Ippolito* is in direct conflict with prior decisions of the Washington Supreme Court as well as Division I of the Washington Courts of Appeal.

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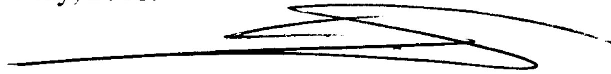
[9] **This analysis from the *Walji* decision is in direct conflict with the analysis of the concurring opinion in Ippolito in which A.C.J. Maxa opined that the arbitration is the "trial" and "the trial de novo is treated as an appeal".**

[10] ***Walji*, at 287.**

VI. CONCLUSION

Based on the foregoing, Petitioner respectfully requests that the Supreme Court accept review in this matter because Division II's opinion in *Ippolito* is in conflict with numerous prior opinions of the Washington Supreme Court and Division I of the Courts of Appeal.

DATED this 2nd day of May, 2018.



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VII. APPENDIX

1. Note for Arbitration w/Fee.
2. Request for Trial De Novo and Seal Award w/Fee.

Exhibit #1

Exhibit #1

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

January 23 2015 9:07 AM

KEVIN STOCK
COUNTY CLERK
NO: 14-2-12429-1

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

MARK IPPOLITO

Plaintiff(s),

vs.

LEAH HENDERSON

Defendant(s)

NO. 14-2-12429-1

NOTE FOR ARBITRATION

CASE CATEGORY:

☐ COL	Collection	☐ MAL	Other Malpractice	☐ TMV	Tort Motor Vehicle
☐ COM	Commercial	☐ MED	Medical Malpractice	☐ TTO	Tort Other
☐ CON	Construction/Real Estate	☒ PIN	Personal Injury	☐ Other	
☐ DIS	Family Law	☐ PRP	Property Damage		

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STATEMENT OF ARBITRABILITY

☒ This case is subject to arbitration because the sole relief sought is a money judgment and involves no claim in excess of Fifty Thousand Dollars ($50,000), exclusive of attorney fees, interest and costs.

☐ This case is not subject to mandatory arbitration because:
- ☐ Plaintiff's claim exceeds Fifty Thousand Dollars ($50,000).
- ☐ Plaintiff seeks relief other than a money judgment.
- ☐ Defendant's counter or cross claim exceeds Fifty Thousand Dollars ($50,000).
- ☐ Defendant's counter or cross claim seeks relief other than a money judgment.

☐ The undersigned contends that its claim exceeds Fifty Thousand Dollars ($50,000). But hereby waives any claim in excess of Fifty Thousand Dollars for the purpose of arbitration.

DATED: January 23, 2015

/s/ TYLER K. FIRKINS

Exhibit #2

Exhibit #2

E-FILED
IN COUNTY CLERK'S OFFICE
PIERCE COUNTY, WASHINGTON

August 31 2015 9:00 AM

KEVIN STOCK
COUNTY CLERK
NO: 14-2-12429-1

SUPERIOR COURT OF WASHINGTON FOR PIERCE COUNTY

IPPOLITO, MARK Plaintiff, vs. HENDERSON, LEAH Defendant.	No.: 14-2-12429-1 **REQUEST FOR TRIAL DE NOVO AND FOR SEALING OF ARBITRATION AWARD** ($RTDNSA)

PLEASE TAKE NOTICE that the aggrieved party IPPOLITO, MARK requests a Trial De Novo from the award filed on 8/21/2015.

1. A Trial De Novo is requested in this case pursuant to MAR 7.1 and PCLMAR7.1.
2. The Arbitration Award shall be sealed pursuant to MAR 7.2 and PCLMAR 7.2.
3. Pursuant to PCLMAR 7.1(a), a note for trial setting is being filed and served at the same time as the filing of this Request.

THE REQUEST FOR TRIAL DE NOVO SHALL NOT REFER TO THE AMOUNT OF THE AWARD.

Do not attach a copy of the award.

Dated: August 31, 2015

/s/ Jeffrey R Caffee
WSBA# 41774

WICKENS LAW GROUP, P.S.

