

FILED
SUPREME COURT
STATE OF WASHINGTON
2/16/2018 1:54 PM
BY SUSAN L. CARLSON
CLERK

SUPREME COURT OF WASHINGTON
CASE NO.: 95329-5

Court of Appeals No.: 34050-3-III & 34698-6-III (consolidated)

In re the Marriage of

Melody Secco (nka Melody Secco),

Petitioner-Respondent,

v.

Gordon Secco,

Respondent-Appellant.

**RESPONDENT-APPELLANT SECCO'S ANSWER TO
PETITIONER-RESPONDENT HAYNES' PETITION FOR REVIEW**

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I. IDENTITY OF RESPONDENT

This Answer is filed by Respondent, Gordon Secco, through undersigned counsel.

II. ISSUE PRESENTED FOR REVIEW

Whether Haynes' Petition for Review satisfies any of the requirements listed in RAP 13.4(b).

III. STATEMENT OF THE CASE

This appeal stems from a dissolution action which Melody Secco (now known as Melody Haynes) filed on February 4, 2014. At that point, Haynes and Secco had been married for approximately 10 years.

A. Motion for service by mail.

Two months after filing, on April 2, 2014, Haynes moved the court to serve Secco by mail. In support of her motion, Haynes provided the court with three pieces of evidence: 1) her counsel's declaration, 2) a declaration from her friend¹, Mark Cavadini, and 3) a declaration from the sheriff. Her counsel's declaration claimed that Secco "cannot be found within this state" and that he had not been able to locate or serve him because he "concealed

¹ Cavadini describes himself as Haynes' personal friend. *Secco v. Secco*, 1, Wn. App. 2d 1023, 1 (2017), *rev. pending*. Page numbering in this brief refers to the page numbers as the opinion is reproduced in the attached Appendix.

himself/herself to avoid service of summons.” CP at 13-14; *Id.* The declaration of her counsel claimed “[s]ervice has been attempted 7 times by 2 different authorities and have been unsuccessful.” *Id.* Mark Cavadini’s declaration claimed:

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

Id. The sheriff’s return declaration stated that “after diligent search and inquiry” the sheriff had been unable to serve Secco at 8010 E. Augusta Avenue in Spokane Valley², after “five attempts made.” *Id.*

At no point did Haynes disclose to the Court that she remained living in their home at least part time while attempting personal service on Secco.³ *Id.* at 1-2. Haynes claims that she was primarily living elsewhere at times relevant to service of process but does admit to staying at their house one to two times per week. *Id.* at 2. Haynes’ daughter also testified that Haynes stayed at the home with Secco at her lawyer’s insistence (apparently to further her legal position in the property division). *Id.* Haynes never

² This was the home address to both Haynes and Secco.

³ Haynes dedicates a portion of her brief rebutting an argument that Secco never made: that she should have served him with the dissolution paperwork herself. *Id.* at 4. Such service is clearly invalid and contrary to the plain language of the Civil Rules.

attempted to serve Secco at his place of employment and no attempts were ever made to call him (at home or on his cell phone) to arrange service of process.

Based on these three declarations, Haynes' motion to serve Secco with the dissolution paperwork via mail was granted. On July 9, 2014, Haynes obtained an order of default against Secco. *See Id.* There is no evidence that Secco had actual knowledge of the dissolution action or of the default having been entered.

B. Default decree of dissolution entered while Secco is in jail.

Beginning on August 22, 2014, Secco was in jail on charges stemming from Haynes' allegations of domestic violence.⁴ No such allegations were made in the dissolution petition or as the basis for Haynes' request for service by mail. On January 21, 2015, following a jury trial on the merits, Secco was acquitted of all charges and released from jail.

While Secco was in jail, Haynes noted a presentment hearing on October 27, 2014 to obtain her final dissolution decree. *Id.* at 2. Haynes

⁴ On August 22, 2014, at their home, Secco opened one of their doors into Haynes' foot, breaking a bone. Haynes alleged that infliction of this injury was purposeful and the result of a protracted assault by Secco. *Id.* Secco indicated that causing the injury to Haynes' foot was the result of him accidentally opening the door into her foot. *Id.*

mailed the final decree paperwork to Secco, which is when he first learned of the divorce proceedings. *Id.*

Upon receipt, and with limited time to respond, Secco contacted two attorneys, but was unable to pay a retainer since he was in jail. *Id.* Posting bail was not possible because Secco was a Canadian citizen and bond companies considered him a flight risk. *Id.*

On October 27, 2014, the trial court entered Haynes' dissolution decree via default, wherein she received the entirety of the couple's home. This was the sole substantial community property asset the couple owned. *Id.* Secco received the final decree in jail on November 10, 2014. *Id.*

C. Procedural History after Secco is found not guilty and released from jail.

After being found not guilty and having been released from jail, Secco filed a motion to vacate the default decree. Secco argued the improper mail service failed to satisfy due process requirements. *Id.* Without personal jurisdiction, the orders in Haynes' dissolution proceedings were void. Secco's motion was denied by the commissioner. Secco filed a timely motion for revision, which was denied. *Id.* This matter was appealed.

