Supreme Court Case No. 93212-8
Court of Appeals Case No. 72269-7-I

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

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

v.

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

PETITION FOR REVIEW

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INTRODUCTION

In this civil suit for damages arising from a crash on a public highway, the Court of Appeals affirmed dismissal based on invalid service of process. Respondent Seok Hwang does not deny he had actual notice, acknowledges that petitioner Mark Heinzig served the summons and complaint on the Secretary of State under RCW 46.64.040, and concedes the Secretary of State's Office mailed notice of that service to Hwang's last known address. Hwang never filed an answer to Heinzig's complaint, and Hwang offers no justification for delaying for more than eight months before he first raised his invalid-service defense. (*See* Resp't's Br. at 4-19.)

The Court of Appeals, holding it was not bound by the rule of liberal construction developed in *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993) and *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996), strictly construed RCW 46.64.040 to require plaintiffs themselves to send a redundant notices of service to defendants. The court also held the statute's affidavits of service are jurisdictional and a part of the notice of service to be sent to defendants, conflicting with the rule of liberal construction, with CR 7, and with a decision of Division Two of the Court of Appeals.

The Court of Appeals further held that Hwang did not waive his defense. This decision conflicts with the dilatory-conduct prong of the waiv-

er doctrine, as discussed in Supreme Court decisions such as *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000). The Court of Appeals decision is a new landmark: no other appellate decision allows a delay of more than five-and-a-half months. The Court of Appeals, instead of demanding Hwang show excusable neglect, shifted the burden to Heinzig to demonstrate prejudice. But the court failed to discern the apparent and inherent prejudices. And such a showing should not be required, lest parties have incentives to push boundaries, shifting the paradigm of the Civil Rules—from one of cooperation and voluntary rules compliance, to one of costly litigation to enforce rules and to preempt chicanery or dillydallying.

Review should be granted under RAP 13.4(b)(1), (2), and (4).

IDENTITY OF PETITIONER

Mark Heinzig, a Washington resident, petitions for review. He was the appellant below and the plaintiff in the suit filed in the trial court.

COURT OF APPEALS DECISION

On August 10, the Court of Appeals entered an order publishing its opinion. A copy of the relevant statute, RCW 46.64.040, is included as Appendix A. The Court of Appeals' opinion is included as Appendix B.

ISSUES PRESENTED FOR REVIEW

1. Whether service of process on the Secretary of State under RCW

46.64.040 is valid where the Secretary of State immediately mails to the defendant a notice of that service, but the plaintiff does not separately mail a duplicate notice or proof of service to the defendant.

2. Whether, under the dilatory-conduct prong of the waiver doctrine for CR 12(b) procedural defenses, defendants waive their defense of invalid service if the defense is first raised eight months after service and without any showing of excusable neglect for the delay.

STATEMENT OF THE CASE

I. FACTUAL HISTORY

In a civil complaint for damages, Mark Heinzig alleged that Seok Hwang drove negligently into him on State Route 99 in Lynnwood, causing bodily injury. (CP 86.) This crash occurred on June 5, 2010. (*Id.*) On May 13, 2013, the summons and complaint were filed. (CP 19 ¶ 2, 34-37, 83-86.)

Heinzig's attorney then went about notifying Hwang of the suit. (CP 19-20 ¶¶ 3-6, 21-39.) Hwang's attorney attempted to locate Hwang. (CP 30.) A process server brought the summons and complaint to three different addresses in Washington, but at each location, the current resident told the process server that Hwang did not live there. (CP 23-24.) Despite these inquiries with those current residents and researching county assessor's records, the process server was not able to locate Hwang. (*Id.*)

Meanwhile, Heinzig's attorney went about notifying Hwang through Hwang's attorneys and liability insurer. (CP 20 ¶ 4, 25-28.) Staff from Heinzig's attorney's office emailed a copy of the summons and complaint to one of Hwang's attorneys, who acknowledged receiving the documents. (CP 26-27.) Hwang's attorney then filed a notice with the Snohomish County Superior Court, entering the appearance of himself and his law firm, identified as "Employees of the Corporate Law Department of State Farm Mutual Automobile Insurance Company," on behalf of Hwang: "The undersigned attorneys appear for Defendant .... (CP 80-81.)

With Hwang thereby notified through his attorneys and insurer, Heinzig's attorney attempted to complete formal service of process. After working with the process server and investigating Hwang with search services, Heinzig's attorney concluded Hwang had left the state. (CP 30.) Hwang's attorney then initiated service of process on the Washington Secretary of State under RCW 46.64.040. (CP 20 ¶ 6, 29-39.) Heinzig's attorney's office mailed a package of documents to the Washington Secretary of State: a letter signed by him, the summons, the complaint, and a declaration of diligence signed by the process server. (*Id.*) This package of documents was mailed by Heinzig's attorney's office on June 4, 2013. (CP 20 ¶ 6.) The attorney's letter provided Hwang's last-known address. (CP 30.)

The Secretary of State's Office, after receiving the package of documents from Heinzig's attorney, returned a confirmation of service to Heinzig's attorney. (CP 31.) The confirmation of service stated that the Secretary of State's Office received the documents from Heinzig's attorney on June 7 and mailed a copy of the documents three days later by certified mail to "the non-resident motorist at the last known address as supplied by the plaintiff or his/her representative (RCW 46.64.040)." (CP 31.) That address was the one specified in the letter from Heinzig's attorney. (CP 30-32.) The package was returned by the post office as undeliverable and unable to be forwarded. (CP 32.) On June 12, Heinzig's attorney's staff emailed one of Hwang's attorney's with a copy of the confirmation of service from the Secretary of State's Office. (CP 20 ¶ 7, 28.)

