

71165-2

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Cause No. 71165-2-1

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

MARY MITCHELL

Appellant,

v.

SOUNDVIEW INVESTMENT GROUP, LLC

Respondent.

BRIEF OF APPELLANT

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10-10-11 10:00 AM


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I. ASSIGNMENTS OF ERROR

A. Assignments of Error

No. 1 *Under Washington law, did the small claims court error in denying Plaintiff Mary Mitchell a fair trial to which she was constitutionally entitled?*

No. 2 *Under Washington law was Plaintiff Mary Mitchell denied her right to proper service of the Defendant's answer and counterclaim?*

No. 3 *Under Washington law did the small claims court error when it overlooked the evidence contravening the Defendant's attempt to mislead the court that Soundview Investment Group, Inc. was bonded at the time the work was done?*

B. Issues Pertaining to Assignments of Error

No. 1 *Should the case brought by Plaintiff Mary Mitchell be remanded back to the small claims court for a new trial?*

No. 2 *Should the judgment paid by the Plaintiff Mary Mitchell be returned to her along with attorney's fees and costs of litigation?*

II. STATEMENT OF THE CASE

Plaintiff Mary Mitchell appeals the Small Claims decision of August 23, 2013, which she brought against the defendant. The Small claims court overlooked the facts that she had not been served the answer, counterclaim and discovery by the defendant, and the defendant misled the court by claiming he was bonded at the time of the flooring contract and work, when he was not. Her appeal to the King county Superior Court resulted in the small claims court decision being affirmed in part and modified in part on November 7, 2013. The Plaintiff now seeks review by the Court of Appeals Division I.

Statement of the Facts

Plaintiff Mary Mitchell hired the Defendant Soundview Investment Group on April 2, 201, to finish wood flooring. CP at 101. On July 12, 2013, Ms. Mitchell brought this claim in the King County District Court Small Claims Division in Seattle, against Defendant Soundview Investment Group, LLC, represented by the owner Stanley Johnson, for breach of contract, fraudulent representation of being bonded, and substandard workmanship on a wooden floor in a house that she owned. CP at 17. On May 28, 2013 the defendant had filed a contractor's lien on the Ms. Mitchell's property on which he had performed substandard work. CP at 67-73.

After completing service on the defendant, Ms. Mitchell did not receive service from the defendant, and heard nothing from him. She naturally

concluded that the defendant was not pursuing a defense. During the trial that was held on August 23, 2013, Ms. Mitchell learned that Defendant Stanley Johnson had filed an answer, counterclaim, and provided the court with discovery, which she had not seen nor had knowledge of, because she had not been served. RP at 4, lines 6 to 20.

During the trial, Mr. Kevin Johnson, present in the court with Ms. Mitchell, informed the court that Ms. Mitchell had not received any of the documents and had never seen them before. RP at 4, lines 6 to 20. Ms. Mitchell confirmed this. RP at 9, lines 17 to 18. The defendant did not provide proof of service because it did not exist, he could only provide the receipt for sending documents, certified, return-receipt to the appellant. RP at 4, lines 16 to 25, RP at 5 lines 1-6.

During the trial, the court did not ask the defendant for proof of service. Defendant Johnson also presented to the court a document to show that he was bonded, but Ms. Mitchell was not provided a copy, nor was she able to see the document that day. Ms. Mitchell was denied the opportunity to point out to the court that the respondent's proof of bonding showed that he posted the bond days after the faulty repair was made, and the court failed to notice the difference between the date of the posting of the bond, and the dates when the work was performed. By the court's ignorance of those facts, the petitioner was left with no opportunity to prepare her arguments regarding the answer and counterclaim, nor was she able to view

any of the defendant's discovery. The small claims court found for the defendant/respondent. CP at 14.

After the trial, Ms. Mitchell researched the defendant's bond, and discovered that he had posted it on May 9, 2013, over four weeks after the work was performed. In addition, Ms. Mitchell called the president of ART by Ara Venjamin Mironyuk. He informed her that Soundview Investments, Inc. and Stanley Johnson were not part of his company, were not included on his bond, and he knew nothing about the problem with the floor.

The petitioner appealed the decision to the superior court on September 20, 2013. CP at 6. The Honorable William Downing affirmed the decision in part and modified in part on November 7, 2013. CP at 116-117.

III. SUMMARY OF ARGUMENT

Mary Mitchell appeals the small claims and superior court decisions asserting that she was not granted a fair trial because her right to proper service was denied and the respondent fraudulently claimed that he was bonded at the time the work was completed.

