

No. 35797-6-II

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

LEA HUDSON,

Respondent,

vs.

CLIFFORD and "JANE DOE" HAPNER, individually, and as a marital community
composed thereof, and MATTHEW NORTON, a Washington corporation,

Appellants.

APPEAL FROM PIERCE COUNTY SUPERIOR COURT
Honorable John A. McCarthy, Judge

REPLY BRIEF OF APPELLANTS

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I. INTRODUCTION

The Mandatory Arbitration Rules (MARs) and arbitration statutes provide that the party who filed a request for trial de novo may unilaterally withdraw the request. MAR 7.3; RCW 7.06.060. The only consequence is that the withdrawing party may be required to pay the other party's attorneys fees and costs. *Id.*

The superior court erred by striking Mr. Hapner's¹ voluntary withdrawal of his trial de novo request. Plaintiff/respondent's arguments relying on other statutory schemes, waiver, or other equitable defenses do not control here. The superior court's order should be reversed and the case remanded for entry of judgment on the arbitration award plus MAR 7.3 attorneys fees.

II. ARGUMENT

A. MAR 7.3 AND RCW 7.06.060 AUTHORIZE UNILATERAL WITHDRAWAL OF A DE NOVO REQUEST.

Plaintiff concedes that MAR 7.3 and RCW 7.06.060 provide for voluntary withdrawal of a request for trial de novo. (Brief of Respondent at 6-7) Yet plaintiff attempts to avoid these authorities by arguing that the MARs do not apply once a trial de novo request is filed. (Respondent's

¹ For continuity, and ease of the reader, the defendants will be referred to in the singular as "Mr. Hapner."

Brief at 5) While MAR 1.3(b)(1) states that the MARs apply after a case is assigned to an arbitrator, there is no suggestion that the MARs cease to have any application once the arbitration concludes. In fact, by their plain language, MAR 7.2 and 7.3 operate after the arbitration concludes. If, as plaintiff argues, the MARs have no further application, then a party would never be entitled to MAR 7.3 fees. Yet, many Washington courts have approved or reversed the award of MAR 7.3 fees for proceedings after a mandatory arbitration.²

Plaintiff attempts to discount the plain language of MAR 7.3 and RCW 7.06.060 by arguing that the rule and statute do not specifically authorize or delineate the procedure for withdrawing a request. Plaintiff acknowledges that a trial de novo is similar to an appeal. Citing RALJ 10.2(c) and RAP 18.2, she argues that since an appeal cannot be withdrawn without the court's permission, then similarly a trial de novo requires the court's permission. (Respondent's Brief at 7-8) Plaintiff

² See, e.g., *Mahler v. Szucs*, 135 Wn.2d 398, 957 P.2d 632, 966 P.2d 305 (1998), *Kim v. Pham*, 95 Wn. App. 439, 975 P.2d 544, *rev. denied*, 139 Wn.2d 1009 (1999), and *Yoon v. Keeling*, 91 Wn. App. 302, 956 P.2d 1116 (1998) (fees awarded because position not improved on de novo); *Hutson v. Rehrig Intern., Inc.*, 119 Wn. App. 332, 80 P.2d 615 (2003), *Tran v. Yu*, 118 Wn. App. 607, 75 P.3d 970 (2003), and *Sultani v. Leuthy*, 86 Wn. App. 753, 943 P.2d 1122, *rev. denied*, 134 Wn.2d 1001 (1997) (no fees where position improved on de novo).

failed to make this argument to the superior court so it need not be considered by this Court. RAP 2.5; *Leipham v. Adams*, 77 Wn. App. 827, 837, 894 P.2d 576, *rev. denied*, 127 Wn.2d 1022 (1995) (court will not consider issue raised for first time on review).

