

No. 288170-III

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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Christopher M. Farmer  
Appellant

v.

Bradley M. Davis  
Respondent

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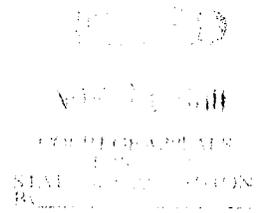
Appeal from the Superior Court of Spokane County

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BRIEF OF RESPONDENT

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WSBA No. 19061



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## I. STATEMENT OF THE CASE

On April 21, 2006, a motor vehicle accident occurred between Christopher Farmer and Bradley Davis. On April 10, 2009, Farmer's Summons and Complaint were filed in Spokane County Superior Court claiming personal injury damages. (CP 1- 5; CP 13 - 16). On May 27, 2009, the Summons and Complaint were served upon Bradley Davis' mother, Laurie Davis, at her residence located at 7049 W. Tombstone, Rathdrum, Idaho. (CP 9 -10 or 11 – 12) and (CP 26 – 29, ¶s 2 & 3). [NOTE that Appellant's Statement of the Case's representation that this was "defendant's usual abode" is unsupported, impermissible argument].

Bradley Davis, age 27, had not lived with his mother at the Tombstone Address since his marriage on January 27, 2007. After getting married, Mr. Davis and his new wife rented an apartment in Coeur D'Alene, Idaho on Emma Street. They lived there until approximately the spring of 2009, at which time they moved into a house in Rathdrum, Idaho located at 13537 Halley Street, Rathdrum, Idaho. (CP 26 – 29, ¶ 4; CP 30 -32, ¶ 3; CP 98 -100, ¶ 2 – 5; CP 101 – 103, ¶ 2, 3 & 5).

On June 3, 2009, Raymond W. Schutts filed a Notice of Appearance in which he appeared as Counsel for Defendants Bradley Davis and his wife. (CP 6 – 8). On June 25, 2009, process server Parker Gibson attempted to serve Bradley Davis mother, Laurie Davis, at her residence located at 7049 W. Tombstone, Rathdrum, Idaho. Mrs. Davis

claims she refused to take the paperwork. Parker Gibson claims she took the paperwork, but immediately tried to return the papers to him. (CP 9 - 10 or 11 - 12; CP 26 - 29, ¶ 5; Parker Gibson Affidavit of Service contained in CP 38 - 83 ¶ 4). On July 10, 2009, the 90 day tolling provision of the statute of limitations expired and Mr. Davis had not been personally served. (CP 30 -32, ¶ 2).

On October 21, 2009, Davis filed a motion for summary judgment. (CP 17 - 18). On November 6, 2009, Farmer filed a Brief in Response along with numerous exhibits, including several affidavits. (CP 38 - 83). On November 11, 2009, Davis served Farmer with a Motion to Strike, a Brief in support of the Motion to Strike and a Reply Brief in Support of the Motion for Summary Judgment. (CP 129 - 140: Schutts Declaration, ¶ 3). These pleadings were filed with the Court on November 12, 2009. (CP 84 - 97; CP 98 - 100; CP 101 - 103).

On November 11, 2009, after being served with Davis' Motion to Strike and Davis' Reply Brief, Farmer's Counsel left a voicemail message for Davis' Counsel, indicating he had a CLE in Las Vegas which conflicted with the November 19<sup>th</sup> hearing date. Counsel for Mr. Farmer requested a continuance. (CP 129 - 140: Schutts Declaration, ¶ 3).

Davis' Counsel was concerned the last minute continuance was being sought for tactical reasons because it had not been made until after Farmer's Counsel had received Davis' responsive briefing and Motion to Strike. In exchange for an agreed continuance, Farmer's Counsel signed a

letter agreement agreeing not to submit any further material in opposition to summary judgment. (CP 129 – 140: Schutts Declaration, ¶s 4 & 5). The hearing was continued to December 9, 2009. Prior to that date, the Court contacted the parties to continue the hearing date to December 17, 2009 due to a criminal trial. (CP 129 – 140: Schutts Declaration, ¶ 6).

