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## **II. PARTIES**

The appellant is James Goughnour, plaintiff at the trial court (hereafter "Goughnour"). The respondents are Mark Doyle and Carolyn Doyle, husband and wife, defendants at the trial court (hereafter "the Doyles"). The Doyles failed to appear in this matter. An order of default against the Doyles was issued on February 17, 2015 (CP 83 – 84).

## **III. RELIEF REQUESTED**

Goughnour, the appellant, requests that this court:

1. Reverse the decision by the trial court on March 19, 2015 (CP 110).
2. Direct the trial court to:
  - a. Strike the order of March 19, 2015 (CP 110),
  - b. Award the plaintiff damage for the amounts certain as specified in the Complaint (CP 9 – 10) and requested in the Motion and Declaration for Default Judgment, plus costs (CP 101 - 102).

#### **IV. INTRODUCTION**

The claims of the underlying action of this appeal were originally counter-claims to an unlawful detainer action brought by the Doyles, after a 30 day notice to vacate without cause. Although the unlawful detainer complaint asserted rent damage which was subsequently awarded to the Doyles, then reversed. Goughnour's defense centered on his claim of substantial, accrued rent funds held by the Doyles. The trial court in that unlawful detainer action dismissed the counter-claims without prejudice and told Goughnour he could file a separate lawsuit for those claims should he desire to do so. Goughnour did so and that is the underlying action to this appeal.

The trial court in the action underlying this appeal conducted a hearing for Goughnour's motion for default judgment. At that time the trial court dismissed the action for reasons related to the factual substance of the claims and additionally found the claims to be previously extinguished. Goughnour brings this appeal arguing that the trial court must award the Complaint's amount certain against the defaulted defendants and notwithstanding that argument which would end the case by itself, that the claims are not extinguished and are meritorious on their own standing.

## V. STATEMENT OF THE CASE

- a. Goughnour filed the Summons (CP 21 – 23) and Complaint (CP 1 – 20) on Oct. 30, 2013.
- b. Service on the Doyles by mail was performed on April 16, 2014 (CP 67 – 69) pursuant to the trial court’s Order Directing Service of Summons by Mail (CP 65 – 66).
- c. An Order of Default against the Doyles was entered Feb. 17, 2015 (CP 83 – 84).
- d. Goughnour filed Plaintiff’s Ex Parte Motion and Declaration for Default Judgment on March 4, 2015 (CP 85 – 106). A hearing was held on March 19, 2014 at which time the trial court denied the motion and entered an Order of Dismissal (CP 110).
- e. Goughnour filed Plaintiff’s Ex Parte Motion for Clarification on March 25, 2014 (CP 112 – 113). The trial court denied the motion on that same day (CP 114 – 115).
- f. Goughnour filed a Notice of Appeal on March 27, 2015 (CP 116 – 119).

## **VI. ISSUES**

- a. Did the trial court err by asserting affirmative defenses on behalf of the defaulted defendants?
- b. Did the trial court err in finding that the claims were previously extinguished?
- c. Did the trial court err by declining to award the plaintiff an amount certain specified in the Complaint, against the defaulted defendants?
- d. Did the trial court err by declining to find in favor of factual assertions in the Complaint and admitted by the defendants by rule?
- e. Did the trial court err in finding its own interpretation of the contract between the parties, in contradiction to the facts asserted in the Complaint and admitted by the defendants?
- f. Did the trial court err by dismissing the entire action?

## **VII. SUMMARY OF ARGUMENT**

The macro view of the argument is in two major parts:

- a. The trial court erred in not awarding the amount certain specified in the plaintiff's Complaint against defaulted defendants. This argument by itself, would determine the result of the case if this court concurs.

- b. Should this court not concur with argument (a) above, the trial court also erred in raising arguments on behalf of defaulted defendants:
1. substantive argument of facts which are admitted by rule,
  2. trial court's interpretation of the contract contrary to extrinsic evidence admitted by rule, and,
  3. affirmative defenses not raised by defendants.

