NO. 90862-1

PETITION FOR REVIEW
TO
SUPREME COURT TO THE STATE OF WASHINGTON

Glen L. Walker, Petitioner
v.
Estate of William Bremer, Respondent

FROM THE UNPUBLISHED OPINION OF DIVISION II

of the

WASHINGTON COURT OF APPEALS
DATED AUGUST 5, 2014
IN
CASE NUMBER 44350-3-II

Attorney for Petitoner
Charles M. Cruikshank
1417 Digby Place
Mount Vernon, WA 98274
(206)624-6761
cruiklaw@gmail.com
October 6, 2014

225 (2012).

Keithly did not understand that bifurcation of RCW 46.64.040 into its elements and satisfying each of them independently did not constitute strict compliance with the substitute service statutes.

Now, Walker has strictly complied with RCW 4.28.080(16), but the statute as designed imposed an unnecessary and unprecedented burden on him that is inconsistent with the other substitute service statutes and needs this Court to harmonize the statues and Civil Rules to bring predictability to the statutes and their rule of law.

Respectfully Submitted on ~~October 6,~~ 2014.

Charles M. Cruikshank WSBA 6682 6682
Attorney for the Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following and below named parties and/or attorneys by 1st class mail, postage prepaid, on the date signed below.

Date: October 6, 2014

Pierre Acebedo, 1011 E. Main, Suite 456 in Puyallup E.Main, #456, Puyallup, WA 98372

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ISSUES PRESENTED FOR REVIEW

A. Does the RCW 4.28.080(16) identification of eligible service agents, to wit, a "resident, proprietor or agent" of the usual mailing address of the person to be served, permit an attorney to be designated as a service agent, if he or she otherwise qualifies?

B. Does evasion and misrepresentation by a service agent in attempts to evade service of process constitute a waiver of the defendant's right to challenge the service or is the defendant equitably estopped from challenging the service?

C. Does RCW 4.28.080(16) satisfy due process when the only time requirement for mailing copies of the summons and complaint to the usual mailing address of the person being served is that mailing take place at any time thereafter personal service and service is not complete until the tenth day after mailing?

D. Is use of RCW 59.12.030 of the Unlawful Detainer statute, allowed for summary eviction of a holdover purchaser who is in default under RCW 61.30, the Real Estate Contract Forfeiture Act, without a prior adjudication of the holdover purchaser as guilty of at least one of the definitions of unlawful detainer in RCW 59.12.030?

E. When a written order is entered by a judge, denying consolidation of two cases with common parties, and another judge, who is assigned to one of the cases, later orally concurs with that order, is the later concurrence the second judge's "discretionary ruling" that acts to bar the second judge being disqualified under RCW 4.12.050 from hearing the one case to which he had been assigned?

F. In a real estate contract forfeiture action, where strict compliance with the service rules is required by RCW 61.30.080, does the failure of the seller to properly serve one purchaser with the Declaration of Forfeiture deprive another purchaser in the same action of standing to challenge the Declaration of Forfeiture?

STATEMENT OF THE CASE

Bremer filed a Declaration of Forfeiture on October 11, 2012. He then filed a Complaint on October 24, 2012, seeking to have Walker judged to be guilty of "unlawful entry," one of the elements of first degree burglary and a felony. [CP-A 89]Bremer also filed an ex parte Motion for a Writ of Restitution under RCW 59.12, the unlawful detainer statute without first complying with RCW 59.12.060, having Walker adjudged to be guilty of one of the seven offenses listed in RCW 59.12.030.

Use of the unlawful detainer procedure requires strict compliance with its terms. To remove a contract buyer in default is only conditionally permitted by the Real Estate Contract Forfeiture Act, RCW 4.12.050.100(3), if the buyer found to be guilty of an unlawful detainer offense as listed in RCW 59.12.030. Bremer's choice to ignore the ejectment procedures and law made it impossible for Walker to assert his setoff and counterclaims in the unlawful proceeding special proceeding, due to its limited jurisdiction designed to restrict the issues and jurisdiction to occupancy of the real estate.

Walker's claim was that the status and quality of the property he was buying had been substantially misrepresented by Bremer.[CP-B1-9; 62-52]

Walker filed his Complaint to Vacate Forfeiture and for Damages on December 7, 2012 and commenced service efforts immediately. By his count, there were twelve separate efforts to serve Bremer, preceded by many attempts to locate him. When Walker learned from his brother, Bill, that Bremer was out of town and not expected to return for "about a week" after December 7, he realized that serving Bremer at his residence could not occur until December 14, at the earliest. The last day for service was December 11, based on the sixty day limit for both filing and service in RCW 61.30.140(2).

Repeated unanswered calls to the residence phone and unreturned voice mail requests for callback by Bill Walker to the residence convinced Glen Walker that abode service under RCW 4.28.080(15) could not be completed in time. He then broadened his efforts to include RCW 4.28.080(16), service on a service agent.[CP-A 10; 57]

On September 14, 2012, Bremer had a Probate Notice to Creditors (Appendix A to Appellants Brief) filed and published, which designated 1011 East Main Street, Suite 456, Puyallup, as his delivery and mailing address for claims against his father's estate, which is also the address of Peter Acebedo's law office. [Appendix A to Appellant's Brief.]

