

FILED

JUL 30 2014

CLERK OF COURT
STATE OF WASHINGTON
300 N. BROADWAY
YAKIMA, WA 98901

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STEVEN J. LACEY,

Appellant,

v.

IAN LANTRY, et.al.

Respondents.

REPLY BRIEF OF APPELLANT

Cause No. 12 – 2 - 03093 – 3

Appeal No. 32189 – 4 - III

Richard R. Johnson
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LACEY v. LANTREY, ET.AL.

Appeal No. 32189 - 4 - III

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ARGUMENT

The two principal cases to be considered in this appeal are *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991), and *Salts v. Estes*, 133 Wn.2d 160, 943 P.2d 275 (1997), both decisions of the Washington Supreme Court. *Salts* is later in time than *Wichert* by six years. *Salts* did not overrule *Wichert*, but, rather, distinguished the *Wichert* decision. *Salts* was a five to four decision, and *Wichert* was a unanimous decision of the court.

Salts concluded that substitute service in that case was insufficient. *Wichert* concluded that substitute service in that case was sufficient. It is interesting that the *Wichert* case was successfully argued for the plaintiff / the appellant before the Washington Supreme Court by Charles Wiggins, who is currently a member of that Court.

Unless and until *Wichert* is overruled by the Washington Supreme Court, it is precedent, and it must be followed. *Hamilton v. Department of L&I*, 111 Wn.2d 569, 761 P.2d 618 (1988).

In the *Wichert* case, the Washington Supreme Court reversed the trial court and the Court of Appeals holding that the substitute service made, pursuant to RCW 4.28.080 (15), was sufficient, and it was reasonably calculated to accomplish service.

In *Wichert*, the defendants were out of state when the service was made. Their residence was occupied by the defendant wife's 26 year old adult daughter, who had stayed in the house the night before process was served. The daughter had a key to the defendant's residence. However, she lived in her own apartment, was self – supporting, and had no personal possessions at the residence of her mother and step – father, the defendants. In *Wichert*, the defendants actually received the Summons and Complaint, and entered a Notice of Appearance in the case ten days after service.

RCW 4.28.080 (15) authorizes substitute service when three elements are satisfied to constitute service : 1) A copy of the Summons is left at the house of the defendant(s) usual abode, 2) With a person of suitable age and discretion, 3) then resident therein. In *Wichert*, the focus was on the phrase of the statute “then resident therein.” The court said that “then” refers to the time of service. “Therein” means the defendants' usual place of abode.

In *Wichert*, the court noted that the terms “reside,” “residing,” “resident,” and “residence” had all been given “elastic” meanings, and that to interpret the sense in which the terms are used the court must look to the object or the purpose of the statute in which the term is employed. *McGrath v. Stevenson*, 194 Wash. 160, 77 P.2d 608 (1938).

The purpose of the services statutes is to provide due process. “The fundamental requisite of due process of law is the opportunity to be heard.” *Grannis v. Ordean*, 234 U.S. 385 (1914). The opportunity to be heard depends on notice that a lawsuit is being commenced. *Mullane v. Central Hanover Bank & Trust Co.* 339 U.S. 306 (1950).

The inquiry in any case is upon the method of the service attempted. Was it reasonably calculated to provide notice to the defendants? A constitutionally proper method of effecting substituted service need not guarantee in all cases that the defendants will in fact receive actual notice. *Wichert, supra*, at p. 860.

So, what the court held in *Wichert* was that service upon a defendant’s adult child who was an overnight resident in the defendant’s house was reasonably calculated to accomplish notice to the defendant. “When the defendant is absent, the person in possession of the house of usual abode is likely to present the papers to the defendant, particularly when that person is a family member.” *Wichert, supra*, at p. 860. Again, *Wichert* was a 1991 unanimous decision of the Washington Supreme Court.

In *Salts*, the process server went to the defendant’s home to accomplish service of the suit papers and met Mary TerHorst at the front door. The defendant was on vacation at the time, and had asked TerHorst

to go to his house during his vacation to feed the dog, bring in the mail, and to take care of similar matters.

TerHorst was not a relative or an employee of the defendant in the *Salts* case. She had never lived at the defendant's home, and didn't keep any of her own possessions there. TerHorst had been at the defendant's house a total of one or two hours between the time defendant left on vacation and when TerHorst was served, and just happened to be at the defendant's house when the process server came there to serve the papers.

In *Salts*, the Washington Supreme Court held – five to four – “...that a person who was a fleeting presence in the defendant's home was not a ‘resident’ therein for purposes of RCW 4.28.080 (15). That was the decision of the five justice majority in *Salts* even though six years earlier the Washington Supreme Court held in its unanimous decision in *Wichert* that service at the defendant's home on defendant wife's adult daughter, who infrequently stayed overnight there, and resided elsewhere, was sufficient substitute service on the defendant.

In the dissenting opinion in *Salts* Justice Alexander pointed out that RCW 4.28.080 (15) doesn't say that the suit papers must be left with a “resident” of the defendant's home, but, rather, that the papers are given to a person of suitable age and discretion “then resident” there. “The use of the word ‘then’ before ‘resident’ suggests that the person to whom the

summons is delivered may have a more transitory relationship to the abode than does the person upon whom service is sought.” As Justice Alexander noted, “Rather, we so construe the statute as to give meaning to its spirit and purpose, guided by the principles of due process stated above.” *Salts, supra*, at p.281.

The dissent in *Salts* cites *Plushner v. Mills*, 429 A.2d 44 (1981) where a Rhode Island appellate court was asked to interpret a statute identical to RCW 4.28.080 (15). The court held there that service on the defendant’s daughter, who maintained a separate residence, was effected because she had been put in charge of the defendant’s house while he was away, and taking care of the family dog there was on the day service was made. The daughter was placed in charge of the home while her father was gone, she had a key and could come and go as she pleased, and was at the defendant’s home when the process server arrived there conducting family business.

