

Court of Appeals No. 36727-1-II

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IN THE COURT OF APPEALS, DIVISION TWO  
OF THE STATE OF WASHINGTON

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Leanna Shipp,  
Appellant,

v.

Mason General Hospital Foundation, et al.,  
Respondents.

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FILED  
COURT OF APPEALS  
DIVISION II  
08 MAR 31 AM 9:56  
STATE OF WASHINGTON  
BY  DEBITY

ON APPEAL FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR MASON COUNTY

The Honorable James B. Sawyer

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BRIEF OF APPELLANT

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TABLE OF CONTENTS

	Page
I. <u>ASSIGNMENTS OF ERROR</u> . . . . .	1
II. <u>ISSUES PERTAINING TO ASSIGNMENTS OF ERROR</u> . . . . .	1
III. <u>STATEMENT OF THE CASE</u> . . . . .	1
IV. <u>ARGUMENT</u> . . . . .	7
V. <u>CONCLUSION</u> . . . . .	17
VI. <u>APPENDIX</u> . . . . .	No APPENDIX

## TABLE OF AUTHORITIES

<u>Leen v. Demopolis</u> , 62 Wn. App. 473, 815 P.2d 269 (1991)	16
<u>Finkelstein v. Sec. Properties, Inc.</u> , 76 Wn. App. 733, 888 P.2d 161, <u>rev. denied</u> , 127 Wn.2d 1002 (1995)	14
<u>Bray v. Bayles</u> , 609 P.2d 1146, (Kan. App.), <u>aff'd in part, rev'd in part</u> , 618 P.2d 807 (Kan. 1980)	14
<u>Precision Lab. Plastics, Inc. v. Micro Test, Inc.</u> , 96 Wn. App. 721, 981 P.2d 454 (1999)	9
<u>Mannington Carpets, Inc. v. Hazelrigg</u> , 94 Wn. App. 899, 973 P.2d 1103, <u>review denied</u> , 139 Wn.2d 1003 (1999)	7
<u>Reiner v. Pittsburg Des Moines Corp.</u> , 101 Wn.2d 475, 680 P.2d 55 (1984)	16
<u>Wichert v. Cardwell</u> , 117 Wn.2d 148, 812 P.2d 858 (1991)	13
<u>Coggle v. Snow</u> , 56 Wn. App. 499, 784 P.2d 554 (1990)	8
<u>DeHart v. Allen</u> , 26 Cal.2d 829, 161 P.2d 453 (1945)	15
<u>Roth v. Nash</u> , 19 Wn.2d 731, 144 P.2d 271 (1943)	15
<u>Jones v. Stebbins</u> , 122 Wn.2d 471, 860 P.2d 1009 (1993)	16
<u>Tabbert, Hahn, Earnest and Weddle v. Lanza</u> , 94 F.Supp. 1010 (S.D.Ind. 2000)	12
RCW 4.28.090	<i>passim</i>

## **I. ASSIGNMENTS OF ERROR**

1. ERROR IS ASSIGNED TO THE TRIAL COURT'S DECISION GRANTING THE RESPONDENT'S MOTION TO DISMISS ON THE BASIS OF INSUFFICIENT SERVICE OF THE LAWSUIT UPON THE RESPONDENT.
2. ERROR IS ASSIGNED TO THE TRIAL COURT'S DECISION DENYING THE APPELLANT'S MOTION TO SET ASIDE THE JUDGMENT DISMISSING THE LAWSUIT.
3. ERROR IS ASSIGNED TO THE TRIAL COURT'S DECISION DENYING THE APPELLANT'S MOTION FOR A CONTINUANCE OF THE MOTION TO DISMISS TO DEPOSE THE DEPOSITION OF THE PRESIDENT OF THE RESPONDENT.

## **II. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the trial court properly dismissed all the Appellant's claims in the above action on the basis of insufficient service of process, and declined the Appellant's request to obtain the attendance of the Respondent's President at a deposition.

