

# Special Appearances under the Rules of Civil Procedure

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### Special Appearances Under the Rules of Civil Procedure

In judicial proceedings which are not within the application of the West Virginia Rules of Civil Procedure, a recurring problem has been the proper method by which to question the jurisdiction of the court over the person. In other words, if the defendant appears specially and asserts as a defense that jurisdiction over his person was not properly obtained, can this defense be raised on appeal if the trial court overrules his defense? What effect, if any, will proceeding to trial after the jurisdictional objection has been overruled have? The question has not yet been before the court in cases which are governed by the West Virginia Rules of Civil Procedure.

Therefore the initial discussion will consider the question as it was applied in prior practice.

In a recent case<sup>1</sup> which was not within the application of the West Virginia Rules, the West Virginia Supreme Court of Appeals based the test of waiver on whether the process served was "void" or "merely defective," namely if the process is "void," a general appearance will not waive objections thereto which had been previously made in a special appearance. An examination of earlier cases reveals that the court has at times been inconsistent as to this matter.

A very early case<sup>2</sup> held that a non-resident defendant, who had not been served with process or order of publication, had a right to object to the non-execution of process; and furthermore, that there was no waiver of the objection by its being joined in the answer with a defense to the merits.<sup>2</sup>

Later, in the case of *Chapman v. Maitland*,<sup>3</sup> the court held there was no waiver where a non-resident defendant, whose objection to the court's lack of jurisdiction was overruled, proceeded to answer to the merits. The court stated that "if the court overrules his objection, he has a right to file his exceptions to such ruling, and if such ruling be erroneous, the appellate court will reverse the same although the defendant afterwards appeared to the action and

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<sup>1</sup> *Duncan v. Tucker County Board of Education*, 149 W. Va. 285, 140 S.E.2d 613 (1965), noted in 68 W. VA. L. REV. 211.

<sup>2</sup> *Price, Ex'r v. Pinnell*, 4 W. Va. 296 (1870).

<sup>3</sup> 22 W. Va. 329 (1883); *accord*, *Steele v. Harkness*, 9 W. Va. 13 (1876).

pleaded fully thereto, unless he expressly waived his exception thereto.”<sup>4</sup>

The next case in which the question was involved was *C. & O. Ry. Co. v. Wright*,<sup>5</sup> in which the defendant company appeared specially before a justice of the peace and moved to quash the return of service as fatally defective. The grounds assigned were that the return did not show the residence of the alleged agent who was served, nor that he was employed by the defendant company at the time of service. The motion was overruled and the case was continued. At the trial, judgment was rendered in favor of the defendant. The plaintiff moved for a new trial, which motion was granted. Upon retrial, judgment was rendered for the plaintiff and the defendant appealed to the circuit court, renewing his motion to quash. The motion to quash was overruled, and judgment was again rendered for the plaintiff. Defendant then applied to the Supreme Court of Appeals for a writ of prohibition, based upon the alleged invalidity of the return of service. The court recognized by way of dicta that the service was invalid and a default judgment based upon it would have been void. However, the court refused the writ upon a determination that the defendant's conduct in obtaining a continuance and proceeding to trial on the merits constituted a general appearance, and therefore a waiver of the objection raised by the special appearance. The court also indicated that the appeal to the circuit court would cure any defects in the service of process. It is pertinent to note that the court specifically limited its ruling to situations involving proceedings before justices.

The question arose again soon after the start of the twentieth century in *Fisher, Sons & Co. v. Crowley*.<sup>6</sup> In this case the defendants appeared and made a motion for security for costs and cravedoyer of the writ, and moved to quash it on the grounds that it was returnable to the wrong Rule Day and therefore void. The trial court overruled the motion to quash, rejected defendant's plea and rendered judgment for the plaintiff. The appellate court held that there was no waiver of the defect in the summons by proceeding to trial after the motion to quash had been overruled, and exception taken thereto. In reaching this result the court cited with approval

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<sup>4</sup> 22 W. Va. at 347.

<sup>5</sup> 50 W. Va. 653, 41 S.E. 147 (1902).

<sup>6</sup> 57 W. Va. 312, 50 S.E. 422 (1905).

