

IN THE COURT OF APPEALS OF TENNESSEE

EASTERN SECTION

**FILED**  
February 15, 1996  
Cecil Crowson, Jr.  
Appellate Court Clerk

WACHOVIA BANK CARD SERVICES,	)	C/A NO. 03A01-9510-CV-00373
	)	
Plaintiff-Appellee,	)	KNOX LAW
	)	
v.	)	HON. HAROLD WIMBERLY,
	)	JUDGE
DONALD E. OVERTON,	)	
	)	REVERSED AND
Defendant-Appellant.	)	DISMISSED

RON CUNNINGHAM, Knoxville, for Plaintiff-Appellee.

GLENN W. OVERTON, Knoxville, for Defendant-Appellant.

O P I N I O N

Franks. J.

In this action on debt, the Trial Court entered judgment against defendant. Defendant has appealed, insisting the judgment is void on the grounds the Court did not have personal jurisdiction over defendant.

The action originated in General Sessions Court of Knox County, when a civil warrant was filed against the defendant. The warrant was returned by the process server, reciting that the warrant was "executed as commanded on Don

Overton evading service...this 6th day of May, 1992" and signed by the process server. The record indicates that the warrant was returned accompanied by a letter from the process server, dated May 6. After recounting his efforts to serve defendant to no avail, he states in his letter:

I then went to Mr. Overton's house at 8805 Fernway Dr. off of Fox Loans Road. I arrived at approx 5:20 p.m. and found two Olds Torandos [sic] sitting in the driveway. One with a tag of ADOCS was one vehicle that I remember seeing at Mr. Overton's officer [sic] and it stuck out because of the tag it displayed. I went to the door saw that lights were on in the house and the front door was cracked open about 2 inches. I knocked several times but no one answered the door. I pressed on the knob to open the screen door to knock on the wooden door but the screen was locked. I knocked on the screen door several more times. I went back to my car and checked the ADOCS tag and found it was the tag that belonged to Mr. Overton's car. I called the Attys for the Plff. and talked with Gail who told me to leave the Warrant on the door. I went back and knocked again still no one came to the door. I attached the Warrant and my card to the front screen door and said Mr. Overton you have been served by Evading Service.

A judgment was entered against defendant in Sessions Court and defendant timely appealed that judgment to Circuit Court. In Circuit Court, defendant filed a motion to dismiss or for summary judgment, stating that he had no notice that any warrant had been filed against him by the plaintiff in Knox County General Sessions Court, and no notice of the trial until after a default judgment had been entered against him. Plaintiff filed a response to this motion, but the Trial Court never acted on the motion.

Subsequently, the Trial Court entered judgment against defendant on May 11, 1995, reciting that defendant did not appear for trial. On June 8, 1995, defendant filed a motion to relieve defendant from judgment, accompanied by

defendant's affidavit that he had no notice of the trial date, and reiterating that he had not been served with a warrant or other papers in the Knox County General Sessions Court with respect to the action. He pointed out that the Court had not ruled on his motion for summary judgment.<sup>1</sup> The Court overruled this motion and defendant has appealed.

Tennessee Rules of Civil Procedure apply to cases appealed to the Circuit Court from the General Sessions Court. *Vincent V. Mills*, 530 S.W.2d 761 (Tenn. 1975). Rule 4.04(1) Rules of Civil Procedure provides:

The plaintiff shall furnish the person making the service with such copies of the summons and complaint as are necessary. Service shall be made as follows:

- (1) Upon an individual...by delivering a copy of the summons and of the complaint to him personally, or if he evades, or attempts to evade service, by leaving copies thereof at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, whose name shall appear on the proof of service, or by delivering the copies to an agent authorized by appointment or by law to receive service on the behalf of the individual served.

The record clearly demonstrates that service was not perfected in accordance with this Rule. By way of background, the

Advisory Commission comments explain:

4.04(1)...prior law also provided that service of process from the Chancery Court be by reading the process to each defendant and leaving a copy with him; if the defendant evaded or attempted to evade service, the officer could serve him by leaving a copy at the defendant's usual residence.

Paragraph 1 of Rule 4.04 drops the requirement that the process be read to defendant, but continues to require that a copy of the process, as well as of

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<sup>1</sup>While the motion mentions Rule 60 T.R.C.P., the motion was a Rule 59 motion.

the complaint, be left with defendant. The paragraph adopts the Chancery rule allowing service, in case of evasion or attempt to evade service, by leaving copies of the summons and complaint at the defendant's dwelling house or usual place of abode; but the Rule adds a provision, for protection of the defendant, that copies must be left with a person of suitable age and discretion residing therein, and requires that that person's name appear on the proof of service. (Emphasis supplied).

Plaintiff however, counters that by appealing the judgment to the Circuit Court, the defendant entered a general appearance and thereby submitted to the Court's jurisdiction. It is asserted that his only remedy was to file a Chancery Court action for relief. We cannot agree.

Defendant timely raised his motion to dismiss in the Circuit Court (*See* Rule 12, Tennessee Rules of Civil Procedure) but the Trial Court never acted on the motion. Plaintiff cites no authority for the proposition that the defendant, by appealing the default judgment from Sessions Court to Circuit Court, constituted a general appearance. Moreover, the Supreme Court has recently noted that there is a modern trend away from the technical requirement that a defendant must enter a special appearance to contest personal jurisdiction. *Landers v. Jones*, 872 S.W.2d 674 (Tenn. 1994). Since the appeal from Sessions Court was for a trial *de novo*, and the Rules of Civil Procedure became applicable to the case upon appeal, the Rules allow the defendant to raise all defenses, including a challenge to personal jurisdiction of the Court in either a pre-trial motion or a responsive pleading. *Landers*, p.676.

We conclude that the defendant could properly and did timely challenge the jurisdiction of the Court in Circuit

Court, and we find that he was not served with process.

Accordingly, the judgment is reversed and the cause dismissed, with costs assessed to appellee.

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Herschel P. Franks, J.

CONCUR:

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Don T. McMurray, J.

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Charles D. Susano, Jr., J.