May 02, 2018 - 2:38 PM

Transmittal Information

Filed with Court:	Court of Appeals Division II
Appellate Court Case Number:	49636-4
Appellate Court Case Title:	Mark Ippolito, Appellant v. Leah and John Doe Henderson, Respondents
Superior Court Case Number:	14-2-12429-1

The following documents have been uploaded:

- 496364_Petition_for_Review_20180502143339D2209118_6805.pdf
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602 YAKIMA AVE
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Filed
Washington State
Court of Appeals
Division Two

January 4, 2018

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

MARK IPPOLITO, an individual, Appellant, v. LEAH HENDERSON and JOHN DOE HENDERSON, husband and wife and their marital community comprised thereof, Respondents.	No. 49636-4-II UNPUBLISHED OPINION

JOHANSON, J. — We are asked to determine whether the trial court erred when it denied Mark Ippolito's CR 41(a)(1)(B) motion for voluntary dismissal of his requested trial de novo following a mandatory arbitration. Ippolito sued Leah Henderson and then submitted the case to mandatory arbitration. Following the arbitrator's award, Ippolito requested a trial de novo in the superior court and then moved for a CR 41(a)(1)(B) voluntary dismissal. The trial court denied Ippolito's motion under *Thomas-Kerr v. Brown*,[1] reasoning that Ippolito was foreclosed from obtaining a voluntary dismissal after arbitration. Ippolito appeals and argues that the trial court erroneously interpreted the law. We affirm the denial of Ippolito's CR 41(a)(1)(B) motion to voluntarily dismiss.

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[1] 114 Wn. App. 554, 59 P.3d 120 (2002).

FACTS

In September 2014, Ippolito sued Henderson, alleging that Henderson had caused a vehicle collision in which Ippolito was injured. Ippolito submitted the case to mandatory arbitration. *See* Pierce County Local Mandatory Arbitration Rule 1.2. The arbitrator entered an arbitration award in August 2015.

After the arbitrator's decision, Ippolito timely requested a trial de novo. Before trial, Ippolito moved for voluntary dismissal under CR 41(a)(1)(B) and requested that the trial court exercise its discretion to dismiss the action without prejudice or costs.

Henderson opposed Ippolito's dismissal request on the basis that a 2002 Division One opinion, *Thomas-Kerr*, barred a plaintiff from obtaining a voluntary dismissal under CR 41(a) after the entry of an arbitrator's award. The trial court agreed with Henderson that *Thomas-Kerr* controlled, denied Ippolito's motion for voluntary dismissal, and noted that Ippolito could withdraw his request for trial de novo if he wished.

The matter proceeded to a bench trial, at which Ippolito presented neither witnesses nor documentary evidence. Henderson moved for a directed verdict. The trial court found that Ippolito had failed to prove negligence and granted Henderson's motion and entered judgment in her favor. The trial court also awarded Henderson her attorney fees and costs. Ippolito appeals the denial of his motion for voluntary dismissal.[2]

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[2] Ippolito's notice of appeal lists the order denying his motion for voluntary dismissal and the judgment and written findings and conclusions following his bench trial. But Ippolito addresses only the denial of his motion for voluntary dismissal.

ANALYSIS

Ippolito argues that the trial court erred when it denied his CR 41(a)(1)(B) motion for voluntary dismissal because it misapplied the law when it relied upon *Thomas-Kerr*. We find no error.

I. LEGAL PRINCIPLES: CR 41 AND MANDATORY ARBITRATION RULES

Rulings on motions to dismiss under CR 41 are reviewed for a manifest abuse of discretion. *Thomas-Kerr*, 114 Wn. App. at 557.

The civil rules allow a plaintiff to have his case voluntarily dismissed. CR 41(a). CR 41(a)(1)(B) provides that "any action shall be dismissed by the court . . . [u]pon motion of the plaintiff at any time before plaintiff rests at the conclusion of plaintiff's opening case." The dismissal is without prejudice unless the trial court states otherwise in the order of dismissal. CR 41(a)(4).

Interpretation of the Mandatory Arbitration Rules (MARs) is a matter of law that we review de novo. *Thomas-Kerr*, 114 Wn. App. at 557. Once a case is assigned to an arbitrator, the MARs apply, rather than the civil rules, unless a MAR states otherwise. MAR 1.3(b)(1). At "any time *prior to the filing of an award*," "[t]he arbitrator shall have the power to dismiss an action, under the same conditions and with the same effect as set forth in CR 41(a)." MAR 1.3(b)(4) (emphasis added). After an arbitrator's award, a plaintiff may no longer obtain a voluntary dismissal under CR 41(a). *Thomas-Kerr*, 114 Wn. App. at 562.

