

No. 3570<sup>9</sup>~~6~~-8-II

COURT OF APPEALS, DIVISION  
OF THE STATE OF WASHINGTON

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DOLORES MARQUEZ, Appellant

v.

CASCADE RESIDENTIAL DESIGN, INC., Respondent

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY SS DEPUTY

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*AMENDED* BRIEF OF RESPONDENT

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## TABLE OF CONTENTS

INTRODUCTION .....	1
COUNTERSTATEMENT OF THE ISSUES.....	1
COUNTERSTATEMENT OF FACTS .....	2
ARGUMENT .....	3
A.    Introduction.....	3
B.    Appellant missed the mandatory seven day deadline for filing a motion for actual attorney’s fees. ....	3
1.    The Process for Obtaining Fees is Clearly Set Out in the Rules. ....	4
2.    The cases interpreting the rules are clear that the deadline is mandatory. ....	6
3.    The law is clear that the fee motion must be filed with the Arbitrator.....	8
C.    Appellant missed the twenty day deadline for filing a request for a trial de novo .....	9
D.    There is a critical similarity between PCLMAR 6.1.(c) and MAR 7.1.....	13
E.    Strict Compliance with PCLMAR 6.1 ensures that the party opposing the amount of the fee award may pursue its sole avenue for appealing the award. ....	14
F.    This appeal is frivolous, and defendant requests its reasonable attorney’s fees for its response to this appeal. ....	14
CONCLUSION.....	15

## TABLE OF AUTHORITIES

<i>Fay v. N.W. Airlines, Inc.</i> , 115 Wn.2d 194, 796 P.2d 412 (1990) .....	14
<i>Malted Mousse, Inc. v. Steinmetz</i> , 150 Wn.2d 518, 79 P.3d 1154 (2003).....	passim
<i>Nevers v. Fireside, Inc.</i> , 133 Wn.2d 804 (Wash. 1997).....	6, 12, 13
<i>Newton v. Legarsky</i> , 97 Wn. App. 375, 984 P.2d 417 (1999) .....	7
<i>Perkins Coie v. Williams</i> , 84 Wn. App. 733, 929 P.2d 1215, <i>review denied</i> , 132 Wn. 2d 1013, 940 P.2d 654 (1997) .....	11
<i>Smukalla v. Barth</i> , 73 Wn. 240, 868 P.2d 888 (1994).....	6, 7, 8, 13, 15
<i>Trusley v. Statler</i> , 69 Wn. App. 462, 849 P.2d 1234 (1993).....	8, 9, 12

### STATUTES, RULES AND REGULATIONS

RCW 7.06.050 .....	5, 7, 11
RAP 18.9(a) .....	14
MAR 1.3(b)(1) .....	8
MAR 3.2(8).....	8
MAR 6.1 .....	4
MAR 6.2 .....	4
MAR 7.1 .....	3, 12, 13
PCLMAR 6 .....	passim
PCLMAR 6.1 .....	passim
PCLMAR 6.1(c)(1) .....	4, 5
PCLMAR 6.1(c)(3) .....	7
PCLMAR 6.1(c)(4) .....	5, 7, 8

PCLMAR 6.1(c)(5) .....	5, 7, 8
PCLMAR 6.1(c)(6) .....	5
PCLMAR 7.1(b) .....	5

## INTRODUCTION

In *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003), the Washington Supreme Court, reversed the Court of Appeals for doing precisely what the appellant is asking the Court to do in this case.

Appellant is asking this Court to vacate or amend one part of the Arbitration Award in this case. This is because Appellant made two errors in seeking fees. These errors, however, preclude an award of fees. They are: 1) Appellant did not file a motion for actual attorney fees with the arbitrator within seven days after the Arbitration Award was filed with the Trial Court; and 2) having failed that, Appellant then failed to exercise its only possible method for “curing” that problem, that is, seeking trial de novo. These defects are fatal.

