

No. 89853-7

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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THERESA SCANLAN, Respondent,

v.

KARLIN TOWNSEND and "JOHN DOE" TOWNSEND  
Wife and Husband, Petitioners.

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**SUPPLEMENTAL BRIEF OF PETITIONER KARLIN TOWNSEND**

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Ronald R. Carpenter  
Clerk

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**A. INTRODUCTION**

Petitioner Karlin Townsend respectfully submits the following Supplemental Brief.

**B. ASSIGNMENTS OF ERROR**

Did the Court of Appeals err in expanding the definition of “process server” to include any adult who was given the summons and complaint at a place other than the defendant’s usual abode, who did not reside with the defendant, and who may not have knowingly consented to being a process server?

Did the Court of Appeals err in holding that the plaintiff need not comply with the statute for service of process, RCW 4.28.080(15), which requires that the person receiving the documents, if not the defendant herself, be served at the defendant’s abode while currently residing there?

**C. STATEMENT OF THE CASE**

Ms. Townsend respectfully refers the Court to the Statement of the Case in Ms. Townsend’s Petition for Review.

## **D. ARGUMENT**

The decision of the Court of Appeals should be reversed and the trial court's dismissal reinstated due to the failure of Ms. Scanlan to lawfully serve Ms. Townsend.

### **1. A Finding of Defective Service Would Be Consistent with the Court's Past Opinions.**

The Court's prior opinions support a finding of defective service in this case. Two opinions, Weiss v. Glemp, 127 Wn.2d 726, 903 P.2d 455 (1995), and Salts v. Estes, 133 Wn.2d 160, 943 P.2d 275 (1997), are particularly relevant here.

In Weiss, the plaintiff attempted to personally serve the defendant, a Cardinal called to Seattle for a pastoral visit. The process server went to the rectory where the defendant was staying to serve the summons and complaint. A woman answered the door, and the server asked for the defendant. The woman returned with a priest, who asked the server to return at a later time. The server responded that he had "important legal documents ... and it would only take a second to make the delivery." Id. at 729. A second priest, who was the defendant's secretary, then came to the door and said that the defendant was not available and asked the process server to leave. The process server then waited outside.

While the server waited, the server could see the defendant through a large plate glass window. After about two hours, the process server approached the window, held the documents high in his hand, and yelled that the defendant had been served. The defendant looked over his shoulder at the server. The server then placed the documents on a concrete windowsill about four feet from the defendant. Id.

The Weiss court began its analysis by considering the plaintiff's argument that he substantially complied with RCW 4.28.080(15). The court cited its definition of substantial compliance in a prior opinion:

'Substantial compliance has been defined as actual compliance in respect to the substance essential to every reasonable objective of [a] statute.... In the cases where substantial compliance has been found, there has been actual compliance with the statute, albeit procedurally faulty.'

Id. at 731-32 (internal citations omitted), quoting Seattle v. Public Employment Relations Comm'n, 116 Wn.2d 923, 928, 809 P.2d 1377 (1991). In finding that the process server's act amounted to "noncompliance with the statute, not significant compliance combined with a merely technical deficiency," the court concluded that "service in this case failed to comply with even the rudiments

of the statutory requirements.” Id. at 732. As a result, the court affirmed the trial court’s dismissal. Id. at 734.

The Weiss court was not persuaded by the plaintiff’s argument that service was constitutionally adequate since it was reasonably calculated to provide notice to the defendant, finding that “statutory service requirements must be complied with in order for the court to finally adjudicate the dispute between the parties.” Id. at 734, quoting Thayer v. Edmonds, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972), review denied, 82 Wn.2d 1001 (1973). Thus, the Weiss court was unconcerned with the fact that the defendant most likely had notice of the lawsuit.

In Salts v. Estes, the process server served a person in defendant’s home who was merely looking after the defendant’s home in the defendant’s absence. In finding defective service and affirming dismissal, the Salts court made key holdings that are instructive here. The court emphasized the importance of remaining faithful to the language of the statute:

RCW 4.28.080(15) has remained essentially untouched by the Legislature since it was enacted in 1893. What the Legislature has not seen fit to do — change the wording of the statute — we decline to do by judicial proclamation in the guise of liberal construction. The language of RCW 4.28.080(15) ... should be enforced as it was written. We do not

adopt the principle in service of process that ‘close is good enough,’ permitting service of process on virtually any person who by happenstance is present in the defendant’s home.

Id. at 162. The court determined that allowing service on the person present in defendant’s home would essentially nullify the statute:

Such a relaxed approach toward service of process renders the words of the statute a nullity and does not comport with the principles of due process that underlie service of process statutes.

Our duty is to effectuate the intent of the Legislature in enacting a statute. If a statute is unambiguous, as is RCW 4.28.080(15), we are obliged to apply the language as the Legislature wrote it, rather than amend it by judicial construction.

Id. at 170. The Salts court stressed the need to provide consistency to the law:

We must provide consistency and predictability to the law so the people of Washington may conform their behavior accordingly. The language of RCW 4.28.080(15) sets forth the standards for substituted service of process. We best accomplish the purposes of establishing predictable standards by not stretching the meaning of those standards beyond their plain boundaries.

Id. The Salts court was apparently unconcerned with whether the defendant later learned of the lawsuit.

While the precise issues in the instant case are different from the issues in Weiss and Salts, the underlying reasoning by the Court in Weiss and Salts and the importance the Court placed on fidelity to the spirit of the statute are applicable here. Just as in Salts, the service in the instant case was done by happenstance, specifically upon someone who by happenstance knows the defendant. The Salts court's reasoning that close is *not* good enough should apply here as well. Allowing virtually any non-party adult who does not live with the defendant to be retroactively deemed a process server, even without his or her knowledge or consent, would be stretching the standards for personal service far beyond its boundaries. Indeed, permitting service in the instant case would result in the inconsistency and unpredictability that the Salts court cautioned against.

Allowing service in this manner goes far beyond substantial compliance. Substantial compliance requires that the statute be actually complied with; only procedural faults are possibly permitted. A process server handing the summons to a non-party adult who does not reside with the defendant and who does not necessarily consent to act as the new process server on the plaintiff's behalf, who then fortuitously passes the summons to the

defendant, is not actual compliance with a mere procedural fault. Rather, it represents a failure of the plaintiff to comply with the basic rudiments of the statutory requirements.

The opinion by the Court of Appeals in this case—that the statute does not require that someone be acting under the control of the plaintiff or that the person act with intent when he or she gives the summons to the defendant—encompasses a reading of the statute that is so strained it stretches the statute beyond reasonable meaning. This kind of second-hand, fortuitous service has apparently not been recognized in Washington other than by the court in Brown-Edwards v. Powell, 144 Wn. App. 109, 182 P.3d 441 (2008). The court in Gerean v. Martin-Joven, 108 Wn. App. 963, 33 P.3d 427 (2001), called this alleged fortuitous service for what it really is—an argument that actual notice equals sufficient service. Gerean, 108 Wn. App. at 972. But the courts in Washington save Brown-Edwards, in addition to numerous other jurisdictions around the country, hold that actual notice does *not* legitimize defective service.

## **2. Other Jurisdictions Hold that the Defendant's Knowledge of the Suit is Irrelevant.**

In Ms. Townsend's Petition for Review, she noted that the court in Gerean, 108 Wn. App. 963, found that actual notice did not constitute sufficient service. Petition for Review at 15. Other courts in Washington have reached the same conclusion. Petition for Review at 13-15.

Outside of Washington, both state and federal courts have likewise held that the defendant's knowledge of the lawsuit is irrelevant when determining whether the plaintiff has accomplished service of process. While these jurisdictions have different rules outlining the procedures for accomplishing personal service, some requiring strict compliance and others substantial compliance, the courts remain faithful to the principle that when these rules are not observed, the defendant's actual knowledge of the lawsuit does not forgive defective service. Many of these courts frame the issue as one of jurisdiction, i.e., jurisdiction over the defendant is obtained only through proper service.

New York's Court of Appeals has consistently held that the defendant's knowledge is irrelevant as to whether personal service upon the defendant was accomplished. In Macchia v.

Russo, 67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 691 (N.Y. 1986), a case stemming from a motor vehicle accident, a process server delivered the summons and complaint to the defendant's son outside the defendant's house. The son then went into the house and gave the papers to his father. The court found that the defendant's receipt of the papers from his son was irrelevant:

In a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment [citations omitted]. Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.

Id. at 595.

Courts in other states that have examined situations where family members were served have reached similar conclusions. In a case from Indiana, the plaintiff attempted to serve the defendant by placing a copy of the summons in the door of the house of the defendant's parents in the mistaken belief that the defendant still resided there. Hill v. Ramey, 744 N.E.2d 509 (Ind. Ct. App. 2001). Even though the defendant eventually learned of the lawsuit, the court found that service was inadequate, holding that the "mere fact that the defendant has knowledge of the action will not grant the court personal jurisdiction." Id. at 512, quoting

Barrow v. Pennington, 700 N.E.2d 477, 479-80 (Ind. Ct. App. 1998).

In a particularly relevant case, the Court of Appeals of Tennessee examined whether second-hand delivery of the summons is sufficient to establish proper service. Watson v. Garza, 316 S.W.3d 589 (Tenn. Ct. App. 2008). In Watson, a case involving a motor vehicle accident, the plaintiff filed an action against the driver of a semi-tractor truck, the truck's owner, and the truck's lessee. The plaintiff attempted to serve the defendant driver by leaving the summons with the truck's owner, who was also the driver's employer. The owner's wife later handed the summons to the driver along with a paycheck. The court held this to be insufficient, finding that there was no precedent for such second-hand service, and actual notice did not cure the defect:

Plaintiff has cited no authority in support of his contention that such 'second-hand' or 'passed along' service of process is authorized under the Rules of Civil Procedure. In effect, Plaintiff asks us to hold that service was proper because Defendant Garza ultimately received the summons and had notice of the lawsuit. However, that is not the standard for proper service. The fact that Defendant Garza had actual knowledge of attempted service does not render the service effectual if the plaintiff did not serve the process in accordance with the rule.

Id. at 598 (internal quotation omitted).

The requirements for personal service in Georgia are nearly identical to the requirements in Washington. In Georgia, personal service on an individual defendant is accomplished as follows in part: “to the defendant personally, or by leaving copies thereof at the defendant’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein...” Ga. Code Ann. § 9-11-4(e)(7). When applying this statute, the courts in Georgia have held that the defendant’s knowledge of the lawsuit does not cure defects in service. For example, in holding that service on a babysitter at the defendant’s house was insufficient, the Court of Appeals concluded that the “fact that defendant acquired knowledge of the pending suit does not cure the defective service.” Mahone v. Marshall Furniture Co., 235 S.E.2d 672, 673 (Ga. Ct. App. 1977). See also Hardwick v. Fry, 225 S.E.2d 88 (Ga. Ct. App. 1976).

Other states hold similarly. See, e.g., ANS Associates, Inc. v. Gotham Ins. Co., 42 A.3d 1074, 1077 (Pa. Super. Ct. 2012) (“improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of the action against him or her”) (internal quotation omitted) (default judgment reversed and jurisdiction relinquished); Clark v. Clark, 43 So.3d

496, 499 (“Actual notice does not cure defective process”; divorce decree void) (Miss. Ct. App. 2010); Trusclair v. McGowan Working Partners, 306 S.W.3d 428, 430 (Ark. 2009) (“Actual knowledge of a proceeding does not validate defective process....The reason for this rule is that service of valid process is necessary to give a court jurisdiction over a defendant”; dismissal affirmed); M.J.W. v. Dept. of Children and Families, 825 So.2d 1038 (Fla. Dist. Ct. App. 2002) (actual notice does not establish lawful service of process; phone contact with subject irrelevant); Gocheff v. Breeding, 53 Ill. App. 3d 608, 610, 368 N.E.2d 982, 11 Ill. Dec. 374 (Ill. App. Ct. 1977) (“actual knowledge of the action has never been deemed the equivalent of service of the summons”; default judgment vacated); Sheehy v. Sheehy, 242 A.2d 153, 155 (Md. 1968) (“the fact that the defendant may have had actual knowledge of the suit against him would not cure a defective service”; decree for specific performance vacated, court without jurisdiction).

The Ohio Supreme Court noted the distinction between mere noncompliance with the rules and obtaining jurisdiction over a defendant:

We acknowledge that the spirit of the Civil Rules is to resolve cases upon their merits and not on pleading deficiencies.... Nevertheless, this appeal does not involve a defective pleading with a claim failing because of noncompliance with a certain prescribed, technical rule....

Rather, the issue presented in this case is one of a failure to perfect service, which ultimately affects whether a court has personal jurisdiction over a defendant.... Similarly, it is an established principle that actual knowledge of a lawsuit's filing and lack of prejudice resulting from the use of a legally insufficient method of service do not excuse a plaintiff's failure to comply with the Civil Rules.

LaNeve v. Atlas Recycling, Inc., 894 N.E.2d 25, 30 (Ohio 2008)

(internal citations omitted) (Court of Appeals decision reversing trial court's dismissal reversed).

The principle has also been applied to corporate defendants. E.g., Pease Brothers, Inc. v. American Pipe & Supply Co., 522 P.2d 996, 1003 (Wyo. 1974) ("It has been consistently held that the fact that process, improperly served, is forwarded to proper officials of the corporation does not validate the service"; default judgment vacated). In holding that service upon a non-employee receptionist was defective as to the corporation, the Court of Appeals of New York articulated one of the central policy reasons behind the principle: if a defendant has filed a motion to dismiss a case, then the defendant likely knows of the lawsuit; if

knowledge were to cure defective service, then such a motion would be invalid:

Numerous authorities hold that personal delivery of a summons to the wrong person does not constitute valid personal service even though the summons shortly comes into the possession of the party to be served .... A contrary rule would negate the statutory procedure for setting aside a defectively served summons, since the motion itself is usually evidence that the summons has been received.

McDonald v. Ames Supply Co., 22 N.Y.2d 111, 115, 238 N.E.2d 726, 291 N.Y.S.2d 328 (N.Y. 1968).

In applying Kansas state law on service of process, which allows for substantial compliance, the 10<sup>th</sup> Circuit found that the defendant's knowledge of the lawsuit did not result in substantial compliance. Burnham v. Humphrey Hospitality Reit Trust, Inc., 403 F.3d 709 (10<sup>th</sup> Cir. 2005) (dismissal affirmed). In noting that under Kansas law “[n]otice or knowledge must come from process of service,” the court concluded that “[t]he fact that [defendant] had actual knowledge of the suit and did not suffer prejudice does not mean there was substantial compliance” with the applicable laws. Burnham, 403 F.3d at 716, quoting Cook v. Cook, 83 P.3d 1243, 1246, 1248 (Kan. Ct. App. 2003).

The federal courts are in agreement when applying federal law. The court in Mann v. Castiel, 681 F.3d 368 (D.C. Cir. 2012), emphasized that proper service must be accomplished in order for a court to obtain jurisdiction:

Under the federal rules enacted by Congress, federal courts lack the power to assert personal jurisdiction over a defendant unless the procedural requirements of effective service of process are satisfied. Service is therefore not only a means of notifying a defendant of the commencement of an action against him but a ritual that marks the court's assertion of jurisdiction over the lawsuit.

Mann, 681 F.3d at 372 (internal quotations and citations omitted) (dismissal affirmed). The defendant's knowledge that a complaint has been filed is not sufficient to establish jurisdiction. Id. at 373. See also Albra v. Advan, Inc., 490 F.3d 826, 829 (11<sup>th</sup> Cir. 2007) ("defendant's actual notice is not sufficient to cure defectively executed service"; dismissal of defendant affirmed); Weston Funding, LLC v. Consorcio G Grupo Dina, S.A. DE C.V., 451 F. Supp. 2d 585, 589 (S.D.N.Y. 2006) (defective service cannot be ignored "on the mere assertion that a defendant had 'actual notice'"; motion to dismiss granted for failure to properly serve); Friedman v. Presser, 929 F.2d 1151, 1156 (6<sup>th</sup> Cir. 1991) ("the requirement of proper service of process 'is not some mindless

technicality” (citation omitted); defendants’ actual knowledge irrelevant, service defective); Mid-Continent Wood Products, Inc. v. Harris, 936 F.2d 297, 301 (7<sup>th</sup> Cir. 1991) (“it is well recognized that a ‘defendant’s actual notice of the litigation ... is insufficient to satisfy Rule 4’s requirements”); district court’s denial of motion for relief from judgment of default reversed) (quoting Way v. Mueller Brass Co., 840 F.2d 303, 306 (5<sup>th</sup> Cir. 1988)).

#### **E. CONCLUSION**

Courts in Washington and in other jurisdictions consistently hold that the plaintiff must follow the applicable law when serving the defendant in order for the court to obtain jurisdiction over the defendant. The defendant’s knowledge of the lawsuit is irrelevant.

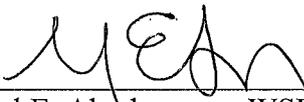
In the instant case Ms. Scanlan failed to comply with RCW 4.28.080(15) in that she did not serve Ms. Townsend personally or leave the summons with an adult who then resided with Ms. Townsend at Ms. Townsend’s abode. Therefore, the Court does not have jurisdiction over Ms. Townsend. As a result, Ms. Townsend requests that the Court reverse the Court of Appeals, reinstate the trial court’s dismissal of the suit, and hold that Ms.

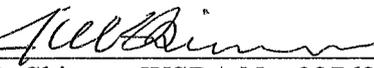
Townsend's father was not a process server and service upon Ms.

Townsend was not accomplished.

RESPECTFULLY SUBMITTED this 27 day of May,  
2014.

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# APPENDIX

490 F.3d 826, 68 Fed.R.Serv.3d 241, 19 A.D. Cases 680, 35 NDLR P 176, 20 Fla. L. Weekly Fed. C 758  
(Cite as: 490 F.3d 826)



Affirmed; motion for sanctions denied.

United States Court of Appeals,  
Eleventh Circuit.  
Adem A. ALBRA, Plaintiff–Appellant,  
v.  
ADVAN, INC., Wayne Abbott, Troy Abbott, Myriam  
Abbott, Defendants–Appellees.

West Headnotes

No. 06–15969  
Non–Argument Calendar.  
June 26, 2007.

[1] Process 313 66

313 Process  
313II Service  
313II(A) Personal Service in General  
313k66 k. Service of pleading with process.  
Most Cited Cases  
(Formerly 170Ak412)

**Background:** Employee brought *pro se* action against employer and three of its officers under Americans with Disabilities Act (ADA) and Florida Omnibus AIDS Act (FOAA), alleging discrimination and retaliation based on his HIV status. The United States District Court for the Southern District of Florida, No. 06-60979-CV-JAL, Joan A. Lenard, J., dismissed claims against employer for failure to effectuate service, and dismissed claims against officers for failure to state claim. Employee appealed and moved for sanctions.

Process 313 82

313 Process  
313II Service  
313II(B) Substituted Service  
313k76 Mode and Sufficiency of Service  
313k82 k. Mailing as constructive service. Most Cited Cases  
(Formerly 170Ak412)

**Holdings:** The Court of Appeals held that:

- (1) mailing copy of summons to employer without attaching copy of complaint was insufficient to effectuate service;
- (2) employer's officers could not be personally liable under ADA for any discrimination against employee;
- (3) as matter of first impression, employer's officers could not be held individually liable under ADA for any retaliation against employee;
- (4) as matter of first impression, employer's officers could not be held personally liable under FOAA for any discrimination against employee; and
- (5) appeal was not frivolous.

Mailing copy of summons to employer without attaching copy of complaint was insufficient to effectuate service in ADA action. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; Fed.Rules Civ.Proc.Rule 4(c), 28 U.S.C.A.

[2] Process 313 153

313 Process  
313III Defects, Objections, and Amendment  
313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases  
(Formerly 170Ak532.1)

490 F.3d 826, 68 Fed.R.Serv.3d 241, 19 A.D. Cases 680, 35 NDLR P 176, 20 Fla. L. Weekly Fed. C 758  
**(Cite as: 490 F.3d 826)**

A defendant's actual notice is not sufficient to cure defectively executed service. Fed.Rules Civ.Proc.Rule 4(c), 28 U.S.C.A.

**[3] Federal Civil Procedure 170A ↪657.5(1)**

170A Federal Civil Procedure  
 170AVII Pleadings  
 170AVII(A) Pleadings in General  
 170Ak654 Construction  
 170Ak657.5 Pro Se or Lay Pleadings  
 170Ak657.5(1) k. In general. Most Cited Cases

The Court of Appeals is to give liberal construction to the pleadings of *pro se* litigants.

**[4] Civil Rights 78 ↪1113**

78 Civil Rights  
 78II Employment Practices  
 78k1108 Employers and Employees Affected  
 78k1113 k. Individuals as “employers”.  
 Most Cited Cases

Employer's officers could not be personally liable under ADA for any discrimination against employee on account of his HIV status. Americans with Disabilities Act of 1990, §§ 101(2), 102(a), 42 U.S.C.A. §§ 12111(2), 12112(a).

**[5] Civil Rights 78 ↪1113**

78 Civil Rights  
 78II Employment Practices  
 78k1108 Employers and Employees Affected  
 78k1113 k. Individuals as “employers”.  
 Most Cited Cases

Individual liability is precluded for violations of the ADA's employment discrimination provision.

Americans with Disabilities Act of 1990, §§ 101(2), 102(a), 42 U.S.C.A. §§ 12111(2), 12112(a).

**[6] Civil Rights 78 ↪1113**

78 Civil Rights  
 78II Employment Practices  
 78k1108 Employers and Employees Affected  
 78k1113 k. Individuals as “employers”.  
 Most Cited Cases

Employer's officers could not be held individually liable under ADA for any retaliation against employee on account of his filing administrative complaints alleging discrimination on account of his HIV status, inasmuch as such alleged discrimination was made unlawful by ADA's provisions concerning employment. Americans with Disabilities Act of 1990, §§ 101–107, 503, 42 U.S.C.A. §§ 12111–12117, 12203.

**[7] Civil Rights 78 ↪1113**

78 Civil Rights  
 78II Employment Practices  
 78k1108 Employers and Employees Affected  
 78k1113 k. Individuals as “employers”.  
 Most Cited Cases

**Civil Rights 78 ↪1527**

78 Civil Rights  
 78IV Remedies Under Federal Employment Discrimination Statutes  
 78k1526 Persons Liable  
 78k1527 k. In general. Most Cited Cases

Individual liability is precluded under the ADA's anti-retaliation provision where the act or practice opposed by the plaintiff is made unlawful by the ADA's provisions concerning employment. Americans with Disabilities Act of 1990, §§ 101–107, 503,

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42 U.S.C.A. §§ 12111–12117, 12203.

**[8] Civil Rights 78 ↪ 1736**

78 Civil Rights

78V State and Local Remedies

78k1734 Persons Protected, Persons Liable,  
and Parties

78k1736 k. Employment practices. Most  
Cited Cases

Employer's officers could not be held personally liable under Florida Omnibus AIDS Act (FOAA) for any discrimination against employee on account of his HIV status. West's F.S.A. § 760.50.

**[9] Civil Rights 78 ↪ 1017**

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1016 Handicap, Disability, or Illness

78k1017 k. In general. Most Cited Cases  
(Formerly 361k226)

The Florida Civil Rights Act (FCRA) is to be construed in conformity with the ADA. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; West's F.S.A. § 760.01 et seq.

**[10] Civil Rights 78 ↪ 1024**

78 Civil Rights

78I Rights Protected and Discrimination Prohibited in General

78k1016 Handicap, Disability, or Illness

78k1024 k. Human immuno-deficiency virus and acquired immune deficiency syndrome. Most Cited Cases  
(Formerly 361k226)

The employment discrimination provisions of the Florida Omnibus AIDS Act (FOAA) shall be construed in conformity with the ADA. Americans with Disabilities Act of 1990, § 2 et seq., 42 U.S.C.A. § 12101 et seq.; West's F.S.A. § 760.50.

**[11] Civil Rights 78 ↪ 1736**

78 Civil Rights

78V State and Local Remedies

78k1734 Persons Protected, Persons Liable,  
and Parties

78k1736 k. Employment practices. Most  
Cited Cases

An individual may not be sued privately in his or her personal capacity for violating the employment discrimination provisions of the Florida Omnibus AIDS Act (FOAA). West's F.S.A. § 760.50.

**[12] Federal Civil Procedure 170A ↪ 2840**

170A Federal Civil Procedure

170AXX Sanctions

170AXX(F) On Appeal

170Ak2837 Grounds

170Ak2840 k. Frivolousness; particular cases. Most Cited Cases

Employee's claims on appeal, that employer's officers could be held individually liable under ADA for retaliating against him on account of his complaints of discrimination based on his HIV status, and that employer's officers could be held individually liable under Florida Omnibus AIDS Act (FOAA) for discrimination, were not frivolous, so as to warrant sanctions for filing frivolous appeal, inasmuch as appeal required Court of Appeals to decide two issues of first impression in Eleventh Circuit. Americans with Disabilities Act of 1990, § 503, 42 U.S.C.A. § 12203; West's F.S.A. § 760.50; F.R.A.P.Rule 38, 28 U.S.C.A.

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\*827 Adem A. Albra, Ft. Lauderdale, FL, pro se.

Cathy Mattson Stutin, Fisher & Phillips, LLP, Ft. Lauderdale, FL, for Advan, Inc.

Appeal from the United States District Court for the Southern District of Florida.

Before BLACK, MARCUS and KRAVITCH, Circuit Judges.

PER CURIAM:

Adem Albra, proceeding *pro se*, appeals the district court's dismissal of his complaint brought pursuant to the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 *et. seq.*, and the Florida Omnibus \*828 AIDS Act ("FOAA"), Fla. Stat. § 760.50. As a matter of first impression, we hold that individuals are not amenable to private suit for violating the ADA's anti-retaliation provision, 42 U.S.C. § 12203, where the act or practice opposed by the plaintiff is made unlawful by the ADA provisions concerning employment, 42 U.S.C. §§ 12111–12117. We also hold that individuals are not amenable to private suit for violating § 760.50(3)(b) of the FOAA.

## I. BACKGROUND

On July 3, 2006, Albra filed a *pro se* complaint against his employer, Advan, Inc., and Advan officers Wayne Abbott, Troy Abbott, and Myriam Abbott (collectively, the "Abbotts"). In the complaint, Albra alleged discrimination and retaliation based on his HIV status in violation of the ADA and the FOAA. On August 8, 2006, Albra executed service to Advan's registered agent, Wayne Abbott, by sending a copy of the summons (but not the complaint) via U.S. mail. The Return of Service showed that Albra listed himself as the process server. On August 17th, Myriam was served by a non-party to the lawsuit. Albra filed a notice of Advan's failure to answer the complaint on August 28th. In that notice, Albra stated that he had

"followed Rule 4 of the Federal Rules of Civil Procedure and mailed the summons to the Registered Agent of the Corporation, Wayne Abbott." On August 31st, service was executed to Wayne in his personal capacity.

On September 19th, pursuant to Federal Rule of Civil Procedure 12(b)(5), Advan filed a motion to dismiss the complaint for insufficiency of service. On that same date, pursuant to Rule 12(b)(6), Myriam and Wayne filed a motion to dismiss for failure to state a claim upon which relief may be granted on the ground that claims against individual defendants are not cognizable under either the ADA or the FOAA. Finally, service was executed to Troy on October 4th, and shortly thereafter, he notified the district court that he joined in Myriam and Wayne's motion to dismiss.

In a written order, the district court granted Advan's motion to dismiss, concluding that Albra had failed to effectuate service upon Advan in accordance with Rule 4(c) because he had personally served Advan through the mail. In that same order, the court granted the Abbotts' motion to dismiss, holding that neither the ADA nor the FOAA countenance individual liability. In so holding, the court dismissed Albra's complaint against Advan without prejudice and dismissed the complaint with prejudice as to the Abbotts. Albra now appeals.

## II. DISCUSSION

On appeal, Albra argues that the district court erred in dismissing his complaint because (1) Advan was properly served, and (2) individual defendants may be liable under the ADA and the FOAA. Advan has moved for sanctions pursuant to Federal Rule of Appellate Procedure 38 on the ground that Albra's appeal is frivolous. We address each argument in turn.<sup>FN1</sup>

FN1. Albra also raises several other arguments on appeal that were not presented in

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the district court below. “[A]rguments not presented in the district court will not be considered for the first time on appeal.” *Sterling Fin. Inv. Group, Inc. v. Hammer*, 393 F.3d 1223, 1226 (11th Cir.2004). We therefore do not address these arguments.

#### A. *Service of Advan*

[1] Albra argues that service to Advan was proper because he mailed a copy of the summons to Advan's registered agent, Wayne Abbott, who was also named as a \*829 defendant in the action. “We review the district court's grant of a motion to dismiss for insufficient service of process under [Federal Rule of Civil Procedure] 12(b)(5) by applying a *de novo* standard to the law and a clear error standard to any findings of fact.” *Prewitt Enters., Inc. v. Org. of Petroleum Exporting Countries*, 353 F.3d 916, 920 (11th Cir.2003).

[2][3] Federal Rule of Civil Procedure 4(c) provides that service of process shall be effected by serving a summons “together with a copy of the complaint. ... within the time allowed under [Rule 4(m)] ... by any person *who is not a party* and who is at least 18 years of age.” Fed.R.Civ.P. 4(c) (emphasis added). A defendant's actual notice is not sufficient to cure defectively executed service. *See Schnabel v. Wells*, 922 F.2d 726, 728 (11th Cir.1991) (interpreting former Rule 4(j)), *superseded in part by rule as stated in Horenkamp v. Van Winkle And Co., Inc.*, 402 F.3d 1129, 1132 n. 2 (11th Cir.2005). And although we are to give liberal construction to the pleadings of *pro se* litigants, “we nevertheless have required them to conform to procedural rules.” *Loren v. Sasser*, 309 F.3d 1296, 1304 (11th Cir.2002).

Here, the record demonstrates that Albra, the plaintiff in the suit, served Advan by mailing a copy of the summons without attaching a copy of the complaint. Accordingly, Albra failed to properly effect service upon Advan in accordance with Rule 4(c), and the district court's grant of Advan's motion to dismiss was proper.

#### B. *Dismissal of Albra's Complaint Against the Abbotts*

Albra also argues that the Abbotts, as owners, officers, and managers of Advan, constitute “employers” under the ADA and the FOAA, and the district court thus erred in dismissing his complaint against them. A district court's dismissal for failure to state a claim under Rule 12(b)(6) is reviewed *de novo*. *Hill v. White*, 321 F.3d 1334, 1335 (11th Cir.2003). Questions of law, such as the construction of a statute, are also reviewed *de novo*. *Konikov v. Orange County, Fla.*, 410 F.3d 1317, 1321 (11th Cir.2005).

##### 1. *ADA Claims*

The ADA prohibits disability discrimination in three areas: employment, public services, and public accommodations. *Shotz v. City of Plantation, Fla.*, 344 F.3d 1161, 1166 n. 5 (11th Cir.2003). Subchapter I of the ADA, which prohibits discrimination on account of disability in employment, covers the same employers and provides the same remedies contained in Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e(b). *See* 42 U.S.C. §§ 12111–12117. Subchapter II bars discrimination by any state or local government entity (that is, discrimination in public services) and affords the remedies outlined in Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. *See* 42 U.S.C. §§ 12131–12165. Subchapter III prohibits discrimination by public accommodations and incorporates the remedies of Title II of the Civil Rights Act of 1964, 42 U.S.C. § 2000a–3(a). *See* 42 U.S.C. §§ 12181–12189. And Subchapter IV sets forth various miscellaneous provisions, including the ADA's anti-retaliation provision, 42 U.S.C. § 12203. *See* 42 U.S.C. §§ 12201–12213.

##### a. *Discrimination Under the ADA*

[4] Albra argues that the Abbotts are personally liable under the ADA for discriminating against him on account of his HIV status. The anti-discrimination provision of Subchapter I of the ADA provides that “[n]o covered entity shall discriminate against a qualified individual with a disability because of the

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disability of \*830 such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.” 42 U.S.C. § 12112(a). The term “covered entity” means “an employer, employment agency, labor organization, or joint labor-management committee.” *Id.* § 12111(2).

The ADA's definition of “employer” is similar to that under Title VII and the Age Discrimination in Employment Act (“ADEA”), 29 U.S.C. § 630(b), and this court has held that neither of those Acts countenance individual liability. *Mason v. Stallings*, 82 F.3d 1007, 1009 (11th Cir.1996). In light of our construction of Title VII and the ADEA, we also have held that individual defendants are not amenable to private suit for violating the anti-discrimination provision of Subchapter I of the ADA. *Id.*

[5] Here, Albra's ADA discrimination claim names the Abbotts as defendants in their individual capacities. Because individual liability is precluded for violations of the ADA's employment discrimination provision, we conclude that the district court properly dismissed Albra's discrimination claim against the Abbotts.

#### *b. Retaliation Under the ADA*

[6] The ADA's general anti-retaliation provision provides that “[n]o person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter...” 42 U.S.C. § 12203(a) (emphasis added). In the instant case, Albra argues that the Abbotts are personally liable under the ADA for retaliating against him after he filed formal charges of discrimination with the Equal Employment Opportunity Commission (“EEOC”) and the Florida Commission on Human Relations. Thus, the issue before this court is whether individual defendants may be personally liable for violating the ADA's anti-retaliation provision when the “act or practice” opposed by the plaintiff is made

unlawful by the ADA provisions concerning employment (Subchapter I).

In *Shotz*, a panel of this court held that individual liability is not precluded for violations of the ADA's anti-retaliation provision, 42 U.S.C. § 12203(a), where the act or practice opposed by the plaintiff is made unlawful by the ADA provisions concerning *public services*, 42 U.S.C. §§ 12131–12165 (Subchapter II). *Shotz*, 344 F.3d at 1179–80. In so holding, the *Shotz* panel first examined the plain language of § 12203 and noted that this provision “is the only anti-discrimination provision in the ADA that uses the unqualified term ‘person’ to define the regulated entity.” *Id.* at 1168. The panel also observed that in Subchapter I of the ADA (the provisions regarding employment), the term “person” is defined to include “individuals.” *Id.* Stating that it “may consider Congress's use of a particular term elsewhere in the statute to determine its proper meaning within the context of the statutory scheme[,]” the *Shotz* panel concluded that “the anti-retaliation provision not only unequivocally confers on those whom it protects a federal right to be free from retaliation, but also imposes a correlative duty on all individuals to refrain from such conduct.” *Id.* But according to the panel, “[t]hat a statutory provision imposes such a duty on a class of actors ... does not compel the further conclusion that individual members of that class are amenable to private suit or otherwise liable for a breach of that duty.” *Id.*

The *Shotz* panel then examined the remedies created by the ADA, noting that the remedies for persons injured by retaliation in the public services context incorporate \*831 the remedies set forth in Title VI of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000d *et seq.*, and courts generally have concluded that Title VI precludes individual liability. *Shotz*, 344 F.3d at 1169–75. But the panel went on to state that “[e]ven were we to ignore the plain meaning [of § 12203(a)] and look only to the available Title VI remedies in determining the scope of liability, we still could not

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conclusively establish that Congress intended to preclude individual liability under § 12203.” *Id.* at 1173. According to the panel, such an “approach might make sense for a violation of § 12203 in the employment context[,]” as in that context, “the aggrieved person is ultimately referred to the remedies provided by Title VII of the Civil Rights Act of 1964, which prohibits discrimination by the same entities as prohibited by Subchapter I of the ADA regulating employment, and ... those remedies do not include suit against individuals.” *Shotz*, 344 F.3d at 1173 (citations omitted). But the *Shotz* panel determined that in the public services context, “allowing the remedial provisions to govern the scope of liability would deviate considerably from the intent and purpose of the statute” because “[t]he ADA makes *any* public entity liable for prohibited acts of discrimination, regardless of funding source[,]” while “Title VI remedies are available only against federal funds recipients.” *Id.* at 1174 (citation omitted) (emphasis in original). The panel therefore concluded that the scope of liability of § 12203 in the public services context could not be confined to that of Title VI. *Id.* at 1175.

Finding the plain language and statutory structure unhelpful in ascertaining Congress's intent, the *Shotz* panel turned to the legislative history and purpose of the ADA and found both to be “equally unhelpful.” *Id.* at 1176–77.

The panel then examined the Department of Justice (“DOJ”) regulations construing the ADA. *Id.* at 1177. The relevant DOJ regulation provides that “[n]o private or public entity shall discriminate against any individual because that individual has opposed any act or practice made unlawful by this part...” 28 C.F.R. § 35.134. The DOJ defines a “private entity” as “a *person* or entity other than a public entity.” 28 C.F.R. § 36.104 (emphasis added). And the appendix to the regulations provides that

Section 35.134 implements section 503 of the ADA, which prohibits retaliation against any individual

who exercises his or her rights under the Act... [T]he section applies not only to public entities subject to this part, but also to persons acting in an individual capacity or to private entities. For example, it would be a violation of the Act and this part for a private individual to harass or intimidate an individual with a disability in an effort to prevent that individual from attending a concert in a State-owned park.

28 C.F.R. pt. 35, App. A at 532, 56 Fed.Reg. 35,696, 35,707 (July 26, 1991) (“Preamble to Regulation on Nondiscrimination on the Basis of Disability in State and Local Government Services,” “Section-by-Section Analysis”). From this language, the *Shotz* panel concluded that the DOJ “has interpreted § 12203 as rendering those individuals acting in their individual capacities amenable to private suit.” *Shotz*, 344 F.3d at 1177.

After stating that “Congress expressly authorized the Attorney General to make rules with the force of law interpreting and implementing the ADA provisions generally applicable to public services[,]” the *Shotz* panel concluded that the DOJ's construction of § 12203 was reasonable and \*832 accorded *Chevron*<sup>FN2</sup> deference to the DOJ regulations. *Id.* at 1179. The panel thus held that “an individual may be sued privately in his or her personal capacity for violating § 12203 in the public services context.” *Id.* at 1180.

FN2. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984).

In reaching its holding, the *Shotz* panel expressly declined to decide whether individual liability is also precluded for violation of the ADA's anti-retaliation provision in the employment context. *Id.* at 1173. Thus, as stated above, the question before us in the instant case is whether individual defendants may be personally liable for violating § 12203 when the act or

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practice opposed by the plaintiff is made unlawful by the ADA provisions concerning employment—that is, Subchapter I.

We first look to the plain language of § 12203(a), which, again, provides that “[n]o *person* shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter....” 42 U.S.C. § 12203(a) (emphasis added). As the *Shotz* panel noted, § 12203(a) “is the only anti-discrimination provision in the ADA that uses the unqualified term ‘person’ to define the regulated entity[.]” and Subchapter I of the ADA defines the word “person” to include “individuals.” *Shotz*, 344 F.3d at 1168 (citing 42 U.S.C. § 12111(7)). But Subchapter I’s definition of “person” explicitly incorporates the definition of “person” articulated in Title VII. 42 U.S.C. § 12111(7) (“The term[ ] ‘person’ ... shall have the same meaning given such term[ ] in section 2000e of this title[.]” which defines “person” as, *inter alia*, “includ[ing] one or more individuals,” 42 U.S.C. § 2000e(a)). And although Title VII defines the term “employer” to include “persons,” and the term “persons” is defined to include “individuals,”<sup>FN3</sup> 42 U.S.C. § 2000e(a)-(b), this court has long held that individuals are not amenable to private suit under Title VII. *Mason*, 82 F.3d at 1009; *Smith v. Lomax*, 45 F.3d 402, 403 n. 4 (11th Cir.1995); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir.1991). Thus, § 12203’s use of the word “person” rather than the term “entity” or “employer” is not dispositive in determining whether an individual may be personally liable for violating this provision. *See Shotz*, 344 F.3d at 1168. We therefore turn to the remedies created by the statute.

FN3. “The term ‘*employer*’ means a *person* engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year....” 42 U.S.C. § 2000e(b) (emphasis added). “The term ‘*person*’ includes

one or more *individuals*, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations....” *Id.* § 2000e(a) (emphasis added).

The remedies for violation of the ADA’s anti-retaliation provision in the employment context are set forth in 42 U.S.C. § 12117. 42 U.S.C. § 12203(c).<sup>FN4</sup> Section 12117, in turn, explicitly incorporates the remedies available under Title VII. *See id.* § 12117(a),<sup>FN5</sup> \*833 *Baird v. Rose*, 192 F.3d 462, 471–72 (4th Cir.1999). Title VII “prohibits discrimination by the same entities as prohibited by Subchapter I of the ADA regulating employment....” *Shotz*, 344 F.3d at 1173 (emphasis added). And, as stated above, this court has held that there is no individual liability for violations of Title VII. *Mason*, 82 F.3d at 1009; *Smith*, 45 F.3d at 403 n. 4; *Busby*, 931 F.2d at 772. Thus, in *Mason*, this court construed the ADA’s employment discrimination provision, 42 U.S.C. § 12112(a), in light of Title VII and concluded that “there is no sound reason to read the [ADA] any differently from this Court’s reading of Title VII....” *Mason*, 82 F.3d at 1009.

FN4. Section 12203(c) provides:

The remedies and procedures available under sections 12117, 12133, and 12188 of this title shall be available to aggrieved persons for violations of subsections (a) and (b) of this section, with respect to subchapter I, subchapter II and subchapter III of this chapter, respectively.

42 U.S.C. § 12203(c).

FN5. Section 12117(a) provides:

The powers, remedies, and procedures set forth in sections 2000e–4, 2000e–5,

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2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the [Equal Employment Opportunity] Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

42 U.S.C. § 12117(a).

In *Shotz*, this court determined that limiting the scope of remedies for violations of § 12203 in the public services context (Subchapter II) to that available under Title VI “would deviate considerably from the intent and purpose of the [ADA,]” because Subchapter II of “the ADA makes *any* public entity liable for prohibited acts of discrimination, regardless of funding source[,]” while “Title VI remedies are available only against federal funds recipients.” *Shotz*, 344 F.3d at 1174 (emphasis in original). But in the employment context, “the aggrieved person is ultimately referred to the remedies provided by Title VII[,] ... which prohibits discrimination *by the same entities as prohibited by Subchapter I* of the ADA regulating employment, and ... those remedies *do not include suit against individuals.*” *Shotz*, 344 F.3d at 1173 (citations omitted) (emphasis added). Thus, unlike the public services context at issue in *Shotz*, limiting the scope of remedies available for violations of § 12203 in the employment context to those remedies available under Title VII would not deviate considerably from the intent and purpose of the ADA. And unlike the DOJ regulations interpreting the ADA (at issue in *Shotz*), neither the EEOC regulations interpreting the ADA nor the EEOC's interpretive guidance accompanying those regulations state that individuals acting in their individual capacities are amenable to private suit.<sup>FN6</sup> See 29 C.F.R. § 1630.2; 29 C.F.R. pt. 1630, App., \*83456 Fed.Reg. 35,726, 35,739– 35,753 (July 26, 1991) (“Interpretive Guid-

ance on Title I of the Americans with Disabilities Act”).

FN6. Although Congress delegated authority to the EEOC to implement Subchapter I of the ADA, *see* 42 U.S.C. § 12116, the ADA's anti-retaliation provision, § 12203, is outside of Subchapter I, and the Supreme Court has stated that “[n]o agency ... has been given authority to issue regulations implementing the generally applicable provisions of the ADA.” *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 479, 119 S.Ct. 2139, 2145, 144 L.Ed.2d 450 (1999). As such, the degree of deference, if any, courts owe the EEOC regulations implementing the ADA's generally applicable provisions is an open question. *See id.* at 480, 119 S.Ct. at 2146; *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 194, 122 S.Ct. 681, 689, 151 L.Ed.2d 615 (2002); *Williams v. Philadelphia Hous. Auth. Police Dep't*, 380 F.3d 751, 762 n. 7 (3d Cir.2004); *Waldrip v. Gen. Elec. Co.*, 325 F.3d 652, 655 n. 1 (5th Cir.2003); *Pollard v. High's of Baltimore, Inc.*, 281 F.3d 462, 468 n. 2 (4th Cir.2002). Nonetheless, the Supreme Court's pronouncements in *Sutton* and *Toyota* strongly suggest that these regulations are *not* entitled to *Chevron* deference to the extent they interpret ADA provisions outside of Subchapter I. *See Sutton*, 527 U.S. at 479–80, 119 S.Ct. at 2145–46; *Toyota*, 534 U.S. at 194, 122 S.Ct. at 689; *see also Waldrip*, 325 F.3d at 655 n. 1. Here, however, we need not determine what deference is due because, as stated above, the relevant regulations and interpretive guidelines do not state that individuals acting in their individual capacities are amenable to private suit. *See* 29 C.F.R. § 1630.2; 29 C.F.R. pt. 1630, App., 56 Fed.Reg. 35,726, 35,739–35,753 (July 26, 1991) (“Interpretive Guidance on Title I of the Americans with Disabilities

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Act”).

[7] For these reasons, we conclude that individual liability is precluded under § 12203 where the act or practice opposed by the plaintiff is made unlawful by Subchapter I of the ADA.

## 2. FOAA Claim

[8] Finally, Albra argues that the Abbotts are personally liable for discriminating against him in violation of the FOAA, Fla. Stat. § 760.50. In relevant part, the FOAA provides:

No person may fail or refuse to hire or discharge any individual, segregate or classify any individual of employment opportunities or adversely affect his status as an employee, or otherwise discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment on the basis of knowledge or belief that the individual has taken a human immunodeficiency virus test or the results or perceived results of such test unless the absence of human immunodeficiency virus infection is a bona fide occupational qualification of the job in question.

Fla. Stat. § 760.50(3)(b).

Although this court has yet to address the issue of individual liability under the FOAA, in *Huck v. Mega Nursing Services, Inc.*, the District Court for the Southern District of Florida found “the spirit of the [FOAA]” to be similar to that of Title VII and the ADA “in the area of employer/employee liability.” 989 F.Supp. 1462, 1464 (S.D.Fla.1997). The *Huck* court thus concluded that

In light of the language of the [FOAA] and upon reviewing the case law of similar statutes, this Court is convinced that the Florida Legislature did not intend to provide a cause of action against individual employees. Rather, the [FOAA] creates a cause

of action for employees who have been discriminated against by their employing entity.

*Id.* at 1464–65. We agree.

Section 760.50(2) of the FOAA provides that “[a]ny person with or perceived as having [AIDS, AIDS-related complex, or HIV] shall have every protection made available to *handicapped persons*.” Fla. Stat. § 760.50(2) (emphasis added). The Florida Civil Rights Act (“FCRA”), Fla. Stat. § 760.01–760.10, provides that it is an unlawful employment practice for an employer to discriminate against an individual on the basis of, *inter alia*, an individual’s “*handicap*.” Fla. Stat. § 760.10(1)(a) (emphasis added). “The FCRA is modeled after Title VII, so that federal case law regarding Title VII is applicable to construe the Act.” *Byrd v. BT Foods, Inc.*, 948 So.2d 921, 925 (Fla. 4th DCA 2007). “As applied to discrimination based on a *handicap*, the FCRA is construed in conformity with the federal Americans with Disabilities Act (ADA).”<sup>FN7</sup> *Id.* (emphasis added); *McCaw Cellular Commc'ns of Fla. v. Kwiatek*, 763 So.2d 1063, 1065 (Fla. 4th DCA 1999).

FN7. Notably, the District Courts of the Middle, Northern, and Southern Districts of Florida have held that individual employees may not be sued under the FCRA’s employment discrimination provisions. See *Lapar v. Potter*, 395 F.Supp.2d 1152, 1160 (M.D.Fla.2005); *King v. Auto, Truck, Indus. Parts and Supply, Inc.*, 21 F.Supp.2d 1370, 1382–83 (N.D.Fla.1998); *Huck*, 989 F.Supp. at 1464. Thus, persons claiming employment discrimination based on a *handicap* may not sue *individual* defendants in their individual capacities under either the FCRA or the federal ADA. See *Lapar*, 395 F.Supp.2d at 1160; *Mason*, 82 F.3d at 1009.

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\*835 [9][10][11] Because the FOAA provides that persons with HIV or AIDS “shall have every protection made available to *handicapped* persons,” Fla. Stat. § 760.50(2) (emphasis added), the FCRA prohibits employment discrimination on the basis of an individual's *handicap*, Fla. Stat. § 760.10(1)(a), and the FCRA is to be “construed in conformity with the” ADA, *Byrd*, 948 So.2d at 925, we conclude that the FOAA's employment discrimination provisions shall also be construed in conformity with the ADA. And because we have held that individual liability is precluded for violations of the ADA's anti-discrimination provision in the employment context, *Mason*, 82 F.3d at 1009, we thus conclude that an individual may *not* be sued privately in his or her personal capacity for violating the FOAA's employment discrimination provisions. Accordingly, the district court's dismissal of Albra's FOAA claim against the Abbots was proper.

Albra v. Advan, Inc.

490 F.3d 826, 68 Fed.R.Serv.3d 241, 19 A.D. Cases 680, 35 NDLR P 176, 20 Fla. L. Weekly Fed. C 758

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*C. Advan's Motion for Rule 38 Sanctions*

[12] Advan argues that this court should impose sanctions against Albra under Federal Rule of Appellate Procedure 38 because Albra's claims on appeal are “frivolous” in light of the “well-settled law.” Rule 38 provides that “[i]f a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee.” Fed. R.App. P. 38.

Here, Albra's appeal was not “frivolous,” as this court's resolution of the appeal required us to decide *two* issues of first impression in this circuit. We therefore deny Advan's motion for Rule 38 sanctions.

III. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of Albra's complaint against Advan and the Abbots, and we DENY Advan's motion for sanctions.

C.A.11 (Fla.),2007.

42 A.3d 1074, 2012 PA Super 50  
(Cite as: 42 A.3d 1074)

## H

Superior Court of Pennsylvania.  
ANS ASSOCIATES, INC., a Pennsylvania General  
Partnership, and Manzoor Chugtai,  
v.  
GOTHAM INSURANCE COMPANY, Mutual Ma-  
rine Office, Inc., Premium Payment Plan, Excel In-  
surance Services, Inc., Vintage Insurance Group, and  
Erik G. Wilson, President and d/b/a Vintage Insurance  
Group, LLC.  
Appeal of Premium Payment Plan.

Argued Jan. 11, 2012.  
Filed Feb. 29, 2012.

**Background:** Plaintiffs filed suit against New York defendant. The Court of Common Pleas, Philadelphia County, Civil Division, No. 2084 November Term, 2008, Bernstein, J., entered default judgment against defendant and then denied defendant's subsequent motion to strike judgment, 2011 WL 3556737. Defendant appealed.

**Holding:** The Superior Court, No. 968 EDA 2011, Strassburger, J., held that defendant was not properly served with original process when plaintiff mailed writ of summons.

Reversed and remanded.

### West Headnotes

#### [1] Judgment 228 336

228 Judgment  
228IX Opening or Vacating  
228k336 k. Nature and scope of remedy. Most Cited Cases

#### Judgment 228 354

228 Judgment  
228IX Opening or Vacating  
228k353 Errors and Irregularities  
228k354 k. In general. Most Cited Cases

A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record, and it may be granted only for a fatal defect or irregularity appearing on the face of the record.

#### [2] Judgment 228 399

228 Judgment  
228IX Opening or Vacating  
228k398 Operation and Effect  
228k399 k. In general. Most Cited Cases

An order of the court striking a judgment annuls the original judgment, and the parties are left as if no judgment had been entered.

#### [3] Judgment 228 354

228 Judgment  
228IX Opening or Vacating  
228k353 Errors and Irregularities  
228k354 k. In general. Most Cited Cases

In determining whether fatal defects exist on the face of the record for the purpose of striking a judgment, a court may look only at what was in the record when the judgment was entered.

#### [4] Appeal and Error 30 982(2)

42 A.3d 1074, 2012 PA Super 50

(Cite as: 42 A.3d 1074)

30 Appeal and Error

30XVI Review

30XVI(H) Discretion of Lower Court

30k982 Vacating Judgment or Order

30k982(2) k. Refusal to vacate. Most

Cited Cases

An appellate court reviews a trial court's refusal to strike a judgment for an abuse of discretion or an error of law.

[5] Process 313 64

313 Process

313II Service

313II(A) Personal Service in General

313k64 k. Mode and sufficiency of service.

Most Cited Cases

The rules concerning service of process must be strictly followed.

[6] Process 313 82

313 Process

313II Service

313II(B) Substituted Service

313k76 Mode and Sufficiency of Service

313k82 k. Mailing as constructive service. Most Cited Cases

New York defendant was not properly served with original process when plaintiff served writ of summons by mail, even if it writ was sent via certified mail, where attached receipt did not contain signature of recipient, and affidavit of service for amended complaint indicated that it was sent ordinary mail, had no delivery receipt, and was unsigned. Rules Civ.Proc., Rules 403, 404(2), 42 Pa.C.S.A.

[7] Process 313 153

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases

Improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of the action against him or her.

\*1075 Joseph H. Blum, Philadelphia, for appellant.

Stephen A. Corbman, Philadelphia, for ANS, appellee.

BEFORE: PANELLA, LAZARUS, and STRASSBURGER,<sup>FN\*</sup> JJ.

FN\* Retired Senior Judge assigned to the Superior Court.

OPINION BY STRASSBURGER, J.:

Premium Payment Plan (PPP) appeals from the March 17, 2011 order denying its petition to strike the default judgment entered on September 2, 2010, against PPP, and in favor of ANS Associates, Inc. (ANS) and Manzoor Chughtai (Chughtai).<sup>FN1</sup> We reverse and remand.

FN1. PPP claims this Court has jurisdiction over this appeal because it is from a final order. PPP's Brief at 1. Although it is not clear whether the trial court's March 17, 2011 order in fact disposed of all claims as to all parties, this Court unquestionably has jurisdiction over this appeal under Pa.R.A.P. 311(a)(1), which provides that an order refusing to strike or open a judgment is an interlocutory order immediately appealable as of right.

42 A.3d 1074, 2012 PA Super 50  
(Cite as: 42 A.3d 1074)

The trial court summarized the history of this case as follows.

On November 14, 2008, [ANS] instituted this suit by filing a praecipe for writ of summons. Although the affidavit of service stated that the writ of summons had been sent by ordinary mail, it had a certified mail receipt attached as an exhibit. The receipt was not signed. [An] amended complaint was eventually filed on May 15, 2009. The affidavit of service for the amended complaint states it was mailed ordinary mail, has no delivery receipt and is unsigned.

[PPP] ... filed no answer or other response to the complaint. No attorney entered an appearance on its behalf prior to the petition at issue in this appeal. On September 2, 2010, a default judgment was entered against [PPP]. On November 22, 2010, damages of \$313,807.54 were assessed against [PPP] and two codefendants.

On January 14, 2011, [PPP] filed a petition to strike the default judgment, or alternatively to open the judgment and stay execution proceedings.... On March 17, 2011, [the trial court] denied those petitions and [PPP] timely appealed.

\*1076 Trial Court Opinion (TCO), 7/27/2011, at 1-2.

[1][2][3][4][5][6] PPP raises, *inter alia*, the following question for our review: “[w]hether the [trial c]ourt improperly denied [PPP’s] Petition to Strike the Default Judgment because the record, as it existed at the time the Judgment was entered, contained insufficient evidence that [PPP] was properly served with original process....” PPP’s Brief at 5. <sup>FN2</sup>

FN2. Based upon our disposition of this issue, we need not address PPP’s remaining questions, which are whether the trial court

erred (1) in denying PPP’s petition to open the default judgment, and (2) in failing to issue a rule to show cause and permitting discovery prior to ruling upon PPP’s petition. *See* PPP’s Brief at 5.

