NO. 46575-2

COURT OF APPEALS
THE STATE OF WASHINGTON
DIVISION II

MAURICE H. BAKER, a single man,
Plaintiff-Appellant,

Vs.

DAVID HAWKINS and CHRISTIE
HAWKINS, husband and wife and
the marital community comprised
thereof,

Defendants-Respondents.

APPEAL FROM ORDER OF DISMISSAL
BY THE SUPERIOR
COURT FOR KITSAP COUNTY

APPELLANT'S BRIEF

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A. Introduction

While the Defendants were out of country for an extended vacation, a known and trusted local contractor couple remodeled Defendants' home, spending 10-12 hours a day there seven days a week for thirty consecutive days. The contractors had full and unfettered access and use of the entire home and left the home only to run errands and sleep. On January 14, 2013, a Saturday evening, the contractors were served with two copies of a Summons and Complaint while carrying packages in to the residence they had just unlocked. When contacted by the process server they informed him they were "living" there. Was service perfected such that the statute of limitations was tolled?

B. Assignments of Error

1. The trial court erred in entering the order of July 25, 2014, granting defendant's motion to dismiss holding that the statute of limitations had expired.

2. The trial court erred in finding insufficient service of process where process was effectuated within the case law construing RCW 4.28.080(15).

C. Issues Pertaining to Assignments of Error

a. Does a contractual agent of Defendants having full possession and control of a Defendants' residence on a full time basis continuously for 31 days weeks have to sleep there or be a relative for service of process to be effective?

b. May a process server be entitled to rely on the statement of the person being served that he is "living" there where the process server witnessed him unlock the door to the home and bring in packages on a Saturday evening?

D. Statement of the Case

On December 16, 2010 in Port Orchard, Washington, Plaintiff, Maurice H. Baker was injured in an accident caused by Defendant Christie Hawkins. Baker initiated this action in Kitsap County Superior Court on December 16, 2013 to recover damages from his injuries caused by Mrs. Hawkins' negligent conduct.[1] CP 1-5 On January 14, 2014 at

[1] The statute of limitations expired on the day after filing the summons and complaint.

approximately 4:45 pm, professional process server and retired police officer Donald DeMers arrived at the Defendants' residence on Bainbridge Island. When DeMers was about to leave a truck pulled up in front of the Hawkins' residence. CP 35

DeMers' declaration of service states that the couple served at the home told him they were "living there". CP 35

Defendants primary residence and usual abode is on Bainbridge Island, Washington. CP 34 Mr. and Mrs. Hawkins were in Mexico during the month of January of 2014 on vacation. CP 43

While they were away, the Hawkins left their primary residence on Bainbridge Island in the exclusive care, custody and control of contractors Gary and Winoma Jellicoe. CP 46 Mr. and Mrs. Jellicoe own a construction company and were performing various construction activities on the Hawkins' home while the Hawkins' were on vacation in Mexico. CP 43

On January 14, 2014, (a Saturday evening), process server, Donald DeMers, arrived at the Defendants' residence on Bainbridge Island, Washington. Mr. DeMers arrived at approximately, 4:45 p.m. as it was getting dark.

Mr. DeMers knocked on the front door of the residence and received no answer. CP 35

As Mr. DeMers moved away from the front porch to the driveway, a pickup truck pulled up and stopped in front of the home. A man and woman (contractors Jellico) got out of the truck carrying packages that appeared to be groceries. They unlocked the home and carried the items into the house. CP 44

Mr. DeMers inquired if they were, in fact, the Defendants. Mr. Jellicoe, indicated that he and his wife were living at the home while they were doing some remodeling of the interior and building an addition. Mr. DeMers then served Mr. Jellicoe with process who indicated he would promptly forward the documents to the residents[2]. CP 35

The Jellicoes were at the home every day for 31 straight days while the Defendants were in Mexico. They would generally arrive between eight and nine a.m. and stay into the evening. Sometimes they stayed past nine p.m. They received deliveries for Mr. and Mrs. Hawkins and themselves from UPS and Fed Ex. CP 47 They had complete and unfettered access to the home. They had the codes for the door locking security systems on the home. CP 46 While they were there, they

[2] Defendants were notified of service by email two days later.

monitored the utilities in the home. They kept their tools and equipment at the home during their stay. CP 41

