

FILED

MAY 28 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

COURT OF APPEALS
DIVISION III
OF THE STATE OF WASHINGTON

STEVEN J. LACEY,

Appellant,

v.

IAN LANTRY, et.al.

Respondents.

BRIEF OF APPELLANT

Cause No. 12 – 2 - 03093 – 3

Appeal No. 32189 – 4 - III

Richard R. Johnson
Jeffrey R. Johnson
Lawyers For Appellant
JOHNSON & JOHNSON LAW FIRM, P.L.L.C.
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LACEY v. LANTREY, ET.AL.

Appeal No. 32189 - 4 - III

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ASSIGNMENT OF ERROR

Plaintiff Steven Lacey submits that the trial court erred in granting the defendants' motions for summary judgment, thus dismissing his Complaint with prejudice.

INTRODUCTION / STATEMENT OF THE CASE

This case arises out of a collision between two vehicles driven by Steven Lacey and Ian Lantry that occurred in Kennewick, Washington on December 23, 2009. (CP 1-3) Undersigned legal counsel was first retained by Steven Lacey on December 19, 2012. (CP 62, ll. 19-20) So, time was of the essence because of the three year limitation of action statute. (CP 62, ll. 19-21)

Summons and Complaint were filed with the clerk of the Benton County Superior Court on December 20, 2013 (CP 1), so within three years of the injury date. Undersigned legal counsel then sent conformed copies of Summons and Complaint to Pronto Process & Messenger Service, in Pasco, Washington. (CP 62, ll. 22-23 & CP 67) Counsel has used this process serving firm on numerous cases for over 20 years and never had any issues arise over proper service of suit papers. (CP 62, ll. 23-25)

The collision in this case had not been investigated by any police agency. There only was an exchange of information at the accident scene

between Steven Lacey and Ian Lantry. (CP 63, ll. 1-3) So, undersigned counsel didn't have a state uniform collision report setting out the at - fault driver's full name, gender, address, date of birth, phone number, driver license number, information about insurance on vehicles, or information about registered owners of vehicles. (CP 63, ll. 3-6) All that Mr. Lacey had was the name of the other driver, Ian Lantry, that he obviously was a male, Ian Lantry's telephone number, and that Ian Lantry appeared to be a young man in his late teens / early 20's. (CP 63, ll. 6-9)

Lacey's undersigned counsel sent a letter to Pronto Process of December 22, 2012, with copies of suit papers to serve. (CP 67) Undersigned counsel also did an online search and found information from White Pages for the household of Thomas and Elizabeth Lantry, of 6001 W. 16th Avenue, in Kennewick, Washington. (CP 63, ll. 10-15) Pronto Process was given information that Steven Lacey and undersigned counsel had regarding the defendants for use in effecting service. (CP 67) Pronto Process was cautioned that Ian Lantry might be a student, and / or that he might not reside with his parents. (CP 63, ll. 16-19 & CP 67)

So, Pronto Process was requested to try to ascertain if Ian Lantry resided with Thomas and Elizabeth at the W. 16th Avenue address in Kennewick. If he did not live there with his parent, then Pronto Process

was asked to learn where Ian Lantry was residing and to proceed with service in that regard. (CP63, ll. 16-19 & CP 67)

Pronto Process provided an Affidavit of Service, dated December 27, 2012, stating that substitute service of Summons and Complaint had been accomplished on the defendants Lantry on December 26, 2012, at 6001 W. 16th Avenue, in Kennewick. (CP 63, ll. 21-25 & Appendix "A")

So, undersigned counsel for Steven Lacey concluded that the limitation of action statute had been tolled, because the suit papers were filed with the court before three years from the injury / collision date, and that service of process had been accomplished, on at least one defendant, within 90 days of institution of the lawsuit, all pursuant to RCW 4.16.170. (CP 63, l 24 and CP 64, ll. 1-2)

After counsel appeared in the lawsuit for the defendants, they claimed that they didn't live / reside at the place where Pronto Process had effected the service of suit papers on December 26, 2012. (CP 64, ll. 3-5) Lacey's undersigned counsel brought those issues to the attention of Pronto Process, and further attempts were made to serve the defendants. (CP 64, ll. 4-6)

