NO. 92418-0

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

MAURICE H. BAKER,

Petitioner,

vs.

DAVID HAWKINS and CHRISTIE HAWKINS, husband and wife, and the marital community composed thereof,

Respondents.

APPEAL FROM KITSAP COUNTY SUPERIOR COURT
Honorable Keith Harper, Visiting Judge

ANSWER TO PETITION FOR REVIEW

REED McCLURE
By Marilee C. Erickson WSBA #16144
Attorneys for Respondents

Address:

Financial Center
1215 Fourth Avenue, Suite 1700
Seattle, WA 98161-1087
(206) 292-4900

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Rules and Regulations

060349.099444/577054

I. INTRODUCTION

Division III of the Washington State Court of Appeals correctly decided that a contractor working at a defendant's house is not a "then resident therein" for purposes of substitute service of process. This Court should deny the Petition for Review.

II. COURT OF APPEALS' DECISION

On September 22, 2015, Division III of the Washington State Court of Appeals issued its decision affirming the Kitsap County Superior Court's order dismissing the lawsuit for failure to timely serve process. A copy of the decision is attached as Appendix A. Division III stated:

> We must determine whether service on a contractor, who spent every day for one month working at the defendants' home, returning only to his home at night to sleep, is service upon a person "then resident therein" for purposes of former RCW 4.28.080(15) (2012) (now codified at RCW 4.28.080(16)). We hold that because the contractor was not "actually living in" the defendants' home as required by *Salts v. Estes,* 133 Wn.2d 160, 170, 943 P.2d 275 (1997), service was deficient under the statute. We therefore affirm the trial court's order dismissing this action as barred by the three-year statute of limitations.

Baker v. Hawkins, 2015 Wash. App. LEXIS 2245, ¶ 1 (2015). This Court should deny the Petition for Review.

III. RESTATEMENT OF ISSUES

1. Should this Court deny review where Division III correctly decided that service on a contractor working at defendants' house was not

substitute service because the contractor was not a "then resident" of the defendants' home?

2. Should this Court deny review where Division III's decision does not fit any of the RAP 13.4(b) criteria for review?

IV. RESTATEMENT OF FACTS

Plaintiff/petitioner Maurice Baker and defendant Christie Hawkins were in a motor vehicle accident on December 16, 2010. (CP 3-4) Three years later, on December 16, 2013, petitioner filed a lawsuit against the Hawkinses. (CP 3-5) On or about January 11, 2014, Gary Jellicoe was served with the summons and complaint. (CP 20-21) The Return of Service states service was made "by delivery to . . . Gary Jellicoe, Cohabitant, W-M, late 50's, a person of suitable age and discretion residing at the respondent's usual abode." (CP 20-21)

The Hawkinses answered asserting lack of personal jurisdiction and lack of service. (CP 7) The Hawkinses moved to dismiss the complaint for lack of personal jurisdiction and lack of service. (CP 9-12) Christie Hawkins' declaration stated that the Jellicoes did not reside at the Hawkinses' home. (CP 23-24)

Petitioner opposed the motion submitting excerpts of the depositions of Gary and Winoma Jellicoe. (CP 25-58) The Hawkinses'

reply in support of their motion to dismiss included the complete transcripts of the Jellicoes' depositions. (CP 59-63, 64-129)

The Hawkinses had hired general contractors, Gary and Winoma Jellicoe, to perform work at their Bainbridge Island house. (CP 23, 71-72) The work was done in two phases. During January 2014, while the Hawkinses were on vacation, the Jellicoes worked to complete the second phase. (CP 71-72, 81)

The Jellicoes also live on Bainbridge Island, about four miles from the Hawkinses' house. (CP 67, 86) The Jellicoes stayed at their own home. (CP 86, 112) The Jellicoes never spent a night at the Hawkinses' house. (CP 54, 86, 112, 114) They did not cook food at the Hawkinses' house in January 2014. (CP 53, 113)

