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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

No. 337421

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KATHERINE M. FORSBERG,

Plaintiff/Appellant,

v.

WESTON T. GRIEPP,

Defendant/Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

INTRODUCTION1

STATEMENT OF THE CASE1

ARGUMENT13

 A. The Trial Court Properly Granted Summary
 Judgment and Dismissed Forsberg’s Action
 for Failure to Commence Timely.....13

 1. The Required Elements for Service by
 Mail Were Not Established.....16

 2. Forsberg’s Attempted Abode Service was
 Insufficient25

 B. The Trial Court Properly Denied Forsberg’s
 Motion for Reconsideration of the Summary
 Judgment Order of Dismissal.....29

 C. Forsberg Did Not Properly Perfect an Appeal of the
 Order Denying Forsberg’s Motion to Vacate the
 Summary Judgment Order33

 D. The Trial Court Properly Denied Forsberg’s
 Motion to Vacate the Judgment34

CONCLUSION41

TABLE OF AUTHORITIES

Cases

Boes v. Bisiar
122 Wn. App. 569, 94 P.3d 975 (2004)21, 22, 23, 31, 32, 39

Bruff v. Main
87 Wn. App. 609, 943 P.2d 295 (Div. I, 1997).....18, 19, 23

Cano-Garcia v. King County
168 Wn. App. 223, 249, 277 P.3d 34, *rev. denied*,
175 Wn.2d 1010, 287 P.3d 594 (2012).....28

Charbonneau v. Wilbur Ellis Co.
9 Wn. App. 474, 477, 512 P.2d 1126 (1973).....27

DeYoung v. Cenex, Ltd.
100 Wn.App. 885, 894, 1 P.3d 587 (2000), *rev. denied*,
146 Wn.2d 1016, 51 P.3d 87 (2002).....35

Farmer v. Davis
161 Wn. App. 420, 250 P.3d 138, *rev. denied*,
172 Wn.2d 1019, 262 P.3d 64 (2011).....25

Fishburn v. Pierce Cnty. Planning & Land Servs. Dep't
161 Wn. App. 452, 472, 250 P.3d 146, *rev. denied*,
172 Wn.2d 1012, 259 P.3d 1109 (2011).....29

Gerean v. Martin-Joven
108 Wn. App. 963, 33 P.3d 427 (2001).....29

Gross v. Evert-Rosenberg
85 Wn. App. 539, 933 P.2d 439, *rev. denied*,
133 Wn.2d 1004, 943 P.2d 662 (1997).....25

In re Marriage of Tomsovic
118 Wn. App. 96, 109, 74 P.3d 692 (2003)30, 31

<i>Jones v. City of Seattle</i> 179 Wn.2d 322, 360, 314 P.3d 380, 399 (2013), as corrected (Feb. 5, 2014)	35
<i>Kohfeld v. United Pac. Ins. Co.</i> 85 Wash.App. 34, 40, 931 P.2d 911 (1997)	14, 29
<i>McCormick v. Lake Washington Sch. Dist.</i> 99 Wn. App. 107, 111, 992 P.2d 511, 513 (1999).....	38
<i>Pascua v. Heil</i> 126 Wn. App. 520, 526-27, 108 P.3d 1253 (2005).....	16, 23, 24
<i>Seybold v. Neu</i> 105 Wn.App. 666, 675, 19 P.3d 1068 (2001).....	14
<i>Sheldon v. Fettig</i> 129 Wn.2d 601, 919 P.2d 1209 (1996).....	26, 27
<i>Sligar v. Odell</i> 156 Wn. App. 720, 734, 233 P.3d 914, 921 (2010)	30
<i>State v. Payne</i> 117 Wn. App. 99, 106, 69 P.3d 889 (2003), <i>rev. denied</i> , 150 Wn.2d 1028, 82 P.3d 242 (2004).....	36
<i>Welling v. Mt. Si Bowl, Inc.</i> 79 Wn.2d 485, 489, 487 P.2d 620 (1971).....	28

Statutes/Court Rules

RCW 4.16.080(2).....	14
RCW 4.16.170	14
RCW 4.28.080(16).....	15

RCW 4.28.100	15, 31
RCW 4.28.100(2).....	19, 21, 39
ER 801	20, 28, 36
ER 802	20, 28, 36
ER 803	36
RAP 2.4.....	34
RAP 7.2.....	33
CR 4(d)(4).....	16
CR 59(a)	30
CR 59(a)(9).....	30
CR 59(b).....	29
CR 59(e)(2).....	7
CR 60	34
CR 60(b).....	35

I. INTRODUCTION

This case arises from a motor vehicle accident that occurred in Stevens County, Washington, and involved vehicles driven by Appellant Katherine Forsberg (Forsberg) and Respondent Weston T. Griep (Griep). As shown below, the trial court properly ruled that Forsberg failed to commence her action against Griep prior to the expiration of the applicable statute of limitations. Specially, although Forsberg filed the lawsuit prior to the expiration of time to do so, she failed properly to effect service upon Griep within the 90-day tolling period provided by statute. Accordingly, the trial court properly dismissed with prejudice Forsberg's complaint against Griep.

II. STATEMENT OF THE CASE

On February 22, 2012, Forsberg and Griep were involved in a motor vehicle accident. On February 10, 2015, twelve days before expiration of the three-year statute of limitations, Forsberg filed her complaint in Stevens County Superior Court. (CP 1-6) The next day, Forsberg attempted to effect service on Griep through substitute service on Griep's father, Weston P. Griep, at Griep's father's residence, which was the address on the accident report three years before. The Return of Service, which was filled out and signed by Deputy Henry

Stroisch, states that the Complaint for Damages, Summons and some discovery requests were served on Griep by substitute service on Griep's father. No additional information is contained in the Return of Service. (CP 8-9) Forsberg sent a courtesy copy of the summons and complaint to Griep's automobile insurer. (CP 137) On February 19, 2015, attorney William Croft entered a Notice of Appearance on behalf of Griep. (CP 7) As is standard, the Notice of Appearance states that counsel will accept service of all additional pleadings, except service of process. On March 23, 2015, after requesting, and receiving, a copy of the Return of Service, Attorney Croft filed, on behalf of Griep, the Answer to Complaint and Affirmative Defenses. (CP 10-13) The answer sets forth four substantive affirmative defenses, the third of which states as follows:

Plaintiff's claims fail for insufficiency of service of process and failure to properly commence by service of process the action within the applicable 3 year statute of limitations, and this court has no jurisdiction over defendant as a result of said insufficient, defective, and/or untimely service of process; . . .