Assuming this Court chooses to consider plaintiff's argument about analogous appellate rules, plaintiff's argument should be rejected. Appeals from courts of limited jurisdiction are expressly governed by a set of rules: Rules for Appeal of Decisions of Courts of Limited Jurisdiction (RALJs). RALJ 1.1(a). Appeals from superior courts are expressly governed by a set of rules: Rules of Appellate Procedure (RAPs). RAP 1.1(a). RALJ 10.2 and RAP 18.2 do require court approval for withdrawal of an appeal. Had the Supreme Court or the Legislature intended a similar requirement for a withdrawal of a de novo request, the requirement would have been included in the MARs.

The Washington Supreme Court has the power to adopt the rules to implement the mandatory arbitration procedures. RCW 7.06.030. In a concurrence in *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), Judge Schindler expressly encouraged the Supreme Court to address the procedures for voluntary withdrawal of de novo requests. 114 Wn. App. at 563-64. Although the Supreme Court has considered amendments to the MARs, the Supreme Court has thus far declined the

invitation to amend the MARs.³ Hence, the same unlimited voluntary withdrawal of the trial de novo request under *Thomas-Kerr* is still permitted and determines the outcome of this case.

B. WITHDRAWAL OF THE TRIAL DE NOVO REQUEST IS CONSISTENT WITH THE PURPOSES OF MANDATORY ARBITRATION.

Mr. Hapner's voluntary withdrawal of the trial de novo request is consistent with goals of mandatory arbitration—reducing court congestion. See *Sorenson v. Dahlen*, 136 Wn. App. 844, 858, 149 P.3d 394 (2006) (foremost goal for mandatory arbitration is to reduce court congestion and delays in civil hearings) (*quoting Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997)). Plaintiff's position, on the other hand, would require the trial to proceed and add to further court congestion. Her position does not further the purposes of mandatory arbitration.

Plaintiff argues that there has been a waste of court resources and time because a trial, verdict, and appeal to this Court previously occurred. (Respondent's Brief at 16) Yet, plaintiff fails to acknowledge that the first

³ A proposed change to the MAR 7.1 was submitted to the Washington Supreme Court. 156 Wn.2d at Proposed 107-08. A copy of the proposed amendment with committee comments is attached as Appendix A. The proposed amendment was not adopted.

trial is a nullity. The verdict and judgment were set aside because Mr. Hapner was denied a fair trial when plaintiff erroneously convinced the trial court to exclude Mr. Hapner's expert and commit other legal errors. Procedurally this case is in the same posture as it was after the arbitration proceeding. Contrary to plaintiff's contention, the trial de novo has not occurred. Moreover, forcing Mr. Hapner to proceed with the trial de novo only increases court congestion. The voluntary withdrawal of the de novo request was authorized and appropriate.

C. PLAINTIFF'S ARGUMENTS AGAINST *WALJI* AND *THOMAS-KERR* ARE UNPERSUASIVE.

Plaintiff's argument that *Walji v. Candyco, Inc.*, 57 Wn. App. 384, 787 P.2d 946 (1990), or *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), do not apply appears to be based on her assertion that their facts are not identical to those at hand. (Respondent's Brief at 13) Plaintiff's argument is unpersuasive.

Walji certainly applies to the present circumstances. Those plaintiffs, when they could not amend their complaint after filing for trial de novo, took a voluntary nonsuit. 57 Wn. App. at 286. The trial court permitted them to take a voluntary nonsuit but awarded MAR 7.3 attorneys fees to defendant. *Id.* at 286-87. The appellate court affirmed and held that there was no limitation on when the voluntary nonsuit could

be taken. 57 Wn. App. at 290. This answers in part the question before this Court.

After arguing unsuccessfully that *Walji* does not apply, plaintiff then seeks to limit *Walji* to the issue of attorneys fees. (Respondent's Brief at 14) Attorneys fees are not in dispute here. As the *Walji* court stated, "An appeal resulting in a dismissal, even a voluntary one, is unsuccessful." 57 Wn. App. at 290. Mr. Hapner concedes that he owes plaintiff attorneys fees because he did not better his position. (Brief of Appellants at 7 n.3) But that does not diminish the fact that *Walji* supports Mr. Hapner's position that the voluntary nonsuit, which is essentially the same as withdrawing a trial de novo appeal, can occur at any time.

