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COURT OF APPEALS  
DIVISION III  
OF THE STATE OF WASHINGTON

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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

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STEVEN J. LACEY,  
Appellant  
v.  
IAN LANTRY, Respondent and  
ELIZABETH S. and THOMAS G. LANTRY,  
Respondents

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RESPONDENTS' ELIZABETH and THOMAS LANTRY'S BRIEF

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## I. INTRODUCTION/RESPONDENTS COUNTERSTATEMENT OF THE CASE

It is the respondents, Mr. & Mrs. Lantry's contention that this lawsuit, dismissed by the trial court, is a decision which should be affirmed because the plaintiff's lawsuit was not properly perfected within the applicable three year statute of limitations; specifically because of insufficient and/or defective substitute service of process by the plaintiff. Actual notice of a lawsuit does not constitute sufficient service under the law. *Gerean v. Martin-Joven*, 108 Wn. App. 963; 33 P.3d 427 (2001); Review denied, 146 Wn.2d 1013; 51 P.3d 88 (2002).

Even though the defendants, Mr. & Mrs. Lantrys' adult son, Ian, had not lived with them for several years (he resided outside the State of Washington), and the vehicle Ian was driving at the time of the MVA, was not owned by the Lantrys', they were nevertheless named in this lawsuit along with their son Ian. CP 9-12, 24-26. The suit against Ian Lantry was for negligent operation of his motor vehicle. CP 1-3. The lawsuit by the plaintiff was filed on December 20, 2012, three days before the three year anniversary of the MVA of December 23, 2009. CP 1-3.

Subsequently, the plaintiff, on December 26, 2012 attempted substitute service on Ian Lantry and his parents by serving another Lantry son, Nathan, at a residence in Kennewick, Washington, claiming that

Nathan advised the process server that he was a “co-resident” of the address/house with his brother Ian Lantry. CP 57-58. Not only did the process server’s declaration assert that Nathan told him he lived in the residence but also that his brother, Ian also resided there, an assertion refuted by both Nathan, his parents and Ian. CP 4-8, 9-12, 27-29.

At the time of the motor vehicle accident in December, 2009, Ian was visiting family over the Christmas holiday. At the time of the attempted service, Mr. & Mrs. Lantry were out of town and in fact, Mr. Lantry was living and working in Hailey, Idaho and Ian was living out of state. CP 4-8. The only reason Nathan was present in the home on the day of the visit by the process server, was because he was picking up the Lantry’s mail. CP 27-29. Neither Ian nor Mr. & Mrs. Lantry were ever personally served prior to the expiration of the Statute of Limitations. CP 4-8, 9-12.

According to Nathan Lantry’s declaration, he advised the process server that he did not reside in the home, nor owned the home, and he would not accept service and was only at the residence to “check on the home” while his mother was out of town. The process server nevertheless handed Nathan the legal papers. CP 27-29.

## II. SUMMARY OF RESPONDENTS ARGUMENT RE: APPELLANTS ASSIGNMENT OF ERROR

The trial court properly ruled that the plaintiff failed to personally serve one or more of the defendants and therefore failed to timely perfect his lawsuit . Because of insufficient/defective substitute service on an individual who was not an actual resident of the Lantry household at the time of the attempted service.

## III. STANDARD OF REVIEW

Appellate courts will review a trial court's order granting CR 56 summary judgment de novo. *Ravenscroft v. Washington Water Power Company*, 136 Wn.2d 911, 969 P.2d 75 (1998). Construction of a statute is a question of law reviewed under the Error of Law standard. *Valley Fruit v. State Department of Revenue*, 92 Wn. App. 413, 963 P.2d 886, review denied, 137 Wn.2d 1017, 978 P.2d 1098. Interpretation and application of a statute to a particular set of facts is a question of law. *Abbs v. Georgie Boy Mfg., Inc.*, 60 Wn. App. 157, 803 P.2d 14 (1991).

#### IV. ARGUMENT

A. THE VALIDITY OF THE PLAINTIFF'S SUBSTITUTE SERVICE HINGES ON WHETHER THE PLAINTIFF COMPLIED WITH THE DICTATES OF RCW 4.28.080 (15) REQUIRING, IN THIS CASE, SUBSTITUTE SERVICE ON A "PERSON OF SUITABLE AGE AND DISCRETION THEN RESIDENT THEREIN."

