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Court of Appeals No. 72269-7-I

COURT OF APPEALS FOR DIVISION I
OF THE STATE OF WASHINGTON

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

v.

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

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ON APPEAL FROM
SNOHOMISH COUNTY SUPERIOR COURT

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# RESPONDENTS' BRIEF

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## I. Introduction and Position Statement

Plaintiff failed to comply with the requirements of the "Secretary of State method" for accomplishing substitute service on an out-of-state resident. And, it was not a minor failure. His attorney never even created the affidavit of compliance which the statute requires, much less personally mailed it to the defendant. Plaintiff's attempt at substitute service was incomplete, and the Statute of Limitations ran. The case was subject to dismissal for failure of service of process, and that is exactly what Judge Farris did, at the trial court level.

Now, on appeal, plaintiff again argues:

a. Defendant waived the right to assert "insufficiency of process," by not filing his Answer; and

b. Plaintiff's attempt at substitute service was "good enough."

The trial court got it right. Defendant did not waive his service defenses, and plaintiff's attempt at substitute service was invalid. This Court should affirm Judge Farris.

## II. Statement of Undisputed Facts

Plaintiff Heinzig and defendant Hwang had a motor vehicle collision on June 5, 2010. (CP at 17-19) (Decl. of Simmons, ¶ 2). Plaintiff claims that

he sustained personal injury.

Plaintiff filed a Summons and Complaint with this Court on May 13, 2013. He still had until the Statute of Limitations ran to accomplish valid service on defendant Hwang. RCW 4.16.080. Because the filing was accomplished with *less than* 90 days left on the statute, there was a 90 day tolling period under RCW 4.16.170.

On May 14, 2013, plaintiff provided copies of his Summons and Complaint to a professional process service, North Sound Due Process, LLC., apparently with instructions to effect personal service of process. Registered Process Server, Debra Gorecki, made three unsuccessful attempts to effect service. (CP at 21-22). Then, she prepared and signed a Declaration of Diligence dated June 4, 2013, which detailed her actions. (CP 21-22) (Decl. of Simmons, Exhibit #1).

On or about June 7, 2013, plaintiff's counsel began trying to accomplish "substitute service," using the method provided in RCW 46.64.040. He sent a copy of the Summons and Complaint for Personal Injury and Damages to the Washington Secretary of State, Corporations Division. (CP 47). Along with it, he also sent process server Gorecki's Declaration of Diligence. (CP 21-22).

The only other document, for purposes of service, was a cover letter.

(CP 57). Counsel's cover letter, *which is not in the form of a Declaration or Affidavit* (see CP 57), states that numerous attempts had been made to serve the Summons and Complaint on defendant Hwang; that he had attempted to trace the defendant through People Search and Property Search and that he was enclosing an "Affidavit of Due Diligence" from North Sound Due Process Service. He provided the last known address of the defendant. (See CP 57).

Counsel's letter was not an "Affidavit of the Plaintiff's Attorney," as the statute requires, because it: (a) did not have any "penalty of perjury" attached to it; and (b) did not aver that plaintiff's attorney has with due diligence attempted to serve personal process upon the defendant *at all addresses* known to him." Instead, it was merely a "Dear Secretary of State" cover letter. (CP 57).

On June 10, 2013, the Secretary of State sent the Summons and Complaint by certified mail, to the last known address of defendant. (CP 58). On June 12, 2013, that letter was marked "Return to Sender, Not Deliverable As Addressed, Unable to Forward." (CP 59).

Then, the process stopped. There is no indication in the court file, nor in the Secretary of State's materials, that plaintiff's counsel *ever* took the next two steps required by RCW 46.64.040—"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." Instead, the record shows that the last thing plaintiff's attorney did was to deliver the papers to the Secretary of State.

Defendant Hwang has never been personally served. Nor has any substitute service been fully accomplished.