The other substantive affirmative defenses include allocation of fault, mitigation of damages, and offset.

Forsberg apparently did not read, or ignored, the affirmative defense related to service of process and the expiration of the statute of limitations. At a discovery conference held a month later on April 24, 2015, Mr. Croft explained to counsel for Forsberg that Griegg had not responded to discovery requests because service had not properly been effected, because Griegg did not reside at the address where service was attempted. (CP 18) Now recognizing the situation, and realizing the 90-day tolling period would expire on May 11, 2015, Forsberg made a second attempt to serve Griegg, again at his father's residence, despite having been told by Mr. Croft that Griegg did not live there. This time, Forsberg utilized the services of Troy Daniels, a process server. Mr. Daniels submitted a declaration which states in pertinent part as follows:

On April 28, 2015, I was contacted by Randi Reagles, a legal assistant at Webster Law Office. Ms. Reagles requested that I serve documents that she would forward to me by email . . . on Weston T. Griegg. Ms. Reagles provided an address on Boone in Chewelah. The Griegg family is known to me, as I reside in Chewelah, a small community. Mr. Griegg is a contractor in the area. On April 29, 2015 I went to 301 N. Stevens, Chewelah, WA, which is the address I know to be the Grieggs' residence and attempted service at 3:26 p.m., 5:12 p.m., and 7:18 p.m. During my last stop, a neighbor came out of the house and told me that the family was in California.

I sent an e-mail that evening (4-29-15) to Randi at Webster Law Office. I also spoke with Ms. Reagles during

the day on April 29, 2015 by phone. It was then that I discovered the Weston Griep I believed I was meant to be serving was actually the father of the Defendant, Weston T. Griep, who actually goes by the name of Taylor.

(underline added). (CP 103-04)

Forsberg did absolutely nothing to follow up on the communications from Troy Daniels. Specifically, after learning that Mr. Daniels was attempting to serve the wrong Griep, Forsberg did not ask Mr. Daniels to attempt to effect service on the correct Griep. Forsberg did not ask Daniels to return to the Boone address he was originally asked to contact to attempt to serve Griep. Forsberg did not ask Mr. Daniels to try to locate Griep. There was no follow-up whatsoever to the communications with Mr. Daniels.

Forsberg took a few additional steps to serve Griep or locate Griep for service. Forsberg's counsel asked Griep's counsel if he would accept service for Griep, and Griep's counsel responded that he was not authorized to accept service for Griep. (CP 18) Forsberg performed some sort of Internet search on April 29 on a site called BeenVerified, but apparently received no search results (of note, the unauthenticated hearsay document from BeenVerified filed by Forsberg specifically states it does not guarantee the accuracy of information provided). (CP 26-27) Also on

April 29, Forsberg located Griep's Facebook page, which states that Griep lives in Spokane, Washington. It further states that Griep is in a relationship with Madison Grubb. (CP 29) Forsberg did not attempt to contact Griep through his girlfriend, nor even attempt to ask Griep's father, other family members or former neighbors for the address of Griep. Forsberg did not retain an investigator or a process server or try to locate Griep in Spokane, or anywhere else for that matter.

On April 30, 2015, Forsberg filed a Motion and Declaration to Serve by Mail. (CP 17-29) The motion is supported by an attached Declaration of Counsel. Arguing Forsberg made a "good faith and diligent" effort to effect service on Griep, attorney Toronto Marasco states that he requested Mr. Croft accept service for Griep, and attempted to serve Griep at the address on his driver's license at the time of the accident, three years before (his father's address). The declaration further mentions the online search that failed to provide any information, Griep's Facebook page, and a vague reference to searching other social media sites. The declaration then states in conclusory fashion that Griep "has either left the State of Washington with intent to avoid service of process of the summons and complaint in this action or is concealing himself

within the state to avoid service.” Absolutely no factual basis for this conclusory assertion is contained in Mr. Marasco’s declaration.

Forsberg moved for a hearing on shortened time due to the soon-to-be-lapsed tolling period. (CP 30-31) Mr. Croft filed a Declaration of Counsel Regarding Motion to Serve by Mail, notifying the court that he was unavailable on the date set for hearing the motion on shortened time, due to a previously scheduled work conflict. (CP 33-36) Mr. Croft stated he would like more time to brief the issues, and gave notice of his reservation of his right collaterally to attack at a subsequent date any order issued at the hearing. Mr. Croft’s declaration further states that Forsberg had been on notice since March 23, 2015, of the defective service, but did absolutely nothing for a month thereafter to cure the problem. Mr. Croft’s declaration states that Griep was not concealing himself or attempting to evade service or defraud creditors, and notes the complete lack of factual support for the conclusory statements in Mr. Marasco’s declaration.

On May 5, 2015, the trial court granted Forsberg’s motion and entered the Order Allowing Service by Mail. (CP 39-40) This Order, which was prepared by Forsberg’s counsel, states that two copies of the summons and complaint “shall be mailed postage prepaid, one by ordinary first class mail, and the other by certified mail, return receipt requested,

showing when, and to whom, delivered, each showing a return address for the sender or an address to which correspondence may be directed to the sender.” The person mailing the summons and complaint was to complete a Return of Service form. *The record reflects that neither of these actions were performed by or on behalf of Forsberg.* Thus, even the attempted service by mail was deficient.

On May 14, 2015, Griep filed Defendant Griep’s Motion for Summary Judgment, Reconsideration and Consolidation of Hearings Per CR 59(e)(2) and Declaration in Support Thereof. (CP 42-45) In support of his motion for summary judgment, Griep submitted a declaration stating that he moved out of his parents’ house at 301 N. Stevens Street in Chewelah, Washington, the address on the police report, in June of 2012, four months after the subject accident. He moved to Spokane and had been residing there. At no time since June of 2012 did he ever move back to this parents’ house in Chewelah, or live at the Chewelah address where service had been attempted. In November of 2013, Griep was issued a driver’s license that contained an address in Spokane. As indicated previously, his Facebook page, located by Forsberg, states that he lives in Spokane. Griep’s declaration further states that as of the date of the declaration, he had not been personally served the summons and

complaint, nor had he received by mail copies of the summons and complaint. He did not receive copies of the papers left with his father in Chewelah. Grieppe denied taking any action to avoid being served or avoid being found. He also denied leaving the state to avoid anyone, or hiding himself from anyone trying to find him. He was not avoiding creditors. He noted that neither Forsberg nor her attorneys had ever contacted him since the accident. (CP 64-67)

Also submitted was a declaration from Weston P. Grieppe, Grieppe's father. The senior Grieppe's declaration states that his son moved from their home in June of 2012 and has lived in Spokane since then. He further states that on February 11, 2015, when an officer came to his residence and asked if he was Weston Grieppe, he responded affirmatively. The officer handed the lawsuit papers to the senior Grieppe, and told him he was served. The senior Grieppe then told the officer that he was not Weston T. Grieppe and that Weston T. Grieppe no longer lived there. The officer did not take back the papers, nor did he ask where Grieppe currently lived. Finally, the senior Grieppe states he has not given the lawsuit papers to his son. (CP 61-63)

Following briefing and argument by both parties, on June 25, 2015, the court entered its Order Granting Grieppe's Motion for Summary

Judgment of Dismissal and Reconsideration of Order Allowing Service by Mail. (CP 122-25) The trial court determined on reconsideration that it should not have granted the motion to serve by mail. This resulted in the dismissal with prejudice of Forsberg's claims against Griep, for failure to commence the action prior to expiration of the statute of limitations.

