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No. 71208-0-I

COURT OF APPEALS, DIVISION ONE
STATE OF WASHINGTON

DANIEL LUCHTERHAND, Respondent,

v.

MICHAEL CROSSAN and ROWENA CROSSAN, d/b/a LAKE
WASHINGTON BOAT CENTER, Appellants

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. Counter-Statement of the Case	4
III. Summary of Argument	8
IV. Argument	9
A. Vacating a Judgment After Arbitration Should be Based on a Higher Standard of Proof Than to Set Aside a Default	10
1. Arguably, if the Crossans Prevail on Appeal, Luchterhand Receives Nothing Despite Abiding by the Rules and Presenting Uncontroverted Evidence at the Arbitration.	11
2. Allowing the Crossans a Trial de Novo Gives Them a New Trial, an Opportunity to Try Their Case Again, and a Possible New Appeal	12
B. Mandatory Arbitration Rules Are Required to be Strictly Applied to Effect Their Purpose	13
C. Where the Crossans Failed to Submit a Prehearing Statement, Evidence, or Declarations, and Failed to Timely Submit the Declaration of the Physician, There are No Valid Grounds to Vacate	13
1. Where Rowena Crossan's Attendance Would Have Preserved a Right to Trial de Novo, and There was No Valid Excuse for Rowena to Fail to Attend the Arbitration, Her Appeal Must Fail	14

	<u>Page</u>
2. Where the Crossans Failed to Submit Anything from the Physician Until 3 ½ Months After the Hearing, It was Proper for the Arbitrator to Proceed	15
D. There is No Excuse for Appellants' Failure to Submit a Prehearing Statement and Declarations Before the Arbitration	20
1. Appellants Failed to Timely Submit Michael Crossan's and Michael Anderson's Declarations for the Arbitration Under MAR 5.3	21
2. Waiting to Submit Declarations Until After Judgment is Entered Violates Established Arbitration Rules and Would Violate Luchterhand's Due Process Rights	22
E. Respondent is Entitled to Attorneys' Fees	23
V. Conclusion	24

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Adams v. Adams</i> , 181 Wash. 192, 42 P.2d 787 (1935)	19
<i>Carpenter v. Elway</i> , 97 Wash. App. 977, 984, 988 P.2d 1009, 1013-14 (1999)	10
<i>Dill v. Michelson Realty Co.</i> , 152 Wash. App. 815, 820, 219 P.3d 726, 729 (2009)	11, 12, 13
<i>Haywood v. Aranda</i> , 97 Wash. App. 741, 744, 987 P.2d 121, 124 (1999) <u>aff'd</u> , 143 Wash. 2d 231, 19 P.3d 406 (2001)	16, 17
<i>Kim v. Pham</i> , 95 Wash.App. 439, 975 P.2d 544, 547 (1999)	23, 24
<i>Little v. King.</i> , 160 Wn.2d 702, 161 P.3d 345 (2007)	8
<i>Pulich v. Dame</i> , 99 Wash. App. 558, 565, 991 P.2d 712, 716 (2000)	16
<i>Pybas v. Paolino</i> , 73 Wash. App. 393, 400, 869 P.2d 427, 431 (1994)	13
<i>Stanley v. Cole</i> , 157 Wash. App. 873, 239 P.3d 611 (2010)	10, 11, 20
<i>Swasey v. Mikkelsen</i> , 65 Wash 411, 118 P. 308 (1911)	19
<i>Yousoufian v. Office of Ron Sims</i> , 168 Wash. 2d 444, 458-59, 229 P.3d 735, 743 (2010).	8, 9

Page

Regulations and Rules

MAR 5.2	.....	20, 21
MAR 5.3	.....	21
MAR 5.4	.....	9
MAR 7.1	.....	4, 23
MAR 7.3	.....	23

I. Introduction

To provide context and background, the underlying facts of the case are pertinent, but not essential to the issues. The complete facts are set out in the Arbitration Brief. CR 165-185.^a

Underlying Facts of Case

Respondent Daniel Luchterhand bought an engine for his pleasure boat and was given an invoice by "US Engine" on April 29, 2011. CR 4. Plaintiff was told that the engine was a Mercury marine engine with 300 horsepower. CR 4. Defendant U.S. Engines' website stated a "guarantee" that the engines are "100% Marine NOT Auto Engines That Others Sell As Marine Engines". It advertised that U.S. Engine sold rebuilt Mercruiser engines. CR 4. At the arbitration of this case, Luchterhand provided evidence and testimony that the engine was not as represented.