Similarly, *Thomas-Kerr v. Brown*, 114 Wn. App. 554, 59 P.3d 120 (2002), supports Mr. Hapner's position and is not in conflict with *Walji*. In *Thomas-Kerr*, the court permitted the defendant to unilaterally withdraw his request for trial de novo. 114 Wn. App. at 557. The appellate court affirmed. 114 Wn. App. at 561. This is the same act performed by Mr. Hapner that plaintiff now challenges. *Thomas-Kerr* controls.

Regarding the citation to Judge Schindler's *Thomas-Kerr* concurrence, plaintiff omits the introductory sentence. Judge Schindler stated, "I agree the current rules imply a right to unilaterally withdraw a

trial de novo request and, therefore, I concur” 114 Wn. App. at 563. The fact that Judge Schindler noticed potential unfairness in the rules is not germane here. The Supreme Court and the Legislature have chosen not to change the MARs in the intervening five years. Judge Schindler’s concurrence still stands: the MARs imply a right to unilaterally withdraw a trial de novo request. *Walji* and *Thomas-Kerr* support Mr. Hapner’s position. The trial court erred when it denied his motion to withdraw the trial de novo request.

D. THIS COURT NEED NOT REACH EQUITABLE DOCTRINES BECAUSE THERE IS A REMEDY AT LAW.

Equitable remedies are extraordinary, not ordinary, forms of relief, and are only available when a remedy at law is inadequate. *Sorenson v. Pyeatt*, 158 Wn.2d 523, 531, ¶12, 146 P.3d 1172 (2006). Plaintiff has an adequate remedy at law here. Plaintiff has the arbitration award, including interest on the award, and her MAR 7.3 fees and costs. Plaintiff’s request for equitable relief should be denied.

1. *Creso, Haywood, and Lybbert* Are Inapposite Here Because There Was No Waiver.

As stated in Mr. Hapner’s opening brief, *Creso v. Philips*, 97 Wn. App. 829, 987 P.2d 137 (1999), *aff’d by Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001), and *Haywood v. Aranda*, 143 Wn.2d 231, 19 P.3d 406 (2001), are inapposite. *Phillips* and *Lybbert v. Grant County*,

141 Wn.2d 29, 1 P.3d 1124 (2000) is also inapplicable. There is no waiver here.

Plaintiff contends that Mr. Hapner waived his right to withdraw his trial de novo request. She relies on *Creso*, *Haywood*, and *Lybbert*, which all concern when a party knows of a procedural defect in the other party's pleadings and "sits on its hands" until after trial. There was no procedural defect here. Mr. Hapner had a right to withdraw the trial de novo request. MAR 7.3. The right is unilateral. *Thomas-Kerr*, 114 Wn. App. at 561. The right does not have any time limitation. *Walji*, 57 Wn. App. at 290. Mr. Hapner did not "sit on his hands."

As noted by plaintiff, *Lybbert* establishes that common law waiver can occur if defendant's assertion of a defense is inconsistent with previous behavior, or if counsel has been dilatory asserting a defense. 141 Wn.2d at 39. Mr. Hapner *did not assert a defense*. He exercised a right provided for under the MARs. Mr. Hapner's exercise of a right is not equivalent to relying on a defense that needed to be pled early and exercised.⁴ Mr. Hapner did not waive any rights.

