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NO. 69106-6-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

THERESA SCANLAN, Appellant

v.

KARLIN TOWNSEND and "JOHN DOE" TOWNSEND,
husband and wife, respondents

REPLY BRIEF OF APPELLANT

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Court Rules

CR 4(c)

CR 4(g)(5)

ER 801(c)

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Statutes

RCW 4.92.110

RCW 4.28.080

ARGUMENT

I. THE TRIAL COURT ERRED IN DISMISSING THE CASE DUE TO INSUFFICIENT PROOF SERVICE.

In her opening brief, Ms. Scanlan advanced two arguments explaining why the trial court erred in dismissing her case due to insufficient proof of service. First, Ms. Scanlan argued that certain statements made by Ms. Townsend and her counsel constituted proof of service by admission under CR 4(g)(5). Second, Ms. Scanlan asserted it is improper to dismiss a case due to insufficient proof of service because it is the fact of service that confers jurisdiction over a defendant, not the proof of service. Ms. Townsend failed to offer any argument refuting these points[1] in her response. The trial court's dismissal of Ms. Scanlan's claims due to insufficient proof of service has no support in law and should be reversed.

II. THE PLAIN LANGUAGE OF RCW 4.28.080 DOES NOT SUPPORT DISMISSAL FOR LACK OF SERVICE.

Ms. Townsend is correct that Washington courts "follow the language of unambiguous statutes." Respondent's Brief, at 6. Indeed, "When statutory language is clear and unequivocal, courts must assume the legislature meant exactly what it said and apply the statute as written."

[1] It appears that Ms. Townsend does not distinguish between insufficient proof of service and insufficient service of process in her response brief, although all of her arguments seem to address the later issue.

Wright v. B&L Properties, Inc., 113 Wn. App. 450, 460, 53 P.3d 1041 (2002). However, it is unclear how Ms. Townsend's citation to this rule helps her argument. The plain language of service statute favors Ms. Scanlan.

The language of the applicable service statute in this case, RCW 4.28.080, states, "The summons shall be served by delivering a copy thereof, as follows: (15) ... to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein." RCW 4.28.080.

Ms. Townsend does not dispute that Mr. Pyne personally handed her copy of the summons and complaint. This constitutes delivery to the defendant personally. Accordingly, if the plain language of the statute can be said to favor one party over another, it favors Ms. Scanlan.

It is Ms. Townsend that attempts to read into the statute an additional requirement: If someone other than the defendant is served with the summons, that person must be served at the defendant's usual abode. She undoubtedly gets this so-called requirement from the inartful restatement of the requirements of RCW 4.28.080(15) in Gerean v. Martin-Joven, 108 Wn. App. 963, 971, 33 P.3d 427 (2001). This requirement is simply not in the plain language of the statute. The statute

does not say who shall deliver the summons, nor does it impose any limitations on who may deliver the summons. The statute simply requires delivery.

The real question in this case is whether Mr. Pyne personally delivering the summons and complaint to Ms. Townsend satisfies the personal service prong of RCW 4.28.080(15) given the applicable case law. The professional process server's delivery of the summons to Mr. Pyne did not constitute personal delivery to the defendant. It was merely a transfer of the documents from one person to another. So it obviously failed to comply with RCW 4.28.080(15). Mr. Pyne's delivery of the summons to Ms. Townsend, however, did satisfy the requirements of the statute. That is the essence of Ms. Scanlan's argument.

III. MS. TOWNSEND WAS SERVED IN ACTUAL OR SUBSTANTIAL COMPLIANCE WITH THE PERSONAL SERVICE PRONG OF RCW 4.28.080(15).

In order for personal service to be valid a person qualified to serve process under CR 4(c) must personally deliver the summons to the defendant pursuant to RCW 4.28.080(15)[2].

[2] Ms. Townsend argues that just because due process was satisfied does not mean service was proper. This argument has been rejected by Washington courts on multiple occasions. See Bruett v. Real Property Known as 18328 11th Ave. N.E., 93 Wn. App. 290, 299, 968 P.2d 913 (1998); Weiss v. Glemp, 127 Wn.2d 726, 734, 903 P.2d 455 (1995). Ms. Scanlan never asserted this argument at the summary judgment hearing and is not raising it on appeal. Accordingly, Ms. Townsend's discussion of this argument is irrelevant to the outcome of this appeal.

A. Mr. Pyne was qualified to serve Ms. Townsend.

Mr. Pyne met all the requirements to qualify as a process server under CR 4(c). He was over 18 and competent at the time of service and he was not a party to the action. When interpreting court rules, Washington courts apply to same principles as when they interpret statutes. City of Bellevue v. Hellenthal, 144 Wn.2d 425, 431, 28 P.3d 744 (2001). One such principle is expressio unius est exclusio alterius – "to express one thing in a statute implies the exclusion of the other." State v. Delgado, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Accordingly, the expression of certain requirements to qualify to serve process implies the exclusion of any other requirements.

