

No.: 359936-II
No. 359952-II

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

CURT ELLISON,

Appellant,

v.

HOMER and DONNA WILSON, and

BOULEVARD DEVELOPMENT, INC.,

Respondents.

BOULEVARD DEVELOPMENT, INC.'S RESPONSE BRIEF

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I. INTRODUCTION

This is an appeal from an evidentiary hearing that lasted more than a day. After hearing the testimony, the trial court considered the evidence and the credibility of the parties. It then found that Appellant Curt Ellison (“Ellison”) had concocted an elaborate fabrication and offered false testimony to defeat service of process. In his appeal, Ellison essentially argues that if the trial court had instead believed his evidence, its ruling would be in error. True as that may be, the trial court’s findings are supported by substantial evidence, and the trial court properly exercised its discretion in accordance with those findings. This Court should affirm.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. The trial court’s order is supported by substantial evidence and the law. The trial court properly exercised its discretion.
2. The trial court properly exercised its discretion in response to orchestrated fraudulent testimony and a willful refusal to appear at a deposition.
3. The trial court did not err in denying reconsideration when the motion was not filed in accordance with the local rules and otherwise had no merit.
4. No response required.

5. The trial court did not err in admitting evidence, and no objection as raised at the trial level.
6. The trial court's findings are amply supported by substantial evidence.
7. The trial court's findings are amply supported by substantial evidence.

**III. RESPONSE TO ISSUES PERTAINING
TO ASSIGNMENTS OF ERROR**

1. A court has jurisdiction to enter a default judgment and award sanctions when it finds on the basis of disputed evidence that the defendant was properly served.
2. Service is proper on a family member at a home that the court properly finds was the defendant's usual place of abode.
3. When a defendant falsely testifies that he did not live in his own house, the court may properly find that the defendant's house is his usual place of abode.
4. Entry of a default judgment is a proper sanction when a defendant both refuses to appear for his own deposition and offers false testimony to evade service.
5. Boulevard did not seek or receive fees below.

6. When no objection is made to evidence when it is presented, an objection may not be raised for the first time on appeal.
7. When an exhibit is admitted without objection, no objection can be made for the first time on appeal, particularly when the error could have been corrected in the trial court.
8. It is proper to enter a default based on the pleadings when the plaintiff has attempted to evade service of process by offering false and fraudulent testimony.
9. Yes.

IV. FACTUAL BACKGROUND

The facts for purposes of this appeal are those found by the trial court except to the extent that the findings are not supported by substantial evidence. Ellison's statement of facts, however, relies instead on the evidence that he presented at trial.

Ultimately, Finding of Fact XXXV is most central to the trial court's decision in this matter. Although Ellison assigns error to this finding of fact, he does not present any meaningful argument or authority against it. That Finding of Fact states:

This Court specifically finds that CURT ELLISON, Craig Ellison, Jeremy Ellison and Josh Ellison has been untruthful and have attempted to perpetrate a fraud in this court, for, as to each of them, for some or all of the following reasons, among others:

1. They were deceitful as to what they told this court about what they said to the process server at the time of service.
2. They were deceitful in testifying that CURT ELLISON was not informed of the lawsuits.
3. They were deceitful in testifying that they did not know where CURT ELLISON was at the time of service.
4. They were deceitful in contradicting each other as to the living conditions in the home in East Wenatchee as it pertains to CURT ELISON.
5. They were deceitful in preparing and causing to be prepared, a declaration of Jeremy Ellison attempting to disavow what he told Mr. Patterson.
6. They were deceitful in indicating that they consulted with an attorney and testifying they were told all they needed to do was submit a declaration to the attorneys and the court.
7. They were deceitful in suggesting it was counsel's responsibility to bring Jeremy Ellison's declaration to the court's attention after they told counsel they had forwarded it to the court.
8. They were deceitful in testifying the declaration was done immediately the next day after process was served when in fact, it was done six days later.
9. They were deceitful in attempting to conceal the extent of CURT ELLISON's business acumen, which the court believes to be extensive.
10. They were deceitful in failing to bring forth numerous records they could have, including CURT ELLISON's driver's license, numerous phone records, and numerous mailings which the court believes they did not as the records would have shown their records to be false in many respects.

11. They were deceitful in trying to show CURT ELLISON got his mail in Ocean Shores when he knew he was having mail sent there forwarded to East Wenatchee. Further, Craig Ellison acknowledged that he never picked up his brother's personal mail but that CURT ELLISON picked up his own personal mail in East Wenatchee, thereby further showing their deceitfulness in claiming mail was received at Ocean Shores.

CP ___ at ¶ XXXV. Essentially, the court strongly found against Ellison and his witnesses on the issue of credibility.

Ellison's entire argument with regard to this finding consists of: "Finding XXXV was also unjustified, as any minor discrepancies that may exist in the testimony do not support a finding that the Ellisons attempted to perpetrate a fraud." Brief of Appellant at 25. In light of the absence of any argument or contrary to the contrary, this court should treat the finding as a verity for purposes of this appeal even though Ellison assigned error to it. *Kinsman v. Englander*, ___ Wn.App. ___, 167 P.3d 622, 627 (2007); *City of Burien v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 113 Wn.App. 375, 383, 53 P.3d 1028 (2002).

The facts in this case are those found by the trial court. Ellison's attempt to rely on testimony that the trial court found to be fraudulent should be rejected. Ellison has no other "facts" or evidence.

