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Southwell & O'Rourke P.S.

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 36111-0-III

COURT OF APPEALS, DIVISION III OF THE STATE OF  
WASHINGTON

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SOUTHWELL & O'ROURKE, P.S., Respondent,

v.

STEPHEN P. ANTHONY, Appellant.

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APPELLANT'S BRIEF

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**I. Assignments of Error**

1. The trial court erred in entering summary judgment in favor of plaintiff and erred in denying defendant's motion for reconsideration.
2. The trial court erred in finding that defendant waived the defense of personal jurisdiction by not including the defense in his answer and/or raising it in prior proceedings.

### **Issues Pertaining to Assignments of Error**

1. When, following service, a defendant sends to plaintiff an unfiled answer and a demand that the summons and complaint be filed within fourteen days per CR 3, and such are not filed with fourteen days, but both the summons and complaint and the answer sent by defendant with the demand are then later filed by plaintiff, does the court err in later entering summary judgment against said defendant? (Assignment of Error 1.)
  
2. Where a *pro se* defendant sends an unfiled answer to plaintiff without giving plaintiff authority to file the answer, and then in a subsequent hearing defendant orally raises the issue of having made a demand under CR 3 and further timely raises the issue again in a motion to reconsider, does a court err in finding a waiver of a personal jurisdiction defense because the plaintiff, without defendant's authority, filed the answer which did not raise the jurisdiction defense? (Assignment of Error 2.)

## II. STATEMENT OF THE CASE

This case relates to plaintiff's complaint against defendant Stephen Anthony "for monies due." CP 50. While the summons and complaint were *filed* in Spokane County Superior Court on November 29, 2016, CP 48 and CP 50, the summons was signed by counsel on August 3, 2016, CP 49, and the complaint was signed by counsel on August 17, 2016. CP 53. As allowed by CR 3 (a), plaintiff served the summons and complaint before filing the same. CP 54-56. This was accomplished on August 30, 2016. CP 55.

On October 21, 2016, Mr. Anthony delivered a cover letter, CP 168, demand to file complaint in court, CP 169, and answer to complaint for monies due, CP 170-174, to plaintiff Southwell & O'Rourke, P.S. via Federal Express. CP 149 at ¶ 3. The Federal Express package was received by plaintiff's law office on October 26, 2016 at 11:22 a.m. CP 152. Mr. Anthony signed the answer to complaint for monies due on October 19, 2016. CP 61. The demand to file complaint, while unfortunately undated, requested that plaintiff file the complaint within 14 days of the receipt of the demand. CP 64. The cover letter stated that, "[a]s soon as the complaint is filed with the court and you provide a cause number, the Answer will be filed with the court." CP 168. Importantly, defendant never authorized plaintiff to file the answer to the

complaint which had been sent, and specifically stated that defendant Mr. Anthony would file the answer once a cause number had been assigned to the case. *Id.*

On November 29, 2016, plaintiff then filed the summons, CP 48, complaint for monies due, CP 50, declaration of service, CP 54, demand to file complaint in court, CP 64, and answer to complaint for monies due. CP 57. The answer and demand plaintiff filed on that date were the same pleadings that had been sent to plaintiff by Mr. Anthony, meaning that plaintiff certainly had both of these documents in its possession prior to November 29, 2016. Critically, plaintiff has never come forward with any contrary evidence suggesting that both the demand and the answer were not received in plaintiff's counsel's office on October 26, 2016 as stated under oath by Mr. Anthony and as shown by the Federal Express delivery receipt. CP 149 at ¶ 3, CP 152. Just as important, plaintiff has never provided any evidence that the demand to file the complaint was separately received on or after November 15, 2016, which would have been fourteen days before the complaint was filed.

No further action occurred on the case until April 7, 2017 when plaintiff filed a motion for summary judgment, which the court heard on May 19, 2017. RP 3. Mr. Anthony appeared *pro se* and the court ultimately granted plaintiff's motion, but did not

enter an order. CP 88. The record reflects that while Mr. Anthony did not file any pleading arguing that the complaint was void per CR 3, he did in fact bring the issue to the court's attention, but at the time did not know the date the complaint had been filed in relation to when he had sent the demand and no further inquiry was made:

[m]y medical practice has undergone significant embezzlement which led to Chapter 11 and ultimately the practice closed on April 20, 2015. Since it closed I moved to the State of Arizona. I don't have access to any of my reports, our e-mail correspondence other than a few but this motion for summary judgment represents the chaos I had with Mr. O'Rourke and his son Mr. Kevin O'Rourke.

