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DEPUTY

EGP INVESTMENTS, LLC, a Washington limited liability
company,

Plaintiff/Appellant,

v.

ERIC A. ANDREWS, as Personal Representative of the
ESTATE OF JENNIFER LUND,

Defendant/Respondent.

On Appeal from the Superior Court of Snohomish County
Hon. Richard T. Okrent
Superior Court Docket Number 12-2-03800-5

REPLY BRIEF OF APPELLANT

Alexander S. Kleinberg, WSBA # 34449
Attorney for Appellant EGP
Investments, LLC

EISENHOWER CARLSON PLLC
1201 Pacific Ave., Ste. 1200
Tacoma, WA 98402
Phone: (253) 572-4500

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COURT OF APPEALS
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ORIGINAL

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I. ARGUMENT IN REPLY

A. The Trial Court Erred When It Dismissed EGP's Complaint Because The PR Failed To Prove By Clear And Convincing Evidence As A Matter Of Law That Service Upon Him Was Defective.

A trial court's ruling on personal jurisdiction is a question of law reviewable de novo when the underlying facts are undisputed. *Lewis v. Bours*, 119 Wn.2d 667, 669, 835 P.2d 221 (1992). However, if the trial court's ruling is based on affidavits and discovery "only a prima facie showing of jurisdiction is required." *Precision Lab. Plastics, Inc. v. Micro Test, Inc.*, 96 Wn. App. 721, 725, 981 P.2d 454 (1999). The rationale is that "[a]ny greater burden such as proof by a preponderance of the evidence would permit a defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through his own affidavits and supporting materials." *Data Disc, Inc. v. Sys. Tech. Assoc.*, 557 F.2d 1280, 1285 (9th Cir. 1977). Therefore, if the plaintiff's proof is limited to written materials, it is necessary only for these materials to demonstrate facts which support a finding of jurisdiction in order to avoid a motion to dismiss. *See id.*

The PR does not cite to or refute any of the foregoing legal authority in his Brief of Respondent.¹ Instead, he cites the *Freestone*

¹ Brief of Respondent at 11-14.

Capital Partners L.P. v. MKA Real Estate Opportunity Fund I, LLC, 155 Wn. App. 643, 230 P.3d 625 (2010) for the proposition that the de novo standard of review applies here.² But this is a case where the underlying facts are disputed within the meaning of *Lewis* given the declaration testimony from process server Mario Robledo and process service manager Laura Meas, among other things. As such, EGP questions whether the de novo standard of review applies here.

What is clear is that the applicable standard of proof is *clear and convincing evidence*, notwithstanding the PR's claim to the contrary. The PR asserts "clear and convincing evidence is not required to prove service was improper" because this is not a case in which a judgment is being attacked due to defective service.³ The PR cites *Farmer v. Davis*, 161 Wn. App. 420, 428-29, 250 P.3d 138 (2011) in support of this proposition. In *Farmer*, Division Three of the Washington Court of Appeals noted in footnote 2 of its opinion that some Washington decisions have applied the presumed validity of affidavits of service and the burden of countervailing them with clear and convincing evidence in the prejudgment context. *Farmer*, 161 Wn. App. at 430, 250 P.3d 138. Two such cases that the *Farmer* court cited are *Witt v. Port of Olympia*, 126 Wn. App. 752, 109

² Brief of Respondent at 11-12.

³ Brief of Respondent at 14.

P.3d 489 (2005), and *Streeter-Dybahl v. Huynh*, 157 Wn. App. 408, 236 P.3d 986 (2010). *Id.*

In *Witt*, Division Two of the Washington Court of Appeals held that when a defendant moves to dismiss based on insufficient service of process, after a plaintiff has met the initial burden of making a prima facie showing of proper service, in response to the defendant's motion to dismiss based on insufficient service of process, the burden shifts to the defendant, who must prove by *clear and convincing evidence* that service was proper. 126 Wn. App. at 752, 757, 109 P.3d 489 (emphasis added).