IV. ARGUMENT

A. STANDARD OF REVIEW

The appellate court generally reviews a trial court's decision to determine whether substantial evidence supports any challenged findings and whether the findings support the conclusions of law. *Dorsey v. King County*, 51 Wn.App. 664, 668-69, 754 P.2d 1255, review denied, 111 Wash.2d 1022 (1988). Unchallenged findings of fact are verities on appeal. *State v. O'Neill*, 148 Wash.2d 564, 571, 62 P.3d 489 (2003). The court will view questions of statutory interpretation de novo. *State v. Stratton*, 130 Wn.App. 760, 764, 124 P.3d 660 (2005). The court must consider context, related provisions, and the statutory scheme as a whole, when interpreting statutory language. *State v. Jacobs*, 154 Wash.2d 596, 600, 115 P.3d 281 (2005). Absent ambiguity, "the court must give effect to plain meaning as an expression of legislative intent." *Jacobs*, 154 Wash.2d at 600 quoting *Department of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wash.2d 1, 9-10, 43 P.3d 4 (2002).

In a small claims case, the pro se parties are not held to the level of counsel, therefore, instead of requiring formal objections and motions, the record of the proceedings are the basis for the court's interpretation.

B. SCOPE OF REVIEW

In general, issues not raised in the trial court will not be considered for the first time on appeal. RAP 2.5; *State v. Wiley*, 26 Wash.2d 422, 613 P.2d 549 (1980). However, where the cumulative effect of all preserved

and non-preserved errors has denied the defendant the constitutional right to a fair trial, the reviewing court can exercise discretion to review all claimed errors. *State v. Alexander*, 64 Wash.2d 147, 822 P.2d 1250 (1992). Under the Rules of Appellate Procedure (RAP) 2.5(a), certain errors may be raised for the first time on appeal. A party may raise the following errors for the first time: 1) lack of trial court jurisdiction; 2) failure to establish facts upon which relief can be granted; and 3) manifest error affecting a constitutional right. *RAP 2.5 (a)*.

The most common exception to the general rule is the claim of manifest error affecting a constitutional right. *State v. Gallo*, 20 Wn.App. 717, 582 P.2d 558 (1978). However, a review will not pass on a constitutional issue unless absolutely necessary to decide the case. *State v. Armstead*, 40 Wn.App. 448, 698 P.2d 1102 (1985). When a manifest error affecting a constitutional right is found, the appellate court may make an independent evaluation of the evidence.

There are two methods for seeking review of decisions of the superior courts, appeal, which is review as a matter of right, or discretionary review, which is review by permission of the reviewing court. *RAP 2.1(a)* A party may appeal a final judgment as a matter of right the following a superior court decision. *RAP 2.1(a)(1)* A superior court decision may be appealed “If the superior court decision has been entered after a proceeding to review a decision of a court of limited jurisdiction, a party may appeal only if the review proceeding was a trial de novo.” *RAP*

2.2(c) “Unless otherwise prohibited by statute or court rule, a party may seek discretionary review of any superior court decision not appealable as a matter of right.” *RAP* 2.3(a). However, discretionary review for a superior court decision on review of a decision of a court of limited jurisdiction will be accepted if:

- 1) If the decision of the superior court is in conflict with a decision of the Court of Appeals or the Supreme Court; or
 - 2) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
 - 3) If the decision involves an issue of public interest which should be determined by an appellate court; or
 - 4) If the superior court has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by the court of limited jurisdiction, as to call for review by the appellate court.
- RAP* 2.3(d)

This case qualifies as an appeal of right yet, would qualify under discretionary review in parts 1, 2, 3, and 4 of *RAP* 2.3(d).

C. DISCRETIONARY REVIEW VS. APPEAL OF RIGHT

The plaintiff was entitled to an appeal of right. Yet, in this case, discretionary review would also be proper because the small claims court ignored the facts that: 1) the plaintiff had not been properly served with answer, counterclaim, and discovery, and 2) that the defendant did not produce evidence of valid bond, and in fact submitted to the court proof of bond that was made significantly after the work was completed. It was because of these court errors that the petitioner was substantially

prejudiced. Not only did the court allow the answer of the defendant onto the record, which denied Ms. Mitchell the opportunity to prepare for trial because she correctly presumed the defendant had not offered a defense, it affirmed the defendant's counterclaim, of which the plaintiff had no knowledge, for lack of service.

In justifying review, the facts in this case satisfy *RAP 2.3(b) Considerations Governing Discretionary Review in the Washington State Rules of Appellate Procedure*. Here, the small claims court committed error of law. The small claims court did commit probable error from which the decision substantially altered the status quo or substantially limited the freedom of the plaintiff. The court also departed from the accepted and usual course of judicial proceedings, as to call for the exercise of supervisory jurisdiction by the appellate court.

