

**NO. 65255-9-I  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I**

**ON APPEAL FROM  
KING COUNTY SUPERIOR COURT NO. 08-2-32384-6**

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CITY OF LAKE FOREST PARK,

**Appellant,**

**vs.**

HERBERT BRACKMAN,

**Respondent.**

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**REPLY BRIEF OF APPELLANT**

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## I. REPLY ARGUMENT

Brackman makes no effort to offer the Court a different or more principled analysis – presumably because he cannot. Instead, he merely voices a conclusory disagreement with the City of Lake Forest Park. The City respectfully submits that Brackman’s argument is not only legally and factually erroneous, but is contrary to the public policy considerations underlying nearly every rule of procedure in Washington. Basic notions of justice not only *allow*, but *require* reversal of the trial court’s ruling.

### A. LEGAL ARGUMENTS

#### 1. Proof of Service Not Required

Brackman’s continued thesis is that the City’s certificate of service did not comply with CR 5’s requirements for formal “proof of service.” That thesis is fundamentally flawed because it *assumes* that such formal rules apply in the arbitration context, when our case law holds that they do not. MAR 1.3 – while requiring that *service* comply with CR 5 – does not require that *proof of service* comply with CR 5. With respect to *proof of service*, MAR 7.1 merely requires that a party submit “proof that a copy has been served.” Our courts have repeatedly and explicitly held that the drafters of MAR 7.1 intentionally “chose not to use the phrase ‘proof of service;’ therefore, they must have contemplated something different from

‘proof of service’ as it is ordinarily understood.” Terry v. City of Tacoma, 109 Wn. App. 448, 457 (2001). These Courts have concluded that “the service requirements of MAR 7.1(a) do not mandate an affidavit of service, but only ‘some evidence’ of the time, place, and manner of service.” *Id.*

Brackman’s response is circular. He reasons that these holdings only apply to personal service, and are therefore irrelevant to service by mail. But that argument is again based solely on cases interpreting CR 5 and the faulty premise that CR 5 controls proof of service in *this* context. It does not. The question is not the type of proof required under CR 5, but the type of proof required under MAR 7.1.

As discussed in the City’s opening brief – and not responded to by Brackman – the cases discussing MAR 7.1 could not be more clear: No formal proof of service is required.

2. Even if Formal Proof is Required, Substantial Compliance is Sufficient

Next, Brackman argues – incorrectly – that the City’s certificate of service does not substantially comply with the “time, place, and manner” requirements imposed by the case law. This argument strains credulity. The case law on this issue discusses instances in which a party *wholly omitted* the time, place, or manner of service, yet service was nevertheless

deemed effectuated. *See, e.g., Manius v. Boyd*, 111 Wn. App. 764 (2002); *VanderPol v. Schotzko*, 136 Wn. App. 504 (2007).

In the present case, Brackman’s complaint about the certificate of service has nothing to do with the time, place, and manner indicated on the certificate. Each of these elements is clearly stated. The sole complaint is that the certificate lacks boilerplate “penalty of perjury” language. This has nothing to do with the time, place, and manner elements discussed by the cases in evaluating substantial compliance.

Even if formal proof of service is required under MAR 7.1, the City’s certificate of service would easily meet the low standard of “substantial compliance.” This issue is beside the point.

**B. POLICY CONSIDERATIONS**

Aside from the black-letter legal principles at issue here, it is also important to assess the important policy considerations at the heart of this issue. The fact is that these considerations are too-often subverted when viewed without context. That context – which illustrates the principles at play in this appeal – is discussed below.

1. The Facts of This Case Matter

Brackman has repeatedly described this case as a “bicycle vs. motor vehicle accident.” *Brief of Respondent*, p. 2. This is factually misleading. In reality, Mr. Brackman was riding his bicycle on the Burke-

Gilman Trail at a high speed. As he came to a major intersection where the Trail meets two state highways (104 and 522), he ignored a stop sign and rode directly onto the street. Officer Parrish was merely sitting in his patrol car at the intersection, preparing to make a turn. As Mr. Brackman rode into the crosswalk, he saw Officer Parrish, and for some reason decided to slam on his brakes. He did not collide with the police car, nor did he have to swerve. Brackman simply skidded to a stop in front of Officer Parrish's car, which remained stationary. Since Mr. Brackman was wearing specialty shoes that attached to his pedals, he was unable to put his feet on the ground. So, once he came to a stop, he simply tipped over with his feet still attached to the bicycle. There was no contact whatsoever between Mr. Brackman (or his bicycle) and the patrol car.

Surprised by the scene that had just unfolded in front of him, Officer Parrish exited his vehicle and began to ask Mr. Brackman if he was okay. Mr. Brackman quickly got back on his bike and rode away. Subsequently, Brackman sued the City of Lake Forest Park for tens of thousands of dollars.

The Court need not ignore the facts of this case or the unjust outcome Brackman seeks to effectuate. He is, in effect, asking this Court to enrich him – and deny both Officer Parrish and the City their day in Court – through a mere technicality. The City has a very good faith basis

to believe that a jury would vindicate it. Even assuming for the sake of argument that the procedural rules were ambiguous – which they are not – public policy is far better served by jury justice, and not trial by technicality.

