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RECEIVED
PETITIONER
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NO. 70206-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

BOUCHRA AGOUR,

Petitioner,

vs.

IAN M. DALRYMPLE and JANE DOE DALRYMPLE, husband and
wife and the marital community thereof,

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT

BRIEF OF PETITIONER

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

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I. INTRODUCTION

Petitioner Bouchra Agour was rear-ended in an auto accident with respondent Ian Dalrymple. This case comes before this Court on Bouchra Agour's appeal from the trial court's order denying her motion to consolidate and granting Ian Dalrymple's motion for summary judgment on the personal service issue and denying Bouchra Agour's motion for continuance.

The record is clear that the trial court failed to recognize that there were several genuine issues of facts that should have been resolved by the trier of fact. The disputed issue at hand is whether the professional process server serve a man with an American accent at Ian Dalrymple's verified address fitting the description of Ian Dalrymple,

This is a hotly disputed factual situation. If this trial court ruling stands, then any personal service issue could be thrown out if a defendant secures an out of country affidavit denying service.

Additionally, Bouchra Agour requests that in the interest of justice and to avoid unnecessary costs, that the two cases be consolidated such that all of the service issues (personal, residency, secretary of state and publication) can be combined into one action.

II. ASSIGNMENT OF ERROR

1. The trial court erred in entering the order of March 14, 2012, denying the motion to consolidate.
2. The trial court erred in entering the order of March 15, 2012, granting the motion for summary judgment.
3. The trial court erred in entering the order of March 15, 2012, denying the motion for continuance.

III. ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Per CR 42, “when actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the motions in issue in the actions; it may order all the actions consolidated . . . as may tend to avoid unnecessary costs or delay.” The issue is whether in terms of justice and fair hearing that the matters herein should have been consolidated.
2. The issue relating to the granting of the summary judgment is whether there were numerous disputed facts relating to the personal service of Ian Dalrymple.
3. The issue is whether the motion to continue would have allowed sufficient discovery or at least an evidentiary hearing as to the facts surrounding the person, who resides in New Zealand and who claims to have received the service of process on June 7, 2012.

IV. STATEMENT OF THE CASE

Bouchra Agour was rear –ended in her car in Seattle, King County on October 5, 2009, when she was hit by a car driven by Ian Dalrymple. Bouchra Agour was injured and her car was damaged. She filed a complaint for Personal Injuries on January 26, 2012 in King County Superior Court against Ian Dalrymple and Jane Doe Dalrymple, Cause No.12-2-03377-3 SEA. The complaint asserted that the accident was caused by Ian Dalrymple’s negligence. (CP 1-4)

On June 7, 2012, Ian Dalrymple was served with a copy of the summons and complaint. (CP 171-177)

Ian Dalrymple filed an Answer and Affirmative Defense. (CP 17-21)

Because of the dispute as to service, Bouchra Agour re-filed the Complaint for Personal Injuries under Cause No. 12-2-27331-6. (CP 165-168)

A process server delivered a copy of the summons and complaint to Ian Dalrymple’s last known residence on September 10, 2012, and was informed by a “Jane Doe” that she had evicted him, and did not have any forwarding information. Because Ian Dalrymple was “dodging service,”

the process server left a copy of the summons and complaint with the “Jane Doe.” (CP 171-177)

Bouchra Agour also served the summons by publication, in Cause No. 12-2-27331-6 SEA., beginning September 21, 2012. (CP 217-218)

Bouchra Agour also served the summons under the same Cause No., via the Secretary of State on September 25, 2012. (CP 181-184)

Bouchra Agour filed a Motion for Consolidation of the two actions on March 6, 2013, with supporting Declarations. The Declaration and Motion for Consolidation contained the cause numbers for both cases. The supporting Declaration stated that the facts, parties and claims were the same for both actions; and the parties’ attorneys were the same. (CP 129-130) Counsel for both parties presented, without oral argument, before the Hon. Susan Craigshead on March 14, 2013. The court issued a written order denying the motion. The order was made without any findings of fact. (CP 530-531)

Counsel for both parties presented, with oral argument, before the Hon. Joan Dubuque on March 15, 2013. The court issued written orders granting motion to dismiss for lack of service of process and denying the motion for continuance of the summary judgment hearing. Both orders were made without any findings of fact. (CP 152-153 and CP 154-155)

Bouchra Agour filed a Notice of Appeal to this Court on April 10, 2013. (CP 157-162)

Commissioner Mary Neel, on August 23, 2012, entered a ruling that the order of dismissal with prejudice for insufficient service of process in Cause No. 12-2-03377-3 is appealable as a matter of right. Commissioner Mary Neel noted “ because the order of dismissal is a final judgment, review in this matter brings up review the order denying the continuance of the summary judgment hearing and the order denying consolidation”.

