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

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

CITY OF LAKE FOREST PARK,

Appellant,

vs.

HERBERT BRACKMAN,

Respondent.

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COMMUNICATIONS SECTION
CLERK OF COURT
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BRIEF OF APPELLANT

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I. INTRODUCTION

The City of Lake Forest Park (“the City”) respectfully requests that the Court of Appeals reverse the trial court’s order entering judgment against it because the words “under penalty of perjury” were not appended to the certificate of service accompanying its request for a trial *de novo*. The plaintiff does not deny receiving the request, nor acting upon. He points to no prejudice of any kind. To the contrary, he actively litigated the matter for *months*, before abruptly moving for immediate judgment due to the form of the original certificate of service. The trial court agreed. Its decision—which elevates form of substance—overlooks the arbitration and court rules, runs contrary to the case law, and generates significant policy concerns.

Because the City was denied its right to a trial on the merits—on the basis of harmless procedural error—it respectfully asks this Court to reverse and remand the trial court’s order.

II. ASSIGNMENT OF ERROR

- A. The Trial Court Erred When It Held That Mar 7.1 Requires “Formal” Proof Of Service Of The Request For Trial *De Novo*.
- B. The Trial Court Erred When It Held That Strict Compliance Is Necessary For Proof Of Service By Mail Under Mar 7.1.

- C. The Trial Court Erred When It Held That The Content Of The Proof Of Service Is Relevant At All, Since Plaintiff Admits Service Was Accomplished Exactly As Stated.

III. STATEMENT OF THE CASE

This case involves a bicycle accident in which Plaintiff Herb Brackman ignored a stop sign and rode directly into the street. *CP 30-31*. Fearing a collision with a Lake Forest Park Police cruiser that was simply stopped at the red light, Brackman slammed on his brakes, came to a complete stop, and simply tipped over onto his side. *Id.* There was no “crash,” “wreck,” “collision,” or any contact whatsoever between Brackman and the police car. *Id.* In fact, the only reason he tipped over onto the ground is that his shoes were attached to his bicycle pedals, and he was unable to detach them and put his feet on the ground after stopping. *Id.*

After originally filing in Superior Court, Brackman transferred this case to mandatory arbitration. On June 17, 2009, shortly after arbitration, the City of Lake Forest Park filed a request for trial *de novo* with the trial court. *CP 7*. The City also filed a certificate of service certifying that the *de novo* request had been served via mail on Brackman’s attorneys. *CP 8*.

More than six months later, Brackman filed a motion asking the trial court to strike the City’s request for trial *de novo*. *CP 13 et seq.*

Brackman did not claim the *de novo* request itself was improper or insufficient, that the request or certificate were not properly filed, or that either document was not timely and properly served. Instead, Brackman's sole claim was that the *content* of the certificate of service was improper because it did not include the words "under penalty of perjury." *Id.* After briefing from both parties, the trial court signed Brackman's proposed order with no explanation, aside from hand-writing "Manius v. Boyd, 111 Wn. App. 764 (2002)" CP 52-53.

Surprised, the City moved for reconsideration. CP 54 *et seq.* The City pointed out that Manius v. Boyd provides no support to Brackman's motion. *Id.* It also cited to MAR 7.1, which—consistent with *Boyd*—does not require formal proof of service of a request for trial *de novo*. *Id.*

After another round of briefing, the trial court denied reconsideration. This time, it did not cite to or discuss Manius v. Boyd at all. It simply concluded that the City was not entitled to a trial on the merits because its certificate of service—filed many months earlier—omitted the words "under penalty of perjury." CP 80-83. The trial court reasoned that while substantial compliance may be acceptable in the context of personal service, strict compliance is required for proof of service by mail. *Id.*

The City timely appealed.

IV. ARGUMENT

Based on the plain text of the Mandatory Arbitration Rules, as well as the accompanying decisional law, the trial court erred in three principle ways. The City of Lake Forest Park respectfully submits that these errors require reversal of the trial court's decision, and remand for a trial on the merits of Mr. Brackman's claims.

A. The Mandatory Arbitration Rules Do Not Require Formal Proof Of Service

Under MAR 7.1(a), a party requesting trial *de novo* must file two documents with the court: (1) a written request for a trial *de novo*, and (2) "proof that a copy has been served upon all other parties." The question here is whether the certificate of service filed by the City constitutes "proof that a copy has been served" under that rule.

