

1986

# Mark A. Wood v. Harry M. Weenig and Erma P. Weenig, his wife : Brief of Respondent

Utah Court of Appeals

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UTAH COURT OF APPEALS  
BRIEF

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DOCKET NO. 860304 IN THE SUPREME COURT

OF THE  
STATE OF UTAH

MARK A. WOOD, )  
 )  
Plaintiff and Respondent, )  
 )  
vs. )  
 )  
HARRY M. WEENIG and ERMA P. )  
WEENIG, his wife, )  
 )  
Defendants and Appellants.

860304-CA  
Case No. 19978

RESPONDENT'S BRIEF ON APPEAL

Appeal From Summary Judgment Of The  
Third District Court for Salt Lake County  
Honorable J. Dennis Frederick, Judge

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Attorneys for Defendants and  
Appellants

FILED

OCT 1997

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

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MARK A. WOOD,	)	
Plaintiff and Respondent,	)	
vs.	)	
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IN THE SUPREME COURT  
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MARK A. WOOD,	)	
Plaintiff and Respondent,	)	
vs.	)	
HARRY M. WEENIG and ERMA P.	)	Case No. 19978
WEENIG, his wife,	)	
Defendants and Appellants.	)	

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RESPONDENT'S BRIEF ON APPEAL

NATURE OF THE CASE

This is a fraudulent conveyance action to set aside the conveyance by defendant Harry M. Weenig of his interest in his residence to his wife, defendant Erma P. Weenig, so that such residence may be levied upon in partial satisfaction of a \$200,000 judgment against Harry M. Weening with interest thereon at the rate of 8% per annum from February 1, 1974.

DISPOSITION IN LOWER COURT

On February 6, 1980, plaintiff was granted a default judgment against defendant Erma P. Weenig which provided that the conveyance of Harry M. Weenig's interest in the residence of the defendants to Erma P. Weenig constituted a fraudulent conveyance as to plaintiff and that plaintiff could levy upon such interest in partial satisfaction of his

\$200,000 judgment. On May 2, 1984, defendant Erma P. Weenig moved the lower court to set aside such default judgment under Rule 60(b) of the Utah Rules of Civil Procedure and such motion was denied.

#### RELIEF SOUGHT ON APPEAL

Appellant's seek to have the order denying their motion for relief from judgment under Rule 60(b) of the Utah Rules of Civil Procedure reversed and the default judgment set aside.

#### STATEMENT OF FACTS

On February 1, 1974, plaintiff obtained a judgment against defendant, Harry M. Weenig (Harry), in the Marion Circuit Court, State of Indiana, for the sum of \$200,000.00, plus interest thereon at 8 percent per annum and costs incurred therein. (R. at 77, 112 and 150) On June 21, 1976, that judgment was affirmed by the Court of Appeals for the State of Indiana, Second District. (R. at 77 and 112) On February 14, 1977, the Indiana judgment was reduced to a judgment in the Third District Court for Salt Lake County, State of Utah in the amount of \$200,000.00 plus interest thereon at 8 percent per annum. (R. at 77, 81-82, 112 and 150) On February 16, 1977, said judgment was docketed in the Clerk's Office of the Third Judicial District Court in and for Salt Lake County, State of Utah. (Id.)

On August 10, 1976, plaintiff, in conducting supplemental proceedings to determine the availability of assets of Harry M. Weenig for satisfaction of such judgment, took the deposition of said defendant. (R. at 77-78, 112 and 149) One day prior to such deposition, defendant Harry M. Weenig, transferred all right, title and interest which he had in the real property where he resides located at 4464 Covecrest Drive, Salt Lake City, Utah to his wife, defendant Erma P. Weenig (Erma). (R. at 77-78, 83, 112 and 149-50) On July 30, 1979, plaintiff initiated an action in the Third Judicial District Court in and for Salt Lake County against Harry M. Weenig and his wife Erma P. Weenig, seeking to set aside such transfer as a fraudulent conveyance. (R. at 2-4, 113, 150, 151 and 154) In addition, on July 30, 1979, the deposition of defendant, Erma P. Weenig, was noticed by plaintiff and a copy of such notice was mailed to defendant Erma P. Weenig at 4464 Covecrest Drive, Salt Lake City, Utah 84117. (R. at 8, 113 and 155)