The Jellicoes did not collect the mail for the Hawkinses. (CP 78) The Jellicoes did not pick up the newspapers. (CP 78) Some packages were delivered during January 2014, mostly for the construction project. (CP 78-79) If a package was left for the Hawkinses on the porch, Winoma Jellicoe would put the package inside the house. (CP 118) The Jellicoes never signed for any packages delivered to the Hawkinses. (CP 79, 125)

Before the Hawkinses returned, Winoma Jellicoe cleaned the construction project dust as she does for any construction job. (CP 117, 123-124) The Jellicoes had access to the Hawkinses' house in January

2014 so they could perform the construction work. (CP 41, 77) The Jellicoes had the code for the key pad to the house. (CP 46) And the Jellicoes worked fulltime on the Hawkinses' house. (CP 43)

Don DeMers, the process server, declared that he went to the Hawkinses' house, knocked on the door, and no one answered. (CP 34-35) As Mr. DeMers was returning to his vehicle, a man and woman arrived. The man and woman carried bags of groceries from their vehicle and unlocked the front door. (CP 35) The man identified himself as Gary Jellicoe. According to Mr. DeMers, Mr. Jellicoe explained that "he and his wife were in the process of remodeling the home and were living there while the work was being performed." (CP 35) Mr. DeMer handed the summons and complaint to Mr. Jellicoe. (CP 35, 85) After the lawsuit was filed, Mr. DeMer contacted Mr. Jellicoe who denied ever saying that he and his wife were occupying the house. (CP 35)

The Jellicoes testified that when the process server arrived, they had returned to the Hawkinses' house after dinner to drop off some supplies. (CP 83) The Jellicoes were not carrying groceries. (CP 83-84) They told the process server the Hawkinses were gone. (CP 85-86) Gary Jellicoe did not tell Mr. DeMer that they were living at the Hawkinses' house. (CP 86) The Jellicoes told the process server they did not live at the house. (CP 111-12)

The superior court granted the Hawkinses' motion and dismissed the case. (CP 130-31). Petitioner Baker appealed. (CP 132-35) Division III affirmed the superior court's order dismissing the case.

V. ARGUMENT

This Court will only accept review if the Court of Appeals' decision fits one of the four criteria in RAP 13.4(b):

> (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
>
> (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals; or
>
> (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
>
> (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court.

Petitioner does not cite RAP 13.4(b) nor does petitioner argue any RAP 13.4(b) criteria for review. Petitioner urges this Court to accept review to "provide this Court with the opportunity to reconcile two recent decisions of this Court that appear incompatible." (Petition at 1) This stated reason does not fit any of the RAP 13.4(b) criteria for review, therefore, this Court should deny review.

This Court should also deny review because Division III's decision was correctly decided. Division III's decision does not conflict with any

Supreme Court or Court of Appeals' decision. Nor does the case present a constitutional question or an issue of substantial public interest.

A. DIVISION III'S DECISION DOES NOT CONFLICT WITH ANY WASHINGTON DECISION.

Division III's decision is consistent with *Salts v. Estes*, 133 Wn.2d 160, 943 P.2d 275 (1997), and *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991).

Proper service of the summons and complaint is a prerequisite to the court obtaining personal jurisdiction over a party. *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010), *rev. denied*, 170 Wn.2d 1026 (2011). "[P]roper service of process must not only comply with constitutional standards but must also satisfy the requirements for service established by the legislature." *Farmer v. Davis*, 161 Wn. App. 420, 432, 250 P.3d 138, *rev. denied*, 172 Wn.2d 1019 (2011).

Pursuant to former RCW 4.28.080(15) (2012) (recodified in 2015 as RCW 4.28.080(16)), service of process is accomplished by delivering the summons "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." (Emphasis added.) Any service other than personal delivery to the defendant is substitute

service. *Salts v. Estes,* 133 Wn.2d 160, 164, 943 P.2d 275 (1997). Substitute service of process can be broken into a three-part test: to accomplish service of process, plaintiff must (1) leave a copy of the summons and complaint at the house of defendant's usual abode, (2) with some person of suitable age and discretion, (3) then resident therein. *Id.*

This case involves the third part of the test: whether Gary Jellicoe was a "then resident therein" of the Hawkinses' house. Division III correctly concluded Mr. Jellicoe was not a resident of the Hawkinses' house. As the Washington Supreme Court has held, a resident is a person actually living at the house. "Even those unlearned in the law would most likely conclude . . . 'then resident therein' means a person who is actually living in that house at the time of the service of process." *Salts v. Estes,* 133 Wn. 2d 160, 164, 943 P.2d 275 (1997).

