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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 OPENING BRIEF

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INTRODUCTION

"Modern rules of procedure are intended to allow the court to reach 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). Respondent Seok Hwang does not deny that he negligently injured appellant Mark Heinzig, nor does Hwang deny that he had actual notice of Heinzig's lawsuit before the statute of limitations had run. Instead, Hwang has asserted a procedural defense, insufficient service of process. But Hwang never filed an answer, and the record discloses no inquiry on his behalf into the sufficiency of service until at least seven months after an attorney first appeared on his behalf. By the time Hwang got around to filing a motion to dismiss, the statute of limitations period precluded Heinzig from curing any defect in service and refiling his suit. Hwang was dilatory in raising the defense. A contrary ruling would harm the civil-justice system. It would invite defendants to drag their feet, give them incentives to hide their procedural defenses, and shift the burden away from defendants to comply with their duties and towards plaintiffs to smoke out unstated defenses through expensive pretrial discovery.

Even if Hwang had not been dilatory, the service of the summons and complaint was valid under RCW 46.64.040, a substitute-service statute

"designed to minimize the 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." *Martin v. Triol*, 121 Wn.2d 135, 147, 847 P.2d 471 (1993) (internal quotation marks and brackets omitted). Although the summons, the complaint, and a notice of service on the Secretary of State were mailed to Hwang's last known address, Hwang objected on the ground that Heinzig's attorney did not personally mail the documents. (CP 76.) Hwang's defense relied on a technical reading of RCW 46.64.040, ignoring the statute's legislative history and also the commandment of *Sheldon* to liberally construe the statute to give effect to service. RCW 46.64.040 was meant to aid the victims of negligence on state roads, not to ensnare them in procedural webs. The trial court's order of dismissal should be reversed and the case remanded.

ASSIGNMENT OF ERROR

The trial court erred in granting respondent Seok Hwang's motion to dismiss appellant Mark Heinzig's complaint with prejudice.

ISSUES

This appeal presents two issues. If the Court rules in favor of Heinzig on the first issue, then it does not need to reach the second. The issues are:

I. Whether Hwang's delay in investigating and raising his procedural

defense was sufficiently serious or inexcusable to constitute a waiver.

II. Whether Heinzig sufficiently complied with the requirements of RCW 46.64.040 to effect service on Hwang.

STATEMENT OF THE CASE

Appellant Mark Heinzig alleged that respondent Seok Hwang drove negligently into him on June 5, 2010 on State Route 99 in Lynnwood, causing him bodily injury and damages. (CP 86.) Hwang never filed a pleading denying this allegation. (*See* CP 1-86.) On May 13, 2013, fewer than three years after the auto collision, the summons and complaint were filed. (CP 19 ¶ 2, 34-37.)

On May 17, staff from Heinzig's attorney's office emailed a copy of the summons and complaint to Hwang's attorney. (CP 20 ¶ 4, 25-27.) "As requested," the staff member wrote in the email to Hwang's attorney, "here is the complaint for Mark Heinzig." (CP 27.) The staff member for plaintiff's counsel continued, "You may send the stipulations via return email." (CP 27.) Hwang's attorney, using an email address with a domain name assigned to State Farm Insurance, immediately responded, "Got it. Thanks." (CP 27.) The email from Hwang's attorney did not, however, raise any concerns about service on Hwang. (*See* CP 27.) The staff member for plaintiff's counsel sent a follow-up email that same day stating, "at-

tached is the filed copy." (CP 26.) Hwang's attorney responded, "Thanks." (CP 26.) This second response email again did not mention anything about service on Hwang. (CP 26.) Three days later, Hwang's attorney signed a notice of appearance on behalf of him and his law firm, who were identified as "Employees of the Corporate Law Department of State Farm Mutual Automobile Insurance Company." (CP 80-81.)

Heinzig's attorney came to believe Hwang had left the state, having seen three attempts at personal service reveal that Hwang did not reside at the three most-recent addresses believed to be Hwang's. (CP 30.) Heinzig's attorney postulated in a letter, "the Defendant lives out of the State of Washington." (CP 30).

On June 4, Heinzig's attorney mailed that letter, along with a copy of the summons and complaint and a declaration of diligence signed by the process server, to the Washington Secretary of State. (CP 20 ¶ 6, 29-39.) The letter stated that Hwang's last-known address was 3023 165th Place, Bothell, Washington. (CP 30.) The Secretary of State's Office returned a confirmation of service to Heinzig's attorney. (CP 31.) The signer of the confirmation stated that she was the "duly appointed and acting clerk in the office of the Secretary of State responsible for the receipt and handling of the service of process under the Washington state statute indicated."

(CP 31.) The confirmation stated that the Secretary of State's Office received the documents from Heinzig's attorney on June 7 and mailed a copy on June 10 by certified mail to the address given for Hwang. (CP 31-32.) On June 12, Heinzig's attorney's staff emailed Hwang's attorney with a copy of this confirmation of service from the Secretary of State's Office. (CP 20 ¶ 7, 28.) No response from Hwang's attorney appears in the record. (*See* CP 1-86.)

The certified mail was returned as undeliverable. (CP 32.)

By June 6, 2013—the day after the three-year anniversary of the collision— Hwang had not filed an answer. (*See* CP 70, 1-86.) By Monday, August 12—the first court day after the 90-day window[1] following plaintiff's filing of the summons and complaint—Hwang still had not filed an answer or any other document asserting that service-of-process was invalid or that the statute of limitations had run. (*See* CP 70, 1-86.)

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[1]CR 3(a) provides as follows: "An action shall not be deemed commenced for the purpose of tolling any statute of limitations except as provided in RCW 4.16.170."

RCW 4.16.170, in turn, provides as follows: "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 occurs 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 personally, or commence service by publication *within ninety days* from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or 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." (Emphasis added.)

