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SEP 21 2010

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 288170-III

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OF

THE STATE OF WASHINGTON

Bradley M. Davis,
Respondent

v.

Christopher M. Farmer,
Appellant

Appeal from the Superior Court of Spokane County

BRIEF OF APPELLANT

Attorney for Appellant Christopher M. Farmer:
Douglas D. Phelps, WSBA #22620
Phelps & Associates
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Spokane, WA 99206
(509) 892-0467

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I. ASSIGNMENTS OF ERROR

1. The trial court erred in applying an incorrect standard to invalidate a properly filed affidavit of service which is presumptively correct.
2. The trial court erred when it abused its discretion in refusing to grant the plaintiffs' motion to continue to allow further discovery regarding the issue of "usual abode" and in striking evidence provided by plaintiff's to establish the defendant's "usual abode".
3. The trial court erred when it ruled contrary to *Central Hanover Trust* by finding service of process personally delivered to the defendant's last known address was improper service even where there is actual notice and the opportunity to appear and defend against the action.
4. The trial court erred when it failed to liberally construe the "usual abode" to effectuate service and uphold the jurisdiction of the court as required by the Washington Supreme Court in *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996) in granting the summary judgment.
5. The trial court erred when it improperly granted summary judgment where the defendant was properly served at his "usual abode".

II. STATEMENT OF THE CASE

The plaintiff was injured in an auto accident on April 21, 2006 and a summons and complaint was filed in Spokane County Superior Court on April 10, 2009. A summons and complaint was served on the defendant's usual abode on May 27, 2009 by ABC Legal Services, Joe M. Wood, at the Tombstone address in Rathdrum, Idaho. (CP11-12) The affidavit of service was filed with the court on July 15, 2009. (CP 11-12) Additionally, on June 25, 2009 Parker Gibson served Laurie Davis with a second

Summons and Complaint at the Tombstone address in Rathdrum, Idaho.
(CP 9-10; CP 26-29 – Declaration of Laurie Davis)

The defendant filed a summary judgment on October 21, 2009 alleging that the service of process at the Tombstone address was improper and that it was not the defendant's "usual abode." The defense never denied that the service notified the defendant of the action and gave the defendant an opportunity to appear and defend against the action. The defense filed a notice of appearance on the case on June 3, 2009. (CP 6-8) The case provides the appellate court with an opportunity to clarify the ruling of the Washington Supreme Court in *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996) that usual abode is to be "liberally construed to effectuate service and uphold the jurisdiction of the court" particularly where the defendant received actual notice, appeared, and defended the action.

III. INTRODUCTION

On April 26, 2006, Bradley Davis was involved in an automobile accident with Christopher Farmer at Argonne and Indiana in the Spokane Valley, Washington. Mr. Davis traveled across the southbound lane of travel into the path of a vehicle driven by Christopher Farmer. Mr. Chris Farmer was injured and was transported to the hospital. (CP 45-46)

A police report was subsequently obtained that was prepared by Deputy Craig Chamberlain which listed a 1520 Tombstone address for Bradley Davis. (CP 45-46) On that report was a phone number of 208-687-5284. (CP 45-46) A telephone call to that phone number had a message stating that a person could leave a message there for Brad and some other named people. (CP 48; 51-52; CP 98-99 Declaration of Laurie Davis) On April 10, 2009 the appellant filed suit in the Spokane County Superior Court. (CP 1-5) Subsequently, on May 27, 2009, ABC Legal Services, Joe M. Wood, hand delivered a copy of the Summons and Complaint served to a female, 18 years or older, at that address who accepted service. (CP 11-12) She admits reading the papers and knowing it was a lawsuit against Bradley Davis. (CP 26-29 Declaration of Laurie Davis) Laurie Davis, Bradley Davis' mother called Bradley Davis and advised him about the papers but she claims to not know if he picked them up or not. (CP 26-29 Declaration of Laurie Davis) On June 02, 2009, attorney Raymond W. Shutts filed a notice of appearance with service to Phelps & Associates, Attorneys at Law. (CP 6-8)

Concerned that the defendant might attempt to deny service, Confidential Investigations was contacted to attempt a hand-to-hand service on Bradley Davis. Confidential Investigations, investigator Parker Gibson, attempted to find Bradley Davis to serve the Summons and