On December 17, 2009, Counsel for both parties appeared for the hearing. The Court began to address Defendant's Motion to Strike, noting Farmer's Counsel had never responded despite having had it for over a month. The Court also noted that Farmer's Counsel's submission contained numerous instances of hearsay. (RP 3 – 7). Ultimately, the Court continued the hearing so Farmer's Counsel could file a responsive brief. In so doing, the Court specifically stated that the continuance was solely for the purpose of Farmer's Counsel responding to the Motion to Strike, stating that the deadline for responding to the Motion for Summary Judgment had long since passed. (RP 7 - 10).

On December 30, 2009, Farmer's Counsel served his Brief in Response to Defendants' Motion to Strike on Davis' Counsel. He also served a "Motion to Continue Summary Judgment" and a Motion to Incorporate Exhibits/Transcripts Held by Clerk's Office. (CP 104 – 105; CP106; CP 107 – 108; CP 109). On January 4, 2010, Davis' Counsel filed his Reply Brief in Support of Motion to Strike, a Memorandum in Opposition to Plaintiff's Motion to Continue and in Opposition to Plaintiff's Motion to Incorporate Exhibits/Transcripts and a Declaration in

Opposition to Plaintiff's Motion for Continuance. (CP 119 – 128; CP 129 – 140; CP 112 – 118).

On January 10, 2010, Counsel for both parties again appeared in Court. After extensive argument, the Court granted Davis' Motion to Strike, denied Farmer's Motion for a Continuance, denied Farmers Motion to Incorporate and granted Davis' Motion for Summary Judgment. (RP 11 – 55). An Order was entered in accordance with the Court's decisions on January 28, 2010. (CP 144 – 149).

## II. ARGUMENT

**Issue 1: The trial court properly applied the correct legal standard and correctly determined there was no issue of material fact which precluded summary judgment.**

While Farmer correctly states the rule that an affidavit of service that is regular on its face is presumptively correct, he incorrectly contends the trial court should have used a "clear and convincing" standard in determining service was improper. Appellant's Brief, p. 11. The cases cited by Farmer all involved actions to vacate default judgments and were not summary judgment cases. The courts in the cited cases applied the standard that a party challenging service after judgment is entered must show service was improper by clear and convincing evidence. *See In re Dependency of A.G.*, 93 Wn. App. 268, 277, 968 P.2d 424 (1998) (court applied clear and convincing standard in appeal to set

aside judgment terminating parental rights based on improper service); *Allen v. Starr*, 104 Wash. 246, 247, 176 P. 2 (1918)(person challenging service after judgment must show it was improper by clear and convincing evidence); *Vukich v. Anderson*, 97 Wn. App. 684, 687, 985 P.2d 952 (1999)(party attacking service after judgment must meet clear and convincing standard); *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745 (1997)(court applied clear and convincing standard in action to set aside default judgment based on improper service).

Farmer's reliance on these cases is misplaced. Davis sought a determination on summary judgment that the only service in this case, service on Mr. Davis' mother, did not constitute substituted service on Mr. Davis because he had his own separate residence. He was not seeking to vacate a default judgment. Accordingly, the applicable legal standard was whether there was a material issue of fact which precluded summary judgment. CR 56(c). The trial judge applied the correct standard.

Farmer also cites *In re Dependency of K.S.C.*, 137 Wn.2d 918, 925, 976 P.2d 113 (1999) in support of the "clear and convincing" standard. That case involved a dependency hearing, in which the State is required to prove certain allegations by "clear, cogent, and convincing" evidence pursuant to RCW 13.34.190(1)(a)(i). This case is also inapplicable.

While an “affidavit of service, regular in form and substance, is presumptively correct, the return is subject to attack and may be discredited by competent evidence.” *Haberman v. Washington Public Power Supply System*, 109 Wn.2d 107, 176, 744 P.2d 1032 (1987). Sworn statements by individuals purportedly served asserting they were not in fact personally served are considered by the courts as competent evidence discrediting averments to the contrary in affidavits of service. *Haberman*, at 176.

In the present case, the affidavits of service merely establish that the summons and complaint were served on Bradley Davis’ mother at her home. (CP 9 – 10; CP 11 – 12). There is no presumption that Bradley Davis resided at his mother’s residence at the time of service and, in fact, it is clear from the record that he did not. (CP 26 – 29; CP 30 – 32; CP 98 – 100; CP 101 – 103). Even if the presumption of validity was as broad as Farmer contends, once Davis submitted competent evidence in support of his summary judgment motion that he did not reside at his mother’s house at the time of service, he had successfully rebutted any presumption of validity given the affidavits of service. Davis’ evidence was not refuted by any competent evidence submitted by Farmer. Farmer had the burden of setting forth specific facts by way of competent evidence establishing there was a genuine issue for trial, and failed to do so. CR 56(e).

