

No. 359936-II  
No. 359952-II

**COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II**

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**CURT ELLISON, Appellant,**

and

**HOMER AND DONNA WILSON, and  
BOULEVARD DEVELOPMENT, INC., Respondents.**

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**REPLY BRIEF OF APPELLANT**

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FILED  
COURT OF APPEALS  
DIVISION II  
08 JAN 11 PM 3:15  
STATE OF WASHINGTON  
BY  DEPUTY

**ORIGINAL**

## ARGUMENT

Curt Ellison is appealing from entry of two default judgments against him based upon substitute service at a home in East Wenatchee, Washington. The home in East Wenatchee was not a center of domestic activity for Mr. Ellison at the time of attempted service, so it was not his place of usual abode and service was improper. The trial court's findings of fact were based upon inadmissible hearsay and not supported by substantial evidence. In addition, entry of a default judgment as a sanction was improper, as was the award of attorney's fees to Respondents Wilson. The trial court's decision must be overturned.

### **A. THE TRIAL COURT'S DECISION SHOULD BE REVIEWED DE NOVO.**

Respondents misstate the standard of review applicable to this case. "Whether a residence amounts to a place of usual abode is a question of law that [is reviewed] de novo." *Blankenship v. Kaldor*, 114 Wn. App. 312, 316, 57 P.3d 295 (2002) (citing *Sheldon v. Fettig*, 77 Wn App. 775, 779, 893 P.2d 1136 (1995), *aff'd*, 129 Wn.2d 601, 919 P.2d 1209 (1996)). Thus, this Court must determine de novo whether the residence in question meets the legal definition of usual abode.

Similarly, if service was ineffective, and jurisdiction is lacking, any judgment is void, and the trial court has "mandatory, nondiscretionary

duty to vacate” the judgment. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). A decision to deny a motion to vacate a default judgment for lack of jurisdiction is also reviewed de novo. *Id.*

Further, several cases confirm that an affidavit of service is presumed valid, but may be rebutted by clear and convincing evidence of irregular service. *Vukich v. Anderson*, 97 Wn. App. 684, 985 P.2d 952 (1999); *Woodruff v. Spence*, 88 Wn. App. 565, 945 P.2d 745 (1997); *Leen v. Demopolis*, 62 Wn. App. 473, 815 P.2d 269 (1991). No reported decision on substitute service clearly describes how the appellate court should review a trial court’s findings regarding service after an evidentiary hearing. The panel in *Coughlin v. Jenkins*, 102 Wn. App. 60, 7 P.3d 818 (2000), agreed with the trial court that the defendant did not present clear and convincing evidence that the place of service was not his usual abode, and held that the court’s finding was supported by substantial evidence. In contrast, *Vukich* did not mention the substantial evidence standard when it reversed the trial court’s holding that service had been effected at the defendant’s usual abode. 97 Wn. App. at 687, 691.

Because this Court must review de novo the determination of place of usual abode and the trial court’s decision on the motion to vacate a default judgment, the Court must also review de novo the evidence presented to the trial court to determine whether it clearly and

convincingly establishes that service was improper. De novo review of “place of usual abode” is meaningless if the Appellate Court must adopt a trial court’s factual finding that a residence was the center of a defendant’s domestic activity.

In any event, the abuse of discretion standard applied in *Wright v. B&L Properties, Inc.*, a case involving service by publication, is inapplicable. 113 Wn. App. 450, 53 P.3d 1041 (2002). See Wilsons’ Brief at 15.

**B. EAST WENATCHEE WAS NOT MR. ELLISON’S PLACE OF USUAL ABODE.**

The ultimate issue before this Court is whether the East Wenatchee home was Mr. Ellison’s place of usual abode. The parties agree that place of usual abode is the “center of domestic activity for [the defendant] where she would most likely receive notice of the pendency of a suit if left with a family member.” *Sheldon v. Fettig*, 129 Wn.2d 601, 610, 919 P.2d 1209 (1996). Correct determination of a party’s place of usual abode is critical, because substituted service under RCW 4.28.080(15) requires strict procedural compliance. See *Martin v. Triol*, 121 Wn.2d 135, 144, 847 P.3d 471 (1993). Case law does not establish a bright-line rule for determining what constitutes a center of domestic activity.

