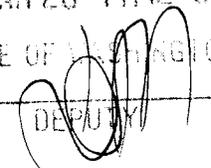


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  DEPUTY

No. 40959-3-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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SUPERIOR COURT OF WASHINGTON FOR CLARK COUNTY

LAURA MORELLO,

Plaintiff/Appellant

v.

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

Defendant/Respondent

---

BRIEF OF APPELLANT

---

WILLIAM H. REED  
Attorney for Appellant

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I. INTRODUCTION

In this matter, plaintiff (Petitioner herein) submitted her claim for Mandatory Arbitration. The arbitrator filed his decision with the clerk on April 21, 2010, and mailed copies to counsel for both parties on the same date. On May 11, 2010, counsel for defendant (Respondent herein) filed her Request for Trial de Novo. A copy was delivered by courier to counsel for plaintiff that same day. Proof of service consisted of a declaration by counsel for defendant, stating she had served plaintiff's counsel by hand delivering a copy of the Request for Trial de Novo. No proof of service showing actual receipt of the Request for Trial de Novo was filed.

On May 21, 2010, plaintiff filed her Motion to Strike Request for Trial de Novo and for Entry of Judgment. In support of her motion, plaintiff filed an affidavit of counsel, setting forth the factual basis for the request (see Statement of the Case, below). Defendant did not file any responsive document to controvert any of plaintiff's factual allegations.

At hearing on May 28, 2010, the trial court found that defendant had failed to strictly comply with the requirements of MAR 7.1(a), but had substantially complied with those requirements. The court denied

plaintiff's motion, based on defendant's substantial compliance with MAR 7.1(a). An order setting forth the trial court's specific findings was entered on June 11, 2010. Plaintiff's Request for Discretionary Review followed. Defendant has not filed any cross petition.

II. ASSIGNMENTS OF ERROR

Assignments of Error

The trial court erred by denying *Plaintiff's Motion to Strike Request for Trial De Novo and for Entry of Judgment*.

Issues Pertaining to Assignments of Error

1. Whether the trial court erred in denying *Plaintiff's Motion to Strike Request for Trial De Novo and for Entry of Judgment*, where the trial court entered a finding that the party requesting trial de novo failed to strictly comply with the requirements of MAR 7.1(a), but had substantially complied with the requirements of MAR 7.1(a).

2. Whether plaintiff is entitled to attorney fees and costs, pursuant to RAP 18.1, RCW 7.06.060 and MAR 7.3.

III. STATEMENT OF THE CASE

This matter arises from the defendant's request for trial de novo following mandatory arbitration. After the filing of an award under

Mandatory Arbitration Rules, the defendant, through counsel, filed a Request for Trial de Novo. Plaintiff filed a motion to strike the request for trial de novo and to enter judgment on the arbitration award, on the basis that the defendant had failed to strictly comply with the requirements of MAR 7.1(a). More specifically, the plaintiff alleged that the defendant had failed to file proof of actual receipt of the Request for Trial de Novo by the plaintiff or plaintiff's counsel. Un-controverted evidence was presented to the trial court that the defendant filed only proof of delivery of the Request for Trial de Novo to a legal courier, to be delivered to counsel for plaintiff and that no proof of actual receipt by the plaintiff or her counsel had been filed. Also presented to the trial court was un-controverted evidence demonstrating that the certificate of service attached to the defendant's Request for Trial de Novo did not establish accomplished service or delivery, only the method of intended service. The trial court found that the defendant had failed to strictly comply with the requirements of MAR 7.1(a). Nevertheless, the trial court denied plaintiff's motion, finding that the defendant had substantially complied with those requirements, and ordered that the matter be set for trial.

#### IV. ARGUMENT

##### 1. Standard of Review.

The appellate court reviews a superior court's legal decisions de novo. *Stout v. Johnson*, 38744-1-II (WACA). Here, the trial court has committed legal error in denying plaintiff's motion. No disputes of fact were presented to the trial court. Based on the un-controverted facts before it, the trial court ruled that substantial compliance with the requirements of MAR 7.1(a) was sufficient to preserve the request for trial de novo.

