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NO. 66134-5-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

DEBRA CHEESMAN AND RICHARD CHEESMAN, ET UX, ET AL.

Plaintiffs/Appellants,

v.

MICHAEL J. ROWSE AND JANE DOE ROWSE, ET UX,

Defendants/Respondents

REPLY BRIEF OF APPELLANTS

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COURT OF APPEALS, DIVISION I
STATE OF WASHINGTON

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A. INTRODUCTION

Respondents do not address the standard of review applicable to the question of the place of usual abode for purposes of service of process. That is a question of law and is to be reviewed de novo. *Blankenship v. Kaldor*, 114 Wn.App. 312, 57 P.3d 295 (2002). While this Court does review the trial court's Findings of Fact to determine whether they are supported by substantial evidence, and if so, whether those findings support the trial court's conclusions of law, the burden shifted in this case to respondent to show by clear and convincing evidence that for the purpose of service of process Michael Rowse did not have two places of usual abode, one being in Washington.

Finally, under the facts of this case it is clear respondent received actual and timely notice of this lawsuit.

B. ARGUMENT

- (1) The Court, Judge Wynne, did not accord the Declaration of Service Presumptive Correctness or Engage in a Burden Shifting Analysis or Enter Findings or Conclusions Regarding This.

Respondent argues the trial court, Judge Wynne, accepted the Affidavit of Service of plaintiffs' process server "at face value" and further "acknowledged that service was affected (sic) twice on the brother at the Everett residence." *Brief of Respondent*, p. 5. Respondent further

argues the Court concluded “there was insufficient evidence to support a conclusion that the residence (Everett) was an abode of Michael Rowse.” *Brief of Respondent*, p. 6.

In fact, the Court in its oral opinion, did state what respondents contend in their brief. RP 98. What the Court did not do in “accepting the affidavit” was accord presumptive correctness to the affidavits of service, including the statements attributable to respondent’s brother, David Rowse, that Michael Rowse lived there but wasn’t present, was out on the road, or driving a truck. Furthermore, the court did not engage in any reported burden shifting to Michael Rowse to prove by clear and convincing evidence that service was improper. Instead, the court concluded the evidence was simply insufficient to support a conclusion that the residence was an abode of Michael Rowse. RP 98.

The Court entered no Finding of Fact or Conclusion of Law indicating it accorded presumptive correctness of the process server’s affidavits of service, or that a burden shifting occurred requiring respondent to prove by clear and convincing evidence that at least one of his abodes for purposes of process was not Washington State.

(2) Actual Notice

There is no question that in this case respondent received actual notice of this lawsuit. The two service dates in Everett on David Rowse were February 14 and March 7, 2007; respondent was in the Everett area for his father's last illness in late February 2007; and he appeared in this lawsuit on April 3, 2007. Service on David Rowse in Everett did, in fact, accomplish what service on a person's place of usual abode, or one of his places of usual abode is intended to accomplish and that is actual notice.

(3) Miscellaneous.

Respondent argues plaintiff did not assign error to Finding of Fact No. 8 to the effect that Defendant Rowse moved to Arkansas in December 2005. In fact, he did but maintained two places of usual abode for purposes of process. Upon moving to Arkansas, Michael Rowse lived in his truck, not in Arkansas, and lived, except for one or two days a month, outside the State of Arkansas. Given these facts in the context of citizens' physical mobility, transitory population shifts, and itinerant workers, the question of usual abode for service of process should be and is liberally construed for purposes of substituted service. *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996).

And, while the Trial Court did conclude it was more likely that David Rowse effected the change of address form that indicated Michael

Rowse's address to be the Everett address, the Court did this in the face of the clear deposition testimony of David Rowse on April 14, 2009 that he did not know how the address change occurred and that he had no idea how it occurred, but that it was not he who effected the change of address. RP 71-74. Of course, by the time of trial David Rowse testified he did, in fact, prepare and file the change of address. While but one factor in this place of usual abode question, if Respondent must prove by clear and convincing evidence that Everett was not one of the addresses for service (one of the places of usual abode), this fact militates against that. This is especially so in the face of David Rowse's admission that his father could not have effected the change of address because he was not in a physical condition to do so. RP 71. With David Rowse initially vehemently denying that he effected the change of address, and with Anthony Rowse being physically unable to do so, that would logically leave only one person who could have effected the change of address and that is Michael Rowse.

C. CONCLUSION

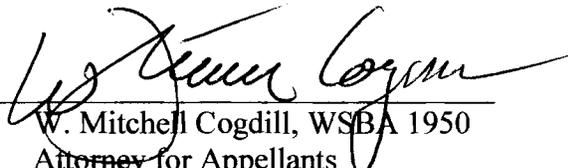
For the reasons set forth in the Brief of Appellants, and Appellants' Reply Brief, the decision of the Trial Court, Judge Thomas Wynne, should be reversed.

Dated this 31st day of May, 2011.

Respectfully submitted:

COGDILL NICHOLS REIN WARTELLE
ANDREWS

By:



W. Mitchell Cogdill, WSBA 1950
Attorney for Appellants

DECLARATION OF SERVICE

On said day below I caused to be delivered via North Sound Legal Messenger Service a true and accurate copy of the following document: Brief of Appellant in Court of Appeals Cause No. 66134-5-I to the following:

Thomas G. Crowell
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720 Olive Way, Suite 1600
Seattle, WA 98101

Original and copy filed with:

Court of Appeals, Division I
Clerk's Office
600 University Street
Seattle, WA 98101

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Dated June 1, 2011 at Everett, Washington.



Susan Egbert
Cogdill Nichols Rein Wartelle Andrews

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