**Issue 2: The Court correctly denied Plaintiff's Motion to Continue because Plaintiff failed to offer any of the requisite factual support for a continuance and the Court properly granted Defendant's Motion to Strike the hearsay contained in Plaintiff's opposition briefing.**

Farmer's second assignment of error combines two decisions by the trial court, the denial of Farmer's motion for a continuance to allow further discovery and the granting of Davis' Motion to strike the inadmissible evidence contained in Farmer's opposition briefing.

**A. The Court's did not abuse its' discretion when it correctly denied Plaintiff's Motion for a Continuance.** Farmer was served with the Motion for Summary Judgment more than two months prior to seeking the continuance. During this time, Farmer never once indicated he needed additional time to obtain affidavits in order to contest summary judgment. To the contrary, Farmer fully responded to Davis' Motion for Summary Judgment with a five and a half page (single spaced) brief and ten exhibits, including affidavits from his attorney and two process servers.

After Davis responded to Farmer's material in opposition with a reply brief and a motion to strike the hearsay and other inadmissible evidence contained in Farmer's materials, Farmer's Counsel suddenly recalled he had a conflict with the hearing date, which was just one week away. Fearing tactical gamesmanship, Davis' Counsel wrote Farmer's Counsel, stating:

**Since, as you indicated, this trip required a plane ticket, hotel room and registration for the CLE, I am surprised to be hearing about it for the first time now, after I delivered my final briefing to you in response to your pleadings in opposition. That said, I am glad to accommodate you provided you agree that you will not submit any further materials in opposition to the motion. I do not want a continuance of the motion to result in additional back and forth briefing, affidavits, etc when the deadline for your responsive materials has passed.**

(CP 112 – 118: ¶s 1 – 5). In exchange for an agreed continuance, Counsel for Farmer signed an agreement agreeing not to submit further material contesting the summary judgment. Despite the issue of additional submissions being squarely in front of him, he never once indicated he needed more time in accordance with CR 56(f). (CP 112 – 118)

At the December 17, 2009 hearing, the Court continued the hearing to give Davis' Counsel an opportunity to respond to Davis' Motion to strike, but specifically limited Counsel's response:

THE COURT: I am going to reset the motion for argument on the first Friday in January. However this is not an opportunity for the Plaintiff to submit anything new. The plaintiff has had their opportunity to respond. The defendant did not provide anything in his reply brief that was new, at all. The only thing that the plaintiff will be able to do is respond to the motion to strike as to why those particular items that he put in there are not subject to evidentiary rulings. You understand that Mr. Phelps?

Mr. PHELPS: I do.

THE COURT: I will not consider anything new, any new declarations, anything of that nature.

(RP 7 – 8).

Once again, the issue of additional submissions was directly addressed. Counsel for Farmer never indicated he needed more time under CR 56(f) in order to fully respond to Davis' summary judgment motion. Once again, he agreed he understood that he was not to submit anything other than a responsive brief to Davis' Motion to Strike.

Despite agreeing twice to not submit anything further, Farmer's Counsel moved for a continuance under CR 56(f) when he filed his responsive briefing to Davis' Motion to Strike in order to take depositions of Bradley Davis and his mother. It should be clear that the continuance was not sought due to an inability to obtain a witnesses' affidavit in order to file responsive briefing, Farmer had already filed extensive responsive materials. Farmer was simply trying to use CR 56(f) to try to correct the deficiencies in the briefing he previously submitted, deficiencies that had now been clearly identified by Davis' subsequent submission.

