

FILED

MAR 31 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 292312-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Gavin Defelice,

Appellant,

v.

Laura and Brian Jones,

Respondents.

BRIEF OF RESPONDENT

Raymond W. Schutts
Attorney for Respondents, Laura and Brian Jones
Law Offices of Raymond W. Schutts
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WSBA No. 19061

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I. STATEMENT OF THE CASE

On August 2, 2006, a motor vehicle accident occurred between Laura Jones and Gavin Defelice. (CP 56 – 57). At the time of the accident, Ms. Jones was insured by Safeco Insurance Company of Illinois (hereinafter “Safeco”). Brandy Burns was the original insurance adjuster on the claim. Ms. Burns dealt directly with Mr. Defelice until October of 2006, at which time she began dealing with his attorney, Peter Dahlin. (CP 94 - 95).

Ms. Burns received a demand package from Mr. Dahlin in mid-February, 2009 and responded with an offer to settle the case. In response, Mr. Dahlin sent a letter dated March 13, 2009 to Ms. Burns rejecting the offer and stating he would “soon” be proceeding with litigation. (CP 94 – 96).

Mr. Dahlin filed suit on July 30, 2009. (CP 1 – 6). The case was assigned to Spokane County Superior Court Judge Kathleen M. O’Connor. (CP 7). On August 3, 2009, in response to Mr. Dahlin’s request, Ms. Burns sent Mr. Dahlin the Jones’ address from her file which she believed to be accurate. This was the only street address Ms. Burns had for Mr. and Mrs. Jones. She was unaware when she sent it to Mr. Dahlin that it was not a current address. (CP 94 – 95).

On August 20, 2009, Attorney Raymond W. Schutts appeared as Counsel for the Jones. (CP 8 – 10). On August 27, 2009, Defelice served a subpoena duces tecum (hereinafter “subpoena”) on Andreas Van Workham directed to “Safeco Insurance Company”. (CP 11 – 12; 50). Mr. Van Workham informed Attorney Dahlin, who served the subpoena himself, that he was “just a security guard.” (CP 21 – 26, ¶ 7, line 15).

The subpoena was forwarded to the Safeco Corporate Legal Department, a separate and distinct department from Mr. Schutts’ law office, for handling. Mr.

Schutts was also sent a copy by the Claims Department since it was issued in conjunction with the case he was handling. (CP 88 – 93, ¶ 3).

On August 28, 2009, Mr. Schutts contacted Mr. Dahlin in his capacity as Counsel for the Jones. Schutts unilaterally decided to call Dahlin to offer assistance in resolving the service issue. The subpoena was discussed only in the context of Schutts' reminding Dahlin that Dahlin needed to copy Schutts with any process issued under the caption of their case together, which Dahlin had failed to do with the subpoena. The deficiencies and substance of the subpoena were not discussed. Mr. Schutts indicated he would see if his clients were willing to accept service, pointing out that he had not been successful in reaching the Jones to date and that he was not sure he had accurate contact information for them. Schutts also stated that he could not accept service without the Jones' permission. (CP 88 – 93, ¶ 's 4 - 6).

Immediately after his conversation with Mr. Dahlin, Mr. Schutts made several attempts to contact the Jones. Mr. Schutts spoke with Mr. Dahlin on Thursday, September 3, 2009 and explained that while he had made progress insofar as his clients had acknowledged his efforts to reach them, he had yet to actually talk with them. Schutts told Mr. Dahlin he would continue his efforts. Mr. Dahlin began to threaten court action. Dahlin brought up the subpoena and started talking about Safeco's obligations. When Mr. Schutts attempted to discuss the difference between his role as Counsel for the Defendants and that of Safeco Corporate Counsel, who was handling the subpoena, Dahlin hung up on him. (CP 88 – 93, ¶ 's 7 - 11).

Later that same day, Mr. Dahlin received a phone call from Carol Meenaghan, a Paralegal with the Corporate Legal Department for Safeco. She

attempted to discuss the subpoena with Mr. Dahlin, but he hung up on her before she could do so. She sent a letter the same day which confirmed the call and pointed out the deficiencies in the subpoena, i.e. the failure to name a proper legal entity, the failure to serve a registered agent and the setting of the hearing date on a State and Federal holiday. Ms. Meenaghan provided Mr. Dahlin with the name of the proper legal entity to serve, “Safeco Insurance Company of Illinois”, and the name and address of the applicable registered agent (CP 46 -47).