In her response brief, Ms. Townsend failed to offer any argument rebutting Ms. Scanlan's assertion that Mr. Pyne meets the requirements to serve process outlined in CR 4(c). She did not point out any other statutory or rule based authority disqualifying Mr. Pyne from serving process. None exists. Despite this fact, Ms. Townsend argued that "Washington law does not support Ms. Scanlan's claim that Ms. Townsend's father was the process server." Respondent's Brief, at 7-10.

In support of this claim, Ms. Townsend relies on a quotation from Gerean that reads:

> The question here is whether service of the summons on Ms. Martin Joven's father at his home in Deer Park is sufficient if the father delivered the papers to her in Walla Walla, where she lives. We agree with the trial court that the service was insufficient.

Gerean, 963 Wn. App. at 966. This is a comment on the sufficiency of the service under the statute, not a comment on the qualifications of the father to serve process in the case. She also relies on the Gerean Court's interpretation of RCW 4.28.080(15). The Court's interpretation was erroneous, as described in section II, supra. The Gerean Court's interpretation of the statute also has nothing to do with the qualifications of the defendant's father to serve process. Accordingly, no authority exists that would prohibit Mr. Pyne from serving Ms. Townsend. The only remaining question is whether Mr. Pyne's delivery of the summons to Ms. Townsend satisfied the service statute.

B. Mr. Pyne served Ms. Townsend in actual compliance with the personal delivery prong of RCW 4.28.080(15).

RCW 4.28.080(15) requires personal delivery of the summons to the defendant. This was accomplished in the present case. Ms. Townsend argues that service was invalid under Gerean v. Martin-Joven and attempts to paint Brown-Edwards v. Powell, 144 Wn. App. 109, 182 P.3d 441 (2008), as an unsupported outlier.

Ms. Townsend's selective reading of the arguments presented in Gerean undermines her position that service was invalid in the present case. The Gerean plaintiff's personal service argument was not based on actual or substantial compliance with the statute:

> She nevertheless contends that Ms. Martin-Joven was personally served. "[W]e served it on the person the statute provides for. If you read the statute, a person of suitable age and discretion gave her the documents."
>
> Ms. Gerean reasons that RCW 1.12.010 requires that statutes be liberally construed. In particular, RCW 4.28.080 is to be liberally construed. This means that delivery of process does not have to be in a manner enumerated in the service statute so long as due process is satisfied.

Gerean, 108 Wn. App. at 970 (emphasis added). The plaintiff in Gerean never argued that the defendant's father got valid personal service on the defendant in compliance with the service statute. She argued that liberal construction of the service statute meant all that was required was due process notice. The Gerean Court rejected this argument. Under this analysis, Gerean, strictly speaking, is not even relevant because the personal service argument presented in Gerean (liberal construction of the service statute means due process notice is all that is required) is fundamentally different than the personal service argument presented here (actual or substantial compliance with the statute is sufficient to satisfy the statute).

Unlike Gerean, Brown-Edwards is on point and is not an unprincipled outlier. The plaintiff in Brown-Edwards presented the exact same arguments being made by Ms. Scanlan in the present case and won. Additionally, the three cases cited by Ms. Townsend in support of Gerean do not address personal service and therefore are irrelevant. In Gross v. Evert-Rosenberg, 85 Wn. App. 539, 933 P.2d 439 (1997), the Court addressed whether substitute service was valid when a summons was served at the defendant's prior residence. Not surprisingly, the Court concluded service was invalid. There was no actual or substantial compliance with the statute. There was no indication that the resident of the house, which was still owned by the defendant, gave the summons to the defendant. The case simply addressed a completely different issue than the Court confronts in the present case. Lepeska v. Farley, 67 Wn. App. 548, 833 P.2d 437 (1992), and Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces, 36 Wn App. 480, 674 P.2d 1271 (1984), also address failed substitute service and are similarly irrelevant.

Ms. Townsend nonetheless argues these cases support Gerean because the courts were supposedly not concerned with whether the individuals that erroneously received a summons through bad substitute service eventually delivered the summons to the actual defendant (perhaps the documents were mailed to the defendant). Of course, just because an

appellate court does not address an issue does not mean the issue is meritless. There are many possible reasons why a court would not address subsequent personal service in a case. There may not be any evidence of hand delivery by the erroneously served person to the defendant. The statute of limitations may have expired before delivery (as was probably the case in Lepeska). Plaintiff's counsel may have simply failed to argue the issue at trial or on appeal. In short, it is a stretch to say the courts in these cases were not concerned with the possibility of personal service following bad substitute service. It is fairer to say that the issue never came up in these cases. The courts certainly never ruled on this issue and there is no way to know how they would have ruled if confronted with the issue. Therefore, the cases are irrelevant.

