69106-6

69106-6

CAUSE No. 69106-6-I

COURT OF APPEALS, DIVISION ONE
IN THE STATE OF WASHINGTON

THERESA SCANLAN, Appellant,

v.

KARLIN TOWNSEND and "JOHN DOE" TOWNSEND
Wife and Husband, Respondents.

BRIEF OF RESPONDENT TOWNSEND

Michael E. Abrahamson, WSBA No. 28717
Jill R. Skinner, WSBA No. 32762
Attorneys for Respondent Townsend

Hollenbeck, Lancaster, Miller & Andrews
15500 SE 30th Place, Suite 201
Bellevue, WA 98007
Telephone: (425) 644-4440
Fax: (425) 747-8338
Email: mike.abrahamson@farmersinsurance.com
jill.skinner@farmersinsurance.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

I. ISSUE PERTAINING TO ASSIGNMENTS OF ERROR

Did the trial court properly grant Ms. Townsend's Motion to Dismiss where Ms. Scanlan did not serve Ms. Townsend personally or by leaving a copy of the summons at Ms. Townsend's usual abode with a suitable resident therein, thereby failing to accomplish service?

II. STATEMENT OF THE CASE

Ms. Townsend wishes to add a few facts to Ms. Scanlan's Statement of the Case. Ms. Townsend did not reside with her parents at 2124 NE 155th Street, Vancouver, WA 98686, at the time her father was given papers by the process server on or about December 21, 2011. CP 11. In fact, Ms. Townsend has not resided with her parents since 1991. CP 11. Ms. Townsend's father told the process server that Ms. Townsend did not reside at 2124 NE 155th Street, Vancouver, WA. CP 123.

After allowing Ms. Scanlan to conduct further discovery and file amended responses (CP 51-62, 85-96), the trial court dismissed all claims against Ms. Townsend with prejudice. CP 126-127. In its Order Granting Defendant's Motion to Dismiss for

Lack of Service, the trial court expressly found that Ms. Townsend's "deposition testimony that her father gave her the summons and complaint is insufficient proof of service. Gerean v. Martin-Joven, 108 Wn. App. 963 (2001)." CP 127.

In oral argument on Ms. Townsend's motion, the trial court noted that there was an apparent discrepancy between two Division Three cases that are central to the issues here: Gerean v. Martin-Joven, 108 Wn. App. 963, 33 P.3d 427 (2001), and Brown-Edwards v. Powell, 144 Wn. App. 109, 182 P.3d 441 (2008). RP 3-18. Ms. Scanlan asked the trial court to adopt the holding in Brown-Edwards, while Ms. Townsend asked the trial court to adopt the holding in Gerean. RP 6, 11-12. At the conclusion of oral argument, the trial court stated that it was going to look at cases preceding the two decisions above and would rule on Ms. Townsend's motion after further review. RP 17-18. The trial court found that Gerean applied and dismissed all claims against Ms. Townsend because Ms. Scanlan did not properly serve Ms. Townsend. CP 127.

III. ARGUMENT

A. Washington Courts Require Strict Compliance with Service of Process Statutes.

A defendant is to be served as follows: "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(15).

A defendant's "usual abode" means the place where the defendant is actually living at the time the service is made. Dolan v. Baldridge, 165 Wash. 69, 4 P.2d 871 (1931); Streeter-Dybdahl v. Nguyet Huynh, 157 Wn. App. 408, 236 P.3d 986 (2010), rev. denied, 170 Wn.2d 1026, 249 P.3d 182 (2011). Many courts describe the defendant's usual abode as "the center of the defendant's domestic activity" or a similar phrase. E.g., Streeter-Dybdahl, 157 Wn. App. at 413. Service at a location where the defendant does not reside is insufficient. Gerean v. Martin-Joven, 108 Wn. App. 963, 971, 33 P.3d 427 (2001). Moreover, actual notice does not constitute sufficient service. Gerean, 108 Wn. App. at 972.

Washington courts follow the unambiguous language of all notice of claim statutes: "Washington courts have consistently

held that strict compliance with the requirements of notice of claim statutes is a condition precedent to recovery." Hardesty v. Stenchever, 82 Wn. App. 253, 259, 917 P.2d 577 (1996). "The proper remedy for a plaintiff's failure to comply with the statute is dismissal of the suit." Id.

In fact, Washington courts follow the language of unambiguous statutes as a whole. In interpreting the meaning of a statute, Washington courts are to discern and implement the Legislature's intent. Jackowski v. Borchelt, 174 Wn.2d 720, 278 P.3d 1100 (2012). If the "statutory language is unambiguous and legislative intent is apparent, we will not construe the statute otherwise." Id. at 729.