On July 6, 2015, Forsberg filed Plaintiff's Motion for Reconsideration on Summary Judgment Order. (CP 127-34) In support of her motion for reconsideration of the trial court's summary judgment order of dismissal, Forsberg submitted a declaration of Deputy Henry Stroisch, which stated as follows:

On February 11, 2015, I went to 301 N. Stevens St. to serve Mr. Weston T. Griep with copy of the Complaint for Damages, Summons, and Plaintiff's First Interrogatories and Request for Production Propounded to Defendant, Weston T. Griep. A man answered the door. I asked if Mr. Weston T. Griep was there. The man said no, I asked if he could make sure that Mr. Weston T. Griep received the papers. The man said, yes. I asked the man his name. He responded that he was Weston's father, Weston P. Griep. Mr. Griep did not state that his son did not live at this residence. If he had, I would not have left the papers with him.

(CP 84-85) Forsberg also submitted the Amended Declaration of Toronto Marasco, Counsel for Plaintiff, Katherine M. Forsberg. (CP 88-89) That declaration contains inadmissible hearsay evidence, and further, evidence

that was not before the court on the initial motion to serve by mail. Mr. Marasco states that he called an individual identified only as “Mrs. F,” allegedly a friend of Griep’s mother, and that she would not disclose Griep’s location. He also allegedly called the Department of Licensing, spoke to an unidentified individual, who refused to give him information. He states that he sent the process server, Mr. Daniels, to serve Griep at another address he found after doing a generic Google search, which was not mentioned in Forsberg’s motion to serve by mail (as stated above, the process server did *not* go to that other address, and he attempted to serve the *wrong* person). Finally, he states that he put in a request to Griep’s apparent employer, but learned Griep no longer worked there. No facts were presented regarding Griep’s alleged intent to avoid service or alleged fleeing from the state. Attached to counsel’s declaration are a number of inadmissible, unauthenticated hearsay documents. (CP 90-101)

Forsberg also submitted a supplemental Declaration of Randi Reagles on July 13, 2015, which states that on June 30, 2015, *after* the motion to serve by mail, and *after* the expiration of the statute of limitations, and indeed *after* the court had dismissed the case, she submitted an Address Request for Driver Record for Griep and mailed it to the Department of Licensing. On July 13, 2015, she submitted a

Request for Box Holder Information to the Chewelah Post Office. Again, these activities occurred after the motion to serve by mail was filed and heard, after expiration of the statute of limitations, and after the case was dismissed with prejudice. On August 11, 2015, the superior court entered its Order Denying Plaintiff's Motion for Reconsideration. (CP 170-72)

On September 10, 2015, Forsberg filed her Notice of Appeal to Court of Appeal, appealing from the Order Granting Griep's Motion for Summary Judgment and For Reconsideration of the Court's Order to Serve by Mail. (CP 224-29) On September 17, 2015, Forsberg filed an Amended Notice of Appeal to include the order denying Forsberg's motion for reconsideration. (CP 230-34) The Perfection Notice was filed September 30, 2015. (CP 237-38)

While proceeding with the appeal, on September 9, 2015, Forsberg filed Plaintiff's Motion to Vacate Defendant's Summary Judgment Dismissal. (CP 176) Without any affidavits or declarations of authenticity or establishing an exception to the hearsay rule, Forsberg attached to her brief a one-page, undated, unauthenticated document called WebsterLawReport2 which sets forth various addresses where Griep *may have* lived, but entirely misses the Chewelah address. Also attached is a Declaration of Randi Reagles, this time stating that she contacted an

unnamed individual at the Washington State Department of Licensing on June 30, 2015, and received information. Both of these documents contain inadmissible hearsay evidence. Finally, Forsberg submitted an Amended Declaration of Deputy Henry Stroisch, Stevens County Sheriff, which conflicts with the Deputy's prior declaration. The first sworn declaration of Deputy Stroisch, which Forsberg submitted in response to Griep's motion for summary judgment, states in pertinent part as follows:

On February 11, 2015, I went to 301 N. Stevens St. to serve Mr. Weston T. Griep with copy of the Complaint for Damages, Summons and Plaintiff's First Interrogatories and Request for Production Propounded to Defendant, Weston T. Griep. **A man answered the door.** I asked if Mr. Weston T. Griep was there. The man said no, I asked if he could make sure that Weston T. Griep received the papers. The man said yes, I asked the man his name. He responded that he was Weston's father, Weston P. Griep. Mr. Griep **did not state that his son did not live at this residence.** If he had, I would not have left the papers with him.

(emphasis added). (CP 84-85) In his new, second sworn declaration, Deputy Stroisch states as follows:

For this particular event I recall driving up the property to see Mr. Weston P, Griep standing outside talking to his employee about the work for the day. I asked him if Weston T. Griep was there. He responded with no. **I asked if Weston T. Griep lived there. He responded with yes. I also recall him stating that Weston T. Griep was on his way home.** I asked him if he was willing to accept service on behalf of his son. He

responded with yes and said something to the effect that they knew these papers were coming.

