SUPREME COURT OF THE STATE OF WASHINGTON
COURT OF APPEALS, DIVISION III
NO. 332284

MAURICE H. BAKER, a single man,
Plaintiff-Petitioner,

vs.

DAVID HAWKINS and CHRISTIE HAWKINS, husband and wife and the marital community comprised thereof,

Defendants-Respondents.

Petition for Review

ATTORNEY FOR PETITIONER
WILLIAM H. BROUGHTON
WSBA # 8858
9057 WASHINGTON AVE NW
SILVERDALE, WA 98383
(360) 692 -4888

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1. **Identity of Petitioner.** Plaintiff Maurice Baker is the Petitioner.

2. **Court of Appeals decision**. Petitioner seeks review of the Court of Appeals decision in Division 3 under case number 332284 filed September 22, 2015.

3. **Issues Presented for Review**

a. Is substituted service on a contractual agent of Defendants having full possession and control of a Defendants' residence while Defendants were out of the country on a full time basis continuously for 31 days returning to his home only to sleep sufficient under RCW 4.28.080(15)?

b. Should the statutory term "then resident" in RCW 4.28.080 be given an elastic and liberal construction allowing for service on the person most likely to give notice of the lawsuit to Defendants or require service on a relative who has slept in the home without regard to the likelihood that the person served will inform the absentee of the service?

4. **Why review should be accepted.**

Acceptance of review will provide this Court with the opportunity to reconcile two recent decisions of this Court that appear incompatible. In *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991) this Court held that the test for effective substituted service is whether the facts

presented show that the service provided was "reasonably calculated to accomplish notice to the defendant." This determination is to be made on a case by case basis necessitated by the fact specific requirements of the statute.

Salts v. Estes, 133 Wn.2d 160, 943 P.2d 275 (1997) seems to suggest a stricter test. Rather than considering the likelihood that the person served would inform the resident Defendant of the lawsuit, this Court opined that "resident" must be given its "ordinary meaning—a person is resident only if the person is actually living in the particular home." *Salts*, at 170. The Court declined to extend the definition of "resident" to include "a person who was a *fleeting* presence in the defendant's home." "Resident" is treated as synonymous with the "then resident" statutory language and seems to require the person served be "actually living there" such as a relative who has slept in the home.

The Court of Appeals noted the tension between *Wichert* and *Salts* in holding that service on the person most likely to inform Defendants was not sufficient as he was not "actually living there".

Acceptance of review would allow these two decisions to be reconciled and provide guidance to insurance consumers and their counsel as to when service is effective. This is particularly important here where many residents are absent for extended periods of time during the winter

months and where insurance companies cannot be trusted to deal fairly with claimants. With a bright line rule, service can be evaluated for its efficacy before the injured Plaintiff loses the ability to have his case decided on its merits.

5. Statement of the Case

On December 16, 2010 in Port Orchard, Washington, Plaintiff, Maurice H. Baker was injured in an accident caused by Defendant Christie Hawkins. Baker initiated this action in Kitsap County Superior Court on December 16, 2013 to recover damages from his injuries caused by Mrs. Hawkins' negligent conduct.[1] (CP 1-5)

On January 14, 2014 (a Saturday evening), at approximately 4:45 pm, professional process server and retired police officer Donald DeMers arrived at the Defendants' residence and usual abode on Bainbridge Island. (CP 34) No one was home when DeMers arrived. (CP 35) When DeMers was about to leave, a truck pulled up in front of the Hawkins' residence. (CP 35) A nicely dressed man and woman (contractors Jellico) got out of the truck carrying packages that appeared to be groceries. They unlocked the home and carried the items into the house. (CP 44)

[1] The statute of limitations expired on the day after filing the summons and complaint.

