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COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**Court of Appeals No. 289125**  
Consolidated with No. 290441

**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

Esther Kloehn and  
Jay Kloehn,  
**Appellants,**

vs.

Dr. David Morrison and  
Dr. Leandro Cabanilla,

**Respondents**

**REPLY BRIEF OF APPELLANTS: ESTHER AND JAY KIOEHN**

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## I. INTRODUCTION TO REPLY BRIEF

Washington courts have yet to determine that an RCW 7.70.110 notice creates, by the plain words of the statute, a four-year statute of limitations, or if there is an implicit requirement that the RCW 7.70.110 notice must be given prior to the running of the three-year statute of limitation period for medical negligence that obtains without an RCW 7.70.110 notice.

Another issue of fact remains about whether the Respondents were served with the RCW 7.70.110 notice prior to the running of the three-year statute of limitations, and yet another about whether the Respondents have rebutted the affidavit of service with clear and convincing evidence as a matter of law. Related minor issues remain.

The rhetorical structure of the Respondents' brief de-emphasizes the fundamental issue of the legislative plain language which creates a four-year statute of limitations, and the Respondents de-emphasizes the interpretive context of "access to the courts" that has been the theme of the Washington State Supreme Court in striking down various barriers to the courts that had benefitted doctors who commit malpractice.

This Reply Brief begins by correcting errors of fact and of

emphasis in the Respondents' brief, and then the Reply re-visits the plain language interpretation of the Appellants, Jay and Esther Kloehn, as they request access to the courts to pursue remedies to their losses.

## II. MISLEADING RHETORICAL MOVES BY RESPONDENTS

### A. Date of Filing Second Suit

The Respondents argue that the Kloehns only had until February 1, 2010, to file their suit, and fault the Kloehns for not filing suit until March 4, 2010. *Response Brief at p. 23.*

However, as of March 4, 2010, RCW 7.70.100 was still in effect, and it required the Kloehns to wait 90 days before filing suit, and then allowed them a 5 day window in which to sue.

On December 1 and December 2, 2009, Dr. Cabanilla and Dr. Morrison, respectively, were re-served with RCW 7.70.100 notices and RCW 7.70.110 requests for mediation as a precaution, given that the residual records of the defunct Ochoa-Lawrence law firm could not produce records of the original service.

Dr. Cabanilla and Dr. Morrison were served with a summons and complaint within that 90-95 day window, as suit

was filed on March 4, 2010, and was promptly served. There was nothing irregular about this action, which was undertaken in conformity with the statute.

**B. Basis of Dismissal of First Suit (Consolidated Herein)**

The first suit, filed in 2009, was dismissed on February 5, 2010, on the basis of the (contested) failure to file a RCW 7.70.100 notice or .110 request. In the eventuality that this might be the ruling of the court, the Kloehns had to re-serve the RCW 7.70.100 notice and .110 request as they promptly did (on 12/1/09 and on 12/2/09), and to file suit as they did on 3/4/10, to preserve their access to the courts.

That February 5, 2010 decision, and the denial of reconsideration, was appealed, and that appeal is consolidated with the present appeal of the decision of April 16, 2010 (reconsideration denied on May 4, 2010) which dismissed the claim that was filed on March 4, 2010.

The bases of dismissal were distinct, and the Kloehns followed the most reasonable means to preserve their access to the courts.

**C. Requested Mediation in 2007 and in 2009**

The Kloehns clearly requested mediation in their letter

sent to the Defendants in 2007, and clearly requested mediation again in 2009. The Kloehns remain sincerely interested in mediation, and would be happy to stay trial court proceedings to mediate with the Respondents.

The Respondents inaccurately allege bad faith in the Kloehns' request for mediation, which (a) is wrong, and (b) is a question of fact, precluding summary judgment.

### III. RESTATEMENT OF KLOEHNS' ARGUMENT

The prior statement of the facts is incorporated herein:

The Kloehns served RCW 7.70.100 notices and a good faith request for mediation under RCW 7.70.110 in 2007. Dr. Morrison and Dr. Cabanilla not only refused to mediate, they refused to produce their medical records, forcing Ms. Kloehn to rely upon the hospital records, alone, to begin to analyze how her horrific injuries were received. *Brief at p.5, citing CP #1: 13 & 37-38, and see CP#1: 8-9 and 29-38.* (Note: The Clerk's papers were numbered beginning at 00001 for both cases on appeal, even after consolidation. The first case, #289125 shall be referenced as CP#1, and #290441 as CP#2, for reference purposes. Appellants apologize to the court for not noticing this overlapping numbering prior to filing their initial Brief.)

