

FILED
COURT OF APPEALS
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STATE OF WASHINGTON
BY *Patrick K. Daly*

No. 34971-0-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

SEBASTIAN BROWN, A single man,

Plaintiff/Respondent,

vs.

TONI EILEEN HAGER,

Defendant/ Petitioner.

BRIEF OF RESPONDENT

DATED this 12th day of March, 2007.

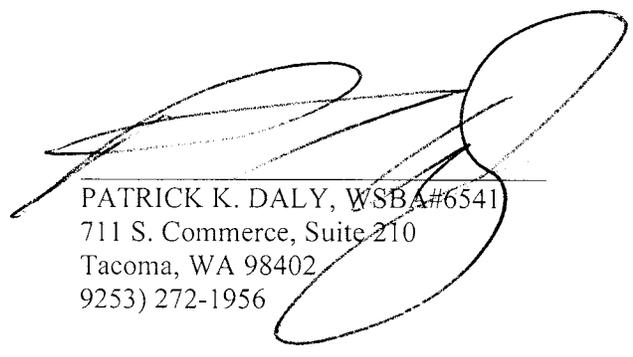

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TABLE OF AUTHORITIES

Table of Cases

Cases

Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005) 8
Brown v. Prowest Transport Ltd, 76 Wash.App. 412, 886 P.2d 223 8
Wilson vs. Steinbach 98 WA 2nd 434, 437 7

Statutes

RCW 4.16.180 8
RCW 46 64.040 10, 11,12

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR05

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR05

 1. In a lawsuit arising out of a motor vehicle accident that occurs in the State of Washington, can a Washington State resident who remains in the State of Washington be served by service on the Secretary of State pursuant to RCW 46.64.040?

 2. Did the Defendant willfully evade Service of Process?

C. STATEMENT OF THE CASE05

 1. Facts of Loss 05

 2. The Plaintiff's Attempts at Service 05

D. ARGUMENT 07

 1. Standard of Review..... 07

 2. Legal Authority08

 3. RCW 46.64.040 is Not Applicable to this Case. 09

E. CONCLUSION..... 14

A. ASSIGNMENTS OF ERROR

1. The Trial Court properly denied Defendant's April 28, 2006 Motion for Summary Judgment.

2. The Trial Court properly denied Defendant's May 19, 2006 Motion for Reconsideration.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR.

1. In a lawsuit arising out of a motor vehicle accident that occurs in the State of Washington, can a Washington State resident who remains in the State of Washington be served by service on the Secretary of State pursuant to RCW 46.64.040?

2. Did the Defendant willfully evade Service of Process?

C. STATEMENT OF THE CASE.

1. Facts of Loss

1. This matter arises out of a motor vehicle accident that occurred on January 9, 2003 in Pierce County, WA.

2. Plaintiff's attempts at service.

Plaintiff made significant attempts at service. Service was attempted at the address provided by the Defendant in the accident investigation report at 3570 Mariposa Street, Apt. 72, Torrance, CA.¹

Further investigation found the Defendant to be an excise taxpayer on mobile home property in Puyallup, WA, not California. Attempted service at that

¹ Helen Smith, Affidavit of Due Diligence. CP 71-72

location failed but it was learned that others were looking for the Defendant because of money she owed the mobile home park. No forwarding address was acquired. Continued attempts trying to locate the Defendant online, internet, telephone, and other sources were to no avail.²

Continued attempts at Service of Process were taken and Mr. Ed Lund was hired to attempt service on the Defendant. Mr. Lund had 50 years of experience in serving process. Mr. Lund picked up the search and periodically attempted service the Defendant on February 28, 2006 at trailer 38 at 5221 71st Ave. E., Puyallup, WA.²

Mr. Lund learned from the manager of the mobile home park that the Defendant had told the manager of the mobile home park prior to disappearing in the summer of 2005 that the Department of Social and Health Services, Department of Labor & Industries and that she owed \$4,780.00 to the owner of the trailer.³⁴

Mr. Lund learned, based on all of the information he had received, that during his investigation and his 50 years of experience was of the opinion that the Defendant was attempting to evade service from spring/early summer 2005 to January, 2006 from the Government authorities as well as the Plaintiff in this matter.⁵

² Affidavit of Edwin Lund CP 39 - 41

³ Affidavit of Edwin Lund CP 39 - 41

⁴ Affidavit of Mr. Baker CP 42 - 43

⁵ Affidavit of Edwin Lund CP 39 - 41

Mr. Baker, the mobile home park manager, stated that Ms. Hager, the Defendant, just disappeared after advising him of the Governmental Agencies trying to find her and the debt she owed to her landlord.

Mr. Baker also advised that there were others attempting to locate the Defendant unsuccessfully.

