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COURT OF APPEALS, DIVISION 1
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON
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AMY GRIMM, et ux., Appellants

v.

KELLY ESCHBACH, et ux., Respondents

BRIEF OF APPELLANTS

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A. Introduction

Defendant/Appellant Amy Grimm appeals the trial court's order striking her request for a trial de novo.

B. Assignments of Error

1. Assignments of Error

- a. The trial court abused its discretion when it struck Amy Grimm's request for trial de novo.

2. Issues Pertaining to Assignments of Error

- a. Amy Grimm has a fundamental right to a trial by jury, requesting a trial de novo protects that right.
- b. Amy Grimm's attorney has a duty to act in her best interests and to protect her substantive rights.
- c. The trial court erred by employing the incorrect standard for Kelly Eschbach's motion.

C. Statement of the Case

This matter was originally filed in the Superior Court of the State of Washington in the County of King on February 22, 2008. The underlying action stems from a motor vehicle accident which occurred when a vehicle driven by Amy Grimm struck the rear of a vehicle driven by Kelly Eschbach.

On December 19, 2008, the parties arbitrated this matter under the King County MAR procedures. Amy Grimm did not dispute liability and therefore did not personally attend the MAR hearing, but she was represented by her attorney, Matthew M. Kennedy. (CP 1-3)

The arbitrator issued his award on December 22, 2008, and on January 7, 2009, Amy Grimm requested a trial de novo. (CP 1-3)

On February 18, 2009, Amy Grimm's deposition was taken by counsel for Kelly Eschbach, Mark Davis. Paul Crowley, an associate of Amy Grimm's attorney defended the deposition. At the deposition, the following colloquy occurred:

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 you have appealed the decision by the arbitrator. Were you made aware of that?

A. Yes.

Q. And did they do that with you consent?

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

THE WITNESS: Okay.

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

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

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

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

MR. CROWLEY: Okay.

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

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

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

MR. CROWLEY: Okay. Go ahead and respond.

A. No.

MR. DAVIS: Thank you. (CP 22-23)

On February 27, 2009, Kelly Eschbach moved to strike Amy Grimm's request for trial de novo. (CP 21-31) Kelly Eschbach's motion was based upon MAR 7.1 et seq. As part of her Response to Kelly Eschbach's motion to strike, Amy Grimm reviewed and signed a declaration indicating that she never objected to the appeal of the arbitration award. (CP 34-40). After briefing by both parties, but without oral argument, the trial court struck Amy Grimm's request for trial de novo on March 13, 2009 formally disposing of this matter. (CP 48-49)

On April 7, 2009, Amy Grimm filed her notice of appeal of the court's order striking her request for a trial de novo. (CP 61-65)

D. Summary of Argument

The two issues on appeal are 1) whether Amy Grimm's attorney acted in her best interests by protecting her fundamental right to a jury trial, and 2) factually whether or not Amy Grimm gave her permission to her attorney to file a request for a trial de novo.

E. Argument

1. Amy Grimm has a fundamental right to a trial by jury, requesting a trial de novo protects that right.

Amy Grimm, pursuant to the Washington State Constitution, has a fundamental right to a trial by jury in a civil matter. Wash.Cons. Art. 1, Section 21. The Legislature recognized and reinforced this right when setting up the MAR process by enacting the portion of the law stating that “[n]o provision of this chapter may be construed to abridge the right to trial by jury.” RCW 7.06.070.

Washington Courts have further upheld a jury trial in a civil matter as a substantive right. Specifically, even following an arbitration, a request for a trial de novo is a “substantive right”.

Faraj v. Chulisie, 125 Wn.App. 536 (2004), and Thomas-Kerr v. Brown, 114 Wn.App. 554 (2002).

The MAR rules do not supersede the Washington State Constitution. The Legislature understood this when they specifically enacted RCW 7.06.070. And the courts have upheld this premise. See Faraj and Thomas-Kerr supra. Therefore, denying Amy Grimm a jury trial was an abuse of the trial court's discretion as it deprived her of her substantive rights.

2. Amy Grimm's attorney has a duty to act in her best interests and to protect her substantive rights.

The Rules of Professional Conduct require attorneys to act in the best interest of their clients. Specifically, RPC 1.4 provides in part that “[a] lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation.”

