

65846-8

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NO. 65846-8-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

JAMES E. HARVEY,

Appellant,

vs.

RICHARD A. OBERMEIT and JANE DOE OBERMEIT, husband and wife, and
their marital community,

Respondents.

APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Cheryl B. Carey, Judge

BRIEF OF RESPONDENTS

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I. NATURE OF THE CASE

The parties were involved in a car accident. Appellant filed suit and attempted to have respondent personally served with the summons and complaint. Personal service was not accomplished, and appellant used the Washington nonresident motorist statute to serve the Secretary of State instead. After conducting a fact-finding hearing on the personal service attempts, the trial court dismissed the case for lack of service of process.

II. ISSUES PRESENTED

1. Was dismissal appropriate where appellant did not undertake a “due and diligent search” in attempting to locate and serve the respondent and thus did not comply with RCW 46.64.040?

2. Did the trial court appropriately conduct a fact-finding hearing to determine the jurisdictional question of whether respondent was properly served with process?

3. Were the trial court’s findings of fact supported by substantial evidence, and did those findings of fact justify its conclusions of law?

4. Did the trial court properly conclude that respondent did not waive the defense of lack of service of process?

5. Did the trial court properly deny appellant’s motion for partial summary judgment?

III. STATEMENT OF THE CASE

On August 4, 2006, James Harvey and Richard Obermeit were involved in an automobile accident in Renton, Washington. (CP 2) On July 23, 2009, Harvey filed a summons and complaint in the King County Superior Court. (CP 1-3) In an effort to locate where Obermeit lived, Harvey looked at the police report, checked the phone book, and hired an investigator. (CP 181-82) The investigator searched the Washington State Department of Licensing databases, the King County Assessor's Office, and the IRB/Accurint skip trace database. (CP 178) These efforts revealed Obermeit's address as 22501 S.E. 277th Place, Maple Valley, Washington, 98038. (CP 178, 182)

Harvey then hired a process server to personally serve Obermeit at the Maple Valley address. (CP 179) According to the declaration of service, the process server made two unsuccessful service attempts – one on August 9, 2009, and another on August 16, 2009. (*Id.*) The Declaration of Attempted Service indicates that “[p]er neighbors, the Obermeits’ will take off for weeks at a time.” (*Id.*) The declaration was not signed. The declaration was also dated with two different dates, November 11, 2009, and November 14, 2009. (*Id.*)

Because the process server was unable to complete personal service on Obermeit, Harvey sought to use Washington's nonresident

motorist statute (RCW 46.64.040) to serve the Secretary of State instead. (CP 169-70, 186-87) This included sending a copy of the documents to Obermeit's address by certified mail. (CP 184) Obermeit received, signed, and returned the return receipt on September 23, 2009. (CP 184)

On October 15, 2009, defense counsel filed a notice of appearance. (CP 200-01) On October 30, 2009, Obermeit filed his answer which included affirmative defenses for: failure "to serve process upon defendants in the manner and form required by law"; failure "to issue sufficient process in order to obtain jurisdiction over defendants and the subject matter of this suit"; lack of jurisdiction; and expiration of the statute of limitations. (CP 155-56)

On February 10, 2010, Obermeit filed a motion to dismiss based on lack of service of process and the expiration of the statute of limitations. (CP 91-95) On February 11, 2010, Harvey filed a motion for summary judgment seeking to dismiss Obermeit's affirmative defenses related to jurisdiction, statute of limitations, and service of process. (CP 33-41) Harvey filed an opposition to Obermeit's motion and a reply in support of his own motion. (CP 133-45, 316) With his materials, Harvey filed a Declaration of Alex Conley, III, (the process server) dated April 12, 2010. (CP 194-96) Conley's declaration indicates that he made four service attempts at Obermeit's house: August 9, 16, 17, and 18, 2009. (CP

195) Mr. Conley asserted he inspected the garbage cans and placed paper clips on the tires of the cars to see if the cars moved before his next attempt. (CP 195-96) He also spoke to neighbors who told him that the residents will take off for weeks at a time. (CP 195)

The motions were initially noted for March 12, 2010, then continued by stipulation of the parties until May 7, 2010. (CP 86-87) At the May 7 hearing, the trial court decided to set the matter for a fact-finding hearing on June 18, 2010. (CP 396) The trial court noted:

The way I have looked at one of the cases, this Court is going to have to make a factual determination. I'm not going to do it on affidavits or declarations. I will do it on testimony, which is what this case that I just cited to, suggests is the more appropriate method. And that's what I plan on doing.

(5/7/10 RP 10) The trial court further explained the process:

I just simply am going to take testimony. I will look to the testimony, look to issues of credibility, and I'll simply make a factual determination which then I can apply the law to.

(*Id.* at 11) Harvey objected to the fact-finding hearing. (CP 24-26)

The trial court conducted its fact-finding hearing on June 18, 2010. At that hearing, the attorneys conducted direct and cross-examination of the process server. (6/18/10 RP 24-37) Mr. Conley testified that he made three service attempts in the early morning hours on different days, and one attempt at 10:00 p.m. on a fourth day. (*Id.* at 25-27) He

acknowledged but did not explain why his first declaration indicated he made two attempts, but his second declaration indicated he made four attempts. (*Id.* at 29-31; CP 179, 195) His supervisor knew there were four cars registered to that address, but Mr. Conley only saw two. (6/18/10 RP 35-36) Finally, Mr. Conley admitted that the neighbors did not tell him that the Obermeits “take off for weeks at a time.” (*Id.* at 36-37; CP 195) Rather, the neighbor told him that Obermeit takes trips on the weekend. (6/18/10 RP 36-37)

Q. Now, when you talked to the neighbor, he said to you that they take trips on weekends?

A. Yeah, that’s what he told me.

Q. Did he say they take off for weeks at a time?

A. No. Huh-uh.

Q. Okay.

A. He did not say that.

(*Id.* at 36-37)

The trial court, disturbed by the conflicting testimony, determined that Mr. Conley was not credible. (*Id.* at 50-51) Even assuming that four service attempts were made (as opposed to the two attempts originally stated), the trial court determined that the four attempts at odd times

during nine days in August were insufficient to constitute due diligence under the statute. (*Id.* at 51)

