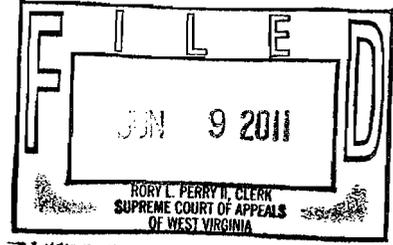


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

NO. 11 – 0430



KERRY SAVARD,
as Personal Representative of
the Estate of Vicki Savard,

Petitioner/Plaintiff Below

Jefferson County Circuit Court
Civil Action No. 10-C-94
The Hon. John C. Yoder

v.

CHEAT RIVER OUTFITTERS, INC.,
BRENT MATTHEW EVERSON,
TRAVIS COBB, SIMON BUCKLAND, and
PAUL HART,

Respondents/Defendants Below.

PETITION FOR APPEAL
PETITIONER'S BRIEF

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I. ASSIGNMENTS OF ERROR

1. The circuit court erred in dismissing the Petitioner's wrongful death action under West Virginia Rule of Civil Procedure 12(b)(2) for lack of personal jurisdiction over Respondent/Defendant Travis Cobb, as service was proper pursuant to W.Va. R. Civ. P. 4(d)(1)(B).

2. The circuit court erred in dismissing the Petitioner's wrongful death action under W.Va. R. Civ. P. 12(b)(3) because venue is proper in Jefferson County under West Virginia's venue statute, W.Va. Code §56-1-1.

II. STATEMENT OF THE CASE

Petitioner Kerry Savard brought a wrongful death action because of his wife's death due to the failure of the Respondents, a commercial whitewater outfitter and whitewater guides, to comply with the West Virginia Whitewater Responsibility Act, West Virginia Code §20-3B-1 et seq. The circuit court dismissed the complaint against Respondent Cobb for improper service of process, because the court held, Cobb's "usual place of abode" was not the address he used on his valid West Virginia driver's license, which is his parents' home in Jefferson County, but a boat in Rhode Island. As Respondent Cobb was the venue-granting party, the court consequently dismissed the entire case for lack of venue.

The circuit court erred by determining that Respondent Cobb was improperly served and that venue was not proper in Jefferson County. Cobb's father accepted service at the address Cobb had used on his valid West Virginia driver's license. At the time of service, Cobb's father told the process server that Cobb was "away on a trip." Cobb had used the Charles Town address on his renewal application for a driver's license

with the West Virginia Division of Motor Vehicles not less than six months before his father accepted service of the summons and complaint at the residence and again during the pendency of his own motion to dismiss for insufficient service of process.

Respondent Cobb received timely actual notice of the lawsuit against him in the place that he himself admits is the best place to reach him, as shown by his registering this address with the United States Postal Service (“USPS”) and his affidavit statement saying that he used this address “in an effort to insure that [he] would receive all important correspondence including correspondence related to [his] license despite the fact that [he] moved frequently and several times a year to live and work in West Virginia as a whitewater guide.” (Appendix 130-31). Moreover, Cobb admits that, in his experience, he “cannot depend upon receiving important mail if he does not use [his] parents’ address for that purpose.” *Id.* Cobb was an itinerant worker traveling around the country for work depending on the season, and he considered his parents’ home in Charles Town as his “home base.”

Petitioner filed this suit in a timely fashion. His wife, Vicki Savard was killed on May 17, 2008. Pursuant to W.Va. Code §55-7-6, the statute of limitations on a wrongful death action in West Virginia is two years from the date of death, in this case May 17, 2010. Here, Petitioner filed suit on March 22, 2010, well within the statute of limitations. The Defendants filed their Motions to Dismiss and Answer with Affirmative Defenses on April 12, 2010; however, the circuit court did not enter a scheduling order for consideration of Defendants’ motions until November 28, 2010, and did not rule on the motion until February 8, 2011, ten months after the motion had been filed.

A. Procedural History

Vicki Savard drowned on May 17, 2008, because the Respondents violated the West Virginia Whitewater Responsibility Act. On March 22, 2010, Petitioner, by counsel, filed a wrongful death complaint in the Circuit Court of Jefferson County. On April 12, 2010, Respondents filed their *Motion to Dismiss and Answer with Affirmative Defenses*. Included in that document were the following:

- 1) *Motion to Dismiss Pursuant to W.Va. R. Civ. Proc. 12(b)(2) by Defendant Travis Cobb for lack of Personal Jurisdiction;*
- 2) *Motion to Dismiss pursuant to W.Va. R. Civ. Proc. 12(b)(3) for Lack of Venue;*
- 3) *Motion to Dismiss by Defendant Paul Hart, pursuant to W.Va. R. Civ. Proc. 12(b)(6);*
- 4) *Motion to Strike pursuant to W. Va. R. Civ. Proc. 12(f); and*
- 5) *Defendants' Answer.*

The court below entered its *Order Granting Travis Cobb's Motion to Dismiss and Dismissing Case for Lack of Venue* on February 8, 2011. (Appendix 182-92). The court held that substituted service had not been accomplished on Respondent Cobb at his "usual place of abode" under W.Va. R. Civ. Proc. 4(d)(1). Subsequently, the court dismissed the case against Respondent Cobb even in the face of evidence that he lived at his parents' address at 705 South Samuel Street, Charles Town, West Virginia, and had used the address both on his valid West Virginia driver's license and with the USPS. Instead of granting appropriate weight to the evidence that Respondent Cobb represented himself to the world as a resident of Charles Town, the court below determined that his temporary stay on a boat in a marina in Rhode Island obviated the effectiveness of substituted service.

