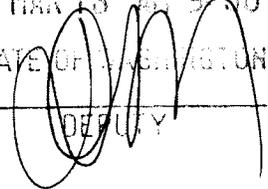


COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
BY  DEPUTY

No. 40959-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

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

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

In her responsive brief, respondent/defendant Vonda fails to address the basis of appellant/plaintiff Morello's request for review: The trial court's ruling that substantial compliance is sufficient under MAR 7.1(a) to preserve a request for trial de novo. Instead, the defendant attempts to re-cast the issue in such a manner as to entirely avoid this question.

B. STANDARD OF REVIEW

On appeal, review is limited to determining whether substantial evidence supports the trial court's findings of fact and, if so, whether the findings support the trial court's conclusions of law. *Hegwine v. Longview Fibre Co., Inc.*, 132 Wn. App. 546, 555, 132 P.3d 789 (2006); *Palermo at Lakeland, LLC v. City of Bonney Lake*, 147 Wn. App. 64, 76-77, 193 P.3d 168 (2008); *Erickson v. Chase*, 156 Wn. App. 151, 160, 231 P.3d 1261 (2010). The trial court can only determine findings of fact and conclusions of law based on facts actually before the court. Factual disputes will not be retried upon appeal. *DeBlasio v. Town of Kittitas*, 57 Wn.2d 208, 211, 356 P.2d 606 (1960). Unchallenged findings of fact are verities on appeal. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d

801, 808, 828 P.2d 549 (1992); *Nearing v. Golden States Foods Corp.*,

114 Wn.2d 817, 818, 792 P.2d 500 (1990); *Erickson v. Chase* at 160.

C. DEFENDANT FAILS TO ADDRESS THE PLAINTIFF'S ARGUMENT THAT THE TRIAL COURT APPLIED THE INCORRECT STANDARD

Nowhere in her responsive brief has the defendant responded to the argument that the trial court applied the incorrect standard in its decision.

In its order, and in the transcript of proceedings submitted in this matter, it is clear that the trial court ruled that substantial compliance with the requirements of MAR 7.1(a) was sufficient to preserve a request for trial de novo. Defendant sets forth no authority that the standard applied by the trial court is the correct standard. There is no such authority. Strict compliance is required to preserve a request for trial de novo. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 947 P.2d 721 (1997); *Alvarez v. Banach*, 153 Wn.2d 834, 109 P.3d 402 (2005). In fact, defendant goes to great lengths to attempt to bring her deficient certificate of service within the strict compliance standard. Defendant acknowledges that strict compliance is required under MAR 7.1(a).

D. DEFENDANT FAILED TO SEEK CROSS-REVIEW OR CROSS-APPEAL OF THE TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

Defendant has not sought any cross-review or cross-appeal of the

trial court's Findings of Fact or Conclusions of Law in this matter. For the first time, in her reply brief, defendant asks this court to reverse the trial court's Finding of Fact No. 6 and Conclusion of Law No. 1 (the defendant does not contest Findings of Fact No.'s 1-5 or Conclusion of Law No. 2). To preserve a request for affirmative relief, a respondent must also seek review of the trial court's decision by timely filing of a notice of appeal or a notice of discretionary review. RAP 2.4(a); *Wagner v. Beech Aircraft Corp.*, 37 Wn. App. 203, 212-213, 680 P.2d 425 (1984); *North Coast Elec. Co. v. Selig*, 136 Wn. App. 636, 646-647 151 P.3d 211 (2007); *Genie Industries, Inc. v. Market Transport, Ltd.*, 138 Wn. App. 694, 707, 158 P.3d 1217 (2007).

Defendant states that she is not seeking affirmative relief, yet asks this court to reverse the trial court's Finding of Fact No. 6 and Conclusion of Law No. 1. Where a respondent is asking the Appellate Court to affirm the trial court on an alternate theory which was explicitly rejected by the trial court, the respondent must also file a notice for review or appeal. *Strother v. Capitol Life Ins. Co.*, 68 Wn. App. 224, 240, footnote 37, 842 P.2d 504 (1992); RAP 2.4(a); RAP 5.1(d).