#### VIII. ARGUMENT

- a. **The trial court erred in not awarding the amount certain specified in the plaintiff's Complaint against defaulted defendants.**

The trial court erred in failing to award the Complaint's amount certain against the defaulted defendants. The specific monetary amounts were pleaded in the Complaint (CP 9 – 10). CR 55(b)(1) in pertinent part reads as follows:

“(b) Entry of Default Judgment. As limited in rule 54(c), judgment after default may be entered as follows, if proof of service is on file as required by subsection (b)(4):

(1)When Amount Certain. When the claim against a party, whose default has been entered under section (a), is for a sum certain or for a sum which can by computation be made certain, the court upon motion and affidavit of the amount due shall enter judgment for that amount and costs against the party in

default, if he is not an infant or incompetent person. No judgment by default shall be entered against an infant or incompetent person unless represented by a general guardian or guardian ad litem. Findings of fact and conclusions of law are not necessary under this subsection even though reasonable attorney fees are requested and allowed.”

10A Wash. Prac. Civil Procedure Forms § 55.32 (3d ed.) in pertinent part reads as follows:

“When the amount of the judgment is a sum certain or can be made certain by computation, **the court is required to enter judgment for that amount and costs** against the party in default unless the party is an infant or incompetent person. CR 55(b)(1); J-U-B Engineers v. Routsen, 69 Wn.App 148, 150, 848 P.2d 733, 734 (1993)” (emphasis added)

When the amount prayed for in the breach of contract Complaint is an amount certain, or by computation can be made certain, that amount must be awarded against the defaulted defendant with no further proceeding.

“As mentioned in an earlier section, a default judgment must be limited to the amount demanded in the complaint.<sup>1</sup> **When the amount is certain (or by computation can be made certain),<sup>2</sup> CR 55(b)(1) requires the court to enter judgment upon motion and affidavit of the amount due. There is little or no discretion involved.<sup>3</sup>** Whether a sum is certain or can by calculation be made certain will depend on whether the amount sought is readily calculable from the face of the complaint.<sup>4</sup> No additional proof is necessary to support the judgment.<sup>5</sup> A judgment in

excess of the amount requested in the complaint is void to the extent of the difference.<sup>6</sup>

The fact that reasonable attorney fees are requested in a summary default proceeding does not render the amount sought uncertain.<sup>7</sup> There is nothing to prevent the party in default from appearing to challenge the reasonableness of the request for attorney fees, however.

**When the amount is certain, no findings of fact or conclusions of law are required, even if attorney fees are awarded.<sup>8</sup>**  
(emphasis added)

14 Wash. Prac. Civil Procedure § 9:18 (2d ed.)

In the present case Goughnour has not requested attorney fees.

However a minimum sum certain for each cause of action was specified in the Complaint by the meaning of the plain language (CP 9 – 10). The total is made certain simply by addition. This amount and costs is the amount requested in Plaintiff's Ex Parte Motion and Declaration for Default Judgment (CP 101 – 102). The trial court erred in declining to grant Goughnour's motion and award the specified amount certain.

**b. Trial Court Raised Arguments on Behalf of Defaulted Defendants:**

The argument of Section (a) above is sufficient to dispose of this case in favor of Goughnour. However should this court not agree, this Section

(b) argues that the trial court engaged in improper intervention when it found facts contrary to those admitted by rule, interpreted the contract between parties in contravention of extrinsic evidence through facts admitted by rule, and raised affirmative defenses on behalf of defaulted defendants.

1. Substantive argument of facts which are admitted by rule:

The trial court erred in failing to recognize factual allegations in Goughnour's Complaint which are by rule, admitted by the Doyles. The trial court stated,

"And for me to go back before April 15, 2010, and start awarding damages to you for some **supposed** agreements that you had on this kind of complex, unique situating that you're arguing, I don't feel comfortable. And I'm not going to do it." (bold emphasis added) (RP 9, Lines 1 – 5)

The agreements, the terms, and the explicit intent of the parties are not supposed, they are admitted by the Doyles. Once an Order of Default is entered as in the present case (CP 83 – 84), "[t]he defaulting party will be deemed to have admitted all the allegations of the plaintiff's complaint as to liability." [4 Karl B. Tegland, Washington Practice: Rules Practice CR 55 author's cmts. At 334 (5<sup>th</sup> ed.2006)]