A petition to strike a judgment is a common law proceeding which operates as a demurrer to the record. A petition to strike a judgment may be granted only for a fatal defect or irregularity appearing on the face of the record.... An order of the court striking a judgment annuls the original judgment and the parties are left as if no judgment had been entered. In determining whether fatal defects exist on the face of the record for the purpose of striking a judgment, a court may look only at what was in the record when the judgment was entered. We review a trial court’s refusal to strike a judgment for an abuse of discretion or an error of law.

*Knickerbocker Russell Co., Inc. v. Crawford*, 936 A.2d 1145, 1146–1147 (Pa.Super.2007) (internal quotations and citations omitted). In conducting our review, we bear in mind that “the rules concerning service of process must be strictly followed.” *Lerner v. Lerner*, 954 A.2d 1229, 1237 (Pa.Super.2008).

As PPP is located in New York, ANS was permitted to serve original process upon PPP by mail. *See* Pa.R.C.P. 404(2). However, the manner of mail service is governed by Rule 403, which provides, in relevant part, “a copy of the process shall be mailed to the defendant by any form of mail **requiring a receipt signed by the defendant or his authorized agent.**” Pa.R.C.P. 403 (emphasis added). As the trial court acknowledged, ANS did not comply with Rule 403:

The record as of September 2, 2010 was devoid of proper proofs of service. The affidavit of the writ demonstrates on its face that [ANS] violated Rule 403 by mailing the writ by ordinary mail to an out[-]of [-]state defendant. Assuming that the language in the affidavits is mistaken and the writ was

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actually sent by certified mail, the attached receipt lacks the required signature to demonstrate delivery to [PPP's] office. The affidavit of service for the amended complaint states it was sent ordinary mail, has no delivery receipts and is unsigned. Because the record at the time of judgment lacked any showing that either the writ or complaint had been properly served, the default judgment on September 2, 2010 should have been stricken.

TCO, 7/27/2011, at 4.<sup>FN3</sup>

FN3. As the trial court noted, although Pa.R.C.P. 404 provides that service outside the Commonwealth also may be made in a manner provided by the law of the jurisdiction in which the party is to be served, service in this case did not satisfy the New York rules. TCO, 7/27/2011, at 3, n. 5.

Based upon these facts, the trial court concluded that it erred: “[t]he Order of this [c]ourt dated March 17, 2011 denying [PPP's] petition to strike should be reversed and the case remanded to the Court of Common Pleas for further proceedings.” *Id.* at 5.

[7] ANS and Chugtai argue that there was sufficient evidence of record to establish\*1077 proper service. *See* Brief of ANS and Chugtai at 3. However, in making this argument, ANS and Chugtai rely upon evidence that PPP did in fact receive the writ of summons. *Id.* at 3–4. This evidence was not part of the record at the time the default judgment was entered; thus, as noted above, it may not be considered by the court in ruling upon a petition to strike. Further, “improper service is not merely a procedural defect that can be ignored when a defendant subsequently learns of the action against him or her.” *Cintas Corp. v. Lee's Cleaning Services, Inc.*, 549 Pa. 84, 700 A.2d 915, 918 (1997). As such, the argument of ANS and Chugtai is without merit.

We commend the learned trial court for conceding its error. We reverse the May 17, 2011 order denying PPP's petition to strike the default judgment and remand the case for further proceedings consistent with this opinion.

Order reversed. Case remanded. Jurisdiction relinquished.

Pa.Super.,2012.

ANS Associates, Inc. v. Gotham Ins. Co.  
42 A.3d 1074, 2012 PA Super 50

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700 N.E.2d 477  
 (Cite as: 700 N.E.2d 477)



Court of Appeals of Indiana.  
 Charles D. BARROW, Appellant–Defendant,  
 v.  
 David A. PENNINGTON, Appellee–Plaintiff.

No. 49A02–9804–CV–349.  
 Oct. 7, 1998.

Defendant filed motion for relief from default judgment. The Marion Superior Court, Caryl F. Dill, J., denied motion. Defendant appealed. The Court of Appeals, Robb, J., held that service of process by leaving a copy of the summons and complaint at defendant's place of abode, without thereafter mailing summons by first-class mail to defendant at his last known address, was insufficient to confer personal jurisdiction over defendant.

Reversed.

West Headnotes

**[1] Judgment 228** **145(3)**

228 Judgment  
 228IV By Default  
 228IV(B) Opening or Setting Aside Default  
 228k145 Meritorious Cause of Action or  
 Defense  
 228k145(3) k. Necessity for stating facts  
 constituting defense. Most Cited Cases

Trial court erred in not allowing defendant to present evidence of his meritorious defense at the hearing on defendant's motion for relief from default judgment based on defendant's failure to specifically plead meritorious defense in motion. Trial Procedure

Rule 60.

**[2] Process 313** **64**

313 Process  
 313II Service  
 313II(A) Personal Service in General  
 313k64 k. Mode and sufficiency of service.  
 Most Cited Cases

If technically deficient service of process is not calculated to “reasonably inform,” the mere fact that the defendant has knowledge of the action will not grant the court personal jurisdiction. Trial Procedure Rule 4.15(F).

**[3] Process 313** **78**

313 Process  
 313II Service  
 313II(B) Substituted Service  
 313k76 Mode and Sufficiency of Service  
 313k78 k. Leaving copy at residence or  
 other place. Most Cited Cases

Compliance with rule requiring that when service is made by leaving a copy of the summons and complaint at defendant's dwelling house or usual place of abode, the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the defendant, is a jurisdictional prerequisite to obtaining personal jurisdiction, and cannot be cured by technically deficient service that is “reasonably calculated” to inform defendant of impending action. Trial Procedure Rule 4.1(A)(3), (B).

**[4] Courts 106** **85(3)**

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(Cite as: 700 N.E.2d 477)

106 Courts

106II Establishment, Organization, and Procedure

106II(F) Rules of Court and Conduct of Business

106k85 Operation and Effect of Rules

106k85(3) k. Construction and application of particular rules. Most Cited Cases

Trial rule which is unambiguous on its face need not and cannot be interpreted by a court.

[5] Process 313  78

313 Process

313II Service

313II(B) Substituted Service

313k76 Mode and Sufficiency of Service

313k78 k. Leaving copy at residence or other place. Most Cited Cases

Service of process by leaving a copy of the summons and complaint at defendant's place of abode, without thereafter sending by first class mail, a copy of the summons without the complaint to the last known address of the defendant, as required by trial rule, was insufficient to confer personal jurisdiction over defendant upon trial court. Trial Procedure Rule 4.1(A)(3), (B).

\*478 Jatin D. Shah, Indianapolis, for Appellant–Defendant.

Duge Butler, Butler, Hahn, Hill & Schembs, Indianapolis, for Appellee–Plaintiff.

## OPINION

ROBB, Judge.

### *Case Summary*

Appellant–Defendant, Charles Barrow (“Barrow”), appeals the trial court's judgment denying his Verified Motion For Relief From Default Judgment. We reverse.

### *Issues*

Barrow raises two issues for our review. We find one dispositive:

1. Whether the trial court had personal jurisdiction over Barrow (whether service of process complied with Indiana Trial Rule 4.1).

### *Facts and Procedural History*

[1] A default judgment was entered against Barrow in favor of David Pennington (“Pennington”). Prior to this action, the Sheriff of Marion County allegedly delivered the underlying Summons and Complaint to Barrow's home. The return stated that the papers were left with a baby-sitter; however, Barrow had never employed a baby-sitter and did not have any children. At the time the Sheriff delivered the Summons and Complaint, Barrow was living with a friend and his friend's girlfriend. The girlfriend had one child, six months old, however, Barrow claimed that she had never employed a babysitter. The return does not state that Barrow was mailed a copy of the summons by first class mail after the summons and complaint were left at his home. Following the default judgment, Barrow filed a Verified Motion for Relief from Default Judgment in the trial court, and the trial court ordered a hearing. At the hearing, Barrow attempted to present a meritorious defense. The meritorious defense was mentioned in the motion for relief from judgment, but the defense was not specifically pleaded. The trial court stated that Trial Rule 60 requires meritorious defenses to be specifically pleaded in motions for relief from judgment, and therefore, did not allow Barrow to present evidence of his defense.<sup>FN1</sup>

FN1. Although we do not reach this point today, we conclude that the trial court erred when it did not allow Barrow to present evidence of his meritorious defense at the hearing. Barrow properly notes that T.R.

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(Cite as: 700 N.E.2d 477)

60(D) does not require a movant to plead specific facts in the motion for relief from judgment regarding meritorious defenses asserted therein. *Id.*

### *Discussion and Decision*

#### *I.*

Barrow argues that the service of process failed to comply with T.R. 4.1(B) because a copy of the summons was not mailed by first-class mail to his last known address following service of process pursuant to T.R. 4.1(A)(3).

[2] Indiana Trial Rule 4.1(A)(3) states that service may be made upon an individual by “leaving a copy of the summons and complaint at his dwelling house or usual place of abode.” When serving an individual in this manner, however, T.R. 4.1(B) states that the person making such service “shall” mail a copy of the summons to the defendant’s last known address. Thus, Pennington did not comply with the terms of the Indiana Trial Rules. Indiana Trial Rule 4.15(F), however, states that no summons or service of process shall be set aside if either is “reasonably calculated” to inform the defendant of the impending action against him. Thus, T.R. 4.15(F) will prevent service of process which is technically deficient from defeating the personal jurisdiction of a court. *Glennar Mercury-Lincoln, Inc. v. Riley*, 167 Ind.App. 144, 338 N.E.2d 670, 676 (1975); *LaPalme v. Romero*, 621 N.E.2d 1102, 1106 (Ind.1993). If service of process is not calculated to “reasonably inform,” the mere fact that the defendant has knowledge of the action will \*479 not grant the court personal jurisdiction. *Id.* 338 N.E.2d at 675.

[3] The issue before this court, therefore, is whether Trial Rule 4.1(B) is mandatory or whether T.R. 4.15(F) will cure noncompliance with the same. We have already addressed this same issue in *Chesser v. Chesser*, 168 Ind.App. 560, 343 N.E.2d 810 (1976). In *Chesser*, the summons and complaint were delivered to the home of the defendant-husband; however,

the evidence indicated that the husband had moved out of the home. *Id.* at 810. We held that the husband should have been mailed a copy of the summons pursuant to T.R. 4.1(B). *Id.* at 812. The language of the case is not clear as to whether the failure of service resulted from noncompliance with T.R. 4.1(B) alone, or whether compliance with T.R. 4.1(B) was required only because the defendant was no longer living at the house.<sup>FN2</sup> Today, we hold that compliance with T.R. 4.1(B), itself, is a jurisdictional prerequisite to obtaining personal jurisdiction.

FN2. According to a reference in *1 Harvey, Indiana Practice*, 98 (1987), *Chesser* holds that noncompliance with Trial Rule 4.1(B) is dispositive.

[4] Indiana Trial Rule 4.1(B) is unambiguously mandatory. The rule states that follow-up service “shall” be mailed if service of process is made pursuant to T.R. 4.1(A)(3). A trial rule which is unambiguous on its face “need not and cannot be interpreted by a court.” *Storey Oil Company, Inc. v. American States Insurance Company*, 622 N.E.2d 232, 235 (Ind.Ct.App.1993). In *Idlewine v. Madison County Bank and Trust Co.*, 439 N.E.2d 1198 (Ind.Ct.App.1982), we held that a joint summons delivered to the husband at the husband’s and wife’s residence was insufficient service of process on the wife. *Id.* In particular, we held that “[s]tatutes prescribing the manner of service of summons are mandatory, and must be strictly complied with to vest the court with jurisdiction.” *Id.* at 1201 (citing *Chaney v. Reddin* 201 Okla. 264, 205 P.2d 310 (1949)).

Moreover, T.R. 4.15(F) will not excuse noncompliance with trial rule 4.1(B). We have previously concluded that failure to technically comply with the trial rules will not defeat a trial court’s jurisdiction so long as a party substantially complies with the trial rules. *See Glennar*, 338 N.E.2d at 675. In all such cases, however, there was some attempt to comply with all of the relevant and mandatory trial rules. *See*

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*LaPalme*, 621 N.E.2d at 1106 (holding that T.R. 4.15(F) only cures technical defects in service of process, not a total failure to serve process). Accordingly, in *Idlewine*, we also stated that T.R. 4.15(F) will not cure defective service of process where no person authorized by the rules was actually served. *Idlewine*, 439 N.E.2d at 1201.

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[5] In the present case, there was no attempt whatever to comply with T.R. 4.1(B). Furthermore, the rules do not contemplate any person who is authorized to accept service of process for the defendant at the defendant's home other than the defendant himself.<sup>FN3</sup> Thus, we conclude that service of process in contravention of T.R. 4.1(B) is not sufficient to confer personal jurisdiction over a defendant upon the trial court. Accordingly, the trial court did not obtain personal jurisdiction over Barrow.

FN3. Under a provision of the Indiana Trial Rules which was deleted in 1971, a person of "suitable age and discretion" at the defendant's home was authorized to accept service of process for the defendant. *See* Rules of Trial Procedure: West's Annotated Indiana Code, Title 34, Historical Notes, Trial Rule 4.1. Trial Rule 4.1(B) was added in the same year that this provision was deleted. *See id.* Thus, it is clear that the intention of our supreme court was to preclude service of process at a defendant's home on anyone other than the defendant unless service of process were followed by mailing the summons to the defendant by first-class mail.

Reversed.

KIRSCH and STATON, JJ., concur.

Ind.App., 1998.

Barrow v. Pennington

700 N.E.2d 477

403 F.3d 709, 61 Fed.R.Serv.3d 69  
(Cite as: 403 F.3d 709)

**H**

United States Court of Appeals,  
Tenth Circuit.  
Mary BURNHAM, Plaintiff–Appellant,  
v.

HUMPHREY HOSPITALITY REIT TRUST, INC.,  
doing business as Humphrey Associates Incorporated,  
doing business as Super 8 Motel; Humphrey Hospi-  
tality Limited Partnership; Humphrey Hospitality  
Management Inc.; Humphrey Hospitality Trust, Inc.,  
Defendants–Appellees.

No. 04–3062.  
March 4, 2005.

**Background:** Motel patron sued motel proprietor for negligence, seeking damages in connection with injuries sustained in a shower when a handrail collapsed. The United States District Court for the District of Kansas, Monti L. Belot, J., dismissed, and the patron appealed.

**Holdings:** The Court of Appeals, Tacha, Chief Circuit Judge, held that:

- (1) patron's untimely filing of an opening brief would be excused, but
- (2) letter from patron was not proved to contain a summons, as required to substantially comply with Kansas law governing service of process, and thus, the suit was barred by limitations.

Affirmed.

West Headnotes

**[1] Federal Courts 170B  3505**

170B Federal Courts

170BXVII Courts of Appeals  
170BXVII(H) Briefs  
170Bk3505 k. Failure to file or serve, or to  
file or serve in time. Most Cited Cases  
(Formerly 170Bk716)

Court of Appeals would excuse appellant's un-  
timely filing of an opening brief, even though the  
filing was tardy by two months and appellant failed to  
explain the delay. F.R.A.P.Rule 31(a)(1), 28 U.S.C.A.

**[2] Federal Courts 170B  3505**

170B Federal Courts  
170BXVII Courts of Appeals  
170BXVII(H) Briefs  
170Bk3505 k. Failure to file or serve, or to  
file or serve in time. Most Cited Cases  
(Formerly 170Bk716)

The untimely filing of a brief is not jurisdictional,  
and Court of Appeals has discretion to excuse a late  
filing. F.R.A.P.Rule 31(a)(1), 28 U.S.C.A.

**[3] Federal Courts 170B  3034(2)**

170B Federal Courts  
170BXV State or Federal Laws as Rules of Deci-  
sion; Erie Doctrine  
170BXV(B) Application to Particular Matters  
170Bk3022 Procedural Matters  
170Bk3034 Limitations and Laches  
170Bk3034(2) k. Diversity cases in  
general. Most Cited Cases  
(Formerly 170Bk422.1)

**Federal Courts 170B  3034(7)**

170B Federal Courts

403 F.3d 709, 61 Fed.R.Serv.3d 69

(Cite as: 403 F.3d 709)

170BXV State or Federal Laws as Rules of Decision; Erie Doctrine

170BXV(B) Application to Particular Matters

170Bk3022 Procedural Matters

170Bk3034 Limitations and Laches

170Bk3034(7) k. Computation and tolling. Most Cited Cases  
(Formerly 170Bk427)

A federal court sitting in diversity applies state law for statute of limitations purposes; moreover, state law determines when an action is commenced for statute of limitations purposes.

#### [4] Federal Courts 170B 3403

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(D) Presentation and Reservation in Lower Court of Grounds of Review

170BXVII(D)2 Particular Grounds of Review

170Bk3402 Matters of Substance

170Bk3403 k. In general. Most Cited

Cases

(Formerly 170Bk614)

Motel patron's claim that her complaint, arising from injuries sustained in a shower when a handrail collapsed, sounded in contract as well as negligence would not be considered where raised for the first time on appeal.

#### [5] Federal Civil Procedure 170A 2533.1

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

170Ak2533 Motion

170Ak2533.1 k. In general. Most Cited Cases

When a party moves to dismiss for failure to state a claim and the district court relies upon material from outside the complaint, the court converts the motion to dismiss into a motion for summary judgment; when a district court does this, it must provide the parties with notice so that all factual allegations may be met with countervailing evidence. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

#### [6] Federal Courts 170B 3705(3)

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)4 Harmless and Reversible

Error

170Bk3686 Particular Errors as Harmless or Prejudicial

170Bk3705 Judgment

170Bk3705(3) k. Summary judgment. Most Cited Cases  
(Formerly 170Bk914)

If a party is not prejudiced by the conversion of a motion to dismiss to a motion for summary judgment by the district court's reliance on material from outside the complaint, the court of appeals should proceed with the appeal, relying upon summary judgment standards, without remanding. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

#### [7] Federal Courts 170B 3705(3)

170B Federal Courts

170BXVII Courts of Appeals

170BXVII(K) Scope and Extent of Review

170BXVII(K)4 Harmless and Reversible

Error

170Bk3686 Particular Errors as Harmless or Prejudicial

170Bk3705 Judgment

403 F.3d 709, 61 Fed.R.Serv.3d 69

(Cite as: 403 F.3d 709)

170Bk3705(3) k. Summary judgment. Most Cited Cases (Formerly 170Bk914)

Plaintiff was not prejudiced by district court's conversion of defendants' motion to dismiss into a motion for summary judgment by relying on materials outside the complaint, permitting Court of Appeals to review district court's grant of motion as a grant of summary judgment, although no notice was given, where plaintiff's opposition to motion to dismiss first introduced affidavits containing facts beyond those in the complaint, and defendants only introduced affidavits in their reply brief to counter those of plaintiff. Fed.Rules Civ.Proc.Rule 12(b)(6), 28 U.S.C.A.

#### [8] Process 313 149

313 Process

313II Service

313II(E) Return and Proof of Service

313k144 Evidence as to Service

313k149 k. Weight and sufficiency.

Most Cited Cases

Letter from motel patron injured in a shower, which was mailed merely to the proprietor of the motel via priority mail, not certified mail with a return receipt, was not proved to contain a summons, as required to substantially comply with Kansas law governing service of process; the only copies of a summons included in the record were of a summons that was first issued after the date of the letter. K.S.A. 60-204, 60-303(b), 60-304(e), 60-513(a)(4); Rules Civ.Proc., K.S.A. 60-203(a).

#### [9] Process 313 64

313 Process

313II Service

313II(A) Personal Service in General

313k64 k. Mode and sufficiency of service.

Most Cited Cases

#### Process 313 153

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases

The fact that defendant had actual knowledge of the suit and did not suffer prejudice does not mean there was substantial compliance with a method of serving process under Kansas law; moreover, if the attempted service did not include a summons, service is not merely irregular or defective but is a nullity. K.S.A. 60-204.

#### [10] Attorney and Client 45 44(1)

45 Attorney and Client

45I The Office of Attorney

45I(C) Discipline

45k37 Grounds for Discipline

45k44 Misconduct as to Client

45k44(1) k. In general. Most Cited

Cases

#### Attorney and Client 45 112

45 Attorney and Client

45III Duties and Liabilities of Attorney to Client

45k112 k. Conduct of litigation. Most Cited

Cases

Members of the Oklahoma bar who negligently fail to obtain timely service of process may be disciplined by the Oklahoma Supreme Court, and may be subject to a malpractice claim. KS.Sup.Ct.Rules, Rule 226, Rules of Prof.Conduct, Rule 3.3(a)(1).

\*710 Submitted on the briefs: <sup>FN\*</sup>

403 F.3d 709, 61 Fed.R.Serv.3d 69  
(Cite as: 403 F.3d 709)

FN\* After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument

John Mac Hayes, Oklahoma City, OK, and Susan Saidian, Redmon & Nazar, Wichita, KS, on behalf of Plaintiff–Appellant.

Patrick J. Murphy, Wallace, Saunders, Austin, Brown & Enochs, Chtd., Wichita, KS, on behalf of Defendants–Appellees.

Before TACHA, Chief Circuit Judge, HENRY, and HARTZ, Circuit Judges.

TACHA, Chief Circuit Judge.

Plaintiff–Appellant Mary Burnham was injured in a shower at the Super 8 Motel in Park City, Kansas. Defendants–Appellees Humphrey Hospitality Trust, Inc., et al., moved to dismiss, arguing that the statute of limitations for negligence barred the suit. The District Court granted the Defendants' motion to dismiss. Ms. Burnham timely appeals, claiming that under Kansas law she had commenced this suit prior to the running of the statute of limitations for a negligence claim or alternatively that her complaint sounds in contract as well as tort and therefore the statute of limitations for a contract claim should apply. Defendants moved this Court to dismiss the appeal for the untimely filing of Ms. Burnham's opening brief. We take jurisdiction under 28 U.S.C. § 1291, DENY Defendants' motion to dismiss the appeal, AFFIRM the District Court's ruling, and ORDER Ms. Burnham's counsel, John Mac Hays, to SHOW CAUSE why we should not sanction him for making “a false statement of material fact ... to a tribunal.” Kan.

Sup.Ct. R. 226, R. Prof. Conduct 3.3(a)(1).

#### \*711 I. BACKGROUND

This case arises under diversity jurisdiction alleging a Kansas common law cause of action. *See* 28 U.S.C. § 1332. On March 29, 2001, Ms. Burnham was injured when a handrail <sup>FN\*\*</sup> in a shower at the Super 8 Motel collapsed. As early as November 9, 2001, Ms. Burnham's counsel, John Mac Hays, contacted the Defendants' insurance carrier, Wausau Insurance Company, to inquire about reaching an insurance settlement. R. at 50. On February 8, 2002, Wausau wrote Mr. Hays and informed him that it would only provide a \$5,000 supplemental medical payment. R. at 52.

FN\*\* The parties dispute whether there was a handrail in the shower, but because the District Court granted the Defendants' motion to dismiss, we assume the facts as alleged by Ms. Burnham.

Ms. Burnham apparently considered this offer unacceptable because she chose to bring suit against Defendants. Ms. Burnham filed her complaint in the District of Kansas on March 19, 2003. This original complaint incorrectly identified the defendant as “Humphrey Associates Incorporated, d/b/a Super 8 Motel.” R. at 44. Mr. Hays relied upon this name because during his correspondence with Wausau he referred to the Defendants in this manner. R. at 47–48.

In an affidavit, Mr. Hays avers that after filing the complaint he discovered that neither “Humphrey Associates Incorporated” nor “Super 8 Motel” were registered entities with the Kansas Secretary of State. R. at 48. He further claims that he contacted the Park City Motel 8 and inquired as to its authorized agent to receive service. *Id.* The employee at the Motel 8 did not know who the appropriate agent was. *Id.*

At this point, Mr. Hays could have rendered ser-

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vice of process under Kan. Stat. Ann. § 60–304(f), which allows service of the Secretary of State in such instances. Instead of serving the Secretary of State, Mr. Hays alleges that on March 28, 2003 he mailed a copy of the complaint and summons via first class mail to “the proprietor” of the Super 8 Motel in Park City. R. at 48, 54. Mr. Hays does not have a return receipt because he failed to use certified mail.

The Defendants contend they never received the March 28, 2003 letter or the accompanying complaint and summons. Although Mr. Hays claims to have sent a summons with the complaint, we note that the District Court's docket shows that the first issuance of a summons in this case did not occur until July 15, 2003—some 109 days after a summons was allegedly mailed to the Defendants. R. at 2–3. Further, the only summons copies included in the record are copies of the July 15, 2003 summons. R. at 13, 15, 17, 19.

Nonetheless, Ms. Burnham filed an amended complaint listing the Defendants by their appropriate names on July 15, 2003. The Defendants were properly served with a copy of the amended complaint and summons on that date. The Defendants responded by filing a motion to dismiss. *See* Fed.R.Civ.P. 12(b)(6).

In their motion, the Defendants argued that Ms. Burnham's claim sounded in negligence and was subject to a two-year statute of limitations. *See* Kan. Stat. Ann. § 60–513(a)(4). Because Ms. Burnham was injured on March 29, 2001, the Defendants argued that the statute ran on March 29, 2003. The Defendants conceded that Ms. Burnham's original complaint, which was filed on March 19, 2003, was timely. Nevertheless, they argued that March 19, 2003 is not the commencement\*712 date for statute of limitations purposes because they were not adequately served until July 15, 2003. *See* Kan. Stat. Ann. § 60–203(a). Ms. Burnham replied that the March 28, 2003 letter and accompanying complaint and summons substantially satisfied the Kansas service of process require-

ments. *See* Kan. Stat. Ann. § 60–204. She further argued that, although the original complaint misnamed the Defendants, her July 15, 2003 amended complaint related back to the original complaint. *See* Fed.R.Civ.P. 15(c). The District Court granted the Defendants' motion and dismissed the case.

Ms. Burnham then filed a timely notice of appeal. Ironically for a statute of limitations case, Mr. Hays did not timely file the appellant's opening brief in this Court. *See* Fed. R.App. P. 31(a)(1); 10th Cir. R. 31.1(A)(1). In fact, the brief was filed over two months late. As a result, the Defendants moved this Court to dismiss Ms. Burnham's appeal. *See* Fed. R.App. P. 31(c).

Ms. Burnham's opening brief was eventually filed. She renews her argument that her March 28, 2003 letter substantially complied with service of process under Kansas law and that her July 15, 2003 amended complaint relates back. She also argues that the District Court inappropriately considered facts outside of those alleged in the complaint in its Rule 12(b)(6) ruling. Finally, for the first time on appeal, she argues that her complaint sounds in contract, thereby garnering a longer statute of limitations. At the request of all parties, we submitted this case without oral argument. *See* Fed. R.App. P. 34(a)(2); 10th Cir. R. 34.1(G).

## II. MOTION TO DISMISS APPEAL

[1] First, we consider Defendants' motion to dismiss this appeal. It is beyond dispute that Mr. Hays was tardy by two months in filing the opening brief. *See* Fed. R.App. P. 31(a)(1). Moreover, he offers no explanation for the delay. *See* Response to Motion of Appellees to Dismiss Appeal (May 13, 2004). Finally, Rule 31(c) specifically states that “[i]f an appellant fails to file a brief within the time provided by this rule, or within an extended time, an appellee may move to dismiss the appeal.” Fed. R.App. P. 31(c).

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[2] The untimely filing of a brief is not jurisdictional, however, and we have discretion to excuse a late filing. *See Bartell v. Aurora Public Schs.*, 263 F.3d 1143, 1146 (10th Cir.2001). As such, it is the practice of this Court “not [to] grant motions to dismiss for failure to follow Fed. R.App. P. 31(a)(1).” *Id.* Thus, even though a two-month delay is far from a de minimis violation and Rule 31 permits such a motion, we deny Defendants’ motion to dismiss this appeal. We expect Mr. Hays to refrain from such dilatory conduct in future appearances before this Court.

### III. STATUTE OF LIMITATIONS

[3] Because this is a diversity case, substantive issues are controlled by state law and procedural issues are controlled by federal law. *See Erie R. Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). A federal court sitting in diversity applies state law for statute of limitations purposes. *Guaranty Trust Co. of New York v. York*, 326 U.S. 99, 109–110, 65 S.Ct. 1464, 89 L.Ed. 2079 (1945). Moreover, state law determines when an action is commenced for statute of limitations purposes. *Walker v. Armco Steel Corp.*, 446 U.S. 740, 751, 100 S.Ct. 1978, 64 L.Ed.2d 659 (1980). Therefore, we apply Kansas law for the statute of limitations questions raised on this appeal.

Ms. Burnham presents two arguments claiming that the District Court erred in \*713 dismissing her complaint. She first argues that her complaint included a contract claim and that the statute of limitations had not run with respect to this claim. She also argues that she substantially complied with Kansas’s service of process statute before the statute of limitations had run and therefore her suit is not barred.

#### A. Contract Claim

[4] Ms. Burnham first argues that her complaint sounds in contract as well as tort. In the proceedings below, Ms. Burnham, the Defendants, and the District Court all treated her complaint as asserting a common-law negligence claim. As such, the District Court found that under Kansas law a two-year statute of

limitations applied. Kan. Stat. Ann. § 60–513(a)(4).

On appeal, Ms. Burnham argues for the first time that her complaint includes both a contract and negligence claim. The statute of limitations for a contract claim is a minimum of three years. *See* Kan. Stat. Ann. § 60–512(1) (three-year statute of limitations for unwritten contracts); Kan. Stat. Ann. § 60–511(1) (five-year statute of limitations for written contracts). Because the Defendants were adequately served by July 15, 2003, the statute of limitations for a contract claim would not have run under either of these statutory provisions. Nevertheless, as this argument is raised for the first time on appeal, we will not consider it. *See Proctor & Gamble Co. v. Haugen*, 222 F.3d 1262, 1271 (10th Cir.2000).

#### B. Substantial Compliance and Relation Back

Ms. Burnham next argues that although the March 28, 2003 letter did not technically comply with Kansas’s service of process statutes, *see* Kan. Stat. Ann. §§ 60–303–60–304, she was in substantial compliance under Kan. Stat. Ann. § 60–204. While she admits that the original complaint does not name the proper defendants, she contends that her July 2003 amended complaint, which properly names the Defendants, relates back to her March 2003 complaint.

##### 1. Standard of Review

The District Court dismissed Ms. Burnham’s complaint in response to Defendants’ motion to dismiss. *See* Fed.R.Civ.P. 12(b)(6). On a Rule 12(b)(6) motion, a court’s factual inquiry is limited to the well-pleaded facts in the complaint, which the court must assume are true for purposes of the motion. *Aspen Orthopaedics & Sports Medicine, LLC v. Aspen Valley Hosp. Dist.*, 353 F.3d 832, 837 (10th Cir.2003). Because the District Court relied upon facts presented in affidavits, Ms. Burnham contends that this reliance converted the motion to dismiss into a motion for summary judgment. Ms. Burnham further notes that the District Court failed to provide notice that it was converting the motion. We agree.

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[5][6] When a party moves to dismiss under Rule 12(b)(6) and the district court relies upon material from outside the complaint, the court converts the motion to dismiss into a motion for summary judgment. *Lamb v. Rizzo*, 391 F.3d 1133, 1136 (10th Cir.2004). When a district court does this, it must provide the parties with notice so that all factual allegations may be met with countervailing evidence. *See Nichols v. United States*, 796 F.2d 361, 364 (10th Cir.1986). However, if a party is not prejudiced by the conversion, the court of appeals should proceed with the appeal, relying upon summary judgment standards, without remanding. *Lamb*, 391 F.3d at 1136 n. 3.

[7] Although no notice was given, Ms. Burnham was not prejudiced by this conversion.\*714 The Defendants' motion to dismiss relied exclusively upon the facts as pleaded in the complaint. R. at 23–26. Ms. Burnham's opposition to the motion to dismiss first introduced affidavits containing facts beyond those in the complaint. R. at 30–54. The Defendants only introduced affidavits in their reply brief to counter those of Ms. Burnham. R. at 59–68. Because Ms. Burnham had the opportunity to introduce evidence that was not contained in the complaint, we hold that Ms. Burnham was not prejudiced by converting the motion to dismiss to a motion for summary judgment. *Cf. Lamb*, 391 F.3d at 1136 n. 3 (finding no prejudice when plaintiff “not only failed to object to the exhibits attached to [defendant's] motion to dismiss, but [plaintiff] also filed his own exhibits in response.”). Because Ms. Burnham was not prejudiced by the conversion of the motion to dismiss to a motion for summary judgment, we review the District Court's dismissal as a grant of summary judgment. *Id.* at 1136.

We review a district court's grant of summary judgment de novo. *Byers v. City of Albuquerque*, 150 F.3d 1271, 1274 (10th Cir.1998). Summary judgment is appropriate “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no gen-

uine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” Fed.R.Civ.P. 56(c). We view the evidence, and draw reasonable inferences therefrom, in the light most favorable to the nonmoving party. *Byers*, 150 F.3d at 1274.

Although the movant must show the absence of a genuine issue of material fact, it “need not negate the nonmovant's claim.” *See Jenkins v. Wood*, 81 F.3d 988, 990 (10th Cir.1996). Once the movant carries this burden, the nonmovant cannot rest upon its pleadings, but “must bring forward specific facts showing a genuine issue for trial as to those dispositive matters for which [it] carries the burden of proof.” *Id.* “The mere existence of a scintilla of evidence in support of the nonmovant's position is insufficient to create a dispute of fact that is ‘genuine’; an issue of material fact is genuine only if the nonmovant presents facts such that a reasonable jury could find in favor of the nonmovant.” *Lawmaster v. Ward*, 125 F.3d 1341, 1347 (10th Cir.1997).

## 2. Merits

[8] Ms. Burnham was injured on March 29, 2001. Because she brings a tort claim, a two-year statute of limitations applies. *See Kan. Stat. Ann. § 60–513(a)(4)*. As such, the statute of limitations ran on March 29, 2003.

In order to determine whether Ms. Burnham's complaint escapes the statute of limitations' bar, we must determine the date on which this action commenced. As with other issues touching upon the statute of limitations, we rely upon Kansas law in making this determination. *See Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533–34, 69 S.Ct. 1233, 93 L.Ed. 1520 (1949) (holding that state law, not the Federal Rules of Civil Procedure, determines when an action is commenced in a diversity case for statute of limitations purposes).

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Under Kansas law, the date on which a suit is commenced is determined as follows:

A civil action is commenced at the time of (1) Filing a petition with the clerk of the court, if service of process is obtained ... within 90 days after the petition is filed, or (2) service of process or first publication, if service of process ... \*715 is not made within the time specified by provision (1).

Kan. Stat. Ann. § 60–203(a).

Ms. Burnham's original complaint was filed on March 19, 2003. Thus, so long as she successfully served the Defendants by June 17, 2003, this suit commenced on March 19, 2003. *See Jenkins v. City of Topeka*, 136 F.3d 1274, 1275 (10th Cir.1998). If she did not serve the Defendants until after June 17, 2003, that later date of service constitutes the commencement of this action. The parties agree that the Defendants were successfully served on July 15, 2003. Of course, if July 15 is the commencement date, this action is barred by the statute of limitations. Ms. Burnham, therefore, argues that Mr. Hays's March 28, 2003 letter constituted service within 90 days of filing the original petition. She further contends that although the original complaint misnames the Defendants, the amended complaint properly identifies the Defendants and relates back to the original complaint. *See Fed.R.Civ.P.* 15(c).

Under the Federal Rules of Civil Procedure, a domestic corporate defendant may be served in one of two ways. *Fed.R.Civ.P.* 4(h)(1). First, defendant may be served pursuant to the laws of the forum state. *Id.* (referencing *Fed.R.Civ.P.* 4(e)(1)). Second, a defendant may be served “by delivering a copy of the summons and of the complaint to an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also

mailing a copy to the defendant.” *Id.* Ms. Burnham does not argue on appeal that the Defendants were served by way of the second method nor does she assert that the Defendants waived service of a summons. *See Fed.R.Civ.P.* 4(d). Therefore, Mr. Hays's March 28, 2003 letter constitutes service only if it is adequate under Kansas law.

Under Kansas law, service by mail must be made by posting “a copy of the process and petition” by way of certified mail evidenced by return receipt. *Kan. Stat. Ann.* § 60–303(b). Further, when serving a corporate defendant by mail, the certified letter, containing a copy of the summons and complaint, must be addressed to an officer or registered agent at their usual place of business. *Kan. Stat. Ann.* § 60–304(e).

In an affidavit included with Ms. Burnham's opposition to the motion to dismiss, Mr. Hays stated that on March 28, 2003, he mailed a copy of the original complaint and summons to the Super 8 Motel. R. at 48. The record also contains a copy of this letter, dated March 28, 2003, that states, “Enclosed is a copy of a Complaint and Summons which my client, Mary Burnham [sic], has caused to be filed against Humphrey Associates, Incorporated in the Wichita, Kansas federal court.” R. at 54. This letter addressed sent to the “Super 8 Motel Proprietor” via priority mail. *Id.* On appeal, Ms. Burnham concedes that Mr. Hays's letter, which was mailed merely to the proprietor via priority mail—not certified mail with a return receipt—does not satisfy sections 60–303(b) or 60–304(e).

Nonetheless, she argues that the March 28 letter, while not technically satisfactory, substantially complies with Kansas law under *Kan. Stat. Ann.* § 60–204. Section 60–204 provides:

In any method of serving process, substantial compliance therewith shall effect valid service of process if the court finds that, notwithstanding some

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irregularity or omission, the party served was made aware that an action or proceeding was pending in a specified court.

\*716 Under section 60–204, then, two requirements must be met. There must be substantial compliance with Kan. Stat. Ann. § 60–301 et seq. and the defendant must be made aware that an action is pending. *See Pedi Bares, Inc. v. P & C Food Markets, Inc.*, 567 F.2d 933, 936 (10th Cir.1977).

Ms. Burnham asserts that she meets both criteria. First, she argues that the letter substantially complies because it contained a copy of the complaint and a summons. Second, she argues that the Defendants had awareness of the suit because of her previous discussions with Wausau and that the letter itself provided awareness. We disagree.

[9] The Kansas Supreme Court has consistently held that, when applying section 60–204, courts must find that the defendant's awareness of the suit results directly from the plaintiff's substantial compliance with the service of process. *See, e.g., Haley v. Hershberger*, 207 Kan. 459, 485 P.2d 1321, 1326 (1971); *Thompson–Kilgariff General Ins. Agency, Inc. v. Haskell*, 206 Kan. 465, 479 P.2d 900, 902 (1971); *Briscoe v. Getto*, 204 Kan. 254, 462 P.2d 127, 129 (1969). As the Kansas Court of Appeals recently stated, “Notice or knowledge must come from process of service.” *Cook v. Cook*, 32 Kan.App.2d 214, 83 P.3d 1243, 1246 (2003), *rev. den'd* (Feb. 10, 2004) (quoting *Kansas Bd. of Regents v. Skinner*, 267 Kan. 808, 812, 987 P.2d 1096 (1999)). “The fact that [defendant] had actual knowledge of the suit and did not suffer prejudice does not mean there was substantial compliance under Kan. Stat. Ann. 60–204.” *Id.* at 1248. Moreover, if the attempted service did not include a summons, service is “not merely irregular or defective but [is] a nullity.” *Id.* at 1248.

Ms. Burnham therefore could not have substan-

tially complied with the service statute unless Mr. Hays included a summons with the March 28 letter. Although Mr. Hays avers that he attached a copy of the summons to this letter, we hold that his affidavit is insufficient to create a genuine issue of material fact on the question whether a summons was sent. Not only do the Defendants present affidavits averring that its agents received neither the March 28 letter, a complaint, nor a summons, R. at 66, but the District Court's docket shows that the first issuance of a summons in this case did not occur until July 15, 2003. R. at 2–3. The only copies of a summons included in the record are of the July 15, 2003 summons. R. at 13, 15, 17, 19. Moreover, Mr. Hays does not explain how a summons that was first issued on July 15, 2003 was enclosed in his alleged March 28, 2003 letter. Given the state of this record, we are—at best—left with only a “metaphysical doubt as to the material facts” regarding the attachment of a summons in the alleged March 28 letter. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 261, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

We hold, then, that there is insufficient evidence supporting the notion that the Defendants received a summons in the alleged March 28 letter to escape summary judgment. Thus, the alleged March 28 letter cannot satisfy section 60–204. *See Cook*, 83 P.3d at 1246–48. Because the March 28 letter does not constitute timely service, there is nothing to which the amended complaint could relate back. Therefore, for purposes of the statute of limitations, this action was commenced on July 15, 2003—the date of actual service. *See Kan. Stat. Ann. 60–203(a)*. The statute of limitations, however, ran on March 29, 2003. As such, this action is time-barred.

#### IV. CONCLUSION

Although Mr. Hays was two months late in filing the opening brief, we DENY the \*717 Defendants' motion to dismiss this appeal. We decline to consider whether Ms. Burnham's complaint sounds in contract as well as negligence because this argument is raised for the first time on appeal. Finally, we AFFIRM the

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District Court's dismissal on statute of limitations grounds. Despite Mr. Hays's affidavit that a summons was attached to this March 28 letter, the District Court docket, among other things, makes clear that no summons was issued at all until July 15. As such, Ms. Burnham fails to present evidence raising a genuine issue of material fact as to whether the Defendants received a summons on March 28.

[10] Given the state of the record, we suspect that Mr. Hays knowingly averred to false statements in his affidavit regarding the inclusion of a summons with the March 28 letter. Therefore, we ORDER Mr. Hays to SHOW CAUSE why we should not sanction him in the amount of \$5,000 for violating the rule prohibiting counsel from making “a false statement of material fact ... to a tribunal.” Kan. Sup.Ct. R. 226, R. Prof. Conduct 3.3(a)(1); *see also* D. Kan. R. 83.6.1(a) (adopting the Kansas Rules of Professional Responsibility). This panel is empowered to issue monetary sanctions for violations of the rules of professional responsibility, and we retain jurisdiction with the panel for that purpose. *See* Fed. R.App. P. 46(c); 10th Cir. R. 46.5(D)(2); Tenth Circuit Plan For Attorney Disciplinary Enforcement § 4.1. Within 20 days after the issuance of this opinion, Mr. Hays must file his response with the Clerk of the Court demonstrating that he did not violate Rule of Professional Conduct 3.3(a)(1). It is also worth noting that members of the Oklahoma bar who negligently fail to obtain timely service of process may be disciplined by the Oklahoma Supreme Court, *see State ex rel. Oklahoma Bar Ass'n v. Scroggs*, 70 P.3d 821, 829 (Okla.2003), and may be subject to a malpractice claim, *see Nicholas v. Morgan*, 58 P.3d 775, 778 (Okla.2002).

C.A.10 (Kan.),2005.

Burnham v. Humphrey Hospitality Reit Trust, Inc.

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END OF DOCUMENT

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(Cite as: 43 So.3d 496)

**H**

Court of Appeals of Mississippi.  
Willie James CLARK, Appellant,  
v.  
Aileen Brown CLARK, Appellee.

No. 2009–CA–00011–COA.  
Jan. 19, 2010.  
Rehearing Denied June 29, 2010.  
Certiorari Denied Sept. 9, 2010.

**Background:** Wife brought action for temporary support and action for divorce. After husband failed to appear, the Chancery Court, Coahoma County, William G. Willard, Jr., Chancellor, entered temporary support order, entered divorce decree, and denied husband's motion to set aside the divorce judgment. Husband appealed.

**Holdings:** The Court of Appeals, Maxwell, J., held that:

- (1) summons with which husband was served in divorce action did not meet the requirements of general rule governing service of process;
- (2) divorce decree was void;
- (3) determination that divorce decree was void required reversal of Chancellor's awards of alimony, child custody, and child support; but
- (4) determination did not require reversal of Chancellor's award of temporary support.

Affirmed in part, reversed in part, and remanded.

Griffis, J., filed specially concurring opinion in which Lee, P.J., and Maxwell, J., joined.

West Headnotes

**[1] Appeal and Error 30 1009(1)**

30 Appeal and Error  
30XVI Review  
30XVI(I) Questions of Fact, Verdicts, and Findings  
30XVI(I)3 Findings of Court  
30k1009 Effect in Equitable Actions  
30k1009(1) k. In general. Most Cited Cases

**Appeal and Error 30 1009(2)**

30 Appeal and Error  
30XVI Review  
30XVI(I) Questions of Fact, Verdicts, and Findings  
30XVI(I)3 Findings of Court  
30k1009 Effect in Equitable Actions  
30k1009(2) k. Sufficiency of evidence in support. Most Cited Cases

Court of Appeals will not disturb a chancellor's findings of fact unless the chancellor's decision is manifestly wrong or unsupported by substantial evidence.

**[2] Appeal and Error 30 893(1)**

30 Appeal and Error  
30XVI Review  
30XVI(F) Trial De Novo  
30k892 Trial De Novo  
30k893 Cases Triable in Appellate Court  
30k893(1) k. In general. Most Cited Cases

When reviewing questions concerning jurisdic-

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tion, Court of Appeals employs a de novo review.

**[3] Divorce 134 ↪76**

134 Divorce

134IV Proceedings

134IV(E) Process or Notice

134k76 k. In general. Most Cited Cases

In divorce cases, general rule governing service of process provides for the means of service of the original complaint and the form of the accompanying summons. Rules Civ.Proc., Rule 4.

**[4] Courts 106 ↪21**

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k21 k. Mode of acquiring or exercising jurisdiction in general. Most Cited Cases

In matters governed by rule providing an alternative procedure in certain estate and family law matters, a summons pursuant to the rule must be issued; otherwise, service is defective. Rules Civ.Proc., Rule 81.

**[5] Judgment 228 ↪17(1)**

228 Judgment

228I Nature and Essentials in General

228k17 Process or Notice to Sustain Judgment

228k17(1) k. Necessity of process and of personal service in general. Most Cited Cases

**Process 313 ↪153**

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and irregularities in ser-

vice or return or proof thereof. Most Cited Cases

Actual notice does not cure defective process; even if a defendant is aware of a suit, the failure to comply with rules for the service of process, coupled with the failure of the defendant voluntarily to appear, prevents a judgment from being entered against him. Rules Civ.Proc., Rules 4, 81.

**[6] Process 313 ↪24**

313 Process

313I Nature, Issuance, Requisites, and Validity

313k24 k. Requisites and validity of writs or other process in general. Most Cited Cases

Use of the sample forms for a summons is not required, but their use is good practice because it removes any question of sufficiency of process under the rules. Rules Civ.Proc., Rules 4, 81, 84.

**[7] Divorce 134 ↪77**

134 Divorce

134IV Proceedings

134IV(E) Process or Notice

134k77 k. Personal service. Most Cited Cases

Summons with which husband was served in divorce action, which followed the form for matters governed by rule providing an alternative procedure in certain estate and family law matters, did not meet the requirements of general rule governing service of process, and thus Chancellor lacked personal jurisdiction over husband; summons did not inform husband that he was required to file an answer or other pleading, and did not specify any deadlines. Rules Civ.Proc., Rules 4, 81.

**[8] Divorce 134 ↪160**

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134 Divorce  
 134IV Proceedings  
 134IV(N) Judgment or Decree  
 134k159 By Default or Pro Confesso  
 134k160 k. Requisites and validity.  
 Most Cited Cases

Generally, default judgments are not permitted in divorce cases; however a special kind of default judgment may be given in uncontested actions for divorce so long as the proceeding is heard in open court and the claimant establishes his claim or right to relief by evidence. West's A.M.C. § 93-5-17; Rules Civ.Proc., Rule 55(e).

**[9] Judgment 228 ↪ 346**

228 Judgment  
 228IX Opening or Vacating  
 228k346 k. Invalidity of judgment in general.  
 Most Cited Cases

Although the grant or denial of a motion for relief from judgment is generally within the discretion of the trial court, if the judgment is void, the trial court has no discretion; the court must set the void judgment aside. Rules Civ.Proc., Rule 60(b).

**[10] Judgment 228 ↪ 5**

228 Judgment  
 228I Nature and Essentials in General  
 228k5 k. Essentials in general. Most Cited Cases

**Judgment 228 ↪ 16**

228 Judgment  
 228I Nature and Essentials in General  
 228k16 k. Jurisdiction of the person and sub-

ject-matter. Most Cited Cases

A judgment is deemed void if the court rendering it lacked jurisdiction; specifically, a judgment is void if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law. U.S.C.A. Const.Amend. 14.

**[11] Divorce 134 ↪ 77**

134 Divorce  
 134IV Proceedings  
 134IV(E) Process or Notice  
 134k77 k. Personal service. Most Cited Cases

**Divorce 134 ↪ 161**

134 Divorce  
 134IV Proceedings  
 134IV(N) Judgment or Decree  
 134k159 By Default or Pro Confesso  
 134k161 k. Opening or setting aside.  
 Most Cited Cases

Divorce decree entered upon husband's failure to appear or otherwise defend was void, and thus Chancellor was required to grant husband's motion to set the default judgment aside, where trial court never obtained personal jurisdiction over husband due to the use of an improper summons. Rules Civ.Proc., Rules 4, 60(b), 81.

**[12] Child Custody 76D ↪ 924**

76D Child Custody  
 76DXIII Appeal or Judicial Review  
 76Dk924 k. Determination and disposition of cause. Most Cited Cases

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**Child Support 76E ↪559**

76E Child Support

76EXII Appeal or Judicial Review

76Ek559 k. Determination and disposition of cause. Most Cited Cases

**Divorce 134 ↪1322(1)**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

134k1320 Determination and Disposition of Cause

134k1322 Spousal Support

134k1322(1) k. In general. Most Cited Cases

(Formerly 134k287)

Determination that divorce decree entered upon husband's failure to appear or otherwise defend was void, due to Chancellor's lack of personal jurisdiction over husband, required reversal of all of Chancellor's determinations in the divorce judgment, including the awards of alimony, child custody, and child support.

**[13] Appeal and Error 30 ↪82(3)**

30 Appeal and Error

30III Decisions Reviewable

30III(D) Finality of Determination

30k82 Orders After Judgment

30k82(3) k. Opening or vacating judgment. Most Cited Cases

Although Mississippi appellate courts are generally without jurisdiction to hear direct appeals from temporary orders, the denial of a motion for relief from judgment is a final judgment that is reviewable. West's A.M.C. § 11-51-3; Rules Civ.Proc., Rule 60(b).

**[14] Child Support 76E ↪559**

76E Child Support

76EXII Appeal or Judicial Review

76Ek559 k. Determination and disposition of cause. Most Cited Cases

**Divorce 134 ↪1322(2)**

134 Divorce

134V Spousal Support, Allowances, and Disposition of Property

134V(I) Appeal

134k1320 Determination and Disposition of Cause

134k1322 Spousal Support

134k1322(2) k. Support pending proceedings. Most Cited Cases

(Formerly 134k287)

Determination that divorce decree entered upon husband's failure to appear or otherwise defend was void, due to wife's use of an improper summons, did not require reversal of Chancellor's award of temporary family support, where wife employed the proper summons with respect to her separate action for such support. Rules Civ.Proc., Rules 4, 81.

\*497 Robert D. Evans, Greenville, attorney for appellant.

Cheryl Ann Webster, Clarksdale, attorney for appellee.

Before MYERS, P.J., ISHEE and MAXWELL, JJ.

MAXWELL, J., for the Court.

¶ 1. Willie James Clark ("Willie") and Aileen Brown Clark ("Aileen") were granted\*498 a divorce in the Chancery Court of Coahoma County, Missis-

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sippi. Prior to granting the divorce, the chancellor had entered a separate temporary support order. Aileen initiated both the divorce and temporary support actions by serving Willie with a Rule 81 summons. Willie moved to set aside the judgment of divorce, arguing that he should have been served instead with a Rule 4 summons. The chancellor denied Willie's motion, and Willie appeals from this decision.

¶ 2. We find that because Aileen failed to serve a Rule 4 summons in the divorce action, the chancellor lacked jurisdiction and erred in refusing to set aside the divorce. While the court lacked jurisdiction to grant the divorce, we find the chancellor had jurisdiction to enter the separate temporary support order, and it should be upheld. Therefore, we affirm in part and reverse and remand in part.

#### FACTS AND PROCEDURAL HISTORY

¶ 3. Aileen and Willie were married for five years before they separated in August 2007. They have one daughter from their marriage. On February 19, 2008, Aileen filed a complaint for divorce, and about ten days later filed an amended complaint for divorce. On May 30, 2008, she filed a motion for temporary support.

¶ 4. Willie was later served with two Rule 81 summons. The first directed him to appear and defend on June 13, 2008, which was the date set for a hearing on Aileen's motion requesting temporary alimony, child support, and custody. Willie did not appear on that date. The chancellor entered a temporary order a few days later granting Aileen \$250 per week in "temporary family support" and awarding Aileen temporary custody of their daughter.

¶ 5. The second summons directed Willie to appear on July 25, 2008, to defend against Aileen's amended complaint for divorce. However, once again, Willie did not appear or otherwise defend.

¶ 6. The chancellor held a hearing on July 25, 2008, and entered a written judgment of divorce granting Aileen a divorce from Willie based upon the ground of adultery. Within this same written judgment of divorce, the chancellor also awarded Aileen custody of the couple's minor child and granted Willie "reasonable visitation." In addition, the chancellor awarded \$750 per month in child support for Aileen as well as \$250 per month in rehabilitative alimony for a three-year period. She was also granted ownership of a vehicle she had driven, and her last name was ordered to be restored to her maiden name. The chancellor also required Willie to provide his daughter's health insurance, and ordered Willie to pay \$1,500 in attorney's fees. On August 29, 2008, the chancellor amended the written judgment of divorce, but no significant substantive changes were made.<sup>FN1</sup>

FN1. The judgment clarified that the child support award was indeed monthly, as no time increment was originally stated.

¶ 7. On September 23, 2008, Willie filed a motion pursuant to Mississippi Rule of Civil Procedure 60(b) to set aside the chancellor's judgment of divorce. Six days later he filed an amended motion requesting the same relief, which the chancellor denied.

¶ 8. On appeal, Willie asserts essentially one assignment of error. He claims that because he was not served with the proper form of summons, the chancellor was without jurisdiction over the matters decided in the August 29, 2008, amended judgment, \*499 which granted the parties' divorce, awarded custody to Aileen, and ordered Willie to make rehabilitative-alimony and child-support payments, among other items. Because of the alleged jurisdictional defect, Willie contends the chancellor erred in refusing to grant his Rule 60(b) motion.<sup>FN2</sup>

FN2. Although in his Rule 60(b) motion Willie disputed that he was properly served

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with process, he now stipulates he was personally served a Rule 81 summons in both the temporary support and divorce actions.

#### STANDARD OF REVIEW

[1][2] ¶ 9. We will not disturb a chancellor's findings of fact “unless the chancellor's decision is manifestly wrong or unsupported by substantial evidence.” *Bougard v. Bougard*, 991 So.2d 646, 648(¶ 12) (Miss.Ct.App.2008) (citation omitted). However, “[w]hen reviewing questions concerning jurisdiction, this court employs a de novo review.” *Sanghi v. Sanghi*, 759 So.2d 1250, 1252(¶ 7) (Miss.Ct.App.2000).

