

64046-1

64046-1

NO. 64046-1-I

Whatcom County Cause No. 06-2-02294-3

COURT OF APPEALS FOR THE STATE OF WASHINGTON  
DIVISION I

---

MATTHEW W. GOETTEMOELLER AND LYNDSEY E.  
GOETTEMOELLER, husband and wife, and the marital community  
composed thereof,

Plaintiffs/Respondents,

v.

GRAHAM M. TWIST AND SUSAN TWIST, husband and wife and the  
marital community composed thereof,

Defendants/Appellants.

2006 JUN 14 11:03  
[Handwritten signature]

---

REPLY BRIEF OF APPELLANTS TWIST

---

COLE, LETHER, WATHEN, LEID & HALL, P.C.  
Rory W. Leid III, WSBA #25075  
Midori R. Sagara, WSBA #39626  
Attorneys for Defendants/Appellants

1000 Second Avenue, Suite 1300  
Seattle, WA 98104-1972  
Telephone: (206) 622-0494

**TABLE OF CONTENTS**

1. The Goettemoellers’ Brief Should be Partially Stricken Because It Alleges Facts Unsupported by the Record. . . . . 1

2. Pursuant to *Gross v. Sunding*, the Goettemoellers Have the Burden of Establishing a Prima Facie Case of Proper Service. . . . . 5

3. The Goettemoellers are Attempting to Create New Washington Law. . . . . 8

4. Mr. Twist Was Under No Obligation to Disclose His Mailing Address to the Process Server. . . . . 9

5. *Montesdeoca v. Krams* Is Distinguishable From This Case. . . . . 9

6. Under *Wright v. B & L Properties*, the Lynden Mailbox Was Not the Twists’ Usual Mailing Address For the Purposes of Personal Service Under RCW 4.28.080(16). . . . . 10

7. Conclusion . . . . . 12

**TABLE OF CASES AND AUTHORITIES**

Cases

*Barnes v. Wash. Natural Gas Co.*, 22 Wn. App. 576,  
591 P.2d 461 (1979). . . . .1

*Gross v. Sunding*, 139 Wn. App. 54, 161 P.3d 380 (2007). . . . . 5, 6

*Montesdeoca v. Krams*, 194 Misc.2d 620,  
755 N.Y.S.2d 581 (2003 NY). . . . . 9, 10

*Thayer v. Edmonds*, 8 Wn. App. 36, 503 P.2d 1110 (1972). . . . . 9

*Topline Equip. v. Nat. Auction Serv.*, 32 Wn. App. 685,  
649 P.2d 165 (1982). . . . .8

*Wright v. B & L Properties, Inc.*, 113 Wn. App. 450,  
53 P.3d 1041 (2002). . . . .10, 11

*Woodruff v. Spence*, 88 Wn. App. 565, 945 P.2d 745 (1997). . . . . 5, 6

Statute

RCW 4.28.080(5). . . . .5

RCW 4.28.080(16) . . . . .2, 6,10

Rules

RAP 10.3(a)(5). . . . .1

RAP 10.3(b). . . . .1

**1. The Goettemoellers' Brief Should be Partially Stricken Because It Alleges Facts Unsupported by the Record.**

The Goettemoellers' Brief contains multiple factual allegations unsupported by any evidence in the record. As a result, the Court should disregard these factual allegations. *See* RAP 10.3(a)(5), (b); *see also Barnes v. Wash. Natural Gas Co.*, 22 Wn. App. 576, 577, 591 P.2d 461 (1979). Specifically, the Court should disregard allegations on pages 1, 2, 3, and 16 of the Goettemoellers' Brief.

On page 1 and 2 of the Goettemoellers' Brief, the Goettemoellers allege the following:

On June 25, 2005, Mr. Twist negligently operated his vehicle in Washington State, which resulted in a collision with the Goettemoellers, who were riding a motorcycle. CP 81-88. The result of this collision were catastrophic injuries for the Goettemoellers: Matthew Goettemoeller sustained multiple fractured bones and serious soft tissue trauma, while Lindsay Goettemoeller has been left with a permanent brain injury. CP 81-88. To date, the Goettemoellers rehabilitation medical specials exceed \$60,000.

Goettemoellers' Brief, 1-2.

