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No. 77954-I-I

Whatcom County Superior Court No. 17-2-01515-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NICHOLAS WALKER, a married man,

Respondent,
v.

ORKIN, LLC, a Delaware limited liability company,

Petitioner.

PETITION FOR REVIEW OF DECISION OF COURT OF APPEALS FOR DIVISION ONE

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Bellingham, WA 98225
360-671-2990

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I. INTRODUCTION

The Court of Appeals with its opinion made a decision of first impression and without precedent in the United States, its assorted territories, and the 50 states. In making its decision, it rewrote CR 4 and inserted a new phrase in it. There is no case which held what it held. This Court should review such an unprecedented decision that rewrites a court rule.

II. IDENTIFY OF PETITIONER

Nicholas Walker ("Walker") seeks review of the Court of Appeals decision designated below.

III. COURT OF APPEALS DECISION

The Court of Appeals decision is Nicholas Walker v. Orkin, LLC, No. 77954-1-I (Division One, published) issued on September 16, 2019. A copy of the opinion is attached as Appendix I. The Court of Appeals denied a motion for reconsideration on November 4, 2019. A copy of the opinion is attached as Appendix II

IV. ISSUES PRESENTED FOR REVIEW

When:

1. Walker filed a lawsuit on July 27, 2019 with a blue-ink signed Summons and Complaint (CP 1-5, CP 62-63);

2. Walker properly served copies of the Summons and Complaint on the defendant, Orkin, LLC, ("Orkin") (CP 20);

3. The properly served Summons contained all information required by CR 4. (CP 62-63);

4. The served Summons did not have a photostatic copy of the attorney's signature on it (CP 22).

5. The served Summons did not have an attorney's blue-ink signature on it (CP 22).[1]

6. Orkin admits that it did not suffer any prejudice because of the signature (RP 4, line 15 & 16); and

7. The express language of CR 4 does not demand that a served summons, to be valid, have a signature.

The issue on the facts above is whether a properly served summons that contains all of the requisite and expressly required information as

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[1]. For simplicity henceforth the word "signature" will include both a blue-ink signature and a photostatic copy of the blue-ink signature on the original blue-ink signed summons filed with the trial court.

required by CR 4, fail to bestow jurisdiction on a trial court, because the properly served summons lacked a signature?

The Court of Appeals with its research capacity did not cite a single case in its opinion that held that the service of a summons that lacked a signature failed to confer jurisdiction on the trial court.

Orkin's attorney,, Gordon Tilden Thomas & Cordell LLP with its ample resources, cited inapposite dicta in only one case that could be construed as so holding: *Bull v. Chicago, M. & St. P. R. Co.,* 6 F.2d 329, (W.D. WA 1925). It cited no others.

Walker not only could not find a case that so held, but found cases from other states that held to the contrary, that the absence of a signature was not fatal to jurisdiction.

V. STATEMENT OF THE CASE

On July 28, 2017, Nicholas Walker filed a complaint against Orkin in Whatcom County Superior Court. (CP 1-5) Walker alleged he was injured by one of Orkin's employees nearly three years earlier, on August 8, 2014 (CP 2-3). The Summons and Complaint which he filed were blue-ink signed and dated. (CP 5 & CP 63). Orkin was properly served with a copy of the Summons and Complaint on August 1, 2017 (CP20). The served

Summons did not have a signature (CP22). Walker faxed a copy of the Summons and the Complaint to Orkin on August 2, 2017 (CP29). The Summons and Complaint were the same as those properly served on Orkin. (CP 30-36). Orkin waited until after the three year statute of limitations of RCW 4.16.080 and the 90 days of RCW 4.16.170 had expired. It filed a motion to dismiss (CP 11-15), contending that absence of the signature on the summmons served on Orkin made the service of process invalid, and since the statute of limitations plus 90 days had expired, the trial court should dismiss the case for want of jurisdiction (CP11-15). In oral argument on its motion it admitted that Orkin suffered no prejudice from the absence of the signature (RP 4 lines 15 & 16). The trial court denied the motion (CP 48-49).

VI. PROCEEDINGS

After the trial court denied Orkin's Motion to Dismiss, Orkin filed a Petition for Discretionary Review. The Petition was granted on March 19, 2018. The Court of Appeal, issued its opinion on September 16, 2019. Its opinion *sotte voce* inserted new language into CR 4 to the effect that the failure of a served summons to have a signature was fatal to the trial court's jurisdiction. It ordered the trial court to dismiss the case. Walker

filed a motion to reconsider, which the Court of Appeals denied on November 4, 2019.