*Sheldon*, relied on by Respondents, is distinguishable from the present case. 129 Wn.2d 601. The defendant in *Sheldon* used her parents' address for her voter and car registrations, left many belongings there, and had a Washington driver's license. *Id.* at 605. The defendant visited the home approximately five times per month and was actually present in the home when the plaintiff's attorney called there prior to the service. *Id.* Although recognizing that "most people generally maintain only one house of usual abode for service of process purposes," this defendant had two usual abodes, and service at her parents' address was sufficient. *Id.* at 611. In contrast, Mr. Ellison visited the East Wenatchee home only about once a month, used the Ocean Shores mailing address at the time of service, and was not residing in East Wenatchee at the time of service. *Sheldon* mentions that the statute should be construed liberally, but the later decision of *Salts v. Estes* limited *Sheldon*, stating: "*Wichert* and *Sheldon* mark the outer boundaries of RCW 4.28.080(15)." 133 Wn.2d 160, 166, 943 P.2d 275 (1997).

The mere fact that a defendant's family members reside at a home is insufficient to qualify it as a center of domestic activity. Service in *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 933 P.2d 439 (1997), was made on the defendant's son-in-law at a home owned by the defendant and leased to her daughter. Although the defendant had not changed her

address for property taxes or voter registration, the home was not a center of domestic activity because the defendant actually resided in another abode. *Id.* at 543. Similarly, the defendant's father's home was not a center of domestic activity in *Blankenship v. Kaldor*, 114 Wn. App. 312, 57 P.3d 295 (2002). The defendant did not actually reside there, although she still received mail at the address. *Id.* at 317.

The facts of *Vukich v. Anderson* are similar to the present dispute. 97 Wn. App. 684. The process server left the summons and complaint with the tenant at a home owned by the defendant. At the time of service, the defendant was in California, although he received mail at the Washington address, registered his car at the address, and listed the address as his in a small claims suit in Washington. *Id.* at 686. In correspondence, the defendant referred to the Washington address as his home, indicated that he would return to Washington, and requested that mail be sent to him at his daughter's address in California. *Id.* at 690. In opposition to this evidence, the defendant showed that he had purchased a home in California and did not reside at the Washington address at the time of service, although he owned the home. *Id.* Because "other reasonable explanations [were] readily apparent" for the plaintiff's

evidence,<sup>1</sup> the Court determined that the defendant had presented clear and convincing evidence that the Washington address was not his place of abode at the time of service. *Id.* at 690-91.

Mr. Ellison presented clear and convincing evidence that East Wenatchee was not his usual abode at the time of service. It is undisputed that he did not reside in East Wenatchee at the time of service. RP 39, 92, 103, 207, 224. Rather, he was helping his father move into and repair a home in Kennewick. RP 39-40, 51-52, 81, 144. Mr. Ellison intended to stay in Kennewick until his project there was complete.<sup>2</sup> RP 52. Previously, Mr. Ellison had been in Ocean Shores to help his niece, Danielle. RP 37, 101-2, 131, 231. Respondents did not present evidence to dispute any of these facts. Rather, Respondents argue that East Wenatchee was still Mr. Ellison's usual abode despite these facts.

As in *Vukich*, there are other reasonable and readily apparent explanations for the minimal evidence presented by Respondents to show

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<sup>1</sup> For example, mail can be forwarded, many people do not change their car registration when absent from the state, many people have driver's licenses from more than one state, etc. *Vukich*, 97 Wn. App. at 691.

