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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 337421

IN THE COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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KATHERINE M. FORSBERG,

Appellant,

v.

WESTON T. GRIEPP,

Respondent.

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**APPELLANT'S OPENING BRIEF**

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## I. INTRODUCTION

In 2012, Mrs. Forsberg was involved in an automobile collision. Mr. Griep had rear-ended her. She served him with service of process at his parents' house under the substitute service statute, RCW 4.28.080(16).

Mr. Griep has asserted a procedural defense, insufficient abode service. He relies on a technical reading of RCW 4.28.080(16), ignoring the commandment of *Sheldon* to liberally construe the statute to give effect to service. RCW 4.28.080(16) was meant to aid the victims of negligence, not to ensnare them in procedural webs. A ruling in favor of Mr. Griep would harm the civil-justice system. It would encourage defendants to hide behind procedural defenses and force plaintiffs to smoke them out through expensive investigation agencies.

Even if abode service is deemed insufficient, Mrs. Forsberg has satisfied the elements of service by publication under RCW 4.28.100(2). Mrs. Forsberg went above and beyond the standard in *Boes* in her efforts to personally serve Mr. Griep. And Mr. Griep, through his actions before the time period for serving expired, made it clear that he did not want Mrs. Forsberg to find him.

Procedurally, the trial court also erred. The trial court—faced with conflicting declarations, and no other evidence—made a determination of fact in favor of the moving party at summary judgment.

The trial court's order of dismissal should be reversed and the case remanded.

## **II. ASSIGNMENT OF ERROR**

Assignment of Error No. 1: The trial court erred by granting Mr. Griep's motion for summary judgment.

Assignment of Error No. 2: The trial court erred by granting Mr. Griep's motion for reconsideration.

Assignment of Error No. 3: The trial court erred by denying Mrs. Forsberg's motion for reconsideration.

Assignment of Error No. 4: The trial court erred by denying Mrs. Forsberg's motion to vacate.

## **III. ISSUES PERTAINING TO THE ASSIGNMENT OF ERROR**

This appeal presents two issues. If the Court rules in favor of Mrs. Forsberg on the first issue, then it does not need to reach the second. The issues are:

1. A plaintiff is allowed to serve process by publication if he uses "due diligence" to locate the defendant and can show that the defendant is intentionally concealing himself from service. Mrs. Forsberg exhausted all resources available to her when she made 14 separate attempts to locate Mr. Griep. Were her attempts sufficient to establish due diligence? [Yes.] During the critical time to serve, Mr. Griep changed his residence. Can

this action be construed as *some* evidence that he was evading service?  
[Yes.] (The trial court erred on this issued under assignment of error 1-4).

2. Our Washington Court has construed the phrase “usual place of abode” to be the place at which the defendant is most likely to receive notice of a pending suit. Mrs. Forsberg served Mr. Griep, under the substitute service statute, at his parents’ home. Did the trial court err by holding, as a matter of law, that Mrs. Forsberg did not properly serve Mr. Griep under RCW 4.28.80(16)? [Yes.] (The trial court erred on this issued under assignment of error 1-4).

#### IV. STATEMENT OF THE CASE

Appellant Katherine M. Forsberg alleged that respondent Weston T. Griep drove negligently into her on February 22, 2012 on Highway 395 in Stevens County, causing her bodily injury and damages. (CP 4) Mr. Griep admits to hitting Mrs. Forsberg’s vehicle from behind. (CP 11) On February 10, 2015, fewer than three years after the auto collision, the summons and complaint were filed. (CP 3)

On February 11, 2015, Mrs. Forsberg sent Deputy Stroisch of the Stevens County Sheriff’s Department to attempt service of process on the respondent Mr. Weston T. Griep at 301 N Stevens St., Chewelah, WA. Deputy Stroisch served Mr. Griep’s father, Weston P. Griep, with a

copy of the summons and complaint along with discovery under the substitute service statute, RCW 4.28.080(16). (CP 8)

Nine days later, on February 19, 2015, Mr. Griep's attorney filed a notice of appearance and Deputy Stroisch's return of service was filed. (CP 7-8) And on March 23, 2015, Mr. Griep filed his answer. (CP 10)