The Washington Supreme Court has held that in order to be entitled to invoke the exception Under *RAP 2.5(a)(3)*, the general rule that appellate courts will not consider issues raised for the first time on appeal, the defendant must identify a constitutional error and show how, in the context of the trial, the alleged error actually prejudiced the defendant's rights. If the defendant cannot do this, he has not established manifest error. *State v. McFarland*, 127 Wash.2d 322, 334-35, 899 P.2d 1251 (1995).

In a small claims trial, the court procedural rules are relaxed because both parties are pro se. The parties are not required to make formal objections on the record to preserve them for appeal.

V. COURT ERRORS

A. INPROPER SERVICE

Washington Courts have struggled with issues relating to service of process, opinions vary between liberal and stringent interpretations of statutes and rules without creating a firm guiding principle. However, one thing is certain. Under Washington law, when service is required for establishing jurisdiction for the court and to inform the other party-- service must be completed. Wash.Const. art. I § 3. It has been noted that “*In light of the uncertainty of the law, the only prudent practice in for the plaintiff to strictly comply with the statutory procedures whenever possible.*” Karl B. Tegland. Washington Practice Volume 14 Civil Procedure. Thomson West 2003. Plaintiff Mary Mitchell properly served the defendant. In filing a counterclaim, a defendant stands in the position of a plaintiff requiring proper service on the other party. In failing to serve the counterclaim, Defendant Stanley Johnson violated court procedure.

Under CRLJ 5(a) Service and Filing of Pleadings and Other Papers requires all pleadings that must be served upon parties to be filed.

(a) Service: When Required. Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous

defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties.
CRLJ 5(a)

The courts may allow substitution of service when necessary, as in a small claims case where the court allows service by certified, return-receipt delivery. It is stated with particularity in the “Small Claims Instructions for Defendants,” “Your counterclaim must be served on the plaintiff by certified mail or personal service [process server or other person over the age of 18] prior to the trial date. When you appear in court you must bring with you the affidavit of service on the other party.” Small Claims Instructions for Defendants,
<https://www.kingcounty.gov/DistrictCourts.aspx>

The defendant Stanley Johnson did not show proof of service to the small claims court. Kevin Johnson on behalf of Ms. Mitchel informed the court that she had not received the counterclaim. RP at 4 lines 7-24, RP at 5 lines 1-25, RP at 6 lines 1- 6. The court heard the testimony of Ms. Mitchell. RP at 9 lines 17-18.

The court failed to require proof from Defendant Stanley Johnson that Ms. Mitchell, or someone authorized, had signed for receipt of the answer, counterclaim and discovery. Instead, the court went on to other issues, ignoring that the plaintiff was substantially unable to defend in the

counterclaim. The court's failure to remedy the lack of service on the plaintiff, resulted in an unfair trial for Ms. Mitchell.

Other Washington cases have reviewed the issue of whether the server's option of providing personal service, or certified, return-receipt required proof of service. The Court of Appeals determined the decisions based upon legislative intent. In *CHG Int'l, Inc. v. Platt Elec. Supply, Inc.*, the issue was whether a material seller had effectively served notice pursuant to a statute which provided for service of a notice by personal service or by registered or certified mail. 23 Wn.App. 425, 427, 597 P.2d 412, review denied, 92 Wash.2d 1026 (1979). In concluding that the material seller had not complied with the statute when the notice it mailed was returned "unclaimed," the Court of Appeals ruled that because the statute had required either personal service of the notice or delivery by certified or registered mail, the intent of the legislature was that there be actual notice. *CHG Int'l*, 23 Wash.App. at 427, 597 P.2d 412 (citing *Robel v. Highline Pub. Schs., Dist.* 401, 65 Wash.2d 477, 398 P.2d 1 (1965); *Van Duyn v. Van Duyn*, 129 Wash. 428, 225 P. 444, 227 P. 321 (1924)). Return of Service was required by the court. Similarly in this case, the small claims court gave the defendant the same option in serving the pleadings, but stated specifically that "When you appear in court you must bring with you the affidavit of service on the other party." Small Claims Instructions for Defendants, <https://www.kingcounty.gov/DistrictCourts.aspx>. The court allowed the defendant to show proof of mailing on August 7, 2013. CP at

81. To complete the service requirements, the defendant had to show proof of receipt of the documents, usually sent on a green postcard with signature from the U.S. Postal Service. Yet the court overlooked the proof of receipt requirement, leaving Ms. Mitchell at a disadvantage.