DeMers' declaration of service states that the couple served at the home told him they were "living there". (CP 35) DeMers then served Mr. Jellicoe with process. He indicated he would promptly forward the documents to the residents. Defendants were notified of the service by email two days later and Allstate Insurance Company retained an attorney who appeared on their behalf. (CP 35)

The Jellicoes were on site remodeling Defendants home ***every day for 31 straight days*** while the Defendants were in Mexico. They would generally arrive between eight and nine a.m. and stay into the evening. Sometimes they stayed past nine p.m. They received deliveries for Defendants and themselves from UPS and Fed Ex. (CP 47) They had complete and unfettered access to the entire home. They had the codes for the door locking security systems on the home. (CP 46) While they were there, they monitored the utilities in the home. They kept their tools and equipment in the home during their stay. (CP 41)

Mr. and Mrs. Jellicoe used the cooking facilities at the home for preparing of meals. (CP 53) Mrs. Jellocoe used the restroom facilities in the home on occasion. Prior to the return of Mr. and Mrs. Hawkins, Mrs. Jellicoe cleaned the home. (CP 55)

On February 24, 2014 Defendant's counsel filed an answer alleging as affirmative defenses lack of personal jurisdiction and

insufficiency of process. (CP 6-8) Defendants moved for dismissal on April 3, 2014 on the grounds that the statute of limitations had run because service of process was improper. After hearing argument, the Court granted the motion on July 25, 2014. (CP 130-131)

6. Argument

Standard of Review

The Motion to Dismiss asserted that Defendants had never been properly served and thus the statute of limitations had expired. The motion was supported and opposed by declarations and evidence outside the pleadings. Where matters outside the pleadings are considered the motion to dismiss is treated as a motion for summary judgment. *Puget Sound Bulb Exch. v. Metal Bldgs. Insulation,* 9 Wn. App. 284, 513 P.2d 102 (1973). As such, review is *de novo* in this Court.

RCW 4.28.080(15) allowing substituted service on the "then resident therein" of a Defendant's residence should be liberally construed.

Substituted service is authorized and governed by RCW 4.28.080(15). There are three elements that must be satisfied for effective substitute service: (1) the summons must be left at the defendant's "house of his or her usual abode"; (2) the summons must be left with a "person of suitable age and discretion"; and, (3) the person with whom the summons

is left must be "then resident therein." It is undisputed that the summons and complaint were left with a person of suitable age and discretion at the Hawkins' residence. Only the issue of whether the contractor was "then resident therein" is at issue.

Jellicoes were "then resident"

The seminal case on this issue is *Wichert v. Cardwell,* 117 Wn.2d 148, 812 P.2d 858 (1991). There, this Court held that process was properly served on defendants by leaving a copy of the Summons with the daughter of one of the defendants at the defendants' usual abode. The Court held that the test for effective service is whether the facts presented show that the service provided was "reasonably calculated to accomplish notice to the defendant." *Id.*

The Court stated that this determination must be made on a case by case basis necessitated by the fact specific requirements of the statute. The Court concluded that "when a Defendant is absent, the person in possession of the house of usual abode is likely to present the papers to the Defendant..." *Wichert* at 152. The Court went on to decide that service of process was effective on the daughter despite the fact that she did not reside at the defendants usual abode, maintained her own residence, was self-supporting and kept no personal possessions at the residence of the defendants.

In the instant case the contractor and his spouse were clearly in possession of Defendants' residence. The contractor had a contractual and agency relationship with Defendants. They spent every day at the Defendants' home for 31 consecutive days. They unlocked the home when they arrived at the home on a Saturday evening. They carried packages into the home suggesting a significant presence. They represented to the process server that they were staying at the home while they were doing construction and remodeling work on the premises.[2] It is undisputed that the Jellicoes were in possession of Defendants' home and that serving them would reasonably accomplish notice to Defendants.

The Court below felt bound by *Salts v. Estes,* 133 Wn.2d 160, 943 .2d 275 (1997). There, a sharply divided court found that service on a person who was coming to the defendant's home periodically to feed the dog and bring in the mail was not effective service. The Court held that "resident" must be given its "ordinary meaning—a person is resident if the person is actually living in the particular home." *Salts,* at 170. The Court declined to extend the definition of "resident" to include "a person who was a fleeting presence in the defendant's home." *Salts,* at 160. There, the person served at the residence, Ms. TerHorst, spent a total of one to

[2] Jellicos dispute that they told the process server they were staying there. CP

two hours at Estes's home in the two week period of Estes' departure on vacation feeding the dog and taking in the mail. TerHorst was not the defendant's relative, agent or employee. She never lived at the defendant's home nor did she keep any of her property there.

