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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

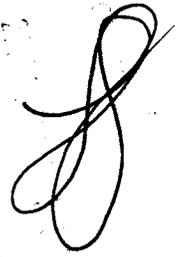
MICHAEL J. ROWSE AND JANE DOE ROWSE, ET UX,

Respondents

v.

DEBRA CHEESMAN AND RICHARD CHEESMAN, ET UX, ET AL.

Appellants



BRIEF OF APPELLANTS

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ORIGINAL

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A. INTRODUCTION

This case involves substituted service on defendant, Michael J. Rowse, pursuant to RCW 4.28.080(15), by leaving a copy of the Summons & Complaint with Michael J. Rowse's brother, David Rowse.

Debra Cheesman, Richard Cheesman, Debra Cheesman and Richard Cheesman as Co-Guardians of Alisson Cheesman, and Ashley Hanks (Cheesman) filed a lawsuit against defendant Michael J. Rowse on December 13, 2006 incident to Mr. Rowse driving his vehicle into the Cheesman vehicle injuring them on December 20, 2003. At the time of the collision Michael Rowse resided at 22611 78th Street NE in Granite Falls, Washington, with his wife, Sheree. In 2005, due to an apparent pending foreclosure, Michael's wife, Sheree, moved to live with her son in Monroe, and then left the State for Arkansas. Michael moved in with his father, Anthony Rowse, at his father's home in Oak Harbor. By November 2006 Anthony Rowse had become ill and was relocated to a care facility. On December 1, 2006 a family change of address order was filed with the Oak Harbor Post Office providing a new street address for Anthony Rowse and Michael Rowse of 9909 24th Drive SE, Everett, Washington 98208. That address was the address listed by the post office as Michael Rowse's address as of January 29, 2007.

By late 2006, Michael Rowse was employed as a long haul truck driver, driving across the nation. While Michael had a Washington State Driver's License during this period of time, including 2007, Michael could not maintain a commercial driver's license in the State of Washington because of issues related to delinquent payment of child support. However, he was able to maintain a commercial driver's license in the State of Arkansas and used that driver's license to drive his truck.

While Michael Rowse lived, ate and slept in his truck, all but approximately two nights a month, his wife lived full time in the State of Arkansas at a few different addresses.

On both February 14, 2007 and March 7, 2007, service of the Summons & Complaint (CP 284-294), and Amended Summons & Complaint (CP 273-281) was delivered to 9909 24th Drive SE, Everett, Washington for service on Michael Rowse. According to the process server, David Rowse accepted the papers and indicated that Michael lived at the residence but was not home at that time.

On April 3, 2007, Michael Rowse appeared in this action through counsel and a Notice of Appearance was filed on that date. (CP 266-268)

Defendant Michael Rowse, through counsel, filed an Answer and Affirmative Defenses on July 18, 2007, claiming he had not been served

process. Michael Rowse thereafter moved for summary judgment on the ground he had not been served with process.

The Court denied the motion on September 29, 2009 (CP 63-64), and thereafter an evidentiary hearing regarding the issue of substituted service occurred on April 29, 2010.¹ The trial court granted defendants' Motion for Summary Judgment finding there was no effective substituted service and dismissed with prejudice plaintiffs' Complaint as to all plaintiffs except for the claims of the minor, Alisson Cheesman. This timely appeal followed.

The Court erred by finding that substitute service was not effected on Michael Rowse by delivery of the Summons and Complaint, and Amended Summons and Complaint on his brother, David Rowse in Everett. The Affidavits of Service signed by the Process Server showing service on David Rowse are presumptively correct and are in proper form, and shift the burden to Michael Rowse to present clear and convincing evidence that 9909 24th Drive SE, Everett, Washington 98208 was not one of his centers of domestic activity when he lived in his truck all but approximately two nights a month; made deliveries in the State of Washington; had two children living in Everett; he received mail at 9909

¹ Judge Michael Downes heard the initial Motion for Summary Judgment and denied it. Judge Thomas Wynne presided over the evidentiary hearing and entered the Findings, Conclusions and Order appealed from. (CP 1-5).

24th Drive SE, Everett, Washington; he maintained his Washington Driver's License; and he had at least one item stored over a period of time at 9909 24th Drive SE, Everett, Washington. Accordingly, this Court should reverse.

B. ASSIGNMENTS OF ERROR

(1) Assignment of Error

1. The trial court erred in making Finding of Fact No. 10.
2. The trial court erred in making Finding of Fact No. 12.
3. The trial court erred in making Finding of Fact No. 18.
4. The trial court erred in entering Conclusion of Law No. 1.
5. The trial court erred in entering Conclusion of Law No. 2.
6. The trial court erred in entering Conclusion of Law No. 3.
7. The trial court erred in entering Conclusion of Law No. 4.
8. The trial court erred in entering its Order of September 27, 2010 except as such Order relates to Alisson Cheesman.

