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NO. 65469-1-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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COURT OF APPEALS
CLERK

VALERIE MILLER, a married woman,

Respondent,

vs.

JEAN SANDLAND and JOHN DOE SANDLAND, wife and husband
and their marital community,

Appellants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Andrea Darvas, Judge

BRIEF OF RESPONDENT

KORNFELD TRUDELL BOWEN
& LINGENBRINK, PLLC

By: Patrick A. Trudell
Attorney for Respondent

3724 Lake Washington Blvd NE
Kirkland, WA 98033
(425) 822-2200

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NATURE OF CASE

The Washington Legislature has provided for mandatory arbitration of certain civil actions. Procedures governing mandatory arbitration are provided by Mandatory Arbitration Rules (MAR) adopted by the Washington State Supreme Court. The supreme court also elected to allow local rules to supplement the Mandatory Arbitration Rules (LMAR). After a mandatory arbitration an aggrieved party may request a trial de novo. MAR 7.1, as supplemented by LMAR 7.1(b), requires a jury demand be filed with the request for trial de novo. LMAR 7.1(b) provides failure to file a jury demand with the request for trial de novo waives the right to a jury trial. In our case Appellant failed to file a jury demand with her request for trial de novo pursuant to LMAR 7.1(b). Rather, Appellant marked on the court's Request for Trial De Novo form "a jury demand **IS NOT** being filed" Appellant's inaction and action constitutes a waiver of jury trial. Moreover, Respondent relied on Appellant's Note for Non jury Trial in preparing for trial.

STATEMENT OF ISSUES

1. Did the Appellant waive her constitutional right to a jury trial either by:
 - a. Failing to file a jury demand with her request for a trial de novo pursuant to LMAR 7.1(b)?

b. Affirmatively marking on the Request for Trial De Novo court form “a Jury Demand **IS NOT** being filed by the aggrieved party?”

2. Is Appellant’s failure to abide by LMAR 7.1(b) excused despite the fact:

a. LMAR 7.1(b) allows a jury trial so long as any jury demand is served and filed along with the request for trial de novo?

b. LMAR 7.1(b) is consistent with Article 1, section 21 of the Washington State Constitution and with CR 38 on the right to a jury trial in a civil action?

3. Is Appellant estopped from asserting her right to a jury trial when she fails to file a jury demand with her request for trial de novo and when she states a jury demand is not being filed when requesting a trial de novo, and when Respondent detrimentally relies on Appellant’s statement of no jury demand?

4. Does prejudice exist for not granting Appellant a jury trial after Appellant has affirmatively waived that right?

5. Is the Respondent entitled to *Mahler* fees?

STATEMENT OF THE CASE

A. STATEMENT OF RELEVANT FACTS

On Monday, December 3, 2007 Jean Sandland (Appellant) had a morning medical appointment at a clinic in Kent. On her way to the appointment Ms. Sandland became disoriented and lost her way. She turned into a Kent QFC parking lot. (Ex. 20, pp.17-18).

Ms. Sandland turned the wrong way into a driving aisle directly adjacent to one side of the QFC store. She parked at an angle close to the sidewalk that runs next to the QFC store. Ms. Sandland opened the driver's door of her 1994 Ford Ranger pick up and got out of her truck. She left the door open. (I RP 44-45).

Valerie Miller (Respondent) also went to the Kent QFC on Monday, December 3, 2007. As Ms. Miller walked on the sidewalk adjacent to the QFC she was approached by Jean Sandland who was standing close to her truck and said "Ma'am, can you help me?" Valerie Miller stopped and learned Jean Sandland needed help with directions (in getting to her medical appointment). (I RP 44-45).

Valerie Miller started to give Jean Sandland directions when Ms. Sandland's truck began to roll forward. As Ms. Sandland's truck started to roll forward, Ms. Miller said "Ma'am, your truck is rolling forward." (I RP 45-46).

After Ms. Miller informed her truck was rolling forward Ms. Sandland reached into the truck (apparently to secure her vehicle). Ms. Sandland did not get into her truck. She reached in with her arm. Ms. Sandland leaned on her seat as she reached in. (I RP 46).

After Ms. Sandland reached into her truck (she either put the truck into neutral or reverse)Valerie Miller observed the truck start to roll backwards. As the truck was rolling backwards Ms. Sandland was leaning into the truck with her feet outside of the truck. (I RP 46).

From Valerie Miller's observation Ms. Sandland was not in a stable situation. Ms. Sandland was an elderly woman. Ms. Miller believed Ms. Sandland's feet were going to come up from underneath her and she would be drug by the truck as it rolled backwards. Ms. Miller feared if Ms. Sandland fell she would be run over by the truck. (I RP 46, 51).

Valerie Miller immediately reacted to help Ms. Sandland. Just as Ms. Miller got past the open truck door out of the corner of her eye she saw a car coming toward the Sandland truck. The car had just entered the parking lot going the correct way. (I RP 46).

