Case No. 98889-7

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

Court of Appeals Division I, Case No. 79934-7-1

KEITH WELCH

Defendant/Appellant,

v.

US BANK NATIONAL ASSOCIATION

Plaintiff/Appellee.

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Petitioner, Keith Welch, *pro se*, seeks the relief set forth below.

II. CITATION TO COURT OF APPEALS DECISION

Pursuant to RAP 13.4(b)(1), (2) (3) and (4), Petitioner, Keith Welch, request that this Court review the unpublished decision by Division I of the Court of Appeals filed on June 15, 2020, in re: *Keith Welch v. US Bank National Association, et al.* **(Appendix A)**.

III. ISSUES PRESENTED FOR REVIEW

A. Does Appellant Welch establish a basis for review under RAP 13.4(b)(1) if his petition identifies a conflict between the Court of Appeals decision and a decision of the Supreme Court?

B. Does Appellant Welch establish a basis for review under RAP 13.4(b)(2) if the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals?

C. Does Appellant Welch establish a basis for review under RAP 13.4(b)(3) if a significant question of law under the Constitution of the State of Washington or of the United States?

D. Does Appellant Welch establish a basis for review under RAP 13.4(b)(4) if the petition involves an issue of substantial public interest that should be determined by the Supreme Court?

On June 15, 2020, the Court of Appeals filed an unpublished opinion. This decision addresses issues of great importance to public and private interests in this State.

IV. STATEMENT OF THE CASE

Appellee US Bank NA's counsel John M. Thomas, articulated at the May 3, 2019, "Show Cause" hearing that the *posted* order to show cause, *(which was posted on the 24th of April, 2019)* was "good enough."

> **MR. THOMAS:** The Court did order and allow alternative service. The process server's affidavit that's on file with the Court says that the process server served by alternative service on the 26th, which was nine days before the summons return date.
>
> **MR. THOMAS:** As far as the notice for this hearing, that was also nine days before the hearing date. The declaration of service for this order to show cause says that it was on the 24th of April. The process server *posted* the order to show cause and did a follow-up mailing that same day, that was *also* nine days ago… "So, I don't see that there is any issue regarding service Your Honor." *Verbatim Report of the Court Proceedings 5/3/2019, Pg. 20.*

As stated above, US Bank NA's counsel Thomas *clearly* admitted that based on the dates between *"mailing,"* "*posting"* and the *"Order to Show Cause" hearing,"* he did *not* comply with the personal service requirements pursuant to CR 6(e), RCW 59.18.370, or the (9) nine court days' pursuant to SCLCR6(d)(2)(i).

Moreover, in a recent response to Appellant Welch's appeal motion filed with the Court of Appeals, dated November 14, 2019, US Bank NA's counsel Thomas stated that the trial court *rejected* the (9) nine court day argument. Because US Bank NA's counsel Thomas provides *no* evidence that the trial court, pursuant to SCLCR6(d)(2)(i), had the legal authority to

reject Appellant Welch's "due process" rights under the nine (9) court day rule, nor can counsel Thomas provide this Court with *any* evidence that the trial court even ruled on the issue, the case was subject to dismissal for failure of service of process**.**

Additionally, RCW 59.18.370 states in relevant part: "A copy of the order, together with a copy of the summons and complaint if not previously served upon the defendant, shall be *served* upon the defendant."

Therefore, regardless of US Bank's counsel Thomas' argument that the trial court purportedly rejected RCW 59.18.370, and the (9) nine court day rule, is simply without merit and a fatal ending to Mr. Thomas's case.

Furthermore, the trial court ignored Appellant Welch's summary judgment declaration swore under oath which controverts US Bank's service compliance arguments.

Moreover, Appellant Welch's declarations swore under oath, should have been considered by the Court of Appeals as being given the same weight as the declaration which was provided by the Defendant US Bank NA's.

Finally, all this boils down to is due process. Non-compliance will not pass the "due process" test. Appellant Welch was entitled to due process. US Bank NA, instituted a *new* lawsuit, and however much they don't like it, they had to *personally* serve Appellant Welch, with the "Order

to Show Cause" hearing and comply with proper service pursuant to SCLCR 6(d)(2)(i).

Therefore, the trial court was without legal authority to rule, uphold or amend US Bank NA's deficient service of process.

The case was subject to dismissal for failure of service of process. The hearing should have been stricken.

Finally, Appellant Welch and this Court would both acknowledge that possession actions are supposed to be summary proceedings intended for expeditious resolution of disputes within its scope and that jury trials might present a challenge to judicial economy and efficiency throughout the state. Nevertheless, the law requires clarification regarding the applicability in the *US Bank NA, vs. Welch, et, al.* case, regarding possession matters in light of the Washington Courts and the legislative amendments removing the express due process right on appeal possession actions.