Mr. and Mrs. Jellicoe also used microwave facilities at the home for preparing of meals. CP 53 Prior to the return of Mr. and Mrs. Hawkins, Mrs. Jellicoe dusted the home. CP 55

On February 24, 2014 Defendant's counsel filed an answer alleging as affirmative defenses lack of personal jurisdiction and insufficiency of process. CP 6-8 Defendants moved for dismissal on April 3, 2014 on the grounds that the statute of limitations had run because service of process was improper. After hearing argument, the Court granted the motion on July 25, 2014. CP 130-131

E. Argument

1. Standard of Review

The Motion to Dismiss asserted that Defendants had never been properly served and thus the statute of limitations had expired. The motion was supported and opposed by declarations and evidence outside the pleadings. Where matters outside the pleadings are considered the motion to dismiss is treated as a motion for summary judgment. ***Puget***

Sound Bulb Exch. v. Metal Bldgs. Insulation, *9 Wash. App. 284, 513 P.2d 102 (1973).* As such, review is *de novo* in this Court.

2. RCW 4.28.080(15) allowing substituted service on the "then resident therein" of a Defendant's residence should be liberally construed.

Substituted service is authorized and governed by RCW 4.28.080(15). There are three elements that must be satisfied for effective substitute service: (1) the summons must be left at the defendant's "house of his or her usual abode"; (2) the summons must be left with a "person of suitable age and discretion"; and, (3) the person with whom the summons is left must be "then resident therein." It is undisputed that the summons and complaint were left with a person of suitable age and discretion at the Hawkins' residence; only "then resident therein" is at issue.

a. Jellicoes were "then resident"

The seminal case on this issue is ***Wichert v. Cardwell.*** 117 Wn2d 148, 812 P.2d 858 (1991). There, the Supreme Court held that process was properly served on defendants by leaving a copy of the Summons with the daughter of one of the defendants at the defendants' usual abode. The Court held that the test for effective service is whether the facts

presented show that the service provided was "reasonably calculated to accomplish notice to the defendant." *Id.*

The Court stated that this determination must be made on a case by case basis necessitated by the fact specific requirements of the statute. The Court concluded that "when a Defendant is absent, the person in possession of the house of usual abode is likely to present the papers to the Defendant…" ***Wichert*** at 152. The Court went on to decide that service of process was effective on the daughter despite the fact that she did not reside at the defendants usual abode, maintained her own residence, was self-supporting and kept no personal possessions at the residence of the defendants.

In the instant case the contractor and his spouse were clearly in possession of Defendants' residence. The Jellicoes' had a contractual and agency relationship with Defendants. They spent every day at the Defendants' home for 31 consecutive days. They unlocked the home when they arrived at the home on a Saturday evening. They carried packages into the home suggesting a significant presence. They represented to the process server that they were staying at the home while they were doing construction and remodeling work on the premises.[3] It is

[3] Jellicos dispute that they told the process server they were staying there. CP

undisputed that the Jellicoes were in possession of Defendants' home and that serving them would reasonably accomplish notice to Defendants.

Defendants rely on ***Salts v. Estes,*** 133 Wn.2d 160, 943 .2d 275 (1997). There, a sharply divided court found that service on a person who was coming to the defendant's home periodically to feed the dog and bring in the mail was not effective service. The Court held that "resident" must be given its "ordinary meaning—a person is resident if the person is actually living in the particular home." ***Salts,*** at 170. The Court declined to extend the definition of "resident" to include "a person who was a fleeting presence in the defendant's home." ***Salts,*** at 160. There, the person served at the residence, Ms. TerHorst, spent a total of one to two hours at Estes's home in the two week period between Estes's departure on vacation feeding the dog and taking in the mail. TerHorst was not the defendant's relative or employee. She never lived at the defendant's home nor did she keep any of her property there.

Unlike the person served in ***Salts***, the Jellicoes were not merely a "fleeting presence" but were at the Defendants home all day, every day for the 31 day duration the Defendants were out of country. They were in a contractual relationship with the Defendants and they kept their tools and

materials at the Defendants' home. Therefore, the instant case is not factually similar to ***Salts*** and this Court should not adopt ***Salts'*** narrow definition of "then resident."

