

FILED

APR 18 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 337421

IN THE COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KATHERINE M. FORSBERG,

Appellant,

v.

WESTON T. GRIEPP,

Respondent.

Appellant's Reply Brief

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Preliminary Statement

This is Forsberg's Reply Brief in support of her request that the Court reverse summary judgment and allow her to proceed with claim for damages. As shown in Forsberg's opening papers, the fundamental issue in this case is whether service of process was proper under the circumstances. On one side is appellant Forsberg, who used all resources available to her to ensure that Grieppe was put on notice of the pending suit against him. On the other side is respondent Grieppe who claims that he should not be held responsible for any of the damages that he caused in an automobile collision because Forsberg was unsuccessful in identifying his "true" residence. Grieppe does not argue that he has suffered any harm. He does not dispute the fact that he had actual notice of the suit; or that the alleged insufficient service of process prejudiced him in anyway. Grieppe's arguments center around their interpretation of the service by publication statute and the substitute service of process statute. His arguments fail for three independent reasons. First, Forsberg exhausted all her resources to locate Grieppe for personal service, satisfying the due diligence prong under *Boes*. Second, she has shown, through declarations, facts that raise an inference of intent to avoid service, satisfying the second prong in *Boes*. Finally, wholly independent of the service by publication statute, Forsberg's substitute service on his father meets the standard set forth in *Sheldon*.

Argument

1. Service by publication is an alternative to personal service.

The service by publication statute allows a plaintiff to serve a defendant by publication if she can show 1) a diligent effort to serve and 2) raises an inference that the defendant intended to avoid service. The factors to consider whether substitute service of process has been perfected is outlined in *Boes v. Bisiar*, 122 Wn. App. 569, 94 P.3d 975 (2004). In his responsive brief, Griep attempts to shift the standard from *Boes* to *Bruff v. Main*, 87 Wn. App 609, 943 P.2d 295 (1997). However, *Bruff* is not the preferred case for analysis because it does not fully address the intent to avoid service prong of the statute. Further, *Bruff*, a Division 1 case, has been distinguished by *Boes*, a Division 3 case.

1.1. **Due diligence: Griep does not *factually* address how Forsberg's due diligence was deficient.**

Griep has argued in his responsive brief that Forsberg had only made a “minimal and short-term effort” to locate him but does not address the 13 separate attempts she cites in her opening brief. Griep also argues that Forsberg “did not follow up on all leads and information, nor did she pursue readily available means to obtain [my] address.” However, he does not reveal what leads or information was available for her to follow up with. Nor does he disclose what the readily available means to obtain his address was that she did not pursue. He simply states that Forsberg failed to follow up with information from Mr. Daniels. What information did Mr. Daniels have that was not followed up with? In the same vein he argues that Forsberg failed to hire a process server, all the while not realizing that Mr. Daniels is a process server. In addition, he claims that Forsberg failed to ask his relatives, former neighbors and/or girlfriend for his address.

This is a misstatement of the facts. It was a *former neighbor* who told Mr. Daniels that the Gripps were in California. When Mr. Daniels spoke with the former neighbor, he was looking for Gripp's parents (relatives). Forsberg was unaware that Gripp had a girlfriend and thus could not have contacted her.

Gripp has also argued that Forsberg made no attempt to hire a private investigator to locate him. While employing a private investigator would certainly strengthen a plaintiff's position, there is no case law that support the argument that a private investigator must be hired to show due diligence, or that failure to hire a private investigator amounts to a lack of due diligence. Gripp's argument seems to indicated that because she did not use every conceivable way to find a person that she did not use due diligence. This argument is contrary to what our courts have continuously held: that a plaintiff is not required to employ all conceivable means to locate a defendant. *Pascua v. Heil*, 126 Wn. App. 520, 528-29, 108 P.3d 1253 (2005).

1.2. Intent to avoid service: Gripp's argument misstates the evidence and misinterprets the court's reasoning.

Gripp responsive brief also states, "there is no evidence [I] knew Forsberg was trying to locate [me] for service, or that the statute of limitation was going to expire". Initially, Mrs. Forsberg, through her counsel, asked Gripp, through his counsel, if he would accept service of process through his counsel. He answered no. (CP 18) Later, Mrs. Forsberg, through her counsel, asked Gripp, through his counsel, if he would provide his current address for service of process. Gripp again responded with no. (CP 138) How can he now honestly state that he had no idea that Forsberg was trying to locate him for service?

In Griep's Answer to the Complaint he affirmatively plead that the applicable 3-year statute of limitation had expired. (CP 11) How can Griep argue that he did not know that the statute of limitations was set to expire and at the same time argue that Forsberg's claim should be dismissed because she failed to serve him within the 3-year statute of limitation?

There is only one case in Washington that fully addresses the intent to avoid service prong—*Boes*. Griep's attempt to use the ruling in *Bruff* and *Pascua* to address this issue are inapplicable. Neither *Bruff* nor *Pascua* fully discuss this issue. Both of those cases focus on due diligence. In *Boes*, the defendant knowingly left the state of Washington for the final 10 days before the statute of limitations for service of process was set to expire. This Court ruled that the defendant's knowledge of the time limitation coupled with his absence from the state raised an inference of intent to avoid service. Griep argues that because there is no evidence he ever left the state, it cannot be found that he had intent to avoid service. Such a narrow reading of this precedent limits the statute to only those facts found in the *Boes* case, and effectively eliminates the courts discretion. Namely, that the only way to prove intent to avoid service is through a showing that a defendant actually left the state. If this was the legislature's intent, the statute would just read: plaintiff must prove that the defendant left the state.

