95329-5

SUPREME COURT OF WASHINGTON

In re the Marriage of

MELODY HAYNES,

PETITIONER/RESPONDENT

V.

GORDON SECCO,

RESPONDENT/APPELLANT

(SUPERIOR COURT MATTER NO. 14-3-00278-3
HONORABLE RAYMOND CLARY SUPERIOR COURT JUDGE)

APPELLATE CAUSE NO. 340503

PETITION FOR REVIEW OF MELODY HAYNES

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I. FACTS

On or about the date of February 4, 2014 Ms. Secco filed a Petition for Dissolution of Marriage in this county. CP 1-12. Attempts were made to serve Mr. Secco personally without success, even by a Spokane County Sheriff deputy. CP 24-25/33-34. On April 2nd, 2014 Ms. Haynes' attorney Paul Dec (WSBA #47090) signed a Motion and Declaration to allow service by mail on Mr. Secco. CP 13-18. His motion stated in part: Mr. Secco the "nonmoving party has concealed himself/herself to avoid service." Id. At 2.3 of this form he also said, "service has been attempted 7 times by 2 different authorizes and have been unsuccessful." Id. He then stated that efforts were made to locate Mr. Secco by the Spokane Sheriff's department on at least 5 different occasions" and that consistent with the court rule at CR 4, that service by mail is as "likely to provide actual notice as service by publication". See again CP 13-18.

With regard to the parties living situation at the time of filing the Petition for Dissolution, Ms. Haynes indicated that Mr. Secco called the residence on Augusta his primary residence. CP 35-43 & 117-120. Although Mr. Secco claims that Ms. Haynes lived at that residence as well, she also indicated, in a contradictory declaration that she in fact moved out of their home to not only protect herself from him and his threats, she indicated that she thought she could

not live there during the period he was to be served by mail. See Affidavit of Petitioner in Response to the motion to vacate the default. CP 117-120.

In her declaration, Ms. Haynes states that not only did Mr. Secco threaten to "kill her", that she also moved out of the family residence where he lived for many other reasons besides the service issues.[1] Id. Therefore, the notion put forth by the Appellant that she was also living there when he was served by mail was and is mainly a sort of "form over substance" argument and makes Ms. Haynes argument that that was his residence too when service was effected.

Ms. Haynes story about the abusiveness of Mr. Secco was corroborated by her daughter who stated that after Mr. Secco became abusive her mother moved out of the Augusta house to get away from him. See 9-24-15 declaration of Kaily Wilson, CP 127-129. Ms. Wilson also indicated that Mr. Secco in her experience, would never answer the door if someone knocked on it. Id.

Mr. Secco was the consistent resident, during the time of the various attempted services, including the mail service, to live at Augusta house full time. CP 117-129. Ms. Haynes also explained that she never picked up the mail at the Augusta address even

[1] Ms. Haynes had also obtained a restraining order against Mr. Secco on the date of 8/25/14 (cause no. 14-2-03334-1) therefore, she could not be around him or the restraining orders may become moot. Those particular restraints also ordered

when she lived there, instead always came home from work after 5pm and Mr. Secco would have already obtained the mail himself. CP 117-120.

Given the service problems, on or about the date of April 2nd, 2016 Ms. Haynes applied for and was granted the right to serve Mr. Gecco by mail. CP 19-20.

A hearing was held in Exparte Court to get the order to serve by mail signed. Commissioner Rachel Anderson, the assigned family law commissioner signed the order on the date of April 7, 2014. CP 19-20. On April 8th, 2014 Ms. Secco's attorney served Mr. Secco by mail. See affidavit of service by mail at his last known address on Augusta. CP 33-34/62.

Having no response from the Respondent/Appellant to the mailed Summons and Petition, on the date of July 9, 2014 Ms. Haynes' counsel filed a Motion for Default against Mr. Secco. CP 26-29. The motion for default indicated in the return of service that Mr. Secco was served at the former family residence at 8010 E. Augusta Ave, Spokane Valley, WA. Id. A default order was entered accordingly. CP 30-32.

On or about the date of October 13, 2014 Ms. Haynes obtained a new attorney, and Ms. Costello set a presentment of the final divorce decree for October 27, 2014 (CP 44-45 & 46-60). However, by October 2014 Mr. Secco was incarcerated at Geiger

Correctional on Spotted Rd in Spokane, for allegedly committing domestic violence on Ms. Haynes, and so she mailed notice of this presentment to Geiger Correctional, his new address, on October 16, 2014. CP 61-62. This notice included the date and time of the presentment and a copy of the proposed final orders in the matter. Id.

Although being served with this notice of the presentment Mr. Secco now had another chance to contest the divorce papers, however, as before, Mr. Secco made no attempt to hire counsel, send a letter to the court notifying them of his incarceration, or even place a call to the judge's assistant to note the file that he could not be there. He also made no effort to try and get a transport to the court to deal with this matter. CP 183-186 containing the Commissioner's findings at the CR 60 hearing to vacate the default.

Final Dissolution orders were entered on October 27th, 2014, providing for a distribution of property. CP 63-72. Although it is true that the distribution was in favor of Ms. Haynes, it was not outside the realm of possible decisions available to her, and was uncontested given the fact that Mr. Secco received a copy of what was going to be presented long before they were signed. CP 44-60.

Sometime after Mr. Secco got out of jail, he filed his initial CR60 motion to vacate their Decree. CP 74-116. His motion was

heard by Commissioner Anderson on the date of October 30, 2015, and was denied because there was "no compelling reason" to vacate the ruling. CP 166. Subsequently, the Respondent filed a motion for revision of the Commissioner's ruling. (CP 202-205). That revision request was denied by Judge Clary. CP 205.