(2) Issues Pertaining to Assignments of Error

1. Did the trial court err in finding that David Rowse's place of abode, was in the State of Arkansas and that he did not have two places of usual abode where as of February and March 2007 he: possessed a Washington Driver's License that was issued in November 2005; the postal service had a recorded change of address for him of 9909 24th Drive SE, Everett, Washington, his brother's house; he drove a long haul truck and continuously lived in his truck except for approximately two nights per month; he obtained a commercial driver's license in the State of Arkansas because he could not maintain one in the State of Washington because of issues of alleged delinquent child support; and there was substantial evidence that Michael's brother, David, stated that Michael lived at his residence in Everett, but was away driving his truck?

(Assignments of Error Nos. 1, 2, 3, 4, 5)

2. Did the trial court err in entry of the Judgment/Order that appropriate substitute service was not effected on Michael Rowse by delivering the Summons & Complaint on his brother, David Rowse, at the Everett address? (Assignments of Error No. 6,8).

3. Did the trial court err in failing to make findings regarding, and accord the Affidavits of Service of the Process Server,

Darrell Bennett, sufficient weight so as to establish a prima facie showing of appropriate substitute service? (Assignments of Error Nos. 6,8).

4. Did Michael Rowse show by clear and convincing evidence that he did not have more than one center of domestic activity, which included the Everett address, and that he did not have actual knowledge of, and personally receive the Summons & Complaint within the time prescribed by law? (Assignments of Error Nos. 5, 6, 7, 8).

C. STATEMENT OF THE CASE

The collision giving rise to this litigation occurred on December 13, 2003, when Michael Rowse drove his vehicle into that of the Cheesman's, injuring all in the Cheesman vehicle. Immediately after the collision Michael Rowse attempted to flee the scene in his vehicle:

Michael Rowse, at the time of the accident, tried to get away... (He) sped off backwards after hitting our vehicle and hit the telephone pole. To stop him from fleeing the scene, I had to run after him and stand in front of his truck because his truck was up against the pole. Dec. of R. Cheesman, CP 174-175

At the time of this motor vehicle collision, Michael Rowse lived in Granite Falls with his wife, Sheree. RP 32²

Michael Rowse lost his Granite Falls residence to foreclosure and his wife, Sheree, moved to Monroe, and then left for Arkansas. RP 32.

² RP refers to the Verbatim Report of Proceedings. The number following the "RP" designation represents the page number of the Verbatim Report of Proceedings.

Michael moved in with his father in Oak Harbor living there at least long enough so as to have issued a new driver's license to him in November 2005. RP 33. The Oak Harbor address of Anthony Rowse, where Michael lived, is the same address shown on Michael's Washington State Driver's License issued in November 2005. RP 43, Ex. 13.

On December 1, 2006 a Family Change of Address Form for Anthony Rowse, Michael's father, and Michael Rowse, was filed with the post office changing their address to 9909 24th Drive SE, Everett.

At trial David Rowse testified he prepared/filed this change of address using a Power of Attorney, but at deposition on April 14, 2009 he testified he did not know how the address change occurred, he had no idea, but it wasn't him. RP 71-74. David Rowse did admit that his father could not have effected the change of address because he was not in a physical condition to do so RP 71. While Michael Rowse also denied effecting the change of address RP 71, other than his father Anthony Rowse, and his brother, David Rowse, he would have been the only one in a position to do so. Michael did indicate that after he left Washington he contacted his father almost daily RP 48.

After the change of address, mail for Michael Rowse commenced to appear at the Everett address of his brother, and as of the date of the evidentiary hearing, April 29, 2010, a reverse trace to determine the

address of Michael Rowse led to the same Everett address, 9909 24th Drive SE, Everett, Washington. RP 11, 12, 67; RP 13 Ex 5.

While Michael Rowse testified he lived in Arkansas as of 2007 when the Summons and Complaint were delivered to David Rowse, he admitted that as of January of 2007:

A. I was driving semi truck. I was living basically in the ... semi truck. I never get to go home driving that thing. RP. 37.

While Michael Rowse could remember the address of his wife's grandmother's house, which he contended he and his wife were allowed to live in on first going to Arkansas, he could not recall his current address in Arkansas.

Q. And where is your current address, Michael?

A. It is in Arkansas.

Q. What is the street address?

A. It is four digits, Madison, another four digits Wesley, Arkansas 7277...

Q. Is it on your driver's license?

A. No, it's got the other address at her grandmother's house, which is I can give you that too, I don't know.

RP 28.

During the years 2005-2007, Michael Rowse's two children were living in Everett at their mother's house. RP 40. That house is located at

5430 128th Place SE in Everett, 98208. Michael Rowse made at least two trips to the State of Washington and maintained a local 425 area code telephone number. RP 50, 40. There is no evidence that Michael Rowse ever submitted any other change of address with any post office in the State of Washington directing mail to Arkansas.