Mr. Luchterhand paid for a warranty, and returned the engine to Appellants multiple times. CR 5. The written warranty listed U.S. Engine, Inc. in the header. CR 5. At the time, there was no U.S. Engine, Inc. It had filed for Chapter 7 bankruptcy in 2004 and which terminated in 2007. CR 5. Mr. Luchterhand returned his boat and engine to U.S. Engine four times in 2011 to fix a large oil leak, and it was never properly fixed. CR 5.

^a With apologies, please note that the citation "CR" throughout this brief should be "CP". That is counsel's error. Only page 1, with this footnote, has been replaced. The remainder of the brief is unchanged.

During the initial launch in 2012, the engine again had a major leak. Mr. Luchterhand told U.S. Engine he would not return it to them, and U.S. Engine referred him to Lake Washington Boat Center for inspection and repair of the engine. CR 5. Appellants gave no indication to Mr. Luchterhand that the two corporations were related. CR 6. Mr. Luchterhand took the engine to Lake Washington Boat Center and they claimed to have fixed it. CR 6. On the next outing, the engine dumped oil again, within 5 minutes of being on the water. CR 6.

The Relationships of All the Defendants

All of the named defendants and d/b/a's are part of the same Mike and Rowena Crossan enterprise. See, CR 170-174. Mike Crossan, has created (and dissolved) and licensed no fewer than 6 corporations, most of them with the name U.S. Engines, or using U.S. Engines as a tradename. CR 2-3.

- 1) US Engine Inc.,
- 2) US Engines Corp., [DL000217-219]
- 3) US Engine & Import Engine, Inc. [DL000230]
- 4) U.S. Marine Engine Corporation [DL000234]
- 5) US Motors Inc.,
- 6) Lake Washington Boat Center Inc. (with registered trade name "US Marine Engines")

The names are interchangeable.

Defendant Lake Washington Boat, Inc., was also doing business as Lake Washington Boat Center. CR 3. It was an active Washington corporation. Its chairman, vice-president and registered agent is Defendant Michael Crossan. CR 3.

Separate from the corporation Lake Washington Boat, Inc., Appellants Michael and Rowena M. Crossan operated as a sole proprietorship, doing business as Lake Washington Boat Center. See, CR 177.

Not Your Typical Pro Se; Consumer Protection Aspects

Appellant Michael Crossan is not an inexperienced litigant. Michael Crossan himself has been sued as defendant or third party defendant 25 times. CR 179-181. A search on the Washington Courts website for "US Engine" rendered 94 public non-sealed cases in King County Superior Court alone¹. CR 179-181 This included US Engine & Import Engine, Inc., US Engine, US Engine

¹ <http://dw.courts.wa.gov/index.cfm?fa=home.caselist&init>

Corp., US Engine Inc., US Engines, and US Engines Corp. --- all related to the Crossans. There were 56 cases in which US Engine was defendant, third party defendant, or a respondent on a foreign judgment. There were 15 in which US Engine appealed from an adverse decision in a lower civil court². CR 179-181

II. Counter-Statement of the Case

This matter derives from an award granted in a mandatory arbitration after the Crossans failed to appear at the arbitration hearing. By failing to appear, the Crossans waived their right to a trial de novo. MAR 7.1

After five months and 29 pleadings, defaults were finally entered against the two corporate defendants (including their d/b/a's) (CR 47-49), Michael and Rowena Crossan finally answered CR 9-10, and Respondent Luchterhand could finally file the statement of Arbitrability. The Statement of Arbitrability was filed on Feb 19, 2013.

² In the remaining cases, a US Engine entity was plaintiff or garnishee defendant (18), or taxpayer defendant on a tax warrant (5).

Defendants were given an additional 30 days from the February 15, 2013 default order, to find counsel to represent U.S. Engines and Lake Washington Boat Center, Inc. The Court allowed that "... if an attorney appears within 30 days and files an Answer, the attorney may bring a motion for an order vacating the order, no later than 10 days after the attorney appears." CR 49. No counsel ever appeared for either corporation.

The arbitration had been initially scheduled for May 3, 2013. CR 53. It was then delayed at the request of the Crossans until May 20th. CR 53. The reason given by the Crossans for the request to continue the hearing was so they could adequately prepare, and upon their representation that they were obtaining the assistance of counsel. CR 53. Luchterhand served his Prehearing Statement of Proof on May 6, 2013. CR 187-191.

