2021 IL App (4th) 190910-U

NO. 4-19-0910

FILED
January 13, 2021
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

NEIL J. ARNTZ, MARION ARNTZ dba ARNTZ FAMILY LIMITED PARTNERSHIP, NEIL J. ARNTZ, GENERAL PARTNER Plaintiffs-Appellees,	)	Appeal from the Circuit Court of Coles County No. 12L22
PAUL W. ROUTT, Assignee-Appellee,	)	
v.	)	Honorable
LUZ O. ZABKA, Defendant-Appellant.	)	Mitchell K. Shick, Judge Presiding.

JUSTICE DeARMOND delivered the judgment of the court.
Justices Cavanagh and Holder White concurred in the judgment.

ORDER

¶ 1 *Held*: The appellate court affirmed, finding the trial court did not err in granting plaintiffs' petition for revival of judgment, nor did the court err in denying defendant's motion to strike.

¶ 2 Plaintiffs, Neil J. Arntz and Marion Arntz, d/b/a Arntz Family Limited Partnership, petitioned for revival of a judgment in the trial court. After trying to serve notice on defendant Luz O. Zabka's counsel through the mail, plaintiffs provided notice of the revival action by publication. Plaintiffs' counsel recounted his efforts to serve defendant's counsel by first class mail in an affidavit. Defendant moved to dismiss the petition, arguing insufficient service of process. Defendant likewise moved to strike opposing counsel's affidavit. The matter came before the trial court for a telephonic hearing, where the court granted plaintiffs' petition for revival of judgment and denied defendant's motion to strike.

¶ 3 On appeal, defendant presents three arguments that we consolidate into two and restate as: (1) the trial court erred in granting plaintiff's "Petition for Revival of Judgment" and (2) the trial court erred in denying defendant's "Motion to Strike."

¶ 4 I. BACKGROUND

¶ 5 This case began nearly 20 years ago in Seattle, Washington, with an investment deal gone bad. The underlying facts can be found in *Arntz v. Valdez*, 163 Wash. App. 1003, 2011 WL 3433018 (2011), but for our purposes here it is enough to note that in 2010, after protracted litigation, the King County Superior Court entered a judgment for plaintiffs (and against defendant) for $48,490.59 owed under a promissory note, plus interest, attorney fees, and costs. The Washington Court of Appeals later affirmed the judgment. At no point during the Washington litigation did defendant challenge the superior court's jurisdiction or plaintiffs' standing to enforce the promissory note.

¶ 6 In April 2012, pursuant to section 12-652 of the Code of Civil Procedure (Code) (735 ILCS 5/12-652 (West 2012)), plaintiffs filed the Washington judgment in the Coles County circuit court, seeking to enforce and collect on the judgment. In opposition, defendant filed a "Petition to Vacate a Void Foreign Judgment," which she later amended, arguing the Washington judgment was void because the King County Superior Court lacked jurisdiction. Specifically, defendant argued the Arntz Family Limited Partnership ceased to exist before the King County Superior Court entered judgment for plaintiffs. Defendant further argued plaintiffs defrauded the King County Superior Court by using a fictious "dba" rather than naming the Arntz Family Limited Partnership as a party. Defendant reasoned plaintiffs' actions deprived the King County Superior Court of jurisdiction. Following a full hearing in November 2012, having

heard arguments from both sides, the trial court denied defendant's petition, thereby allowing the Washington judgment to be registered in Illinois. Defendant did not appeal that decision.

¶ 7 The Washington judgment, now an Illinois judgment, laid dormant for almost seven years until plaintiffs petitioned to revive it in April 2019. Meanwhile, plaintiffs assigned the judgment to their attorney, Paul W. Routt (individually assignee or collectively plaintiffs). Plaintiffs served notice of the petition on attorney Kent Heller, who represented defendant in the 2012 proceedings. Within days, Heller moved to strike service of notice, attesting he briefly represented defendant in 2012, he no longer represented her, and serving him did not properly constitute service on defendant. On May 24, 2019, attorney Brent Winters entered his appearance for defendant and filed a motion to dismiss the petition for revival of judgment. On May 30, 2019, the trial court held a telephonic hearing on the pending motions. The trial court granted Heller's motion to strike service, finding he no longer represented defendant. Attorney Winters agreed to accept service on defendant's behalf. When plaintiffs agreed to serve Winters according to Illinois Supreme Court Rules, the trial court continued the hearing on defendant's motion to dismiss, subject to proper notice.

