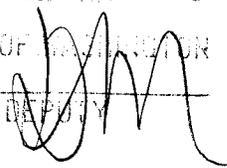


COURT OF APPEALS  
DIVISION II

Cause No. 40959-3-II

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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON  
BY   
DEPUTY

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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

LAURA MORELLO,

Plaintiff/Appellant

v.

REBEKA VONDA and JOHN DOE VONDA, husband and wife, and the  
marital community composed thereof.

Defendant/Respondent

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RESPONDENT'S BRIEF

---

Stephen Archer, WSB # 38884  
Attorney for Respondent

SMITH FREED & EBERHARD PC  
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## I. INTRODUCTION

This case presents the Court with yet another opportunity to decide an issue of compliance with Superior Court Mandatory Arbitration Rule (“MAR”) 7.1(a) which governs requests for a trial de novo following a mandatory arbitration pursuant to Chapter 7.06 RCW.

After the issuance of the arbitration award in favor of Appellant Laura Morello (hereinafter “Morello”), Respondent Rebecka Vonda (hereinafter “Vonda”) filed in the Superior Court a Request For Trial De Novo on May 11, 2010, along with a document entitled “Certificate of Service” in which her attorney expressly certified that “on May 11, 2010 I served” the aforementioned Request by “hand delivering” a copy to Morello’s attorney at his office.

Although service occurred on the day described in the Certificate of Service, Morello contends that because the filing preceded the service, the Certificate of Service was not “proof that a copy has been served upon all other parties appearing in the case” as MAR 7.1(a) requires and instead under *Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005), the proof was insufficient because it was proof of *intended* service.

For the following reasons, the Certificate of Service was express proof of actual service and sufficient to establish strict compliance with MAR 7.1(a).

## **II. RESPONSE TO APPELLANT'S ASSIGNMENT OF ERROR**

The trial court properly denied Morello's motion to strike Vonda's request for a trial de novo.

## **III. RESTATEMENT OF THE ISSUE**

1. Whether Vonda complied with MAR 7.1(a) when she filed a Request For Trial De Novo on May 11, 2010, along with a Certificate of Service in which her attorney expressly certified that on May 11, 2010 she "served" the Request by "hand delivering" a copy to Morello's attorney at his office address, and such service was completed on that day, even though the service was completed subsequent to the filing of the Request for Trial De Novo?

## **IV. CROSS-ASSIGNMENTS OF ERROR**

1. The trial court erred in its Finding of Fact No. 6 that "[n]o proof of service has been filed, within the time frame prescribed under MAR 7.1(a), showing actual receipt of defendant's Motion for Trial De Novo by plaintiff or by her counsel."

2. The trial court erred in its Conclusion of Law No. 1 that "[t]he defendant did not strictly comply with the requirements of MAR 7.1(a)."

**V. STATEMENT OF THE ISSUES REGARDING CROSS-ASSIGNMENTS OF ERROR**

1. Was the Certificate of Service proof of the actual receipt of a copy of the Request For Trial De Novo?

2. If so, was the Certificate of Service some evidence of the time, place and manner of service and filed with Superior Court within the time period allotted under MAR 7.1(a)?

**VI. RESTATEMENT OF THE CASE**

Morello sued Vonda for personal injuries allegedly sustained in an automobile accident. The case went to arbitration and the arbitrator filed an award on April 21, 2010. On May 11, 2010, Vonda filed in Superior Court a Request for Trial De Novo along with a Certificate of Service in which her counsel certified that “I served” the Request for Trial De Novo “by hand delivering to” Morello’s counsel a copy of that Request at his office on May 11, 2010.

Morello moved to strike the Request for Trial De Novo. On June 11, 2011, the trial court entered conclusions of law that Vonda “did not strictly comply with the requirements of MAR 7.1(a)” and Vonda “substantially complied with the requirements of MAR 7.1(a)” and denied Morello’s motion.

Vonda takes exception to Morello's Statement of the Case with regard to each description therein of what evidence was presented to the trial court and what such evidence established or did not establish.