The trial court issued findings of fact and conclusions of law. (CP 341-45) The trial court found that Mr. Conley was not a credible witness based on his testimony and that testimony's discrepancies with previous declarations. (CP 343) It found that Mr. Conley's attempts at service (whether two or four) were not adequate to show due diligence on the part of the plaintiff to personally serve the defendants. (CP 343-44) The trial court further concluded that service on the Secretary of State under RCW 46.64.040 was improper because: 1) defendants were found within the state but were never personally served; 2) plaintiff did not make a due and diligent search; and 3) the Declaration of Attempted Service was not properly authenticated. (CP 344) Finally, the trial court concluded that plaintiff had no personal jurisdiction over the defendants and the statute of limitations had expired. (*Id.*) The trial court ordered the case dismissal with prejudice. (*Id.*)

The trial court denied plaintiff's summary judgment motion. (CP 346-48) The same day, Harvey moved for reconsideration. (CP 8-22) The court denied the motion for reconsideration. (CP 349-50) Harvey appealed. (CP 339-50)

IV. SUMMARY OF ARGUMENT

The superior court properly dismissed plaintiff's case because Mr. Obermeit was not served with service of process. He provided clear and convincing evidence that he was not served, the declaration of service was irregular, and no substitute service was effective because plaintiff failed to satisfy the "due and diligent search" requirement of service under the non-resident motorist statute. This Court should affirm.

The superior court correctly exercised its authority and heard testimony to resolve factual disputes regarding service. This Court should treat the superior court's findings of fact as verities on appeal because plaintiff has failed to challenge them. If this Court considers the factual findings, this Court should conclude that the findings are supported by substantial evidence and support the conclusions of law.

Plaintiff's various procedural arguments lack merit because plaintiff fails to acknowledge the superior court's broad authority to determine matters before it. The superior court's dismissal should be affirmed.

V. ARGUMENT

A. THE SUPERIOR COURT'S FINDINGS OF FACT ARE VERITIES BECAUSE PLAINTIFF HAS FAILED TO COMPLY WITH RAP 10.3(g) and 10.4(c).

This Court should treat the superior court's findings of fact as verities on appeal because plaintiff has failed to comply with RAP 10.3(g). Unchallenged findings of fact are considered "verities" on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). RAP 10.3(g) says, "A separate assignment of error for each finding of fact a party contends was improperly made *must* be included with reference to the finding by number" (emphasis added). RAP 10.4(c) provides, "If a party presents an issue which requires study of a . . . finding of fact . . . , or the like, the party should type the material portions of the text out verbatim or include them by copy in the text or in an appendix to the brief."¹

The Brief of Appellant violates all of these rules. "Assignment of Error" no. 14, which is styled like an Issue Statement, asks whether the superior court erred in entering findings of fact. (Appellant's Brief 3) A blanket assignment of error to the findings of fact is improper. *See In re Welfare of H.S.*, 94 Wn. App. 511, 520, 973 P.2d 474, *rev. denied*, 138

¹ A copy of the Findings of Fact and Conclusions of Law is attached hereto as Appendix A.

Wn.2d 1019 (1999), *cert. denied*, 529 U.S. 1108 (2000).

Further, there is only passing reference to some of the findings by number. And none of the findings of fact are set forth verbatim. Finally, plaintiff has failed to demonstrate that the findings are not supported by the evidence. It is not the court's responsibility to search the record for the evidence. *Bostwick v. Ballard Marine Inc.*, 127 Wn. App. 762, 770, 112 P.3d 571 (2005). The appellant must show why specific findings are not supported by the evidence and to cite to the record to support the argument. *In re Discipline of Haskell*, 136 Wn.2d 300, 311, 962 P.2d 813 (1998); *Green v. McAllister*, 103 Wn. App. 452, 469, 14 P.3d 795 (2000). Because plaintiff has failed to comply with the RAPs, this Court should treat the factual findings as verities. As explained below, if this Court chooses to address the findings of fact, this Court should conclude that the findings are supported by substantial evidence and support the conclusions of law.

B. DISMISSAL WAS CORRECT BECAUSE MR. OBERMEIT WAS NOT SERVED WITH SERVICE OF PROCESS.

Plaintiff did not personally serve Mr. Obermeit. Plaintiff located Mr. Obermeit's address and sent a process server to the residence attempt service. It is undisputed that no one personally served Mr. Obermeit. It is

also undisputed that no one personally served any resident of Mr. Obermeit's usual abode.

“Basic to litigation is jurisdiction, and first to jurisdiction is service of process.” *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111 P.3d 271 (2005). Service must be both constitutionally adequate **and** in compliance with statutory requirements. *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745 (1997), *rev. denied*, 135 Wn.2d 1010 (1998).

RCW 4.28.080 sets forth how a summons must be served on a defendant. The statute generally requires personal service of a summons on the defendant. The statute also permits substitute personal service on the defendant “by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.” RCW 4.28.080(15). Plaintiff here failed to accomplish either method of service of process. It is undisputed that Mr. Obermeit was not personally served, and there was not substitute service of process. The superior court properly dismissed plaintiff's case.

Contrary to plaintiff's argument, Mr. Obermeit's signed receipt of the mailed copy of the summons and complaint did not accomplish service of process. The fact that the defendant received actual notice of the suit is not sufficient. *See Lepeska v. Farley*, 67 Wn. App. 548, 552, 833 P.2d 437 (1992). “[A]ctual knowledge of pending litigation . . . standing alone

is insufficient to impart the statutory notice required to invoke the court's in personam jurisdiction." *Thayer v. Edmonds*, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972), *rev. denied*, 82 Wn.2d 1001 (1973). Washington statutes mandate that a copy of the summons either be delivered to the defendant personally or by substitute service. *Gerean v. Martin-Joven*, 108 Wn. App. 963, 969, 33 P.3d 427 (2001), *rev. denied*, 146 Wn.2d 1013 (2002).

C. SERVICE UNDER THE NONRESIDENT MOTORIST STATUTE WAS NOT ACCOMPLISHED BECAUSE PLAINTIFF DID NOT PLAINTIFF CONDUCT A DUE AND DILIGENT SEARCH.