Having erroneously found that it lacked jurisdiction over Respondent Cobb, the court also dismissed the case for lack of venue. As those two decisions disposed of the case, the court did not consider any of the other pending motions.

B. Statement of Facts Relevant to the Appeal

In March 2010, the Petitioner filed his complaint in this wrongful death action in the Circuit Court of Jefferson County. (Appendix 5-14). In accordance with W.Va. R. Civ. Proc. 4, Petitioner attempted service of a summons and a copy of the complaint on each Respondent. Service was effected on Defendant/Respondent Cheat River Outfitters (“CRO”) by personal service of the summons and complaint on April 7, 2010. (Appendix 83). Both Defendant/Respondent Paul Hart and Defendant/Respondent Simon Buckland were personally served with copies of the summons and complaint. (Appendix 67, 17 respectively). Although the Plaintiff was unable to serve Defendant/Respondent Brent Everson, he waived service by filing an “Answer with Affirmative Defenses” in conjunction with the other Respondents. *See In re Appointment of Trustees for Woodlawn Cemetery*, 222 W.Va. 351, 664 S.E.2d 692 (2008).

Only Respondent Cobb challenged service of process, which was accomplished on him through substituted service upon his father, Gregory Cobb, at his home at 705 South Samuel Street in Charles Town, West Virginia. (Appendix 15). Petitioner did not make the decision to serve Cobb in Charles Town lightly; instead, Petitioner understood Respondent Cobb to be a fairly transient seasonal worker whose varied employment caused him to move frequently around the country. Petitioner sought to effect service upon Respondent where he was most likely to receive actual notice of the suit pending against him, his home in Charles Town, West Virginia.

On March 24, 2010, process server Robbie R. Roberts attempted service on Defendant Cobb at the Charles Town address, where he spoke to Defendant Cobb's father, Gregory Cobb. Once advised of the content of the summons and complaint, Mr. Cobb accepted service, indicating that his son was "on a trip." (Appendix 112-13). According to Mr. Roberts, Mr. Cobb further stated "that he would deliver [the summons and complaint] to the attorneys who represented Travis Cobb in the matter." *Id.*

III. SUMMARY OF THE ARGUMENT

The circuit court erred in determining that the Petitioner had not met his burden of establishing a *prima facie* case of personal jurisdiction. The Petitioner complied with all of the requirements necessary for effective substituted service pursuant to W.Va. R. Civ. Proc. 4(d)(1)(B), including delivering a copy of the summons and complaint to the "dwelling or usual place of abode" of the venue-granting party, Respondent Travis Cobb. Cobb lives a transient lifestyle that causes him to relocate every few months; in fact, during the pendency of this action, Respondent Cobb moved three times in only fifteen months, living twice on a boat. During that time, he held a valid West Virginia driver's license that listed as his home his parents' address in Charles Town, West Virginia, and also elected to list that address with the USPS. Petitioner served Respondent Cobb at his Charles Town home, the address Cobb represented to the world as his residence, and the Respondent did indeed receive service. Thus, service of process was proper, and Petitioner did indeed present a *prima facie* case of personal jurisdiction. This Court should reverse the decision of the court below.

Since Respondent Cobb is the jurisdiction granting party in this case, and since he is indeed subject to personal jurisdiction, venue in the Circuit Court of Jefferson County

is appropriate under W.Va. Code §56-1-1. Respondent Cobb himself admitted residence in Jefferson County by listing the address of his home in Charles Town on both his driver's license and with the USPS. Venue in Jefferson County is therefore appropriate for Respondent Cobb, and, consequently, all of the parties in this case.

IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

The Petitioner requests oral argument under Rule of Appellate Procedure 19. This appeal turns on the central question of whether or not 705 South Samuel Street, Charles Town, West Virginia was Respondent Cobb's dwelling or "usual place of abode" under W.Va. R. Civ. Proc. 4(d)(1)(B). Although precedent offers some guidance on application of the law to the facts, there is little dispositive case law on the issue. Consequently, oral argument in this appeal would help to clarify and focus the relevant issues.

In light of the uncertain guidance provided by existing case law concerning the meaning of the phrase "dwelling or usual place of abode" as used in W.Va. R. Civ. Proc. 4(d)(1)(B), the Petitioner requests that this Court continue to clarify that meaning by issuing a W.Va. R. App. Proc. 22 opinion in this case.

