102023-6

NO. 83831-8-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MOHAMMAD HAMID VIDA, an individual,

Appellant,

v.

YONG PARK and SANG PARK, husband and wife,

Respondents.

RESPONDENTS' PETITION FOR REVIEW TO SUPREME COURT

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I. STATEMENT OF THE NAME AND IDENTITY OF THE PERSON FILING THE CASE

The identity of the persons filing this Petition for Review are the Respondents Yong Park and Sang Park (collectively "Park").

II. CITATION TO COURT OF APPEALS' DECISION

The Parks seek review of Division I of the Court of Appeals' ("COA") March 27, 2023 Unpublished Opinion ("Opinion)" and its April 25, 2023 Order Denying Parks' Motion for Reconsideration.

III. ISSUES PRESENTED FOR REVIEW

This Petition for Review presents the following issues for review:

1. RAP 13.4(b)(2) states that "[a] petition for review will be accepted by the Supreme Court only: … (2) If the decision

of the Court of Appeals is in conflict with a published decision of the Court of Appeals.[1]

In its Opinion, the Court held that the date of mailing stated in a *pro se* litigant's unsworn Attorney's Certificate of Mailing controls over the date stated in a United States Postal Service postmark.[2] The Court's ruling conflicts with the COA's published decision in *Corona v. Boeing Co*., where the COA held that "**only a United States Postal Service postmark** can be evidence of when an envelope was mailed."[3]

Park requests the Court to accept review of this case and determine whether the date of mailing stated in an Attorney's Certificate of Mailing or in a Certificate of Service controls over the date of mailing contained in a United States Postal Service postmark.

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[1] WA RAP 13.4.

[2] COA's March 27, 2023 Opinion ("Opinion"), pg. 7.

[3] *Corona v. Boeing Co*., 111 Wn. App. 1, 6–7, 46 P.3d 253, 256 (2002) (emphasis added).

2. The COA held in its Opinion that that the date of mailing in an unsworn Certificate of Mailing, filed by a *pro se* litigant, is presumed correct. More importantly, the COA said that this "**presumption cannot be rebutted**" and "**[n]o evidence presented could refute this presumption."**[4] A "conclusive presumption," or "irrebuttable presumption," is "[a] presumption that cannot be overcome by any additional evidence or argument because it is accepted as irrefutable proof that establishes a fact beyond dispute."[5] The COA did not cite any legal authority to support this "conclusive presumption."

[4] COA, pgs. 6-7, (emphasis added).

[5] *State Construction, Inc. v. City of Sammamish* 11 Wn. App.2d 1068, fn. 8 (2020) (unpublished) (quoting Black's Law Dictionary 1435 (11th ed. 2019)). Examples of cases recognizing conclusive presumptions include: *Carey v. Reeve*, 56 Wn. App. 18, 24 n.3, 781 P.2d 904 (1989) (conclusive presumption that child under age six is incapable of intending to harm others); *Chapman v. Crawford*, 38 Wn. App. 301, 685 P.2d 1104 (1984) (conclusive presumption that child under age six is incapable of negligence), reversed on other grounds 104 Wn.2d 241, 704 P.2d 1181 (1985); *Peters v. Skalman*, 27 Wn. App. 247, 617 P.2d 448 (1980) (conclusive presumption that one spouse cannot adversely possess community property). *See also* Tegland, 5 Washington Practice, Evidence Law and Practice § 301.9 (6th ed.).

Park requests the Court to accept review and reverse the COA's determination that the date of mailing in an unsworn Certificate of Mailing, filed by a *pro se* litigant, is presumed to be "conclusively correct."

IV. STATEMENT OF THE CASE

The Appellant Mohammad Hamid Vida ("Vida") filed suit against Park in Snohomish County for breach of contract. The matter was subject to mandatory arbitration. On November 12, 2021, the arbitrator filed the arbitration award with the Snohomish County Clerk. The arbitrator simultaneously filed a certificate of mailing, certifying that he sent copies of the award to both parties by United States mail on November 12, 2021.[6]

On December 1, 2021, Vida, acting pro se, filed a Request for a Trial de Novo ("Request"). The Request included a Certificate of Mailing, which represented that Vida sent a copy

[6] COA, pgs. 1-2.

of the Request via United States mail to Park's attorney on December 1, 2021.[7] The envelope containing the Request was actually postmarked December 4, 2021.[8]

Park moved to strike Vida's Request as being untimely served. The trial court granted Park's motion, striking Vida's Request.[9] Vida appealed.

