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A. REPLY TO ASSIGNMENTS OF ERROR AND ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR.

1. REPLY TO RESPONSE TO APPELLANT'S ASSIGNMENTS OF ERROR.

Respondents, Tom Sorenson and Paul Endresen, doing business as ES Woodshop (hereinafter collectively referred to as ES Woodshop), generally deny all five of Appellant Skip P. Dahlen's (hereinafter "Dahlen") assignments of error. ES Woodshop does not support those general denials with any specific factual issues, other than the strict compliance issue supporting the trial court decision.

2. REPLY TO ISSUE PERTAINING TO THE ASSIGNMENTS OF ERROR.

In response to Issues Pertaining to Assignments of Error contained in Dahlen's Brief, ES Woodshop does not address Appellant's Assignment of Error 2, concerning the local rules being more restrictive than the state rule contained at MAR 7.1(a), nor Appellant's Assignment of Error 3 concerning MAR 8.2 and CR 83(a) and KCLCR 81(c), which grant to the trial court the discretion to modify or suspend any of the Kitsap County local court rules for good cause. ES Woodshop only addressed Assignment of Error 1, which pertains to the Note for Trial Setting form, claiming it was not in strict compliance with MAR 7.1(a). ES Woodshop also points out that 21 months elapsed between the date the Note for Trial

Setting was served upon ES Woodshop's attorney and filed with the trial court, and the time ES Woodshop filed the Motion to Strike Dahlen's Trial De Novo Request, but does not explain how ES Woodshop was prejudiced by this delay after timely receiving a copy of the Note for Trial Setting form constituting actual notice of the November 5, 2003 return date for the trial setting.

ES Woodshop ignored Dahlen's equal protection Assignment of Error 4, as applied to Dahlen, which involved the trial court applying LMAR 7.1 and 7.2, KCLCR 40(b)(1) and KCLCR 77(k)(8) in a way that was more restrictive than the state's MAR 7.1(a). The Respondent also failed to address Dahlen's equal protection Assignment of Error 5, which highlighted the trial court's application of LMAR 7.1 and 7.2 in a way inconsistent with other similar local mandatory arbitration rules for other jurisdictions within Washington, without a rational basis and without any comparative basis other than geographical location.

No other bases for precluding Dahlen's de novo appeal rights are presented in ES Woodshop's Response Brief.

B. REPLY TO RESPONDENT'S STATEMENT OF CASE.

The full facts of this case are more particularly set forth in Dahlen's Brief of Appellant, and are only referenced herein to highlight Appellant's issue with ES Woodshop's statement of the same:

ES Woodshop's representation that the arbitration process was "fair" is irrelevant. Because Dahlen complied with MAR 7.1(a), he is entitled to a de novo appeal of the arbitrator's decision. For this reason, Dahlen disputes that the trial court's determination to strike Dahlen's Request for Trial De Novo and deny Dahlen a trial on the merits, was proper. Further, because Dahlen was denied his right to de novo appeal, ES Woodshop is not entitled to an award of attorneys fees.

C. REPLY TO RESPONDENT'S ARGUMENT.

Respondent ES Woodshop's argument focuses exclusively upon LMAR 7.1 and the fact that a request for trial de novo must be accompanied by a Note for Trial form and that the form must docket the return date for a Friday at 9:00 am in accord with Kitsap County Local Court Rule (KCLCR)77(k)(8).

Dahlen complied with LMAR 7.1 when he served and filed a Note for Trial Setting in the same format proscribed by that rule, along with the Request for Trial de Novo and a Certificate of Service. Dahlen strictly complied with both MAR 7.1 and LMAR 7.1 and has proof of the same. While it is true that there was a scrivener's error in Dahlen's Note for Trial Setting form, that does not negate that Dahlen did, in fact, file and serve that Note as the rules require.

