

63274-4

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NO. 63274-4-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

AMY GRIMM, et ux.,

Appellants,

v.

KELLY ESCHBACH, et ux.,

Respondents.

BRIEF OF RESPONDENTS

ON APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF WASHINGTON FOR KING COUNTY

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I. RESPONDENTS' STATEMENT OF THE CASE

A. Introduction

Respondents Kelly and Eric Eschbach (collectively "Eschbach") respectfully request this Court to affirm the trial court's order striking Appellant Amy Grimm's request for a trial de novo following an arbitration hearing. Counsel for Grimm filed the request without her consent. Thus, the pertinent requirements for requesting a trial de novo were not met, and the trial court correctly struck the request.

B. Issues Presented

- 1. Whether the trial court erred in striking the request for a trial de novo when the aggrieved party did not consent to filing the request.**
- 2. Whether Eschbach is entitled to attorneys fees on appeal.**

C. Facts

On February 25, 2005, Kelly Eschbach was rear-ended by Amy Grimm, and sustained injuries to her neck, shoulders, and upper back. Clerk's Papers ("CP") 22. Grimm was insured by GEICO Insurance Company. *Id.* When Eschbach filed this lawsuit, Grimm tendered her defense to GEICO, who then assigned counsel to represent her at GEICO's expense. *Id.* The case was transferred to the King County Superior Court mandatory arbitration

department. *Id.* Grimm did not attend the arbitration hearing in person, nor did she participate by telephone, but she was represented by counsel. *Id.*; CP 12. The arbitrator issued an award for Eschbach, and filed his decision with the court on December 23, 2008. CP 1.

On January 7, 2009, counsel for Grimm filed a request for trial de novo. CP 6. But Grimm did not authorize her attorney to file this request on her behalf. She testified to her lack of consent in her deposition, taken on February 18, 2009, as follows:

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

A. Yes.

Q. And did they do that with your consent?

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

THE WITNESS: Okay.

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 17-18.

On February 30, 2009, Eschbach moved to strike the request for a trial de novo. CP 21. In her response, Grimm attached a declaration in which she testified, in relevant part, as follows:

Prior to the filing of, what I now know to be a "request for trial de novo", [sic] I consulted with my attorney; we discussed the pros and cons and ultimately decided to proceed with a jury trial.

At no time, [sic] did I object to this course of action or request that my attorney take no action so as to allow the arbitration award to stand.

...

... I never objected to appeal the arbitration award.

CP 40. The trial court granted Eschbach's motion to strike, and allowed judgment to be entered on the arbitration award. CP 58.

Grimm now appeals.

II. ARGUMENT

A. **The trial court did not err in striking Grimm's request for a trial de novo because Grimm did not authorize the filing of the request.**

1. The decision to appeal the arbitrator's award belonged to Grimm alone, not to her attorney.

The trial court correctly struck the request for a trial de novo because Grimm's counsel filed it without her consent. Without such authorization, counsel's action resulted in a request being filed by someone other than the party aggrieved by the arbitration award. MAR 7.1, Washington case law, and the Rules of Professional Conduct do not permit this.

An appellate court reviews *de novo* the application of the mandatory arbitration rules to a particular set of facts. *Pulich v. Dame*, 99 Wn.App. 558, 561, 991 P.2d 712 (2000). Under MAR 7.1(a), "any aggrieved party not having waived the right to appeal" may request a trial de novo within 20 days after the arbitrator files the award. An "aggrieved party" is a party to the proceedings "whose property, pecuniary, or personal rights were directly and substantially affected by the lower court's judgment." *In re Welfare of*

Hansen, 24 Wn.App. 27, 35, 599 P.2d 1304 (1979). Here, Grimm, not her insurer, is the party aggrieved by the arbitration award. GEICO has never been a party to the personal injury action brought by Eschbach and therefore could not file the appeal without the consent of its insured.

Trial courts strictly comply with MAR 7.1 “to effectuate the Legislature’s intent to relieve congested dockets and reduce delays in hearing civil cases.” *Pulich*, 99 Wn.App. at 563. Indeed, trial courts will not deviate from such strict compliance to accommodate mistakes, the errors of others, or even an attorney’s injuries. *See Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001)(request named incorrect party due to a scrivener’s error); *Pybas v. Paolino*, 73 Wn.App. 393, 869 P.2d 427 (1994) (legal messenger mistakenly filed request after the 20-day filing period); *State on Behalf of JMH v. Hofer*, 86 Wn.App. 497, 942 P.2d 979 (1997)(request was untimely due to attorney’s head injury).