On August 9, 1979, process in the fraudulent conveyance action was served upon Erma P. Weenig by Frank E. Spriggs, Deputy Constable for John A. Sindt, Constable Murray Precinct, by leaving a copy of the Summons and Complaint with Mrs. Weenig's daughter, at Mrs. Weenig's usual place of abode. (R. at 113 and 159-67) Mrs. Weenig's daughter was a person of suitable age and discretion there residing over the age of fourteen. (Id.) Mrs. Weenig's daughter refused to open the door of Erma's home at the time service was made. Instead, she communicated with the constable through an intercom communication system having a speaker on the front porch of Weenig's



home. Id. Because the constable was unsuccessful in getting the daughter to open the door and accept service for Erma P. Weenig, he told the daughter he was serving Erma P. Weenig by leaving the papers with the daughter. He then put the complaint and summons face down on the porch of Weenig's home. Because she would not identify herself, the daughter was referred to as Jane Doe, daughter, in the return made by the Constable's office. (R. at 112-13 and 159-67.)

The testimony of Frank E. Spriggs, deputy constable, concerning service of process was as follows:

Q Could you tell us the facts and circumstances surrounding the service of that complaint and summons?

A Well, as near as I can remember, it was on an afternoon in August, and I went to the home on Covecrest Drive. I knocked on the door. I don't remember whether I knocked on the door or rang the bell, but anyway a young woman answered through an intercom system. I identified myself as a deputy constable and asked if one of the parents were home, and they indicated they weren't. I asked who she was, and she indicated that she was the daughter of the defendants. I asked if she was over the age of 14, and she answered that she was. I asked her name, and she refused to answer. I asked her to come to the door. She refused. After about 10 minutes of this kind of going on, I got upset and told the person that I was going to fill a summons and complaint out and leave it on the porch, and they said that they did not have to accept it and I just said, you are served.

And I left.

Q Was there any communication by the woman or girl at the door concerning instructions that she had received from her father at all in regard to legal papers?

A Yes. She said her Dad said that she didn't have to answer the door. (R. at 33)

The constable's wife testified that she overheard the following conversation at the time of service:

. . . I heard her say that she would not open the door, and that she had been instructed not to accept any papers concerning her father's business. (R. at 171)

On August 28, 1979, an Amended Complaint in such fraudulent conveyance action was filed naming two additional defendants. Inasmuch as Erma P. Weenig had not filed an answer to the original Complaint, the Amended Complaint was not served upon her in accordance with Rule 5(a) of the Utah Rules of Civil Procedure as follows (R. at 155-56):

No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of Summons in Rule 4.

On February 6, 1980, pursuant to minute entry of the Honorable Homer F. Wilkinson, Third District Court Judge, defendant Erma P. Weenig's default was entered and plaintiff was granted a default judgment. (R. at 115 and 156) Such judgment stated that the conveyance of real property located at 4464 Covecrest Drive, Salt Lake City, Utah, by Harry M. Weenig to Erma P. Weenig was fraudulent as to Mr. Weenig's creditors as follows:

. . . It is ordered, adjudged and decreed that the conveyance from Harry M. Weenig to Erma P. Weenig of real property located at 4464 Covecrest Drive, Salt Lake City, Salt Lake County, Utah, reflected by Quitclaim Deed dated August 9, 1976 is hereby disregarded and Plaintiff is hereby granted a Writ of Execution upon the property so conveyed.

Defendants and respondents, Harry M. and Erma P. Weenig (Weenigs), filed a motion in the lower court to have the default judgment set aside under Rule 60(b) of the Utah Rules of Civil Procedure on the basis that service of process upon her was improper. Such motion came on for an evidentiary hearing before the Third District Court on May 2, 1984, at 10:00 a.m., before the Honorable J. Dennis Frederick, without a jury. At the conclusion of that evidentiary hearing, Judge Frederick refused to set the default judgment aside. His ruling was based on the fact that Erma had failed (a) to set forth a meritorious defense to the fraudulent conveyance action; (b) to timely file her motion for relief from judgment under Rule 60(b) of the Utah Rules of Civil Procedure; and (c) that service of the summons and complaint on Erma was in compliance with Rule 4 of the Utah Rules of Civil Procedure. (R. at 116-117; 175-76).

