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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,

v.

HERBERT BRACKMAN,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

I. INTRODUCTION..... 1

II. RESPONSE TO ASSIGNMENTS OF ERROR.....1

III. STATEMENT OF THE CASE.....1

IV. ARGUMENT.....4

 A. Compliance With CR 5(B)(2)(B) Is Required For
 Proof Of Mailing Under MAR 7.1(a).4

 B. Washington Case Law Distinguishes Between
 Personal Service and Service By Mail for
 Purposes Of Compliance With CR10

 C. The City's Proof of Mailing Fails to Comply With
 CR 5(b)(2)(B) Substantially or Otherwise.16

 D. Policy Behind the "Penalty of Perjury" Requirement...18

 E. The City's Proof of Mailing Does Not Constitute
 "Some Evidence of the Time, Place and Manner
 Of Service" Because the Trial Court Did Not
 Consider it to be Evidence At All.23

 F. The City's Failure to Improve Its Position Triggers
 The Attorney's Fee Statute, And Attorney's Fees
 And Costs Should Be Awarded.26

V. CONCLUSION.....27

TABLE OF AUTHORITIES

Page

WASHINGTON CASES

Alvarez v. Banach, 153 Wn.2d 834, 109 P.3d 402 (2005)....5,9,10,11,12,22

Brown v. Scott Paper Worldwide Co., 143 Wn.2d 349 (2001).26

Carpenter v. Elway, 97 Wn. App. 977 (1999).12,13,14,22,24

Chai v. Kong, 122 Wn.App. 247, 253, 93 P.3d 936 (2004).10

In re Estate of Starkel, 134 Wn.App. 364, 375,7,16
134 P.3d 1197 (2006).

Inman v. Netteland, 95 Wn. App. 83, 974 P.2d 365 (1999).22

Johnson v. King County, 148 Wn.App. 220,16
198 P.3d 546 (2009).

Kim v. Pham, 95 Wn. App. 439, 975 P.2d 544 (1999).27

Manius v. Boyd, 111 Wn.App. 764 (2002).....3,4,7,9,11,14,16,17,21

Nevers v. Fireside, Inc., 133 Wn.2d 804, 810 n. 3,4,9,14,20
947 P.2d 721 (1997).

Newton v. Legarsky, 97 Wn. App. 375, 984 P.2d 417 (1999).22

Perkins Coie v. Williams, 84 Wn.App. 733, 737,20
929 P.2d 1215, *review denied*, 132 Wash.2d 1013,
940 P.2d 654 (1997).

Raymond v. Pac. Chem., 98 Wn.App. 739,26
744 n. 1, 992 P.2d 517 (1999).

Seto v. American Elevator, Inc., 159 Wn.2d 767,5,6,9
776, 154 P.3d 189 (2007).

Sunbreaker Condo. Ass'n v. Travelers Ins. Co.,26
79 Wn.App. 368, 372, 901 P.2d 1079 (1995).

Sunderland v. Allstate, 100 Wn.App. 324 (2000)....8,10,12,13,14,23,24,25

<i>Terry v. City of Tacoma</i> , 109 Wn. App. 448 (2001).	10,11,12,14,24,25
<i>Vanderpol v. Schotzko</i> , 136 Wn. App. 504 (2007).	15,18,19
<i>Wilkerson v. Wegner</i> , 58 Wn. App. 404, 408, fn. 2,	18,21
793 P.2d 983 (1990).	

STATUTES

RCW 9A.72.085	1,7,8,16,17,18,21,22,23,25,26,27
-------------------------	----------------------------------

RULES

CR 4(g)(7)	14,24
CR 5	4,5,9,10,11,12,15
CR 5(b)	10
CR 5(b)(2)	5,6,7,10
CR 5(b)(1)	5,11,12,13,15,24
CR 5(b)(2)(A)	5,9,11,19
CR 5(b)(2)(B)	1,2,4,5,6,7,8,9,10,11,13,15,16,25,27
GR 13	7,16,25
GR 13(a)	26
MAR 1.3	9,10
MAR 1.3(b)(1)	5
MAR 1.3(b)(2)	4,5,6,12
MAR 6.2	13,14
MAR 7.1	3,8,22,27
MAR 7.1(a)	1,3,4,10,13,14,15,22,23,24,25,26
MAR 7.3	26,27

I. INTRODUCTION

Respondent Herbert Brackman (“Brackman”) respectfully requests that the Court of Appeals affirm the Superior Court’s Order striking the City of Lake Forest Park’s (“the City”) Request for Trial De Novo.

In striking the City’s Request for Trial De Novo, the Superior Court correctly applied CR 5(b)(2)(B) and RCW 9A.72.085 to proof of mailing of a Request for Trial De Novo under MAR 7.1(a), and found that the City’s certificate of mailing, which was not attested to “under penalty of perjury,” neither strictly complied nor substantially complied with MAR 7.1(a)’s proof of service requirements.