Secco filed a second motion to vacate based on CR 60(b)(4) (for fraud... misrepresentation, or other misconduct of an adverse party), and

CR 60(b)(9) (for unavoidable casualty or misfortune preventing a party from... defending). *Id.* at 3. This motion was denied and then timely appealed. Both appeals were consolidated. *Id.*

IV. HAYNES' PETITION FOR REVIEW FAILS TO MEET ANY OF THE REQUIREMENTS OF RAP 13.4(b)

Rule of Appellate Procedure 13.4(b) outlines the Supreme Court's four criteria governing acceptance of petitions for review, at least one of which must be satisfied. RAP 13.4(b) states that "[a] petition for review will be accepted by the Supreme Court only:

- (1) if the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or
- (2) if the decision of the Court of Appeals is in conflict with a decision of the Court of Appeals; or
- (3) if a significant question of law under the Constitution of the State of Washington or of the United States is involved; or
- (4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

A petition for review will be granted only in certain circumscribed cases, RAP 13.4(b), and, if [the Supreme Court] accepts review, [it] will review only the questions raised in the petition and in the answer to the petition, unless the court orders otherwise. *Shumway v. Payne*, 136 Wn. 2d 383, 392-393, 964 P.2d 349 (1998). Here, Haynes fails to analyze or show how any

of these four requirements are met.⁵ Secco nonetheless independently addresses each of the RAP 13.4(b) factors on their own merits below.

A. The Court of Appeals decision is not in conflict with any decision of this Court.

Review is not warranted by RAP 13.4(b)(1) because it does not illustrate any conflict between a Court of Appeals opinion and any decision of the Supreme Court. Since Haynes does not raise any such conflicts in her Petition, nor are there any apparent from the Court of Appeals decision, review of Haynes' Petition under RAP 13.4(b)(1) should be denied.

B. The Court of Appeals Decision does not conflict with other Court of Appeals decisions.

The court rules implicitly recognize that only the Supreme Court can overrule a Court of Appeals decision. For this reason, if the Court of Appeals decision conflicts with another decision of the Court of Appeals, a basis exists for a petition for discretionary review by the Supreme Court. *Grizby III v. Herzog*, 190 Wn. App. 786, 808-809, 362 P.3d 763 (2015) (internal quotations omitted). However, here Haynes does not present any conflicts in Court of Appeals decisions requiring reconciliation by the Supreme Court.

⁵Rather than address RAP 13.4(b) at all, it appears that Haynes' Petition for Review is a copy of her appellate Reply brief.

The Court of Appeals provided some clarification for plaintiffs regarding substitute service (and in fact warns parties to use caution when seeking to use substitute service⁶), there was no need to reconcile any conflicting legal authority. Since there is no conflict between Court of Appeals decisions for the Supreme Court to address, review of Haynes' Petition is not warranted under RAP 13.4(b)(2).

C. The only significant constitutional question raised in this case is Secco's right to due process, which was resolved properly by the Court of Appeals.

Per RAP 13.4(b)(3), review of a petition by the Supreme Court is warranted if it poses a question of law under the Constitution of the State of Washington or of the United States. The only significant constitutional question reached by the Court of Appeals concerns Secco's due process rights, which was already resolved below to satisfy his due process rights.

The Court of Appeals focused on the requirements for a successful challenge to orders entered based on improper service of process.⁷

⁶ See *Secco*, 1 Wn. App. 2d 1023 at 5.

⁷ There was disagreement between the majority and the dissenting opinions regarding the difference in procedure between pre- and post-judgment motions to vacate, but the Court of Appeals explained "... when a default judgment has been entered that will deprive a 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*. *Id.* at 4. Despite this, even Judge Korsmo in his dissent decision below is consistent with the law as it exists. *Id.* at 6.

However, these concerns have been already appropriately addressed by Washington case law by the Court in *Parkash* and *Brennan*. The Court in *Parkash* addressed pre-judgment motions to vacate stating that the original affidavits in support of substitute service alone are reviewed for sufficiency. *Parkash v. Perry*, 40 Wn. App. 849, 851-53, 700 P.2d 1201 (1985). But in a post-judgment motion to vacate the Court does not look to the sufficiency of the affidavits, but rather to what *in fact* Haynes, as the petitioner, did before seeking to serve Secco via substitute service. *Brennan v. Hurt*, 59 Wn. App. 315, 319, 796 P.2d 786 (1990); *See Secco*, 1 Wn. App. 2d 1023 at 4.⁸ Under this analysis the Court looks to see if Haynes in fact made an honest and reasonable effort to locate the defendant. *Brenner v. Port of Bellingham*, 53 Wn. App. 182, 186, 765 P.2d 1333 (1989); see also, *Secco*. An honest and reasonable effort includes not only following up on available information, it also means following up on ways of personally contacting a defendant. *Secco*, at 5. “The focus is that a plaintiff makes a good faith effort [to personally serve a defendant] (and not whether it was unreasonable for a defendant to refuse to respond a knock at the front door). *Id.*

⁸ Haynes cites to *Brennan v. Hurt* both in her appellate Reply and again in her Petition to this Court. *See* Haynes Petition for Review at 8.