#### DISCUSSION

##### I. Divorce Action: Form of the Summons and Jurisdiction

¶ 10. Both the divorce summons and the separate summons for temporary support utilized the identical language and format found in Form 1D, located in Appendix A to the Mississippi Rules of Civil Procedure. Form 1D is the sample form for matters governed by Rule 81(d) of the Mississippi Rules of Civil Procedure. *See Sanghi*, 759 So.2d at 1256(¶ 28).

[3] ¶ 11. It is well settled that in divorce cases, Rule 4 of the Mississippi Rules of Civil Procedure “provides for the means of service of the original complaint and the form of the accompanying summons.” *Sanghi*, 759 So.2d at 1253(¶ 11); *see also Carlisle v. Carlisle*, 11 So.3d 142, 144(¶ 9) (Miss.Ct.App.2009).<sup>FN3</sup> We have instructed that “[t]he rules on service of process are to be strictly construed. If they have not been complied with, the court is without jurisdiction unless the defendant appears of his own volition.” *Kolikas v. Kolikas*, 821 So.2d 874, 878(¶ 16) (Miss.Ct.App.2002) (internal citations omitted).

FN3. Although Aileen did not serve Willie

with an original complaint, but rather an amended complaint, Rule 4 still controls. Because Rule 81(d) embodies “special rules of procedure” that only apply to the matters listed in Rules 81(d)(1)-(2), and divorce is not one of these enumerated matters, service of Aileen's amended complaint for divorce falls outside the scope of Rule 81. *See* M.R.C.P. 81(d). Thus, the general rules govern, *see Sanghi*, 759 So.2d at 1256(¶ 27), and Rule 4 contains the proper procedure for serving the amended complaint.

[4][5] ¶ 12. Furthermore, in Rule 81 matters, a Rule 81 summons must be issued; otherwise, service is defective. *See, e.g., Powell v. Powell*, 644 So.2d 269, 274 (Miss.1994); *Saddler v. Saddler*, 556 So.2d 344, 346 (Miss.1990); *Serton v. Serton*, 819 So.2d 15, 21(¶ 24) (Miss.Ct.App.2002). Actual notice does not cure defective process. *See, e.g., Mosby v. Gandy*, 375 So.2d 1024, 1027 (Miss.1979). “Even if a defendant is aware of a suit, the failure to comply with rules for the service of process, coupled with the failure of the defendant voluntarily to appear, prevents a judgment from being entered against him.” *Sanghi*, 759 So.2d at 1257(¶ 33).

¶ 13. For example, in *Sanghi*, we found process was defective where the defendant in a contempt action, Dr. Harishankar Sanghi, received notice of the date and time of the hearing, but was not served with a Rule 81 summons. *Id.* at (¶ 31). Dr. Sanghi not only received a copy of the petition for contempt via certified mail, but \*500 he also received via first-class mail a notice prepared by the chancery court's administrator informing him of the date on which the hearing had been scheduled. *Id.* at 1254(¶ 16). After receiving the notice, Dr. Sanghi called the administrator requesting to have the hearing postponed due to medical problems, and he was accommodated. *Id.* When Dr. Sanghi failed to appear on the date on which the hearing had been rescheduled, the trial court found him in contempt and ordered his incarceration. *Id.* at 1254(¶ 19).

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Nevertheless, we found the defendant was not served with valid process under Rule 81, and we reversed and remanded for further proceedings. *Id.* at 1258 (¶¶ 36–37).

¶ 14. Because it is undisputed that Willie failed to appear or otherwise defend against Aileen's amended divorce complaint, our jurisdictional inquiry turns on whether Willie was properly served with process. Specifically, we must decide whether service is defective where a Rule 81 summons is served to initiate a divorce action, a non-Rule 81 matter.

[6] ¶ 15. Rule 4 lists the requirements for a valid summons issued under Rule 4, and provides in pertinent part:

The summons shall be dated and signed by the clerk, be under the seal of the court, contain the name of the court and the names of the parties, be directed to the defendant, state the name and address of the plaintiff's attorney, if any, otherwise the plaintiff's address, and the time within which these rules require the defendant to appear and defend, and shall notify him that in case of his failure to do so judgment by default will be rendered against him for the relief demanded in the complaint.... *Summons served by process server shall substantially conform to Form 1A.*

M.R.C.P. 4(b) (emphasis added).<sup>FN4</sup> The summons in Form 1A informs the defendant that he or she is “required to mail or hand deliver a copy of a written response to the Complaint” to the plaintiff's attorney within thirty days or a default judgment will be entered against the defendant. M.R.C.P.App. A. Form 1A. The form further provides that the defendant “must also file the original of [his/her] response with the [appropriate trial court clerk] within a reasonable time[.]” *Id.* As we have noted before, use of the sample forms is not required, but their use is good practice because it “removes any question of sufficiency [of

process] under the Rules.” *Sanghi*, 759 So.2d at 1256(¶ 28) (citing M.R.C.P. 84).

FN4. In the Opinion and Judgment denying Willie's Rule 60(b) motion, the chancellor acknowledged that Rule 4 is the proper form of summons in a divorce case. However, it appears the chancellor denied the Rule 60(b) motion because he found that the Rule 81 summons substantially conformed to Form 1A, although it is not entirely clear that he denied Willie's motion for this reason.

¶ 16. In the case before us, Willie was informed that a judgment would be entered against him if he failed to appear and defend, as is required by Rule 4(b). However, the summons at issue contained substantial deviations from Rule 4. First, the Rule 81 summons stated: “You are not required to file an answer or other pleading but you may do so if you desire.” Second, the Rule 81 summons did not specify any deadline—specifically, that Willie was required to answer with a response to his wife's attorney within thirty days. Third, the Rule 81 summons did not inform Willie that he was required to also file his answer with the chancery clerk within a reasonable time.

[7] ¶ 17. In explaining the primary distinction between a Rule 4 and Rule 81 \*501 summons, we have recognized that “[a] Rule 81 summons notifies a party ‘of the time and place where he is to appear and defend,’ while a Rule 4 summons requires a written response within 30 days.” *Sanghi*, 759 So.2d at 1253(¶ 14). Since the summons with which Willie was served in the divorce action contained substantial deviations from the requirements of Rule 4, and most notably did not provide that he was required to respond within thirty days, we find the particular Rule 81 summons did not meet the explicit requirements of Rule 4(b), nor did it substantially conform to Form 1A. *See* M.R.C.P. 4(b). Therefore, Willie was not served with valid process, and the chancellor lacked jurisdiction to enter the divorce decree.

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## II. Setting Aside the Judgment of Divorce

[8] ¶ 18. Generally, “[d]efault judgments are not permitted in divorce cases. However ... a ‘special kind of default judgment’ may be given in uncontested actions for divorce so long as the proceeding is heard in open court and ‘the claimant establishes his claim or right to relief by evidence.’ ” *Brown v. Brown*, 872 So.2d 787, 788(¶ 10) (Miss.Ct.App.2004) (internal citations omitted); *see also* Miss.Code Ann. § 93–5–17 (Rev.2004); M.R.C.P. 55(e).

¶ 19. We have held a properly served defendant's “failure to answer does not drag a divorce case to a halt. Instead, the plaintiff must, at a hearing, prove the allegations that support the receipt of a divorce. If that is done, then the chancellor has authority to grant the divorce despite the absence of the defendant.” *Stinson v. Stinson*, 738 So.2d 1259, 1263 (¶ 15) (Miss.Ct.App.1999) (citing *Rawson v. Buta*, 609 So.2d 426, 430 (Miss.1992)).<sup>FN5</sup>

FN5. We note that the rule is different in an irreconcilable differences divorce, in which, under certain circumstances, a judgment may be entered without proof or testimony being offered. *See* Miss.Code Ann. § 93–5–2(4) (Supp.2009).

¶ 20. However, even if the allegations in the divorce complaint are established by the evidence, the chancellor must also have proper jurisdiction over the parties. Here, Willie's sole argument is that the court lacked jurisdiction over him because he was never served with a proper summons. For this reason, Willie argues the judgment of divorce is void, and the chancellor erred in refusing to set it aside pursuant to Rule 60(b).

### A. Personal Jurisdiction

[9][10] ¶ 21. Although “[t]he grant or denial of a

60(b) motion is generally within the discretion of the trial court, ... [i]f the judgment is void, the trial court has no discretion. The court must set the void judgment aside.” *Soriano v. Gillespie*, 857 So.2d 64, 69–70(¶ 22) (Miss.Ct.App.2003). A judgment is deemed void if the court rendering it lacked jurisdiction. *Morrison v. Miss. Dep't of Human Servs.*, 863 So.2d 948, 952(¶ 13) (Miss.2004). Specifically, a judgment is void “if the court that rendered it lacked jurisdiction of the subject matter, or of the parties, or if it acted in a manner inconsistent with due process of law.” *Id.* (citation omitted).

¶ 22. In *Kolikas*, 821 So.2d at 879(¶ 32), we found the chancellor erred in failing to set aside a divorce decree pursuant to Mississippi Rule of Civil Procedure 60(b), where the defendant in a divorce action was served by publication without strictly complying with the requirements of Rule 4. We observed that a defendant is “under no obligation to notice what is going on in a cause in court against him, unless the court has gotten jurisdiction of him in some manner recognized by law.” *Id.* at 878(¶ 17). Here, we find the chancellor, \*502 just as in *Kolikas*, did not acquire personal jurisdiction over the defendant because service in a manner recognized by law was never achieved.

[11] ¶ 23. Since the chancellor lacked personal jurisdiction over Willie, the divorce is void. Thus, the chancellor erred in refusing to set it aside pursuant to Rule 60(b) of the Mississippi Rules of Civil Procedure.

¶ 24. Because we find the divorce void, our next inquiry is whether the related matters addressed by the chancellor within the chancellor's judgment of divorce should also be deemed void.

### B. Related Matters

¶ 25. In chancery practice, most of the financial awards accompanying the chancellor's divorce decree are linked. *See, e.g.,* *Deborah H. Bell*, *Bell on Mis-*

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Mississippi Family Law § 19.09[7] (2004). Our supreme court has explained:

All property division, lump[-]sum or periodic alimony payment, and mutual obligations for child support should be considered together. Alimony and equitable distribution are distinct concepts, but together they command the entire field of financial settlement of divorce. Therefore, where one expands, the other must recede.

*Lauro v. Lauro*, 847 So.2d 843, 848–49(¶ 13) (Miss.2003) (internal quotation marks omitted). For this reason, it has been held that when a divorce is invalidated, “all matters decided as a result of the divorce decree are null and void and should be brought in another hearing.” *Peterson v. Peterson*, 797 So.2d 876, 879(¶ 12) (Miss.2001). For example, in *Thompson v. Thompson*, 894 So.2d 603, 607(¶ 22) (Miss.Ct.App.2004), we reversed the chancellor's division of property, which we held also required reversal of the chancellor's award of lump-sum alimony as well as her child support determination. Also, in *Duncan v. Duncan*, 815 So.2d 480, 485(¶ 16) (Miss.Ct.App.2002), we reversed a chancellor's award of periodic alimony, and finding that any changes in that award would impact on other aspects of the chancellor's decision on remand, we vacated all aspects of the final judgment relating to financial matters. Moreover, the supreme court held reversal of a chancellor's distribution of property also required reversal of the chancellor's award of attorney's fees. *Lauro*, 847 So.2d at 850(¶ 18).

¶ 26. While this rule may not apply to rehabilitative alimony awards, see *Lauro*, 847 So.2d at 849(¶ 15), in this case, the rehabilitative alimony award is also void because alimony, like divorce, is governed by Rule 4, and Willie was never served with a Rule 4 summons. Thus, the court also lacked jurisdiction to make the rehabilitative-alimony award.

[12] ¶ 27. Accordingly, we find the chancellor's judgment of divorce is void in its entirety, and all determinations therein—including the chancellor's awards of alimony, child custody, and child support—must also be reversed.

### III. Temporary Order

¶ 28. Finally, Willie claims that Aileen's motion for temporary support was “nothing more than a derivative action” of the divorce complaint, and, therefore, the court's lack of jurisdiction over the divorce complaint extends to the motion for temporary relief.

[13] ¶ 29. Although Mississippi appellate courts are generally without jurisdiction to hear direct appeals from temporary orders, *Michael v. Michael*, 650 So.2d 469, 471 (Miss.1995) (citing Miss.Code Ann. § 11–51–3 (Supp.1993)), the denial of a Rule 60(b) motion is a final judgment that is reviewable. *Sanghi*, 759 So.2d at 1255(¶ 22).

\*503 [14] ¶ 30. As Rule 81 makes clear, an action for *temporary relief* in divorce and an action for *divorce* are two separate matters. Each requires the issuance of a different form of summons—the former requiring a Rule 81 summons and the latter requiring a Rule 4 summons. We simply do not see how improper service in the divorce action affects the chancery court's jurisdiction to hear temporary matters. We, therefore, reject the notion that failure to achieve proper service in the divorce action renders the action for temporary relief void. Furthermore, we note that a separate Rule 81 summons was properly issued in Aileen's action for temporary support, thus giving the chancellor jurisdiction to award temporary relief. This issue is without merit.

### CONCLUSION

¶ 31. The chancellor lacked jurisdiction over the divorce action because Willie was improperly served with a Rule 81 summons, rather than the required Rule

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4 summons. For this reason, the chancellor's judgment of divorce was void, as were his accompanying financial awards. Thus, the chancellor erred in refusing to set aside the judgment pursuant to Rule 60(b). Because the chancellor had jurisdiction over the matters adjudicated at the temporary support hearing, the temporary order stands.

**¶ 32. THE JUDGMENT OF THE COAHOMA COUNTY CHANCERY COURT IS AFFIRMED IN PART AND REVERSED AND REMANDED IN PART FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION. ALL COSTS OF THIS APPEAL ARE ASSESSED EQUALLY BETWEEN THE PARTIES.**

KING, C.J., LEE AND MYERS, P.J.J., IRVING, BARNES, ISHEE, ROBERTS AND CARLTON, JJ., CONCUR. GRIFFIS, J., SPECIALLY CONCURS WITH SEPARATE WRITTEN OPINION JOINED BY LEE, P.J., AND MAXWELL, J.  
GRIFFIS, J., Specially Concurring.

¶ 33. I concur with the majority. A summons under Rule 81 of the Mississippi Rules of Civil Procedure may not be substituted for a Rule 4 summons under Rule 4 of the Mississippi Rules of Civil Procedure.

¶ 34. I write separately because I believe Rule 81 is a treacherous and often misunderstood rule. It was included in the rules at the behest of several well-respected chancellors. They were concerned with how practice under the then "new" rules of civil procedure would affect domestic relations law and other statutory claims.

¶ 35. After almost thirty years now that the Mississippi Rules of Civil Procedure have governed procedure in our chancery courts, more than one party and practitioner have fallen prey to the hidden tentacles of Rule 81. The results of the trap laid by Rule 81 can be devastating, such as in this case.

¶ 36. Rule 81(d) should be transferred to Rule 4 or some other appropriate rule. All notice provisions should be in or near Rule 4. Rule 81 should remain, but without paragraph (d). I urge the Mississippi Supreme Court to revise the Mississippi Rules of Civil Procedure to make the notice requirements of Rule 81 easier to understand and to comply with in actual practice.

LEE, P.J., AND MAXWELL, J., JOIN THIS OPINION.

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Court of Appeals of Kansas.  
Noreen COOK, Appellee,  
v.  
Michael COOK, Appellant.

No. 90,176.<sup>FN1</sup>

FN1. **REPORTER'S NOTE:** Previously filed as an unpublished opinion, the Supreme Court granted a motion to publish by an order dated December 23, 2003, pursuant to Rule 7.04 (2002 Kan. Ct. R. Annot. 46).

Nov. 21, 2003.

Review Denied Feb. 10, 2004.

**Background:** Passenger brought action against driver, seeking damages in excess of \$75,000, alleging that driver's negligence caused accident resulting in her injuries. The Sedgwick District Court, Terry L. Pullman, J., denied driver's motion to dismiss action. Driver appealed.

**Holdings:** The Court of Appeals, Brazil, S.J., held that:

(1) action was barred by two-year statute of limitations, although passenger filed petition within two years, where she failed to issue summons within 90 days of filing petition as required by statute, and  
(2) driver's actual or constructive notice that a petition had been filed was not sufficient to overcome passenger's failure to serve defendant with a summons.

Reversed.

West Headnotes

[1] **Limitation of Actions 241** **181.1**

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k181 Pleading Statute as Defense

241k181.1 k. In General. Most Cited Cases

**Limitation of Actions 241** **195(3)**

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k194 Evidence

241k195 Presumptions and Burden of Proof

241k195(3) k. Burden of Proof in General. Most Cited Cases

Although the burden of pleading and proving applicability of statute of limitations rests on the defendant, the plaintiff bears the burden of proving facts sufficient to toll the statute of limitations.

[2] **Limitation of Actions 241** **119(1)**

241 Limitation of Actions

241II Computation of Period of Limitation

241II(H) Commencement of Proceeding; Relation Back

241k117 Proceedings Constituting Commencement of Action

241k119 Issuance and Service of Process

241k119(1) k. Issuance of Process. Most Cited Cases

Plaintiff's negligence action was barred by two-year statute of limitations, although she filed petition within two years, where she failed to issue summons within 90 days of filing petition as required

by statute. K.S.A. 60–203(a), 60–513(a)(2).

**[3] Process 313 ↪48**

313 Process  
313II Service  
313II(A) Personal Service in General  
313k48 k. Nature and Necessity in General.

Most Cited Cases

A defendant does not normally become a party to the action until he or she is served with the summons.

**[4] Process 313 ↪4**

313 Process  
313I Nature, Issuance, Requisites, and Validity  
313k3 Necessity and Use in Judicial Proceedings  
313k4 k. In General. Most Cited Cases

**Process 313 ↪11**

313 Process  
313I Nature, Issuance, Requisites, and Validity  
313k7 Forms of Process for Institution or Notice of Action or Other Proceeding  
313k11 k. Summons as Notice. Most Cited Cases

A summons is the means by which the defendant is afforded the opportunity to appear before and be heard by the court; it is this notice which gives the court jurisdiction to proceed.

**[5] Process 313 ↪64**

313 Process  
313II Service  
313II(A) Personal Service in General  
313k64 k. Mode and Sufficiency of Service.

Most Cited Cases

Defendant's actual or constructive notice that a petition had been filed was not sufficient to overcome plaintiff's failure to serve defendant with a summons. K.S.A. 60–203(a), 60–204.

**[6] Process 313 ↪64**

313 Process  
313II Service  
313II(A) Personal Service in General  
313k64 k. Mode and Sufficiency of Service.

Most Cited Cases

**Process 313 ↪166**

313 Process  
313III Defects, Objections, and Amendment  
313k166 k. Waiver of Defects and Objections.  
Most Cited Cases

Actual knowledge of the pendency and the nature of an action is not a substitute for service; notice or knowledge must come from process of service, or there must be a valid waiver. K.S.A. 60–204.

**\*\*1243 \*214 Syllabus by the Court**

1. K.S.A. 60–203(a) is discussed and applied.
2. K.S.A. 60–204 is discussed and applied.
3. K.S.A. 60–301 is discussed and applied.

4. A defendant does not normally become a party to the action until he or she is served with the summons.

5. A summons is the means by which the defendant is afforded the opportunity to appear before and be heard by the court. It is this notice which gives

the court jurisdiction to proceed.

6. The methods of serving process set forth in K.S.A. 60–301 *et seq.* constitute sufficient process. Different methods which are specifically provided for by law are also permissible. In any method of serving process, substantial compliance therewith shall effect valid service of process if the court finds that, notwithstanding some irregularity or **\*\*1244** omission, the party served was made aware that an action or proceeding was pending in a specified court in which his or her person, status or property were subject to being affected. K.S.A. 60–204.

7. Actual knowledge of the pendency and the nature of an action is not a substitute for service. Notice or knowledge must come from process of service, or there must be a valid waiver.

8. Under the facts of this case, service on the defendant was not merely irregular or defective but was a nullity. The fact that defendant had actual knowledge of the suit and did not suffer prejudice does not mean there was substantial compliance under K.S.A. 60–204, and the district court erred in so finding.

**\*215** Constance L. Shidler and Lee M. Smithyman, of Smithyman & Zakoura, Chartered, of Overland Park, and David J. Roberts, of Case & Roberts, P.A., of Kansas City, Missouri, for the appellant.

Russell B. Cranmer, of Associated Attorneys of Pistotnik Law Offices P.A., of Wichita, for the appellee.

Before JOHNSON, P.J., GREEN, J., and BRAZIL, S.J.

BRAZIL, S.J.

Michael Cook appeals the denial of his motion to dismiss the negligence action filed by his wife, Noreen Cook. He contends the court erred by denying his motion because the action was barred by the statute of

limitations.

We agree and reverse.

Noreen incurred injuries as a passenger in a vehicle driven by Michael on March 14, 2000. On March 7, 2002, she filed a petition seeking damages in excess of \$75,000, alleging that Michael's negligence caused the accident resulting in her injuries. On May 30, 2002, the petition, interrogatories, and request for production of documents were sent to Michael by certified mail.

On July 17, 2002, Michael's counsel filed a special entry of appearance in order to present a motion to dismiss and the accompanying memorandum. In the memorandum, Michael argued Noreen had not procured nor served a valid summons in order to commence the lawsuit. Due to Noreen's failure to properly serve him, Michael concluded the lawsuit had not commenced within the applicable 2-year statute of limitations. On July 18, 2002, the district court granted the motion to dismiss, agreeing Noreen's action was barred by the statute of limitations.

In response to Michael's allegation, Noreen obtained personal service on Michael on July 17, 2002. An affidavit was filed on July 29, 2002, indicating that a summons, petition, interrogatories, and request for production of documents were served to Michael on July 17, 2002. Additionally, Noreen alleged that service of process had been completed in compliance with K.S.A.2002 Supp. 60–303. Noreen's counsel alleged Michael had personally contacted Noreen's counsel to confirm receipt of the petition, interrogatories, **\*216** and request for production shortly after they were mailed on May 30, 2002. Noreen attached a copy of the certified mail receipt stamped May 30, 2002.

Subsequently, on August 5, 2002, the district court set aside the journal entry dismissing the cause

of action, and scheduled a hearing to address the motion. At the hearing, Michael testified the first mailing he received was on June 30, 2002. He confirmed the mail carrier left the return receipt request in the mail box rather than returning it to show that he had received the documents. Next, Michael testified he received documents on July 17, 2002. After being reminded of evidence indicating that he had forwarded the documents he received to his insurance carrier on June 10, 2002, Michael testified he received the petition on May 30 or June 1, 2002.

Noreen testified she resided with Michael in May and June of 2002. She stated she sent the documents via certified mail and received the documents in the mail on June 1 with the green return receipt still attached to the envelope. After Michael filled out the documents, he asked Noreen to call her attorney and inquire what he should do with the documents.

**\*\*1245** The district court found Noreen had substantially complied with the intent of the laws governing service of process. Therefore, the district court denied the motion to dismiss. Upon hearing the district court's decision, counsel for Michael immediately requested permission from the court to file an interlocutory appeal, which the trial judge denied.

At trial, Michael's counsel renewed his motion to dismiss, which was again denied for the same reasons as stated in the earlier journal entry. Judgment was entered against Michael in the tort action on January 7, 2003.

[1] Interpretation of a statute is a question of law, for which an appellate court's review is unlimited. *Williamson v. City of Hays*, 275 Kan. 300, 305, 64 P.3d 364 (2003). Accordingly, this court also exercises plenary review on questions regarding the interpretation and application of a statute of limitations. *Dougan v. Rossville Drainage Dist.*, 270 Kan. 468, 472, 15 P.3d 338 (2000). The statute of limitations is

an affirmative defense. Although the burden of \*217 pleading and proving its applicability rests on the defendant, the plaintiff bears the burden of proving facts sufficient to toll the statute of limitations. *Slayden v. Sixta*, 250 Kan. 23, 26, 825 P.2d 119 (1992).

[2] Michael contends the district court erred in refusing to grant his motion to dismiss because Noreen, by failing to issue the summons within the required time period, did not commence the lawsuit prior to the running of the statute of limitations. The applicable statute of limitations is 2 years. See K.S.A.2002 Supp. 60-513(a)(2); *Slayden*, 250 Kan. at 24, 825 P.2d 119 (2 years is the time in which to file suit for injuries incurred in an accident). The accident occurred "on or about March 14, 2000"; thus, Noreen seemingly had until March 14, 2002, to file her cause of action, or the filing must somehow relate back to that date in order for it to have been timely filed. See *Grimmett v. Burke*, 21 Kan.App.2d 638, 641, 906 P.2d 156 (1995), *rev. denied* 259 Kan. 927 (1996).

At issue is whether Noreen commenced the lawsuit in compliance with K.S.A. 60-203(a), which states:

"A civil action is commenced at the time of: (1) Filing a petition with the clerk of the court, if service of process is obtained or the first publication is made for service by publication within 90 days after the petition is filed, except that the court may extend that time an additional 30 days upon a showing of good cause by the plaintiff; or (2) service of process or first publication, if service of process or first publication is not made within the time specified by provision (1)."

The court is required to give effect to the intention of the legislature as expressed when a statute is plain and unambiguous, rather than determine what the law should or should not be. *Williamson*, 275 Kan. at 305, 64 P.3d 364. The language of K.S.A. 60-203(a) is

clear and unambiguous, affording a petitioner two ways in which to commence a civil action.

A petitioner may commence a suit by filing a petition on the last day allowed by the statute of limitations. The petitioner then receives 90 days, or 120 days if so extended by the court, to serve process on the defendant. K.S.A. 60–203(a)(2) provides that if service is not made within 90 days of the filing of the action (or 120 days if extended by the court), then the action is deemed commenced\*218 on the date of service of process. *Lindenman v. Umscheid*, 255 Kan. 610, 632, 875 P.2d 964 (1994).

Here, the petition was filed on March 7, 2002; thus, Noreen had until June 5, 2002, in which to serve Michael. The record does not indicate, nor does Noreen contend, that an extension was requested within the relevant 90–day period. See *Read v. Miller*, 247 Kan. 557, 563, 802 P.2d 528 (1990) (“[O]nce the 90–day period has expired, there is nothing to extend, and no period to prolong.”). The petition, interrogatories, and requests for production were sent by certified mail to Michael on May 30, 2002, within the 90–day time period; however, the summons was not issued until July 17, 2002, 132 days after the petition was filed.

Noreen claims Michael testified he believed he received a summons with the documents sent by certified mail on May 30, 2002. \*\*1246 K.S.A. 60–301 stipulates that the clerk, upon filing of the petition, shall issue a summons for service. In addition to the record clearly reflecting that no summons was issued when the petition was filed on March 7, 2002, the appearance docket also indicates that the summons was issued on July 17, 2002. Based on the affidavit indicating service on July 17 and as noted in the appearance docket, the district court found the summons was first issued on July 17, 2002. Substantial competent evidence supports the district court's determination; thus, it will not be disturbed by this court on appeal. See *Grimmett*, 21 Kan.App.2d at 642–43, 906

P.2d 156.

#### *Personal Jurisdiction*

[3][4] Because Noreen failed to issue a summons before the statute of limitations ran, Michael further contends the judgment entered against him is void as the court lacked personal jurisdiction over him. See *Automatic Feeder Co. v. Tobey*, 221 Kan. 17, 21, 558 P.2d 101 (1976) (a judgment is void if the court that rendered it lacked personal jurisdiction of the parties). A defendant does not normally become a party to the action until he or she is served with the summons. *In re Marriage of Welliver*, 254 Kan. 801, 803, 869 P.2d 653 (1994). A summons is the means by which the defendant “is afforded the opportunity to appear before and be heard by the court. It is this notice which gives the court jurisdiction to proceed. \*219 See 62 Am Jur.2d, Process § 2.” *State ex rel. Stephan v. Kansas House of Representatives*, 236 Kan. 45, 50, 687 P.2d 622 (1984).

Notably, Michael did not raise the defense of lack of personal jurisdiction in his motion to dismiss. See K.S.A. 60–212(h) (defense of lack of personal jurisdiction is waived if omitted from a motion or not included in a responsive pleading). However, at the hearing on the motion, counsel for the defendant argued that the only way to acquire personal jurisdiction over a party was through a statutorily prescribed method for issuance and service of process. Although the district court had the opportunity to review the argument below, Michael's sole argument in his motion to the court, which resulted in the district court's initial order dismissing the case, was based on the running of the statute of limitations.

#### *Did the District Court Err in Determining Noreen Substantially Complied With the Intent of the Statute Requiring Service of Process?*

[5] Noreen maintains the court appropriately found that she substantially complied with the statutes governing service of process. K.S.A. 60–204 states that the methods of serving process, set forth in K.S.A.

60–301 *et seq.*, constitute sufficient process. Different methods which are specifically provided for by law are also permissible. Importantly, K.S.A. 60–204 also states:

“In any method of serving process, substantial compliance therewith shall effect valid service of process if the court finds that, notwithstanding some irregularity or omission, the party served was made aware that an action or proceeding was pending in a specified court in which his or her person, status or property were subject to being affected.”

The district court determined that Noreen's mailing of the petition, interrogatories, and requests for production of documents on May 30, 2002, constituted “substantial compliance with the intent of the statute requiring service of process.” Receipt of the documents on June 1, 2002, provided Michael with “actual or constructive notice” that a petition had been filed. Because the petition was served within 90 days of filing the case and Michael had notified his insurance carrier, which took appropriate action, he had not been prejudiced. The court found, therefore, that Noreen's \*220 cause of action commenced on the date of filing and the matter had been timely filed.

[6] Kansas law does not support the district court's determination that “actual or constructive notice” that a petition has been filed is sufficient to overcome the plaintiff's failure to serve the defendant with a summons. Our Supreme Court has stated that actual knowledge of the pendency and the nature of an action is not a substitute for service. “Notice or knowledge must come from process of service, or there must be a \*\*1247 valid waiver.” *Kansas Bd. of Regents v. Skinner*, 267 Kan. 808, 812, 987 P.2d 1096 (1999). The court's position is compatible with commentary from 1 Gard and Casad, *Kansas Code of Civil Procedure Annotated* 3d § 60–204, p. 2–18 (1997):

“Proof of the fact that a party had actual

knowledge of the pendency of an action against him and of its nature is not a substitute for service. Notice or knowledge must come from process itself (or valid waiver), and the summons must bear the minimum emblems of authenticity. But a rule of liberal construction is expressly established in keeping with such decisions as *Kunz v. Lowden*, 124 F.2d 911 [10th Cir.1942]. Awareness of the pendency of the action or proceeding in a specified court must result from ‘such service of process,’ and if awareness is apparent or established, irregularities and omissions do not invalidate the service.”

Noreen's contention that substantial compliance does not require issuance of a summons is likewise unsupported by relevant statutes. For service by certified mail, as used in the instant case, K.S.A.2002 Supp. 60–303(c)(2) states a plaintiff should cause a *copy of the process* and petition or other document to be mailed in compliance with the statute. Thereafter, the “original return of service shall be filed with the clerk, along with a copy of the return receipt evidencing such delivery.” K.S.A.2002 Supp. 60–303(c)(4). It is only upon receipt of service of “*the summons and the petition*” that a defendant is required to serve his or her answer. (Emphasis added.) K.S.A. 60–212. If the defendant fails to file an answer or to appear within the time specified in *the summons*, upon proof of service as provided by law, a judgment by default can be taken against the defendant for the relief demanded in the petition. See K.S.A.2002 Supp. 61–3301(a)(1) (replacing K.S.A. 61–1721, repealed January 1, 2001).

\*221 Briefly, the appearance docket does not reflect that a return on service was filed for the May 30, 2002, mailing. Noreen's counsel stated no return receipt was received from the May 30 certified letter, instead relying on the telephone call from Noreen indicating that Michael had received the petition, interrogatories, and request for production of documents. Again, the first entry in the court record for the issuance of a summons was July 17, 2002.

Michael cites *Jenkins v. City of Topeka*, 958 F.Supp. 556, 561 (D.Kan.1997), *rev'd on other grounds* 136 F.3d 1274 (10th Cir.1998), in support of his argument concerning the vital step of service of a summons. In *Jenkins*, a “Notice and Acknowledgment for Service by Mail” form, a “Notice of Lawsuit and Request for Waiver of Service of Summons” form, a “Waiver of Service of Summons” form, and a copy of the complaint were mailed to defendants. 958 F.Supp. at 558. No summons accompanied the documents. The parties did not dispute that the defendants had not been properly served under Kansas law. 958 F.Supp. at 558. On review, the Tenth Circuit did not reach application of K.S.A. 60–203(b), finding instead that service of process had been properly effected pursuant to K.S.A. 60–203(c) when counsel entered his appearance on defendants' behalf. 136 F.3d at 1276.

Noreen contends that *Chee–Craw Teachers Ass'n v. U.S.D. No. 247*, 225 Kan. 561, 593 P.2d 406 (1979), and *In re Marriage of Powell*, 13 Kan.App.2d 174, 766 P.2d 827 (1988), *rev. denied* 244 Kan. 737 (1989), provide support for her contention that she substantially complied with the statute. However, the issue of substantial compliance in both cases cited by Noreen did not involve the complete absence of a summons. In *Chee–Craw*, a summons had been issued, along with the complaint. 225 Kan. at 563, 593 P.2d 406; see also *Bray v. Bayles*, 228 Kan. 481, 485, 618 P.2d 807 (1980) (stating *Chee–Craw* is not applicable to personal service “on an *individual* ”); K.S.A. 60–212. In *In re Marriage of Powell*, personal service was also made on the defendant. The issue of substantial compliance was not considered as the court found the defendant had voluntarily appeared and testified before the court, failing to raise the defense of personal jurisdiction at every stage of the case, including\*222 on appeal, thereby waiving the issue of personal jurisdiction. 13 Kan.App.2d at 178, 766 P.2d 827.

\*\*1248 In conclusion, Noreen did not serve Michael as the statutes required. Here, service on Mi-

chael was not merely irregular or defective but was a nullity. See *Hughes v. Martin*, 240 Kan. 370, 373–74, 729 P.2d 1200 (1986). The fact that Michael had actual knowledge of the suit and did not suffer prejudice does not mean there was substantial compliance under K.S.A. 60–204, and the district court erred in so finding.

#### *Does K.S.A. 60–203(b) Apply?*

“If service of process or first publication purports to have been made but is later adjudicated to have been invalid due to any irregularity in form or procedure or any defect in making service, the action shall nevertheless be deemed to have been commenced at the applicable time under subsection (a) if valid service is obtained or first publication is made within 90 days after that adjudication, except that the court may extend that time an additional 30 days upon a showing of good cause by the plaintiff.” K.S.A. 60–203(b).

In *Grimmett*, this court applied K.S.A. 60–203(b) to circumstances wherein service had been declared invalid by the district court for failing to serve on the proper address. 21 Kan.App.2d at 644, 906 P.2d 156. The court held that before it can be said “service has ‘purported to have been made,’ it must be shown that a defendant was given actual notice of having been sued.” 21 Kan.App.2d at 647, 906 P.2d 156. Further, the following factors should exist:

“(1) The original service must have ‘appeared’ to be valid and the returns by the sheriff's office or other process servers must indicate that the service was valid. (2) The record should show that the plaintiff believed in good faith that his or her service was valid and relied on that validity to his or her detriment. (3) The plaintiff had no reason to believe the defendant was contesting service until after the statute of limitations had run, but had no opportunity to take steps to correct the defective service.” *Grimmett*, 21 Kan.App.2d at 647–48, 906 P.2d 156.

In applying the *Grimmett* factors to his case, although Noreen told her counsel during a telephone conversation that Michael had received some documents, there is no support in the court records of the validity of the original service upon which Michael could have relied in good faith. Noreen cannot contend that original service appeared valid, as the appearance docket reflects that a summons\*223 had not been issued in the case until the statute of limitations ran. Additionally, no return of service was filed with the court suggesting that service was valid.

In short, although Michael has shouldered the burden of proving the applicability of the statute of limitations in the instant case, Noreen has failed to prove facts sufficient to toll the running of the statute. K.S.A. 60-204 and K.S.A. 60-203(b) do not apply, and the district court erred in failing to dismiss Noreen's action as being barred by the statute of limitations.

Reversed.

Kan.App.,2003.

Cook v. Cook

32 Kan.App.2d 214, 83 P.3d 1243

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(Cite as: 929 F.2d 1151)



United States Court of Appeals,  
Sixth Circuit.  
Allen FRIEDMAN; Nancy J. Logue, Plain-  
tiffs–Appellants (89–3948), Plaintiffs–Appellees  
(89–4012),

v.

ESTATE OF Jackie PRESSER; Harold Friedman;  
International Brotherhood of Teamsters, Chauffeurs,  
Warehousemen and Helpers of America, Local 507,  
Defendants–Appellees (89–3948),  
Estate of Jackie Presser, Defendant–Appellant  
(89–4012).

Nos. 89–3948, 89–4012.  
Argued Jan. 31, 1991.  
Decided April 11, 1991.

Former union officer commenced *Bivens* action, claiming that other union officials had been acting as government informants and entrapped the officer into embezzling union funds. The United States District Court for the Northern District of Ohio, Alvin I. Krenzler, J., found that the *Bivens* claim was time barred. Appeal and cross appeal were taken. The Court of Appeals, Engel, Senior Circuit Judge, held that: (1) service by mail was defective where no acknowledgment form was ever returned; (2) personal service more than 600 days after the complaint was filed was not timely; (3) the district court's purported stay of proceedings did not toll the time for effecting personal service because the district court had no personal jurisdiction over the defendants who had not been properly served; (4) the two-year Ohio statute of limitations on the *Bivens* claim began to run when the officer became aware of the possible relationship between other union officials and the government; and (5) the officer did not allege due diligence that would warrant tolling the statute of limitations for fraudulent

concealment.

Affirmed.

West Headnotes

[1] Process 313 153

313 Process

313III Defects, Objections, and Amendment  
313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases  
(Formerly 170Ak532.1, 170Ak532)

Defendants' actual knowledge of action did not cure defective service of process by certified mail for which acknowledgment form was neither signed nor returned. Fed.Rules Civ.Proc.Rule 4(c)(2)(C)(ii), (j), 28 U.S.C.A.

[2] Process 313 63

313 Process

313II Service  
313II(A) Personal Service in General  
313k63 k. Time for service. Most Cited Cases  
(Formerly 170Ak417)

Personal service of summons and complaint more than 600 days after complaint was filed did not comply with requirements for service of process after attempted service by mail and defendants' refusal to return acknowledgment form. Fed.Rules Civ.Proc.Rule 4(c)(2)(C)(ii), (j), 28 U.S.C.A.

[3] Process 313 63

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313 Process

313II Service

313II(A) Personal Service in General

313k63 k. Time for service. Most Cited

Cases

(Formerly 170Ak417)

District court's purported stay of all proceedings in *Bivens* action did not toll 120-day period for effecting personal service on defendants after attempted service by mail and defendants' refusal to sign or return acknowledgment form; absent proper service, district court did not have personal jurisdiction over defendants. Fed.Rules Civ.Proc.Rule 4(c)(2)(C)(ii), 28 U.S.C.A.

**[4] Process 313**  167

313 Process

313III Defects, Objections, and Amendment

313k167 k. Cure of defects by subsequent proceedings. Most Cited Cases

(Formerly 170Ak417)

Plaintiffs' reliance on purported stay issued by district court was not "good cause" that would have excused failure to effect personal service, within 120 days after complaint was filed in *Bivens* action, to cure defective mail service; plaintiffs at the very least should have known that attempted service by mail was incomplete unless defendants signed and returned acknowledgment forms, and plaintiffs did nothing to perfect service after they received response to stay motion indicating that service had been defective. Fed.Rules Civ.Proc.Rule 4(c)(2)(C)(ii), (d, j), 28 U.S.C.A.

**[5] Federal Civil Procedure 170A**  1837.1

170A Federal Civil Procedure

170AXI Dismissal

170AXI(B) Involuntary Dismissal

170AXI(B)5 Proceedings

170Ak1837 Effect

170Ak1837.1 k. In general. Most Cited Cases

(Formerly 170Ak1837)

Dismissal of *Bivens* action without prejudice was warranted for plaintiffs' failure to complete personal service of process after unsuccessful attempt at service by mail, even though dismissal could render action time barred. Fed.Rules Civ.Proc.Rule 4(c)(2)(C)(ii), (d, j), 28 U.S.C.A.

**[6] Limitation of Actions 241**  95(3)

241 Limitation of Actions

241II Computation of Period of Limitation

241II(F) Ignorance, Mistake, Trust, Fraud, and Concealment or Discovery of Cause of Action

241k95 Ignorance of Cause of Action

241k95(3) k. Nature of harm or damage, in general. Most Cited Cases

Ohio's two-year statute of limitations on *Bivens* action began to run when former union officer became aware that other officials may have been acting as government informants and entrapped officer into embezzling funds; former officer learned of possible relationship while he was incarcerated, moved for new trial, and government dismissed indictment, thereby allegedly confirming his suspicions that exculpatory evidence relating to government informants had been withheld at trial. Ohio R.C. § 2305.10.

**[7] Limitation of Actions 241**  179(2)

241 Limitation of Actions

241V Pleading, Evidence, Trial, and Review

241k176 Pleading in Anticipation of Defense

241k179 Matters Avoiding Bar of Statute

241k179(2) k. Ignorance, trust, fraud, and concealment of cause of action. Most Cited Cases

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*Bivens* complaint filed by former union officer did not allege sufficient due diligence to warrant tolling of two-year Ohio statute of limitations on basis of alleged fraudulent concealment that other union officials were allegedly acting as government informants and may have entrapped officer into embezzlement; there was no indication that officer did anything to investigate his claim after he learned of possible informant relationship. Ohio R.C. § 2305.10; Fed.Rules Civ.Proc.Rule 9(b), 28 U.S.C.A.

\*1153 Robert J. Vecchio, Vecchio & Schulz, Cleveland, Ohio, and Robert S. Catz (argued), District of Columbia School of Law, Washington, D.C., for plaintiffs-appellants.

John R. Climaco, Paul S. Lefkowitz, Thomas M. Wilson (argued), Climaco, Climaco, Seminatore, Lefkowitz & Garofoli, Cleveland, Ohio, Paul J. Cambria, Jr., William M. Feigenbaum (argued), Lipsitz, Green, Fahringer, Roll, Schuller & James, Buffalo, N.Y., and Thomas A. McCormack (argued), Motta, McCormack, Wolgamuth & Watling, Cleveland, Ohio, for defendants-appellees.

Before KEITH and KRUPANSKY, Circuit Judges, and ENGEL, Senior Circuit Judge.

ENGEL, Senior Circuit Judge.

Allen Friedman and Nancy Logue appeal the district court's September 19, 1989 order overruling their motion for leave to amend this *Bivens* action, which seeks monetary relief for the violation of Friedman's due process rights and for various related pendent state claims. While plaintiffs claim that Jackie Presser (one of the defendants who allegedly entrapped Friedman in an embezzlement scheme) was an FBI informant and the government withheld exculpatory information at Friedman's prior criminal trial, the district court found that plaintiffs failed to plead any facts of fraudulent concealment from which to

find the relevant statute of limitations period tolled in the instant action.

Presser, now the Estate of Presser, cross appeals a portion of the district court's July 28, 1989 order denying its 12(b)(2) and 12(b)(5) motion to dismiss based on lack of personal jurisdiction resulting from insufficient service of process. The Estate claims that plaintiffs' mail service was defective because no acknowledgment form was ever returned as required by Rule 4(c)(2)(C)(ii). Moreover, the Estate argues that personal service was not timely effected under Rule 4(j), and the district court's stay of all proceedings for approximately fifteen months did not toll the 120 day limitations period for such service. For the reasons that follow, we affirm the district court's dismissal of plaintiffs' complaint.

#### I.

Plaintiff-appellant Allen Friedman ("A. Friedman") is a former vice president of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 507 ("Local 507"). In December of 1976, he suffered a massive heart attack, requiring extensive recuperation. He was subsequently offered a position with Local 507 as a "labor consultant" at a weekly salary of \$1,000. A. Friedman asserts, however, that during this time he was falsely designated as a "business consultant." Thereafter, defendants Presser (now Estate of Presser or "Estate") and Harold Friedman ("H. Friedman"),<sup>FN1</sup> together with unknown federal agents, allegedly formulated a plan to entrap A. Friedman in a "ghost employee" scheme so as to secure his prosecution and conviction for embezzlement of Local 507's funds. In 1981, Local 507 was investigated by the Department of Labor ("DOL") and the Department of Justice ("DOJ"). Pursuant thereto, and allegedly as a result of his false designation as a business agent, A. Friedman was convicted and sentenced to four concurrent three year terms for embezzling union funds.

FN1. Until his death in 1988, Presser had

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served as President of the Teamsters International and Secretary-Treasurer of Local 507. As explained below, Presser had also been an FBI informant. Until his 1989 RICO conviction, H. Friedman served as President of Local 507.

While in prison, A. Friedman learned from media publicity that Presser may have been an FBI informant and that U.S. agents had withheld exculpatory evidence at his trial. As a result of plaintiff's motion for a new trial and not wishing to divulge information provided by informants,\*1154 on August 26, 1985, the government moved to dismiss the indictment against A. Friedman, which was subsequently granted with prejudice.

On September 15, 1986, attorneys for Presser filed a pretrial discovery motion in *United States v. Presser*, No. CR-86-114-1 (N.D. Ohio), seeking DOJ documents pertaining to the decision of the government not to turn over exculpatory information to A. Friedman and his attorney at his original criminal trial. Plaintiffs-appellants allege that this was the first time they were able to actually ascertain the plausible existence of a relationship between Presser and the government.

Thereafter, on September 1, 1987, A. Friedman and Nancy Logue ("Logue"), his ex-wife who claims to have suffered emotional distress from A. Friedman's incarceration, brought a *Bivens* action in district court in Ohio against Presser (now the Estate), H. Friedman, and Local 507. The complaint alleged that defendants violated A. Friedman's due process rights and included pendent state claims for negligence, false arrest and imprisonment, malicious prosecution, loss of consortium and emotional distress. On September 22, 1987, plaintiffs-appellants moved for a stay of all proceedings in this action because of the pending criminal case of *United States v. Presser*, which involved not only Presser but H. Friedman as well. Although opposed to it, H. Friedman joined in the

motion for a stay and at that time put plaintiffs on notice that service of process was defective. The district court granted the stay on November 2, 1987, and subsequently lifted it on March 8, 1989.

In April and May of 1989, each of the three defendants filed a motion to dismiss the complaint for failure to state a claim for relief based on the inapplicability of a *Bivens* action as against private citizens; the running of the applicable statute of limitations on plaintiffs' *Bivens* claim; and insufficient service of process. On July 28, 1989, the district court upheld the service of process on defendants, but granted defendants' motion to dismiss, finding that plaintiffs failed to plead any facts of fraudulent concealment from which to find the limitations period tolled. On August 28, 1990, without first pursuing any other procedural steps under Rules 59 or 60, plaintiffs moved to amend their complaint to allege facts of fraudulent concealment. The district court denied the motion, setting forth no reasons for doing so. This timely appeal followed.

## II.

Initially we consider the threshold issue of whether the district court correctly held, as a matter of law, that there was sufficient service of process. In comparing the record with H. Friedman's cross-appeal, the particular facts regarding the manner in which plaintiffs served defendants are not in dispute.

Plaintiffs first attempted to serve defendants on September 2 and 3, 1987, pursuant to Rule 4(c)(2)(C)(ii).<sup>FN2</sup> At that time, plaintiffs sent to defendants, by certified mail, a summons and complaint with the required notice and acknowledgment form. Defendants, however, neither signed nor returned the acknowledgment form to plaintiffs.

FN2. Rule 4(c)(2)(C)(ii) states in pertinent part:

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(C) A summons and complaint may be served upon a defendant ...

(ii) by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to form 18-A and a return envelope, postage prepaid, addressed to the sender. If no acknowledgment of service under this subdivision of this rule is received by the sender within 20 days after the date of mailing, service of such summons and complaint shall be made [by personal service under Rule 4(d)(1) or 4(d)(3) ]...

On October 16, 1987, defendant H. Friedman, in his response to plaintiffs' motion for a stay, placed plaintiffs on notice that service of process was defective:

Harold Friedman denies that he has been duly served with a copy of the plaintiff's summons and complaint, either on September 2 or September 3, 1987 or to date.

Again on April 24, 1989, H. Friedman reiterated his allegation of insufficient service \*1155 of process and requested that the district court issue an order "pursuant to Rules 12(b)(5) and 4(j) of the Federal Rules of Civil Procedure, vacating the plaintiff's purported service of summons and complaint on said defendant on the grounds that it was in violation of Rule 4(c)(2)(C)(ii)." Likewise, the other two defendants, the Estate and Local 507, moved the court on May 1, 1989 to dismiss the complaint for insufficient service of process.

On April 27 and 28, 1989, over 600 days after the original complaint was filed, plaintiffs properly served

defendants by *personal* service. Under Rule 4(j), which the Estate relies on in arguing that there was insufficient service of process, a plaintiff is required to serve the defendant(s) within 120 days from the filing of the complaint or the court must dismiss the action, unless the plaintiff demonstrates good cause.<sup>FN3</sup> One of plaintiffs' arguments below<sup>FN4</sup> was that defendants were fully aware of their complaint by way of the mailed service effected in early September of 1987, and as evidenced by the pleading subsequently filed by H. Friedman in October of 1987. Therefore, plaintiffs contended defendants were properly served back in September of 1987, well within the 120-day period required by Rule 4(j).

FN3. Rule 4(j) states in pertinent part:

If a service of the summons and complaint is not made upon a defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why such service was not made within that period, the action shall be dismissed as to that defendant without prejudice upon the court's own initiative with notice to such party or upon motion.

FN4. On appeal, plaintiffs refrain from defending the district court's ruling upholding the sufficiency of process. Nevertheless, since the issue of ineffective service of process may be raised *sua sponte*, see Rule 4(j), *supra* note 3, and given the district court's conclusory disposition of this issue, we address plaintiffs' arguments made below to the extent they have merit.

[1] The district court agreed with plaintiffs' argument and stated that "although plaintiff's original service was technically defective, all defendants had actual knowledge of this action and have not been

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prejudiced by the delay in service.” For the great majority of courts, however, actual knowledge of the law suit does not substitute for proper service of process under Rule 4(c)(2)(C)(ii). *See, e.g., United States v. Gluklick*, 801 F.2d 834, 836 (6th Cir.1986) (“The courts, consistent with the legislative history, have held that the defendant's failure to acknowledge service renders such service invalid...” (citation omitted); *Geiger v. Allen*, 850 F.2d 330, 332 n. 3 (7th Cir.1988) (“The rule in this and other circuits is that service by mail is not complete until an acknowledgment is filed with the court.”); *Worrell v. B.F. Goodrich, Co.*, 845 F.2d 840, 841 (9th Cir.1988) (virtually every court that has examined the rule has concluded that service fails unless defendant returns acknowledgment form); *Stranahan Gear Co., Inc. v. NL Indus., Inc.*, 800 F.2d 53, 57–58 (3rd Cir.1986); *Armco, Inc. v. Penrod–Stauffer Bldg. Sys., Inc.*, 733 F.2d 1087, 1088–89 (4th Cir.1984).

In *Combs v. Nick Garin Trucking*, 825 F.2d 437 (D.C.Cir.1987), the plaintiffs attempted to serve the defendants by certified mail pursuant to Rule 4(c)(2)(C)(ii). Although the plaintiffs later received a return receipt, which indicated that the summons and complaint had been delivered, the defendants never returned the acknowledgment of service of those papers. Based on the language of the Rule and congressional intent, the D.C. Circuit agreed “with the Third and Fourth Circuits” that federal mail service is rendered completely ineffective without return of an acknowledgment of service. *Id.* at 444–48. The court in *Combs* pointed out that Congress, in enacting Rule 4(c)(2)(C)(ii), had rejected a mail service rule proposed by the Supreme Court which would not have required the return of an acknowledgment form. *Id.* at 446–47. *But see Morse v. Elmira Country Club*, 752 F.2d 35 (2d Cir.1984).<sup>FN5</sup>

FN5. In running against the majority rule, the Second Circuit in *Morse* reasoned that “strong factors of justice and equity push toward reading Rule 4(c) as providing effec-

tive mail service where, as here, the recipient actually received the mail service but refuses to acknowledge it properly.” 752 F.2d at 40. Despite clear legislative intent to the contrary, that court found that “Congress would have no ground” for wanting an unacknowledged mailing to be deemed ineffective service where it is clear that the summons and complaint had been delivered to the appropriate parties. *Id.*

\*1156 As suggested by our prior decision in *Gluklick, supra*, we agree with the majority rule. Due to the integral relationship between service of process and due process requirements, we find that the district court erred in its determination that actual knowledge of the action cured a technically defective service of process. *See Omni Capital Int'l v. Rudolf Wolff & Co., LTD.*, 484 U.S. 97, 104, 108 S.Ct. 404, 409, 98 L.Ed.2d 415 (1987) (“[B]efore a court may exercise personal jurisdiction over a defendant, there must be more than notice to the defendant and a constitutionally sufficient relationship between the defendant and the forum.”); *Amen v. City of Dearborn*, 532 F.2d 554, 557 (6th Cir.1976) (“[D]ue process requires proper service of process in order to obtain in personam jurisdiction.”); *Delta S.S. Lines, Inc. v. Albano*, 768 F.2d 728, 730 (5th Cir.1985) (A defendant's return and acknowledgment are an essential part of the procedure for establishing in personam jurisdiction). In short, the requirement of proper service of process “is not some mindless technicality.” *Del Raine v. Carlson*, 826 F.2d 698, 704 (7th Cir.1987). We conclude that plaintiffs' attempted service of process under Rule 4(c)(2)(C)(ii) did not give the district court personal jurisdiction over defendants.

[2] Moreover, Rule 4(c)(2)(C)(ii) requires “a defendant who refuses to return the acknowledgment form [to] be personally served—within the 120-day period—with copies of the summons and complaint.” *Green v. Humphrey Elevator and Truck Co.*, 816 F.2d 877 at 882 (3rd Cir.1987) (emphasis added). *See also*

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*Gluklick*, 801 F.2d at 836; *Stranahan*, 800 F.2d at 56. As noted previously, personal service was completed over 600 days after the complaint was filed.

[3] Plaintiffs, however, argued below that the district court's "stay of *all* proceedings" issued on November 2, 1987 and lifted on March 8, 1989 tolled the 120-day period because service of process is a "proceeding" and plaintiffs, therefore, were barred from serving defendants during the period of the stay. By excluding the days the proceedings were tolled, plaintiffs contended that their personal service of process under Rule 4(d) was completed within the 120-day period required by Rule 4(j).<sup>FN6</sup>

FN6. According to plaintiffs, the time period for service of process should be calculated as follows:

1. 9-01-87 (complaint filed) to 11-02-87 (action stayed): 66 days.
2. 03-08-89 (stay lifted).
3. 04-27-89 (Estate of Presser served): 51 days after stay lifted.
4. 04-28-89 (Local 507 & H. Friedman served): 52 days after stay lifted.
5. 04-30-89 (last day for possible service if days during stay excluded): 120 days total.