II. RESPONSE TO ASSIGNMENTS OF ERROR

The City has not identified errors that would justify reversing the Superior Court. The Superior Court Judge correctly held that (1) the requirements of CR 5(b)(2)(B) and RCW 9A.72.085 apply to proof of mailing of a Request for Trial De Novo under MAR 7.1(a); and (2) that the City’s unsworn certificate of mailing did not strictly comply or even substantially comply with these requirements.

III. STATEMENT OF THE CASE

This is a personal injury action arising out of a bicycle vs. motor vehicle accident on September 1, 2007.¹ An Arbitration Award in favor of the Brackman against the City was rendered on June 10, 2009.² On June 17, 2009, Defendant's attorney filed a Request for Trial De Novo along with a Certificate of Service by mail dated June 15, 2009.³ Defendant's Certificate of Service by mail is signed by, Heather Hegeman, defense counsel's legal assistant,⁴ and states in pertinent part as follows:

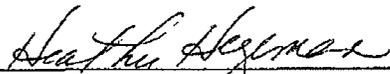
CERTIFICATE OF SERVICE

I hereby certify that on June 15, 2009, I caused a copy of Defendant's REQUEST FOR TRIAL DE NOVO to be:

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

from Seattle, Washington, to the following party:

Robert Windes
Moran Windes & Wong PLLC
5608 17th Ave NW
Seattle, WA 98107-5207


Heather Hegeman

Brackman moved to strike the City's Request for Trial De Novo on the basis that the City's proof of mailing failed to comply with CR 5

¹ CP 4.

² CP 7.

³ CP 27-28.

(b)(2)(B), since Ms. Hegeman is not an attorney and the certificate is not an affidavit.⁵ Brackman argued that no document evidencing proof of service on counsel for Plaintiffs was filed within the 20-day period as required by MAR 7.1, because the only document evidencing proof that the Request was mailed to Plaintiffs' counsel is an unsworn statement, and therefore, is not proof at all.⁶ Therefore, the City's Request for Trial De Novo is defective as a matter of law.⁷

The Superior Court granted Brackman's motion based on the Court of Appeal's holding in *Manius v. Boyd*, 111 Wn.App. 764 (2002).⁸ The City subsequently moved for reconsideration and, after additional briefing from the parties, the Court denied reconsideration.⁹ The Court found that, "Whether applying the strict compliance standard, which is the correct standard of proof of service by mail, or even applying the substantial compliance standard allowed for proof of personal service, the certificate of mailing missing the language 'under penalty of perjury' falls short of the requirements of MAR 7.1(a)."¹⁰

⁴ CP 29.

⁵ CP 13-24.

⁶ Id.

⁷ Id.

⁸ CP 52-53.

⁹ CP 80-83.

¹⁰ CP 81.

IV. ARGUMENT

This case presents the question of what is required under MAR 7.1(a), to adequately prove service of a request for trial de novo by mail. The gist of the City's argument on appeal rests upon the mistaken assumption that compliance with CR 5(b)(2)(B) is not required under MAR 7.1. As discussed below, the Court of Appeals addressed this issue in *Manius v. Boyd*, 111 Wn.App. 764, 47 P.3d 145 (2002), and held that CR 5(b)(2)(B) applies to proof of mailing of a Request for Trial De Novo under MAR 7.1(a).

A. Compliance With CR 5(B)(2)(B) Is Required For Proof Of Mailing Under MAR 7.1(a)

MAR 7.1(a) provides in pertinent part as follows:

Service and Filing. Within 20 days after the arbitration award is filed with the clerk, any aggrieved party not having waived the right to appeal may serve and file with the clerk a written request for a trial de novo in the superior court **along with proof that a copy has been served upon all other parties** appearing in the case. The 20-day period within which to request a trial de novo may not be extended....

MAR 7.1(a) (emphasis added). MAR 1.3(b)(2) requires service of all arbitration papers to comply with CR 5. *See Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 810 n. 3, 947 P.2d 721 (1997) ("According to MAR 1.3(b)(2), all pleadings and other papers should be served in accordance with CR 5."). The Supreme Court reiterated the applicability of CR 5's service

requirements under the MAR in *Alvarez v. Banach*, 153 Wn.2d 834, 109

P.3d 402 (2005):

Under the Mandatory Arbitration Rules, all pleadings and other papers are to be served in accordance with Court Civil Rules (CR) 5 after a case is assigned to an arbitrator. MAR 1.3(b)(2). CR 5 provides that service on an attorney or party shall be made by personal delivery or mail. CR 5(b)(1). **The rule provides that proof of service by mail “[m]ay be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by the certificate of an attorney.” CR 5(b)(2)(B).** Proof of service by mail is not deemed complete until the third day after mailing. CR 5(b)(2)(A).