After receiving this confirmation of service, Hwang's attorneys did not respond. (*See* CP 1-86.) By August 11, 2013, which was 90 days[1] following Heinzig's filing of the summons and complaint, Hwang still had not filed an answer or any other document asserting the defense of invalid service. (CP 70; *see also* CP 1-69, 71-86.) Hwang's attorneys did not write a letter, email, or call, nor did they propound discovery directed to the issue of service. (CP 21 ¶ 10.) Hwang has never denied he had actual notice of the suit

[1] *See* CR 3(a); RCW 4.16.170.

through the emails delivered to his attorneys. (*See* CP 1-86.)

Six months after Hwang's attorneys appeared, they withdrew, and a substitute attorney appeared. (CP 78-79.) Still no answer came. (CP 1-86.)

II. PROCEDURAL HISTORY

More than eight months after the initial notice of appearance for Hwang, Hwang's new attorney filed a motion to dismiss under CR 12(b), which was granted. (CP 49-77, 81.) The Court of Appeals affirmed.

ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. THE COURT OF APPEALS' CONSTRUCTION OF RCW 46.64.040 MERITS REVIEW UNDER RAP 13.4

A. The decision below conflicts with the Supreme Court's liberal-construction rule for statutes such as RCW 46.64.040

The Court of Appeals' construction of RCW 46.64.040 should be reviewed because "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court." RAP 13.4(b)(1). The Court of Appeals decision, by insisting that courts do not apply a rule of liberal construction to RCW 46.64.040, conflicts with *Triol* and *Sheldon* and results in a strict construction that undermines, instead of furthers, the statute's purposes.

1. The statute provides a remedy designed to encourage safety on public highways and to enable injured persons to seek redress

RCW 46.64.040 is meant "'to promote care on the part of all ... who use [state] highways,' as well as to 'provide ... a convenient method by

which [claimants] may sue to enforce [their] rights.'" *Triol*, 121 Wn.2d at 147 (quoting *Hess v. Pawloski*, 274 U.S. 352, 356, 47 S. Ct. 632, 71 L. Ed. 1091 (1927)). Recognizing these purposes, the Supreme Court views RCW 46.64.040 not as a procedural barrier to surmount, but rather a helpful statute "designed to minimize procedural difficulties in bringing actions arising out of 'the use of [the State's] highways ... and the protection of persons and property within the State.'" *Id.* (quoting *Tellier v. Edwards*, 56 Wn.2d 652, 654, 354 P.2d 925 (1960) (internal quotation omitted)). The statute is remedial and an exercise of the police power. *Tellier*, 56 Wn.2d at 654 (quotation omitted).

For residents who abscond or leave the state, as in this case, the statute "appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section." RCW 46.64.040. Service upon such a resident is "sufficient and valid" where two copies of the summons and complaint are provided to the Secretary of State's Office. *Id.* The statute attaches a proviso, requiring that a notice of this service be sent to the defendant's last known address: "notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said defendant." *Id.*

2. *Conflicting with* Triol *and* Sheldon, *the Court of Appeals wrongly determined that the rule of liberal construction does not apply*

The Court of Appeals' decision conflicts with the rule of liberal construction that applies to RCW 46.64.040. Instead of recognizing the rule, the Court of Appeals focused its inquiry on the need for "strict procedural compliance with the requirements of RCW 46.64.040." *Heinzig v. Hwang*, No. 72269-7-I, slip op. at 7 (Wash. App. June 29, 2015). Rejecting petitioner Heinzig's reliance on *Sheldon* and *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991) for the proposition "that the nonresident motorist act must be construed liberally," the Court of Appeals concluded that "[n]either decision interpreted Washington's nonresident motorist act." *Heinzig*, No. 72269-7-I, slip op. at 8 n.4. That view is untenable.

Of course, in a 50-year-old case involving an earlier version of RCW 46.64.040, the Supreme Court held that all statutes like it, which allow constructive or substitute service other than in-hand delivery to the defendant, "are in derogation of the common law and, therefore, must be strictly construed." *Muncie v. Westcraft Corp.*, 58 Wn.2d 36, 38, 360 P.2d 744, 745 (1961). But in *Wichert*, the Supreme Court began to question the wisdom of the rule of strict construction for statutes that derogate the common law, including the common law's requirement of in-hand service of process. After finding legislative intent to alter the common law, the

Supreme Court stated it must "construe the statute as to give meaning to its spirit and purpose, guided by the principles of due process." *Wichert*, 117 Wn.2d at 156. Two years later, in *Triol*, the Supreme Court dealt with RCW 46.64.040. Following *Wichert*, the Court declined to apply strict construction when determining the effect of RCW 4.16.170, the 90-day tolling statute, on RCW 46.64.040. *Triol*, 121 Wn.2d at 144-45. Instead, the Court focused on "the legislative purpose underlying each of the statutes in question" and construed the statutes so "'as to give meaning to [their] spirit and purpose, guided by the principles of due process.'" *Id.* at 145 (quoting *Wichert*, 117 Wn.2d at 156). The Supreme Court thus shifted away from strict construction.

