

TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR..... 01

1. The trial court erred in denying Defendant’s April 28, 2006 Motion for Summary Judgment..... 01

2. The trial court erred in denying Defendant’s May 19, 2006 Motion for Reconsideration..... 01

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR..... 01

1. In a lawsuit arising out of a motor vehicle accident that occurred within the State of Washington, is the Statute of Limitations tolled pursuant to RCW 4.16.180 when a plaintiff could have made timely service on the Secretary of State? (Assignments of Error Nos. 1 & 2)..... 01

2. When a defendant is unaware of a lawsuit filed against her, can there be willful concealment as required to invoke the tolling provisions of RCW 4.16.180? (Assignments of Error Nos. 1 & 2.) 01

C. STATEMENT OF THE CASE..... 01

1. Facts of Loss..... 01

2. The Plaintiff’s Attempts at Service..... 02

3. The Motions for Summary Judgment and Reconsideration..... 03

4. Defendant’s Motion for Discretionary Review Is Granted..... 04

D. ARGUMENT..... 05

1. Standard of Review..... 05

2. The plaintiff could have served Ms. Hager within the Statute of Limitations by service on the Secretary of State..... 05

3. The tolling provisions of RCW 4.16.180 do not apply in a case in which the plaintiff could have made service on the Secretary of State..... 07

4. The plaintiff failed to establish a willful attempt to evade service of process on the part of the defendant..... 08

E. CONCLUSION..... 12

TABLE OF AUTHORITIES

Table of Cases

Berrocal v. Fernandez, 155 Wn.2d 585, 590, 121 P.3d 82 (2005)..... 5
Brown v. ProWest Transport, 76 Wn. App. 412, 886 P.2d 223
(1995)..... 8, 9, 10, 11
Caouette v. Martinez, 71 Wn. App. 69, 856 P.2d 725 (1993)..... 9
Huff v. Budbill, 141 Wn.2d 1, 1 P.3d 1138 (2000)..... 7
Patrick v. De Young, 45 Wn. App. 103, 724 P.2d 1064 (1986),
review denied, 107 Wash. 2d 1023 (1987), *overruled on other*
grounds by Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325,
815 P.2d 781 (1991).....7
Rodriguez v. James-Jackson, 127 Wn. App. 139,
111 P.3d 271 (2005)..... 10, 11
Smith v. Forty Million, Inc., 64 Wn.2d 912, 395 P.2d 201 (1964)..... 8

Statutes

RCW 4.16.180..... 1, 3, 4, 6, 7, 9, 10, 11, 12
RCW 46.64.040..... 6, 7, 8

Regulations and Rules

RAP 2.3(b)(2)..... 5

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

SEBASTIAN BROWN, a single man,

Plaintiff/Respondent,

v.

TONI EILEEN HAGER,

Defendant/Petitioner.

BRIEF OF PETITIONER

DATED this 16 day of November, 2006.

GEORGE W. MCLEAN, JR. & ASSOCIATES

By: 

Thomas G. Crowell, WSBA#23622

720 Olive Way, Suite 1600

Seattle, WA 98101

(206) 839-4200

Attorney for Defendant/Petitioner

A. ASSIGNMENTS OF ERROR

1. The trial court erred in denying Defendant's April 28, 2006 Motion for Summary Judgment.

2. The trial court erred in denying Defendant's May 19, 2006 Motion for Reconsideration.

B. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR

1. In a lawsuit arising out of a motor vehicle accident that occurred within the State of Washington, is the Statute of Limitations tolled pursuant to RCW 4.16.180 when a plaintiff could have made timely service on the Secretary of State? (Assignments of Error Nos. 1 & 2.)

2. When a defendant is unaware of a lawsuit filed against her, can there be willful concealment as required to invoke the tolling provisions of RCW 4.16.180? (Assignments of Error Nos. 1 & 2.)

C. STATEMENT OF THE CASE

1. Facts of Loss.

This matter arises out of a motor vehicle accident that occurred on January 9, 2003 in Pierce County.¹ Mr. Brown and Ms. Hager exchanged

¹ Plaintiff's Complaint for Personal Injuries, Paragraph III. CP 2.

information at the scene of the accident, including current addresses, driver's license information and insurance information.²

2. The Plaintiff's Attempts at Service.

Mr. Brown filed this lawsuit on May 31, 2005 – more than seven months prior to the expiration of the Statute of Limitations.³ During the subsequent months, Mr. Brown attempted but failed to personally serve Ms. Hager with a copy of the Summons and Complaint.⁴

Finally, on January 20, 2006, Mr. Brown served a copy of the Summons and Complaint on the Secretary of State's office.⁵ This was eleven (11) days after the expiration of the Statute of Limitations. As part of the service on the Secretary of State's office, H. L. Smith, a legal assistant in the offices of plaintiff's attorneys, filed an "Affidavit of Compliance" with the Secretary of State's office stating that they had been unable to locate Ms. Hager.⁶

On February 28, 2006, Mr. Brown finally caused Ms. Hager to be personally served with a copy of the Summons and Complaint.⁷

² Declaration of Toni Hager, attached as Exhibit A to Defendant's Reply Memorandum in Support of Motion for Summary Judgment. CP 54-56.

