

No. 36727-1-II

COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

FILED  
COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
BY DEPUTY

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LEANNA SHIPP,

Appellant,

vs.

MASON GENERAL HOSPITAL FOUNDATION, a Washington  
Corporation, doing business under United Business Identifiers  
#601-336-014, and TREASURES THRIFT STORE, a commercial  
business venture wholly operated under the MASON GENERAL  
HOSPITAL FOUNDATION,

Respondents.

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RESPONDENTS' BRIEF

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## **I. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

- A. Whether the Trial Court Properly Granted Respondent's Motion to Dismiss Due to Insufficient Service of Process.
- B. Whether the Trial Court Properly Denied Appellant's Motion to Vacate the Trial Court's Order Granting Respondents' Motion to Dismiss.
- C. Whether the Trial Court Properly Denied Appellant's Motion for Continuance.

## **II. RESTATEMENT OF THE CASE**

### **A. Appellant's Statement of the Case is Improper.**

RAP 10.3(a)(4), provides in relevant part: "[r]eference to the record must be included for each factual statement." All such statements in violation of this rule should not be considered by the Court. Appellant's factual assertions are replete with "un-referenced assertions" which must be deemed irrelevant due to non-compliance with RAP 10.3(a)(4). Similarly, appellant's Statement of the Case is more argument than fact and thus should not be considered by the Court.

### **B. Statement of Facts.**

Plaintiff has brought a claim against defendants Mason General Hospital Foundation (hereafter "Foundation") and Treasures Thrift Store (hereafter "Treasures"). CP 171-177. The Foundation is a 501(c)(3) non-

profit corporation that is an entity distinct from Mason County General Hospital. CP 161-162. The Foundation operates Treasures as part of its fund-raising activities. CP 172.

The present suit arises from plaintiff's previous employment with Defendant Foundation and Treasures Thrift Store. CP 172. Appellant's employment with Foundation was terminated January 21, 2004. Id. Suit was filed in Mason County Superior Court on January 19, 2007, alleging: 1) wrongful termination, 2) outrage and 3) wages owed. CP 171.

Peg Stock, President of the Foundation, was never served with process. She visited the Clerk of the Mason County Superior Court, requested and purchased copies of the summons and complaint on file with the and received them on or about February 6, 2007. RP 2.

Joan Hayes, the registered agent for the Foundation and, was similarly never served with process. Her identity and address were readily available through multiple sources, including the Washington Secretary of State's website, telephone directories and in general Internet search databases. CP 157-158.

Leigh Bacharach, Mason General Hospital Development Director, was served with the Summons and Complaint in this matter, on April 6, 2007. Ms. Bacharach was not employed by, nor was a member of the

Foundation. CP 8-14; CP 15-20. Ms. Bacharach was not authorized to accept service of process for the Foundation. Id. When served, Ms. Bacharach did not allege that she was authorized to accept service. CP 142; 114-115.

### **III. ARGUMENT**

#### **A. Service of Process is Distinct from Actual Notice and “Mere Receipt” of the Pendency of a Lawsuit. Receipt of Court Documents Requested by a Defendant from a Clerk of Court is not Adequate Service.**

##### **1. Law regarding service of process, receipt of process, and notice.**

Under Washington law, “[m]ere receipt of process and actual notice alone do not establish valid service of process.” Haberman v. Washington Public Power Supply System, 109 Wn.2d 107, 177, 744 P.2d 1032 (1987). Notice without proper service is not enough to confer jurisdiction. In re Marriage of Logg, 74 Wn.App. 781, 875 P.2d 647 (1994). Statutory requirements relating to service of process must be complied with in order for trial court to finally adjudicate dispute between parties. Thayer v. Edmonds, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972).

Here, Appellant wrongly argues that the trial court invented a new “mere knowledge” theory of law in construing the rules of service. Appellant’s Brief at 4; 10-11. In addition, Appellant claims that the trial

judge imputed a “mind of the president theory” in his reading of the law. Appellant’s Brief at 10. Reading the trial court’s oral ruling shows that instead, the court was merely articulating the rule that notice alone does not confer jurisdiction. The trial judge stated,

And there, I think, lies the distinction between notice and service. Service puts one on notice that there are acts that you must take to defend against this litigation, and the mere knowledge of the existence of the litigation does not effect service.

