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NO. 72517-3-I

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

PEGGI NORTHWICK,

Respondent,

vs.

ANDREW LONG,

Appellant.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Laura C. Inveen, Judge

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

Northwick failed to serve Long with the summons and complaint before the statute of limitations expired. A lone service attempt was made at an address where Long no longer resided. However, the trial court denied Long's motion to dismiss by misapplying the law regarding substitute service and improperly relying on hearsay testimony. Then, despite making credibility determinations, the court declined to allow an evidentiary hearing. This Court granted discretionary review.¹

II. ARGUMENT

A. THERE WAS NO VALID SERVICE OF PROCESS.

1. A Defendant Is Not Required to Establish a New Address.

Northwick acknowledges that substitute service must be accomplished pursuant to RCW 4.28.080(15), but she glosses over the actual language of that statute, particularly the language requiring service at the defendant's residence. (Respondent's Brief 6) The statute specifies that substitute service can only be accomplished "by leaving a copy of the

¹ Long's Motion for Discretionary Review presented three issues for review (failing to dismiss case, relying on hearsay, and failing to conduct an evidentiary hearing). The Commissioner's Ruling on Discretionary Review focused its discussion on the issue related to an evidentiary hearing, but she generally "ORDERED that discretionary review is granted." Both parties have had an opportunity to fully brief all three issues, and Long requests that the Court fully consider all issues raised in the appeal.

summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.” RCW 4.28.080(15) (emphasis added).

Northwick argues that because Long did not submit a declaration precisely stating where he lived, he failed in his burden to establish an alternate “usual abode.” (Respondent’s Brief, 8) Northwick incorrectly seeks to place a burden on Long to establish where his new residence was. (Respondent’s Brief, 8) That is not the law in Washington. Washington caselaw focuses on the address where service was attempted and whether that location was the center of the defendant’s domestic activity. *See Streeter-Dybdahl v. Huynh*, 157 Wn. App. 408, 414, 236 P.3d 986 (2010), *rev. denied*, 170 Wn.2d 1026 (2011). The courts do not require that the defendant identify another home address. A defendant certainly may put forth evidence about a new abode, but he need not affirmatively establish one abode to disprove another. Further, the fact that the declaration of Long’s father did not specifically articulate a new address for Long does not permit any adverse inferences to be drawn.² (Respondent’s Brief, 9)

² The case of *Lynott v. Nat’l Union Fire Ins. Co. of Pittsburg, PA*, 123 Wn.2d 678, 871 P.2d 146 (1994), cited by respondent has no application here. (Respondent’s Brief, 9) That case involved a complex coverage analysis and an ambiguous exclusion to an insurance policy in the summary judgment context. Specifically, the language in the *Lynott* opinion related to drawing an adverse inference was limited to a situation in which a party stated that its underwriter relied on certain documents but could not find those

Northwick retained the ultimate burden to prove that the Snohomish address was indeed Long's usual abode, and Long had no duty to identify or establish some other location.

2. Northwick Misapprehends the Burden-Shifting Analysis.

Washington courts have established a burden-shifting framework for determining whether service has been accomplished. When service of process is challenged, the plaintiff has the initial burden of proof to establish a prima facie case of sufficient service.³ *Gross v. Sunding*, 139 Wn. App. 54, 60, 161 P.3d 380 (2007). Plaintiff can satisfy this initial burden by producing an affidavit of service of process that is presumptively valid on its face. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994). The burden then shifts to the defendant to show that the service was actually improper by clear and convincing evidence.⁴ *Id.* The plaintiff has no role in this second step of the analysis; the only question is whether the defendant can put forth the

documents. *Id.* at 688-89. It was essentially a discovery question. The case and its ruling have no application to the jurisdictional and burden-shifting questions before this Court.

³ "Prima facie" is defined as "a fact presumed to be true unless disproved by some evidence to the contrary." BLACK'S LAW DICTIONARY 1189 (6th ed. 1990). A "prima facie case" is defined as "[a] case which has proceeded upon sufficient proof to that stage where it will support finding if evidence to contrary is disregarded." *Id.* at 1189-90

⁴ "Clear . . . and convincing" evidence is described as being "more substantial" than a preponderance, and the fact at issue must be shown by the evidence to be "highly probable." *In re LaBelle*, 107 Wn.2d 196, 209, 728 P.2d 138 (1986).

necessary evidence. If the defendant demonstrates the necessary evidence, then the burden shifts back to the plaintiff to prove by a preponderance of the evidence that service was proper.⁵ *Scanlan v. Townsend*, 181 Wn.2d 838, 856, 336 P.3d 1155 (2014). At this ultimate stage, the plaintiff must produce evidence to meet the preponderance burden, while the defendant will likely put forth evidence to prevent the plaintiff from meeting that burden.

