NO. 93229-8

SUPREME COURT OF THE STATE OF WASHINGTON

WILLIAM LOVE, as Personal Representative of the ESTATE OF CAMILLE LOVE, and JOSHUA LOVE, individually,

Petitioners,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, a governmental entity,

Respondents.

STATE OF WASHINGTON'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

This Court should deny review because the Loves' Estate improperly seeks review of issues not raised at the trial court and therefore not addressed by the Court of Appeals. Even if the Court were to reach the issue raised, this case involves nothing more than a straightforward application of well established law to facts found at an evidentiary hearing. The lawsuit filed by the Estate was dismissed because it failed to personally serve its complaint on an Assistant Attorney General as required by law. RCW 4.92.020 requires a party to serve the attorney general or leave a copy of the summons and complaint with an Assistant Attorney General in order to properly commence a lawsuit and obtain jurisdiction over the State or any of its agencies. *Landreville v. Shoreline Community College District No. 7*, 53 Wn. App. 330, 766 P.2d 1107 (1989).

In response to the Department of Corrections' (DOC) motion to dismiss, the Estate offered shifting explanations and testimony. Ultimately, after conducting an evidentiary hearing at the request of the Estate, the trial court found their evidence was not credible and that the Estate had not personally served an Assistant Attorney General. Substantial evidence supports the trial court's findings.

The Estate's petition also does not raise an issue of substantial public interest because the law on how to properly serve the state with a summons and complaint is clear and well established. It is a fact-based determination that does not raise any issues impacting the public at large.

Simply put, the Estate was placed on notice they failed to serve an Assistant Attorney General and failed to cure the defective service by returning to any Attorney General's Office across Washington where they could have served an Assistant Attorney General in accordance with RCW 4.92.020. The Estate's attempt to complicate the clear and simple statutory process for serving the state—by injecting ambiguity into the process—is contrary to the public interest. This court should deny review.

II. STATEMENT OF FACTS

This case arises out of a shooting that occurred on February 7, 2010. A number of individuals allegedly involved were under the Washington State Department of Corrections (DOC) supervision at the time. On February 7, 2013, appellants filed suit. Clerk's Papers (CP) at 31-47, 76-88.

On March 5, 2013, a copy of the summons and complaint was left at the Tacoma Attorney General's Office (AGO), General Services unit.

CP at 48-75. The Tacoma AGO General Services unit is comprised of non-attorney professional staff who are responsible for documenting receipt of mail, making copies, and answering phones--among other things--at the Tacoma AGO. CP at 48-75.

When a person comes to the front desk of the Tacoma AGO and indicates they want to serve an Assistant Attorney General, an Assistant Attorney General is called to the front desk area to accept service. Report of Proceedings (RP) at 66-67. In contrast to procedures applicable to general mail received by the unit, summonses and complaints that are personally served on an Assistant Attorney General are stamped by the General Services staff with an acknowledgement of receipt stamp. CP at 53.

The acknowledgement of receipt stamp includes a section for the Assistant Attorney General who is accepting service to sign. CP at 53. The signature of the particular Assistant Attorney General who was served is an acknowledgement that the document was served on an Assistant Attorney General. CP at 53. Summonses and complaints that the Attorney General's Office receives by means other than personal service on an Assistant Attorney General are simply date stamped. CP at 50.

The General Services unit maintains a log, which lists the receipt of all summonses and complaints regardless of whether the summons and

complaint were personally served on an Assistant Attorney General. CP at 75. If the documents were served on an Assistant Attorney General, the log notes the name of the individual Assistant Attorney General who was served. CP at 75. If an Assistant Attorney General was not served, the log notes that as well. CP at 75.

On March 5, 2013, Stephen Currie—attorney Vicky Currie's office manager and son—executed a declaration of service stating he delivered a copy of the summons and complaint to a white male receptionist at the Tacoma AGO. CP at 183-84.[1] Tacoma AGO General Service unit records confirm the Love summons and complaint were received on March 5, 2013, but not served on an Assistant Attorney General. CP at 75.