The parties submitted briefing concerning the issues in the appeal. After briefing was complete, the COA sent an e-mail to the parties requesting they "be prepared to address the following at oral argument on March 3, 2023:"

> CR 5(b)(2)(B) states, "Proof of service of all papers permitted to be mailed may be by written acknowledgement of service, by affidavit of the person who mailed the papers, or by certificate of an attorney." Is a pro se litigant an attorney for purposes of this rule?

The COA spent the entirety of the oral argument

[7] *Id.*, pg. 2

[8] *Id.*

[9] *Id.*

discussing this question.

The COA issued the Opinion on March 27, 2023. Citing to CR 5(b)(2)(B), the COA said that an Affidavit of Service or a Certificate of Mailing were "acceptable forms of proof of service:"

> CR 5(b)(2)(B) provides that the acceptable forms of proof of service by mail are "written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney." If a party files one of these forms, the date of service is deemed to be three days after the date given on the proof of service and **the presumption cannot be rebutted**. *Vanderpol v. Schotzko*, 136 Wn. App. 504, 509, 150 P.3d 120 (2007).[10]

The COA said that if Vida's Certificate of Mailing (with its claimed December 1, 2022 mailing date) "constituted "acceptable proof of service," then service of the Request was "timely:"

> If Vida's certificate of mailing constituted acceptable proof of service under CR 5(b)(2)(B), then service is deemed complete as of December 6, 2021. **No evidence presented could refute this presumption and service**

[10] *Id*., pg. 6 (emphasis added).

> **was therefore timely.** On the other hand, if Vida's certificate of mailing does not constitute acceptable proof of service, then the only proof of service on record is the envelope displaying a postmark of December 4, 2021. If this piece of evidence controls, then service was not timely.[11]

The COA determined that a *pro se* litigant like Vida could file an unsworn Attorney's Certificate of Mailing under CR 5(b)(2)(B).[12] Based on this determination, the COA held that "Vida's certificate declaring that he mailed a copy of the request for trial de novo on December 1, 2021 constitutes adequate proof of service."[13] Further holding that "[n]o evidence presented could refute this presumption," the COA concluded that Vida timely served the Request.[14]

Park respectfully requests this Court to accept review to consider the COA's conclusion that the date of mailing in an

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[11] *Id*., pg. 7 (emphasis added).

[12] *Id*., pg. 8.

[13] *Id*., pg. 9.

[14] *Id.*

Affidavit of Service or a Certificate of Mailing is presumed valid over a United States Postal Service postmark.

Further, the COA held in its Opinion that that the date of mailing stated in an unsworn Certificate of Mailing, filed by a *pro se* litigant, is presumed correct. More importantly, the COA said that this "**presumption cannot be rebutted**" and "**[no] evidence presented could refute this presumption."**[15] Park respectfully requests this Court to accept review to consider the COA's conclusion that the date of mailing in an Affidavit of Service or a Certificate of Mailing is "conclusively presumed" to be valid and cannot be rebutted by any other evidence.

V. ARGUMENT

1. The established law in Washington has been that a "only a United States Postal Service postmark can be evidence of when an envelope was mailed." The COA's unpublished decision overrules this holding.

[15] *Id*., pgs. 6-7, (emphasis added).

RAP 13.4(b)(2) states that "[a] petition for review will be accepted by the Supreme Court only: … (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals.[16] Twenty years ago, the COA held in *Corona v. Boeing Co*. that "**only a United States Postal Service postmark can be evidence of when an envelope was mailed**."[17] The COA said this is because "a United States Postal Service mark cannot be applied to an envelope until that envelope **is actually placed into the United States mail**."[18] The COA further held that "[t]he date of the United States Postal Service postmark **shall be presumed** to be the date the written communication was mailed."[19]

The COA's current Opinion overrules *Corona*. According to the Court, the date contained in an unsworn Certificate of

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[16] WA RAP 13.4.

