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No. 64046-1-I

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

COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION 1

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

Respondents,

v.

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

Petitioners.

BRIEF OF RESPONDENTS GOETTEMOELLER

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I. RESTATEMENT OF THE ISSUE

When the Goettemoellers were reasonably diligent in attempting to locate Mr. Twist for personal service of the summons and complaint, but the defendant could not be found, and given that Washington law authorizes service in such a case at the defendant's "usual mailing address", and given that the Goettemoellers served the defendants at their *only* mailing address of record, was service proper?

The trial court found such service was statutorily and constitutionally proper and Mr. Twist has appealed that ruling.

II. STATEMENT OF THE CASE

A. Synopsis

This case is about shielding oneself from personal service by hiding behind the substitute service statute of RCW 4.28.080(16). CP 125-214. After a due diligence search to locate Mr. Twist, his *only* mailing address of record was located at "The Mailbox", 413 B 19th Street PMB #104 Lynden, Washington 98264. CP 121-123; CP 124. Service was perfected by leaving a copy of the summons and complaint with "a person of suitable age and discretion" acting as agent for the proprietor. CP 215-223. Mr. Twist denies he was duly served and that this court has *in personam* jurisdiction over him. CP 55-62.

B. The complete factual and procedural background

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 Goettemollers rehabilitation medical specials exceed \$60,000. 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. The only disputed issue in this lawsuit is whether this court has *in personam* jurisdiction over Mr. Twist. CP 125-214.

On June 6, 2008 at 1:00pm, Graham Twist was served at 413 B 19th Street PMB #104 Lynden, Washington 98264 by way of service pursuant to RCW 4.28.080(16). CP 124; CP 215-223. On October 27, 2008, Mr. Twist, through counsel, answered the complaint. CP 67-71. In his answer, page 3, beginning at line 1, Mr. Twist affirmatively plead that “the Plaintiffs have failed to serve process upon these defendants in the manner and form required by law”. CP 67-71. Mr. Twist has refused to voluntarily strike his affirmative defense, notwithstanding the declaration of the process server filed in this matter. CP 67-71; CP 121-123; CP 124; CP 215-223.

1. Summary Judgment on *In Personam* Jurisdiction

On January 20, 2009 the Goettemoellers filed their Motion for Partial Summary Judgment on the issue of whether or not service was perfected by way of RCW4.28.080(16), thereby conferring *in personam*

jurisdiction over Mr. Twist. CP 125-214. On February 17, 2009 Mr. Twist filed a Response and Cross Motion for Summary Judgment. CP 55-62. Included with Mr. Twist's response was a *Declaration of Graham Twist*, filed on February 17, 2009. CP 23-44. In paragraph 4 of that declaration, Mr. Twist says "In October on 2005, I cancelled my postage service at 413 B 19th Street PMB #104 Lynden, Washington 98264". CP 23-44. On June 16, 2009 the *Declaration by Chris Cooke*, the Custodian of Records at The Mailbox, was filed with the trial court. CP 10-18. The declaration of Chris Cooke evidenced that (1) Mr. Twist opened the mailbox account on June 1, 2001, (2) that regular payments on the mailbox had been made up to December 15, 2009, (3) the mailbox was still in Mr. Twist's name, and (4) Mr. Twist never returned his mailbox keys. Thus, Mr. Twist grossly mislead the trial court in his declaration whereby he stated he closed his mailbox at the 413 B 19th Street PMB #104 Lynden, Washington 98264, because in fact, the evidence proved it was still open at the time he swore to his declaration. CP 10-18.

By his own admission, Mr. Twist secreted himself from the process server when he was contacted, by not providing his identity or location via email. CP 23-44. Had Mr. Twist not secreted himself, personal service could have been accomplished. However, because Mr. Twist chose to secret himself and attempted to avoid personal service of this lawsuit, a course of action he chose to impose upon the injured

Goettemoellers, service by RCW 4.28.080(16) was effectuated. CP 121-123; CP 215-223; CP 124.