VII. ARGUMENT

A. STANDARD OF REVIEW

The standard of review is *de novo.* The facts are not at issue.

B. WASHINGTON STATE LAW

None of the Washington State court rules, statutes or cases cited by the Court of Appeals or in Orkin's briefs hold that to confer jurisdiction, the actual served summons must have a signature.

a. This Court has held that the absence of a signature on an original document is not fatal to the trial court's jurisdiction

In *Griffith v. City of Bellevue,* 130 Wn.2d 189; 922 P.2d 83 (1996), the issue was not whether a copy of an original pleading signature. The issue was whether a statutorily required affidavit had an original blue-ink signature on the original affidavit filed with the court. Our Supreme Court ruled that the absence of the blue-ink signature on the original pleading

did not deprive the court of jurisdiction.

The issue in *Biomed Comm, Inc. v. Dep't of Health Bd. of Pharmacy,* 146 Wn. App. 929, 193 P.3d 1093 (2008) was the corporate appeal of an administrative law order. Again, it was an invalid signature on an original pleading because it was signed by a non-attorney in violation of CR11(a). The petition was timely filed and served. The trial court dismissed the case. At 941, the appellate court discussed RCW 34.05.542(2), the appeal statute at issue. It stated that a plain reading of the statute does not require that the petition be signed.

In *Crosby v. Spokane County,* 137 Wn.2d 296, 971 P.2d 32 (1999), a petitioner for a writ of review from a denial of a plat application failed in the filed original petition to sign the affidavit in support of it as in *Griffith, supra.* At 302, the court found that the petitioner had failed to submit a signed affidavit *at all* (Emphasis added) in the original proceeding as required by law. The trial court dismissed. The court of appeals affirmed the trial court. Our Supreme Court reversed and reinstated the lawsuit. At, 302, the Court cited *In re Welfare of Messmer,* 52 Wn.2d 510, 326 P.2d 1004 (1958) and *Griffith v. City of Bellevue,* 130 Wn.2d, 922 P.2d 85 and held that substantial compliance with the jurisdictional requirement, not

strict compliance, was held sufficient and that the trial court should not have dismissed the case for want of jurisdiction.

To summarize, a plain reading of CR4(a)(1) does not require that the served summons have a signature. The Court of Appeals in ruling that the served summons must have a signature, rewrote the plain reading of the statute and, in effect, inserted new language in it.

b. The Court Rules should be interpreted to avoid elevating form over substance

DGHI Enters. v. Pacific Cities, Inc., 137 Wn.2d 933, 954, 977 P.2d 1231, 1241 states "...(O)ur rules are designed to avoid elevating form over substance." citing *Griffith, supra.*

Spokane County v. Specialty Auto & Truck Painting, Inc., 153 Wn.2d 238, 245, 103 P.3d 792, 795 (2004) in interpreting CR 41(a)(4) cited *Griffith, supra,* for the proposition that cases are to be decided on the merits.

In summary, Walker believes the record shows that the apparently unprecedented opinion of this Court which is without precedent and which rewrites CR 4, elevates form over substance, contrary to the cited language.

c. The dicta in *Bull, supra* supports Plaintiff's position

Bull v. Chicago, M. & St. P. R. Co., 6 F.2d 329, (W.D. WA 1925). is 94 years old. It is not a service of process case. The real issue in it was community property. Mary Bull filed a tort lawsuit on behalf of her husband. The issue was whether she was the real party in interest. If she was not the real party in interest, she could not initiate the lawsuit and sign any pleadings, including a summons. The court ruled that under community property law, she was not the real party in interest and that the pleadings she signed and filed (including the summons) were of no legal effect. At 330, it stated "If ...("Mary Bull") is not the real party in interest, then she could not issue a summons and the documents subscribed by her would be of no effect...."

At 329 the court cited 1925 service of process statutes:

> "Court proceedings can only be instituted by the parties and in the manner provided by law.
>
> Section 221, Rem. C.S. of Wash., provides: "The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant requiring him to answer * * * within twenty days after the service. * * *"
>
> Section 222, Code, supra, provides that the summons "* * * shall be subscribed by the plaintiff * * * with the addition of his post office address, at which the papers in the action may be served on him by mail."
>
> Section 281, supra: "Every pleading shall be subscribed by the

party or his attorney...."

