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No. 72269-7-I

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MARK HEINZIG and
JANE DOE HEINZIG, and their marital community,
Appellant,

v.

SEOK HWANG and
JANE/JOHN DOE HWANG, and their marital community,
Respondents.

ON APPEAL FROM
SNOHOMISH COUNTY SUPERIOR COURT

APPELLANT'S REPLY BRIEF

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REPLY INTRODUCTION

The issues are whether defendant-respondent Seok Hwang waived his defense of insufficient service of process and whether service under the non-resident motorist statute, RCW 46.64.040, was sufficient. Hwang's response offers no justification for delaying for more than eight months before he first raised his defense. (*See* Resp't's Br. at 4-19.) Hwang's delay was thus serious and inexcusable. Hwang's response also disregards our Supreme Court's liberal-construction standard for RCW 46.64.040, ignores the statute's legislative history, insists the statute should be read to require duplicative mailings, and elevates the statute's proof-of-service provision to a jurisdictional prerequisite. (*See* Resp't's Br. at 4-19.) Hwang's formalistic reading of the statute does not comport with modern procedure. The trial court's judgment dismissing the suit against Hwang should be reversed, and the case should be remanded.

SUMMARY OF REPLY ARGUMENT

Hwang's response does not dispute several points. Hwang does not deny that he failed to file an answer, and he does not contend that he otherwise alerted plaintiff-appellant Mark Heinzig to Hwang's defense of insufficient service. (*See* Resp't's Br. at 4-19.) Hwang does not deny that over eight months elapsed between his first attorney filing a notice of ap-

pearance and the filing of his motion to dismiss. (*See id.*) Hwang also does not deny that he received actual notice of this lawsuit, through his attorney and liability insurer, before any judgment was entered. (*See id.*) Hwang does not deny that Heinzig supplied the summons and complaint to the Secretary of State's Office, and that the Secretary of State's Office in turn mailed a notification of service to Hwang's last known address. (*See id.*) Despite these apparent concessions, Hwang insists this case should be resolved in his favor based on procedural technicalities instead of the merits of Heinzig's claim that Hwang's unsafe driving negligently caused injury. Hwang's arguments should be rejected.

I. Hwang's argument regarding the applicable waiver doctrine collapses the two independent grounds for finding waiver: (1) dilatory assertion of the defense and (2) engaging in conduct inconsistent with such a defensive position. Hwang's response says nothing about when a defendant's assertion of the defense would become seriously delayed enough to be deemed dilatory. In Hwang's view, any delay in first raising an insufficient-process defense, no matter how tardy, would never suffice by itself to constitute waiver. (*See* Resp't's Br. at 13-14.) Tying the waiver doctrine to the length of delay would be "carving a new rule out of whole cloth," according to Hwang. (*Id.* at 14.) In reality, however, it is Hwang's position

that would change the law. Eliminating delay as an independent basis for waiver would excise the dilatory-conduct prong from the waiver doctrine.

Not only would Hwang's proposed rule undo a line of well-established precedent, but also it would entrench a system where defendants would have little reason to comply with the Civil Rules unless plaintiffs spent time and money enforcing the rules and smoking out defendants' unpleaded defenses. If defendants are "at liberty to ... employ delaying tactics," our Supreme Court has warned, "the purpose behind the procedural rules may be compromised." *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). Perhaps it is for this reason Hwang fails to cite a single appellate decision upholding a delay of more than five-and-a-half months. By contrast, the application of waiver finds support in at least four cases—*French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991), *Blankenship v. Kaldor*, 114 Wn. App. 312, 320, 57 P.3d 295 (2002), *Kahclamat v. Yakima County*, 31 Wn. App. 464, 643 P.2d 453 (1982), and *Raymond v. Fleming*, 24 Wn. App. 112, 600 P.2d 614 (1979)—none of which Hwang characterizes properly.

II. Our Supreme Court has pronounced in at least two cases, none of which have been overruled and which may not be disregarded by the reviewing court here, that a liberal-construction standard applies to RCW

46.64.040. Further, not all of the documents referenced in RCW 46.64.040 pertain to service. Specifically, the affidavit of compliance is proof of service. Any deficiency in proof of service does not render insufficient the service itself. And under a liberal construction of RCW 46.64.040, Heinzig complied with all the steps required to effect service.

