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NO. 64046-1-I

Whatcom County Cause No. 06-2-02294-3

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I

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MATTHEW W. GOETTEMOELLER AND LYND SAY E.  
GOETTEMOELLER, husband and wife, and the marital community  
composed thereof,

Plaintiffs/Respondents,

v.

GRAHAM M. TWIST AND SUSAN TWIST, husband and wife and the  
marital community composed thereof,

Defendants/Appellants.

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BRIEF OF APPELLANT TWIST

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## I. INTRODUCTION

This is a case in which service was not properly effected on the Appellants, Graham and Susan Twist (hereinafter “Twists”), within the applicable statute of limitations. There is no question that the Respondents, the Goettemoellers, did not personally serve the Twists or effect service through the Secretary of State or via publication. Rather, the Goettemoellers attempted to serve the Twists via a mailbox at 413 B 19<sup>th</sup> St., PMB #104, Lynden, Washington 98264, pursuant to RCW 4.28.080(16), on June 6, 2008.

All of the undisputed facts show that the Lynden mailbox address was not the Twists’ usual mailing address for the purposes of personal service under RCW 4.28.080(16). The undisputed facts show that the Twists moved back to the United Kingdom in January 2006, more than eight months before this lawsuit was commenced, on September 29, 2006, and that the Lynden address was not the Twists’ usual mailing address at the time that service was attempted. The Goettemoellers knew that the Twists had moved back to the U.K. before they attempted service at the Lynden address. Further, the Goettemoellers have failed to present any evidence that at the time that service was attempted, the Twists were

receiving any mail at the Lynden address, or that this address was in any way the Twists' usual mailing address. The trial court incorrectly found that the Twist had been served within the statute of limitations. Because the trial court's ruling is contrary to the undisputed facts and law, it must be reversed.

## **II. ASSIGNMENTS OF ERROR**

The Twists assign the following errors in the trial court's rulings:

1. The trial court erred in granting the Goettemoellers' Motion for Partial Summary Judgment, dated March 20, 2009, regarding the issue of service. The trial court entered the Goettemoellers' Order for Partial Summary Judgment on August 7, 2009. The trial court incorrectly found that the Twists were served with the Summons and Complaint at 413 B 19<sup>th</sup> St., PMB #104, Lynden, WA on June 06, 2008.
2. The trial court erred in denying the Twists' Cross Motion for Partial Summary Judgment regarding the issue of service. The trial court denied the Twists' cross motion despite the following facts: (1) the Twists lived in England at all relevant times after the motor vehicle accident, and

had a usual mailing address there; (2) they were not personally served within the statute of limitations; (3) service was attempted on a mailbox that they had not used in over two years at the time that service was attempted; (4) there was no service on the Secretary of State; and (5) there was no service by publication.

### **III. STATEMENT OF THE CASE**

#### **A. Procedural History**

This lawsuit was filed on September 29, 2006. CP 81-88.

On March 20, 2009, the Goettemoellers moved for partial summary judgment regarding the issue of service. *See* CP 55-62. The Twists cross moved for partial summary judgment. CP 55-62. The trial court ordered additional discovery before making a ruling. RP1, at 3.

On August 7, 2009, the parties were again before the trial court on the motion and cross motion for partial summary judgment. *See* CP 3-4, 8. The trial court ruled that the Twists were personally served with the Summons and Complaint thereby conferring in personam jurisdiction over them. CP 3-4.

The Twists timely filed for discretionary review of the trial court's

ruling. *See* CP 1-2. On November 23, 2009, this Court accepted discretionary review. *Id.*

**B. Factual History**

On June 25, 2005, the Goettemoellers were in a motor vehicle accident in which their vehicle collided with the Twists' vehicle. CP 84-85.

The Twists were living at 1577 D St., #11, Blaine, Washington, at the time of the accident. CP 23. The Twists are originally from the U.K. and had been living in the United States on a VISA. CP 32.

The Twists last received mail at 413 B 19<sup>th</sup> St., PMB #104, Lynden, Washington in October 2005. CP 23-24. The business name for this location was The Mailbox. CP 11. Thereafter, the Twists began receiving mail at 1225 E. Sunset Dr., Ste. 145 PMB 543, Bellingham, Washington. CP 24. In January 2006, the Twists moved back to the U.K. CP 23, 27, 34.

In March 2006, Mr. Twist began receiving a pension from the U.K. government. CP 24, 35. A March 27, 2006, letter confirming Mr. Twist's pension was sent to his usual mailing address in Gloucestershire, England. CP 35. A person cannot receive a pension from the U.K. government

unless they are a full-time resident. CP 24.