Ms. Miller recognized she was now in danger of getting pinned between Ms. Sandland's open door and the car entering the parking aisle. As Valerie backed to get out of the way she put her right hand on

the front of the approaching car to push off so she would not get caught in the middle of the two cars. The force of pushing off caused personal injuries to Valerie Miller. (I RP 51).

As a result of the December 3, 2007 automobile collision Valerie Miller sustained the following injuries: 1) Sprained and partially torn muscles in right arm; 2) Contusion to left calf; and 3) Sprain/strain injuries to neck, mid back and low back. (Ex. 59A, p. 16, CP 325).

The right arm injuries are permanent. (Ex. 59A, pp. 29-30, CP 325). This reality resulted in Valerie Miller filing an action at the King County Superior Court. (CP 1-5). The action was later transferred into mandatory arbitration under the MARs. (CP 11-13).

B. STATEMENT OF PROCEDURE

Respondent adopts Appellant's statement of procedure beginning on Page 7 of Appellant brief and continuing through Page 8. Beginning at Page 9 of Appellant's statement of procedure, Respondent points out Appellant engages in argument rather than a fair presentation of the facts and procedures. Conscious of the mandate not to engage in argument, Respondent points out Appellant was put on timely notice that jury trial request would be opposed. (CP 36).

In regard to the trial, the Findings of Fact and Conclusions of Law demonstrate Valerie Miller proved facts giving rise to the application of

the rescue doctrine in Washington. Consequently, the trial court found Ms. Sandland liable under the rescue doctrine which precludes comparative negligence. (CP 160-61).

ARGUMENT

A. APPELLANT WAIVED HER CONSTITUTIONAL RIGHT TO A JURY TRIAL

1. The Constitutional Right to a Jury Trial is Not Absolute for Civil Trials

Article I, section 21, of the Washington State Constitution

provides:

The right of trial by jury shall remain inviolate, but the legislature may provide... for waiving of the jury in civil cases where the consent of parties interested is given thereto.

In 1984, the Legislature repealed former RCW 4.44.100 that had defined waiver of a jury trial because the statute had been superseded by CR 38. Laws of 1984, ch. 76, sec. 15 (repealed the former RCW 4.44.100). CR 38 acts to preserve the right to a jury trial but requires parties to exercise specific acts to access this right. *Sackett v. Santilli*, 101 Wn. App. 128, 133-134, 5 P.3d 11, 14 (2000). CR 38 states:

(a) Right of Jury Trial Preserved. The right of trial by jury as declared by article 1, section 21 of the constitution or as given by a statute shall be preserved to the parties inviolate.

(b) Demand for Jury. At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law. If before the case is called to be set for trial no party serves or files a demand that the case be tried by a jury of twelve, it shall be tried by a jury of six members with the concurrence of five being required to reach a verdict.

Under CR 38 preservation of a jury trial requires a party to exercise specific acts including: 1) serving a written jury demand upon the other parties; 2) filing the demand with the court clerk; and 3) paying the jury fee. CR 38(b); *Sackett*, 101 Wn. App. at 133-134, 5 P.3d at 14.

The right to a jury, in civil cases, is not absolute. *State ex rel. Evergreen Freedom Foundation v. Washington Education Association*, 11 Wn. App. 586, 609, 49 P.3d 894 (2002) *rev. denied*, 148 Wn.2d 1020 (2003). Not only can a party affirmatively choose to waive their right to a jury trial, but a jury trial may also be waived by inaction. *Westberg v. All-Purpose Structures, Inc.*, 86 Wn. App. 405, 413, 936 P.2d 1175 (1997).

The consent of a party to proceed to trial without a jury may be expressed by words or conduct, or may be implied from failure to demand a jury in a prescribed manner. *Godfrey v. Hartford Casualty Insurance Co.*, 142 Wn.2d 885, 888, 16 P.3d 617, 623 (2001) (finding that by entering into an insurance agreement that was subject to the arbitration act appellant had

waived their right to a jury trial); *Hoye v. Century Builders, Inc.*, 52 Wn.2d 810, 329 P.2d 474 (1958).

Respondent agrees Appellant originally had the right to a jury trial, yet Appellant waived her right in two ways: (1) Appellant waived her right to a jury through inaction by failing to properly abide by LMAR 7.1(b); (2) Appellant waived her right to a jury trial by affirmatively marking that a jury demand “IS NOT” being filed by the aggrieved party.

