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COURT OF APPEALS  
DIVISION II  
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STATE OF WASHINGTON  
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No. 48415-3-II

COURT OF APPEALS, DIVISION 2  
OF THE STATE OF WASHINGTON

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SHANTA STEGER, Plaintiff and Appellant,

v.

JANICE TURNER, Defendant and Respondent.

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BRIEF OF APPELLANT

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## **I. ASSIGNMENT OF ERROR**

The trial court erred in entering the order of December 4, 2015 granting Defendant Janice Turner's Motion for Summary Judgment regarding service of process.

## **II. ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. The Court should use the substantial compliance standard in interpreting statutory procedures for service of process where there is no prejudice to the Defendant;
- B. A practical solution should be favored over a technical one.

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

Shanta Steger was injured in an automobile accident on July 20, 2012 in Kitsap County. (CP 4) On July 23, 2014, Ms. Steger had cervical surgery related to the accident. (CP 67)

On July 14, 2015, Ms. Steger filed her Summons and Complaint naming the Defendant Janice Turner. (CP 1-5) Ms. Steger attempted service on Ms. Turner on ten separate occasions. (CP 97-120) On August 20, 2015, service of the Amended Complaint on the Secretary of State by mail was effected on Defendant Janice Turner. (CP 90)

On November 6, 2015, Janice Turner filed a Motion for Summary Judgment on the issue of defective service of process. (CP 18-29) In support thereof, Janice Turner's husband, John Turner, filed a Declaration listing the documents he had received at his home from Ms. Steger's attorney:

1. Amended Summons;
  2. First Amended Complaint for Damages and Personal Injuries;
  3. Affidavit of Mailing of the Notice of Summons and Complaint Upon the Defendants by Service Upon the Secretary of State and the Summons and Complaint;
  4. Sworn Statement of Plaintiff Shanta Steger;
  5. Notice of Service of Summons and Complaint Upon the Defendants By Service Upon the Secretary of State of the State of Washington;
  6. Affidavit of John Orlandini;
  7. Sworn Statement off John Orlandini of Service of Summons and Complaint Upon Defendant By Service Upon the Secretary of State of the State of Washington.
- Attached are Exhibit 1 – Declaration of Non-Service and

Exhibit 2 – Internet Search. (CP 32-33)

The Declaration submitted to the Secretary of State by Shanta Steger in support of service was undated. (CP 42-43) The accompanying documents, including the Affidavit of Mailing, the Notice of Service on the Secretary of State and the Sworn Statement of John L. Orlandini in Support of Service were all dated August 17<sup>th</sup> or 18<sup>th</sup>, 2015. (CP 40-41, 44-49)

In response to Ms. Turner's Motion for Summary Judgment, Shanta Steger filed a Declaration of Michelle Moran attesting that Ms. Steger had executed her Declaration on or about August 17, 2015. (CP 95-96) The trial court ruled that the undated declaration did not comply with the service statute and granted Janice Turner's Motion for Summary Judgment. The court stated:

"Getting to the last issue, which is the failure to date the declaration, I do (*sic.*) think that is favored to the plaintiff's case. That is a declaration that was undated. It is different from the case cited where there was a failure to include at the location. The date itself is critical to an affidavit or a declaration. And without that dating of the declaration, it doesn't qualify as a declaration or a sworn statement. And without the sworn statement being appended, there's a failure to follow the rule.

And with a failure to follow the rule, I believe that there has been a lack of proper service. It did not qualify under the statute as required and as cited, the motorist

statute.

So with that, I'm finding in favor of the defendant in its motion based upon my ruling today. So granting the motion for the defense regarding Turner.”

(RP, 20)

#### **IV. STANDARD OF REVIEW**

The standard of review on appeal of a summary judgment order is de novo, with the reviewing court performing the same inquiry as the trial court. *Herron v. Tribune Publishing Company* 108 Wash.2d 162, 169, 736 P.2d 249 (1987). Logical conclusions, including the proper interpretation of statutes, are reviewed de novo. *Gildon v. Simon Property Group, Inc.* 158 Wash.2d 483, 493, 145 P.3d 1196 (2006). The question of personal jurisdiction is one of law reviewed de novo when the underlying facts are undisputed. *Hein v. Taco Bell, Inc.* 60 Wash.App. 325, 328, 803 P.2d 329 (1991). Questions of statutory interpretation are reviewed de novo. *State v. Morales* 173 Wash.2d 560, 567 n.3, 269 P.3d 263 (2012).

