NO. 89853-7

SUPREME COURT
OF THE STATE OF WASHINGTON

THERESA SCANLAN,
Respondent,

v.

KARLIN TOWNSEND and "JOHN DOE" TOWNSEND,
Petitioners.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

STATUTES

RULES

A. IDENTITY OF PARTY

Respondent Theresa Scanlan was the plaintiff in the trial court and appellant in the Court of Appeals.

B. STATEMENT OF RELIEF SOUGHT

Ms. Scanlan asks this Court to deny review.

C. ISSUE PRESENTED

Whether service of process is valid when any person over the age of 18 years who is competent to be a witness in the action, other than a party, personally delivers the complaint and summons to the defendant before the expiration of the relevant statute of limitations?

D. STATEMENT OF THE CASE

This case arises out of an automobile collision between a vehicle driven by Plaintiff Theresa Scanlan and a vehicle driven by Defendant Karlin Townsend that occurred on October 28, 2008, in King County, Washington. CP 1-2. Ms. Scanlan filed a complaint on October 27, 2011, the final day before the expiration of the statute of limitations, alleging Ms. Townsend negligently operated her vehicle causing the collision and injuring Ms. Scanlan. CP 1-2. Pursuant to RCW 4.16.170, Ms. Scanlan had 90 days to serve her complaint on Ms. Townsend. The 90 day tolling period expired on January 25, 2012.

On December 21, 2011, well within the 90 day statutory period, Ms.

Scanlan's process server delivered the summons and complaint in this case to Ms. Townsend's father, Charles William Pyne, at his home in Vancouver, Washington. CP 3. Ms. Scanlan's process server recalls Mr. Pyne saying that the defendant was living with him and that he would give the documents to the defendant. CP 45. However, Mr. Pyne has declared that he never told the process server that the defendant was residing with him and the defendant denies living there at the time service was attempted. CP 123-24, 11. Regardless, it is undisputed that Mr. Pyne did take the summons and complaint from the process server and give them to Ms. Townsend when she came to visit him at his Vancouver residence sometime in late December 2011 or early January 2012. CP 109. All of this occurred within the 90-day toll of the statute of limitations after Ms. Scanlan filed her complaint.

Ms. Townsend brought on a motion to dismiss for lack of service on July 13, 2012. CP 4-9. She claimed that Ms. Scanlan did not affect substitute service on her because she did not reside at her father's Vancouver residence at the time of service and that the case should be dismissed with prejudice because the statute of limitations had expired. *Id.* In response, Ms. Scanlan argued that she properly served Ms. Townsend through substitute service on Mr. Pyne (based on the belief that Ms. Townsend actually did live with Mr. Pyne at the time of service), or, in the

alternative, that Mr. Pyne personally served Ms. Townsend before the 90-day statutory period expired. CP 85-96. The court reserved its ruling on the motion at the end of the hearing. RP 17-18.

Later that day, the Court issued its written ruling, holding that the "Defendant's deposition testimony that her father gave her the summons and complaint is insufficient proof of service." CP 126-28. Most of the argument at the hearing was directed towards whether service was proper under Washington law. However the Court did briefly discuss the issue of proof of service with Ms. Townsend's counsel during the hearing:

> THE COURT: But as I understood it, (in *Gerean v. Martin-Joven*) there was no – no Declaration on the part of the father that he had done the service, whereas in Brown-Edwards the neighbor, they – the Plaintiff got the neighbor to sign an Affidavit or a Declaration or something saying that she had done the service. And, you know, the [dissent], one of them says something about well, you know[,] is it service if the paper flies by someone in the wind and they pick it up and get it.
>
> ...
>
> THE COURT: Well, how is – how is the Defendant in Brown not personally served? How was that? I mean, she –

the neighbor – you know, obviously you don't have to have someone who has a certification of a process server.

MR. ABRAHAMSON: Right.

THE COURT: You or I could serve, as long as we're not a party.

