

NO. 77751-9

FILED

NOV 22 2005
CLERK OF SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE
STATE OF WASHINGTON

MATTHEW SETO, a single person,

Petitioner,

v.

AMERICAN ELEVATOR, INC., a Washington corporation,

Respondent.

CLERK

BY C. J. MERRITT

05 NOV 22 AM 7:52

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

ANSWER TO PETITION FOR REVIEW

Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494
Bullivant Houser Bailey PC
1601 Fifth Avenue, Suite 2300
Seattle, Washington 98101-1618
Telephone: 206.292.8930
Facsimile: 206.386.5130
Attorneys for Respondent

ORIGINAL

TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. ISSUES PRESENTED FOR REVIEW	2
III. STATEMENT OF THE CASE	3
IV. ARGUMENT	5
A. Review is not warranted pursuant to RAP 13.4(b).	5
B. Seto’s right to a trial by jury has not been abridged.	6
C. The court of appeals decision does not conflict with any decisions of this Court.	9
D. This case does not involve an issue of substantial public interest.	16
E. American Elevator is entitled to recover its attorney fees and costs on appeal.	18
V. CONCLUSION	19

TABLE OF AUTHORITIES

	Page
Cases	
<i>Alvarez v. Banach</i> , 153 Wn.2d 834, 109 P.3d 402 (2005).....	9-11
<i>Domingo v. Los Angeles County Metro. Transp. Auth.</i> , 88 Cal. Rptr. 2d 224 (1999)	15-16
<i>Godfrey v. Hartford Cas. Ins. Co.</i> , 142 Wn.2d 885, 16 P.3d 617 (2001).....	6
<i>Haywood v. Aranda</i> , 97 Wn. App. 741, 987 P.2d 121 (1999), <i>aff'd</i> , 143 Wn.2d 231, 19 P.3d 406 (2001).....	7-8
<i>Hedlund v. Vitale</i> , 110 Wn. App. 183, 39 P.3d 358 (2002)	18
<i>Kim v. Pham</i> , 95 Wn. App. 439, 975 P.2d 544 (1999)	6-7
<i>Metz v. Sarandos</i> , 91 Wn. App. 357, 957 P.2d 795 (1998)	17
<i>Millay v. Cam</i> , 135 Wn.2d 193, 955 P.2d 791 (1988).....	12
<i>Oats v. Oats</i> , 196 Cal. Rptr. 20 (Cal. Ct. App. 1983)	14
<i>Roberts v. Johnson</i> , 137 Wn.2d 84, 969 P.2d 446 (1999).....	9, 13
<i>Seto v. Am. Elevator, Inc.</i> , 129 Wn. App. 146, 118 P.3d 373 (2005)	5, 11-12
<i>State v. Greenwood</i> , 120 Wn.2d 585, 845 P.2d 971 (1993).....	12
Statutes and Rules	
MAR 6.2	passim
MAR 7.1	7, 10, 18
MAR 7.1(a).....	passim

MAR 7.3	17
RAP 13.4(b)	1, 5, 13, 14
RAP 13.4(b)(1).....	5, 9, 13
RAP 13.4(b)(2).....	5
RAP 13.4(b)(3).....	5, 9
RAP 13.4(b)(4).....	6, 16
RAP 18.1(j).....	18
Other Authorities	
WASH. CONST. art. I, § 21	6

I. INTRODUCTION

Petitioner, Matthew Seto, seeks review of the court of appeals decision affirming the denial of his request for a trial de novo following mandatory arbitration. Seto's request was denied because he did not file it within 20 days after filing of the arbitration award, as required by MAR 7.1(a).

Seto has not satisfied the requirements of RAP 13.4(b), and his petition for review should therefore be denied. First, the court of appeals decision does not violate his right to a trial by jury. He waived that right by failing to file his request for a trial de novo in a timely manner. Second, the court of appeals decision does not conflict with any decisions by this Court. Seto's assertion to the contrary is based upon his failure to recognize the distinction between MAR 6.2, which requires only that the arbitrator file "proof of service," and MAR 7.1(a), which requires a party to file proof that the opposing party "has been served."

Finally, Seto asserts this case involves an issue of substantial public interest because his interpretation of MAR 6.2 will reduce congestion in the courts. In fact, the enforcement of the plain and unambiguous language of MAR

6.2 already accomplishes that goal. Granting untimely requests for trials de novo such as Seto's will increase, not decrease, court congestion.