A. Trial Court Procedural Facts

On April 18, 2013, the State filed its answer, in which it specifically raised insufficient service of process as an affirmative defense. CP at 298-307. Despite knowing DOC had raised improper service as a defense, the Estate's counsel made no attempt to correct the deficient service prior to the expiration of the statute of limitations.[2]

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[1] Mr. Currie admitted at the evidentiary hearing he noted March 6, 2013, in his declaration but the correct date was March 5, 2013. RP at 141.

[2] At the time the State filed its answer, the statute of limitations had not expired, thus rendering appellants' complaint that the State did not raise the expiration of the statute of limitations in its answer irrelevant. If appellants had acted promptly on DOC's assertion of its affirmative defense, this case would not be before this Court.

On April 18, 2014, DOC moved for summary judgment based on the fact that the Estate never served an Assistant Attorney General and the claims were now barred by the statute of limitations. In the Estate's response brief, the Estate's counsel made two arguments. CP at 22-30.

First, counsel argued service of a receptionist was proper service under RCW 4.28.020(9). CP at 100-09. RCW 4.28.020(9) states service can be made upon the president or other head of a corporation, including a corporation's secretary among others. The only declaration filed in support of the Estate's response was dated May 6, 2014, from Stephen Currie stating he served an unidentified white male wearing a badge around his neck who Mr. Currie believed to have authority to accept service for the Attorney General's Office. CP at 31-47. Notably, appellants did not submit the original declaration of service executed by Mr. Currie on March 6, 2013[3] which states, "...I, Stephen Currie served a copy of the Order Setting Case Schedule, Summons and Complaint to the receptionist, a tall Caucasian male." CP 183-84.

Second, the Estate's counsel argued the State waived the defense. The Estate's response brief did not raise any issues regarding timely notice, or sufficient identification of the affirmative defense. It also did not raise any arguments in regard to the statute of limitations issue. Vicky

[3] Mr. Currie admitted at the evidentiary hearing that the correct date on this declaration should be March 5, 2013 not March 6, 2013. RP 141.

Currie, the Estate's counsel, did not submit a declaration, nor was there any admissible evidence, presented by the Estate or in the court record, that the actions of the State were inconsistent with DOC's assertion of an inadequate service of process defense.

In reply, counsel for DOC pointed out that RCW 4.92.020 governed service of original process on the State, not RCW 4.28.020(9). CP at 120-27. At the conclusion of oral argument, the court granted summary judgment. CP at 156-58.

On June 2, 2014, appellants moved for reconsideration. CP 159-71. The Estate's counsel did not include any new evidence showing an Assistant Attorney General was served. However, the briefing did contain a copy of the original declaration of service executed by Mr. Currie on March 5, 2013, stating under penalty of perjury that he served a white male receptionist. CP at 183-84.

B. Evidentiary Hearing Facts

Starting on August 7, 2014, the trial court began conducting the evidentiary hearing requested by the Estate. During the course of the hearing, the Estate presented testimony from Stephen Currie. RP at 104-55. Mr. Currie is counsel Vicky Currie's son and the office manager of her law firm. RP at 146. He has worked at the office for over ten years and

from time to time serves documents on behalf of the firm when the firm's regular process server is not available. RP at 147-48.

During his testimony, Mr. Currie directly contradicted his March 2013 declaration of service, in which he swore under penalty of perjury that he served a receptionist. Instead, he claimed for the first time in Court that he served Senior Assistant Attorney General Glen Anderson. Mr. Currie testified he recognized Mr. Anderson from a series of photos supplied to the Estate by the Attorney General's Office. He also claimed Mr. Anderson was wearing a suit and a badge around his neck at the time he served Mr. Anderson. In cross-examination, Mr. Currie again confirmed his story regarding Mr. Anderson allegedly wearing a suit and badge around his neck when he was allegedly served by Mr. Currie. RP 154-55.