Furthermore, Appellant Welch and this Court would find possession action akin to a breach of contract claim—a traditional legal cause of action— and would: (1) hold that the trial court erred when it ruled against Appellant Welch; (2) reverse the trial court's judgment in favor of Appellant Welch; and (3) remand the matter for a jury trial. The trial court's judgment is reversed, and the case is remanded.

Therefore, due to the general importance of the issues presented and for the purpose of reexamining existing law, this case should be transferred to the Supreme Court under RAP 13.4(b).

V. ARGUMENT

A. Appellant Welch Has Established a Basis for Review under RAP 13.4(b)(3) Because His Petition Does Identify a Significant Question of Law Under the Constitution of the State of Washington or of the United States.

Appellant Welch has established that the Court of Appeals opinion in applying the ***"harmless error test"*** to the Skagit County Local Court Rule (SCLCR) 6(d)(2)(i), did prejudicially violate Appellant Welch's civil rights under due process. Moreover, the Court of Appeals opinion, did confirm, with the citation of (2) two criminal cases that Appellee US Bank's service did in fact violate SCLCR 6(d)(2)(i), court rule, though it was the Court of Appeals opinion that it was a *harmless* violation of the local rule.

Furthermore, was it an expansion of a nonconforming use for the Court of Appeals to base its opinion on the harmless error test when citing criminal cases in a civil case matter as controlling law?

To the extent Washington case law distinguishes between permissible intensification and improper expansion, it does so only to protect nonconforming uses against constitutionally protected intensification. This is a subtle but important distinction, which the Court of Appeals may have overlooked or misapprehended.

Courts rely on the rules of statutory construction to interpret court rules. *State v. Blilie,* 132 Wn.2d 484, 492, 939 P.2d 691 (1997). Generally, courts attempt to give effect to the plain terms of a statute. *Tommy P. v. Board of Cy. Comm'rs,* 97 Wn.2d 385, 391, 645 P.2d 697 (1982); *see also, State v. Beaver,* 148 Wn.2d 338, 343, 60 P.3d 586 (2002) (every statutory term is intended to have some material effect). Whether oral or written findings are required is a question of law, which the Court of Appeals reviews *de novo. State v. Hanson,* 151 Wn.2d 783, 784-85, 91 P.3d 888 (2004). This Court applies canons of statutory interpretation when construing court rules. *State v. Robinson,* 153 Wn.2d 689, 692, 107 P.3d 90 (2005). The plain language of a court rule controls when it is unambiguous. *Robinson,* 153 Wn.2d at 693. Where the terms of a court rule are unambiguous the plain language controls and no interpretation is necessary. *State v. Robinson,* 153 Wn.2d 689, 693, 107 P.3d 90 (2005).

Accordingly, the Court of Appeals' failure to apply a presumption of prejudice, as required by the constitutional harmless error test, conflicts with precedent and merits review. RAP 13.4(b)(1), (2). The proper test is a constitutional issue worthy of this Court's review. RAP 13.4(b)(3). Further, the issue concerning the proper application of the harmless error test will recur and qualifies as a matter of substantial public interest. RAP 13.4(b)(4).

This Court should grant review to clarify that the Washington standard provides more, than the legal doctrine of harmless error typically found in the Federal Rules of *Criminal* Procedure.

B. The Trial Court Erred in Denying Appellant Welch's Due Process Rights under the United States and Washington Constitution.

Appellant Welch has a constitutionally protected interest in an opportunity to meaningfully defend actions filed against him in state courts. Both the state and federal constitutions provide these protections, grounded in due process, which prohibit any state action that infringes upon an individual's interest in life, liberty, and property. Because Appellant Welch may have had a property interest, he cannot be deprived of that interest without a full and fair procedure provided at a meaningful time and in a meaningful manner.

The state and federal constitutions also provide for a right to a jury trial. The issue before this Court is whether that right exists in possession actions where it is not expressly provided for in the Revised Code of Washington Statutes.

1. Due Process.

The present case involves a fundamental constitutional right enjoyed by all United States citizens: protection from state action to deprive Appellant Welch of life, liberty, or property, without due process of law. The Fourteenth Amendment guarantees an individual a fair legal process

before he can be deprived of these constitutionally protected interests.

