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No. 359936-II

No. 359952-II

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

CURT ELLISON, Appellant

and

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

BRIEF OF RESPONDENT'S WILSON

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ORIGINAL

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I. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court's order is supported by substantial evidence and the law. The trial court properly exercised its discretion.
2. The trial court properly exercised its discretion in response to orchestrated fraudulent testimony.
3. The trial court did not err in denying reconsideration when the motion was not filed in accordance with the local rules and otherwise had no merit.
4. The award of attorney's fees to the Wilsons was proper.
5. The trial court did not err in admitting evidence, and no objection was raised at the trial level.
6. The trial court's findings are amply supported by the evidence.
7. The trial court's findings are amply supported by substantial evidence.

II. RESPONSE TO ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. A court has jurisdiction to uphold a default judgment when it

finds on the basis of evidence the appellant was properly served.

2. Service is proper on a family member at a home that the court finds was the appellant's usual place of abode.
3. When an appellant falsely testifies that he did not live in his own house, the court may properly find that the appellant's house is his usual place of abode. In addition, temporary absence from an abode does not preclude the finding it is an abode.
4. Not applicable.
5. The award of attorney's fees to the Wilsons was proper in light of appellant's misconduct.
6. When no objection is made to evidence when it is presented, an objection may not be raised for the first time on appeal.
7. When an exhibit is admitted without objection, no objection can be made for the first time on appeal, particularly when the error could have been corrected in the trial court.
8. It is proper, as foundational testimony, to accept a complaint, verified by affidavit, and which is consistent with all of the testimony.

9. It is proper to enter Findings based upon substantial weight of evidence.

III. STATEMENT OF THE CASE

By way of background, Homer and Donna Wilson are beneficiaries of a Deed of Trust on a parcel of unimproved real property in Ocean Shores, Washington upon which the maker defaulted. CP 1, 32.

Around the same time as the default, unbeknownst to the Wilsons, the City of Ocean Shores foreclosed a ULID assessment. Curt Ellison bought the property at the foreclosure sale. CP 1, 32. RP 97.

The Wilsons subsequently became aware of these developments and brought suit in this action to foreclose their Deed of Trust, claiming therein that their interest was superior to that of Ellison. CP 1, 32.

Prior to filing suit, there was communication between Wilsons' counsel, Curt Ellison, and Doug Lewis, City Attorney for the City of Ocean Shores. Discussions were had therein as to the merits of the various positions and attempts at resolution were made, unsuccessfully. All of the communications by Mr. Lewis and by Wilsons' counsel were directed at Mr. Ellison's Wenatchee post office box. The correspondence was received, responded to, and never objected to as being to a wrong address. Ex. 1, 2, 5, 6, & 7.

Suit was brought to foreclose and Curt Ellison was named as a Defendant. Efforts were made to serve process on all Defendants. CP 1, RP 150. As it happens, Boulevard Development, Inc., in a separate action, brought suit against Mr. Ellison and likewise made efforts to effect service of process. RP 176.

As it happens, both Plaintiffs identified the East Wenatchee, Washington, area to effect service as Mr. Ellison owned real property there and tax statements were being mailed to a Wenatchee post office box. RP150, 176, Ex. 3.

Both Plaintiffs, coincidentally, engaged the same process server, J.L. Patterson, of Wenatchee. RP 150, 176. Mr. Patterson had twenty years prior experience in law enforcement with the Alaska State Police, Washington State Patrol, and the Wenatchee Police Department. In 1991, he started his own investigation agency. RP 149 - 150. Mr. Patterson conducted an investigation and determined, from the public records, that an address in East Wenatchee, 1724 – 10th Place NE, appeared to be Curt Ellison's residence. RP 150-152. The home was in his name (Ex. 3) and he owned several vehicles at the residence, most particularly a green Lexus. RP 50, 112, 152, 158. Ex. 11.

On March 21, 2007, he noticed the Lexus gone, and then back again.

Ex. 11. Shortly before 5 p.m. he knocked on the door, with no response. RP 152. Ex. 11. He left his card on the windshield with his cell phone number. RP 152. Ex. 11. At 8:26 p.m., Jeremy Ellison contacted him by phone. RP 153. Ex. 11, 13. They had an extensive discussion. RP 154-157. Ex. 11.

Jeremy advised Mr. Patterson that he was Curt Ellison's nephew, that he and his brother, Josh, lived at the residence with their father, Craig Ellison, and with Curt Ellison and that his uncle was in the Tri-Cities for a couple of days helping a relative. RP 154-167. Ex. 11.

Jeremy advised the green Lexus was owned and regularly used by Curt Ellison, but that Jeremy had permission to use it in Curt's absence. RP 153 – 156, 158. Ex. 11.

Mr. Patterson confirmed with Jeremy three times that Curt Ellison lived at the residence. RP 157. Ex. 11.

Mr. Patterson immediately proceeded to the home and knocked on the door. Josh Ellison, Jeremy's younger brother, answered the door. Mr. Patterson asked for Jeremy. Josh yelled for him and he came to the door. RP 158-159. Ex. 11. He asked both of them if Curt Ellison lived there and they both said yes. They also confirmed they too lived there. At that time, Jeremy was 17 and Josh 16. RP 159. Ex. 11.

At 9:50 a.m. and 9:52 a.m. the next day, Curt Ellison called Mr.

Patterson and was hostile and verbally abusive. RP166 – 167, Ex. 13. He claimed he did not live at the residence indicating some level of knowledge of its significance. RP 159, 166-169. Ex. 11, 13.

Thereafter, Craig Ellison claims to have talked to an attorney who he claims told him to just send an affidavit to the Plaintiff's attorney explaining that Curt Ellison did not live there. This unidentified attorney was apparently associated with a father of one of Jeremy's friends. The discussion is purported to have occurred in the attorney's home. RP 133-135.

A declaration purported to be by Jeremy Ellison was mailed to counsel for Wilsons and Boulevard, disclaiming what had been told to Mr. Patterson was not now true and Curt Ellison should be "served" directly. RP 113-124. Ex. 24. A review of this declaration might suggest the substance of the declaration did not come from a seventeen year old. The substance of the declaration and the boys testimony suggest it to have been motivated less by the truth and more by the anger displayed by Craig Ellison (RP 106) and Curt Ellison (RP 166 – 167).