On September 4, 2009, Mr. Schutts faxed and mailed Mr. Dahlin a letter documenting their prior conversation and withdrawing his offer of assistance with regard to service of process. Mr. Dahlin responded with a letter accusing Schutts of intentionally trying to trick him with an “intentional misstatement” that Dahlin had two months left to serve Schutts’ clients. Schutts responded with a letter pointing out his prior statement about having two months left to serve his clients was in fact accurate, with Schutts clarifying the precise timetable. (CP 88 – 93, ¶ 12; 44-45, 42 – 43, 38 – 39).

On September 9, 2009, Defelice served a Notice of Deposition on Oral Examination on Brian Jones on Attorney Schutts. (CP 30 - 31). Schutts responded by letter dated September 11, 2009 which advised that neither he nor his clients would be attending as it was undisputed that the Jones had yet to be served and that under the Civil Rules of Procedure, Dahlin had no right to seek a deposition at that time. (CP 32 – 33). Mr. Dahlin responded by letter the next day. His letter quoted a truncated portion of CR 30(a) and indicated he would be filing a motion to compel. (CP 29).

On October 7, 1999, Mr. Defelice filed a “Motion to Compel Compliance with Subpoena and For Sanctions” and a “Motion and Declaration for Order

Allowing Service by Mail”. Neither motion asked the court to compel Jones’ attendance at a deposition (CP 52 – 55). On October 16, 2009, the hearing on the Motions occurred before Judge O’Connor. Judge O’Connor orally denied the motions and assessed terms against Mr. Defelice. (RP 19 – 20).

On October 19, 2009, Mr. Dahlin served a new subpoena on Safeco’s registered agent in Mukilteo, Washington. (CP 115 – 116, 118). On October 22, 2009, Safeco Corporate Legal Department Paralegal Carol Meenaghan wrote Mr. Dahlin acknowledging receipt of the subpoena. She noted that although the subpoena was still deficient in multiple respects and did not comply with CR 45, Safeco was providing documents responsive to the subpoena without waiving its objections. The street address provided was the same that had been given to Mr. Dahlin previously by Brandy Burns. (CP 120 – 123) Safeco also filed a detailed objection to the subpoena. (CP 111 – 113). Mr. Dahlin responded by threatening to sue Safeco. (CP 125).

On November 17, 2009, the Jones filed a Motion for Summary Judgment. (CP 134 – 135) as they had never been personally served with the Summons and Complaint. (CP 140 – 143). On November 25, 2009. Defelice filed a Motion for Reconsideration pertaining to the Court’s prior ruling denying his motions and awarding attorneys fees. (CP 146 – 147).

On December 18, 2009, the Trial Court issued a letter awarding attorneys fees and stating the Court would not rule on Defelice’s Motion for Reconsideration until the written order on the original motions was entered. (CP 164). On February 11, 2010, the trial court entered written orders denying Defelice’s motions and granting sanctions and issued an Order setting forth the briefing schedule on Defelice’s Motion for Reconsideration. (CP 180 -181; 182).

On May 13, 2010, the Trial Court entered an order denying Defelice's Motion for Reconsideration. (CP 214 – 215). On June 25, 2010, the Trial Court entered an Order granting summary judgment to the Jones and dismissing Defelice's case with prejudice. (CP 221 – 222).

II. ARGUMENT

Issue 1.: The trial court correctly denied Appellant's motion for service by mail because Appellant sought to do so in a manner specifically precluded by statute and because Appellant failed to meet the requirements of RCW 4.28.080 and CR 4(d)(4).

In his Motion to Serve by Mail, Defelice cited RCW 4.28.100 and CR 4(d)(4) for authority. Since RCW 4.28.100 pertains to service by publication, which was never sought by Defelice, it was assumed by Jones that Defelice meant to cite R.C.W. 4.28.080(16), the subsection of the service statute that addresses substituted service when personal service can not be achieved as this subsection does speak to mailing the summons and complaint to the person to be served. Despite briefing and argument specifically on R.C.W 4.28.080(16) by Jones' Counsel, Defelice has never denied that it was his intent to rely on this statute. In fact, as set forth below, he himself referenced it during oral argument.

A. R.C.W. 4.28.080(16) does not provide an independent basis for service by mail and to the extent it addresses mailing a copy of the summons and complaint to the person to be served, the statute explicitly prohibits use of a Post Office Box for purposes of substituted service.

R.C.W. 4.28.080(16) states:

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of

suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, **"usual mailing address" shall not include a United States postal service post office box** or the person's place of employment.

R.C.W. 4.28.080(16) (Emphasis added.)

