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No. 74068-7-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KIRK AND JENNIFER BANKS,

Petitioners,

v.

MARK AND GEORGIA HOPKINS,

Respondents.

PETITION FOR SUPREME COURT REVIEW

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A. INTRODUCTION

If the devil lurks in the details, then generalities and expediency are its camouflage. Here, the Petitioners, Kirk and Jennifer Banks ("Banks") who are Assignees of Billie E. Getschmann Skyles ("Skyles"), continue the challenge initiated by Skyles against the default judgment obtained by the Respondents, Mark and Georgia Hopkins ("Hopkins"). Skyles challenged the Hopkins' January 27, 2015 default judgment against her based on a failure to serve her with service of process as required by Washington's service of process statute.

To serve Skyles, the Hopkins used her longtime next-door neighbor and former longtime tenant, Richard Wagner ("Wagner"). The lawsuit involved a real property transaction between herself and the Hopkins. At the time of service, Skyles was suffering from long-term debilitating health conditions that included Parkinson's disease and eye problems (which included four eye surgeries and glaucoma) that limited her eyesight to about the length of her arms. According to the third and final declaration of service, Wagner approached Skyles to a distance of about five to seven feet and delivered the legal-papers to a third party, Mr. Banks, who was sitting a few feet in front of Skyles. Wagner claims that Skyles acknowledged his presence, but otherwise no words were spoken and no communications occurred between the three people.

The Court of Appeals deemed that such service constituted substantial compliance with Washington's service of process statute for personal service, despite the fact that no one knows if, how, and when anyone ever delivered the documents to Skyles. A Notice of Appearance was later filed on behalf of Skyles, which means she obtained notice of the lawsuit. To the Court of Appeals, this notice of the lawsuit coupled with Wagner's delivery

of the service of process to Banks (who was sitting a few feet away from the nearly blind defendant) constituted substantial compliance with Washington's service of process statute such that it found valid service on Skyles.

But this result is contrary to the Washington Supreme Court's decision in ***Weiss v. Glemp***, 127 Wn.2d 762, 732, 903 P.2d 455 (1995), in which the Supreme Court stated that if it were to apply the substantial compliance doctrine to the service of process statute, an essential objective of the statute is the requirement that process be actually delivered to a person responsible under the statute. In the same decision, the Supreme Court went on to hold that statutory service requirements must be complied with for the court to finally adjudicate the dispute between the parties. ***Id.*** at 734, citing, ***Thayer v. Edmonds***, 8 Wn. App. 36, 39, 503 P.2d 1110 (Div. II 1972). These statutory service requirements were established by Washington's legislature in 1893, yet the Court of Appeals in this matter relied on the substantial compliance doctrine to equate service on a third party as complying with the legislatively mandated requirement that service occur directly on a defendant. The Court of Appeals reached this position by obtaining its articulation of substantial compliance from a decision that articulated the substantial compliance standard for compliance with Washington's Civil Rule 5, which focuses on notice of a motion or event to an opposing party, instead of the substantial compliance standard for compliance with Washington's service of process statute, which focuses on actual delivery of service of process on either the defendant or someone of suitable age and discretion resident therein. The error was to focus on notice to Skyles instead of focusing on delivery to Skyles.

The Banks now petition Washington's Supreme Court to accept review of the Court of Appeals' decision in this matter to apply its articulation of the substantial compliance

doctrine from the ***Weiss*** decision and its holding that the statutory service requirements must be complied with in order for the court to finally adjudicate the dispute between the parties. Alternatively, if the Court of Appeals correctly applied the substantial compliance doctrine, the Supreme Court needs to articulate the requirements of substitute personal service of process so that parties and professionals alike may know when they may properly deliver service of process to third parties so as to effectuate personal service of process correctly under Washington law.

B. IDENTITY OF PETITIONER

Petitioners are Kirk and Jennifer Banks ("Banks") who are Assignees of Billie E. Getschmann Skyles. Mrs. Skyles initiated the challenge to the below judgment and assigned her rights to the Banks before she passed away, on September 26, 2015.

C. DECISION

Petitioners, Kirk and Jennifer Banks ("Banks") respectfully request this Court to accept review of the decision entered by Division I of Washington Court of Appeals on April 3, 2017 (Court of Appeals No. 74068-7-I)("Decision" or "Opinion") and the related April 27, 2017 decision denying Petitioners' Motion for Reconsideration. Attached hereto as **Appendix A** and **B**, respectively.

D. ISSUES PRESENTED FOR REVIEW

Whether the Court Appeals erred in this matter when it determined that "substantial compliance" with Washington's service of process statute merely required both actual notice and service in a manner reasonably calculated to reach the party on whom the statute requires service, when a 1995 Washington Supreme Court Decision held that an essential objective of the service of process statute is the requirement that process be actually

delivered to a person on whom the statute requires service? Or, more simply stated: did the Court of Appeals err by failing to assess whether service in this case resulted in the summons and complaint being actually delivered to the defendant, as required by the Supreme Court's 1995 Decision, ***Weiss v. Glemp***, 127 Wn.2d 762, 734, 903 P.2d 455 (1995), and its progeny.

Did the Court of Appeal's err by finding that substitute personal service on a third party, who was sitting near the defendant and who worked for the defendant, constituted substantial compliance with Washington's service of process statute when the defendant was neither evasive nor agreed to accept delivery of the documents on the third party as service of process on her—especially when Washington's service of process statute has required delivery of personal service of process directly to defendants since 1893? When does "substantial compliance" go from effectuating the legislative intent to supplanting it with judicial action?

E. STATEMENT OF THE CASE

For the purpose of this Petition, the facts related to Wagner's service of process as stated in Wagner's third Declaration of Service are the central, operative material facts. All the facts from this declaration of service that are related to Wagner's service of process are set forth below:

> 7. To be clear, On Thursday, December 18, 22014 at approximately 3:30 pm, I served a copy of the following documents upon a woman known to me to be Billie E. Getschmann Skyles at the address of 41816 May Creek Rd. Gold Bar, WA 98251. The documents were physically handed to Kirk Banks in the presence of Billie E. Getschmann who was sitting in a chair a few feet beyond my reach but who acknowledged my presence.

