No. 82409-6

SANDERS, J. (dissenting)—RCW 7.06.060(1) and MAR 7.3 recognize a party can withdraw its request for a trial de novo, and nothing in chapter 7.06 RCW or MAR 7 places any limitation on when a party can do so—nor is such a limitation necessary for the provisions to function. This court should hold, as the Court of Appeals held, that Clifford Hapner is entitled to withdraw his trial request. *See Hudson v. Hapner*, 146 Wn. App. 280, 290, 187 P.3d 311 (2008).

Instead, the majority creates a limitation on when a party can withdraw its trial request, precluding a party from doing so once the trial has begun. But nothing in chapter 7.06 RCW or MAR 7 alludes to a party losing its right to withdraw its request for a trial. The majority attempts to justify its judicially fabricated cutoff with a balance of policy interests—something the legislature already did when drafting chapter 7.06 RCW. Yet even ignoring the inappropriateness of the majority's replacing the legislature's policy balance with its own, the justifications cited by the majority do not actually support the majority's conclusion. I dissent.

It is difficult to address the majority's reasoning because, much like

Frankenstein's monster, the majority opinion is a sewn-together collection of partial arguments, each pilfered from a different cadaver and none lending any real support to its conclusion.

The majority reasons that the purpose of mandatory arbitration is to reduce court congestion and delays in hearing cases. Majority at 7 (citing *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 815, 947 P.2d 721 (1997); *Haywood v. Aranda*, 143 Wn.2d 231, 238, 19 P.3d 406 (2001)). The majority further instructs:

> Without placing some limit on when a party can withdraw a request for trial de novo, one party is free to drag the case on by conducting discovery to see if his or her position improves or not. If it does not, the party can withdraw the request for a trial de novo knowing there is only a risk of having to pay additional attorney fees and costs (which are discretionary, not mandatory), but there is no risk of paying any further damages. Allowing unilateral withdrawal during trial would artificially alter the balance of power between the parties.

Majority at 8.

So, according to the majority, permitting a party to request a trial de novo, conducting some discovery, getting cold feet, and rescinding that request "is contrary to the purpose of avoiding congestion and delay . . . ." *Id.* at 9. The conclusion that logically follows from that statement is that a party cannot conduct discovery and then rescind his or her request for a trial de novo. Thus, the majority's argument *should* lead it to hold Hapner cannot rescind his request after he begins to take discovery. Instead the majority concludes a party is permitted to request a trial de novo, *fully*

conduct discovery, and then withdraw the trial request on the eve of trial. *Id*. at 9-10. How does that address the majority's concern that courts will be congested and trials delayed if "one party is free to drag the case on by conducting discovery to see if his or her position improves or not"? *See id*. at 8. The majority's justification does not support its holding.

Preventing a party from withdrawing a trial request at the commencement of discovery *or* trial increases court congestion. Once a party requests a trial de novo, court congestion and delays are reduced when the party rescinds its request at any time, whether it does so at the onset of discovery, during discovery, the eve of trial, or during the trial. Even if a party rescinded its request on the morning of the last day of trial, the court would be less congested for not having to conduct trial on that final day.[1] The majority's deadline is inconsistent with reducing court congestion.

The majority insists that, although precluding withdrawal *adds* to court congestion *in this case*, precluding it in future cases "will serve as a disincentive to requests for a trial de novo for the purpose of delay." *Id*. at 9. Again, the stated justification for the majority's holding does not actually support it. First, the legislative purpose here was never to *discourage* a party from exercising its trial right if it so desired. RCW 7.06.070 (the mandatory arbitration provisions are not to "be

[1] To clarify, that is *not* the case here. Hapner withdraw his trial request *prior* to the commencement of the trial on remand, and whether a deadline exists to preclude him from doing so is the only issue presently before this court. However, the above example demonstrates the inconsistency in the majority's argument.

construed to abridge the right to trial by jury."). The majority does not explain why it feels justified to do so here.

Oddly, the majority cites the Judicial Council Comment to MAR 7.3 (which was deleted by order of this court 20 years ago), which noted permitting a trial court to *impose costs and attorney fees* on a party that withdrew its trial request would discourage the party from requesting a trial de novo for the purpose of delay. Majority at 9. Thus, the rules *already* contain a mechanism to discourage requesting a trial de novo for inappropriate motive; the majority need not create another one.

