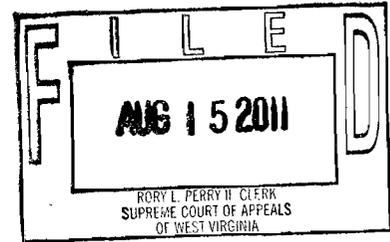


IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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.*

---

**PETITIONER'S REPLY BRIEF**

---

*Counsel for Petitioner*

Stephen G. Skinner  
(WV State Bar No. 6725)  
SKINNER LAW FIRM  
P.O. Box 487  
Charles Town, West Virginia 25414  
(304) 725-7029/Fax: (304) 725-4082  
sskinner@skinnerfirm.com

*Counsel for Respondents*

George N. Stewart  
(WV State Bar No. 5628)  
ZIMMER KUNZ, PLLC  
132 South Main Street, Suite 400  
Greensburg, Pennsylvania 15301  
(724) 836-5400/Fax: (724) 836-5149  
stewart@zklaw.com

Dated: August 12, 2011

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
ARGUMENT.....	3
I.    THE CIRCUIT COURT’S FINDING THAT SUBSTITUTE SERVICE ON RESPONDENT COBB WAS NOT EFFECTIVE UNDER W.VA. R. CIV.PROC. 4(d)(1)(B) RESULTED FROM ITS ERRONEOUS APPLICATION OF FACTS TO THE LAW REGARDING RESPONDENT COBB’S “USUAL PLACE OF ABODE.”.....	3
II.   BECAUSE THE PETITIONER COMPLIED WITH THE RULES REGARDING SUBSTITUTE SERVICE SO AS TO ENSURE THAT RESPONDENT COBB RECEIVED ACTUAL NOTICE OF THE LAWSUIT PENDING AGAINST HIM, THE CIRCUIT COURT SHOULD HAVE INFERRED PROPER SERVICE.....	6
III.  THE EVIDENCE SHOWS THAT RESPONDENT COBB INTENDED TO REMAIN A RESIDENT OF JEFFERSON COUNTY, AND HE IS THEREFORE SUBJECT TO VENUE IN THAT COUNTY.....	8
IV.  THE PETITIONER HAS APPROPRIATELY ARGUED ESTOPPEL IN THIS CASE, HAVING ARGUED THE SAME ISSUE BEFORE THE CIRCUIT COURT.....	9
CONCLUSION.....	10

## TABLE OF AUTHORITIES

### CASES

<i>Beane v. Dailey</i> , 226 W.Va. 445, 701 S.E.2d 848 (2010).....	1,7,10,2,8
<i>Bowers v. Wurzburg</i> , 202 W.Va. 43, 501 S.E.2d 851 (1998).....	3
<i>Capehart, Adm'r. v. Cunningham, Adm'r.</i> , 12 W.Va. 750 (1878).....	6
<i>Griffith &amp; Coe Advertising, Inc. v. Farmers and Merchants Bank &amp; Trust</i> , 215 W.Va.428, 599 S.E.2d 851 (2004).....	3
<i>Karlsson v. Rabinowitz</i> , 318 F.2d 666 (4 <sup>th</sup> Cir. 1963).....	4
<i>LeFevre v. LeFevre</i> , 124 W.Va. 105, 19 S.E.2d 442 (1942).....	8
<i>Minnesota Mining and Mfg. Co. v. Kirkevold</i> , 87 F.R.D. 317 (D.Minn. 1980).....	4
<i>State ex rel. Bell-Atlantic-West Virginia v. Ranson</i> , 201 W.Va. 402, 497 S.E.2d 755 (1997).....	3
<i>Williamson v. Taylor</i> , 96 W.Va. 246, 122 S.E. 530 (1924).....	6

### RULES

W. Va. R. Civ. P. 4(d)(1)(B) .....	1,3,7
------------------------------------	-------

## INTRODUCTION

This petition hangs on one central question: was substitute service on Respondent Travis Cobb made at his “dwelling place or usual place of abode” when it was made at the address that he provided to the State of West Virginia and the United States Postal Service as his residence both prior to and after the substitute service was made.

