

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

No. 11-0430

Kerry Savard, as Personal Representative
of the Estate of Vicki Savard, Plaintiff Below,
Petitioner

vs.

Cheat River Outfitters, Inc.,
Brent Matthew Everson, Travis Cobb,
Simon Buckland, and Paul Hart,
Defendants Below, Respondents

RESPONDENTS' BRIEF

Counsel for Respondents

George N. Stewart, Esquire
(WV State Bar No. 5628)
Dara A. DeCourcy, Esquire
(WV State Bar No. 7034)
ZIMMER KUNZ, PLLC
132 South Main Street
Suite 400
Greensburg, PA 15601
(724) 836-5400
stewart@zklaw.com
decourcy@zklaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
RESPONSE TO ASSIGNMENTS OF ERROR	1
STATEMENT OF THE CASE	2
SUMMARY OF THE ARGUMENT	5
STATEMENT REGARDING ORAL ARGUMENT AND DECISION	6
ARGUMENT	7
I. The circuit court properly dismissed Petitioner’s complaint against Travis Cobb for lack of personal jurisdiction.	7
A. Petitioner’s attempt to accomplish substituted service on Respondent Cobb pursuant to W.Va.R.Civ.P. 4(d)(1)(B) at a place other than his “dwelling place or usual place of abode” was ineffective.	7
B. Under West Virginia law, receipt of “actual notice” of a lawsuit does not establish the circuit court’s jurisdiction over the person.	11
II. The circuit court acted within its discretion in dismissing the complaint for lack of venue, for it was undisputed that under W.Va.Code § 56-1-1 venue over this suit would lie in Jefferson County only if Travis Cobb resided there.	14
CONCLUSION	17

TABLE OF AUTHORITIES

Cases

<i>Adkins v. Globe Fire Ins. Co.</i> , 32 S.E. 194 (1898).....	13
<i>Beane v. Dailey</i> , 226 W.Va. 445, 701 S.E.2d 848 (2010).....	7, et passim
<i>Capehart, Adm'r, v. Cunningham, Adm'r</i> , 12 W. Va. 750 (1878)	8
<i>Crouch v. Crouch</i> , 124 W. Va. 331, 20 S.E.2d 169, 171 (1942).....	9, 10
<i>Dierkes v. Dierkes</i> , 165 W.Va. 425, 430, 268 S.E.2d 142, 145 (1980).....	9
<i>Jones v. Crim & Peck</i> , 66 W.Va. 301, 66 S.E. 367, 368 (1909).....	9
<i>LeFevre v. LeFevre</i> , 124 W. Va. 105, 19 S.E.2d 444 (1942).....	16
<i>Leslie Equipment Co. v. Wood Resources Co., L.L.C.</i> , 224 W.Va. 530, 687 S.E.2d 109 (2009)	7
<i>McClay v. Mid-Atlantic Country Magazine</i> , 435 S.E.2d 180, 182-83 (W. Va. 1993).	13
<i>State ex rel. Smith v. Bosworth</i> , 145 W.Va. 753, 117 S.E.2d 610 (1960).	7
<i>State ex rel. The Galloway Group v. McGraw</i> , filed May 16, 2011, ___ W.Va. ___, ___ S.E.2d ___, 2011 W.Va. LEXIS 32.....	14
<i>Walker v. Doe</i> , 210 W.Va. 490, 558 S.E.2d 290 (2001)	12
<i>Wetzel Co. Sav. & L. Co. v. Stern Bros.</i> , 156 W. Va. 693, 195 S.E.2d 732 (1973)	14
<i>Williamson v. Taylor</i> , 96 W. Va. 246, 247, 122 S.E. 530, 531 (1924).....	8, 9

Statutes and Rules

W.Va. Code § 31-1-15	13
W.Va.Code § 56-1-1	5, 14,15
W.Va. Code § 56-3-31(b).....	13
W.Va.R.A.P. 18(a)	6
W.Va.R.A.P. 19(a)(1), (2).....	6
W.Va.R.A.P. 21(c)	6
W.Va.R.Civ.P. 4(d)(1)(B).....	6, 7
W.Va.R.Civ.P. 4(d)(1)(B)(1)(A).....	12
W.Va.R.Civ.P. 4(d)(1)(C).....	13
W.Va. R.Civ. P. 4(d)(8)(A).....	13

RESPONSE TO ASSIGNMENTS OF ERROR

- I. The circuit court properly dismissed Petitioner's complaint against Travis Cobb for lack of personal jurisdiction, for Petitioner's attempt to accomplish substituted service on Respondent Cobb pursuant to W.Va.R.Civ.P. 4(d)(1)(B) at a place other than his "dwelling place or usual place of abode" was ineffective.