Goughnour stated in the Complaint that:

- A. "The Doyles representations caused consequential damage to Goughnour." (CP 5, ¶11)
- B. "The Doyles breached the subject contract resulting in rent overpayments." (CP 5, ¶13)
- C. "The Doyles thereby obtained money from Goughnour under false pretense." (CP 6, ¶16)
- D. "Under the terms of the subject contract, the Doyles had a fiduciary duty to apply Goughnour's payments to the mortgage payments on the subject property. The Doyles failed to do so and diverted all of these funds to their personal use. The Doyles thereby breached their fiduciary duty." (CP 6, ¶18)
- E. "The Doyles thereby conspired to commit the fraud, obtaining money under false pretense, and breach of fiduciary duty described in the causes of action described within this complaint." (CP 6, ¶20)
- F. "These acts and conduct caused a substantial amount of time and disruption for Goughnour. The Doyes therefore knowingly and willfully interfered with Goughnour's right to peaceful enjoyment of the subject property." (CP 7, ¶22)
- G. "The Doyles' conduct included the following nine (9) elements:
  - a. The Doyles represented an existing fact,

- b. The Doyles' representations were material to the parties contract and related payments that the Doyles knowingly and willfully received from Goughnour,
- c. The Doyles made representations that are now known to be false,
- d. The Doyles possessed at all times, knowledge of the falsity of the representations,
- e. The Doyles intended that Goughnour act upon the representations,
- f. Goughnour was ignorant of the falsity of the Doyles' representations,
- g. The Doyles' representations were relied upon by Goughnour for truthfulness,
- h. The Doyles' representations were rightfully relied upon by Goughnour,"

(CP 8 – 9, ¶128)

The Affidavit by James Goughnour attached to and filed with the Complaint affirms the factual assertions in the Complaint, specifically including:

- A. "1(c). The agreement's Paragraph 7, "Rent will never exceed Landlord's mortgage payment for the property tenant occupies," was intended as an elegant means to encompasses the fore mentioned terms and serve as a punitive mechanism to insure that Mr. Doyle would in fact use my rent payments

to make his mortgage payments (Exhibit A, Paragraph 7).”  
[CP 11, ¶1 (c)]

- B. “I offered to suspend for an unspecified period of time, collection efforts and debiting of the rent overpayment (aka Positive Rent Balance) in order to give Mr. Doyle some breathing room in order to get his financial condition stabilized. It was clearly understood that the rent overpayment would remain and that applying debits from that account to the rent would resume at my option. Beginning May, I suspended debiting the rent overpayment and resumed paying with new funds.” [CP 13, ¶5]

This body of factual assertions contained in the Complaint and attached affidavit, admitted by the Doyles by rule, clearly support and maintain Goughnour’s claims. The trial court erred in ignoring those established facts and dismissing the complaint.

2. Trial court’s interpretation of the contract contrary to extrinsic evidence admitted by rule:

The trial court erred in applying its own interpretation of the subject contract. In response to Goughnour’s statement during the hearing of,

“MR. GOUGHNOUR Exactly, it would be a much lower payment. And that was the whole principal. And then as, what we believe is an elegant way to enforce this, was that in that agreement it said that rent will never exceed the

mortgage payment, whatever he pays could be the limit on rent.” (RP 7, Lines 1 - 6)

The trial court responded,

“THE COURT: Yeah, that’s my interpretation. I saw that in there, but that’s an interesting argument. But I think the way I would interpret that if that was, in fact, the agreement would be that whatever – it wouldn’t exceed what the mortgage payment, you know, listed in the mortgage is supposed to be. I don’t believe that the correct interpretation would be that if he missed a mortgage payment because he was financially stressed, that would mean you have to pay him no rent.” (RP 7, Lines 7 – 15)

Goughnour’s response to the court reiterates the facts asserted in the complaint and attached affidavit,

“MR. GOUGHNOUR: Well, the purpose was to make sure that he did pay the mortgage, use those funds to pay the mortgage; that was the whole point. It was meant to be punitive.” (RP 7, Line 24 – 8, Line 2).