While Michael denied ever providing any third party his father's address in Oak Harbor as his address, and denied he ever used it as his address, his most recent driver's license issued in the State of Washington in November 2005 contains that address as his. RP 41, 42, Ex 13.

Michael Rowse was motivated to represent to the authorities in the State of Arkansas that he was a resident of Arkansas so he could obtain a commercial driver's license. Michael Rowse had had his Washington State Driver's License suspended by his own count four to six times. RP 45. His commercial driver's license issued in this State was also suspended and he was not allowed to drive "on it" (at or about the time he says he moved to Arkansas) for three years, because of failure to pay child support RP 45-46. Michael Rowse obtained a commercial driver's license in the State of Arkansas in December 2006 and it has never been suspended. RP 48.

The process server involved in this matter is Darrell Bennett. He is employed by ABC Legal Messengers and has been a process server since 1992 with a five year break in between RP 16.

Mr. Bennett testified he has a standard protocol he uses when he effects service so as to determine who it is he is serving and where the person is who is to be served if not then present. He indicated that

...

I go up to the door and knock on the door, ring the doorbell. Person opens up the door. I go is John Doe home, or something like that, and they say if he is not home he is not home. Does he live here? And he say yes, he lives here but he is not home at this time so they got the procedure, you know, serve only him or I can serve somebody over 14 there. And if the person lives there then I give the paperwork to the resident that lives there. RP 17-18.

When asked what the first thing he says when he knocks on the door, Mr. Bennett testified:

I go up to the door and knock on the door, ring the doorbell. Person opens up the door. I need to speak to so and so. I got legal documents for that individual. RP 18.

He also indicated he always asks the person's name if a person other than the subject to be served answers the door. RP 19.

When asked if he remembered service of process in February and March 2007 on the Cheesman/Rowse matter, he indicated he would have to look at the documentation.

Darrell Bennett identified RP 20, Ex. 6, as one of his Affidavits of Service in this case. He identified his signature and the date of February 15, 2007.

The Declaration of February 15, 2007 states:

The declarant duly served the above-described documents upon Michael J. Rowse and Jane Doe Rowse by then and there personally delivering true copies thereof by then presenting to and leaving the same with John Doe Rowse/brother/co-resident, who refused his name, a white male approximately 35 to 40 years of age, 5'8" to 5'10" weighing 160 to 180 pounds with brown hair and a mustache. RP 20, Ex. 6.

When asked how he knew the person he served was Michael Rowse's brother, Mr. Bennett testified David Rowse stated he was RP 20.

When asked how he knew that he was a co-resident of the house with Michael Rowse, he testified David Rowse indicated that he (Michael) wasn't home, he was out driving a truck RP 20.

On May 30, 2007 Darrell Bennett signed a narrative affidavit . RP 21, Ex. 9. That Affidavit states:

On or about February 5, 2007, ABC Legal Services, Inc., received the above-listed documents for service on Michael Rowse at the address of 9909 24th Drive SE, Everett, Washington. On February 14, 2007, 6:45 p.m., I went to

the given address. A male answered the door and I indicated I have legal papers for Michael Rowse. He said he is not home right now. I asked if he lives here, meaning the John Doe, he indicated he does, and he is the subject's brother. I told him I could leave papers with him, at which time he accepted, but would not give me his name.

RP 22, Ex. 9

When asked if the man who answered the door at the Everett residence ever chased him off or yelled at him, screamed or told him to leave, he answered no. RP 22. Darrell Bennett had an opportunity to deliver process a second time to the same address at 9909 24th Drive SE. The Complaint was amended and that was served on March 7, 2007. CP 269-272. On March 7, 2007 Mr. Bennett asked the person at the residence if Michael was home and he said that he wasn't and he wouldn't give his name but he was the same individual who he served in February who identified himself as Michael's brother. RP 25

Michael Rowse's counsel questioned Darrell Bennett as to whether he ever does any independent investigation to determine who is supposed to be "at the home where you are delivering service". RP 26. Mr. Bennett indicated the only time he did that was if somebody told him that the person lived some place else. RP 26.

David Rowse's version of the service of process is that he remembers being served once and he thinks that he remembers throwing

somebody out who tried to serve him RP 80- 81. But, at deposition, David Rowse testified no one came to his house (to serve papers).

Q. Okay. Now I've heard you here testify about a series of attempted service of process? A. Yes. Q Which you didn't mention during your deposition? A. Yes, I did. We had back-and-forth conversation and I called that guy a liar because you said I was served seven times. And I said right there in the deposition that guy is a liar and I challenged you. And you said - and this black guy I've never seen. So I don't know where you're coming from with this. I'm very agitated that you would even threaten me with these questions about something like this and clearly nobody came to my house.

RP 74.