- II. The circuit court acted within its discretion in dismissing the complaint for lack of venue, for it was undisputed that under W.Va.Code § 56-1-1 venue over this suit would lie in Jefferson County only if Travis Cobb resided there.

STATEMENT OF THE CASE

In his statement of the case, Petitioner has omitted discussion of the facts upon which the circuit court based its ruling that Petitioner's attempt at substituted service upon Respondent Travis Cobb was ineffective. The omission is significant. Petitioner's representation that the court made its ruling "in the face of evidence that [Respondent Cobb] lived at his parents' address at 705 South Samuel Street" is unsupported by the record. (Petitioner's Brief, p.3; underscore added).

The Circuit Clerk's docket reflects that Plaintiff attempted service on Travis Cobb by delivering a copy of the summons and complaint to "G. Cobb", on March 24, 2010. The return of service filed on March 25, 2010 confirms that on March 24, 2010, process server Robbi R. Roberts attempted substituted personal service upon Travis Cobb by delivering the summons and complaint to "Gregory Cobb, a member of his/her family above the age of 16 years", at 705 S. Samuel Street, Charles Town, West Virginia. (Joint Appendix p.000038 -- Exhibit A appended to Defendant's Motion to Dismiss: Return of Service).

Travis Cobb was not at his parents' home when the process server delivered the summons and complaint there. Rather, he delivered the summons and complaint to Travis Cobb's father. Travis Cobb was not staying as a visitor at his parents' home when the summons and complaint were delivered there. In the six months preceding Petitioner's attempt to serve the summons and complaint, Travis Cobb had spent less than one week in total time at his parents' home. He had last been a full time student in the year 2004. He had been a seasonal employee of Cheat River Outfitters, Inc. since 2005. (Joint Appendix pp.000040-41 -- Defendants' Motion to Dismiss, Exhibit B, Affidavit of Travis Cobb).

At the time Plaintiff attempted service of the summons and complaint, Travis Cobb was living aboard a sailboat he purchased in 2009. He had lived aboard the sailboat for six months, and

in November 2009 docked the boat in East Greenwich, Rhode Island. At the time Plaintiff attempted service (March 24, 2010), Mr. Cobb had lived in East Greenwich, Rhode Island for several months. During the spring rafting season, he lived in Albright, Preston County. (Joint Appendix pp.000040-41).

The circuit court considered documents submitted by Mr. Cobb in support of his declaration that at the time Petitioner attempted service of the summons and complaint, his “usual place of abode” was aboard his sailboat in East Greenwich, Rhode Island. Mr. Cobb submitted receipts for the rental of a boat slip, utility payments, his Rhode Island library card, membership to the local YMCA, and bank statements which reflect voluminous transactions in East Greenwich, Rhode Island for some time before and after the date Petitioner attempted service on Mr. Cobb in Jefferson County. The bank records reflect that Mr. Cobb traveled to other states, including West Virginia, during the period January 2010 to August 2010, but the vast majority of transactions occurred in Rhode Island, supporting Mr. Cobb’s claim of residence there. (Joint Appendix, pp. 000129-000174—Affidavit of Travis Cobb; Joint Appendix 006186, 006189—Order Granting Travis Cobb’s Motion to Dismiss and Dismissing Case for Lack of Venue).

The court also considered Petitioner’s proffered evidence of effective service -- that Mr. Cobb maintained a West Virginia driver’s license bearing his parents’ Jefferson County address. (Joint Appendix 000189). The court found that “renewal of a West Virginia driver’s license, without further evidence, is not sufficient to rebut the multiplicity of records that show Mr. Cobb was maintaining his dwelling or usual place of abode in Rhode Island at the time of service.” (Joint Appendix 000189). The court also considered Petitioner’s argument that the fact that Mr. Cobb had appeared in the suit indicated that he received notice of the suit. The court was bound by

decisions of this Court, however, that a party's receipt of some notice of a suit does not remedy defects in service of process. (Joint Appendix 000189-000190).