On April 1, 2015, Mrs. Forsberg's counsel left a voicemail for Mr. Griep's counsel regarding overdue discovery responses. The call was not returned. (CP 136) On April 6, 2015, Mrs. Forsberg's counsel's office called Mr. Griep's attorney to again inquire about a timeframe for the overdue discovery response. His office's legal assistant could not give a time frame but requested that the discovery be sent to them in PDF and editable Word version. Follow up calls for a timeframe were made on April 8<sup>th</sup> and 9<sup>th</sup>. Those calls were not returned. On April 17, 2015, Mrs. Forsberg's counsel's office again left a message with Mr. Griep's counsel's office to schedule a CR 26(i) discovery conference. The call was not returned. On April 22, 2015, Mrs. Forsberg's counsel sent a letter to Mr. Griep's counsel setting the conference for April 24, 2015. (CP 138) Finally, at the CR 26(i) call, counsel for Mr. Griep stated that service was improper because his client no longer resided at 301 N Stevens St., Chewelah, WA. (CP 18)

Four days later, on April 28, 2015 (12 days before the 90-day extension on the statute of limitations was set to expire on May 11, 2015) Mr. Grieppe updated his address with the department of licensing (“DOL”) to 1507 W 7<sup>th</sup> Ave., Spokane, WA. (CP 155) Coincidentally, on that same day, Mrs. Forsberg’s counsel’s office called Mr. Grieppe’s counsel and requested Mr. Grieppe’s current address. The request was denied. (CP 138)

In an abundance of caution, on April 30, 2015, Mrs. Forsberg filed a motion to service by publication. That order was granted on May 5, 2015. (CP 37-38, 40-41) On May 15, 2015, two days after the statute of limitations had expired, Mr. Grieppe filed a motion for reconsideration and summary judgment. (CP 42) His motions were granted. (CP 122-124) Mrs. Forsberg subsequently filed a motion for reconsideration. (CP 127) Her motion was denied. (170-172) Lastly, Mrs. Forsberg filed a motion for vacation. (CP 176) Her motion was again denied. (CP 222-223)

## **V. SUMMARY OF ARGUMENT**

1. In the case of motorists who commit torts on Washington highways and then cannot be found within the state, the legislature has provided for service by publication under RCW 4.28.100(2). The first requirement of the statute is that the party seeking to effect service under the statute use due diligence to personally serve the defendant. Mrs. Forsberg has provided evidence that she used all the resources available

to her in attempting to locate Mr. Griep. The second part of the statute requires that the party show *some* evidence that the defendant is attempting to avoid service. Mrs. Forsberg had provided the court with 2 different instances evidencing Mr. Griep's intent to avoid service. The court failed to follow *Boes* when it ruled that Mrs. Forsberg failed to use due diligence or to provide any evidence that Mr. Griep was attempting to avoid service.

2. The trial court concluded that Mrs. Forsberg did not properly serve Mr. Griep under the substitute service statute because his parents' address was not his "place of usual abode." This decision was flawed and should be reversed because it failed to follow the construction in *Sheldon*—to construe the statute liberally to effect service. Specifically, our Supreme Court has defined the phrase "usual place of abode" under the service of process statute to be the place at which the defendant is most likely to receive notice of a pending suit.

## VI. ARGUMENT

### A. Standards of review.

The following rules and standards apply to this matter.

#### 1. Standard of review on summary judgment.

This Court's review of an order granting summary judgment is *de novo*, meaning that the appellate court is in the same position as the trial

court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004).

Summary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to summary judgment as a matter of law. CR 56; *Carr v. Blue Cross*, 93 Wn. App. 941, 971 P.2d 102 (1999), (citing *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). All facts submitted and all reasonable inferences from them are viewed in a light most favorable to the nonmoving party. *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794-95, 64 P.3d 22 (2003). The moving party has the burden of showing the absence of an issue of material fact and they are entitled to judgment as a matter of law. *LaPlante v. State*, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). “But, [i]f the moving party does not sustain that burden, summary judgment should not be entered, irrespective of whether the nonmoving party has submitted affidavits or other materials.” *Jacobsen v. State*, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). As is shown below, Mr. Griep did not meet his burden on summary judgment.

## **2. Standard of review on reconsideration.**

Reconsideration is appropriate under CR 59(a)(7) when there is no evidence or reasonable inference from the evidence to justify the verdict or the decision, or that it is contrary to law.

A motion for a new trial may be granted under CR 59(a)(8) if an error in law occurred at trial and was objected to at the time by the party making the application.

