

COURT OF APPEALS
DIVISION II

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

UNITED STATES SHEEPSKIN, INC.,
a Washington corporation,

Appellant,

v.

MAO LI YING, an individual,
d/b/a MOONSOFT,

Respondents.

APPEAL FROM THE SUPERIOR COURT FOR PIERCE COUNTY
STATE OF WASHINGTON
THE HONORABLE LINDA LEE

BRIEF OF APPELLANT

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COMES NOW Appellant UNITED STATES SHEEPSKIN, INC. (“US Sheepskin”), by and through its attorney of record, MAHER INGELS SHAKOTKO CHRISTENSEN LLP, and Kelly DeLaat-Maher and Jordan K. Foster, and submits Appellant’s brief on Appeal as follows:

I. ASSIGNMENTS OF ERROR

A. **Assignment of Error:** The trial court erred in granting Defendant’s Motion for Summary Judgment on May 18, 2007.

B. **Issues on Appeal:** Did the Court properly conclude that there were no material issues of fact preventing summary judgment as to the claims contained in Appellant’s Complaint for Breach of Contract and Fraud based upon the statute of limitations and/or the basis that Appellant lacked personal jurisdiction over the Defendant? **No.**

II. STATEMENT OF THE CASE

A. FACTUAL BACKGROUND TO THE CASE

US Sheepskin is in the business of manufacturing and distributing sheepskin products and has been operating since 1976. US Sheepskin’s products include such items as seat covers, auto accessories, footwear, apparel, sports accessories, and various household items. US Sheepskin purchases many of the products and materials for these products from factories located within the People’s Republic of China.

Beginning in 1995, US Sheepskin began employing Defendant Li Ying Mao (“Mao”) as an agent/liaison between the many Chinese factories in ordering and purchasing many of its sheepskin products. Declaration of David Phillips September 23, 2003, CP 1005 -1017, and Declaration of Mr. Phillips May 7, 2007, CP 1230-1289. During 1995 through 2001, Defendant acted as agent between US Sheepskin and the Chinese factories. *Id.* Defendant Mao’s duties for US Sheepskin included brokering purchase orders, negotiating prices, quality control inspections, arranging shipments, coordinating invoices and transferring money with the Chinese factories. *Id.* In return, Defendant Mao was compensated by receiving a commission on these orders. *Id.*

In or about September of 2001, US Sheepskin discovered that Defendant Mao was creating false/fraudulent invoices from the Chinese factories, to collect a larger commission for herself. *Id.* Defendant Mao, in connection with the Chinese factories would revise the actual invoice price by inflating the prices to US Sheepskin. *Id.* Defendant Mao would then reissue new invoices on her company’s (Defendant Moonsoft) letterhead. The inflation of these invoices is believed to be well over \$100,000 in damages. *Id.*

i. Establishment of Agreement and Fiduciary Duties of Defendant Mao

Attached to the declaration of David Phillips submitted in response to Defendants' Motion for Summary Judgment were true and correct copies of a few select excerpts of correspondence between US Sheepskin and Defendant Mao between the years 1996 through 2001. CP 1230-1289. These documents supported US Sheepskin's contention that Defendant Mao was operating as US Sheepskin's agent within China, a fact which Defendant Mao denied. See Requests for Admission #16, 17, 18, and 19 attached to Declaration of Jordan Foster of May 7, 2007, CP 1198-1229. These documents also sufficiently outlined the written terms of the contracts between the parties.

ii. Confession of Defendant Mao to Inflating Prices to US Sheepskin

Attached to the Declaration of Jacob Engelstein submitted in response to Defendants' Motion for Summary Judgment is a fax he received from Defendant Mao as of January 8, 2002, containing a confession of Defendant Mao's liability in this matter. CP 1187-1197. In this letter, Defendant Mao admits to inflating prices and states that she did not see anything wrong with doing that. *Id.*

B. CHRONOLOGICAL TIMELINE OF RELEVANT DATES

US Sheepskin commenced this action in January, 2002, and thereafter attempted to gain service on Defendants over the course of

several years. An outline of relevant Court filings is listed in the table below, while US Sheepskin's attempts at service are more fully detailed in Section C hereunder.

