



E-FILED
THURSTON COUNTY, WA
SUPERIOR COURT
05/25/2021 11:45:28 AM
Linda Myhre Enlow
Thurston County Clerk

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Date: _____
Time: _____
Judge/Calendar: _____

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THURSTON COUNTY

DEPARTMENT OF LABOR AND
INDUSTRIES OF STATE OF
WASHINGTON,

Plaintiff,

v.

FOWLER NAT D. AND MARY M
DBA FARMBOY DRIVE IN,

Defendant.

No. 20-2-02460-34

NOTICE OF APPEAL TO COURT OF
APPEALS, DIVISION II


Defendant, FOWLER NAT D. AND MARY M DBA FARMBOY DRIVE IN, seeks review
by the designated Appellate Court, Division 2, of the following orders by the trial court:

Copies of all such orders are attached.

1. Order Denying Motion to Dismiss and Vacate, entered by Judge Chris Lanese on
April 30, 2021. (Att. 1, Order Denying Motion to Dismiss and Vacate).

DATED this 25th day of May 2021.

HARBOR APPEALS AND LAW, PLLC


Drew Mazzeo, WSBA No. 46506

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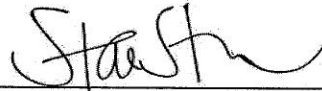
Attorney for Farm Boy

CERTIFICATE OF SERVICE

My name is Stacia Smith, I am over the age of 18. I declare this statement to be true and correct, under penalty of perjury under the laws of the state of Washington. I caused to be served this Notice of Appeal, on

Attorney General of Washington, Labor and Industries Division
Att: Michael Hall, WSBA No. 19871
Att: Brian Dew, WSBA No. 18877
800 Fifth Avenue, Suite 2000
Seattle, WA 98104-3188
(360) 564-7740

via process server and via USPS first class mail, this 25th day of May, 2021.



Stacia Smith
Paralegal to Drew Mazzeo
stacias@lifetime.legal

ATTACHMENT 1

FILED
SUPERIOR COURT
THURSTON COUNTY, WA

2021 APR 30 AM 8:36

LINDA MYHRE ENLOW
THURSTON COUNTY CLERK

SUPERIOR COURT OF WASHINGTON
FOR THE COUNTY OF THURSTON

DEPARTMENT OF LABOR AND
INDUSTRIES OF THE STATE OF
WASHINGTON,

Plaintiff.

vs.

FOWLER NAT D. AND MARY M. DBA
FARM BOY DRIVE IN,

Defendant.

No. 20-2-02460-34

**ORDER DENYING DEFENDANT'S
MOTION TO DIMISS AND VACATE**

EX PARTE

This matter comes before the Court on Defendants' Motion to Dismiss and Vacate (Defendants have filed multiple motions currently pending before this Court; for ease of reference the Court refers to them collectively as "Defendants' Motion to Dismiss and Vacate"). Most of the arguments raised in this Motion have been waived due to Defendants' failure to timely raise them. The remaining arguments have been previously raised and rejected by this Court. Accordingly, Defendants' Motion is DENIED.

Given its significance to the issues raised in Defendants' Motion, the Court provides the following procedural history:

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- December 15, 2020: Plaintiff filed its Petition initiating this action and obtained a Temporary Restraining Order and Order to Show Cause, setting a hearing for December 22, 2020 for Defendants to show cause as to why the Temporary Restraining Order should not remain in full force and effect until a final determination in this matter.
 - December 22, 2020: Defendants' counsel filed a Notice of Appearance directing all further pleadings be served on him and without reserving any objections or defenses, including but not limited to those related to personal jurisdiction or service of a summons.
 - December 22, 2020: The first show cause hearing occurred. No objections are raised by Defendants at the hearing. Instead, Defendants' requested a two-week continuance, which the Court granted after engaging in the following colloquy with Defendants' counsel:
 - THE COURT: [I]s that request [for a two week continuance] made with the understanding that the temporary restraining order will remain in full force and effect until this continued hearing occurs?
 - MR. CELSKI: It's my understanding that everything that's been order by Your Honor or prior judges will remain in full force and effect until a future hearing, yes, Your Honor.
 - December 23, 2020: Plaintiff filed its first Motion for Contempt.
 - December 29, 2020: The first contempt hearing occurred. Defendants' filed no brief opposing the Motion for Contempt, instead only filing declarations from assorted individuals asserting their support for, and subjective feeling of safety within, Defendants' restaurant. At oral argument, Defendants' counsel sole argument

