

65523-0

65523-0

NO. 65523-0-I

**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.

2010 OCT 15 AM 10:20

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Mary Yu, Judge**

BRIEF OF APPELLANT

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I. NATURE OF CASE

This case involves a challenge to a timely filed and served request for trial *de novo*. The superior court erroneously deprived appellant Ms. Maas of a jury trial rather than follow the established rules of law that (1) an attorney is authorized to act on behalf of his client, (2) an attorney cannot waive the client's jury right, (3) an attorney must preserve his client's substantial rights, and (4) a client can ratify her attorney's action.

This Court should reverse the superior court's orders and award of MAR 7.3 fees and remand for a full jury trial.

II. ASSIGNMENTS OF ERROR

1. The superior court erred in entering the March 26, 2010, Order Granting Plaintiff's Motion to Strike Defendant's Request for Trial *de novo*; To Allow Judgment to Be Entered Upon MAR Award, and for Sanctions. (CP 94-95)

2. The superior court erred in entering the May 13, 2010, Order Awarding Plaintiff's Costs and Attorney Fees Pursuant to MAR 7.3. (CP 150-52)

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the superior court err in striking Ms. Maas' request for trial *de novo* where Ms. Maas was an aggrieved party under MAR 7.1 and fully complied with MAR 7.1?

2. Did the superior court err in failing to follow the general rule that an attorney is authorized to act for his client and his actions bind his client?

3. Did the superior court err, in absence of any requirement of rule or statute, by imposing a requirement that a party seeking a trial de novo prove that the party expressly and affirmatively requested the trial?

4. Did the superior court err by forcing Ms. Maas to testify about communications with her attorney when such communications are protected by the attorney-client privilege?

5. Did the superior court err by improperly interfering with Ms. Maas' attorney-client relationship and create an extra step for a party to obtain her constitutional right to a jury trial?

6. Did the superior court err in awarding plaintiff the amount of the arbitration award where a timely request for trial de novo was filed and any judgment or award must await the outcome of the jury trial?

7. Did the superior court err in awarding attorney fees and costs under MAR 7.3 where no trial has occurred and, therefore, it cannot be determined whether or not Ms. Maas improved her position at a trial de novo?

IV. STATEMENT OF FACTS AND PROCEDURE

Plaintiff Robert Russell was living in a single family home with Debra Maas. (CP 10) On February 1, 2005, plaintiff was painting the exterior of the house. (CP 10-11) After completing the majority of the painting, plaintiff placed the ladder in the flower garden but did not ensure the ladder was properly secured. As he climbed the ladder, one side sunk into the dirt. Plaintiff threw his paint can and jumped from the ladder into a raspberry bush. (CP 10-11) He was injured when his leg struck rebar that was holding the raspberry bushes. *Id.*

Plaintiff sued Ms. Maas. (CP 1-4) Ms. Maas answered the complaint and denied the allegations. (CP 5-6) She asserted the affirmative defense of comparative fault. *Id.*

Ms. Maas timely filed and served a jury demand. (CP 7) A jury trial was scheduled for October 19, 2009. (CP 8)

Shortly before the trial, the case was moved into mandatory arbitration. (CP 19-20) The arbitrator awarded plaintiff \$50,000. The arbitrator's award did not address the issue of comparative fault. (CP 112) Ms. Maas, through her attorney of record, timely filed and served a request for trial de novo from the arbitration award. (CP 21)

Plaintiff asked defense counsel to withdraw the de novo request because plaintiff maintained that Ms. Maas was not the person who had

requested the trial *de novo*. (CP 52) Defendant did not agree to withdraw the request. Plaintiff asked to depose Ms. Maas. (CP 54)

As an alternative to the deposition, plaintiff drafted a declaration for Ms. Maas to sign. (CP 56-57) A declaration was drafted but not signed so Ms. Maas's deposition took place. (CP 58, 60-71) When Ms. Maas was asked about the language in the draft declaration, counsel objected. (CP 64) Counsel objected to other questions posed to Ms. Maas on the grounds of attorney-client privilege. (CP 66-69) The deposition was suspended after a short time. (CP 69)

Plaintiff moved to strike the trial *de novo* request arguing that Ms. Maas was not an "aggrieved party" under MAR 7.1 because she herself did not ask for the trial. (CP 32-43) In the motion to strike, plaintiff argued:

Defense counsel will produce no evidence that Maas authorized or consented to the filing of the Request for Trial *de novo*, in fact, his actions at her deposition[] clearly reflect an intention to hide the true information – that [Ms. Maas's liability carrier] wanted this *de novo*, defendant Maas did not.

