IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DEBRA CHEESMAN, individually and RICHARD CHEESMAN, individually, and DEBRA CHEESMAN and RICHARD CHEESMAN, as Co-Guardians of ALISSON CHEESMAN, a minor, ASHLEY HANKS, fka ASHLEY JOHNSON, Appellants, v. MICHAEL J. ROWSE and JANE DOE ROWSE, individually and as husband and wife, MICHAEL ALAN ROWSE and JANE DOE ROWSE, individually and as husband and wife, Respondents.	)	No. 66134-5-I DIVISION ONE UNPUBLISHED OPINION FILED: April 23, 2012

Becker, J. — Plaintiffs injured in a collision filed a personal injury complaint and twice served defendant's brother at the brother's house in Everett. The defendant answered and asserted that the plaintiffs failed to properly serve the defendant before expiration of the statute of limitations. The trial court held an evidentiary hearing, determined that the plaintiffs had not properly completed substitute service because the defendant had never maintained a domicile at the

brother's house, and dismissed the case as to all but one plaintiff.

Plaintiffs appeal, arguing that the trial court failed to apply the proper standard and burden of proof, made findings of fact without the support of substantial evidence, and entered erroneous conclusions. Because substantial evidence supports the findings of fact and the trial court properly concluded that the brother's house had never been, and was not therefore at the time of service, a place of usual abode for the defendant, we affirm.

FACTS

On December 20, 2003, in Granite Falls, Washington, Michael Rowse failed to stop at a stop sign and drove his pickup truck into a 1999 Dodge Durango occupied by driver Debra Cheesman and passengers Richard Cheesman, Alisson Cheesman, and Ashley Hanks. At the time of the accident, Rowse and his wife Sheree lived in Granite Falls.

The Cheesmans filed a personal injury complaint on December 13, 2006. On February 14, 2007, a process server delivered copies of the summons and complaint for Michael J and Jane Doe Rowse to a "JOHN DOE ROWSE/BROTHER/CO-RESIDENT WHO REFUSED HIS NAME" at a house on 24th Drive Southeast in Everett, Washington. On March 7, 2007, the Cheesmans filed an amended complaint. A process server delivered copies for Michael J and Jane Doe Rowse to "JOHN DOE ROWSE/BROTHER/CO-RESIDENT" at the same Everett address on March 7, 2007.

Thereafter, the Rowses appeared through counsel and filed an answer,

asserting as an affirmative defense that the Cheesmans failed to properly serve them before the statute of limitations expired. The Rowses later filed a motion for summary judgment dismissal based on the lack of service. The Rowses admitted that they lived in Granite Falls at the time of the accident but provided evidence that Sheree moved to Arkansas in 2005. Also in 2005, Michael moved in with his father, Anthony Rowse, in Oak Harbor, for a few months, until finally moving to Arkansas in December 2005. The Rowses produced telephone bills and bank statements addressed to them at an address on Lee Street in Huntsville, Arkansas. They also produced deposition testimony and declarations to establish that the house on 24th Drive Southeast in Everett belonged to Michael's brother, David Rowse, and that Michael had never lived there.

In response, the Cheesmans produced evidence that a request had been filed with the post office to forward Michael's mail to the Everett address and that David Rowse had admitted that he received mail addressed to Michael at his house in Everett. The Cheesmans also claimed that the process server indicated that David admitted that Michael lived at the Everett address at the time of service. The trial court denied the motion for summary judgment and ordered a hearing to determine whether the Everett address was Michael's usual abode at the time of service.

At the hearing, the Cheesmans presented testimony of a private investigator and a process server. The private investigator testified that she located an Oak Harbor address associated with Michael Rowse and then made

a number of requests for information to the post office regarding a forwarding address. The investigator learned that Anthony Rowse requested forwarding service for his family from the Oak Harbor address to an address on 24th Drive Southeast in Everett, effective December 1, 2006. The process server testified by referring to his affidavits describing the circumstances of the service. The affidavit for the February 14 service states:

> A male answered the door and I indicated I have legal papers for Michael Rowse. He said he is not home right now. I asked if he lives here (meaning the John Doe), He indicated he does and he is the subjects brother. I told him I could leave the papers with him at which time he accepted but would not give me his name.

The process server also testified that he believed Michael was a "coresident" in the house because the man at the door said Michael "wasn't home, he was out driving a truck." When the "same resident came to the door" on March 7, the process server "asked if Michael was home in which he said he wasn't. He accepted the papers again but again would not give me his name."

Michael Rowse testified that he lost his Granite Falls house in foreclosure sometime in 2005 and moved in with his father in Oak Harbor. After living in his father's garage for two or three months, Michael moved to Arkansas. He testified that he never lived in his brother's house in Everett, although he may have spent one or two nights there when leaving for Arkansas and when he was in the area while working as a long-haul truck driver. He testified that he never used his brother's address in Everett for any purpose, such as for forwarding mail, for a work reference, or for bills or magazines. David testified that Michael

had never lived with him in Everett. David also testified that he did not tell the process server that Michael lived at his house. David testified that he had forwarded his father's mail to his own address by signing for Anthony as power of attorney and that he was required to forward mail for the entire family. He testified that he only received "junk mail," such as advertisements, at his own address for Michael, and that he threw them away.