Respondent Cobb leads a transient life. He often works as a whitewater guide in West Virginia in the spring and fall. (It is his role as a river guide that is the subject of the underlying wrongful death claim). From working at a ski resort in Colorado in winter to living on a boat between Rhode Island and South Carolina, occasionally finding work in those locations, he is rarely in one place for very long. He has, however, always maintained a “home base” at his parents’ home in Charles Town, Jefferson County, West Virginia. In fact, he lists his “home base” on his valid drivers license issued by the West Virginia Division of Motor Vehicles and with the United States Postal Service. Although he lives a nomadic life, Cobb has made it known that his permanent residence is at 705 S. Samuel Street, Charles Town, West Virginia.

How does a plaintiff perfect service on a nomad such as respondent Cobb? The answer is found in the West Virginia Rules of Civil Procedure, which provides that substitute service may be had at a person’s dwelling place or usual place of abode. W. Va. R. Civ. Proc. 4. The rule was designed to allow service upon someone who is not home very often.

The challenge is when the nomad rarely comes home or does not know that he was being served, as happened in the case of *Beane v. Dailey*, 226 W. Va. 445, 701 S.E.2d 848 (2010). In the instant case though, the nomad apparently comes home on a

regular basis. Respondent Cobb came home to renew his driver's license on both September 9, 2009 and October 1, 2010. Crucially, those dates of renewal were after the injury giving rise to this action and during the pendency of this lawsuit, times that Respondent Cobb denies that his dwelling place or usual place of abode was the exact address he was telling the state was his home.

More importantly, there is a serious question as to whether Cobb was actually in Rhode Island at all at the time of service. According to the bank records that Cobb uses to argue Rhode Island residency, he was actually in West Virginia at the time he was served with substitute service: Cobb made a check card transaction at the Hollywood Theater in Granville West Virginia the day before substitute service and at a Wal-Mart in Martinsburg the day *after* substitute service on his father.<sup>1</sup> (Respondent Cobb's father which suggests that Mr. Cobb is temporarily out of town and expected to return).

The most distinguishable factor between the instant case and *Beane* is that in this case, the nomad received actual notice of the lawsuit, unlike in *Beane*, where the defendant was faced with a default judgment in a lawsuit about which he knew nothing.

Despite having intentionally elected to hold himself out as a West Virginia resident and benefit from the privileges and protections of that status, Respondent Cobb now asserts that substitute service was not proper at the address he himself used to renew his drivers license **during the pendency of his motion to dismiss in the trial court below**. The Respondent denies that he is subject to the jurisdiction of the Circuit Court of Jefferson County, the court that sits in the very county in which he claims residence, and that is actually located just a few blocks away from his home on S. Samuel Street.

---

<sup>1</sup> Appendix 148 (Transactions on 3/23 and 3/25).

He argues instead for an interpretation of West Virginia's rules regarding service of process so strict as to be unreasonable and unworkable in the face of the nomadic and transient lifestyle of Respondent Cobb.

## ARGUMENT

**I. The circuit court's finding that substitute service on Respondent Cobb was not effective under W.Va. R. Civ. Proc. 4(d)(1)(B) resulted from its erroneous application of facts to the law regarding Respondent Cobb's "usual place of abode."**

The circuit court's findings are in error. It did not "view the allegations in the light most favorable to [the party asserting personal jurisdiction], drawing all inferences in favor of jurisdiction." Syllabus Pt. 4, *State ex rel. Bell-Atlantic-West Virginia v. Ranson*, 201 W.Va. 402, 497 S.E.2d 755 (1997). Reviewing the ruling of the circuit court, this Court must determine whether the Petitioner "made a *prima facie* showing of personal or *in personam* jurisdiction . . . sufficient to withstand the motion to dismiss. In that regard, the allegations and inferences in the record are to be viewed in favor of such jurisdiction." *Griffith & Coe Advertising, Inc. v. Farmers & Merchants Bank and Trust*, 215 W. Va. 428, 599 S.E.2d 851, 853 (2004); *see also Bowers v. Wurzburg*, 202 W.Va. 43, 501 S.E.2d 851 (1998). Though the Petitioner was the non-moving party, the circuit court erroneously drew all inferences in favor of the movant, Respondent Cobb.