Here, counsel for the aggrieved party, Grimm, filed the request for a trial de novo without Grimm’s consent or authorization. A trial de novo following arbitration is treated as an appeal. *Thomas – Kerr v. Brown*, 114 Wn.App. 554, 558, 59 P.3d 120 (2002). An attorney may not file an appeal without his client’s consent. *In re Disciplinary Proceeding Against Marshall*, 160 Wn.2d 317, 338-39, 157 P.3d 859 (2007)(Washington Supreme Court

suspends attorney's license for, among other things, filing an appeal of an order dismissing some of his clients' claims without their agreement or authorization). Indeed, the client has a fundamental right "to reject or accept the advice of the attorney." *In re Welfare of Parzino*, 22 Wn.App. 88, 90, 587 P.2d 201 (1978)(this court dismisses appeal filed by attorney in client's absence). Thus, Grimm's right to accept or reject her counsel's advice regarding the decision to request a trial de novo was hers alone; her attorney could not decide that question on his own.

Moreover, it is well-settled that, while an attorney may, on his own, make decisions that do not affect the merits of the case or substantially prejudice his client's rights, the authority to make all other decisions "is exclusively that of the client[.]" *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 304, 616 P.2d 1223 (1980) (quoting former Washington Code of Professional Responsibility 7-7 (1972)). The current Rules of Professional Conduct similarly require an attorney to "abide by a client's decisions concerning the objectives of representation" and to "consult with the client as to the means by which they are to be pursued." RPC 1.2(a).

Counsel's filing a request for a trial de novo without Grimm's consent clearly rises above inadvertent mistakes, which will not be tolerated under MAR 7.1(a). Instead, counsel's unilateral decision to appeal the arbitration

award directly involved the merits of the case and posed a significant risk of prejudice to Grimm's rights. The judgment entered on the arbitration award fell only slightly below the limits of Grimm's liability insurance coverage. *See* CP 9 n.4. If the de novo appeal results in a jury verdict that matches or exceeds the arbitration award, Grimm will be personally exposed to pay attorneys fees and costs pursuant to MAR 7.3. Grimm thus has nothing to gain but everything to lose by her attorney's decision to file an appeal without her consent.

The authority to decide whether to appeal the arbitrator's decision rested with Grimm alone. Her attorney did not simply fail to abide by her decision – he entirely omitted her from the decision-making process, in direct contravention of Washington case law and ethical rules. Under these circumstances, it cannot be said that the aggrieved party, Grimm, requested a trial de novo, particularly given that courts must strictly comply with MAR 7.1. The trial court properly applied that rule to this situation, and correctly struck the trial de novo request.

Grimm now argues that her attorney could not “*accept*” the arbitration award without her consent because such acceptance would have waived her substantive right to an appeal. Appellants' Br. at 6 (emphasis in original). As a result, according to Grimm, her attorney was ethically bound to request a

trial de novo to protect her rights. This argument fails for two reasons.

First, Grimm did not present this argument to the trial court. She may claim that she can raise this issue for the first time on appeal under RAP 2.5(a)(3), but she entirely fails to demonstrate that the trial court's order involves a "manifest error affecting a constitutional right."¹ Accordingly, this court should decline to consider this new argument. RAP 2.5(a).

Second, Grimm's argument misses the point. It is undisputed that the decision to appeal, or not to appeal, an arbitrator's award involves a client's substantive rights. *See* Appellants' Brief at 4-5. But whichever decision is made belongs solely to the client precisely *because* the rights involved are substantial. An attorney is simply not allowed to make such an important decision without his client's consent. *See Marshall*, 160 Wn.2d at 338-39; *Graves*, 94 Wn.2d at 304; RPC 1.2(a). The only decisions an attorney may make without his client's authorization are ones that do *not* affect the client's substantive rights. *See Graves*, 94 Wn.2d at 304. Grimm's position that her

¹ An appellate court's analysis of an alleged constitutional error raised for the first time on appeal involves the following four steps: 1) "a cursory determination as to whether the alleged error in fact suggests a constitutional issue"; 2) deciding whether the alleged error is "manifest," which requires the appellant to present a "plausible showing ... that the asserted error had practical and identifiable consequences" in the proceedings below; 3) if the appellate court finds the alleged error is manifest, it must address the merits of the constitutional claim; and 4) "if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis." *State v. Lynn*, 67 Wn.App. 339, 345, 835 P.2d 251 (1992). Even assuming Grimm had met the first three steps of this analysis, which she has not, the trial court's order striking the request for a trial de novo was harmless because, as described above, Grimm was not prejudiced by the arbitrator's award; rather, she stood only to lose by appealing it.

attorney was somehow required to appeal the arbitration award, with or without her consent, to preserve her substantive rights is not only illogical, but is contrary to case law and the ethical rules to which every attorney in this state is bound.

