2011 IL App (2d) 101212-U
No. 2-10-1212
Order filed October 26, 2011

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re APPLICATION FOR A TAX DEED	)	Appeal from the Circuit Court
	)	of Kane County.
	)	
	)	No. 10-TX-61
	)	
(Sabre Group, LLC, Petitioner-Appellant v.	)	Honorable
Nicolette A. Hannan, n/k/a Nicolette A.	)	Michael J. Colwell,
Pflueger, Respondent-Appellee).	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Jorgensen and Justice Hudson concurred in the judgment.

ORDER

Held: (1) The trial court's holding that, respondent's evidence, which consisted of testimony of herself and her family members and did not expressly foreclose the possibility that respondent was present at the subject property at the date and time of service, overcame the properly filed return of service which indicated that respondent had been personally served, was against the manifest weight of the evidence.
(2) Petitioner strictly complied with the notice requirements of the Property Tax Code so the trial court erred in denying petitioner's motion for tax deed.

¶ 1 Petitioner, Sabre Group, LLC, appeals the judgment of the circuit court of Kane County, granting the motion to quash petition for tax deed of respondent, Nicolette A. Hannan n/k/a Nicolette A. Pflueger, and denying its petition for a tax deed. Petitioner contends that the trial court erred by finding that it had not effected personal service of the take notice on respondent despite the affidavit

of personal service filed by the deputy sheriff in charge of service for this matter and the lack of independent corroborating evidence presented by respondent. We reverse and remand.

¶ 2 Respondent and Ross Pflueger were the owners of record for the subject property located on Buckeye Street in Elgin. The property taxes for the 2006 tax year for the subject property became delinquent, and, on October 29, 2007, the subject property's delinquent 2006 property taxes were sold to petitioner at the Kane County annual tax sale. After the sale, petitioner continued to pay the property taxes as they came due. Petitioner also extended the final redemption date for the subject property to August 31, 2010.

¶ 3 In undertaking the research to identify persons entitled to notice of the tax sale, petitioner ordered a title search and searched the records of the Kane County assessor, recorder of deeds, and clerk of the circuit court. Petitioner also sent someone to the property to confirm that it was occupied. Petitioner prepared an internal report, dated December 29, 2009, based on its research.

¶ 4 The report stated that property taxes for the subject property were last assessed against respondent and Ross Pflueger, who were also the record owners. The report noted that there was an October 31, 2008, mortgage on the subject property held by National City Bank. The report also listed respondent and Pflueger as the residents of the property based on phone book records.

¶ 5 On April 28, 2010, petitioner issued its take notices. The notices were sent to the Kane County clerk, National City Bank, to respondent and Pflueger at the property's address, and to the "Occupant" of the property at the property's address. The take notices were mailed by the circuit clerk the next day via certified mail, return receipt requested. All of the notices were accepted and the cards returned, except respondent's, which was unclaimed and returned as undeliverable. As well, petitioner had the take notices personally served on the same parties via the county sheriff. The bank and the county clerk were successfully served. Jose Gomez, the deputy sheriff responsible

for service of process, indicated that he had personally served respondent and Pflueger. Gomez averred that, on May 19, 2010, he personally served respondent and Pflueger in the affidavit of service, which contained both physical descriptions of the recipients as well as their dates of birth. Petitioner also published the take notice in a local paper.

¶ 6 On April 20, 2010, petitioner filed its petition for tax deed to the subject property. As a result, the matter was scheduled for an August 10, 2010, case management hearing, followed by a September 8, 2010, hearing in which a final order on the petition for tax deed would be issued. Neither respondent, Pflueger, nor anyone else redeemed the taxes before the August 31, 2010, deadline.

¶ 7 According to petitioner, on September 7, 2008, respondent contacted Kenneth Rochman, an agent of petitioner, who, in conversation with respondent, told her that she had every right to attend the scheduled September 8, 2010, hearing. Petitioner states, however, that Rochman did not at any time provide respondent with any advice about the proceedings or the possibility of redeeming the taxes. On the other hand, respondent, in motions before the trial court, alleged that Rochman told her to request a continuance for the purpose of redeeming the delinquent taxes. Petitioner argumentatively embellishes its statement of facts,[1] claiming that respondent's version of the conversation regarding redemption after the expiration of the redemption period was "an impossibility pursuant to the Property Tax Code well-known in the tax buying community."

¶ 8 At the September 8, 2010, hearing, petitioner's attorney requested a continuance to September 20. Petitioner states that its attorney was present only to request a continuance and she

[1]We do not consider improper argument in the statement of facts. See Ill. S. Ct. R. 341(h)(6) (eff. July 1, 2008).

never indicated to respondent that the continuance was for the purpose of allowing redemption. Petitioner further denies that its attorney provided any advice to respondent about the proceeding. Respondent also attended and requested time in which to redeem the delinquent taxes. In affidavits filed in the trial court, respondent averred that "she was advised by [the trial court] to bring a Redemption Receipt to the next Court hearing on September 20, 2010." The trial court recalled their exchange at the September 8 hearing:

> "I remember [respondent] being in court. I told her she needed an attorney, and she was before me and did ask for time, and she wanted to pay the taxes, and I said, 'Well, you have a legal issue. You better get some advice.'
>
> So the record is clear—I remember this—she did ask for time, and I said she could have time basically to get some legal advice."

¶ 9 Thereafter, on September 20, 2010, respondent presented a check in the amount of $18,569.43 to the Kane County clerk, seeking to redeem the delinquent taxes on the subject property. The clerk's office accepted the payment and provided respondent with a receipt of redemption. At the September 20 hearing, respondent presented the receipt to the trial court. Petitioner objected to the redemption, arguing that respondent acted to redeem the taxes after the redemption period had expired. The trial court granted petitioner leave to file a motion challenging the redemption and continued the matter to October 5, 2010, for hearing.