Similarly, in *Streeter-Dybdahl v. Huynh*, in reversing the denial of the defendant's motion to dismiss due to improper service, this Court held that "[a]n affidavit of service is presumptively correct, and the party challenging the service of process bears the burden of showing by clear and convincing evidence that the service was improper." 157 Wn. App. 408, 412, 236 P.3d 986.

Moreover, respected legal commentator Karl B. Tegland has noted in the Washington Practice series that once the plaintiff makes a prima facie showing of proper service, "the burden shifts to the defendant to prove, by clear and convincing evidence, that the affidavit [of service] is inaccurate and that service was not properly carried out." KARL B. TEGLAND, 15A Wash. Prac. § 10.17.

For these reasons, the PR is mistaken in his assertion that “clear and convincing evidence is not required to prove service was improper” in a case such as this.⁴

The PR has also failed to say anything in his Brief of Respondent about the large body of case law that EGP cited in its Brief of Appellant that holds the trial court should conduct a hearing with live testimony before ruling on the issue of personal jurisdiction when the facts are sharply in dispute, as in this case. *E.g.*, KARL B. TEGLAND, 15A Wash. Prac. § 10.17 (“If the facts are sharply in dispute, so that factual determinations turn on the credibility of witnesses, the trial court should conduct a hearing with live testimony before ruling on the issue of personal jurisdiction.”) (internal citations omitted).

The reality is the trial court committed reversible error when it granted the PR’s motion to dismiss EGP’s complaint. The trial court should have denied the PR’s motion to dismiss outright because process server Mario Robledo’s original declaration of service — which reflects good service on the PR — is presumptively valid, and the PR failed to overcome this presumption by clear and convincing evidence as a matter of law. The trial court even denied the PR’s motion to strike this declaration. CP 259, 265. The fact is the trial court’s ruling runs contrary

⁴ Brief of Respondent at 14.

to cases such as *Data Disc., Inc.*, as it permitted the “defendant to obtain a dismissal simply by controverting the facts established by a plaintiff through his own affidavits and supporting materials.” *Data Disc, Inc. v. Sys. Tech. Assoc.*, 557 F.2d 1280, 1285.

If nothing else, under these circumstances, the trial court was required to hold an evidentiary hearing as to whether service on the PR was good. The trial court erred when it failed to do so despite EGP’s oral request for such at the hearing on the PR’s motion to dismiss.

B. The Trial Court Erred When It Struck Material Portions Of Process Server Manager Laura Meas’s Declaration.

The trial court’s decision to strike material portions of process service manager Laura Meas’s declaration pursuant to the PR’s first motion to strike, which declaration EGP submitted in response to the PR’s motion to dismiss, rests on untenable grounds. Ms. Meas, a manager at process service company Pacific Coast Attorney Services LLC, stated in her declaration that on May 30, 2012, her process server asked a male occupant of 40818 May Creek Road in Gold Bar if he was a resident of 40818 May Creek Road and he then replied “yes.” CP 269. Ms. Meas further declared her process server then asked the male occupant if the PR lives at 40818 May Creek Road and he then replied “yes.” CP 269. Ms. Meas then declared the process server left EGP’s summons and complaint

with the male occupant, who was a white male with black hair in his twenties, 5'11" and 150 pounds. CP 269.

Ms. Meas's declaration contains material evidence concerning the location of the PR's house of usual abode and bears on the question of whether a person of suitable age and discretion lived with the PR at 40818 May Creek Road in Gold Bar during the period in question. The trial court erred when it struck the material portions of Ms. Meas's declaration on hearsay grounds. As seen from EGP's Brief of Appellant and the *Marsh-McLennan Bldg., Inc. v. Clapp* case cited therein, 96 Wn. App. 636, 980 P.2d 311 (1999), Ms. Meas's declaration is admissible for the purpose of asserting proper service even if it contains hearsay statements. By striking the material portions of Ms. Meas's declaration, the trial court abused its discretion, as this ruling rests on untenable grounds in light of the controlling legal authority set forth above.