Alvarez v. Banach, 153 Wn.2d at 838 (emphasis added).¹¹

In *Seto v. American Elevator, Inc.*, 159 Wn.2d 767, 776, 154 P.3d 189 (2007), the Supreme Court held again that CR 5(b)(2) governs service by mail of all documents requiring service under the MAR:

MAR 1.3(b)(1) provides that the MAR, rather than the CR, governs arbitration procedure after a case has been assigned to an arbitrator, “except where an arbitration rule states that a civil rule applies.” MAR 1.3(b)(2) requires: “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.” Service requirements, such as acceptable forms of service, are not addressed anywhere else in the MAR. Presumably, then, the drafters of the MAR intended MAR

¹¹ Appellant’s Brief incorrectly states that, “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.’” Brief of Appellant, p. 15. In fact, the 3 day rule is found under CR 5(b)(2)(A) while CR 5(b)(2)(B) provides for the permissive forms for proof of mailing. The *Alvarez* Court clearly recognized the distinction between these two subsections.

1.3(b)(2) to apply to all documents requiring service under the MAR, regardless of whether filed by a party or by the arbitrator. Therefore, service of an arbitration award is governed by CR 5.

CR 5(b)(2) provides for service by mail. It describes both how service by mail must be made and permissible forms of proof of service by mail.

Seto v. American Elevator, Inc., 159 Wn.2d at 776 (emphasis added).¹²

While the Supreme Court in *Seto* addressed the service of an arbitration award by the arbiter (as opposed to service of a Request for Trial De Novo by the aggrieved party), the Court clearly held that MAR 1.3(b)(2) and CR 5(b)(2) apply to “**all documents** requiring service under the MAR, regardless of whether filed **by a party** or by the arbitrator.” *Id.* (emphasis added). In other words, CR 5(b)(2) governs the service by mail of the City’s Request for Trial De Novo in this case in both the manner of service and in the permissive forms of proof of mailing.

In pertinent part, CR 5(b)(2) provides the methods for both the manner of service and proof of service by mail as follows:

(2) Service by mail.

¹² Despite this clear statement in *Seto* regarding the applicability of CR 5(b)(2) in MAR proceedings, Appellant’s Brief dismisses *Seto* and misleadingly states that “neither of the terms ‘CR 5(b)(2)(B)’ or ‘content’ appear anywhere in the *Seto* opinion. Brief of Appellant, p. 16.

(A) How made. If service is made by mail, the papers shall be deposited in the post office addressed to the person on whom they are being served, with postage prepaid . .

(B) Proof of service by mail. Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, **by affidavit of the person who mailed the papers**, or by certificate of an attorney. The certificate of an attorney may be in form substantially as follows:

CERTIFICATE

I certify that I mailed a copy of the foregoing _____ to (John Smith), (plaintiff's) attorney, at (office address or residence), and to (Joseph Doe), an additional (defendant's) attorney (or attorneys) at (office address or residence), postage prepaid, on (date).

(John Brown)
Attorney for (Defendant)

CR 5(b)(2) (Emphasis added). If the person who mailed the papers is a non-attorney, CR 5(b)(2) requires proof of mailing to be in the form of an affidavit. As discussed below, our Courts have held that a declaration is sufficient as an affidavit of service under CR 5(b)(2)(B)(2) as long as it complies with GR 13 and RCW 9A.72.085. *See In re Estate of Starkel*, 134 Wn.App. 364, 375, 134 P.3d 1197 (2006), *citing Manius v. Boyd*, 111 Wash.App. 764, 47 P.3d 145 (2002).

In *Manius v. Boyd*, *supra*, the Court of Appeals confirmed that an affidavit of service may be substituted by a declaration under penalty of

perjury for purposes of proving service by mail of the Request for Trial De

Novo under MAR 7.1 and of CR 5(b)(2)(B):

CR 5(b)(2)(B) enumerates three forms of proof of service: (1) written acknowledgement of service; (2) an affidavit of the person who mailed the papers; or (3) a certificate of an attorney. Here, we address the second form—an affidavit (a sworn “certificate”) FN4 of the person who mailed the de novo trial request, Sandra Barlow. **The trial court recognized that a declaration under penalty of perjury may be substituted for the CR 5(b)(2)(B) forms for proof of service if the requirements of RCW 9A.72.085 are met. We agree.**

FN4. We also made a passing reference to the attestation requirement for MAR 7.1 service-by-mail in *Sunderland*, 100 Wash.App. at 328, 995 P.2d 614:

[T]he CR 5(b)(2)(B) attestation requirement for service by mail also applies to service by delivery and requires a sworn statement by the messenger that service did in fact occur; and that proof of service must be done by attestation in light of [the] Nevers policy of strict compliance.

