

No. 359936-II

No. 359952-II

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

APPELLANT'S EXHIBIT
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COURT OF APPEALS
DIVISION II
TACOMA, WA

CURT ELLISON, Appellant,

and

**HOMER AND DONNA WILSON, and
BOULEVARD DEVELOPMENT, INC., Respondents.**

BRIEF OF APPELLANT

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Assignments of Error

1. The trial court erred in denying Curt Ellison's motion to set aside the default judgment dated April 12, 2006, entered against Curt Ellison in *Wilson v. Phlegar, et al.*, by order dated December 18, 2006.

2. The trial court erred in granting a default judgment against Curt Ellison in *Boulevard Development, Inc. v. Ellison*, by order dated December 18, 2006.

3. The trial court erred in denying Curt Ellison's motion for reconsideration in each case by orders dated January 22, 2007.

4. The trial court erred in awarding attorney's fees to the Wilsons against Curt Ellison by order dated January 22, 2007.

5. The trial court erred in admitting into evidence and considering inadmissible hearsay during the hearing of October 11 and 12, 2006.

6. The trial court's Findings of Fact I-VIII were in error, as there was no evidence submitted other than the parties' complaints.

7. The trial court erred in making Findings of Fact XIII, XV, XVIII, XIX, XX, XXI, XXIII, XXVIII, XXX, XXXIII, XXXIV, and XXXV based upon the evidence submitted.

Issues Pertaining to Assignments of Error

1. Does a court have jurisdiction to enter a default judgment or to award sanctions or attorney's fees when there has not been proper service upon the defendant? (Assignments of Error 1, 2, 3, and 4)

2. Is substitute service upon a family member at a home owned by the defendant sufficient to confer jurisdiction over the defendant, when the defendant was not living in the home at the time of service? (Assignments of Error 1 and 3)

3. When a defendant has not lived in a home for several months, but has moved to another location to care for and assist a family member for an extended period of time, can the home be considered the defendant's usual place of abode for the purposes of RCW 4.28.080(15)? (Assignments of Error 1 and 3)

4. Is entry of a default judgment an appropriate sanction for failure to appear at a deposition when the trial court does not consider lesser sanctions and when there is no showing of prejudice to the party noting the deposition? (Assignments of Error 2 and 3)

5. Is it proper to award attorney's fees on equitable grounds against a defendant when the defendant has a valid objection to service of process? (Assignments of Error 2 and 3)

6. Is it proper to admit into evidence statements by a process server regarding his conversations with family members of the defendant prior to and at the time of attempted service of process? (Assignment of Error 5)

7. Are the contents of a process server's affidavit not specifically relating to the time, place, or manner of service admissible as an exception to the hearsay rule? (Assignment of Error 5)

8. Is it proper to enter Findings of Fact when no evidence is submitted to support the finding other than a party's initial complaint? (Assignment of Error 6)

9. Is it proper to enter Findings of Fact based on hearsay or contradicted by substantial evidence in the record? (Assignment of Error 7)

STATEMENT OF FACTS

This is a consolidated appeal from decisions in two related matters in Grays Harbor County Superior Court. The matter of *Wilson v. Phlegar, et al.*, cause number 05-2-00450-5 (“the Wilson matter”) was a complaint to foreclose a deed of trust between the Wilsons as beneficiaries and Phlegar as grantor. CP 1-9. Curt Ellison, appellant herein, claimed an interest in the real property subject to foreclosure. CP 4. The complaint in *Boulevard Development, Inc. v. Ellison*, cause number 06-2-00466-0 (“the Boulevard matter”), alleged that Mr. Ellison had refused to permit redemption of certain property under RCW 35.50.270. CP 244-46. Service of the complaints allegedly occurred on March 21, 2006. CP 10-12, 247-48, Ex. 11.

Mr. Ellison owns an RV park and several rental and investment properties. RP 33, 43, 96.¹ He owns a home located at 1724 10th Place NE, East Wenatchee, Washington (“the East Wenatchee home”). When he first purchased the home, Mr. Ellison lived there at times along with his brother Craig Ellison, and his nephews Jeremy and Joshua Ellison. RP 37. In September 2005, Danielle Ellison, a niece of Mr. Ellison, was involved in some difficulty in Wenatchee, so Mr. Ellison moved at that time to another residence he owned in Ocean Shores in order to put Danielle into

¹ “RP” as used herein shall refer to the Report of Proceedings from October 11 and 12, 2006. “RP (Jan. 22)” shall refer to the Report of Proceedings from January 22, 2007.

school there. RP 30, 37, 45, 101-2, 131, 231. He did not return to the East Wenatchee home until June 2006. RP 29, 102.

At the time of this move, Craig Ellison began paying rent to his brother for the East Wenatchee home. RP 30, 79, 102. Although he had moved to Ocean Shores, some of the utilities for the East Wenatchee home remained in Mr. Ellison's name. RP 78, 102-3. In addition, some of his business and personal mail went either to the East Wenatchee home or to a PO Box in Wenatchee. RP 32-33, 127. However, the Ocean Shores home was insured as his primary residence. RP 37-38, Ex. 20. Mr. Ellison would only visit his family in the East Wenatchee home at the most once a month for a day or so at a time. RP 33, 74-75, 91, 104.

In late November or early December 2005, Danielle had additional problems at the school in Ocean Shores and was withdrawn. RP 39, 80, Ex. 15. Mr. Ellison attended a court proceeding with Danielle in December 2005. RP 31. Mr. Ellison entered her into a private boarding school in Raymond, Washington early in 2006. RP 39, 111. In February 2005, Mr. Ellison went to the Tri-cities to help his father move into and fix up a house Mr. Ellison had purchased for his father. RP 39-40, 51-52, 83, 144. Although he stayed there for long periods of time, he returned regularly to Ocean Shores to visit Danielle at school. RP 39, 51-52, 81, 142. During the spring of 2006, Mr. Ellison identified his Ocean Shores

PO Box as his mailing address to the Kennewick Irrigation District and the Department of Licensing. RP 40, 45-46, Ex. 17, 18.