*Price, Ex'r v. Pinnell*,<sup>7</sup> *Steele v. Harkness*,<sup>8</sup> and *Chapman v. Maitland*.<sup>9</sup> The court further indicated that the holding in *C. & O. Ry. Co. v. Wright*<sup>10</sup> was not to be applied to courts of record. This apparently overruled the latter case at least insofar as its application to proceedings in courts of record. The court further indicated by way of dicta that "His intent is shown by the state of the record at the time the plea was tendered . . . not by what subsequently took place."<sup>11</sup> This would seem to indicate that in the future the test would be based upon the record at the time the motion was made and not by any activity subsequent to the motion.

In *Damron v. Williamson Construction & Engineering Co.*,<sup>12</sup> plaintiff instituted a notice of motion of judgment proceeding. The defendant appeared specially to quash the notice and return of service on the grounds that the return of service did not contain a recital of the residence of the officer of defendant corporation who was served. The motion was overruled and defendant filed a counter affidavit and its plea. The court held that the defendant had waived the points raised in the special appearance because of the "active defense" made after the points raised in the special appearance were overruled. The court did not cite *Fisher, Sons & Co.* in its opinion, but instead supported its ruling by "numerous cases cited in Michie's Digest of Virginia and West Virginia Reports, 1929, vol. 1, p. 586 et seq."<sup>13</sup>

As late as 1940,<sup>14</sup> the court indicated its approval of *Fisher, Sons & Co.* by way of dicta, but four years later apparently overruled it. In *Stone v. Rudolph*,<sup>15</sup> plaintiff began his action by forwarding process to the auditor for service on a non-resident motorist, as provided by statute.<sup>16</sup> The auditor mailed the process to defendant's place of business within West Virginia, where it was accepted by the wife of defendant's business manager. Defendant entered a special appearance in January 1943, to quash the service of process and return thereof because it was not served pursuant to statute.

<sup>7</sup> 4 W. Va. 296 (1870).

<sup>8</sup> 9 W. Va. 13 (1876).

<sup>9</sup> 22 W. Va. 329 (1883).

<sup>10</sup> 50 W. Va. 653, 41 S.E. 147 (1902).

<sup>11</sup> 57 W. Va. 312, 324, 50 S.E. 422, 426 (1905).

<sup>12</sup> 109 W. Va. 122, 153 S.E. 250 (1930).

<sup>13</sup> *Id.* at 125, 153 S.E. at 251.

<sup>14</sup> *Hall, Adm'r v. The Ocean Accident & Guar. Corp.*, 122 W. Va. 188, 9 S.E.2d 45 (1940).

<sup>15</sup> 127 W. Va. 335, 32 S.E.2d 742 (1944).

<sup>16</sup> W. VA. CODE ch. 56, art. 3, § 31 (Michie 1966).

The motion was overruled and defendant excepted. In April 1943, defendant again entered a special appearance to renew his prior motion to quash service of process. The motion was overruled, defendant excepted and filed an affidavit showing he was at the time in the military service, and the case was tried. The court held that the defendant had waived any defects in the service of process and said, "We do not think that we are called upon to decide the question whether there was, in the first instance, a valid service of process on Rudolph, because we consider that the subsequent acts of Rudolph and his counsel constituted general appearance."<sup>17</sup> The court cited *C. & O. Ry. Co. v. Wright*<sup>18</sup> which *Fisher, Sons & Co.* had apparently overruled and which was expressly limited to justice proceedings. The court also considered the *Chapman* case to be "in conflict" and apparently overruled it also.

Nine years later the court apparently reversed its position again in *Camden on Gauley v. O'Brien*.<sup>19</sup> The defendant had appeared specially and moved to quash the process on the grounds that the omission of a statement of damages rendered it void. The trial court permitted the plaintiff to amend the process over defendant's objection, and the case was tried. On appeal, the defendants asserted for the first time that the process was void because it was returnable to an impossible Rule Day. The court held the process was void and that the defect was not waived in view of defendant's exception to the trial court's ruling. The court cited *Fisher, Sons & Co.* which was supposedly overruled, at least impliedly by the *Stone* case.

While the court's reasoning has not always been consistent, the court's holdings do not appear to be inconsistent. If the process is void, a general appearance will not constitute a waiver of objections made in a previous special appearance. If the process or service is voidable however, the opposite result will occur. It appears that the court's adherence to the above stated propositions can only serve to encourage piecemeal appeals by means of writs of prohibition<sup>20</sup> or certified questions.<sup>21</sup> This comes about

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<sup>17</sup> 127 W. Va. 335, 339, 32 S.E.2d 742, 745 (1944).