## **III. STATEMENT OF THE CASE**

The Appellant filed the present lawsuit on January 19, 2007, over her termination from employment on January 21, 2004 and unsuccessful efforts by the Plaintiff to collect her unpaid wages that continued after that, alleging three causes of action, each having a 3-year statute of limitations. CP. 165, 174-176. On February 6, 2007, Lee Bacharach and the President of the Respondent, Peg

Stock, went to the Mason County Clerk's office and the President was hand-delivered a copy of the summons, complaint and jury demand on file with the Mason County Clerk's office from Amy Nussbaum. CP. 122, 128, 137, 7/23/07 RP. 2, and 8/22/07 RP 32. On April 6, 2007, the Appellant served a second copy of the summons, complaint and jury demand at the location identified by the Secretary of State as the business address of the registered agent, Joan Hayes. CP. 142. After verifying the location, Leigh Bacharach identified herself to the process server as "the office manager for Ms. Hayes," and that she would provide the documents to Ms. Hayes, and Ms. Bacharach signed and dated the summons and complaint. CP. 142. According to Leigh Bacharach, upon receiving the summons and complaint, she immediately notified the Respondent's Board members that she was served with the papers. CP. 137.

The Respondent filed a motion to dismiss, claiming insufficient service of the summons and complaint upon the Respondent when the summons and complaint were served on Ms. Leigh Bacharach on April 6, 2007. CP. 164.

The Appellant replied to the Motion to Dismiss and filed a motion for continuance to address the Respondent's failure to respond to overdue discovery requests and to permit the Appellant to depose the President of the Respondent. RP. 2-4, CP. 146.

In response to the Appellant's reply, the Respondent argued primarily on public policy grounds, that the court should find mere "knowledge" of the lawsuit occurred in February, and not find that the Respondent was sufficiently served when the summons and complaint were hand-delivered to the Respondent's President by the Clerk of Court. CP. 117.

The court accepted all of the pleadings on file, but denied the motion to continue. CP. 111. Instead, the court considered as a verity for purposes of the motion to dismiss that the President of the Respondent received the summons and complaint on February 6, 2007, but attempted to distinguish the matter as one involving "notice" versus "service" as follows:

"I am willing to accept for - as verity, the fact that [the President] had received that information from the Clerk's office at her own behest. Now, the issue is whether or not that and/or the delivery of the documents up at Mason General Hospital effected service and where we go from there." RP. 4.

The trial judge indicated that his initial “gut” reaction to the facts was that the Respondent was served, but then the court started considering what “service” meant:

“And I looked at the term is not to give notice but to serve process. And what does that mean? And is there a distinction between the two? ... If somebody hands me paperwork in the street, that is not, in fact, serving it and putting me on notice that now you have X-number of days to respond to this paperwork. But just says, saw this laying in the street thought it might be interesting to you. Am I served with that process at that point, and do I necessarily assume that that means that now I have X-number of days to respond to it?

If I come home after a month-long vacation and I find laying on my front step a summons and complaint in a civil process against me, do I assume that from the day that I got home now I have X-number of days to respond to that service of process? Has due process been served in that situation? And does just, essentially, dumb luck mean that I have stumbled in and gotten myself served? And there, I think, lies the distinction between notice and service. Service puts one on notice that there are acts that you must take to defend against this litigation, and the mere knowledge of the existence of the litigation does not effect service. RP. 12-13

Under the “mere knowledge” theory, the court denied the motion for a continuance and granted the motion to dismiss. CP. 111-112. Using the untimely discovery documents delivered by the Respondent immediately before the motion to dismiss was entered, the Appellant filed a “Motion to Vacate” and pointed out that Leigh Bacharach was identified as a “Staff” member of the Hospital

Foundation in 2005 (CP. 76), and participated in numerous Executive Committee activities for the Foundation in 2007 (CP. 77). Leigh Bacharach informed the Board on January 11, 2007, eight days before the lawsuit for wrongful termination was filed, that she “would like to hire someone” (CP. 77) to apparently help her with data entry and filing for the Foundation. CP. 77, 80. Leigh Bacharach and the President of the Foundation were going to “do an assessment on the Foundation and help with the by-laws” (CP. 78). The Appellant also filed a copy of the Respondent’s Secretary of State Application To Register as a Charitable Trust, signed by Peg Stock, president of the Foundation, identifying Leigh Bacharach as “the individual with expenditure authority” (emphasis added) for the Respondent “who can respond to questions regarding the [Respondent’s] expenditure of funds.” CP. 67. In addition, the Respondent’s Charitable Trust Renewal of its registration designates Leigh Bacharach as the official “contact person” for the Respondent in 2007. CP. 72.