<sup>2</sup> Whether he intended to return at some point to East Wenatchee does not make that his place of usual abode. The defendant in *Vukich* apparently intended to return to Washington, but that did not support a finding that Washington was the defendant's place of usual abode. 97 Wn. App. at 690, 691. Place of usual abode is not domicile. There is no legal requirement that a party must permanently relocate in order to change his place of usual abode. A family with a temporary job or a student with a summer job might relocate with the intent to return when the job is complete, but if the center of domestic activity has changed, the law should not allow service at the home they intend to return to.

that East Wenatchee was Mr. Ellison's place of usual abode. Respondents rely on the fact that Mr. Ellison owned the home and some of the utilities were in his name. However, ownership of the home certainly does not establish that it was a center of domestic activity, and the utilities could have been left in his name as a convenience. Mr. Ellison admitted that he did not move a lot of furniture out of East Wenatchee to Ocean Shores, but he explained that he already had sufficient furniture in Ocean Shores. RP 77.

Where a defendant receives mail and what address is used for a driver's license and voter registration does not appear to be a critical factor, as the homes in *Gross*, *Vukich*, and *Blankenship* were all held not to be the defendant's abode despite use of the address by the defendants for such purposes. Regardless, the evidence shows that although he received mail in East Wenatchee before and after his move to Ocean Shores, he used the Ocean Shores mailing address during the period from September 2005 to May 2006. Ex. 17, 18, 21, 22. A change of address form was signed on September 27, 2005 to forward mail from PO Box 5455 in Wenatchee to a PO Box in Ocean Shores. CP 123. PO Box 5300 in East Wenatchee was not opened until after the date of attempted service. CP 157. Exhibit 21 shows that Mr. Ellison changed his address

from the Ocean Shores PO Box back to the East Wenatchee PO Box in June 2006.

Respondents reference the presence of Mr. Ellison's vehicle in East Wenatchee as justification for the service, but the car was there for the simple reason that he had lent it to his nephews. RP 41, 50, 112, 208.<sup>3</sup> This has no bearing on whether the home was his usual abode.

Respondents rely mainly on the testimony of the process server. Setting aside for the moment the arguments against admissibility of his testimony, Respondents' argument is based on the server's statement that Mr. Ellison's nephews told him that Mr. Ellison lived in the home but was "out of town." Mr. Ellison's nephews cannot be expected to be entirely candid with a total stranger regarding their uncle's whereabouts. The defendant's mother in *Blankenship* also told the process server that her daughter was "out of town" when she had permanently relocated to Portland. 114 Wn. App. at 314. The hearsay testimony of the process server does not support a finding that the East Wenatchee home was Mr. Ellison's place of usual abode.

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<sup>3</sup> Contrary to the Wilsons' statement of the case, there was no testimony by Mr. Patterson that Jeremy said the car was "regularly used" by Mr. Ellison. RP 153-158; Ex. 11; Wilson's Brief at 5.

**C. THE FINDINGS OF FACT WERE NOT SUPPORTED  
BY SUBSTANTIAL EVIDENCE.**

Even if a substantial evidence standard is applied to the trial court's findings of fact, the decision must be overturned. Findings of fact may be overturned when the evidence is insufficient to persuade a rational, fair-minded person. *Rogers Potato Service, LLC v. Countrywide Potato, LLC*, 152 Wn.2d 387, 391, 97P.3d 745 (2004). "A mere scintilla of evidence will not support the findings; it requires believable evidence of a kind and quantity that will persuade an unprejudiced thinking mind of the existence of the fact to which the evidence is directed." *Hewitt v. Spokane, Portland & Seattle Railway Co.*, 66 Wn.2d 285, 286, 402 P.2d 334 (1965) (citations omitted).

Mr. Ellison has not waived his objections to the findings of fact. A finding is treated as a verity on appeal only if there is no argument or citation to the record to challenge the finding. *City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wn. App. 375, 383, 53 P.3d 1028 (2002); *Millgan v. Thompson*, 110 Wn. App. 628, 635, 42 P.3d 418 (2002).<sup>4</sup> Pages 20 to 25 of the opening brief contain more than "a few sweeping statements" in support of his objections to the finding. See Boulevard's Brief at 13. Ultimately, the trial court unjustifiably rejected

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<sup>4</sup> *Kinsman v. Englander*, 140 Wn. App. 835, 167 P.3d 622 (2007), also states that a finding is treated as a verity only if unchallenged, but the portion of the decision cited by Respondent Boulevard is unpublished.

the testimony of Mr. Ellison and his witnesses based solely upon the hearsay testimony of the process server. As argued in the opening brief, there was insufficient admissible evidence in the record to convince a fair-minded person of Mr. Ellison's lack of credibility.

