

63136-5

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NO. 63136-5-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

DANIEL KROLOW,

Appellant,

v.

LILY KDEP and "JOHN DOE" KDEP, wife and husband, and the
marital community composed thereof,

Defendants.

BRIEF OF APPELLANT

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INTRODUCTION

The trial court dismissed Daniel Krolow's personal injury claim after process was served on the defendant Lily Kdep's adult niece in the defendant's residence. The trial court held that a 1991 Washington Supreme Court case, *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991), which held that service on a close family member in control of the defendant's residence was sufficient substitute service, was overruled by "dismissive" dicta in a later case. However, this 1997 case, *Salts v. Estes*, 133 Wn.2d 160, 943 P.2d 275 (1997), explicitly distinguished its ruling from the factual circumstance in *Wichert*: a close family member in control of the residence. Moreover, courts have acknowledged before and after *Salts* that serving a close family member in the defendant's residence was sufficient and remains the rule.

Especially under the liberal construction long established in interpreting substitute service of process, this Court should follow the rule in *Wichert*, which is factually indistinguishable from the instant case. Krolow asks the Court to reverse and remand to decide the case on the merits.

ASSIGNMENTS OF ERROR

1. The trial court erred in dismissing the case on summary judgment for insufficient service of process where direct precedent allows substitute service on a close family member at the residence of the defendant.

2. The trial court erred in denying Krolow's motion for reconsideration.

ISSUE PERTAINING TO ASSIGNMENT OF ERROR

Whether *Wichert v. Cardwell* has been overruled by *Salts v. Estes* for its holding that substitute service on a close family member in the residence of the defendant is proper service?

STATEMENT OF THE CASE

On December 7, 2004, Daniel Krolow was rear-ended by Lily Kdep after he stopped for a pedestrian crossing the street. CP 34. Krolow initiated this action in King County Superior Court on November 28, 2007 to recover his damages from injuries caused by Kdep's negligent conduct. CP 19-21.

Rich Marlow, a professional process server with ABC Legal Messengers, received the summons and complaint on December 7, 2008. CP 42. He attempted twice to serve the Kdep residence, noticing a "For Sale" sign and receiving no answer despite lights

being on inside the residence. *Id.* Marlow served Lily's niece, Chumno Kdep, at Lily and Kevin Kdep's residence on December 29, 2007 after she claimed to reside at the location with Lily Kdep. *Id.* Marlow followed his standard professional procedure in ensuring that both the defendant and the person receiving service are residents of the location. *Id.* Despite her claim, Chumno, a 30-year-old stepmother of two, was at the house to babysit for the night and lived elsewhere. CP 13.

Lily Kdep received the summons and complaint that night after Chumno left them on the table. CP 14, 16. Counsel appeared and filed an answer for Lily Kdep on January 11, 2008. CP 23. Kdep moved for dismissal on November 21, 2008, on grounds that the statute of limitations had passed because service of process was improper. CP 27, 33. After hearing argument, the Court granted the motion on January 26, 2009. CP 70-71. Krolow moved for reconsideration based on the declaration of Wendy Shanahan, paralegal for Krolow's counsel, that Krolow did not attempt to re-serve defendant because process server Marlow assured Shanahan that Chumno Kdep claimed to be a resident in the home. CP 53-54, 59-60. Reconsideration was denied on February 17, 2009. CP 72.

ARGUMENT

A. Standard of Review.

Summary judgment dismissal for insufficient service of process is appropriate only where there is no genuine issue of material fact. CR 56(c); *Olympia Fish Products Inc. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (1980). All facts must be considered in the light most favorable to the non-moving party. *Olympia Fish Products Inc.*, 93 Wn.2d at 602.

B. “Then resident therein” should be liberally construed.

Substitute service is authorized and governed by RCW 4.28.080(15). There are three elements that must be satisfied for effective substitute service: (1) a copy of the summons must be left at the house of the defendant’s usual abode, (2) with some person of suitable age and discretion, (3) then resident therein. *Id.* It is undisputed that a copy of the summons was left with a person of suitable age and discretion at the Kdep’s residence; only “then resident therein” is at issue.