Unlike the person served in *Salts*, the Jellicoes were not merely a "fleeting presence" but were at the Defendants home all day, every day for the 31 day duration the Defendants were out of country. They were in a contractual relationship with the Defendants and they kept their tools and materials in the Defendants' home and went home only to sleep. Therefore, the instant case is not factually similar to *Salts* and this Court should clarify *Salts'* narrow definition of "then resident."

Moreover, the *Wichert* opines that a bright-line rule for determining when an individual is "then resident" is to be avoided because "a case-to-case determination is necessitated by the fact-specific requirements of the statute." *Wichert* at 152 (citing *Nowell v. Nowell*, 384 F.2d 951, 953, 5th Cir.1967), cert. denied, 390 U.S. 956, 88 S.Ct. 1053, 19 L.Ed.2d 1150 (1968). This Court reasoned as follows:

> This approach is wholly consistent with Black's Law Dictionary which states that the "[w]ord 'resident' has many meanings in law, largely determined by statutory context in which it is used. BLACK'S LAW DICTIONARY 1309 (6th ed.1990) (emphasis added) (citing *Kelm v. Carlson,* 473 F.2d 1267, 1271 (6th Cir. 1973).

In interpreting substitute service of process statutes, strict construction was once the guiding principle of statutory construction. See *Muncie v. Westcraft Corp.,* 58 Wn.2d 36, 38, 360 P.2d 744 (1961). However, more recently, Washington Courts 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, 607, 919 P.2d 1209 (1996).

The purpose of substitute service statutes such as RCW 4.28.080(15) is to provide due process which requires that "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Wichert,* at 151 (quoting *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 315, 70 S. Ct 652, 657, 94 L.Ed. 865 (1950). The *Wichert* Court explained its reasoning as follows:

> We also note that the inquiry in any case is upon the method of attempted service, i.e., was it reasonably calculated to provide notice to the defendant? "It is horn book law that a constitutionally proper method of effecting substituted service need not guarantee that in all cases the defendant will in fact receive actual notice...." (Citation omitted.) *Bossuk v. Steinberg,* 58 N.Y.2d 916, 918, 460 N.Y.S.2d 509, 447 N.E.2d 56 (1983).

Wichert, at 152.

It is difficult to reconcile the Supreme Court opinions in *Wichert and Salts.* Justice Talmadge, who authored the majority opinion in *Salts* suggests that the person served in *Wichert* was the daughter of the defendants who had slept in the home the night before service was accomplished. *Salts* at 169. However, the majority does not recite other facts established in *Wichert* such as the fact that the daughter lived in her own apartment, was self-supporting, had no personal possessions at the parents' residence and seldom stayed over at her parents' residence.

While the daughter happened to have spent the night at her parents' home the day before the attempted service, the facts suggest that the daughter's presence at the parents' was, in fact, "fleeting". The majority's holding in *Salts* that service would have been effective had the occupant been a relative or slept there was not lost on the dissenting justices. Justice Alexander, writing in dissent, opined that the holding in *Wichert* in construing RCW 4.28.080 is to provide due process, which, in turn, requires that "the means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Wichert,* at 151. The dissent further notes that *Wichert* specifically avoids a bright line rule for determining when an individual is "then resident"

because a case to case determination is necessitated by the fact specific requirements of the statute.

The *dicta* in *Salts* suggests that the person served must be a resident and/or slept in the home. Such an attempted bright-line rule is contrary to *Wichert*. One wonders if a ten minute nap in the home would be adequate. What degree of a familial relationship is required? Is a cousin or nephew sufficient?

A better explanation for reconciliation of the *Wichert* and *Salts* opinions is to examine them in the context of constitutional due process and its limitations on a court's ability to exercise jurisdiction. As the *Wichert* court explains, the purpose of statutes which proscribe the methods of service of process is to provide due process.

In *Sheldon v. Fettig*, 129 Wn2d 60, 919 P.2d 1209 (1966), the plaintiff attempted service by leaving a copy of the Summons and Complaint with the defendant's brother at the defendant's parents' house in Seattle. Validity of service of process depended upon whether the defendant was still residing with her parents at their home in Seattle.

