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**I. STATEMENT OF THE ISSUES**

- a. Whether Zelko failed to commence his action against Strader within the time allowed by the applicable statute of limitations.
- b. Whether Strader was not required to plead both the statute of limitations defense and the failure of service of process defense in order to preserve his statute of limitations defense.
- c. Whether the affirmative defense of insufficiency of service was not waived and was properly allowed by the trial court.
- d. Whether the statute of limitations was not tolled by RCW 4.16.180.

**II. STATEMENT OF THE CASE**

On August 5, 2005, Defendant John P. Strader (Strader) was operating a boat in the Kalama Marina in Kalama, Washington. Clerk's Papers (CP) at 4. One of the boat's motors was not operating properly as Strader navigated the boat into the marina. CP at 4. The Plaintiff, George E. Zelko (Zelko), alleges he injured his leg when he attempted to prevent Strader's boat from hitting docks and other boats in the marina. CP at 4.

On June 30, 2008, Zelko filed a Summons and Complaint for Personal Injuries against the Defendant in the Superior Court of Washington for Cowlitz County (trial court). CP at 1, 3. Zelko alleged that Strader's negligence caused his injuries. CP at 4-5.

From July 7, 2008 to July 22, 2008, a professional process server hired by Zelko attempted to personally serve Strader at 44155 Mohave Court, Indian Wells, CA 92210.<sup>1</sup> CP at 7. On August 27, 2008, Zelko mailed the summons and complaint to Strader at two locations: P.O. Box 957, Kelso, WA 98626, and 44155 Mohave Court, Indian Wells, CA 92210. CP at 17. On September 2, 2008, Zelko filed a declaration of non-service. CP at 7. In an affidavit for service by publication filed on September 2, 2008, Zelko's counsel stated that "Defendant John P. Strader is not currently residing [in] the State of Washington and service cannot be made upon him in the State of Washington." CP at 11. Zelko's counsel alleged that RCW 4.28.100(2) authorized service by publication. CP at 12. From September 3, 2008 to October 8, 2008, the summons was published in *The Daily News*, an approved legal newspaper for Cowlitz County, Washington. CP at 19.

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<sup>1</sup> Strader's address also appears in the record as "Mojave." When service was attempted, the address was spelled "Mohave." However, the correct spelling is "Mojave."

On November 18, 2008, a representative of Strader allegedly contacted Zelko's counsel to acknowledge the existence of the lawsuit and to provide a current mailing address for Strader. CP at 21. On November 26, 2008, Zelko filed a motion and affidavit for default, alleging that more than 60 days had elapsed since the service by publication and that Strader had failed to answer after appearing on November 18, 2008, by his representative's alleged telephone call. CP at 21.

On December 5, 2008, Strader answered the summons and complaint *pro se* and listed 44155 Mojave Court, Indian Wells, CA 92210, as his residence. CP at 23. **Strader disclosed the statute of limitations as an affirmative defense in his *pro se* answer.** Strader subsequently retained counsel and, on February 11, 2009, filed a motion to amend the answer pursuant to CR 15(a). CP at 27. Strader included in the proposed amended answer, among other things, the affirmative defense of insufficiency of service. CP at 30. On March 2, 2009, the trial court orally granted Strader leave to amend the answer but denied the motion as to the inclusion of insufficiency of service as an affirmative defense.

On March 20, 2009, Strader stated in a declaration that he had moved to California in February 2008 and has not resided outside California since

that time. CP at 73. Strader filed a motion for summary judgment on March 20, 2009, in which he argued, in part, that Zelko had failed to commence the action within the applicable statute of limitations. CP at 60, 61.

On April 20, 2009, the trial court reduced to writing its March 3, 2009, oral ruling. CP at 125. The trial court failed to provide any reasons for denying the motion with regard to the inclusion of insufficient service of process as an affirmative defense.

The hearing on Strader's motion for summary judgment was held on April 20, 2009.

Strader filed an amended answer on April 21, 2009, and, per the Judge's ruling, did not include insufficient service of process as an affirmative defense. CP at 128. The amended answer did include an affirmative defense that the applicable statute of limitations had expired. CP at 128.