(CP 400).

In its Decision, the Court of Appeals recast the above as follows:

> Taking the facts as stated in the third Wagner declaration, the summons and complaint were "reasonably calculated to reach" Skyles: *Skyles saw and nodded to Wagner as he handed the documents to Kirk*; Kirk was one of Skyles's "caretakers" and so could be expected to deliver important documents to her; moreover . . . (Emphasis added)

Why the extra, added facts? Wagner's Declaration of service says nothing about Skyles nodding or doing anything while he handed documents to Banks. For some reason, the Court of Appeals felt like it needed to "beef up" Wagner's Declaration of Service.

The facts not addressed by the Court of Appeals are also notable. The Court failed to account for or even address Mrs. Skyles's medical records and four eye surgeries showing that Mrs. Skyles suffered from, among other problems, Parkinson's disease, Dementia, and Glaucoma. According to Skyles's declaration, on December 18, 2014, Skyles suffered from tunnel vision that limited her eyesight to about the length of her arms, but without any peripheral vision. (CP 328, lnn 18-25). The Court of Appeals was silent on the facts concerning Skyles's health and whether a defendant with such medical conditions required additional considerations under the state's service of process statute.

On its face, the Court of Appeals' Decision appears to posit the idea that delivering service of process to a third party beyond the eyesight of a Defendant with Dementia constitutes a process reasonably calculated to have the delivered documents be actually delivered to the Defendant. The issue of Skyles's eyesight is heightened because of Wagner's silence during his service effort. Wagner failed to inform Banks about the nature of the delivered envelop. Wagner failed ask or instruct Banks to deliver the documents to the Defendant. And, Wagner failed to inform Skyles that anything had been given to the third party. If Skyles could barely see past her own hands, how could she see Wagner and his interaction with Banks? The Court of Appeals' Decision instructs that Washington Courts do not account for physical limitations or disabilities in the context of assessing

compliance with the service of process statute. Yet, this issue arises only because the Court of Appeals Decision focuses on whether the defendant had notice of the lawsuit from a process reasonably calculated to reach the defendant with service of process. **Appendix A** at P. 7. If instead, the Court of Appeals had focused on delivery of the service of process on the Defendant such as when and how the documents were delivered to her hands, the issue of her eyesight and other disabilities would be rendered nearly moot. The fact being that using a silent delivery of process on a third party beyond the defendant's eyesight seems, factually at least, not to be part of a process reasonably calculated to reach a nearly blind, debilitated defendant.

A. THE RECORD RELATED TO DELIVERY OF DOCUMENTS ON KIRK BANKS

A lawyer drafted Wagner's third declaration of service to correct for the fact that Wagner delivered the lawsuit documents to Kirk Banks and not to Skyles as sworn to in his first Declaration of Service. The third declaration adjusts to account for the facts contained in the second declaration. Wagner asserts that the second declaration is forged, but a handwriting expert opined to the opposite (CP 430-433), and Wagner's third declaration accounts for the material facts of the second declaration thus proving up the contents of the second declaration—with or without the expert's opinion that Wagner signed the second declaration.

The third Declaration of Service contains one sentence material to the Court's inquiry. One sentence of 32 words. Words that could be taken at face value or words to be taken as Rorschach-test challenge to see if the words could satisfy the constitutional and statutory requirements of proper personal service in Washington. Wagner's words are:

> The documents were physically handed to Kirk Banks in the presence of Billie E. Getschmann who was sitting in a chair a few feet beyond my reach but who acknowledged my presence.

(CP 400). Based on Wagner's words and Skyles's medical conditions affecting her vision, Skyles could hear, but not see Wagner.

WAGNER WAS SKYLES'S NEXT DOOR NEIGHBOR AND TENANT SINCE 2013

Wagner is an interesting witness in this matter. Wagner lived as Skyles's neighbor and tenant since at least 2013 (CPs 216, 217). Wagner lived as Skyles's immediate, next-door neighbor with a shared driveway at 41508 May Creek Rd, Gold Bar 98251. (CP 216). He was Skyles's tenant at this address until the Hopkins purchased this property, at which point he became the Hopkins' tenant. (CP 217). Finally, Wagner helped Kirk Banks move Skyles's personal property from 41508 May Creek Road to her trailer and storage at 41816 May Creek Road. (CP 215). Between being a helper, a tenant, and a neighbor—Wagner was a regular feature in Skyles's life. Wagner's mere presence would fail to alert Skyles that anything significant was happening. Thus, Skyles's acknowledgment of Wagner's presence speaks more to her familiarity with Wagner than the fact that Wagner was delivering an envelope to Banks beyond her eyesight.

KNOWN UNKNOWNS ARISING FROM WAGNER'S DELIVERY OF DOCUMENTS ON KIRK BANKS

From Wagner's third declaration, we know that Wagner handed the lawsuit documents to Banks. This was done in Skyles's presence. Skyles was at least a few feet beyond Wagner's *reach* and therefore Wagner and Kirk were beyond Skyles's sight. According to Wagner's third declaration, Skyles acknowledges his presences, but *nothing else*, which makes sense given that Skyles could hear, but not see him or Banks.

The unknowns arising from Wagner's delivery of documents on Banks far outnumber the knowns. The unknowns include the following:

- What if anything did Wagner say to Banks when delivering the documents;
- Did Banks know that the delivered documents were about a lawsuit;
- Did Wagner ask or tell Banks to deliver the documents to Skyles;

- If Wagner was so close to Skyles, why did he fail to tell her about the lawsuit and that he was handing documents to Banks;
- Who, if anyone, delivered the documents to Skyles;
- How were documents ultimately delivered to Skyles;
- Where and when were the documents ever delivered to Skyles; and
- Whether Wagner handed the documents to Banks inside or outside of Skyles's trailer.

These unknowns render it impossible to determine if or how the lawsuit papers were actually delivered to Skyles.

B. SKYLES'S STATEMENTS ABOUT BEING SERVED

The Court of Appeals mistakenly determined that Skyles only offered two identical statements that she was not served the papers. The Court of Appeals concluded that Skyles's statements—"I was not served with the lawsuit papers—period" were vague, self-serving, and conclusory. **Appendix A** at Page 9.