CR 56(f) was not designed to provide a means to cure deficient briefing already filed by the non-moving party. CR 56(f) provides a remedy for parties who know of the existence of a material witness and show good reason why they cannot obtain the witness' affidavits in time for the summary judgment proceeding. *Turner v. Kohler*, 54 Wn. App. 688, 693, 775 P.2d 474 (1989). The trial court may, however, deny a motion for continuance if:

**1) the requesting party does not offer a good reason for the delay in obtaining the desired evidence; 2) the requesting party does not state what evidence would be established through the additional discovery; or 3) the desired evidence will not raise a genuine issue of material fact.**

*Turner* at 693. Denial of a continuance can be made based on any one of the above three prongs. *Pelton v. Tri-State Memorial Hosp., Inc.*, 66 Wash. App. 350, 356, 831 P.2d 1147 (1992). The trial court's grant or denial of a motion for continuance will not be disturbed absent a showing of manifest abuse of discretion. *Turner* at 693.

It can not be said that there was a manifest abuse of discretion on the part of the trial court when the record is clear that Farmer failed to offer any of the requisite factual justification for the continuance. Counsel offered nothing in his Affidavit in Support (CP 107 – 108) to explain the months of delay in seeking depositions of Brad Davis and his mother. Counsel offered no specifics as to what evidence would be established or how such evidence would raise an issue of material fact.

On appeal, Counsel fails to address CR 56(f) at all. His brief first cites ER 702, an evidence rule addressing testimony by experts. This rule has no bearing on whether a CR 56(f) continuance should have been granted. The rest of Farmer's argument makes no sense at all. Farmer contends, without any support, that the Court failed to consider aspects of

Laurie Davis' declarations. Laurie Davis' declarations have no bearing on Farmer's request for a continuance.

Counsel's statement that "The trial court failed without any apparent basis to allow a continuance to complete discovery" ignores the clear explanation provided by the Court. After questioning Davis' Counsel about his failure to seek depositions or propound discovery earlier, the Court clearly pointed to the requirements of CR 56(f), stating:

THE COURT: One of the things that you have to show me, Mr. Phelps, in a motion to continue a summary judgment is your attempts to get the information. If you have an opportunity to do the deposition, what information you intend to elicit and what you expect it to show. You cannot just ask for a continuance without making some showings.

(RP 27 - 28).

Davis' Counsel failed to articulate any of the requisite showings under CR 56(f) and the Court properly denied the Motion for Continuance.

**B. The Court correctly granted Davis' Motion to Strike.**

Davis' Motion for Summary Judgment established that Davis had not been personally served prior to the expiration of the statute of limitations. To avoid summary judgment, Farmer needed to offer opposing affidavits which set forth such facts as would be admissible in evidence. CR 56(e). Farmer, however, submitted affidavits full of hearsay and other inadmissible evidence. Each instance of objected to evidence was specifically identified by Davis in his Motion to Strike and

rather than repeat it here, the Court is respectfully referred to that briefing. (CP 84 – 97). In response, Farmer filed briefing that did not contain any specific legal authority. Instead, Farmer misapplied legal terminology such as “circumstantial evidence”, “impeachment evidence”, “foundation” and “state of mind”. (CP 104 – 105). In short, Farmer offered nothing of legal merit to oppose Davis’ Motion to Strike.

In response to Farmer’s brief, Davis’ Reply Brief walked the trial court through each of Farmer’s erroneous arguments, pointing out for example, that “circumstantial evidence” was not an exception to the hearsay rule; that Davis’ “state of mind” can not be shown by third party hearsay; that “foundation” is not some catch-all, cure-all exception to the hearsay rule; and that the hearsay offered was in fact, being offered for the truth of the matter asserted, not for foundation. For the sake of brevity here, the Court is respectfully referred to that briefing. (CP 119 – 128).

On appeal, Farmer once again fails to provide any substantive argument for why the objected to evidence should have been considered by the Court. There are no specific references to any of the objected to statements, let alone any citation to any evidentiary rules that define the contested evidence as not being hearsay, subject to an exception to the hearsay rule, or admissible for other reasons. The trial court’s decision to grant the Motion to Strike was correct.

**Issue 3: The Court's ruling granting summary judgment was consistent with Washington law which holds that actual notice does not, by itself, constitute sufficient service.**

Davis' reliance on *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950) is erroneous. *Mullane* is a due process case regarding the constitutional sufficiency of New York banking law. There has been no constitutional due process argument raised by Davis in this case and *Mullane* does not stand for the proposition that notice, in and of itself, supplants a defendant's right under Washington law to be personally served.