II. ISSUES PRESENTED FOR REVIEW

1. A party who does not comply with the procedural requirements and deadlines of the MARs is deemed to waive the right to trial by jury. Seto did not file his request for a trial de novo within 20 days after the arbitration award was filed as required by MAR 7.1(a). Did Seto waive his right to trial by jury?

2. This Court has held (1) MAR 7.1(a)'s requirement of filing proof that an opposing party "has been served" with a request for a trial de novo requires evidence of actual service, and (2) the 20-day period to file a request for a trial de novo does not begin to run until the arbitrator files the arbitration award and proof of service. Here, MAR 7.1(a) is not at issue, and the arbitrator filed proof of service 21 days before Seto filed his request for a trial de novo. Does the court of appeals decision affirming that Seto's request was untimely conflict with case law from this Court?

3. Seto contends this case involves an issue of substantial public interest because construing MAR 6.2 to require proof that a party “has been served” with an arbitration award will reduce court congestion. The rule, as written, sets a firm deadline for filing a request for a trial de novo that clearly begins to run when an arbitration award is filed. Has Seto satisfied the public interest requirement entitling him to review by this Court?

III. STATEMENT OF THE CASE

Seto filed suit against respondent, American Elevator, Inc., in King County Superior Court. (CP 11-13) The case was subsequently transferred to mandatory arbitration. (CP 12) Following an arbitration hearing on April 27, 2004, the arbitrator entered an award in favor of American Elevator. (CP 54-55) The arbitrator filed the award on April 28 together with a certificate of mailing which provided, “I certify under penalty of perjury under the laws of the State of Washington that I mailed on this date [April 28] a copy of the ARBITRATION AWARD, properly addressed and postage prepaid” to counsel. (CP 54-55, 56)

The arbitrator also forwarded copies of the award and the certificate of mailing to counsel by e-mail on April 28. (CP 14) The e-mail stated the arbitrator would file the award no later than April 29. (CP 24) Seto's attorney received the e-mail copy of the award on April 28 and received a copy in the mail on April 29. (CP 23-24)

Seto filed a request for a trial de novo on May 19. (CP 1-3) On May 21, the Arbitration Department issued a Notice of Waiver of Right to Trial De Novo stating that a trial date would not be set because Seto had not filed his request for a trial de novo within 20 days after the filing of the arbitration award. (CP 4) American Elevator then filed a motion to set aside Seto's request for a trial de novo. (CP 5-7) The court granted American Elevator's motion and entered judgment in favor of American Elevator. (CP 42-43, 44-46) Seto appealed from these rulings. (CP 47-53)

In an opinion filed August 22, 2005, the court of appeals affirmed the trial court's decision. The court explained:

We conclude the arbitrator's MAR 6.2 obligation to file "proof of service" when filing the award does not extend the 20-day period by the time it

takes to complete service. Because Seto filed his request for trial de novo 21 days after the award was filed, the trial court correctly entered judgment on the arbitration award.¹

Seto now seeks review of the court of appeals decision.

IV. ARGUMENT

A. Review is not warranted pursuant to RAP 13.4(b).

RAP 13.4(b) does not authorize review in every case in which the court of appeals may have erred. Instead, a decision must fall into one of the categories listed in the rule. RAP 13.4(b) provides that a petition for review will be granted only if certain criteria are satisfied. These criteria include:

- If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court (RAP 13.4(b)(1));
- If the decision of the Court of Appeals is in conflict with a decision of another division of the Court of Appeals (RAP 13.4(b)(2));
- If a significant question of law under the Constitution of the State of Washington or of the United States is involved (RAP 13.4(b)(3)); or

¹ *Seto v. Am. Elevator, Inc.*, 129 Wn. App. 146, 152, 118 P.3d 373 (2005).

- If the petition involves an issue of substantial public interest that should be determined by the Supreme Court (RAP 13.4(b)(4)).

Seto contends review is warranted because (1) the court of appeals decision abridged his right to a trial by jury, (2) the court's decision conflicts with decisions of this Court, and (3) the case involves an issue of substantial public interest. As explained below, Seto fails to establish that any of these requirements has been satisfied, and his petition for review should therefore be denied.

B. Seto's right to a trial by jury has not been abridged.

Seto claims, for the first time in his petition for review, that the denial of his request for a trial de novo abridged his constitutional right to a trial by jury. Although the right to trial by jury is "inviolable,"² it can be waived.³ In *Kim v. Pham*,⁴ the court rejected an argument similar to that made by Seto here. In *Kim*, the defendant filed a request for a trial de novo following mandatory arbitration. However, she failed to

² WASH. CONST. art. I, § 21.