RCW 9A.72.085 sets forth the requirements for attestation as follows:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the

official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (1) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (2) Is subscribed by the person;
- (3) States the date and place of its execution; and
- (4) States that it is so certified or declared under the laws of the state [sic] of Washington.

The certification or declaration may be in substantially the following form:

‘I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.’

Manius, 111 Wash. App. at 768-769 (emphasis added). In this case, the City attempted to serve its Request for Trial De Novo by mail. Thus, pursuant to *Nevers*, *Alvarez*, *Seto*, and *Manius*, CR 5(b)(2)(B) governs the proof of mailing of the City’s Request.

The City spends a great deal of its briefing on the “important difference between service and proof of service,” arguing that MAR 1.3 only requires compliance with CR 5 as it relates to service, not proof of service. Appellant’s Brief, pp. 8-10. Essentially, the City asserts that although CR 5(b)(2)(A) applies to this case, CR 5(b)(2)(B) does not. The

City's assertion is unsupported by any authority. No case has ever made such a distinction for purposes of MAR 1.3. Instead, the cases cited herein clearly hold that MAR 1.3 requires compliance with CR 5(b) in its entirety, not just a portion of it. The trial court correctly held that CR 5(b)(2)(B) applies to this case.

B. Washington Case Law Distinguishes Between Personal Service and Service By Mail For Purposes of Compliance With CR 5

Service by mail requires strict compliance. This Court has held that service by mail under CR 5(b)(2) requires strict compliance as opposed to personal service, which requires only substantial compliance. *See Chai v. Kong*, 122 Wn.App. 247, 253, 93 P.3d 936 (2004) ("The substantial compliance doctrine, however, applies only to *personal* service, not service by mail."). As discussed below, Washington case law has repeatedly upheld this important distinction as it pertains to proof of service of a Request for Trial De Novo under MAR 7.1(a).

The City's reliance upon *Terry v. City of Tacoma*, 109 Wn. App. 448 (2001), *Sunderland v. Allstate*, 100 Wn.App. 324 (2000), and the Supreme Court's opinion in *Alvarez v. Banach*, 153 Wn.2d 834 (2005), to argue that all that is required to prove service by mail is "some evidence of the time, place, and manner of service" does not apply to service by mail. As they relate to the form for proof of service, each of those cases is

distinguishable from this case, and the case upon which the plaintiff principally relies, *Manius v. Boyd*, 111 Wn. App. 764 (2002), because those cases involved service of a request for trial de novo by personal service. The *Alvarez* Court recognized that, “*Manius* is inapplicable to the case before us because it involved service by mail where receipt is assumed after three days. See CR 5(b)(2)(A).” *Alvarez*, 153 Wn.2d at 839

In *Alvarez supra*,, the proof of service issue before the Court involved personal service under CR 5(b)(1). The *Alvarez* Court noted that the affidavit requirement for service by mail under CR 5(b)(2)(B) is separate and distinct from the proof of service requirements of personal delivery, which merely requires some evidence of time, place, and manner of delivery:

CR 5 provides that service on an attorney or party shall be made by personal delivery or mail. CR 5(b)(1). The rule provides that proof of service by mail “[m]ay be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by the certificate of an attorney.” CR 5(b)(2)(B). Proof of service by mail is not deemed complete until the third day after mailing. CR 5(b)(2)(A). **CR 5 does not provide the requirements for proof of service by personal delivery. However, Washington case law indicates that proof of service by personal delivery requires that there be some evidence of the time, place, and manner of service.** See *Terry v. City of Tacoma*, 109 Wash.App. 448, 455-56, 36 P.3d 553 (2001).

Alvarez v. Banach, 153 Wn.2d at 838 (emphasis added).

Even the City's reliance upon *Alvarez's* concurring opinion (Appellant's Brief, p. 20) is misleading and taken out of context, since it omits the later part of the opinion which specifically states that the time, place, and manner requirements pertain to personal service:

I concur with the majority. I write separately to stress that, while 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. **As the majority notes, there is a long line of cases that have accepted that personal service has been accomplished so long as there is some evidence that it met time, place, and manner requirements.** Majority at 5-7; *accord Terry v. City of Tacoma*, 109 Wash.App. 448, 457, 36 P.3d 553 (2001) (formal declaration not required; opposing counsel's copy-received stamp sufficient to show service); *Sunderland v. Allstate Indem. Co.*, 100 Wash.App. 324, 329, 995 P.2d 614 (2000). Nothing we do today changes this.

Alvarez, 153 Wn.2d at 841 (*Chambers, Johnson, Sanders concurring*)

(Emphasis added to note the portion omitted from Appellant's Brief).