[17] *Corona*, 111 Wn. App. at 6–7 (emphasis added).

[18] *Id.* (emphasis added).

[19] *Id.,* 111 Wn. App. at 6 (emphasis added).

Mailing, filed by a *pro se* litigant, is presumed to be correct. This presumption cannot be challenged, even when a United States Postal Service postmark shows a different date of mailing.

Vanderpol v. Schotzko[20] is the only authority the COA cited in support of its decision. Respectfully, *Vanderpol* does not support the COA's conclusion that "no evidence presented could refute" the December 1, 2022 mailing date stated in Vida's Certificate of Mailing.

In *Vanderpol*, the defendant filed and mailed his notice of request for trial de novo on the 16th day after the arbitrator filed and served the award. However, the plaintiff did not actually receive the notice until the 21st day. The plaintiff argued that the defendant failed to comply with MAR 7.1 because actual service did not occur within the 20-day period.

[20] *Vanderpol v. Schotzko*, 136 Wn. App. 504, 509, 150 P.3d 120 (2007).

The court rejected this argument, noting that the plaintiff's claim was "unsupported by any authority:"

> Service by mail is complete as of three days after mailing, and so the fact to be shown in the affidavit is the date of mailing. Vanderpol's argument that the presumption of completed service is rebutted if the mail takes longer than three days is unsupported by any authority.[21]

The court held that allowing a party to assert the actual date it received a document would render the three-day requirement in CR 5(b)(2)(A) "meaningless:"

> Perhaps the presumption of completed service may be rebutted as to the fact of service, as for example where no service is ever received. But rebuttal as to the date service is "deemed complete" by evidence of actual receipt after the presumptive three days would render the "deemed complete" language in the rule meaningless.[22]

Relevant to our situation, the *Vanderpol* court concluded that "[t]he date of mailing is the operative fact for completion

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[21] *Vanderpol*, 136 Wn. App. at 508–09.

[22] *Id*. at 509 (citing *Bank of the West v. F & H Farms, L.L.C.,* 123 Wn. App. 502, 504, 98 P.3d 532 (2004)).

of mailed service, and the presumption of completion operates automatically from that date."[23] *Vanderpol* **does not** say the date of mailing stated in an Affidavit of Service or a Certificate of Mailing is "presumed valid" or—if a presumption does exist—that the presumption cannot be rebutted.

Park respectfully requests the Court consider the COA's decision that the date of mailing in an unsworn Certificate of Mailing filed by a pro se litigant controls over the date of a United States Postal Service postmark.

Alternatively, Park respectfully requests the Court to consider the COA's ruling that "[n]o evidence presented could refute this presumption [that the date of mailing in an unsworn Certificate of Mailing is correct],"[24] and remand the case to the

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[23] *Id.*, at 510. *See Long Painting Company, Inc. v. Donkel*, 14 Wn.App.2d 582, 589, 471 P.3d 893, 897 (2020) ("There is a presumption that service **by properly postmarked mail** is complete three days after mailing.") (Emphasis added).

[24] Opinion, 7.

trial court for an evidentiary hearing to determine the actual date of mailing.

2. Park should be allowed to challenge Vida's claim that he mailed the Attorney's Certificate of Mailing on December 1, 2022.

For more than twenty years, the law in Washington has been that "**only** a United States Postal Service postmark can be evidence of when an envelope was mailed" and "the date of the postmark **shall be presumed** to be the date the written communication was mailed."[25]

The COA now says that the date of mailing in an unsworn Certificate of Mailing, filed by a *pro se* litigant, is presumed correct. More importantly, the COA says that this "**presumption cannot be rebutted**" and "**[no] evidence presented could refute this presumption."**[26]

[25] *Corona,* 111 Wn. App. at 8-7 (emphasis added).

