STATE OF IDAHO)
County of KOOTENAI)ss

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CLERK OF DISTRICT COURT

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Deputy

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

JOHN LYNCH and REBECCA LYNCH, husband and wife, *Plaintiffs*, vs. **THOMAS SHIELDS and CHERYL DEAN-SHIELDS, husband and wife.** *Defendants*.	Case No. **CV 2007 2048** **MEMORANDUM DECISION AND ORDER DENYING MOTION TO SET ASIDE DEFAULT**

I. PROCEDURAL BACKGROUND.

An Order for Entry of Default in favor of plaintiffs Lynches and against defendants Thomas Shields and Cheryl Dean-Shields (Shields) was entered by this Court on April 18, 2007. On April 23, 2007, the Shields filed an Objection to the Entry of Default Judgment and a Motion to Set Aside Default, arguing improper service of process. Hearing on the Motion to Set Aside Default was held May 9, 2007, where the Court heard evidence and argument on the Defendant's Motion to Set Aside Default.

At the May 9, 2007, hearing, Lynches' process server Steven Reed testified that on March 25, 2007, he went to Shields' house in an attempt to serve them with a summons and complaint. Reed testified he was familiar with the Shields and their place of residence because he had served them before. Reed testified he arrived at the Shields' residence and knocked on their back door, which was a sliding glass door through which Reed could clearly see inside. Reed testified he could see a male, who

he believed to be Thomas Shields, standing in the living room of the house and talking on the telephone. Reed believed that the male individual saw him, and therefore he attempted to make contact with the male individual. Reed testified that when he knocked on the door, the male individual came toward the door but would not open the door. Instead, the male crawled under the kitchen table and continued on with his telephone conversation with his back toward Reed.

Because Reed could see the male individual on the floor about three to four feet away from where Reed was standing, and Reed could hear him speaking on the phone, Reed knocked on the door again and shouted to the individual that he had legal documents to serve and that he was going to leave those documents outside the door underneath a rock. Reed informed the individual that he had been served and that he did not have to touch the papers. Reed then left the legal documents with a rock on top of the legal documents, on the doorstep in a visible place such that the individual inside would have to step on the documents to get out of the door.

Although Thomas Shields did not testify at the May 9, 2007, hearing, he had previously submitted an affidavit to the court asserting he did not see anyone leave legal documents on his back porch, nor did he hear anyone announce that he was being served on or about the date of March 25, 2007. Shields also asserted in his affidavit that he did not hide under his kitchen table on that day or any other day. Shields stated in his affidavit that he found the legal papers on the back porch. Shields stated he took those papers to his attorney who advised him that service was not proper and that Shields should not take any action unless and until an Affidavit of Service was filed with the court. Shields' counsel stated that he had his staff check with the Clerk of Court to see if an Affidavit of Service was filed, and if there was, they would have filed

an answer to the complaint.

After hearing testimony and oral argument, the Court found Reed to be credible. The court found it more probable than not that Reed served either Thomas Shields, or a person over the age of eighteen residing at the Shields' residence, and that that person was avoiding service of process. The Court asked for supplemental briefing relating to the issues of whether leaving legal papers outside the door, under a rock, constitutes proper service of process and whether default on the basis of actual service can be converted to a default by acknowledgement. Both parties submitted supplemental briefing, which the court has reviewed. The matter is now at issue.

II. ANALYSIS.

A. Service of Process was Sufficient Under These Facts.

There is no Idaho case directly on point. However, there are several cases from other jurisdictions that provide guidance to this Court regarding sufficiency of service of process. The purpose of process is to give the addressee actual notice of the action filed against him and an opportunity to respond. *Liberty Mutual Insurance Co., v. Rapton,* 140 Ariz. 60, 62, 680 P.2d 196, 198 (Ct.App.Ariz. 1984). Service of process does not require "in hand" delivery, and the rules governing service are utilized for the purpose of providing a likelihood of bringing actual notice to the intended recipient. *Minnesota Mining & Manufacturing Co., v. Kikevold*, 87 F.R.D. 317 (D.Minn.1980). Personal service of process should not become a degrading game of wiles and tricks, and a defendant should not be able to defeat service simply by refusing to accept the papers or instructing others to reject service. *Wood v. Weenig*, 736 P.2d 1053,1055 (Ct.App. Utah 1987). In that case, default was granted upon complete service where the process server left the papers on the porch when a person who identified herself

over the front door intercom as the defendant's daughter refused to open the door to accept service as she had been instructed by her father not to accept any legal papers. The rules governing service are not designed to create an obstacle course for plaintiffs to navigate, or a cat-and-mouse game for defendants who are otherwise subject to the court's jurisdiction. *TRW, Inc. v. Derbyshire*, 157 F.R.D. 59 (D.Col. 1994).