Between Mark Owens, the owner of Pronto Process, and Lacey's undersigned counsel, working in consultation with Mr. Jeff Frankeberger, the Pronto Process process server who had worked on the case, it appeared

that Thomas Lantry may not have resided at 6001 W. 16th Avenue, in Kennewick, on December 26, 2012, but Mr. Owens and Mr. Frankeberger believed that Elizabeth, Ian and Nathan Lantry – Nathan being a son of Thomas and Elizabeth / a brother to Ian Lantry – did, in fact, reside at 6001 W. 16th on December 26, 2012, when Mr. Frankeberger served suit papers on Nathan Lantry. (CP 64, ll. 6-12)

So, Pronto Process did a second Affidavit of Service, dated May 9, 2013, reflecting substitute service on Elizabeth and Ian Lantry, only, through Nathan Lantry, at the same Kennewick address, on December 26, 2012. (CP 64, ll. 15-17 and Appendix “B”)

When counsel for the Lantrys were raising issues about them not living at 6001 W. 16th Avenue, in Kennewick, it then occurred to undersigned counsel for Steven Lacey to order a title company report as to who owned the property at that address at the time of service on December 26, 2012. (CP 64, ll. 15-17)

Benton - Franklin Title Company provided a Chain of Title Certificate in this case, dated April 30, 2013. (CP 69-74) Attached to that report were / are Deeds conveying the subject property to Thomas and Elizabeth Lantry in September, 1989, (CP 71) and then the Lantrys conveying title to the property to third parties on February 22, 2013. (CP 72) So, it certainly appears that Thomas and Elizabeth Lantry owned the

property at 6001 W. 16th Avenue, in Kennewick, when service of process in this case was effected there on December 26, 2012. (CP 64, ll. 22-24)

The defendants Lantry moved the trial court for summary judgment of dismissal, on the basis, they claimed, that the Lantrys didn't reside at 6001 W. 16th Avenue, in Kennewick, at the time Pronto Process effected substitute service on Nathan Lantry on December 26, 2012. (CP 13-56) The court granted the defense motions on December 20, 2013. Steven Lacey then appealed to this court. (CP 84-88)

ARGUMENT

1. Standard of Review – C.R. 56 Summary Judgment: Appellate courts in this state review a trial court's order granting summary judgment *de novo*. *Loeffelholz v. Univ. of Washington.*, 175 Wn.2d 264, 271, 285 P.3d 854 (2012).

2. C.R. 56 Summary Judgment Legal Principles:

In *Balise v. Underwood*, 62 Wn.2d 195, 198, 381 P.2d 966 (1963), the Washington Supreme Court set out the following principles applicable to summary judgment motions, that were at that time, and still are, well established:

“(1) The object and function of the summary judgment procedure is to avoid a useless trial; however, a trial is not useless, but is absolutely

necessary where there is a genuine issue as to any material fact. (Citation omitted)

(2) Summary judgments shall be granted only if the pleadings, affidavits, depositions or admissions on file show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. (Citation omitted)

(3) A material fact is one upon which the outcome of the litigation depends. (Citation omitted)

(4) In ruling on a motion for summary judgment, the court's function is to determine whether a genuine issue of material fact exists, not to resolve any existing factual issue. (Citation omitted)

(5) The court, in ruling upon a motion for summary judgment, is permitted to pierce the formal allegations of facts in pleadings and grant relief by summary judgment, when it clearly appears, from uncontroverted facts set forth in the affidavits, depositions or admissions on file, that there are, as a matter of fact, no genuine issues. (Citation omitted)

(6) One who moves for summary judgment has the burden of proving that there is no genuine issue of material fact, irrespective of whether he or his opponent, at the trial, would have the burden of proof on the issue concerned. (Citation omitted)

(7) In ruling on a motion for summary judgment, the court must consider the material evidence and all reasonable inferences therefrom most favorably to the nonmoving party and, when so considered, if reasonable men might reach different conclusions the motion should be denied. (Citation omitted)

(8) When, at the hearing on a motion for summary judgment, there is contradictory evidence, or the movant's evidence is impeached, an issue of credibility is present, provided the contradicting or impeaching evidence is not too incredible to be believed by reasonable minds. The court should not at such hearing resolve a genuine issue of credibility, and if such an issue is present the motion should be denied. (Citation omitted)”

3. Material Facts Alleged That Are Particularly Within the Knowledge of the Moving Party:

In *Felsman v. Kessler*, 2 Wn.App. 493, 496-97, 468 P.2d 691, 693

(1970), this court held that:

“It is the general rule that once the moving party has filed affidavits controverting the pleadings, the non-moving party can no longer rely upon his pleadings but must come forth with evidence, as long as it is available, which would justify a trial. *W. G. Platts, Inc. v. Platts, Supra; Plaisted v. Tangen*, 72 Wash.2d 259, 432 P.2d 647 (1967); *Reed v. Streib*, 65 Wash.2d 700, 399 P.2d 338 (1965); *Barron & Holtzoff, Federal Practice and Procedure* § 1235 at 149. However, where material facts averred in an affidavit are particularly within the knowledge of the moving party, it is advisable that the cause proceed

to trial in order that the opponent may be allowed to disprove such facts by cross-examination and by the demeanor of the moving party while testifying. *United States v. Logan Co.*, 147 F.Supp. 330 (W.D.Pa.1957); *Subin v. Goldsmith*, 224 F.2d 753 (2d Cir. 1955). See also *Hudesman v. Foley*, 73 Wash.2d 880, 441 P.2d 532 (1968); *Balise v. Underwood*, 62 Wash.2d 195, 381 P.2d 966 (1963).”

In this case, defendants filed declarations / sworn statements to the effect that they did not live at 6001 W. 16th Avenue, in Kennewick, at the time that Nathan Lantry was served there. (CP 24-25, CP 47-48, & CP 50-51)

Nathan Lantry provided a Declaration in this case stating that he is the brother of defendant Ian Lantry and the son of defendants Elizabeth and Thomas Lantry (CP 27, ll. 20-21). Nathan stated that he did not reside with his parents or his brother, Ian, in December, 2012. (CP 27, l 21, and CP 28, l 1). Nathan states that on the evening of December 26, 2012, his parents were out of town, and he stopped by their house at 6001 W. 16th Avenue, in Kennewick, to check on the place and to pick up their mail. (CP 28, ll. 2-4)

Nathan Lantry goes on to state that when he was at his parents’ home on 16th Avenue, a process server came to the door and said that he wanted to serve suit papers. Nathan states that he told the process server that he didn’t live there / didn’t own the home. (CP 28, ll. 5-9)

Nathan also states that he told the process server that he didn't agree to accept service for anyone. (CP 28, ll. 9-10)

The Pronto Process process server, Jeff Frankeberger, submitted a Declaration and a Sworn Statement that were before the trial court here when it granted summary judgment of dismissal. (CP 57-58 & CP 59-61)

In his first statement / Declaration, dated May 8, 2013, Mr. Frankeberger stated that December 26, 2012, he effected substitute service on the defendants by giving Nathan three copies of Summons and Complaint in this matter. (CP 57, ll. 20-22) Mr. Frankeberger stated that Nathan told him that he was a co-resident of the address / house on W. 16th Avenue. Mr. Frankeberger gave a physical description of Nathan, and that he was 20 years old. (CP 57, ll. 23-24) Mr. Frankeberger also stated that Nathan told him that he was the brother of Ian Lantry, and that he and Ian lived at the address in question. (CP 58, ll. 1-2)

In this Sworn Statement of November 26, 2013, Mr. Frankeberger states that he was almost 28 years old, that he had a Bachelor's Degree in Criminal Justice from C.W.U, and that he was employed for five years by the Washington State Department of Corrections as a probation officer. (CP 59, ll. 20-22) At the time that he signed the

Sworn Statement in November, 2013, Mr. Frankeberger stated that he was then employed by the United States Courts as a probation officer in Bismarck, N.D. (CP 59, ll. 23). In his Sworn Statement of November, 2013, Mr. Frankeberger also stated that:

“When the young man described in my Affidavit of Service in this case, and in my Declaration of May 8, 2013, came to the door of the residence – who told me he was Nathan Lantry - I asked him if Ian Lantry or his parents were home. He said “they’re not home right now.” I asked Nathan, “do they live here?” He said “yes.” Nathan told me Ian Lantry was his brother, and that Ian lived at the 6001 W. 16th Avenue address. I remember asking Nathan Lantry if HE lived at 6001 W. 16th Avenue. He told me that he did. I estimated that Nathan was about 20 years old. I was not concerned at the time I saw him that Nathan was under age 18. If I was concerned, I would have specifically asked Nathan for his age. I told Nathan, “well alright, these papers are for Ian and your parents.” So, Nathan told me his name, that Ian was his brother, than Elizabeth and Thomas were their parents, and that they all lived at the 6001 W. 16th Avenue address.” (CP 60, ll. 1-12)