Craig Ellison, nor anyone else, ever filed the declaration with the court. Craig Ellison testified he expected the attorney's to file it (RP 118-123), contrary to the clear language of the declaration (Ex. 24) and contrary

to his admission that counsel for the Wilsons' told him it was not counsel's responsibility to do that. RP 123. When counsel submitted the Motion and Order of Default to the court for entry, he brought this declaration to the court's attention. Ex. 10.

In any event, it is known the boys told their father, Craig, about being served when he got home later, and that communication was then had with Curt Ellison almost immediately as to what had transpired. Craig Ellison disputed this and testified it took more than a couple of days to reach his brother, but Mr. Patterson's phone records show otherwise. Ex. 13. RP 114. Curt Ellison did admit he knew service of process against him had taken place. RP 199.

It should be noted this call with Mr. Patterson occurred early in the morning the next day. We do not know when Craig Ellison talked to the lawyer, but it likely was not until sometime that same day, and therefore likely occurred after he had contacted Curt Ellison and after Curt Ellison had contacted Mr. Patterson. RP 135-136.

Mr. Ellison appears to have done nothing else in response, now claiming the East Wenatchee home was not his usual place of abode but that his Ocean Shores property was. RP 64-65.

It is undisputed Curt Ellison lived in the East Wenatchee home from

2000 to the present, except for a short, disputed time frame in the latter part of 2005 and the first half of 2006 and which was the focus of the hearing. RP 101 – 102.

Mr. Ellison makes an issue of the fact he was in Kennewick at the time of service, but acknowledges that was only temporary while he assisted his father. RP 27, 52. Jeremy described him, during this period, as being “out of town”, further evidencing that Curt Ellison was simply temporarily away from his normal abode of East Wenatchee. RP 210, 216 – 217. His father indicated he was in Kennewick for four to five weeks helping him move and clean up. RP 144-146. The father also acknowledged Curt Ellison was there only on a temporary basis (RP 146), and further indicated Curt would be gone part of the time he was there. RP 145-146. In fact, Curt Ellison admitted to being in East Wenatchee on a regular basis during this period. RP 74 – 75.

Curt Ellison testified extensively about his close relationship with his brother’s family. RP 29-32, 43-49, 98 - 99. His “goal is to help try to raise those kids.” RP 94. He discussed how he put his brother’s daughter into a school in Ocean Shores because she was getting into trouble elsewhere and how he had to be there for her. RP 29-32, 37. Yet it is known that she was only in public school in Ocean Shores for a little over

two months, from September 20, 2005, to November 29, 2005. Ex. 15.

After that, she was in detention and then in boarding school until June 16, 2006. During this time he only visited her “occasionally”, maybe 6-8 times according to the school principal. RP 141-142. He also acknowledged his being in Ocean Shores was not permanent. RP 131.

Mr. Ellison testified “My whole goal was to spend 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. However, even he asserts he was in Kennewick for 4-5 weeks during the period of time she was in Ocean Shores.

Coincident with that, we see the effect, or lack thereof, of his living in Ocean Shores on his utility bills. Ex. 21 & 22. Those same utility bills show that for nine months prior to Danielle being in public school, the Ocean Shores residence was not used to any great extent, if at all. These same records also show from after that time, through September of 2006, when the records stop, Mr. Ellison was not in Ocean Shores to any degree, if at all.

The testimony of all the witnesses, coupled with the utility records, leads to the conclusion that while Mr. Ellison may have been in Ocean Shores to some extent when Danielle was in public school for two months in

the fall of 2005, he was no longer there on any regular basis as soon as she was residing either in detention or at the residential school.

In this regard, it is interesting to note that Mr. Ellison still claims he was primarily in Ocean Shores through June of 2006, RP 53, Appellant's brief at pp. 20 & 21. However, Exhibit 9, clearly shows that by May 8, 2006, his Ocean Shores mail was being forwarded to Wenatchee. We do not know how long before that the mailing change was made, but the hearing lasted two days and Mr. Ellison had that information available to him at the Ocean Shores Post Office a short distance away and never produced it. At a minimum, we know his claim to have not moved back until June is false. See also RP 53 – 56.

Curt Ellison conducted a business acquiring properties. He was very successful. He was worth over a million dollars. RP 96 – 98. His brother was intimately involved in that business, and that business was centered around the East Wenatchee house. RP 57-58, 103 - 104. His father described Curt Ellison as being very sharp and having acquired a lot of "stuff". RP 147.

Mr. Ellison was having mail delivered to the Wenatchee post office box both immediately before and after the service of process. Ex. 1, 2, 3, 5, 6, 7, 8, 9, 10, 20, 21, 23. He had the ability to produce post office records

showing otherwise, and did not. He was asked to produce his driver's license. He did not. RP 72.

What is also interesting is no witness ever testified there was no time during this period that Mr. Ellison was not getting mail in Wenatchee, regardless of the status of mailings to Ocean Shores. In fact, Craig Ellison talked about how he absolutely would not get Curt's mail and he would leave it in the post office box for him that they shared. RP 126. No one ever testified his mail to Wenatchee was being forwarded to Ocean Shores at any time. Consequently, all through this period we know Curt Ellison was actively receiving mail in Wenatchee.

Curt Ellison owned the home in East Wenatchee, (RP 47). He maintained a bedroom at the East Wenatchee home. RP 229 – 230. He maintained furniture there. RP 77. The utilities were in his name. RP 78, 102 – 103, 132. His brother was only paying \$350.00 per month rent on a home assessed at \$298,600.00 (RP 95, Ex. 3), suggesting the rental value was being split because Curt Ellison lives there.

While Jeremy testified that when Curt Ellison went to Ocean Shores with Danielle in the fall of 2005, he took over his uncle's room, RP 218, Josh testified the home in East Wenatchee was a four bedroom home and there was plenty of room for he, his brother, his father, and his uncle. RP

229 – 230.

We also see Mr. Ellison went back and forth to the East Wenatchee residence at will (RP 36, 37, 40), so obviously his brother's family's tenancy was not exclusive as most normal tenancies are. Also, starting in December of 2005, the niece was in a boarding school and the need for Mr. Ellison to remain in Ocean Shores was not present. RP 67, 80. The majority of his numerous vehicles were kept at the East Wenatchee home. RP 73, 74, and only two or three were in Ocean Shores. RP 74.