A motion for a new trial may be granted under CR 59(a)(9) if substantial justice has not been done.

In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration. *Chen v. State*, 86 Wn. App. 183, 937 P.2d 612 (1997). Generally, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. *Id.*

### **3. Standard of review on vacation.**

Under CR 60(b) the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:

- (1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;
- (3) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under rule 59(b); and
- (4) Fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Further, CR 60(b)(11), permits a court to vacate a judgment for “[a]ny other reason justifying relief,” is available only for “extraordinary circumstances not covered by any other section of the rule.” *In re Marriage of Thurston*, 92 Wn. App. 494, 499, 963 P.2d 947 (1998).

Additionally, CR 60(c) allows the court to entertain an independent action to relieve a party from a judgment, order, or proceeding.

**B. Mrs. Forsberg complied with the requirements of RCW 4.28.100.**

Under the service by publication statute, RCW 4.28.100(2), two prongs must be satisfied in order to comply with the statute: 1) a diligent effort to serve; and 2) some showing that the defendant is trying to avoid service. *Boes v. Bisiar*, 122 Wn. App. 569, 94 P.3d 975 (2004).

Initially, Mrs. Forsberg filed a motion for, and was granted, an order to serve Mr. Grieppe under the service by publication statute. (CP 37-38, 40-41) After Mrs. Forsberg served Mr. Grieppe by publication, Mr. Grieppe filed a motion for reconsideration and summary judgment dismissal. (CP 42) Mr. Grieppe’s motion was granted. (CP 122-124) In the court’s correspondence to Mrs. Forsberg the court directed her to the *Boes* case for guidance in its ruling that Mrs. Forsberg had failed to meet the requirements of the service by publication statute of RCW 4.28.100(2). (CP 126) In *Boes* the court held that the plaintiff had satisfied the requirements of the service by publication statute. A

comparison of the facts in *Boes* with the facts in this appeal reveal that the facts are analogous. The court erred in its analysis under *Boes* by holding that Mrs. Forsberg failed to conduct reasonably diligent efforts to personally serve the defendant and that Mr. Griep was not intentionally avoiding service.

In *Boes*, the plaintiff filed his original affidavit regarding his efforts to serve the defendant and subsequently filed an amended affidavit after service was challenged. Likewise, Mrs. Forsberg in this appeal also filed her original affidavit and subsequent affidavits pursuant to *Dobbins v. Mendoza*, 88 Wn. App. 862, 872-73, 947 P.2d 1229 (1997); *Brennan v. Hurt*, 59 Wn. App 315, 318-19, 796 P.2d 786 (1990); *see also First Fed. Sav. & Loan Ass'n of Walla Walla v. Ekanger*, 93 Wn.2d 777, 782, 613 P.2d (1980)(affidavit for publication can be supplemented or amended if it merely alters the record to reflect what actually happened) after service was challenged.

**1. Under *Boes*, Mrs. Forsberg made a diligent effort to serve.**

Parallel efforts to serve were made on behalf of the plaintiff in *Boes* and by Mrs. Forsberg.

<b>Diligent effort to serve</b>	
<b>BOES</b>	<b>MRS. FORSBERG</b>
Boes sent a professional process server to serve the defendant at the address listed on the police report.	Mrs. Forsberg sent the county sheriff to serve the defendant at address listed on police report. (CP 8, 21-22)
Boes checked current Qwest Dex and regional telephone directories.	Mrs. Forsberg checked all social media sites including: Facebook, Instagram, Google+, and Twitter. (CP 18, 29)
Boes made an internet search of Washington, Oregon, and Idaho.	Mrs. Forsberg performed a google internet search for any information relating to the Mr. Griep's whereabouts. (CP 89)
Boes hired a private investigator to check, police, utility, and voting records.	Mrs. Forsberg paid for an on-line records search to locate any information on the defendant. (CP 26-27)
Boes found another possible address and sent a process server. The process server spoke with a second cousin and distant relative at that address who were unable to provide any information.	Mrs. Forsberg found another possible address and sent a professional process server to serve Mr. Griep. In attempting to serve Mr. Griep the process server spoke with a neighbor who told him that the family was on vacation in California. (CP 89, 100-101, 103-104)
Attempted service to address of vehicle registration.	Not applicable. Registered owner and Mr. Griep listed as the same on police report. (CP 21)
	Mrs. Forsberg contacted a friend of Mr. Griep's mother to inquire about Mr. Griep's whereabouts. (CP 88)

