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Supreme Court No. 97929-4
Court of Appeals No. 77954-1-I

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**IN THE SUPREME COURT
OF THE STATE OF WASHINGTON**

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NICHOLAS WALKER, a married man,

*Petitioner,*

v.

ORKIN, LLC, a Delaware limited liability company,

*Respondent*.

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# ANSWER TO PETITION FOR REVIEW

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# I. INTRODUCTION

Nicholas Walker's Petition for Review does not identify any basis for review under RAP 13.4(b). Rather, Walker attempts to re-argue the merits. This Court should decline review.

Omitted from Walker's petition is the actual language of Civil Rule ("CR") 3 and CR 4, which require the served summons to be signed. CR 3(a) dictates "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**."[1] CR 4(a)(1) requires the "summons **must be signed** and dated."[2] And CR 4(b)(1)(iii) requires the summons "**shall be signed** and dated by the plaintiff, or the plaintiff's attorney."[3] "The word 'must' and the word 'shall' impose a mandatory requirement."[4]

Here, "Walker did not sign the copy of the summons served on Orkin" and the statute of limitations expired.[5] The superior court never obtained personal jurisdiction.[6] There is no basis for this Court's review.

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[1] CR 3(a) (emphasis added).

[2] CR 4(a)(1) (emphasis added).

[3] CR 4(b)(1)(iii) (emphasis added).

[4] *Walker v. Orkin*, -- Wn. App.2d --, 448 P.3d 815, 819 (2019) (quoting *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)), *reconsideration denied* Nov. 4, 2019.

[5] *Walker*, 448 P.3d at 820; RCW 4.16.080; RCW 4.16.170.

[6] *Walker*, 448 P.3d at 817, 820; *Weber v. Associated Surgeons, P.S.*, 166 Wn.2d 161, 163, 206 P.3d 671 (2009).

## II. ISSUE PRESENTED

Should this Court decline review of the Court of Appeals' opinion when the Petitioner does not identify a basis for review under RAP 13.4(b).

## III. STATEMENT OF THE CASE

### A. Suit Was Tentatively Commenced Within the Statute of Limitations.

On July 28, 2017, Walker filed a summons and complaint against Orkin in Whatcom County Superior Court.[7] Walker alleged he was injured by Orkin nearly three years earlier, on August 8, 2014.[8] As such, Walker tentatively commenced the action within the statute of limitations, so long as he properly served Orkin within 90 days of filing his complaint.[9]

### B. Walker Failed to Properly Serve Orkin.

On August 1, 2017, Orkin's registered agent received a summons and complaint.[10] Neither Walker, nor his attorney, signed the summons.[11] And neither Walker, nor his attorney, signed or dated the complaint.[12]

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[7] Clerk's Papers (CP) 1-5; *Walker*, 448 P.3d at 816.

[8] CP 2; *Walker*, 448 P.3d at 816.

[9] RCW 4.16.080 (providing the three-year statute of limitations for personal injury actions); RCW 4.16.170 (providing the 90-day tolling period for service of valid process).

[10] CP 20-27; *Walker*, 448 P.3d at 817.

[11] CP 22; *Walker*, 448 P.3d at 817.

[12] CP 27; *Walker*, 448 P.3d at 817.

On August 2, 2017, Walker's attorney sent a fax to Orkin that stated: "I attach a copy of the Summons and Complaint which were served on Orkin, LLC."[13] The attached summons was not signed, and the attached complaint was not signed or dated.[14]

### C. <u>Orkin Alerted Walker to the Invalid Service of Process in its Answer and Allowed Time for Walker to Correct the Problem</u>.

Orkin filed its Answer on September 7, 2017 and asserted failure to serve valid process as an affirmative defense.[15] Walker had until October 26, 2017—another 50 days—to correct the invalid service of process within the 90-day tolling period.[16] But he never did.[17] Walker also never moved to amend the summons, but instead has steadfastly maintained that the summons does not require a signature.[18] As a result, Walker never perfected service of valid process before the statute of limitations expired.[19]

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[13] CP 29; *Walker*, 448 P.3d at 817.

[14] CP 34, 36; *Walker*, 448 P.3d at 817.