Mr. Ellison claims to have only moved back to Wenatchee in June of 2006 (RP 27 – 28), but the utility records for the Ocean Shores house contradict that. Ex. 21, 22. Mr. Ellison points to Exhibit 20, his insurance on the Ocean Shores house, as proving this was his primary residence. RP 37 – 38 (Appellant's brief p.8). Exhibit 20, shows that this "primary homeowner's insurance policy" for the Ocean Shores house was issued on April 25, 2006, a date Mr. Ellison admits he was living in East Wenatchee. RP 30 – 31, 69 – 72. It is clear he was only in Kennewick for a short time on a temporary basis. The Ocean Shores utility bills show he was not at the Ocean Shores property more than a short time, between February of 2005 through September of 2006. Ex. 21, 22. RP 81-84. It should be apparent that if he was not in Kennewick, and was not in Ocean Shores, he was in

East Wenatchee.

The court should also review carefully certain testimony of Josh Ellison. RP 225 – 230. In this portion of his testimony he indicated no one had discussed his testimony with him prior to the hearing (RP 225 – 226), Curt Ellison was only, at the time of the hearing, a visitor at the East Wenatchee house (RP 228), and that Curt was primarily in Ocean Shores as far back as the spring of 2005 (RP 229). He contradicts the rest of his family in an attempt to assist his uncle.

IV. ARGUMENT

A. **THE DEFAULT JUDGMENT ENTERED AGAINST MR. ELLISON IN FAVOR OF THE WILSONS WAS PROPER AS THE APPELLANT HAD BEEN SERVED AND THE COURT HAD JURISDICTION.**

The sole basis upon which Mr. Ellison argues the default should be set aside is his claim the service of process was not proper.

RCW 4.84.080(15), provides, in relevant part:

4.28.080 Summons, how served

“Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:

...

“(15) In all other cases, 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.”

Mr. Ellison was served at 1724 - 10th Place NE, East Wenatchee, Washington, by leaving the Summons and Complaint with his nephew, Jeremy Ellison. Ex. 11.

It should be made clear at the onset that several matters have not been contested herein, those being that:

1. The nephews were of suitable age and discretion and were residents therein. (RP 115).
2. Excusable neglect was not asserted and therefore not an issue. CP 16, RP 239-240.
3. If service was not properly effected, the default is improper and must be set aside.

Therefore, the sole issue in determining whether service was proper is, whether service at the East Wenatchee home was at the home of Mr. Ellison’s usual abode.

Three foundational issues need to be established.

First, as Appellant concedes, the affidavit of service is presumed valid, and may only be rebutted by clear and convincing evidence. Blankenship v. Kalder, 114 Wn.App. 312, 316, 57 P.3d 295 (1995).

Second, the trial court determined, in no uncertain terms, that Curt Ellison, his brother Craig, and his two nephews were totally lacking in credibility. RP 254 – 259, RP 1/22/07, 14-15, RP 2/26/07, 18. Issues of credibility and the inferences to be drawn from the testimony are to be determined by the trial court, and a reviewing court should defer to the trial court. Standing Rock Homeowner’s Association v. Misich, 106 Wash.App. 231, 23 P.3d 520 (2001), Hilltop Terrace Homeowner’s Association v. Island County, 126 Wash.2d 22, 891 P.2d 29 (1995).

Third, as was held in Wright v. B & L Properties, Inc., 113 Wash.App. 450, 53 P.3d 1041 (2002), the standard here is abuse of discretion.

This case is controlled by Sheldon v. Fettig, 129 Wash.2d 601, 919 P.2d 1209 (1996), which overturned and refined prior case law and stated as follows at p.607,

“In interpreting substitute service of process statutes, strict construction was once the guiding principle of statutory construction. See Muncie v. Westcraft Corp., 58 Wash.2d 36, 38, 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.”

The court went on to state, at p. 608-609;

“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.1998); 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 substituted 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).”

The court adding at p.610,

“Applying our holding here, we note that there is no hard and fast definition of the term “house of usual abode”. See Korpela, Annotation, 32 A.L.R.3d at 127. The underlying purpose of RCW 4.28.080(15) is to provide a means to serve defendants in a fashion reasonably calculated to accomplish notice. Wichert, 117 Wash.2d at 151-52, 812 P.2d 858. With this purpose in mind, we approve the reasoning of the Court of Appeals which stated:

The term “usual place of abode” is used in the statute because it is the placed at which the defendant is most likely to receive notice of the pendency of a suit.

...

“... [U]sual place of abode” must be taken to mean such center of one’s domestic activity that service left with a family member is reasonably calculated to come to one’s attention within the statutory period for defendant to appear. Sheldon v. Fettig, 77 Wash.App. 775, 781, 893 P.2d 1136 (quoting Thoenes v. Tatro, 270 Or. 775, 529 P.2d 912 (1974)), review granted, 127 Wash.2d 1016, 904 P.2d 300 (1995).”

The court held, at p. 612;

“We hold the term “house of (defendant’s) usual abode” in RCW 4.28.080(15) may be liberally construed to effectuate service and

uphold jurisdiction. We also hold that in appropriate circumstances a defendant may maintain more than one house of usual abode if each is a center of domestic activity where it would be most likely that defendant would promptly receive notice if the summons were left there. We conclude Ms. Fetting's family home in Seattle constituted such a center of domestic activity, where she in fact received actual notice. Accordingly, service of process was sufficient and the case will be heard on the merits."

In that case, the defendant had been in an auto accident in Grant County. She subsequently moved to Seattle, and subsequently, Renton, where she lived for two or three years.

She subsequently became a flight attendant for United Airlines and was assigned to Chicago for a seven week training course. Two months before she left, she moved into her parent's home in Seattle and moved her belongings there. However, she had no designated bedroom.

After moving to Chicago and completing her training, she and two other flight attendants signed a thirteen month lease on an apartment there. She was working on an on-call basis and would fly home to Seattle on occasion. At the time she was served, when she would visit her parents, she would stay next door at her boyfriend's residence.

Eight months after she moved to Chicago, process was served on her brother at her parent's residence.

The Washington State Supreme Court, applying the foregoing

criteria, held service was proper.

The Appellant sets forth an interesting discussion of a number of other cases. However, those cases are either not relevant or are consistent with Sheldon v. Fettig, supra.