2. MAR 7.1 and LMAR 7.1

The Legislature adopted rules for mandatory arbitration through RCW 7.06. RCW 7.06.030 provides the procedures to implement the mandatory rules of arbitration are to be adopted by the supreme court. The Washington State Supreme Court then adopted mandatory arbitration rules by way of the Superior Court Mandatory Arbitration Rules (MARs). *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721, 723 (1997). Like all other court rules, the MARs are interpreted as they were drafted by the Legislature. *Id.* As such, they are to be construed in accordance with their purpose. *Id.* (citing *State v. Wittenbarger*, 124 Wn.2d 467, 484, 800 P.2d 517 (1994)). The Legislature’s purpose in adopting mandatory arbitration legislation was to reduce congestion in the courts and delays in hearing civil cases. *Tran v. Yu*, 118 Wn. App. 607, 611, 75 P.3d 970, 972 (2003).

RCW 7.06.050(1) recognizes an aggrieved party's right to a trial de novo. RCW 7.06.050(1) states:

Within twenty days after ... filing, any aggrieved party may file with the clerk a written notice of appeal and request for a trial de novo in the superior court on all issues of law and fact.

MAR 7.1(a) goes into greater detail about attaining a trial de novo after an arbitration award. MAR 7.1(a) states:

Service and Filing. Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court along with proof that a copy has been served upon all other parties appearing in the case. The 20-day period within which to request a trial de novo may not be extended.

Pursuant to MAR 8.2, arbitration rules may be "supplemented by local superior court rules...." King County has supplemented MAR 7.1 with LMAR 7.1. King County LMAR 7.1(b) states:

Jury Demand. Any jury demand shall be served and filed by the appealing party along with the request for trial de novo, and by a non-appealing party within 14 calendar days after the request for a trial de novo is served on that party. If no jury demand is timely filed, it is deemed waived.

3. Standard of Review

It is well established in Washington that "absent an abuse of discretion, the Court of Appeals will not overturn the trial court's decision to deny a jury demand after a previous waiver." *Sackett*, 101 Wn. App. at

134, 5 P.3d at 14; *Mt. Vernon Dodge, Inc. v. Seattle First Nat'l Bank*, 18 Wn.App. 569, 581, 570 P.2d 702 (1977). Because the superior court in our case found Appellant waived her right to a jury trial by failing to comply with LMAR 7.1(b) and affirmatively filing a form requesting a bench trial, the standard of review is abuse of discretion.

4. Appellant Waived Her Right to a Jury Trial by not Complying with LMAR 7.1(b)

Appellant argues her original demand for a jury trial, which was filed and served prior to mandatory arbitration, entitles her to a jury trial in the trial de novo. Appellant's Brief 14. This argument fails because Appellant failed to strictly comply, or even substantially comply, with LMAR 7.1(b).

a. *Nevers v. Fireside and Wiley v. Rehak*

In *Nevers v. Fireside*, 133 Wn.2d 804, 947 P.2d 721 (1997), and *Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001), the Washington State Supreme Court established that failure to strictly comply with the MARs results in a forfeiture of the statutory right to a trial de novo following mandatory arbitration. Because MAR 8.2 provides that superior courts may supplement the MARs with local rules, the standard set out in *Nevers* and *Rehak*, concerning strict compliance, applies to LMAR 7.1(b) as well. Therefore by failing to strictly comply with the requirements of a jury

demand enumerated in LMAR 7.1(b) Appellant has waived her right to a jury trial.

In *Nevers v. Fireside*, the Washington State Supreme Court found that by failing to timely serve copies of a request of a trial de novo and failing to file proof of service of a request for trial de novo, as required by MAR 7.1, the plaintiffs had lost their right to a trial de novo. *Nevers*, 133 Wn.2d at 815-816, 947 P.2d at 726. In doing so the court stressed the importance of strict compliance with the MARs. MAR 7.1(a) clearly stated the aggrieved party was required to file a request for a trial de novo, serve copies of the request, and file proof of service. *Id.* 133 Wn.2d at 811-812, 947 P.2d at 724 - 725. Failure to abide by the clear language of these requirements resulted in the loss of a trial de novo. Importantly, the court noted:

[R]equiring strict compliance with the filing requirements set forth in the rule better effectuates the Legislature's intent in enacting the statutes providing for mandatory arbitration of certain civil cases. The primary goal of the statutes providing for mandatory arbitration (RCW 7.06) and the Mandatory Arbitration Rules that are designed to implement that chapter is to “reduce congestion in the courts and *delays in hearing civil cases.*” *Perkins Coie v. Williams*, 84 Wash.App. 733, 737, 929 P.2d 1215, *review denied*, 132 Wash.2d 1013, 940 P.2d 654 (1997) (emphasis added); *see Christie-Lambert Van & Storage Co. v. McLeod*, 39 Wash.App. 298, 302, 693 P.2d 161 (1984) (citing Senate Journal, 46th Legislature (1979), at 1016-17). Were we to conclude that the specific requirement of MAR 7.1 that copies of a request for trial de novo be

served within 20 days of the filing of the arbitration award and that proof of that service be filed within that same period may be satisfied by substantial compliance, we would be subverting the Legislature's intent by contributing, inevitably, to increased delays in arbitration proceedings.