Within 20 days of an arbitrator's award or determination of costs, "[a]ny aggrieved party not having waived the right to appeal may request a trial de novo in the superior court." MAR 7.1(a). But if no party seeks a trial de novo within the 20-day period, the arbitrator's award

becomes the final judgment and is not subject to appellate review or attack, except by a CR 60 motion to vacate. MAR 6.3. The primary purpose of mandatory arbitration rules is to promote the finality of disputes and to reduce court congestion and delays in hearing civil cases. *Wiley v. Rehak*, 143 Wn.2d 339, 347, 20 P.3d 404 (2001).

II. *THOMAS-KERR V. BROWN*

Thomas-Kerr addressed whether a plaintiff may obtain a voluntary dismissal under CR 41(a) following an arbitrator's award. *See* 114 Wn. App. at 562. There, the defendant, but not the plaintiff, requested a trial de novo following an arbitrator's award, and then the defendant withdrew his request. *Thomas-Kerr*, 114 Wn. App. at 556-57. The plaintiff requested, among other things,[3] that she be granted a voluntary nonsuit under CR 41(a). *Thomas-Kerr*, 114 Wn. App. at 557. The trial court denied the plaintiff's motion, and the plaintiff appealed. *Thomas-Kerr*, 114 Wn. App. at 557.

The appellate court affirmed, reasoning that MAR 1.3(b)(4) allowed a plaintiff to obtain a voluntary dismissal under CR 41(a) only until the arbitrator made an award. *Thomas-Kerr*, 114 Wn. App. at 562 & n.35. "[W]hile a case is assigned to an arbitrator, the plaintiff has the ability to withdraw under CR 41(a). However, once the arbitrator *makes an award*, the plaintiff no longer has the right to withdraw [under CR 41(a)] without permission." *Thomas-Kerr*, 114 Wn. App. at 562 (emphasis added). Accordingly, the appellate court rejected the plaintiff's argument "that she

[3] *Thomas-Kerr* also addressed the plaintiff's alternative argument that the defendant's withdrawal of his request for trial de novo deprived her of her right to a jury trial. 114 Wn. App. at 557. Division One disagreed with this argument, holding that the plaintiff's rights were not abridged because she chose not to appeal the arbitrator's decision by filing her own request for a trial de novo. *Thomas-Kerr*, 114 Wn. App. at 562.

should have been permitted to take a voluntary [dismissal] under CR 41(a)." *Thomas-Kerr*, 114 Wn. App. at 562.

III. The Trial Court Properly Denied Ippolito's Motion

When the trial court denied Ippolito's voluntary dismissal motion, it did so on the basis that *Thomas-Kerr* applied. We agree with the trial court that a plaintiff is not allowed to obtain a voluntary dismissal after an arbitrator's award.

Allowing Ippolito to obtain a voluntary dismissal under the circumstances would undermine the primary goals of mandatory arbitration and allow a plaintiff to circumvent an unfavorable arbitration award. Following the arbitrator's award, Ippolito had two options: allow the arbitrator's award to become the final judgment and move to vacate the judgment or attempt to obtain a more favorable outcome by requesting a trial de novo. *See* MAR 1.3(b)(4); MAR 7.1(a); MAR 6.3. Ippolito exercised the latter option and then sought a CR 41(a) voluntary dismissal without prejudice. Had the trial court granted Ippolito's request for voluntary dismissal, Ippolito could then have avoided the arbitrator's unfavorable award[4] and potentially restarted the entire process by filing a new lawsuit. This outcome would increase court congestion and delays in hearing civil cases, undermining the primary goals of the MARs. *See Wiley*, 143 Wn.2d at 347. The trial court's ruling promoted the purpose and plain language of the MARs.

Ippolito attempts to distinguish *Thomas-Kerr* on the basis that the holding applies only to plaintiffs who fail to request a trial de novo and not to plaintiffs such as Ippolito who request a trial de novo before moving for voluntary dismissal. Ippolito accurately recognizes that in

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[4] Although the arbitrator's award is not part of our record, only an "aggrieved party" may request a trial de novo. *See* MAR 7.1(a).