V. ARGUMENT

Ellison never really denies that the decision below was entirely proper under the facts as found by the trial court. Instead, he challenges almost all of the central findings of the trial court. Ellison raises both evidentiary and substantive arguments. The Court therefore should first address the evidentiary challenges to identify the admissible evidence and then consider that evidence under the substantial evidence standard. Because the admissible evidence overwhelmingly supports the trial court's findings, this court should affirm.

A. Standard of Review.

This appeal can be decided on the standard of review alone. Ellison's entire brief is based on evidence that the trial court rejected as fraudulent. He argues that this court should disregard the trial court's findings because "an appellant court reviews the evidence *de novo* to determine whether it clearly and convincingly establishes that the residence in question was the defendant's usual place of abode." Brief of Appellant at 12-13. The law is quite the opposite.

Ellison is at least correct that the determination whether a residence constituted a usual abode is a question of statutory construction that the court reviews *de novo*. *Blankenship v. Kaldor*, 114 Wash.App. 312, 316, 57 P.3d 295, 297-98 (2002). The *de novo* review, however, is

limited to the legal question of statutory interpretation and does not extend to the factual determinations of the trial court. *See Nollette v. Christianson*, 115 Wn.2d 594, 600, 800 P.2d 359, 362 (1990); *Intermountain Elec., Inc. v. G-A-T Bros. Const., Inc.*, 115 Wn.App. 384, 390-91, 62 P.3d 548, 551 (2003).

Specifically with regard to disputes over abode service, this court has applied the substantial evidence test to a trial court's findings after an evidentiary hearing.

The superior court found that Jenkins did not present clear and convincing evidence that his usual place of abode was not the Fountain, Colorado address, and that personal jurisdiction existed from the time of the service. We agree. Substantial evidence supports this factual finding and it, in turn, supports the trial court's conclusion of law as to personal jurisdiction.

State ex rel. Coughlin v. Jenkins, 102 Wn.App. 60, 65, 7 P.3d 818, 822 (2000).

The question in this appeal is not whether the evidence “clearly and convincingly establishes that the residence in question was the defendant’s usual place of abode,” but instead whether Ellison presented clear and convincing evidence that it was **not** his usual abode. *Witt v. Port of Olympia*, 126 Wn.App. 752, 757, 109 P.3d 489, 491 (2005); *State ex rel. Coughlin v. Jenkins*, 102 Wn.App. 60, 65, 7 P.3d 818, 821-22 (2000) (“An affidavit of service is presumed to be valid if it is regular in its form

and substance; the person contesting the service must prove by clear and convincing evidence that the service was improper.”) Ellison’s mere regurgitation of evidence that the trial court rejected as fraudulent cannot possibly meet that burden.

B. The Trial Court Properly Admitted Evidence.

Ellison makes two arguments regarding the admissibility of evidence at trial. First, he claims that the process server should not have been permitted to testify to his verification of Ellison’s address. Second, he argues that the essential statements in the Affidavit of Service should not have been admitted. Neither argument has merit.

Most evidentiary rulings are reviewed for abuse of discretion and are presumed to be correct.

A trial court's admission of evidence is reviewed for an abuse of discretion. *State v. Lane*, 125 Wash.2d 825, 831, 889 P.2d 929 (1995). A court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *State ex rel. Carroll v. Junker*, 79 Wash.2d 12, 482 P.2d 775 (1971). A trial court's judgment is presumed to be correct and should be sustained absent an affirmative showing of error. *Smith v. Shannon*, 100 Wash.2d 26, 35, 666 P.2d 351 (1993); *Mattice v. Dunden*, 193 Wash. 447, 450, 75 P.2d 1014 (1938).

State v. Wade, 138 Wn.2d 460, 463-64, 979 P.2d 850, 852 (1999); *State v. Lewis*, ___ Wn. App. ___, 166 P.3d 786, 795 (2007); *State v. Stein*, ___ Wn.App. ___, 165 P.3d 16, 28 (2007).

One exception to the general rule is that an appellate court will “review de novo whether a statement was inadmissible hearsay.” *Lynn v. Labor Ready, Inc.*, 136 Wn.App. 295, 306, 151 P.3d 201, 207 (2006). However, that de novo review still accords the trial court wide discretion with respect to factual determinations underlying the decision. *State v. Strauss*, 119 Wn.2d 401, 417, 832 P.2d 78, 86 (1992). De novo review is limited to whether the trial court made an erroneous determination of law. *See State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883, 885 (1998).

Ellison would effectively have this court make domicile service impossible to prove because the proof of service would be limited to the narrowly defined “time, place and manner” of service. If Ellison were correct, the proof of service could not contain a statement by the person served that the defendant lived there. *See* RCW 4.28.080(15). Nor, for that matter, could the proof of service include the statement of the person served that he or she resided there.

Patterson’s proof of service does nothing more than to describe the time, place and **manner** of service. The manner of service was domicile service as authorized by RCW 4.28.080(15). That statute permits service “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.” Proof of service would require evidence that the address was the

defendant's "usual abode" and that the person served was "then resident therein." Both elements of proof require hearsay.