Almost a year later Mr. Secco filed another CR 60 motion based on alleged fraud by Ms. Haynes, but not until after filing this first appeal. CP 280-283. That motion was also denied by Judge Clary as well. CP 290. A second appeal was filed on the last Revision order and the two appeals were consolidated. CP 284-289.

Mr. Secco has filed this appeal claiming many reasons for overturning the denials of his CR 60 motions, and seems to focus on what Commissioner Anderson said in her ruling in his opening brief. Most of his arguments revolve around CR 4(d)(4) and that the court had no jurisdiction. Mr. Secco makes little argument about Judge Clary's revision denial even though that is of greater procedural importance in this appeal, in this writer's opinion. This then is Ms. Haynes' response to this appeal.

II. Law & Argument

A. Ms. Haynes could not have served Mr. Secco the initial summons and Petition, therefore the notion that she too lived at the Augusta residence as well is irrelevant to whether he made himself available to the process servers.

The case law in this state is clear, a party may not serve the

other party with any initial pleadings that require personal service of process. CR 4(c) specifically indicates that a party to an action cannot serve the non-moving party with any action, or court papers that require personal service on the other party. See also, *Crouch v. Friedman*, 51 Wash.App. 731, 754 P.2d 1299 (1988); *Columbia Vly. Credit Exch., Inc. v. Lampson*, 12 Wash.App. 952, 533 P.2d 152, review denied, 85 Wash.2d 1018 (1975).

Regardless of Mr. Secco's argument as to the validity of the mail service order, his counsel clearly knows Ms. Haynes could not serve Mr. Secco with any papers in their home. Therefore, it did not matter that at one time or another she was residing in their family home. However, to insure there was no argument that she was in the house and therefore, could have received his mail, she moved out during the time the order allowing service by mail was in effect, until he was served. His argument then that somehow her being a resident of the family home does nothing to the fact that Mr. Secco also lived there and was available to receive his mail there.

B. Spokane Superior Court had jurisdiction to enter a default against Mr. Secco given the CR 4(d)(4) declaration provided by Petitioner's attorney, and the case law interpreting this court rule's application.

One of Mr. Secco's first and most vehement arguments is that the Superior Court had no jurisdiction to enter a default judgment because CR 4(d)(4) was not properly followed. And

since CR 4(d)(4) is to be strictly followed, that there could not be any jurisdiction because Ms. Haynes somehow knew Mr. Secco could be found because she also lived at his residence. Ipso facto her attorney could not say he could not be found in the state. (See Appellant's Opening Brief)

The case of *Ashley v. Superior Court In and For Pierce County*, 83 Wn.2d 630, 521 P.2d 711 (1974) is the seminal case on service by publication or mail. As a result of *Ashley* our Supreme Court ordered a new court rule codifying that case in what is now known as CR4(d)(4). CR 4(d)(4) states,

> (4)Alternative to Service by Publication. In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at the party's last known address or any other address determined by the court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. The summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint within 90 days from the date of mailing. Service under this subsection has the same jurisdictional effect as service by publication.

As can be seen this court rule can appear somewhat complicated but spells out what is needed for publication or mail service on a non-moving party. The court in the case of *In re Marriage of Logg*, 74 Wn.App. 781, 875 P.2d 647 (Div. 3 1994) analyzed the application of CR 4(d)(4) and indicated that a summons for publication and ipso facto, an order for mailed service, is allowed only if the following requirements are met:

1. The defendant cannot be found in the state ...

2. Plaintiff, his agent, or attorney file an affidavit stating that he believes the defendant cannot be found in the state.

3. A copy of the summons has been mailed if the residence is known. [Obviously only necessary for publication, sic]

4. There is a statement in the affidavit that the defendant, being a resident of this state, has departed therefrom with intent to defraud his creditors, ***or the Respondent/Defendant, to avoid the service of a summons, keeps himself concealed therein with like intent****. (Emphasis added) (Citing Dobbins v. Beal, 4 Wash.App. 616, 619, 483 P.2d 874, review denied, 79 Wash.2d 1007 (1971)).*

The *Logg* court also indicated that a "bare recitation of these factors is insufficient. The conclusions are required, but so are the facts supporting the conclusions. Citing *Brennan v. Hurt*, 59 Wash.App. 315, 317, 796 P.2d 786 (1990), review denied, 116 Wash.2d 1002, 803 P.2d 1310 (1991).

In the *Logg* the affidavit did not recite that the Defendant could not be found in the state; it only stated that he was on the road frequently and was difficult to locate at any given time. The

summons was not mailed to any of the three addresses the defendant provided, although counsel apparently thought one of the addresses was current, at least for purposes of mailing. There was also "no averment that Mr. Logg left the state *for purposes of avoiding service*, let alone a statement of supporting facts." (Emphasis added) See *Lepeska v. Farley*, 67 Wash.App. 548, 554, 833 P.2d 437 (1992). Finally, there was also no allegation that the defendant *concealed himself within the state to avoid service*.

As further stated in *Logg,* publication requirements (thus mailed service requirements) are strictly construed. See *Kent v. Lee,* 52 Wash.App. 576, 579-80, 762 P.2d 24 (1988). Cf., *Jones v. Stebbins*, 122 Wash.2d 471, 481-82, 860 P.2d 1009 (1993), as also cited in *Logg*. "At least one of the eight factual scenarios enumerated in RCW 4.28.100 to which publication applies must be recited in the affidavit. *Kent*, 52 Wash.App. at 579, 762 P.2d 24." The *Logg* court also said, "An affidavit that omits the essential statutory elements is as good as no affidavit at all." *Kent*, at 579, 762 P.2d 24.

