

68303-9

68303-9

NO. 68303-9-I

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

CHRISTINA LINDSTROM,

Respondent,

vs.

MARK EMERY and JANE DOE EMERY, Husband and Wife, and the community
thereof,

Appellants.

APPEAL FROM SNOHOMISH COUNTY SUPERIOR COURT
Honorable Linda C. Krese, Judge
Honorable Susan C. Gaer, Commissioner

REPLY BRIEF OF APPELLANTS

REED McCLURE
By Michael N. Budelsky WSBA #35212
Attorneys for Appellants

Address:

Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161
(206) 292-4900

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ARGUMENT	1
A. THE RIGHT TO A TRIAL CANNOT BE ABRIDGED BY AN ADDITIONAL, MINISTERIAL LOCAL RULE PROVISION.....	1
B. DISMISSAL WAS NOT WARRANTED BASED ON THE PERMISSIVE LANGUAGE OF THE STATUTES.....	4
C. EMERY’S DUE PROCESS RIGHTS WERE VIOLATED BY DENIAL OF HIS TRIAL DE NOVO AT AN EX PARTE HEARING	6
D. THE TRIAL COURT IMPROPERLY DECLINED TO HEAR THE MERITS OF EMERY’S MOTIONS FOR RECONSIDERATION AND REVISION	7
III. CONCLUSION	8

TABLE OF AUTHORITIES

Washington Cases

	Page
<i>Heaney v. Seattle Municipal Court</i> , 35 Wn. App. 150, 665 P.2d 918 (1983), <i>rev. denied</i> , 101 Wn.2d 1004 (1984)	3, 4, 6
<i>In re Detention of Turay</i> , 139 Wn.2d 379, 986 P.2d 790 (1999)	7
<i>King County v. Williamson</i> , 66 Wn. App. 10, 830 P.2d 392 (1992)	7
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804, 947 P.2d 721 (1997)	1, 2
<i>Sackett v. Santilli</i> , 146 Wn.2d 498, 47 P.3d 948 (2002).....	6
<i>Scannell v. City of Seattle</i> , 97 Wn.2d 701, 648 P.2d 435, 656 P.2d 1083 (1982)	4, 5
<i>Smith v. Orthopedics Int'l, LTD</i> , 170 Wn.2d 659, 244 P.3d 939 (2010)	3
<i>Sorenson v. Dahlen</i> , 136 Wn. App. 844, 149 P.3d 394 (2006)	1, 2, 3, 8
<i>State v. Kratzer</i> , 70 Wn.2d 566, 424 P.2d 316 (1967).....	6

Rules and Regulations

SCLCR 40(b)(2)	6
SCLCR 40(c)(1)	4, 5, 6, 7
SCLMAR 7.2.....	1
SCLMAR 7.2(b)	4, 5, 7

060349.099362/366861

I. INTRODUCTION

Although Emery did not confirm the trial date pursuant to a local rule, the commissioner improperly allowed that ministerial rule to trump the Civil and Mandatory Arbitration Rules. The commissioner meted out an unduly harsh remedy at a hearing for which Emery was not provided any notice. Finally, the court failed to substantively consider Emery's motions to correct the error.

II. ARGUMENT

A. THE RIGHT TO A TRIAL CANNOT BE ABRIDGED BY AN ADDITIONAL, MINISTERIAL LOCAL RULE PROVISION.

The court in *Sorenson v. Dahlen* held that “local procedural requirements cannot be a condition that must be timely met in order for the trial court to conduct a trial de novo.” 136 Wn. App. 844, 854, 149 P.3d 394 (2006). That is precisely what occurred in this case. Lindstrom acknowledges that SCLMAR 7.2 is merely a procedural rule. (Resp. Brief 7) *Sorenson* specifically rejected the argument that strict compliance is necessary when applying local rules in the situation of a trial de novo. 136 Wn. App. at 854. However, Lindstrom continues to insist that strict compliance with the local rules is necessary. (Resp. Brief 15) Lindstrom mistakenly seeks to rely on *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997). (Resp. Brief 13-15) However, *Nevers* required strict compliance only for the filing and service requirements for requesting a

trial de novo. 133 Wn.2d at 811-12. *Nevers* did not address the application of local rules within the mandatory arbitration scheme, and it has little application in this case.

