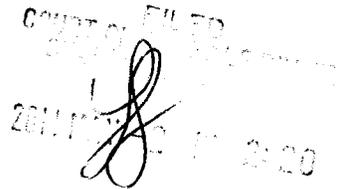


66134-5

66134-5



No. 66134-5-I

COURT OF APPEALS,  
DIVISION I  
OF THE STATE OF WASHINGTON

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DEBRA CHEESMAN, individually and RICHARD CHEESMAN,  
individually, and DEBRA CHEESMAN and RICHARD CHEESMAN, as  
Co-Guardians of ALISSON CHEESMAN, a minor, ASHLEY HANKS,  
fka ASHLEY JOHNSON,

Plaintiffs/Appellants,

v.

MICHAEL J. ROWSE and JANE DOE ROWSE, Individually and as  
husband and wife, MICHAEL ALAN ROWSE and JANE DOE ROWSE,  
Individually and as husband and wife,

Defendants/Respondents.

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BRIEF OF RESPONDENTS

---

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ORIGINAL

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**A. STATEMENT OF THE CASE**

**Facts of Incident**

This case arises out of a motor vehicle accident that occurred on December 20, 2003 in Granite Falls, Washington. CP 277, 287. The drivers of the two vehicles involved were plaintiff Debra Cheesman and defendant Michael Rowse. CP 277, 287.

**Michael Rowse's Residences**

At the time of the motor vehicle accident Michael Rowse was (and still is) married to Sheree Rowse. CP 241, 251; RP 31, 32. They were residing in a house located at 22611 - 78th Street NE in Granite Falls. CP 241, 251. This address was listed on the Police Traffic Collision Report. CP 241, 243.

Michael and Sheree Rowse subsequently lost their house in foreclosure. RP 32. After the foreclosure, Sheree Rowse initially moved in with her son in Monroe and then moved to Arkansas in approximately May 2005. RP 32, 33. Sheree Rowse was issued an Arkansas drivers license on May 24, 2005 listing her address as Huntsville, Arkansas. CP 253.

Michael Rowse moved in with his father, Anthony Rowse at 2151 October Lane, Oak Harbor. RP 33, 34; CP 241. Michael Rowse stayed with his father for a number of months while he gathered his personal

belongings in preparation for a cross country move to Arkansas. RP 34. Michael Rowse moved to Huntsville, Arkansas and rejoined his wife in December 2005. RP 29, 31; CP 241, 251.

Michael and Sheree Rowse received correspondence at their new Arkansas address in 2006, including bank correspondence and utility bills. CP 246, 256.

On December 27, 2006, Michael Rowse was issued a drivers license by the State of Arkansas which listed Huntsville, Arkansas as his home. RP 29-31; CP 248.

#### **David Rowse and the House in Everett**

David Rowse is the brother of Michael Rowse. RP 58. The last time Michael and David lived together was 1976. RP 64. Anthony Rowse was also David Rowse's father. RP 69. David Rowse lives at 9909 - 24th Drive SE in Everett with his wife Susan. RP 56. He has lived at that address since 1997. RP 56. On December 1, 2006, David Rowse signed a postal change of address form for Anthony Rowse directing that mail sent to the Oak Harbor address be forwarded to 9909 - 24th Drive SE in Everett. RP 11, 14, 66. David Rowse did so pursuant to the power of attorney he had for his father, Anthony Rowse:

Q. Okay. So when your dad passed away -- let me back up. There's been some evidence indicating a change of address was done --

- A. I did that.
- Q. And that was done in December of 2006?
- A. Because I had power of attorney.
- Q. Okay.
- A. And I wanted dad's mail to come to my house, and they would not let me just take my dad and then what do you do with my brother's mail? My brother is supposed to transition his mail himself, right? If he lives in Arkansas, like when you move you file the little card. And then so we had to sign for the whole kitten-caboodle and I probably signed my dad's name because I had power of attorney. I probably put POA after my name, too, if you looked at signature.
- Q. Let me ask a question. When you did that, that assignment of -- that change of address, where was Michael at that time?
- A. Arkansas.
- Q. Was your dad living alone at the time?
- A. Yeah. With two dogs -- three dogs.
- Q. And have you in fact gotten any mail for Michael at your address?
- A. Junk mail, which just goes in the garbage.

Testimony of David Rowse, RP 66-67.

In his testimony, Michael Rowse denied recalling ever receiving mail forwarded from the 9909 - 24th Drive SE address. RP 52; CP 162. Michael Rowse denied directing any of his mail to the 9909 - 24th Drive SE address. RP 38. In fact, Michael Rowse did not recall even having the mail forwarded to his father's house when he moved in for a few months. RP 38.