Unfortunately, the Court of Appeals overlooked and failed to account for four statements of from Skyles about *not* being served:

- The server, Mr. Richard J. Wagner, never served me with lawsuit papers. CP 190.
- I was not served at my usual abode and Mr. Banks does not and has not resided with me at any time. CP 190.
- The fact is that no one served me any papers (legal or otherwise) on December 18, 2014. CP 329.
- No one came to my abode or residence and served me papers of any kind. CP 329.

These four statements are contained in Skyles's two declarations of record in this matter. Each declaration also contains statements about her health, about her different relationships with Kirk and Jennifer, and about other material facts that support the idea that no one served her. In this context, the two, short final statements noted by the Court were statements of summation—each statement serving as an endcap to the multi-paragraphed statement preceding it. Why would the Court of Appeals need to understate the number of

Skyles's statements about not being served?

The key to assessing each Skyles Declaration is to know that each statement addresses a different argument from the Hopkins: the July declaration addresses the argument that Wagner personally served Skyles, while the August declaration also addresses the argument that Wagner served Skyles by substitution service. Thus, by reading the two declarations in the two different contexts (which resulted from Wagner's shifting narrative of service on Skyles), the Court can see how the different declarations detail Skyles health, residence, and separate relationships with Kirk Banks and Jennifer Banks (formerly Wilson) to evidence the impossibility of Wagner's story of service on Skyles.

SKYLES' JULY 20, 2015 DECLARATION

The July declaration introduced the dispute, Skyles, and Skyles's health problems to the Court. Paragraph 4 detailed Skyles's "Sun Downers Dementia" and how her glaucoma and four eye surgeries had deprived her of her peripheral vision in both eyes. (CP 188 lnn 6-11). Declaration paragraph 7 detailed how Jennifer Banks was Skyles's only "*caretaker*" in the sense of attending to Skyles's medical needed, personal needs, and personal business needs. (CP 189 lnn 16-19). Declaration paragraphs 8 through 10 introduced the parties' dispute about the real estate transaction.

The last three paragraphs of the declaration state, variously, how no one served Skyles with the lawsuit. (CP 189-190). In paragraph 10, Skyles identified Kirk Banks as her "*farm hand*" in addition to stating in two different ways that Wagner never served her as a caretaker. (CP 190 lnn 1-6).

SKYLES' AUGUST 24, 2015 DECLARATION

The August declaration details Skyles's health and vision challenges. Specifically,

the declaration's second paragraph covers about a full page to detail about how the confluence of Skyles's vision limiting medical conditions combined with the lighting conditions of 3:30 p.m. December 18, 2014 to render Skyles almost blind. (CP 328 lnn 1-25). On December 18, 2014 at 3:30 p.m., Skyles could only see immediately in front of her face to about the length of her arms. In fact, Skyles stated:

> vision I would not be able to see anything beyond a few feet directly in front of me. The only way I would know that I was given legal papers is if someone was a foot or two from me (about arm's lengthI and physically handed the paper to me.

(CP 328 lnn 23-25). Amongst her other statements of not being served, Skyles also took time in this declaration to describe Kirk Bank's role in her life and on the ranch:

> which seems pretty minor compared to what the Hopkins would want us to think. I know Kirk Banks as a nice, reliable man who works on my goat ranch taking care of my goats, my buildings, my water system, and my acres of property because I can no longer do so. My goats mean everything to me, and I would have lost them from my life if Kirk Banks had not been in my life. The attack on him is shameful

(CP 329 lnn 7-11). Notably, no evidence links Kirk Banks to any part of Skyles's personal business life. Kirk took care of the goats and the ranch, nothing more. Thus, if ranch hands are deemed by law to be personal "caregivers," then ranch hands around the state could be subject to service on behalf of the ranch owner while on the owner's ranch.

F. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In Washington, personal service occurs by delivering a copy of the summons to the defendant personally, or by substitute service of the summons. RCW 4.28.080 provides, in relevant part, as follows:

> Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:
>
> (16) 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.

RCW 4.28.080(16). This statute has remained essentially untouched by the Legislature since it was enacted in 1893. ***Salts v. Estes***, 133 Wn.2d 160, 162, 943 P.2d 275 (1997). Proper service of the summons and complaint is essential to invoke personal jurisdiction. ***Morris v. Palouse River & Coulee City R.R.***, *149 Wn. App. 366, 370-71, 203 P.3d 1069 (2009)* (quoting ***In re Marriage of Markowski***, *50 Wn. App. 633, 635-36, 749 P.2d 754 (1988))*. Proper service of process must comply with both constitutional and statutory requirements, ***Farmer v. Davis***, *161 Wn. App. 420, 432, 250 P.3d 138 (2011)*. Nevertheless, there is a difference between constitutionally adequate service and the service required by the statute because the statutory service requirements must be complied with in order for the court to finally adjudicate the parties' dispute. ***Weiss v. Glemp***, 127 Wn.2d 762, 734, 903 P.2d 455 (1995); ***Thayer***, 8 Wn. App. At 40; and, ***Salts v. Estes***, 133 Wn.2d 160, 165, 943 P.2d 275 (1997)(footnote 4).

The standard of review in matters like this one is *de novo* if service of process was proper. ***Scanlan v. Townsend***, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). The only legal issue regarding service of process, at this point, is whether Hopkins complied with the

statutory requirements of the personal service prong of RCW 4.28.080(16) when serving Skyles.

THE COURT OF APPEALS FINDS SUBSTANTIAL COMPLIANCE WITH RCW 4.28.080(16)

Statutory compliance with the personal service prong of the service of process statute requires personal delivery of the service documents on the defendant. The personal service prong of RCW 4.28.080 (16) states, "[t]he summons shall be served by delivering a copy . . . to the defendant personally." Here, the Record shows that Wagner chose to deliver the summons and complaint to Banks instead of Skyles. Nothing forced Wagner to make this choice—he simply decided to serve Banks instead of Skyles, who was immobile in a chair only a few feet from him. The Record is void of any evidence that Skyles was evasive or agreed with and directed Wagner to deliver the documents to Banks. Likewise, the Record is void of any evidence that Wagner asked or instructed Banks to deliver the documents to Skyles, and the Record is similarly void of any evidence that Banks ever delivered the documents to Skyles as a form of hand-to-hand, second hand service of process.

