

NO. 65523-0-1

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

ROBERT RUSSELL, an individual,

Respondent,

vs.

DEBRA LYNN MAAS,

Appellant,

and

DOES 1 through 10; ROE COMPANIES XI through XX,

Defendants.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Washington follows the rule that a party acts through his or her lawyer. A lawyer cannot waive a substantial right without the express approval of his or her client. Here, the superior court ignored this fundamental and well established principle and instead invented the total opposite: a lawyer can preserve a substantial right only with the express authority of his client. The superior court erred as a matter of law. The court's order striking the trial de novo should be reversed and the matter remanded for a full jury trial.

II. ARGUMENT

A. THE TRIAL DE NOVO RIGHT WAS PROPERLY AND TIMELY REQUESTED; THE JURY TRIAL SHOULD OCCUR.

Ms. Maas through her counsel of record properly and timely requested a jury trial. The superior court erred in striking the request and entering judgment, including attorney fees, on the arbitration award. Washington, like most jurisdictions in the United States, follows the rule that an attorney acts on behalf of the client. *Rivers v. Washington State Conference of Masons Contractors*, 145 Wn.2d 674, 679, 41 P.3d 1175 (2002) (actions of lawyer are binding on client in law and equity); *People v. Mariposa Co.*, 39 Cal. 683, 684 (1870); *Bethlehem Steel Corp. v. Devers*, 389 F.2d 44 (4th Cir. 1968); *Grey v. First National Bank*, 393 F.2d 371 (5th Cir. 1968); *Lovering v. Lovering*, 380 A.2d 668, 670 (Md. App.

1977); *Pender v. McKee*, 582 S.W.2d 929, 938 (Ark. 1979); *State Bank v. City of Bismarck*, 316 N.W. 2d 85, 88 (N.D. 1982); 7 Am. Jur. 2D *Attorneys at Law* §§ 147, 160 (1997). The attorney does not, however, have the authority to surrender or waive a client's substantial right without the client's express authority. *Graves v. P. J. Taggares Co.*, 94 Wn.2d 298, 304-05, 616 P.2d 1223 (1980).

Respondent argues that a trial de novo is a substantial right that only Ms. Maas, not her attorney, was authorized to request. (Resp. Br. at 7) Again, respondent can cite no Washington authority which requires that a party, independent of her attorney, exercise a substantial right. The authorities repeatedly state that an attorney cannot waive his client's substantial rights without the client's express authority. *Graves v. P. J. Taggares Co.*, 94 Wn.2d at 304-05; *In re Houts*, 7 Wn. App. 476, 481, 499 P.2d 1276 (1972). There is no antithetical rule.

Several statutes provide that an aggrieved party has the right to seek relief by revision, petition, appeal, or de novo review. *E.g.* RCW 2.24.050 (right to revision of commissioner's orders); RCW 34.05.514, .530 (petition for review under Administrative Procedure Act); RCW 36.70C.060 (petition of land use decision); RCW 51.52.050 (appeal of Board of Industrial Appeals decision). None of these statutes requires that the individual, rather than the individual's attorney, expressly and

affirmatively show that he sought review. Nor is Ms. Maas aware of any Washington court which has required a party who seeks review under any of these statutes to affirmatively demonstrate that the party's attorney was acting with the party's authority.

Wiley v. Rehak, 143 Wn.2d 339, 20 P. 3d 404 (2001), does not support respondent's position here. There three defendants sought trial de novo of a mandatory arbitration award. One defendant's name was omitted from the request. The court struck the de novo request. *Wiley* stands merely for the proposition that all parties who are seeking a trial de novo must be identified in the request. Moreover, as Division III recently noted in *Splattstoesser v. Scott*, ___ Wn. App. ___, ___ P.3d ___ 2011 WL 91040 (Jan. 11, 2011), the *Wiley* case has limited reliance since MAR 7.1(a) was amended in September 2001 to add a substantial compliance standard. *Wiley* does not establish that the party, instead of the party's attorney, must affirmatively request the trial de novo.