V. ARGUMENT

A. The Trial Court Erred In Entering The Order Of March 14, 2012 Denying The Motion To Consolidate.

1. Harm was done to Bouchra Agour in not allowing Bouchra Agour to prove service by residency, service by publication and service by secretary of state.

The issue before the Court is whether the order denying the motion to consolidate was an abuse of discretion. Bouchra Agour requests that the Order Denying Motion to Consolidate, issued by the Hon. Susan Craighead in Cause No. 12-2-27331-6 SEA and Cause No. 12-2-03377-3

SEA on March 14, 2013, be reversed. (CP 530-531) The Order prevented Bouchra Agour from consolidating the cases, in which she had filed two Complaints for Personal Injuries against Ian Dalrymple. Bouchra Agour found it necessary to file two complaints against Ian Dalrymple because process of service was challenged by the Answer filed in the first case No. 12-3-03377-3 SEA. (CP17-21) There is only one motor vehicle accident herein and only one Plaintiff and only one Defendant.

Bouchra Agour seeks relief under RAP 2.3(b)(2), which permits review if “the superior court has committed probable error and the decision of the superior court substantially alters the status quo or substantially limits the freedom of a party to act”. The superior court’s denial of the motion to consolidate was probable error and is an abuse of discretion. The only reason that Bouchra Agour filed the second cause of action is that service of process was being challenged under the first cause of action. The superior court’s denial of the motion for consolidation substantially altered the status quo, because it allowed the second action to be subject to res judicata and thus disallowing the other three avenues of perfecting service under Cause No. 12-2-27331-6 (service by residency, service by publication or service by secretary of state).

The issue of whether or not cases should be consolidated for trial is a matter within the discretion of the trial court. *State ex rel. Sperry v.*

Superior Court for Walla Walla County, 41 Wn.2d 670, 251 P.2d 164 (1952) (affirming denial of a motion to consolidate three lawsuits, involving several vehicle collisions that resulted from a dust cloud on a highway, and that were part of a chain reaction). The facts of *Sperry* can be distinguished from the fact of this case. The lawsuits in *Sperry* involved multiple parties with multiple claims, affirmative defenses and cross-claims. The case herein involves one accident with one plaintiff and one defendant. There is no reason not to consolidate the cases and many reasons to consolidate. In addition to the costs saving aspect of consolidating the cases, the consolidation would allow all aspects of the service issue to be tested by the court. In essence, the denial of the motion to consolidate allowed Ian Dalrymple to block the service by residency, service by publication and service by secretary of state from ever being ruled upon by the court. This procedural block has harmed Bouchra Agour by denying her right to be heard in court.

In *State v. Haydel*, 122 Wn. App. 365, 95 P.3d 760 (2004), the defendant entered an *Alford* plea to a charge of attempted first-degree assault, and then moved to withdraw the guilty plea. Sua sponte, the trial court decided that the plea was not “knowing” as a matter of law, granted the defendant’s motion to withdraw the plea and denied the State’s motion for reconsideration. The Court of Appeals held that the trial court had

committed probable error by allowing the defendant to withdraw his plea, and that discretionary review was proper because the trial court's ruling altered the status quo and meant that the defendant had to go to trial; if convicted, the issues regarding the guilty plea would be moot. If he is acquitted, double jeopardy would bar reinstatement of his guilty plea. *Id.* at 369-70, 95 P.3d 760.

In *State v. Hegge*, 53 Wn. App. 345, 766 P.2d 1127 (1989), the Court held that the trial court committed probable error when it denied the defendant's motion to continue representing himself in his criminal trial, with the assistance of counsel. The defendant's waiver of counsel was knowing and intelligent, based upon the trial court's comprehensive examination of him. Therefore, the trial court committed probable error, which substantially altered the status quo. *Id.* at 349, 766 P.2d 1127.