On May 13, 2009, the trial court dismissed Zelko's complaint, finding that the action had not been commenced within the time allowed by the applicable statute of limitation. CP at 132-33. As part of this ruling, the court found that service was insufficient because Zelko did not comply with

the requirements of RCW 4.28.100 and that the statute of limitations was not tolled by RCW 4.16.180. CP at 132-33.

On May 19, 2009, Zelko filed a motion for reconsideration of the order dismissing the complaint. CP at 134.

On June 23, 2009, the trial court denied the motion for reconsideration, reversed its previous order denying the motion to amend the answer as to the inclusion of insufficiency of service as an affirmative defense, and found that Zelko did not show Strader intended to avoid service as required by RCW 4.28.100. CP at 140.

Zelko now appeals the trial court's May 13, 2009, order dismissing the complaint and the June 23, 2009, order denying the motion for reconsideration.

### **III. STANDARD OF REVIEW**

The Court of Appeals reviews a trial court's summary dismissal *de novo*. *Boes v. Bisiar*, 122 Wn. App. 569, 574, 94 P.3d 975 (2004)(citing *Bruff v. Main*, 87 Wn. App. 609, 611, 943 P.2d 295 (1997)). "A trial court's findings of fact and conclusions of law following a summary judgment are

then superfluous.” *Boes*, 122 Wn. App. at 574, 94 P.3d 975 (citing *Skimming v. Boxer*, 119 Wn. App. 748, 755, 82 P.3d 707 (2004)).

#### IV. ARGUMENT

##### A. **Zelko failed to commence his action against Strader within the time allowed by the applicable statute of limitations.**

Under RCW 4.16.080, an action for personal injuries must be commenced with three years. RCW 4.16.170 will toll the statute of limitations for up to 90 days under limited circumstances:

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).

“The time period provided for in RCW 4.16.170 is not an extension of the statute of limitations. Instead, the ninety days simply allow a plaintiff,

who has *tentatively* commenced an action against a party by filing a complaint just before the pertinent statute of limitations runs, *to perfect the commencement* of the action by serving that party, even after the statute runs, as long as it is within ninety days of the date the complaint was filed.” *Kiehn v. Nelsen’s Tire Co.*, 45 Wn. App. 291, 298, 724 P.2d 434 (Div. 2 1986) (citations omitted) (emphasis added).

Strader was not a resident of the state of Washington at the time Zelko attempted service by publication. Service by publication is generally unavailable as to nonresidents of the state of Washington. RCW 4.28.100 lists nine exceptions to this rule, subsection (2) being the only one that Zelko alleges is applicable to the case at bar. “RCW 4.28.100(2) authorizes service by publication when the defendant cannot be found in the state, and, with the intent to avoid service of a summons, he either conceals himself within the state or leaves the state.” *Boes*, 122 Wn. App. at 574, 94 P.3d 975. RCW 4.28.100(2) makes clear that the defendant must be a resident of Washington for service by publication to be authorized by the subsection. In this case, Strader clearly was not a resident of Washington at the time service was attempted because he had moved to California in February 2008. RCW 4.28.100(2) has no application to the case at bar.

Even if the court were to apply RCW 4.28.100(2), that statute provides no aid to Zelko. A party that claims jurisdiction under RCW 4.28.100(2) has the burden of showing proper service by publication. *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wn. App. 358, 362, 75 P.3d 1011 (2004). The party “cannot meet this burden merely by reciting the relevant statutory factors in conclusory fashion; rather he must produce facts which support the conclusions required by the statute. Such facts must show:

(1) that his efforts to personally serve the defendant were reasonably diligent, and

(2) that the defendant either (a) left the state with intent to defraud creditors or avoid service, or (b) concealed himself within the state with intent to defraud creditors or to avoid service.”

*Id.* (Internal quotation and citations omitted.)

Zelko made numerous attempts to personally serve Strader *at his residence in California* from July 7, 2008 to July 22, 2008. Even assuming that Zelko can show diligence as required by the statute, there is simply no evidence that Strader left the state of Washington with the intent to avoid this service of process. Mr. Strader is retired and he moved south. Thousands of retirees do this every year. There is nothing in the record that even implies

that Mr. Strader was on the run or otherwise relocating in California with the intent to avoid service of process.

