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(consolidated with 369811)

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' OPENING BRIEF

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ASSIGNMENTS OF ERROR

1. The superior court erred in dismissing the complaint in Cause No. 18-2-01976-03. CP 56-59.
2. The superior court erred in denying reconsideration of the order dismissing Cause No. 18-2-01976-03. CP 147-48.
3. The superior court erred in dismissing the complaint in Cause No. 18-2-03274-03. CP 326-27.

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is the dismissal of a complaint based on insufficiency of service of process or lack of personal jurisdiction “on the merits,” as required for res judicata?
2. Is it equitable to apply res judicata under the circumstances present in this case?
3. Did Plaintiff-Appellant properly serve Defendant-Respondent under RCW 46.64.040? In particular, did Defendant-Respondent satisfy her burden to prove by clear and convincing evidence that Plaintiff-Appellant did not mail service documents to what she reasonably believed was Defendant-Respondent’s last known address?

STATEMENT OF THE CASE

Around 5:20 pm on December 22, 2015, Plaintiff-Appellant Ivonne Campbell was driving a 2012 Toyota Prius northbound on Highway 395 heading towards the Pioneer Memorial Bridge. CP 3. Defendant-Respondent Ana Fernandez was driving a 2010 Nissan Armada, a large sport utility vehicle, behind Campbell’s Prius and a 2014 Honda Accord.

Fernandez failed to notice that traffic was slowing and rear-ended the Honda. CP 3:3-22. The force of the impact caused the Honda to collide with Campbell. CP 19-22. Campbell was seriously injured in the collision. CP 3:23-24, 4:23-6:8.

Before filing a complaint, counsel for Campbell contacted Investigator Ken Taylor on August 3, 2018, asked him to locate Fernandez, and provided him with copies of the summons and complaint to accomplish service on her. CP 128:3-7; CP 135:25-136:3. Four days later, on August 7, Campbell filed the complaint in the Superior Court for Benton County. CP 1. This became Cause No. 18-2-01976-03 (“first lawsuit”). CP 1. The complaint alleged negligence and sought damages for the injuries suffered by Campbell and for her husband’s loss of consortium. CP 1-7.

The same day the complaint was filed, August 7, Taylor attempted to serve Fernandez at the address listed on the police report from the accident, i.e., 728 W Agate St, Apt B, Pasco, WA 99301. CP 128:3-7; CP 130. A Hispanic family at that address informed him that they had moved there some months before and that they did not know Ana Fernandez. CP 128:8-10. Taylor then performed a skip trace using the IRB

Search database.¹ CP 128:10-13. The search yielded an address for Fernandez at 69 Jadwin, Apt 19 Richland WA 99352. CP 128:12-15.

On August 10, Taylor served the summons and complaint at 69 Jadwin, Apt. 19 Richland, WA 99352. CP 135:25-136:18. According to Taylor, a woman answered, stating that she was Ana's grandmother but refusing to give her own name. CP 128:20-129:1; 136:4-6. She acknowledged that Ana resided with her and promised to deliver the documents to her. CP 128:20-129:1; 136:4-6. Taylor left the documents with the woman at that address. CP 128:20-129:1; 136:4-6.

After service on the woman who said she was Fernandez's grandmother, counsel appeared October 5 on Fernandez's behalf. CP 19:9-10. Counsel filed an answer on her behalf on October 17. CP 13. The answer did not allege a lack of personal jurisdiction or insufficiency of service of process. CP 13-17.

On November 8, Campbell received responses to her first request for admissions. CP 27:20-28:4; CP 80:14-22. They included a standard request asking Fernandez to admit she was not contesting service of process. CP 27:20-28:4; CP 80:14-22; CP 87:5-7. Fernandez responded as follows: "[d]efendant has made reasonable inquiry into the Request for Admission

¹ See <https://www.irbsearch.com/index.html> (viewed January 22, 2020).

and the information known or readily obtainable by Defendant is insufficient to enable Defendant to admit or deny. If an answer is required Defendant denies.” CP 87:5-10. This was the first indication of any problem regarding the sufficiency of service.