It therefore is not surprising that Washington courts routinely consider the very evidence that Ellison would have this court find inadmissible. For example, in *Salts v. Estes*, 133 Wash.2d 160, 164, 943 P.2d 275, 277 (1997), the Supreme Court expressly considered the process server's declaration that the person served admitted to being a resident of the property. In *Blankenship v. Kaldor*, 114 Wn.App. 312, 314-15, 57 P.3d 295, 296-97 (2002), the court extensively considered statements that the process server reported. The process server's testimony about what the resident said was also accepted in *Vukich v. Anderson*, 97 Wn.App. 684, 686, 985 P.2d 952, 953 (1999). Other cases, while not specifying the source of the evidence, plainly considered the process server's testimony about what would otherwise be hearsay evidence. *Wichert v. Cardwell*, 117 Wn.2d 148, 150, 812 P.2d 858, 859 (1991) (evidentiary hearing); *Sheldon v. Fettig*, 129 Wash.2d 601, 606, 919 P.2d 1209, 1211 (1996) (summary judgment). In *Woodruff v. Spence*, 88 Wn.App. 565, 567-68, 945 P.2d 745, 747 (1997), the court considered that the process server "verified through the post office and his company's trace department that [the defendant] did in fact still live" at the subject property.

Together with the absence of any reported decision limiting the hearsay exception for proof of service, these cases collectively stand for the proposition that the exception includes all information necessary to establish service. Any other rule would effectively preclude a proof of service under RCW 4.28.080(15).

Ellison makes a final argument that the form of the proof of service is defective. This argument was not raised at trial. RP 160-63. The only objection was hearsay. *Id.* Ellison may not raise new evidentiary objection for the first time on appeal. RAP 2.5(a). *State v. Davis*, 141 Wn.2d 798, 850, 10 P.3d 977, 1007 (2000) (“An objection to the admissibility of evidence must be made to the trial court in order to preserve a claim of error on appeal.”) If Ellison had made this argument below, Patterson could have simply amended the proof of service. CR 4(h).

Without exception, all of the hearsay evidence admitted by the trial court was either a CR 4(d)(7) proof of service or testimony necessary to establish that the manner of service complied with RCW 4.28.080(15). This Court should so rule.

C. Substantial Evidence Supports the Trial Court’s Findings.

Ellison’s attempt to demonstrate a lack of substantial evidence is certainly novel. He assigned error to twenty findings of fact, but mentions

only seventeen of them in his brief. That discussion is limited to four short paragraphs which merely cites purportedly contrary evidence. Brief of Appellant at 24-25.

The trial court's factual findings are reviewed under a substantial evidence test. *In re Estate of Jones*, 152 Wash.2d 1, 8, 93 P.3d 147 (2004) (“An appellate court will uphold challenged findings of fact and treat the findings as verities on appeal if the findings are supported by substantial evidence.”) The substantial evidence test respects the role of the trial judge as the sole arbiter of credibility. *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 115 Wn.2d 364, 369-70, 798 P.2d 799, 803 (1990); *Davis v. Department of Labor & Indus.*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). Importantly, the substantial evidence test concerns the adequacy of the evidence presented, and an appellant may not simply point to contrary evidence that was presented to the trial court. *E.g., Katare v. Katare*, 125 Wn.App. 813, 829 n. 15, 105 P.3d 44, 52 (2004); *Washington Cedar & Supply Co., Inc. v. State, Dept. of Labor & Industries*, 119 Wn.App. 906, 915, 83 P.3d 1012, 1016 (2003).

Ellison's “argument” is simply his assertion that the trial court was wrong. For example, Ellison asserts that Finding of Fact XIII concerning what was said to the process server “was not consistent with the testimony of Jeremy Ellison.” Brief of Appellant at 23. He disputes Finding XXI

because “there was insufficient evidence to discredit the statements of the witnesses.” Brief of Appellant at 24. He says that “Finding XXV was also unjustified, as any minor discrepancies that may exist in the testimony do not support a finding that the Ellisons attempted to perpetrate a fraud.” Brief of Appellant at 25.

A few sweeping statements about the evidence and a restatement of the evidence rejected at trial are an inadequate basis to disturb a trial court’s factual findings after an evidentiary hearing. Ellison’s failure to address the substantial evidence standard waives his objections to the trial court’s factual findings. *Milligan v. Thompson*, 110 Wn.App. 628, 635, 42 P.3d 418, 422 (2002) (“A party waives an assignment of error not adequately argued in its brief.”)

D. Ellison Was Properly Served.

Even if one were to accept Ellison’s fundamental claims as true, the trial court’s determination would still be correct. Ellison admits that he owns and lived at the residence where he was served until September 2005. Brief of Appellant at 7. He claims that he then left his home to put his niece into a school in Ocean Shores and did not return until June 2006. Brief of Appellant at 8. He also claims that while he was caring for his niece, he spent “long periods of time” helping his father in the Tri-Cities. Brief of Appellant at 8.

According to Ellison, at the time of service, he was “splitting his time between Ocean Shores and Kennewick in order to assist his father.” Brief of Appellant at 9. It is interesting that Ellison never identifies where he thinks his “principle place of abode” was on the date of service. He appears to argue that he had a floating place of abode that traveled with him, which effectively would render domicile service impossible.

Washington courts have long rejected such attempts to evade service. First, the law recognizes that a person may have more than one usual place of abode. *Sheldon v. Fettig*, 129 Wn.2d 601, 611, 919 P.2d 1209 (1996); *Blankenship v. Kaldor*, 114 Wn.App. 312, 316, 57 P.3d 295, 297 (2002); *Vukich v. Anderson*, 97 Wn.App. 684, 687, 985 P.2d 952, 954 (1999). Assuming that Ellison ever established another usual abode, he never abandoned Wenatchee.

Ellison testified that when he left Wenatchee in September 2005, he fully intended to return as soon as the next spring.

Q Ocean Shores, you were in Ocean Shores, you were there for your niece, then when your business was – when your the niece was done you went back to East Wenatchee; is that right?

* * * *

A Um, I don't really understand the question too well but I can I think get the gist of what he is trying to get at. My whole goal was to spend my time here in Ocean Shores as

long as my niece was in this area and then I was not planning on being here anymore.

