Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

ATTORNEY FOR APPELLANT:

JAY L. LAVENDER
Lavender & Bauer, P.C.
Warsaw, Indiana

ATTORNEYS FOR APPELLEE:

GREGORY F. ZOELLER
Attorney General of Indiana

FRANCES BARROW
Deputy Attorney General
Indianapolis, Indiana

FILED
Jul 29 2011, 9:53 am
CLERK
of the supreme court, court of appeals and tax court

IN THE
COURT OF APPEALS OF INDIANA

RACHEL MOSCO,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 43A05-1102-MI-69
	)	
INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION a/k/a INDIANA DEPARTMENT OF CHILD SERVICES,	)	
	)	
Appellee.	)	

APPEAL FROM THE KOSCIUSKO CIRCUIT COURT
The Honorable Rex L. Reed, Judge
Cause No. 43C01-1010-MI-544

July 29, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Rachel Mosco appeals the dismissal of her petition for judicial review. Mosco raises three issues, which we consolidate and restate as whether the court erred in dismissing her petition. We reverse.

The relevant facts follow. On August 31, 2010, an administrative law judge (the "ALJ") entered a Notice of Hearing Decision revoking Mosco's child care license,[1] and on September 29, 2010, the Director of the Division of Family Resources of Family and Social Services Administration ("FSSA") issued a Notice of Final Agency Action which affirmed the ALJ's decision. On October 4, 2010, Mosco received a letter from a child care administrator with the Bureau of Child Care which indicated that Mosco had exhausted her administrative appeal rights.[2]

On October 7, 2010, Mosco filed a verified petition for judicial review of administrative decision and a verified petition for stay of administrative order pending court decision. The caption of Mosco's petition for judicial review states in part: "RACHEL MOSCO[,] Petitioner, v. INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION a/k/a DEPARTMENT OF CHILD SERVICES, Respondent." Appellant's Appendix at 11. Paragraph 2 of the petition states:

> That Respondent, Indiana Family & Social Services Administration a/k/a Department of Child Services (hereinafter "FSSA"), is an Indiana agency designed to protect children and provide child support enforcement, with its principal headquarters located at Room W292-MS 47, 402 West

[1] Paragraph 2 of the ALJ's decision stated in part that "[o]n February 20, 2009, [DCS] mailed a notification by certified letter to the appellant which informed her that her child care home license was being revoked . . . ." Appellant's Appendix at 16.

[2] The letter from the Bureau of Child Care also referred to the February 20, 2009 letter referenced in paragraph 2 of the ALJ's August 31, 2010 decision.

> Washington Street, Indianapolis, Indiana 46204-2739, and its local agency, which is subject to this action, being located at 2307 East Center Street, Suite B, Warsaw Indiana 46580.

Id. In the petition, Mosco in part requested the court to find that she had been prejudiced by the final agency action, to set aside the findings and conclusions of FSSA, to order FSSA to provide her with the record, and to reinstate her childcare license.

The caption of Mosco's verified petition for stay also states in part: "RACHEL MOSCO[,] Petitioner, v. INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION a/k/a DEPARTMENT OF CHILD SERVICES, Respondent." Id. at 135. In paragraph 1, the petition for stay refers to Mosco's petition for judicial review, and in the remaining paragraphs the petition for stay alleges among other things that Mosco's petition for judicial review provides with reasonable probability that the administrative decision's findings of fact are insufficient.

A summons was issued to the Indiana Attorney General (the "AG") and to the Indiana Department of Child Services ("DCS"). The caption of the summonses stated: "RACHEL MOSCO[,] Petitioner, v. INDIANA DEPARTMENT OF CHILD SERVICES, Respondent." See id. at 73-74. One of the summons was served on DCS along with the petition for stay. The other summons was served on the AG along with the petition for judicial review.

On October 27, 2010, a deputy attorney general filed an appearance. Paragraph 1 of the appearance stated: "The undersigned attorney and attorneys listed on this form now appear in this case for the following party member(s): **Indiana Family and Social Services Administration**." Id. at 46. The caption of the appearance states: "RACHEL

MOSCO[,] Petitioner, v. INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION a/k/a DEPARTMENT OF CHILD SERVICES, Respondent." Id.

Also on October 27, 2010, FSSA, by its counsel the deputy attorney general, filed an initial motion for enlargement of time to respond to Mosco's petition. The motion stated in part: "Respondent, Indiana Family and Social Services Administration ('FSSA'), by counsel, . . . Deputy Attorney General, respectfully moves the Court for an enlargement of time of thirty (30) days . . . to file a response . . . ." Id. at 48. The motion also stated: "Petition and summons was served on the Indiana Department of Child Services on or about October 10, 2010, via certified mail." Id.

