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COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

IVONNE CAMPBELL and VINCE CAMPBELL,
wife and husband and the marital community thereof,

Plaintiffs-Appellants,

vs.

ANA FERNANDEZ and JOHN DOE FERNANDEZ,
wife and husband and the marital community
composed thereof,

Defendants-Respondents.

APPELLANTS' REPLY BRIEF

Bryant Sutton
WSBA #51602
Calbom & Schwab Law Group, PLLC
1240 South Pioneer Way
Moses Lake, WA 98837
(509) 765-1851

George M. Ahrend
WSBA #25160
David C. Whisenand
WSBA #55213
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000

Co-Attorneys for Plaintiffs/Appellants

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REPLY

Plaintiffs-Appellants Ivonne and Vince Campbell (“Campbell”) submit this reply to the Brief of Respondent, filed on behalf of Defendant-Respondent Ana Fernandez (“Fernandez”).

A. In her response brief, Fernandez makes dispositive concessions regarding whether the superior court’s dismissal of Campbell’s first lawsuit on procedural grounds was “on the merits” for purposes of res judicata.

In the opening brief, Campbell argued that the superior court below erred in dismissing the second lawsuit on grounds of res judicata because the dismissal of the first lawsuit for insufficiency of service and a resulting lack of personal jurisdiction was not “on the merits.” *See* App. Br., at 8-14. This is a threshold requirement for application of the doctrine of res judicata, which ensures that litigants receive their day in court. *See* App. Br., at 9 (citing, *inter alia*, *Reninger v. State Dep’t of Corr.*, 134 Wn.2d 437, 454, 951 P.2d 782, 791 (1998), and *Weaver v. City of Everett*, 194 Wn.2d 464, 483, 450 P.3d 177, 187 (2019)). A litigant is only entitled to “one bite of the apple,” *Reninger*, 134 Wn.2d at 454; but they are entitled to at least one “bite,” *Weaver*, 194 Wn.2d at 483. Whether a prior dismissal is on the merits is subject to de novo review. *See* App. Br., at 8 (citing *Fortson-Kemmerer v. Allstate Ins. Co.*, 198 Wn. App. 387, 393, 393 P.3d 849, 853

(2017), *rev. denied*, 189 Wn. 2d 1039, 409 P.3d 1071 (2018)); *Weaver*, 194 Wn.2d at 473.

In response, Fernandez concedes what she describes as “a general rule that when a case has been dismissed on a procedural issue the court has not given the prior determination res judicata effect because the dismissal was not on the merits[.]” Resp. Br., at 22. Fernandez further concedes there is “a vast number of cases for the proposition that dismissal for lack of service is not on the merits,” and “an equally vast number of cases for the proposition that res judicata does not apply to a dismissal that was not on the merits,” and she does not cite any contrary authority. Resp. Br., at 18. Lastly, Fernandez concedes that application of res judicata is reviewed de novo. *See* Resp. Br., at 18 (citing *Fortson-Kemmerer*, 198 Wn. App. at 393).

Despite these concessions, Fernandez contends there is no authority that would “definitively link” the admittedly vast number of cases supporting the proposition that dismissal for insufficient service is not on the merits with the also admittedly vast number of cases supporting the proposition that res judicata does not apply to dismissal on the merits. Resp. Br., at 18. The definitive link is established by deductive reasoning from the undisputed facts and law. The propositions conceded by Fernandez lead inexorably to the conclusion that dismissal for insufficient service should

not be given res judicata effect because insufficient service does not involve the merits of a claim.

This reasoning is supported by Washington authorities limiting res judicata to decisions on the merits and describing service of process as a procedural requirement and insufficiency of service as a procedural defense, both of which are distinguished from the merits of an action. *See* App. Br., at 9-11. None of these authorities have been addressed by Fernandez.

This reasoning is further supported by the authorities from other jurisdictions specifically holding that dismissal for insufficiency of service or a resulting lack of personal jurisdiction is not deemed to be on the merits for purposes of res judicata. *See* App. Br., at 11-14. Again, Fernandez does not address these authorities, which are consistent with Washington law and expressly make the “definitive link” Fernandez claims is lacking.

In accordance with Fernandez’s concessions, and the logical conclusions to be drawn from her concessions, the Court should hold that the superior court’s dismissal of Campbell’s first lawsuit based on insufficiency of service and a resulting lack of personal jurisdiction was not on the merits, and that the lower court erred in giving the dismissal res judicata effect in Campbell’s second lawsuit.