Q Your intention was to go back to East Wenatchee?

A That is exactly right, and that was around the summer time, or when my niece out of school.

Q You are saying that was around the early part of June of 2006.

A Well, or the later part of May.

RP 53. Similarly, Ellison testified that when he went to Kennewick to help his father, he planned to stay until he could “get the place fixed up for him, and I lived there at that time.” RP 52. When asked if his stay at Kennewick was temporary, Ellison could only answer “well, yes and no.” *Id.*

Ellison himself recognized that he sometimes maintained more than one residence. When asked to explain why he insured the Ocean Shores house as his primary residence months before he left Wenatchee, Ellison explained: “Well, I lived at both places up to that time. But primarily in September is when I lived there full time.” RP 69. He then clarified by stating: “Well, I’m all over the state of Washington,” and that “I was living in both places.” RP 70.

When Ellison left Wenatchee for Ocean Shores, he did not move out of the Wenatchee home. RP 77. He did not disconnect the utilities or have them transferred from his name. RP 78. His brother who shared the house paid rent before Ellison went to Ocean Shores, while Ellison was in

Ocean Shores and after Ellison returned to Wenatchee. RP 79. Critically, Ellison even testified that while he was in Ocean Shores, Wenatchee remained his “secondary residence.” RP 89. He then testified that he also considered the Tri-Cities and Puyallup to be residences. RP 90. When he does not have a specific reason to be elsewhere, however, Ellison always returns to his home in Wenatchee. *See* RP 45, 53, 99.

For these reasons, it is not surprising that the trial court found that: “For all purposes, the home in East Wenatchee was the focus of CURT ELLISON’s universe.” CP ____ at ¶ 9. Ellison assigned error to Finding of Fact XXIV, of which this is a part, but he never addresses or disputes this specific finding.

Even Ellison’s own testimony establishes that the Wenatchee house was his usual abode for purposes of service of process. Usual abode means the “center of one’s domestic activity.” *Salts v. Estes*, 133 Wn.2d 160, 165, 943 P.2d 275, 277-78 (1997); *Sheldon v. Fettig*, 129 Wn.2d 601, 610919 P.2d 1209 (1996); *Blankenship v. Kaldor*, 114 Wn.App. 312, 317, 57 P.3d 295, 298 (2002). Even if Ellis did leave Wenatchee for a few months, he never moved out of the Wenatchee home, and he always intended to return to Wenatchee after his family duties were done. Under these circumstances, the Wenatchee home was the one place in Washington where Ellison was “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, 1213 (1996). Service was proper in Wenatchee.

E. The Sanction of Default Was Proper.

Ellison argues that the Court could not grant a default merely for his refusal to appear at a properly noted deposition that had been scheduled by agreement. Even if that argument were correct, it is quite beside the point because the sanction of default was awarded for perpetrating a fraud on the court.

The trial court went to great pains to explain that the sanction was not based on the failure to appear for the deposition.

[MR. BURTCH:] As far as vexatious conduct is concerned, my clients had a right to challenge whether or not the substitute service was proper. I think that he should have -- that you should not have declared a default against him as far -- or not set aside the default in Wilson and declared the default in the other case. The other case I understood you did because of his failure to come to the deposition. We did not have a proper hearing, and I -- although I am not arguing that in the one case, which is the corporation case, that maybe sanctions should be made because he didn't appear at the deposition, I think dismissal and entering a default is too severe, particularly since no lesser sanctions were considered.

THE COURT: I don't know how many times I have to say this, and the record speaks for itself. First of all, let's discuss the issue of reconsideration. You guys can argue what you want about CR 59. You're in violation of local rule 7(5), (B) and (G). There isn't supposed to be a motion until you have given this Court copies and the Court responds to allow oral argument, and I don't recall telling anyone they could have oral argument in this. So, you're in

violation of local rules, but I was courteous enough to allow this to happen.

Now, let's go back to where I started with this case when I made my conclusions. Now, a higher court can do what they want with this, but I'll guarantee you something, there's not one judge of the Court of Appeals or Supreme Court who sat in that courtroom and observed the demeanor of the witnesses and made assessments of their credibility. They flat came in this courtroom and lied, and I don't know how to tell you any more. They lied to the Court, and they were caught lying to the Court, and in fact, you can go back and read your own records, Mr. Burtch. You made the comment at least once, if not more, you would not have, quote, advised your client to take the course of action that they took in this matter.

And now we're trying to extrapolate the issue of the deposition in this. The issue of this whole case came down to your client avoiding process of service so appropriate jurisdiction could prevail and be brought before the Court. He was properly served, and he did everything under the sun to avoid coming into a court to discuss the merits of the case, and I'm not going to get into the merits of the case. Merits have nothing whatsoever to do with this. This Court made its orders granting the motions by both of the parties in this situation against your client, and it was based blatantly on the bad faith of your client coming into this Court and, I'll say it again, trying to perpetuate a fraud on the Court.

And I'll go right back to where I started. The Court of Appeals can do whatever they want to do with it, but they didn't sit up here with a black robe in that courtroom and sit here and watch the demeanor of those witnesses and answer the questions, and that includes Mr. Ellison, his nephews, his brother, and his father. Now, type this up and take it up to them, and if they want to tell me I'm deaf, dumb and blind, they can go right ahead and do it, but outside of that, the motion stands, and that includes the attorney fees.

RP (January 22, 2007) 12-14.