Here plaintiff relied on the nonresident motorist statute, RCW 46.64.040, as his sole method of service of process. The service was not effective because plaintiff failed to comply with the statutory requirement of a due and diligent search. The superior court correctly concluded as a matter of law that service was not accomplished.

A plaintiff seeking to use an alternative to personal service must strictly comply with the statutory provisions for substitute service. *Martin v. Triol*, 121 Wn.2d 135, 144, 847 P.2d 471 (1993). RCW 46.64.040, the nonresident motorist statute, is one such statute. The statute sets forth detailed procedures necessary to accomplish a form of substitute service on a defendant in a manner that satisfies due process requirements. The statute provides in pertinent part:

Likewise each resident of this state who, while operating a motor vehicle on the public highways of this state, is involved in any accident, collision, or liability and thereafter at any time within the following three years **cannot, after a due and diligent search, be found in this state** appoints the secretary of state of the state of Washington as his or her lawful attorney for service of summons as provided in this section for nonresidents. . . .

RCW 46.64.040 (emphasis added). “It is appropriate to require strict compliance with the detailed procedures for service of process set forth in RCW 46.64.040.” *Martin v. Triol*, 121 Wn.2d 135, 144, 847 P.2d 471 (1993).

Here, plaintiff’s efforts to locate and serve Mr. Obermeit failed to satisfy the requirements of RCW 46.64.040. Plaintiff did not exercise due diligence in trying to personally serve Mr. Obermeit. The superior court ruled that “plaintiff did not make a due and diligent search.” (CP 344; Conclusion of Law 6). During seven-to-nine days in August (when people are often on vacation), Mr. Conley, process server, only made two attempts to personally serve Mr. Obermeit. (6/18/10 RP 51; Findings of Fact 6, 15; CP 342-43) Mr. Conley acknowledged that two service attempts is not adequate. (6/18/10 RP 30-31; CP 343, Finding of Fact 16) He sometimes tries up to ten times to personally serve a defendant. (6/18/10 RP 12; CP 343, Finding of Fact 16)

The two service attempts were at odd hours of the day. Mr. Conley did not check for the four cars registered to the property (as opposed to two). (*Id.*; CP 343, Finding of Fact 14) The neighbors confirmed that Mr. Obermeit lived there, and only that he sometimes left on the weekends. (*Id.* at 36-37; CP 343, Findings of Fact 12, 17, 18) These attempts were not due and diligent efforts to personally serve Mr. Obermeit. (CP 343, Conclusion of Law 2)

Plaintiff also failed to comply with RCW 46.64.040 because he knew that Mr. Obermeit lived in the state and thus could be found in the state. (CP 344, Conclusion of Law 5) Plaintiff's research located Mr. Obermeit's address in Washington, and it was confirmed to the process server by the neighbors. (CP 179) In *Huff v. Budbill*, 141 Wn.2d 1, 1 P.3d 1138 (2000), the process server unsuccessfully attempted to personally serve defendant. Plaintiff was also unsuccessful in trying to reach the defendant by telephone and ascertaining the defendant's whereabouts through government agencies. Plaintiff subsequently served the summons and complaint pursuant to the Nonresident Motorist Statute. The Supreme Court concluded that was invalid because plaintiff did not establish a good faith belief defendant had left the state. *Id.* at 17. The process server's unsuccessful attempts to locate the defendant might suggest he was not at home or had moved. The unsuccessful attempts did not, however,

reasonably lead to the conclusion that defendant had left the state. *Id.* at 16.

RCW 46.64.040 was amended in 2003 to substitute the language “at any time within the following three years cannot, after a due and diligent search, be found” for the old language “within three years departs from.” Comments to RCW 46.64.060. This amendment did not overturn the holding of *Huff v. Budbill*, 141 Wn.2d 1, 1 P.3d 1138 (2000). The Washington Supreme Court has consistently interpreted RCW 46.64.040 to apply where the defendant could not be found in the state. The 2003 amendment to RCW 46.64.040 retains the concept. It states in part: “[e]ach resident . . . who . . . cannot, after a due and diligent search, be found in this state appoints the secretary of state . . . as his or her lawful attorney for service . . .” Further, the statute is titled: “**Nonresident’s** use of highways – **Resident leaving state** – Secretary of state as attorney-in-fact.” (Emphasis added.) Plaintiff’s interpretation of the amendment to the statute would eliminate “nonresident” and “leaving the state” from the statute. There is no basis for this.

This statute was amended in 2003 to substitute the language “at any time within the following three years cannot, after a due and diligent search, be found” for the old language “within three years departs from.” Comments to RCW 46.64.040. Plaintiff contends that the 2003

amendment to RCW 46.64.040 indicates the Washington Legislature intended to change existing Supreme Court decisions, and that he is not required to demonstrate a good faith belief that Mr. Obermeit left the state. (Appellant's Brief 30-32) In fact, the amendment to RCW 46.64.040 did not alter the requirement that plaintiff strictly comply with the statute. The amendment did not alter the requirements that plaintiff exercise due diligence in attempting to locate and personally serve defendant and that plaintiff have a good faith belief that defendant left the state. There has been no caselaw supporting a contention that a good faith belief that the motorist resides in another state has been eliminated.

Plaintiff was required to make honest and reasonable efforts to locate and serve Mr. Obermeit.² *Triol*, 121 Wn.2d at 150. Plaintiff knew that Mr. Obermeit lived at the address in question as early as September 11, 2009, when the process server indicated on his declaration that “[p]er neighbors, the Obermeits’ will take off for weeks at a time.” (CP 179) This knowledge was further confirmed on September 23, 2009, when Mr. Obermeit signed and returned the return receipt for the pleadings mailed to him. (CP 185) Even with these confirmations of Mr. Obermeit’s address,

² Unlike in *Triol*, Harvey’s process server did learn from the neighbors that the Obermeits lived at that address. The process server simply did not come by at the right time of day to catch him when Obermeit was home.

plaintiff did not attempt personal service again, instead choosing to rely on the nonresident motorist statute (despite knowledge that Mr. Obermeit was, in fact, a Washington resident).³ Plaintiff failed to comply with RCW 46.64.040 because he did not exercise due diligence in attempting to locate and personally serve Mr. Obermeit, and he had no reasonable basis to believe that Mr. Obermeit was not in the state. The two-to-four attempts over seven-to-nine days were not due and diligent and neither was the failure to follow up with further attempts after Plaintiff confirmed that Mr. Obermeit lived at the address (from the neighbors and Mr. Obermeit himself).