1. What Constitutes "Proof That a Copy has Been Served?"

In order to determine whether the City's certificate of service complies with MAR 7.1, we must first decide what "proof that a copy has been served" actually means. Washington courts have analyzed this language several times—and each time, they have come to the same conclusion: MAR 7.1 does not require the same type of "proof" that is required by the normal court rules and statutes. Quite the opposite, in fact:

Here, the drafters of the MAR chose not to use the phrase "proof of service;" therefore, they must have contemplated something different from "proof of service" as it is ordinarily understood. This is more than mere semantics, for "proof of service" is a term of art meaning an affidavit attested by the person who effected service. Black's defines the term as follows: "a document filed (as by a sheriff) in court as evidence that process has been successfully served on a party." If the drafters had intended to require formal proof of service as that phrase is understood, they would have employed the phrase "proof of service" instead of "proof that a copy has been served."

Terry v. City of Tacoma, 109 Wn. App. 448, 457 (2001) (internal citation omitted). Having found that MAR 7.1 does not require formal proof of service, as it is normally understood, the *Terry* Court then outlined what is required under the rule: "the service requirements of MAR 7.1(a) do not mandate an affidavit of service, but only 'some evidence' of the time, place, and manner of service." *Id.*

Four years later, the Washington Supreme Court revisited the issue, and affirmed that "a formal proof of service is unnecessary to satisfy the requirements of MAR 7.1(a)." *Alvarez v. Banach*, 153 Wn.2d 834, 839 (2005) (citing *Terry v. City of Tacoma*, 109 Wn. App. 448, (2001)).

And then, more recently, the Court of Appeals again addressed this exact issue in *VanderPol v. Schotzko*, 136 Wn. App. 504, 150 P.3d 120 (2007). Echoing both *Terry* and *Alvarez*, the *VanderPol* Court held that compliance with MAR 7.1 only requires "some evidence of the time,

place, and manner of service...” *Id.* at 122. Specifically addressing service by mail, the *VanderPol* court stated that “[i]f the affidavit of service makes clear that mailed service was accomplished by operation of law within the deadline, the affidavit is sufficient under MAR 7.1(a).” *Id.* at 124.

With this framework in mind, the City now turns to its own certificate of service.

2. **The City’s Certificate of Service Complies With MAR 7.1**

The certificate of service at issue here is sufficient and firmly grounded in precedent. It was (1) written on defense counsel’s pleading paper, (2) signed by defense counsel’s legal secretary, and (3) certified that the documents were sent to Plaintiff’s counsel via U.S. Mail on (4) June 15, 2009. *CP 8*. There can be little question that the certificate is “some evidence of the time, place, and manner of service,” or that it “makes clear that mailed service was accomplished by operation of law within the deadline.” In fact, the certificate leaves no question whatsoever as to the time, place, and manner of service here. The standard promulgated by the case law is met, and exceeded.

By way of comparison, the certificate in *VanderPol* stated “[o]n this day affiant deposited a copy of the foregoing Request for Trial *de*

novo and this Affidavit of Mailing in the mails of the United States of America in a properly stamped and addressed envelope directed to [opposing counsel].” *Id.* at 121-122. That is essentially the exact same language used by the City.

Similarly, the court in *Manius v. Boyd* addressed a certificate of service that admittedly lacked an essential component of a formal “proof of service” (the place of service). 111 Wn. App. 764 (2002). The court nevertheless held that its absence *did not* make the certificate deficient, because “the certificate's various components constitute ‘some evidence’ of the time, place, and manner of service.” *Id.* at 770-771 (2002) (*citing Terry, supra*).

MAR 7.1 does not require magic words. Had they been intended, the words “under penalty of perjury” would be explicit in the rule. *See, State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003) (courts should assume the legislature meant exactly what it said and apply the text as written; they should refrain from rewriting, adding, or deleting statutory language).