Contrary to Ellison's argument, the trial court did consider whether the sanction of a default was appropriate or whether some lesser sanction

would suffice. The trial court believed that a default was the only appropriate remedy for fraudulent testimony.

Now, regarding the issue of the corporation. I think the ruling case on this, and I was actually quite surprised at this when it happened, and I think you can look at the appellate sheets, I don't have the cite, but I believe it was one of the BEHR cases, I can't remember, because I remember I did one and Judge Foscue did the other one and it had to do with sanctions. And the sanction in this case, BEHR 1, we will call it, you can get the name of the case from the clerks because we were in that matter for a number of years, involved a case where BEHR Paint basically was perpetrating a fraud upon the court based upon witnesses and evidence and depositions and discovery and issues of that nature. And the remedy, and I was actually shocked because I didn't believe he would ever do it, was Judge Foscue granted liability judgment against the defendants for their conduct and what they did in that matter. And for me to not rule and grant the order of default that is being requested by the corporation would run counter to the BEHR holding, because that is the appropriate sanction for the conduct that I have observed in this courtroom. And it was further and finally demonstrated, apparently, not that there weren't enough nails in the coffin in the first place was this gentleman's refusal to show up at a deposition. And I will say this again that wasn't the final nail, it was just the final proof, because I probably would have granted the same sanction had they asked me, even if you would have shown up at the deposition.

RP 261-62.

The cases cited by Ellison all concern discovery violations. As the trial court explained, the sanction of default was granted because Ellison attempted to perpetrate an orchestrated fraud on the court, which undermines the entire legal system. RP 252-62 (attached as Appendix A).

The trial court was faced with a difficult decision in the face of extensive false testimony. Ellison never offers what he thinks an appropriate sanction would be. It is difficult to imagine any lesser sanction for willful, bad faith conduct that undermines the most basic tenet of the judicial system. Testifying truthfully is not a trifling matter.

One of the basic obligations resting on everyone living under the protection of our constitutions is that, when called upon to give evidence in court he will, without reservation, speak the truth; that he will not avoid or evade this duty through fear, malice, or hope or promise of reward. The court and every party to a judicial proceedings- indeed, society itself- has a right to assume that the duty to give truthful evidence will be discharged and it need not be anticipated that that duty will be betrayed.

State v. Green, 71 Wn.2d 372, 378, 428 P.2d 540, 544 (1967).

When a party violates the fundamental requirement of testifying truthfully and goes so far as to perpetrate an elaborate fraudulent scheme, no sanction short of dismissal or default would come close to addressing the wrong committed. Perhaps the most analogous Washington case is *Woodhead v. Discount Waterbeds, Inc.*, 78 Wn.App. 125, 131, 896 P.2d 66, (1995), where the trial court's dismissal of a lawsuit was affirmed because the plaintiff deliberately failed to serve the defendants while seeking ex-parte relief and then lied to the court about it.

Fortunately, Washington courts do not appear to have confronted such a spectacle, but other states have. These cases were well summarized

by the Wisconsin Court of Appeals in *Schultz v. Sykes*, 248 Wis.2d 746, 764-67, 638 N.W.2d 604, 612-13 (2001):

¶ 12 There are few, if any, functions of a circuit court more vital in maintaining its dignity or accomplishing the purposes of its existence than ensuring the truthful disclosure of facts. When parties attempt to influence witnesses to lie under oath, this at best interferes with the court's ability to impartially adjudicate the instant case, and at worst can undermine both the opposing party's and the public's faith in the integrity of the judiciary. For courts to effectively fulfill their role as impartial arbiters of justice, parties who come to the courts as either plaintiffs or defendants must have confidence that they will be treated fairly and honestly, both by the court and by the opposing party. Without such confidence, our commitment to the rule of law itself is threatened. Accordingly, we believe that a court must be empowered to protect itself from those egregious practices which threaten the dignity of the judicial process. Because an attempt to suborn perjury undoubtedly threatens this dignity, we conclude that circuit courts have inherent authority to sanction with dismissal a party who has attempted to suborn perjury from a witness.

¶ 13 Federal and out-of-state case law support our conclusion. *See, e.g., Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 250, 64 S.Ct. 997, 88 L.Ed. 1250 (1944) (“Had the District Court learned of the fraud it would have been warranted in dismissing [the plaintiff's] case.”); *Combs v. Rockwell Int'l Corp.*, 927 F.2d 486, 489 (9th Cir.1991) (upholding dismissal with prejudice as a sanction for falsifying deposition testimony); *Cox v. Burke*, 706 So.2d 43, 47 (Fla. Dist. Ct. App. 1998) (holding that dismissal of case is proper where party has engaged in fraud); *Rockdale Mgt. Co., Inc. v. Shawmut Bank, N.A.*, 418 Mass. 596, 638 N.E.2d 29, 32 (1994) (upholding dismissal for proffering forged document, providing misleading answers to interrogatories, and giving false deposition testimony).

¶ 14 Schultz and ALI argue that dismissal is proper only when the plaintiff acts in bad faith, and that, here, “a finding of bad faith is impossible since the case was not frivolous.” Although we agree that Wisconsin permits dismissal as a sanction for misconduct only where the plaintiff has acted in bad faith or engaged in egregious acts of misconduct, we do not agree that “frivolous” and “bad faith” are interchangeable terms. Rather, bad faith “consists of a conscious attempt to affect the outcome of the litigation or a flagrant, knowing disregard of the judicial process.” *Garfoot*, 228 Wis.2d at 719, 599 N.W.2d 411 (quoting *Milwaukee Constructors II v. Milwaukee Metro. Sewerage Dist.*, 177 Wis.2d 523, 533, 502 N.W.2d 881 (Ct.App.1993)); see also *Roadway Exp., Inc. v. Piper*, 447 U.S. 752, 766, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980) (“[B]ad faith may be found, not only in the actions that led to the lawsuit, but also in the conduct of the litigation.”). Subornation of perjury is a flagrant and knowing disregard of the judicial process. Therefore, we cannot conclude that the circuit court misused its discretion in determining that such conduct warranted dismissal.