Service of process is complete when the facts "demonstrate a clear attempt by the process server to yield possession and control of the documents" to the defendant. *United Pacific Insurance v. Discount Co*., 15 Wn.App. 559, 562, 550 P.2d 699, 702 (Ct.App.Wn.1976). In that case, the corporate secretary for the defendant slammed the door on the process server, knocking the papers from his hand. The court held service was effectuated, and defendant's motion to vacate the default judgment was denied. Where the defendant has received actual notice of the action, the rules governing process should be liberally construed to effectuate service and uphold the jurisdiction of the court. *Ali v. Mid-Atlantic Settlement Services*, 233 F.R.D. 32 (D.Col. 2006).

In *Nielsen v. Braland,* 264 Minn. 481, 119 N.W.2d 737 (Minn. 1963), the process server tried to give the summons to the defendant and left them on the fender of a car when defendant refused to accept service. The Minnesota Supreme Court held: "…if the process server and the defendant are within speaking distance of each other, and such action is taken as to convince a reasonable person that personal service is being attempted, the service cannot be avoided by physically refusing to accept the summons." 246 Minn. at 484, 119 N.W.2d at 740.

In *Valley v. Bogard*, 324 Ark. 336, 28 S.W.3d. 296 (2000), the Supreme Court of Arkansas found valid service of process when the process server stuck the papers through the appellant's front door after the appellant refused to accept service of

process. *Id*. at 271. The process server testified that he "saw Valley's truck in his driveway, knocked on his door, received no answer, went to a side window, saw Valley inside, made eye contact with him, announced that he had papers for Valley, saw Valley fall to his knees and crawl to the back of the house, and stuck the process papers through the front door". *Id*. The court found that service was complete although Valley refused to accept personal service because the process server announced his purpose and then left the papers at Valley's house. *Id*. at 272.

In *Gambone v. Lite-Rock Drywall Corp.*, 2003 WL 21891584 (E.D. Pa. 2003), the Court found that even though the defendant refused physical acceptance of a summons, service was complete because the defendant was "in close proximity to a process server under such circumstances that a reasonable person would be convinced that personal service was being attempted". *Id*. at p. 4. The court found service effective when the process server found the defendant at his dwelling house and announced her business, but the defendant refused to open the door and accept personal service. *Id*. The process server left the papers under the door mat after she announced to the defendant that he had been served. *Id*. The court found the defendant's refusal to open the door did not invalidate service of process because personal service need not be face to face or hand to hand. *Id*.

The Supreme Court of South Carolina refused to find proper service when the process server posted the summons and complaint on the front door of the Petitioner's residence. *BB&T v. Taylor*, 396 S.C. 548, 554, 633 S.E.2d 501, 505 (2006). The process server had made nine visits to the petitioner's residence attempting to serve her. 396 S.C. at 550, 633 S.E.2d at 503. The server claimed that on his final attempt, he noticed the petitioner's car in the driveway and believed there was someone inside

the residence who would not open the door to communicate with him. *Id*. The server announced his intent to leave the papers and then posted the documents on the front door. 396 S.C. at 551. 633 S.E.2d at 504. The court found that the petitioner was not properly served under the facts of the case because the process server never saw or spoke to anyone who resided at the residence. *Id*. at 554. The Shields argue the evidence in the present case does not support the conclusion that the person inside the Shields' house was evading and/or refusing service. Supplemental Briefing on Motion to Set Aside Default, p. 2, n. 1. To the contrary, this Court finds that the person of sufficient age inside the Shields' home, three to four feet away, could hear what Reed was saying to him, and was in fact either evading or refusing service. Reed testified he could see him, he could hear him. Those facts are absent in *BB&T.*

The courts have made it clear that whether or not service is effective turns on the facts and circumstances of each case. *ALI v. Mid-Atlantic Settlement Services*, 233 F.R.D. 32, 35 (D.Col. 2006). Case law also holds that where the Plaintiff has made a good faith effort to serve the defendant, and the defendant receives actual notice pursuant to the rules of civil procedure, service of process is effective. *Id*. at 36. The courts are quick to recognize that service of process is not a "game of hide and seek" or a game of "wiles and tricks," and therefore good faith efforts at service are effective particularly where the defendant has engaged in evasion, deception, or trickery to avoid being served. *Id*. at 37.