¶ 8 Meanwhile, plaintiffs twice attempted to serve notice to attorney Winters via prepaid first-class certified mail, restricted delivery, return receipt requested. In the first attempt, plaintiffs mailed notice to the address listed on the "Notice of Appearance" Winters filed in the trial court: 5105 U.S. Highway 41, Terre Haute, IN 47802. This address is a UPS Store. Because plaintiffs mailed the notice certified mail, restricted delivery, Winters had to go to the UPS Store and sign to perfect delivery and service. He never did. Stymied, plaintiffs reached out to Winters by telephone, who said he was temporarily in California, and he would be there for several weeks. Winters provided plaintiffs with the following address: 11318 Via Vista, Nevada City,

California, 95959. Plaintiffs mailed notice to this address, again prepaid first-class certified mail, restricted delivery, return receipt requested, which required Winters's signature upon delivery. For reasons unclear from the record, this second mailing has not been delivered to Winters.

¶ 9 Stymied again, plaintiffs sought to serve notice of the petition for revival of judgment by publication. On August 15, 22, and 29, 2019, plaintiffs published notice in the *Journal Gazette-Times Courier*. On October 1, 2019, assignee filed his affidavit describing his attempts to serve Winters by mail and explaining why he finally resorted to service by publication. On October 28, 2019, defendant filed a "Motion to Strike Affidavit," moving to strike both assignee's affidavit and the service by publication.

¶ 10 On November 25, 2019, the trial court held a telephonic hearing to consider plaintiff's petition for revival of judgment and defendant's motion to strike. Attorneys Winters and Rout appeared for their clients and argued their respective sides. The record before us contains no transcript of this proceeding, nor does it contain a copy of the court's judgment. We know from the docket sheet, however, the trial court granted the petition for revival of judgment over defendant's objection. The court denied defendant's motion to strike.

¶ 11 This appeal followed.

¶ 12 II. ANALYSIS

¶ 13 Defendant challenges the trial court's decisions on two grounds: (1) the trial court erroneously revived the judgment because the original Washington judgment was void for lack of jurisdiction and, therefore, not entitled to full faith and credit and (2) the trial court erroneously denied defendant's motion to strike. We disagree and affirm the trial court.

¶ 14 A. Revival of Judgment

¶ 15 "[A]n action to revive a judgment *** is not a new proceeding, but a continuation of the suit in which the judgment was originally entered." *Dec & Aque v. Manning*, 248 Ill. App. 3d 341, 349, 618 N.E.2d 367, 373 (1993). Section 2-1602 of the Code provides, "a judgment may be revived by filing a petition to revive the judgment in the seventh year after its entry *** or at any other time within 20 years after its entry if the judgment becomes dormant and by serving the petition and entering a court order for revival ***." 735 ILCS 5/2-1602(a) (West 2018). Section 2-1602 instructs that judgment holders must file the petition "in the original case in which the judgment was entered" and must serve the defendant with "notice of the petition to revive a judgment *** in accordance with Supreme Court Rule 106." 735 ILCS 5/2-1602(b), (c) (West 2018); see also *Department of Public Aid ex rel. McGinnis v. McGinnis*, 268 Ill. App. 3d 123, 129, 643 N.E.2d 281, 284 (1994) ("[P]ursuant to Rule 105, the party seeking revival (and possibly interest on the original judgment) must give personal notice to prevent surprise on the party owing the dormant judgment."). "The recognized effect of a revived judgment is to 'revive the judgment as it formerly existed and to reinvest it with the same attributes and conditions which originally belonged to it.' " *Dec & Aque*, 248 Ill. App. 3d at 349 (quoting *Bank of Eau Claire v. Reed*, 232 Ill. 238, 241, 83 N.E. 820, 821 (1908)).