Martin Heyting was also called to testify. Mr. Heyting worked at the time in the Tacoma AGO reception area. RP at 63. One of his duties was to log in summonses and complaints that are either left with an Assistant Attorney General or received by the office through some other manner. RP at 80-81. He further testified, pursuant to office practice, if the documents were served on an Assistant Attorney General he would note the name of the individual Assistant Attorney General who was served. If an Assistant Attorney General was not served, he would note that in the log as well. RP at 82.

A copy of the log was introduced into the record. RP at 82. Mr. Heyting identified the log and testified the Love summons and complaint were not served on an Assistant Attorney General. RP at 83.

The appellants also called Glen Anderson to the stand. RP at 91. Mr. Anderson is a 25-year veteran attorney in the Attorney General's Office Torts Division and is currently the Tacoma Torts Section Chief. Mr. Anderson testified concerning his knowledge of the AGO service of process policy, the Tacoma Office's general practice concerning acceptance of service by an Assistant Attorney General, and the allegation that he accepted service from Mr. Currie.

Mr. Anderson is familiar with the AGO policy. RP at 97. The policy was originally instituted to protect not only the Attorney General's Office but the party serving documents by documenting whether a party had properly served an Assistant Attorney General. RP at 97-98. Mr. Anderson was familiar with the creation of the policy because of his work on the *Landreville*[4] case, where a party claimed it served a receptionist who allegedly claimed to have authority to accept service on behalf of the AG's office. RP at 97-98.

Mr. Anderson also testified he was never served by Mr. Currie. RP at 96-97. He was not served, because if he had been served,

[4] *Landreville v. Shoreline Comm. College Dist. No. 7*, 53 Wn. App. 330, 332, 766 P.2d 1107 (1988).

Mr. Anderson would have acknowledged receipt by signing the acknowledgement of receipt stamp with his signature. RP at 96-97.

Mr. Anderson was recalled to also address what he was wearing March 5, 2013. RP at 156. Contrary to Mr. Currie's testimony, Mr. Anderson does not have a badge or wear a badge around his neck as Mr. Currie claimed. RP at 159. The only persons in the Tacoma Attorney General's Office who are authorized to carry badges and credentials under AGO Policy I.23 are the two female investigators in the Tacoma Torts unit. CP at 31-47. Per office policy, the badges are kept in a foldable wallet, they don't wear the badges around their neck and, neither the credentials nor the badges identify them as an Assistant Attorney General. CP at 31-47.

Mr. Anderson also testified he was not wearing a suit or a tie the day Mr. Currie allegedly left the complaint at the office. RP at 159. A copy of a group office photograph taken the day Mr. Currie left the documents at the Tacoma AGO shows Mr. Anderson in the front row of the picture not wearing a suit coat, a tie, or a badge of any kind around his neck. RP at 158-60; CP at 316.

At the conclusion of the testimony and upon review of the entire record, the court ruled Mr. Currie's testimony was not credible and as a

matter of fact the appellants failed to serve an Assistant Attorney General. RP at 180.

III. COUNTERSTATEMENT OF ISSUES

If review is granted, the issue in this case would be:

A. Whether leaving a copy of the summons and complaint at an office of the Washington State Attorney General is sufficient to commence a lawsuit against the State when RCW 4.92.020 requires personal service on the Attorney General or an Assistant Attorney General to effectively commence a lawsuit against the State.

IV. REASONS WHY REVIEW SHOULD BE DENIED

The Estate seeks review under RAP 13.4(b)(4). However, their petition for review should be denied because the petition does not involve an issue of substantial public interest.