Dolan v. Baldrige, 165 Wash. 69, 4 P.2d 871 (1931), and Lepeska v. Farley, 67 Wash.App. 548, 833 P.2d 437 (1992), cited by Appellant were decided prior to Sheldon and at least as to Lepeska, therefore, to the extent it is inconsistent therewith, is of no further force and effect. However, these two cases are interesting in that, in each instance, the proof was very clear the defendant had permanently relocated his or her residence, a fact not present in Sheldon nor something Mr. Ellison had done here.

Wichert v. Cardwell, 117 Wash.2d 148, 812 P.2d 858 (1991), involves substitute service on an adult daughter at the defendant's home who was an overnight guest. While, obviously, not directly on point as the case had nothing to do with identifying a person's abode, the court stated:

“There are numerous rules of statutory construction, but of particular relevance here are (1) the spirit and intent of the statute should prevail over the literal letter of the law and (2) there should be made that interpretation which best advances the perceived legislative purpose. In re R., 97 Wash.2d 182, 187, 641 P.2d 704 (1982); Bennett v. Hardy, 113 Wash.2d 912, 928, 784 P.2d 1258 (1990).

The court has observed that “[e]ach of the terms ‘reside,’ ‘residing,’ ‘resident,’ and ‘residence’ is elastic. To interpret the sense in which such a term is used, we should look to the object or purpose of the

statute in which the term is employed.” McGrath v. Stevenson, 194 Wash. 160, 162, 77 P.2d 608 (1938).

The purpose of statutes which prescribe the methods of service of process is to provide due process. “The fundamental requisite of due process of law is the opportunity to be heard.” Grannis v. Ordean, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity to be heard in turn depends upon notice that a suit is being commenced. However, “[p]ersonal service has not in all circumstances been regarded as indispensable to the process due to residents...” Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Compliance with due process is described thusly: “The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” Mullane, at 315, 70 S.Ct. at 657.”

Weiss v. Glemp, 127 Wash.2d 726, 903 P.2d 455 (1995), simply decided that yelling at someone that they had documents to serve, without handing them or placing them where they could accept them, did not effect service.

This is not inconsistent with Sheldon. Sheldon does not say you do not have to serve someone at their abode. Sheldon simply defines what may be considered an abode, a term within the statute. It does not suggest anything more. However, in defining what an abode is, the court looked to the purpose behind the statute, the constitutional requirements, and the fact we live in a fluid, ever changing, world.

After the Sheldon decision, the court in Salts v. Estes, 133 Wash.2d

160, 943 P.2d 275 (1997), addressed an issue similar to Wichert. In Salts, a friend was served while in the defendants home for a short time feeding a dog, and bringing in the mail while the defendants were on vacation for two weeks. She was not related to the defendants, had never lived in the home, and had never even stayed there. The court did not overrule Wichert, but distinguished it stating, at p. 279, 280,

“Wichert is distinguishable from the present case both by the fact that the daughter was related to the defendants, and had actually slept in the home of the defendants the previous night at the time service was accomplished. Neither one of these facts was present here.”

In a 5-4 decision, the dissent would have expanded the Wichert holding to liberalize what is required to effect service.

However, it should be added, the Salts decision, at p. 164, recognized the viability of Sheldon by stating:

“Even those unlearned in the law would most likely conclude a home of usual abode is somebody’s home, even if only on a seasonal basis, ...”.

recognizing an abode does not have to be full time and that one can have more than one abode for purposes of substitute service. Mr. Ellison even acknowledged this in his testimony when he stated that when he was in East Wenatchee, Ocean Shores was his secondary residence and when in Ocean Shores, East Wenatchee was his secondary residence. RP 89.

Appellant points to four other cases decided since Sheldon, Gross v. Evert-Rosenberg, 85 Wash.App. 539, 933 P.2d 439 (1997), Vukich v. Anderson, 97 Wash.App. 684, 985 P.2d 952 (1999), Gerean v. Martin-Joven, 108 Wash.App. 963, 33 P.3d 427 (2001), and Blankenship v. Kaldor, 114 Wash.App. 312, 57 P.3d 295 (2002). Each held service was not proper and each is, clearly, distinguishable from the present case.

In Gross, the defendant had permanently moved from the service address in Federal Way to Puyallup. He was not staying at the old residence at any time, for any purpose.

In Vukich, the defendant moved to California eight months prior to service and had likewise permanently relocated. He was also not staying at the old address for any purpose, at any time.

In each of these cases, the defendants continued to own the former home but leased it out legally, abandoning any right to use or occupy the premises.

While the tenant in the Gross case did involve an adult daughter and son-in-law, no familial living together situation with the defendant existed.

In Gerean, a defendant had been living with her parents until her husband returned from the military. He did return and she moved out on a permanent basis. Her father was served and this was held insufficient.

Again, the move was permanent. The defendant detached from the residence. No familial living arrangement continued.

The Blankenship facts are similar to Gerean.

The thread in all these cases since Sheldon remains the same and none presents facts similar to the present case.

In the present case, Curt Ellison was temporarily in Kennewick assisting his father. He only intended to be there a short period of time. He maintained a bedroom in East Wenatchee. He treated his brother's family as his own and was very much a second father to all his brother's children.

His business was integrally linked with his brother, who worked for him and was dependent upon him. He had no separate family of his own. It is very clear he was the patriarch of the family unit and stayed very close to them in all respects.

Curt Ellison had only two places to go to when he left Kennewick, either East Wenatchee or Ocean Shores. It is clear under Sheldon, each could be considered an abode. However, it is likewise clear that, as between the two, Mr. Ellison maintained more connections with East Wenatchee than he did with Ocean Shores, not only for the reasons stated, but also because by forwarding his mail to East Wenatchee, whether before or shortly after the service, whatever one is to believe, it still expresses his intentions when

he was in Kennewick to return to East Wenatchee. Therefore, whenever he was in Ocean Shores, his intent was to return to East Wenatchee and therefore any removal therefrom was not permanent.

Appellant would have this court accept the idea that if someone is not actively staying at, and sleeping in a house at the time of substitute service, that home cannot be their usual abode, that the nature of one's absence from the residence is immaterial. If that were true, there could never be substitute service. If that were a valid criteria, then what would be enough time away from the residence to say the residence no longer serves as an abode. Would one night be enough? A weekend? Two weeks?