Northwick satisfied the first step of the analysis by providing the affidavit of service. The burden then shifted to Long. Through the declaration of his father, Long established by clear and convincing evidence that he did not live with his father at the Snohomish address. Long's father was the individual who actually lived at the Snohomish address, and he unquestionably knew who resided there with him. His declaration unequivocally stated that Long did not live there at the time of service. Rather, Long lived, worked, and went to school in Texas. Long's father had no reason to believe that Long planned to return to live with him at any point in the future. (CP 23-24) Based on the declaration, it was highly probable that Long did not reside at the Snohomish address.

⁵ "The preponderance of the evidence standard requires that the evidence establish the proposition at issue is more probably true than not true." *Department of Soc. & Health Servs. v. Bissett (In re H.W.)* 92 Wn. App. 420, 425, 961 P.2d 963 (1998).

Long met his burden, and the analysis should have shifted back to Northwick for her ultimate burden of proof.

However, Northwick misinterprets the “clear and convincing” step of the analysis. Northwick, like the trial court below, conflates the defendant’s “clear and convincing” step with the ultimate burden of proof retained by the plaintiff. (Respondent’s Brief, 8-10) The trial court’s basic mistake in applying the burden-shifting analysis was to require that Long’s evidence rebutting the initial presumption be clear and convincing in light of further contradictory evidence put forth by the plaintiff. That is improper. The defendant must merely put forth clear and convincing evidence that – on its own – rebuts the presumption of proper service established by the facially correct affidavit of service. Then, the plaintiff can put forth whatever evidence she chooses to show that service was proper, and the defendant can use whatever evidence he chooses to prevent the plaintiff from meeting her burden.

This final step in the analysis – in which the court weighs all of the evidence to determine whether the plaintiff proved that service was proper – is a separate step that is addressed only after the defendant shows by clear and convincing evidence that service was improper. The clear and convincing evidence burden is a stand-alone step that must be met in order for the court to engage in an analysis of competing evidence. The court

need not weigh competing evidence if the defendant cannot meet his burden under the clear and convincing evidence standard. Likewise though, the court cannot require the defendant to disprove service by clear and convincing evidence in the face of facts to the contrary proffered by the plaintiff. That would both impose a higher burden on the defendant and also require him to carry the ultimate burden of disproving service.

In ultimately determining whether a plaintiff has met his burden of establishing service, Washington courts generally consider evidence that militates in favor of and against the place of service being defendant's abode. See, e.g., *Streeter-Dybdahl v. Huynh*, 157 Wn. App. at 414; *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 541-43, 933 P.2d 439, *rev. denied*, 133 Wn.2d 1004 (1997); *Lepeska v. Farley*, 67 Wn. App. 548, 551, 833 P.2d 437 (1992). However, the courts do not require any sort of heightened evidentiary standard for the evidence put forth by the defendant. In other words, the courts do not combine the second and third steps of the burden-shifting analysis. Remarkably, Northwick argues that "[a] plaintiff is not required to put forth evidence that demonstrates the defendant actually lived at the dwelling in question." (Respondent's Brief 10). In fact, caselaw is clear that a plaintiff bears the ultimate burden of proving exactly that. *Scanlan*, 181 Wn.2d at 856.

Northwick also incorrectly posits that the clear and convincing evidence for the second step of the analysis must have “been available to a reasonably diligent plaintiff.” (Respondent’s Brief 8) Neither the *Vukich* nor *Streeter-Dybdahl* cases cited by Northwick stand for that principle. *Vukich v. Anderson*, 97 Wn. App. 684, 985 P.2d 952 (1999); *Streeter-Dybdahl*, 157 Wn. App. 408. In fact, no court has required that the evidence put forth by a defendant to rebut the presumption of a declaration of service be “available” in this manner. Even so, Northwick fails to demonstrate that information about Long’s relocation to Texas was “not available” to him had he been reasonably diligent. Rather, the evidence establishes that Northwick conducted no search until after the motion to dismiss was filed. (CP 78)

3. Northwick Failed to Establish Service as a Matter of Law.

A mere connection to a past residence is not sufficient to establish it as a usual abode or center of domestic activity. *See Gross v. Evert-Rosenberg*, 85 Wn. App. at 541-43; *Lepeska v. Farley*, 67 Wn. App. at 551; *Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces*, 36 Wn. App. 480, 483-84, 674 P.2d 1271 (1984). Even though Long’s father continued to live at the Snohomish address, that connection is not enough to continue to qualify it as Long’s place of usual abode.