ES Woodshop cites *Wiley v. Rehak*, 143 Wn.2d 339, 20 P.3d 404 (2001) for the proposition that the word “shall” in the Mandatory Arbitration Rules imposes a mandatory duty to comply with “the stated requirement.” This statement is made immediately following the reference to LMAR 7.1(a)(1) and italicized language stating that the Request for Trial de Novo must be accompanied by a Note for Trial. In point of fact, the cited case had no relationship to any local court rule, much less Kitsap County LMAR 7.1(a)(1). The case stands for the proposition that an aggrieved party's failure to timely make an MAR 7.1(a) request precludes him from seeking a trial de novo. *Wiley v. Rehak*, 143 Wn.2d at 347, 20 P.3d 404 (2001). The other references to this case all related to MAR 7.1(a), not to LMAR 7.1(a)(1). Dahlen's Request for Trial De Novo was accompanied by a Certificate of Service and a Note for Trial in the form required by LMAR 7.1(a)(1) and by Kitsap County local court rules (KCLCR) 40(b)(1) and 77(k)(8). The fact that the return date for the trial setting was mistakenly set for a Wednesday instead of a Friday, is not jurisdictional. Because trials are set administratively by the Court Scheduler based upon notification from the Clerk's Office, attorneys are not required to be present at trial settings. Consequently, neither the attorney for Dahlen or ES Woodshop were ever notified that the matter had not been set for trial. (CP 95, 96 and 97) Note for Trial forms in

Kitsap County are routinely returned by the Superior Court Scheduler when errors on the form are made, due to such things as one party's failure to file an answer to a complaint or third-party claim, a reply to a counterclaim or cross-claim, the failure to note a matter before a visiting judge in certain instances, and many others. These errors do not deprive a party of the right to trial in a civil case, however. They merely require the requester to re-note the matter for trial setting after the error is corrected. The error in this case was the return date selected for the Superior Court Scheduler to administratively set the trial de novo. The form was timely filed with the Superior Court Clerk after being served upon ES Woodshop's attorney, along with the Request for Trial de Novo and a Certificate of Service, within the 20 day time limit mandated by MAR 7.1(a). For this reason, *Wiley v. Rehak*, is not applicable to the present appeal.

Respondent next cites KCLCR 77(k)(8) as mandating the selection of a Friday on the return date for the Superior Court Scheduler to administratively set a trial, including a trial de novo. The trial-setting form contained an incorrect date -- a scrivener's error -- based upon an inadvertent mistake by Dahlen's counsel looking at a "wild" ([SIC] should be "wall") calendar (RP1-9, line 14). He selected the 5th day of November 2003 (CP 4), a Wednesday, instead of the 5th day of December

2003, which was a Friday. This incorrect date did not defeat the purpose of the requirements and did not prejudice ES Woodshop; ES Woodshop's attorney timely received a copy of the note for trial setting form with the scrivener's error. Respondent is apparently arguing that failure to comply with this local rule is akin to strict liability on the part of the requester. For the reasons indicated above, this local rule is not jurisdictional. Failure to comply means only that the matter cannot be administratively set for trial or arbitration, but that the matter must be re-noted.

Next, ES Woodshop cites *Nevers v. Fireside* and *Inman v. Netteland* for the proposition that strict compliance with MAR 7.1 is required in a trial de novo situation, and that the trial court lacks discretion to hear the trial de novo if the time limits of MAR 7.1(a) are not met. The *Nevers* decision holds that the “primary goal for the statutes providing for mandatory arbitration (RCW 7.06) and the Mandatory Arbitration Rules (MAR) that are designed to implement that chapter is to reduce congestion in the courts and delays in hearing civil cases.” *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997). The general rule, as recognized in *Inman v. Netteland*, 95 Wn.App 83, 974 P.2d 365 (1999) is that strict compliance with the service requirement of MAR 7.1(a) is mandatory; it is only when there has been both timely service and filing of that proof of service, that the court may conduct a trial de novo. *Nevers*,

133 Wn.2d at 812, 947 P.2d 721. Because the rule requires strict compliance, sending a facsimile copy of a request for trial de novo does not constitute service on an attorney or party as required by MAR 7.1(a) and as further defined in CR 5(b). *Inman*, 95 Wn.App at 89, 974 P.2d 365. Both *Nevers* and *Inman* refer to compliance with MAR 7.1(a), not with regard to compliance with LMAR 7.1(a)(1). Dahlen has complied with MAR 7.1(a)'s requirements. Thus reference to the *Nevers* and *Inman* holdings are not applicable to the present appeal.