On December 2, 2010, FSSA, by its counsel the deputy attorney general, filed a motion to dismiss with prejudice and a memorandum of law in support of the motion. FSSA argued in part that Mosco "failed to properly serve the state agency . . . ." Id. at 55. Specifically, FSSA argued that FSSA and DCS are separate state agencies, that DCS investigates and substantiates claims of child abuse and neglect against licensed childcare workers, and that FSSA's Division of Family Resources decides when to revoke a childcare license and issues notices to licensees regarding licenses. FSSA alleged that DCS had substantiated a claim of child abuse against Mosco and that, "[u]pon receiving notice that DCS substantiated a claim of child abuse against [Mosco], FSSA's Division of Family Resources – *not* DCS – revoked [Mosco's] childcare license pursuant to Indiana Code § 12-17-2.5-32." Id. at 56. FSSA further argued that Mosco sent a summons to the AG and DCS local office in Kosciusko County, Indiana, but that Mosco "did not serve FSSA with a summons, the Petition, or the Motion For Stay." Id. at 57. FSSA further

stated that "[o]nly a copy of the Petition was attached to the summonses issued to the Attorney General" and "[s]imilarly, only a copy of the Motion for Stay was attached to the summons issued to DCS." Id. FSSA then argued that Mosco's petition must be dismissed and that the trial court is without personal jurisdiction because Mosco did not properly serve FSSA and the AG. In support of its argument, FSSA argued that the case of Guy v. Comm'r, Ind. Bureau of Motor Vehicles, 937 N.E.2d 822, 825 (Ind. Ct. App. 2010), was controlling.

On December 15, 2010, Mosco filed a memorandum in response to FSSA's motion to dismiss. In her memorandum, Mosco argued that dismissal for lack of personal jurisdiction was not warranted and in support of her argument cited to Evans v. State, 908 N.E.2d 1254 (Ind. Ct. App. 2009), reh'g denied. On January 7, 2011, FSSA filed a reply in which it argued in part that DCS "was served with a summons and with the Petition For Stay" and that only the AG was served with a copy of the petition for judicial review. Appellant's Appendix at 126.

On January 19, 2011, the court held a hearing and entered an order of dismissal granting FSSA's motion to dismiss.[3] The order provided in part:

> Simply stated, [FSSA's] position is that it . . . was not served with a summons, a copy of the Petition, or a copy of the Motion for Stay. Indeed, the Court file indicates that neither a summons nor copy of the Peititon or Motion to Stay was directed to [FSSA] and that failure deprives this Court of personal jurisdiction as well as subject matter jurisdiction over the action.

Id. at 9.

[3] The record does not contain a transcript of the hearing.

The issue is whether the trial court erred in dismissing Mosco's petition for judicial review. Mosco argues that "any procedural error was minor, without prejudice to FSSA, and was in fact caused by" the ALJ's decision. Appellant's Brief at 5. Mosco asserts that the ALJ's decision indicated that DCS, not FSSA, revoked her license. In addition, Mosco cites to Evans, 908 N.E.2d 1254, and argues that "service was reasonably calculated to reach Respondent, and in fact, such service did reach Respondent, as evidenced by the record and the Attorney General's appearance in this case." Id. at 9. Mosco contends that "[t]he Attorney General has not been prejudiced and had obvious knowledge of its rights and duties under this matter, as it timely filed an appearance in this case." Id. at 10. Mosco further argues that the petitioner in Guy, 937 N.E.2d 822, did not issue service to the Attorney General and that her case "is similar to Evans but distinguishable from Guy . . . ." Id. at 11. Mosco also argues that DCS was an apparent agent of FSSA, thereby imputing service upon FSSA, and that even if service was improper, her petition should be subject to reinstatement because any error was not caused by her neglect.

FSSA argues that because of Mosco's failure to serve FSSA the court did not obtain jurisdiction over it. Specifically, FSSA argues that Mosco did not comply with the requirements of the Administrative Orders and Procedures Act ("AOPA") because "she failed to serve her petition for judicial review and summons on FSSA and/or its secretary." Appellee's Brief at 3. FSSA argues that the AG "did enter an appearance for FSSA and request an extension of time to respond to the petition for judicial review, but a prior request for an extension of time in which to file an answer or appearance should

not, in and of itself, act as a waiver of, or estop the defendant from, preserving the issue of lack of personal jurisdiction." Id. at 4-5. FSSA argues that Mosco's failure to comply with the AOPA "caused the trial court to lose its ability to exercise its authority to entertain the petition for judicial review" and "[a]ccordingly, the trial court properly dismissed this case for lack of personal jurisdiction." Id. at 6.