Also in the spring of 2006, counsel for both the Wilsons and Boulevard Development, Inc. (herein, "Boulevard") happened to contact the same process server to locate Mr. Ellison for service of the summons in their respective lawsuits. RP 151. Upon investigation, the process server, James Patterson, determined that Mr. Ellison owned the East Wenatchee home. Ex. 3. On the evening of March 21, 2006, Patterson left copies of the summons and complaint in each matter with Jeremy and Joshua Ellison, nephews of Mr. Ellison, who lived in the home. RP 155, 225.

At the time of attempted service, Mr. Ellison did not live in the East Wenatchee home. RP 28, 39, 41, 92, 103, 207, 224. He had left in September 2005 for the specific purpose of watching over his niece. RP 53. He was splitting his time between Ocean Shores and Kennewick in order to assist his father. RP 52. In June 2006, after Danielle had graduated and the project in Kennewick was complete, Mr. Ellison moved back to Wenatchee. RP 29, 45, 89, 102.

The Wilson complaint had been filed on April 8, 2005, prior to the attempted service. CP 1. Patterson filed a declaration of service stating that the Mr. Ellison had been served by substitute service on his nephews

at the East Wenatchee home. CP 10-12, 247-48, Ex. 11. The Wilsons then obtained an order of default on April 12, 2006. CP 16-17. A notice of appearance was filed on Mr. Ellison's behalf on May 3, 2006, and a motion to set aside the default judgment for lack of jurisdiction was filed May 9, 2006. CP 24, 25.

The Boulevard complaint was filed April 21, 2006. CP 244. Mr. Ellison filed a notice of appearance May 3, 2006. CP 249. Counsel for Boulevard noted Mr. Ellison's deposition for July 14, 2006, which was rescheduled to August 10, 2006. CP 256. When Mr. Ellison failed to appear at the deposition, Boulevard filed a motion for default and a motion for sanctions. CP 252. Mr. Ellison filed a motion to dismiss the Boulevard complaint based upon faulty service of process. CP 250-51.

A consolidated hearing was held on October 11 and 12, 2006, to determine whether service in each matter had been effected. The trial court denied Mr. Ellison's motion to set aside the default judgment in the Wilson matter, and granted Boulevard's motion for entry of a default judgment and for sanctions. CP 62-64. The court subsequently denied Mr. Ellison's motion to reconsider the decisions. CP 213-15, 275. Wilson's motion for attorney's fees was also granted. CP 216-18. Mr. Ellison timely filed a notice of appeal in each matter.

ARGUMENT

The trial court's decisions below must be reversed. The home in East Wenatchee was not Mr. Ellison's usual abode, so service at that address was ineffective. The default judgments against Mr. Ellison were void for lack of jurisdiction. The trial court's conclusion was partly based on inadmissible hearsay, which should have been excluded. The evidence submitted on reconsideration further confirms that service was improper, and the motion for reconsideration should have been granted.

In addition, the entry of an order of default against Mr. Ellison in the Boulevard matter should be reversed because there is no indication in the record that the trial court considered lesser sanctions. The award of fees against Mr. Ellison was based largely upon the court's finding that he had been properly served, and must also be reversed.

A. The Default Judgments Against Mr. Ellison Are Void Because He Was Never Properly Served and the Court Did Not Have Jurisdiction.

All orders entered below are void for lack of jurisdiction. As has been stated several times, “[f]irst and basic to any litigation is jurisdiction, and first and basic to jurisdiction is service of process.” *State v. Breazeale*, 144 Wn.2d 829, 841, 31 P.3d 1155 (2001) (quoting *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997)); *see also Pascua v. Heil*, 126 Wn. App. 520, 526, 108 P.3d 1253 (2005). When a court

lacks personal jurisdiction over a party, any judgment entered against that party is void. *Breazeale*, 144 Wn.2d at 841 (quoting *Dobbins*, 88 Wn. App. at 871); *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131 (1996).

A motion under CR 60(b)(5) to vacate a judgment on the grounds that it is void may be made at any time. *Roberts v. Johnson*, 137 Wn.2d 84, 92, 969 P.2d 446 (1999); *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 372, 83 P.2d 221 (1938). Courts have a mandatory, nondiscretionary duty to vacate void judgments. *Dobbins*, 88 Wn. App. at 871; *Scott*, 82 Wn. App. at 6. Thus, “a trial court’s decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed de novo.” *Dobbins*, 88 Wn. App. at 871.

A facially correct affidavit of service is presumed valid, but that presumption can be rebutted by clear and convincing evidence that service was improper. *Vukich v. Anderson*, 97 Wn. App. 684, 687, 985 P.2d 952 (1999). In addition, “[w]hether a residence amounts to a place of usual abode is a question of law” and is therefore reviewed de novo. *Blankenship v. Kaldor*, 114 Wn. App. 312, 316, 57 P.3d 295 (2002) (citing *Sheldon v. Fettig*, 77 Wn App. 775, 779, 893 P.2d 1136 (1995), *aff’d*, 129 Wn.2d 601, 919 P.2d 1209 (1996)). Thus, an appellate court reviews the evidence de novo to determine whether it clearly and convincingly

establishes that the residence in question was the defendant's usual place of abode.

When dealing with a default judgment in particular, it is well settled that courts prefer trial on the merits over entry of default. The Supreme Court “has long favored resolution of cases on their merits over default judgments” and therefore “liberally set[s] aside default judgments pursuant to CR 55(c) and CR 60 and for equitable reasons in the interests of fairness and justice.” *Morin v. Burris*, ___ Wn.2d ___, ¶ 2, 161 P.3d 956, 958 (June 28, 2007). “Default judgments are not favored in the law.” *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 581, 599 P.2d 1289 (1979) (citations omitted). “The trial court should exercise its authority ‘liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be fairly and judiciously done.’” *Id.* at 582 (quoting *White v. Holm*, 73 Wn.2d 348, 351, 438 P.2d 581 (1968)). A default judgment that is void for lack of jurisdiction can be set aside without a showing of a meritorious defense to the action. *Leen v. Demopolis*, 62 Wn. App. 473, 477, 815 P.2d 269 (1991).