B. Fernandez’s attempts to portray the superior court’s dismissal of Campbell’s first lawsuit as being “on the merits” for purposes of res judicata are meritless.

While conceding the dispositive points, Fernandez makes two arguments why, in her estimation, the superior court’s dismissal of Campbell’s first lawsuit on grounds of insufficiency of service should nonetheless be considered “on the merits” and be given res judicata effect. Neither of the arguments has any merit, nor do they lend any support to the superior court’s decision dismissing Campbell’s second lawsuit on grounds of res judicata.

1. Contrary to Fernandez, Campbell had the ability to “cure,” and did in fact cure, the allegedly insufficient service of process; although the ability to cure has no bearing on whether a judgment is “on the merits” for purposes of res judicata.

Fernandez argues that the dismissal based on insufficiency of service is on the merits because it cannot be “cured.” Resp. Br., at 19-20. This argument is inapt because Campbell was able to, and did in fact, cure the allegedly improper service of the first lawsuit by tentatively commencing the second lawsuit within the applicable limitations period and accomplishing service within 90 days after commencement of the second action. *See* RCW 4.16.170; *Banzeruk v. Estate of Howitz ex rel. Moody*, 132 Wn. App. 942, 947, 135 P.3d 512, 514 (2006).

In any event, the ability to cure a procedural defect is not determinative of, or even relevant to, the issue whether a prior decision was on the merits for purposes of res judicata. As support for her argument, Fernandez cites *State ex rel. Hamilton v. Cohn*, 1 Wn.2d 54, 62-63, 95 P.2d 38, 42 (1939), which held that a dismissal of a claim on grounds that an action was prematurely brought is not on the merits and does not therefore bar another action on the same claim. *See* Resp. Br., at 19-20. *Hamilton* does not suggest that the distinction between a procedural decision and a decision on the merits hinges upon the ability to cure, and does not even mention the word “cure.”

On the contrary, *Hamilton* recognized that “[a] judgment is not conclusive ... on any point or question which, from the nature of the cause, the form of the action, or the character of the pleadings, could not have been adjudicated in the action in which it was rendered, nor as to any matter which must necessarily have been excluded from consideration[,]” and “[t]he principle of estoppel by judgment is not dependent on the form or the object of the litigation in which the adjudication was made; it is only essential that there should have been a judicial determination of rights in controversy with a final decision thereon.” 1 Wn.2d at 59-60 (brackets & ellipses added).

Hamilton adopted a presumption against finding a case was decided on the merits where the case presents multiple issues, stating:

If there were two issues or questions (constitutionality of the exemption section of the statute raised expressly by the parties and the question of prematurity of the action disclosed by the pleadings and raised by us) in the original proceeding in this court for writ of mandamus upon either of which our order denying the petition could have rested, one going to the merits and the other not,-if the order does not disclose, or in the absence of a finding or adjudication on one or both of the issues or questions-the disposition of the cause will generally be considered as resting upon the issue which did not go to the merits; the merit remaining unadjudicated unless the order or judgment appears to have been upon the merits.

Id. at 63-64. In this way, *Hamilton* supports the distinction between a procedural decision and a decision on the merits made by Campbell, without regard for the ability to cure.

Fernandez also cites *In re Cogswell's Estate*, 189 Wash. 433, 436, 65 P.2d 1082, 1082 (1937), to support her argument that the ability to cure is somehow relevant. *See* Resp. Br., at 20. *Cogswell's Estate* noted that dismissal of a claim on grounds of lack of jurisdiction would not have res judicata effect. However, as with *Hamilton*, *Cogswell's Estate* does not suggest that the ability to cure is relevant to the issue of res judicata, nor does it mention the word "cure."

On the contrary, *Cogswell's Estate* recognizes that a decision "based upon the manner in which the proceedings were brought," also described as "a mere question of procedure," does not have res judicata effect. 189 Wash.

at 436. In this way, *Cogswell's Estate* provides additional support for Campbell, not Fernandez.

2. Contrary to Fernandez, dismissal of a lawsuit on procedural grounds is not deemed to be “on the merits” for purposes of res judicata, even if the dismissal is “with prejudice.”

