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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COA No.36111-0-III

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

SOUTHWELL & O'ROURKE, P.S.

Respondent,

vs.

STEPHEN P. ANTHONY,

Appellant.

RESPONDENT'S BRIEF

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I. INTRODUCTION

The Appellant, Dr. Anthony, personally guaranteed the fees of the Respondent, Southwell & O'Rourke. Southwell & O'Rourke took Dr. Anthony's entity through a chapter 11 bankruptcy, and then had its fees approved by the bankruptcy court. Dr. Anthony refused to pay the fees and this case initiated.

In summary judgment, Dr. Anthony admitted that he hired Southwell & O'Rourke and they represented him and his firm for a chapter 11 bankruptcy. *RP 7*. In the hearing Dr. Anthony argued that he did not owe anything more than what he had already paid them. *RP 8-9*. The trial court awarded summary judgment after looking at the bankruptcy court's order on fees owed, and the promissory note and supplemental fee agreement signed by Dr. Anthony. *RP 11*.

Dr. Anthony now wants to avoid his promises and debt by arguing the court never had personal jurisdiction over him. This argument ignores that fact that Dr. Anthony put forward an answer that never pled the affirmative defense of personal jurisdiction, and never amended that answer to add this defense. CR 12(h)(1) required pleading the affirmative defense in an answer or CR 12(b) motion. That alone waives such a defense.

Dr. Anthony also participated in a summary judgment without raising the affirmative defense of personal jurisdiction to the trial court or to Southwell & O'Rourke. Even after Dr. Anthony had the matter reviewed by counsel, and before the entry of the final judgment, he did not raise the affirmative defense of personal jurisdiction to the trial court. Instead, Dr. Anthony sat on the issue and only raised it post judgment in a CR 60(b) motion.

Despite never raising the affirmative defense of personal jurisdiction until after the judgment was entered, Dr. Anthony now wants to claim the trial court erred in two ways: (1) the trial court did not *sua sponte* recognize the affirmative defense of personal jurisdiction when it entered the summary judgment, and (2) the trial court incorrectly found waiver of the affirmative defense since it was not pled, and was raised for the first time after the judgment was entered. These are wrong and unfair to the trial court.

Dr. Anthony chose to represent himself pro se and unless he has a severe mental disability the trial court must hold him to the standard of a lawyer. Unless Dr. Anthony can bring forward evidence that he has a severe mental disability, then he is not allowed to blame his litigation choices on the trial court. Judge Hazel correctly exercised his discretion in this matter and should be upheld.

II. ASSIGNMENT OF ERROR

Southwell & O'Rourke does not believe the trial court made any errors and therefor does not assign any. Southwell & O'Rourke though objects to the following in the assignment of errors by Dr. Anthony:

1. That the trial court erred by entering summary judgment. The notice of appeal only designates "the Trial Court's ruling on Order Denying Defendant's Motion for Reconsideration" entered on April 26, 2018. Along with this, the record is clear Dr. Anthony never raised personal jurisdiction during the summary judgment.

2. That the trial court erred in finding waiver based on an unauthorized filing of an answer, when Dr. Anthony chose to sign and serve the answer. This also misstates the actual findings of the trial court, which found waiver based on the actions of Dr. Anthony, of which not pleading personal jurisdiction in the answer is only a piece of the actions.

III. STATEMENT OF FACTS

A. SUBSTANTIVE FACTS OF THE CASE

Evergreen Hematology & Oncology P.S. employed Southwell & O'Rourke to provide legal services in regards to a Chapter 11 bankruptcy. *CP 66*. The Bankruptcy Court in or about October 25, 2013 approved this employment. *Id.* Dr. Stephen Anthony was a member of Evergreen

Hematology & Oncology P.S. and personally guaranteed the payment of Southwell & O'Rourke. *CP 67 at paragraph 8; CP 62-63; CP 82.* The Bankruptcy Court for the first time on August 19, 2014, and the second time on March 20, 2015, approved Southwell & O'Rourke's compensation. No appeal was taken from the Bankruptcy Court's ruling. *CP 67 at paragraphs 9, 10; CP 31-34.*

Dr. Stephen Anthony and Evergreen Hematology & Oncology P.S. paid everything but \$44,753.03. *CP 68, paragraph 14; CP 74.* The interest owed from March 1, 2016 to February 1, 2017 at 12% per year was \$5,470.36. *CP 74.*

Demand was made to Dr. Anthony to pay this outstanding debt. *CP 52, paragraph 2.8; CP 59, paragraph 2.8.* Dr. Anthony did not pay the debt. *Id.*