## III. Governing Legal Authorities

### A. Strict Compliance with Substitute Service Statutes

First and basic to personal jurisdiction is service of process. *Pascua v. Heil*, 126 Wash.App. 520, 108 P.3d 1253 (2005); *Painter v. Olney*, 37 Wn.App. 424, 427, 680 P.2d 1066, *review denied*, 102 Wn.2d 1002 (1984). And, a court cannot adjudicate a personal claim or obligation without personal jurisdiction over that party. *Vanderbilt v. Vanderbilt*, 354 U.S. 416,

418, 77 S.Ct. 1360, 1362, 1 L.Ed.2d 1456 (1957); *In re Marriage of Powell*, 84 Wn.App. 432, 927 P.2d 1154 (1996). Said differently, a court cannot adjudicate a claim in which the defendants have not been properly served. Any action it took, and any judgment it entered, would be void. *See Dobbins v. Mendoza*, 88 Wn.App. 862, 947 P.2d 1229 (1997); *Scott v. Goldman*, 82 Wash.App. 1, 6, 917 P.2d 131 (1996) (When a court lacks personal jurisdiction over a party, any judgment entered against that party is void).

**B. Requirements of RCW 46.64.040**

In this case, the only way that plaintiff allegedly accomplished service on Hwang is through RCW 46.64.040—the Secretary of State method. Therefore, it is the terms of that statute with which he must strictly comply.

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*** **[STEP #1]** 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** **[STEP #2]** 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** **[STEP #3]** 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.

In other words, RCW 46.64.040 provides a relatively straight-forward procedure for accomplishing substitute service. To perfect service of process under this statute, the plaintiff must: (1) deliver two copies of the Summons and Complaint to the Secretary of State with the required fee and supporting information; (2) 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 at his last known address; and (3) when performing Step #2, the attorney must attach, to Step #2, an *affidavit from the attorney* certifying compliance with these procedures. See *Clay v. Portik*, 84 Wn.App. 553, 929 P.2d 1132 (1997).

Specifically, because the statute contains Steps 2 and 3, the attorney

must do two things *after* having provided documents to the Secretary: (a) he must also send the Secretary of State service documents to the defendant by registered mail, and (b) he must attach, to that mailing, an affidavit by the attorney himself, certifying his compliance. RCW 46.64.040. This statutory procedure is such that there is a reasonable probability that if plaintiff complies with the procedure, defendant will receive actual notice. *Meier,* 111 Wn.2d at 482; see also *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950).

Notably, the fact that the Secretary of State sends the Summons and Complaint to the same, last-known address, is not enough. The statute specifically provides, in the final section, that the Secretary will do so. However, it *also* requires, above, that the attorney do so, also. Further, the Secretary's mailing must go by *certified* mail—the attorney's mailing must go by *registered* mail. These two mailings cannot be "conflated"—the attorney's failure is not excused by the Secretary's compliance. Both mailings are required. RCW 46.64.040.

**C. If strict compliance is not made, dismissal is mandatory.**

Constructive or substituted service statues require strict procedural compliance. *Martin v. Triol*, 121 Wn.2d 135, 144, 847 P.2d 471 (1993). Substitute service is in derogation of the common law and cannot be used

when personal service is possible. Strict compliance with the statute is required. *Rodriguez v. James-Jackson,* 127 Wn. App. 139, 111 P.3d at 271 (2005).

The procedures set forth under RCW 46.64.040 'must be strictly adhered to, otherwise jurisdiction is not obtained under the statute.' *Meier,* 111 Wn.2d at 479 (citing *Muncie v. Westcraft Corp.,* 58 Wn.2d 36, 38, 360 P.2d 744 (1961); *Reynolds v. Richardson,* 53 Wn.2d 82, 330 P.2d 1014 (1958)); see also *Triol,* 121 Wn.2d at 144 ('It is appropriate to require strict compliance with the detailed procedures for service of process set forth in RCW 46.64.040.').

When a plaintiff fails to strictly comply and therefore fails to obtain valid service under RCW 46.64.040, and the statute of limitations has run, the court does not have personal jurisdiction, and dismissal is the only legitimate remedy. *Harvey v. Obermeit,* 163 Wash.App. 311, 261 P.3d 671 (2011).

## IV. No Waiver Occurred

Plaintiff's first category of responses all fall under the idea of "Waiver by Delay." He contends that the defense was so dilatory in filing its Answer that it should be deemed to have waived any and all service defenses. Each of plaintiff's "waiver" arguments is addressed in turn.

### A. There is no "60 day" cut-off for CR 12(h)(1) motions.

Plaintiff's first argument on appeal is that because Answers should be filed within 60 days, this Court should adopt an ipso facto "bar" against CR 12(h)(1) motions filed after 60 days. (Appellant's Opening Brief, at 9-10). He concedes that "this strictly applied waiver has been rejected in Washington," (Appellant's Opening Brief, at 11), but argues that it should control. It should not, for the reasons stated in *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 243-45, 178 P3d 981 (2008).