### **Plaintiff's Service at the House in Everett**

The plaintiffs filed this lawsuit on December 13, 2006. CP 284, 286. An investigator hired by the plaintiffs' attorney found that Michael Rowse had resided at the address in Oak Harbor. RP 7. The investigator also later determined that mail had been forwarded from the Oak Harbor address to the house at 9909 - 24th Drive SE in Everett. RP 9. The investigator later admitted in her testimony that she never found any document signed by Michael Rowse changing his address to 9909 - 24th Drive SE in Everett. RP 14.

On February 14, 2007, a process server went to the 9909 - 24th Drive SE address and served a copy of the Summon and Complaint. RP 22. The process server testified that the person who was served stated that he was Michael Rowse's brother and that Michael Rowse lived there but was not home. RP 22. David Rowse testified that he accepted the Summons and Complaint but told the process server his brother did not live there. RP 62.

Anthony Rowse passed away on February 28, 2007. RP 51, 69. At the time of Anthony Rowse's passing, Michael and Sheree Rowse were living in Arkansas. RP 54. Michael Rowse flew back to Washington State courtesy of a ticket purchased for him by his sister. RP 50. His sister lived in Florida. RP 54. When he arrived in Washington State, Michael

went directly to his father's bedside at the Hospital. CP 162. Michael Rowse stayed at a hotel during this trip. RP 54.

On March 7, 2007, the plaintiffs' process server returned to the 9909 - 24th Drive SE address and again asked for Michael Rowse. CP 25. The process server testified that the person who accepted the papers again said his brother was not there and was "on the road." RP 25.

Michael Rowse has never resided at his brother's house in Everett. RP 35, 83; CP 79, 241. Michael Rowse has never had a key to his brother's residence. RP 84. Michael Rowse had left some personal property at his father's house when he left for Arkansas and, after his father fell ill, those items were transferred to his brother's house without his consent. RP 37, 38. Nonetheless, Michael Rowse himself never moved any of his possessions into his brother's house. RP 36.

### **The Evidentiary Hearing**

On April 29, 2010, the trial court conducted an evidentiary hearing in this matter. At the conclusion of the hearing, the trial court judge issued an oral opinion. The court first noted that the parties agreed there had been no actual service of process and that the sole issue was whether there was sufficient substitute service of process. The court accepted the affidavit of service at face value and acknowledged that service was affected twice on the brother at the Everett residence. RP 98. The court

concluded, however, that there was insufficient evidence to support a conclusion that the residence was an abode of Michael Rowse. RP 98. The court noted there had been no evidence showing defendant Michael Rowse had anything to do with a change in the mail. RP 98. The court further held that it did not appear that there had been any active scheme or plan by Michael Rowse to evade service. RP 99. The court found that service on David Rowse did not constitute effective service on Michael Rowse. RP 99.

The Court entered Findings of Fact and Conclusions of Law on September 27, 2010. CP 1-5.

## **B. ARGUMENT**

### **1. Findings of Fact - Standard of Review.**

The Plaintiffs/Appellants' (hereinafter "plaintiffs") appeal is based on a challenge to the Findings of Fact and Conclusions of Law entered by the trial court. In regards to findings of fact, it is not the function of an appellate court to substitute its judgment for that of the trial court or to weigh the evidence or the credibility of witnesses. *Davis v. Department of Labor and Industries*, 94 Wn.2d 119, 124, 615 P.2d 1279 (1980). Where the trial court has weighed the evidence, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings of fact in turn support the conclusions of law

and judgment. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). A reviewing court may not disturb findings of fact supported by substantial evidence even if there is conflicting evidence. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162, (2010). Evidence is substantial if it is sufficient to persuade a fair-minded, rational person of the declared premise. *Id.* Unchallenged findings of fact are verities on appeal. *Id.*

**2. There Is Substantial Evidence To Support The Challenged Findings Of Fact.**

The plaintiffs specifically challenge Findings of Facts number 10, 12 and 18. These findings are listed in full as follows:

10. At the time of the filing of this lawsuit, Defendant Michael Rowse was living in Arkansas.

a. On December 1, 2006 a family change of address order was filed with the Oak Harbor Post Office, providing a new address for Anthony Rowse and Michael Rowse of 9909 24th Drive SE, Everett, Washington 98208. That change of address remained on file as of January 29, 2007.

...

12. Defendant Michael Rowse never resided with his brother at 9909 - 24th Drive SE in Everett.

...

18. Michael Rowse did not initiate, facilitate or otherwise request any transfer of his mail to his brother's residence at 9909 - 24th Drive SE in Everett.

The record has abundant evidence to support all three of these findings of fact.