R.C.W. 4.28.080(16) does not authorize service by mail as an independent means of service. Rather the mailing of the summons and complaint to the person to be served is merely the final step after a copy is left "at his or her usual mailing address with a person of suitable age and discretion...". The phrase "usual mailing address" is used twice, first with respect to where the substituted service must take place and second with respect to the requisite follow up mailing.

There is nothing in the record to establish that Defelice ever left a copy of the summons and complaint with anyone, let alone anything that could be considered the usual mailing address of the Jones. To the extent he intended to do so or mail a copy of the summons and complaint in accordance with this statute, the statute emphatically states that the "usual mailing address" for purposes of both leaving a copy and mailing a copy "shall not include a United States postal service post office box...". R.C.W. 4.28.080(16).

Yet this is precisely what Defelice sought to do. Paragraph 4.4 of Defelice's Motion to Serve by Mail explicitly stated that he wished to mail the Summons and Complaint to a Post Office box. It stated:

**The mailings should be sent to the following address:
P.O. Box 39, Mead, WA 99021**

(CP 55 ¶ 2.4).

Counsel for Defelice did not contest that he was trying to use R.C.W. 4.28.080 as support for service by mail. In fact, during oral argument, he stated that after receiving Jones' briefing on this issue, he went back and reviewed the statute himself, stating "And counsel, as I went back and looked after I saw his paperwork, is correct, the statute says you can't serve a Post Office box." (RP 6:8 – 10). He then asked the Trial Court to allow service to the former address for the Jones which had already had been shown not to be current. Counsel now claims this was tantamount to his having "verbally amended his motion to that of service by mail at the previously given false address". (Appellant's Brief, p. 4). His argument during the motion, and again on appeal continues to ignore, however, the fact that he had not met the requirements of R.C.W. 4.28.080(16) or CR 4(d)(4).

B. Defelice failed to offer any competent evidence in support of service by mail under CR 4(d)(4), which requires (1) a predicate showing of circumstances "justifying service by publication" under RCW 4.28.100 and (2) facts "from which the court determines that service by mail is just as likely to give actual notice as service by publication".

CR 4(d)(4) states:

Alternative to Service by Publication. In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at his last known address or any other address determined by the court to be appropriate.

CR 4(d)(4).(emphasis added.) . As noted by the bolded portion of the rule, allowing service by mail is discretionary with the Trial Court and then, only after the requisite predicate showings are made.

1. Defelice failed to show that the Jones were concealing themselves.

In order to avail himself of CR 4(d)(4), Defelice first needed to provide the Court with the factual predicate to justify service by publication, which is set forth in RCW 4.28.100. The procedural requirements of RCW 4.28.100 must be strictly followed. *Boes v. Bisiar* 122 Wash.App. 569, 576, 94 P.3d 975, Wash.App. (2004). Accordingly, in order to show circumstances “justifying service by publication”, Defelice needed to show that the Jones had left the state or were concealing themselves in order to avoid service. R.C.W. 4.28.100(2). Defelice’s original motion contained no such evidence. There was not a single fact submitted by Defelice in his original motion that described any action or inaction on the part of the Jones at all and no other facts that would reasonably give rise to the conclusion that the Jones had left the state or were concealing themselves in order to avoid service.

The fact that Defelice had not located the Jones by the time Defelice filed his Motion to Serve by Mail does not support a conclusion that the Jones had left the state or were concealing themselves. The Court of Appeals has specifically stated that RCW 4.28.100(2) does not authorize service by publication merely because the Plaintiff was unable to locate the Defendant, stating:

In sum, the Bruffs' affidavits contained no facts clearly suggesting that Main's change of residence, or any other conduct, was undertaken with the intent required by RCW 4.28.100(2).

Bruff, 87 Wash.App. at 614, 943 P.2d 295. Having failed to submit any such facts from which the Jones' intent to evade service could be derived, Plaintiff's motion was properly denied.