Then on May 17, the Crossans requested continuance of the Arbitration hearing because an evidentiary video taken of the marine engine in this case purportedly could not be ready in time for the hearing. CR 53. Despite being allowed another 17 days, they did not retain counsel. CR 53. The Crossans never submitted a Prehearing Statement of Proof.

The Arbitrator agreed to the continuance and the arbitration was rescheduled for June 10th. CR 53. At that time Luchterhand's counsel had mistakenly forgotten a family trip planned for June 10th, and so notified the parties and the arbitrator by May 24th. The hearing was again rescheduled, this time for June 17, 2013. CR 53.

Luchterhand's arbitration brief was submitted to the arbitrator and to Mr. Crossan, on June 14, 2013. CR 185. No arbitration brief was submitted by the Crossans.

On June 17, 2013, the day of the arbitration, the only email Mr. Crossan sent Luchterhand's counsel that day regarding Crossan's inability to attend was sent at 8:35 a.m. CR 142. It said: "I was inn (sic) TRI City's 90 plus heat. I think I became dehydrated and cannot attend this day." No mention of cancer. No mention of Dr. Jangala.³

Ten minutes later, Mr. Crossan emailed the Arbitrator without sending a copy to Luchterhand's counsel. CR 95. In the 8:45 a.m. email, Mr. Crossan doesn't say anything about abdominal

³For being so deathly ill, however, the Court may note that the rest of Mr. Crossan's email is rather comprehensive and detailed.

pain or calling a doctor, or being advised to stay in bed. The email says, "Sorry I cannot even email correctly. Just sick." CR 95.

Plaintiff presented testimony by four live witnesses, including experts, as well as a declaration from another witness. CR 138-39. The summary of their testimony was offered in the arbitration brief. There were 34 exhibits and a video of an inspection of the engine presented at the hearing. After two fact witnesses and two expert witnesses testified, and exhibits offered in evidence, and argument, the hearing was four hours long. CR 138-39.

After the arbitration, from June 27, 2013 to August 26, 2013, Luchterhand's counsel requested Michael Crossan produce evidence of his medical condition (as of the day of the arbitration) in ten emails. CR 145-156.

The Crossans first filed a Request for Trial de Novo on July 3, 2013. CR 11-17. Both Rowena and Michael submitted declarations. They did not submit a declaration from Dr. Jangala at that time. They didn't state in those declarations that anyone had spoken with Dr. Jangala the day of the arbitration. The declarations of July 3rd don't even mention Dr. Jangala. CR 11-17.

And finally, Michael Crossan filed a pleading on September 5, 2013 (CR 64-65) wherein he states: "My doctors at Seattle Cancer Center Dr. Whiting (sic) or my surgeon Dr. Mann at the UW hospital can provide me with a letter or I can sign a release the court can contact them. (sic)" CR 65, ll. 5-8. Even at this late date, there was no mention of the alleged call to Dr. Jangala, and no mention of Dr. Jangala.

Dr. Jangala was first mentioned almost a month later, on October 3, 2013. CR 84-85.

The Crossans motion to vacate was denied after a hearing on November 1, 2013.

III. Summary of Argument

A trial court's decision to vacate a judgment is reviewed for an abuse of discretion. *Little v. King*, 160 Wn.2d 702, 161 P.3d 345 (2007). A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. *Yousoufian v. Office of Ron Sims*, 168 Wash. 2d 444, 458-59, 229 P.3d 735, 743 (2010). "Manifestly unreasonable" is if the court, despite applying the correct legal standard to the

supported facts, adopts a view that no reasonable person would take. *Id.*

Under MAR 5.4, the arbitrator, “for good cause shown, may allow an absent party an opportunity to appear at a subsequent hearing before making an award.”

The Arbitration hearing was June 17, 2013. The Arbitrator maintained jurisdiction until he issued his Amended Arbitration Award six weeks later on July 31, 2013. CR 221-222. While the Arbitrator still had jurisdiction, the Crossans failed to show good cause why another hearing should be conducted to take Michael Crossan’s testimony.