A more reasonable view of the *Boes* ruling does not limit intent to avoid service to just a physical absence from the state. Rather, it would also incorporate a theory of intent to avoid whenever a defendant causes himself to be so concealed that it is unfair or nearly impossible for the plaintiff to find him within the looming deadline.

Here, eleven days before the time to serve was set to expire, Forsberg was told by a neighbor that “the Grieps” have left for California. (CP 89) Whether or not the Griep family, with or without Defendant Griep, left for California is immaterial. Griep focuses his argument on the fact that he never left the state; as if this is all that the Court needs to consider. What is actually required is *an inference* from Forsberg’s point of view that Griep has left the state. That inference is present and evidenced through a declaration. (CP 89)

Griep’s actions, whether intentional or not, put Forsberg at an unfair disadvantage to serve him within the deadline. Twelve days (8 business days) before the statute was set to expire, Griep changed his address. (CP 155) Even if Forsberg somehow knew that Griep changed his address, 8 days is simply not enough time for public databases to show the updated address. By the time this new address would have been updated, the time limit to serve him would have expired. While Griep does defend his position regarding changing residences from his parent’s home to Spokane, his responsive brief does not address this specific argument of changing his address immediately before the statute was set to expire. Forsberg can only assume that Griep does not contest this point.

1.3. A ruling in favor of Griep would cloud the law for future plaintiffs.

If Griep is allowed to avoid his responsibility to Forsberg, it would empower future defendants to invest in creative tactics to avoid service of process. Plaintiffs, as a result, may start filing lawsuits well before the statute of limitations (even with settlement on the horizon) for fear of protracted service of process issues. In the long term, the costs will fall on

society as a whole as more lawsuits are filed and more defendants find it worth their while to resist service attempts.

Service of process was intended to help protect defendants from default judgments for which they had no notice. It is not a penal law intended to punish plaintiffs for not being able to find the defendant. Nor is it intended to reward defendants who leave no traceable paper trail as to their “true” residence.

2. **Another alternative to personal service is through the substitute service of process statute.**

Substitute service of process is effective when (1) a copy of the summons is left at defendant’s house of usual abode, (2) with some person of suitable age and discretion, (3) then resident therein. RCW 4.28.080(16).

2.1. **The seminal case interpreting the substitute service of process statute is *Sheldon*.**

Sheldon v. Fettig, 129 Wn.2d 601, 919 P.2d 1209 (1996) stands for the premise that cases should be decided on the merits rather than dismissed on “technical niceties.” To that effect, the Court reasoned that it is unrealistic to interpret the substitute service statute to mean that a defendant can only have one residence. And that the term “residence” should be interpreted to be the place at which the defendant is most likely to receive notice of the suit.

2.2. **Griep dismisses the analysis in *Sheldon* with an attempt to shift the focus on a hearsay argument.**

Their argument as to hearsay fails. The “hearsay” in Deputy Stroisch’s report is admissible because it was put into evidence to impeach Griep’s father, and wasn’t admitted to prove the truth of the matter asserted. Given

Stroisch's declaration, the credibility of Griep's father is impeached, and summary judgment was inappropriate.

As to the *Sheldon* case, the Court found that the defendant's parent's home was the center of her domestic activity for the purpose of substitute service. In that case extensive discovery had taken place and Griep places emphasis on all the facts from that discovery in an attempt to show that this case is distinguishable. Here, Forsberg did not have the luxury of discovery. In fact, Griep refused to answer Forsberg's written discovery. And her case was dismissed before any other discovery could take place. However, from the few facts available, it can be properly stated that the purpose of the statute was satisfied by serving Mr. Griep's father. In its analysis the Court in *Sheldon* made it clear that the purpose of the substitute service statute was to ensure that the defendant receive prompt notice of the summons. It would be absurd for Griep to argue that he did not receive the summons (even though he has testified that he never received it) because he filed his Answer to the Complaint. (CP 65) Hence, the purpose of the statute was satisfied—he was promptly put on notice of a pending suit against him.

In Griep's response to the *Sheldon* ruling he again misstates the evidence. In his response he states, "There is no evidence that [I] used [my parent's] residence for any purpose whatsoever". However, there is evidence that Griep continues to maintain a mailing address in Chewelah, Washington with his parent's address as the physical address. (CP 158) Important documents are often transmitted through mail and the fact that Griep received his mail in Chewelah – not Spokane – is evidence that he retained strong ties to his parent's address even three 3 years after he moved out of their home.

2.3. A ruling in Griep's favor would undermine the ruling in *Sheldon*.

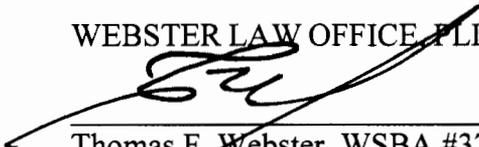
The lower court's holding fundamentally misreads *Sheldon*. Its holding turns *Sheldon* on its head by immunizing intentional evasion of process. Anything less than reversal of the lower court's decision would send a highly visible, and detrimental signal that this Court has retreated from its clear ruling in *Sheldon*.

Conclusion

Forsberg contends that this suit should proceed because Griep engaged in deceptive conduct by intentionally concealing himself, and because he was put on actual notice of the complaint and therefore suffered no harm. Not only would Forsberg be permanently harmed if she is not allowed to pursue her claim, but public interest also favors reversal of the lower court's ruling. Imposing additional duties on plaintiffs to "smoke out" defendants would have the effect of turning plaintiffs into bounty hunters. In the end, finding for Griep would place an unfair burden on Plaintiffs while doing nothing to protect a defendant.

Respectfully submitted this 15 day of April, 2016.

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CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on this date true and correct copies of the APPELLANT'S OPENING BRIEF was served by the method indicated below and addressed to the following:

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