Both the Arbitrator and the Court recognized the effect of these errors to bar a fee award. The Arbitrator declined to award fees to Appellant, stating that he could no longer do so, and the Court upheld that determination. It is the Court’s Order that is at issue in this appeal, and that Order should be affirmed by this Court.

## COUNTERSTATEMENT OF THE ISSUES

Is the PCLMAR 6.1(c)(1) requirement that a motion for actual attorney’s fees be filed and served on the arbitrator within seven days after

the filing of the arbitration award mandatory and thus a condition precedent to obtaining fees? YES.

Is the MAR 7.1 requirement that a request for a trial de novo be filed within twenty days after the filing of the arbitration award mandatory and thus a condition precedent to reviewing all or any part of the award? YES.

### **COUNTERSTATEMENT OF FACTS**

Appellant's statement of the facts omits the dates of the pertinent events in this case because they relate to mandatory deadlines that Appellant failed to meet. For these very reasons, however, they must carefully be noted.

The arbitration took place on August 24, 2006. CP12. On August 28, 2006, the Arbitrator issued and served the Arbitration Award. CP13. While the Award stated that Appellant was statutorily entitled to a reasonable attorney's fee, the Arbitration Award did not – nor could it – include a determination or award of plaintiff's actual attorney fees. CP12-13.

On September 1, 2006, the Arbitration Award was filed with the Court and served on the parties. CP15. On September 21, 2006, the twenty day deadline for appealing the Arbitration Award passed, with neither party requesting a trial de novo. October 5, 2006, over a month after the Arbitration Award was filed, and twenty-eight days after the deadline

passed for filing a fee request with the Arbitrator, Appellant filed a Motion for Attorneys Fees with the Court. CP14.

## **ARGUMENT**

### **A. Introduction**

This is purely and simply a case where the Appellant missed a mandatory deadline for requesting attorney's fees. Failing to recognize that, Appellant missed a second mandatory deadline which might have provided her a second opportunity to obtain fees. Appellant alone is responsible for her actions, yet she is asking this Court to ignore the two mandatory deadlines to avoid the consequences. This Court, however, cannot do so. Washington statutes, court rules and case law, squarely and unequivocally prohibit this Court from acceding to Appellant's request. The deadlines Appellant missed are: 1) the seven day deadline for filing a motion for actual attorney's fee set out in PCLMAR 6, and, 2) the twenty day deadline for seeking a trial de novo set out in MAR 7.1.

### **B. Appellant missed the mandatory seven day deadline for filing a motion for actual attorney's fees.**

Appellant's actual attorney fees were not included in the Arbitration Award filed on September 1, 2006 - and could not possibly have been - because no amount of "actual" fees had been requested. Appellant failed to bring a motion for actual attorney fees until October 5, 2006, thirty-eight (38) days after service of the Arbitration Award, in

violation of PCLMAR 6.1. Further, Appellant brought the motion for actual fees before the Court rather than the Arbitrator. To properly seek attorney fees, Appellant was required to submit a motion for actual fees to the Arbitrator by September 5, 2006. PCLMAR 6.1(c)(1).<sup>1</sup> Appellant did not do this, and thus is precluded from obtaining fees.

**1. The Process for Obtaining Fees is Clearly Set Out in the Rules.**

To place the Appellant's actions in context, a review of the process for obtaining fees is helpful. The procedure is set out in the Mandatory Arbitration Rules ("MAR") and the Pierce County Local Mandatory Arbitration Rules ("PCLMAR"). It could not be clearer:

- Within 14 days after the hearing, the arbitrator must make the arbitration award. MAR 6.1. This time can be extended for reasons and by methods specified in the rules, none of which are applicable in this case. *See, e.g.*, MAR 6.2.