III. Argument

The only relief the Crossans seek is to vacate the judgment. Their position is that the unsubstantiated assertion of illness via Michael Crossan's email the morning of the arbitration stripped the arbitrator of discretion to go forward, and stripped the trial judge of discretion to affirm the arbitration award. The Crossan’s position is that because Michael Crossan emailed on the morning of the arbitration, and then followed it 3 ½ months later with an unsubstantiated declaration of a physician, Luchterhand loses the

case and the Crossans walk away scot free. The months of litigation, the expense of expert witnesses, the four hours of hearing all count for nothing.

It would be an absurd result and a violation of Respondent Luchterhand's due process rights if defendants in an arbitration, particularly an arbitration with a history such as this one, could claim illness without contemporaneous medical support, and then months later be allowed to vacate the judgment with a simple declaration from a medical provider unsupported by any documentation.

A. Vacating a Judgment After Arbitration
Should be Based on a Higher Standard
of Proof Than to Set Aside a Default

The rules and statutes pertaining to arbitration awards restrict the reviewability of awards. "[T]his promotes the legislative purposes of providing for finality of disputes, alleviating court congestion, and reducing delay." *Carpenter v. Elway*, 97 Wash. App. 977, 984, 988 P.2d 1009, 1013-14 (1999).

There is a "strong policy favoring the finality of judgments on the merits." *Stanley v. Cole*, 157 Wash. App. 873, 887, 239 P.3d 611, 619 (2010). "Allowing a party to circumvent this rule through

CR 60(b)(9) would undermine the entire mandatory arbitration scheme.” *Id.* at 888.

1. Arguably, if the Crossans Prevail on Appeal, Luchterhand Receives Nothing Despite Abiding by the Rules and Presenting Uncontroverted Evidence at the Arbitration.

It would appear that the statutes and case authority stand for the proposition that there is only one of two outcomes available: either the judgment in favor of Respondent Lucherthand stands, or the judgment is vacated and Mr. Luchterhand will receive absolutely nothing. That is the position the Crossans propose.

The remedies for an unsatisfactory arbitration award are “limited to a trial de novo ... and, in very limited circumstances, a motion to vacate the judgment on the award.” 15A Washington Practice: Washington Handbook on Civil Procedure: at 613; MAR 6.3, 7. 1...An appeal is allowed from the trial court's ruling on a motion to vacate the judgment but it is limited to whether the court abused its discretion when ruling on the motion. *Pybas v. Paolino*, 73 Wash.App. 393, 399, 869 P.2d 427 (1994).

Dill v. Michelson Realty Co., 152 Wash. App. 815, 820, 219 P.3d 726, 729 (2009) (emphasis added).

The rules don't make a provision for an arbitration hearing “do-over”.

There is no mechanism for reconsideration of a mandatory arbitration award. 15A Karl B. Tegland & Douglas J. Ende, *Washington Practice: Washington Handbook on Civil Procedure*: § 79.3, authors' cmt. at 612 (2008–09). The arbitrator may amend an award “to correct an obvious error made in stating the award,” but only if done within the time for filing the award or upon application of the superior court to amend. MAR 6.2; 15A *Washington Practice: Washington Handbook on Civil Procedure*: at 612. Amendments are permitted to adjust the award in matters of form rather than substance, such as to correct an inadvertent miscalculation or description. 15A *Washington Practice: Washington Handbook on Civil Procedure*: at 612–13. Parties who fail to request a trial de novo “may not alter [an arbitration award] by requesting action by the Superior Court which would amend that award.” *Trusley v. Statler*, 69 Wash.App. 462, 465, 849 P.2d 1234 (1993).

Dill v. Michelson Realty Co., 152 Wash. App. 815, 820, 219 P.3d 726, 729 (2009).

2. Allowing the Crossans a Trial de Novo Gives Them a New Trial, an Opportunity to Try Their Case Again, and a Possible New Appeal.

The Crossans don't seek a trial de novo, but in the event they attempt to change their position, trial de novo is not available.

The reason for a strict standard against granting a trial de novo should be obvious:

The act of vacating the judgment and allowing a trial de novo gives the party “more than a right to argue for and possibly receive a new trial. It granted him a new trial. It gave him the opportunity to try his case again. Furthermore, if he is dissatisfied with the results of the new trial, he could appeal from that judgment.”

Pybas v. Paolino, 73 Wash. App. 393, 400, 869 P.2d 427, 431 (1994).

B. Mandatory Arbitration Rules Are Required to be Strictly Applied to Effect Their Purpose

“The purpose of authorizing mandatory arbitration ... is to alleviate court congestion and reduce delay in hearing civil cases. ... Washington courts interpret these rules strictly to effectuate their purpose of reducing court congestion....”