Service is effective even though the defendant refuses physical acceptance of the documents, so long as the defendant has received actual notice. *See Gambone v. Lite-Rock Drywall Corp.*, 2003 WL 21891584 (E.D.Pa.) (in cases where the defendant has attempted to evade service, service was found sufficient despite a failure to

manually deliver the process); *Villanova v. Solow*, 1998 WL 643686 (E.D.Pa.) (refusal of a defendant to open a door does not invalidate plaintiff's service); *Bossuk v. Steinberg,* 58 N.Y.2d 916, 447 N.E.2d 56 (1983) (sufficient delivery found where the process server announced intention to leave the summons and complaint and left a copy of the documents outside the defendant's door after a person of suitable age and discretion refused to open the door to accept service).

Courts are also quick to recognize service of process where the defendant is in close proximity to the process server and the particular circumstances show that a reasonable person would know that personal service was being *attempted*. The facts of this case are very similar to those in *Valley*, where the court found proper service after the process server left a copy of the legal documents at the defendant's door because the defendant refused to answer. In *Valley*, the process server saw Valley through a window, made eye contact with him, and then attempted to serve him with process even after Valley tried to hide from him. The same happened in this case when Mr. Reed attempted to serve Mr. Shields. Reed saw an individual inside the Shields' residence and attempted to make contact with the individual even after the individual tried to hide under the kitchen table. Furthermore, as in *Valley*, Reed announced his purpose and then left the papers at the Shields' residence.

The facts in *Gambone* are also substantially similar to the facts in this case. In *Gambone*, the court found proper service when the process server found the defendant at his residence, announced her business, and then left the papers under a mat on the porch when the defendant refused to open the door. In the present case Reed found an individual he believed to be the defendant (or in any event, an individual believed to be of suitable age) at the Shields' residence, announced his business, and then left the

papers under a rock on the porch after the individual refused to open the door.

Although the court in *BB&T* refused to find proper service after the process server announced his intent to leave the papers and then posted the documents to the front door, the facts of that case can be distinguished from those in the present case. In *BB&T*, the process server never *saw* or *spoke* to anyone who resided at the residence, but instead left the papers when he believed there was someone inside the residence who would not communicate with him. The court refused to accept service of process because the process server could only speculate that an individual of suitable age was inside the petitioner's residence. In this case Reed testified that he saw a person inside the Shields' residence, a person who Reed believed to be the defendant Thomas Shields or someone of suitable age, and only left the papers after that individual refused to open the door or communicate with Reed.

While Idaho has no case law on point, these cases from other jurisdictions support a finding of proper service in this case. Thomas Shields (or a person of sufficient age in the Shields' residence) was in close proximity to the process server; in fact, so close that the process server testified that he could hear that person's telephone conversation through the sliding glass door. The circumstances of this case are such that a reasonable person would be convinced that personal service was attempted. Reed testified that he saw an individual inside the Shields' residence who appeared to be of sufficient age to accept service of process. That individual's refusal to open the door does not invalidate service of process. The purpose of process was met in this case because the addressee received actual notice of the action filed against him and had ample opportunity to respond. If the person on the phone was Thomas Shields, service occurred because Shields had to have heard what Reed was saying. If the

person on the phone was someone of appropriate age at the Shields residence, the same conclusion is reached. There is no way that person would have any doubt that Reed was trying to accomplish service. It is also inconceivable that this person would not relay to the Shields the sequence of events that occurred between that person and Reed. However, that is not relevant. All that matters is this Court finds that person was of sufficient age, and he was made aware by Reed of his efforts to effectuate service.

B. Service Was Not Accomplished by Acknowledgement.

Thomas Shields states that "On or about March 25, 2007, I found a Complaint for Declaratory Judgment, Quiet Title, and Injunctive Relief (the Complaint) and a Summons under a rock on my back porch." Affidavit of Thomas Shields, pp. 1-2, ¶ 2. Shields then "took the Complaint and Summons that I found on the back porch to my attorney, Gary Amendola." *Id.* p. 2, ¶3. Thomas Shields "acknowledges" the lawsuit.

Shields' counsel argues: "A subsequent acknowledgement in no way supports the taking of default." *Rudd v. Merritt,* 138 526 (2003)." Supplemental Briefing on Motion to Set Aside Default, p. 5. *Rudd* does not state that. *Rudd* states that "knowledge by the defendant of plaintiff's claim does not constitute a waiver of the mandatory requirement that the plaintiff serve the summons and complaint timely." 138 Idaho at 533, 66 P.2d at 237.