Walker's service efforts were initially foiled by the proprietor of Bremer's usual mailing address, Acebedo, whose participation in evasions and misrepresentations about his presence at that address created a barrier that initially appeared insurmountable.

Acebedo's staff first represented to the registered process server, Bill Farmin, that Acebedo was out of his office and that the time of his return was unknown, so Farmin was only able to complete office service, not valid personal service and so he was asked to attempt service at Bremer's residence, but he had a schedule conflict and so declined the job.

Another Walker process server, Jeremi McCullough, then attempted repeatedly on December 10 to gain access to Acebedo for

service. After his initial efforts were thwarted, he called Acebedo's cell phone number while he (McCullough) was in Suite 456 at 1011 E. Main after Acebedo's receptionist had repeatedly said that Acebedo was not in the office and his expected time of return was unknown.

When McCullough heard the sound of a phone ringing, indicating that Acebedo, or at least his phone, was actually in the office, McCullough started walking down the hall towards the sound and Acebedo appeared, and was personally served by McCullough.

On the same date, December 10, Walker's lawyer mailed copies of the original Summons and Complaint to both of Bremer's usual mailing addresses, his residence in Snohomish and his mail drop in Puyallup. [CP-B 10, CP-B 57]

On December 21, Bremer moved for dismissal of Walker's Complaint based on insufficiency of service and statute of limitations. Bremer's Declaration on support acknowledged receipt of the mailed Summons and Complaint at his residence, but Acebedo's did not.

Bremer's Motion to Dismiss confirmed most of Walker's proof of service facts, while arguing the legal issues that his lawyer could not

be his service agent, as no consent was given for him to accept service and also that he had not appointed Acebedo as his "attorney-in-fact" for signing the Declaration of Forfeiture[1]. The court agreed and dismissed Walker's complaint. [CP-A 10] [Rpt. Proc. 1/4/2013]

Division II's unpublished opinion of September 5, 2014 held that "Walker raised a 'private mailbox' argument for the first time in oral argument related to the process of serving [sic], which we do not consider. RAP 5.5(a)." See the Court of Appeals Unpublished Opinion, August 5, 2014, p. 8, fn. 4, where issues of the private mailbox, "usual mailing address" and related issues were addressed in Walker's Appellant's Brief at pages 5 - 9.

Bremer moved to eject Walker as a holdover from property which was being purchased with a real estate contact after Bremer had moved to declare forfeiture. Bremer relied on the terms of RCW 61.31.100(3) which permits ("may use") the Unlawful Detainer Act to evict a holdover. [CP-A 29; 13]

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[1] RCW 61.30.140(2) restricts service of process for an action to vacate a real estate forfeiture to Mr. Bremer, the person who signed the Declaration of Forfeiture.

RCW 59.12.060 limits the parties for which the unlawful detainer procedure may be used to those adjudicated "guilty of the offense charged" as found in one of the seven offenses in RCW 59.12.030. The ex parte Writ of Restitution that Bremer used to eject Walker found him to be guilty of "unlawful entry," as the Complaint requested, but not one of the unlawful detainer offenses in RCW 59.12.030. Evidence to support "unlawful entry" was not part of the ex parte motion. Walker was therefore not adjudicated to be guilty of any of the seven offenses identified in RCW 59.12.030.

Walker's previously filed lawsuit against Bremer and Walker's co-purchasers Scott and Elizabeth Hawton was assigned to Judge Garold Johnson. Walker's suit to vacate the Declaration of Forfeiture, which was filed on December 7, 2012, was assigned to Judge John Hickman. Walker filed a Motion for Consolidation of these two lawsuits and noted it to be heard before Judge Garold Johnson at 9:00 on January 4, 2013.

Bremer noted a Motion to Dismiss the forfeiture case based on his statute of limitations defense for hearing before Judge Hickman

later the same day. Walker had also filed a Declaration of Prejudice under RCW 4.1246.64.050 to have Judge Hickman replaced by another judge, which was to be heard by Judge Hickman before Bremer's Bremer's Motion to Dismiss was to be heard. [CP-B 83-88; 71-73;; 48-49; 71-73; 48-51; 103-121]]

Judge Johnson denied consolidation and with entry of an order. Counsel for the parties then appeared before Judge Hickman for Walker's motion for appointment of a replacement judge and for Bremer's Motion to Dismiss Judge Hickman orally stated his agreement with Judge Johnson's earlier order denying consolidation, then used his oral ruling as the basis for denial of his own disqualification from the real estate forfeiture case and he then granted Bremer's motion to dismiss. [CP-B 10-14; 91-93; 48-49; Rpt. Proc. 12/21/2-12]

