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FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 SEP 16 AM 10:31

Appellate Court No. 66738-6-1
Skagit County Superior Court No. 09-2-02483-1

IN THE COURT OF APPEALS - STATE OF WASHINGTON
DIVISION ONE

SOREN AND JANICE JENSEN,

Plaintiffs-Appellants,

v.

DAVE LUECKE AND DIANE VAN ACKEREN, husband and wife,
ROBERT LUECKE AND JANE DOE LUECKE, husband and wife,
dba **SHOPPROP, INC.**, a Washington corporation, and **TERESA A.**
WEAVER AND JOHN DOE WEAVER, husband and wife,

Defendants-Respondents.

REPLY BRIEF OF APPELLANT

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TABLE OF AUTHORITIES

CASES

In re Estate of Stevens, 94 Wn. App. 20, 35, 971 P. 2D 58 (1999).....4

I. STATEMENT OF ADDITIONAL FACTS

The Respondent's Brief¹ contains inaccurate factual statements and unsupported speculation. The respondent asserts that the Complaint was served twice.² The record supports only one service of the Complaint. CP 13. Respondent asserts that the Plaintiffs, “simply refiled their Complaint, perhaps as a procedural precaution.”³ The Complaint was, however, only filed once. *Appendix A.*⁴

In his brief, the Respondent speculates that the reason the Complaint signed in July was not served until October was due to a “procedural precaution”. It was. The process server made at least 12 attempts to serve the Respondent, and the Plaintiff was at the point of requesting permission to serve by publication when service was finally effected.⁵

1 Although there are two respondents the brief caption is singular.

2 Respondent's Brief, pg 4.

3 Respondent's Brief, pg 9.

4 *Appendix A* is a printout of the trial court docket.

5 Respondent's avoidance of service is not in the record before the court,

Respondent continues to argue that an answer was Served before the Complaint was filed. Judge Cook implicitly rejected this assertion at the first hearing when she imposed attorney fees on the Respondent. If she had found that an Answer was served, attorney fees would have been awarded in favor of, not against, the Respondent. The same argument was made before Judge Meyer, who also implicitly found otherwise by imposing attorney fees on Respondent.

II. RESPONDENT REFUSED TO DEFEND

Respondent argues for the first time on appeal that he had appeared by informally indicating an intent to defend. Because this argument was not made before the trial court, no ruling was made on it. However, the facts before the trial court do not support the argument.

After many futile attempts, the Summons and Complaint were finally served on October 22nd, 2009. The Summons stated:

In order to defend against this lawsuit, you must respond to the Complaint by stating your defense in writing, and by serving a copy upon the person signing this Summons within 20 days after the service of this Summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where Plaintiff is entitled to what he asks for because you

nor is there anything in the record to support Respondent's speculation. However, Respondent should not be allowed to mislead the court with speculation and innuendo.

have not responded. If you serve a Notice of Appearance on the undersigned person you are entitled to notice before a default judgment may be entered.

CP 1-2, Emphasis Added.

After service, counsel for the Appellant repeatedly called Respondent in an attempt to get him to defend the action. CP 39-40. Respondent made promises, but absolutely failed to defend against the Complaint despite being told in the Summons that he must do so, and being repeatedly told by counsel that he must do so.

Despite Respondent's promises that he would defend, months of silence went by without a Notice of Appearance or an Answer being served or filed. Respondent is not entitled to use silence as a way to avoid the requirement to defend. A default judgment was obtained based on his failure to appear or defend.

Respondent was immediately sent a copy of the Default Judgment. He then engaged in improper maneuvers, with the assistance of a non-attorney, to set aside the Default. CP 40. A hearing was held before Judge Cook. Appellant requested that attorney fees be imposed on Respondent, but that Respondent be given an opportunity to properly file his motion. Judge Cook agreed and so ordered.

Respondent's response was again silence.⁶ This silence continued for nearly a year. Then, one day before a full year had expired, Respondent, this time with the assistance of an attorney, obtained a second Show Cause Order. No explanation has ever been given, even on appeal, for the failure to defend during this one year period.

Respondent failed and refused to defend before the Default Judgment was granted despite the provisions of the Summons. Respondent failed to defend after a court hearing where the judge told him that he should stop relying on a non-attorney friend and either hire an attorney or read the rules, RP (2-26-10) 3-7. His failure to defend was intentional.