Thomas-Kerr, the plaintiff did not request a trial de novo. Rather, the defendant requested a trial de novo and then withdrew that request. *Thomas-Kerr*, 114 Wn. App. at 556-57. But Ippolito's identified distinction is unpersuasive as a reason not to apply *Thomas-Kerr*'s holding. As the *Thomas-Kerr* court reasoned, relying on MAR 1.3(b)(4), it is the filing of the arbitrator's award that prevents a plaintiff from obtaining a voluntary dismissal. 114 Wn. App. at 562 & n.35. This rationale applies regardless of whether the plaintiff requested a trial de novo. Thus, Ippolito provides no principled basis to depart from *Thomas-Kerr*'s holding.[5]

Ippolito also argues that pre-*Thomas-Kerr*, Division One opinions *Perkins Coie v. Williams*, 84 Wn. App. 733, 929 P.2d 1215 (1997), and *Nguyen v. Glendale Construction Co.*, 56 Wn. App. 196, 782 P.2d 1110 (1989), and the Supreme Court's opinion in *Wiley* hold that a plaintiff may obtain a voluntary dismissal following an arbitrator's award in mandatory arbitration. But in Ippolito's cited cases, the appellate court was not asked to resolve the question presented in *Thomas-Kerr*—whether the MARs foreclose a plaintiff from obtaining a voluntary dismissal following an arbitrator's award. *See Perkins Coie*, 84 Wn. App. at 743-44; *Nguyen*, 56 Wn. App. at 207.

Ippolito also relies on *Walji v. Candyco, Inc.*, where the appellate court "agree[d]" with a party that the party had a right to voluntary dismissal without terms until it rested its case in the trial de novo. 57 Wn. App. 284, 287, 787 P.2d 946 (1990). But *Walji* stated without any analysis that a voluntary dismissal was available following mandatory arbitration because its holding focused upon whether the dismissal should be with or without terms. 57 Wn. App. at 287.

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[5] We disagree with the concurrence that MAR 6.3 alone formed the basis for *Thomas-Kerr*'s decision.

In *Wiley*, our Supreme Court held that a plaintiff was entitled to attorney fees after an aggrieved defendant brought an unsuccessful, untimely trial de novo request. 143 Wn.2d at 342, 348. In holding that bringing an unsuccessful trial de novo request constituted failure to improve the party's position, *Wiley* mentioned that "fees may be awarded following a summary judgment *or voluntary dismissal*, or when the appellant voluntarily withdraws the notice for a trial de novo." 143 Wn.2d at 348. But *Wiley* did not involve a voluntary dismissal and did not analyze whether the MARs allowed a voluntary dismissal following an arbitrator's award. *Wiley*'s brief reference to a voluntary dismissal is dicta and not a persuasive reason to depart from *Thomas-Kerr*'s holding.

The trial court properly denied Ippolito's motion for voluntary dismissal under CR 41(a)(1)(B) following the entry of an arbitrator's award. Accordingly, we hold that the trial court did not abuse its discretion and affirm the trial court's ruling.[6] *See Thomas-Kerr*, 114 Wn. App. at 562.

III. ATTORNEY FEES ON APPEAL

Henderson requests "attorney fees and costs" on appeal under RAP 14.2. To obtain appellate attorney fees, a party must devote a section of her brief to the request and not merely make bald requests for attorney fees. RAP 18.1; *Hudson v. Hapner*, 170 Wn.2d 22, 33, 239 P.3d 579 (2010). Henderson provides no authority or argument to support her claim for attorney fees on appeal. Therefore, we decline to award attorney fees on appeal.[7]

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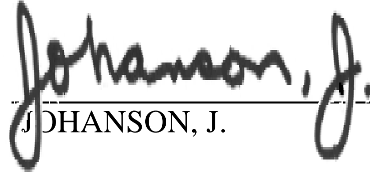
[6] Unlike the concurrence, we confine our analysis to the issues raised and briefed by the parties.

[7] Henderson's request for costs should be directed to the commissioner or court clerk. RAP 14.2 ("A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.").

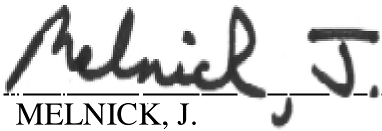
We affirm.

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



JOHANSON, J.

I concur:



MELNICK, J.