Put simply: the Court of Appeals found that Washington plaintiffs meet the statutory service requirements for personally serving visually impaired defendants by delivering service of process to third parties beyond their sight instead of delivering the documents to the hands of such impaired defendants. Additionally, the Court of Appeals determined that evidence of actual delivery of the lawsuit documents to the defendant was not needed if the third party receiving the documents served some interest of the defendant—i.e. served as a ranch hand on the defendant's goat ranch. The Court of Appeals determined that Wagner's conduct and choices in this matter constituted

substantial compliance with the personal service prong of RCW 4.28.080 (16).

THE COURT OF APPEALS APPLIED THE SUBSTANTIAL COMPLIANCE DOCTRINE INCORRECTLY

In determining that Wagner substantially complied with the personal service prong of RCW 4.28.080(16), did the Court of Appeals apply the doctrine as articulated in the Supreme Court's decision in ***Weiss v. Glemp***, 127 Wn.2d 762, 732, 903 P.2d 455 (1995), and its progeny; or did the Court of Appeal adopt a more expansive vision of "Substantial Compliance." This question is answered by first reviewing how Washington Courts have developed and applied the substantial compliance doctrine to the service of process statute over the years. Do the cases reflect a consistent factual footprint reflective of the Supreme Court's legal analysis that is absent in this matter?

SUBSTANTIAL COMPLIANCE UNDER THE WASHINGTON SUPREME COURT *WEISS* DECISION

Substantial compliance is actual compliance in respect to the substance essential to reasonable objective of the statute. ***Weiss v. Glemp***, 127 Wn.2d at 731. In the ***Weiss*** Decision, the Supreme Court stated that if it were to apply the substantial compliance doctrine to the service of process statute, an essential objective of the statute is the requirement that process be actually *delivered* to a person responsible under the statute. ***Weiss v. Glemp***, 127 Wn.2d 762, 732, 903 P.2d 455 (1995) (emphasis added). In fact, in cases where substantial compliance has been found, there has been ***actual compliance*** with the service of process statute, albeit procedurally faulty. ***Id.*** at 730-1, ***see also***, ***Thayer v. Edmonds***, 8 Wn.App. 36, 39, 503 P.2d 1110 (Div. II 1972)(service found effective when defendant received summons by agreement for server to leave documents inside front door), ***Scanlan v. Townsend***, 181 Wn.2d 838, 847, 844-6, 336 P.3d 1155 (2014)(service found effective when defendant admitted that she received the documents from her father, who was found competent to effect service and who submitted a sworn statement

confirming service on the defendant [his daughter]), ***Brown-Edwards v. Powell***, 144 Wn.App. 109, 111, 182 P.3d 441(Div. III 2008) (service found effective when server mistakenly served neighbor, who in turn served the defendant complete with an affidavit of service), ***Gerean v Martin-Joven***, 108 Wn.963, 33 P.3d 427 (2001)(service found defective when plaintiff served father at the father's' abode even though the father later personally delivered the summons to his daughter, provided no sworn statement of service), and ***United Pacific Insurance Company v Discount Company***, 15 Wn.App. 559, 561-3, 550 P.2d 699 (Div. II 1976)(attempted personal delivery deemed effective service on an evasive defendant when server was positioned in a manner to effect service and the server's attempt to yield possession and control of the summons to the defendant would have worked, but for the defendant's evasive conduct). These cases fall into three categories of recognized "substantial compliance" exceptions to Washington's statutory requirements for personal service: (1) personal service by agreement of alternative delivery; (2) personal service by hand-to-hand, second hand service; and (3) evasive defendant service. Service that falls outside of these three recognized exceptions or outside of the statutory requirements of RCW 4.28.080 (16) result in the Court determining that the attempted service of process was defective. ***See e.g., Weiss v. Glemp***, 127 Wn.2d 762, 734, 903 P.2d 455 (1995)(server's decision to leave documents on a windowsill instead of serving one of the two persons required by the service statute resulted in defective service); ***Gerean v Martin-Joven***, 108 Wn.963, 33 P.3d 427 (2001)(server's failure to serve one of the two persons required by the service statute resulted in defective service, even though the person initially served later personally delivered the documents to the defendant but without a sworn statement of service).

Central to all the above decisions where service was found to be effective is the fact of actual compliance with the requirement of personally delivering the lawsuit documents to the defendant. In each of the above cases in which service was found effective, the Record contained evidence of how and when the documents were delivered to the Defendant. When the Record lacked evidence of delivering service of process to the defendant, the service was found to be ineffective.

The foregoing result is consistent with the correct application of the "Substantial Compliance" doctrine to the service of process statute. In the matter of ***Weiss v. Glemp***, 127 Wn.2d at 732, the server left the summons on a windowsill and not with either the defendant or a person of suitable age and discretion. ***Id.*** The ***Weiss*** Court stated that the decision to leave the summons on the windowsill was noncompliance with the statute and not significant compliance combined with a merely technical deficiency. ***Id.*** The ***Weiss*** Court went on to say that an essential objective of the service of process statute is the actual delivery of the summons to either the defendant or someone of suitable age and discretion (then resident therein the defendant's abode). ***Id.*** In applying the personal service prong of RCW 4.28.080 (15), the ***Weiss*** Court observed that nothing is ambiguous about the legislative command that the summons shall be served by delivering a copy thereof to the defendant personally. ***Id.*** at 733. Thus, substantial compliance occurs with the service of process statute when the summons is delivered to either person designated by the statute for such delivery—i.e. the defendant or the person of suitable age and discretion then resident therein the defendant's abode.