REPLY ARGUMENT

I. HWANG FAILS TO JUSTIFY WHY THE WAIVER DOCTRINE SHOULD NOT BAR HIS DEFENSE OF INSUFFICIENT SERVICE OF PROCESS

A. Hwang's position would gut the applicable waiver doctrine of its dilatory-conduct prong

The modern Superior Court Civil Rules were adopted in 1967 "[t]o eliminate many procedural traps." *Foreword to Civil Rules for Superior Court*, 71 Wn.2d xxiii, xxiv (1967), *quoted in Curtis Lumber Co. v. Sortor*, 83 Wn.2d 764, 766, 522 P.2d 822 (1974). Shortly after the rules' enactment, Division One of the Court of Appeals adopted a waiver doctrine to prevent defendants from using delay or subterfuge as a procedural snare when asserting one of the defenses enumerated in Rule 12(b). The Court held that "[a] defendant's conduct through his counsel ... may be 'sufficiently dilatory or inconsistent with the later assertion of one of these defenses to justify declaring a waiver.'" *Raymond*, 24 Wn. App. at 115 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1344 at 526 (1969)).

In the decades since then, Washington courts have repeatedly recognized that dilatory conduct and inconsistent conduct are two independent grounds for finding waiver. *See, e.g.*, *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563, 565 (2002) ("[A]defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior *or* (2) the defendant has been dilatory in asserting the defense." (emphasis added) (citing *Lybbert,* 141 Wn.2d at 39)). Hwang's response does not recognize that these two prongs operate separately and call different types of behavior into question.

The term "dilatory" is synonymous with "delay." *See, e.g.*, Black's Law Dictionary 488 (8th ed. 2004) (defining "dilatory" as "[t]ending to cause delay"). As the First Circuit Court of Appeals has noted, the dilatory initial assertion of a Rule 12(b) defense runs counter to the modern procedural objective "to eliminate unnecessary delay at the pleading stage." *Marcial Ucin, S.A. v. SS Galicia*, 723 F.2d 994, 997 (1st Cir. 1983). Hwang, however, reads *French* to mean that any delay, no matter how long, "without anything else," cannot result in a waiver. (Resp't's Br. at 13.)

But Hwang's interpretation of *French* can be sustained only by collapsing the two separate prongs of the applicable waiver doctrine. Sometimes the facts supporting each prong overlap, but sometimes they do not. In

Marcial, for example, the defendant failed to file an answer for four years before raising a Rule 12(b) defense in a motion to dismiss. *Marcial*, 723 F.2d at 997. Not only did the defendant engage in delay, but also the defendant engaged in pre-trial discovery, taking several depositions. *Id.* On these facts, the First Circuit found waiver because the defendant's actions were both dilatory and inconsistent with a Rule 12(b) defense. *Id.* Just because the defendant's serious delay was coupled with pre-trial discovery, however, does not mean, as Hwang's response suggests, that a defendant's participation in discovery is a condition for finding conduct dilatory. A defendant engaging in discovery raises concerns about deception and the reliance interest of the plaintiff, not the system-wide interest in compliance with timing rules and in quickly moving through the pleading stage of litigation.

A Washington decision, *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003), is also illustrative. In *Butler*, the defendant filed an answer asserting insufficient service five-and-a-half months after his attorney first appeared, similar to *French*. *See Butler*, 116 Wn. App. at 294. According to Division Three, the defendant was not dilatory because he filed the answer. *Id.* at 298. Nevertheless, the Court found waiver on the second prong because the defendant directed discovery to issues other than the

insufficient-service defense. *Id.* Thus, *Butler* further shows that the two prongs of the waiver doctrine may overlap in some cases but not all, and thus the two prongs should not be conflated.

For this reason, Hwang's discussions of the facts in *Raymond* and *French* are imprecise, failing to separate out the two different prongs. (*See* Resp't's Br. at 13, 15.) Because precedents and new controversies cannot be analyzed without separately applying the two different prongs, it is improper to cite all the facts in each case and conclude that delay can never be dilatory by itself.