RP 13. The judge discussed this distinction at length. RP 12-16.

Appellant tries to distract the court from this plain explanation and discussion of the rules regarding service of process. On the contrary, the court’s mention of mere “knowledge” was only a reference to the concept of notice, not a new theory of law, as suggested by Appellant. In addition, the trial court was accurate in its discussion of the distinction between service of process and “mere notice.”

Plaintiff relies solely on Tabbert, et. al. v. Lanza, 94 F. Supp. 2d 1010 (S.D. Ind. 2000), a federal case interpreting Indiana law, as authority that a clerk’s hand delivery of requested pleadings constitutes effective service. First, out of state authority is not controlling. State ex rel. Quick-Ruben v. Verharen, 136 Wn.2d 888, 908, 969 P.2d 64 (1998).

Second, Tabbert is factually inapposite to the case before this Court. The Tabbert court construed a situation in which service was made on an individual by certified mail, not a corporation, by hand. Id. at 1012. In addition, Tabbert shows that Indiana's rule of service are much more lenient than those of Washington. The Tabbert court found that "the manner of service set forth in Trial Rule 4.1 [the service of process rule in Indiana] is 'discretionary and therefore serve[s] only to outline general guidelines for service of process.'" *quoting Swaim v. Moltan Co.*, 73 F.3d 711, 720 (7th Cir. 1996). Further the court found: "[t]he discretionary nature of T.R. 4.1 . . . , coupled with the provision in T.R. 4.15(F), . . . is evidence that personal jurisdiction is acquired by any method of service of summons which comports with due process." Id. Thus, the Tabbert court found that service issued by certified mail by a clerk of court was proper service on an individual under Indiana law, reasoning that the method fulfilled due process under Indiana law. Id. at 1013.

In stark contrast, under Washington law, "a summons against a corporation **shall** be served by delivering a copy thereof to the president or other head of the company or corporation." RCW 4.28.080(9) (emphasis added). A trial court does not have personal jurisdiction over a party that is not lawfully served with process. Dobbins v. Mendoza, 88 Wn. App.

862, 871, 947 P.2d 1229 (1997). Washington case law further mandates proper service under statutory requirements. “[i]n order to be sufficient, service of process **must satisfy both due process and statutory requirements.**” Weiss v. Glemp, 127 Wn.2d 726, 734, 903 P.2d 455 (1995) (emphasis added).

Appellant’s citation of inapposite and non-controlling authority should not persuade the court that purchasing copies of documents from a Clerk of a Superior Court constitutes proper service. Appellant cites no Washington case, rule, or statute supporting that a Clerk of Court handing a requested document to an individual constitutes proper service. The trial court properly denied extending the rule to such acts. If Washington courts were to agree with Appellant, every Clerk of Court would become an unwitting participant/witness in litigation where a clerk’s strict impartiality is needed. For example, every time the Clerk of the Mason County Superior Court provided copies of documents in future cases on request, Washington courts would be bound to hold that such transfer constituted proper service. In so holding, every Clerk of Court in Washington State would become a *de facto* process server whenever pleadings or other documents were requested by litigants. This is a novel argument on the part of Appellant and an untenable rule and policy.

Receiving documents from a Clerk of Court should not be considered proper service. The trial court's well-reasoned decision should stand.

**B. The Trial Court Properly Granted Respondents' Motion to Dismiss Based on the Finding that Service on Leigh Bacharach was Insufficient.**

Washington courts have been rigorous in enforcing the statutory requirements of service, and especially in the context of service on corporations. See, e.g., Kain v. Grant County, 47 Wn.App. 153, 156, 734 P.2d 514 (1987) (service on county commissioners, rather than auditor, held insufficient); Nitardy v. Snohomish County, 105 Wn.2d 133, 134-35, 712 P.2d 296 (1986) (service on secretary of county executive held insufficient). In Crystal, China & Gold, Ltd. v. Factoria Ctr. Invs., Inc., 93 Wn. App. 606, 969 P.2d 1093 (1999), the process server attempted to serve a corporation's registered agent, who was absent, and instead served a bookkeeper employed by another company. Crystal at 608-609. This bookkeeper allegedly stated that she was authorized to accept service for this corporation. Id. The trial court found that the bookkeeper was not one of the enumerated persons to whom service could be made under RCW 4.28.080(9). On appeal, the plaintiff argued substantial compliance with the service statute. Id. at 609. The Court of Appeals disagreed with the plaintiff, stating,

[h]ere, the service statute for corporations communicates the Legislature's decision that only persons holding certain positions can accept service on behalf of a corporation. We find no justification that permits service of persons in unnamed occupations to satisfy the statute.