A. The Estate's Petition Does Not Raise Any Issues Subject To Review, Let Alone An Issue Of Substantial Public Importance

The Estate's petition does not warrant review because there are no issues properly before this Court to review. The Estate's contention at the trial court level initially was that service on a receptionist was effective to commence a lawsuit against the state despite the explicit direction in RCW 4.92.02 that the Attorney General or an Assistant Attorney General must be served. When that argument failed, the Estate moved for reconsideration, contending that they had in fact served an Assistant Attorney General (despite the fact that their own original

declaration of service stated that a receptionist was served). At the Estate's request, the trial court conducted an evidentiary hearing and determined as a factual matter that the Estate did not serve an Assistant Attorney General. On appeal, the Court of Appeals found that the trial court's findings of fact were supported by substantial evidence and affirmed the trial court's ruling. The Estate makes no contention in their petition that the Court of Appeals' finding that the trial court's factual determinations were supported by substantial evidence raises an issue of substantial public import. Nor could they, as the factual determinations made by the trial court have no impact outside this case.

Rather, as the basis for their petition, the Estate relies on issues they raised for the first time on appeal. The Estate argues that the state was properly served, premising its argument on constructive service, and arguing that the state's receipt of actual notice of the complaint was evidenced by the state's appearing and defending the lawsuit. However, as the Court of Appeals specifically ruled: "... Love did not make these arguments in the trial court. Therefore, we decline to consider them for the first time on appeal." *Love v. State*, 193 Wn. App. 1049, n.1 (citing RAP 2.5(a); *Martin v. Johnson*, 141 Wn. App. 611, 623, 170 P.3d 1198 (2007)). Because the Court declined to review these matters pursuant to its authority under RAP 2.5(a), the petition does not meet the

requirement of RAP 13.4(b)(4) because there are no issues properly before this Court to review.

B. The Law Regarding Service Of Process On The State Is Well Established And Thus The Estate's Petition Does Not Raise An Issue Of Substantial Public Import

While it is not clear if the Estate is claiming that the Court of Appeals' determination that they failed to comply with the service requirements of RCW 4.92.020 raises an issue of substantial public import, to the extent they are the Estate's argument lacks merit. As already noted, the Estate does not contend in its petition that the factual determination that they did not serve an Assistant Attorney General raises an issue of substantial public importance subject to review. Because that determination is supported by substantial evidence, the Estate necessarily must assert that whether service on a receptionist in the Attorney General's Office complies with RCW 4.92.020's service requirements raises an issue of substantial public import. It does not because the law on serving the State is well established.

Article 2, § 26 of the Washington State Constitution provides; "The legislature shall direct by law, in what manner, and in what courts, suits may be brought against the state." RCW 4.92.020, providing for the manner of service on the state, was promulgated by the legislature pursuant to this constitutional grant of authority. *Northwestern & Pacific*

Hypotheek Bank v. State, 42 L.R.A. 33 (1897) (*overturned on other grounds*).

"Proper service of the summons and complaint is required to invoke personal jurisdiction." *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014). Actual notice is not a substitute for proper service. *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 585, 225 P.3d 1035 (2010).

RCW 4.92.020 is the applicable service statute enacted by the legislature pursuant to its constitutional authority to direct the manner in which the State may be sued: "Service of summons and complaint in such actions shall be served in the manner prescribed by law upon the attorney general, or by leaving the summons and complaint in the office of the attorney general *with an assistant attorney general.*" (Emphasis added.) The statute was construed in *Landreville v. Shoreline College*, 53 Wn. App. 330, 766 P.2d 1107 (1988).

In *Landreville*, as here, the plaintiff had served an administrative assistant (i.e., receptionist) in the Office of the Attorney General and the plaintiff contended, as appellant does here, that service on the administrative assistant constituted substantial compliance with RCW 4.92.020. Construing RCW 4.92.020, the Court of Appeals noted that, "[w]hen a statute designates a particular person or officer upon whom

service of process is to be made in an action against a municipality, no other person or officer may be substituted." *Landreville*, 53 Wn. App. at 332 (citing *Meadowdale Neighborhood Comm. v. Edmonds*, 27 Wn. App. 261, 264, 616 P.2d 1257 (1980)). Based on this principle of law the court found:

> Because RCW 4.92.020 specifies that service can only be made on the Attorney General or left with an Assistant Attorney General, leaving the summons and complaint with the administrative assistant was not sufficient to acquire jurisdiction over the State. Actual notice to the State, standing alone, is not sufficient. Any hardship engendered by this exclusive method of service is a matter for the Legislature, not for this court, which must enforce the law as plainly written.