In order to perfect service by publication, a plaintiff must set forth facts supporting the conclusion that a defendant has left the state or is concealing himself with intent to defraud creditors or avoid service of process. *Bruff v. Main*, 87 Wn. App. 609, 611, 943 P.2d 295 (Div. 1 1997); *see also Pascua*, 126 Wn. App. at 527, 108 P.3d 1253. A bare recitation of statutory factors required to obtain jurisdiction is insufficient. *Id.* “Because the statute requires strict compliance, an ‘affidavit that omits the essential statutory elements is as good as no affidavit at all.’” *Lepeska v. Farley*, 67 Wn. App. 548, 553-54, 833 P.2d 437 (Div. 1 1992). “[T]he plaintiff must produce the specific facts which support the conclusions required by the statute.” *Pascua v. Heil*, 126 Wn. App. at 527, 108 P.3d 1253. The statute ***does not authorize service by publication merely because the plaintiff was unable to locate the defendant***, despite diligent efforts. *Bruff v. Main*, 87 Wn. App. at 614, 943 P.2d 295 (emphasis added).

In *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 146-47, 111 P.3d 271 (Div. 1 2005), the court found that RCW 4.28.100 was not complied with

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because the defendant left the state for a reason other than to avoid service of process:

There is no direct or circumstantial evidence, or any reasonable inference that James-Jackson left the state with the intent to defraud or hide from any action filed by Rodriguez. The reason James-Jackson moved to Texas was because her husband took a job in a school outside of Houston, not to avoid service of process. The declarations contained no facts suggesting proof that James-Jackson's change of residence, or any other conduct, was undertaken with the intent to conceal herself as required by RCW 4.28.100(2).

*Id.* at 146.

In *Charboneau Excavating, Inc. v. Turnipseed*, where “[n]othing in the record show[ed] that [the defendant] was trying to conceal himself to avoid service of process, as opposed to *simply being ignorant of the existence of the suit*,” the court held that service by publication was not authorized. 118 Wn. App. 358,364, 75 P.3d 1011 (Div. 2 2003) (emphasis added).

Plaintiff filed his Complaint for Personal Injuries on June 30, 2008, and thereby *tentatively* commenced this action. The period of limitations was set to expire on August 5, 2008, unless service of process was accomplished within 90 days of June 30, 2008. Zelko failed to serve Strader within 90 days and, therefore, the action was not commenced within the applicable period of limitation.

**B. Strader was not required to plead both the statute of limitations defense and the failure of service of process defense in order to preserve his statute of limitations defense.**

Strader raised the affirmative defense of the statute of limitations in his original *pro se* answer. As a result, there is no question that Defendant preserved this defense. After obtaining legal counsel, Defendant was not permitted to amend his answer to include the *jurisdictional defense* of insufficiency of service of process. Now, Plaintiff argues that because Defendant was not allowed to amend his answer to add the additional defense of insufficiency of service, that he was barred from asserting the statute of limitations defense that was pled in his original *pro se* answer.

The Plaintiff is arguing that a defendant must plead an exact combination of affirmative defenses in order for any one of those defenses to be valid. This would result in substantial injustice, particularly against *pro se* litigants like Mr. Strader. To prevent injustice to *pro se* litigants, both the United States Supreme Court and the Ninth Circuit afford a *pro se* litigant wide leeway in their pleadings. *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (applying a less stringent standard to a *pro se* pleading than an attorney-drafted pleading); *U.S. v. Ten Thousand Dollars (\$10,000.00) in U.S. Currency*, 860 F.2d 1511, 1513 (C.A.9 1988) (“We have consistently

held in this circuit that courts should liberally construe the pleadings and efforts of *pro se* litigants, particularly ‘where highly technical requirements are involved’”); *see also Cruz v. Gomez*, 202 F.3d 593, 597 (C.A.2 2000) (Conn.) (“[C]ourts must construe *pro se* pleadings broadly, and interpret them ‘to raise the strongest arguments that they suggest’”).

Strader seeks a ruling that would require the assertion of two defenses in order to preserve one defense. This makes little sense when applied to represented defendants and, let alone as applied to *pro se* defendants. That is, an injustice would result if the Court imputed on to Strader the knowledge that in order to assert a statute of limitations defense, he must also plead a failure of service of process defense. Strader put Zelko on notice that he was alleging that Zelko failed to commence this action within the applicable period of limitations. Washington is a notice pleading state. Nothing else was required.