The majority then continues: "*Regardless of whether delay is specifically intended*, delay is certainly the effect when, as here, the arbitration award remains unpaid and the party against whom the award was entered is permitted to pursue a trial de novo until he decides for strategic or tactical reasons that withdrawal from the trial de novo is the more advantageous course." *Id*. at 9 (emphasis added). This statement has no connection with the Judicial Council Comment to MAR 7.3. The Judicial Council Comment clarifies the trial court is permitted to impose cost and attorney fees to discourage parties from requesting a trial de novo "*for the purpose* of delaying enforcement of the award." (Emphasis added.) *Of course* delay occurs automatically when a party requests a trial, but according to the Judicial Council Comment, MAR 7.3 is intended to discourage such delay when delay is *the purpose* for requesting the trial, *not* – as the majority spuriously suggests – when the delay is the unavoidable

effect of a good faith pursuit of a party's right to trial. The majority's overextension of the mandatory arbitration provisions place a chilling effect, not intended by the legislature, on a party's decision whether to exercise its right to a trial.

Second, without explanation or justification, the majority labels as a "misuse of the mandatory arbitration rules" a party requesting a trial and then rescinding that request upon determining its case is weaker than it believed. *See* majority at 9. But it is not only common in, but also a characteristic of, our trial system that a party can and will attempt to settle a case after learning through discovery that the facts are not as favorable as once believed. A party may similarly rescind its request for a trial after learning through discovery that the facts are not as favorable as believed. The majority speaks of maintaining "the balance of power between the parties," *id*. at 8, and this is a perfect example. Without mandatory arbitration, a party can conduct discovery and then settle; with mandatory arbitration, the party should still be permitted to conduct discovery before deciding to forgo its right to a trial – doing so is not a "misuse" of the mandatory arbitration rules, *see* majority at 9. Permitting a party to conduct discovery to flesh out its case *retains* the balance of power that existed prior to mandatory arbitration.

Instead, the majority condemns a party if it seeks discovery and realizes that its case is weaker than previously believed. *See* majority at 9. A fundamental purpose of discovery is to require both sides to exchange relevant information, which necessarily

will affect each party's view of the strength of its case. Seeking discovery to determine the strength of one's case is no more a "misuse" of the mandatory arbitration rules than it is a "misuse" of the system as a whole – that is to say, it is no misuse at all.

Third, the majority's claim that preventing withdrawal of a trial request will reduce court congestion is based upon unarticulated speculation. The majority concedes that its conclusion actually *adds* to court congestion in the case before us, but assumes future litigants (in cases for which we know neither the facts nor issues involved) will hereafter behave in a manner that will reduce court congestion. I presume the majority believes its holding will reduce the number of de novo trials by discouraging litigants from exercising their rights to a trial. *See id*. at 9. If that is the case, it was neither the intent of the legislature to circumvent a party's trial rights, as discussed above, *see* RCW 7.06.070, nor does the majority elaborate why it is confident its holding will have that effect on future litigants.

And the majority's holding, in practice, will *not* discourage a party from initially requesting a trial. Nothing about precluding a party from withdrawing the trial request *after the trial has begun* will discourage the party from requesting a trial de novo to conduct discovery.[2] *See* majority at 8. Under the majority's holding, parties are not

[2] To the extent the majority is concerned with the "balance of power," *see* majority at 8, MAR 7.3 permits the trial court to "assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo." A party is not given free rein to explore the trial option at the other party's expense.

discouraged from requesting a trial to conduct discovery and, according to the majority, "misuse" the process by "assessing the strength of the other party's case." *See id*. at 9. Under the majority, parties can take full discovery and, on the eve of trial, rescind the trial request. The majority's "solution" is all show and no go.

Adrift in a sea of half-developed and mostly irrelevant policy considerations, the majority makes one attempt to anchor its holding to the text of an applicable rule. The majority cites MAR 7.3: "The court may assess costs and reasonable attorney fees against a party who voluntarily withdraws a request for a trial de novo." Majority at 6. The majority asserts the rule permits withdrawal only of *a request* for a trial de novo, not withdrawal from the actual trial. "Once a trial de novo is under way, it is no longer a matter of withdrawing a 'request' alone." *Id.* at 8.

