WASHINGTON COURT OF APPEALS
DIVISION II

GLEN L. WALKER, Defendant and Appellant
v.
KEVIN BREMER, Personal Representative,
Estate of William P. Bremer, Plaintiff and Respondent
No. 44350-3-II

APPELLANT'S REPLY

October 9, 2013
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PERSONAL JURISDICTION AND WALKER'S SERVICE

Chronology of Service of The Summons and Complaint

OCTOBER 11, 2012.

• The Respondent served and filed a Notice of Forfeiture, triggering the 60-day period for filing and service of a lawsuit to vacate the forfeiture.

DECEMBER 7, 2013.

• Walker filed his summons and complaint.

• Bill Walker, a long-time friend of the father of Kevin Bremer, was told by a person who answered his phone call to Bremer's phone number that Mr. Bremer was out of town for about a week, well after the period allowed for service of the summons and complaint.

• On December 7th through December 9th Bill Walker continued to call all known phone numbers to reach Personal Representative Bremer but the calls and requests for a return call went unanswered.

• Walker's process server McCullough attempted to serve Mr. Acebedo as the "proprietor and agent" of Mr. Bremer's mailing address as listed by him in the Notice to Creditors which he had filed, published and served on behalf of his father's estate.

DECEMBER 10, 2013.

• On December 10, Walker requested process server Farmin to serve both Mr. Acebedo, as service agent and to attempt abode service on Bremer.

• The personal service on Mr. Acebedo was not successfully completed by Mr. Farmin, as he was told that Mr. Acebedo was not in, so he only completed office service while noting evasion by Mr. Acebedo's receptionist in the proof of service.

• Mr. Farmin was unable to accept the abode service assignment due to a scheduling conflict.

• Walker attempted to pursue abode service through Renton Process Service, but due to weather and end of day business closing for this process server company, he was unable to complete the assignment so

that the service could be attempted.

• Process server McCullough made his second, third and fourth attempts to serve Mr. Acebedo as service agent and despite evasion by Mr. Acebedo, he completed service at about 2:10 p.m. on December 10.

• After McCullough reported success, Walker's attorney mailed copies of the summons and complaint to Personal Representative's Bremer's home address and to him at 1011 Main Street, No. 456, Puyallup, Washington 98372, the address designated by Bremer for presentation for claims against his father's estate, which he represented.

DECEMBER 13, 2013.

• Mr. Acebedo and Mr. Bremer acknowledged in their declarations receipt of the copies of the summons and complaint that were mailed to the two addresses on December 10 by Walker's attorney. The declarations were made in support of Bremer's motion to dismiss Walker's summons and complaint.

MR. ACEBEDO'S OFFICE ADDRESS IS BREMER'S "USUAL MAILING ADDRESS" FOR CLAIMS AGAINST THE ESTATE

After Appellant Walker received the report from his brother of Mr. Bremer's absence from the jurisdiction until well after the end of the sixty days allowed for service, Walker continued with efforts at abode service under RCW 4.28.080(15) and also sought service through RCW 4.28.080(16) or "Subsection 16".

Mr. Bremer had designated 1011 Main Street, Suite 456, in Puyallup as his mailing address for the presentation of claims against his father's estate in his Notice to Creditors (Appendix A). Walker reasoned that Mr. Acebedo was an agent and proprietor of that address as it was also the location of Acebedo's law office. Mr. Acebedo was thus served as the agent and proprietor of the mailing address, not as Mr. Bremer's attorney or attorney-in-fact. Cf., Appellant's Brief, at 5.

