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

NO. 42226-3-II

EUGENE LAYTON, APPELLANT

v.

**MADANI KEISS AB DALLA and
“JANE DOE” KEISS AB DALLA,
husband and wife, and ADVANCED MOBILITY, LLC,
a/k/a ADVANCED MOBILITY OF
PUYALLUP, LLC., RESPONDENTS**

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignment of Error No. 1. The trial court erred in its Order of May 20, 2011, dismissing, on Summary Judgment, plaintiff's claim for negligence for insufficiency of process.

Issue No. 1: Where plaintiff presented evidence that the defendant was served at his usual place of abode by a then resident therein of suitable age and discretion, was it error to for the Court to dismiss plaintiff's claim for negligence for insufficiency of process on Summary Judgment?

(Assignment of Error 1)

II. STATEMENT OF THE CASE

This case arises out of an automobile collision between the defendant's medical transport vehicle and the plaintiff's motorcycle on or about September 26, 2007 in Puyallup, Washington. CP 1-3. The plaintiff filed his lawsuit on September 1, 2010. CP 1-3.

Jennifer Gillispie, a private investigator with ABC Legal Services, Inc. was hired to locate the defendant Madani Keiss Ad Dalla. CP 88-90.

Based upon Jennifer Gillispie's declaration, at the time of service, the defendant's motor vehicle was registered to 3445 S 160th St, Apt. 46, Seatac, WA 98188-5624. CP 88-90. Further, investigator Gillispie confirmed with

the US Postal Service that Keiss Madani's address listed with the US Postal Service was in fact 3445 S 160th St, Apt. 46, Seatac, WA 98188-5624. CP 88-90.

Based upon the information provided by Investigator Gillespie, on September 20, 2010, Richard Marlow of ABC Legal Services, Inc. attempted to serve two copies of the summons and complaint to 3445 S 160th St, Apt. 46, Seatac, WA 98188. CP 87.

Mr. Marlow received no answer at the door, but noticed a door open across the hall and asked the occupants if they knew the defendant. CP 87. The individuals in the room stated that the defendant was not there and called out for a female, who came out, identified herself as Afra Sulimani. CP 87. Mr. Marlow asked if she lived at this address and she replied, "yes", and then Mr. Marlow asked her if Madani Keiss Ab Dalla resided at that address and she replied, "yes". CP 87.

At that point, Mr. Marlow served Afra Sulimani 2 copies of the summons and complaint pursuant to RCW 4.28.080(15). CP 87.

The defendant denies residing in Apt. 46, yet offers no other evidence of where his usual place of abode is. CP 19-28. The defendant admits that he had his mail go to apt. 46, that he registered his vehicle at apt. 46. CP 19-28.

III. ARGUMENT

A. The Standard of Review

The appellate court reviews a summary judgment ruling de novo. *Vallandigham v. Clover Park Sch. Dist. No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005). Summary judgment is affirmed when there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *Id.*; CR 56(c).

All facts and reasonable inferences are considered in the light most favorable to the nonmoving party, and summary judgment is appropriate only if, from all the evidence, reasonable persons could reach but one conclusion. *Id.* (citing *Atherton Condo Apartment Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)).

The moving party has the burden to show that there is no genuine issue of material fact. Once the moving party satisfies that burden, the nonmoving party must present evidence showing that material facts are in dispute. *Id.* Summary judgment is proper if the nonmoving party fails to do so. *Id.*

B. The trial court erred in granting defendant's motion for summary judgment for insufficiency of service because there is a dispute as to the material fact of where the defendant's usual place of abode is, the plaintiff produced prima facie evidence that the defendant was properly served at his usual place of abode and the defendant has not produced evidence as to where his usual place of abode is.

Proper service of a summons and complaint is a prerequisite to the court obtaining jurisdiction over a party. *Goettemoeller v. Twist*, 161 Wn.App. 103, 253 P.3d 405 (2011), citing *Woodruff v. Spence*, 76 Wn.App. 207, 209, 883 P.2d 936 (1994).

The plaintiff has the initial burden of producing an affidavit of service that on its face shows that service was properly carried out. *Goettemoeller*, 161 Wn.App. at 104, citing *Witt v. Port of Olympia*, 126 Wn.App. 752, 757, 109 P.3d 489 (2005).

An affidavit of service is presumptively correct, and the party challenging the service of process bears the burden of showing by clear and convincing evidence that the service was improper. *Goettemoeller*, 161 Wn.App. at 104 citing *Woodruff*, 76 Wn.App. at 210.