The Petitioner submitted West Virginia Division of Motor Vehicles records demonstrating that Respondent Cobb claimed residence in Jefferson County, West Virginia at all times relevant to this action. Moreover, Respondent Cobb stated that he registered his address as Jefferson County with the United States Postal Service "in an effort to insure that [he] would receive all important correspondence including

correspondence related to his license.” (Affidavit of Travis Cobb, Appendix pp 129 - 131). Stating his residence as being in Charles Town, Jefferson County to both the State of West Virginia and the federal government is strong evidence of intent to use that address as a permanent place of abode.<sup>2</sup> The Respondent’s actions make it reasonable for any individual to direct official correspondence and papers to the Jefferson County address, as that was the location where Respondent Cobb specifically intended to receive such papers. *Id.*

Remarks made by Respondent Cobb’s father at the time of service also indicate that Cobb’s “usual place of abode” was in Jefferson County. When process server Robbie Roberts served Respondent’s father, Mr. Cobb indicated **not** that his son no longer lived at that address, but that his son “was away on a trip.” *Id.* This statement has even more probative weight when one examines the bank records submitted by Respondent Cobb. On March 23, 2010, one day before substitute service was effected in Charles Town, Respondent Cobb made a check card purchase in Granville, West Virginia, near Morgantown. (Appendix p 148). On March 25, 2010, one day after service of process, Respondent Cobb made another check card purchase in Martinsburg, West Virginia, perhaps a mere twenty minutes from the 705 S. Samuel Street address. (*Id.*) Respondent Cobb was actually in West Virginia – perhaps even at his parents’ home in Charles Town **at the time of service**. If service of process had been attempted on Respondent Cobb at his claimed usual place of abode at Norton’s shipyard and Marina in East Greenwich, Rhode Island, it would have failed.

---

<sup>2</sup> Intent is a factor considered by courts in determining whether a given location is an individual’s “usual place of abode.” See *Minnesota Mining and Mfg. Co. v. Kirkevold*, 87 F.R.D. 317 (D. Minn. 1980); *Karlsson v. Rabinowitz*, 318 F.2d 666 (4<sup>th</sup> Cir. 1963).

To counter the Petitioner's evidence that substitute service was effected on March 24, 2010, Respondent Cobb submitted

1. An undated library card for the East Greenwich Free Library,
2. Bills for marina fees in East Greenwich, Rhode Island for the months from January to May of 2010,
3. A letter indicating membership at a Rhode Island YMCA for the month of July, and
4. A series of bank statements from a West Virginia BB&T account, sent to a Rhode Island Post Office box, demonstrating purchases made in places as diverse as Rhode Island, Pennsylvania, Illinois, Connecticut, South Carolina, and West Virginia.

While these documents may show that Respondent Cobb spent time in Rhode Island, they also show that he spent time in West Virginia and South Carolina and other states. None of these documents, even when taken together and viewed as a whole, indicates an established residence of any permanence. Each of the items of evidence presented by Defendant Cobb is available to a transient individual whether or not he has the intent to reside in a given location. None of these documents provide strong evidence of anything other than yet another temporary sojourn. In fact, Respondent Cobb proved himself to be just such a transient when he moved his sailboat to South Carolina in September 2010 – just two months later – and then returned to West Virginia for his seasonal job as a whitewater guide.<sup>3</sup>

Respondent Cobb may well have rented a slip in a Rhode Island Marina, but the impracticality of serving him at that location cannot be overstated. A boat can be moved

---

<sup>3</sup> When Respondents suggest that Petitioner could have served Respondent Cobb in Preston County, they assume that the Petitioner knew Cobb would again be in Preston County and when. Petitioner reasonably chose substitute service at the location claimed by Respondent Cobb as his residence.

at a moment's notice. It can be gone for a few hours, a few days, or never to return. Even if Petitioner had located Cobb in Rhode Island, how could service have been ensured? Had the process server arrived at the boat slip to find the boat gone, how could he have known that the Respondent planned to return? He could not have left summons and complaint anywhere for service by posting, as the boat would have been gone.