V. ARGUMENT

It is well established in West Virginia that proper service of process is necessary to confer jurisdiction upon a circuit court. *Beane v. Dailey*, 226 W.Va. 445, 701 S.E.2d 848 (2010) (*per curiam*); *State ex rel. Farber v. Mazzone*, 213 W.Va. 661, 584 S.E.2d 517 (2003). Pursuant to W.Va. R. Civ. Proc. 4(c), a defendant must be served with a summons and a copy of the complaint before personal jurisdiction can attach. Courts are clear that the "object of the [service] statute was to enable the defendant to know, or have

notice, of the action against him, that he might protect his rights therein.” *Williamson v. Taylor*, 96 W.Va. 246, 122 S.E. 530 (1924) (quoting *Capehart, Adm’r, v. Cunningham, Adm’r*, 12 W.Va. 750 (1878)). In the instant case, this requirement was satisfied pursuant to W.Va. R. Civ. Proc. 4(d)(1)(B), which states that substituted service can be made by

[d]elivering a copy of the summons and complaint at the individual’s dwelling place or usual place of abode to a member of the individual’s family who is above the age of sixteen (16) years and by advising such person of the purport of the summons and complaint.

Respondent Cobb does not argue that the Petitioner failed to deliver both the summons and complaint to a family member more than sixteen years of age or to advise such a person of the contents of the summons and complaint. What Respondent Cobb does argue is that the summons and complaint were not delivered to his “usual place of abode” within the meaning of the rule.

A. The standard of review for this case is *de novo*.

First, this Court reviews a circuit court’s order granting a motion to dismiss a complaint for lack of personal jurisdiction *de novo*. *Easterling v. American Optical Corp.*, 207 W.Va. 123, 529 S.E.2d 588 (2000); *State ex rel. McGraw v. Scott Runyan Pontiac-Buick*, 194 W.Va. 770, 461 S.E.2d 516 (1995). Additionally, this Court reviews *de novo* a circuit court’s ruling regarding a question of law or the interpretation of a statute. *Bowers v. Wurzburg*, 205 W.Va. 450, 519 S.E.2d 148 (1999).

Second, on the issue of improper venue, this Court reviews the circuit court’s decision on a motion to dismiss for improper venue for abuse of discretion. *Caperton v. A.T. Massey Coal Co., Inc*, 225 W.Va. 128, 690 S.E.2d 322 (2009); *United Bank v. Blosser*, 218 W.Va. 378, 624 S.E.2d 815 (2005). “An abuse of discretion occurs when the trial court’s decision is clearly against the logic and effect of the facts and

circumstances before the court.” *In re West Virginia Rezulin Litigation*, 214 W.Va. 52, 585 S.E.2d 52 (2003) (citing *Associated Medical Networks, Ltd.v. Lewis*, 785 N.E.2d 230 (Ind. Ct. App. 2003)). In the case at bar, the circuit court discounted Respondent Cobb’s own claim of residency in Jefferson County and therefore dismissed the case for lack of venue. This action represents an abuse of discretion and warrants reversal of the circuit court’s decision.

B. In the court below, the Petitioner met his burden and made a *prima facie* showing of personal jurisdiction.

When a defendant files a motion to dismiss for lack of personal jurisdiction under W.Va. R. Civ. Proc. 12(b)(2), the party asserting jurisdiction need only make a *prima facie* showing of personal jurisdiction in order to survive a motion to dismiss. *Griffith & Coe Advertising, Inc. v. Farmers & Merchants Bank and Trust*, 215 W.Va. 428, 599 S.E.2d 851 (2004). In determining whether a party has made a *prima facie* showing of personal jurisdiction, the court must view the allegations in the light most favorable to such party, drawing all inferences in favor of jurisdiction. Syl. Point 4, *State ex rel. Bell Atlantic-West Virginia, Inc. v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997). “In that regard, the allegations and inferences in the record are to be viewed in favor of such jurisdiction.” *Griffith & Coe Advertising, Inc.*, 215 W.Va. at 430, 599 S.E.2d at 853.

In the instant case, this Court should determine that the Petitioner made a *prima facie* showing of personal jurisdiction below. Petitioner has demonstrated that Respondent Cobb used his Charles Town address on his valid West Virginia driver’s license and with the USPS. Most importantly, Cobb received actual and timely notice of the suit pending against him. This Court should reverse the decision of the court below.

C. The Petitioner complied with all requirements of substituted service under W.Va. R. Civ. Proc. 4(d)(1)(B); therefore, service on Respondent Cobb was perfected and the court had personal jurisdiction over him.

In this case, the Petitioner's process server specifically complied with each of the requirements of substituted service as stated in W.Va. R. Civ. Proc. 4(d)(1)(B).

Examination of the return of service and affidavit attested to by process server Robbie Roberts, makes it apparent that both the summons and complaint were personally delivered to Cobb's father Gregory Cobb, an individual over sixteen years of age, and that Roberts informed Gregory Cobb of the purport of those documents. (Appendix 15). Furthermore, the return of process indicates that Roberts delivered the summons and complaint to the address believed to be the Respondent's "usual place of abode." *Id.*

The circuit court recognized that Cobb "uses this address to ensure that ultimately he will receive important mail" but then dismissed the importance of that by stating, without authority, "[i]n the absence of other indicia that a person resides at a particular address, receipt of mail alone does not establish an individual's 'usual place of abode.'" The lower court did not address the importance of the use of the address for the driver's license, that Cobb's father indicated that Cobb was merely away "on a trip" or, most importantly, that Cobb had received actual notice. Rather, the circuit court applied for a strict construction of service of process, citing cases that relate to default judgment under the no longer applicable posting rule, then using the dicta of the *per curiam* decision in *Beane v. Dailey*, 226 W.Va. 445, 701 S.E.2d 848 (2010), to justify its decision. Importantly, the circuit court confused the validity of a default judgment, where there has been no actual notice, versus the validity of substituted service on someone who does receive actual notice. The circuit court gave all inferences to Cobb

and failed to consider the implications of dismissing a wrongful death lawsuit because of a crabbed interpretation of outdated statutes.