DATE	ACTION
01/18/2002	US Sheepskin files case against Defendants, Summons CP 976-979 and Complaint CP 980-986
06/18/2002	US Sheepskin files Motion for Service by Publication, CP 992-994.
11/15/2003	Defendants file motion to vacate default and default judgment.
11/17/2003	Defendants' motion to vacate is denied.
11/24/2003	Defendants file motion for reconsideration.
12/16/2003	Defendants' motion for reconsideration is granted; default and default judgment are vacated, CP 1041-1043
02/09/2004	Service is completed on Defendants,
05/25/2006	Defendants file motion to dismiss, CP 1097-1099
06/09/2006	Defendants' motion to dismiss is denied
06/24/2006	Service Completed again on Defendants at 14908 Palomino Lane in Mica, Washington by service on Dan Simmons, See Declaration of Service CP 1129-1133
08/29/2006	US Sheepskin seeks default against Defendants.
08/31/2006	Defendants file answer and counterclaim against US Sheepskin, CP 1138-1144
11/08/2006	US Sheepskin sends outs subpoenas duces tecum for Defendants' bank account information
12/04/2006	Defendants seek protection order regarding their bank account information
12/15/2006	Court grants protective order and orders both parties to trade client lists within 30 days
02/05/2007	US Sheepskin files reply to Defendants' counterclaims
03/26/2007	US Sheepskin sends requests for admission to Defendant Mao
03/14/07	Defendant Mao files Motion for Summary Judgment CP 1148-1157
05/07/07	US Sheepskin files response, CP 1169-1186, along with Declaration of David Phillips (CP 1230-1289); Declaration of Jacob Engelstein (CP 1187-1197); Declaration of Jordan

	Foster (CP 1198-1229); and Declaration of Kelly DeLaat-Maher (CP 1290-1348).
05/14/07	Defendant files response CP 1349-1366.
05/18/07	Court grants Motion for Summary Judgment CP 1421-1422

In March, 2007, Defendants filed their Motion for Summary Judgment, upon which this appeal is based. Defendants argued that US Sheepskin's claims were barred by the three year Statute of Limitations, RCW 4.16.080, and that the court lacked jurisdiction over the Defendants. Defendants' Motion was argued on May 18, 2007, and the court ultimately granted Defendants' Motion by Order entered on that date. CP 1421-1422. In its oral ruling, the Court stated that the case file had been reviewed, and that the court had reviewed RCW 4.16.180, RCW 4.16.040, and RCW 4.16.080. RP 26:15-23. The court further stated as follows:

And recognizing that this is a motion for summary judgment and that I must view all of the evidence in the light most favorable to the nonmoving party, U.S. Sheepskin in this case, I am going to find that there are no genuine issues of material fact and that summary judgment should be granted in this case as a matter of law.

RP 26:24-25; RP 27:1-4. The court cited no other bases for its decision.

C. US SHEEPSKIN'S SERVICE OF PROCESS ATTEMPTS ON DEFENDANTS

Since this case was initiated on January 18, 2002, US Sheepskin has attempted service in several locations around the United States, in the Peoples Republic of China, and most recently in Spokane, WA. Those

attempts have been brought to the attention of the court on several occasions. Attached to the Declaration of Kelly DeLaat-Maher of May 7, 2007, as Exhibit "A" is a copy of a Declaration from David Phillips, filed with the Court on September 23, 2003. CP 1290-1348, CP 1005 – 1017. That Declaration outlines attempts to serve Defendant Mao at various trade shows within the country, including a trade show in Miami, Florida, in January, 2002. That Declaration also outlines the fact that until late 2002, US Sheepskin had no knowledge of Defendant Mao's address within the United States.

Attached as Exhibit "B" to the Declaration of Kelly DeLaat-Maher of May 7, 2007, was a copy of US Sheepskin's Motion to Adjust Trial Date, filed May 15, 2006. CP 1290-1348. That Motion outlines later attempts to serve Defendants after the initial Default Judgment was vacated in December, 2003. The motion outlines the attempts that were made in February, 2004 at Defendant Mao's home address in Mica, Washington, which included service on a resident of Defendant Mao's home. The Motion also outlines subsequent attempts to serve Defendant Mao's address in China, pursuant to the requirements of the Hague Service Convention. Certificates received from the Ministry of Justice of the People's Republic of China indicate that no company or person existed

at the address previously known to US Sheepskin and at which US Sheepskin had conducted business.