The substitute service of process statute is liberally construed. *Sheldon v. Fetting*, 129 Wn.2d 601, 607, 919 P.2d 1209 (1996) (citing *Martin v. Meier*, 111 Wn.2d 471, 760 P.2d 925 (1988) (liberally construed “departs from this state” in the

nonresident motorist statute to allow where defendant cannot be found within state. Court looked to the underlying purpose to interpret the nonresident motorist statute); **Wichert**, 117 Wn.2d 148 (liberally construing "then resident therein" in substitute service statute, finding that the underlying purpose of the statute was met); **Martin v. Triol**, 121 Wn.2d 135, 847 P.2d 471 (1993) (looked to the spirit of the rule to allow service in the 90-day tolling period after the three-year statute of limitations had passed for the nonresident motorist statute); *Accord*, **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 where defendant received actual notice); 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)); see also **Gerean v. Martin-Joven**, 108 Wn. App. 963, 970, 33 P.3d 427 (2001), *rev. denied*, 146 Wn.2d 1013 (2002) ("In particular, RCW 4.28.080 is to be liberally construed").

The substitute service statute should not, however, be interpreted so liberally as to defeat the purpose of the statute and render meaningless the phrase “then resident therein.” *Salts*, 133 Wn.2d at 166 (“Precious little would be left of the term ‘then resident therein’ were we to determine substituted service can be obtained on a person who happens to be in the defendant’s house only to feed the defendant’s dog and check his mail”). Thus, “then resident therein” should be liberally construed, while remaining true to the spirit of the statute.

C. Chumno Kdep was “then resident” at defendant’s home when she was served.

1. *Wichert v. Cardwell*: The defendant’s adult daughter who was temporarily at defendant’s home, was “then resident therein.”

Three instructive Washington Supreme Court cases have interpreted substitute service under RCW 4.28.080(15) in the past 20 years. In *Wichert*, 117 Wn.2d at 150, the defendants’ 26 year-old daughter accepted service at her parents’ residence, where she had a key, but where she stored no belongings and stayed infrequently. The court applied the rule of statutory construction that “(1) the spirit and intent of the statute should prevail over the literal letter of the law and (2) there should be made that

interpretation which best advances the perceived legislative purpose.” *Id.* at 151 (citing *In re R.*, 97 Wn.2d 182, 187, 641 P.2d 704 (1982); *Bennett v. Hardy*, 113 Wn.2d 912, 928, 784 P.2d (1990)).

The *Wichert* Court looked to the purpose of the statute to interpret the term “resident,” which has an elastic definition:

Each of the terms “reside,” “residing,” “resident,” and “residence” is elastic. To interpret the sense in which such a term is used, we should look to the object or purpose of the statute in which the term is employed.

Wichert, 117 Wn.2d at 151 (quoting *McGrath v. Stevenson*, 194 Wash. 160, 162, 77 P.2d 608 (1938)).

Wichert explained that the purpose of service of process statutes is to provide due process, including the right to be heard. 117 Wn.2d at 151 (citing *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S. Ct. 779, 58 L. Ed. 1363 (1914)). Due process is provided for service of process under the *Mullane* test: “The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Having determined that “then resident therein” should be

interpreted according to the purpose of the statute – to provide due process through service reasonably likely to inform the defendant of the lawsuit – the unanimous Court found that service was sufficient:

Service upon a defendant's adult child who is an overnight resident in the house of defendant's usual abode, and then the sole occupant thereof, is reasonably calculated to accomplish notice to the defendant. When defendant is absent, the person in possession of the house of usual abode is likely to present the papers to the defendant, particularly when that person is a family member.

Wichert, 117 Wn.2d at 152.

Finally, the Court noted that it did not establish a bright-line rule, preferring instead to decide on the fact-specific requirements of the statute and the practicalities of the particular fact situation. *Id.* (citing **Nowell v. Nowell**, 384 F.2d 951, 953 (5th Cir. 1967), *cert. denied*, 390 U.S. 956 (1968)).

2. **Sheldon v. Fettig**: The home of the parents of an adult daughter was the daughter's "house of usual abode" even though the daughter had moved away, where the daughter maintained ties with the same.

In **Sheldon**, 129 Wn.2d at 604, the defendant was a beginning flight attendant who had moved to Chicago eight months prior to service at her parents' home. Although she had moved, she retained numerous ties with her parents' home, listing it as her home address for voting, car insurance, and a speeding ticket. *Id.*

at 604-605. She also spent four or five days a month at her parents' home when she was not working. *Id.* Process was served on defendant's brother and the issue was whether the defendant was "then resident therein." *Id.* at 603-04.