The cases relied upon by the City have also taken note of this distinction. In *Carpenter v. Elway*, 97 Wn. App. 977 (1999), the Court limited the "time, place, and manner" compliance standard to proof of personal service:

MAR 1.3(b)(2), which governs service of arbitration documents, requires service in accordance with CR 5. CR 5(b)(1) states that personal service is made on a party or attorney by handing the copy directly to the party, attorney or person in charge of receiving such copies. By analogy,

under MAR 6.2 or 7.1(a), adequate proof of **personal service** requires some evidence as to time, place, and manner of service.FN4

FN4. By contrast, CR 5(b)(2)(B) requires proof of service by mail in the form of a signed certificate of mailing.

Carpenter v. Elway, 97 Wn. App. at 987 (emphasis added).

In *Sunderland v. Allstate Indem. Co.*, 100 Wn. App. 324 (2000), also distinguished between personal service and service by mail. The Court noted that CR 5(b)(2)(B)'s attestation requirement for service by mail did not apply to personal service:

Here, Allstate filed a request for a trial de novo containing a "RECEIVED" stamp as well as a sworn certificate of service declaring that a named legal assistant had forwarded a copy of the request for a trial de novo to counsel of record via legal messenger on April 2, 1998. But the trial court ruled: that the CR 5(b)(2)(B) attestation requirement for service by mail also applies to service by delivery and requires a sworn statement by the messenger that service did in fact occur; and that "proof of service must be done by attestation in light of Nevers policy of strict compliance."

But CR 5(b)(1) contains no analogous subsection describing what constitutes adequate proof of service accomplished by delivery.

Sunderland, at 328. Again, the Court reaffirmed the holding in *Carpenter* and applied the "time, place, and manner" compliance standard to personal service:

Although in *Carpenter* we did not reach the narrow issue of whether attestation is required for proof of service, we did hold **that for personal service**, “adequate proof of personal service under MAR 6.2 or 7.1(a) requires an indication of time, place, and manner” of service.

Sunderland, 100 Wn.App. at 328-329 (emphasis added). See also *Terry v. City of Tacoma*, 109 Wn. App. 448, 454-455 (2001) (“To establish **personal service**, the record must contain adequate proof of personal service under MAR 6.2 or 7.1(a), including an indication of time, place, and manner of service as required by CR 4(g)(7)”) (emphasis added).

The Court in *Manius v. Boyd*, 111 Wash.App. 764, 47 P.3d 145 (2002), which was decided after *Carpenter*, *Sunderland*, and *Terry*, also recognized the distinction between service by mail and service by delivery, finding that previous cases did not address proof of service by mail:

The Court has not however, addressed the requirements for proof of service by mail under MAR 7.1(a) . . . Thus, this case presents an issue of first impression: What constitutes sufficient proof of service by mail of a post-arbitration request for trial de novo? Fn. 1

Fn 1. The MAR 7.1(a) sufficiency-of-proof-of-service cases following *Nevers [v. Fireside, Inc.]*, 133 Wn.2d 804, 815 (1997) involved personal service, not service by mail.

Manius, 111 Wn.App. at 766 (distinguishing *Terry v. City of Tacoma*, *supra*, and *Sunderland v. Allstate Indem. Co.*, *supra*, insofar as those cases involved personal service by delivery).

Finally, the City's reliance upon *Vanderpol v. Schotzko*, 136 Wn. App. 504 (2007), to support its proposition that an affidavit of mailing is not required is completely unfounded. In fact, the very passage that the City cites to in *Vanderpol* states the exact opposite (Appellant's Brief, p. 14):

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, 136 Wn. App. at 511. Nothing in *Vanderpol* suggests that an affidavit is unnecessary for proof of mailing.

As relevant to this case, the principal distinction between the two subsections of CR 5 is that CR 5(b)(1) does not contain any specific description of what constitutes adequate proof of personal service. An affidavit of personal delivery is not required under CR 5(b)(1). By contrast, CR 5(b)(2)(B) specifies exactly what form of proof is required when service of a request for trial de novo is accomplished by mail. If the mailing is accomplished by a non-attorney, as in this case, then proof of mailing is made by "affidavit of the person who mailed the papers." CR 5(b)(2)(B). The City's Certificate of Mailing clearly fails to strictly comply with CR 5(b)(2)(B). It is not an affidavit of the person who mailed the papers and it is not the certificate of an attorney.