B. FRAUD

In contracting, both parties have a duty to act in good faith and not deceive one another, and misrepresentations violate that duty. *Kammerer v. Western Gear Corp.*, 27 Wn.App. 512, 618 P.2d 1330 (1980). Fraud is an intentional false misrepresentation of a matter of material fact either by words, conduct, concealment, or false or misleading allegations which both deceive and is intended to do so, so that one shall act upon it to her legal detriment. *Axtel v. MacRae*, 133 Wash. 490, 233 P. 934 (1925); Black's Law Dictionary 685 (8th ed. 2004). A misrepresentation is a false assertion resulting from ignorance or carelessness, Restatement (Second) of Contracts § 15, comment a (1981), while fraudulent representations intend to mislead. *Skagit State Bank v. Rasmussen*, 109 Wash.2d 377, 745 P.2d 37 (1987). When operating simultaneously, a fraudulent misrepresentation may result in an option to void the contract by the innocent party, while a nonfraudulent misrepresentation will only have legal consequences if it is material to the contract. *Brinkerhoff v. Campbell*, 99 Wn.App. 692, 994 P.2d 911(Div. 1 2000); Restatement (Second) of Contracts § 15, comment a (1981); *Skagit State Bank v. Rasmussen*, 109 Wash.2d 377, 745 P.2d 37

(1987). Fraud is “an appendage of misrepresentation” that permits additional legal remedies. The four elements of a misrepresentation are: 1) an assertion or representation not in accord with the facts; 2) the assertion is either fraudulent or material; 3) the assertion was relied upon in manifesting assent; and 4) the reliance was justified. *Yakima County (West Valley) Fire Protection Dist. No. 12 v. City of Yakima*, 122 Wash.2d 371, 858 P.2d 245 (1993).

If a party’s manifestation of assent is induced by either a fraudulent or material representation by the other party, upon which the recipient is justified in relying and did rely, the contract is voidable by the recipient. Restatement (Second) of Contracts § 169 (1981). If avoidance of the contract is inequitable, such as the contract has been substantially performed, then damages may be awarded as compensation. Restatement (Second) of Contracts § 381 (1981).

The facts in this case suggest fraud was committed by the respondent in two ways. First, when he denied the failure to properly sand the floor before treatment of the floor. Yet, that issue was ignored by the court because Ms. Mitchell did not receive service of the defendant’s answer and counterclaim and could not prepare argument for the court. Second, the respondent stated to Ms. Mitchell and the court that he was bonded, when he was not, then he provided fraudulent proof to the court that he was bonded under All Phase Quality Contractors, and Art by Ara.

The defendant produced from the Labor and Industries (L&I) web site a copy of the listing of bond for Art by Ara CP at 91-92, but after the trial was over, Ms. Mitchell called the president of the company Venjamin Mironyuk, who informed her that Art by Ara had “nothing to do with that contract.” RP at 18 lines 2-25, RP at 19 lines 1-8. Mr. Mironyuk admitted to repairing only the mirrors. RP at 19 line 8.

The defendant also entered into the court record a copy of an employer identification number listing on the IRS website from April 2013, of a construction company All Phase Quality Contractors in Pierce County. Defendant Stanley Johnson was named as the sole proprietor. CP at 91-92. Handwritten on the copy was “contractor # ALLPHPQ879KZ,” and “S.J. proof of General Contractor in April (During proj.). Upon further investigation by Ms. Mitchell, the listing found on the L&I registered contractor list showed that All Phase was registered on May 9, 2013-- a month after the work was performed.

Stanley Johnson testified at the trial that he was a licensed contractor:

COURT: All right. And, Mr. Johnson, you said that you are a registered contractor?

MR. STANLEY JOHNSON: Yes. I'm a licensed contractor, which I also provided my contractor's license there and contractor name. The contractor number is on there and then the registration information is on there. RP at 32 lines 22-25, RP at 33 lines 1-2.

What the court had failed to ask the defendant, was whether he was a registered contractor **during the time the work was completed.** Ms.

Mitchell was kept from correcting the misleading testimony because she had never received the counterclaim and was not given the chance to study the documents and prepare an informed response.

When the court asked why the defendant did not enter into this agreement as All Phase Quality Contractors, the defendant fraudulently claimed that Art by Ara completed all of the work including the flooring and the plaintiff was the general contractor:

COURT: Okay. Give me just a moment. And is there any reason why you didn't enter into this contract as All Phase Quality Contractors, LLC?