SUMMARY OF THE ARGUMENT

West Virginia law requires that substituted service upon an individual be made at the individual's "dwelling place or usual place of abode". The court fairly weighed the substantial evidence that Mr. Cobb did not live at his parents' home in Jefferson County when Petitioner served the summons and complaint there, against evidence that he held a West Virginia driver's license bearing that address and otherwise directed that important mail be delivered to that address. The court correctly concluded that the evidence established that the Jefferson County residence was not Mr. Cobb's "usual place of abode" when service was attempted there. The fact that Mr. Cobb received some notice of the suit, as reflected by the filing of affidavits in support of the motion to dismiss, does not remedy defects in service of process.

Petitioner acknowledges that venue lies in Jefferson County only if Respondent Cobb resides there. Mr. Cobb was absent from Jefferson County for a substantial period of time before this suit was filed, however, and he resided outside Jefferson County. The accident did not occur in Jefferson County; it occurred on the Cheat River in Preston County. Cheat River Outfitters is located in Preston County. Its president, Respondent Paul Hart, resides in Preston County. Clearly, venue would lie in Preston County, pursuant to Section 56-1-1(a)(1), but there is no basis for venue in Jefferson County. The circuit court acted within its discretion in dismissing the complaint without prejudice for lack of venue, ruling that Mr. Cobb was not a resident of Jefferson County when this suit was filed.

STATEMENT REGARDING ORAL ARGUMENT AND DECISION

Respondents believe that the dispositive issues in this case have been authoritatively decided, and that this case involves the application of settled law governing the requirements for valid substitute service upon an individual under W.Va.R.Civ.P. 4(d)(1)(B) to the particular facts presented. Respondents would be pleased to present oral argument in defense of the circuit court's ruling in their favor, but must recognize that under the criteria for oral argument established by W.Va.R.A.P. 18(a), oral argument would not be necessary. Furthermore, affirmance by memorandum decision pursuant to W.Va.R.A.P. 21(c) would be appropriate.

If the Court in its discretion determines that oral argument will be held, however, Respondents would suggest that this case would be suitable for Rule 19 argument, as a case involving assignments of error in the application of settled law or an unsustainable exercise of discretion where the law governing that discretion is settled. W.Va.R.A.P. 19(a)(1), (2).

ARGUMENT

- I. **The circuit court properly dismissed Petitioner’s complaint against Travis Cobb for lack of personal jurisdiction.**
 - A. **Petitioner’s attempt to accomplish substituted service on Respondent Cobb pursuant to W.Va.R.Civ.P. 4(d)(1)(B) at a place other than his “dwelling place or usual place of abode” was ineffective.**

“To enable a court to hear and determine an action, suit or other proceeding it must have jurisdiction of the subject matter and jurisdiction of the parties; both are necessary and the absence of either is fatal to its jurisdiction.” Syl. Pt. 3, *State ex rel. Smith v. Bosworth*, 145 W.Va. 753, 117 S.E.2d 610 (1960).” Syl. Pt.1, *Leslie Equipment Co. v. Wood Resources Co., L.L.C.*, 224 W.Va. 530, 687 S.E.2d 109 (2009). Proper service of process is necessary to confer jurisdiction upon the court. Syl.pt.3, *Beane v. Dailey*, 226 W.Va. 445, 701 S.E.2d 848 (2010).

Service properly may be effectuated by substitute service, which can be made by:

Delivering 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 the complaint.

W.Va. R. Civ. P. 4(d)(1)(B) (emphasis added).

The central issue with respect to whether effective service was made on Respondent Cobb is the meaning of the term “usual place of abode.” In *Beane v. Dailey*, supra, the Supreme Court of Appeals addressed that question.

Plaintiff Beane filed a complaint against Defendant Dailey for injuries she sustained while riding as a passenger in a vehicle driven by the defendant. Plaintiff’s summons was served on Defendant’s mother at Defendant’s mother’s address. Defendant did not file an answer, and Plaintiff was awarded a default judgment and damages against Defendant. Defendant appealed the judgment against him on the basis that service was defective. Defendant argued that he did not

receive notice of the civil action against him and that he was not a resident of West Virginia at the time of the accident or during the proceedings which occurred thereafter.