Over six months after Hwang's original attorney appeared, the attorney withdrew and a substitute attorney appeared for Hwang. (CP 78-79.) Still no answer came. (*See* CP 1-86.) Finally, on January 30, 2014, more than eight months after Hwang's first attorney signed a notice of appearance, Hwang filed a motion to dismiss under CR 12(b)(2), (4), and (5), arguing improper service of process. (CP 49-77, 81.) Before then, Hwang still had not filed an answer or any other document asserting that service-of-process was invalid or that the statute of limitations had run. (*See* CP 1-86.)

The trial court issued a memorandum decision in favor of Hwang. Relying principally on *Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671 (2011), the trial court found Hwang did not waive the defense of insufficient service. The trial court believed that a timely answer may have been properly filed after the limitations period, in which case Heinzig would not have had an opportunity to cure any defect in service. (CP 11.) The trial court believed the lack of defense pleadings and pre-trial discovery weighed against waiver. (*Id.*). The trial court also found the defendant did not know or had no reason to know that of the alleged defects in service. (*Id.*) Finally, the trial court argued that "the mere passage of time" did not work a waiver. (*Id.*) On the issue of the validity of service, the trial court

ruled for Hwang again. (*Id.*) Although the Secretary of State's Office had sent by certified mail a copy of the summons and complaint and other documents to the last-known address for Hwang, the trial court concluded that service did not sufficiently comply with RCW 46.64.040 because Heinzig had not also mailed the documents to Hwang's last known address. (*Id.*)

The trial court entered an order of dismissal with prejudice on July 3. (CP 3-4.) Heinzig timely filed a notice of appeal on August 1. (CP 1.)

SUMMARY OF ARGUMENT

I. The trial court concluded that Hwang did not waive his defense of insufficient service of process. This decision was flawed and should be reversed, for two principal reasons. First, no Washington court appears to have permitted the initial assertion of this defense so long after the defendant had appeared and the limitations period had run. Second, Hwang's conduct was sufficiently dilatory to constitute waiver, because Hwang's delay was serious, he waited too unreasonably long to be pardoned in light of the harm to Heinzig, and Hwang failed to inquire into the potential defense with sufficient diligence. If the trial court's ruling were upheld, defendants would have more incentives to delay, fail to file response pleadings, obstruct the litigation process, and force plaintiffs to engage in expen-

sive pre-trial discovery and motions practice. The trial court's judgment should be reversed.

II. In the case of motorists who commit torts on Washington highways and then leave the state, the legislature has provided for substitute service under RCW 46.64.040. The first requirement of the statute is that the party seeking to effect service via the secretary of state must provide two copies of summons or process to the secretary of state and pay the appropriate fee. It is undisputed that Heinzig satisfied the first requirement. Where the court below erred was in holding that Heinzig failed to comply with the mailing requirements of the statute. Specifically, the court erred because (1) the Court declined to construe the statute liberally to effect service, as required by *Sheldon*; and (2) Heinzig caused mail to be sent to Hwang's last known address on June 10, 2013, and that mail contained all documents required under RCW 46.64.040.

ARGUMENT

I. HWANG WAIVED HIS DEFENSE OF INSUFFICIENT SERVICEOF PROCESS

A. The waiver issue is reviewed de novo

Whether a defendant has waived an affirmative defense by violating or undermining the Civil Rules is a mixed question for the court involving the application of law to the facts. When the material facts are not in dispute

on appeal the reviewing court may apply the doctrine of waiver to the facts to reach its own independent judgment on the waiver question. *See Lybbert v. Grant County*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000) ("It is ... appropriate for this court to apply the doctrine of waiver to the undisputed material facts to determine if the County is precluded from asserting the defense of insufficient service of process in this case."). Because the material facts appear to be undisputed in this case, the Court of Appeals should employ de novo review.

B. If the defendant appears, any defense of insufficient service must be raised by pleading or motion within 60 days of service under RCW 46.64.040

We begin with the formal requirements of the Superior Court Civil Rules. The Civil Rules require defendants to serve their answer within 60 days of service of the summons on the Secretary of State under RCW 46.64.040. CR 12(a)(3). The Civil Rules further require defendants to raise any defense of insufficient service of process in their answer or a motion to dismiss. CR 12(b), (b)(5). A defendant's violation of CR 12(b) is fatal to that affirmative defense: "The defense of insufficient service of process is waived if not asserted in a responsive pleading or motion under CR 12(b)(5)." *Harvey v. Obermeit*, 163 Wn. App. 311, 323, 261 P.3d 671 (2011) (citing *French v. Gabriel*, 116 Wn.2d 584, 588, 806 P.2d 1234

(1991)). This basis for waiver is formalized in CR 12(h)(1):

> A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in section (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by rule 15(a) to be made as a matter of course.

This basis for waiver is not at issue here, because Hwang did not omit the defense in his answer (he never filed one) and filed a motion to dismiss. (CP 49-77.) But Hwang's motion to dismiss fell well outside the formal timing requirements of the Civil Rules.

Whether by pleading or motion, if defendants raise the defense of insufficient process, they must first do so during the pleading stage of a case. This proposition follows from the intersection between the process of CR 12(b) and the timing rule of CR 12(a). Under CR 12(b), "[a] motion making any of these defenses [including insufficiency of process] shall be made before pleading if a further pleading is permitted." In other words, if defendants want to employ a motion, they must file it before their answer. Under CR 12(a), in turn, their answer is due within 60 days when service is on the Secretary of State. The Civil Rules presume the parties will comply, including by timely filing their pleadings. Thus, if defendants are to file a Rule 12(b)(5) motion before pleading their answer, they must do so within

the permissible timeframe for filing an answer.

To be sure, CR 12(h)(1) and the rest of the Civil Rules do not expressly provide for waiver of defenses not timely raised within the pleading window established in CR 12(a). Some courts have held that Rule 12(b) defenses are waived if not made before the deadline for the defendant's answer. *See, e.g., Granger v. Kemm, Inc.*, 250 F. Supp. 644, 645 (D.C. Pa. 1966) (applying the federal analogue to CR 12(b)). This strictly applied waiver has been rejected in Washington, however, at least in circumstances where the defendant is only 11 days late in pleading improper venue in the answer. *See Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243-45, 178 P.3d 981 (2008).