Without personal jurisdiction over an individual, however, a court lacks all jurisdiction to adjudicate that party's right, whether or not the court has valid subject matter jurisdiction. *Dragor Shipping Corp. v. Union Tank Car Co.*, 378 F.2d 241, 244 (9th Cir.1967) ("The fact that subject-matter jurisdiction exists does not excuse the lack of *in personam* jurisdiction."). In other words, given our prior conclusion that plaintiffs

did not effect proper mail service the district court's subsequent stay was nullified, as the court had not yet acquired *in personam* jurisdiction over any defendant. See *Kulko v. Superior Court*, 436 U.S. 84, 91, 98 S.Ct. 1690, 1696, 56 L.Ed.2d 132 (1978) ("[I]t has long been the rule that a valid judgment imposing a personal obligation or duty in favor of the plaintiff may be entered only by a court having jurisdiction over the person of the defendant."); *Duplantier v. United States*, 606 F.2d 654, 663 n. 19 (5th Cir.1979) (federal courts must have both subject matter and *in personam* jurisdiction before they may act); *Naum v. Brown*, 604 F.Supp. 1186, 1188 (E.D.N.Y.1985) ("[W]ithout personal jurisdiction over the defendants, any judgment *or ruling* is without force or effect....") (emphasis added). The district court was as powerless to issue \*1157 orders affecting defendants<sup>FN7</sup> as it was powerless to issue orders affecting any other non-party. Accordingly, the stay did not toll the 120-day period for service of process.<sup>FN8</sup> We therefore find that plaintiffs did not effect personal service of process under Rule 4(d) within the required 120-day period.

FN7. We acknowledge that H. Friedman made an appearance, through his attorneys, when he filed a response to plaintiffs' motion to stay all proceedings. However, as his *first* pleading specifically contested the insufficiency of service of process, it cannot be plausibly contended that he waived Rule 4's requirements and thereby submitted to the district court's jurisdiction. See, e.g., *Rauch v. Day & Night Mfg. Corp.*, 576 F.2d 697, 701 (6th Cir.1978); *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir.1982); *Martin v. New York Dept. of Mental Hygiene*, 588 F.2d 371, 373 (2d Cir.1978).

FN8. Cf. *Geiger*, 850 F.2d at 332-33 ("Of course, the 120-day period was tolled between the time that the action was dismissed and the date that the court reinstated the action, *since no action was pending during that*

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*interval.*”) (emphasis added).

[4] Absent a showing of good cause as to why Rule 4(c)(2)(C)(ii)'s 120-day period was not complied with, the language of Rule 4(j) mandates dismissal. *Gluklick*, 801 F.2d at 837. Whether plaintiffs have established good cause is “a discretionary determination entrusted to the district court, and we are reluctant to substitute our own judgment for that court's.” *Del Raine*, 826 F.2d at 705. See also *Lovelace v. Acme Markets, Inc.*, 820 F.2d 81, 83 (3rd Cir.1987); *Edwards v. Edwards*, 754 F.2d 298, 299 (8th Cir.1985).

As a final argument in support of the validity of their service of process, plaintiffs contended and the district court agreed that reliance on the stay of all proceedings constitutes “good cause” for plaintiffs' failure to perfect service within 120 days. While this is a close issue, we nevertheless find that the district court did not properly exercise its discretion in upholding the service of process on defendants. Based on the language of Rule 4(j), *supra* note 3, plaintiffs bear the burden of showing good cause. See *Norlock v. City of Garland*, 768 F.2d 654, 656 (5th Cir.1985) (“[o]nce the validity of process has been contested, the plaintiff ‘must bear the burden of establishing its validity.’”). We do not believe that plaintiffs have met their burden in this regard.

Legislative history provides only one example where an extension for good cause is appropriate—when the defendant intentionally evades service of process. 128 Cong.Rec. H9849, 9852 n. 25 (daily ed. Dec. 15, 1982), reprinted in 1982 U.S.Code Cong. & Admin.News 4434, 4446 n. 25. Courts that have considered this issue, however, agree that counsel's inadvertent failure or half-hearted efforts to serve a defendant within the statutory period does not constitute good cause. *E.g.*, *Lovelace*, 820 F.2d at 84; *Hart v. United States*, 817 F.2d 78, 81 (9th Cir.1987) (secretarial negligence in serving defendant is chargeable to counsel); *Braxton v. United States*, 817 F.2d 238, 240 (3rd Cir.1987); *Geiger*, 850 F.2d at 333

(plaintiff may not rely on another's delay in supplying needed information, but is obligated to pursue alternative methods in finding and serving defendant).

Considering the totality of the circumstances, plaintiffs' efforts to properly serve defendants were half-hearted at best. Even if we assume plaintiffs held a good faith belief that the stay would prevent them from perfecting service, plaintiffs at the very least should have known (given the strong legal precedent) that they would not effect proper mail service on defendants unless the acknowledgment forms were returned. Accordingly, when plaintiffs initially decided to move for a stay several weeks after filing their complaint, all they had to do was wait a few days at most to make sure that they had properly served defendants.<sup>FN9</sup> *Cf. Excalibur Oil, Inc. v. Gable*, 105 F.R.D. 543, 545 (N.D.Ill.1985) (“[S]ervice by mail, though a convenient measure to try when a case is first \*1158 filed, gives no assurance at all of obtaining effective jurisdiction over the defendant.”).

FN9. Plaintiffs served defendants by mail on September 2 and 3, 1987. Rule 4(c)(2)(C)(ii) requires that the acknowledgment form be sent back to the sender within 20 days. Plaintiffs' motion for a stay was filed on September 22, 1987.

Alternatively, they could have requested an exemption from the stay as to service of process. Despite direct notice by H. Friedman on October 16, 1989 that service of process was defective, plaintiffs never bothered to ask for a clarification on the scope of the stay. Plaintiffs had two and a half weeks after H. Friedman's notice and before the effective date of the stay in which to perfect service or move for a Rule 6(b) extension of the 120-day period, but they failed to do anything at that time.

After the stay was granted, plaintiffs could have moved the district court for a partial lifting of the stay

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to permit them to serve defendants, or to at least pursue one of the previously mentioned options.<sup>FN10</sup> Instead, plaintiffs did nothing until three days before what they claim was the 120-day period deadline—a date approximately 600 days after the complaint was filed. Even at that time, they may not have acted were it not for H. Friedman's motion to dismiss. That motion was filed a few days prior to plaintiffs' personal service of process on defendants on April 27 and 28, 1989, which again alerted plaintiffs that the mail service was defective.

FN10. Plaintiffs filed a motion, which was granted on September 28, 1988, to substitute one of the defendants who had died, thereby demonstrating that they knew the court would allow some proceedings in spite of the stay.

In sum, while we recognize the lack of specific authority on the effect of a stay with regard to service of process requirements, there is enough authority on both the need for a court to have *in personam* jurisdiction before a court may act and the need to timely perfect mail service that is unacknowledged by the defendant(s) to hold plaintiffs, who are represented by counsel, accountable for their “assumption” that reliance on the stay would constitute good cause. Plaintiffs had more than ample time to determine whether their reliance on the stay was misplaced. *Cf. Lovelace*, 820 F.2d at 84–85 (plaintiff cannot rely on misrepresentation of specially appointed process server that process had been served on defendant). Under the mandatory language of Rule 4(c), we do not believe that plaintiffs took enough precautionary measures to make sure their service of process was effective. *Cf. Whale v. United States*, 792 F.2d 951, 953 (9th Cir.1986) (plaintiff's service by mail on U.S. Attorney General within 120 days, when Rule 4(d)(4) permits personal service only, does not constitute good cause). Accordingly, we reverse the district court's determination that there was good cause for plaintiffs' failure to perfect service of process.

[5] Absent good cause and proper service upon defendants, Rule 4(j) forces us to dismiss plaintiffs' complaint without prejudice. *Braxton*, 817 F.2d at 240. We realize that a dismissal without prejudice in this case may render plaintiffs' *Bivens* action subsequently time-barred. Despite the severity of such a result, dismissal is nevertheless warranted. *See Green*, 816 F.2d at 879 & n. 6; *Redding v. Essex Crane Rental Corp. of Alabama*, 752 F.2d 1077 (5th Cir.1985) (affirming dismissal despite fact statute of limitations had run); *Deloss v. Kenner General Contractors, Inc.*, 764 F.2d 707, 711 n. 5 (9th Cir.1985) (“Congress recognized the possibility that dismissal after the expiration of a statute of limitations could bar a plaintiff from bringing an action.”) (citation omitted). *But see Morse*, 752 F.2d at 40 n. 9. In fact, in order to make sure the court is not burdened with further appeals on this case we will also address defendants' statute of limitations argument.

### III.

Plaintiffs vigorously contest the district court's ruling that their *Bivens* action is barred by the applicable statute of limitations. Initially, we agree with the district court that the relevant Ohio statute of limitations for *Bivens* actions was changed from one year to two years as a result of *Owens v. Okure*, 488 U.S. 235, 109 S.Ct. 573, 102 L.Ed.2d 594 (1989), and that the change should be applied retroactively in \*1159 this case based on *Browning v. Pendleton*, 869 F.2d 989 (6th Cir.1989).

[6] Ohio's two year statute of limitations, Ohio Rev.Code Ann. § 2305.10, began to run when A. Friedman knew or should have known of the injury which is the basis of his *Bivens* claim. *Sevier v. Turner*, 742 F.2d 262, 273 (6th Cir.1984); *Keating v. Carey*, 706 F.2d 377, 382 (2d Cir.1983). This inquiry focuses on the harm incurred, rather than the plaintiff's knowledge of the underlying facts which gave rise to the harm. *Shannon v. Recording Indus. Ass'n of Am.*, 661 F.Supp. 205, 210 (S.D. Ohio 1987). “A plaintiff

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has reason to know of his injury when he should have discovered it through the exercise of reasonable diligence.” *Sevier*, 742 F.2d at 273 (citing *Briley v. California*, 564 F.2d 849, 855 (9th Cir.1977)).

A. Friedman complains of a general deprivation of due process. Giving him every conceivable favorable inference, we agree with the district court that A. Friedman knew or should have known of his injury no later than August 26, 1985. A. Friedman admits that in June of 1985, while he was incarcerated, he learned from generalized newspaper accounts of a possible relationship existing between Jackie Presser and the federal government. Based on that information, A. Friedman subsequently moved for a new trial. As a consequence of A. Friedman's motion, on August 26, 1985 the government moved to dismiss A. Friedman's indictment, thereby allegedly confirming his suspicions that exculpatory evidence relating to government informants had been withheld at his trial. We find that given the aforementioned sequence of events, A. Friedman knew or should have known at that time that his alleged entrapment and denial of due process were the result of actions taken by defendants under color of federal law. We thus conclude that the relevant statute of limitations began to run on August 26, 1985.

[7] Plaintiffs had two full years from August 26, 1985 to determine the purported facts underlying their *Bivens* claim, and file their complaint. Instead, they waited until September 1, 1987, at which time the statute of limitations had already run. Plaintiffs' argument that the running of the statutory period was tolled because of fraudulent concealment is not well taken. To establish fraudulent concealment, a plaintiff must plead three elements: “(1) wrongful concealment of their actions by the defendants; (2) failure of the plaintiff to discover the operative facts that are the basis of his cause of action within the limitations period; and (3) plaintiff's due diligence until discovery of the facts.” *Electric Power Bd. of Chattanooga v. Monsanto Co.*, 879 F.2d 1368, 1377 (6th Cir.1989)

(citations omitted). *See also Weinberger v. Retail Credit Co.*, 498 F.2d 552, 555 (4th Cir.1974). Although plaintiffs' complaint and amended complaint are deficient in all three respects, it is sufficient to observe that plaintiffs have failed to plead their own due diligence with the requisite particularity demanded by Rule 9(b).<sup>FN11</sup> *Cf. Dayco Corp. v. Goodyear Tire & Rubber Co.*, 523 F.2d 389, 394 (6th Cir.1975).

FN11. Rule 9(b) states in part: “In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.”

Plaintiffs have the burden of proving the elements of fraudulent concealment, and therefore their own diligence in discovering the operative facts of their cause of action. *See Akron Presform Mold Co. v. McNeil Corp.*, 496 F.2d 230, 233, 234 n. 5 (6th Cir.1974). Plaintiffs allege that the first time they were able to actually ascertain the plausible existence of a relationship between Presser and the government was on September 15, 1986, when attorneys for Presser filed a pretrial discovery motion in *United States v. Presser*. That motion sought DOJ documents pertaining to the decision of the government not to turn over exculpatory information to A. Friedman and his attorney at his original criminal trial.

If plaintiffs were right, their cause of action would have been timely filed. However, A. Friedman himself acknowledged that in July of 1985 while he “was incarcerated that he had read generalized newspaper\*1160 accounts of a possible relationship existing between Jackie Presser and the Federal Government.” Our circuit has set forth a test as to whether there is fraudulent concealment or simply a lack of diligence on the part of a plaintiff in discovering the operative facts of his cause of action. In following the Supreme Court case of *Wood v. Carpenter*, 101 U.S. 135, 25 L.Ed. 807 (1879), we stated in *Dayco Corp.*: “Any fact that should excite [the plaintiff's] suspicion is the

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same as actual knowledge of his entire claim.” *Dayco Corp.*, 523 F.2d at 394. A. Friedman's suspicions that Presser was a government informant arose in July of 1985 and were subsequently confirmed on August 26, 1985, when the government dismissed his indictment.

The knowledge A. Friedman possessed on August 26, 1985 with regard to his injury would have apprised a diligent plaintiff of his cause of action within the limitations period. As the district court recognized, “[t]here is no indication that Friedman did anything to investigate his claim between August 26, 1985, and September 15, 1986.” *Cf. Campbell v. Upjohn Co.*, 676 F.2d 1122, 1126 (6th Cir.1982) (“The plaintiff's ignorance of his cause of action does not by itself satisfy the requirements of due diligence and will not toll the statute of limitations.”). Plaintiffs do not convince us that they have satisfied their “positive duty to use diligence in discovering [their] cause of action within the limitations period.” *Dayco Corp.*, 523 F.2d at 394.

Moreover, based on the record, the knowledge A. Friedman allegedly gained on September 15, 1986 as to the nature of his claims was no different than that which he already had on August 26, 1985. *See Wood*, 101 U.S. at 143 (“The circumstances of the discovery must be fully stated and proved, and the delay which has occurred must be shown to be consistent with the requisite diligence.”); *Pinney Dock and Transport Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1465 (6th Cir.1988) (There must be “distinct averments as to the time when the fraud, mistake, concealment, or misrepresentation was discovered, and what the discovery is, so that the court may clearly see whether, by ordinary diligence, the discovery might not have been before made.”) (citing *Wood*, 101 U.S. at 139–40). As plaintiffs have failed to plead additional facts from which to find the limitations period was tolled due to defendants' alleged fraudulent concealment, the conclusion that their *Bivens* claim is time-barred remains.

The substance of plaintiffs' amended complaint

does not alter our finding that the statute of limitations was not tolled. The factual allegations contained therein and pertaining to the alleged fraudulent concealment are not pleaded with particularity; nor do they add to the factual allegations contained in the original complaint. As we dismiss plaintiffs' complaint because it is time-barred, we need not address plaintiffs' argument that the district court erred in denying their motion to amend their complaint. Finally, as no significant proceedings have taken place, the district court's dismissal, without prejudice, of plaintiffs' remaining state law claims was an appropriate exercise of its pendent jurisdiction.

#### IV.

We AFFIRM the dismissal of plaintiffs' complaint.

C.A.6 (Ohio),1991.

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Appellate Court of Illinois, Fifth District.  
George GOACHEFF and Marguita Gocheff d/b/a  
Marjan Company, Plaintiffs-Appellees,  
v.

Earl BREEDING and Mary Breeding, Defendants-Appellants.

No. 77-105.  
Oct. 3, 1977.

Creditors brought action against debtors for nonpayment on demand note. The Circuit Court, St. Clair County, William P. Fleming, J., entered default judgment in favor of creditors, and debtor appealed. The Appellate Court, Carter, P. J., held that: (1) where service of process upon debtor, if it was made at all, was made by creditor and not by sheriff or coroner, default judgment was void for lack of jurisdiction over debtor, and (2) where judgment against debtor was default judgment entered upon basis of complaint and exhibits, no person or attorney confessed judgment against debtor in accordance with note and contract, creditors gave no indication that they intended to utilize confession of judgment clauses in note and contract, and argued for the first time on appeal that no service of process was required because contract and note contained "confession of judgment" clauses, creditors could not on appeal invoke protection of judgment by confession to avoid effect of invalid service of process.

Reversed and remanded with directions.

West Headnotes

[1] Process 313 54

313 Process

313II Service

313II(A) Personal Service in General

313k50 Authority or Capacity to Serve

313k54 k. Indifferent or Disinterested Person. Most Cited Cases

Reason for statutory provision that private person making service cannot be party to action is to ensure that party serving process be a wholly disinterested person. S.H.A. ch. 110, § 13.1.

[2] Process 313 153

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

Where service of process is not carried out in accordance with matter provided by law it is invalid, no jurisdiction over person of defendant is acquired, and default judgment rendered against defendant is void. S.H.A. ch. 110, §§ 1 et seq., 13.1.

[3] Process 313 48

313 Process

313II Service

313II(A) Personal Service in General

313k48 k. Nature and Necessity in General. Most Cited Cases

Service of process on defendant is prerequisite to court's jurisdiction to enter judgment against him.

[4] Judgment 228 123(1)

## 228 Judgment

## 228IV By Default

## 228IV(A) Requisites and Validity

## 228k121 Application for Judgment

## 228k123 Proceedings in General

## 228k123(1) k. In General. Most Cited

## Cases

Actual knowledge of action on part of defendant is not deemed the equivalent of service of summons, for purposes of entry of default judgment against defendant.

## [5] Appeal and Error 30 ↪ 171(1)

## 30 Appeal and Error

## 30V Presentation and Reservation in Lower Court of Grounds of Review

## 30V(A) Issues and Questions in Lower Court

## 30k171 Nature and Theory of Cause

## 30k171(1) k. In General; Adhering to Theory Pursued Below. Most Cited Cases

Where default judgment was entered against debtor upon basis of complaint and exhibits, no person or attorney confessed judgment against defendant in accordance with note and contract, creditors gave no indication that they intended to utilize confession of judgment clauses in note and contract, and argued for the first time on appeal and that no service of process was required against defendant because contract and note filed as exhibits with complaint each contained "confession of judgment" clause, creditors were not allowed to invoke protection of judgment by confession to avoid effect of invalid service of process. S.H.A. ch. 110, §§ 13.1, 50(3).

## [6] Judgment 228 ↪ 123(1)

## 228 Judgment

## 228IV By Default

## 228IV(A) Requisites and Validity

## 228k121 Application for Judgment

## 228k123 Proceedings in General

## 228k123(1) k. In General. Most Cited

## Cases

Where creditor bringing action against debtors for nonpayment on demand note was upon application appointed special officer of court for service of process on debtors, and service of process upon debtors, if it was made at all, was made by creditor and not by sheriff or coroner, default judgment entered against debtor was void for lack of jurisdiction over debtor. S.H.A. ch. 110, §§ 1 et seq., 13.1.

**\*608 \*\*982 \*\*\*374** Crowder & Associates, Ltd., Columbia, for defendants-appellants.

A. J. Nester, Belleville, for plaintiffs-appellees.

**\*\*983 \*\*\*375** CARTER, Presiding Justice.

Plaintiffs, George Gocheff and Marguita Gocheff, doing business as the Marjan Company, filed a Complaint in the Circuit Court of St. Clair County against defendants Earl and Mary Breeding on October 12, 1973. The Complaint alleges that defendants individually and jointly retained the services of plaintiffs pursuant to a retainer contract attached as Exhibit A to the Complaint and that as evidence of the value of the services **\*609** rendered, defendants gave and executed a certain Demand Note of August 10, 1973, in the face amount of \$943.56 which is attached as Exhibit B to the Complaint.

On October 12, 1973, upon application, the circuit court appointed plaintiff George Gocheff as special officer for service of process on defendants. On December 6, 1973 the court entered an Order of Default and Judgment Order in the total amount of \$1226.63, representing the amount of the Demand Note plus \$283.07 in attorney fees in favor of plaintiffs and against defendant Earl Breeding. No judgment was entered against Mary Breeding. On March

28, 1974 defendant Earl Breeding filed a Motion to Set Aside Default Judgment which, by stipulation, was later continued indefinitely.

On December 6, 1976 the circuit court entered an order sustaining the default judgment and dismissing defendant's motion to set aside same. Defendant Earl Breeding now appeals from that order and argues that the default judgment against him is invalid, because George Gocheff, a party plaintiff, individually served process on him. We agree.

[1] Ill.Rev.Stat.1973, ch. 110, sec. 13.1 provides in pertinent part as follows:

“(1) Writs shall be served by a sheriff, or if he is disqualified, by a coroner of some county of the State. The court may, in its discretion upon motion, order service to be made by a private person over 21 years of age and not a party to the action. . . .”

“(2) Summons may be served upon the defendants wherever they may be found in the State, by any person authorized to serve writs. . . .” (Emphasis supplied).

In the instant case it is undisputed that if service was made at all, it was made by plaintiff George Gocheff and not by a sheriff or coroner. The statute in clear and unambiguous terms requires that a private person making service cannot be a party to the action. As is noted in the Civil Practice Act (Ill. Ann. Stat., ch. 110, par. 13.1, Historical and Practice Notes at 103), “The restriction against service by a party is a codification of the law which existed prior to the 1937 amendment.” *People ex rel. Lafferty v. Feicke*, 252 Ill. 414, 96 N.E. 1052; *Lee v. Fox*, 89 Ill. 226; *Filkins v. O'Sullivan*, 79 Ill. 524. The reason for this prohibition is to insure that the party serving process be a wholly disinterested person. *People ex rel. Lafferty v. Feicke*, supra.

[2][3][4] Where service of process is not carried out in accordance with the manner provided by law it is invalid, no jurisdiction over the person of the defendant is acquired, and a default judgment rendered against the defendant is void. *Escue v. Nichols*, 335 Ill.App. 244, 81 N.E.2d 652 (1948). Service of process on a defendant is a prerequisite to the court's \*610 jurisdiction to enter judgment against him. *Stone & Adler, Inc. v. Cooper*, 20 Ill.App.3d 576, 315 N.E.2d 56; *Isaacs v. Shoreland Hotel*, 40 Ill.App.2d 108, 188 N.E.2d 776. Further, actual knowledge of the action has never been deemed the equivalent of service of the summons. *Newman v. Greeley State Bank*, 92 Ill.App. 638.

[5] Plaintiff argues that no service of process was required, because the contract and note filed as exhibits with the Complaint each contain a “confession of judgment” clause. Judgments by confession, without service of process, are authorized under Ill.Rev.Stat.1973, ch. 110, sec. 50(3). However, the judgment against defendant was a default judgment entered upon the basis of the complaint and exhibits. No person or attorney confessed judgment against the defendant in accordance with the note and contract as is required by Section 50(3) in order to obtain a valid \*\*984 \*\*\*376 confession judgment. Plaintiffs gave no indication that they intended to utilize the confession of judgment clauses and made no mention of this in their opposition to defendant's Motion to Set Aside Default Judgment or at any time in the lower court. The argument is made for the first time on this appeal. Since plaintiffs did not attempt to follow this procedure, they cannot now on appeal invoke its protection to avoid the effect of an invalid service of process.

[6] For the reasons discussed herein, we hold that the judgment against the defendant is void for lack of jurisdiction over the defendant. The order of the circuit court dismissing defendant's motion to vacate default judgment is reversed and the cause remanded with directions to vacate the order of default and judgment order entered in this cause.

REVERSED AND REMANDED WITH DI-  
RECTIONS.

EBERSPACHER, and GEORGE J. MORAN, JJ.,  
concur.

Ill.App. 1977.

Gocheff v. Breeding

53 Ill.App.3d 608, 368 N.E.2d 982, 11 Ill.Dec. 374

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## C

Court of Appeals of Georgia, Division No. 3.

Jean H. R. HARDWICK

v.

K. W. FRY.

No. 51838.

Feb. 24, 1976.

Appeal was taken from an order of the State Court, DeKalb County, Mitchell, J., overruling defendant's motion to set aside default judgment. The Court of Appeals, Quillian, J., held that failure to obtain service upon defendant by leaving a copy at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein rendered default judgment void.

Reversed.

## West Headnotes

## [1] Judgment 228 ↪ 17(1)

## 228 Judgment

228I Nature and Essentials in General

228k17 Process or Notice to Sustain Judgment

228k17(1) k. Necessity of Process and of Personal Service in General. Most Cited Cases

Failure to obtain service upon defendant by leaving a copy at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein rendered default judgment void. Code, § 81A-104(d)(7).

## [2] Process 313 ↪ 153

## 313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

Knowledge by defendant as to a pending lawsuit will not operate to cure a defect in service. Code, § 81A-104(d)(7).

\*\*88 \*771 Dennis & Fain, Michael J. Gorby, Atlanta, for appellant.

William S. Rhodes, Atlanta, for appellee.

QUILLIAN, Judge.

Appeal was taken from an order overruling the defendant's motion to set aside a default judgment. Held:

The defendant (appellant) introduced proof that service was not obtained upon her. The person served was not residing in defendant's dwellinghouse or usual place of abode. See CPA s 4 (Code Ann. s 81A-104(d)(7); Ga.L.1966, pp. 609, 610 et seq.). The plaintiff introduced proof which only tended to show the defendant had knowledge of the suit.

[1][2] The failure to obtain service by leaving a copy 'at his dwellinghouse or usual place of abode with some person or suitable age and discretion then residing therein,' renders the judgment void. Code Ann. s 81A-104(d)(7). See Thompson v. Lagerquist, 232 Ga. 75, 205 S.E.2d 267. Where service is defective, knowledge by \*\*89 the defendant as to a pending lawsuit would not cure the defect. American Photocopy &c. Co. v. Lew Deadmore &c., Inc., 127 Ga.App. 207(2), 193 S.E.2d 275.

The trial judge erred in overruling the motion to set aside the judgment.

Judgment reversed.

DEEN, P.J., and WEBB, J., concur.

Ga.App. 1976.

Hardwick v. Fry

137 Ga.App. 771, 225 S.E.2d 88

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744 N.E.2d 509

(Cite as: 744 N.E.2d 509)



Court of Appeals of Indiana.  
Philip P. HILL, Appellant–Defendant,  
v.

Daniel E. RAMEY and Christina L. Ramey, Appel-  
lees–Plaintiffs.

No. 40A01–0005–CV–166.  
Feb. 19, 2001.

Father filed motion for relief from a permanent protective order that was previously issued against him. The Superior Court, Jennings County, James Funke, Jr., J., denied relief. Father appealed. The Court of Appeals, Mattingly, J., held that: (1) motion for continuance filed by an attorney on a father's behalf did not demonstrate a waiver of the trial court's lack of personal jurisdiction; (2) attempted service on father was ineffective, and thus, permanent protective order was void for lack of personal jurisdiction; (3) protective order against father could not be used to modify father's child visitation arrangements without notice to father; and (4) protective order could not be used to modify father's child visitation arrangements without notice to father.

Reversed.

Robb, J., filed opinion dissenting in part and concurring in part.

West Headnotes

**[1] Protection of Endangered Persons 315P**  
126

315P Protection of Endangered Persons  
315PII Security or Order for Peace or Protection

315PII(G) Appeal and Review  
315Pk126 k. Dismissal; mootness. Most  
Cited Cases  
(Formerly 62k21 Breach of the Peace)

Court of Appeals would treat issue of whether protective order was void for lack of personal jurisdiction as one that was not moot, even though order likely expired when not renewed after one year, where there was some indication in record that criminal charges were filed against defendant for violating the protective order.

**[2] Appeal and Error 30** 761

30 Appeal and Error  
30XII Briefs  
30k761 k. Points and arguments. Most Cited  
Cases

When an appellee's brief is not submitted, the Court of Appeals does not undertake the burden of developing arguments for the appellee.

**[3] Appeal and Error 30** 773(5)

30 Appeal and Error  
30XII Briefs  
30k769 Failure to File or Serve, or to File or  
Serve in Time  
30k773 Dismissal or Affirmance or Reversal  
30k773(5) k. Reversal. Most Cited  
Cases

Applying a less stringent standard of review with respect to showings of reversible error, used when an appellee does not submit a brief, the Court of Appeals may reverse the lower court if the appellant can es-

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establish prima facie error; however, where an appellant is unable to meet that burden, it will affirm.

**[4] Appeal and Error 30 ↻773(5)**

30 Appeal and Error

30XII Briefs

30k769 Failure to File or Serve, or to File or Serve in Time

30k773 Dismissal or Affirmance or Reversal

30k773(5) k. Reversal. Most Cited Cases

Term “prima facie,” in context of determining whether an appellant has established prima facie error, is defined as at first sight, on first appearance, or on the face of it, for purposes of less stringent standard of review applicable when appellee does not submit a brief.

**[5] Infants 211 ↻1533**

211 Infants

211XI Orders for Protection of Children

211k1533 k. Proceedings and jurisdiction. Most Cited Cases

(Formerly 211k15.5(3), 62k20 Breach of the Peace)

Attempted service on father, by placing copy of summons and temporary protective order against him in the door of the house where father's parents lived, was ineffective, and thus, permanent protective order was void for lack of personal jurisdiction, even if father eventually received the summons and motion for protective order that sheriff later mailed to him at his parents' address. Trial Procedure Rule 4.1(A)(3).

**[6] Judgment 228 ↻16**

228 Judgment

228I Nature and Essentials in General

228k16 k. Jurisdiction of the person and subject-matter. Most Cited Cases

A judgment rendered without personal jurisdiction is void.

**[7] Infants 211 ↻1533**

211 Infants

211XI Orders for Protection of Children

211k1533 k. Proceedings and jurisdiction. Most Cited Cases

(Formerly 211k15.5(3), 62k21 Breach of the Peace)

Motion for continuance filed by an attorney on a father's behalf did not demonstrate a waiver of the trial court's lack of personal jurisdiction, where that attorney never entered an appearance for father in action seeking a protective order against father.

**[8] Courts 106 ↻37(3)**

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k37 Waiver of Objections

106k37(3) k. Estoppel arising from submitting to or invoking jurisdiction. Most Cited Cases

A defendant can waive the lack of personal jurisdiction and submit himself to the jurisdiction of the court if he responds or appears and does not contest the lack of jurisdiction.

**[9] Process 313 ↻78**

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313 Process

313II Service

313II(B) Substituted Service

313k76 Mode and Sufficiency of Service

313k78 k. Leaving copy at residence or other place. Most Cited Cases

For purposes of service of process, the determination of what is or is not a person's dwelling house or abode turns on the particular facts of each case; however, plaintiff's "belief," without more, does not determine the location of a defendant's dwelling house. Trial Procedure Rule 4.1(A)(3).

[10] Courts 106  21

106 Courts

106I Nature, Extent, and Exercise of Jurisdiction in General

106I(A) In General

106k21 k. Mode of acquiring or exercising jurisdiction in general. Most Cited Cases (Formerly 106k11)

The mere fact that the defendant has knowledge of the action will not grant the court personal jurisdiction.

[11] Child Custody 76D  577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases (Formerly 285k2(18))

**Protection of Endangered Persons 315P  56**

315P Protection of Endangered Persons

315PII Security or Order for Peace or Protection

315PII(C) Proceedings

315Pk51 Plenary Proceedings in General

315Pk56 k. Pleading, notice, and process. Most Cited Cases (Formerly 62k16 Breach of the Peace)

**Protection of Endangered Persons 315P  78**

315P Protection of Endangered Persons

315PII Security or Order for Peace or Protection

315PII(D) Protection Orders in General

315Pk72 Nature, Scope, and Operation of Order

315Pk78 k. Other particular orders or relief. Most Cited Cases (Formerly 62k16 Breach of the Peace)

Protective order against father could not be used to modify father's child visitation arrangements, by ordering him to pick up the children at the county jail, without notice to father, where petition for protective order did not address visitation.

[12] Child Custody 76D  577

76D Child Custody

76DIX Modification

76DIX(B) Grounds and Factors

76Dk577 k. Visitation. Most Cited Cases (Formerly 285k2(18))

Modification of father's child visitation arrangements was improper, absent a finding that modification would serve the child's best interests. West's A.I.C. 31-17-4-2.

\*510 Jason J. Pattison, Rogers & Dove, North Vernon, IN, Attorney for Appellant.

**OPINION**

MATTINGLY, Judge.

Philip P. Hill appeals the trial court's denial of his Motion for Relief from Order pursuant to Trial Rule

744 N.E.2d 509

(Cite as: 744 N.E.2d 509)

60(B)(6). We reverse.

#### FACTS AND PROCEDURAL HISTORY

On April 16, 1999, Daniel and Christina Ramey filed a Petition for Temporary Protective Order and Notice of Filing P.O. (Protective Order) with the Jennings Superior Court.<sup>FN1</sup> A temporary protective order was issued, and the trial court scheduled a hearing on the Protective Order for April 28, 1999.

FN1. The Petition filed with the court was a “form” petition, and refers to Indiana Code § 34–4–5.1–1 *et seq.* as its supporting code sections. This is incorrect, as those sections were repealed in 1998, before the filing of the Protective Order. The statute now governing protective orders is Indiana Code chapter 34–26–2. The revision of the controlling statutes does not affect our analysis.

On April 20, 1999, the Jackson County Sheriff's Department placed a copy of the Protective Order and summons addressed to Hill in the door of the house in Seymour, Indiana, where Hill's parents lived.<sup>FN2</sup> On April 28, 1999, a hearing on the Protective Order was held. Hill did not appear, and a “Permanent Protective Order” was issued.<sup>FN3</sup> (R. at 9.)

FN2. At some point, Hill's mother returned the Protective Order and summons to the court with this note attached: “Placed in door at 211 W. Harrison—person does not reside at this address.” (R. at 5.) Since the returned summons and Protective Order do not have “received” date stamps, it is not known whether these documents were received by the court before or after the April 28, 1999, hearing on the Protective Order.

FN3. In addition to the usual protective order terms, Hill's child visitation arrangements were modified in that he was ordered to pick

up the children at the Jennings County Jail.

After receiving a letter from Christina Ramey complaining that Hill had violated the Protective Order, the trial court issued an “Order to Set for Hearing” for July 21, 1999. Service on Hill was again attempted at the Seymour address; this time, however, sheriff's deputies spoke with Hill's father, who advised that Hill was residing in Louisville, Kentucky. The trial court acknowledged that no service had been obtained on Hill and the hearing was reset for August 11, 1999. The Order resetting \*511 the hearing designated Hill's Louisville address.<sup>FN4</sup>

FN4. A second Order reset the hearing for September 1, 1999. On August 31, 1999, an attorney filed a motion for continuance on Hill's behalf. However, that attorney never filed an appearance. As a result of the motion for continuance, the hearing was reset for October 6, 1999. Since the Chronological Case Summary is not included in the record, it is not known whether this hearing was held.

[1] In March of 2000, Hill filed a Motion for Relief from Order, asking that the Protective Order issued by the court on April 28, 1999, be set aside. After a hearing, the trial court denied Hill's motion.<sup>FN5</sup>

FN5. We note that Hill's Motion for Relief might normally be moot, as a protective order, unless renewed, expires after one year. However, the record and brief indicate that there were criminal actions filed against Hill for violating the Protective Order. We do not address the accuracy of this indication, other than to comment that in light of this information we will treat this issue as one that is not moot.

#### DISCUSSION AND DECISION

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[2][3][4] At the outset, we note that the Rameys did not submit an appellee's brief. In such a situation, we do not undertake the burden of developing arguments for the appellee. Applying a less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish *prima facie* error. *Fisher v. Board of Sch. Trustees*, 514 N.E.2d 626, 628 (Ind.Ct.App.1986). *Prima facie*, in this context, is defined as "at first sight, on first appearance, or on the face of it." *Johnson County Rural Elec. Membership Corp. v. Burnell*, 484 N.E.2d 989, 991 (Ind.Ct.App.1985). Where an appellant is unable to meet that burden, we will affirm. *Blair v. Emmert*, 495 N.E.2d 769, 771 (Ind.Ct.App.1986).

Hill moved into an apartment in Louisville, Kentucky, in December of 1998. Because the Seymour, Indiana, address was not his "dwelling house or usual place of abode,"<sup>FN6</sup> he claims proper service was not obtained, and the court was without personal jurisdiction to issue the April 28, 1999, Protective Order. At the hearing on Hill's motion for relief, he introduced into evidence a copy of his lease, a copy of a Kentucky driver's license showing the Louisville address, and copies of rent receipts and a cancelled check.

FN6. Ind. Trial Rule 4.1(A)(3) provides that service may be made upon an individual by leaving a copy of the summons or complaint at the individual's dwelling house or usual place of abode.

Also at the hearing, Hill, his mother, and his father testified that Hill did not live at the Seymour, Indiana, house in April of 1999. Hill testified that he told Christina Ramey in December of 1998 that he had moved to Louisville. Hill's mother testified that if mail came to the house for Hill, she kept it for him until he picked it up. She did not remember whether a letter from the court to Hill had come to the Seymour, Indiana, address.

Christina Ramey testified that Hill had not told her he had moved to Louisville, and that his last known address was the Seymour, Indiana, address.

[5] The trial court issued Findings of Fact and Conclusions of Law at Hill's request. The Conclusions of Law read:

A. Trial Rule 4.1(B) Copy Service To Be Followed With Mail. Whenever service is made under Clause (3) or (4) of subdivision (A), the person making the service also shall send by first class mail a copy of the summons without the complaint to the *last known address of the person being served*, and this fact shall be shown upon the return.

1. Deputy Wayman left the paper pursuant to Trial Rule 4.1(A)(3) and mailed a copy by first class mail pursuant to Trial Rule 4.1(B).

2. Proof of mailing was done by placing an "X" on line after 'copy also mailed'.

\*512 B. The Petitioner, Christina Ramey, stated she believed the Respondent was still living with his parents in April, 1999, and did not know he had moved to Louisville until July, 1999.

C. Therefore Ms. Ramey believed the Respondent's last known address was at his parent's residence. This is where the papers were served by Deputy Wayman and where he sent a copy by first class mail.

D. Mrs. Carol Hill testified she kept first class mail sent to Phillip Hill at 211 W. Harrison Drive, Seymour, Indiana, for him to pick up.

E. Also, Sarah Hill signed for Philip Hill's certified mail in a criminal case. This certified mail was sent

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to his parent's address. This obviously got to Philip because he hired an attorney and appeared for a hearing on August 31, 1999.

F. The Respondent testified that he provided the Petitioner with his Louisville, Kentucky telephone number in December, 1998, and she had called him. The Petitioner denied this happened.

G. The Petitioner had no reason to lie about knowing the Respondent's location. Once she learned that the Respondent moved to Kentucky in July, 1999, she tracked him down and reported this new address to the Court in order to get a contempt hearing.

(R. at 47–48.) (Emphasis in original.)

[6][7][8] A judgment rendered without personal jurisdiction is void. *Stidham v. Wheelchel*, 698 N.E.2d 1152, 1156 (Ind.1998).<sup>FN7</sup> In light of our standard of review which requires a showing only of *prima facie* error, we believe this case to be controlled by *Mills v. Coil*, 647 N.E.2d 679 (Ind.Ct.App.1995), and so find that the Protective Order is void for lack of personal jurisdiction.

FN7. A defendant can waive the lack of personal jurisdiction and submit himself to the jurisdiction of the court if he responds or appears and does not contest the lack of jurisdiction. *Stidham*, 698 N.E.2d at 1155. The motion for continuance filed by an attorney on Hill's behalf does not demonstrate a waiver, as that attorney never entered an appearance for Hill in this case.

[9] In *Mills*, the plaintiff attempted service on the defendant at the defendant's last known address. The plaintiff was unaware that the defendant had moved out of the state three months before service was attempted. The court issued a default judgment, which it later set aside. We upheld the trial court's ruling,

finding that “[s]ervice upon a defendant's former residence is insufficient to confer personal jurisdiction.”<sup>FN8</sup> *Id.* at 681.

FN8. The dissent, relying on *Kelly v. Bennett*, 732 N.E.2d 859 (Ind.Ct.App.2000), would find service was effected “in substantial compliance with Trial Rule 4.1 by leaving a copy of the summons and petition *at what the Ramseys believed to be Hill's dwelling house....*” (Emphasis supplied.) In *Kelly* we addressed the rule governing service on a *business address* and not the rule governing the case before us. Furthermore, we did not reach the issue whether the address to which the summons and complaint was a valid business address for the defendant. In *Kelly*, we found service insufficient where the summons and complaint was left by the sheriff at the defendant's business address but was not personally served or properly mailed in accordance with T.R. 4.1(A)(1).

We acknowledge that the determination of what is or is not a person's dwelling house or abode turns on the particular facts of each case. *Doyle v. Barnett*, 658 N.E.2d 107, 109 (Ind.Ct.App.1995). However, we must decline to adopt the purely subjective standard suggested by the dissent, under which a plaintiff's “belief,” without more, would determine the location of a defendant's dwelling house for Rule 4.1 purposes.

[10] Even if Hill eventually received the summons and motion for protective order the Sheriff mailed to him at the Seymour address, such receipt does not, without more, guarantee sufficient service. “The mere fact that the defendant has knowledge of the action will not grant the court personal jurisdiction.” \*513 *Barrow v. Pennington*, 700 N.E.2d 477, 479–80 (Ind.Ct.App.1998).

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[11][12] Finally, we note that the Protective Order entered by the court contained a provision that purported to modify Hill's child visitation arrangements. Even if Hill actually received the Rameys' Petition for Protective Order, the visitation arrangements were modified without notice to Hill, as the Petition does not address visitation. This modification is also improper because the order includes no finding that modification would serve the child's best interests. Ind.Code § 31-17-4-2.

Reversed.

MATHIAS, J., concurs.

ROBB, J., dissents with opinion.

ROBB, Judge, dissenting.

I respectfully dissent from the majority's conclusion that the Protective Order issued against Hill is void for lack of personal jurisdiction due to the failure of service. Because I believe the service attempted by the Rameys was reasonably calculated to inform Hill of the pending petition for protective order, I believe that the Protective Order was valid and the trial court properly denied Hill's motion for relief from judgment.

Our review of a trial court's decision on a motion for relief from judgment pursuant to Trial Rule 60(B) is limited to determining whether the trial court abused its discretion. *Merkor Mgmt. v. McCuan*, 728 N.E.2d 209, 211 (Ind.Ct.App.2000). Thus, we will reverse the judgment only if it goes against the logic and effect of the facts or the trial court has misinterpreted the law. *Id.* Further, we will not reweigh the evidence, and we give the trial court's order substantial deference. *Id.* I note that the case relied upon by the majority was in a procedural posture opposite from that presented here. In *Mills*, the trial court had *granted* the defendant's motion for relief from judgment, and thus we were required to give deference to the trial court's grant of

relief. In this case, we have the opposite situation: the trial court denied the motion for relief, and thus, we owe that determination deference on appeal. I therefore do not believe that the result in *Mills* is dispositive of the issue before us.

Personal jurisdiction over a party can be obtained by any method of service which comports with due process. *Gourley v. L.Y.*, 657 N.E.2d 448, 450 (Ind.Ct.App.1995). "The minimal requirements of due process require only that notice be served in a manner reasonably calculated to inform the defendant of the pending action." *Id.* Trial Rule 4.15 reflects these minimal requirements: "[n]o summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him...."

In this case, the trial court found, and there was evidence to support the finding, that the Rameys believed, at the time the petition for protective order was filed, that Hill lived at the address to which they addressed service. Hill did at that time and continues to receive mail at that address, despite no longer residing there. Moreover, there was no evidence, including Hill's own testimony, that Hill told the Rameys he had moved from that address. Accordingly, the trial court determined that the sheriff's act of leaving a copy of the summons and petition at Hill's last known address, followed by mailing copies to the same address, was sufficient service. *See* T.R. 4.1(A)(3) and (B). Pursuant to our standard of review, I cannot say that such determination was an abuse of the trial court's discretion.

I would also note that I believe the legal reasoning of the most recent case from this court to deal with the issue of service, despite reaching the opposite conclusion, supports my position. *Kelly v. Bennett*, 732 N.E.2d 859 (Ind.Ct.App.2000). In *Kelly*, the plaintiffs filed a complaint for medical\*514 malpractice against the defendant, and requested that the summons and

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complaint be served upon the defendant by Sheriff at his office address. The Sheriff left copies of the summons and complaint at the office address and also mailed copies to that address. The defendant did not answer the complaint within the required thirty days, and a default judgment was entered for the plaintiffs. The defendant filed a motion to set aside the default judgment, which the trial court denied. This court reversed the trial court, holding that the plaintiffs' means of service were insufficient pursuant to Trial Rule 4.1 because

the prescribed means of service at a business address are: personal service, registered or certified mail, or some other means of mailing with a written acknowledgement of receipt. Service by Sheriff under the circumstances would have been appropriate only if [the defendant] or his agent had been personally served or if a copy of the summons and complaint had been left at his dwelling house or usual place of abode.

*Id.* at 861. We noted that Trial Rule 4.15 “does not operate to render service sufficient despite non-compliance with Trial Rule 4.1. ‘Trial Rule 4.15(F) only cures technical defects in the service of process, not the total failure to serve process.’ ” *Id.* at 862 (quoting *LaPalme v. Romero*, 621 N.E.2d 1102, 1106 (Ind.1993) (footnote omitted)). I acknowledge that the facts of *Kelly* are different from those presented here, in that the service in *Kelly* was to be effected upon a business address, as opposed to a private address. However, as stated above, I believe the legal reasoning of *Kelly* is equally applicable to this case. Here, service was effected in substantial compliance with Trial Rule 4.1 by leaving a copy of the summons and petition at what the Rameys believed to be Hill's dwelling house followed by sending copies to Hill's last known address. This is not, as the majority suggests, a purely subjective standard, in that the evidence supported the Rameys actions: Hill had lived at that address, he still received mail at that address, and he had not told the Rameys that he had moved from that address. I believe

this is exactly the situation for which Trial Rule 4.15 was designed, and thus, I believe Trial Rule 4.15 is appropriately applied in this case. Accordingly, I would affirm the trial court's denial of Hill's motion for relief from judgment.<sup>FN9</sup>

FN9. I note that I concur with the majority regarding the lack of notice regarding modification of Hill's child visitation arrangement.

Ind.App.,2001.

Hill v. Ramey

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**H**

Supreme Court of Ohio.  
 LaNEVE et al., Appellees,  
 v.  
 ATLAS RECYCLING, INC.; China Shipping (North  
 America) Holding Company, Ltd. et al., Appellants.

Nos. 2007–1199, 2007–1372, 2007–1373.  
 Submitted April 9, 2008.  
 Decided Aug. 13, 2008.

**Background:** Accident victim and wife brought action against employer and various “John Doe” defendants for intentional tort, negligence, and loss of consortium, and later amended complaint to replace two of the “John Doe” defendants with shipping company and container company. After container company filed answer asserting the defenses of failure of and/or improper service and the statute of limitations, shipping company and container company both filed motions to dismiss for failure to state a claim. The Court of Common Pleas, Trumbull County, No. 04 CV 1266, granted the motions, and plaintiffs appealed. The Court of Appeals, 172 Ohio App.3d 44, 872 N.E.2d 1277, reversed and remanded.

**Holdings:** After recognizing a conflict and accepting the discretionary appeals of shipping company and container company, the Supreme Court, Cupp, J., held that:

- (1) amended complaint did not relate back to date of original complaint, and
- (2) savings statute did not apply to extend period of time for plaintiffs to obtain service on defendants.

Reversed.

West Headnotes

**[1] Limitation of Actions 241 ↪121(2)**

241 Limitation of Actions  
 241II Computation of Period of Limitation  
 241II(H) Commencement of Proceeding; Relation Back  
 241k121 Defects as to Parties  
 241k121(2) k. Amendment of Defects.  
 Most Cited Cases

When a plaintiff files an amended complaint pursuant to rule governing amendments where name of party was originally unknown, and the applicable statutory time limit has expired, the determination of whether service has been properly effected on the formerly fictitious, now identified, defendant requires that the rule governing amendments where name of party was originally unknown to be read in conjunction with rules governing relation back of amendments and commencement of civil actions. Rules Civ.Proc., Rules 3(A), 15(C, D).

**[2] Process 313 ↪72**

313 Process  
 313II Service  
 313II(B) Substituted Service  
 313k72 k. Persons on Whom Substituted Service May Be Made. Most Cited Cases

Service on a formerly fictitious, now identified, defendant by certified mail is not in accordance with the personal-service requirement of rule governing amendments where name of party was originally unknown. Rules Civ.Proc., Rule 15(D).

**[3] Limitation of Actions 241 ↪127(2.1)**

119 Ohio St.3d 324, 894 N.E.2d 25, 2008 -Ohio- 3921  
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## 241 Limitation of Actions

### 241II Computation of Period of Limitation

#### 241II(H) Commencement of Proceeding; Relation Back

##### 241k127 Amendment of Pleadings

#### 241k127(2) Amendment Restating Original Cause of Action

#### 241k127(2.1) k. In General. Most Cited Cases

An amendment relates back to the date of an original complaint if the parties are not changed. Rules Civ.Proc., Rule 15(C).

### **[4] Limitation of Actions 241 ↪121(2)**

## 241 Limitation of Actions

### 241II Computation of Period of Limitation

#### 241II(H) Commencement of Proceeding; Relation Back

##### 241k121 Defects as to Parties

#### 241k121(2) k. Amendment of Defects. Most Cited Cases

The substitution of a fictitious name for a real name in a pleading, pursuant to rule governing amendments where name of party was originally unknown, is not changing a party, for purposes of rule governing relation back of amendments. Rules Civ.Proc., Rules 15(C, D).

### **[5] Limitation of Actions 241 ↪121(2)**

## 241 Limitation of Actions

### 241II Computation of Period of Limitation

#### 241II(H) Commencement of Proceeding; Relation Back

##### 241k121 Defects as to Parties

#### 241k121(2) k. Amendment of Defects. Most Cited Cases

So long as an original complaint was filed prior to

the expiration of the statutory time limit, service does not have to be made on a formerly fictitious, now identified, defendant within the statute of limitations. Rules Civ.Proc., Rules 3(A), 15(D).

### **[6] Limitation of Actions 241 ↪121(2)**

## 241 Limitation of Actions

### 241II Computation of Period of Limitation

#### 241II(H) Commencement of Proceeding; Relation Back

##### 241k121 Defects as to Parties

#### 241k121(2) k. Amendment of Defects. Most Cited Cases

Plaintiff's amended complaint, filed against formerly fictitious and unknown defendants after expiration of statute of limitations on his personal injury claim, did not relate back to date of original complaint filed before expiration of statute of limitations, where plaintiff failed to fulfill requirements of the rule governing amendments where name of party was originally unknown; summons for plaintiff's complaint or amended complaint did not include the words "name unknown" with respect to any of the defendants, and it was served by certified mail. R.C. § 2305.10; Rules Civ.Proc., Rules 3(A), 15(C, D).

### **[7] Limitation of Actions 241 ↪130(9)**

## 241 Limitation of Actions

### 241II Computation of Period of Limitation

#### 241II(H) Commencement of Proceeding; Relation Back

##### 241k130 New Action After Dismissal or Nonsuit or Failure of Former Action

#### 241k130(9) k. Failure of Action for Want of or Defects in Process or Service Thereof. Most Cited Cases

Plaintiff failed to properly attempt to commence personal injury action against formerly unknown de-

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defendants, and thus savings statute did not apply to extend period of time for plaintiff to obtain service on defendants, where plaintiff failed to comply with personal-service requirement of rule governing amendments where name of party was originally unknown; plaintiff used certified mail to obtain service on defendants, and never attempted, or obtained, personal service on defendants. R.C. §§ 2305.10(A), 2305.19(A); Rules Civ.Proc., Rule 15(D).

### [8] Action 13 66

#### 13 Action

13IV Commencement, Prosecution, and Termination

13k66 k. Course of Procedure in General. Most Cited Cases

The spirit of the civil rules of procedure is to resolve cases upon their merits and not on pleading deficiencies.

### [9] Appeal and Error 30 1166

#### 30 Appeal and Error

30XVII Determination and Disposition of Cause  
30XVII(D) Reversal

30k1166 k. Jurisdictional Defects. Most Cited Cases

The obligation to perfect service of process is placed only on the plaintiff, and the lack of jurisdiction arising from want of, or defects in, process or in the service thereof is ground for reversal.

### [10] Process 313 64

#### 313 Process

313II Service

313II(A) Personal Service in General

313k64 k. Mode and Sufficiency of Service.

#### Most Cited Cases

### Process 313 153

#### 313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

Actual knowledge of a lawsuit's filing and lack of prejudice resulting from the use of a legally insufficient method of service do not excuse a plaintiff's failure to comply with the civil rules governing service.

### [11] Courts 106 85(3)

#### 106 Courts

106II Establishment, Organization, and Procedure

106II(F) Rules of Court and Conduct of Business

106k85 Operation and Effect of Rules

106k85(3) k. Construction and Application of Particular Rules. Most Cited Cases

The rules of civil procedure are not just technicalities, and a court may not ignore the plain language of a rule in order to assist a party who has failed to comply with a rule's specific requirements.

### [12] Courts 106 85(3)

#### 106 Courts

106II Establishment, Organization, and Procedure

106II(F) Rules of Court and Conduct of Business

106k85 Operation and Effect of Rules

106k85(3) k. Construction and Application of Particular Rules. Most Cited Cases

The rules of civil procedure are a mechanism that

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governs the conduct of all parties equally.

**\*\*26** Robert F. Burkey, Warren, for appellees.

Ray, Robinson, Carle & Davies, Julia R. Brouhard,  
and Robert T. Coniam, Cleveland, for appellant China  
Shipping (North America) Holding Company, Ltd.

Davis & Young, Thomas W. Wright, and William  
Jack Meola, Vienna, for appellant ContainerPort  
Group, Inc.

CUPP, J.

**\*324** {¶ 1} In this discretionary and certified-conflict appeal, the issue is whether the saving statute of R.C. 2305.19(A) applies to an action that was not commenced pursuant to the specific requirements of Civ.R. 15(D). We conclude that when the specific requirements of Civ.R. 15(D) for commencing an action are not met, an amendment does not relate back to the date of the original complaint under Civ.R. 15(C) and Civ.R. 3(A) and the saving statute of R.C. 2305.19(A) does not apply. Therefore, we reverse the judgment of the appellate court.

## I

### A

{¶ 2} In 2002, John A. LaNeve was injured in the course of his employment with **\*\*27** Atlas Recycling, Inc.<sup>FN1</sup> LaNeve was exposed to unknown hazardous chemicals when he opened a container, and he suffered injuries to his eyes, nose, throat, and lungs.

FN1. Because this cause of action was dismissed by the trial court pursuant to Civ.R. 12(B)(6), we accept the material allegations in the complaint as true. *Vitantonio, Inc. v. Baxter*, 116 Ohio St.3d 195, 2007-Ohio-6052, 877 N.E.2d 663, ¶ 2.