**VII. ARGUMENT IN RESPONSE TO MORELLO'S ASSIGNMENT OF ERROR**

**1. Standard of Review**

Interpretation of the mandatory arbitration rules is a question of law reviewed de novo. *Manius v. Boyd*, 111 Wn.App. 764, 766-67, 47 P.3d 145 (2002).

**2. When Service Actually Occurs on a Given Day, a Certificate of Service In Which An Attorney Certifies on That Day That Service Occurred On That Day Is On Its Face Some Proof of Actual Service Sufficient to Satisfy MAR 7.1(a).**

**A. Relevant Facts**

There is no dispute that Vonda's Request For Trial De Novo was filed on May 11, 2010 and that sometime later on the same day a copy was hand-delivered to Morello's attorney. CP 25. There is also no dispute that along with the Request For Trial De Novo, Vonda filed a Certificate of Service signed by one of Vonda's attorneys, providing in pertinent part:

"I hereby certify that on May 11, 2010 I served the foregoing **DEFENDANT VONDA'S REQUEST FOR TRIAL DE NOVO, NOTICE TO SET FOR TRIAL and ARBITRABILITY, and DEMAND FOR JURY** on:

William H Reed  
Reed Johnson & Snider, P.C.  
Attorneys at Law  
201 NE Park Plaza Drive, Suite 248  
Vancouver, WA 98684

\* \* \*

  X   by hand delivering to each of the foregoing a copy thereof to the address listed above.”

CP 58.

The issue here is whether the foregoing events satisfied MAR 7.1(a)’s requirement that a party seeking review of an arbitration award “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.”

**B. *Alvarez v. Banach* is Distinguishable.**

Morello contends that the issue here is the “exact issue” that the court faced in *Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005). *Alvarez*, however, is distinguishable. In *Alvarez*, the court held that proof of actual receipt was necessary, and “a party merely needs to file proof with the superior court that the opposing party received a copy of its request for a trial de novo.” *Id.* at 402, 404. The *Alvarez* court applied that rule to a declaration of delivery in which the secretary of the requesting party’s counsel stated “she sent via Legal Messenger Services

to be delivered on June 18, 2002” copies of the request. *Id.* at 403. The messenger actually delivered the copy the following day, on June 19. While that date was within the deadline, the court found that the statement was insufficient to comply with MAR 7.1(a)’s requirement of filing proof of actual service.

The court held that while formal proof of service is not required, proof that was only “in the form of a declaration of delivery indicating the time, place, and manner of *intended* service” was insufficient. *Id.* at 404. The court further held that “[A] declaration of delivery stating that a copy is ‘to be delivered,’ without more, does not satisfy that requirement.” *Id.* at 404.

In the present case, the Certificate of Service is “some evidence of the time, place and manner of service,” respectively, that “on May 11, 2010 I served” the notice by “hand delivering to each of the foregoing [Morello’s counsel] a copy thereof to the address listed above.” Morello admits that a copy of the notice indeed was served upon her counsel on May 11, 2010.

Unlike the situation in *Alvarez*, here the certificate attested to service in the past tense, indicating that a copy of actually *was* “served” on May 11. This was not a statement of *intended* service; it was a statement of accomplished service.

Morello correctly observes that the *Alvarez* court recognized that there is no rule “establishing that receipt is assumed where service is executed by legal messenger.” *Id.* at 839. However, while the absence of such a rule was significant in *Alvarez*, it is not significant here. The rule’s significance in *Alvarez* correlated to the fact that the declaration of delivery in that case expressly stated that the copy of the request was “to be delivered”—an event that was to occur in the future. Without a presumption of delivery, the court could not infer from the declaration of future delivery that the request was actually delivered. This is consistent with the court’s holding that “[A] declaration of delivery stating that a copy is ‘to be delivered,’ *without more*, does not satisfy that requirement.” *Id.* at 404 (emphasis added).

Unlike *Alvarez*, the certification of Vonda’s counsel plainly was proof of actual service and in the past tense: the copy was “served” on May 11. It was not a declaration that the copy was to be delivered, much less a statement that “I intend to deliver.” There was no place or need for any presumption; instead, the statement was accurate on its face, because on that day, the copy *was* “served.”