Fernandez argues that the superior court’s dismissal of Campbell’s first lawsuit was on the merits because it was “with prejudice.” Resp. Br., at 20-21. This is simply incorrect. In *Ullery v. Fulleton*, 162 Wn. App. 596, 605-06, 256 P.3d 406, 412, *rev. denied*, 173 Wn.2d 1003 (2011), this Division of the Court of Appeals held that a dismissal based on a procedural issue such as lack of standing or jurisdiction is *not* on the merits, regardless of whether it is specifically denominated as a dismissal “with prejudice.”¹

Ullery cited the Restatement (Second) of Judgments § 20 (1982), as support for its holding. *See* 162 Wn. App. at 606. This Restatement section provides in pertinent part:

(1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:

¹ *Accord State v. Kimble*, 2020 WL 1282510, at *3-4 (Wn. App., Mar. 17, 2020) (citing *Ullery* with approval for the proposition that, “[i]n evaluating whether there is a final judgment on the merits, courts must consider whether the claim was properly resolved on the merits as opposed to procedural grounds”; brackets added). *Kimble* is properly cited as persuasive authority pursuant to GR 14.1.

(a) *When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties; or*

(b) When the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice; or

(c) When by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made.

(2) A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

Restatement (Second) of Judgments § 20 (emphasis added). The official comments to the Restatement explain:

*d. Specification that dismissal on any of the grounds in Subsection (1)(a) is “with prejudice” or “on the merits”. A court in dismissing on any of these grounds may specify that its decision is “with prejudice” or “on the merits”, or words to that effect. While there are instances in which a court may have discretion to determine that a judgment of dismissal shall operate as a bar (see Comment *n* to this Section), a judgment may not have an effect contrary to that prescribed by the statutes, rules of court, or other rules of law operative in the jurisdiction in which the judgment is rendered. Thus in a jurisdiction having a rule patterned on Rule 41(b) of the Federal Rules of Civil Procedure, a dismissal for lack of jurisdiction, for improper venue, or for nonjoinder may not be a bar regardless of the specification made. And even in the absence of such a rule, **a dismissal on any of these grounds is so plainly based on a threshold determination that a specification that the dismissal will be a bar should ordinarily be of no effect.***

Id. § 20 cmt. *d* (emphasis added). *Ullery* and the Restatement demonstrate that, for purposes of res judicata, it is irrelevant whether the superior court’s dismissal of Campbell’s first lawsuit on grounds of insufficiency of service and a resulting lack of personal jurisdiction was “with prejudice.”²

Fernandez does not acknowledge *Ullery* or the Restatement in her briefing. Instead, she cites *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866 n.10, 93 P.3d 108 (2004), for the proposition that a dismissal with prejudice is deemed to be on the merits for purposes of res judicata. *See* Resp. Br., at 20-21. In context, the dismissal at issue in *Hisle* was on the merits because it was entered pursuant to a settlement agreement. *See* 151 Wn.2d at 859. A dismissal with prejudice pursuant to a settlement represents an agreed resolution of the merits of a lawsuit. *See* Kathleen M. McGinnis, *Revisiting Claim and Issue Preclusion in Washington*, 90 Wash. L. Rev. 75, 86 (2015) (“when a court enters judgment based on the parties’

² Several authorities from other jurisdictions cited in App. Br. at 11-14 directly address the issue of a dismissal with prejudice. *Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1164 (9th Cir. 2016) (declining to give dismissal with prejudice res judicata effect when it had alternative bases, one of which was lack of personal jurisdiction; citing Restatement (Second) of Judgments § 20(1) for the proposition that a dismissal for lack of personal jurisdiction is not “on the merits”); *Danziger & De Llano, LLP v. Morgan Verkamp LLC*, 948 F.3d 124, 132–33 (3d Cir. 2020) (finding a dismissal with prejudice not to be an adjudication on the merits when it was based on a finding of lack of personal jurisdiction); *Wallace v. Holden*, 297 Or. App. 824, 841, 445 P.3d 914, 924-25, *rev. denied*, 365 Or. 557, 451 P.3d 1005 (2019) (affirming the trial court’s holding that there was no personal jurisdiction but remanding for the order to be entered without prejudice instead of with prejudice since a lack of personal jurisdiction is not on the merits); *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1221 (11th Cir. 1999) (instructing court to dismiss claims without prejudice and describing previous dismissal with prejudice as error because the dismissal was on jurisdictional grounds).