THE COURT OF APPEALS APPLIES THE SUBSTANTIAL COMPLIANCE STANDARD FOR CR 5 AND NOT FOR RCW 4.28.080(16)

The Court of Appeals in this matter framed "substantial compliance" differently

than the above. In the Decision, the Court of Appeals articulates the below standard for substantial compliance:

> statutes require only substantial compliance."[13] Substantial compliance is "'actual compliance in respect to the substance essential to every reasonable objective of [a] statute.'"[14] This "requires both actual notice and service in a manner reasonably calculated to reach the party on whom the statute requires service."[15]

Appendix A at Page 7. Absent from the Court of Appeals' articulation of the substantial compliance standard is the requirement that any actually delivery service of process to the defendant, Skyles. Oddly, the Court of Appeals cites and adopts the application of "substantial compliance" for compliance with CR 5—and not for compliance with RCW 4.28.080. The Court cites ***In re Marriage of Mu Chai***, 122 Wn.App. 247, 253, 93 P.3d 936 (Div. I 2004) for its articulation of "substantial compliance" without accounting for the fact that the Court in ***Marriage of Mu Chai*** was focused on the issue of substantial compliance with the civil rule for serving notice for a civil motion on an opposing party. ***Id.*** at 253.

Here, the issue is <u>*not*</u> substantial compliance with Civil Rule 5, but rather substantial compliance with the service of process statute. By applying the wrong standard for "substantial compliance," the Court of Appeals abandoned the legislative command to deliver the summons to the defendant personally. This adoption of the wrong standard for substantial compliance in this matter enabled the Court of Appeals to find substantial compliance with the service of process statute by simply determining that Wagner effected service in a manner reasonably calculated to reach the defendant without the burden of actually delivering any documents to the defendant. Thus, the Court of Appeals'

determination of substantial compliance broke with the express wording of the personal service prong of RCW 4.28.080 (16) and the legal standard established by the Supreme Court in ***Weiss v. Glemp***, 127 Wn.2d 762, 734, 903 P.2d 455 (1995) and its progeny.

THE SUPREME COURT PREVIOUSLY REJECTED THE STANDARD USED BY THE COURT OF APPEALS IN THIS MATTER

It's worth noting, that Washington's Supreme Court rejected an effort by the plaintiff in ***Weiss*** to have the Supreme Court adopt as "substantial compliance" an effort to serve the defendant that failed to deliver the documents to the defendant. ***Weiss v. Glemp***, 127 Wn.2d at 734. In **Weiss**, the plaintiff argued that the windowsill service was adequate to effectuate service because it was reasonably calculated to provide notice to the defendant. ***Id.*** In rejecting the plaintiff's argument, the **Weiss** Court responded that there is a difference between constitutionally adequate service and the type of service required by the statute. ***Id.*** The ***Weiss*** Court stated that beyond due process requirements, statutory service requirements must be complied with for the court to finally adjudicate the dispute between the parties. ***Id.***, ***citing***, ***Thayer***, 8 Wn.App. at 40.

Here, the record is void of any evidence that Wagner or anyone else delivered the Summons and Complaint to Skyles. Wagner had one job—deliver the lawsuit papers to Skyles. Yet, for reasons unknown, Wagner chose not to deliver the documents to Skyles. Instead and contrary to RCW 4.28.080(16), Wagner delivered the documents to a third-party, who was neither the defendant nor a person of suitable age and discretion then resident in the defendant's abode.

Wagner's third declaration indicates that Wagner remained completely silent during his efforts to serve Skyles. Without speaking to Skyles or even to Kirk Banks about the documents, how could Skyles know that Wagner was not present on December 18,

2014 on one of his many social visits? How would Kirk Banks know that the envelope contained a lawsuit or that he was to deliver the envelope to anyone? The point is that Wagner, just like the server in ***Weiss***, decided on his own initiative and for his own reasons to avoid delivering the documents to Skyles, who—according to him—was sitting in a chair just feet away from him. Instead, he delivered them to a third person beyond Skyles's sight—akin to putting the lawsuit documents on a windowsill. The result in ***Weiss*** was that Washington's Supreme Court determined that "windowsill service" on the defendant was insufficient to effect service of process. Under the Supreme Court's reasoning in ***Weiss***, the result is the same when the server elects "third party service" instead of service on the defendant. The legislative mandate has always been for the server to deliver the documents to one of two people and both the server in ***Weiss*** and Wagner chose to deliver the summons and complaint to neither person. And, just as "substantial compliance" could not save the service of process in ***Weiss***, it cannot save the service of process in this matter.

Hence, this Court ought to accept review to apply the correct embodiment of the "substantial compliance" doctrine to reach the same result that it reached in ***Weiss***.

APPLYING CONSTRUCTIVE SERVICE TO PERSONAL SERVICE

The Court of Appeals, for the first time in Washington law, applies the doctrine of constructive service to Wagner's personal service efforts. In addressing why delivery of the documents to Banks equated to delivery of the documents to Skyles, the Court of Appeals states:

> Kirk was one of Skyles's "caretakers" and so could be expected to deliver important documents to her;

Appendix A at Page 9. The Court adopts the central rationale behind "substitute service," namely that if the server delivers the documents to a person with a legally sufficient

relationship to the defendant, then the Court will presume actual delivery of the documents to the defendant by the person initially served. But, the Court of Appeals adoption of substitute personal service is in direct conflict with the 1893 legislative mandate that the documents be personally delivered to the Defendant. Hence, the Decision represents a major shift in Washington law because the Decision is the Court's first time to apply "substitute service" to the personal service prong of RCW 4.28.080 (16). In 1893, the Washington legislature mandated that personal service was to be effectuated by personal delivery of the documents on the defendant. No court had changed or challenged the legislature in 124 years—until this Decision.

The consequences of such a game changing Decision are many: parties no longer need to deliver such service of process documents to infirmed or disabled defendants. Plaintiffs can now effectuate service of process on a defendant by serving the defendant's farm hands, ranch hands, gardeners, or really anyone with a regularized presence around the defendant, who are otherwise in the defendant's service. The Court's adoption of substitute personal service to "cure" the inadequate record of Wagner's service efforts on Skyles is a radical change after 124 years of personal service law that required personal delivery of service of process on the defendant. As noted above, the change is especially significant because of the fact that Kirk Bank was Skyles's ranch hand with no connection to her personal or personal business affairs. (CP 329 lnn 7-11). His connection to Skyles's personal life was attenuated, at best, because those responsibilities fell to Jennifer, who was Skyles's only "*caretaker*" in the sense of attending to Skyles's medical needs, personal needs, and personal business needs. (CP 189 lnn 16-19). Thus, the Court's choice of Kirk Banks as someone subject to substitute personal service means that substitute personal

service is much more expansive than the substitute service proscribed by the express language of RCW 4.28.080(16).