But defendants may not violate the Civil Rules with impunity. The question on appeal is not whether Hwang should be held to a rigid standard of formality and punished for failing to follow every letter of the rules. The question is whether Hwang's conduct was sufficiently dilatory that Hwang must be deemed to have waived the defense of insufficient service.

C. Although strict adherence to the Civil Rules' formal timing deadline is not required, defendants waive the defense of insufficient service if they are too dilatory in first raising it

In addition to the formal waiver rule set forth in CR 12(h)(1), the common law and equity supply two additional grounds for waiver of the

defenses listed in CR 12(b), including insufficient service of process. *See, e.g.*, *Lybbert*, 141 Wn.2d at 38 (referring to waiver in this context as a "common law doctrine"); *Vozeh v. Good Samaritan Hospital*, 84 F.R.D. 143, 144 (D.C.N.Y., 1979) (denying the defendant's motion to dismiss for insufficient service because the defendant was "clearly guilty of laches and to a degree worthy of condemnation"). First, the affirmative defense of insufficient service of process will be waived "if the defendant's counsel has been dilatory in asserting the defense." *Lybbert*, 141 Wn.2d at 39 (citing *Raymond v. Fleming,* 24 Wn. App. 112, 115, 600 P.2d 614 (1979)). Second, it will be waived "if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior." *Id.* at (citing *Romjue v. Fairchild*, 60 Wn. App. 278, 281, 803 P.2d 57 (1991)). Not only in Washington, but also "the common law doctrine of waiver enjoys a healthy existence in courts throughout the country." *Lybbert*, 141 Wn.2d at 39.

Each of the two grounds for waiver is independent and sufficient, and the courts will consider them separately. This point is exemplified in *Harvey*. The Court of Appeals concluded the defendant was not dilatory because he pleaded in his answer the defense of insufficient service of process. 163 Wn. App. at 323. Nevertheless, the Court considered the remaining question of whether the defendant's litigation conduct before filing a

motion to dismiss was inconsistent with his assertion of the defense. *See id.* As *Harvey* and other cases show, the appellate courts have been unwavering in defining the two alternative grounds for waiver as distinct from each other. *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)); *Raymond*, 24 Wn. App. at 115 ("A defendant's conduct through his counsel ... may be 'sufficiently dilatory *or* inconsistent with the later assertion of one of these defenses [CR 8 defenses] to justify declaring a waiver.' " (emphasis added) (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1344, at 526 (1969))).

This doctrine of waiver "is sensible" and serves critical functions, helping "to foster and promote 'the just, speedy, and inexpensive determination of every action.'" *Lybbert*, 141 Wn.2d at 39 (quoting CR 1). If defendants used pleading delays as a litigation tactic without any adverse effect on their own claims and defenses, the goals of the Civil Rules would be undermined. *Id.*. It not a supposition to say some defendants would routinely delay complying with duties under CR 12; it is empirical reality. In

Lybbert, for example, the defendant admitted in the record that it "'routinely avoid[s] answering a complaint, until a motion for default is brought.'" 141 Wn.2d at 43 (quoting record). The doctrine of waiver must be enforced in order to create a disincentive for this type of behavior. As the Supreme Court observed when contemplating discovery abuses, "Misconduct, once tolerated, will breed more misconduct and those who might seek relief against abuse will instead resort to it in self-defense." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 355, 858 P.2d 1054 (1993) (internal quotation marks omitted).

With these principles in the backdrop, we now turn to Hwang's assertion of the defense of insufficient process. On appeal, the issue of waiver is not based on an argument that Hwang's conduct before filing the motion to dismiss was inconsistent with his assertion of the defense. Instead, the issue of waiver thus turns on whether Hwang or his counsel was dilatory in asserting the defense.

D. Hwang was sufficiently dilatory to waive the defense

Hwang was dilatory. Of course, a defendant's "mere delay in filing an answer does not constitute a waiver of an insufficient service defense." *French*, 116 Wn.2d at 593-94 (internal quotation omitted). But *French* cannot be read to broadly to eliminate dilatory conduct as a basis for waiver. A

defendant's delay may become seriously lengthy, harmful, or otherwise inexcusable to be sufficiently dilatory to constitute waiver. This principle emerges from the cases on waiver, including *French*, as well as CR 6. As applied here, it demonstrates the trial court erred in failing to find waiver.

1. Hwang's delay was serious enough by itself to constitute waiver

Instead of forgiving all delays, *French* marks the outer boundary of a delay constituting "mere" delay instead of a delay that is so serious that it must be deemed dilatory. *French* did not purport to undo the written words of CR 8 and CR 12, which require timely filing of an answer that include affirmative defenses. And the Court expressed some hesitation about the defendant's delay in waiting five and half months to file an answer pleading the defense of insufficient service. *See French*, 116 Wn.2d at 593 ("We wish to make clear ... that [the defendant's] conduct in this case should not serve as a model to other practitioners."). *French* is consistent with cases that have refused a harsh application of waiver where a defendant raises a defense a few days or even a few weeks late. *See, e.g.*, *Oltman v. Holland America Line USA, Inc.*, 163 Wash.2d 236, 241, 244-47, 178 P.3d 981, 987 (Wash.,2008) (answer pleading defense of improper venue filed 31 days after service; no waiver); *Foss v. Klapka*, 95 F.R.D. 521, 523 (D.C. Pa. 1982) (motion to dismiss for lack of personal jurisdiction filed 22 days

after the complaint was served; no waiver).

