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Case No. 530724-II

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

JASON L. AGUIRRE,

Appellant,

v.

KROGER, INC.

Respondent.

KROGER'S RESPONDENT BRIEF

Rebecca A. Watkins, WSBA No. 45858
Of Attorneys for Kroger

Sather, Byerly & Holloway, LLP
111 SW Fifth Avenue, Suite 1200
Portland, OR 97204 - 3613
Telephone: 503-225-5858

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I. INTRODUCTION

The superior court did not err in dismissing Mr. Aguirre's appeal with prejudice based on his failure to perfect his appeal pursuant to the Civil Rules of the State of Washington.

II. COUNTER-STATEMENT OF THE CASE

Kroger does not agree with the facts outlined by Mr. Aguirre, as many of the dates and characterizations of the records cited are inaccurate. Therefore, Kroger provides this counter-statement.

This appeal arises out of an industrial insurance claim. The Board of Industrial Insurance Appeals (hereinafter, "the Board") issued a Decision and Order on February 28, 2018. On March 22, 2018, Jason Mr. Aguirre filed a Notice of Appeal of that Decision and Order in the Clark County Superior Court. CP 1. According to the Notice of Appeal and Proof of Service it was mailed to Kroger, the Department of Labor and Industries (hereinafter, "the Department") and the Board. CP 1-2. The March 22, 2018 Proof of Service did not contain a written acknowledgment of service, affidavit, or certification. CP 2. The Department had not confirmed service of the Notice of Appeal. RP 3.

On July 11, 2018, Mr. Aguirre mailed a copy of the Demand for Six Person Jury and Proof of Service to Kroger's attorney of record and the Office of the Attorney General. CP 4. The July 11, 2018 Proof of

Service also did not contain a written acknowledgment of service, affidavit, or certification. CP 4.

On August 9, 2018, Kroger filed a motion to dismiss with the superior court, seeking dismissal of Mr. Aguirre's appeal due to failure to comply with RCW 51.12.110 and Civil Rule 5(b)(2)(B). CP 5-11; 26-27. On August 24, 2018, Mr. Aguirre filed a Proof of Service with the superior court addressing service of the March 22, 2018 Notice of Appeal. CP 37.¹ The August 24, 2018 Proof of Service included a declaratory statement. On November 1, 2018, Mr. Aguirre filed his Response to Kroger's motion to dismiss. CP 28-31.

The parties presented oral arguments on Kroger's motion before Judge Collier on November 16, 2018. On February 12, 2019, Judge Collier issued an order dismissing Mr. Aguirre's appeal with prejudice for failure to properly serve all necessary parties in accordance with RCW 51.12.110 and Civil Rule 5(b)(2)(B). CP 32. Mr. Aguirre has appealed that order.

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¹ Mr. Aguirre failed to include this document in his designation of clerk's papers. Kroger has filed a supplemental designation of clerks papers to include that missing document. Respondent references this document as CP 37, assuming sequential numbering by the trial court.

III. ARGUMENT

A. Standard of Review

The appellate court's review is governed by RCW 51.52.140, which provides that an appeal shall lie from the judgment of the superior court as in other civil cases, and that ordinary practice in civil cases shall apply. CR 41(b) allows for involuntary dismissal if a plaintiff fails to comply with the rules of civil procedure. A trial court's decision on a motion to dismiss is reviewed under an abuse of discretion standard. *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn. App. 183, 190, 69 P.3d 895 (2003). The trial court's underlying legal interpretations are reviewed *de novo*. *Nevers v. Fireside, Inc.*, 133 Wn.2d 804, 809, 947 P.2d 721 (1997); *Emmerson v. Weilep*, 126 Wn. App. 930, 935, 110 P.3d 214 (2005). "A court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons. An abuse of discretion is found if the trial court relies on unsupported facts, takes a view that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law." *Gildon v. Simon Prop. Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) (citing *Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, P14, 132 P.3d 115 (2006)).