Id. 133 Wn.2d at 815, 947 P.2d at 726 (1997).

In *Wiley v. Rehak*, the Washington State Supreme Court upheld the finding that the trial court erred in allowing a party to amend a notice for trial de novo after failing to properly name the aggrieved party within the 20 day time period proscribed by MAR 7.1 and LMAR 7.1. 143 Wn.2d at 343, 20 P.3d at 406. The court noted throughout the case that strict compliance with the MARs was necessary.

Appellant, in that case, attempted to argue substantial compliance sufficed because opposing counsel knew there would be a trial de novo and no prejudice attached. *Id.* 143 Wn.2d at 347, 20 P.3d at 408. In response, the court specifically found substantial compliance was not enough and that *Nevers* explicitly foreclosed the argument that substantial compliance could fulfill the MARs. *Id.* The court also rejected the argument that CR 60 allows amendment of the notice, finding MAR 7.1 does not provide for such relation back amendment and CR 60 could not be used to circumvent the 20 day requirement. *Id.*, 143 Wn.2d at 343, 20 P.3d at 407.

In adopting the MARs the supreme court expressly stated that local rules, once properly adopted, supplement the MARs. MAR 8.2. Therefore the strict compliance standard as adopted through *Nevers* and *Rehak* applies to the LMARs as well. King County LMAR 7.1(b) requires that “[a]ny jury demand shall be served and filed by the appealing party along with the request for trial de novo.” Further, King County LMAR 7.1(b) expressly states that “[i]f no jury demand is filed, it is deemed waived.” Moreover, the Washington State Supreme Court has found that the word “shall” in the MARs makes the stated requirement mandatory. *Rehak*, 143 Wn. 2d at 345, 20 P.3d at 407.

Appellant failed to follow the clear language of LMAR 7.1(b) by not serving a jury demand with the request for a trial de novo. Appellant argues she substantially complied with the rule by filing a jury demand prior to mandatory arbitration and this jury demand entitles her to a jury trial. Brief of Appellants 14. By the clear language of the rule “[a]ny jury demand” covers situations, like the current, in which a jury demand was filed prior to a mandatory arbitration. Therefore LMAR 7.1(b) requires the filing of a jury demand or any prior jury demand with the notice for a trial de novo regardless of any prior filing.

Further, requiring strict compliance with LMAR 7.1(b) supports the statutory goal of reducing delays in hearing civil cases. Local rules act to streamline the process of trying civil cases. Allowing substantial compliance to fulfill local rules would contribute to increase delays in hearing civil cases.

b. Sorenson v. Dahlen

Respondent has only found one case that supports the contention LMARs only require substantial compliance. Importantly Division Two of the Washington State Court of Appeals noted its ruling was based on “special circumstances” unique to the case. *Sorenson v. Dahlen*, 136 Wn. App. 844, 849, 149 P.3d 394, 397 (2006).

In *Sorenson* the party requesting the trial de novo had properly filed but listed the wrong date on the note for trial form. *Id.*, 136 Wn. App. at 849, 149 P.3d at 397. Kitsap County enacted a LMAR which stated, “[t]he request for trial de novo shall be accompanied by a Note for Trial on the forms provided by the clerk.” The note for trial form instructs the party requesting a trial de novo to note the date “that this case will be placed on the trial setting docket for assignment of trial.” Kitsap County only has trial setting dockets on Friday at 9:00am. The defendant improperly noted the trial for a Wednesday. *Id.*

The appellate court ruled substantial compliance was enough in *Sorenson* because: (1) enforcing the local rule would add an additional step unique to Kitsap County that requires the timely filing a correct note for trial in order to be granted a trial de novo; (2) the Kitsap County Local Rules have a provision that allows the rules to be modified or suspended for good cause therefore the local rule is not mandatory; (3) the clerk erred by failing to take action after accepting the defendant's filing; (4) the goals of mandatory arbitration would not be served if trial de novo request was denied. *Sorenson*, 136 Wn. App. at 852-58, 149 P.3d at 398-41 (2006).