David Rowse ultimately admitted he got the papers that were served by Mr. Bennett. RP 82. When asked what he did with the papers after he got them, he said he looked at them, and he probably called his sister and did nothing else because "they got to be served to him (Mike)."

RP 82.

D. SUMMARY OF ARGUMENT

A party may have two residences at which service of legal process may be effective. Here, Michael Rowse, works as an itinerant worker driving a semi truck across the United States, living in it most every night of the month. He maintained substantial ties to the State of Washington by his driver's license, the address where he received mail, and his two

children who he visited. It strains credulity to believe that Michael Rowse was not provided the Summons & Complaint when he was in the State on or about February 27-28, 2007, two weeks after service of the process on David Rowse.

Defendant did not present clear and convincing evidence to overcome the prima facie evidence of appropriate substitute service created by the Affidavits of the Process Server.

E. ARGUMENT

(1) Standard of Review

The Order appealed from includes Findings of Fact and Conclusions of Law which were entered after the initial denial of Defendant's Motion for Summary Judgment but after an evidentiary hearing. There are two different standards of review involved here. The question of the place of usual abode for purposes of service of process is a question of law that is always to be reviewed de novo. *Blankenship v. Kaldor*, 114 Wn.App. 312, 57 P.3d 295 (2002). Following a bench trial (and presumably this evidentiary hearing), this Court reviews the trial court's findings of fact to determine whether they are supported by substantial evidence, and if so, whether those findings support the trial court's conclusions of law. *Landmark Dev. Inc. v. City of Roy*, 138 Wn.2d

561, 573, 980 P.2d 1234 (1999) (citing *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986)).

Substantial evidence is evidence that would persuade a reasonable trier of fact of the truth of the matter argued/contended. *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 176, 4 P.3d 123 (2000). The Court reviews questions of law and conclusions of law de novo. *Sunnyside Valley Irrigation District v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Here, the court's findings of fact are not supported by substantial evidence and do not support its conclusions of law, including those regarding place of usual abode for purposes of service.

(2) The Trial Court Erred By Not According Presumptive Correctness to the Affidavits of Service And By Concluding That Defendant Carried His Burden of Proof.

Here, Process Server Darrell Bennett served two sets of pleadings on Michael Rowse's brother, David Rowse, at the address in Everett that was indicated to be Michael Rowse's address. Darrell Bennett signed four Affidavits of Service, the first for the Summons & Complaint served on February 14, 2007, and the second for the Amended Summons & Complaint served on March 7, 2007, and two subsequent Narrative Affidavits of Service. RP 19, Ex. 6; RP 23, Ex. 7.

The Narrative Affidavits of Service indicate that process was served to a person identifying himself as the brother of Michael Rowse and who stated that Michael Rowse was not at home, that he was out driving his truck. On one occasion he stated he wasn't "here". RP 20, Ex. 6 & RP 25, Ex. 8. The clear message of David Rowse's statements is that Michael lived at the residence but he wasn't then present because he was working driving a truck.

When faced with the issue of review of a motion to dismiss for failure of service, the Court has stated

b. Review of Motion to Dismiss for Failure of Service [4,5] ¶10 We review de novo a trial court's dismissal of an action on legal grounds. *Brundridge v. Fluor Fed. Servs. Inc.*, 109 Wn.App. 347, 352, 35 P.3d 389 (2001) (citing *In re Estate of Peterson*, 102 Wn.App. 456, 462, 9 P.3d 845 (2000)), *cert. denied*, 538 U.S. 906 (2003). When a defendant moves to dismiss based upon insufficient service of process, "the plaintiff has the initial burden making a prima facie showing of proper service." 14 Karl B. Tegland, *Washington Practice: Civil Procedure* §4.40, at 109 (2004). A plaintiff may make this showing by producing an affidavit of service that on its face shows that service was properly carried out. 14 Tegland §4.40, at 108; *see also, State ex. Rel. Coughlin v. Jenkins*, 102 Wn.App. 60, 65, 7 P.3d 818 (2000); *Woodruff v. Spence*, 88 Wn.App. 565, 571, 945 P.2d 745 (1997). Then the burden shifts to the defendant who must prove by clear and convincing evidence that service was improper. *Coughlin v. Demopolis*, 62 Wn.App. 473, 478, 815 P.2d 269 (1991) (stating that the burden is upon the person attacking the service to show by clear and convincing proof that the service was improper).

Witt v. Port of Olympia, 126 Wn.App. 752, 757, 109 P.3d 489 (2005)

While the Affidavit of Service relied upon by Appellant in *Witt* presented no prima face proof that the person served was an office assistant to one of the persons named in the service statute, the Affidavits of Service in this case present prima facie proof that (a) Michael Rowse's brother, David, was served; (b) at a house in Everett that had been designated as Michael Rowse's address with the postal service and at the time of service still was; and (c) David Rowse stated that Michael lived at that house but was not there because he was driving a truck.