The PR maintains the trial court properly struck most of Ms. Meas's declaration because she is not the person who effectuated abode service on the PR.⁵ However, this fact is of no legal significance. Ms. Meas's declaration demonstrates her declaration testimony was based on the records maintained in her office. CP 292. The obvious import of such is that Ms. Meas is testifying about information set forth in her company's

⁵ Brief of Respondent at 17.

business records, which she can do without violating the hearsay rule. *See* RCW 5.45.020; ER 803(a)(6).

The PR next asserts Ms. Meas's declaration is not admissible under *Marsh* because Ms. Meas made statements in her declaration regarding documents in her company's possession that were never produced.⁶ However, *Marsh* and the Rules of Evidence do not require a declarant to produce documents in order to submit a declaration. Nor is there any Washington authority that prevents a declarant from testifying about her process service company's business records concerning regularly conducted activity, namely, the service of pleadings upon defendants. *See* RCW 5.45.020; ER 803(a)(6).

Based on the foregoing, there is no doubt that the trial court abused its discretion when it struck material portions of process service manager Laura Meas's declaration.

C. The Trial Court Erred By Denying EGP's Motion For Reconsideration.

1. Reconsideration Of The Order Dismissing EGP's Complaint Is Required Due To Irregularity In The Proceedings Of The Adverse Party And Abuse Of Discretion.

CR 59(a)(1) provides that reconsideration may be granted when there is an irregularity in the proceedings of the court, jury, or adverse

⁶ Brief of Respondent at 17.

party, or any order of the court, or abuse of discretion, by which such party was prevented from having a fair trial or hearing. *See* CR 59(a)(1).

There is no question that the trial court abused its discretion when it struck material portions of process service manager Laura Meas's declaration on hearsay grounds and dismissed EGP's complaint without first conducting an evidentiary hearing as to whether EGP effectuated good service on the PR. These rulings cannot stand under the controlling authority set forth above. As such, the trial court should have reconsidered its ruling on the PR's motion to dismiss pursuant to CR 59(a)(1), especially when the PR failed to provide to the trial court any authority or argument in response to this subsection of the rule.

The PR asserts on appeal that "the record reflects EGP never requested an evidentiary hearing at any point in this litigation, and the [trial court] exercised its discretion in deciding not to hold an evidentiary hearing absent a request from the parties."⁷ However, by way of its motion to admit additional evidence dated May 15, 2013, EGP has moved to submit two new declarations that reflect Jeffrey Yonek, local counsel for EGP, requested an evidentiary hearing at the July 20, 2012 hearing on the PR's motion to dismiss. As seen from this motion, for some reason unbeknownst to EGP, this hearing was not recorded or transcribed. Further, the PR has

⁷ Brief of Respondent at 20.

not pointed to any evidence in the record that reflects EGP did *not* request an evidentiary hearing, nor does the PR assert such in his Brief of Respondent.

On balance, the trial court should have granted EGP's motion for reconsideration under CR 59(a)(1), and its decision not to do so cannot properly be upheld.

2. *Reconsideration Of The Order Dismissing EGP's Complaint Is Required Due To The Misconduct Of The PR.*

CR 59(a)(2) provides that reconsideration may be granted based on misconduct of the prevailing party. CR 59(a)(2). "Misconduct" has been defined as "improper or unprofessional behaviour." The Oxford Dictionary of Current English, New Revised Edition, Page 568 (Oxford University Press 1998 ed.).

Here, it is undisputed that there are inconsistencies in the PR's declarations that were filed in the trial court, and that certain of the PR's witnesses changed their stories insofar as their testimony is concerned. There is also evidence to the effect that two of the PR's witnesses, Messrs. Rask and Domhoff — each of whom have previously been convicted of theft, a crime of moral turpitude — provided false testimony to the trial court. By causing this questionable evidence to be submitted in support of his motion to dismiss, the PR is responsible for it. EGP submits the PR

therefore engaged in “improper or unprofessional behavior” in this case by virtue of his submission of declarations from Messrs. Rask and Domhoff that contain false statements.

In contrast, the PR maintains he committed no misconduct, and that the trial court properly denied reconsideration of the order of dismissal under CR 59(a)(2).⁸ The PR would have the Court believe that EGP’s argument for reconsideration under this rule is simply based on the fact that Messrs. Domhoff and Rask, two of the PR’s witnesses, have criminal records. However, importantly, as seen from EGP’s Brief of Appellant, these witnesses both submitted declarations that contain factual inconsistencies. Further, both of these witnesses have been convicted of theft, which is a crime of moral turpitude that calls their credibility into question.