The Court of Appeals Unpublished Opinion of August 5, 2014 held that Walker lacked standing to pursue his action to set aside Bremer's Declaration of Forfeiture, based upon Walker's claim tha Bremer failed to strictly follow the notice provisions of RCW 61.31. Walker's Appellant's Brief discussed Bremer's failure to serve the

bankruptcy trustee of Scott and Elizabeth Hawton, but it did not argue that failure to serve the Hawton's trustee gave Walker standing. His argument is, and was, that it was Bremer's failure to serve Walker which gave Walker standing to seek to vacate the forfeiture. Mention of Bremer's failure to serve the trustee was to show that the quality of ALL of Bremer's service as improper and insufficient to permit the forfeiture to stand, which is consistent with Walker's argument on this service. [CP-B 49; CP-A 27; 72]

Bremer mailed the Declaration of Forfeiture to Walker at the Hawtons' residence address to serve him by certified mail, return receipt requested, but he did not produce a receipt signed by Walker, showing that Walker was never served. Nor did Bremer produce proof of publication, which is required where a seller moving for forfeiture claims to be unable to locate a proper address for service of the Declaration of Forfeiture on a defaulting buyer, as RCW 61.31.020(1) requires. The same statute requires strict compliance with its notice provisions. RCW 61. 30. 040(1). Appellant's Brief, pp. 31-34.

ARGUMENT

PERSONAL SERVICE UNDER RCW 4.28.080(16) The public policy that drove the enactment of the statute was cited in *Wright v. B & L Properties, Inc.*, 462, as follows:

> [T]he bill addresses the situation in which people use "mail drop" addresses as their legal residence. This legislation would not permit persons to avoid service of process through the use of such a device. S.B. Rep. No. 5167, at 2 (as passed, Jan. 1996).

This Court has stated that its ". . . prime construction objective is to "carry out the legislature's intent." *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

Bremer's argument that Acebedo could not be served because he was Bremer's attorney and consent was lacking is authoritatively addressed in *Wright v. B & L Properties, Inc.*[2], supra, 462, where the court explained that Subsection 16 provided the authority for service on the proprietor of a usual mailing address and that consent of the person's usual mailing address was not required. Acebedo never disputed that he was the proprietor and agent of 1011 E. Main, Suite

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[2], 11 Wn.App. 450, 53 P.3d 1041 (2002).

456 in Puyallup. [CP-B 10]

The argument that Acebedo's office could not function as a usual mailing address or private mail box was rejected Division I by its holding that if the Legislature had wanted to exclude certain types of mailing addresses, in addition to the exclusion for US Postal Service post office boxes, it would have done so. Wright, supra, 461.

As to Bremer's arguments that his designation for mail to be sent to him at 1011 E. Main, Suite 456 in Puyallup in the Probate Notice to Creditors did not make that address into a usual mailing address for him and that a person could not have more than one usual mailing address, Goettemeuller v. Twist[3], at 107, in one paragraph, demolished both arguments:

> . . . [U]nder RCW 4.28.080(16), a person may have more than one "usual mailing address." But just as more is required than the mere existence of an additional abode, so too there must more than the existence of a mailing address. A "usual mailing address" must mean some level of actual use for the receipt of mail or arrangements contemplating an actual use for receiving and forwarding

[3] 161 Wn.App. 103, 253 P.3d 405 253 P.3d 405 (2011).

mail.

Probate Notice to Creditors is designed precisely to provide a "level of actual use for the receipt of mail or arrangements contemplating an actual use for receiving and forwarding mail."

A person who challenges personal jurisdiction based on insufficient service of process has the burden of proof to establish a prima facie case of improper service. Goettemeuller v. Twist[4], 107.

The outrageous attempts to evade and avoid service by Bremer's service agent were contrary to, and inconsistent with, service of process service and justifies equitable estoppel.[5] Walker's registered process server noted the evasiveness of Acebedo's receptionist in his Proof of Service. The avoidance and evasion by Bremer's service agent that were described by McCullough's Proof of Service are apparent. These actions waived any right Bremer may have had to attack Walker's Proof of Service and provide ample grounds for equitable

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[4] 161 Wn.App. 103, 253 P.3d 405 253 P.3d 405 (2011)

[5] *Gereant v. Martin-Joven*, 108 Wash.App. 963, 968, 33 P.3d 427 (2001), rev.den.,146 Wn.2d 1013, 51 P.3d 88 (2002).

estoppel to be applied to bar Bremer's attacks of the service.

Since Bremer did not dispute the facts of Walker's evidence of service at the trial court, he now is without evidence making it impossible for him to meet the clear and convincing standard that is required in order to make the prima facie case required to successfully challenge Walker's service[6]. And, Bremer's challenges to Walker's Proof of Service cannot be heard on appeal, since he did not raise it in the trial court. RAP 2.4(b).

When the plaintiff's exercise of reasonable diligence fails to achieve service with "abode service" with RCW 4.28.080(15) then RCW 4.28.080(16)("Subsection 16") service procedures may be used. Subsection 16 permits service on "a person of suitable age and discretion who is a resident, proprietor or agent, thereof" of the usual mailing address of the party to be served and requires that a copy of the summons must "thereafter" be mailed with first class postage prepaid. The statute includes only USPS post office boxes from its exclusions of allowed usual

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[6] *Goettemeuller v. Twist*, supra, 107.

mailing addresses. The qualification for a "service agent" is "a person of suitable age and discretion who is a resident, proprietor or agent, thereof" of the usual mailing address of the person to be served.