¶ 10 Also on September 20, the Kane County clerk returned respondent's redemption payment to Pflueger at the Buckeye Street address. In the letter accompanying the returned payment, the clerk indicated that the redemption check had been accepted in error and "the redemption period for the 2006 taxes [] expired as of August 31, 2010."

¶ 11 On October 5, 2010, respondent's attorney appeared and requested and was granted leave to appear on respondent's behalf. Respondent's attorney was also granted leave to file a motion to quash the petition for tax deed. The trial court set a briefing schedule and ordered that the motion to quash would be heard on October 9.

¶ 12 On October 9, respondent argued that she had not been personally served with the take notice. Pflueger, her husband, testified that, on December 31, 2006, respondent moved out of the subject property and moved into her parents' home on Jaguar Court in Elgin. Pflueger further testified that respondent was not present at the date and time Gomez served the take notices. In addition, Kayla Pflueger, respondent's daughter, Danielle Hannan, her sister, and Robert Hannan, her father, all testified that respondent had moved out of the subject property and was not residing there on May 19, 2010, the date of Gomez's service. Kayla also testified that she had been in school and not at the subject property at the time of the purported service, so respondent would not have had a reason to be there.

¶ 13 Robert and Danielle Hannan also testified about the illnesses in their family. Robert had cancer, Danielle had heart trouble and was awaiting a transplant, and respondent's mother, who had since passed away, had chronic obstructive pulmonary disease. Robert and Danielle specifically recalled May 19 because it was three days before their appointments at the Mayo Clinic. Both testified that respondent was the only person in the family who was driving, and as the family was preparing for its trip to Mayo and attending appointments before their trip, it was unlikely that respondent would have been elsewhere other than the Jaguar Court residence. Neither Robert nor Danielle testified that respondent was actually present at the Jaguar Court house or with them at the time of the purported service by Gomez.

¶ 14 Respondent testified that she had not been personally served. Instead, Pflueger testified that he received the three take notices from Gomez and placed them on his desk in his study and did nothing with them. On September 6, Pflueger mentioned the take notice to respondent and told her about the September 8, 2010, court date. Also on September 6, respondent picked up a copy of the take notice.

¶ 15 Gomez testified that he personally served the take notice to respondent. He testified about his custom in filling out the affidavit, including estimating the age of the recipient for service on a corporation or corporate entity, and obtaining the birth dates of individuals. Gomez testified that he would not have completed and signed the affidavit of service had he not actually effected service on the named individuals. Gomez was unable to remember how many people he served on May 19, 2010. He was also unable to describe anyone he had served on that date. Nevertheless, Gomez maintained that he was confident that he personally served respondent.

¶ 16 The trial court granted respondent's motion to quash. The court emphasized that it was the judge of credibility and, during the hearing, it had the opportunity to observe the method and manner of the testimony of the witnesses and their demeanor. The trial court held that respondent had established by clear and convincing evidence that service was not made upon her. Rather, the court stated that it was clear that Gomez did not serve respondent (despite acknowledging that Gomez appeared to be an honorable person). The trial court also denied petitioner's petition for tax deed. Petitioner timely appeals.

¶ 17 On appeal, petitioner contends that the trial court's determination that respondent clearly and convincingly rebutted petitioner's evidence of personal service was against the manifest weight of the evidence. Likewise, petitioner also contends that the trial court's decision to grant respondent's

motion to quash the petition for tax deed was against the manifest weight of the evidence in light of petitioner's evidence demonstrating full compliance with the Property Tax Code.

¶ 18 Petitioner first challenges the trial court's determination that respondent successfully rebutted its evidence that personal service had been effected upon her. Petitioner argues that the evidence presented by respondent that she was not personally served fell short of the necessary burden of providing clear and convincing evidence to overcome the presumption of service attaching to the deputy's affidavit of service. Relatedly, petitioner also contends that the trial court ignored or gave improperly short shrift to the presumption of service established by the deputy's affidavit of service. As a last measure, petitioner also argues that the Property Tax Code did not require that respondent receive actual personal service. We consider each of the contentions in turn as necessary.

¶ 19 Petitioner's first issue is whether the trial court erred in holding that respondent rebutted the presumption of validity attaching to Gomez's affidavit of personal service. The general rule is that the sheriff's return of service is *prima facie* proof of service, and this will be set aside only if the return is impeached by clear and convincing evidence. *Freund Equipment, Inc. v. Fox*, 301 Ill. App. 3d 163, 166 (1998). Where factual findings must be made by clear and convincing evidence in the trial court, the appellate court employs the manifest-weight-of-the-evidence standard of review despite the elevated burden of proof in the court below. *Roadside Auto Body, Inc. v. Miller*, 285 Ill. App. 3d 105, 113 (1996). The trial court's factual finding under a clear-and-convincing evidentiary burden is against the manifest weight of the evidence " 'where, upon review of all the evidence in the light most favorable to the prevailing party, an opposite conclusion is clearly apparent' or the factual finding is 'palpably erroneous and wholly unwarranted, is clearly the result of passion or prejudice, or appears to be arbitrary and unsubstantiated by the evidence.' " *In re Estate of Cuneo*, 334 Ill. App. 3d 594, 598 (2002), quoting *Joel R. v. Board of Education of Mannheim School*

District 83, 292 Ill. App. 3d 607, 613 (1997). In a nonjury case, the trial court's judgment will be sustained if there is evidence in the record to support it. *Estate of Cuneo*, 334 Ill. App. 3d at 598. Nevertheless, even though we are reviewing the issue under a manifest-weight-of-the-evidence standard, we must keep in mind that we are reviewing the trial court's determination that respondent presented clear and convincing evidence to rebut the presumption of personal service. See *Estate of Cuneo*, 334 Ill. App. 3d at 598 (considering the evidence rebutting the presumption that recorded deeds are valid).

