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I. INTRODUCTION AND RELIEF REQUESTED

Respondent/Defendant American Contractors Indemnity Company (“ACIC” or “Defendant”) respectfully requests the Court to affirm the following trial court orders: (1) *Order Granting Defendant ACIC’s Motion to Strike Plaintiff’s Request for Trial De Novo and To Dismiss* and (2) *Order and Judgment Awarding Defendant ACIC Attorney Fees and Costs*. In addition, pursuant to RAP 18.9(c), ACIC moves this Court to dismiss Plaintiff’s appeal because it is moot. Finally, ACIC should be awarded reasonable attorney fees and costs as explained below.

II. COUNTERSTATEMENT OF FACTS

1. Plaintiff failed to timely file and serve her request for trial de novo on ACIC.

This case arises out of an alleged breach of construction contract between Plaintiff and Gordon Lund doing business as Lund Handyman Services. Pursuant to RCW 18.27 et seq., all construction contractors in the State of Washington are required to maintain a Contractor’s Registration Act surety bond. ACIC issued a surety bond on behalf of Gordon Lund in the amount of \$12,000. ACIC’s surety bond is conditioned upon Gordon Lund’s faithful compliance with Washington’s Contractor’s Registration Act. See *RCW 18.27.040*.

On or about June 13, 2013, Plaintiff Deborah Pimentel filed suit against Defendants Gordon Lund, ACIC, and several other defendants. Defendant ACIC was served through the Department of Labor & Industries pursuant to RCW 18.27.040(3) on July 26, 2013.

On February 24, 2014, this matter went to arbitration with Allen Hendricks presiding as arbitrator. On March 4, 2014, Mr. Hendricks filed the arbitration award and Declaration of Proof of Service with the Court. *CP 21-22*. The Declaration of Proof of Service states that the arbitration award was mailed to all parties on March 4, 2014. *Id.* Plaintiff concedes that she received the Arbitration Award on March 7, 2014. *See Appellant's Brief at 3.*

On March 24, 2015, Plaintiff filed a request for trial de novo and a certificate of service with the trial court. *CP 4-8*. The Certificate of Service states that Plaintiff mailed her request for trial de novo to defendants on March 24, 2014. *Id.* However, the envelopes mailed to Defendant Gordon Lund and ACIC are postmarked March 25, 2014. *CP 28-29*. It is unclear when Gordon Lund received a copy of Plaintiff's request for trial de novo.

The envelope addressed to ACIC was returned to Plaintiff because it was insufficiently addressed. *CP 29*. On April 15, 2014, ACIC first received Plaintiff's request for trial de novo in the mail. *CP 30-32*.

Even if Plaintiff's envelope postmarked March 25, 2014, and mailed to ACIC was properly addressed, service to ACIC was untimely because service would not have been deemed complete until March 28, 2014. *See CR 5(b)(2)(A)*. Thus, under either scenario, Plaintiff failed to timely file **and** serve ACIC with a request for trial de novo in accordance with MAR 7.1(a) and CR 5.

On May 2, 2014, the trial court struck Plaintiff's request for trial de novo and dismissed ACIC with prejudice. *CP 54-55*. On May 29, 2014, the trial court awarded ACIC its reasonable attorney fees and costs pursuant to MAR 7.3 and RCW 18.27.040(6). *CP 117-119*. Plaintiff appeals from the above-referenced trial court orders. *CP 120-121*.

2. Plaintiff's appeal is moot.

As previously discussed, ACIC moved to strike Plaintiff's request for trial de novo as against ACIC because it was untimely served. *CP 11-18*. On May 2, 2014, this Court dismissed ACIC with prejudice and subsequently awarded ACIC reasonable fees and costs as the prevailing party. *CP 54-55; CP 117-119*. The court did not dismiss Plaintiff's

remaining claims against the remaining defendants – rather, the trial court only dismissed ACIC.

Pursuant to an Order Setting Arbitration Trial De Novo Case Schedule, the trial de novo was scheduled for July 21, 2014. See *ACIC's Motion to Dismiss Pursuant RAP 18.9(c) – Appendix – H*. Plaintiff did not appear at trial to prosecute her claims against the remaining defendants.