This case is closest in facts to *Salts v. Estes.* In *Salts*, the Washington Supreme Court held that service of process on a person who was temporarily in the defendant's house to feed dogs and take in the mail was insufficient for substitute service of process. The *Salts* court refused to give the same broad interpretation of "resident" that appellant is urging here: that "mere presence in the defendant's home or 'possession' of the premises [would be] sufficient to satisfy the statutory residency requirement." 133 Wn.2d at 169. The Supreme Court explained:

> Under such a view, service on just about any person present at the defendant's home, regardless of the person's real connection with the defendant, will be proper. A housekeeper, a baby-sitter, a repair person or a visitor at the defendant's home could be served. Such a relaxed approach toward service of process renders the words of the statute a nullity and does not comport with the principles of due process that underlie service of process statutes.

133 Wn.2d at 170.

The term "resident" requires something more than being present in the defendant's usual abode. *Salts v. Estes,* 133 Wn. 2d 160, 168, 943 P.2d 275 (1997). To be a "then resident" in the defendant's usual abode, there must be something more than fleeting occupancy. *Id.* at 168. Service on employees and others who do not reside in the defendant's house is not proper substitute service of process. *Id.*

The *Salts* case was distinguished from the earlier case of *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991). In *Wichert*, the Supreme Court concluded that substitute service was proper on the adult daughter of the defendant who had slept at the house the previous night. Service on the adult daughter was sufficient service upon the defendant parents. The daughter not only slept at the house the night before the process server delivered the summons and complaint, she occasionally slept there. Also, the daughter was a relative of defendants. These facts were sufficient to consider her a "then resident" pursuant to RCW 4.28.080(15).

Petitioner argues that *Wichert* requires a court to liberally construe the statutory phrase "then resident therein." (Petition at 6) Actually, this Court expressly stated the opposite. In analyzing the history of the service of process statute, this Court noted a basis for liberal construction but made no such holding. 117 Wn.2d at 154. The *Wichert* court stated:

> Arguably the rule of liberal construction applies to the present statute, RCW 4.28.080, but the matter is not briefed and **we express no opinion thereon**.

Wichert, 117 Wn.2d at 154 (emphasis added).

Petitioner argues *Wichert* established the "test for effective service" is whether service was "'reasonably calculated to accomplish [provide] notice to the defendant.'" (Petition at 6, *quoting* 117 Wn.2d at 152) This Court explicitly did not establish a "bright line" rule for service of process. *Wichert*, 117 Wn.2d at 152. "[T]his decision [establishes] . . . a case-to-case determination . . . necessitated by the fact-specific requirements of the statute." *Id.*

Petitioner argues *Wichert* is the seminal case on the issue of "then resident therein." (Petition at 6) The *Wichert* court was fact dependent. The Court held:

> Service upon a **defendant's adult child who is an overnight resident in the house** of defendant's usual abode, and then the sole occupant thereof, is reasonably calculated to accomplish notice to the defendant.

Wichert, 117 Wn.2d at 152 (emphasis added).

Like the *Salts* case, the record is clear that the Jellicoes were not residing at the Hawkinses' house.

Division III correctly concluded that the *Salts* case applied: "*Salts* repudiates the expansive approach embraced in *Wichert.*" (Appendix A at 9) The *Salts* case holds that a person is only "resident therein" if the person is "actually living" at the home. 133 Wn.2d at 170. One who is not sleeping in the home is not "actually living" at the home.

To the extent *Wichert* applies, Division III's decision is consistent with both *Salts* and *Wichert*. In *Salts*, substitute service on a person who was watching the house was not sufficient because the person was not a "resident therein." The person served was at the defendant's home but was not a relative and had not actually slept in the home. In *Wichert,* substitute service on an adult daughter who had slept in the defendants' home the prior night was sufficient.