III. RESPONDENT'S AUTHORITY IS INAPPLICABLE

None of the cases cited by Respondent help his cause. Many involve a determination by the trial court as to whether or not an informal appearance was made. No informal appearance claim was made before the trial court. Below, Respondent asserted only that he had appeared before the Complaint was filed or served.⁷ The failure to raise this issue below prevented the trial court from considering it. The Respondent also

⁶ Respondent did file some documents after the hearing in violation of the provisions of Judge Cook's order.

⁷ He does claim he was "given" or sent a copy months before the complaint was served, but there is no support for this bare assertion.

offered no evidence below to support the informal appearance claim he now makes.

Running throughout the cases the Respondent relies on is the requirement that a party in default act in a timely and diligent manner to challenge the default. Respondent cites no case where the party in default intentionally waited a year before obtaining relief. In fact, the authority Respondent cites holds that waiting three months after notice of default is not due diligence. In re Estate of Stevens, 94 Wn. App. 20, 35, 971 P. 2d 58 (1999).⁸

IV. RESPONDENT SHOULD NOT BE REWARDED FOR PLAYING GAMES

There is no question on this record that Respondent was playing games with this litigation. By his account, he knew of the Complaint months before it was filed (the same period where service could not be accomplished). Once the complaint was served on him, he promised to, but failed to defend, despite the clear direction in the Summons and the entreaties of Appellant's counsel. After being served with the Default

⁸ "Curtis has provided no case law in support of her argument that Curtis acted with due diligence. As there was no excusable neglect and three months is not within a reasonable time to respond to an order of default, the trial court did not abuse its discretion in denying Curtis' motion to vacate." Stevens, at pg. 35.

Judgment, he maneuvered around pro se, but when told by the court he would have to follow the rules, apparently decided he could just wait a for a year and strike on the last day. His lack of diligence was strategic and intentional.

Courts rightly prefer to interpret the rules of court to promote decisions on the merits. But intentional misuse of the rules must never be rewarded. Here, Respondent intentionally inflicted delay of a year on Appellant because he thought he could get away with it under the rules. He is incorrect. The rules do not provide for their intentional abuse, or allow the resulting prejudice to the opposing party and harm to the administration of justice.

IV. RESPONDENT FAILS TO ADDRESS ISSUES ON APPEAL

Motion to Strike. Appellant assigned error to, and argued both below and in the opening brief, that the pleadings Luecke filed should have been stricken because they were filed in violation of the Court's explicit order that Luecke could file additional pleadings only after he had paid the attorney fees imposed to opposing counsel.

Respondent does not address this error in his Brief. Striking the

pleadings will put any motion filed by Respondent beyond the one year limit he claims is applicable. The pleadings should be stricken and the matter remanded for dismissal.

No Valid Defense Established. Respondent both below and on appeal fails to even attempt to establish a valid defense to the Complaint. He cannot meet his burden without establishing a defense.

No Due Diligence. Respondent does not argue, either below or on appeal, that he exercised due diligence by intentionally waiting a year to bring his motion for relief. He cannot meet his burden without proving due diligence.

Prejudice to Appellant. Respondent has not shown, either below or on appeal, that Appellant was not prejudiced by Respondent's intentionally waiting a year to bring a motion to set aside the default. He cannot meet his burden without proving a lack of prejudice.

Attorney Fees. Respondent does not address or challenge Appellant's request for attorney fees.

VI. CONCLUSION

The trial court abused its discretion in setting aside the judgment. It failed to make findings on the required elements and

failed to hold the moving party to its burden of proof. The trial court should be reversed and the judgment reinstated, and attorney fees awarded to Jensen.

RESPECTFULLY SUBMITTED this 15th day of September, 2011.


