

FILED  
Court of Appeals  
Division III  
State of Washington  
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COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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PETER CLARK,  
Appellant

v.

JESSE HOYOS DIAZ and JANE DOE  
HOYOS DIAZ, Respondent

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OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION

This matter involves an appeal from an order of dismissal based upon a finding of insufficient service of a summons and complaint.

## II. ASSIGNMENTS OF ERROR

### Assignment of Error

*The Honorable Judge Carrie Runge wrongly found that “clear and convincing” evidence established the Defendant, Jesse Hoyos Diaz, did not reside at the address where service of a summons and complaint was made.*

### Issues Pertaining to Assignments of Error

*Was service of a summons and complaint proper where the address where service was made was the address the Defendant, Jesse Hoyos Diaz, provided previously, and the person answering the door at the address affirmed that Mr. Hoyos did reside there?*

## III. STATEMENT OF THE CASE

On the 26<sup>th</sup> of March, 2019, two copies of a summons and complaint were served at 402 Umatilla Avenue, Apartment C, Umatilla, Oregon, upon a lady identified as Maria Diaz, a person of suitable age and discretion. (CP 7-8) Ms. Diaz confirmed that Jesse Hoyos Diaz resided there. (CP 7)

On June 27<sup>th</sup>, 2019, Mr. Hoyos filed a motion to dismiss the

complaint pursuant to CR 12(b)(6), based upon inadequate service. (CP 9-10) The motion was granted by the Honorable Carrie Runge, Franklin County Superior Court, on August 9, 2019, after a letter memorializing the decision had been sent on July 29, 2019. (CP 37-38; 35-36) This appeal followed. (CP 39)

## V. ARGUMENT

A. Service of process was proper. The declaration of service states that service was made upon Maria Diaz, a person of suitable age, who confirmed that Plaintiff resided there. The address was the same as provided by Mr. Hoyos in the police report generated after a car accident.<sup>1</sup> (CP 11) If personal, in hand service is not made, a party must show that service was made at the residence of usual abode to someone of suitable age. "The term 'usual place of abode' means '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 [the] defendant to appear.'..." *Northwick v. Long*, 192 Wn.App. 256, 364 P.3d 1067 (2015) - which is exactly what occurred in this matter. There is no hard and fast definition of "place of usual abode." Courts have said that the underlying purpose of RCW 4.28.080(15) is to provide a means to

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<sup>1</sup> Defendant pointed out that there was no such address because the declaration of service says apartment "c" and not "C2". Obviously, the apparent clerical error means nothing as

serve defendants in a fashion reasonably calculated to accomplish notice. *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991). Notice was accomplished in this case.

B. Mr. Hoyos has failed to establish with clear and convincing evidence that service was improper. When a defendant challenges service of process, the plaintiff has the initial burden of proof to establish a *prima facie* case of proper service. A plaintiff can establish a *prima facie* case by providing a declaration of a process server, regular in form and substance. Then the challenging party must show by clear and convincing evidence that service was improper. *Witt v. Port of Olympia*, 1216 Wn.App. 752, 757, 109 P.3d 489 (2005). The Plaintiff has clearly established a *prima facie* case in this matter. Defendant's attempt at providing "clear and convincing evidence" is a declaration of the Defendant that states he doesn't live at that address and his mother does not speak English. Further, they provided a declaration from the property manager at his "new" apartment. (CP 31-34) This declaration merely says that he pays rent at the "new" address. The declaration does not say anything about whether he pays rent elsewhere, spends most of his time there, stays elsewhere, or where he gets mail. These declarations do not come close to "clear and convincing." In reviewing a similar case, the court in

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the resident confirmed Mr. Hoyos lived there.

*Northwick* stated, in rejecting a party's argument concerning "clear and convincing" evidence that

*Andrew produced no similar evidence for a different address. He provided no documentation relating to housing, banking, and other activities highly probative of domestic activity linking him to a different address. When a party fails to produce relevant evidence within its control without satisfactory explanation, the trial court is permitted to draw the inference that the evidence would be unfavorable to the nonproducing party. (emphasis added)*

*Northwick v. Long*, 192 Wn.App. 265. In the case at bar, the address used by the process server was the address given by the defendant himself. The person at the apartment confirmed he lived there. The declarations are not enough. Furthermore, in *State ex rel. Coughlin v. Jenkins*, 102 Wn.App 60, 64-65, 7 P.3d 818 (2000) Division Two of the Court of Appeals concluded that affidavits from the defendant's mother and ex-wife, stating that the defendant did not live at the place where substitute service occurred, did not amount to clear and convincing evidence of improper service of process when weighed against evidence of mail to and from that address which demonstrated he did reside there. In this case, we do not have mail, but we do have a statement from the Defendant himself, and an admission from a person at the address. The Washington Supreme Court has stated

*In interpreting substitute service of process statutes, strict construction was once the guiding principle of*

*statutory construction. (Citation omitted) 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.*

*Sheldon v. Fettig*, 129 Wn.2d 601, 610, 919 P.2d 1209 (1996). The Court went on to say

*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 1.12.010, 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. (Citations omitted)*

*Sheldon v. Fettig*, 129 Wn.2d, at 610.

## VI. CONCLUSION

The decision of the Franklin County Superior Court Judge should be overturned.

Dated: March 27, 2020

Respectfully submitted,



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Attorney for Appellant, Peter Clark  
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CERTIFICATE OF SERVICE

I certify that today I caused a copy of the foregoing APPELLANT'S OPENING BRIEF to be served on the following people in the manner indicated below:

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Dated: March 27, 2020



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## Transmittal Information

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