In *Lindsey v. Normet,* 405 U.S. 56, 67 (1972), the U.S. Supreme Court held that due process requires states to provide individuals the opportunity to be heard in a meaningful time and a meaningful manner with the ability to present "every available defense" in determining the measure of process necessary. In expanding on the definition of a meaningful time and manner, the Court has also stated "absent a full, fair, potentially effective opportunity" to address allegations against a party, the right to a hearing would be "but a barren one."

The Court further has acknowledged that depending on circumstances of the individual case, a meaningful time and manner can be anything from an extensive evidentiary hearing to a simple process that makes an "initial check against mistaken decisions[.]"

The Court further held that the following factors must be considered when determining whether a procedure provides an individual sufficient due process protections:

> "First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

While the Fourteenth Amendment of the United States Constitution extends federal due process protections to state actions, the Washington

State Constitution contains its own due process clause mirroring the language of the United States Constitution, U.S. Const. amend. XIV, § 1, (stating "no person shall be deprived of life, liberty or property without due process of law.").

2. <u>Judicial Economy Should Not Trump Due Process</u>.

What is unclear about the Court of Appeals interpretation of the summary proceeding here, is why US Bank NA's right to recover physical possession of the property is supreme to the Appellant Welch's property interest in retaining physical possession of a property in which he has a lawful and constitutionally-protected interest. The trial court's decision to deny Appellant Welch's his constitutional right over the concerns of judicial efficiency and economy, reinforce the principle that Appellant Welch's possessory interest was somehow less. The trial court failed to consider whether the procedural scheme might limit important rights, by requiring Appellant Welch to litigate them before returning possession to the purported owner. As a result, the Court of Appeals elevated the property rules designed to restore an income stream to the owner over the fairness concerns involved in resolving disputes regarding parties' rights. The property rules validated in *Lindsey* arose in the context of conflicting claims of ownership and were designed to protect persons with possession and status *(i.e., owners of land)* against hostile claims.

Appellant Welch contends that a trial court in an unlawful detainer action lacks jurisdiction if a party fails to comply with the alternate service of process requirements under RCW 59.12.085, and subsequently failed to serve a proper summons under RCW 59.12.070.

Additionally, the Court of Appeals in applying the "harmless error test" to the Skagit County Local Court Rule (SCLCR) 6(d)(2)(i), did prejudicially violate Appellant Welch's civil rights under due process.

Furthermore, Appellee US Bank NA, failed to provide/serve Appellant Welch, proper notice of Appellee's show cause motion/hearing, thereby depriving Appellant Welch of his due process rights under the United States U.S. Const. amend. XIV, § 1.

RAP 13.4 (b) provides:

> "A petition for review will be accepted by the Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with a published decision of the Court of Appeals; or (3) If a significant question of law under the Constitution of the State of Washington or of the United States is involved; or (4) If the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

Appellant Welch established these criteria in his petition for review.

VI. CONCLUSION

For the reasons set forth above, this Court should accept review and address whether the Court of Appeals June 15, 2020, ruling should be overruled.

DATED this 12th day of August, 2020.

RESPECTFULLY SUBMITTED:

/s/ Keith Welch
Keith Welch, Defendant/Appellant

DECLARATION OF SERVICE

I, Keith Welch, certify under penalty of perjury under the laws of the State of Washington, that on the day I signed this declaration of service, I caused a copy of the Petition for Review, to be electronically mailed and served as follows upon Counsel of record and filed with the Court:

McCarthy & Holthus, LLP
920 SW Third Ave 1st Floor
Portland, OR 97204
Telephone: (971) 201.3203
Facsimile: (971) 201.3202

Signed at Mount Vernon, Washington, this 12th day of August, 2020.

/s/ Keith Welch
Keith Welch, Defendant/Appellant

Appendix A

FILED
6/15/2020
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

U.S. BANK NATIONAL ASSOCIATION, as Trustee for GreenPoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2007-AR2, Respondent, v. KEITH WELCH; All Occupants and Persons in Possession, Appellant.	No. 79934-7-I DIVISION ONE UNPUBLISHED OPINION

CHUN, J. — After filing a complaint for unlawful detainer, US Bank National Association could not locate defendant Keith Welch to serve him with process. The trial court authorized US Bank to serve Welch through alternative means. The court then held a show cause hearing and issued a writ of restitution in favor of US Bank. Welch appeals, arguing that deficiencies in the service of the summons, complaint, and notice of the show cause hearing merit reversal. We identify only one procedural violation, which was harmless. We affirm.

I. BACKGROUND

US Bank filed a complaint against Welch for unlawful detainer related to real property in Burlington, Washington (Property).

About a month later, US Bank moved for an order authorizing alternative service "due to the fact the defendants are evading service." The court entered

an order the next day, permitting alternative service.