³ *Godfrey v. Hartford Cas. Ins. Co.*, 142 Wn.2d 885, 898, 16 P.3d 617 (2001).

⁴ *Kim v. Pham*, 95 Wn. App. 439, 975 P.2d 544 (1999).

file a written proof of service of the request within 20 days, as required by MAR 7.1(a). The plaintiff moved to strike the defendant's request for a trial de novo, and the trial court granted that request.⁵

On appeal, the defendant argued the trial court's denial of her request for a trial de novo violated her constitutional and statutory rights to trial by jury. The court rejected this assertion, explaining that the right to a jury trial can be waived by a party's failure to comply with MAR procedural requirements and deadlines.⁶ Because the defendant failed to comply with the requirements of MAR 7.1, she was not entitled to a trial de novo.⁷

In support of his claim that he was improperly denied his right to a jury trial, Seto cites *Haywood v. Aranda*.⁸ In that case, the defendant filed a request for a trial de novo following mandatory arbitration proceedings. He failed to

⁵ *Kim*, 95 Wn. App. at 441.

⁶ *Id.* at 445.

⁷ *Id.*

⁸ *Haywood v. Aranda*, 97 Wn. App. 741, 987 P.2d 121 (1999), *aff'd*, 143 Wn.2d 231, 19 P.3d 406 (2001).

file proof of service of the request as required by MAR 7.1(a). However, the plaintiff did not object, and the case proceeded to a jury trial. After the jury awarded the plaintiff a lower amount than she received in arbitration, she moved to vacate the award on the ground that the defendant failed to file proof of service of the request for a trial de novo.⁹

The trial court rejected the plaintiff's argument, concluding she waived her right to assert noncompliance with MAR 7.1(a), and the court of appeals agreed.¹⁰ The appellate court also concluded the doctrines of laches and estoppel applied to preclude plaintiff's challenge to the jury verdict.¹¹

However, the court *rejected* the defendant's argument that his right to a jury trial necessitated the denial of the plaintiff's motion to vacate. The court explained, "[A] waiver of the right to a jury trial can occur when a party fails to comply with MAR 7.1(a) procedural requirements and deadlines."¹²

⁹ *Haywood*, 97 Wn. App. at 742.

¹⁰ *Id.* at 743, 744.

¹¹ *Id.* at 748.

¹² *Id.* at 749 (citing *Kim*, 95 Wn. App. at 445).

In this case, Seto did not comply with the requirement in MAR 7.1(a) that a request for trial de novo be filed and served within 20 days after the arbitration award is filed with the clerk. It is undisputed that the award was filed April 28, 2004. It also is undisputed Seto did not file his request for a trial de novo until May 19—21 days later. Because Seto failed to timely file his request for a trial de novo, he waived his right to a trial by jury. Under these circumstances, review is not warranted pursuant to RAP 13.4(b)(3).

C. **The court of appeals decision does not conflict with any decisions of this Court.**

Seto also asserts review is appropriate pursuant to RAP 13.4(b)(1) because the court of appeals decision allegedly conflicts with this Court’s decisions in *Alvarez v. Banach*¹³ and *Roberts v. Johnson*.¹⁴ These cases are readily distinguishable, and there is no conflict.

In *Alvarez*, the court considered “whether a declaration of delivery without further proof that a request for a trial de novo has been served complies with the filing requirements”

¹³ *Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005).

¹⁴ *Roberts v. Johnson*, 137 Wn.2d 84, 969 P.2d 446 (1999).

of MAR 7.1.¹⁵ The defendant had filed a request for trial de novo together with a declaration of service signed by the defendant's attorney's secretary. The declaration stated the secretary had sent the request via legal messenger to be delivered the next day.¹⁶

The plaintiff filed a motion to strike the request for a trial de novo, arguing the declaration of delivery was insufficient to comply with MAR 7.1. The trial court granted the motion. The court of appeals reversed, concluding the declaration of delivery was sufficient, and proof of actual receipt need not be filed with the request for a trial de novo.¹⁷

The plaintiff then sought review by this Court. The Court reversed the court of appeals decision, concluding, "A declaration of delivery stating that a copy is 'to be delivered,' without more, does not satisfy" MAR 7.1(a)'s requirement of filing proof that a copy of the request for a trial de novo has been served."¹⁸ In reaching this conclusion,

¹⁵ *Alvarez*, 153 Wn.2d at 836.

¹⁶ *Id.*

¹⁷ *Id.* at 837.