1 opposing continued injunctive relief was that Plaintiff had allegedly provided
2 insufficient evidence that Defendants had continued to provide indoor dining
3 services. No other arguments, including but not limited to those related to personal
4 jurisdiction or service of a summons, were raised. The Court found Defendants in
5 contempt.
6

- 7 • December 31, 2020: Defendants filed their Response to Order to Show Cause and
8 Temporary Restraining Order. In that Response, Defendants argued: (1) there was an
9 insufficient threat to health or safety to justify the temporary restraining order, (2) other
10 establishments presented a greater threat to health or safety and remain open, and (3)
11 the mitigation efforts performed by Defendants were sufficient to prevent any threat to
12 health or safety. No other arguments, including but not limited to those related to
13 personal jurisdiction or service of a summons, were raised. Defendants requested the
14 following affirmative relief in their Response: (1) dismissal of the temporary
15 restraining order, (2) an award of attorney's fees and costs, and (3) any other award the
16 Court deemed appropriate.
17
- 18 • January 5, 2021: The previously continued show cause hearing occurred. Defendants'
19 counsel raised only the arguments raised in the December 31, 2020 Response identified
20 above. No other arguments, including but not limited to those related to personal
21 jurisdiction or service of a summons, were raised. The Court ordered that the
22 temporary restraining order remain in full force and effect pending a preliminary
23 injunction hearing on January 19, 2021.
24
- 25 • January 13, 2021: Defendants filed their Response to Preliminary Injunction and
26 Motion to Dismiss Case and Vacate Restraining Order on Constitutional

1 Grounds. Defendants raised assorted constitutional arguments. Many constitutional
2 provisions were referenced in only passing without substantive argument. A
3 comparatively small number were adequately briefed to be properly before the
4 Court. No arguments—whether referenced in passing or adequately briefed—were
5 raised regarding personal jurisdiction or service of a summons.¹ The Response
6 requested the following affirmative relief: (1) dismissal of the case, and (2) vacation of
7 the temporary restraining order.
8

- 9 • January 13, 2021: Plaintiff filed its Motion for Second Order of Contempt.
- 10 • January 19, 2021: The Court held a hearing on the issuance of a preliminary injunction
11 and Plaintiff's Motion for Second Order of Contempt. Defendants' counsel raised only
12 the arguments raised in the January 13, 2021 Response identified above. No other
13 arguments, including but not limited to those related to personal jurisdiction or service
14 of a summons, were raised. The Court granted the request for the preliminary
15 injunction, found Defendants in contempt again, and denied Defendants Motion to
16 Dismiss.
17
- 18 • February 8, 2021: Defendants file the instant Motion, raising arguments regarding
19 personal jurisdiction and service of a summons for the first time in this action.
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21 Defendants' primary argument in the instant Motion is that this Court lacked personal
22 jurisdiction over Defendants due to Plaintiff's failure to serve them with a summons. As a result,
23
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26 ¹ Defendants argue that the following sentence in their January 13, 2021 Response raised these issues: "Farmboy objects to every material finding in the temporary restraining order." 1/13/21 Response at 5. This vague, general statement was insufficient to properly present any issue, including but not limited to issues related to personal jurisdiction or service of a summons, to this Court for its consideration.

1 Defendants assert that this Court should dismiss this action and vacate its prior orders under CR
2 12(b)(2), (4) and (5), and CR 60(b)(5).

3 Defendants have waived this argument for two independent reasons. First, Defendants
4 have waived this argument through their own affirmative requests that failed to include these
5 defenses. On January 13, 2021, Defendants moved to dismiss this action. Defendants also moved
6 for affirmative relief in their December 31, 2020 responsive briefing. Doing so without raising a
7 defense as to personal jurisdiction or service of a summons waives those defenses. CR 12(h); *In*
8 *re Marriage of Steele*, 90 Wn. App. 992, 997-98, 957 P.2d 247 (1998) (“A party also waives any
9 claim of lack of personal jurisdiction if, before the court rules, he or she asks the court to grant
10 affirmative relief[]”).
11

12 Second, Defendants have waived this argument through their conduct. Defendants fully
13 litigated issues regarding a temporary restraining order, preliminary injunction, and contempt
14 before raising this argument. Given the circumstances of this case—specifically the rapidly
15 developing nature of the pandemic-related restrictions that are at the core of this case—this
16 effectively resulted in Defendants fully litigating this case at the trial court level before raising this
17 argument. The Court of Appeals in *Boyd v. Kulczyk*, 115 Wn. App. 411, 415, 63 P.3d 156 (2003)
18 addressed similar circumstances when it held:
19
20

21 Such defenses [concerning insufficient service of process and lack of personal
22 jurisdiction] may be considered waived as a matter of law if the defendant’s
23 assertion of the defense is inconsistent with previous behavior, or if
24 defendant’s counsel has been dilatory in asserting the defense. In this case, the
25 validity of the service of process was never questioned before Mr. Kulczyk’s
26 appeal. He appeared, filed responsive pleadings, participated in arbitration,
moved for a trial de novo, and tried the matter—all without asserting the
defense of insufficient service of process. We can think of no better example
of the “‘trial by ambush’ style of advocacy” condemned in *Lybert [v. Grant*
County, 141 Wn.2d 29, 1 P.3d 1124 (2000)].