In a lawsuit of this nature involving a motor vehicle tort claim, a three year statute of limitation applies. RCW 4.16.080. Thus, any lawsuit of this nature must be commenced by service of the summons and complaint or by filing a complaint. CR 3. If the lawsuit was commenced by filing the complaint, as in this case, then the plaintiff has 90 days in which to serve one or more of the defendants. RCW 4.16.170. While the plaintiff in this case timely filed his lawsuit three days before the expiration of the Statute of Limitations, temporarily tolling the running of the Statute of Limitations, the plaintiff failed over the ensuing 90 days to personally serve any of the defendants, plaintiff opted at the last minute to attempt substitute service on one or more of the defendants' by serving the defendants son, Nathan Lantry, Ian's brother. Under the statute, if proper service is not accomplished within 90 days of the filing of the complaint "the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations." When substitute service was attempted, Mrs. Lantry, who was a resident of the household in question, was out of town. Her husband, Mr. Lantry, did not reside in the residence at the time,

nor did Ian, the defendant and the driver of the motor vehicle involved in the accident with the plaintiff. Nathan had not resided in the residence since at least December, 2011 and lived at a separate residence. CR 27-29,CP 48-49, CP 51-52.

In Salts v. Estes, 133 Wn.2d 160, 943 P.2d 275 (1997), our Washington State Supreme Court considered this very issue in concluding that substitute service of process is not valid, so long as the person, (other than the defendant) who accepts substitute service is not a “resident” of the household.

The facts of that case involved the plaintiff Salts who allegedly sustained injuries while working at the home of defendant Estes in November, 1990. On November 22, 1993 Salts initiated her lawsuit against the defendant and 8 days later, a process server went to the Estes home to accomplish service of the summons and complaint. As the Court noted, the lawsuit was filed close to the expiration of the statute of limitations and consequently, Salts left “little room for maneuvering should Estes not be available for service. As it turned out, Estes was out of town.” FN 1 at page 163.

The process server met a female by the name of “Ter Horst” at the front door who was neither related nor married to Estes and received a

copy of the summons and complaint from the process server, who then left. Subsequently, Estes appeared through counsel on December 6, 1993 and moved for summary judgment contending the service of process was insufficient and the lawsuit was not properly perfected within the three year statute of limitations, as in this case.

Interestingly enough, “Ter Horst” was at the defendants’ residence for the specific purpose of caretaking the residence and the defendant’s dog while the defendants were out of town for a couple of weeks including bringing in the mail. She did not reside in the home during this period of time and it just so happened she was at the residence the day the process server showed up, much like Nathan Lantry in this case. The process server also asserted that this individual, Ter Horst, claimed she was a “resident” of the household, a claim denied by Ter Horst, the care taker.

The trial court in Salts supra, granted the defendants’ summary judgment motion holding she was not an actual “resident” of the defendants’ home per RCW 4.28.080 (15) and the Court of Appeals affirmed.

The Supreme Court, per Justice Talmidge, writing for the majority, analyzed this issue in detail concluding that the term “resident” in the statute is unambiguous and that it requires something more than the person

receiving service to have been “present” in the defendant’s home, for what Justice Talmidge described as “fleeting occupancy.” In the final analysis, the State Supreme Court concluded that only a true “resident” of the household can be statutorily authorized to accept substitute service under such circumstances.

In citing Moore’s Federal Practice §4.11(3) at 4-126, the Court noted that the person in this case who was served was not a full time resident of the defendants’ dwelling and further citing the additional federal practice treatise 4 Charles A. Wright and Arthur R. Miller, Federal Practice and Procedure at chapter 10.96 at 368-69 that “residing therein” requires the recipient of the process to be actually living in the same place as the defendant.

Justice Talmidge then went on to distinguish the Court’s holding in Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991). In Wichert, the Court at that time concluded the legislative intent behind the substituted service statute was to provide due process, i.e. a notice and opportunity to be heard. The Court held that service at the defendant’s home on the defendant’s wife’s 26 year old daughter who only infrequently stayed over at her parents house and resided elsewhere, was sufficient to support the validity of the service. Justice Talmidge noted

that the daughter of the defendant actually slept in the home the night before the service was accomplished.