Because Grimm, the aggrieved party, did not consent to the filing of the request for a trial de novo, the requirements of MAR 7.1(a) were not met. The trial court strictly complied with that rule when it struck the request. Accordingly, this court should affirm the trial court's order.

2. Eschbach presented substantial evidence that Grimm did not consent to the trial de novo request.

Whether Grimm actually authorized her attorney to request a trial de novo is a question of fact, which is reviewed for substantial evidence. *Ross v. Bennett*, 148 Wn.App. 40, 49, 203 P.3d 383 (2008), *review denied*, -- P.3d -- (Wash. Jul. 7, 2009). "Evidence is substantial if it is sufficient to persuade a fair-minded person that the declared premise is true." *Green v. Hooper*, 149 Wn.App. 627, 641, 205 P.3d 134 (2009).

Eschbach presented the most direct evidence of Grimm's lack of consent: Grimm's own testimony that she did not consent to the request for a trial de novo. CP 17-18. Such evidence is more than sufficient to persuade a fair-minded person that the request was filed without her consent.

Contrary to Grimm's position, the statements in her later declaration

cannot contradict her clear answer to an unambiguous question in her deposition. *Marshall v. AC & S Inc.*, 56 Wn.App. 181, 185, 782 P.2d 1107 (1989). In *Marshall*, a plaintiff testified in his deposition that doctors told him he suffered from asbestosis when he first visited a Seattle hospital. *Id.* at 183. His medical records revealed that the visit occurred in July 1982, more than three years before he filed a personal injury lawsuit for his asbestos exposure. *Id.* When the defendants moved for summary judgment on the statute of limitations issue, the plaintiff offered an affidavit stating that he first learned of his asbestos-related disease in 1985. *Id.* The trial court granted defendants' motion and this court affirmed, concluding that the plaintiff's "self-serving," contradictory affidavit did not create a genuine issue of material fact as to when he first learned of his illness. *Id.* at 185.

By contrast, a trial court may rely on later testimony that does not flatly contradict the earlier testimony, but only explains it. *Safeco Ins. Co. v. McGrath*, 63 Wn.App. 170, 174-75, 817 P.2d 861 (1991), *review denied*, 118 Wn.2d 1010 (1992). In that case, a defendant first testified in an affidavit that he did not intend to injure the person he shot, and that he thought he was aiming at the victim's shoulder. *Id.* at 174 n. 11. The defendant later testified in a deposition that he was aiming the gun in the "general area" of the victim's shoulder. *Id.* He also said that he

assumed after the shot was fired that [the victim] was shot in

the shoulder because [the victim] said something – ‘that son-of-a-bitch shot me.’ And I assumed that he was shot in the shoulder. But I was aiming the – or pointing the gun in the direction of that area.

Id. at 174 n. 11, 13. This court found that the subsequent testimony created a genuine issue of material fact as to the defendant’s intent to injure the victim.

The court explained that the *Marshall* rule did not apply to the deposition testimony because it was not in “flat contradiction” to the earlier affidavit, and it offered “an explanation of one of the principal affidavit statements[.]”

Id. at 175.

Here, Grimm’s deposition testimony and later affidavit fall squarely within the *Marshall* rule. At her deposition, counsel for Eschbach unequivocally asked Grimm if she consented to her attorney filing a request for a trial de novo; she clearly answered that question “No.” CP 17-18. Given the unqualified nature of Grimm’s response, her attempt in the later declaration to retract her earlier testimony does not meet the *Safeco* exception.

Grimm’s later declaration contains three statements relevant to the issue of her consent, or lack thereof, to request a trial de novo: 1) “[W]e discussed the pros and cons and ultimately decided to proceed with a jury trial”; 2) “At no time, [sic] did I object to this course of action or request that my attorney take no action so as to allow the arbitration award to stand”; and

3) “I never objected to appeal the arbitration award.” CP 40. Only the first statement arguably addresses Grimm’s potential consent. But the statement offers no explanation about her earlier unambiguous testimony that she did not consent to the filing of the request. Instead, Grimm flatly attempts to contradict her deposition testimony in the hope the later self-serving declaration will give rise to a question of fact. This she cannot do. *Marshall*, 56 Wn.App. at 185.