A genuine issue of material fact remains as to whether or not the Respondents can rebut, with clear and convincing evidence, the affidavit of service noted at *CP#1: 8-9*.

The fact of service, not the affidavit of service, is what is relevant for the finder of fact to determine. CR 4(g)(7), and see *In re Estate of Palucci*, 61 Wash.App. 412, 810 P.2d 970 (1991) (“It is the fact of service that confers jurisdiction, not the return,” at 416, citations omitted). Construing the facts in favor of the Kloehns, the *Miebach* standard applies, and the Respondents must rebut the fact of service by clear and convincing evidence. *Miebach v. Colasurdo*, 35 Wn.App. 803, 670 P.2d 276 (1983), *reversed in part on other grounds*, 102 Wash.2d 170, 685 P.2d 1074(1984).

The relevant issue regarding the second case, filed on 3/4/10, is (a) whether the first dismissal was proper, and then (b) whether or not RCW 7.70.110 creates a four year statute of limitations, or creates that four year statute of limitations only if served before the three years have run.

For sake of clarity of argument, without conceding the point, the Kloehns revisit the rules of statutory construction in determining the proper construction of RCW 7.70.110.

#### IV. STATUTORY INTERPRETATION – PLAIN LANGUAGE

The plain language of RCW 7.70.110 is the following

(emphasis added):

The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

The language is clear and plain that filing the RCW 7.70.110 notice creates a four year statute of limitations. The only statutory restriction is “prior to filing a cause of action.”

The legislature could have written “prior to the ordinary three year statute of limitations running” alongside the “prior to filing a cause of action,” but did not.

As the court noted in *Qwest Corp. v. City of Kent*:

Where the legislature omits language from a statute, whether intentionally or inadvertently, this court will not read into the statute the language it believes was omitted. *State v. Cooper*, 156 Wash.2d 475, 480, 128 P.3d 1234 (2006).

*Qwest Corp. v. City of Kent*, 157 Wash.2d 545, 553, 139 P.3d 1091 (2006).

And further see (emphasis added):

Where a statute specifically designates the

things or classes of things upon which it operates, an inference arises in law that all things or classes of things omitted from it were intentionally omitted by the legislature under the maxim *expressio unius est exclusio alterius*-specific inclusions exclude implication. *State v. Roadhs*, 71 Wash.2d 705, 707, 430 P.2d 586 (1967).

*Washington Natural Gas Co. v. Public Utility Dist. No. 1*, 77 Wash.2d 94, 98, 459 P.2d 633 (1969).

V. UNIQUE INTERPRETIVE CONTEXT OF RCW 7.70.110 -  
- NAMELY: MANY RCW 7.70 BARRIERS TO PLAINTIFFS  
HAVE BEEN STRUCK DOWN TO PROTECT THE "ACCESS  
TO THE COURTS" FOR PLAINTIFFS

RCW 7.70.150, which required a certificate of merit prior to medical malpractice plaintiffs filing suit, was struck down in late 2009. *Putman v. Wenatchee Valley Medical Center, P.S.* 166 Wash.2d 974, 216 P.3d 374 (2009).

In holding that RCW 7.70.150 unduly burdened the right of access to the courts, the *Putnam* court stated:

"The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163, 2 L.Ed. 60 (1803). The people have a right of access to courts; indeed, it is "the bedrock foundation upon which rest all the people's rights and obligations." *John Doe v. Puget Sound Blood Ctr.*, 117 Wash.2d 772, 780, 819 P.2d 370 (1991). This right of access to courts "includes the right

of discovery authorized by the civil rules.” *Id.* As we have said before, “[i]t is common legal knowledge that extensive discovery is necessary to effectively pursue either a plaintiff’s claim or a defendant’s defense.” *Id.* at 782, 819 P.2d 370.

