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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 340503
Spokane County Superior Court No. 14-3-00278-3

**COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION III**

In re:

MELODY SECCO (a.k.a. HAYNES),

Petitioner-Appellee,

and

GORDON SECCO,

Respondent-Appellant.

APPELLANT'S REPLY BRIEF

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I. REPLY ARGUMENT

- 1. Nowhere in Mr. Secco's Opening Brief does he suggest that Ms. Haynes herself should have served him with original process.**

To quickly put a minor issue to rest, Mr. Secco agrees with Respondent in that the law is clear regarding a party being precluded from effectuating service on another party in a lawsuit. However, that is not what Mr. Secco argued. To clear up Respondent's misstatement, Mr. Secco argued that because Respondent (in her own words, under oath, in Mr. Secco's criminal trial) remained living with Mr. Secco, she had access to the house.¹ Since she had access to the house, she could simply arrange a time to meet a process server at the house and open the door (her friend, neighbor, etc.) and let them in to serve Mr. Secco. Nowhere did Mr. Secco claim that Ms. Haynes could or should have served him herself, as the same constitutes ineffective service.

- 2. The crux of Mr. Secco's appeal is that Ms. Haynes could not have truthfully satisfied either of the two "paths" through the publication statute, RCW 4.28.100, thereby failing to confer jurisdiction of the Court.**

Ms. Haynes asserts that "a careful reading of CR 4(d)(4) indicates two bases for obtaining an order to serve someone by mail. You can either show that they are not in the state, or that they are avoiding service."

¹ Ms. Haynes even admits that "[she] lived there from time to time" in her brief. Respondent's Brief, Pg. 13.

Respondent's Brief, Pg. 14. Although CR 4(d)(4) appears to contain no such language, Mr. Secco concedes that a careful reading of RCW 4.28.100 reveals two bases (or “paths”) for obtaining an order to serve by mail. Assuming Ms. Haynes is indeed referring to RCW 4.28.100, she misstates the statutory language and thereafter fails to satisfy it.

The first “path” through RCW 4.28.100 is:

“When the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff, his or her agent, or attorney, with the clerk of the court, stating that he or she believes that the defendant is not a resident of the state, or cannot be found therein, and that he or she has deposited a copy of the summons (substantially in the form prescribed in RCW 4.28.100) and complaint in the post office, directed to the defendant at his or her place of residence...” RCW 4.28.100. (Emphasis added.)

In this case, Respondent (via her attorney at the time) plead and claims to have satisfied RCW 4.28.100(2). *Responsive Brief*, pg. 10. To that end, she focuses on the claim that “... as long as the affiant indicated that he was hiding from service of process” the Court’s rule regarding service by mail was triggered. *Responsive Brief*, pg. 14. This is the second “path” through RCW 4.28.100, which, contrary to Ms. Haynes’ oversimplified reading, states:

“... unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his or her attorney in any of the following cases:

...
(2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his or her creditors, or to avoid the service of a summons, or keeps himself or herself concealed therein with like intent;...” (Emphasis added.)

It is clear from the plain language of the statute, and supporting case law, that Ms. Haynes submitting an affidavit in support of a motion to serve by publication indicating only that Mr. Secco was “hiding from service of process” is insufficient to satisfy the statute. Each “path” has at least two requirements to satisfy.

The Court in *Kent v. Lee* reiterates this position, where it states that “[i]t does not authorize service by publication simply because a defendant cannot be found, **but only if, in addition**, one of the specific factual requirements of the statute can be shown. *Kent v. Lee*, 52 Wn.App. 576, 579, 762 P.2d 24 (1988). (Emphasis added.) Furthermore, the statute must be strictly complied with. *Id.* As such, not only must subsection (2) of RCW 4.28.100 be satisfied, but Ms. Haynes must swear out an affidavit to the court also satisfying the relevant section of the first paragraph of RCW 4.28.100. Regardless of “path,” such an affidavit is something that Ms. Haynes cannot truthfully do.

Contrary to all of Mr. Haynes assertions, in October of 2014, Ms. Haynes unequivocally admitted to “living in the same house” with Mr.