RCW 4.28.080(15) is unambiguous. It explicitly allows substitute service in only one situation: by leaving a copy of the summons at the house of defendant's usual abode with some person of suitable age and discretion then resident therein. The language of the statute is clear. It does not allow for service upon someone who does not reside with the defendant but who knows the defendant, whether the person agrees or refuses to deliver the papers to the defendant. Because the statute is unambiguous, it is to be interpreted and applied as it is written.

Under RCW 4.28.080(15), because Ms. Scanlan did not serve Ms. Townsend personally, Ms. Scanlan was required to leave the summons at Ms. Townsend's usual abode with a suitable resident therein. Ms. Scanlan did not do that. Instead of complying with the unambiguous language of the statute, Ms. Scanlan attempted to serve Ms. Townsend at her parents' abode. This is simply not allowed under the statute and is insufficient to accomplish substitute service.

B. Washington Law Does Not Support Ms. Scanlan's Claim that Ms. Townsend's Father was the Process Server.

Ms. Scanlan's appeal is based on her argument that Ms. Townsend's father became the process server, regardless of his knowledge or consent, when the true process server left the summons and complaint with him. Ms. Scanlan's claim is contrary to Washington law.

The trial court found that Ms. Townsend's testimony that her father gave her the summons and complaint was insufficient proof of service. The trial court relied on Gerean v. Martin-Joven, 108 Wn. App. 963, 33 P.3d 427 (2001), which is very similar to the instant case and is instructive here. In Gerean, the plaintiff had attempted service on the defendant by giving the summons and

complaint to the defendant's father at the father's home. The defendant had previously lived in her father's home in Deer Park but had moved to Walla Walla with her husband approximately one year before the attempted service. Gerean, 108 Wn. App. at 967. The defendant's father was in Walla Walla the day after the attempted service and gave the documents to the defendant at her home. Id. The Gerean court found that service was insufficient even though the defendant's father gave her the summons:

> The question here is whether service of the summons on Ms. Martin Joven's father at his home in Deer Park is sufficient if the father delivered the papers to her in Walla Walla, where she lives. We agree with the trial court that the service was insufficient.

Id. at 966. Thus, it is irrelevant whether the defendant is eventually given the summons by someone other than the true process server.

In an attempt to distinguish Gerean, Division Three stated in a later case that "[t]he plaintiff in Gerean did not argue that the defendant's father was competent to effect service...." Brown-Edwards v. Powell, 144 Wn. App. 109, 182 P.3d 441 (2008). Contrary to Gerean, other Washington courts, and the unambiguous language of RCW 4.28.080(15), the court in Brown-

Edwards found that a third party can be deemed a process server if handed the papers by the true process server.

The Brown-Edwards court's assessment of Gerean is incorrect. The plaintiff in Gerean did indeed argue that the father was competent to effect service, and the court rejected the plaintiff's argument:

> She nevertheless contends that Ms. Martin-Joven was personally served. '[W]e served it on the person the statute provides for.' RP at 9. 'If you read the statute, a person of suitable age and discretion gave her the documents.' RP at 15. Her argument depends on selective mixing and matching of the statutes and civil rules—a mix and match with which we disagree.

Gerean, 108 Wn. App. at 970. The Gerean court further discussed plaintiff's argument that the father accomplished service:

> Ms. Gerean reasons that a copy of the summons was left at the defendant's place of abode in Walla Walla by her father. The father is a person over 18 years of age, competent, and a non-party. Nothing in CR 4(c) would therefore preclude Mr. Martin from effecting service.

Id. at 970. The plaintiff clearly argued that defendant's father was competent to effect service. The Gerean court unequivocally rejected the plaintiff's argument:

> But the rule goes on to require that personal service within the state must comply with RCW 4.28.080. CR 4(d)(2). And RCW 4.28.080 requires that the person receiving the documents, if not the defendant

> herself, must be served at the defendant's abode while currently residing there.

Id. at 970-71 (emphasis in original). The Gerean court found that the father did not effect service: "The fortuitous delivery of process by the defendant's father did not constitute valid service." Id. at 972.

The Gerean court also rejected the plaintiff's argument that due process was satisfied:

> Ms. Gerean's general observation is correct that constitutional due process is satisfied when the plaintiff employs a method reasonably calculated to inform the defendant of the lawsuit. [Citations omitted.] But this general constitutional observation ignores specific statutory requirements for effective service on an individual defendant in Washington. And Ms. Gerean makes no argument that these statutory requirements are unduly burdensome or unconstitutional.