MR. STANLEY JOHNSON: Yeah. Because we decided it would be better if Art by Ara just did the work. Because at that budget of \$1600, normally what I would have done was bid it as twenty-three, then I would have just did the whole contract under All Phase, and then I would have hired every contractor in there such as Art by Ara or the painting companies, whoever would have hired under All Phase as a general contractor.

His statement was in direct opposition to what Ms. Mitchell had later learned from Venjamin Mironyuk, president of Art by Ara.

The defendant also went so far as to produce for the court a copy of a letter dated August 9, 2013 sent to the Small Claims Court containing the Art by Ara letterhead signed by the defendant's brother Dwayne Johnson. CP at 87. The letter stated that the defendant had acted only as a third party, and in fact Art by Ara completed all of the work at Ms. Mitchell's property.

Stan Johnson, investor and representative of Soundview Investment Group LLC, had shown Mary Mitchell, investor some of our work that we have done for Soundview. Mary

Mitchell wanted us to work on her wood floors at the Steilacoom project, as well as, do other projects.

We agreed to do the work for Mary Mitchell, as long as, Soundview Investment Group LLC was involved as a third party in communicating with the customer and handling the billing. Soundview Investment Group LLC did not do any of the work that is in question for billing and was only utilize as a third party for this project. As of today we have not received payment for work performed or completed at her Steilacoom project.

CP at 87.

This letter was apparently intended to exonerate the defendant from any responsibility for the faulty work, while Art by Ara later denied any involvement in the contract or performance other than the mirror. Yet, the court did not inquire why neither of these contractors, both listed on the heading of the contract, was responsible for the faulty work. RP at 31 lines 12-15, RP at 32 lines 1-14.

Ms. Mitchell was kept in the dark during the entire process and was not given an opportunity that day to bring her case to the court. When the small claims court allowed into evidence the defendant's proof of posting bond on May 6, 2013, when neither the court nor the defendant presented a copy to Ms. Mitchell, she could not aid the court in recognizing that the bond was posted days after the work was performed. Then when the court accepted the letter from Dwayne Johnson, it left Ms. Mitchell with both contractors Art by Ara and Soundview Investments LLC denying that they were the contractor on the failed floor.

Mr. Kevin Johnson had tried to inform the court that Ms. Mitchell was never served. Ms. Mitchell confirmed this, but the court became distracted by the defendant's unserved documents. The defendant's fraud went unrecognized and this was to the detriment of the plaintiff.

Here, Stanley Johnson asserted and represented that he was licensed and bonded under All Phase and Art by Ara which were not in accord with the facts; 2) His assertions were fraudulent and material; 3) His assertions were relied upon in manifesting assent by Marty Mitchell in the contract; and 4) Ms. Mitchell's reliance was justified. Under Restatement (Second) of Contracts § 169 the contract was voidable, but avoiding the contract was inequitable because the contract had been substantially performed before Ms. Mitchell discovered the misrepresentation. Therefore, damages may be awarded as compensation under Restatement (Second) of Contracts § 381.

VI. CONCLUSION

This Court will determine what it means in Washington to be properly served in a fair small claims trial. Does it mean that the defendants **may** fail to provide proof of service of answer and counterclaim resulting in the court hearing only the defendant's version of the facts? Does it mean that only the court shall see the defendant's pleadings, leaving the plaintiff out of the loop, effectively removing any chance of meaningful response or argument by the plaintiff?

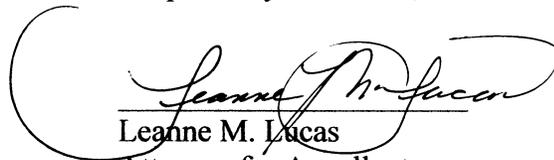
If the Court determines that the answers to each question is "yes," then Mary Mitchell received a fair trial in Washington on August 23, 2013.

Conversely, if the Court agrees that Ms. Mitchell was entitled to a fair trial where she would be served with all pleadings and she would be provided time to study them, before she faced the defendant in court, then she did not receive a fair trial that day.

This Court will also determine whether the deceit and “sight of hand” maneuvering by the defendant that went undetected in the trial, regarding who performed and was responsible for the contract and that Stanley Johnson was not registered and bonded at the time of performance, will be supported by the Washington State Judicial System, or whether such deception by contractors shall be discouraged in this State.

February 27, 2015

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Leanne M. Lucas", is written over a horizontal line. The signature is enclosed within a large, hand-drawn circular scribble.

Leanne M. Lucas

Attorney for Appellant

Washington State Bar Association No. 37414