2. Defelice failed to show that he had made reasonably diligent efforts to personally serve the Jones. In addition, in order to show circumstances "justifying service by publication", Defelice was also required to prove he had made reasonably diligent efforts to personally serve the Jones. *Boes v. Bisiar*, 122 Wash.App. 569, 94 P.3d 975 (2004). Defelice also failed in this regard. The only evidence in the record as to Defelice's efforts to properly serve the Jones prior to filing his Motion to Serve by Mail is as follows:

- a. On March 13, 2009, negotiations between Plaintiff's Counsel Dahlin and Adjuster Brandy Burns broke down with Mr. Dahlin stating the Jones "would shortly be served with a Summons and Complaint. Mr. Dahlin then waited four months, however, to file suit until July 30, 2009. There was nothing in the record to show that Mr. Dahlin had done anything to locate the Jones during this time.
- b. On August 3, 2009, Mr. Dahlin obtained an address from a Safeco adjuster who believed the address to be accurate. Sometime before August 26, 2009, Dahlin attempted to serve the Jones at the address he had been given and learned it was inaccurate.
- c. On August 26, 2009, Dahlin improperly served a defective subpoena on "Safeco Insurance Company", which is not a legal entity. The subpoena was not served on a registered agent for Safeco Insurance Company of Illinois and Dahlin set the records deposition to take place on Labor Day. The defects were immediately pointed out to Dahlin, yet he took no steps to correct them.

- d. On September 9, 2009, Dahlin served Defense Counsel Schutts with Notices of Deposition for Mr. and Mrs. Jones which he had no right to take.
- e. Mr. Dahlin waited nearly another month before acting again. On October 5, 2009, Dahlin filed a motion for an order allowing service by mail in a manner specifically precluded by statute and without making any of the requisite showings required by RCW 4.28.080 and CR 4(d)(4), and a motion to enforce his prior defective subpoena.

In short, the only evidence in the record supporting reasonable diligence in locating and serving the Jones is Mr. Dahlin having obtained an address from Safeco and having attempted to serve at this address. Counsel's subsequent improper and defective legal process can hardly qualify as "reasonable diligence". By the time the Motion to Serve by Mail was heard, seven months had passed since Plaintiff's Counsel stated suit was imminent and the only evidence of reasonable diligence is his having followed up on what turned out to be an erroneous lead. There is nothing in the record to show that Defelice took any affirmative steps to locate the Jones himself. Incredibly, Defelice waited nearly a full month after having had the defects in the subpoena spelled out for him before taking any action and then, instead of sending a proper subpoena to the registered agent for Safeco, he instead filed a Motion to Compel responses to his previously defective subpoena. It is clear that to Defelice simply wanted to be given the Jones' address. This is not reasonable nor is it diligent. The Trial Court so noted, stating:

As far as service is concerned, there has not been a showing that the Joneses are not available for service in Spokane. In fact, it appears to be just the opposite, they are here somewhere. It is not that ultimately Mr. Dahlin could not ask the court for service by mail, but he would

have to provide an affidavit to the court about the efforts that were made to go out and find the address. At this point, Mr. Schutts has indicated they do not have it. They provided what they did have. It was wrong. It is not the responsibility of the defendant to go out and provide that information, in my view. There has to be some attempt to do so on the part of Mr. Dahlin directly.

(RP 18:13 – 19:1).

3. Jones failed to show that service by mail was just as likely to give actual notice as service by publication. CR 4(d)(4) allows for service by mail only when “the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication...” Defelice offered no facts whatsoever from which the Court could conclude that service by mail was just as likely to give actual notice as service by publication. All Defelice did in this regard was state the requirement of CR 4(d)(4) as an unsupported conclusion. (CP 55 ¶ 2.3). Defelice’s Counsel’s “verbal amendment” to mail the summons and complaint to the address provided by Ms. Burns, an address that was shown not to be current, offered the Trial Court nothing from which the Trial Court could conclude that service by mail was just as likely to give actual notice as service by publication.

In short, Defelice sought service by mail under CR 4(d)(4), then failed to offer any of the factual support required by this rule. Allowing service by mail is discretionary by the Trial Court. The Trial Court was well within its discretion to deny this request given Defelice’s failure to meet the requirements of CR 4(d)(4). It should be clear to this court that Counsel for Defelice repeatedly ignored or rejected the assistance offered, by Jones’ Counsel, Safeco’s Paralegal and even the Court, which clearly left the door open for a future order allowing service by

mail provided Defelice's Attorney simply detail the affirmative efforts made to locate the Jones:

It is not that ultimately Mr. Dahlin could not ask the court for service by mail, but he would have to provide an affidavit to the court about the efforts that were made to go out and find the address.

(RP 18:13 – 20).

C. Defelice's Argument in his Assignment of Error to the Court's Denial of his Motion to Serve by Mail Fails to Provide any Substantive Support for Reversal of The Trial Court's Decision.