Sheldon tells us eight months may not be enough. What Sheldon does tell us is, while absence may be a consideration, it is only an element in the overall consideration of where the center or centers of a person's domestic activity resides.

While Mr. Ellison was only away from the East Wenatchee home for 4-5 weeks in Kennewick, his business was in East Wenatchee, his family was in East Wenatchee, and his interest, but for circumstances which temporarily drew him away, those being Danielle's schooling or his father's move, was to be in East Wenatchee.

RCW 4.28.080(15), as implemented by Sheldon, supra, is designed

to permit service of process in a manner designed to assure notice and an opportunity to a defendant. In this case, it worked exactly as it was intended.

Mr. Ellison was appraised of and put on notice of the law suit. He had an opportunity to be heard. The only failure was the lack of response of Mr. Ellison, and therefore where the consequences of that failure should lie.

Appellant cites several cases for the proposition that defaults are not favored and should be liberally set aside. This would be an issue were the Appellant to have asserted excusable neglect. The Appellant has not, either here, nor before the trial court. RP 239 – 240.

A review of the cases cited by Appellant indicates this concept of defaults being disfavored are not discussed where the issue relates to voiding defaults.

Even where these principles are a consideration, Griggs v. Averbeck Realty, Inc., 92 Wash.2d 576, 599 P.2d 1289 (1979), cited by defendants states, at p. 58:

“Balanced against that principle is the necessity of having a responsive and responsible system which mandates compliance with judicial summons, that is, a structured, orderly system not dependent upon the whims of those who participate therein, whether by choice or by the coercion of a summons and complaint.”

Moody v. Reichnow, 38 Wash. 303, 80 P. 461 (1905), discusses the discretion a court has in this circumstance:

“It is not a mental discretion, to be exercise ex gratia, but a legal discretion, to be exercised in conformity with the spirit of the law, and in a manner to subserve, and not to impede or defeat, the ends of substantial justice. In a plain case this discretion has no office to perform, and its exercise is limited to doubtful cases, where an impartial mind hesitates. Again, in People’s Ice Co. v. Schlenker, supra, it was observed: Courts are naturally and very properly inclined to relieve a party from a default if he furnishes any reasonable excuse for his neglect and makes any fair showing of merits. But we could not affirm the action of the trial court in this case without disregarding well-settled rules on the subject, offering a premium on negligence, and even opening the door for the perpetration of fraud.”

While this case is 102 years old, its vitality remains today. In Housing Authority of Grant County v. Newbigging, 105 Wn.App. 178, 19 P.3d 1081 (2001), in recognizing the court’s discretion, and in recognizing a concern over default judgments, the court stated:

“On the other hand, an orderly system of justice mandates that a party comply with a judicial summons.”

That case also sets out the standard to be followed:

“When deciding a motion to vacate a default judgment, the court must consider two primary and two secondary factors that must be shown by the moving party.” Norton, 99 Wash.App. at 123, 992 P.2d 1019 (citing White v. Holm, 73 Wash.2d 348, 352, 438 P.2d 581 (1968)). The two primary factors are (1) “the existence of substantial evidence to support at least a prima facie defense” to the opposing party’s claim; and (2) the “failure to timely appear was the result of mistake, inadvertence, surprise or excusable neglect.” Norton, 99 Wash.App. at 123, 992 P.2d 1019. The secondary factors are (3) the party seeking relief acted with diligence after receiving notice of the default judgment; and (4) the effect on the opposing

party would not be prejudicial if the judgment was vacated. Id at 123-24, 992 P.2d 1019. “These factors are interdependent; thus, the requisite proof that needs to be shown on any one factor depends on the degree of proof made on each of the other factors.” Id. at 124, 992 P.2d 1019 (citing White, 73 Wash.2d at 352-53, 438 P.2d 581).”

The Respondent acknowledges that where a defendant asserts a lack of jurisdiction, a defense on the merits need not be shown.

While this balancing is not applicable here, assuming it were, Respondents would set forth their view of the equities.

Respondent is seeking to foreclose on a deed of trust where about \$6,500.00 is owed. CP 1, 32. Ex. 5. Respondent brought this action in April of 2005. CP 1. Respondent has had to expend over \$10,000.00 in attorney’s fees, costs, and witness expenses, not including the costs of this appeal. CP 64, 69.

On the other hand, Appellant knew of the law suit, claims to have consulted with an attorney, and did virtually nothing to respond.

Appellant challenges a number of findings by the trial court. See Appendix A. These challenged findings and responses thereto are:

1. I-VIII – These are the basic facts of the complaint, serve as background to the proceeding and were verified by Homer Wilson in his declaration. CP 1, 40-45. Appellant never contested those facts.

2. XIII – These are the facts Mr. Patterson, the process server, attested to that he was told by Jeremy. This finding is supported by Mr. Patterson’s declarations (CP 10-12), and by his testimony (RP 149-177, but more particularly RP 153, 156-158). The credibility as it relates to what Jeremy said versus what Mr. Patterson states can be readily shown by Mr. Patterson’s Affidavit of Service (CP 10-12), which was signed on March 21, 2007. Six days later on March 27, 2007, Jeremy Ellison signs a declaration (Ex. 24), he sends to counsel stating he does not know where his uncle is. Yet Mr. Patterson knows he is in the Tri-Cities, and there was no evidence presented by Appellant in this matter which explains how Mr. Patterson could have known that other than being told by Jeremy (RP 160). It has been conceded by the Appellant, in fact asserted by him quite vehemently, that he was, in fact, in the Tri-Cities at that moment in time.
3. XV – The fact that Mr. Patterson confirmed with the nephew that Mr. Ellison resided there is attested to by his affidavits (CP 10-12), and by his testimony (RP 159).
4. XVIII – Appellant appears to claim the only error is that

Jeremy Ellison, not his father, contacted him about the service of process. RP 64. This is probably irrelevant as the issue is, was Mr. Ellison informed of the service of process, and Appellant admits he was. RP 64. Curt Ellison admits he talked to his brother (RP 123). Consistent with that, Curt Ellison called Mr. Patterson the next day (RP 167 - 172).