How is a plaintiff to locate such a defendant? According to Respondent Cobb, a plaintiff in the Petitioner's position would be obliged to check every library and YMCA at ports from Rhode Island all the way down the East Coast to determine where to find a defendant who may or may not be in a particular place at a particular time. Boston, Massachusetts; New York, New York; Wilmington, Delaware; Wilmington, North Carolina; Charleston, South Carolina . . . Respondent Cobb could have spent time at any of those places, but how was the Petitioner to divine this? Respondent Cobb declared to the world that he could be found at 705 S. Samuel Street in Charles Town, West Virginia. Even his father declared that his son was "on a trip," not taking up residence elsewhere. The Petitioner relied on that information, and rationally served Cobb at that location. To require service at any other alleged "residence" would impose a burden upon a plaintiff that would be nearly impossible to meet in the case of a transient who moves from place to place on his own schedule.

**II. Because the Petitioner complied with the rules regarding substitute service so as to ensure that Respondent Cobb received actual notice of the lawsuit pending against him, the circuit court should have inferred proper service.**

The parties do not dispute that the primary goal of the rules governing service of process is to assure that defendants receive actual notice of suits pending against them so as to afford them the opportunity to defend themselves. *Williamson v. Taylor*, 96 W.Va. 246, 247; 122 S.E. 530, 531 (1924) (quoting *Capehart, Adm'r, v. Cunningham, Adm'r*, 12

W.Va. 750 (1878)). However, the Respondents mischaracterize Petitioner's argument regarding actual notice; they misunderstand Petitioner as claiming that actual notice of the pendency of a lawsuit in and of itself renders service of process effective. The Petitioner makes no such argument. Instead, he asserts that, given the particular circumstances of Respondent Cobb, who moved from place to place, never establishing any roots for any length of time, an interpretation of the phrase "usual place of abode" that takes into account the realities of transient life is warranted. Where a defendant is served using substitute service at the location he tells the world is his permanent address and where he receives actual notice of the suit, courts should accept such service as perfected.

In the instant case, the parties agree that the Petitioner complied with the requirements of W. Va. R. Civ. Proc. 4(d)(1)(B). Process server Robbie Roberts delivered a copy of the summons and complaint to Respondent Cobb's father, a family member over the age of sixteen years, and advised him of the contents and purpose of the documents. As stated above, the only element of the rule that the parties dispute is whether or not 705 S. Samuel Street qualified as Cobb's "usual place of abode."

Respondent Cobb asks this Court to disregard his nomadic lifestyle and strictly construe the rule governing substitute service. Like the court below, the Respondents rely on *Beane v. Dailey*, 226 W.Va. 445, 701 S.E.2d 848 (2010), for the proposition that West Virginia courts have specifically refused to adopt a dynamic interpretation of the phrase "usual place of abode" regardless of the facts of a given case. This simply is not the case. In fact, the decision in *Beane* turned, to a great extent, on the fact that the defendant in that case had **not** received actual notice of the lawsuit. *Beane*, 701 S.E.2d at 852.

Moreover, the return of service in *Beane* was otherwise flawed; among other defects, it did not specify that the complaint had been delivered to Mr. Dailey’s mother or that the process server had informed his mother of the purport of the documents. *Id.* Most importantly, the plaintiff in *Beane* offered no evidence to counter the defendant’s claims that his mother’s residence was not his “usual place of abode.” *Id.* Furthermore, the defendant had left his mother’s home with no intention to return. Such is not the case here, where Respondent Cobb demonstrated his intent to return over and over, as indicated by his repeated renewal of his drivers license.

*Beane* does not provide guidance on determining a defendant’s “usual place of abode”; it simply recognizes an attempt at substitute service that was ineffectual at providing actual notice and thus sheds little light on the instant case.<sup>4</sup> *Beane* also reinforces the rule that ineffective service of process renders a **subsequent default** judgment unenforceable, but it does not specifically address the issue central to this case – was 705 S. Samuel Street Respondent Cobb’s “usual place of abode”? At a minimum, the fact of actual notice supports an inference that that the summons and complaint in this case were indeed delivered to Respondent Cobb’s “usual place of abode.”