A person who challenges the personal jurisdiction based on insufficient service of process has the burden of proof to establish a prima facie case of improper service. *Id.*

Substitute service may be made at a house of "usual abode" with a person of suitable age and discretion, who resides therein. *Goettemoeller*, 161 Wn.App. at 104, RCW 4.28.080(15); *Sheldon v. Fettig*, 129 Wn. 2d 601, 607, 919 P.2d 1209 (1996). Our Supreme Court has weighed in on the issue of abode service and has held "the term "house of [defendant's] usual abode in RCW 4.28.080(15) may be liberally construed to effectuate service and uphold jurisdiction." *Sheldon v. Fettig*, 129 Wn.2d at 612.

A person challenging service claiming that the residence served is not his usual place of abode has the burden to prove his usual place of abode is somewhere else. See *Romjue v. Fairchild*, 60 Wn.App. 278, 282-83, 803 P.2d 57 (1991).

A person can have more than one house of usual abode. *Goettemoeller*, 161 Wn.App. at 104-105 citing *Sheldon*, 129 Wn.2d at 611. The *Sheldon* Court explained that the inquiry is whether the home served was a center of domestic activity for the defendant where he would most likely receive notice of the pendency of a suit if left with a resident therein. *Id.* at 610. In this case, Ms. Sulimani admitted to the process server that both she and the defendant resided in the apartment. Further, in her own declaration she admitted that she would forward anything important to the defendant

while he was in Alaska.

In *Sheldon*, the Court held that her parents home was one “place of abode” because there were so many indicia of one’s domestic activity, her car was registered there, that was where she was registered to vote, and the address she listed on her vehicle’s bill of sale.

A place of usual abode, however, must be a place where the defendant's domestic activity is centered and where service left with a resident therein is reasonably calculated to come to the defendant's attention within the statutory period for making an appearance. *Goettemoeller*, 161 Wn.App. at 104-105, citing *Blankenship v. Kaldor*, 114 Wn.App. 312, 316, 57 P.3d 295 (2002) (quoting *Gross v. Evert-Rosenberg*, 85 Wn.App. 539, 542, 933 P.2d 439 (1997)).

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). All the evidence and reasonable inferences therefrom must be considered in a light most favorable to the nonmoving party. *Farmer v. Davis*, 28817-0-III (2011) citing *Schaaf v. Highfield*, 127 Wn.2d. 17, 21, 896 P.2d 665 (1995).

This case is akin to *Romjue v. Fairchild*, 60 Wn.App. 278, 803 P.2d 57 (1991). In *Romjue*, the process server attempted abode service and the woman answering the door told the process server that the defendant lived at the abode and was served. Later, on motion for summary judgment, the woman filed an affidavit stating that was not what she said to the process server. The Court held that when looking in the light most favorable to the non-moving party, the process server's affidavit raises an inference that service was proper and the defendant's affidavit was not sufficient to prove as a matter of law that his usual place of abode was somewhere else.

In this case, although Ms. Sulimani admitted that the defendant resided with her, she later denied so. However, the rule is settled that "the court does not weigh credibility in deciding a motion for summary judgment." *Jones v. State, Dept. of Health*, 170 Wash.2d 338, 349, 242 P.3d 825, 834 (2010) footnote 7, citing 14A KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 25:16 (2009). All evidence is to be viewed in the light most favorable to the non-moving party. *Vallandigham*, 154 Wn.2d at 26.

Here, the defendant's motor vehicle is registered to Unit 46, the US postal service confirmed that's his last known mailing address and Ms.

Sulimani admitted to the process server that she and the defendant resided therein. Further, the defendant does not ever state where the center of his domestic affairs was at the time of service.

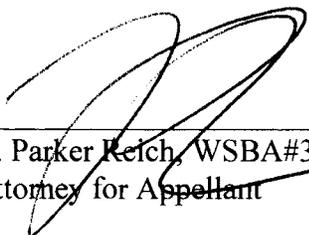
In viewing the evidence in the light most favorable to the non-moving party, the defendant has failed to prove, by clear cogent and convincing evidence, that as a matter of law, Unit 46 was not his usual place of abode. All the indicia of the center of one's domestic activity indicate that Unit 46 was the defendant usual place of abode for purposes of substitute service under RCW 4.28.080(15).

IV. CONCLUSION

This case should be remanded for trial on the merits.

Respectfully submitted this 26th day of October, 2011.

JACOBS & JACOBS



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Attorney for Appellant

CERTIFICATE OF SERVICE

The undersigned certifies under the penalty of perjury of the laws of the State of Washington that on the date given below I caused to be served in the manner indicated a copy of the foregoing Brief of Appellant upon the following persons:

Debra Dunlap
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PLLC
325 118th Avenue SE, Suite 209
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via Mail
 via Facsimile
 via ABC Messenger Delivery
 via email

DATED this 26th day of October, 2011


Ann Forthuber

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