Immediately after receiving the foregoing answer, Campbell hired a private investigator, Michael Briggs, to confirm Fernandez’s location and serve her again, if necessary. CP 80:23-26. Based on Fernandez’s name and birthday, Briggs found three addresses, using multiple sources. CP 80:25-81:2. Based on his analysis of the information, he identified her most recent address as 277 W. 1st St., #2, Nogales, AZ 85621 (“1st St. address”).² CP:81:2-4; CP 139:17-20.

On November 9, the day after receiving Fernandez’s response to the first requests for admission, Campbell sent the following documents via certified mail to Fernandez’s 1st St. address: two copies of the Summons on Complaint for Damages, two copies of the Complaint for Damages, and a Notice to Defendants of Service of Process on the Washington Secretary of State. CP 81:9-14.

On November 13, Ana Fernandez appears to have signed for the package. CP 81:14-17; CP 88. On November 20, Fernandez moved to

² The other two addresses were also in Nogales: 273 W. Walnut St., #B, Nogales, AZ 85621 and 2133 N. Grand Ave., #1A, Nogales, AZ 85621. CP 81:5-9.

amend her answer to allege lack of personal jurisdiction and insufficiency of service of process. CP 100. The motion to amend was granted December 14, and the amended answer was filed the same day. CP 50-54.

On December 10, Campbell tried to serve Fernandez again, this time at the 1st St. address. CP 72:15-17. The process server went to the 1st St. address at 8:00 a.m. CP 89. Erlasena Valenzuela answered. CP 89. She said that she was a relative of Fernandez and that Fernandez had moved to Mexico. CP 89.

Campbell also tried serving Fernandez by enlisting the services of a local constable, Edward Huerta. CP 72:20-21. He attempted service at the 1st St. address on December 17, serving an “Ernestina Valenzuela”. CP 90.

On December 19, Campbell attempted to depose Fernandez, but she did not appear. CP 72:22-26, 82:7-9. Counsel for Fernandez stated on the record that he thought service was improper. CP 72:22-26, 82:7-9.

On December 21, in accordance with RCW 46.64.040, Campbell served the Washington State Secretary of State with two copies of the Summons and Complaint for Damages and an Affidavit of Compliance. CP 73:1-4. On the same day, they also sent notice of service on the Secretary of State, the documents served on the Secretary of State, and two copies of the Summons on Complaint for Damages and Complaint for Damages via registered mail to the 1st St. address. CP 73:3-8.

Fernandez moved to dismiss on January 18, 2019 pursuant to CR 12(b)(2), regarding lack of personal jurisdiction. CP 56-57. They did not deny that Fernandez lived at the 1st St. address. CP 59:15-24. Instead they argued that “[t]here is nothing to indicate it is the same Ana Fernandez, as it is a fairly common name.” CP 59:15-24. They admitted that Campbell had made reasonable efforts to accomplish service, but argued that the procedure had been improper. VRP, Jan. 25, 2019, 4:15-17 (“We’re not discrediting their effort to try to serve our client. It’s more so the procedural – their procedure in doing so.”).

The superior court granted Fernandez’s motion to dismiss on the basis that there was no service and therefore no personal jurisdiction and the statute of limitations had expired. CP 56-59; 109-10. Specifically, the court stated:

[RCW 46.64.040] is an unyielding statute where strict compliance is required, due diligence and good faith can be shown, but here the absence of any original declaration by Mr. Briggs prevents the Court from finding facts sufficient to show due diligence to bring the matter within *James*, and for that reason the defense motion is granted.

VRP, Jan. 25, 2019, 16:8-14. The motion was granted on January 25 and the case was dismissed with prejudice. CP 109-11.

Campbell moved for reconsideration of the ruling on February 1. CP 112-120. They included a declaration by Mr. Briggs explaining his findings

and reasoning. CP 137-146. Reconsideration was denied March 6. CP 147-48. Campbell timely appealed seeking review of both the motion to dismiss and the motion for reconsideration. CP 149-50.

In the meantime, because she was concerned about the statute of limitations and the time limits to accomplish service and toll the applicable limitations period, Campbell filed a second (identical) complaint on December 20, 2018. CP 155-160; 188:23-24. This became Cause No. 18-2-03274-03 (“second lawsuit”). CP 155. On March 14, Campbell personally served Fernandez for this second lawsuit at her place of work in Nogales, i.e., 547 W Mariposa Rd Nogales, Arizona (Mariposa Hotel). CP 189:3-6; 275:8-9³. Fernandez does not deny this was valid personal service. CP 161-171, 314-321.