The Court liberally construed "house of usual abode" citing a long line of cases interpreting service of process statutes. *Id.* at 608-609; *see supra* b. The Court noted, "modern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties." 129 Wn.2d at 609 (quoting ***Carle v. Earth Stove, Inc.***, 35 Wn. App. 904, 908, 670 P.2d 1086 (1983)). Again under the ***Mullane*** test, the Court held that the defendant was reasonably likely to receive notice from service on her parents' home and that the home was a center of her domestic activity. ***Sheldon***, 129 Wn.2d at 609-610. The facts of the case made her parents' home the place where Ms. Fettig was most likely to receive notice of the suit. *Id.* at 611.

3. *Salts v. Estes*: A friend fleetingly present in defendant's home to pick up mail and feed the dog was not "then resident therein."

In ***Salts***, a friend was served with a summons while in the defendant's house to take care of the dog and bring in the mail. She was not a relative of the defendant and was served in one of

the few minutes per day she was in the defendant's house. *Id.*

A five-judge majority, in an opinion written by Justice Talmadge, relied on dictionary definitions that "resident" means settling in a place for a continued length of time. *Id.* at 167. "Resident" requires something more than "present" in the defendant's usual abode." *Id.* at 167-168.

We decline to interpret RCW 4.28.080(15) so that mere presence in the defendant's home or "possession" of the premises is sufficient to satisfy the statutory residency requirement. Under such a view, service on just about any person present at the defendant's home, regardless of the person's real connection with the defendant, will be proper. . . . Such a relaxed approach toward service of process renders the words of the statute a nullity and does not comport with the principles of due process that underlie service of process statutes.

Id. at 169-170. Thus, the Court found that even liberal construction could not lead to the interpretation that service on a non-relative fleetingly present to perform a chore was sufficient.

Salts distinguished **Wichert**, while noting that courts "have generally approved service on close relatives of the defendant who happen to be temporarily in the defendant's home." *Id.* at 168. **Wichert** was distinguishable because the daughter was related to the defendants and she had slept in the house the previous night. *Id.* at 169.

Finally, the Court noted its duty to effectuate the Legislature's intent stated in unambiguous language. *Id.* at 170. To provide consistency and predictability, the Court should not expand the standards of substituted service of process beyond their plain boundaries. *Id.*

4. *Salts* does not purport to overrule *Wichert* and does not overrule *Wichert*.

Wichert advocated a fact-specific inquiry into the sufficiency of service that was not contradicted by *Salts*. *Wichert*, 117 Wn.2d at 152. Despite some dicta at the end of the *Salts* decision, the dispositive reasoning of the decision was that a fleeting occupancy is an insufficient contact to ensure service on the defendant and that such a definition would expand substitute service unreasonably. *Salts*, 133 Wn.2d at 170. The Court reasoned that too relaxed a definition would not comport with the underlying principles of due process. *Id.* This is exactly the reasoning of the *Wichert* court, except that the facts are different.

In ruling against Krolow, the trial court held that *Wichert* impliedly overruled *Salts*.

Maybe it's because I know Justice Talmadge, but it's one of these things where he couldn't get enough votes to overrule it, but it was pretty dismissive of the rationale of *Wichert*. I personally like the rationale of *Wichert* better than the

rationale of **Salts**, but my job is to figure out what's the law currently, not to pick which rationale I like better.

RP 23-24. The trial judge erred in concluding that **Salts** overruled **Wichert**. Stare decisis requires “a clear showing that an established rule is incorrect and harmful before it is abandoned.” **State v. Devin**, 158 Wn.2d 157, 168, 142 P.3d 599 (2006) (quoting **Riehl v. Foodmaker, Inc.**, 152 Wn.2d 138, 147, 94 P.3d 930 (2004)). There is no showing in the “dismissive” rationale of **Salts** that the factual holding of **Wichert** was incorrect or harmful. Instead, **Salts** explicitly distinguishes **Wichert** and notes without passing negative judgment that courts generally approve service on visiting family members. **Salts**, 133 Wn.2d at 168. Though **Salts** has different facts and a different outcome as a result, it certainly does not overrule **Wichert**.

Division Three of the Court of Appeals agrees that **Wichert** was not overruled by **Salts**. In **Gerean**, 108 Wn. App. at 969, a 2001 case interpreting another portion of RCW 4.28.080(15), the court stated that “**Wichert** relaxed the definition of a person ‘then resident’ to include a visiting family member” That conclusion was not affected by **Salts**.