On October 28, 2014, the trial court entered an Order of Dismissal pursuant to which “all of Plaintiff’s claims against all remaining defendants are DISMISSED” under CR 40, LCR 4, and LCR 41. See *ACIC's Motion to Dismiss Pursuant RAP 18.9(c) – Appendix – I*. The trial court dismissed Plaintiff’s claims against the remaining defendants under the above-referenced local and state civil rules because Plaintiff failed to appear at the scheduled trial date to prosecute her claims. *Id.* Plaintiff has not appealed the trial court’s October 28, 2014 Order of Dismissal.

Because Plaintiff’s claims against Gordon Lund are forever dismissed, Plaintiff is similarly barred from triggering liability against ACIC’s surety bond. Thus, even if Plaintiff were to succeed in reversing the trial court’s Order Striking the Trial De Novo and Order awarding ACIC its fees and costs, Plaintiff would have no legal avenue to trigger liability against ACIC. Accordingly, Plaintiff’s appeal is moot.

III. STANDARD OF REVIEW

Application of court rules to the facts is a question of law reviewed de novo on appeal. *Russell v. Maas*, 166 Wash. App. 885, 889, 272 P.3d 273, review denied, 174 Wash. 2d 1016, 281 P.3d 687 (2012). The mandatory arbitration rules, like any other court rules, are interpreted as though they were drafted by the Legislature and are construed consistent with their purpose. *Id.*

IV. ARGUMENT

1. **The trial court was required to strike Plaintiff's Request for Trial De Novo because it was not timely served on ACIC.**

Plaintiff's appeal brief shows a fundamental misunderstanding of MAR 7.1(a). She argues that her request for trial de novo was timely under MAR 7.1(a) merely because she "filed her Request for Trial De Novo on March 26, 2014." *See Appellant's Brief at 3 and 7.* Timely filing – alone – is insufficient. Plaintiff must have both timely **filed and served** the request for trial de novo. Noticeably absent from the trial court's record or Appellant's Brief is any evidence showing that she timely "filed and served" in accordance with MAR 7.1(a).

MAR 7.1(a) sets forth the procedure for requesting a trial de novo in Washington:

(a) Service and Filing. Any aggrieved party not having waived the right to appeal may request a trial de novo in the superior court. Any request for a trial de novo must be filed with the clerk and served, in accordance with CR 5, upon all other parties appearing in the case within 20 days after the arbitrator files proof of service of the later of: (1) the award or (2) a decision on a timely request for costs or attorney fees. A request for a trial de novo is timely filed or served if it is filed or served after the award is announced but before the 20-day period begins to run. The 20-day period within which to request a trial de novo may not be extended.

As can be seen from the provisions of MAR 7.1(a), the party appealing the arbitration award must both **file and serve** upon all parties the request for trial de novo within 20 days of the arbitrator filing the award.

Importantly, the request for trial de novo must be served in accordance with CR 5.

“[O]nly when there has been timely service” of the request for trial de novo may the court conduct a trial de novo. *Nevers v. Fireside, Inc.*, 133 Wash. 2d 804, 812, 947 P.2d 721 (1997). “MAR 7.1(a) forbids the extension of the 20 day time limit.” *Id.* at 815, citing *City of Seattle v. Public Employment Relations Comm'n*, 116 Wash.2d 923, 929, 809 P.2d 1377 (1991). Washington law requires “strict compliance” with the procedures set forth in MAR 7.1(a). *Nevers v. Fireside, Inc.*, 133 Wash. 2d. at 815. The law is clearly settled in this regard and Plaintiff fails to provide any distinguishing authority.

Here, the arbitration award and proof of service was filed on March 4, 2014. *CP 21-22*. Plaintiff admits she received the arbitration award on March 7, 2014. *See Appellant's Brief at 3*. On March 25, 2014, Plaintiff filed her request for trial de novo and certificate of service with the trial court. *CP 4-8*. The certificate of service states that Plaintiff mailed a copy of her request for trial de novo to the defendants on March 24, 2014, yet both envelopes addressed to Gordon Lund and ACIC are postmarked March 25, 2014. *CP 4-8; CP 28-29*. Thus, under CR 5(b)(2)(A), service was not deemed complete until March 28, 2014, which is beyond the 20-day period prescribed by MAR 7.1(a).