This distinction was addressed in *Thayer v. Edmonds*, 8 Wa.App 36, 503 P.2d 1110 (1973). In *Thayer*, the Court addressed whether service of process was proper and timely where the summons and complaint were left in the defendant's door. The Court found that the defendant's prior statement to the process server that it was fine for the process server to leave the papers in the door because defendant was going to bed was an explicit authorization to be served in this manner. *Id* at 40.

Before analyzing whether service met statutory requirements, however, the *Thayer* court rejected the contention that Farmer now makes, that notice standing alone is sufficient to impart the statutory notice required to invoke the court's in personam jurisdiction. The *Thayer* Court first quoted RCW 4.28.080, which reads in pertinent part:

**The summons shall be served by delivering a copy, as follows: ...(14) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of usual abode with some other person of suitable age and discretion then resident therein.**

RCW 4.28.080. *Thayer* at 39. The Court went on to conclude that the telephone conversation between the defendant and the process server, which clearly communicated the nature of the papers and the subject matter, was insufficient to satisfy the requirements of the statute, distinguishing *Mullane* while stating:

**While this communication did give defendant actual notice of pending litigation, such notice standing alone was insufficient to impart the statutory notice required to invoke the court's in personam jurisdiction. *Interior Warehouse Co. v. Hays*, 91 Wash 507, 158 P.99 (1916). It is not our intention to say that actual notice may not also be required. Of course, notice reasonably calculated, under all the circumstances, to apprise interested parties of a pending action is a matter of constitutional due process. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950). See also *Tonelson v. Haines*, 2 Ariz. App. 127, 406 P.2d. 845 (1965). But beyond due process, statutory service requirements must be complied with in order for the court to finally adjudicate the dispute between the parties.**

*Thayer* at 40.

*Thayer's* holding that actual notice does not constitute sufficient service was followed by Division 3 of the Court of Appeals of Washington in *Gerean v. Martin-Joven*, 108 WaApp 963, 33 P.3d 427 (2001). In

*Gerean*, which parallels the facts of this case, *Gerean* served Ms. Martin-Joven's father, who was not a party to the lawsuit. *Gerean* at 967. However, Ms. Martin-Joven had moved from her father's home a year earlier. *Id.* Mr. Martin-Joven subsequently provided the paperwork to his daughter. *Id.*

*Mullane* was again distinguished by the Court:

**Ms. Gerean's general observation is correct that constitutional due process is satisfied when the plaintiff employs a method reasonably calculated to inform the defendant of the lawsuit. *Mullane v. Central Hanover Bank and Trust Co.*, 339 U.S. 306, 70 S. Ct. 652, 94 L.Ed. 865 (1950). *Thayer*, 8 Wash.App at 40, 503 P.2d 1110. But this general constitutional observation ignores specific statutory requirements for effectuating service on an individual defendant in Washington. And Ms. Gerean makes no argument that these statutory requirements are unduly burdensome or unconstitutional.**

*Gerean* at 971. The Court went on to reject the contention that the father's delivery of the suit papers to his daughter was sufficient service, stating:

**The argument that defective service is cured if the summons is fortuitously delivered by a person who is over the age of 18 and not a party to the lawsuit boils down to the argument that actual notice should be sufficient. But the cases in this state are clear: actual notice does not constitute sufficient service. *Thayer*, 8 Wash.App at 40, 503 P.2d. 1110. Proper service requires actual service on a defendant at her abode, not at an unverified address where she lived three years earlier.**

*Gerean* at 972.

**Issue 4: The trial court properly construed the term “house of usual abode” as set forth in *Sheldon v. Fettig*, 129 Wash2d. 601, 919 P.2d 1209 (1996).**

Farmer’s fourth assignment of error appears to argue that the requisite liberal construction of “usual abode” supported by *Sheldon v. Fettig*, 129 Wash2d. 601, 919 P.2d 1209 (1996) supports a “notice equals service” argument. As noted previously, the Courts of this state have rejected such a position.

A careful review of the facts involved in the cases cited by Farmers, *Sheldon, Larson v. Hendrickson*, 394 N.W. 2d 524 (Minn. Ct. App. 1986), *Karlsson v. Rabinowitz*, 318 F.2d 666 (4<sup>th</sup> Cir. 1963) and *Lavey v. Lavey*, 551 A.2d 692 (R.I. 1988), clearly distinguish them from the case before this Court. In each of these cases, there was substantial evidence that the defendant still owned the residence where service took place and was still using the residence as a “usual abode.”