5. XIX – Appellant references this finding in its Assignment of Errors on page 4 of his brief, but does not further discuss it (see page 23 thereof). In any event, the testimony of Mr. Patterson (RP 67 - 172, Ex. 12), supports this finding.
6. XX – Craig Ellison’s testimony about conferring with an attorney is found at RP 133-136. Therein, Mr. Ellison testified he was told to simply send a letter to both counsel. It is not unreasonable to conclude that a competent lawyer who had a long standing relationship with a client and who had been consulted with as Craig Ellison testified, would not give the advise Mr. Ellison attests was given. Therefore, it is not unreasonable for the court to have concluded Mr. Ellison’s testimony in this regard was not convincing.
7. XXI – The court obviously chose to believe Mr. Patterson,

and for good reasons, as to the assertions contained within Exhibit 24, the Declaration of Jeremy Ellison.

8. XXIII – The declaration, Ex 24, clearly states, “This will be sent certified to the court and to the attorneys referenced ...”.

From this alone, the court could conclude counsel had reason to believe the declaration had been mailed to the court. Exhibit 11, counsel’s letter to the court of April 11, 2006, when the Motion and Order of Default were submitted, makes it clear that counsel believed the declaration was in the court file and brought that declaration to the court’s attention. See also Exhibit 10.

9. XXX – The Findings indicate Curt Ellison had no communication with counsel until May 1st or 2nd, 2006, because Jeremy mailed the declaration, Exhibit 24, to counsel. If it is being asserted that Jeremy Ellison, in submitting the declaration, was acting as an agent for Curt Ellison, then a good deal of Appellant’s argument becomes even more disingenuous.

10. XXXIII – The issue raised here is not addressed to the Wilson matter and therefore is not responded to herein.

11. XXXIV, XXXV – These findings go to what the court ultimately believed and why. Counsel would refer to the statement of facts as clearly supporting these findings.

B. THE AFFIDAVIT OF SERVICE AND TESTIMONY OF MR. PATTERSON ARE ADMISSIBLE.

The Appellant, in attempting to prove his case, introduced Exhibit 24, a declaration from Jeremy Ellison and later placed his nephews on the witness stand. The testimony of Mr. Patterson, as to their statements to him or lack thereof, was presented to impeach the nephews as prior inconsistent statements. As such they are admissible under ER 801(d)(1), or by what is also termed impeachment by contradiction. ER 607.

Objection is made to the testimony of Mr. Patterson as to certain public records he reviewed. RP 152. Mr. Patterson testified he used this foundational information coupled with other evidence he found to, in his expertise, reach a conclusion that service at the residence was proper. An expert is permitted to testify as to foundational hearsay facts which lead to his opinion. ER 703, 704, 705.

It should be noted all of the foundational facts attested were proved or admitted by the Appellant or his witnesses. RP 50, 112, 151-152, 156,

158, Ex. 3.

While admitting an affidavit of service is properly admitted and considered by the trial court, it is asserted by Appellant the affidavit was overly broad. No authority is presented for this argument, nor does CR 4 or Marsh-McLennan Building, Inc. v. Clapp, 96 Wn.App. 636, 980 P.2d 311 (1999), cited by Appellant, create such a restrictive rule.

Appellant asserts the form of the affidavit or declaration of service (Ex. 11) was not in proper form in that it was not an affidavit (not notarized) nor was it in compliance with GR 13, as it was not dated. It does contain the date of service and appears to have been drafted and signed on the same date. GR 13, also provides that substantial compliance is sufficient. See Veranth v. State, Department of Licensing, 90 Wash.App. 1028, 959 P.2d 128 (1998).

In any event, the objection was not made at the trial level and cannot be raised for the first time on appeal. Ashcraft v. Wallingford, 17 Wn.App. 853, 565 P.2d 1224 (1997). This is particularly significant in cases such as this as an affidavit of service can be amended after the fact, John Hancock Mutual Life Ins. Co. v. Gooley, 196 Wash. 357, 83 P.2d 221 (1938), the principal inquiry being what happened not the form of the declaration itself.

C. MR. ELLISON'S MOTION FOR RECONSIDERATION WAS PROPERLY DENIED.

Additional evidence submitted with the Motion for Reconsideration was objected to by the Wilsons, CP 52, which Mr. Ellison acknowledges. It is therefore not admissible unless Mr. Ellison can show it could not have been available previously with reasonable diligence. CR 59(a)(4), and Marriage of Tomsovic, 118 Wash.App. 96, 24 P.3d 692 (2003). The assertion Mr. Ellison had not collected the additional evidence may well be true, but does not assert the nature and extent of Mr. Ellison's diligence or in any way explain why it was previously unavailable.

The Respondent properly objected. CP 62. However, the court never commented on the objection. Rather, the court simply ruled on the motion. RP, 1/22/07, 13-15.

While not being able to read into the mind of a court, it may well be the court recognized the impropriety of the evidence but decided the new evidence made no difference. It is clear, the submittal of the new evidence was improper and was a further basis for a bad faith determination by the court.

The court may well have believed Mr. Ellison was temporarily in Kennewick at the time of service, but that it was irrelevant in that being temporarily in another location does not prevent the conclusion that East

Wenatchee was the abode of the Appellant.

The telephone call to Mr. Patterson, CP 73, could well have confirmed in the court's mind the conclusion that the East Wenatchee home was the center of Mr. Ellison's domestic life since he became aware of the service within hours of it occurring, CP 73, also putting into question the other testimony of the level of knowledge of where Mr. Ellison was.

The court could well have believed he forwarded mail to Ocean Shores in September 2005 (CP 123), and then changed that again sometime in the first part of 2006, (Appellant states in his brief, at p. 21 it was June 1, but provides no proof of that. Exhibit 21, cited by Appellant does not establish that fact), was further evidence that whatever he was doing there was, again, temporary, confirming the center of his domestic activity was in East Wenatchee.

D. ENTRY OF DEFAULT JUDGMENT AND SANCTION.

This issue is not present in the matter involving the Wilsons and therefore is not responded to herein.

E. THE AWARD OF ATTORNEY'S FEES TO THE WILSONS WAS PROPER.

A reviewing court will overturn a trial court's award of attorney's

fees only for a manifest abuse of discretion. Lay v. Hass, 112 Wash.App. 818, P.3d 130 (2002), and Bowles v. Washington Dep. Of Ret. Sys., 121 Wash.2d 52, 71-72, 847 P.2d 440 (1993).