In addition to the Goettemoellers' response, the Supplemental Declaration of the process server, Anna Odushkin, was filed on February 18, 2009. CP 124. A declaration of Robin K Mullins was filed on February 19, 2009. CP 121-123. Mr. Twist's Reply to Defendants' Response for Cross Motion for Summary Judgment was filed on February 23, 2009. CP 55-62.

The first hearing on the Goettemoellers' Motion for Partial Summary Judgment was held on March 20, 2009. CP 101. At the hearing, it was determined that further evidence would be needed in order for the trial court to make a determination whether or not there was a material issue as to fact or law regarding adequate service. CP 101. Subsequent to the hearing, the *Declaration of Chris Cooke* was filed on June 16, 2009. CP 10-18. A second *Declaration of Chris Cooke* was filed on July 27, 2009. CP 5-7.

On August 7, 2009 the Goettemoellers' Motion for Partial Summary Judgment was again argued to the trial court, with new evidence to show that in fact there was not a material issue as to fact or law with regards to perfecting service on Mr. Twist, pursuant to RCW 4.28.080(16). CP 91. At the August 7, 2009 hearing, the

Geottemoellers' Motion for Partial Summary Judgment was granted.

CP 3-4.

On November 23, 2005, this Court accepted discretionary review. See CP 1-2.

III. LEGAL ARGUMENT

A. Procedure and Standard of Review

Graham Twist argued before the trial level Judge on two separate occasions that when the Goettemoellers served notice of this lawsuit at mailbox 413 B 19th St., PMB #104, Lynden, Washington, 98264, they did not comply with Washington Statutes. CP 55-62; CP 91; CP 101. Their argument must be rejected because service was statutorily proper per RCW 4.28.080(16), which authorizes service as follows:

(16) in lieu of service under subsection (15) of this section [personal service or at the defendants home], 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.

The trial Judge found that service was proper in that service was accomplished by leaving a copy of the Summons and Complaint at 413

B 19th St., PMB #104, Lynden, Washington, 98264, with the appropriate individual at the business known as “The Mailbox”, pursuant to RCW 4.28.080(16). CP 3-4.

Scope and Standard of Review – The standard of review from a motion granting summary judgment is a question of law and is reviewed *de novo*. *Sheldon v. Fettig*, 77 Wn.App 775, 779, 893 P.2d 1136 (1995), citing *Parkin v. Colocousis*, 53 Wn. App 649, 653, 769 P.2d 326 (1989); and citing *Clingan v. Dept. of Labor and Industries*, 71 Wn.App 590, 592, 860 P.2d 417 (1993). If findings of fact are not challenged, they are accepted as verities on appeal. *Tapper v. Employment Security Dept*, 122 Wn.2d 397 (1993).

B. The Goettemoellers complied with RCW 4.28.080(16) when they used reasonable diligence in attempting to locate the defendants; failing that, they left the summons and complaint at the defendants’ only mailing address of record.

The preferred method of service is personal service RCW 4.28.080(15). However, personal service is not the *only* method of service that the statute authorizes. In RCW 4.28.080(16), Washington also authorizes substituted service on the “usual mailing address” if “the person cannot with ‘reasonable diligence’ be served as described” in subsection (15) [personal service at home]. [Substitute service is something other than personal service.] Mr. Twist devotes a number of paragraphs in his brief that state other means of substitute service were

not effectuated, potentially misleading this Court that service via the Secretary of State or publication trumps service pursuant to RCW 4.28.080(16), if it is an available option. There is no case or statute in Washington which stands for this premise and Mr. Twist is simply wrong in asserting this position. Service on the Secretary of State applies when no fixed address can be found for the non-resident motorist, which did not appear to be the case in this instance as Mr. Twist maintained a mailing address in Washington, which he presumably derived a benefit from. Service by publication would have been on his address at 413 B 19th St., PMB #104, Lynden, Washington, 98264, as that would have been the address where he was most reasonably likely to receive notice of this lawsuit, as no other address could be found for Mr. Twist. RCW 4.28.080(16) simply provides a plaintiff the ability to serve a defendant by the method prescribed in the statute as an alternative means of service when it is applicable, such as in this case.