{¶ 3} On May 28, 2004, LaNeve and his wife filed a complaint against Atlas and five John Doe

defendants, alleging that he had sustained personal injuries in the 2002 incident. The John Doe defendants were identified in the complaint as either an “unknown company” or “unknown,” and the addresses were “unknown.” LaNeve obtained service on Atlas by certified mail.

**\*325** {¶ 4} On May 6, 2005, LaNeve filed an amended complaint that named Atlas, China Shipping (North America) Holding Company, Ltd., and ContainerPort Group, Inc. (ContainerPort), as defendants. No John Doe defendants were named. LaNeve obtained service on China Shipping and ContainerPort by certified mail.

### B

{¶ 5} Before the trial court, both China Shipping and ContainerPort filed motions to dismiss on the basis that LaNeve's cause of action was time-barred by R.C. 2305.10. They argued the same grounds for dismissal: (1) that LaNeve's amended complaint was filed after the expiration of the statutory time limit and (2) that LaNeve had failed under the Ohio Rules of Civil Procedure to comply with the time requirements in commencing the action or in effecting personal service on either of the formerly unknown, now identified, defendants. Therefore, China Shipping and ContainerPort argued, LaNeve's amended complaint did not relate back to the date the original complaint had been filed, which was within the statutory time limit for LaNeve's cause of action. The trial court granted the motions to dismiss.

{¶ 6} On appeal, the Eleventh District Court of Appeals reversed the judgment of the trial court, concluding that the saving statute of R.C. 2305.19(A) allowed LaNeve one year from the filing of the amended complaint, May 6, 2005, to comply with the Civil Rules and obtain service on China Shipping and ContainerPort. 172 Ohio App.3d 44, 2007-Ohio-2856, 872 N.E.2d 1277, ¶ 18. The appellate court also concluded that LaNeve's failure to comply with the applicable rules was only a technicality because China

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Shipping and ContainerPort were not hindered in their awareness of, or ability to prepare their defense against, LaNeve's claims. Id. at ¶ 20–21.

{¶ 7} We recognized a conflict on the following question: “Does the Ohio savings statute, R.C. 2305.19(A), apply to an action where plaintiff fails to comply strictly with the requirements of Civ.R. 15(D) in serving the original complaint.”<sup>FN2</sup> 115 Ohio St.3d 1418, 2007-Ohio-5056, 874 N.E.2d 536. We also accepted China Shipping's and ContainerPort's discretionary appeals and consolidated the cases. 115 Ohio St.3d 1420, 2007-Ohio-5056, 874 N.E.2d 537.<sup>FN3</sup>

FN2. The conflict cases are *Kramer v. Installations Unlimited, Inc.* (2002), 147 Ohio App.3d 350, 2002-Ohio-1844, 770 N.E.2d 632; *Permanent Gen. Cos. Ins. Co. v. Corrigan* (May 24, 2001), Cuyahoga App. No. 78290, 2001 WL 563072; and *Mustrie v. Penn Traffic Corp.* (Sept. 7, 2000), Franklin App. No. 00AP–277, 2000 WL 1264526.

FN3. The first propositions of law presented by China Shipping and ContainerPort question the extent to which the procedural requirements of Civ.R. 15(D) must be complied with when serving a subsequently identified John Doe defendant, so as to invoke the relation-back rule of Civ.R. 15(C). The second propositions of law parallel the conflict question.

## \*\*28 \*326 II

### A

{¶ 8} Pursuant to Civ.R. 3(A), an action is commenced if a complaint is filed with the court and a defendant is served with the complaint within one year thereafter. The statutory time limit for a plaintiff to commence a personal-injury claim in Ohio is two years from the date an injury was incurred or discov-

ered. R.C. 2305.10(A).

[1] {¶ 9} If the proper defendant is unknown, a plaintiff may nevertheless file a complaint and then amend it when the name of the unknown party is discovered. Civ.R. 15(D). When a plaintiff files an amended complaint pursuant to Civ.R. 15(D) and the applicable statutory time limit has expired, the determination of whether service has been properly effected on the formerly fictitious, now identified, defendant requires Civ.R. 15(D) to be read in conjunction with Civ.R. 15(C) and 3(A). *Amerine v. Haughton Elevator Co.* (1989), 42 Ohio St.3d 57, 537 N.E.2d 208, syllabus.

### B

[2] {¶ 10} Because of the unique situation addressed by Civ.R. 15(D), specific requirements accompany this rule. Id. at 58, 537 N.E.2d 208. One requirement is that the summons is to contain the words “name unknown.” Civ.R. 15(D). Another requirement is that the summons must be personally served upon the formerly fictitious, now identified, defendant. Service on the formerly fictitious, now identified, defendant by certified mail is “clearly not in accordance with the requirement of Civ.R. 15(D).” *Amerine*, 42 Ohio St.3d at 58, 537 N.E.2d 208.

### C

[3][4] {¶ 11} Assuming that a plaintiff meets the specific requirements of Civ.R. 15(D), the relation-back provisions of Civ.R. 15(C) are then considered. *Amerine*, 42 Ohio St.3d at 58, 537 N.E.2d 208. The relation-back concept provides, “If plaintiff files his complaint, and if the applicable statute of limitations runs, and if plaintiff amends his complaint[,] \* \* \* the amendment relates back to the time of the original filing of the action. Because of relation back, the intervening statute of limitation does not interfere with the opportunity to amend.” Civ.R. 15 Staff Notes (1970). An amendment relates back to the date of an original complaint if the parties are not changed. *Amerine*, 42 Ohio St.3d at 59, 537 N.E.2d 208. The

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substitution of a fictitious name for a real name is not changing a party. *Id.*

[5] \*327 {¶ 12} The rule pertaining to the commencement of a civil action specifically permits an amendment made pursuant to Civ.R. 15(D) to relate back to the filing of an original complaint, provided service is obtained within one year of the filing of the original complaint. Civ.R. 3(A); *Amerine*, 42 Ohio St.3d at 59, 537 N.E.2d 208. Moreover, so long as the original complaint was filed prior to the expiration of the statutory time limit, “service does not have to be made on the formerly fictitious, now identified, defendant within the statute of limitations.” *Id.*

#### D

{¶ 13} In appropriate circumstances, the saving statute of R.C. 2305.19(A) allows an original action that has either been properly commenced or “attempted to be commenced” to be voluntarily dismissed and then refiled or replaced with an amended complaint against the same defendant based on the same injury, even if the applicable statute of limitations has expired at the time of the refiling. The \*\*29 application of the R.C. 2305.19(A) saving statute extends the Civ.R. 3(A) time period in which to serve a defendant by one additional year.

### III

#### A

[6] {¶ 14} LaNeve filed his original complaint in this matter on May 28, 2004, the last day of the two-year statute of limitations for his personal-injury claim. LaNeve's complaint invoked Civ.R. 15(D) by designating certain defendants as “John Doe, unknown.” Within the Civ.R. 3(A) one-year period for obtaining service on a complaint, LaNeve amended his complaint, identifying China Shipping and ContainerPort as defendants. Because the amended complaint against China Shipping and ContainerPort was filed outside of the statute of limitations, LaNeve clearly attempted to invoke the relation-back principles in order to maintain his action against these de-

fendants.

{¶ 15} Contrary to the express requirements of the rule, the summons for LaNeve's complaint or amended complaint, however, did not include the words “name unknown” with respect to any of the defendants, and it was served by certified mail. LaNeve did not attempt, or obtain, personal service of the summons for either the complaint or the amended complaint on China Shipping or ContainerPort. As a result, LaNeve failed to meet the specific requirements of Civ.R. 15(D); LaNeve is unable to claim the benefit of the relation back of the amended complaint as provided by Civ.R. 3(A); and LaNeve's attempted action against China Shipping and ContainerPort is, therefore, outside of the applicable statute of limitations. See *Amerine*, 42 Ohio St.3d 57, 537 N.E.2d 208. LaNeve's \*328 amended complaint is time-barred by the principles set forth in *Amerine*.<sup>FN4</sup>

FN4. {¶ a} The appellate court questioned whether the Civ.R. 15(D) personal-service requirement pertained to the original complaint or the amended complaint: “[T]here is some question as to whether the original complaint and summons, or the amended complaint and summons, are the matters requiring personal service under Civ.R.15(D).” *LaNeve*, 172 Ohio App.3d 44, 2007-Ohio-2856, 872 N.E.2d 1277, ¶ 11, fn. 1.

{¶ b} The issue presented in this appeal, however, specifically pertains to the method of service used to effect commencement of the suit. Accordingly, we decline to address whether the personal-service requirement applies to the original or the amended complaint. The appellate court's admonishment perhaps best addresses this separate matter: “It seems that prudent counsel should request personal service of both the original and

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amended complaints and summons and should otherwise comply strictly with the provisions of Civ.R. 15(D), in regard to any pleading served on a John Doe or former John Doe defendant.” Id.

#### B

[7] {¶ 16} Application of the R.C. 2305.19(A) saving statute is inappropriate in this situation. LaNeve contends that his improper method of service (certified mail rather than personal) constituted an “attempt to commence” an action within the meaning of R.C. 2305.19(A), thereby allowing the saving statute to extend the period of time for LaNeve to obtain service on China Shipping and ContainerPort.

{¶ 17} An attempt to commence an action as contemplated by R.C. 2305.19, however, must be pursuant to a method of service that is proper under the Civil Rules. Certified mail is an improper method of service under Civ.R. 15(D), which specifies that personal service is the only method by which a fictitious, now identified, defendant may be served.

{¶ 18} LaNeve used certified mail to obtain service on China Shipping and ContainerPort. LaNeve never attempted, or \*\*30 obtained, personal service on either China Shipping or ContainerPort. Because LaNeve failed under the Rules of Civil Procedure to properly attempt to commence the action against these defendants, the R.C. 2305.19(A) saving statute is inapplicable.

{¶ 19} This is not to say that the saving statute cannot be applied to a plaintiff's attempt to commence an action. However, this is not a situation in which LaNeve attempted personal service on China Shipping or ContainerPort but was unable to perfect it. Rather, the only method of service attempted or obtained by LaNeve, in contravention of the specific requirements of Civ.R. 15(D), was by certified mail.

{¶ 20} Thus, because Civ.R. 15(D) specifies that personal service is the only method by which a formerly fictitious, now identified, defendant may be served, and LaNeve did not attempt to comply with this rule, LaNeve failed to file his \*329 amended complaint within the applicable statute of limitations, and his action is time-barred.

#### IV

[8] {¶ 21} We acknowledge that the spirit of the Civil Rules is to resolve cases upon their merits and not on pleading deficiencies. See, e.g., *Patterson v. V & M Auto Body* (1992), 63 Ohio St.3d 573, 577, 589 N.E.2d 1306; *Peterson v. Teodosio* (1973), 34 Ohio St.2d 161, 175, 63 O.O.2d 262, 297 N.E.2d 113. Civ.R. 1(B) further requires that the Civil Rules are to be applied “to effect just results,” and “[p]leadings are simply an end to that objective.” *Peterson*, at 175. Nevertheless, this appeal does not involve a defective pleading with a claim failing because of noncompliance with a certain prescribed, technical rule. See, e.g., *Iacono v. Anderson Concrete Corp.* (1975), 42 Ohio St.2d 88, 92, 71 O.O.2d 66, 326 N.E.2d 267 (describing Ohio's Civil Rules as establishing “notice pleading,” which supports pleading constructions allowing for substantial justice).

[9][10] {¶ 22} Rather, the issue presented in this case is one of a failure to perfect service, which ultimately affects whether a court has personal jurisdiction over a defendant. The obligation to perfect service of process is placed only on the plaintiff, and the lack of jurisdiction arising from want of, or defects in, process or in the service thereof is ground for reversal. *Gliozzo v. Univ. Urologists of Cleveland, Inc.*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 16 (discussing the plaintiff's obligation to perfect service); *Ohio Elec. Ry. Co. v. United States Express Co.* (1922), 105 Ohio St. 331, 345–346, 1 Ohio Law Abs. 12, 137 N.E. 1 (discussing the effect of the failure to obtain service). Similarly, it is an established principle that actual knowledge of a lawsuit's filing and lack of prejudice resulting from the use of a le-

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gally insufficient method of service do not excuse a plaintiff's failure to comply with the Civil Rules. *Maryhew v. Yova* (1984), 11 Ohio St.3d 154, 157, 11 OBR 471, 464 N.E.2d 538; *Haley v. Hanna* (1915), 93 Ohio St. 49, 52, 112 N.E. 149.

[11][12] {¶ 23} In this regard, the Civil Rules are not just a technicality, and we may not ignore the plain language of a rule in order to assist a party who has failed to comply with a rule's specific requirements. *Gliozzo*, 114 Ohio St.3d 141, 2007-Ohio-3762, 870 N.E.2d 714, ¶ 16. The Civil Rules are a mechanism that governs the conduct of all parties equally. *Id.*

{¶ 24} Based on the foregoing, we resolve the issues presented in this appeal by holding that Ohio's R.C. 2305.19(A) saving statute is inapplicable to an action that was not commenced pursuant to the specific requirements of Civ.R. 15(D), so as to allow an amendment to relate back to the \*\*31 date of the original complaint \*330 under Civ.R. 15(C) and Civ.R. 3(A). Therefore, we reverse the judgment of the court of appeals.

Judgment reversed.

MOYER, C.J., and LUNDBERG STRATTON,  
O'CONNOR, O'DONNELL, and LANZINGER, JJ.,  
concur.  
PFEIFER, J., dissents.

Ohio,2008.

LaNeve v. Atlas Recycling, Inc.

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Court of Appeals of New York.  
 Ralph MACCHIA, Appellant,  
 v.  
 Salvatore RUSSO, Respondent, et al., Defendant.

July 10, 1986.

Action was brought to recover for injuries sustained in automobile accident. The Supreme Court, Special Term, Queens County, Buschmann, J., denied motion to dismiss. The Supreme Court, Appellate Division, 115 A.D.2d 595, 496 N.Y.S.2d 256, reversed. Permission to appeal was granted. The Court of Appeals held that delivery of summons to defendant's son outside family house when son entered house and gave summons to father, was not valid personal service.

Affirmed.

West Headnotes

**[1] Process 313 ↪ 153**

313 Process

313III Defects, Objections, and Amendment  
 313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

Service of process on defendant's son outside family home, with son shortly thereafter entering home and giving summons to father, was not valid service, notwithstanding that defendant was not prejudiced or that process server, who was accompanied by plaintiff, may have acted reasonably. McKinney's CPLR 308, subd. 1.

**[2] Process 313 ↪ 153**

313 Process

313III Defects, Objections, and Amendment  
 313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

In challenge to service of process, fact that defendant has received prompt notice of the action is of no moment; notice received by means other than those authorized by statute does not bring a defendant within jurisdiction of the court. McKinney's CPLR 308, subds. 1, 2.

\*593 \*\*\*592 \*\*681 Jeffrey J. Ellis, New York City, for appellant.

Michael Conforti, New York City, for respondent.

**OPINION OF THE COURT**

PER CURIAM.

Delivery of a summons to defendant's son outside his house, after which the son goes into the house and gives the summons to his father, is not valid service on defendant pursuant to CPLR 308(1).

[1] Plaintiff instituted this action for damages arising out of injuries incurred on February 27, 1975 while he was a passenger in defendant's car. Nearly three years later, on February 15, 1978, a process server—accompanied by plaintiff—went to the home of defendant, Salvatore Russo, to serve him with a summons. Upon arrival, the process server approached John Russo (Salvatore's son), who was outside the house washing a car. The process server said either “Mr. Russo?” or “Sal Russo?”,<sup>FN\*</sup> and handed John the summons. John Russo walked to the car in which plaintiff was seated, inquired of plaintiff's

health, and asked what the papers were. The process server told him to read them and drove off with plaintiff. John then went into the house and handed the papers to his father.

FN\* John testified that he was asked “Mr. Russo?”, and answered “Yes”, at which point he was handed a paper. The process server testified he said “Sal Russo?” and John made no answer. The courts below made no finding on this issue.

Upon defendant's motion for summary judgment dismissing the complaint for inadequate service, Special Term ruled that service on defendant had been effected, relying on \*594 *Pitagno v. Staiber*, 53 Misc.2d 858, 280 N.Y.S.2d 178. The Appellate Division, 115 A.D.2d 595, 496 N.Y.S.2d 256, reversed and dismissed the complaint on the ground that delivery of a summons to the wrong person does not confer jurisdiction over defendant, even though the summons shortly thereafter comes into the possession of the party to be served, citing *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 291 N.Y.S.2d 328, 238 N.E.2d 726. We granted leave to appeal and now affirm.

None of the three grounds tendered by plaintiff in support of service has merit.

First, plaintiff urges that delivery to defendant was sufficiently close in time and space to the initial delivery to his son to constitute valid service under CPLR 308(1). The Legislature in CPLR 308 has provided a plaintiff with a range of methods for effecting personal service upon a natural person (see, *Feinstein v. Bergner*, 48 N.Y.2d 234, 239–240, 422 N.Y.S.2d 356, 397 N.E.2d 1161). Where plaintiff chooses to make service by personal delivery to defendant the statutory requirements could not be plainer: service must be made “by \*\*\*593 delivering the summons within the state to the person to be served” (CPLR 308[1]). While the Appellate Division has in certain

circumstances sustained service where delivery initially was made to the wrong person (see, *Daniels v. Eastman*, 87 A.D.2d 882, 449 N.Y.S.2d 538; *Conroy v. International Term. Operating Co.*, 87 A.D.2d 858, 449 N.Y.S.2d 294; *Green v. Morningside Hgts. Hous. Corp.*, 13 Misc.2d 124, 177 N.Y.S.2d 760, *affd.* 7 A.D.2d 708, 180 N.Y.S.2d 104), in *Espy v. Giorlando*, 56 N.Y.2d 640, 450 N.Y.S.2d 786, 436 N.E.2d 193, this \*\*682 court refused to recognize delivery of process to another person as constituting personal delivery to defendant. As we stated: “We see no reason to extend the clear and unambiguous meaning of CPLR 308 (subd 1).” ( *Id.*, 56 N.Y.2d at p. 642, 450 N.Y.S.2d 786, 436 N.E.2d 193.) Thus, plaintiff's first contention must fail.

Second, citing *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 115, 291 N.Y.S.2d 328, 238 N.E.2d 726, *supra*, plaintiff argues that service should be validated because “the process server has acted reasonably”. *McDonald* was decided before the enactment of CPLR 308(2), which permits service to be made upon an individual by leaving a copy of the summons with a person other than the named defendant. Given this alternative, “any consideration of whether due diligence was or was not used in an effort to make delivery to [defendant] in person is irrelevant.” ( *duPont, Glore Forgan & Co. v. Chen*, 41 N.Y.2d 794, 797, 396 N.Y.S.2d 343, 364 N.E.2d 1115.) Whether a narrow exception to the requirements of CPLR 308(1) may be made in situations where a process server acts reasonably in the face of misrepresentations regarding the identity or authority\*595 of the person served is a question we do not reach, particularly in view of plaintiff's presence at the time the summons was delivered to defendant's son (see, *Bossuk v. Steinberg*, 58 N.Y.2d 916, 460 N.Y.S.2d 509, 447 N.E.2d 56; and *Bradley v. Musacchio*, 94 A.D.2d 783, 463 N.Y.S.2d 28).

[2] Finally, plaintiff's contention that defendant has not been prejudiced, and therefore service should be upheld, must also be rejected. In a challenge to

service of process, the fact that a defendant has received prompt notice of the action is of no moment (*see, e.g., De Zego v. Donald F. Bruhn, M.D., P.C.*, 67 N.Y.2d 875, 501 N.Y.S.2d 801, 492 N.E.2d 1217). Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court (*see, Feinstein v. Bergner*, 48 N.Y.2d 234, 241, 422 N.Y.S.2d 356, 397 N.E.2d 1161; *McDonald v. Ames Supply Co.*, 22 N.Y.2d 111, 115, 291 N.Y.S.2d 328, 238 N.E.2d 726, *supra* ).

Accordingly, the order of the Appellate Division should be affirmed, with costs.

WACHTLER, C.J., and MEYER, SIMONS, KAYE, ALEXANDER, TITONE and HANCOCK, JJ., concur in Per Curiam opinion.

On review of submissions pursuant to section 500.4 of the Rules of the Court of Appeals (22 NYCRR 500.4), order affirmed, with costs.

N.Y., 1986.

*Macchia v. Russo*

67 N.Y.2d 592, 496 N.E.2d 680, 505 N.Y.S.2d 591

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C

Court of Appeals of Georgia, Division No. 1.  
Ella Mae MAHONE  
v.  
MARSHALL FURNITURE COMPANY.

No. 53665.  
May 9, 1977.

Defendant against whom default judgment had been entered in a suit on open account filed motion to set aside the judgment on the ground of lack of personal jurisdiction. The Civil Court, Bibb County, J. Douglas Carlisle, J., denied the motion, and appeal was taken. The Court of Appeals, Bell, C. J., held that because the baby-sitter with whom the summons and complaint had been left did not reside at defendant's apartment, there was a failure to obtain lawful service and, therefore, the trial court lacked jurisdiction over defendant and the default judgment was void.

Reversed.

West Headnotes

[1] Process 313 ↪ 79

313 Process  
313II Service  
313II(B) Substituted Service  
313k76 Mode and Sufficiency of Service  
313k79 k. Leaving Copy with Member  
of Family or Other Person. Most Cited Cases

Process 313 ↪ 153

313 Process

313III Defects, Objections, and Amendment  
313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

Where baby-sitter with whom summons and complaint was left was not a resident of defendant's apartment, there was a failure to obtain lawful service of process and, therefore, trial court lacked jurisdiction over defendant and default judgment thereafter entered in suit on open account was void. Code, § 81A-104(d)(7).

[2] Process 313 ↪ 153

313 Process  
313III Defects, Objections, and Amendment  
313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

Fact that defendant acquired knowledge of pending suit against her did not cure defective service of process. Code, § 81A-104(d)(7).

**\*\*673 \*243** Willie Abrams, Macon, for appellant.

J. Alton Gladin, Macon, for appellee.

**\*242** BELL, Chief Judge.

In this suit on open account the summons and complaint were served by leaving a copy at defendant's apartment with a Mary Lue Hankerson. Defendant failed to file a timely answer and a judgment by default was entered. Thereafter defendant filed a motion to set aside the judgment on the ground of lack of personal jurisdiction. In a supporting affidavit defendant averred that Miss Hankerson was the babysitter for defendant's three minor children and a nonresident of her household. The trial court in denying the motion recited that the babysitter testified

at the hearing that she placed the summons and complaint on defendant's dresser and notified defendant of that fact on the day of service. Held:

[1][2] Section 4(d)(7) of the Georgia Civil Practice Act (Code Ann. s 81A-104(d)(7)) requires, in pertinent part, that the person with whom the copy of the summons and complaint is left at the defendant's dwelling or usual place of abode be "of suitable age and discretion then residing therein." As it was uncontradicted that the babysitter was not residing with defendant, there was a failure to obtain lawful service. In the absence of lawful service or waiver, the court lacked jurisdiction over the defendant and the judgment was void. *Thompson v. Lagerquist*, 232 Ga. 75, 76, 205 S.E.2d 267. The fact that defendant acquired knowledge of the pending suit does not cure the defective service. *Hardwick v. Fry*, 137 Ga.App. 770, 225 S.E.2d 88.

Judgment reversed.

McMURRAY and SMITH, JJ., concur.

Ga.App. 1977.

*Mahone v. Marshall Furniture Co.*

142 Ga.App. 242, 235 S.E.2d 672

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681 F.3d 368  
United States Court of Appeals,  
District of Columbia Circuit.

John B. MANN, et al., Appellants  
v.  
David CASTIEL, et al., Appellees.

No. 10–7109. | Argued Feb. 14, 2012. | Decided June  
1, 2012.

**Synopsis**

**Background:** Owners and their two wholly-owned companies sued 31 defendants, alleging various violations of federal and state law, including racketeering, larceny, negligence, unjust enrichment, and unfair trade practices in connection with alleged satellite communications scheme. The United States District Court for the District of Columbia, Royce C. Lamberth, Chief Judge, 729 F.Supp.2d 191, dismissed without prejudice for failure to prove proper service of process on three defendants or to show cause therefor. Owners appealed.

**Holdings:** The Court of Appeals, Rogers, Circuit Judge, held that:

[1] service was not waived by defendants' acknowledgement of service;

[2] service was not waived by defendants' pleading;

[3] plaintiffs lacked good cause for untimely service; and

[4] discretionary extension of time to effect service was not warranted.

Affirmed.

West Headnotes (19)

[1] **Process**  
☞Nature and necessity in general

Service of process is fundamental to any procedural imposition on a named defendant.

Fed.Rules Civ.Proc.Rule 4(c), 28 U.S.C.A.

3 Cases that cite this headnote

[2] **Process**  
☞Nature and necessity in general

Under the federal rules enacted by Congress, federal courts lack the power to assert personal jurisdiction over a defendant unless the procedural requirements of effective service of process are satisfied. Fed.Rules Civ.Proc.Rule 4(c), 28 U.S.C.A.

5 Cases that cite this headnote

[3] **Process**  
☞Nature and necessity in general

Service of process is not only a means of notifying a defendant of the commencement of an action against him, but a ritual that marks district court's assertion of jurisdiction over the lawsuit. Fed.Rules Civ.Proc.Rule 4(c), 28 U.S.C.A.

2 Cases that cite this headnote

[4] **Federal Civil Procedure**  
☞Process or notice to sustain judgment

A judgment is void where the requirements for effective service of process have not been satisfied. Fed.Rules Civ.Proc.Rule 4(c), 28 U.S.C.A.

4 Cases that cite this headnote

[5] **Process**

Presumptions and burden of proof

Plaintiff has the burden to demonstrate that the procedure employed to deliver the papers satisfies the requirements of the relevant portions of the rule governing service of process. Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.

1 Cases that cite this headnote

[6]

Process

Nature and necessity in general

Although the district court cannot be assured that it has jurisdiction over a defendant until the plaintiff files proof of service, the defendant becomes a party officially, and is required to take action in that capacity, upon service. Fed.Rules Civ.Proc.Rule 4(l)(1), 28 U.S.C.A.

Cases that cite this headnote

[7]

Federal Civil Procedure

Time for Pleading

Process

Return of Proof of Service in General

A defendant must answer the complaint within 21 days after being served, even if the plaintiff fails timely to prove service by filing a server's affidavit or files defective proof of service, for the district court may permit proof of service to be amended. Fed.Rules Civ.Proc.Rules 4(l)(3), 12(a)(1)(A), 28 U.S.C.A.

2 Cases that cite this headnote

[8]

Process

Nature and necessity in general

Process

Return of Proof of Service in General

The federal rule authorizing amendment of

proof of service may prevent a defendant from avoiding the obligation to respond to a summons or from filing an untimely answer on the grounds that the plaintiff delayed filing proof of service or filed defective proof of service that had to be amended, but the rule does not excuse the plaintiff's failure to file any proof of service; plaintiff must either make proof of service or come within an exception provided by the rule. Fed.Rules Civ.Proc.Rule 4(l)(3), 28 U.S.C.A.

1 Cases that cite this headnote

[9]

Federal Courts

Notice

A defendant's knowledge that a complaint has been filed is not sufficient to establish that the district court has personal jurisdiction over the defendant.

Cases that cite this headnote

[10]

Process

Waiver of defects and objections

Defendants' statement in their stay motion, acknowledging that they were served process in plaintiffs' lawsuit claiming violations of federal and state law by defendants' alleged satellite telecommunications scheme, was not sufficient to waive service of process, as would be required to bar defendants from challenging validity of service, since defendants' motion to dismiss questioned whether they were served by qualified person and noted with suspicion that plaintiffs failed to produce any returns of service sworn to by process server despite court order to do so. Fed.Rules Civ.Proc.Rule 4(c)(2), (d), (l)(3), (m), 28 U.S.C.A.

Cases that cite this headnote

[11]

Process

☞ Waiver of defects and objections

Defendants' failure to argue in their stay motion that service of process was defective, in plaintiffs' lawsuit claiming violations of federal and state law by defendants' alleged satellite telecommunications scheme, did not waive service of process under rule providing that defenses not included in responsive pleading or in motion raising defense were waived, since motion to stay was not responsive pleading addressing allegations of complaint or dispositive motion raising defense, but merely signaled that defendants wished to postpone disposition of case. Fed.Rules Civ.Proc.Rules 8(b), 12(b, h), 28 U.S.C.A.

Cases that cite this headnote

[12]

**Action**

- ☞ Stay of Proceedings
- Federal Civil Procedure**
- ☞ Extension

A motion to stay a case or for an extension of time to answer the complaint is not a defensive move under rule governing defenses. Fed.Rules Civ.Proc.Rule 12, 28 U.S.C.A.

Cases that cite this headnote

[13]

**Action**

- ☞ Stay of Proceedings
- Federal Civil Procedure**
- ☞ Extension
- Federal Courts**
- ☞ Waiver, estoppel, and consent

When a party seeks affirmative relief from a court, the party normally submits itself to the jurisdiction of the court with respect to the adjudication of claims arising from the same subject matter, but a motion to stay proceedings or to extend the time to answer signals only that a defendant wishes to postpone the court's disposition of a case.

Cases that cite this headnote

[14]

**Action**

- ☞ Stay of Proceedings

Far from indicating that a defendant intends to defend a suit on the merits, a motion to stay can serve to indicate the opposite, namely, that a defendant intends to seek alternative means of resolving a dispute, and avoid litigation in that jurisdiction.

Cases that cite this headnote

[15]

**Process**

- ☞ Time for service

Good cause for failure to meet deadline for service of process exists when some outside factor, rather than inadvertence or negligence, prevented service, such as a defendant's intentional evasion of service, or the plaintiff proceeds in forma pauperis and was entitled to rely on the United States marshal or deputy marshal to effect service. Fed.Rules Civ.Proc.Rule 4(m), 28 U.S.C.A.

4 Cases that cite this headnote

[16]

**Process**

- ☞ Time for service

Good cause for failing to meet deadline for service of process means a valid reason for delay. Fed.Rules Civ.Proc.Rule 4(m), 28 U.S.C.A.

Cases that cite this headnote

[17]

**Process**

⌚ Time for service

Plaintiffs' argument that postponing their lawsuit against defendants until close of bankruptcy proceedings in which defendants were allegedly involved was in interests of all parties and judicial economy did not provide good cause for extending deadline for service of process in plaintiffs' lawsuit claiming that defendants' alleged satellite telecommunications scheme violated federal and state law, since it was unclear whether any defendants who had not been served process were involved in bankruptcy proceeding. Fed.Rules Civ.Proc.Rule 4(m), 28 U.S.C.A.

identify any statute of limitations that would bar refiling suit, plaintiffs were not diligent in correcting service deficiencies, and plaintiffs were not typical unsophisticated pro se litigants but instead were businessmen with extensive litigation experience and legal training and were notified of service requirements. Fed.Rules Civ.Proc.Rules 4(m), 6(b)(2), 28 U.S.C.A.

1 Cases that cite this headnote

Cases that cite this headnote

\*370 Appeal from the United States District Court for the District of Columbia (No. 1:09-cv-02137).

**Attorneys and Law Firms**

Robert B. Patterson, pro se, argued the cause for appellants. With him on the briefs was Ronald B. Patterson.

David G. Wilson argued the cause and filed the brief for appellees.

Before: HENDERSON, ROGERS and BROWN, Circuit Judges.

**Opinion**

Opinion for the Court by Circuit Judge ROGERS.

ROGERS, Circuit Judge:

**\*\*39** On the basis of Rule 4(m) of the Federal Rules of Civil Procedure, the district court dismissed plaintiffs' case without prejudice for failure to prove proper service of three defendants or to show cause therefor. *See Mann v. Castiel*, 729 F.Supp.2d 191, 202 (D.D.C.2010). On appeal, plaintiffs contend that this was error because their failure to timely file proof of service pursuant to Rule 4(l) did not invalidate good service pursuant to Rule 4(m); the three defendants waived any objections to service by failing to object in what plaintiffs characterize as their initial responsive pleading; and it was an abuse of discretion to deny additional time to effect service on other defendants.

[18] **Federal Civil Procedure**

⌚ Process, defects in

Whether the district court's exercise of its discretion to extend the time for effecting and filing proof of service, even if plaintiff fails to show good cause, is cabined by the requirement that excusable neglect be found or by equitable factors, dismissal of a case for failing to timely serve process is appropriate when the plaintiff's failure to effect proper service is the result of inadvertence, oversight, or neglect, and dismissal leaves the plaintiff in the same position as if the action had never been filed. Fed.Rules Civ.Proc.Rules 4(m), 6(b)(2), 28 U.S.C.A.

4 Cases that cite this headnote

[19] **Process**

⌚ Time for service

Plaintiffs lacked any cause based on equitable factors or excusable neglect for failing to timely effect service of process, as required for discretionary extension of deadline for service in their lawsuit claiming that defendants' alleged satellite telecommunications scheme violated federal and state law, since plaintiffs failed to

\*371 \*\*40 Because plaintiffs failed to demonstrate a waiver by defendants pursuant to Rule 4, they offer no basis on which this court can conclude that the district court clearly erred in finding plaintiffs failed to prove proper service. Plaintiffs rely on defendants' acknowledgment of being served without considering defendants' suggestion of improper service. Plaintiffs also confuse defendants' motion for a stay of the case, and to dismiss the case in its entirety, with a responsive pleading joining issue with plaintiffs' claims. The record further demonstrates plaintiffs failed to show cause, much less good cause, for their failure to effect timely service and thus the district court acted within its discretion in denying additional time to effect service. Accordingly, we affirm the dismissal of the case without prejudice.

## I.

On November 13, 2009, John Mann, Robert Patterson, and their two wholly owned companies sued 31 defendants alleging various violations of federal and state law, including racketeering, larceny, negligence, unjust enrichment, and unfair trade practices in connection with defendants' involvement in the satellite communications industry. Complaint ¶¶ 199–382; see *Ellipso, Inc. v. Mann, et al.*, No. 1:05–cv–01186 (D.D.C.2008). On March 9, 2010—116 days after the complaint was filed—the district court notified plaintiffs of the requirements of Rule 4(m) and ordered them to file proof of service by March 22, 2010 or to “show cause why this case should not be dismissed.” Order, Mar. 9, 2010.

On February 12, 2010, three defendants—David Castiel, Cameran Castiel, and Ambassador (Ret.) Gerald Helman—moved for a stay of the case pending the conclusion of a pending bankruptcy proceeding, *In re Ellipso, Inc.*, No. 1:09–00148 (Chap.11) (Bankr.D.C.2009). They acknowledged that summonses had been issued for some defendants and that they had been “served” in January 2010. Defs.’ Mot. for Stay or, Alternatively, Mot. for Enlargement of Time in which to File Answer (“Stay Motion”) ¶ 6 (Feb. 12, 2010). On March 25, 2010, plaintiffs belatedly responded to the district court’s order, stating that both Castiels, Ambassador Helman, and a fourth defendant had been served, and requesting a 60–day extension to effect service on the remaining defendants; they provided no proof of service or explanation for their tardy response. Pls.’ Resp. to Court’s Order Concerning Service of Process Entered Mar. 12, 2010 (“Response”) ¶¶ 1, 8 (Mar. 25, 2010). On April 7, 2010, the three defendants moved to dismiss the case pursuant to Rule 4(m). They

acknowledged receiving the summons and a copy of the complaint from “some person” but questioned whether they had been properly served, noting that “[n]o proofs of service have been submitted as required by ... [the] March 9 Order,” and that plaintiffs had failed, “even at this late date,” to produce returns of service sworn to by a process server. Jt. Mot. of Defs. to Reject Pls.’ Late Resp. to Court’s Order Concerning Service of Process Entered Mar. 12, 2010 and to Dismiss Action (“Motion to Dismiss”) ¶¶ 21–22 (Apr. 7, 2010). Plaintiffs did not file a response to the Motion to Dismiss.

The district court dismissed plaintiffs’ case without prejudice pursuant to Rule 4(m) on August 3, 2010, because plaintiffs failed “to establish that any of the named defendants were served within 120 days of filing their complaint” or offer an adequate excuse for their failure to do so. *Mann*, 729 F.Supp.2d at 196. Declining to entertain plaintiffs’ untimely Response, the district court noted that they had not filed a \*\*41 \*372 motion for an extension of time to respond to the March 9, 2010 Order, despite two opportunities to do so. *Id.* at 195. Even if it had entertained the Response, the district court explained that “it would still find that plaintiffs have not carried their burden” to show “good cause” warranting an extension of time to effect service pursuant to Rule 4(m), *id.* at 197, or even “some cause” warranting a discretionary extension, *id.* at 200.

## II.

[1] [2] [3] [4] “Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant.” *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350, 119 S.Ct. 1322, 143 L.Ed.2d 448 (1999). Under the federal rules enacted by Congress, federal courts lack the power to assert personal jurisdiction over a defendant “unless the procedural requirements of effective service of process are satisfied.” *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 514 (D.C.Cir.2002); see *Omni Capital Int’l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104, 108 S.Ct. 404, 98 L.Ed.2d 415 (1987); *Miss. Publ’g Corp. v. Murphree*, 326 U.S. 438, 444–45, 66 S.Ct. 242, 90 L.Ed. 185 (1946). Service is therefore not only a means of “notifying a defendant of the commencement of an action against him,” but “a ritual that marks the court’s assertion of jurisdiction over the lawsuit.” *Okl. Radio Assocs. v. FDIC*, 969 F.2d 940, 943 (10th Cir.1992). Consequently, courts have “uniformly held ... a judgment is void where the requirements for effective service have not been satisfied.” *Combs v. Nick*

*Garin Trucking*, 825 F.2d 437, 442 & n. 42 (D.C.Cir.1987) (collecting cases); *cf. Cambridge Holdings Grp., Inc. v. Federal Ins. Co.*, 489 F.3d 1356, 1360 (D.C.Cir.2007).

Rule 4(c) of the Federal Rules of Civil Procedure provides, in relevant part, that “[a] summons must be served with a copy of the complaint. The plaintiff is responsible for having the summons and complaint served within the time allowed by Rule 4(m).” Rule 4(m) provides, in relevant part:

If a defendant is not served within 120 days after the complaint is filed, the court—on motion or on its own after notice to the plaintiff—must dismiss the action without prejudice against that defendant or order that service be made within a specified time. But if the plaintiff shows good cause for the failure, the court must extend the time for service for an appropriate period.

FED.R.CIV.P. 4(m). Rule 4 further specifies who may make service, *see* FED.R.CIV.P. 4(c)(2) & (3), and how a waiver of service may be proved, *see* FED.R.CIV.P. 4(d). “Unless service is waived, proof of service must be made to the [district] court.” FED.R.CIV.P. 4(l)(1). “[P]roof must be by the server’s affidavit,” unless service is made by the United States marshal (or deputy marshal). *Id.*

<sup>[5]</sup> By the plain text of Rule 4, the plaintiff has the burden to “demonstrate that the procedure employed to deliver the papers satisfies the requirements of the relevant portions of Rule 4.” 4A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1083 (3d ed. 2002 & Supp. 2012); *see Light v. Wolf*, 816 F.2d 746, 751 (D.C.Cir.1987); *Grand Entm’t Grp., Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 488 (3d Cir.1993); *Aetna Bus. Credit, Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434, 435 (5th Cir.1981). Seeking to demonstrate compliance with Rule 4, plaintiffs rely on Rule 4(l)(3) and defendants’ waiver by pleading as well as cause for delay in effecting proof of service \*\*42 \*373 None of their contentions is persuasive.

#### A.

<sup>[6]</sup> <sup>[7]</sup> Rule 4(l)(3) provides: “Failure to prove service does not affect the validity of service. The court may permit

proof of service to be amended.” FED.R.CIV.P. 4(l)(3). Although the district court cannot be assured that it has jurisdiction over a defendant until the plaintiff files proof of service, the defendant “becomes a party officially, and is required to take action in that capacity ... upon service.” *Murphy Bros.*, 526 U.S. at 350, 119 S.Ct. 1322. That is, a defendant must answer the complaint “within 21 days after being served,” FED.R.CIV.P. 12(a)(1)(A), even if the plaintiff fails timely to prove service by filing a server’s affidavit or files defective proof of service, for the district court “may permit proof of service to be amended,” FED.R.CIV.P. 4(l)(3); *see O’Brien v. R.J. O’Brien & Assocs., Inc.*, 998 F.2d 1394, 1402 (7th Cir.1993) (interpreting FED.R.CIV.P. 4(g), the precursor of current Rule 4(l)).

<sup>[8]</sup> Plaintiffs offered no evidence to the district court to show that the three defendants had been served, much less properly served. Rule 4(l)(3) may prevent a defendant from avoiding the obligation to respond to a summons or from filing an untimely answer on the grounds that the plaintiff delayed filing proof of service or filed defective proof of service that had to be amended, but it does not excuse the plaintiff’s failure to file any proof of service. *See* WRIGHT & MILLER § 1130. The plaintiff must either make proof of service or come within an exception provided by the rule.

#### B.

Rule 4(d) contains a procedure for establishing waiver of service of a summons. It requires the plaintiff to make an unequivocal request for a waiver in writing, the defendant to return the waiver form within a reasonable time, and the plaintiff to file the waiver. The plaintiff must “notify ... a defendant that an action has been commenced and request that the defendant waive service of a summons.” FED.R.CIV.P. 4(d)(1). The notice and waiver request must be accompanied by “two copies of a waiver form.” FED.R.CIV.P. 4(d)(1)(C). If the defendant signs and timely returns the waiver form and the plaintiff files it, “proof of service is not required” and it is “as if a summons and complaint had been served.” FED.R.CIV.P. 4(d)(4). Waiving service of a summons does not waive any objection to personal jurisdiction or to venue. FED.R.CIV.P. 4(d)(5).

<sup>[9]</sup> <sup>[10]</sup> Plaintiffs do not claim to have followed this waiver procedure, and a defendant’s knowledge that a complaint has been filed is not sufficient to establish that the district court has personal jurisdiction over the defendant. *See, e.g., Bridgeport Music, Inc. v. Rhyme Syndicate Music,*

376 F.3d 615, 623 (6th Cir.2004); *McMasters v. United States*, 260 F.3d 814, 817 (7th Cir.2001). Instead, plaintiffs rely on the defendants' statement in their Stay Motion that they had been "served." The question presented is whether this acknowledgment sufficed to show a waiver and barred the three defendants from challenging the validity of service by moving for dismissal pursuant to Rule 4(m). Assuming a waiver could be accomplished other than as prescribed in Rule 4(d), *cf.* FED.R.CIV.P. 12(h), the district court properly concluded plaintiffs failed to show a waiver of service pursuant to Rule 4 by the three defendants. *See Mann*, 729 F.Supp.2d at 196.

\*374 \*\*43 First, in focusing on defendants' Stay Motion, plaintiffs ignore defendants' Motion to Dismiss in which they questioned whether they had been properly served. In that motion defendants clarified that while they had received a copy of the summons and complaint from "some person," it was "unknown" whether this person was qualified to serve process. Stay Motion ¶ 6; *see* FED.R.CIV.P. 4(c)(2). Further, defendants argued that it was "very suspicious" that plaintiffs "even at this late date and under Court order, did not produce any returns of service sworn to by a process server." Stay Motion ¶ 6.

<sup>[11]</sup> <sup>[12]</sup> <sup>[13]</sup> <sup>[14]</sup> Second, plaintiffs' alternative suggestion of waiver is based on a flawed premise. Plaintiffs maintain the three defendants waived any objections to the service of process by failing to argue that the service of process was defective in their "initial responsive pleading": the Stay Motion. Appellants' Br. 12. Plaintiffs mischaracterize the Stay Motion. That motion was neither a responsive pleading, such as an answer or third party complaint addressing the allegations of the complaint, *see* FED.R.CIV.P. 8(b); WRIGHT & MILLER § 1348, nor a dispositive motion raising a defense listed in Rule 12(b), *see Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir.1983) (citing FED.R.CIV.P. 12(h)). As our sister circuits explain, a motion to stay a case or for an extension of time to answer the complaint is hardly a "defensive move" under Rule 12. *See Conrad v. Phone Directories Co., Inc.*, 585 F.3d 1376, 1383 n. 2 (10th Cir.2009); *Aetna Life Ins. Co. v. Alla Med. Serv., Inc.*, 855 F.2d 1470, 1475 (9th Cir.1988); *see generally* WRIGHT & MILLER § 1386. It is true that "when 'a party seeks affirmative relief from a court, it normally submits itself to the jurisdiction of the court with respect to the adjudication of claims arising from the same subject matter,'" *PaineWebber Inc. v. Chase Manhattan Private Bank*, 260 F.3d 453, 460–61 (5th Cir.2001) (quoting *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 443 (3d Cir.1999)), but a motion to stay proceedings (or to extend the time to answer) "signals only that a defendant

wishes to postpone the court's disposition of a case. Far from indicating that a defendant intends to defend a suit on the merits, a motion to stay can serve to indicate the opposite—that a defendant intends to seek alternative means of resolving a dispute, and avoid litigation in that jurisdiction." *Gerber v. Riordan*, 649 F.3d 514, 519 (6th Cir.2011); *see PaineWebber*, 260 F.3d at 461; *United States v. 51 Pieces of Real Property*, 17 F.3d 1306, 1314 (10th Cir.1994).

### C.

Plaintiffs' contentions that the district court abused its discretion in denying an extension of time to effect service on other defendants fare no better.

<sup>[15]</sup> <sup>[16]</sup> 1. Rule 4(m) provides that the district court "must extend" the 120-day deadline for service "if the plaintiff shows good cause for the failure" to meet the deadline. FED.R.CIV.P. 4(m). Good cause exists "when some outside factor ... rather than inadvertence or negligence, prevented service," *Lepone–Dempsey v. Carroll Cnty. Com'rs*, 476 F.3d 1277, 1281 (11th Cir.2007), for example, a defendant's intentional evasion of service, *see* H.R. 7152 Amendments to Federal Rules of Civil Procedure, 1982 U.S.Code Cong. & Admin. News 4434, 4446 n.25, or the plaintiff proceeds *in forma pauperis* and was entitled to rely on the United States marshal (or deputy marshal) to effect service, *see Dumaguin v. Sec'y of Health and Human Servs.*, 28 F.3d 1218, 1221 (D.C.Cir.1994); *Rance v. Rocksolid Granit USA, Inc.*, 583 F.3d 1284, 1287–88 (11th Cir.2009) (collecting cases). In *Moore v. Agency for International Development*, 994 F.2d 874, 877 (D.C.Cir.1993), this court concluded a *pro se* plaintiff, who had made two attempts to serve the defendants shortly after filing the complaint but had done so improperly, had shown "good cause" where the defendants long delayed in responding to the complaint and were represented by counsel who repeatedly asked for extensions of time, causing the *pro se* plaintiff to "no doubt believe[ ] the defendants had been properly served." In sum, "[g]ood cause means a valid reason for delay." *Coleman v. Milwaukee Bd. of Sch. Dirs.*, 290 F.3d 932, 934 (7th Cir.2002).

<sup>[17]</sup> Plaintiffs offer no "valid reason" but suggest an institutional consideration, namely that the district court should have granted them additional time because postponing this litigation until the close of the bankruptcy proceedings was in the interests of all parties and judicial economy. Apparently plaintiffs filed the instant lawsuit as a protective measure in the event their creditor claims

were not resolved to their satisfaction in bankruptcy and so made minimal, and ultimately insufficient, efforts to preserve their right to continue to litigate their district court claims based on the November 13, 2009 complaint. In any event, the institutional argument appeared only in their untimely Response, which the district court refused to consider in the absence of a request in their Response or in a separate motion for an extension of time to respond to the March 9, 2010 Order. *Mann*, 729 F.Supp.2d at 195. Although “[i]n the absence of any motion for an extension, the trial court ha[s] no basis on which to exercise its discretion” to grant an extension after a filing deadline has passed, *Smith v. District of Columbia*, 430 F.3d 450, 457 (D.C.Cir.2005); see FED.R.CIV.P. 6(b), we need not decide if this principle applies here, where a rule mandated that the district court exercise its discretion. The district court in fact considered the arguments in the Response and found them to lack merit.

In their Response, plaintiffs claimed that nine corporate defendants involved in the ongoing bankruptcy proceeding would be served “promptly” after that proceeding concluded “within the next few weeks.” Response ¶ 2. The district court found that it was unclear any of these nine defendants were involved in the bankruptcy proceeding. *Mann*, 729 F.Supp.2d at 197. On appeal, plaintiffs do not challenge this finding. Plaintiffs also claimed in their Response that summonses had been issued for four other defendants. Response ¶ 6. The district court noted that the case docket showed that a summons had been issued for only one of the four. *Mann*, 729 F.Supp.2d at 197. Again, plaintiffs do not challenge this finding on appeal. Rather than convince the district court that plaintiffs had good cause for failing to effect service, their Response unsurprisingly convinced the district court “that plaintiffs have been careless at best or untruthful at worst.” *Id.* Plaintiffs thus can show no abuse of discretion by the district court in denying a extension of time on the basis of good cause shown.

2. The Advisory Committee note for Rule 4(m) instructs that the district court has discretion to extend the time for effecting and filing proof of service even if the plaintiff fails to show “good cause.” FED.R.CIV.P. 4, Advisory Committee Note to 1993 Amendments, Subdivision (m). Other circuits to consider the issue have held, with one exception, that Rule 4(m) allows the district court to grant discretionary extensions. See *Coleman*, 290 F.3d at 934; *Horenkamp v. Van Winkle & Co., Inc.*, 402 F.3d 1129, 1132 (11th Cir.2005) (collecting cases); but see *Mendez v. Elliot*, 45 F.3d 75, 78 (4th Cir.1995); see \*\*45 \*376 generally WRIGHT & MILLER § 1137. They relied on the textual reference in Rule 4(m) to the district court’s

ability to “order that service be made within a specified time,” FED.R.CIV.P. 4(m), and the observation of the Supreme Court in *Henderson v. United States*, 517 U.S. 654, 116 S.Ct. 1638, 134 L.Ed.2d 880 (1996), that under Rule 4(m) district courts have “discretion to enlarge the 120–period ‘even if there is no good cause shown,’ ” *id.* at 662–63, 116 S.Ct. 1638 (quoting FED.R.CIV.P. 4, Advisory Committee Note to 1993 Amendments, Subdivision (m)); see *id.* at 658 n. 5, 116 S.Ct. 1638. In view of this authority and in the absence of instruction from this court, the district court concluded that Rule 4(m) required it to consider whether it would grant, as a matter of discretion, an extension of time to effect service. In that regard, the district court observed “no hard list of considerable factors exist,” and looked to the Advisory Committee’s suggestions of equitable factors. *Mann*, 729 F.Supp.2d at 198.

[18] [19] Whether the district court’s exercise of its discretion pursuant to Rule 4(m) is cabined by Rule 6(b)(2)’s requirement that “excusable neglect” be found, or by equitable factors, compare *Turner v. City of Taylor*, 412 F.3d 629, 650 (6th Cir.2005), with *United States v. McLaughlin*, 470 F.3d 698, 700 (7th Cir.2006); see generally WRIGHT & MILLER, § 1166, dismissal of a case pursuant to Rule 4(m) is appropriate when the plaintiff’s failure to effect proper service is the result of inadvertence, oversight, or neglect, see *Wei v. Hawaii*, 763 F.2d 370, 372 (9th Cir.1985), and dismissal leaves the plaintiff “in the same position as if the action had never been filed,” H.R. 7152 Amendments to Federal Rules of Civil Procedure, 1982 U.S.Code Cong. & Admin. News 4434, 4442. The district court found that plaintiffs had not shown that there was “some cause” for an extension of time on the grounds that the statute of limitations would bar refiling the complaint, their service deficiencies existed for only a limited period of time, or they were unsophisticated *pro se* litigants as to whom latitude should be given to correct their mistakes. *Mann*, 729 F.Supp.2d at 198–200. Plaintiffs fail to show the district court’s factual findings with respect to these equitable factors are clearly erroneous, see *Anderson v. Bessemer City*, 470 U.S. 564, 573–74, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); FED.R.CIV.P. 52(a)(6), or that the district court failed to consider a relevant factor, see *Kickapoo Tribe of Indians v. Babbitt*, 43 F.3d 1491, 1497 (D.C.Cir.1995), or that the district court otherwise abused its discretion in refusing to extend the time to effect service.

Specifically, the district court found that plaintiffs had failed to provide enough information to gauge the legitimacy of their concern that they would be unable to refile their complaint if it were dismissed. Plaintiffs stated

in their Response that they had filed their complaint “*inter alia*, because of statute of limitations considerations,” Response ¶ 7, but did not identify any particular statute of limitations that would bar refiling much less “which—if any—of their numerous claims would be time barred,” *Mann*, 729 F.Supp.2d at 199. Plaintiffs provide no further information on appeal. The district court also found that plaintiffs had not been diligent in correcting the service deficiencies; although alerted to their non-compliance with Rule 4(m) and the potential for dismissal of the case nearly five months earlier, plaintiffs had taken no action to remedy their non-compliance and had not responded to the Motion to Dismiss. *See id.* (citing D.D.C. LcvR 7(b)). (During oral argument in this court plaintiffs stated, for the first time, that they did not file proofs of service because the process server they \*\*46 \*377 hired using the website “Craigslist” had disappeared, Oral Arg. Tape 1:55–2:13, but offered no explanation for failing to proceed with a new process server or seek a Rule 4(d) waiver.) The district court further found that the

additional latitude it “typically affords *pro se* litigants” to correct defects in service of process was unwarranted; the two *pro se* plaintiffs had been notified of the requirements of Rule 4(m) and appeared “not [to] be typical, unsophisticated *pro se* litigants” but businessmen with extensive litigation experience, one of whom had formal legal training, and both of whom worked in tandem with counsel for the corporate plaintiffs. *Mann*, 729 F.Supp.2d at 199–200 (citing *Moore v. Agency for Int’l Dev.*, 994 F.2d 874, 876 (D.C.Cir.1993)).

Accordingly, we affirm the order dismissing the case without prejudice.

#### Parallel Citations

401 U.S.App.D.C. 37, 82 Fed.R.Serv.3d 931

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Court of Appeals of New York.

John J. McDONALD, Plaintiff,

v.

AMES SUPPLY CO., Inc., Defendant and  
Third-Party Plaintiff-Appellant, et al., Defendant,  
AEROSOL RESEARCH CO., Third-Party Defendant-  
Respondent.

May 16, 1968.

Product liability action, wherein defendant third-party plaintiff appealed from order of Appellate Division, Second Department, 27 A.D.2d 559, 275 N.Y.S.2d 1005, unanimously affirming order of Supreme Court, Kings County, at special referee's term, Meier Steinbrink, Special Referee, quashing the purported service of third-party summons and dismissing third-party complaint against foreign corporation for lack of personal jurisdiction. The Court of Appeals, Breitel, J., held that service of summons left with receptionist in building, in which defendant foreign corporation's salesman had office, was defective where receptionist was not an employee of corporation.

Order of Appellate Division affirmed.

#### West Headnotes

#### [1] Process 313 67

313 Process

313II Service

313II(A) Personal Service in General

313k67 k. Acceptance or acknowledgment of service. Most Cited Cases

Personal delivery of summons to wrong person does not constitute valid personal service even though summons shortly comes into possession of party to be served. CPLR 311.