<sup>18</sup> 50 W. Va. 653, 41 S.E. 147 (1902).

<sup>19</sup> 138 W. Va. 787, 79 S.E.2d 74 (1953).

<sup>20</sup> W. VA. CODE ch. 53, art. 1, §§ 1-12 et seq. (Michie 1966).

<sup>21</sup> W. VA. CODE ch 58, art. 4, § 2 (Michie 1966).

because if the process is "merely defective" and the trial court erroneously overrules the objection to jurisdiction, continued participation in the case by the defendant will be deemed a waiver, therefore the only possible review of the trial court's ruling is by writ of prohibition or certified question.

What effect will the doctrine of waiver, as applied in previous West Virginia cases, have upon proceedings under the West Virginia Rules of Civil Procedure? Since there are no West Virginia cases on this point, federal cases decided under Federal Rule 12(b)<sup>22</sup> must be examined. Federal courts have interpreted the language in Federal Rule 12(b)<sup>23</sup> which states that "no defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion" to mean that a party can raise the defense of lack of jurisdiction over the person without appearing specially and also answer to the merits, and such joinder of defenses will not constitute a waiver of the jurisdictional defense.<sup>24</sup>

A federal court indicated in an early case<sup>25</sup> that a new approach would be taken toward the concept of appearances by saying:

It necessarily follows that Rule 12 has abolished for the federal courts the age-old distinction between general and special appearances. A defendant need no longer appear specially to attack the court's jurisdiction over him. He is no longer required at the door of the federal courthouse to intone that ancient abracadabra of the law, *de bene esse*, in order by its magic power to enable himself to remain outside even while he steps within. He may now enter openly in full confidence that he will not thereby be giving up any keys to the courthouse

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<sup>22</sup> FED. R. Civ. P. 12(b) was amended in 1966, but even in its present form is substantially identical to W. VA. R. Civ. P. 12(b).

<sup>23</sup> Identical to language in W. VA. R. Civ. P. 12(b).

<sup>24</sup> *Kerr v. Compagnie De Ultramar*, 250 F.2d 860 (2d Cir. 1958); *Investors Royalty Co. v. Market Trend Survey*, 206 F.2d 108 (10th Cir. 1953), *cert. denied*, 346 U.S. 909 (1953); *Fahey v. O'Melveny & Myers*, 200 F.2d 420 (9th Cir. 1952), *cert. denied*, 345 U.S. 952 (1953); *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871 (3d Cir. 1944), *cert. denied*, *Orange Theatre Corp. v. Brandt*, 322 U.S. 740 (1944); *Davis v. Ensign-Bickford Co.*, 139 F.2d 624 (8th Cir. 1944); *Blank v. Bitker*, 135 F.2d 982 (7th Cir. 1943); *Carter v. Powell*, 104 F.2d 428 (5th Cir. 1939) (concurring opinion); *Speir v. Robert C. Herd & Co.*, 189 F.Supp. 436 (D. Md. 1960).

<sup>25</sup> *Orange Theatre Corp. v. Rayherstz Amusement Corp.*, 139 F.2d 871 (3d Cir. 1944), *cert. denied*, *Orange Theatre Corp. v. Brandt*, 322 U.S. 740 (1944).

door which he possessed before he came in. This, of course, is not to say that such keys must not be used promptly. If the defense of lack of jurisdiction of the person is not raised by motion before answer or in the answer itself it is by the express terms of paragraph (h) of Civil Procedure Rule 12 to be treated as waived, not because of the defendant's voluntary appearance but because of his failure to assert the defense within the defense within the time prescribed by the rules.<sup>26</sup>

This is not to say that many of the principles developed in prior practice will not be applicable to cases under the West Virginia Rules. For example, in West Virginia prior to the adoption of the Rules, it was also possible to join a jurisdictional defense and a defense to the merits by virtue of statute.<sup>27</sup> The statute provided that a defendant could "plead in abatement and in bar at the same time, but the issue on the plea in abatement shall be first tried . . . ."<sup>28</sup> The Supreme Court of Appeals repeatedly held that proceeding to trial on the merits without first obtaining a ruling on the plea in abatement constitutes a waiver of such defense.<sup>29</sup> These prior cases become important when viewed in the light of Federal Rule 12(d).<sup>30</sup> Federal Rule 12(d) and West Virginia Rule 12(d) both provide that the defenses enumerated in Rule 12(b), "shall be heard and determined before trial on application of any party. . . ."<sup>31</sup> One recent case from a federal court<sup>32</sup> indicated, by way of dicta, that proceeding to trial on the merits without obtaining a ruling on a motion under Rule 12(b) would constitute a waiver.

