

No. 45600-1-II

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY _____
DEPUTY

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

DIANE MATHENY, an individual,

Appellant,

v.

ROBERT LEVESQUE, an individual, and PRISCILLA LEVSQUE, an
individual,

Respondents.

BRIEF OF RESPONDENTS

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I. INTRODUCTION

Diane C. Matheny (“Matheny”) has engaged in a long-running strategy of avoiding the proper adjudication of this legal issue. This appeal, supported by “evidence” that was not properly before the trial court, is simply a continuance of this pattern.

However, that is not the important most legally relevant factor for the Court to consider. The Court should deny this appeal because Ms. Matheny failed to present any evidence at the trial court level to justify a ruling in her favor.

II. ASSIGNMENTS OF ERROR

The Levesques accept the Assignments of Error and Issues Pertaining to Assignments of Error as drafted by the Appellant.

III. STATEMENT OF THE CASE

A. Substantive Factual History.

The factual grounds of the underlying causes of action are irrelevant to this appeal and are therefore omitted.

B. Relevant Procedural History.

1. Returned Mailings.

Levesques' initial mailings to Matheny were returned unopened with handwriting which stated "return to sender," "no forward," "not at this address," and "no longer at this address." CP 82.

Subsequent to the returned mailings, Matheny listed this same address in the pro se answer received by the Respondents on April 5, 2013 and the notice of appearance Ms. Matheny filed in Thurston County Superior Court Cause No. 13-2-30715-1 on September 11, 2013. CP 83, 88. However, this pro so answer was never filed with the Court and was not signed by Ms. Matheny.

2. Service of Motion and Motion for Summary Judgment.

At the time the Motion for Summary Judgment was filed, Matheny had a long history of rejecting mail from the office of Levesque's counsel. CP 82. Furthermore, due to Matheny's attempts to avoid service, the Court granted an Order Authorizing Service by Mail pursuant to CR 4(d)(4). CP 22-23. However, before original service was affected, Matheny was personally served and the Order Authorizing Service by Mail pursuant to CR 4(d)(4) was moot.

On April 5, 2013, counsel for Levesque received an unsigned package of documents that appeared to be an attempt by Matheny at

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providing an answer. CP 82-83. These documents were never filed by Matheny nor has she provided an answer. However, the return envelope on the letter listed the address that the Court had allowed for service by mail in its Order Authorizing Service by Mail. CP 86.

On July 16, 2013, counsel for Levesque signed a notice of issue and motion for summary judgment that, along with the Declaration of Robert Levesque, were mailed to Matheny. CP 52-53. However, consistent with previous mailings, this mailing was returned by the postal service unopened on July 26, 2013. CP 87. A copy of the returned mailing was attached to the Declaration of Jason Zittel Re: Service of Process. Id.

The Civil Notice of Issue for the Motion for Summary Judgment also contained a signed certification that the documents were served on Ms. Matheny by mail at her residence. CP 53. That the mail was returned, unopened, was merely consistent with the pattern that had been previously established.

3. *Order to Show Cause*

On September 24, 2013, the Court granted an Order To Show Cause which provided that “IT IS ORDERED that: The motion Stay Writ, which a challenge to service and other issues as may be filed + served shall be on 11-1-13 @ 9:00 AM.” CP 79.

After the issuance of this order, Matheny provided no evidence or argument to support her contention that she was not served.

IV. ARGUMENT

A. **The Court did not err in allowing Ms. Matheny to be served with motions by mail.**

For the purposes of being responsive to Ms. Matheny's Assignment of Error, this section will deal with Assignments of Error Nos. 1-3 in their totality. Ms. Matheny is essentially asserting that service by mail was not appropriate. However, Ms. Matheny is clearly mistaken.

1. *Service by Mail is permitted for motions under CR 5(b).*

For service of pleadings after original service, CR 5(b)(1) states that "[s]ervice upon the attorney or upon a party shall be made by deliver a copy to him or by mailing it to him at his last known address." In this case, as the parties are neighbors, the Levesques knew where she lived and all mailings were sent to this address.