Id. at 332; *see also* Tegland and Ende, 15A *Washington Practice* § 15.13 and Tegland, 14 *Washington Practice* § 8.12 (both providing that the service requirements of RCW 4.92.020 are strictly construed and rigorously enforced).

The Estate's contention that service on an administrative assistant constitutes substantial compliance with RCW 4.92.02 has already been decided and rejected. Any contention by appellants that the issue of whether they complied with RCW 4.92.020 raises a substantial issue of public importance is without merit.

The Estate's argument that actual notice is sufficient to satisfy the requirements of personal service regardless of what direction a

statute provides regarding the proper person to serve is equally misguided. In every case where a defendant raises the defense of improper service they necessarily have received actual notice of the lawsuit; otherwise they would not be appearing and raising the defense by answer or motion. In that respect, the Estate's position goes so far as to completely nullify any statutory requirement regarding the proper service of process. Review should be denied.

C. The Court Of Appeals' Determination There Is Substantial Evidence To Support The Trial Court's Findings Does Not Raise An Issue Of Substantial Public Importance

The sufficiency of service of process is a question of law reserved to the trial court. *Harvey v. Obermeit*, 163 Wn. App. 311, 327, 261 P.3d 671 (2011). When an evidentiary hearing is required to determine an issue of fact, a court of appeals reviews the trial court's findings of fact and conclusions of law to determine whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law. *Harvey*, 163 Wn. App. at 318.

Here, the Court of Appeals, in upholding the trial court's ruling, noted the testimony "...at the evidentiary hearing strongly supported both the factual finding and the conclusion of law." *Love v. State*, 193 Wn. App. 1049, 1055 (2016). It went on to state that pursuant to *Dave Johnson Ins., Inc. v. Wright*, 167 Wn. App. 758, 778, 275 P.3d 339

(2012), the court "...deferred to the trial court's determination that Appellant's assertion they directly served an Assistant Attorney General was not credible. . . " *Love v. State*, 193 Wn. App. at 1056.

In the face of the trial court's finding that personal service had not been made, the Estate raised for the first time on appeal the claim the AGO has deliberately created barriers to personal service of an Assistant Attorney General. The Court of Appeals properly rejected this claim because it was never raised before the trial court.

Further, it simply is not supported by the record, which included testimony about the regular procedure the office follows when someone represents they want to serve a summons and complaint on an Assistant Attorney General. RP at 97-99. The record shows members of the public successfully serve an Assistant Attorney General on a regular basis. CP at 74. Despite the ready ability to do so, the Estate failed to effect personal service, and compounded its error by failing to correct it even when advised in the DOC's Answer that insufficiency of process was raised as a defense.

In sum, the Court of Appeals' ruling is in accord with the Legislature's requirements for service outlined in RCW 4.92.020 and is consistent with *Landreville, Harvey* and *Dave Johnson Ins.* The Estate's

arguments do not overcome this nor do they support review under RAP 13.4(b)(4). Thus the petition for review should be denied.

RESPECTFULLY SUBMITTED this 25 day of August, 2016.

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CERTIFICATE OF SERVICE

I certify that on this 25th day of August, 2016, I caused a true and correct copy of this State of Washington's Answer to Petition for Review to be served on the following via email:

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Good morning:

Attached please find a .pdf copy of State of Washington's Answer to Petition for Review, for filing with the Supreme Court of Washington today.

Case name: Love v. State of Washington Department, et al.
Case Number: 93229-8

Thank you.

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