The abandonment of *Muncie* became complete in *Sheldon*, which expressly rejected *Muncie*, noting, "more recently, we have applied liberal construction to substitute service of process statutes in order to effectuate the purpose of the statute while adhering to its spirit and intent." *Sheldon*, 129 Wn.2d at 607. The Court, after reviewing *Wichert* and *Triol*, announced a rule of liberal construction "to effectuate service and uphold jurisdiction." *Sheldon*, 129 Wn.2d at 609. The Court expressed a strong preference for deciding cases on the merits instead of procedure. *See id.*

The Court of Appeals' decision misconstrued this line of cases. The

Court of Appeals relied on its outdated opinion in *Omaits v. Rabers*, 56 Wn. App. 668, 670, 785 P.2d 462 (1990), which preceded *Wichert*, *Triol*, and *Sheldon*. *See Heinzig*, No. 72269-7-I, slip op. at 7. Further, it misapprehended *Triol*, citing *Triol* for the requirement of strict procedural compliance with the terms of RCW 46.64.040, but ignoring the teaching of *Triol* that the effect of the statute—that is, the legal significance of the statutory language—is to be constructed "'to give meaning to its spirit and purpose.'" *Triol*, 121 Wn.2d at 145 (quoting *Wichert*, 117 Wn.2d at 156). The Court of Appeals also believed it was not bound by *Sheldon* because the substitute-service statute construed in *Sheldon* was not RCW 46.64.040. *See Heinzig*, No. 72269-7-I, slip op. at 8 n.4. This view conflicts with *Sheldon*, which expressly rejected the strict-construction rule from *Muncie*, discerned a general rule of construction for *all* substitute-service statutes, and based its holdings on the understanding that *Triol* had "applied liberal construction" to RCW 46.64.040. *Sheldon*, 129 Wn.2d at 607-08. The Court of Appeals' decision thus creates a conflict warranting review.

3. The Court of Appeals strictly and incorrectly construed RCW 46.64.040 to impose a "statutory duty" requiring plaintiffs to themselves mail a duplicate notice of service to defendants

Nowhere did the Court of Appeals' opinion mention the legislative purposes of RCW 46.64.040, contrary to the teachings of *Triol* and *Shel-*

don. See Heinzig, No. 72269-7-I, slip op. at 1-12. Instead, the Court of Appeals adopted a strict and literal reading of the relevant statutory phrase: "notice of such service and a copy of the summons or process is forthwith sent ... *by plaintiff* to the defendant at the last known address." RCW 46.64.040 (emphasis added). The Court of Appeals believed RCW 46.64.040 creates a "statutory duty" which only plaintiffs, or perhaps their attorneys, can discharge. *Heinzig*, No. 72269-7-I, slip op. at 9. Accordingly, the Court of Appeals held Heinzig had not met the statute's notice requirement by causing the Secretary of State's Office to mail a notice of service (Heinzig's attorney's letter had supplied the last known address of Hwang, CP 30-32, and RCW 46.64.040 requires the Secretary of State to mail a copy of the summons and complaint to the defendant's address "if known to the secretary of state").

This a draconian and formalistic construction: literally the plaintiff must to mail the notice of service, but no one else, except perhaps the plaintiff's attorney, is allowed to do so—not a paralegal, not the plaintiff's personal assistant, not a third-party service such as Stamps.com, not a legal-messenger company, and not the Secretary of State. The Court of Appeals' decision handcuffs plaintiffs to this procedural task. In doing so, it contorts the procedural remedy afforded to plaintiffs by RCW 46.64.040

into a non-delegable "statutory duty." It insists on a pointlessly duplicative notice of service to be sent to the defendant. In short, the Court of Appeals' decision erects procedural barriers that conflict with the direction to construe substitute-service statutes liberally to "allow the court to reach the merits, as opposed to disposition on technical niceties." *Sheldon*, 129 Wn.2d at 609 (internal quotations omitted).

Even if the Supreme Court were to ultimately agree with the Court of Appeals' conclusion about the legal effect of RCW 46.64.040, review would still be appropriate under RAP 13.4(b)(1) because the Court of Appeals' pronouncements regarding the rule of statutory construction conflict with the Supreme Court's decisions and must be corrected.

B. By treating the affidavits of compliance and due diligence as jurisdictional, Division One's opinion conflicts with the liberal-construction rule, CR 7(g), and precedent on proof of service

Heinzig urged the Court of Appeals to rule that, under RCW 46.64.040, the affidavits of compliance and due diligence are proof of service to be filed with the trial court, and not mandatory components of the notice of service. This distinction was relevant because Heinzig's attorney's cover letter was not an affidavit. (CP 30.) The Court of Appeals construed RCW 46.64.040 to require that these affidavits of service be included with the mailing to the defendant. *Heinzig*, No. 72269-7-I, slip op. at 7.

This construction of RCW 46.64.040 conflicts with the decisions of the Supreme Court and the Civil Rules. Division One's view could emerge only from a strict construction unconcerned with the purposes of RCW 46.64.040. The statute says only that the affidavits must be "appended to the process," but it does not refer to the copy of the summons and complaint mailed to the defendant. RCW 46.64.040. Further, it gives the option of skipping the affidavits if "defendant's endorsed receipt is received and entered as part of the return of process" after the notice of service is mailed to the defendant. *Id.* This option would be pointless if the affidavits were a mandatory part of the notice of service to be mailed to the defendant in the first place. Further, there is no reason why the legislature would insist on more procedural technicalities, when the purpose of the statute is to shed procedural barriers and enable service. 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." 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 would not be here. *See, e.g.*, *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 66 Wn.2d 469, 471, 403 P.2d

351 (1965). The Court of Appeals' decision conflicts with these authorities, and it should be reviewed accordingly under RAP 13.4(b)(1).