(CP 36-37)

Plaintiff argued that pursuant to the Rules of Professional Conduct, counsel cannot validly request a trial *de novo* without the client's express prior permission. (CP 37-39) Plaintiff cited to *Graves v. P.J. Taggares*,

94 Wn. 2d 298, 616 P.2d 1223 (1980), and *Morgan v. Burks*, 17 Wn. App. 193, 563 P.2d 1260 (1977). He argued that only Ms. Maas had the right to determine whether to exercise the substantive right of a trial *de novo* request. Plaintiff contended that Ms. Maas's attorney could not do so without express authorization from Ms. Maas. (CP 38-39) Plaintiff's motion to strike also sought sanctions against defense counsel for asserting the attorney-client privilege at the deposition. (CP 40-43)

Ms. Maas opposed the motion to strike. (CP 72-82) She argued that she was the party to the lawsuit and is an aggrieved party with standing to request a trial *de novo*. She also argued that her attorney had authority to act. Ms. Maas had neither fired nor expressed a desire to fire her attorney. (CP 77) Ms. Maas and counsel were in constant communication regarding the progression of the case as it materialized through arbitration and trial. *Id.*

Ms. Maas' opposition included a declaration from defense counsel, Michael Brown, and a declaration of defendant Maas. (CP 83-84, 85-86)

Ms. Maas's declaration states in part:

3. Mr. Brown and I communicated adequately about the developments in this case throughout the duration of the lawsuit.
4. I was aware this case may go to trial following the arbitration and is set to go to trial.

5. I do not object to the request for trial de novo following the arbitration of this case.
6. I felt like my best interests were being represented by Mr. Brown in this lawsuit.

(CP 83-84)

In reply, plaintiff argued that a defendant's lack of objection to a trial de novo request does not comply with MAR 7.1(a). (CP 87-91) Plaintiff argued the operative issue is whether defendant herself requested the trial *de novo*. Plaintiff contended the record lacked an indication that Ms. Maas affirmatively requested the trial. *Id.*

On March 26, 2010, the superior court held a hearing. (3/26/10 RP 1-28) The court ordered Ms. Maas to appear. (3/26/10 RP 2) At the hearing, plaintiff's counsel was permitted to ask Ms. Maas questions. The judge also asked questions.

The superior court also questioned Mr. Brown, Ms. Maas's defense attorney. The judge stated in part:

So there's a difference between Ms. Maas not objecting and Ms. Maas requesting. So maybe you want to address that because **what I need to know at the end of the day was Ms. Maas the person who requested this trial de novo.**

(3/26/10 RP 9:9-13) (emphasis added). “[D]oes Ms. Maas wish to have a trial de novo[?]” (3/26/10 RP 11:25-12:1)

Ms. Maas's attorney objected to the questions at the proceeding on the grounds of attorney-client privilege. The court disagreed stating: “I

do not believe that the question asks her to reveal any client/attorney communications and I'm not asking that she do that." (3/26/10 RP 13:7-9)

Plaintiff's counsel, Mr. Boddy, asked Ms. Maas questions. The questions included the following:

Q: At any time since you learned of the arbitrator's decision in this case has it been your personal desire to have this case appealed and put in front of a jury?

A: I've -- on a personal level I've gone back and forth. My own conclusion is I'm not sure that I care. I was hoping a decision would have been made or would have been accepted but it's not and I accept that.

Q: I'm unclear. You accept the arbitrator's decision?

A: I --

Q: Or you accept the de novo request?

A: Both.

...

Q: Well, the question is, did you request a trial de novo? Did you do that? Did you want that?

A: I did not do that. But did I -- I don't know how to answer the second question. It was -- I did not direct anyone to make that happen.

(3/26/10 RP 19:8-20:8)

The judge asked Ms. Maas the following questions:

Q: Is it your concern, Ms. Maas, that if you were to do something else other than where we are today that you would lose your insurance coverage?

Ms. Maas: I don't know and it's a concern that I don't know.

Q: I don't know how else to ask this in a way other than have you been threatened that you might lose your insurance coverage if you were not to proceed?

Ms. Mass: No.