In *Sorenson* the court allowed substantial compliance based on the "special circumstances" in that case. Those "special circumstances" are absent in our case. In our case, Appellant received a trial de novo, the King County rules are enforced mandatorily, no error by the clerk occurred, and the goal of reducing delays in hearings is achieved by strictly enforcing LMAR 7.1(b). Because the "special circumstances" of *Sorenson* are not present in our case, the strict compliance standard that applies to all MARs should apply to King County LMAR 7.1(b) as it was adopted through MAR 8.2.

c. Appellant has not substantially complied with LMAR 7.1(b)

Even if this Court decides substantial compliance with the LMARs is sufficient, Appellant's actions have not substantially complied with LMAR 7.1(b). To establish substantial compliance, the party seeking to invoke the doctrine must demonstrate "some level of actual compliance" with the substance of the rule, but that a procedural fault rendered the compliance imperfect. *Clymer v. Employment Sec. Dept.*, 82 Wn. App. 25, 28-29, 917 P.2d 1091 (1996). Importantly, this Court has found belated compliance, or a failure to comply through inaction, inadvertence, or in a manner which does not fulfill the objective of the statute or rule, cannot constitute substantial compliance. *Petta v. Department of Labor and Industries*, 68 Wn. App. 406, 409-410, 842 P.2d 1006, 1008-1009 (1993)(failure to serve even if inadvertent was not substantial compliance with RCW 51.52.110).

The purpose of LMAR 7.1(b) is to ensure the court and opposing counsel are aware the pending trial de novo is a jury trial. By affirmatively marking the following box on the court forms:

Pursuant to LMAR 7.1(b), a Jury Demand.

IS NOT being filed by the aggrieved party. The non-aggrieved party has fourteen (14) calendar days from the date of service of Request for Trial De Novo to file a Jury Demand.

Appellant not only gave no notice that it was her intention to exercise her right to a jury trial at the time of requesting a trial de novo, but expressly noted a bench trial. Based on that representation the case schedule was issued. (CP 189). In the case schedule the clerk correctly noted no jury trial was requested. (CP 189).

By failing to put the court and opposing counsel on notice that the trial de novo was a jury trial, and by noting the trial as a bench trial, Appellants subverted the objective of LMAR 7.1(b). Therefore, even though Appellant initially filed a jury demand prior to mandatory arbitration, the doctrine of substantial compliance is inapplicable.

5. Appellant Waived Her Right to a Jury Trial by Affirmatively Noting the Trial as a Bench Trial.

By affirmatively marking the following box on the court forms:

Pursuant to LMAR 7.1(b), a Jury Demand.

IS NOT being filed by the aggrieved party. The non-aggrieved party has fourteen (14) calendar days from the date of service of Request for Trial De Novo to file a Jury Demand.

Appellant waived her right to a jury trial.

a. Appellant's Waiver was Voluntary and Intentional

Appellant contends she did not waive her right to a jury trial by checking the above box. In doing so, Appellant argues her actions do not

fit the definition of waiver. Appellant's Brief 18-19. Waiver is the "intentional or voluntary relinquishment of a known right." *Wilson v. Horsley*, 137 Wn.2d 500, 510, 974 P.2d 316 (1999) (quoting BLACK'S LAW DICTIONARY 1580 (6th ed. 1990)).

The Washington State Supreme Court has found the doctrine of waiver applies to all rights or privileges a person is legally entitled to. *Bowman v. Webster*, 44 Wn.2d 667, 669-670, 269 P.2d 960, 961-962 (1954). Further, the court found that waiver "may result from an express agreement or be inferred from circumstances indicating an intent to waive" and that "[a] waiver is unilateral and arises by the intentional relinquishment of a right, **or by neglect to insist upon it.** *Id.*, 44 Wn.2d at 669-70, 269 P.2d at 961-62 (emphasis added).

LMAR 7.1(b) is clear that "[a]ny jury demand shall be served and filed by the appealing party along with a request for trial de novo... [i]f no jury demand is timely filed it is deemed waived." The court form on which the Appellant marked that a jury demand "**IS NOT** being filed by the aggrieved party" made clear reference to the LMAR 7.1(b). By marking that no jury was being demanded, Appellant not only waived her right to a jury trial by "neglect to insist upon it" but provided circumstances that indicated a clear intent to waive.

b. Clark v. Falling and Parry v. Windermere Real Estate/East, Inc.

Appellant relies heavily on *Clark v. Falling*, 92 Wn. App.805, 965 P.2d 644 (1998) and *Parry v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 10 P.3d 506 (2000) to support her argument that checking a box and signing a form is insufficient to waive a jury trial. Yet, the facts from those cases and purpose of the forms used in those cases are distinguishable from the current case.

Clark involved King County Local Rule 4.2 which requires the plaintiff to file and serve a confirmation of joinder form. *Clark*, 92 Wn. App. 812-813, 965 P.2d 648. On this form the party must mark whether they were served. *Id.* In *Clark* the affirmative defense of insufficient service was asserted even though defendant had conferred with the plaintiff and plaintiff had marked that service had been received on the filed form. *Id.*

The plaintiff attempted to argue the defense was waived due to what was indicated on the form. *Id.* The court concluded that the confirmation of joinder form at most indicated that service had occurred but did not suggest that the service was timely or sufficient. *Id.* The court held that even if the defendant acquiesced that service did occur, that

acquiescence did not waive the defendant's affirmative defense of insufficient service. *Id.*

In *Clark*, the court found the purpose of King County Local Rule 4.2's confirmation of joinder form was to notify the court of the status of the case. *Id.* Also, in *Clark* the form being used against the defendant was filed by the plaintiff after conferring with all parties. *Id.* In our case, the form filed by Appellant explicitly references LMAR 7.1(b) which clearly states "[a]ny jury demand shall be served and filed by the appealing party along with a request for trial de novo... [i]f no jury demand is timely filed it is deemed waived."