Complaint directly to him. In attempting to locate Bradley Davis, Parker Gibson spoke with a neighbor at the Tombstone address. That neighbor confirmed that Bradley Davis had a boat and other personal items at the Tombstone address. According to this neighbor Bradley Davis was currently driving a red Chevy pickup truck. The neighbor said he knew Bradley Davis and hunted with him and was unsure where he lived. The neighbor also said that he did not want to be involved with the service of the papers the investigator was attempting. (CP 57-60)

The investigator also called the phone number 208-687-5284 and made a recording of the phone message. Again, the phone message states messages could be left for Bradley at this phone number. (CP 51-52; 57-59)(CP 98-99 Declaration of Laurie Davis) Further, Parker Gibson checked computer records available to their firm and found listings of an address for Bradley Davis at 1520 Tombstone and 7049 Tombstone, which is the same location. The computer records supported their information that Bradley Davis was utilizing this address as his usual abode. (CP 57-59; CR 69-71)

Parker Gibson, in a computer search, found an alternate address of 1101 W. Emma Avenue Apt. M, Coeur d' Alene, Idaho 83814. On June 16, 2009 he attempted service at that address but an unidentified white

female in her mid-twenties said she had taken over the previous tenant's lease. She did not have any information about Bradley Davis. (CP 57-63)

After conducting this investigation on June 25, 2009, Parker Gibson served the Summons and Complaint at the Tombstone address (CP 9-10) on a female who stated that she was Bradley Davis' mother but claimed she had no information about Brad Davis. She claimed to know nothing about his whereabouts, contrary to the phone message and neighbors statements. (CP 69-71; CP 57-59) This is also contrary to Ms. Laurie Davis' declaration where she said that she contacted Bradley Davis after each service at her residence. (CP 26-29; 98-100; Declarations of Laurie Davis) It is also contrary to Bradley Davis' declaration wherein he claims he lives less than two miles from his mother in Rathdrum, Idaho. (CP 101-102)

On July 16, 2009 Bradley Davis was located at 13537 Halley St. Rathdrum, Idaho and the investigator recorded the contact and service of the papers directly to Bradley Davis. (CP 76-78) The recording of that meeting was submitted to the Superior Court as Exhibit F in the Plaintiff's Response to Summary Judgment filed November 06, 2009 and in the Affidavit of Service by Parker Gibson. (CP 76-78; CP 62-63) In the recording of personal service on July 16, 2009 Mr. Bradley Davis confirms by his statements that he was aware that the Summons and

Complaint was coming. Further, Bradley Davis states “about time” and “you’re too late aren’t you?” (CP 76-79 Affidavit of Service July 16, 2009) Clearly the service at Bradley Davis’ usual abode on Tombstone had been successful on both occasions consistent with the affidavits of Ms. Laurie Davis wherein she admits contacting Bradley Davis on both occasions. (CP 98-100; CP 26-29 Declaration of Laurie Davis) The affidavit of personal service on Bradley Davis was filed with Superior Court. (CP 76-78 Affidavit of Service July 16, 2009)

On August 24, 2009 Parker Gibson returned to the 1101 W. Emma Avenue Apt. M address and a male at that address stated he was Josh. Josh stated he moved into the apartment on May 21, 2009. As recently as August 24, 2009 Mr. Bradley Davis received a traffic infraction in Spokane County District Court. At that time the police were provided an address of 1101 W. Emma Avenue Apt M. in Coeur d’ Alene, Idaho. That traffic ticket was filed August 25, 2009 and paid September 04, 2009. (CP 101-102 Declaration of Bradley Davis; CP 72-74) That was the very address that had been checked by investigator Parker Gibson, who had tried to serve Mr. Bradley Davis there on June 16, 2009. An address that was the only other address on any records related to Mr. Bradley Davis other than the Tombstone address where the female occupant stated Bradley Davis did not reside. On October 22, 2009 the voice message at

the 208-687-5284 phone number still said a message could be left there for Brad Davis. (CP 69-71 Affidavit of Service Parker Gibson)