2. The Trial Court's Findings Were Based on Un-controverted Facts.

Counsel for plaintiff filed an affidavit supporting the motion to strike the request for trial de novo. The facts set forth in this affidavit establish that the certificate of service is inaccurate, in that it was not served by counsel for the defendant, but was delivered by courier. The affidavit also establishes the fact that delivery was not made until 4:20 p.m., that the Superior Court Clerk's office closed at 4:30 p.m., and that it would not have been possible to have filed the Request for Trial De Novo with the Clerk's office after delivery to plaintiff's counsel and before the Clerk's closing time. Therefore, the Certificate of Service filed with the court does not describe an accomplished fact of service. The affidavit further establishes that no proof of actual receipt by plaintiff or her counsel

was ever filed with the trial court. The affidavit further establishes that the Superior Court Case Summary shows that the Request for Trial De Novo was filed on May 11, 2010; it does not show the filing of any proof of actual service, on that day or any day thereafter.

Based on the un-controverted facts, it is clear that Respondent's Request for Trial De Novo, including the Certificate of Service, was filed first, then delivered by courier afterward. The Certificate of Service filed by Respondent does not describe an accomplished act. It does not state that Respondent's counsel personally served the Request for Trial De Novo. It does not state a time of delivery; it could not, as delivery had not occurred when the Certificate of Service was signed and filed. It is clear that defendant's counsel delivered the Request for Trial De Novo to a courier for delivery to plaintiff's counsel. The Certificate of Service only describes defendant's *intended* method of service. This is the issue that was squarely addressed in *Alvarez v. Banach*, 153 Wn.2d 834, 109 P3d 402 (2005), where the Court held that proof of actual receipt is necessary. "We employed the past tense when we promulgated the rule, which provides that the request for de novo must be filed in the Superior Court '[a]long with proof that a copy *has been served* upon all other parties appearing in the case.' ... Again, a party merely needs to file proof with the

superior court that the opposing party received a copy of its request for a trial de novo.” *Id.* at 840.

These facts were not controverted by the defendant. Unchallenged findings of facts are verities on appeal. *Davis v. Dept. of Labor & Industries*, 94 Wn.2d 119, 615 P.2d 1279 (1980); *Teel v. Stading*, 155 Wn. App. 390, 228 P.3d 1293 (2010).

3. A Party Requesting Trial De Novo Must Strictly Comply With MAR 7.1(a).

**MAR 7.1(a)**

MAR 7.1(a) provides in 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 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 within which to request a trial de novo may not be extended (emphasis added).

Strict compliance with the provisions of MAR 7.1(a) is required to preserve the right to request trial de novo; failure to do so prevents the court from conducting a trial de novo. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 811-812, 947 P2d 721 (1997). “[F]ailure to strictly comply with MAR 7.1(a)’s filing requirement prevents the Superior Court from conducting a trial de novo. It follows, we believe, that the requirement in

MAR 7.1.(a) that proof of service of copies of the request for trial de novo be filed is also a *prerequisite to obtaining a trial de novo.*” *Id.* (emphasis added). “[M]ere filing of the request is not, by itself, sufficient. The request must, according to that rule, be filed, ‘along with’ proof that a copy of it was served on all parties to the case. . . .*Both steps must be taken, and on this the rule is unambiguous.*” *Nevers* at 812 (emphasis added). Timely filing of a request for trial de novo is linked to the requirement that there be a filing of proof of timely service of the request. *Nevers* at 813. “*One act, in short, is not complete without the other.* That, as we have observed above, is made manifest by the clear language of MAR 7.1(a) to the effect that the request for trial de novo be filed ‘along with’ proof of service.” *Nevers* at 813-814 (emphasis added).

In *Alvarez v. Banach*, the court dealt with the exact issue presented in this matter. In that case, an arbitration award was filed on June 12, 2002. A request for trial de novo was filed on June 18, 2002. Filed with the request for trial de novo was a declaration signed by a secretary for the requesting party’s counsel, stating that on June 17, 2002, she had sent copies of the request for trial de novo to counsel for the other party via legal messenger service, to be delivered on June 18, 2002. The declaration also included the address of the other party’s attorney. The request for

trial de novo was actually received by counsel for the other party on June 19, 2002, well within the 20 day period set forth in MAR 7.1(a). The trial court granted a motion to strike the request for trial de novo, finding that the declaration of delivery was insufficient to comply with the dictates of *Nevers v. Fireside, Inc.* The trial court then entered a judgment on the arbitration award. On appeal, the Court of Appeals reversed the trial court, reasoning that proof of service requirements under the rule are not as strict as the *Nevers*' requirements for filing the request for trial de novo. On review, the Supreme Court reversed the Court of Appeals. In its opinion, the court discussed various methods of service allowed under the Civil Court Rules. At 839, the court stated, "There is no corresponding rule establishing that receipt is assumed where service is executed by legal messenger." At page 840 of its opinion, the court discussed its prior holding in the *Nevers* case, and stated, "We employed the past tense when we promulgated the rule, which provides that the request for de novo must be filed in the Superior Court '[a]long with proof that a copy *has been served* upon all other parties appearing in the case.'" In discussing the reasoning of the Court of Appeals, the court stated, "it erroneously concluded that the proof need only be in the form of a declaration of delivery indicating the time, place, and manner of *intended* service." *Id.*