#### **V. ARGUMENT**

##### **A. The Court Should Apply the Substantial Compliance Standard Where There was no Prejudice to the Defendant**

Janice Turner contends that the service herein was a “nullity”

because RCW 46.64.040 must be strictly adhered to or no service is accomplished. In her motion, Ms. Turner cited *Omaits v. Raber* 56 Wn. App. 668, 670, 785 P. 2d 462 (1990) (CP 26), where the plaintiff attempted service on a non-resident by using RCW 46.64.040. However, he failed to notify the defendant that he had served the summons and complaint on the Secretary of State. In other words, the plaintiff failed to give notice to the defendant of the service. This failure to give notice was strictly construed resulting in dismissal of the case.

Similarly, in *Heinzig v. Hwang* 189 Wash.App. 304, 354 P.3d 943 (2015) and *Keithly v. Sanders* 170 Wash.App. 683, 285 P.3d 225 (2012) the plaintiff failed to send defendant notice of service on the Secretary of State. Dismissal was affirmed in all three cases.

In contrast, however, in *Sheldon v. Fettig* 129 Wash.2d 601, 607, 919 P.2d 1209 (1996) the Washington Supreme Court explained,

“In interpreting substitute service of process statutes, strict construction was once the guiding principle of statutory construction. See *Muncie v. Westcraft Corp.*, 58 Wash.2d 36, 38, 360 P.2d 744 (1961). However, more recently, we 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.”

The *Sheldon* court continued:

“For example, in *Martin v. Meier*, 111 Wash.2d 471, 760 P.2d 925 (1988) the issue was whether a defendant was properly served under the motorist statute. Such service is statutorily permitted only when the defendant “departs from this state.” RCW 46.64.040. The defendant in *Martin* had not left the state although plaintiff was unable to locate him. This court liberally construed the term and upheld the sufficiency of service of process. In doing so, the term “departs” was interpreted by looking at the underlying purpose of the motorist statute which is to provide a method for serving motorists who cannot be found in the State.

In *Wichert v. Cardwell*, 117 Wash.2d 148, 812 P.2d 858 (1991), we used liberal construction in interpreting the term “then resident therein” in the substitute service of process statute noting that strict construction “ ‘has been the object of a great deal of criticism in modern times.’ ” *Id.* at 152, 155, 812 P.2d 858. In *Wichert*, we focused on the “spirit and intent of the statute” rather than “the literal letter of the law” and stated that the term should be defined so as to uphold the underlying purpose of the statute. *Id.* at 151, 812 P.2d 858. We held the dual purpose of the statute is to (1) provide means to serve defendants in a fashion reasonably calculated to accomplish notice and (2) allow injured parties a reasonable means to serve defendants.

In *Martin v. Triol*, 121 Wash.2d 135, 847 P.2d 471 (1993) we also applied liberal construction. The issue there was whether defendant could be served under the motorist statute during the 90-day tolling period following the three-year period allowed in the statute. RCW 46.64.040. The motorist statute only authorizes service for three years following an accident. Plaintiff attempted service within 90 days after expiration of the three years. In a strict reading, plaintiff failed to serve within

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three years. However, the court, mindful that the civil rules are meant to minimize miscarriages of justice on procedural grounds, stated " 'we do not apply a strict construction ... [r]ather, we so construe the statute as to give meaning to its spirit and purpose, guided by the principles of due process....' " *Martin v. Triol*, 121 Wash.2d at 145, 847 P.2d 471 (quoting *Wichert*, 117 Wash.2d at 156, 812 P.2d 858). The court defined the three-year period in which service could be made as three years plus the 90-day tolling period, and found service sufficient.

*Sheldon* makes it clear that the purpose of strictly construing statutes regarding service of process is to ensure that the Defendant is provided notice of the action. Once the Defendant has been provided actual notice, the form of that notice should be liberally construed.