Here the Jellicoes were not related to the Hawkinses. The Jellicoes had not and did not sleep overnight in the Hawskinses' home. Division III correctly decided that personal delivery of the summons and complaint to the Jellicoes was not substitute service. This Court should deny review.

B. THIS CASE DOES NOT FIT ANY OTHER RAP 13.4(b) CRITERIA FOR REVIEW.

This case does not meet any other RAP 13.4(b) criteria for review. Petitioner has not identified any Court of Appeals' decision in conflict with Division III's decision. RAP 13.4(b)(2). This case does not involve any question of law under the Constitution of the State of Washington or of the United States is involved. RAP 13.4(b)(3). Finally, this case does not involve any issue of public interest. RAP 13.4(b)(4). Service of process is a fact dependent inquiry done on a case-by-case basis. The unique facts of this case are not of public interest. This Court should deny review.

VI. CONCLUSION

Division III correctly affirmed the superior court's order on summary judgment. Division III's decision does not qualify for review under RAP 13.4. Respondent Hawkinses respectfully request that this Court deny review.

Dated this 17th day of November 2015.

REED McCLURE

By _____

Marilee C. Erickson WSBA #16144
Attorneys for Respondents

060349.099444/575443.docx

FILED
SEPTEMBER 22, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

MAURICE H. BAKER, a single man, Appellant, v. DAVID HAWKINS and CHRISTIE HAWKINS, husband and wife and the marital community comprised thereof, Respondents.	)	No. 33228-4-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — We must determine whether service on a contractor, who spent every day for one month working at the defendants' home, returning only to his home at night to sleep, is service upon a person "then resident therein" for purposes of former RCW 4.28.080(15) (2012) (now codified at RCW 4.28.080(16)). We hold that because the contractor was not "actually living in" the defendants' home as required by *Salts v. Estes*, 133 Wn.2d 160, 170, 943 P.2d 275 (1997), service was deficient under the statute. We therefore affirm the trial court's order dismissing this action as barred by the three-year statute of limitations.

APPENDIX A

FACTS

Maurice Baker alleges he was injured in a car accident caused by Christie Hawkins on December 16, 2010. Mr. Baker filed a summons and complaint initiating this action against Ms. Hawkins and her husband, David Hawkins, for personal injuries and damages on December 16, 2013. Under RCW 4.16.170, the statute of limitations is tolled for 90 days if one or both defendants are served within that period.

On January 11, 2014, a Saturday, Mr. Baker's process server served Gary Jellicoe with the summons and complaint at the Hawkinses' residence on Bainbridge Island, Washington. The return of service stated that service was made "by delivery to . . . Gary Jellicoe, Cohabitant, W-M, late 50's, a person of suitable age and discretion residing at the respondent's usual abode." Clerk's Papers (CP) at 21.

Mr. Jellicoe and his wife, Winoma Jellicoe, are general contractors who were hired by Mr. and Ms. Hawkins to perform work on their Bainbridge Island house. The Jellicoes completed the work in two phases. While Mr. and Ms. Hawkins were in Mexico on vacation for the month of January 2014, the Jellicoes worked on the second phase of the project. While the first phase focused on adding a second floor to the existing structure of the main house, the second phase focused on removing the carport and building a garage

in its place with a guest house on top and also building an addition to the south end of the house for an office.

While Mr. and Ms. Hawkins were gone in January 2014, the Jellicoes worked on the house full time, including weekends. The Jellicoes generally worked from 8:30 a.m. until 6:30 p.m. They spent every night at their own home and never slept in the Hawkinses' home. They had the code for the home's electronic door locking system and were able to let themselves in or out.

The Jellicoes kept construction tools in the house during the project. They also monitored the utilities to make sure that the water and power were working properly when they turned them off and on as part of the construction. They did not use any of the kitchen appliances during the second phase of the project in January 2014. Mr. Jellicoe did not use the bathrooms in the main house because there was a portable restroom on the job site. Ms. Jellicoe would occasionally use the restroom in the main house.