The defendant, Bradley Davis brought a Motion for Summary Judgment (CP 17-18) maintaining that 7049 Tombstone was not the defendant's "usual abode". Further, that the statute of limitations had expired. (CP 19-25) It was the defense position that the service on May 27, 2009 at 7049 W. Tombstone upon Laurie Davis was not proper "abode service." (CP 22-24) Ms. Davis admits by declaration that she advised Bradley Davis, the defendant, of the process service at the 7049 W. Tombstone address. (CP 26-29 Declaration of Laurie Davis) Similarly, Ms. Laurie Davis admits that she was served with papers at 7049 W. Tombstone address again in June of 2009. Once again she contacted her son regarding the papers. (CP 26-29 Declaration of Laurie Davis) Ms. Davis states that she is uncertain if her son picked up the Summons and Complaint. (CP 26-29 Declaration of Laurie Davis) Ms. Laurie Davis remembers that her son advised her that the papers had to be served on him personally. (CP 26-29 Declaration of Laurie Davis)

The Superior Court in considering the summary judgment motion allowed the defense to bring a motion to strike portions of the plaintiff's evidence. (January 10, 2010 RP 11; CP 84-97) Also the court considered the plaintiff's motion to continue to allow additional discovery regarding

the service of process. The basis for the exclusion of the affidavits was a claim that the testimony was hearsay. (January 10, 2010 RP 13-15) The plaintiff argued that many of the statements made by the defendant were admissions against interest by a party opponent or otherwise exceptions to the hearsay rule. (CP 104-105)(January 10, 2010 RP 21-23)

The defense maintained that they had no objection to the recording of the defendant Bradley Davis. (January 10, 2010 RP 24)(CP 61-63) Defense counsel argued that the evasion of service was not relevant because service was possible through the Secretary of State by mailing to the Tombstone address by certified mail. (January 10, 2010 RP 25 lines 1-16) Although the defense pointed out that this would merely have resulted in a certified letter being sent to the Tombstone address listed on this police report where the plaintiff actually served papers. (January 10, 2010 RP 22 , lines 16-25, RP 23, lines 1-22)

The Superior Court refused to allow the plaintiff a continuance to take a deposition of Mr. Bradley Davis. The discovery was needed to determine information as to his “usual abode” at the time of service. (January 10, 2010 RP 29) Additionally to determine if Mr. Bradley Davis was evading service (January 10, 2010 RP 31) and whether his usual abode was the Tombstone address. (January 10, 2010 RP 32) The plaintiff argued the defense was arguing form over substance because service

through the Secretary of State would result in mail service at the address where the plaintiff had personally served the defendant's mother. (January 10, 2010 RP 33) The plaintiff argues that service through the Secretary of State is not to be used as a shield to protect the defendant who has been served at his "usual abode" and has actual notice. (January 10, 2010 RP 22-23) Here the plaintiff delivered two Summons and Complaints to the "usual abode". (CP 9-10; CP 11-12; CP 26-29 Declaration of Laurie Davis) (January 10, 2010 RP 34-35) The court denied the plaintiff's motion for continuance to conduct discovery on the usual abode question. (January 10, 2010 RP 40)

The defense argued that the address on Tombstone was not his usual abode or second abode. (January 10, 2010 RP 41-44) The plaintiff argued that the usual abode service that occurred at the Tombstone address by both ABC Service on May 27, 2009, Joe M. Wood (CP 11-12), and Parker Gibson on June 25, 2009 should be upheld. (CP 89-90) (January 10, 2010 RP 45-46) The court rules that actual notice by abode service at the last address known for the defendant is not effective even when that is the address which would have been served by mail through the Secretary of State. (January 10, 2010 RP 52-53) The fact that the plaintiff actually served two Summons and Complaints at the address where the Secretary of State would have allowed mail service was an "intriguing argument".

While the court understands the policy argument the court granted summary judgment. (January 10, 2010 RP 53)

IV. ARGUMENT

The plaintiff contends that the Summons and Complaint was properly served at the defendant's "usual abode." The plaintiff filed an affidavit of service from ABC Legal Services, Joe M. Wood supporting the service (CP 11-12) and a second on June 25, 2009 by Parker Gibson. (CP 9-10) The defendant does not deny that the service actually advised the defendant of the action or that he appeared to defend in the action. (CP 26-28)

The case provides the court with an opportunity to clarify the Supreme Court's decision that trial courts are to construe "usual abode" to "effectuate service and uphold the jurisdiction of the court". Further, this case provides the court with an excellent opportunity to apply the *Fettig* decision consistent with the purpose of giving defendants notice and an opportunity to appear and defend in an action consistent with *Mullane v. Central Hanover and Trust Co.*, 339 U.S. 306, 314, 94 L.Ed. 865, 70 S. Ct. 652 (1950) Such a decision would be consistent with the trend of upholding the usual abode service where actual notice is accomplished by the usual abode service.