I was served a summons by the Sheriff in May at my office while I was seeing patients on August 30<sup>th</sup>. **I responded within the timeframe that had been set aside and I said I need clarification, please file a lawsuit.**

Your Honor I did not hear until April of this year there was a motion for summary judgment and, obviously, references a lawsuit and today's date. **I have evidence that according to the original papers I filed they had 14 days within receipt of my response to their summons to file a lawsuit. I'm assuming that was done...**

RP 6, lines 9-25 (emphasis added).

No further action was taken on the matter until counsel appeared for Mr. Anthony on June 9, 2017. CP 98. Along with his appearance, counsel for Mr. Anthony sent a letter to plaintiff's counsel Mr. O'Rourke raising the issue of lack of jurisdiction as a result of the summons and complaint not being filed within fourteen days of the demand. CP 96-97. Without noting the matter

for presentment, on August 29, 2017 plaintiff then sent in an order granting summary judgment *ex parte*, CP 140, which the court signed on August 31, 2017. CP 84-85. On October 19, 2017, Mr. Anthony moved to set aside this order pursuant to CR 54 (f) due to the lack of notice to counsel for Mr. Anthony. CP 93.

The court heard this motion on December 1, 2017. RP 12. Despite plaintiff's later assertions, the focus of this hearing was simply whether the summary judgment order should relate back to date it was entered, or whether the failure to properly note the matter for presentment would allow the "clock" to re-start on defendant's motion for either reconsideration or notice of appeal. RP 15, lines 11-24. The latter is what the court ordered in that the order specifically "preserved" the timing of defenses asserted by defendant through reconsideration or appeal. CP 146 at ¶ 4. Until this issue was resolved, there was no need to address the jurisdictional issue that had been previously raised in counsel's letter of June 19, 2017. CP 96-97.

Following the entry of this order, defendant then moved to reconsider the order on summary judgment, CP 148-152, and squarely presented the issue of voidness under CR 3 which had been raised both orally by plaintiff at the summary judgment hearing, and by his counsel when he appeared in the matter. Plaintiff asserted that, despite the defendant having filed a

declaration indicating what he had mailed and when he had mailed along with a delivery receipt, defendant had not proven service of the demand, and further argued that defendant had waived the defense of lack of personal jurisdiction by not asserting it as a defense in the answer that plaintiff had filed without defendant's authorization to do so. The court, in ruling on the motion, determined that defendant had waived the defense of lack of personal jurisdiction:

The Court has reviewed the legal file in this case as well as the materials submitted for this motion and my look at the file and the procedural history of this case would also indicate that the first time the issue of personal jurisdiction has been raised is in this motion to reconsider.

There was a full hearing on the summary judgment motion. That issue was never brought forward, never discussed, never raised, and I think while it's certainly true that subject matter jurisdiction can never be waived, personal jurisdiction and venue are something that can be waived based on the party's action.

What the Court really needs to look at out of a general sense of fairness is was due process satisfied. In this case, the Court is confident that that due process was satisfied. Certainly Mr. Anthony knew about the summary judgment motion, had a meaningful opportunity to participate and lay out his arguments. He was fully engaged in the process.

And the Court at this time is not making a ruling on the specifics of the summons itself. I think there's some ambiguity and maybe a fact-finding hearing would be needed to determine whether service was perfected or not. But, certainly, the Court can make the determination that jurisdiction was waived based on the actions of the Respondent in this case.

For that reason, I respectfully deny the motion to reconsider and I'll take any findings of fact that you have, Counsel.

RP 24, lines 17-25, and RP 18, lines 1-18.

On April 26, 2018, the court signed an order denying defendant's motion to reconsider. CP 184-185. This appeal followed.

### III. ARGUMENT

#### Standard of Review

On appeal from summary judgment, the standard of review is de novo and the appellate court performs the same inquiry as the trial court. *Go2Net, Inc. v. C I Host, Inc.*, 115 Wn. App. 73, 83, 60 P.3d 1245, 1250 (2003). Motions for reconsideration are within the discretion of the trial court and will not be disturbed absent a clear abuse of discretion. *Morgan v. Burks*, 17 Wash.App. 193, 197, 563 P.2d 1260 (1977). A trial court abuses its discretion "when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons." *Noble v. Safe Harbor Family Pres. Trust*, 167 Wash.2d 11, 17, 216 P.3d 1007 (2009). An error of law constitutes an untenable reason. *Farmer v. Farmer*, 172 Wash. 2d 616, 625, 259 P.3d 256, 262 (2011). A trial court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and applicable legal standard. *In re Marriage of Horner*, 151 Wn.2d 884, 894, 93 P.3d 124 (2004).

#### The trial court erred by entering judgment in a void lawsuit

CR 3 (a) allows a party to commence a lawsuit by either filing it in court, or serving it upon the defendant. When, as here, a

summons and complaint are first served without being filed, a defendant has the option under CR 3 (a) to demand that the lawsuit be filed. The rule provides: “Upon written demand by any other party, the plaintiff instituting the action shall pay the filing fee and file the summons and complaint within 14 days after service of the demand or the service shall be void.”

It is undisputed in this case that the plaintiff received such a demand from Mr. Anthony after he was served and before the summons and complaint were filed. The dispute in this case is instead whether there is sufficient proof that the defendant’s written demand to file was properly served on plaintiff greater than 14 days prior to the complaint’s filing on November 29, 2016. Defendant has submitted uncontroverted evidence of proof of service via his sworn December 11, 2017 declaration testifying that on October 21, 2016 he caused to be sent to plaintiff his CR 3 (a) demand (“demand”) for filing via Federal Express and that plaintiff received the demand on October 26, 2016 at 11:22 a.m. CP 149 at ¶ 3; CP 152. It is further undisputed that plaintiff actually received the defendant’s demand some time prior to November 29, 2016 because plaintiff filed the demand along with the complaint and thus obviously had the demand in its possession prior to filing. Unfortunately, the demand itself is not dated to corroborate Mr. Anthony’s declaration, but plaintiff has not offered

any evidence either contradicting that it received the demand on October 26, 2016, that the signature on the demand was not Mr. Anthony's signature, or asserting that the demand came into its possession after November 15, 2016 (i.e., within 14 days of filing in compliance with the demand).

Additionally, plaintiffs are, obviously, both attorneys and parties. CR 5 (a) states (emphasis added):

**(b) Service--How Made.**

***On Attorney or Party.*** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service directly upon the party is ordered by the court. **Service upon the attorney or upon a party shall be made by delivering a copy to the party or the party's attorney** or by mailing it to the party's or the party's attorney's last known address or, if no address is known, filing with the clerk of the court an affidavit of attempt to serve. **Delivery of a copy within this rule means:** handing it to the attorney or to the party; or **leaving it at the party's or the attorney's office with a clerk or other person in charge thereof;** or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the person's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

CR 5 (b)(1).

Here, the uncontroverted evidence is that a package containing the demand was delivered by defendant's agent, a Federal Express courier/employee, to plaintiff's attorneys on October 26, 2011 and signed for by an individual named "E. Whited" at the front desk at 11:22 a.m. CP 152.

An affidavit, declaration, or certificate of service is presumptively correct, and the challenging party bears the burden of showing improper service by clear and convincing evidence. *State ex rel. Coughlin v. Jenkins*, 102 Wash. App. 60, 7 P.3d 818 (Div. 2 2000); *Woodruff v. Spence*, 76 Wash. App. 207, 883 P.2d 936 (Div. 3 1994), as amended, (Jan. 30, 1995). A declaration under penalty of perjury may be substituted for the CR 5(b)(2)(B) forms for proof of service. *Manius v. Boyd*, 111 Wn. App. 764, 768, 47 P.3d 145, 147 (2002). Here, Mr. Anthony's declaration is sufficient proof of service and, as such, the plaintiff bears the burden of clearly and convincingly showing that the facts stated in the declaration are incorrect. Plaintiff submitted no evidence contradicting Mr. Anthony's declaration. Since it is clear that plaintiff had the demand in its possession before the case was filed and has not submitted any evidence contradicting Mr. Anthony's sworn testimony that he caused the demand to be delivered to plaintiff's office on October 26, 2016, it must be taken as true that the demand was in fact served greater than 14 days prior to the plaintiff's filing of the complaint. As such, under the clear terms of CR 3 (a), the prior service of process on Mr. Anthony was "void." As a result, the court's denial of Mr. Anthony's motion for reconsideration was error since basic to litigation is jurisdiction, and first to jurisdiction is service of process. When a court lacks

personal jurisdiction over a party, the judgment obtained against that party is void. *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111 P.3d 271, 274 (2005). Here, defendant in asking for reconsideration was neither asserting insufficiency of process nor insufficiency of service of process, *See* CR 12' (h), but rather is asserting that the service made on August 30, 2016 was rendered “void” by operation of CR 3. It is as though it never occurred. There was therefore nothing to waive because the suit itself never properly commenced.

