[Cite as *Paasewe v. Wendy Thomas 5 Ltd.*, 2009-Ohio-6852.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Eric K. Paasewe,	:	
Plaintiff-Appellant,	:	
		No. 09AP-510
v.	:	(C.P.C. No. 08CVB06-9233)
Wendy Thomas 5 Limited et al.,	:	(REGULAR CALENDAR)
Defendants-Appellees.	:	

D E C I S I O N

Rendered on December 24, 2009

Eric K. Paasewe, pro se.

Freund, Freeze & Arnold, and *Carl A. Anthony*, for appellee Thomas 5 Limited.

Calfee, Halter & Griswold LLP, *W. Eric Baisden* and *Christopher M. Ward*, for appellee Calfee, Halter & Griswold LLP.

APPEAL from the Franklin County Court of Common Pleas

KLATT, J.

{¶1} Plaintiff-appellant, Eric K. Paasewe, appeals from a judgment of the Franklin County Court of Common Pleas dismissing his actions against defendants-appellees, Thomas 5 Limited ("Thomas 5"), Calfee, Halter & Griswold LLP ("Calfee"),

Freund, Freeze & Arnold ("Freund"), and Carl A. Anthony. For the following reasons, we affirm.

{¶2} On June 26, 2008, Paasewe, acting pro se, filed a complaint against Thomas 5 and Ohio Casualty.[1] In the complaint, Paasewe stated that he had visited the Wendy's restaurant located on Hudson Street in Columbus, Ohio[2] on January 2, 2008. Paasewe ordered a salad. While eating the salad, Paasewe allegedly discovered a glove in the salad. Paasewe returned the salad to the counter, where he spoke with the restaurant manager. According to Paasewe, the manager convinced him to leave the salad and glove at the restaurant. When Paasewe visited the restaurant the next day, the "boss" told Paasewe that the restaurant had forwarded the salad and glove to Ohio Casualty, Thomas 5's insurer. Passewe later learned, however, that the restaurant had waited until late January 2008 to send the salad and glove to Ohio Casualty. Based on these allegations, Paasewe asserted claims for fraud, spoliation of evidence, conversion, and violation of his civil and constitutional rights.

{¶3} In a second complaint, filed on November 12, 2008, Passewe relied upon the same incident to assert a claim for product liability. Unlike the first action, this second action only named Thomas 5 as a defendant. Thomas 5 moved for consolidation of the first and second action. The trial court granted Thomas 5's motion.

{¶4} On December 30, 2008, Paasewe filed a third complaint. Naming Thomas 5, Calfee, Ohio Casualty,[3] Freund, and Anthony as defendants, the third complaint asserted a claim for defamation. Paasewe maintained that defendants defamed him

[1] The trial court dismissed Paasewe's action against Ohio Casualty for failure to state a claim.

[2] Apparently, Thomas 5 is the owner and operator of that Wendy's restaurant.

when they stated that he had inserted the glove into his salad. Upon the motion of

[3] Paasewe never achieved proper service of his third complaint on Ohio Casualty.

Thomas 5, Calfee, Freund, and Anthony, the trial court consolidated the third action with the first and second actions.

{¶5} After attempting to conduct discovery, Thomas 5 moved for summary judgment on all of the claims asserted against it. In large part, Thomas 5 supported its motion with admissions that Paasewe made when he failed to answer requests for admission. Acting pursuant to Civ.R. 36(A), Thomas 5 had served requests for admission on Paasewe on November 21, 2008, giving him 28 days to respond. Thomas 5 asked that Paasewe admit or deny the following requests for admission:

> **REQUEST FOR ADMISSION NO. 1:**
>
> Admit that on January 2, 2008, the date that you purchased a taco salad from the Wendy's restaurant on Hudson Street, the cost of the salad was refunded to you.
>
> * * *
>
> **REQUEST FOR ADMISSION NO. 4**
>
> Admit that no employee or representative of the Defendant Thomas 5 Ltd., made any false or misleading statements to you.
>
> * * *
>
> **REQUEST FOR ADMISSION NO. 9**
>
> Admit that Thomas 5 Ltd., did not tamper with any evidence related to this case.
>
> **REQUEST FOR ADMISSION NO. 10**
>
> Admit that Thomas 5 Ltd., did not willfully destroy evidence relevant to your case.
>
> **REQUEST FOR ADMISSION NO. 11**
>
> Admit that Thomas 5, Ltd., did not destroy evidence with an intent to disrupt your case.

* * *

REQUEST FOR ADMISSION NO. 13

Admit that Thomas 5 Ltd. did not deprive you of any rights, privileges or immunities secured by any constitution and laws.

REQUEST FOR ADMISSION NO. 14

Admit that Thomas 5 Ltd. did not violate your civil rights in any way.