ISSUE 1: The trial court applied an incorrect standard in invalidating a properly filed affidavit of service which is presumptively correct.

The courts in Washington State have held that “an affidavit of service that is regular in form and substance is presumptively correct.” *In re Dependency of A.G.*, 93 Wn. App. 268, 277, 968 P.2d 424 (1998) Thus, a party challenging service bears the burden of proving improper service by clear and convincing evidence. *Allen v. Starr*, 104 Wash 246, 247, 176 P.2d (1918); *Vukich v. Anderson*, 97 Wn. App. 684, 687, 985 P.2d 952 (1999)(quoting *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745 (1997)) Clear and convincing evidence exists “when the defendant shows the ultimate fact at issue to be highly probable.” *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999) On appellate review, to sustain a finding in favor of the defendant-movant, there must be substantial evidence in the record from which a rational trier of fact could have found the necessary facts by clear and convincing evidence. See *K.S.C.*, 137 Wn.2d at 925

Beyond this the court must consider the evidence at a summary judgment motion. On appeal from summary judgment the appellate court is to engage in the same inquiry as the trial court. Summary judgment is properly granted when the pleadings, affidavits, depositions, and admissions on file demonstrate that there is no genuine issue of material

fact and that the moving party is entitled to summary judgment as a matter of law. The moving party bears the initial burden of establishing its right to judgment as a matter of law. Once the moving party satisfies its initial burden, the burden then shifts to the moving party to show that a triable issue exists. All inferences from the evidence must be construed in favor of the non-moving party. *Jacob's Meadow Owners Association v. Plateau 44 II, LLC*, 139 Wash. App. 743, 752 n.1, 162 P.3d 1153 (2007)

In the case before the court the plaintiff filed an affidavit of service from ABC Legal Service signed by Joe M. Wood. (CP 11-12) Further, the plaintiff provided yet a second affidavit of service by Parker Gibson on June 25, 2009. (CP 9-10) In the case before the court the trial court failed to give proper weight to the affidavits of service. First, the cases cited hold that affidavits are first held presumptively correct. Then at summary judgment all inferences must be construed in favor of the non-moving party. The trial court failed to apply the presumptively correct standard in conducting its inquiry requiring that this court set aside the trial courts decision in granting the defendants summary judgment.

ISSUE 2: The trial court abused its discretion in refusing to grant the plaintiffs' motion to continue to allow further discovery regarding the issue of "usual abode" and in striking evidence provided by plaintiffs to establish the defendant's "usual abode".

A court abuses its discretion when its decision is based on untenable grounds or is manifestly unreasonable or arbitrary. Testimony that will assist the trier of fact is to be admitted ER702. “A trial court abuses its discretion when its decision is manifestly unreasonable, or exercised on untenable grounds or for untenable reasons”, namely when the court “relies on unsupported facts, takes views that no reasonable person would take, applies the wrong legal standard, or bases its ruling on an erroneous view of the law.” *Gideon v. Simon Property Group, Inc.*, 158 Wn.2d 483, 494, 145 P.3d 1196 (2006) At summary judgment the court must consider “the facts and all reasonable inferences therefrom must be considered in the light most favorable to the non-moving party.” *Nivens v. 7-11 Hoogy’s Corner*, 133 Wash.2d 192, 197-98, 943 P.2d 286 (1997)

It is important to note that the trial court failed to consider plaintiffs declarations of Laurie Davis admitting receipt of the Summons and Complaint. (CP 26-28 Declaration of Laurie Davis) Additionally, Ms. Davis admits on both occasions contacting Bradley Davis. (CP 26-28 Declaration of Laurie Davis) The court failed to consider this along with the admissions by Ms. Davis that she contacted Bradley Davis and is uncertain if he picked up the first Summons and Complaint she received. (CP 26-29; CP 98-100 Declarations of Laurie Davis) Then the court failed to consider her statement that Bradley Davis said “they have to serve me

personally” a clear acknowledgment of the nature of the documents. (CP 26-28; CP 98-100 Declarations of Laurie Davis)

In the case before the court the trial court refused to consider evidence properly submitted by affidavits. The trial court without any apparent basis refused to allow a continuance to complete discovery. The question of a persons’ usual abode is a fact specific decision. In the case before the court the trial court without any clear reason refused to consider evidence presented and refused to allow a continuance to depose the parties to present further evidence. The plaintiff therefore requests a remand back to trial court for deposition of Bradley and Laurie Davis. Alternatively the plaintiff seeks reversal of the trial courts decision granting summary judgment after the appellate court reviews the evidence properly offered.