For example, in *Larson*, while the defendant had moved from Minnesota to Key West, Florida, the defendant had acted affirmatively to renew his Minnesota teaching license, his two vehicles were registered and insured in Minnesota, and he retained his Minnesota bank account and his Minnesota driver’s license. Service had taken place at the defendant’s home on a tenant living in the defendant’s home. *Larson* at 525. The trial court concluded that the Defendant was actually in a period of transition

but that for purposes of service of process, his usual place of abode was still in Minnesota. *Id.*

In *Karlsson*, the defendant had moved from Maryland to Arizona and moved into a motel, while his Arizona house was being built. *Karlsson* at 667. His wife, children and his maid continued to reside in the Maryland home owned by the defendant in order to complete the sale of the house, to dispose of certain household furnishings and to ship the rest to Arizona before joining the defendant in Arizona. It was at their Maryland home that his wife was served, service which the Court found to be sufficient. *Id.*

In *Lavey v. Lavey*, 551 A.2d 692 (R.I. 1988), the defendant was attempting to overturn a default judgment taken against him four and a half years earlier. *Id.* at 693. In reviewing the challenged service, the Court noted that testimony had been given that the defendant was at the disputed residence where service had taken place “practically every day”, that he received his mail there and at times would sleep, shower and dress there, that he was the title owner of the property and that he repeatedly used the street address of this residence for a variety of loan applications, bank records and his voter registration. *Id.* at 694.

In *Sheldon*, defendant Fettig was a flight attendant, who had relocated to Chicago from Seattle in order to begin a training program. *Id.*

at 604. Just prior to her departure for Chicago, she gave up her personal apartment and moved back in with her parents. *Id.* While in Chicago, she continued to use her parent's home as a secondary residence, she registered to vote in Washington using her parents' address, her mail continued to arrive there for seven weeks and she changed her car insurance to reflect her parents' address. *Id.* When she sold her car just prior to service, the bill of sale listed her Seattle address as being her home. *Id.* at 605.

In each of these cases, there was also evidence supporting the defendants' contentions that they had established a separate residence other than the residence where service had taken place, but a liberal construction of the facts outlined above led to each court upholding service. None of these cases stand for the proposition that notice to the defendant is all that is needed for the Court to find proper service. As was stated in *Gerean*, which factually is most comparable to this case:

**Liberal construction does not mean abandoning the statutory language entirely. *Salts v. Estes*, 133 Wash. 160, 162, 943 P.2d 275 (1997). Even the most liberal construction of the statute cannot bring this service within its terms. Ms. Gerean did not accomplish service either in person or by substitution. The fortuitous delivery of process by the defendant's father did not constitute valid service.**

*Gerean* at 972.

In dramatic contrast to the out of state cases cited by Farmer, Farmer did not produce any competent evidence that Davis was using his mother's house as a house of usual abode. In other words, there was nothing for the trial court to liberally construe at all and the Court so noted, stating:

**With regard to whether Ms. Davis is the usual place of abode, there is absolutely no evidence that that is the case. In fact, what evidence the court can consider is that is the contrary. She is his mother. Yes, he visits her. Apparently now he lives fairly close to her. But it was not at the time, and had not been for some years, his usual place of abode. The fact that she never changed her answering machine does not indicate that this is his usual place of abode. It indicates she chose not to change her answering machine. She indicated why, but I guess in the end it does not matter why. This is her answering machine. It is her house. He is an adult. He has not lived in her house for many years. There really is no evidence to support this was the usual place of abode of service.**

(RP 49 – 50).

**Issue 5: The trial court properly granted summary judgment as there was an absence of any issue of material fact as to Mr. Davis' "usual abode".**

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as matter of law. *Marquis v. City of Spokane*, 130 Wash.2d 97, 105, 922 P.2d 43 (1996). The moving party bears the initial burden of showing the absence of an issue of material fact. *Young v. Key Pharmaceuticals*, 112 Wn.2d 216, 225, 770 P.2d

182 (1989). If the moving party makes this showing, the burden then shifts to the non-moving party, who “must set forth specific facts showing that there is a genuine issue for trial.” *Young*, at 225-26 (citing CR 56(e)).