(emphasis added). (CP 186-87)

In addition to being in conflict with his prior declaration, Deputy Stroisch's new declaration contains facts and information that, even if true, were available to Forsberg when she initially sought authority to serve by mail, and when she submitted the Deputy's initial declaration to avoid the order of summary judgment. Griep responded with a motion to strike inadmissible evidence and opposition to the motion to vacate. (CP 194-95, 196-211) On October 13, 2015, the trial court entered its Order Denying Plaintiff's Motion to Vacate Defendant's Summary Judgment Dismissal. (CP 222-23) Although briefed by Forsberg in Appellant's Opening Brief, *Forsberg did not at any time, let alone within the time prescribed by court rule, appeal from the order denying her motion to vacate the summary judgment of dismissal.*

III. ARGUMENT

A. The Trial Court Properly Granted Summary Judgment and Dismissed Forsberg's Action for Failure to Commence Timely.

The trial court properly reconsidered its prior order granting Forsberg's motion to serve by mail, having correctly determined that the

requirements for service by mail were not met, and properly granted Griep's motion for summary judgment of dismissal due to Forsberg's failure to commence the action within the required time period. Summary judgment is proper when there are no genuine issues of material fact to be decided by the trier of fact, and the moving party is entitled to judgment as a matter of law. CR 56. Summary judgment orders are reviewed *de novo*. *E.g.*, *Seybold v. Neu*, 105 Wn.App. 666, 675, 19 P.3d 1068 (2001). A decision to grant or deny a motion for reconsideration is reviewed for abuse of discretion. *E.g.*, *Kohfeld v. United Pac. Ins. Co.*, 85 Wash.App. 34, 40, 931 P.2d 911 (1997). A trial court abuses its discretion when its decision is manifestly unreasonable or based on untenable grounds. *Id.*

Actions for personal injury in Washington are subject to a three-year statute of limitations. RCW 4.16.080(2). For the purpose of tolling a statute of limitations, an action is deemed commenced when the complaint is filed or summons is served. RCW 4.16.170. If service has not occurred prior to filing the complaint, the plaintiff must serve a defendant within 90 days from the date of filing the complaint. If service is not so made, "the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations." *Id.*

The preferred method of service of process is set forth in RCW

4.28.080(16):

Service made in the modes provided in this section is personal service. The summons shall be delivered by delivering a copy thereof, as follows:

* * *

(16) In all other cases, to the defendant personally, or 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.

In very limited and specific circumstances, when personal service cannot be effected, a trial court can authorize service by publication or mail.

RCW 4.28.100 sets forth the requirements for service by publication, and provides in pertinent part as follows:

When the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff, his or her agent, or attorney, with the clerk of the court, stating that he or she believes that the defendant is not a resident of the state, or cannot be found therein, . . . and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his or her attorney in any of the following cases:

* * *

(2) When the defendant, being a resident of this state, has departed therefrom with the intent to defraud his or her creditors, or to avoid the service of a summons, or keeps himself or herself concealed therein with like intent; . . .

(underline added). CR 4(d)(4) allows courts to authorize service by mail under circumstances in which service by publication would be authorized.

1. The Required Elements for Service by Mail Were Not Established.

Service of process is necessary to a court's acquisition of personal jurisdiction over a defendant. Statutes authorizing service by means other than personal service require strict compliance with their provisions. Substitute service by mail is permissible only when the plaintiff establishes that the defendant: (1) cannot be found within the state after a diligent search, (2) is a resident of Washington, *and* (3) either left the state or concealed himself within it, with the intent to defraud creditors or avoid service of process. *E.g., Pascua v. Heil*, 126 Wn. App. 520, 526-27, 108 P.3d 1253 (2005). A party seeking to serve by mail or publication may not rely on conclusory statements regarding satisfaction of the elements for such service, but rather must produce specific facts which support the conclusions required by the statute. *Id.* at 527. Whether service of process by mail is proper is an issue reviewed *de novo*. *Id.*

Here, the trial court initially granted, *ex parte*, Forsberg's motion to serve by mail, but then on reconsideration, determined the initial order

was erroneous, as Forsberg had not established the elements necessary for such constructive service.

“An order permitting substitute or constructive service, much like a search warrant in criminal cases, is reviewed based on only that information *actually* before the issuing magistrate.” *Id.* Thus, in response to Griep’s motion for reconsideration, Forsberg could submit declarations that clarified or supplemented information already provided to the trial court authorizing substitute service, but could not add information never previously presented to the court. *Id.* Even if additional information, regarding activities undertaken before the order to serve by mail was entered, could be considered, Forsberg’s submissions do not meet the rigorous standards for service by mail.

“Due diligence” requires honest and reasonable efforts to locate the defendant for service of process. Although a plaintiff is not required to employ all conceivable means to locate a defendant, a plaintiff is required to follow up on any information that might reasonably assist in locating the defendant. *Id.* at 528-29. This includes contacting known third parties who might have knowledge of the defendant’s whereabouts. *Id.* at 529. One must pursue leads even if they might ultimately be unsuccessful in determining the location of the defendant. *Id.* at 530.

Proof of a defendant's evasion is separate from, and in addition to, proof of a diligent search. *Bruff v. Main*, 87 Wn. App. 609, 943 P.2d 295 (1997). In *Bruff*, the parties were involved in a motor vehicle accident. The plaintiff filed an affidavit in support of publication stating that an investigation had failed to locate the defendant and the defendant's father did not know his whereabouts. *Id.* at 610. The record showed that the defendant had moved twice within Snohomish and King Counties between the time of the accident and the time plaintiff filed the complaint. *Id.* at 611.

The defendant in *Bruff* moved to dismiss, arguing that service by publication was invalid. In response, the plaintiff filed an amended affidavit setting forth in more detail than in the original affidavit the efforts undertaken to find the defendant, claiming that the defendant was not employed, did not have a listed telephone number, had never lived at the address listed on the police report, and had "a history of credit problems." *Id.* at 613. Plaintiff's counsel also attached declarations from two investigators who had attempted to serve the defendant personally. The court was not convinced by the plaintiff and affirmed the trial court's dismissal of the action:

The Bruffs have cited no authority to support the proposition that a person's lack of a 'public recorded persona,' without more, raises an inference that he or she is attempting to defraud creditors or avoid process. The record establishes that after the accident, Main changed his residence twice; both moves occurred before the Bruffs filed their action. . . . Nor does the bare allegation that Main had 'a history of credit problems' indicate that he was attempting to avoid a collection action or defraud a creditor.

Id. at 613. The court concluded that diligence alone did not warrant service by publication:

In sum, the Bruffs' affidavits contained no facts clearly suggesting that Main's change of residence, or any other conduct, was undertaken with the intent required by RCW 4.28.100(2). RCW 4.28.100(2) does not authorize service by publication merely because the Bruffs were unable to locate Main, despite diligent efforts.

Id. at 614.

As set forth above, Forsberg made little effort to serve, or locate, Griep prior to seeking authority to serve by mail. The complaint was filed as the statute of limitations was about to expire, service was attempted at only one address (the Chewelah address on the police traffic collision report, despite the Facebook information Griep lives in Spokane), minimal internet-based efforts were made to locate Griep, and a clearly stated affirmative defense was ignored. Information from Mr.