Federal Rule 12(b)<sup>33</sup> enumerates specific defenses regarding jurisdiction which may be raised by motion.<sup>34</sup> If these defenses are made by motion and overruled, will a subsequent general appearance amount to a waiver? The federal cases hold that it will not, and no distinction is made between "void" and "merely defective" process.

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<sup>26</sup> *Id.* at 874.

<sup>27</sup> W. VA. CODE ch. 56, art. 4, § 38 (Michie 1966).

<sup>28</sup> *Id.*

<sup>29</sup> *Robinson v. Engle*, 107 W. Va. 598, 149 S.E. 836 (1929).

<sup>30</sup> Identical to W. VA. R. CIV. P. 12(d).

<sup>31</sup> W. VA. R. CIV. P. 12(d); FED. R. CIV. P. 12(d).

<sup>32</sup> *Speir v. Robert C. Herd & Co.*, 189 F.Supp. 436 (D. Md. 1960).

<sup>33</sup> FED. R. CIV. P. 12(b) is substantially identical to W. VA. R. CIV. P. 12(b).

<sup>34</sup> FED. R. CIV. P. 12(b)(2) lack of jurisdiction over the person; FED. R. CIV. P. 12(b)(4) insufficiency of process; FED. R. CIV. P. 12(b)(5) insufficiency of service of process.

The question arose soon after the promulgation of the Federal Rules of Civil Procedure, in the case of *Molesphini v. Bruno*.<sup>35</sup> In this case, the United States marshal pursuant to state law delivered a copy of the summons to the Secretary of State and sent a copy of the summons, complaint, and notice that the summons had been served to the non-resident defendant.<sup>36</sup> The defendant made a motion to quash service of summons on the ground that the summons had been delivered to the Secretary of State in the Southern District instead of the Eastern District where the case was being tried, and therefore was invalid. The court overruled the motion to quash, defendant answered and asserted as his third defense in the answer, the invalidity of the service which had been previously presented by motion and overruled. Plaintiff moved to strike this defense from the answer. The motion was granted. The court held it was not necessary, or possible, to raise in the answer the jurisdictional defense previously asserted by motion, in order not to waive the objection to jurisdiction. The court indicated that there would be no waiver by saying, "Having once raised the question of jurisdiction she is amply protected and in the event of an adverse verdict, on appeal that question may be presented."<sup>37</sup>

In *Vilter Mfg. Co. v. Rolaff*,<sup>38</sup> the action was commenced by plaintiff, Rolaff, in a state court against the defendant company. The action was removed by the defendant to a federal district court, and a special appearance was made to quash service of process. The district court, after hearing evidence on the question, denied the motion. The case proceeded to trial, and at the close of the testimony both parties moved for a directed verdict. The court directed a verdict for the plaintiff and the defendant appealed, assigning as one of the grounds that the court had no jurisdiction over him. On this appeal, the plaintiff asserted that the defendant had waived the jurisdictional defense by his subsequent general appearance. The appellate court affirmed the judgment for the plaintiff, but recognized that the objection was not waived after it had been overruled even though the defendant had obtained a continuance, reset the time for trial, and answered to the merits. The court said, "Having raised the question of jurisdiction, the defendant

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<sup>35</sup> 26 F.Supp. 595 (E.D.N.Y. 1939).

<sup>36</sup> The West Virginia procedure for service on a non-resident motorist is provided for in W. VA. CODE ch. 56, art. 3, § 31 (Michie 1966).

<sup>37</sup> 26 F.Supp. 595, 596 (E.D.N.Y. 1939).

