

65846-8

NO. CA 65846-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES E. HARVEY,

Plaintiff/Appellant,

v.

RICHARD A. OBERMEIT and JANE DOE OBERMEIT,  
husband and wife, and their marital community,

Defendants/Respondents.

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REPLY BRIEF OF APPELLANT

King County Superior Court No. 09-2-27489-4 KNT

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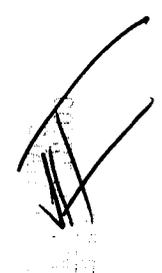
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DIVISION I

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	)	CA No. 65846-8-I
Appellant,	)	
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v.	)	APPELLANT
	)	
RICHARD A. OBERMEIT and	)	
JANE DOE OBERMEIT,	)	
husband and wife, and their	)	
marital community,	)	
	)	
Respondents.	)	
_____	)	

**I. APPELLANT'S REPLY BRIEF.**

**A. Defendants Have Not Put Forth any Valid Opposition to the Law and Facts Showing Waiver of Defenses Through Their Inconsistent Discovery and Other Acts.**

On the question of waiver of affirmative defenses and equitable estoppel, Defendants rely upon old case law and do not accurately state the current rule on the doctrine. The supreme court's 2002 decision in *King v. Snohomish County* summarizes the current rule. The holding in *King*, as well as the holdings of the earlier cases that *King* discusses, identifies two

separate bases for waiving a sufficiency of process defense: 1) failing to plead the defense in the Answer to the Complaint, or 2) even if the defense is raised in the Answer, engaging in conduct *inconsistent* with that defense. *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002), *citing Lybbert and Romjue*. The *Lybbert-Romjue-King* “inconsistent conduct” rule thus modified prior law that Defendants rely upon from earlier cases such as *French v. Gabriel* (1991) and *Raymond v. Fleming* (1979), which focused solely on dilatory conduct and whether a defendant filed an Answer containing the defense.

Defendants do not articulate a clear response to this current law. Instead, Defendants’ primary argument, premised on that old line of cases, is that they did not waive their defenses simply because they raised it in their Answer to the Complaint and in answers to interrogatories. This argument goes only to the first basis for a waiver cited in *King*, however, which is not relevant or at issue here.

The relevant issue here is *King*’s second basis for waiver, that is, waiver through inconsistent conduct. One way a defendant can act

inconsistently with the defense is by engaging in unrelated discovery. (The other way is through other inconsistent actions by defense counsel, discussed further below.) Defendants ignore this basis and all of the various facts indicating their waiver of defenses.

Defendants attempt to distinguish the cases supporting the inconsistent conduct rule, but these attempts fail. For example, Defendants first incorrectly read *King* as suggesting a waiver can occur only if a defendant engages in inconsistent discovery *and* waits an “unreasonably long time to bring his motion to dismiss.” (Brief of Respondents, p. 35.) This is simply a misstatement of *King*. The supreme court in *King* confirmed that in its prior decisions in *Lybbert* and *French*, it had held that a defendant could waive the defense by inconsistent conduct **or** being dilatory in asserting the defense. *King* at 424. The rule is not stated in the conjunctive. While it is true that the facts in *King* did suggest the presence of both bases, the supreme court did not actually hold that both bases must be present to find a waiver and, in fact, it found a waiver solely upon the second basis even though the defendant had

previously filed an Answer containing the defenses. *Id.*

In any event, both bases for waiver are present in our case. Defendants engaged in extensive discovery having nothing to do with their service defense, and following actual notice of the lawsuit the Defendants waited 40 days (until after the limitations period expired) to file an Answer and waited nearly five months before bringing their Motion to Dismiss.

Defendants' next contention that "later cases have limited *Romjue* to its facts" (Brief of Respondents, p. 34.) is patently incorrect.

Defendants actually cite only one case to support this contention, however: *Davidheiser v. Pierce County*. *Davidheiser* is a 1998 case from the Division II Court of Appeals and, significantly, it relied on *French* and was issued before the supreme court's adoption of the inconsistent conduct rule in *Lybbert*. *Lybbert* and *King* thus have impliedly overruled *Davidheiser* (and *French*) or limited them to dilatory conduct situations.

*King* explained its decision in *Lybbert* and discussed how in *Romjue*, because discovery "was not designed to elucidate facts related to the defense of insufficient service of process, those efforts were

inconsistent with assertion of that defense.” *King* at 425. In so ruling, *King* rejected the same argument made in *Davidheiser* and that Defendants make here: that based on *French*, engaging in discovery following assertion of a defense does not indicate waiver. While *King* acknowledged that “engaging in discovery is not always tantamount to conduct inconsistent with a later assertion of insufficient service,” it said in the next sentence, “However, as we noted in *Lybbert*, when a defendant engages in discovery that is inconsistent with the defense, then waiver may be required. *Lybbert*, 141 Wn.2d at 41.” *King* at 425. *King*’s intention is thus clear: *French* and the cases relying upon it do not apply where the discovery is inconsistent with the defense, even if an Answer was filed.

