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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 321894

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

STEVEN J. LACEY,

Plaintiff/Appellant,

v.

IAN LANTRY, and ELIZABETH S. and THOMAS G. LANTRY,

Defendants/Respondents.

BRIEF OF RESPONDENT IAN LANTRY

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TABLE OF CONTENTS

COUNTER STATEMENT OF THE CASE 1

ARGUMENT 3

A. Standard of Review 3

B. The Trial Court Properly Granted Summary
Judgment of Dismissal 5

C. The Process Server’s Declaration Does Not
Create an Issue of Fact 8

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

<i>Cano-Garcia v. King County</i> 168 Wn. App. 223, 249, 277 P.3d 34, <i>review denied</i> , 175 Wn.2d 1010, 287 P.3d 594 (2012)	9
<i>Charbonneau v. Wilbur Ellis Co.</i> 9 Wn. App. 474, 477, 512 P.2d 1126 (1973)	9
<i>Gerean v. Martin-Joven</i> 108 Wn. App. 963, 33 P.3d 427 (2001)	10
<i>Mohr v. Grantham</i> 172 Wn.2d 844, 859, 262 P.3d 490 (2011)	3,4
<i>Salts v. Estes</i> 133 Wn.2d 160, 167-68, 943 P.2d 275 (1997).....	6,7,8
<i>Welling v. Mt. Si Bowl, Inc.</i> 79 Wn.2d 485, 489, 487 P.2d 620 (1971)	9
<i>Young v. Key Pharmaceuticals, Inc.</i> 112 Wn.2d 216, 225, 770 P.2d 182 (1989)	4

Statutes/Court Rules

RCW 4.16.0805

RCW 4.16.1705

RCW 4.28.0806

RCW 4.28.080(15).....6

ER 801 10

ER 802 10

CR 35

CR 564

CR 56(e)9

I. COUNTER STATEMENT OF THE CASE

This case arises from a motor vehicle accident that occurred on December 23, 2009, in Kennewick, Washington. Appellant Steven Lacey (Lacey) contends that the accident was caused by the negligence of respondent Ian Lantry (Ian). On December 20, 2012, three days before the expiration of the applicable statute of limitation, Lacey sued Ian and his parents, Elizabeth Lantry (Elizabeth) and Thomas Lantry (Thomas), the latter two on the alleged basis that Ian was driving a family car at the time of the subject accident. (CP 1-3) On December 26, 2012, a process server attempted service on all of the defendants by leaving copies of the summons and complaint at the home of Elizabeth located at 6001 W. 16th Avenue in Kennewick. (CP 57-61) At the time, Elizabeth was not at the home, nor was Thomas. (CP 48-49, 51-52) Ian had not lived in the home at 6001 W. 16th Avenue in Kennewick for a number of years, since 2007. Indeed, in December of 2012, Ian did not even reside in the State of Washington. (CP 24-26, 48-49, 51-52)

When the process server came to Elizabeth's home on December 26, 2012, Elizabeth's son, and Ian's brother, Nathan Lantry (Nathan), was at the house, having stopped by to pick up mail and make sure everything was as it should be at the house. He did not, however, reside there. Instead, he had a separate residence in Kennewick and had not resided with his parents for over one year. He was simply there for a few minutes to check on the home while his mother was out of town. (CP 27-29, 48-49, 51-52) While at his mother's home, a process server came to the door, and stated that he wanted to serve lawsuit papers. Nathan made it clear to the process server that he did not reside at that home, nor did he own the home. Nathan also told the process server that he would not agree to accept service of the papers on behalf of the individuals he was attempting to serve. The process server handed Nathan the papers anyway. (CP 27-29)

Ian filed his answer to Lacey's complaint, and alleged affirmative defenses of insufficient service of process and the expiration of the applicable statute of limitation. (CP 4-8) Elizabeth

and Thomas Lantry also filed their answer to the complaint, asserting the same affirmative defenses. (CP 9-12) None of the defendants/respondents Lantry engaged in any litigation activity, other than moving for summary judgment dismissal based on Lacey's failure to effect service prior to the expiration of the statute of limitation, including the 90-day tolling period. Ian filed his motion for summary judgment on October 11, 2013 (CP 13-15), and Elizabeth and Thomas filed their motion for summary judgment that same day. (CP 30-32) Following briefing by the parties and oral argument, Benton County Superior Court Judge Robert Swisher granted Ian, Elizabeth and Thomas Lantrys' motions for summary judgment, and dismissed all claims against them. (CP 81-83) Lacey then filed his Notice of Appeal. (CP 84-88)

II. ARGUMENT

A. Standard of Review.

Appellate courts review a trial court's order granting summary judgment *de novo*. *E.g., Mohr v. Grantham*, 172 Wn.2d

844, 859, 262 P.3d 490 (2011). The court reviews the evidence in a light most favorable to the non-moving party. *Id.*

An order of summary judgment is appropriate when there are no issues of material fact to be determined by a trier of fact, and the moving party is entitled to judgment as a matter of law. CR 56. In moving for summary judgment, the moving party bears the initial burden of showing the absence of a material issue of fact. *E.g., Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A moving defendant may meet its initial burden by pointing out to the court that there is an absence of evidence to support the non-moving party's case. *Id.*, n.1. If a defendant meets this initial showing, then the burden shifts to the plaintiff. If at that point, plaintiff fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial, then the motion for summary judgment should be granted. *Id.*

B. The Trial Court Properly Granted Summary Judgment of Dismissal.

Lacey did not file and serve his complaint within the applicable statute of limitation period, a prerequisite for prosecuting his case, and accordingly, summary judgment dismissal was properly granted.