[26] *Id*., pgs. 6-7. (emphasis added).

This ruling opens the door to potential fraud. "Allegations of mailing are easy to make and hard to disprove."[27] A person submitting an Affidavit of Service or a Certificate of Mailing can include a false date of mailing, secure in the knowledge that "no evidence" can be used to challenge this date.

In our present case, Vida's Certificate of Mailing states that he mailed the Request on December 1, 2022. Vida claimed in his brief that he was "surprised" the mailing envelope was postmarked on December 4, 2022.[28] Vida did not cite to the record to support this self-serving statement because no evidence exists; Vida never filed a declaration with the trial court on this or any other topic.[29]

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[27] *Sorrentino v. I.R.S.,* 383 F.3d 1187, 1194 (10th Cir. 2004).

[28] Appellant's Opening Brief, pg. 4.

[29] Washington appellate courts generally decline to consider facts recited in a brief but unsupported by the record. *Sherry v. Fin. Indem. Co*., 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007) (citing RAP 10.3(a)(5)); *Prasse v. VonErffa,* 13 Wn. .App.2d 1138 (2020) (unpublished).

Washington cases hold that some presumptions when challenged by contrary evidence disappear from the case and the party relying on the presumption must carry on without it.[30] A presumption is not evidence and its efficacy is lost when the other party adduces credible evidence to the contrary. Presumptions are the "bats of the law, flitting in the twilight but disappearing in the sunshine of actual facts."[31] A presumption is not evidence and its efficacy is lost when the other party adduces credible evidence to the contrary.[32] The sole purpose

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[30] *Chaloupka v. Cyr*, 63 Wn.2d 463, 387 P.2d 740 (1963) (bailment); *Sprague v. Snug Harbor Marina*, 13 Wn. App. 246, 534 P.2d 583 (1975) (presumption of unseaworthiness from unexplained sinking of vessel); *Tire Towne v. G & L Serv. Co.*, 10 Wn. App. 184, 518 P.2d 240 (1973) (presumption of ownership arising from possession).

[31] *In re Indian Trail Trunk Sewer Sys*., 35 Wn. App. 840, 843, 670 P.2d 675 (1983).

[32] *In re Marriage of Akon,* 160 Wn. App. 48, 62, 248 P.3d 94 (2011) (citing *Bates v. Bowles White & Co*., 56 Wn.2d 374, 378, 353 P.2d 663 (1960)). For example, the mailbox rule provides that the proper and timely mailing of a document raises a **rebuttable** presumption that the document has been received by the addressee in the usual time. *Olson v. The Bon, Inc*., 144 Wn. App. 627, 634, 183 P.3d 359, 363 (2008). The presumption of receipt permitted under the common law mailbox rule is not invoked lightly and requires proof of mailing, such as an independent proof of a postmark, a dated receipt, or evidence of mailing apart from a party's own self-serving

of a presumption is to establish which party has the burden of going forward with evidence on an issue.[33]

The COA's Opinion does not explain why the claimed mailing date in an unsworn Certificate of Mailing "cannot be rebutted." Park respectfully requests the Court consider this decision and remand the matter to the trial court for an evidentiary hearing to determine the actual date of mailing.

VI. CONCLUSION

RAP 13.4(b)(2) states that "[a] petition for review will be accepted by the Supreme Court only: … (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals.[34]

In its Opinion, the Court held that the date of mailing stated in a *pro se* litigant's unsworn Attorney's Certificate of

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testimony. *Id.* at 634 (citing *Sorrentino,* 383 F.3d at 1191. *See City v. Bohon*, 194 Wn. App. 1028 (2016) (unpublished).

[33] *In re Indian Trail,* 35 Wn. App. at 843.

[34] WA RAP 13.4.

Mailing controls over the date stated in a United States Postal Service postmark.[35] The Court's ruling conflicts with the COA's published decision in *Corona v. Boeing Co*., where the COA held that "**only a United States Postal Service postmark** can be evidence of when an envelope was mailed."[36]

Park requests the Court to accept review of this case and determine whether the date of mailing stated in an Attorney's Certificate of Mailing or in a Certificate of Service controls over the date of mailing contained in a United States Postal Service postmark.