ISSUE 3: The trial court ruled contrary to *Central Hanover Trust* by finding service of process personally delivered to the defendant’s last known address was improper service where there is actual notice and the opportunity to appear and defend against the action.

The decision of the United States Supreme Court in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) held:

“the fundamental requisite of due process of law is the opportunity to be heard. *Granis v. Ordean*, 234 U.S. 385, 394 This right to be heard

has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce, or contest.

The Court has not committed itself to any formula achieving a balance between these interests in a particular proceeding or determining when constructive notice may be utilized, or what test it must meet. Personal service has not, in all circumstances, been regarded as indispensable to the process due to residents, and it has more often been held unnecessary as to nonresidents. We disturb none of the established rules on these subjects. The notice must be of such nature as reasonably to convey the required information. *Grannis v. Ordean, supra* and it must afford a reasonable time for those interested to make their appearance, *Roller v. Holly, supra*, and *CF. Goodrich v. Ferris*, 214 U.S. 71 but if, with due regard for the particularities and peculiarities of the case, these conditions are reasonably met the constitutional requirements are satisfied.”

The *Mullane* case focus’ on the need to assure that the citizen has notice that allows the defendant an opportunity to appear and defend in the legal action. The court made it clear it is not looking to a formula but at the person (defendant) having notice and an opportunity to appear.

Consistent with this spirit of the law the Washington Courts have permitted substantial compliance where a defendant has clearly authorized service upon another, or where service was indirect. See e.g. *Lee v. Barnes*, 58 Wash.2d 265, 267, 362 P.2d 237 (1961)(recognized service as sufficient where a person was appointed by the defendant to accept service, even though statute did not appear to allow service on that individual); *Thayer v. Edmonds*, 8 Wash. App. 36, 41-42, 503 P.2d 1110

(1972), rev. denied, 82 Wash.2d 1001 (1973)(service sufficient where the defendant indicated that the notice could be left at the door.)

In the case before this court there is no dispute that the defendant appeared and defended the action. A notice of appearance was filed within days of the May 27, 2009 service upon Laurie Davis serving copies on the plaintiff's counsel. (CP 6-8) Ms. Laurie Davis admits by affidavit that she was served with the Summons and Complaint. (CP 26-29 Declaration of Laurie Davis) Indeed she states in her affidavit she called Mr. Bradley Davis about the papers but does not "recall if he picked them up." (CP 26-29 Declaration of Laurie Davis) Again in June, 2009 she received the legal paperwork and again she called her son about the paperwork. (CP 26-29 Declaration of Laurie Davis) Ms. Laurie Davis in fact says her son told her that he had to be personally served. (CP 26-29; Declaration of Laurie Davis) Absent knowledge of the papers and their contents how would he know he had to be served personally? Without knowledge of these papers how would his attorney know who the plaintiff counsel was on the case to serve the notice of appearance. (CP 6-8)

Here the defense appears to admit by their own declarations that Mr. Bradley Davis knew of the action. Indeed he obtained legal counsel who appeared serving notice on the attorney that was on the Summons and Complaint. (CP 6-8) The case is contrary to *Mullane* which focused upon

“notice and opportunity to defend” rather than a “formula”. The plaintiff maintains that formula should not be upheld but “notice and opportunity to appear” upheld consistent with *Mullane*. The plaintiff seeks reversal of the courts formula approach and denial of summary judgment consistent with *Mullane* based upon the defendants actual notice and opportunity to defend.

ISSUE 4: The trial court erred when it failed to liberally construe the “usual abode” to effectuate service and uphold the jurisdiction of the court as required by the Washington Supreme Court in *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996).