This case involves two post-judgment motions to vacate.⁹ The Court of Appeals properly found that Haynes' attempts at service solely at their home were insufficient in fact.¹⁰ *Id.* There was nothing in the record of Haynes attempting service at Secco's work.¹¹ Similarly, there was no mention that any attempt was made to call Secco to arrange service of process. Following *Brennan*, the Court of Appeals properly found that Haynes' efforts *in fact* to attempt personal service prior to seeking substitute service failed to satisfy the requirements in CR 4(b)(4) and RCW § 4.28.100. *Id.* at 5.

In addition to following well-established case law in *Brennan*, the Court of Appeals' finding also complies with the Court's overarching policy that [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); *Secco*, at 3. It also supports the Court's preference that matters be tried on their merits rather than by default. *Secco*, at 4.

⁹ The Court of Appeals found Secco's first appeal based on CR 60(b)(5) to be dispositive and, as a result, did not reach the second appeal based on CR 60(b)(4) and CR 60(b)(9). *Secco*, at 1.

¹⁰ The dissent speculates that additional attempts at personal service would possibly subject Haynes to danger. However, this concern is misplaced here as such a concern is rebutted by Haynes' own testimony in Secco's criminal trial. CP at 258-259; *Id.* at 5.

¹¹ That Secco was found at work and arrested on August 22, 2014 is evidence of just one of the service alternatives open to Haynes and her lawyer. *Id.*

Haynes' Petition does not satisfy RAP 13.4(b)(3) and review should be denied.

D. The Court of Appeals decision does not involve an issue of substantial public interest.

Per RAP 13.4(b)(4), review of Haynes' Petition may be warranted if it involves an issue of substantial public interest that should be determined by the Supreme Court. Haynes' Petition does not raise any arguments under RAP 13.4(b)(4)). However, the dissent below raises concerns about when a plaintiff may find themselves in danger if forced to be in the presence of a hostile or violent defendant after being served with lawsuit paperwork. *Secco*, at 7. While the dissent raises concerns that are both serious and legitimate, there is nothing in the record to support the dissent's concern in this case. The dissent's concerns would be better served by proper evaluation in a case where such a significant public interest had been thoroughly developed through the record, rather than a case in which they are hypothetical concerns.

Haynes' Petition does not address a substantial public interest as contemplated by RAP 13.4(b)(4) and, even if she did, such an interest would favor finding as the Court of Appeals did: in favor of *Secco*. The Petition for Review should be denied.

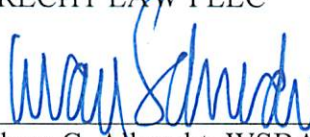
V. CONCLUSION

Based on the foregoing argument and authority, Gordon Secco respectfully request that this Court deny Haynes' Petition for Review.

DATED this 16th day of February at Spokane, Washington.

ALBRECHT LAW PLLC

By:



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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I served the document to which this is annexed by fax, email and personal delivery as follows:

Gary Stenzel
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Signed at Spokane, Washington on February 16, 2018.



Evan C. Schneider

APPENDIX

1 Wash.App.2d 1023

NOTE: UNPUBLISHED OPINION, SEE WA R GEN
GR 14.1

Court of Appeals of Washington,
Division 3.

Melody SECCO (nka Haynes), Respondent,
v.
Gordon SECCO, Appellant.

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

NOVEMBER 16, 2017

Appeal from Spokane Superior Court, 14-3-00278-3,
Honorable Raymond F. Clary, Judge

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Opinion

UNPUBLISHED OPINION

Siddoway, J.

*1 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 sheriffs 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.

*2 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.

*3 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).

*4 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.

*5 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

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.

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. 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

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.

*6 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.

I CONCUR:

Lawrence–Berrey, A.C.J.

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

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.

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

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.

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.

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.

All Citations

Not Reported in P.3d, 1 Wash.App.2d 1023, 2017 WL 5499875

ALBRECHT LAW PLLC

February 16, 2018 - 1:54 PM

Transmittal Information

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Appellate Court Case Title: In re the Marriage of: Melody Secco (nka Hayne) and Gordon Secco
Superior Court Case Number: 14-3-00278-3

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