Moreover, the ***Wichert*** opines that a bright-line rule for determining when an individual is "then resident" is to be avoided because "a case-to-case determination is necessitated by the fact-specific requirements of the statute." ***Wichert*** at 152 (citing ***Nowell v. Nowell***, 384 F.2d 951, 953, 5th Cir.1967), cert. denied, 390 U.S. 956, 88 S.Ct. 1053, 19 L.Ed.2d 1150 (1968). The Curt reasoned as follows:

> This approach is wholly consistent with Black's Law Dictionary which states that the "[w]ord 'resident' has many meanings in law, largely determined by statutory context in which it is used. BLACK'S LAW DICTIONARY 1309 (6th ed.1990) (emphasis added) (citing ***Kelm v. Carlson,*** 473 F.2d 1267, 1271 (6th Cir. 1973).

In interpreting substitute service of process statutes, strict construction was once the guiding principle of statutory construction. See ***Muncie v. Westcraft Corp.,*** 58 Wn.2d 36, 38, 360 P.2d 744 (1961). However, more recently, Washington Courts have applied liberal construction to substitute service of process statutes in order to effectuate the purpose of the statute while adhering to its spirit and intent. ***Sheldon v. Fettig,*** , 129 Wn.2d 601, 607, 919 P.2d 1209 (1996).

The purpose of substitute service statutes such as RCW 4.28.080(15) is to provide due process which requires that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." ***Wichert,*** at 151 (quoting ***Mullane v. Central Hanover Bank & Trust Co.,*** 339 U.S. 306, 315, 70 S. Ct 652, 657, 94 L.Ed. 865 (1950). The Wichert Court explained its reasoning as follows:

> We also note that the inquiry in any case is upon the method of attempted service, i.e., was it reasonably calculated to provide notice to the defendant? "It is horn book law that a constitutionally proper method of effecting substituted service need not guarantee that in all cases the defendant will in fact receive actual notice...." (Citation omitted.) ***Bossuk v. Steinberg,*** 58 N.Y.2d 916, 918, 460 N.Y.S.2d 509, 447 N.E.2d 56 (1983).

Wichert, at 152.

It is difficult to reconcile the Supreme Court opinions in ***Wichert and Salts.*** Justice Talmadge, who authored the majority opinion in ***Salts*** suggests that the person served in ***Wichert*** was the daughter of the defendants who had slept in the home the night before service was accomplished. ***Salts*** at 169. However, the majority does not recite other facts established in ***Wichert*** such as the fact that the daughter lived in her own apartment, was self supporting, had no personal possessions at the

parents' residence and seldom stayed over at her parents' residence.

While the daughter happened to have spent the night at her parents' home the day before the attempted service, the facts suggest that the daughter's presence at the parents' was, in fact, "fleeting". The majority's holding in ***Salts*** that service would have been effective had the occupant been a relative or slept there was not lost on the dissenting justices. Justice Alexander, writing in dissent, opined that the holding in ***Wichert*** in construing ***RCW 4.28.080*** is to provide due process, which, in turn, requires that "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." ***Wichert,*** at 151. The dissent further notes that ***Wichert*** specifically avoids a bright line rule for determining when an individual is "then resident" because a case to case determination is nesseccitated by the fact specific requirements of the statute.

The dicta in ***Salts*** suggests that the person served must be a resident and/or had slept in the home. Such an attempted bright-line rule is contrary to ***Wichert***. One wonders if a nap in the home would be adequate. What degree of a familial relationship is required? Is a cousin or nephew sufficient?

A better explanation for reconciliation of the ***Wichert*** and ***Salts*** opinions is to examine them in the context of constitutional due process and its limitations on a court's ability to exercise jurisdiction. As the ***Wichert*** court explains, the purpose of statutes which proscribe the methods of service of process is to provide due process.

In ***Sheldon v. Fettig,*** 129 Wn2d 60, 919 P.2d 1209 (1966), the plaintiff attempted service by leaving a copy of the Summons and Complaint with the defendant's brother at the defendant's parents' house in Seattle. Validity of service of process depended upon whether the defendant was still residing with her parents at their home in Seattle.

At the time process was served on defendant's brother, she was living in Chicago, had signed a lease for a Chicago residence, opened a checking account and joined a health club in Chicago and was having her mail forwarded to her Chicago address. The court adopted a rule of liberal interpretation of service of process statutes and of Civil Rule 1, which promotes the policy to <u>decide cases on their merits</u> rather than dismissing them on technicalities. ***Sheldon*** at 609. The court further concluded that its rule of liberal construction still exceeds constitutional due process requirements.