If inclusion of that language *were* a requirement under MAR 7.1, it would be explicit. After all, the drafters know how to add this language when they intend it. *See, e.g.*, RCW 9A.72.085 (a sworn statement must be “certified or declared by the person to be true under penalty of

perjury”); RCW 7.70.065(2) (informed consent for health care of incompetent person calls for, among other things, declaration “under penalty of perjury”); RCW 11.20.020(2) (requiring “sworn statement” of witness to effectuate a will); RCW 43.43.842(1)(b) (vulnerable adult statute calls for statement “under penalty of perjury”).

Here, in contrast, this language is wholly absent from MAR 7.1. There is no principled reason to arbitrarily inject it into the statute. *See, Millay v. Cam*, 135 Wn.2d 193, 202, 955 P.2d 791 (1998) (when language is used in one instance, “but different dissimilar language is used in another, a difference in legislative intent is presumed.”). If the drafters deem it appropriate one day, that is their province—and the City will abide by it—but until then, it should not be inferred.

3. **The Trial Court Erroneously Relied on CR 5 and RCW 9A.72.085**

Despite the above analysis, Brackman argued that formal “proof of service” rules, under CR 5(b)(2)(B) and RCW 9A.72.085, apply—thereby leading the trial court into error. *CP 80*. This overlooks the clear holdings to the contrary by Washington’s appellate courts.

a. **MAR 1.3 Does Not Require Compliance with CR 5’s Requirements for “Proof of Service”**

The confusion about CR 5 stems from the language of MAR 1.3(b)(2):

Service. After a case is assigned to an arbitrator, all pleadings and other papers shall be served in accordance with CR 5 and filed with the arbitrator.

Brackman concluded—and the trial court concurred—that MAR 1.3(b)(2) not only requires compliance with CR 5’s rules for *service*, but also for *proof of service*. However, this analytical leap is not contemplated by the rules, nor the cases discussing them.

For example, the trial court’s order denying reconsideration first states that MAR 1.3 requires that service of arbitration documents comply with CR 5. The very next sentence then states that “CR 5(b)(2)(B) and RCW 9A.72.085 allow proof of service by mailing to be by...” *CP 80:17-19* (emphasis added). Indeed, Brackman’s initial motion to strike quotes MAR 1.3’s requirement that service comply with CR 5, then immediately jumps to an analysis of CR 5’s rules for proof of service. *CP 18:10-25*. This sleight of hand was incorrectly adopted as the state of the law.

There is an important difference between service and proof of service, and the trial court’s reliance on CR 5’s rules for proof of service is therefore misplaced. CR 5 addresses a wide variety of issues (*i.e.*, in person versus mail, on a party or on an attorney, service after final judgments, filing with the court, payment of judgments, and the like). There is nothing in CR 5 controlling MAR 1.3.

But more importantly, MAR 1.3 *only* requires compliance with CR 5 as it relates to service, not proof of service. This case presents no dispute regarding service. The only dispute involves the City's proof of service.

MAR 1.3 does not address proof of service. Again, the drafters of MAR 1.3 could easily have said “both service and proof of service must comply with CR 5.” But they did not. The rule only addresses service, and is completely silent on the requirements for proof of service. Given MAR 1.3's complete silence on the issue, there is no reason to infer that that MAR 1.3 nevertheless requires compliance with CR 5's rules for formal proof of service. Indeed, the law calls for the opposite result. *State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) (addition of language is never permissible unless it is “imperatively required to make the statute rational”).

b. The Case Law Does Not Transpose CR 5's “Proof of Service” Rules Onto The Arbitration Context

The trial court's decision is also inconsistent with the case law addressing the “proof that a copy has been served” language of MAR 7.1. Both the Washington Court of Appeals and the State Supreme Court have repeatedly, and emphatically, held that the requirements for formal proof

of service as contemplated under CR 5 do not apply in the arbitration context.

As noted above, the *Terry* Court rightly held that “the drafters of the MAR chose not to use the phrase “proof of service;” therefore, they must have contemplated something different from “proof of service” as it is ordinarily understood.” 109 Wn.App at 457. That same court specifically addressed the “affidavit” requirement of CR 5, holding that “the service requirements of MAR 7.1(a) do not mandate an affidavit of service.” *Id.* (emphasis added); *see also Alvarez v. Banach*, 153 Wn.2d 834, 839 (2005). Given the courts’ repeated pronouncements that “a party is not required to submit formal proof of service, such as affidavit of service” in the arbitration context, it is not logical to require compliance CR 5(b)(2)(B)—a rule titled “Proof of Service”—and unpredictably require sworn affidavits.