³ Plaintiff's Complaint for Personal Injuries. CP 1-3.

⁴ See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. CP 19-21.

⁵ See Declaration of Thomas G. Crowell in Support of Motion for Summary Judgment. CP 11-12.

⁶ Id., Exhibit 1. CP 13-15.

⁷ See Motion and Affidavit for Order of Default, page 2, lines 10-14, dated May 31, 2006. CP 76.

3. The Motions for Summary Judgment and Reconsideration.

On March 28, 2006 Ms. Hager moved for summary judgment on the grounds that Mr. Brown had failed to serve her within the time limits of the Statute of Limitations.⁸ Mr. Brown replied by arguing that Ms Hager had been evading service and the Statute of Limitations was tolled pursuant to RCW 4.16.180.⁹ In his opposition memorandum to Defendant's Motion for Summary Judgment, Mr. Brown alleged that the defendant intentionally concealed herself and the Statute of Limitations was therefore tolled pursuant to RCW 4.16.180.

Mr. Brown alleged that, on June 22, 2005, his process server attempted to serve the defendant at an address in Torrance, California and found that Ms. Hager did not reside there.¹⁰ Mr. Brown also alleged that, on July 3, 2005, his process server went to an address in Puyallup and found that Ms. Hager no longer resided there either.¹¹ Mr. Brown alleged that, on February 28, 2006, his process server went to another (and nearby) address in Puyallup and was finally able to serve Ms. Hager.¹²

⁸ Defendant's Motion for Summary Judgment. CP 4-18.

⁹ Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment. CP 19-38.

¹⁰ See Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment, attached declaration of Jackie Brazil. CP 29.

¹¹ Id., attached declaration of Bernie Dunayski. CP 30.

¹² Id., attached Affidavit of Service of Ed Lund. CP 31-32.

The defense responded by arguing that Mr. Brown had shown no proof of evasion.¹³ The defense presented the declaration of Ms. Hager in which she stated that, at the scene of the accident, she had provided her address, driver's license information, and insurance information.¹⁴ Ms. Hager stated that she had to been forced to move residences due to financial hardship.¹⁵ Finally she stated that she was not even aware of the lawsuit until after she was served in February 2006.¹⁶

On April 28, 2006, Pierce County Superior Court Judge Kathryn J. Nelson denied the defense Motion for Summary Judgment.¹⁷

On May 5, 2006, the defense filed a Motion for Reconsideration.¹⁸ The defense argued that the tolling provisions of RCW 4.16.180 did not apply in a case such as this in which Mr. Brown could have made service on the Secretary of State.¹⁹ Judge Nelson denied the defense motion for reconsideration on May 19, 2006.²⁰

4. Defendant's Motion for Discretionary Review is Granted.

The defendant filed a Notice for Discretionary Review in this

¹³ Defendant's Reply in Support of Motion for Summary Judgment. CP 45-48.

¹⁴ Declaration of Toni Hager, Paragraph 3, attached to Defendant's Reply in Support of Motion for Summary Judgment. CP 54-55.

¹⁵ Id., paragraph 5. CP 55.

¹⁶ Id., paragraph 8. CP 55.

¹⁷ Order Denying Defendant's Motion for Summary Judgment. CP 57-58.

¹⁸ Defendant's Motion for Reconsideration. CP 59-62.

¹⁹ Id. CP 59-62.

²⁰ Order Denying Reconsideration. CP 73-74.

matter on June 19, 2006. On August 28, 2006 Commissioner Eric Schmidt granted review pursuant to RAP 2.3(b)(2) finding that the trial court committed probable error in denying the motion for summary judgment and that this denial “substantially altered the status quo because it allowed an action to proceed when the defendant had not been served within the statute of limitations.”

D. ARGUMENT

1. Standard of Review.

On appeal from a summary judgment, appellate courts engage in de novo review and make the same inquiry as the trial court, looking to the documents presented to determine if there are any genuine issues of material fact and if the moving party is entitled to judgment as a matter of law. *Berrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

In this matter, a review of the materials presented to the trial court in each of the two motions in question establishes conclusively that the defendant was entitled to dismissal of the lawsuit against her.