D. THE SUPERIOR COURT PROPERLY CONDUCTED A FACT-FINDING HEARING.

The vast majority of plaintiff's arguments complain that the superior court did not follow correct procedure. These arguments ignore that the superior court acted fully within its authority. Contrary to plaintiff's argument, a superior court is not constrained in a rigid procedural box. A superior court has broad authority both expressly and inherently. CONST. art. IV, §§ 1, 4; RCW 2.28.010; 2.28.150.

³ Harvey has never alleged that Obermeit intentionally attempted to avoid service. The only evidence on the record indicates that Obermeit was unaware of and did not intentionally attempt to evade service. (CP 96-97)

CR 1 mandates that the civil rules “shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.” Further, trial courts are directed to interpret all of the civil rules in a manner “that advances the underlying purpose of the rules, which is to reach a just determination in every action.” *Burnet v. Spokane Ambulance*, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997). CR 43(e), which allows the trial court to take evidence on motions in the form of affidavits or oral testimony, must also be read in this spirit. Thus, a trial court should hear oral testimony if it is necessary to reach a just determination. Further, a trial court has discretion to accept evidence any time prior to issuing its final order on summary judgment. *Davies v. Holy Family Hospital*, 144 Wn. App. 483, 499, 183 P.3d 283 (2008).

Jurisdiction is a question of law, and because service of process is required for jurisdiction, sufficiency of service of process is a question of law. *Gross v. Sunding*, 139 Wn. App. 54, 66-67, 161 P.3d 380 (2007). Determination of valid service is reserved for the judge to determine, and it cannot be left to the jury based on an allegation that there is a factual dispute. *Id.* at 67. If a court determines there is legitimate conflict in the evidence, the court can conduct a further evidentiary hearing. *See Woodruff v. Spence*, 88 Wn. App. 565, 566, 945 P.2d 745 (1997), *rev. denied*, 135 Wn.2d 1010 (1998); *In Re Marriage of Ferree*, 71 Wn. App.

35, 42, n.9, 856 P.2d 706 (1993) (court has authority to take testimony on motions).

Here the court was presented with Mr. Obermeit's declaration verifying his address was the address where service was attempted. (CP 96) Mr. Obermeit established that he was not out of the state in August 2009. (CP 96-97) The court was also presented with Mr. Conley's declarations that he found no one at the address. (CP 179, 194-96) Most significantly, Mr. Conley's declarations conflicted about what service attempts were made and when they were made. The court properly called for an evidentiary hearing.

The superior court was not obligated to rule on the motions based only on the evidence as it existed at the time of the May 7, 2010 hearing. (Appellant's Brief 23) CR 43(e)(1) states:

When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

Indeed, where a question of jurisdiction is at issue, trial courts are specifically instructed to conduct fact-finding hearings if necessary to resolve the issue. *See Woodruff v. Spence*, 76 Wn. App. 207, 211, 883 P.2d 936 (1994). Not doing so can constitute an abuse of discretion. *Id.* The declarations raise issues of witness credibility which can only be

resolved by a hearing. *Woodruff v. Spence*, 76 Wn. App. 207, 210, 883 P.2d 936 (1994). A court's failure to hold an evidentiary hearing in such circumstances may result in an abuse of discretion. *Id.*; *See Autera v. Robinson*, 419 F.2d 1197, 1202 (D.C.Cir.1969).

In this case, the declaration of the process server filed in response to the summary judgment motion was different and conflicted with his original declaration. (CP 179, 194-96) The superior court noted that a fact-finding hearing was necessary:

And in reading the cases, it would appear to me that what we may need so that it never comes back to us, is actually a factual determination. And in looking at the cases, the more appropriate way of handling that would be to actually take testimony where the Court then could make appropriate findings that, of course, it would then take and apply to the law.

....

I just simply am going to take testimony. I will look to the testimony, look to issues of credibility, and I'll simply make a factual determination which then I can apply the law to.

(5/7/10 RP 2, 11) Without the hearing, the court would not have learned that the process server lied on both of his declarations about the neighbor's informing him that the Obermeits took off for weeks at a time. Neither caselaw, the court rules, nor common sense supports the proposition that the court was required to accept the process server's untrue statements

simply because they were “on the record” by the original date of the hearing.

Plaintiff similarly fails to cite any authority supporting his contention that it was error for the superior court to solicit oral representations about what facts were disputed. (Appellant’s Brief 24) The inconsistent declarations of the process server and the issue of whether his efforts constituted due diligence were sufficient factual issues for the court to reasonably seek a fact-finding hearing. By asking the parties to articulate what other factual issues existed, the court was properly seeking to clarify the issues for itself and the parties for when the hearing was ultimately conducted on June 18, 2010.

Plaintiff also argues that Mr. Obermeit should have been held strictly to the facts articulated by counsel on May 7. (Appellant’s Brief 33) At the May 7 hearing, the superior court instructed the parties to get together and discuss disputed facts to facilitate the fact-finding hearing.⁴ (5/7/10 RP 11) Defense counsel stated that all of the facts alleged in paragraph 6 of the process server’s new declaration were in dispute. (5/7/10 RP 16; CP 195-96) Defense counsel had already stated earlier that

⁴ It is worth noting that the defense attorney that day was merely standing in for Obermeit’s primary attorney who had a scheduling conflict. (5/7/10 RP 2)

the issues of whether there were two or four service attempts and what the neighbors told the process server about Mr. Obermeit's comings and goings were in dispute. (5/7/10 RP 4-5, 10)

The court was not looking for a "binding admission" like those discussed in the cases cited by plaintiff. The parties were asked to suggest factual areas to help with the upcoming fact-finding hearing. Additionally, the superior judge indicated her intent to look at the overall credibility of the process server. (*Id.* at 11) Because it was determining jurisdiction, the court was within its discretion to inquire into additional areas if it so chose.