Soon after, US Bank issued an amended eviction summons. The summons required Welch to respond by January 4, 2019. US Bank also submitted a declaration of service claiming that, on December 26, 2018, it posted at, and mailed to, the Property three copies of the summons and complaint.

US Bank then moved for an order to show cause "why a writ of restitution should not be issued restoring to [US Bank] possession of the [Property]." The court granted US Bank's motion. US Bank notified Welch of the show cause hearing through alternative service on April 24, 2019.

A few weeks after the court's order, Welch filed "Defendants Answer and Affirmative Defenses; and to Dismiss Plaintiffs Complaint; and Grant Defendant a Continuance Under CR 56(f); and for Costs and Fees under CR 56(g)." The court held a show cause hearing that both parties attended on May 3, 2019. See Report of Proceedings May 3, 2019. It then entered a judgment for restitution in favor of US Bank. Welch appeals.

II. ANALYSIS

A. Service under RCW 59.12.085

Welch argues that the trial court lacked personal jurisdiction over him because US Bank did not serve him in strict compliance with RCW 59.12.085.[1] We disagree.

We review de novo whether service of process was proper. Scanlan v.

[1] Welch also appears to suggest that the court should not have authorized alternative service. But because he does not assign error to this decision, we do not address the issue. See State v. Olson, 126 Wn.2d 315, 319, 893 P.2d 629 (1995).

Townsend, 181 Wn.2d 838, 847, 336 P.3d 1155 (2014).

To invoke personal jurisdiction over a defendant, there must be proper service of the summons and complaint. Scanlan, 181 Wn.2d at 847. Such service must satisfy both statutory and constitutional requirements. Scanlan, 181 Wn.2d at 847. The plaintiff initially bears the burden to prove a prima facie case of sufficient service. Scanlan, 181 Wn.2d at 847. An affidavit of service that is regular in form and substance is presumptively correct. Leen v. Demopolis, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). If the plaintiff meets their initial burden, the party challenging the service must show that it was improper by clear and convincing evidence. Scanlan, 181 Wn.2d at 847. Evidence is clear and convincing if it shows the ultimate fact at issue is highly probable. In re Dependency of K.S.C., 137 Wn.2d 918, 925, 976 P.2d 113 (1999).

RCW 59.12.085 permits alternative service of process by (1) posting the summons and complaint "in a conspicuous place on the premises unlawfully held not less than nine days from the return date stated in the summons," and (2) depositing copies of the summons and complaint "in the mail, postage prepaid, by both regular mail and certified mail directed to the defendant or defendants' last known address not less than nine days from the return date stated in the summons." RCW 59.12.085(2)(a)-(b).

Welch claims that US Bank did not comply with RCW 59.12.085 because it posted the amended summons at the Property on December 28, 2018, which was fewer than nine days before the January 4, 2019 return date stated in the summons. But US Bank provided a declaration of service stating that it posted

and sent by first class and certified mail three copies of the amended summons and complaint to the Property on December 26, 2018. This satisfied its initial burden of proving a prima facie case of sufficient service. The burden then shifted to Welch to show improper service by clear and convincing evidence.

Welch submitted a declaration providing merely that "Plaintiff posted an amended summons and complaint, on December 28, 2018." Welch, however, did not explain in any way the basis for his assertion. For example, he did not say that he witnessed the posting. As a matter of law, Welch's unsupported assertion does not make it highly probable that the declaration of service is incorrect, and it thus does not constitute clear and convincing evidence to overcome the presumption that the declaration of service is correct.[2] Thus, Welch fails to meet his burden.[3]

[2] Even assuming, under the clear and convincing standard, Welch had shown that an issue of fact existed as to whether service was proper, the court could have properly exercised its discretion to hold an evidentiary hearing if needed for a just determination. See Woodruff v. Spence, 76 Wn. App. 207, 210, 883 P.2d 936 (1994) (remanding for an evidentiary hearing where conflicting affidavits created an issue of fact). Welch, however, did not request an evidentiary hearing below nor does he ask for one on appeal. Under the facts of this case, had Welch requested such a hearing below, the court would have been within its discretion in denying it as he submitted only the unsupported assertion from his declaration to contradict the affidavit of service. Cf. Woodruff, 76 Wn. App. at 210 (determining that two declarations and an affidavit contradicting the affidavit of service created an issue of fact); Price ex rel. Estate of Price v. City of Seattle, 106 Wn. App. 647, 657, 24 P.3d 1098 (2001) (determining that a declaration was too conclusory to raise an issue of fact on summary judgment).