The facts in Crystal, China and Gold, Ltd. v. Factoria Ctr. Invests., Inc.,[7] are remarkably similar to those in this case and the Court of Appeals there held that the attempts to locate the defendant for service were honest and reasonable, just as were Walker's' efforts, justifying his use of RCW 4.28.080(16). In any event, since Bremer did not contest Walker's reasonable diligence in the trial court, he cannot do so now. RAP 2.4(b).

JUDICIAL DISQUALIFICATION. CR 54 defines "order" and "judgment," but the definition of "discretionary ruling" is from case law. Whether Judge Hickman's oral concurrence with Judge Johnson's earlier signed order which denied consolidation was a "discretionary ruling" is the issue of law that determines whether Walker's affidavit declaration of prejudice was timely filed. In reaching the issue of what constitutes a "discretionary ruling" which triggers the end of a party's

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[7] 93 Wn.App. 606, 611, 969 P.2d 1093 (1999)

right to have an appointed judge replaced based upon an allegation of prejudice, this Court held that "the court's discretion is invoked only where, in the exercise of that discretion, the court may either grant or deny a party's request" in Rhinehart[8] v. Seattle Times Newspaper Co. Unless Judge Hickman had the authority to grant or deny Walker's motion for consolidate the two cases after Judge Johnson earlier entered an order disposing of the issue then Judge Hickman's "ruling" or concurrence on the action taken by Judge Johnson was without legal impact. Only an appellate court has the power to do what Judge Hickman thought that his comment, which was not reduced to writing or signed, could do.

UNLAWFUL DETAINER. Although the Court of Appeals unpublished opinion made the observation that Turner v. White[9] addressed a residential tenancy and not a commercial one as this is, and used that as a reason to see the case as not controlling, RCW 59.12.030 does not share that distinction and the critical issue in the

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[8] 98 Wn.2 226, 654 P.2d 673 (1982)

[9] 20 Wn.App. 290, 579 P.2d 410 (1978).

case is that without a finding of guilt under RCW 59.12.030, an eviction cannot proceed through the summary unlawful detainer procedure, no matter whether the tenant is commercial or residential.

The principle of strict compliance with service statutes requires that the common law rules may be superceded by the statutes, and substitute service statutes particularly require such strict compliance, which may be, and are, different from the common law that existed before the statutes were enacted. Satisfaction of service requirements, under the common law is not enough where the common law has been superceded by substitute service statutes, in this case, RCW 4.28.080(16), particularly as to the mailing of a copy of the summons and complaint to the defendant's usual mailing address "thereafter" the hand-to-hand personal service on the service agent.

Every substitute service statute other than RCW 4.28.080(16) requires mailing copies of the summons and complaint to the defendant at a specific time related to the time of filing, publication of personal service to designate completion of service.

- CR 4(d)(3) Service by publication: Mailing on date of first

publication completes service.

- CR 4(d)(4) Service by mail: Date of mailing is when service is complete. Jones v. Stebbens:[10]

  "Therefore, we hold that, pursuant to CR 4(d)(4), service by mail of the original summons and complaint is complete on the date of mailing. If this were not the case, language mirroring CR 5(b)(2)(A) or language to the effect that the defendant will 'appear and answer within 90 days from the date of receiving the mailing' would have been used." No such instruction appears in §§ 16 and the statute does not contain language to advise of its construction which would be required to be included in §§ 16 summons' as required by CR 4(a)(1).

- RCW 46.64.040: Service on nonresident motorist, service is compete at time of mailing if the mailing is done "forthwith" or immediately after serving the Se5cretary of State.

  Compare RCW 4.28.080(16), where mailing the summons and complaint to the last usual mailing address of the plaintiff can take place months or years after filing or service and still be in strict compliance with that substitute service statute[11] with large resulting dangers to due process failures and abuses.

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[10] Jones v. Stebbens 122 Wn.2d 471, 476, 860 P.2d 1010(Wash. 1993).

[11] But not with the applicable statute of limitations.

This is particularly true, if tolling under RCW 4.16.170 is not allowed as held by Division I in *Clark v. Equinox Holdings, Ltd.*[12]. The application of the open time period after service in RCW 4.28.080(16) then effectively reduces the sixty day period of limitation in RCW 61.30.140 in Walker to fifty days. This case cites no authority for its reasoning that since the Real Estate Contract Forfeiture Act sixty day period of limitation for service and filing is a special statute, it does not merit the 90 days of tolling under RCW 4.16.170.

The dangers arising from the lack of precision in how RCW 4.28.080(16) addressing the time when mailing must take place was highlighted in another case about a substitute service statute.