Further, the fact that Long did not promptly update his contact information with the Post Office and State Department of Licensing after he moved in 2013 did not sufficiently demonstrate that Long was actually living at the Snohomish address when service was attempted on March 8, 2014. (CP 111, 113) Such limited and unpersuasive evidence was insufficient as a matter of law. *See Vukich v. Anderson*, 97 Wn. App. at 690-91 (receiving mail at an address, and having one's car registered at the address are not sufficient to show that a home is a center of domestic activity); and *Streeter-Dybdahl v. Huynh*, 157 Wn. App. at 414 (“the use of a particular address for a limited purpose [such as registration with the DOL] is not a critical factor in determining a center of domestic activity.”)

Although Northwick cites the case of *Sheldon v. Fetting*, 129 Wn.2d 601, 919 P.2d 1209 (1996), she does not allege that Long had two usual abodes, as the defendant in *Sheldon* did. (Respondent's Brief, 11-13). Regardless, Northwick's reliance on the *Sheldon* case is misplaced. *Sheldon* marks the outer boundaries of RCW 4.28.080(15) interpretation. *Salts v. Estes*, 133 Wn.2d 160, 166, 943 P.2d 275 (1997). Moreover, the circumstances here are far less compelling than those in *Sheldon*. The unusual facts of *Sheldon* lent themselves to a finding that the defendant had a second abode for purposes of service because she “used the family home for so many of the indicia of one's center of domestic activity. . . .”

129 Wn.2d at 610. Defendant lived with her parents before moving to Chicago for flight attendant training. *Id.* at 604-05. As a flight attendant, she led a “highly mobile” lifestyle. *Id.* at 612. After her training, she leased an apartment in Chicago, but went “home” to Seattle whenever she could. *Id.* at 605. Indeed, she spent 4-5 days at her parents’ house in the month service was attempted and spent 5-6 days there in the previous month. *Id.* at 605. As the *Sheldon* Court noted, “Ms. Fettig, working as a flight attendant, constantly jetting across the country, is a quintessential example of a highly mobile person splitting her time between two places, Seattle and Chicago. She maintained two places of usual abode, one at her family home in Seattle and one at her flat in Chicago.” *Id.* at 612.

Northwick has neither alleged nor demonstrated that Long was a highly mobile person who split his time between two residences. The fact that the *Sheldon* defendant actually lived (albeit intermittently) at the address where service was made distinguishes *Sheldon* from Long’s situation. Other than outdated records at the Post Office and Department of Licensing, Northwick did not develop any evidence to show that Long continued to live, even on a part time or intermittent basis, at his father’s house. Unlike in *Sheldon*, there was no evidence that Long was traveling back and forth between Texas and Snohomish. There was no evidence that he, on an ongoing basis, split his time between those two locations.

Rather, the evidence established that Long moved out, had not returned, and no longer resided at the Snohomish address. By the time of the lone service attempt, it was not the center of his domestic activity and was not a proper location for substitute service.

4. Long Had No Duty to Help Northwick Achieve Service.

Northwick takes issue with the fact that Long's attorney did not inform her attorney that service was lacking.⁶ (Respondent's Brief, 13-14) However, Northwick does not offer any evidence that Long avoided service. In fact, a defendant has no duty to assist the process server. *Thayer v. Edmonds*, 8 Wn. App. 36, 41-42, 503 P.2d 1110 (1972), *rev. denied*, 82 Wn.2d 1001 (1973). A plaintiff is only entitled to RCW 4.16.180 tolling of the statute of limitations if she proves willful concealment and evasion of process. *Rodriquez v. James-Jackson*, 127 Wn. App. 139, 147, 111 P.3d 271 (2005). Further, the concealment must be such that "'process *cannot* be served upon [her].'" *Bethel v. Sturmer*, 3 Wn. App. 862, 866-67, 479 P.2d 131 (1970) (quoting *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969)) (emphasis in original).

⁶ Notably, Northwick fails to explain why she took no action to confirm service in the three months after it was attempted and before the statute of limitations expired.

Long did nothing to avoid service and took no action to prevent Northwick from serving him in Texas. Had Northwick undertaken any investigation beyond mere reliance on a three-year-old accident report, she could likely have ascertained Long's residence. Northwick alleges that the process server attempted service at "Long's last known address." (Respondent's Brief 3) In fact, there is nothing on the record to indicate that Northwick, her attorney, or her process server made any attempt to determine where Long lived prior to the service attempt. The process server simply went to the address that was on the request from Northwick's counsel.⁷ (CP 59)