The statutes use the word "subscribed." BALLENTINE'S LAW DICTIONARY 3rd Ed, defines "subscribed" as "Signed at the end of the instrument." It cites *Stone v. Marvel,* 45 N.H. 481 1864 N.H. LEXIS 58. The case at 481 states:

> "The word ***subscribed***, when used in reference to the authentication of a writing or document, ordinarily implies that the name of the party who **subscribes** is set by him or by his authority at the bottom or end of the writing or document;

Here it defines subscribed as..."the name of the party who subscribes is set ....at the bottom or end of the writing...." It does not use the word "signature."

The point is that a subscribed document does not require a signature, only a name. And the summons at issue in this appeal has the attorney's name, address, telephone number and e-mail address, and thus is subscribed as required by the service of process statutes cited in *Bull.*

d. Dismissing the case violates CR 1

Does the Court of Appeals in dismissing the lawsuit, fulfill the CR 1 purpose of "secure(ing) the just, speedy and inexpensive determination of every action?" Walker does not believe that dismissing the lawsuit fulfills these purposes.

CR 1 reads

"These rules govern the procedure in the superior court in all suits

of a civil nature whether cognizable as cases at law or in equity with the exceptions stated in rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action."

Ashley v. Superior Court, 83 Wn. 2d 630, 636, 637, 521 P.2d 711 (1974) discusses service of process. Ibid. 636, 637 it stated.

"Until notice, actual or constructive, is given to a defendant, the court has no jurisdiction in any case to proceed to judgment. *Ware v. Phillips*, 77 Wn. 2d 879, 468 P.2d 444 (1970), and authorities cited therein. *It is also the general rule that, in order to acquire jurisdiction by constructive service, the statute permitting such service must be strictly followed. Yarbrough v. Pugh*, 63 Wash. 140, 114 P. 918 (1911). *Also, where a special statute provides a method of process, compliance therewith is jurisdictional. Sowers v. Lewis*, 49 Wn. 2d 891, 307 P.2d 1064 (1957). (Emphasis added).

We are not here concerned with a special statute providing a method of process, but with the general statute which has been incorporated in Civil Rule for Superior Court 4.

RCW 2.04.190 provides that the Supreme Court shall have the power to prescribe from time to time the mode and manner of giving notice and serving writs and process of all kinds. It further provides that the Supreme Court will have the power to regulate and prescribe by rule the forms for and the kinds and character of the entire pleading, practice and procedure to be used in all suits, actions and appeals and proceedings of whatever nature by the Supreme Court, superior courts and justices of the peace of the state.

The constitutionality of this act was upheld. *State ex rel. Foster-Wyman Lumber Co. v. Superior Court*, 148 Wash. 1, 267 P. 770 (1928), and *State v. Pavelich*, 153 Wash. 379, 279 P. 1102 (1929). Pursuant to this statute our Civil Rule for Superior Court 4 was promulgated.

> The court has inherent power to waive its rules. *O'Connor v. Matzdorff, supra.* 76 Wn. 2d 589, 458 P.2e 154 (1969) The power to waive the requirements of a rule necessarily includes the power to impose conditions upon the waiver. Of course, *this power does not extend to the waiving of a defendant's constitutional right to notice,* but we think it is within the power and the discretion of this court and of the Superior Court to waive the particular provisions of a rule providing the method by which notice is to be given upon the condition that another method, more reasonably calculated to effectively give notice, is utilized. (Emphasis added).
>
> The exercise of such power is in harmony with RCW 2.28.150, which provides:
>
> > 'When jurisdiction is, by the Constitution of this state, or by statute, conferred on a court or judicial officer all the means to carry it into effect are also given; and in the exercise of the jurisdiction, if the course of proceeding is not specifically pointed out by statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of the laws.'"

And the cited language applies here. Orkin was not served constructively or under a special statute. *Ibid.* 636. Orkin was served pursuant to the common law under CR 4. (CP 015). CR 4 does not state that the actual summons served on a defendant must be signed and dated. It states that the summons and complaint filed with the court must be signed and dated, and they were. With the service of process, Orkin was given the constitutionally required notice and a hearing that made it subject to this Court's jurisdiction. As it stated (RP 4 - lines 15 & 16), it has suffered no prejudice.

e. Washington State statutory authority supports Plaintiff

The court of appeals does not discuss the applicability of RCW 4.32.250 and RCW 4.36.240. Yet the plain language of each statute applies to the facts of this case. RCW 4.32.250 begins with

> "A notice or other paper is valid and effectual though the title of the action in which it is made is omitted, or it is defective either in respect to the court or parties, if it intelligently refers to such action or proceedings...."

The served summons and complaint in the instant case are a notice or other paper that refer intelligently to the instant case. There is no prejudice. (RP p.4 - lines 15 & 16). The service is valid.