*Davidheiser*, therefore, is easily distinguished since its holding is based on *French*, as well as for factual reasons. In *Davidheiser* the plaintiff argued that defendant waived the defense of insufficient service of process by engaging in discovery. The Court’s opinion does not mention what specific discovery the county conducted, however, so it is unknown how much was conducted and to what extent it was inconsistent

with the claimed defense, two critical issues today after *Lybbert* and *King*. Also, in finding there was no waiver, the *Davidheiser* court attached great importance to the fact the Answer was filed before the statute of limitation expired, unlike here. *Davidheiser*, 92 Wn. App. at 156.

Also contradicting Defendants' argument is the fact our supreme court did not limit *Romjue* to its facts. *Lybbert* followed the inconsistent conduct rule from *Romjue* and did not limit the case to its facts; in reaching its decision *Lybbert* actually analogized to the facts in *Romjue* expressly. *Lybbert*, 141 Wn.2d at 41-42. *Lybbert* also called the *Romjue* decision both "well-reasoned" and "instructive." *Id.* at 40. Later, in 2002, the supreme court in *King* again agreed with and followed the inconsistent conduct rule from *Lybbert* and *Romjue*, without any suggestion that *Romjue* was limited to its facts. *King*, 146 Wn.2d at 420.

Defendants' final arguments are based on cited cases of limited or no applicability to the inconsistent conduct rule for finding waiver. As mentioned above, all of the cases that Defendants cite in this section, except one, predate *Lybbert* and *King*, so they adhere only to the dilatory

conduct basis for waiver that existed at that time and they do not apply to today's inconsistent conduct rule. The *Lybbert* line of cases confirms that filing an Answer with the defense no longer ends the inquiry about waiver.

The one case issued after *King* that Defendants cite is *O'Neill v. Farmers Insurance Company*, 124 Wn. App. 516, 125 P.3d 134 (2004). Although Defendants contend that this case is "most similar" to *O'Neill*, Defendants do not accurately describe its facts, and the holding is actually favorable to Plaintiff. While the *O'Neill* court did hold the defendant there had not waived the service of process defense by engaging in discovery, the Court did so because of these facts present there that are not present in this case: 1) the defendant put plaintiff on notice of the service of process defense before the statute of limitation expired, and 2) defendant put plaintiff on notice of the defense before engaging in discovery. *O'Neill*, 124 Wn. App. at 529.

Defendants also do not address the fact our courts deem various factors important in finding whether inconsistent or dilatory conduct for a waiver exists. Each of these factors are present in this case and require the

finding of a waiver:

1) Whether the defendant filed an Answer raising the defense only after the statute of limitation expired.<sup>1</sup> Here, Defendants received actual notice of the lawsuit on September 23, 2009, but nevertheless did not serve an Answer until 40 days later on November 2, 2009, after the limitations period lapsed on October 21, 2009. *CP 185, 156.*

2) Whether defendants' counsel had communications with plaintiff's counsel before the expiration of the limitations period yet did not disclose the defense (*Romjue*). Here's defense counsel communicated with Plaintiff's counsel before the limitations period expired but he did not disclose any concern about service anytime before the statute ran. *CP 200.*

3) Whether defendant asserted the defense only after commencing discovery.<sup>2</sup> Here, Defendants filed their Answer only after they served unrelated interrogatories, requests for production, a Request for Statement

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<sup>1</sup> *Lybbert*, 141 Wn.2d at 41; *King*, 146 Wn.2d at 426; *Meade v. Thomas*, 152 Wn. App. 490, 495, 217 P.3d 785 (2009); *Clark v. Falling*, 92 Wn. App. 805, 814-15, 965 P.2d 644 (1998); *Davidheiser*; *O'Neill*; *Blankenship v. Kaldor*, 114 Wn. App. 312, 315, 57 P.3d 295 (2002), *review denied*, 149 Wn.2d 1021, 72 P.3d 761 (2003).

<sup>2</sup> *Clark*, 92 Wn. App. at 814; *Romjue*; *O'Neill*, 124 Wn. App. at 529; *Blankenship*, 114 Wn. App. at 315.

of Damages, a general Notice of Appearance, and also filed a Jury Demand and paid its \$250 fee. (Brief of Appellant, pp. 11-12).

4) The amount and length of discovery.<sup>3</sup> Here, the Defendants completed virtually all of their entire case discovery before their Motion to Dismiss. Their many efforts are listed in the Brief of Appellant, pp. 11-12.

5) Whether defendants knew that plaintiff was relying on his process server's efforts and unaware that service may be ineffective (*Lybbert; Meade*). Defendants received copies of the process server's and investigator's Declarations well within the limitations period. *CP 177-85*.

6) The impropriety of dismissing the case on unrelated procedural grounds after the parties engaged in extensive discovery, given our procedural rules that are designed to promote "the just, speedy, and inexpensive determination of every action." *King*, 146 Wn.2d at 426.

7) Whether waiver complements are current notion of procedural fairness, reduces the likelihood of "ambush" style of advocacy, and does not allow a defendant "to lie in wait, masking by misnomer its contention

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<sup>3</sup> *Lybbert; Meade*, 152 Wn. App. at 495.

that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitation has run, thereby depriving the plaintiff of the opportunity to cure the service defect.” *Lybbert* at 40.