On appeal, this Court noted that the summons and complaint were not personally served on Defendant, but rather were hand-delivered to Defendant's mother at his mother's address in an attempt to effectuate substitute service as provided by Rule 4(d)(1)(B). The Court ultimately concluded that the defendant was not properly served notice of the summons and complaint against him and that the default judgment was therefore void. In doing so, the Court relied in part on *Williamson v. Taylor*, 96 W. Va. 246, 247, 122 S.E. 530, 531 (1924) which quoted *Capehart, Adm'r, v. Cunningham, Adm'r*, 12 W. Va. 750 (1878) where the Court stated:

What does the statute mean by the expression 'his usual place of abode'? When we consider that the object of the statute was to enable the defendant to know, or have notice, of the action against him, that he might protect his rights therein, it is clear the statute meant his usual place of abode eo instanti that the summons was posted, **not a place of casual abode, but one of present abiding**. It would be absurd to hold that a boarding house, or place where a person stopped temporarily when visiting a city or country, on matters of business, or socially, should be considered his usual place of abode when his visit or stay had ended, and he absent, so as to make the posting of a summons on the front door thereof legal notice.

701 S.E.2d 853 (emphasis added). The Court in *Taylor* also said:

Under the statute "the usual place of abode" means the customary place of abode at the very moment the writ is left posted; hence, where the writ is left posted at a former place of abode, but from which defendant had, in good faith, removed, and taken up his place of abode elsewhere, service so had is ineffective and invalid.

Taylor, 96 W. Va. at 246, 122 S.E. at 530. In contrast, in *Crouch v. Crouch* the Court noted:

The place of posting had, of course, been defendant's usual place of abode. Has he abandoned it? . . . His father testified that defendant had moved from the dwelling, but failed to state how he had acquired such information. There is no witness from whose evidence it may be said unequivocally that defendant had quit the

premises with the intention not to return, or that he had established a new residence bona fide.

Crouch v. Crouch, 124 W. Va. 331, 20 S.E.2d 169, 171 (1942). The Court found the record devoid of any evidence that the defendant had abandoned his usual place of abode. *Id.*

In *Beane v. Dailey*, this Court made clear two important propositions. “Before substituted service can take the place of, and be equivalent to, an actual personal service, all the requirements of the statute regarding the manner of such substituted service must be strictly complied with. . . Such want of service renders the decrees based thereon absolutely void.” 701 S.E.2d at 854, quoting *Jones v. Crim & Peck*, 66 W.Va. 301, 66 S.E. 367, 368 (1909). “Moreover, our case law is clear that a court that enters a judgment where there has been insufficient service of process is without jurisdiction to enter said judgment, ‘and a void judgment or decree is a mere nullity and may be attacked at any time.’” *Id.*, quoting *Dierkes v. Dierkes*, 165 W.Va. 425, 430, 268 S.E.2d 142, 145 (1980).

Here, Petitioner did not establish strict compliance with the statutory requirements for substituted service. As set forth in Mr. Cobb’s affidavits, and as the circuit court found, on March 24, 2010 when service was attempted at the South Samuel Street address, Mr. Cobb did not live there. (Joint Appendix pp.000040-41, 129-174 -- Motion to Dismiss, Exhibit B; Defendants’ Rebuttal Memorandum, Exhibit 1). In line with *Taylor*, Mr. Cobb had, in good faith, removed himself, and taken up abode elsewhere. In the six months preceding Petitioner’s attempt to serve the summons and complaint, Mr. Cobb had spent less than one week in total time at his parents’ home. At the time Petitioner attempted service of the summons and complaint, Mr. Cobb was living aboard a sailboat he purchased in 2009. He had lived aboard the sailboat for six months, and in November 2009 docked the boat in East Greenwich, Rhode Island. At the time Petitioner attempted service (March 24, 2010) Mr. Cobb had lived in East Greenwich, Rhode Island for

several months. That was his “place of abode”. (See Joint Appendix pp. 000129-000174). Unlike the defendant in *Crouch*, Respondent Cobb introduced ample evidence that he had abandoned his parents’ home as his place of abode.

Essentially, Petitioner argues that his attempt at substituted service was effective on the grounds that Mr. Cobb “held himself out as a Jefferson County, West Virginia resident” by holding a West Virginia driver’s license which reflected his parents’ Charles Town address. He asserts that Respondent Cobb should be estopped from denying the validity of service, because he holds a driver’s license bearing that address. In the circuit court, Petitioner did argue that because Mr. Cobb in effect declared his residence to be his parents’ address, Petitioner served him at the place he determined would be most likely to insure that Mr. Cobb received notice of the suit. (Joint Appendix pp.000077-78). He did not develop an estoppel argument, as he does before this Court, relying on cases from other jurisdictions. (Joint Appendix pp.000075-78). Nevertheless, the circuit court squarely addressed the effect of this evidence on the questions before the court-- whether service was effective, and ultimately whether Mr. Cobb was a resident of Jefferson County for purposes of venue. (Joint Appendix pp.000189-191).