Here, the trial court specifically rejected the theory that defendant had strictly complied with the requirements of MAR 7.1(a). RP, pg. 16,

lines 15-21. The defendant did not file any specific written objection to plaintiff's proposed findings. CP 53, 54, 58, 59. At the hearing for entry of the order, the defendant did not place any specific objection to any of the proposed findings on the record. RP 12-18. At best, all that can be said is that defendant raised some non-specific objection that the trial court had not actually enunciated plaintiff's proposed findings at the hearing on plaintiff's motion to strike defendant's Request for Trial De Novo. Id. No exception to any proposed finding of fact or conclusion of law was ever placed on the record by defendant. Id. The defendant has failed to preserve her right to seek reversal of the trial court's Findings of Fact and Conclusions of Law. The only issue on appeal is whether the trial court erred in ruling that substantial compliance with the requirements of MAR 7.1(a) is sufficient.

E. THE TRIAL COURT'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE

At the trial court, plaintiff submitted documentary evidence setting forth facts upon which the trial court based its Findings of Fact. CP 49, 50. The defendant did not file any documentation to controvert the facts set forth by the plaintiff. CP 53, 54, 58, 59. The uncontroverted facts, as established by the pleadings, included the facts that the defendant's

certificate of service was signed before any documents were delivered to counsel for plaintiff, that the person who signed the declaration of service did not actually deliver the Request for Trial De Novo, that the Request for Trial De Novo was filed before it was delivered to plaintiff's counsel, and that defendant filed no subsequent document showing *actual receipt* of the Request for Trial De Novo by plaintiff or her counsel. On pages 8 and 9 of her brief, defendant acknowledges that the Request for Trial De Novo was in fact delivered by courier. These unchallenged facts are verities on appeal. ***Cowiche Canyon Conservancy v. Bosley, Nearing v. Golden States Foods Corp., Erickson v. Chase***, supra.

In Finding of Fact No. 6, the trial court found that the defendant had not filed any pleading that demonstrated *actual receipt* of the Request for Trial De Novo by plaintiff or her counsel. The only evidence of delivery was the certificate of service signed by defendant's counsel prior to filing, prior to being given to a courier, and prior to delivery of defendant's Request for Trial De Novo. Defendant did not file any proof of service signed by the person actually making delivery; and has cited no authority that a certificate of service signed by someone other than the person making actual delivery is sufficient. Defendant's argument that her certificate of service demonstrates actual receipt is a legal conclusion and

is not supportable. There is substantial evidence in the record to support the court's Finding of Fact No. 6.

F. **THE TRIAL COURT'S FINDINGS OF FACT SUPPORT ITS CONCLUSIONS OF LAW**

The trial court's Findings of Fact support its Conclusion of Law No. 1. The trial court ruled that, based on the uncontroverted facts before it, defendant had failed to strictly comply with the requirements of MAR 7.1(a). In *Alvarez v. Banach*, 153 Wn.2 834, 840, 109 P.3d 402 (2005) the court "employed the past tense" when it held that proof had to demonstrate that a copy of the Request for Trial De Novo "has been served" upon other parties in the case. "Again, a party merely needs to file proof with the Superior Court that the opposing counsel *received* a copy of its Request for Trial De Novo." *Id.* (emphasis added).

As in *Alvarez*, the defendant in this case delivered her Request for Trial De Novo to a courier to be delivered to plaintiff's counsel. As in *Alvarez*, a declaration of service was signed, prior to being given to a courier, which did not demonstrate actual receipt by the opposing party. As in *Alvarez*, no proof, signed by the person actually making delivery, was subsequently filed to show actual receipt by plaintiff or her counsel.