	Mrs. Forsberg filed a motion with the tribal court in an attempt to serve Mr. Griep at his last known place of employment, a casino. (CP 89, 91-93)
	Mrs. Forsberg contacted the Washington Department of Licensing regarding a release of Mr. Griep's current driver's license address. (CP 88, 97-98)
	Mrs. Forsberg asked Mr. Griep's counsel if he would accept service for his client. (CP 18)
	Mrs. Forsberg sent Mr. Griep discovery requesting his address. (CP 137)
	Mrs. Forsberg made a motion for and was granted an order from the court allowing service by publication. (CP 37-38, 40-41)

In *Boes*, 122 Wn. App. at 575, the court held that the plaintiff's efforts satisfied the first prong of the statute—diligent effort to serve (efforts that included a diligent search by counsel and further efforts by a professional investigator and process server were enough to satisfy the diligence requirement).

The above table shows that Mrs. Forsberg had practically made the same attempts at locating Mr. Griep as the plaintiff in *Boes*. In addition to making comparable attempts for service as the plaintiff in *Boes*, Mrs. Forsberg also contacted the department of licensing, asked Mr. Griep's

counsel to accept service, served Mr. Griep and Mr. Griep's counsel discovery for the address, tried to serve Mr. Griep at his last known place of employment, and contacted a friend of Mr. Griep's mother. In his argument Mr. Griep has relied on *Pascua v. Heil*, 126 Wn. App. 520, 108 P.3d 1279 (2005) and *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 75 P.3d 1011 (2003) to advance his argument that Mrs. Forsberg has not used "due diligence" in her efforts to personally serve him. (CP 56) However, that argument is misplaced as those cases focused on the plaintiff's failure to follow up on information known to her. Here, Mrs. Forsberg has used every piece of information available to her. Hence, the court erred in its analysis under *Boes* that Mrs. Forsberg failed to conduct reasonably diligent efforts to personally serve Mr. Griep.

**2. Mrs. Forsberg has, at the least, created a genuine issue as to whether Mr. Griep is trying to avoid service.**

The affidavit of a party requesting service of summons by publication must clearly articulate the facts to meet the required conditions for publication by service, not clearly prove intent to avoid service. *Bruff v. Main*, 87 Wn. App. 609, 943 P.2d 295 (1997); *Jones v. Stebbins*, 122 Wn.2d 471, 860 P.2d 1009 (1993).

The facts in *Boes* are that the defendant left the state for the final 10 days before the statute of limitations was set to expire. The court noted that the purpose of the trip was not an issue to be focused on. Rather, their focus was on the plaintiff's affidavits and whether those affidavits raised the required inference of intent to avoid service. As previously stated, the facts in *Boes* are indistinguishable from the facts in this appeal.

<b>A showing that Mr. Griep is trying to avoid service</b>	
<b>BOES</b>	<b>PLAINTIFF</b>
Ten days before the statute of limitations was set to expire, defendant left the state.	Eleven days before the statute of limitations was set to expire, Mrs. Forsberg received evidence that Mr. Griep had left the state. (CP 89, 100-101, 13-104)
	Twelve days before the statute of limitations was set to expire, Mr. Griep (fully aware that Mrs. Forsberg was attempting to locate him) changed his residence. (CP 155)

In *Boes*, 122 Wn. App. at 579, the court held that the second prong of the statute was satisfied—some showing that the defendant was trying to avoid service. It held that absence during the critical period together with knowledge that the statute was running out supports the required inference of intent to avoid.

Here, Mrs. Forsberg's filed declarations that established the required inference of intent to avoid service. The declaration of Mrs. Forsberg's counsel states:

I sent Troy, a process server, to try and serve defendant at another address that I found after doing a generic "google" search and was told the "Griepps" were in California.

(CP 89)

...then it is apparent that Defendant has either left the State of Washington with intent to avoid service of process of the summons and complaint in this action or is concealing himself within the State to avoid service.

(CP 19)

The above statements from Mrs. Forsberg's counsel show that Mrs. Forsberg could only infer that Mr. Griep was intending to avoid service. It is too convenient that with the time clock ticking on the statute of limitation (coupled with Mr. Griep's knowledge of this) that Mr. Griep either left for California or that the only people (Mr. Griep's parents) Mrs. Forsberg could get in contact with had left the state. Mrs. Forsberg could only infer that Mr. Griep was attempting to avoid service.