In addition, the envelope addressed to ACIC was returned for "insufficient address," presumably because the handwritten address was illegible. *CP 29*. As a result, ACIC did not receive notice of Plaintiff's request for trial de novo until April 15, 2014. *CP 30-32*. Even assuming for the sake of argument that Plaintiff had properly addressed her envelope to ACIC, under CR 5(b)(2)(A), service would not be deemed complete until March 28, 2014.¹ Accordingly, Plaintiff's request for trial de novo is untimely under either scenario.

¹ Under CR 5(b)(2)(A), [s]ervice [by mail] shall be deemed complete upon the third day following the day upon which they are placed in the mail.

Under Washington law, the postmark “determines the time of mailing.” *Collins v. Lomas & Nettleton Co.*, 29 Wash.App. 415, 418, 628 P.2d 855 (1981) citing *C. Wright & A. Miller, Federal Practice and Procedures* 1148 (1969). Furthermore, proper and timely mailing of a document requires independent proof, such as a postmark. *Olson v. The Bon, Inc.*, 144 Wash.App. 627, 634, 183 P.3d 359 (2008). A party’s own self-serving testimony as to the date of mailing is insufficient. *Id.* Here, both postmarks indicate that Plaintiff mailed her request for trial de novo to all parties on March 25, 2014. There is no proof whatsoever that Plaintiff mailed the request for trial de novo on March 24, 2014. Thus, under CR 5(b)(2)(A), service of the request for trial de novo was not complete until March 28, 2014, which is untimely under MAR 7.1(a).

In this case, Plaintiff failed to comply with the strict service requirements set forth in MAR 7.1(a) because service on ACIC was “deemed” complete not until after the 20-day period expired and “actual” service was effectuated not until long after the 20-day period expired. Under either scenario, Plaintiff failed to timely serve her request for trial de novo. The trial court’s orders are undeniably supported by the evidence on record and Washington law. In fact, the trial court was without discretion to allow Plaintiff’s trial de novo to proceed and was

required to strike Plaintiff's Request for Trial De Novo. *Nevers v. Fireside, Inc.*, 133 Wash. 2d at 812.

Under Washington law, Plaintiff's failure to timely serve ACIC required the trial court to strike her request for trial de novo as against ACIC and dismiss her claim against ACIC with prejudice. The trial court's orders in this regard should be affirmed.

2. Plaintiff's appeal is moot.

It is black letter surety law that "[t]he surety cannot be held liable unless the principal is liable. *Tucker v. Brown*, 20 Wash. 2d 740, 848, 150 P.2d 604 (1944). "The general rule is that the surety is not liable to the creditor unless his principal is liable[.]" *A. A. B. Elec., Inc. v. Stevenson Pub. Sch. Dist. No. 303*, 5 Wash. App. 887, 891, 491 P.2d 684 (1971). In other words, if there is no finding of liability on the part of the principal, in this case, Gordon Lund doing business as Lund Handyman Services, then no liability is triggered under ACIC's bond.

Gordon Lund was dismissed pursuant to Judge Allred's Order of Dismissal on October 28, 2014. See *ACIC's Motion to Dismiss Pursuant RAP 18.9(c) – Appendix – I*. Because Gordon Lund is not liable by virtue of the Order of Dismissal, Plaintiff cannot trigger liability against ACIC's bond. Furthermore, Plaintiff has not appealed the October 28, 2014 Order

dismissing her claims against Gordon Lund. Accordingly, Plaintiff's appeal is moot.

3. Defendant ACIC should be awarded its reasonable attorney's fees and costs on appeal.

Under RAP 14.2, this Court may award costs to the prevailing party on appeal. ACIC respectfully requests an award of its costs incurred on this Appeal. Furthermore, pursuant to RAP 18.1, this Court may award reasonable attorney's fees or expenses on review.

ACIC requests an award of attorney fees and costs under RAP 18.9(a) because Plaintiff's appeal is frivolous. An appeal is frivolous if, considering the entire record, the court is convinced that the appeal presents no debatable issues upon which reasonable minds might differ and that it is so devoid of merit that there is no possibility of reversal. *Ramirez v. Dimond*, 70 Wash.App. 729, 855 P.2d 338 (1993).

Here, Plaintiff's appeal is devoid of merit because, under black-letter Washington law, even if the Court of Appeals were to reverse the trial court's order striking the trial de novo, Plaintiff cannot possibly trigger liability under ACIC's bond.