The Affidavits of Service do not have to conclusively prove the Everett address was one of the usual abodes of Michael Rowse, but only that there is substantial information and evidence contained in the Affidavit to establish on its face that service was properly carried out.

Once, as here on the face of the Affidavits, it is shown that service was properly carried out, the burden shifted to Michael Rowse, who is required to prove by clear and convincing evidence, that service was improper. In that respect, Michael Rowse did not meet his burden, and the Court neither found that he had nor concluded that it was required.

The evidence before the Court included the following: Michael Rowse admitted at the time of service of process in 2007 he still had a valid Washington State Driver's License, which was last issued to him on

November 15, 2005. RP 44. He further testified he was a long haul truck driver, and that his commercial driver's license was suspended in this state incident to issues dealing with payment of child support. He apparently could obtain a commercial driver's license in the State of Arkansas that would allow him to drive, and he obtained one in December 2006. RP 30. Michael Rowse also testified when he moved to Arkansas, he first lived in his wife's grandmother's house, drove his truck all over the country, living in it for all but two nights a month, and never lived at the Everett address. RP 34-35, 37. While he contended he continued to live in Arkansas, he could not recall the address of his house. RP 28. And, at the time of service of process in this case, his two children still lived in the State of Washington. RP 40.

This evidence is not sufficiently clear and convincing to overcome the presumptive validity of service in this case.

(3) Usual Abode Is To Be Liberally Construed For Purposes of Substituted Service.

Michael Rowse cannot recall his address in Arkansas. He lives in his truck, sleeps in his truck, and eats in his truck, maybe getting only two days off a month. He does not primarily live in Arkansas. Michael Rowse maintained significant contacts within the State of Washington while he was driving his truck across the country. Furthermore, Michael

Rowse testified that when he left the State of Washington he provided a forwarding address to his father. RP 48. The only forwarding address that was provided at hearing was the post office change of address, his brother's house. There is no evidence that any address in Arkansas was ever provided anyone in Washington, including the post office.

In recognition of this country's physical mobility, transitory population, and itinerant workers, our courts have held that a person may have more than one place of usual abode.

[1-4] ... Substitute service of process is effective when a copy of the summons is left at the defendant's house of usual abode, with a person of suitable age and discretion, who is then a resident therein. RCW 4.28.080(15); *Sheldon v. Fettig*, 129 Wn.2d 601, 607, 919 P.2d 1209 (1996). The term "usual abode" is liberally construed and "under certain circumstances a defendant can maintain more than one house of usual abode." *Sheldon*, 129 Wn.2d at 609, 611. A place of usual abode, however, must be "a place where the defendant's domestic activity is centered and where service left with a family member is reasonably calculated to come to the defendant's attention within the statutory period for making an appearance." *Gross v. Evert-Rosenberg*, 85 Wn.App. 539, 542, 933 P.2d 439 (1997).

Blankenship v. Kaldor, *supra* at p. 316.

In *Blankenship* the defendant who had moved to Portland was found not to have two usual places of abode because she maintained more domestic activity in Portland, and insufficient domestic activity at her father's house in Washington State.

The *Blankenship* Court compared its facts with those in *Sheldon v. Fetting*, 77 Wn.App. 775, 893 P.2d 1136 (1995), aff'd 129 Wn.2d 601, 919 P.2d 1209 (1996). In *Sheldon* the defendant moved from an apartment in Renton to Chicago to train as a flight attendant. Before leaving the State of Washington, and after she apparently vacated her apartment, she lived at her parent's house in Seattle for two months. She maintained a mailing address in Chicago and a checking account, bank cards and a health club membership in Chicago. She continued to use her parent's Seattle house as a place of contact, keeping many of her belongings there and registering to vote here. The Supreme Court found that the defendant used the Seattle address for many of her indicia of domestic activity, thus finding that it was a place of usual abode. *Sheldon*, 129 Wn.2d at 610.

Here, while the facts are not as clear as in *Sheldon* concerning a second abode in the State of Washington, they are clear that the abode claimed in the State of Arkansas is not based upon significant contact with that State. And that Michael had several understandable reasons for maintaining the Everett address as an abode: his father was in failing health but living in the area; his children lived in the area; and he was in reality hardly ever in Arkansas. In addition, Michael lives in his truck. Michael does not know/could not recall his Arkansas address, which is evidence of little contact with that address. Furthermore, he doesn't have

an Arkansas phone number, but a 425 area code number. While he has a commercial driver's license issued from the State of Arkansas that was clearly obtained because he could receive and maintain that license where he could not in the State of Washington.

(4) Constitutional Due Process Requirements Are Satisfied If Substitute Service Is Reasonably Calculated To Provide The Defendant With Notice of Action.