Another case relevant herein is *Greenlaw v. Smith*, 67 Wn. App. 755, 840 P.2d 223 (Div. 2 1992), *judgment rev'd on other grounds*, 123 Wn. 2d 593, 869 P.2d 1024 (1994). A court commissioner had granted temporary custody of the couple's child to the noncustodial parent, and the superior court denied the custodial parent's motion for revision. The Court of Appeals granted the custodial parent's motion for discretionary review. It reasoned that the superior court probably didn't have subject matter jurisdiction to exercise jurisdiction. Also, the superior court's orders had a

substantial impact on the status quo, and on the lives of the parties and their child. *Greenlaw*, 68 Wn. App. at 760, 840 P.2d 223.

This Court should remand this case because the trial court committed an abuse of discretion, which substantially altered the status quo on the case, which in effect took away three avenues of perfecting service on Ian Dalrymple (service by residency, service by publication and service by secretary of state). This substantial alteration of the status quo constitutes abuse of discretion.

B. The Trial Court Erred In Entering The Order Of March 15, 2012

Granting The Motion For Summary Judgment.

1. There is substantial evidence in the record that personal service on Ian Dalrymple is hotly disputed and thus not proper for dismissal by summary judgment.

The issue before the Court is whether the motion for summary judgment was in error when (1) the evidence shows that the summons and complaints were timely served on an individual whose description matches those of the Ian Dalrymple; and (2) the person served spoke in an American accent similar to that of Ian Dalrymple; and (3) the address of

service was verified by an earlier call to Ian Dalrymple and verified by his neighbor.

Summary judgment is properly granted when the pleading, affidavits, depositions, and admissions on file demonstrate there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Hutchins v. 1001 Fourth Ave. Assocs.*, 116 Wash. 2d 217, 220, 802 P.2d 1360 (1991). The burden is on the party moving for summary judgment to demonstrate there is no genuine dispute as to any material fact and reasonable inferences from the evidence must be resolved against the moving party. *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 325, 349, 588 P.2d 1346 (1979). The motion should be granted only if, from all the evidence, a reasonable person could reach only one conclusion. *Id.* at 350, 588 P.2d 1346. An appellate court engages in the same inquiry as the trial court when reviewing an order for summary judgment. *Mountain Park Homeowners Ass'n v. Tydings*, 125 Wash. 2d 337, 883 P.2d 1383 (1994).

The de novo standard of review is used by an appellate court when reviewing all trial court rulings made in conjunction with a summary judgment motion. This standard of review is consistent with the requirement that evidence and inferences are viewed in favor of the nonmoving party, *Lamon*, 91 Wash. 2d at 349, 588 P.2d 1346, and the

standard of review is consistent with the requirement that the appellate court conduct the same inquiry as the trial court. *Mountain Park Homeowners Ass'n*, 125 Wash. 2d at 341, 883 P.2d 1383.

Granting of the summary judgment is not proper herein since there are genuine issue as to numerous material facts, and thus the moving party is not entitled to judgment as a matter of law. *Locke v. City of Seattle*, 162 Wn. 2d 474, 483, 172 P.3d 705 (2007) (quoting CR 56(c)). This is a classic – he said/he said case. A professional process server is certifying that he served an individual fitting the description of Ian Dalrymple (CP171-177) and Ian Dalrymple (CP 76-78) is claiming no such service. This fact is in dispute. A professional process server has claimed no interaction with a man claiming to be Henry. (CP 388-389) However, a resident of New Zealand named Henry Winsor claims to have been at the residence in question and that he received some “papers”. (CP 46-48) This fact is in dispute. In determining whether an issue of material fact exists, the court construes all facts and reasonable inferences in favor of the nonmoving party. *Lybbert v. Grant County*, 141 Wn. 2d 29, 34, 1 P.3d 1124 (2000). If that law is applied herein, then summary judgment can not be granted.

Summary judgment is subject to a burden shifting scheme. Upon the filing of the motion, the burden is on the moving party to show the

absence of a genuine issue of material fact. *Sun Mountain Productions, Inc. v. Pierre*, 84 Wn. App. 608, 616, 929 P.2d 494 (1997). Next, the burden shifts to the nonmoving party to show specific facts that would disclose the existence of a genuine issue as to a material fact. *Barrett v. Pacheco*, 62 Wn. App. 717, 721, 815 P.2d 834 (1991). Therefore, as the moving party, Ian Dalrymple has the initial burden to prove that he is entitled to prevail as a matter of law on the facts construed most favorable to Bouchra Agour. The facts, if construed most favorable to Bouchra Agour and her professional process server, clearly shows a legitimate dispute that should be resolved by the trier of fact. The facts as outlined in the statements by Mr. James and Henry Winsor show specific disputed facts that should be resolved by the trier of fact and not just summarily dismissed at a summary judgment hearing.