Specifically regarding Finding XXXV, there was no reason to disbelieve the testimony of Joshua and Jeremy Ellison without the hearsay statements of Mr. Patterson. Mr. Ellison admitted that he found out about the attempted service and called the process server shortly thereafter, so there could have been no attempt at deceit in that regard. RP 64. The extent of Mr. Ellison's business acumen was entirely irrelevant, and nothing in the record supports a finding that there was an attempt to conceal it. Additional records were submitted on the motion for reconsideration, and they supported Mr. Ellison's testimony. There is no evidence to show that he received mail in East Wenatchee at the time of service.

To support the trial court's decision, there must be evidence in the record to show that East Wenatchee was the center of Mr. Ellison's domestic activity. As discussed previously, case law does not clarify what constitutes "domestic activity," although it is reasonable to conclude that it refers to activity related to the home or family and does not include

business activity. Thus, Mr. Ellison's business ties to East Wenatchee are irrelevant.

There is very little in the record that would constitute domestic activity of Mr. Ellison in the East Wenatchee home. He did not sleep or eat there at the time of service, and had not stayed there for more than a few days in several months. He leased the property to his brother's family, who also paid the utilities.<sup>5</sup> Respondents argue that Mr. Ellison was "the patriarch of the family unit" to support the trial court's finding that East Wenatchee was the focus of Mr. Ellison's universe, but do not cite anything in the record to support the conclusion. Wilson's Brief at 22. Certainly, Mr. Ellison cared for his niece and nephews, but nothing in the record shows any kind of domestic activity by Mr. Ellison in East Wenatchee at the time of service. Rather, all of Mr. Ellison's domestic activity was in Ocean Shores and Kennewick.<sup>6</sup> Thus, the finding that East Wenatchee was the center of Mr. Ellison's domestic activity and universe,

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<sup>5</sup> Despite Respondents' comments, there is nothing unusual about the lease arrangement. It is not surprising that Mr. Ellison was welcome to visit despite the general rule that tenants have exclusive possession—this was his brother and nephews, whom he would have visited regardless of who owned the house. Further, there was no evidence to suggest what a reasonable lease payment would have been, but even if \$350 is low, it can be explained because the tenants were Mr. Ellison's family, not because he was also an occupant.

<sup>6</sup> The critical items Respondents use to claim Mr. Ellison's abode was in East Wenatchee apply even more so to Kennewick and Ocean Shores. Mr. Ellison owned the home in Kennewick where he stayed with his father. RP 144-45. He had close ties with his family in Kennewick, as evidenced by the amount of time and money he spent to help his father. Given that he was actually in Kennewick at the time of service, that was the location where he would "most likely receive notice of the pendency of a suit if left with a family member." *Sheldon*, 129 Wn.2d at 610.

and the conclusion that it was his place of usual abode, are not supported by substantial evidence.

**D. THE TRIAL COURT IMPROPERLY CONSIDERED HEARSAY.**

The trial court erred in admitting hearsay testimony of the process server and the process server's affidavit. Regarding Mr. Patterson's testimony at the hearing, Respondents Wilson argue that it was admissible as impeachment by contradiction under ER 801(d)(1) or ER 607.<sup>7</sup> ER 801(d)(1) provides in part that a statement is not hearsay when "[t]he declarant testifies at the trial or hearing and is subject to cross examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony, *and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition ...*" (emphasis added). Jeremy and Joshua's statements to Mr. Patterson were not under oath at a trial or similar proceeding, and this hearsay exemption does not apply.

ER 607 merely states that any party may attack the credibility of a witness. However, "[e]ven if the person being attacked is one who can be impeached, the particular evidence being offered must still be (1) relevant to impeach, and (2) *either nonhearsay or within a hearsay exemption or*

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<sup>7</sup> Respondent Boulevard's argument regarding hearsay is directed only to the return of service, not the testimony at the hearing.