¶ 15 Schultz and ALI also suggest that even if dismissal would be appropriate in some cases involving an attempt to suborn perjury, it is not proper here because the perjury allegation was not relevant to the issues being tried. In essence, Schultz is arguing that because Engel was not a crucial witness in establishing her claims, she should not be punished if she asked him to lie. The circuit court did not accept Schultz's assertion that Engel was an unimportant witness, and, we believe, with good reason. Even if we assume, however, that Engel would not have been an important witness, we do not consider that to be a controlling factor in deciding whether the circuit court had authority to dismiss this lawsuit. A circuit court is not required to impose a sanction that reflects the degree of assistance the perjured testimony would have provided to the party. Schultz considered Engel important enough to ask that he testify for her in both the criminal case against her and the defamation suit against the Journal. The fact that Engel might not have been helpful to Schultz does not

make an attempt to suborn perjury from him any less a flagrant and knowing disregard of the judicial process. *Cf. Richardson v. Union Oil Co. of Calif.*, 167 F.R.D. 1, 4 (D.D.C.1996) (“Discovery is not just a game where all that counts is the ultimate score no matter how unethically the players behaved.”). Thus, any attempt by Schultz to persuade Engel to lie for her under oath could properly be considered egregious misconduct.

¶ 16 Similarly, whether the Journal was prejudiced is also not a factor that the circuit court was required to consider. The court's ability to maintain judicial integrity was compromised regardless whether the Journal was harmed. *Cf. Johnson*, 162 Wis.2d at 281-82, 470 N.W.2d 859 (holding that finding of prejudice to the opposing party was not required before dismissing suit as a sanction for disobeying court orders because the plaintiff's misconduct had prejudiced the circuit court's ability “to prevent injustice to the operation of the judicial system as a whole”).

Other courts around the country have affirmed the right of a trial court to issue a dispositive sanction for egregious misconduct. *Stephen Slesinger, Inc. v. Walt Disney Co.*, 155 Cal.App.4th 736, 762, 66 Cal.Rptr.3d 268, 288 (2007) (case dismissed for theft of documents from defendant).

The trial court's reasoning for its decision were explained in great detail following the evidentiary hearing. That oral decision is attached as Appendix A, and Boulevard requests that the Court read it instead of accepting any party's characterization of the Court's thinking.

Ultimately, the question presented to the trial court was what sanction would be appropriate when a party presents a day of false

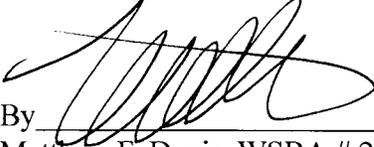
testimony to avoid service of process. The trial court ruled in its discretion that such a party has forfeited its right to the benefits of the legal system. This court should agree that any lesser sanction would be an affront to the dignity of the court.

VII. CONCLUSION

This court should affirm the trial court in all respects.

DATED this 27th day of November, 2007.

DEMCO LAW FIRM, P.S.

By 
Matthew F. Davis, WSBA # 20939
Attorneys for appellants

DECLARATION OF SERVICE

I, Teresa L. DiTommaso, state:

On this day I caused to be delivered by U.S. mail, postage prepaid to the Court of Appeals Division II and to Kevin T. Steinacker and Thomas L. Dickson, DICKSON STEINACKER LLP, 1201 Pacific Avenue, Suite 1401, Tacoma, Washington 98409, a copy of the following documents: BOULEVARD DEVELOPMENT, INC.'S RESPONSE BRIEF.

Declarant is a resident of the State of Washington and over the age of eighteen (18) years. I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

Dated this 2nd day of November, 2007 at Seattle, Washington.

Teresa L. DiTommaso
Teresa L. DiTommaso

2007 NOV 02 10:10 AM
CLERK OF COURT
COURT OF APPEALS
DIVISION II
TACOMA, WA
2007 NOV 02 10:10 AM
CLERK OF COURT
COURT OF APPEALS
DIVISION II
TACOMA, WA

APPENDIX A

1 in the one case yesterday. If in fact you feel that my
2 client should have acted more appropriately, I don't
3 believe a ruling against him is proper, but sanctions
4 might be proper, and that's about all I can say about
5 it.

6 We always should try to decide the cases on the
7 merits, and that's all I am asking in this case, and I
8 think we have shown sufficient evidence that supports a
9 decision that allows us to argue the case on the
10 merits.

11 THE COURT: You know, next month I will have
12 been doing this, practicing law for 30 plus years, been
13 up on this bench going on half that time now, about 15.
14 You know, when you come in this courtroom, I always
15 say, this is probably the prettiest courthouse in the
16 State of Washington, I don't think there is much like
17 that. In fact, you know, I had a guy come in here one
18 time about ten years ago, elderly man, just finished a
19 docket, he asked if he could approach the bar. He was
20 obviously a very professional person, so I allowed him
21 to. Come to find out he was a retired judge on his way
22 to Phoenix for his snow bird and he was from Minnesota,
23 and his hobby, going back to Phoenix every year, was to
24 travel around the United States and take pictures of
25 courthouses. And he told me that out of the deep

COURT'S RULING

1 south, he has not seen a courthouse like this west of
2 the Mississippi, and I would believe him, having been
3 in a number of courthouses myself. I think this
4 courthouse is emblematic of what we do for a living,
5 those of us with the alphabet soup after our name, that
6 allows us to come in here and represent people.