consent or on a settlement, that judgment is on the merits, and typically will preclude later actions on the claims that were or should have been raised in the case”). It nothing like a dismissal of a lawsuit on procedural grounds, and there is no reason to depart from the holding in *Ullery* or the Restatement in this case.³

C. Contrary to Fernandez, *Banzeruk* is persuasive authority supporting Campbell’s argument.

In the opening brief, Campbell cited *Banzeruk*, 132 Wn. App. at 947, for the proposition that filing the second lawsuit within the applicable limitations period had the effect of giving her a new 90-day period of time to accomplish personal service on Fernandez under RCW 4.16.170. *See* App. Br., at 7-8 n.4 & 15. Since Campbell was able to personally serve Fernandez within 90 days after filing the second lawsuit, the second lawsuit was validly and timely served and did not suffer from the same alleged procedural defect as the first lawsuit. *See id.* at 15 n.6.

This approach was expressly approved in *Banzeruk*, where the court held that the plaintiff did not receive an additional 90-day period of time to accomplish personal service after she amended her complaint, but instead

³ *Hisle* cited *Maib v. Maryland Casualty Co.*, 17 Wn.2d 47, 135 P.2d 71 (1943), to support the statement that a dismissal with prejudice is on the merits, a fact that was noted by Fernandez. *See* 151 Wn.2d at 865 n.10; Resp. Br., at 20-21. *Maib* recognizes that a dismissal with prejudice is often equivalent to an adjudication on the merits that will operate as a bar to a future action. *See* 17 Wn.2d at 51-52. However, *Maib* also recognizes that a dismissal “because of a procedural error” should not operate as a bar to a future action. *See id.* at 51-52.

suggested that “[i]nstead of amending the original complaint, [the plaintiff] could have tentatively commenced a new action against [the defendant] by filing a new complaint” to obtain an additional 90 days to accomplish service. 132 Wn. App. at 947 (brackets added).

In response, Fernandez states that *Banzeruk* “does not support” Campbell’s argument because the portion of the decision on which Campbell relies is dicta. *See* Resp. Br., at 15-17. While the cited passage from *Banzeruk* is admittedly dicta, the case is nonetheless supportive of Campbell’s argument. *See Pierce County v. State*, 150 Wn.2d 422, 435 n.8, 78 P.3d 640, 648 n.8 (2003) (noting that dicta may be considered persuasive, even though it is not precedential). There is no authority to the contrary that would preclude Campbell’s reliance on *Banzeruk*, nor is there any persuasive reason why this Court should not approve of Campbell’s reliance on *Banzeruk*.

D. Contrary to Fernandez, equity is a basis to limit res judicata, not expand application of the doctrine.

As pointed out in the opening brief, res judicata is an equitable doctrine, and principles of equity limit application of the doctrine. *See* App. Br., at 14-15. Fernandez seems to acknowledge the equitable nature of res judicata. *See* Resp. Br., at 17 (describing res judicata as an “equitable doctrine”). However, she seems to argue that equity is a basis for expanding,

rather than limiting, application of the doctrine. *See id.* at 17 & 23-25. Thus, she seems to argue that Campbell has something akin to unclean hands for not disclosing the existence of the second lawsuit before Fernandez was personally served and for following the procedure described in *Banzeruk*:

Given the fact that Campbell actively tried to hide the fact that two complaints were simultaneously at issue in this case, Campbell's reliance on equity for allowing these cases to continue is not an especially sympathetic position. One must ask what is more inequitable than filing two identical lawsuits to try and game the system and extend a statute of limitations? Unfortunately, Campbell's process has been a deceptive one and should not become precedent for future cases.

Resp. Br., at 24.

Fernandez's unclean hands-type argument is meritless because Campbell was under no duty to disclose the existence of the second lawsuit before it was personally served. Campbell had sound prudential reasons for not disclosing the second lawsuit, e.g., to avoid giving Fernandez an opportunity to evade service, especially given the difficulties in obtaining personal service up to that point in time. In addition, Campbell cannot be faulted for following the procedure expressly approved by the court in *Banzeruk*.