Plaintiff's argument that the court, as fact-finder, was required to deem all other facts as undisputed is meritless. (Appellant's Brief 25) The court sought to examine discrepancies in the declarations and determine exactly what efforts were made to personally serve Mr. Obermeit. The process server's credibility was a key issue for the court to resolve. On the day of the hearing, the court clearly informed the parties:

I simply would like to take testimony so at least the Court can conclude what those facts are from which it's going to make its ruling.

(6/18/10 RP 23)

The court was within its discretion to allow the examination that occurred and to issue its findings of fact. Plaintiff's attorney questioned

the process server first, and asked him a wide variety of questions beyond those that he now claims should have been the limit. For example, plaintiff's attorney questioned the process server about whether he made four attempts or two and whether he talked to the neighbors. (*Id.* at 25-28) Indeed, it was during direct examination that the process server first testified that the neighbors only told him that "he takes trips on the weekends" instead of takes "off for weeks at a time." (*Id.* at 28; CP 195) Plaintiff was not prejudiced by the subsequent cross-examination on those same issues.

Plaintiff's objection to the fact that Mr. Obermeit was able to conduct a cross-examination is curious. (Appellant's Brief 27-29) The superior court said that it would not rely on declarations and instead wanted to hear live testimony. (5/7/10 RP 10) Taking testimony from a witness necessarily includes conducting direct examination and cross-examination. Plaintiff was also given an opportunity to conduct redirect examination if he wanted to. (6/18/10 RP 37)

During the May 7 hearing, Mr. Obermeit's counsel specifically requested a fact-finding hearing and the right to cross-examine the process server. (5/7/10 RP 10) Plaintiff had ample time to prepare his witness for direct and cross-examination. The court was well within its power to conduct a fact-finding hearing that involved direct and cross-examination

of the process server. There was no error in denying plaintiff's motion to strike the testimony.⁵

Plaintiff's argument that the superior court should have simply accepted the process server's "undisputed" declarations and not conducted a fact-finding hearing is directly contrary to Washington law. (Appellant's Brief 25) *See Woodruff*, 76 Wn. App. at 211 (not conducting a fact-finding hearing if necessary to resolve a jurisdictional issue can constitute an abuse of discretion). Further, the two declarations from the process server were patently inconsistent and were not "undisputed." CR 43(e)(1) specifically authorizes a court to hear a motion "on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions." (Emphasis added).

Plaintiff fundamentally misapprehends the superior court's role in determining a jurisdictional challenge. This is not a situation in which disputed facts are ultimately determined by a jury. *Gross*, 139 Wn. App. at 67. As the *Gross* Court held:

Since proper service of process is required for jurisdiction, sufficiency of service of process is a question of law. As a

⁵ Harvey never officially moved the trial court to strike the cross-examination testimony. He simply objected and "moved" within his motion for reconsideration. (CP 12)

result, the determination of valid service is reserved to the judge. Gross is not entitled to a jury trial on the issue of service.

Id. The court must act as the fact-finder, and it properly did so in this case. None of the summary judgment cases cited by plaintiff involve jurisdictional issues where the court is tasked as the trier of fact. (Appellant's Brief 26, 37-41) Each of those cases involved summary judgment on the substantive claims (in which questions of fact are left to the jury to resolve) as opposed to jurisdictional issues which must be decided by the court. None of those cases are relevant to the resolution of this appeal.

The superior court properly ruled on the process server's credibility. In light of the inconsistent stories that he told in two declarations and live testimony, the court's ruling that he was not credible is reasonable. Plaintiff again misapprehends the nature of a jurisdictional challenge by alleging that the court should not have ruled on credibility, and if a credibility question arose, it should have denied the motion. (Appellant's Brief 37-39) Factual determinations in jurisdictional issues are to be made by the court, and credibility determinations are left to the fact-finder. *See J.L. Stordahl & Sons, Inc. v. Cowlitz County*, 125 Wn. App. 1, 11, 103 P.3d 802 (2004), *rev. denied*, 155 Wn.2d 1002 (2005). None of the cases addressing credibility determinations cited by plaintiff

deal with jurisdictional issues. (Appellant's Brief 37-39) Further, the superior court noted in its findings of fact, that even if the process server's alleged best efforts were credited, they still did not amount to due diligence. (CP 344)

The court's job was to determine the jurisdictional issues of fact related to whether service was proper. The court could not have simply viewed them in a light most favorable to Plaintiff and then left them to ultimately be decided by the jury. *See Gross*, 139 Wn. App. at 67. In *Carson v. Northstar Development Co.*, 62 Wn. App. 310, 316-17, 814 P.2d 217 (1991), the court held that a trial court abused its discretion when it failed to conduct an evidentiary hearing to determine whether the plaintiff conducted due diligence prior to resorting to service by publication. Without a resolution of the disputed facts created by declarations, the court could not determine whether due diligence was exercised. *Id.* at 315.

Plaintiff contends that the superior court was obligated to grant his partial summary judgment motion because Mr. Obermeit did not file any opposition to the motion. (Appellant's Brief 24) The court clearly considered all the materials before it. The order denying the partial summary judgment specifically lists the materials submitted for the partial summary judgment and the motion to dismiss. (CP 346-48) Moreover,

plaintiff waived any procedural challenges regarding the motion procedures when he stipulated that the partial summary judgment motion and motion to dismiss be consolidated. (CP 86-87) Because the superior court properly determined that it had no jurisdiction over Mr. Obermeit due to the lack of sufficiency of the service of process, it properly denied plaintiff's competing motion for summary judgment.

Based on Mr. Obermeit's motion to dismiss, the superior court was asked to rule whether service of process under the nonresident motorist statute (RCW 46.64.040) was appropriate. (CP 91-95) It did precisely that. Plaintiff argues that Mr. Obermeit did not specifically challenge that due diligence was exercised, and the superior court ruled on an issue not before it. (Appellant's Brief 32) In fact, Mr. Obermeit did argue in his motion to dismiss that the service attempts were not due and diligent:

More surprisingly, he [Plaintiff] asserts that a diligent attempt at service had been made by the process server when he had only been out to the house twice; once on August 9, and once on August 16, 2009. Only two attempts within the same week can hardly count as a diligent attempt, even if this was relevant.

....

He made only two attempts to serve the Obermeits here in Washington. There is no explanation why the process server did not make more attempts between the middle of August and the end of October.