The trial court erred in effectively redefining the phrase, “mortgage payment,” to “mortgage obligation,” on its own accord and in contravention to the facts admitted by the Doyles in both their actions and by rule. The admitted facts are established by the Complaint’s attached affidavit:

“1(c) The agreement’s Paragraph 7, ‘Rent will never exceed Landlord’s mortgage payment for the property tenant occupies,’ was intended as an elegant enforcement mechanism to insure that Mr. Doyle would in fact use my rent

payment to make his mortgage payments (Exhibit a, Paragraph 7).” [CP 11, ¶1(c)]

This provision could only be an enforcement mechanism if the rent Goughnour paid was to be limited to the mortgage payment that the Doyles actually paid. Under the trial court’s interpretation, that the rent Goughnour paid was limited to the mortgage payment that the Doyles were obligated to pay, there would not be an,

“enforcement mechanism to insure that Mr. Doyle would in fact use my rent payment to make his mortgage payments,” (id)

That the parties intended it to be an enforcement mechanism is an admitted fact by rule.

“2(b). Feb. 5, 2010: Mr Doyle came over to the house. About the first thing he said to me was that he could not afford to make good on the money he accepted from me while not making corresponding mortgage payments. This is paraphrase as I cannot recall his exact words. At the time I thought we were dealing with one or two missed mortgage payments.” [CP 11, ¶12(b)]

In this exchange, the Doyles admitted by their own words, and their action as well, that a breach by them via failure to make any mortgage payments would require them to “make good” on those funds to Goughnour. The Doyles spent two (2) months

subsequent to Goughnour's original inquiry regarding the matter, engaged in a willful and aggressive campaign of subterfuge in an attempt to conceal their breach of the contract in failing to make any mortgage payments at all [CP11, ¶2(a) – 12. ¶2(f)]. Finally, on March 29, 2010 Mr. Doyle admitted to Goughnour that he had made no mortgage payments whatsoever from the inception of the contract.

“3. March 29, 2010: I met with Mr. Doyle and during this discussion he admitted to me that he had not made any of the mortgage payments from the beginning of our agreement of May 12, 2009,” (CP 12, ¶3).

Clearly, the Doyles entered the contract with the deceitful intention of breaching the terms from the very inception. Subsequent to this admission Goughnour debited what became known as the Positive Rent Balance towards current rent with no objection from the Doyles (CP 12, ¶4). Goughnour then made an accommodation to the Doyles to help them get on their “financial feet:”

“I offered to suspend for an unspecified period of time, collection efforts and debiting of the rent overpayment (aka Positive Rent Balance) in order to give Mr. Doyle some breathing room in order to get his financial condition stabilized. **It was clearly understood that the rent overpayment would remain and that applying debits from**

**the account to the rent would resume at my option.**

Beginning May 1, I suspended debiting the rent overpayment and resumed paying with new funds.” (emphasis added) (CP 13, ¶15)

Goughnour’s generous conduct was rewarded with duplicity when approximately four (4) months later the Doyles demanded that Goughnour vacate the property without remuneration of the funds due him (CP 13, ¶16 - 7). The Doyles filed an action for unlawful detainer based upon a 30 day notice without cause. No demand or assertion regarding unpaid rent was made by the Doyles (CP 13, ¶16 - 7). This was a claim added by their attorney only upon filing an unlawful detainer action. To complete this aspect of the narrative, the trial court in that unlawful detainer action did award the Doyles rent damage at a later date. However that award was reversed by this Court of Appeals.

Insofar as the present case; that,

“It was clearly understood that the rent overpayment would remain and that applying debits from the account to the rent would resume at my option.” (CP 13, ¶17)

is a fact admitted by rule.

The trial court erred by failing to recognize admitted facts, then interpreting the contract between Goughnour and the

Doyles in contravention of those facts. The trial court interpreted the contract such that the instrument did not create a liability upon the Doyles nor a claim in favor of Goughnour when the Doyles failed to use the funds received from Goughnour (or any funds) for the mortgage payments.

“THE COURT: Yeah, that’s my interpretation. I saw that in there, but that’s an interesting argument. But I think the way I would interpret that if that was, in fact, the agreement would be that whatever – it wouldn’t exceed what the mortgage payment, you know, listed in the mortgage is supposed to be. I don’t believe that the correct interpretation would be that if he missed a mortgage payment because he was financially stressed, that would mean you have to pay him no rent.” (RP 7, Lines 7 – 15)

This interpretation by the trial court is in clear, objective contravention of the facts admitted by rule.