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<sup>1</sup> PCLMAR 6.1(c) is set forth in mandatory language as follows:

Any motion for actual attorney fees, whether pursuant to contract, statute, or recognized ground in equity, **must** be presented to the arbitrator, as follows:

(1) Any motion for an award of attorney fees **must be submitted to the arbitrator and served on opposing counsel within seven calendar days of receipt of the award.** There shall be no extension of this time, unless the moving party makes a request for an extension before the seven day period has expired, in writing, served on both the arbitrator and opposing counsel;

PCLMAR 6.1 (c) (1) (emphasis added).

- The prevailing party must request “actual” attorney’s fees via motion served on the arbitrator and opposing counsel within 7 days after receipt of the arbitration award.<sup>2</sup> PCLMAR 6.1(c)(1). The opposing party has 7 days from the date of service of the motion to object to the award. *Id.*
- The arbitrator may either: 1) hold a hearing with respect to the amount of the fees, or 2) deny or award fees. PCLMAR 6.1(c)(4) &(5). This must be done within 14 days PCLMAR 6.1(c)(4), but the time can be extended pursuant to PCLMAR 6.1(c)(6).
- If the arbitrator awards fees, the arbitrator files an amended award, which includes the amount of the fees. If the arbitrator denies fees, the decision shall be served on both parties. PCLMAR 6.1(c)(4).
- Either party has 20 days to appeal the arbitrator’s decision or amended decision, *including* the amount awarded for fees. PCLMAR 7.1(b). Trial de novo is the sole, exclusive vehicle for appealing an arbitration award or *any portion of an award*.<sup>3</sup> PCLMAR 7.1(b).

These rules must be interpreted as though they were drafted by the legislature. When interpreting a court rule, the court gives effect to the

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<sup>2</sup> This time can be extended, *but only* on specific written request made within the seven-day time frame. *Id.*

<sup>3</sup> the party seek review of “all issues of law and fact” – that is, *the entire award*. RCW 7.06.050 and *Malted Mousse*, 150 Wn.2d at 530.

ordinary meaning of the rule's language. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809-812 (1997).

It is undisputed that the Appellant failed to follow this procedure. Appellant asserts that she was not required to follow this procedure, but that is inaccurate as a matter of law.

**2. The cases interpreting the rules are clear that the deadline is mandatory.**

The case law interpreting the relevant rules is as clear as the rules are. The cases reinforce the plain language of the rules, establishing a bright line that the seven day deadline for submitting attorney fee motions contained in PCLMAR 6.1 is mandatory. In *Smukalla v. Barth*, 73 Wn. App. 240, 868 P.2d 888 (1994), *overruled on separate grounds by Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003), the Court held that a party seeking attorney's fees on mandatory arbitration must meet the deadlines established by PCLMAR 6.1. The court in *Smukalla* determined that the moving party was not entitled to attorney fees when he "did not present his motion for attorney fees to the arbitrator and did not move for attorney fees until more than 4 months after the arbitrator had filed his decision. *He did not comply with the applicable local rules and is not entitled to attorney fees.*" *Id.* at 244 (emphasis added). Because the moving party had not met the procedural requirements of PCLMAR

6.1, the court would not consider the merits of the fee request. *Id.* at 242-44.

In reaching its holding, the *Smukalla* court reiterated the explicit requirements of PCLMAR 6.1:

Pierce County's local rules provide detailed procedures governing motions for and awards of attorney fees in mandatory arbitration. The party seeking fees must submit his or her motion to the arbitrator within 7 days of receipt of the award from the arbitrator. PCLMAR 6.1(c)(1). The arbitrator must produce a written decision within 14 days of the motion. PCLMAR 6.1(c)(3). If the arbitrator decides to award attorney fees, the arbitrator must file an amended award; if the arbitrator decides to deny attorney fees, the arbitrator must serve the parties with the decision denying fees. PCLMAR 6.1(c)(4). The arbitrator may choose to hold a hearing on the fee issue. PCLMAR 6.1(c)(5).

*Smukalla*, 73 Wn. App. at 244.