C. The City's Proof of Mailing Fails to Comply With CR 5(b)(2)(B) Substantially or Otherwise

The trial court correctly found that even under a substantial compliance standard, the City's proof of mailing does not substantially comply with any of the acceptable forms of proof under CR 5(b)(2)(B). As indicated above, Courts have held that a declaration may be substituted for an affidavit under CR 5(b)(2)(B) as long as it substantially complies with GR 13 and RCW 9A.72.085. *In re Estate of Starkel*, 134 Wn.App. 364, 375, 134 P.3d 1197 (2006), citing *Manius v. Boyd*, 111 Wash.App. 764, 47 P.3d 145 (2002). A declaration is in substantial compliance with RCW 9A.72.085, so long as the requirements of RCW 9A.72.085 can be "reasonably implied" from within the document. *Manius*, at 771; *See also Johnson v. King County*, 148 Wn.App. 220, 198 P.3d 546 (2009) (Motorist's failure to explicitly state place of signing on county tort claim form seeking damages from county resulting from her car being struck by a bus did not deprive court of jurisdiction over motorist's suit against county, as motorist signed claim under penalty of perjury, and place of signing was reasonably inferred from information provided in the claim, such that motorist substantially complied with requirements of RCW 9A.72.085, the statute governing unsworn statements.).

In *Manius*, the certificate of mailing at issue was attested to under penalty of perjury, but the place of signing was absent. The Court held that the place of signing could be reasonably implied from its contents, since the address was both typed on the certificate and printed on the law firm's pleading paper on which the certificate was prepared:

Although the Certificate does not expressly state that Barlow signed the certificate and mailed the documents from her law firm's address, such originating address is reasonably implied.

Manius, 111 Wn.App. at 771. It is important to note that the *Manius* Court did not hold that the missing address at issue was not required on the certificate of mailing. Instead, the Court held that the address could be *reasonably implied* from other parts of the certificate.

Therefore, despite the City's argument that a recitation under penalty of perjury is not required so long as "the time, place, and manner" requirements are met, *Manius* holds that elements of RCW 9A.72.085 must be "reasonably implied" from the certificate of mailing. And unlike the missing address that could be reasonably implied from other parts of the certificate of mailing in *Manius*, the missing attestation under penalty of perjury can in no way be reasonably implied from the City's certificate of mailing. Furthermore, while omitting the place of signing may be an innocuous violation of RCW 9A.72.085, omitting the recitation under oath

or penalty of perjury when attempting to offer a written statement as the sole proof of mailing undermines the central purpose of RCW 9A.72.085.

D. Policy Behind the “Penalty of Perjury” Requirement

The trial court correctly noted in its Order Denying Reconsideration that failing to include the “penalty of perjury” language is qualitatively different from omitting the place of execution in a certificate of mailing:

There are logical and policy reasons for distinguishing between personal service and service by mail. Proof of personal service occurs after the opposing party has received the documents at issue. Proof of service by mail occurs when the mailer signs an affidavit, declaration or certificate, stating that the documents were mailed, but before the opposing party has received the documents. Requiring “under penalty of perjury” language is important to ensuring that the statement that the documents have been mailed is true, and its absence cannot be equated with “[the]...failure to incant four magic words”. Absent the “under penalty of perjury” language the certificate is not proof at all. Statements that do not comply with RCW 9A.72.085, for instance, are not considered proof for purposes of summary judgment. *Wilkerson v. Wegner*, 58 Wn. App. 404, 408, fn. 2, 793 P.2d 983 (1990).

CP 81.

The *Vanderpol* Court also distinguished proof of service by mail from personal service on this basis:

Nevers involved personal service, which must be shown by the affidavit of service to have occurred within the

deadline. The point of *Nevers* is that service must occur within the deadline. 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, 136 Wn. App. at 508-509 (emphasis added). In *Vanderpol*, a party opposing a trial de novo request received it in the mail after the 20 day deadline. The *Vanderpol* Court found that that request for trial de novo was deemed received by the opposing party three days after it was mailed. *Id.* at 511. The Court held that an affidavit of mailing unilaterally establishes service on an opposing party three days after mailing under CR 5(b)(2)(A), regardless of when the document was actually received. *Id.*

The holding in *Vanderpol*, reinforces the trial court's policy reasoning. Since an affidavit of mailing automatically establishes service on a certain date, regardless of whether the document was actually received by that date, it is even more important that the affidavit have the attestation under penalty of perjury. A statement made under penalty of perjury carries a measure of trustworthiness and assurance that can be relied upon by the court. In the absence of a timely filed acknowledgment of service,¹³ the only evidence that is placed in the record to prove service by mail is a testimonial statement that the mailing occurred. When an

affidavit or sworn statement is filed, those statements carry with them the added assurance that they are made under oath and subject to the laws of perjury and can therefore be relied upon by the court.