Defendant attempts to distinguish *Alvarez* on the basis that (1)

rather than being signed by a secretary, the certificate of service in this case was signed by an attorney, and (2) the certificate states that the Request for Trial De Novo *was* delivered as opposed to the statement that it was *to be* delivered. In essence, the defendant is taking the position that she can do the same thing that was done by the defendant in the *Alvarez* case, call it something different, and avoid the holding of the *Alvarez* court.

At page 7 of her brief, the defendant further attempts to avoid the holding of *Alvarez* by stating the presumption of delivery discussed by the *Alvarez* court does not apply in this case. However, the defendant is asking this court to confer a presumption of delivery on a declaration of service, which has been shown to be inaccurate by uncontroverted evidence. The heading of Section VII.2 of defendant's brief states that her declaration is "on its face some proof of actual service sufficient to satisfy MAR 7.1(a)." The defendant, however, does not provide any authority for that position in her brief. Even if such a declaration was some sort of facial proof of service, the accuracy of the declaration was rebutted by plaintiff by the uncontroverted facts submitted to the trial court.

At page 8 of her brief, the defendant states that result would be different if the courier had switched the order of delivery. That argument

is flawed. Even in that circumstance, there would be no proof of service signed by the person actually delivering the documents. In *Alvarez*, at 840, the court discusses that receipt is assumed when mailed pursuant to CR 5(b)(2)(A). In that scenario, the certificate of mailing would still be signed by the person actually depositing the documents to be served in the mail. In this case, no proof of service, signed by the person delivering the Request for Trial De Novo, was ever filed with the court.

At page 9 of her brief, the defendant states, “The fact that counsel for Vonda stated that ‘I’ served ‘by hand delivering’ when indeed a courier made the delivery is inconsequential;...” It is *not* inconsequential. It is the statement, under oath, by counsel for one of the parties. The accuracy of counsel’s representations to the court is extremely important. That kind of inaccuracy seemed important to the court in *Alvarez*.

G. CONCLUSION

In some regards, the holding of the court in *Alvarez* can appear to be harsh. However, compliance with the requirements of MAR 7.1(a) is not difficult. The legislative intent of mandatory arbitration is to “reduce congestion in the courts and delays in hearing civil cases.” *Nevers v.*

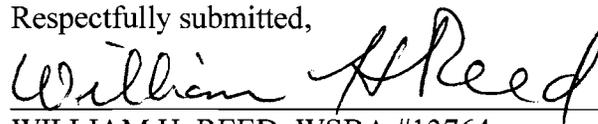
Fireside, Inc., 133 Wn.2d 804, 815, 947 P.2d 721 (1997); *Perkins Coie v. Williams*, 84 Wn. App. 733, 737, 929 P.2d 1215 (1997); *Sorenson v.*

Dahlen, 136 Wn. App. 844, 858, 149 P.3d 384 (2006). The holding in *Alvarez* is consistent with this legislative intent.

The trial court concluded that the defendant failed to strictly comply with the requirements of MAR 7.1(a). That conclusion is supported by the trial court's Findings of Fact, which are based on uncontroverted factual evidence. Substantial evidence exists to support the trial court's Findings of Fact.

The trial court denied plaintiff's Motion to Strike Request for Trial De Novo based on its conclusion that the defendant had substantially complied with the requirements of MAR 7.1(a). In ruling that substantial compliance is sufficient to preserve a request for trial de novo, the trial court erred. That is the sole issue on appeal.

Respectfully submitted,

A handwritten signature in cursive script that reads "William H. Reed". The signature is written in black ink 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
BY 
DEPUTY

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing *Appellant's Reply Brief* on the following attorneys at the address listed below:

Stephen Archer
Maria Liesl "Sam" Ruckwardt
Smith Freed & Eberhard, P.C.
111 SW Fifth Avenue, Suite 4300
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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 attorneys as shown above, the last-known office addresses of the attorneys, 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 17th day of March, 2011.



William H. Reed, WSBA #13764
Law Office of William H. Reed, P.C.