Appellant asserts that the fee request made at the hearing is the equivalent of filing the motion required by PCLMAR 6.1(c). That, of course, is inaccurate. The period for filing the motion does not commence until the arbitrator's filing of proof of service of the award as required by MAR 6.2. RCW 7.06.050; *Newton v. Legarsky*, 97 Wn. App. 375, 984 P.2d 417 (1999).

As in *Smukalla*, Appellant in this case failed to meet the PCLMAR seven-day deadline, and thus may not obtain fees.

**3. The law is clear that the fee motion must be filed with the Arbitrator.**

Appellant's fee motion was also fatally defective in another way. The fee motion was improperly brought before the Trial Court instead of submitted to the Arbitrator as required under the local rules and case law. For this reason as well as Appellant's failure to comply with the mandatory deadline of PCLMAR 6.1, the Trial Court's judgment in this arbitration must be affirmed. According to PCLMAR 6.1(c)(1), a motion for actual attorney fees "must be submitted *to the arbitrator.*" PCLMAR 6.1 (emphasis added)<sup>4</sup>. The rule further provides that "[i]f the arbitrator awards fees, the arbitrator shall file an amended award. If fees are denied, the decision shall be filed and served on the parties." and "[i]t is within the arbitrator's discretion whether to hold a hearing on the issue of fees." PCLMAR 6.1(c)(4),(5). In addition, the rules specifically grant the arbitrator the discretion to hold a hearing on the issue of fees. PCLMAR 6.1(c)(5); *Trusley v. Statler*, 69 Wn. App. 462, 464, 849 P.2d 1234 (1993).

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<sup>4</sup> Under the Superior Court Mandatory Arbitration Rules, "[a]fter a case is assigned to the arbitrator, these arbitration rules apply except where an arbitration rule states that a civil rule applies." MAR 1.3(b)(1). In addition, "[a]n arbitrator has the authority to...[p]erform other acts as authorized by...local rules adopted and filed under rule 8.2." MAR 3.2(8). Under the local rules adopted and filed by the Pierce County Superior Court, "[a]n arbitrator has the authority to...[a]ward attorney fees, as authorized by these rules, by a contract or by law." PCLMAR 3.2(b). As discussed throughout Section III (B), of this memorandum, the local rules also mandate that a motion for attorney fees be submitted to the arbitrator. PCLMAR 6.1(c). *See also Smukalla, supra*, at 244.

In *Trusley*, the court reversed an award of attorney fees granted by the Superior Court when it entered judgment on the arbitration award, stating that the Superior Court had “delegated the authority to award attorney fees in mandatory arbitration to the arbitrator.” *Id.* This delegation of authority recognizes that the arbitrator has heard the evidence, considered the issues, observed the product of the time and effort expended by the parties’ attorneys, and is in the best position to make any determination as to the whether a specific fee award is appropriate.

Appellant did not ask the Arbitrator to exercise his delegated authority and award her fees, and therefore Appellant’s actual fees were not part of the arbitration award. *See Trusley*, 69 Wn. App. at 463-65. Consequently, fees cannot become part of the final judgment affirming the Award. *Id.* The Appellant’s failure to file a motion for fees with the Arbitrator and within the time frame established by the rules left the Appellant with only two options: to accept the Award “as is” without the fee amount set, or to request a trial de novo within the 20 day deadline for doing so.

**C. Appellant missed the twenty day deadline for filing a request for a trial de novo**

Once the seven day deadline for filing a fee motion was missed, Appellant still could have filed a motion for a trial de novo, which could

have provided her with fees. Appellant did not do so, but instead, thirty eight days after the award was filed, asked the Court to award actual attorneys fees. Initially, the Court agreed and sent the fee motion back to the Arbitrator.<sup>5</sup> The Arbitrator properly recognized that he no longer had jurisdiction to do so, and declined. The Trial Court then properly concurred with the Arbitrator's conclusion and entered Judgment on the Award as originally filed on September 1, 2006. The Court's action in this regard was exactly as required by not only the rules, but the cases interpreting them. This Court must affirm the Trial Court's decision, *because the Supreme Court has already reversed the Court of Appeals for failing to do so in a virtually identical situation.*