7 You take a look at the overall purpose, we have
8 two young men in the courtroom who are apparently in
9 school going to college, and you take a look at your
10 life's experiences and realize, if you have been around
11 the world, we truly are fortunate in this country. I
12 am not going to sit and bang the patriotic drum, but,
13 you know, we have the right to come to a court. We
14 have the right to peacefully come in to a court and ask
15 a person who is elected or appointed, whatever, whose
16 function is to be absolutely neutral and fair. And,
17 you know, I think I know just about every judge in this
18 state, in one fashion or another, from the superior
19 court level at least, all the way up to the appellate
20 level, and I think most of them and just about every
21 one of them I meet take the job with that thought in
22 mind. In my career I can only think of one judge in
23 this state that I have ever run across that ever had a
24 problem with that issue. If I remember, he is not a
25 judge anymore.

COURT'S RULING

1 So you ask, what is our purpose? Our purpose is
2 to sit in a courtroom and resolve disputes among
3 people. There is before the court a dispute. A
4 lawsuit has been started on behalf of the Wilsons
5 because they are claiming something about property that
6 Mr. Ellison disputes. We have a corporation in here
7 who is entitled to the same merits in front of a court,
8 just as a person does, to come in and say we have a
9 dispute. Just happens to be, coincidentally, with the
10 same gentleman. I don't know whether or not the two
11 plaintiffs in this matter ever ran into each other
12 before they happened to have hired the same process
13 server, but at least they ended up in the same
14 courtroom at the same time. This is one of those cases
15 that I am sure maybe a higher court would be very
16 entertained in knowing. But I can assure you, having
17 done this and done a lot of stuff in my life as a
18 lawyer, one of the favorite scenes I ever saw in a
19 movie was with Al Pacino, and he was sitting there
20 talking to his brother in law, and his brother in law
21 was named Carlo in the movie, and it was a movie called
22 The Godfather. And the discussion was, don't insult my
23 intelligence, Carlo. Because the issue was whether or
24 not Carlow had been involved in the assassination
25 attempt of Don Corleone. Don't insult my intelligence.

COURT'S RULING

1 I can tell you, for two days as we have sat in
2 here, my intelligence has been insulted virtually from
3 the moment I walked in this door until now. And in my
4 career as a judge, I don't think that I have had anyone
5 come into this courtroom as blatant as what I have
6 observed in this courtroom in this last two days, of
7 virtually perpetrating or attempting to perpetrate a
8 fraud on a court.

9 Now, as far as let's get to one issue, as I recall
10 signing the document of default, I believe, for
11 Mr. Whitehouse in this matter some months ago. And I
12 recall being informed that there was an affidavit and I
13 recall reading this affidavit of service before I
14 signed anything. I don't merely stamp my name to
15 things, I actually try to do my job. They pay me
16 sufficient sums to do that; it was a cut in pay from
17 what I used to do, so be it.

18 Let's go to the heart of this matter: Was this
19 gentleman served? Yes. Was Wenatchee his usual place
20 of abode? Yes. Was service proper on March 21st, 2006
21 at I believe 8:31 p.m? And I have news for you, March
22 falls somewhere right around the beginning of Spring.
23 It's half way between the winter and the summer
24 equinox. At 8:31 in Wenatchee, Washington, it's dark.
25 It's not still light out and it's not the afternoon.

COURT'S RULING

1 Both of you young men should learn to tell the truth in
2 a courtroom, because you did not.

3 And you take a look at the evidence in this case.
4 You take a look at what these process servers do for a
5 living, a lousy \$120 service fee? I have one witness
6 that verified that the car has been parked across the
7 street for a couple of days. And yet, you know what?
8 They didn't answer the door. The car was parked across
9 the street sufficiently that the neighbor came over and
10 complained, but they didn't answer the door. And not
11 only that, I have witnesses that say that Mr. Ellison,
12 Curt Ellison, moved out and then the boys finally got
13 their own bedrooms, but that's not what the witnesses
14 said, they already had their own bedrooms. If not,
15 that's what one of them said, but that's maybe not what
16 the other one said, that's what their father said, but
17 that's not what the kids said.

18 And then let's take a look at a few things. I
19 never called my brother and I never told him what was
20 going on. I never talked to him for a couple of days.
21 I have no idea how he knew. But the phone records show
22 that Mr. Ellison was on the phone the next morning. I
23 have yet to hear that anyone in this courtroom has ESP.
24 That's basically a blatant lie. And furthermore, I
25 went to a lawyer the next day and went home and made

COURT'S RULING

1 out the affidavit and I can see a head nodding, that
2 must have been true, the evidence was signed six days
3 later, not the next day. And the inconsistencies
4 continue, over and over and over and over and over
5 again. Interesting.

6 What is also -- this isn't a criminal case where,
7 you know, you have a right to remain silent and the
8 burden is on the defendant, so to speak, or the non
9 moving party to prove something. Where is the evidence
10 by the moving party? Where is the evidence of the
11 phone records? We have three different, four different
12 people with phone records here. We have got the
13 brother, we have got the two nephews, we have got
14 Mr. Ellison. I don't see one phone record about
15 anything from these people about anything.