**The trial court erred by predicating waiver on plaintiff's unauthorized filing of defendant's answer**

The court agreed with plaintiff's counsel that defendant had waived the defense of personal jurisdiction under CR 12 (h) because the defense had not been raised in defendant's answer. RP 22, lines 18-23, and because, according to plaintiff and the court, the issue “was never brought forward, never discussed, never raised.” RP 24, lines 23-24. The former argument ignores the fact that it was not defendant who filed his answer; it was plaintiff. At the time the hearing for summary judgment occurred, it was clear that Mr. Anthony was not aware of the procedural posture of the case *vis a vis* when the complaint was filed in relation to his CR 3 (a) demand. He was certainly not aware that the other side had filed his answer. A waiver is the “intentional and voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right.” *Schroeder v. Excelsior Mgmt. Grp., LLC*,

177 Wn.2d 94, 106, 297 P.3d 677, 683 (2013)(emphasis added). Here, there is no evidence that Mr. Anthony intentionally omitted a defense from his answer because he did not file the answer. Plaintiff filed the answer without any authorization from Mr. Anthony to do so. This is hardly a knowing and voluntary relinquishment of rights.

Further, the record is clear that the issue of voidness per CR 3 (a) was raised at least orally by Mr. Anthony at the summary judgment hearing, RP 6, lines 9-25, and then again less than a month later by his counsel in a letter to plaintiff's counsel, CP 96-97, and then yet again when defendant filed his motion to reconsider. CP 148-152. The second hearing in this matter, which revolved around the impropriety of entering an order *ex parte* when counsel had appeared, did not touch on the issue of jurisdiction, and any argument that this was yet another chance to raise the issue of jurisdiction is disingenuous.

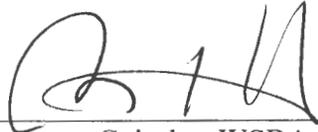
In short, Mr. Anthony's conduct was more than consistent with raising this defense all along. The court's ruling to the contrary is not consistent with the record and ignores the fact that a waiver must be both intentional and voluntary, and is therefore an abuse of discretion. The only waiver that occurred was the direct result of plaintiff deciding to file an answer on a *pro se* defendant's behalf without any authorization to do so. Such conduct should not be rewarded.

#### IV. CONCLUSION

Appellant respectfully requests that this Court find that the trial court failed to recognize that Mr. Anthony properly preserved, and did not waive, his right to assert that the lawsuit filed by plaintiff was void per CR 3 (a). As such, respectfully, the court should reverse the trial court's order on summary judgment and remand for further proceedings.

Dated: November 26<sup>th</sup>, 2018.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read 'R. Geissler', written over a horizontal line.

R. Bryan Geissler, WSBA #12027  
Attorney for Appellant

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COURT OF APPEALS  
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**STATE OF WASHINGTON COURT OF APPEALS  
DIVISION III**

In re:

STEPHEN P. ANTHONY,

Appellant,

And

SOUTHWELL & O'ROURKE, P.S.,

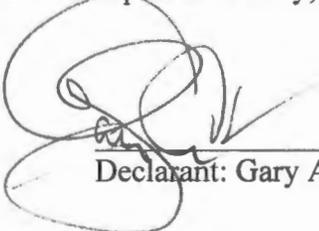
Respondent.

**CASE No. 361110**

**DECLARATION OF MAILING APPELLANT'S BRIEF**

Gary A. Smith certifies under penalty of perjury under the laws of the State of Washington that on November 26, 2018 I deposited in the United States postbox (with first class postage affixed) a copy of *Appellant's brief* in the above-entitled proceeding respondent Daniel P. O'Rourke, Southwell & O'Rourke, P.S., 421 West Riverside Avenue, Suite 960, Spokane, Washington 99201.

DATED THIS 26<sup>th</sup> day of November 2018 at Spokane Valley, Washington.

  
Declarant: Gary A. Smith

ORIGINAL