Secco in her declaration in support of entry of the default decree paperwork. CP 92. She reiterates a similar position while on the stand during Mr. Secco's criminal trial. CP 160. It was only after Mr. Secco began attempting to protecting his rights did her position change. She (as well as her attorney) also clearly knew where Mr. Secco lived.² *Respondent's Brief*, pgs. 13, 14. Additionally, the police arrested Mr. Secco at work on August 22, 2014, where he could have been served personally with process.³ CP 208. Although Ms. Haynes seems to belittle these facts her brief, "strict compliance with the statute" renders those facts of paramount importance and the Court failing to vacate Mr. Secco's original motion to vacate was error as a result.

Ultimately, regardless of path she claims to have relied on in RCW 4.28.100, she (or her attorney, or anyone on her behalf) could not have truthfully claimed to the court that Mr. Secco could not be found within the state, believed that he was not a resident of the state, or that he could not be found therein or that his residence is not known to her. As a matter of fact, Ms. Haynes' responsive brief is replete with statements that she, at all times

² Ms. Haynes' Responsive Brief refers to Mr. Secco as "the consistent resident... to live full time at [their community property home.]" *Respondent's Brief*, pg. 2.

³ Following Ms. Haynes' allegations, she is the only likely source of information indicating to the police where he could be found.

relevant to service of process, knew exactly where he lived and had, at the very least, access to the home as a co-resident.

The fact that Ms. Haynes simply cannot satisfy the statutory requirements to serve my publication as a result is certainly a compelling reason to vacate the default decree. After all, the court conferred jurisdiction based on a false affidavit. Everything obtained thereafter is void and it was error of the lower court to not vacate the default decree.

3. Ms. Haynes relies on *Logg* for her assertion that her affidavit satisfies the statutory requirements.

Mr. Secco and Ms. Haynes appear to be in agreement that *Logg* is applies here. Although the Court in *Logg* does enumerate requirements to serve by publication, its holding overturns a trial court's denial of a motion to vacate in finding that the moving party's declaration in support of the motion to serve by publication failed to meet the requirements of RCW 4.28.100(2). *In re the Marriage of Logg*, 74 Wn.App. 781, 786, 875 P.2d 647 (1994).

Here, the analysis is similar to that in *Logg*. The Court found that the declaration in *Logg* failed to, for example, recite that Mr. Logg cannot be found within the state. Also, as has been pointed out by Ms. Haynes as well, a "bare recitation of these factors is insufficient." *Id.* Analogously, Ms. Haynes' declaration amounts to a "bare recitation of the factors" as she cannot truthfully declare that she satisfies the requirements of RCW

4.28.100. Because Ms. Haynes cannot truthfully claim that Mr. Secco “could not be found within the state” when she *knew* where Mr. Secco resided (as she admitted to residing there, too), and had also become aware of where he had obtained employment. CP 160. There is no requirement that Mr. Secco only be served at home, or that he may not be served with process after entry of a default.

Because Ms. Haynes’ and Mr. Secco lived together, her claim that Mr. Secco “could not be found within the state” is at best a bare and/or empty recitation of the publication factors and at worst a misrepresentation to the court.

4. The court relied on Ms. Haynes’ false affidavit when granting her motion to serve by publication/mail.

Ms. Haynes claims that CR 60(b)(4) has not been properly pled or argued by Mr. Secco. *Respondent’s Brief*, pg 15. However, in this case, the Commissioner relied on Ms. Haynes’ attorney’s affidavit when granting the order to “based on information provided to the Court, and that information at the time was deemed reliable...” (CP 183.) After all, “[a]n affidavit is not a pleading, but is a solemn, formal asseveration, under oath, upon which others might rely.” *Kent v. Lee*, 52 Wn.App at 579, citing *State v. Howard*, 91 Wash. 481, 487, 158 P. 104 (1916).

Although in subsequent declarations it appears that Ms. Haynes attempts to cure her prior claims that she remained living in the same house

as Mr. Secco, those do not erase Ms. Haynes' trial testimony in Mr. Secco's criminal trial or her declaration in support of her default decree. This testimony contains unequivocal statements that they remained living in the same house.⁴

This leaves Ms. Haynes with one of two choices: she was either not telling the truth to the Court on the witness stand in Mr. Secco's criminal trial (or in the declaration in support of the default decree) when she stated that they remained living together *or* she is not telling the truth when she subsequently stated that she had moved out of the house. *Respondent's Brief*, Pg. 15.