Mr. Frankeberger’s Sworn Statement also states that:

“I served hundreds of people during the time I worked for Mark Owens at Pronto Process. Mark trained me. I knew what the rules were for serving people, and especially for making substitute service on adult household residents. If it turned out that I didn’t have the correct address on a case, or a proper person to serve on a case, then I always asked more questions of the person / people I was speaking with to try to find out additional information. I never found it difficult to be straight – forward with people, and to ask people the proper questions, to see if I could get the information needed to assure proper service.

I remember this case. I’m a probation officer. I deal with all kinds of people. There is nothing about what happened, or what was said, on the evening of December 26, 2012, that leads me to believe that the Nathan Lantry was not telling me the truth about who he was, and about who lived at 6001 W. 16th Avenue, in Kennewick, at that time.” (CP 60, ll. 13-24)

These sworn statements / declarations of Nathan Lantry and Jeff Frankeberger are directly contrary / conflicting with each other on every point that is critical to Steven Lacey on the issue of Mr. Frankeberger effecting proper substitute service on at least one of the defendants Lantry, at 1601 W. 16th Avenue, in Kennewick, on December 26, 2012.

Nathan Lantry stated in the Declaration filed with the trial court that on December 26, 2012 he was at his parents' house at 6001 W. 16th Avenue to check on their house and to "...pick up their mail." (CP 28, ll. 2-5). We know that Elizabeth and Thomas Lantry still owned the property at 6001 W. 16th Avenue in December, 2012, because they didn't convey it to third parties until February 22, 2013. (CP 72). Isn't the Lantrys getting their mail delivered to the 16th Avenue address an indication / evidence that they still lived there in December, 2012?

To have granted the defense summary judgment motions, the trial court would have had to accept the truth / the veracity / the credibility of Nathan Lantry over that of Jeff Frankeberger. It has been very well – settled in this state, going back for many decades, that the trial court can't do that when it is hearing and deciding a summary judgment motion. The court must consider the material evidence, and all reasonable inferences therefrom, most favorably to the nonmoving party and, when so

considered, if reasonable men might reach different conclusions, the motion should be denied.

To have effectively tolled the limitation of action statute in this case, all that Steven Lacey was required to do was to have effected personal or substitute service on at least one of the defendants within 90 days of the date that he filed the lawsuit with the clerk of the court. RCW 4.16.170.

Steven Lacey made out at least a *prima facie* case that he effectively tolled the limitation of action statute in this case with the testimony of Mr. Frankeberger, as is set out in his two service affidavits, (App. “A” and “B”), in his Declaration of May 8, 2013, and then in his Sworn Statement of November 26, 2013.

Steven Lacey also submits, under the circumstances of this case, that where the Lantrys all lived at the time that Jeff Frankeberger was effecting service was / is “particularly” within the knowledge of the Lantrys at that time.

It’s well – settled in this state that it was / is at least “advisable” then that Steven Lacey’s case should be allowed to proceed to at least a hearing in open court for the purpose of taking testimony in order that Lacey be allowed to disprove the facts alleged by the Lantrys in their summary judgment submissions, by way of cross-examining them, and /

or by a Superior Court judge observing their demeanor while so testifying.

See, Felsman v. Kessler, supra.

CONCLUSION

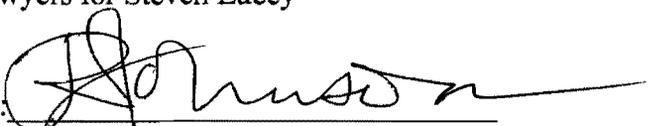
Steven Lacey submits that this court should rule that the trial court erred in granting the Lantrys' motions for summary judgment, that it should be reversed, and that this matter be remanded for further proceedings.

DATED this 27th day of May, 2014.