In filing the request for a trial de novo, Amy Grimm's attorney took action protecting her substantive right to a trial by jury. The courts have found that an attorney may not waive, compromise, or bargain away a client's substantive rights without the client's authorization or consent. Graves v. P.J. Taggers Company, 94 Wn.2d 298 (1980). The Supreme Court in Graves held that

... 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.

Because a right to a jury trial is a substantive right, it seems axiomatic that an attorney could *not accept* an arbitration award without his client's specific consent, and that requesting a trial de novo protects his client's substantive rights. For example, in the matter of Morgan v. Burks, 17 Wn.App. 193 (1977), the court invalidated a settlement because the client did not give the attorney permission to settle the matter.

Denying Amy Grimm her substantive right to a civil jury trial was an abuse of discretion.

3. The trial court erred by employing the incorrect standard for Kelly Eschbach's motion.

Subsequent to her deposition, Amy Grimm reviewed and signed a declaration indicating that she consulted with her attorney and ultimately decided to proceed to a jury trial. (CP 39-40). Her declaration alone should have sufficed to deny Kelly Eschbach's motion to strike.

A motion to strike a request for trial de novo is a dispositive motion. Dispositive motions, including Summary Judgment, are heard in the light most favorable to the non-moving

party, and are granted only where there is no genuine issue as to material fact. Scott v. Pacific West Mountain Resort, 119 Wn.2d 484, 834 P.2d 6 (1992). In this case, considering the difference between the deposition testimony and her signed declaration, there clearly existed an issue of material fact with regards to whether or not Amy Grimm consented to a request for trial de novo.

It is the duty of the court to consider all evidence and all reasonable inferences therefrom in the light most favorable to the non-moving party. Fancher Cattle Co. v. Cascade Packing Inc., 26 Wash. App. 407, 613 P.2d 178 (1980). In the present case, the trial court erred when it reviewed the facts in a manner not consistent with the standard of review. However, as indicated above, whether Amy Grimm explicitly authorized her attorney to request a trial de novo is irrelevant in light of her fundamental rights to a trial by jury, which her attorney sought to protect.

F. Conclusion

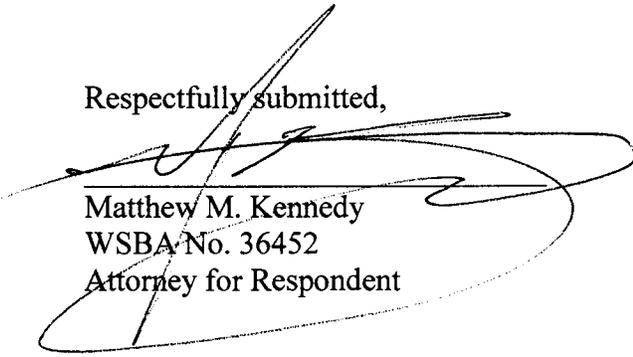
Amy Grimm has a fundamental right to a jury trial under the Washington State Constitution, and was deprived of this right by the trial court. Whether or not Amy Grimm gave explicit permission to protect her rights is irrelevant in light of the fact, that her attorney would have been powerless to accept the arbitration award in the absence of explicit

approval to do so. Because an attorney cannot terminate litigation absent his client's approval, the only option is to protect his client's substantive rights.

Amy Grimm hereby requests the Appellate Court reinstate her trial de novo and remand to the Superior Court for a jury trial, with specific orders to issue a new case scheduling order.

June 27, 2009

Respectfully submitted,



Matthew M. Kennedy
WSBA No. 36452
Attorney for Respondent

CERTIFICATE OF SERVICE

I am employed in the County of King, State of Washington. I am over the age of eighteen and not a party to the within action. My business address is 600 University Street, Suite 400, Seattle, Washington 98101.

On June 29th, 2009, I served the foregoing documents on the interested parties in this action by depositing a true copy with a messenger and/or placing it for collection, mailing, and deposit with the United States Postal Service following ordinary business practices, addressed as follows:

1. Brief of Appellants

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I am readily aware that the business practice for collection and processing of correspondence for mailing with the United States Postal Service and that the correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

I declare that I am employed in the office of a member of the bar of this Court at whose direction that service was made. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed this 29th day of June, 2009, in Seattle, Washington.


Kathryn E. La Madrid

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