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COURT OF APPEALS
DIVISION II

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STATE OF WASHINGTON
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No. 39551-7-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

GEORGE E. ZELKO,

Appellant,

v.

JOHN P. STADER and JANE DOE STRADER, husband and wife,

Respondents.

APPELLANT'S REPLY BRIEF

By WESLEY S. JOHNSON
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TABLE OF CONTENTS

	<u>Page</u>
A. Mr. Zelko did not fail to commence his action against Mr. Strader within the time allowed by the applicable statute of limitations.....	1
B. Strader was required to plead failure of service of process if he is going to rely on failure of service of process to now claim the statute of limitations.....	3
C. The affirmative defense of insufficiency of process was waived.....	4
D. The statute of limitations was tolled by RCW 4.16.180.....	5

TABLE OF AUTHORITIES

	<u>Page</u>
<i>Butler v. Joy</i> , 116 Wn. App. 291, 65 P.3d 671 (2003).....	3
RCW 4.16.180.....	5
RCW 4.28.100(2).....	1
CR 12(h)(1).....	4
CR 15(a).....	4
CR 15(b).....	4

A. Mr. Zelko did not fail to commence his action against Mr. Strader within the time allowed by the applicable statute of limitations.

1. The defendant misstates the effect of RCW 4.28.100(2).

Counsel first seems to be taking the position that a person must be a resident of the State of Washington at the time of the service by publication rather than that the defendant must have been a resident who then left the state. He cites no case for that position. There is no question that at the time of the tort alleged, the defendant resided in the State of Washington. See Declaration of George Zelko of April 2009 (35 CP page 87-92). Defendant's is a novel approach that is not consistent with the language of the statute. The statute that applies to a defendant "being a resident of the state [which] has departed therefrom..." It is clear that this intends to apply to a resident who has since departed. It would make no sense to allow a defendant to run away from a lawsuit in the State of Washington and avoid service by establishing residence elsewhere. Even if it were interpreted this way, however, there is an issue of fact because the defendant

continued to receive mail in Kelso, Washington, owned property in Cowlitz County, Washington, and had tax statements mailed there. A jury could find that he not only was a resident at the time of the tort, but at the time of the service as well.

2. The defendant then claims that there is no evidence that Strader left the state with the intent to avoid the service of process. Of course, we cannot see inside Mr. Strader's head. We can judge from his actions, however. What we have is evidence that he received mail at a false address, represented a mailing address that he never had as his mailing address, declined to pick up certified mail, and that he was impossible to serve at the residence that he now claims was his residence. A jury could find that he was concealing himself.

B. Strader was required to plead failure of service of process if he is going to rely on failure of service of process to now claim the statute of limitations.

Even if service had not been proper, that defense has been waived.

Defendant indicates that Butler v. Joy is “so far off the mark that they are difficult to discuss.” He doesn’t discuss how, though. Although the court in Butler does not say that failure to plead insufficient service of process will preclude the assertion of a statute of limitations defense based on that failure; that is exactly what happened. The defendant in Butler v. Joy was trying to get the matter dismissed because the statute of limitations had run because it had not been properly served. Failure to plead the defense of insufficiency of service of process precluded relying on that insufficiency in a motion to dismiss for missing the statute of limitations. That is exactly what we have here. Although the court does not discuss it in those words, the holding was necessary for the result obtained.

C. The affirmative defense of the insufficiency of process was waived.

1. Defendant makes the same mistake that the trial court did. The defendant believes that he can make his motion to the defense of insufficiency of process after he has filed an answer which failed to contain that defense. He fails to take into consideration Rule 15(b) which requires that the motion

“shall be made before pleading if a further pleading is permitted.”

2. The defendant then contends that CR 15(a) allows the court discretion to amend their answer. CR 12(h)(1) does not allow this, however. That defense is waived unless it is omitted from the motion described above (which has to be filed before the answer) or if it is “included in a responsive pleading or an amendment thereof permitted by Rule 15(a) as a matter of course.” It does not say that it is waived unless it is included in an amendment permitted by Rule 15(a) to be made as a matter of discretion. This rule makes it very clear that the court does not have discretion to allow an amendment adding this defense.

D. The statute of limitations was tolled by RCW 4.16.180.

Counsel indicates that there is no evidence that Strader attempted to conceal himself.

As indicated above, there is more than sufficient evidence to raise a jury question about whether Mr. Strader was attempting to conceal himself. He gave people an address that he never has used, he used an address in Washington to receive mail and had it

forwarded to him, and a jury could find that the thirteen times that a professional process server tried to serve him was an indication that he was avoiding service.

Dated this 24th day of November, 2009.



WESLEY S. JOHNSON, WSB #16930
Attorney for Appellant

DECLARATION OF MAILING

On this day I deposited in the United States Mail a properly stamped and addressed envelope directed to:

MATHEW ANDERSON
Walstead Mertsching
PO Box 1549
Longview, WA 98632

containing a copy of the document on which this declaration appears.

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

Executed at Kelso, Washington, on the 24rd day of November, 2009.

Susan R. Truluck
Susan Truluck

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