B. Mr. Aguirre's Proof of Service was insufficient under RCW 51.12.110 and Civil Rule 5(b)(2)(b).

1. Substantial compliance with rules necessary to invoke jurisdiction

The superior court has appellate, not original, jurisdiction over industrial insurance appeals from the Board. *See Fay v. Northwest Airlines*, 115 Wn.2d 194, 197, 796 P.2d 412 (1990); *Maddox v. Indus. Ins. Comm'n*, 119 Wash. 21, 23-24, 204 P. 1057 (1922). In this appellate capacity, the superior court has limited jurisdiction, and to invoke jurisdiction, all statutory requirements must be met. *Fay*, 115 Wn.2d at 197. Both filing of the appeal and proper service of notice to the necessary parties is required to perfect an appeal under RCW 51.52.110. *Vasquez v. Dep't of Labor & Indus.*, 44 Wn. App. 379, 381, 722 P.2d 854 (1986). A party must substantially comply with procedural rules to convey jurisdiction on the court. *Id.* at 383 (citing *In re Saltis*, 94 Wn.2d 889, 896, 621 P.2d 716 (1980)).

RCW 51.52.110 provides that an appeal from a Board decision “shall be perfected by filing with the clerk of the court a notice of appeal and by serving a copy thereof by mail, or personally on the director and on the board. If the case is one involving a self-insurer, a copy of the notice of appeal shall also be served by mail, or personally, on such self-insurer.” Further, the civil rules of procedure apply to appeals in industrial

insurance cases. *See* RCW 51.52.140; WAC 263-12-125. Washington Civil Rule 5(b)(2)(B) states: “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 any attorney.” GR 13 further clarifies CR 5(b)(2)(B), providing:

[W]henever a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.72.085. 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:

(Date and Place)

(Signature)

This court has held that “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. 977, 987 fn 4, 988 P.2d 1009 (1999). Despite Mr. Aguirre’s arguments otherwise, the superior court correctly ruled he failed to substantially comply with the service rules.

2. Mr. Aguirre did not substantially comply.

Mr. Aguirre’s proof of service, filed with his Notice of Appeal on March 22, 2018, did not comply with CR 5(b)(2)(B) or GR 13 because it did not contain the required certification. CP 2. Mr. Aguirre argues his

filing of the Notice of Appeal with Proof of Service substantially complied with the legal requirements of CR 5(b)(2)(B), but his failure to include the required certification of mailing of the Notice of Appeal is not substantial compliance. Substantial compliance does not equate to ignoring the requirements of the rules of civil procedure and practice. Were that the case, CR 5(b)(2)(B) and GR 13 would be meaningless. Mr. Aguirre blatantly disregarded the civil requirements for proof of service.

Time and again the Washington Appellate Courts have held that service is invalid when the certificate of service is not properly executed. *See Brackman v. City of Lake Forest Park*, 163 Wn. App. 889, 262 P.3d 116 (2011) (legal assistant's signature on certificate of service not legally valid because it was not made under penalty of perjury per CR 5(b)(2)(B)); *Sunderland v. Allstate Indem. Co.*, 100 Wn. App. 324, 995 P.2d 614 (2000) (arbitration award reversed because certificate of service did not conform to the requirements of CR 5). In this case, Mr. Aguirre completely failed to provide a certificate of service as required by CR 5(b)(2)(B) and GR 13 when filing his notice of appeal. As such, service of his notice of appeal was incomplete and his appeal was not perfected. The superior court did not abuse its discretion in dismissing Mr. Aguirre's appeal for failure to comply with RCW 51.12.110 and CR 5(b)(2)(B).

C. Mr. Aguirre Did Not File a Properly Amended Proof of Service as Required by CR 4(h).

On appeal, Mr. Aguirre also argues he filed an amended proof of service, perfecting his appeal under CR 4(h). Not only did he not comply with CR 4(h), he also did not raise such an argument below.

Civil Rule 4(h) states:

“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.”

This rule allows a party to amend a proof of service only when permitted by the court.