#### [2] Corporations and Business Organizations 101 3266(1)

101 Corporations and Business Organizations

101XIII Foreign Corporations

101XIII(D) Actions by or Against Foreign Corporations

101k3262 Process

101k3266 On Whom Service May Be Made

101k3266(1) k. In general. Most Cited Cases  
(Formerly 101k668(4), 101k68(4))

Service of summons left with receptionist in building, in which defendant foreign corporation's salesman had office, was defective where receptionist was not an employee of corporation and complaint against foreign corporation must be dismissed for lack of personal jurisdiction. CPLR 301, 311.

\*\*\*329 \*\*726 \*111 B. Leo Schwarz and Marc Bazin, New York City, for appellant.

\*112 Richard J. Burke, New York City, and William R. Ahmuty, Jr., Rockville Centre, for respondent.

BREITEL, Judge.

In this product liability action, defendant third-party plaintiff Ames Supply Co. appeals from an order of the Appellate Division, Second Department, unanimously affirming an order of the Supreme Court, Kings County, by a Special Referee to hear and determine. The Special Referee quashed the purported

service of the third-party summons and dismissed the third-party complaint against Aerosol Research Co. for lack of personal jurisdiction, finding that Aerosol, a foreign corporation, was not doing business in the State and that service upon its New York-based employee had been defective. The Appellate Division unanimously affirmed, in a memorandum opinion, on \*113 the ground that the service of summons was faulty. The Appellate Division granted leave to appeal to this court.

Two issues are presented. First, whether the requirement of CPLR 311 that the summons be 'delivered' to a person authorized \*\*727 to receive service for a corporation is satisfied when the summons is left with a receptionist, not employed by the corporation, who later redelivers it to the proper person. Second, whether a foreign corporation does business in this State so as to subject it to general jurisdiction under CPLR 301 when it maintains an office in the State for its 'Eastern salesmanager,' who regularly solicits and negotiates orders for its goods. Since the service in this case was so clearly defective there is no need to reach the second question.[FN1]

FN1 See, however, *Elish v. St. Louis Southwestern Ry. Co.* (305 N.Y. 267, 112 N.E.2d 842); compare *Bryant v. Finnish Nat. Airline* (15 N.Y.2d 426, 260 N.Y.S.2d 625, 208 N.E.2d 439).

Plaintiff John J. McDonald was injured in 1961 when he inhaled chemical material discharged by a can of spray paint which he was using at work. The paint can had been sold to plaintiff's employer by defendant third-party plaintiff Ames Supply Co. The defective spray head \*\*\*330 which caused the accident had been manufactured by third-party defendant Aerosol. Plaintiff McDonald sued seller Ames, alleging negligence and breach of warranty, on October 9, 1961. On November 19, 1965 seller Ames served a summons and third-party notice and complaint upon the manufacturer Aerosol. Aerosol served no answer

or appearance to the third-party complaint and thus defaulted.

The actions reached trial on January 17, 1966. At that time the trial court severed the main action and the third-party action for purposes of trial. In the main action, plaintiff recovered \$20,000 against the seller Ames. After inquest on the default, Ames was awarded recovery over against manufacturer Aerosol. On January 17 (the date of trial) Aerosol obtained an order to show cause returnable January 19 in connection with its motion to dismiss the third-party complaint for lack of personal jurisdiction. Special Term stayed enforcement of the judgment against Aerosol and referred the motion to the Special Referee.

At a hearing before the Special Referee, conflicting testimony was presented concerning the manner of service upon Aerosol. \*114 Samuel M. Goldfarb, a professional process server, testified that he had handed the the summons and other papers to one Jack R. Schlossman, Aerosol's eastern sales manager stationed in New York. However, Mr. Schlossman also testified that the summons had been left with the building receptionist (not an Aerosol employee), who handed it to him when he returned to the office. This testimony was confirmed by the receptionist. Mr. Schlossman forwarded the summons and other papers served to Aerosol's main office in Illinois.

The Special Referee also took testimony concerning whether Aerosol was doing business in New York. Mr. Schlossman testified that he was Aerosol's 'Eastern salesmanager,' on a salaried basis, and represented the company in 'exploring with prospects and customers the eventual utilization' of the company's products. He received orders, looked them over, and transmitted them to the head office in Illinois. This activity had been conducted from a permanent office maintained by Aerosol in New York for 10 years. The office was listed in Aerosol's name on the building directory as well as in the Manhattan telephone di-

rectory. Aerosol was not, however, licensed to do business in New York.

The Special Referee found that the summons had in fact been left with the building receptionist, and concluded that the statutory requirement of personal delivery had not been fulfilled. This finding and conclusion, as already noted, were affirmed by the Appellate Division.

\*\*\*331 CPLR 311 provides that:

‘Personal service upon a corporation or governmental subdivision shall be made by delivering the summons as follows:

‘1. upon any domestic or foreign corporation, to an officer, director, managing\*\*728 or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service’.

Plaintiff contends that delivery was property effected when the receptionist handed the summons to Schlossman. However, this contention is contrary to well-established authority and to the policies underlying the requirement of personal delivery in the CPLR and the prior Civil Practice Act.

[1] Numerous authorities hold that personal delivery of a summons to the wrong person does not constitute valid personal \*115 service even though the summons shortly comes into the possession of the party to be served ( Clark v. Fifty Seventh Madison Corp., 13 A.D.2d 693, 213 N.Y.S.2d 849 app. dismd. 10 N.Y.2d 808, 221 N.Y.S.2d 509, 178 N.E.2d 225; Commissioners of State Ins. Fund v. Singer Sewing Mach. Co., 281 App.Div. 867, 119 N.Y.S.2d 802; Loeb v. Star & Herald Co., 187 App.Div. 175, 179, 175 N.Y.S. 412, 414; Beck v. North Packing & Provision Co., 159 App.Div. 418, 420—421, 144 N.Y.S. 602, 604—605; O’Connell v. Gallagher, 104 App.Div.

492, 493, 495, 93 N.Y.S. 643, 644, 645; Eisenhofer v. New Yorker Zeitung Pub. Co., 91 App.Div. 94, 86 N.Y.S. 438; contra, Erale v. Edwards, 47 Misc.2d 213, 262 N.Y.S.2d 44). A contrary rule would negate the statutory procedure for setting aside a defectively served summons, since the motion itself is usually evidence that the summons has been received (see Loeb v. Star & Herald Co., supra; Eisenhofer v. New Yorker Zeitung Pub. Co., supra). Contrary to seller Ames’ argument, it has been held that redelivery of a summons by the person to whom delivery was wrongly made does not constitute personal ‘delivery’ to the ultimate proper recipient ( B & J Bakery v. United States Fidelity & Guaranty Co., 21 A.D.2d 783, 250 N.Y.S.2d 562; Ziembecki v. Mott Improvement Corp., 18 A.D.2d 926, 238 N.Y.S.2d 202; Mecca v. Young, 133 Misc. 540, 233 N.Y.S. 169).

[2] Distinguishable are those cases in which the process server has acted reasonably in placing the summons within reach of the defendant, and, therefore, with ‘due diligence’ in fulfilling the statutory requirement of personal delivery (compare CPLR 308, subd. 3). In such cases, service is sustained even though the process server did not in fact hand the summons to the proper party. Thus, where the defendant resists service, it suffices to have the summons in his general vicinity (e.g., Buscher v. Ehrich, 12 A.D.2d 887, 209 N.Y.S.2d 941; \*\*\*332Chernick v. Rodriguez, 2 Misc.2d 891, 150 N.Y.S.2d 149; Levine v. National Transp. Co., 204 Misc. 202, 125 N.Y.S.2d 679; compare Green v. Morningside Hgts. Housing Corp., 13 Misc.2d 124, 125, 177 N.Y.S.2d 760, 761, affd. 7 A.D.2d 708, 180 N.Y.S.2d 104, where redelivery by the person wrongly served was upheld where it was ‘so close both in time and space that it can be classified as a part of the same act’, with Ives v. Darling, 210 App.Div. 521, 206 N.Y.S. 493.).[FN2] In all of these cases, the process server has acted reasonably and diligently in attempting to fulfill the statutory mandate and under circumstances\*116 bringing the questioned process within the purview of the person to be served. Consequently, upholding service in such

cases does not endanger the statutory scheme by encouraging careless service. In the instant case, on the other hand, there is no evidence of due diligence on the part of the process server. He left the summons with the building receptionist, while Mr. Schlossman was absent, without even ascertaining whether the receptionist was a company employee. To sustain such service would encourage carelessness, or worse, thus increasing the risk of default by parties\*\*729 who in fact fail to receive the summons.

FN2 Similarly, but more doubtfully, it has been held that where a process server reasonably mistakes the defendant's son for the defendant, personal delivery is effected when the son redelivers to the father ( Marcy v. Woodin, 18 A.D.2d 944, 237 N.Y.S.2d 402).

Accordingly, the order of the Appellate Division should be affirmed. with costs.

FULD, C.J., and BURKE, SCILEPPI, BERGAN, KEATING and JASEN JJ., concur.

Order affirmed.

N.Y. 1968.

McDonald v. Ames Supply Co.

22 N.Y.2d 111, 238 N.E.2d 726, 291 N.Y.S.2d 328

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936 F.2d 297, 60 USLW 2052, 19 Fed.R.Serv.3d 1406  
(Cite as: 936 F.2d 297)

**H**

United States Court of Appeals,  
Seventh Circuit.  
MID-CONTINENT WOOD PRODUCTS, INC.,  
Plaintiff-Appellee,  
v.  
Lawrence A. HARRIS, Defendant-Appellant.

No. 89-3571.  
Argued Sept. 13, 1990.  
Decided July 3, 1991.  
Rehearing and Rehearing In Banc Denied Sept. 13,  
1991.

Action was commenced to collect on note. Defendant filed motion for relief from judgment of default, claiming improper service. The United States District Court for the Northern District of Illinois, Charles P. Kocoras, J., denied motion, and defendant appealed. The Court of Appeals, Coffey, Circuit Judge, held that: (1) actual knowledge of existence of lawsuit was insufficient to confer personal jurisdiction in absence of valid service of process; (2) doctrine of substantial compliance did not extend to impropriety in delivery of summons and complaint; and (3) record did not support finding of evasion or inequitable conduct by defendant.

Reversed.

West Headnotes

**[1] Process 313**  **64**

313 Process  
313II Service  
313II(A) Personal Service in General  
313k64 k. Mode and sufficiency of service.

Most Cited Cases  
(Formerly 170Ak411)

Actual knowledge of existence of lawsuit is insufficient to confer personal jurisdiction over defendant in absence of valid service of process. Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.

**[2] Process 313**  **64**

313 Process  
313II Service  
313II(A) Personal Service in General  
313k64 k. Mode and sufficiency of service.

Most Cited Cases  
(Formerly 170Ak411)

Substantial compliance doctrine would not encompass any impropriety in delivery of summons and complaint, as opposed to some impropriety in form of summons and complaint, for purposes of determining whether service was adequate to confer personal jurisdiction. Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.

**[3] Process 313**  **82**

313 Process  
313II Service  
313II(B) Substituted Service  
313k76 Mode and Sufficiency of Service  
313k82 k. Mailing as constructive service. Most Cited Cases  
(Formerly 170Ak412)

Plaintiff's efforts to effect service on defendant did not substantially comply with service requirements, even assuming doctrine of substantial compliance encompassed improprieties in delivery of summons and complaint, where extent of plaintiff's

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efforts consisted of one certified mailing of summons and complaint to business address of defendant (which defendant denied receiving), and neither envelope containing summons and complaint nor return receipt evidencing delivery were ever returned, three attempts at personal service by private process server over four-day period at incorrect address, and noncertified mailing to same incorrect address. Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.

**[4] Process 313 ↪153**

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases  
(Formerly 170Ak532.1, 170Ak532)

Settlement discussions between attorneys for plaintiff and defendant could not save plaintiff from its failure to substantially comply with requirements for service of process. Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.

**[5] Process 313 ↪67**

313 Process

313II Service

313II(A) Personal Service in General

313k67 k. Acceptance or acknowledgment of service. Most Cited Cases  
(Formerly 170Ak532.1, 170Ak532)

**Process 313 ↪153**

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases  
(Formerly 170Ak532.1, 170Ak532)

Record did not support finding that defendant engaged in evasion or inequitable conduct in relation to plaintiff's failure to effect service of process, as would warrant any exception from usual strict compliance requirement, based upon repeated, faulty attempts at service of process by plaintiff and upon defendant's permitting his attorney to engage in settlement discussions. Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.

\*298 Roger Pascal, Michael L. Brody, Patricia J. Thompson, Schiff, Hardin & Waite, Chicago, Ill., for plaintiff-appellee.

Sean M. Sullivan, Arthur F. Radke, Ross & Hardies, Chicago, Ill., for defendant-appellant.

Before COFFEY, RIPPLE, and KANNE, Circuit Judges.

COFFEY, Circuit Judge.

Lawrence A. Harris appeals the district court's order denying his Rule 60(b)(4) motion to vacate and dismiss a default judgment on the grounds of improper service of process. We reverse.

**I. FACTS AND DISPOSITION BELOW**

Harris Plywood, Inc. ("Harris Plywood") purchased lumber from the plaintiff, Mid-Continent Wood Products, Inc. ("Mid-Continent") on three separate occasions between May and August of 1980. When Harris Plywood failed to make any payments on the three shipments, the parties entered into negotiations in October 1980 and Harris agreed that the amount due would bear interest at the rate of fourteen percent per annum and that payments would commence within a few weeks. After Harris Plywood failed to make any payments, Mid-Continent filed suit in April 1981 for breach of contract. The parties entered into negotiations for a second time and after these discussions proved fruitless, Mid-Continent filed a motion for a default judgment. On October 28,

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1981, the district court granted Mid-Continent's motion for a default judgment in *Mid-Continent Wood Products, Inc. v. Harris Plywood, Inc.* in the amount of \$28,544.75.<sup>FN1</sup> Instead of executing on the default judgment, Mid-Continent accepted a promissory note for the judgment amount from the defendant Lawrence Harris, President of Harris Plywood, in December of 1981. When Harris failed to pay the amount due, Mid-Continent filed this action to collect on Harris' promissory note.

FN1. Harris Plywood never challenged the October 28, 1981, default judgment against it or the service in that action.

Mid-Continent makes clear that (to state it mildly) it had a rather difficult time locating Harris and serving him with the complaint and summons. Initially, Mid-Continent attempted to serve Harris personally through a U.S. Marshal in December 1982. One month later on January 5, 1983, the marshal again attempted service by certified mail at Harris' place of employment, Superb Realty Corporation.<sup>FN2</sup> Harris denied receipt of this mailing.

FN2. Harris went to work for Superb Realty Corporation, 115-40 Dunkirk Street, St. Albans, New York, after Harris Plywood went out of business.

Mid-Continent states it next attempted service in May 1983 through a private process server at what was thought to be Harris' residence at 13 Secor Drive, Port Washington, New York. On two separate occasions the server attempted personal service but found no one at the address. On the third attempt, the server left the complaint and summons attached to the door of the residence, and followed this up by mailing another copy addressed to Harris at the same address.

At the request of the district court, Mid-Continent's attorney sent a letter on June 3, 1983,

to the residence at 13 Secor Drive in order to notify Harris of an upcoming status hearing. A copy of this letter was also sent to Harris' counsel of record in the previous lawsuit, Samuel Panzer. Neither \*299 the letter to Harris nor the copy sent to Harris' attorney included copies of the complaint and summons. Harris' attorney contacted Mid-Continent on June 9, 1983 and proposed a settlement in which Harris would pay the entire amount due on the note in monthly installments. Mid-Continent's attorney rejected the offer and stated instead that if the full amount was not received, Mid-Continent would seek a judgment order against Harris. Nevertheless, Harris' attorney confirmed in writing Harris' intention of forwarding a check and promissory notes in partial satisfaction of the amount due under Harris' guaranty. As promised by Harris' attorney, a mailing arrived from Superb Realty, Harris' place of business, containing a check for \$1,000.00 signed on behalf of Superb Realty and three notes for \$1,000.00 each, also signed by agents acting on behalf of Superb Realty. On June 16, 1983, Mid-Continent's attorney again informed Harris' attorney that no settlement for less than the full amount would suffice and that if full payment was not received before the next status hearing on June 28, 1983, Mid-Continent would seek a default judgment against Harris. When no further payments were made, Mid-Continent obtained a default judgment against Harris on July 20, 1983, in the amount of \$24,549.92.

After securing the judgment, Mid-Continent alleges that it attempted but was unable to locate Harris' assets for some time for purposes of executing on the judgment. Six years later, in June of 1989, Mid-Continent located certain assets of Harris' in Massachusetts and attempted to execute upon the 1983 judgment. However, on August 31, 1989, Harris filed a motion for relief in the district court pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure<sup>FN3</sup> claiming that because service on him did not properly comply with Rule 4 of the Federal Rules of Civil Procedure, the district court lacked personal jurisdiction over him at the time of the entry of

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judgment in 1983 and further that he never received a copy of the complaint and summons in this action. In support of his motion, Harris offered exhibits and affidavits stating that he never resided at 13 Secor Drive, Port Washington, New York, but stated that he lived at 15 Secor Drive, Port Washington, New York in 1983. He further stated that no one at 13 Secor Drive ever brought any documents pertaining to the case to his house at 15 Secor Drive. The district court issued an opinion denying Harris' motion to vacate and dismiss the default judgment on the grounds of improper service of process on November 1, 1989. While the district court acknowledged in its opinion that service upon Harris did not strictly comply with Rule 4, it nonetheless determined that strict compliance was unnecessary because of: 1) Harris' "actual knowledge of the lawsuit" based on Harris' former attorney's negotiations with Mid-Continent; 2) Mid-Continent's diligent efforts "to obtain technically proper service upon Harris"; and 3) Harris' evasive conduct in responding to the attempts at service of process.

FN3. Rule 60(b)(4) provides relief from a final judgment when the judgment is void.

## II. ISSUE FOR REVIEW

The issue before us is whether a district court may formulate its own test to determine whether to assert personal jurisdiction over a defendant in the absence of service of the complaint and summons in accordance with Rule 4 of the Federal Rules of Civil Procedure.

## III. DISCUSSION

We review a district court's application of a legal standard *de novo*. *Forum Corporation of North America v. Forum, Ltd.*, 903 F.2d 434, 438 (7th Cir.1990).

The district court found that Mid-Continent's attempted service of process on Harris did not comply

with Rule 4.<sup>FN4</sup> The district\*300 court then proceeded to devise a three-part test and fashioned an exception to the usual requirements of strict compliance with Rule 4:

FN4. The district court stated:

"It must also be noted that, contrary to plaintiff's position and regardless of the burden of proof in this case, the plaintiff's service on the defendant did not strictly comply with Rule 4. Hanging a summons and complaint on a door with follow-up uncertified mailing cannot qualify as either personal, abode or certified mail service under Rule 4. Neither does this procedure qualify under the even stricter Illinois service requirements. Although the plaintiff attempts to argue in favor of the rule that mail service coupled with actual knowledge complies with Rule 4, such a rule would render the rule's explicit procedures meaningless."

"When the cases are examined, three requirements present themselves as requisite to finding an exception to strict compliance. First, it is imperative to upholding faulty service that the defendant actually know of a lawsuit.... Second, the server must show that he duly tried to serve the defendant properly; in other words, show that more than a minimum effort was made and that the service actually made on the defendant came reasonably close to satisfying the requirements. This is often stated in terms of the plaintiff having 'substantially complied' with Rule 4's mandate.... Third, the equities of the situation must warrant an exception from the usual strict compliance requirement. Specifically, the focus here is on the conduct of the defendant in responding to the situation."

The district court determined that these three factors "point clearly toward an exception from strict compliance in this case."

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Rule 4(d)(1) provides that the complaint and summons shall, with respect to an individual defendant who is not an infant or incompetent, be made:

“by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.”

The Supreme Court recently addressed the issue of judicially created rules authorizing the service of process:

“We would consider it unwise for a court to make its own rule authorizing service of summons. It seems likely that Congress has been acting on the assumption that federal courts cannot add to the scope of service of summons Congress has authorized.... The strength of this long-standing assumption, and the network of statutory enactments and judicial decisions tied to it, argue strongly against devising commonlaw service of process provisions at this late date for at least two reasons. First, since Congress concededly has the power to limit service of process, circumspection is called for in going beyond what Congress has authorized. Second, as statutes and rules have always provided the measures for service, courts are inappropriate forums for deciding whether to extend them.” *Omni Capital International v. Rudolf Wolff & Company, Ltd.*, 484 U.S. 97, 108 S.Ct. 404, 412–413, 98 L.Ed.2d 415 (1987) (citations and footnotes omitted.)

This court has previously stated that a liberal construction of the rules of service of process “cannot be utilized as a substitute for the plain legal requirement as to the manner in which service of process may

be had.” *United States v. Mollenhauer Laboratories, Inc.*, 267 F.2d 260, 262 (7th Cir.1959).

The district court has not cited, nor have we discovered, any cases in support of a judicially created three-part test for substantial compliance with Rule 4's requirements for service of process such as the one devised by the district court. Instead, the factors considered by the district court have questionable validity, and as a result, the district court's three-part test must fail.

[1] The first factor the district court considered in determining the jurisdictional question concerning Harris was its finding that Harris had “actual knowledge of the lawsuit” based on Harris' former attorney's negotiations with Mid-Continent. The district court quotes *Armco, Inc. v. Penrod-Staufffer Building Systems, Inc.* for the proposition that “[w]hen there is actual notice, every technical violation of the rule or failure of strict compliance may not invalidate the service of process.” \*301733 F.2d 1087, 1089 (4th Cir.1984). However, the appellate court in *Armco* found the service of process to be invalid despite the defendant's knowledge of the suit and thus, the trial court was without jurisdiction and the default judgment was void. *Id.* at 1089.

This court has long recognized that valid service of process is necessary in order to assert personal jurisdiction over a defendant. *Rabiolo v. Weinstein*, 357 F.2d 167 (7th Cir.1966). Moreover, it is well recognized that a “defendant's actual notice of the litigation ... is insufficient to satisfy Rule 4's requirements.” *Way v. Mueller Brass Company*, 840 F.2d 303, 306 (5th Cir.1988); see also *Sieg v. Karnes*, 693 F.2d 803, 807 (8th Cir.1982).

In a case similar to ours, the District Court for the Northern District of Indiana held that a defendant's knowledge of a lawsuit will not serve to “cure the deficiencies in service.” *Bennett v. Circus U.S.A.*, 108

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(Cite as: 936 F.2d 297)

F.R.D. 142, 148 (1985). In *Bennett*, the plaintiff was unable to locate the defendant and attempted service of the complaint and summons by sending them certified mail to the law firm which had represented the defendant in a previous matter. The law firm signed the return receipt and forwarded the complaint and summons to the defendant. The defendant then contacted the law firm to seek representation in the matter. After agreeing to represent the defendant, the defendant's attorney contacted the plaintiff's attorney and informed him that the firm was not an agent of the defendant authorized to accept service of process. The parties' attorneys also discussed the possibility of settling the underlying dispute. Several months later, after a hearing at which the defendant did not appear, the district court entered a default judgment against the defendant for failure to answer the complaint. Almost two years after the default judgment had been entered, the plaintiff located assets of the defendant in North Carolina, registered the default judgment in that state, and proceeded to execute on the judgment. At this time, the defendant moved to vacate the default judgment under Rule 60(b)(4) on the ground that he had never been properly served with the complaint and summons. The district court granted the defendant's motion and set aside the default judgment. Citing *Schultz v. Schultz*, 436 F.2d 635 (7th Cir.1971), the *Bennett* court initially held that service of the summons and complaint upon the defendant's attorney was insufficient because the attorney had not been specifically appointed as an agent to accept service of process. Next, the court rejected the plaintiff's argument that the court had personal jurisdiction over the defendant because the defendant knew of the lawsuit prior to the entry of the default judgment. In rejecting this argument, the district court stated:

“[the] liberal construction rule ‘cannot be utilized as a substitute for the plain legal requirement as to the manner in which service may be had.’ *United States v. Mollenhauer Laboratories, Inc.*, 267 F.2d 260, 262 (7th Cir.1959).... *Precisely because of the court's need to get jurisdiction over the person of*

*the defendant, actual notice alone is insufficient to give the court the jurisdiction necessary to allow it to enter a judgment against a defendant .... Therefore, [the defendant's] knowledge of the pendency of this lawsuit cannot cure the deficiencies in service upon [the defendant].” *Bennett* at 148 (citations omitted and emphasis added).*

We agree with the *Bennett* court and hold that actual knowledge of the existence of a lawsuit is insufficient to confer personal jurisdiction over a defendant in the absence of valid service of process. Even though Harris may have had knowledge of the lawsuit as a result of Harris' former attorney's negotiations with Mid-Continent, “actual notice alone is insufficient to give the court the jurisdiction necessary to allow it to enter a judgment against a defendant.” *Id.* Thus, the district court's reliance on actual notice in determining that it had personal jurisdiction over Harris is erroneous.

[2] The second part of the district court's three-part test focused on whether “the service actually made on the defendant\*302 came reasonably close to satisfying the requirements [of Rule 4].” The district court characterized this factor as whether the plaintiff “substantially complied” with Rule 4's mandate.<sup>FN5</sup> The district court determined that Mid-Continent “tried diligently to obtain technically proper service upon Harris.” The court further noted that these attempts “were sufficient to result in settlement discussions between the parties.”

FN5. As we noted *supra*, Rule 4(d)(1)'s clear language provides that the summons and complaint shall, with respect to an individual defendant who is not an infant or incompetent, be made “by delivering a copy of the summons and of the complaint to the individual personally or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing

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(Cite as: 936 F.2d 297)

therein or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.”

This court is reluctant to find jurisdiction based upon whether Mid-Continent “tried diligently” to serve Harris. Indeed, the extent to which the plaintiff “tried” to serve process should not be a factor as to whether a federal court has personal jurisdiction over a defendant. Rather, the requirements of Rule 4 are satisfied only when the plaintiff is successful in serving the complaint and summons on the defendant.

The district court cites *United Food & Commercial Workers Union v. Alpha Beta Company*, 736 F.2d 1371 (9th Cir.1984), for its erroneous conclusion that a plaintiff need only come “reasonably close” to satisfying the requirements of Rule 4. However, *United Food* is applicable only to those cases in which the “substantial compliance” is used to prevent a technical error in the form of the documents under Rule 4 from defeating an otherwise proper and successful delivery of process. In *United Food*, the defendant argued that the district court did not have personal jurisdiction over it because the complaint and summons incorrectly directed the defendant that it was required to answer the complaint within ten days, rather than the proper twenty-day period. The court in *United Food* determined that the defendant failed to present any evidence that it was prejudiced by the minor defect in the summons because the defendant answered the petition and argued its case before the district court and the court of appeals. *Id.* at 1382. It is significant to note that the defendant in *United Food* did not argue that the *delivery of the complaint and summons was improper under Rule 4, but rather that the form of the summons and complaint was improper*. Thus, to the extent that the “substantial compliance” doctrine has any validity, it is applicable to only those cases such as *United Food*, where it was involved to prevent a purely technical error in the form of the documents under Rule 4 from invalidating an otherwise proper

and successful delivery of process.

[3] Even if we agreed with the district court's interpretation of the “substantial compliance” doctrine (which we do not), the facts lead us to believe that ours is a case of “substantial *non-compliance*.” The extent of Mid-Continent's efforts to obtain service on Harris consisted of the following: 1) one certified mailing of the complaint and summons to a business address of Harris (which Harris denies receiving), and neither the envelope containing the complaint and summons nor the return receipt evidencing delivery were ever returned; 2) three attempts at personal service by a private process server over a four-day period at an incorrect address; and 3) a non-certified mailing to the same incorrect address.

[4] The district court also cites the settlement discussions between the parties' attorneys as proof that the above-cited attempts at service were sufficient. However, nowhere in Rule 4 is there an exception for settlement discussions in the absence of the usual requirements of proper service of process, nor does the district court cite any case law in support of this proposition. Settlement discussions with Harris cannot save Mid-Continent from its failure to “substantially comply” with Rule 4's requirements of service of process.

[5] \*303 The third and final factor of the district court's three-part test is whether the “equities” of the case warrant an exception from the usual strict compliance requirement: “Specifically, the focus here is on the conduct of the defendant in responding to the situation.” The court cites evasion of process by the defendant as “the most typical example” of this kind of conduct. In support of this factor, the district court relied on *Nikwei v. Ross School of Aviation, Inc.*, 822 F.2d 939, 942 (10th Cir.1987), a case in which the defendant's motion to vacate the default judgment on the grounds of improper certified mail service was denied because the record clearly established that the defendant had refused to accept his mail. The district

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court also cited *Benage v. Gibraltar Building and Loan Association, Inc.*, 115 F.R.D. 20, 21 (D.Conn.1987), another case where effective service was found to have been accomplished where the defendant actually received the mail service but refused to acknowledge it.

The cases cited by the district court involve clear-cut examples of evasion: both involve defendants who specifically refused to acknowledge service and are thus distinguishable. The facts in the case before us fall short of establishing clear and convincing evidence of evasion on the part of the defendant. Unlike the defendants in *Nikwei* and *Benage*, there is no evidence that Harris either refused to accept his mail or actually received mail service but refused to acknowledge it. The district court infers evasion on the part of Harris because of the repeated, *though faulty*, attempts at service of process by Mid-Continent. As we stated *supra*, valid service of process is a must in order to assert personal jurisdiction over a defendant. Furthermore, the district court found that Harris had acted inequitably by allowing his attorney to engage in settlement discussions with Mid-Continent's attorney and then challenging the service of process six years after the judgment was entered: "Defendant in this case simply sat on his potential defense until the plaintiff finally found some of his assets and only then attempted to assert it." While we certainly do not condone Harris' or his attorney's conduct, we are of the opinion that the record falls short of supporting a finding of evasion or inequitable conduct by Harris.

#### IV. CONCLUSION

The three-part test devised by the district court to uphold the default judgment entered against Harris fails to support an exception to the service of process requirements of Rule 4. Therefore, the district court's order denying Harris' Rule 60(b)(4) motion to vacate and dismiss the default judgment on the grounds of improper service of process is reversed.

C.A.7 (Ill.),1991.

Mid-Continent Wood Products, Inc. v. Harris  
936 F.2d 297, 60 USLW 2052, 19 Fed.R.Serv.3d 1406

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 (Cite as: 825 So.2d 1038)

**C**

District Court of Appeal of Florida,  
 First District.  
 M.J.W., Mother of J.W., A Child, Appellant,  
 v.  
 DEPARTMENT OF CHILDREN AND FAMILIES,  
 Appellee.

No. 1D01-4074.  
 Sept. 13, 2002.

Department of Child and Family Services filed petition for termination of mother's parental rights to daughter. The Circuit Court, Duval County, Mallory Cooper, J., granted petition, and mother appealed. The District Court of Appeal, Van Nortwick, J., held that Affidavit of Avoidance of Service of Process was insufficient to confer personal jurisdiction over mother.

Reversed and remanded.

Benton, J., concurred in result.

West Headnotes

**[1] Infants 211 ↪ 2065**

211 Infants  
 211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need  
 211XIV(E) Proceedings  
 211k2065 k. Jurisdiction and venue. Most Cited Cases  
 (Formerly 211k196)

Affidavit of Avoidance of Service Process signed

by counselor for Department of Children and Families was insufficient to confer personal jurisdiction over mother, in proceedings to terminate her parental rights; rather, after attempts to effect personal service on mother were unsuccessful, Department was statutorily required to effect service by publication. West's F.S.A. § 39.801(3); West's F.S.A. R.Juv.P.Rule 8.505(c).

**[2] Constitutional Law 92 ↪ 4403.5**

92 Constitutional Law  
 92XXVII Due Process  
 92XXVII(G) Particular Issues and Applications  
 92XXVII(G)18 Families and Children  
 92k4403.5 k. Removal or termination of parental rights. Most Cited Cases  
 (Formerly 92k4393, 92k274(5))

Procedural due process contemplates that a defendant in a termination of parental rights proceeding will be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure. U.S.C.A. Const.Amend. 14; West's F.S.A. R.Juv.P.Rule 8.505.

**[3] Process 313 ↪ 48**

313 Process  
 313II Service  
 313II(A) Personal Service in General  
 313k48 k. Nature and necessity in general.  
 Most Cited Cases

The object and purpose of service of process is to give notice of the proceedings to the opposing party so that he or she may be given the opportunity to defend the suit.

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**[4] Process 313** 48

313 Process  
313II Service  
313II(A) Personal Service in General  
313k48 k. Nature and necessity in general.  
Most Cited Cases

**Process 313** 145

313 Process  
313II Service  
313II(E) Return and Proof of Service  
313k144 Evidence as to Service  
313k145 k. Presumptions and burden of proof. Most Cited Cases

The burden of proof to sustain the validity of service of process is upon the person who seeks to invoke the jurisdiction of the court and, without proper service of process, the court lacks personal jurisdiction over the defendant.

**[5] Infants 211** 2070

211 Infants  
211XIV Dependency, Permanent Custody, and Termination of Rights; Children in Need  
211XIV(E) Proceedings  
211k2070 k. Notice and process. Most Cited Cases  
(Formerly 211k198)

Under statute and juvenile rule governing service of process, a parent in a termination proceeding must be personally served with the petition and notice of an advisory hearing. West's F.S.A. § 39.801; West's F.S.A. R.Juv.P.Rule 8.505.

**[6] Process 313** 77

313 Process  
313II Service  
313II(B) Substituted Service  
313k76 Mode and Sufficiency of Service  
313k77 k. In general. Most Cited Cases

**Process 313** 103

313 Process  
313II Service  
313II(C) Publication or Other Notice  
313k102 Mode and Sufficiency of Publication  
313k103 k. In general. Most Cited Cases

When substituted or constructive service is substituted in place of or for personal service, a strict and substantial compliance with the provisions of said statute must be shown in order to support the judgment or decree based on such substituted or constructive service; the inquiry must be as to whether the requisites of the controlling statute have been complied with.

**[7] Process 313** 153

313 Process  
313III Defects, Objections, and Amendment  
313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases

The fact that a defendant had actual knowledge of the attempted personal service cannot be relied upon to justify the failure of the plaintiff to strictly observe and substantially comply with a statute authorizing service by publication.

\*1039 Noel G. Lawrence, Jacksonville, for Appellant.

Cynthia L. Dubell of the Department of Children and

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Families, Jacksonville, for Appellee.

VAN NORTWICK, J.

M.J.W. (the mother) appeals a final order terminating her parental rights. We reverse because the Department of Children and Families, appellee, did not serve the mother, personally or by publication, with a notice of the termination proceeding as required by section 39.801, Florida Statutes (1999), and Florida Rule of Juvenile Procedure 8.505(a)(1) and (c). As a result of our holding on the service issue, we do not address the other issues raised by the mother.

On September 23, 1998, the Department filed a petition for dependency alleging that the mother had no known place of residence, no known source of income, and a history of mental problems and that she had failed to provide the child with a safe, secure and stable home. The petition was granted at the conclusion of the dependency hearing on December 16, 1998. Pursuant to the mother's case plan, she was to maintain a stable income, seek out and maintain a stable living arrangement, ensure that the residence had utilities in working order, schedule a psychological evaluation, and follow the treatment regimen of her doctors. The record reflects that the mother moved to Atlanta, Georgia, and made no effort to work with the Department concerning compliance with her case plan.

The Department filed a petition for termination of parental rights on September 28, 1999, alleging that the child had been neglected and abandoned. The petition alleged that the mother lacked stable housing, had failed to schedule a psychological evaluation, had failed to provide proof of income or pay child support, and had failed to maintain a relationship with her daughter by exercising visitation.

At the initial advisory hearing on the petition on October 18, 1999, counsel for the Department advised the court that the sheriff in DeKalb County, Georgia,

had been provided with the petition for termination, but that he had been unable to effectuate service of process on the mother. Counsel represented that a Department\*1040 counselor had spoken to the mother over the telephone.

On October 27, 1999, the Department filed a notice of filing of the sheriff's return of service/affidavit as to the mother, which stated that after diligent search and inquiry the mother could not be found in DeKalb County, Georgia. At another advisory hearing on December 3, 1999, a Department counselor testified that she spoke with the mother during the week prior to the hearing. The counselor stated that the mother told her, "she didn't have time to come down here and she wanted me to come up and take a deposition."

A notice of the final adjudicatory hearing, scheduled to be held on January 31, 2000, was mailed to the mother's address in Atlanta, Georgia. At the final adjudicatory hearing, the Department counselor testified that she had spoken with the mother again and explained to her that the proceeding would affect the mother's rights concerning her child; but that the mother advised her that she would not be coming to court and that she wished to be left alone.

After the adjudicatory hearing, but before the court issued its ruling, the Department filed a document entitled "an Affidavit of Avoidance of Service of Process" signed by the counselor assigned to the mother's case. It stated that the Department had made several attempts to serve the mother with process and that the counselor had spoken to the mother on numerous occasions and was informed that the mother would not accept service of process. The Department also provided evidence that it notified the father of the adjudicatory hearing by publication, in accordance with Florida Rule of Juvenile Procedure 8.505(c). The Department provided no evidence of notice by publication as to the mother. On February 24, 2000, the court entered an order terminating the parental rights of both the mother and the father.

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[1] Pursuant to section 39.801(1), Florida Statutes (1999):

All procedures, including petitions, pleadings, subpoenas, summonses, and hearings, in termination of parental rights proceedings shall be according to the Florida Rules of Juvenile Procedure unless otherwise provided by law.

Under section 39.801(3)(a), notice of the advisory hearing and a copy of the petition to terminate parental rights must be personally served upon the parents. If the notice cannot be personally served, under section 39.801(3)(b), “notice of hearings must be given as prescribed by the rules of civil procedure, and service of process must be made as specified by law or civil actions.” Florida Rule of Juvenile Procedure 8.505, sets forth the requirements governing service of process in a proceeding for termination of parental rights, in relevant part, as follows:

(a) **Personal Service.** Upon the filing of a petition requesting the termination of parental rights a copy of the petition and notice of the date, time, and place of the advisory hearing must be personally served on

(1) the parents;

\* \* \*

(c) **Constructive Service.** Parties upon whom personal service of process cannot be effected shall be served by publication as provided by law.

[2][3][4] Procedural due process contemplates that a defendant in a termination proceeding will be given fair notice and afforded a real opportunity to be heard and defend in an orderly procedure. *See J.B. v. Florida Dep't of Children and Family Servs.*, 768 So.2d 1060, 1063–64 (Fla.2000). The object and purpose of service\*1041 of process is to give notice of the proceedings to the opposing party so that he or she

may be given the opportunity to defend the suit. *See Bay City Mgmt., Inc. v. Henderson*, 531 So.2d 1013 (Fla. 1st DCA 1988). The burden of proof to sustain the validity of service of process is upon the person who seeks to invoke the jurisdiction of the court and, without proper service of process, the court lacks personal jurisdiction over the defendant. *See Carlini v. State, Dep't of Legal Affairs*, 521 So.2d 254 (Fla. 4th DCA 1988).

[5] Under section 39.801, Florida Statutes (1999), and Florida Rule of Juvenile Procedure 8.505(a)(1), a parent in a termination proceeding must be personally served with the petition and notice of an advisory hearing. *See M.E. v. Florida Dep't of Children & Family Servs.*, 728 So.2d 367, 368 (Fla. 3d DCA 1999); *see also J.B.*, 768 So.2d at 1065–67 (stating that twenty-four hours' notice of advisory hearing is insufficient to satisfy minimum due process requirements). If personal service cannot be effected, rule 8.505(c) provides that service may be obtained by publication.

The Department presented evidence that it was unable to obtain personal service of process upon the mother. The Department, however, did not seek to serve the mother by publication. Instead, the Department has relied upon submission of the “Affidavit of Avoidance of Service of Process.” Such an affidavit, however, is not by itself a statutorily prescribed means of providing personal or constructive service in a parental termination proceeding.

[6][7] Additionally, the fact that J.W.'s mother may have received actual notice of this proceeding does not establish a lawful service of process. As the Florida Supreme Court explained in *Bedford Computer Corp. v. Graphic Press, Inc.*, 484 So.2d 1225, 1227 (Fla.1986) quoting *Napoleon B. Broward Drainage District v. Certain Lands Upon Which Taxes Were Due*, 160 Fla. 120, 33 So.2d 716, 718 (Fla.1948):

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It is established law that when substituted or constructive service is substituted in place of or for personal service a strict and substantial compliance with the provisions of said statute must be shown in order to support the judgment or decree based on such substituted or constructive service.... The inquiry must be as to whether the requisites of the controlling statute have been complied with.... The fact that the defendant had actual knowledge of the attempted service cannot be relied upon to justify the failure of the plaintiff to strictly observe and substantially comply with a statute authorizing service by publication.

Section 39.801(1) and (3)(a) and rule 8.505(a)(1) and (c) provide the sole manner to effect service of process in a parental termination proceeding. The Department failed to comply with these provisions. Consequently, the trial court did not acquire jurisdiction to consider the Department's petition for termination of the mother's parental rights.

Accordingly, we REVERSE the order terminating the mother's parental rights and REMAND for proceedings consistent with this opinion.

BOOTH, J., CONCURS AND BENTON, J., CONCURS IN RESULT.

Fla.App. 1 Dist.,2002.

M.J.W. v. Department of Children and Families  
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 (Cite as: 522 P.2d 996)

**C**

Supreme Court of Wyoming.  
 PEASE BROTHERS, INC., Appellant (Defendant  
 below),  
 v.  
 AMERICAN PIPE & SUPPLY CO. (Defendant be-  
 low),  
 P. A. Coleman et al., Appellees (Plaintiffs below).

No. 4294.  
 May 28, 1974.

Action by judgment creditor against judgment debtor and garnishee for determination of assets of judgment debtor in possession of garnishee, and to recover such assets to amount sufficient to satisfy judgment. The District Court, Natrona County, R. M. Forrister, J., entered default judgment against judgment debtor and denied motion to set aside default judgment, and judgment debtor appealed. The Supreme Court, McClintock, J., held that where process out of District Court of Natrona County was served on employee of defendant corporation in Campbell County, employee was not 'found in county in which the action is brought' as required by rule and district court did not acquire jurisdiction over defendant by such service.

Reversed and remanded.

West Headnotes

**[1] Evidence 157**  **48**

157 Evidence

157I Judicial Notice

157k48 k. Official proceedings and acts. Most Cited Cases

Judicial notice could be taken by Supreme Court of records of Secretary of State to determine status of defendant corporation.

**[2] Corporations and Business Organizations 101**  
 **2544(4)**

101 Corporations and Business Organizations

101IX Corporate Powers and Liabilities

101IX(F) Civil Actions

101k2539 Process and Notice

101k2544 What Officer or Agent  
 Should or May Be Served

101k2544(4) k. Subordinate officer or  
 agent. Most Cited Cases  
 (Formerly 101k507(6))

Where process out of District Court of Natrona County was personally served on and delivered to employee of defendant corporation in Campbell County, employee was not "found in county in which the action is brought" as required by rule and district court did not acquire jurisdiction over defendant by such service. Rules of Civil Procedure, rule 4(d)(4).

**[3] Process 313**  **166**

313 Process

313III Defects, Objections, and Amendment

313k166 k. Waiver of defects and objections.  
 Most Cited Cases

Defect in service of process was not waived by failing to raise issue on subsequent motion to vacate default judgment.

**[4] Corporations and Business Organizations 101**  
 **2548**

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101 Corporations and Business Organizations  
 101IX Corporate Powers and Liabilities  
 101IX(F) Civil Actions  
 101k2539 Process and Notice  
 101k2548 k. Objections to service and  
 waiver thereof. Most Cited Cases  
 (Formerly 101k507(14))

Fact that officials of corporation had actual notice  
 of suit did not cure defect in service of process.

**[5] Judgment 228** ↪ 101(2)

228 Judgment  
 228IV By Default  
 228IV(A) Requisites and Validity  
 228k100 Pleadings to Sustain Judgment  
 228k101 In General  
 228k101(2) k. In particular actions.  
 Most Cited Cases

Where prayer of complaint in action by judgment  
 creditor against judgment debtor and garnishee for  
 determination of assets of judgment debtor in posses-  
 sion of garnishee and for recovery of such assets to  
 amount sufficient to satisfy judgment was general,  
 trial court should not have entered default judgment  
 requiring judgment debtor to purchase pipe for credit  
 purchase price against recovery by it against garnishee  
 of amount garnishee owed judgment debtor.

\*996 Donald P. White, of White & Hansen, Riverton,  
 for appellant.

Donald E. Chapin, Casper, for appellee Coleman.

George M. Apostolos, of Brown, Drew, Apostolos,  
 Barton & Massey, Casper, for appellee American Pipe  
 & Supply Co.

Before PARKER, C. J., and McEWAN, GUTHRIE,  
 McINTYRE and McCLINTOCK, JJ.

Mr. Justice McCLINTOCK delivered the opinion of  
 the Court.

Pease Brothers, Inc.[FN1] appeals from the order  
 of the district court of Natrona \*997 County, Wyo-  
 ming denying its motion to vacate default judgment  
 theretofore entered after this defendant had failed to  
 appear and plead in the action.

FN1. One of two defendants below and  
 hereinafter referred to as Pease. Its desig-  
 nated codefendant, but now one of the ap-  
 pellees, American Pipe & Supply Co., will be  
 referred to as American, and the plain-  
 tiffs-appellees will be collectively referred to  
 as Coleman or plaintiffs.

By judgment entered in the district court of  
 Campbell County, Wyoming on May 6, 1972 the three  
 plaintiffs herein were awarded separate judgments and  
 accrued interest against Pease totaling \$58,898.71. As  
 part of execution proceedings out of that court they  
 thereafter caused garnishment notice to be served  
 upon American. Its answer acknowledged an indebt-  
 edness to Pease after payment of existing indebtedness  
 of \$34,457.94, which sum it claimed could be reduced  
 by setoffs which could amount to \$16,000.00. It was  
 also stated that American had in its possession certain  
 damaged pipe belonging to Pease, the future storage  
 and cost of removal of this damaged pipe being the  
 basis of the contingent setoff of \$16,000.00.

No further proceedings appear to have transpired  
 in that execution and on April 12, 1973 the present  
 action was commenced in the district court of Natrona  
 County by these same plaintiffs against American and  
 Pease as defendants. The first claim of the complaint  
 alleges the entry of the judgment, the issuance of  
 garnishee notice, answer by American, a copy thereof  
 being attached to and incorporated in the complaint,

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and that the disclosures therein are unsatisfactory. It is then alleged that the present action is commenced against American pursuant to the provisions of ss 1-430 and 1-256, W.S.1957 for determination of the amount of property and credits of every kind of Pease in the possession of American. The second claim, directed against Pease, alleges that the amount due from American to Pease arises from a contract between the two defendants whereby Pease undertook to do certain work in the excavation and removal of a pipe line which had been purchased by American and the right to relief by plaintiffs against American cannot be adequately determined without the designation of Pease as a party defendant. The complaint prays for determination of the amount due from American to Pease; judgment against American Pipe for all property, credits, money, and every other asset in the possession of American owned by or owed to Pease, to an amount sufficient to satisfy its existing judgment against Pease; and

‘3. Such other and proper relief as to afford complete adjudication of the rights and obligations between plaintiffs and the defendants or either of them and between the defendants.’

Signed summons bearing the seal of the court addressed to American was issued April 12 and bears a notation of acceptance of service by the attorney who later appeared in behalf of American.

Unsigned summons[FN2] bearing no official seal, addressed to Pease, likewise was issued on April 12 and the return thereon shows that it was served by the deputy sheriff of Campbell County on April 14, by delivery ‘to Pease Brothers, Inc. (by leaving with Roy Lind, agent) in person and personally, in Campbell County, Wyoming’.

FN2. This summons bears the typed names and printed titles ‘Ralph L. Dinstead (Clerk of court) by Joyce Johnson (Deputy Clerk)’ and

also stamped circle with the word ‘SEAL’ therein, but does not bear any written signature or the official seal of the court as was the case on the separate summons served on American. Rule 4(b), W.R.C.P. states that the ‘summons shall be signed by the clerk, (and) be under the seal of the court \* \* \*’.

[1] On April 17, 1973 plaintiffs filed a request to the clerk to mail a copy of the complaint and summons to ‘said defendant corporation,[FN3] registered mail with return \*998 receipt requested, at its last known address, 120 East Main, Vernal, Utah, 84078’, which request was made pursuant to provisions of Rule 4(d)(4), W.R.C.P. for personal service upon a corporation. Attached to the clerk's certificate of mailing is a postal receipt for certified mail dated April 17, 1973, No. 130851. The record also contains an unopened envelope addressed by the clerk to Pease Brothers, Inc., at the above Utah address, postmarked in the Casper post office April 17, 1973 with stamped notation thereon that first notice was given April 20, 1973 and ‘2nd Notice Return’ May 5, 1973. It also is stamped ‘Returned to Writer, Reason Checked, Unclaimed X’. This envelope apparently was returned to the Casper post office on May 9, 1973 and thereupon returned to the clerk of the court.

FN3. This is the first reference in the record to the capacity of this defendant. Nowhere in the record is it disclosed whether Pease is a foreign or domestic corporation, but taking judicial notice of the records in the office of the secretary of state, 31 C.J.S. Evidence s 36, p. 967, we find that no certificate of incorporation, either foreign or domestic, has been filed for this corporation and therefore proceed on the premise that it was and is a foreign corporation. This is confirmed by Pease's brief and not denied by appellees.

On May 7, 1973 American filed its answer addressed to the first claim,[FN4] denying for want of

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information the allegations concerning the Campbell County judgment and payment thereon, admitting that it had received the garnishee notice and filed its answer, copy of which had been attached to plaintiffs' complaint and by reference thereto incorporated the same in this answer. All other allegations of the complaint were denied.

FN4. Certificate of service attached to this pleading shows that a copy thereof had been left with the clerk of the court 'for delivery to the attorney for Pease Brothers, Inc., on this 7th day of May, 1973'. At that time there was no attorney of record for Pease and it does not appear that a copy of this answer was mailed to Pease directly or to its attorney. Neither the record nor the briefs disclose when this answer may have come to the attention Pease or its attorney.

Without affirmative allegations or cross-claim against Pease, American demanded judgment against the plaintiffs and Pease jointly and severally: declaring and determining the amount of money due from American to Pease; declaring what property, if any, belongs to or is the property of Pease; determining the disposition of any money found to be owed by it to Pease and the disposition of any property that may be owned by Pease; discharging American as garnishee upon the court's making the foregoing determinations and dispositions; for such other and proper relief 'as to afford a complete adjudication of the rights and obligations among plaintiffs and defendants or either of them, and as between the defendants'; and for costs of action and any other relief that might be proper.

Pease filed no answer or other pleading and on May 8, 1973 attorney for the plaintiffs filed an affidavit for entry of default, reciting the foregoing facts concerning the service and mailing, and also claiming that time for answer had expired and Pease had neglected and failed to answer or otherwise plead. Pursuant thereto, and on May 8, 1973, entry of default

was entered by the clerk, reciting the facts of service, mailing, and failure to plead.

The judgment entered May 21, 1973[FN5] shows appearances by attorneys for plaintiffs and American. It recites the facts concerning service upon and mailing to Pease as above set forth, and the entry of default by the clerk. It is then recited that after hearing the court found that personal service had been made on Pease within the state of Wyoming as required by law and applicable rules, 'and that the court now \*999 has jurisdiction over all of the parties to and the subject matter of this action; that defendant Pease Brothers, Inc. is in default and its default is hereby entered'.

FN5. This judgment, presented to the trial judge within 20 minutes after the hearing had started as the 'judgment we have agreed upon' must have been prepared in advance of the hearing. The amount found to be due from American to Pease is entirely based on the calculations of American's manager as to the amount due after charging Pease with the purchase price of some 36,000 feet of allegedly damaged pipe under this provision of the agreement: 'Any pipe which Contractor shall flatten, dent or mash so that the same may not be properly repaired by Contractor for use shall be purchased by the Contractor at \$1.75 Per Foot. The price of the pipe purchased by the Contractor shall be deducted from contract price at the final payment.'

It is further found that Pease is indebted to plaintiffs for a total amount of \$54,651.11; that American, in obedience to the garnishee notice, has retained funds owed by it to Pease in the amount of \$37,845.44; and that in addition American is holding 36,421 feet of 12 3/4 O.D. pipe owned by defendant located at three separate places in the state of North Dakota, which it is holding subject to the further order of the court.

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Judgment was then entered that American was indebted to Pease.

‘in the total amount of \$37,845.44, which amount is in full satisfaction of any and all rights and claims which defendant Pease Brothers, Inc. may now have or could hereafter assert against American Pipe & Supply Co. arising out of or accruing in connection with or on account of the performance of that certain agreement between said defendants dated July 17, 1971, which agreement provided for the removal by Pease Brothers, Inc. of a pipeline of 12 3/4 O.D. pipe extending 36 miles from Golva, North Dakota and about 27 miles of 12 3/4 O.D. pipeline commencing south of Dickinson, North Dakota, and other services relating to the removed pipe.’

It was then ordered that American pay plaintiffs the sum which it owed Pease for application upon plaintiffs' judgment.

‘and forthwith deliver to the plaintiffs all of said pipe owned by defendant Pease Brothers, Inc. in its present condition in the yards in which it is now situated as aforesaid, and that upon such delivery, made to the satisfaction of the Court, defendant American Pipe & Supply Co. shall be released from any further obligation to the plaintiffs under the garnishment proceedings or to Pease Brothers, Inc. under said July 17, 1971 agreement or otherwise.’[FN6]

FN6. The record, filed in this Court on September 25, 1973 and presumably the complete record in the case, does not show that subsequent to entry to this judgment any showing was made or that the court indicated its satisfaction with the delivery of the pipe to plaintiffs.

On May 25, 1973 Pease, acting through present Wyoming counsel, filed motion to vacate and set aside the judgment and to grant leave to defendant to file an

answer or otherwise plead in said cause, on the ground that through mistake and inadvertence answer or other pleadings were not filed in its behalf within the time required by law, as shown by the affidavit of attorney attached. The gist of this affidavit is that on May 9 (one day after default had been entered by the clerk) Wyoming counsel had received a call from Salt Lake City counsel about the matter, had discussed the case briefly, and it was agreed that the complaint and other pertinent documents would be forwarded to Wyoming counsel who would then contact opposing counsel. It further appears that while a letter of transmittal was written in Salt Lake City on May 10, the envelope bearing the enclosures was not postmarked in the Salt Lake City post office until May 22, and was received on May 23 by Wyoming counsel who immediately called the attorney for the plaintiffs and was informed by his secretary that judgment had been entered on May 21. It is further alleged in the affidavit that fairness and equity demand that the judgment should be vacated and set aside and the respective rights of the defendants and the claims and demands between them be adjudicated and determined by the court after due notice and hearing.

Prior to hearing on the motion to vacate there was filed affidavit of Ray Pease, president of the corporation, referring to the contract between it and American, stating that a substantial dispute had arisen with respect to the amount due Pease, which claimed that American owed it some \$152,000.00 as of April 1, 1973, that numerous contacts and communications attempting\*1000 to settle the dispute had failed, and that the dispute must be settled through court proceedings in which both parties are allowed to present their claims. A counter affidavit of O. C. Major, manager for American, was filed, reciting the facts concerning the court proceedings which we have related and recapitulating the various events and the delays of Pease after time for answer had expired. It was further set forth that on the date of the judgment he had given American's check for \$37,845.44 to the clerk of the court who in turn had given plaintiffs his

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check in the same amount; that he had also on that same date delivered to plaintiffs approximately 36,421 feet of pipe located in North Dakota, which delivery of pipe had been accepted and acted upon by the plaintiffs; that leases on storage yards for the pipe had been surrendered by American to plaintiffs and plaintiffs are now responsible therefor.