As several potential scenarios show, moreover, Hwang's broad reading of *French* would create a bright-line rule shielding all delays from the dilatory-conduct prong of waiver, no matter how egregiously long. Consider cases like this one where the defendant is obviously negligent—a rear-end auto collision, for example—and thus discovery is targeted entirely to the facts in plaintiff's control regarding damages. Although the defendant fails to file an answer, the plaintiff decides not to spend the several hours of attorney and staff time required to file a motion for default, write and serve discovery regarding procedural defenses, schedule the inevitable CR 26(i) discovery conference, and move to compel discovery responses. Would it be permissible for the defendant to wait six months before first asserting an

insufficient-service defense? Ten months? Twelve months? Eighteen? Hwang's proposed extension of *French* has no logical limiting principle.

Hwang's rule "would be 'subversive of orderly procedure and make for harmful delay and confusion.'" *Marcial*, 723 F.2d at 997 (quoting *Commercial Cas. Co. v. Consolidated Stone Co.*, 278 U.S. 177, 180, 49 S. Ct. 98, 73 L. Ed. 252 (1929)). If defendants are "at liberty to ... employ delaying tactics," our Supreme Court has already warned, "the purpose behind the procedural rules may be compromised." *Lybbert*, 141 Wn.2d at 39. In fact, since *French*, the Court has already documented such delaying tactics, with one defendant choosing as a matter of routine to delay filing an answer until the plaintiff files a motion for default. *See Lybbert*, 141 Wn.2d at 43 (discussing the defendant's admitted practice). It is no wonder that Hwang fails to cite a single appellate decision upholding a delay of more than the five-and-a-half months allowed in *French*. *See DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

French itself signals a limited scope to its holding, characterizing the delay there as a "mere" delay. *French*, 116 Wn.2d at 593. Further, for its

waiver rule, this Court has previously relied on the preeminent treatise on federal civil procedure. *See Raymond*, 24 Wn. App. at 115 (citing 5C. Wright & A. Miller, Federal Practice and Procedure § 1344 at 526 (1969)). And the current edition of that treatise states that a "serious" delay may work a waiver of Rule 12(b) defenses. 5C Wright & Miller Federal Practice and Procedure: Civil § 1391, at 520 (3d ed. & 2004). Thus, these authorities indicate that the length of the delay affects the dilatory inquiry.

Although these authorities would allow a court to presume that a delay exceeding six months works a waiver, Heinzig does not contend that a bright-line rule should be adopted. As *French* itself seems to show, each case must be reviewed on its own facts. Courts should review each case of serious delay under the existing standard from CR 6(b), which allows extensions of time upon a showing of "excusable neglect." *See* 3 Karl B. Tegland, Washington Practice: Rules Practice CR 6 (7th ed. & Westlaw Update Aug. 2013) (discussing the eight factors that may be properly weighed to determine "excusable neglect" under CR 6). Through the prisms of "serious" delay and "excusable neglect," *French* reconciles with its own facts and the case here, as discussed further below. Here, moreover, the delay was serious enough to work a waiver, and nothing appears in the record to excuse Hwang's neglect.

B. Hwang improperly attempts to shift the blame to Heinzig instead of offering a justification for the extended delay in raising the defense of insufficient service

Hwang faults for Heinzig never demanding Hwang's answer, moving for default, or serving discovery about service of process. (*See* Resp't's Br. at 14-15.) But the question regarding waiver is not whether Heinzig spent enough time and resources enforcing Hwang's duties under the Civil Rules. Such a framing of the issue would flip the proper inquiry on its head. As our Supreme Court noted in the landmark decision in *Washington State Physicians Insurance Exchange and Association v. Fisons Corp.*, 122 Wn.2d 299, 858 P.2d 1054 (1993), a plaintiff's decision not to compel a defendant's compliance with the court rules is not a prerequisite to levying consequences for a defendant's rule violations. *Id.* at 345. Properly viewed, then, the issue here is whether Hwang's failure to plead his defense as required by the court rules was sufficiently dilatory that his defense was waived. The focus belongs on the conduct of Hwang and his attorneys; it is Hwang's duties under the court rules that are at issue. *See Fisons*, 122 Wn.2d at 355 ("Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense." (internal quotation marks omitted)).