More importantly, however, equitable arguments cannot justify extending application of res judicata to cases like this one, which do not involve a final judgment on the merits. Equity is a basis for declining to

apply res judicata in a case where it would otherwise be appropriate. *See Weaver*, 194 Wn.2d at 482. The “final objective” of the doctrine is “doing justice.” Philip A. Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L. Rev. 805, 842 (1985); *accord Weaver v. City of Everett*, 4 Wn.App.2d 303, 336-37, 421 P.3d 1013 (2018), *aff’d*, 194 Wn.2d 464, 450 P.3d 177 (2019) (quoting Prof. Trautman with approval for this proposition).

In this case, justice requires giving Campbell an opportunity to pursue the claims alleged in the second lawsuit, which were admittedly timely and properly served.⁴

⁴ Fernandez also argues that the prior judgment has “direct estoppel effect.” Resp. Br., at 22. Direct estoppel is sometimes equated with res judicata. *See Puget Sound Nat. Bank v. Ferguson*, 102 Wn. App. 400, 403, 7 P.3d 822, 824 (2000), *rev. denied*, 143 Wn. 2d 1002 (2001). It is sometimes equated with collateral estoppel on the same claim. *See Alcantara v. Boeing Co.*, 41 Wn. App. 675, 679, 705 P.2d 1222, 1225 (1985) (citing Restatement (Second) of Judgments § 27 cmt. b.) Fernandez seems be using direct estoppel in the sense of collateral estoppel on the same claim. However, Fernandez does not address the substantive reasons why direct/collateral estoppel is inapplicable. *See App. Br.*, at 14 n.5. In short, service of process in the first issue did not involve the same issue as service of process in the second lawsuit because service in each case occurred pursuant to different statutory procedures, and at different dates, times and locations. *See id.*

- E. **With respect to service of the first lawsuit, the issue is Campbell’s reasonable belief and good faith rather than Fernandez’s actual address, although Campbell’s belief is well grounded in an investigator’s opinion regarding Fernandez’s actual address.**

Fernandez argues that an address can only be the “last known” address if there is admissible evidence establishing that address is, in fact, a former residence. Resp. Br., at 10 (“RCW 46.64.040 required Campbell to send notice via registered mail to the Jadwin address, as based on the admissible evidence provided by Campbell in response to the Motion to Dismiss that was the only address that could possibly be considered ‘last known’”); *id.* at 10 (alleging there was “no proof” and that it was “unclear” that Fernandez ever resided at that address). Fernandez never provides any authority for this alleged requirement of admissible proof, and it is based on a misapprehension of the applicable law.

1. **The “last known” address is where the plaintiff “reasonably believes the defendant has most recently lived, based on good faith and reasonable efforts to locate the defendant.”**

In *James v. McMurry*, 195 Wn. App. 144, 157, 380 P.3d 591, 597 (2016), the Court held that compliance with RCW 46.64.040 “requires only that a plaintiff mail process and the affidavits to the address at which the plaintiff *reasonably believes* the defendant has most recently lived, based on *good faith and reasonable efforts* to locate the defendant.” (Emphasis added.) There is no requirement of proof of the defendant’s actual former

residence. In *James* the investigator provided the wrong address, but the court still found reliance on the investigator to be reasonable and service on the address to be based on good faith and reasonable efforts. 195 Wn. App. at 157.

While Fernandez argues that “*James* simply does not speak to the issue of proof that the trial court found here,” Resp. Br., at 13; this is because the actual address involves a separate issue from the plaintiff’s reasonable belief and good faith. *James* does address proof of reasonable belief by finding that reliance on a private investigator’s findings was reasonable and in good faith. 195 Wn.App. at 157. There is no discussion of the investigator’s methods, and it was irrelevant that the investigator’s methods yielded incorrect information. *Id.* at 155.

Fernandez’s argument is similar to the defendant’s argument in *James*, where the defendant argued that “defendant’s ‘last known address’ should be interpreted as the known address at which the defendant in fact most recently resided.” 195 Wn. App. at 155; *cf.* Resp. Br., at 10 (“at no point did Campbell attempt to give the required notice to Fernandez via registered mail to either of the two residences where it was known she previously resided”). *James* rejects this argument as “bluntly at odds with the legislature’s intent to create a convenient method for bringing an action against a motorist.” 195 Wn. App. at 157. The address that the plaintiff

reasonably believes to be most recent after a good faith and reasonable effort “will also be reasonably calculated to provide notice to the defendant.” *Id.* at 156.

2. Contrary to Fernandez, *James* does address the issue of what is required to show an address is the “last known” address.