### B. A Delayed Answer is Not a Waiver

Plaintiff's second argument on appeal is that this defendant was simply "too dilatory" in raising its defense. Since this defendant exceeded the "5 month" cut-off that occurred in *French v. Gabriel*, plaintiff argues that the defendant passed the "too dilatory" threshold, and argues that "a line must be drawn in this case." (Appellant's Opening Brief, at 17).

This is incorrect, as a matter of law. Although plaintiff cites *French v. Gabriel*, 116 Wash. 2d 584, 806 P.2d 1234 (1991), he misrepresents it. The holding of *French* is this:

> *"Mere delay in filing an answer <u>does not constitute a waiver</u> of an insufficient service defense."*

In other words, *French* stands for exactly the opposite of what plaintiff is

arguing! *French* contains no "bright line"cut-off, after the 5 month mark. Instead, in reaching its holding, the *French* court made the following observations:

a. plaintiff's counsel *never asked* for an answer;

b. defendant never sought an extension of time to answer;

c. plaintiff's counsel did nothing to move for a default;

d. there were no conversations between the parties about the issue, and no "deceptive" or misleading comments made, to create an appearance of waiver;

e. no discovery occurred;

f. no other pleadings or other documents were filed.

Given those facts—the mere filing of a lawsuit then a delay in answering, without anything else—the *French* Court held that there is no waiver.

**C. "Short" versus "Long" delay**

Plaintiff urges this Court to adopt a new rule, that "short delay" is not waiver (i.*e., French*), but "long delay" might be. He cites to not-on-point cases like *Blankenship v. Kaldor*, 114 Wn.App. 312, 315, 57 P.3d 295 (2002) (where defendant engaged in written and oral discovery before raising the defense); *and Kahclamat v. Yakima County*, 31 Wn. App. 464, 466, 643 P.2d 453 (1982) (where defendant did not include the defense in his first

responsive pleading, violating CR 12).

This is the wrong case for carving a new rule out of whole cloth. Here, as the trial court found, the Answer was not even due *until after the statute of limitations had expired*. (CP at 74-75). As Judge Farris stated, "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." (CP at 75). Therefore, this is not a case where "long delay" caused plaintiff to miss the statute.

Plaintiff also argues from *Raymond v. Fleming*, 24 Wash App. 112, 115, 600 P.2d 614 (1979), for this idea of a "bright line" rule. In reality, the Raymond holding is instructive, in defendant's favor. In *Raymond*:

a. plaintiff asked defendant repeatedly for the overdue Answer;

b. defendant repeatedly asked for extensions to file the Answer;

c. plaintiff sent interrogatories to defendant, which defendant did not answer.

The *Raymond* court found that defendant's conduct had been instrumental in causing the plaintiff to miss the statute of limitations. Raymond is not a "delay" case, but a "deception" case.

Here, the facts are much closer to *French*. The *only* activity that occurred was the filing of a Complaint. The statute of limitations then ran.

Then, the defense filed an Answer. Prior to defendant filing his Answer, Plaintiff never asked for one. He never sent discovery, inquiring about service issues. And, he certainly never moved to compel an Answer. Even if the defense did not file an Answer within 60 days, that *is not a waiver*, under the clear holding of *French*, which is still-controlling law. Again, the Statute of Limitations ran before the Answer would have been received. Therefore, there has been no waiver. *French, supra*, at 593-94.

## V. Plaintiff did not comply with the substitute service statute

Plaintiff's next body of arguments is about his "substantial compliance" with the substitute service statute. Plaintiff did not even substantially comply, because he never generated one of the key documents—an attorney's affidavit of compliance. Furthermore, substantial compliance is not the law.

### A. Strict compliance is still the law after *Sheldon*.

Plaintiff argues, at pages 28-30 of his Appellant's Brief, that "substantial compliance" is the law. He contends now, like he did in the trial court, that the case of *Sheldon v. Fettig*, decided under the "usual place of abode" provision of RCW 4.28.080(15), has relaxed the legal requirements imposed by RCW 46.64.040 (the Secretary of State service statute). Under

plaintiff's argument, *Sheldon* "undid" *all* of the specific requirements of the various "substitute service" statutes, and now, simply allows substantial compliance with any and all "substitute service" statutes.