Unlike the confirmation of joinder form in *Clark*, which served only as a case status report, the form which Appellant marked serves two purposes: (1) To inform the court and Respondent that a trial de novo is being requested; (2) To indicate the type of trial demand being filed in accordance with LMAR 7.1(b). Our case is further distinguishable from *Clark* because Appellant marked and filed the form herself, unlike *Clarke* where the form was filed by the plaintiff who was attempting to use the form against defendant.

The facts in *Parry* are similar to the facts in *Clark*. As in *Clark*, defendant had raised an affirmative defense of insufficient process, but instead of merely acquiescing to the confirmation of joinder form, defense

counsel in *Parry* also affirmatively approved the form by signing it. *Parry*, 102 Wn. App. at 927-29, 10 P.3d at 510-11.

Appellant quotes the court's statement, "it would defy logic to hold that a party's properly preserved defense is waived merely by signing a form required by local rule for case scheduling and management." *Id.*; Appellant's Brief 21. As stated above, the purpose of the form in our case goes beyond case scheduling and management. The purpose of the form is to provide notice to the court and the responding party of an impending trial de novo and whether the appealing party is exercising their right to a jury through a properly filed jury demand in accordance with LMAR 7.1(b).

LMAR 7.1(b)'s purpose of providing notification to both the court and the responding party serves the legislature's purpose in adopting the MARs of "reducing delays in hearing civil cases." *Tran*, 118 Wn. App. at 611, 75 P.3d at 972. By providing clear local rules and forms to aid in the trial process, in this case forms that provide clear notification of a trial de novo and jury demand to the court and responding party, the court reduces delays and confusion as the trial date approaches.

By failing to abide by LMAR 7.1(b) in failing to file any jury demand at the time of the request for trial de novo Appellant waived her right to a jury trial by inaction. More importantly, by marking that a jury

demand “**IS NOT** being filed by the aggrieved party” Appellant affirmatively waived her right to a jury trial by requesting a bench trial.

B. LMAR 7.1(b) NEITHER VIOLATES WASH. CONST. ART. 1 § 21 NOR IS IN CONFLICT WITH CR 38 (b).

1. LMAR 7.1(b) does not Violate Wash. Const Art. I §21

Appellant argues that LMAR 7.1(b)’s requirement of the filing of a jury demand with the request for a trial de novo violates Wash. Const Art.

I §21. Appellant Brief 14-15. Wash. Const Art. I §21 provides:

The right of trial by jury shall remain inviolate, but the legislature may provide... for waiving of the jury in civil cases where the consent of parties interested is given thereto.

Both the United States’ Supreme Court and this Court have found that “a procedure for a nonjudicial determination prior to a jury trial does not violate the ... right to a jury trial as long as a right of appeal to a court for a jury trial is preserved.” *Christie-Lambert Van & Storage Co., Inc. v. McLeod*, 39 Wn. App. 298, 306, 693 P.2d 161, 166 - 167 (1984) (citing to *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S.Ct. 580, 597, 43 L.Ed. 873 (1899)). Further, the Washington State Supreme Court has recognized:

[a]ll that is required is that the right of appeal for the purpose of presenting the issue to a jury must not be burdened by the imposition of onerous conditions, restrictions or regulations which would make the right practically unavailable.

Sofie v. Fibreboard Corp., 112 Wn.2d 636, 652-653, 771 P.2d 711, 720 (1989).

LMAR 7.1(b) is a procedural rule that requires a jury demand to be filed with the request for a trial de novo if the aggrieved party chooses to appeal a mandatory arbitration and preserve their right to a jury. In no way does LMAR 7.1(b) “impose onerous conditions, restriction, or regulations that make the right [to a jury] practically unavailable.” Instead LMAR 7.1(b) acts as a procedural safeguard and specifies measures to exercise the right to a jury trial.

2. **LMAR 7.1(b) is not in conflict with CR 38(b)**

Appellant argues that LMAR 7.1(b)’s requirement that a jury demand be filed with the request for a trial de novo is in conflict with CR 38(b). Appellant’s Brief 16. CR 38(b) provides:

At or prior to the time the case is called to be set for trial, any party may demand a trial by jury of any issue triable of right by a jury by serving upon the other parties a demand therefor in writing, by filing the demand with the clerk, and by paying the jury fee required by law.