Appellant's first assignment of error pertains to the Trial Court's denial of his Motion to Serve by Mail, yet Defelice's briefing alternately jumps back and forth between this assignment of error and Assignment of Error No. 3, which pertains to the Trial Court's denial of his Motion for Reconsideration. The Court is respectfully requested to keep these arguments separate as Defelice's Motion for Reconsideration improperly included events that had not taken place, and "new" evidence that was not before the Trial Court, at the time Defelice's Motion for Service by Mail was originally heard. Once separated, the Court will see that Defelice's briefing on the first assignment of error boils down to four conclusory statements (each addressed below) that are without foundation in the record and the same deficient foundation originally offered in support of his Motion to Serve by Mail. None of this offers any basis whatsoever to conclude that the Trial Court abused its discretion in its original ruling denying Plaintiff's Motion to serve by Mail.

1. Defelice's conclusory statements are without foundation and do not provide the support needed to conclude the Trial Court erred when it denied Defelice's Motion to Serve by Mail.

a. "The Appellant was given false information by Safeco Insurance Company".

On August 3, 2009, Safeco Adjuster Brandy Burns provided an address to Defelice's Counsel which she believed was accurate. There is no evidence of any improper intent or action on her part. The only evidence in the record is that Ms. Burns sent what she had, what she believed to be accurate and that the address turned out to be no longer current.

The accident at issue took place in August of 2006. There is no evidence in the record as to whether the Jones were still insured with Safeco nearly three years later in March of 2009 when Ms. Burns provided the address to Mr. Dahlin, when the Jones moved or if the Jones ever updated their records with Safeco. There is simply no evidence that Safeco had any other address for the Jones in its possession when Ms. Burns provided the address to Mr. Dahlin. The Trial Judge noted this in her ruling when she stated:

With regard to the Jones, there is no evidence before the court that Mr. Schutts or the claims adjuster deliberately provided a wrong address to Mr. Dahlin. Mr. Dahlin asserts that, she denies it, and there is no proof of it. It is clear from looking at the reports that the Jones used a mailing address of a Post Office Box in providing information to law enforcement. It is also clear from Ms. Burns' declaration that she did give Mr. Dahlin the address she thought was accurate, he made an assumption that he was deliberately misled. There are no facts in the record to support the assumption that it was deliberate, rather she had the wrong address.

(RP 17:21 – 18:12)

b. “The Appellant exercised due diligence to serve Respondents but relied upon the information given by Safeco’s representatives”.

It is unclear exactly what Defelice is arguing here with regard to reliance, but as addressed above, it cannot reasonably be concluded that Defelice exercised due diligence in attempting to serve the Jones. His attorney was on the case for nearly three years, since October of 2006. Seven months passed since Defelice indicated he was going to proceed with litigation. The record is devoid of nearly any appropriate effort by Defelice to locate the Jones other than asking Safeco to voluntarily produce the Jones’ address.

c. “When Respondent’s counsel and clients refused to appear for the deposition, it was obvious that Safeco and the Respondents were trying to evade service and rely on the statute of limitations to dismiss their liability for the accident”.

Once again, Defelice offers up a conclusory statement without factual support. CR 30(a) states:

(a) When Depositions May Be Taken. After the summons and a copy of the complaint are served, or the complaint is filed, whichever shall first occur, any party may take the testimony of any person, including a party, by deposition upon oral examination. **Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant** or service made under rule 4(e), except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subsection (b)(2) of this rule. The attendance of witnesses may be compelled by subpoena as provided in rule 45. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

CR 30(a) (emphasis added).

Defelice has repeatedly quoted the first portion of CR 30(a) to support his claimed right to depositions, but in so doing, he has repeatedly ignored the second part of CR 30(a) (bolded above), which clearly requires service of process. Counsel for Defelice acknowledged the second portion of CR 30(a) in his letter of September 12, 2009 when he stated “I will be filing a motion to compel pursuant to CR 30(a) in that less than 30 days has occurred since service”. (CP 29).

But it is important to note, no motion to compel was ever filed by Defelice so the issue of whether a deposition prior to service was proper was never before the Court. The only reason it was discussed in the Motion to Serve by Mail at all was because Counsel for Defelice brought the facts surrounding the deposition notice up as part of his factual predicate for his evasion of service theory in his Motion to Serve by Mail. Accordingly, Counsel for Jones addressed it in his briefing, clarifying that to seek a Court order compelling attendance prior to service would be improper because proper service of the summons and complaint is necessary to invoke the court’s jurisdiction over a party. *Lee v. Wertn Processing Co. Inc.*, 35 Wn.App. 466, 469, 667 P.2d 638 (1983). It is the fact of service that confers jurisdiction. *John v. Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 363, 83 P.2d 221 (1938). Where a trial court lacks personal jurisdiction, orders and judgments are void and must be set aside. *Vukich v. Anderson*, 97 Wn.App. 684, 691, 985 P.2d 952 (1999).