As Defendant Cobb attested, he used his parents’ address to ensure that ultimately he will receive important mail. (Joint Appendix, p.000131). In the absence of other indicia that a person

resides at a particular address, receipt of mail does not establish an individual's "usual place of abode."¹

B. Under West Virginia law, receipt of "actual notice" of a lawsuit does not establish the circuit court's jurisdiction over the person.

Petitioner complains that the circuit court "confuse[d] 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 result, he asserts, was a "crabbed interpretation of outdated statutes". (Petitioner's Brief, pp.9-10).

The circuit court, of course, was bound by the West Virginia Legislature's "outdated statutes" and by this Court's precedent. If those statutes are "outdated", it is for the Legislature to revisit the statutory requirements for service. Last year, in *Beane v. Dailey*, this Court made clear that West Virginia law does not reflect the "trend towards liberal construction of the phrase 'usual place of abode'" which Petitioner asserts a few other jurisdictions have implemented. (Petitioner's Brief, pp.21-23). "Before substituted service can take the place of, and be equivalent to, an actual personal service, all the requirements of the statute regarding the manner of such substituted service must be strictly complied with...Such want of service renders the decrees based thereon absolutely void." *Beane*, 701 S.E.2d at 854.

¹ In the circuit court, Petitioner also relied on Defendant Cobb's "Commercial White Water Guide-Trainee Information Sheet" which listed his parents' address as his address. This document is dated April 16, 2005, almost five years before Plaintiff attempted service upon Mr. Cobb at the South Samuel Street address. Defendant had been a seasonal employee of Cheat River Outfitters, Inc. since 2005. The circuit court agreed with Respondents that the document offered no support for Plaintiff's assertion that the Jefferson County address was Mr. Cobb's "usual place of abode" in March 2010. (Joint Appendix p. 000187) Petitioner has abandoned reliance on that evidence.

Petitioner argues that the circuit court used the *dicta* of this court's *per curiam* decision in *Beane* to justify its decision, and suggests that the court's rationale thereby was impaired. (Petitioner's Brief, p.9). In *Walker v. Doe*, 210 W.Va. 490, 558 S.E.2d 290 (2001), this Court held that its *per curiam* opinions "have precedential value as an application of settled principles of law to facts necessarily differing from those at issue in signed opinions. The value of a *per curiam* opinion arises in part from the guidance such decisions can provide to the lower courts regarding the proper application of the syllabus points of law relied upon to reach decisions in those cases." *Id.*, syl.pt. 3. The circuit court's discussion of *Beane* reflects that the court heeded that directive.

The circuit court recognized that *Beane v. Dailey* is distinguishable from the present case in two important respects. In *Beane*, there was no evidence showing that the defendant resided at his mother's home, where plaintiff attempted substituted service, and the defendant made no appearance at the trial court level. (Joint Appendix, p.000188-189). Nevertheless, the court correctly perceived, West Virginia law requires substituted service to be made at the defendant's "dwelling place or usual place of abode".

Petitioner complains that given Mr. Cobb's "itinerant lifestyle, there existed no other logical place to serve Cobb". (Petitioner's Brief, p. 13). Petitioner overlooks that service may be had on an individual by "[d]elivering the summons and complaint to that individual personally", without restriction. W.Va.R.Civ.P. 4(d)(1)(B)(1)(A). As Petitioner acknowledges, Mr. Cobb has worked for Respondent Cheat River Outfitters seasonally since 2005, in Preston County.

The fact that Gregory Cobb said he would deliver the summons and complaint to counsel utterly fails to satisfy West Virginia's requirements for substituted service.

W.Va. Rules of Civil Procedure authorize service on an individual "[b]y delivering a copy of the summons and of the complaint to an agent or attorney in fact authorized by appointment or

by statute to receive or accept service of process of his behalf.” W.Va.R.C.P. 4(d)(1)(C) (underscore added). For example, under the W.Va. Code § 56-3-31(b), an insurance company is the agent or attorney in fact for every non-resident motorist involved in automobile accident. Under W.Va. Code § 31-1-15, the Secretary of State is the attorney in fact for all domestic and foreign corporations authorized to do business in the state. No West Virginia statute, however, authorizes delivery of a copy of the summons and complaint to an attorney as a substitute for personal service on the defendant in this case. In the absence of an enabling statute, the attorney’s client must give authority to the attorney to accept service on his or her behalf. *McClay v. Mid-Atlantic Country Magazine*, 435 S.E.2d 180, 182-83 (W. Va. 1993).