Ultimately, Ms. Scanlan complied with the requirements of RCW 4.28.080(15) and Mr. Pyne was qualified to serve process under CR 4(c). The arguments made at the trial court level and on appeal are clearly more analogous to the arguments made in Brown-Edwards than in Gerean. The evidence that service by Mr. Pyne was not fortuitous is much stronger than in either Brown-Edwards or Gerean. For all these reasons, the Court should conclude that Mr. Pyne personally served Ms. Townsend in actual compliance with RCW 4.28.080(15).

C. Mr. Pyne personally served Ms. Townsend in substantial compliance with the personal delivery prong of RCW 4.28.080(15).

Ms. Townsend's assertion that "notice of claim" statutes require strict compliance is misleading at best. She cites Hardesty v. Stenchever, 82 Wn. App. 253, 259, 917 P.2d 577 (1996), for the proposition that "Washington Courts have consistently held that strict compliance with the requirements of the notice of claim statutes is a condition precedent to recovery." Id. However, Hardesty and the cases cited therein all address the question of whether a plaintiff complied with the statute that requires individuals to file a notice of claim with the State before initiating a lawsuit against the State. Ms. Townsend has apparently confused the service of process statute, RCW 4.28.080 with the statute that requires plaintiffs to file claims with the State before filing a lawsuit against the State, RCW 4.92.110. They are different statutes and Washington courts approach them differently.

The rule in Washington is that personal service statutes require substantial compliance and constructive or substituted service statutes require strict compliance. Bruett v. Real Property Known as 18328 11 Ave. N.E., 93 Wn. App. 290, 299, 968 P.2d 913 (1998). Every method of service described in RCW 4.28.080 is personal service, including hand

delivery and abode service. Accordingly, service in the present case must only substantially comply with the service of process statute.

Substantial compliance requires actual compliance in respect to the substance essential to every reasonable objective of a statute. Weiss v. Glemp, 127 Wn.2d 726, 731, 903 P.2d 455 (1995). The substantial compliance doctrine applies where there has been compliance with the statute that was procedurally faulty. Id. at 731-32.

Even if the Court rules that service in this case did not constitute actual compliance with the statute, the Court should hold that service by Mr. Pyne constituted a mere technical deficiency and that Ms. Scanlan substantially complied with the statute.

IV. MR. PYNE'S AGREEMENT TO GIVE THE SUMMONS TO MS. TOWNSEND IS RELEVANT TO SHOW DELIVERY WAS NOT ACCIDENTAL OR FORTUITOUS.

Contrary to Ms. Townsend's assertion, Mr. Pyne's representation to the professional process server that he would deliver the summons to Ms. Townsend is highly relevant to show that the service of process was accidental or fortuitous[3]. It is at least arguable that Gerean stands for the proposition that accidental or fortuitous service is invalid, although the

[3] Ms. Townsend argues that Mr. Pyne's consent to receive the summons is irrelevant. This is a different statement than the one relied on in Ms. Scanlan's opening brief to show the delivery was not fortuitous. Ms. Scanlan relied on Mr. Pyne's statement that he would deliver the documents to Ms. Townsend.

service in Brown-Edwards was at least as fortuitous as in Gerean and it was permitted. The statement is not relevant to the issue of whether Mr. Pyne properly served the defendant under the statute. Whether the process server agreed to deliver the summons and complaint is not an issue under any statute or court rule.

V. PERMITTING PEOPLE WHO ARE NOT PROFESSIONAL PROCESS SERVERS TO SERVE PROCESS DOES NOT SHIFT THE PLAINTIFF'S RESPONSIBILITY TO PROPERLY SERVE THE DEFENDANT.

Ms. Townsend seems to argue that permitting service in the manner accomplished in this case is tantamount to shifting the duty to serve process to the third-party (Mr. Pyne in this case). Respondent's Brief, at 13-14. This is wrong. It is axiomatic that the duty to serve a defendant is on the plaintiff. The burden does not shift merely because someone else agrees to actually serve the documents.

Indeed, a plaintiff must always get someone else to actually serve process. CR 4(c) prohibits a party to a case from serving process in his or her own case. Plaintiff's routinely hire professional process servers to serve process despite the fact that there is no specific statute or rule requiring the use of a professional process server. This delegation of the actual act of serving process does not relieve the plaintiff of the ultimate responsibility for serving process. There is no principled reason why it

should be any different for non-professional third-parties who agree to serve process.

VI. MR. PYNE'S STATEMENT TO THE PROCESS SERVER THAT HE WOULD DELIVER THE SUMMONS AND COMPLAINT TO MS. PYNE IS NOT HEARSAY.