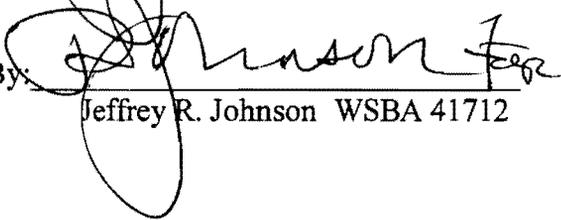
Respectfully submitted,

JOHNSON & JOHNSON LAW FIRM, PLLC
Lawyers for Steven Lacey

By:


Richard R. Johnson WSBA 6481

By:


Jeffrey R. Johnson WSBA 41712

APPENDIX

**“A” Affidavit of Service
of December 27, 2012**

**“B” Affidavit of Service
of May 9, 2013**

**“A” Affidavit of Service of
December 27, 2012**

AFFIDAVIT OF SERVICE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

Case Number: 12-2-03093-3

Plaintiff:
STEVEN J LACEY

vs.

Defendant:
IAN LANTRY, ELIZABETH S LANTRY, AND THOMAS
G. LANTRY

Service Documents:
SUMMONS AND COMPLAINT FOR MONEY
DAMAGES, CIVIL CASE SCHEDULE ORDER

For:
Richard Johnson
DELORIE JOHNSON
1030 N Center Partway
Suite 313
Kennewick, WA 99336

Received by PRONTO PROCESS SERVICE, INC. to be served on IAN LANTRY, ELIZABETH S LANTRY, AND THOMAS
G. LANTRY, 6001 W 16TH AVE, KENNEWICK, WA.

I, J FRANKEBERGER, being duly sworn, depose and say that on the 26th day of December, 2012 at 8:55 pm, I:

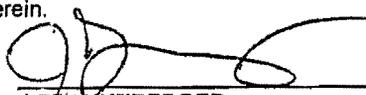
***SUBSTITUTE SERVICE**

That on 12/26/2012 at 8:55 pm at 6001 W 16TH AVE, KENNEWICK, WA, I duly served the above described documents in
the above entitled matter upon IAN LANTRY, ELIZABETH S LANTRY, AND THOMAS G. LANTRY by then and there at the
residence and usual place of abode of said person (s), personally delivering THREE true and correct copy(ies) thereof to and
leaving the same with NATHAN (NO LAST NAME) WHITE MALE, 6'0", 230, 20 Y/O, BLACK HAIR, as CO-RESIDENT,
being a person of suitable age and discretion then resident therein.

The undersigned, being first duly sworn on oath, deposes and says; That he/she is now and at all times herein mentioned
was a citizen of the United States and resident of the State of Washington, over to age of eighteen years, not a party to or
interested in the above action and competent to be a witness therein.

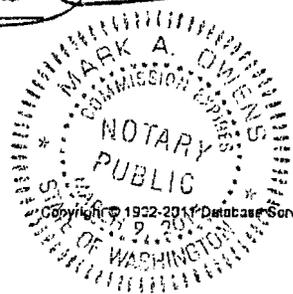
Subscribed and Sworn to before me on the 27th day of
December, 2012 by the affiant who is personally known to
me.


NOTARY PUBLIC


J FRANKEBERGER
2012-03

PRONTO PROCESS SERVICE, INC.
P.O. Box 1194
Pasco, WA 99301
(509) 547-1122

Our Job Serial Number: PTO-2012011898



**“B” Affidavit of Service
of May 9, 2013**

AFFIDAVIT OF SERVICE

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF BENTON

Case Number: 12-2-03093-3

Plaintiff:
STEVEN J LACEY

vs.

Defendant:
**IAN LANTRY, ELIZABETH S LANTRY, AND
THOMAS G. LANTRY**

Service Documents:
SUMMONS AND COMPLAINT FOR MONEY
DAMAGES, CIVIL CASE SCHEDULE ORDER

For:
Richard Johnson
DELORIE JOHNSON
1030 N Center Partway
Suite 313
Kennewick, WA 99336

Received by PRONTO PROCESS SERVICE, INC. to be served on IAN LANTRY, ELIZABETH S LANTRY, 6001 W 16TH AVE, KENNEWICK, WA.

