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STATE OF WASHINGTON

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No. 77751-9

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SUPREME COURT OF THE
STATE OF WASHINGTON

MATTHEW SETO, a single person,

Petitioner,

v.

AMERICAN ELEVATOR, INC., a Washington corporation,

Respondent.

SUPPLEMENTAL BRIEF OF PETITIONER

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ORIGINAL

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I. INTRODUCTION

MAR 6.2 requires an arbitrator to file the arbitration award and proof of service of the award within 14 days after the conclusion of an arbitration.¹ MAR 7.1(a) requires a party requesting a trial de novo to file and serve the request within 20 days after the arbitrator files the award and proof of service.² The question presented for review is whether the 20-day period commences when the arbitrator files the award with incomplete proof of service.

II. STATEMENT OF THE CASE

The facts are not disputed. On April 27, 2004, the parties tried this matter in arbitration. On April 28, 2004, the arbitrator ruled in favor of respondent American Elevator, Inc. (“American Elevator”) and sent an e-mail to both parties attaching copies of the arbitration award and the certificate of mailing. CP 25. The arbitrator stated in the e-mail that he would file the award and certificate “no later than tomorrow (April 29, 2004).” CP 24.

Also on April 28, 2004, the arbitrator signed the arbitration award and certificate and filed both documents with the King County Clerk. CP 11. The certificate stated: “I certify under penalty of perjury under the

¹ MAR 6.2.

² MAR 7.1(a). *See Roberts v. Johnson*, 137 Wn.2d 84, 92, 969 P.2d 446 (1999) (holding 20-day period for requesting trial de novo does not commence until arbitrator files both award and proof of service of award).

laws of the State of Washington that I mailed on this date a copy of the ARBITRATION AWARD, properly addressed and postage prepaid, to the parties listed ...” CP 56.

Petitioner Matthew Seto received his copy of the award on April 29, 2004. CP 23. Neither the copy of the award, nor the attached certificate of service, bore a date stamp from King County Superior Court or otherwise indicated that the documents had been filed with the King County Clerk the previous day. CP 54-56.

On May 19, 2004, 20 days after he received his copy of the award and 21 days after the arbitrator filed and mailed the award, Mr. Seto filed a request for trial de novo. Mr. Seto also served a copy of the request upon American Elevator and filed confirmation of service along with his request for a trial de novo. CP 1-3.

On May 21, the King County Superior Court Arbitration Department filed a "Notice of Waiver of Right to Trial De Novo.” CP 4. Citing MAR 7.1, the Notice states that because the arbitration award and proof of service were filed on April 28, Seto’s request for trial de novo was untimely. *Id.* On May 24, 2004, American Elevator moved to set aside Mr. Seto’s request for trial de novo on the basis that the request was untimely. CP 5-7. Following briefing on the issue, the trial court issued

an order setting aside Mr. Seto's request for a trial de novo and entered judgment on the arbitration award. CP 42-43.

Mr. Seto appealed the trial court's order setting aside his request for a trial de novo and entry of judgment to Division I of the Washington State Court of Appeals. Over Judge Appelwick's dissent, the appellate court affirmed the trial court.³

III ARGUMENT

MAR 6.2 requires the arbitrator to serve and file the arbitration award:

Filing and Service of Award. Within 14 days after the conclusion of the arbitration hearing, the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party. On the arbitrator's application in cases of unusual length or complexity, the arbitrator may apply for and the court may allow up to 14 additional days for the filing and service of the award. Late filing shall not invalidate the award. The arbitrator may file with the court and serve upon the parties an amended award to correct an obvious error made in stating the award if done within the time for filing an award or upon application to the superior court to amend.⁴

MAR 7.1(a), in turn, provides:

Service and Filing. Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may 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. The 20-day period

³ *Seto v. American Elevator, Inc.*, 129 Wn. App. 146, 118 P.2d 373 (2005).

⁴ MAR 6.2.

within which to request a trial de novo may not be extended.⁵

Civil Rule 5 applies to service of all papers in a proceeding under the Mandatory Arbitration Rules.⁶ If service is made by mail, service is not complete until the third day following the day upon which papers are placed in the mail (or later if the third day falls on a weekend or holiday).⁷ A certificate of mailing can serve as “proof of service.”⁸ However, “[p]roof of service by mail is not deemed complete until the third day after mailing,” or later if the third day falls on a weekend or holiday.⁹ The certificate mailed by the arbitrator in this case conformed to the requirements of CR 5(b)(2)(B).