Id. at 971. In rejecting the plaintiff's analogy to Oregon law, the Gerean court found that Washington law is clear on this issue: "Washington law is well settled that process not handed to the defendant in person must be left at her 'center of domestic activity' to be deemed reasonably calculated to effect actual notice." Id. at 971.

As the trial court likely found when it reviewed Washington law, there are several cases that hold as the Gerean

court did, including in Division One. For example, in Gross v. Evert-Rosenberg, 85 Wn. App. 539, 933 P.2d 439 (1997), the court found that the plaintiff did not accomplish service when she left the summons and complaint at a house owned by the defendant but in which she no longer lived. The court in Gross held that the liberal construction of the substitute service statute did not extend so far as to allow service upon the defendant's former home even though the defendant's daughter and son-in-law lived in the home. Id. 541-43.

In Lepeska v. Farley, 67 Wn. App. 548, 833 P.2d 437 (1992), the court found that substitute service at the defendant's parents' home was invalid: "Under Washington case law, service on Farley at his parents' home, when he maintained his own separate home, fails to comply with the substitute service statute." Id. at 551. The court was not concerned with whether the defendant's parents gave the papers to the defendant.

In Mid-City Materials, Inc., v. Heater Beaters Custom Fireplaces, 36 Wn. App. 480, 674 P.2d 1271 (1984), the court held that service on defendants' son at the son's residence was invalid. The affidavits of service filed by the plaintiff

> showed residence service on the parents at their son's residence in Federal Way by service of summons and complaint on their son at that address. The plaintiff conceded later, however, that at all times herein the parents did not reside with their son in Federal Way but resided in Kent. Such attempted service on the parents was, therefore, invalid for any purpose.

Id. at 484. Thus, even though the summons and complaint were given to the defendants' son, service was not accomplished. Just as in Lepeska, the court was not concerned with whether the defendants' son gave the papers to the defendants.

The Division One cases above, in addition to Gerean, show that Washington law is clear on this point: service on an individual defendant is accomplished by either serving the defendant personally or by leaving a copy at the defendant's usual abode with someone of suitable age and discretion then resident therein. Service is not accomplished by giving the summons and complaint to anyone not a resident of the defendant's usual abode but who knows the defendant. Brown-Edwards appears to be an anomaly and is contrary to many cases in Division One, Gerean, and RCW 4.28.080(15).

C. The Consent of the Person Receiving the Papers is Irrelevant.

Washington law places a specific and undelegable duty upon the plaintiff to properly serve the defendant. RCW 4.28.080(15) unambiguously states how the plaintiff is to accomplish this. A plaintiff cannot pass that burden to anyone who knows the defendant, with or without that person's knowledge or consent.

The statute does not allow a plaintiff to pass the duty of effecting service to someone else even with that person's consent. Indeed, in reaching their holdings the courts in Gross, Lepeska, and Mid-City Materials did not rely on whether the person receiving the papers consented to receiving the papers. In fact, in Gerean the defendant's father accepted the papers from the process server and gave them to the defendant the next day, and that still did not legitimize plaintiff's attempted service.

Moreover, the statute certainly does not support passing the burden of effecting service to someone without his or her consent. It would be unconscionable for Washington courts to hold that a plaintiff can compel someone who knows the defendant but does

not reside with him or her, including a member of the defendant's own family, to serve the defendant with papers initiating a lawsuit.

Ms. Townsend's father testified that he told the process server that Ms. Townsend did not reside in his home. That was all the information the process server needed to know that she could not effect service at that address. The plaintiff cannot rely on the process server's claim that Ms. Townsend's father stated that Ms. Townsend lived there because the statement is inadmissible hearsay and is contrary to the evidence. Ms. Townsend had not lived with her parents since 1991, so there would be no reason for her father to state that she lived there.

Ultimately, it is irrelevant whether Ms. Townsend's father agreed to accept the summons because Washington law does not consider whether the person consents to receiving the summons if that person is not a resident of the defendant's usual abode. As a result, even if the Court were to conclude that Ms. Townsend's father accepted the summons, he still could not be deemed the process server.

Furthermore, Ms. Townsend's father still could not be deemed the process server even if he later gave the papers to Ms. Townsend. After all, the courts in Gerean and in Division One

above did not consider whether someone eventually passed the papers along to the respective defendants. What matters is whether the plaintiffs in those cases complied with the statute, and the courts found that they did not comply. Likewise, Ms. Scanlan did not comply with the statute—she did not serve Ms. Townsend personally or leave the papers at Ms. Townsend's usual abode with a suitable resident therein.