A party “needs to provide some evidence of the time, place, and manner of service.” *Id.* at 839. The City’s certificate of service provided that information, as is best evidenced by Brackman’s response and subsequent litigation of the matter. The trial court’s decision—based wholly on CR 5—constituted error and should be reversed.

4. **The Trial Court Erroneously Distinguished Between Personal Service And Mail Service**

Mr. Brackman also argued that the cases requiring “some evidence of the time, place, and manner of service” apply only when service is made in person, and that proof of service by mail requires something more formal under the arbitration rules. The trial court adopted this argument as well, concluding that “[t]here is a significant distinction between personal and service by mail... CR 5 describes precisely what is required to prove service by mail, but does not describe what is required to prove personal service.” *CP 80-81*. The trial court went on to reason that when service is made by mail, “proof that a copy has been served” requires formal compliance with CR 5(b)(2)(B)—and criminal statute RCW 9A.72.085.

This holding cannot be squared with MAR 7.1, nor with the case law analyzing it.

a. **CR 5 Does Not Apply to the “Proof” Required Under MAR 7.1**

First, while the trial court and Mr. Brackman cite several cases discussing the different sorts of proof required for personal versus mail service, *all of them* are addressing CR 5. The City agrees that CR 5 requires formal affidavits and sworn attestations. The unstated but faulty premise, however, is the assumption that compliance with CR 5 is implicitly required by the Mandatory Arbitration Rules. It is not.

As discussed above, the question is whether the certificate complied with MAR 7.1, not CR 5. Brackman’s reliance on CR 5 puts the cart before the horse by analyzing the requirements of a rule—while ignoring the logical leap it took to get there. CR 5 does not apply to the “proof” required under MAR 7.1, and the cases discussing CR 5’s proof of service requirements are therefore inapplicable here.

b. Neither MAR 7.1 Nor the Cases Analyzing it Distinguish Between Personal and Mail Service

Second, it is important to note that the cases discussing the “proof” required under MAR 7.1 are not discussing CR 5. They are discussing the plain language of MAR 7.1 itself. This is significant because although the plain language of CR 5 distinguishes between the two types of service, MAR 7.1 does not. In other words, it is illogical to interpret the MAR 7.1 “proof” cases as applying to only personal or mail service, since MAR 7.1 itself makes no such distinction.

For example, the Court of Appeals decision in *Terry* merely analyzed the plain language of MAR 7.1: “the drafters of the MAR chose not to use the phrase ‘proof of service;’ ... If the drafters had intended to require formal proof of service as that phrase is understood, they would have employed the phrase ‘proof of service’ instead of ‘proof that a copy has been served.’” 109 Wn. App. 448, 457 (2001). The *Terry* decision

made no distinction between personal or mail service, nor can any distinction be implied, since the Court was addressing the plain language of MAR 7.1, which has no such distinction.

Repeatedly, Washington Courts analyzing MAR 7.1 have held:

- “If the affidavit of service makes clear that mailed service was accomplished by operation of law within the deadline, the affidavit is sufficient under MAR 7.1(a).” *VanderPol v. Schotzko*, 136 Wn. App. 504 (2007)
- “We hold that an attestation of service is not required to provide the proof of service required by MAR 7.1.” *Sunderland v. Allstate Indem. Co.*, 100 Wn. App. 324 (2000)
- “[T]he service requirements of MAR 7.1(a) do not mandate an affidavit of service, but only ‘some evidence’ of the time, place, and manner of service.” *Terry, supra*, at 457.
- “[A] party is not required to submit formal proof of service, such as an affidavit of service, but merely needs to provide some evidence of the time, place, and manner of service.” *Alvarez, supra*, at 839

While each of these cases obviously involves only one type of service—personal or via mail—they do not limit their holding to one type or the other. The holdings in these cases are not based on what type of service is involved, but rather on the plain language of MAR 7.1. They simply observe that MAR 7.1 requires less than formal service, then discuss what type of proof is necessary.