Furthermore, it makes little sense for Ms. Haynes to "specifically stay away from the house during the time of mail service." *Id.* Is this to insinuate that she moved right back in or stayed there more frequently right after mail service was complete? This does not stand up to the claim that she was in any way "scared" of Mr. Secco. There were no claims that he had become more hostile toward Mr. Secco from April of 2014 (when the default was entered) forward. There is only one allegation of anything resembling violence that ultimately put him in jail for the duration of the

⁴ As an aside, it is unclear how Ms. Haynes could allege domestic abuse against Mr. Secco without them living together.

dissolution proceeding which conveniently yielded Ms. Haynes the entirety of their community property home. Her claims simply do not add up.

The affidavit provided to the Court by Ms. Haynes was not reliable and said order should not have been signed. It was error to fail to vacate the default judgment which was obtained through Ms. Haynes' misconduct and misrepresentations to the Court.

5. Although numerous attempts are made, Ms. Haynes cannot retroactively cure defective original service of process.

Considering the foregoing, the following arguments should not be reached. However, Mr. Secco addresses them nonetheless.

a. Mr. Secco, contrary to Ms. Haynes claims that he did nothing to protect his rights while in jail, took numerous steps to protect his rights.

Ms. Haynes has repeatedly claimed that Mr. Secco failing to obtain an attorney and failing to contact, or show up at, the court to justifies the entry of her default decree. Leaving aside the original process issues, these claims misstate the record and/or mislead the Court as to what "freedoms" Geiger allows to inmates.

First, Mr. Secco not only contacted *an* attorney, he contacted *two* attorneys in an effort to obtain representation to help in in this matter after receiving the paperwork in jail. CP 87, 252. He was in jail (again on Ms.

Haynes' allegations of domestic abuse for which he was found not guilty), without the money to pay for an attorney or to post bail. CP 87.

Additionally, Ms. Haynes casually suggests that Mr. Secco make travel arrangements with Geiger to appear at the Court. *Respondent's Brief*, pg. 4. However, a simple call to Geiger reveals that Geiger only allows inmates to leave the jail for criminal matters, not civil matters unrelated to the reason for incarceration. CP 87, 208-209.

The default decree was certainly not entered due to Mr. Secco's apathy. Rather, it was entered against him despite his reasonable efforts to either post bail or to obtain counsel, which were both unfortunately not successful.

b. Ms. Haynes again regresses to what amounts to a character assassination of Mr. Secco to justify service by mail.

Notwithstanding the fact that there was no history of abuse in Ms. Haynes' and Mr. Secco's relationship, she cites to no authority which would exempt Ms. Haynes from effecting proper service on Mr. Secco for such allegations. All of the declarations to which Ms. Haynes refers contradict her own prior sworn testimony while on the stand in Mr. Secco's criminal trial.⁵

⁵ "Q: Was the marriage ever violent before --
A: No.

Furthermore, Mr. Secco is no longer on trial (as he was found not guilty) and there is no civil trial pending containing any allegations of damages in tort. As no fact finder has determined the validity of any of her allegations. He has already suffered and lost enough because of Ms. Haynes' allegations of domestic abuse.

c. There is no test contained in *Calhoun v. Merritt* for Ms. Haynes to satisfy.

Ms. Haynes lists in her brief numerous considerations which she claims “far in a way [sic] satisfy[ed]” the case standard in *Calhoun v. Merritt*. *Respondent’s Brief*, pgs. 12, 13.

It is unclear what “case standard” Ms. Haynes is referring to. The only “case standard” contained in *Calhoun* is a cite to the test in *White v. Holm*, which enumerates a test ultimately applicable to motions to vacate under CR 60(b)(1).⁶ *Calhoun v. Merritt*, 46 Wn.App 616, 619, 713 P.2d 1094 (1986); *White v. Holm*, 73 Wash.2d 348, 350, 438 P.2d 581 (1968).

Q: -- this incident?

A: No.

Q: Okay. No issues there for you in terms of –

A: No.

Q: -- violence? Okay. So just personality clashes?”

A: Yes.

Q: Is that fair to say?

A: Yes.” CP 259.