During January 2014, a number of packages were delivered to the Hawkinses' home containing items that Ms. Hawkins had ordered for the Jellicoes to use during the construction project, including a toilet, light fixtures, and a few plumbing items. If a package addressed to Mr. or Ms. Hawkins was left on the porch, Ms. Jellicoe would put the package inside the house. The Jellicoes never signed for any of the packages.

Mr. and Ms. Hawkins filed their answer to the complaint on February 24, 2014, and asserted lack of personal jurisdiction and lack of service. They filed a motion to dismiss on April 3, 2014, asserting the statute of limitations had run when Mr. Baker failed to perfect service on them personally within the applicable timeframe. Ms. Hawkins submitted a declaration to support the motion to dismiss, stating that Mr. Jellicoe is a contractor who was doing work on her home at the time he was served the summons and complaint, but that Mr. Jellicoe never resided in the home.

Mr. Baker responded to the motion to dismiss requesting that the court deny the motion because the statute of limitations was tolled when substitute personal service was perfected on Mr. Jellicoe. In support of his response to the motion to dismiss, Mr. Baker submitted a declaration of the process server, Donald DeMers, as well as a declaration that included excerpts from the depositions of Mr. and Ms. Jellicoe. Mr. and Ms. Hawkins filed a reply in support of their motion to dismiss. Complete transcripts of the depositions of Mr. and Ms. Jellicoe were attached as exhibits to the Hawkinses' reply.

In his declaration, Mr. DeMers stated he arrived at the Hawkinses' residence located at 10800 Broomgerrie Road, Bainbridge Island, Washington 98101 at 4:45 p.m. on the day in question. He knocked on the front door, and no one answered. He left the front door and was standing in the driveway next to his vehicle when a man and a woman

drove to the front of the home in a pickup truck. Mr. DeMers went to speak to the man when he got out of the truck, and the woman began unloading several bags of groceries from the truck. The man identified himself as Gary Jellicoe to Mr. DeMers and explained that he was not Mr. Hawkins, but that he and his wife were in the process of remodeling the home and were "living there" while the work was being performed. CP at 35. Mr. DeMers gave the summons and complaint to Mr. Jellicoe, and Mr. Jellicoe said he would deliver them to Mr. and Ms. Hawkins. Before Mr. DeMers left the premises, Mr. and Ms. Jellicoe walked to the front door, unlocked it, and began bringing the groceries into the home.

At their depositions, the Jellicoes testified that they were unloading packages related to the construction project when Mr. DeMers came to serve process. When Mr. DeMers approached the Jellicoes, he said he was looking for the Hawkinses' residence. Ms. Jellicoe replied that he was at the right place but that Mr. and Ms. Hawkins were not home. Mr. DeMers then handed the subpoena to Mr. Jellicoe. Mr. Jellicoe stated he told Mr. DeMers he would put the subpoena in the house and tell Mr. and Ms. Hawkins about it. Mr. and Ms. Jellicoe denied telling Mr. DeMers that they were staying at or living in the Hawkinses' residence.

The trial court granted the Hawkinses' motion and dismissed Mr. Baker's complaint with prejudice. The order was filed July 25, 2014. Mr. Baker appeals, contending that service on Mr. Jellicoe satisfied former RCW 4.28.080(15) for substitute service of process because the undisputed facts establish that the Jellicoes were "then resident therein" of the Hawkinses' home at the time of service to satisfy the statute.

ANALYSIS

Whether the trial court erred in dismissing Mr. Baker's complaint based on insufficient service of process

Standard of Review

Under CR 12(c), if a trial court considers matters outside of the pleadings when reviewing a motion to dismiss, the court must treat the motion as one for summary judgment. We then review an appeal from an order in that context as we do an appeal from a summary judgment order. *Lowe v. Rowe*, 173 Wn. App. 253, 258, 294 P.3d 6 (2012). Summary judgment is proper only if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *U.S. Mission Corp. v. KIRO TV, Inc.*, 172 Wn. App. 767, 771-72, 292 P.3d 137, *review denied*, 177 Wn.2d 1014, 302 P.3d 181 (2013). In our review, we consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 772.