The eight factual scenarios cited in RCW 4.28.100 are as follows:

> (1) When the defendant is a foreign corporation, and has property within the state;
> (2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his or her creditors, **or** to avoid the service of a summons, or keeps himself or herself concealed therein with like intent; (Emphasis added)

(3) When the defendant is not a resident of the state, but has property therein and the court has jurisdiction of the subject of the action;
(4) When the action is for (a) establishment or modification of a parenting plan or residential schedule; or (b) dissolution of marriage, legal separation, or declaration of invalidity, in the cases prescribed by law;
(5) When the action is for nonparental custody under chapter 26.10 RCW and the child is in the physical custody of the petitioner;
(6) When the subject of the action is real or personal property in this state, and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly, or partly, in excluding the defendant from any interest or lien therein;
(7) When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate in the county where the action is brought, or satisfy or redeem from the same;
(8) When the action is against any corporation, whether private or municipal, organized under the laws of the state, and the proper officers on whom to make service do not exist or cannot be found;

In this case, Ms. Haynes attorney specifically plead #(2), that Mr. Secco *keeps himself concealed to avoid service*, in her attorney Mr. Dec's declaration in support of service by mail, therefore, this requirement was met to establish jurisdiction as well as specifically following CR 4(d)(4)'s instructions.

C. The Appellant claims that the reason why the Commissioner denied his original motion to vacate, was because he was not timely in filing his motion; however, timeliness of filing was not the only basis the Commissioner enumerated in support of a denial of Mr. Secco's motion to vacate the default decree.

The Appellant states in his brief that his original motion to vacate was primarily focused on his theory that the default decree was void for lack of jurisdiction, citing CR 60(b)(5), and states that

instead the "Trial Court" (who was Commissioner Anderson according to his Clerk's Papers designation) focused primarily on the timeliness of his motion, rather than the more important issue of "voidness". [See p. 17 of Appellant's Opening Brief. He then refers to CP 185 as the source of this argument.]

CP 185 is the transcript of the hearing and ruling by Commissioner Anderson. That transcript is "dicta" and is not incorporated in the Order of October 30, 2015. The actual Order states in the findings that, "After reviewing the case record to date, and the basis for the motion, the court finds that service was properly effectuated and Respondent failed to present a compelling reason as to why the matter should be vacated." CP 166.

It is understood that the Appellate Court may look to oral findings to interpret the written findings of fact, if necessary. *State v. Hescock,* 98 Wn.App. 600, 606, 989 P.2d 1251 (1999). When we look at the transcript of Commissioner Anderson's ruling she did not deny the CR 60 motion simply because the Appellant took a long time to file it. She made it clear that there were several reasons for denying the motion. The Commissioner's reasons for denying the motion were as follows:

1. The motion to allow service by mail was proper. CP 183-184;

2. There were multiple attempts to serve Mr. Secco without success. CP 183;
3. Mr. Secco's incarceration was really not an excuse for not even sending the court a letter about the default and presentment; Mr. Secco did nothing. CP 184-185;
4. It was unreasonable to rely on the fact that Ms. Haynes also lived in the same house as a reason why Mr. Secco should not answer the door to allow deputies to serve him. CP 183-186;
5. That Ms. Haynes had stopped living at the joint residence with the Appellant when he was to be served by mail; therefore, he was the only one to get the mail during that time. CP 184;
6. Mr. Secco offered no explanation why he would not have received the mail service of the summons at the Augusta residence, where he lived. CP 183-186;
7. Mr. Secco never, from review of the transcript, attempted to respond properly to the summons. CP 183-186;

The Commissioner specifically found many reasons for not granting the motion. It was not just the timeliness of Mr. Secco's motion that was the problem.

D. The Court Commissioner did consider appropriate equitable factor of Mr. Secco being incarcerated as an alleged impediment to his responding to the Petition, before making its ruling on the Appellant's CR 60 motion.

The Appellant alleges that the trial court failed to consider CR 60 factor (b)(9), his unavoidable misfortune of being incarcerated in deciding to deny his motion to vacate the default, and that this was error. However, Commissioner Anderson specifically showed that she in fact did consider his incarceration in this matter. She said:

> ". . . there is proof in this court file that, as Ms. Costello indicates, not only did they provide Mr. Secco notice of presentment on final documents while he was incarcerated, but there was also notice of these [sic] are the proposed final orders that are being proffered to the Court. And Mr. Secco did not make an attempt. [Sic] there are avenues a person, even representing yourself, could put some sort of correspondence in the court file. We see it all the time that we get mail from the jail, Nothing appeared in this court file," and the default orders were entered. CP 185.

Commissioner Anderson specifically showed she considered at least 7 different factors in this decision to deny the motion to vacate, and specifically also dealt with the fact that Mr. Secco was incarcerated. And also, dealt with the fact that Ms. Haynes lived there with him from time to time. CP 182-186. She and the Revision Judge considered each fact in this matter individually; there was not simple "denial" ruling. Each argument was considered individually and clearly, far in a way satisfying the *Calhoun v. Merritt*, 46 Wn.App 616, 731 P.2d 1094 (1986) case standard. Again, Mr. Secco's incarceration did not in any

way hamper him from at least sending a letter to the court file asking for some leeway in avoiding the entry of the final default orders. Instead he did nothing, apparently passively avoiding anything that would help him avoid the effect of the original default; which also was in no way Ms. Haynes' fault.

E. Although Mr. Secco claimed that Ms. Haynes somehow committed fraud by allowing her attorney to state that the Appellant was "out of state" to obtain the order allowing service by mail; he fails to show how that was fraud, when all that is needed to obtain the order is to show that Mr. Secco was intentionally avoiding service, as an alternative part of a CR4(d)(4) declaration.