K. GARL LONG, WSBA #13569
Attorney for Plaintiff/Appellant

Appendix A

Superior Court Case Summary

Court: Skagit Superior

Case Number: 09-2-02483-1

Sub	Docket Date	Docket Code	Docket Description	Misc Info
.001	11-19-2009	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
	12-09-2009	FILING FEE RECEIVED	Filing Fee Received	230.00
1	12-09-2009	SUMMONS	Summons	
2	12-09-2009	COMPLAINT	Complaint	
3	12-09-2009	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
4	01-07-2010	ORDER OF DEFAULT	Order Of Default Against Def Luecke	
		JDG0002	Judge Mike Rickert	
5	01-07-2010	DEFAULT JUDGMENT JDG0002	Default Judgment Against Luecke Judge Mike Rickert	
6	01-07-2010	EX-PARTE ACTION WITH ORDER JDG0002	Ex-parte Action With Order Judge Mike Rickert	
35	01-18-2010	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
7	02-01-2010	MOTION TO SUPPRESS	Mt To Set Aside Default Judgmt	
8	02-01-2010	DECLARATION	Declaration Of D Luecke In Sppt Of Mt To Set Aside Jdgmnt	
9	02-01-2010	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
10	02-01-2010	ANSWER	Answer To Complaint	
11	02-11-2010	MOTION	Motion To Set Aside Dflt Jgmt	
12	02-11-2010	ORDER ACTION JDG0001	Order Setting Hrg Show Cause Judge John M. Meyer	02-26-2010G0
13	02-11-2010	EX-PARTE ACTION WITH ORDER JDG0001	Ex-parte Action With Order Judge John M. Meyer	
13.100	02-25-2010	MEMORANDUM	Memorandum In Oppos To	

			Mot To Set Aside Default Jgmt W/mot To Strike Pleadings	
14	02-26-2010	MOTION HEARING JDG0003	Motion Hearing Judge Susan K. Cook	
	02-26-2010	CD RECORD OF PROCEEDINGS	Cd Record Of Proceedings 3/10:05	
15	02-26-2010	ORDER DENYING MOTION/PETITION JDG0003	Order On Motion To Set Aside Default Jgmt **denied** Judge Susan K. Cook	
16	02-26-2010	DECLARATION	Declaration Of Garl Long Re Service	
17	02-26-2010	VOID-SUB NUMBER VOIDED	Void-sub Number Voided	
18	03-03-2010	NOTICE OF APPEARANCE PSD0001	Notice Of Appearance Luecke, David	
19	03-03-2010	MOTION	Defts Motion To Modify Order	
20	03-05-2010	SUMMONS	Summons On 3d Pty Complaint	
	03-05-2010	FILING FEE RECEIVED	Filing Fee Received (1118)	230.00
21	03-05-2010	SUMMONS	Summons On 3d Pty Complaint	
22	08-03-2010	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
23	01-05-2011	TRUST RCVD-TENDER	Trust Rcvd-tender	500.00
24	01-05-2011	MOTION	Defts Motion To Modify Order	
25	01-05-2011	ORDER DENYING MOTION/PETITION JDG0003	***proposed Order Denied**** Judge Susan K. Cook	
26	01-05-2011	EX-PARTE ACTION WITHOUT ORDER JDG0003	Ex-parte Action Without Order Judge Susan K. Cook	
27	01-06-2011	MOTION FOR ORDER TO SHOW CAUSE	Motion For Order To Show Cause For Relief From Judgment	
28	01-06-2011	DECLARATION	Declaration Of D Luecke In Sppt Of Jdgmnt Mts To Shw Cz For Relief Frm	
29	01-06-2011	DECLARATION	Declaration Of John-paul	

			Cox In	
			Sppt Of Mt To Shw Cause	
30	01-06-2011	ORDER TO SHOW CAUSE JDG0003	Order To Show Cause Judge Susan K. Cook	01-21- 2011G0
		ACTION	Shw Cz Re Vacate Jdgmnt	
31	01-06-2011	EX-PARTE ACTION WITH ORDER JDG0003	Ex-parte Action With Order Judge Susan K. Cook	
32	01-07-2011	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
33	01-07-2011	NOTE FOR MOTION DOCKET ACTION	Note For Motion Docket Bowen: Shw Cz Re Jdgmnt Vacated	01-21- 2011G0
34	01-18-2011	MEMORANDUM	Memorandum In Opposition To Second Motion To Set Aside Default Jdgmnt With Mt To Strike Pleadings	
35.100	01-20-2011	DECLARATION	Declaration Of Dave Luecke In Response Tp Plf's Reply	
36	01-21-2011	MOTION HEARING JDG0001	Motion Hearing Judge John M. Meyer	
	01-21-2011	CD RECORD OF PROCEEDINGS	Cd Record Of Proceedings 1/10:01	
37	01-21-2011	DECLARATION	Declaration Of Cox In Sppt Of Jdgmnt Motions To Shw Cz & For Relief Frm	
38	01-21-2011	ORDER ON SHOW CAUSE JDG0001	Order On Show Cause Judge John M. Meyer	
39	01-31-2011	ORDER TO DISBURSE FUNDS JDG0004	Order To Disburse Funds Judge David R. Needy	
40	01-31-2011	EX-PARTE ACTION WITH ORDER JDG0004	Ex-parte Action With Order Judge David R. Needy	
41	02-07-2011	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed Check 66808/joseph Bowen	
	02-07-2011	TRUST FUND DISBURSED	Trust Fund Disbursed	-500.00
42	02-07-2011	ANSWER & AFFIRMATIVE DEFENSE	Answer & Affirmative Defense	
43	02-17-2011	NOTICE OF APPEAL TO COURT	Notice Of Appeal To Court	