[15] CP 6-10; *Walker*, 448 P.3d at 817.

[16] RCW 4.16.170; *Walker*, 448 P.3d at 817.

[17] *Walker*, 448 P.3d at 817.

[18] *Cf.* CR 4(h); *Walker*, 448 P.3d at 819-20.

[19] *Walker*, 448 P.3d at 817 ("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.").

**D. Orkin Moved to Dismiss.**

On November 6, 2017, Orkin filed and served a motion to dismiss for lack of jurisdiction.[20] The trial court heard and denied the motion to dismiss on December 22, 2017.[21] It relied on two statutes neither party cited—RCW 4.32.250 and RCW 4.36.240—which concern minor defects in pleadings, and the undisputed lack of prejudice to Orkin.[22]

**E. The Court of Appeals Granted Discretionary Review.**

The Commissioner at the Court of Appeals granted discretionary review under RAP 2.3(b)(1)—"obvious error"—of the superior court's denial of the motion to dismiss.[23] The Commissioner recognized prejudice was immaterial and the requirements of the Civil Rules controlled:

> The issue here is not one of prejudice nor of constitutionally adequate notice/due process. The issue is compliance with the civil rules.[24]

The Commissioner concluded, because CR 4(a)(1) states "the summons **must be signed** and dated by the plaintiff or the plaintiff's attorney," and CR 4(b)(1)(iii) states the summons "**shall be signed** and dated by the

[20] CP 11-15; *Walker*, 448 P.3d at 817.

[21] CP 48-49.

[22] Verbatim Report of Proceedings (VRP) 3-4, 8.

[23] *Walker*, 448 P.3d at 817; Orkin's Appendix in Answer to Petition for Review ("Orkin Appx.") at 1-3 (Ruling on Motion for Discretionary Review, filed March 19, 2018).

[24] Orkin Appx. 2-3.

plaintiff, or the plaintiff's attorney," Walker did not comply with the civil rules and the superior court committed obvious error.[25]

### F. <u>The Court of Appeals Reversed the Superior Court</u>.

After full briefing on the merits, the Court of Appeals unanimously agreed with the Commissioner's assessment and reversed the superior court's denial of the Orkin's motion to dismiss.[26] The Court of Appeals held the plain language of CR 3 and CR 4 controlled and remanded for dismissal.[27]

Walker moved for reconsideration.[28] Without requiring an answer from Orkin, the Court of Appeals denied the motion.[29] Walker now petitions this Court for review.[30]

## IV. ARGUMENT

Review should be denied for two reasons. First, Walker's petition ignores the RAP 13.4(b) standards, and, instead, attempts to re-argue the

[25] Orkin Appx. 2-3 (emphasis added).

[26] *Walker*, 448 P.3d at 816.

[27] *Walker*, 448 P.3d at 817-20.

[28] Orkin Appx. at 4 (Order Denying Motion for Reconsideration).

[29] Orkin Appx. at 4.

[30] Petition for Review ("Pet.") 7-8.

merits of this case.[31] Second, there is no basis for review under RAP 13.4(b).

## A. **The Court of Appeals Did Not Err.**

The Court of Appeals employed a plain-language analysis of CR 3 and CR 4.[32] The Court of Appeals explained:

> 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." 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(b)(2) shows the plaintiff or plaintiff's attorney must sign the summons and print or type the name below the signature line.[33]

Accordingly, the Court of Appeals held:

> 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."[34]

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[31] Pet. 11-27. Review under RAP 13.5 does not apply because the decision appealed was not an interlocutory decision. RAP 12.3(a), (b); RAP 13.5(a).

[32] *Walker*, 448 P.3d at 817-19.

[33] *Walker*, 448 P.3d at 819.

[34] *Walker*, 448 P.3d at 816.

Walker does not, and cannot, offer any other interpretation of the plain language of CR 3 and CR 4. There is no basis for review.

**B. <u>Nor Is There Any Basis for Review Under RAP 13.4(b)</u>.**

Walker's petition does not identify a basis for review under RAP 13.4(b)(1)-(4).[35] And even a generous review of his claims shows none of the standards for review under RAP 13.4(b) are satisfied.