Despite never having filed a Motion to Compel, Counsel for Defelice began to argue about the deposition in oral argument on his Motion to Serve by mail. The Trial Court responded by stating:

With regard to the Jones, again I am not in a position to order the Jones to do anything. They have not been served. I cannot order them to go to Mr. Dahlin's office. I have no authority to do that. I cannot order them to a deposition. They have to be served. The court has to have some ability to exercise jurisdiction over them, and I do not have it at this point.

(RP 20:7 – 14)

d. “Safeco Insurance Company of Illinois... has refused to honor a subpoena...”. It is absolutely incredible that even now, after having been repeatedly provided with ample authority as to the defects in Defelice's original subpoena (CP 46, 73 – 74, 75 – 78; 11 – 113), that Defelice is still arguing Safeco had any obligation to respond or that the defective subpoena offers any of the requisite support needed for the Trial Court to have exercised its discretion in allowing service by mail.

Issue 2: The trial court correctly granted sanctions against Appellant's Counsel for filing a frivolous motion to serve by mail when the motion sought to do so in a manner that is explicitly prohibited by law and because Appellant's Counsel failed to submit any evidence to support the requisite factual predicate required by RCW 4.28.080 and CR 4(d)(4).

If Defelice sought to use R.C.W. 4.28.080(16) as a legal basis to serve by mail, which has never been denied and was, in fact, alluded to in oral argument by Counsel for Defelice, then such an effort was without any basis in the law and therefore frivolous and deserving of sanctions. R.C.W. 4.28.080(16) does not provide an independent basis for service by mail and to the extent it speaks to the

mailing of the summons and complaint to the person to be served, the statute clearly prohibits using a Post Office Box for this purpose. Yet, this is clearly what Defelice asked the Trial Court to order.

If Defelice purposely cited R.C.W. 4.28.100 as a basis for service by mail, then this also was frivolous and deserving of sanctions. R.C.W. 4.28.100 is the statute that addresses service by publication. It does not provide an independent legal basis for service by mail. It does set forth the requisite foundation which must be laid in order to serve by mail under CR 4(d)(4). But Defelice failed to provide any of the factual support needed to meet the requirements of R.C.W. 4.28.100 in either one of his declarations (CP 21 – 26; 55). All he did then, like he does now, is to state unsupported or irrelevant conclusions such as:

1) The Jones can not be found within the state.

-One can not reasonably draw this conclusion based on a single attempt to serve the Jones at an old address.

2) The Jones' attorney refuses to give their address to Defelice.

- The Jones' Attorney had no obligation to do so.

3) The Jones' attorney refuses to comply with a Notice of Deposition.

- There was no obligation to do so and if Defelice felt otherwise, he should have filed a Motion to Compel.

4) Jones' insurance company has given a false address for the Jones.

- The only evidence in the record is that the insurance company sent what it had in its possession.

5) Jones' insurance company refuse to honor a subpoena.

- The subpoena was blatantly defective.

(CP 55, ¶ 2.1) (Paraphrased with responses in bold). Incredibly, despite extensive briefing in this case and clear guidance from the Trial Court, Defelice continues to make the exact same arguments on appeal.

Defelice burdened the Jones' with frivolous arguments about the actions of Safeco and the purported difficulties his attorney encountered in trying to serve a security guard at Safeco's Liberty Lake office. Defelice's briefing and argument was a complete waste of everyone's time because of his complete and utter failure to follow RCW 48.05.200 (Service on a foreign corporation by way of service on the Insurance Commissioner) or RCW 23B.15.100 (Service on a registered agent). Defelice's Counsel never needed to go to Safeco's Liberty Lake office and his attempt to serve Safeco in this manner was improper.

The record is clear that prior to filing his Motion to Serve by Mail, Defelice had previously been informed, both by Counsel for the Jones and Carol Meenaghan, a Paralegal for Safeco, of significant legal defects in his subpoena and service, yet he relied on the deficient subpoena as support for his Motion to Serve by Mail. Ignoring obvious and well-established law is by definition, the essence of a frivolous motion.

Issue 3.: The trial court correctly denied Appellant's motion for reconsideration when Appellant failed to meet the requirements of CR 59(b), re-hashed the same frivolous arguments previously made and attempted to improperly rely upon newly submitted evidence which was inadmissible under CR 59(4) and ER 802.