For this paragraph, the Goettemoellers cite only their Summons and Complaint in this action. *Id.* However, the Goettemoellers' Summons and Complaint do not contain any objective evidence for the above

allegations. Specifically, the Summons and Complaint do not contain any objective evidence that the Goettemoellers sustained catastrophic injuries as a result of the accident; or that the Goettemoellers' medical specials exceed \$60,000.00. *See* CP 81-88. Further, there is no objective evidence at all in the record to support any of these allegations. *See* CP 1-223. As a result, the Court should disregard the above paragraph in the Goettemoellers' Brief.

Further, on page 2 of the Goettemoellers' Brief, the Goettemoellers allege that "Mr. Twist was insured at the time of the accident and his insurer had actual notice of this lawsuit prior to him being served pursuant to RCW 4.28.080(16). CP 72-73." Goettemoellers' Brief, 2. The Goettemoellers cite to the Twists' Notice of Appearance ("NOA"), dated October 7, 2008, and filed on October 8, 2008, to support that "[Mr. Twist's] insurer had actual notice of this lawsuit prior to him being served pursuant to RCW 4.28.080(16)." *Id.* However, the Twists' NOA, dated October 7, 2008, and filed on October 8, 2008, does not support that the Twists' insurer had notice of this lawsuit prior to the Goettemoellers' attempted service pursuant to RCW 4.28.080(16) on June 6, 2008. *See* CP 72-73. The Twists' NOA was dated and filed approximately five months

after the Goettemoellers' attempted service on June 6, 2008. *Id.* Nowhere in the record is there any indication that the Twists' insurer had notice of this lawsuit prior to June 6, 2008. *See* CP 1-223. In fact, there is only evidence to support that the Twists' insurer had notice of this lawsuit after June 6, 2008. *See* CP 72-73. As such, the Court should disregard the Goettemoellers' allegation regarding the Twists' insurer's actual notice of this lawsuit.

On page 3 of the Goettemoellers' Brief, the Goettemoellers allege that Mr. Twist "grossly mislead" the trial court regarding the Lynden mailbox given the declaration of Chris Cooke, filed on June 16, 2009. Goettemoellers' Brief, 3. However, this allegation is misleading given the declaration of Chris Cooke, dated on June 25, 2009. *See* CP 5-6. In Mr. Cooke's June 25, 2009, declaration, he states that the Mailbox has not received any mail for Mr. Twist since January 2007; Mr. Twist has not come to the Mailbox since January 2007; it is unknown who has paid for the mailboxes; and Mr. Twist's alleged mailbox is not used for regular mail. *Id.* Mr. Cooke's June 25, 2009, declaration supports rather than contradicts Mr. Twist's declaration, dated February 13, 2009. *See* CP 5-6, 23-24. Thus, the Goettemoellers' allegation that Mr. Twist mislead the

trial court is itself misleading.

Finally, on page 16 of the Goettemoellers' Brief, the Goettemoellers allege as follows:

The defendants chose "The Mailbox" as the place to receive mail in Washington State. The defendants paid "The Mailbox" to provide this support service. For years they trusted "The Mailbox" to be their only mailing address in Washington State.

Goettemoellers' Brief, 16.

The Goettemoellers cite no evidence to support the above allegations. There is no support in the record for these allegations. *See* CP 1-223. In fact, there is evidence to rebut that the Twists paid the Mailbox. *See* CP 5-6. Mr. Cooke stated that it is unknown who has paid for the mailboxes. *Id.* Further, there is evidence to rebut that the Mailbox was the Twists' only mailing address in Washington. *See* CP 23, 24. The evidence indicates that the Twists have had at least two other mailing addresses in Washington: 1577 D St., #11, Blaine, Washington; 1225 E. Sunset Dr., Ste. 145 PMB 543, Bellingham, Washington. *Id.* Thus, the Court should disregard the above paragraph in the Goettemoellers' Brief. As specified above, the Court should disregard allegations on pages 1, 2, 3, and 16 of the Goettemoellers' Brief.

**2. Pursuant to *Gross v. Sunding*, the Goettemoellers Have the Burden of Establishing a Prima Facie Case of Proper Service.**

The Goettemoellers incorrectly contend that pursuant to *Woodruff v. Spence*, the burden is on the Twists to show that service was irregular. See *Woodruff v. Spence*, 88 Wn. App. 565, 945 P.2d 745 (1997). However, *Woodruff v. Spence*, a Division Three case, is not mandatory authority in this case. Rather, *Gross v. Sunding*, a Division One case, is mandatory authority. See *Gross v. Sunding*, 139 Wn. App. 54, 161 P.3d 380 (2007). Pursuant to *Gross v. Sunding*, when a defendant in a civil action challenges personal jurisdiction based on insufficient service of process, plaintiff has the burden of establishing a prima facie case of proper service. *Gross*, 139 Wn. App. at 60. The Goettemoellers have the burden of establishing proper service. The Goettemoellers cannot meet their burden because the Lynden address was not the Twists' usual mailing address at the time of attempted service.