(CP 94) The entire point of Mr. Obermeit's motion was to demonstrate that service was not proper under RCW 46.64.040. Mr. Obermeit also argued lack of due diligence at the hearing on June 18, 2010. (6/18/10 RP 39-41) The situation is totally different from *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wn. App. 163, 166, 810 P.2d 4 (1991), where the court declined to hear an argument raised for the first time in defendants' reply in support of their motion for dismissal. (Appellant's Brief 30) Moreover, in *White*, the Court of Appeals was merely affirming the superior court's exercise of its discretionary authority, not mandating that a superior court follow some rigid rule.

In addition, assuming for the sake of argument Mr. Obermeit had not fully articulated all the grounds for dismissal in his motion, plaintiff was not prejudiced. Plaintiff was fully able to respond to the argument. He addressed the due diligence argument in his responsive pleading and at oral argument. (CP 141-42; 6/18/10 RP 42-43) The superior court's orders should be affirmed.

E. THE SUPERIOR COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW WERE CORRECT.

Findings of fact are reviewed under a substantial evidence standard which requires that there be a sufficient quantum of evidence in the record to persuade a reasonable person that a finding of fact is true. *Pardee v.*

Jolly, 163 Wn.2d 558, 566, 182 P.3d 967 (2008). “If substantial evidence supports a finding of fact, an appellate court should not substitute its judgment for that of the trial court.” *Id.* Washington courts have followed this “two-step” standard of review for a trial court’s findings of fact and conclusions of law: first determine if the findings of fact were supported by substantial evidence in the record; and if so, determine whether those findings of fact support the trial court’s conclusions of law. *Landmark Development, Inc. v. City of Roy*, 138 Wn.2d 561, 573, 980 P.2d 1234 (1999). Questions of law and a trial court’s conclusions of law are reviewed de novo. *Sunnyside Valley Irrigation Dist. v. Dickie*, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

A trial court’s findings of fact must simply be able to justify its conclusions of law. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007). In addition, A reviewing court will defer to the fact-finder and “consider all of the evidence and reasonable inferences in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority.” *Cingular Wireless LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.2d 300 (2006). Finally, a reviewing court reserves credibility determinations to the fact-finder and will not review them on appeal. *J.L. Storedahl & Sons, Inc. v. Cowlitz*

County, 125 Wn. App. 1, 11, 103 P.3d 802 (2004), *rev. denied*, 155 Wn.2d 1002 (2005).

Assuming plaintiff has properly preserved any challenge to the factual findings, plaintiff only challenges four of the superior court's findings of fact.⁶ For each, Mr. Obermeit is able to show that those facts are supported by substantial evidence. *See Pardee*, 163 Wn.2d at 566 (there simply must be a sufficient "quantum" of evidence to persuade a reasonable person that a finding of fact is true). Finding no. 14 addresses the number of vehicles the Obermeits owned and the use of paperclips by the process server. It is supported by the process server's testimony at the hearing. (6/18/10 RP 35-36). Finding no. 15 concerns the number of times the process server tried to serve Mr. Obermeit. It is supported by the original declaration and the court's determination regarding Mr. Conley's credibility. (CP 179; 6/18/10 RP 50-51) Finding no. 16 addresses the process server's beliefs about whether his attempts were adequate. It is supported by his testimony at the hearing. (6/18/10 RP 30-32). Finally, Finding no. 17 relates to what the neighbors told the process server about the Obermeits being gone. This finding is supported by the process server's testimony at the hearing. (*Id.* at 36-37)

⁶ Unchallenged findings of fact are deemed "verites" on appeal. *Robel*, 148 Wn.2d at 35.

The court in *Carras v. Johnson*, 77 Wn. App. 588, 892 P.2d 780 (1995), held that “[t]he determination of what particular set of actions are sufficient to constitute due diligence is not subject to mathematical certainty.” Reviewing courts have to defer to the court as fact-finder. *See Cingular Wireless*, 131 Wn. App. at 768. The superior court’s determination in this case that service efforts lacked due diligence is well-founded in the facts before it, and this Court can properly defer to its determinations.

Each of the conclusions of law challenged by Plaintiff are reasonably justified by the court’s findings of fact. *See Hegwine*, 162 Wn.2d at 353 (findings of fact must simply be able to justify the conclusions of law). Conclusion no. 5 is reasonably based on the facts that the process server made only two or four attempts at odd hours over the course of seven-to-nine days and his discussions with neighbors. Because the process server did not diligently attempt to serve Mr. Obermeit, service based on the nonresident motorist statute is improper. Conclusion no. 7 is reasonably based on the fact that the original declaration was never signed, but contains two different dates. (CP 179) Conclusion no. 8 is reasonably based on the fact that November 1, 2009, was the last date to effect personal service, and that was not accomplished.

Plaintiff objects that the proposed findings of fact were sent to the court by Mr. Obermeit's counsel without prior notice to plaintiff's counsel. (Appellant's Brief 48-49) This objection is immaterial to the substance of the superior court's rulings. Further, the superior court orally announced its findings and rulings at the conclusion of the hearing on June 18, 2009. (RP 50-52) The court's findings and conclusions were well known to Plaintiff. Plaintiff was also able to argue to the court the perceived impropriety in his motion for reconsideration. (CP 8-21) Plaintiff was not prejudiced, and the superior court had an opportunity to correct an error, had there been one.

Plaintiff also contends that the court failed to recite additional facts which he contends demonstrated that the process server's efforts were reasonable. (Appellant's Brief 43-45) All of the facts cited by plaintiff involve locating Mr. Obermeit's address, not locating his person for personal service. These facts were not necessarily germane to the superior court's analysis under RCW 46.64.040, and there was no error in declining to recite them. Plaintiff undertook several steps to locate Mr. Obermeit's home address, and did locate it. His efforts to locate Mr. Obermeit so he could personally serve him (two-to-four attempts at odd hours over a seven-to-nine day period) lacked due diligence. As discussed above, there

was substantial evidence to support the superior court's findings of facts, and the omission of the facts plaintiff claims to be important is not error.

F. MR. OBERMEIT DID NOT WAIVE THE DEFENSE OF INSUFFICIENT SERVICE OF PROCESS.

Mr. Obermeit timely and repeatedly asserted his challenge to the court's jurisdiction over him. He did not waive the defense. The superior court correctly rejected appellant's waiver argument.