C. Division One's opinion creates a split with Division Three, which recognizes liberal construction, and deepens a split with Division Two about the affidavits required by the statute

Review should also be granted because "the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals." RAP 13.4(b)(2). The conflict lies along two fault lines. The first is the rule of liberal construction. Division Three has interpreted *Sheldon* to apply to all substitute service statues, not just RCW 4.28.080(15). *See Farmer v. Davis*, 161 Wn. App. 420, 433-34, 250 P.3d 138 (2011) ("In *Sheldon*, the court explicitly abandoned strict construction of service of process statutes in favor of the trend toward liberal construction reflected in its more recent decisions ...."). Here, Division One refused to apply *Sheldon.*

The second fault line is between Division One's and Division Two's differing constructions of the affidavit requirements in RCW 46.64.040. In *Clay v. Portick*, 84 Wn. App. 553, 559, 929 P.2d 1132 (1997), Division Two construed the affidavits of compliance and due diligence as documents to be filed with the court, not as documents that had to be sent to the defendant personally or by mail. In *Keithlv v. Sanders*, 170 Wn. App. 683, 688-90, 285 P.3d 225 (2012), Division One did not acknowledge *Clay*, and the

court held the notice of service sent to the defendant "must include the plaintiff attorney's affidavit of due diligence." *Keithly*, 170 Wn. App. at 690. A rupture thus opened within the Court of Appeals' jurisprudence. The split deepened with Division One's decision in this case, with the court reaffirming its decision in *Keithly* and acknowledging that *Clay* was contrary authority on the issue. *See Heinzig*, No. 72269-7-I, slip op. at 7-8.

Review must be granted to resolve the present and deepening conflict within the Court of Appeals on the construction of RCW 46.64.040.

II. REVIEW SHOULD ALSO BE GRANTED OF THE COURT OF APPEALS' REFUSAL TO FIND WAIVER

The Court of Appeals' decision stretched the Supreme Court's waiver cases beyond the breaking point: eight months is an unprecedented delay, and the delay prejudiced Heinzig, contrary to the decision below. Review should be granted on the waiver issue.

A. Division One's opinion conflicts with the dilatory-conduct ground for waiver and will undermine the pleading rules

The Civil Rules require defendants to file an answer within 60 days if they are served under RCW 46.64.040, and their answer must include their affirmative defenses and any procedural defenses such as invalid service and the statute of limitations (if they have such defenses and have not yet filed a pre-answer motion to dismiss). CR 8(c); CR 12(a)(3), (b). These

pleading rules facilitate the speedy, orderly, and cost-effective disposition of the case. *See* CR 1; *Mahoney v. Tingley*, 85 Wn.2d 95, 100, 529 P.2d 1068 (1975); *Sanders v. Sanders*, 63 Wn.2d 709, 715, 388 P.2d 942 (1964).

To give effect to these pleading rules, in *Lybbert* the Supreme Court adopted the common-law waiver doctrine, with two prongs, each of which supplies a sufficient and independent ground for waiver: first, "the defendant's assertion of the defense is inconsistent with the defendant's previous behavior," or second, "the defendant's counsel has been dilatory in asserting the defense." *Lybbert,* 141 Wn.2d at 39. The dilatory 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).

A missed deadline may be forgiven on a showing of "excusable neglect." CR 6(b)(2). But Hwang never made any such showing, and the Court of Appeals did not require one. A delay of eight months sets a new record. Petitioner is aware of no other Washington appellate decision upholding a delay of that length. The outer boundary is *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991), which involved a delay of five-and-a-half months. But the defendant did actually file an answer, the plaintiff did not object to it as untimely, and the plaintiff had time to cure the defect in ser-

vice before the limitations period ran. *Id.* at 593, 595. In those circumstances, the delay was forgivable, but *French* marks the limits.

The Court of Appeals disregarded the length of Hwang's delay and his lack of excuse, holding that Heinzig must show actual prejudice. *See Heinzig*, No. 72269-7-I, slip op. at 9-10 (citing *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 246-47, 178P.3d 981 (2008)). An actual-prejudice requirement effectively relieves parties of voluntarily complying with the Civil Rules, and shifts the burden to the other side to litigate to enforce the rules. But, if defendants are "at liberty to ... employ delaying tactics," the Supreme Court has already warned, "the purpose behind the procedural rules may be compromised." *Lybbert*, 141 Wn.2d at 39. Some defendants will utilize this new opportunity to delay complying with CR 12. In *Lybbert*, for example, the defendant admitted that it "'routinely avoid[s] answering a complaint, until a motion for default is brought.'" 141 Wn.2d at 43 (quoting record). The Court of Appeals was not justified in extending *Oltman*; that case involved a minor delay (the defense of improper venue was raised 31 days after service), and the Court held simply that actual prejudice did not exist on those particular facts, not that actual prejudice is required in all cases under the dilatory-conduct prong. *See Oltman*, 163 Wn.2d 236 at 241, 244-47. By requiring actual prejudice, the

Court of Appeals evaporated the dilatory-conduct prong adopted in *Lybbert*. Review should therefore be granted under RAP 13.4(b)(1) and (b)(4).

B. The Court of Appeals was wrong to ignore the actual and inherent prejudices that resulted, partly because it incorrectly treated RCW 46.64.040 as a service-by-mail statute

Even if actual prejudice were necessary, there is a conflict between Supreme Court decisions and the Court of Appeals holding that actual prejudice could not be shown here. In deciding that Heinzig did not have an opportunity to cure because the limitations period had run, the Court of Appeals treated RCW 46.64.040 as a service-by-mail statute. It is not. Even as a "substitute service" statute, in the sense that it is not the same as the common law's in-hand personal service, it is deemed to be a method of personal service in modern parlance, by its own terms: "such service shall be sufficient and valid *personal service* upon said resident or nonresident." RCW 46.64.040 (emphasis added). Also, CR 4(d)(2) categorizes it as "[p]ersonal service." Finally, in *Triol,* the Supreme Court considered whether RCW 46.64.040 qualifies a "personal service" statute within the meaning of RCW 4.16.170, the 90-day tolling statute. The Supreme Court recognized and gave effect to the Legislature's intent to make RCW 46.64.040 a form of personal service. *Triol*, 121 Wn.2d at 149-150. None of these authorities was distinguished or even cited by the Court of Appeals.