Service on Mr. Ellison was not proper at the East Wenatchee home. According to statute, a summons may be served “to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident

therein.” RCW 4.28.080(15). Whether a defendant has received actual notice of an action does not excuse failure to comply with the statutory requirements. *Interior Warehouse Co. v. Hays*, 91 Wash. 507, 512, 158 P. 99 (1916); *Gerean v. Martin-Joven*, 108 Wn. App. 963, 972, 33 P.3d 427 (2001). The issue in this case is whether the residence in East Wenatchee was the place of Mr. Ellison’s “usual abode” at the time the summons was delivered.

The Supreme Court has alternated in recent years between policies of strict and liberal construction of RCW 4.28.080(15). The Court first decided *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991). *Wichert* involved service upon an adult daughter who was staying overnight in the defendant’s house while they were away. *Id.* at 150. Because she was a family member in possession of the house, the Court concluded that she was likely to present the papers to the defendant. *Id.* at 152. Thus, although it declined to create a bright line rule, the decision held that the daughter was a person “then resident therein” and service was proper under the particular facts presented. *Id.*

In contrast, *Weiss v. Glemp* adopted a strict construction, holding that leaving the summons on the windowsill of a room where the defendant was sitting did not meet the statutory requirements of delivery to a person of suitable age and discretion residing in the defendant’s usual

house of abode. 127 Wn.2d 726, 731-32, 903 P.2d 455 (1995). Although the service in *Weiss* was constitutionally adequate, in that it was “reasonably calculated to provide notice to the defendant,” it was insufficient because it did not meet the equally necessary elements of the statute. *Id.* at 734. Although the defendant knew the process server was attempting to deliver documents and apparently refused to speak to him, *Weiss* emphasized that “those who are to be served with process are under no obligation to arrange a time and place for service or to otherwise accommodate the process server.” *Id.* (quoting *Thayer v. Edmonds*, 8 Wn. App. 36, 42, 503 P.2d 1110 (1972)).

Sheldon v. Fettig returned to a liberal approach. 129 Wn.2d 601, 610, 919 P.2d 1209 (1996). *Sheldon* evaluated the meaning of “house of usual abode,” holding that it should be “liberally construed to effectuate service and uphold jurisdiction of the court.” *Id.* at 609. *Sheldon* held that a house of usual abode must be the “center of domestic activity for [the defendant] where she would most likely receive notice of the pendency of a suit if left with a family member,” and that a party may have more than one usual abode. *Id.* at 610, 611. Thus, service upon a flight attendant at her parents’ home in Seattle was sufficient, although she rented her own apartment in Chicago, because she used her parents’ address on her voter registration, car registration, and car insurance; she visited the home

frequently; and she immediately responded to correspondence from the plaintiff's attorney to that address. *Id.* The Court concluded that the parents' home "was the place where [the defendant] was most likely to receive notice of the pendency of a suit." *Id.* at 611.

The most recent Supreme Court decision, *Salts v. Estes*, retreated from the holding in *Sheldon*. 133 Wn.2d 160, 943 P.2d 275 (1997). *Salts* criticized both *Wichert* and *Sheldon*, and clarified that "*Wichert* and *Sheldon* mark the outer boundaries of RCW 4.28.080(15)." *Id.* at 166. *Salts* refused to adopt a liberal construction for the "then resident therein" language of RCW 4.28.080(15), holding that the statute "should be enforced as it was written." *Id.* at 162. The individual who received the summons, TerHorst, had been asked by the defendant to look after his home while he was out of town. *Id.* at 163. She was there regularly to feed the dog, and was responsible for receiving the defendant's mail. *Id.* The process server's declaration claimed that TerHorst had said she resided in the home, but TerHorst denied the statement. *Id.* at 164. In direct contrast to *Wichert*,² *Salts* held that service upon an individual present in a home to look after it for the owner is insufficient under RCW 4.28.080(15). *Id.* at 170-71.

² The dissenting opinion concluded that the majority "has, in effect, repudiated [*Wichert*] without overruling it." *Id.* at 173 (Alexander, J., dissenting).

Against this backdrop, this Court should determine that the East Wenatchee home was not Mr. Ellison's usual abode. Originally, house of abode was defined as the place where the defendant is actually living at the time of service. *Dolan v. Baldrige*, 165 Wash. 69, 74, 4 P.2d 871 (1931) (home which husband had vacated 2 weeks prior to attempted service, but which still contained furniture and other belongings, was not his usual house of abode). Prior to *Sheldon, Lepeska v. Farley* held that service on a defendant at his parents' home, when he maintained his own separate residence, did not comply with the substitute service statute, even though the defendant was actually informed of the service. 67 Wn. App. 548, 551, 833 P.2d 437 (1992).

Significantly, despite the liberal approach adopted in *Sheldon*, the majority of cases since *Sheldon* have also held that a home where the defendant was not actually living at the time of service was not a usual place of abode. *Blankenship*, 114 Wn. App. 312; *Gerean*, 108 Wn. App. 963; *Vukich*, 97 Wn. App. 684; *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 933 P.2d 439 (1997).

The facts in both *Vukich* and *Gross* are similar to the facts in this dispute. In *Vukich*, the summons was left with a tenant at a home in Nine Mile Falls owned by the defendant. 97 Wn. App. at 685. The defendant, Anderson, received mail at the Nine Mile Falls address, used that address

to register his car, and used the Nine Mile Falls address in a small claims action in Stevens County just prior to the attempted service. *Id.* at 686, 690. The tenant testified she told the process server that Anderson did not live with her, but the process server contradicted her, claiming he would not have left the summons if she had made such a statement. *Id.* at 686. Anderson presented evidence he had actually moved to California and had bought a home there. *Id.* The plaintiff's evidence supporting the Nine Mile Falls address as an abode was not convincing because there were other reasonable explanations. *Id.* at 690-91. On these facts, Anderson provided sufficient evidence to establish that the Nine Mile Falls home was not the center of his domestic activity, and the default judgment was set aside. *Id.* at 691.

The plaintiff in *Gross* also attempted service on a tenant at a Federal Way home owned by the defendant, Evert-Rosenberg. 85 Wn. App. at 541. Evert-Rosenberg still used the Federal Way home as her address on her voter registration and had not changed the mailing address for property taxes. *Id.* However, she had moved to Puyallup prior to the attempted service, leasing the house to her daughter. *Id.* The process server filed an affidavit stating that the son-in-law told him Evert-Rosenberg lived there when he served the summons. *Id.* The son-in-law later filed an affidavit contradicting this statement. *Id.* at 542. Despite the

process server's affidavit and the defendant's connections to the Federal Way home, it was not Evert-Rosenberg's center of domestic activity at the time of service, and service was insufficient. *Id.* at 543.

