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IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

PETER CLARK,

Appellant-Plaintiff,

v.

JESSE HOYOS DIAZ and JANE DOE HOYOS DIAZ,

Respondent-Defendant.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Respondent is Jesse Hoyos Diaz (hereinafter, Hoyos Diaz). The Appellant, Peter Clark (hereinafter, Clark), seeks reversal of the Trial Court's order granting dismissal in favor of Hoyos Diaz, and against Clark.

II. ASSIGNMENT OF ERROR

1. Whether the trial court erred in dismissing the lawsuit filed by Clark due to a failure of proper substitute service of process prior to the expiration of the statute of limitations.

III. COUNTERSTATEMENT OF THE CASE

A. Facts and Procedural History.

This matter concerns a personal injury action filed by Clark in which Clark sought monetary damages against Hoyos Diaz regarding an automobile accident the parties were involved in on June 2, 2016. CP 3-5. At the time of the accident, Hoyos Diaz was a nineteen-year-old who resided at 402 Umatilla Ave., Apt. C2, Umatilla, OR 97882. CP 27.

More than two and a half years after the accident, on March 22, 2019, Clark filed a Complaint regarding the June 2, 2016 accident with the Franklin County Superior Court. CP 3-5. Counsel for Hoyos Diaz filed a Notice of Appearance on April 1, 2019. CP 46-47. On April 9, 2019, Clark

filed a Declaration of Service. CP 7-8. Thereafter, Clark took no steps to confirm service or to verify if Hoyos Diaz was asserting a lack of service defense. No motion for default was filed by Clark, and no discovery was sent to Hoyos Diaz. Had Clark done so, he would have been put on notice of the defenses that were subsequently and successfully asserted.

In the Declaration of Service filed by Clark he asserted that Hoyos Diaz was served on March 26, 2019 through the alleged service of “Maria Diaz” at 402 Umatilla Ave., Apt C in Umatilla, Oregon. CP 86-87. CP 7-8. The Declaration of Service states that Maria Diaz “confirmed that he/she was a named defendant, or a person of suitable age and discretion who confirmed that the above referenced address is the defendant Jesse Hoyos Diaz’s residence.” CP 7.

However, this was not proper service. There is no Apartment “C” at that address. CP 49. Further, Hoyos Diaz did not reside at 402 Umatilla Ave., Apt C or Apt C2 in Umatilla, Oregon at the time of service and had not resided at Apt C2 for some time. *Id.* Instead, at the time service was attempted, Hoyos Diaz resided at 625 SW Spruce St., Apt A-1, Hermiston, OR, which had been his residence since March 20, 2018. *Id.* Additionally, Maria Diaz is not a party to this case, and does not speak English. *Id.* She would not have been able to communicate what was alleged to have been communicated to the process server. *Id.*

After the statute of limitations had run, as well as the 90-day post filing period, Hoyos Diaz filed an Answer to the Complaint wherein he asserted affirmative defenses of insufficiency of service of process and lack of personal jurisdiction on Hoyos Diaz due to the expiration of the statute of limitations. CP 53-56. Together therewith, on June 27, 2019, Hoyos Diaz moved for dismissal of the case based on the position that Clark failed to properly complete service within the timeframe of the statute of limitations, leaving the Court without personal jurisdiction over Hoyos Diaz and requiring the case to be dismissed with prejudice. CP 9-15.

A hearing before the Superior Court on this matter took place on July 8, 2019. A letter memorializing the issue and decision was sent to the parties by the Honorable Judge Carrie Runge on July 29, 2019. CP 35-36. Therein, the Honorable Judge Runge found that “[t]he question is whether 402 Umatilla Ave, Apt. C, Umatilla, OR. was the house of defendant’s usual abode. The answer is no. The defendant has established by clear and convincing evidence that he did not reside in Umatilla when the summons was served upon his mother, Maria Diaz.” CP 35. A final Order Granting Fernandez’s Motion to Dismiss with prejudice was entered on August 9, 2019. CP 37.