One of three scenarios occurred. First, the person on the phone was Thomas Shields (though Thomas Shields in his affidavit denies this, Thomas Shields Affidavit, p. 2, ¶2), and Shields knew he had been served. Second, a male present at Shields' residence knew that Reed was trying to serve the Shields, and he conveyed that information to one of the Shields. Third, a male present at Shields' residence knew Reed was trying to serve the Shields and kept that information to himself.

Regardless of which of these three scenarios actually occurred, since Thomas Shields admits *he* found the complaint and summons on his back porch, he has acknowledged the existence of the lawsuit. Thomas Shields admits he has "actual notice" of this lawsuit. In *ALI v. Mid-Atlantic Settlement Services*, 233 F.R.D. 32, 36 (D.Col. 2006), the federal district court held "Where the defendant receives **actual notice** and the plaintiff makes a good faith effort to serve the defendant pursuant to the federal rule, service of process has been effective." *Id.* (emphasis added). In *Liberty Mutual Insurance Co., v. Rapton,* 140 Ariz. 60, 680 P.2d 196, 198 (Ct.App.Ariz. 1984), the Arizona Court of Appeals held

> The purpose of process is to give the addressee **actual notice** of the action filed against him and an opportunity to respond. "It is this notice which gives the Court jurisdiction to proceed." *Scott v. G.A.C. Finance Coproration,* 107 Ariz. 304, 305, 486 P.2d 786, 787 (1971). Where the defendant actually receives notice of the action, the requirements of service under Rule 4(d)(1) of the Arizona Rules of Civil Procedure will be liberally construed.

140 Ariz. at 62, 680 P.2d at 198. (emphasis added). This Court finds Thomas Shields' act of "finding" the papers and taking them to his attorney does not constitute service of process by "acknowledgement" as set forth in Idaho Rule of Civil Procedure 4(d)(6). However, Thomas Shields' "finding" the papers and taking them to his attorney clearly illustrates why the facts as related by Mr. Reed constitute service, and why such service is fair to the defendants in this case. They took the papers to their attorney!

The facts of this case which occurred after Reed's service at the Shields' residence are very similar to the facts in *Liberty Mutual Insurance Co., v. Rapton.* In that case, service was made upon the defendant's fiancée who was living at the residence. The defendant called his attorney who advised him service was not proper and to "disregard the pleadings." 140 Ariz. at 62, 680 P.2d at 198. Default judgment

was taken and when it was sought to be set aside, the trial court denied the motion. Not only was the service proper, but the Arizona Court of Appeals held there was no excusable neglect due to the improper legal advice he received from his attorney. As noted in Plaintiffs' Supplemental Brief, page 5, the Arizona Court of Appeals held:

> Advice of counsel in a case such as this is not excusable neglect. The neglect of an attorney is attributed to the client and, unless the attorney's neglect is legally excusable, the client will not be excused. *United Imports and Exports, Inc. v. Superior Court,* 134 Ariz. 43, 653 Pl.2d 691 (1982).
>
> The question here is whether a reasonably prudent attorney would have completely ignored the complaint. We think not. At the very least, counsel ought to have made some objection to the service under Rule 12 or filed an answer containing the defense of improper service. To err on the side of nonfeasance in this case was at best risky.

140 Ariz at 64, 680 P.2d at 200. Counsel for Shields claims "The Record of Action in this matter was checked several times during the period preceding entry of default to see if an Affidavit of Service had been filed." Memorandum in Support of Motion to Set Aside Default, p. 2. Just as in *Rapton,* such conduct is "at best risky."

III. CONCLUSION AND ORDER.

The above cases show why, given the uncontradicted facts as testified to by process server Steven Reed, process was effectuated on March 25, 2007, by Reed's one sided conversation with an individual of proper age at the Shields' residence, and subsequent leaving them under a rock in front of the door through which Reed had been informing the male inside what he was there to do, and in fact doing.

IT IS HEREBY ORDERED Defendants' Motion to Set Aside Default is **DENIED**.

Entered this 4th day of June, 2007.

_____
John T. Mitchell, District Judge

Certificate of Service

I certify that on the _____ day of June, 2007, a true copy of the foregoing was mailed

postage prepaid or was sent by interoffice mail or facsimile to each of the following:

Lawyer	**Fax #**	**Lawyer**	**Fax #**
Scott L. Poorman	772-7243	Gary I. Amendola	765-1046

_____
Secretary