Finally, Respondent argues that MAR 8.2 allows the arbitration rules to be supplemented by local superior court rules adopted and filed in accordance with CR 83. The question of a conflict between a statewide civil rule and a more restrictive local court rule has arisen in a number of Washington cases. For the reasons set forth in Dahlen's original brief, when interpretation of local court rules restrict a valuable right granted by a statewide civil rule, the local rule interpretation cannot be given effect if it violates the spirit of the civil rules, which is to allow the court to reach the merits of a controversy. (In *King County v. Williamson*, 66 Wn.App 10, 830 P.2d 392 (1992), Division I reversed a trial court that had earlier ruled untimely a motion for reconsideration that was filed within the 10 day time limits of CR 59(b), but not within the more restrictive requirements of a King County Local Rule.) (In *Harbor Enterprises, Inc.*

v. Gudjonsson, 116 Wn.2d 283, 803 P.2d 798 (1991), the court negated a local rule requiring filing of an affidavit of prejudice immediately after assignment to a judge; that rule conflicted with RCW 4.12.050, which requires that the affidavit be filed “before the judge presiding has made any order or ruling involving discretion.”) (In *Hessler Construction Co., Inc. v. Looney*, 52 Wn.App. 110, 112, 757 P.2d 988, *review denied*, 111 Wn.2d 1029 (1988) a King County Local Rule allowing the court to refuse to consider a responsive affidavit properly served and filed solely because it was not served upon the Civil Motions Coordinator, was challenged as being more restrictive than CR 5(d)(2); that rule requires a motion and hearing before the imposition of sanctions could be made upon a party.) Noting that the civil rule would be ineffective if the local rule procedure was permitted, the court reversed the trial court. As further authority for its ruling, the court noted:

Summary disregard of the controverting affidavit for non-service on the Coordinator also violates the spirit of the Civil Rules, whose purpose is to allow the court to reach the merits. *Rinke v. Johns-Mansville Corp.*, 47 Wn.App. 222, 227, 734 P.2d 533 (1987). The court erred in refusing to consider Looney's controverting affidavit without following the procedures in CR 5(d)(2).

Hessler, 52 Wn.App. at 112, 757 P.2d 988.

Local court rules which afford a party less than that party's entitlements under the state procedural rules, including the Mandatory

Arbitration Rules, are not in accordance with CR 83, and must yield.

Strict compliance with a local rule will be denied when enforcement would exalt form over substance. In *Wilson v. Olivetti North America, Inc.*, 85 Wn.App 804, 934 P.2d 1231 (1997), *review denied*, 133 Wn.2d 1017, 948 P.2d 388 (1997) the Court of Appeals for Division III overruled a trial court's order striking an aggrieved party's demand for a jury trial. In that case, the appellant timely filed the jury demand form with the court clerk and paid the jury demand fee as required by CR 38(b). The parties to that action also filed a Joint Status Report form indicating "a 12 person jury would be demanded." *Wilson*, 85 Wn.App at 807, 934 P.2d 1231. However, Spokane County Local Superior Court rule LR 38(a)(1) required that a jury demand "be contained on a separate document" which must be served. *Wilson*, 85 Wn.App at 808, 934 P.2d 1231. The trial court granted opposing party's motion and struck Ms. Wilson's demand for a jury trial on the basis that the separate document containing the jury demand language had not been served upon the opposing party as required by this local court rule. The Court of Appeals noted as follows:

In Washington, the right to a trial by jury is "inviolable" and may not be impaired by either legislative or judicial action. Const. Art. I, §21, *Geschwind v. Flanagan*, 121 Wn.2d 833, 839-40, 854 P.2d 1061 (1993); *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 771 P.2d 711, 780 P.2d 260 (1989).