A similar argument was rejected by the court in *Gross v. Sunding*, 139 Wn. App. 54, 63, 161 P.3d 380 (Div. 1 2007). In *Gross*, the Court of Appeals upheld the dismissal of an action for insufficient service of process and stated that defendant therein was not required to also plead the statute of

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limitations as an affirmative defense. 139 Wn. App. at 63, 161 P.3d 380.

There is no reason why the opposite would also be true.

Furthermore, the affirmative defenses of the statute of limitations and of insufficiency of service of process are different defenses. In a Tennessee case, *First Tennessee Bank, N.A. v. Dougherty*, the court dealt with a similar issue. The plaintiff's service was sufficient under Rule 4 (process), but did not meet the requirements under Rule 3 (commencement of action) to toll the statute of limitations. The defendant filed a motion to dismiss, asserting that the service of process was not sufficient to toll the statute of limitations. The court said:

We are of the opinion that Rules 3 and 4 address differing concepts and are not inconsistent in any way. Rule 3 is directed toward commencement of actions; when the commencement tolls the statute of limitations; and the circumstances under which the plaintiff may prevent the statute of limitations from running. \* \* \*

On the other hand, Rule 4 addresses the way and manner and by whom process may be served. It seems abundantly clear that if process is served and proper return is made as provided in Rule 4, the process possesses the necessary validity to bring the person served before the court for jurisdictional purposes. Process may be valid under Rule 4, but still insufficient to toll the statute of limitations as provided by Rule 3. Rule 4 is in no way intended to toll the statute of limitations. Therefore, *even if service is complete and valid under Rule 4, if the requirements of Rule 3 have not been met, the statute of limitations is not tolled.*

\* \* \*

To interpret the rules differently would result in an *irreconcilable conflict* between the two rules.

*First Tennessee Bank, N.A. v. Dougherty*, 963 S.W.2d 507 (Tenn.App. 1997)(emphasis added).

The only case cited by Zelko in support of this argument, from Washington or anywhere else in our nation, is *Butler v. Joy*, 116 Wn. App. 291, 65 P.3d 671 (2003). However, Zelko's description of *Butler* and arguments based thereon are so far off the mark that they are difficult to discuss. Nowhere in *Butler* does the court say that failure to plead insufficient service of process will preclude the assertion of a properly pled statute of limitations defense.

Insufficient service of process is a jurisdictional defense. Failure to commence the action within an applicable period of limitations is a statutory defense. The fact that the two defenses may have overlapping elements does not require, particularly in a notice pleading state, that a defendant, *pro se* or not, plead both defenses in order to enjoy the protection of the statute of limitations. When the trial court denied Strader's motion to amend his answer to include insufficiency of service of process, the trial court did not

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rule that service of process was sufficient. This ruling had no preclusive effect on Strader's properly pled statute of limitations defense.

**C. The affirmative defense of insufficiency of service was not waived and was properly allowed by the trial court.**

Assuming in arguendo that in order to assert the statute of limitations defense a defendant must also assert the insufficient service of process defense, the Court properly allowed dismissal of this case for insufficient service of process. Strader did not waive insufficiency of service as an affirmative defense and the trial court properly allowed this defense. Rule 12(h)(1) of the Superior Court Civil Rules states, in relevant part, that the defense of insufficiency of service is waived "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."

Strader did not raise the affirmative defense of insufficiency of service in his *pro se* answer filed on December 5, 2008. CP at 23. However, on February 11, 2009, Strader filed a motion to amend the answer pursuant to CR 15(a) to include insufficiency of service as an affirmative defense. CP at 27. On March 2, 2009 and April 20, 2009, the trial court denied the motion to amend the answer as it pertained to the inclusion of insufficiency of service as an affirmative defense. CP at 125. The trial court failed to provide any

justification for that decision. On May 13, 2009, the trial court dismissed the complaint in response to Strader's motion for summary judgment as to the statute of limitations defense. CP at 133. In its June 23, 2009, order denying Zelko's motion for reconsideration, the trial court went a step further and reversed its previous order denying the inclusion of insufficiency of service as an affirmative defense. CP at 140. While this reversal was entirely unnecessary, it appears that the Court may have ruled that Strader prevailed on both his originally pled statute of limitations defense and his secondary *jurisdictional defense* of failure of service of process.