A hearing was held on July 3 at which no further evidence was taken but arguments of counsel were presented, and on July 5 letter opinion of the trial judge was issued indicating that the motion would be denied and giving reasons therefor. Order was entered July 18 finding that Pease had failed to demonstrate an excuse for not defending the cause, had failed to act in good faith, and had failed to show a meritorious defense; that other parties had undergone a change of circumstances; and that it would be inequitable to set aside the default. The motion to vacate was denied. Notice of appeal was filed July 31, 1973.

Upon this appeal Pease contends first that it was an abuse of discretion to deny its application to vacate the default judgment entered against it but raises the further point, not made in any of the proceedings below, that the default judgment was entered without jurisdiction of the person of the defendant, Pease, and was therefore null and void. While asserting that the jurisdiction over Pease was properly obtained, American and Coleman contend that in any event the question of jurisdiction of the person has been waived.

We believe that the second point is dispositive of this appeal. It has been said by the Supreme Court of Ohio in *Lincoln Taverin v. Snader* (1956), 165 Ohio St. 61, 133 N.E.2d 606, 610:

‘It is axiomatic that for a court to acquire jurisdiction there must be a proper service of summons or an entry of appearance, and a judgment rendered without proper service or entry of appearance is a nullity and void.’

The Supreme Court of Virginia in *Finkel Outdoor Products, Inc. v. Bell* (1965), 205 Va. 927, 140 S.E.2d 695, 698, expresses the rule:

“Judgments without personal service of process within the state issuing it, or its equivalent, or upon a service of process in a manner not authorized by law, are void judgments, and may be so treated in any proceeding, direct or collateral. \* \* \* *Burks Pl. & Pr.*, 4 ed., s 353, pp. 667-8.’ (Emphasis supplied.)

Other cases holding that a judgment by default cannot properly be entered unless the defendant is brought into court in some way sanctioned by law are: *State ex rel. Bowman v. Malloy* (1965), 264 N.C. 396, 141 S.E.2d 796, 797; *Ponca Wholesale Mercantile Company v. Alley* (Tex.Civ.App.1964), 378 S.W.2d 129, 131 (service upon a corporation by delivery to ‘Manager Don Landers’ instead of the registered agent for service of process); *Wilson v. Wilson* (Tex.Civ.App.1964), 378 S.W.2d 156, 159 (citation required answer at time different than that fixed by law); *State ex rel. Ballew v. Hawkins* (Mo.App.1962), 361 S.W.2d 852, 857 (service of process made after return day stated in summons); and *Brown v. Amen* (1961), 147 Colo. 468, 364 P.2d 735, 737 (summons not signed by the clerk). Both *Bryant v. Lovitt* (1957), 231 Miss. 736, 97 So.2d 730, 731, and *Braun v. Quinn* (1920), 112 Neb. 485, 199 N.W. 828, 829 held that process could not be issued from one county and served upon \*1001 the defendant in another county, being his place of residence. In 62 Am.Jur.2d Process 49, p. 831 the authorities are summarized as holding that in the absence of a controlling practice provision, service in another county on an action for money judgment does not give jurisdiction over the person of the defendant. ‘If he fails to appear, a judgment rendered upon such service is void.’

In *State ex rel. Minihan v. Aronson* (1942), 350 Mo. 309, 165 S.W.2d 404, 407 the Supreme Court of

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Missouri considered a situation where summons was issued to and served in a different county from that where the action was filed. Motion to quash the service was denied, whereupon prohibition proceedings were commenced in the Supreme Court. It was said that a summons is

‘the means of compelling a defendant to subject his person to the jurisdiction of the court from which the summons issues. \* \* \* Until such notice is given, that is, such a notice as compels the defendant to take cognizance of it, the court has no authority to proceed against the party defendant, even though the court may have jurisdiction of the subject matter of the action. \* \* \*

‘Subject to certain limitations not involved here, service of process is wholly a statutory matter. \* \* \* Consequently, the general rule is that unless a defendant is served with process, or summoned, in some manner authorized by statute law the court is without authority to proceed.’

[2] Counsel for Pease contends that service upon Pease by delivery of copy of the summons and complaint to Lind, employed by Pease as a heavy equipment operator, was not service upon an ‘officer, manager, general agent, or agent for process’ in compliance with Rule 4(d)(4), W.R.C.P. While the record shows that Lind was an employee of Pease, he was not ‘found in the county in which the action is brought’ and we therefore agree that service was not made in conformity with the rule. Under the above authorities, then, the court did not have jurisdiction over Pease.

Ford Motor Company v. Arguello (Wyo.1963), 382 P.2d 897, cited by appellees for the proposition that due process requires only that the representative served be a responsible representative of the foreign corporation, is not contrary to the position we take. It is there held that Rule 4(d)(4) is cumulative to statutes pertaining to service upon and acquisition of personal

jurisdiction over foreign corporations that have done business in the state of Wyoming without qualification and designation of an agent for service. Upon the facts of that case there had been sufficient contact of Ford with the state of Wyoming to render it amenable to process of our courts, a question not raised in the present case, but the service of process there approved was made in the county in which the action was filed and was clearly in compliance with the rule.

Nor do we think that this decision is contrary to our holding in *State ex rel. Sheehan v. District Court of the Fourth Judicial District* (Wyo.1967), 426 P.2d 431, 435, cited by appellees as holding that there is a presumption of jurisdiction from the fact that it was exercised. It was held that the presumption had not been rebutted. However, both 21 C.J.S. Courts s 96, p. 149 and *Jackson v. Bobbitt*, 253 N.C. 670, 117 S.E.2d 806, cited therein, clearly qualify the existence of the presumption with the statement that ‘unless the contrary appears, as by the record’, the presumption applies. In the case at bar the record clearly shows that service was made upon an employee of Pease, outside the county in which the action was brought.

Our holding does not mean that the action could not be commenced in and process properly issued out of Natrona County for service in another county. Section 1-36, W.S.1957, specifically provides that an action against a foreign corporation may \*1002 be brought in the county where the action arose or the plaintiff resides, and further:

‘Summons may be issued to the sheriff of the county where the agent for service of the foreign corporation resides or, if there is not such agent in this state, to the sheriff of Laramie County, Wyoming for service on the secretary of State of Wyoming and, in such case such service shall be deemed service upon such foreign corporation \* \* \*.’

Section 17-36.104, W.S.1957, C.1965, further

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relates to service upon a foreign corporation, particularly one that has done business in the state without qualification or if authorized to do business has failed to appoint or maintain an agent for service, by permitting service of the process upon the secretary of state. Subject to the limitation expressed in *Ford Motor Co.*, that mere service of summons upon a representative of a foreign corporation in the state does not of itself confer jurisdiction upon the trial court,

‘and that it must also appear that Ford, as a foreign corporation, was at the time of service engaging in activities within the state sufficient to make it amenable to jurisdiction of the court from which the process issued’,

it appears that if Pease was doing business within the state of Wyoming without having qualified as a foreign corporation it was amenable to service of process out of Natrona County by the sheriff of Laramie County upon the secretary of state.

Had Pease included with his motion to vacate the default judgment a motion to quash the service it in all probability would have been sustained. However, no such motion was made to the trial court and that court had no opportunity to pass upon the question.

[3] Appellees contend that Pease waived the defense of improper service by not raising the question in the district court and again cite *State ex rel. Sheehan v. District Court of the Fourth Judicial District*, supra. We there held that Mrs. Sheehan, by filing motion attacking the action for lack of jurisdiction of the subject matter and failure of the complaint to state a claim, had submitted her person to the jurisdiction of the court and under the provisions of Rule 12(b) and (h), W.R.C.P., had thereby waived any defense as to the insufficiency of the process. We further recognized the general rule that it is necessary to question jurisdiction of the court over the person at the earliest opportunity, failing in which the defense will be considered waived.

It is of course elemental that voluntary appearance of the defendant is equivalent to service of process, and in this case had Pease entered its appearance prior to judgment and failed some sort of pleading to the merits of the case without questioning the service, it would be a clear waiver under Rule 12(h). But here we are considering the validity of a default judgment entered without proper service and it would seem anomalous indeed that having tendered its appearance in the case only for the purpose of setting aside the judgment and being permitted to participate, and having been denied that right, offer to appear rendered valid a previously void judgment. Vacation having been refused, does it not follow that the judgment remains in the same status that it was, subject to the same defects, and still vulnerable to attack? As said in *Bryant v. Lovitt*, supra, 97 So.2d at p. 733, where default judgment had been entered in improper service: ‘Subsequent proceedings could not breathe life into the prior dead judgment.’

In *Jones v. Colescott* (1957), 134 Colo. 552, 307 P.2d 464, 465, a default judgment had been entered against certain defendants, based upon service which the court found to be defective. Four of these defendants filed motion to vacate the judgment. The court said:

‘\* \* \* As to the four defendants who filed the motion to vacate the judgment, the court now has jurisdiction, but only to grant time to plead or answer to the complaint herein. The general appearance\*1003 did not validate the void judgment. However, as to the defendants who did not join in the motion and the unknown defendants, the attempted substituted service by publication is void. The plaintiffs must now begin anew to obtain service on them.’

In *Brown v. Amen*, supra, 364 P.2d at p. 737, the court adhered to earlier rulings that where the summons had not been signed by the clerk it was ineffec-

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tive to bring the defendants within the jurisdiction of the court, and to its decision in *Jones* that a general appearance has no retroactive effect. Under our view of the law as expressed in these Colorado decisions, Pease may not now further question the service but is entitled to be permitted to plead to the complaint and thereafter participate fully in any trial that may be posed by the pleadings.

[4] Appellees place considerable emphasis upon the fact that Lind did in fact forward the summons and complaint to the proper officers of Pease. It has been consistently held that the fact that process, improperly served, is forwarded to proper officials of the corporation does not validate the service. In *McDonald v. Ames Supply Co.* (1968), 22 N.Y.2d 111, 291 N.Y.S.2d 328, 331, 238 N.E.2d 726, the Court of Appeals of New York says:

‘Numerous authorities hold that personal delivery of a summons to the wrong person does not constitute valid personal service even though the summons shortly comes into the possession of the party to be served. \* \* \* A contrary rule would negate the statutory procedure for setting aside a defectively served summons, since the motion itself is usually evidence that the summons has been received \* \* \*.’

[5] Throughout this opinion we have referred to the judgment sought to be vacated as though it were a default judgment in the ordinary sense and authorities cited by us have pertained to that kind of judgment. This was hardly the ordinary default judgment. The real disputants in the case were Pease and American. While it may be said that the plaintiffs undoubtedly thought in filing their complaint that the parties would appear, cross pleadings would be filed, and the issues between them settled so that plaintiffs would have something tangible against which to enforce their judgment, we find nothing in the prayers of the complaint requesting, as between American and Pease, the grant of specific performance requiring Pease to purchase 36,241 feet of pipe at a price of some

\$66,000.00, crediting that purchase price thereof against a recovery by it against American of \$37,845.44. The prayer of the complaint is completely general and merely that the amount due from American to Pease be determined and that judgment be entered against American for all property, credits, money, and every other asset in the possession of American owned by or owed to Pease to the extent necessary to satisfy its judgment against Pease.

We think that the trial court went far beyond the prayers of the complaint, in violation of the principle which we recently announced in *Zweifel v. State of Wyoming ex rel. Brimmer* (1974), Wyo., 517 P.2d 493. As declared in *Fong v. United States* (9 Cir. 1962), 300 F.2d 400, 412:

‘In 6 Moore’s Federal Practice, 2 ed., Par. 54.61, pp. 1205-1206, it is said: ‘Since the prayer-limits the relief granted in a judgment by default, the prayer must be sufficiently specific that the court can follow the mandate of the Rule. \* \* \*’

We reverse the judgment and remand the same to the district court with instructions to set aside the default judgment and to permit Pease to answer or otherwise plead to the complaint.

Wyo. 1974.

Pease Bros., Inc. v. American Pipe & Supply Co.  
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END OF DOCUMENT



Court of Appeals of Maryland.

Vincent A. SHEEHY, Jr.

v.

May J. SHEEHY.

Nos. 254, 342.

May 29, 1968.

Action for specific performance of alleged agreement whereby defendant was to make monthly payments to plaintiff and for money judgment for payments in default. The defendant questioned jurisdiction of court. The Circuit Court for Montgomery County, Ralph G. Shure, J., ordered defendant to specifically perform terms of agreement and entered money judgment for unpaid installments and defendant appealed and plaintiff countered by petitioning for counsel fees in defense of the appeal. An order was issued by Irving A. Levine, J., directing defendant to pay attorney's fees and defendant appealed from that order. The Court of Appeals, Marbury, J., held that where deputy sheriff who claimed to have made service on defendant testified that he made service at address and apartment different from those shown in complaint and subpoena, deputy did not see occupant of apartment and his only knowledge of inhabitant was that voice answered 'yes' when he stated defendant's last name, there was no valid personal service of process.

Decree and order reversed.

West Headnotes

[1] Equity 150 415

150 Equity

150X Decree and Enforcement Thereof  
150k415 k. Nature and Essentials in General.  
Most Cited Cases

If defendant was not properly served, trial court had no jurisdiction and decree issued against him was invalid and without significance.

[2] Process 313 153

313 Process

313III Defects, Objections, and Amendment  
313k153 k. Defects and Irregularities in Service or Return or Proof Thereof. Most Cited Cases

That defendant may have had actual knowledge of suit against him would not cure defective personal service of process.

[3] Process 313 141

313 Process

313II Service  
313II(E) Return and Proof of Service  
313k141 k. Conclusiveness of Return or Certificate in General. Most Cited Cases

Proper return is prima facie evidence of valid service of process.

[4] Process 313 145

313 Process

313II Service  
313II(E) Return and Proof of Service  
313k144 Evidence as to Service  
313k145 k. Presumptions and Burden of Proof. Most Cited Cases

Simple denial of service of process by defendant is not sufficient to rebut presumption arising from proper return.

**[5] Process 313** ↪64

313 Process

313II Service

313II(A) Personal Service in General

313k64 k. Mode and Sufficiency of Service.

Most Cited Cases

Where deputy sheriff who claimed to have made service on defendant testified that he made service at address and apartment different from those shown in complaint and subpoena, deputy did not see occupant of apartment and his only knowledge of inhabitant was that voice answered "yes" when he stated defendant's last name, there was no valid personal service or process. Maryland Rules, Rule 104.

**[6] Process 313** ↪78

313 Process

313II Service

313II(B) Substituted Service

313k76 Mode and Sufficiency of Service

313k78 k. Leaving Copy at Residence or

Other Place. Most Cited Cases

Where testimony of deputy sheriff indicated that he did not even request that door to apartment where he left process be opened and there was no showing that he was in any way repelled by force or was threatened, service by reading papers to person within apartment and posting papers on the door was not proper on basis of statute providing that if service has been prevented or resisted by threats, violence, intimidation or superior force or process shall be within any fortress or fortified place or building, officer shall leave copy of process upon premises. Code 1957, art.

75, § 92.

**[7] Equity 150** ↪415

150 Equity

150X Decree and Enforcement Thereof

150k415 k. Nature and Essentials in General.

Most Cited Cases

Inasmuch as there was no valid service of process on defendant, court was without jurisdiction of parties and decree for specific performance of agreement and money judgment was of no force and effect.

**[8] Costs 102** ↪8

102 Costs

102I Nature, Grounds, and Extent of Right in General

102k5 Power to Award Costs

102k8 k. Want of Jurisdiction. Most Cited

Cases

Where defendant maintained his denial of jurisdiction throughout proceeding against him, he did not put in general appearance and there was no valid service of process upon him, court had no jurisdiction to enter order requiring him to pay sum as counsel fees.

**\*182 \*\*154** Vivian V. Simpson, Rockville (Simpson & Simpson, Joseph B. Simpson, Jr., H. Algire McFaul, Rockville (William T. Wood, Rockville, on the No. 342 brief only), and Arthur C. Elgin, Washington, D. C., on the brief), for appellant.

**\*183** James C. Christopher, Bethesda (Robert L. Hillyard, Bethesda, on the No. 342 brief only), for appellee.

Before HAMMOND, C. J., and HORNEY,<sup>FN\*</sup> MARBURY, BARNES, McWILLIAMS, FINAN and

SINGLEY, JJ.

FN\* Horney, J., sat at the oral argument of these cases but took no part in the decisions.

MARBURY, Judge.

The two appeals considered here both arise from a single equity case heard before the Circuit Court for Montgomery County, sitting as a court of equity.

On December 22, 1966, the appellee, May J. Sheehy, filed a bill of complaint in which she alleged that she and the appellant, Vincent A. Sheehy, Jr., had entered into an agreement on December 18, 1965, reciting, inter alia, that they were not living together as man and wife and that Mr. Sheehy was to pay his wife the sum of \$7,000 per year in monthly payments of \$583.30. The bill further alleged that the payments coming due after June 18, 1966, had not been paid, and prayed that the defendant be required to specifically perform the agreement; that the plaintiff be awarded a money judgment for the payments in default; and that the plaintiff be accorded such other and further relief as may be required.

On December 22, 1966, a show cause order returnable on or before January 20, 1967, was issued and directed to the appellant. On January 4, 1967, a return was made as follows:

‘Served the within subpoena personally by reading to and leaving copy of same together with a copy of the bill of complaint and order with Vincent A. Sheehy, Jr., this 29th day of December, 1966.

Ralph W. Offutt, Sheriff

On January 17, 1967, Mr. Sheehy filed a preliminary motion under Maryland Rule 323 entitled ‘Motion to Quash Service’ by which he appealed through his solicitors for the limited purpose of the motion on the ground that he had not been served personally nor

had he been served by having a subpoena read to him and a copy left with him. This motion was supported by an \*\*155 affidavit specifically denying the sheriff’s return.

A hearing on the motion was held on January 20, 1967, before Judge Shook, at which testimony was taken from deputy sheriff Day, the deputy who had supposedly served the suit \*184 papers. He testified that he had served the papers by reading same to the person within the apartment and posting the papers on the door. He further testified that after attending to some other business he later returned and found that the papers had been removed from the door, although he did not know by whom. After the testimony had been taken Judge Shook denied the motion on the ground that Code (1957), Article 75, Section 92 had been complied with and allowed the defendant fifteen days to plead to the bill of complaint.

The appellant answered and a hearing was held before Judge Shure on June 26, 1967. At this hearing the appellee testified in her own behalf and the appellant, who renewed his motion to quash, did not offer any evidence because of the question of jurisdiction that had been raised by him. The matter was taken under advisement by the court and on July 17, 1967, a decree was filed by Judge Shure ordering the defendant to specifically perform the terms of the agreement and further, entering a money judgment in the amount of \$7,000 for unpaid instalments under the agreement.

The appellant then appealed to this Court from the decree of July 17, 1967, which is the basis of appeal No. 254, and the appellee countered on September 6, 1967, by filing a petition for counsel fees in defense of that appeal. The appellant answered denying that the court had jurisdiction to award counsel fees to the plaintiff in any action other than an action for divorce. At the hearing before Judge Levine on October 20, 1967, no testimony was taken and on October 25, 1967, an order was issued ordering the appellant to

pay the appellee \$500 attorney's fees for her defense of the appeal. The appellant also appealed from this order, which gives rise to appeal No. 342.

[1][2][3][4][5] On the appeal from the decree ordering the specific performance of the agreement and entering the money judgment there is only one question raised, namely, whether the defendant had been personally served with process in accordance with the provisions of Article 75, Section 92. If the defendant was not properly served the court below had no jurisdiction and the decree issued was invalid and without significance. *Little v. Miller*, 220 Md. 309, 153 A.2d 271; \*185 *Thomas v. Hardisty*, 217 Md. 523, 143 A.2d 618; *Wilmer v. Epstein*, 116 Md. 140, 81 A. 379. To have been valid the service must have been personal and the fact that the defendant may have had actual knowledge of the suit against him would not cure a defective service. *Little v. Miller*, supra; *Harvey v. Slacum*, 181 Md. 206, 29 A.2d 276; *Wilmer v. Epstein*, supra; 2 *Poe*, Pleading and Practice, Section 62 (Tiffany Ed.). It is true, as the appellee points out, that a proper return is prima facie evidence of valid service of process and a simple denial of service by the defendant is not sufficient to rebut the presumption arising from such a return. *Weinreich v. Walker*, 236 Md. 290, 203 A.2d 854; *Little v. Miller*, supra. In the instant case, however, there was much more than a simple denial of service by the defendant. At the hearing before Judge Shook, the deputy sheriff who claimed to have made the service, testified that he made it at \$10200 Grosvenor Park, Apartment 301', while the bill of complaint and the subpoena gave the appellant's address as '10201 Grosvenor Place, Apt. 321.' Moreover, the deputy never saw the occupant of the apartment at which he claimed to have served the suit papers and admitted that he did not know if the occupant was Vincent A. Sheehy, Jr. or some other Sheehy. Indeed, his only knowledge of the inhabitant of the apartment was that a voice answered 'yes' when he asked 'Mr. Sheehy?' This is quite different from a \*\*156 case where the person behind the door volunteers that he is 'Mr. Sheehy.' In the latter example the

person answering would be unlikely to be able to volunteer the correct name if he was not actually that person, while in the instant case anyone could say yes if asked if he was Mr. Sheehy. From the discrepancies indicated by the testimony and the pleadings below we conclude from the record before us that there was no valid personal service of process as required by Rule 104.

The appellee also contended that service was properly made under the provisions of Article 75, Section 92, as determined by Judge Shook, which provides as follows:

'In all cases of civil process at law or or in equity, or of any civil writ whatsoever, issued out of any court, or by any judge of this State, and directed to or \*186 against, or lawfully to be served upon any person whatsoever, wherein the service of such writ or process upon such person then being within the local jurisdiction of such court or judge, shall be prevented or resisted by threats, violence, intimidation or superior force on the part or behalf of such person; or when the said person so liable to be served with such writ or process shall be within any fortress, or fortified place or building, or at any military post within said jurisdiction, and entrance thereto, or access therein to such person shall be by order or on the behalf of such person refused, obstructed or prevented, so that the officer charged with the service of such writ or process shall be unable to serve the same, or cannot do so without force, or personal risk, the said officer shall leave a copy of such writ of process, if practicable or permitted, with such person or persons as shall present themselves, where such writ or process is sought to be served, and where or whereabouts the person on whom the same is sought to be served shall be; or shall set up such copy upon the fortress, building or premises aforesaid, or as near thereto as may be practicable; and shall make return of the facts accordingly; which return shall to all legal intents, purposes and effect be equivalent to a return of actual personal service of such writ or process upon the party named therein.'

[6] An examination of the deputy's testimony does not reveal any circumstances from which we can draw the conclusion that service was 'prevented or resisted by threats, violence, intimidation or superior force' or that the person behind the apartment door was 'within any fortress, or fortified place or building \* \* \*.' Actually the testimony indicates that the deputy never even requested that the door be opened and there was nothing to show that he was in any way repelled by force or was threatened.

[7] Accordingly, we hold that there was no valid service of process on the defendant and that the decree for specific performance\*187 on the agreement and the money judgment as a result thereof was of no force and effect since the court was without jurisdiction of the parties.

[8] Neither was there any jurisdiction as to the order requiring the appellant to pay \$500 counsel fees. The appellant maintained his denial of jurisdiction throughout and did not put in a general appearance. As the order stands on no firmer grounds than did the decree issued by Judge Shure, we hold that it was invalid and without legal effect and therefore must be reversed. Under these circumstances we need not consider the question raised by the appellant, whether the lower court erred in ordering the defendant husband to pay counsel fees of the wife from whom he was separated under an agreement, when no suit had been filed for a divorce.

Decree in No. 254 reversed. Order in No. 342 reversed. Costs to be paid by appellee.

Md. 1968.  
Sheehy v. Sheehy  
250 Md. 181, 242 A.2d 153

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C

Supreme Court of Arkansas.  
Edward TRUSCLAIR, Appellant,  
v.  
McGOWAN WORKING PARTNERS, Appellee.

No. 08-769.  
April 16, 2009.

**Background:** After plaintiff voluntarily dismissed his original complaint against defendant, a foreign corporation, plaintiff re-filed and served complaint. Defendant moved to dismiss for lack of jurisdiction based on defective summons. The Circuit Court, Union County, David Fredric Guthrie, J., granted motion, and dismissed complaint with prejudice. Plaintiff appealed.

**Holdings:** The Supreme Court, Annabelle Clinton Imber, J., held that:

(1) dismissal of plaintiff's action was mandatory, and  
(2) trial court properly dismissed plaintiff's complaint with prejudice.

Affirmed.

West Headnotes

[1] Process 313 ↪49

313 Process  
313II Service  
313II(A) Personal Service in General  
313k49 k. Statutory provisions. Most Cited Cases

Process 313 ↪64

313 Process  
313II Service  
313II(A) Personal Service in General  
313k64 k. Mode and sufficiency of service.  
Most Cited Cases

Statutory service requirements, being in derogation of common-law rights, must be strictly construed and compliance with them must be exact.

[2] Process 313 ↪24

313 Process  
313I Nature, Issuance, Requisites, and Validity  
313k24 k. Requisites and validity of writs or other process in general. Most Cited Cases

The technical requirements regarding the form of a summons must be construed strictly and compliance with those requirements must be exact. Rules Civ.Proc., Rule 4(b).

[3] Process 313 ↪64

313 Process  
313II Service  
313II(A) Personal Service in General  
313k64 k. Mode and sufficiency of service.  
Most Cited Cases

Process 313 ↪153

313 Process  
313III Defects, Objections, and Amendment  
313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases

Actual knowledge of a proceeding does not validate defective process because service of valid process is necessary to give a court jurisdiction over a defendant.

#### [4] Pretrial Procedure 307A ↪560

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)2 Grounds in General

307Ak560 k. Process, defects and objections as to. Most Cited Cases

Dismissal of plaintiff's action was mandatory, where summons misstated the time in which defendant, a foreign corporation, was required to respond, and no motion to extend was made within 120 days of filing of the complaint. Rules Civ.Proc., Rule 4(b, h, i).

#### [5] Pretrial Procedure 307A ↪694

307A Pretrial Procedure

307AIII Dismissal

307AIII(B) Involuntary Dismissal

307AIII(B)6 Proceedings and Effect

307Ak693 Operation and Effect

307Ak694 k. Adjudication on merits.

Most Cited Cases

Trial court properly dismissed plaintiff's complaint with prejudice, as plaintiff's original complaint against defendant was previously dismissed without prejudice, before it was refiled, and thus, second dismissal operated as an adjudication on the merits. Rules Civ.Proc., Rule 41(b).

\*\*429 Ronald L. Griggs, El Dorado, for appellant.

Greer, McCasland & Miller, LLP, by: William W. Miller, Jr., Texarkana, for appellee.

ANNABELLE CLINTON IMBER, Justice.

\*1 This appeal arises from the dismissal with prejudice of a complaint filed by Appellant Edward Trusclair. The facts forming the basis of this case are not in dispute. Appellant's original complaint against Appellee McGowan Working Partners was voluntarily dismissed without prejudice on May 26, 2006. Appellant then refiled his complaint on March 6, 2007, demanding damages from Appellee as a result of injuries allegedly caused by Appellee. The circuit court dismissed Appellant's complaint with prejudice on May 1, 2008.

Appellee is a foreign corporation with its principal place of business in Mississippi and an agent designated for service of process in Arkansas. Appellant served the agent by certified mail and return receipt on March 8, 2007, with a copy of the complaint attached to a properly issued summons. The summons, however, contained an error stating that \*2 Appellee had twenty (20) days from the date of service to answer the complaint. Rule 12(a) of the Arkansas Rules of Civil Procedure allows foreign corporations thirty (30) days to answer. Appellee filed an answer on March 26, 2007, within the 20-day period, and pointed out that the summons' statement of a 20-day period violated Ark. R. Civ. P. 12(a). Appellee's answer also addressed the allegations made in the complaint. Appellant did not serve a corrected summons on Appellee within 120 days of the filing of the complaint as required by Ark. R. Civ. P. 4(i), nor did he file any motion to extend within that period.

On July 13, 2007, Appellee filed a motion to dismiss with prejudice for lack of jurisdiction. The circuit court held a hearing on April 9, 2008, and granted Appellee's motion to dismiss. Because the 120-day period for service of summons had expired without an extension, the circuit court concluded that it lacked jurisdiction to amend the defective summons. In addition, as this was the second dismissal, the circuit court dismissed Appellant's complaint with prej-

udice pursuant to Ark. R. Civ. P. 41. Appellant filed a timely notice of appeal on May 9, 2008.

The sole issue on appeal is whether the incorrect statement in the summons as to the deadline for filing an answer constitutes a sufficient defect to invalidate the service of process and deprive the circuit court of jurisdiction. We have jurisdiction over the case pursuant to Ark. Sup.Ct. R. 1–2(b)(5) because the appeal involves significant issues needing clarification or development of the law, or overruling of precedent.

**\*\*430 \*3** It is undisputed that the only defect in the summons was the statement that Appellee had 20 days instead of 30 days to file an answer. Ark. R. Civ. P. 4(b) mandates the form of the summons:

(b) Form. The summons shall be styled in the name of the court and shall be dated and signed by the clerk; be under the seal of the court; contain the names of the parties; be directed to the defendant; state the name and address of the plaintiff's attorney, if any, otherwise, the address of the plaintiff; and the time within which these rules require the defendant to appear, file a pleading, and defend and shall notify him that in case of his failure to do so, judgment by default may be entered against him for the relief demanded in the complaint.

Ark. R. Civ. P. 4(b) (2008). According to Ark. R. Civ. P. 12(a)(1), “A defendant shall file his or her answer within 20 days after the service of summons and complaint upon him or her, except that: (A) a defendant not residing in this state shall file an answer within 30 days after service....” Ark. R. Civ. P. 12(a)(1) (2008).

Appellant argues that strict compliance with Rule 4(b) should not be applied to this case because it is preferable to decide cases on the merits and, in this case, Appellee did not suffer any prejudice. Appellee, on other hand, responds that the technical require-

ments of Rule 4 must be met exactly in order for process and service of process to be valid.

[1][2][3] Our case law is well-settled that statutory service requirements, being in derogation of common-law rights, must be strictly construed and compliance with them must be exact. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525 (2003). This court has held that the same reasoning applies to service requirements imposed by court \*4 rules. *Id.* More particularly, the technical requirements of a summons set out in Ark. R. Civ. P. 4(b) must be construed strictly and compliance with those requirements must be exact. *Id.* Actual knowledge of a proceeding does not validate defective process. *Carruth v. Design Interiors, Inc.*, 324 Ark. 373, 921 S.W.2d 944 (1996). The reason for this rule is that service of valid process is necessary to give a court jurisdiction over a defendant. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, *supra*; *Posey v. St. Bernard's Healthcare, Inc.*, 365 Ark. 154, 226 S.W.3d 757 (2006).

We have made it clear in a long line of cases that compliance with Rule 4(b) must be exact. *See Brennan v. Wadlow*, 372 Ark. 50, 270 S.W.3d 831 (2008); *Posey v. St. Bernard's Healthcare, Inc.*, *supra*; *Shotzman v. Berumen III, M.D.*, 363 Ark. 215, 213 S.W.3d 13 (2005); *Tobacco Superstore, Inc. v. Darrough*, 362 Ark. 103, 207 S.W.3d 511 (2005); *Nucor Corp. v. Kilman*, 358 Ark. 107, 186 S.W.3d 720 (2004); *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, *supra*. The bright line standard of strict compliance permits certainty in the law; whereas, a substantial compliance standard would lead to an ad hoc analysis in each case in order to determine whether the due process requirements of the Arkansas and U.S. Constitutions have been met.

[4] With regard to the instant appeal, our court's decision in *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, *supra*, is particularly instructive. In that case, the defendant's designated agents for service of

process were properly served, but the summonses did not identify the defendants correctly, and the summonses misstated the time in which an out-of-state\*5 defendant is required to respond. The circuit court dismissed Smith's complaint with prejudice based on the deficiencies in \*\*431 the summonses. *Id.* Because the service requirements imposed by the court rules must be strictly construed and compliance with them must be exact, we concluded that the circuit court had properly dismissed Smith's complaint for failure of service of valid process under Rule 12(b). *Id.* Likewise, in the instant case, the summons misstated the time in which an out-of-state defendant is required to respond. Thus, the circuit court properly applied the above-cited case law and dismissed Appellant's complaint based upon the deficiency of the summons under Rule 4(b).

Appellant nonetheless suggests that the circuit court should have amended the summons pursuant to Ark. R. Civ. P. 4(h). His response to Appellee's motion to dismiss included a request to amend the summons, which request was reiterated at the hearing. Rule 4(h) provides that “[a]t any time in its discretion and upon such terms as it deems just, the court may allow any summons or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the summons is issued.” Ark. R. Civ. P. 4(h) (2008). Appellant, however, failed to obtain service of valid process on Appellee within 120 days after the filing of the complaint; nor did he file any motion to extend within that period, as required by Ark. R. Civ. P. 4(i). Pursuant to Rule 4(i), “If service of the summons is not made upon a defendant within 120 days after the filing of the complaint, the action shall be dismissed as to that defendant without prejudice upon motion or upon the court's initiative. If a motion to extend is made \*6 within 120 days of the filing of the suit, the time for service may be extended by the court upon a showing of good cause.” Ark. R. Civ. P. 4(i) (2008). By its plain language, which we have strictly construed, Rule 4(i) requires that service

of process be accomplished within 120 days after the filing of the complaint unless the plaintiff has filed a motion to extend time prior to the expiration of the deadline. *Smith v. Sidney Moncrief Pontiac, Buick, GMC Co.*, 353 Ark. 701, 120 S.W.3d 525. If service is not obtained within that time and no timely motion to extend is made, dismissal of the action is mandatory. *Id.* Appellant did not accomplish service of valid process within 120 days after the filing of the complaint or move for an extension within that period. Thus, the dismissal of Appellant's complaint was mandatory.

[5] Finally, we are required to consider Rule 41 of the Arkansas Rules of Civil Procedure which governs the dismissal of actions in civil proceedings. With regard to involuntary dismissal, Rule 41(b) provides in pertinent part: “[a] dismissal under this subdivision is without prejudice to a future action by the plaintiff unless the action has been previously dismissed, whether voluntarily or involuntarily, in which event such dismissal operates as an adjudication on the merits.” Ark. R. Civ. P. 41(b) (2008). Appellant's original complaint against Appellee was dismissed without prejudice on May 26, 2006. The complaint at issue was refiled on March 6, 2007. Pursuant to Ark. R. Civ. P. 41(b), the second dismissal operates as an adjudication on the merits. Ark. R. Civ. P. 41(b) (2008). Therefore, the circuit court properly dismissed Appellant's complaint with prejudice. \*7 *Bakker* [http://www.westlaw.com/Find/Default.wl?rs=d\\_fa1.0&vr=2.0&DB=713&FindType=Y&SerialNum=1996250735](http://www.westlaw.com/Find/Default.wl?rs=d_fa1.0&vr=2.0&DB=713&FindType=Y&SerialNum=1996250735) *v. Ralston*, 326 Ark. 575, 932 S.W.2d 325 (1996).

Affirmed.

Ark., 2009.

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 (Cite as: 316 S.W.3d 589)



Court of Appeals of Tennessee,  
 Western Section, at Jackson.  
 Ronald WATSON  
 v.  
 Roberto GARZA, et al.

No. W2007-02480-COA-R3-CV.  
 June 19, 2008 Session.  
 Nov. 7, 2008.

No Permission to Appeal Applied for to the Supreme  
 Court.

**Background:** Plaintiff filed action against driver of semi-tractor truck, truck's owner, and truck's lessee, relating to automobile accident. The Circuit Court, Crockett County, Clayburn Peeples, J., granted driver's motion to dismiss for insufficient service of process, and the order was made final. Plaintiff appealed.

**Holdings:** The Court of Appeals, Alan E. Highers, P.J., W.S., held that:

- (1) owner of truck was not presumed to be truck driver's agent for receipt of service of process, and
- (2) driver was not estopped from asserting insufficient service of process.

Affirmed.

West Headnotes

[1] Process 313 48

313 Process  
 313II Service  
 313II(A) Personal Service in General  
 313k48 k. Nature and necessity in general.  
 Most Cited Cases

Because the trial court's jurisdiction of the parties is acquired by service of process, proper service of process is an essential step in a proceeding.

[2] Process 313 64

313 Process  
 313II Service  
 313II(A) Personal Service in General  
 313k64 k. Mode and sufficiency of service.  
 Most Cited Cases

Process 313 127

313 Process  
 313II Service  
 313II(E) Return and Proof of Service  
 313k127 k. Nature and necessity in general.  
 Most Cited Cases

The record must establish that the plaintiff complied with the requisite procedural rules for service of process, and the fact that the defendant had actual knowledge of attempted service does not render the service effectual if the plaintiff did not serve process in accordance with the rules.

[3] Process 313 4

313 Process  
 313I Nature, Issuance, Requisites, and Validity  
 313k3 Necessity and Use in Judicial Proceedings  
 313k4 k. In general. Most Cited Cases

Process 313 64

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313 Process  
 313II Service  
 313II(A) Personal Service in General  
 313k64 k. Mode and sufficiency of service.

Most Cited Cases

The Tennessee Rules of Civil Procedure govern service of process in Tennessee. Rules Civ.Proc., Rule 4.01 et seq.

**[4] Courts 106 ↪ 85(1)**

106 Courts  
 106II Establishment, Organization, and Procedure  
 106II(F) Rules of Court and Conduct of Business  
 106k85 Operation and Effect of Rules  
 106k85(1) k. In general. Most Cited Cases

The Tennessee Rules of Civil Procedure are laws of the state, in full force and effect, until such time as they are superseded by legislative enactment or inconsistent rules promulgated by the Supreme Court and adopted by the General Assembly.

**[5] Process 313 ↪ 64**

313 Process  
 313II Service  
 313II(A) Personal Service in General  
 313k64 k. Mode and sufficiency of service.  
 Most Cited Cases

Service of process in Tennessee must strictly comply with the Tennessee Rules of Civil Procedure. Rules Civ.Proc., Rule 4.01 et seq.

**[6] Process 313 ↪ 127**

313 Process

313II Service  
 313II(E) Return and Proof of Service  
 313k127 k. Nature and necessity in general.  
 Most Cited Cases

The “return of service” is a written account of the actions taken by the person making service of process to show to whom and how the service was made, or the reason service was not made. Rules Civ.Proc., Rule 4.03.

**[7] Process 313 ↪ 145**

313 Process  
 313II Service  
 313II(E) Return and Proof of Service  
 313k144 Evidence as to Service  
 313k145 k. Presumptions and burden of proof. Most Cited Cases

Statements made in the officer's return of service, regarding service of process, are entitled to presumptive weight because sheriffs and their deputies cannot be expected to retain independent recollections of each service, and they generally have no personal interest in the litigation.

**[8] Process 313 ↪ 145**

313 Process  
 313II Service  
 313II(E) Return and Proof of Service  
 313k144 Evidence as to Service  
 313k145 k. Presumptions and burden of proof. Most Cited Cases

**Process 313 ↪ 148**

313 Process  
 313II Service  
 313II(E) Return and Proof of Service

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313k144 Evidence as to Service

313k148 k. Evidence to impeach or contradict return, certificate, or affidavit of service.  
Most Cited Cases

The officer's return of service, regarding service of process, is regarded in the law as the best evidence of the fact it states, and the oath of an interested party is not sufficient in law to overcome such return.

**[9] Process 313 ↪ 145**

313 Process

313II Service

313II(E) Return and Proof of Service

313k144 Evidence as to Service

313k145 k. Presumptions and burden of proof. Most Cited Cases

The presumption of correctness of facts stated in an officer's return of service, regarding service of process, does not extend to statements in a return that are no more than the officer's conclusions based upon information provided to the officer by others.

**[10] Process 313 ↪ 149**

313 Process

313II Service

313II(E) Return and Proof of Service

313k144 Evidence as to Service

313k149 k. Weight and sufficiency.  
Most Cited Cases

If the method of service of process employed requires the establishment of a particular legal predicate, the conclusory allegations of the process server will not be sufficient to establish valid service.

**[11] Automobiles 48A ↪ 235**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak235 k. Process. Most Cited Cases

Prima facie weight had to be given to deputy sheriff's statements in return of service that he served the summons for driver of semi-tractor truck on truck's owner, at owner's request, and thus, driver could not disprove these statements without presenting other disinterested witnesses or corroborating circumstances.

**[12] Automobiles 48A ↪ 235**

48A Automobiles

48AV Injuries from Operation, or Use of Highway

48AV(B) Actions

48Ak235 k. Process. Most Cited Cases

Owner of semi-tractor truck was not presumed to be truck driver's agent for receipt of service of process, and thus, driver was not required to present a disinterested witness, in order to show that owner was not driver's agent for receipt of service of process.

**[13] Principal and Agent 308 ↪ 99**

308 Principal and Agent

308III Rights and Liabilities as to Third Persons

308III(A) Powers of Agent

308k98 Implied and Apparent Authority

308k99 k. In general. Most Cited Cases

Apparent authority of an agent must be determined by the acts of the principal and not those of the agent.

**[14] Process 313 ↪ 164(3)**

313 Process

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313III Defects, Objections, and Amendment  
 313k161 Amendment of Defects  
 313k164 Return of Proof of Service in  
 General  
 313k164(3) k. Defects amendable. Most  
 Cited Cases

Although the correction of defects in the return of summons, regarding service of process, may be allowed in some circumstances, there a difference between a mere irregularity and a jurisdictional defect.

[15] Process 313  166

313 Process  
 313III Defects, Objections, and Amendment  
 313k166 k. Waiver of defects and objections.  
 Most Cited Cases

Driver of semi-tractor truck was not estopped from asserting insufficient service of process, in personal injury action; after deputy sheriff served driver's summons on truck's owner, owner and truck's lessee filed answers and engaged in discovery with plaintiff, but driver did not file a responsive pleading, engage in discovery, or otherwise participate in the lawsuit, and the first pleading filed by driver was his motion to dismiss for insufficient service of process.

[16] Process 313  166

313 Process  
 313III Defects, Objections, and Amendment  
 313k166 k. Waiver of defects and objections.  
 Most Cited Cases

As a general rule, defects in process, service of process, and return of service may be waived.

[17] Process 313  166

313 Process  
 313III Defects, Objections, and Amendment  
 313k166 k. Waiver of defects and objections.  
 Most Cited Cases

A defendant may, by his conduct, be estopped from objecting that service of process was improper, which conduct may include participating in discovery, in addition to failing to raise the issue of insufficiency of service clearly or with the necessary specificity.

[18] Process 313  166

313 Process  
 313III Defects, Objections, and Amendment  
 313k166 k. Waiver of defects and objections.  
 Most Cited Cases

Once the defense of insufficient service of process has been properly raised, any other participation in the lawsuit by the defendant does not constitute a waiver of that defense.

\*591 Glenn K. Vines, Jr., Memphis, TN, for Appellant.

R. Dale Thomas, Jesse D. Nelson, Jackson, TN, for Appellee.

## OPINION

ALAN E. HIGHERS, P.J., W.S., delivered the opinion of the court, in which DAVID R. FARMER, J., and HOLLY M. KIRBY, J., joined.

ALAN E. HIGHERS, P.J., W.S.

This appeal involves a motion to dismiss for insufficient service of process. The summons issued for service on the defendant-appellee was served by the deputy sheriff on a co-defendant. The trial court granted the defendant-appellee's motion to dismiss.

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 (Cite as: 316 S.W.3d 589)

We affirm.

#### I. FACTS & PROCEDURAL HISTORY

Ronald Watson (“Plaintiff”) and Roberto Garza, Jr., (“Defendant Garza”) were involved in an automobile accident on November 19, 2004. Defendant Garza was driving a semi-tractor truck owned by Jimmy Harber, and leased to Allon Delivery, LLC. On November 1, 2005, Plaintiff filed this action against Defendant Garza, Jimmy Harber, and Allon Delivery. A summons was issued for service on Defendant Garza, listing his correct home address. \*592 The return of summons was completed by a deputy sheriff as follows <sup>FN1</sup>:

FN1. The underlined portions were handwritten by the deputy.

I HEREBY CERTIFY THAT I HAVE SERVED THE WITHIN THE WITHIN SUMMONS:

By delivering on the 21st day of December, 2005, at 18:50 P.M. a copy of the summons and a copy of the Complaint to the following defendants:

Jimmy Harber owner of Allon Delivery, owner requested paper to be served upon Jimmy Harber

Answers were filed on behalf of Jimmy Harber and Allon Delivery, but Defendant Garza did not file an answer. Plaintiff subsequently engaged in discovery with Jimmy Harber and Allon Delivery, but Defendant Garza did not participate.

On May 21, 2007, Defendant Garza filed a motion to dismiss for insufficient service of process, along with a memorandum of law and his own affidavit stating that he was never served with process. Defendant Garza further stated by affidavit that he had resided at the address listed on the summons since 2002, and that to his knowledge, no one had attempted to serve him with process. Defendant Garza also stated

that he had “never given authorization to Mr. Harber to accept process on my behalf,” and that Mr. Harber had never been his authorized agent for any purpose.

Jimmy Harber testified by deposition that the deputy sheriff left “papers” at his house, and that his wife, Bonnie, gave them to Defendant Garza when he picked up his paycheck at the Harbers' residence later that week. Mr. Harber explained that he was out of town when Defendant Garza came to get his paycheck, and Bonnie did not tell him any details about the encounter.

Plaintiff's counsel deposed Defendant Garza on July 28, 2007, after he had filed the motion to dismiss for insufficient service of process. Defendant Garza testified that he received “the lawsuit” one day when he went to Jimmy Harber's house to get his paycheck. Defendant Garza could not remember if Bonnie Harber handed the papers directly to him, or if she was even present. He stated that the papers were in an envelope with his paycheck, and that he did not even look at them at the time. When he got home, his wife discovered the summons and read it to him.

On August 3, 2007, Plaintiff filed a “Motion for Suggestion of Diminution of Record,” requesting that the summons be amended to show that it was served upon Defendant Garza by Bonnie Harber. Plaintiff also filed a response to the motion to dismiss, arguing that Defendant Garza should be estopped from asserting the defense of insufficiency of service of process because his motion to dismiss was untimely.

The trial court held a hearing on the motions on August 6, 2007. Thereafter, the court entered an order granting Defendant Garza's motion to dismiss and denying Plaintiff's motion for suggestion of diminution of the record. The order was made final pursuant to Rule 54.02 of the Tennessee Rules of Civil Procedure, and Plaintiff timely appealed.

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## II. ISSUES PRESENTED

Plaintiff presents the following issues, slightly restated, for review:

1. Whether the trial court erred in requiring n requiring Plaintiff to prove that service of process was proper when the deputy sheriff returned the summons as “served” on Defendant Garza;

\*593 2. Whether the trial court erred in denying Plaintiff's motion for suggestion of diminution of the record to amend the summons;

3. Whether the trial court erred in finding that Defendant Garza was not estopped to claim insufficiency of service of process.

For the following reasons, we affirm the decision of the circuit court.

## III. DISCUSSION

### A. The Manner of Service

[1][2] Because the trial court's jurisdiction of the parties is acquired by service of process, proper service of process is an essential step in a proceeding. *Stitts v. McGown*, No. E2005-02496-COA-R3-CV, 2006 WL 1152649, at \*2 (Tenn.Ct.App. May 2, 2006) (citing *Haley v. University of Tennessee-Knoxville*, 188 S.W.3d 518, 522 (Tenn.2006)). The record must establish that the plaintiff complied with the requisite procedural rules, and the fact that the defendant had actual knowledge of attempted service does not render the service effectual if the plaintiff did not serve process in accordance with the rules. *Wallace v. Wallace*, No. 01A01-9512-CH-00579, 1996 WL 411627, at \*2 (Tenn.Ct.App.M.S. July 24, 1996).

[3][4][5][6] “The Tennessee Rules of Civil Procedure govern the service of process, and the Supreme Court has held that the Rules of Civil Procedure are ‘laws’ of this state, in full force and effect, until such time as they are superseded by legislative enactment

or inconsistent rules promulgated by the Court and adopted by the General Assembly.” *Estate of McFerren v. Infinity Transport, LLC*, 197 S.W.3d 743, 747 (Tenn.Workers Comp.Panel 2006) (citing *State v. Hodges*, 815 S.W.2d 151, 155 (Tenn.1991)). “Service of process must strictly comply to Rule 4 of the Tennessee Rules of Civil Procedure.” *Wallace*, 1996 WL 411627, at \*2. Rule 4.04 of the Tennessee Rules of Civil Procedure provides, in relevant part:

The plaintiff shall furnish the person making the service with such copies of the summons and complaint as are necessary. Service shall be made as follows:

(1) Upon an individual other than an unmarried infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or if he or she evades or attempts to evade service, by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on behalf of the individual served.

...

Rule 4.03 provides that “[t]he person serving the summons shall promptly make proof of service to the court and shall identify the person served and shall describe the manner of service.” The return of service is “a written account of the actions taken by the person making service to show to whom and how the service was made, or the reason service was not made.” 3 Nancy Fraas MacLean, *Tennessee Practice Series—Rules of Civil Procedure Annotated* § 4:15 (4th ed.2008). According to the Advisory Commission Comment to Rule 4.03, “the manner of service must be described and the person served must be identified on the return; thus any departure from the routine

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manner of service will instantly be apparent to the court and to defendant's counsel." Rule 4.01 states that the return indorsed \*594 on the summons "shall be proof of the time and manner of service."

In the case before us, the return indorsed on the summons for Defendant Garza reads, "Jimmy Harber owner of Allon Delivery, owner requested paper to be served upon Jimmy Harber." Thus, the summons was not delivered "to the individual [Defendant Garza] personally," in accordance with the first part of Rule 4.04(1). Instead, it was left with a co-defendant. Still, Plaintiff argues that because "an officer's return is prima facie evidence of proper service," *Jackson v. Aldridge*, 6 S.W.3d 501, 503 (Tenn.Ct.App.1999), we must assume that service was proper, and that Jimmy Harber must have been "an agent authorized by appointment or by law to receive service on behalf of" Defendant Garza. *See* Tenn. R. Civ. P. 4.04(1). According to Plaintiff, Defendant Garza was required to prove, through disinterested witnesses, by clear and convincing evidence, that Jimmy Harber was not authorized to receive process on his behalf. We disagree. The presumption that statements in an officer's return are true does not extend to the lengths urged by Plaintiff.

[7] Statements made in the officer's return are entitled to presumptive weight because sheriffs and their deputies "cannot be expected to retain independent recollections of each service, and they generally have no personal interest in the litigation." 62B Am.Jur.2d *Process* § 291 (2008). For example, in *Brake v. Kelly*, 189 Tenn. 612, 226 S.W.2d 1008, 1010–11 (1950), three defendants testified that they were not served with process, but the official return of the deputy sheriff was directly to the contrary. The deputy testified that while he had no independent recollection of having served these particular summonses, "he was sure that he did do so, or he would not have so made the return which, except as to the printed part, [was] in his own handwriting." *Id.* at 1009. The Supreme Court concluded that the de-

fendants "had failed to carry the burden of proof in support of their allegation that they had not been served with process and that the return of the officer to the contrary was false." *Id.* at 1010. The Court interpreted previous cases as holding that when a defendant denies being "served with process, *the official return and the testimony of the sheriff to the contrary*, such testimony of defendant ... should be supported by other disinterested witnesses or corroborating circumstances." *Id.* at 1011 (emphasis added) (citing *Tatum v. Curtis*, 68 Tenn. 360 (1878)). The testimony of one interested witness alone was not sufficient to impeach the return, because it presented a situation of "oath against oath." *Id.* Therefore, the Court found that the defendants' own testimony that they were not served was "insufficient to overcome the presumption of verity of the return of the officer[.]" *Id.*

[8] In another case, the Supreme Court explained that "the officer's return is regarded in the law as the best evidence of the fact it states, and the oath of an interested party is not sufficient in law to overcome such return." *Royal Clothing Co. v. Holloway*, 208 Tenn. 572, 347 S.W.2d 491, 492 (1961).

[9] The Middle Section of this Court addressed an argument similar to Plaintiff's in *Third National Bank of Nashville v. Estes*, No. 85–142–II, 1986 WL 3155 (Tenn.Ct.App.M.S. Mar. 12, 1986) *perm. app. denied* (Tenn. May 4, 1987). In that case, the plaintiff had filed a motion seeking to have a default judgment set aside for insufficient service of process. *Id.* at \*1. The deputy sheriff's return of service stated, "served [Defendant's wife] by leaving a copy of his summons with her and advising her to see that [Defendant] receives\*595 it. [Defendant] is evading service." *Id.* at \*4–5. When the defendant challenged service of process, the plaintiff tried to rely upon "the presumption that the statements in an officer's return are true" to establish that the defendant was evading service. *Id.* at \*5. On appeal, Judge Koch (now Justice Koch) explained that the return of service does not conclusively prove that the manner in which the defendant was

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served with process was adequate:

Third National Bank appears to be relying upon the presumption that the statements in an officer's return of process are true. This reliance is misplaced because the statements in the return deal with more than the action of the officer who served the process.

Tennessee is one of the jurisdictions following the rule that, absent fraud, an officer's return is prima facie evidence that the facts stated therein are true. *Royal Clothing Co. v. Holloway*, 208 Tenn. 572, 574, 347 S.W.2d 491, 492 (1961). This rule is based upon the long-recognized presumption that public officials perform their duties in the manner prescribed by law. *Wartrace v. Wartrace & Beech Grove Turnpike Co.*, 42 Tenn. (2 Cold.) 515, 519 (1865). However, this presumption of correctness does not extend to statements in a return that are no more than the officer's conclusions based upon information provided to the officer by others. *Canon [Cannon] v. Time, Inc.*, 115 F.2d 423, 426 (4th Cir.1940); *Hollinger v. Hollinger*, 416 Pa. 473, 206 A.2d 1, 3 (1965); *First Federal Savings and Loan Association of Chicago v. Brown*, 74 Ill.App.3d 901 [30 Ill.Dec. 538], 393 N.E.2d 574, 578 (1979); and *Goldner v. Reiss*, 64 Misc.2d 285 [785], 315 N.Y.S.2d 644, 645 (1970). See also 62 Am.Jur.2d *Process* §§ 179 & 180 (1972) and 72 C.J.S. *Process* § 99 (1951).

Based upon these principles, the officer's statements in the return that he left a copy of the summons with Mrs. Estes and that he asked her to see that Mr. Estes received it are to be given prima facie weight because they are statements concerning what the officer actually did. They relate to matters that are presumptively within the officer's personal knowledge. However, the same cannot be said for the officer's conclusion that Mr. Estes was evading service of process. We have no proof concerning how the officer reached this conclusion. Without

such proof, through testimony or otherwise, we cannot accord to the officer's conclusion the same weight given to his statements of fact. See *Harris v. American Legion John T. Shelton Post No. 838*, 12 Ill.App.3d 235, 297 N.E.2d 795, 796–97 (1973).