I, J FRANKEBERGER, being duly sworn, depose and say that on the **26th day of December, 2012 at 8:55 pm, I:**

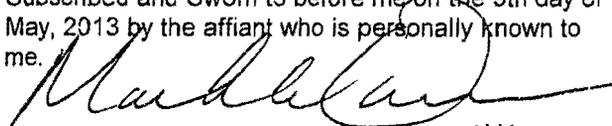
***SUBSTITUTE SERVICE**

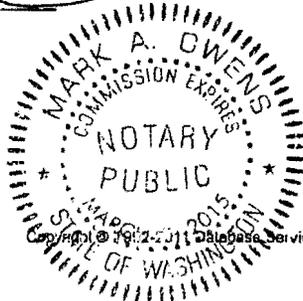
That on **12/26/2012 at 8:55 pm at 6001 W 16TH AVE, KENNEWICK, WA**, I duly served the above described documents in the above entitled matter upon **IAN LANTRY, ELIZABETH S LANTRY** by then and there at the residence and usual place of abode of said person (s), personally delivering **TWO** true and correct copy(ies) thereof to and leaving the same with **NATHAN (NO LAST NAME) WHITE MALE, 6'0", 230, 20 Y/O, BLACK HAIR**, as **CO-RESIDENT/BROTHER**, being a person of suitable age and discretion then resident therein.

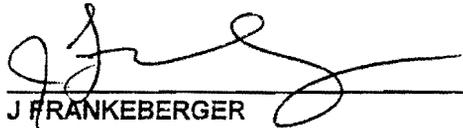
AFFIDAVIT OF SERVICE for 12-2-03093-3

The undersigned, being first duly sworn on oath, deposes and says; That he/she is now and at all times herein mentioned was a citizen of the United States and resident of the State of Washington, over to age of eighteen years, not a party to or interested in the above action and competent to be a witness therein.

Subscribed and Sworn to before me on the 9th day of May, 2013 by the affiant who is personally known to me.


NOTARY PUBLIC





J FRANKEBERGER
2012-03

PRONTO PROCESS SERVICE, INC.
P.O. Box 1194
Pasco, WA 99301
(509) 547-1122

Our Job Serial Number: PTO-2012011835

FILED

MAY 28 2014

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By: _____

COURT OF APPEALS DIVISION III OF THE STATE OF WASHINGTON

STEVEN J. LACEY,)	
)	No. 321894
Appellant,)	
)	CERTIFICATE OF SERVICE OF
)	BRIEF OF APPELLANT
)	
IAN LANTRY, and ELIZABETH LANTRY))	
And THOMAS LANTRY, wife and husband,)))	
)	
Respondents.)	
)	
_____)	

Richard R. Johnson, lawyer for appellant, states under penalty of perjury of the laws of the state of Washington that on May 26, 2014, I placed in the U.S. Mail, first – class, postage paid, copies of the Brief of Appellant in this matter, addressed as follows:

Cheryl R.G. Adamson
Lawyer for Ian Lantry
6725 W. Clearwater
Kennewick, WA. 99336

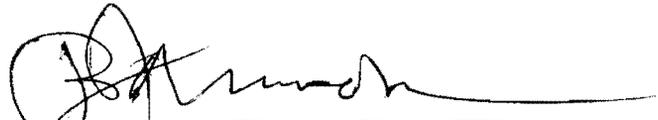
John P. Bowman
Lawyer for Elizabeth & Thomas Lantry
221 N. Wall Street
Suite 210
Spokane, WA. 99201

Certificate of Service

Dated this 26th day of February, 2014.

JOHNSON & JOHNSON LAW FIRM, PLLC
Lawyers for appellant

BY:



Richard R. Johnson WSBA #6481
917 Triple Crown Way #200
Yakima, WA. 98908
(509) 469 - 6900

CERTIFICATE OF TRANSMITTAL

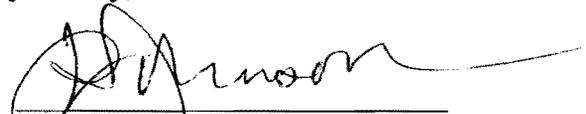
On this date, the undersigned sent to the lawyers for the respondents a copy of this document by U.S. Mail postage prepaid as follows:

Cheryl R.G. Adamson
Lawyer for Ian Lantry
6725 W. Clearwater
Kennewick, WA. 99336

John P. Bowman
Lawyer for Elizabeth & Thomas Lantry
221 N. Wall Street
Suite 210
Spokane, WA. 99201

I hereby certify under penalty of perjury of the laws of the state of Washington that the foregoing is true and correct.

DATED at Yakima, WA. this 26th day of May, 2014.



Richard R. Johnson

Certificate of Service