Fernandez argues that:

Regarding proof, *James* only addresses the need to file the statutory affidavits of compliance and due diligence with the trial court, which *James* found no such requirement. *Id.* The filing or not filing of said affidavits is not at issue in this case.

Resp. Br., at 12-13. This is a misreading of *James*. There were three main arguments addressed in *James*:

This case presents us with three separate procedural questions related to RCW 46.64.040, the statute providing for alternative service of process on a defendant motorist via the secretary of state. We must address (1) whether the statute requires filing an affidavit of compliance with the trial court, (2) ***whether a defendant's most recent address known to the plaintiff is his “last known address”*** within the meaning of the statute, and (3) whether the statute requires attempted personal service at all known past addresses.

195 Wn. App. at 149 (emphasis added). *James* found sufficient proof of reasonable reliance and good faith efforts when the plaintiffs hired a professional investigator to find the most recent address and the investigator provided a list of addresses, designating one as most recent. *Id.* at 148. The holding provides no other facts necessary to show reasonable reliance.

3. Even though not required by *James*, Campbell provided additional proof that reliance on the investigator's research was reasonable.

As noted above, reliance on a professional investigator is reasonable unless the research is patently defective or flawed, and here there is no allegation that the research was patently defective or flawed. Even though it is not necessary, counsel for Campbell described the methods he believed the investigator used.

Using her name and birthdate, [the investigator] located Defendant Ana Fernandez in Arizona and provided three addresses associated with her. *Using the Credit Bureau, he identified the most recent address* as [1st St. address]

CP 80-81 (emphasis; brackets added). On reconsideration, Campbell provided a declaration from the investigator confirming and expanding on this description, explaining his research methods and his conclusion. CP 137-40.⁵

4. The description of the investigator's research methods contained in counsel for Campbell's declaration is not hearsay because it is not offered for the truth of the matter asserted.

Fernandez characterizes the statements about research methods contained in counsel for Campbell's declaration as "hearsay" and therefore inadmissible. Resp. Br., at 12. This is presumably because Fernandez

⁵ Fernandez wrongly claims that there was "no proof that Fernandez ever lived there." Resp. Br., at 10. The evidence was referred to in the Response to the Motion to Dismiss, and then elaborated on in the Motion for Reconsideration. CP 80-81 & 137-40.

characterizes them as attempts to provide evidence of what the investigator actually did. *See* Resp. Br., at 12. “‘Hearsay’ is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” ER 801(c). These statements are not offered for the truth of the matter asserted because it is not the actual research that is at issue, but whether counsel *reasonably relied* on the investigator’s findings. The statements describe what counsel *thought* the investigator did and *why* counsel relied on the investigator. They are offered to explain the fact of counsel’s reliance on the investigator, which is not hearsay. *Northwick v. Long*, 192 Wn. App. 256, 266, 364 P.3d 1067, 1072 (2015) (testimony about statements of another are admissible when offered to prove the effect it had on the listener).⁶

F. Fernandez still fails to satisfy her burden to prove, by clear and convincing evidence, that service of the first lawsuit was improper.

Fernandez concedes that when a defendant moves to dismiss on the basis of improper service, the plaintiff simply has the burden of making a

⁶ Proof of service under the Civil Rules simply requires an affidavit stating the time, place, and manner of service. CR 4(g)(2) & (7). Such proof of service is not subject to the normal prohibition against hearsay. *Marsh-McLennan Bldg., Inc. v. Clapp*, 96 Wn. App. 636, 641, 980 P.2d 311, 314 (1999) (“Proofs of service of summons by affidavit prepared under CR 4(g) have been identified as a type of hearsay evidence whose admission has been preserved under ER 802’s statement that ‘[h]earsay is not admissible except as provided by these rules, by other court rules, or by statute’”; quotation & brackets in original). In any event, “[f]ailure to make proof of service does affect the validity of the service.” CR 4(g)(7) (brackets added).

prima facie showing of proper service. *Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155, 1159 (2014); Resp. Br., at 8. If the plaintiff makes the requisite showing, then the burden shifts to the defendant to prove by clear and convincing evidence that service was improper. *Witt v. Port of Olympia*, 126 Wn. App. 752, 757, 109 P.3d 489, 491 (2005), *disapproved on other grounds by Durland v. San Juan Cty.*, 182 Wn.2d 55, 340 P.3d 191 (2014); Resp. Br., at 8. The parties agree that clear and convincing evidence is evidence that shows the ultimate fact at issue to be “highly probable.” *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705 (2014); Resp. Br., at 8-9.