*Alvarez* does not stand for the proposition that under these circumstances the court must look at a continuum of moments in a single day to determine whether the certification refers to an event that has

happened at the moment of the signing or filing of the certificate. If personal service had *not* been effected on May 11, *then* the certificate of service would be no proof, instead of some proof.

Indeed, if the courier in this case merely had switched the order of its deliveries and had visited counsel first, and next the Superior Court, then *Alvarez* would not even have an arguable application here. As Division One observed in another MAR 7.1(a) case:

“It is also worth noting that the time limit for a request for trial de novo balances the competing interests of finality in judgments, and the right to a jury trial. These interests are not equivalent. The right to a jury trial is fundamental.”

*Vanderpol v. Schotzko*, 136 Wn. App. 504, 510, 150 P.3d 120 (2007).

Although *Vanderpol*'s precise holding is inapplicable here because it involved proof of service by mail, which has a presumption of receipt, the principle it recognized is overarching and instructive here. As the court in *Vanderpol* further observed: “A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity.” *Id.* at 124 (quoting *Manius v. Boyd*, 111 Wn.App. 764, 770, 47 P.3d 145 (2002)(quoting *Reed v. Allen*, 286 U.S. 19, 209 (1932)(Cardozo, J. dissenting)).

Morello effectively asks this court to determine Vonda’s counsel’s certification that “on May 11, 2010 I served” on May 11 is a nullity—*i.e.*, no proof whatsoever— because at the precise moment that Vonda’s counsel signed the statement, the hand-delivery described in the certification had not yet happened. Nevertheless, it did happen, which is what the certification stated. The statement “on May 11, 2010 I served . . . by hand-delivering” is a true fact. This certification is not a nullity; service *was* effected. Nothing in MAR 7.1(a) or *Alvarez* compels the foreclosure of Vonda’s right to a jury trial under these circumstances— where counsel attests that service *was* accomplished on a given day and service was indeed accomplished on that day—simply because on that day the order of service of the request and filing of the request for a trial is one way, and not the other.

Morello also contends that the Certificate of Service does not set forth the time, place and manner of service. This argument is flawed. The Certificate of Service plainly states the time (May 11, 2010), the place (Morello’s counsel’s office) and the manner (hand-delivery).<sup>1</sup> The fact that counsel for Vonda stated that “I” served “by hand delivering” when indeed a courier made the delivery is inconsequential; the manner was indeed hand-delivery. Nothing in the case law or language of the rule

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<sup>1</sup> The notation of the date a pleading is served is sufficient to meet the “time” requirement. *Terry v. City of Tacoma*, 109 Wn.App. 448, 455 n.9, 36 P.3d 553 (2001).

indicates that who actually performs the delivery is material to the proof of manner of service.

In sum, “a party merely needs to file proof with the superior court that the opposing party received a copy of its request for a trial de novo.”

*Id.* at 404. Vonda did so, and in doing so, complied with the rule.

## **VIII. ARGUMENT IN SUPPORT OF CROSS-ASSIGNMENTS OF ERROR**

### **1. Standard of Review**

Interpretation of the mandatory arbitration rules is a question of law reviewed de novo. *Manius v. Boyd*, 111 Wn.App. 764, 766-67, 47 P.3d 145 (2002).

“The prevailing party need not . . . cross-appeal a trial court ruling if it seeks no further affirmative relief. It may argue any ground to support a court's order which is supported by record.” *State v. Kindsvogel*, 149 Wn.2d 477, 481, 699 P.3d 870 (2003). “A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” *Kindsvogel*, 149 Wn.2d at 481 (quoting RAP 10.3(g)). Moreover, this Court may affirm the trial court on any basis supported by the record. *Backlund v. Univ. of Wash.*, 137 Wn.2d 651, 670, 975 P.2d 950 (1999).

Here, Vonda prevailed when the trial court denied Plaintiff's Motion To Strike Request For Trial De Novo and she does not seek affirmative relief; she presents only reasons that the trial court's order denying that motion should be affirmed.