See Heinzig, No. 72269-7-I, slip op. at 10-12. After incorrectly treating RCW 46.64.040 as service by mail, the Court of Appeals wrongly relied on CR 6(e) to calculate the deadline for Hwang's answer as August 13, after the statute of limitations had run. *See Heinzig*, No. 72269-7-I, slip op. at 11.

In reality, the deadline for Hwang's answer was August 6, which was *before* the statute of limitations had run and 60 days after service on the Secretary of State. This calculation properly starts the clock on June 7, when the Secretary of State received service, not on June 10, when the notice was mailed. (CP 31.) RCW 46.64.040 itself segregates the service on the Secretary of State, on the one hand, and the notice of that service, on the other. *See* RCW 46.64.040. Thus, when the Secretary of State is served as the defendant's appointed agent, the defendant has been served, for purposes of the timing rules (although that service is voidable if plaintiff does not subsequently arrange for notice of that service). Were it otherwise, the statute would not refer to the notice as "notice of *such* service." *Id.* (emphasis added). Indeed, the Supreme Court has already distinguished between service and the notice of service under RCW 46.64.040. In *Smith v. Forty Million, Inc.*, 64 Wn.2d 912, 915, 395 P.2d 201, 203 (1964), the Court rejected the contention that the notice of service under RCW 46.64.040 was one of the "elements of service of process."

The Court explained that this reading of the statute confuses service on the Secretary of State, as "the statutory agent of the defendant," with the notice of that service, which is a separate requirement designed to satisfy constitutional due process. *Smith*, 64 Wn.2d at 915-16. Thus, it is the service on the defendant's statutory agent, not the separate due-process notice of service, that triggers the 60-day clock under CR 12(a)(3). The Court of Appeals' decision conflicts with these authorities under RAP 13.4(b)(1).

Further, the Court of Appeals decision failed to appreciate the inherent prejudice that inheres in a long delay. CR 1 recognizes that parties may expect the "speedy ... determination" of their cases. As with statutes of limitations, *see, e.g.*, *Atchison v. Great W. Malting Co.*, 161 Wn.2d 372, 382, 166 P.3d 662 (2007), the dilatory-conduct prong gives the plaintiff certainty and a sense of finality: with the passage of significant time, the plaintiff may reasonably expect that his claim will be decided on the merits and will not dismissed by surprise on procedural grounds. The Court of Appeals' decision fails to account for this inherent interest in procedural regularity.

CONCLUSION

For the forgoing reasons, review should be granted.

DATE: September 9, 2015

RESPECTFULLY SUBMITTED BY:

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APPENDIX

A

RCW 46.64.040

The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as evidenced by his or her operation of a vehicle thereon, or the operation thereon of his or her vehicle with his or her consent, express or implied, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability in which such nonresident may be involved while operating a vehicle upon the public highways, or while his or her vehicle is being operated thereon with his or her consent, express or implied, and such operation and acceptance shall be a signification of the nonresident's agreement that any summons or process against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington.

Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents.

Service of such summons or process shall be made by leaving two copies thereof with a fee established by the secretary of state by rule with the secretary of state of the state of Washington, or at the secretary of state's office, and such service shall be sufficient and valid personal service upon said resident or nonresident:

PROVIDED, That notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said defendant, and the plaintiff's affidavit of compliance herewith are appended to the process, together with the affidavit of the plaintiff's attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served.

However, if process is forwarded by registered mail and defendant's endorsed receipt is received and entered as a part of the return of process then the foregoing affidavit of plaintiff's attorney need only show that the defendant received personal delivery by mail:

PROVIDED FURTHER, That personal service outside of this state in accordance with the provisions of law relating to personal service of summons outside of this state shall relieve the plaintiff from mailing a copy of the summons or process by registered mail as hereinbefore provided.

The secretary of state shall forthwith send one of such copies by mail, postage prepaid, addressed to the defendant at the defendant's address, if known to the secretary of state.

The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action.

The fee paid by the plaintiff to the secretary of state shall be taxed as part of his or her costs if he or she prevails in the action.

The secretary of state shall keep a record of all such summons and processes, which shall show the day of service.

APPENDIX

B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARK HEINZIG and JANE DOE HEINZIG, and their marital community,	)	DIVISION ONE
Appellants,	)	No. 72269-7-I
v.	)	
SEOK HWANG and JANE/JOHN DOE HWANG, and their marital community,	)	ORDER GRANTING MOTION TO PUBLISH OPINION
Respondents.	)	

William H. P. Fuld, a non-party, having filed a motion to publish opinion, and the hearing panel having reconsidered its prior determination and finding that the opinion will be of precedential value; now, therefore, it is hereby:

ORDERED that the unpublished opinion filed June 29, 2015, shall be published and printed in the Washington Appellate Reports.

Done this 10th day of August, 2015.