The COA held in its Opinion that that the date of mailing in an unsworn Certificate of Mailing, filed by a *pro se* litigant, is presumed correct. More importantly, the COA said that this "**presumption cannot be rebutted**" and "**[no] evidence**

[35] COA's Opinion, pg. 7.

[36] *Corona,* 111 Wn. App. at 6–7 (emphasis added).

presented could refute this presumption."[37] The COA did not cite any legal authority to support this "conclusive presumption."

Park requests the Court to accept review and reverse the COA's determination that the date of mailing in an unsworn Certificate of Mailing, filed by a *pro se* litigant, is presumed to be "conclusively correct."

VII. APPENDIX

Attached to this appendix are copies of the Court of Appeals' March 27, 2023 Opinion and the Court of Appeals' April 25, 2025 Order Denying the Parks' Motion for Reconsideration.

I certify that the foregoing contains 2,896 words in compliance with RAP 18.17 (excluding Appendices; Title Sheet/Caption; Tables of Contents/Authorities; Certificates of Compliance/Service; Signature Blocks; and Pictorial Images/Exhibits), as calculated by the word processing software used to prepare this document.

[37] *Id*., pgs. 6-7, (emphasis added).

DATED this 25th day of May, 2023.

/s/Theresa H. Rava

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that under the laws of the State of Washington that on 25th day of May, 2023, I caused a true and correct copy of the foregoing document, RESPONDENTS' PETITION FOR REVIEW, to be served via the Appellate Court Web Portal to:

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DATED this 25th day of May, 2023, at Seattle, Washington.

/s/Azra Hadzic
on behalf of Theresa H. Rava

APPENDIX

FILED
3/27/2023
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MOHAMMAD HAMID VIDA,

Appellant,

v.

YONG PARK and SANG PARK,

Respondents.

DIVISION ONE

No. 83831-8-I

UNPUBLISHED OPINION

DWYER, J. — The Superior Court Civil Arbitration Rules (SCCAR) dictate that a party requesting a trial de novo following an arbitration award must file and serve that request within 20 days of the date of service of the award. Mohammad Vida had until December 6, 2021 to file and serve his request for a trial de novo. Finding that his request for a trial de novo was untimely served, the trial court struck Vida's request and entered judgment on the arbitration award. Because Vida's request for a trial de novo was both filed and served within 20 days of the date that the arbitrator served the award on the parties, we reverse the trial court's order and remand for further proceedings.

I

Vida filed a lawsuit against Yong and Sang Park for breach of an oral contract to serve as construction manager of a home on the Park's real property in Kenmore, Washington. The Parks filed a counterclaim against Vida for negligent, intentional, and fraudulent misrepresentation arising from Vida's

various representations about the construction project. Because both parties' claims were for less than $100,000, the parties were referred to mandatory arbitration.

On November 12, 2021, the arbitrator filed the arbitration award with the Snohomish County Clerk. Therein, the arbitrator awarded $0 to Vida and $49,123 to the Parks. The arbitrator simultaneously filed a certificate of mailing, certifying that he sent copies of the award to both parties by United States mail on November 12, 2021.

On December 1, 2021, Vida, acting pro se, filed a request for a trial de novo. Therewith, Vida filed a certificate of mailing, certifying that he sent a copy of the request via United States mail to the Parks' attorney on December 1, 2021. The envelope containing the request was postmarked December 4, 2021. The Parks' attorney received the copy of the request on December 6, 2021.

The Parks moved to strike Vida's request for a trial de novo on the ground that it was untimely served. They also moved to enter judgment on the arbitration award. The trial court granted the Parks' motions, striking Vida's request for a trial de novo and entering judgment on the arbitration award. It also awarded attorney fees to the Parks.

Vida appeals.

II

Vida asserts that the trial court erred by striking his request for a trial de novo. This is so, he argues, because he timely served the Parks within 20 days of the date the arbitration award was served on the parties. We agree.