⁶ *Calhoun v. Merritt* also reiterates the well-established principles that: (1) “default judgments are not favored because ‘it is the policy of the law that controversies be determined on the merits...’” and (2) an abuse of discretion is “less likely to be found if the superior court sets aside the default judgment than if it refuses to do so.” *Calhoun v. Merritt*, 46 Wn.App 616, 618-619, 713 P.2d 1094 (1986), and citing *White v. Holm*, 73 Wash.2d 348, 351-352, 438 P.2d 581 (1968).

To wit, “the basis for the motion was that the defendants’ failure to timely appear and answer plaintiff’s claim was due to mistake, inadvertence, surprise, or excusable neglect, and that the defendant had a meritorious defense.” *Id.* This appeal, and the underlying motion(s) to vacate, deal with CR 60(b)(4), (5), and (9). As such, *Calhoun* (and therefore *White v. Home*), does not apply here. Even if said test did apply, it would be for Mr. Secco to satisfy (as the moving party), not Ms. Haynes (as the responding party).

For example, it appears that Ms. Haynes relies on her subsequent mailing of the dissolution paperwork to Mr. Secco in jail to cure the original lack of service. However, “notice without proper service is not enough to confer jurisdiction. *In re Marriage of Logg* at 784, citing *Haberman v. WPPSS*, 109 Wash.2d 107,177, 744 P.2d 1032, 750 P.2d 254 (1987). Since mailing the decree paperwork to Mr. Secco in jail does not constitute process, it is ineffective at conferring jurisdiction over Mr. Secco.

6. Ms. Haynes is not entitled to her attorney fees as there is no clear evidence of any intransigence on the part of Mr. Secco.

Ms. Haynes cites to *In re: Marriage of Greenlee* in support of her claim of attorney fees and refers to what she considers Mr. Secco’s “intransigence” to justify such a claim. Intransigence means a refusal to compromise or to abandon an extreme position or attitude.⁷ However, there was nothing extreme about any position Mr. Secco has taken in this case.

⁷ <https://www.merriam-webster.com/dictionary/intransigent>

Rather, *In re: Greenlee* involves what amounts to a breach of a voluntary agreement between two spouses contained in their dissolution paperwork, including one where the parties promised to “cooperate with each other to the fullest extent...” *In re: the Marriage of Greenlee*, 65 Wn.App. 703, 705, 829 P.2d 1120 (1992).

Here, Mr. Secco never agreed to anything. As a matter of fact, one of Mr. Secco’s primary concerns is that he was not provided such an opportunity because he was defaulted and a default judgment was thereafter entered against him (while he was incarcerated on Ms. Haynes’ allegations of abuse, which he was ultimately found not guilty). Additionally, Mr. Secco has legitimate concerns about Ms. Haynes’ use of the court system to deprive him of half of their community property home, which ultimately left him homeless and living out of his truck after being released from Geiger. CP 208.

Finally, Ms. Haynes points to no “clear evidence of intransigence” on Mr. Secco’s part other than her assertion that Mr. Secco “fail[ed] to do anything about being served with notice.” *Respondent’s Brief*, pg. 17. All Mr. Secco has done since he was released from jail was do what he thought was necessary to protect his rights. As such, Ms. Haynes should not be awarded her attorney fees.

II. CONCLUSION

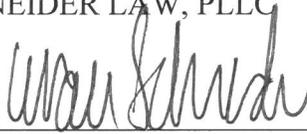
Rather than expand the statute and relevant alternative service case law to allow a co-resident to serve another co-resident with process via mail

service. Since such statutes are least likely to provide notice to a party and to therefore afford due process, the interpretations thereof should remain narrow and require strict compliance. The default decree awarding Mr. Haynes the community property home was ultimately begotten through a declaration which failed to satisfy the requirements of RCW 4.28.100 and should be vacated.

DATED this 16th day of June, 2017 at Spokane, Washington.

SCHNEIDER LAW, PLLC

By:



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Attorney for Respondent-Appellant

CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

On June 16th, 2017 I served the document to which this is annexed by the following means:

By personal service:

Gary Stenzel
Stenzel Law Office
1304 W. College Avenue, Lower Level
Spokane, WA 99201

Signed on June 16th, 2017 at Spokane, Washington.



Evan C. Schneider