¶ 20 In addition to the foregoing general rules, there are principles applied to the specific issue of challenging a return of service. Courts must indulge every presumption in favor of service. *Freund Equipment*, 301 Ill. App. 3d at 166. A defendant's uncorroborated testimony that he or she did not receive service will be insufficient to overcome the presumption of service. *Freund Equipment*, 301 Ill. App. 3d at 166. Nevertheless, the trial court is in the best position to judge the witnesses' credibility, and we will employ a deferential review of the trial court's determination on service. *Freund Equipment*, 301 Ill. App. 3d at 167.

¶ 21 We further note that, in this case, the trial court was the finder of fact. As such, it was required to consider the credibility of the witnesses and weigh the effect of their testimony. *People v. Bannister*, 236 Ill. 2d 1, 18 (2009). Among the factors the trial court could properly consider was the number of witnesses, but the number of witnesses alone will not determine the outcome. See *Hardware State Bank v. Cotner*, 55 Ill. 2d 240, 252 (1973) ("the number of witnesses alone is not conclusive if the testimony of the lesser number is more convincing"); *In re Estate of Lukas*, 155 Ill. App. 3d 512, 523-24 (1987) (the number of witnesses for each side is a factor to be considered, but it is not determinative). (Of course, these rules suggest the idea that the affidavit of service will give rise to a presumption of proper service that may only be overcome by clear and convincing

evidence, which is not determined solely by the number of witnesses attempting to challenge the service.)

¶ 22 Thus we come to the parties' positions: petitioner relies on the deference due to the trial court as finder of fact in urging affirmance; respondent focuses on the presumption of service and the lack of evidence unconnected with petitioner in urging reversal. We turn to the evidence to determine evaluate the merits of each position.

¶ 23 Gomez's affidavit of service was completed with specificity. Gomez reported that he had personally served respondent, recorded her name, approximate height and weight, and her exact birth date. Gomez testified at trial about his procedure in serving a document, such as a take notice pursuant to section 22-10 of the Property Tax Code (35 ILCS 200/22-15 (West 2010)). Gomez also admitted that he did not have a present memory or serving either respondent or Pflueger on that day. Despite his lack of memory, Gomez testified that he was confident that he had served respondent.

¶ 24 In contrast, respondent testified that she had not received service from Gomez at any time. Her husband and co-owner of the subject property, Pflueger, also testified that respondent did not receive service on the date specified in the affidavit of service. Pflueger also testified that respondent no longer resided at the subject property, noting that she moved to her parents' home on New Year's Eve in 2006. Respondent's other witnesses corroborated that respondent no longer resided at the subject property. They further elaborated that respondent was taking care of her sister (who had been diagnosed with a heart ailment), father (cancer), and mother (chronic obstructive pulmonary disease) at the time of the purported service. In addition to caretaking at the Jaguar Court residence, respondent drove the family members to their appointments. From the change in residence, respondent attempts to infer the likelihood that she was not present at the subject property on the date and time reflected in Gomez's affidavit of service. The family witnesses did not,

however, give express testimony that respondent was with them on the date and time of service. Thus the testimony falls short of being conclusive. Additionally, respondent did not present any documentary evidence, such as receipts or appointment records that would have shown that she was engaged at a location other than the subject property at the time and date of service. This lack of independent corroborative evidence is, in our opinion, key.

¶ 25 It is both longstanding and well established that the uncorroborated testimony of a defendant (or the person on whom the service is to be made) is insufficient to impeach the plaintiff's affidavit of service. See, *e.g.*, *Marnik v. Cusack*, 317 Ill. 362, 364 (1925); *In re Jafree*, 93 Ill. 2d 450, 455 (1982); *Pyle v. Groth*, 15 Ill. App. 2d 361, 366 (1957); *Whitworth v. W.D. Morgan*, 46 Ill. App. 3d 292, 295 (1977); *Four Lakes Management & Development Co. v. Brown*, 129 Ill. App. 3d 680, 683 (1984); *Freund*, 301 Ill. App. 3d at 166; *Pineschi v. Rock River Reclamation District*, 346 Ill. App. 3d 719, 724 (2004). Here, there was no "independent" evidence that respondent was not or could not have been served. For example, while Pflueger testified that respondent was not present when Gomez served him, Pflueger is both respondent's husband, albeit estranged, and, more importantly, co-owner of the subject property. His testimony, then, can hardly be said to be disinterested or independent. Likewise, the testimony of Kayla, respondent's daughter, and Danielle and Robert Hannan, respondent's sister and father, is also not independent, because of the familial relations. Of greater import, though, was the inability of Danielle and Robert to give unequivocal testimony that respondent was present with them on the date and time of the purported service. That they did not do so is a serious deficiency to respondent's proof.

¶ 26 Robert and Danielle testified that the date of service was just three days before they were scheduled to take a trip to the Mayo Clinic. They testified that respondent was busy driving them to their final appointments before the trip to Mayo. While respondent may have been engaged in

driving duties around the date and time of the purported service, neither Robert nor Danielle recalled an appointment that occurred at the time service was purportedly effected. In other words, there was no evidence that made it impossible for respondent to have been both present at the subject property and present as driver to an appointment. In addition to the lack of testimony in that regard, respondent did not present any documentary evidence that would have shown that it was impossible for her to be at the subject property, such as a receipt or an appointment card or the like. Based on these deficiencies, we hold that the trial court's determination, that respondent's evidence clearly and convincingly overcame the presumption of service, was against the manifest weight of the evidence.

¶ 27 In addition, we believe that Gomez's affidavit of service, despite his inability at trial to independently recall the service, is sufficiently reliable and forceful to support the opposite conclusion. Of particular note is the fact that Gomez recorded respondent's birth date. Gomez testified that, with respect to individuals, he records the birth date, while with respect to corporate entities, he estimates the agent's age. We find it quite telling that Gomez recorded respondent's birth date, as that strongly suggests that she gave it to him. (We note that Pflueger did not testify that Gomez asked and he provided respondent's birth date.) We further find that respondent's argument, that the birth date shows that Gomez got his information from an outside source, is unlikely and strained. Indeed, the argument offers nothing more than speculation, and respondent's attorney conceded this at oral argument. The more natural inference from the presence of the birth date is that the process server obtained it from the person served or that person's driver's license rather than he obtained it from some other source. There is no indication in the record that petitioner would have had access to personal information like respondent's birth date so as to be able to provide it to the process server before the process server attempted to serve the notice. For these

reasons, then, we determine that the trial court's holding on this point was against the manifest weight of the evidence.