1. <u>Neither RAP 13.4(b)(1) nor (b)(2) is satisfied</u>.

The requirements for review under RAP 13.4(b)(1) and (b)(2) are not satisfied because Walker does not cite any case from this Court or the Court of Appeals that conflicts with the Court of Appeals' holding below.

In his petition, Walker provides summaries of *Griffith v. City of Bellevue*,[36] *Biomed Comm. Inc. v. Dept. of Health Bd. of Pharmacy*,[37] and *Crosby v. County of Spokane*[38]—none of which were cited in his merits briefing to the superior court or Court of Appeals.[39] Walker then summarily

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[35] Pet. 3-6, 11-27.

[36] 130 Wn.2d 189, 922 P.2d 83 (1996) (cited for the first time in Walker's motion for reconsideration to the Court of Appeals).

[37] 146 Wn. App. 929, 193 P.3d 1093 (2008) (cited for the first time in Walker's petition for review to this Court).

[38] 137 Wn. 2d 296, 971 P.2d 32 (1999) (cited for the first time in Walker's motion for reconsideration to the Court of Appeals).

[39] Pet. 11-13. Walker's petition later identifies *DGHI Enters. v. Pacific Cities, Inc.*, 137 Wn.2d 933, 977 P.2d 1231 (1999) and *Spokane Cnty v. Specialty Auto & Truck Painting, Inc.*, 153 Wn.2d 238, 103 P.3d 792 (2004). Pet. 13. Again, neither was cited in his merits briefing below. To the extent Walker's petition could be interpreted as citing these two cases under RAP 13.4(b)(1), such a claim would fail for numerous reasons, not the least of

concludes that "a plain reading of CR 4(a)(1) does not require that the served summons have a signature."[40]

Even if Walker had preserved arguments related to these new cases by citing them in his merits briefing, not one of the new cases he cites "is in conflict" with the Court of Appeals' decision below.

- ***First***, not one of these new cases deals with the signature requirement on a summons; none even mention CR 3 or CR 4.[41] Thus, none are "in conflict" with the Court of Appeals' opinion, which considered the plain language of CR 3 and CR 4.[42]
- ***Second***, all three new cases concern appellate jurisdiction.[43] They are not "in conflict" because the present case concerns a lack of personal jurisdiction.[44]
- ***Third***, in *Griffith* and *Crosby*,[45] the parties stipulated to the issuance of a writ of certiorari despite the absence of the

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which is because neither case allows a superior court to ignore jurisdictional predicates in favor of deciding a case on its merits.

[40] Pet. 13.

[41] *Griffith*, 130 Wn.2d at 190-94; *Biomed*, 146 Wn. App. at 931-42; *Crosby*, 137 Wn.2d at 298-303.

[42] *Cf. Walker*, 448 P.3d at 819.

[43] *Griffith*, 130 Wn.2d at 192; *Biomed*, 146 Wn. App. at 941; *Crosby*, 137 Wn.2d at 303.

[44] *E.g.*, *Weber*, 166 Wn.2d at 163 ("Failure to properly serve a defendant prevents the trial court from obtaining personal jurisdiction over the defendant.").

[45] *Griffith*, 130 Wn.2d at 191; *Crosby*, 137 Wn.2d at 303.

signature; but here, Orkin did not agree, and in fact advised Walker that the invalid process was an affirmative defense.[46] There is no conflict.

- ***Fourth***, *Griffith* and *Biomed* noted CR 11 required a party be given an opportunity to sign "'promptly after the omission is called to the attention of the pleader or movant'";[47] but here, Walker did not avail himself of the opportunity to promptly remedy the omission (he had 50 days) and instead steadfastly maintains a signature is not required by CR 4.[48] Again, there is no conflict.
- ***Fifth***, *Biomed* is not in conflict because it interpreted RCW 34.05.542(2) and RCW 34.05.546, and noted that "[n]either of these statutes mentions any signing requirement."[49] Unlike the statutes at issue in *Biomed*, here, CR 4 expressly requires (in two different places) that Walker sign the summons.[50]

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[46] CP 8; *Walker*, 448 P.3d at 817.