On June 5, 2019, Fernandez moved for summary judgment in the second lawsuit based on res judicata and collateral estoppel. CP 161-69; VRP, July 10, 2019, 8:14-24, 9:21-25, 10:13-17. The superior court granted summary judgment and dismissed this action as well. CP 326-327. The court reasoned:

I'm not persuaded that *Banzeruk*^[4] provides authority for the existence of two cases at the same time, with the same theory of

³ The declaration of service is being transmitted to the Court pursuant to a supplemental designation of Clerk's Papers.

⁴ In *Banzeruk v. Estate of Howitz ex rel. Moody*, 132 Wn. App. 942, 947, 135 P.3d 512, 514 (2006), *rev. denied*, 159 Wn.2d 1016 (2007), the court held that amending a complaint does not give rise to a new 90-day period of time to accomplish service and toll the statute

recovery, and even if there were the dismissal of the one action while the other action is pending, whether viewed under res judicata or collateral estoppel, serves to terminate the other case which seeks recovery on an identical theory.

VRP, July 10, 26:15-21. Campbells timely appealed this ruling. CP 328-329. The two causes have been consolidated on appeal.

ARGUMENT

A. The superior court erred in dismissing Campbell’s second lawsuit based on res judicata because the dismissal of her first lawsuit was based on insufficiency of service of process rather than “on the merits,” as required to trigger application of res judicata.

The superior court’s dismissal of Campbell’s second lawsuit was based on the res judicata effect of the dismissal of her first lawsuit. Application of res judicata is reviewed de novo. *See 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) (stating “[r]es judicata is an issue of law, subject to de novo review on appeal”; quotation omitted); *NOVA Contracting, Inc. v. City of Olympia*, 191 Wn. 2d 854, 864, 426 P.3d 685, 689 (2018) (stating “[w]e review a trial court’s grant of summary judgment de novo, taking all facts and inferences in the light most favorable to the nonmoving party”).

of limitations under RCW 4.16.170. However, the court indicated that that filing a new action would give rise to a new 90-day period to accomplish service. *See id.*

In this case, the superior court erred in applying res judicata to the Campbell's second lawsuit because the first lawsuit was dismissed based on insufficiency of service of process rather than "on the merits." This Court should therefore reverse the superior court's dismissal of the second action and remand for trial.

"The threshold requirement of res judicata is a final judgment *on the merits* in the prior suit." *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn. 2d 853, 865, 93 P.3d 108, 114 (2004) (emphasis added); *State v. Stevens Cty. Dist. Court Judge*, — Wn.2d —, 453 P.3d 984, 987 (2019) (quoting *Hisle* for this proposition). The rationale underlying res judicata and similar preclusion principles is that, in the interest of finality of judgments, a litigant is only entitled to one bite of the apple. *See Reninger v. State Dep't of Corr.*, 134 Wn.2d 437, 454, 951 P.2d 782, 791 (1998) (stating plaintiffs "were entitled to one bite of the apple, and they took that bite. That should have been the end of it"). The "on the merits" requirement ensures that litigants receive at least one bite. *See Weaver v. City of Everett*, — Wn.2d —, 450 P.3d 177, 187 (2019) (stating "collateral estoppel and res judicata dictate that at common law, claimants are 'entitled to one bite of the apple'"; quoting *Reninger*).

Proper service of the summons and complaint is necessary to hale a defendant into court and obtain personal jurisdiction. *See* CR 4(d)-(e)

(regarding service of summons); RCW 4.28.080 (prescribing modes of personal service of summons within the state); RCW 46.64.040 (prescribing mode of service on nonresident motorist); *see also Scanlan v. Townsend*, 181 Wn.2d 838, 847, 336 P.3d 1155, 1159 (2014) (stating “[p]roper service of the summons and complaint is essential to invoke personal jurisdiction”; brackets added; quotation omitted); *Marriage of Orate*, — Wn. App. —, 2020 WL 284501, at *2 (Jan. 21, 2020) (“Generally, a trial court obtains personal jurisdiction over a party-defendant when that party receives lawful service of the summons and complaint”). Service does not have anything to do with the merits of the claim for which the defendant is brought before the court.