2. The plaintiff could have served Ms. Hager within the Statute of Limitations by service on the Secretary of State.

It has never been disputed by the parties that this matter arises out of a motor vehicle accident that occurred on January 9, 2003. The three-

year statute of limitations set out in RCW 4.16.080 therefore applied and Mr. Brown had until January 9, 2006 to serve Ms. Hager.

Mr. Brown does not deny that he failed to serve Ms. Hager within the time limits set out in the statute of limitations. Mr. Brown instead argues that Ms. Hager was evading service and that this evasion tolled the statute of limitations pursuant to RCW 4.16.180.

This case arises out of a motor vehicle accident in which the defendant was operating a motor vehicle within the state of Washington, RCW 46.64.040 provides that “each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability **and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state** of the state of Washington as his or her lawful attorney for service of summons” (emphasis added).

RCW 46.64.040 clearly applies in this case. Ms. Hager was a resident of this state, involved in a motor vehicle accident, and was not able to be located after a due and diligent search. All criteria necessary for service on the Secretary of State’s office was met prior to the expiration of the Statute of Limitations. This court should take note that Mr. Brown did

in fact serve Ms. Hager through the Secretary of State's office – albeit eleven days after the expiration of the Statute of Limitations.

In reviewing the case law regarding RCW 46.64.040, it should be kept in mind that the statute was amended in 2003 to eliminate any requirement that the plaintiff show a good faith belief that resident defendants were absent from the state. *See Huff v. Budbill*, 141 Wn.2d 1, 1 P.3d 1138 (2000). RCW 46.64.040 now only requires that the plaintiff show that the resident defendant “at any time within the following three years cannot, after a due and diligent search, be found in this state.” In this case specifically, Mr. Brown did not need to show a good faith belief that Ms. Hager was absent from the state – he only needed to show that he could not locate her after a “due and diligent search.”

3. The tolling provisions of RCW 4.16.180 do not apply in a case in which the plaintiff could have made service on the Secretary of State.

This court has already recognized, in *Patrick v. De Young*, 45 Wn. App. 103, 724 P.2d 1064 (1986), *review denied*, 107 Wash. 2d 1023 (1987), *overruled on other grounds by Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991), that “[t]he tolling provisions of RCW 4.16.180 do not apply when a defendant may be served pursuant to

RCW 46.64.040.” See also *Smith v. Forty Million, Inc.*, 64 Wn.2d 912, 915, 395 P.2d 201 (1964).

Mr. Brown cited to *Brown v. ProWest Transport*, 76 Wn. App. 412, 886 P.2d 223 (1995) in his opposition to the Motion for Summary Judgment. Significantly, the *Brown v. ProWest Transport* court directly addressed the issue of potential service on the secretary of State’s office, but observed that it was not possible in that case as the defendant had failed to stop and provide an address to which the plaintiff could have mailed process as required by RCW 46.64.040. As such, service on the Secretary of State’s office was unavailable to the plaintiff in *Brown v. ProWest Transport*.

In this case, it is undisputed that Ms. Hager provided her address to Mr. Brown and could be served pursuant to RCW 46.64.040. Mr. Brown did, in fact, serve her by this method. Mr. Brown simply failed to do so in a timely manner.

4. The plaintiff failed to establish a willful attempt to evade service of process on the part of the defendant.

Mr. Brown does not dispute that he failed to serve Ms. Hager within the time limits of the Statute of Limitations. In his opposition memorandum to Defendant’s Motion for Summary Judgment, however, Mr. Brown alleged that Ms. Hager intentionally concealed herself to evade

service of process and the Statute of Limitations was therefore tolled pursuant to RCW 4.16.180.

Specifically, Mr. Brown alleged that, on June 22, 2005, his process server attempted to serve the defendant at an address in Torrance, California and found that the defendant did not reside there. Mr. Brown further alleged that, on July 3, 2005, his process server went to an address in Puyallup and found that defendant no longer resided there. Finally, Mr. Brown also alleged that, on February 29 [sic], 2006, his process server went to another (and nearby) address in Puyallup and was finally able to serve Ms. Hager.

The rest of Mr. Brown's allegations concerned the opinions of his process server and a third party as to the motives of Ms. Hager as well as hearsay statements they claimed were made to them. This was unsubstantiated hearsay and conclusory opinions regarding an ultimate fact and should have been stricken and disregarded as a matter of law. Nonetheless, even accepting the improper testimony, the allegations of Mr. Brown were not factually sufficient to establish that Ms. Hager was concealing herself.