MAXA, A.C.J. (concurring) – I agree that a plaintiff cannot obtain a voluntary dismissal of a lawsuit without prejudice under CR 41(a)(1)(B) after an arbitrator has made an award in mandatory arbitration. I write separately because I disagree that *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), applies under the facts of this case.[8]

A. *THOMAS-KERR* RULING

In *Thomas-Kerr*, the *defendant* filed a request for trial de novo following an arbitration award. 114 Wn. App. at 556. The defendant then filed a notice withdrawing the trial de novo request, and the plaintiff requested a voluntary dismissal without prejudice under CR 41(a). *Id.* at 556-57. The appellate court rejected the plaintiff's argument that she was entitled to a voluntary dismissal after the defendant withdrew his request for trial de novo. *Id.* at 562.

The basis for the court's ruling was MAR 6.3. *Id*. at 562-63. The court stated, "*MAR 6.3* does not allow a plaintiff to nonsuit a case following a decision by the arbitrator." *Id.* at 563 (emphasis added). MAR 6.3 deals with entry of judgment if neither party files a request for trial de novo. In *Thomas-Kerr*, the defendant initially filed a de novo request but then withdrew it. 114 Wn. App. at 556-57. Therefore, the court's holding must have been that once a request for trial de novo is withdrawn, the case must be treated as if nobody had filed a de novo request. In that event, the trial court must enter judgment on the arbitration award under MAR 6.3 and a voluntary nonsuit would not be available.

[8] I recognize that Henderson does not make the argument I present below, and that we normally do not make arguments for the parties. However, we should address this argument because it is necessary to correctly state the law.

Relying on MAR 6.3 makes no sense here, where Ippolito filed a request for trial de novo and did not withdraw it. Because the ruling in *Thomas-Kerr* was based on MAR 6.3, it has no application in this case.

B. CR 41(a)(1)(B) ANALYSIS

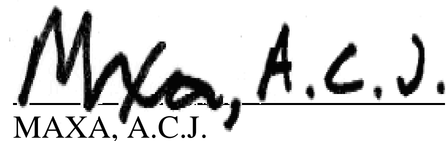
Instead of relying on *Thomas-Kerr*, I would rely on the language of CR 41(a)(1)(B). That rule states that a plaintiff can obtain a voluntary nonsuit "at any time before plaintiff rests at the conclusion of plaintiff's opening case." CR 41(a)(1)(B). The question is what constitutes the "conclusion of plaintiff's opening case" when a case has been submitted to mandatory arbitration.

The Supreme Court considered a similar issue in *Williams v. Tilaye*, 174 Wn.2d 57, 272 P.3d 235 (2012). The court addressed RCW 4.84.250-.280, which allow a party to recover attorney fees in actions involving $10,000 or less when the result at trial is better than that party's settlement offer. *Williams*, 174 Wn.2d at 61-62. To invoke the statutory provisions, the party must have made the settlement offer at least 10 days before "trial." RCW 4.84.280. The court stated that in mandatory arbitration, the arbitration hearing is treated as the original "trial" and the trial de novo is treated as an appeal. *Williams*, 174 Wn.2d at 68; *see also Thomas-Kerr*, 114 Wn. App. at 558 (stating that "[a] trial de novo following arbitration is treated as an appeal"). Therefore, the court in *Williams* held that the "trial" referenced in RCW 4.84.280 is the arbitration hearing, not the trial de novo. 174 Wn.2d at 68-69.

The same rule should apply for purposes of CR 41(a). Because a mandatory arbitration hearing is the "original trial" and the trial de novo is an appeal, the "conclusion of plaintiff's opening case" referenced in CR 41(a)(1)(B) necessarily refers to the plaintiff's presentation of

evidence *at the arbitration hearing*. In other words, a plaintiff is entitled to mandatory voluntary dismissal in the arbitration context only before the conclusion of the plaintiff's opening case at the arbitration hearing. Significantly, MAR 1.3(b)(4) authorizes an arbitrator to dismiss an action under the same conditions as set forth in CR 41(a) before an arbitration award is entered.

Applying this rule here, Ippolito did not file a motion for voluntary dismissal before the conclusion of his opening case in the arbitration hearing. Therefore, he was not entitled to voluntary dismissal under CR 41(a)(1)(B). As a result, the trial court properly denied Ippolito's motion, albeit for the wrong reason. Because we can affirm on any ground, I agree with the majority that we should affirm the trial court's ruling.



MAXA, A.C.J.