But courts appear to find waiver when the defendant's assertion of a Rule 12(b) defense stretches beyond the five-and-a-half-month timeframe allowed in *French*. *See, e.g.*, *Blankenship v. Kaldor*, 114 Wn. App. 312, 315, 320, 57 P.3d 295 (2002) (answer pleading insufficient service filed 15 months after defense counsel filed a notice of appearance; waiver for dilatory conduct found); *Kahclamat v. Yakima County*, 31 Wn. App. 464, 466, 643 P.2d 453 (1982) (defense of improper venue not raised in a pleading or a motion to dismiss for 12 months; waiver found); *Raymond*, 24 Wn. App. at 113-15 (defense of insufficient service not raised in a pleading or motion to dismiss for 11 months after service of the complaint under RCW 46.64.040; waiver found for dilatory conduct). Thus, while "mere" delay does not work a waiver, a serious delay can.

This proposition is supported even by the leading treatise on civil procedure in federal courts. Wright and Miller advocate the view that a Rule 12(b)(5) defense of insufficient service is not waived solely because the deadline for an answer has passed under Rule 12(a). 5C Wright & Miller Federal Practice and Procedure: Civil § 1391, at 519 (3d ed. & 2004). Yet Wright and Miller concede that a delay might become "serious enough" that a total waiver of the defendant's right to bring the defense should be

found. *Id.* at 520. As Wright and Miller also note, after the defendant files a notice of appearance, "the defendant should act in timely fashion lest the court consider his conduct sufficiently dilatory or inconsistent with the later assertion of one of these threshold defenses to justify declaring a waiver." 5B Wright & Miller Federal Practice and Procedure § 1344, at 35 (3d ed. 2004).

Classifying Hwang's 255-day delay as "mere" delay would stretch *French* beyond the breaking point. Heinzig is not aware of any case that upholds a delay longer than the one permitted in *French*. Given the Court's fear in *French* that its holding could turn the defendant's behavior into a model, the Court admonished other defendants not to follow that defendant's lead. *See* 116 Wn.2d at 593. But if this Court were to extend *French*, instead of curbing it sharply to its facts, defendants would find only encouragement to engage in delaying tactics. Notably, the defendants here cited *French* in his motion to dismiss below, describing that case as "identical" to this one. (CP 14.) To prevent *French* from becoming any more of a template than it already is, then, a line must be drawn in this case. The Civil Rules are meant to facilitate a "speedy" resolution of the case. CR 1. But if defendant are "at liberty to ... employ delaying tactics," our Supreme Court cautioned in *Lybbert*, "the purpose behind the procedural

rules may be compromised." 141 Wn.2d at 39. The door should not be left open to behavior found in *Lybbert*, where the defendant openly acknowledged that "'routinely avoid[s] answering a complaint, until a motion for default is brought,'" 141 Wn.2d at 43 (quoting record), as though a policy of delay were a reason for allowing dilatory conduct instead of condemning it.

2. Hwang's delay was too unreasonable to preserve his right to raise procedural defenses in light of the harm to Heinzig that occurred from allowing the untimely defense

In determining what else, besides the length of delay, supports a finding of dilatory conduct, we see helpful guidance in CR 6. If the defendant fails to timely file an answer or perform any other step required under the Civil Rules, CR 6(b) permits the defendant to file a post-deadline motion for an enlargement of time on a showing of "excusable neglect." Because CR 6(b) and the waiver doctrine are designed to solve the same problem—giving the Civil Rules teeth without enforcing deadlines too harshly on the parties—it should be consulted here. Our Supreme Court has found excusable neglect based on considerations of justice, including a lack of prejudice to the other party. *See City of Goldendale v. Graves*, 88 Wn.2d 417, 424, 562 P.2d 1272 (1977) (interpreting the "excusable neglect" standard in a criminal procedural rule). Similarly, the U.S. Supreme Court has

found eight separate factors bearing on the "excusable delay" standard under the bankruptcy rules:

> (1) the prejudice to the opponent; (2) the length of the delay and its potential impact on the course of judicial proceedings; (3) the cause for the delay, and whether those causes were within the reasonable control of the moving party; (4) the moving party's good faith; (5) whether the omission reflected professional incompetence, such as an ignorance of the procedural rules; (6) whether the omission reflected an easily manufactured excuse that the court could not verify; (7) whether the moving party had failed to provide for a consequence that was readily foreseeable; and (8) whether the omission constituted a complete lack of diligence.

3 Karl B. Tegland, Washington Practice: Rules Practice CR 6 (7th ed. & Westlaw Update Aug. 2013) (citing *Pioneer Inv. Servs. Co. v. Brunswick Associates Ltd. P'ship*, 507 U.S. 380, 113 S. Ct. 1489, 123 L. Ed. 2d 74 (1993). Courts thus seek to balance the equities, weighing the rights and conduct of the defendant against the harm to the plaintiff. This view of the waiver doctrine coincides with the equitable doctrine of laches, the term that at least one court has used when holding a defendant dillydallied for too long to raise a defense. *See Vozeh*, 84 F.R.D. at 144. Laches is "[u]n reasonable delay in pursuing a right or claim ... in a way that *prejudices* the party against whom relief is sought." Black's Law Dictionary 891 (8th ed. 2004) (emphasis added).

Balancing the defendant's right with the harm to the plaintiff has been

an evident consideration in the Washington cases on waiver as well. It particularly explains how *French* could be "mere" delay. There, the defendant filed the answer late, but there was still another year for the plaintiff to cure the defective service before the limitations period had run. *French*, 116 Wn.2d at 595. And as Division One of this Court has noted before, "Courts are unlikely to find waiver of a service-related defense where a defendant raises the defense before the statute of limitations runs and thus the plaintiff has notice and time to cure the problem." *Harvey*, 163 Wn. App. 324 n.6. It follows, then, that when a delay becomes sufficiently harmful to the plaintiff's substantive rights, the defendant's procedural rights must yield.

It is undisputed that the limitations period ran on Heinzig's claims by the time that Hwang first raised the defense of insufficient service. By that time, therefore, excusing Hwang's delay would necessarily mean weighing Hwang's procedural defenses more heavily than Heinzig's substantive rights under Washington tort law. Balancing the equities in favor of Hwang would undercut the modern civil-justice system's preference for reaching the merits of a case instead of bouncing them out of court on procedural grounds.