In his response, however, Hwang offers no justification for his serious

delay. There is no excusable neglect. Hwang made no showing of good faith behavior in causing the delay. (*See* Resp't's Br. at 4-19.) The delay was serious, lasting more than eight months. (*See* CP 49-77, 81.) The delay would thus undermine the usual course of judicial proceedings, which favors the prompt raising of any procedural defenses under CR 12. Further, Hwang's position would elevate his interest in procedural regularity above Heinzig's interest in adjudication of his substantive rights. Such a result would undo the existing balancing of these interests in Washington's modern civil procedure, which favors outcomes on "the merits as opposed to disposition on technical niceties." *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996) (internal quotation marks and brackets omitted). For these reasons, Hwang's serious delay was not excusable, and waiver should be found.

C. Precedent supports a conclusion of waiver in this case

Although no Washington case exists with identical facts to the one here, a careful reading of the applicable precedents shows ample support for waiver in this case. Hwang's behavior cannot be compared with *French*. Instead, *French* marks the outer boundary of what may constitute "mere" delay, as opposed to fully dilatory conduct, and the situation there was quite different. In *French*, the defendant waited five-and-a-half months to

assert the defense, 116 Wn. 2d at 587; here, Hwang delayed over eight months. In *French*, the defendant actually pleaded the defense in an answer, *id.* at 593; here, Hwang waited to raise the defense in a motion to dismiss. In *French*, the plaintiff did not object upon receiving the untimely defense in the answer, *id.*; here, Heinzig opposed the defense as untimely as soon as Hwang first raised it, in the motion to dismiss. In *French*, the plaintiff could have attempted service to cure any deficiency, allowing more weight to be placed on the defendant's interest in procedural regularity, *id.* at 587; here, Heinzig had no such opportunity, because the statute of limitations had run.

These contrasting circumstances show why the *French* defendant's delay could be excusable—"mere" delay—and not sufficiently tardy to weigh the plaintiffs' interests more heavily than the defendant's. Our Supreme Court already expressed misgivings about the defendant's conduct in *French*, stating, "this case should not serve as a model to other practitioners." 116 Wn.2d at 593. That precedent should therefore be limited to its facts, not extended to new and different situations. If *French* were expanded, defendants would have a template for engaging in delay and burdening plaintiffs with the time and expense of rules enforcement.

Raymond supports the position of Heinzig that a long delay of asserting

an insufficient-service defense may be dilatory. In *Raymond*, Division One found the defense attorneys actions were "both dilatory and inconsistent with the later assertion of the defense of insufficient service of process." 24 Wn. App. at 115. Although the Court's reasoning did not separate out the conduct that was dilatory from what triggered the second prong of the waiver doctrine, the fact was that eleven months elapsed between the defendant's notice of appearance and the defendant's motion to dismiss, without the defendant ever filing an answer. *Id.* at 114. And the Court did not hold that it would be necessary for a defendant to request extensions and continuances before the conduct would be dilatory. Rather, the Court simply held that such conduct was sufficient to be dilatory. *Id.* at 115. (One could also say that a defendant who recognizes his duties under the rules and at least bothers to request an extension of time is less blameworthy than a defendant who ignores the rules completely.) Further, the Court noted a lack of evidence that the defendant utilized the delay for the purposes of investigating whether there was a basis for the defense. *Id.* Thus, two key circumstances—the eleven-month delay and the lack of justification for the delay—make *Raymond* much closer to this case than is *French*.

Heinzig and Hwang's situation also compares with *Blankenship*, a case where Division Three held the defendant waived an insufficient-process

defense. In *Blankenship*, the Court found waiver on both of the two grounds for waiver. Although Hwang correctly observes that the defendant engaged in discovery before raising the defense, those facts were relevant to the Court's finding that the defendant behaved inconsistently with an insufficient-waiver defense. *Blankenship*, 114 Wn. App. at 319-20. But the Court separately found that the defendant was dilatory because "the defense was tardy in asserting the insufficient service defense when it had the necessary facts within its control to make the critical assessment and failed to act earlier." *Id.* at 320. Because waiver can occur in two ways, this finding of dilatory conduct was a sufficient basis for finding waiver. Similarly to here, the defendant failed to file and serve an answer for over nine months. *Id.* at 315. Even though the plaintiff waited that long to demand an answer, *id.*, the Court had no difficulty placing the blame where it belonged: on the defendant who broke the rules. In fairness, then, Heinzig's case should be treated the same as in *Blankenship*.