Dill v. Michelson Realty Co., 152 Wash. App. 815, 818-19, 219 P.3d 726, 728 (2009)(citations omitted)

C. Where the Crossans Failed to Submit a Prehearing Statement, Evidence, or Declarations, and Failed to Timely Submit the Declaration of the Physician, There are No Valid Grounds to Vacate

The arbitration was initially scheduled for May 3, 2013. Then May 20th. Michael Crossan represented that he required more time, and was hiring an attorney. Respondent Luchterhand submitted his Prehearing Statement on May 6, 2013. CR 187.

Even though the Crossans are pro se, they had the opportunity to follow the format of the Luchterhand prehearing statement and still comply with the rules. The Crossans could have submitted a declaration from Michael Anderson at that time, and failed to do so.

1. Where Rowena Crossan's Attendance Would Have Preserved a Right to Trial de Novo, and There was No Valid Excuse for Rowena to Fail to Attend the Arbitration, Her Appeal Must Fail

Rowena Crossan didn't appear at the hearing. Had she appeared, that would have preserved at least Rowena's right to request a trial de novo, at a minimum. Rowena certainly had testimonial knowledge about her involvement in the business, and the filings that were made in her name with various state agencies, but decided to not appear.

Michael P. Crossan has an adult son who works with him, Michael C. Crossan. CR 139. Michael C. Crossan, could have tended to his father and permitted his stepmother to attend. Then Rowena could have provided her own testimony and timely explained the alleged reason for Michael P. Crossan's inability to attend.

2. Where the Crossans Failed to Submit Anything from the Physician Until 3 ½ Months After the Hearing, It was Proper for the Arbitrator to Proceed

Assume for the sake of argument that the declaration of Dr. Jangala, timely submitted, would have sufficed as “good cause” for Michael Crossan to miss the arbitration. Even so, by failing to submit Dr. Jangala’s declaration for three and a half months, and by failing to timely provide it to the arbitrator, the Crossans waived their right to assert there was “good cause” to appear at a subsequent hearing.

MAR 5.4 provides, in pertinent part:

...The arbitrator, for good cause shown, may allow an absent party an opportunity to appear at a subsequent hearing before making an award. A party who fails to participate without good cause waives the right to a trial de novo.

(emphasis added).

How does one show “good cause”?

Simply an email, under these circumstances (where the party hadn’t prepared, hadn’t submitted prehearing statement of proof, hadn’t submitted brief, no evidence, etc.) where the Crossans had already been granted two continuances, did not suffice as “good cause”. Even assuming Dr. Jangala’s declaration is a showing of

“good cause”, it is irrelevant. Why? Because the Crossans didn’t provide it to the arbitrator so he had an opportunity to consider it.

By delaying and not timely exercising one’s rights under the MAR rules, they may be waived. *Haywood v. Aranda*, 97 Wash. App. 741, 744, 987 P.2d 121, 124 (1999) aff’d, 143 Wash. 2d 231, 19 P.3d 406 (2001) (party that waited until after jury verdict to object to failure to file proof of service of request for trial de novo has waived the right to object). The *Haywood* court found that allowing a party to raise defenses too late “...would be inconsistent with the Legislature’s primary goal in creating a mandatory arbitration system – to “reduce congestion in the courts and delays in hearing civil cases.” *Id.* 97 Wash. App. at 744, 987 P.2d at 124, (citation omitted).

Even assuming that the timely submission of Dr. Jangala’s to the arbitrator would have sufficed as “good cause” for a subsequent hearing, the Crossans invited error by not submitting Dr. Jangala’s declaration on time. “The doctrine of invited error prohibits a party from setting up an error and then complaining of it on appeal.” *Pulich v. Dame*, 99 Wash. App. 558, 565, 991 P.2d 712, 716 (2000). In *Pulich*, the prevailing party in a mandatory arbitration failed to timely raise the defense that Request for Trial de Novo was filed too soon. The trial court denied the plaintiff’s motion to enter judgment, the

matter proceeded to trial, and a jury entered a verdict in favor of the defendant. *Pulich*, 99 Wash. App. at 561, 991 P.2d at 714 (2000).