FSSA further argues that the case of Evans, 908 N.E.2d 1254, is distinguishable. FSSA specifically argues that "[a]s in Evans, the Attorney General in this case entered an appearance for FSSA," that "[h]owever, unlike Evans, FSSA was not named on the summonses served on the Attorney General and on the DCS," that "[i]nstead the captions named DCS as the respondent," and that "DCS, however, is a separate and distinct agency from FSSA." Id. at 7-8. FSSA further states: "However, the petition for judicial review did name as respondent 'Indiana Family & Social Services Administration a/k/a Department of Child Services.' Perhaps the confusion was not whether FSSA was a respondent, but whether both DCS and FSSA were respondents. In any event, the task was not as easy as in Evans . . . ." Id. at 8. FSSA also argues that "[a]nother difference is that Mosco served DCS and not FSSA, where in Evans the petitioner served the Governor and not FSSA." Id. FSSA also asserts that Mosco improperly requests relief under theories she did not raise in the trial court.

"The standard of appellate review of rulings on motions to dismiss on jurisdictional grounds depends on whether the trial court resolved disputed facts, and if so, whether the trial court conducted an evidentiary hearing or ruled on a paper record." Evans, 908 N.E.2d at 1256 (citing Wayne Cnty. Prop. Tax Assessment Bd. of Appeals v.

United Ancient Order of Druids–Grove No. 29, 847 N.E.2d 924, 926 (Ind. 2006)). We review *de novo* a ruling on a motion to dismiss for lack of jurisdiction if the facts are not disputed or the court rules on a paper record. Id. Here, the facts are not disputed, and thus our review is *de novo*.

Initially, we observe that FSSA argues that the trial court lacked personal jurisdiction only and not that it lacked subject matter jurisdiction.[4] There is no dispute that the Kosciusko Circuit Court had jurisdiction over the general class of actions at issue here, i.e., petitions for judicial review of agency actions, and therefore had subject matter jurisdiction over Mosco's petition. See Evans, 908 N.E.2d at 1257 (noting that there was "no dispute that the Fayette Circuit Court had jurisdiction over the general class of actions at issue here—petitions for judicial review of agency actions" and that "[t]he trial court had subject matter jurisdiction over Evans's petition for judicial review"). Thus we turn to whether Mosco's failure to comply with the service requirements of Ind. Code § 4-21.5-5-8 should result in dismissal under the circumstances presented.[5]

---

[4] In its brief, FSSA states: "Under the holding of Evans and cases cited therein, the trial court in this case incorrectly determined that it lacked subject matter jurisdiction. The question remains whether the separate holding in Evans regarding personal jurisdiction applies to this case." Appellee's Brief at 7.

[5] Ind. Code § 4-21.5-5-8 provides:

(a) A petitioner for judicial review shall serve a copy of the petition upon:

(1) the ultimate authority issuing the order;

(2) the ultimate authority for each other agency exercising administrative review of the order;

(3) the attorney general; and

(4) each party to the proceeding before an agency;

Generally speaking, ineffective service of process prohibits a trial court from having personal jurisdiction over a defendant. Evans, 908 N.E.2d at 1258 (citing Thomison v. IK Indy, Inc., 858 N.E.2d 1052, 1055 (Ind. Ct. App. 2006)). However, this is not always the case such as under certain circumstances where there is not a total lack of service. See id.

Ind. Trial Rule 4.6(A) describes the persons to be served when service is made upon an organization. Regarding state governmental organizations, this Rule provides that service may be made upon the executive officer of the organization and the AG. Ind. Trial R. 4.6(A)(3). Here, the AG was served, but Mosco was required to serve both FSSA and the AG. See id.; Evans, 908 N.E.2d at 1258.

In Evans, FSSA affirmed an administrative law judge's decision that the petitioner was not eligible for certain Medicaid coverage, and the petitioner filed a verified petition for judicial review with the trial court. 908 N.E.2d at 1256. A summons was sent to the Governor, and the caption of the summons named the State and FSSA as respondents. Id. Another summons was sent to the Attorney General, and that summons referred to the State and FSSA as respondents. Id. The trial court dismissed the petition for lack of jurisdiction. Id.

> in the manner provided by the rules of procedure governing civil actions in the courts. If the ultimate authority consists of more than one (1) individual, service on the ultimate authority must be made to the secretary or chairperson of the ultimate authority.
>
> (b) The petitioner shall use means provided by the rules of procedure governing civil actions in the courts to give notice of the petition for review to all other parties in any proceedings that led to the agency action.