A. Defelice's Motion for Reconsideration was properly denied as it failed to meet the requirements of CR 59(b).

CR 59(b) states in pertinent part:

A motion for ...reconsideration shall identify the specific reasons in fact and in law as to each ground on which the motion is based.

CR 59(b).

Defelice failed to specify the legal grounds upon which he sought the Trial Court to reconsider the Court's prior ruling on Defelice's motion to serve by mail. The only law cited in the entire motion is a truncated, and therefore misleading, quotation from CR 30(a). The factual basis that can be distilled from the Defelice's Counsel wasn't any clearer. This failure to meet the requirements of CR 59(b) was grounds enough for the Trial Court to deny Plaintiff's Motion for Reconsideration. Neither the Jones nor the Trial Court should have had to guess at the grounds of Plaintiff's motion.

B. The Court Cannot Consider Plaintiff's "New" Evidence.

In support of his motion for reconsideration of the Court's October 16, 2009 ruling, Defelice submitted new "evidence" generated after the October 16, 2009 ruling (G/T Investigations Investigation Report, paragraph 5 of the Declaration of Peter D. Dahlin and paragraph 6 of the Declaration of Peter D. Dahlin – lines 10 through 15 ("Safeco's response" through "...GT Investigations") and "evidence" regarding the Trial Court's Purported bias. None of this was at issue in the original Motion to Serve by Mail. Such evidence could not be considered by the Trial Court for numerous reasons.

First, for reconsideration to be based on newly discovered evidence, CR 59(4) requires that any new evidence be evidence that Defelice "**could not with reasonable diligence have discovered and produced...**".

Defelice made no showing that the G/T Investigations Report could not have been obtained prior to Defelice's original Motion for service by Mail through the exercise of reasonable diligence. In fact, Defelice offered no explanation at all for why he could not and did not hire GT Investigations prior to bringing his original Motion to Serve by Mail. Without such an explanation, pursuant to CR 59(4), the Trial Court could not consider the G/T Investigations Report.

Second, even if such evidence had met the CR 59(4) standard, such evidence is inadmissible under the rules of evidence due to lack of foundation and hearsay.. While Defelice's Counsel referred to the GT Investigation Report in his Declaration, he failed to lay any foundation for admitting this report into evidence for consideration by the Court. This document is hearsay, in fact, double hearsay, because the hearsay report purports to quote third parties. As such, it could not be considered by the Court regardless of the limitations of CR 59.

Third, Defelice's Counsel's claimed bias and the prejudice by Trial Court was also not at issue in the original motion. Paragraph 8 of Defelice's Counsel's Declaration is rife with unsupported accusations, hearsay and other inadmissible evidence. Having not been raised prior to the Court's initial ruling on the Motion to Serve by Mail, such a claim can not be raised for the first time in a motion for reconsideration. As set forth below, it was incumbent on Counsel for Defelice to raise this issue at the outset of the case, rather than sit back and wait until the Court ruled and then claim judicial bias.

The rest of Defelice's Motion for reconsideration was a re-hash of arguments made in the original Motion to Serve by Mail. There was nothing provided to merit a reversal of the Trial Court's original decision.

Issue 4: The trial court correctly granted Respondent's motion for summary judgment, which was unopposed, and correctly dismissed Appellant's case as there was no issue of fact regarding Appellant's failure to serve the Respondents within the applicable statute of limitations.

It is uncontested that Defelice never served the Jones prior to the expiration of the statute of limitations. The Jones' legal and factual support are set forth in the documents filed in association with that motion and for the sake of brevity, the Court is respectfully referred to those documents. (See CP 134 – 143). It should be noted that the motion for summary judgment was not contested. Defelice filed nothing and argued nothing. (RP 23).

Issue 5: There is no error as to the Trial Judge hearing and deciding the motions when the Judge had no duty to recuse herself, when Appellant's Counsel failed to file an affidavit of prejudice and when Appellant's Counsel failed to ever raise the issue of recusal prior to the Trial Judge hearing Appellant's motion to serve by mail.

Defelice failed to raise the issue of recusal at any time prior to his Motion for Reconsideration. In failing to raise it prior to the Trial Court's ruling on his Motion to Serve by Mail and his Motion to Compel Compliance With Subpoena, Defelice availed himself of the possibility of a ruling in his favor and only began to complain of bias and prejudice after he got an adverse ruling. This issue was not properly before the Trial Court on the Motion for Reconsideration and it is not properly before this Court on Appeal. Because a party may not raise a new issue or argument on appeal, the Court of Appeals confines its' review to the issues and

arguments properly raised in the trial court. RAP 2.5(a); *Smith v. Shannon*, 100 Wash.2d 26, 666 P.2d 351(1983). “The purpose of this rule is to afford the trial court an opportunity to correct errors, thereby avoiding unnecessary appeals and retrials.” *Demelash v. Ross Stores, Inc.*, 105 Wash.App. 508, 20 P.3d 447 (2001).