B. PROCEEDURAL FACTS OF THE CASE

Southwell & O'Rourke commenced the suit by service on August 30, 2016. *CP 55.* Dr. Anthony signed an answer on October 19, 2016 and delivered it to Southwell & O'Rourke. *CP 57-61.*

Dr. Anthony's answers contained no affirmative defenses or any statement about personal jurisdiction or failure of service. *CP 57-61.*

At sometime between service and filing, Dr. Anthony served a demand to file under CR 3. *CP 169*. This demand is undated. *Id.*

On November 29, 2016 Southwell & O'Rourke filed the complaint in the superior court of Washington. *CP 50*. At the same time Southwell & O'Rourke filed Dr. Anthony's answer that they had received. *CP 57*.

On April 7, 2017 Southwell & O'Rourke moved for summary judgment on the note and personal guaranty. *CP 69-77*. On May 1, 2017, Dr. Anthony responded to the Summary Judgment motion with a memorandum and an affidavit. *CP 14*.¹ Judge Hazel heard the matter on May 19, 2017, with both parties appearing. *CP 88*.

In the summary judgment hearing, Dr. Anthony argued he did not owe Southwell & O'Rourke "any additional fees." *RP 9*. Dr. Anthony's argument, when asked to clarify it by the court, was that he had paid \$101,000 and did not believe he owed any more money. *RP 10-11*. At no time during the hearing did Dr. Anthony make clear any defense of service or personal jurisdiction or ask for relief on that matter. *RP 3-11*. The trial court granted summary judgment to Southwell & O'Rourke. *CP 129-130*. For some reason though the final order was not entered at that time. *CP 140*.

In June, after the summary judgment hearing, Dr. Anthony

¹ For some reason the Appellant has chosen not to designate the memorandum or affidavit as part of the record, so the letter acknowledging them is used.

² The Appellant did not designate the notice of appeal per RAP 9.6(b)(1) so this is cited

consulted with Mr. Geissler on a different matter. *CP 96*. At that time Mr. Geissler reviewed this matter and claimed the late filing of the complaint voided service. *Id.* However, neither Mr. Anthony nor Mr. Geissler raised this defense to the court, or in an amended answer prior to the judgment. (See file; *RP 24*).

On December 1, 2017 the Court entered the final judgment on this matter. *CP 145-147*. Mr. Geissler signed this final judgment, approving it for entry. *CP 147*.

On December 11, 2017 Dr. Anthony, through his counsel, brought a motion for vacation of the judgment under CR 60(b)(5). *CP 148*. This was supported by the declaration of Dr. Anthony that for the first time argued service was void due to filing, and therefore the summary judgment was void. *CP 149, paragraphs 5, 6*.

The CR 60(b)(5) motion was argued on April 26, 2018. At that hearing, Judge Hazel asked Dr. Anthony's counsel:

“Counsel, how do you respond to the position that this was waived since it was not brought up as part of the summary judgment?”

Dr. Anthony's counsel responded:

“Can't waive jurisdiction, Your Honor...”

RP 18, lines 13-16.

Dr. Anthony's position in the motion for reconsideration was that

he did not “affirmatively” waive jurisdiction. *RP 19, line 15 – RP 20, line 16*. Nowhere in the argument though does Dr. Anthony’s counsel argue that Dr. Anthony actually raised the defense of personal jurisdiction in the summary judgment or any other pleadings prior to the judgment. *Id.*

The trial court found that Dr. Anthony had waived personal jurisdiction based on his actions in the case. *RP 25, lines 12-15*. The court noted that a fact-finding hearing would be necessary to look at the service versus filing issues. *Id. at 10-12*. However, the record showed that personal jurisdiction was not raised until after the judgment, and in the motion for reconsideration. *RP 24 lines 17-21*. The trial court found personal jurisdiction was waived, and denied Dr. Anthony’s CR 60(b)(5) motion. *RP 25 lines, 9-18*.

On May 29, 2018, Dr. Anthony appealed this denial of the motion for reconsideration to this Court. (See *Notice of Appeal*).²

IV. ARGUMENT

An affirmative defense of service and personal jurisdiction is waived in one of two ways:

(1) by not following the court rule and pleading it in an answer or

² The Appellant did not designate the notice of appeal per RAP 9.6(b)(1) so this is cited by statement rather than to the clerk’s papers.

raising it in a CR 12(b) motion (CR 12(h)(1); *French v. Gabriel*, 116 Wn.2d 584, 588 (1991)); or

(2) under the common law doctrine of waiver by inconsistent or dilatory actions (*Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29, 39 (2000)).