In making its determination, the appellate court did not look beyond the first sentence of MAR 6.2.¹⁰ It found the language therein “unambiguous.”¹¹ It construed the words “proof of service” a “term of art,” requiring no more than technical compliance.¹² Accordingly, the appellate court found filing even incomplete proof of service sufficient to

⁵ MAR 7.1.

⁶ MAR 1.3(b)(2).

⁷ CR 5(b)(2)(A).

⁸ CR 5(b)(2)(B)

⁹ *Alvarez v. Banach*, 153 Wn.2d 834, 838, 199 P.3d 402 (2005).

¹⁰ *Seto*, 129 Wn. App. at 149, 118 P.2d 373.

¹¹ *Id.* at 150.

¹² *Id.* at 149-51.

commence the 20-day filing period and found that service upon Mr. Seto was not required.¹³

The appellate court's analysis of MAR 6.2 is flawed in several respects. First, the appellate court determined that incomplete proof of service is sufficient to commence the 20-day period for requesting a trial de novo under MAR 6.2. Second, it read MAR 6.2 in piecemeal fashion, taking into account only the first sentence of the Rule. Third, it misconstrued Supreme Court authority holding that MAR 6.2 and 7.1(a) must be interpreted as both requiring completed service.

A. The Arbitrator's Proof of Service was Incomplete.

The appellate court considered *if* a certificate of mailing can serve as proof of service, but not *when* a certificate of mailing can serve as proof of service. Mr. Seto does not dispute that the certificate conformed to the requirements for proof of service. However, neither service of the award nor the proof thereof were complete until May 1, 2004, the date Mr. Seto was deemed to have received service under CR 5(b)(2)(A).¹⁴ The certificate the arbitrator filed with the arbitration award on April 28, 2004 was akin to a post-dated check. The appellate court nevertheless ruled that

¹³ *Id.*

¹⁴ Although Mr. Seto received the award in the mail on April 29, because the proof of service filed with the court was a certificate of mailing, the proof of service was not completed until May 1.

the 20-day period for Mr. Seto to file his request for a trial de novo began on April 28, 2004, effectively shortening the appeal period for Mr. Seto.

The appellate court has crafted a rule under which a party served by personal service has 20 days in which to request a trial de novo, while a party served by mail has at most 17 days. This incongruous result is at odds with the basic purpose of the service requirement. The core function of service is to provide timely and proper notice to parties of their rights and obligations.¹⁵

It is clear that MAR 6.2 requires that the arbitrator serve the award¹⁶ - filing proof thereof is a corollary act. Accordingly, the drafters of MAR 6.2 must have intended that parties to an arbitration receive notice of the award.¹⁷ The appellate court's decision fails to take this core function of service into account. Consequently, Mr. Seto was deprived of the same notice and opportunity to appeal the arbitrator's decision as other litigants.

Moreover, Mr. Seto's constitutional right to a jury trial is at stake. The right to a trial by jury is inviolate.¹⁸ This Court noted the quasi-

¹⁵ See, e.g., *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

¹⁶ MAR 6.2.

¹⁷ See *Domingo v. Los Angeles County Metro. Transp. Auth.*, 88 Cal. Rptr. 2d 224, 226 (1999) (interpreting the California equivalent of MAR 6.2 and finding "before a court can enter an arbitrator's award as its judgment, the parties must have notice of the award").

¹⁸ WASH. CONST. art. I, § 21.

jurisdictional nature of MAR 6.2 and 7.1(a) in that filing and serving a request for a trial de novo is “somewhat akin” to filing an appeal.¹⁹ Mr. Seto’s fundamental rights should not be subject to abridgment based on the manner of delivery chosen by the arbitrator.

The appellate court determined that the arbitrator is not required to serve the parties in order to trigger the 20-day appeal period. The Arbitrator need only file the award with incomplete proof of service. The appellate court has accordingly read the service requirement out of the Rule. Under this reading, filing, rather than service, is the triggering event.

However, MAR 6.2 is not a docketing rule. For example, the drafters of MAR 6.2 did not draft the Rule in the format of CR 58(b), the Rule governing entry of judgment. The relationship between CR 58(b) and CR 59(b) is similar to that between MAR 6.2 and MAR 7.1(a), in that the 10-day period for filing a motion for reconsideration or for a new trial under CR 59(b) commences on the date the judgment is entered under CR 58(b).²⁰ However, under CR 58(b), a judgment is effective upon delivery

¹⁹ *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 812 n.4, 947 P.2d 721 (1997). Technically, jurisdiction is not at issue. “The superior court’s jurisdiction is invoked upon the filing of the underlying lawsuit and it is not lost merely because the dispute is transferred to mandatory arbitration.” *Id.*

²⁰ CR 59(b).

to the clerk for filing.²¹ No further acts are required. There is no requirement that parties be served with a copy of the judgment.