On the continuum of dilatory defense behavior, *Kahclamat* lends further support for concluding that Hwang's conduct was far enough from the defendant's behavior in *French* and reaches the side of the continuum where waiver occurs. Hwang is correct, so far as it goes, that Division One held in *Kahclamat* that the defendant violated the rule against successive

motions to dismiss under CR 12(b). *See Kahclamat*, 31 Wn. App. at 466. But Hwang neglects to mention that the Court also relied on *Raymond* and Wright and Miller—the two authorities establishing the dilatory-conduct basis for waiver of Rule 12(b) defenses in Washington. On this ground, the Court held that the defendant's twelve-month delay in asserting the defense resulted in waiver. *Kahclamat*, 31 Wn. App. at 467.

In sum, the trial court should have found Hwang was dilatory. The Court of Appeals should hold Hwang was dilatory and reverse the trial court's dismissal of Heinzig's complaint. If the Court of Appeals so holds, it need not reach the next issue.

II. THE SERVICE OF PROCESS ON THE SECRETARY OF STATE WAS VALID

Although our Supreme Court's view of the continued vitality of the strict-compliance standard is not entirely clear after *Martin v. Triol*, 121 Wn.2d 135, 142, 847 P.2d 471 (1993) and *Sheldon*, the Court left no doubt about one point: when construing the terms of RCW 46.64.040, a liberal-construction standard applies. In *Martin*, the Court construed RCW 46.64.040 so "'as to give meaning to its spirit and purpose, guided by the principles of due process.'" *Martin*, 121 Wn.2d at 145 (quoting *Wichert v. Cardwell*, 117 Wn.2d 148, 156, 812 P.2d 858 (1991)). Following *Martin*, the Court in *Sheldon* adopted a general interpretive standard for all substitute-

service statutes, not just RCW 46.64.040: a rule of liberal construction "to effectuate service and uphold jurisdiction of the court." *Sheldon*, 129 Wn.2d at 609. The Court reiterated the "policy to decide cases on their merits" and noted that "[m]odern rules of procedure are intended to allow the court to reach the merits as opposed to disposition on technical niceties." *Id.* (quoting *Carle v. Earth Stove, Inc.*, 35 Wn. App. 904, 908, 670 P.2d 1086 (1983) (internal quotations omitted)). And, in characterizing its interpretation of RCW 46.64.040 in *Martin*, the Court stated that it had applied "liberal construction." *Sheldon*, 129 Wn.2d at 608. Unless it is to run afoul of the Supreme Court's precedent, therefore, this reviewing court must liberally construe the terms of RCW 46.64.040 to effect service and facilitate a decision on the merits.

Hwang is correct that a line of cases following *Sheldon*, including Division One's decision in *Harvey v. Obermeit*, 163 Wn. App. 311, 318, 261 P.3d 671 (2011), require strict compliance with RCW 46.64.040. But only the Supreme Court can overrule *Sheldon*; it is the law of this state. Thus, a liberal-construction standard must be applied to RCW 46.64.040. But Hwang fails to mention this standard. Until our Supreme Court speaks further on the strict-compliance standard, however, it may be reconciled with *Sheldon*, as follows. The terms of the statute are construed in accordance with

the liberal-construction standard established under *Martin* and *Sheldon*. Once the statutory steps for service have been so defined, the question becomes whether plaintiff strictly complied with each one.

As discussed in Heinzig's opening brief, once our Supreme Court's liberal-construction standard is applied to RCW 46.64.040, particularly in the context of the statute's legislative history, the statute should not be read to require duplicative mailings of notice to the defendant. (*See* Appellant's Opening Br. at 31-38.) It is not sufficient for Hwang to cite the strict-compliance standard and to insist that duplicative mailings are required. Hwang fails to argue why, under a liberal-construction standard, RCW 46.64.040 means that duplicative mailings must be sent in every case where the plaintiff also causes the Secretary of State's Office to accomplish mailing by supplying the defendant's last known address.