Disputed Facts

Here, there are only two disputed facts. The first is whether the Jellicoes were bringing groceries or construction supplies into the house. For purposes of review, we will presume the bags contained groceries. The second is whether the Jellicoes told the process server that they were staying at the Hawkinses' residence. This statement is hearsay; it is therefore inadmissible and does not create an issue of fact. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014).

Substitute Service

RCW 4.28.080 provides the ways in which a person may be served with a summons. Generally, personal service is required, but former RCW 4.28.080(15) permits substitute service if certain requirements are met. Substitute service requires (1) "leaving a copy of the summons at the house of [the defendant's] usual abode" (2) "with some person of suitable age and discretion" (3) "then resident therein." Former RCW 4.28.080(15). The only element at issue here is the third one. Specifically, the issue is whether Mr. Jellicoe was "then resident therein" under this statute when he received the summons and complaint for Mr. and Ms. Hawkins.

The Washington Supreme Court has addressed the "then resident therein" element in two recent cases. Mr. Baker relies on the first of these two cases, *Wichert v. Cardwell*,

117 Wn.2d 148, 152, 812 P.2d 858 (1991), where the court found sufficient substitute service. There, the defendant wife's adult child, who had her own apartment and infrequently stayed at the defendants' home, had stayed overnight at the defendants' residence the night before accepting service on their behalf. *Id.* at 150.

Mr. and Ms. Hawkins rely on *Salts* arguing that the facts here are more similar to the facts in *Salts* than *Wichert*. In *Salts*, the court held that service of process on a person unrelated to the defendant, who was temporarily in the defendant's home to feed dogs and take in mail, was insufficient for substitute service of process. *Salts*, 133 Wn.2d at 163-64, 170-71.

A review of these two cases displays tension and even incompatibility between them. The *Wichert* court applied a liberal test, noted that "resident" was an elastic term, and held that whether service was proper should depend upon the *Mullane* test, i.e., "whether [the] method [used] is such that a plaintiff 'desirous of actually informing the absentee might reasonably adopt to accomplish it.'" *Wichert*, 117 Wn.2d at 151 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). The *Salts* court eschewed a liberal test, took a definitional approach to the term "resident," and stated that "resident" meant more than "mere presence" and that "possession of the premises" was insufficient. *Salts*, 133 Wn.2d at 167, 169-70.

Salts determined that the term "resident" was unambiguous, and as such, required the court to "apply the language as the Legislature wrote it, rather than amend it by judicial construction." *Id.* at 170. The *Salts* court held that "for purposes of [former] RCW 4.28.080(15) that 'resident' must be given its ordinary meaning—a person is resident if the person is actually living in the particular home." *Id.*

Mr. Baker contends that *Wichert* and *Salts* should be reconciled by examining them in the context of due process. But, as recognized by the *Salts* dissent, *Salts* repudiates the expansive approach embraced in *Wichert*. *Id.* at 173 (Alexander, J., dissenting). Therefore, we determine that the facts of this case must be analyzed under the *Salts* "actually living in" rule.

Here, Mr. Jellicoe and his wife spent the entire month of January 2014 working at the Hawkinses' home on Bainbridge Island. The Hawkinses gave Mr. Jellicoe and his wife their access code. Mr. Jellicoe and his wife were actually in possession of the home during the entire month. Mr. Jellicoe was the one person in Washington State during the month of January 2014 most likely to give notice of the lawsuit to the Hawkinses. The Jellicoes nevertheless returned to their own home each evening, slept, and departed therefrom each morning. Mr. Jellicoe was therefore not "actually living in" the Hawkinses' home. For this reason, we must conclude that service of process on Mr.

Jellicoe was inadequate under former RCW 4.28.080(15), and the trial court properly dismissed this action.

Affirm.

Lawrence-Berrey, J.

WE CONCUR:

Brown, A.C.J.

Korsmo, J.