For the first time on appeal, Mr. Aguirre contends he perfected his appeal by filing an amended proof of service in August pursuant to CR 4(h).² Furthermore, Mr. Aguirre contends Kroger waived its right to argue that CR 4(h) does not apply in this case, as Kroger did not raise the argument before the superior court. However, if a waiver argument applies in this case, it applies to Mr. Aguirre, not Kroger. While before the superior court, Mr. Aguirre never claimed he filed an “amended” proof of service pursuant to CR 4(h), and never sought permission of the court to

² Mr. Aguirre references CP 4, but that is a Jury Demand. He mentions an two different August dates, so Kroger assumes he means the August 24, 2018 filing at CP 37.

file an amended proof of service, even after the fact. To the contrary, he characterized his August 24, 2018 filing as simply his filing of the original proof of service, albeit months late, specifically under CR 4(g)(2). RP 5-6. Only now on appeal, Mr. Aguirre claims for the first time the August 24, 2018 filing was his “amended” proof of service filed pursuant to CR 4(h). This new argument, raised for the first time on appeal, should be disregarded as waived.

In addition to not preserving this argument below, Mr. Aguirre also failed to comply with the requirements of CR 4(h). Mr. Aguirre himself acknowledges that he did not first request permission from the court nor did the court grant him permission to amend his proof of service. Mr. Aguirre did not amend his proof of service pursuant to CR 4(h) as he argues on appeal; if his August 24, 2018 filing can be re-characterized as an “amended” filing on appeal, he violated CR 4(h) by filing it without the permission of the court. Since Mr. Aguirre was not permitted by the court to file an amended proof of service, CR 4(h) does not apply.

Mr. Aguirre’s attempt to recharacterize his August 2018 filing as an “amended” proof of service contradicts his position below, and also ignores the requirements of CR 4(h). In fact, his filing without permission of the court would be a violation of CR 4(h), further evidencing Mr. Aguirre’s blatant disregard for the civil rules. Mr. Aguirre did not

have permission to file an amended proof of service as required by CR 4(h); therefore, his argument that he cured the original “irregularity” with this later filing lacks merit.

D. Attorney Fees

Kroger disagrees with Mr. Aguirre that he would receive attorney fees if he prevails on appeal. RCW 51.52.130 requires a decision and order of the Board be reversed and relief granted to a worker before an award of attorney fees. This appeal does not pertain to the merits of the Board’s order at all. Even if he prevails, no attorney fees under RCW 51.52.130 should be awarded for this appeal.

IV. CONCLUSION

For the foregoing reasons, Kroger asks that the court affirm the superior court’s dismissal of this case with prejudice.

Dated: June 28, 2019

Respectfully submitted,



Rebecca A. Watkins, WSBA No. 45858
Of Attorneys for Kroger

CERTIFICATE OF SERVICE

I hereby certify, under penalty of perjury pursuant to the laws of the State of Washington, that on June 28, 2019, I efiled a copy of KROGER'S RESPONDENT BRIEF and this CERTIFICATE OF SERVICE via the Washington State Appellate Courts Portal with

Derek Byrne, Clerk
Washington Court of Appeals – Division II
950 Broadway, Suite 300
Tacoma, WA 98402
Email: coa2filings@courts.wa.gov

and served copies via the Washington Court of Appeals, Division II efilings system and First Class Mail on the following:

Steven L. Busick
Busick Hamrick Palmer, PLLC
PO Box 1385
Vancouver, WA 98666-1385
Email: sbusick@busicklaw.com

Anastasia Sandstrom
Senior Counsel
Washington State Department of Labor and Industries
Office ID No. 91018
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
Email: anas@atg.wa.gov



Rebecca A. Watkins, WSBA No. 45858
Of Attorneys for Kroger, Inc.

SATHER BYERLY & HOLLOWAY LLP

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Sender Name: Rebecca Watkins - Email: rwatkins@sbhlegal.com
Address:
111 SW 5TH AVE STE 1200
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