1 This delay prejudiced Plaintiff, the health of Defendants' employees and the public, and
2 the Court. Properly and timely addressing this issue would have allowed it to be remedied and for
3 this case to be properly addressed on its merits. Permitting Defendants to instead sit on this defense
4 until the practical conclusion of this case—while continuously ignoring orders from Plaintiff and
5 the Court—would allow their dilatory conduct to nullify Plaintiff's ability to protect workers in
6 Washington, to nullify the Court's ability to enforce its orders, and to continuously place the health
7 and safety of Defendants' employees and the public at risk without consequence. Accordingly,
8 Defendants have waived this argument through their conduct.
9

10 Even if Defendants had not waived their arguments related to personal jurisdiction and
11 service of a summons, those arguments fail on their merits for the reasons articulated in Plaintiff's
12 Response to this Motion.
13

14 The remainder of Defendants' motion is an assortment of claims on the substantive merits
15 of the Court's prior orders that either were previously raised and rejected, or that Defendants had
16 adequate opportunity to raise earlier in these proceedings and failed to do so. Such arguments are
17 not a basis to dismiss a case under CR 12(b)(2), (4) or (5), or CR 60, are not a basis to grant
18 Defendants' Motion, and the Court will not address them further as a result, with one exception.
19

20 The one exception is Defendants' argument that the Courts contempt finding before
21 holding a contested show cause hearing on the temporary restraining order violated their Due
22 Process rights. Defendants cite no case holding that that a Court cannot enforce its validly issued
23 orders before a contested hearing regarding the underlying order. Such a rule would be
24 inconsistent with statutes and court rules that permit the issuance of effective court orders prior to
25 contested hearings. Further, the originally scheduled show cause hearing on December 22, 2020
26 was continued at Defendants' request and with a recognition from Defendants' counsel that the

1 temporary restraining order would remain in full force and effect until the continued hearing
2 occurred. Finally, the contempt hearings were themselves contested hearings, and there was a
3 contested hearing on the temporary restraining order on January 5, 2021, two weeks prior to the
4 Court imposing contempt sanctions with a specific monetary amount attached. Accordingly, this
5 additional Due Process argument is not supported by the law or by the facts of this case.
6

7 Finally, the Court notes that Plaintiff has offered a Proposed Order Granting Second Order
8 of Contempt and Affirming Temporary Restraining Order. It is similar to, but differs in certain
9 respects from, the Court's Order Granting Preliminary Injunction and Denying Motion to Dismiss,
10 and Second Order of Contempt, which was signed on February 8, 2021 and memorialized the
11 Court's oral ruling given on January 19, 2021. The Court declines to sign that proposed order
12 because it is largely duplicative of the Court's February 8 Order. However, to the extent the
13 Proposed Order seeks to clarify various factual findings in the Court's February 8 Order, including
14 but not limited to Findings of Fact 1, 2, 6, 7, 14, 15, 17, and 18, to clearly reference the timeframes
15 relevant to this case, the Court notes that such reference should be clear from the context of the
16 Court's February 8 Order and, to the extent it is necessary, the Court now clarifies that all
17 timeframes referenced in that Order refer to the periods of time relevant to this case. The Proposed
18 Order also includes language referencing the Court finding that the balance of equities favored
19 issuing injunctive relief in this case. Again, the Court believes such a finding should already be
20 clear from the record in this case but, to the extent it is necessary, the Court specifically notes that
21 it found and finds that all injunctive relief ordered in this case was ordered under circumstances
22 where the balance of equities favored the issuance of the injunctive relief.
23
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25 In conclusion, Defendants' Motion is DENIED. Due to Thurston County entering Phase
26 II of the Governor's recovery plan, the Court's prior injunctions are DISMISSED EFFECTIVE

1 FEBRUARY 1, 2021. However, all injunctive relief ordered in this case was effective at all times
2 relevant to this Court's prior Orders.

3 DATED this 29th day of April, 2021.



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6 Judge Chris Lanese

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