Also, in *Golden Gate Hop Ranch, Inc. v. Velsicol Chemical Corporation* 66 Wash.2d 469, 403 P.2d 351, cert. denied 382 U.S. 1025, 86 S.Ct. 644, 15 L.Ed.2d 339 (1966) (disagreed with on other grounds by *Grange Insurance Association v. State of Washington* 110 Wash.2d 752, 757 P.2d 933 (1988)) the court applied the substantial compliance standard under the long arm statute, RCW 4.28.185. The statute requires an affidavit be filed that the defendant could not be served in the state. The affidavit was not filed until after the motion to dismiss was filed. The court held that substantial compliance with the

statute was sufficient where non-compliance was due to the failure to timely file the affidavit of non-residency, provided the defendant was not prejudiced by the late filing.

In the instant case, Janice Turner's husband received all of the documents including the undated declaration of Shanta Steger. (CP 32-54, 92) Ms. Steger, in opposition to the Motion for Summary Judgment, subsequently filed the declaration of her attorney's paralegal, Michelle Moran, which stated that the declaration was executed on or about August 17, 2015. (CP 95-96) The delay in filing did not prejudice Ms. Turner.

Other jurisdictions follow the rule of liberal construction in interpreting substitute service of process statutes where actual notice is received. See, e.g., *Larson v. Hendrickson* 394 N.W.2d 524, 526 (Minn.Ct.App. 1986); *Lavey v. Lavey* 551 A.2d 692 (R.I. 1988); *Karlsson v. Rabinowitz* 318 F.2d 666 (4<sup>th</sup> Cir. 1963); *Plonski v. Halloran* 36 Conn.Supp. 335, 337, 420 A.2d 117 (1980) (statutes governing substituted service should be liberally construed in those cases where the defendant received actual notice).

Professor Karl Tegland noted, when discussing substantial compliance versus strict compliance, that the Washington Supreme

Court has occasionally provided mixed signals as to how strictly the plaintiff must comply with the statutory procedures for service of process. In one 1995 case (*Weiss v. Glemp* 127 Wash.2d 726, 903 P.2d 455 (1995)), the court said so-called “substantial compliance” with the statutory procedures is insufficient and does not give the court jurisdiction over the defendant, even if the defendant has received actual notice of the proceedings. Other cases have been less rigorous. (e.g., *Sheldon v. Fettig* 129 Wash.2d 601, 607, 919 P.2d 1209 (1996); *Woodruff v. Spence* 88 Wash.App. 565, 945 P.2d 745 (1997); *In re Marriage of McLean* 132 Wash.2d 301, 937 P.2d 602 (1997).

**B. A Practical Solution Should Be Favored Over a Technicality**

The date of the undated document can be inferred by the surrounding circumstances and documents. In *Johnson v. King County* 148 Wash.App. 220, 198 P.3d 546 (2009) regarding a notice for a county tort claim, on the line for date and place of signing, the claimant dated the form but left out the place of signing. The Superior Court dismissed the case. The Court of Appeals held that the place of signing was reasonably inferred from the information provided in the claim, and as such the court was not deprived of jurisdiction.

In *Manius v. Boyd* 111 Wash.App. 764, 47 P.3d 145 (2002) the court dealt with proof of service of a request for a trial de novo. The statute, RCW 9A.72.085 and CR5, provide that the declaration have both the date and the place of execution.

RCW 9A.72.085 states, in pertinent part:

Whenever, under any law of this state or under any rule, order, or requirement made under the law of this state, any matter in an official proceeding is required or permitted to be supported, evidenced, established, or proved by a person's sworn written statement, declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved in the official proceeding by an unsworn written statement, declaration, verification, or certificate, which:

- (a) Recites that it is certified or declared by the person to be true under penalty of perjury;
- (b) Is subscribed by the person;
- (c) States the date and place of its execution; and
- (d) States that it is so certified or declared under the laws of the state of Washington.

(2) The certification or declaration may be in substantially the following form:

"I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct":

.....  
(Date and Place)

.....  
(Signature)

Similarly, GR 13 states, in pertinent part,

"Except as provided in section (b), whenever a matter is required or permitted to be supported or proved by affidavit, the matter may be supported or proved by an

unsworn written statement, declaration, verification, or certificate executed in accordance with RCW 9A.72.085. The certification or declaration may be in substantially the following form:

I certify (or declare) under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct:

\_\_\_\_\_

(Date and Place)

\_\_\_\_\_

(Signature)

In *Manius, supra.*, the declaration had the date, but not the location of execution. On appeal, the court held that the certificate of service constituted adequate proof of service by mail of the request for a trial de novo.