¶ 16 "There are only two permissible defenses to a revival action: the denial of the existence of the judgment, or proof of satisfaction or discharge of the action ***." *McGinnis*, 268 Ill. App. 3d at 131. However, "these defenses must appear on the face of the record." *McGinnis*, 268 Ill. App. 3d at 131. Defendant did not and does not raise either of these defenses—she neither denies the judgment's existence nor does she claim she satisfied the judgment. Rather, defendant collaterally attacks the underlying Washington judgment, which became an Illinois judgment when plaintiffs registered it in 2012, alleging the King County Superior Court never

had jurisdiction to enter the order. Though revival actions allow only two defenses, "[r]evival cannot preclude *** a [jurisdictional] challenge" because it is a well-worn legal principle that "a judgment is subject to challenge at any time on the basis that it was rendered without personal jurisdiction." *Dec & Aque*, 248 Ill. App. 3d at 349-50; see also *BAC Home Loans Servicing, LP v. Mitchell*, 2014 IL 116311, ¶ 17, 6 N.E.3d 162 ("A judgment entered by a court without jurisdiction over the parties is void and may be challenged at any time, either directly or collaterally."). We now turn our attention to defendant's claim the King County Superior Court lacked jurisdiction, making its judgment against her void and subject to collateral attack here. We review this claim *de novo*. *BAC Home Loans Servicing*, 2014 IL 116311, ¶ 17.

¶ 17 1. *Jurisdiction*

¶ 18 Though we think defendant's challenge to the Washington court's jurisdiction hinges on personal jurisdiction, we are not convinced she is not challenging the court's subject matter jurisdiction also. Accordingly, we will address both components.

¶ 19 Illinois and Washington law view jurisdiction similarly. "In a general sense, 'jurisdiction' refers to the 'right or power to interpret and apply the law,' or to a court's 'sphere of authority or control.' " *In re M.W.*, 232 Ill. 2d 408, 414, 905 N.E.2d 757, 763 (2009); see also *Buecking v. Buecking*, 179 Wash. 2d 438, 447, 316 P.3d 999, 1003 (2013) ("Generally speaking, jurisdiction is the power of a court to hear and determine a case."). A court's jurisdiction (or power) comprises two necessary components: subject matter jurisdiction and personal jurisdiction. *M.W.*, 232 Ill. 2d at 414; *Buecking*, 179 Wash. 2d at 447. A court must have both jurisdictional components in order to issue a valid judgment. *M.W.*, 232 Ill. 2d at 414; *Buecking*, 179 Wash. 2d at 447. In other words, "[i]f a court lacks either subject matter jurisdiction over the

matter or personal jurisdiction over the parties, any order entered in the matter is void *ab initio* and, thus, may be attacked at any time." *M.W.*, 232 Ill. 2d at 414.

¶ 20 Subject matter jurisdiction refers to the type of case or controversy a court can hear and decide (adjudicate). *Boudreaux v. Weyerhaeuser Co.*, 10 Wash. App. 2d 289, 295, 448 P.3d 121, 127 (2019). "Thus, '[a] court has subject matter jurisdiction where it has authority "to adjudicate the type of controversy involved in the action." ' " *Boudreaux,* 10 Wash. App. 2d at 295 (quoting *In re Marriage of McDermott*, 175 Wash. App. 467, 480-81, 307 P.3d 717, 723 (2013) (quoting *Shoop v. Kittitas County*, 108 Wash. App. 388, 393, 30 P.3d 529, 532 (2001))). "Washington superior courts have broad subject matter jurisdiction." *Saunders v. Meyers*, 175 Wash. App. 427, 437, 306 P.3d 978, 983 (2013) (citing Wash. Const. art. IV, § 6); see also *Trinity Universal Insurance Co. of Kansas v. Ohio Casualty Insurance Co.*, 176 Wash. App. 185, 198, 312 P.3d 976, 984 (2013) ("[T]he Washington Constitution places few constraints on superior court jurisdiction.").

¶ 21 For example, the Washington Constitution confers upon superior courts original jurisdiction over several specific types of cases. *ZDI Gaming, Inc. v. State ex rel. Washington State Gambling Comm'n*, 173 Wash. 2d 608, 617, 268 P.3d 929, 933 (2012) (citing Wash. Const. art. IV, § 6). One such type of case is that "in which the demand or the value of the property in controversy amounts to three thousand dollars[.]" Wash. Const. art. IV, § 6. Besides listing the categories of cases included in the superior court's original subject matter jurisdiction, Article 4, section 6, includes a catchall provision, stating, "The superior court shall *** have original jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by law vested exclusively in some other court ***." Wash. Const. art. IV, § 6. Plaintiff's complaint, in part, sought what was due on the promissory note defendant signed, approximately $48,500.