Further, *Woodruff v. Spence* is distinguishable from the present case. *Woodruff v. Spence* involves a challenge to service under RCW 4.28.080(5). *Woodruff*, 88 Wn. App. 565. In *Woodruff*, the defendant challenged service after a default judgment was entered against him, claiming that he had never received the summons and complaint. *Id.* at

570. There was evidence that the defendant had multiple default judgments entered against him. *Id.* at 566. Under these circumstances, the *Woodruff* Court held that “[a] facially correct return of service is presumed valid and, after judgment is entered, the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular. *Id.* at 571.

In this case, unlike in *Woodruff*, the Twists are challenging service under RCW 4.28.080(16). Further, unlike in *Woodruff*, no default judgment was entered against the Twists. The Twists’ challenge to service has been properly preserved. Unlike in *Woodruff*, there is no evidence of multiple default judgments entered against the Twists. *Woodruff* has no bearing on the present case, and the rule cited by the Goettemoellers is inapplicable.

Under the *Gross v. Sunding* rule, the Goettemoellers cannot meet their burden because the Lynden address was not the Twists’ usual mailing address at the time that service was attempted. The following is undisputed evidence:

- A copy of Mr. Twist’s passport that shows he is a British Citizen. The last date stamp in his passport is January 19, 2006, the date when he left the U.S. for the U.K. CP 25-27.

- January 5, 2006 letter of reference written on behalf of the Twists by their property manager at 1577 D. St., Blaine, WA. The letter states that the Twists were moving away from the area. CP 34.
- March 27, 2006 letter addressed to Mr. Twist at his mailing address where he resides in Gloucestershire, England. The letter is from the Pension Service informing him that he is entitled to Pension Credit. A person is not entitled to pension credit in the U.K. unless he is a full-time resident of the U.K. CP 24, 35.
- Mr. Twist's billing statements addressed to him at his Gloucester, England address. There are billing statements from the following dates: February 21, 2007, July 24, 2007, March 27, 2008, and December 23, 2008. The billing statements are undisputed evidence of the Twists' usual mailing address. CP 40-43.
- Two bank statements from US Bank addressed to the Twists. The August 17, 2005 through September 19, 2005 statement was the last billing statement sent to 413 B 19<sup>th</sup> St. #104, Lynden, Washington. Thereafter, the Twists began receiving US Bank statements at 1225 E Sunset Dr., Ste. 145, PMB 543, Bellingham, Washington, as evidenced by statement period October 12, 2005 through October 26, 2006. These two bank statements are evidence that as of October 2005, 413 B 19<sup>th</sup> St., #104, Lynden, Washington was no longer the Twists' usual mailing address. CP 23-24, 44.
- The Twists' Answer and Affirmative Defenses. The Answer affirmatively asserts that the Plaintiffs have failed to serve process on the Defendants in the manner and form required by law, and that the Plaintiffs have failed to properly commence this action within the time required by the applicable statute of limitations. CP 67-71.
- Declaration of Mr. Twist, in which he states that he has not resided in the U.S. since January 2006 and has not used any U.S. addresses to receive mail since leaving in January 2006. Mr. Twist further states that he never received a copy of the Summons and Complaint for this action in the

mail. This declaration is also evidence that the Twists were not receiving mail at the Lynden address at the time that service was attempted. CP 23-24.

- The Mailbox has not received any mail for the Twists since January 2007. CP 5-6.

The above is undisputed evidence that the Lynden address was not the Twists' usual mailing address at the time of attempted service. Thus, the Court should dismiss this lawsuit.

**3. The Goettemoellers are Attempting to Create New Washington Law.**

The Goettemoellers contend that because the Lynden address was the only known mailing address to them, it was the Twists' usual mailing address. The Goettemoellers cite no authority for this proposition.

Arguments unsupported by legal authorities need not be considered by the court. *Topline Equip. v. Nat. Auction Serv.*, 32 Wn. App. 685, 692, 649 P.2d 165 (1982). The Goettemoellers are attempting to create new Washington law without any briefing regarding why the Court should create new law.