Hearsay "is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." ER 801(c). Hearsay is generally inadmissible unless it falls under an exception. ER 802.

Mr. Pyne's statement that he would give the summons and complaint to Ms. Townsend is not hearsay because it is not being offered to prove the truth of the matter asserted. The statement is not being offered to prove that Mr. Pyne actually delivered the summons and complaint to Ms. Townsend. That has been established by other evidence including Ms. Townsend's deposition and the admission of defense counsel at the summary judgment hearing. Rather, it is being offered to prove that delivery of the summons and complaint to Ms. Townsend was not fortuitous as prohibited by *Gerean*. Therefore, the statement is not hearsay.

Mr. Pyne's statement that he would give the summons and complaint to Ms. Townsend falls under the then existing mental condition

exception. ER 803(a)(3). The exception includes any statement regarding a person's intent. Mr. Pyne's statement that he would deliver the documents was a statement of his present intent. Accordingly, the exception applies and the hearsay rule does not bar its admissibility.

VII. PUBLIC POLICY DOES NOT REQUIRE DISMISSAL.

Ms. Townsend's public policy concerns are largely unfounded. Ms. Townsend begins her public policy argument by listing a number of issues that would need to be resolved. Most of these so-called issues have obvious and uncontroversial answers.

- May a plaintiff compel a person to serve process? The answer is obviously no. Outside of a preexisting contractual agreement to serve process, a plaintiff may not compel any person to serve process. This issue does not support a public policy against permitting service in the present case.
- Should the person be compensated? This can be left to the plaintiff and third-party to decide. This issue does not support a public policy against permitting service in the present case.
- Should the person be told he or she can refuse to serve process? Asking someone to deliver a summons on your behalf implies their right to say no. This issue does not

support a public policy against permitting service in the present case.

- What if a process server leaves papers on a person's doorstep? Service is obviously invalid. But that is not what happened in this case. This issue does not a support a public policy against permitting service in this case.

Ms. Townsend worries that someone might gratuitously agree to deliver a summons then forget and be held liable. Of course, such a situation would not give rise to contract liability given the lack of exchange of consideration.

Ms. Townsend imagines another situation where a neighbor accepts a summons on behalf of a defendant without knowledge of their significance. Upon discovering the summons significance, the neighbor decides not to deliver the documents because the neighbor likes the defendant. Ms. Townsend then imagines that the process server files a proof of service "designating" the neighbor as process server. She then contends that service would be accomplished in this situation if service is deemed valid in this case. This is a complete misunderstanding of Ms. Scanlan's argument. Service in this hypothetical would not be accomplished until the neighbor hand delivered the summons to the defendant. And even then it may be impermissible fortuitous service

unless the neighbor agreed to deliver the documents. Additionally, a proof of service designating someone else as a process server is a not a proof of service at all.

Ms. Townsend also exaggerates the public policy implications of holding that service was valid in this case. She states that process servers will just start leaving summons in neighbor's mailboxes and hoping that the neighbors will hand deliver the documents to the defendants. This is absurd. Professional process servers will continue to attempt to get obviously valid personal service to avoid the need for their clients to waste money vigorously litigating service of process issues.

Ms. Townsend worries that there could be no accountability and no proof of service in cases with service like the present case. Of course, there is proof of service in the present case. Both Ms. Townsend and her counsel have given valid admissions of service in this case. Additionally, there is nothing preventing individuals like Mr. Pyne from offering valid affidavits of service. Mr. Pyne could issue one in the present case if he were inclined. There is no reason to believe that relying on admissions or affidavits from people who are not professional process servers would lead to less accountability or lack of proof of service.

CONCLUSION

The trial court clearly erred when it dismissed Ms. Scanlan's case for insufficient proof of service. Washington law does not permit dismissal of a case due to insufficient proof of service. On this basis alone the trial court's dismissal should be overturned.

Additionally, Ms. Scanlan requests that the Court address the underlying service of process issue in this case. Ms. Scanlan complied with the plain language of the service statute and Mr. Pyne was qualified to serve process under CR 4(c). Accordingly service is valid. The only case that is on point where the parties presented the same arguments as made here is Brown-Edwards. Division III's decision in that case upheld the validity of service. Ms. Scanlan respectfully requests that Division I follow the reasoning of Brown-Edwards, rule that service was valid in this case, and remand the case for further proceedings.

Respectfully submitted this 29th day of Nov, 2012.

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CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner indicated a copy of the foregoing Brief of Appellant upon the following persons:

Michael Abrahamson Hollenbeck, Lancaster, Miller & Andrews 15500 SE 30th Place, Suite 201 Bellevue, WA 98007	( ) via Mail ( ) via Facsimile (✓) via ABC Messenger Delivery ( ) via email

DATED this 29th day of November, 2012.

Ann Forthuber