To interpret these cases as limiting themselves to only personal service unnecessarily introduces conflict and limitations where none exists. Again, the cases discussing CR 5 should be limited to the type of service at issue in those cases—after all, CR 5 itself distinguishes between the “proof of service” required for each type of service. But limiting the MAR 7.1 cases to one type of service is based upon nothing textual: MAR 7.1 contains no such distinction.

In his briefing, Mr. Brackman relied upon several cases to argue that different proof is required for personal service versus mail service. However, the argument does not withstand scrutiny. Brackman relies, in large part, on *Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005), in making his argument regarding personal versus mail service. *See, Plaintiff's Brief*, 2:20-3:18 . However, the distinction between personal and mail service was important in that case because of the specific issue addressed. In *Alvarez*, the certificate stated that service would be made via messenger at a later date. *Id.* The Court noted that MAR 7.1 was written in the past tense, and therefore required proof that the request had already been served, so a certificate indicating future service was not sufficient. *Id.* The *Alvarez* Court's only reference to CR 5(b)(2)(B) was to observe that completion of mail service is “assumed after three days,” so that a certificate of mailing need not include the actual date of receipt.

Id. at 839. The *Alvarez* decision does not otherwise address the content of a certificate of service, and certainly does not pronounce any requirement to comply with CR 5 (b)(2)(B) in the arbitration context. So, while the distinction between personal service and service by mail was important in *Alvarez*, the same is not true here.

Brackman also relied on *Seto v. American Elevator*, 159 Wn.2d 767 (2007). But the sole issue in *Seto* was whether the arbitrator's award was timely served on the parties. The content of the certificate of service was not at issue. In fact, neither of the terms "CR 5(b)(2)(B)" or "content" appear anywhere in the *Seto* opinion. 159 Wn.2d 767 (2007).

The citation to *Manius v. Boyd* is likewise confusing.¹ The parties in *Manius* both conceded that CR 5(b)(2)(B) applied, and merely disputed the specifics of CR 5's requirements. 111 Wn. App. 764 (2002). Consequently, the *Manius* decision does not address the main dispute in the present case: whether or not CR 5(b)(2)(B) applies in the first place. Nor should the City in this case be held to the admissions of different parties in a different case decided more than eight years ago. Moreover, as discussed below, the *Manius* court explicitly held that even in light of

¹ As described earlier, the trial court's original Order striking the City's request for trial *de novo* had a single handwritten citation to *Manius v. Boyd* with no explanation or analysis. CP 53.

CR 5(b)(2)(B)'s requirements, MAR 7.1 does not require strict compliance. *Id.* at 770-771.

Brackman also repeatedly quoted *Carpenter v. Elway* for the observation that “CR 5(b)(2)(B) requires proof of service by mail in the form of a signed certificate of mailing.” However, that quote is from a mere footnote to the *Carpenter* decision and is inapplicable to the actual decision. 97 Wn. App. 977, 987 n. 4 (1999). *Carpenter* was a consolidation of four different cases with four different fact patterns, all of which concerned the timing of a *de novo* request as it relates to the arbitrator’s filing of the award with the Superior Court.² *Carpenter* is irrelevant to the issues here, and citation to a mere footnote from that case is unpersuasive.

c. “Time, Place, and Manner” Requirements Have Been Specifically Applied to Mail Service Under MAR 7.1

Finally, even if the cases discussing MAR 7.1 can be interpreted to distinguish between mail and personal service—which they cannot—it would not change existing precedent which provides that informal “time, place, and manner” requirements apply to service by mail.

² The *Carpenter* holding was as follows: “We hold that a request for a trial *de novo* is premature if filed before the arbitrator files proof of service and that a judgment on an arbitration award is not appealable until after the challenger has brought a CR 60 motion.” This holding is, on its face, inapposite to our issue.