All of the above factors are present in this case. Our courts have found waiver where only a few of these factors were present (e.g., *Lybbert* and *Romjue*). None of the cases Defendants rely upon involved the presence of the above factors. The cases where no waiver was found all involved minimal discovery efforts and the absence of the above factors. *See, e.g., French* (defendant conducted one deposition); *Meade* (one set of interrogatories, following up with an e-mail and a letter, and “asking about” plaintiff’s deposition).

**B. Defendants Have Not Addressed the Issues of Waiver Through Their Counsel’s Concealment of the Defense and Their Delay in Bringing Their Motion.**

A second type of conduct through which a defendant may be precluded (by waiver or estoppel) from asserting the defense, besides engaging in unrelated discovery, is through delay or concealment of the defense. Here, Defendants do not discuss the key issue of their counsel

concealing the defense despite his communications with Plaintiff's counsel within the limitations period, nor do they discuss *Romjue*'s direct application to this situation. Defendants also did not address their delay in waiting almost five months before moving to dismiss.

**C. Defendants have not Shown how the Trial Court Could Properly Dismiss the Action Based on the Issues of Conducting a "Due and Diligent Search" to locate Defendants "in this State," When Defendants Never Raised Them in Their Motion.**

Defendants' Motion did not reference the current statute's requirements about not finding a resident defendant "in this state" after a "due and diligent search." Instead the Motion referenced only the repealed language in RCW 46.64.040 and *Huff v. Budbill*'s holding on that same language. Defendants do not dispute that their Motion identified this repealed law as the stated issue in both the "Statement of Issues" and "Argument" sections. *CP 92-93*.

Nevertheless, Defendants contend they sufficiently raised these issues by two vague and isolated references to the word "diligent" within the narrative Argument section, on page 4, of their Motion. (Brief of

Respondents, p. 26). *CP 94, l. 9-13*. A reference just to the word “diligent” in the middle of their motion papers does not raise an issue on summary judgment under the authorities found in *White v. Kent Medical Center*, and Defendants cite no contrary cases.

This Court should not condone Defendants’ improper conduct of bringing a dispositive motion specifically based on the repealed RCW 46.64.040 provision and the holding in *Huff v. Budbill*. Defendants brought their Motion under a false premise that they knew or should have known was no longer grounded in good law. It would be unconscionable for the Court to reward this conduct or Defendants’ contention today that they somehow raised an issue under the amended statute.

**D. Even if They had Raised the Issues and not Waived Them, Defendants have not Shown how the Trial Court Correctly Followed Summary Judgment Procedure at the May 7<sup>th</sup> Hearing in Ignoring Plaintiff’s Undisputed Declarations, and in Ordering a Fact-Finding Hearing, *Sua Sponte*, and Determining Witness Credibility Itself.**

The Brief of Respondents has not shown any legal authority justifying the trial court’s various breaches of established summary

judgment protocol under CR 56. At the May 7<sup>th</sup> hearing, the trial court should have ruled based upon the only evidence before it, which was the various Declarations Plaintiff submitted containing facts and opinions that he could not find Defendants in the state and his efforts constituted a due and diligent search. Defendants filed no evidence disputing these facts.

Also, Defendants' stated concerns about Plaintiff's Declarations have been waived because they never moved to strike them. If documents supporting a summary judgment motion do not conform to the requirements of the rules the opposing party must file a timely motion to strike the documents. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wn.2d 874, 881, 431 P.2d 216 (1967); *Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 365, 966 P.2d 921 (1998). Defendants have waived all of their current concerns about the form and content of Mr. Conley's Declarations on which they are defending this appeal. Nowhere in the trial court record did Defendants ever make a motion to strike any part of these documents.

For any one of the above reasons the trial court should have accepted Plaintiff's evidence as true. Doing so would have required ruling

in Plaintiff's favor as a matter of law. Even if Defendants had produced evidence sufficient to raise a genuine fact issue, the trial court still erred because the issue of due diligence under this statute is a factual one that must be reserved for the trier of fact, not the trial court. *Triol*, 121 Wn.2d at 151; *Carras v. Johnson*, 77 Wn. App. 588, 593, 892 P.2d 780 (1995).

Further, neither party requested a fact-finding hearing, much less a hearing where the trial court would determine witness credibility and rule based upon its credibility assessment. Defendants' only response to this fact is their claim that their counsel "specifically requested" such a hearing (Brief of Respondents, p. 22), but defense counsel actually said, "I would suggest we do set this over for a fact finding hearing" (*RP 10*) only several minutes after the Court has already raised it *sua sponte*. *RP 2*, 7.

Second, Defendants rely on CR 43(e)(1) for the court disregarding Mr. Conley's Declarations of Service and requiring a fact-finding hearing. Even assuming Defendants did not waive objections to his Declarations, this rule does not apply because it permits a court to call for oral testimony only "[w]hen a motion is based on facts not appearing of record." CR

43(e)(1) (emphasis added). There were no facts on the parties' Motions not appearing "of record." All the facts were in or attached to the Declarations filed with the trial court prior to the May 7<sup>th</sup> hearing.