¹⁸ *Id.* at 840.

the Court noted, “We employed the past tense when we promulgated [MAR 7.1(a)], which provides that the request for a trial de novo must be filed in superior court ‘along with proof that a copy *has been served* upon all other parties appearing in the case.’”¹⁹

As the *Alvarez* court pointed out, MAR 7.1(a) requires a party seeking a trial de novo to file proof that the request for a trial de novo has actually been served on the opposing party. In contrast, MAR 6.2, at issue here, only requires “proof of service.” Seto fails to appreciate the significance of this distinction, but the court of appeals in this case did not:

The unambiguous language of MAR 6.2 requires “proof of service.” Where the language in a court rule is unambiguous, “we give it its plain meaning.” . . . “Proof of service” is a term of art. It does not mean proof that the party has actually received service.

The drafters used the language “proof of service” in MAR 6.2 rather than using the MAR 7.1 language, “has been served.” If the drafters had intended MAR 6.2 to require actual service or proof that a copy of the award “has been served” as stated in MAR 7.1, they would have used the

¹⁹ *Id.* (quoting MAR 7.1(a)) (citations omitted).

same language.²⁰

The court went on to explain that its interpretation of MAR 6.2 was *supported* by the *Alvarez* decision:

In *Alvarez*, the Supreme Court held that by using the past tense in MAR 7.1 to require that the request for trial de novo must be filed “along with proof that a copy *has been served* upon all other parties appearing in the case,” the drafters intended that the opposing party had actually received service of the request for trial de novo. By contrast, the drafters did not use the past tense in MAR 6.2. We must therefore conclude that the drafters did not intend the opposing party to actually receive service of the request for trial de novo.²¹

As the court of appeals correctly recognized, its decision does not conflict with *Alvarez*. MAR 6.2 and MAR 7.1(a) contain different language with respect to the service requirement, and it is well-established that when the legislature uses certain language in one instance but different, dissimilar language in another, a difference in legislative intent is presumed.²² Accordingly, because

²⁰ *Seto*, 129 Wn. App. at 150.

²¹ *Id.* at 151.

²² *See Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1988). It also is well-established that principles of statutory construction are applied to construe court rules. *See, e.g., State v. Greenwood*, 120 Wn.2d 585, 592, 845 P.2d 971 (1993).

Alvarez construed MAR 7.1(a), not MAR 6.2, it does not conflict with the court of appeals decision in this case, and review is not warranted pursuant to RAP 13.4(b)(1).

Nor does the court of appeals decision conflict with this Court's decision in *Roberts*. In that case, the Court considered whether an arbitrator's failure to file proof of service as required by MAR 6.2 tolled the time period to file a request for a trial de novo. The Court concluded it did, stating, "The 20-day period begins to run only when both the award and proof of service thereof have been filed."²³

Here, in contrast, it is undisputed the arbitrator filed both the arbitration award and the proof of service on April 28. *Roberts* is distinguishable and there is no conflict warranting review under RAP 13.4(b)(1).

Seto also contends this Court should accept review because the court of appeals decision below allegedly conflicts with MAR 6.2 and case law from other jurisdictions. Even if this were true, these assertions do not fall within the scope of review authorized by RAP 13.4(b). As noted above,

²³ *Roberts*, 137 Wn.2d at 92.

it is not sufficient to show that the court of appeals erred; the petitioner must satisfy the requirements of RAP 13.4(b).

In fact, the court of appeals did not err. As explained above, the court correctly interpreted MAR 6.2 to require only that “proof of service” be filed by the arbitrator. It is undisputed that the arbitrator satisfied this requirement on April 28, 21 days before Seto filed his request for a trial de novo.

In addition, the California cases cited by Seto are factually distinguishable. In *Oats v. Oats*,²⁴ the arbitrator filed an arbitration award on November 13; he did not file a proof of service and did not, in fact, serve the parties at that time. On December 4, the superior court arbitration clerk served copies of the award on the parties by mail and filed a proof of service. On appeal, the court concluded the defendant’s request for a trial de novo was timely because it was filed within 30 days after the arbitration clerk filed the proof of service.²⁵ Here, in contrast, Seto did *not* file his request for a trial de novo within the requisite period

²⁴ *Oats v. Oats*, 196 Cal. Rptr. 20 (Cal. Ct. App. 1983).

²⁵ *Id.* at 20-21.

following the filing of the arbitration award and proof of service.