On appeal, this court concluded, even though the petitioner incorrectly sent one summons to the Governor instead of the Secretary of FSSA, that dismissal for lack of personal jurisdiction was not warranted. Id. at 1258. Specifically, the court referred to Ind. Trial Rule 4.15(F), which provides: "No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond." We also noted our previous statement concerning personal jurisdiction and service of process:

> Under Indiana Trial Rule 4.15(F), no summons or service of process shall be set aside if either is reasonably calculated to inform the defendant of the impending action against him. Thus, Trial Rule 4.15(F) will prevent service of process which is technically deficient from defeating the personal jurisdiction of a court. [A]lthough actual notice alone will not cure defective service, it may be considered in determining whether the notice was reasonably calculated to inform an organization of the action.

Id. (citing Thomison, 858 N.E.2d at 1058 (quotations and citations omitted)). The court went on to find that "FSSA had actual notice of the petition for judicial review because on October 29, 2008, a deputy attorney general entered an appearance on behalf of the State *and* the FSSA." Id. at 1258-1259. The court also noted that, on the same day the appearance was entered, the appellees moved for an enlargement of time to file a responsive pleading. Id. at 1259.

The court in Evans then concluded that the summons was reasonably calculated to inform FSSA of the action. Id. The court noted that the summons "specifically named the FSSA as a respondent twice," that "[a]lthough it was addressed to the Governor, the Final Agency Action and Notice of Hearing Decision both named only the Governor on

the letterhead," and that "[t]he fact that the Final Agency Action indicated that Secretary Roob had reviewed the ALJ's findings and conclusion does not show that the service of a summons on the Governor was not reasonably calculated to inform the FSSA of the action." Id. The court held that, because the summons and service thereof were reasonably calculated to give FSSA notice of the action and FSSA had actual notice of the action, they would not be set aside and that the trial court had personal jurisdiction over FSSA. Id.

In this case, we find that, even though Mosco may have incorrectly sent one summons to DCS instead of FSSA, dismissal for lack of personal jurisdiction is not warranted. Similar to Evans, FSSA here had actual notice of the petition for judicial review. On October 27, 2010, a deputy attorney general entered an appearance on behalf of FSSA. The caption of the appearance states: "RACHEL MOSCO[,] Petitioner, v. INDIANA FAMILY & SOCIAL SERVICES ADMINISTRATION a/k/a DEPARTMENT OF CHILD SERVICES, Respondent." Appellant's Appendix at 46. That same day, also like in Evans, FSSA by counsel filed an initial motion for enlargement of time to respond to the petition. The motion stated in part: "Respondent, Indiana Family and Social Services Administration ('FSSA'), by counsel, . . . respectfully moves the Court for an enlargement of time of thirty (30) days . . . to file a response . . . ." Id. at 48.

In addition, Mosco's petition for judicial review, which was served on the AG and referenced in the petition to stay served on DCS, identified the Respondent in the caption and in paragraph 2 as the "Indiana Family & Social Services Administration a/k/a

Department of Child Services." See id. at 11, 150. The petition for judicial review also requested relief from FSSA's final agency action. Further, the petition for stay, which was served on the DCS, identified FSSA as the Respondent in the caption and referred to and set forth a part of the allegations contained in Mosco's petition for judicial review. We also note that paragraph 2 of the ALJ's August 31, 2010 decision indicated that DCS "mailed a notification by certified letter to the appellant which informed her that her child care home license was being revoked . . . ." Id. at 16.

Based upon the record, the summons and service thereof were reasonably calculated to give FSSA notice of the action and FSSA had actual notice of the action. Accordingly, they shall not be set aside, and the trial court had personal jurisdiction over FSSA. See Ind. Trial R. 4.15(F); Evans, 908 N.E.2d at 1258-1259 ("Because the summons and service thereof were reasonably calculated to give the FSSA notice of the action and the FSSA had actual notice of the action, they shall not be set aside. See T.R. 4.15(F). The trial court had personal jurisdiction over the FSSA.").[6]

Because the trial court had subject matter jurisdiction over Mosco's petition for judicial review and personal jurisdiction over FSSA, the court improperly dismissed Mosco's petition. We reverse.

Reversed.

FRIEDLANDER, J., and BAILEY, J., concur.

---

[6] To the extent FSSA argued below that Guy, 937 N.E.2d 822, is controlling, we disagree. In Guy, FSSA was served and there was no attempt at serving the Attorney General. 937 N.E.2d at 825. As a result, the court concluded that Evans was not controlling. Because the Attorney General was not served, no one appeared on FSSA's behalf. Here, the Attorney General received a summons and a deputy attorney general entered an appearance in the case. Thus, Guy is distinguishable from this case.