The Wilsons sought attorney's fees pursuant to Rogerson Hiller Corporation v. Port of Port Angeles, 96 Wn.App. 918, 982 P.2d 131 (1999), pet. rev. denied, 140 Wash.2d 1010, 999 P.2d 1259, CR 11, and RCW 4.84.185, and CR 64.

Rogerson Hiller Corporation, supra. is a culmination of the decisions in the following cases:

State ex rel. Macri v. City of Bremerton, 8 Wn.2d 93 (1941).
Public Utility District No. 1 v. Kottsick, 86 Wn.2d 388, 545 P.2d 1 (1976).
Miotke v. City of Spokane, 101 Wn.2d 307, 678 P.2d 803 (1984).
Hsu Ying Li v. Tang, 87 Wn.2d 796, 557 P.2d 342 (1976).
Wilson v. Henke, 45 Wn.App. 162, 724 P.2d 1069 (1986).

The principal basis of Wilsons' claim is the bad faith aspect of Ellison's conduct. Such an award is allowed if a party participates in "vexatious conduct during the course of litigation." supra at p. 928, citing Mallor, and Punitive Atty's Fees for Abuses of the Judicial System, 6 N.C.L. Rev. 613 (1983).

The purpose of the award is "to protect the efficient and orderly administration of the legal process." supra at p. 928, quoting Mallor, supra at 644. The court in Rogerson Hiller, at p. 928, went on to say;

“The court’s inherent power to sanction is “governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” [Chambers, 501 U.S.] at 43, 111 S.Ct. 2123 (citation omitted). Sanctions may be appropriate if an act affects “the integrity of the court, and [if] left unchecked, would encourage future abuses.” Gonzales v. Surgidev Corp., 120 N.M. 151, 899 P.2d 594, 600 (1995)[.]”

Citing State v. S.H. 95 Wash.App. 741, at 747, 977 P.2d 621 (1999).

The court, in ruling at the initial hearing was compelled to comment as follows:

“I can tell you, for two days as we have sat in here, my intelligence has been insulted virtually from the moment I walked in this door until now. And in my career as a judge, I don’t think that I have had anyone come into this courtroom in this last two days, of virtually perpetrating or attempting to perpetrate a fraud on a court.” RP 253.

The court felt strongly Mr. Ellison sought to perpetuate a fraud on the court.

Even after that, Mr. Ellison submitted a Motion for Reconsideration (DCP 57), with 212 pages of new exhibits without citing any reason this information was not available at the time of the original hearings which encompassed substantial portions of two days.

The court responded again and stated:

“Now, let’s go back to where I started with this case when I made my conclusions. Now, a higher court can do what they want with

this, but I'll guarantee you something, there's not one judge of the Court of Appeals or Supreme Court who sat in that courtroom and observed the demeanor of the witnesses and made assessments of their credibility. They flat came in this courtroom and lied, and I don't know how to tell you any more. They lied to the Court, and they were caught lying to the Court, and in fact, you can go back and read your own records, Mr. Burtch. You made the comment at least once, if not more, you would not have, quote, advised your client to take the court of action that they took in this matter. RP 1/22/07, 14.

...

And I'll go right back to where I started. The Court of Appeals can do whatever they want to do with it, but they didn't sit up here with a black robe in that courtroom and sit here and watch the demeanor of those witnesses and answer the questions, and that includes Mr. Ellison, his nephews, his brother, and his father. Now, type this up and take it up to them, and if they want to tell me I'm deaf, dumb and blind, they can go right ahead and do it, but outside of that, the motion stands, and that includes the attorney fees.

This is a very, very simple case that all he had to do was come into this courtroom and these two gentlemen come in here, and we would have sat and had a trial and discussed some of the legal issues you're discussing and some of the factual questions you're discussing, but we didn't get there, and we're not going to get there". RP 1/22/07, 15.

F. ATTORNEY'S FEES ON APPEAL.

Pursuant to RAP 18.1, Respondent requests attorney's fees on appeal. The basis for this request is upon the same basis as set forth in Section E, above, upon which the trial court granted fees.

V. CONCLUSION

The decision of the trial court should be affirmed in all respects and the Respondents Wilson should be awarded their attorney's fees on appeal.

DATED this 21 day of November, 2007.



STEPHEN WHITEHOUSE, WSBA #6818
Attorney for Respondents WILSON

APPENDIX A

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR GRAYS HARBOR COUNTY

HOMER WILSON and DONNA WILSON,)
Husband and wife,)

Plaintiffs,)

vs.)

STEVEN PHLEGAR, a single man; CURT)
ELLISON, a single man; DYNAMIC)
COLLECTORS, INC., and OCEAN SHORES)
COMMUNITY CLUB, INC.)

Defendants.)

NO. 05-2-00450-5

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

BOULEVARD DEVELOPMENT, INC.,)

Plaintiff,)

vs.)

CURTIS ELLISON,)

Defendant.)

NO. 06-2-00466-0

FINDINGS - 1

STEPHEN T. WHITEHOUSE
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ORIGINAL

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3 THIS MATTER having come on regularly before the Honorable Gordon Godfrey, Judge
4 of the Grays Harbor County Superior Court, on October 11 & 12, 2006, the two matters having
5 been consolidated for purposes of this hearing only, the Plaintiffs, HOMER & DONNA
6 WILSON, being represented by STEPHEN WHITEHOUSE, Attorney at Law, the Plaintiff,
7 BOULEVARD DEVELOPMENT, INC., being represented by MATTHEW DAVIS, Attorney
8 at Law, and the Defendant, CURT ELLISON, being represented by JACK L. BURTCHE,
9 Attorney at Law, the court having heard the testimony of all of the witnesses presented and
10 being otherwise duly advised, the court does hereby make it's

11
12 **FINDINGS OF FACT**

13 I.

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

16 II.

17 On May 17, 2000, Plaintiffs were named as Grantees of a Deed of Trust recorded June
18 14, 2000, under Grays Harbor County Auditor's File Number 2000-06140052, against the
19 following described real property:

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

22 Parcel Number: 093300501700.

23 III.

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

25 IV.

26 About the same time, on June 16, 2004, an Order of Sale was entered in Grays Harbor

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3 County Superior Court Cause Number 03-2-01668-0, which foreclosed ULID liens by the City
4 of Ocean Shores against the Plaintiff WILSON's property and against property referenced below
5 with respect to Plaintiff BOULEVARD.