Finally, attached as Exhibit "C" to the Declaration of Kelly DeLaat-Maher of May 7, 2007, is a copy of the Declaration of Kelly DeLaat-Maher filed on June 7, 2006, in response to Defendants' Motion to Dismiss. CP 1290-1348. Therein, further attempts to serve were outlined, including several occurring in May, 2006. Therein, several attempts were made on Defendant Mao's home in Mica, which evidence people apparently being inside the home, but not coming to the door. These efforts eventually culminated in service on an individual identified as Daniel Simmons, Defendant Mao's husband, although he then denied that this individual was him. Nonetheless, that service was accomplished on June 24, 2006.

III. ARGUMENT

A. STANDARD OF REVIEW

This appeal deals with the court's grant of a Motion for Summary Judgment. On review of an order for summary judgment, the court perform the same inquiry as the trial court. *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 860, 93 P.3d 108 (2004) (citing *Kruse v. Hemp*, 121 Wn.2d 715, 722, 853 P.2d 1373 (1993)). As specifically stated in *Kruse v. Hemp*, in reviewing a summary judgment order, an appellate

court evaluates the matter de novo, performing the same inquiry as the trial court. *Kruse*, at 722.

As the court knows, summary judgment is governed by the Civil Rules of Procedure, Rule 56(c). That rule provides as follows:

The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.

In this case, summary judgment was not appropriate. Summary judgment, pursuant to CR 56 (c), is only proper if the pleadings, affidavits and depositions before the trial court establish that there is no genuine issue of material fact. *Ruff v. County of King*, 125 Wn.2d 697, 703, 887 P.2d 886 (1995) (quoting *Dickenson v. Edwards*, 105 Wn.2d 457, 461, 716 P.2d 814 (1986); and *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982)). A material fact is one on which the outcome of the litigation depends. *Braegelmann v. Snohomish County*, 53 Wn.App. 381, 383, 766 P.2d 1137, review denied, 112 Wn.2d 1020 (1989). In a summary judgment motion, the moving party must first show absence of issue of material fact, with burden then shifting to nonmoving party to set forth specific facts showing genuine issue for trial. *Iwai v. State*, 129 Wn.2d 84, 915 P.2d 1089 (1996).

If the moving party is a defendant who meets the initial burden of showing the absence of an issue of material fact:

. . .then the inquiry shifts to the party with the burden of proof at trial, the US Sheepskin. If, at this point, the US Sheepskin 'fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial', then the trial court should grant the motion.

Young v. Key Pharms., Inc., 112 Wn.2d 216, 225, 770 P.2d 182 (1989).
(quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)).

Here, summary judgment was not appropriate, as there were material issues of fact in dispute. Sufficient writings existed between the parties demonstrating the existence of a written contract, and therefore the statute of limitations should have been six years and not three years. Regardless of either three years or six years, the statute of limitations had not passed, making the Defendants subject to the jurisdiction of Pierce County Superior Court. Further, evidence existed as to Defendants' breach of contract, as outlined in the Declaration of Jacob Engelstein submitted in response to the Motion for Summary Judgment. CP 1187-1197.

**B. MATERIAL ISSUES OF FACT EXISTED
DEMONSTRATING THAT US SHEEPSKIN'S CLAIMS
WERE NOT BARRED BY THE STATUTE OF
LIMITATIONS**

i. US Sheepskin's Claims are Not Subject to a Three Year Statute of Limitations

In their Motion for Summary Judgment, Defendants claimed that US Sheepskin's cause of action was barred as US Sheepskin had not accomplished service prior to the expiration of the statute of limitations on an oral contract. Material issues of fact existed as to whether the contract at issue was oral or written, and therefore the court should not have granted summary judgment on that issue.

Defendant relied upon RCW 4.16.080 in support of their contention that the action was subject to a three year statute of limitations. RCW 4.16.080(3) states that actions of contract or liability not arising out of any written instrument shall be governed by a three year statute of limitations. However, when a written instrument is established then the statute of limitations shall be six years. RCW 4.16.040. RCW 4.16.040 is the proper statute of limitations which should have been applied in this case.

