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NO. 63136-5-I

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

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DANIEL KROLOW,

Appellant,

v.

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

Defendants.

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STATE OF WASHINGTON  
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**REPLY BRIEF**

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## **REPLY TO COUNTERSTATEMENT OF THE CASE**

This is an appeal from a summary judgment. BA 2, BR 1. Respondents Kdep agree that all facts must be considered in the light most favorable to appellant Krolow. BR 4.

Construing the facts most favorably to Krolow, the Court accepts the declaration of professional process server Rich Marlow that when Chumno Kdep answered the door at the Kdeps' home, she told Marlow that both Chumno and defendant Lily Kdep resided at the home. CP 42. The Court also accepts the declarations of Marlow and Wendy Shanahan, paralegal for plaintiff's counsel, that upon receiving Kdeps' allegation of insufficiency of service of process, Shanahan immediately contacted the process service agency to confirm that Marlow had indeed served process on a person then resident in the Kdeps' abode. CP 57-58, 59-60. Nor is there any dispute that this conversation took place before the expiration of 90 days after filing the complaint, so that any deficiency in service could have been cured. CP 60.

Marlow followed his standard professional procedure in asking whether Chumno Kdep resided at the home and received confirmation that she did. CP 42. In response, Kdep seems to argue by implication that Marlow should have requested

identification, but has presented no evidence or argument that identification is ever required to serve documents. BR at 2. There is no legitimate dispute as to Marlow's professional procedure.

The parties agree that Chumno Kdep lived elsewhere and that she was in possession of the residence at the time that the summons was served. CP 13. Lily and Kevin Kdep did in fact receive the summons and complaint the night they were served after Chumno left them on the table to be found. CP 14, 16.

## ARGUMENT

### A. Kdep had abandoned the trial court's reasoning.

Kdep never even attempts to defend the mistaken reasoning of the trial court and thus abandons it. The trial court held that **Salts v. Estes**, 133 Wn.2d 160, 943 P.2d 275 (1997), impliedly overruled **Wichert v. Cardwell**, 117 Wn.2d 148, 812 P.2d 858 (1991):

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 court reasoned that she would have followed the **Wichert** reasoning if she had a choice, but she felt that the dismissive reasoning of **Salts** bound her decision. Kdep makes no

effort in response to defend the rationale that **Wichert** is no longer good law or that **Salts** impliedly overrules it. See also BA at 11-12.

In effect, Kdep admits that the trial court was mistaken in reasoning and only argues that the trial court's decision should be upheld on alternative grounds--namely that this fact situation more closely resembles **Salts** than **Wichert**.

**B. "Then resident therein" should be construed liberally.**

Kdep has presented no argument to dispute the long line of precedent that shows that substitute service of process statutes are liberally constructed. BA at 1, 4-6; **Sheldon v. Fettig**, 129 Wn.2d 601, 607, 919 P.2d 1209 (1996); and **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."). **Salts** limited liberal construction of RCW 4.28.080, but only to the extent that it should not be construed so liberally as to render the language of the statute meaningless. 133 Wn.2d at 166.

Kdep has framed the issue as if the decision were a simple determination whether the facts here are more similar to **Salts** or **Wichert**. Kdep ignores **Wichert's** holding that the spirit of the statute must control over its literal language and that the statute

must be interpreted to accomplish the legislative purposes. In considering Kdep's reliance on dicta from the **Salts** case, the court should be mindful that the substitute service statute is construed liberally.

**C. Chumno Kdep was "then resident" at defendant Lily Kdep's home when she was served.**

Kdep argues that RCW 4.28.080(15) should be interpreted so that all language used is given effect, with no portion rendered meaningless or superfluous. BR 5. Having stated this principle, Kdep proceeds to ignore it. RCW 4.28.080(15) requires delivery of process "to the defendant personally, or 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."