Defendants argue next that the trial court properly refused to rule on May 7<sup>th</sup> and ordered a fact-finding hearing because Mr. Conley's Declarations "conflicted." Even assuming Defendant did not waive this argument, the Declarations did not conflict. The only difference between them is his second Declaration described his two additional service attempts that were not listed in the first Declaration. The second Declaration thus merely augments the first one. The additional facts do not contradict any statement made in the first Declaration.

Even if Defendants had submitted any evidence disputing Plaintiff's Declarations, or even if Mr. Conley's Declarations conflicted in some material way, this was not sufficient to raise a genuine fact issue. "An affidavit of service is presumptively correct, and the party challenging the service of process bears the burden of showing by clear and convincing evidence that the service was improper." *Streeter-Dybdahl v. Nguyet*

*Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010) (underline added);

*Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994).

Defendants clearly did not meet this strict standard, especially when viewing the facts and their inferences most favorably to the Plaintiff. And they did not meet their CR 56(e) burden of setting forth material facts.

Third, the trial court did not order a fact-finding hearing because it had concerns about Mr. Conley's Declarations. Nowhere in the May 7<sup>th</sup> Report of Proceedings did the trial court express any concerns about his Declarations, or say they were in conflict or untrue. Defendants' attempt now to justify the hearing on this alleged basis is thus misplaced.

In a similar after-the-fact argument, Defendants attempt to justify the ordering of the fact-finding hearing through their interpretation of Mr. Conley's testimony *at that hearing*. This is backwards. Even if Defendants' bare conclusions were correct that his testimony was "untrue" or "lies" or "not credible" (which the facts do not show), the issue is the trial court's actions based on what evidence was before it *on May 7th*. Later testimony is irrelevant to this inquiry.

Defendants rely upon inapplicable cases in this section as well. None of the cases Defendants rely upon as “authority” for a fact-finding hearing involves a CR 56 motion where oral testimony was ordered or taken, let alone where no conflicting material facts existed: *see Davies* (no oral testimony ordered, taken, or at issue); *Gross* (no oral testimony ordered, taken, or at issue); *Woodruff* (evidentiary hearing conducted on motion to vacate default judgment only after the parties submitted conflicting affidavits)<sup>4</sup>; *In Re Marriage of Ferree* (CR 43(e)(1) might allow for live testimony on a motion to enforce a settlement agreement); *Carson* (trial court should have held an evidentiary hearing before vacating default judgment when the parties submitted conflicting affidavits); *J.L. Storedahl* (jurisdiction case where issue was whether county commissioners were permitted to make their own findings in a land use decision).

Plaintiff is not aware of a case upholding a trial court’s order for

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<sup>4</sup> Brief of Respondents incorrectly quotes *Woodruff* at 76 Wn. App. 210-11, as holding that trial courts are specifically instructed to conduct fact-finding hearings if necessary to resolve a jurisdiction issue, and not doing so can constitute an abuse of discretion. (Brief of Respondents at pp. 18-19 and p. 23.) *Woodruff*, however, does not say anything like this here. Quite differently, it says, in the context of a motion to vacate a default judgment, only that a “court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility.” *Woodruff*, 76 Wn. App. at 210 (underline added).

oral testimony on summary judgment where the facts are not disputed in the record (or doing so *sua sponte*, or with the court deciding credibility).

Likewise, the Defendants attempt to minimize their counsel's May 7<sup>th</sup> admissions of what facts they disputed by calling the admissions "suggestions." This interpretation is belied by the May 7<sup>th</sup> Report of Proceedings, however, since the trial court directed the parties to agree on what facts were or were not disputed. *RP 15*. Defense counsel subsequently agreed on the record that Defendants disputed only whether Mr. Conley attempted service twice or four times, whether he checked garbage cans and if they were empty, and whether he placed paper clips on car tires and if they had been moved. *RP 15-16*. The trial court thus erred either way: By dismissing the action based on these "disputed" facts when Defendants produced no contrary facts, or based on due and diligent search, witness credibility, and the other findings that counsel admitted were not disputed.

Defendants also contend that Plaintiff "waived any procedural challenges regarding the motion procedures" simply by agreeing to

continue the summary judgment hearings to May 7th, at defense counsel's request due to a scheduling conflict defense counsel had. (Brief of Respondents, p. 26). *CP 86-87*. Plaintiff objected at all times to the June fact-finding hearing. Defendants cite no supporting authority for this.

E. **Even if They had Raised the Issues and not Waived Them, Defendants have not Shown that Plaintiff Failed to Conduct a Due and Diligent Search to Find Defendants in the State, When Viewing All Evidence and Inferences Most Favorably to Plaintiff.**

After Defendants' conduct showing waiver and their failure to raise the due and diligent search issue, whether Plaintiff even conducted such a search should not be in focus. Plaintiff did conduct a due and diligent search, however. Defendants' analysis on this topic is deeply flawed. First, Defendants spend substantial time in their brief talking about personal service requirements when only substitute service is at issue.