Civil Rule 1 requires Washington Courts to interpret the court rules in a manner “that advances the underlying purpose of the rules, which is to reach a just determination in every action.” *Burnett v. Spokane Ambulance*, 131 Wash.2d 484, 498, 933 P.2d 1036 (1997) The rules are intended to allow the court to reach the merit of the action. *Sheldon v. Fettig*, 129 Wash.2d 601, 609, 919 P.2d 1209 (1996) “Whenever possible, the rules of civil procedure should be applied in such a way that substance will prevail over form.” *Griffith v. Bellevue*, 130 Wash.2d 189, 192, 922 P.2d 83 (1996)(quoting *Fast F. Savi. & Loan Ass’n v. Ekanger*, 93 Wash.2d 777, 781, 613 P.2d 129 (1980)

The Washington Supreme Court in *Sheldon v. Fettig*, 129 Wn.2d 601, 608-609, 919 P.2d 1209 (1996) announced that:

“We also note many sister jurisdictions follow a rule of liberal construction in interpreting substitute service of process statutes when actual notice is received. See e.g. *Larson v. Hendrickson*, 394 N.W.2d 524, 526 (Minn.Ct.App. 1986); *Lavey v. Lavey*, 551 A.2d 692 (R.I.1988); *Karlsson v. Rabinowitz*, 318 F.2d 666 (4th Cir.1963); *Plonski v. Halloran*, 36 Conn.Supp. 335, 337, 420 A.2d 117 (1980)(statutes governing 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, 124-125 (1970)

We therefore conclude “house of [defendant’s] usual abode” in RCW 4.28.080(15) is to be liberally construed to effectuate service and uphold jurisdiction of the court. This is consistent with our procedural rules in (1) RCW 1.12.020, which mandates that “[t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction”; and (2) CR 1, which states the rules “shall be construed to secure the just, speedy, and inexpensive determination of every action,” which promotes a policy to decide cases on their merits. Indeed, “[m]odern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.” *Carle v. Earth Stove Inc.*, 35 Wash.App. 904, 908, 670 P.2d 1086 (1983)(quoting *Fox v. Sackman*, 22 Wash.App. 707, 709, 591 P.2d 855 (1979))

Moreover, the substitute service of process statute is designed to allow injured parties a reasonable means to serve defendants. *Wichert*, 117 Wash.2d at 151-52, 812 P.2d 858 Our holding here is consistent with this purpose. Finally, our holding well exceeds the constitutional due process requirements set out in *Mullane v. Central Hanover Bank & Trust Co.*, 330 U.S. 306, 315, 70 S. Ct. 652, 657, 94 L.Ed. 865 (1950)(“The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.”)

The Washington Supreme Court in *Fettig* announced a policy consistent with court rules, *Mullane v. Central Hanover Trust*, and other jurisdictions to conclude “house of [defendant’s] usual abode” in RCW 4.28.080(15) is to be liberally construed to effectuate service and uphold

the jurisdiction of the court. In *Sheldon v. Fettig*, 129 Wn.2d 601, 608-609, 919 P.2d 1209 (1996) the court cited cases from sister jurisdictions.

Larson v. Hendrickson, 394 N.W.2d 524, 526 (Minn. Ct. App. 1986) was cited in *Fettig supra* for cases supporting liberal construction in interpreting substitute service of process when actual notice is received. The Minnesota Court of Appeals upheld service on a renter where the court held: "There appears to have been no significant problem resulting from the service of the summons and complaint on the tenant, as he promptly forwarded it to Pearson's attorney. When actual notice has been received by the intended recipient "the rules governing such service should be liberally construed.'" Similarly in *Lavey v. Lavey*, 551 A.2d 692, (R.I.1988) the court held: "When a defendant receives actual notice of the suit Rule 4(d)(1) will be interpreted broadly....we would further note that in today's highly mobile society it is possible that a defendant may maintain more than one dwelling place or usual abode of Rule 4(d)(1)" citing *Karlin v. Avis*, 326 F. Supp. 1325, 1329 (E.D. N.Y. 1971)

The federal case cited in the *Fettig* case was *Karlsson v. Rabinowitz*, 318 F.2d 666 (4th Cir. 1963) which held: "To the extent that there is any rule or guide to be followed by the federal courts in such a case it is that where actual notice of the commencement of the action and the duty to defend has been received by the one served, the provisions of