Following the hearing, the trial court determined that neither Michael nor Sheree Rowse ever maintained a domicile at the house on 24th Drive Southeast in Everett, that the Rowses had not been properly served, and that the statute of limitations had expired except with regard to the claims of Allison Cheesman, a minor. The court entered findings of fact and conclusions of law and dismissed the case with prejudice as to three of the plaintiffs and without prejudice as to Allison Cheesman.

The Cheesmans appeal.

DISCUSSION

Personal injury actions must be commenced within three years. RCW 4.16.080. An action may be commenced by filing a complaint as long as the summons and complaint is served on the defendant within 90 days. CR 3(a); RCW 4.16.170. Substitute service of process is effective when a copy of the summons is left at the defendant's "usual abode with some person of suitable age and discretion then resident therein." RCW 4.28.080(15); Blankenship v. Kaldor, 114 Wn. App. 312, 316, 57 P.3d 295 (2002), review denied, 149 Wn.2d

1021 (2003). Although the term "usual abode" is liberally construed and a person may have more than one place of usual abode, substitute service must be accomplished at "a center of domestic activity" where the defendant "would most likely receive notice of the pendency of a suit if left with a family member." Sheldon v. Fettig, 129 Wn.2d 601, 610, 919 P.2d 1209 (1996). Whether a residence is a place of usual abode is a question of law that we review de novo. Blankenship, 114 Wn. App. at 316.

When the trial court has weighed the evidence, our review is limited to determining whether substantial evidence supports the findings and, if so, whether the findings in turn support the trial court's conclusions of law. Ridgeview Props. v. Starbuck, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Substantial evidence exists when the evidence is in "sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Ridgeview, at 719.

The Cheesmans first claim that the trial court failed to accord presumptive correctness to the affidavits of service and failed to require the Rowses to prove by clear and convincing evidence that the service was improper. See, e.g., Leen v. Demopolis, 62 Wn. App. 473, 478, 815 P.2d 269 (1991) (where default judgment has been entered based upon affidavit of service that is regular in form and substance and therefore presumptively correct, the person attacking service bears the burden to show by clear and convincing proof that the service was improper), review denied, 118 Wn.2d 1022 (1992); Woodruff v. Spence, 76 Wn.

App. 207, 210, 883 P.2d 936 (1994) (same); but see Farmer v. Davis, 161 Wn. App. 420, 427-30, 250 P.3d 138 (refusing to apply heightened burden of proof to defendant where no judgment was being attacked and requiring plaintiff to prove validity of service where defendant appeared in the action and put plaintiff on notice that sufficiency of process was at issue by affirmative defense), review denied, 172 Wn.2d 1019 (2011). The Rowses have not responded to this argument and do not address the applicable standard or burden of proof.

At the hearing, the Cheesmans cited authority and argued that the trial court must presume that the affidavits of service were correct and that the Rowses had the burden to show by clear and convincing evidence that service was improper. The Rowses did not argue for a different standard and did not attack the validity of the affidavits. Instead, the Rowses argued that the central question was whether the Everett house was a place of usual abode for Michael, which would be required for proper substitute service. Although the trial court's findings of fact and conclusions of law do not explicitly state the burden of proof applied here, it is clear from the oral ruling that the trial court presumed the affidavits to be valid. "So for the purpose of this case, the court's going to accept the declarations of service as stated valid on their face, and that service was effected twice on the brother at that residence." Nothing in the record indicates that the trial court resolved the only question raised regarding the affidavits and the process server's testimony, which David disputed in his testimony, of whether David actually indicated to the process server that Michael

lived at the Everett house. Rather, it appears that the trial court considered all the evidence presented at the hearing to make its findings. The trier of fact must weigh the evidence and determine whether it meets the applicable standard; the appellate function is to determine whether there is substantial evidence to support the facts as found. See Bland v. Mentor, 63 Wn.2d 150, 154, 385 P.2d 727 (1963). Under these circumstances, the Cheesmans fail to demonstrate any error regarding the weight assigned to the evidence by the trial court or its allocation of the burden of proof.