Daniels was not followed up, Griep's relatives, former neighbors and/or girlfriend were not asked for Griep's address, and no one was hired to locate Griep.

Further, Forsberg offered no facts that showed or even suggested that Griep had either left the state with intent to avoid service of process or was concealing himself within the state to avoid service. Forsberg contends that because she could not find Griep, with minimal and short-term effort, Griep must have left the state or was hiding. Forsberg submitted no admissible evidence that Griep left the state, that Griep was trying to avoid service, or that she attempted personal service anywhere other than Griep's former residence, where Forsberg knew Griep did not live because she had his Facebook page and her counsel had been informed Griep did not live there. Forsberg suggests that the alleged statement by a neighbor of Griep's parents that the family was in California raises an inference of intent leaving the state with intent to avoid service. That alleged statement, however, is inadmissible hearsay, ER 801, 802, which was recognized by Forsberg's counsel during oral argument on Griep's motion for reconsideration and summary judgment of dismissal:

I'm not – everything in my motion where he wanted to strike saying it's hearsay **is not asserted to say they were actually in California**. It's just to show our attempts at service.

(emphasis added). (RP 24) It is disingenuous for Forsberg to now claim the alleged hearsay statement constitutes substantive evidence, as opposed to simply reflects an effort to serve Griep. ¹ Even if the statement was admissible, it does not tend to prove that Griep, who did not reside with the Chewelah-based Grieps, had left the state to avoid service.

Although Forsberg likens this case to *Boes v. Bisiar*, 122 Wn. App. 569, 94 P.3d 975 (2004), the facts of the two cases are materially different. In fact, a careful reading of *Boes* supports Griep's position. The primary issue in *Boes* was whether the element of intent to evade service was established, but the court addressed the diligence prong too. The court stated the requirements for constructive service as follows:

Service by publication first requires a diligent effort to serve and then some showing that the defendant is trying to avoid service. RCW 4.28.100(2). Our disposition here turns on the sufficiency of the plaintiff's showing that the defendant attempted to avoid service. We conclude that leaving the state for the final 10 days of the service period raises a sufficient inference of an attempt to avoid service of process. . . .

¹ Griep moved to strike the inadmissible evidence submitted by Forsberg (CP 112-15), but the court did not formally rule on the motion.

Id. at 571.

In *Boes*, the court determined that the plaintiff had established due diligence because she had hired an investigator and a process server, had attempted to contact family members of the defendant, had performed various document and telephonic searches for defendant, and had followed up on each and every lead or information discovered. *Id.* at 575. “Washington courts have held that where a plaintiff possesses information that might reasonably assist in determining a defendant’s whereabouts but fails to follow up on that information, the plaintiff has not made the honest and reasonable effort necessary to allow service by publication.” *Id.* As set forth above, Forsberg did not follow up on all leads and information, nor did she pursue readily available means to obtain Griep’s address.

With regard to the required element of leaving the state, or secreting oneself within the state, with the intent to avoid service, the facts in *Boes* are materially different from those here. There, the record contained evidence that the defendant had, in fact, left the state, on a trip to New York with a relative, and did so with knowledge the statute was running out. The court determined these facts together supported the required inference of intent to avoid service. *Id.* at 578-79. Here, there is no evidence Griep knew Forsberg was trying to locate him for service, or

that the statute of limitation was going to expire. Moreover, there is no evidence Grieppe left the state shortly before the running of the statute of limitations. There is no competent evidence Grieppe ever even left Spokane. Indeed, the only evidence even weakly offered by Forsberg is that a neighbor allegedly told Mr. Daniels that the Chewelah-based Grieppe family was in California, which even counsel for Forsberg admitted was not substantive evidence offered for the truth of the matter, because the evidence would constitute inadmissible hearsay. Thus, the *Boes* case is not analogous to this case.

Rather, *Bruff* and *Pascua*, where the courts determined the plaintiffs had not shown they acted with due diligence in attempting to serve the defendants, nor that the defendants intended to evade service, are applicable here. The evidence shows lack of due diligence by Forsberg to locate Grieppe, and is devoid of facts showing an intent by Grieppe to evade service. Forsberg's efforts essentially consisted of trying to serve Grieppe at the address on the police report, and when that failed, plugging his name into a disclaimer-filled "people search" website and searching social media sites, which revealed Grieppe lived in Spokane. Yet, Forsberg did not attempt to locate Grieppe through a family member or other associates, look in a phone book or call information, or hire a process server or

investigator to find Griep. Because Forsberg failed to follow up on information that might reasonably assist in locating Griep through “known third parties,” and failed to follow up on Mr. Daniels’ information, she failed to establish due diligence. *See Pascua*, 126 Wn. App. at 529-30 (plaintiff must follow up on all leads).

Even if the Court were to find Forsberg exercised due diligence in attempting to serve Griep, Forsberg has clearly failed to provide evidence of intent to evade service by Griep. Griep has not engaged in any act that has been interpreted by Washington courts as showing concealment or intention to evade service. Moving from the residence listed on the police report between the time of the accident and the time of service is considered within the norm of Washington residents; it does not show intent to evade service. Failure to maintain a public persona similarly does not show such intent. Changing one’s address within the state has never been found to show intent to avoid service by leaving the state or hiding within the state.

Accordingly, the trial court did not abuse its discretion in reconsidering its order allowing service by mail, and instead ruling that the required elements of service by mail were not established. After determining that Forsberg had thus not commenced the action against

Griegg prior to expiration of the statute of limitations, the court properly granted Griegg's motion for summary judgment of dismissal.

2. Forsberg's Attempted Abode Service was Insufficient.

Although barely a whisper of an assertion below, Forsberg now contends that the substitute abode service on Griegg's father was effective and sufficient service. Forsberg's attempted abode service was insufficient as a matter of law because Griegg was not a resident where the attempted service occurred. Griegg had not resided there since June of 2012.