Service by certified mail, as Ms. Matheny states is required pursuant to CR 5(g) is not required or preferred.

2. *The Motion for Summary Judgment and Presentation of Judgment Pleadings were mailed to Ms. Matheny's home address.*

Mailings to Ms. Matheny were made pursuant to CR 5(b)(2)(A) which provides that "[i]f service is made by mail, the papers shall be

deposited in the post office addressed to the person on whom they are being served, with the postage prepaid.”

The Notice of Issue for the motion for summary judgment included a signed certification, pursuant to CR 5(b)(2)(B), that the documents were mailed on July 16, 2013. CP 53. The Presentation of Judgment also included a similar certification. CR 80-81. The Declaration of Jason M. Zittel Re: Service also included documentation that the pleadings were mailed on July 16, 2013.

As such, Ms. Matheny was properly served with both the Motion for Summary Judgment and Presentation of Judgment.

To specifically address the Assignments of Error, (1) the Court did not err by allowing Ms. Matheny to be served with a motion by mail as it is permitted under the Civil Rules, (2) Ms. Matheny was not required to be served by Certified or Registered Mail, and (3) Ms. Matheny was properly served with the motion for summary judgment, by mail, pursuant to CR 5(b).

B. Ms. Matheny may not raise new issues upon appeal or introduce facts not in the record.

This section will address Ms. Matheny’s Assignments of Error Nos. 4-7. These issues are not properly before the Court where Ms. Matheny is attempting to raise them for the first time on Appeal.

In general, issues not raised in the trial court may not be raised on appeal. Roberson v. Perez, 156 Wn.2d 33, 39, 123 P.3d 844, 847 (2005)

(citing RAP 2.5(a)). While there are several explicit exceptions to this rule, Ms. Matheny does not provide any justification that her issues fall into these exceptions.

Furthermore, Ms. Matheny is attempting to supplement the record of the trial court by stating facts that are not in the record. Ms. Matheny makes numerous unsupported allegations in her Assignments of Error. I will address each Assignment of Error in brief.

In response to Ms. Matheny's Assignment of Error No. 4, this issue was not raised at summary judgment nor during her subsequent Order to Show Cause Hearing or the presentation of Judgment. Furthermore, there is nothing in the record to support the factual statement that the Levesque's are not bona fide purchasers.

In response to Ms. Matheny's Assignment of Error No. 5, Ms. Matheny again failed to raise these issues with the trial court nor is her factual allegation that the Levesques cannot present a valid deed supported in the record.

In response to Ms. Matheny's Assignment of Error No. 6, Ms. Matheny's statement of the alleged error is too vague for a substantive response.

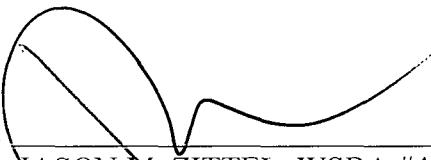
In response to Ms. Matheny's Assignment of Error No. 7, Ms. Matheny failed to raise these issues at the trial court and again there is

nothing in the record to support the facts underlying her alleged claim of error.

V. CONCLUSION

In Conclusion, the only issue properly before the Court was whether Ms. Matheny was allowed to be served with motions, subsequent to original service, by mail. This is clearly permitted under CR 5(b). As such, the Court should affirm the opinion of the trial court.

RESPECTFULLY SUBMITTED this 19th day of August, 2014.

By: 

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Certificate of Service

I certify that on the 19th day of August, 2014, I served the party listed below with a true and correct copy of the foregoing Brief of Respondents in the above-entitled matter by mail:

Diane C. Matheny
P.O. Box 11374
Olympia, WA 98508

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED at Olympia, Washington, this 19th day of August, 2014.



DONNA WAITE
Paralegal for attorney Zittel

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