No Motion for Reconsideration was filed by Clarke. A Notice of Appeal was filed by Clark on September 5, 2019. CP 39. Hoyos Diaz now

responds to Clark's Opening Brief of Appellant and respectfully requests that the Appeal be denied.

IV. ARGUMENT

A. Clark's Lawsuit was Properly Dismissed.

1. Hoyos Diaz provided Clear and Convincing Evidence of Insufficient Service.

A civil action is commenced in superior court by (1) service of a summons and complaint, or (2) by filing a complaint and paying the statutory filing fee. Wash. Super. Ct. Civ. R. 3. Although the action is deemed commenced upon the occurrence of either service or filing, the action is said to be only *tentatively* commenced until both steps are taken. 14 Wash. Prac., Civil Procedure § 7:1 (2d ed.). Proper service of the summons and complaint is a prerequisite to a court obtaining jurisdiction over a party. *Woodruff v. Spence*, 76 Wn. App. 207, 209, 883 P.2d 936 (1995).

RCW 4.28.080 provides some of the applicable methods of service in a civil action, including the means of service that was attempted here. It also allocates a variety of other methods of service for certain specific situations, which are not applicable here. *Id.* The applicable method therein for service in this case was "to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some

person of suitable age and discretion then resident therein.” RCW 4.28.080(16). The latter half of this method of service is known as substitute service.

Because substitute service is in derogation of the common law, a plaintiff must strictly comply with the statutory requirements to obtain personal jurisdiction over a defendant. *Martin v. Meier*, 111 Wn.2d 471, 479, 760 P.2d 925 (1988); *Martin v. Triol*, 121 Wn.2d 135, 144, 847 P.2d 471 (1993).

When a defendant moves to dismiss based upon insufficient service of process, ‘the plaintiff has the initial burden of making a prima facie showing of proper service.’ *Witt v. Port of Olympia*, 126 Wn. App. 752, 757, 109 P.3d 489 (2005) (citation omitted). “A plaintiff may make this showing by producing an affidavit of service that on its face shows that service was properly carried out.” *Id.* If the plaintiff makes this showing, “the burden shifts to the defendant who must prove by clear and convincing evidence that service was improper.” *Id.* Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 243, 237 P.3d 944 (2010).

Whether service of process is proper is a question of law that is subject to de novo review. *Davis v. Blumenstein*, 7 Wn. App. 2d 103, 432

P.3d 1251 (2019). Here, proper service did not occur within the statute of limitations and the court thus did not obtain personal jurisdiction over Hoyos Diaz and properly dismissed the case with prejudice. This is because Hoyos Diaz proved by clear and convincing evidence that service was improper.

At the time of the subject accident in June of 2016, Hoyos Diaz was a nineteen-year-old who resided with his mother at 402 Umatilla Ave., Apt. C2, Umatilla, OR 97882. CP 27. However, as children of that age are accustomed to do, in March 2018 he moved to a different city, where he rented an apartment of his own, and where he continues to reside. CP 49. That address is 625 SW Spruce St., Apt A-1, Hermiston, OR. *Id.* He resided there for more than a year before the alleged service occurred. *Id.* Clark's only attempt at service occurred at presumably a different apartment than where Hoyos Diaz previously resided and no attempt at service was made where he currently resides.

Washington has a three-year statute of limitations for personal injury actions. RCW 4.16.080. In this case, the subject accident occurred on June 2, 2016. This case was filed on March 22, 2019. Pursuant to RCW 4.16.170, because Clark started this lawsuit by filing the complaint, he had ninety days from the date of filing to serve Hoyos Diaz. Clark thus had until June 20, 2019 to serve Hoyos Diaz before the Statute of Limitations ran. Clark did not

achieve proper service in that time frame. The only attempted service was via substitute service of Hoyos Diaz's mother and did not occur at Hoyos Diaz's residence, which was his usual place of abode. Clark thus failed to personally serve Hoyos Diaz before the statute of limitations expired. Because of this, this case was properly dismissed with prejudice as the Court did not have personal jurisdiction over the Defendant and the time to acquire it had passed.