G. Conclusion

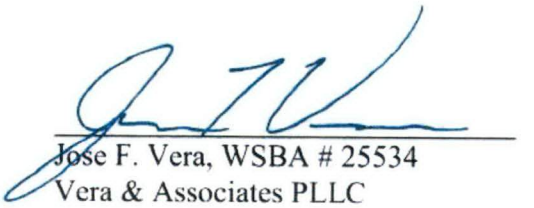
Based on the foregoing, the Banks respectfully request the Supreme Court to accept review of this matter. The Court of Appeals decision in this matter is directly contrary to the Supreme Court's decision in ***Weiss v. Glemp***, 127 Wn.2d 762, 734, 903 P.2d 455 (1995). The Banks respectfully request the Supreme Court to revise the Decision to align the facts stated in the Decision with the facts established by the record and to revise the standard for "substantial compliance" to the standard set forth in ***Weiss v. Glemp***, 127 Wn.2d 762, 734, 903 P.2d 455 (1995)(which applies substantial compliance to personal service under RCW 4.28.080(15)), as opposed to the incorrect standard for substantial compliance with Civil Rule 5 articulated by the Court in ***In re Marriage of Mu Chai***, 122 Wn.App. 247, 253, 93 P.3d 936 (Div. I 2004).

If the Supreme Court affirms the Court of Appeals' Decision by adopting constructive service as an exception to the personal delivery requirement of the personal service prong of RCW 4.28.080(16), then the Banks respectfully request that the Supreme Court take a moment to articulate fully the new requirements of substitute personal service.

The bottom line is that the Court of Appeals used the "substantial compliance" standard for Civil Rule 5 to avoid the 1893 legislative mandate that service of process on a defendant by personal delivery required delivering the documents directly to the Defendant to be effective. This contrary to Washington law and certainly contrary to the Supreme Court's decision in ***Weiss v. Glemp***, 127 Wn.2d 762, 734, 903 P.2d 455 (1995),

Submitted May 30, 2017

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, Jose F. Vera, hereby declare under penalty of perjury of the laws of Washington State, that on the dates listed below that I caused a true and correct copy of the documents listed below to be delivered to the below listed parties in the manner indicated.

MOTION TO PUBLISH

Gourley Law Group P.O. Box 1091/1002 Tenth Street Snohomish, Washington 98290 Date: May 30, 2017	☐ ☒ ☐ ☒	Cert. U.S. Mail, postage prepaid Hand Delivered Overnight Courier Email
Court of Appeals Clerks Office One Union Square 600 University Street Seattle, WA 98101-1176 Date: May 30, 2017	☐ ☒ ☐ ☐	Cert. U.S. Mail, postage prepaid Hand Delivered Overnight Courier Email

Jose F. Vera, WSBA # 25534
DATE: May 30, 2017
PLACE: Spokane County, Spokane WA

Appendix A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARK HOPKINS AND GEORGIA HOPKINS, husband and wife, Respondents, v. KIRK AND JENNIFER BANKS, as assignees for MRS. BILLIE E. GETSCHMANN SKYLES, Appellants.	No. 74068-7-I DIVISION ONE UNPUBLISHED OPINION FILED: April 3, 2017

LEACH, J. — Kirk and Jennifer Banks appeal the trial court's reinstatement of a default judgment for Mark and Georgia Hopkins. This court substituted the Bankses as defendants in place of Billie Getschmann Skyles, who died. The Bankses contend that the Hopkinses did not properly serve Skyles with the summons and complaint or their motion for default judgment. They also contend that the Hopkinses' counsel withheld material facts at the default judgment hearing. The Hopkinses cross appeal, challenging the trial court's denial of attorney fees.

The Hopkinses presented prima facie proof of proper service on Skyles, and the Bankses did not present clear and convincing evidence showing otherwise. Because the Bankses' other two challenges are not properly before

this court, we decline to consider them. Thus, we affirm the trial court's reinstatement of the default judgment. And because RCW 4.84.330 required the trial court to award reasonable attorney fees to the Hopkinses under their agreement with Skyles, we remand for the trial court to decide the proper amount.

FACTS

Billie Getschmann Skyles owned and lived on a goat ranch near Gold Bar, Washington. Kirk and Jennifer Banks also lived on the ranch. They helped Skyles and took care of the goats and the property.[1]

In February 2014, Skyles signed a purchase and sale agreement (PSA), selling part of her property to neighbors Mark and Georgia Hopkins. That November, the Hopkinses sued Skyles to enforce the PSA.[2] On December 18, Richard Wagner attempted to serve the Hopkinses' complaint and summons on Skyles.

Skyles filed a pro se notice of appearance on January 6, 2015. But she did not appear at the default judgment hearing the Hopkinses scheduled for January 27. The trial court entered a default judgment in favor of the Hopkinses.

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[1] Jennifer Banks also appears in the record as Jennifer Wilson. For clarity, Kirk and Jennifer Banks are referred to by their first names when mentioned as individuals.

[2] The Hopkinses claimed that Skyles breached the PSA by failing to sign a boundary line adjustment.

Later, Skyles asked the trial court to vacate the judgment, arguing that she was not properly served. The parties submitted the following evidence about Wagner's efforts to serve Skyles.

In his first declaration, Wagner stated that he served Skyles with the summons and complaint at her address on December 18, 2014.

Skyles stated in a declaration that she was not served with process papers. She also submitted a declaration purporting to be signed by Wagner. That declaration stated that Wagner served the documents on Kirk, not Skyles, adding, "I was not given clear directions and was confused about the service process."

Hopkins then submitted a third declaration from Wagner. Wagner said he reviewed the second declaration in his name. He stated, "That is not my signature. It is a forgery." He said that Kirk had offered him money to sign such a declaration, but he declined. He attached copies of text messages containing those offers.[3] He continued,

> To be clear, . . . I served a copy of the following documents upon a woman known to me to be Billie E. Getschmann Skyles at the address of 41816 May Creek Rd, Gold Bar, Washington 98251. The documents were physically handed to Kirk Banks in the presence of Billie E. Getschmann who was sitting in a chair a few feet beyond my reach but who acknowledged my presence.