Although this case is not identical to *Romjue*, that case is instructive. The plaintiff's counsel wrote a letter to the defendant's attorney stating that he believed the defendant had been served. 60 Wn. App. at 281. Here, Heinzig's attorney's staff emailed Hwang's attorney with copies of the complaint and the confirmation of service from the Secretary of State's Office. (CP 20 ¶ 7, 26-28.) Yet Hwang's attorney responded with nothing more than a brief email stating, "Thanks," never an inquiry about the other facts surrounding service. (CP 26-27.) In *Romjue*, the Court of Appeals faulted the defendant's attorney for saying nothing about any deficiency in the service until the statute of limitations had expired. *Id.* The Court found waiver and reversed the trial court's dismissal. A takeaway from *Romjue*, when viewed through the prism of excusable negligence, is that when the defendant's attorney knows about the service of process and has an opportunity to inquire further and invoke the procedural defense of insufficient process before the statute of limitations has run, then the defendant's procedural defense is entitled to much less weight under waiver analysis. The same result should obtain here.

3. Hwang's inquiry into the availability of the defense lacked the diligence and openness that could otherwise excuse the delay

The excusable-negligent standard accounts for the diligence of the dilatory party, calling for the court to consider "the cause of the delay, and

whether those causes were within the reasonable control of the moving party," "whether the moving party had failed to provide for a consequence that was readily foreseeable," and "whether the omission constituted a complete lack of diligence." 3 Tegland, Washington Practice: Rules Practice CR 6 (citing *Pioneer*, 507 U.S. 380). These same factors appear in the Washington cases on waiver. For example, in *Blankenship*, the Court found "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; in this sense, the defense was dilatory within the spirit of *Lybbert*." *Blankenship*, 114 Wn. App. at 320. Similarly, in *Kahclamat*, the Court held the defendant's CR 12(b) defense of improper venue was waived because, "if due diligence had been used, the grounds for the change of venue motion would have been as obvious to the defendant at the time it was served as it was the following year when the motion was made." 31 Wn. App. at 466.

Here, Hwang's first insurance-defense attorney could have easily called his client to determine whether Hwang had received any mailing. Further, the record demonstrates that plaintiff's counsel had been openly sharing information about plaintiff's pleading and his attempt to serve Hwang under RCW 46.64.040. But the record discloses no instance of

Hwang's first insurance-defense attorney engaging in any follow-up inquiry with Heinzig's attorney's office. It was not until several months later, when Hwang's second attorney substituted in, that an inquiry was conducted on behalf of Hwang into the sufficiency of service. (CP 53-54 ¶ 10, 78-79). This lack of diligence weighs against excusing Hwang's neglect in raising the defense.

It is no response for Hwang to argue that he should be pardoned for the dilatory conduct because his insurer, State Farm Insurance, controlled the defense. That same argument has already been rejected by Division Three of the Court of Appeals. *See Blankenship*, 114 Wn. App. at 320 ("Kaldor's argument that her counsel should be excused from contacting her and ignoring Mr. Kaldor's role in the attempted service because he was retained by the insurance company and not Ms. Kaldor personally is unpersuasive.").

The parties to civil litigation should be able to rely on the other side diligently pursuing their claims and defenses and performing their duties under the Civil Rules. Although Hwang may wish to, Heinzig should not be blamed for choosing not to serve formal, scattershot discovery requests designed to pin down Hwang on his defenses. A contrary holding would run against the goal of achieving an "inexpensive determination of every

action." CR 1. This is a simple auto-collision tort case with a very brief complaint. (CP 85-86.) In cases like these, it often makes little sense for the plaintiff to engage in costly, formal discovery. The defendant is often clearly liable for causing the collision, and the plaintiff is well aware of all the witnesses because he has access to the police report. The discovery that is done is typically directed from the defendant to the plaintiff, because the contested issues usually involve the plaintiff's injuries and damages. The solution is simply not to force a plaintiff to engage expensive formal discovery to smoke out any unstated defenses and pin down the defendant. Such an interpretation of the waiver doctrine would make it necessary to engage in more, not less, discovery. The explosion of pre-trial discovery in the court system has been increasingly recognized as a costly blight on our justice system. In fact, the WSBA, in cooperation of the justices of the Washington State Supreme Court, has established a multi-year task force designed to *reduce* the burden of pre-trial discovery. *See, e.g.*, Wash. State Bar Ass'n, *Escalating Cost of Civil Litigation Task Force*, available at http://www.wsba.org/Legal-Community/Committees-Boards-and-Other-Groups/Escalating-Cost-of-Civil-Litigation-Task-Force (last accessed Oct. 27, 2014). The burden should remain where it is: on the de-

fendant to comply with his own duties under the Civil Rules and to diligently inquire into his potential defenses.

4. The trial court improperly relied on Harvey

The trial court improperly relied on *Harvey* to find that no waiver had occurred. Citing *Harvey*, the trial court held, "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." (CP 11.) But this point of law does not flow from *Harvey*. In *Harvey*, the defendant filed an answer and pleaded the defense of insufficient service of process. 163 Wn. App. at 325. Accordingly, the Court of Appeals held the defendant "was not dilatory." *Id.* at 323. Waiver was still an issue, but not on the ground of delay in filing an answer and pleading the defense. The specific issue was whether the defendant had waived the defense because his conduct during the litigation was inconsistent with the defense. *Id.* Thus, *Harvey* supplies very little guidance, if any, in this case.

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

RCW 46.64.040 provides, in pertinent part:

> 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.

It is undisputed Heinzig complied with the statutory requirement that he provide two copies of summons or process to the secretary of state and pay the appropriate fee. The trial court held below that Heinzig failed to comply with the mailing requirements. The trial court was wrong, however, for

two reasons. First, the trial court failed to construe the statute liberally to effect service, as required by *Sheldon v. Fettig*, 129 Wn.2d 601, 919 P.2d 1209 (1996). Second, Heinzig caused mail to be sent to Hwang's last known address on June 10, 2013, and that mail contained all documents required pursuant to RCW 46.64.040.