Likewise, insufficiency of service of process is a procedural defense that has nothing to do with the merits of the action. *See Diehl v. W. Washington Growth Mgmt. Hearings Bd.*, 153 Wn.2d 207, 216, 103 P.3d 193, 197 (2004) (describing CR 4 as a “procedural rule” governing the service of summonses and complaints); *Sheldon v. Fettig*, 129 Wn.2d 601, 609, 919 P.2d 1209, 1212 (1996) (equating RCW 4.28.080 with “procedural rules” and “technical niceties”); *In re Estate of Tuttle*, noted at 189 Wn. App. 1029, 2015 WL 4760548, at *1 (2015) (describing defenses of insufficiency of process and insufficiency of service of process as “procedural” issues); *Blankenship v. Kaldor*, 114 Wn. App. 312, 319, 57

P.3d 295, 299 (2002), *rev. denied*, 149 Wn. 2d 1021 (2003) (describing insufficiency of service of process as a “procedural defense”).

While there appear to be no Washington cases directly on point, Washington courts have consistently distinguished service of process from the merits of an action. *See Sheldon*, 129 Wn.2d at 609 (holding RCW 4.28.080 should be liberally construed to promote a policy of deciding cases on the merits); *Lybbert v. Grant Cty., State of Wash.*, 141 Wn.2d 29, 32-34, 1 P.3d 1124, 1126 (2000) (distinguishing “preparing to litigate the merits of the case” from raising defense of insufficiency of service); *Diehl*, 153 Wn.2d at 219 (remanding for a “hearing on the merits” after holding that service was proper under the Administrative Procedure Act); *Witt v. Port of Olympia*, 126 Wn. App. 752, 758-59, 109 P.3d 489, 492 (2005), *disapproved of on other grounds by Durland v. San Juan Cty.*, 182 Wn.2d 55, 77-79, 340 P.3d 191 (2014) (holding dismissal of land use petition based on insufficiency of service of process and corresponding lack of jurisdiction is not “on the merits” for purposes of fee-shifting statute).

Other jurisdictions have recognized that dismissal based on insufficiency of service is not deemed to be a final judgment on the merits for purposes of res judicata. *See, e.g., Joseph v. Daily News Publ'g Co.*, 57 V.I. 566, 580 n.4 (V.I. 2012) (explaining that a dismissal arising from lack of service of process was not on the merits under the doctrine of res

judicata); *Montague v. Godfrey*, 289 Ga. App. 552, 557, 657 S.E.2d 630, 636 (2008), *overruled on other grounds*, *Giles v. State Farm Mut. Ins. Co.*, 330 Ga. App. 314, 319 & n.2, 765 S.E.2d 413, 417 & n.2 (2014) (“Dismissal of an action for insufficient service of process under OCGA § 9–11–12(b)(5) does not constitute a judgment on the merits”); *Candido v. D.C.*, 242 F.R.D. 151, 157 n.6 (D.D.C. 2007) (“because a dismissal for insufficient service of process is not a disposition on the merits”); *Dutil v. Burns*, 687 A.2d 639, 641 (Me.1997) (“dismissal for failure to comply with the statutory procedure is akin to a dismissal for insufficient service of process or lack of subject matter jurisdiction, and does not serve as an adjudication of the merits”); *Watkins v. Resorts International Hotel & Casino*, 124 N.J. 398, 412-13, 424, 591 A.2d 592, 604-05 (1991) (“the complaint against Bally's was dismissed for insufficient service of process under Federal Rule of Civil Procedure 4(j). A dismissal on that ground is not a judgment on the merits for res judicata purposes”); *Lewis v. Price*, 104 Ga. App. 473, 475, 122 S.E.2d 129, 130 (1961).