In *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 933 P.2d 439, *rev. denied*, 133 Wn.2d 1004, 943 P.2d 662 (1997), service of process was held to be insufficient when the summons and complaint were left with the defendant's daughter's husband at a house owned by the defendant but leased to his daughter and her husband. *Id.* The court concluded that although the tenants of the defendant's rental house were related to the defendant, "they had a completely different center of domestic activity," and thus service at the rental house was not valid. *Id.* In *Farmer v. Davis*, 161 Wn. App. 420, 250 P.3d 138, *rev. denied*, 172 Wn.2d 1019, 262 P.3d 64 (2011), the court upheld a trial court's dismissal for improper service where the defendant had married and moved out of his mother's home in the three years between the accident and the time of attempted service and

had not moved back home. Similarly, in the present case, there is no genuine issue of material fact that in February of 2015 when abode service was attempted, Griep's parents' house at 301 North Stevens in Chewelah was no longer, and had not been for nearly three years, Griep's usual abode or his center of domestic activity. Griep had, in fact, changed his address on his driver's license and on his Facebook page. Both Griep and his father submitted declarations stating Griep had moved to Spokane and resided there for years before service was attempted. The record contains no competent evidence to the contrary.

Forsberg's reliance on *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996), is misplaced. In *Sheldon*, the defendant was a flight attendant with a "home base" in Chicago. Prior to moving to Chicago, Sheldon lived with her parents. After moving to Chicago, she repeatedly used her parents address as the place where she could be contacted before, during and after she lived there. She used her parents address for voter registration, for identification when receiving a speeding ticket, and for car insurance. *Id.* at 604. Additionally, she returned home to stay at her parents' house frequently, and even had her attorney send her correspondence to her parents' house. *Id.* at 610. Based on these continuous and repeated actions by Sheldon, the court determined that her

parents' house was one of Sheldon's houses of usual abode. *Id.* at 611-12. Here, Griep moved from his parents' house in June of 2012, nearly three years before service was attempted there, and he never returned to live at that house. There is no evidence he used the residence for any purpose whatsoever. He had his own residence, in Spokane. There is no evidence to the contrary. The attempted service was not made at Griep's usual abode, and thus, was defective as a matter of law.

Forsberg contends Deputy Stroisch's second declaration, setting forth statements allegedly made to him by the senior Griep, creates genuine issues of material fact, thus precluding summary judgment. Forsberg is incorrect.

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

CR 56(e).

Courts have repeatedly held that hearsay contained within declarations is not admissible and not competent evidence to defeat a summary judgment motion. *See, e.g., Charbonneau v. Wilbur Ellis Co.*, 9 Wn. App. 474, 477, 512 P.2d 1126 (1973) (hearsay statement of an expert fieldman contained in plaintiff's declaration was not competent,

admissible evidence to defeat defendant's motion for summary judgment, or to rebut the fieldman's affidavit stating to the contrary); *Welling v. Mt. Si Bowl, Inc.*, 79 Wn.2d 485, 489, 487 P.2d 620 (1971) (hearsay statements contained within affidavit of appellant are not facts which "would be admissible in evidence"). A trial court may not consider inadmissible evidence when ruling on a motion for summary judgment, and an appellate court presumes the trial court disregarded any inadmissible evidence in reaching its ruling. *Cano-Garcia v. King County*, 168 Wn. App. 223, 249, 277 P.3d 34, *rev. denied*, 175 Wn.2d 1010, 287 P.3d 594 (2012).

The senior Griep is not a party to this action, and accordingly, his out-of-court statements, allegedly made to the Deputy and recounted in the Deputy's second declaration, constitute hearsay evidence. Such statements would not be "admissible in evidence." ER 801, 802. The senior Griep filed a declaration stating Griep did not live at the house, and he told the Deputy this. The hearsay evidence contained in Deputy Stroisch's revised declaration does not create an issue of fact regarding, nor operate to rebut, the statements contained in Griep's and/or the senior

Griep's properly submitted declarations.² Accordingly, there were no issues of fact as to the ineffective attempt at substitute abode service, and summary judgment was properly granted.

B. The Trial Court Properly Denied Forsberg's Motion for Reconsideration of the Summary Judgment Order of Dismissal.

As stated above, a trial court's denial of a motion for reconsideration is reviewed for abuse of discretion. *Kohfeld*, 85 Wash.App. at 34. In asking the trial court to reconsider its ruling, Forsberg must "identify the specific reasons in fact and law as to each ground on which the motion is based." CR 59(b); *Fishburn v. Pierce Cnty. Planning & Land Servs. Dep't*, 161 Wn. App. 452, 472, 250 P.3d 146, rev. denied, 172 Wn.2d 1012, 259 P.3d 1109 (2011).

In seeking reconsideration, Forsberg essentially reiterated all of the arguments previously presented to, and rejected by, the trial court. Forsberg's argument really boils down to an assertion that her failure to satisfy "procedural" requirements should not result in dismissal of her case, because it would not be fair, and thus substantial justice would not be done. Forsberg's argument ignores that proper service of process is

² Moreover, even if we assume Deputy Stroisch's declaration is correct, and that the senior Griep made misrepresentations to him, those misrepresentations are not the fault of Griep, and again, do not create an issue of fact regarding the effectiveness of service of process. See *Gerean v. Martin-Joven*, 108 Wn. App. 963, 33 P.3d 427 (2001).

jurisdictional, and those rules, along with statutes of limitation, are in effect for good and sound policy reasons. Courts rarely grant reconsideration under CR 59(a)(9) for lack of substantial justice because of the other broad grounds afforded under CR 59(a). *Sligar v. Odell*, 156 Wn. App. 720, 734, 233 P.3d 914, 921 (2010). In affirming a trial court's denial of a plaintiff's motion to reconsider a summary dismissal of a dog bite case, the *Sligar* court stated:

In seeking reconsideration, Sligar merely repeated the arguments that she made in her motion for summary judgment. As set forth above, Sligar failed to demonstrate any error in the trial court's order on summary judgment. Under these circumstances, Sligar has failed to demonstrate that the trial court abused its discretion in denying reconsideration based on CR 59(a)(9).

Id. Here, Forsberg simply repeated the same arguments she already presented to the court.

The "additional evidence" Forsberg submitted on reconsideration similarly reiterated evidence that was in prior declarations, and concerned events that occurred before the court's initial order on service of May 5, 2015, and which thus could have been presented to the court in support of Forsberg's opposition to summary judgment, but was not. Such "new" evidence is not admissible on reconsideration. *In re Marriage of Tomsovic*, 118 Wn. App. 96, 109, 74 P.3d 692 (2003). In *Tomsovic*, the

court held that the trial court did not abuse its discretion by denying the appellant's motion for reconsideration where the additional evidence presented to the court in his motion for reconsideration was available at an earlier stage in the case, and the appellant failed to explain why he neglected to bring the arguments to the court's attention earlier. *Tomsovic*, 118 Wn. App. at 109. The same is true here. None of the "additional" evidence submitted was newly discovered. Even if the additional evidence submitted by Forsberg was admissible, however, it still did not establish the elements for service by mail, nor did it establish proper abode service.