[47] *Biomed*, 146 Wn. App. at 935 (quoting CR 11) (emphasis omitted); *Griffith*, 130 Wn.2d at 194.

[48] CP 6-10; *cf.* CR 4(h).

[49] 146 Wn. App. at 941.

[50] CR 4(a)(1); CR 4(b)(1)(iii).

- ***Sixth***, in *Crosby*, the purpose of the affidavit or verification statute at issue was to allow a court to issue a writ against a governmental body in the absence of notice.[51] Here, notice was not at issue—a party receiving deficient service of process still receives notice of the suit. The issue here was compliance with the civil rules.[52] *Crosby* is not "in conflict" with the Court of Appeals' decision here.

In sum, the requirements for review under RAP 13.4(b)(1) and (b)(2) are not satisfied. None of the cases Walker cites are "in conflict" with the Court of Appeals' holding below.

2. RAP 13.4(b)(3) is not satisfied.

This case did not involve a constitutional issue. This case involved the plain language of CR 3 and CR 4. There is no basis for review under RAP 13.4(b)(3).

Walker claims that "the served summons passes constitutional muster,"[53] which is different than claiming review is warranted because a constitutional issue exists.[54] Because Walker does not argue a

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[51] 137 Wn.2d at 302-03.

[52] Orkin Appx. 2-3 ("The issue here is not one of prejudice nor of constitutionally adequate notice/due process. The issue is compliance with the civil rules.").

[53] Pet. 21-22.

[54] *Cf.* RAP 13.4(b)(3).

constitutional issue exists, this Court should decline review under RAP 13.4(b)(3).

Even if the claims could be equated, Walker relies solely on *Mullane v. Central Hanover Bank & Trust*[55] and that reliance is misplaced. *Mullane* addresses the constitutional importance of notice as a component of due process, but here, neither constitutional notice nor due process are at issue because Orkin acknowledged receiving notice.

While notice that a suit has been filed is a component of service of valid process, it is not the only component. For example, CR 4(c) requires personal service by a person over 18 years of age or the sheriff's department; but a defendant would still have notice, albeit through invalid process, if a kindergartner served the process. In the same way CR 4(a) and (b) require the plaintiff or plaintiff's attorney to sign the summons; but an unsigned summons still provides notice, albeit through invalid process.

3. RAP 13.4(b)(4) is not satisfied.

Other than emphasizing his dissatisfaction with the Court of Appeals' holding, Walker does not claim that his failure to comply with CR 3 and CR 4 involves an issue of "substantial public interest."[56] Nor does

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[55] 339 U.S. 306, 313-14, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

[56] *Cf.* RAP 13.4(b)(4).

Walker explain why a litigant's failure to comply with CR 3 and CR 4 "should be determined by the Supreme Court."[57]

Plainly, mere dissatisfaction with a unanimous holding by the Court of Appeals in a particular case does not satisfy RAP 13.4(b)(4). This is especially true when the petitioner does not even claim the standard is met. This Court should decline the petition for review.

## C. The Remainder of Walker's Petition Re-Argues the Merits of the Case.

Walker's remaining claims are similarly untethered to the standards under which this Court accepts review. For this reason alone, this Court should decline to consider Walker's remaining claims.

To the extent this Court does consider Walker's remaining claims, it should find none of the claims availing.

### 1. The superior court must first have personal jurisdiction to then consider the merits of a case.

Walker cites two other cases he did not cite in his merits briefing for the general proposition that cases should be decided on their merits and then concludes that Court of Appeals' opinion was "unprecedented."[58] Walker's petition neglects to acknowledge that the present case concerned the

[57] *Cf.* RAP 13.4(b)(4).

[58] Pet. 13. To the extent Walker's petition could be interpreted as citing these two cases pursuant to RAP 13.4(b)(1), such a claim would fail because neither case allows a superior court to ignore jurisdictional predicates in favor of deciding a case on its merits.

threshold issue: a superior court cannot decide a case on the merits without personal jurisdiction, and personal jurisdiction is acquired through service of valid process.[59] Here, the superior court did not have personal jurisdiction because Orkin was never served with valid process. Thus, Walker's citations to *DGHI Enters. v. Pacific Cities, Inc.*[60] and *Spokane Cnty v. Specialty Auto & Truck Painting, Inc.*[61] do not create an issue for review.