In *Malted Mousse*, the prevailing party in the arbitration, Steinmetz, filed a motion asking the court to confirm the part of the arbitration award granting him relief and "vacate" the part of the award that denied him fees. The trial court declined to do so, because it correctly decided that it could not approve *a portion* of an arbitration award as filed by the arbitrator. The Court of Appeals reversed the trial court and awarded fees. The Supreme Court reversed the Court of Appeals. Beginning with a lengthy review of the purposes and function of mandatory arbitration, the Supreme Court very clearly held that a trial

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<sup>5</sup> Strictly speaking, the Trial Court's initial action in referring the award back to the arbitrator for a determination of fees was error, but the Arbitrator and the Trial Court "cured" that error by their later actions.

court cannot both *vacate and confirm* a mandatory arbitration award. If a party does not like a part of an award, it must file a request for a trial de novo. “We hold the sole way to appeal an erroneous ruling from mandatory arbitration is the trial de novo.” *Malted Mousse*, 150 Wn.2d at 528-529.

The Court then reviewed its other holdings on mandatory arbitration, all of which make it abundantly clear that once the 20 day deadline for seeking a trial de novo passes, the award precisely as the arbitrator filed it, is “etched in granite.” The trial court loses jurisdiction to alter the award in any way, *or any portion of it*.

The Supreme Court cited with approval the approach of the Court of Appeals in *Perkins Coie v. Williams*, 84 Wn. App. 733, 929 P.2d 1215, *review denied*, 132 Wn. 2d 1013, 940 P.2d 654 (1997). There, Perkins Coie, seeking payment for legal services, prevailed against one of three defendants in mandatory arbitration. Unsatisfied, Perkins Coie convinced the trial court to allow trials de novo only on the two defendants against whom it was unsuccessful at arbitration. The Court of Appeals reversed the trial court and held the clear language of RCW 7.06.050 allowing review of “all issues of law and fact” set the “minimum scope of issues” available to a trial court. *Malted Mousse*, 150 Wn.2d at 529-520, *citing Perkins, supra*.

In the case before this Court, Appellant asked the Court to *amend a portion* of the arbitration award, because the arbitration award as filed on September 1, 2006, contained no award of “actual” attorney’s fees. Appellant does not want to acknowledge that the motion to set the amount of fees was also a motion to amend the order, but, of course, it is. It would have amended the amount paid to the Appellant by the Respondent – and *after* the 20-day deadline during which the Respondent could have sought review of that amount through a request for a trial de novo.

The *Malted Mousse* Court also cited *Trusley* with approval for the proposition that “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.” *Malted Mousse*, 150 Wn.2d at 530. Appellant cannot reasonably contend that the motion to set the amount of the fees in her case would not “amend the award.” Both *Trusley* and *Malted Mousse* prohibit such action by the Superior Court. The Arbitrator and the Trial Court in this case recognized that Appellant was seeking an amendment of the September 1, 2006 award. The Arbitrator declined to enter an award of “actual” fees for that reason, and the Trial Court affirmed that decision.

Similarly and significantly, the Supreme Court has determined that the deadline imposed for appealing an arbitration award, as set out MAR 7.1, must be strictly observed. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 811-815 (1997). In that case, the appellants had failed to file proof of

service of a request for a trial de novo within the 20 day deadline imposed by MAR 7.1. The Court held that permitting only substantial compliance with the deadlines of MAR 7.1 would “subvert...the Legislature's intent by contributing, inevitably, to increased delays in arbitration proceedings.”<sup>6</sup>

**D. There is a critical similarity between PCLMAR 6.1(c) and MAR 7.1**

One additional point of law must be noted. PCLMAR 6.1(c) is identical to MAR 7.1 in one critical respect that underscores the mandatory nature of the seven day filing requirement as to fees. After MAR 7.1 states that a request for trial de novo must be timely filed in strict compliance with the statute, the rule goes on to expressly provide that “the 20-day period within which to request a trial de novo **may not be extended.**” MAR 7.1; *Nevers*, 133 Wn.2d at 812 (1997) (emphasis added). Similarly, PCLMAR 6.1 provides that the seven day deadline for filing a motion for attorney’s fees with the arbitrator *shall not be extended* unless the extension is requested before the deadline runs. PCLMAR 6.1(c) (emphasis added). The language similarity confirms that the deadline for filing a motion for fees is a mandatory deadline that Appellant missed.

