NOTICE: SLIP OPINION
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The opinion that begins on the next page is a slip opinion. Slip opinions are the written opinions that are originally filed by the court.

A slip opinion is not necessarily the court's final written decision. Slip opinions can be changed by subsequent court orders. For example, a court may issue an order making substantive changes to a slip opinion or publishing for precedential purposes a previously "unpublished" opinion. Additionally, nonsubstantive edits (for style, grammar, citation, format, punctuation, etc.) are made before the opinions that have precedential value are published in the official reports of court decisions: the Washington Reports 2d and the Washington Appellate Reports. An opinion in the official reports replaces the slip opinion as the official opinion of the court.

The slip opinion that begins on the next page is for a published opinion, and it has since been revised for publication in the printed official reports. The official text of the court's opinion is found in the advance sheets and the bound volumes of the official reports. Also, an electronic version (intended to mirror the language found in the official reports) of the revised opinion can be found, free of charge, at this website: https://www.lexisnexis.com/clients/wareports.

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Filed
Washington State
Court of Appeals
Division Two

April 3, 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 ORDER PUBLISHING OPINION

WHEREAS, Respondents have moved to publish the opinion filed on January 4, 2018, it is now

ORDERED, that the final paragraph, reading "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 pursuant to RCW 2.06.040, it is so ordered." is deleted. It is further

ORDERED, that the opinion will be published.

FOR THE COURT

PANEL: Jj. Johanson, Maxa, Melnick

Johanson, J.

JOHANSON, J.

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.

[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]

[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

[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.

[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

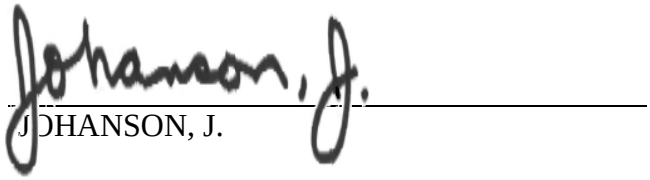
Henderson requests "attorney fees and costs" on appeal under RAP 14.2. To obtain appellate attorney fees, a party must devote a section of her brief to the request and not merely make bald requests for attorney fees. RAP 18.1; *Hudson v. Hapner*, 170 Wn.2d 22, 33, 239 P.3d 579 (2010). Henderson provides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

[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.").

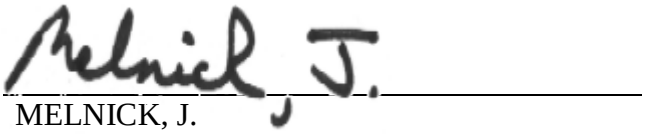
We affirm.

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.

MAXA, A.C.J.