The operative terms in the statute are “reasonable diligence” and “usual mailing address”. The Goettemoellers’ actions fulfill both of these statutory requirements.

- 1. The defendants did not overcome the presumption that service is valid – the burden of proof is not by a preponderance, but by clear and convincing evidence.**

“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 service was irregular.” *Woodruff v. Spence*, 88 Wn.App 565, 571 (1997), *rev. den.* 135 Wn.2d 1010 (1998). The return of service in this case is facially correct and is therefore, presumed valid. The defendants did not meet their burden of proof by any standard, let alone by clear and convincing evidence, that service on 413 B 19th St., PMB #104, Lynden, Washington, 98264 was anything but proper.

2. The statute should be liberally interpreted.

The Washington Supreme Court has stated that RCW 4.28.080 should be liberally construed. *Wichert v. Cardwell*, 117 Wn.2d 148 (1991). The Supreme Court set out the proper framework for analysis of this statute: “There are numerous rules of statutory construction, but of particular relevance here are (1) the spirit and intent of the statute should prevail over the literal letter of the law and (2) there should be made that interpretation which best advances the perceived legislative purpose.” *Id* at 151. This has been repeated in a line of cases interpreting the substitute service statute that allows injured motorists to file suit against the driver when the driver cannot be found.

The legislative intent behind RCW 4.28.080(16) was investigated by this Court in *Wright v. B & L Properties, Inc.*, 113 Wash.App 450, 462, 53 P.3d 1041 (2002). The Court in *Wright* found

that the Legislature intended to disallow individuals from hiding behind the veil of a private mailbox to avoid service in Washington State, and still receive the benefit of maintaining a presence within the State.

Wright v. B & L Properties, Inc., 113 Wash.App 450. The exact testimony in support of the Bill was that “this legislation would not permit persons to avoid service of process through the use of such a device [private mail drop boxes].” S.B. Rep. N 5167, at 2 (s passed, Jan 1996). The Legislative history indicates that no testimony was presented against the bill. S.B. Rep. No 5167, at 2.; H.B. Rep. No. 5167, at 2 (amended, Feb 1996).

3. The Goettemollers used “reasonable diligence” to locate the Twists.

The Twists, for obvious reasons, have never contested that the Goettemoellers did not use “reasonable diligence” in trying to locate them. “Reasonable diligence” means making an honest and reasonable effort to locate the defendant, but not all conceivable means need to be employed. *Crystal, China and Gold, Ltd v. Factoria*, 93 Wn.App 606, 611 (1999) (construing the statute authorizing substituted service on a corporation’s registered agent through the Secretary of State). In *Crystal*, a corporation’s registered agent was not going to be present at his business office to accept personal service until after the statute of limitations expired. The plaintiff’s attorney then checked the phone book and called directory assistance in an unsuccessful attempt to

locate the agent's home address. The plaintiff then used substituted mail service on the Secretary of State. The defendants moved to dismiss for lack of proper service claiming that the plaintiff did not exercise "reasonable diligence" to find the registered agent before serving the Secretary of State. The Court of Appeals found that the plaintiff's efforts to locate the registered agent met the requirement for "reasonable diligence." The Court found that **"inability to serve the registered agent was not a result of [the plaintiff's] lack of diligence but was a result of the registered agent not being available for service."** *Id.* At 612 (emphasis added).

Just as in the *Crystal* case, the failure to serve Mr. Twist personally was not because the Goettemoellers failed to use "reasonable diligence" in attempting to locate them. The failure to find Mr. Twist was not because the Goettemoellers didn't try, but because the Twists made themselves unavailable for service. As we know, Mr. Twist purposefully concealed his identity and whereabouts when he was contacted by the process server via email, thereby secreting himself in an attempt to avoid service and obtain a dismissal for lack of personal jurisdiction.