Id. at 610. The undisputed fact pattern in this case mirrors that in Crystal.

The process server served Ms. Bacharach, who was an employee of an entirely separate organization, Mason County General Hospital. Crystal shows that even if Ms. Bacharach had stated that she was eligible to accept service (which she did not), she does not hold a position contemplated by the statute and could not be served process.

Service on a corporation must be made

to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

RCW 4.28.080(9). Washington courts have found that for purposes of service, "a managing agent of a corporation upon whom process could be served is one who must have some substantial part in the management of its affairs generally or in a particular district or locality" Johanson v. United Truck Lines, 62 Wn.2d 437, 440, 383 P.2d 512 (1963). The

Johansen court found service proper where the “managing agent” fulfilled the following criteria:

[o]f the 12 to 15 employees at the branch terminal, [the defendant’s employee] had authority to hire and fire 9 of them. There was also evidence that both before and after the service in question, he had been served with legal process directed to the defendant, including garnishment process; and it had not, theretofore or thereafter, denied his authority to accept such process.

Id. at 439-40. Moreover, “agent” status under RCW 4.28.080 will not be imputed to an employee “who has neither express nor implied authority to represent the corporation.” Fox v. Sunmaster Prods., Inc., 63 Wn. App. 561, 567, 821 P.2d 502 (1991), review denied, 118 Wn.2d 1029, 828 P.2d 563 (1992). Here, Ms. Bacharach was not even employed by the Foundation. CP 159-160. Unlike the employee in Johanson, Ms. Bacharach had no hiring or firing authority, and had to request Foundation permission to enlist a part-time filing assistant. CP 12. In addition, she had never accepted legal process in the past and had no expectation of ever receiving legal process on behalf of the foundation or its related businesses. CP 10. Ms. Bacharach had extremely limited oversight over spending. 15-16. She participated in Foundation board and executive meetings only to fulfill her duties as a hospital employee. Id. In addition, analysis of the Foundation’s

organizational chart does not place Ms. Bacharach in the organization. Instead, it highlights that the Mason General Hospital Development Office is only tangentially related to the Foundation's operations. CP 18-20. In addition, Mrs. Bacharach's mere presence at meetings does not confer managing agent status. If that were the case, every board member and other employee of either the Hospital or the Foundation that participated in such meetings would be authorized for service of process. Moreover, contrary to plaintiff's assertions, a single denotation of an employee as "staff," with no qualifier, does not confer managing agent status. Moreover, such a designation as easily denotes Hospital as it does Foundation staff. Ms. Bacharach was a Hospital employee unable to accept service of process on behalf of the Foundation.

Appellant's citation to authority supporting service on a manager of "site support services" is inapposite. Reiner v. Pittsburg Des Moines Corp., 101 Wn.2d 475, 478, 680 P.2d 55 (1984) involved a case in which an employee of the defendant **foreign** corporation was served. Service on a foreign corporation is effected by service on "any agent, cashier or secretary" of the defendant. RCW 4.28.080(10). This is distinguishable from the rules of service on **domestic** corporations, which require, in relevant part, service on a "managing agent." RCW 4.28.080(9). Appellant has conflated the

requirements of two sections of the statute. Similarly, Wichert v. Cardwell, 117 Wn.2d 148, 150, 812 P.2d 858 (1991), is distinguished by Crystal in which it was stated,

The Wichert court discounted the commonly accepted rule of statutory construction that statutes in derogation of common law are strictly construed by finding that the substitute service statute was evidence that the Legislature intended to change the common law and by construing "the statute as to give meaning to its spirit and purpose, guided by the principles of due process[.]" Wichert, 117 Wn.2d at 156. Here, the service statute for corporations communicates the Legislature's decision that only persons holding certain positions can accept service on behalf of a corporation. We find no justification that permits service of persons in unnamed occupations to satisfy the statute.