The first problem for plaintiff is that *Sheldon* did not actually relax the requirements for complying with the "usual place of abode" statute—it merely held that the particular defendant in that case had two "usual places of abode." (She was a highly mobile flight attendant who actively used two addresses for personal and business affairs, so service at either of the two addresses was valid "abode" service). *See Sheldon*, 129 Wash.2d at 611. *Sheldon* did <u>not</u> excuse the requirement that someone must actually still go to a "usual place of abode" and perform service there.

The second problem for plaintiff is that, even after *Sheldon*, the courts have continued to require *actual performance* of the statutory steps—including the three-step process in RCW 46.64.040. Ongoing decisions *after Sheldon* have made it clear—there still must be an attempt to perform each and every one of the statutory requirements in a "substitute service" statute. In *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 111 P.3d at 271 (2005), which post-dates *Sheldon*, the court said that strict compliance with the statute is required. In *Harvey v. Obermeit*, 163 Wash.App. 311, 261 P.3d 671 (2011), which post-dates *Sheldon*, the court said, "RCW 46.64.040 provides

for a form of substituted service under which "service of the summons and complaint upon the secretary of state constitutes valid personal service" over a defendant. *The statute requires strict compliance, or else jurisdiction is not obtained.*"). In *Farmer v. Davis*, 161 Wash.App. 420, 250 P.3d 138 (2011), which post-dates *Sheldon*, the court said, "Liberal construction does not mean abandoning the statutory language entirely." (The *Farmer* court also clarified that, "In Washington, proper service of process must not only comply with constitutional standards but *must also satisfy the requirements for service established by the legislature*.")

What plaintiff tries to "stretch" *Sheldon* to do, is wrong. As other, later, courts have examined the *Sheldon* holding, they have characterized it as a case where "substantial compliance" was adequate *because the defendant was actually served* and was not injured by a failure to strictly comply. *See, e.g., O'Neill v. Farmers Ins. Co. of Washington*, 124 Wash.App. 516, 125 P.3d 134 (2004). *Sheldon* did not, and does not, stand for the idea that plaintiff can simply skip the second and third step of RCW 64.46.040, and "call it good."

**B. Plaintiff's counsel missed the last two steps of RCW 46.64.040.**

Again, the three steps of RCW 46.64.040 service are:

(1) deliver two copies of the Summons and Complaint to the Secretary of State with the required fee and supporting information;

(2) 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 at his last known address (separate and apart from the fact that the Secretary of State is doing the same thing by certified mail);

(3) When performing Step #2, the attorney must attach, to Step #2, an affidavit from the attorney, certifying compliance with these procedures. See *Clay v. Portik*, 84 Wn.App. 553, 929 P.2d 1132 (1997).

Plaintiff concedes that he did not perform Step 2 or 3, at all. He simply argues that his partial compliance (Step 1) should be enough, because the Secretary of State's mailing serves the same purpose as Step 2, and Step 3 would not have actually provided notice to the defendant either. (CP 42); (Plaintiff's Response, at 4) ("The chances of the defendant receiving actual notice is no different even if Mr. Warren had sent the summons and complaint...").

With due respect, that is not plaintiff's decision to make. The Legislature has determined that compliance with *all three steps* of RCW 46.64.040 is "reasonably calculated" to give adequate notice to a defendant. And, the courts have already decided that full compliance with the procedures under RCW 46.64.040 will satisfy due process requirements, and conversely, that non-compliance will *not* pass the "due process" test. *Martin v. Meier, supra,* 111 Wash.2d at 478, 760 P.2d 925.

This court should accept plaintiff's concession that he did not accomplish Step 2 and 3 of RCW 46.64.040. There never was an "attorney affidavit". That is the end of the inquiry.

## V. Conclusion: Defendant Hwang was not validly served.

Plaintiff failed to validly serve defendant Hwang within the statutory three year period. The attempted service through the Secretary of State was not done properly, in that plaintiff did not follow up on the Secretary of State service with a registered letter to defendant, nor an Affidavit of Compliance. Therefore, this court should affirm the trial court's entry of judgment of dismissal with prejudice for defendant.

DATED this 26th day of November 2014.

Respectfully submitted,

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I certify that on today's date I caused a copy of Respondents' Brief to be served on Gary W. Manca, Manca Law, PLLC, 108 S. Washington St., Suite 308, Seattle, WA 98104, via U.S. Mail, First Class Postage, pre-paid.

DATED this 26th day of November 2014.

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