Second, Defendants make the unbelievable argument that *Huff v. Buddbill's* holding involved here is still good law after the 2003 amendment. While certain of *Huff's* holdings are presumably still valid today, *Huff's* holding at issue in this case is no longer valid: *Huff's*

holding that a plaintiff using RCW 46.64.040 must show a resident motorist defendant departed the state or attempted to evade service was directly supplanted later by the statutory change requiring only that a plaintiff show he could not find a resident motorist defendant in the state after a due and diligent search. The legislature's intention to amend the statute because of *Huff* is clearly demonstrated in the Bill Analysis for this amendment, which discusses the supreme court case and its "departed the state" requirement, and that the bill would remove a resident from this requirement. *See Appendix A* (underline added). Most telling, the actual amendment did strike the "departs from" language. *CP 28*.

Third, Defendants erroneously argue that RCW 46.64.040 precludes substitute service upon the Secretary of State if a resident's *property* is found within the state. Under this argument Defendants claim that Plaintiff "found" Defendant Obermeit in the state by learning of a house and cars registered to him, even though Plaintiff never found Mr. Obermeit *himself* at that address to personally serve him. Defendants' argument ignores the statute's plain language and underlying purpose.

The statute's phrase, "...each *resident* of this state who. . .cannot. . .be found in this state" is not ambiguous. RCW 46.64.040. It refers to being unable to find a person, not his or her property. Clearly the statute's plain meaning is to allow substitute service when a plaintiff cannot find a resident's *person in order to personally serve him*, after a due and diligent search.<sup>5</sup> This is the only construction that makes sense since a plaintiff cannot personally serve a tort defendant through service upon his property.

Unsurprisingly, every major dictionary gives the word "resident" the usual and ordinary meaning of a "person" who resides in a place.<sup>6</sup> The court should apply this plain meaning that a resident means a person, rather than Defendants' strained construction that resident means property.

Such a construction was also the legislature's intent, since it meant in this statute to provide an alternative when a defendant could not be *personally served*. For example, in amending RCW 46.64.040 in 2003,

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<sup>5</sup> This court agreed. Under RCW 46.64.040 "the dispositive factor may be the plaintiff's ability to find *and serve* the resident motorist defendant. . ." *Huff v. Budbill*, 93 Wn. App. 258, 267, 969 P.2d 1085 (1998) (italics added).

<sup>6</sup> See, e.g., <http://dictionary.reference.com/browse/resident>; <http://en.wikipedia.org/wiki/Resident>; <http://www.merriam-webster.com/dictionary/resident?show=1&t=1295830773>].

the legislature stated that substitute service is allowed “under certain circumstances if a plaintiff is unable to personally serve the defendant.”

*See Appendix A* (underline added).

Common sense also tells that us that locating the resident’s property is not relevant. The legislature amended the statute specifically to allow substitute service on a defendant known to live in Washington. Since by definition a resident has a home here (and likely a car), in almost every case involving a resident the plaintiff would be unable to use the substitute service provisions of the statute if finding property were enough, thus defeating the statute’s purpose.

To the extent this Court finds the statute’s amended phrase to be ambiguous, the Court should interpret it as meaning that a plaintiff *cannot find the defendant’s person in the state in order to personally serve him*, after a due and diligent search. This must be the test to give effect to the amendment allowing substitute service upon residents. The purposes of the statute are promoted by this construction: To promote care on the part of all who use state highways, to provide a convenient method by which

claimants may sue to enforce their rights, to minimize procedural difficulties in bringing actions arising out of the use of our highways, and to protect persons and property within our state. *Martin v. Triol*, 121 Wn.2d 135, 147, 847 P.2d 471 (1993). These factors favor the Plaintiff.

The Brief of Respondents also ignored the considerations our courts use in determining “due diligence” to personally serve a defendant under this statute include: 1) honest and reasonable efforts, focusing on what Plaintiff did rather than what he failed to do (“not all conceivable means need be employed”); 2) the plaintiff has the right to rely on information in the police report; and 3) whether allowing substituted service on the Secretary of State prejudiced the defendant. *Carras*, 77 Wn. App. at 593-94 (citing *Meier* and *Triol*). Ruling in favor of the Plaintiff was the only proper outcome given that his evidence was presumptively correct, undisputed by Defendants anyway, and Defendants were not prejudiced (they received actual notice of the suit by mail, retained defense counsel, conducted full discovery, no default was taken against them, etc.).

Also, Defendants have not addressed the cases (e.g., *Triol*, *Carras*,

etc.) in which *fewer efforts* than Plaintiff conducted here were still deemed to constitute a due and diligent search. Defendants also have not shown clear and convincing evidence that Plaintiff failed to act in good faith or conduct a due and diligent search to personally serve Defendants.

Last, Mr. Conley never acknowledged that his efforts here were inadequate, as Defendants inaccurately represent at page 12 of their Brief. Defendants cite to “(6/18/10 RP 30-31),” but Mr. Conley said nothing here resembling such an acknowledgment; instead, he testified only that he made two additional attempts at serving Defendants to give better (customer) service to his client, i.e., the Plaintiff who hired him.