A personal injury action must be commenced within three years of the injury. RCW 4.16.080(2). An action is deemed commenced when either a complaint is filed or a summons is served, whichever occurs first. RCW 4.16.170. When a lawsuit is commenced with the filing of a complaint, the plaintiff has 90 days from the date of filing to serve one or more defendants. RCW 4.16.170. If service is not accomplished within 90 days, the lawsuit is time barred. RCW 4.16.170.

In the present case, Farmer timely filed the lawsuit on April 10, 2009, eleven days before the statute of limitation expired. Farmer had 90 more days, or until July 9, 2009, to properly serve Davis. A summons is properly served on an individual defendant by delivering a copy “to the defendant personally, or by leaving a copy of the summons **at the house of his or her usual abode** with some person of suitable age and discretion then resident therein.” RCW 4.28.080(15)(emphasis added).

It is undisputed that Davis was never personally served. The issue in this case is whether or not his mother’s Tombstone address in Rathdrum, Idaho was Davis’ secondary “usual abode” for purposes of substituted service under RCW 4.28.080(15). While it is possible for a defendant to maintain more than one house of usual abode, each must be a “a center of

domestic activity”. *Sheldon v. Fettig*, 129 Wash2d. 601, 612 919 P.2d 1209 (1996).

Washington Courts have repeatedly ruled that service at the home of a parent of an adult child when the adult child maintains their own residence is insufficient. *Lepeska v. Farley*, 67 Wn. App. 548, 833 P.2d 437 (1992)(service on defendant’s mother at her house in Woodinville insufficient when defendant had his own home in Burien); *Gerean v. Martin-Joven*, 108 Wn. App. 963, 22 P.3d 427 (2001)(service on defendant’s father at his home in Deer Park insufficient when defendant moved into her own home in Walla Walla a year before). See also *Gross v. Evert-Rosenberg*, 85 Wn. App. 539, 933 P.2d 439 (1997)(service on defendant’s son-in-law at a home he rented from defendant insufficient).

In support of the motion for summary judgment, Davis submitted declarations from himself and his mother establishing the following:

1. Mr. Davis, age 27, had not lived at his mother’s Tombstone Street address since he got married on January 27, 2007. After he got married, he moved into an apartment with his new wife in Coeur D’Alene, Idaho. They lived there the spring of 2009, at which time they moved into a house in Rathdrum, Idaho located at 13537 Halley Street. (CP 26 – 29 ¶4; CP 30 -32 ¶3).
2. Since moving out, Mr. Davis has never moved back in with his mother for any period of time. He does not use his mother’s house as any kind of secondary residence for any purpose. He lives with his wife at his own home. He sleeps, eats his meals, and conducts his personal business at his own house. He receives his mail at his home. His only connection with his mother’s house on Tombstone

street is that his mother lives there. (CP 98 – 100; ¶s 4 & 5; CP 101 – 103, ¶ 2).

3. Mr. Davis has his own phone number. He does not use his mother's phone number or his mother's answering machine to get phone messages. Mrs. Davis made the decision to keep an old message on her answering machine, which included his name and the name of his brother, who had also previously moved out, for safety reasons since she was living alone. The only person who uses his mother's phone number or his mother's answering machine is his mother, Laurie Davis. (CP 98 – 100; ¶s 2 & 3; CP 101 – 103, ¶ 3).
4. There is no reason for Mr. Davis to use his mother's home on Tombstone as a secondary residence for any purpose. He lives less than two miles from her. When he visits her, he returns to his home just as Mrs. Davis returns to her home when she visits Mr. Davis' wife and Mr. Davis. (CP 101 -103 ¶ 5).

These facts remain uncontested. This Court should take note of the fact that in his briefing at page 23, Davis attempts to inject hearsay evidence which was properly stricken by the trial court (“He kept his boat and personal property at his mother’s residence”) and evidence for which there is no support whatsoever in the record (“He received messages regularly at the Tombstone address and continued even into October of 2009 to receive messages at his mother’s Tombstone phone.”). Farmer’s reference at page 25 of his brief to a specific move date of May 21, 2009 also comes from hearsay evidence stricken by the court. Since Farmer failed, under Assignment of Error 2, to offer any explanation as to why the

court was in error in striking this testimony, it is very improper to offer this information as “fact” in his brief.