In West Virginia, courts considering the issue of substituted service have not dealt extensively with the issue of what constitutes an individual's "usual place of abode." In cases under the old service rule which allowed for posting of the summons and complaint at a defendant's "usual place of abode,"¹ this State's courts held that summons must be "posted, not at a place of casual abode, but one of present abiding." *Williamson*, 96 W.Va. at 247, 122 S.E. at 531 (citations omitted). Because the rules governing service are designed to provide a defendant with notice of a pending lawsuit, this strict construction made sense under the old rule allowing for posting of summons. However, W.Va. R. Civ. Proc. 4(d)(1) eliminated posting as a valid means of service and obviated the need for such strict construction of the rules, particularly where there is ample evidence that the Defendant maintains regular contact with the individuals upon whom substituted service was effected for the express purpose of learning of important communications delivered to him at that address. (Appendix 130-31).

The Respondent argued that West Virginia courts have held that an individual's "usual place of abode" is the place where he is at that moment residing. To support this assertion, he relies on a *per curiam* opinion, *Beane v. Dailey*, which is distinguishable from the one at bar. In *Beane*, a service member stationed at an Air Force base in Missouri was involved in a motor vehicle accident in West Virginia. A woman injured in the accident brought suit against Mr. Dailey and attempted substituted service at his

¹ Barnes' Code of W.Va. §6, c. 124 (1923).

mother's home in West Virginia. Mr. Dailey did not appear at trial, and a default judgment was entered against him. Evaluating service, this Court noted that there was

neither evidence in the record herein, nor even an assertion that Mr. Dailey was served at his "dwelling place or usual place of abode" by Ms. Beane. As previously discussed, the only information in the record before this Court is Mr. Dailey's assertion that he did not reside in West Virginia at the time of attempted service by Ms. Beane. Further, the return of service did not indicate that Mr. Dailey's mother's residence was his "usual place of abode." This assertion by Mr. Dailey is uncontroverted by the record and is not refuted by Ms. Beane, and, therefore, the circuit court's entry of default judgment was an abuse of discretion as it was based solely upon an insufficient return of service and was "personally served" upon Mr. Dailey's mother.

Beane, 226 W.Va. ___, 701 S.E.2d at 854. The Court stated that there was no statement in the return of service that Mr. Dailey's mother had been advised "of the purport of the summons and complaint" in accordance with W.Va. Rule Civ. Proc. 4(d)(1)(B). The *Beane* Court overturned the default judgment against Mr. Dailey not because service was not effected at his "usual place of abode," but because the default judgment was based upon insufficient return of service.

The facts of the case at bar are very different from those of *Beane*. First, Petitioner in this case offers abundant evidence that 705 South Samuel Street, Charles Town, West Virginia is Cobb's "usual place of abode." The record in *Beane* was devoid of any such evidence. Cobb's father, who accepted substituted service, never denied his son's residence at the Charles Town address. Instead, he informed the process server that his son was "on a trip" and accepted service with a promise "that he would deliver [the summons and complaint] to the attorneys who represented Travis Cobb in the matter." (Appendix 15). Additionally, the return of service for Respondent Cobb was sufficient; it indicated complete

compliance with the rules of service and should consequently be allowed to stand.

(Appendix 15).

- 1. The transient nature of Respondent Cobb's life necessitates a finding that his "usual place of abode" at the time of substituted service was 705 South Samuel Street, Charles Town, West Virginia.**

Although a number of jurisdictions besides West Virginia, including federal courts, employ the phrase "dwelling place or usual place of abode," there exists little black letter law defining those terms. It is widely accepted that

[w]hat constitutes [an individual's] dwelling house or usual place of abode depends upon the facts of each particular case. Factors which are considered in determining whether a place is a defendant's usual place of abode include the retention of a room and storage of possessions there, the intention to return, the use of that address on official forms such as drivers' licenses and voters' registrations, the use of a telephone listing at that location, a failure to provide the post office with a forwarding address, the receipt of actual notice, and the defendant's ability to present at least some evidence that his or her abode is elsewhere.

62B Am.Jur.2d. Process, §195; *see also Redmondi v. Girard*, 45 Conn. L. Rptr. 307, 2008 WL 1914252 (Conn. Super. Ct. 2008); *Garcia*, 363 B.R. 503.

Based on the information and belief that Defendant Cobb was largely transient, working seasonal jobs at various locations throughout a given year, Petitioner determined that Defendant Cobb's dwelling place or "usual place of abode," was his parents' house in Charles Town, West Virginia, which was where the Respondent maintained a valid West Virginia driver's license and registered his address with the USPS. This was the place where Respondent was most likely to and in fact, did indeed receive actual and timely notice of the suit pending against him.