RCW 4.36.240 reads:

> "The court shall, in every stage of an action, disregard any error or defect in pleadings or proceedings which shall not affect the substantial rights of the adverse party, and no judgment shall be reversed or affected by reason of such error or defect."

The service of the summons is part of the proceedings of the instant case. The failure of the served copy to have a signature does not affect Orkin's substantial rights. It suffered no prejudice (RP 4 - lines 15 & 16).

With these two statutes, the Washington State Legislature recognized that everyone makes mistakes. And that only if the mistakes affect a substantial right of a party should they be considered. The

absence of the signature on the served summons does not affect any substantial right of Orkin.

It would appear that the served summons falls within the ambit of these two statutes. Service is valid.

f. Defendant cites inapposite state court cases.

Orkin cites several inapposite cases in its brief. None of the cases hold that a summons must be signed and dated when served for the court to obtain jurisdiction over the defendant.

Orkin cites *Thompson v. Robbins*, 32 Wash. 149, 72 P. 1043 (1903). The court set aside a default judgment based on service of process by publication, which service was in derogation of the common law. At 152 it stated:

> "'(T)he right to serve process by publication being of purely statutory creation and in derogation of the common law, the statutes authorizing such service must be strictly pursued in order to confer jurisdiction upon the court."

Because the content of the summons by publication was not in the form demanded by statute, its publication did not confer jurisdiction. The instant case does not involve a summons by publication in derogation of the common law. The service of the summons in the instant case should be measured by the common law as outlined in *Mullane, infra.* And the

service in the instant case passes common law muster.

Painter v. Olney, 37 Wn. App. 424, 680 P.2d 1066 (1984) is another service by publication in derogation of the common law case. Plaintiff contended it could not locate the defendant to serve him. The court found factually to the contrary, that a bit of skip tracing would have located defendant, and thus set aside the default judgment. In the instant case, the summons and complaint were physically delivered to Orkin's registered agent (CP 015) in accord with the common law.

Streeter-Dybdahl v. Nguyet Huynh, 157 Wn. App. 408, 236 P.3d 986 (2010) did not reach the issue of the sufficiency of the summons. It was the sufficiency of the physical service of process. Defendant was not served personally. Residence service was inadequate because the house where Plaintiff had the summons delivered was not a "center of domestic activity" for the defendant.

Bethel v. Sturmer, 3 Wn. App. 862, 479 P.2d 131 (1970) is another example of service of process in derogation of the common law. The issue was whether Plaintiff's service of Defendant complied with the long-arm statute of RCW 46.64.040 for a non-resident involved in an automobile accident in Washington State. It did not address the sufficiency of the summons. Because the physical service of process did not comply with

RCW 46.64.040, and the service was in derogation of the common law, the service was invalid.

Delex Inc. v. Sukhoi Civil Aircraft Co., 193 Wn. App. 464, 372 P.3d 797 (2016). The issue was the Hague Convention international service of process treaty. Again, it is a special statute in derogation of the common law. It dealt only with the physical delivery of the summons. Russia refused to serve process on the Russian company, Sukhoi, as required by the Treaty. As a result, Washington State service rules applied. Plaintiff complied with them. Again, the instant case is not a Hague service of process or out-of-country service of process case. With the service of process, Orkin was given the constitutionally required notice and a hearing. It has suffered no prejudice. (RP 4 - lines 15 & 16).

E. THE SERVED SUMMONS PASSES CONSTITUTIONAL MUSTER

Does the summons at issue pass constitutional muster? Under applicable law it does.

The seminal case for adequacy of service of process is *Mullane v. Cent. Hanover Bank & Trust Co.,* 339 U.S. 306, 70 S. Ct. 652, 94 L. Ed. 865 (1950). It does not discuss the terms "signature" or "subscribe." In it, the Supreme Court tested a New York State service of process statute. A

A trustee was the trustee of a trust composed of numerous consolidated d small trusts. The issue was whether the notice of an accounting the trustee gave to each of the smalls trusts met the due process notice and a hearing requirements of the 14th Amendment of the United States Constitution. *Ibid.* 314, it stated: "Personal service of written notice within the jurisdiction is the classic form of notice is always adequate in any type of proceeding." In the instant case, the service was the "classic form of notice" and was adequate (CP 015).

Did the summons Plaintiff served on Orkin's registered agent give written notice to Orkin of this lawsuit? It did and it suffered no prejudice (RP 4 - lines 15 & 16).

Ibid. 314 the court further stated:

> '"The fundamental requisite of due process of law is the opportunity to be heard *Grannis v. Ordean,* 234 U.S. 385, 394." This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'

Did the summons served on Orkin inform it of the matter at issue and inform it of its right to be heard? The answer again is yes. It suffered no prejudice (RP 4 - lines 15 & 16).