Fernandez argues for the first time on appeal that Campbell failed to make a prima facie showing of proper service. Resp. Br., at 9. In the superior court, Fernandez acknowledged that Campbell “may be able to meet their initial burden.” CP 61 (line 22). In her response brief, Fernandez argues that Campbell did not meet her burden because she “failed to provide admissible evidence to make the requisite showing of proper service.” Resp. Br., 11. No authority is cited for this proposition. Fernandez also notes that there is no affidavit regarding the “alleged service through the secretary of state.” Resp. Br., at 12.

A plaintiff can meet the prima facie burden through a facially correct return of service. *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745, 749 (1997). This is not limited to affidavits but includes any return of

service under CR 4(g). “A plaintiff can also establish proof of service by ‘[t]he written acceptance or admission of the defendant, his agent or attorney’ of the time, place, and manner of service.” *Scanlan*, 181 Wn.2d at 848 (citing CR 4(g)(5) & (7)). RCW 46.64.040 provides that, under the conditions in the statute, the secretary of state becomes the “true and lawful attorney upon whom may be served all lawful summons and processes[.]” (brackets added). Written acceptance of service from the secretary of state pursuant to RCW 46.64.040 is thus a facially valid return of service through CR 4(g). This admission has been provided. CP 91 (signed letter from the office of the secretary of state by an appointed agent acknowledging service on December 21, 2019 through files received at the office including the summons and complaint). No defect has been alleged in this admission. In addition to this admission of service, Campbell also provided a declaration that provides prima facie evidence of reasonable reliance and due diligence as required by *James*. CP 80-81; 195 Wn. App. at 157; *see* CP 82 (declaration describing service on Secretary of State); CP 92-95 (affidavit of compliance with RCW 46.64.040).

Because Campbell has made a prima facie showing of proper service, the burden shifts to Fernandez to show by clear and convincing evidence that service was improper. She cannot do this because a failure to provide evidence of an investigator’s actual methods does not make it

“highly probable” that reliance on that investigator was unreasonable, especially when counsel’s beliefs about those methods were both provided in a declaration *and* provided a reasonable basis for reliance. Fernandez does not otherwise contest that it was reasonable for counsel for Campbell to rely on the investigator’s methods as he understood them, and the Court should hold that service was proper in Campbell’s first lawsuit.

Respectfully submitted this 7th day of April, 2020.

s/George M. Ahrend

George M. Ahrend, WSBA #25160

Ahrend Law Firm PLLC

100 E. Broadway Ave.

Moses Lake, WA 98837

(509) 764-9000

Email gahrend@ahrendlaw.com

s/David C. Whisenand

David C. Whisenand, WSBA #55213

Ahrend Law Firm PLLC

100 E. Broadway Ave.

Moses Lake, WA 98837

(509) 764-9000

Email gahrend@ahrendlaw.com

s/Bryant Sutton

Bryant Sutton, WSBA #51602

Calbom & Schwab Law Group, PLLC

1240 South Pioneer Way

Moses Lake, WA 98837

(509) 765-1851

Email bsutton@cslawteam.com

Co-Counsel for Plaintiffs/Appellants

CERTIFICATE OF SERVICE

The undersigned certifies the following under oath and penalty of perjury of the laws of the State of Washington:

On the date set forth below, I electronically filed the foregoing with the Washington State Appellate Court's Secure Portal system, which will send notification and a copy of this document to all counsel of record:

Joel R. Comfort
John A. Rashko
Miller, Mertens & Comfort PLLC
1020 North Center Parkway, Ste B
Kennewick, WA 99336
jcomfort@mmclegal.net
jrashko@mmclegal.net
sharris@mmclegal.net

and via email to co-counsel for Plaintiffs/Appellants pursuant to prior agreement to:

Bryant Sutton at bsutton@cslawteam.com

Signed at Soap Lake, Washington, on April 7, 2020.

s/George M. Ahrend
George M. Ahrend, WSBA #25160
Ahrend Law Firm PLLC
100 E. Broadway Ave.
Moses Lake, WA 98837
(509) 764-9000
Email gahrend@ahrendlaw.com

AHREND LAW FIRM PLLC

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