		OF APPEAL	Of Appeal	
	02-17-2011	FILING FEE RECEIVED	Filing Fee Received	280.00
44	02-17-2011	AFFIDAVIT/DCLR/CERT OF SERVICE	Affidavit/dclr/cert Of Service	
45	02-23-2011	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed	
			Notice Of Appeal To Coa	
46	03-15-2011	DESIGNATION OF CLERK'S PAPERS	Designation Of Clerk's Papers From K. Garl Long	
47	03-23-2011	CLERK'S PAPERS - FEE ASSESSED	Clerk's Papers - Fee Assessed	-59.00
			Index Sent To Garl Long	
48	03-28-2011	CLERK'S PAPERS - FEE RECEIVED	Clerk's Papers - Fee Received	59.00
49	03-30-2011	TRANSMITTAL LETTER - COPY FILED	Transmittal Letter - Copy Filed	
			Long Designation To Coa	
50	04-01-2011	RECEIPT(S)	Receipt(s) From Court Of Appeals	
	04-28-2011	VERBATIM REPORT OF PROCEEDINGS	Verbatim Report Of Proceedings 02-26-2010 Pattie Long (1 Vol)	
	04-28-2011	VERBATIM REPORT OF PROCEEDINGS	Verbatim Report Of Proceedings 01-21-2011 Pattie Long 1 Vol	
51	04-28-2011	VERBATIM RPT TRANSMITTED	Verbatim Rpt Transmitted To Ct Of Appeals	
52	05-02-2011	RECEIPT(S)	Receipt(s)	
53	05-19-2011	NOTE FOR MOTION DOCKET ACTION	Note For Motion Docket Bowen: Mt To Compel	06-03-2011G0
54	05-19-2011	MOTION TO COMPEL	Motion To Compel	
55	05-19-2011	DECLARATION	Declaration In Sppt Of Mt To Compel Against Plf	
56	06-03-2011	HEARING STRICKEN:IN COURT NONAPPEAR	Hearing Stricken:in Court Nonappear	
57	06-09-2011	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	
58	09-07-2011	NOTICE OF ABSENCE/UNAVAILABILITY	Notice Of Absence/unavailability	

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Defendants-Respondents.

PROOF OF SERVICE

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I certify that I served in the manner indicated below, a true and correct copy of the:

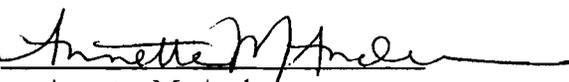
1. Reply Brief of Appellant
2. Declaration of Service

TO THE FOLLOWING PARTIES:

Clerk of the Court Court of Appeals, Division 1 600 University Street One Union Square Seattle, WA 98101	<input checked="" type="checkbox"/> U. S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivered by <input type="checkbox"/> Electronic Mail
Joseph D. Bowen Attorney at Law 401 S. Second Street Mount Vernon, WA 98273 Counsel for Defendants-Respondents	<input checked="" type="checkbox"/> U. S. Regular Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Facsimile <input type="checkbox"/> Hand Delivered by <input type="checkbox"/> Electronic Mail

Under penalty of perjury of the laws of the State of Washington, I declare the above to be a true, accurate and correct statement to the best of my knowledge and belief.

DATED this 15th day of September, 2011.

By: 
Annette M. Anderson