Ibid. 314, 315 the court stated:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections (Citations omitted). The notice must be of such nature as reasonably to convey the required information (Citation omitted) and it must afford a reasonable time for those interested to make their appearance.(Citations omitted)"

Did the subscribed, but unsigned summons served on Orkin in the instant case give it notice of the pendency of the action and the opportunity to presents its objections? It did. Defendant suffered no prejudice. (RP 4 - lines 15 & 16).

This Court has personal jurisdiction over Orkin in the instant case.

F. CASES FROM OTHER STATES SUPPORT PLAINTIFF'S POSITION

Case law from other states supports Plaintiff's position that the served summons need not be signed.

Hagen v. Gresby, 34 N.D. 349, 159 N.W. 1, (1916) holds that a summons is not a nullity when the served summons lacks the attorney's signature, when the name of the attorney for plaintiff, with his address, is typewritten at his request in accordance with general custom of office. At 349 it stated: "The object of our statutes upon this subject is to give to

a defendant notice of the pendency of the action, and where the attorney's name and address are typewritten on the summons by his direction, this is a sufficient compliance with the law. (Citation omitted).

In *Mezchen v. More*, 54 Wis. 214, 11 N.W. 534 (1882), there was no signature on the summons. It contained just the name of the attorney. The emphasized language from 534 below describes the purpose of a summons. At 534 it stated:

> We think the learned counsel and the court erred in giving the statute this restricted construction. *The summons is not a writ or process of the court, but is simply a notice to the defendant that an action has been commenced against him, and that he is required to answer to the complaint which is either attached thereto or is or will be filed in the proper clerk's office. Porter v. Vandercook,* 11 Wis. 70; *Rahn v. Gunnison,* 12 Wis. 528; *Johnston v. Hamburger,* 13 Wis. 175. It is substantially the same method of commencing an action which was long practiced in the state of New York before the adoption of the code, viz., by filing a declaration with the clerk of the court in which the action was commenced, and entering a rule requiring him to plead, and then serving upon the defendant a copy of the complaint and a notice of such rule. *The summons is, in fact, a notice to the defendant that an action is commenced against him, and that he must answer the complaint within a certain time or judgment will be taken against him. The only object of requiring it to show the name of the attorney or party who commences the action, and his post-office address, is that the defendant may know upon whom and at what place he may serve his answer and other papers in the action.* "That this is the object is apparent from the fact that the same section provides that the summons shall state the title of the cause, the court in which the action is brought, the county where the action is to be tried, and the names of the parties." (Emphases added).

The served summons in that case, as in the instant case, is effective even if it is no signature.

Huenfeld Co. v. Sims, 120 S.C. 193, 112 S.E. 917 (1922) at 194 stated:

> Plaintiff obtained a default judgment against defendant. Defendant sought to set the judgment aside, contending that plaintiff's attorney failed to sign his name at the end of the summons, as required by § 178 of the Code. *The name of plaintiff's attorney and his office address were set forth in the body of the summons,* the summons was attached to the complaint.... The trial court sustained defendant's motion and set aside the default judgment. On appeal, the court reversed. *Defendant was not entitled to set aside the default judgment on the ground that plaintiff's attorney failed to sign the summons because the omission was not a jurisdictional defect when defendant was advised of the name and address of plaintiff's attorney in the body of the summons and in the attached complaint.* (Emphasis Added).

Gifford v. Bowling, 86 S.D. 615, 200 N.W.2d 379, (1972) was an appeal of a motion to vacate a default judgment. The issue was whether the served summons and complaint had to be signed and filed before they were served on the defendant. (In the instant case they were). The court at the default hearing told Plaintiff's attorney that he had to sign and file the summons and complaint before the Court could go forward with the default hearing. (Apparently the served summons was not signed.) The

court on appeal at 626 stated:

> It would also appear that the summons and complaint bore the typewritten name of the attorney and the attorney's post office address, and also they *now* bear the signature of the attorney in longhand. SDCL 15-6-4(a) requires that "The summons shall be legibly subscribed by the plaintiff or his attorney" and SDCL 15-6-11 requires, "Every pleading of a party represented by an attorney shall be signed by at least one attorney of record in his individual name, whose address shall be stated." 72 C.J.S. Process § 19, p. 1015 states: **"Effect of lack of proper signature.** There is a difference of opinion among courts as to the effect of a want of proper signature, some holding that it renders the process void and insufficient to confer jurisdiction, and others holding that it is a nonjurisdictional defect or irregularity which renders the process voidable only." 71 C.J.S. Pleading § 339b, p. 740, gives the rule as follows: **"Effect of Omission of Signature.** The omission of a required signature from a pleading is generally considered a formal defect which can be remedied." A North Dakota case, *Hagen v. Gresby*, 34 N.D. 349, 159 N.W. 3, L.R.A. 1917B 281, holds that a summons is not a nullity to which the name of the attorney for plaintiff, with his address, is typewritten at his request in accordance with general custom of office. (Emphasis added).
>
> It is not clear to this court from the transcript whether the summons and complaint were signed by the longhand signature of the attorney prior to the hearing on the default judgment. *It is possible that the trial judge's comment was prompted by desire to have counsel check to make sure the pleadings were signed* or it is just possible he may have been referring to other summonses and complaints and inasmuch as the assignments do not raise the issue, we conclude that there is nothing properly before us for decision on the question whether the summons and complaint were properly subscribed." (Emphasis added)

Under the rulings of courts of other states, a served summons, complete in itself, does not require a signature to confer a court jurisdiction over a

defendant.

IX. CONCLUSION

The Court of Appeals cited no case holding that a summons to be effective had to have a signature.

The Court of Appeal rewrote CR 4, in effect, to state that a properly served summons had to have a signature.

The summons Walker properly served on Orkin conferred jurisdiction on the trial court.

The Court of Appeal's decision should be reversed. The trial court's decision was correct and should be affirmed and the case remanded for trial.

DATED this 4th day of December 2019.

/s / James Sturdevant
James Sturdevant WSBA #8016
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned declares under penalty of perjury under the laws of the state of Washington that on the below date, I caused a true and correct copy of this document to be delivered via court electronic service on:

Counsel for Appellant:

Mark Wilner

John D. Cadagan

Gordon Tilden Thomas & Cordell LLP

DATED this 10th day of July 2018.

/ s / James Sturdevant
James Sturdevant WSBA #8016
Attorney for Respondent

No. 77954-I-I

Whatcom County Superior Court No. 17-2-01515-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NICHOLAS WALKER, a married man,

Respondent,
v.

ORKIN, LLC, a Delaware limited liability company,

Petitioner.

APPENDIX I

JAMES STURDEVANT WSBA #8016
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Attorney for Respondent Nicholas Walker

FILED
9/16/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NICHOLAS WALKER, a married man, Respondent, v. ORKIN, LLC, a Delaware limited liability company, Appellant.	)	No. 77954-1-I PUBLISHED OPINION FILED: September 16, 2019

SCHINDLER, J. — Under CR 3, an action is commenced by serving a copy of the summons and a copy of the complaint as provided in CR 4. CR 4(a)(1) states, "The summons must be signed and dated by the plaintiff or the plaintiff's attorney." There is no dispute that Nicholas Walker served Orkin LLC with a copy of a summons that was not signed. Orkin filed an answer, asserting insufficient service of process. We granted discretionary review of the superior court order denying the motion to dismiss the lawsuit for insufficient service of process. Because Walker did not correct the defect by serving a signed copy of the summons on Orkin before the expiration of the statute of limitations or timely file a motion to amend the summons to correct the defect, we reverse and remand for entry of an order dismissing the lawsuit.

The procedural facts are not in dispute. On July 28, 2017, Nicholas Walker filed a summons and a complaint for personal injury damages against Orkin LLC. The summons is signed by his attorney and dated July 27, 2017. The complaint is signed by the attorney and dated July 28, 2017.

The personal injury complaint alleged that on August 8, 2014, Walker was injured in a vehicle collision. Walker alleged the Orkin driver was negligent and his negligence was the proximate cause of Walker's damages. The statute of limitations for a personal injury action is three years. RCW 4.16.080(2). If a plaintiff files a complaint within the three-year period, the statute of limitations is tolled for 90 days to allow the plaintiff to serve the defendant. RCW 4.16.170 provides:

> For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

The complaint Walker filed on July 28, 2017 tolled the three-year statute of limitations for 90 days or until October 26, 2017 to serve Orkin. On August 1, Walker served the Orkin registered agent with a copy of a summons and a copy of the complaint. The copy of the summons is dated July 27, 2017 but is not signed. The copy of the complaint is not dated or signed. The next day, Walker's attorney sent a fax to Orkin attaching the "copy of the Summons and Complaint which were served on Orkin."