In Manius v. Boyd, 111 Wn. App 764 (2002), the parties did not even dispute the applicability to CR 5(b)(2)(B). However, despite the fact that the certificate of mailing in that case did not comply with CR 5, the Manius court nevertheless held that striking the *de novo* request was inappropriate because “the certificate's various components constitute 'some evidence' of the time, place, and manner of service.” Manius, 11 Wn. App. at 770-771. Similarly, the plaintiff in VanderPol v. Schotzko complained that the certificate of mailing did not comply with the formal requirements of CR 5(b)(2)(B). 136 Wn. App. 504. The Court of Appeals held that such compliance was unnecessary: “If the affidavit of service makes clear that mailed service was accomplished by operation of law within the deadline, the affidavit is sufficient under MAR 7.1(a).” *Id.*

The cases addressing service by mail have held that MAR 7.1 does not require compliance with CR 5's rules for formal proof of service. All that is required under MAR 7.1 – regardless of whether service is in person or mail – is “some evidence of the time, place, and manner” of service.

Here, the City's certificate indicated the time, place, and manner of service on Brackman's attorneys. It was received and acted upon. The trial court erred by nevertheless striking it.

B. Even If Formal Proof of Service Were Required Under MAR 7.1, Substantial Compliance is Sufficient

Even assuming – contrary to the language of MAR 7.1 and the cases interpreting it—that formal proof of service under CR 5(b)(2)(B) is required by the Mandatory Arbitration Rules, the trial court erred in holding that substantial compliance was insufficient.

In the trial court proceedings, Brackman repeatedly argued that Washington courts require strict compliance “with regard to the filing and service requirements of MAR 7.1(a).” *CP 17*. The trial court agreed, holding that the case law “requires strict compliance with MAR and there are no cases which allow for less than strict compliance for proof of service by mail.” *CP 80:20-22*. Both the trial court and Brackman cite to *Nevers v. Fireside, Inc.*, 133 Wn.2d 804 (1997), in support of that proposition. *Nevers* does not support the proposition.

The *Nevers* decision only addressed the *timing* of service, and not the content of a proof of service. Indeed, the Court of Appeals has explicitly stated that “[t]he *Nevers* court expressly *declined* to decide whether the parties substantially complied with the filing of the proof of service required under MAR 7.1(a).” *Terry, supra*, at 453 (emphasis added).

Moreover, the statement that “there are no cases which allow for less than strict compliance for proof of service by mail” is demonstrably erroneous. As pointed out above, both Manius v. Boyd and VanderPol v. Schotzko approved of certificates of service by mail that constituted less than strict compliance with CR 5(b)(2)(B). In fact, the Manius opinion specifically states that “the proof of service of the request for trial *de novo* is not as strict as the Nevers requirements for filing the request for trial *de novo* itself.” Manius v. Boyd, 111 Wn. App. 764, 771 (2002). Even the State Supreme Court has held that strict compliance is not required for proof of service:

[W]hile we require strict compliance with the time requirements of filing a request for trial *de novo*, we have never required that the form of the proof of service requires strict compliance...

Alvarez v. Banach, 153 Wn.2d 834, 841 (2005) (*Chambers, Johnson, Sanders concurring*) (emphasis added).

The trial court’s conclusion that strict compliance is required for proof of service under MAR 7.1 is contrary to the language of the rule and the cases interpreting it. All that MAR 7.1 requires is “some evidence of the time, place, and manner of service.” The City’s certificate of service was sufficient under the case law.

C. **Requiring Formal Proof of Service Here Violates The Policy Behind The Rules**

Though the law is plain, as it applies to the issues in this case, the City must still note the troubling public policy consequences of the trial court's order. In addition to elevating foot-faults over the merits of the case, it runs contrary to what the rules strive to provide.

1. **Policy Behind Requiring "Penalty of Perjury" Language**

The first policy question is what purpose the "penalty of perjury" language serves. The trial court held that "requiring 'under penalty of perjury' language is important to ensuring that the statement that the documents have been mailed is true." *CP 81*. But as the record illustrates, Brackman's attorneys do not deny the certificate of service is true. They have never claimed—nor can they—that service was not accomplished exactly as described in the certificate of service. Any issues relating to the truthfulness of the document are not implicated. Perhaps the courts will need to adjudicate a case involving a faulty document one day, but that is not our facts. The truthfulness of the document has never been disputed.

In *Manius v. Boyd*, the Court of Appeals addressed an almost identical policy question. In *Manius*, the plaintiff complained that the "place of signing" was omitted from the certificate of service, yet did not

dispute that service had properly occurred. *Id.* The Court held that requiring strict compliance with proof of service rules “would serve no useful purpose, especially in the absence of an allegation that the Maniuses did not receive timely service or notice of the Boyds’ request for trial *de novo*.” *Manius, supra*, at 770. The *Manius* Court went on emphasize that requiring compliance with a formal rule in such a situation would be counterproductive, because:

a system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity.