MAR 8.2 provides: “The arbitration rules may be supplemented by local superior court rules adopted and filed in accordance with CR 83.” CR 83(a) allows the superior court to adopt rules “not inconsistent” with the superior court civil rules. *Sorenson*, 135 Wn. App. at 852, 149 P.3d at 398.

Court rules are inconsistent under CR 83(a) only when they are “so antithetical that it is impossible as a matter of law that they can both be effective.” *Heaney v. Seattle Mun. Court*, 35 Wn. App. 150, 155, 665 P.2d 918 (1983), *review denied*, 101 Wn. 2d 1004 (1984). Further, it has been acknowledged that “[t]he ultimate test is whether ‘[t]he two rules can be reconciled and both be given effect.’” *City of Seattle v. Marshall*, 54 Wn. App. 829, 833, 776 P.2d 174 (1989)(quoting *Heaney*, 35 Wn. App. at 156, 665 P.2d 918).

In no way is LMAR 7.1(b) “so antithetical” that it cannot be reconciled and be effective with CR 38(b). CR 38(b) provides a method for attaining a jury trial in all civil cases to which a right to a jury trial is applicable. LMAR 7.1(b) is much narrower. It provides a procedure to preserve a right to jury after a case has gone through mandatory arbitration in accordance with the MARs.

When a case is filed in superior court, if mandatory arbitration is sought, a separate note for MAR must be filed. This takes the case from the initial non-MAR case schedule. A superior court trial is then available only after mandatory arbitration.

The aggrieved party in a mandatory arbitration must request a superior court trial. The local MAR rules provide the procedure for this request. The rules contemplate a jury or a bench trial and simply require

the aggrieved party to so note. In no way does the local rule burden the right to a jury trial. It only requires the choice be made. When the aggrieved party chooses a bench trial, then a bench trial occurs.

C. THE TRIAL COURT CORRECTLY CONCLUDED APPELLANT WAS ESTOPPED FROM HAVING A JURY TRIAL

Appellant's arguments on equitable estoppel fail to recognize we are in a mandatory arbitration situation in our case, a jury trial is available after a party is aggrieved in arbitration, and any jury demand may be used if filed when the aggrieved party requests a trial de novo. But when the aggrieved party requests a bench trial de novo, and the non-aggrieved party relies on that request, the aggrieved party is estopped to receive a jury trial de novo.

The trial court correctly concluded plaintiff demonstrated she would be prejudiced if the court were to allow a jury trial. Order Granting Plaintiff's Motion to Confirm Bench Trial De Novo 2. The elements of equitable estoppel are (1) an admission, statement, or act inconsistent with a claim afterwards asserted, (2) action by another in reliance upon that act, statement, or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement, or admission. *Board of Regents of University of Washington v. City of Seattle*, 108 Wn.2d 545, 551, 441 P.2d 11, 14 (1987). Equitable estoppel

must be proven by clear, cogent, and convincing evidence. *Colonial Imports, Inc. v. Carlton Northwest, Inc.*, 121 Wn.2d 34, 82, 830 P.2d 318, 346 (1992). The Washington Supreme Court has quoted with approval this description of equitable estoppels from 31 C.J.S., Estoppel, § 59:

Estoppel by misrepresentation, or equitable estoppel, is defined as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, . . . as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right This estoppel arises when one by his acts, representations, or admissions, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist and such other rightfully relies and acts on such belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts

Kessenger v. Anderson, 31 Wn.2d 157, 169, 196 P.2d 289, 296 (1948).

In our case all three elements of estoppel have been fulfilled.

There is clear, cogent, and convincing evidence that Appellant affirmatively marked the following:

Pursuant to LMAR 7.1(b), a Jury Demand.

- IS NOT** being filed by the aggrieved party. The non-aggrieved party has fourteen (14) calendar days from the date of service of Request for Trial De Novo to file a Jury Demand.

Further, Appellant did not file a jury demand with the request for a trial de novo as required by LMAR 7.1(b), nor did she reference the prior filing of a jury demand with the request for a trial de novo. Appellant later informed Respondent she intended the trial to be a jury trial and opposed Respondent Motion to Enforce Trial De Novo Bench Trial. (CP 25-59). By failing to file a jury demand as required by LMAR 7.1(b), and filing for a bench trial de novo, and then opposing Respondent's motion for a bench trial de novo, Appellant fulfilled the first element of an act inconsistent with a claim afterwards.

The second element of estoppel was fulfilled by clear, cogent, and convincing evidence because Respondent relied on Appellant's bench trial request in making the strategic choice of videotaping her expert witness instead of calling him live at trial and scheduling her absence from employment based on a bench trial being one to two days shorter than a jury trial. When Appellant made the choice to videotape her expert and schedule less time off work she relied on the Appellant's failure to demand a jury pursuant to LMAR 7.1(b).