In the *Crystal* case, the only effort the plaintiff made to locate the agent consisted of looking in the phone book and calling directory assistance. Here, the Goettemoellers hired a professional process server who, after numerous failed attempts at personal service, attempted to

locate the Twists through their address, traffic and criminal records, directory assistance as well as many other sources both public and private, but was unable to locate the defendants. The records custodian at “The Mailbox” indicated the defendants had an active mailbox in their name that received mail. The Goettemoellers exercised reasonable diligence to locate Mr. Twist but no other address existed for him.

In ruling for Partial Summary Judgment on *in personam* jurisdiction over the defendant, the trial judge found the Goettemoellers used due diligence in attempting to locate Mr. Twist. Mr. Twist does not challenge this finding.

A plaintiff is not required to exhaust all possible means of locating a defendant – only to use reasonable means, which is what the Goettemoellers did.

4. The Washington State address was the defendants’ only known mailing address at the time service was effectuated – therefore, when the Goettemoellers served them on June 6, 2008, it was their “usual mailing address.”

“Usual” is not defined in the statute. An undefined term in a statute will be given its usual and ordinary meaning, and the court may use a dictionary definition to determine the usual and ordinary meaning of the term. *State v. Martin*, 55 Wn.App 275, 277, rev. den 113 Wn.2d 1033 (1989).

“Usual” is defined as meaning: “Habitual, ordinary, customary, according to usage or custom; commonly established, observed, or practiced; such as is in common use or occurs in ordinary practice or course of events, synonymous with custom, common, regular.” *Black’s Law Dictionary*, 4th ed., 1968.

The only mailing address of record used by the defendants at the time of service in June of 2008 was the 413 B 19th St., PMB #104, Lynden, Washington, 98264 address – they had no other. Therefore, it was their ordinary, customary and common address.

Mr. Twist perverts this Court’s holding in the *Wright* case when he suggests there is a five part test to determine whether one’s mailbox is a “usual mailing address.” This is simply wrong. The basic facts of *Wright* were that the plaintiffs were suing a *business* entity known as B & L Properties, Inc, for negligent construction of their home. This Court’s holding in the *Wright* case was that the mailbox the defendant was served at was its “usual mailing address” for purposes of RCW 4.28.080(16). This court in *Wright* did not create a bright line rule that one needs to establish in order to meet the requirements of establishing someone’s “usual mailing address”; rather, the *Wright* court analyzed the facts presented in that case and used those facts to support its holding.

The facts of *Wright* are very different from the facts in the present case for a number of reasons: (1) the defendants in the *Wright*

case, a business known as B & L Properties, Inc, used their mailbox for business purposes, (2) the defendants in *Wright* therefore received all of their business mail at that address, such as bills, banking information, tax information for the partnership and (3) the defendant's claimed the address as their principal place of business. *Wright v. B & L Properties, Inc.*, 113 Wash.App 450, 53 P.3d 1041 (2002). We are not serving a business in this case, and thus the facts as to what kind of mail and how frequently that mail was received at that address are going to differ greatly from the *Wright* case. The important fact for this Court is that Mr. Twist had a valid mailing address at the time of service and *no other* known Washington address, or any address at all, that was able to be located *after* a due diligence search by the Goettemoellers.

Mr. Twist also relies heavily on the case of *Blankenship v. Kaldor*, 114 Wash.App 312, 57 P.3d 295 (2002), to support his position. In *Blankenship* the basic facts were that the defendant was served at her parents' house, where she did not live at the time. *Blankenship* at 114Wash.App315-16. Her father then mailed her a copy of the summons and complaint at her Oregon address. *Id.* The *Blankenship* court's inquiry was then "whether at the critical time Ms. Kaldor's father's home was a center of domestic activity for her [the defendant]." *Blankenship* at 114Wash.App315-16. Failing then to convince the *Blankenship* court the defendant's parents' home was the center of domestic activity at the time service was attempted, counsel

for the plaintiff then argued the defendant's father became a process server for purposes of RCW 4.28.080(16) when he mailed the summons and complaint to his daughter, the defendant. *Blankenship* at 114Wash.App315-16.