SERVICE ON MR. ACEBEDO WAS PERSONAL SERVICE ON PERSONAL REPRESENTATIVE BREMER

While the dozen or so attempts by Walker to locate and to serve Mr. Bremer by hand-to-hand service, abode or substitute service continued, Walker continued to seek to serve him under Subsection 16, which is also "personal service" both by the language of the statute[1] and by the holding of Martin v. Triol[2], following:

> [W]e assume that the common law required personal service of process and that only personal service would suffice. We need [p. 145] not strictly construe the statute to conclude that the Legislature, if that were the common law, intended to change it by permitting substitute service.
> * * *
> [P. 149]Service of process on the Secretary of State instead of service on a defendant is an obvious substitute for traditional personal service, and has been referred to by this court as substituted or constructive service. The Legislature has, however, chosen to identify this type of service as a form of "personal" service. This identification operates in favor of plaintiffs who use the statute in the manner in which it was used in this case and who rely on the wording of the statute to determine and satisfy the detailed requirements of service of process.
> Where language of a statute is not ambiguous, there is no need for judicial interpretation. In such a case, we accept [p. 150] the legislative characterization of the statute's procedures as a form of "valid personal service". [Footnotes and citations omitted.]

Arguments similar to those made here by Mr. Acebedo that he was not authorized or a proper person to accept service for Mr. Bremer were also rejected in another very similar case, based upon arguments

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[1] "RCW 4.28.080. Summons, how served – Service made in the modes provided in this section is personal service."

[2] Martin v. Triol, 121 Wn.2d 135, 145, 149-50, 847 P.2d 471(1993).

that the proprietor of the defendant's private mailbox company was not authorized to accept service of process in Wright v. B & L Properties, Inc., following:

> First, Brokaw argues that service on Aaron's was not proper because he did not live there and because the manager at Aaron's . . . was apparently not authorized to accept service of process on his behalf. These arguments confuse the requirements of the substitute service subsection of the statute, RCW 4.28.080(16), with the requirements set forth in the previous subsection, RCW 4.28.080(15). The previous subsection presents an alternative way to obtain personal service by leaving a copy of the summons at the defendant's "usual abode with some person [Page 458] of suitable age and discretion then resident therein." RCW 4.28.080(15). The Wrights have never claimed that Brokaw's private mailbox was his usual abode. Thus, the requirements set forth in RCW 4.28.080(15) do not apply to this case. Accordingly, whether Brokaw lived at the address used under the substitute service statute and whether the manager at Aaron's was a resident authorized to accept service of process are of no consequence to this case." Wright v. B & L Properties, Inc., 113 Wn.App. 450, 457-8, 53 P.3d 1041(Div. 1 2002).

In our case, the fact that Mr. Acebedo was also the attorney for Mr. Bremer is of no consequence. He was served because he was the agent and proprietor of the mailing address designated by Mr. Bremer for claims against his father's estate, which is 1011 Main, Suite 456, Puyallup, Washington 98372 and not as Mr. Bremer's attorney.

Goettemoeller v. Twist holds that under proper circumstances, a person may have more than one "usual mailing address":

> A person may have more that one house of usual abode. By analogy, under Subsection 16, a person may have more than one "usual mailing address." . . . A usual mailing address must mean some level of actual use for the receipt of mail or arrangements contemplating an actual use for receiving and forwarding mail."

REASONABLE DILIGENCE IN ABODE SERVICE

Mr. Bremer argues, too late, that Walker's unrewarded diligence in seeking abode service under RCW 4.28.080(15), was lacking, but his failure to offer any evidence to the trial court and case law dooms his argument.

Undisputedly, Mr. Bremer was out of the jurisdiction during the time between December 7, after filing and when service efforts commenced until after the period of limitations for service had passed.

- Where factual issues related to service are not disputed, due diligence is reserved to the trial court as a matter of law. Carras v. Johnson.[3]
- CR 12(g) & (h) constitute waivers of any proof of service challenge by the Respondent because of failure to properly raise it in his motion.
- Cf., Appellant's Brief at 13.

FIRST CLASS MAILING OF THE SUMMONS AND COMPLAINT AFTER HAND-TO-HAND SERVICE IS REQUIRED TO SATISFY DUE PROCESS, BUT NOT TO ACQUIRE JURISDICTION

Mr. Bremer also argues that the first class mailing of copies of the summons and complaint to the defendant at his usual mailing address was required to complete service, and that it is "deemed complete" on the tenth day after the required mailing" under Subsection 16 of RCW 4.28.080.