Lindstrom attempts to distinguish the *Sorenson* case by arguing that Emery did not substantially comply with the rules. (Resp. Brief 10) In fact, Emery did substantially comply with the rules. Both parties in this case were actively preparing for trial. Emery had confirmed a prior trial date and had made preparations for trial, including necessary filings with the court. (CP 57, 59, 68, 71, 104-07, 108-09, 110-12) Lindstrom had confirmed the January 2012 trial date and was also prepared for trial. (CP 65-67, 101) Finally, the trial court had not stricken the case from its docket and was otherwise prepared for trial to begin on the appointed date. Both Lindstrom and the court had ample notice that Emery intended to proceed with trial on January 10, 2012. The rule's purpose of ensuring that the parties and court were ready for trial had been met.

However, the *Sorenson* decision did not actually mandate that substantial compliance with local ministerial rules is required. The *Sorenson* Court was troubled by the prospect of a party requesting a trial de novo in Kitsap County being required to meet an additional condition to which parties in other counties would not be subjected. *Id.* at 853. Further, when discussing what remedy might be appropriate, the *Sorenson*

Court noted that defendant had not acted in bad faith and the plaintiff was not prejudiced. *Id.* at 857. Similarly in this case, Emery did not act in bad faith, and Lindstrom was not prejudiced. Lindstrom alleges in her conclusion that she has been prejudiced “by the fact that she is entitled to resolution of her claim in reliance to the rules and procedures prescribed by the court.” (Resp. Brief 20). Lindstrom suffered no actual harm and would not be prejudiced by a trial.¹

Lindstrom instead seeks to rely on *Heaney v. Seattle Municipal Court*, 35 Wn. App. 150, 665 P.2d 918 (1983), *rev. denied*, 101 Wn.2d 1004 (1984). (Resp. Brief 7-9) However, the *Heaney* case provides little guidance to the situation before this Court. *Heaney* involved two criminal defendants who sought to dismiss the charges against them because they had not received a jury trial within the 60 days prescribed by the court rules. *Id.* at 152-54. The local rules required the trial to occur within 60 days absent good cause and required a party to object within a period of time, otherwise the party waived his objection. *Id.* First, the Court of Appeals determined that the local rules were not inconsistent with the criminal rules in question. *Id.* at 156. For one of the defendants, the court

¹ Generally, prejudice requires a showing of actual harm from the violation. *See Smith v. Orthopedics Int'l, LTD*, 170 Wn.2d 659, 672, 244 P.3d 939 (2010).

determined that it was the defendant's own actions that led to the trial being set beyond the time limit, and dismissal was not appropriate. *Id.* at 154, 157. For the other defendant, the court determined that he had sufficiently complied with the local rule to preclude waiver of his objection. *Id.* at 156. The Court of Appeals held that although checking a box on the plea form was not the formal motion specified in the local rule, it constituted "sufficient compliance," and he was entitled to a dismissal of charges because the trial was not within 60 days. *Id.* at 156-57. If anything, *Heaney* supports the proposition that "sufficient" compliance can be adequate to comply with a ministerial local rule. Even if Emery's actions did not rise to the level of "substantial" compliance, they certainly constituted "sufficient" compliance to preclude dismissal under a local rule.

B. DISMISSAL WAS NOT WARRANTED BASED ON THE PERMISSIVE LANGUAGE OF THE STATUTES.

Lindstrom does not dispute that SCLCR 40(c)(1) contains permissive language about the remedy to be obtained if the trial is not confirmed, but she does dispute that the language of SCLMAR 7.2(b) is permissive. (Resp. Brief 6) SCLMAR 7.2(b) contains both the words "may" and "shall." Thus, it is presumed that the drafter intended "may" to be permissive and "shall" to be mandatory. *See Scannell v. City of Seattle*,

97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982). In SCLMAR 7.2(b), an opposing party “may” obtain a judgment on the arbitrator’s award if the other party fails to confirm the trial. Put another way, the court “may” enter judgment if the party requesting a trial de novo fails to confirm. Similarly under SCLCR 40(c)(1), if the trial date is not confirmed, the trial court “may” strike the trial date and “may” impose other sanctions or terms. Both local rules are permissive and afford the court discretion to avoid unduly harsh results.