Arntz, 2011 WL 3433018 at *2-3. Since the amount in controversy exceeded $3000, the King County Superior Court certainly had subject matter jurisdiction over plaintiff's suit against defendant to enforce the promissory note. And if for some reason this case did not fall into that specific category identified in article 4, section 6, it probably would have fallen into the catchall provision since we found no law vesting another court with jurisdiction over these types of lawsuits. Defendant does not argue otherwise. In simplest terms, there is no doubt the King County Superior Court had jurisdiction (power) to hear this *type of case*—one party to a promissory note enforcing the note against the other party. See *Saunders*, 175 Wash. App. at 437 ("The critical concept in determining whether a court has subject matter jurisdiction is the type of controversy.").

¶ 22 Turning now to the second necessary component to a court's jurisdiction—personal jurisdiction—we recall that "personal jurisdiction" refers to a court's coercive power to bind the parties through a judgment. Unlike subject matter jurisdiction, personal jurisdiction can be waived. *Volkmar v. State Farm Mutual Automobile Insurance Co.*, 104 Ill. App. 3d 149, 151, 432 N.E.2d 1149, 1151 (1982); *Boyd v. Kulczyk*, 115 Wash. App. 411, 415, 63 P.3d 156, 159 (2003) (citing CR 12(b), (h)(1)). For the King County Superior Court to have personal jurisdiction in the underlying litigation, it must have had power to issue a judgment binding the plaintiffs and defendant. Furthermore, it is necessary to determine if defendant waived the defense of lack of personal jurisdiction.

¶ 23 "It has long been established that the Fourteenth Amendment limits the personal jurisdiction of state courts." *Bristol-Myers Squibb Co. v. Superior Court of California*, 582 U.S. ___, 137 S. Ct. 1773, 1779 (2017); see also *Montgomery v. Air Serv Corp.*, 9 Wash. App. 2d 532, 538, 446 P.3d 659, 664 (2019). "In determining whether personal jurisdiction is present"—

whether a court has the power to bind the parties—"a court must consider a variety of interests," but "[t]he primary focus of [the] personal jurisdiction inquiry is the *defendant's* relationship to the forum State." (Emphasis added.) *Bristol-Myers Squibb Co.*, 582 U.S. ___, 137 S. Ct. at 1779-80. There is no question the King County Superior Court had personal jurisdiction over defendant. She conducted business in Seattle, Washington, signed the promissory note in Washington, and voluntarily appeared and defended herself in the Washington courts. With that said, defendant does not and has not questioned King County Superior Court's jurisdiction *over her*, but oddly enough, she questions the court's jurisdiction over plaintiffs. These types of challenges are almost nonexistent because by merely filing a complaint in a Washington court the plaintiff submits to the court's jurisdiction. See *Adam v. Saenger*, 303 U.S. 59, 67 (1938) ("The plaintiff having, by his voluntary act in demanding justice from the defendant, submitted himself to the jurisdiction of the court ***."); *Kuhlman Equipment Co. v. Tammermatic, Inc.*, 29 Wash. App. 419, 424, 628 P.2d 851, 854 (1981) (stating that when a party files a claim seeking affirmative relief from the court, the party invokes that court's jurisdiction). Defendant seems to believe the confusion in the caption, namely plaintiffs using "dba" rather than listing the "Arntz Family Limited Partnership" as a party in addition to Neil and Marion Arntz individually, amounted to a "fictitious entity" over which the King County Superior Court had no personal jurisdiction. But she is mistaken. There is no question the King County Superior Court had jurisdiction over Neil and Marion Arntz since they filed the complaint and invoked the court's jurisdiction over them. In other words, by filing the original complaint, the Arntzs submitted to the King County Superior Court's jurisdiction, *i.e.*, the court's power to bind them with a judgment. Moreover, the record clearly shows defendant never questioned the King County Superior Court's personal jurisdiction during the Washington litigation. She never questioned the

court's jurisdiction over her or the plaintiffs. She therefore waived the defense of personal jurisdiction. *Kulczyk*, 115 Wash. App. at 415 (citing CR 12(b), (h)(1)); *Volkmar*, 104 Ill. App. 3d at 151.