Rule 4(d)(1) should be liberally construed to effectuate service and uphold the jurisdiction of the court, thus insuring the opportunity for a trial on the merits.” Service in *Plonski v. Halloran*, also cited in the *Fettig* case approved service on a former Connecticut resident who was living in California but was in Connecticut temporarily on business. The court held that where the summons and complaint was left at the defendant’s hotel room and actual notice was received the substitute service should be upheld. The *Plonski* decision held: “the fact that the defendant received actual notice of this action weighs heavily in favor of the plaintiff; the defendant cannot be heard to say that he was prejudicial in any manner whatsoever....it has been held that provisions for substituted service should be liberally construed in those cases where the defendant received actual notice.” Citing *Annot*, 32 ALR.3d 112, 124-25

All of the cases cited to in the case of *Sheldon v. Fettig*, 129 Wn.2d 601, 608-609, 919 P.2d 1209 (1996) stand for the proposition that where actual notice is received the courts should liberally construe the statute to “effectuate service and uphold the jurisdiction of the court.” The decision by these courts is consistent with the Supreme Court ruling set forth in *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) that when the defendant has an opportunity to

appear and defend in the legal action the case should be decided on its merits.

In the case before the court the defendant received actual notice and the trial court failed to liberally construe the “usual abode” where the defendant received actual notice. The defendant’s mother notified him of the process service on two occasions. (CP 26-28 Declaration of Laurie Davis) The mother states in her declaration that she does not know if her son picked up the papers. (CP 26-28 Declaration of Laurie Davis) As a result his attorney appeared and defended in the action by serving the notice on the attorney listed in the Summons and Complaint. (CP 6-8) The defendant states in his declaration that he lived within two miles of his mothers home. (CP 101-103 Declaration of Bradley Davis) The appellate court should properly apply the criteria required by *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996) to deny the summary judgment motion where service was made and actual notice occurred.

ISSUE 5: The trial court improperly granted summary judgment where the defendant was properly served at his “usual abode”.

The inquiry is whether there is genuine issue as to any material fact and whether the moving party is entitled to judgment as a matter of law. *Fahn v. Cowlitz County*, 93 Wn.2d 368, 373, 610 P.2d 857(1980) We

consider the evidence and the reasonable inferences therefrom in a light most favorable to the non-moving party. *Schaaf v. Highfield*, 127 Wn.2d 17, 21, 896 P.2d 665(1995) If the court finds there was a dispute as to any material fact, then summary judgment is improper. *Hiatt*, 120 Wn.2d at 65 However, where reasonable minds could reach but one conclusion from the admissible facts in evidence, summary judgment should be granted CR56(c); *La Mon v. Butler*, 112 Wn.2d 193, 199, 770 P.2d 1027, cert. denied, 493 U.S. 814(1989). A “material fact” is a fact upon which the litigation depends, in whole or in part. *Barrie v. Host of AM., Inc.*, 94 Wn.2d 640, 643, 618, P.2d 96(1980)

The issue in this case is whether or not the Tombstone address in Rathdrum, Idaho was the defendant’s “usual abode”. RCW 4.28.080(15) allows for substitute service of process. Washington courts have held that substitute service is effective when (1) a copy of the summons is left at the defendant’s house of usual abode, (2) with some person of suitable age and discretion, (3) then resident therein. *Sheldon v. Fettig*, 129 Wn.2d 601, 607, 919 P.2d 1209(1996)

The legislative purpose of the statutes’ relating to the service of process was discussed in *Martin v. Triol*, 121 Wn.2d 135, 145, 847 P.2d 471(1993). Service of process requires adherence to due process requirements, and its’ execution must provide “notice reasonably

calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” Citing *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 314, 94L.Ed. 865, 70 S. Ct. 652(1950)

Washington state courts have held that “house of [defendant’s] usual abode” in RCW 4.28.080(15) is to be liberally construed to effectuate service and uphold the jurisdiction of the court. *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919, P.2d 1209(1996) Additionally, substitute service of process statute is designed to allow injured parties a reasonable means to serve defendants. *Fettig* at 609 citing *Witchert v. Cardwell*, 117 Wn.2d 148, 151-52(1991)

The court concluded that “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 the defendant would promptly receive notice if the summons were left there.” *Sheldon v. Fettig*, 129 Wn.2d 601, 612, 919 P.2d 1209(1996)

Applying the law to the case before the court, Mr. Bradley Davis clearly maintained two usual abode’s, primarily he maintained the Tombstone address at Rathdrum with his mother. He kept his boat and

personal property at his mother's residence. (CP 57-59) He received phone messages regularly at the Tombstone address and continued even into October of 2009 to receive messages at his mother's Tombstone phone. (CP 98-100 Declaration of Laurie Davis) As a second usual abode it would appear that Mr. Bradley Davis holds out a second abode at 1101 W. Emma Apartment M in Coeur d' Alene, Idaho. As late as August 24, 2009 Mr. Bradley Davis provided that address in another courtroom in Spokane County. It is clear from the investigation of Parker Gibson that Mr. Bradley Davis moved from that apartment before May 21, 2009. Coincidentally, Mr. Gibson visited with a tenant at 1101 W. Emma Apartment M named Josh that same day Mr. Davis received a ticket in Spokane County and gave the Emma address to law enforcement.