A. The issue of the validity of service under RCW 46.64.040 is reviewed de novo

Whether service was valid under RCW 46.64.040 is a question of law, not a jury question. *Gross v. Sunding*, 139 Wn. App. 54, 67, 161 P.3d 380 (2007). The judge decides. *See id.* ("[T]he determination of valid service is reserved to the judge."). The trial court's conclusions of law are reviewed de novo. *Harvey v. Obermeit*, 163 Wn. App. 311, 318, 261 P.3d 671 (2011). The trial court has the discretion to hold a fact-finding hearing and make findings resolving conflicting evidence as well as credibility issues. *See Harvey*, 163 Wn. App. at 317. The trial court's findings of fact are reviewed to determine "whether substantial evidence supports the findings of fact and whether the findings support the conclusions of law." *Harvey*, 163 Wn. App. at 318. Here, the trial court decided Hwang's motion based on the declarations submitted in support and in opposition; no fact-finding hearing was held. (CP 3.) The material facts appear to be undisputed, and

the record is the same as appeared below. Therefore, review on appeal here is de novo.

B. Substitute-service statutes like RCW 46.64.040 must be liberally construed to effect service and facilitate decisions on the merits

Historically, service-of-process statutes that deviated from the requirements of personal service were "strictly construed as in derogation of the common law." *Martin v. Triol*, 121 Wn.2d 135, 142, 847 P.2d 471 (1993). However, beginning with its decision in *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991), our Supreme Court called into doubt the wisdom of strictly construing substitute-service statutes. The statute at issue in *Wichert* provided for substitute service by the leaving a copy of the summons at the usual abode of the person to be served with a person of suitable age and discretion who was then residing at that abode. *Id.* at 149-50. Although the statute deviated from personal service, *Wichert* rejected the need to strictly construe the statute because it was clear that the legislature had intended to provide an alternative to personal service. *Id.* at 155. In short, the *Wichert* court concluded that strict construction would only frustrate the intent of the legislature. But the Court declined to determine the appropriate standard for construing substitute-service statutes general-

ly, leaving such a determination to "[a]nother case, with thorough briefing and analysis" on the issue. *Id.* at 155-56.

Two years later in *Martin*, the Court had its first opportunity to elaborate on the issue raised in *Wichert*. As with this appeal, *Martin* dealt with RCW 46.64.040. Citing *Wichert*, the Court declined to apply strict construction in interpreting the statute. *Martin*, 121 Wn.2d at 144-45. Instead, the Court generously construed the statute so "'as to give meaning to its spirit and purpose, guided by the principles of due process.'" *Id.* at 145 (quoting *Wichert*, 117 Wn.2d at 156).

While both *Wichert* and *Martin* had applied a more-liberal construction of substitute-service statutes, neither case declared a general interpretive standard for such statutes. Such a general declaration would not be made until the Court's decision in *Sheldon*. The *Sheldon* case dealt with the same substitute-service statute that was at issue in *Wichert*. *See Sheldon*, 129 Wn.2d at 607. The Court recognized the recent trend in its cases applying "liberal construction to substitute service of process statutes in order to effectuate the purpose of the statute while adhering to its spirit and intent." *Id.* After reviewing *Martin*, *Wichert*, precedent from other jurisdictions, and both CR 1 and RCW 1.12.010, the Court announced a rule of liberal construction "to effectuate service and uphold jurisdiction of the

court." *Id.* at 609. The Court expressed a strong preference for deciding cases on the 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))(alteration in original)(internal quotations omitted). And in retrospect, the Court declared that it had applied "liberal construction" when interpreting RCW 46.64.040 in *Martin. Sheldon*, 129 Wn.2d at 608. Accordingly, in determining whether Heinzig complied with RCW 46.64.040, the courts must liberally construe the terms of the statute to effect service and facilitate a decision on the merits. *See also Farmer v. Davis*, 161 Wn. App. 420, 433-34, 250 P.3d 138 (2011).

C. Heinzig timely complied with the mailing requirements of RCW 46.64.040 by causing documents to be mailed to Hwang's last known address on June 10, 2013

The relevant section of RCW 46.64.040 requires a plaintiff seeking service on the Secretary of State to send notice that service is being sought through the Secretary of State, along with a copy of the summons or process, by registered mail with return receipt to the last known address of the defendant. RCW 46.64.040. Heinzig sufficiently complied with the mailing portion of the statute because (1) he caused mail to be sent to Hwang's

last known address, and (2) that mail contained everything necessary to comply with RCW 46.64.040.

1. *Heinzig caused mail to timely be sent to Hwang's last known address by filing the necessary documents with the Secretary of State and providing the Secretary of State with Hwang's last known address*

Heinzig caused the necessary documents to be timely mailed to Hwang's last known address. Heinzig filed his documents with the Secretary of State on June 7, 2013, a Friday, and those documents were mailed to Hwang's last known address on June 10, 2013, the following Monday. (CP 59-60.) The process was sent by mail with return receipt. (CP 60-61.) Given that the complaint in this matter was filed May 13, 2013, Heinzig was well within 90 day tolling period for effecting service under RCW 4.16.170.

By providing Hwang's last known address to the secretary of state, Heinzig caused all of the necessary documents to be sent to the relevant address. The record shows that Heinzig provided Hwang's last known address, and that address was the address to which process was mailed. (CP 59-60, 62). 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). Additionally, where the Secretary of State possesses no address for the defendant, the Secretary is not obligated to send process by mail. *See*

RCW 46.64.040 ("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."). Accordingly, only where the plaintiff provides the last known address of the defendant to the Secretary of State does the plaintiff cause the process to be mailed to the correct place.