On September 7, Orkin filed an answer to the complaint. Orkin denied the allegations. Orkin asserted as an affirmative defense that "Plaintiff has failed to serve Defendant with process under Washington law." Walker did not correct the defect and serve Orkin with a copy of the signed summons before the expiration of the statute of limitations on October 26, 2017.

On November 6, Orkin filed a CR 12(b) motion to dismiss the lawsuit for insufficient service of process within the statute of limitations. Orkin argued Walker did not comply with the court rules for service of process before the expiration of the statute of limitations on October 26, 2017. Orkin asserted that contrary to CR 4(a)(1), Walker did not serve it with a copy of a signed summons.

Walker argued he complied with CR 4 by signing the summons and complaint filed on July 28, 2017. Walker also argued serving Orkin with an unsigned copy of the summons did not result in prejudice to Orkin.

The court denied the motion to dismiss. We granted the motion for discretionary review under RAP 2.3(b)(1).

Orkin contends the superior court erred in denying the motion to dismiss the lawsuit for failure to comply with the requirements of CR 4.

Proper service of the summons and complaint is an essential prerequisite to obtaining personal jurisdiction. Scanlan v. Townsend, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). Service of process must comply with constitutional, statutory, and court rule requirements. Scanlan, 181 Wn.2d at 847. The plaintiff bears the initial burden to prove sufficient service. Scanlan, 181 Wn.2d at 847. The party challenging service of process must demonstrate by clear and convincing evidence that service was improper.

Scanlan, 181 Wn.2d at 847. We review whether service was proper de novo. Scanlan, 181 Wn.2d at 847.

We review the interpretation of court rules de novo. Jafar v. Webb, 177 Wn.2d 520, 526, 303 P.3d 1042 (2013). Court rules are interpreted in the same manner as statutes. Jafar, 177 Wn.2d at 526. If the rule's meaning is plain on its face, we must give effect to that meaning as an expression of the drafter's intent. Jafar, 177 Wn.2d at 526. We discern plain meaning from the plain language of the court rules. Columbia Riverkeeper v. Port of Vancouver, 188 Wn.2d 421, 432, 395 P.3d 1031 (2017). We read the rule " 'as a whole, harmonizing its provisions, and using related rules to help identify the legislative intent embodied in the rule.' " Jafar, 177 Wn.2d at 526-27 (quoting State v. Chhom, 162 Wn.2d 451, 458, 173 P.3d 234 (2007)). If the plain language of the rule is subject to only one interpretation, the court's inquiry is at an end. Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010).

CR 3 governs commencement of an action. CR 3(a) states, in pertinent part, "[A] civil action is commenced by service of a copy of a summons together with a copy of a complaint, as provided in rule 4 or by filing a complaint" as provided in RCW 4.16.170.[1]

Orkin concedes that under RCW 4.16.170, Walker tentatively commenced the action by filing the complaint on July 28, 2017 and the statute of limitations was tolled for 90 days to serve Orkin. Walker served the registered agent for Orkin on August 1. Orkin does not challenge the manner of service or claim prejudice. Orkin asserts Walker did not commence the lawsuit within the statute of limitations because Walker did not comply with the mandatory requirement under CR 4 to serve Orkin with a signed copy of the summons.

[1] Emphasis added.

CR 4(a) governs issuance of the summons. CR 4(a)(1) states:

> The summons must be signed and dated by the plaintiff or the plaintiff's attorney, and directed to the defendant requiring the defendant to defend the action and to serve a copy of the defendant's appearance or defense on the person whose name is signed on the summons.[2]

CR 4(b) governs the content and the form of the summons. CR 4(b)(1) states:

> Contents. The summons for personal service shall contain:
> (i) The title of the cause, specifying the name of the court in which the action is brought, the name of the county designated by the plaintiff as the place of trial, and the names of the parties to the action, plaintiff and defendant;
> (ii) A direction to the defendant summoning the defendant to serve a copy of the defendant's defense within a time stated in the summons;
> (iii) A notice that, in case of failure so to do, judgment will be rendered against the defendant by default. It shall be signed and dated by the plaintiff, or the plaintiff's attorney, with the addition of the plaintiff's post office address, at which the papers in the action may be served on the plaintiff by mail.[3]

CR 4(b)(2) states the summons for personal service shall substantially comply with "the following form":

SUPERIOR COURT OF WASHINGTON
FOR [_____] COUNTY

_____)
_____,
Plaintiff,) No. _____
Summons [20 days]
_____)
_____,
Defendant.)

TO THE DEFENDANT: A lawsuit has been started against you in the above entitled court by _____, plaintiff. Plaintiff's claim is stated in the written complaint, a copy of which is served upon you with this summons.

---

[2] Emphasis added.