2. Outcome Urged by Brackman is Absurd

The case law is clear that interpretations of rules and statutes should be avoided if those interpretations lead to absurd or illogical results. *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987) (absurd consequences resulting from a literal reading are to be avoided). In this case, the logical endpoint of Brackman’s arguments is a confusing morass of illogical and absurd results. Neither Mr. Brackman nor his attorneys can deny they were timely and properly served with a properly-prepared request for trial *de novo*. They further cannot deny they immediately began preparing for trial as a result of that request. Yet, they deem actual service – and the fact that it had precisely the effect it was supposed to – entirely irrelevant. Under Brackman’s theory, it makes no difference whether service *actually happened*; all that matters is boilerplate verbiage on the document (which was not even reviewed until trial preparation was well-underway). This is absurd.

Suppose, for example, the certificate of service *did* include the words “penalty of perjury,” but the secretary who prepared it later

admitted she had not actually mailed the document, and had simply lied about it. Under Brackman's current theory, the City would be entitled to a trial on the merits because the certificate of service had the magic words, despite those words being false. In other words, the City would be in a better position if it *swore* to something that was *untrue* than if it *failed* to swear to something that *everyone agrees is true*. This is "form over substance" at its worst.

The fact that service *actually happened*, exactly as described in the certificate, is more important than whether a document "swears" that it happened. Stated more plainly, the rules should be construed in favor of the correct outcome, not technicalities that operate to deny justice.

### 3. Purpose of the Rule

Finally, it is important to understand the limited application of the City's arguments here. It would certainly not compel reversal of any prior case law on this issue. The City is not claiming that the content of a certificate of service does not matter. It recognizes that affidavits and certificates sworn under penalty of perjury are important and necessary tools. But the purpose of the rule requiring "sworn" statements is to provide extra assurance that the content of that statement is true, and provide a disincentive (perjury charges) for providing false testimony. Logically, then, a claim that a particular statement is *actually untrue* must

be a precondition for inquiring into whether the statement is *sworn*. In other words, when the statement is *admittedly* true, swearing to the same is immaterial. But when the inquiry is reversed – as Brackman urges here – reality becomes unhinged from legal semantics and form has replaced function. The purpose of the rule therefore is certainly not well-served in such a situation.

If Mr. Brackman and his attorneys had a bona fide claim that service was improper, this may be a wholly different case. However, the fact that they do not, and cannot, make this argument should be dispositive. As a matter of common sense, the “under penalty of perjury” language should be implicated where there is a question about the veracity of the statement. Here, that is not the case. When there is no question about the truth of a statement, litigating the issue is, by definition, unproductive and contrary to the purpose of the rule itself.<sup>1</sup>

## II. CONCLUSION

As this Court is aware, the simplest and most logical decision in a case is usually the right one. Here, Brackman urges the Court to engage in legal gymnastics, in hopes of winning by technicality. While conceding that the actual language of MAR 7.1 does not require formal proof of

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<sup>1</sup> As pointed out in the City’s Opening Brief, this argument has been adopted repeatedly by our Courts, holding that complaints about the content of the certificate of service are unpersuasive in the absence of any argument that service was defective in any way.

service and makes no distinction between mail or personal service, Brackman claims it actually *does* require formal proof of service and actually *does* mean different things in different contexts. This is illogical, and requires the Court to overturn a significant line of cases holding directly to the contrary.

Conversely, the City's position is simple: while CR 5 may certainly differentiate between mail and personal service, MAR 7.1 makes no such distinction – until the drafters express otherwise. This holding is the simplest holding, the most logical holding, and the holding most easily squared with the case law. This requires no esoteric reasoning and does no violence to prior case law on this issue.

Moreover, the City's position works no injustice on either party. It does not adopt any legal fiction, does not impose liability on any party, and makes no determination as to the ultimate facts of this case. It merely clears the way for a full and fair presentation of the case to a jury for a proper decision on the merits. While it is often lost in the crossfire of issues like this, a trial by a jury is the fundamental constitutional right that the entire body of court rules are designed to enshrine and protect. The City only asks that it be allowed to exercise that right.

The trial court erred when it struck the City's *de novo* request, based solely on the absence of "penalty of perjury." The City of Lake

Forest Park respectfully requests that the Court REVERSE the Trial Court,  
and REMAND for a trial on the merits.

DATED this 23<sup>rd</sup> day of August, 2010.

KEATING, BUCKLIN & McCORMACK,  
INC., P.S.

A handwritten signature in black ink, appearing to read 'Jeremy W. Culumber', written over a horizontal line.

Jeremy W. Culumber, WSBA #35423  
Attorneys for Appellant City of Lake Forest  
Park

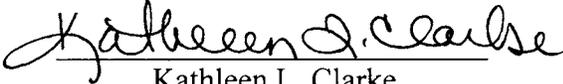
CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the 23rd day of August, 2010, I caused a copy of the foregoing Appellant's Reply Brief to be:

- faxed; and/or
- mailed via U.S. Mail, postage pre-paid; and/or
- sent via ABC Legal Messengers, Inc.

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