**III. The evidence shows that Respondent Cobb intended to remain a resident of Jefferson County, and he is therefore subject to venue in that county.**

Relying on *LeFevre v. LeFevre*, 124 W. Va. 105, 19 S.E.2d 442 (1942), the Respondents argue that the act of leaving the state coupled with an intent to change one’s residence to another state is sufficient to render an individual a nonresident of West Virginia. They contend that Respondent Cobb qualifies as a nonresident under this analysis, and therefore, that venue in Jefferson County is inappropriate. In fact, the

---

<sup>4</sup> Again, Petitioner points out that the decision in *Beane* was a *per curiam* decision.

evidence in the instant case supports the inference that Respondent Cobb did **not** intend to become a resident of another state.

Despite his extensive travels, Respondent Cobb deliberately maintained a West Virginia drivers license listing his parents' home in Charles Town as his residence. Cobb even returned to the state to renew or replace his drivers license on both September 9, 2009 (after Vicki Savard's death and after filing his Motion to Dismiss) and again on October 1, 2010, during the pendency of this action. Moreover, he intentionally listed that address with the United States Postal Service to ensure his receipt of important mail. These acts indicate that Cobb specifically intended to maintain residency in Jefferson County. Although he claims his intention to quit Jefferson County, West Virginia, his actions speak louder. Respondent Cobb cannot have it both ways. He cannot claim residency in Jefferson County when it suits him and deny it when it does not. Venue is proper in Jefferson County.

**IV. The Petitioner has appropriately argued estoppel in this case, having argued the same issue before the circuit court.**

The weight of the evidence necessitates a finding that Respondent Cobb's "usual place of abode" was at his parents' home in Charles Town. Once it is established that Cobb was appropriately served at his usual place of abode in Jefferson County, it naturally follows that Respondent Cobb is subject to venue in Jefferson County. What is more, Respondent Cobb should be estopped from denying his residence in Jefferson County for the purposes of both personal jurisdiction and venue.

Respondents suggest that the Petitioner's arguments regarding estoppel were not raised in the circuit court. In actuality, the Petitioner did raise that argument in *Plaintiff's*

*Memorandum in Opposition to Defendants' Motions to Dismiss.* In that memorandum, the Plaintiff states

Defendant Cobb cannot now in good faith assert that the substitute service at his family home failed to either comply with West Virginia's laws or to give him actual notice of this action. It is the height of impudence to move for a dismissal based on non-residence and then apply to the state of West Virginia for a driver's license asserting such residence.

(Appendix p 78). Although the Petitioner did not specifically name the doctrine of estoppel to the circuit court, it is clear that estoppel is a legal theory upon which this argument was built.

### CONCLUSION

The Respondents' efforts to shoehorn the facts of this case into the particular scenario that existed in *Beane v. Dailey* are ineffectual. That case determined that ineffective service of process rendered a subsequent default judgment unenforceable. It did not offer guidance on how to determine the "usual place of abode" of a transient individual who specifically avails himself of the privileges and protections of a given jurisdiction. In the instant case, Respondent Cobb deliberately held himself out as citizen and resident of Charles Town in Jefferson County, West Virginia, though he traveled extensively and unpredictably. As Respondent Cobb purposefully availed himself of the privileges and protections of his claims of residence, he cannot now avoid the jurisdiction of Circuit Court of Jefferson County, nor can he avoid venue in that court. This Court should reverse the judgment of the circuit court and return this case to that court for further proceedings.

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

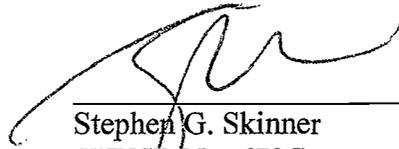


Stephen G. Skinner (WV Bar No. 6725)  
SKINNER LAW FIRM  
P.O. Box 487  
Charles Town, WV 25414  
sskinner@skinnerfirm.com  
(304) 725-7029/Fax: (304) 725-4082  
www.skinnerfirm.com

**CERTIFICATE OF SERVICE**

I, Stephen G. Skinner, hereby certify that on August 12, 2011, I served a true copy of the the foregoing Petitioner's Reply Brief by United States mail, first class, postage prepaid, addressed as follows:

George N. Stewart, Esquire  
ZIMMER KUNZ, PLLC  
132 South Main Street, Suite 400  
Greensburg, Pennsylvania 15301



---

Stephen G. Skinner  
(WVSB No. 6725)  
SKINNER LAW FIRM  
*Counsel of Record for Petitioner*