In *McClay*, on appeal from the entry of default judgment in favor of the plaintiff, this Court addressed Rule 4(d)(8)(A) of W.Va. Rules of Civil Procedure, which authorizes service on foreign corporations by service of the summons and complaint upon an agent or attorney in fact of the foreign corporation. Plaintiff alleged that the defendant breached their contract. Before plaintiff’s filed their complaint for breach of contract, the defendant’s attorney wrote to the plaintiff, representing that his firm had been retained to collect an account due and owing by plaintiff and that all communications and correspondence relating to this account must be directed to his office.

Plaintiff filed suit and served the defendant’s attorney with the summons and the complaint. Relying on *Adkins v. Globe Fire Ins. Co.*, 32 S.E. 194 (1898), this Court held that the plaintiff was required to show that the attorney had authority to accept service of process on behalf of his client. Consequently, the Court held that the circuit court’s order granting default judgment to plaintiff was void.

Here, Petitioner does not claim that counsel was authorized to accept service for Defendant Cobb. In the absence of such express authorization, delivery of a complaint to counsel for a party

does not satisfy West Virginia's requirements for the service of legal process. Respondent Cobb's submission of affidavits in support of his challenge to personal jurisdiction notwithstanding, he would be "prejudiced" if suit against him were permitted to proceed in violation of West Virginia law requiring effective service of original process.

The "driving issue" in this case is not, as Petitioner claims, merely whether Mr. Cobb received notice of this suit. (Petitioner's Brief, p.20). The resolution of the question whether Mr. Cobb's "dwelling place or usual place of abode" was in Jefferson County has more profound consequences. The determination of whether all of the Respondents are subject to suit in Jefferson County rests entirely on whether Mr. Cobb resides in Jefferson County. As the circuit court found, he does not, but the circuit court's finding does not deprive Petitioner of a West Virginia forum for his suit. Clearly, Petitioner could have filed suit in Preston County in the first instance. Having failing in his efforts to establish that Defendant Cobb was a resident of Jefferson County, Petitioner then could have filed suit in Preston County.

The circuit court correctly ruled that personal jurisdiction over Travis Cobb is absent in this case because service upon him was ineffective.

II. The circuit court acted within its discretion in dismissing the complaint for lack of venue, for it was undisputed that under W.Va.Code § 56-1-1 venue over this suit would lie in Jefferson County only if Travis Cobb resided there.

With regard to which party has the burden of proof on the issue of venue, this Court has held that "[w]here properly questioned by motion to dismiss under Rule 12(b)(3), W. Va. R.C.P., venue must be legally demonstrated independent of *in personam* jurisdiction of the defendant." Syl. pt. 2, *State ex rel. The Galloway Group v. McGraw*, filed May 16, 2011, ___ W.Va. ___, ___ S.E.2d ___, 2011 W.Va. LEXIS 32, quoting Syl. pt. 1, *Wetzel Co. Sav. & L. Co. v. Stern Bros.*, 156 W. Va. 693, 195 S.E.2d 732 (1973). Here, the circuit court acted within its discretion in dismissing

this suit for lack of venue, because Petitioner failed to discharge his burden of demonstrating that venue was proper in Jefferson County.

West Virginia Code §56-1-1 governs whether venue is proper in this case. The statute provides that “[a]ny 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 . . .” W. Va. Code §56-1-1(a)(1). If a corporation is a defendant, the action may be brought “wherein its principal office is, or wherein its mayor, president or other chief officer resides . . .” W. Va. Code §56-1-1(a)(2).

Petitioner did not assert that his cause of action arose in Jefferson County. Cheat River Outfitters is a West Virginia corporation, with its principal place of business (and its only office from which it conducts business) located in Preston County. Cheat River Outfitters’ president Paul Hart resides in Preston County. Cheat River Outfitters does not hold a license to conduct commercial whitewater operations on the Shenandoah River in Jefferson County.² Furthermore, the incident itself did not occur in Jefferson County. Rather, the incident occurred on the Cheat River, again in Preston County. Thus, to establish that venue was proper in this case, Petitioner must have established that Defendant Cobb resides in Jefferson County. Indeed, Petitioner has conceded that Defendant Cobb is “the jurisdiction-conferring party”. (Petitioner’s Brief p.1; Joint Appendix p.000078 -- Plaintiff’s Memorandum, p.6).