The Goettemoellers' proposition is unsupported by the evidence. At the time that service was attempted, the Twists had another mailing address in the U.K., their usual mailing address. Further, the Goettemoellers' position would allow for service under this statute once a

plaintiff learned of a single address for mailing. The intent of the service statute is not promoted under the Goettemoellers' position. As such, it should not be considered by the Court.

**4. Mr. Twist Was Under No Obligation to Disclose His Mailing Address to the Process Server.**

The Goettemoellers allege that Mr. Twist purposely concealed his identity and whereabouts in his email exchange with the process server. However, this is inaccurate. Mr. Twist's identity was disclosed; his name is clearly on all of the emails. CP 36-39. Mr. Twist also disclosed that he was no longer living in the U.S. *Id.* Mr. Twist's disclosure to the process server was sufficient. Mr. Twist was under no duty to provide his address so that the Goettemoellers could effect service. *See Thayer v. Edmonds*, 8 Wn. App. 36, 42, 503 P.2d 1110 (1972) (“[T]hose who are to be served with process are under no obligation to arrange a time and place for service or to otherwise accommodate the process server.”).

**5. *Montesdeoca v. Krams* Is Distinguishable From This Case.**

The Goettemoellers incorrectly cite *Montesdeoca v. Krams*, a New York case, to support their position. *Montesdeoca v. Krams*, 194 Misc.2d 620, 622, 755 N.Y.S.2d 581 (2003 NY). First, it is not mandatory authority. Second, *Montesdeoca v. Krams* stands only for the proposition

that service can be properly effected on a private mailbox. *Montesdeoca*, 194 Misc.2d at 622. The *Montesdeoca* Court made no other ruling. *Id.* at 621.

In this case, in juxtaposition to *Montesdeoca*, the issue is whether the Lynden address was the Twists' usual mailing address at the time that service was attempted. The Twists are not challenging service at the Lynden address on the basis that it was a private mailbox. The Twists concede that in Washington, service on a private mailbox can be properly effected. However, because the Lynden mailbox was not the Twists' usual mailing address, service was not properly effected. This lawsuit should therefore be dismissed.

**6. Under *Wright v. B & L Properties*, the Lynden Mailbox Was Not the Twists' Usual Mailing Address For the Purposes of Personal Service Under RCW 4.28.080(16).**

*Wright v. B & L Properties* is the only Washington case to have addressed the issue of what constitutes a defendant's usual mailing address for the purposes of RCW 4.28.080(16). See *Wright v. B & L Properties, Inc.*, 113 Wn. App. 450, 53 P.3d 1041 (2002). In *Wright*, the court found that the defendant's private mailbox was his "usual mailing address" for the purposes of RCW 4.28.080(16). *Id.* The *Wright* Court made this

determination based on the following factual findings at the time of attempted service: (1) the address was continually being used by the defendant; (2) the address was used on personal bank accounts, income tax returns, and telephone bills; (3) if the defendant was out of the country, special arrangements were made to have the mail forwarded from that address to the defendant; (4) the only address used by the defendant was the address in question; and (5) while out of the country, defendant still claimed his principal place of business was in the state of the address. *Id.* A thorough reading of *Wright* confirms that these were the factors that the *Wright* Court considered. *Id.*

In juxtaposition to *Wright*, the Lynden mailbox was not the Twists' usual mailing address because at the time of service, (1) the Twists were not using the address; (2) the address was not being used on personal bank accounts and telephone bills; (3) the Twists were residing in the U.K. and they did not make special arrangements to have their mail forwarded from the address in question to their usual mailing address in the U.K.; and (4) while residing in the U.K., the Twists never claimed that they were still residents of Washington. CP 5-6, 23-44. None of the factors considered in *Wright* were satisfied in this case. As a result, the Lynden address could

not have been the Twists' usual mailing address at the time that service was attempted.

**7. Conclusion**

Because the Lynden address was not the Twists' usual mailing address at the time of attempted service, and service on the Lynden address was the only service allegedly effected, this lawsuit should be dismissed.

DATED this 24 day of May, 2010.

COLE, LETHER, WATHEN & LEID, P.C.



---

Rory W. Leid, III, WSBA #25075  
Midori R. Sagara, WSBA #39626  
Attorneys for Petitioners