REQUEST FOR ADMISSION NO. 15

Admit that Thomas 5 Ltd. did not violate your constitutional rights in any way.

* * *

REQUEST FOR ADMISSION NO. 17

Admit that there was no glove or other foreign object in the salad at the time that you purchased it from the Wendy's restaurant on Hudson Street on January 2, 2008.

REQUEST FOR ADMISSION NO. 18

Admit that you put the glove into the taco salad that you purchased from the Wendy's restaurant on Hudson Street on January 2, 2008.

Passewe did not respond to these requests for admission, nor did he file a memorandum contra to Thomas 5's motion for summary judgment.

{¶6} Freund and Anthony also moved for summary judgment, relying, in part, on Paasewe's admissions. Calfee filed a Civ.R. 12(B)(6) motion for dismissal.

{¶7} On April 27, 2009, the trial court issued a judgment granting all of defendants' motions. Finding that Paasewe had admitted that the salad did not contain a glove when he purchased it and that he put the glove in the salad after its purchase, the

trial court concluded that Paasewe's claims lacked any merit, and it dismissed all of his claims.

{¶8} Paasewe now appeals from the April 27, 2009 judgment, and he assigns the following error:

> The franklin court common pleas court erred by affirming the order of the wendy Thomas 5 limited and the wendy international and finidng that the order of the wendy thjomas 5 limited and the wendy international was supported by reliable, probative and substail evidence. [Sic passim.]

{¶9} As an initial matter, we must address the numerous procedural motions filed before this court. First, Calfee, Freund, and Anthony have moved to dismiss Paasewe's notice of appeal, arguing that it violates the mandates of App.R. 3(D).

{¶10} Pursuant to App.R. 3(D), a notice of appeal "shall designate the judgment, order or part thereof appealed from." When presented with a notice of appeal that fails to comply with this requirement, an appellate court must determine whether the notice served its intended purpose despite its defect. *Maritime Manufacturers, Inc. v. Hi-Skipper Marina* (1982), 70 Ohio St.2d 257, 259-60. The purpose of a notice of appeal is to apprise the opposing party of the taking of an appeal. Id. at 259. " 'If this is done beyond [the] danger of reasonable misunderstanding, the purpose of the notice of appeal is accomplished.' " Id. (quoting *Couk v. Ocean Accident & Gaur. Corp.* (1941), 138 Ohio St. 110, 116). Thus, if an appellate court determines that a notice of appeal includes sufficient information to reasonably alert the opposing party of the existence of the appeal, then the court should disregard any technical defect in the notice of appeal. Id. at 259-60; *Roberts v. Skaggs*, 176 Ohio App.3d 251, 2008-Ohio-1954, ¶8; *Monahan v. Duke Realty Corp.*, 1st Dist. No. C-070318, 2008-Ohio-1113, ¶15; *Interstate Gas Supply, Inc. v.*

Calex Corp., 10th Dist. No. 04AP-980, 2006-Ohio-638, ¶17-19; *Belcher v. Lesley* (Dec. 12, 1995), 10th Dist. No. 95AP-662.

{¶11} In the case at bar, the notice of appeal consists of a pre-printed form on which Paasewe handwrote the relevant information. In relevant part, the notice of appeal states:

> Notice is hereby given that Eric K. Paasewe ___ hereby
> (PARTY NAME)
>
> appeals to the Court of Appeals, Tenth Appellate District of
>
> Franklin County, Ohio, from the final judgment entry of the
>
> civil common plea_____ entered on _____.
> (NAME OF TRIAL COURT) (DATE)

{¶12} Because Paasewe omitted the date of the judgment he was appealing, the notice of appeal fails, on its face, to pinpoint with specificity which judgment Paasewe intended to appeal. However, the trial court had only issued one "final judgment entry"—the April 27, 2009 judgment that dismissed Paasewe's claims against all defendants. Thus, when Paasewe stated that he was appealing from the "final judgment entry," he necessarily had to be appealing from the April 27, 2009 judgment. Interpreting the notice of appeal in context with the other filings in the record, we conclude that the notice of appeal identified the judgment being appealed and reasonably notified each defendant named in that judgment of the existence of the appeal. Therefore, we disregard the technical defect in Paasewe's notice of appeal.

{¶13} Moreover, we reject Calfee, Freund, and Anthony's argument that we should dismiss the notice of appeal because it does not mention them or Paasewe's defamation claim against them. Nothing in App.R. 3(D) requires that a notice of appeal include the identity of the parties opposing an appeal or the claims asserted by or against

those parties. Additionally, Calfee, Freund, and Anthony suffered no prejudice due to their omission from the notice of appeal. In his appellate brief, Paasewe neglected to assert any assignments of error challenging the trial court's entry of judgment for Calfee, Freund, and Anthony. Accordingly, this court has no basis on which to reverse that judgment as it relates to them. We thus deny Calfee, Freund, and Anthony's motions to dismiss the notice of appeal.