This case involves a motor vehicle tort claim, for which there is a three-year statute of limitation. RCW 4.16.080. The action must be commenced by service of the summons and complaint, or by filing the complaint. CR 3. If the action is commenced by filing the complaint, then the plaintiff has 90 days within which to serve at least one of the defendants. RCW 4.16.170. Here, although Lacey filed the complaint prior to the expiration of the statute of limitation, the 90-day tolling period within which he had to serve at least one of the defendants expired without proper service being effected on any of the defendants.

It is undisputed that Lacey did not serve any of the defendants. Instead, Lacey asserts that he achieved substitute

service on the respondents Lantry by serving Nathan. To effect substitute service, however, each and all of the following three requirements must be satisfied: 1) the summons must be left at the defendant's "house of his or her usual abode;" 2) the summons must be left with a "person of suitable age and discretion;" and 3) the person with whom the summons is left must be "then resident therein." RCW 4.28.080. The substitute service statute is unambiguous, and the legislative dictate must be enforced as written. *See, e.g., Salts v. Estes*, 133 Wn.2d 160, 167-68, 943 P.2d 275 (1997). The court's duty is to effectuate the intent of the legislature in enacting a statute. If a statute is unambiguous, a court must apply the language as the legislature wrote it, rather than as the court wishes it to be. *See Id.* at 170.

We hold for purposes of RCW 4.28.080(15) that "resident" must be given its ordinary meaning – a person is resident if the person is actually living in the particular home.

Id.

In *Salts*, Salts attempted substitute service on Estes by leaving a copy of the summons and complaint with a woman who was looking after Estes' home while he was out of town for a couple of weeks. Specifically, the woman was at Estes' home over the two-week period for the purpose of feeding his dog, bringing in his mail, and addressing similar matters. *Id.* at 163. Finding that there was no valid argument that the woman was a resident of Estes' household, as she was there simply to bring in his mail, feed his dog, and the like, the court ruled that substitute service was ineffective. *Id.* at 170-71.

In this case, substitute service on Nathan is not effective service on any of the defendants because Nathan was not then a resident of the home. With regard to Ian, the home where the process server attempted service was not Ian's house of usual abode. Ian lived outside the State of Washington. Additionally, Nathan was not "then resident therein." Nathan had his own residence in Kennewick, he did not reside with his parents, and he had not for some time. As in *Salts*, Nathan was at the home simply to bring in

the mail and make sure things were as they should be. He was there briefly, and for a limited purpose.

It is irrelevant that the respondents Lantry ultimately learned of the lawsuit. The statute's unambiguous requirements must be strictly followed. *See Salts, infra*. Because Lacey failed to commence the action, by both timely filing the complaint and timely effecting proper service of the summons and complaint, within the statute of limitation applicable to negligence claims, he may not maintain his action, and it was properly dismissed.

C. The Process Server's Declaration Does Not Create an Issue of Fact.

Lacey contends that the process server's declaration, setting forth statements allegedly made to him by Nathan, creates genuine issues of material fact, thus precluding summary judgment. Lacey is incorrect.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

CR 56(e).

Courts have repeatedly held that hearsay contained within declarations is not admissible and not competent evidence to defeat a summary judgment motion. *See, e.g., Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973) (hearsay statement of an expert fieldman contained in plaintiff's declaration was not competent, admissible evidence to defeat defendant's motion for summary judgment, or to rebut the fieldman's affidavit stating to the contrary); *Welling v. Mt. Si Bowl, Inc.*, 79 Wn.2d 485, 489, 487 P.2d 620 (1971) (hearsay statements contained within affidavit of appellant are not facts which "would be admissible in evidence"). A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment, and an appellate court presumes the trial court disregarded any inadmissible evidence in reaching its ruling. *Cano-Garcia v. King County*, 168 Wn. App. 223, 249, 277 P.3d 34, *review denied*, 175 Wn.2d 1010, 287 P.3d 594 (2012).

Nathan is not a party to this action, and accordingly, his out-of-court statements, allegedly made to the process server and

recounted in the process server's declaration, constitute hearsay evidence. Such statements would not be "admissible in evidence." (ER 801, 802) Nathan made a declaration stating that he was *not* a resident of his parents' home at the time service of process was attempted, and further, that Ian was not a resident of the home. Nathan's declaration states that he told the process server these facts. The hearsay evidence contained in the process server's declaration does not create an issue of fact regarding, nor operate to rebut, the statements contained in Nathan's properly submitted declaration.¹

V. CONCLUSION

For the reasons set forth above, the trial court properly granted Ian's motion for summary judgment of dismissal due to failure timely to perfect service of process. Lacey simply did not commence the action prior to the expiration of the three-year statute of limitation. Although a harsh result for Lacey, the result is

¹ Moreover, even if we assume the process server's declaration was correct, and that Nathan made misrepresentations to the process server, those misrepresentations are not the fault of respondents Lantry, and again, do not create an issue of fact regarding the effectiveness of service of process. *See Gerean v. Martin-Joven*, 108 Wn. App. 963, 33 P.3d 427 (2001).

required by the law. Ian Lantry respectfully requests that this Court affirm the trial court's order dismissing the case.

RESPECTFULLY SUBMITTED this 24th day of June, 2014.


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