> Keithly argues that this statement by the court[13] indicates that service, for purposes of tolling, is satisfied by service on the secretary of state. That is incorrect. Providing immediate notice to the defendant is what the legislature has chosen as the appropriate method for satisfying due process. As the U.S. Supreme Court noted in Mullane v. Central Hanover Bank & Trust Co., the "

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[12] 56 Wn. App. 125, 130, 783 P.2d 82 (1989)

[13] From *Smith v. Forty Million, Inc.*, 64 Wash.2d 912, 395 P.2d 201 (1964): "[T]he plaintiff confuses service, which is upon the plaintiff's agent—the Secretary of State—with the necessity of notice of that service, actual or constructive, to the defendant.

> 'fundamental requisite of due process of law is the opportunity to be heard.' This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." Keithly v. Sanders.[14]

Without some method of anchoring the necessary mailing to a case event other that "thereafter" personal service, or to give notice of this odd vagary[15] in RCW 4.28.080(16) which can be expected to create opportunities for those who seek to abuse the legal system and headaches for those who try to work within it.

RCW 4.28.080(16) has three mandatory requirements:

1) Failure to be able to serve the defendant using RCW 4.28.080(15) procedures after exercising due diligence in attempts to do so.

2) Delivery of the summons and complaint to a "resident, proprietor or agent of the defendant's usual mailing address."

3) "Thereafter" mailing a copy of the summons and

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[14] 170 Wash.App. 683, 692, 285 P.3d 225 (2012).

[15] "An erratic, unpredictable, or extravagant manifestation, action, or notion" according to http://www.merriam-webster.com/dictionary/.

complaint to the defendant's usual mailing address, by first class mail.

Within the five days that Walker had to satisfy these requirements, between December 7 and December 11, 2012, he completed them all, with a day to spare, and so fully complied with RCW 4.28.080(16) to complete personal service over Personal Representative Bremer, despite the machinations and manipulations of a miscreant service agent.

This situation represents a mirror image of the difficulty the plaintiff in Keithly v. Sanders had. Keithly believed that simple personal delivery of the summons and complaint to the Secretary of State accomplished one of the two elements of personal service, as our common law had defined it, and that mailing copies to the defendant provided the other element, providing the common law constitutional due process "notice reasonably designed to provide actual notice" so that immediate notice to the defendant is necessary to provide the "fundamental requisite of due process of law [which] is the opportunity to be heard." Keithly v. Sanders, 170 Wash.App. 683, 692, 285 P.3d

225 (2012).

Keithly did not understand that bifurcation of RCW 46.64.040 into its elements and satisfying each of them independently did not constitute strict compliance with the substitute service statutes.

Now, Walker has strictly complied with RCW 4.28.080(16), but the statute as designed imposed an unnecessary and unprecedented burden on him that is inconsistent with the other substitute service statutes and needs this Court to harmonize the statues and Civil Rules to bring predictability to the statutes and their rule of law.

Respectfully Submitted on October 6, 2014.

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Charles M. Cruikshank WSBA 6682 6682
Attorney for the Petitioner

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GLEN'S PETITION FOR REVIEW

From : Charles Cruikshank <cruiklaw@gmail.com> Mon, Oct 06, 2014 03:18 PM

Subject : GLEN'S PETITION FOR REVIEW 2 attachments

To : Judy Richard Walker <Walkerjm1@comcast.net>

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JUST FINISHED AS YOU CAN SEE

HERE IS THE INFO FOR THE PLACE TO GO.

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*Charlie Cruikshank *
Lawyer since 1975
* * * **

*The longer I live, the more convinced I become that life is 10% what happens to you and 90% how you respond to it. *Charles R. Swindoll

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225 (2012).

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Respectfully Submitted on ~~October 6, 2014~~.

Charles M. Cruikshank WSBA 6682 6682
Attorney for the Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon the following and below named parties and/or attorneys by 1st class mail, postage prepaid, on the date signed below.

Date: October 6, 2014

Pierre Acebedo, 1011 E. Main, Suite 456 in Puyallup E.Main, #456, Puyallup, WA 98372

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

In re the Estate of:

WILLIAM P. BREMER,

Deceased.

No. 44350-3-II
consolidated with
No. 44494-1-II

UNPUBLISHED OPINION

MELNICK, J. — Glen Walker and Scott and Elizabeth Hawton (collectively "purchasers") entered into a real estate contract with William Bremer. After the purchasers failed to make payments under the contract, William[1] obtained a forfeiture of the contract under the Real Estate Contract Forfeiture Act.[2] When Walker refused to vacate the property, Kevin Bremer, the personal representative of William's estate, filed an unlawful detainer action and obtained a writ of restitution to remove Walker from the property. Walker appeals the superior court's denial of his motion to revise the order for a writ of restitution, the superior court's dismissal of his suit to vacate the forfeiture and for recission of the real estate contract, and the superior court's award of attorney fees to Kevin. Because the Real Estate Contract Forfeiture Act specifically allows for the use of an unlawful detainer action, Kevin properly brought such action, and because Walker failed to properly serve Kevin the summons and complaint in his suit to vacate the forfeiture, the superior court properly dismissed Walker's suit to vacate the forfeiture. We affirm.