Again, a careful reading of CR 4(d)(4) indicates that there are two bases for obtaining an order to serve someone by mail. You can either show that they are not in the state, or that they are avoiding service. In this case, Spokane County uses a standard form for a motion for service by mail. That form asks some questions about where the respondent may be living and why mail service is appropriate. Ms. Haynes attorney did not know why Mr. Secco would not come to his door where he lived, other than that was his last known address. When the Spokane Sheriff's department were unable to serve him on several occasions, that triggered the court rule allowing service by mail as long as the affiant indicated that he was hiding from service of process. There was no fraud involved because the court rule allows the party seeking mail service to cite to either option of living outside

the state or avoiding service as a basis for this kind of service. See *Logg*, supra.

Finally, to commit fraud the party claiming that the other party committed fraud must satisfy the traditional nine elements of fraud. See e.g. See *Beckendorf v. Beckendorf*, 76 Wash.2d 457, 462, 457 P.2d 603 (1969); *Pedersen v. Bibioff*, 64 Wash.App. 710, 723 n. 10, 828 P.2d 1113 (1992). These cases show that you just can't shout out "fraud" in your argument without analyzing whether the nine elements have been met to claim fraud.

In this case Mr. Secco raises "fraud" as a basis to overturn the default, but does not show that that occurred. Ms. Haynes said she lived at Augusta, but that because of her fear of Mr. Secco did not live there all the time, and specifically stayed away from him during the time for mail service.

Living together in a home is common in the first part of a dissolution; it is rare to find people who are prepared for divorce, let alone moving to new residences. Should Mr. Secco's argument be adopted by the courts, everyone could simply avoid being served divorce papers stating that the other spouse was there, so they really were never served. This would throw the entire service of process into chaos and jam the courts with unrealistic expectations of having to find another residence before anyone could be served. And it would also encourage

passive avoidant spouses to use the shield of a "shared residency" to constantly avoid service; a point made by Commissioner Anderson in her discussion of this factor. CP 183-185. There was no fraud here.

F. Ms. Secco should be awarded her fees and costs for having to respond to this matter, which was caused by the Respondent/Appellant's intransigence.

Although attorney's fees in a marital dissolution are most often based on the concept of "need and ability to pay", case law indicates that when there is clear evidence of intransigence fees can be awarded under RCW 26.09.140 or in equity.

In the case of *In re Matter of Marriage of Greenlee*, 65 Wn.App. 703, 829 P.2d 1120 (Div. 1 1992), the court awarded fees due to the wife's intransigence in a financial matter under their decree. In that case the husband was forced to bring the wife back to court because she failed to "refinance the home" as ordered to pay an IRS bill. Had he not filed the motion she would not have been forced to refinance the house to pay that important lien. This was a hold harmless case and the ex-husband prevailed in every respect. In addition, the parties were bound by their decree to follow it just as one would be required to follow a contract, especially that section dealing with indemnification for costs. Since Ms. Greelee failed to do what she was ordered to do as found by the court, she was ordered to refinance and pay his

fees/sanctions which were $1,000.00.

Likewise, in this case, but for the Respondent's intransigence in failing to do anything about being served with notice, especially in jail, Ms. Haynes has now spent tremendous amounts of money on fees to defend against something he alone did that caused himself to be defaulted. It is not fair for her to have to ride along on this legal journey that came about because of his failure to properly respond. He should pay her fees for this intransigence.

III. Conclusion

The Appellant failed to respond to several attempts to be served personally at his residence and was deemed by the court to have hid out, so much so that a request to serve by mail was granted. Mr. Secco was served by mail and did not respond. Subsequently he was defaulted.

After the default order was entered the wife's new counsel did Mr. Secco a favor and served him while he was in jail with a notice of presentment of the final papers; ostensibly giving him a second chance. Mr. Secco failed to respond in any way to the presentment, frankly ignoring it. Final papers were entered in favor of Ms. Secco.

Many months later Mr. Secco filed a motion to vacate the final orders but was denied that motion. He filed a revision but

that was denied as well. He appealed that denial. He then filed another Motion to Vacate only this was based on alleged fraud. That was also denied by the revision Judge. He appealed and consolidated that appeal with this one.

Mr. Secco was properly served and failed to respond. There was no fraud. The Decree should stand, and Ms. Haynes should receive her fees for having to respond to this Appeal.

Respectfully submitted this 18th day of December 2017 by,

Gary R Stenzel, WSBA #16974

Declaration of Mailing

I, Seju Oh, declare under penalty of perjury pursuant to the laws of the state of Washington that I am now and all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of twenty-one years; that on Dec. 18, 2017, a copy of this PETITION FOR REVIEW was delivered by mail to the office of Eric Schneider, Attorney for Appellant, at 421 W. Riverside #614, Spokane, WA 99201.

Seju Oh

FILED
NOVEMBER 16, 2017
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

MELODY SECCO (nka HAYNES),	)	
	)	No. 34050-3-III
Respondent,	)	(consolidated with
	)	No. 34698-6-III)
v.	)	
	)	
GORDON SECCO,	)	UNPUBLISHED OPINION
	)	
Appellant.	)	

SIDDOWAY, J. — In successive and consolidated appeals, Gordon Secco challenges the superior court's denial of his motions to vacate orders entered in this proceeding to dissolve his marriage to Melody Haynes (formerly Melody Secco). His first appeal assigns error to the denial of his motion under CR 60(b)(5) to vacate an order of default he contends was void for lack of personal jurisdiction. The second assigns error to the court's denial of a subsequent motion under CR 60(b)(4) and (9) to vacate the

order on the basis of fraud or his inability to defend as the result of an unavoidable misfortune.