D. Service on defendant's niece at defendant's home was sufficient.

1. Courts have consistently followed *Wichert* when a close family member was served.

The facts here fall squarely into the scenario distinguished by *Salts* and analogous to *Wichert*. Here, a close family member, the defendant Lily Kdep's niece, was in the house babysitting when she was served. Courts have consistently interpreted these facts under the *Wichert* reasoning:

- Before *Salts*: "The [*Wichert*] court found an adult family member who was in sole control of the home while its inhabitants were away would likely present the papers to defendant. Because the underlying rationale was thus met, the court held that the daughter fit within the statutory definition of 'then resident therein,'" *Sheldon*, 129 Wn.2d at 608 (citations omitted).
- *Salts*: "courts, like *Wichert*, have generally approved service on close relatives of the defendant who happen to be temporarily in the defendant's home," 133 Wn.2d at 168.
- After *Salts*: "*Wichert* relaxed the definition of a person 'then resident' to include a visiting family member," *Gerean*, 108 Wn. App. at 969.

Regardless of the dicta in *Salts*, serving a visiting family member in control of the house has always been sufficient.

2. Service on the defendant's niece satisfied the statutory purpose of service on a person reasonably calculated to provide notice to defendant.

The rationale for the sufficiency of serving a visiting family member in control of the residence is clear. As a family member left with such responsibility, the relationship with the defendants is strong and the likelihood that the defendants will receive notice is very high. "When defendant is absent, the person in possession of the house of usual abode is likely to present the papers to the defendant, particularly when that person is a family member." *Wichert*, 117 Wn.2d at 152. It is a means of service reasonably calculated to give actual notice.

Here, Chumno Kdep is a 30-year-old niece of the defendant who was left in charge of the defendant's home and child while they were out of the residence. It was reasonable to expect Chumno to deliver the documents to Lily Kdep. Moreover, it is undisputed that this method of service was in fact successful and that Lily Kdep received the documents. It was a reasonably calculated method of guaranteeing service. Following the liberal construction rule clearly

established in precedent for interpreting RCW 4.28.080(15), this court should find that substitute service on Chumno Kdep was proper.

3. Sleeping in the home is not a critical factor.

At one point, the *Salts* court distinguishes its facts from *Wichert* based on the fact that the daughter had slept in the home the night before. *Salts*, 133 Wn.2d at 169. The Court gives no explanation for using this as a factor, and neither *Wichert* nor any other court states this would be a determining factor. See *Sheldon*, 129 Wn.2d at 608; *Gerean*, 108 Wn. App. at 969. As discussed above, the determining factors in *Wichert* were the familial relationship and the possession of the house, making it more likely that the documents would be responsibly delivered. *Wichert*, 117 Wn.2d at 152. Sleeping in the abode does not help or hinder that argument.

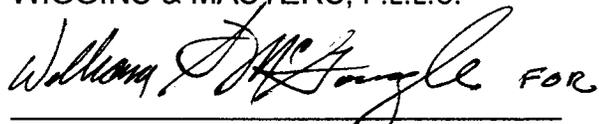
CONCLUSION

Substitute service was proper here where a close family member was served at the residence of the defendant, Lily Kdep. The Washington Supreme Court found in *Wichert* that these facts satisfy the purpose of the substitute service statute and that service is therefore sufficient. The *Salts* court explicitly distinguished itself

from this fact scenario. Both cases agree that facts such as those in the instant case should be decided under **Wichert**. We ask this court to reverse the trial court and remand to decide the case on its merits.

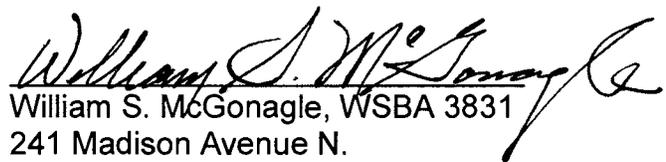
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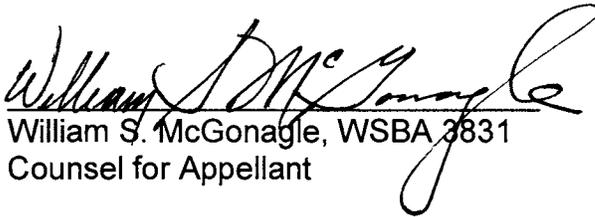
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CERTIFICATE OF SERVICE BY MAIL

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