[3] Also, Welch states, "The amended summons received by Appellant Welch was *not* filed with the summons." But he does not explain how this assertion supports any legal argument, nor does he cite any applicable legal authority. Thus, we need not consider the assertion. See Bercier v. Kiga, 127 Wn. App. 809, 824, 103 P.3d 232 (2004) ("We need not consider arguments that are not developed in the briefs and for which a party has not cited authority.").

B. Service of Order to Show Cause Hearing Dates

Welch contends that US Bank did not serve him with notice of the show cause hearing dates in compliance with RCW 59.18.370 or Skagit County Local Court Rule (SCLCR) 6(d)(2)(i). Though we determine the service violated SCLCR 6(d)(2)(i), the violation was harmless.

Again, we review de novo whether service of process was proper. Scanlan, 181 Wn.2d at 847.

RCW 59.18.370 discusses the process for obtaining a writ of restitution and provides, in relevant part:

> The plaintiff . . . may apply to the superior court . . . for an order directing the defendant to appear and show cause, if any [they have], why a writ of restitution should not issue restoring to the plaintiff possession of the property . . . and the judge shall by order fix a time and place for a hearing of the motion, which shall not be less than seven nor more than thirty days from the date of service of the order upon the defendant.

Also, SCLCR 6(d)(2)(i) requires that "[m]otions, other than Summary Judgment motions, shall be filed and served upon all parties at least nine (9) court days before hearing."

Welch contends that US Bank did not comply with RCW 59.18.370 because it did not personally serve him at least seven days before the hearing date. While US Bank did not personally serve Welch, it served him through alternate means, which the court had authorized.[4] Also, US

[4] Welch appears to claim that RCW 59.18.370 was also violated because a court commissioner, rather than a judge, entered the order to show cause. But our state constitution grants superior court commissioners the authority "to perform like duties as a judge of the superior court at chambers." CONST. art. IV, § 23. This provision grants commissioners the "same powers which a judge at chambers had the right to exercise at the time of the adoption of the constitution," including hearing and determining "all

Bank submitted a declaration of service showing that on April 24, 2019, it posted at, and sent by first class and certified mail three copies of the order to show cause to, the Property. April 24, 2019 was nine calendar days before the show cause hearing on May 3, 2019. Thus, the service complied with RCW 59.18.370.

But because US Bank served Welch only seven court days before the hearing, the service violated SCLCR 6(d)(2)(i). We apply the harmless error test to the violation of a court rule. State v. Robinson, 153 Wn.2d 689, 697, 107 P.3d 90 (2005). Thus, we reverse only if, within reasonable probabilities, Welch shows that had the error not occurred, the outcome of the hearing would have been materially affected. Robinson, 153 Wn.2d at 697; State v. Sublett, 176 Wn.2d 58, 78, 292 P.3d 715 (2012) (noting that defendant has the burden to show that an error was harmless). As Welch does not argue that the two-court-day delay in service prejudiced him, the error does not require reversal.

We affirm.

Chun, J.

WE CONCUR:

Bowman, J.

Andrus, A.C.J.

actions, causes, motions, demurrers, and other matters not requiring a trial by jury." State ex rel. Lockhart v. Claypool, 132 Wash. 374, 375-77, 232 P. 351 (1925). Also, rulings by commissioners are subject to revision by superior court judges. RCW 2.24.050. In addition, Welch fails to show that having a commissioner, rather than a judge, enter the order prejudiced him. Thus, we reject Welch's argument.

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

U.S. BANK NATIONAL ASSOCIATION, as Trustee for GreenPoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2007-AR2, Respondent, v. KEITH WELCH; All Occupants and Persons in Possession, Appellant.	No. 79934-7-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellant Keith Welch filed a motion to reconsider the opinion filed on June 15, 2020. Following consideration of the motion, the panel has determined the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

FOR THE COURT:

Chun, J.

Judge

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

U.S. BANK NATIONAL ASSOCIATION, as Trustee for GreenPoint Mortgage Funding Trust Mortgage Pass-Through Certificates, Series 2007-AR2, Respondent, v. KEITH WELCH; All Occupants and Persons in Possession, Appellant.	No. 79934-7-I ORDER DENYING MOTION TO PUBLISH

Appellant Keith Welch has moved to publish the opinion filed on June 15, 2020. Following consideration of the motion, the panel has determined the motion should be denied.

Now, therefore, it is hereby

ORDERED that the motion to publish is denied.

FOR THE COURT:

Chun, J.

KEITH WELCH - FILING PRO SE

August 12, 2020 - 12:34 PM

Transmittal Information

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