Requiring medical malpractice plaintiffs to submit a certificate prior to discovery hinders their right of access to courts. Through the discovery process, plaintiffs uncover the evidence necessary to pursue their claims. *Id.* Obtaining the evidence necessary to obtain a certificate of merit may not be possible prior to discovery, when health care workers can be interviewed and procedural manuals reviewed. Requiring plaintiffs to submit evidence supporting their claims prior to the discovery process violates the plaintiffs’ right of access to courts. It is the duty of the courts to administer justice by protecting the legal rights and enforcing the legal obligations of the people. *Id.* at 780, 819 P.2d 370. Accordingly, we must strike down this law.

166 Wn.2d at 979.

Obviously, with this constitutional dimension added to the discussion, legislative plain language is subordinate to fundamental constitutional rights.

The constitutional aspect of interpreting RCW 7.70.110 was extended by *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010), which struck down the 90 day waiting period of RCW 7.70.100 as violating the separation of powers. The 90 day waiting period of RCW 7.70.100 is that to which the Kloehns conformed prior to filing suit on 3/4/10, as it was the law of the

land prior to the *Waples* decision, which was entered on 7/1/10.

The theme of both *Waples* and *Putnam* is that the legislature can alter substantive rights, but the legislature cannot erect barriers of access to the courts.

## VI. HARMONIZING ACCESS TO THE COURTS AND LEGISLATIVE INTENT

In the Kloehn case, the normal process of statutory interpretation can be easily harmonized with the *Waples* and *Putnam* concern with access to the courts.

The legislature clearly omitted any requirement that the RCW 7.70.110 request for mediation be made before the three year statute of limitations had run, and thus the Kloehn suit should proceed. It serves the *Putnam* value of access to the courts to allow the Kloehn suit to proceed.

The Appellants' case should be remanded for trial, consistent with both the plain language of the statute and consistent with *Waples* and *Putnam*.

## VII. ADDITIONAL ARGUMENTS IN REPLY TO RESPONDENTS

### A. Res Judicata Issue

The *Respondents' Brief*, at p. 27, raises the issue of *res*

*judicata*. However, the first Kloehn suit was dismissed due to the *trial court rejecting that there were any questions of fact regarding any service* of the 2007 RCW 7.70.100 notice and RCW 7.70.110 request for mediation. The Kloehn's cured the (contested) issue of service of the notice and the request for mediation. *CP#2: 9&10*. Thus, the second case turns on the meaning of properly served and verified RCW 7.70.100 notices and RCW 7.70.110 requests for mediation.

With these perfected notices, the second case was timely filed on 3/4/10, and, after dismissal, was consolidated with the 2009 case, for purposes of this appeal. (The Respondents did not object to the substance of the request for mediation in the court below; Respondents only contested the legal implications of those 12/1/09 and 12/2/09 notices. Now, the Respondents would raise a new *factual dispute on appeal*. *Response Brief at p. 12-15 & 18*. Such a new factual dispute would warrant a remand for additional facts. *RAP 9.10*. Also, the Respondents themselves have submitted the Kloehns' good faith request for mediation made to Respondents' counsel, via email, prior to the December 1 and 2, 2009, service upon the Respondents. *See, e.g., CP for Respondents: 112-116*, which in conjunction with the letters of

Kloehns' counsel to the Respondents show a clear request for mediation. CP#1: 20-21. No other interpretation is substantively reasonable.

*Res judicata* does not apply in this case. The subject matter of the 2009 case (*whether there is an issue of fact regarding the 2007 notices*) is distinct from the construction of RCW 7.70.110 once the RCW 7.70.100 notice (now struck down) and the RCW 7.70.110 request have definitively been served. *See, e.g., Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108 (2004) (four-part test to apply *res judicata* requires that all four elements be met, including a requirement of identical subject matter), *and see Spokane County v. Miotke*, 240 P.3d 811, 814 (Wn.App. Div. 3, October 12, 2010).

#### **B. Trial Court Orders on Reconsideration**

Respondents raise the appealability of the trial court's denials of reconsideration. *Respondents' Brief at p.27.*

RAP 2.4(f) reads:

(f) Decisions on Certain Motions Not Designated in Notice. An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of

judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 new trial).

The issue for both cases are *errors of law*; and errors of law are abuses of discretion.