At the time process was served on defendant's brother, she was living in Chicago, had signed a lease for a Chicago residence, opened a checking account and joined a health club in Chicago and was having her mail forwarded to her Chicago address. The court adopted a rule of liberal

interpretation of service of process statutes and of Civil Rule 1, which promotes the policy to decide cases on their merits rather than dismissing them on technicalities. *Sheldon* at 609. The court further concluded that its rule of liberal construction still exceeds constitutional due process requirements.

The seeming retreat from this rule by the majority in *Salts* also seems a clear departure from other opinions of the Supreme Court. For example, in *City of Spokane v. Department of Labor and Industries (In re: Saltis)*, 94 Wn.2d 889, 621 P.2d 716, the court explained that substantial compliance with service of process statutes is sufficient to obtain initial jurisdiction because delay or the possibility of losing lawsuits should not result from complicated procedural technicalities.

A rule requiring that a person being served be a relative of some degree who has recently slept at a defendant's residence would be contrary to recent decisions of the Court. Instead, Washington Courts have concluded in a variety of factual constellations that substituted service is adequate if reasonably calculated to provide notice to the defendant. In addition, the legislature specifically used the term "then resident" rather than "resident" in the statute to allow greater latitude in effectuating substituted service.

It is clear in the instant case that service was reasonably calculated to give the defendant's knowledge of the proceedings and an opportunity to be heard. The contractors who were served were contractual agents of defendants entrusted with the custody and care of defendant's home. They were entrusted with securing the home and were present at the home continuously while defendants were on vacation out of the county. They were contractual agents. Just as the doorman at a defendant's condominium building whose duty it is to receive delivery of packages and correspondence for tenants was residing therein for purpose of service of process, contractors with similar duties and responsibilities were appropriate persons to receive substituted service. See *Hartford Fire Ins.Co. v. Perinovice,* 152 F.R.D. 128 (1993). See also 4*A CHARLES A. WRIGHT & ARTHUR R. MILLER,* Federal Practice and Procedure, Sec. 1096, at 82-83 (2d ed. 1987).

A conclusion that service on the contractor was sufficient here is supported by other jurisdictions. *See United States v. House,* 100 F. Supp.2d 967 (D.Minn. 2000) (holding that service was proper on a daily visitor and periodic overnight guest proper as it was intended to give notice to the Defendants and was reasonably calculated to reach them); *O'Sell v. Peterson,* 595 N.W. 2d 870,873-874 (Minn. App. 1999) (holding that leaving Summons and Complaint with the defendant's 14-year-old

stepson, who was staying at defendant's home for a six-day, non-custodial visitation, constituted substitute service of process on defendant); *Magazine v. Bedoya,* 475 So.2d 1035, 1035-36 (Fla.App.1985) (concluding mother-in-law, who was visiting defendant for six weeks, and who told process server that she lived there, was residing there); *Sangmeister v. McElnea,* 278 So.2d 675. 676-77 (Fla.App.Dist. 3 1973) (holding four-month visitor was residing therein); see also *Plushner v. Mills,* 429 A.2d 444, 446 (R.I.1981) (concluding that daughter, who was placed in charge of father's home in his absence, was residing therein).

Finally, the procedural posture here requires that the facts be viewed most favorably to Plaintiff. The undisputed facts are that the Jellicoes arrived at the home in the evening on a Saturday night. They opened the locked front door. They unloaded packages from their truck and carried them into the home. They confirmed that they would insure that the documents were promptly delivered to the Defendants.

The only fact in dispute is whether the Jellicoes' represented to the process server that they were "living" at the house while they were performing some remodeling activities. While both Mr and Mrs. Jellicoe deny this statement, any factual dispute must be viewed most favorably to Mr. Baker. It is undisputed that the Jellicoes were in full and unfettered possession of the home and were there ten hours a day for 31 consecutive

days while the Defendants were out of the country. They had contracted with Defendants and had an agency relationship. They kept their tools at the home. They accepted deliveries for Defendants. They used the kitchen and bathroom in the home. This Court should determine that the Jellicoes' were "then resident" of Defendants' home when they were served and therefore, service was proper.