Further, it strains credulity to believe Grimm would have consented to the trial de novo under these circumstances. First, she would gain nothing by the appeal, and instead would risk incurring MAR 7.3 penalties in excess of her insurance coverage. Second, Grimm felt attending a half-day arbitration hearing was a hardship,² but now claims to be willing to travel from Olympia to either Kent or Seattle to attend a three- or four-day jury trial at which she stands to gain nothing.

The second and third statements quoted above do not speak to the consent issue. Grimm says only that she did not object to the trial de novo request after it was filed, and that she did not ask her attorney to let the arbitration award stand. But saying that she did not act (i.e., did not object; did not direct counsel to let the award stand) is entirely different than saying she did act (i.e., authorize the request). MAR 7.1 clearly envisions an

aggrieved party taking at least two affirmative steps to appeal an arbitrator's decision: 1) request a trial de novo, and 2) provide notice of the request to the other parties. MAR 7.1(a). Grimm cannot achieve those steps through non-action.

Rather than filing a subsequent declaration, Grimm's counsel should have cross-examined his own client during her deposition. This would have given counsel for Eschbach the opportunity to examine her further if Grimm's cross-examination responses created any new issues or ambiguity about her lack of consent. Alternatively, Grimm herself could have asked Eschbach's counsel to clarify what she later claimed was a confusing question. Neither did so. Instead, Grimm directly answered a direct question: she did not consent to her attorney filing the trial de novo request. As a result, she cannot use the statements in her later declaration to contradict her earlier testimony.

On appeal, Grimm argues that the trial court erroneously failed to view the parties' conflicting evidence regarding her consent in the light most favorable to her as the non-moving party. She fails to cite relevant authority for this proposition. Instead, Grimm directs this court to cases reciting the evidentiary standard for a summary judgment motion, and simply concludes that the same standard applies to a motion to strike a trial de novo request.

² See CP 17.

Appellants' Br. at 6-7. Without proper citations to authority, this court should decline to address Grimm's argument. RAP 10.3(a)(6); *Saviano v. Westport Amusements, Inc.*, 144 Wn.App. 72, 84, 180 P.3d 874 (2008).

Even assuming that the trial court was required to view the evidence in the light most favorable to Grimm, there is no indication in the record that the trial court failed to do so. Although Grimm disagrees with the trial court's conclusion, she does not demonstrate that the court reached it in error. By contrast, Eschbach presented substantial evidence that Grimm did not consent to the trial de novo request. Therefore, this Court should affirm the trial court's order striking that request.

B. Eschbach is entitled to attorneys fees on appeal.

RCW 7.06.060(1) and MAR 7.3 require the trial court to "assess costs and reasonable attorneys' fees against a party who appeals the award and fails to improve his or her position on the trial de novo." Where a party's request for trial de novo does not proceed to trial because she fails to comply with MAR 7.1, the non-requesting party is entitled to recover attorney's fees because the requesting-party failed to improve her position. *Wiley*, 143 Wn.2d at 348. If the requesting-party then appeals the trial court's decision and again fails to improve her position, the non-requesting party is also entitled to recover attorney's fees on appeal. *Id*; *See also Kim v. Pham*, 95

Wn.App. 439, 446-47, 975 P.2d 544 *review denied*, 139 Wn.2d 1009 (1999).

If Grimm fails to improve her position in this appeal, this court should award Eschbach the attorney's fees she incurred in defending it.

III. CONCLUSION

Grimm is the only "aggrieved party" in this case, as contemplated by MAR 7.1(a). She did not authorize the request for a trial de novo. Rather, her counsel unilaterally filed the request without her consent. But the decision to appeal, or not to appeal, the arbitration award rested with Grimm alone. Here, defense counsel did not have Grimm's consent, and the trial court, strictly construing MAR 7.1, correctly struck the request for a trial de novo. Accordingly, this Court should affirm the trial court's order.

Dated this 29th day of July, 2009.



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CERTIFICATE OF SERVICE

Julie A. Snead, being first duly sworn, on oath deposes and says:

I am over the age of 18 years and am not a party t the within cause. I work at Curran Law Firm P.S. and on this date I caused to be served by ABC Legal Messengers a true and correct copy of the above **Brief of Respondent** on the following persons set forth below:

Counsel for Appellant

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Kent, Washington, this 29 day of July, 2009.


JULIE A. SNEAD

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