**a. Finding of Fact No. 10 – Michael Rowse lived in Arkansas at the time of the filing of this lawsuit.**

This lawsuit was filed on December 13, 2007. Michael Rowse testified that he lived in Arkansas in February 2007. He received correspondence directed to his home in Arkansas in 2006. In addition, he was issued an Arkansas driver license exactly two weeks after the filing of this lawsuit – but before any attempt to serve him at the Everett house. The evidence is abundant that he resided in Arkansas at the time of this lawsuit.

**b. Finding of Fact No. 10(a) – On December 1, 2006 a change of address order forwarded mail from Oak Harbor to the Everett house.**

The plaintiffs' own witness testified that mail was forwarded from the Oak Harbor address to the Everett address. David Rowse testified that he filed a change of address form in order to forward his father's mail to his address in Everett. There is substantial evidence to support this finding of fact.

**c. Finding of Fact No. 12 – Michael Rowse never resided with his brother in Everett.**

Michael Rowse denied he ever resided with his brother in Everett. David Rowse denied his brother ever resided with him in Everett. Michael Rowse has never had a key to his brother's house in Everett. Although some of Michael Rowse's personal property ended up at the Everett house after his father passed away, Michael had no part in that and, in fact, took steps to collect his property.

There is substantial evidence to support this finding of fact.

**d. Finding of Fact No. 18 – Michael Rowse did not initiate, facilitate or otherwise request any transfer of his mail to his brother's residence.**

David Rowse testified that he filed the change of mail form in order to forward his ailing father's mail to his house. Michael Rowse denied having any of his mail directed to his brother's house. The plaintiff's witness admitted that she never found any document signed by Michael Rowse changing his address to 9909 - 24th Drive SE in Everett.

There is substantial evidence to support this finding of fact.

**3. The Conclusions of Law.**

In addition to their challenge to certain findings of fact, the plaintiffs further allege the trial court erred in making Conclusions of Law numbers 1 through 4. These conclusions are listed in full as follows:

1. At the time this lawsuit was filed, defendants Michael and Sheree Rowse resided in Arkansas and maintained their domicile there.
2. Neither Michael nor Sheree Rowse has ever maintained a domicile at 9909 - 24th Drive SE in Everett.
3. Defendants Michael and Sheree Rowse have not been properly served with the Summons and Complaint in this matter.
4. The accident which gives rise to this lawsuit occurred more than three years ago and the Statute of Limitations, except where it has been tolled due to the minor status of Allison Cheesman, has expired.

**a. Conclusion No. 1 – Michael and Sheree Rowse lived in Arkansas at the time this lawsuit was filed.**

Conclusion number 1 follows logically from the court's findings of fact. As stated above, unchallenged findings of fact are considered verities on appeal. *Merriman v. Cokeley*, 168 Wn.2d at 631. Findings of Fact numbers 6 and 8 are not challenged by the plaintiffs. They establish conclusively that Michael and Sheree Rowse moved to Arkansas in 2005.

As has already been pointed out, Michael Rowse was issued an Arkansas drivers license listing his address as Huntsville, Arkansas just

two weeks after the filing of this lawsuit. Conclusion of Law Number 1 is therefore abundantly supported by the record.

**b. Conclusion No. 2 – Neither Michael nor Sheree Rowse has ever maintained a domicile at 9909 - 24th Drive SE in Everett.**

The plaintiffs never asserted, much less presented evidence, that Sheree Rowse had ever been to David Rowse's house in Everett. The plaintiffs argue instead that Michael maintained a domicile at his brother's house in Everett. Michael and David Rowse both dispute that Michael ever resided at the Everett address. There was no evidence presented that Michael, for example, ever registered to vote at the address or registered a vehicle at the address or listed the address on a driver license. The clear evidence is that Michael moved from Granite Falls to Oak Harbor to Arkansas. There is no evidence that Michael ever moved to Everett.

In the brief of appellant, the plaintiffs argue that the “facts militate against a finding that defendant has established by clear and convincing evidence that for purposes of service of process he did not have two residences.” This is true. Michael Rowse had one residence – in Arkansas.

The plaintiffs argument necessarily requires a conclusion that Michael Rowse did not maintain a domicile in Arkansas: where his wife

lived, where he received utility and banking correspondence, and where he was issued a driver license. Instead, the plaintiffs contend that Michael maintained a domicile in Everett – because someone else had forwarded his mail there and because he had a cell phone with a 425 area code. The plaintiffs’ argument on this point is without merit.

The trial court’s conclusion on this is abundantly supported by the facts and the law.

**c. Conclusion Number 3 – Defendants Michael and Sheree Rowse were not properly served.**

There has never been any contention that Michael or Sheree Rowse were served personally. The plaintiffs’ assertion of service is based upon substitute service pursuant to RCW 4.28.080(15), which permits service 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.” The key issue in this appeal is whether or not the Everett address constituted a “usual abode” for Michael Rowse.