“A declaration of delivery stating that a copy is ‘to be delivered,’ without more, does not satisfy that requirement. Again, a party merely needs to file proof with the superior court that the opposing party *received* a copy of its request for trial de novo.” *Id.* (emphasis added) In its conclusion, the court stated, “We hold that Banach failed to timely file proof that a copy of the request for trial de novo had been served on Alvarez.” *Id.*

The present case presents the same fact pattern as that in *Alvarez* . Here, defendant served counsel for plaintiff by courier, or legal messenger. The Certificate of Service *does not* set forth the time, place, and manner of service, as required under *Nevers* and *Alvarez*; it *does not* show actual receipt of the Request for Trial De Novo. Defendant has not filed, let alone timely filed, *any* document showing actual receipt of the Request for Trial De Novo by plaintiff or her counsel. Based on the un-controverted facts, the Certificate of Service merely sets forth the *intended* method of service.

Compliance with the requirements of MAR 7.1(a) is not difficult. Defendant waited until the last minute to file her Request for Trial de Novo. However, because the arbitrator had mailed his decision to the parties, she still had three more days to have the courier sign an affidavit of service and to file it with the trial court. See *Seto v. American*

*Elevator, Inc.*, 159 Wn.2d 767, 154 P.3d 189 (2006). She did not do so. Instead, she chose to rely on a declaration which set forth the method of *intended* service.

The trial court made specific findings. The court found that defendant had failed to strictly comply with the requirements of MAR 7.1(a), but had substantially complied. Those findings have been unchallenged at the trial court level and at this level. The trial court erred when it denied *Plaintiff's Motion to Strike Request for Trial De Novo and for Entry of Judgment* on the basis that substantial compliance with the requirements of MAR 7.1(a) was sufficient.

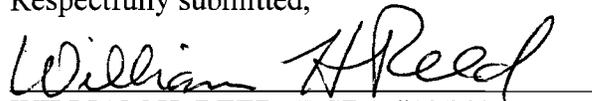
V. ATTORNEY FEES AND COSTS

Pursuant to RAP 18.1, plaintiff requests attorney fees and costs on appeal. MAR 7.3 and RCW 7.06.060 provide that a party who fails to improve his or her position after requesting trial de novo will be responsible for the other party's attorney fees and costs incurred after the request has been filed. If the trial court is reversed, and judgment is entered on the arbitration award, the defendant will not have improved her position after requesting trial de novo. See *Hudson v. Hapner*, \_Wn.2d\_ , 239 P.3d 579, 584-6 (2010).

VI. CONCLUSION

The defendant failed to strictly comply with the requirements of MAR 7.1(a). The trial court's order denying plaintiff's motion should be reversed, the defendant's Request for Trial De Novo should be stricken, and judgment should be entered on the arbitration award. Plaintiff should be awarded her attorney fees and costs incurred following the request for trial de novo.

Respectfully submitted,

A handwritten signature in black ink that reads "William H. Reed". The signature is written in a cursive style and is positioned above a horizontal line.

WILLIAM H. REED, WSBA #13764

Attorney for Appellant

COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

DEPUTY

CERTIFICATE OF SERVICE

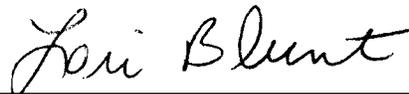
I hereby certify that I served the foregoing *Brief of Appellor* on the following attorney at the address listed below:

Maria Liesl "Sam" Ruckwardt  
Smith Freed & Eberhard, P.C.  
111 SW Fifth Avenue, Suite 4300  
Portland, OR 97204

by facsimile to (503)227-2535, and by mailing full, true and correct copies thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office addresses of the attorney, and deposited with the United States Postal Service at Vancouver, Washington on the date set forth below.

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

Executed at Vancouver, Washington this 19<sup>th</sup> day of January, 2011.



\_\_\_\_\_  
Lori Blunt, Legal Assistant  
Law Office of William H. Reed, P.C.