Id. supra, at 610. The facts in Wichert involved personal service on an individual, not service on a corporation. In addition, "the issue involved interpreting the phrase 'then resident therein,' under RCW 4.28.080(14)." Id. Here, the issues involves service on a corporation, where the statute section has been construed differently (and more strictly) by Washington Courts.

**C. Appellant's Estoppel Argument is Not Supported by Washington Law.**

Appellant makes a claim that Respondents should have been estopped from asserting the insufficient service defense because, Appellant alleges,

Ms. Bacharach “represented to the process server that she was the office manager for the registered agent.” Appellant’s Brief at 14. While not outlined in Appellant’s brief, The elements of estoppel are:

- (1) An admission, statement or act inconsistent with a claim afterwards asserted,
- (2) action by another in reliance upon that act, statement or admission, and
- (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

Board of Regents v. Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987). This identical fact pattern and legal issue was discussed in Landreville v. Shoreline Cmty. College Dist. No. 7, 53 Wn. App. 330, 332, 766 P.2d 1107 (1988).

In Landreville, the plaintiff argued that the defendant community college “should have been estopped from contesting the service of process because the administrative assistant in the office of the Attorney General represented that she had the authority to accept service.” Id. at 332. The court reasoned that estoppel could not lie in that situation:

[i]n light of the clear language designating the proper recipient for service of process, any reliance upon the process server's statements regarding the administrative assistant's authority was not reasonable. Accordingly, the State was not estopped from contesting the service of process.

Id. at 332. Here, the situation is identical and the elements of estoppel have

not been met. First, the trial court rightly found that Ms. Bacharach indicated only that she was the manager of the office and was not asked to specify for which entity she worked, nor whether or not she had authority to accept service, based on the statement from the process server. RP 14; CP 142. Second, any statement regarding her representation of authority made by the process server, on which the Appellant here relies in full, cannot estop the Respondents from alleging insufficient service under Landreville.

**C. The Trial Court Properly Denied Appellant's Motion to Vacate Judgment on the Basis of Failure to Pursue Evidence with Due Diligence.**

Under Washington law,

motions to vacate or for relief from judgments are addressed to the sound discretion of the trial court, whose judgment will not be disturbed absent a showing of a clear or manifest abuse of that discretion.

Morgan v. Burks, 17 Wn. App. 193, 197, 563 P.2d 1260 (1977). In addition, CR 60 motions to vacate require that a party pursue evidence with due diligence. Appellant's motion to vacate was properly denied as Appellant failed to diligently pursue evidence and bring it to the court's attention during the hearing for the Motion to Dismiss. The trial court stated, "The information provided [after the Motion to Dismiss was granted] was information that was available. The information had not been obtained and,

therefore, does not fit the CR 60 requirements to vacate.” RP 32 (bracketed portion added). The court’s assessment was accurate. Appellant’s counsel had deposed Leigh Bacharach on June 11, 2007, and asked questions about service of process and her role as Development Director for the hospital, and her work with the foundation. RP 28-31. Appellant points to Foundation bylaws as alleged proof that Bacharach was a managing agent. Appellant’s Brief at 4-5. However, Appellant admitted possession of those documents well before Motion to Dismiss was heard. Appellant’s Brief 5-6. Moreover, defendant points to Board minutes for support of Bacharach’s “agent” status. Appellant’s Brief at 4-5. These documents were provided before the Motion to Dismiss was heard, and their contents were brought to the attention of the trial court at the hearing for the Motion to Dismiss. RP 28-31. In addition, Appellant points to a document filed with the Secretary of State by the Foundation for further support. Appellant’s Brief at 5. This document was not requested by Appellant in discovery. However, the document was available to any person as a matter of public record, which Appellant’s counsel admitted was discovered through his own efforts at information gathering. RP 25. Appellant’s counsel stated before the trial court that

...I go back to the Secretary of State and say,  
you know, are there any other papers they file  
with the Secretary of State other than a

registered agent for service of process? Well, yes, they have to designate an agent for their charity. They have to designate an agent for their trust. And low and behold, Leigh is the agent for both of those [sic].