16 And then guess what? We have a certified letter
17 by the post office, return to sender, with an address
18 in Wenatchee, and it's dated May 15th. That's some
19 five, six weeks after this matter. Who went to the
20 post office and told them to do that? If I recall
21 correctly, common sense tells you, the post office only
22 lets the person whose mail it is tell them that and
23 they fill out a little form, and so it would have been
24 quite easy to go to the post office and say, here it
25 is, judge, I lived there until this day, and I went to

COURT'S RULING

1 the post office and had my mail returned. Don't have
2 that here.

3 So we own 16 vehicles. Do you ever wonder where
4 they sent the license tabs information request? I
5 think we have to get license tabs every year. We have
6 so much property that Mr. Ellison doesn't even know how
7 much property he has, at least that's what he told me.
8 He doesn't even know what he is worth. And, in fact,
9 he didn't know who the registered agent of his
10 corporation was when he was on the stand, but he
11 spontaneously volunteered it when his brother was on
12 the stand.

13 So, if you are at a higher court and you want to
14 know what's going through this judge's mind, let me put
15 it quite bluntly: I have sat here for a day and a half
16 and listened to blatant lies to this Court about lack
17 of service, and that's not true.

18 And then you take a look at the rest of the
19 evidence, and this gentleman knew that there was a
20 dispute going on way back in October of 2004.

21 So let's go back to where I started with this
22 process. This is a courtroom. This is where you
23 resolve those issues. You come in here and say we have
24 a problem. The Wilsons have a problem with Ellison as
25 to who owns this property, as to whether or not the

COURT'S RULING

1 note was valid or whether the deed of trust was
2 involved, come in, let's resolve it. You cannot sit
3 out there and use the court in such slipshod
4 fraudulent, fashion. And then you sit here with the
5 other party who just innocently just comes along and
6 happens to serve something on the same date. And they
7 have not apparently been put through the torture of the
8 Wilsons.

9 Realistically, I never take these things
10 personally. If I did, I wouldn't be doing the job.
11 But as a judicial officer and a member of the judicial
12 system, I am actually, on behalf of the Court, offended
13 at your behavior, let alone the affront of failing to
14 show up at a deposition that's been agreed upon; that's
15 improper.

16 Now, service, jurisdiction, absolutely, without a
17 question. And for a higher court, if you want to
18 appeal it, I will tell you right now, they should come
19 down, they should read every bit of this transcript.
20 They should go through every bit of evidence, all the
21 way from -- I mean, this is ridiculous. The heat
22 records? I like it cold? Come on. Take a look at the
23 heat records. November, December, you are over one
24 hundred some bucks. And then we get down to 28 bucks a
25 month. In this country at Ocean Shores with the wind

COURT'S RULING

1 coming off the Pacific Ocean, 28 bucks in February,
2 March, April, May, it just never stops. So if a higher
3 court wants to reverse that they would be absolutely
4 wrong.

5 Your usual place of abode is where everything else
6 took place, Wenatchee. That was the focus of the
7 universe here. Your brother testified that's where the
8 business mail came. He left the personal mail there
9 until you showed up. You know what? That runs
10 completely contradictory to the fact that some mail
11 must have been going to Ocean Shores at some time. And
12 I can go on and on and on and on.

13 Now, my dilemma, now that we have service, I am
14 caught in the situation of the issue of do I or do I
15 not set aside the default on behalf of Wilson. The
16 answer is no. No, I'm not. They were entitled to the
17 default. Just as if you would have been entitled to
18 come in here way back just like your lawyer, and I
19 think counted eight or nine times that he sat here and
20 said I would have advised my client that there is no
21 notice of appearance, we would have come in and argued
22 this issue. That's not what happened. And even then,
23 if you could have come in and argued that, that would
24 have been fine. But for me, to entertain a motion of
25 default to set it aside, Mr. Ellison, regarding you for

COURT'S RULING

1 the conduct that I have observed in this courtroom,
2 absolutely not.

3 Now, regarding the issue of the corporation. I
4 think the ruling case on this, and I was actually quite
5 surprised at this when it happened, and I think you can
6 look at the appellate sheets, I don't have the cite,
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15 and depositions and discovery and issues of that
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17 because I didn't believe he would ever do it, was Judge
18 Foscue granted liability judgment against the
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20 matter. And for me to not rule and grant the order of
21 default that is being requested by the corporation
22 would run counter to the BEHR holding, because that is
23 the appropriate sanction for the conduct that I have
24 observed in this courtroom. And it was further and
25 finally demonstrated, apparently, not that there

COURT'S RULING

1 weren't enough nails in the coffin in the first place
2 was this gentleman's refusal to show up at a
3 deposition. And I will say this again that wasn't the
4 final nail, it was just the final proof, because I
5 probably would have granted the same sanction had they
6 asked me, even if you would have shown up at the
7 deposition.

8 So bottom, line, you win, Mr. Whitehouse, you win,
9 Mr. Davis. Draft your pleadings. And if you -- if you
10 people want to go through further findings of fact, I
11 would be more than happy before we get to it, to the
12 bottom line, to go through each and every one of these
13 exhibits to demonstrate to a higher court what has been
14 attempted to be perpetrated upon this court, and it's
15 highly improper.

16 MR. BURTCH: Your Honor, are you granting
17 default to the corporation?

18 THE COURT: Yes, I am.

19 MR. BURTCH: Okay.

20 THE COURT: We are done. Thank you very
21 much. I will keep my notes if you gentleman wish to
22 note this up for pleadings. I would want full findings
23 of each and every issue found on each and every shred
24 of evidence and the testimony by these people. Thank
25 you.

COURT'S RULING