Ian Dalrymple's motion for summary judgment should have been denied because there is a genuine issue as to whether Ian Dalrymple was the individual who accepted service. As Mr. James' affidavit of service describes, upon his arrival at the Dalrymple residence, a white "bare-foot" male answered the door. CP 388-389 When the male saw the legal documents, he stated that Ian Dalrymple was not home. According to Mr. James, a licensed process server, it was his experience that persons who do

not want to get served often act in this manner.(CP 388-389) Mr. James proceeded to explain to the male that the paperwork was about the October 2009 accident and that he “needed to get in touch with his insurance carrier, State Farm.” The individual then took the documents, thanked Mr. James, and closed the door. During the interaction, Mr. James noted that the male spoke in an American accent similar to the one he heard when speaking with Ian Dalrymple on the phone prior to service. (CP 388-389 and CP 470-471)

Additionally, Mr. James described the male as being in his forties and this is consistent with the police report herein. (CP 388-389)

In support of his motion, Ian Dalrymple included a declaration from Mr. Henry Winsor, a New Zealand resident, who alleges that (1) he was the only person at Ian Dalrymple’s residence at the time of service; (2) he informed the process server that his name was Henry and offered to show his identification; (3) he refused to accept the papers when Mr. James “shoved” them at him; and (4) after he closed the door, the process server stated he had “been served”. (CP 46-49) This description of the events is contradictory to the one provided by the process server. Mr. James denies that the male he encountered at the residence identified himself as “Henry”. Mr. James specifically denies “shoving” the

documents or making the statement that the individual has “been served”.

(CP 388-389)

In this case, therefore, the facts pertaining to the process of service are hotly dispute. Construing the evidence in the light most favorable to the Bouchra Agour , Ian Dalrymple is unable to show that there is no issue of material fact, and that he is entitled to judgment as a matter of law.

C. The Trial Court Erred Entering The Order Of March 15, 2012,
Denying The Motion To Continue.

1. Bouchra Agour should be given the opportunity to ascertain the veracity of the person (residing in New Zealand) who is claiming receipt of the service of process.

When factual determinations turn on the credibility of witnesses, a court may abuse its discretion by failing to hold an evidentiary hearing. *Harvey v. Obermeit*, 163 Wn. App. 311, 327, 261 P.3d 671 (2011) (citing *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994)). In *Harvey*, the motions submitted by the parties raised the issue of whether the trial court had jurisdiction over the defendant based on substituted service. *Id.* at 327, 261 P.3d 671. The main disputed fact was whether the plaintiff made two or four attempts to serve the defendant before effecting

substitute service under the nonresident motorist statute. *Id.* at 314, 320, 261 P.3d 671. While the defendant claimed that only two attempts were made, the plaintiff maintained that the process server made four attempts. *Id.* at 320, 261 P.3d 671. The Court of Appeals ruled that the trial court appropriately held a fact-finding hearing when the court found there was a need for a factual determination as to the plaintiff's efforts to locate the defendant. *Id.* at 316, 327-28, 261 P.3d 671.

Similarly, in this case the declarations submitted by the parties are replete with factual disputes surrounding the service. While Ian Dalrymple claims that he was not at the residence at the time of service, the process server's affidavit and declaration state that Ian Dalrymple was the individual who accepted service. Because of the factual disputes, the Court should set the matter for evidentiary hearing to determine whether Ian Dalrymple was personally served. In the alternative, this Court should remand the case in order to allow Boucha Agour to depose the out of country person claiming only by declaration to be the one receiving the process of service.

VI. CONCLUSION

The case before this Court comes down to simple justice. Bouchra Agour respectfully requests her day in court. Ian Dalrymple is seeking to deny this day by hiding behind a questionable declaration. The disputed facts contained in the questionable declaration should be resolved by the trier of fact.

Additionally, Bouchra Agour requests that this Court consolidate her cases such that she can present evidence to the lower court that not only was personal service perfected in this case but that Bouchra Agour also perfected service by residency, by publication and by secretary of state.

DATED this 13th Day of January, 2014

KAREN L. GIBBON P.S.

A handwritten signature in black ink, appearing to read 'P. McGreevy', is written over a horizontal line.

Patrick McGreevy

WSBA No. 8487

CERTIFICATE OF SERVICE

I hereby certify that I sent by messenger a complete copy of the brief, including this Certificate of Service, to the following address on 13th day of January, 2013.

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