MAR 6.2 and CR 58(b) govern similar acts. Each governs procedure and conduct relating to the delivery of a final determination to the clerk for filing. Presumably, the drafters of MAR 6.2 looked to the provisions of CR 58(b) for guidance. Yet unlike CR 58(b), MAR 6.2 does more than establish a filing date. It requires service of the award, imposing an affirmative duty on the arbitrator to provide notice of the award to the parties.

The appellate court treated MAR 6.2 no differently than the Rule for entry of judgment. The act of delivery to the clerk for filing, with or without notice, is the event triggering commencement of the appeal periods. Had this been the drafters' intent, they would have drafted MAR 6.2 to mirror CR 58(b). They did not. MAR 6.2 requires service of the award; filing alone is insufficient. Moreover, when service is not complete, proof of service should not be deemed sufficient. MAR 6.2 may not require proof of completed service, but it does requires completed proof of service. Accordingly, the 20-day appeal period for Mr. Seto should have commenced on May 1, 2004, three days after the arbitrator

²¹ CR 58(b).

mailed the award. Mr. Seto's request for trial de novo, filed on May 19, 2004, was timely.

B. The Appellate Court did not Read the Rule as a Whole.

The interpretation and construction of a court rule is a question of law reviewed de novo.²² Court rules should generally be construed in the same manner as statutes.²³ Statutes, and court rules, must be read and interpreted in their entirety, not in piecemeal fashion.²⁴ Where language is ambiguous, the Court must construe the language to discern the drafter's intent.²⁵ In this case, the appellate court improperly read only the first sentence of MAR 6.2, declining to read the statute in its entirety. In addition, the appellate court wrongly concluded that the words "proof of service" were unambiguous and declined to discern the drafter's intent.

The appellate court acknowledged that it considered only the "proof of service" language in the first sentence of MAR 6.2.²⁶ This piecemeal reading of the Rule violates basic tenets of statutory construction. Moreover, the appellate court's interpretation is naturally limited and at odds with the plain language of the Rule. When the Rule is

²² *Nevers*, 133 Wn.2d at 809, 947 P.2d 721.

²³ *State v. McIntyre*, 92 Wn.2d 620, 622, 600 P.2d 1009 (1979).

²⁴ *Vaughn v. Chung*, 119 Wn.2d 273, 282, 830 P.2d 668 (1992); *Donovick v. Seattle-First Nat'l Bank*, 111 Wn.2d 413, 757 P.2d 1378 (1988); *State v. Parker*, 97 Wn.2d 737, 741, 649 P.2d 637 (1982).

²⁵ *Simmerly v. McKee*, 120 Wn. App. 217, 221, 84 P.3d 919, *rev. denied*, 152 Wn.2d 1033, 103 P.3d 201 (2004)

²⁶ *Seto*, 129 Wn. App. At 149, 118 P.2d 373.

read as a whole, the plain language requires the arbitrator to serve and file the award *at the same time*.²⁷

For example, the second sentence of MAR 6.2, which allows the arbitrator additional time to file the award, explicitly requires that the arbitrator serve the award by the filing date: “On the arbitrator’s application in cases of unusual length or complexity, the arbitrator may apply for and the court may allow up to 14 additional days for *the filing and service of the award*.”²⁸ The arbitrator must also serve an amended award by the filing date. “The arbitrator may file with the court *and serve upon the parties* an amended award to correct an obvious error made in stating the award if done within the time for filing an award ...”²⁹

These later sentences provide information omitted from the first sentence of MAR 6.2. The first sentence provides, expressly, that the arbitrator must file proof of service with the award. It provides, inferentially, that the arbitrator must also serve the award. As noted by the appellate court, the first sentence of MAR 6.2 does not state *when* the arbitrator must serve the award. However, the later sentences clarify that the award must be served when it is filed.

²⁷ MAR 6.2

²⁸ MAR 6.2 (emphasis added).

²⁹ *Id.* (emphasis added).