Similarly, dismissal based on lack of personal jurisdiction is not deemed to be a final judgment on the merits for purposes of res judicata. *See, e.g., Danziger & De Llano, LLP v. Morgan Verkamp LLC*, — F.3d —, 2020 WL 219006, at *6 (3d Cir. Jan. 15, 2020) (“Because the

basis for the District Court’s involuntary dismissal with prejudice was limited to lack of personal jurisdiction in Pennsylvania courts, the dismissal was not an adjudication on the merits”); *Zapata v. HSBC Holdings PLC*, — F.Supp.3d —, 2019 WL 4918626, at *3 (E.D.N.Y. Sept. 30, 2019) (“a dismissal for lack of personal jurisdiction does not constitute an adjudication “on the merits” for claim preclusion (i.e. res judicata) purposes”); *Wallace v. Holden*, 297 Or. App. 824, 841, 445 P.3d 914, 924–25 (2019), *rev. denied*, 451 P.3d 1005 (2019) (“This case was dismissed for lack of personal jurisdiction. That type of dismissal is a matter of procedure, not a decision on the merits”); *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1221 (11th Cir.1999) (dismissal due to lack of personal jurisdiction was not an adjudication on the merits, but did act as res judicata to prevent further litigation in Florida); *Sabek, Inc. v. Engelhard Corp.*, 65 Cal. App. 4th 992, 998–99, 76 Cal. Rptr. 2d 882, 885 (1998) (order dismissing cause of action for lack of personal jurisdiction in the State precluded that issue, but was not on the merits in other states); *People v. Smith*, 416 Ill.Dec. 609, 613, 84 N.E.3d 591, 595 (Ill. App. 2017) (“[a] dismissal on jurisdictional grounds is not res judicata on the merits of the petition”); *Ruiz v. Snohomish Cty. Pub. Util. Dist. No. 1*, 824 F.3d 1161, 1165 (9th Cir. 2016) (holding that res judicata does not apply to a judgment that rests on both a lack of personal jurisdiction and a merits determination because a ruling for lack of personal

jurisdiction is not on the merits). This authority is consistent with Washington law requiring a final judgment on the merits and should be followed here.⁵

B. It would be inequitable to apply res judicata under the circumstances present in this case.

Res judicata is an equitable doctrine, and principles of equity should act as a check on abuse of the doctrine. *See In re Pearsall-Stipek*, 136 Wn.2d 255, 262 n.3, 961 P.2d 343, 347 (1998); *Weaver*, 450 P.3d at 186 (stating “[w]e are also mindful that res judicata remains an equitable, common law doctrine. Like its sister doctrine, collateral estoppel, ‘res judicata ... is not to be applied so rigidly as to defeat the ends of justice, or to work an injustice’”; brackets added).

Campbell went to great lengths in her efforts to get her day in court. Even counsel for Fernandez recognized the sheer effort involved: “We’re not discrediting their effort to try to serve our client. It’s more so the procedural – their procedure in doing so.” VRP, Jan. 25, 2019, 4:15-17.

The purpose of res judicata is to “curtail multiplicity of actions, prevent harassment in the courts, and promote judicial economy.” *Weaver*,

⁵ The superior court also referenced collateral estoppel in dismissing the Campbell’s second lawsuit. VRP, July 10, 2019, 26:15-21. Collateral estoppel precludes relitigation of an issue that has previously been decided. *State v. Dupard*, 93 Wn.2d 268, 273, 609 P.2d 961, 963 (1980). Service of process in the first lawsuit did not involve the same issue as service of process in the second lawsuit. Service in each case occurred pursuant to different statutory procedures, and at different dates, times, and locations.

450 P.3d at 186 (2019). None of these purposes are served by application of res judicata here. While there are two lawsuits, the second lawsuit is not about relitigating the issues, but rather about extending the time for ensuring adequate service of process and staying within the statute of limitations.⁶ In this regard, Campbell followed the procedure suggested in *Banzeruk*, 132 Wn. App. at 947 (“Instead of amending the original complaint, Banzeruk could have tentatively commenced a new action against the Estate by filing a new complaint on November 4, 2004. Had she done so, service of that new complaint on Moody on January 27, 2005, would have perfected commencement of the action”).

At a minimum, the Court should allow Campbell’s second lawsuit to proceed under these circumstances. Fernandez did not dispute that the second lawsuit was timely filed and served. CP 163-171. It would be an injustice for Campbell’s inability to accomplish service in the first lawsuit to somehow preclude her from timely filing and serving the second lawsuit.