{¶14} Next, we address Thomas 5's motion to strike two documents from the trial court's record. After the trial court issued its April 27, 2009 final judgment entry, Paasewe filed an affidavit and "Motion to dimissed [sic] defendent motions for summery judgement [sic]." Thomas 5 argues that because the trial court did not consider either of these documents when rendering its judgment, this court cannot consider the documents when reviewing the trial court's judgment for error.

{¶15} Appellate review is limited to the record as it existed at the time the trial court rendered judgment. *Leiby v. Univ. of Akron*, 10th Dist. No. 05AP-1281, 2006-Ohio-2831, ¶7; *Waterford Tower Condominium Assn. v. TransAmerica Real Estate Group*, 10th Dist. No. 05AP-593, 2006-Ohio-508, ¶13; *Bank of New York v. Bartmas*, 10th Dist. No. 04AP-1011, 2005-Ohio-6099, ¶9. Pursuant to long-standing precedent, "[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter." *State v. Ishmail* (1978), 54 Ohio St.2d 402, paragraph one of the syllabus. Similarly, a reviewing court cannot consider evidence that a party added to the trial court record after that court's judgment, and then decide an appeal from the judgment based on the new evidence. *Leiby* at ¶6-7 (refusing to consider an affidavit that the appellant filed with the

trial court after that court entered summary judgment); *Bartmas* at ¶8-9 (declining to consider exhibits contained in the trial court record because the appellant filed the exhibits after the trial court rendered the judgment under review). Both prohibitions arise from the maxim that " 'in an appeal on questions of law the reviewing court may consider only that which was considered by the trial court and nothing more.' " *Ishmail* at 405 (quoting *Bennett v. Dayton Mem. Park & Cemetary Assn.* (1950), 88 Ohio App. 98, paragraph one of the syllabus).

{¶16} In the case at bar, Paasewe filed the two documents at issue after the trial court rendered the judgment that the instant appeal challenges. Because the trial court did not consider these documents in granting summary judgment, we cannot consider them in reviewing that judgment. However, although we agree with Thomas 5's argument, we do not find the relief that Thomas 5 requests appropriate. As a matter of comity, we are disinclined to meddle with the record of another court. Instead, we will strike from Paasewe's appellate briefs any references to and arguments based on the two documents. See *Waterford Tower Condominium Assn.* at ¶12-13 (granting such relief). Accordingly, we grant Thomas 5's motion to the extent state above.

{¶17} Finally, we address a motion that Paasewe filed entitled "Plaintiff demand for evidence from defendent." In this motion, Paasewe asks this court to order an unnamed defendant, presumably Thomas 5, to produce evidence, including a copy of the video recording of the interior of the Wendy's restaurant from January 2 and 3, 2008, the salad and glove, a copy of the incident report prepared by the restaurant manager, a receipt signed by Paasewe showing the refund of the price of the salad, and a return receipt demonstrating that Paasewe received the requests for admission.

{¶18} Essentially, Paasewe wants this court to conduct discovery for him. Paasewe's belated attempt at discovery betrays his unfamiliarity with the judicial system. Discovery occurs in the trial court through the procedures provided in Civ.R. 26 through 37. Not only has Paasewe elected the wrong method to conduct discovery, he has petitioned the wrong court for assistance in procuring the evidence he seeks. Accordingly, we deny Paasewe's motion.

{¶19} We now turn to the merits of Paasewe's appeal. By Paasewe's sole assignment of error, he argues that the trial court erred in granting Thomas 5 summary judgment on his claims.[4] We disagree.

{¶20} As we explained above, the trial court primarily relied upon Paasewe's admissions in determining that summary judgment was appropriate. When requests for admission are served on a party, that party must timely respond by either objection or answer. Civ.R. 36(A)(1); *Cleveland Trust Co. v. Willis* (1985), 20 Ohio St.3d 66, 67. "Failure to respond at all to the requests will result in the requests becoming admissions." *Willis* at 67. See also Civ.R. 36(A)(1) ("The matter is admitted unless, within a period designated in the request, not less than twenty-eight days after service * * *, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney."). Any matter admitted under Civ.R. 36 is conclusively established, even if it goes to the heart of the case. *Willis* at 67 (also recognizing that a trial court can relieve a party of the admission by permitting withdrawal or amendment); *Progressive Cas. Ins.*

[4] Additionally, Paasewe contends that the trial court erred in granting summary judgment in favor of another entity, which Paasewe calls "wendy international." Although Paasewe attempted to sue "wendy international" in his second complaint, he never separately named "wendy international" as a defendant or achieved service on "wendy international." Accordingly, "wendy international" is not a party to this case.