There simply exists no other logical place to serve Cobb. He has led a “migratory” life. Since ending his career as a full time student in 2004, Cobb has held a series of seasonal jobs at locations throughout the country. (Appendix 129-31). During the pendency of this action alone, Respondent claims to have lived in three separate places during a fifteen-month period. He alleges that he lived on his boat in Greenwich from December 2009 until August 2010, before returning to Fayette County, West Virginia to work as a river guide in September 2010. (Appendix 130-31). Additionally, he allegedly moved his boat from Rhode Island to Beaufort, South Carolina in September 2010 before beginning his seasonal employment as a guide. (Appendix 130).

When a party has no permanent residence, courts hold that “the likelihood of the defendant appearing at the place of service in the near future coupled with the absence of a permanent residence elsewhere [renders service effective when] made at a residence maintained with a member of the [party’s] family even if the [party] is seldom there.” 4A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* 521-22 §1096 (3d ed. 2002) (examining the meaning of the phrase “dwelling or usual place of abode” in Fed. R. Civ. Proc. 4(e)(2)); *see, e.g., Thanco Products and Imports, Inc. v. Kontos*, 2009 WL 540963 (S.D.Tex. 2009); *Skidmore v. Green*, 33 F.Supp 529 (D.C.N.Y. 1940).

Respondent has spent varying amounts of time in different locations but has consistently represented his own home as being his parents’ home in Charles Town, West Virginia, as evidenced by the fact that he has held a valid West Virginia driver’s license with that address since 2003, deliberately renewing it multiple times during that period.

Given the Respondent's relative mobility and the frequency with which he relocates, Cobb's "usual place of abode" is in Charles Town, West Virginia. Respondent Cobb may well have laid his head in multiple locations over the past several years, but he broadcast to the world and represented to the State that his home was in Charles Town.

A similar fact pattern was under consideration in *Skidmore*, 33 F.Supp. 529. Francis Skidmore, a resident of West Virginia, was vacationing in Florida when he was seriously injured in an automobile accident that was the fault of Samuel Whitaker, a retired New York City Policeman. Seeking to recover for his injuries, Mr. Skidmore filed a lawsuit in New York against Mr. Whitaker, but, when he attempted to have Mr. Whitaker served with summons and complaint he ran into a considerable problem. Having retired, Mr. Whitaker spent most of his time travelling around the country in a trailer. Upon his retirement, he began to winter in Florida and return to New York in the summer, occasionally stopping for weeks at the time at points in between.

During the course of his travels, Mr. Whitaker maintained a valid New York driver's license and kept New York tags on his car. On his applications for each, he gave his brother's address as his residence, and that address is where Mr. Skidmore had Mr. Whitaker served.

Mr. Whitaker challenged service on the grounds that his brother's address was not his "dwelling or usual place of abode" within the meaning of New York's service statute. He submitted an affidavit to the effect that he considered a tourist camp in Daytona Beach Florida to be his residence. Additionally, his brother and sister-in-law submitted affidavits claiming that "at no time did Samuel Whitaker reside permanently" at their home, although they did admit he had lived there in the past.

Evaluating the evidence before it, the court determined that Mr. Whitaker's statements of residence on "the various license applications made at a time when he was disinterested [were] convincing" and further stated that "so far as the migratory nature of his life permits of any place or abode or dwelling house," it was his brother's house in New York. *Skidmore*, 33 F.Supp. at 529.

Respondent Cobb was as mobile as Mr. Whitaker. Although he offers a library card, a YMCA membership, rental fees and electric bills for the boat slot, and bank records sent to a Post Office box he maintained during his stay at the marina; he offers no evidence that his stay in Rhode Island was anything more than a long trip. (Appendix 130). It was, as we know now, even less permanent than Mr. Whitaker's stay in Florida. None of the alleged ties to Rhode Island were of a permanent character, and there was nothing to prevent Cobb from sailing to the next port on a whim.

Cobb had no "usual place of abode" other than his parents' home in Charles Town. Even Cobb's father told the process server not that his son lived elsewhere, but that his son was "on a trip." Given the nomadic quality of Cobb's life, the Petitioner cannot reasonably have been expected to serve Respondent anywhere other than where he himself claims to live – 705 South Samuel Street, Charles Town, West Virginia. Balancing the evidence introduced by the parties, Petitioner has presented a *prima facie* case that the Respondent was effectively served at his "usual place of abode."

2. **Because he held a valid West Virginia driver's license listing 705 South Samuels Street in Charles Town as his residence, Respondent Cobb should be estopped from denying the sufficiency of substituted service at that address.**

The fact that Respondent Cobb held a valid West Virginia driver's license at all times relevant to this action is in and of itself strong evidence of his "usual place of abode" at the time of service. *See Agricola ABC, S.A. de C.V. v. Chiquita Fresh North America, LLC*, 2010 WL 4809641 (S.D.Cal. 2010) (address on California driver's license constitutes "usual place of abode"); *Garcia*, 363 B.R. 503 (even though debtor claimed to have moved to Mexico months prior to service of process, he maintained a valid Texas driver's license listing a Texas address and was consequently subject to service at that address); *Skidmore*, 33 F.Supp 529 (where plaintiff moved frequently from New York to Florida in trailer camper and often stayed for weeks at points in between, service of process was appropriate at address listed on his New York driver's license); *Silinzy v. Williams*, 247 S.W.3d 595 (Mo. Ct. App. 2008) (service was appropriate at individual's mother's home where, among other things, the individual's valid Missouri driver's license listed that address as his residence); *Trans National Communications Intern., Inc., v. Gould*, 2007 WL 5448172 (Ariz. Ct. App. 2007) (evidence that party had been served at address listed on Arizona driver's license and with the USPS was ample evidence of "usual place of abode"); *Sheldon v. Fettig*, 919 P.2d 1209 (Wash. 1996) (although woman maintained an apartment and job in Chicago, her maintenance of a valid Washington state driver's license listing her parents' address as her residence, coupled with her continued use of that address for receipt of important mail, rendered service at parents' Washington state address sufficient); *Cambiano v. Davis*, 880 S.W.2d 584 (Mo. Ct. App. 1994) (official forms such as drivers' licenses are factors to be considered in the