In addition, EGP submits the declarations from the PR himself call *his* credibility into question given that *he never disclosed to the trial court his ownership of the property located at 40816 May Creek Road that is adjacent to his residence.* CP 67-8; CP 303-8; CP 312-316. The first time that the PR disclosed his ownership of this property where the PR claims Brad Domhoff was served with EGP’s summons and complaint was in his

⁸ Brief of Respondent at 20.

Brief of Respondent, where he references “*either* of his properties[.]” (Emphasis added).⁹

The PR’s motion to dismiss is misleading, and EGP believes this is by design. Any reasonable person who read the PR’s motion to dismiss and supporting declarations would have no idea that the PR owned the property located at 40816 May Creek Road. EGP cannot help but think that this omission was intentional, and that it was designed to help the PR’s cause by making the trial court believe that the PR had no connection whatsoever to the property where he claims Brad Domhoff was served with EGP’s summons and complaint.

Nevertheless, instead of acknowledging the numerous inconsistencies in the declarations of Messrs. Domhoff and Rask and the obvious import from the fact that these declarations came from felons convicted of crimes of moral turpitude (among other things), the PR instead complains about “flagrant contradictions and irregularities” in EGP’s own evidence, and mentions an argument EGP made to the trial court to the effect that it was not timely served with the PR’s motion to strike and reply

⁹ Brief of Respondent at 12. The Court may also take judicial notice of Mr. Andrews’s ownership of the property located at 40816 May Creek Road based on public records available online from Snohomish County, as seen from the following link:
[https://www.snoco.org/proptax/\(2y2pdumh3gmaqxytr4vu3a45\)/search.aspx?parcel_number=27090500202500](https://www.snoco.org/proptax/(2y2pdumh3gmaqxytr4vu3a45)/search.aspx?parcel_number=27090500202500).

declarations.¹⁰ The PR also complains about an affidavit from process server Bryan Milbradt that was misfiled in the wrong action. These arguments are of no consequence, and they do nothing to improve the PR's position.

3. *Reconsideration Of The Order Dismissing EGP's Complaint Is Required Based On EGP's Newly Discovered Evidence.*

CR 59(a)(4) provides that newly discovered evidence, material for the party making the application, which he could not with reasonable diligence have discovered and produced beforehand, provides grounds for reconsideration. CR 59(a)(4).

Newly discovered evidence may warrant relief from judgment if it is discovered after the judgment, could not have been discovered before the judgment, is material, and is not cumulative or impeaching. *See Graves v. Dep't of Game*, 76 Wn. App. 705, 718-19, 887 P.2d 424 (1994).

The PR filed his first motion to strike with a declaration from Jason Rask and a supplemental declaration from Brad Domhoff one (1) day prior to the hearing on the PR's motion to dismiss. Soon after EGP's complaint was summarily dismissed, it submitted its motion for reconsideration. As seen from this motion, EGP had no way to obtain its new evidence beforehand, which was partly because process Mario

¹⁰ Brief of Respondent at 21-22.

Robledo had left the legal services company he had been working for when he served the PR in May of 2012 and moved out of state to join his wife. CP 200.

EGP's new evidence provided further proof that EGP effectuated good service on the PR while it also called the veracity of the PR's declarations into question.

To illustrate, in addition to the internal inconsistencies and contradictions themselves that are set forth in certain of the PR's declarations, the Westlaw background checks that EGP ran on Messrs. Domhoff and Rask reflect these individuals have lengthy criminal histories, and that each of these individuals has been convicted of theft. CP 127 (showing third degree theft conviction for Brad Domhoff); CP 137-38 (showing theft conviction for Jason Rask). These theft convictions call the credibility of Messrs. Domhoff and Rask into question. EGP could have used these convictions to impeach the testimony of Messrs. Domhoff and Rask under ER 404(a)(3) and ER 609(a) and (b) had the trial court granted EGP's previous request for an evidentiary hearing.