Dwyer, J.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

MARK HEINZIG and JANE DOE HEINZIG, and their marital community,	DIVISION ONE
Appellants,	No. 72269-7-I
v.	PUBLISHED OPINION
SEOK HWANG and JANE/JOHN DOE HWANG, and their marital community,	
Respondents.	FILED: June 29, 2015

DWYER, J. — Following a motor vehicle collision with Seok Hwang, Mark Heinzig commenced a lawsuit against Hwang and, subsequently, sought to accomplish substituted service of process pursuant to Washington's nonresident motorist act, RCW 46.64.040. Heinzig failed, though, to strictly comply with the procedural requirements contained in RCW 46.64.040 before the applicable statutory limitation period expired. Thus, when Hwang later brought a motion to dismiss, alleging insufficient service of process, the trial court properly granted the motion and dismissed Heinzig's complaint. Finding no error in the trial court proceedings, we affirm.

I

On June 5, 2010, Heinzig was involved in a motor vehicle collision with Hwang. The collision occurred in Lynwood, Washington.

On May 13, 2013, Heinzig initiated a lawsuit against Hwang in Snohomish County Superior Court. In the complaint, Heinzig alleged that he had suffered injury as a result of Hwang's negligence in operating a motor vehicle. Upon filing of the complaint, the three-year statutory limitation period was tolled for 90 days, so long as valid service of process was effected on Hwang within the 90-day period. RCW 4.16.170.[1]

On May 14, copies of the summons and complaint were provided to a professional process service company, North Sound Due Process, LLC. Registered process server Debra Gorecki made three unsuccessful attempts to effect service upon Hwang. Thereafter, Gorecki prepared and signed a "Declaration of Diligence," in which she detailed her attempts to serve Hwang.

On May 17, a staff member of Heinzig's attorney's office sent an e-mail to Hwang's attorney, attached to which were copies of the summons and complaint. The e-mail included the following statement: "As requested, here is the complaint for Mark Heinzig." Hwang's attorney replied, "Got it. Thanks." Later that day, the same staff member sent another e-mail to Hwang's attorney, which stated, "attached is the filed copy." Hwang's attorney replied, "Thanks."

On May 22, Hwang's attorney filed a notice of appearance.

On June 4, Heinzig's attorney mailed two copies of the summons and

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[1] This provision provides, in part, for the following:
For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever comes first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served . . . within ninety days from the date of filing the complaint. . . . If following . . . filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

complaint to the Washington secretary of state. Included in this mailing was a letter written by Heinzig's attorney, wherein he informed the secretary of state of the fruitless attempts to serve Hwang in Washington and provided Hwang's last known address. Also included in the mailing was Gorecki's "Declaration of Diligence." All of this was done in an attempt to effect service of process on Hwang pursuant to RCW 46.64.040.

A staff member of the secretary of state's office, in a letter to Heinzig's attorney, confirmed that Heinzig's mailing had been received on June 7. The staff member informed Heinzig that a copy of the received documents had been mailed to Hwang's last known address on June 10.[2] The mailing sent from the secretary of state to Hwang's last known address was returned as undeliverable.

On January 30, 2014, Hwang filed a CR 12(b) motion to dismiss the complaint. Therein, Hwang asserted that he had never been personally served, that Heinzig had failed to accomplish substituted service pursuant to RCW 46.64.040, and that the applicable statute of limitation had run. With regard to Heinzig's attempt to effect substituted service, Hwang contended that Heinzig had failed to adhere to two statutory requirements: (1) sending notice by registered mail to Hwang of service upon the secretary of state, and (2) attaching to that mailing an affidavit of due diligence signed by his attorney and certifying that attempts had been made to serve Hwang personally.

In an April 3 memorandum decision, the trial court ruled in Hwang's favor.

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[2] On June 12, a staff member of Heinzig's attorney's office e-mailed Hwang's attorney and attached a copy of the letter sent from the secretary of state's office to Heinzig's attorney.

The court ruled that Heinzig's failure to send a "letter with summons and complaint" to Hwang by registered mail rendered Heinzig's attempt at effecting substitute service ineffective. In so ruling, the court declined to hold that Hwang had waived the defense of insufficient service of process. The court's reasons for doing so are set forth in some detail below.

> (3) The agreed facts, as a matter of law, cannot support a finding of waiver for the following reasons:
>
> a. The statute of limitations ran on August 11, 2013, and assuming the Secretary of State sent the letter on June 10, even if service had been proper, defendant's answer would not have been due for 60 days plus potentially 3 days for mailing. Even if defendant answered timely at the end of 60 days and asserted improper service, there would have been insufficient time to remedy the service defect.
>
> b. The defendant did not answer or conduct discovery or file other pleadings and fail[ed] to raise insufficiency of process. No other pleadings have been filed and no discovery conducted.
>
> c. There is no evidence presented that defendant or defense counsel conducted negotiations or participated in other actions to lead plaintiff to believe the case was headed toward trial and litigation.
>
> d. There is no evidence that defense counsel knew or had any facts or way to know of the particular defect in service before the statute of limitations ran. As the information sent to defense counsel showing service by the Secretary of State would have shown the letter from the Secretary of State and any letter from defense counsel went to a bad address, the defense could not have known the failure of the defendant to receive a registered letter from the defense counsel meant no such letter was sent. The defense reasonably could assume the letter was simply returned to the plaintiff as undeliverable.
>
> e. The mere passage of time before bringing the action to dismiss after the statute of limitations [h]as run is not necessarily enough to constitute waiver. Compare, Harvey v. Obermeit, [163 Wn. App. 311, 261 P.3d 671 (2011)] supra. (Waiver was not found, although defendant did not advise plaintiff of service of process issue in the 90 day service period before statute of limitations ran and did not file

> motion to dismiss until 6.5 months after the lawsuit was filed.)

On July 3, the court entered an order granting Hwang's motion to dismiss on the basis that service of process had not been accomplished before expiration of the applicable statutory limitation period.

Heinzig appeals.