Despite respondent's argument, *Trowbridge v. Walsh*, 51 Wn. App. 727, 755 P.2d 182 (1988), holds that an attorney acts on behalf of his clients. There the opponent argued the parties' absence at the mandatory arbitration hearing precluded them from obtaining a trial de novo citing MAR 5.4. The Court of Appeals reversed. The attorney appeared for them at the hearing. The Court explained:

We hold it was error to conclude the Walshes and Imperial Pools, Inc., lost their right to trial de novo because they personally did not attend the hearing; they participated through their attorney . . .

51 Wn. App. at 730. The *Trowbridge* court followed the established rule that an attorney acts on behalf of his client. Similarly here, Ms. Maas's attorney acted on her behalf.

Lane v. Brown & Haley, 81 Wn. App. 102, 912 P.2d 1040, *rev. denied*, 129 Wn.2d 1028 (1996), does not support respondent's argument. There the Court of Appeals reversed a CR 60 order holding that the attorney's failure to pursue proper legal theories did not constitute grounds to vacate a judgment. The *Lane* court acknowledged the general rule that "once a party has designated an attorney to represent him in regard to a particular matter, the court and the other parties to an action are entitled to rely upon that authority until the client's decision to terminate it has been brought to their attention." 81 Wn. App. at 108, *quoting Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978).

Notably, after respondent's counsel appeared in this case, all submissions to the superior court and this Court have been signed and submitted by counsel.¹ Respondent's complaint was specifically labeled

¹ Respondent was pro se at the time that the complaint was filed. Therefore, he signed and submitted the complaint himself. (CP 1-4)

“EXEMPT FROM ARBITRATION” and alleged damages in excess of \$50,000. (CP 1, 3) Yet, his counsel later stipulated to submit the case to mandatory arbitration. (CP 19-20) Under respondent’s arguments, the stipulation which waived his right to recover any amounts in excess of \$50,000 and suspended his right to a jury trial should have required a showing that respondent himself had expressly authorized the stipulation. The fact that he did not come forward with this proof of his express authority and/or consent belies his arguments about Ms. Maas’s request for a trial de novo. If opposing parties are permitted to challenge the authority of his opponent’s attorney, litigation will get bogged down in a quagmire of collateral issues.

B. RESPONDENT’S REFERENCES TO MS. MAAS’S INSURANCE COMPANY ARE IMPROPER AND SHOULD BE STRICKEN.

This Court should reject respondent’s argument that Ms. Maas’s insurance carrier requested the de novo. (Resp. Br. at 11) The argument is purely speculation. There is no evidence to support it. Respondent fails to cite to any record reference to support the statement. RAP 10.3(a)(5), (6). The only record reference is to CP 33. (Resp. Br. at 2) Page 33 of the clerk’s papers is a page in respondent’s motion. The motion refers to Ex. 3 to Mr. Boddy’s declaration which is a letter from Mr. Boddy to Ms. Maas’s counsel. (CP 52) The letter states merely that Mr. Boddy learned

from his client that Ms. Maas did not request the trial de novo. (*Id.*) Triple hearsay is a far cry from proof.

Respondent's other arguments regarding Allstate should similarly be rejected and stricken as entirely speculative. (Resp. Br. at 15-16) Allstate is a not a party to this lawsuit. Any complaints about the mandatory arbitration were waived when respondent's counsel stipulated to the mandatory arbitration. (CP 19-20) And respondent had every opportunity to transfer the case to mandatory arbitration prior to the stipulation. Respondent's arguments about Allstate should be rejected and stricken in their entirety.

C. THE SUPERIOR COURT IMPROPERLY INTERFERED WITH THE ATTORNEY-CLIENT PRIVILEGE.

Ms. Maas respectfully submits that the questioning at the superior court improperly invaded her attorney-client communications. Respondent disagrees and contends the questioning was appropriate because the communications were not intended to be confidential. Respondent's contention is based on the faulty premise that a document filed with the court is public and therefore any document signed by an attorney is public and no attorney-client privilege exists. The logical extension of that argument is unworkable and unreasonable. Just because an attorney signs a document after he or she has consulted with his or her

client does not make the consultation and the communication public. In fact, this Court rejected a similar argument in *Seattle Northwest v. SDG Holding Co.*, 61 Wn. App. 725, 812 P.2d 488 (1991).