A trial court abuses its discretion when its decision or order is manifestly unreasonable, exercised on untenable grounds, or exercised for untenable reasons. Untenable reasons include errors of law.

*Noble v. Safe Harbor Family Preservation Trust*, 167 Wn.2d 11, 17, 216 P.3d 1007 (2009) (emphasis added). *See also* RAP 7.3 for the courts' broad power to achieve orderly management of the case.

### C. The Definition of "Toll"

In this case, the very definition of "toll" is itself the thing to be decided, and to be *construed by the court*, not merely "found" in some self-enacting way, given all the contextual values of access to courts that are at stake in this decision.

To counter the Respondents' list of definitions of "toll," offered at *Response Brief p. 20*, two competing definitions of "toll," from legal authority, are offered by the Appellants.

#### 1. "Toll" Means "To Make Null: Remove."

The *Castro v. Stanwood* definition would serve the Kloehns nicely (emphasis added):

In *Medina*, we provided definitions to support our finding that the term “toll” was not ambiguous. First, we looked to the standard **\*\*1168 dictionary definition for “toll”**: “‘to take away: make null: REMOVE <[ ]the statute of limitations>.’” *Medina*, 147 Wash.2d at 315, 53 P.3d 993 (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2405 (1986)).

*Castro v. Stanwood School Dist. No. 401*, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004) (“<[ ]the statute of limitations>” in the original).

**2. “Toll” Means to “Remove Its Bar of the Action”**

The *Hamilton v. Pearce* court offered the following definition of “toll” (emphasis added):

In our opinion this past usage has been correct. By definition, to Toll a statute of limitations means to show facts which remove its bar of the action. Black’s Law Dictionary 1658 (Rev. 4th ed. 1968); 2 Bouvier’s Law Dictionary 3283 (3rd rev. ed. 1914).

*Hamilton v. Pearce*, 15 Wash.App. 133, 138, 547 P.2d 866 (1976).

**3. RCW 7.70.110 Offers a Determinate “Toll” of One Year for Requesting Mediation**

The plain language of RCW 7.70.110 is a determinate “tolling” of one year. A good faith request for mediation was made in this case (in 2007 and in 2009), and that request increases the statute of limitations from three to four years.

This plain statutory language should govern to provide the Kloehns with access to the courts on their second case, in the event that the first dismissal of their case is not also reversed.

**D. Defendants' Refusal to Produce Medical Records – A Basis for Equitable Tolling**

The Respondents refused to produce their medical records at the request of the Appellants, which brings their behavior squarely under the equitable tolling doctrine of *Cox v. Oasis Physical Therapy, PLLC*, 153 Wn.App. 176, 222 P.3d 119 (2009):

The statute of limitations for medical negligence is tolled by proof of intentional concealment. RCW 4.16.350(3). This provision “requires more than just the alleged negligent act or omission forming the basis for the cause of action.” *Gunnier v. Yakima Heart Ctr., Inc.*, 134 Wash.2d 854, 867, 953 P.2d 1162 (1998). Rather, the provision “is aimed at conduct or omissions intended to prevent the discovery of negligence or of the cause of action.” *Id.* Ms. Cox argues her case is like *Duke v. Boyd* and *Doe v. Finch*. See *Duke v. Boyd*, 133 Wash.2d 80, 942 P.2d 351 (1997); *Doe v. Finch*, 133 Wash.2d 96, 942 P.2d 359 (1997).

*Cox*, 153 Wn.App at 187.

The Respondents also had notice of a possible suit back in 2007, as their own witness testified. CP: 129

(See the *Cox* case, at 153 Wn.App. 124, also, for the following: “A motion for summary judgment based on a statute

of limitations should be granted only if the record demonstrates that there is no genuine issue of material fact as to when the statutory period commenced.” *Zaleck v. Everett Clinic*, 60 Wash.App. 107, 110, 802 P.2d 826 (1991) (citing *Olson v. Siverling*, 52 Wash.App. 221, 224, 758 P.2d 991 (1988)).

Here we have a genuine issue of material fact, and summary dismissal should be reversed.

**E. Respondents Did Not Preserve Objection to Mr. Anderson’s Declaration**

The Respondents, at their page 18, seek to render Mr. Anderson’s affidavit inadmissible, but did not object to this affidavit in the court below.