2. *Bull v. Chicago* held the signature was "vital to the validity" of the summons under CR 4's predecessor statute.

Walker claims the dicta in *Bull v. Chicago*[62] supported his argument below.[63] The "dicta" cited is the statutory language using the word "subscribed," to which Walker applies a dictionary definition and a 1864 New Hampshire case and to then conclude "a subscribed document does not require a signature, only a name."[64] Belying Walker's claim is the fact that the statute at issue in *Bull* was codified into CR 4 and the word "subscribed"

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[59] *E.g.*, *Painter v. Olney*, 37 Wn. App. 424, 427, 680 P.2d 1066 (1984) ("First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process.").

[60] 137 Wn.2d 933 (cited at Pet. 13).

[61] 153 Wn.2d 238 (cited at Pet. 13).

[62] 6 F.2d 329 (W.D. Wash. 1925).

[63] Pet. 14.

[64] Pet. 15.

was changed to "signed and dated."[65] Thus, this Court interpreted "subscribed," as used in the statutes in *Bull*, to mean "signed and dated."

Furthermore, Walker's characterization of *Bull* as a community property case does not change the salient facts or holding.[66] The *Bull* court applied the CR 4 portions of Washington's Remington Code to a woman who signed and served a summons, and then held the case must be dismissed pursuant to the statute's plain language because the signature on the summons was invalid.[67] The court held:

> The requirement of the statute that a summons shall be authenticated by **the signature of the plaintiff or his attorney is vital to the validity of such summons**. A summons must contain all that is required by the statute, **whether deemed needful or not**.[68]

That is what was relevant. *Bull* supported the Court of Appeals' reversal of the superior court.

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[65] *Compare* Section 221, Rem. 1915 Code ("The summons must be subscribed by the plaintiff or his attorney, and directed to the defendant"), *with* CR 4(a)(1) ("The summons must be signed and dated by the plaintiff or the plaintiff's attorney, and directed to the defendant"). *Compare also* Section 222, Rem. 1915 Code (the summons "shall be subscribed by the plaintiff or his attorney, with the addition of his post office address at which the papers in the action may be served on him by mail"), *with* CR 4(b)(1)(iii) (the summons "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 paper in the action may be served on the plaintiff by mail").

[66] Pet. 14.

[67] 6 F.2d at 332.

[68] *Bull*, 6 F.2d at 332 (emphasis added) (internal citation omitted).

3. CR 1 does not obviate jurisdictional requirements.

Walker claims that CR 1 excuses his noncompliance with CR 4.[69] Walker's hypothesis would read CR 1 as "fulfilled" where every case is tried on its merits, even those where the court lacks jurisdiction. That is not what the language of CR 1 says. Nor is it the intent of the rule.

Walker supports his CR 1 theory with citation to *Ashley v. Superior Court*,[70] but reliance on *Ashley* (much like *Mullane*, *supra*) misses its mark.[71] *Ashley*, like *Mullane*, concerns the constitutional importance of notice as a component of due process. The issue in *Ashley* was whether the public should bear the cost of service by publication in the case of indigent litigants, but the issue was not decided because service satisfying constitutional notice requirements could be achieved without public expense.[72] Again, Orkin does not dispute it had notice; constitutional notice or due process were never at issue in this case.

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[69] Pet. 15.

[70] 83 Wn.2d 630, 636, 521 P.2d 711 (1974). Reliance on *Ashley* here is confusing, as *Ashley* does not discuss CR 1 anywhere in the opinion.

[71] Pet. 16-17.

[72] 83 Wn.2d at 633, 634. Importantly, the *Ashley* Court included the discussion quoted by Walker because constitutionally required notice could not be effectuated through the requirements of CR 4(d)(3) (service by publication). That is not the issue here. Here, Walker could have provided notice **and** complied with CR 4 by serving a signed summons within the statute of limitations or 90-day tolling period thereafter. Walker provided notice but failed to comply with CR 4.