⁶ The collision occurred on December 22, 2015. The applicable limitations period expired three years later, on December 22, 2018. *See* RCW 4.16.080(3). The first lawsuit was filed on August 7, 2018, 4 ½ months before expiration of the limitations period. The second lawsuit was filed December 20, 2018, 2 days before expiration of the limitations period. Campbell had 90 days from the date of each filing to accomplish service and toll the statute of limitations. *See* RCW 4.16.170; *Banzeruk*, 132 Wn. App. at 947. The motion to dismiss the first lawsuit was not filed until January 18, 2019. CP 56-57.

- C. **Regardless of whether the superior court’s dismissal of Campbell’s first lawsuit has res judicata effect, the superior court erred in dismissing the first lawsuit because Fernandez failed to meet her burden to prove, by clear and convincing evidence, that Campbell failed to mail the summons and complaint to what she reasonably believed was Fernandez’s last known address, based on the research of a private investigator.**

Fernandez had the burden of proof by clear and convincing evidence that service was improper. *Castellon v. Rodriguez*, 4 Wn.App.2d 8, 16-17, 418 P.3d 804 (2018) (“The party attacking the sufficiency of the service carries the burden to show by clear and convincing proof that it was improper.”). “When the standard of proof is clear, cogent, and convincing evidence, the fact at issue must be shown to be ‘highly probable.’” *State v. Dobbs*, 180 Wn.2d 1, 11, 320 P.3d 705, 710 (2014).

Fernandez did not, and cannot, meet her burden because Campbell complied with RCW 46.64.040 by serving the secretary of state in reliance on an investigator’s determination that Fernandez’s most recent address was out of state, and sending copies of the relevant documents to Fernandez at that address.

“Procedural difficulties are best minimized by allowing a plaintiff to comply with RCW 46.64.040 by mailing copies of the process and affidavits to the address at which he *reasonably believes* the defendant has most recently resided.” *James v. McMurry*, 195 Wn. App. 144, 156, 380

P.3d 591, 597 (2016) (emphasis added). The *James* court held that the statute “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.” 195 Wn. App. at 157 (emphasis added). A “most recent” address is the address where plaintiffs reasonably believe it is after a good faith and reasonable effort.

In *James*, the court found relying on an investigator to be reasonable even though the investigator later turned out to be wrong.⁷ “[W]hen [the Plaintiffs] initiated this lawsuit nearly three years later they employed the services of a private investigator to follow up on the [police] report and determine [the Defendants’] most recent address. That investigator incorrectly identified the Judd Street address as the most recent. The [Plaintiffs] reliance on that information was reasonable and in good faith.” 195 Wn. App. at 157 (brackets added). The *only* fact identified by the Court as being relevant to the issue of reasonableness is the fact that the plaintiffs’ counsel hired a private investigator to locate the defendants.

⁷ In *James*, there appeared to be an error in the investigator’s report, listing a third address that merely was a “typo” of another. 195 Wn. App. at 148. This apparent error made no difference to the Court’s analysis of good faith and reasonable belief in relying on the investigator’s report.

Here, Campbell did the same thing that the Court found to be reasonable in *James*. They hired an investigator to locate Fernandez or determine her most recent address. CP 80:23-26. The investigator provided three addresses, one of which he identified as being the most recent. CP 80:25-81:2. Campbell relied on the investigator in accomplishing service. CP 81:9-14.

In this case, however, the court added another requirement. The court did not find the attorney's declaration sufficient, instead looking for a declaration from the investigator himself. VRP, Jan. 25, 2019, 13:20-24 ("The information regarding Mr. Briggs' efforts, that is contained in the declaration of [Plaintiffs' counsel] and – not contained elsewhere, correct – the information regarding those three addresses and any information regarding how selection was made?"); VRP, Jan. 25, 2019, 14:18-20 ("Okay, but there's no original material from Mr. Briggs appended to the declaration or referenced.")

Ultimately, the court ruled that there could be no due diligence or good faith *because there was no declaration from the investigator himself*. "[T]he absence of any original declaration by Mr. Briggs prevents the Court from finding facts sufficient to show due diligence to bring the matter within *James*, and for that reason the defense motion is granted." VRP, Jan. 25, 2019, 16:10-14 (brackets added).