Co. v. Harrison, 2d Dist. No. 21521, 2007-Ohio-579, ¶10 (" 'Failure to answer is not excused because the matters requested to be admitted are central or non-central to the case or must be proven by the requesting party at trial.' ") (quoting *Klesch v. Reid* (1994), 95 Ohio App.3d 664, 674). A trial court may grant summary judgment based upon admissions that arise due to a party's failure to timely respond to requests for admission. *Farah v. Chatman*, 10th Dist. No. 06AP-502, 2007-Ohio-697, ¶9; *Asset Acceptance, L.L.C. v. Rees*, 10th Dist. No. 05AP-388, 2006-Ohio-794, ¶14; *Mulhollen v. Angel*, 10th Dist. No. 03AP-1218, 2005-Ohio-578, ¶14.

{¶21} Here, Paasewe never answered the requests for admission that Thomas 5 served on him. The trial court, therefore, properly determined that Paasewe admitted each request for admission. On appeal, Paasewe contends that neither the trial court nor this court should bind him to his admissions by default. Paasewe alleges that he never received the requests for admission, so he should not suffer the consequences of his failure to respond to them. We find this argument unavailing.

{¶22} Civ.R. 5 permits a party to serve "every paper relating to discovery" by "mailing it to the last known address of the person to be served." Moreover, Civ.R. 5(B) provides that "[s]ervice by mail is complete upon mailing." Where a party follows the Ohio Civil Rules of Procedure, courts presume proper service unless the presumption is rebutted with sufficient evidence. *State ex rel. Benjamin v. Ohio Dept. of Rehab. and Corr.*, 10th Dist. No. 06AP-158, 2007-Ohio-2471, ¶5; *Rogers v. United Presidential Life Ins. Co.* (1987), 36 Ohio App.3d 126, 128. "[U]nsworn statements, such as bare allegations in an appellate brief, do not constitute evidence and are not sufficient to rebut the presumption of proper service." *Poorman v. Ohio Adult Parole Auth.*, 4th Dist. No.

01CA16, 2002-Ohio-1059. See also *L.E. Sommer Kidron, Inc. v. Kohler*, 9th Dist. No. 06CA0044, 2007-Ohio-885, ¶48 (holding that the plaintiff's bare allegation that it did not receive the defendants' requests for admission failed to rebut the presumption of proper service).

{¶23} In the case at bar, the certificate of service attached to the requests for admission states that Thomas 5 served Paasewe with the requests on November 21, 2008 by ordinary mail. Thomas 5 mailed the requests for admission to the mailing address Paasewe has used throughout the course of this litigation. Consequently, because Thomas 5 complied with Civ.R. 5 in serving the requests for admission, a presumption of proper service arose. Paasewe's only rebuttal to this presumption is his unsworn, unsupported allegation that he never received the requests for admission. We conclude that such an allegation cannot overcome the presumption of service.

{¶24} Moreover, we need not rely upon the presumption alone to reject Paasewe's attempt to avoid his admissions. In an affidavit attached to Thomas 5's motion for summary judgment, Thomas 5's attorney stated that he spoke with Paasewe after serving him with a discovery packet that included the requests for admission. During that conversation, Paasewe acknowledged receiving the discovery packet. Because the record contains sworn, uncontradicted testimony establishing that Paasewe received the requests for admission, we conclude that Civ.R. 36 obligated him to answer and his failure to do so resulted in the requests becoming admissions.

{¶25} As the trial court found, the admissions preclude Paasewe from recovering on his claims against Thomas 5. Paasewe cannot recover on his fraud claim because he admitted that no one employed by or representing Thomas 5 made a false or misleading

statement to him. He cannot recover on his spoliation claim because he admitted that Thomas 5 did not tamper with or willfully destroy evidence material to his case. He cannot recover on his conversion claim because he admitted that Thomas 5 refunded to him the cost of his salad, and consequently, he sustained no damage. He cannot recover for a violation of his civil or constitutional rights because he admitted that Thomas 5 did not violate his civil or constitutional rights. He cannot recover on his product liability claim because he admitted that the salad did not have the glove in it when he purchased it, and thus the salad was not defective. He cannot recover on his defamation claim because he admitted that he did, in fact, put the glove in the salad. Accordingly, we conclude that the trial court did not err in granting Thomas 5 summary judgment, and we overrule Paasewe's assignment of error.

{¶26} Having overruled Paasewe's sole assignment of error, we affirm the judgment of the Franklin County Court of Common Pleas.

Motions to dismiss the notice of appeal denied; motion to strike granted; motion demanding evidence denied; and judgment affirmed.

BRYANT and McGRATH, JJ., concur.