The City's assertion that the trial court's ruling is contrary to the purpose of the MARs is completely unfounded. In fact, the opposite is true. "The primary goal of the statutes providing for mandatory arbitration (RCW 7.06) and the Mandatory Arbitration Rules that are designed to implement that chapter 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), *citing Perkins Coie v. Williams*, 84 Wn.App. 733, 737, 929 P.2d 1215, *review denied*, 132 Wash.2d 1013, 940 P.2d 654 (1997). Since timely proof that a request for trial de novo has been served is frequently the subject of litigation, it is even more important that certificates of mailing include the "penalty of perjury" language. Otherwise, there would be no consequence or penalty to backdating a certificate of mailing or a declaration of personal service in future cases. The City's omission of the penalty of perjury language is not an innocuous

¹³ *Nevers, supra*, requires strict compliance with the 20 day filing requirement, so acknowledgment of service by an opposing party after the 20 day deadline does not constitute as timely proof of service.

violation of RCW 9A.72.085, like the omitted place of signing element at issue in *Manius*.

In this case, the missing recitation under penalty of perjury can in no way be reasonably implied from the City's certificate of mailing. While the City suggests that an unsworn "certification" is the same as "swearing" to a fact (Appellant's Brief p. 24), RCW 9A.72.085 and case law clearly state that a certification without the "penalty of perjury" language does not comport with RCW 9A.72.085:

"RCW 9A.72.085 sets forth the requirements for attestation as follows:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

(1) **Recites that it is certified or declared by the person to be true under penalty of perjury;**

Manius, 111 Wash. App. at 769 (Emphasis added). *See also Wilkerson v. Wegner*, 58 Wash. App. 404, 408 n.3, 793 P.2d 983 (1990) ("The certifications considered by the trial court were not signed under penalty of perjury nor were they sworn statements....we do not consider such

“certifications” to be competent proof in a summary judgment proceeding. RCW 9A.72.085.”).

Finally, Washington Court’s have struck down numerous insufficient certificates of service under MAR 7.1, even when the opposing party has timely received a copy of the Request for Trial De Novo. *See Alvarez v. Banach*, 153 Wn.2d 834 (2005) (Defendant’s declaration of delivery indicating the time, place, and manner of a Request for Trial de Novo “to be delivered” was insufficient proof of service, even though plaintiff’s counsel was timely served); *Carpenter v. Elway*, 97 Wn. App. 977, 988 P.2d 1009 (1999) (Certificate of mailing of arbitration award stating “[o]riginal to the Clerk for filing with copies to each party” was insufficient even though the parties did not dispute timely receipt); *Inman v. Netteland*, 95 Wn. App. 83, 974 P.2d 365 (1999) (An affidavit of service by facsimile indicating time, place, and manner of service did not substantially comply with MAR 7.1(a) proof of service even though opposing party acknowledged receipt of Request for Trial De Novo by fax); *Newton v. Legarsky*, 97 Wn. App. 375, 984 P.2d 417 (1999) (Holding proof of service is insufficient when such proof consists only of trial de novo request stamped with “certificate of delivery” to legal messenger for delivery to opposing counsel, even though Newton's lawyer

received the request the following day). On the other hand, there is not one single published opinion holding that the “penalty of perjury” requirement of RCW 9A.72.085 can be reasonably implied from anything other than a recitation under penalty of perjury.

E. The City’s Proof of Mailing Does Not Constitute “Some Evidence of the Time, Place, and Manner of Service” Because the Trial Court Did Not Consider It To Be Evidence At All

Even assuming that an affidavit of service is not required to prove service under MAR 7.1(a), whether by personal delivery or by mail, no case has held that an unsworn statement constitutes proof of service under MAR 7.1(a). In all the cases relied upon by the City wherein the Court has held that a formal affidavit is not required, the Court was offered proof in a form other than an affidavit of service – a “RECEIVED” stamp from the opposing party.

In *Sunderland*, 100 Wn. App. at 328, the issue before the Court was whether a request for a trial de novo containing a “RECEIVED” stamp from opposing counsel as well as a sworn certificate of service declaring that a named legal assistant had forwarded a copy of the request for a trial de novo to counsel of record via legal messenger was adequate proof of personal service. The Court held that it was:

Here, Allstate's declaration of service, together with the Sunderlunds' attorney's date stamp, indicate the time, place, and manner of service. *Carpenter*, 97 Wash.App. at 989, 988 P.2d 1009; see also CR 4(g)(7). Thus, it constitutes adequate proof that Allstate's request for trial de novo was delivered to the Sunderlunds' attorney's office in compliance with CR 5(b)(1).

Id. at 329.