(3/26/10 RP 21:3-12)

The court ruled that the trial de novo request should be stricken.

(CP 94-95) The judge explained her ruling as follows:

After considering all of this and recognizing that there really is no true clear direction for this court, the only question that I believe I have to answer at this point is who is the aggrieved party and that seems pretty obvious that it's Ms. Maas. And having reviewed all of these materials as well as listening and seeing her today, **I'm not persuaded that she is the individual who made the decision to file this trial de novo.** So I'm going to go ahead and grant the motion and I'm striking the request for a trial de novo.

(3/26/10 RP 24:22-25:6) (emphasis added). The court denied plaintiff's motion for sanctions against defense counsel and granted plaintiff's motion to strike. (CP 94-95)

Plaintiff moved for an award of attorney fees and costs under MAR 7.3. (CP 96-107) On May 13, 2010, the court entered an order awarding plaintiff attorney's fees and costs under MAR 7.3. The court awarded plaintiff a total of \$75,881.68 comprised of \$50,000 arbitration award, \$1,431.68 in costs, and \$24,450 in attorney fees. (CP 150-52)

Ms. Maas timely appealed. (CP 154-60)

V. ARGUMENT

A. STANDARD OF REVIEW.

This Court reviews de novo a trial court's decision involving the interpretation of a court rule. *Kim v. Pham*, 95 Wn. App. 439, 441, 975 P.2d 544, *rev. denied*, 139 Wn.2d 1009 (1999). Similarly, a review of the application of a statute is reviewed de novo. *Basin Paving Co. v. Contractors Bonding and Ins. Co.*, 123 Wn. App. 410, 414, 98 P.3d 109 (2004). The superior court committed a legal error in its interpretation and application of RCW 7.06.050, MAR 7.1, and MAR 7.3.

B. MS. MAAS TIMELY FILED AND SERVED A DE NOVO REQUEST PURSUANT TO RCW 7.06.050(1) AND MAR 7.1 AND IS ENTITLED TO A JURY TRIAL.

The superior court erred by concluding that Ms. Mass could only pursue a jury trial de novo if she expressly requested the trial de novo. Ms. Mass, acting through her attorney of record, timely filed and served the de novo request. She fully complied with RCW 7.06.050 and MAR 7.1 and thus is entitled to her jury trial.

RCW 7.06.050(1) provides in part:

Following a hearing as prescribed by court rule, the arbitrator shall file his decision and award with the clerk of the superior court, together with proof of service thereof on the parties. **Within twenty days after such filing, 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, including a right to jury, if demanded.

(Emphasis added.) RCW 7.06.030 authorizes the Supreme Court to promulgate mandatory arbitration rules. *Robert v. Johnson*, 137 Wn.2d 84, 88, 969 P.2d 446 (1999). These rules (MAR) implement basic procedural requirements set forth in RCW 7.06.050. *Id.* MAR 7.1(a) provides in pertinent part:

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 superior court recognized that Ms. Maas was the aggrieved party. (3/26/10 RP 24-25) Ms. Maas, the aggrieved party, fully complied with RCW 7.06.050(1) and MAR 7.1(a). Nothing in the statute or rule requires Ms. Maas to do more. No further proof or showing was necessary. “[S]uch trial de novo shall . . . be held” before a jury. RCW 7.06.050(1).

MAR 7.1 does not require an “aggrieved party” to personally file the request for trial de novo. MAR 7.1 does not specifically preclude an aggrieved party’s attorney from acting on the party’s behalf. MAR 7.1 does not specifically require an “aggrieved party” to sign off on any request for trial de novo or objectively manifest his or her approval of the

request for trial de novo in some particular fashion. MAR 7.1 does not specifically require the “aggrieved party” to have knowledge of the arbitration award or the request for trial de novo where defense counsel is acting on her behalf. The superior court erred by imposing additional requirements on Ms. Maas. The matter should be reversed and remanded for a jury trial.

C. MS. MAAS’S ATTORNEY HAD AUTHORITY TO FILE THE REQUEST FOR TRIAL DE NOVO.

An attorney’s actions are done with authority and are binding on the client. It is well settled that once an attorney has been designated to represent a party, the other parties and the Court are entitled to rely upon that authority. *Lane v. Brown & Haley*, 81 Wn. App. 102, 108, 912 P.2d 1040, *rev. denied*, 129 Wn.2d 1028 (1996).