[3] The texts offered Wagner cash to sign a new declaration saying "that you served Kirk not [B]illie [Skyles.] No one explained the rules [of] service you were unaware."

The Hopkinses also submitted a declaration by Jeannie Harrison, who stated, "On December 18, 2014 I accompanied Richard Wagner when he went to serve Billie Getschmann Skyles. . . . I walked with Richard to the fence where I stopped and watched Richard walk to Billie's house. He returned without the papers."

A commissioner vacated the judgment on September 1, 2015. The Hopkinses asked the trial court to revise this decision. The trial court reinstated the judgment on September 18.

Skyles died on September 26, 2015. She had purportedly assigned her interest in this lawsuit to the Bankses. Counsel for Skyles appealed the September 18 order in October 2015.

In December 2015, the Bankses filed their own motion to vacate the default judgment. The trial court noted that the defendant, Skyles, had died and the Bankses had not asked to substitute themselves as parties. So it declined to decide the Bankses' motion until it could determine the identity of the defendant and whether a "viable action" existed.

At the Bankses' request, this court substituted them for Skyles in the appeal from the September 2015 order.

STANDARD OF REVIEW

The Hopkinses ask this court to apply a substantial evidence review standard to the trial court's decision about the service of process. While this court reviews a trial court's findings of fact for substantial evidence,[4] we generally review the propriety of service de novo.[5] "Appellate courts give deference to trial courts on a sliding scale based on how much assessment of credibility is required."[6] We review issues de novo "[w]here the record at trial consists entirely of written documents and the trial court therefore was not required to 'assess the credibility or competency of witnesses, and to weigh the evidence, nor reconcile conflicting evidence.'"[7] Review for substantial evidence may be more appropriate where "the trial court reviewed an enormous amount of documentary evidence, weighed that evidence, resolved inevitable evidentiary conflicts and discrepancies, and issued statutorily mandated written findings."[8]

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[4] Guarino v. Interactive Objects, Inc., 122 Wn. App. 95, 108, 86 P.3d 1175 (2004).

[5] See Scanlan v. Townsend, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014); Delex Inc. v. Sukhoi Civil Aircraft Co., 193 Wn. App. 464, 469, 372 P.3d 797, review denied, 186 Wn.2d 1027 (2016).

[6] Dolan v. King County, 172 Wn.2d 299, 311, 258 P.3d 20 (2011).

[7] Dolan, 172 Wn.2d at 310 (internal quotation marks omitted) (quoting Progressive Animal Welfare Soc'y v. Univ. of Wash., 125 Wn.2d 243, 252, 884 P.2d 592 (1994)).

[8] Dolan, 172 Wn.2d at 311.

Here, the trial court considered a relatively small record that consisted solely of documentary evidence. It made no written findings. We adhere to our normal rule and review the propriety of service de novo.

This court uses an error of law standard to review a party's entitlement to some award of attorney fees authorized by statute.[9]

ANALYSIS

Service of Process

The Bankses contend that the default judgment was void for lack of personal jurisdiction over Skyles because she was not served with the summons and complaint. The Hopkinses respond that Richard Wagner served Skyles personally or, alternatively, by substitute service through Kirk Banks. We agree that the Hopkinses accomplished personal service on Skyles and decline to reach the issue of substitute service.

Proper service of the summons and complaint is necessary for a trial court to have personal jurisdiction over a party.[10] A judgment that the court enters without this jurisdiction is void.[11]

Former RCW 4.28.080(15) (1997) authorized a plaintiff to serve a defendant personally or by leaving a copy of the summons at the defendant's

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[9] MJD Props., LLC v. Haley, 189 Wn. App. 963, 976, 358 P.3d 476 (2015).
[10] Woodruff v. Spence, 76 Wn. App. 207, 209-10, 883 P.2d 936 (1994).
[11] Woodruff, 76 Wn. App. at 209-10.

usual abode with a "person of suitable age and discretion" who resides there.[12] Substitute service statutes require strict compliance, but "personal service statutes require only substantial compliance."[13] Substantial compliance is "'actual compliance in respect to the substance essential to every reasonable objective of [a] statute.'"[14] This "requires both actual notice and service in a manner reasonably calculated to reach the party on whom the statute requires service."[15]

"When a defendant challenges service of process, the plaintiff has the initial burden of proof to establish a prima facie case of proper service."[16] The plaintiff can do this with the declaration of a process server "regular in form and substance."[17] The defendant must then show with clear and convincing evidence

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[12] Former RCW 4.28.080(15) (1997), recodified as RCW 4.28.080(16).

[13] Martin v. Triol, 121 Wn.2d 135, 144, 847 P.2d 471 (1993); see Bruett v. 18328 11th Ave. NE, 93 Wn. App. 290, 299, 968 P.2d 913 (1998).

[14] Weiss v. Glemp, 127 Wn.2d 726, 731, 903 P.2d 455 (1995) (alteration in original) (internal quotation marks omitted) (quoting Seattle v. Pub. Emp't Relations Comm'n, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991)); see United Pac. Ins. Co. v. Discount Co., 15 Wn. App. 559, 561-62, 550 P.2d 699 (1976) (holding defendant was served where server made "clear attempt . . . to yield possession and control of the documents to [the defendant] while he was positioned in a manner to accomplish that act"); Thayer v. Edmonds, 8 Wn. App. 36, 39-41, 503 P.2d 1110 (1972) (holding personal service effective where defendant indicated consent for server to leave papers between door and doorjamb).

[15] In re Marriage of Mu Chai, 122 Wn. App. 247, 253, 93 P.3d 936 (2004).

[16] Northwick v. Long, 192 Wn. App. 256, 261, 364 P.3d 1067 (2015).