The majority's attempt to anchor its deadline to MAR 7.3 is rife with problems. The request for the de novo trial is the *only* basis for conducting the trial. Withdrawal of the request entails withdrawal from the trial.

But frankly, MAR 7.3 has little relevance here because it addresses "costs and attorney fees." The majority's demanding MAR 7.3 provide it a deadline for withdrawal is like ordering a steak at a vegetarian restaurant – it doesn't matter that you want it; it's just not there.

Regardless, the majority abandons its MAR 7.3 argument when it applies, or rather fails to apply, its holding to the facts of this case. Clifford Hapner requested a

trial de novo, received one, and lost. *Hudson v. Hapner*, noted at 126 Wn. App. 1057, 2005 WL 834433, at *1. However, the trial court improperly excluded the testimony of Hapner's expert. The Court of Appeals reversed and remained for a new trial. *Id.* at *5. Hapner then withdrew his request for a trial de novo *before* the start of the trial on remand. The majority offers no explanation or analysis why Hapner's withdrawal here is time-barred under its newly established deadline.

One might presume the majority views the beginning of the first trial, the verdict of which was subsequently reversed, as the cutoff for Hapner's withdrawal regardless of the later reversal. However, that conclusion is inconsistent with the majority's claim that its cutoff is justified by the language of MAR 7.3. Majority at 8. Because the trial on remand was not yet underway, Hapner was only withdrawing his request for a new trial; he was not requesting withdrawal from a trial itself. *See id.* Either the majority's nuanced reading of MAR 7.3 is correct, and Hapner can withdraw his trial request, or the majority's holding does not permit Hapner to withdraw his request prior to the trial on remand and MAR 7.3 does not support the majority's holding. Logic does not permit the majority to choose both.

The majority cites concerns over "the balance of power between the parties" to justify creating a deadline. Majority at 8. But the relevant statute and rules already struck the balance between competing policy and party interests. The legislature weighed an individual's right to a trial by jury against concerns over court congestion

and delays in civil cases. A citizen's right to a jury trial is fundamental, and the legislature treaded lightly to avoid discouraging a party from exercising its right. A party must file a request for a trial within 20 days after the arbitration decision, RCW 7.06.050, MAR 7.1(a), but that party is then permitted to unilaterally withdraw that request, RCW 7.06.060(1), MAR 7.3. The statute and rules permit a party to err on the side of requesting a trial.

And permitting a party to withdraw that request reduces court congestion. Here, Hapner's withdrawing his request saves the trial court from conducting an entire trial on remand.

The legislature was also mindful of the balance between the parties. "The court may assess costs and reasonable attorneys' fees against a party who voluntarily withdraws a request for a trial de novo . . . ." RCW 7.06.060(1); *accord* MAR 7.3. A party pointlessly pursuing postarbitration litigation pays the costs of that pursuit, risking liability for all court costs and the attorney fees of both parties. Here, Hapner's withdrawal of his request for a trial de novo permits the trial court to award Lea Hudson any costs and fees incurred after the arbitration award was announced—costs and attorney fees for discovery; the original, invalid trial; the subsequent appeal; any additional preparation that occurred for the trial on remand; and this appeal.[3]

[3] I find no error in the majority's resolution of the costs to date—upholding the Court of Appeals award of costs to Hapner for prevailing on appeal, but recognizing that Hapner may ultimately be liable for the costs of the appeal as part of the trial court's assessment of costs and attorney fees under MAR 7.3.

Ultimately, the majority attempts to "fix" something that isn't broken. Reasonable people may argue there is a better way for chapter 7.06 RCW and MAR 7 to address this issue; they may argue the mandatory arbitration provisions should not provide such leeway to a party uncertain of whether he or she wishes to fully exercise his or her right to a jury trial. But there is no legal infirmity with how the provisions are written now, nor is any created because the provisions permit a party to withdraw its request for a trial at any time prior to a final verdict.

I would apply chapter 7.06 RCW and MAR 7 as written. Hapner was not precluded from seeking to withdraw his trial request. And, even under the majority's holding, Hapner should be permitted to withdraw his request because he made it before the start of the trial on remand.

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Mary E. Fairhurst

Justice James M. Johnson