**2. The Trial Court Erred In Its Finding Of Fact No. 6 That “[N]o Proof Of Service Has Been Filed, Within The Time Frame Prescribed Under MAR 7.1(A), Showing Actual Receipt Of Defendant’s Motion For Trial De Novo By Plaintiff Or By Her Counsel.**

For the reasons set forth above in Section G., the record demonstrates the Certificate of Service was some proof that the opposing party actually received a copy of Vonda's request for a trial de novo.<sup>2</sup> There is no dispute that the Certificate of Service was filed within the time frame prescribed. The trial court erred when it found differently.

**3. Vonda Strictly Complied With The Requirements Of MAR 7.1(A) Because She Served And Filed A Request For A Trial De Novo In The Superior Court Along With Proof Of Service Upon All Case Parties Within 20 Days Of The Filing And Service.**

The strict compliance standard of MAR 7.1(a) was set forth in *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997) in which the court held that such compliance requires: (1) a party must serve and file with the court clerk a written request for a trial de novo in the superior court; (2) along with proof of service upon all case parties; (3) within 20

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<sup>2</sup> Morello asserts that the trial court's findings have been unchallenged. Vonda disagrees; she objected to the findings of fact and conclusions of law. CP 50-55.

days of the filing and service of the arbitration award. The *Nevers* court explained "[a] party complies with the rule's [MAR 7.1(a)] *filing* deadline by filing the request with the clerk, together with proof of service of the request on the opposing party within 20 days of the arbitration award." *Id.* at 814 (citation omitted)(original emphasis). The requirement of "proof that a copy has been served," is satisfied as long as the proof contains "some evidence of the time, place, and manner of service." *Alvarez*, 153 Wn. 2d at 838.

For the reasons set forth above in Section G., the record demonstrates that all of the foregoing requirements were satisfied; therefore, Vonda strictly complied with the requirements of MAR 7.1(a). The trial court erred when it found differently.

## **IX. CONCLUSION**

Vonda's counsel certified in a Certificate of Service that she served a copy of the Request for Trial De Novo on a particular day at a particular place by hand-delivery. All of those things happened. The order that each of those events occurred makes no difference; the certification that service was accomplished that day is a true fact, and not a statement of intended time of service. It was sufficient evidence required under MAR 7.1(a) to establish that the Request was filed "along with proof that a copy has been served upon all other parties appearing in the case."

Vonda strictly complied with MAR 7.1(a), and Vonda respectfully requests that this Court affirm the trial court's order denying Morello's motion to strike Vonda's request for a trial de novo.

Respectfully submitted this 18<sup>th</sup> day of February, 2011.

A handwritten signature in black ink, appearing to read 'S. Archer', with a long horizontal flourish extending to the right.

---

STEPHEN E. ARCHER, WSBA #38884  
Of Attorneys for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on February 18, 2011 I served the foregoing **RESPONDENT'S**

**BRIEF** on:

William H Reed  
Law Office of William H. Reed, P.C.  
1104 Main St Ste 220  
Vancouver, WA 98660-2974

FACSIMILE: 360-314-2316

Of Attorneys for Plaintiff

STATE OF OREGON  
DEPARTMENT OF REVENUE  
11 FEB 22 AM 10:45  
CLERK OF SUPERIOR COURT  
DIVISION II

X by mailing to each of the foregoing a copy thereof, placed in a sealed envelope addressed as listed above and deposited in the United States mail at Portland, Oregon, and that postage thereon was fully prepaid.

X by facsimile transmission to each of the foregoing of a copy thereof to the number shown above.

\_\_\_\_\_ by hand delivering to each of the foregoing a copy thereof to the address listed above.

The undersigned hereby declares, under penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Portland, Oregon on this 18<sup>th</sup> day of February, 2011.

SMITH FREED & EBERHARD, P.C.

By   
Stephen E. Archer, WSB #38884  
Maria Liesl "Sam" Ruckwardt, WSB #42242  
Of Attorneys Respondent