## ARGUMENT

### POINT I

THE LOWER COURT JUDGMENT SHOULD BE AFFIRMED AS  
IT WAS BASED ON THE TRIAL COURT'S EVALUATION OF THE  
CREDITABILITY OF THE WITNESSES AND THEIR EVIDENCE

At the hearing in the lower court on May 2, 1984, plaintiff and defendant presented evidence in support of and in opposition to the motion of Erma to set aside the default judgment. At the conclusion of such evidence and the arguments of counsel, the Honorable J. Dennis Frederick determined that plaintiff's witnesses were more believable than defendants and found in plaintiff's favor on that basis as follows:

The court: very well. With regard to this matter, counsel, as is generally the case, the issues here would have to do with the credibilty of the witnesses because there is conflicting testimony. The court has not been impressed with the candor or testimony of Mrs. Weenig. It has not been convincing. As far as I am concerned, the evidence has established that the elements comprising the tests set forth in the Musselman case, the 1983 case, have not been met. Accordingly, the motion to set aside the default judgment is denied. (R. at 175-76) (Emphasis added)

The Utah Supreme Court has repeatedly held that if the findings of the trial court are supported by evidence which is substantial, competent and admissable, its judgment will not be substituted for that of the trial court. Dang v. Cox Corp., 655 P.2d 658 (Utah 1982); Jensen v. Brown, 639 P.2d 150 (Utah 1981); Meese v. Brigham Young University, 639 P.2d 720 (Utah 1981); Cannon v. Wright, 531 P.2d 1290 (Utah 1975); People's Finance and Thrift Company of Ogden v. Doman, 27 Utah 2d 404, 497 P.2d 17 (Utah 1972); Staples Excavation and Erection Co. v. Weyher Construction Co., 26 Utah 2d 387, 490 P.2d 330 (Utah 1971); and De Vas v. Noble, 13 Utah 2d 123, 369 P.2d 290 (Utah 1962). This is because the trial court, having heard and viewed the witnesses and their testimony, is in a better position to weigh and evaluate the same. The rule is best stated in Staples Excavation at 333 as follows:

It would appear that this court is asked to review issues of fact rather than issues of law. A review of the pertinent parts of the record before us leads us to the conclusion that the trial court could fairly and reasonably remain unconvinced that the appellants here had established their claim of damages by a preponderance of the evidence. Being an action at law, we are not at liberty to interfere with the findings of the court below unless such findings are arbitrary or have no basis in the record. In the case before us the

record reveals numerous and wide conflicts in the evidence which only the trial judge was in a position to evaluate. As to the appellants' claim that the court failed to give proper credance to the testimony of their witnesses which was uncontrodicted, this too was a matter for the trial court to weigh.

A review of the record fails to establish a reasonable basis to reverse the decision of the court below. The decision of the trial court having been made upon disputed and contradictory evidence, it would appear that the rule we have enunciated in numerous cases, that the trial court being in an advantaged position from having heard the testimony of the witnesses and observed their demeanor is better able to determine issues of fact than is this court upon a written record. We therefore conclude that the decision and judgment of the court below must be affirmed.

The rule is further supported by the case of Tonelson v. Haines, 2 Ariz. App. 127 406 P.2d 845 (1965) cited by appellants in their brief. In that case, the appellate court left to the trial court the task of evaluating the creditbility of the witnesses and their evidence. In so doing, the court affirmed the lower court's decision that service of process was improper.

In the present case the Honorable J. Dennis Frederick, Third District Court Judge, decided in plaintiff's favor because the defendant's witnesses were unbelievable. His findings of fact and conclusions of law were entered in accordance therewith. As stated numerous times by this court, the trial court is in a better position to evaluate the creditability of the witnesses and the party's evidence and will not be reversed on appeal if there is evidence in support of such findings and the trial court has not abused its discretion.

## POINT II

### THE TRIAL COURT JUDGMENT SHOULD BE AFFIRMED AS DEFENDANT FAILED TO SATISFY THE REQUIRMENTS FOR SETTING ASIDE A DEFAULT JUDGMENT UNDER RULE 60(b) OF THE UTAH RULES OF CIVIL PROCEDURE

In their docketing statement at 5, Weenigs state that the trial court erred in refusing to set aside the default judgment against Erma on the basis that (a) she was not served in this action in accordance with Rule 4 of the Utah Rules of Civil Procedure and (b) she has a meritorious defense to the fraudulent conveyance action which she should have been permitted to raise. The problem with those issues is that the lower court specifically found that Erma was served in accordance with Rule 4 of the Utah Rules of Civil Procedure and the record on appeal is utterly void of any meritorious defense which she may have to the fraudulent conveyance action. She did not raise a meritorious defense in the lower court. The first time that a meritorious defense was raised by Erma was in the docketing statement, filed with the Utah Supreme Court, at 2 where she states that the conveyance which plaintiff alleges was fraudulent as to himself was made by Harry M. Weenig to Erma P. Weenig for good and valuable consideration.