7. **Conclusion**

For any and all the above reasons, Petitioner requests that this Court reverse the trial court's dismissal of this case and set this matter to proceed to trial.

Respectfully submitted this 15th day of October 2015.

BROUGHTON LAW GROUP, Inc. P.S.
William H. Broughton
William H Broughton, WSBA #: 8858
Attorney for Petitioner

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

MAURICE H. BAKER, a single man, *Plaintiff-Petitioner,* vs. DAVID HAWKINS and CHRISTIE HAWKINS, husband and wife and the marital community comprised therof, *Defendants-Respondents.*	)	No. 332284 DECLARATION OF MAILING

Kathi Strand, under penalty of perjury under the laws of the State of Washington, hereby declares as follows:

i) That I am over the age of eighteen (18) years, not a party to this action, and am competent to make this declaration;

ii) That on October 15, 2015 I caused the following document: **Petition for Review** along with this Declaration of Service to be sent via first class mail to the following:

Marilee C. Erickson
Reed McClure
1215 4th Ave. Ste. 1700
Seattle, WA 98161-1087

DATED this 15th day of October, 2015

Kathi Strand

Kathi Strand

FILED
SEPTEMBER 22, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

MAURICE H. BAKER, a single man, Appellant, v. DAVID HAWKINS and CHRISTIE HAWKINS, husband and wife and the marital community comprised thereof, Respondents.	)	No. 33228-4-III PUBLISHED OPINION

LAWRENCE-BERREY, J. — We must determine whether service on a contractor, who spent every day for one month working at the defendants' home, returning only to his home at night to sleep, is service upon a person "then resident therein" for purposes of former RCW 4.28.080(15) (2012) (now codified at RCW 4.28.080(16)). We hold that because the contractor was not "actually living in" the defendants' home as required by *Salts v. Estes*, 133 Wn.2d 160, 170, 943 P.2d 275 (1997), service was deficient under the statute. We therefore affirm the trial court's order dismissing this action as barred by the three-year statute of limitations.

FACTS

Maurice Baker alleges he was injured in a car accident caused by Christie Hawkins on December 16, 2010. Mr. Baker filed a summons and complaint initiating this action against Ms. Hawkins and her husband, David Hawkins, for personal injuries and damages on December 16, 2013. Under RCW 4.16.170, the statute of limitations is tolled for 90 days if one or both defendants are served within that period.

On January 11, 2014, a Saturday, Mr. Baker's process server served Gary Jellicoe with the summons and complaint at the Hawkinses' residence on Bainbridge Island, Washington. The return of service stated that service was made "by delivery to . . . Gary Jellicoe, Cohabitant, W-M, late 50's, a person of suitable age and discretion residing at the respondent's usual abode." Clerk's Papers (CP) at 21.

Mr. Jellicoe and his wife, Winoma Jellicoe, are general contractors who were hired by Mr. and Ms. Hawkins to perform work on their Bainbridge Island house. The Jellicoes completed the work in two phases. While Mr. and Ms. Hawkins were in Mexico on vacation for the month of January 2014, the Jellicoes worked on the second phase of the project. While the first phase focused on adding a second floor to the existing structure of the main house, the second phase focused on removing the carport and building a garage

in its place with a guest house on top and also building an addition to the south end of the house for an office.

While Mr. and Ms. Hawkins were gone in January 2014, the Jellicoes worked on the house full time, including weekends. The Jellicoes generally worked from 8:30 a.m. until 6:30 p.m. They spent every night at their own home and never slept in the Hawkinses' home. They had the code for the home's electronic door locking system and were able to let themselves in or out.

The Jellicoes kept construction tools in the house during the project. They also monitored the utilities to make sure that the water and power were working properly when they turned them off and on as part of the construction. They did not use any of the kitchen appliances during the second phase of the project in January 2014. Mr. Jellicoe did not use the bathrooms in the main house because there was a portable restroom on the job site. Ms. Jellicoe would occasionally use the restroom in the main house.