The fact that the mailing was not personally done by Heinzig is immaterial. In *Clay*, the court faced a question about whether the language in RCW 46.64.040 that directs the "plaintiff" to perform certain functions actually requires those actions to be personally performed by the plaintiff. *Clay*, 84 Wn. App. at 561-62. Specifically, the *Clay* court addressed the fact that the statute references a "plaintiff's affidavit" and an "affidavit of the plaintiff's attorney." RCW 46.64.040. Despite the fact that the statute appeared facially to draw a distinction between the plaintiff and his attorney, the *Clay* court held that the plaintiff need not personally sign either affidavit. *See Clay*, 84 Wn. App. at 561-62. Instead, plaintiff's attorney could sign both affidavits. *Id.*

While the decision in *Clay* involved an attorney-client relationship, it must also be noted that *Clay* involved the signing of sworn statement. Nothing in the opinion suggests that such a strong relationship is required

to accomplish more ministerial tasks. Indeed, it would be difficult to imagine a legal system that did not rely on administrative assistants and paralegals to deposit legal documents in the mail every day. If Heinzig had paid an administrative assistant to accomplish the June 10 mailing, it would be the height of formalism to suggest that he had not met his duty under RCW 46.64.040. That Heinzig accomplished the same result by providing Hwang's last known address to the Secretary of State should make no difference.

Sheldon and *Wichert* support the conclusion that the June 10, 2013 mailing satisfied Heinzig's burden. First, *Wichert* counsels in favor of case-by-case determinations as opposed to bright-line rules. 117 Wn.2d at 152. Accordingly, it is appropriate to look at what actually resulted in this case. Second, to hold that the validity of service turns on whether it was a private administrative assistant or a public clerk who mailed process would inject the sort of formalistic bars that belie the Court's direction in *Sheldon* to liberally construe substitute service statutes to "allow the court to reach the merits, as opposed to disposition on technical niceties." *Sheldon*, 129 Wn.2d at 609 (internal quotations omitted). To hold that both the assistant and the clerk had to mail service would amount to saying that jurisdiction required two redundant letters to be sent to the same house at the same

time. As this Court pointed out in *Keithly v. Sanders*, 170 Wn. App. 683, 285 P.3d 225 (2012), the purpose of the statute's mailing requirement is to provide immediate notice to the defendant of the action in order to comply with the requirements of due process. 170 Wn. App. at 692. The plaintiff in *Keithly* failed to send any mail to the defendant's last known address until nearly a month after filing with the secretary of state. *Id.* at 694. In contrast, Heinzig filed his documents with the secretary of state on Friday, June 7, 2013. (CP 59). Those documents were mailed the following Monday, June 10, 2013. (CP 59). Accordingly, the statute's purpose of swift notice was met in this case by the June 10, 2013, mailing to Hwang's last known address, and that mailing satisfied the statute's directives.

Holding that the June 10, 2013 mailing satisfied the plaintiff-mailing requirement of RCW 46.64.040 does no violence to the separate statutory language requiring mailings from the Secretary of State. Again, this is a case where the last known address of the defendant was provided to the Secretary of State, and the Secretary of State's mailing went to that address. In cases where the address possessed by the Secretary of State and the last known address possessed by the plaintiff differ, the separate mailing requirements will ensure that mail will be sent to multiple addresses, increasing the odds of actual notice. Similarly, the separate mailing re-

quirement for the plaintiff is important where no address is provided to or known by the Secretary of State. However, in cases like this one, where the addresses are the same, the Secretary of State's mailing accomplished all of the purposes of the statute. Accordingly, this Court should construe the statute to effect service and hold that June 10, 2013 mailing satisfied Heinzig's obligation.

2. The contents of the June 10, 2013 mailing were sufficient to meet the requirements of the statute

The record shows that the secretary of state's file contained a signed letter by Heinzig's counsel describing both his compliance with RCW 46.64.040 and providing notice that service had been made on the Secretary of State (CP 62), a copy of the summons and complaint (CP 63-66), and an affidavit of due diligence showing the addresses at which personal service of Hwang had been attempted (CP 67-68). A copy of that file was sent in June 10, 2013 mailing to Hwang's last known address. (CP 59).

There is tension between two cases as to the handling of the affidavits under RCW 46.64.040. In *Keithly*, Division One of this Court held that the plain language of RCW 46.64.040 required "that notice of service on the secretary of state mailed to the defendant must include the plaintiff attorney's affidavit of due diligence." 170 Wn. App. at 690. In this case, the June 10, 2013, mailing contained an affidavit of due diligence, as well as a

signed letter providing notice of service on the secretary of state. (CP 62, 67-68). The signed letter described the filing of the summons and complaint and payment of the fee to the secretary of state. (CP 62). The mailing also contained the summons and complaint. (CP 63-66). Accordingly, the materials contained in the June 10, 2013, mailing met the requirements as explained in *Keithly*.

In contrast to the decision in *Keithly*, the Division Two's decision in *Clay* did not require that any affidavit be mailed to the defendant's last address. *See* 84 Wn. App. at 559. Instead, all affidavits were to be filed with the court. *Id.*

The *Clay* decision finds strong support in the legislative history of RCW 46.64.040. Prior to 1971, RCW 46.64.040 contained a different mailing procedure. The relevant statutory section reads:

> That notice of such service and a copy of the summons or process is forthwith sent by registered mail, requiring personal delivery, by plaintiff to the defendant and the defendant's return receipt, or an endorsement by the proper postal authority showing that delivery of said letter was refused, and the plaintiff's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof.

Laws of 1961, ch. 12, § 46.64.040.

Under the pre-1971 statute, the plaintiff had to use the United States Postal Service's personal-delivery option. *See id.* The plaintiff was then

obligated to append an affidavit of compliance to a copy of the process documents and file them as "part of the return thereof." *See id.* The affidavit would also be accompanied by either a receipt if delivery had occurred or endorsement by the postal service that delivery was refused. *See id.* Again, the receipt or endorsement were to be "entered as a part of the return thereof." *See id.*

"Return of service," along with "return of process," is a synonym for "proof of service" and means, "A document filed . . . in court as evidence that process has been successfully served on a party." Black's Law Dictionary 1242, 1343 (8th ed. 2004). Accordingly, under the pre-1971 statute, the affidavit of compliance was to be filed in court as part of proving service.