¶ 24 2. *Standing*

¶ 25 Though defendant couched her claims in terms of jurisdiction, it was better suited for a standing argument. Meaning, if she believed the plaintiff in the caption, "Neil J. Arntz, Marion Arntz, dba as Arntz Family Limited Partnership, Neil J. Artnz, General Partner," was "fictious" or "ceased to exist" during the underlying Washington litigation, she should have argued the plaintiffs lacked standing to enforce the promissory note in the Washington courts. She did not; consequently, she waived the defense. *Deutsche Bank National Trust Co. v. Snick*, 2011 IL App (3d) 100436, ¶ 9, 957 N.E.2d 1273; *Matter of Estate of Reugh*, 10 Wash. App. 2d 20, 53-55 (2019). But even if defendant had not waived a standing argument, such an argument could not prevail at this stage of the proceedings. Recall, revival actions are subject to only two defenses (either the judgment does not exist, or it has been satisfied) or is subject to a collateral attack for lack of jurisdiction. *Dec & Aque*, 248 Ill. App. 3d at 349-50. Defendant, therefore, cannot now challenge the trial court's order reviving the judgment based on plaintiffs' lack of standing in the Washington litigation.

¶ 26 B. Motion to Strike

¶ 27 Defendant next argues the trial court erred in denying her motion to strike assignee's affidavit regarding service of process. We disagree.

¶ 28 We know from the record that assignee twice attempted to serve defense counsel by prepaid first-class certified mail, restricted delivery, return receipt requested. When he could not serve attorney Winters (defense counsel) by mail, assignee resorted to service by publication.

He filed an affidavit outlining his attempts to serve defense counsel. In her "Motion to Strike Affidavit" filed in the trial court, defendant moved to strike service by publication and assignee's affidavit in support of service by publication, arguing assignee "attempts service by publication, but without showing that he had 'conducted due inquiry into defendant's whereabouts before obtaining service by publication.' " Defendant also claimed assignee's affidavit "is false as to material matters" and a "misrepresentation of material fact." Defendant concluded that since assignee failed to properly serve defense counsel, the trial court lacked jurisdiction over defendant.

¶ 29 We do not have the transcript of the November 25, 2019, telephonic hearing where the court heard arguments on defendant's motion to strike, so we do not know what the parties specifically argued to the trial court. From the pleadings in the record, though, we understand the arguments centered on factual disputes—what the parties did or did not do related to ascertaining defense counsel's location and attempted service by mail, specifically assignee's due diligence. The trial court ultimately denied defendant's motion to strike, signaling it resolved the factual issues in assignee's favor. Given these facts and procedural posture of this motion, we review the trial court's decision for an abuse of discretion. See *Jackson v. Graham*, 323 Ill. App. 3d 766, 773, 753 N.E.2d 525, 531 (2001) (explaining that evidentiary rulings, including those on motions to strike affidavits, are generally reviewed for an abuse of discretion); *In re Estate of Hoover*, 155 Ill. 2d 402, 420, 615 N.E.2d 736, 744 (1993) (finding the trial court did not abuse its discretion in denying defendant's motion to strike plaintiff's affidavit). We conclude the trial court did not abuse its discretion in denying defendant's motion to strike.

¶ 30 It is well-established Illinois law that the appellant bears the burden "to present a record which fairly and fully presents all matters necessary and material for a decision of the

questions raised." *Interstate Printing Co. v. Callahan*, 18 Ill. App. 3d 930, 932, 310 N.E.2d 786, 789 (1974); see also *Higgins v. Columbia Tool Steel Co.*, 76 Ill. App. 3d 769, 776, 395 N.E.2d 149, 154 (1979) ("Where a party desires to have a judgment reviewed it is incumbent upon him to present a record of the proceedings and judgments sufficient to show the errors of which he complains."); *In re Marriage of Gulla*, 234 Ill. 2d 414, 422, 917 N.E.2d 392, 397 (2009) ("[T]o support a claim of error, the appellant has the burden to present a sufficiently complete record."). Specifically, pursuant to Illinois Supreme Court Rule 321 (eff. Feb. 1, 1994), the appellant must submit to the reviewing court "the judgment appealed from, the notice of appeal, *** the entire original common law record," "[and] any report of proceedings prepared in accordance with Rule 323."