Ms. Hager lived at various places in Washington. She never left the state and does not deny evading service by the Sate of Washington and the landlord.⁶

D. ARGUMENT

1. Standard of Review

The Court will review the Petitioner's Motion, viewing the facts and all the reasonable inferences from those facts in the light most favorable to Respondents, the non-moving parties. The court in Wilson vs. Steinbach 98 WA 2nd 434, 437 stated:

. . . A summary judgment motion under CR 56(c) can be granted only if the pleadings, affidavits, depositions, and admissions on file demonstrate there is no genuine issue as to any material fact, and that the moving party is ****1032** entitled to judgment as a matter of law. Barrie v. Hosts of America, Inc., 94 Wash.2d 640, 642, 618 P.2d 96 (1980). The court must consider all facts submitted and all reasonable inferences from the facts in the light most favorable to the nonmoving party. Yakima Fruit & Cold Storage Co. v. Central Heating & Plumbing Co., 81 Wash.2d 528, 530, 503 P.2d 108 (1972); Barber v. Bankers Life & Cas. Co., 81 Wash.2d 140, 142, 500 P.2d 88 (1972). The motion should be granted only if, from all the evidence, reasonable persons could reach but one conclusion. Morris v. McNicol, 83 Wash.2d 491, 494-95, 519 P.2d 7 (1974).

Further, where statutory language is plain free from ambiguity and devoid of uncertainty, there is no room for construction because legislative intent derives

⁶ Affidavit of Mr. Baker CP 42 43

solely from the language of the statute. Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

2. **Legal Authority**

Ms. Hager Attempted to Avoid Service of Process.

RCW 4.16.180 provides:

If the cause of action shall accrue against any person who is a nonresident of this state, or who is a resident of this state and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as part of the time limit for the commencement of such action.

In this case Ms. Hager was attempting to evade service of process on this lawsuit, the matter between her and the Department of Social and Health Services, and the matter between her and the Department of Labor and Industries and the matter between her and the owner of the trailer where she owed rent.

Pursuant to RCW 4.16.180 the statute is tolled for a six month time period where Ms. Hager was attempting to evade process. In the case of Brown v. Prowest Transport Ltd, 76 Wash.App. 412, 886 P.2d 223, with slightly different facts, the court found that:

And the court goes on to say:

[7] Because the statute of limitations is an affirmative defense, the burden is on the party asserting it to prove the facts which establish it. Haslund v. Seattle, 86 Wash.2d 607, 547 P.2d 1221 (1976)

[9][10] Judicial interpretations of the standard of “concealment” necessary to the tolling of the statute of limitations are scarce. Bethel v. Sturmer, 3 Wash.App. 862, 867, 479 P.2d 131 (1970). Concealment under RCW 4.16.180 is defined as a “clandestine or secret removal from known address” Caouette v. Martinez, 71 Wash.App. 69, 74, 856 P.2d 725 (1993) (quoting Patrick v. DeYoung, 45 Wash.App. 103, 109, 724 P.2d 1064 (1986), review denied, 107 Wash.2d 1023 (1987)). Willful evasion of process appears to be a necessary ingredient Muncie v. Westcraft Corp., 58 Wash.2d 36, 38, 360 P.2d 744 (1961). While it is true that these defendants could have been served by publication of summons pursuant to RCW 4.28.100, such service is a constructive only and is not, as a practical matter, an effective means of notifying a party of the pendency of a lawsuit. Caouette, 71 Wash.App. at 75, 856 P.2d 725. The tolling provisions of RCW 4.16.180 apply notwithstanding availability of service by publication Caouette, at 76 856 P.2d 725. 76 Wash.App. 412, 886 P.2d 223.

At the time of the accident, Ms. Hager used a California address.

The affidavit of Edwin Lund in which Mr. Lund states based on his experience, based on what he learned in his attempts to serve Ms. Hager, believes that Ms. Hager was attempting to evade process, is adequate to demonstrate with reasonable inferences in favor of the Plaintiff that Ms. Hager was willfully attempting to elude service. Here, the issue of statute of limitations is simply an affirmative defense being pled by the Defendant. Mr. Lund’s opinion, based on his investigation, establishes a prima facie case of willful attempt to elude service.

The Plaintiff/Respondent is entitled to all reasonable inferences from the evidence before the Court and the law. Here, the evidence and the law support the Plaintiff's position that Defendant was willfully concealing herself within the State of Washington and that because of this concealment, the statute of limitations was tolled.

The Defendant successfully evaded Service of Process for a six month time period. This was willful conduct on the part of the Plaintiff ___ at the time of the accident when the Defendant used a California address on the investigation report.