Defelice’ Counsel could have easily raised the issue of recusal prior to any ruling by the Trial Court. Defelice could have filed an Affidavit of Prejudice without citing any reason whatsoever in order to obtain a different Judge. While Defelice’s Declaration fails to establish bias or prejudice on the part of the Trial Judge, it is clear that he believes the Judge is biased and prejudiced towards him, although one must wonder if he would have been so virulent if the Trial Judge had originally ruled in his favor. While Defelice’s Counsel’s subjective belief is not the standard for recusal, it does beg the question as to why Counsel failed to meet his obligation to his client and his case and take affirmative steps such as described above to obtain a new Judge. A party must move to have a judge recuse himself and that motion must specify the grounds for recusal. *In re Parentage of J.H.*, 112 Wash.App. 486, 496, 49 P.3d 154 (2002).

Even if the issue of recusal had been timely raised, the evidence in the record does not support a finding of error in the Judge failing to recuse herself. Recusal is within the sound discretion of the trial court. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wash.App. 836, 840, 14 P.3d 877 (2000). Bias or prejudice on the part of an elected judicial officer is never presumed. *Barbee Mill Co. v. State*, 1953, 43 Wash.2d 353, 261 P.2d 418 (1953). In fact, the presumption is that the judge is not biased. The party seeking to overcome that

presumption must provide specific facts establishing bias. *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 692, 101 P.3d 1 (2004) (footnote omitted).

In his Declaration, Defelice's Counsel fails to provide "specific facts" establishing bias. Defelice's Counsel improperly references purported other Appellate decisions involving rulings previously made by the Trial Judge in other cases, but like his prior motions, such references are made in a conclusory fashion without any actual underlying facts. No case names or citations are provided, no facts of any of the cases are provided and the purported outcomes are all unsupported hearsay. Judicial rulings alone almost never constitute a valid showing of bias." *In re Pers. Restraint of Davis*, 152 Wash.2d 647, 692, 101 P.3d 1 (2004) (footnote omitted).

A court must determine "whether a reasonably prudent and disinterested observer would conclude [the defendant] obtained a fair, impartial, and neutral [hearing]." *State v. Dominguez*, 81 Wash.App. 325, at 330, 914 P.2d 141 (1996). However, "[w]ithout evidence of actual or potential bias, an appearance of fairness claim cannot succeed and is without merit." *State v. Post*, 118 Wash.2d 596, at 619, 826 P.2d 172, 837 P.2d 599 (1992).

This Court should not give any credence to Defelice's personal attack on the Trial Court. It was not raised in a timely manner and is without merit.

Issue 6: The Jones are entitled to Attorneys Fees and Costs for Defelice's Frivolous Appeal.

This appeal has no merit factually or legally. Therefore, the Jones respectfully request the appeal be dismissed with prejudice and that reasonable attorneys fees be awarded to the Jones pursuant to RAP 18.1 and RAP 18.9.

III. CONCLUSION

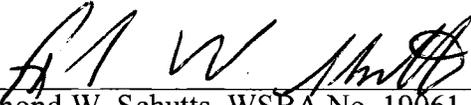
The trial court's decision in denying Defelice's Motion to Serve by Mail was correct. It was fully within the Court's discretion to conclude that Defelice had failed to set forth the factual predicate necessary to justify an alternative to personal service, in this case, service by mail. It wasn't even a close call. Defelice failed to provide any of the factual basis to meet the requirement of showing "circumstances justifying service by publication" or any facts "from which the court determines that service by mail is just as likely to give actual notice as service by publication".

The trial court's decision to award attorneys fees was also correct. Defelice's Motion was without merit, factually and legally. Given this, the other outcomes justifiably followed; denial of the Motion for Reconsideration and Dismissal of Defelice's case on summary judgment. The post-decision attack on the Trial Court is also without merit. What all this shows is a blatant disregard for established Washington law, which continues throughout Defelice's appeal.

Respectfully submitted this 30th day of March, 2011

LAW OFFICES OF RAYMOND W. SCHUTTS

By:


Raymond W. Schutts, WSBA No. 19061
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March, 2011 I caused to be served a true and correct copy of the foregoing BRIEF OF RESPONDENT by the method indicated below, and addressed to the following:

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