[1] We refer to William Bremer and Kevin Bremer by their first names to avoid confusion.

[2] Chapter 61.30 RCW.

FACTS

I. FORFEITURE AND UNLAWFUL DETAINER

William entered a real estate contract with the purchasers on October 23, 2009, for the sale of commercial property located in Sumner. After the purchasers failed to make payments under the contract, William filed a notice of forfeiture on June 11, 2012. The notice gave the purchasers until September 7, 2012, to cure the identified defaults. William sent the notice of forfeiture to the address the purchasers had provided in the real estate contract and to the purchasers' attorneys.

Shortly after William filed the notice of forfeiture, the Hawtons filed for Chapter 7 bankruptcy. In order to proceed with the forfeiture, Kevin obtained relief from the bankruptcy court's stay on October 5, 2012. Kevin then obtained a declaration of forfeiture on October 11, 2012, and served the purchasers the notice of the declaration by certified mail at the address provided in the real estate contract. Kevin also served notice on the purchasers' respective attorneys and posted notice on the Sumner property. The declaration of forfeiture required the purchasers to surrender possession of the Sumner property within 10 days. The declaration of forfeiture notified the purchasers that if they wished to contest the forfeiture they had to file and serve the summons and complaint on the seller or the person who signed the declaration of forfeiture, Kevin, no later than December 11, 2012.

After Walker failed to vacate the Sumner property, Kevin filed a complaint for unlawful detainer against Walker on October 24, 2012. Walker answered the complaint and asserted Kevin could not utilize an unlawful detainer action because it is available for relief only in landlord-tenant matters. The show cause hearing for the unlawful detainer action occurred on November 9, 2012. The superior court commissioner issued a writ of restitution restoring the

Sumner property to Kevin's possession. Walker moved for revision of the order for writ of restitution, which the superior court denied. The superior court awarded Kevin $7,500.00 in attorney fees and $329.35 costs. Walker appeals the order for writ of restitution and the order for fees.

II. SUIT TO VACATE THE FORFEITURE

On December 7, 2012, Walker filed a complaint in superior court against Kevin to vacate the forfeiture, rescind the real estate contract, and for damages. On December 10, 2012, Walker had the summons and complaint served on Pierre Acebedo, Kevin's attorney in another matter. Walker also mailed a copy of the summons and complaint to Kevin on December 10, 2012, which Kevin received by regular United States Post on December 12, 2012. Walker stated that he did not personally serve Kevin because Kevin was out of town. Walker filed a *lis pendens* for the Sumner property in Pierce County Superior Court on January 2, 2013.

Walker moved to consolidate his suit to vacate the forfeiture with a previous suit he filed against the Hawtons and William in September 2011. Walker argued his consolidation motion in front of Judge Garold Johnson on December 21, 2012. Judge Johnson denied Walker's motion to consolidate. Later the same day, Walker again presented his motion to consolidate to Judge John Hickman, which Judge Hickman also denied.

Kevin moved to dismiss Walker's complaint alleging improper service of the complaint and improper filing of the *lis pendens*. Walker also moved for a change of judge and filed a declaration of prejudice regarding Judge Hickman on January 2, 2013. Judge Hickman

concluded that he had already made a discretionary ruling in the case and that Walker's motion was too late. The superior court also granted Kevin's motion to dismiss Walker's lawsuit to vacate the forfeiture. In addition to appealing the order for writ of restitution, Walker appeals the order dismissing his lawsuit to vacate the forfeiture. We consolidated Walker's two appeals.

ANALYSIS

I. CHALLENGES TO KEVIN'S FORFEITURE ACTION AND SUIT FOR UNLAWFUL DETAINER

A. WALKER LACKS STANDING TO CHALLENGE NOTICE TO THE HAWTONS' TRUSTEE IN BANKRUPTCY

Walker argues Kevin failed to provide notice of the declaration of forfeiture to Walker and the Hawtons' trustee in bankruptcy. Walker did not raise the issue of lack of notice to himself in the superior court and cannot raise this issue for the first time on appeal. RAP 2.5(a). We also hold that Walker lacks standing to challenge the lack of notice to the Hawtons' trustee in bankruptcy.

"'The doctrine of standing generally prohibits a party from asserting another person's legal right.'" *In re Estate of Fitzgerald*, 172 Wn. App. 437, 452, 294 P.3d 720 (2012) (quoting *Timberlane Homeowners Ass'n, Inc. v. Brame*, 79 Wn. App. 303, 307, 901 P.2d 1074 (1995)). Under the Real Estate Contract Forfeiture Act, both Walker and the Hawtons had the right to notice of the declaration of forfeiture. RCW 61.30.040(7), .070. But Walker cannot raise a lack of notice to the Hawtons or their trustee in bankruptcy. Thus, Walker lacks standing to contest the Hawtons' legal right to notice and we do not consider Walker's arguments regarding notice of the declaration of forfeiture.