4. Walker cannot avoid the plain language of CR 4.

Walker claims none of Washington's court rules, statutes, or cases require service of a signed summons.[73] As the Court of Appeals held, the plain language of CR 4 contradicts this claim. CR 4's first sentence states:

> The summons must be signed and dated by the plaintiff or the plaintiff's attorney, and directed to the defendant . . . .

CR 4(b)(1)(iii) further states the summons "shall be signed and dated by the plaintiff, or the plaintiff's attorney." Walker's claim that CR 4 does not require a signed summons to be served on the defendant fails.

5. Pleading statutes are relevant to pleadings.

Walker complains that the Court of Appeals did not discuss RCW 4.32.250 and RCW 4.36.240 when interpreting the plain language of CR 3 and CR 4.[74] Walker makes no effort to refute that the statutes only provide rules for "pleadings" and a summons is not a pleading.[75]

6. The cases cited in Orkin's appellate brief supported the propositions for which they were cited.

Walker claims this Court should grant review because Orkin cited *Thompson v. Robbins*,[76] *Painter v. Olney*,[77] *Streeter-Dybdahl v. Nguyet*

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[73] Pet. 17.

[74] Pet. 18-19.

[75] CR 7(a); 3A Karl B. Tegland, *Washington Practice: Rules Practice* CR 7, at 172.

[76] 32 Wash. 149, 72 P. 1043 (1903).

[77] 37 Wn. App. 424, 680 P.2d 1066 (1984).

*Huynh*,[78] *Bethel v. Sturmer*,[79] and *Delex Inc. v. Sukhoi Civil Aircraft*[80] and, Walker states, "[n]one of the cases hold that a summons must be signed and dated when served for the court to obtain jurisdiction over the defendant."[81] None were cited for that proposition.

*Thompson*, *Painter*, and *Delex* were cited for the proposition that the trial court lacks jurisdiction if service of process is invalid.[82] All support that proposition.[83] Notably, Walker had no problem with *Weber v. Associated Surgeons*,[84] which similarly states "[f]ailure to properly serve a defendant prevents the trial court from obtaining personal jurisdiction over the defendant." Nor did Walker take issue with *Heinzig v. Seok Hwang*,[85]

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[78] 157 Wn. App. 408, 410, 236 P.3d 986 (2010).

[79] 3 Wn. App. 862, 868, 479 P.2d 131 (1970).

[80] 193 Wn. App. 464, 468, 382 P.3d 797 (2016).

[81] Pet. 19-20.

[82] Appellate Brief ("App. Br.") at 6 n.24, n.25, n.26, 7 n.27, n.30, 8 n.33, 11 n.50, and 13 n. 55.

[83] *Painter*, 37 Wn. App. at 427 ("First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process."); *Thompson*, 32 Wash. at 153 (without service of valid summons, no jurisdiction; "no right can be based upon a judgment entered without jurisdiction."); *Delex*, 193 Wn. App. at 468 ("judgment against a party is void if the court did not have personal jurisdiction over that party…. A court does not have personal jurisdiction over a party if service of the summons and complaint was improper.").

[84] 166 Wn.2d at 163.

[85] 189 Wn. App. 304, 310, 354 P.3d 943 (2015).

which states "[p]roper service of the summons and complaint is a prerequisite to a court's obtaining jurisdiction over a party."[86]

*Streeter-Dybdahl* and *Bethel* were cited for the proposition that a trial court commits reversible error when it fails to dismiss a case for deficient service of process because the court lacks jurisdiction.[87] Both cases support that proposition.[88] In sum, the cases Orkin cited supported the propositions for which they were cited.

7. Foreign cases interpreting foreign law do not manufacture a basis for review.

Walker discusses four non-Washington cases.[89] None of the cases apply Washington law or Washington's civil rules.

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[86] Walker also takes no exception to *Gutierrez v. Icicle Seafoods, Inc.*, 198 Wn. App. 549, 557, 394 P.3d 413 (2017) for the proposition that, "courts will dismiss a claim with prejudice when the statute of limitations has run," nor does he take exception to *Lewis Cty. v. W. Washington Growth Mgmt. Hearings Bd.*, 113 Wn. App. 142, 156–57, 53 P.3d 44 (2002), which holds RCW 4.36.240 could not save a case from dismissal for lack of jurisdiction because the statute "is designed to prevent the reversal of a judgment entered by a court having jurisdiction, not to mandate the waiver of jurisdictional defects."