The Respondents had not provided the Bylaws in response to the Appellant’s discovery demands, but from an older set of Bylaws the Appellant had retained from her employment, the

Appellant described Leigh Bacharach's "Chief Development Officer" role in the Bylaws of the Respondent, as the equivalent of a Executive Director for the Respondent. CP. 97- .

The Respondent filed declarations from the President (Peg Stock) and Leigh Bacharach, arguing that Leigh Bacharach was "not a manager or officer of the Foundation" (CP. 23) and she only had "limited authority to expend and answer questions about Foundation funds." CP. 23-24.

At the August 22, 2007 hearing, the Appellant's counsel moved to strike the declaration of the Respondent's President, and its argumentative statement that the President wasn't served, and again to compel the deposition of the President. RP. 25. Counsel asked for a "fair chance" to respond to the dismissal by obtaining information from the President. RP. 27. The court felt that "the information that was provided" to the court on the CR 60 motion was information that was available prior to the motion to dismiss and denied the Appellant's motion. RP., 32. This appeal ensued.

#### **IV. ARGUMENT**

- 1. Whether the trial court erred in not allowing the Appellant a continuance to obtain the testimony of Peg Stock.**

The Appellant sought a continuance, noting the contradiction between testimony under oath by Leigh Bacharach – who claimed she was not active with the Foundation and had not attended Board meetings in two years – with documents the Respondent’s attorney turned over right before the hearing showing that Leigh Bacharach attended Board Meetings and Executive Committee Meetings. The Appellant’s counsel sought to obtain the testimony of the President, Peg Stock, who had been successfully served with a deposition notice on the Thursday prior to the hearing on the Respondents’ motion.

Appellate courts review the trial court's denial of a summary judgment continuance for abuse of discretion. Mannington Carpets, Inc. v. Hazelrigg, 94 Wn. App. 899, 902, 973 P.2d 1103 (1999). The Appellant provided adequate support for a continuance, noting that the Respondents had not been forthcoming with discovery, the Appellant's counsel had been diligent in attempting to obtain discovery, the request served a substantial purpose, and the evidence was necessary for a just determination. Under such circumstances, “{t}he primary

consideration in the trial court's decision on the motion should have been justice." Coggle v. Snow, 56 Wn. App. 499, 508, 784 P.2d 554 (1990). Here, there was no showing that the Respondent would be prejudiced in any way by allowing the Appellant to depose the President about her role upon being served with the summons, and the truthful role of Leigh Bacharach in the Foundation, and what transpired in the Foundation. The continuance was necessary because the Respondent's counsel declined to honor the subpoena served on Peg Stock to attend the hearing and the subpoena for a deposition, due to their lack of 5 days' notice. RP.

4. In further prejudice to the Appellant, the court allowed the Respondent to subsequently file a declaration from the President, over the objection of Appellant's counsel. The prejudice the Appellant faced (dismissal with prejudice) and the on-the-record effort by the trial court to interpret the President's state of mind in receiving the lawsuit, also support reversal of the decision denying the Appellant an opportunity to depose the Respondent's President prior to dismissal. This court should remand this matter to allow the Appellant to depose the President of the Respondent and present the results to the trial court.

**2. Whether the trial court erred in entering an Order of Dismissal and denying the Motion to Vacate.**

RCW 4.28.080, and subpart (9) state that:

“The summons shall be served by delivering a copy thereof as follows: (9) to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.”

**The Trial Court Should Have Trusted His Instincts**

A trial court’s ruling on personal jurisdiction is a question of law, reviewable de novo when the underlying facts are undisputed; when the trial court decides the question of personal jurisdiction solely on affidavits and discovery, only a prima facie showing of jurisdiction is required. Precision Lab. Plastics, Inc. v. Micro Test, Inc., 96 Wn. App. 721, 725, 981 P.2d 454 (1999)(upholding jurisdiction over out-of-state defendant).