Similarly, in *Terry*, 109 Wn. App. at 450, the Court was asked to determine whether the presence of “date received” stamps from both the opposing party's attorney and the clerk's office on the original document filed with the court proved that there was personal service. Holding that an affidavit of delivery is not required, the Court refused to find that such stamps constituted adequate proof of service as a matter of law and remanded the factual issue of whether the stamps provided “some evidence” of the manner of service back to the trial court:

Terry asks this court to find as a fact that the original request for trial de novo bears the stamps of both the City Attorney and the court Clerk and, therefore, conclusively establishes personal service. This court does not hear evidence or make such factual determinations. If the trial court on remand finds that receiving stamps from the City Attorney's Office and Clerk's office can only both appear as a consequence of being placed on the original document when personally served, there is “some evidence” of the manner of service and the requirements of MAR 7.1(a) are satisfied.

Id. at 457-458.

Sunderland and *Terry* both hold that a “RECEIVED” stamp from an opposing counsel’s law office may constitute adequate proof of personal service under MAR 7.1(a) and may be offered in lieu of a formal affidavit of service. Neither of the cases hold that an unsworn certificate of service, standing alone, constitutes sufficient proof.

In this case, even if the City need not prove service by affidavit, it has provided no other alternative proof of mailing for consideration by the Court. A certificate of mailing was the method chosen by the City to prove mailing, so CR 5(b)(2)(B) applies. The record is absent any other proof of mailing other than an unsworn statement that fails to comply with CR 5(b)(2)(B), GR 13 and RCW 9A.72.085. Instead of an affidavit of mailing, the City could have filed evidence similar to that found in *Sunderland* and *Terry, supra*, such as a signed return receipt of mailing. However, the record is void of any such evidence.

Pursuant to *Terry*, even if this Court finds that MAR 7.1(a) requires only substantial compliance for purposes of proof of service by mail and finds that an affidavit is not required for proof mailing, the factual issue of whether the City’s unsworn certificate of mailing satisfies “some evidence of time, place, and manner of service,” should be left to the discretion of the trial court. As indicated above, the trial court has

found that the certificate of mailing is not competent evidence and neither strictly complies nor substantially complies with MAR 7.1(a). CP 81. The only timely proof of service in the record is an unsworn statement, which the trial court has found to be no proof at all. CP 81. In light of this finding, there is no competent or valid evidence in the record to prove service and, as a result, the City's Request for Trial De Novo must be stricken. A trial court's decision to strike a declaration is reviewed for an abuse of discretion.¹⁴ Here, the trial court has determined that the City's certificate is unreliable evidence. CP 81. The trial court was well within its discretion to disregard an unsworn declaration is an acceptable form of proof if it fails to comport with GR 13(a) and RCW 9A.72.085.¹⁵

F. The City's Failure To Improve Its Position Triggers The Attorney's Fee Statute, And Attorney's Fees And Costs Should Be Awarded.

The City, by virtue of its failure to timely file adequate proof of service of its Request for Trial De Novo, has triggered the attorney's fees provision of MAR 7.3. Where a party files a request for trial de novo

¹⁴ *Sunbreaker Condo. Ass'n v. Travelers Ins. Co.*, 79 Wn.App. 368, 372, 901 P.2d 1079 (1995)

¹⁵ GR 13(a); RCW 9A.72.085. *See also Raymond v. Pac. Chem.*, 98 Wn.App. 739, 744 n. 1, 992 P.2d 517 (1999), *rev'd on other grounds sub nom. Brown v. Scott Paper Worldwide Co.*, 143 Wn.2d 349 (2001).

following an arbitration and fails to improve his position, MAR 7.3 requires a Court to assess costs and attorney's fees incurred after the request for trial de novo was filed against that party. If a party's request for trial de novo is stricken because the party failed to comply with the service and filing requirements of MAR 7.1 within the time prescribed, the opposing party is entitled to an award of attorney's fees under MAR 7.3. *Kim v. Pham*, 95 Wn. App. 439, 975 P.2d 544 (1999) (award of attorney's fees under these circumstances is "mandatory").

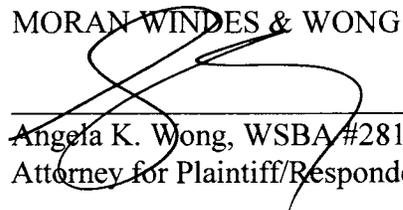
V. CONCLUSION

The City filed a defective unsworn proof of mailing failed to comply with the requirements of CR 5(b)(2)(B), MAR 7.1, and RCW 9A.72.085. Thus, its Request for Trial De Novo must be stricken. This is the mandated result of MAR 7.1 and the cases deciding it. This result also serves the public policy purposes of alleviating court congestion and reducing delays in hearing cases.

DATED this 22nd day of July, 2010.

Respectfully submitted,

MORAN WINDES & WONG

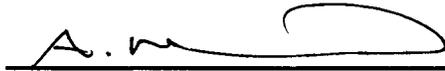


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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury in the State of Washington that on July 22, 2010 the foregoing was hand delivered to Attorney for Appellant:

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