**3. Service of process was coordinated to be impossible.**

To support his motion for summary judgment, Mr. Griep declared that he was never properly served at his place of abode. He attached a declaration (along with his driver's license) to his motion making it seem

as if his current address was 3311 N. Lacey St, Spokane, WA because his address was the main issue of contention. (CP 64-66) However, this was not and is not currently his address according to the DOL. (CP 155) Fifteen days prior to Mr. Grieppe signing his declaration he updated his address with the DOL to 1507 W 7<sup>th</sup> Ave., Spokane, WA. *Id.* At the summary judgment hearing Mr. Grieppe argued that Mrs. Forsberg would have only needed to do a \$2.00 search with the DOL to obtain to his current address for abode service. (CP 108) This argument is flawed. Up to the 12 days prior to the 90 days statute of limitations extension expiring, the address found with the DOL search would have shown the 3311 N Lacey St., Spokane, WA address—an address that Mr. Grieppe no longer resided at. If Mrs. Forsberg put in a request into the DOL for Mr. Grieppe's address before April 28, 2015, it would have returned the 3311 Lacey address. By the time she would have received this information Mr. Grieppe would have already moved to the 1507 W 7<sup>th</sup> Ave address. If Mrs. Forsberg would have put in a request to the DOL for Mr. Grieppe's address after April 28, 2015, she would not have received his true address until after the time limitation had expired. This scenario is akin to the analysis in *Boes*. In *Boes*, the defendant made himself unavailable for service of process by leaving the state 10 days before the time limit to serve was set to expire. The court noted that the reason for his

unavailability was immaterial. But because there was no conceivable way for the plaintiff to serve the defendant “during this crucial time period,” it was held that this was equal to intent to evade service. This instant matter is indistinguishable.

All Mrs. Forsberg needs to satisfy the statute is an inference that Mr. Griep was attempting to avoid service. There is no question that Mr. Griep was aware of the lawsuit (he retained counsel and filed his answer). There is no question that Mr. Griep was aware that Mrs. Forsberg was attempting to locate him (he told his attorney not to accept service of process for him). And there can be no question that Mr. Griep took this stance because he was attempting to avoid service in preparation for a summary judgment motion.

Under the *Boes* analysis, Mrs. Forsberg’s affidavits meet the requirements of the second prong of the service by publication statute under two theories. The first is that Mrs. Forsberg had reliable evidence that Mr. Griep had left the state during the critical period. (CP 89) The second is that Mr. Griep (with knowledge of the time limit approaching) changed his residence during the critical period for service, making himself “unfindable” through regular investigation tools. This Court should properly find that under the *Boes* standard, the intent to evade prong is satisfied.

**C. Substitute-service statutes like RCW 4.28.080(16) must be liberally construed to effect service and facilitate decisions on the merits.**

1. **The trial court misapplied *Sheldon*.**

Substitute service of process is effective when (1) a copy of the summons is left at defendant's house of usual abode, (2) with some person of suitable age and discretion, (3) then resident therein. RCW 4.28.080(16).

In *Sheldon v. Fettig*, 129 Wash.2d 601, 919 P.2d 1209 (1996), the plaintiff had served process by sending a professional process server to the home of the defendant's parents where a copy of the complaint and summons was left with the defendant's brother pursuant to the substitute service of process statute. However, the defendant had moved from her parents' home 8 months prior. Shortly after service was made, the defendant's attorney filed an appearance and answer. After the statute of limitations and the 90-day extension period ran, the defendant moved for summary judgment on the grounds that the court lacked jurisdiction because service of process was insufficient.