The first appeal is dispositive. Mr. Secco overcomes the presumption that the court had jurisdiction to enter the decree and final orders. Ms. Haynes is unable to demonstrate an honest and reasonable effort to personally serve Mr. Secco before seeking approval for service by mail. We reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

Melody Secco petitioned for a dissolution of her marriage to Gordon Secco on February 4, 2014. Two months later, on April 2, she moved the court for an order allowing her to serve him by mail. Using a superior court form, her lawyer included the required averments that Mr. Secco "cannot be found in this state" and that Ms. Haynes had not been able to locate or serve him because he "has concealed himself/herself to avoid service of summons." Clerk's Papers (CP) at 13-14. As facts supporting these averments, counsel stated, "Service has been attempted 7 times by 2 different authorities and have been unsuccessful," and, as efforts made to locate Mr. Secco, stated "5 attempts by Spokane County Sheriff's Department. 2 attempts by ____." CP at 14.

The motion was also supported by a sheriff's return of service stating that "[a]fter diligent search and inquiry" the signatory deputy sheriff had been unable to serve Gordon Secco at 8010 E. Augusta Avenue in Spokane Valley (the couples' home address),

indicating "five attempts made." CP at 17. A further declaration from Mark Cavadini, who described himself as a friend of Ms. Haynes, declared:

> Try to serve paper on the following date
> Feb 18, 2014 at time of 3:00 pm
> Feb 19, 2014 at time of 1:30 pm
> Feb 20, 2014 at time of 2:00 pm
> At Every attempt I could hear noise inside of the house, But no answer!
> Address 8010 E. Augusta Ave. Spokane, WA

CP at 15.

Undisclosed in the declarations was the fact that Ms. Haynes continued to reside at the couple's home at least part time during the early February to early April time frame when service of process was being attempted. According to Mr. Secco, during that time, "I shared the same home with [Ms. Haynes]. Not only did we share the same home, but we slept in the same bed." CP at 87. Ms. Haynes claims that for the most part she was staying with her daughter or in a rental home owned by her ex-husband during that time frame, but she admits to staying at her and Mr. Secco's home once or twice a week. The "once or twice a week" estimate was corroborated by Ms. Haynes's daughter, who testified that her mother stayed at the couple's home at her divorce lawyer's insistence, evidently in the belief it would advance her legal position in the property division. CP at 160.

An ex parte order allowing service by mail was entered by a court commissioner on April 7. According to a declaration filed by Ms. Haynes's lawyer, he served Mr.

Secco by mail the next day. Ms. Haynes claims to have stayed away from the couple's home during the time the substitute service was being effected, so there could be no suggestion that she diverted papers mailed to Mr. Secco at their home address. Mr. Secco nonetheless claims he never received them.

On July 9, 2014, Ms. Haynes moved for and was granted an order of default.

Six weeks later, on the morning of August 22, Mr. Secco and Ms. Haynes were both at the couple's home before going to work when Mr. Secco slammed a door into Ms. Haynes's foot, breaking a bone. She claims he engaged in an extended assault that began with pushing her down the stairs and concluded with his slamming her foot in the door and then choking her. Mr. Secco claims her foot was injured accidentally, when Ms. Haynes, and then he, pushed the door into the other during an argument. Ms. Haynes initially went to work but was taken to the hospital by a coworker, and hospital personnel reported the domestic violence assault to police. By 9:17 a.m. that morning, a deputy sheriff located Mr. Secco at his place of work and arrested him.

Mr. Secco was charged with second degree assault and unlawful imprisonment. While Mr. Secco was in custody awaiting trial, Ms. Haynes noted presentment of a final divorce decree for October 27. Notwithstanding the default order, her lawyer arranged for service of the materials to be presented on Mr. Secco at the correctional facility where he was detained. Mr. Secco claims this is when he first learned of the divorce action. According to Mr. Secco, after being served at the correctional facility, he attempted to

contact two attorneys but having no access to funds, he was unable to pay a retainer. He also claims to have tried to make bail, but bail bond companies considered him a flight risk since he is a Canadian citizen.

At the presentment on October 27, the trial court entered findings of fact and conclusions of law and signed the final decree of dissolution. Ms. Haynes requested and was awarded the entire interest in the couple's home, which Mr. Secco contends was their most significant asset. The final orders were mailed to Mr. Secco on November 10.

Mr. Secco was acquitted of the domestic violence charges and released from incarceration on January 21, 2015.

In August 2015, seven months after he was acquitted and released, Mr. Secco filed a motion to show cause why the order of default should not be vacated, arguing that the trial court never acquired personal jurisdiction over him and the default and later orders were void under CR 60(b)(5). A court commissioner denied the motion, commenting in her oral decision on Mr. Secco's delay in seeking relief and his failure to take action in response to the materials he admitted receiving in October 2014. The written order prepared by counsel and entered by the court said nothing about delay, however, stating instead that "[s]ervice was properly effectuated and [Mr. Secco] failed to present a compelling reason as to why this matter should be vacated." CP at 166. A motion for revision was filed and denied, with the superior court stating only, "I'm going to decline

to revise the commissioner." Report of Proceedings (RP) (Dec. 3, 2015) at 23. Mr. Secco filed his first appeal.

Five-and-a-half months later, with the first appeal pending, Mr. Secco sought a second order to show cause why the default decree of dissolution should not be vacated, this time relying on CR 60(b)(4) (providing relief for "[f]raud . . . , misrepresentation, or other misconduct of an adverse party") and CR 60(b)(9) (providing relief for "[u]navoidable casualty or misfortune preventing the party from . . . defending"). CP at 218. The trial court denied the motion, questioning Mr. Secco's right to bring serial CR 60 motions but also finding a lack of evidence of all nine elements of common law fraud.

Mr. Secco filed his second appeal. We consolidated it with the first.