**F. This Appeal Can be Disposed of in Plaintiff’s Favor Regardless of how he Briefed the Findings of Fact. In any Event the Findings Are Not “Verities” on Appeal Because the Standard of Review on this Appeal is De Novo Review, not a Substantial Evidence Standard. The Findings were also Unnecessary on Summary Judgment and thus Superfluous and Should be Disregarded. Plaintiff Properly Challenged them on Appeal, Anyway.**

The correct standard of review for a summary judgment ruling is a de novo review, not whether substantial evidence supports any findings of fact, as Defendants incorrectly allege. *Qwest Corp. v. City of Bellevue*,

161 Wn.2d 353, 358, 166 P.3d 667 (2007). Further, findings of facts are unnecessary on summary judgment and should be disregarded on appeal:

**It is not necessary for the trial court to enter findings on summary judgment. CR 52(a)(5)(B). Any that are entered may be disregarded on appeal,** because summary judgment determines issues of law, not issues of fact. *Duckworth v. Bonney Lk.*, 91 Wn.2d 19, 586 P.2d 860 (1978).

*Redding v. Virginia Mason Medical Center*, 75 Wn. App. 424, 426, 878 P.2d 483 (1994) (emphasis added).

Defendants' reliance on RAP 10.3(g) and 10.4(c), therefore, is misplaced. All cases that Defendants rely upon, beginning with *Pardee*, involve the substantial evidence standard that applies to findings of fact entered following a *bench trial* (the wrong standard of review here), or involve an appellant's violation of RAP 10.3(a)(5) by failing to provide *any* citations to facts in the record, or otherwise do not involve RAP 10.3(g) and 10.4(c). None of Defendants' cited cases involves the situation here: review of findings of facts on a summary judgment.

It matters that Plaintiff made his challenge to the findings clear, anyway. An "appellate court may excuse a party's failure to assign error

where the briefing makes the nature of the challenge clear and the challenged finding is argued in the text of the brief.” *Noble v. Lubrin*, 114 Wn. App. 812, 60 P.3d 1224 (2003). In that case, the court concluded that Noble adequately raised the issue of matters contained in the trial court’s findings, even though he did not assign error to all findings of fact that relate to the disputed issue, where it was clear in the text of his brief that Noble was challenging the court’s determination. *Id.* at 818.<sup>7 8</sup>

RESPECTFULLY SUBMITTED this 27th day of January, 2011.



Terence F. Traverso  
WSBA #21178  
Attorney for Appellant

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<sup>7</sup> *Accord Welch Foods, Inc. v. Benton County*, 136 Wn. App. 314, 321, 148 P.3d 1092 (2006) (findings of facts were sufficiently challenged and the suggested RAP violation did not hinder court’s review where the party provided legal authority and references in the argument section of its brief and provided the findings and conclusions in an appendix to its reply brief).

<sup>8</sup> Here, Plaintiff submitted the Findings of Fact with the Clerk’s Papers, *CP 341*, and also specifically listed them throughout the Brief of Appellant at, for example, pages 17-18, 36, and 45-47. He also attaches them to this Reply Brief. *See Appendix B.*

**CERTIFICATE OF SERVICE**

I declare under penalty of perjury under the laws of the State of Washington that on January 27, 2011, I caused this Reply Brief of Appellant to be served upon Defendants/Respondents, by depositing a copy of it in the U.S. Mail, in a properly stamped and addressed envelope, postage pre-paid, to their attorneys of record:

Marilee C. Erickson  
Reed McClure  
Two Union Square  
601 Union Street, Suite 1500  
Seattle, Washington 98101-1363

Dated this 27th day of January, 2011 at Bellevue, Washington.

  
\_\_\_\_\_  
Natalie Knoblich

# **APPENDIX A**

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**Judiciary Committee**

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**HB 1226**

**Title:** An act relating to service of summons for persons who cannot be found in this state.

**Brief Description:** Authorizing service of summons for persons not found in this state.

**Sponsors:** Representatives Moeller, Campbell, Lantz and Carrell.

**Brief Summary of Bill**

- Allows service of process on the Secretary of State for resident motorists who can not be found in the state after a due and diligent search.

**Hearing Date:** 2/4/03

**Staff:** Edie Adams (786-7180).

**Background:**

In order to properly institute a lawsuit, a plaintiff must notify the defendant of the commencement of the suit by serving a summons on the defendant. This is called service of process. Generally a defendant must be personally served with the summons. Individuals may be personally served either by delivering a copy of the summons to the defendant personally or by leaving a copy at the defendant's home with a person of suitable age and discretion.

Substitute service of process is allowed under certain circumstances if a plaintiff is unable to personally serve the defendant. In motor vehicle actions, the Secretary of State may receive substitute service of process for a nonresident motorist involved in an accident, or for a resident who within three years of the accident "departs from this state." For substitute service upon the Secretary of State to be valid, the plaintiff must also send notice of such service and a copy of the summons to the defendant's last known address by registered mail with return receipt requested.

The Washington Supreme Court in a case construing the absent motorist statute held that a person who cannot be found in the state is not the equivalent of the statute's requirement that the resident "departs from this state." Instead, the court found that a plaintiff may only serve substitute process upon the Secretary of State if: (1) the defendant has in fact departed the

state; or (2) the plaintiff has a good faith belief that the defendant has departed and has attempted, with due diligence, to find and serve the defendant.