¶ 28 We note additionally that Gomez's affidavit of service is the type of high-quality evidence that can stand against the testimony of any number of lesser-quality witnesses. See, *e.g.*, *Cotner*, 55 Ill. 2d at 252 ("the number of witnesses alone is not conclusive if the testimony of the lesser number is more convincing"); *Estate of Lukas*, 155 Ill. App. 3d at 523-24 (it is proper to consider the number of witnesses, but that alone is not determinative; the outcome depends upon the credibility and weight assigned). Here, the trial court apparently confused quantity with quality in giving credence to a larger number of interested witnesses who did not testify about respondent's whereabouts at the time and date in question. For this reason too, we determine that the trial court's determination was against the manifest weight of the evidence.

¶ 29 Respondent argues that Robert's testimony corroborated her denial that she received service. Respondent notes that the evidence showed that the family was preparing for a trip to Mayo on May 22, 2010, and that respondent was responsible for driving the family members to appointments around that time. Respondent also notes that Robert and respondent's mother both had appointments at Mayo during the week including May 19, 2010. This actually appears to contradict the earlier testimony that, as of May 19, the family was preparing for a trip on May 22, while Robert testified that he had an appointment with Mayo doctors during the week including May 19. Of course, if the appointment was after May 22, then there is no contradiction, but the formulation of the argument suggests a conflict or confusion between the two statements. Additionally, it is significant that neither Robert nor Danielle testified that a doctor's appointment (or any other appointment) was on an exact date, only in the vicinity of May 19. Thus, the testimony supporting respondent's denial was not straightforward, clear, or unequivocal, but was vague and imprecise. Most problematic, of

course, is the fact that, other than respondent's denial and Pflueger's testimony, there was no disinterested or independent evidence showing either that respondent's presence at the subject property on May 19 at about 10:15 a.m. was an impossibility or that she was not present at the subject property on that date and time.

¶ 30 Respondent argues that Robert and Danielle's testimony was corroborative of her denial that she was served. While this is technically true, the corroboration is not convincing. Robert and Danielle are both family members and, as such, they are not independent or disinterested witnesses. (This is not to say, of course, that the familial relation renders their testimony wholly incredible; rather, by highlighting this relationship, we mean to suggest that their testimony must be carefully scrutinized.) Additionally, Robert and Danielle were unable to provide express testimony that, on May 19, at about 10:15 a.m., respondent was present with them at the Jaguar Court residence. In light of this significant lack, the trial court's apparent acceptance of their testimony versus the affidavit of service was against the manifest weight of the evidence.

¶ 31 Our conclusion is further bolstered by the case law cited above. For example, in *Marnik*, the court first noted that:

> "[t]he stability of judicial proceedings *** requires that the return of an officer, made in the due course of his official duty and under the sanction of his official oath, should not be set aside merely upon the uncorroborated testimony of the person on whom the process has been served, but only upon clear and satisfactory evidence." *Marnik*, 317 Ill. at 364.

Marnik further explained the circumstances of the purported service at issue. The plaintiff in error denied that he had received service. The deputies were unable to recall that they made service on the plaintiff in error. Instead, they relied on their records, which indicated that they served the plaintiff in error. *Marnik*, 317 Ill. at 364-65. The court held that the uncorroborated testimony of

the plaintiff in error did not provide the clear and convincing evidence necessary to impeach the return of service notwithstanding the fact that the deputies who served the summons had no actual recollection of the service and wholly relied on their written records. *Marnik*, 317 Ill. at 365.

¶ 32 Respondent attempts to distinguish *Marnik* by noting that, unlike that case in which only the plaintiff in error offered any testimony denying that service had taken place, respondent presented the corroborating testimony of Pflueger, Kayla, Robert, and Danielle. However, as we have noted above, we find that this corroborating testimony by respondent's family members to be of insufficient value in light of the fact that they did not testify that respondent was with them and not at the subject property at the time and date of the purported service. Accordingly, we reject respondent's contention.

¶ 33 In *In re Jafree*, the court reiterated its position that the uncorroborated testimony of the person to whom the summons was addressed would be insufficient to overcome the presumption of service. *In re Jafree*, 93 Ill. 2d at 455. In that case, the officer serving summons was able to give detailed testimony about the service, including the facts that the respondent was unwilling to receive the summons and attempted to walk away, prompting the officer to place the summons on the respondent's shoulder. The summons fell to the ground as the officer left, and the officer did not know if the respondent retrieved the summons. *In re Jafree*, 93 Ill. 2d at 455. The court compared the affidavit of service and the officer's testimony with the respondent's testimony denying that service had occurred and an affidavit of respondent's client that stated she was with the respondent on the date of service and no one served the respondent with process, finding that the respondent's evidence was insufficient to overcome the proof of service. *In re Jafree*, 93 Ill. 2d at 455. Additionally, the court commented that it was "interesting" that respondent denied that he had

knowledge about the complaint while at the same time the respondent filed a motion to dismiss the complaint. *In re Jafree*, 93 Ill. 2d at 455.

¶ 34 Respondent here does not directly attempt to distinguish this case. We find it instructive because the court rejected an affidavit corroborating the respondent's denial that he received service from a seemingly neutral party, namely the respondent's client. *In re Jafree*, 93 Ill. 2d at 455. However, we doubt that the respondent's client truly can be termed as an independent or disinterested witness. In any event we hold that *In re Jafree* supports our determination here.