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[3] 77 Wn.App. 588, 892 P.2d 780, as amd., June 23, 1995(1995).

That issue was resolved in 1964 by Smith v. Forty Million, Inc.[4], (cf., Appellant's Brief at 21-22) where the Court noted that:

> ...[S]ervice by substitute on a fictional agent – here, the Secretary of State, cannot meet the demand of due process unless such service is accompanied by notice to the defendant of the service... Smith, at 916.

The Court explained ". . . that the plaintiff confuses service, which is upon the plaintiff's agent–the Secretary of State–with a necessity of notice of that service, actual or constructive, to the defendant." Smith, at 915-916.

In our case, it was Mr. Acebedo, not the Secretary of State that acted as the "service agent" and RCW 46.64.040, the direct analogue to RCW 4.28.080, establishes that " . . . such service shall be sufficient and valid personal service upon said resident or non-resident."

The defendant in Wright v. B & L Properties, Inc., *supra*, alleged he had not received the mailed summons and complaint, but Division I nonetheless upheld the trial court's default judgment, confirming that the mailing and its receipt are not jurisdictional. Under the principles stated in Dependency of A.G[5]., jurisdiction can be vacated ". . . only upon convincing evidence that the return of service was incorrect. An affidavit of service that is regular in form and substance is presumptively correct. The burden is on the person attacking service to show by clear and convincing evidence that service

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[4] 64 Wn. 2d 912, 395 P.2d 201(1964).

[5] 93 Wn. App. 268, 276-77, 968 P.2d 464(1998).

was improper." In accord is the holding of State ex rel Dahl, v. Superior Court for Pierce County, et al.[6], although before the adoption of the Civil Rules for Superior Court, held that when a summons is filed prior to its service, a civil action is only deemed commenced when served and then service gives the Superior Court personal jurisdiction.

Put another way, when the service is properly completed on a proper service agent, including someone satisfying the requirements for abode service, that act is also deemed to be "reasonably calculated to provide actual notice to the defendant" and to complete the commencement of the lawsuit and personal jurisdiction. Gerean v. Martin-Joven, 108 Wn. App. 963, 33 P.3d 427(2001).

Once notice, actual or constructive, is properly given to a defendant, the court has jurisdiction in any case to proceed to judgment. Ware v. Phillips, 77 Wash.2d 879, 468 P.2d 444 (1970).

UNLAWFUL DETAINER PROCEDURE IS NOT ALLOWED TO EJECT A DEFAULTING PURCHASER BASED ON UNPROVEN ALLEGATIONS OF "UNLAWFUL ENTRY UNDER RCW 59.12.010"

Unlawful entry is an element of first degree burglary and not one of the seven conditions precedent to the use of the unlawful detainer procedure listed in RCW 59.12.030 that permit use of the

[6] 13 Wn. 2d 626, 126 P.2d 199(1942).

Landlord Tenant Act's unlawful detainer procedure to eject a holdover purchaser who is in default.[7]

The requirements of strict statutory compliance with the forfeiture act were not adhered to, providing further evidence that the use of the unlawful detainer procedure must be voided as required by RCW 61.30.040(1). The failure of service on Walker is reflected by the signed certified mail receipt for Walker being missing from the record on appeal of the copy of the Declaration of Forfeiture allegedly mailed to Mr. Walker at the residence address of Mr. & Ms. Hawton, with whom Walker was in litigation with at the time. Also, failure to serve the Hawton's bankruptcy trustee, who was the legal owner of the Hawton's interest in the property at the time is a direct violation of the duties in the Real Estate Contract Forfeiture Act, which specifically requires service of the Declaration of Forfeiture on trustees in bankruptcy. Cf., Appellant's Brief at 24-28.

While Personal Representative Bremer could arguably have proceeded under the ejectment statutes, articularly RCW 7.28.150 and .160, to remove Walker from the property, that would have afforded Walker his rights to assert setoff and counterclaims which were denied as unlawful detainer proceedings are "special proceedings" and do not permit any counterclaims, cross claims or setoffs. Bar K Land Co. v.