*exception.” State v. Allen S., 98 Wn. App. 452, 466, 989 P.2d 1222 (1999)* (footnotes omitted) (emphasis added).

Further, although experts may base their testimony on hearsay, there is no indication that Mr. Patterson was admitted as an expert witness. He may have had experience determining who owns a home according to public records, but there was no evidence that he could be qualified as an expert in determining whether a home is the center of one’s domestic activity. The argument by Wilson is entirely inapplicable. The bulk of Mr. Patterson’s testimony should have been excluded as hearsay.

Mr. Patterson’s affidavit should also have been excluded. The parties agree that CR 4(g)(7) allows admission of an affidavit stating “the time, place, and manner of service.” The affidavit submitted by Mr. Patterson contained much more than what is allowed under the rule. The process server should be allowed to state when the pleadings were served, the address, who was served, and whether the pleadings were hand-delivered or posted somewhere on the premises. Anything more is unrelated to time, place, and manner, and should be excluded.

Respondent Boulevard claims that hearsay was considered in *Salts* and *Blankenship*. Boulevard’s Brief at 10. However, there is no indication in these decisions that an objection to hearsay was made at the trial court. It is also significant that the decisions in these cases were

contrary to the hearsay statements by the process servers. *Salts*, 133 Wn.2d at 170; *Blankenship*, 114 Wn. App. at 317. Contrary to Boulevard's assertion, there is no indication that hearsay was admitted in *Vukich*, *Wichert*, or *Sheldon*. In *Vukich*, the process server only testified as to his usual practice (and service was held improper despite this testimony). 97 Wn. App. at 686. In *Wichert*, the only finding stated that a discussion was held, but there was no hearsay statement about what was said. 117 Wn.2d at 150. Similarly, the only evidence from the process server in *Sheldon* was that the defendant "was reportedly not there and the server left the complaint and summons with Ms. Fettig's brother pursuant to the substitute service of process statute." 129 Wn.2d at 606.

The process server's affidavit in the case at hand contained much more than was necessary to relate the time, place, and manner of service. The descriptions of events before and after the alleged service are clearly unrelated to the manner of service. Further, the conversation between Mr. Patterson and Joshua and Jeremy is not necessary to describe the time, place, and manner of service, and should be excluded. To hold otherwise would open a back door to hearsay statements loosely related to service.

Without the hearsay testimony of Mr. Patterson, Respondents cannot point to substantial evidence in the record to support any of the trial court's findings of fact.

**E. THE EVIDENCE OFFERED ON THE MOTION FOR RECONSIDERATION SUPPORTED MR. ELLISON'S TESTIMONY.**

The trial court did not rule on the Wilsons' objection to the additional evidence submitted by Mr. Ellison in support of the motion for reconsideration and apparently considered it. As such, that evidence should also be considered on appeal when determining whether the East Wenatchee home was a center of Mr. Ellison's domestic activity. The evidence was not submitted in bad faith as the Wilsons imply, but was offered to correct a manifest injustice. The additional evidence confirms that Mr. Ellison was not lying, as the court assumed. He was in Kennewick helping his father for several weeks before and after the date of service. Several witnesses testified that he was living in Kennewick from February to June 2006. CP 126-133. East Wenatchee was not the center of Mr. Ellison's domestic activity, as testified at the hearing and confirmed by the evidence presented on the motion for reconsideration. The default judgments must be reversed.

**F. ENTRY OF A DEFAULT JUDGMENT AS A SANCTION WAS IMPROPER.**

The default judgment for Boulevard must also be set aside because it was imposed as an excessive sanction. Respondent Boulevard does not attempt to argue that it was a proper discovery sanction. Rather, it argues

that a default was entered as a sanction for Mr. Ellison's alleged bad faith. However, the only motion before the trial court was a motion for sanctions due to Mr. Ellison's failure to appear at the deposition. CP 252-54. Boulevard has not cited any Washington authority that would allow a court to enter such a severe sanction sua sponte.