*Id.* at \*5–6.<sup>FN2</sup> In *Stanley v. Mingle*, No. 01–A–01–9007–CV–00253, 1991 WL 53423, at \*3 (Tenn.Ct.App.W.S. Apr. 12, 1991), this Court similarly refused to infer that a defendant was evading service of process from the statement in the officer's return that the defendant was “[n]ot to be found.”

FN2. The record in *Estes* contained only the motion to set aside the judgment and the return of service, and there was no evidence, by affidavit or otherwise, concerning the efforts to serve the defendant. 1986 WL 3155, at \*5. Therefore, the Court remanded the case for an evidentiary hearing regarding the manner of service. *Id.* at \*6.

[10] In sum, Rule 4.01 provides that the return indorsed on the summons “shall be proof of the time and manner of service.” However, “[i]f the method of service employed requires the establishment of a particular legal predicate, the conclusory allegations of the process server will not be sufficient to establish valid service.” Robert Banks, Jr. & June F. Entman, \*596 *Tennessee Civil Procedure* § 2–2(f), at 2–22 (2d ed.2004).

[11][12] Applying these principles to the case at bar, we conclude that prima facie weight should be given to the deputy's statement that he served Defendant Garza's summons on Jimmy Harber, at Jimmy Harber's request. In other words, Defendant Garza could not disprove these statements without presenting “other disinterested witnesses or corroborating circumstances.” See *Brake v. Kelly*, 189 Tenn. 612, 226 S.W.2d 1008, 1011 (1950). We do not also presume, however, that Jimmy Harber must have been an

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agent authorized by appointment or by law to receive service on behalf of Defendant Garza. Although Defendant Garza had the burden of showing that Jimmy Harber was not authorized to receive service of process on his behalf, *see Boles v. Tenn. Farmers Mut. Ins. Co.*, No. M1999-00727-COA-R3-CV, 2000 WL 1030837, at \*5 (Tenn.Ct.App. July 27, 2000), he was not required to do so through disinterested witnesses.

[13] In support of his contention that Jimmy Harber was not authorized to accept service of process on his behalf, Defendant Garza presented his own affidavit stating that he had “never given authorization to Mr. Harber to accept process on my behalf,” and that Mr. Harber had never been his authorized agent for any purpose. Plaintiff did not present any evidence to suggest that Jimmy Harber was an agent of Defendant Garza for any purpose. He simply argued that Defendant Garza's own testimony was insufficient to establish that Jimmy Harber was not his agent.<sup>FN3</sup> Plaintiff's attorney asked Defendant Garza during his deposition if he received other important documents or mail, such as Federal Express deliveries, at Jimmy Harber's house, but Defendant Garza responded that he only received his paycheck there. *Cf. Boles*, 2000 WL 1030837, at \*5 (observing that in some jurisdictions, an employee who is authorized to sign for and receive a defendant's certified mail is also authorized to accept service of process by mail as the defendant's authorized agent). Although the return of summons indicates that Jimmy Harber requested that the papers be left with him, Plaintiff does not argue that Jimmy Harber's conduct was evidence of an agency relationship. In any event, “[a]pparent authority of an agent must be determined by the acts of the principal and not those of the agent.” *Boone v. Gibson*, No. E2003-00226-COA-R3-CV, 2004 WL 367621, at \*5 (Tenn.Ct.App. Feb. 27, 2004) (quoting *Edmond Bros. Supply Co. v. Boyle and Adams*, 44 S.W.3d 530, 534 (Tenn.Ct.App.2000)). Regarding agents “authorized by appointment” to accept service, the federal courts have similarly held that “claims by an agent of having authority to receive process or the fact that an agent

actually accepts process is not enough to bind the defendant to the court's jurisdiction; there must be evidence that the defendant intended to confer that authority upon the agent in order to satisfy the terms of [\*597Federal Rule of Civil Procedure] Rule 4(e)(2).” 4A Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 1097 (2008).

FN3. Plaintiff relies on *Eluhu v. Richards*, No. M2005-00922-COA-R3-CV, 2006 WL 1521158, at \*5-6 (Tenn.Ct.App. June 2, 2006), which is distinguishable from the case at bar. In *Eluhu*, the return of summons for the defendant, Anthony Cebrun, stated “Served—Tony Cebru[n].” *Id.* at \*1. The Court explained, “when a defendant denies that he was served with process and the official return as well as the testimony of the serving officer is to the contrary, then the testimony of the defendant must be supported by disinterested witnesses or by corroborating circumstances.” *Id.* at \*5 (citations omitted). Here, the return unambiguously states that it was served on a third party, and Defendant Garza is not disputing the statements on the official return.

From the record before us, it is undisputed that Jimmy Harber was not authorized by Defendant Garza to accept service of process on his behalf. In the absence of any evidence demonstrating that Jimmy Harber was “an agent authorized by appointment or by law to receive service on behalf of the individual served,” Tenn. R. Civ. P. 4.04, we must conclude that service of process was improper.

#### ***B. The Motion for Suggestion of Diminution of Record***

Next, Plaintiff argues that the trial court should have granted his “Motion for Suggestion of Diminution of Record” and allowed him to amend the summons to show that it was served on Defendant Garza by Bonnie Harber. It is undisputed that the summons

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was passed along from person to person, and that it eventually made it into the hands of Defendant Garza. Apparently, Bonnie Harber placed the documents in an envelope with his paycheck and either handed the envelope to him or left it for him to pick up. Plaintiff contends that this constituted proper service because Rule 4.01(2) of the Tennessee Rules of Civil Procedure provides, “A summons and complaint may be served by any person who is not a party and is not less than 18 years of age.” However, Rule 4.01(2) requires that “[t]he process server must be identified by name and address on the return.” Bonnie Harber is more than eighteen years old, but it is not clear from the record that she personally delivered the summons to Defendant Garza, and she is not mentioned on the return.

[14] Rule 4.09 of the Tennessee Rules of Civil Procedure provides that “[a]t any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.” Plaintiff cites *Clifton v. American Ins. Co.*, 167 Tenn. 579, 72 S.W.2d 769 (1934), in support of his argument that he should have been permitted to amend the return of summons. In *Clifton*, process was properly served upon the state insurance commissioner, but the clerk had erroneously addressed the subpoena “to the Insurance Commissioner” instead of to the sheriff. *Id.* The trial court granted the defendant's motion to dismiss. *Id.* On appeal, the Supreme Court acknowledged that the trial judge has “broad discretion with respect to allowance of amendments,” but it concluded that the chancellor should have allowed an amendment of the summons because the defendant's argument was based “upon the sheerest technicality.” *Id.* In *Ford Motor Co. v. Taylor*, 60 Tenn.App. 271, 446 S.W.2d 521, 525 (1969), a summons listed the correct date of filing and date of issuance, but its “teste date,” or “ceremonial reference to the beginning of the term,” listed the wrong month. The Court of Appeals noted

that “much of the reason and substance” for stating the teste date was outdated and held that “[t]he circuit judge acted entirely within his discretionary powers in allowing the correction by amendment to comply with the ‘forms of ancient days.’” *But see Citizens Bank v. Jarvis*, No. 03A01-9507-CV-00224, 1996 WL 159647, at \*1-2 (Tenn.Ct.App.W.S. Apr. 4, 1996) (holding that a civil warrant was “fatally defective” and “void *ab initio*” where it summoned the defendants to appear before the general sessions court of Carter County, Tennessee, but the case was actually pending in Sullivan County). Although the correction of defects in the return of summons may be allowed in \*598 some circumstances, there is clearly a difference between a “mere irregularity” and a “jurisdictional defect.” 72 C.J.S. *Process* §§ 125, 147 (2008); 62B Am. Jur. 2d *Process* § 301 (2008).

As stated above, in Tennessee, “[s]ervice of process must strictly comply to Rule 4 of the Tennessee Rules of Civil Procedure.” *Wallace v. Wallace*, No. 01A01-9512-CH-00579, 1996 WL 411627, at \*2 (Tenn.Ct.App.M.S. July 24, 1996). Plaintiff has cited no authority in support of his contention that such “second-hand” or “passed along” service of process is authorized under the Rules of Civil Procedure. In effect, Plaintiff asks us to hold that service was proper because Defendant Garza ultimately received the summons and had notice of the lawsuit. However, that is not the standard for proper service. The fact that Defendant Garza “had actual knowledge of attempted service does not render the service effectual if the plaintiff did not serve the process in accordance with the rule.” *Id.* In *Wallace*, a process server left the summons with the defendant's son, and the son “passed the process on to defendant.” *Id.* at \*2. Because nothing in the record suggested that the defendant attempted to evade service of process, such service was found to be improper and void despite the defendant's knowledge of the lawsuit. *Id.* Service was similarly improper in *Toler v. City of Cookeville*, 952 S.W.2d 831, 833 (Tenn.Ct.App.1997), where the summons and complaint were taped to a defendant's

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door, even though the defendant received actual notice of the lawsuit. In *Stitts v. McGown*, No. E2005-02496-COA-R3-CV, 2006 WL 1152649, at \*3 (Tenn.Ct.App. May 2, 2006), the plaintiff argued that service was proper where the defendant received a copy of the complaint in the mail. The Court rejected his argument because the “mere receipt of a complaint in the mail does not comply with the requirements of Tenn. R. Civ. P. 4 and, therefore, does not suffice for proper service.” *Id.* The plaintiff further argued that the defendant actually knew about the lawsuit, to which the Court responded, “While we have no doubt that he did, again, this does not suffice for service of process.” *Id.*

In conclusion, we decline to hold that service of process was proper in this case even though Defendant Garza ultimately received a copy of the summons and complaint and had notice of the lawsuit. We find no abuse of discretion in the trial court's decision to deny the motion for suggestion of diminution of the record.

### C. Estoppel

[15] Finally, Plaintiff argues that Defendant Garza should be estopped from claiming that service of process was insufficient because he did not file his motion to dismiss until May of 2007, and service was attempted in December of 2005.

[16][17][18] Sufficiency of personal service is subject to challenge under Rule 12.02(5) either in the adverse party's responsive pleading or, optionally, by motion to dismiss. *Barker v. Heekin Can Co.*, 804 S.W.2d 442, 444 (Tenn.1991). Specifically, Rule 12.02 provides that this defense, among others, “shall be asserted in the responsive pleading,” or “may at the option of the pleader be made by motion in writing.” *Faulks v. Crowder*, 99 S.W.3d 116, 125 (Tenn.Ct.App.2002). “As a general rule, defects in process, service of process, and return of service may be waived.” *Id.* Rule 12.08 states that “[a] party waives all defenses and objections which the party does not present either by motion as hereinabove

provided, or, if the party has made no motion, in the party's answer or reply[.]” For example, in *Faulks*, 99 S.W.3d at 124, a defendant \*599 waived the issue of insufficient personal service where he failed to raise it in his answer, then tried to raise the issue in a motion to dismiss two years later. A defendant may also, by his conduct, be estopped to object that service was improper. *Id.* (citing 72 C.J.S *Process* § 99 (1987); 108 A.L.R. Fed. 887 (1992)). “Such conduct may include participating in discovery, in addition to failing to raise the issue of insufficiency of service clearly or with the necessary specificity.” *Id.* (citations omitted). See, e.g., *Goodner v. Sass*, No. E2000-00837-COA-R3-CV, 2001 WL 35969, at \*2 (Tenn.Ct.App. Jan. 16, 2001) (holding that the defense of insufficient service of process was waived where the defendant engaged in discovery for one year before raising the issue in a motion for summary judgment). However, once the defense of insufficient service of process has been properly raised, any other participation in the lawsuit by the defendant does not constitute a waiver. *State ex rel. Barger v. City of Huntsville*, 63 S.W.3d 397, 399 (Tenn.Ct.App.2001) (citing *Toler v. City of Cookeville*, 952 S.W.2d 831 (Tenn.Ct.App.1997)).

The deputy sheriff served Defendant Garza's summons on Jimmy Harber on December 21, 2005. Thereafter, Defendant Garza's co-defendants filed answers and engaged in discovery with Plaintiff, but Defendant Garza did not file a responsive pleading, engage in discovery, or otherwise participate in the lawsuit. The first pleading filed by Defendant Garza was the motion to dismiss for insufficient service of process on May 21, 2007. Filing a motion to dismiss was a proper method of raising the issue of insufficient service pursuant to Rule 12.02 of the Tennessee Rules of Civil Procedure. Moreover, Defendant Garza did not engage in any conduct prior to filing the motion which would demand that he be estopped from raising the defense. This argument is without merit.

## IV. CONCLUSION

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For the aforementioned reasons, we affirm the decision of the circuit court. Costs of this appeal are taxed to the appellant, Ronald Watson, and his surety, for which execution may issue if necessary.

Tenn.Ct.App.,2008.

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END OF DOCUMENT

840 F.2d 303, 46 Fair Empl.Prac.Cas. (BNA) 558, 46 Empl. Prac. Dec. P 37,900, 10 Fed.R.Serv.3d 1309  
(Cite as: 840 F.2d 303)



United States Court of Appeals,  
Fifth Circuit.  
Mildred WAY, Plaintiff–Appellant,  
v.  
MUELLER BRASS COMPANY, Mississippi State  
Employment Service, and Judith Riley, Defend-  
ants–Appellees.

No. 87–4638  
Summary Calendar.  
March 23, 1988.

Job applicant for employment at factory brought action against operator of factory and state employment commission alleging she was denied employment because of her sex and that commission and one of its employees joined in conspiracy to discriminate against her. The United States District Court for the Northern District of Mississippi, Glen H. Davidson, J., dismissed claims against commission for improper service of process and held claims against factory operator were time barred, and appeal was taken. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that: (1) service of summons and complaint on manager of state employment commission's local office, rather than on either chief executive officer of commission or Attorney General as required by federal rules and state law, was improper and warranted dismissal of complaint without prejudice; (2) filing of claim by job applicant against state employment commission did not revive time barred Title VII claim against factory operator, notwithstanding job applicant's assertion that she was suing both commission and operator on ground that commission and one of its employees joined employer in conspiracy to discriminate against applicant; (3) material issue of fact existed as to when applicant learned of alleged conspiracy precluding summary judgment on limitations

grounds; and (4) applicant's allegations were sufficient to state claim of conspiracy.

Affirmed in part, reversed in part and remanded.

#### West Headnotes

#### [1] Federal Civil Procedure 170A 1751

170A Federal Civil Procedure  
170AXI Dismissal  
170AXI(B) Involuntary Dismissal  
170AXI(B)2 Grounds in General  
170Ak1751 k. Process, defects in. Most  
Cited Cases

#### States 360 204

360 States  
360VI Actions  
360k204 k. Process. Most Cited Cases  
(Formerly 170Ak426)

Service of summons and complaint on manager of state employment commission's local office, rather than on either chief executive officer of commission or Attorney General as required by federal rules and state law, was improper and warranted dismissal of complaint without prejudice. Fed.Rules Civ.Proc.Rule 4(d)(6), 28 U.S.C.A.; Miss.Code 1972, § 11–45–3.

#### [2] Process 313 64

313 Process  
313II Service  
313II(A) Personal Service in General  
313k64 k. Mode and sufficiency of service.  
Most Cited Cases

840 F.2d 303, 46 Fair Empl.Prac.Cas. (BNA) 558, 46 Empl. Prac. Dec. P 37,900, 10 Fed.R.Serv.3d 1309  
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(Formerly 170Ak412)

Actual notice of litigation is insufficient to satisfy requirements of federal civil rule governing process. Fed.Rules Civ.Proc.Rule 4, 28 U.S.C.A.

### [3] Process 313 155

313 Process

313III Defects, Objections, and Amendment

313k155 k. Necessity and mode of objection in general. Most Cited Cases  
(Formerly 170Ak536)

### Process 313 166

313 Process

313III Defects, Objections, and Amendment

313k166 k. Waiver of defects and objections. Most Cited Cases  
(Formerly 170Ak536)

Defendant did not waive objection to service of process by noting defect in answer rather than raising it in separate pleading.

### [4] Limitation of Actions 241 137

241 Limitation of Actions

241II Computation of Period of Limitation

241II(H) Commencement of Proceeding; Relation Back

241k136 Failure to Commence Action or Proceeding in Time

241k137 k. In general. Most Cited Cases

Filing of claim by job applicant against state employment commission did not revive time barred Title VII claim against factory operator, notwithstanding job applicant's assertion that she was suing both commission and operator on ground that com-

mission and one of its employees joined employer in conspiracy to discriminate against job applicant. Civil Rights Act of 1964, § 706(e), as amended, 42 U.S.C.A. § 2000e-5(f)(1).

### [5] Civil Rights 78 1517

78 Civil Rights

78IV Remedies Under Federal Employment Discrimination Statutes

78k1512 Exhaustion of Administrative Remedies Before Resort to Courts

78k1517 k. Parties in administrative proceedings. Most Cited Cases  
(Formerly 78k364, 78k41)

Party not named in Equal Employment Opportunity Commission charge may not be sued under Title VII unless there is clear identity of interest between it and party named in charge or it has unfairly prevented filing of EEOC charge. Civil Rights Act of 1964, § 706(e), as amended, 42 U.S.C.A. § 2000e-5(f)(1).

### [6] Federal Civil Procedure 170A 2491.5

170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)2 Particular Cases

170Ak2491.5 k. Civil rights cases in general. Most Cited Cases

Substantial issue of material fact existed as to when job applicant learned of alleged conspiracy between potential employer, state employment commission, and commission's employee, precluding summary judgment on statute of limitations grounds on action brought by applicant for conspiracy to violate her civil rights. 42 U.S.C.A. §§ 1983, 1985.

### [7] Conspiracy 91 18

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91 Conspiracy

91I Civil Liability

91I(B) Actions

91k18 k. Pleading. Most Cited Cases

Allegation that female applicant was qualified for employment at factory but was not hired, although 16 males were hired, that she was not hired because she was not referred by state employment commission, that commission did not refer her because potential employer told commission that it did not want any women, and at Equal Employment Opportunity Commission hearing, commission employee falsely denied having admitted to applicant that reason she was not referred was that potential employer did not want women, stated conspiracy claims against potential employer for violation of applicant's civil rights. 42 U.S.C.A. §§ 1983, 1985.

\*304 Jim Waide, Estes & Waide, Tupelo, Miss., for plaintiff-appellant.

Leo T. Aragon, M. Curtiss McKee, Richard D. Mitchell, Fuselier, Ott & McKee, Jackson, Miss., for defendants-appellees.

Appeal from the United States District Court for the Northern District of Mississippi.

Before GEE, RUBIN and JONES, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

A woman who sought employment at a factory charges that the employer discriminated against her because of her sex and that the state employment commission and one of its employees joined in a conspiracy to discriminate against her. The district court properly dismissed the claims against the state commission for improper service of process and the Title VII claim against the employer for failure to sue in timely fashion, but it erred in granting summary judgment holding that the statute of limitations had

run on claims based on 42 U.S.C. §§ 1983 and 1985. We therefore AFFIRM in part, REVERSE in part, and REMAND for further proceedings.

#### I.

Mildred Way first sought employment at a Mueller Brass Company factory in January 1984. She later filed a formal application with the company on May 21. Contending that a number of male workers had been hired, she had not been, and she was a victim of continuing sex-based discrimination, she filed a complaint with the Equal Employment Opportunity Commission. On August 22, the EEOC held a hearing, at which Mueller contended that it had decided not to hire her because she had not been referred for employment by the Mississippi State Employment Service, which is a division of the Mississippi Employment Security Commission. As a result, she filed a complaint with the EEOC charging the State Commission with discrimination. On October 29, the EEOC issued a notice to Way stating that its conciliation efforts with Mueller had failed and that she had a right to sue the company. It later issued a similar letter regarding the charge against the State Commission on December 18, 1984.

Way then filed a suit in district court against both Mueller and the State Commission, invoking Title VII of the Civil \*305 Rights Act of 1964.<sup>FN1</sup> She alleged that Mueller's personnel director had told her when she first applied that it was not hiring and that its business was slowing down, but, although she was qualified, the company had thereafter hired no less than sixteen males for the position for which she had applied. In its answer, the State Commission, reserving all defenses, pointed out that Way had improperly served her complaint on the manager of a local office of the Commission, rather than on the State's Attorney General, as Mississippi law required.

FN1. 42 U.S.C. § 2000e (1982).

840 F.2d 303, 46 Fair Empl.Prac.Cas. (BNA) 558, 46 Empl. Prac. Dec. P 37,900, 10 Fed.R.Serv.3d 1309  
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Mueller moved for summary judgment on the ground that Way had not filed suit within ninety days after receiving the right-to-sue letter on October 29, 1984, and her Title VII claim was therefore time barred. Way then amended her complaint, on June 25, 1985, to add an employee of the State Commission, Judith Riley, as a defendant and to include causes of action under 42 U.S.C. §§ 1983 and 1985. Way alleged that Riley, the State Commission, and Mueller had agreed and conspired “that Plaintiff would not be hired because of her sex.” As a basis for this claim, she alleged that Riley had told her in June 1984 that the State Commission had referred her application but had been advised by Mueller that it did not want any women, but that in August of that year, she had learned that Riley had lied and the State Commission had never referred the application. She contended, finally, that because Mueller and the State Commission had “acted jointly and pursuant to a single conspiracy to deny [her] employment because of sex,” the ninety-day time limit for her Title VII suit should begin from December 18, 1984, the date she received the right-to-sue letter concerning the State Commission, rather than October 29.

Thereafter, more than 120 days after the original complaint against it had been filed, the State Commission moved to dismiss the suit for improper service of process. The district court granted this motion and dismissed the claims against the Commission without prejudice. In addition, Mueller sought reconsideration of the order permitting Way to file the amended complaint, arguing that the statute of limitations had run. The court referred the issue to a magistrate, who denied the motion to reconsider on the ground that the Mississippi six-year statute of limitations applied to Way's § 1983 and § 1985 claims and these claims therefore were not time barred.

Mueller appealed the magistrate's order allowing the amended complaint to be filed. The district court agreed with Mueller, holding that the motion to amend came too late because the Mississippi one-year statute

of limitations applied, the amendment was filed on June 25, 1985, and Way's cause of action had accrued no later than June 18, 1984, when she “knew, or should have been aware of the injury.” The district court also dismissed the Title VII claim against Mueller on the ground it had been filed after the ninety-day period.

## II.

[1] We first address the dismissal of the claims against the State Commission for improper service of process. Fed.Rule Civ.Proc. 4(d)(6) provides that when a state or other governmental organization is sued, service shall be made “by delivering a copy of the summons and of the complaint to the chief executive officer thereof or by serving the summons and complaint in the manner prescribed by the law of that state for the service of summons or other like process.” The Mississippi Code of 1972, 11-45-3, provides the manner of service for such complaints in that state: summons in a suit against the state or its agencies shall be served on the Attorney General.

Instead of serving either the chief executive officer of the State Commission or the Attorney General, Way mailed a copy of the summons and complaint to Gerald Williams, manager of the State Commission's local office in Fulton, Mississippi. Williams was neither the chief executive officer of the Commission nor authorized to receive service for it. The State Commission thereafter filed an answer, stating \*306 that it reserved all defenses. In the answer, it pointed out that the Commission is an agency of the State of Mississippi, the real party in interest, and that proper service on the Attorney General of Mississippi was required before the State Commission could be made a party.

After more than 120 days had passed and Way had failed to serve process either on the Attorney General or on the Executive Director of the State Commission, the Commission moved to dismiss under Fed.Rule Civ.Proc. 4(j). That rule provides that an action shall be dismissed without prejudice if service

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is not made on the defendant within 120 days after the filing of the complaint and the party on whose behalf such service was required cannot show good cause why service was not made within that period.

In response, Way's counsel filed an affidavit of good cause, stating that he did not realize that he had served the wrong person until the filing of the motion to dismiss. Considering that the deficiency in service was expressly asserted and explained in the Commission's answer some four and a half months earlier, counsel's ingenuousness cannot be considered good cause.

[2] Way now contends instead that the statutory provision requiring service on the "chief executive officer" should be read to permit service on the officer in charge of the local office that committed the act complained of and that such service should suffice when, as here, the state agency has actual knowledge of the litigation. We decline thus to twist the plain words of the statute. The defendant's actual notice of the litigation, moreover, is insufficient to satisfy Rule 4's requirements.<sup>FN2</sup>

FN2. *See Sieg v. Karnes*, 693 F.2d 803, 807 (8th Cir.1982); *Martin v. New York State Dept. of Mental Hygiene*, 588 F.2d 371, 373 (2d Cir.1978) (citing 2 Moore's Federal Practice ¶ 4.11[1] at 4–115 (2d ed. 1978)).

[3] The State Commission did not waive its objection to the service of process by noting the defect in its answer rather than by raising it in a separate pleading.<sup>FN3</sup> Accordingly, the motion to dismiss the State Commission was properly granted.

FN3. *Housing Authority of Atlanta v. Millwood*, 472 F.2d 268, 272 (5th Cir.1973).

### III.

[4] We next consider the Title VII claim against

Mueller. The statute permits an aggrieved applicant to file suit in federal district court within ninety days after the EEOC gives "notice" that it has not filed a suit or effected a conciliation agreement,<sup>FN4</sup> and failure to act with this time limit precludes later action, barring some equitable basis to extend the period.<sup>FN5</sup>

FN4. *Id.* § 2000e–5(f)(1).

FN5. *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 151, 104 S.Ct. 1723, 1725, 80 L.Ed.2d 196 (1984); *Pinkard v. Pullman–Standard*, 678 F.2d 1211, 1215–19 (5th Cir. Unit B 1982), *cert. denied*, 459 U.S. 1105, 103 S.Ct. 729, 74 L.Ed.2d 954 (1983); *Gonzalez v. Firestone Tire & Rubber Co.*, 610 F.2d 241, 245 (5th Cir.1980).

Way concedes that more than ninety days elapsed between her receipt of the letter notifying her of her right to sue Mueller and her suit against the company. She argues, however, that the period had not run from the date she received the letter notifying her of her right to sue the State Commission and, since she is now suing both defendants jointly, she should have been allowed ninety days from the time she received the letter notifying her of the right to sue the Commission.

Way has cited no authority, and we know of none, to support her assertion that the filing of her claim against the State Commission would revive the time-barred, hence extinct, claim against Mueller. She asserts that when such joint liability might exist, efforts to effect a conciliation might be continuing and filing a suit might interfere with these efforts. Way, however, filed two separate claims and received two separate right-to-sue letters. She has shown no reason why the suit against Mueller would interfere with ongoing negotiations between the EEOC and the State Commission, or why those negotiations would have prevented her from suing Mueller. The EEOC evi-

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dently feared no \*307 such disruption when it issued the right-to-sue letter against Mueller. Way could easily have sued Mueller in timely fashion and then joined the State Commission as a defendant once conciliation with it had failed.

[5] We note, by way of analogy, that a party not named in an EEOC charge may not be sued under Title VII unless there is a clear identity of interest between it and the party named in the charge or it has unfairly prevented the filing of an EEOC charge.<sup>FN6</sup> No such identity or connection between the defendants exists here.

FN6. *Romain v. Kurek*, 772 F.2d 281, 283 (6th Cir.1985).

The only case cited by Way remotely on point, *Ratcliffe v. Insurance Company of North America*,<sup>FN7</sup> involved the similar issue whether the plaintiff had filed timely charges with the EEOC within 300 days of the alleged discrimination.<sup>FN8</sup> The plaintiff sought to bring her charges against one defendant, INA, within the time limit by arguing that although she left INA's employ more than 300 days before filing charges, she remained an employee of the other defendant, INA Corporation, which was related and whose acts therefore could be imputed to INA. The court agreed that these two entities were interrelated and a single employer for limitations purposes.<sup>FN9</sup> Mueller and the State Commission had no such connection. None of the other cases on which Way relies involves a distinctly different defendant being sued after the statutory period has run.

FN7. 482 F.Supp. 759 (E.D.Pa.1980).

FN8. *See* 42 U.S.C. § 2000e-5(e).

FN9. *Id.* at 764-65.

Accordingly, the district court correctly dis-

missed the Title VII claim against Mueller.

#### IV.

[6] Applying the one-year period that it found applicable under Mississippi law, the district court held that the statute of limitations had run on the claims asserted against Mueller for conspiracy with state officials in violation of §§ 1983 and 1985. For statute of limitations purposes, these claims accrued when Way knew or should have known of the overt acts involved in the alleged conspiracy.<sup>FN10</sup>

FN10. *Helton v. Clements*, 832 F.2d 332, 335 (5th Cir.1987).

In her deposition, Way stated that, on June 18, 1984, Judith Riley, a State Commission employee, told her that Mueller had advised Riley that it did not want to hire any women. The district court found that this put Way on notice of the conspiracy against her that she now asserts. Way, however, alleges:

At all relevant times, there existed an agreement and conspiracy between Defendants Mueller Brass Company, Riley and Mississippi State Employment Service that Plaintiff would not be hired because of her sex. This conspiracy was, in fact, admitted by the Defendants, since the Defendant Riley has told Plaintiff that Mueller Brass Company was not interested in Plaintiff because of Plaintiff's sex (female), and, when the Equal Employment Opportunity Commission investigated this case, Riley stated falsely, to the Equal Employment Opportunity Commission, that she did not admit Mueller Brass Company refused to hire Plaintiff because of her sex; thus, proving that Riley was acting in concert and agreement with the Mueller Brass Company when Mueller Brass Company refused to consider Plaintiff because of her sex. Because Mueller Brass Company has thus acted in concert with State actors Riley and Mississippi State Employment Service, the Defendant, Mueller Brass

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Company has acted under color of state law, and has thus brought itself within the authority of this Court under 42 U.S.C. § 1983 and 42 U.S.C. § 1985.

Way's version therefore is that the June 18, 1984, statement did not disclose a conspiracy. It lays sole fault on Mueller. The evidence of the alleged conspiracy, rather, consists of Mueller's testimony that the State Commission had not referred Way's application to the company and Riley's later\*308 denial, at the EEOC hearing on August 22, 1984, that she had made the statement to Way on June 18. At the earliest, then, if this is ultimately proved, Way learned of the possible existence of the claimed conspiracy sometime after June 18, 1984. Until this time, accepting Way's assertions as true, she had no reason to know of or infer any conspiracy involving the State Commission and therefore any claim under §§ 1983 or 1985. Because the events necessary to fix liability for conspiracy did not occur until after June 18, Way's conspiracy claim could not arise until after that date. Unlike the plaintiff in *Helton v. Clements*, Way does not seek to postpone the running of the statute until the last overt act in the conspiracy,<sup>FN11</sup> but only until acts occurred that gave her reason to think she might face a conspiracy, as opposed to the acts of a single party.

FN11. See *Helton*, 832 F.2d at 335.

Even if the one-year period is applicable, a matter we need not decide, summary judgment on the basis that the statute of limitations barred the claim was therefore not proper on the present record.

[7] The district court also held that Way's conspiracy allegations, even if not time barred, failed to state a claim on which relief could be granted because they set forth no adequate factual basis to find that the defendants entered into an agreement to commit an illegal act. Plaintiffs who assert conspiracy claims under the civil rights statutes must plead the "operative facts" showing a prior illegal agreement, and

"bald allegations" of an agreement do not suffice.<sup>FN12</sup> The plaintiff, however, may and often must rely on circumstantial evidence and reasonable inferences therefrom, since conspiracies "are rarely evidenced by explicit agreements."<sup>FN13</sup>

FN12. *Lynch v. Cannatella*, 810 F.2d 1363, 1369–70 (5th Cir.1987); *Arsenaux v. Roberts*, 726 F.2d 1022, 1023–24 (5th Cir.1982).

FN13. *Mack v. Newton*, 737 F.2d 1343, 1350–51 (5th Cir.1984) (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.1976)); *McCabe's Furniture, Inc. v. La-Z-Boy Chair Co.*, 798 F.2d 323, 328 (8th Cir.1986).

Way's allegations, accepted as true for present purposes, establish these facts: (1) Way was qualified for employment at Mueller Brass but was not hired, although sixteen males were hired; (2) she was not hired because she was not referred by the State Commission; (3) the Commission did not refer her because Mueller had told the Commission it did not want any women; and (4) at the EEOC hearing, Riley, the Commission's employee, falsely denied having admitted to Way that the reason she was not referred was that Mueller did not want any women. These constitute "operative facts" that, if further developed, would permit a reasonable inference that Mueller, Riley, and the State Commission had agreed that no women would be referred to Mueller Brass Company for employment. The conspiracy claims against Mueller therefore should not have been dismissed at this juncture.

## V.

The district court, in an order several months after its original order of dismissal, also dismissed the conspiracy action against Riley as untimely filed. We therefore reverse the judgment insofar as it dismisses the claims against her, intimating, of course, no

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opinion on their merits.

For these reasons, the judgment is AFFIRMED insofar as it dismissed the Mississippi State Employment Commission without prejudice and insofar as it dismissed the Title VII claims against Mueller Brass Company. It is REVERSED insofar as it dismissed the § 1983 and § 1985 conspiracy claims against Mueller and Riley. The case is REMANDED for further proceedings consistent with this opinion.

C.A.5 (Miss.),1988.

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C

United States District Court,  
S.D. New York.  
WESTON FUNDING, LLC, Plaintiff,

v.

CONSORCIO G GRUPO DINA, S.A. DE C.V., De-  
fendant.

No. 05 CIV. 9830(RWS).  
Aug. 31, 2006.

**Background:** Buyer of debentures brought action against issuer following issuer's default. Issuer moved to dismiss for insufficient service of process, or in the alternative for summary judgment.

**Holdings:** The District Court, Sweet, J., held that:

- (1) entity served with process was not shown to be the same entity as defendant's authorized agent for service;
- (2) successor debenture trustee did not succeed as agent for service; and
- (3) summary judgment affidavit lacked requisite personal knowledge.

Motion granted.

West Headnotes

**[1] Federal Civil Procedure 170A**  **1832**

170A Federal Civil Procedure  
170AXI Dismissal  
170AXI(B) Involuntary Dismissal  
170AXI(B)5 Proceedings  
170Ak1827 Determination  
170Ak1832 k. Matters considered in  
general. Most Cited Cases

On a motion to dismiss, a court is entitled to consider the terms of any documents attached to or referenced in the complaint. Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.

**[2] Federal Civil Procedure 170A**  **1832**

170A Federal Civil Procedure  
170AXI Dismissal  
170AXI(B) Involuntary Dismissal  
170AXI(B)5 Proceedings  
170Ak1827 Determination  
170Ak1832 k. Matters considered in  
general. Most Cited Cases

On a motion to dismiss, in addition to any allegation of the plaintiff's complaint, the court may consider matters of which judicial notice may be taken. Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.; Fed.Rules Evid.Rule 201, 28 U.S.C.A.

**[3] Federal Civil Procedure 170A**  **1832**

170A Federal Civil Procedure  
170AXI Dismissal  
170AXI(B) Involuntary Dismissal  
170AXI(B)5 Proceedings  
170Ak1827 Determination  
170Ak1832 k. Matters considered in  
general. Most Cited Cases

**Federal Civil Procedure 170A**  **2533.1**

170A Federal Civil Procedure  
170AXVII Judgment  
170AXVII(C) Summary Judgment  
170AXVII(C)3 Proceedings  
170Ak2533 Motion

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170Ak2533.1 k. In general. Most Cited Cases

Consideration of documents subject to judicial notice does not necessarily convert a motion to dismiss into a motion for summary judgment. Fed.Rules Civ.Proc.Rule 12(b), 28 U.S.C.A.; Fed.Rules Evid.Rule 201, 28 U.S.C.A.

**[4] Process 313 ↪145**

313 Process

313II Service

313II(E) Return and Proof of Service

313k144 Evidence as to Service

313k145 k. Presumptions and burden of proof. Most Cited Cases  
(Formerly 170Ak511)

The plaintiff bears the burden of proof to show adequacy of service of process. Fed.Rules Civ.Proc.Rule 12(b)(5), 28 U.S.C.A.

**[5] Process 313 ↪153**

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases  
(Formerly 170Ak532.1)

Defective service of process cannot be cured by the mere assertion that a defendant had actual notice of the action. Fed.Rules Civ.Proc.Rule 12(b)(5), 28 U.S.C.A.

**[6] Process 313 ↪64**

313 Process

313II Service

313II(A) Personal Service in General

313k64 k. Mode and sufficiency of service. Most Cited Cases  
(Formerly 170Ak411)

Defendant's attorneys' access to a copy of the complaint did not constitute effective service of process. Fed.Rules Civ.Proc.Rule 12(b)(5), 28 U.S.C.A.

**[7] Process 313 ↪58**

313 Process

313II Service

313II(A) Personal Service in General

313k56 Persons to Be Served

313k58 k. Attorney or agent of party.

Most Cited Cases  
(Formerly 170Ak421.1)

Entity served with process was not shown to be the same entity as defendant's authorized agent for service of process. Fed.Rules Civ.Proc.Rule 12(b)(5), 28 U.S.C.A.

**[8] Trusts 390 ↪260**

390 Trusts

390IV Management and Disposal of Trust Property

390k245 Actions Between, By, or Against Trustees

390k260 k. Process and appearance. Most Cited Cases

Successor debenture trustee did not succeed as agent for service of process; indenture under which the debentures issued contained no provision appointing the trustee as agent for service of process nor did it provide for successorship of an agent for service. Fed.Rules Civ.Proc.Rule 12(b)(5), 28 U.S.C.A.

**[9] Federal Civil Procedure 170A ↪2539**

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170A Federal Civil Procedure

170AXVII Judgment

170AXVII(C) Summary Judgment

170AXVII(C)3 Proceedings

170Ak2536 Affidavits

170Ak2539 k. Sufficiency of showing. Most Cited Cases

Summary judgment affidavit of plaintiff's president referring to acquisition of defendant's authorized agent for service of process by German bank lacked requisite personal knowledge of these other corporations. Fed.Rules Civ.Proc.Rule 56(e), 28 U.S.C.A.

**[10] Process 313**  **63**

313 Process

313II Service

313II(A) Personal Service in General

313k63 k. Time for service. Most Cited Cases  
(Formerly 170Ak417)

Debenture buyer's request that it be granted additional time to effectuate service of its complaint on debenture issuer was unsupported by any showing of good cause; purchaser knew of issuer's challenge to service for approximately nine months. Fed.Rules Civ.Proc.Rule 12(b)(5), 28 U.S.C.A.

**[11] Process 313**  **153**

313 Process

313III Defects, Objections, and Amendment

313k153 k. Defects and irregularities in service or return or proof thereof. Most Cited Cases  
(Formerly 170Ak417)

Good cause to excuse deficient service generally requires proof of exceptional circumstances that were beyond the plaintiff's control. Fed.Rules

Civ.Proc.Rule 12(b)(5), 28 U.S.C.A.

**\*586** Reiss Eisenpress LLP, New York, NY, By Sherril L. Eisenpress, Esq., Matthew Sheppe, Esq., Of Counsel, for Plaintiff.

Jones Day, New York, NY, By Steven C. Bennett, Esq., Of Counsel, for Defendant.

*OPINION*

SWEET, District Judge.

Defendant Consorcio G Grupo Dina, S.A. de C.V. ("Dina") has moved under **\*587** Rules 12(b) and 56, Fed.R.Civ.P., to dismiss the complaint of plaintiff Weston Funding, LLC ("Weston"), or in the alternative for summary judgment. Weston has opposed Dina's motions and has cross-moved under Rule 15(a), Fed.R.Civ.P., to file a third amended complaint. For the reasons set forth below, the motion of Dina to dismiss for failure of service of process is granted and the cross-motion of Weston is denied.

***Prior Proceedings***

Weston commenced this action on November 21, 2005 by the filing of a complaint. On December 13, 2005, Dina moved to dismiss or in the alternative for summary judgment, and Weston filed both an amended complaint and a second amended complaint ("SAC"). Weston cross-moved for leave to file a third amended complaint on February 23, 2006. The Dina motions and the Weston cross-motion were heard and marked fully submitted on March 15, 2006.

***The Parties***

Weston is a Delaware corporation authorized to do business in the State of New York, with its principal place of business at 450 Park Avenue, Suite 2001, New York, N.Y. 10022.

John Liegey ("Liegey") is the sole member and President of Weston.

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Dina is a Mexican corporation.

### ***The Facts Relating To The Transaction***

The following facts are taken from the SAC and are assumed to be true for the purposes of this motion.

Under an indenture dated August 8, 1994 (the "Indenture"), Dina issued \$164,000,000 of its 8% Convertible Subordinated Debentures due August 8, 2004 (the "Debentures"). (SAC ¶ 7.) On February 26, 1999, Weston purchased \$5,221,000 of the Debentures. (SAC ¶ 8.) Dina did not make its scheduled interest payment on January 15, 2001, nor any interest or principal payment thereafter, and is currently in default. (SAC ¶ 9.) The Debentures matured and became due and payable on August 8, 2004 (SAC ¶ 10), but Dina has not made payment to Weston on the Debentures (SAC ¶ 11).

### ***The Facts Relating To Service***

The facts relating to service are drawn from the SAC, as well as the affidavits and exhibits submitted by the parties.

[1] A court is entitled to consider the terms of any documents attached to or referenced in the complaint. *See Cortec Indus., Inc. v. Sum Holding L.P.*, 949 F.2d 42, 47 (2d Cir.1991) ("[T]he complaint is deemed to include any written instrument attached to it as an exhibit or any statements or documents incorporated in it by reference."), *cert. denied*, 503 U.S. 960, 112 S.Ct. 1561, 118 L.Ed.2d 208 (1992); *see also Barnum v. Millbrook Care L.P.*, 850 F.Supp. 1227, 1232–33 (S.D.N.Y.) ("[I]f the allegations of a complaint are contradicted by documents made a part thereof, the document controls and the court need not accept as true the allegations of the complaint."), *aff'd*, 43 F.3d 1458 (2d Cir.1994). Here, the complaint expressly references the Indenture dated August 8, 1994. (SAC ¶ 7.) A copy of the Indenture is attached as Exhibit B to the Affidavit of Liegey dated February 23, 2005 (the "Liegey Affidavit").

[2][3] In circumstances where jurisdictional issues such as failure of service of process are presented, the factual allegations of a complaint may be controverted. *See LeBlanc v. Cleveland*, 198 F.3d 353, 356 (2d Cir.1999) ("[W]here jurisdictional facts are placed in dispute, the court has the power and obligation to decide issues of fact by reference to evidence outside the pleadings, such as affidavits.") The Court may consider additional documents as a \*588 matter of judicial notice. On a motion to dismiss, in addition to any allegation of the plaintiff's complaint, the court may "consider matters of which judicial notice may be taken under Fed.R.Evid. 201." *Kramer v. Time Warner Inc.*, 937 F.2d 767, 773 (2d Cir.1991). Consideration of documents subject to judicial notice does not necessarily convert a motion to dismiss into a motion for summary judgment. *See Graal Enterp., Ltd. v. Desourdy Int'l 1949 Inc.*, No. 95 Civ. 0752(LMM), 1996 WL 353003, at \*3 (S.D.N.Y. June 26, 1996) (court may consider pleadings and "facts that are capable of accurate and ready determination") (internal quotation marks omitted). Rule 201 of the Federal Rules of Evidence generally permits a court to take judicial notice of any facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Fed.R.Evid. 201(b)(2).

Section 112 of the Indenture states that "[i]n respect of this Indenture and the Securities, [Dina] irrevocably appoints Bankers Trust Company, at its office at Four Albany Street, New York, New York 10006, Attn: Corporate Trust and Agency Group, as its authorized agent for service of process in New York City." (Indenture § 112, at 14–15; Liegey Aff. Ex. B.)

Section 101 of the Indenture defines "Trustee" as "the Person named as the 'Trustee' in the first paragraph of this instrument until a successor Trustee shall have become such pursuant to the applicable provisions of this Indenture, and thereafter 'Trustee' shall

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mean such successor Trustee.” (Indenture § 101, at 9; Liegey Aff. Ex. B.) The first paragraph of the Indenture names “Bankers Trust Company, a New York banking corporation ... as Trustee ....” (Indenture, at 1; Liegey Aff. Ex. B.)

Weston has asserted that Bankers Trust Company (“BTC”) was acquired by Deutsche Bank A.G. on or about June 4, 1999. (Liegey Aff. ¶ 5.) The Liegey Affidavit includes as Exhibit C the text of a Deutsche Bank press release, which states, in relevant part:

Deutsche Bank is buying all outstanding shares of Bankers Trust for roughly US\$ 9 billion.... After Bankers Trust shareholders approved the transaction by a large majority and all necessary approvals were received from the relevant regulatory authorities, the acquisition becomes effective on 4 June 1999. Bankers Trust will now rapidly be integrated into Deutsche Bank.

(Liegey Aff. Ex. C; *see also* Press Release, Deutsche Bank, Acquisition of Bankers Trust Successfully Closed (June 4, 1999), [http://www.db.com/ir/en/releases\\_766.shtml](http://www.db.com/ir/en/releases_766.shtml).)

Weston also has asserted that on or about April 15, 2002, BTC “amended its certificate of organization and filed with the New York State Department of State a name change, changing its name to Deutsche Bank Trust Company Americas (‘DBTCA’). DBTCA continued to operate ... under the very same charter pursuant to which BTC operated prior to the name change.” (Liegey Aff. ¶ 5.)

Weston has attached as exhibits securities documents issued on behalf of Dina which state that as of April 2, 2003, the trustee under the Indenture was “Deutsche Bank Trust Company Americas” (Dina Offer to Exchange, attached as Liegey Aff. Ex. E), and that the Indenture was “amended by the First Supplemental Indenture dated as of May 15, 2003, be-

tween Dina and Deutsche Bank Trust Company Americas, formerly known as Bankers Trust Company, as trustee” (Dina Letter of Transmittal and Waiver, at 6, attached as Liegey Aff. Ex. D).

\*589 The affidavit of service filed on February 23, 2006 and attached as Exhibit F to the Liegey Affidavit states that service was made on November 22, 2005 by serving Stanley Burg (“Burg”) at 60 Wall Street. (Liegey Aff. Ex. F.) The affidavit of service further states that Burg was known to be the “trustee” of Dina. (Id.)

On November 23, 2005, Burg sent an e-mail to counsel for Dina, stating in relevant part:

Please be advised that on November 22, 2005 we were served with a Sum Complaint (CASE NUMBER 05 CV 09830 Judge Sweet) Weston Funding, LLC, Plaintiff v. Consorcio G. Grupo Dina, S.A. de C.V. addressed to the Co. c/o Deutsche Bank, AG, New York.

...

Do you still represent the Company in this matter. Please advise promptly.

Stan Burg

Stanley Burg

Deutsche Bank Trust Company Americas

Trust & Securities Services

MS NYC60-2720

60 Wall Street

New York, N.Y. 10005-2858

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(Lieghey Aff. Ex. G.)

Counsel for Dina replied to Burg by e-mail on November 29, 2005, stating, “Deutsche Bank is not authorized to accept service of process on behalf of Dina in the Weston Funding matter.” (Garcia Decl. Ex. B.) A copy of this e-mail correspondence was transmitted by fax to counsel for Weston on November 30, 2005.

***Proof Of Service Has Not Been Established***

[4] Pursuant to Rule 12(b)(5), Fed.R.Civ.P., “a complaint may be dismissed for insufficient service of process.” *Howard v. Klynveld Peat Marwick Goerdeler*, 977 F.Supp. 654, 658 (S.D.N.Y.1997) *see also Hawthorne v. Citicorp Data Sys., Inc.*, 219 F.R.D. 47, 49 (E.D.N.Y.2003) (“Without proper service a court has no personal jurisdiction over a defendant.”). On such jurisdictional matters, the plaintiff bears the burden of proof. *See Commer v. McEntee*, 283 F.Supp.2d 993, 997 (S.D.N.Y.2003) (“Once a defendant challenges the sufficiency of service of process, the burden of proof is on the plaintiff to show the adequacy of service.” (quoting *Klynveld*, 977 F.Supp. at 658)).

[5][6] Waiver of service, moreover, cannot lightly be inferred. *See Klynveld*, 977 F.Supp. at 659 (requests for “affirmative relief” by defendant not waiver of service objection, where service objection presented “prior to or simultaneously with the request for affirmative relief”). Nor can defective service be ignored on the mere assertion that a defendant had “actual notice.” <sup>FN1</sup> *Russ Berrie & Co. v. T.L. Toys (HK) Ltd.*, No. 01 Civ. 4715(LMM), 2002 WL 31458232, at \*2 (S.D.N.Y. Nov.4, 2002) (“[A]ctual notice of the action will not, in itself, cure an otherwise defective service.” (internal quotation marks omitted)); *see also Grand Entertainment Group, Ltd. v. Star Media Sales, Inc.*, 988 F.2d 476, 492 (3rd Cir.1993); *Mid-Continent Wood Prod., Inc. v. Harris*,

936 F.2d 297, 300–01 (7th Cir.1991); *Echevarria-Gonzalez v. Gonzalez-Chapel*, 849 F.2d 24, 28 (1st Cir.1988).

FN1. The fact that Dina's attorneys have access to a copy of the complaint does not constitute effective service of process. *See, e.g., Cruisephone*, 278 B.R. at 333 (“An attorney does not become his client's agent for service of process solely by reason of serving in the capacity as attorney.”).

\*590 [7][8] Weston has sought to establish proper service of process in this action on the basis of service upon DBTCA. (*See* SAC ¶ 3; Pl.'s Mem. Opp'n at 14.) Weston, however, has not met its burden to show that DBTCA was Dina's agent for service of process. *See Lewis & Kennedy, Inc. v. Permanent Mission of Botswana*, No. 05 Civ. 2591(HB), 2005 WL 1621342, at \*2 (S.D.N.Y. July 12, 2005) (“plaintiff has the burden to demonstrate proper service”); *Pearson v. Bd. of Educ.*, No. 02 Civ. 3629(RCC), 2004 WL 2297354, at \*4 (S.D.N.Y. Oct.12, 2004) (“once a defendant has raised a bona fide question as to the propriety of service, the burden of proving proper service rests with plaintiff” (quoting *Rates Technology, Inc. v. UTT Corp.*, 94 Civ. 0326, 1995 WL 86264, at \*1 (S.D.N.Y. Mar.2, 1995))).

Weston argues in the alternative that BTC and DBTCA are the very same entity, or that DBTCA, as “the successor Trustee stepping into the shoes of BTC [pursuant to] the Indenture,” therefore is “Dina's agent for service of process.” (Pl.'s Mem. Opp'n at 13.) Neither argument is availing.

[9] Weston has failed to establish that BTC and DBTCA are the same entity. In his affidavit in opposition to the Dina motion, Lieghey referred to the acquisition of BTC by Deutsche Bank. Lieghey does not claim any personal knowledge regarding these other corporations. *See* Fed.R.Civ.P. 56(e) (requiring that

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affiant have “personal knowledge,” and that affidavit set forth “facts as would be admissible in evidence”). Furthermore, Deutsche Bank's acquisition of BTC does not support the conclusion that DBTCA is BTC by another name. Weston has alleged the existence of, but has not submitted, an amended certificate of organization for BTC changing its name to DBTCA. (Lieghey Aff. ¶ 5.) This mere allegation is insufficient to carry Weston's burden of proof on this issue.

Weston has asserted that because DBTCA is the successor to BTC as trustee, it therefore is also the successor to BTC as agent for service of process on Dina under section 112 of the Indenture. (SAC ¶ 3.) However, the express language of the Indenture differentiates between the “authorized agent for service of process,” specifically naming “Bankers Trust Company” (Indenture § 112), and the “Trustee,” defined as the person named in the Indenture “until a successor Trustee shall have become such” (Indenture § 101). The Indenture contains no provision appointing the “Trustee” generally as agent for service of process, nor does it provide for successorship of an agent for service of process. Thus, the fact that Dina's offerings refer to DBTCA as the new “Trustee” does not mean that DBTCA automatically became the “agent for service of process.” (See Lieghey Aff. Exs. D, E.)

The affidavit of service names Burg as the “trustee” of Dina, without making reference to DBTCA. (See Lieghey Aff. Ex. F.) Burg's e-mail to counsel for Dina does not suggest that Burg ever “accepted service on behalf of Dina.” Burg, moreover, was immediately informed by Dina's counsel that “Deutsche Bank is not authorized to accept service of process on behalf of Dina ....” (Garcia Decl. Ex. B.)

Weston has advanced the proposition that “[i]f DBTCA is not deemed to be the agent, Dina should be required to designate an agent for service of process under the terms of the Indenture.” (Pl.'s Mem. Opp'n at 13 n. 6.) The Indenture does not require that there be a

successor agent for service of process. Dina cannot be compelled under the Indenture to name a successor (even though the parties could easily have added a provision that required \*591 such a designation). See *Terwilliger v. Terwilliger*, 206 F.3d 240, 245 (2d Cir.2000) (“A court may neither rewrite, under the guise of interpretation, a term of the contract when the term is clear and unambiguous, nor redraft a contract to accord with its instinct for the dispensation of equity upon the facts of a given case.”).

[10][11] Weston's request that it be granted additional time to effectuate service is unsupported by any showing of “good cause.” Good cause to excuse deficient service generally requires proof of “exceptional circumstances” that were “beyond [the plaintiff's] control.” *Sleigh v. Charlex, Inc.*, No. 03 Civ. 1369(MBM), 2004 WL 2126742, at \*4 (S.D.N.Y. Sept.14, 2004) (quoting *Nat'l Union Fire Ins. Co. v. Sun*, No. 93 Civ. 7170(LAP), 1994 WL 463009, at \*3 (S.D.N.Y. Aug.25, 1994)). Weston has known of Dina's challenge to service since November 30, 2005. (See Garcia Decl. Ex. B.)

Absent the amended certificate of organization and any provision in the Indenture to provide for a successor agent for the service of papers and any authority to establish that a name change effectuates status as a successor agent for the service of process, the better practice is to dismiss the complaint without prejudice. See Fed.R.Civ.P. 4(m).

***The Remaining Motions Are Dismissed Without Prejudice***

Absent service, there is no jurisdiction for the court to act further. *Hawthorne*, 219 F.R.D. at 49. Consequently, the remaining motions are dismissed without prejudice.

It is so ordered.

S.D.N.Y.,2006.

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Weston Funding, LLC v. Consorcio G Grupo Dina,  
S.A. de C.V.

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END OF DOCUMENT

**DECLARATION OF SERVICE**

I declare that I served the foregoing SUPPLEMENTAL BRIEF OF PETITIONER KARLIN TOWNSEND on the party below:

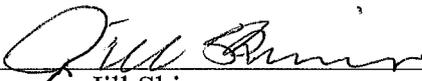
G. Parker Reich  
Attorney for Theresa Scanlan  
Jacobs & Jacobs  
114 E. Meeker Avenue  
Puyallup, WA 98372

by causing a full, true and correct copy thereof to be MAILED in a sealed, postage-paid envelope, addressed as shown above, which is the last-known address for the party's office, and deposited with the U.S. Postal Service at Bellevue, WA, on the date set forth below;

By causing a full, true and correct copy thereof to be given to ABC MESSENGER SERVICE for HAND DELIVERY by May 30, 2014, to the party at the address listed above, which is the last-known address for the party's office, on the date set forth below.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Executed at Bellevue, Washington, on this 27 day of May, 2014.

  
\_\_\_\_\_  
Jill Skinner