During January 2014, a number of packages were delivered to the Hawkinses' home containing items that Ms. Hawkins had ordered for the Jellicoes to use during the construction project, including a toilet, light fixtures, and a few plumbing items. If a package addressed to Mr. or Ms. Hawkins was left on the porch, Ms. Jellicoe would put the package inside the house. The Jellicoes never signed for any of the packages.

Mr. and Ms. Hawkins filed their answer to the complaint on February 24, 2014, and asserted lack of personal jurisdiction and lack of service. They filed a motion to dismiss on April 3, 2014, asserting the statute of limitations had run when Mr. Baker failed to perfect service on them personally within the applicable timeframe. Ms. Hawkins submitted a declaration to support the motion to dismiss, stating that Mr. Jellicoe is a contractor who was doing work on her home at the time he was served the summons and complaint, but that Mr. Jellicoe never resided in the home.

Mr. Baker responded to the motion to dismiss requesting that the court deny the motion because the statute of limitations was tolled when substitute personal service was perfected on Mr. Jellicoe. In support of his response to the motion to dismiss, Mr. Baker submitted a declaration of the process server, Donald DeMers, as well as a declaration that included excerpts from the depositions of Mr. and Ms. Jellicoe. Mr. and Ms. Hawkins filed a reply in support of their motion to dismiss. Complete transcripts of the depositions of Mr. and Ms. Jellicoe were attached as exhibits to the Hawkinses' reply.

In his declaration, Mr. DeMers stated he arrived at the Hawkinses' residence located at 10800 Broomgerrie Road, Bainbridge Island, Washington 98101 at 4:45 p.m. on the day in question. He knocked on the front door, and no one answered. He left the front door and was standing in the driveway next to his vehicle when a man and a woman

drove to the front of the home in a pickup truck. Mr. DeMers went to speak to the man when he got out of the truck, and the woman began unloading several bags of groceries from the truck. The man identified himself as Gary Jellicoe to Mr. DeMers and explained that he was not Mr. Hawkins, but that he and his wife were in the process of remodeling the home and were "living there" while the work was being performed. CP at 35. Mr. DeMers gave the summons and complaint to Mr. Jellicoe, and Mr. Jellicoe said he would deliver them to Mr. and Ms. Hawkins. Before Mr. DeMers left the premises, Mr. and Ms. Jellicoe walked to the front door, unlocked it, and began bringing the groceries into the home.

At their depositions, the Jellicoes testified that they were unloading packages related to the construction project when Mr. DeMers came to serve process. When Mr. DeMers approached the Jellicoes, he said he was looking for the Hawkinses' residence. Ms. Jellicoe replied that he was at the right place but that Mr. and Ms. Hawkins were not home. Mr. DeMers then handed the subpoena to Mr. Jellicoe. Mr. Jellicoe stated he told Mr. DeMers he would put the subpoena in the house and tell Mr. and Ms. Hawkins about it. Mr. and Ms. Jellicoe denied telling Mr. DeMers that they were staying at or living in the Hawkinses' residence.

The trial court granted the Hawkinses' motion and dismissed Mr. Baker's complaint with prejudice. The order was filed July 25, 2014. Mr. Baker appeals, contending that service on Mr. Jellicoe satisfied former RCW 4.28.080(15) for substitute service of process because the undisputed facts establish that the Jellicoes were "then resident therein" of the Hawkinses' home at the time of service to satisfy the statute.

ANALYSIS

Whether the trial court erred in dismissing Mr. Baker's complaint based on insufficient service of process

Standard of Review

Under CR 12(c), if a trial court considers matters outside of the pleadings when reviewing a motion to dismiss, the court must treat the motion as one for summary judgment. We then review an appeal from an order in that context as we do an appeal from a summary judgment order. *Lowe v. Rowe*, 173 Wn. App. 253, 258, 294 P.3d 6 (2012). Summary judgment is proper only if no genuine issues of material fact exist, and the moving party is entitled to judgment as a matter of law. *U.S. Mission Corp. v. KIRO TV, Inc.*, 172 Wn. App. 767, 771-72, 292 P.3d 137, *review denied*, 177 Wn.2d 1014, 302 P.3d 181 (2013). In our review, we consider the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Id.* at 772.