As Defendant Cobb has argued, proper service was not effectuated on him. Because proper service was not accomplished, and the circuit court lacked personal jurisdiction over the

² In his complaint, Petitioner asserted venue on the basis that Cheat River Outfitters is licensed to conduct commercial whitewater operations on the Shenandoah River in Jefferson County (Joint Appendix, p.000008), but Petitioner offered no evidence of that assertion. Cheat River Outfitters offered evidence that it is not licensed to conduct commercial whitewater operations on the Shenandoah River in Jefferson County. (Joint Appendix, p.000042-43). Apparently, Petitioner has withdrawn the claim.

only Defendant whom Petitioner alleges had sufficient contact with Jefferson County to establish venue, venue is improper.

Again, Petitioner argues that because Mr. Cobb's driver's license displays his parents' Charles Town address, Respondent Cobb necessarily resides in Jefferson County. Again, Petitioner offers no West Virginia case law supporting his position that a driver's license alone establishes that a defendant resides in a given county for purposes of establishing venue. On the contrary, in the context of an attachment proceeding, this Court said that a "resident of a state may become a 'nonresident,' within the meaning of [the] attachment statute, by leaving the state with [the] intention of changing his residence from the state to residence elsewhere ." *LeFevre v. LeFevre*, 124 W. Va. 105, 19 S.E.2d 444 (1942). Notably, the Court cited this court's earlier holder in *Trust Co. v. Swisher*, 105 W.Va. 476, 144 S.E. 294: "No precise rule or definite rule can be laid down as to the exact duration of the absence which will render a person a nonresident." 19 S.E.2d at 446.

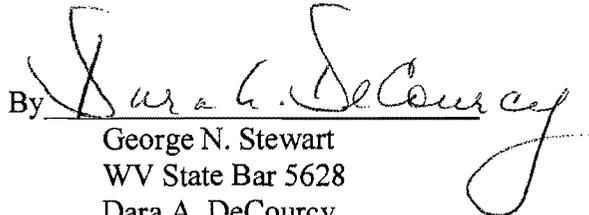
Defendant Cobb was not a resident of Jefferson County when this suit was filed. He left the state of West Virginia before suit was filed and service was attempted. Defendant Cobb was absent from Jefferson County for a substantial period of time before this suit was filed, and he resided outside Jefferson County. Furthermore, the incident did not occur in Jefferson County; it occurred on the Cheat River in Preston County. Cheat River Outfitters is located in Preston County. Its president, Defendant Paul Hart, resides in Preston County. Clearly, venue would lie in Preston County, pursuant to Section 56-1-1(a)(1), but there is no basis for venue in Jefferson County.

CONCLUSION

Respondents respectfully request that this Court affirm the order of the circuit court dismissing the complaint against Travis Cobb for lack of personal jurisdiction, and dismissing this suit without prejudice for lack of venue.

Respectfully submitted,

ZIMMER KUNZ, PLLC

By 
George N. Stewart
WV State Bar 5628
Dara A. DeCourcy
WV State Bar 7034

132 South Main Street
Suite 400
Greensburg, PA 15601
(724) 836-5400

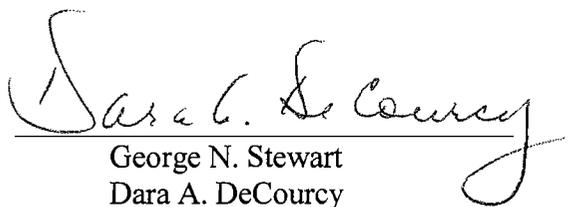
Date: July 22, 2011

Attorneys for Respondents, Cheat River
Outfitters, Inc., Brent Matthew Everson,
Travis Cobb, Simon Buckland, and
Paul Hart

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing Respondents' Brief upon the following counsel by United States Mail, First Class, postage pre-paid this 22nd day of July, 2011 addressed as follows:

Stephen G. Skinner, Esquire
Skinner Law Firm
115 East Washington Street
P.O. Box 487
Charles Town, WV 25414-0487
Attorney for Petitioner


George N. Stewart
Dara A. DeCourcy