Defendant argued that the parties did not have a written contract, although there was no dispute that several writings, invoices and memorandum existed between the parties, which were presented to the court attached to the Declaration of David Phillips. CP1230-1289. Washington courts have determined that it is well established that a

“contract need not be contained in one document, but may be comprised of several documents, including antecedent correspondence and prior written memorandums.” *Smith v. Skone & Connors Produce, Inc.*, 107 Wn.App. 199, 206, 26 P.3d 981 (2001), review denied 145 Wn.2d 1028; citing *Boyd v. Davis*, 127 Wn.2d 256, 261, 897 P.2d 1239 (1995); *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wn.2d 109, 124, 173 P.2d 194 (1946). Nonetheless, for purposes of applying the six year statute of limitations, written instruments must still contain all essential elements of a contract, including the subject matter, the parties, the terms and conditions, and the price or consideration. *Smith v. Skone & Connors Produce, Inc.*, 107 Wn.App. at 206. Signatures of both parties are not essential elements, and ex parte writings are sufficient to bring a contract within the six-year statute of limitations. *Urban Development, Inc. v. Evergreen Bldg. Products, LLC*, 114 Wn.App. 639, 651, 59 P.3d 112 (2002), as amended, review granted 149 Wn.2d 1027 (2003), affirmed 151 Wn.2d 534 (2004). As such a memorandum or other writing that memorializes an oral agreement between the parties satisfies the writing requirement. *Urban Development*, 114 Wn.App. at 651.

In the present case, US Sheepskin, as principal, maintained an agency relationship with Defendant Mao, who operated as US Sheepskin’s agent within China from 1995 through 2001. This agency relationship is

well established in various written forms of correspondence either via facsimile or email throughout 1996-2001. See Decl. of Mr. Phillips, May 7, 2007, CP 1165-1168. An email from Defendant Mao to David Phillips on May 23, 2001, admits to the agency relationship, "From the first day to be the agent of your company, commission for seat covers is based off percentage which was 5%..."

The general duties of Defendant Mao were to find sheepskin products and suppliers, negotiate prices and contracts, quality control inspections, arrange shipping, coordinate invoicing, and the transfer or wiring of money with the Chinese tanneries on behalf of US Sheepskin. In return, Defendant Mao generally received either a 5% or fixed price of .01 to .02 cent commissions on most items ordered by US Sheepskin. In early as 1996, David Phillips of US Sheepskin maintained correspondence with Defendant Mao agreeing to pay her commissions of 0.02 cents on each unit of steering wheel covers. CP 1230-1289. Decl. Mr. Phillips, May 7, 2007, Ex. A section 1996: Agreement on Commission.

The procurement of orders from US Sheepskin would then be requested upon Defendant Mao via facsimile or email. Defendant Mao would then secure the contract with the tannery and forward the written invoice to US Sheepskin. (For example, see Decl. Mr. Phillips, May 7, 2007, section 1998: email from US Sheepskin on January 28, 1998, to

Defendant Mao, which requests an order of steering wheel covers (“SWC”); followed by Defendant Mao’s reply email on January 30, 1998, referencing Invoice No. 98MD002; followed by the referenced Invoice No. 98MD002). Thus, each transaction or order from a tannery was supplemented by written invoice.

Additionally, US Sheepskin would from time to time remind Defendant Mao what her general duties included. For example, US Sheepskin sent a fax to Defendant Mao on September 30, 1996, which stated as follows: “Mao, for the future, please remember these golden rules of business. 1) PRICE 2) QUANTITY 3) DELIVERY TIME. These rules are most important when negotiating new contracts. They should be confirmed as much as needed so that situations like this one almost never happen. This is one of your responsibilities because you are there and you are our agent.” Decl. Mr. Phillips, May 7, 2007, section 1996. CP 1230-1289. Defendant Mao also maintained a confidentiality agreement with US Sheepskin. See, Decl. Mr. Phillips, May 7, 2007, section 1996: Contract of Confidentiality. CP 1230-1289.

When the various communications and writings between the parties are reviewed, one is easily able to discern the written agreement between the parties as the Defendant Mao’s responsibilities and the rates at which US Sheepskin agreed to compensate her for her services. As a

result, a written contract existed between the parties, albeit one that is comprised of several writings. In any event, those writings are sufficient to constitute a written contract subject to a six-year statute of limitation rather than the three-year statute, contrary to the trial court's ruling at summary judgment. In the alternative, the court had sufficient evidence to determine that Defendant Mao was served within the time period necessary on a three year statute of limitations, as more fully outlined below, and summary judgment should not have been granted on that issue as well.

ii. The Action was commenced and the Provisions of RCW 4.16.170 are Inapplicable.