“I offered to suspend for an unspecified period of time, collection efforts and debiting of the rent overpayment (aka Positive Rent Balance) in order to give Mr. Doyle some breathing room in order to get his financial condition stabilized. **It was clearly understood that the rent overpayment would remain and that applying debits from the account to the rent would resume at my option.** Beginning May 1, I suspended debiting the rent overpayment and resumed paying with new funds.” (emphasis added) (CP 13, ¶15)

It is well settled law that in interpreting a contract, the court must rely upon the intent of the parties when that intent is firmly established by the facts.

“When faced with questions of contract interpretation, courts ‘must discern the intent of the contracting parties, and may consider evidence extrinsic to the contract itself for that purpose, even when the contract terms are not themselves ambiguous’ “

*Bellevue Square Manager, Inc. v. Barcelino Continental Corp.*, 157 Wash.App 1061 (2010)

“Interpretation of contract is determination of fact, and is process that ascertains meaning of term by examining objective manifestation of parties intent.”

*Denny’s Restaurants, Inc. v. Security Union Title Ins. Co.*, 71 Wash.App 194 (1993)

In the present case, the trial court ignored extrinsic evidence of admitted facts which demonstrate the intent of the parties. At the core of those facts is the intent of the parties that the Doyles failure to perform with respect to mortgage payments created what became known as the Rent Overpayment Account. Further, the facts explicitly show that the funds designated as the Rent Overpayment account remained as an obligation of the Doyles through and beyond the subsequent contract of April 15, 2010 (CP 13, ¶15).

Additionally, there is no evidence that the subsequent contract contained any provision of accord and satisfaction for prior or standing claims, even if the Doyles had raised those defenses.

“[12] [13] The elements of an accord and satisfaction are (1) a debtor tenders payment (2) on a disputed claim, (3) communicates that the payment is intended as full satisfaction of \*686 the disputed claim, and (4) the creditor accepts the payment. *Town of North Bonneville v. Bencor Corp. of America*, 32 Wash.App. 144, 145, 646 P.2d 161 (1982). The party alleging an accord and satisfaction must prove there was a meeting of the minds and that both parties understood that such would be the result. *Gleason v. Metropolitan Mort. Co.*, 15 Wash.App. 481, 498, 551 P.2d 147, *review denied*, 87 Wash.2d 1011 (1976).”

*Douglas Northwest, Inc. v. Bill O’Brien & Sons Const., Inc.*, 64 Wash.App 661 (1992), 628 P.2d 565

The admitted facts are clear and unequivocal that the Doyles never disputed the claim at any time, much less in the course of this case (CP 12, ¶4). Further there is nothing in the second agreement of April 15, 2010 that indicates that prior claims are extinguished or superseded in any way; and no such evidence has been produced. That agreement is not in the record of the present case. The trial court took it upon itself to research another case (RP 3, Line 5 – 4, Line 11). The admitted fact is that

the parties understood that the prior claim would remain as rent overpayment with which Goughnour could restart collection effort or debit towards current rent, at his discretion and choice. There was not payment, much less communication that payment was intended as full satisfaction. There was no meeting of the minds that satisfaction was intended, offered, or accepted (CP 13, ¶15).

The trial court made much of this court's finding in a prior appeal that a subsequent agreement explicitly superseded the underlying contract of this case (RP 9, Lines 13 – 17). That Opinion in this court's case No. 41538-1-II acknowledged that the subsequent agreement explicitly superseded the original agreement. This court was not addressing any claims in that opinion. The opinion was strictly limited to the terms of the new agreement and whether those terms allowed the Doyles to terminate tenancy under thirty (30) days notice without cause. The terms were superseded; however nothing in that new agreement, the party's communication, or the party's actions indicate that there was any explicit or implicit release of outstanding claims. To the contrary, the facts admitted in this

case show unequivocally that the parties intended Goughnour's claim against the Doyles to remain in effect and enforceable at Goughnour's discretion (CP 13, ¶15).