Further, noting that no authority had been cited by the parties or found by the reviewing court addressing the issue whether a party's failure to comply with a local court rule waives the constitutional right to a jury trial, the court cited *Aetna Ins. Co. v. Kennedy*, 301 U.S. 389, 57 S.Ct. 809, 812, 81 L.Ed. 1177 (1937), for the proposition that the right to a jury trial in federal court is “fundamental,” and courts have been instructed to “indulge every reasonable presumption against waiver.” At page 810 of the *Wilson* decision, the court stated:

Washington courts similarly have held that substantial compliance may be sufficient to satisfy procedural notice requirements if the other party has actual notice or if the service was reasonably calculated to give notice to the other party. *In re Saltis*, 94 Wash.2d 889, 896, 621 P.2d 716 (1980).

In this case, the captions of Ms. Wilson's two complaints (which were served on Olivetti) stated that a jury trial was demanded. And the joint status report (which Olivetti's attorney signed) indicated a jury trial was being demanded. Olivetti certainly had actual notice that Ms. Wilson was demanding a jury trial. Moreover, Olivetti cannot reasonably contend it was prejudiced by Ms. Wilson's failure to serve the separate jury trial demand. Aware of the demand at least at the time of the joint status report more than a year before the trial, a simple inquiry of plaintiff's counsel would have clarified any confusion. Olivetti's insistence on strict compliance with the local rule, despite its actual knowledge of the jury trial demand, exalts form over substance. Ms. Wilson substantially complied with the procedural requirements, and Olivetti was not prejudiced significantly by the violation because it had actual knowledge of the jury trial demand. The trial court abused its discretion in refusing the jury trial.

ES Woodshop extrapolates CR 83 to encompass LMAR 7.1 in order to argue that “[t]he defense did not accompany their Request for a Trial de Novo with a proper Note for Trial in this matter.” Respondent then argues that strict compliance with LMAR 7.1 is mandated by CR 83, and cites *Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005) in support of this proposition.

The most recent case on the topic of “proof of service” was the Supreme Court decision in *Alvarez v. Banach*. The court confirmed the earlier Court of Appeals, Division II, decisions of *Carpenter v. Elway*, 97 Wn.App. 977, 988 P.2d 1009 (1999), *Sunderland v. Allstate Indemnity Co.*, 100 Wn.App 324, 995 P.2d 614 (2000) and *Terry v. City of Tacoma*, 109 Wn.App 448, 36 P.3d 553 (2001) for the proposition that the service requirements of MAR 7.1(a) do not mandate an affidavit of service, but only 'some evidence' of the time, place, and manner of service to prove that the opposing party timely received a copy of the aggrieved party's request for trial de novo for purposes of MAR 7.1(a). The court did clarify, however, that personal service requires “proof of receipt”, that receipt is not presumed, and, thus, that receipt is not proved by a declaration of delivery stating that a copy is “to be delivered,” without more. *Alvarez*, 153 Wn.2d at 840, 109 P.3d 402.

ES Woodshop's strict compliance argument is akin to that made in *Carpenter v. Elway*, 97 Wn.App. 977, 988 P.2d 1009 (1999). In that case, respondent argued that Carpenter's trial de novo request must be dismissed due to his failure to strictly comply with MAR 6.3.¹ *Carpenter*, 97 Wn.App. at 985, 988 P.2d 1009. Distinguishing the purpose of MAR 6.3 from MAR 7.1(a), the court of appeals for Division II ruled that to require Carpenter to strictly follow MAR 6.3 would not further the legislative goal of reducing delay and court congestion in the same way as strict requirements relating to the timely filing of proof of service and the court declined to extend the standard of strict compliance

Respondent ES Woodshop neglects to address Dahlen's position that the trial court had authority under KCLCR 81(c) to modify or suspend any of the local court rules, in any given case, upon good cause being shown therefore or upon the court's own motion.