In their Motion for Summary Judgment, Defendants alleged that the action was not commenced in accordance with RCW 4.16.170, as US Sheepskin failed to complete service within 90 days of filing the lawsuit. Issues of material fact existed, thereby making summary judgment improper as to whether or not the action had commenced pursuant to that statute.

RCW 4.16.170 provides as follows:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the US Sheepskin shall cause one or more of the defendants to be served personally, or commence

service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the US Sheepskin shall file the summons and complaint within ninety days from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 4.16.170. Defendant argued below that US Sheepskin was required to serve within 90 days of filing the complaint, pursuant to that statute. However, case law clarifies that the 90-day "catch up" provision of this statute only pertains to tolling the applicable statute of limitations. *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 822, 792 P.2d 500 (1990). If both service and filing are accomplished prior to the expiration of the statute of limitations, then RCW 4.16.170 is inapplicable. *Hansen v. Watson*, 16 Wn.App. 891, 892-93, 559 P.2d 1375 (1977).

In *Hansen v. Watson*, the plaintiff sustained injuries in a car accident on December 7, 1971. *Hansen*, 16 Wn.App. 891. The plaintiff was subject to a three year statute of limitations. *Id.* The plaintiff served the defendant with a summons and complaint on October 3, 1972. *Id.* Thereafter, the plaintiff did not file the summons and complaint until December 6, 1974 (within the three year statute of limitations). *Id.* Despite the plaintiff filing the summons and complaint over two years after service on the defendant, the court held that both service and filing

were accomplished within the three year statute of limitation and thus RCW 4.16.170 was not applicable. *Id.*

In the present case, US Sheepskin did not discover any injury until at the earliest date of September of 2001. Declaration of David Phillips 2003. CP 1005 – 1017. Applying the discovery rule from this date, a six year statute of limitations would have run until September of 2007. Here, US Sheepskin filed a summons and complaint on January 18, 2002. As previously noted, various attempts at service were made leading to service by publication, which resulted in a default judgment that was later vacated. After vacation of the default judgment, US Sheepskin definitively completed service on June 24, 2006 (although evidence existed that service had been accomplished in 2004). Thus, both filing (January 18, 2002) and service (June 24, 2006) were completed prior to the six year statute of limitations (September 2007). Therefore, because service and filing were completed within the six year statute of limitations, US Sheepskin was not required to re-file the Complaint.

Even under a three year statute of limitations, US Sheepskin commenced the action timely. From the discovery date of September 2001, a three year statute of limitations would have run in September 2004. As indicated above, although a later service was made on Defendant Mao personally (June 24, 2006), Defendant Mao was actually

served on February 9, 2004, as outlined an Affidavit of Non-Service of Summons and Complaint attached to the Declaration of Jordan Foster (Exhibit A to April 18, 2007 Declaration of Jordan Foster, also attached as Exhibit “A” to May 7, 2007 Declaration). CP 1198 – 1229. This Affidavit, although entitled Affidavit of Non-Service, actually identifies service on Mao by stating “. . .Service was completed on Mao Li Ying by leaving with a resident of the 14908 E. Palomino Lane, Mica, WA, who refused to identify himself but replied he did live with Mao Li Ying, but was not her husband, and refused to provide any other information regarding Mao Li Ying or Moonsoft Sheepskin Co.” See Declaration of Jordan Foster. CP 1198 – 1229. The Affidavit goes on to state that only Moonsoft was not served.

Although titled an Affidavit of Non-Service, it is not the title of the document that controls, but rather the facts of the service. In *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938), the Court stated that it is the facts of service rather than the statement in the return of service that effectuates service of process. Specifically, the Court stated that “[i]t is the fact of service which confers jurisdiction, and not the return, and the latter may be amended to speak the truth.” *Id.* at 363. Here, the title of the affidavit should not take away the facts

contained therein, which evidences service on a resident of suitable age at Defendant Mao's place of residence.