The defendant in *Blankenship* was allegedly served by substitute service on her father at her father's home. 114 Wn. App. at 314-15. Although she had previously lived at her father's home, and still used that address on a checking account, she had since signed a lease in Portland about two weeks prior to the date of service. *Id.* at 317. She also registered a car in Oregon and became employed in Portland after the attempted service on her father. *Id.* On these facts, the father's home was not sufficiently a center of the defendant's domestic activity, and service was defective.³ *Id.*

Service on the defendant in *Gerean* was also attempted at the defendant's father's home. 108 Wn. App. at 967. The plaintiff eventually conceded that the father's home was not the defendant's usual place of abode, because the defendant had moved to another city a year before the attempted service. *Id.* at 969-70. An amended affidavit of the process server stated that the father had informed the process server that his daughter was not home but would return later that day. *Id.* at 968. The father had submitted an affidavit stating only that he had said she was not

³ Ultimately, the default judgment was upheld because the defendant's participation in discovery waived the defense of insufficient service. *Blankenship*, 114 Wn. App. at 321.

present. *Id.* at 967. Both the trial court and the appellate court held that a factual dispute about the conversation between the father and the process server was immaterial. *Id.* at 972.

The facts presented below clearly establish that the East Wenatchee home was not the center of Mr. Ellison's domestic activity. Although Mr. Ellison owned the home and had lived there previously, he did not live in the East Wenatchee home at the time of service. RP 39, 92, 103, 207, 224. He had moved out in September 2005 to care for his niece in Ocean Shores. RP 37, 101-2, 131, 231. His brother began paying rent for occupation of the East Wenatchee home when Mr. Ellison moved out. RP 30, 79, 102. Beginning in about February 2006, Mr. Ellison split his time between Ocean Shores and Kennewick, where he spent a considerable amount of time helping his father move into and repair a home. RP 39-40, 51-52, 81, 144. He did not move back to the East Wenatchee home until June 2006, after his niece had graduated and he had finished the project in Kennewick with his father. RP 29, 45, 89, 102.

Mr. Ellison left the East Wenatchee home because he had assumed responsibility to care for his niece: "My whole goal was to spend my time here in Ocean Shores as long as my niece was in this area and then I was not planning on being here anymore." RP 53. He only returned to East Wenatchee when that responsibility was discharged. RP 45.

After Danielle enrolled in the school in Raymond, Mr. Ellison had time to help his father in Kennewick, although he still visited Danielle when he could. He intended to remain in Kennewick until that project was complete: “Until I can get the place fixed up for him.” RP 52. His residence in Kennewick was not defined by a period of time, but by whether the job was complete: “Q: Well, what’s a lengthy period of time in your mind? A: However long it took to get his place fixed.” RP 52.

During the time between September 2005 and June 2006, Mr. Ellison reported the PO Box in Ocean Shores as his mailing address to various entities, including the Kennewick Irrigation District, RP 40, Ex. 18, public utilities in Ocean Shores, Ex. 21, 22, and the Department of Licensing, RP 45-46, Ex. 17. He changed his address for the Grays Harbor PUD from the Ocean Shores PO Box back to the Wenatchee PO Box in June 2006. Ex. 21. The Ocean Shores home was insured as his primary residence. RP 37-38, Ex. 20. Although Mr. Ellison received some mail in East Wenatchee, RP 32-33, 127, and some utilities for the home remained in his name after he moved to Ocean Shores, RP 78, 102-3, this alone is insufficient to establish that location as his abode.

Thus, on March 21, 2006, when service was attempted at the East Wenatchee home, Mr. Ellison’s domestic activity was split between Ocean Shores and Kennewick. RP 39-40, 51-52, 81. He only occasionally

visited his brother and nephews in East Wenatchee. RP 33, 74-75, 91, 104. Unlike the defendant in *Sheldon*, who visited her parents' home frequently, the East Wenatchee home cannot be construed as the place where Mr. Ellison was most likely to receive notice of a lawsuit, and it was not his abode for purposes of RCW 4.28.080(15).

There is insufficient evidence in the record to contradict the facts presented by Mr. Ellison's witnesses. Whether Mr. Ellison received letters at the Wenatchee PO Box address prior to 2006 does not contradict his statement that he moved away from East Wenatchee in September 2005. Thus, the letters admitted as Exhibits 1, 2, 5, 6, and 7, the latest of which is dated almost a year prior to the attempted service, are irrelevant. The fact that a vehicle owned by Mr. Ellison was present at the home at the time of service is easily explained by the testimony that he had lent it to his nephews. RP 41, 50, 112, 208.

The process server claims that Mr. Ellison's nephews stated that Mr. Ellison resided in the home at the time of service.⁴ RP 159. Both Joshua and Jeremy Ellison deny this statement. RP 207, 224. There is no independent evidence to corroborate the process server's testimony, especially given that he admitted never having seen Mr. Ellison at the home or driving the car. RP 175-76. In contrast, as discussed above, there

⁴ Mr. Ellison objected to the admission of this testimony as hearsay. See Section B, *infra*.

is ample evidence supporting the nephews' testimony that Mr. Ellison was not living there and had not even visited in some time. The discrepancy between the testimony of the process server and the nephews should be resolved in favor of the nephews, as the courts decided in *Salts*, *Vukich*, *Gross*, and *Gerean*, *supra*.

As required by RAP 10.3(g), Mr. Ellison has assigned error to those findings that were not supported by evidence in the record.⁵ As stated above, there was no jurisdiction to enter any findings of fact. Specifically, error is assigned to Findings I-VIII because there was no evidence to support these findings. Due to the default judgments entered against him, Mr. Ellison had no opportunity to contest these findings, which were supported only by the parties' complaints.