On appeal, Clark essentially argues that he had a right to serve Hoyos Diaz at the address he resided at the time of the subject accident, nearly three years earlier, but provides no basis. Hoyos Diaz did not reside there any longer and Clark fails to present any evidence that any due diligence was done in attempting to locate Hoyos Diaz aside from looking at the police report. There is no evidence of any other searches done by Clark or anyone on his behalf and the declaration of the process server is clearly a fill-in-the-blank form that provides no details on how the location was determined. As to the comments of Hoyos Diaz's mother, what she allegedly said to the process server is not included verbatim. *See* CP 7. It simply says she confirmed that the address is Hoyos Diaz's residence, but provides none of her alleged statement or how that conclusion was reached. *Id.*

On the other hand, as found by the trial court judge, Hoyos Diaz provided clear and convincing evidence that service was not proper based on two affidavits that clearly establish Hoyos Diaz resided in his own apartment

in an entirely different city for more than a year before service was allegedly made. *See* CP 31, 48-49. At issue then, are three declarations regarding service. Again, clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly probable. *In re Welfare of L.N.B.-L.*, 157 Wn. App. at 243. The two declarations that support Hoyos Diaz factually prove that Hoyos Diaz rented his own apartment in a different city and paid rent for that apartment. CP 31, 48-49. One declaration contains a direct statement from Hoyos Diaz to that fact. CP 49. In comparison, the one declaration of the process server provides no alleged statements. CP 7-8. It is a form document for someone to fill out (contains “he/she”) that provides no relevant substantive information on why service was proper on Maria Diaz. *Id.* As such, the declarations in support of Hoyos Diaz make it at a minimum highly probable that service was not properly completed and the decision of the trial court should be upheld.

2. Service did not occur at the Usual Abode of Hoyos Diaz.

Clark’s argument on appeal relies on a discussion of how the term “usual abode” is defined. Again, RCW 4.28.080(16) requires service “to the defendant personally, or by leaving a copy of the summons at the house of his or her **usual abode** with some person of suitable age and discretion then resident therein.” (Emphasis Added). It is Clark’s contention that service to

Hoyos Diaz's mother at her separate residence is proper service of Hoyos Diaz. His position has no real basis in the law.

Clark relies on two cases for this proposition. The first is *Northwick v. Long*, 192 Wash. App. 256, 364 P.3d 1067 (2015). *Northwick* is also a case regarding service after a motor vehicle accident. *Id.* There, the plaintiff served the defendant's father at a residence the defendant had actually registered his vehicle at and the plaintiff had independently verified. *Id.* The defendant subsequently filed a motion to dismiss wherein he relied solely on a declaration from his father in support. *Id.* The process server was deposed in that matter and testified that the father stated multiple times that the defendant lived there and that he would be home later that night and the father would provide him with the documents. *Id.* The process server also testified about his due diligence to locate the defendant, which included review of the defendant's vehicle identification from the Washington Department of Licensing database, a TransUnion Locate report, and a United States Postal Service trace which confirmed that the defendant resided at the address in question. *Id.*

Based on the whole of this information, the trial court in *Northwick* denied the defendant's motion to dismiss and the defendant appealed. *Id.* On appeal, the court of appeals took note of the plaintiff's reliance on *State ex rel. Coughlin v. Jenkins*, 102 Wn. App. 60, 7 P.3d 818 (2000), where

Division Two concluded that affidavits from the defendant's mother and ex-wife, stating that the defendant did not live at the place where substitute service occurred, did not amount to clear and convincing evidence of improper service of process when weighed against evidence of mail to and from that address which demonstrated he did reside there. *Id.*

Also noted in *Northwick* was *Woodruff*, *supra*, where the court held that the defendant failed to establish that service was insufficient, even though the defendant did establish he was not at the residence on the date of service and denied ever actually receiving the documents served, but in that case service occurred at the defendant's actual residence. *Id.*

The *Northwick* court also looked at evidence a court has found to be clear and convincing. *Id.* This included *Gross v. Evert-Rosenberg*, 85 Wash.App. 539, 933 P.2d 439 (1997), where the court held that for purposes of substitute service, a house owned by the defendant, but leased to her daughter and son-in-law, was not the defendant's house of usual abode because the defendant produced evidence that she had established a new address. Again, the *Northwick* court noted that the defendant in *Northwick* did not produce any similar evidence. *Id.*