Similarly, there was no error of law. The *Boes* case relied on heavily by Forsberg primarily focused on whether the defendant's *admitted* travel out of state 10 days prior to the statute running, knowing the statute was expiring, satisfied the intent to avoid service element of RCW 4.28.100. Here, Grieppe filed a declaration stating specifically that he no longer resides in Chewelah, resides in Spokane, was not hiding, and did not leave the state prior to May 11, 2015. The hearsay declaration of a process server which states that he was told by a neighbor that the Chewelah-based Grieppe "family" had gone to California, does not overcome Grieppe's testimony, and cannot be used to prove that Grieppe

went to California. Additionally, there is no evidence Grieppe knew when the tolling period would end.

On reconsideration, to establish due diligence, Forsberg improperly relied on items that are either hearsay (the results of internet searches, Mr. Daniels' report about what a neighbor told him, Mr. Marasco's contact with an unidentified friend of Grieppe's mother), or that were intentionally omitted from the evidence provided to the court when it entered the order allowing service by mail (Mr. Marasco acknowledged at oral argument that he did not put the evidence into his original declaration because he thought what he had presented was sufficient). Even if these late submissions are considered, the attorney in *Boes*, by hiring both a professional investigator and process server, both of whom affirmatively followed up on all information they were provided, did far more than Forsberg did, despite the self-serving chart, devoid of dates, she created.

The record establishes the trial court exercised its discretion reasonably in denying the motion for reconsideration. As explained by the court:

But in the end, I didn't see, and couldn't conclude, that there has been the continuous efforts to follow up on information that others had got – That's number one.

As importantly, I think what tipped the scale for me is I saw virtually no information that would even provide –

some quantum of evidence to establish that Mr. Griep had been intentionally trying to evade service while within the state. He posts that he's in Spokane, he has friends that are obviously responding to him. There's no indication that a private process server was dispatched to Spokane, investigator to Spokane, to locate him in Spokane, other than this effort out at Northern Quest – I acknowledge that.

(RP 63) Thus, the court again weighed *all* the evidence before the court and determined the required elements for service by mail were not met, and accordingly, the case was properly dismissed.

C. **Forsberg Did Not Properly Perfect an Appeal of the Order Denying Forsberg's Motion to Vacate the Summary Judgment Order.**

As indicated above, Forsberg filed her motion to vacate the summary judgment at approximately the same time she started her appeal process regarding the trial court's prior orders. Forsberg did *not* ever file a Notice of Appeal as to the order denying her motion to vacate the summary judgment order. RAP 7.2 addresses the authority of the trial court after review has been accepted by the Court of Appeals and provides in pertinent part as follows:

(e) Postjudgment Motions and Actions To Modify Decision. The trial court has authority to hear and determine (1) postjudgment motions authorized by the civil rules, the criminal rules, or statutes, and (2) actions to change or modify a decision that is subject to modification by the court that initially made the decision. The postjudgment motion or action shall first be heard by the

trial court, which shall decide the matter. . . . The decision granting or denying a postjudgment motion may be subject to review. Except as provided in rule 2.4, a party may only obtain review of the decision on the postjudgment motion by initiating a separate review in the manner and within the time provided by these rules. If review of a postjudgment motion is accepted while the appellate court is reviewing another decision in the same case, the appellate court may on its own initiative or on motion of a party consolidate the separate reviews as provided in rule 3.3(b).

RAP 2.4 provides in pertinent part as follows:

(b) Order or Ruling Not Designated in Notice.

The appellate court will review a trial court order or ruling not designated in the notice, including an appealable order, if (1) the order or ruling prejudicially affects the decision designated in the notice, and (2) the order is entered, or the ruling is made, before the appellate court accepts review.

(underline added). Although certain orders that predate the order from which an appeal is taken are sometimes brought up for review by the appeal of a later ruling, that is not true with regard to a trial court decision on a CR 60 motion entered *after* the appellate court accepts review. Thus, this Court should refuse to address this portion of Forsberg's appeal.

D. The Trial Court Properly Denied Forsberg's Motion to Vacate the Judgment.

Even if the Court decides to review the trial court's denial of Forsberg's motion to vacate the summary judgment, such review is under an abuse of discretion standard, and the trial court did not act

unreasonably in denying Forsberg's motion to vacate. *E.g., DeYoung v. Cenex, Ltd.*, 100 Wn.App. 885, 894, 1 P.3d 587 (2000), *rev. denied*, 146 Wn.2d 1016, 51 P.3d 87 (2002).

Forsberg moved pursuant to CR 60(b) to vacate the judgment of dismissal, citing "newly discovered evidence." Under CR 60(b), however, "newly discovered evidence" is evidence "which by due diligence could not have been discovered in time to move for a new trial under rule 59(b)." To justify vacating a judgment on the ground of newly discovered evidence, the moving party must establish that the evidence: (1) would probably change the result if a new trial were granted, (2) was discovered since trial, (3) could not have been discovered before the trial by the exercise of due diligence, (4) is material, and (5) is not merely cumulative or impeaching. *Jones v. City of Seattle*, 179 Wn.2d 322, 360, 314 P.3d 380, 399 (2013), *as corrected* (Feb. 5, 2014).

In support of her motion to vacate the summary judgment order of dismissal, Forsberg filed a brief with three attachments, two of which are unauthenticated and/or contain inadmissible hearsay evidence. None of these documents contains "newly discovered evidence," which Forsberg could not have discovered earlier in the case and prior to judgment being entered. "Authentication is a threshold requirement designed to assure

that evidence is what it purports to be.” *State v. Payne*, 117 Wn. App. 99, 106, 69 P.3d 889 (2003), *rev. denied*, 150 Wn.2d 1028, 82 P.3d 242 (2004). The undated document headed “WebsterLawReport2” is described in Forsberg’s brief as a “locator report;” however, there is no sworn testimony establishing the authenticity of this document, the source of the information contained in the “report,” or establishing it is a business record, an exception to the hearsay rule. ER 801, 802, 803. Moreover, the document purports to state an address history for Griep, but omits that he grew up or ever lived in Chewelah, Washington, thus reinforcing Griep’s position that the attempted abode service in Chewelah was defective (or at a minimum, causing one to question the source to which Forsberg’s counsel turned for information). Under possible relatives it states “none found,” despite the fact that Griep’s father has a nearly identical name.

Additionally, Forsberg’s counsel’s legal assistant’s new declaration recounts a brief conversation she allegedly had with an unidentified “operator” after calling a phone number in Olympia. This is inadmissible hearsay.