RP 25. This statement reveals two things. First, Appellant's counsel failed to diligently pursue such information pursuant to CR 60, as it was not requested in discovery and available as a matter of public record. Second, it shows that the Foundation had not granted authority to Ms. Bacharach, but to Ms. Hayes, to accept service of process. These documents do not indicate that Ms. Bacharach could accept service. More important, counsel had the opportunity to pursue this information and failed to bring it to the court's attention in its response to Respondents' Motion to Dismiss, the trial court's decision to deny the Motion to Vacate was properly rendered.

**D. Appellant's Motion to Continue in Order to Conduct Further Depositions was Properly Denied.**

A trial court's grant or denial of a motion for continuance is reviewed for abuse of discretion, State v. Hurd, 127 Wn.2d 592, 594, 902 P.2d 651 (1995). Here, the trial court denied the motion to continue on the basis that no further information relevant to the Motion to Dismiss could be obtained by the Appellant. Appellant provided two reasons for the continuance. Appellant asked to depose Amy Nussbaum, an employee of the Mason

County Superior Court, to bolster facts regarding the Clerk of Court's delivery of documents to Peg Stock. RP 1-2. In response, the court stated,

I am willing to accept the fact that the President of the...Mason General Hospital Foundation paid for and received a copy of the summons and the complaint...at the Mason County Clerk's Office.

RP 2. In addition, Respondents stipulated to the court's notice of that fact.

RP 2. Thus, Appellant's motion for a continuance for that reason was rendered moot. Secondly, Appellant argued that a deposition of Peg Stock might reveal that

the President sat there and handed out copies of the lawsuit. Either from the one that was served on Ms. Bacharach, who testified she left it in her file, or through the one she obtained through the Clerk's office. I can't tell you, Your Honor, which source was used to disseminate to the entire Board, then, not just the President at that Board meeting without her deposition. So, that's the only other argument I'd have why a continuance would be beneficial.

RP 3-4. The trial court found this argument unpersuasive, and the ruling was correct. It was wholly immaterial whether copies of the summons and/or complaint were given to other members of the board, as that act describes only potential notice of the lawsuit, not perfected service of process. Thus, given the reasons for continuance provided by the Appellant, the trial court

properly decided the issue.

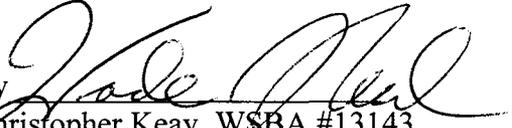
#### IV. CONCLUSION.

For the foregoing reasons, the Appellant's request for relief should be denied. The trial court's orders granting Respondents' Motion to Dismiss, denying a continuance and denying the Appellant's Motion to Vacate should be affirmed.

Dated this 30 day of April, 2008.

Respectfully submitted,

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business venture wholly operated under the MASON GENERAL  
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Respondents.

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CERTIFICATE OF SERVICE OF RESPONDENTS' BRIEF

---

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CERTIFICATE OF SERVICE

FILED  
COURT OF APPEALS  
DIVISION II

I, Karin Paton, certify under penalty of perjury under the laws of the State of Washington that the following is true and correct:

08 APR 30 PM 3:41  
STATE OF WASHINGTON  
BY [Signature]  
DEPUTY

A. I am a United States Citizen, over the age of 18 years, I am not a party to this cause, and am competent to testify to the matters set forth herein.

B. I am employed by the law firm of Johnson, Graffe, Keay, Moniz & Wick, LLP, 2115 N. 30<sup>th</sup>, Ste. 101, Tacoma, WA 98403, attorneys for respondents.

C. On April 30, 2008, I caused a copy of Respondents' Brief to be served upon the following:

Clerk of the Court Court of Appeals-Division I 950 Broadway, #300 Tacoma, WA 98402	Christopher W. Bawn Attorney at Law 1013 Tenth Ave. SE Olympia, WA 98501
<input type="checkbox"/> US mail	<input checked="" type="checkbox"/> US mail
<input type="checkbox"/> Facsimile	<input type="checkbox"/> Facsimile
<input type="checkbox"/> Overnight Mail	<input type="checkbox"/> Overnight Mail
<input type="checkbox"/> Email	<input checked="" type="checkbox"/> Email
<input checked="" type="checkbox"/> Courier Service	<input type="checkbox"/> Courier Service

Dated this 30th day of April, 2008.

[Signature: Karin Paton]

Karin Paton, CLA