On September 29, 2006, over eight months after the Twists had moved back to the U.K., the Goettemoellers filed a Summons and Complaint against the Twists. CP 81-88. At the time that the Summons and Complaint were filed with the court, the Twists were no longer residents of Washington. CP 23, 27, 34.

On October 22, 2006, the Goettemoellers attempted to personally serve the Twists at 1577 D St., Apt. 11, Blaine, Washington and were unable to effect service. *See* CP 37-38. The resident of that address did not know the Twists and had never heard of them. *Id.* The Goettemoellers made no other attempts to locate and serve the Twists for well over a year. *See* CP 80.

One year and six months later, the clerk of the trial court filed a Notice of Dismissal for Want of Prosecution on March 12, 2008, due to no activity in the case for more than a year. CP 80. At this point, the Twists had not been served, nor had their insurance company been notified of the lawsuit. CP 24, 56, 69. The Goettemoellers filed an Amended Complaint on April 07, 2008. CP 74-79.

On April 11, 2008, Mr. Twist was contacted through email, while

living in the U.K., by Robin Mullins, a process server for the Goettemoellers. CP 36-39. Mr. Twist responded that he was not a U.S. citizen or resident and departed from the U.S. approximately twenty-seven months before this email contact in April 2008. CP 36.

Despite the fact that Mr. Twist informed the process server that he had not been a resident of Washington and had been living outside the U.S. for the last twenty-seven months (since January 2006), the Goettemoellers attempted to serve the Twists at 413 B 19<sup>th</sup> St., PMB #104, Lynden, Washington on June 6, 2008. CP 56. This attempted service occurred long after the Twists moved back to the U.K. CP 23, 27, 34, 56. The Twists were no longer receiving mail at the Lynden address at the time that service was attempted. CP 5-6, 23-24. In fact, as early as February 21, 2007, the Twists were receiving billing statements at their usual mailing address in Gloucester, U.K. CP 40.

The records custodian of The Mailbox, the location for PMB #104 at 413 19<sup>th</sup> St., Lynden, Washington, corroborates that the Twists were not receiving mail at the mailbox at the time that service was attempted on June 06, 2008. CP 5-6.

The statute of limitations ran on June 25, 2008. CP 53, 61-62.

The first time that attorneys for the Twists received notice of the Amended Summons and Complaint was in October 2008, after the statute of limitations had run. *See* CP 72-73.

On October 27, 2008, the Twists served and filed their Answer and Affirmative Defenses to the Goettemoellers' Amended Complaint. CP 67-71. The Twists asserted insufficiency of service of process and failure to properly commence this action within the statute of limitations as affirmative defenses. CP 69.

#### **IV. LEGAL ARGUMENT**

##### **A. Standard of Review**

The standard of review from a motion granting summary judgment is de novo. *Sheldon v. Fettig*, 77 Wn. App. 775, 779, 893 P.2d 1136 (1995), *citing Parkin v. Colocousis*, 53 Wn. App. 649, 653, 769 P.2d 326 (1989). Jurisdiction is a question of law and reviewed de novo. *Sheldon*, 77 Wn. App. at 779, *citing Clingan v. Dept. of Labor & Indus.*, 71 Wn. App. 590, 592, 860 P.2d 417 (1993).

##### **B. Personal Jurisdiction**

Jurisdiction is the foundation of every lawsuit; without it, no case can go forward. First and basic to invoking personal jurisdiction over a

party is proper service of the summons and complaint. *Pascua v. Heil*, 126 Wn. App. 520, 108 P.3d 1253 (2005). In personam jurisdiction requires either service on the defendant personally or by substitute service. *Lepeska v. Farley*, 67 Wn. App. 548, 551, 833 P.2d 437 (1992). Statutes authorizing service by means other than personal service, i.e. constructive and substitute service, require strict compliance. *Pascua*, 126 Wn. App. at 526.

When a defendant in a civil action challenges personal jurisdiction based on insufficient service of process, plaintiff has the burden of establishing a prima facie case of proper service. *Gross v. Sunding*, 139 Wn. App. 54, 60, 161 P.3d 380 (2007). It is undisputed that the Twists did not attempt to serve the Twists through the Secretary of State or through publication. Personal service was not made on the Twists. The Goettemoellers claim only to have served the Twists at the Lynden address.