The due diligence standard requires a plaintiff to make honest and reasonable efforts to locate the defendant. Not all conceivable means must be employed, but at the least any accident report made must be examined and its information investigated with reasonable effort. In addition, if the plaintiff has information pertaining to the defendant's whereabouts other than that contained in the accident report, he or she must make reasonable efforts to investigate based on that information as well.

**Summary of Bill:**

A state resident involved in a motor vehicle accident while operating a motor vehicle on a state public highway may be served by substitute service of process on the Secretary of State if the resident cannot be found in Washington, after a due and diligent search, at any time within the three years following the event.

**Appropriation:** None.

**Fiscal Note:** Not Requested.

**Effective Date:** The bill takes effect ninety days after adjournment of session in which bill is passed.

(SHHS) is authorized to administer grants to state and local governments to make polling places accessible to the disabled, including the blind and visually impaired. Grants may also be used to provide information about the accessibility of polling places. To receive funding, a state or locality must submit an application to the SHHS describing activities for which assistance is sought, and additional information as necessary. States must submit a report on the activities conducted with the funds to the SHHS not later than six months after the end of each fiscal year.

**Summary:** The Secretary of State must establish standards for the certification of voting systems and technology that are accessible to blind and visually impaired voters. All newly acquired voting technology and systems utilized by the state or any county must allow blind or visually impaired individuals with access equal to the access available to voters who are not blind or visually impaired. Each polling location must have at least one certified voting machine accessible to those voters who are blind or visually impaired.

Implementation is contingent on available funds. Voting technology and systems purchased prior to the effective date must meet the requirements once the equipment and systems are upgraded or replaced.

**Votes on Final Passage:**

House	94	0
Senate	46	0

**Effective:** July 27, 2003

**HB 1226**  
C 223 L 03

Authorizing service of summons for persons not found in this state.

By Representatives Moeller, Campbell, Lantz and Carrell.

House Committee on Judiciary  
Senate Committee on Judiciary

**Background:** In order to properly institute a lawsuit, a plaintiff must notify the defendant of the commencement of the suit by serving a summons on the defendant. This is called service of process. Generally, a defendant must be personally served with the summons. Individuals may be personally served either by delivering a copy of the summons to the defendant personally or by leaving a copy at the defendant's home with a person of suitable age and discretion.

Substitute service of process is allowed under certain circumstances if a plaintiff is unable to personally serve the defendant. In motor vehicle actions, the Secretary of State may receive substitute service of process for a non-resident motorist involved in an accident or for a resident who within three years of the accident "departs from this

state." For substitute service upon the Secretary of State to be valid, the plaintiff must also send notice of such service and a copy of the summons to the defendant's last known address by registered mail with return receipt requested.

The Washington Supreme Court, in a case construing the absent motorist statute, held that a person who cannot be found in the state is not the equivalent of the statute's requirement that the resident "departs from this state." Instead, the Court found that a plaintiff may only serve substitute process upon the Secretary of State if: (1) the defendant has in fact departed the state; or (2) the plaintiff has a good faith belief that the defendant has departed and has attempted, with due diligence, to find and serve the defendant.

The due diligence standard requires a plaintiff to make honest and reasonable efforts to locate the defendant. Not all conceivable means must be employed, but at the least any accident report made must be examined and its information investigated with reasonable effort. In addition, if the plaintiff has information pertaining to the defendant's whereabouts other than that contained in the accident report, he or she must make reasonable efforts to investigate based on that information.

**Summary:** A state resident involved in a motor vehicle accident while operating a motor vehicle on a state public highway may be served by substitute service of process on the Secretary of State if the resident cannot be found in Washington, after a due and diligent search, at any time within the three years following the event.

**Votes on Final Passage:**

House	95	0
Senate	49	0

**Effective:** July 27, 2003

**SHB 1232**  
C 99 L 03

Requiring jail booking fees to be based on actual costs.

By House Committee on Criminal Justice & Corrections (originally sponsored by Representatives Kirby, Carrell and Flannigan).

House Committee on Criminal Justice & Corrections  
Senate Committee on Government Operations & Elections

**Background:** Municipalities and counties are authorized to require any person who is booked in a county or municipal jail to pay a \$10 booking fee to the sheriff's department or police chief's department where the jail is located. The person may pay the booking fee from any money currently in his or her possession. If the person does not have any money in his or her current possession, then the sheriff must notify the court for assessment of the fee. If the defendant is acquitted, not charged, or if

# **APPENDIX B**

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ORIGINAL

JUL 12 2010

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ORIGINAL

Honorable Cheryl B. Carey

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
IN AND FOR KING COUNTY

JAMES E. HARVEY,

Plaintiff,

v.

RICHARD A. OBERMEIT and JANE DOE  
OBERMEIT, husband and wife, and their  
marital community,

Defendants.

NO. 09-2-27489-4 KNT

**FINDINGS OF FACT AND  
CONCLUSIONS OF LAW**

And

**ORDER DISMISSING DEFENDANTS  
WITH PREJUDICE**

THIS MATTER having come on before this Court upon the motion of defendants  
Obermeit for an order dismissing the case against them,

The Court having considered these documents submitted herein

1. Defendants' Motion to Dismiss with Declaration of Counsel and Exhibits;
2. Plaintiff's Response in Opposition, Declaration of Counsel with Exhibits;
3. Plaintiff's Objection to Fact Finding Hearing, and the pleadings on file herein.
4. On June 18, 2010, the Court heard testimony of Alex Conley, III, process server.