⁴ Plaintiff challenges this without any support by stating "What is good for the goose, is good for the gander" and "[I]f a party can waive its right to claim a defect as to a mandatory process by proceeding through a trial de novo, a party can likewise waive a potential 'implied' ability to withdraw a request for trial de novo by proceeding through a trial de novo." (Respondent's Brief at 20) Not only does she not supply any authority for

2. Plaintiff's Other Equitable Arguments Should Also Be Disregarded.

Mr. Hapner's voluntary withdrawal of the trial de novo request is not barred by either estoppel or laches. The doctrine of judicial estoppel prevents a party from taking a factual position in one litigation and an inconsistent factual position in the next litigation. *Holst v. Fireside Realty, Inc.*, 89 Wn. App. 245, 259, 948 P.2d 858 (1997). For example, parents who admitted in one court that their children were abused or neglected were barred from stating the reverse in another court proceeding. *Miles v. State, Child Protective Services Dept.*, 102 Wn. App. 142, 153 n.21, 6 P.3d 112 (2000), *rev. denied*, 142 Wn.2d 1021 (2001). Mr. Hapner has made no statement in a proceeding that is inconsistent with any other statement. There is no judicial estoppel.

There is no equitable estoppel. Plaintiff cannot establish any of the three elements of equitable estoppel: (1) an admission, statement, or act which is inconsistent with a later claim, (2) that the other party relied upon, and (3) that the other party would suffer injury if the party to be estopped were permitted to contradict his own earlier admission, statement, or act. *Public Utility Dist. No. 1 of Klickitat County v. Walbrook Ins. Co. Ltd.*, 115 Wn.2d 339, 347, 797 P.2d 504 (1990). The

these propositions, but she also does not acknowledge that the trial de novo that occurred was reversed and remanded by this Court.

reliance by the party seeking estoppel must be reasonable. *Hisle v. Todd Pacific Shipyards, Corp.*, 113 Wn. App. 401, 416, 54 P.3d 687 (2002), *aff'd*, 151 Wn.2d 853, 93 P.3d 108 (2004). As stated above, Mr. Hapner has made no statement or admission which was later contradicted. Presumably plaintiff contends that Mr. Hapner's filing of the trial de novo request and later withdrawing it are inconsistent actions. These acts are not inconsistent. Such acts are allowed by MAR 7.3 and RCW 7.06.060. Most importantly, assuming an inconsistency exists, plaintiff could not have reasonably relied on the filing of the request nor has plaintiff been injured.

Plaintiff's reliance could not have been reasonable when the filing of a trial de novo request is permissive. Mr. Hapner had the choice to pursue or not pursue a trial de novo. Plaintiff's reliance would perhaps have been reasonable if the litigation event (trial de novo) was mandatory. It is not reasonable where the Mr. Hapner has a choice of options.

Furthermore, plaintiff cannot say she was injured. She had an adjudication on the merits, the arbitration. Plaintiff had an opportunity to be heard by a factfinder. She is receiving her attorneys fees with interest. There is no injury to her. Mr. Hapner has acknowledged that MAR 7.3 applies. His proposed judgment on the arbitration award included an amount for MAR 7.3 fees. (CP 2-5) Plaintiff has not been harmed by Mr.

Hapner's exercise of his right to voluntarily withdraw the trial de novo request.

Plaintiff's laches argument also fails. Although the components are inexcusable delay and prejudice to the other party for such delay, the cornerstone of the doctrine is the resulting prejudice and damage to others. *Clark County Pub. Util. Dist. No. 1 v. Wilkinson*, 139 Wn.2d 840, 848-49, 991 P.2d 1161 (2000). Again, plaintiff cannot argue that she was damaged by delay when she has already had her adjudication on the merits and she is receiving her attorneys fees and interest. The withdrawal of the request for trial de novo means she cannot *capitalize* on the new appeal, not that she did not get her opportunity to be heard.

E. THIS APPEAL IS NOT FRIVOLOUS AND PLAINTIFF IS ONLY ENTITLED TO ATTORNEYS FEES ON APPEAL IF SHE PREVAILS.

This is not a frivolous appeal. Plaintiff is only entitled to attorneys fees on appeal if she prevails.

As stated by this Court earlier this year,

An appeal is frivolous when there are no debatable issues on which reasonable minds would differ, when the appeal is so devoid of merit that there was no reasonable possibility of reversal, or when the appellant fails to address the basis of the trial court's decision.