Concealment under RCW 4.16.180 is defined as a "clandestine or secret removal from a known address." *Brown v. ProWest Transport*, 76 Wn. App. 412, 420, 886 P.2d 223 (1995), *see also Caouette v. Martinez*,

71 Wn. App. 69, 856 P.2d 725 (1993). Willful evasion of process is a necessary ingredient to toll the limitations statute under RCW 4.16.180. *Brown*, 76 Wn. App. at 421.

In *Brown v. ProWest Transport*, the plaintiff had been driving his car on Interstate 5 in Seattle when he was struck by a tractor-trailer truck. The driver of the truck did not stop at the accident scene. Third party witnesses provided a license plate number for the truck that was traced back to a Canadian trucking company. The owner of the truck identified a third person as someone who had been driving the truck on the day of the accident but failed to provide that person's address. The *Brown v. ProWest Transport* court found that the failure to stop and disclose information at the scene of an accident suspended the statute of limitation when, as a result of the failure, there was an inability to prosecute that cause of action. *Brown*, 76 Wn. App. at 418.

Unlike the defendant in *Brown v. ProWest Transport*, Ms. Hager stopped at the accident scene and provided her address, drivers' license, and insurance information. As such, the facts of this case are much more comparable to those in *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 111 P.3d 271 (2005).

In *Rodriguez*, the defendant also disclosed her driver's license information, address, and insurance information. *Rodriguez*, 127 Wn. App.

at 141. Some time after the accident, the defendant moved out of state. *Id.* The Court of Appeals recognized that these facts contrasted with the case in *Brown v. ProWest* Transport where there had been actual concealment. The *Rodriguez* court found that the plaintiff had not established that the defendant had willfully concealed herself and so was not entitled to claim tolling of the Statute of Limitations under RCW 4.16.180. *Rodriguez*, 127 Wn. App. at 147.

In this case, Mr. Brown presents no evidence of willful concealment. Read plainly, his allegations established no more than that the defendant had moved out of her residence several months before he attempted to serve her and that she was reputedly in financial distress. The rest of the plaintiff's allegations amount to no more than conjecture and supposition. Mr. Brown failed to present any competent evidence at all from which the trial court could have logically concluded that Ms. Hager was even aware of this lawsuit until she was personally served on February 28, 2006.

In her declaration, Ms. Hager denied that she was aware of this lawsuit until she was served on February 28, 2006. Mr. Brown presented no evidence contradicting this declaration. Because Ms. Hager was unaware of the lawsuit, it is impossible for her to have been willfully evading service. Consequently, there was no legal basis to toll the Statute

of Limitations pursuant to RCW 4.16.180 and the trial court committed obvious error in failing to grant the defense Motion for Summary Judgment.

E. CONCLUSION

The trial court erred when it failed to recognize that the tolling provisions of RCW 4.16.180 do not apply to this case. They do not apply because: 1) Ms. Hager could have been (and later was) served through the Secretary of State's office; and 2) there is no evidence to support the allegation that Ms. Hager was either aware of the lawsuit or was intentionally concealing herself. It is undisputed that there was no service within the applicable statute of limitations. Because there was no timely service and no tolling, Mr. Brown's claim is barred and this case should be remanded to the trial court to dismiss it with prejudice.

COURT OF APPEALS,
DIVISION II
OF THE STATE OF WASHINGTON

SEBASTIAN BROWN, a single man,

Plaintiff/Respondent,

v.

TONI EILEEN HAGER,

Defendant/Petitioner.

CERTIFICATE OF SERVICE

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and competent to be a witness herein.

I certify under penalty of perjury of the laws of Washington that I caused to be delivered the following document to all parties or their attorneys of record on the 16th day of November, 2006, as follows:

DOCUMENT: BRIEF OF PETITIONER

PARTY/COUNSEL

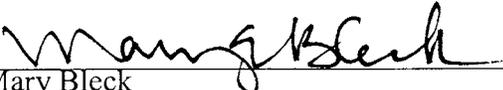
DELIVERY INSTRUCTIONS

Counsel for Plaintiff

Patrick K. Daly, WSBA #6541
Daly and MacFie
711 S. Commerce Street, Ste. 210
Tacoma, WA 98402
Tel.: (253) 272-1956

- Via U.S. Mail
- Via Hand Delivery **ABC**
- Via Overnight Mail

Dated this 16th day of November, 2006.



Mary Bleck

FILED
COURT CLERK
05 NOV 16 PM 4:15
BY: [illegible]
[illegible]