¶ 35 *Pyle* next reiterates that the sheriff's return of service is *prima facie* proof of service and can be overcome only by clear and convincing evidence. *Pyle*, 15 Ill. App. 2d at 366. Factually, the case is largely distinguishable from this case, although its analysis of the evidence remains instructive. In *Pyle*, the sheriff's deputies who served the summons testified in detail and with precision about the circumstances under which the served the summons upon the defendant. *Pyle*, 15 Ill. App. 2d at 363-64. The defendant offered the testimony of himself, his wife, and his daughter which flatly denied that the deputies had served the summons as they stated. *Pyle*, 15 Ill. App. 2d at 364-65. The defendant also offered the testimony of three other, non-family witnesses who had appointments with the defendant the morning of service. The testimony of these witness contradicted the testimony of the defendant and his family and tied in with the testimony of the deputies. *Pyle*, 15 Ill. App. 2d at 365-66. The court noted the discrepancy between the defendant's witnesses and further noted that the defendant and his wife and daughter "were all interested parties." *Pyle*, 15 Ill. App. 2d at 367. The court held that the fact of the discrepancy between the defendant's witnesses undercut their testimony (as well, presumably, as the fact that the defendant and his family were not disinterested parties). *Pyle*, 15 Ill. App. 2d at 367-68. The court held that the defendant's evidence "did not meet the burden imposed upon him to impeach the sheriff's return

or to show by clear and convincing evidence that the summons was not served." *Pyle*, 15 Ill. App. 2d at 368.

¶ 36 Respondent attempts to distinguish *Pyle* by noting that, here, unlike in *Pyle*, there was no testimony that she was at the subject property on the date of service, whereas in *Pyle*, the defendant admitted he was at his property, but had left for meetings before the deputies arrived. See *Pyle*, 15 Ill. App. 2d at 364-65. Respondent also argues that petitioner "fabricated" the contention that Gomez "unequivocally testified that he personally served" respondent, and noted that Gomez admitted that he had no present recollection of anyone he served on May 19. These statements, while true (at least when respondent's embellishments are taken out), are insufficient to successfully distinguish *Pyle*. Regarding respondent's presence at the subject property, while she and Pflueger testified that she was not present, the return of service indicated that Gomez personally served respondent and listed her exact date of birth. In contrast, respondent did not present any witnesses who were not intimately connected to respondent, and more importantly, did not present any express testimony (other than respondent's and Pflueger's) that she was not present at the subject property at the date and time of the purported service. We note that this lack of testimony is fairly analogous to the testimony of the defendant's non-family members, who contradicted the defendant's timing. Likewise here, the fact that Robert and Danielle did not testify that respondent was with them on May 19, 2010, at about 10:15 a.m. does not serve to establish that respondent could not have been at the subject property and undercuts hers and Pflueger's testimony with its evasiveness on that point. While Robert and Danielle are not directly comparable to the defendant's disinterested witnesses in *Pyle*, their evasive testimony here has a similar effect on respondent's evidence as the disinterested witnesses in *Pyle*.

¶ 37 Respondent additionally charges that petitioner attempts to read *Pyle* too broadly and to create the holding that testimony of any number of family members will always be insufficient to overcome the presumption of proper service attaching to the sheriff's affidavit of service. We agree with respondent that such a rule does not arise from *Pyle*. Nevertheless, as we have noted above, *Pyle* carefully considered the testimony of the defendant's witnesses and noted that the testimony of the non-family members contradicted the family's testimony. Here, there are no non-family members who testified for respondent. Nevertheless, the testimony of Robert and Danielle was weak and avoided the subject at issue, namely, respondent's whereabouts at the date and time of the purported service, and this weakness serves to further undercut the testimony given by respondent and Pflueger, themselves directly interested parties in this matter. Thus, while we agree with much of respondent's analysis of *Pyle*, we do not believe that *Pyle* is against petitioner's position or is otherwise inapposite to our analysis above. Accordingly, we do not accept respondent's position regarding *Pyle*.

¶ 38 Next, the court in *Whitworth* once again invoked the rule that the sheriff's affidavit of service will not be set aside absent the production of clear and satisfying evidence. *Whitworth*, 46 Ill. App. 3d at 295. The court also reiterated the rule that the uncorroborated testimony of the person served is insufficient. *Whitworth*, 46 Ill. App. 3d at 295. In that case, the plaintiff presented the testimony of the sheriff and one of the sheriff's employees. They described how service was effected, because the deputy who had actually served the summons had died before trial. *Whitworth*, 46 Ill. App. 3d at 294. The testimony revealed that the serving deputy did not sign the return of service, but instead filled out a card, letting the office employee sign the return. *Whitworth*, 46 Ill. App. 3d at 294. The court did not describe the defendant's evidence beyond noting that the defendant denied that he had been served and his wife and son's testimony corroborated the defendant's testimony to their own

knowledge. *Whitworth*, 46 Ill. App. 3d at 294. The court held that the defendant's testimony was "self-serving" and the testimony of the defendant's wife and son fell "short of the clear and satisfactory evidence needed to rebut the presumption of service." *Whitworth*, 46 Ill. App. 3d at 295.

¶ 39 Respondent asserts that petitioner uses *Whitworth* to support the proposition that her family's testimony "is insufficient to impeach the Sheriff's return." Respondent notes that the court did not give any details of the testimony on behalf of the defendant and noted only that the defendant's testimony was self-serving and that of his wife and son fell short of the clear and convincing evidence needed to overcome the return of service. Respondent contrasts the evidence in *Whitworth* with her evidence in this case, which she believes corroborates her denial of service. We disagree. We have analyzed respondent's evidence above and determined that the trial court's determination was against the manifest weight of the evidence. Nothing in *Whitworth* compels a different conclusion. Further, *Whitworth* squarely supports the rule that the return of service will be overcome only through clear and convincing evidence, which, apparently was not presented in that case. *Whitworth*, 46 Ill. App. 3d at 295. Thus, we reject respondent's contention.