¶ 31 These production requirements are essential for adequate, meaningful appellate review. " 'An issue relating to a circuit court's factual findings and basis for its legal conclusions obviously cannot be reviewed absent a report or record of the proceeding.' " *Gulla*, 234 Ill. 2d at 422 (quoting *Corral v. Mervis Industries, Inc.*, 217 Ill. 2d 144, 156, 839 N.E.2d 524, 532 (2005)). When the appellant fails to provide the reviewing court with a sufficiently complete record, we presume the trial court's order conformed to the law and rested on a sufficient factual basis. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392, 459 N.E.2d 958, 959 (1984). Similarly, "[a]ny doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 392.

¶ 32 Defendant challenges the trial court's decision denying her motion to strike assignee's affidavit and strike service by publication, yet she failed to produce the judgment appealed from and the report of proceedings from the November 25, 2019, telephonic hearing. As a result, we do not know what the parties specifically argued to the trial court in that hearing.

Nor do we know the legal or factual reasons for the trial court's decision to deny the motion to strike. We must, therefore, resolve any doubts as to what took place in the trial court against defendant. *Foutch*, 99 Ill. 2d at 392. From what we can gather from defendant's motion to strike and assignee's response thereto, the disputed issues before the trial court included whether assignee exercised due diligence in serving defense counsel by mail before resorting to service by publication. This is a fact-sensitive issue, evidenced by the parties' relevant pleadings and filings, which contained only factual arguments and no citable legal precedent. Since the trial court denied defendant's motion to strike, we deduce the court found assignee exercised due diligence in trying to serve defense counsel by mail before resorting to service by publication. Without a record, we must presume the trial court grounded its decision to deny defendant's motion to strike in a sufficient factual basis. *Foutch*, 99 Ill. 2d at 392. Likewise, we must presume the trial court knew the law and rules governing service by publication and applied them properly when considering defendant's motion to strike. *Foutch*, 99 Ill. 2d at 392; see also *People v. Phillips*, 392 Ill. App. 3d 243, 265, 911 N.E.2d 462, 483 (2009) ("[A] trial court is presumed to know the law and apply it properly."). Presuming the trial court relied on sufficient facts and followed the applicable law, we find the trial court did not abuse its discretion in denying defendant's motion to strike.

¶ 33 We pause briefly to note defendant ventures to raise new legal issues relating to technical infirmities in the service by publication, *i.e.*, contrary to the requirements set forth in the Code (735 ILCS 5/2-206(a) (West 2018)), assignee's affidavit did not state defendant resides or has gone out of Illinois, defendant is concealed in Illinois, or that on due inquiry defendant cannot be found in Illinois. We have two responses to this argument. First, since defendant did not raise an argument that assignee failed to strictly comply with section 2-206(a) to the trial

court through her motion to strike, she waived it for appellate review. See *Nelson v. Board of Trustees of the Police Pension Fund of the City of Springfield*, 141 Ill. App. 3d 411, 417, 490 N.E.2d 216, 221 (1986). As we see it, based on the incomplete record before us, the trial court resolved the only disputed issue before it (the due diligence requirement for service by publication) when denying defendant's motion to strike. There is no indication in the record defendant raised these claimed technical infirmities with the service by publication to the trial court; in fact, the record clearly shows defense counsel agreed to accept service on defendant's behalf. Due to defendant's waiver, we will not consider such technical infirmities now. Second, as we explained *supra*, when presented with a deficient record for appellate review, we must presume the trial court knew and followed the law. *Foutch*, 99 Ill. 2d at 392. Consequently, we presume the trial court knew the law governing service by publication (section 5/2-206(a)) and properly applied it. See *Phillips*, 392 Ill. App. 3d at 265.

¶ 34 Defendant has failed to show the trial court erred in granting plaintiffs' petition for revival of the judgment, and she also failed to show the trial court abused its discretion in denying her motion to strike.

¶ 35 III. CONCLUSION

¶ 36 For the reasons stated, we affirm the trial court's judgment.

¶ 37 Affirmed.