Here, the parties did not dispute and the trial court accepted as a “verity” that the Appellant had submitted sufficient proof that summons was personally delivered by a suitable person

over the age of 18 to the President of the Defendant within the statutory time for doing so. The trial court should have trusted its initial “gut” instinct, that the Appellant had met her burden of proof, and denied the motion to dismiss.

Unfortunately, the trial court elected to ruminate on this matter, and rewrite the statute, by adding more requirements than delivery to the president, by arguing that the word “service” meant more than the two requirements identified in the statute. Instead of proof that the summons was personally delivered to the President, the trial court appeared to institute an added requirement in Washington, that a Plaintiff must prove what was in the mind of the president of a corporation when the documents were hand delivered to that person. As noted above, the Defendants failed to enter any argument or evidence in the motion to dismiss concerning the “mind of the president” theory,<sup>1</sup> and the trial court specifically refused to allow the Plaintiff’s attorney, who had served a subpoena for a deposition on the president, to attempt to read

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<sup>1</sup> The Respondent filed a “reply” argument, not contesting the “delivery” to the president, but claiming that the court should rely upon cases involving service on people who were not the president, and the theory that a president who is personally delivered a copy of the lawsuit upon her own initiative, merely obtains “knowledge” of it.

that person's mind. The trial court seemed to get lost in what constituted adequate "notice" of a lawsuit, rather than the statutory requirements. This case does not involve substitute service, and thus the court's effort to incorporate the "notice" elements upon the actual delivery to the president is unsound. In any event, if this is a fact-based issue, the facts support the position that this president understood that a lawsuit had been filed against her corporation. The fact that she sought out a copy was fortuitous, and the court seemed to be caught up in the notion that a Plaintiff must prove that the summons was delivered by hunting down the President, rather than the President hunting down the summons. Proof that it was personally delivered to her by a suitable person is what the statute requires.

Even if this court is going to adopt the trial court's theory, the evidence clearly shows from the circumstances, that the president would understand what had been handed to her was a legitimate summons in a legitimate lawsuit, that had been actually filed with the Mason County Superior Court. The trial court's reasoning that the facts in this case are equivalent to someone

finding papers on the street, or someone returning from a vacation to discover papers lying on the doorstep is not persuasive.

The trial court in this case also got overly concerned with what obligations might arise upon a Defendant when the President is handed a summons. The president's obligations upon proof of delivery of the summons were not even before the trial court, and therefore would be dicta.

Thus, the requirement of the statute was met when the Clerk of Mason County personally handed the summons to the Respondent's president in February. See also Tabbert, Hahn, Earnest and Weddle v. Lanza, 94 F.Supp. 1010 (S.D.Ind. 2000) (regardless of alleged deficiency in service by the Appellant, service was upheld upon evidence that the county clerk copied and delivered the summons and complaint to Lanza on December 7).

Moreover, the statute provides for service by delivery on "the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or ... registered agent."

Respondents conceded that Leigh Bacharach was served with the lawsuit in April, at the place of business of the

Foundation's agent, after indicating that Leigh Bacharach was the "office manager for Ms. Hayes (the designated agent)" and that she was the one who handled delivery of documents to Ms. Hayes. See Reiner v. Pittsburg Des Moines Corp., 101 Wn.2d 475, 680 P.2d 55 (1984)(Service on the manager of "site support services" at Hanford's No. 2 site satisfied RCW 4.28.080(10) because his title "implies that he possessed sufficient discretionary authority to act in a representative capacity.).

Here, the record includes more than the open representations by Ms. Bacharach to the process server. Leigh Bacharach's financial check signing authority, registered agency for charitable giving, executive committee participation, hiring (or hiring recommendation), and office assistant duties were all presented to the trial court. Although some of this evidence came to the attention of the trial court through the CR 60 motion, the result of which is reviewed for an abuse of discretion, it is important for this court to note that the court's role in interpreting the statute is to promote justice and not gamesmanship by a Defendant. See Wichert v. Cardwell, 117 Wn.2d 148, 150, 812 P.2d 858 (1991)(substitute service on adult daughter who stayed overnight in

the home, was sufficient “notice” and comports with the common law goals of due process).