In 1971, the Legislature amended RCW 46.64.040. Laws of 1971, 1st Ex. Sess., ch. 69, § 1. The Legislature removed the requirement that the mail carrier personally serve the defendant and replaced it with the modern requirement that a return receipt be requested. *Id.* With the removal of the personal-service component, the Legislature also needed to remove the old language about the postal authority's endorsement that delivery was refused. *Id.* Along with the new language about a return receipt, the Legislature added a whole new affidavit requirement: the affidavit of due dili-

gence showing attempts at personal service. *Id.* Simultaneously, the Legislature added that if an endorsed receipt was received and entered as a part of the return of process, then the affidavit of due diligence need only show that defendant received personal delivery by mail. *Id.* In pushing the two affidavit sections together next to each other in the statute, the Legislature removed language "and entered as a part of the return thereof." *Id.*

After the removal of the language, the *Clay* court in 1997, citing to the Washington Practice Series, concluded that the affidavits were still intended to be filed with the court. 84 Wn. App. at 559 (citing 9 David E. Breskin & Margaret L. Barbier, Wash. Prac., Civil Procedure Forms §§ 4.46, .47 (2d ed. 1990)). That is an interpretation that the Legislature was aware of when it most recently amended the statute in 2003, but the Legislature did not make any amendments affecting that portion of the statute. *See* Laws of 2003, ch. 223, § 1. Accordingly, the Legislature has acquiesced to the interpretation by the Court of Appeals in *Clay*. *See, e.g. Soproni v. Polygon Apartment Partners,* 137 Wn.2d 319, 327 n.3, 971 P.2d 500 (1999) ("[T]he Legislature is presumed to be aware of judicial interpretations of its enactments and that its failure to amend a statute following a judicial decision interpreting it indicates legislative acquiescence in that decision.").

Nothing in the legislative record suggests that removal of the proof-of-service language was intended to transform an evidentiary affidavit that had traditionally been filed with the court into something that was now to accompany service. Not only does it make little sense to send evidentiary documents as part of notice pleading, but the fact that the new return receipt is still to be returned as proof of service if it is endorsed suggests that both affidavits should remain as court filings, not service mailings. The basis for this conclusion is that the affidavits authenticate and explain the significance of the return receipt under RCW 46.64.040.

The distinction between whether the affidavits referenced in RCW 46.64.040 are among the documents to be served or whether they are proof of service to be filed with a court is an important distinction because proof of service is distinct from service itself. *See* CR 4(g)(7).

To understand the relationship between service and proof of service, it is important to first understand the relationship between statutes like RCW 46.64.040 and the civil rules promulgated by the Washington State Supreme Court. The judicial branch of the Washington State government possesses the inherent and ultimate constitutional power to enact procedural rules for negligence cases. *See, e.g.*, CR 1 (providing that the Superior Court Civil Rules "govern the procedure in the superior court in all suits

of a civil nature," except for special proceedings); *Putman v. Wenatchee Valley Med. Ctr., P.S.*, 166 Wn.2d 974, 980, 216 P.3d 374 (2009) (discussing the sepa-ration of powers doctrine and holding that statutory procedural rules for medical-malpractice claims may not conflict with the Superior Court Civil Rules because they are akin to common-law negligence claims). Where a statute prescribing a rule of procedure conflicts with the civil rules promulgated by the Washington State Supreme Court, it is the Court's rules that will control. *Putman*, 166 Wn.2d at 980 ("If a statute appears to conflict with a court rule, this court will first attempt to harmonize them and give effect to both, but if they cannot be harmonized, the court rule will prevail in procedural matters and the statute will prevail in substantive matters.") Accordingly, RCW 46.64.040 must be read to harmonize with the civil rules, including CR 4(g)(7).

Service pursuant to RCW 46.64.040 is made under the authority of CR 4(e)(4). Accordingly, the proof of service requirement prescribed by the Court Rules is pursuant to CR 4(g)(7). *See* CR 4(g)(1)-(7). Both RCW 46.64.040 and CR 4(g)(7) require proof of service. *See* RCW 46.64.040, CR 4(g)(7). But neither authority provides a deadline for completing and filing a proof of service. *See id.* The Civil Rules also do not link the proof of service to the validity of the service itself. Rather, the Civil Rules provide

expressly, "Failure to make proof of service does *not* affect the validity of the service." CR 4(g)(7) (emphasis added).

Because the affidavits required by RCW 46.64.040 are best understood as part of the proof-of-service requirement of service under CR 4(e)(4) and CR 4(g)(7), and because CR 4(g)(7) makes explicit that proof of service is not related to the validity of service, a failure to include any affidavit in the June 10, 2013 mailing would not affect the validity of service. Even if RCW 46.64.040 purported to condition the validity of service on the filing of proof of service, such language would be void as conflicting with CR 4(g)(7). Accordingly, all that is required to effect service under RCW 46.64.040 is the filing of two copies of the summons along with the required fee with the secretary of state and the mailing of a copy of the summons and notice to the last known address of the defendant.

Because Heinzig appropriately filed the necessary materials with the Secretary of State, paid the required fee, and caused the Secretary to send the appropriate mailings, Heinzig perfected service under RCW 46.64.040 well within the 90-day tolling period of the statute of limitations.

CONCLUSION

For the forgoing reasons, the trial court's order of dismissal should be reversed and the case remanded for further proceedings.

DATE: October 27, 2014

RESPECTFULLY SUBMITTED BY:

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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.	Certificate of Service

I certify that today I caused a copy of the following court filing:

- Appellant's Opening Brief

to be served on the following people in the manner indicated below:

Bret S. Simmons and Jill Smith Roy, Simmons, Smith & Parsons, P.S. 1223 Commercial St. Bellingham, WA 98225 *Attorney for Respondents*	☒ U.S. mail, first-class postage prepaid ☐ Hand delivery ☐ By legal messenger ☐ By email, per prior consent

DATE: October 27, 2014

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