Further, Mr. Robledo's declaration dated July 26, 2012 states he was shown a picture of Brad Domhoff on July 23, 2012 and that Mr. Domhoff, who claims to be the "John Doe" that Mr. Robledo served with EGP's summons and complaint on May 30, 2012 at 40818 May Creek

Road in Gold Bar, is “unequivocally not the ‘John Doe’ I served.” CP 176.

Nevertheless, the trial court refused to grant reconsideration or hold an evidentiary hearing to gauge the credibility of the PR’s witnesses. Further, the trial court improperly struck EGP’s newly discovered evidence. These rulings constitute an abuse of discretion in light of EGP’s newly discovered evidence and the facts and circumstances herein.

In reality, the PR’s claim that the criminal histories of Messrs. Domhoff and Rask “are irrelevant to the issue at hand” is far from accurate.¹¹ Again, EGP could have used these convictions to impeach the testimony of Messrs. Domhoff and Rask under ER 404(a)(3) and ER 609 had the trial court granted EGP’s request for an evidentiary hearing. Messrs. Domhoff and Rask each submitted declarations that bear on the validity of service on the PR, which is the primary issue in this case. How the criminal histories of the PR’s “star witnesses,” Messrs. Domhoff and Rask, can be said to be “irrelevant to the issue at hand” is beyond EGP. The reality is the trial court should have granted reconsideration under CR 59(a)(4).

4. *Reconsideration Of The Order Dismissing EGP’s Complaint Is Required Because Substantial Justice Has Not Been Done.*

¹¹ Brief of Respondent at 25.

CR 59(a)(9) provides that reconsideration may be had when substantial justice has not been done.

There is no question that this portion of the rule provides grounds for reconsideration of the trial court's order dismissing EGP's complaint. The fact is substantial justice has not been done, certainly not in this case where the PR utilized testimony from two criminals who were each convicted of a crime of dishonesty or moral turpitude, the original declaration of service from Mario Robledo that reflects good service on the PR was never stricken from the record, and Mr. Robledo's subsequent declaration from July 26, 2012 states Mr. Domhoff is not the "John Doe" that he served on May 30, 2012.

Further, let it not be forgotten that the trial court denied EGP's request for an evidentiary hearing, and it now appears that the PR intentionally misled the trial court by not acknowledging his ownership of the property located at 40816 May Creek Road that is adjacent to his residence.

For these reasons, the trial court should have reconsidered its ruling on the PR's motion to dismiss pursuant to

CR 59(a)(9), especially considering the PR failed to provide to the trial court any authority or argument under this portion of the rule. CP 33.

II. CONCLUSION

The trial court committed reversible error when it granted the PR's motion to dismiss EGP's complaint due to insufficient service of process and refused EGP's request for an evidentiary hearing. The trial court also erred when it struck material portions of process server manager Laura Meas's declaration of service, struck EGP's newly discovered evidence, and denied EGP's motion for reconsideration. As such, EGP respectfully asks this Court to allow EGP to have its day in court by reversing the trial court's rulings and remanding this case for an evidentiary hearing on the topic of whether EGP properly served the PR with its summons and complaint.

RESPECTFULLY SUBMITTED this 24th day of May, 2013.

EISENHOWER CARLSON PLLC

By: 
Alexander S. Kleinberg, WSBA # 34449
Attorneys for Appellant EGP
Investments, LLC

I, Jennifer K. Fernando, am a legal assistant with the firm of Eisenhower Carlson PLLC, and am competent to be a witness herein. On May 24, 2013, at Tacoma, Washington, I caused a true and correct copy of the Reply Brief of Appellant to be served upon the following in the manner indicated below:

W. Mitchell Cogdill William W. Mitchell Cogdill Nichols Rein Wartelle Andrews 3232 Rockefeller Avenue Everett, WA 98201 Email: wmc@cnrlaw.com	<input checked="" type="checkbox"/> by Legal Messenger <input checked="" type="checkbox"/> by Electronic 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.

DATED this 24th day of May, 2013, at Tacoma, Washington.


Jennifer K. Fernando