Seattle Northwest involved the buyer of a business who sought to recover from the seller defense costs after the seller refused the tender. The buyer sought discovery of the legal opinions written by the seller's attorney arguing that the seller's attorney had written a letter to the buyer's attorney indicating there was a strong and valid defense to the lawsuit. The buyer argued the letter waived the seller's attorney-client privilege and entitled the buyer to obtain the legal opinions of the seller's attorney.

Division I disagreed stating:

[The] letter is at most a disclosure of a legal *conclusion*, not a confidential legal opinion. If such a disclosure did waive the attorney-client privilege, every letter an attorney writes to opposing counsel, an audit firm, or a witness in a case could be construed as waiving the privilege. To penalize a disclosure of a legal conclusion by characterizing it as a waiver would greatly hamper attorneys in their ability to effectively represent and advise their clients. The exception would swallow the rule and render the privilege a virtual nullity.

61 Wn. App. at 739-40 (emphasis in original).

Respondent overstates the effect of the holding in *Green v. Fuller*, 159 Wn. 691, 294 P.1037 (1930), when he argues that “[c]ommunications which an attorney must make public, or are made for that purpose, are not

confidential and not privileged.” (Resp. Br. at 16) The statement is correct if limited to the actual written or oral communication which is made public. Yet, the concept does not extend to communications between the attorney and the client which lead up to the disclosed, public communication.

Green involved a dispute about wages owed to decedent’s chauffeur. He claimed he had earned \$125 per month and had not been fully paid. The executor of the estate maintained the chauffeur had earned \$80 per month and had been fully paid. To support his position, the executor introduced an answer to a writ of garnishment and a related letter which showed the chauffeur had earned \$80 per month. The answer and letter were prepared by an attorney who had represented the decedent and the chauffeur. The original documents could not be found so the attorney was permitted to testify that the copies were exact duplicates of the originals. The chauffeur objected to the attorney’s testimony on the basis of attorney-client privilege. 159 Wn. at 694-95. The Supreme Court rejected the argument noting in part that the letter was not a communication between the attorney and the client. The letter was a communication between the attorney and a judgment creditor. The letter was not privileged.

Here Ms. Maas is not claiming that the request for trial de novo is privileged. The request is obviously a matter of public record. The fact that the request is filed with the court does not, however, make any communications between Ms. Maas and her attorney a matter of public record.

D. MS. MAAS CHALLENGES THE BASIS FOR THE ATTORNEY FEE AWARD – THE STRIKING OF THE DE NOVO REQUEST.

Because this Court should reverse and remand this case for trial, the Court should also reverse the attorney fee award. Attorney fees were only awarded because the superior court determined that when the trial de novo request was stricken Ms. Maas had not improved her position on the trial de novo pursuant to MAR 7.3. Reversal of the order striking the trial de novo removes the entire basis for the attorney fee award. It will restore the parties to the original position. Any fee award under MAR 7.3 must await the outcome of the trial de novo.

E. RESPONDENT IS PRECLUDED FROM AGAIN RAISING THE ISSUE OF THE TIMELINESS OF THE APPEAL.

Although the Court's commissioner already ruled the appeal was timely and a panel of this Court denied respondent's motion to modify, respondent again challenges the timeliness of the appeal. (Resp. Br. 20-23) If respondent disagreed with the motion to modify, his remedy was to seek discretionary review by the Supreme Court. He failed to do so. The

issue has thus been finally resolved and this Court should not consider it for a third time.