[3] Second emphasis added.

> In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what she or he asks for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before a default judgment may be entered.
>
> You may demand that the plaintiff file this lawsuit with the court. If you do so, the demand must be in writing and must be served upon the person signing this summons. Within 14 days after you serve the demand, the plaintiff must file this lawsuit with the court, or the service on you of this summons and complaint will be void.
>
> If you wish to seek the advice of an attorney in this matter, you should do so promptly so that your written response, if any, may be served on time.
>
> This summons is issued pursuant to rule 4 of the Superior Court Civil Rules of the State of Washington.
>
> **[signed]** _____
> Print or Type Name
> ( ) Plaintiff ( ) Plaintiff's Attorney
> P.O. Address _____
> **Dated** _____
> Telephone Number _____.[4]

The plain and unambiguous language of CR 3(a) states that a civil action is commenced by service of a copy of a summons and a complaint "as provided in rule 4." The plain and unambiguous language of CR 4(a)(1) states, "The summons must be signed and dated by the plaintiff or the plaintiff's attorney." CR 4(b)(1)(iii) also states the summons "shall be signed and dated by the plaintiff, or the plaintiff's attorney."[5] The word "must" and the word "shall" impose a mandatory requirement. Ohio Sec. Ins. Co. v. Axis Ins. Co., 190 Wn.2d 348, 352, 413 P.3d 1028 (2018); Erection Co. v. Dep't of Labor & Indus., 121 Wn.2d 513, 518, 852 P.2d 288 (1993). The form set forth in CR

[4] Boldface added.

[5] We note the General Rules allow attorneys and nonattorneys to sign electronic documents with a digital signature or an "s/." GR 30(d)(2). RCW 19.360.030 defines "electronic signature."

4(b)(2) shows the plaintiff or plaintiff's attorney must sign the summons and print or type the name below the signature line.

Contrary to the assertion of Orkin, a defect in the form of the summons is not always fatal. The purpose of a summons is to give notice of the time to answer prescribed by law and advise the defendant of the consequences of failing to do so. Quality Rock Prods., Inc. v. Thurston County, 126 Wn. App. 250, 264, 108 P.3d 805 (2005).

The failure to accomplish personal service of process is not a defect that can be cured by amendment. Sammamish Pointe Homeowners Ass'n v. Sammamish Pointe LLC, 116 Wn. App. 117, 124, 64 P.3d 656 (2003). By contrast, errors in the form of original process are "generally viewed as amendable defects, so long as the defendant is not prejudiced." Sammamish Pointe, 116 Wn. App. at 124. " 'Dismissal should not be granted on a mere technicality easily remedied' " by either correcting the defect and serving the defendant or filing a timely motion to amend under CR 4(h). Sammamish Pointe, 116 Wn. App. at 125 (quoting In re Marriage of Morrison, 26 Wn. App. 571, 573, 613 P.2d 557 (1980)). CR 4(h) allows a plaintiff to file a motion to amend a defective summons that substantially complies with the purpose of a summons. CR 4(h) provides:

> Amendment of Process. At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

However, a plaintiff must "make a timely motion to amend the summons." Sammamish Pointe, 116 Wn. App. at 125. " '[T]he plaintiff must make some motion to

amend . . . . Without such a motion, the proper action for the trial court is to determine whether to dismiss the cause for lack of jurisdiction.' " Sammamish Pointe, 116 Wn. App. at 125 (quoting Morrison, 26 Wn. App. at 575).

The uncontroverted record establishes that Walker did not sign the copy of the summons served on Orkin. After Orkin asserted the affirmative defense of insufficient service of process, Walker did not correct the defect by either serving Orkin with a signed summons before expiration of the statute of limitations or filing a timely motion to amend the summons. We reverse denial of the motion to dismiss and remand for entry of an order of dismissal.

WE CONCUR:

No. 77954-I-I

Whatcom County Superior Court No. 17-2-01515-2

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

NICHOLAS WALKER, a married man,

Respondent,
v.

ORKIN, LLC, a Delaware limited liability company,

Petitioner.

APPENDIX II

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Attorney for Respondent Nicholas Walker

FILED
11/4/2019
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

NICHOLAS WALKER, a married man, Respondent, v. ORKIN, LLC, a Delaware limited liability company, Appellant.	No. 77954-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Nicholas Walker filed a motion for reconsideration of the opinion filed on September 16, 2019. A majority of the panel has determined that the motion should be denied. Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Judge

LAW OFFICE OF JAMES STURDEVANT

December 04, 2019 - 2:20 PM

Filing Petition for Review

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