II

Heinzig contends that the trial court erred in holding that his attempt to accomplish substituted service pursuant to RCW 46.64.040 was ineffective. Contrary to the court's conclusion, he maintains that he "sufficiently complied" with the statute's procedural requirements. Only strict compliance, however, could permit jurisdiction to be obtained over Hwang. Thus, appellate relief is unwarranted.

"Proper service of the summons and complaint is a prerequisite to a court's obtaining jurisdiction over a party." Harvey v. Obermeit, 163 Wn. App. 311, 318, 261 P.3d 671 (2011). Whether service of process was proper is a question of law that this court reviews de novo. Goettmoeller v. Twist, 161 Wn. App. 103, 107, 253 P.3d 405 (2011).

As noted, RCW 46.64.040 is Washington's nonresident motorist act. Generally speaking, it allows for substituted service on the Washington secretary of state when the person intended to be served is not an inhabitant of or cannot be found within Washington. It provides,

> The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as

evidenced by his or her operation of a vehicle thereon, or the operation thereon of his or her vehicle with his or her consent, express or implied, shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of the state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability in which such nonresident may be involved while operating a vehicle upon the public highways, or while his or her vehicle is being operated thereon with his or her consent, express or implied, and such operation and acceptance shall be a signification of the nonresident's agreement that any summons or process against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington. Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years cannot, after a due and diligent search, be found in this state appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents. Service of such summons or process shall be made by leaving two copies thereof with a fee established by the secretary of state by rule with the secretary of state of the state of Washington, or at the secretary of state's office, and such service shall be sufficient and valid personal service upon said resident or nonresident: PROVIDED, That notice of such service and a copy of the summons or process is forthwith sent by registered mail with return receipt requested, by plaintiff to the defendant at the last known address of the said defendant, and the plaintiff's affidavit of compliance herewith are appended to the process, together with the affidavit of the plaintiff's attorney that the attorney has with due diligence attempted to serve personal process upon the defendant at all addresses known to him or her of defendant and further listing in his or her affidavit the addresses at which he or she attempted to have process served. However, if process is forwarded by registered mail and defendant's endorsed receipt is received and entered as a part of the return of process then the foregoing affidavit of plaintiff's attorney need only show that the defendant received personal delivery by mail: PROVIDED FURTHER, That personal service outside of this state in accordance with the provisions of law relating to personal service of summons outside of this state shall relieve the plaintiff from mailing a copy of the summons or process by registered mail as hereinbefore provided. The secretary of state shall forthwith send one of such copies by mail, postage prepaid,

> addressed to the defendant at the defendant's address, if known to the secretary of state. The court in which the action is brought may order such continuances as may be necessary to afford the defendant reasonable opportunity to defend the action. The fee paid by the plaintiff to the secretary of state shall be taxed as part of his or her costs if he or she prevails in the action. The secretary of state shall keep a record of all such summons and processes, which shall show the day of service.

RCW 46.64.040.

Our Supreme Court has made known that only strict procedural compliance with the requirements of RCW 46.64.040 will permit personal jurisdiction to be obtained over a nonresident defendant. Martin v. Triol, 121 Wn.2d 135, 144, 847 P.2d 471 (1993); see also Harvey, 163 Wn. App. at 318; Omaits v. Raber, 56 Wn. App. 668, 670, 785 P.2d 462 (1990). A plaintiff's failure to adhere to the statute's procedures for notifying the defendant that process has been served on the secretary renders service on the secretary a nullity. Omaits, 56 Wn. App. at 670.

The statutory procedure for notifying a defendant that process has been served on the secretary requires the plaintiff to (1) either personally serve the defendant with a copy of the summons and notice of service on the secretary or send the same documents by registered mail, return receipt requested, to the defendant's last known address, and (2) append to the mailing an affidavit of compliance with the statute signed by the plaintiff and an affidavit of due diligence signed by the plaintiff's attorney and certifying that attempts were made to serve the defendant personally. RCW 46.64.040; Keithly v. Sanders, 170 Wn. App. 683, 688-90, 285 P.3d 225 (2012). But see Clay v. Portik, 84 Wn. App.

553, 559, 929 P.2d 1132 (1997) (requiring only that the affidavits be filed with the court).[3]

Heinzig failed to adhere to this procedure. Nevertheless, he contends that he "sufficiently complied" with RCW 46.64.040. This is so, he asserts, because he "caused the necessary documents" to be mailed to Hwang's last known address by the secretary of state, which, he maintains, satisfied the statute's purpose of providing notice to Hwang of service on the secretary. In other words, Heinzig takes the position that, so long as Hwang received notice by mail of service on the secretary, the requirements of RCW 46.64.040 were met.

Heinzig relies primarily on Clay.[4] The issue in Clay, however, was whether the plaintiff's affidavit of compliance was insufficient by virtue of being signed by the plaintiff's attorney, but not by the plaintiff herself. 84 Wn. App. at 560-61. The court held that an affidavit of compliance may be signed by either the plaintiff or the plaintiff's attorney. Clay, 84 Wn. App. at 561-62. "Since an attorney is presumed to act on behalf of her client in all procedural matters," the court observed, "it follows then, that under this statute, the attorney's signature is proper." Clay, 84 Wn. App. at 561. Indeed, because "the actions required by the statute are those that generally would be performed by an attorney," the court reasoned that the attorney's signature "best satisfies the Legislature's intent that

[3] There is no evidence in the record that Heinzig's attorney filed with the court an affidavit of due diligence certifying that attempts were made to serve the defendant personally.