Finally, the revised declaration signed by Sheriff’s Deputy Henry Stroisch, which contradicts the Deputy’s prior sworn declaration and revises his prior description of attempted, but unsuccessful, substitute

service on Griep, was not properly considered by the trial court. Even if the court could consider Deputy Stroisch's revised version of events, such was not sufficient to cause the court to reconsider its prior rulings.

Despite both of Deputy Stroisch's declarations being offered under penalty of perjury regarding the identical subject matter, Deputy Stroisch's second declaration is materially different from, and in conflict with, his first sworn testimony. In his first declaration, he stated that he spoke with Griep's father at the door of his house when the senior Griep answered the door. Deputy Stroisch stated, in the negative, that the senior Griep *never told him that his son did not live there*, implying that the elder Griep likely was never directly asked this question and was silent on the issue. At a minimum, the senior Griep clearly did not tell Deputy Stroisch that the Griep *did* live there, or that statement would have been in the declaration. Deputy Stroisch's second sworn declaration materially changes and contradicts his earlier sworn testimony. Deputy Stroisch *now* states that when he arrived at the senior Griep's house, Mr. Griep was standing outside and talking to an employee about the work for the day, in direct contradiction to his earlier sworn testimony that the senior Griep answered his front door to the Deputy. Deputy Stroisch's revised declaration states that the senior Griep affirmatively told the Deputy that

Griep lived there and was on his way home, in direct contradiction to the Deputy's earlier sworn testimony that the elder Griep did not tell the Deputy that his son did not live at the home, essentially being silent on the issue. Even assuming, *arguendo*, that Deputy Stroisch's second version of events is true, the Deputy possessed that knowledge at the time he made and signed his first sworn declaration. Thus, even if true, this new declaration does not contain evidence that was not discovered, and that could not have been discovered, until after the motions were heard in June 2015. Accordingly, under any standard of due diligence, Forsberg should have elicited this testimony from the Deputy at the time the Deputy's first declaration was filed. Moreover, this second declaration, even if it were true, could not be considered by the trial court because subsequent testimony which contradicts prior sworn testimony cannot create an issue of fact on summary judgment. *See McCormick v. Lake Washington Sch. Dist.*, 99 Wn. App. 107, 111, 992 P.2d 511, 513 (1999). Moreover, as stated above, the alleged hearsay statements of the senior Griep are not admissible evidence and cannot be considered by the court. In short, this declaration cannot serve as a basis for vacation of the order on summary judgment.

Forsberg also argues that Griep changing his address in late April proves his intent to evade service similar to the defendant in the *Boes* case, but in that case the defendant affirmatively left the State of Washington and went to New York before the 90-day tolling period ran. *See* RCW 4.28.100(2) (statute requires showing that person sought to be served has “departed” from the State of Washington, not simply that they moved addresses within a city located within the State of Washington). Moreover, this exact argument was presented by Forsberg on her motion for reconsideration, and the trial court considered it and denied her motion. Finally, this information could have been discovered by Forsberg prior to the summary judgment hearing.

There is nothing extraordinary about the situation before the Court. When a plaintiff elects to file a lawsuit right when the statute of limitations is set to expire, then the plaintiff needs to exercise extra diligence and caution in insuring service is effected properly. A defendant has no obligation to help a plaintiff effect service, contrary to Forsberg’s repeated suggestions to the contrary. Moreover, the answer was filed on March 23, 2015, and asserted affirmative defenses of insufficient service of process and failure to commence the action prior to the expiration of the statute of limitations. At that time, Forsberg had nearly two months to

effect service on Griep, but took no action whatsoever to locate Griep for one full month. Forsberg presumably failed to read the answer, and such conduct is not excusable neglect. Forsberg simply waited until the last minute to file her complaint, and then failed properly to effect service within the 90-day tolling period. The trial court did not abuse its discretion in refusing to vacate the summary judgment order of dismissal. He clearly set forth solid reasoning:

And I – certainly applaud your stick-to-itiveness. You’ve been dogged about this case. And I’ve probably mentioned that – in some respects I wouldn’t be bothered if the appellate court disagreed with me, because I generally believe that all cases should be decided on their merits if at all possible.

But to some degree, also, this case was decided on its merits, to the extent that I concluded that based on the record that was provided at the time of the motion for publication that there was an inadequate bases to support an order of publication.

* * *

But I do think that what was produced about Dep. Stroisch is arguably relevant; I simply find that it’s – doesn’t meet the criteria of newly discovered evidence that with due diligence could not have been provided earlier.

Therefore I have nothing – nothing substantive on which to base a decision to un-do what I have now done, both by way of summary judgment and by way of denial of reconsideration.

So, I will additionally deny the motion to vacate.

(RP 91-93)

IV. CONCLUSION

For the reasons set forth above, and based on the documents on file herein, Griep respectfully requests the Court affirm the trial court's reconsideration of the order allowing service by mail, and summary judgment of dismissal. Further the Court should not review the order denying Forsberg's motion to vacate the judgment, as Forsberg did not appeal from that order; however, if the Court elects to review that order, Griep respectfully requests the Court affirm the trial court's denial of the motion.

RESPECTFULLY SUBMITTED this 17th day of March, 2016.


CHERYL R. G. ADAMSON, WSBA #19799
Attorneys for Respondent Griep

FILED

MAR 18 2016

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
BY _____

No. 337421

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KATHERINE M. FORSBERG,

Plaintiff/Appellant,

v.

**AFFIDAVIT OF
SERVICE**

WESTON T. GRIEPP,

Defendant/Respondent.

STATE OF WASHINGTON)

COUNTY OF BENTON)

) ss.

I, REBEKAH E. HARRIS, being first duly sworn upon oath,
depose and state:

That I am over the age of 18 years; that on or about the 17th day of
March, 2016, I served a true and correct copy of Brief of Respondent upon
Toronto Marasco and Thomas Webster, attorneys for Plaintiff/Appellant, at
WEBSTER LAW OFFICE, PLLC, 116 N. Main Street, Colville,

Affidavit of Service

Page 1 of 2

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Washington 99114; and upon William Croft, co-counsel for Defendant/Respondent, at HOLLENBECK LANCASTER MILLER & ANDREWS, 201 W. North River Drive, Suite 450, Spokane, Washington 99201, by depositing same with the United States Postal Service in properly addressed, postage prepaid envelopes.


REBEKAH E. HARRIS

SUBSCRIBED AND SWORN to before me this 17th day of March, 2016.




NOTARY PUBLIC, in and for the State of Washington, residing at: Kennewick
My Commission Expires: 4-30-17