Finally, equitable estoppel holds a party accountable for a representation made when inequitable consequences would otherwise result to another who relied on that representation in good faith. Bray v. Bayles, 609 P.2d 1146, 1147 (Kan. App.), aff’d in part, rev’d in part, 618 P.2d 807 (Kan. 1980). An equitable result is permitted over false assurances by the defendant, when the plaintiff has exercised diligence. Finkelstein v. Sec. Properties, Inc., 76 Wn. App. 733, 739-40, 888 P.2d 161, review denied, 127 Wn.2d 1002 (1995)(allowing tolling of the statute of limitation). Here, there is no question that the process server went to the proper office, and obtained a signature from Ms. Bacharach, who indicated she had the authority to accept documents on behalf of the Foundation’s registered agent. She represented to the process server that she was the office manager for the registered agent (a person suitable to be served with this lawsuit under the statute), and it is clear from the record that she manages a substantial portion of the Foundation’s business from the Foundation’s “Development Office” as described in the Foundation’s bylaws. Because of the unique

makeup of a "foundation" it is unfair for the court to impose an obligation that the Foundation's principals, agents, or their assistants, with check-signing authority, must be paid "employees" of the Foundation as the trial court appeared to consider. That is not something contained in the statute.

The minutes of the Foundation mention Ms. Bacharach more than any other principal. Ms. Bacharach seems to be involved in every Foundation activity, including her participation in the delivery of the lawsuit to the president. The trial court's decision not to accept Ms. Bacharach's own representations to the process server, and the records and evidence of her Foundation involvement, upon the mere assertion that she is also a Hospital worker, should be set aside. See DeHart v. Allen, 26 Cal.2d 829, 161 P.2d 453 (1945)(admitting business records to support affidavit, where process server failed to notarize signature on affidavit and died prior to the matter being contested by Respondents). See also Roth v. Nash, 19 Wn.2d 731, 734-35, 144 P.2d 271 (1943)(upholding affidavit of service by Appellant's attorney). Failure to make proof of service does not affect the validity of the service. CR 4(g)(7). It is the fact of service, not the return of service, that

confers jurisdiction. Jones v. Stebbins, 122 Wn.2d 471, 482, 860 P.2d 1009 (1993). When a party has actually been served, the failure to file adequate proof amounts to a mere irregularity. Jones, at 482.

The burden is on the challenging party to show improper service by clear and convincing evidence. Leen v. Demopolis, 62 Wn. App. 473, 478, 815 P.2d 269 (1991). As the court explained in Reiner v. Pittsburg Des Moines Corp., 101 Wn.2d 475, 680 P.2d 55 (1984), service on the manager of "site support services" at Hanford's No. 2 site satisfied RCW 4.28.080(10) because his title "implies that he possessed sufficient discretionary authority to act in a representative capacity." Here, Leigh Bacharach's title as the designated contact for the Foundation (filed with the Secretary of State), her own statements, as well as her actions in seeking the hiring of Foundation staff to replace her duties in the Foundation's office, and as a check-signing authority, imply a lot more than the temporary site support manager at Hanford. There is clear, convincing and un rebutted evidence that the Respondent was served with this lawsuit in February 2007, and again in April 2007.

Like the statute, Washington's court rules allow any competent witness to confirm delivery of the summons and complaint to a defendant (See CR 4(c)), or the defendant's admission that they accepted the summons and complaint from that person (See CR 4(g)(5)), both of which occurred in this case.

### CONCLUSION

In sum, the Appellant's request for relief should be granted, and the trial court's orders granting the motion to dismiss, denying the continuance, and denying the motion to vacate should be reversed.

Respectfully submitted March 28, 2008. I certify that I served the Brief of Appellant by placing it in the United States Mail on March 28, 2008, attention the Attorney for the Respondent, Chris Key, at his office address.



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