CONCLUSION

Similar to the fact situation in *Wichert* and *Plushner*, delivery of the Summons and Complaint to Nathan Lantry, an adult son of defendants Elizabeth and Thomas Landry, and a brother to defendant Ian Lantry, who was at the Lantry home with a key, conducting family business – getting the mail - at the time that Nathan was served with Summons and Complaint was reasonably calculated to give the defendants Lantry knowledge of the legal proceeding against them so that they would have an opportunity to respond and be heard.

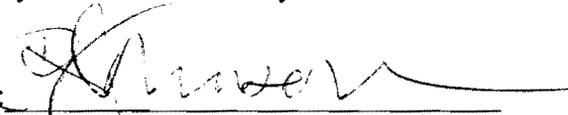
It is apparent that the Lantrys received notice of this lawsuit when Nathan was served on December 26, 2012 because a Notice of Appearance was filed on their behalf in Benton County Superior Court on January 15, 2013. (Appendix hereto).

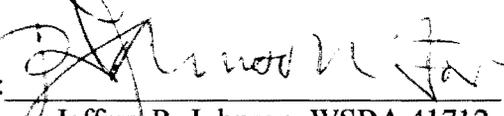
When the facts here are reviewed most favorably to Steven Lacey, proper substituted service was effected in this case by delivering the suit papers to Nathan Lantry during the time that he was in possession of the Lantry residence, which comported with due process requirements, and complied with RCW 4.28.080 (15).

DATED at Yakima, WA. this 27th day of July, 2014.

Respectfully submitted,

JOHNSON & JOHNSON LAW FIRM, PLLC
Lawyers for Steven Lacey

By: 
Richard R. Johnson WSBA 6481

By: 
Jeffrey R. Johnson WSBA 41712

APPENDIX

Notice of Appearance of January 14, 2013

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SUPERIOR COURT, STATE OF WASHINGTON, COUNTY OF BENTON

STEVEN J. LACEY,
Plaintiff,

No.: 12-2-03093-3

vs.

NOTICE OF APPEARANCE

IAN LANTRY, and ELIZABETH S. LANTRY and
THOMAS G. LANTRY, wife and husband,
Defendants.

TO: Plaintiff and attorney Richard Raymond Johnson

AND TO: Clerk of Court

Please take notice that the appearance of the Defendants are hereby entered in the above-entitled matter through the undersigned attorney, and that all further pleadings or papers, exclusive of original process, are to be served upon said attorney at the address stated below.

DATED this 14th day of January, 2013.

HOLLENBECK, LANCASTER, MILLER &
ANDREWS

BY:


Ward Andrews, WSBA # 16525
Of Attorneys for Defendants

NOTICE OF APPEARANCE -1

Hollenbeck, Lancaster, Miller & Andrews
201 W. North River Drive, Suite 430
Spokane, WA 99201 (509) 325-6652
Fax: (509) 325-6671

CERTIFICATION

I certify under penalty of perjury under the laws of State of Washington that I caused to be delivered/mailed (original/copy) of this document to Clark Johnson on this 14 day of January, 2013, by Ward Andrews
Employees of the Farmers Insurance Exchange, a Member of the Farmers Insurance Group of Companies

COPY

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JUL 30 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

STEVEN J. LACEY,)	
)	No. 321894
Appellant,)	
)	CERTIFICATE OF SERVICE OF
)	REPLY BRIEF OF APPELLANT
)	
IAN LANTRY, and ELIZABETH LANTRY))	
And THOMAS LANTRY, wife and husband,)))	
)	
Respondents.)	
)	
_____)	

Richard R. Johnson, lawyer for appellant, states under penalty of perjury of the laws of the state of Washington that on July 27, 2014, I placed in the U.S. Mail, first – class, postage paid, copies of the Brief of Appellant in this matter, addressed as follows:

Cheryl R.G. Adamson
Lawyer for Ian Lantry
6725 W. Clearwater
Kennewick, WA. 99336

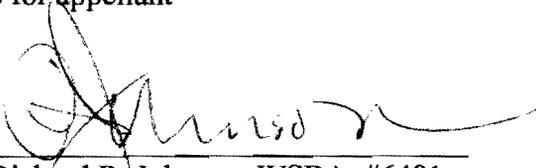
John P. Bowman
Lawyer for Elizabeth & Thomas Lantry
221 N. Wall Street
Suite 210
Spokane, WA. 99201

Certificate of Service

Dated this 27th day of July, 2014.

JOHNSON & JOHNSON LAW FIRM, PLLC
Lawyers for appellant

BY:



Richard R. Johnson WSBA #6481
917 Triple Crown Way #200
Yakima, WA. 98908
(509) 469 - 6900

CERTIFICATE OF TRANSMITTAL

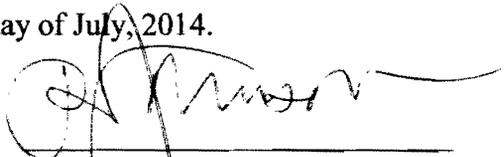
On this date, the undersigned sent to the lawyers for the respondents a copy of this document by U.S. Mail postage prepaid as follows:

Cheryl R.G. Adamson
Lawyer for Ian Lantry
6725 W. Clearwater
Kennewick, WA. 99336

John P. Bowman
Lawyer for Elizabeth & Thomas Lantry
221 N. Wall Street
Suite 210
Spokane, WA. 99201

I hereby certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

DATED at Yakima, WA. this 27th day of July, 2014.



Richard R. Johnson

Certificate of Service