The trial court correctly found waiver through Dr. Anthony's actions by (1) not raising the affirmative defense of personal jurisdiction in an answer, and (2) by participating in litigation through judgment without ever raising the affirmative defense of personal jurisdiction. *RP* 24-25.

This brief will address (A) that the standard of review here is for abuse of discretion since it is the review of a motion to vacate and not a summary judgment; (B) a party's waiver of the affirmative defense of personal jurisdiction does not make a summary judgment, or any judgment, void; (C) the Court's finding of waiver, and applying it to a motion to vacate under CR 60 was correct; and (D) attorney fees are proper to award to the Southwell & O'Rourke under RAP 18.1.

A. THE STANDARD OF REVIEW IS ABUSE OF DISCRETION

The decision to grant or deny a motion to vacate is reviewed for abuse of discretion. *Haller v. Wallis*, 89 Wn.2d 539, 543 (1978). When evaluating a decision to vacate a judgment, a court is to exercise its authority liberally to preserve substantial rights and do justice between the parties. *Id.*

Discretion is abused if it is exercised on untenable grounds or for untenable reasons. *Driggs v. Howlett*, 193 Wn. App. 875, 897 (2016), review denied, 186 Wn.2d 1007, 380 P.3d 450 (2016). Important to the proper exercise of discretion is that the decision rests on facts supported by the record, and the correct application of law. *Hundtofte v. Encarnacion*, 181 Wn.2d 1, 7 (2014).

This appeal is based solely around the Court's denial of the CR 60(b)(5) motion. (See *Notice of Appeal*). While Dr. Anthony argues the summary judgment should have been denied for lack of personal jurisdiction, the record is clear that Dr. Anthony never raised the issue in the summary judgment motion even when Judge Hazel asked him about the legal issues he was raising as a defense. *RP 8-9*. Because of this, the affirmative defense of personal jurisdiction was not part of the summary judgment decision. Therefore, none of this is reviewed under the summary judgment standard.

The trial court found that the actions prior to the CR 60 motion waived the affirmative defense of personal jurisdiction. *RP 24-25*. This was the only time the trial court reviewed and decided the matter of personal jurisdiction, and is therefore the only decision to review on appeal. The “Order Denying Defendant’s Motion for Reconsideration” is the only order up on appeal here. See *Notice of Appeal*.

B. The court was correct to enter the summary judgment on this matter

Dr. Anthony wrongly argues that the summary judgment is void because there was no personal jurisdiction. This is wrong because (1) lack of personal jurisdiction does not void a judgment if the issue is waived; and (2) Dr. Anthony’s argument would require the trial court to improperly raise the issue on its own since the record is clear Dr. Anthony never raised the issue of personal jurisdiction.

1. Lack of personal jurisdiction does not void a judgment if the affirmative defense was waived.

A party may waive the defense of personal jurisdiction. *Skagit Surveyors & Engineers, LLC v. Friends of Skagit Cty.*, 135 Wn.2d 542, 556 (1998). In contrast, a party may not waive subject matter jurisdiction.

Id. Basic logic would then say a judgment entered when a party has waived the affirmative defense of personal jurisdiction is not void, so long as there is evidence the party waived the affirmative defense.

This basic logic is held up by the outcome of *Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29 (2000). The defendant in *Lybbert* argued insufficiency of service of process, which creates the defense of personal jurisdiction. The *Lybbert* court held that the defendant waived this defense by participating in litigation and then raising it late. *Id.* at 45. The outcome of *Lybbert* is that the case was sent back for trial with the possibility of a judgment. Due to the waiver, the Supreme Court showed no concerns over the judgment being invalid for a lack of service or personal jurisdiction.

Regardless of clear law that the personal jurisdiction may be waived, Dr. Anthony argues the court wrongly entered a summary judgment when it lacked personal jurisdiction over him. *Appellant's brief* p. 11-15. Dr. Anthony argues this is based on *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, (2005) that without personal jurisdiction the judgment is void.