Our Supreme Court has held, in *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996) that a person can have more than one “usual abode.” In *Sheldon* the defendant was a flight attendant who leased an apartment in Chicago but had previously lived at her parents’ house in Seattle and stayed there periodically when she flew back. The defendant registered to

vote at her parents' home, registered her car at her parents' home, and listed her parents' home as her address for her insurance paperwork. Service was made upon the parents at the Seattle residence. The Washington State Supreme Court held that this constituted proper substitute service of process.

Unlike *Sheldon*, however, there is no evidence that Michael Rowse ever affirmatively represented his address to be in Everett. There is no evidence that he was ever registered to vote there, that he listed that address on any driver license, or that he registered any vehicles there.

The recent case of *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn.App. 408, 236 P.3d 986 (2010) is instructive as to what constitutes sufficient context to establish a domicile. In *Streeter-Dybdahl* the plaintiffs' process server attempted to serve the defendant at the address listed for the defendant in the police traffic collision report. *Streeter-Dybdahl*, 157 Wn.App. 410. The defendant later moved to dismiss the lawsuit based on insufficiency of process. The defendant established that she had resided at the address in question but had moved prior to the commencement of the lawsuit. The plaintiff in *Streeter-Dybdahl* presented evidence that the defendant had listed the address with the Department of Licensing as her current address and that she received mail left for her at the address. The *Streeter-Dybdahl* court found neither factor persuasive:

While the Seattle address was listed with DOL as her current residence, the use of a particular address for a limited purpose is not a critical factor in determining a center of domestic activity.

. . .

While *Streeter-Dybdahl* places much weight on the fact that mail was kept in a special box for Huynh at the Seattle house, there is no evidence that she was immediately notified or aware when mail came for her at that address; it was simply kept there for her in the event she came by.

*Streeter-Dybdahl*, 157 Wn.App at 414-15.

The *Streeter-Dybdahl* court found that these factors were insufficient to establish a center of domestic activity sufficient for substitute service of process. *Streeter-Dybdahl*, 157 Wn.App at 415. By contrast, in this lawsuit there is even less support for any contention that Michael Rowse maintained a center of domestic activity at the Everett address.

The trial court was fully justified in concluding that Michael and Sheree Rowse were not properly served.

**d. Conclusion Number 4 – The Statute of Limitations has expired.**

The motor vehicle accident that gives rise to this lawsuit occurred on December 20, 2003. The statute of limitations on personal injury actions is 3 years. RCW 4.16.080(2). Consequently, the plaintiffs had

until December 20, 2006 to commence their action against the defendants. They filed their lawsuit on December 13, 2006. Pursuant to RCW 4.16.170, the statute of limitations was tolled an additional 90 days in order to serve the plaintiffs. That 90 day period expired on March 13, 2007. The applicable Statute of Limitations has expired.

The plaintiffs argue that they obtained valid substitute service on the defendants prior to the expiration of the Statute of Limitations. That argument is addressed above. Regardless, simple arithmetic leads to the inescapable conclusion that the relevant Statute of Limitations has expired.

#### **4. The Order Dismissing the Lawsuit.**

Finally, the plaintiffs argue that the court erred in entering an order dismissing the lawsuit. Clearly, once the court concluded that there was insufficient service of process, a dismissal was the only course of action left to the court. There was no error in dismissing this lawsuit.

#### **C. CONCLUSION**

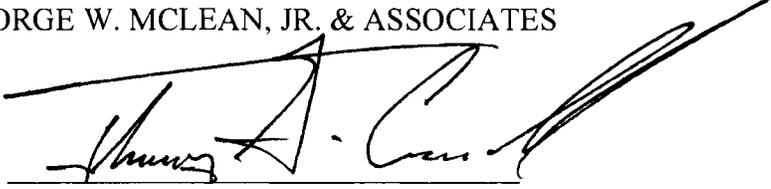
Michael Rowse is the defendant. He was never served personally. Instead, the plaintiffs served Michael's brother David at David's home in Everett. Michael never lived at David's home. Michael never directly or indirectly represented that he lived at David's home. Michael never took any steps to establish a domestic presence at his brother's home.

The service on David Rowse did not constitute proper substitute service of process on Michael Rowse. The trial court correctly dismissed this lawsuit. This court should affirm the trial court's order.

DATED this 2nd day of May, 2011.

Respectfully submitted,

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---

CERTIFICATE OF SERVICE

---

The undersigned declares as follows:

I am over the age of 18 years, not a party to this action, and  
competent to be a witness herein.

I certify under penalty of perjury of the laws of Washington that I  
caused to be delivered the following document to all parties or their  
attorneys of record on the 2nd day of May, 2011, as follows:

