No. 320201

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III

THE COLLECTION GROUP LLC
Respondents/Plaintiffs,
v.
DAVID R. COOK and JANE DOE COOK
Appellants/Defendants

Brief of Appellants

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Assignments of Error

Assignment of Error No. 1: The Court Below erred in failing to grant Defendant's CR 60 motion to vacate default judgment.

Assignment of Error No. 2: The Court below erred in finding the return of service was correct on its face.

Issues Pertaining to Assignments of Error

Issue No. 1: Is a return of service facially correct if it fails to recite that substitute service was made at the Defendant's usual place of abode?

Issue No. 2: If a return is not facially correct must a defendant prove improper service by clear and convincing evidence?

Issue No. 3: Did Appellant show invalid service making the default against him void?

STATEMENT OF THE CASE:

FACTS

DAVID COOK apparently incurred credit card charges through March, 2003 in a total amount of $5,993.80, which apparently went unpaid. [CP 17] The last payment was made in September, 2003. [CP 6] Additional late fees and interest were charged through 2004. [CP 6] The address shown on the billing statement for that card was 1515 Lilac Lane, Liberty Lake, WA. [CP 6]

Suit was filed and service was made, according to the return of service declaration by Roger Papini, [CP 111, Appendix A] on July 2, 2006 by leaving the papers "with a white female who would not give her name, approximately mid to late 40's, 5'2", glasses, above shoulder blond hair, who stated that she lived there." [CP 111] That is all the return of service stated.

A copy of the relevant portion of the return of service shows [CP 111, Appendix A]:

Judgment by default was entered in Spokane County District Court, No. 26084340, on August 30, 2006, and then transcribed to Superior Court. [CP 105]

> I, ROGER PAPINI DECLARE:
>
> I am a resident of the State of Washington, County of Spokane. I am over the age of 18 years of age and I am not a party to this case. I am competent to be a witness in this action.
>
> I served **David R. Cook & Jane Doe Cook** by delivering to and leaving with **a white female, who would not give her name,** approximately mid to late 40's, 5'2", glasses, above shoulder blond hair, who stated she lived there (a person of suitable age & discretion a resident therein) 2 true copy(ies) of the following documents: Summons; Complaint
>
> Date: July 2, 2006 Time: 1:55 p.m.
>
> Address: 1515 S. Lilac Lane, Liberty Lake, WA

David Cook filed a motion to show cause and obtained an order to show cause to vacate the judgment for want of proper service. [CP 24, 25] In his declaration [CP 16] Mr. Cook asserts that the Liberty Lake house where service occurred was leased by co-owner Richard Cook (David's brother) to a company called Timberland-Ag LLC in August 2005. He

states that in June and July 2006 – the time of the service – he was not residing at the house and in fact was buying a home in California. [CP 16] Timberland-Ag was still leasing the Liberty Lake house. Mr. Cook did not receive copies of any legal papers that may have been delivered to the house in 2006. [CP 16-17]

Marti Mortensen, now married to David Cook, stated in her declaration [CP 20] that in 2006 she and her then-husband V. Jerry Mortensen owned the Company called Timberland-Ag. Timberland-Ag leased the Liberty Lake house from Richard Cook, beginning August 2005 and through August 2006. She produced some limited records [CP 22 - 23] showing that Timberland-Ag made mortgage payments on the house in 2005 and in May 2006. Ms. Mortensen testifies she was not present at the Liberty Lake house on the date of service. [CP 20 - 21]

In response to the motion to vacate the Plaintiffs submitted evidence that David Cook was a co-owner of the

house with Richard Cook, [CP 39] which is not disputed. Two letters were sent to David Cook at the Liberty Lake address on May 4 and June 5, 2006, which were not returned as undeliverable. [Id.] Plaintiff additionally took issue with a number of specific items asserted by Defendant that occurred after the date of service.

PROCEDURE

The judgment was transcribed From District Court to Superior Court for collection. Mr. COOK brought his CR 60 motion before the Superior Court. [CP 24, 25]

At hearing Mr. COOK objected to several items of evidence submitted by Respondents. [CP 100]

After hearing on the motion, on the written record, the Superior Court, the Hon. Michael Price, declined to grant the motion. [CP 102] Mr. COOK appeals that decision. [CP 103]

LEGAL ARGUMENT

I. STANDARD OF REVIEW IS *DE NOVO*

This Court reviews *de novo* questions of law and the application of the law to established facts. *Attorney Gen.'s Office, Public Counsel Section v. Utils. & Transp. Comm'n,* 128 Wn.App. 818, 827, 116 P.3d 1064 (2005). When as here the underlying facts are undisputed (although inferences and sufficiency under the burden of proof may be disputed), the determination personal jurisdiction based upon proper service is a question of law reviewed *de novo*. *CTVC of Hawaii, Co., Ltd. v. Shinawatra*, 82 Wn.App. 699, 707–08, 919 P.2d 1243, 932 P.2d 664 (1996); *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992).

II. THE JUDGMENT IS VOID FOR LACK OF PERSONAL SERVICE.

CR60(b)(5) provides,

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:...
> (5) The judgment is void.

COOK asserts the judgment is void due to lack of

service, requiring the judgment be vacated. *Ahten v. Barnes*, 242 P.3d 35, 38-39 (2010). A default judgment entered without proper jurisdiction is void. *In re Marriage of Markowski*, supra; *Woodruff v. Spence*, 76 Wash.App. 207, 209, 883 P.2d 936 (1994). If a judgment is void for want of jurisdiction, no showing of a meritorious defense is required to vacate the judgment. *Leen v. Demopolis*, 62 Wn.App. 473, 477, 815 P.2d 269 (1991).

A. Appellants May Show Lack of Service By Simple Preponderance of Evidence Because the Return of Service was not Correct on its Face

The first part of the decision the Court below made that Mr. COOK asserts was in error, was whether the return of service [CP 111] is facially valid. This is a fairly crucial issue since if it is not, the burden of proof for the movant is much lower. A facially correct return of service is presumed valid, so the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular.

Farmer v. Davis, 161 Wn.App. 420, 250 P.3d 138 (2011).

John Hancock Mut. Life Ins. Co. v. Gooley, 196 Wash. 357, 83 P.2d 221 (1938) involved an affidavit of service that stated:

> [O]n the 18th day of February, 1932, he served the summons and complaint in the action upon Edward Gooley and Pauline E. Gooley, his wife, '* * * by then and there delivering to and leaving with Mrs. August Gooley, a true copy of said summons and of the complaint herein, at the Englehorn hotel * * *, they each being absent therefrom, and the said Mrs. August Gooley being a person of suitable age and discretion then resident therein.'

The Court held this was a defective affidavit:

> The affidavit of service was defective on its face, first, **because it failed to state that the Englehorn hotel was the house of usual abode** of Mr. and Mrs. Gooley, and second, because it failed to state that a copy of the summons and complaint had been left with Mrs. August Gooley for defendant Edward Gooley, and a copy for defendant Pauline Gooley. [Emphasis added]

The exact same situation occurs here. The return of service does not state that the location of service was the usual place of abode. *Gooley* is still good law: more recent decisions

have focused on the substantive content of affidavits but have not overruled *Gooley*.

Appellant submits that, even if the return of service had simply recited that the place of service was the usual place of abode, the return would not have been facially correct unless it gave some sort of basis for that conclusion. In *Woodruff v. Spence*, 88 Wash.App. 565, 571, 945 P.2d 745 (1997), *review denied*, 135 Wash.2d 1010, 960 P.2d 938 (1998) a return of service was deemed facially valid, but in that case the process server went to extreme lengths to verify that the Defendant actually resided at the house in question. He spoke to neighbors, checked with the Post Office to verify the address, and amended his return of service to state he left the papers with:

> "John Doe, who refused to state his name believed to be Richard Spence, as directed[,] who stated the above address to be the residence and usual place of abode of themselves and the subjects listed above for service."

[88 Wn. App at 568] Plus, in *Woodruff*, the Defendant admitted

he in fact lived at the address where he was served, although he denied actually getting papers.

Lee v. Western Processing Co., Inc., 35 Wn.App. 466, 469, 667 P.2d 638 (1983)(cited in *Leen v. Demopolis*, 62 Wash.App. 473, 479, 815 P.2d 269 (1991), *review denied*, 118 Wash.2d 1022, 827 P.2d 1393 (1992) held:

> An affidavit of service, regular in form and substance, is presumptively correct. **The return, however, is subject to attack and may be discredited by competent evidence.** *Dubois v. Western States Inv. Corp.*, 180 Wash. 259, 39 P.2d 372 (1934); *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938).
>
> [Emphasis added]

In *Lee* the return of service was questionable due to a date inconsistency, and was irregular in not attaching a copy of the summons. The appeals court upheld a trial court decision that service was not in fact made based in part on extrinsic evidence from employees who testified the alleged service didn't occur.

This court discussed related issues in some detail in *Farmer v. Davis*, 161 Wn.App. 420, 250 P.3d 138 (2011). But

none of the authority cited in that decision by Judge Siddoway are in any way contrary: the presumption of valid service, and the subsequent enhanced burden of proof to rebut it, requires a facially correct affidavit, which must at the very least recite that the place of service was the Defendant's usual place of abode, and some basis for that assertion. If it does not, as is the case here, the Plaintiff may still attempt to prove it was the usual place of abode; but the Plaintiff no longer enjoys a presumption of valid service, and the Defendant no longer faces an enhanced burden of proof.

B. Under Either Burden of Proof David Cook Shows the Liberty Lake House was not his "Usual Place of Abode."

To begin with, Judge Price applied the wrong burden of proof in his decision. Mr. Cook only has to show by a simple preponderance that the service was invalid. But even under the presumption, service here was not established.

The elements under RCW 4.28.080 for substitute service

are:

> (15) In all other cases, to the defendant personally, or by leaving a copy of the summons **at the house of his or her usual abode with some person** of suitable age and discretion **then resident therein**.

Sheldon v. Fettig, 919 P.2d 1209, 129 Wn.2d 601 (1996). Whether the person served was a person of suitable age and discretion then resident therein is measured by the purpose of the statute: is it likely the person would give notice of the service to the intended recipient? *Wichert v. Cardwell*, 117 Wash.2d 148, 812 P.2d 858 (1991). Presumably an adult person who was actually living there would pass on legal papers if the Defendant was also actually living there.

Whether the house is a person's "usual place of abode" addresses whether the house is such a "center of one's domestic activity that service left with a family member is reasonably calculated to come to one's attention within the statutory period for defendant to appear." *Sheldon v. Fettig*, supra. *State v. Hatchie*, 133 Wn.App. 100, fn. 8, 135 P.3d 519 (2006)

summarized:

> Residence as the term is commonly understood is the place where a person lives as either a temporary or permanent dwelling, a place to which one intends to return, as distinguished from a place of temporary sojourn or transient visit. *State v. Pickett*, 95 Wash.App. 475, 478, 975 P.2d 584 (1999); see also *Sheldon v. Fettig*, 129 Wash.2d 601, 611, 919 P.2d 1209 (1996) (an individual can maintain more than one "dwelling place[]" or "house of usual abode").

Salts v. Estes, 133 Wn.2d 160, 165, 943 P.2d 275 (1997)

concluded that residence follows a person's "center of domestic

activity" and held,

> [A] person who actually lives in Chicago can maintain her "center of domestic activity" in Seattle, even if she is there only a few days a month for purposes of Washington's substituted service of process statute.

In this case Mr. Cook was not in fact residing at the house. The

facts supporting this contention are as follows:

- David Cook testifies he was residing primarily in California and staying temporarily in North Idaho at this time, but not living in the Liberty Lake house. [CP 16]
- Cook testifies that he was leasing the house at Liberty

Lake to a man named Vernon Mortensen whose business was called Timber-Land-Ag LLC. [CP 16-17]

- Copies of emails show that Mr. Mortensen's secretary at the time was paying the mortgage payments directly as rent. [CP 20, 23]
- Marti Mortensen, also a principal in Timber-Land-Ag LLC, verifies that Mr. Cook was not residing at all at the Liberty Lake Address and that the house was rented to Timber-Land-Ag LLC. [CP 20]

The Affidavit of Service [Appendix A] does not indicate that the process server had any information that would lead a reasonable person to conclude David Cook actually lived at the Liberty Lake Residence. This was the billing address on the underlying credit card, but the application was at least 3 years old at time of service. The server didn't even ask if David Cook lived there. Information provided later, at the time of the motion, [CP 39] indicate that County tax records show the

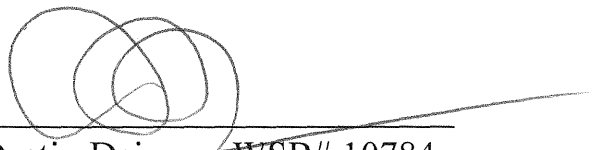
residence at 1515 S. Lilac Lane was owned by David and Richard Cook, which is true; but Cook was leasing it to someone else. Allegedly, letters sent to the address were not sent back; Mr. Cook objected the evidence offered as lacking foundation [CP 100] but even if proved, that only shows that the mail was not returned, not that Cook was living there or that he got the mail.

There is simply no meaningful proof that David Cook did reside at the Liberty Lake house.

CONCLUSION

Because service is void, the Statute of Limitations has run and this matter should be dismissed with prejudice. This court should reverse the decision of the Trial Court, remand with instructions to dismiss with prejudice.

May 29, 2014



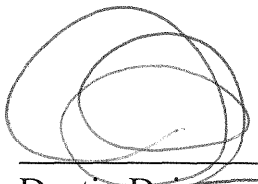
Dustin Deissner WSB# 10784

CERTIFICATE OF SERVICE

I hereby certify that on the ~~12th~~ 29th day of May, 2014 I caused to be served a true copy of the foregoing document by the method indicated below, and addressed to the following:

[x] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Telecopier (fax)	To: Robert W. Sealby Carlson McMahon & Sealby 37 S. Wenatchee Ave. Ste. F PO Box 2965 Wenatchee WA 98807-2965
[x] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Telecopier (fax)	To: Alexander Kleinberg Eisenhower & Carlson 1201 Pacific Ave Ste 1200 Tacoma WA 98402-4395
[x] U.S. Mail [ ] Hand Delivered [ ] Overnight Mail [ ] Telecopier (fax)	Andrea Lynn Asan Paukert & Troppmann 522 W. Riverside Ste 560 Spokane WA 99201-0519

May ~~12~~ 29, 2014



Dustin Deissner WSB# ~~10784~~

APPENDIX
Appellant's Brief
Collection Group LLC v. Cook
32020-1-III

DISTRICT COURT, STATE OF WASHINGTON, COUNTY OF SPOKANE

THE COLLECTION GROUP, LLC, a Washington Limited Liability Company, Plaintiff, vs. DAVID R. COOK and JANE DOE COOK, husband and wife, and their marital community composed thereof, Defendants.	26084340 Case No.: **RETURN OF SERVICE**

I, ROGER PAPINI DECLARE:

I am a resident of the State of Washington, County of Spokane. I am over the age of 18 years of age and I am not a party to this case. I am competent to be a witness in this action.

I served **David R. Cook & Jane Doe Cook** by delivering to and leaving with **a white female, who would not give her name,** approximately mid to late 40's, 5'2", glasses, above shoulder blond hair, who stated she lived there (a person of suitable age & discretion a resident therein) 2 true copy(ies) of the following documents: Summons; Complaint

Date: July 2, 2006 Time: 1:55 p.m.

Address: 1515 S. Lilac Lane, Liberty Lake, WA

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Signed at: Spokane, WA Date: July 3, 2006

ROGER PAPINI #379 Spokane County

Inland Empire Legal Services
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