Matheson v. Gregoire, 139 Wn. App. 624, 639, ¶42, 161 P.3d 486 (2007) (citing *Mahoney v. Shinpoch*, 107 Wn.2d 679, 691-92, 732 P.2d 510 (1987)). This is not such an appeal.

First, this Court granted discretionary review of the superior court's order striking Mr. Hapner's voluntary withdrawal. Granting of review, in and of itself, demonstrates this appeal is not frivolous. This appeal presents an issue of law. There is a substantial possibility of reversal based on an error of law. Reasonable minds differ here. This appeal is not frivolous.

Mr. Hapner concedes that attorneys fees will be owed to plaintiff under MAR 7.3 if he, as the appealing party, fails to improve his position in this appeal. If the court reverses the trial court and permits the trial de novo withdrawal, then he will have improved his position. No attorneys fees will be owed in that instance.

III. CONCLUSION

Mr. Hapner was within his rights under the MARs to move the trial court to dismiss his Request for Trial de Novo and enter judgment on the arbitration award. The trial court erred by denying the motion. Mr. Hapner respectfully requests that this Court reverse the trial court and remand for entry of judgment on the arbitration award.

DATED this 29th day of November, 2007.

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is brought by or against a receiver is governed by these rules:

(b) Dismissal. An action wherein a receiver has been appointed shall not be dismissed except by order of the court:

(c) Notice to Creditors. A general receiver appointed to liquidate and wind up affairs shall, under the direction of the court, give notice to the creditors of the corporation, of the copartnership, or of the individual, by publication in a newspaper of general circulation in the county in which the action is pending, once each week for 3 weeks, requiring such creditors to file their claims, duly verified, with the receiver, his attorney, or the clerk of the court, within 30 days from the date of first publication of such notice. If necessary to afford proper notice to such creditors, the court may by order enlarge the time for such publication or direct publication of such notice in other counties. In addition to such publication, the receiver shall give actual notice by mail at their last known addresses to all persons and parties to him known to be or to claim to be creditors:

(d) Request for Special Notices. At any time after a receiver is appointed, any person interested in said receivership as a party, creditor, or otherwise, may serve upon the receiver (or upon the attorney for such receiver) and file with the clerk a written request stating that he desires special notice of any and all of the following named matters, steps or proceedings in the administration of said receivership, to-wit:

- (1) Filing of petitions for sales, leases, or mortgages of any property in the receivership;
 - (2) Filing of accounts;
 - (3) Filing of petitions for removal or discharge of receiver, or
 - (4) Such other matters as are officially requested and approved by the court.
- Such request shall state the post office address of such person, or his attorney.

(e) Notices and Hearings. Notice of any of the proceedings set out in section (d) of this rule (except petitions for the sale of perishable property, or other personal property, the keeping of which will involve expense or loss) shall be addressed to such person, or his attorney, at his stated post office address and deposited in the United States Post Office, with the postage thereon prepaid, at least 5 days before the hearing on any of the matters above described, or personal service of such notice may be made on such person or his attorney not less than 5 days before such hearing, and proof of mailing or personal service must be filed with the clerk before the hearing. If upon the hearing it appears to the satisfaction of the court that the notice has been regularly given, the court shall so find in its order of judgment, and such judgment shall be final and conclusive:

Purpose

This suggested amendment is based on a recommendation originally submitted by Karl B. Tegland, attorney at law, and was approved by the WSBA Court Rules and Procedures Committee after consultation with the WSBA Creditor-Debtor Section. The suggested amendment deletes and reserves CR 66 (Receivership Proceedings) in its entirety. In 2004 the legislature enacted comprehensive amendments to chapter 7.60 RCW and other statutes governing receiverships. See LAWS OF 2004, ch. 165. The legislation addresses the procedures governed by CR 66 and renders them superfluous. Redundant Civil Rules would cause needless confusion.