Generally, waiver of the defense of insufficiency of process requires "the intentional abandonment or relinquishment of a known right. It must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive." *Clark v. Falling*, 92 Wn. App. 805, 812-13, 965 P.2d 644 (1998) quoting *Mid-Town Ltd. Partnership v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268, rev. denied, 122 Wn.2d 1006 (1993). The defense of insufficiency of process may be waived by dilatory conduct or conduct inconsistent with asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000). Mr. Obermeit did not take any action inconsistent with the defense nor was he dilatory in asserting the defense.

A defendant has no duty to assist the process server. *Thayer v. Edmonds*, 8 Wn. App. 36, 41, 503 P.2d 1110 (1972), rev. denied, 82

Wn.2d 1001 (1973). In addition, actual knowledge is insufficient to constitute adequate service of process. *See Lepaska*, 67 Wn. App. at 552. The defense of insufficient service of process is not waived if it is asserted in a responsive pleading. *Gerean v. Martin-Joven*, 108 Wn. App. 963, 972-73, 33 P.3d 427 (2001), *rev. denied*, 146 Wn.2d 1013 (2002). It is undisputed that Mr. Obermeit properly raised the defense in his answer.

The facts and procedure here are distinctly different from the cases cited by Plaintiff. (Appellant's Brief 19-22) In *Raymond v. Fleming*, 24 Wn. App. 112, 600 P.2d 614 (1979), *rev. denied*, 93 Wn.2d 1004 (1980), defense counsel did not file an answer or respond to interrogatories for nine months after the case was filed. He repeatedly requested additional time from opposing counsel and the court, and he ultimately moved to dismiss for lack of service of process. *Id.* at 114. The court of appeals held that defendant's actions (on which plaintiff had relied), effectively waived any defect of service defense. *Id.* at 115.

In *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002), the defendant included an insufficient claim filing defense in its answer, but it did nothing to pursue that defense until three days before trial and nearly four years after the complaint was filed. *Id.* at 425. In ruling that defendant had waived the defense, the *King* Court noted that it would have

been improper to dismiss the case on procedural grounds after both parties engaged in extensive and costly discovery and litigation. *Id.* at 426.

In *Romjue v. Fairchild*, 60 Wn. App. 278, 803 P.2d 57, *rev. denied*, 116 Wn.2d 1026 (1991), the court of appeals held that the defendant waived the defense of insufficient service of process. Defendant had engaged in discovery unrelated to the defense and had ignored a pointed inquiry from plaintiff's counsel (before the statute of limitations expired) asking whether service had been accomplished. *Id.* at 281-82. Later cases have limited *Romjue* to its facts. For example, in *Davidheiser v. Pierce County*, 92 Wn. App. 146, 960 P.2d 998 (1998), *rev. denied*, 137 Wn.2d 1016 (1999), the court held that the insufficiency defense was not waived despite discovery because unlike in *Romjue*, the defendant in its case filed an answer asserting the affirmative defense and did not attempt to deceive the plaintiff about service. *Id.* at 155-56.

Unlike the defendants in *Romjue* and *Raymond*, Mr. Obermeit did file an answer asserting the defense of lack of service of process. In fact, four of his five affirmative defenses relate to lack of jurisdiction. (CP 155-56) Mr. Obermeit reaffirmed that defense in responding to plaintiff's interrogatories and requests for admission. (CP 230-37, 294-95) He reiterated his position on the Confirmation of Joinder and noted his challenge to service of process. (CP 394-95) Unlike the defendant in

Romjue, Mr. Obermeit did not ignore or do anything to mislead Plaintiff about whether he felt service had been proper. Unlike the defendant in *King*, Mr. Obermeit did not wait an unreasonably long time to bring his motion to dismiss.

This case is most similar to *O'Neill v. Farmers Ins. Co. of Washington*, 124 Wn. App. 516, 125 P.3d 134 (2004), provides a useful example. The *O'Neill* Court held that the defendant had not waived the defense of insufficient service of process. *Id.* at 529. In *O'Neill*, as in the case before this Court, the defendant properly pled the defense of insufficiency of process, it promptly notified the opposing party, and the plaintiff failed to investigate that defense before the statute of limitations expired. *Id.* at 529.

A review of the timeline in this case demonstrates that Mr. Obermeit did not waive the defense by dilatory conduct or conduct inconsistent with asserting the defense. *See Lybbert*, 141 Wn.2d at 38-39. Mr. Obermeit included the affirmative defense in his answer filed on October 30, 2009. (CP 156) He included it in his interrogatory responses dated January 11, 2010, and in his responses to requests for admission dated January 8, 2010. (CP 295, 233-34) Mr. Obermeit made his position on the service issue clear from the start and did not avoid any questions from plaintiff in order to gain a tactical advantage.

It is true that both parties conducted some discovery during the short life of this case. Mr. Obermeit served plaintiff with pattern interrogatories and a request for statement of damages on November 2, 2009, and served records deposition subpoenas to eight of plaintiff's health care providers on January 14, 2010. However, a service of process defense is not waived by an attorney serving interrogatories. *Omaits v. Raber*, 56 W. App. 668, 671, 785 P.2d 462, *rev. denied*, 114 Wn.2d 1028 (1990). Even the *Romjue* Court acknowledged that participating in discovery does not necessarily waive an insufficient service of process defense. 60 Wn. App. at 281. As long as the defense is properly preserved in the answer, a defendant does not waive the defense by proceeding with discovery, even if the discovery is unrelated to the service of process defense. *Davidheiser*, 92 Wn. App. at 156.

Mr. Obermeit's motion to dismiss was filed on February 10, 2010. The other discovery actions referenced by plaintiff (Appellant's Brief 20-21) were taken while the motion to dismiss was pending (the defendant's deposition was taken on March 2, 2010, and Mr. Obermeit requested on April 9, 2010, that plaintiff undergo an IME).⁷ These limited discovery

⁷ It is not unreasonable that both parties engaged in some discovery while their competing motions for summary judgment were pending.

activities (including defendant's deposition initiated by Plaintiff), are unlike the expensive and protracted litigation over the course of four years in the *King* case. 146 Wn.2d at 426. Plaintiff was aware all along that Mr. Obermeit was actively pursuing his defense based on insufficiency of process. There was no waiver.