Finding XIII was not consistent with the testimony of Jeremy Ellison. RP 206-210. Neither Jeremy nor Josh said that Mr. Ellison resided at the East Wenatchee home, as stated in Finding XV. RP 207, 224. Regarding Finding XVIII, the testimony was that Jeremy, not Craig, called Mr. Ellison and informed him of the attempted service. RP 136, 196. The court's Finding XX was apparently based upon an assumption that an attorney would not have advised Craig Ellison to submit an affidavit to the court. However, submission of the affidavit was consistent

⁵ The Findings of Fact are set out verbatim in the Appendix.

with what was done in *Gerean* and *Gross* when improper substitute service was attempted. *Gerean*, 108 Wn. App. at 967; *Gross*, 85 Wn App. at 542

Finding XXI was improper because there was insufficient evidence to discredit the statements of the witness. Craig Ellison testified that he asked Wilsons' counsel to submit the affidavit, and Finding XXIII was therefore improper.⁶ RP 122. Finding XXX was inaccurate, given Craig Ellison's testimony that the Jeremy's affidavit had been mailed to both counsel. RP 106. Finding XXXIII is inaccurate because Mr. Ellison also argued that the imposition of an order of default as a sanction was excessive.

Findings XXXIV was contrary to the evidence presented. As stated previously, neither Jeremy nor Josh claimed that the home was Mr. Ellison's usual place of abode. RP 207, 224. Mr. Ellison alternated between Kennewick and Ocean Shores. RP 39. He slept on the couch and did not have a bedroom after September 2005. RP 75, 132. Although he certainly loved his nephews, he did not visit frequently during the time in question. RP 75, 211. Mr. Ellison did not conduct business at the home; he had hired his brother to conduct business at the home. RP 42-43, 104.

⁶ Mr. Ellison does not suggest that counsel for the Wilsons acted unethically, as he brought the affidavit to the court's attention when he moved for an order of default. The finding of fact is nevertheless inaccurate based on the testimony of Craig Ellison.

There is no evidence that all mail was being forwarded to East Wenatchee *at the time of service*. RP 55-56, Ex. 9. Mr. Ellison testified several times that he was living in Kennewick at the time of service, with occasional visits to Ocean Shores. *E.g.* RP 28. At the time of service, Mr. Ellison's focus was split between Ocean Shores and Kennewick. RP 52-53.

Finding XXXV was also unjustified, as any minor discrepancies that may exist in the testimony do not support a finding that the Ellisons attempted to perpetrate a fraud.

In summary, the East Wenatchee home was not the center of Mr. Ellison's domestic activity in March 2006. Thus, service upon his nephews at that time was not proper substitute service on Mr. Ellison's place of abode. The default judgments entered by the trial court are void for lack of jurisdiction.

B. The Trial Court Improperly Considered Inadmissible Hearsay.

The trial court further erred by considering inadmissible hearsay from the process server, James Patterson. Whether a statement is inadmissible hearsay is reviewed *de novo*. *Lynn v. Labor Ready, Inc.*, 136 Wn. App. 295, 306, 151 P.3d 201 (2006). Out of court statements offered to prove the truth of the matter asserted are inadmissible as hearsay, unless a particular exception exists. ER 801, 802. If the statement in question becomes irrelevant if false, then the hearsay rule applies to exclude the

evidence. *State v. Stubsjoen*, 48 Wn. App. 139, 147, 738 P.2d 306 (1987).

The purpose of the hearsay rule is to exclude untrustworthy evidence that may prejudice a party's case. *State v. Picard*, 90 Wn. App. 890, 899, 954 P.2d 336 (1998).

The trial court erred in allowing hearsay in the process server's testimony regarding his conversations with Jeremy and Josh Ellison. Patterson claims that Jeremy and Josh told him that they resided in the East Wenatchee home with Mr. Ellison. RP 156, 159. In both the phone conversation and the subsequent conversation at the door, all statements by either Jeremy or Josh were hearsay and should not have been admitted. Whether the alleged statement was true, ie, whether Mr. Ellison actually resided in the home, was clearly the fundamental issue for the trial court. Patterson's testimony as to what he was told was offered to prove the truth of the matter asserted, and the testimony should have been excluded as hearsay.

In addition, Patterson testified that he reviewed various public records to determine Mr. Ellison's residence. RP 152. The records themselves, however, were not offered as exhibits. Based upon these hearsay records, Patterson concluded that Mr. Ellison resided at the East Wenatchee home. RP 152. Patterson was testifying as a fact witness, and his conclusions based on hearsay should not have been admitted.

The affidavit of the process server also contained inadmissible hearsay. CR 4(g) provides that proof of service may be by the affidavit of the process server. Therefore, a process server's return of service is admissible as an exception to the hearsay rule. *Marsh-McLennan Building, Inc. v. Clapp*, 96 Wn. App. 636, 641, 980 P.2d 311 (1999). Under CR 4(g)(7), the affidavit should state "the time, place, and manner of service." The hearsay exception for an affidavit of service should be applied only to the portions of the affidavit that directly relate to the time, place, and manner of service. A blanket exception to any hearsay statement in a declaration of service expands the rule beyond what is necessary to prove service and creates a potential for abuse.

Most of James Patterson's declaration of service does not relate to the time, place, or manner of service, but rather contains hearsay statements regarding his investigation to determine Mr. Ellison's address, his observations of activity at the home, the contents of a phone call prior to the attempted service, the statements of both the individual served and a witness at the time of service, and the contents of a phone call the day after the attempt. CP 11-12, 247-48, Exhibit 11. All of the statements after the phrase "Additional information pertaining to this Service" are hearsay and should not have been admitted into evidence.

Furthermore, the declaration itself does not meet the requirements of GR 13, and it cannot therefore be admitted. CR 4(g) requires an affidavit of service. An affidavit must be made under oath and notarized. *State v. Carter*, 138 Wn. App. 350, 366, 157 P.3d 420 (2007). GR 13 allows a declaration to be substituted for an affidavit if the declaration contains a certification that the statements are made under penalty of perjury and includes both the date and place of signing. The declaration of service at issue here is not notarized and is not an affidavit. As a declaration, it does not show the date it was signed, and therefore does not comply with GR 13. CP 12, 248, Ex. 11.

When the hearsay statements and declaration of James Patterson are excluded, the only remaining evidence is that of Mr. Ellison's witnesses, which convincingly establishes that the home in East Wenatchee was not his abode at the time of attempted service.

C. Mr. Ellison's Motion for Reconsideration Should Have Been Granted.

The trial court also erred in denying Mr. Ellison's motion for reconsideration. The additional evidence provided in support of the motion confirms that Mr. Ellison was not living at the East Wenatchee home at the time of attempted service. None of his phone calls at the time in question originated from Wenatchee. CP 68-122. The records confirm

that he called James Patterson from Kennewick on the morning of the day after the attempted service. CP 73. Mr. Ellison also had his mail forwarded to Ocean Shores beginning in September 2005, consistent with his testimony that he moved there to care for his niece. CP 123. Four individuals submitted declarations confirming that Mr. Ellison was in Kennewick at the time of service. CP 126-133. Mr. Ellison made purchases in Richland between March 14, 2006 and April 7, 2006. CP 141-42, 144-47. The declaration of Richard Montoya corroborates Craig Ellison's testimony that he contacted an attorney about the attempted service. CP 124-25; RP 133.

The trial court's orders on the motion for reconsideration did not clearly state whether it considered the evidence submitted in support of Mr. Ellison's motion. CP 213-14, 275. The order presented by the Wilsons' attorney states that the court "examined the records and files herein and the testimony of the witness," indicating that the additional declaration of Mr. Ellison was considered. CP 214. Only the Wilsons objected to the introduction of new evidence. CP 181. Whether to consider additional evidence on reconsideration is normally left to the discretion of the judge. *Chen v. State*, 86 Wn. App. 183, 193, 937 P.2d 612 (1997).

The evidence presented here was not available at the time of the original hearing because Mr. Ellison had not collected it. RP (Jan. 22) 11. The additional evidence should be considered to correct a manifest injustice. *See e.g.* CP 59 (erroneous and unjustified speculation by trial court that additional records would not corroborate Mr. Ellison's testimony).

D. Entry of a Default Judgment Was an Extreme Sanction for Failure to Attend a Deposition.

In addition to lack of jurisdiction, judgment in the Boulevard matter must be set aside because entry of a default judgment was an inappropriate sanction. The only motion before the court for sanctions was Boulevard's motion under CR 37(d) due to Mr. Ellison's failure to appear at the deposition. CP 252-54. Therefore, other conduct by Mr. Ellison should not be considered by the Court in evaluating the sanction imposed.

1. The Trial Court Failed to Consider Lesser Sanctions.

Discovery sanctions are reviewed for an abuse of discretion. *Casper v. Esteb Enterprises, Inc.*, 119 Wn. App. 759, 768, 82 P.3d 1223 (2004). Prior to imposing a severe discovery sanction, a trial court must explicitly consider (1) whether a lesser sanction would suffice and (2) whether the failure to comply with a discovery order was willful or

deliberate and substantially prejudiced the opposing party's ability to prepare for trial. *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997); *Casper*, 119 Wn. App. at 768-69. "[T]he court should impose the least severe sanction that will be adequate to serve the purposes of the particular sanction, but not be so minimal that it undermines the purpose of discovery." *Burnet*, 131 Wn.2d at 495-96 (citing *Wash. State Physicians Ins. Exch. & Ass'n. v. Fisons Corp.*, 122 Wn.2d 299, 355-56, 858 P.2d 1054 (1993)). Thus, an abuse of discretion occurs when a court fails to consider on the record less severe options before imposing a discovery sanction. *Rivers v. Wash. State Conference of Mason Contractors*, 145 Wn.2d 674, 696, 41 P.3d 1175 (2002); *Burnet*, 131 Wn.2d at 497. *Smith v. Behr Process Corp.*, ostensibly relied upon by the trial court, confirms these principles. 113 Wn. App. 306, 324, 54 P.3d 665 (2002).

There is no indication in the record that the trial court considered less drastic sanctions. Judging by the court's oral statements, Judge Godfrey felt he was *required* to declare a default based upon the holding in *Smith v. Behr*, which had not been briefed by the parties. RP 261. There is no mention of a less severe sanction in the oral decision. The Findings of Fact and Conclusions of Law entered by the Court also do not discuss a lesser sanction. CP 50-61. Although the pleading states, "the

court recognizes that this is an extreme sanction, but deems it appropriate and the minimum necessary under the circumstances,” there is no mention of a lesser sanction and why it would be inadequate. CP 60. Even after the requirement to consider a lesser sanction was brought to the attention of the court in an objection and on Mr. Ellison’s motion for reconsideration, the court did not make any comments on the record as to why the severe sanction of a default judgment was necessary. CP 48; RP (Jan. 22) 12-15. The trial court misapplied the holding of *Smith v. Behr*, and improperly imposed the sanction without considering other remedies.

2. *Entry of a Default Judgment Was An Excessive Sanction.*

Even if the trial court had considered lesser sanctions, the default judgment entered as a sanction in the Boulevard matter was too severe. A default judgment is one of the most extreme sanctions a court can impose. *E.g. Griggs*, 92 Wn.2d at 581. Default judgment or dismissal should only be granted as a sanction when the party’s violation was willful or deliberate and caused substantial prejudice to the opponent’s ability to prepare for trial, and when a lesser sanction would be inadequate. *Rivers*, 145 Wn.2d at 700; *see also Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 688, 132 P.3d 115 (2006). A willful violation is one performed “without reasonable excuse or justification.” *Rivers*, 145 Wn.2d at 686-87; *see also Smith v. Behr*, 113 Wn. App. at 327.

Mr. Ellison's failure to appear at the deposition was not a willful discovery violation because he had a reasonable excuse. A party cannot be compelled to attend a deposition without leave of court if he has not been properly served:

Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant or service made under rule 4(e), except that leave is not required (1) if a defendant has served notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subsection (b)(2) of this rule.

CR 30(a). Further, "[a] voluntary appearance of a defendant does not preclude his right to challenge lack of jurisdiction over his person, insufficiency of process, or insufficiency of service of process pursuant to rule 12(b)." CR 4(d)(5); *see also Gerean*, 108 Wn. App. at 973. In contrast, appearance at a deposition can in some circumstances waive objections to service of process. *E.g. Blankenship*, 114 Wn App. at 318-20.

Although the Boulevard complaint had been filed, it had never been properly served upon Mr. Ellison. Boulevard could therefore not take his deposition without leave of court. The notice of appearance filed on Mr. Ellison's behalf reserved his right to contest jurisdiction and service, and did not relieve Boulevard of the obligation to obtain leave of

court to conduct a deposition of a party who had not been served. CP 24, 249. Mr. Ellison had a reasonable excuse for not attending the deposition set by Boulevard, and his failure to appear was therefore not willful.

The failure to appear also did not substantially prejudice Boulevard's ability to prepare for trial, as a trial date had not yet been set. Boulevard did not allege any prejudice, or submit evidence substantiating any prejudice. Even if Mr. Ellison had been served and a sanction was appropriate, a variety of lesser sanctions would have sufficed to punish the discovery violation, including a requirement to appear at a new deposition and perhaps pay additional attorney's fees incurred by Boulevard. Entry of a default judgment was a drastic sanction and was not warranted by the alleged discovery violation. The judgment should be reversed.

E. The Award of Attorney Fees to the Wilsons Must Be Reversed.

The trial court also erred in awarding attorney's fees to the Wilsons. In general, attorney fees may be awarded only when authorized by contract, statute or recognized ground in equity. *E.g. Bowles v. Dept. of Retirement Sys.*, 121 Wn.2d 52, 70, 847 P.2d 440 (1993). The Wilsons requested fees on equitable grounds, citing Mr. Ellison's alleged bad faith. CP 181.

Washington recognizes that bad faith litigation can result in an award of fees. *In re Recall of Pearsall-Stipek*, 136 Wn.2d 255, 267, 961

P.2d 343 (1998). However, Washington courts do not often award fees on equitable grounds, so there is little precedent on the subject. *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 131 (1999). Neither *Pearsall-Stipek* nor *Rogerson*, awarded fees for bad faith. 136 Wn.2d at 267; 96 Wn. App. at 930.

Rogerson outlines three categories of bad faith conduct which can warrant an award of fees: prelitigation misconduct, procedural bad faith, and substantive bad faith. 96 Wn. App. at 927. Prelitigation misconduct is “‘obdurate or obstinate conduct that necessitates legal action’ to enforce a clearly valid claim or right.” *Id.* (quoting Jane P. Mallor, *Punitive Attorney’s Fees for Abuses of the Judicial System*, 61 N.C. L. Rev. 613, 632 (1983)). Fees are awarded as a fine for wasting private and judicial resources. *Id.* There is no evidence in the record to support a finding that Mr. Ellison’s conduct *prior to commencement of litigation* justified any sanction.

“Procedural bad faith is unrelated to the merits of the case and refers to the ‘vexatious conduct during the course of litigation’.” *Id.* at 928 (quoting Mallor, *supra*, at 644). Examples of procedural bad faith include “dilatory tactics during discovery, failure to meet filing deadlines, misuse of the discovery process, and misquoting or omitting material portions of documentary evidence.” *Id.* (citing *Lipsig v. Nat’l Student*

Mktg. Corp., 663 F.2d 178, 181 (D.C.Cir.1980)). Sanctions under this theory are appropriate if the actions affect the integrity of the court. *Id.* (quoting *Chambers v. Nasco, Inc.*, 501 U.S. 32, 46, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991)).

Finally, substantive bad faith refers to an intentionally frivolous claim, counterclaim, or defense with an improper motive. *Id.* at 929 (citations omitted). There must be evidence that the claim was intentionally brought in order to harass. *Id.* (citing *Pearsall-Stipek*, 136 Wn.2d at 267). The mere determination that one party was less credible than the other does not amount to a finding of substantive bad faith. *Id.*

No sanctions are appropriate against Mr. Ellison on equitable grounds, because he did not in fact reside at the East Wenatchee home, as discussed above, and his defense was therefore not made in bad faith. There is no evidence in the record of an actual intent to delay the litigation or waste judicial resources. Rather, Mr. Ellison simply exercised his constitutional right to contest service. The trial court's award of attorney's fees to the Wilsons must be reversed.

CONCLUSION

Service on Mr. Ellison was improper. He did not live in East Wenatchee at the time of service. The center of his domestic activity was in Ocean Shores and Kennewick, where he was caring for his niece and helping his father. Because service was improper, the trial court never had jurisdiction to enter default judgments or the award of attorney's fees. Even if there had been proper service, entry of a default judgment as a discovery sanction was extreme, and the default must be set aside.

Respectfully submitted this 10th day of September, 2007.

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APPENDIX

Pursuant to RAP 10.3(g) and 10.4(c), Appellant includes here the findings of fact to which error has been assigned, from the Findings of Fact and Conclusions of Law entered December 18, 2006. CP 50-61.

I.

Plaintiffs HOMER WILSON and DONNA WILSON, are husband and wife. Plaintiff BOULEVARD DEVELOPMENT, INC., is a Washington Corporation.

II.

On May 17, 2000, Plaintiffs were named as Grantees of a Deed of Trust recorded June 14, 2000, under Grays Harbor County Auditor's File Number 2000-06140052, against the following described real property:

Lot 17, Block 5, Ocean Shores Division 17, as per plat recorded in Volume 9 of Plats, Page 34, records of Grays Harbor, Washington.

Parcel Number: 093300501700.

III.

The maker of the Note secured by the Deed of Trust defaulted.

IV.

About the same time, on June 16, 2004, an Order of Sale was entered in Grays Harbor County Superior Court Cause Number 03-2-01668-0, which foreclosed ULID liens by the City of Ocean Shores against the Plaintiff WILSON's property and against property referenced below with respect to Plaintiff BOULEVARD.

V.

Defendant CURTIS ELLISON was the purchaser of the properties at the ULID sale which are the subject of this action.

VI.

Plaintiffs WILSON were not given notice of the sale and on August 8, 2005, filed suit in this matter to foreclose their Deed of Trust and to establish their superior position to that of the Defendant as respects the above described real property. As a result of the title report they obtained, they discovered the ULID sale.

VII.

After the sale, Defendant BOULEVARD acquired the redemption rights to the following described real property sold at the ULID sale:

1. Tax Parcel 092900022600 (Shorter)

Lot 226, Ocean Shores Division No. 15, situate in County of Grays Harbor, State of Washington.

2. Tax Parcel 093300600200 (Marczac)

Lot 2, Block 6, Ocean Shores Division No.1 7, as per plat recorded in Volume 9 of Plats, page 34, situate in County of Grays Harbor, State of Washington.