D. Public Policy Requires Dismissal.

Even if the Court were to conclude that the statute does not need to be interpreted as written, public policy still requires dismissal. If Washington courts were to decide that a plaintiff can deem anyone a process server who knows the defendant but does not live with the defendant, then a vast range of issues would need to be resolved. For example, is the person required to be a process server? Should the plaintiff compensate the person? Is the person allowed to refuse to be a process server? If so, shouldn't the person be told when someone gives them papers that he or she can refuse to deliver them to the defendant? What if the person rightfully refuses to accept the papers, but the process server leaves the papers on the person's doorstep anyway?

Further, courts would need to consider what duties and liabilities of the new unwitting process server arise. Should the unwitting process server be told that he or she is taking on certain duties and liabilities? For example, if the process server leaves the summons with the defendant's neighbor, what would happen if the neighbor simply forgets to give the papers to the defendant or accidentally discards them? Would the neighbor be liable to the plaintiff for not accomplishing service? Certainly Washington law does not support placing legal duties and responsibilities on someone in this situation without his or her full knowledge or consent.

Or, perhaps the defendant's neighbor holds out her hand when the process server gives the neighbor some papers, and the neighbor does not realize the significance of the papers until after the process server leaves. Maybe the neighbor has a good relationship with the defendant, wants to maintain that relationship, and decides to not give the papers to the defendant. In the meantime, the process server files a proof of service stating that he designated defendant's neighbor as the process server. Is service accomplished in that situation? If Brown-Edwards were the law, service would probably be deemed accomplished, and holding as

such would create a tremendous amount of confusion in the legal system.

Clearly, allowing anyone who knows the defendant to be turned into a process server introduces a great amount of uncertainty into the entire service of process issue. There would often be no accountability and no proof of service. The Legislature obviously wanted to avoid this uncertainty, and so it wrote the statute to create a clear method to effect substitute service and plainly placed the burden of service on the plaintiff.

Adopting plaintiff's position in this case would mean that a process server, not finding a defendant at home, could go to the neighbor's house next door and leave the papers to be served in the neighbor's mailbox. Later the process server could come back and interview the neighbor and obtain a declaration from the neighbor that they personally gave it to the defendant. To be safe, the process server, would want to leave such papers in the mailboxes of the neighbors within a several block radius of defendant's house and then come back and see if anyone had personally served the defendant. Such a result would be absurd and potentially turn everyone into a process server. Instead, Washington State law is clear as to how a plaintiff must serve a

defendant and provides for other remedies, after due diligence by the plaintiff, for substitutional service (ie, service on Secretary of State, service by mail, or service by publication) in the event the plaintiff is not able to serve "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(15), without the extreme result of turning entire neighborhoods into process servers.

IV. CONCLUSION

Respondent Townsend respectfully requests that the Court affirm the trial court's Order Granting Defendant's Motion to Dismiss for Lack of Service. The applicable statute here, RCW 4.28.080(15) establishes how Ms. Scanlan was to effect service upon Ms. Townsend. The statute is unambiguous, and Washington courts interpret it as written. Because Ms. Scanlan did not serve Ms. Townsend personally or leave the papers at Ms. Townsend's usual abode with a suitable resident therein, Ms. Scanlan did not accomplish service upon Ms. Townsend. Thus, the trial court

properly dismissed all claims against Ms. Townsend.

RESPECTFULLY SUBMITTED this 6 day of November, 2012.

Hollenbeck, Lancaster, Miller & Andrews

By: _____

Michael E. Abrahamson, WSBA No. 28717
Jill R. Skinner, WSBA No. 32762
Attorneys for Respondent Townsend
15500 SE 30th Place, Suite 201
Bellevue, WA 98007
Telephone: (425) 644-4440
Fax: (425) 747-8338
Email: mike.abrahamson@farmersinsurance.com
jill.skinner@farmersinsurance.com

DECLARATION OF SERVICE

I declare that I served the foregoing BRIEF OF

RESPONDENT TOWNSEND on the party below

G. Parker Reich
Attorney for Appellant
Jacobs & Jacobs
114 E. Meeker Avenue
Puyallup, WA 98372

[ ] by causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Bellevue, WA, on the date set forth below;

[X] By causing a full, true and correct copy thereof to be HAND-DELIVERED BY ABC MESSENGER SERVICE to the party, at the address listed above, which is the last-known address for the party's office, on the date set forth below;

[ ] By causing a full, true and correct copy thereof to be FAXED to the party, at the fax number shown above, which is the last-known fax number for the party's office, on the date set forth below.

I declare under penalty of perjury under the laws of the

State of Washington that the foregoing is true and correct.

Executed at Bellevue, Washington, on this 6th day of

November, 2012.

Kirstyn Kono
Assistant to Michael E. Abrahamson