In *Wichert v. Cardwell*, 117 Wn.2d 148, 812 P.2d 858 (1991) the court examined whether service was sufficient on the daughter of absent owners when she only spent the night before at the home of her parents, and was not a permanent resident of the home. In its analysis, the court stated as follows:

The purpose of statutes which prescribe the methods of service of process is to provide due process. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394, 34 S.Ct. 779, 783, 58 L.Ed. 1363 (1914). That opportunity to be heard in turn depends upon notice that a suit is being commenced. However, "[p]ersonal service has not in all circumstances been regarded as indispensable to the process due to residents...." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 657, 94 L.Ed. 865 (1950). Compliance with due process is described thusly: "The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Mullane*, at 315, 70 S.Ct. at 657.

Id. at 151. The court went on to state that while personal service is preferable, alternative means for service are allowable to protect creditors with just claims. The court stated as follows:

In *Northwestern & Pac. Hypotheek Bank v. Ridpath*, 29 Wash. 687, 710, 70 P. 139 (1902), "[t]his statute providing for service at his usual abode was not made exclusively for the benefit and protection of defendants, but was made also for the benefit and protection of parties who have just

claims, so that residents of the state could not depart therefrom and defeat their creditors.”

Id. at 152. The court ultimately determined that because service on the daughter was reasonably calculated to accomplish notice, it was sufficient.

Id. Nonetheless, the court recognized that its decision did not provide a bright line rule, but rather indicated that a case to case determination is necessitated by the fact-specific requirements of the statute. “[T]he practicalities of the particular fact situation determine whether service meets the requirements of [Fed.R.Civ.P.] 4(d)(1).” *Id.*, (citing to *Nowell v. Nowell*, 384 F.2d 951, 953 (5th Cir.1967), cert. denied, 390 U.S. 956, 88 S.Ct. 1053, 19 L.Ed.2d 1150 (1968)).

Similarly, although we have an individual who refused to identify themselves on February 9, 2004, that person did admit they lived with Mao Li Ying, at an address she has consistently stated in court records is in fact her address, and one which she admits is her address in Requests for Admission recently received from the Defendant Mao. See Decl. Mr. Foster May 7, 2007. CP 1198 – 1229. This service was already after Defendant Mao had significant awareness of the cause of action, based upon her attorney’s recent success in vacating the Default Judgment in December, 2003, only a few months prior. Thus, it is difficult to say that service on a resident of suitable age and discretion at her usual abode was

not reasonably calculated to give Defendant Mao notice of the action. In reviewing the facts of the situation, the February 9, 2004, service on Mao should be deemed sufficient, regardless of any of US Sheepskin's later efforts to serve her and the company personally.

Despite the law stated above, the court apparently determined that subsequent statements of counsel that service was not accomplished controlled, and that therefore service had not been accomplished. US Sheepskin urges the court to look to the events of what actually occurred in terms of service as of February, 2004, rather than later attempts to perfect that service on other Defendants.

iii. The Statute of Limitation was tolled pursuant to RCW 4.16.180

In response to Defendant's Motion for Summary Judgment, US Sheepskin argued that the Statute of Limitations was tolled pursuant to RCW 4.16.180. US Sheepskin urges that the trial court erred in failing to determine that the statute of limitations was tolled during the period of time in which the Defendants concealed themselves from service. The trial court declined to apply any tolling of the statute of limitations in accordance with RCW 4.16.180.

RCW 4.16.180 provides that the statute of limitations is tolled during a period in which a defendant willfully conceals himself from service. It specifically provides as follows:

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

RCW 4.16.180. Case law interpreting the statute indicates that willful concealment is a necessary element, which further requires a clandestine removal from a known address. In *Brown v. ProWest Transport Ltd.*, 76 Wn.App. 412, 886 P.2d 223 (1994) the Court of Appeals stated as follows:

Judicial interpretations of the standard of “concealment” necessary to the tolling of the statute of limitations are scarce. *Bethel v. Sturmer*, 3 Wn.App. 862, 867, 479 P.2d 131 (1970). Concealment under RCW 4.16.180 is defined as a “ ‘clandestine or secret removal from a known address’ ”. *Caouette v. Martinez*, 71 Wn.App. 69, 74, 856 P.2d 725 (1993) (quoting *Patrick v. DeYoung*, 45 Wn.App. 103, 109, 724 P.2d 1064 (1986), review denied, 107 Wash.2d 1023 (1987)). Willful evasion of process appears to be a necessary ingredient. *Muncie v. Westcraft Corp.*, 58 Wn.2d 36, 38, 360 P.2d 744 (1961).