After consulting these cases, the *Northwick* court was ultimately critical of the lack of a declaration by the Defendant and the failure to produce evidence of a different address. *Id.* The court also relied on the fact

that the plaintiff there was able to produce evidence that the address served was the same address on file with the DOL and post office. *Id.* Ultimately, the Court found that the defendant there did not demonstrate by clear and convincing evidence that service was improper. *Id.*

The facts of this case are markedly different from *Northwick* and the cases it relied on and demonstrate why Hoyos Diaz met his clear and convincing burden. Here, unlike *Northwick*, Hoyos Diaz did produce his own declaration definitively establishing that he did not reside at his mother's residence and provided the actual address where he resided when service was attempted. CP 48-49. He also provided a declaration from his apartment manager further proving this fact. CP 31.

On the other hand, no comparable information was put forth by Clark here refuting this information. Clark relies exclusively on the address on the police report. There is no evidence of any other attempt to identify an address for Hoyos Diaz through any other entity like there was in *Northwick*. There was no contact with the DOL, no verification of where Hoyos Diaz received mail, no deposition of the process server. There was also no effort to get additional information from the process server or even provide a more detailed declaration from him. There is no evidence of what Maria Diaz actually said to the process server, if anything. Further, unlike

Woodruff, the substitute service did not occur at Hoyos Diaz’s actual residence.

The other case Clark relies on is *Wichert v. Caldwell*, 117 Wn.2d 148, 812 P.2d 858 (1991). There, the plaintiff filed a personal injury suit one day before the expiration of the statute of limitations and attempted service within 90 days of filing. *Id.* However, the explicit issue there was whether the defendant's adult child, who was an overnight resident in, and sole occupant of, defendant's residence, was “resident therein” capable of receiving substitute service. *Id.* While the court ultimately concluded the daughter could be served, the court did not look at whether the residence was the defendant’s “usual abode”, which is the issue Clark makes on appeal here. *Id.*

While the *Wichert* court does provide analysis as to what the purpose of service is and the importance of eventual notice on the party, the context is far different than what occurred in this case. *Id.* Further, the issue of whether the defendants therein did in fact receive the summons and complaint after service in that case is conceded as a fact. *Id.* Here, there is no such contention that Hoyos Diaz received the summons and complaint from his mother, let alone a factual agreement by the parties as to that.

Ultimately, the *Wichert* court concluded that service was proper in that case because “[w]hen defendant is absent, the person in possession of

the house of usual abode is likely to present the papers to the defendant”.
Id. Here, there is nothing analogous to what happened in this case. For *Wichert* to apply to this case, Hoyos Diaz’s mother would have had to have been served at Hoyos Diaz’s actual residence. As such, *Wichert* has no actual bearing on the issues at hand. The only other case Clark relies on, *Northwick*, actually supports that Hoyos Diaz presented clear and convincing evidence that the residence where his mother was served was not his place of usual abode. As such, Hoyos Diaz respectfully requests that Clark’s appeal be dismissed.

V. CONCLUSION

Clark filed suit in this matter near the time when the statute of limitations was set to run. Clark relied on an address for Hoyos Diaz from a nearly three-year-old police report, attempted service at that address, and did nothing further in this case. No effort was made to confirm service with Hoyos Diaz or verify that a service defense was not being asserted. Once the statute of limitations ran, Hoyos Diaz successfully moved to dismiss. This is because Hoyos Diaz presented clear and convincing evidence that his place of usual abode was not his mother’s apartment, but that he had his own apartment where he paid rent for more than a year before the attempted service. The affidavit of service filed by Clark provides little to no information regarding service and no other evidence regarding that service

is before the Court. Because of this, the trial court's dismissal should be upheld on appeal.

DATED this 24th day of April, 2020.

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I certify that on the 27th day of April, 2020, I caused a true and correct copy of the foregoing document to be served electronically on the clerk of the above entitled court and on the following in the manner indicated below:

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