This Court set a motion to determine whether the appeal was timely. Commissioner Neel ruled on the Court's motion and determined that the appeal was timely filed. (Commissioner's Ruling entered July 19, 2010) A panel of judges denied respondent's motion to modify the Commissioner's ruling. (Order Denying Motion to Modify entered September 21, 2010) Respondent did not file a motion for discretionary review with the Supreme Court of the order denying the motion to modify the Commissioner's ruling. Respondent is therefore precluded from raising the issue of the timeliness of the appeal in his brief.

The Rules of Appellate Procedure mandate that there are two types of appellate court decisions: decisions terminating review and interlocutory decisions. RAP 12.3. An interlocutory decision is any decision that does not terminate review. RAP 12.3(b). A party seeking review of an interlocutory decision must file a motion for discretionary review with the Supreme Court within 30 days of the interlocutory decision. RAP 13.3(c) and 13.5(a). If discretionary review of an interlocutory order is denied, the party may still later obtain review of that decision. RAP 13.5(d).

Here, the Commissioner ruled that the appeal was timely filed, and a panel of the Court of Appeals denied respondent's motion to modify. Because that order did not terminate review, it was an interlocutory order. RAP 12.3. If respondent desired review, he needed to file a motion for discretionary review with the Supreme Court within 30 days of the denial. RAP 13.5(a). That was not done.

A comparison with *Gladding v. Department of Social & Health Servs.*, 33 Wn. App. 728, 656 P.2d 1140, *rev. denied*, 99 Wn.2d 1006 (1983), is useful. In *Gladding*, the plaintiff/appellant sought review in his brief of a previously denied motion to modify a commissioner's ruling.

The Court stated:

The panel's order denying Gladding's motion to modify the commissioner's ruling was an "interlocutory decision" within the meaning of RAP 12.3(b) and 13.3(a)(2). A party seeking review by the Supreme Court of an interlocutory decision must file a motion for discretionary review within 30 days after the decision is filed. RAP 13.3(c), 13.5(a). Gladding did not pursue that avenue of review. We will not presume, however, to determine the effect of this failure upon Gladding's right to seek review of the panel's order. We hold simply that the Rules on Appeal do not provide for a motion addressed to this court to reconsider an order of a panel of the court which denied a motion to modify a commissioner's ruling. Accordingly, we refuse to reconsider the panel's order entered in this case.

33 Wn. App. at 730. Respondent is precluded from raising the issue of the timeliness of the appeal in his brief.

If this Court chooses to yet again address the timing of this appeal, this Court should conclude that the appeal is timely. The May 13, 2010, order was for all intents and purposes the final judgment in this case. All the court's prior rulings merged into that order and judgment and became final. An appeal from a final judgment brings up most pretrial orders for appeal. *Behavioral Sciences Institute v. Great-West Life*, 84 Wn. App. 863, 869-70, 930 P.2d 933 (1997); *Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 884 P.2d 13 (1994). Ms. Maas brought this appeal within 30 days of May 13, 2010. Her appeal is timely.

The case of *Dix v. ICT Group, Inc.*, 125 Wn. App. 929, 106 P.3d 841 (2005), *aff'd*, 160 Wn.2d 826, 161 P.3d 1016 (2007), does not support respondent's argument. There the respondent challenged the timeliness of the appeal because the appeal was filed more than 30 days after the court's memorandum opinion. The trial court's memorandum decision was formally entered in a subsequent order. The written order was timely appealed. The Court of Appeals determined the appeal was timely commenced. 125 Wn. App. at 933.

Respondent argues that the court's March 26, 2010, order was not incorporated in the May 13, 2010, order so the March 26 order was final and appealable. Again, respondent's argument ignores the principle of all

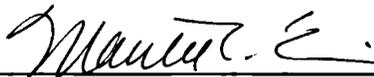
court rulings merging into the final judgment. The appeal was timely and should proceed.

III. CONCLUSION

Ms. Maas, through her counsel of record, timely filed and served a request for a trial de novo. She is entitled to proceed with her constitutional right to a jury trial. The superior court's orders and judgment striking the de novo request, awarding attorney's fees under MAR 7.3, and entering judgment should be reversed. This matter should be remanded for a jury trial.

DATED this 14th day of February, 2011.

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