Pulich, like the Crossans, did not take timely action. The plaintiff in *Pulich* didn't timely point out the defect in service. The Crossans didn't timely provide the arbitrator with the declaration of Dr. Jangala. The *Pulich* Court had this to say about the result of not taking timely action: "Now, Pulich may not benefit from the error by setting aside the results of a trial that was otherwise conducted in compliance with the law." *Pulich*, supra, 99 Wash. App. at 566, 991 P.2d at 717 (2000).

In the above analysis, Respondent emphasizes that we are making a big assumption *for the sake of argument*. We have assumed that the declaration of Dr. Jangala would have been a sufficient showing of "good cause" called for under the rule. That is really giving said declaration the benefit of the doubt. The arbitrator would not have been wrong to find the declaration of Dr. Jangala was not sufficient cause. Dr. Jangala's declaration doesn't say that he actually saw or examined Mr. Crossan. Even by his own declaration, Dr. Jangala had no testimonial knowledge of Mr. Crossan's condition on that day. According to his recollection of a phone call 90 days before, he had only spoken to Rowena Crossan, not Michael

Crossan. His clinic is in Maple Valley, where Mr. Crossan lives. Dr. Jangala didn't include any supporting documentation, such as chart notes, telephone message slips, or anything of that nature. There is no supporting documentation reflecting that there had been a call.

The reliability of the declaration really must be questioned. After Mr. Crossan's assertions that he had proof from the University of Washington that he was ill that day, he was asked ten times for the documentary proof from June 27 through August 26th. CR 145-156. Even as late as September 5, 2013, Mr. Crossan referred to other doctors, but failed to mention Dr. Jangala. CR 64-65.

Never, not once, between the day of the call to Dr. Jangala and the Rule 60 motion, did the Crossans mention Dr. Jangala. Not in emails, and not in the three pleadings they filed. Surely the Crossans understood the importance of proving through evidence or testimony that Michael was medically incapacitated that day. It is, to put it mildly, implausible that the Crossans would have forgotten Rowena's conversation with Dr. Jangala.

Under the facts of this case, where the Crossans already sought and obtained two continuances, where one of the continuances was supposedly for the purpose of retaining an attorney, where they failed to submit a Prehearing Statement of

Proof, where they failed to submit declarations supporting their case, where they failed to submit an Arbitration Brief --- a mediator could have concluded that the Jangala declaration was an insufficient showing of "good cause".

No one disputes that a default may be vacated due to "unavoidable casualty or misfortune preventing the party" from participating. *Adams v. Adams*, 181 Wash. 192, 195, 42 P.2d 787, 788 (1935). But this is not a default. It is a mandatory arbitration proceeding.

Swasey v. Mikkelsen, 65 Wash. 411, 118 P. 308 (1911), cited by the Crossans, does not support their position. The appeal to set aside the judgment was denied, and judgment affirmed. The Supreme Court noted that party moving to set aside the default had sufficient opportunity to employ counsel. *Swasey v. Mikkelsen*, 65 Wash. 411, 118 P. 308 (1911). The Crossans had plenty of time to employ counsel, and in fact were advised by the Court to secure counsel. CR 49 And again, this case is not a case of default. The Crossans had answered, and they had plenty of time to submit evidence and testimony before the alleged sickness, and time to submit the declaration of Dr. Jangala.

Stanley v. Cole, 157 Wash. App. 873, 239 P.3d 611 (2010) is very close to this case: it is based on a motion to vacate an arbitration award. The trial court and the Court of Appeals rejected the motion to vacate, noting that the award was not a default judgment, it was resolved on its merits. *Stanley v. Cole*, 157 Wash. App. 873, 887, 239 P.3d 611, 619 (2010). Even though there may have been an “unavoidable misfortune”, the defendant is not entitled to relief from judgment unless he can show “that the misfortune actually prevented him from defending against the lawsuit.” *Stanley v. Cole*, 157 Wash. App. 873, 883, 239 P.3d 611, 616 (2010). Here, the misfortune may have been avoided if the Crossans had followed the rules and had timely showed good cause for another hearing date.

D. There is No Excuse for Appellants’ Failure to Submit a Prehearing Statement and Declarations Before the Arbitration

Under MAR 5.2, the Crossans were required at least 14 days prior to the date of the arbitration hearing to file a “Prehearing Statement of Proof”. Nothing that Mr. Crossan submitted complied with MAR 5.2 because it did not “contain a brief description of the matters about which each witness will be called to testify, and whether that testimony is anticipated to be provided in writing, in person, or by telephone.” MAR 5.2.