MAR 7.1

REQUEST FOR TRIAL DE NOVO

(a) 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. The request for a trial de novo shall not refer to the amount of the award and shall be in substantially the form set forth below:

SUPERIOR COURT OF WASHINGTON
FOR [] COUNTY

RAJ 4.1

AUTHORITY OF COURTS PENDING APPEAL

_____,)
Plaintiff,) No. _____
v.) REQUEST FOR
_____,) TRIAL DE NOVO
Defendant.)

TO: The clerk of the court and all parties:
Please take notice that [name of aggrieved party] requests a trial de novo from the award filed [date].

Dated: _____
[Name of attorney
for aggrieved party]

(b) [Unchanged.]

Purpose
The suggested amendment eliminates the requirement that a party requesting a trial de novo must file proof of service of the request prior to expiration of the 20-day period within which the request itself must be filed. The amendment also removes from MAR 7.1(a) the express requirement that service of the request occur within the 20-day period. The amendment is intended to remedy the result in *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997), and its progeny, *see, e.g., Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005); *Roberts v. Johnson*, 137 Wn.2d 84, 969 P.2d 445 (1999). *Nevers* and subsequent case law have held that timely service and timely filing of proof of service are mandatory; a failure to strictly comply with these requirements prevents the superior court from conducting a trial de novo. This is a harsh result. Considering the amount of litigation and appellate review that has been devoted to the issue, the rule in its present form represents a trap for the unwary. It is not necessary that service and proof of service be accomplished within the 20-day limit, since the statute authorizing mandatory arbitration requires only that the request be filed. See RCW 7.06.050(1)(b) (Within 20 days after entry and service of an arbitrator's decision, "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. Such trial de novo shall thereupon be held . . .").

Elimination of the requirement that a party serve the request will not relieve a party from the obligation to serve other parties. Service of all pleading and other papers is required by MAR 1.3(b)(2). It will simply avoid the result of divesting the superior court of authority to hold a trial de novo if service is not effected within 20 days after the arbitration award is filed.

(a) - (c) [Unchanged.]

(d) Attorney Fees and Costs. When a party is entitled to an award of attorney fees or costs, the court of limited jurisdiction has authority to determine such an award for a party's efforts in the court of limited jurisdiction. A party may obtain review of a court of limited jurisdiction's decision on attorney fees or costs in the same review proceeding as that challenging the judgment without filing a separate notice of appeal.

Purpose

The suggested amendment is based on a recommendation originally submitted by Devin T. Theriot-Orr, attorney at law. The suggested amendment is intended to authorize a court of limited jurisdiction to determine issues of costs and attorney fees while a RALJ appeal is pending. This authority, which is equivalent to the authority of a superior court under RAP 7.2(i), will promote judicial economy and avoid piecemeal litigation in situations where attorney fees and costs are not resolved at the time of entry of judgment in a court of limited jurisdiction.

RAJ 9.3

COSTS

(a) Party Entitled to Costs. The party that substantially prevails on appeal shall be awarded costs on appeal to the extent authorized by statute. Costs will be imposed against a party whose appeal is involuntarily dismissed. Costs will be awarded in a case dismissed by reason of a voluntary withdrawal of an appeal only if the superior court so directs at the time the order is entered permitting the voluntary withdrawal of the appeal.

(b) - (f) [Unchanged.]

(g) Reasonable Attorney Fees. A request for reasonable attorney fees or expenses should not be made in the cost bill. The request should be made as provided in rule 11.2.

addressed to the following parties:

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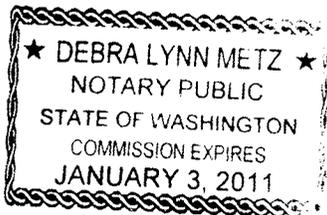
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DATED this 29th day of November, 2007.

Sara Leming
Sara Leming

SIGNED AND SWORN to before me on 11-29-07 by

Sara A. Leming.



Debra Lynn Metz
Print Name: Debra Lynn Metz
Notary Public Residing at Tacoma
My appointment expires: 1-3-2011