¶ 40 *Four Lakes* also states the general rule that the affidavit of service constitutes *prima facie* evidence that process was properly served upon the recipient, and it should not be set aside unless the return of service is impeached by clear and convincing evidence. *Four Lakes*, 129 Ill. App. 3d at 683. The court also reiterated the rule that the uncorroborated evidence produced by the recipient denying service will be insufficient to overcome the return of service. *Four Lakes*, 129 Ill. App. 3d at 683. In that case, only the defendant provided any evidence denying service. The defendant averred and testified that she had moved from the apartment at which the service purportedly occurred three weeks before the date indicated on the return, and that she never returned to the apartment. However, she did not present any other evidence, for example from her husband or uncle

with whom she lived after vacating the apartment. *Four Lakes*, 129 Ill. App. 3d at 683-84. The court held that the defendant's affidavit alone was insufficient to overcome the return of service. *Four Lakes*, 129 Ill. App. 3d at 684.

¶ 41 Once again, respondent seeks to distinguish *Four Lakes* on the grounds that, while that case had only the uncorroborated testimony of the defendant, in our case, respondent's testimony was corroborated by the testimony of Pflueger, Kayla, Robert, and Danielle. While we acknowledge that their testimony is technically corroborating, we disagree that it constitutes such clear and convincing evidence as to overcome the presumption of personal service arising from the affidavit of service for the reasons expressed above. Likewise, *Four Lakes* does not compel a different result, but it supports our decision, if only in the general framework employed to analyze the issue. Accordingly, we reject respondent's attempt to distinguish *Four Lakes* as well as her argument that the corroborative testimony of her family constituted clear and convincing evidence demonstrating that respondent was not personally served with the take notice.

¶ 42 We also relied on *Freund Equipment* for the general rule as well as the rule that the uncorroborated testimony of the defendant cannot overcome the return of service. *Freund Equipment*, 301 Ill. App. 3d at 166. In that case, the defendant provided testimony denying service, was evasive, and his roommate's testimony was also vague and inconclusive. In contrast, the deputy provided clear and consistent testimony about his efforts to effect service. *Freund Equipment*, 301 Ill. App. 3d at 167. We find *Freund Equipment* to be particularly instructive. There, the corroborating testimony was weak and evasive; likewise here, Robert and Danielle's corroborating testimony avoided the actual date and time of the purported service, thereby significantly weakening its effect. Further, while the court in *Freund Equipment* appeared satisfied to consider the defendant's roommate to be a disinterested witness, we cannot say that either Kayla, Robert, or

Danielle were disinterested witnesses here. Thus, we find that *Freund Equipment* squarely supports our determination above.

¶ 43 Respondent seeks to distinguish *Freund Equipment* because in that case, the deputy serving process had a clear recollection of the service while the defendant's witnesses were evasive, vague, and inconclusive. Respondent asserts that the situation was reversed in this case, with Gomez lacking any recall of the service of process, while respondent's witnesses all provided clear and consistent testimony. While it is true that Gomez was unable to recall the details of service in this matter, we do not believe that the testimony of respondent's family was sufficient to clearly and convincingly overcome the return of service because, particularly, Robert and Danielle were unable to expressly testify that respondent was with them at the time and date of service in this matter. Instead, they avoided making that specific testimony and only inferred that respondent was likely present based on the fact that they were ill and respondent was responsible for their care. This is contrasted with the clarity of the return of service that included identifying information about respondent, including her birth date. Accordingly, we reject respondent's attempt to distinguish *Freund Equipment*.

¶ 44 We come at last to *Pineschi*, in which the court again adhered to the proposition that the defendant's testimony that he or she did not receive service, standing alone, is insufficient to overcome the return of service. *Pineschi*, 346 Ill. App. 3d at 724. In *Pineschi*, the plaintiff served a water reclamation district. The person who ordinarily received process was listed on the affidavit of service as being the person personally served, but she testified that she did not remember receiving process on the date and time listed, and she testified that she had not posted the summons to the claims company that handled the district's legal issues. *Pineschi*, 346 Ill. App. 3d at 721. The court held that agent's denial of service, namely, that she did not remember being served, was

"hardly compelling." *Pineschi,* 346 Ill. App. 3d at 724. The court also held that the district had failed to rebut the return of service and failed to present clear and convincing evidence it had not been served. *Pineschi*, 346 Ill. App. 3d at 724.

¶ 45 Respondent points out many distinguishing factors. First, in *Pineschi*, the defendant water reclamation district did not actually claim that it had not been served, but only argued, in attempting to open a default judgment against it, that it was unclear whether it had been properly served, and that doubt militated in favor of vacating the default judgment. *Pineschi*, 346 Ill. App. 3d at 723. Second, of course, is the fact that service was on a corporate entity through an agent. Last, respondent notes that the agent only did not remember being served, while here, respondent and Pflueger's testimony that respondent was not served is clear and convincing and is corroborated by the testimony of her family. As to the third point, we disagree, as we have set forth above. Respondent and Pflueger are interested parties, and the testimony of Robert and Danielle shied away from an express statement that respondent was with them at the date and time of the purported service. Accordingly we do not accept respondent's argument. *Pineschi* still supports the rule that a party's denial that it received service is insufficient to overcome a proper return of service, albeit not as strongly as some of the other cases cited above.

¶ 46 The law in Illinois is clear: the return of service is *prima facie* proof that the defendant was properly served, and the defendant must present clear and convincing evidence that he or she was not served to overcome the return of service. While there are no limitations on what may constitute the clear and convincing evidence, courts have held uniformly that the defendant's uncorroborated denial is insufficient. Extrapolating, even if there is corroboration (at least in a technical sense), it must be carefully scrutinized as well in order to determine if it constitutes the necessary clear and convincing evidence. Here, while the testimony of Pflueger, Kayla, Robert, and Danielle was

technically corroborating, it was itself fraught with weakness. For instance, all of the witnesses were interested parties owing to their status as family members of respondent or co-owners of the subject property. Additionally, Robert and Danielle did not give express testimony that respondent was with them at the date and time of the purported service, relying instead on general testimony that respondent was their caretaker and busy taking them to unidentified appointments. Last, we note that respondent did not present documentary evidence, such as receipts or appointments, to show that she was elsewhere at the date and time of the purported service. Accordingly, we hold that, in light of these failings, the trial court's determination that respondent had presented clear and convincing evidence she had not been personally served was itself against the manifest weight of the evidence. Based on this conclusion, we need not further consider petitioner's contentions of error regarding the propriety of service issue. Respondent, however, raises several other arguments on the point that we will now proceed to address.