Washington courts should not resort to severe sanctions such as dismissal or default lightly. See *Will v. Frontier Contractors, Inc.*, 121 Wn. App. 119, 129, 89 P.3d 242 (2004). When considering sanctions for willful violation of a court order, a court should consider on the record whether a lesser sanction would have been sufficient. *Id.* at 129, 133. The trial court's dismissal in *Will* was reversed because the conduct was not willful, there was minimal prejudice to the other side, and because the court had not considered the appropriateness of a lesser sanction. *Id.* In contrast, *Woodhead v. Discount Waterbeds, Inc.*, cited by Respondent, upheld dismissal as a sanction because willful violation of a court order was combined with "deliberate attempts to mislead the court with false claims." 78 Wn. App. 125, 131, 896 P.2d 66 (1995).

Contrary to Boulevard's assertion, the trial court did not consider lesser sanctions. Judge Godfrey discussed the decision in *Smith v. Behr Process Corp.*, 113 Wn. App. 306, 54 P.3d 665 (2002), and felt that the

sanction was justified based on that decision, but he never addressed why a lesser sanction would not suffice in this matter. RP 261-62.

Entry of a default judgment against Mr. Ellison cannot be upheld as a sanction. The sanction was too severe for mere failure to appear at a deposition. The trial court did not consider applicability of lesser sanctions, either for a discovery violation or for alleged bad faith.

**G. THE AWARD OF ATTORNEY'S FEES WAS IMPROPER.**

The award of fees to the Wilsons must be reversed as well. The Wilsons seek fees based on Mr. Ellison's alleged bad faith. The Wilsons rely on *Rogerson Hiller Corp. v. Port of Port Angeles*, 96 Wn. App. 918, 927, 982 P.2d 131 (1999), in which the court decided *not* to award fees for bad faith conduct. Mr. Ellison was not attempting to perpetrate a fraud, as the court believed. Rather, he was presenting his good faith defense to substitute service at a home where he did not reside, as shown by the evidence discussed above. "[T]hose who are to be served with process are under no obligation to arrange a time and place for service or to otherwise accommodate the process server." *Weiss v. Glemp*, 127 Wn.2d 726, 734, 903 P.2d 455 (1995) (quoting *Thayer v. Edmonds*, 8 Wn. App. 36, 42, 503 P.2d 1110 (1972)).

Even if fees were warranted below, there is no basis for the request for fees on appeal. As discussed in *Rogerson*, fees might be appropriate for prelitigation misconduct, procedural bad faith (vexatious conduct during litigation), or substantive bad faith (an intentionally frivolous claim or defense). 96 Wn. App. at 927. None of those grounds are applicable to this appeal, and the Wilsons do not cite any actions by Mr. Ellison during the appeal that would justify an award of fees in equity.

#### **H. CONCLUSION**

Substitute service on Mr. Ellison in East Wenatchee was improper. East Wenatchee was not the center of Mr. Ellison's domestic activity, and therefore not his place of usual abode. The trial court's findings to the contrary are not supported the evidence in the record, especially once the hearsay testimony of the process server is properly excluded. Whether Mr. Ellison actually received notice of the suit is irrelevant if the statutory requirements were not met. The default judgments against Mr. Ellison are void for lack of jurisdiction and must be reversed.

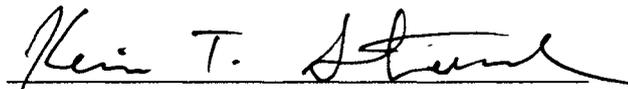
In addition, the default judgment entered as a sanction against Mr. Ellison should be vacated. The trial court's decision to enter a judgment was an abuse of discretion because it did not consider lesser alternative sanctions.

Finally, the award of attorney's fees to Respondents Wilson should be overturned. Mr. Ellison did not act in bad faith in disputing service at a home where he did not reside.

Due to the errors below, Mr. Ellison never had an opportunity to argue the merits of the suits against him. The decision of the trial court in this matter was unjust and should be reversed.

Respectfully submitted this 11<sup>th</sup> day of January, 2008.

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**Certificate of Service**

I, the undersigned, hereby certify under penalty of perjury of the laws of the State of Washington that I caused the foregoing Reply Brief of Appellant to be served upon:

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Service was accomplished by:

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Amy M. DeSantis  
Legal Assistant

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