ANALYSIS

Mr. Secco's first appeal, assigning error to his motion to the denial of his motion to vacate the trial court's orders and judgment as void, is dispositive. There is no need to address the second.

Service of process by means other than personal service, i.e., constructive and substitute service, "is in derogation of the common law and cannot be used when personal service is possible." *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111 P.3d 271 (2005). "When the defendant cannot be found within the state," however, and an affidavit is filed asserting that fact and other prerequisites, the court may authorize service by publication. RCW 4.28.100. By court rule, if the circumstances justify

service by publication and the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order service by mail. CR 4(d)(4).

Strict compliance with the statute authorizing service by publication is required for either type of substitute service. Compliance in this case required two things, the first being that Mr. Secco could not be found within the state *in fact*, which is established by demonstrating Ms. Haynes's honest and reasonable effort to locate him for service before seeking service by mail. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1987). Compliance also required a sufficient affidavit from Ms. Haynes or on her behalf, averring that (1) after a diligent search, Mr. Secco could not be found in Washington; (2) he was a resident of Washington; and (3) he either left the state or concealed himself within it, with the intent to defraud creditors or avoid service of process. *Pascua v. Heil*, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005); RCW 4.28.100(2). To ensure that substitute service is being used only as a last resort, the affidavit must provide the specific facts supporting the required assertions, not conclusory statements, and the authorizing judge must closely scrutinize the facts provided rather than merely serving as a rubber stamp. *Pascua*, 126 Wn. App. at 527-28.

When allegedly defective substitute service is followed by entry of an order of default and default judgment, the defendant may move to set aside the judgment as void for lack of personal jurisdiction. CR 60(b)(5); *Vukich v. Anderson*, 97 Wn. App. 684,

686, 691, 985 P.2d 952 (1999). When there is a recital in a default judgment that proper service of process has occurred, a presumption of jurisdiction arises, but it can be overcome. *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 186, 765 P.2d 1333 (1989) (citing *Burns v. Stolze*, 111 Wash. 392, 395-96, 191 P. 642 (1920)). Once overcome, the burden shifts to the plaintiff to produce evidence that a reasonable search was made. *Id.* at 187. If service was not proper, dismissal is required even where a defendant has actual notice of the lawsuit. *In re Marriage of Logg*, 74 Wn. App. 781, 784, 875 P.2d 647 (1994). There is no time limit to bring a motion to vacate a void judgment. *Servatron v. Intelligent Wireless Prods., Inc.*, 186 Wn. App. 666, 679, 346 P.3d 831 (2015).

Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a motion to vacate a default judgment for want of jurisdiction is reviewed de novo. *Ahten v. Barnes*, 158 Wn. App. 343, 350, 242 P.3d 35 (2010). The issue before the court in a *postjudgment* CR 60(b) motion is not the sufficiency of the original affidavits but "what *in fact* did the plaintiff do before seeking [substitute] service." *Brennan v. Hurt*, 59 Wn. App. 315, 319, 796 P.2d 786 (1990). What in fact happened can be supported by supplemental affidavits. *Id.* This is unlike the situation where the defendant specially appears and makes a *prejudgment* challenge to allegedly improper service of process; in that case, the original affidavits alone are reviewed for sufficiency. *E.g.*, *Parkash v. Perry*, 40 Wn. App. 849, 851-53, 700 P.2d 1201 (1985).

Our dissenting colleague finds this difference in procedure between prejudgment and postjudgment challenges anomalous, but it makes sense given the stakes at issue. If a defendant specially appears but defends on the basis of insufficient service, he or she is aware of the litigation and able to defend. The inquiry therefore ends with a review of whether the plaintiff's submission in support of substitute service was facially defective, establishing that the trial court erred in authorizing it. The stakes for the defendant do not justify looking beyond the submission to determine whether the plaintiff in fact fully discharged the duty to attempt personal service.

By contrast, when a default judgment has been entered that will deprive the defendant of the opportunity to be heard on the merits unless set aside, the stake for the defendant—due process—warrants looking at whether the circumstances justified substitute service *in fact.*

Since the prerequisite to disfavored substitute service is that the "defendant cannot be found within the state," RCW 4.28.100, the first inquiry for the court presented with a postjudgment challenge to substitute service is whether the defendant really could not be found. A central theme of cases that address when it is fair to say a defendant cannot be found in Washington is "'that while not all conceivable means of personal service have to be exhausted before service by publication is authorized, there must have been an honest and "reasonable effort" to find the defendant.'" *Brenner*, 53 Wn. App. at 186 (quoting *Longview Fibre Co. v. Stokes*, 52 Wn. App. 241, 245, 758 P.2d 1006 (1988)).

This includes following up on any information possessed that might reasonably assist in locating a defendant. *Id.*

Mr. Secco has never contended that because Ms. Haynes resided part time in the couple's home, she could have served him—he acknowledges that as a party she could not effect proper service. But as he testified in support of his first motion to vacate the default, "Since we lived in the same house and [Ms. Haynes] was also aware of my work schedule, if she wanted to get me served all she had to do was have a friend, process server or sheriff's office[r] come over at a time that she knew I was going to be home, or have them serve me at a time she knew I was going to be at work." CP at 87. As he argued in his briefing in the trial court, "All she had to do is bring a process server with her on one of the nights that she was staying [at the home], or open the door for service of process to be effectuated." CP at 196. These are valid points that were unanswered in the trial court. That Mr. Secco was found at work and arrested at 9:17 a.m. on August 22 is evidence of just one of the service alternatives open to Ms. Haynes and her lawyer.