B. UNLAWFUL DETAINER ACTION WAS PROPER

Walker next argues the superior court erred by ordering a writ of restitution in an unlawful detainer action and denying his motion to revise the writ. He claims that Kevin should have brought an ejectment action, which would have allowed Walker to assert counter claims. Because the Real Estate Contract Forfeiture Act specifically allows use of an unlawful detainer action, Kevin properly brought such action and the superior court did not err by denying Walker's motion to revise the writ of restitution.

We review questions of law de novo. Here, the issue is the appropriateness of the unlawful detainer action. *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 782, 295 P.3d 1179 (2013). Pursuant to RCW 61.30.100(3), once a seller has obtained a declaration of forfeiture, the Forcible Entry and Unlawful Detainer Act (chapter 59.12 RCW) may be used to remove the buyer from the property. "The seller shall be entitled to possession of the property ten days after the declaration of forfeiture is recorded or any longer period provided in the contract or any other agreement with the seller. The seller may proceed under chapter 59.12 RCW to obtain such possession." RCW 61.30.100(3). Here, Walker did not vacate the Sumner property within 10 days as ordered in the declaration of forfeiture. Accordingly, Kevin lawfully exercised his rights to commence an unlawful detainer action.

Walker argues that the real estate contract states that he became a tenant at will by remaining on the Sumner property 10 days after receiving notice of the declaration of forfeiture. Relying on *Turner v. White*, 20 Wn. App. 290, 292, 579 P.2d 410 (1978), Walker contends that an unlawful detainer action cannot be used to remove a tenant at will from property. But *Turner* does not apply in this situation. In *Turner* the tenant, as part of his employment compensation, lived in a trailer his landlord owned, which the court characterized as a tenancy at will. 20 Wn.

App. at 291-92. After the landlord fired the tenant, the landlord served the tenant with notice of eviction and notice to vacate immediately, and five days later the landlord filed an unlawful detainer action. *Turner*, 20 Wn. App. at 291. The court held that an unlawful detainer action was improper and that the tenancy at will "was terminable only upon demand for possession, allowing the tenant a reasonable time to vacate." *Turner*, 20 Wn. App. at 292.

The tenant in *Turner* used the property as his primary residence, whereas Walker used the Sumner property for a commercial business and had already lost all rights in the property due to the forfeiture action. Because the Real Estate Contract Forfeiture Act specifically permits a seller to utilize an unlawful detainer action to remove a purchaser who remains on the property 10 days after being served notice of the declaration of forfeiture, Kevin acted properly and the superior court did not err by denying Walker's motion for revision of the writ of restitution.

C. SUPERIOR COURT PROPERLY AWARDED ATTORNEY FEES

Walker argues the superior court improperly awarded Kevin attorney fees and costs. Because the superior court used the lodestar method to calculate fees and its decision was not manifestly unreasonable, we affirm the superior court's award of attorney fees and costs for Kevin.

We apply a two-part standard of review to a superior court's award of attorney fees: "(1) we review de novo whether there is a legal basis for awarding attorney fees . . . and (2) we review a discretionary decision to award . . . attorney fees and the reasonableness of any attorney fee award for an abuse of discretion." *Gander v. Yeager*, 167 Wn. App. 638, 647, 282 P.3d 1100 (2012). The superior court has broad discretion when determining the reasonableness of an attorney fee award. *Hall v. Feigenbaum*, 178 Wn. App. 811, 827, 319 P.3d 61, *review denied*,

180 Wn.2d 1018 (2014). We will overturn the superior court's award only if the superior court's decision is manifestly unreasonable or based on untenable grounds. *Hall*, 178 Wn. App. at 827.

The superior court may award reasonable attorney fees only if authorized by a contract, statute, or rule. *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 535, 79 P.3d 1154 (2003). Here, the real estate contract authorized reasonable attorney fees and costs for the prevailing party for any litigation arising out of a default or forfeiture.[3] The Real Estate Contract Forfeiture Act also authorizes reasonable attorney fees in the event that any person fails to surrender possession of the property at issue: "Any person in possession who fails to surrender possession when required shall be liable to the seller for actual damages caused by such failure and for reasonable attorneys' fees and costs of the action." RCW 61.30.100(3).

As a general rule, Washington courts calculate reasonable attorney fees based on the lodestar method. *Clausen v. Icicle Seafoods, Inc.*, 174 Wn.2d 70, 81, 272 P.3d 827 (2012). Under this method, the court evaluates whether counsel spent a reasonable number of hours—excluding any wasteful or duplicative hours and any hours pertaining to unsuccessful claims—and whether counsel billed a reasonable rate. *Smith v. Behr Process Corp.*, 113 Wn. App. 306,

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[3] The real estate contract provides:

> The defaulting party hereby promises to pay all costs and expenses so incurred by the non defaulting party, including . . . reasonable attorneys' costs and fees. . . . In the event either party hereto institutes, defends, or is involved with any action to enforce the provisions of this contract, the prevailing party in such action shall be entitled to reimbursement by the losing party for its court costs and reasonable attorneys' costs and fees, including such costs and fees that are incurred in connection with any forfeiture, . . . or to contest the reasonableness of any person's costs or attorneys' fees . . . appeal, or other proceeding.