Even if the Crossans had appeared, the rules grant the arbitrator discretion to not allow the testimony. *Id.*

A party failing to comply with this rule or failing to comply with a discovery order may not present at the hearing the witness, exhibit, or documentary evidence required to be disclosed or made available, except with the permission of the arbitrator.

Id.

The Crossans did not serve a Prehearing Statement of Proof.

1. Appellants Failed to Timely Submit Michael Crosson's and Michael Anderson's Declarations for the Arbitration Under MAR 5.3.

Appellants submitted the declaration of Mike Anderson in support of their Rule 60 motion. His testimony could have been presented one of two ways: by submitting their declaration to the arbitrator pursuant to Rule 5.3, or live. There has been no offer of an excuse why he wasn't lined up to testify, and no excuse as to why his declaration wasn't submitted.

The Declaration of Anderson Fails to Establish Anderson Was Available and Would Have Testified

The declarations that the Crossans submitted in support of this motion are silent on the issue of whether Michael Anderson was even asked to testify, or was prepared to testify, or that Mike Crossan and Rowena had to call Michael Anderson to tell him not

to go to the arbitration hearing. That's telling. That's an indication that they never had any intention of having Michael Anderson, or anyone for that matter, attend the hearing. His testimony should not be accepted now when the Crossans don't state in their declarations that Anderson would have testified at the hearing but for Michael P. Crossan's medical condition.

2. Waiting to Submit Declarations Until After Judgment is Entered Violates Established Arbitration Rules and Would Violate Luchterhand's Due Process Rights

Luchterhand presented four hours of testimony and evidence. He was ready to cross-examine any witnesses the Crossans chose. But the Crossans didn't appear, denying Luchterhand the opportunity to cross-examine. The Crossans submitted the declarations of Anderson and Michael Crossan and expect the Court to accept those declarations as uncontroverted verities. Nothing could be further from the truth. To award the Crossans any relief would violate Luchterhands right to due process. He was ready to present his case, and did present his case. That judgment should not be vacated.

Mr. Anderson could have testified at the hearing by declaration. The Crossans could have timely submitted Mike

Anderson's declaration under MAR 5.3. The Crossans had plenty of time to do it, because the arbitration was continued three times. The Crossans have offered no excuse for failing to submit Anderson's declaration in time for the arbitration. They should not be permitted to prevail by submitting it after judgment was already entered.

E. Respondent Luchterhand is Entitled to Attorneys' Fees

By failing to appear and participate at the arbitration hearing, the Crossans waived their right to a trial de novo. MAR 7.1: "Any aggrieved party not having waived the right to appeal may request a trial de novo in the superior court."

Plaintiff is entitled to an award of attorney's fees and costs for the appeal. *Kim v. Pham*, 95 Wash.App. 439, 975 P.2d 544, 547 (1999).

MAR 7.3 provides that the court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo. The *Kim v. Pham* case is directly on point. Although requests for trial de novo were filed CR 11-19, they were neither adjudicated on the

trial de novo nor were the request "voluntarily" withdrawn. The Court interprets MAR 7.3 "as requiring a mandatory award of attorney fees when one requests a trial de novo and does not improve their position at trial because they failed to comply with requirements for proceeding to a trial de novo such as MAR 7.1(a)." *Kim v. Pham*, 95 Wash.App. 439, 447, 975 P.2d 544, 548 (1999).

V. Conclusion

The judgment of Luchterhand should be affirmed. Any other result would be gross violation of the spirit and letter of the Mandatory Arbitration process, and a miscarriage of justice.

RESPECTFULLY SUBMITTED this 24th day of April, 2014.

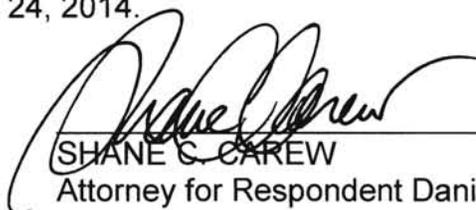


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CERTIFICATE

I certify that I mailed a copy of the foregoing RESPONDENT'S BRIEF to Ronald J. Meltzer, Appellant's attorney, at 701 Fifth Avenue, Suite 4780, Seattle, WA 98104, priority mail, postage prepaid, on April 24, 2014.

A handwritten signature in black ink, appearing to read "Shane C. Carew", is written over a horizontal line.

SHANE C. CAREW

Attorney for Respondent Daniel Luchterhand