determination of an individual's "usual place of abode"); *Treutlein v. Gutierrez*, 129 A.D.2d 791 (N.Y. App. Div. 1987) (address on drivers license evidence of "usual place of abode"); *McNeil v. Tomlin*, 82 A.D.2d 825 (N.Y. App. Div. 1981) (where defendant failed to update his driver's license, plaintiff rightly relied on address thereon for ascertaining appropriate location for service of process); *Capitol Light and Supply Co. v. Gunning Electric Co.*, 190 A.2d 495 (Conn. Super. Ct. 1963) (among other factors, continued maintenance of a Connecticut driver's license listing parents' home as residence authorized service of process at that address).

Respondent Cobb deliberately and consistently represented himself as a resident of his parents' home in Charles Town, West Virginia. Holding himself out as a Jefferson County resident was not limited to Respondent Cobb merely receiving his first driver's license while living with his parents. Respondent renewed this license on August 8, 2006, on September 9, 2009 (after Vicki Savard's death and after filing this Motion to Dismiss), and again on October 1, 2010. It defies explanation that Cobb would file a motion to dismiss claiming he did not live in Charles Town and then, while that motion was pending, apply for a new West Virginia drivers license listing the South Samuel Street address as his "residence" on the application form. (Appendix 98-99).

That he *renewed* that license after the complaint was filed and less than six months before substituted service was accomplished renders the argument that Cobb's "usual place of abode" was indeed at his parents' address in Charles Town all the more compelling. The Respondent deliberately availed himself of the privileges and protections provided to citizens of West Virginia by declaring his residence in Jefferson County, yet he now seeks to deny the jurisdiction of the court in that very county.

Respondent Cobb should be estopped from denying the validity of service where he affirmatively states his address as 705 South Samuel Street, Charles Town West Virginia. *See Treutlein*, 129 A.D.2d at 791 (holding plaintiff estopped from denying “usual place of abode” where he had failed to update his driver’s license four months after moving); *McNeil*, 82 A.D.2d at 825 (plaintiff estopped from denying sufficient service at residence listed on valid driver’s license).

By claiming that the address he named as his residence on his license is not, in fact, his “usual place of abode,” Respondent essentially admits that he has violated one or more West Virginia laws. Cobb states that he has not lived at his parents address since 2004, when he ceased his full-time studies, yet he has consistently claimed that address as his residence on his West Virginia driver’s license. W.Va. Code §17B-4-1 and W.Va. Code §17B-4-2 make this deliberate misrepresentation a crime.² By alleging that he was improperly served at the address he gave on his driver’s license, Respondent essentially asks to be rewarded for his illegal acts. This Court should not allow him to use that address to deliberately avail himself of the privileges and protections afforded to West Virginia residents while simultaneously denying that he is subject to the jurisdiction of the Jefferson County Circuit Court. *See Thanco Products and Imports, Inc.*, 2009 WL 540963, at 5 (defendant could not deny parents’ address as “usual place of abode” where he had executed a voter registration application using that address and actually voted within one month of substituted service).

² Pursuant to W.Va. Code §17B-4-1, it is a misdemeanor for any person to “use a false or fictitious name in any application for an operator’s . . . license . . . or to knowingly make a false statement or to knowingly conceal a material fact or otherwise commit a fraud in any such application . . .” W.Va. Code §17B-4-2 further states that “any person who makes any false affidavit, or knowingly swears or affirms falsely to any matter of thing required by the terms of this chapter . . . is guilty of perjury . . .”

Whether he deliberately misrepresented his address to the West Virginia Division of Motor Vehicles or failed to notify that bureau of his new address, by maintaining a West Virginia driver's license listing the Charles Town address as his residence, Cobb represents to the world that that his "usual place of abode" is Charles Town. At a minimum, Respondent Cobb has violated W.Va. Code §17B-2-13(a)³ which requires the holder of a West Virginia driver's license to notify the state in writing of a new address within twenty days of moving from the address listed as his residence.

A Texas Bankruptcy Court evaluating service under a similar set of facts found that where an individual is under a legal compulsion to notify the state of a change of address, failure to comply with that statutory obligation renders the address on a still valid driver's license evidence of an individual's "usual place of abode." *Garcia*, 363 B.R. 503. Respondent Cobb has repeatedly renewed his driver's license without changing that address, and should therefore be estopped from challenging service at that address.