[87] App. Br. at 8 n.34, 11 n.51, 13 n.56.

[88] *Streeter-Dybdahl*, 157 Wn. App. at 410 ("the defendant was not properly served and the trial court erred by denying the defendant's motion to dismiss for insufficient process. Accordingly, we reverse."), 412 ("Proper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction over a party"); *Bethel*, 3 Wn. App. at 868 (reversing an order denying defendant's motion to dismiss, where process was not served within the statute of limitations, and remanding to dismiss with prejudice)

[89] Pet. 23-26.

*Hagen v. Gresby*[90] (North Dakota), *Mezchen v. More*[91] (Wisconsin), and *Huenfeld Co. v. Sims*[92] (South Carolina) pre-date the *Bull* (Washington) decision, and did not change the way the *Bull* court applied Washington's statutes.[93] In the same way, the foreign holdings have no bearing on the way this Court applies its civil rules, which it codified as civil rules from Washington statutes.

Notably, *Hagen* (North Dakota) and *Mezchen* (Wisconsin) highlight an important distinction. *Hagen* and *Mezchen* hold a typewritten signature affixed to the summons at the attorney's direction satisfies the "subscribed" requirement.[94] The courts in both cases explicitly note that the signature, whether typed or handwritten, was still affixed as a signature. The *Hagen* and *Mezchen* results make sense in the modern legal practice, where lawyers regularly sign legal documents by typing "*s/ [name]*" on the signature line. In both instances (typed and handwritten), the inclusion of the lawyer's name on the signature line evidences the lawyer's intent to give that

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[90] 34 N.D. 349, 159 N.W. 3 (1916).

[91] 54 Wis. 214, 11 N.W. 534 (1862).

[92] 120 S.C. 193, 112 S.E. 917 (1922).

[93] Further, the *Gifford v. Bowling*, 86 S.D. 615, 627, 200 N.W.2d 379 (1972), case did not reach the conclusion Walker suggests because the record did not reveal whether the summons had been signed.

[94] *Hagen*, 159 N.W. at *4; *Mezchen*, 11 N.W. at 534, 536.

particular document legal effect.  This contrasts with the present case where **no** signature—typed or handwritten—was affixed to Walker's summons.[95]

## V.  CONCLUSION

Walker's Petition for Review does not identify any basis for review under RAP 13.4(b).  It, instead, attempts to re-argue the merits of an appeal that a unanimous panel rejected.  This Court should decline review.

Respectfully submitted this 30th day of December, 2019.

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[95] *Hagen*, 159 N.W. at *4. (defining "signature" as name or mark "written with intent to authenticate."); *Mezchen*, 11 N.W. at 36 (requirement for subscription can "be complied with by a written or printed signature at the option of the party issuing it.").

**CERTIFICATE OF E-SERVICE**

I, John D. Cadagan, certify that I initiated electronic service of the foregoing document on the parties listed below via the Court's eFiling Application. Service was initiated this 30th day of December, 2019 on:

**Attorney for Respondent:**
James Sturdevant, WSBA #8016
sturde@openaccess.org

DATED this 30th day of December, 2019, at Seattle, Washington.

s/ *John D. Cadagan*
John D. Cadagan, WSBA #47996

# APPENDIX

RICHARD D. JOHNSON,
*Court Administrator/Clerk*

*The Court of Appeals*
of the
*State of Washington*

DIVISION I
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March 19, 2018

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CASE #: 77954-1-I
Nicholas Walker, Respondent v. Orkin, LLC, Appellant

Counsel:

The following notation ruling by Commissioner Mary Neel of the Court was entered on March 19, 2018, regarding petitioner's motion for discretionary review:

"This matter involves an issue of service of process in a personal injury action brought by plaintiff Nicholas Walker against Orkin, LLC. Orkin seeks discretionary review of a trial court order denying its motion to dismiss. Review is granted.