[17] Northwick, 192 Wn. App. at 261.

that service was improper.[18] "Failure to make proof of service does not affect the validity of the service."[19] On the other hand, actual notice does not establish valid service.[20]

Here, Wagner's declarations provide prima facie proof that the Hopkinses substantially complied with the personal service statute. The first declaration stated, "On Thursday, December 18, 2014 at approximately 3:30 PM, I served a copy of the [summons and complaint] upon a woman known to me to be Billie E. Getschmann Skyles, at the address of 41816 May Creek Rd, Gold Bar, WA 98251." The third Wagner declaration again stated that he personally served Skyles but added that he actually handed the papers to Kirk in Skyles's presence. The Hopkins also submitted a declaration from Jeannie Harrison, who stated that she saw Wagner walk to Skyles's house with the papers and return without them.

Wagner's declarations were "regular in form and substance."[21] They also show substantial compliance. Taking the facts as stated in the third Wagner

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[18] Northwick, 192 Wn. App. at 261. Where neither party timely requests live testimony, the trial court and reviewing court may determine the propriety of service based on affidavits alone. See Leen v. Demopolis, 62 Wn. App. 473, 478-79, 815 P.2d 269 (1991).

[19] CR 4(g)(7).

[20] Gerean v. Martin-Joven, 108 Wn. App. 963, 972, 33 P.3d 427 (2001).

[21] Northwick, 192 Wn. App. at 261; see Alvarez v. Banach, 153 Wn.2d 834, 840, 109 P.3d 402 (2005) (noting that proof of service is sufficient if it shows the date, manner, and place of service).

declaration, the summons and complaint were "reasonably calculated to reach" Skyles: Skyles saw and nodded to Wagner as he handed the documents to Kirk; Kirk was one of Skyles's "caretakers" and so could be expected to deliver important documents to her; moreover, the Bankses do not dispute that Skyles received actual notice, and she filed a notice of appearance 19 days later.

The Bankses failed to rebut the Hopkinses' showing with clear and convincing evidence that service was improper. Their evidence consisted of the purported second Wagner declaration and Skyles's two identical statements that she was not served with the papers. Skyles's statements—"I was not served with the lawsuit papers—period"—were vague, self-serving, and conclusory. The alleged second declaration by Wagner is even less substantial: Wagner's subsequent declaration stated that his purported signature on the second declaration was a forgery and that around the date on that declaration, Kirk tried to bribe him to sign such a statement.

Taken together and in light of the Hopkinses' evidence, the Bankses' evidence is neither clear nor convincing. We therefore conclude the Hopkinses accomplished personal service on Skyles.

Second Motion To Vacate

The Bankses make two arguments that they first raised in their motion to vacate. They contend that the Hopkinses' counsel violated a rule of professional

conduct by withholding material information at the default judgment hearing, and they contend that the Hopkins did not properly serve their motion for default judgment on Skyles.[22] These challenges are not properly before this court.

RAP 2.2 lists the trial court decisions a party may appeal. These include a "final judgment entered in any action or proceeding" and "[a]n order granting or denying a motion to vacate a judgment."[23]

The trial court heard the Bankses' second motion to vacate the default judgment on January 8, 2016. The trial court declined to decide the motion because Skyles had died in September 2015 and no party had been substituted in her place. Because the trial court did not enter an order granting or denying the Bankses' motion to vacate or a final judgment of any kind, RAP 2.2 provides no basis for the Bankses to appeal the trial court's inaction.

Instead, the only order the Bankses' appeal brings to this court for review is the order granting the Hopkinses' motion to revise the commissioner's ruling. These two issues were not raised in the briefing on that motion. We decline to consider them for the first time on appeal.[24]

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[22] See CR 5(b)(2)(B).
[23] RAP 2.2(a)(1), (10).
[24] RAP 2.5(a). The Bankses do not assert that their challenges fall under any of the types that can be raised for the first time on appeal, and such an argument would in any case lack merit.

Attorney Fees

Because the Bankses' arguments on appeal fail, we deny their request for attorney fees.[25]

In the Hopkinses' cross appeal, they contend that the trial court should have awarded them attorney fees under the PSA. We agree.

RCW 4.84.330 requires that the trial court award attorney fees to the prevailing party in an action to enforce a contract where the contract provides for an award of reasonable attorney fees to one of the parties in an enforcement action.

Here, paragraph 13 of the PSA states,

> In the event that any suit or other proceeding is instituted by either party to this [PSA] or that any costs, expenses or attorney fees are incurred or paid by either party in enforcing this [PSA], the substantially prevailing party, as determined by the court or in the proceeding, shall be entitled to recover its reasonable attorneys fees and all costs and expenses incurred relative to such suit or proceeding from the substantially non-prevailing party, in addition to such other relief as may be awarded.

The Hopkinses requested attorney fees under paragraph 13 in their motion for default and attached an affidavit documenting $3,356 in attorney fees and costs. The trial court awarded that amount in its default judgment. The commissioner vacated that award along with the rest of the default judgment.

[25] RAP 18.1.

When the trial court reinstated the default judgment, it denied the Hopkinses' request for attorney fees without explanation.

The Bankses make no argument supporting the trial court's decision not to award attorney fees to the Hopkinses. The PSA provides for attorney fees the prevailing party incurs in an enforcement action. The Hopkinses prevailed in the trial court and now prevail on appeal in an enforcement action. RCW 4.84.330 thus required the trial court to award reasonable attorney fees to the Hopkinses. Because the Hopkinses have requested additional trial court fees and appellate fees, we remand to the trial court to redetermine a reasonable attorney fee award.

CONCLUSION

Because the Bankses did not satisfy their burden of showing that service of process was improper, we affirm in part. Because the trial court erred when it denied the Hopkinses attorney fees under their contract with Skyles, we remand for the trial court to determine a reasonable attorney fee award.

Leach, J.

WE CONCUR:

Spearman, J.

Appendix B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARK HOPKINS AND GEORGIA HOPKINS, husband and wife, Respondents, v. KIRK AND JENNIFER BANKS, as assignees for MRS. BILLIE E. GETSCHMANN SKYLES, Appellants.	No. 74068-7-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellants, Kirk and Jennifer Banks, as assignees for Mrs. Billie E. Getschmann Skyles, having filed a motion for reconsideration herein, and the hearing panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 27th day of April, 2017.

FOR THE COURT:

Leach, J.

Judge