¶ 47 Respondent argues that the trial court's determination was not against the manifest weight of the evidence. Respondent urges that we defer to the trial court's better position from which to judge the credibility of the witnesses and to assign their testimony the appropriate weight. Respondent argues that, in this case, the trial court adjudged the credibility of the witnesses in her favor, and recites the same arguments we have rejected above. Respondent also emphasizes the deference due to the trial court's factual determination, citing, among others, *Freund Equipment*. We acknowledge that the trial court was sitting as the finder of fact and its superior position for observing the testimony of the witnesses and their demeanor and weighing their credibility. Indeed, we incorporated that deference into our review, expressly proceeding under the manifest-weight-of-the-evidence standard of review in considering the witnesses and evidence presented at the hearing.

Although our outcome differs from that which respondent wishes, we nevertheless have performed our review according to respondent's authority and the dictates of applicable authority.

¶ 48 Respondent cites *Ford v. Continental Illinois National Bank & Trust Co.*, 18 Ill. App. 3d 166 (1974), and *Schulenberg v. Signatrol, Inc.*, 37 Ill. 2d 352 (1967), to support her contention that the reviewing court owes deference to a trial court's factual determination and cannot substitute its judgment for that of the trial court. In *Schulenberg*, the supreme court stated, in the context of reviewing the trial court's factual determination as to how long it would take to reproduce an electronic device by lawful means, that it would not disturb the trial court's ruling unless it was against the manifest weight of the evidence. *Schulenberg*, 37 Ill. 2d at 356. As we have noted above, we followed the manifest-weight-of-the-evidence standard of review in reaching our conclusion. Additionally, we note that *Schulenberg* involves factual findings made in an injunction, and does not contain any issue questioning the propriety of service. To the extent that it is applicable to this case, we have followed *Schulenberg*; otherwise, it has little bearing upon our analysis and appears to have been cited only for its boilerplate.

¶ 49 *Ford*, on the other hand, presents both factual and analytical similarities to this case. In *Ford*, one of the defendants moved to vacate a default judgment against him, alleging that he had not been served. The trial court granted the motion. *Ford*, 18 Ill. App. 3d at 169. The defendant testified that he had not received service; his mother, with whom he resided, was on vacation in California at the time of service, and he was sure about his absence from his residence from 8 a.m. to 10 p.m. on the date of service because he was at the Northwestern University library studying for the upcoming bar exam. Additionally, the defendant's lawyer also testified that he had neither received process on his client's behalf nor been advised that his client was now being named as an individual defendant in addition to the company of which his client was president. *Ford*, 18 Ill. App.

3d at 169. The court determined that this testimony was sufficient to determine that the defendant had shown by clear and convincing evidence that he had not received service. *Ford*, 18 Ill. App. 3d at 170.

¶ 50 *Ford* appears to be a case that violates the longstanding rule that a defendant's uncorroborated testimony will be insufficient to overcome the return of service. We note, however, that the court did not recite this rule, but instead cited only that the return of service was *prima facie* proof of service that can be overcome only by clear and convincing evidence. *Ford*, 18 Ill. App. 3d at 170. In addition, there was also testimony by the defendant's lawyer that he had not been advised of an amended complaint naming the defendant as a party individually as well as the defendant's denial of service. The lawyer's testimony corroborates the defendant's because it is reasonable to infer that, had the defendant received service, he would have notified his lawyer. Additionally, the plaintiff should have sent a copy of the amended complaint to the defendant's lawyer because he was also the attorney for the defendant's company, which was already a party-defendant in the matter. That the lawyer did not receive the amended complaint lends credence to the defendant's denial of service because plaintiff was not fulfilling its obligations in the case. Further, it is also reasonable to infer that the lawyer, as an officer of the court, was not considered to be an interested party in the same way that Pflueger and respondent's family are interested parties. Thus, while defendant was the only witness to testify, we cannot say that his testimony was uncorroborated. In addition, based on the evidence set forth, the court was apparently satisfied with the lawyer's corroboration and concluded that the trial court had properly accepted the defendant's evidence. By contrast, here, there were no witnesses who were not closely associated with respondent and there was testimony that danced around the central point of respondent's case, namely, that she was not there at the

subject property at the time and date of the purported service. In light of these differences, we find that *Ford* is distinguishable and does not compel a different result.

¶ 51 We next turn to petitioner's second issue on appeal. Petitioner contends that the trial court erred in not granting its petition for tax deed because it fulfilled all of the requirements for such a deed in the Property Tax Code. Because we could sustain the trial court's judgment on any ground appearing in the record, our conclusion above, that the trial court's determination that respondent was not served was against the manifest weight of the evidence, does not dispose of this issue. Accordingly we will address it.

¶ 52 Petitioner claims that it fully complied with the requirements of the Property Tax Code in sending the notices to respondent and all other interested parties and owners of the subject property. Respondent disagrees on two grounds. First respondent argues that she was not property served, so petitioner failed to comply in that respect. We have already resolved this issue above, determining that the trial court's determination that respondent was not served was against the manifest weight of the evidence. We note, however, that respondent raises a curious argument which we are compelled to address.

¶ 53 The Property Tax Code provides, pertinently, that

> "If any owner or party interested, upon diligent inquiry and effort cannot be found or served with notice in the county as provided in this Section, and the person in actual occupancy and possession is tenant to, or in possession under the owners or the parties interested in the property, then service of notice upon the tenant, occupant or person in possession shall be deemed service upon the owners or parties interested." 35 ILCS 200/22-15 (West 2008).