In order for Weenigs to have the default judgment set aside, they must satisfy three requirements as set forth in the recent Utah Supreme Court case of State of Utah v. Musselman, 667 P.2d 1053, 1055 (Utah 1983) as follows:

In order for the defendant to be relieved from the default judgment, he must not only show that the judgment was entered against him through excusable neglect [or any other reason specified in Rule 60(b)], but he must also show that his motion to set aside the judgment was timely, and that he has a meritorious defense to the action.

Weenig's have failed to satisfy those three requirements as is shown by the record below.

a. Defendant's motion to set aside judgment was untimely.

Erma made her motion to set aside the default judgment under Rule 60(b)(4) of the Utah Rules of Civil Procedure which provides that a party may be relieved from a final judgment as follows:

On motion upon such terms as are just, the court may in furtherance of justice relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons . . . (4) when, for any cause, the Summons in an action has not been personally served upon the defendant as required by Rule 4(e) and the defendant has failed to appear in said action . . . . The motion shall be made within a reasonable time and for reasons (1), (2), (3) or (4), not more than three months after the judgment, order or proceeding was entered or taken. (emphasis added)

Rule 60(b) is clear that a motion for relief from a judgment based upon improper service of the Summons must be made within three months of the judgment. In this action, the judgment was entered on February 6, 1980, and docketed on February 8, 1980. Erma's motion was made more than four years after the entrance and docketing of said judgment. Said motion was clearly outside the time requirement set forth in Rule 60(b).

In the lower court, Erma relied upon the case of Woody v. Rhodes, 23 Utah 2d 249, 461 P.2d 465 (1969) for the proposition that the three month provision of Rule 60(b) has no application where service of process is defective. Defendants and respondents have also cited such case as controlling in their docketing statement filed in this court. That case is inapplicable to the case presently before the court for several reasons. First, the summons and complaint in this case were properly served upon defendant Erma P. Weenig at her usual place of abode by leaving the same with her daughter who was a person of suitable age and discretion there residing. Second, in the Woody case an ambiguity arose as to which defendant process was being served upon. In Woody, process was left with the wife of one of the defendants but the return indicated that it had been served upon another of the defendants who did not reside at the home where service was made. Because of the ambiguity, the Utah Supreme Court held that service was defective and the three month period was inapplicable. In the present case, there is no such ambiguity. It is clear from both the summons and the return, the testimony below and the lower court's findings that service was being made upon Erma P. Weenig and that she was the person who needed to respond to the complaint in order to avoid a default judgment being entered against her.

Third, not only was defendant Erma P. Weenig properly served with the summons and complaint in this action, but she received notice of such case pursuant to a notice of deposition which was mailed to her personally and a notice of lis pendens which was recorded with the Salt



Lake County Recorder on the real property in which she resided. It is therefore clear that the Woody case is distinguishable, that the time period of Rule 60(b) is inapplicable and the lower court's decision should be summarily affirmed in accordance with the lower court's finding that Erma's motion was untimely.

b. The lower court's judgment should be affirmed as defendant Erma P. Weenig failed to present a meritorious defense.

As set forth in the Musselman case, a default judgment will not be set aside under Rule 60(b) of the Utah Rules of Civil Procedure unless the defendant sets forth a meritorious defense to the complaint in said action. The record on appeal is void of any evidence, or even arguments or statements of counsel, as to a meritorious defense which Erma P. Weenig may have to the fraudulent conveyance action. The first time that Erma raised a meritorious defense is in the docketing statement at 2 where she states that the conveyance of the home by Harry M. to Erma P. Weenig was made for good and valuable consideration. The law is clear and this court has repeatedly held that matters, including evidence, "not offered at the hearing cannot be considered for the first time on appeal." Utah Department of Transportation v. Fuller, 603 P.2d 814, 817 (Utah 1979); Edgar v. Wagner, 572 P.2d 405 (Utah 1977); Reliable Furniture Co. v. Fidelity and Guarantee Insurance Underwriters, Inc., 14 Utah 2d 169 380 P.2d 135 (Utah 1963); and Pilcher v. State, Dept. of Social Services, 663 P.2d 450 (Utah 1983).