Under RCW 46.64.040, the "plaintiff" must send a "notice" of service on the Secretary of State, together with "a copy of the summons or process ... by registered mail with return receipt requested ... to the defendant at the last known address of the said defendant." RCW 46.64.040. Hwang's quibble is that Heinzig or Heinzig's attorney did not perform these steps personally. But under a liberal-construction standard, the term "plaintiff" in RCW 46.64.040 should not mean that only the plaintiff may

perform the required tasks. *See Clay v. Portik*, 84 Wn. App. 553, 561-62, 929 P.2d 1132 (1997). When the statutory language is viewed according to "its spirit and purpose, guided by the principles of due process," *Wichert*, 117 Wn.2d at 156, it does not matter whether the plaintiff personally or someone on the plaintiff's behalf sets in motion the events necessary to accomplish a ministerial task, such as mailing, and it is in fact accomplished. Any other interpretation would run afoul of our Supreme Court's directive in *Martin* and *Sheldon* to construe RCW 46.64.040 in a manner that avoids procedural formalism.

When RCW 46.64.040 is interpreted liberally as it must be, we see that Heinzig complied with the statute as required. The Secretary of State's Office does not always mail the documents, as the statute requires the mailing only if the defendant's address is known to the Secretary of State. *See* RCW 46.64.040. Further, plaintiffs are not required to provide an address to the Secretary of State. *Clay v. Portik*, 84 Wn. App. 553, 559-60, 929 P.2d 1132 (1997). But if plaintiffs elect to provide an address, the Secretary of State's Office gains knowledge of the address and thus becomes statutorily obligated to mail the documents. Heinzig, by supplying the last known address of Hwang to the Secretary of State's Office, caused the

Secretary of State to perform the ministerial task of mailing the necessary documents to Hwang.

Although Division One stated in *Keithly v. Sanders*, 170 Wn. App. 683, 690, 693, 285 P.3d 225 (2012) that affidavits of compliance and due diligence were required to be mailed to the defendant in order to perfect service, that is not a correct interpretation of the statute. It is worth noting that *Keithly* did not cite our Supreme Court's liberal-construction standard and that *Keithly* did not need to reach that issue, as the plaintiff failed to cause *any* documents, not just the affidavits, to be mailed to the defendant before the statute of limitations had run. *See Keithly*, 170 Wn. App. at 686, 694. Further, the statement in *Keithly* needlessly created a conflict with Division Two's decision in *Clay*, where the Court held that the affidavits were proof of service to be filed with the trial court. *Clay*, 84 Wn. App. at 560.

The interpretation in *Clay* is the better one, as discussed in Heinzig's opening brief, in light of the statute's legislative history and CR 4(g)(7). The affidavits are simply proof of service, not part of service itself. And CR 4(g)(7) provides that "[f]ailure to make proof of service does not affect the validity of the service." The cases are in accord with CR 4(g)(7). *See, e.g.*, *Estate of Palucci*, 61 Wn. App. 412, 416, 810 P.2d 970 (1991); *Lake v.*

Butcher, 37 Wn. App. 228, 232, 679 P.2d 409 (1984). Further, even when strict compliance is required for service under a substitute-service statute, only substantial compliance is required for proof of service, if the defendant is not harmed by the late filing, as Hwang was not here. *See, e.g.*, *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 471, 403 P.2d 351 (1965).

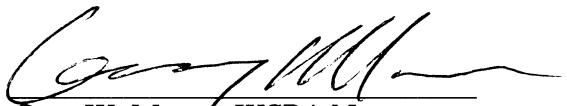
In sum, Heinzig complied with the substitute-service statute, as construed under *Martin* and *Sheldon*. Heinzig was not required to mail any affidavit of compliance to effect service, as such a document was merely a proof of service. The Court of Appeals should hold Hwang was properly served and reverse the trial court's dismissal of Heinzig's complaint.

CONCLUSION

The trial court's order of dismissal should be reversed and the case remanded for further proceedings.

DATE: January 30, 2015

RESPECTFULLY SUBMITTED BY:



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