

No. 39670-0-II

**COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON**

COURT OF APPEALS
DIVISION II
10 JUN 13 4:11:51
STATE OF WASHINGTON
BY
CLERK

Rose Howell, *Appellant*,
v.
Arlis J. Plotner, as Personal Representative of the Estate of Keith Walter
Plotner, Deceased, *Respondent*

RESPONSE BRIEF OF RESPONDENT PLOTNER

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PIV 1-11-10

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I. INTRODUCTION

This is a personal injury case with a *pro se* plaintiff and admitted liability. The case was tried to the bench, with the Honorable Robert Harris presiding. The trial court entered judgment for plaintiff in the amount of \$6,817.52. Plaintiff filed a notice of appeal. Although plaintiff's *pro se* brief is difficult to understand, it seems to be based primarily upon the notion that the trial court erred in denying her motion for default.

Plaintiff filed her motion for default in February of 2008, more than six years after the action was originally filed. At that time, the defense had already filed (a) a notice of appearance; (b) an answer to plaintiff's original complaint; and (c) an answer to plaintiff's first amended complaint. Prior to the date set for the hearing on plaintiff's motion for default, defendant filed an answer to plaintiff's second amended complaint. Consequently, the trial court denied the motion for default (CP 305).

The trial court's written order specifically cited the court rule (CR 55) that applies to defaults, and it identified the relevant facts (CP 305). In her 50-page appellate brief, plaintiff did not articulate any reason why the rule cited by the trial court does not control this case, and she did not take issue with the facts stated in the trial court's order. Furthermore, she does not explain how the record supports any of her arguments. Therefore, Defendant hereby requests an award of terms.

II RESPONSE TO ASSIGNMENTS OF ERROR

Although plaintiff's brief contains 24 different assignments of error, it seems to assert only four different arguments.¹ Plaintiff apparently contends that the trial court erred:

- a) In denying her motion for default;
- b) In appointing a GAL to determine if plaintiff was competent to represent herself;
- c) In denying an affidavit of prejudice; and
- d) In declining to recognize plaintiff's so-called "pro se lien."

Plaintiff's contentions are meritless. This court should affirm the trial court's decisions because:

- a) Defendant filed an answer prior to oral argument on plaintiff's motion for default. Therefore, the trial court would have no choice but to deny the motion;
- b) The court's appointment of a GAL is not reversible because plaintiff:
 - Has not cited any authority to suggest that it was improper to appoint a GAL; and
 - Was not harmed by the appointment of a GAL.
- c) The denial of plaintiff's affidavit of prejudice is not reversible error because:

¹ Defense counsel has done his best to interpret plaintiff's brief. If the Court of Appeals concludes that plaintiff's brief raises some other valid issues not addressed in this brief, defendant respectfully asks for leave to address those issues in a supplemental brief.

- Plaintiff has not shown how or where the record supports this argument; and
 - Plaintiff had already exhausted her “free” affidavit of prejudice.
- d) Plaintiff did not cite any authority to support the existence or validity of the so-called “pro se lien” she asserted after trial.

III. STATEMENT OF THE CASE

Defendant moves to strike plaintiff’s statement of the case on the grounds that it is argumentative, disjointed, and difficult to understand. Because the pleadings are voluminous for a case of this nature, defendant offers the following chronological chart in lieu of a narrative statement of the case:

| Date | Event | Citation |
|-------------|---|-----------------|
| 03/03/99 | Keith Plotner accidentally rear-ended plaintiff. | CP 2 |
| 07/10/01 | Plaintiff’s first attorney filed complaint against Mr. Plotner. | CP 1-3 |
| 08/10/01 | Defense counsel filed notice of appearance. | CP 5-6 |
| 12/04/03 | Defense counsel filed answer. | CP 14-15 |
| 06/24/04 | Court order entered allowing plaintiff to amend complaint. | CP 18-20 |
| 07/09/04 | Plaintiff filed amended complaint. | CP 26-28 |

| | | |
|----------|--|----------------------|
| 07/14/04 | Defense counsel filed answer to amended complaint. | CP 22-26 |
| 05/02/05 | Defendant Keith Plotner passed away. | CP 30 |
| 07/25/05 | Plaintiff's attorney moved for leave to amend complaint to substitute Mr. Plotner's estate as the defendant. | CP 29 |
| 08/26/05 | Court entered order allowing amendment of complaint to list Mr. Plotner's estate as the defendant. | CP 35-36 |
| 08/29/05 | Plaintiff's counsel filed an amended complaint naming the estate as the defendant. | CP 39-40 |
| 06/19/07 | Plaintiff filed a "pro se notice" indicating that she was now representing herself. | CP 41-42 |
| 02/12/08 | Plaintiff filed a 21-page motion for default (without notice of hearing). | CP 49-69 |
| 02/14/08 | Plaintiff filed a notice of hearing, scheduling her motion for default for 03/07/08. | CP 82 |
| 02/15/08 | Defense counsel filed an answer to plaintiff's second amended complaint. This was the third answer filed by defense counsel. | CP 86-88 |
| 03/07/08 | Court orally denied plaintiff's motion for default. ² | Unknown ³ |
| 03/10/08 | Plaintiff moved for reconsideration. | CP 195 |
| 04/04/08 | Plaintiff filed affidavit of prejudice against Judge Johnson. | CP 237 |

² It is unclear whether the oral ruling is expressly stated in the appellate record. However, because plaintiff subsequently filed a motion for reconsideration (CP 195), we know that the motion was denied.

³ Plaintiff recently decided not to offer the verbatim report into the appellate record, and defendant sees no need to do so at this time.

| | | |
|----------|---|-------------------|
| 04/11/08 | Judge Johnson signed a written order denying default motion. | CP 251-52 |
| 04/17/08 | Case transferred from Judge Johnson to Judge Harris. | CP 253 |
| 07/08/08 | Plaintiff filed affidavit of prejudice against Judge Harris. ⁴ | CP 254 |
| 12/04/08 | Memorandum by Judge Harris explaining denial of default motions is entered into record. ⁵ | CP 305-06 |
| 05/26/09 | Two day bench trial commenced. Only issue is damages. | |
| 06/08/09 | Judge Harris issued a Memorandum of Decision in which he determined plaintiff's total proven damages to have been \$6,817.52. | CP 617-19 |
| 07/17/09 | Judge Harris signed (a) Findings of Fact and Conclusions of Law and (b) Judgment in amount of \$6,817.52. | CP 651-56 |
| 10/20/09 | Judge Harris signed an order allowing clerk to disburse funds (paid into court in satisfaction of judgment by defendant) in accordance with attorney fee and health care liens. Judge Harris also denied a lien claimed by plaintiff. | Supp. CP 41-42 |

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⁴ Without the verbatim report of proceedings, the court's ruling on this affidavit does not appear to be contained within the appellate record.

⁵ The motions do not appear to be included in the appellate record.

IV. ARGUMENT

A. Because defendant filed an answer prior to the hearing, the court properly denied the motion for default.

The mere act of filing a motion for default does not prevent a defendant who has “appeared” in the action from filing a responsive pleading. Under CR 55(a)(2), if a defendant has “appeared” before the plaintiff files a motion for default, the defendant may respond to the pleading or otherwise defend at any time before the hearing on the motion.⁶ A defendant is deemed to have “appeared” for purposes of CR 55 if he or she has appeared for “any purpose.”⁷

The present plaintiff did not file a motion for default until February 12, 2008 (CP 0049-0069). By that time, defendant had “appeared” by filing a notice of appearance and by filing two different answers to plaintiff’s first two complaints (CP 5-6; CP 14-15; CP 22-26). Therefore, under the plain language of CR 55(a)(2), the defendant was allowed to “respond to the pleading [plaintiff’s third amended complaint] or

⁶ CR 55(a)(2) Pleading After Default. Any party may respond to any pleading or otherwise defend at any time before a motion for default and supporting affidavit is filed, whether the party has previously appeared or not. *If the party has appeared before the motion is filed, he may respond to the pleading or otherwise defend at any time before the hearing on the motion.* If the party has not appeared before the motion is filed he may not respond or otherwise defend without leave of court. *Any appearances for any purpose in the action shall be for all purposes under this rule 55.* (italics added).

⁷ See last sentence of CR 55(a)(2).

otherwise defend at any time before the hearing [on the motion for default].”⁸

Plaintiff’s motion for default did not strip the defendant of the right to defend. A motion for default is nothing more than a request for action by the court. That request was rendered moot by the fact that the defense filed an answer prior to the hearing, and by the plain language of CR 55(a)(2). Therefore, the trial court properly denied plaintiff’s motion for default.

B. The trial court’s appointment of a GAL was not reversible error.

Plaintiff takes issue with the court’s decision to appoint a GAL to determine whether plaintiff was competent to represent herself at trial (Plaintiff’s brief, page 10). Two factors demonstrate that the appointment of a GAL was not reversible error. First, plaintiff does not cite any authority as to when it is or is not appropriate to appoint a GAL. Second, there is no showing that plaintiff was harmed by the order.

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⁸ The fact that Mr. Plotner’s estate had been substituted in as the defendant does not alter the result. As stated in the *Washington Handbook on Civil Procedure, 2008-2009*, section 36.2:

“A party who replaces a deceased party will assume the position that the deceased party occupied at the time of death, without any other change in the status of the case. Thus, for example, if the deceased party had already waived the right to a jury trial, the successor will be precluded from making a jury demand.”

C. The trial court did not err in denying plaintiff's affidavit of prejudice.

In her fourth assignment of error, plaintiff takes issue with the denial of the affidavit of prejudice she filed against Judge Harris in July of 2008. This argument fails for three reasons:

- 1) Judge Harris had already rendered a substantive ruling, and plaintiff had moved for reconsideration of that ruling (CP 195). Under RCW 4.12.050, an affidavit of prejudice must be filed prior to any such ruling.
- 2) Before she filed an affidavit of prejudice against Judge Harris, plaintiff had already filed an affidavit of prejudice against Judge Johnson (CP 237). The last sentence of RCW 4.12.050 expressly limits each party to one affidavit of prejudice. (“[N]o party or attorney shall be permitted to make more than one such application in any action or proceeding...”).
- 3) Plaintiff fails to identify any facts in the record to support the notion that Judge Harris was prejudiced against her.

D. Plaintiff fails to explain the basis for a “pro se lien.”

Defendant was aware that various creditors would claim liens against the judgment. Therefore, defendant tendered the full amount of

the judgment into court and asked that the court determine the validity of the liens. The court issued an order as to how and when the liens would be decided (CP 740). On October 20, 2009, the court issued an order as to how the funds would be disbursed (Supplemental CP 41).

Plaintiff claims that her "pro se lien" was entitled to precedence over the other liens. However, the only statute she cites to support this notion is RCW 60.40.010, which provides in pertinent part that "an attorney has a lien for his or her compensation... as herein provided." There is nothing in the statute to suggest that a *pro se* litigant can assert a lien over a judgment in his or her favor. Moreover, the whole point of liens is to protect persons other than the judgment creditor. Plaintiff's argument has no merit.

E. Defendant is entitled to terms.

RAP 18.9 provides that the appellate court can require a party who "files a frivolous appeal" to pay "terms or compensatory damages" to the party harmed by the violation. In the present case, plaintiff's 50-page brief failed to raise a single valid issue. In addition, she has barraged defense counsel and the court with numerous motions, most of which are incomprehensible. In many instances, she cited cases that do not stand for the proposition stated. Many of her citations to the record directed the

reader to papers that seem to have no relationship to the alleged "fact" plaintiff is endeavoring to prove.

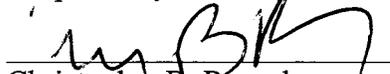
Judge Harris spelled out the reasons for his denial of the default motion in a written decision. Plaintiff has never identified any facts Judge Harris got wrong, and she has not identified any case to suggest that CR 55 does not mean what it says. Terms should be awarded in a reasonable amount, to be determined pursuant to RAP 18.1(f).

VI. CONCLUSION

Plaintiff has not shown that the trial court committed any reversible error. On the contrary, plaintiff's brief does not raise any colorable legal arguments, and it does not adequately substantiate the "facts" stated therein. This court should affirm the trial court and award terms against plaintiff.

Dated this 8th day of January, 2010

Respectfully submitted,



Christopher B. Rounds,

WSBA No. 17583

Attorney for Respondent Plotner