The facts in this appeal parrot those in *Sheldon*. Here, Mrs. Forsberg had served process by sending the sheriff to the family home of Mr. Griep's parents. (CP 8-9) Under the substitute service of process statute he left a copy of the summons and complaint with Mr. Griep's father. *Id.*

Six days later Mr. Griep hired an attorney and filed his answer to the complaint. (CP 7) Two days after the statute of limitations and the 90-day extension period ran, Mr. Griep moved for summary judgment on the grounds that the court lacked jurisdiction because service of process was insufficient. (CP 42)

In *Sheldon*, the issue revolved around whether the defendant's family home was a center of domestic activity where the defendant would most likely receive notice of the pendency of a suit if left with a family member. In that case, extensive discovery had found that the defendant frequently used the family home's address for voting, car registration, and insurance. Unfortunately, Mrs. Forsberg's case was dismissed before discovery could be conducted. However, in searching for another possible address for Mr. Griep, Mrs. Forsberg found that respondent Weston T. Griep continuously maintained a mailing address (P.O. Box in Chewelah, Washington) with his parents' address as his physical address—evidencing Mr. Griep's ties to his parents' home. (CP 157-158)

Moreover, Mrs. Forsberg presented an amended declaration from Deputy Stroisch where Mr. Griep's father states that his son lives (at least part time) at the family home. (CP 188)

After reviewing *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993), *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991), and precedent

from other jurisdictions (interpreting substitute service of process statutes when actual notice is received), both CR 1 and RCW 1.12.010, the Court announced a rule of liberal construction “to effectuate service and uphold jurisdiction of the court.” *Id.* at 609. The Court held that the defendant’s family home constituted a center of activity where the defendant would most likely, and in fact did receive, prompt notice of the summons. The Court reasoned that in a highly mobile society it is unrealistic to interpret the substitute service statute as mandating service at only one location and that the defendant maintained two places of usual abode. *Id.* at 611. The Court expressed a strong preference for deciding cases on the merits and noted that “[m]odern rules of procedure are intended to allow the court to reach the merits as opposed to disposition on technical niceties.” *Id.* (quoting *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 908, 670 P.2d 1086 (1983))(alteration in original)(internal quotations omitted).

The Court went on to state that “the substitute service of process statute is designed to allow parties a reasonable means to serve defendants.” The Court even included a definition for “usual place of abode”:

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

...

*Sheldon*, 129 Wash.2d at 610.

... “[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.

*Id.*

Not unlike the defendant in *Sheldon*, Mr. Griep’s family home was likely, and in fact did, put him on prompt notice of the summons and complaint. Mr. Griep cannot contest actual notice of the suit against him. Within a week of service, he hired counsel to defend him. (CP 7) He filed an answer to the complaint specifically admitting and denying the allegations in the complaint. (CP 10) And he instructed his attorney not to accept service of process for him or reveal his home address. (CP 138)

In determining whether Mrs. Forsberg complied with RCW 4.28.080(16), the court erred by failing to follow *Sheldon* and not liberally construing the terms of the statute to effect service. Accordingly, this court should find that Mr. Griep’s family home was his usual place of abode under the service of process statute.

**2. The trial court misapplied the summary judgment standard.**

Where a defendant challenges jurisdiction based on insufficient service of process, and the plaintiff files controverting affidavits, a triable issue of

fact is presented. *Roth v. Nash*, 19 Wn.2d 731, 144 P.2d 271 (1943); *see also Little v. Rhay*, 8 Wn. App. 725, 509 P.2d 92 (1973). “Since proper service of process is required for jurisdiction, sufficiency of service of process is a question of law. As a result, the determination of valid service is reserved to the judge.” *Gross v. Sunding*, 139 Wn. App. 54, 60, 161 P.3d 380 (2007). A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact requiring a determination of witness credibility. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994).

On February 10, 2015, Mrs. Forsberg filed her summons and complaint for damages against Mr. Griep. (CP 3) On February 11, 2015, Deputy Henry Stroisch completed substitute service on Weston T. Griep. (CP 8) Substitute service may be made by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein. RCW 4.28.080(16). On February 19, 2015, Mrs. Forsberg filed a declaration of substitute service by Deputy Henry Stroisch. *Id.* An affidavit of service that is regular in form and substance is presumptively correct. *Lee v. W. Processing Co.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983). And the challenging party bears the burden of showing improper service by clear and convincing evidence.

*Allen v. Starr*, 104 Wash. 246, 247 P. 2 (1918); *McHugh v. Conner*, 68 Wash. 229, 231, 122 P. 1018 (1912).

On March 17, 2015, Mr. Grieppe filed his answer admitting and denying specific allegations in the complaint. (CP 10) Mrs. Forsberg's statute of limitations for service of process expired on May 11, 2015. On May 14, 2015, Mr. Grieppe filed a motion for summary judgment dismissal based on insufficient service of process. (CP 42) Along with his motion, he attached his declaration stating in part:

(3) To date, I have not been personally served the summons and complaint by the plaintiff. I have also not received by mail, certified or otherwise, a copy of the summons and complaint. I have never authorized my parents or anyone else to accept service of process on my behalf. I understand that plaintiffs have sent papers to my parents in Chewelah, but I have not received these and I do not live there and have not lived there since June 2012 . . . .