We review issues of statutory interpretation de novo. Hanson v. Luna-Ramirez, 19 Wn. App. 2d 459, 461, 496 P.3d 314 (2021). "We interpret a court rule as though it were enacted by the legislature, giving effect to its plain meaning as an expression of legislative intent." State v. Chhom, 162 Wn.2d 451, 458, 173 P.3d 234 (2007). If the rule is ambiguous, we construe the rule to fulfill the intent of the drafter. Simmerly v. McKee, 120 Wn. App. 217, 221, 84 P.3d 919 (2004).

In December 2019, the Supreme Court amended the Mandatory Arbitration Rules (MAR) and renamed them the SCCAR. SCCAR 7.1(a)[1] now reads as follows:

> Any aggrieved party not having waived the right to appeal may request a trial de novo in the superior court. Any request for a trial de novo must be filed with the clerk and served, in accordance with CR 5, upon all other parties appearing in the case within 20 days after the arbitrator files proof of service of the later of: (1) the award or (2) a decision on a timely request for costs or attorney fees. A request for a trial de novo is timely filed or served if it is filed or served after the award is announced but before the 20-day period begins to run. The 20-day period within which to request a trial de novo may not be extended.

Failure to strictly comply with this rule is fatal to the request for a trial de novo, and the trial court's authority is limited to entry of judgment on the arbitration award. Nevers v. Fireside, Inc., 133 Wn.2d 804, 811, 947 P.2d 721 (1997).

In Seto v. American Elevator, Inc., 159 Wn.2d 767, 769, 154 P.3d 189 (2007), our Supreme Court held that the 20-day period to request a trial de novo

[1] Although the parties both refer consistently to MAR 7.1, there is no dispute that SCCAR 7.1 is the operative rule in this matter, as all proceedings occurred after the effective date of the amended rules.

under MAR 7.1 begins once service of the award is complete. MAR 7.1 stated in pertinent part:

> 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 court held that this rule, as well as MAR 6.2, must be read in conjunction with CR 5.[2] Seto, 159 Wn.2d at 775-76. Pursuant to CR 5(b)(2)(A), service of "pleadings and other papers"

> shall be deemed complete upon the third day following the day upon which they are placed in the mail, unless the third day falls on a Saturday, Sunday, or legal holiday, in which event service shall be deemed complete on the first day other than a Saturday, Sunday or legal holiday, following the third day.

Given this rule, the court held that if an arbitrator serves the arbitration award on the parties by mail, the 20-day period to request a trial de novo does not begin to run until the third day after mailing. Seto, 159 Wn.2d at 769-70.

Contrary to the Parks' argument, the amendment to SCCAR 7.1 did not supersede Seto. SCCAR 7.1 starts the 20-day clock when "the arbitrator files proof of service." This is consistent with, not contrary to, the Supreme Court's

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[2] Unlike the arbitration rules, which are to be strictly construed, the civil rules are to be applied more generously so as to "secure the just, speedy, and inexpensive determination of every action." CR 1. As explained by our Supreme Court:

> CR 1 requires Washington courts to interpret the court rules in a manner "that advances the underlying purpose of the rules which is to reach a just determination in every action." Burnet v. Spokane Ambulance, 131 Wn.2d 484, 498, 933 P.2d 1036 (1997). The court rules are intended to allow the court to reach the merits of an action. Sheldon v. Fettig, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996). "'[W]henever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.'" Griffith v. Bellevue, 130 Wn.2d 189, 192, 922 P.2d 83 (1996) (quoting First Fed. Sav. & Loan Ass'n v. Ekanger, 93 Wn.2d 777, 781, 613 P.2d 129 (1980)).