Manius, supra, at 770 (citing *Reed v. Allen*, 286 U.S. 191, 209 S. Ct. 532, 76 L.Ed. 1054 (1932) (*Cardozo, dissenting*)).

The same concept was analyzed in *Sunderland v. Allstate*, 100 Wn.App 324 (2000). In *Sunderland*, the plaintiff “conceded that they had received the request in a timely manner, but argued that neither the date stamp nor the certificate of service constituted adequate proof of service as required by MAR 7.1. They contended that proof of service required an attestation that service was in fact effected.” *Id.* at 326. The court reversed the trial court’s dismissal of Allstate’s request for trial *de novo* because “[D]espite the Sunderlands’ descriptions of potential perils of service by legal messenger, they acknowledge that here, they did receive

the request for a trial *de novo* in a timely fashion via legal messenger delivery.” *Id.* at 329.

The same is true here; Brackman’s claims regarding the *potential* problems with an unsworn certificate of service are entirely hypothetical. Brackman does not dispute that service occurred exactly as described. The rules should be interpreted in accordance with their purpose, which is to ensure timely, accurate service. *See* CR 1; *Weeks v. Chief of Washington State Patrol*, 96 Wn.2d 893, 895-96, 639 P.2d 732 (1982) (the trend of modern law is to interpret court rules and statutes to allow decision on the merits of the case). Since this admittedly happened here, there is no reason to subvert the merits of the case based upon what is, at best, a semantic foot fault. The rights of the parties should not be curtailed based upon a concern that everyone agrees is not even implicated.

2. General Policy Considerations Behind the Court Rules

The civil rules at issue here, and case law discussing those rules, repeatedly warn against this sort of overly-technical, “gotcha” litigation. These warnings are especially pertinent in light of the Supreme Court’s holding that only substantial compliance is required for the content of a certificate of service under MAR 7.1. As one court explained:

Pragmatic considerations govern in reaching the overall objective stated in CR 1. Accordingly, a practical solution should be preferred to a technical one whose use might

result in frustrating the purpose of the superior court rules.
A practical solution is here possible.

Kohl v. Zemiller, 12 Wn. App. 370, 372, 529 P.2d 861 (1974).

Similarly, a practical solution was possible in the present case. Dismissing a case for certifying, but not “swearing,” to a fact that no one has disputes is not justice.

While it is true that “the primary purpose of the Mandatory Arbitration Rules is to ‘reduce congestion in the courts and delays in hearing civil cases,’” *CP 71*, it does not follow that the citizens of Lake Forest Park should be liable for tens of thousands of dollars in unproven damages and attorney’s fees, based upon failing to “swear” to something that is admittedly true. The arbitration rules do not encourage dismissal at all costs. Considerations of efficiency only qualify the true purpose of the rules: reaching the merits. The four magic words—under penalty of perjury—do not change this, especially when the cases reject such rigid formalities under MAR 7.1.

Dismissal of the City’s request for trial *de novo*, besides being legal error, is simply an unjust outcome.

V. CONCLUSION

MAR 7.1 does not require formal “proof of service” under CR 5 and RCW 9A.72.085, and substantial compliance is sufficient in any

event. This level of proof and procedure is, if anything, consistent with the overriding purpose and judicial interpretation of the rules: an expedient trial on the merits.

Accordingly, the trial court's dismissal of the City's request for trial *de novo* constituted error. The City of Lake Forest Park respectfully requests that its decision be reversed, and that this case be remanded for a trial on the merits.

DATED this 22nd day of June, 2010.

KEATING, BUCKLIN & McCORMACK,
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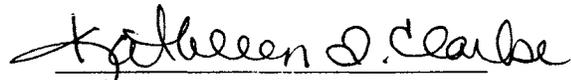
CERTIFICATE OF SERVICE

I hereby declare under penalty of perjury under the laws of the state of Washington that on the 23rd day of June, 2010, I caused a copy of the foregoing Brief of Appellants to be:

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

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