3. Because of the uncertainty inherent in his transient lifestyle as a seasonal worker, Respondent Cobb chose to receive his important and official mail at 705 South Samuel Street, Charlestown, West Virginia.

To substantiate his claim that his "usual place of abode" was not in Charles Town, Respondent Cobb submitted to the lower court two affidavits in which he stated that he lived on a sailboat in East Greenwich, Rhode Island. (Appendix 40-41, 129-31). He claims that the boat was his "usual place of abode" at the time of service. He offers copies of electric bills from the marina, membership cards for the local library and YMCA, and bank statements sent to a Post Office box that he maintained in East

³ Whenever any person applying for or receiving a driver's license moves from the address named in the application or in the license issued to the person . . . the person shall within twenty days thereafter notify the division in writing of the old and the new address . . .

Greenwich. However, in the same affidavit in which he asserts Rhode Island residency, the Respondent also states that he has registered his address as Charles Town, West Virginia with the USPS “in an effort to insure that [he] would receive all important correspondence including correspondence related to [his] license despite the fact that [he] moved frequently and several times a year traveled for extended periods of time to live and work in West Virginia as a whitewater guide.” *Id.*

Respondent Cobb himself admits that he prefers to receive important papers at the Charles Town address to **insure receipt of those papers**. Essentially, he admits that any other place he stayed lacked the permanence necessary to insure receipt of such correspondence. Respondent Cobb purposefully elected to avail himself of the Charles Town address as his “usual place of abode” within West Virginia. The Respondent admits that the Petitioner did in fact elect to serve him at the location most likely to give him actual notice of the suit pending against him, thus giving effect to the purpose of the rules governing service. *Williamson*, 96 W.Va. at 247; 122 S.E. at 531.

That Respondent used his Charles Town address for both his driver’s license and mailing address speaks volumes because the driving issue is whether the party receives notice. In a similar case, substituted service at the home of a defendant’s mother was held sufficient even though the defendant claimed to have moved from the address prior to service of process. *Silinzy*, 247 S.W.3d 595. Although the defendant was able to produce a certified mail receipt signed by himself and indicating that an item of mail had been addressed and delivered to an address he claimed as his “usual place of abode,” the court found the evidence that the appellant’s “usual place of abode” was at his mother’s house overwhelming. Specifically, the court noted that, among other things,

- 1) The defendant listed his mother's address as his residence with the USPS;
- 2) The defendant held a valid Missouri driver's license listing his mother's address as his residence; and
- 3) The defendant's Missouri Driver's History listed his mother's address as his own.

Silinzy, 247 S.W.3d at 599. Likewise, by electing to list his Charles Town address as his official residence with both state and federal officials, Respondent Cobb acknowledges the primacy of this address as his "usual place of abode." *See also Thanco Products and Imports, Inc.*, 2009 WL 540963 at 1; *Trans National Communications, Intern., Inc.*, 2007 WL 5448172, at 5; *Sheldon*, 919 P.2d at 611; *Cambiano*, 880 S.W.2d 588. Viewing the facts on record in the light most favorable to the Petitioner, the Petitioner has produced evidence sufficient to establish the *prima facie* showing of personal jurisdiction required to defeat a motion to dismiss.

4. Because Respondent Cobb received actual notice of this lawsuit, substituted service did not in any way prejudice or disadvantage him in this litigation.

Because a primary purpose of the rules regarding service is ultimately to ensure that all defendants have actual notice of and the opportunity to defend lawsuits, courts in many jurisdictions construe notice statutes liberally where actual notice to the defendant is proved. *Thanco Products and Imports, Inc.*, WL 540963 at 5 (substituted service adequate at home of defendant's mother where defendant received actual notice of suit and defendant had voted in that jurisdiction only one month before being served); *S.E.C. v. Marino*, 299 Fed.Appx. 538 (10th Cir. 2002); *Remondi*, 2008 WL 1914252 at 2; *Trans Nat. Communications Intern., Inc.*, 2007 WL 5448172 at 4 ("Arizona courts construe the

provisions of Rule 4.1(d)⁴ liberally when the defendant has actually received notice of the lawsuit before the entry of a default judgment weeks before the judgment was entered); *Sheldon*, 919 P.2d at 1211 (“ . . . we have applied liberal construction to substituted service of process statutes in order to effectuate the purpose of the statute while adhering to its spirit and intent.”); *see also Ali v. Mid-Atlantic Settlement Services, Inc.*, 233 F.R.D. 32, 2006 WL 29198 (D.D.C. 2006); *Karlsson v. Rabinowitz*, 318 F.2d 666 (4th Cir. 1963); *First Nat. Bank & Trust Co. of Tulsa v. Ingerton*, 207 F.2d 793 (10th Cir. 1953).