Spokane County v. Specialty Auto & Truck Painting, Inc., 153 Wn.2d 238, 245, 103 P.3d 792 (2004).

decision in Seto. Indeed, the respondent in Seto had argued that MAR 6.2's requirement that the arbitrator file proof of service in the court meant that MAR 7.1 must be read to start the 20-day clock when proof of service was filed, not when service was actually completed. 159 Wn.2d at 773. The Supreme Court rejected this argument, holding instead that the requirement that proof of service be filed "'leads logically to a conclusion' that the parties must actually be served *before* the request for trial de novo can be considered complete and properly filed." Seto, 159 Wn.2d at 773 (quoting Nevers, 133 Wn.2d at 811). The amendment to SCCAR 7.1 adopted the "proof of service" language that had previously been used in MAR 6.2, from which it can only be assumed that the adopters of the rule (the Supreme Court) intended SCCAR 7.1 to encompass the Supreme Court's holding in Seto. Indeed, reading SCCAR 7.1 in such a manner is necessary to "prevent the injustice" of "giv[ing] people served personally longer to appeal than people served by mail." Seto, 159 Wn.2d at 775.

When SCCAR 7.1 is viewed in its entirety, it is apparent that the amendments to the rule were designed to address an entirely different issue. Whereas MAR 7.1 started the 20-day clock at the date the arbitrator served the parties with a copy of the award, SCCAR 7.1 now starts the clock at the service of "the later of: (1) the award or (2) a decision on a timely request for costs or attorney fees." This demonstrates that the rule was amended to account for arbitrators who issued rulings on attorney fees separate from the arbitration award, rather than to eliminate the presumption called for in CR 5(b)(2)(B).

Here, the arbitrator served the award on the parties via mail on November

12, 2021. Thus, the 20-day clock did not begin to run until November 15, 2021. Vida had until December 6, 2021[3] to request a trial de novo, not December 2 as the Parks argue.

There is no dispute that Vida timely filed his request for a trial de novo on December 1. However, in Nevers, our Supreme Court held that under MAR 7.1, a request for trial de novo is not timely unless it has been filed *and* served on the other parties within 20 days of the date of service of the arbitration award. 133 Wn.2d at 811. The operative language of the rule upon which the court relied required that the party requesting a trial de novo file the request "along with proof" of service. Nevers, 133 Wn.2d at 811. Although SCCAR 7.1(c) removed the requirement that a party file proof of service within 20 days, the amended rule now plainly states, "Any request for a trial de novo must be filed with the clerk *and served* . . . within 20 days." SCCAR 7.1(a) (emphasis added). Accordingly, Vida must both have filed his request for a trial de novo *and* served it on the Parks on or before December 6, 2021.

CR 5(b)(2)(B) provides that the acceptable forms of proof of service by mail are "written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney." If a party files one of these forms, the date of service is deemed to be three days after the date given on the proof of service and the presumption cannot be rebutted. Vanderpol v. Schotzko, 136 Wn. App. 504, 509, 150 P.3d 120 (2007).

Along with his request for a trial de novo, Vida filed a certificate of mailing

[3] Twenty days from November 15 is December 5. December 5, 2021 was a Sunday.

certifying that he sent a copy of the request to the Parks' attorney on December 1, 2021. If Vida's certificate of mailing constituted acceptable proof of service under CR 5(b)(2)(B), then service is deemed complete as of December 6, 2021. No evidence presented could refute this presumption and service was therefore timely. On the other hand, if Vida's certificate of mailing does not constitute acceptable proof of service, then the only proof of service on record is the envelope displaying a postmark of December 4, 2021. If this piece of evidence controls, then service was not timely.

Vida's certificate of mailing is not a written acknowledgement of service, nor is it an affidavit of the person who mailed the papers.[4] Accordingly, Vida's certificate of mailing can only constitute adequate proof of service under CR 5 of process if it qualifies as a "certificate of an attorney." At the time that the request for trial de novo was filed, Vida was representing himself pro se. Thus, whether service of Vida's request for a trial de novo is timely turns entirely on whether a pro se litigant, in the circumstances of this case, qualifies as an "attorney" within the ambit of CR 5.