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<sup>6</sup>Some aspects of the MAR have been held to require only “substantial compliance,” but others, including MAR 7.1 and PCLMAR 6.1(c)(1) have been held to be mandatory under *Nevers* and *Smukalla*, respectively.

**E. Strict Compliance with PCLMAR 6.1 ensures that the party opposing the amount of the fee award may pursue its sole avenue for appealing the award.**

If Appellant should prevail on this question, which she cannot, Respondent would have no method for challenging the amount of fees awarded, because the twenty day deadline for seeking a trial de novo has passed. The importance of timeliness is indicated by the mandatory language of the rule, and the fact that a litigant must be able to receive a timely adjudication of the fees issue to be able exercise his or her sole right to review within the strictly construed 20 day period for requesting a trial de novo. *Malted Mousse*, 150 Wn.2d at 528-32. The Trial Court's judgment must be affirmed because Appellant's position contravenes the purpose and meaning of PCLMAR 6.1 and attempts to cut off Respondent's right to seek a trial de novo on the amount of the fee award, its sole avenue for appeal of such an award. *Malted Mousse*, 150 Wn.2d at 528-32.

**F. This appeal is frivolous, and defendant requests its reasonable attorney's fees for its response to this appeal.**

This Court has the power to require a party to "pay terms or compensatory damages" caused by a "frivolous appeal." RAP 18.9(a). "An appeal is frivolous if there are no debatable issues upon which reasonable minds might differ and it is so totally devoid of merit that there was no reasonable possibility of reversal." *Fay v. N.W. Airlines, Inc.*, 115 Wn.2d 194, 200-01, 796 P.2d 412 (1990). Given the clarity of PCLMAR 6.1,

MAR 7.1, *Smukalla* and *Malted Mousse*, an award of reasonable attorney fees on appeal would be appropriate under the standard enunciated in *Fay*. Appellant cannot improve her position on this “appeal.” *Malted Mousse, Inc.* 150 Wn.2d 518, 535 (Wash. 2003). Respondent respectfully requests that its attorney’s fees on this appeal be awarded against Appellant.

### CONCLUSION

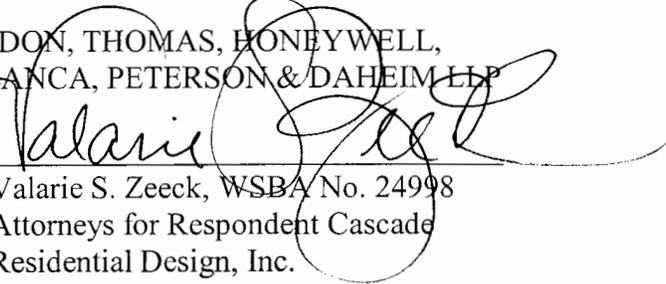
For all the reasons stated herein, Respondent respectfully requests that Appellant’s appeal be denied, that the judgment of the Trial Court be affirmed, and that Respondent be awarded its fees and costs on appeal.

Dated this 4<sup>th</sup> day of June, 2007.

Respectfully submitted,

GORDON, THOMAS, HONEYWELL,  
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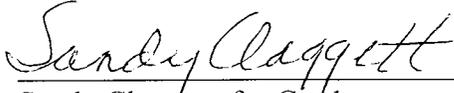
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CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of June, 2007, I caused a copy of the Brief of Respondent to be delivered via Legal Messengers, Inc. to the attorney(s) of record listed below:

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