Giving effect to all of the language, it is immediately apparent that the legislature used two different phrases: service must occur at the defendant's "usual abode" and may be delivered to someone "then resident therein." As this Court has said, "where the legislature uses language in one instance but different language in another in dealing with similar subjects, a difference in legislative intent is indicated." **Lundberg ex rel. Orient Found. v. Coleman**, 115 Wn. App. 172, 177, 60 P.3d 595 (2002), *rev. denied*, 150

Wn.2d 1010 (2003). Significantly, the legislature did not say that the person “then resident therein” must be in his or her “usual abode.” Rather, she must be in the place of the defendant’s usual abode, as **Wichert** stated: “The word ‘then’ necessarily refers to the time of service; ‘therein’ refers to the defendant’s usual place of abode.” 117 Wn.2d at 151.

In other words, one can be “then resident therein” at a place that is not one’s “usual abode.” Kdep’s argues that Chumno lived with her husband elsewhere, she was only resident in Lily’s home in order to babysit, her residence was relatively short-term. But substituted service on Chumno was not required at Chumno’s “usual abode”; rather, it was required at Lily’s “usual abode.” Although Chumno was not at her own usual abode, she was certainly present and in control of Lily’s usual abode—she was “then resident therein.”

More fundamentally, Kdep ignores the principles of statutory interpretation followed in **Wichert**:

There are numerous rules of statutory construction, but of particular relevance here are (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.

117 Wn.2d at 151 (also quoted at BA 6-7). Kdep admits that **Wichert** held that the purpose of the service of process statutes is to provide due process as articulated in **Mullane v. Central Hanover Bank & Trust Co.**, 339 U.S. 306, 314 (1950). BR at 6. "[T]he due process test for adequacy of substituted service is whether the method employed was one that a plaintiff 'desirous of actually informing the absentee might reasonably adopt to accomplish it.'" BR at 6 (quoting (without attribution) **Wichert**, 117 Wn.2d at 151). This test is a fact-specific determination. **Wichert**, 117 Wn.2d at 152.

Kdep ignores yet another reason for liberal construction of substitute service—the Court accepts as true that Chumno Kdep told process server Marlow that she was then resident at the Kdep home. CP 42, 58. As a practical matter, when an adult answers the door and tells a process server that she and the defendants are resident in the home, the process server should be able to rely on that statement. The process server has no right to demand that the person show identification to confirm her residence and many people, if not most people, would refuse the demand of a stranger at the door to prove that they reside in the home where they have just answered the door. Indeed, just asking for identification would

likely cause many people to cut off any further communication and even refuse to accept service of process. This impractical result would undermine the perceived legislative purpose, contrary to the mandate of *Wichert* that the interpretation of the statute should advance the legislative purpose.

There will be cases such as *Salts* in which the facts simply do not support the claim of the person to be resident. But here, where a niece of the defendant is in possession of the home, tells the process server she is a resident, and then delivers or leaves the summons and complaint where they are immediately found by the defendant, the service is effective.

Kdep argues that the facts of this case do not satisfy the *Mullane* test for two reasons: Chumno was Lily's niece, not Lily's daughter; and she was only present for part of a day. BR at 7. The closeness of a family member is an appropriate consideration, but it must be looked at relative to the *Mullane* test--whether serving the family member might reasonably inform the defendant. As *Wichert* noted, "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 (cited at BR 6).

Here, Chumno was actually more likely to present the papers than the daughter in *Wichert*. Without context, serving a niece may be somewhat less likely to inform the defendant than serving a daughter. But here, Chumno was left in charge of the house and the child as babysitter, bearing the responsibility of safety while the Kdeps were out. Her position of responsibility and possession of the residence shows the process server that she can be trusted to inform her aunt. In contrast, there was no evidence in *Wichert* that the daughter was in the home on anything more than a whim of her own or that the defendants even knew that the daughter was present.

Kdep's argument that Chumno did not have sole custody or possession of the home misses the point. It is undisputed that Chumno Kdep was the only adult present in the home when served and that she was left in charge as a babysitter. The fact that she did not sleep there that night does not determine whether it was reasonable to serve papers on her. First, the process server has no way to know whether the person will sleep in the home (especially if she claims to be a resident). Second, the underlying inquiry is whether the defendant will be informed; whether Chumno slept in Kdep's home or her home is beside the point.