An honest and reasonable effort includes not only following up on available information, it also means following up on available ways of personally contacting a defendant. If the objective was truly to accomplish personal service, not simply to create a paper trail, a reasonable party would have pursued one of the simple and obvious alternatives for personally contacting Mr. Secco. Ms. Haynes did not offer any reason for

her failure to attempt these other means of service, never providing testimony that they would have exposed her to danger as speculated by the dissent.[1]

Since Ms. Haynes did not meet her burden of demonstrating an honest and reasonable effort to serve Mr. Secco, there is no need to reach the issue of his behavior.

---

[1] The record belies speculation that Ms. Haynes believed in February and March 2014 that providing more assistance in serving her husband would have placed her in danger. Mr. Secco filed a transcript of her January 20, 2015 testimony at his criminal trial for the assault she alleged occurred five to six months after the attempts at service. She testified:

> Q. . . . [H]ow did the marriage fall apart?
>
> A. It was gradual. He's a very negative person, kind of hard to be around. He's an angry person. We kind of fell apart, didn't have really anything in common. I didn't like being around him anymore, just wanted to be by myself.
>
> Q. When did that start to happen that you wanted to be by yourself?
>
> A. Over a year ago, maybe like the summer of '13.
>
> Q. Okay. Now, you said there were anger issues and stuff like that. Was the marriage ever violent before—
>
> A. No.
>
> Q. —this incident?
>
> A. No.
>
> Q. Okay. No issues there for you in terms of—
>
> A. No.
>
> Q. —violence? Okay. So just personality clashes?
>
> A. Yes.
>
> Q. Is that fair to say?
>
> A. Yes.

CP at 258-59.

Whether Mr. Secco received the summons and complaint that was allegedly mailed also need not be addressed; it is irrelevant. The trial court erred in concluding that it had personal jurisdiction over Mr. Secco. The judgment should have been vacated as void.

Mr. Secco also assigns error to the application by the court commissioner of the wrong legal standard to his CR 60(b)(5) motion, pointing to the commissioner's discussion during her oral ruling of his failure to take earlier or different action. Since the superior court denied the revision motion without findings, conclusions, or an oral explanation, we deem the commissioner's findings and conclusions to have been adopted by the trial court. *See In re Marriage of Williams*, 156 Wn. App. 22, 27-28, 232 P.3d 573 (2010).

As noted earlier, there is no time limit to bring a motion to vacate a void judgment. The commissioner's oral comments suggesting she was mistakenly concerned about delay may have been no more than a thinking process. Her oral reasoning has no final or binding effect since no finding of delay was incorporated into findings, conclusions and a judgment or order. *State v. Collins*, 112 Wn.2d 303, 308, 771 P.2d 350 (1989). We review the commissioner's order, not its oral ruling.

In conclusion, when a party seeks to provide notice of its lawsuit through disfavored substitute service, and necessarily does so ex parte, it can be required, later, to prove that it first honestly and reasonably tried to personally serve the defendant. The focus will be on its good faith effort, not on whether it was unreasonable for the

defendant to refuse to respond to a knock at the front door. Parties seeking to use substitute service should govern themselves accordingly.

The order of default, findings, conclusions and decree are reversed and the matter is remanded for further proceedings.[2]

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, J.

I CONCUR:

Lawrence-Berrey, A.C.J.

[2] Ms. Haynes seeks an award of attorney fees and costs on the basis that Mr. Secco has been intransigent. We find no intransigence and deny the request.

No. 34050-3-III (consolidated with No. 34698-6-III)

KORSMO, J. (dissenting) — The governing law most likely is as my learned colleagues state that it is, but it should not be so. The current approach rewards those who attempt to evade service and imposes extra obligations on those attempting to serve the unwilling. Another unsettling aspect of this approach is to put this court in the position of being a fact-finder and determining facts differently than the trial court did. If this is what the law requires, it is time to do things differently.

The wife presented ample evidence that the husband evaded service. Two of their neighbors were regular witnesses to the service efforts and the husband's subsequent visit to the mailbox after the server had left the premises; they could hear the server's pronouncements about his reasons for being there. Clerk's Papers (CP) at 145-148. It is difficult to imagine that the husband did not. A person inside the house during one service effort likewise provided a declaration that the husband was aware of the presence of the process server due to a driveway alert device and had his guest (the declarant) remain silent until the server was gone. The husband advised his guest that "Mel is trying to serve me." The two men even dropped to their knees in order to not be observed. CP at 149-150. The husband's declaration to the contrary rings quite hollow.

Having considered this evidence, a court commissioner and, on revision, a superior court judge, concluded that service by mail was proper. I agree and would affirm on that basis. However, the majority says that because the matter proceeded to a default judgment, the focus must change from the reasons that service by mail was proper to whether or not additional efforts at personal service could have been attempted with some possibility of success despite Mr. Secco's repeated efforts to avoid being served. That is a disconnection in logic that my simple mind cannot follow. Moreover, this change in focus effectively collaterally attacks the decision to permit service by mail by requiring the plaintiff to come up with additional evidence to justify the service by mail. That also makes no sense to me. Once the service by mail statute was satisfied, there is no reason to undermine that statute's purpose by requiring additional justification for using the statute by showing that other methods of attempting personal service would have been unavailing.

The majority also appears to accept as true Mr. Secco's unproven allegation that he never received the service paperwork mailed to him. He claims to have never received it, but there is no evidence to support that claim (mail returned to sender, etc.). On this record, it appears that a trier-of-fact would have severe reasons to doubt his assertions and the superior court, understandably, never found that he did not receive the mailing.