In *Domingo v. Los Angeles MTA*,²⁶ the arbitrator filed an arbitration award June 17 and served it by mail that same date. However, the arbitrator sent the defendant's copy to his attorneys an incorrect address. After the copy was returned by the post office, the arbitrator sent the award to the defendant's attorneys at their former address. On July 24, the attorneys learned of the award and immediately filed a request for a trial de novo. The court rejected the request as untimely and denied the defendant's subsequent request to set aside the arbitrator's award and an ensuing judgment in favor of plaintiff.²⁷

On appeal, the defendant argued the 30-day period to file a request for a trial de novo did not begin to run until it received actual notice of the award. The court of appeals agreed, explaining "before a court can enter an arbitrator's

²⁶ *Domingo v. Los Angeles County Metro. Transp. Auth.*, 88 Cal. Rptr. 2d 224 (1999).

²⁷ *Id.* at 225-26.

award as its judgment, the parties must have notice of the award.”²⁸

In this case, in contrast, there can be no dispute Mr. Seto received actual notice of the arbitration award on April 28. There also is no dispute the arbitrator filed the award, together with proof of service, that same day. Thus, Seto was aware the arbitrator had ruled against him on April 28. Although he was not, on April 28, certain the award had been filed that day, he had notice of the award and that it would be filed then or the next day.²⁹

D. This case does not involve an issue of substantial public interest.

Seto contends the “public interest” requirement of RAP 13.4(b)(4) is satisfied because his interpretation of MAR 6.2 “will reduce congestion in the courts.” He does not explain, however, why allowing untimely requests for a trial de novo will achieve this goal. As explained above, the language of MAR 6.2 and MAR 7.1(a) is clear. MAR 6.2 requires the arbitrator to file the arbitration award and proof of service

²⁸ *Id.* at 554.

²⁹ Seto does not explain why he failed to check the court record to determine whether the award was filed April 28 or April 29.

with the court, and MAR 7.1(a) requires that a request for a trial de novo be filed within 20 days after an arbitration award is filed. It is undisputed the arbitrator filed the arbitration award on April 28, together with proof of service and that Seto did not file his request for a trial de novo until 21 days later. The trial court quickly denied Seto's untimely request, thus allowing judicial resources to be utilized by those parties who comply with the plain and unambiguous language of the arbitration rules.

Seto contends, and the dissent agreed, that it is unfair to grant a party who is personally served more time to file a request for a trial de novo than a party who is served by mail. However, the plain and unambiguous language of MAR 6.2 must be enforced as written, whether "fair" or not.³⁰

It also should be noted that the arbitration rules evidence an intent to discourage parties from seeking a trial de novo. For example, MAR 7.3 states, "The court shall assess costs and reasonable attorney fees against a party who

³⁰ See, e.g., *Metz v. Sarandos*, 91 Wn. App. 357, 360, 957 P.2d 795 (1998) (10-day service and filing requirement for motion for reconsideration under CR 59 begins to run when order is filed, even if parties do not receive a copy of the order that same day).

appeals the award and fails to improve the party's position in the trial de novo." The Washington courts have recognized that this provision is intended to "discourage meritless appeals."³¹

In this case, the purposes of the arbitration rules are best served by adhering to the plain and unambiguous language of MAR 7.1 requiring a request for a trial de novo to be filed within 20 days after filing of an arbitration award.

E. American Elevator is entitled to recover its attorney fees and costs on appeal.

The court of appeals awarded attorney fees and costs to American Elevator. Pursuant to RAP 18.1(j), American Elevator respectfully requests an award of attorney fees and costs incurred in preparing its answer to Seto's petition for review in the event the petition is denied.

³¹ *Hedlund v. Vitale*, 110 Wn. App. 183, 187, 39 P.3d 358 (2002).

V. CONCLUSION

For the reasons set forth above, American Elevator respectfully requests that Seto's petition for review be DENIED.

DATED this 21st day of November, 2005.

BULLIVANT HOUSER BAILEY PC

By *Deborah L. Carstens*
Jerret E. Sale, WSBA #14101
Deborah L. Carstens, WSBA #17494

Attorneys for Respondent

CERTIFICATE OF SERVICE

The undersigned certifies that on this 21st day of
November, 2005, I caused to be served this document to:

Tucker F. Blair	<input type="checkbox"/>	via hand delivery.
Scott A. Sayre	<input checked="" type="checkbox"/>	via first class
Blair & Meeker LLP		mail.
2505 2 nd Ave., Ste. 500	<input type="checkbox"/>	via facsimile.
Seattle, WA 98121-1452		

I declare under penalty of perjury under the laws of
the State of Washington this 21st day of November, 2005, at
Seattle, Washington.



Kimberly Fergin