3. RCW 46.64.040 is Not Applicable to this Case.

RCW 46.64.040 allows service on non-residents outside the State of Washington and residents outside the State of Washington. The amendment in 2003 only made it easier to demonstrate that the Defendants were not in the State of Washington. Pursuant to the affidavit of Ms. Hager she state she remained and resided in the State of Washington during the appropriate time period. She never resided out of the State of Washington. RCW 46.64.040 is not, based on the facts of this case, an appropriate statute to serve the Defendant, Ms. Hager. Even though Ms. Hager, the Defendant, gave a California address at the time of the accident by her affidavit she remained in the State of Washington and never resided outside of the State of Washington.

RCW 46.64.040 states:

Nonresident's use of highways — Resident leaving state — Secretary of state as attorney in fact.

The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as evidenced by his or her operation of a vehicle thereon, or the operation thereon of his or her vehicle with his or her consent, express or implied, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability in which such nonresident may be involved while operating a vehicle upon the public highways, or while his or her vehicle is being operated thereon with his or her consent, express or implied, and such operation and acceptance shall be a signification of the nonresident's agreement that any summons or process against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington. Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents. Service of such summons or process shall be made by leaving two copies thereof with a fee established by the secretary of state by rule with the secretary of state of the state of Washington, or at the secretary of state's office, and such service shall be sufficient and valid personal service upon said resident or nonresident: PROVIDED, That notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said defendant, and the plaintiff's affidavit of compliance herewith are appended to the process, together with the affidavit of the plaintiff's attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served. However, if process is forwarded by registered mail and defendant's endorsed receipt is received and entered as a part of the return of process then the foregoing affidavit of plaintiff's attorney need only show that the defendant received personal delivery by mail: PROVIDED FURTHER, That personal service outside of this state in accordance with the provisions of law relating to personal service of summons outside of this state shall relieve

the plaintiff from mailing a copy of the summons or process by registered mail as hereinbefore provided. The secretary of state shall forthwith send one of such copies by mail, postage prepaid, addressed to the defendant at the defendant's address, if known to the secretary of state. The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The fee paid by the plaintiff to the secretary of state shall be taxed as part of his or her costs if he or she prevails in the action. The secretary of state shall keep a record of all such summons and processes, which shall show the day of service.

RCW 46.64.040 allows service on the Secretary of State for a non resident and residents of the State of Washington who are out of the State. The language of the statute is clear: When a Washington state resident is out of state, service on the Secretary of State is permitted.

The 2003 amendments still contains the language “cannot . . . be found in this state.” If the legislature intended for this State to allow service on residents of the state who remain in this state, the words, “in this State” would not have been left in this statute. Here Ms. Hager remained in the state and evaded service. RCW 46.64.040 is not applicable in this case.

E. CONCLUSION

There was no error in the trial court in denying the defendant’s Motion for Summary Judgment. There are material facts in dispute and the decision of the trial court was proper.

FILED
COURT OF APPEALS
DIVISION II
07 MAR 15 PM 1:17
STATE OF WASHINGTON
BY _____
DEPUTY

No.34971-0-II

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

SEBASTIAN BROWN, A single man,

Plaintiff/Respondent,

vs.

TONI EILEEN HAGER,

Defendant/ Petitioner.

BRIEF OF RESPONDENT

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& Associates

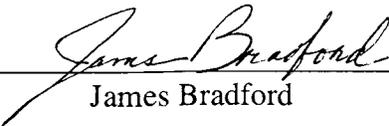
COURT OF APPEALS, DIVISION II OF THE STATE OF WASHINGTON
SEBASTIAN BROWN, A SINGLE MAN | Cause No. 34971-0-II
vs. | Narrative Affidavit of Service of
TONI EILEEN HAGER | BRIEF OF RESPONDENT

State Of Washington County of Pierce

The undersigned, being first duly sworn on oath, deposes and says: That (s)he is now, and at all times herein mentioned, a citizen of the United States and resident of the State of Washington, over the age of eighteen, not a party to nor interested in the above entitled action, and is competent to be a witness therein.

On or about March 14 2007 ABC Legal Services, Inc. received the above listed document(s) for service on George W. McLean & Associates at the address of 720 OLIVE WY #1600 SEATTLE, WA 98101.

I James Bradford, did attempt the given address 3/15/07, 10:43 am. and served the above listed document on Thomas Crowell, Attorney at Law.
I also filed the above listed documents on 3/15/07, approx 1:00 pm. with the clerk of the court of Appeals Div. II, State of Washington.


James Bradford

Subscribed and sworn before me on March 15 2007


Notary Public in the State of Washington, residing at Tacoma
Sally A. Bryan

SALLY A. BRYAN
STATE OF WASHINGTON
NOTARY — • — PUBLIC
MY COMMISSION EXPIRES 04/11/08

STATE OF WASHINGTON
07/MAR/15 PM 1:59
COURT OF APPEALS
DIVISION II

Daly, Patrick

Narrative Affidavit of Service

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