MR. ABRAHAMSON: Well, the other distinction with this case is that in Brown they did go get an Affidavit of Service from the neighbor.

THE COURT: Um hum.

MR. ABRAHAMSON: There's nothing like that in this case.

THE COURT: Um hum.

MR. ABRAHAMSON: From Mr. [Pyne]

THE COURT: But isn't an Affidavit of service a sworn statement that I am competent and I served this? I guess the thres [sic] – maybe it comes down to if the person who's being served swears that they were served, is that the same thing as the person who's doing the service, swearing that they were served?

MR. ABRAHAMSON: You're going to have to run that one by me again.

THE COURT: Well, in this case, the proof of service –

MR. ABRAHAMSON: Yes.

THE COURT: -- comes from the Defendant herself when she was asked in her deposition, did your father give it to you.

MR. ABRAHAMSON: Correct.

THE COURT: At first in her deposition she said, you know, he told me it was at his home. And that's not good enough. Right? If he went to her home and left it under the doormat, that wouldn't work. But then she was asked did your father give it to you and she said yes. And that's under – that's a statement under oath. Yes, I was personally served with these documents.

MR. ABRAHAMSON: Yeah. And we're not disputing that.

...

THE COURT: Well, however, I mean, I'd be interested if there are any cases in Division I that make this distinction because it – there's nothing in this statute that says, again, that you have to have some person who works for a process serving company do it. You just need to – you know, it's

not enough to put in motion something that fortuitously results in service, but I think that Brown-Edwards stands for the idea that once you've established by sworn testimony that personal service was done, that's sufficient, regardless of who the server is, the process server is.

RP 5-9. Despite this discussion of proof of service (that seems to indicate the Court was favoring Ms. Scanlan during the hearing), the Court ruled that proof of service was inadequate. In support of its ruling, the Court cited *Gerean v. Martin-Joven*, 108 Wn. App. 963, 33 P.3d 427 (2001). CP 126-28.

Ms. Scanlan timely filed her notice of appeal on July 16, 2012. CP 129-32. On December 30, 3013, Division One of the Court of Appeals reversed and remanded the case to trial court. The court held that service was effective in this case because the undisputed record established Ms. Townsend's father personally delivered a copy of the summons and complaint to her, and proof of service was established by her admission under oath that she received the summons and complaint within the 90-day tolling period.

Ms. Townsend filed a petition for review to this Court on January 28, 2014.

E. ARGUMENT

This Court should deny Ms. Townsend's petition for review because she has failed to demonstrate that this case presents any issue that would allow to this Court to accept review pursuant to RAP 13.4(b). The Court of Appeals decision in the present case does not conflict with other decisions of the Court of Appeals. Nor does this case present an issue of substantial public interest that should be determined by the Supreme Court.

1. THERE IS NO CONFLICT IN THE COURT OF APPEALS BECAUSE THE COURTS OF APPEALS HAVE CONSISTENTLY HELD THAT FACTS SIMILAR TO THIS CASE CONSTITUTE VALID SERVICE OF PROCESS.

Personal service of process can be accomplished by (1) serving the defendant personally, or (2) by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion. RCW 4.28.080. The statute does not specify who may serve process. *Id.* The issue is addressed in Washington's Civil Rules.

Any person who is (1) over 18 years old, (2) competent to be a witness, and (3) not a party to the action, may serve process. CR 4(c); *Brown-Edwards v. Powell*, 144 Wn. App. 109, 111, 182 P.3d 441 (2008). Any person means any person. *Roth v. Nash*, 19 Wn.2d 731, 734-35, 144 P.2d 271 (1943). The rule does not require that the "process server have a contractual obligation to serve process." *Brown-Edwards*, 144 Wn. App. at

111. The process server also need not intend to serve process. *Id.* A person who comes into possession of a summons and complaint through defective service may be a competent process server. *Id.*; *see* CR 4(c). The rule only prohibits a person from affecting service if they are underage, incompetent, or a party to the action. *Brown-Edwards*, 144 Wn. App. at 111-12.