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Seattle, WA 98164  
Phone: 206-689-4288

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2 The Court makes the following Findings of Facts and Conclusions of Law:  
3

4 FINDINGS OF FACT

- 5 1. November 1, 2009, was the last day for completing personal service.  
6 2. No defendant was ever personally served with a summons and complaint.  
7 3. Defendants Answered the Complaint on October 30, 2009, naming failure  
8 to serve process and expiration of the statute of limitations as affirmative  
9 defenses.  
10 4. On January 8, 2010, defendants received notice that the plaintiff had  
11 attempted to perfect personal service of process by serving the Washington  
12 Secretary of State under the nonresident motorist statute on September 23,  
13 2009.  
14 5. Part of this attempted service on the Secretary of State included a  
15 "Declaration of Attempted Service" signed by Alex Conley III.  
16 6. This Declaration admitted that personal service had not been made, and  
17 stated that the Declarant had made two attempts at service at the  
18 defendants' home; one on August 9, 2009 and the other on August 16,  
19 2009.  
20 7. The Declaration stated "[p]er neighbors, the Obermeits' will take off for  
21 weeks at a time." (sic)  
22 8. The declaration was signed with two dates, 9/11/09 and 9/14/09. Mr.  
23 Conley did not know why there were two dates.  
24 9. The declaration had no actual signature of the Declarant.  
25 10. This second Declaration stated that Mr. Conley had made two additional  
26 attempts at serving process, which also failed.  
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- 11. A second declaration further stated that Mr. Conley had placed paper clips on the tires of vehicles at the premises, which were still present when he returned the next time.
- 12. The second declaration repeated his original claim from the first declaration, stating "I spoke to neighbors, who informed me that the residents at the subject address will take off for weeks at a time."
- 13. On June 18, 2010, this Court heard the testimony of Alex Conley III at a Fact Finding Hearing.
- 14. Mr. Conley knew, that defendants had four vehicles registered to their address, however, he only put paper clips on two vehicles, rather than all four.
- 15. Twice, Mr. Conley attempted to personally serve the defendants
- 16. He felt that he had not done an adequate job, because his service makes up to ten attempts before deeming the effort adequate.
- 17. No neighbors told Mr. Conley, that the defendants were gone "for weeks at a time," but rather they left sometimes on the weekends.
- 18. Given the discrepancies, Mr. Conley was not a credible witness.

**CONCLUSIONS OF LAW**

- 1. After hearing the testimony of Alex Conley III and the cross examination by the defendants' counsel, this Court finds that Mr. Conley's testimony is in conflict with his declarations, and is not credible.
- 2. Mr. Conley's two attempts were not adequate to show due diligence on the part of the plaintiff to personally serve the defendants.

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- 1
- 2 3. Even if Mr. Conley is to be believed in that he made four attempts at
- 3 service, they were made in a short time span during the month of August,
- 4 and still show a lack of due diligence.
- 5 4. Defendants were never personally served.
- 6 5. Service on the Secretary of State under RCW 46.64.040 was improper,
- 7 because defendants were found within the state but never personally
- 8 served.
- 9 6. Service on the Secretary of State under RCW 46.64.040 was improper
- 10 because plaintiff did not make a due and diligent search.
- 11 7. Service on the Secretary of State under RCW 46.64.040 was improper
- 12 because the Declaration of Attempted Service was not properly
- 13 authenticated.
- 14 8. The statute of limitations has expired in this case, with neither personal
- 15 service nor appropriate alternative service.
- 16 9. Plaintiff has no personal jurisdiction over the defendants.
- 17
- 18

19 This Court, having made these Findings of Fact and Conclusions of Law, and being fully

20 advised, it is therefore

21 **ORDERED, ADJUDGED AND DECREED** that defendants are Dismissed With

22 Prejudice from the above captioned lawsuit.

23 **DONE IN OPEN COURT** this 7 day of July, 2010.

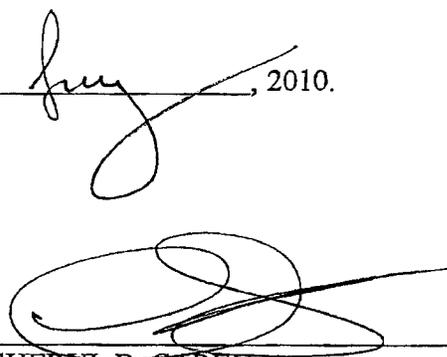
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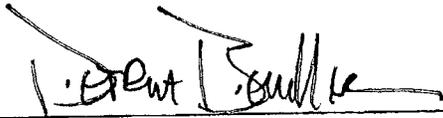
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CHERYL B. CAREY  
JUDGE

Prepared and Presented by:

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DIETRICH BIEMILLER, WSBA #32171  
Attorney for Defendants Obermeit

Approved as to form  
Notice of Presentation Waived

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