Counsel for Wood has reviewed the transcript of the lower court proceeding as well as the record in an attempt to discover any evidence or mention of a meritorious defense which Erma may have presented to the lower court. The only mention of a meritorious defense is contained in Finding of Fact number 15 (R. at 116) and Conclusion of Law number 4 (R. at 117). Both the finding of fact and conclusion of law of the lower court state in effect that defendant Erma P. Weenig failed to present any evidence that would suggest or establish a meritorious defense to the fraudulent conveyance action. Inasmuch as Erma failed to present a meritorious defense to the fraudulent conveyance action in the lower court, she is precluded from doing so for the first time on appeal.

- c. The lower court judgment should be affirmed as service of process on defendant Erma P. Weenig was in accordance with Rule 4 of the Utah Rules of Civil Procedure.

Weenigs state in their docketing statement and in Appellant's Brief that the summons and complaint in the fraudulent conveyance action was not personally served upon defendant as required by Rule 4(e) of the Utah Rules of Civil Procedure. For that reason they argue they should be granted relief from the judgment under Rule 60(b) of such rules. Such argument is directly contrary to the conclusion of law of the lower court (R. at 116 ¶ 1) which states as follows:

The summons and complaint in the above-entitled fraudulent conveyance action were properly served in accordance with Rule 4 of the Utah Rules of Civil Procedure upon defendant

Erma P. Weenig by Frank E. Spriggs, Deputy Constable for John A. Sindt, Constable, Murray Precinct, by leaving a copy thereof at Mrs. Weenig's usual place of abode with her daughter over the age of fourteen, who qualified as a person of suitable age and discretion there residing.

It is also contrary to the decision of courts from other jurisdictions which have held on similar facts that service of process was proper in accordance with rules for service similar to those contained in Rule 4 of the Utah Rules of Civil Procedure. Business and Professional Adjustment Co. v. Baker, 62 Or. App. 237, 659 P.2d 1025 (Or. App. 1983) and United Pacific Insurance Co. v. Discount Co., 15 Wash. App. 559, 550 P.2d 699 (1976).

In the Baker case, the constable knocked on the door of the defendant's residence in order to serve the summons and complaint upon him. The defendant yelled in a loud voice for the constable to go away. The constable recognized the defendant by his voice because he had communicated with him on a prior occasion for forty-five minutes. The constable responded in a loud voice that he was serving the papers and that the defendant had been served. The constable then left the papers on the front porch. The Oregon appellate court specifically held that service upon the defendant was proper and that a defendant could not avoid service by refusing to identify himself or accept the papers as follows:

The rules do not require an actual in-hand delivery, or a face-to-face encounter with an acknowledgement of identity from the person to be served, as defendant argues they do. To so require would allow a defendant to defeat service simply by refusing to identify himself or accept the papers. It would make personal service a degrading game of wiles and

tricks, rather than a procedure for insuring that a defendant received actual notice of the subject and pendency of an action.

Baker at 1027.

In the United Pacific case, the defendant opened the front door of her residence in the process server's presence. When the process server told her who he was and that he had some legal papers for her, she slammed the door knocking the papers from his hand. The process server then stated in a loud voice that she had been served and left. The papers never actually touched the defendant's hand but were knocked from the constable's possession by the action of the defendant in slamming the door. The Washington Appellate Court held at 700-01 that service of process was valid as follows:

RCW 4.28.080 provides in part:

The summons shall be served by delivering a copy thereof as follows:

. . . . .

(9) If the suit be against a company or corporation other than those designated in the preceding subdivisions of this section, to the president or other head of the company or corporation, secretary, cashier, or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, secretary, cashier or managing agent.

. . . . .

(14) In all other cases to the defendant personally, or by leaving a copy of the summons at the house of his usual abode with some person of suitable age and discretion then resident therein.

Service made in the modes provided in this section shall be taken and be held to be personal service.

\* \* \* \*

The facts in the case at bench demonstrate a clear attempt by the process server to yield possession and control of the documents to Mrs. Norelius while he was positioned in a manner to accomplish that act. Normal "delivery" thereof would have been affected upon Mrs. Norelius except for her obvious attempt to evade service by slamming the door after the papers had been held out to her. The summons need not actually be placed in the defendant's hand. We find, as did the trial court, that facts in the record supported conclusion that "delivery" occurred and service was effected.

Appellants argue in their brief at 12-14 that the reasoning of the Arizona Appellate Court in Tonelson V. Haines, 2 Ariz. App. 127, 406 P.2d 845 (1965) should be adopted by this court to the effect that service is not valid unless the person being served knows papers are being left with him. The problem with appellant's argument is that the Tonelson decision is based on a specific finding of the lower court that the person there being served was unaware that service was being attempted and she did not do anything to defeat service. The lower court in this case made opposite findings and conclusions.