Our court has addressed this issue only once, in Houston v. Dick Hannah Motors, noted at 127 Wn. App. 1029, 2005 WL 1178170. Although this opinion has no precedential value and is not binding upon us, see GR 14.1, we nevertheless find its reasoning persuasive. In Houston, Judge Morgan, writing for a panel of judges from Division Two of this court, held that a certificate of

[4] Written statements or declarations do not constitute affidavits unless they are made under penalty of perjury. See RCW 5.50.050.

mailing filed by a pro se litigant was sufficient proof of service under CR 5. The opinion so held because

> [a] party acting as his or her own attorney bears the burden of "comply[ing] with all applicable procedural rules" to the same extent as if he or she were an attorney. We perceive no reason why a party bearing that burden should not receive the corresponding benefits as well, provided that such benefits are limited to the particular case.

Houston, noted at 127 Wn. App. 1029, 2005 WL 1178170, at *2 (footnote omitted).

We agree. Our courts have long held that "the law does not distinguish between one who elects to conduct his or her own legal affairs and one who seeks assistance of counsel—both are subject to the same procedural and substantive laws." In re Marriage of Wherley, 34 Wn. App. 344, 349, 661 P.2d 155 (1983). This is true whether the procedural rules are designed to burden counsel or to benefit them. To hold otherwise would penalize litigants who choose to represent themselves pro se by depriving them of a means of service that is otherwise generally available.

Reading the word "attorney" in CR 5 to include those who represent themselves pro se is consistent with the overall purpose of the civil rules. CR 1 dictates that the rules of procedure are to be construed "to secure the just, speedy, and inexpensive determination of every action." In accordance with this purpose, "'the rules of civil procedure should be applied in such a way that substance will prevail over form.'" CalPortland Co. v. LevelOne Concrete LLC, 180 Wn. App. 379, 395, 321 P.3d 1261 (2014) (quoting First Fed. Sav. & Loan

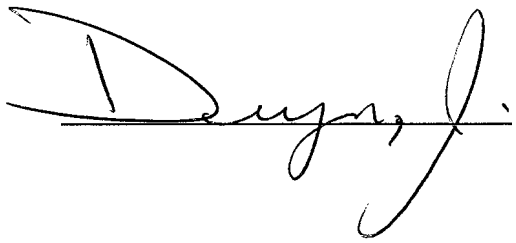
Ass'n of Walla Walla v. Ekanger, 93 Wn.2d 777, 781-82, 613 P.2d 129 (1980)).

We hold that Vida's certificate declaring that he mailed a copy of the request for trial de novo on December 1, 2021 constitutes adequate proof of service. Service should have been deemed complete as of December 6, 2021, the Monday after December 4. As this fell within the 20-day window for service, service of the request for trial de novo was timely. Accordingly, the trial court erred by striking Vida's request for a trial de novo.

III

The Parks request attorney fees on appeal pursuant to RAP 18.1 and SCCAR 7.3. SCCAR 7.3 states that "[t]he court shall assess costs and reasonable attorney fees against a party who appeals the award and fails to improve the party's position on the trial de novo." Because Vida's request for trial de novo was timely filed, any decision on whether Vida has failed to improve his position is premature. The Parks should not have been awarded attorney fees by the trial court, and they are not entitled to an award of fees on appeal. Accordingly, we direct the trial court to vacate its award of attorney fees to the Parks.

Reversed and remanded for further proceedings.



WE CONCUR:

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MOHAMMAD HAMID VIDA,

Appellant,

v.

YONG PARK and SANG PARK,

Respondents.

DIVISION ONE

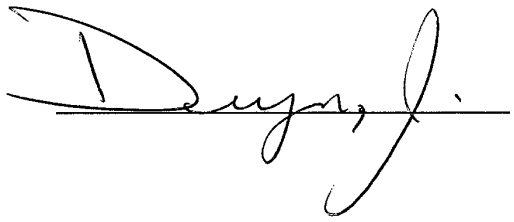
No. 83831-8-I

ORDER DENYING MOTION FOR RECONSIDERATION

The respondents having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration is hereby denied.

FOR THE COURT:



WILLIAMS KASTNER

May 25, 2023 - 4:40 PM

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Appellate Court Case Title:	Mohammad Hamid Vida, Appellant v. Young & Sang Park, Respondent
Superior Court Case Number:	21-2-01143-2

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