Farmer ultimately failed to submit any competent evidence to establish a material issue of fact prior to summary judgment. The statement of an unidentified neighbor who claimed that Mr. Davis kept property at his mother’s house was stricken as inadmissible hearsay as were hearsay statements from an unidentified apartment dweller and data from an unidentified computer web site. The court also properly struck improper affidavit testimony from counsel and a process server which simply repeated the hearsay or drew inadmissible conclusions from it.

The only “facts” ultimately submitted by Farmer was a transcript of Mrs. Davis’ answering machine, which indicated one could leave a message for Bradley and Bradley’s brother, both of whom had moved out of the house, and the fact that Bradley’s driver’s license still reflected his Emma Street apartment address when he received a speeding ticket on August 24, 2009, after the statute of limitations had run.

As the court correctly noted, the fact that Mrs. Davis never changed her answering machine message does not turn her home into Bradley Davis’ “usual abode”. It is her machine, her decision, and both she and Bradley testified that despite the message, which she kept for her

own safety reasons, Bradley did not use her phone number or her answering machine for any purpose.

Farmer did not assign any error to the court's decision that judicial estoppel did not apply to this case and there was never any service on anyone at the Emma apartment address, so the speeding ticket has no bearing on this court's analysis of "usual abode", other than the speeding ticket establishes that Bradley had in fact previously moved out of his mother's home on Tombstone.

Unlike the jet-setting flight attendant in *Sheldon*, the Minnesota teacher relocating to Florida in *Larson* or the Maryland father waiting for his family to join him in Arizona as described in *Karlsson*, Mr. Davis is not highly mobile and is not splitting his time between two distant cities. He lives in the same small town as his mother, less than five minutes away from her. There is no logical reason for him to maintain "two usual abodes". There simply is no evidence from which one could conclude he uses his mother's residence as a "center of domestic activity". The trial court correctly found that there was no issue of material fact as to Mr. Davis' "usual abode" and that summary judgment was appropriate.

### III. CONCLUSION

Farmer's briefing repeatedly relies on erroneous interpretations or applications of law, ignores clear Washington authority and presents a

convoluted, repetitive “notice is all that it needed argument” in support of his appeal. This should all be rejected.

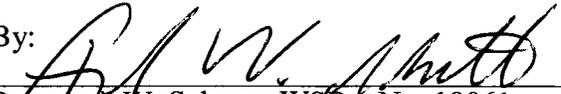
Mr. Davis, a 27 year old adult, moved out of his mother’s house when he got married, more than two years before any attempted service. He was never personally served. His mother was served at her house. Service on his mother constitutes substituted service on him only if he was using his mother’s home as a “center of domestic activity”. Farmer failed to submit competent evidence to raise an issue of fact to support this contention, so summary judgment was properly granted. A liberal interpretation of “usual abode” and notice to Mr. Davis does not change this result.

There was no error in the court’s denial of Farmer’s motion for a continuance or granting of Davis’ motion to strike because Farmer failed to provide the requisite legal or factual basis to support a different result.. Summary judgment was properly granted in this case and the trial court’s decisions should be affirmed.

Respectfully submitted this 4<sup>th</sup> day of November, 2010.

LAW OFFICES OF RAYMOND W. SCHUTTS

By:

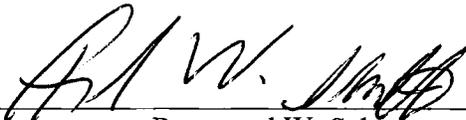
  
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Raymond W. Schutts, WSBA No. 19061  
Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on the 4<sup>th</sup> day of November, 2010 I caused to be served a true and correct copy of the foregoing BRIEF OF RESPONDENT by the method indicated below, and addressed to the following:

Douglas D. Phelps  
Phelps & Associates, PS  
2903 N. Stout Rd.  
Spokane, WA 99206-4373

<input type="checkbox"/>	PERSONAL SERVICE
<input type="checkbox"/>	LEGAL MESSENGER
<input type="checkbox"/>	U.S. MAIL
<input checked="" type="checkbox"/>	HAND DELIVERED
<input type="checkbox"/>	EXPRESS DELIVERY
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Raymond W. Schufft