The quality of research and the reasoning *of the investigator* is not a factor in *James*. Reliance on a professional investigator’s determination is itself reasonable. *See James*, 195 Wn. App. at 157. Here, Fernandez did not even claim the address found the investigator was incorrect,⁸ only stating that that “[t]here is nothing to indicate it is the same Ana Fernandez, as it is a fairly common name.” CP 59:15-24. The suggestion that the investigator might have been wrong because of how common a defendant’s name does not constitute clear and convincing evidence that Campbell did not reasonably rely on that investigator’s determination. Because Fernandez did not provide clear and convincing evidence that the service of process was insufficient, the court erred in granting her motion to dismiss on that basis.

D. The trial court erred in denying Campbell’s motion to reconsider the dismissal of her first lawsuit.

The denial of a motion for reconsideration is reviewed for an abuse of discretion. *August v. U.S. Bancorp*, 146 Wn. App. 328, 339, 190 P.3d 86, 92 (2008), *as amended* (Sept. 4, 2008). “A trial court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or untenable reasons.” *Ameriquest Mortgage Co. v. Office of Attorney Gen. of Washington*, 177 Wn.2d 467, 478, 300 P.3d 799, 804 (2013). “The superior court abuses its discretion when it applies the wrong legal standard to the

⁸ Her place of work where she was eventually served in the second lawsuit was in the same city (Nogales, Arizona) as the addresses the investigator identified. CP 189:3-6; 275:8-9.

issue.” *Mainline Rock & Ballast, Inc. v. Barnes, Inc.*, 439 P.3d 676, 678 (Wash. Ct. App. 2019), *review denied*, 193 Wn.2d 1033, 447 P.3d 157 (2019).

Here, the court abused its discretion by applying the wrong legal standard for due diligence and placing the burden of proof improperly on Campbell. In its order denying reconsideration, the court said:

The Court persists in its view that the absence of declarations by the investigators/process servers from the record at the time of the decision on the motion prevented the Plaintiffs from meeting their burden of demonstrating due diligence.

CP 147:23-26. Campbell only had to make a prima facie showing of proper service. *Weber v. Associated Surgeons, P.S.*, 146 Wn. App. 62, 66, 189 P.3d 817, 819 (2008), *rev'd*, 166 Wn.2d 161, 206 P.3d 671 (2009) (reversed on other grounds); *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); 14 Wash. Prac., Civil Procedure § 4:40 (3d ed.).

Campbell satisfied her burden to make a prima facie showing of proper service. The attorney’s declaration showing reliance on the investigator’s determination of what was the most recent address made a prima facie case for due diligence. *See James*, 195 Wn. App. at 157; *compare* CP 80:23-81:9. At that point, the burden should have shifted to

Defendants to prove that service was improper by clear and convincing evidence. *Castellon v. Rodriguez*, 418 P.3d 804, 809 (Wash. Ct. App. 2018); 14 Wash. Prac., Civil Procedure § 4:40 (3d ed.).

Instead of shifting the burden of proof, the trial court wanted further evidence that was not necessary. Fernandez did not dispute the fact of reliance; they only questioned the quality of research and the fact that the method was not disclosed. VRP, Jan. 25, 2019, 6:4-7:8. The court only expressed concerns over the information and how it was found, not the fact of reliance. VRP, Jan. 25, 2019, 13:20-24. But, unless it is patently defective or flawed, the quality of the research or research methods of the investigator is not necessary to make a prima facie showing of reasonable reliance on an investigator's determination. *See James*, 195 Wn. App. at 157. The court repeated its error when it denied the motion for reconsideration on that basis.

VI. CONCLUSION

The Court should reverse in one or both actions consolidated in this appeal, and remand for trial.

Respectfully submitted this 23rd day of January, 2020.

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CERTIFICATE OF SERVICE

The undersigned does hereby declare the same under oath and penalty of perjury of the laws of the State of Washington:

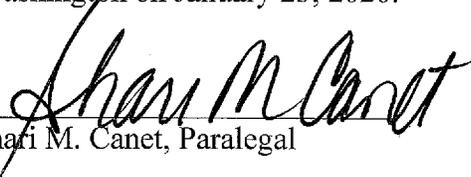
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