Dr. Anthony does not call out that the *Rodriguez* court was analyzing a case based on invalid service of mailing and publication. *Id.* at 143-144. Unlike this current matter, the defendant in *Rodriguez* did not

even appear until she discovered a default judgment was entered. *Id.* at 143. Also unlike this matter, the *Rodriquez* defendant pled lack of personal jurisdiction as soon as she was aware of the matter. *Id.*

Rodriquez does not evaluate waiver of the defense of personal jurisdiction, because there were no facts that the defendant participated in litigation and then raised the issue after the judgment was entered. As will be shown later, the issue of personal jurisdiction was waived. Part of this waiver was Dr. Anthony not raising this issue until the judgment had been entered. It is incorrect to argue that the lack of personal jurisdiction makes every judgment void; the law is clear, if personal jurisdiction is waived then the judgment is not void.

2. Dr. Anthony did not raise personal jurisdiction in the summary judgment motion and it is unfair to require the judge to raise an issue not in front of the court.

“To constitute a motion challenging jurisdiction the statement must be clear enough both to inform the trial judge as to the nature of the issue and to ask for an immediate ruling on it.” *Sanders v. Sanders*, 63 Wn.2d 709, 715 (1964). The function of a summary judgment is to determine whether there is a genuine issue of material fact requiring a formal trial. *Leland v. Frogge*, 71 Wn.2d 197, 200 (1967). The scope of a summary

judgment is what the moving party has raised in the initial pleading. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 168 (1991); CR 56(c), (e).³

There is no dispute that Dr. Anthony never raised the affirmative defense in his answer, or in his summary judgment response. Regardless of this Dr. Anthony argues that somehow the trial court should have not entered the summary judgment because personal jurisdiction was lacking. What Dr. Anthony does not address is why the trial court should be raising defenses for him that he did not raise.

It is anticipated that in the reply Dr. Anthony will argue two incorrect items to address why the trial court should raise an affirmative defense for him. These are (a) Dr. Anthony was pro se and therefore should have been helped by the trial court, and (b) that he brought up the demand for filing and this was enough to alert the trial court of the issue. Neither of these is correct.

a. The trial court would have acted improperly by bringing up the affirmative defense for Dr. Anthony

A trial court must remain impartial. *Edwards v. Le Duc*, 157 Wn. App. 455, 460 (2010). This includes for pro se parties. *Id.*

³ There is case law that allows a non-moving party to be granted summary judgment if the facts are not in dispute, but that is not relevant here so not briefed.

In *Edwards* the trial court helped a pro se party with the proper testimonial standard of an expert witness. *Edwards*, 157 Wn. App. at 464. This was found to violate the standards of impartiality and was cause for a new trial. *Id.*

Personal jurisdiction is an affirmative defense that must be pled. CR 12(h)(1). Because of this, the trial court would have been advocating for Dr. Anthony had the trial court raised it on its own. The trial court was proper to not evaluate personal jurisdiction, since it was Dr. Anthony's to either raise or waive.

b. Dr. Anthony did not raise the affirmative defense of personal jurisdiction when he talked about his demand for filing.

“To constitute a motion challenging jurisdiction the statement must be clear enough both to inform the trial judge as to the nature of the issue and to ask for an immediate ruling on it.” *Sanders v. Sanders*, 63 Wn.2d 709, 715 (1964). This is not what Dr. Anthony did.

The record is clear that Dr. Anthony said the following:

“I was served by the Sherriff in May at my office while I was seeing patients on August 30th. 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 16-25.

There is nothing in that which makes the issue clear, or asks for an immediate ruling. Along with that, Dr. Anthony was asked by Judge Hazel to clarify his defenses to the CR 56 motion. *RP 8, lines 14-17.* At that time Dr. Anthony brought up the defense of "payment," another affirmative defense under CR 8(c), and the court considered that. *RP 8-11.* Dr. Anthony did not raise personal jurisdiction.

There was absolutely nothing in the summary judgment motion that addressed the affirmative defense of personal jurisdiction. Because it was for Dr. Anthony to raise the issue, it was perfectly proper to enter the judgment with the issue not addressed. Since personal jurisdiction, unlike subject matter jurisdiction, can be waived, the judgment is not void for lack of jurisdiction.

C. The trial court correctly found waiver in this matter

The record is clear that Dr. Anthony waived the defense of personal jurisdiction (1) by not pleading it in an answer or raising it in a CR 12 motion, and (2) by inconsistent and dilatory actions of waiting until

the judgment was entered to raise the defense to the court. The trial court found that personal jurisdiction was waived by Dr. Anthony's actions. *RP* 24-25. This was supported by the record and is a correct application of law.

1. Dr. Anthony was required to plead the affirmative defense of personal jurisdiction in an answer or it would be waived

Affirmative defenses of service of process and personal jurisdiction must be raised in a responsive pleading or CR 12 motion. CR 12(h)(1). Washington is a notice pleading state and requires that a party give the opposing party fair notice of the affirmative defense in its pleadings. *Gunn v. Riely*, 185 Wn. App. 517, 528 (2015). Accordingly, affirmative defenses are waived unless they are pled or tried with the parties' express or implied consent. *Id.*; *French*, 116 Wn.2d at 588.

The record is clear that Dr. Anthony did not plead the affirmative defense of personal jurisdiction. *CP 57-61*. In his opening brief Dr. Anthony claims he was not required to do this because (a) "the defendant did not file the complaint," (b) Dr. Anthony was not aware of the procedural issues, and (c) he did not intentionally omit the affirmative defense of personal jurisdiction from his answer. None of these are justifications for violating the Supreme Court's mandate the affirmative

defense of personal jurisdiction be pled in the answer or it is waived. CR 12(h).

a. Dr. Anthony's answer was effective upon service, and who filed it is irrelevant

An answer becomes operative at the time it is served. *Burns v. Payne*, 60 Wn.2d 323, 325 (1962). The answer is to be filed “with the court either before service or promptly thereafter.” CR 5(d)(1)⁴. Filing with the court merely stops the defendant from being defaulted. CR 5(d)(2).

Dr. Anthony argues that Southwell & O'Rourke did something wrong when they filed his answer. The only thing that Southwell & O'Rourke did by filing the answer was to protect Dr. Anthony from being defaulted. Washington does not favor defaults, but prefers to have things litigated on the merits. *Morin v. Burris*, 160 Wn.2d 745, 754 (2007). Filing of the answer ensured that Dr. Anthony's matter was heard on the merits rather than a default, and this was correct.

Dr. Anthony served his answer and according to law that is what made it effective. Since Dr. Anthony does not disclaim his signature or claim it was not his answer, this filing also did not violate CR 1's mandate

⁴ It is noted that the *Burns* matter was decided when the RCW's rather than the Civil Rules governed procedure. However, the reasoning equally fits the rules of CR 5.

that the court rules be “administered to secure the just, speedy, and inexpensive determination of every action.” Dr. Anthony’s argument on who filed the answer has no bearing on this matter since Dr. Anthony chose to make it his answer. Dr. Anthony never amended his complaint to add personal jurisdiction and service.

b. Dr. Anthony’s ignorance of the law is not an excuse for his own failures as an attorney

Pro se parties are held to the same standards as attorneys. *Edwards*, 157 Wn. App. at 460. The sole exception to this rule is if the *pro se* party suffers from a significant mental disability. *Carver v. State*, 147 Wn. App. 567, 575 (2008). RPC 1.1 requires a lawyer to provide competent representation to their client.

Dr. Anthony now argues that he was not aware of the procedural posture of the case, nor that the answer had been filed. *Appellant’s brief p. 15*. Along with this Dr. Anthony calls out being *pro se* in one of his issues pertaining to the assignments of error. *Id. at 5*. All of this should be disregarded since Dr. Anthony chose to represent himself as an attorney and is held to that standard.

Dr. Anthony was required to file his answer before or promptly thereafter. CR 5(b)(1). The status of the filings is a matter of public

record and available to Dr. Anthony. Southwell & O'Rourke, as well as the court, hid nothing from him on the filing and status of this matter. Dr. Anthony's ignorance of the case status and the rules is all Dr. Anthony's choosing; going *pro se* rather than hiring counsel requires a person to investigate their case and know the law.

However, the record is even more against Dr. Anthony since he did eventually get counsel on June 9, 2017. *CP 96-97*. Even though the final judgment had not been entered at that point, Dr. Anthony still did not enter a responsive pleading raising service of process and personal jurisdiction. While it still may have been dilatory and waiver, Dr. Anthony could at least have attempted to satisfy CR 12(h)(1) after he had counsel identify the issue. That would have shown some respect for the rules laid down by our Supreme Court.

While Dr. Anthony may not have been skilled at law that is not enough to show Dr. Anthony suffers from a significant mental disability. Unless such a disability can be proved, Dr. Anthony must own his choices as his own counsel. Dr. Anthony never raised this defense in an answer, nor did he ever amend the answer under CR 15, which would likely have been granted since CR 15 is liberally construed.

c. Not putting an affirmative defense in answer is deemed waiver under the court rules; proof of intent is not required

Omitting the affirmative defense of personal jurisdiction in an answer or CR 12(b) motion waives the defense as a matter of court rule. CR 12(h)(1); *French*, 116 Wn.2d at 588. The rule was designed to serve the competing purposes of preventing delays, but also protecting parties against unintended waivers of defense. *Id.* at 591-592.