Issues related to abode service are irrelevant to the determination of whether Ms. Townsend was properly served in this case. The Court of Appeals reversed the Trial Court's dismissal of Ms. Scanlan's claims because "the undisputed record establishes Townsend's father personally delivered a copy of the summons and complaint to Townsend." However, nearly all of the cases cited by Ms. Townsend are limited to the issue of abode service.

Ms. Townsend incorrectly claims that the Court of Appeals did not consider whether service of process was delivered in *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 541, 933 P.2d 439 (1997), *Lepeska v. Farley*, 67 Wn. App. 548, 549, 833 P.2d 437 (1992), and *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 482, 674 P.2d 1271 (1984). *Pet. For Review* (hereinafter *Pet.*) at 15. However, the courts in each case went to considerable effort to factually demonstrate that personal delivery of the summons and complaint never

occurred. *See, e.g.*, *Gross*, 85 Wn. App. at 541 (noting that the defendant's son refused copies of the summons and complaint and after two failed attempts of service, no more attempts were made); *Lepeska*, 67 Wn. App. at 549 (stating that the defendant's mother physically returned all of the process paperwork to the serving attorney's office); *Mid-City Materials, Inc.*, 36 Wn. App. at 482 (describing how the defendant parents did not appear until after the initial case was complete, and noting that the defendant parents had affidavits stating that they had never received the summons or complaint). Thus, after factually distinguishing themselves, it was impossible for the courts in those cases to analyze the CR 4(c) question that arises in this case.

The only two cases factually similar to the present case are *Gerean,* 108 Wn. App. 963, and *Brown-Edwards*, 144 Wn. App. 109, both decided by Division Three of the Court of Appeals. The only possible source of confusion between the two cases was resolved in *Brown-Edwards*, the latter case. *Id.* at 112-113 (clarifying that while service of process was actually delivered in both cases, the CR 4(c) question was not properly raised by the parties in *Gerean* and thus the *Gerean* analysis did not apply). The *Brown-Edwards* court explicitly held that *Gerean* should be "limited to its facts and **the particular arguments made there.**" *Id.* at 112. (emphasis added). In this case, Ms. Scanlan has consistently made the

same type of arguments advanced by the plaintiff in *Brown-Edwards*: That Mr. Pyne was qualified to serve process and personally served Ms. Townsend with the summons and complaint. Service in this manner complies with all of the personal service requirements and is good service.

Additionally, while it is true that proof of service should ordinarily and preferably be in the form of an affidavit, *Terry v. City of Tacoma*, 109 Wn. App. 448, 455, 36 P.3d 553 (2001), CR 4(g)(5) states that proof of service may take the form of an admission by the defendant, his agent, or his attorney. *Hamil v. Brooks*, 32 Wn. App. 150, 151, 646 P.2d 151 (1982). CR 4(g)(7) requires that proof of service must state the time, place, and manner of service. *Id.* In *Hamil*, Division One held that an admission of service by the defendant made during a sworn deposition was not just sufficient to satisfy the proof of service requirement, but that it constituted "the best possible evidence that he received the summons and complaint." *Id.* at 152. Here, Ms. Townsend claims that a formal affidavit of service distinguishes this case from the ruling in *Brown-Edwards*. *Pet.* at 13. However, the "affidavit of service" in *Brown-Edwards* was a not a formal affidavit, but a declaration of the neighbor, filed by the defendant, during the hearing for summary judgment. *Brown-Edwards*, 144 Wn. App. at 114 (Brown, J. dissenting). This places the facts of the instant case—proof of service through deposition testimony of Ms. Townsend under oath and the

declaration of Mr. Pyne—in line with *Brown-Edwards*, *Hamil*, and CR 4(g)(5), and CR 4(g)(7). Delivery was made by a competent person and there is valid proof of service.