Washington has long recognized the common law rule that an attorney is authorized to act on behalf of his or her 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). It is presumed that when an attorney acts for his client, he acts with authority. *State v. Elder*, 130 Wash. 612, 228 P. 1016 (1924). *Hale v. Island County*, 88 Wn. App. 764, 770, 946 P.2d 1192 (1997)

(appropriate for court to rely on attorney's declaration that his client abandoned appeal).

The Washington Supreme Court has explained the attorney's authority as follows:

[O]nce 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, as provided in RCW 2.44.040-.050 . . .

Haller v. Wallis, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978) (rejecting parent's claim that court approved minor settlement was void because attorney lacked authority). Similarly, the Court of Appeals has recognized that:

It is axiomatic that trial counsel is clothed with authority to speak for and act in behalf of his client and control the incidents of a trial...[h]is procedural acts done in the regular and ordinary conduct of a case are those of his client and are binding upon his client.

State v. Peeler, 7 Wn. App. 270, 274, 499 P.2d 90 (1972).

Ms. Maas's attorney acted with authority. Rather than follow the general rule in Washington, the superior court devised a new rule and a new requirement unsupported by any statutory, rule, or case law authority. The superior court turned the general rule on its head and imposed upon Ms. Maas the burden of affirmatively proving that she expressly

authorized her attorney to file the trial de novo request. The superior court erred in doing so.

Washington courts only require an attorney to have the client's express authority in a few, limited circumstances. None of these limited circumstances apply here. An attorney cannot accept service of process except with the client's express authority. *Ashcraft v. Powers*, 22 Wash. 440, 443, 61 P. 161 (1900). An attorney cannot settle or compromise a claim without the client's express authority. *Timm v. Timm*, 34 Wash. 228, 234-35, 75 P. 879 (1904); *Barton v. Tombari*, 120 Wash. 331, 336, 207 P. 239 (1922), *aff'd*, 124 Wash. 696, 214 P. 170 (1923); *Grossman v. Will*, 10 Wn. App. 141, 149, 516 P.2d 1063 (1973).

An attorney cannot waive a client's substantial rights without express authority. *Graves v. Taggares*, 94 Wn.2d 298, 304-05, 616 P.2d 1223 (1980) (attorney must have express authority to waive jury trial right); *In re Houts*, 7 Wn. App. 476, 481, 499 P.2d 1276 (1972) (attorney cannot stipulate to deprivation of client's parental rights without express authority).

None of these limited circumstances exist here. Therefore, the general rule that the attorney's action is binding applies. Moreover, here the attorney's signature on the request for de novo assured that Ms.

Maas's substantial right to a jury trial was preserved. This Court should reverse and remand.

D. MS. MAAS RATIFIED HER ATTORNEY'S ACTIONS.

Not only did Ms. Maas's attorney have authority to act, any question about the scope of the authority was resolved by Ms. Maas's ratification of the trial de novo request. Any challenge to an attorney's authority to act on behalf of his client is overcome when the client subsequently ratifies the attorney's action. *Denney v. Parker*, 10 Wash. 218, 220-21, 38 P. 1018 (1894). Here Ms. Maas acknowledged that she did not object to the trial de novo request. (CP 83) She specifically testified that she accepted the trial de novo request. (3/26/10 RP 19:8-20:8). Her actions ratified the attorney's action.

The early case of *Gaffney v. Megrath*, 23 Wash. 476, 63 P. 520 (1900), illustrates how ratification eliminates any challenge to an attorney's authority to act. *Gaffney* involved a challenge to a settlement, one of those limited circumstances where an attorney must have express authority to act. The attorney settled a judgment on behalf of his client by receiving a payment of bricks. The client said the attorney was not authorized to settle the case. The client then sued the attorney for the value of the bricks. The Washington Supreme Court ruled that the client's suit was a ratification of the attorney's action.

Ms. Maas's case is certainly not as extreme as the *Gaffney* case, particularly because the trial de novo request is not a situation where an attorney must have the client's express authority to act. Any question about the extent of the attorney's authority was removed when Ms. Maas acknowledged that she did not object to the trial de novo and she accepted the trial de novo request.

Ms. Maas never asserted any challenge to her attorney's action. Rather, she acknowledged they were in regular communication. (CP 83-84) She was aware of the procedural posture of the case. *Id.* She trusted her attorney and believed he acted in her best interest. *Id.* Her actions ratified and affirmed her attorney's action. This matter should be reversed and remanded for a full jury trial.