Kdep's cursory argument fails to disprove that serving Chumno Kdep was a method of service reasonably adopted to accomplish informing the defendants. The exact closeness of relation and whether the person served slept in the residence are precisely the kind of bright-line rules that the *Wichert* court sought to avoid in applying liberal construction and adopting the *Mullane* test. Rather, the facts here show that serving a family member in possession of the house and in a position of responsibility therein was reasonably calculated to inform the defendant.

**D. These facts do not resemble the *Salts* case**

The *Salts* majority held that a neighbor was not "then resident" where she was fleetingly present to pick up the mail and feed the dog. 133 Wn.2d at 166. Kdep quotes the *Salts* court that "mere presence in the defendant's home or 'possession' of the premises is insufficient to satisfy the statutory residency requirement." *Id.* at 169-170. Krolow agrees that mere presence in the residence does not make it reasonable that the person served will inform the defendant--that must be determined by the context.

Kdep claims, "Chumno Kdep is more like the friend temporarily in possession of the defendants' residence in *Salts v. Estes*, rather than the daughter in *Wichert* who stayed at least

overnight at her parents' home while they were out of the state and had her own key." BR at 9. Of course, the possession of a key cannot be a determining factor in distinguishing from **Salts**, since the neighbor almost certainly had a key to let herself in to feed the dog. As argued above, sleeping location cannot be determinative in a reasonableness inquiry.

Kdep then argues that babysitters fall within the category of persons specifically identified as inappropriate recipients of substitute service. BR at 9 (citing **Salts**, 133 Wn.2d at 170). However, **Salts** also allowed that "courts, like **Wichert**, have generally approved service on close relatives of the defendant who happen to be temporarily in the defendant's home." **Salts**, 133 Wn.2d at 168. The court did not intend to exclude a family member simply because she is babysitting. This is a fact-specific inquiry. Merely babysitting may not qualify someone to be served, but an adult niece babysitting is a much closer relation and creates a greater likelihood that the papers will be served.

**E. Kdep presents no other argument to show substitute service was insufficient**

**1. Chumno Kdep is a "close relative"**

A niece entrusted to babysit while the defendants are away must certainly be considered a close family member. Of course, it

is possible for a niece to be estranged from her aunt, but it is also possible for a daughter to be equally estranged. The context sheds light on the inquiry: a liberally constructed, fact specific determination of the reasonable likelihood that the defendant will be informed. That Chumno was the niece *and* left in charge of the residence made it more than reasonable that she would inform the defendant if served.

**2. Chumno Kdep provided actual notice to Lily Kdep.**

Kdep argues that service on Chumno Kdep was not reasonably calculated to provide notice to the defendant because the summons was not personally delivered but was left on the table. First, a reasonableness inquiry is decided based on what was reasonable from the process server's perspective, not what actually happened. Second, Lily Kdep found the summons left for her that very night and immediately acted on it. CP 14, 16. The goal of substitute service is to inform the defendant, not to personally serve her. See *Wichert*, 117 Wn.2d at 152. Lily Kdep was actually informed.

**CONCLUSION**

Rich Marlow, and Krolow in turn, relied on the long established rule that serving a family member in possession of the

defendant's residence is sufficient for substitute service. The reason for that rule is not limited to the specific facts of the **Wichert** case, but is based on the underlying **Mullane** test. It is that

an adult family member who was in sole control of the home while its inhabitants were away would likely present 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 v. Fettig**, 129 Wn.2d at 608 (citations omitted). This rationale is all the stronger where service is on a niece who is actually left in charge rather than a daughter who happens to be in the home for the night purely by chance. The rationale would not be met by a neighbor who is merely in the house to feed the dog as in **Salts**. Substitute service was proper here because it was reasonably calculated to inform the defendant and provide due process. The Court should reverse and remand for decision of the case on the merits.

RESPECTFULLY SUBMITTED this 24 day of September, 2009.

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**CERTIFICATE OF SERVICE BY MAIL**

I certify that I mailed, or caused to be mailed, a copy of the foregoing **REPLY BRIEF** postage prepaid, via U.S. mail on the 24 day of September 2009, to the following counsel of record at the following addresses:

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