Because of the permissive language, lesser sanctions or remedies are available to the trial court. In fact, SCLCR 40(c)(1) specifically cites “sanctions and/or terms” as separate options to striking the trial date or dismissing the case. Lindstrom’s insistence that the rule must expressly state other courses of action if the drafters intended the court to be able to chose a less severe remedy is unfounded. (Resp. Brief 6) Emery is not aware of any Washington courts that have required rules or statutes to spell out all possible options when permissive language is used.

Finally, Lindstrom incorrectly alleges that Emery has attempted to “mislead” the Court by referring to the lack of trial confirmation as a “scrivener’s error.” (Resp. Brief 5) In fact, Emery has not alleged scrivener’s error as part of this appeal.

C. EMERY’S DUE PROCESS RIGHTS WERE VIOLATED BY DENIAL OF HIS TRIAL DE NOVO AT AN EX PARTE HEARING.

In her discussion of due process, Lindstrom never addresses the key point of this argument – Emery was denied a substantial right without notice. Emery was not given notice to participate in the hearing which determined whether or not he would be denied the right to a jury trial. (CP 27, 74, 100-03) Lindstrom also ignores the fact that the commissioner relied on SCLCR 40(c)(1), a rule that does not authorize an ex parte hearing without notice to the other party. (CP 97) It is patently unjust for a party failing to confirm the trial date to have the trial stricken and judgment entered without notice of the hearing simply because the case first proceeded through mandatory arbitration; a party making a similar error in a case not having come from arbitration is entitled to notice of the hearing. SCLCR 40(b)(2), 40(c)(1).

Lindstrom argues that “[c]ases like *Heaney* demonstrate that a Constitutional right can be waived through inaction.” (Resp. Brief 12) However, the parties in *Heaney* were able to participate in the hearing. Wn. App. at 153-54. The other cases cited by Lindstrom similarly did not involve ex parte hearings for which the party had no notice. *Sackett v. Santilli*, 146 Wn.2d 498, 508, 47 P.3d 948 (2002); *State v. Kratzer*, 70 Wn.2d 566, 571, 424 P.2d 316 (1967). (Resp. Brief 12-13) Because the

language of both SCLMAR 7.2(b) and SCLCR 40(c)(1) is permissive and the court was free to exercise discretion to fashion a remedy, Emery's participation in that hearing was imperative. The local rule abridged Emery's right to notice of the hearing on a dispositive issue and his right to a jury trial. *See King County v. Williamson*, 66 Wn. App. 10, 830 P.2d 392 (1992).

Lindstrom also argues that if she had not confirmed the trial, she risked dismissal of her case. (Resp. Brief 14) In this scenario, Lindstrom may have risked the sanctions in SCLCR 40(c)(1), but the ex parte hearing pursuant to SCLMAR 7.2(b) would not have applied.²

D. THE TRIAL COURT IMPROPERLY DECLINED TO HEAR THE MERITS OF EMERY'S MOTIONS FOR RECONSIDERATION AND REVISION.

Lindstrom's hypertechnical approach to the reconsideration and revision motions filed by Emery elevates procedure over the substantive adjudication of a crucial issue. The case of *In re Detention of Turay*, 139 Wn.2d 379, 390-91, 986 P.2d 790 (1999), outlined Washington's preference to minimize procedural traps and to interpret the rules to allow substance to prevail over form. By declining to hear the merits of Emery's

² For the party opposing a trial de novo request, SCLMAR 7.2(b) only discusses consequences if that party "fails to appear at trial."

motions, the trial court failed to utilize the flexibility in the system to avoid an unduly harsh result. Even Lindstrom acknowledges that the result of the court's application of the local rules in this case was "harsh." (Resp. Brief 10, 15) Emery's substantial compliance with the rules should have allowed the trial court to hear the merits of his motions.

III. CONCLUSION

As in *Sorenson*, this Court need not "condone" Emery's inadvertent failure to comply with a local rule in order to find that his right to a jury trial should be reinstated under the circumstances. 136 Wn. App. at 858. Emery requests that the Court vacate the judgment and remand the case for trial.

DATED this 10th day of September, 2012.

REED McCLURE

By


Michael N. Budelsky WSBA #35212
Attorneys for Appellants

060349.099372/366073

Cathi Key
Cathi Key

SIGNED AND SWORN to (or affirmed) before me on September
10, 2012 by Cathi Key.



[Signature]
REBECCA BARRETT (Print Name)
Notary Public Residing at 4-9-2014
My appointment expires LYNNWOOD, WA