(CP 64-65) He also filed his father's declaration which stated:

(3) On February 11, 2015, an officer came to my residence and asked me if I was Weston Grieppe and I said yes and handed me the lawsuit against my son and told me I was served. After looking at the papers briefly, I told the officer that I was not Weston T. Grieppe and that he no longer live here, but the officer did not take the papers back, nor did he ask where my son currently lived. I have not given those papers to my son.

(CP 61-62)

In opposition Mrs. Forsberg filed her response along with Deputy Stroisch's declaration stating that, "Mr. Grieppe did not state that his son

did not live at this residence. If he had, I would not have left the papers with him.” (CP 84) In an amended declaration Deputy Stroisch stated:

“For this particular event I recall driving up the property to see Mr. Weston P. Griep standing outside talking to his employee about the work for the day. I asked him if Weston T. Griep was there. He responded with no. I asked if Weston T. Griep lived there. He responded with yes. I also recall him stating that Weston T. Griep was on his way home. I asked him if he was willing to accept service on behalf of his son. He responded with yes and said something to the effect that they know these papers were coming.” (CP 188)

The competing declarations in this case present an issue of fact which could only be resolved by determining the credibility of the witnesses. What is more, the declarations of the Grieps raise issues of credibility since he cannot specifically answer the allegations in the complaint and at the same time claim to have never received the complaint. Further, fifteen days **prior** to Mr. Griep signing his declaration that his address was 3311 N Lacey St., Spokane, WA, he updated his address with the DOL to 1507 W 7<sup>th</sup> Ave., Spokane, WA. (CP 66, 155)

In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably for the nonmoving party and, when so considered, if reasonable

people might reach different conclusions, the motion should be denied. *Balise v. Underwood*, 62 Wn.2d 195, 199, 381 P.2d 966 (1963). When viewed in the light most favorable to, the nonmoving party, Mrs. Forsberg, Deputy Stroisch's declaration raises an inference that service was proper. Given this inference, Mr. Griep's declarations were not sufficient to establish as a matter of law that the substitute service on his father was improper.

The trial court had before it the declaration of service from Deputy Stroisch stating that he personally delivered the summons and complaint to Mr. Griep at 7:48 a.m. on February 11, 2015. (CP 8) Deputy Stroisch's declaration creates the presumption that service upon Mr. Griep was correct. *See Lee*, 35 Wn. App. at 469, 667 P.2d 638. Further, Deputy Stroisch's statement, "I asked if Weston T. Griep lived there. He responded with yes" in his amended declaration is additional evidence that Mr. Griep did reside at his parents' residence—at least part time. Armed with only competing declarations, the trial court erroneously made determinations of fact in favor of the *moving* party and granted Mr. Griep's motion for summary judgment dismissal. (CP 122-124) The trial court abused its discretion when it failed to hold a fact-finding hearing to determine whether substituted service of process under RCW

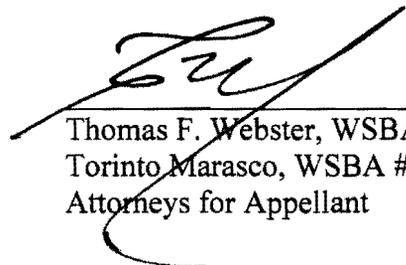
4.28.080(16) was valid. Accordingly, the trial court committed procedural errors in not considering the evidence in favor of the non-moving party.

## VII. CONCLUSION

For the above stated reasons, the trial court should be reversed and this matter remanded for further proceedings.

Respectfully submitted this 12 day of February, 2016.

WEBSTER LAW OFFICE, PLLC



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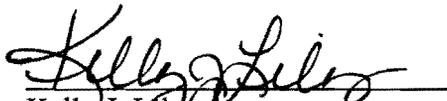
CERTIFICATE OF SERVICE

I declare under penalty of perjury of the laws of the state of Washington that on this date true and correct copies of the APPELLANT'S OPENING BRIEF was served by the method indicated below and addressed to the following:

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Kelly J. Idles