VI. CONCLUSION

Plaintiff sought to use RCW 46.64.040 to serve process on Mr. Obermeit through the Secretary of State instead of by personal service. However, the original declaration of service did not demonstrate that plaintiff made due and diligent efforts to personally serve Mr. Obermeit before resorting to the nonresident motorist statute. Mr. Obermeit moved to dismiss, and plaintiff filed a second declaration by the process server which contained new and different assertions about the service attempts.

Faced with discrepancies, the superior court held a fact-finding hearing to obtain live testimony from the process server. Following this hearing, the court issued findings of fact and conclusions of law. The court dismissed plaintiff's case for lack of jurisdiction due to insufficient service of process. Both the process undertaken by the superior court and its conclusions are sound. Dismissal should be affirmed.

DATED this 23rd day of December, 2010.

REED McCLURE

By *Marilee C. Erickson*
Marilee C. Erickson WSBA #16144
Michael Budelsky WSBA # 35212
Attorneys for Respondents

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KING COUNTY
SUPERIOR COURT CLERK

ORIGINAL

Honorable Cheryl B. Carey

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

JAMES E. HARVEY,

Plaintiff,

v.

RICHARD A. OBERMEIT and JANE DOE
OBERMEIT, husband and wife, and their
marital community,

Defendants.

NO. 09-2-27489-4 KNT

**FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

And

**ORDER DISMISSING DEFENDANTS
WITH PREJUDICE**

THIS MATTER having come on before this Court upon the motion of defendants
Obermeit for an order dismissing the case against them

The Court having considered these documents submitted herein

1. Defendants' Motion to Dismiss with Declaration of Counsel and Exhibits;
2. Plaintiff's Response in Opposition, Declaration of Counsel with Exhibits;
3. Plaintiff's Objection to Fact Finding Hearing, and the pleadings on file herein.
4. On June 18, 2010, the Court heard testimony of Alex Conley, III, process server.

APPENDIX A

FINDINGS OF FACT AND CONCLUSIONS OF LAW - 1

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Phone: 206-689-4288

1
2 The Court makes the following Findings of Facts and Conclusions of Law:
3

4 FINDINGS OF FACT

- 5 1. November 1, 2009, was the last day for completing personal service.
6 2. No defendant was ever personally served with a summons and complaint.
7 3. Defendants Answered the Complaint on October 30, 2009, naming failure
8 to serve process and expiration of the statute of limitations as affirmative
9 defenses.
10 4. On January 8, 2010, defendants received notice that the plaintiff had
11 attempted to perfect personal service of process by serving the Washington
12 Secretary of State under the nonresident motorist statute on September 23,
13 2009.
14 5. Part of this attempted service on the Secretary of State included a
15 "Declaration of Attempted Service" signed by Alex Conley III.
16 6. This Declaration admitted that personal service had not been made, and
17 stated that the Declarant had made two attempts at service at the
18 defendants' home; one on August 9, 2009 and the other on August 16,
19 2009.
20 7. The Declaration stated "[p]er neighbors, the Obermeits' will take off for
21 weeks at a time." (sic)
22 8. The declaration was signed with two dates, 9/11/09 and 9/14/09. Mr.
23 Conley did not know why there were two dates.
24 9. The declaration had no actual signature of the Declarant.
25 10. This second Declaration stated that Mr. Conley had made two additional
26 attempts at serving process, which also failed.
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11. A second declaration further stated that Mr. Conley had placed paper clips on the tires of vehicles at the premises, which were still present when he returned the next time.
12. The second declaration repeated his original claim from the first declaration, stating "I spoke to neighbors, who informed me that the residents at the subject address will take off for weeks at a time."
13. On June 18, 2010, this Court heard the testimony of Alex Conley III at a Fact Finding Hearing.
14. Mr. Conley knew, that defendants had four vehicles registered to their address, however, he only put paper clips on two vehicles, rather than all four.
15. Twice, Mr. Conley attempted to personally serve the defendants
16. He felt that he had not done an adequate job, because his service makes up to ten attempts before deeming the effort adequate.
17. No neighbors told Mr. Conley, that the defendants were gone "for weeks at a time," but rather they left sometimes on the weekends.
18. Given the discrepancies, Mr. Conley was not a credible witness.

CONCLUSIONS OF LAW

1. After hearing the testimony of Alex Conley III and the cross examination by the defendants' counsel, this Court finds that Mr. Conley's testimony is in conflict with his declarations, and is not credible.
2. Mr. Conley's two attempts were not adequate to show due diligence on the part of the plaintiff to personally serve the defendants.

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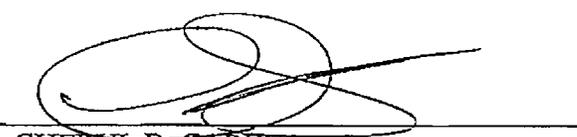
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- 3. Even if Mr. Conley is to be believed in that he made four attempts at service, they were made in a short time span during the month of August, and still show a lack of due diligence.
- 4. Defendants were never personally served.
- 5. Service on the Secretary of State under RCW 46.64.040 was improper, because defendants were found within the state but never personally served.
- 6. Service on the Secretary of State under RCW 46.64.040 was improper because plaintiff did not make a due and diligent search.
- 7. Service on the Secretary of State under RCW 46.64.040 was improper because the Declaration of Attempted Service was not properly authenticated.
- 8. The statute of limitations has expired in this case, with neither personal service nor appropriate alternative service.
- 9. Plaintiff has no personal jurisdiction over the defendants.

This Court, having made these Findings of Fact and Conclusions of Law and being fully advised, it is therefore

ORDERED, ADJUDGED AND DECREED that defendants are Dismissed With Prejudice from the above captioned lawsuit.

DONE IN OPEN COURT this 7 day of July, 2010.


CHERYL B. CAREY
JUDGE

Prepared and Presented by:

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DIETRICH BIEMILLER, WSBA #32171
Attorney for Defendants Obermeit

Approved as to form
Notice of Presentation Waived

TERENCE F. TRAVERSO, WSBA #21178
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