[4] Heinzig also relies on Sheldon v. Fettig, 129 Wn.2d 601, 919 P.2d 1209 (1996), and Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991), in an effort to support his position that the nonresident motorist act must be construed liberally. Neither decision interpreted Washington's nonresident motorist act.

there be proof of compliance by a responsible person." Clay, 84 Wn. App. at 562.

Clay was an acknowledgment of the unique relationship between attorney and client. The secretary of state, however, is not Heinzig's attorney. Nor is the registered process server. The secretary could not, whether by action or inaction, have relieved Heinzig of his statutory duty. In much the same way, the process server could not have substituted for Heinzig's attorney in certifying that attempts had been made to serve Hwang personally. Because Heinzig failed to strictly comply with RCW 46.64.040, service of process was not effected. Given that the statute of limitation expired on August 12, 2013, the trial court did not err in granting Hwang's January 30, 2014 motion to dismiss the complaint.

III

Heinzig next contends that Hwang waived his defense of insufficient process. According to Heinzig, waiver occurred as a result of the delay between the supposed service upon the secretary of state in June 2013 and Hwang's motion to dismiss in January 2014. We disagree.

"The defense of insufficient service of process is waived if not asserted in a responsive pleading or motion under CR 12(b)(5)." Harvey, 163 Wn. App. at 323 (citing French v. Gabriel, 116 Wn.2d 584, 588, 806 P.2d 1234 (1991)). This defense may also be waived "if '(1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense.'" Harvey, 163 Wn. App. at 323 (quoting King v. Snohomish County, 146 Wn.2d 420, 424, 47 P.3d 563 (2002)). Significantly, though, in order for the

waiver doctrine to be applied, the defendant's actions must have caused prejudice to the plaintiff. Oltman v. Holland Am. Line USA, Inc., 163 Wn.2d 236, 246-47, 178 P.3d 981 (2008).

Hwang raised the defense of insufficient service of process by motion, which was filed after the time period in which he was permitted to file an answer had expired. While Heinzig concedes that Hwang did not waive this defense solely by virtue of raising it after the time to file an answer had expired,[5] Heinzig nevertheless contends that waiver occurred as a result of the length of delay between filing the complaint and raising the defense which, he maintains, amounted to dilatory conduct. Heinzig's contention is unconvincing but, ultimately, unnecessary to address. This is so because Heinzig is unable to show that he was prejudiced by any delay.

Assuming, for the sake of argument, that substituted service was accomplished pursuant to RCW 46.64.040, the date that service became effective was June 10, 2013, when notice of service upon the secretary was mailed to Hwang's last known address. See, e.g., Keithly, 170 Wn. App. at 688 ("[B]oth service of two copies of the summons on the secretary of state ***and*** mailing of notice of such service . . . must be accomplished to effect proper service."). Hence, the time period in which Hwang could have, had he chosen to

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[5] This concession is well taken, given that the court in Omaits rejected a proposed definition of a "'timely'" CR 12 motion "as one 'brought within the time to answer.'" 56 Wn. App. at 671; cf. Oltman, 163 Wn.2d at 244 ("Nothing in [CR 12(h)(1)] or the state cases supports the conclusion that asserting an affirmative defense in an untimely answer constitutes waiver.").

On the other hand, filing an answer within the period allowed by law cannot be considered dilatory conduct.

do so, filed an answer began on June 11[6] and ended on August 15. CR 12(a)(3) ("A defendant shall serve an answer within the following periods: . . . Within 60 days after the service of the summons upon the defendant if the summons is served . . . on the Secretary of State as provided by RCW 46.64.040."). Admittedly, the 60th calendar day fell on August 10. However, because August 10 was a Saturday and August 11 was a Sunday, and because notice of service had been mailed to Hwang, he was entitled, by rule, to file an answer three days after the first weekday following August 10. Compare CR 6(a) ("The last day of the period so computed shall be included, unless it is a Saturday, a Sunday or a legal holiday, in which event the period runs until the end of the next day which is neither a Saturday, a Sunday nor a legal holiday."), with CR 6(e) ("Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period."), and In re Estate of Toth, 138 Wn.2d 650, 654, 981 P.2d 439 (1999) ("CR 6(e) operates to toll the response time only in cases in which a party is required to respond within a certain time after being served or notified.").

The statute of limitation on Heinzig's claim expired on August 12. Accordingly, Hwang could have raised the defense of insufficient service of process in a timely answer on or after the day on which the statutory limitation

[6] "In computing any period of time prescribed or allowed by these rules, by the local rules of any superior court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included." CR 6(a).

period expired. Had Hwang done so, Heinzig would have been unable to cure the service defect. Confronted with a similar scenario, our Supreme Court held that prejudice could not be demonstrated. Oltman, 163 Wn.2d at 246-47. In accordance with that decision, we hold that Heinzig cannot show that he was prejudiced by the mere passage of time in asserting the defense. Absent a showing of prejudice, we decline to hold that Heinzig waived the defense of insufficient service of process.

Affirmed.

We concur:

MANCA LAW PLLC

September 09, 2015 - 4:56 PM

Transmittal Letter

Document Uploaded: 722697-Petition for Review.pdf

Case Name: Heinzig v. Hwang

Court of Appeals Case Number: 72269-7

FILED
Sep 09, 2015
Court of Appeals
Division I
State of Washington

Party Respresented: Mark Heinzig

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Trial Court County: Snohomish - Superior Court # 13-2-04821-1

The document being Filed is:

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- ○ Brief: ____
- ○ Statement of Additional Authorities
- ○ Affidavit of Attorney Fees
- ○ Cost Bill
- ○ Objection to Cost Bill
- ○ Affidavit
- ○ Letter
- ○ Copy of Verbatim Report of Proceedings - No. of Volumes: ____
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