Prior to effecting service on the Everett address, a substantial and diligent review and search was accomplished to determine Michael Rowse's residence and whereabouts. To this end, Jennifer Crichton of Bayview Investigations was retained by plaintiffs to locate the address/residence of Michael Rowse. RP 5, 6. The investigator was provided the previous Granite Falls address of Michael Rowse. RP 6.

Upon receiving the Granite Falls address, Ms. Crichton attempted through public record data bases to link Mr. Rowse to that address and she was unable to do so and thus embarked upon reviewing further public records to determine the current address for him. RP 6, 7. She was able to find an address in Oak Harbor and recommended a process server in Oak Harbor to serve process. RP 7.

Ms. Crichton testified that not long after providing plaintiffs with the Oak Harbor address, she was again contacted and was told to determine if she could find something more current and to keep looking.

RP 8. She then undertook a postal trace, asking the post office for a forwarding address. RP 8, Ex. 2. The postal trace specifically requested a trace for either Anthony or Michael Rowse.

Thereafter, the Oak Harbor Post Office provided a forwarding address of 9909 24th Drive SE, Everett, Washington 98208. That address was provided to plaintiffs. RP 9.

After obtaining the Everett address, Ms. Crichton drove to 9909 24th Drive SE to confirm that it was an actual address with a house at that location.

Thereafter, following service of process in February and March 2007, Ms. Crichton was requested to seek further clarification as to her postal trace as it related solely to Michael Rowse. RP 9. She accomplished that and received another response from the Postmaster indicating the same address of 9909 24th Drive SE. RP 10, Ex. 3.

As late as the morning of the evidentiary hearing, April 29, 2010, Ms. Crichton conducted a reverse trace using whitepages.com to determine the mailing address of Michael Rowse and it demonstrated that Michael Rowse's address in the State of Washington is 9909 24th Drive SE, Everett. RP 10, Ex. 5. The reverse trace showed that David Rowse also lived at the address. RP 12-13.

Considerable effort was expended in attempting to locate the address of Michael Rowse. Every indication was that a residence address for him was 9909 24th Drive SE, Everett, Washington.

From a constitutional standpoint, the method of attempted service must only reasonably be calculated to provide notice to the defendant. *Wright v. B&L Props, Inc.*, 113 Wn.App. 450, 462, 53 P.3d 1041 (2002). While this rule speaks to the method in place to accomplish service, discussion of *Wright* is helpful.

In *Wright* plaintiff served the defendant by serving his private mail box and then mailing a copy of the pleadings to that mail box. While service was effected pursuant to RCW 4.28.080(16), *Wright* highlights the significance of the effort made to locate an address where the defendant could be served. It also reaffirms that from a constitutional standpoint attempted service must be reasonably calculated to provide notice to the defendant.

Here, it stretches credulity to contend that Michael Rowse either did not receive the Summons & Complaint or receive actual notice of this lawsuit within the time period allowed.

Michael Rowse's father died on February 28, 2007. RP 69. Michael Rowse was in the State at that time. RP 50. This was exactly 14

days after the first substituted service of the pleadings on David Rowse at the Everett address.

David Rowse admitted receiving the Summons and Complaint, and that he called his sister upon receiving the process. RP 82. However, when asked what his contact with Michael Rowse was concerning these pleadings, he said he did nothing because they were not served on Michael. He stated “they got to be served to him.” RP 82.

While David testified he did nothing because “they got to be served to him”, he also testified at his deposition that he initially refused to cooperate in these proceedings, and demanded that an attorney be appointed to represent him because “I don’t know where this is going”. RP 72. He also testified he admits to receiving the Summons and Complaint and he asserts “throwing some guy (the process server) out (of the house or off the porch).” RP 79, 81. Clearly, David Rowse did not want to do anything that could hurt his brother, nor did he want to participate in these proceedings without his own attorney.

That Michael Rowse was not provided the pleadings by David or his sister, and that he did not know of the pending lawsuit, is not believable.

While addressing RCW 4.28.080(15), the courts in *Sheldon v. Fetting*, 77 Wn.App. 775, 893 P.2d 1136 (1995) and 129 Wn.2d 601, 919

P.2d 1209 (1996), spoke to the issue of substitute service of process and what is sufficient in the face of a liberal interpretation of the requirements.

The Supreme Court in *Sheldon* stated the following:

In interpreting substitute service of process statutes, strict construction was once the guiding principle of statutory construction. *See Muncie v. Westcraft Corp.*, 58 Wn.2d 36, 3d8, 360 P.2d 744 (1961). However, more recently we have applied liberal construction to substitute service of process statutes in order to effectuate the purpose of the statute while adhering to its spirit and intent.