The Court of Appeals in this case correctly considered the facts before it and applied the law consistently with all previous cases with similar fact patterns. Therefore, no conflict exists to review.

2. THIS CASE DOES NOT CREATE AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST BECAUSE THE FACTS AT ISSUE COMPLY EXPRESSLY WITH THE STATUTES AND COURT RULES GOVERNING SERVICE OF PROCESS.

Ms. Townsend incorrectly contends that applying the current, clear rule of *any* person to the service of process will increase the level of uncertainty of service. CR 4(c); *Pet.* at 16-17. Ms. Townsend ignores the burden of proof on the plaintiff which already exists to counter any possible issue of uncertainty. The plaintiff has the burden to prove that service was completed before the end of the 90-day tolling period. *See* CR (4)(g); RCW 4.16.170; *Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010) (stating that the plaintiff has the initial burden of proof to establish a prima facie case of sufficient service, and an affidavit of service is presumptively correct). Were some random stranger to pick up a summons and complaint off the street, deliver it to the defendant, and then fade back into the night, there would be no way for the plaintiff to

meet the burden of proof of service and no jurisdiction would be conferred on the defendant. Thus, a check system already exists to address the concern of Ms. Townsend and there is no substantial issue of public concern.

F. CONCLUSION

No conflict exists because the Court of Appeals in this case correctly considered the facts before it and applied the law consistently with all previous cases with similar fact patterns. There is no issue of substantial public concern because this case does not deviate from the standards of service of process and proof of service. The Division One ruling in this case does not set forth any new standards; rather it complies with all other holdings before it. Therefore, Ms. Scanlan respectfully requests that this Court deny review because no basis for review exists.

Respectfully submitted this 27th day of February, 2014,

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DECLARATION OF SERVICE

I declare that I served the foregoing Respondent's Answer to Petition for Review on the party below:

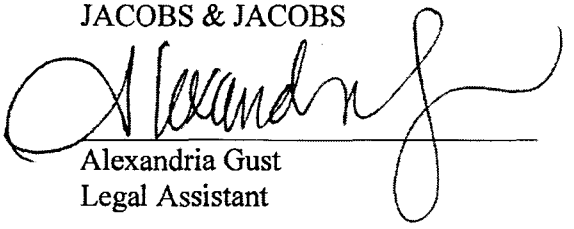
Michael E. Abrahamson
Jill R. Skinner
Hollenbeck, Lancaster, Miller & Andrews
15500 SE 30th Place, Suite 201
Bellevue, WA 98007

By causing a full, true and correct copy thereof to be hand delivered by ABC Legal Messenger Service to the party, at the address listed above, which is the last known address for the party's office, on the date set forth below.

I DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

DATED this 27th day of February, 2014, at Puyallup, Washington.

JACOBS & JACOBS



Alexandria Gust
Legal Assistant

IN THE SUPREME COURT IN THE STATE OF WASHINGTON

THERESA SCANLAN,

Respondent,

vs

No. 89853-7

KARLIN TOWNSEND and "JOHN DOE" TOWNSEND,

DECLARATION OF EMAILED DOCUMENT (DCLR)

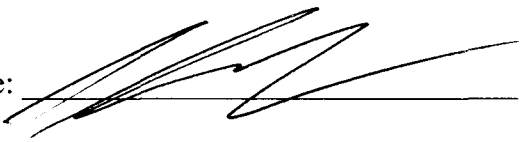
Petitioners,

I declare as follows:

1. I am the party who received the foregoing email transmission for filing.
2. My address is: 3400 Capitol Blvd. SE #103, Tumwater WA 98501
3. My phone number is (360) 754-6595.
4. I have examined the foregoing document, determined that it consists of 17 pages, including this Declaration page, and that it is complete and legible.

I certify under the penalty of perjury under the laws of the State of Washington that the above is true and correct.

Dated: February 27, 2014 at Tumwater, Washington.

Signature: 

Print Name: James Lincoln