Petitioner suggests that, under the above-quoted provision, Pflueger is akin to a tenant in possession and that successful service upon him should be deemed service upon the owner, namely, respondent. Respondent responds to this, arguing that, because Pflueger is an owner, he cannot be in possession under the owners. This seems to us to be a strained reading of the above-quoted passage. There is no argument that Pflueger and respondent are both co-owners of the subject property. There is also no argument that Pflueger resides at the property, while respondent does not. Thus, it appears that Pflueger is "the person in actual occupancy and possession" and his possession is upon the agreement of the co-owners. This would seem to conform to the requirements of the passage and to contradict respondent's contention. Further it would seem to be anomalous that the service on one co-owner who is in occupancy of the property could not be considered to be service on the other owners or parties in interest. We also note, however, that this argument was not presented to the trial court and the parties did not address it below. Nevertheless, based on our reading of the Property Tax Code, it appears that the service upon Pflueger as occupant should "be deemed service upon the owners or parties interested" in the subject property.

¶ 54 Respondent reiterates her argument that petitioner was not diligent in locating the owners (despite the fact that petitioner claimed, and we agree, that it achieved personal service on respondent). Respondent appears to argue that, notwithstanding the service upon her, because petitioner did not send a notice by certified mail, return receipt requested, to her Jaguar Court residence, it cannot claim strict compliance with the Property Tax Code because it did not, in fact, locate all of the owners. We see at least two flaws with this argument. First, and most importantly, petitioner personally served respondent at her last known address, at least according to the public records. Even if petitioner's search was not as in-depth as respondent believes it should have been, it succeeded. Second, while respondent believes that petitioner did not do enough to locate her

address at the Jaguar Court residence, we cannot see what more petitioner could have done. Petitioner could not have obtained copies of the bills and other personal communications that respondent used to demonstrate that she had left the subject property. The public records all indicated that respondent continued to reside at the subject property. Even an internet search of telephone book information showed respondent's address to be the subject property. Respondent did not produce a phone directory or any other publicly accessible document that showed her address to be the Jaguar Court residence. Likewise, there was no evidence presented that respondent officially changed her address with the bank holding the mortgage or with any taxing bodies and the like from which petitioner might have garnered her current address. It appears then, that petitioner undertook reasonable measures to learn respondent's whereabouts, and respondent's contention fails.

¶ 55 Respondent's remaining arguments on this issue deal with petitioner's supposed failure to diligently attempt to serve the required notices on her. As we have already decided this issue above, we need not further consider respondent's contention on this issue.

¶ 56 Respondent also contends that petitioner did not strictly comply with the requirements of the Property Tax Code because the take notice pursuant to section 22-25 of the Property Tax Code (35 ILCS 200/22-25 (West 2008)) was not signed by the Kane County circuit court clerk. Respondent argues that strict compliance with the provisions of the Property Tax Code are required for a tax purchaser to receive a tax deed. Respondent concludes that, because the take notice was unsigned by the court clerk, petitioner did not strictly comply with the section 22-25 take notice. We disagree.

¶ 57 Initially, we note that respondent is correct in insisting upon strict compliance. For example, in *In re Application of the County Collector*, 295 Ill. App. 3d 703, 704 (1998) (*Midwest*), the tax purchaser left off the prefix to the certificate of purchase when it filled out the take notice. The court

held that this omission invalidated its tax deed. *Midwest*, 295 Ill. App. 3d at 708-09. The court acknowledged that its decision could be considered to be a "rigid and legalistic application of the strict compliance language from section 22-40" [(35 ILCS 200/22-40 (West 2008))], but justified its decision by noting that "the primary purpose of the tax sales provisions of the Property Tax Code is to coerce tax delinquent property owners to pay their taxes, not to assist tax petitioners in depriving the true owners of their property." *Midwest*, 295 Ill. App. 3d at 710. The court concluded:

> "Moreover, we view the statute's strict compliance language as a bulwark. By opening the dike to permit any omission—however minute—of statutorily required information, we may unintentionally encourage a flood of litigants seeking case-by-case determinations of the strict compliance boundaries. We find that by failing to include the complete certificate number on the notice forms it sent to respondent Anderson, Midwest failed to comply with the notice requirements of the Property Tax Code." *Midwest*, 295 Ill. App. 3d at 710-11.

Thus, we agree with respondent that strict compliance is required.

¶ 58 Section 22-25 states that:

> "[t]he form of notice to be mailed by the owners clerk shall be identical in form to that provided by Section 22-10 for service upon owners residing upon the property sold, except that it shall bear the signature of the clerk and shall designate the parties to whom it is to be mailed." 35 ILCS 200/22-25 (West 2008).

Thus, the section 22-25 take notice to be sent to the owners must be signed by the clerk.

¶ 59 Our review of the record, however, belies respondent's contention. The take notice which the clerk mailed to the parties does, in fact, bear the clerk's signature and otherwise conforms to the requirements of section 22-25. The copies of the take notice which do not bear the clerk's signature appear to be attached to pleadings submitted by petitioner. It is these copies appearing in the

pleadings to which respondent appears to direct our attention. As they are copies attached to petitioner's pleadings by petitioner, and as the record shows that the clerk sent the signed take notices to the parties, we reject respondent's contention. Thus, we hold that, contrary to respondent's argument, petitioner caused to be sent take notices that were properly signed by the clerk.

¶ 60 Respondent points to no other matters in which she claims that petitioner failed to comply with the requirements of the Property Tax Code. Because we have determined that the issues about strict compliance with the Property Tax Code raised by respondent are without merit, we conclude that petitioner has sustained its contention that it complied with the dictates of the Property Tax Code and was entitled to receive a tax deed. Accordingly, we hold that the trial court erred in denying petitioner's petition for tax deed, and we reverse the trial court's judgment and remand the cause with the direction that the trial court issue petitioner a tax deed for the subject property.

¶ 61 For the foregoing reasons, the judgment of the circuit court of Kane County is reversed and the cause is remanded for further proceedings consistent with this order.

¶ 62 Reversed and remanded with directions.