The third element of estoppel was fulfilled by clear, cogent, and convincing evidence because if Appellant would have been able to change the trial de novo from a bench trial to a jury trial a little over a month before trial was scheduled the Respondent would have been prejudiced.

Respondent would not have been able to call her expert in front of the jury without great expense. Further, Respondent would have been required to either be absent from parts of the trial or change her scheduled absence from employment.

D. NO PREJUDICE EXISTS BECAUSE APPELLANT AFFIRMATIVELY WAIVED HER RIGHT TO TRIAL

1. NO PREJUDICE AS A MATTER OF LAW

The Appellant's argument that deprivation of the constitutional right to a jury was prejudicial as a matter of law is inapposite because Appellant affirmatively waived her right to a jury trial.

Error without prejudice is not grounds for reversal. *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097, 1102 (1983). Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of a trial. *Id.* Respondent does not deny that “[t]he right to a jury trial when such exists is a substantial right, and denial thereof is prejudicial error.” *Reed v. Reeves*, 160 Wn. 282, 286, 294 P. 995, 997 (1931).

Respondent asserts that the determinative phrase in the above quote is “when such exists.” Here no right to a jury trial exists because it was affirmatively waived when the Appellant marked the box which stated a jury demand “**IS NOT** being filed by the aggrieved party.” In marking

this box and failing to abide by LMAR 7.1(b), which requires a jury demand be filed with the request for a trial de novo, Appellant not only failed to preserve her right to a jury but affirmatively waived her right to a jury. Because it is well established in case law that the right to a jury trial can be waived by express action or inaction, the Appellant cannot now assert that after waiving her right to a jury, by affirmatively marking no jury demand is being filed and failing to abide by LMAR 7.1(b), that not providing the right is prejudicial error as a matter of law.

2. No Actual Prejudice.

Appellant's brief beginning at the bottom of Page 26 and continuing through Page 30 argues a jury may have found differently than our trial judge. This is an attempt to re-argue the trial following a full blown bench trial de novo. It is well established after a trial court has weighed the evidence in a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law. *City of Tacoma v. State*, 117 Wn.2d 348, 361, 816 P.2d 7 (1991). Substantial evidence is evidence sufficient to persuade a fair minded person of the truth of the asserted premise. *Fred Hutchinson Cancer Research Ctr v. Holman*, 107 Wn.2d 693, 712, 732 P.2d 974 (1987). When the substantial evidence standard is satisfied, the appellate court will not substitute its

judgment for that of the trial court even when the appellate court may have resolved disputed facts differently. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 879-80, 73 P.3d 369 (2003).

Moreover, respondent in a bench trial is entitled to the benefit of all evidence and reasonable inference therefrom that support the findings of fact that are entered by the trial court. *Mason v. Mortgage MAM., Inc.*, 114 Wn.2d 842, 853, 792 P.2d 142 (1990). Likewise, even assuming a jury may have found differently than our trial judge, so long as the trial court's findings are based on substantial evidence and supported by conclusions of law, the case should be affirmed. This is the situation in our case, and Appellant's attempt to retry her case should fall on deaf ears.

E. APPELLANT IS CORRECT ON "MAHLER" FEES

Appellant correctly states the law on *Mahler* fees in our case. Respondent agrees after reading case law cited by Appellant that there has been no common fund established. Consequently, Appellant should be credited with \$3,663.39, which is the amount of attorney fees the trial judge awarded respondent under the *Mahler* rationale.

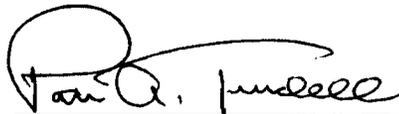
F. CONCLUSION

Appellant has a Constitutional right to a jury trial, but that right can be waived. The right to a jury trial needs to be exercised pursuant to our King County Mandatory Arbitration Rules since our case is a King

County Mandatory Arbitration case. The jury demand Ms. Sandland initially filed pursuant to CR 38(b) is contemplated as “any jury demand” in the King County Mandatory Arbitration Rules.

When Appellant sought a trial de novo she simply needed to file her original jury demand with the request for trial de novo or at the very least incorporate it by reference with her trial de novo request. Instead, Appellant chose to inform the court by way of the local rule form that a jury demand is not being filed by the aggrieved party. This informed the King County Superior Court and Respondent that the trial de novo would be a bench trial. A full blown bench trial occurred. The trial judge’s findings of fact are supported by the conclusions of law. There is neither a factual nor a legal basis to overturn the bench trial decision and grant a new trial. It is respectfully submitted our Appellate Court should affirm the trial court decision with the exception of giving Appellant credit for \$3,663.39 which is the amount of *Mahler* attorney fees that should be returned to Appellant.

DATED this 29 day of October, 2010



Patrick A. Trudell, WSBA #11363
KORNFELD, TRUDELL, BOWEN
& LINGENBRINK, PLLC
Attorney for Respondent