It is black letter Washington law that "[t]he surety cannot be held liable unless the principal is liable. *Tucker v. Brown*, 20 Wash. 2d at 848.

Given Judge Allred dismissal of Gordon Lund, no relief can possibly be had against ACIC's surety bond.

Had Plaintiff bothered to perform the most basic research prior to proceeding with this appeal, she would have altered herself to the fact that her appeal against ACIC is moot. Literally, there is no conceivable theory under which Plaintiff could ever prevail against ACIC. For this reason, Plaintiff appeal is frivolous and ACIC should be awarded attorney fees and costs on appeal.

In addition, ACIC is entitled to reasonable attorney fees and costs under RCW 18.27.040(6). An award of reasonable attorney fees and costs to the prevailing party under RCW 18.27.040(6) is mandatory. The statute does not give the trial court any discretion to award attorney fees to the prevailing party – rather, it is required. Here, ACIC is the prevailing party because it successfully moved to dismiss all of Plaintiff's claims with prejudice.

Finally, ACIC is entitled to recover its reasonable attorney fees and costs under MAR 7.3. A party who successfully moves to strike an untimely request for trial de novo is entitled to an award of reasonable attorney fees and costs under MAR 7.3. *Brackman v. City of Lake Forest Park*, 163 Wash. App. 889, 898, 262 P.3d 116, 121 (2011). MAR 7.3 mandates an award of reasonable attorney fees when a party secures

dismissal of a request for trial de novo based on the opposing party's failure to comply with MAR 7.1(a). *Brandenberg v. Cloutier*, 103 Wash. App. 482, 486, 12 P.3d 664 (2000). Under MAR 7.3, it is mandatory that ACIC be awarded its reasonable attorney fees and costs.

V. CONCLUSION

ACIC respectfully requests this Court to affirm the trial court's (1) *Order Granting Defendant ACIC's Motion to Strike Plaintiff's Request for Trial De Novo and To Dismiss* and (2) *Order and Judgment Awarding Defendant ACIC Attorney Fees and Costs*.

The undisputed evidence shows that Plaintiff failed to timely serve her Request for Trial De Novo on ACIC. Plaintiff offers no Washington authority or facts to controvert the trial court's order striking her trial de novo. The trial court was required to strike the trial de novo and had no discretion to act otherwise.

According to the presumption contained in CR 5(b)(2)(A), service on ACIC was deemed complete on March 28, 2014. In actuality, the request for trial de novo was not served until April 15, 2014. Under either scenario, Plaintiff failed to timely serve ACIC as required by MAR 7.1(a). The time requirements set forth in MAR 7.1(a) are strictly enforced and cannot be excused. Under Washington law, Plaintiff's failure to timely serve ACIC required the trial court to strike her request for trial de novo as

against ACIC and dismiss her claim against ACIC with prejudice. Thus, the trial court's orders in this regard should be affirmed.

However, even if the trial court's orders are reversed, Plaintiff's appeal is moot because she failed to prosecute her claim against ACIC's bond principal, Gordon Lund. Accordingly, Plaintiff's appeal should be dismissed pursuant to RAP 18.9(c).

RESPECTFULLY SUBMITTED this 24 day of December, 2014.

YUSEN & FRIEDRICH



Alexander Friedrich WSBA #6144
Paul K. Friedrich, WSBA #43080
Attorneys for Respondent
American Contractors Indemnity Company

DECLARATION OF SERVICE

Vanessa Stoneburner declares:

On December 24, 2014, I put a copy of the foregoing in the US Mail postage prepaid to:

Deborah J. Pimentel
32606 6th Ave SW
Federal Way, WA 98023

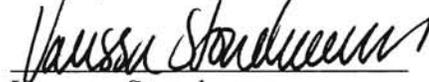
On December 24, 2014, I put a copy of the
foregoing in the US Mail postage prepaid to:

Gordon and Margaret Lund
Lund Handyman Services
26725 191st Place SE
Covington, WA 98042

I declare under penalty of perjury under the laws of
the State of Washington that the foregoing is true and
correct.

EXECUTED THIS 24th day of December, 2014, at

Seattle, Washington.



Vanessa Stoneburner