For example, in *Martin v. Meier*, 111 Wn.2d 471, 760 P.2d 925 (1988) the issue was whether a defendant was properly served under the motorist statute. Such service is statutorily permitted only when the defendant “departs from this state.” RCW 46.64.040. The defendant in *Martin* had not left the state although plaintiff was unable to locate him. This court liberally construed the term and upheld the sufficiency of service of process. In doing so, the term “departs” was interpreted by looking at the underlying purpose of the motorist statute, which is to provide a method for serving motorists who cannot be found in the State.

In *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991), we used liberal construction in interpreting the term “then resident therein” in the substitute service of process statute, noting that strict construction “has been the object of a great deal of criticism in modern times.” *Id.* At 152, 155 (quoting 3 Norman J. Singer, *Statutory Construction* §61.04 (4th ed. 1986)). In *Wichert*, service was left at defendant’s home with his adult stepdaughter who happened to be staying the night while the parents were away. The adult daughter, however, lived elsewhere, was self-supporting, and had no personal possessions at the parental house. *Wichert*, 117 Wn.2d at 150. We focused on the “spirit and intent of the statute” rather than “the literal letter of the law” and stated that the term should be

defined so as to uphold the underlying purpose of the statute. *Id.* At 151. We held the dual purpose of the statute is to (1) provide means to serve defendants in a fashion reasonably calculated to accomplish notice and (2) allow injured parties a reasonable means to serve defendants. *Wichert*, 117 Wn.2d at 151-52. The court found an adult family member who was in sole control of the home while its inhabitants were away would likely present the papers to defendant. *Id.* at 152. Because the underlying rationale was thus met, the court held that the daughter fit within the statutory definition of ‘then resident therein.’ *Id.* at 153.

In *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993) we also applied liberal construction. The issue there was whether defendant could be served under the motorist statute during the 90-day tolling period following the three-year period allowed in the statute. RCW 46.64.040. The motorist statute authorizes service for only three years following an accident. Plaintiff attempted service within 90 days after expiration of the three years. In a strict reading, plaintiff failed to serve within three years. However, the court, mindful that the civil rules are meant to minimize miscarriages of justice on procedural grounds, stated “we do not apply a strict construction... [r]ather, we so construe the statute as to give meaning to its spirit and purpose, guided by the principles of due process...” *Triol*, 121 Wn.2d at 145 (quoting *Wichert*, 117 Wn.2d at 156). The court defined the three years plus the 90-day tolling period, and found service sufficient.

We also note many sister jurisdictions follow a rule of liberal construction in interpreting substitute service of process statutes when actual notice is received. *See, e.g., Larson v. Hendrickson*, 394 N.W.2d 524, 526 (Minn. Ct. App. 1986); *Lavey v. Lavey*, 551 A.2d 692 (R.I. 1988); *Karlsson v. Rabinowitz*, 318 F.2d 666 (4th Cir. 1963); *Plonski v. Halloran*, 36 Conn. Supp. 335, 337, 420 A.2d 117 (1980) (statutes governing substitute service should be liberally construed in those cases in which the defendant received actual notice). *See generally* Allen E. Korpela, Annotation, *Construction of Phrase “Usual Place of*

Abode,” or Similar Terms Referring to Abode, Residence, or Domicil, as Used in Statutes Relating to Service of Process, 32 A.L.R.3d, 112, 124-25 (1970).

We therefore conclude “house of [defendant’s] usual abode” in RCW 4.28.080(15) is to be liberally construed to effectuate service and uphold jurisdiction of the court. This is consistent with our procedural rules in (1) RCW 1.12.010, which mandates that “[t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction”; and (2) CR 1, which states the rules “shall be construed to secure the just, speedy, and inexpensive determination of every action,” which promotes a policy to decide cases on their merits. Indeed, “[m]odern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.” *Carle v. Earth Stove, Inc.*, 35 Wn.App. 904, 908, 670 P.2d 1086 (1983) (quoting *Fox v. Sackman*, 22 Wn.App. 707, 709, 591 P.2d 855 (1979)).

[2-4] Moreover, the substitute service of process statute is designed to allow injured parties a reasonable means to serve defendants. *Wichert*, 117 Wn.2d at 151-52. Our holding here is consistent with this purpose. Finally, our holding well exceeds the constitutional due process requirements set out in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L.Ed. 865 (1950) (“The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”).

Sheldon, 129 Wn.2d at 607-09

Here, Michael Rowse testified he left the state of Washington some time toward the end of 2005 with a recently minted driver’s license; that he moved to the State of Arkansas and lived in his wife’s grandmother’s house; that he commenced driving long haul trucks and

lived in his truck, ate in his truck, and slept in his truck, for all but a couple days a month; that he drove all over the Country in furtherance of his job; that he could not recall his current address in Arkansas; and that during the period of time immediately after service was effected in February 2007, he was in the State of Washington, he visited his father, he was with his brother and sister, and he had two children still residing in the State. These facts militate against a finding that defendant has established by clear and convincing evidence that for purposes of service of process he did not have two residences (or for that matter, that he did not receive and have actual notice of the lawsuit within the time prescribed by law, and that his brother and/or sister did not apprise him of that and deliver to him the Summons and Complaint).