Along with waiver by the court rule, the Supreme Court has recognized the common law doctrine of waiver as a separate way of waiving the affirmative defense on service and personal jurisdiction. *Lybbert*, 141 Wn.2d at 38. This will be briefed more in the next section. However, it is clear both in *Lybbert* and *French* that waiver can occur under the court rule by not pleading the affirmative defense or not raising it in a CR 12(b) motion. Both cases evaluated the common law doctrine of waiver only after first noting that the affirmative defense of service and personal jurisdiction had been raised in the pleadings.

Dr. Anthony only argues the common law doctrine of waiver, versus the court rule's exercise of waiver. Since Dr. Anthony never pled the affirmative defense of personal jurisdiction, it was waived by court rule regardless of the common law doctrine of waiver.

2. Dr. Anthony also waived the affirmative defense of personal jurisdiction by his actions under the common law doctrine of waiver.

Common law waiver of an affirmative defense can occur in two ways: first if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior, and second if the defendant is dilatory in asserting the defense. *Lybbert*, 141 Wn.2d at 39. Here the trial court found both civil rule waiver, as addressed above, but also common law waiver. *RP 25, lines 12-15.*

To find common law waiver the trial court noted that there was a full hearing on the summary judgment motion. In that hearing Dr. Anthony never "brought forward, never discussed, [and] never raised" the issue of personal jurisdiction. *RP 24, lines 22-24.* Judge Hazel correctly noted that Dr. Anthony knew about the summary judgment motion, had a meaningful opportunity to, and did, participate and lay out his arguments. *RP 25, lines 3-8.* Despite this Dr. Anthony did not raise the issue to the trial court until after the judgment was entered, and that in a motion to set the judgment aside.

The trial court correctly applied the law to these facts when it found Dr. Anthony's actions waived the affirmative defense of personal jurisdiction. Participating in a summary judgment hearing, and in the case all the way to the point of a judgment is inconsistent with claiming the

court does not have personal jurisdiction. Such actions are certainly dilatory.

Because Dr. Anthony's actions are substantial facts in the record, and the correct application of law supports these actions being waived, the trial court correctly applied its discretion here. Just like waiver occurred under the court rule, waiver occurred also under the common law.

D. Southwell & O'Rourke is entitled to attorney fees in this matter

Attorney fees are to be awarded to the prevailing party if they are provided for in the contract. *Target Nat. Bank v. Higgins*, 180 Wn. App. 165, 173 (2014). The fee agreement contains an attorney fees to the prevailing party if "legal action" is required. *CP 62, paragraph 5*. The promissory note contains an attorney fee provision "suit is instituted to collect the note." *CP 82*.

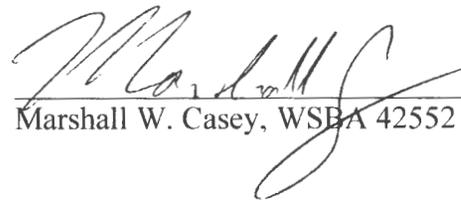
Southwell & O'Rourke has had to institute suit, and this legal action to get paid. Under the note and contract, attorney fees are to be awarded to Southwell & O'Rourke. This includes on appeal under RAP 18.1. Attorney fees are requested under the contract and note.

V. Conclusion

The trial court correctly found Dr. Anthony waived the defense of personal jurisdiction. Dr. Anthony's appeal of the motion to vacate the judgment, was correctly denied. This Court is requested to uphold the trial court's ruling, since the trial court correctly used its discretion.

Respectfully submitted this 26 day of December, 2018

M Casey Law, PLLC



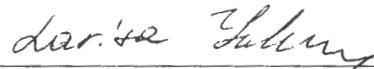
Marshall W. Casey, WSBA 42552

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 26th day of December, 2018, I caused a true and correct copy of the foregoing document to be delivered in the manner indicated below to the following court reporter and counsel of record:

<p><u>Counsel for Defendant:</u></p> <p>R. Brian Geissler Attorney for Appellant N 205 University, Suite #3 Spokane, WA 99206</p>	<p>SENT VIA:</p> <p><input type="checkbox"/> Hand Delivery <input type="checkbox"/> Eastern WA Attorney Services <input checked="" type="checkbox"/> U.S. Mail <input type="checkbox"/> Email</p>
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Dated this on 26th of December, 2018.



Larisa Yukhno-Legal Assistant
M CASEY LAW, PLLC