The trend towards liberal construction of the phrase “usual place of abode” is particularly fitting in cases like this one where the Respondent lives a transient lifestyle and designated a specific address as one where he is most likely to receive actual notice. If a firm definition of “usual place of abode” was difficult to construct in the past, it is more so “in these modern times, because people are mobile and may have multiple homes.” *Garcia*, 363 B.R. at 511. Courts and commentators alike note that “because of today’s environment of global travel, job mobility, and multiple residences, the meaning of the phrase [“usual place of abode”] has been blurred further.” 4A Wright & Miller, *Federal Practice and Procedure* 521-22 §1096 (3d ed. 2002); *see also Thuy Hoa Ngo v. Bach Van Ha Thi*, 2008 WL 5567806, 3-4 (W.D.La. 2008) (“the increased mobility of individuals and the ability to communicate information rapidly over global

⁴ The Arizona substituted service rule reads substantially like the West Virginia rule, stating that “[s]ervice upon an individual . . . shall be effected by delivering a copy of the summons and of the pleading to that individual personally or by leaving copies thereof at that individual’s dwelling house or usual place of abode with some person of suitable age and discretion then residing therein . . .” Ariz. R. Civ. Proc. 4.1(d).

differences appears to have relaxed the strict interpretation of ‘dwelling or usual place of abode.’”).

Respondent Cobb apparently has no place where he “lives.” He follows seasonal work from location to location. At the time of service, he claims to have lived on a boat in Rhode Island, a situation that is hardly permanent. The only logical place for Petitioner to serve Respondent Cobb was at his parents’ home in Charles Town, the place that he represented to the world as his residence.

Most importantly, **Respondent does not dispute that he received timely and actual notice of this lawsuit.** In fact, when accepting substituted service on behalf of his son, Respondent’s father indicated that Cobb had anticipated the action and had already retained representation. (Appendix 104). Moreover, Respondent Cobb has actively participated in defense of this action, as evidenced by the two affidavits he has filed in the case. He has been in no way prejudiced or disadvantaged by the substituted service accomplished on him.

D. Venue in Jefferson County is proper.

Pursuant to W.Va. Code §56-1-1

(a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county:

(1) Wherein any of the defendants may reside or the cause of action arose . . .

The key to determining proper venue, whether for a case involving an individual or corporate defendant, is thus determining the residence of *any* defendant. The circuit court abused its discretion when it found that Respondent Cobb was not a resident of

Charles Town and that none of the Respondents/Defendants were subject to venue in Jefferson County.

- 1. Because Respondent Cobb was a resident of Charles Town in Jefferson County, West Virginia, at the time this lawsuit was initiated, venue in the Circuit Court of Jefferson County is appropriate in this case.**

In the case *sub judice*, Respondent Cobb, the jurisdiction-granting party, declared himself a resident of Jefferson County, West Virginia by holding **and** renewing a valid West Virginia driver's license listing his family home at 705 South Samuel Street, Charles Town, West Virginia as his residence. Though he works at several locations throughout the country, he chooses to maintain his residence in Jefferson County, West Virginia and to rely on the address of his family home to justify his doing so. He deliberately receives important mail at that address in order to ensure its receipt by him. Respondent Cobb, having availed himself of the rights and privileges available to residents of Jefferson County, should not now be allowed to deny residence here in order to avoid the venue of the County's courts.

Because Respondent Cobb is a resident of Charles Town and therefore subject to venue in the Circuit Court of Jefferson County, all other defendants in this action are likewise subject to venue here. *State ex rel. Kenamond v. Warmuth*, 179 W.Va. 230, 366 S.E.2d 738 (1988); *Webber v. Offhaus*, 135 W.Va. 138, 62 S.E.2d 690 (1950); *McConaughy v. Bennet's Executors*, 50 W.Va. 172; 40 S.E. 540 (1901). Under West Virginia Law, where venue is proper for one defendant, "it is proper for all other defendants subject to process." *McGuire v. Fitzsimmons*, 197 W.Va. 132, 137, 475 S.E.2d 132, 137 (1996). This principle applies equally to individual and corporate

defendants. *Staats v. Co-operative Transit Co.*, 125 W.Va. 473, 24 S.E.2d 916 (1943).
Venue in Jefferson County is thus proper in this Court against all defendants.

VI. CONCLUSION

Petitioner has presented a *prima facie* case that Respondent Cobb's "usual place of abode" at the time of substituted service in this action was 705 South Samuel Street, Charles Town, West Virginia. The weight of the evidence – Respondent Cobb's purposeful representation of residence at that address to both state and federal authorities and the fact of his actual and timely notice of this lawsuit – clearly support Petitioner's argument that Cobb's "usual place of abode" was indeed the Charles Town, West Virginia address. Because substituted service on Respondent Cobb was proper, venue in Jefferson County is appropriate under W.Va. Code §56-1-1. Therefore, the Petitioner respectfully requests that this Court reverse the lower court's ruling that the Circuit Court of Jefferson lacks personal jurisdiction over Respondent Cobb and remand this case to that court for further proceedings. Additionally, Petitioner requests that this court overturn the lower court's ruling that venue for this action cannot lie in Jefferson County.

Kerry Savard, as Personal Representative
of the Estate of Vicki Savard, deceased
By Counsel

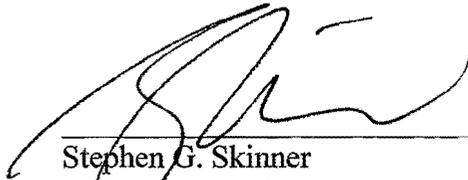


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CERTIFICATE OF SERVICE

I, Stephen G. Skinner, hereby certify that on June 8, 2011, I served the foregoing Petitioner's Brief by deposition a true copy thereof in the United States mail, first class, postage prepaid, addressed as follows:

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