(5) The Trial Court's Relevant Findings of Fact Are Not Supported by Substantial Evidence and Do Not Support The Conclusions of Law.

Quite apart from not either finding or concluding that the Affidavits of Service of plaintiffs' Process Server create a presumption of correctness, there is no indication that the court weighed the evidence presented by defendant using the correct standard of clear and convincing evidence.

Findings 10, 12 and 18 address the issue of where Michael Rowse's abode was located. They do not address whether, under the

unique circumstances of this case where he was mobile and lived in his truck, he had two residences where it would be appropriate to serve substitute service.

It appears that at the time of filing this lawsuit, December 2006, Michael Rowse was on the road driving and living in his truck. He testified that he and his wife lived in his wife's grandmother's house, even though he did not live or even stay there for the vast and overwhelming majority of time. Likewise, while Michael Rowse testified he never lived with his brother, that was the address that was provided and which is accessible in the State of Washington as being his address, which was near his ailing father and two children. He never provided an alternate address.

Concerning whether Michael Rowse initiated, facilitated, or otherwise requested any transfer of his mail to his brother's address, David Rowse testified at his deposition that he certainly didn't do that, and that his father was incapable of doing that, leaving the only other person capable and in a position to do so being Michael Rowse. By the time of trial David Rowse changed his testimony and testified he was the one that effected the change of address.

Significantly, however, there is no finding as to whether the Affidavits of Service of the Process Server were given presumptive effect as being correct on their face regarding Michael Rowse living at his

brother's house.³ Furthermore, there is no indication the Court found the evidence presented by defendant to be clear and convincing in order to rebut the Affidavits of the Process Server. Without this, it cannot be said the findings are supported by evidence that is substantial enough to support a "clear and convincing" burden; and, without this support for the findings, the conclusions must also fail.

F. CONCLUSION

The Trial Court, Judge Thomas Wynne, erred in dismissing plaintiffs' Complaint with prejudice, (with the exception of Alisson Cheesman) based upon ineffective substituted service.

The Trial Court completely disregarded the contacts which Michael Rowse maintained in the State of Washington and that his living circumstances, living in his truck, eating in his truck, and sleeping in his truck all but two days a month, mitigated against a finding that he resided only in the State of Arkansas, especially when he could not even remember, recall or state the address where he resided at the time of trial.

³ The facts of the case before the Court are to be distinguished from those facts in *Streeter-dybdahl v. Huynh*, 157 Wn.App. 408, 236 P.3d 986 (2010). In that case the Affidavit of Service was clearly wrong on its face because the person sought to be served was a woman who was 5'1" tall, weighing 110 lbs. The would-be defendant also indicated in testimony that her husband was 49 years old and 5'3" tall. The process server signed a Declaration of Service indicating that the person he served while purporting to be the defendant female, was a male in his 30's, 5'8" tall and 140 lbs. The Declaration describing the defendant was clearly wrong and thus did not meet the standard to establish a prima facie case. The Affidavit filed here provides an address where David Rowse lives and identifies David Rowse as Michael Rowse's brother, and indicates that David Rowse stated that this brother lived at the house.

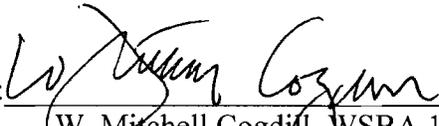
Furthermore, the Court ignored the testimony and evidence with regard to the likelihood that defendant Michael Rowse received actual notice within the time prescribed of plaintiffs' lawsuit. He was in the State of Washington incident to his father's death within two weeks after the initial service on February 14, 2007, and he had contact both with his brother and sister at that time.

Given the facts of this case, Michael Rowse had at least the same contacts in Washington, if not more, than he had in the State of Arkansas. He shouldn't be allowed to escape the consequences of his acts of December 20, 2003.

Dated this 30th day of March, 2011.

Respectfully submitted:

COGDILL NICHOLS REIN WARTELLE
ANDREWS

By: 

W. Mitchell Cogdill, WSBA 1950
Attorney for Appellants

DECLARATION OF SERVICE

On said day below I caused to be delivered via North Sound Legal Messenger Service a true and accurate copy of the following document: Brief of Appellant in Court of Appeals Cause No. 66134-5-I to the following:

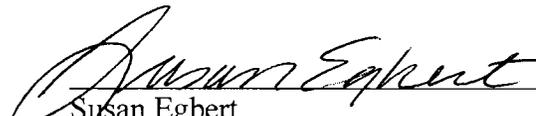
Thomas G. Crowell
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Original and copy filed with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated March 31, 2011 at Everett, Washington.


Susan Egbert
Cogdill Nichols Rein Wartelle Andrews