3. Tax Parcel 090700018600 (Anderson)

Lot 186, Ocean Shores Division No.4, situate in County of Grays Harbor, State of Washington.

In addition, after the ULID sale, BOULEVARD entered into an agreement to acquire the redemption rights of the owner of the following described real estate:

1. Tax Parcel 094300301400 (Robles)

Lot 14, Block 3, Ocean Shores Division 20" situate in County of Grays Harbor, State of Washington.

Defendant tortuously interfered with that contract by making false accusations about Plaintiff and by threatening the owners of the redemption rights.

VIII.

Plaintiff BOULEVARD thereafter redeemed the subject property and, on April 21, 2006, commenced their action relating thereto in Grays Harbor County Superior to confirm their position as to the property.

XIII.

Jeremy Ellison advised Mr. Patterson of the following:

1. That he was CURT ELLISON's nephew.
2. That he resided at the 10th Place home.
3. That CURT ELLISON resided at the 10th Place home.
4. That CURT ELLISON was temporarily in the Tri-Cities (Richmond) area helping another relative to move.
5. That the green Lexus in the driveway was owned and driven by CURT ELLISON.
6. That he, Jeremy, was only using the Lexus on a temporary basis while his uncle was gone.
7. He confirmed his and his uncle's residence at that location two more times during the conversation.

XV.

Mr. Patterson confirmed with both Jeremy and Josh that they regularly resided at the 10th Place residence as did their uncle, CURT ELLISON.

XVIII.

Craig Ellison, Jeremy & Josh's father, came home that evening shortly after the service and was advised of the service by Jeremy. While they deny this, it is clear to the court Craig Ellison then advised CURT ELLISON, who was in the Tri-Cities area assisting his father move.

XIX.

The next day at 9:50 a.m., CURT ELLISON called Mr. Patterson objecting to the service, claiming he did not live there. He was hostile and abusive. It is clear from this conversation MR. ELLISON was aware service of process had taken place, as no other reason he could have known is evident.

XX.

Craig Ellison claims to have met with an attorney the next day who advised him to submit a declaration into the court files by Jeremy disavowing the above recited facts he told Mr. Patterson. The court does

not believe CURT EILLISON consulted with a lawyer, at least not in the manner he states.

XXI.

Jeremy prepared a declaration saying he had not seen CURT ELLISON in months, did not know where he was, and that he did not live there. The court believes each of these statements in the declaration to be a fabrication.

XXIII.

The declaration also states and informed both counsel,

"This will be sent certified mail to the court. . . "

The declaration was never mailed to the court. Counsel for the Plaintiffs had every reason to believe the declaration had been filed with the court.

XXVIII.

Prior to the entry of the Order of Default, Defendant ELLISON had not communicated with counsel for the WILSON's in any fashion regarding the lawsuit.

XXX.

On May 1st or 2nd, 2006, counsel for ELLISON appeared in both matters. This is the first communication had by CURT ELLISON to the Plaintiffs in response to the service of process.

XXXIII.

CURT ELLISON claims he was on, March 21, 2006, not a resident at 1724-10th Place NE, East Wenatchee, Washington. This is the sole basis upon which ELLISON has proceeded in this matter.

XXXIV.

This court finds that CURT ELLISON was a resident of 1724-10th Place NE, East Wenatchee, Washington, at the time of service on March 21, 2006, and that this was his usual place of abode for the following reasons:

1. His nephews both said it was.
2. MR. ELLISON was only in the Tri-Cities on a temporary basis.
3. MR. ELLISON was not residing in Ocean Shores at that time which was clearly evident from the utility records.

4. MR. ELLISON maintained a bedroom and personal effects one would associate with a home in the East Wenatchee residence.

5. MR. ELLISON maintained a very close relationship with his brother's children treating them in many respects as his own. They lived there.

6. MR. ELLISON conducted his business at the East Wenatchee home.

7. MR. ELLISON's personal mail was all either being delivered to East Wenatchee or being forwarded there. He retrieved his own, personal, mail.

8. MR. ELLISON maintained no other possible residence, this court specifically finding he was not physically present in Ocean Shores during or around the time period of service nor did he evidence any intention of returning there on any kind of a full time basis.

9. For all purposes, the home in East Wenatchee was the focus of CURT ELLISON's universe.

XXXV.

This court specifically finds that CURT ELLISON, Craig Ellison, Jeremy Ellison and Josh Ellison have been untruthful and have attempted

to perpetuate a fraud in this court for, as to each of them, for some or all of the following reasons, among others;

1. They were deceitful as to what they told this court about what they said to the process server at the time of service.

2. They were deceitful in testifying that CURT ELLISON was not informed of the lawsuits.

3. They were deceitful in testifying they did not know where CURT ELLISON was at the time of service.

4. They were deceitful in contradicting each other as to the living conditions in the home in East Wenatchee as it pertains to CURT ELLISON.

5. They were deceitful in preparing and causing to be prepared, a declaration of Jeremy Ellison attempting to disavow what he told Mr. Patterson.

6. They were deceitful in indicating they consulted with an attorney and testifying they were told all they needed to do was submit a declaration to the attorneys and the court.

7. They were deceitful in suggesting it was counsel's responsibility to bring Jeremy Ellison's declaration to the court's attention after they told counsel they had forwarded it to the court.

8. They were deceitful in testifying the declaration was done immediately the next day after process was served when, in fact, it was done six days later.

9. They were deceitful in attempting to conceal the extent of CURT ELLISON's business acumen which this court believes to be extensive.

10. They were deceitful in failing to bring forth numerous records they could have, including CURT ELLISON's driver's license, numerous phone records, and numerous mailings which this court believes they did not as the records would have shown their testimony to be false in many respects.

11. They were deceitful in trying to show CURT ELLISON got his mail in Ocean Shores when he knew he was having mail sent there forwarded to East Wenatchee. Further, Craig Ellison acknowledged he never picked up his brother's personal mail but that CURT ELLISON picked up his own personal mail in East Wenatchee, thereby further showing their deceitfulness in claiming mail was received at Ocean Shores.

CERTIFICATE OF SERVICE

I the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the forgoing Brief of Appellant to be served upon:

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DATED this 11 day of September, 2007

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