And the Cheesmans fail to establish that the challenged findings of fact are not supported by substantial evidence. The Cheesmans challenge the trial court's findings that (1) Michael Rowse lived in Arkansas at the time the suit was filed, (2) Michael Rowse never resided with his brother at the house in Everett, and (3) Michael Rowse did not request any transfer of his mail to his brother's house in Everett. Michael Rowse testified that he had moved to Arkansas in 2005 and produced an Arkansas driver's license issued December 27, 2006. He also testified that he had never lived with David and that he had never forwarded his mail to David's address. David Rowse also testified that Michael had never lived with him at the Everett house and that he (David) was the person who signed the request to forward mail addressed to the family of Anthony Rowse. As the trier of fact, the trial court was entitled to find David's trial testimony more credible than his statement at his earlier deposition that he did not recall requesting forwarding service for Anthony. Such credibility determinations are

not subject to appellate review. Fisher Props., Inc. v. Arden-Mayfair, Inc., 115 Wn.2d 364, 369-70, 798 P.2d 799 (1990).

The Cheesmans also complain that the trial court did not determine whether Michael Rowse had more than one residence or where substitute service could have been accomplished, given Michael's admission that he lived in his truck for all but a few days each month. See Sheldon, 129 Wn.2d at 610 (defendant had two places of usual abode: Chicago apartment where she had bank account and health club membership, and father's house in Seattle where she stayed when in Seattle, kept her belongings, and registered to vote). But the Cheesmans fail to identify any authority requiring the trial court to make such findings. The only essential inquiry was whether the Everett house was a place of usual abode for Michael. See Blankenship, 114 Wn. App. at 316 (where defendant challenged validity of substitute service, relevant inquiry is whether at the critical time the house where the plaintiff served the summons was a center of domestic activity for the defendant).

Here, the trial court correctly determined that David's home was not a center of domestic activity for Michael. He never lived at David's Everett home or stored any belongings there, except for a rifle that he retrieved some time before the lawsuit was filed. Michael did not forward his mail to David's address, and David only received "junk mail" addressed to Michael as a result of forwarding all mail from their father's address to his own home. Although Michael had a cellular phone with a 425 area code and a Washington State

driver's license issued in November 2005, there was no evidence that either had any connection to David's Everett address. Finally, there was no evidence Michael ever used David's address for any purpose such as employment, banking, billing, voter registration, or magazine subscriptions. As a matter of law, Michael did not conduct sufficient domestic activity at David's address to render the house a place of usual abode. See, e.g., Blankenship, 114 Wn. App. at 317 (defendant's father's house in Seattle was not place of usual abode where, before service was attempted, defendant had moved out of state, signed a lease, purchased a car, obtained employment and a new driver's license, and used her father's address only on her checking account); Streeter-Dybdahl v. Nguyet Huynh, 157 Wn. App. 408, 414, 236 P.3d 986 (2010) (service at defendant's former residence, which she no longer owned and where current resident, defendant's brother, kept mail for defendant in a special box, in the event she came by, was not proper based on lack of evidence house was center of domestic activity for defendant), review denied, 170 Wn.2d 1026 (2011); Vukich v. Anderson, 97 Wn. App. 684, 690, 985 P.2d 952 (1999) (despite evidence that resident received mail at and owned house where substitute service was attempted, specific evidence that another party was leasing his residence during the time of service and records indicating that he opened a bank account and purchased a house in another state demonstrated that house where service was attempted was not a usual place of abode).

In sum, contrary to the Cheesmans' arguments, the trial court's findings of

fact support its conclusions of law that (1) Michael and Sheree Rowse resided in Arkansas and maintained their domicile there at the time the lawsuit was filed, (2) neither Michael nor Sheree ever maintained a domicile at the house on 24th Drive Southeast in Everett, (3) defendants Michael and Sheree were not properly served with the summons and complaint, and (4) the statute of limitations had expired as to the claims of all plaintiffs except the minor Allison Cheesman.

Finally, without citation to relevant authority, the Cheesmans claim the service here was sufficient to satisfy constitutional due process because Michael received actual notice of the lawsuit from his brother David, or from their sister, as a result of the attempted substitute service. "But this general constitutional observation ignores specific statutory requirements for effecting service on an individual defendant in Washington." Gerean v. Martin-Joven, 108 Wn. App. 963, 971, 33 P.3d 427 (2001) (rejecting argument that defective substitute service is cured if summons is fortuitously delivered to defendant by person over age of 18 and not a party to the lawsuit), review denied, 146 Wn.2d 1013 (2002); Blankenship, 114 Wn. App. at 318 (rejecting argument that defendant's father became equivalent of process server by mailing copy of summons and complaint to defendant and discussing matter with her and insurance agent). Actual notice may be relevant to constitutional due process, but "such notice standing alone is insufficient to impart the statutory notice required to invoke the court's in personam jurisdiction." Thayer v. Edmonds, 8 Wn. App. 36, 40, 503 P.2d 1110

(1972), review denied, 82 Wn.2d 1001 (1973). Based on this record, the Cheesmans failed to properly serve the Rowses before the statute of limitations expired, at least as to three plaintiffs, and the trial court properly dismissed the suit with prejudice as to those three plaintiffs and without prejudice as to the remaining plaintiff.

Affirmed.

Becker, J.

WE CONCUR:

Ellington, J.

Cox, J.