Proper objection must be made at trial to perceived errors in admitting or excluding evidence and failure to do so precludes raising the issue on appeal. *State v. Guly*, 104 Wash.2d 412, 421, 705 P.2d 1182 (1985).

*State v. Thomas*, 150 Wn.2d 821, 856, 83 P.3d 970 (2004).

This objection by the Respondents is too late, although this is a proper matter for factual determination at trial.

**VIII. THE FOREST OF THE ARGUMENT AMIDST THE TREES OF CONTENTION AND RELIEF REQUESTED**

There are many side debates that comprise the “trees” of

this case, but the “forest” is the following:

Ms. Kloehn is not to blame for Ms. Ochoa-Lawrence’s firm going under. Mr. Mason did what he could to protect Ms. Kloehn before he left the Ochoa-Lawrence Law Group.

Construing the facts in favor of Ms. Kloehn, the fact of service of the RCW 7.70.100 notice and 7.70.110 request for mediation occurred in August of 2007. Ms. Kloehn is not to blame.

Ms. Gloria Ochoa (no longer married to Mr. Lawrence) did not maintain the necessary records, and it was credible that all the records that could be found in the remnants of the defunct firm were those provided by Mr. Anderson. This factual situation creates a question of fact, and on that basis, the first dismissal of 2/5/10, should be reversed.

If the 2/5/10 dismissal of the Kloehn suit is to be upheld, then RCW 7.70.110 should be construed to provide Ms. Kloehn with a four-year statute of limitations, within which her properly served and acknowledged RCW 7.70.110 request for mediation (and law suit filed in conformity with RCW 7.70.100 timelines) should proceed.

The prejudice to Ms. Kloehn if her first suit is dismissed, but her second suit allowed to proceed, is that the Respondents

will be tempted to confess that all their malpractice dates back to the first surgery of October 11, 2005, which will falls prior to the 12/1/09 and 12/2/09 notices on a four year statute of limitations basis from those dates.

The dates of her medical procedures about which malpractice is alleged were, on or about, 10/11/05, 12/5/05, 12/11/05, 12/23/05, 1/27/06, and 1/27/06. *See CP#1: 2-5.*

With the foregoing in mind, Mr. and Mrs. Kloehn request the following relief:

(1) That the first Kloehn case be allowed to proceed, contingent upon the factual question of service of the good faith request for mediation under RCW 7.70.110 being found in her favor by the trier of fact, and with this court construing the implications of *Waples v. Yi*, 169 Wn.2d 152, 234 P.3d 187 (2010) regarding the RCW 7.70.100 notice, as applied to both cases.

(2) That the second Kloehn case be allowed to definitively proceed regarding all medical negligence occurring after 12/2/05.

Respectfully requested,

1/3/11

  
Craig A. Mason, WSBA#32962  
Attorney for Appellants

## APPENDIX

### STATUTES: RCW 7.70.100/110

#### RCW 7.70.110

##### **Mandatory mediation of health care claims — Tolling statute of limitations.**

The making of a written, good faith request for mediation of a dispute related to damages for injury occurring as a result of health care prior to filing a cause of action under this chapter shall toll the statute of limitations provided in RCW 4.16.350 for one year.

#### RCW 7.70.100

##### **Mandatory mediation of health care claims — Procedures.**

(1) No action based upon a health care provider's professional negligence may be commenced unless the defendant has been given at least ninety days' notice of the intention to commence the action. The notice required by this section shall be given by regular mail, registered mail, or certified mail with return receipt requested, by depositing the notice, with postage prepaid, in the post office addressed to the defendant. If the defendant is a health care provider entity defined in RCW 7.70.020(3) or, at the time of the alleged professional negligence, was acting as an actual agent or employee of such a health care provider entity, the notice may be addressed to the chief executive officer, administrator, office of risk management, if any, or registered agent for service of process, if any, of such health care provider entity. Notice for a claim against a local government entity shall be filed with the agent as identified in RCW 4.96.020(2). Proof of notice by mail may be made in the same manner as that prescribed by court rule or statute for proof of service by mail. If the notice is served within ninety days of the expiration of the applicable statute of limitations, the time for the commencement of the action must be extended ninety days from the date the notice was mailed, and after the ninety-day extension expires, the claimant shall have an additional five court days to commence the action.