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[7] 21 Wash.2d 656, 659, 152 P.2d 722 (1944). There were six conditions listed in RCW 59.12.030 in Najewitz, but the additional condition precedent is not "unlawful entry" and RCW 59.12.010, as in the Writ of Restitution, does not detail any circumstances that permit use of the unlawful detainer procedure.

Webb[8]. The same case holds that "Any issue not incident to the right of possession within the specific terms of RCW 59.18 must be raised in an ordinary civil action."

Bremer's proposed distinction that both Turner v. White[9] and Najewitz v. Seattle[10] were residential, and not commercial tenancies does not appear to have been of any consequence in any of the cases cited.

The argument also appears quite strange that Mr. Bremer would argue that the Residential Landlord Tenant Act should be construed as not applicable to commercial tenancies, when that is exactly what Walker contends in the instant situation.

CONCLUSION

Respondent has stubbornly and frivolously failed to cite applicable and reasonable authority to support his arguments and has ignored governing authority cited by Appellant, much of it unchallenged and unchanged for decades. Most of the authority cited by Respondent suggests that the positions taken by the Respondent are a continuation of the intransigence displayed in the trial court.

The only issue which Respondent did not just look the other way is the issue of the disqualification of a judge for prejudice under

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[8] 72 Wn.App. 380, 864 P.2d 435(1993), cf. Appellant's Brief, 27.

[9] 2120 Wn. App. 290, 579 P.2d 410(1978).

[10] 2321 Wash.2d 656, 659, 152 P.2d 722 (1944).

RCW 4.12.040 and 4.12.050, where the Respondent's position is without support either in law or fact, but where the issue is apparently one of first impression: When a trial judge issues a final, written order, can a reasonable person take the position that another trial judge's later, oral-only agreement with that order is also a "discretionary ruling"?

Mr. Bremer, the Respondent, filed, published and served a Notice to Creditors that named the office address of his attorney as the address to send or serve claims against his father's estate. Can a reasonable person deny that attorney Acebedo is the "agent and proprietor" of that address and that it is a usual mailing address for Personal Representative Bremer?

Where an attorney seeking his fees from the opposing party makes a substantial, concealed misrepresentation to the court of the amount of those fees to the court, can his fees request be granted, despite his breach of the multiple rules forbidding the conduct of the attorney seeking fees, particularly where the matter involves use of a statutory procedure which is not permitted under the facts and law for which he sought those fees?

Where RCW 4.28.080(16), the substitute service statute used by the Appellant for personal service, states that the service it provides for is "personal service" and where the Supreme Court explained the same issue in detail some twenty years ago, can a reasonable person argue that the service under the statue is not "personal service."

Where a Seller seeks forfeiture under the Real Estate Contract Forfeiture Act, RCW 61.30, which requires strict compliance with its service requirements, particularly the Declaration of Forfeiture, properly move to remove a Buyer from the property where service of the Declaration of Forfeiture was only attempted on him at the residence address of his litigation adversary and where the buyer was aware of all of these circumstances?

Can a reasonable person not comprehend that a Supreme Court case from 1964 which explains with clarity that personal hand-to-hand service on a service agent establishes *in personam* jurisdiction and that the later mailing of a copy to the defendant is not service but the "notice reasonably calculated, under all of the circumstances" required to satisfy due process which allows jurisdiction to continue?

Appellant believes that no reasonable person could accidentally ignore or not comprehend the above precedents, but the Respondent has. Is that not enough to grant the Appellant the relief he has so painfully sought in this appeal?

Dated this October 9, 2013.

Charles M. Cruikshank III WSB 6682
Attorney for Appellant Glen L. Walker

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing was served upon Respondent's attorney by U S Mail, 1st Class Postage affixed on October 9, 2013.

/S/ Charles M. Cruikshank III

Mr. Pierre E. Acebedo, Acebedo & Johnson LLC, 1011 East Main–#456, Puyallup, WA 98372