Mr. Bradley Davis petitioned the Superior Court to find service improper when substituted at his Tombstone address. Apparently, arguing that service should have occurred at the 1101 W. Emma Apartment M. On June, 16, 2009 Parker Gibson attempted service at that address and Mr. Bradley Davis did not live at that address. Mr. Parker Gibson then went on to complete a second service at the Tombstone address. (CP 9-10) Mrs. Laurie Davis maintains in her declarations that on both occasions she received the Summons and Complaint she notified Bradley Davis. She states that she is "unsure" if he picked up the Summons and Complaint.

(CP 26-28 Declaration of Laurie Davis) His attorney filed a notice of appearance with the court and serve plaintiff counsel on June 02, 2009.

(CP 6-8)

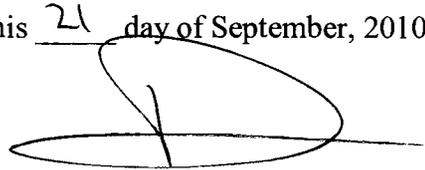
It appears that Bradley Davis was in the process of a move during the month of May, 2009. The usual place of abode in this case is the Tombstone address where the summons and complaint was served on two separate occasions by two different process servers. (CP 9-12) The home where the defendant kept his boat, receives phone messages, and returns to on a frequent basis. (CP 57-59)

Mr. Bradley Davis maintains in his affidavit that he moved in the “spring of 2009” when the date more precisely is May 21, 2009. (CP 30-31) He still maintains in another court that his address is 1101 W. Emma Apartment M in Coeur d’ Alene, Idaho. (CP 73-74; CP 101-102) It is clear from the declarations of Bradley Davis (CP 30-31) and Ms. Laurie Davis that the service of the summons and complaint on Ms. Davis resulted in notice to Mr. Bradley Davis (CP 26-29 Declaration of Laurie Davis) and the June 02, 2009 notice of appearance from counsel and to plaintiffs counsel resulted from that service. (CP 6-8)

V. CONCLUSION

The trial court appears to have applied the improper standard in invalidating an affidavit of service. Additionally, the trial court failed to liberally construe the “usual abode” to effectuate service and uphold the jurisdiction of the court as required by the Washington Supreme Court in *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996) particularly where actual notice and appearance resulted. The plaintiff seeks reversal of the trial court and remand for trial on the facts. Alternatively, the plaintiff seeks remand for completion of discovery on the issue of determining usual abode.

Respectfully submitted this 21 day of September, 2010



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ORIGINAL

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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

CHRISTOPHER M. FARMER; a single person,)
Appellant) Cause No. 28817-0-III
) Cause No. 09-2-01579-6
v.)
BRADLEY M. DAVIS and JANE DOE DAVIS,) DECLARATION OF
and the marital community thereof;) SERVICE
Respondent)
)
_____)

I, Leah M. Hill, declare as follows:

That I am over the age of eighteen (18) years, not a party to this action, and competent to be a witness herein. That I, as a legal assistant in the office of Phelps & Associates, PS, served in the manner indicated below, an original and one copy of the Appellant's Brief, on September 21, 2010.

COURT OF APPEALS DIVISION III
500 N. CEDAR) Legal Messenger
SPOKANE, WA 99201) U.S. Regular Mail

I further declare that I served in the manner indicated below a true and correct copy of the Appellant's Brief on September 21, 2010.

SPOKANE COUNTY SUPERIOR COURT
1116 W. BROADWAY) Legal Messenger
SPOKANE, WA 99260) U.S. Regular Mail

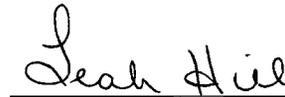
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I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

Signed at Spokane, WA on this 21 day of September, 2010



LEAH M. HILL