The seeming retreat from this rule by the majority in ***Salts*** also seems a clear departure from other opinions of the Supreme Court. For example, in ***City of Spokane v. Department of Labor and Industries*** (In re: Saltis), 94 Wn2d 889, 621 P.2d 716), the court explained that substantial compliance with service of process statutes is sufficient to obtain initial jurisdiction because delay or the possibility of losing lawsuits should not result from complicated procedural technicalities.

A rule requiring that a person being served be a relative of some degree who has recently slept at a defendant's residence would be contrary to recent decisions of the Court. Instead, Washington courts have concluded in a variety of factual constellations that substituted service is adequate if reasonably calculated to provide notice to the defendant. In addition, the legislature specifically used the term "then resident" in the statute to allow greater latitude in effectuating substituted service.

It is clear in the instant case that service was reasonably calculated to give the defendant's knowledge of the proceedings and an opportunity to be heard. The contractors who were served were contractual agents of defendants entrusted with the custody and care of defendant's home. They were entrusted with securing the home and were present at the home continuously while defendants were on vacation out of the county. They accepted deliveries for defendants. They

prepared meals there. They used the plumbing facilities in the home. They were contractual agents. Just as the doorman at a defendant's condominium building whose duty it is to receive delivery of packages and correspondence for tenants was residing therein for purpose of service of process, contractors for similar duties and responsibilities were appropriate persons to receive substituted service. See ***Hartford Fire Ins.Co. v. Perinovice,*** 152 F.R.D. 128 (1993). See also 4*A* *CHARLES A. WRIGHT & ARTHUR R. MILLER,* Federal Practice and Procedure, Sec. 1096, at 82-83 (2d ed. 1987).

A conclusion that service on the contractor was sufficient here is supported by other jurisdictions. ***See United States v. House,*** 100 F. Supp.2d 967 (D.Minn. 2000) (holding that service was proper on a daily visitor and periodic overnight guest proper as it was intended to give notice to the Defendants and was reasonably calculated to reach them); ***O'Sell v. Peterson,*** 595 N.W. 2d 870,873-874 (Minn. App. 1999) (holding that leaving Summons and Complaint with the defendant's 14-year-old stepson, who was staying at defendant's home for a six-day, non-custodial visitation, constituted substitute service of process on defendant); ***Magazine v. Bedoya,*** 475 So.2d 1035, 1035-36 (Fla.App.1985) (concluding mother-in-law, who was visiting defendant for six weeks, and who told process server that she lived there, was residing there); ***Sangmeister v. McElnea,*** 278 So.2d 675. 676-77 (Fla.App.Dist. 3 1973) (holding four-month

visitor was residing therein); see also ***Plushner v. Mills,*** 429 A.2d 444, 446 (R.I. 1981) (concluding that daughter, who was placed in charge of father's home in his absence, was residing therein).

Finally, the procedural posture here requires that the facts be viewed most favorably to Plaintiff. The undisputed facts are that the Jellicoes arrived at the home in the evening on a Saturday night. They opened the locked front door. They unloaded packages from their truck and carried them into the home. They confirmed that they would insure that the documents were promptly delivered to the Defendants.

The only fact in dispute is whether the Jellicoes' represented to the process server that they were "living" at the house while they were performing some remodeling activities. While both Mr and Mrs. Jellicoe deny this statement, any factual dispute must be viewed most favorably to Mr. Baker. It is undisputed that the Jellicoes were in full and unfettered possession of the home and were there ten hours a day for 31 consecutive days while the Defendants were out of the country. They had contracted with Defendants and had an agency relationship. They kept their tools at the home. They accepted deliveries for Defendants. They used the kitchen and bathroom in the home. This Court should determine that the Jellicoes' were "then resident" of Defendants' home when they were served and therefore, service was proper.

E. Request for Attorney's Fees and Expenses

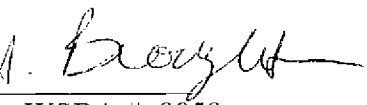
Mr. Baker requests attorney's fees and costs on this appeal pursuant to RAP 18.1.

F. Conclusion

For any and all the above reasons, Appellant requests that this Court reverse the trial court's dismissal of this case and set this matter to proceed to trial.

Respectfully submitted this 30 day of November 2014.

BROUGHTON LAW GROUP, Inc. P.S.



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