Clerk's Papers (CP) at 22.

341, 54 P.3d 665 (2002) (citing *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 597, 675 P.2d 193 (1983)).

Here, Kevin requested $14,369.35 in attorney fees and $329.35 in costs. The superior court concluded that Kevin was entitled to attorney fees based on both the real estate contract and by statute. The superior court, however, awarded Kevin only $7,500 in attorney fees and $329.35 in costs because it could not agree, given Kevin's counsel's experience with unlawful detainer actions, even though this one was contested, that $14,369.35 was warranted. We hold Kevin was entitled to attorney fees based on the real estate contract and RCW 61.30.100(3) and that the superior court's award of attorney fees was not manifestly unreasonable. We affirm the award of attorney fees and costs.

II. CHALLENGES TO SUIT TO VACATE THE FORFEITURE

A. WALKER PROVIDED INSUFFICIENT PROCESS OF SERVICE

Walker argues he properly served his summons and complaint for his suit to vacate the forfeiture on Kevin pursuant to RCW 4.28.080(16) and that the superior court erred by dismissing his case for failure to provide proper service.[4] Because Walker failed to personally serve the proper party, we affirm the dismissal of Walker's suit to vacate the forfeiture.

We review the superior court's dismissal of an action for insufficient service of process de novo. *Witt v. Port of Olympia*, 126 Wn. App. 752, 757, 109 P.3d 489 (2005). The Real Estate Contract Forfeiture Act provides a specific method for process of service in order to vacate the forfeiture. RCW 61.30.140(2) states in pertinent part:

[4] Walker raised a "private mailbox" argument for the first time in oral argument related to process of service, which we do not consider. RAP 2.5(a).

> An action to set aside the forfeiture permitted by this section may be commenced . . . by filing and serving the summons and complaint not later than sixty days after the declaration of forfeiture is recorded. Service shall be made upon the seller or the seller's attorney-in-fact, if any, who signed the declaration of forfeiture.

The declaration of forfeiture was filed on October 11, 2012. Therefore, the sixtieth day both to file and serve the summons and complaint challenging the forfeiture expired not later than December 11, 2012. Walker filed the summons and complaint on December 7, 2012, within the 60-day timeframe, but never personally served Kevin.

Walker argues he effectuated proper service on December 10, 2012 by serving the summons and complaint on Acebedo, Kevin's attorney in a separate matter, per RCW 4.28.080(16). RCW 4.28.080(16) provides:

> In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address.[5]

Walker contends Acebedo's address was Kevin's "usual mailing address" because Acebedo's address appeared in the notice to creditors in the probate matter where Kevin was appointed personal representative of William's estate. Walker's argument fails for two reasons.

First, Acebedo represented Kevin in the probate matter and not every action. Pursuant to RCW 61.30.140(2), Kevin signed the declaration of forfeiture as the seller of William's property in his capacity as personal representative. No attorney-in-fact existed. There is no evidence that

[5] RCW 4.28.080(15) provides: "In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein."

Acebedo's address was Kevin's usual mailing address and Acebedo did not fall under any of requirements as a person who could be served.

Second, even if Acebedo's address had been Kevin's usual mailing address, the 60-day timeframe for service would have expired. Walker served Acebedo and mailed a copy of the summons and complaint to Kevin on December 10, 2012. Per RCW 4.28.080(16), service is not complete until the tenth day after the mailing. Thus, service in this case was not complete until December 20, 2012, after the 60-day timeframe lapsed. We affirm the superior court's dismissal of Walker's suit to vacate the forfeiture.

B. MOTION FOR CHANGE OF JUDGE

Walker next argues the superior court improperly denied his motion for a change of judge. Walker contends that Judge Hickman's prior denial of Walker's motion to consolidate was not a discretionary decision. Although Walker identifies this issue as one of first impression, he cites to no law to provide guidance for us to review this issue. Because Walker did not provide meaningful argument in his brief or support this argument with relevant legal authority, we do not consider this argument. RAP 10.3(a)(6).

III. ATTORNEY FEES ON APPEAL

Both Kevin and Walker request reasonable attorney fees and costs on appeal. We may award attorney fees on appeal if "allowed by statute, rule, or contract and the request is made pursuant to RAP 18.1(a)." *Malted Mousse, Inc.*, 150 Wn.2d at 535. Here, as we discuss above, the real estate contract contains a provision permitting a prevailing party to recover reasonable attorney fees in a suit arising out of the contract.

We deny Walker's request because he is not the prevailing party. Kevin, however, is the prevailing party on appeal and, thus, we award him attorney fees for reasonable expenses incurred for this appeal.

Because the Real Estate Contract Forfeiture Act specifically allows for the use of an unlawful detainer action, Kevin properly brought such action and because Walker failed to properly serve Kevin the summons and complaint in his suit to vacate the forfeiture, the superior court properly dismissed his suit to vacate the forfeiture. We affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Melnick, J.

We concur:

Worswick, J.

Johanson, C.J.