CR 15(a) states, in relevant part, that "a party may amend the party's pleading only by leave of court or by written consent of the adverse party; and *leave shall be freely given when justice so requires.*" (Emphasis added.) "A motion to amend the pleadings is addressed to the sound discretion of the trial court and will not be overturned except for abuse of that discretion." *Kirkham v. Smith*, 106 Wn. App. 177, 181, 23 P.3d 10 (2001)(quoting *Culpepper v. Snohomish County Dep't of Planning and Cmty. Dev.*, 59 Wn. App. 166, 169, 796 P.2d 1285 (1990)). "Leave to amend should be freely given unless it would result in prejudice to the non-moving party." *Kirkham*, 106 Wn. App. at 181, 23 P.3d 10. The party opposing an amendment to a

pleading has the burden to show prejudice. *Wilson v. Horsley*, 137 Wn.2d 500, 513, 974 P.2d 316 (1999)(Sanders, J., concurring in part and dissenting in part).

Zelko has failed to present any evidence of how he would have been prejudiced by the inclusion of insufficiency of service as an affirmative defense. At no point in these proceedings has Zelko raised concerns over potential delay, unfair surprise, or the introduction of remote issues. Because Zelko failed to raise any issues of prejudice, the trial court acted well within its discretion when, on June 23, 2009, it reversed its previous order.

**D. The statute of limitations was not tolled by RCW 4.16.180.**

Zelko filed a complaint in this action on June 30, 2008. This was within the three (3) year statute of limitations. Zelko then had 90 days from the date he filed the complaint to serve Strader personally or by publication. Zelko failed to personally serve Strader or properly serve him by publication within 90 days of filing the complaint. Because Strader was not timely served, Zelko's action against Strader is time barred unless the statute of limitations was tolled for some reason.

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Zelko argues that, if it is determined he failed to timely serve Strader, the statute of limitations was tolled pursuant to RCW 4.16.180.

RCW 4.16.180 reads as follows:

If the cause of action shall accrue against any person who is a nonresident of this state, or who is a resident of this state and shall be out of the state, or concealed therein, such action may be commenced within the terms herein respectively limited after the coming, or return of such person into the state, or after the end of such concealment; and if after such cause of action shall have accrued, such person shall depart from and reside out of this state, or conceal himself, the time of his absence or concealment shall not be deemed or taken as any part of the time limit for the commencement of such action.

“Concealment under RCW 4.16.180 is defined as a clandestine or secret removal from a known address.” *Brown v. Prowest Transport Ltd.*, 76 Wn. App. at 420, 886 P.2d 223 (internal quotations omitted).

“Under RCW 4.16.180, the statute of limitations is tolled for the period that a nonresident defendant is concealed.” *Id.* at 421. In this case, there is no evidence that Strader ever attempted to conceal himself. Strader has lived in California since February 2008. Strader’s residency in California was hardly clandestine or secret. The record clearly indicates Zelko knew where Strader lived because the very first location at which personal service was attempted was Strader’s Indian Wells, California, residence. Also, the

fact that Strader was not home when service was attempted does not indicate he was avoiding service by clandestine means or by secret removal. As noted above, Zelko's affidavits for service by publication failed to set forth any facts that supported a contention that Strader was avoiding service.

Zelko's time to properly serve Strader was not tolled by RCW 4.16.180. Therefore, dismissal of Zelko's complaint is appropriate because the statute of limitations for commencing an action against Strader has run.

**V. CONCLUSION**

The Appellate Court should affirm the trial court's decision to dismiss Zelko's complaint.

DATED: November 6, 2009.

Respectfully submitted,

  
\_\_\_\_\_  
MATTHEW J. ANDERSEN, WSBA #30052  
Of Attorneys for Respondent

CERTIFICATE

I certify that on this day I caused a copy of the foregoing Respondent's Brief on Appeal to be mailed, postage prepaid, to Appellant's attorney, addressed as follows:

Wesley S. Johnson  
Attorney at Law  
600 Royal Street, Suite B  
Kelso, WA 98626

DATED this 6 day of November 2009, at Longview,  
Washington.

  
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MATTHEW J. ANDERSEN

COURT OF APPEALS  
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