<sup>38</sup> 110 F.2d 491 (8th Cir. 1940).



was not prejudiced by participation in the trial and defending the matter on the merits."<sup>39</sup>

The question of waiver arose again on appeal in *Heiser Ready Mix Co. v. Fenton*.<sup>40</sup> Plaintiff company had instituted proceedings to compel general counsel of the National Labor Relations Board to process an unfair labor practice charge against certain unions. The defendant moved to dismiss on the grounds of lack of personal jurisdiction, which motion was overruled. On appeal by the defendant, plaintiff asserted that there had been a waiver of the objection to jurisdiction. As support for this contention plaintiff urged that the defendant had entered into a stipulation of facts, voluntarily complied with the ruling of the court, and had obtained an injunction against the unions. The appellate court reversed the decision and rejected the assertion of waiver by saying, "When the District Court denied his motion to dismiss, the question was preserved and he never stipulated to any facts thereafter which could in any manner constitute a waiver of jurisdiction over his person."<sup>41</sup>

The most recent case dealing directly with the question of waiver is *Speir v. Robert C. Herd & Co.*<sup>42</sup> In this case one of three defendants requested the court to include in its order, denying defendant's motion to quash service of process, that the order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation."<sup>43</sup> One of defendant's reasons given for the motion was a fear that a general appearance and filing an answer would be "a waiver of the special appearance and the rights set forth in the preliminary motion."<sup>44</sup> The court denied the motion and assured the defendant no waiver would occur by saying, "A party may raise the defenses numbered (1-5) in Rule 12(b), and losing thereon proceed to litigate on the merits, and losing on the merits appeal and attack the judgment both on the merits and on such grounds (1-5) as he has urged."<sup>45</sup>

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<sup>39</sup> *Id.* at 495.

<sup>40</sup> 265 F.2d 277 (7th Cir. 1959).

<sup>41</sup> *Id.* at 280.

<sup>42</sup> 189 F.Supp. 436 (D. Md. 1960).

<sup>43</sup> *Id.* at 437, 438.

<sup>44</sup> *Id.* at 438.

<sup>45</sup> *Id.*

The foregoing discussion should not be interpreted to mean that jurisdictional defenses can never be waived. The conduct of the party asserting the defense may be such that the court will rule the defense to be waived, even though there is a timely motion asserting the defense. In *Wyrough & Loser, Inc. v. Pelmor Laboratories, Inc.*,<sup>46</sup> plaintiff filed his complaint on February 14, 1967 in district court requesting an injunction pendente lite to restrain the defendant from further use of plaintiff's trade secrets. Defendant was served with process on February 18, 1967 requiring an answer within thirty-five days. Hearings were held on a motion for a preliminary injunction, during which, the defendant cross-examined the plaintiff's witnesses, presented affidavits and defense testimony. The defendant filed no answer or motions prior to or during the hearing. At the close of the hearing, the district court announced an intention to enter a preliminary injunction. Before the time required to answer, defendant filed a motion to dismiss in which he asserted that the court lacked jurisdiction of his person. The district court denied the motion and ruled that the defendant had waived any defects of personal jurisdiction by participating in the hearing. On appeal, the defendant asserted that its participation in the hearing could not be deemed a waiver so long as time remained in which to file a timely motion under Rule 12(b), and further, he would be placed at a disadvantage to be required to research a complex area of the law to secure defenses to assert prior to the hearing. The appellate court affirmed the ruling of waiver, but was careful to limit its decision to the circumstances present in the case. The court recognized that there were conflicting policies involved because "the whole philosophy behind the Federal Rules militates against placing parties in a procedural strait jacket by requiring them to possibly forego valid defenses by hurried and premature pleading."<sup>47</sup> Yet at the same time "there also exists a strong policy to conserve judicial time and effort; preliminary matters such as defective service, personal jurisdiction and venue should be raised and disposed of before the court considers the merits or quasi-merits of a controversy."<sup>48</sup>

In summary it would appear that if the jurisdictional defense is asserted timely by motion, the point will be saved for appeal in

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<sup>46</sup> 376 F.2d 543 (3d Cir. 1967).

<sup>47</sup> *Id.* at 547.

<sup>48</sup> *Id.*

the event of an adverse ruling on the motion. In order to be timely, the motion should be made before the "merits or quasi-merits" are presented to the court, otherwise a waiver may be found.

#### CONCLUSION

In order for this conclusion to have any degree of validity, it must be assumed that the federal courts have correctly interpreted the Federal Rules of Civil Procedure and further, that such interpretation will be followed by the West Virginia Supreme Court of Appeals. Founded upon this premise the doctrine of special appearance and waiver as it has been known should become extinct in cases under the West Virginia Rules. The test of "void" or "merely defective" process will give way and be replaced with the test of timeliness. If the objection is made by timely motion before the "merits or quasi-merits" have been presented to the court, or if no motion is made and the objection is included in the answer, a subsequent general appearance will not waive the objection and it will be preserved for appeal.

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