The Court in Salts refused to interpret RCW 4.28.080 (15) to authorize service on a person whose mere presence in the defendants' home was sufficient to satisfy the statutory residency requirement. In fact, in the case under consideration, Nathan Lantry had not lived with his parents for well over a year, had his own separate residence and was only there to retrieve mail. Likewise the Court in Salts supra concluded that it is not simply enough to be "present" in the defendants home and that the term "resident" be given its ordinary meaning, i.e. person who is a resident "a person is a resident if the person is actually living in the particular home." Salts, 170-171. In doing so, Talmidge noted that the legislature was free to amend the statute (which it has not) and affirmed the Court of Appeals reasoning in dismissing the case.

B. THE HOLDING IN SALTS REJECTED APPELLANTS ASSERTION THAT AN ISSUE OF FACT IS CREATED BY THE PROCESS SERVER'S ASSERTION THAT NATHAN LANTRY INFORMED HIM HE WAS A RESIDENT OF THE HOUSEHOLD.

The appellant asserts that because there was a conflict in the declaration testimony of Nathan Lantry, Ian, his parents and Jeff Frankenberger, the process server, under the rules of summary judgment

proceedings, this testimonial conflict created a genuine issue of material fact precluding summary judgment by the trial court.

First there is no dispute that Mrs. Lantry resided at the residence in Kennewick, Washington at the time of the attempted service by Mr. Frankenberger. It is admitted in his declaration that the statements he claims were made to him by Nathan Lantry, were in testimonial conflict with the defendants and Nathan's declarations. Nevertheless, the same factual situation was present in the Salts case; the process server asserted in his declaration that the individual whom he served, Ter Horst, told him she was a "resident" of the household, a claim Ter Horst denied. It is entirely possible that in both the Salts situation and the present case, the person temporarily watching an otherwise vacant home might be motivated to advise a complete stranger at the door that they "live there" to discourage a potential burglary or other opportunistic criminal from visiting the home.

Both the trial court and the Washington State Supreme Court refused to engage in a CR 56 "conflict in testimony" analysis by strictly construing the dictates of RCW 4.28.080 (15) and the use of the term "resident" in requiring that either the person who is the subject of the substitute service actually be a resident from the legal perspective. Thus

the Court impliedly rejected any invitation to reverse the trial court's decision in Salts, based upon the assertion that a "genuine issue of material fact" was in dispute, an approach rejected by not only the trial court but the Court of Appeals. Likewise, this court as did the trial court, should reject any such invitation by the Appellant to overturn the trial court's decision to facilitate a fact finding hearing on the issue of Nathan's "resident" status at the time he was admittedly served.

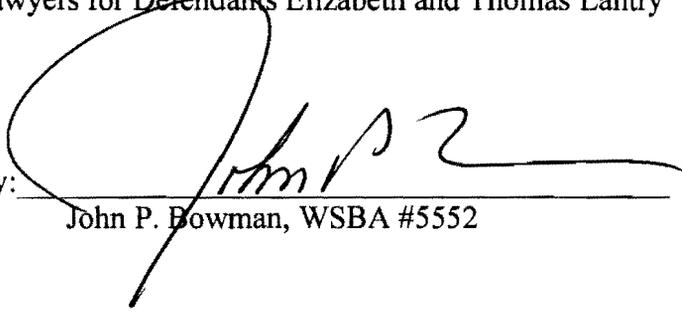
At page 12 of the Appellants brief, the Appellant accurately stated "to have effectively tolled the limitation of action statute in this case all that Steven Lacey was required to do was to have effected personal service or substitute service on at least one of the defendants within 90 days of the date he filed the lawsuit with the clerk of the court." The fact of the matter is that plaintiff's agent failed to properly do so, therefore this Court should affirm the trial court's dismissal.

## V. CONCLUSION

The court should affirm the trial court's decision dismissing the plaintiff's lawsuit for the reasons set forth above.

Respectfully submitted this 18<sup>th</sup> day of June, 2014.

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