Further, court rules relating to each other, like statutes relating to each other, should be read as complementary, rather than in conflict. *City of Bellevue v. Hellenthal*, 144 Wn.2d 425, 435, 28 P.3d 744 (2001), citing *State v. Chapman*, 140 Wn.2d 436, 448, 998 P.2d 282, cert. denied, 531 U.S. 984, 121 S.Ct. 438, 148 L.Ed.2d 444 (2000); *In re Personal Restraints of Yim*, 139 Wn.2d 581, 592, 989 P.2d 512 (1999).

¹ MAR 6.3 requires a CR 60(b)(1) motion to vacate a judgment on arbitration award, and Carpenter sought relief under CR 59(a)(1).

For these reasons, Dahlen submits strict compliance with MAR 7.1(a) has occurred, giving the trial court authority to entertain Dahlen's trial on the merits. Thereafter, scheduling of Dahlen's matter for trial became an administrative function of the Court Clerk's office, and KCLCR 40 was to be used, per MAR 8.2, to supplement the intent and purpose of MAR 7.1(a), not to override it.

D. REPLY TO RESPONDENT'S STATEMENT RE: ENTITLEMENT TO ATTORNEY'S FEES.

Under MAR 7.3, only those costs and reasonable attorneys fees incurred after a request for trial de novo is filed may be assessed under this rule. Further, a party is entitled to these costs and fees only if the party who requested the trial de novo fails to improve his position at trial. It is Dahlen's position that because his request for trial de novo was denied, he was never given the opportunity to improve his position at trial. Had Dahlen's request been granted, ES Woodshop would not be entitled to an award of attorneys fees and costs until after it was determined whether Dahlen had improved his position or not.

E. CONCLUSION

As can be seen from the analysis above, there is no legal authority for requiring "strict compliance" with KCLCR 40 and 77, and there is significant support for only requiring substantial compliance with those

rules when strict compliance with MAR 7.1 has been achieved. Dahlen therefore respectfully requests this court to decline ES Woodshop's invitation to extend the strict compliance holdings in *Nevers* and *Inman* (pertaining to MAR 7.1(a)) to the construction of KCLCR 40 and 77 in this case.

For the reasons set forth above, Appellant Dahlen respectfully requests that this Court reverse the trial court's dismissal of his request for trial de novo on the bases described. The extremely strict interpretation of the Mandatory Arbitration Rules, other than MAR 7.1, is not supported by the law and it violates Dahlen's right to equal protection under the law. Denial of Dahlen's right to a trial produced a Draconian result not contemplated by either KCLCR 81(c) or case law precedents mandating that disputes be tried on the merits, and further that substantial justice be done. Finally, Dahlen respectfully requests that the Judgment and Decree be vacated, that he be allowed to proceed to trial on the merits as provided by law, and that he be awarded his attorney fees and costs on review.

Respectfully Submitted this 27th day of June, 2006.

LIEBERT MORGAN & FLEISCHBEIN, P.S.

By: 

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PROOF OF SERVICE

I, KRISTINA L. BASIC, declare under penalty of perjury under the laws of the State of Washington that the following statements are true and based on my personal knowledge, and that I am competent to testify to the same.

That on this day I caused to be delivered a copy of this APPELLANT'S REPLY BRIEF to which this Proof of Service is attached, by the means described as follows:

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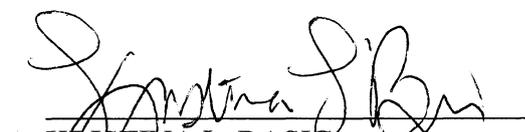
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DATED this 25th day of June, 2006, Silverdale, Washington.



KRISTINA L. BASIC