Why the majority finds this contention believable is beyond me. More importantly, I do not understand fact-finding to be an appellate function.[1]

Although probably not necessary to this dissent, I do want to take issue with the contention made by the husband in argument and acknowledged by the majority, at page 9, that the wife could have facilitated service by arranging to be present and letting the process server into the house. I imagine this suggestion will send chills down the back of many victim advocates. Seldom is a strained domestic relationship more volatile than when one party is served with dissolution or protection order paperwork. *See, e.g.*, *Washburn v. City of Federal Way*, 169 Wn. App. 588, 283 P.3d 567 (2012), *aff'd*, 178 Wn.2d 732, 310 P.3d 1275 (2013) (affirming liability against city for murder committed when process server left victim alone with killer after serving protection order). Whether or not Mr. Secco presented a genuine threat to his wife, the suggestion that such a risk

[1] *See State v. Hill*, 123 Wn.2d 641, 644-645, 870 P.2d 313 (1994) (rejecting line of authority permitting appellate courts to undertake independent review of the evidence). We do not weigh the evidence under any circumstance. *Thorndike v. Hesperian Orchards, Inc.*, 54 Wn.2d 570, 575, 343 P.2d 183 (1959); *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn. App. 710, 717, 225 P.3d 266 (2009). We similarly do not substitute our judgment for that of the trier of fact. *Hesperian*, 54 Wn.2d at 575.

must be undertaken to serve someone who has been resisting service should be rejected as a matter of public policy.[2]

Viewing this record in a light most favorable to the judgment below, as I think we should be doing, we have the following facts: (1) Mr. Secco eight times evaded service by people he knew were trying to serve dissolution paperwork; (2) Mr. Secco received the documents in the mail; (3) Mr. Secco did not appear in the action; (4) Mr. Secco was even served with notice of the default hearing, but did not contact the court to explain his inability to appear. Why these facts, alone or in combination, require vacation of the judgment is a mystery to me. The fact that he can hypothesize other methods of personal service that possibly might have been effective is no basis, in my mind, for forcing the plaintiff to try to establish how Mr. Secco would have been unable to avoid service if those other avenues had been attempted. She should not bear that burden.

---

[2] The remaining suggestion that Mr. Secco should have been served at work, just as he was arrested there many months after evading service at home, is not supported by any evidence. The record is devoid of evidence that Mr. Secco would not have been able to continue to avoid service at work. Would his employer have permitted a process server on the premises? Would the business have been disrupted? Did he work at a location a process server could reach without assistance of management? I would put the burden on Mr. Secco, who contends this was a viable method of service, of establishing that fact. In light of his ongoing efforts to avoid service to that point, there is no reason to think this method would have been effective. I also suspect that most people other than Mr. Secco would rather not be served in the presence of fellow employees.

I would hold that when a plaintiff shows that a defendant is purposely evading service, the burden falls on the defendant to prove that the plaintiff had more reasonable means of serving him that also would have overcome his best efforts at evasion. If we do anything less, we simply reward bad behavior and render our courts less accessible to those who cannot afford to pay for around the clock efforts at serving a reluctant party.

Since our case law appears to create incentives for defendants to evade reasonable efforts at service by increasing costs and requiring more effort from plaintiffs, I respectfully dissent.

Korsmo, J.

Renee S. Townsley
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CASE # 340503
Melody Secco v. Gordon Secco
SPOKANE COUNTY SUPERIOR COURT No. 143002783

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please file an original and two copies of the motion (unless filed electronically). If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion (may be filed by electronic facsimile transmission). The motion for reconsideration and petition for review must be received (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Renee S. Townsley

Renee S. Townsley
Clerk/Administrator

RST:jab
Enc.

c: **E-mail**—Hon. Raymond F. Clary

OPINION FACT SHEET

Case Name: *Secco v. Secco*

Case Number: 34050-3-III (consol. w/ 34698-6-III)

1. TRIAL COURT INFORMATION:

A. SUPERIOR COURT: Spokane
Judgment/Order being reviewed: Order on motion to vacate default decree of dissolution
Judge Signing: Hon. Raymond F. Clary
Date Filed: December 15, 2016

B. DISTRICT COURT:
Judgment/Order being reviewed:
Judge Signing:
Date Filed:

2. COURT OF APPEALS INFORMATION:
Disposition* Check only 1

( )	Affirmed	( )	Other
( )	Affirmed as Modified	( )	Reversed and Dismissed
( )	Affirmed in Part/Remanded**	( )	Remanded**
( )	Affirmed/Reversed-in part and Remanded**	( )	Reversed
( )	Affirmed/Vacated in part	( )	Reversed in part
( )	Affirmed in part/Reversed in part	( )	Remanded with Instructions**
( )	Denied (PRP, Motions, Petitions)	**(X)**	**Reversed and Remanded****
( )	Dismissed (PRP)	( )	Reversed, Vacated & Remanded**
( )	Granted/Denied in part	( )	Vacated and Remanded**
( )	Granted (PRP, Motions, Petitions)		

* These categories are established by the Supreme Court
** If remanded, is jurisdiction being retained by the Court of Appeals? ( ) YES (X) NO

3. SUPERIOR COURT INFORMATION (IF THIS IS A CRIMINAL CASE, CHECK ONE)

Is further action required by the superior court?
(X) YES
( ) NO

LHS
Authoring Judge's Initial

Log Number: U-254
Oral Argument Date: 10/18/2017

DO NOT CITE. SEE GR 14.1(a).

Court of Appeals Division III
State of Washington

Opinion Information Sheet

Docket Number: 34050-3
Title of Case: Melody Secco (nka Haynes) v. Gordon Secco
File Date: 11/16/2017

SOURCE OF APPEAL

Appeal from Spokane Superior Court
Docket No: 14-3-00278-3
Judgment or order under review
Date filed: 12/15/2015
Judge signing: Honorable Raymond F. Clary

JUDGES

Authored by Laurel Siddoway
Concurring: Robert Lawrence-Berrey
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