Disputed Facts

Here, there are only two disputed facts. The first is whether the Jellicoes were bringing groceries or construction supplies into the house. For purposes of review, we will presume the bags contained groceries. The second is whether the Jellicoes told the process server that they were staying at the Hawkinses' residence. This statement is hearsay; it is therefore inadmissible and does not create an issue of fact. *SentinelC3, Inc. v. Hunt*, 181 Wn.2d 127, 141, 331 P.3d 40 (2014).

Substitute Service

RCW 4.28.080 provides the ways in which a person may be served with a summons. Generally, personal service is required, but former RCW 4.28.080(15) permits substitute service if certain requirements are met. Substitute service requires (1) "leaving a copy of the summons at the house of [the defendant's] usual abode" (2) "with some person of suitable age and discretion" (3) "then resident therein." Former RCW 4.28.080(15). The only element at issue here is the third one. Specifically, the issue is whether Mr. Jellicoe was "then resident therein" under this statute when he received the summons and complaint for Mr. and Ms. Hawkins.

The Washington Supreme Court has addressed the "then resident therein" element in two recent cases. Mr. Baker relies on the first of these two cases, *Wichert v. Cardwell*,

117 Wn.2d 148, 152, 812 P.2d 858 (1991), where the court found sufficient substitute service. There, the defendant wife's adult child, who had her own apartment and infrequently stayed at the defendants' home, had stayed overnight at the defendants' residence the night before accepting service on their behalf. *Id.* at 150.

Mr. and Ms. Hawkins rely on *Salts* arguing that the facts here are more similar to the facts in *Salts* than *Wichert*. In *Salts*, the court held that service of process on a person unrelated to the defendant, who was temporarily in the defendant's home to feed dogs and take in mail, was insufficient for substitute service of process. *Salts*, 133 Wn.2d at 163-64, 170-71.

A review of these two cases displays tension and even incompatibility between them. The *Wichert* court applied a liberal test, noted that "resident" was an elastic term, and held that whether service was proper should depend upon the *Mullane* test, i.e., "whether [the] method [used] is such that a plaintiff 'desirous of actually informing the absentee might reasonably adopt to accomplish it.'" *Wichert*, 117 Wn.2d at 151 (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315, 70 S. Ct. 652, 94 L. Ed. 865 (1950)). The *Salts* court eschewed a liberal test, took a definitional approach to the term "resident," and stated that "resident" meant more than "mere presence" and that "possession of the premises" was insufficient. *Salts*, 133 Wn.2d at 167, 169-70.

Salts determined that the term "resident" was unambiguous, and as such, required the court to "apply the language as the Legislature wrote it, rather than amend it by judicial construction." *Id.* at 170. The *Salts* court held that "for purposes of [former] RCW 4.28.080(15) that 'resident' must be given its ordinary meaning—a person is resident if the person is actually living in the particular home." *Id.*

Mr. Baker contends that *Wichert* and *Salts* should be reconciled by examining them in the context of due process. But, as recognized by the *Salts* dissent, *Salts* repudiates the expansive approach embraced in *Wichert*. *Id.* at 173 (Alexander, J., dissenting). Therefore, we determine that the facts of this case must be analyzed under the *Salts* "actually living in" rule.

Here, Mr. Jellicoe and his wife spent the entire month of January 2014 working at the Hawkinses' home on Bainbridge Island. The Hawkinses gave Mr. Jellicoe and his wife their access code. Mr. Jellicoe and his wife were actually in possession of the home during the entire month. Mr. Jellicoe was the one person in Washington State during the month of January 2014 most likely to give notice of the lawsuit to the Hawkinses. The Jellicoes nevertheless returned to their own home each evening, slept, and departed therefrom each morning. Mr. Jellicoe was therefore not "actually living in" the Hawkinses' home. For this reason, we must conclude that service of process on Mr.

Jellicoe was inadequate under former RCW 4.28.080(15), and the trial court properly dismissed this action.

Affirm.

Lawrence-Berrey, J.

WE CONCUR:

Brown, A.C.J.

Korsmo, J.