5. Northwick Concedes That Reliance on Hearsay Was Improper.

Northwick does not dispute that the trial court's reliance on hearsay testimony was improper. The testimony was hearsay because the content of the statement was relevant to the credibility of Long's father. *See Ensley v. Mollmann*, 155 Wn. App. 744, 230 P.3d 599, *rev. denied*, 170 Wn.2d 1002 (2010). Without reliance on the hearsay testimony from the process server, the trial court had no basis to discredit the testimony of Long's father. Further, the process server's belief that Long lived at the

⁷ The process server did not take efforts to locate Long with the Post Office and the Department of Licensing until after Long filed his motion to dismiss. (CP 78)

Snohomish address was irrelevant to the analysis, particularly if that belief was only based on inadmissible hearsay. Thus, the only evidence put forth by Northwick from which a court could determine that Long resided at the Snohomish address was the Post Office and DOL addresses. As discussed above, this was insufficient as a matter of law.

B. AN EVIDENTIARY HEARING WAS NECESSARY.

1. The Court Failed to Conduct an Evidentiary Hearing.

The trial court made credibility determinations based on a declaration and deposition transcript. (RP 27-28) Thus, the court, in acting as the fact-finder on the issue of service of process, was required to hold an evidentiary hearing to properly weigh credibility and resolve disputed facts. *Woodruff*, 76 Wn. App. at 210. Failing to do so constituted an abuse of discretion. *Id.*

Northwick mistakenly analogizes the analysis to a summary judgment hearing. (Respondent's Brief, 15-16) This is not a situation in which Northwick merely needed to establish an issue of fact to defeat the dispositive motion. Jurisdiction and sufficiency of service of process are questions of law. *Gross v. Sunding*, 139 Wn. App. at 66-67. A judge must determine whether valid service has been obtained, and it cannot be left to the jury to decide based on an allegation that there is a factual dispute. *Id.* at 67. If there is an issue of fact in the summary judgment

setting, then the jury will ultimately hear the evidence to make a determination. However, with a service of process question, the judge is the ultimate trier of fact.

Long properly requested an evidentiary hearing after the court weighed the credibility of two declarants and relied on hearsay testimony. There is no requirement that Long provide “credible reasoning for not requesting live testimony, or what evidence he predicts he would obtain.” (Respondent’s Brief, 16) Long’s motion for an evidentiary hearing was not a CR 56(f) motion. The necessary elements for obtaining a continuance to conduct discovery pursuant to CR 56(f) have never been required when there is a question of service. *See Woodruff*, 76 Wn. App. at 210.

Northwick suggests that she would not object to an evidentiary hearing “as long as Mr. Long is limited to the scope of the evidence that was presented to the trial court at the time of Mr. Long’s motion to dismiss.” (Respondent’s Brief, 16) It is unclear exactly what Northwick suggests. However, if an evidentiary hearing is to be held on the issue of service of process, then the issue of service should be decided on its merits and not constrained by the limited documentary evidence accompanying the previous legal arguments. Simply rehashing the documentary evidence would defeat the purpose of conducting an evidentiary hearing.

Long, like Northwick, should be permitted to elicit additional relevant testimony and produce additional relevant evidence to inform the court as to whether service was proper. Certainly though, Northwick should not be permitted to rely on the hearsay testimony on her process server.

2. A Different Judge Should Conduct the Evidentiary Hearing.

Northwick argues that the previous trial judge should preside over any rehearing and suggests that the trial judge did not “indicate any prejudice toward either side.” (Respondent’s Brief, 16) Prejudice is not a requirement for a new judge to hear a matter on remand. Rather, in the interest of the appearance of fairness, a new superior court judge should conduct further proceedings on remand where it appears that a trial court judge will have difficulty setting aside a previously expressed opinion. See *Noordin v. Abdulla (In re Custody of R.)*, 88 Wn. App. 746, 754-55, 762-63, 947 P.2d 745 (1997). That is the case here. The trial judge improperly relied on hearsay testimony to determine that Long’s father was “of questionable veracity.” (RP 28) This is clearly not giving him, as Northwick alleges, “every benefit of the doubt.” (Respondent’s Brief, 17) The trial judge’s attack on Long’s father’s credibility, her reliance on hearsay testimony, and her proclivity to inject her own opinions and

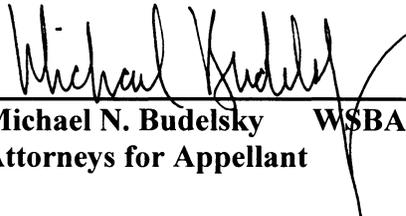
experiences is precisely why a different judge is necessary on remand.
(RP 15, 26-30)

III. CONCLUSION

Northwick was unable to establish that Long lived at the address where service was attempted, and dismissal is appropriate. In the alternative, the matter should be remanded to the trial court for a full evidentiary hearing before a different judge.

Dated this 26th day of June 2015.

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