6 V.

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

9 VI.

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

14 VII.

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

17 1. Tax Parcel 092900022600 (Shorter)

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

20 2. Tax Parcel 093300600200 (Marczac)

21 Lot 2, Block 6, Ocean Shores Division No. 17, as per plat recorded in Volume 9 of Plats,
22 page 34, situate in County of Grays Harbor, State of Washington.

23 3. Tax Parcel 090700018600 (Anderson)

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

26 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:

FINDINGS - 3

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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.

IX.

The Plaintiffs in both actions were attempting to serve Defendant ELLISON with original process and each happened to engage James L. Patterson, for that purpose.

X.

Mr. Patterson conducted an investigation as to the whereabouts of MR. ELLISON. He determined that MR. ELLISON owned a home at 1724-10th Place NE, East Wenatchee, Washington. He also became aware MR. ELLISON was the legal and registered owner of a green Lexus automobile, Washington License Number 349 JFE.

XI.

Mr. Patterson made several attempts to contact MR. ELLISON at the residence. Finally, on March 21, 2006, he left his business card on the windshield of the Lexus parked at the residence asking that he be contacted.

XII.

At 8:26 p.m., Mr. Patterson received a phone call from Jeremy Ellison, CURT ELLISON's 17 year old nephew.

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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.

XIV.

Immediately thereafter, Mr. Patterson went to the residence and met with Jeremy and his brother, Josh, then age 16.

XV.

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

XVI.

Mr. Patterson then handed to Jeremy copies of the Summons and Complaint in both matters, which he accepted.

XVII.

It is stipulated that Jeremy Ellison was then a person of suitable age and discretion then

1
2 resident therein. The court so finds.

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4 XVIII.

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

8
9 XIX.

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

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15 XX.

16 Craig Ellison claims to have met with an attorney the next day who advised him to
17 submit a declaration into the court files by Jeremy disavowing the above recited facts he told Mr.
18 Patterson. The court does not believe CURT EILLISON consulted with a lawyer, at least not in
19 the manner he states.

20
21 XXI.

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

25
26 XXII.

The declaration was mailed to Stephen Whitehouse, Attorney for the WILSON's, and
Matthew Davis, Attorney for BOULEVARD.

XXIII.

The declaration also states and informed both counsel,

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“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.

XXIV.

On April 11, 2006, counsel for WILSON forwarded to the Grays Harbor County Superior Court a Motion & Affidavit for an Order of Default, and proposed Order of Default.

XXV.

Counsel for the Plaintiffs included a letter which advised the court to review the file, bringing to the court’s attention the declaration of Jeremy Ellison and that it conflicted with the information of Mr. Patterson.

XXVI.

The declaration of Jeremy Ellison had not been filed and this fact was unknown to Plaintiff’s counsel.

XXVII.

On April 12, 2006, an Order of Default was entered in the WILSON matter.

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.

XXIX.

Defendant BOULEVARD did not take an Order of Default.

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.

XXXI.

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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

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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.

Having entered the foregoing Findings of Fact, the Court does hereby enter its Conclusions of Law,

CONCLUSIONS OF LAW

I.

The Court has jurisdiction over the parties and the subject matters of these actions.

II.

CURT ELLISON was duly and properly serviced on March 21, 2006, by substitute

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3 service pursuant to RCW 4.28.080(15), in that a Summons and Complaint in each cause was left
4 with Jeremy Ellison, a person a suitable age and discretion at 1742-10th Place NE, East
5 Wenatchee, Washington, which was his usual place of abode and which, at that time, was also
6 the usual abode of Defendant CURT ELLISON.

7 III.

8 In the WILSON matter, the Order of Default entered on April 12, 2006, was duly and
9 properly entered.

10 IV.

11 CURT ELLISON has not asked in any of his pleadings that he be allowed to set aside the
12 default on the basis of excusable neglect. However, this court specifically concludes there was
13 not excusable neglect in that he willfully and knowingly failed to appear in this matter for six
14 weeks and that lack of response to the Summons, and his conduct in these proceedings, have
15 shown his complete lack of regard for this court and its process.

16 V.

17 As to the BOULEVARD matter, MR. ELLISON has completely disregarded the process
18 of this court both as to his conduct in these proceedings but by is failure to participate in the
19 deposition scheduled for him and by his canceling of the deposition at the last minute. This
20 court concludes that the entry of an Order of Default is an appropriate sanction against MR.
21 ELLISON. The court recognizes that this is an extreme sanction, but deems it appropriate and
22 the minimum necessary under the circumstances in light of the orchestrated and intentional
23 conduct of MR. ELLISON and the witnesses who testified on his behalf.

24 VI.

25 The Motion to Set Aside the Order of Default in the WILSON matter should be denied.
26 The Motion for Sanctions in the BOULEVARD matter should be granted.

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VII.

As to the BOULEVARD matter, MR. ELLISON should be ordered to immediately permit the redemption of the four parcels identified in paragraph VII of the Findings of Fact. The redemption amounts shall be calculated as of the date the redemption claim was submitted to the City of Ocean Shores. With respect to the Robles Property, the redemption amount shall be calculated as of the date of the agreement between BOULEVARD and Robles, May 28, 2005. If MR. ELLISON fails to immediately permit redemption, the court will appoint a commissioner to execute the deeds by motion.

DATED this 15th day of December, 2006.

S/
GORDON GODFREY, JUDGE

Presented by:

S/
STEPHEN WHITEHOUSE, WSBA #6818
Attorney for Plaintiffs WILSON

M/
MATTHEW DAVIS, WSBA #
Attorney for Plaintiff BOULEVARD DEVELOPMENT

Approved as to form; Notice of Presentation Waived:

J/
JACK L. BURTCH, WSBA #4161
Attorney for Defendant ELLISON

CERTIFICATE OF SERVICE

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

Thomas L. Dickson
Kevin T. Steinacker
Attorneys at Law
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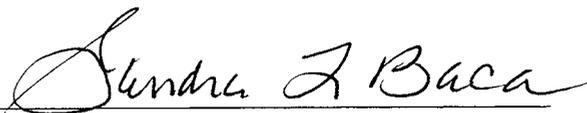
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dn

Service was accomplished by First Class Mail.

DATED this 21st day of November, 2007.

STEPHEN WHITEHOUSE


Sandra L. Baca, Legal Assistant