“A system of procedure is perverted from its proper function when it multiplies impediments to justice without the warrant of clear necessity.” Similarly, Washington court rules and case law reflect the same principles. Civil Rule 1 provides in part: “[These rules] shall be construed to secure the just, speedy, and inexpensive determination of every action.” “[A] practical solution should be preferred to a technical one whose use might result in frustrating the purpose of the superior court rules.” *Kohl v. Zemiller*, 12 Wash.App. 370, 372, 529 P.2d 861 (1974).

Here, requiring an additional statement that Barlow signed the original and mailed the copies from the law firm's address would serve no useful purpose, especially in the absence of an allegation that the Maniuses did not receive timely service or notice of the Boyds' request for trial de novo. Rather, the certificate's various components constitute “ ‘some evidence’ of the time,

place, and manner of service.” *Terry*, 109 Wash.App. at 457, 36 P.3d 553 [*Terry v. City of Tacoma*, 109 Wash.App. 448, 36 P.3d 553, 556 (2001)], citing *Carpenter*, 97 Wash.App. at 987, 988 P.2d 1009 [*Carpenter v. Elway*, 97 Wash.App. 977, 987 n. 4, 988 P.2d 1009 (1999) *review denied*, 141 Wash.2d 1005, 10 P.3d 403 (2000)]. As we have previously noted, the proof of service of the request for trial de novo is not as strict as the Nevers requirements for filing the request for trial de novo itself. *Terry*, 109 Wash.App. at 457, 36 P.3d 553.

Accordingly, we hold that Barlow's Certificate of Service constitutes adequate proof of service by mail of the request for trial de novo. We reverse the Maniuses' judgment and the order striking the Boyds' request for the trial de novo, and we remand for a trial de novo.” *Manius v. Boyd, supra*. 111 Wash.App. at 770-771, 47 P.3d 145 (2002).

As a matter of practicality, missing dates are often not fatal to documents, even in the context of a criminal case. In *State v. Young* 97 Wash.App. 235, 984 P.2d 1050 (1999), the defendant was charged with forgery of a postdated check. The court held that the postdated check created liability under the UCC, resulting in a conviction for forgery. See also, *State v. Bartlett* 56 Wash.App. 77, 782 P.2d 570 (1989) (Undated waiver and continuance forms waiving right to speedy trial deemed valid).

In fact, under the UCC, even an undated check is considered dated at least at the time the holder comes into possession of the

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instrument. RCW 62A.3-113 provides as follows: "If an instrument is undated, its date is the date of its issue or, in the case of an unissued instrument, the date it first comes into possession of a holder." RCW 62A.3-113(b).

## VI. CONCLUSION

This is a case where Ms. Turner received notice of the lawsuit. This is a case where Ms. Turner was not prejudiced by Ms. Steger's failure to date the declaration. Ms. Turner received the Summons and Complaint within the statutory time period, she was aware that a lawsuit had been filed against her, and the only defect found by the trial court was the failure of Ms. Steger to date her declaration. The dismissal was a matter of form over substance, of technicality over practicality. The ruling of the trial court should be overturned and Ms. Steger should be permitted to continue her lawsuit to recover against Ms. Turner. As set forth in Civil Rule 1: "These rules govern the procedure in the superior court in all suits of a civil nature whether cognizable as cases at law or in equity ... They shall be construed and

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administered to secure the just, speedy, and inexpensive determination of every action.”

Respectfully submitted this 24 day of March 2016.

ORLANDINI & WALDRON

BY:



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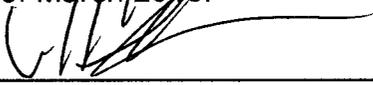
**DECLARATION OF SERVICE**

On this day I delivered a true and accurate copy of the document to which this certificate is affixed by personally by depositing the same in the mails of the United States of America a properly stamped and addressed envelope, for delivery to the attorney of record for Defendant/Respondent and also served via e-mail:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed at Tacoma, Washington this 25 day of March 2016.

  
\_\_\_\_\_  
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