The following procedural history is undisputed:

- August 8, 2014 - alleged injury; the three year statute of limitations applies and is tolled for 90 days to accomplish service (RCW 4.16.170)
- July 28, 2017 - Nicholas commenced the action by filing a signed and dated complaint
- August 1, 2017 – Nicholas served Orkin's agent with an unsigned summons and a complaint that was unsigned and undated
- August 2, 2017 – Nicholas faxed Orkin's counsel a copy of the unsigned summons and unsigned/undated complaint
- October 26, 2016 – the statute of limitations expired
- November 6, 2017 – Orkin filed a motion to dismiss, relying on Nicholas' failure to comply with CR 4 (Appendix at 32-36)

Nicholas opposed dismissal, arguing that there was no prejudice to Orkin, it received constitutionally required notice, and Nicholas complied with applicable rules by filing a signed and dated complaint (Appendix at 42-50). Orkin acknowledged that it was not prejudiced, but argued that prejudice is not relevant, that proper service is required, and that without it the court does not have jurisdiction.

On December 22, 2017, the trial court denied Orkin's motion to dismiss. The court relied on statutes involving minor defects in pleadings (RCW 4.32.250 and RCW 4.26.240) and the absence of prejudice. (Appendix at 56-58, 62).

Orkin seeks discretionary review under RAP 2.3(b)(1), obvious error that renders further proceedings useless, and (b)(2), probable error that substantially alters the status or limits the freedom to act. The applicable rule is (b)(1). If Orkin is correct that its motion to dismiss should have been granted, then further proceedings are useless within the meaning of the rule.

Orkin cites long-established law in Washington that a court does not obtain personal jurisdiction over a party absent proper service of process. Orkin also argues that CR 4 unambiguously requires a signed summons. Orkin further argues that the statutes relied on by the trial court (which neither party had raised) are inapplicable because they apply only to pleadings. Nicholas distinguishes the cases cited by Orkin on their facts (as for example, involving substitute service) and argues that Orkin received constitutionally adequate notice/due process.

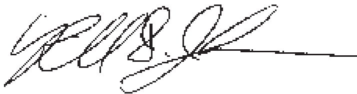
The issue here is not one of prejudice nor of constitutionally adequate notice/due process. The issue is compliance with the civil rules. Under CR 3, a civil action is commenced by service of a copy of the summons together with a copy of the complaint as provided in CR 4 or by filing a complaint. Under CR 4(a)(1), "the summons must be signed and dated by the plaintiff or the plaintiff's attorney." Under CR 4(b)(iii), the summons "shall be signed and dated by the plaintiff, or the plaintiff's attorney."

Nicholas filed a signed and dated complaint within the three years statute of limitations. Under RCW 4.16.170, the statute of limitations was tolled for 90 days for Nicholas to complete commencement of the action by properly serving the summons. Nicholas served Orkin with an unsigned summons and unsigned/undated complaint. Although Orkin timely raised the issue in its answer, Nicholas did not remedy the deficiency. Nicholas argues that it was sufficient that his complaint filed with the court was signed, but he has cited no authority that this relieved him of the obligation to properly serve Orkin. The litigation is in its early stages, and no trial date is set. Discretionary review of the trial court order denying Orkin's motion to dismiss is warranted.

Therefore, it is

ORDERED that discretionary review is granted, and the clerk will set a perfection schedule."

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

emp

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

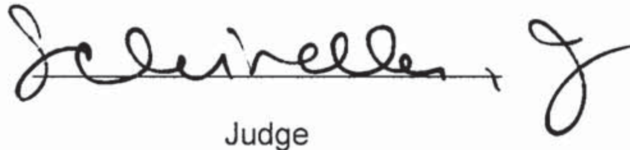
IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

| | |
|---|---|
| NICHOLAS WALKER, a married man,<br><br>Respondent,<br><br>v.<br><br>ORKIN, LLC, a Delaware limited liability company,<br><br>Appellant. | No. 77954-1-I<br><br>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

## GORDON TILDEN THOMAS CORDELL LLP

## December 30, 2019 - 2:11 PM

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| **Appellate Court Case Number:** | 97929-4 |
| **Appellate Court Case Title:** | Nicholas Walker v. Orkin, LLC |
| **Superior Court Case Number:** | 17-2-01515-2 |

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