E. THE SUPERIOR COURT IMPROPERLY MEDDLED IN THE ATTORNEY-CLIENT RELATIONSHIP.

The superior court erred by unnecessarily scrutinizing the attorney-client relationship of Ms. Maas and her counsel and requiring them to submit to questioning about the extent of their communications. It is axiomatic that the attorney-client relationship is premised on full and open communications which are confidential and protected by the attorney-client privilege. RCW 5.60.060(2). The superior court overstepped its bounds and improperly interfered with the attorney-client relationship.

In *State v. Marshall*, 83 Wn. App. 741, 923 P.2d 709 (1996), the Court of Appeals rejected an approach very similar to the one employed by plaintiff here. There the attorneys for a criminal defendant stipulated to an order extending the time for filing a death penalty notice. Before the revised deadline for the death penalty notice, the defendant personally notified the court he wished to plead guilty. Defendant did so against the advice of his counsel. The state later filed the death penalty notice.

Defendant's counsel withdrew. New defense counsel challenged the stipulated order extending the time for the death penalty notice because the defendant was not in court when the order was entered. The state argued the defendant need not be in court for entry of the order. The State also argued that the defendant was challenging the authority of prior counsel. The State submitted:

“[B]y making this motion, the defense not only has challenged whatever procedure was used, but they specifically have challenged the authority of the defense attorneys to act on their client's behalf in this respect and implicitly said that the attorneys acted without authority. The Court is entitled and in fact required to make a record that will allow the Court to decide, did they act with authority or without authority.”

83 Wn. App. at 747.

The superior court held a hearing and required the former defense counsel to testify about any discussions they had with the defendant about

their authority to extend the filing period. The attorneys refused to testify asserting the attorney-client privilege. The court ruled the attorney-client privilege did not apply and held the attorneys in contempt. The Court of Appeals reversed.

The *Marshall* court reframed the issue as a purely legal question: is the defendant's presence required at a hearing seeking to extend the time for filing the death penalty notice or can the defendant's presence be waived. 83 Wn. App. at 749-50.

If a defendant's presence is required, then testimony from Marshall's former attorneys was not needed. If a defendant's presence can be waived, the court could properly presume that counsel acted with their client's authority; it would not need to inquire into attorney-client communications unless and until the defendant claimed counsel acted without his authority. The trial court was able to decide the legal question of whether Marshall's presence was required in court without delving into attorney-client communications.

83 Wn. App. at 750. The court ruled it was improper for the superior court to conclude that the attorney-client privilege did not apply.

Similarly here, the court was presented with a legal question: did an aggrieved party timely serve and file with proof of service a request for trial de novo? This question did not require the court to delve into Ms. Maas's communications with her attorney. Ms. Maas did not challenge her attorney's authority to act. The court should not have challenged that

authority. The court should have followed the general rule that an attorney's actions are done with the client's authority. The court's unnecessary inquiry into the attorney-client relationship and setting aside the attorney-client privilege constitute reversible error.

F. THE ARBITRATION AWARD AND MAR 7.3 FEES SHOULD BE VACATED AND SET ASIDE.

Proceeding on the faulty premise that Ms. Maas had not complied with RCW 7.06.050 and MAR 7.1, the superior court awarded plaintiff the amount of the arbitration award and fees and costs under MAR 7.3. Both awards should be set aside. An arbitration award cannot be entered if a party files a de novo request. MAR 6.3; RCW 7.06.050. Similarly, attorney fees and costs under MAR 7.3 can only be awarded if a party fails to improve her position at a trial de novo or voluntarily withdraws the request. *See Hudson v. Hapner*, 170 Wn.2d 22, 34-35, ¶¶ 34, 38, 239 P.3d 579 (2010). Neither of these conditions exists here. Ms. Maas has not withdrawn her request. Ms. Maas has been deprived of her constitutional right of a jury trial. CONST. ART. I, §21. The superior court's awards should be vacated and set aside.

VI. CONCLUSION

Ms. Maas, through her counsel of record, timely filed and served a request for trial de novo. Nothing in Washington's jurisprudence requires a party to affirmatively make the decision about what course to take in

litigation. This Court should reverse and remand this case for a full jury trial.

DATED this 14th day of December, 2010.

REED McCLURE

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