**C. The Goettemoellers Did Not Attempt to Serve the Twists Via the Secretary of State or Publication.**

It is undisputed that the Goettemoellers did not attempt to serve the Twists through the Secretary of State or through publication. *See* CP 4, 61. The Goettemoellers never sought an order from the trial court

authorizing service by mail or publication. *Id.*

**D. The Twists Were Not Personally Served.**

The Goettemoellers did not personally serve the Twists. On October 22, 2006, the Goettemoellers attempted to personally serve the Twists at 1577 D St., Apt. 11, Blaine, Washington and were unable to effect service. *See* CP 37-38. The Twists had moved back to the U.K. in January 2006. CP 23, 27, 34. As a result, the Twists could not have received in-hand service.

**E. The Twists Were Not Served Pursuant to RCW 4.28.080(16).**

**1. The Undisputed Facts Show That the Lynden Address Was Not the Twist's Usual Mailing Address at the Time That Service Was Attempted.**

The Goettemoellers' only claim is to have served the Twists at the Lynden address. The trial court erred in finding that the Twists were served with the Summons and Complaint at 413 B 19<sup>th</sup> St., PMB #104, Lynden, Washington, on June 6, 2008. RCW 4.28.080(16) provides that if a defendant cannot be served personally with reasonable diligence, service can be accomplished by leaving the documents at the defendant's *usual mailing address* with a person of suitable age and discretion, and by

mailing additional copies of the same documents to the usual mailing address. *See* RCW 4.28.080(16) (emphasis added). However, in this case, 413 B 19<sup>th</sup> St., PMB #104, Lynden, Washington was not the Twists' usual mailing address on June 6, 2008. CP 23, 27, 34, 56.

It is undisputed that the Twists moved back to the U.K. in January 2006, more than eight months before the lawsuit was commenced, on September 29, 2006. CP 23, 27, 34. The following are undisputed facts that prove that the Twists were not using the Lynden address as their usual mailing address at the time service was attempted:

- A copy of Mr. Twist's passport that shows he is a British Citizen. The last date stamp in his passport is January 19, 2006, the date when he left the U.S. for the U.K. CP 25-27.
- January 5, 2006 letter of reference written on behalf of the Twists by their property manager at 1577 D. St., Blaine, WA. The letter states that the Twists were moving away from the area. CP 34.
- March 27, 2006 letter addressed to Mr. Twist at his mailing address where he resides in Gloucestershire, England. The letter is from the Pension Service informing him that he is entitled to Pension Credit. A person is not entitled to pension credit in the U.K. unless he is a full-time resident of the U.K. CP 24, 35.
- Mr. Twist's billing statements addressed to him at his Gloucester, England address. There are billing statements from the following dates: February 21, 2007, July 24, 2007, March 27, 2008, and December 23, 2008. The billing

statements are undisputed evidence of the Twists' usual mailing address. CP 40-43.

- Two bank statements from US Bank addressed to the Twists. The August 17, 2005 through September 19, 2005 statement was the last billing statement sent to 413 B 19<sup>th</sup> St. #104, Lynden, Washington. Thereafter, the Twists began receiving US Bank statements at 1225 E Sunset Dr., Ste. 145, PMB 543, Bellingham, Washington, as evidenced by statement period October 12, 2005 through October 26, 2006. These two bank statements are evidence that as of October 2005, 413 B 19<sup>th</sup> St., #104, Lynden, Washington was no longer the Twists' usual mailing address. CP 23-24, 44.
- The Twists' Answer and Affirmative Defenses. The Answer affirmatively asserts that the Plaintiffs have failed to serve process on the Defendants in the manner and form required by law, and that the Plaintiffs have failed to properly commence this action within the time required by the applicable statute of limitations. CP 67-71.
- Declaration of Mr. Twist, in which he states that he has not resided in the U.S. since January 2006 and has not used any U.S. addresses to receive mail since leaving in January 2006. Mr. Twist further states that he never received a copy of the Summons and Complaint for this action in the mail. This declaration is also evidence that the Twists were not receiving mail at the Lynden address at the time that service was attempted. CP 23-24.

On March 20, 2009, the trial court requested additional information from the records custodian of The Mailbox, at 413 B 19<sup>th</sup> St., PMB 104, Lynden Washington, as to whether the Twists were receiving mail at that address at the time that service was attempted. RP1, at 3. The trial court

believed that the determining factor in establishing the Twists' usual mailing address was whether the Twists were actually receiving mail at the Lynden address at the time that service was attempted. *Id.*

In response to the trial court's March 20, 2009 request, the Twists obtained a declaration from the records custodian of The Mailbox, Chris Cooke, for PMB #104 at 413 B 19<sup>th</sup> St., Lynden, Washington. CP 5-6. Mr. Cooke stated that he has been the records custodian for The Mailbox since January 2007. *Id.* Mr. Cooke further stated that the Mailbox has not received any mail for the Twists at the address in question since he has been the records custodian for The Mailbox. *Id.* Thus, the trial court was presented with undisputed evidence that 413 B 19<sup>th</sup> St., PMB #104, Lynden, Washington was not the Twists' usual mailing address on June 6, 2008, when service was attempted.