When the Rule is read as a whole, the meaning of “proof of service,” used in the first sentence of MAR 6.2, becomes clear. The arbitrator is required to file proof that he has completed his express duty under MAR 6.2 to serve the arbitration award within the filing period. “Proof of service” in MAR 6.2 is no more a term of art than “proof that a copy has been served” in MAR 7.1.

C. The Decision of the Court of Appeals is in Conflict with the Supreme Court’s Decisions in *Alvarez* and *Roberts*.

The appellate court contrasted the language “proof of service” in MAR 6.2 with the language “proof that a copy has been served” in MAR 7.1 for the proposition that the two Rules require different acts.³⁰ The appellate court further cited this Court’s recognition in *Alvarez* of the use of the past tense in MAR 7.1(a) as a basis for interpreting the two Rules differently.³¹ The appellate court reasoned that because the drafters used the past tense in MAR 7.1(a) but not in MAR 6.2, they did not intend that service be required.³² This disparate treatment of the two Rules is premised on a misunderstanding of this Court’s holding in *Alvarez* and ignores this Court’s prior declination in *Roberts* to interpret MAR 6.2 and MAR 7.1(a) as having different meanings.

³⁰ *Seto*, 129 Wn. App. At 151-52, 118 P.2d 373.

³¹ *Id.*

³² *Id.*

In *Alvarez*, this Court clarified the proof necessary to satisfy the filing requirements of MAR 7.1(a).³³ The Court did not discuss MAR 6.2 or compare the two Rules. MAR 6.2 was not cited once in the opinion. The essence of the holding in *Alvarez* was that although MAR 7.1(a) does not require formal proof of service, a party must still file some proof that the opposing party received a copy of the request for a trial de novo.³⁴ The holding acknowledges that the drafters used the past tense in MAR 7.1(a), but does not state or imply that different proof is required under MAR 6.2. *Alvarez* does not stand for the proposition that incomplete proof of service is sufficient under MAR 6.2.

In *Roberts*, this Court mandated strict compliance with MAR 6.2's proof of service requirement.³⁵ This Court furthermore examined the language of MAR 6.2 and MAR 7.1(a) and expressly declined to find "virtually the same language, albeit in different rules, to have different meanings and to require different acts."³⁶ Under *Roberts* then, MAR 6.2's mandate of proof of service must be interpreted to have the same meaning as MAR 7.1(a)'s requirement of "proof that a copy has been served." The appellate court's reliance upon *Alvarez* is misplaced. *Alvarez* does not state that a court must apply different interpretations to MAR 6.2 and

³³ *Alvarez*, 153 Wn.2d at 837, 199 P.3d 402.

³⁴ *Id.* at 838.

³⁵ *Roberts*, 137 Wn.2d at 90, 969 P.2d 446.

³⁶ *Id.* at 91.

7.1(a). *Roberts*, in contrast expressly provides that the language of the two Rules has the same meaning and requires the same acts.

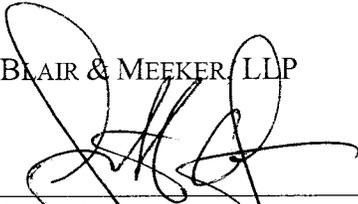
CONCLUSION

MAR 6.2 plainly required the arbitrator to serve the arbitration award upon Mr. Seto. The appellate court improperly determined that incomplete service - and incomplete proof of service - of the award was sufficient to commence the 20-day period for Mr. Seto to file his request for a trial de novo. The appellate court decision is at odds with the core function of the service requirement and the plain language of the Rule, read as a whole. Furthermore, the decision misconstrues authority of this Court.

Mr. Seto's 20-day appeal period did not begin until May 1, 2004, three days after the arbitrator filed the certificate of mailing (and mailed Mr. Seto's copy of the award). Mr. Seto's request for a trial de novo, filed on May 19 was timely.

DATED this 30TH day of JUNE, 2005.

BLAIR & MEEKER, LLP



Scott A. Sayre, WSB No. 29533
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Attorneys for Petitioner

Certificate of Service

I certify under penalty of perjury under the laws of the State of Washington that on the 30th day of June, 2006, I caused to be delivered and correct copy of the foregoing SUPPLEMENTAL BRIEF OF PETITIONER to the following counsel of record:

Deborah L. Carstens
Bullivant Houser Bailey, PC
2300 Westlake Office Tower
1601 Fifth Avenue
Seattle, WA 98101-1618

VIA:

- Facsimile
- Hand-delivery
- US Mail
- Certified/Return Receipt Requested
- Legal Messenger

Signed: 
Esther Booker