3. Affirmative Defenses not raised by defendants:

The trial court's position is that the claims of this action are extinguished by a prior, separate action.

"But in reading all this, what – I started comparing the two files, Mr. Goughnour. And frankly your recent case is based on what you claim to be agreements in different back-and-forth conversations or alleged agreements between the Doyles in – from the 2009, supposedly there was some sort of agreement. But the Court of Appeals recognized that on April 15<sup>th</sup>, 2010; there was a new agreement that expressly superseded all previous agreements." (RP 4, Lines 12 – 19)

"But I'm not going to go back before 2010 and start trying to calculate some way to award you damages for what, specifically and expressly as the Court of Appeals said, was the new agreement superseded the prior agreement. And I'm not going to – I can't go against what the Court of Appeals agrees and states because they're a higher court than I am as far as decision making on this, so that's my ruling for today." (RP 9, Lines 11 - 18)

Regardless of this court's finding regarding the above arguments related to the substance of the claims, the trial court erred in raising on its own initiative, issues relate to accord and

satisfaction, and res judicata. These are affirmative defenses that the trial court may not raise on behalf of a defaulted defendant.

For example:

“[2] The court, however, did not base its denial of J–U–B’s motion on the procedural requirements of CR 65(b). The court’s memorandum opinion offered the following reason for refusing to enter judgment:

Testimony given before judicial, legislative and administrative bodies is absolutely privileged.

This court cannot grant a judgment, even by default, when it clearly has no merit.

(Citations omitted.) For all practical purposes, the court sua sponte raised a defense for Dr. Routson under CR 12(6)(b): namely, that J–U–B’s complaint did not state a claim because Dr. Routson’s testimony was absolutely privileged as a matter of law. In this the court erred, for it is the defendant (Dr. Routson) who should raise the issue, not the court. CR 12(b)(6).”

[J-U-B Engineers, Inc. v. Routson, 69 Wash.App 148 (1993), 848 P.2d 733, at 734.]

In J-U-B Engineers, the Court of Appeals ruled that even in that case where the complaint for defamation was meritless because the speech was privileged, the trial court erred in raising that defense on behalf of defaulted defendants. In the present case the trial court sua sponte effectively raised a defense for the

Doyles that the claims were extinguished by previous accord and satisfaction, and barred by the principle of res judicata.

Notwithstanding the previous argument that these defenses fail on the merit, the trial court erred as in J-U-B Engineers. It is improper intervention for the court to raise those defenses on behalf of the defendant (id).

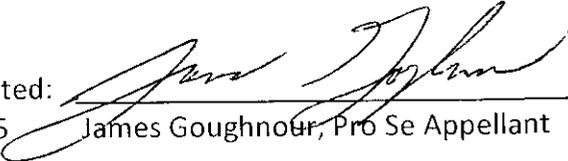
#### IX. CONCLUSION

This court must reverse the decision by the trial court on March 19, 2015 (CP 110). Further, this court must direct the trial court to:

- a. Strike the order of March 19, 2015 (CP 110),
- b. Award the plaintiff damage for the amounts certain as specified in the Complaint (CP 9 – 10) and requested in the Motion and Declaration for Default Judgment plus costs (CP 101 - 102).

Respectfully submitted:

Dated: July 10, 2015

  
James Goughnour, Pro Se Appellant

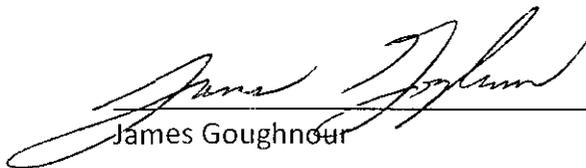
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Declaration of Service:

STATE OF WASHINGTON  
BY James Gough I, James Gough, hereby certify and declare that I served a complete copy of  
this Opening Brief of Appellant; on July 10, 2015 by first-class mail from  
Enterprise, Washington, postage prepaid, to Respondent's address as provided  
by their former counsel in his Notice of Withdrawal of Attorney, given as:

Mark Doyle and Carolyn Doyle, husband and wife  
P.O. Box 866  
Enterprise, UT 84725

  
James Gough

Dated: July 10, 2015