**2. The Trial Court's Finding That the Twists Were Personally Served Is Contrary to *Wright v. B & L Properties*.**

In determining a defendant's usual mailing address for the purposes of RCW 4.28.080(16), the only Washington Court to have addressed this issue specifically stated that an address is a defendant's "usual mailing address" if at the time of service, (1) the address was

continually being used by the defendant, (2) the address was used on personal bank accounts, income tax returns, and telephone bills, (3) if the defendant was out of the country, special arrangements were made to have the mail forwarded from that address to the defendant, (4) the only address used by the defendant was the address in question, and (5) while out of the country, defendant still claimed his principal place of business was in the state of the address. *See Wright v. B & L Properties, Inc.*, 113 Wn. App. 450, 53 P.3d 1041 (2002). In *Wright*, the court found that because the defendant had done all of the above in reference to a private mailbox, it was his “usual mailing address” for the purposes of serving the defendant. *Id.*

In juxtaposition to *Wright*, the mailbox was not the Twists’ usual mailing address because at the time of service, (1) the Twists were not using the address, (2) the address was not being used on personal bank accounts and telephone bills, (3) the Twists were residing in the U.K. and they did not make special arrangements to have their mail forwarded from the address in question to their usual mailing address in the U.K., (4) while residing in the U.K., the Twists never claimed that they were still residents of Washington. CP 5-6, 23-44. None of the factors outlined in *Wright*

were met in this case. As such, the Lynden address could not have been the Twists' usual mailing address at the time that service was attempted.

In *Blankenship v. Kaldor*, the defendant challenged service of process under RCW 4.28.080(16). *Blankenship v. Kaldor*, 114 Wn. App. 312, 315, 57 P.3d 295 (2002). In *Blankenship*, plaintiff and the defendant were involved in a motor vehicle accident on or about September 6, 1997. *Id.* at 314. At the time of the accident, defendant was living with her mother. *Id.* Soon after the accident, defendant began living with her father. *Id.* Two years later, on August 10, 2000, defendant moved to Portland, Oregon. *Id.*

On September 1, 2000, plaintiff filed a personal injury action against the defendant. *Id.* at 314. Plaintiff attempted service on the same day at the defendant's mother's residence. *Id.* Plaintiff's process server was told that the defendant had moved to Portland, Oregon. *Id.* at 315. Despite this, the process server left the summons and complaint at the defendant's father's residence and mailed copies to the defendant in Portland, Oregon. *Id.*

Defendant answered the complaint on December 2, 2001, alleging insufficiency of service of process. *Id.* The trial court found that the

defendant had been properly served. Defendant appealed. *Id.*

The Court of Appeals reversed the trial court's ruling. *Id.* at 321. The Court of Appeals rejected the plaintiff's argument that she had effected service under RCW 4.28.080(16). *Id.* at 318. The court stated that the plaintiff did not explain how she had satisfied the requirements under RCW 4.28.080(16). *Id.* The court further relied on *Gerean v. Martin-Joven*, in which the process server served the defendant's father even though the defendant had moved to Walla Walla. *Id.* The *Blankenship* Court ruled that the defendant had not been properly served. *Id.* at 321.

Just as in *Blankenship*, the Goettemoellers' process server was advised that the Twists had moved out of the country prior to the attempted service at the Lynden address. *See* CP 37-38. Despite the process server's knowledge that the Lynden address was not the Twists' usual mailing address, the process server attempted service there. CP 56. Just as the *Blankenship* Court ruled, the Court in this case should rule that the Twists were not served under RCW 4.28.080(16), or in any manner.

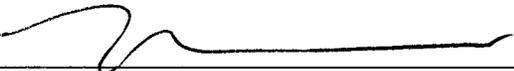
## V. CONCLUSION

The Court should reverse the trial court's order, dated August 7,

2009, and rule as a matter of law that the Twists were not properly served, in any manner, within the statute of limitations. As a result, this case must be dismissed.

DATED this 8 day of April, 2010.

COLE, LETHER, WATHEN, LEID  
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