Contrary to appellant's arguments, the holding in Tonelson is simply that the appellate court will not substitute its judgment for the trial court as to the credibility of the witnesses and their evidence. This is clear from the language of the court at 846-847 as follows:

After hearing the evidence, the trial court found as follows:

"There is no dispute in the evidence in relation to the fact that the defendant was at his home at the time in question; as to the fact that Mr. Estein called at the defendant's home at the time in question; as to the fact that Mrs. Haines was then a member of the family of the defendant and that the same Mrs. Haines answered the door;

and that the copy of the complaint and summons were not physically placed in the possession of Mrs. Haines at the time in question. The court need not decide the law point as to whether or not the leaving of a copy of the complaint and summons on the premises and in the vicinity of an individual following that individual's refusal to accept the same constitutes good service."

"The purpose of the visit of Mr. Estein was not presented to Mrs. Haines in such manner that she heard and understood the fact that Mr. Estein was there for the purpose of serving process upon the defendant. This being so, the fact of leaving the same between the screen door and the front door does not constitute service. There was no intentional act on the part of Mrs. Haines designed to knowingly attempt to defeat the service of process."

On appeal, the contention is made that the undisputed facts constitute service as a matter of law and that the trial court neither had discretion, nor abused its discretion, in setting aside the default and default judgment.

In *Eldridge v. Jagger*, 83 Ariz. 150, 317 P.2d 942 (1957), our Supreme Court said:

"It is a well-established rule of law that the return of service of process can be impeached only by clear and convincing evidence." 83 Ariz. 150, 152, 317 P.2d 942, 943.

In this same case, however, the court also said: "However, the trial judge, in hearing the testimony and in observing the demeanor and manner of the witnesses in testifying as to conflicting facts, concluded that the defendant Jagger had not been served with summons and should be given an opportunity to litigate a disputed obligation. We have repeatedly held an application to open, vacate or set aside a judgment is within the sound discretion of the trial court and its action will not be disturbed by this court except for a clear abuse of discretion." 83 Ariz. 150, 152, 317 P.2d 942, 944.

We hold that in order for there to be a " \* \* \* leaving \* \* \* with \* \* \*" a person a copy of the summons and complaint, as required by Rule 4(d), supra, such person must be aware of the "leaving." We have not been cited a decision directly in point. Generally, when personal service is attempted, the person served must be apprised in some

that the person "with" whom the papers are left must have knowledge that the papers are so left. Otherwise service might be accomplished by surreptitiously placing papers in a person's pocket, or by other means not likely to bring about actual notice.

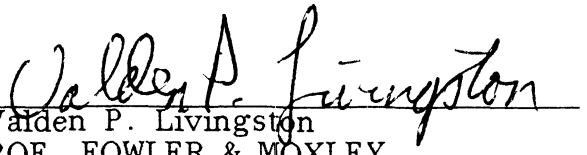
In this case the evidence is "clear" that Mrs. Haines did not have any knowledge of the leaving of this summons with her. Whether it is "convincing" we feel should be left up to the trial court under the Jagger decision. It was the trial court's function, and not ours, to judge the credibility of the witnesses and we hold that we are bound by its decision in this regard. (emphasis added)

In the present case, the lower court specifically found that defendant's daughter resided at the usual place of abode of Erma P. Weenig, that she was over the age of fourteen and that she was a person of suitable age and discretion. The court further found that service was made at such usual place of abode and that service was properly made upon Erma by delivering a copy of the summons and complaint to her daughter by leaving the same on the front porch after the daughter refused to open the front door to accept service of process. If the trial court or this court were to hold that such facts do not constitute proper service, a defendant could avoid service of process and jurisdiction of the court over him by simply refusing to take possession of the summons and complaint. Such would result in a mockery of the judicial system. The lower court judgment should be summarily affirmed as there is no question that service of process was valid in this case. Defendants cannot avoid service by refusing to accept process and instructing residents of their household to do the same.

### CONCLUSION

For the foregoing reasons Wood respectfully requests that the judgment of the lower court be summarily affirmed.

DATED this 26 day of October, 1984.

  
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### CERTIFICATE OF SERVICE

I hereby certify that on the 26 day of October, 1984, I served two copies of the foregoing Respondent's Brief on Appeal upon the following, by depositing a copy thereof in the United States mails, postage prepaid, addressed as follows:

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