The facts in this case are so far removed from the facts at issue in *Blankenship*, that to suggest *Blankenship* is dispositive as to whether service was perfected under RCW 4.28.080(16) is almost confusing. The issue presented to the Court in this case is not whether a parent can act as a process server to satisfy either personal service or substitute service, of any kind. There is no nexus at all between *Blankenship* and this case.

The Court in *Montesdeoca v. Krams*, 194 Misc.2d 620, 622, 755 N.Y. S.2d 581 (2003 NY) may have phrased it best when it said:

Cases such as *Wright*, *Rio Properties*, and *Hollow* show that innocent parties need not despair and judges do not have to twiddle their thumbs anxiously where an elusive party attempts to barricade itself from service of process. The law will follow in step in fashioning appropriate relief. This Court thus agrees with the holding of the Washington State court in *Wright* and thus disagrees with defendant's contention that service on a private mailbox can never be good service. If counsel were correct, then a person bent upon thwarting service, creditors, and other legitimate means of communication, could always hide behind the shield of a private mailbox.

Mr. Twist is doing exactly what the *Montesdeoca* Court was concerned about, that is, hiding behind the shield of a private mailbox.

5. The summons and complaint were left with the records custodian of “The Mailbox” – a person of suitable age and discretion was the proprietor or his agent.

The person who received the summons and complaint at “The Mailbox” was an employee and therefore agent of the proprietor, clearly a “person of suitable age and discretion” who was the proprietor or his agent. The agent confirmed that Mr. Twist had a mailbox and received mail at that address.

Mr. Twist does not challenge that the agent fits the statutory requirements.

6. The only exclusions to “usual mailing address” are for a “United States postal service post office box” and “a place of employment” – “The Mailbox” address was neither.

It is undisputed that “The Mailbox” address is neither a “United States postal service post office box” nor was it the defendant’s place of employment. Had the Washington legislature intended to exclude mailing addresses such as the defendant’s address at “The Mailbox”, it would have done so. Not having done so, service on 413 B 19th St., PMB #104, Lynden, Washington, 98264 was valid under the statute.

C. The requirements of due process have been met in this case.

The Washington Supreme Court has said that the purpose of the service statute is twofold: 1) to provide means to serve defendants in a

fashion reasonably calculated to accomplish notice and 2) allow injured parties a reasonable means to serve defendants. In *Sheldon v. Fettig*, 77 Wn.App 775, 893 P.2d 1136 (1995), the Court said that substituted service is designed to allow injured parties a *reasonable means* to serve defendants.

There is no constitutional or statutory requirement that a defendant must have “actual” notice before a plaintiff can proceed to seek redress in the judicial system. The requirement is that the plaintiff use reasonable means to provide notice. In this case, it is undisputed that counsel for Mr. Twist had actual notice of this lawsuit prior to any action of record being taken, thereby allowing the defendant proper notice and a full defense.

In *Sheldon v. Fettig*, one of the focal points for the court was whether the method of service was reasonably calculated to provide the defendants with notice. Applying that focal point to the case at hand, service at the “The Mailbox” is the place where defendants would most likely have knowledge of service of process. The defendants chose “The Mailbox” as the place to receive their 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.

In the case at hand, the defendant left Washington while maintaining a mailing address here; yet the defendants blame the

plaintiffs for the failure to get their mail, even though they themselves chose the exact circumstances; the defendants made personal service impossible. The purposes behind the service statute were served in this case and service should be upheld.

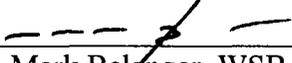
IV. CONCLUSION

The ramifications of finding service on Mr. Twist under these circumstances invalid would be disastrous for any plaintiff who finds himself in similar circumstances as the Goettemoellers. Finding that service was improper would be nothing short of a windfall for parties such as Mr. Twist, and would reward them for engaging in subterfuge and deception while leaving injured parties without any recourse.

Service was proper and the Order of Partial Summary Judgment as to *in personam* jurisdiction over Mr. Twist should be declared valid.

Respectfully submitted this 22nd day of April, 2010

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