(2) The provisions of subsection (1) of this section are not applicable with respect to any defendant whose name is unknown to the plaintiff

at the time of filing the complaint and who is identified therein by a fictitious name.

(3) After the filing of the ninety-day presuit notice, and before a superior court trial, all causes of action, whether based in tort, contract, or otherwise, for damages arising from injury occurring as a result of health care provided after July 1, 1993, shall be subject to mandatory mediation prior to trial except as provided in subsection (6) of this section.

(4) The supreme court shall by rule adopt procedures to implement mandatory mediation of actions under this chapter. The implementation contemplates the adoption of rules by the supreme court which will require mandatory mediation without exception unless subsection (6) of this section applies. The rules on mandatory mediation shall address, at a minimum:

(a) Procedures for the appointment of, and qualifications of, mediators. A mediator shall have experience or expertise related to actions arising from injury occurring as a result of health care, and be a member of the state bar association who has been admitted to the bar for a minimum of five years or who is a retired judge. The parties may stipulate to a nonlawyer mediator. The court may prescribe additional qualifications of mediators;

(b) Appropriate limits on the amount or manner of compensation of mediators;

(c) The number of days following the filing of a claim under this chapter within which a mediator must be selected;

(d) The method by which a mediator is selected. The rule shall provide for designation of a mediator by the superior court if the parties are unable to agree upon a mediator;

(e) The number of days following the selection of a mediator within which a mediation conference must be held;

(f) A means by which mediation of an action under this chapter may be waived by a mediator who has determined that the claim is not appropriate for mediation; and

(g) Any other matters deemed necessary by the court.

(5) Mediators shall not impose discovery schedules upon the parties.

(6) The mandatory mediation requirement of subsection (4) of this section does not apply to an action subject to mandatory arbitration under chapter 7.06 RCW or to an action in which the parties have agreed, subsequent to the arising of the claim, to submit the claim to arbitration under chapter 7.04A or 7.70A RCW.

(7) The implementation also contemplates the adoption of a rule by the supreme court for procedures for the parties to certify to the court the manner of mediation used by the parties to comply with this section.

[2007 c 119 § 1; 2006 c 8 § 314; 1993 c 492 § 419.]

**RAPS: RAP 2.4(f), RAP 7.3 & RAP 9.10**

**RAP 2.4(f):** (f) Decisions on Certain Motions Not Designated in Notice. An appeal from a final judgment brings up for review the ruling of the trial court on an order deciding a timely motion based on (1) CR 50(b) (judgment as a matter of law), (2) CR 52(b) (amendment of findings), (3) CR 59 (reconsideration, new trial, and amendment of judgments), (4) CrR 7.4 (arrest of judgment), or (5) CrR 7.5 (new trial).

**RAP 7.3:** The appellate court has the authority to determine whether a matter is properly before it, and to perform all acts necessary or appropriate to secure the fair and orderly review of a case. The Court of Appeals retains authority to act in a case pending before it until review is accepted by the Supreme Court, unless the Supreme Court directs otherwise.

**RAP 9.10:** If a party has made a good faith effort to provide those portions of the record required by rule 9.2(b), the appellate court will not ordinarily dismiss a review proceeding or affirm, reverse, or modify a trial court decision or administrative adjudicative order certified for direct review by the superior court because of the failure of the party to provide the appellate court with a complete record of the proceedings below. If the record is not sufficiently complete to permit a decision on the merits of the issues presented for review, the appellate court may, on its own initiative or on the motion of a party (1) direct the transmittal of additional clerk's papers and exhibits or

administrative records and exhibits certified by the administrative agency, or (2) correct, or direct the supplementation or correction of, the report of proceedings. The appellate court may impose sanctions as provided in rule 18.9(a) as a condition to correcting or supplementing the record on review. The party directed or permitted to supplement the record on review must file either a designation of clerk's papers as provided in rule 9.6 or a statement of arrangements as provided in rule 9.2 within the time set by the appellate court.

**COURT RULES: CR 4(g)(7)**

**CR 4(g)(7):** In case of service otherwise than by publication, the return, acceptance, admission, or affidavit must state the time, place, and manner of service. Failure to make proof of service does not affect the validity of the service.