Brown v. ProWest Transport Ltd., 76 Wn.App. at 420-421.

Here, Defendant Mao's actions evidence a secret removal from an address she admits is hers. Review of the files and records in this matter reveal several attempts at service at Defendants admitted residence and even her place of business in China. Those attempts resulted in, amongst others, an individual who refused to identify himself but admitted that he lived with Defendant Mao (February 9, 2004) (See Declaration of Kelly DeLaat-Maher filed June 7, 2006, CP 1107-1122); an individual who refused to identify himself and indicated no knowledge of Defendant Mao or her company whatsoever (February 14, 2004) CP 1044; the Ministry of Justice of the People's Republic of China's return on service indicating that no person or company exists at the reported address, CP 1107-1122; and service on an individual identified as Daniel Simmons, who subsequently claimed it was not him who was served (June 24, 2006), CP 1129-1131; CP 1132-1133. The evidence also revealed several attempts on the admitted residence, wherein individuals were clearly home, but refused to answer the door (Declaration of Kelly DeLaat-Maher filed June 7, 2006, CP 1107-1122).

This evidence presented to the court at summary judgment indicated Defendant Mao's attempts to conceal herself and the company. The evidence was further supported by the fact that she had an attorney appear on her behalf early in the action, but apparently instructed that

attorney to refuse to accept service for his long standing client. Further, counsel's lack of acceptance of service and history of concealment were certainly convenient to the Defendants' argument at summary judgment that jurisdiction had never been obtained. Simply put, the court should have determined that RCW 4.16.180 tolled the statute of limitations until service could be obtained, either in 2004, as argued above, or in 2006 when service was had again on June 24 of that year.

C. DEFENDANTS WAIVED JURISDICTION.

The trial court failed to recognize waivers of jurisdiction by Defendant Mao. In summary judgment, Defendant Mao argued she was not subject to the jurisdiction of the court, based upon an October 2003 decision issued by the court vacating a judgment previously entered. However, waiver of jurisdictional defenses can occur in either of the three following general circumstances: (1) if a defendant omits said defenses in a motion to dismiss or fails to consolidate said defenses in a single motion, CR 12(h)(1) and CR 12(g), see *Kahclamat v. Yakima County*, 31 Wn.App. 464, 643 P.2d 453 (1982); (2) if a defendant seeks any form of affirmative relief by way of counterclaim, cross-claim, or third-party complaint, *Livingston v. Livingston*, 43 Wn.App. 669, 719 P.2d 166 (1986), *Kuhlman Equipment Co. v. Tammermatic, Inc.*, 29 Wn.App. 419, 628 P.2d 851 (1981).; or (3) if the defendant is dilatory in asserting an affirmative

defense or by a showing of unequivocal acts that show intent to waive, *Lybbert v. Grant County*, 141 Wn.2d 29, 1 P.3d 1124 (2000); *Clark v. Falling*, 92 Wn.App. 805, 965 P.2d 644 (1998).

In the present case, Defendants had an active role in litigation, which should have constituted a waiver of jurisdiction. Defendants answered the Complaint and asserted Counterclaims. CP 1138 – 1144. Defendants brought a Motion for Dismissal. CP 1097-1099. Defendant brought two Motions for protective orders. Defendants argued in their Motion for Summary Judgment that the service upon resident individuals (one of whom was identified as her husband) at her place of abode somehow does not subject her to the jurisdiction of the courts is confounding.

As stated above, Defendants were regularly served with a summons and complaint on February 9, 2004, following the vacated default and default judgment. Declaration of Jordan Foster April 18, 2007. CP 1198 – 1229. US Sheepskin attempted service several times thereafter, including at Defendants' alleged place of business in China. Service was accomplished yet again on June 24, 2006, on Defendant Mao's husband, Dan Simmons. It is curious that close to a year after service on June 24, 2006, and the apparent submission to the court's jurisdiction in filing a jury demand, witness list, and motions for dismissal and protective orders,

Mr. Simmons only now has indicated that the individual upon whom service was made on that day was not him. It should certainly seem curious that on several occasions now, individuals in Defendant Mao's home have answered the door, one of whom indicated on February 9, 2004 that he lived there, yet these individuals are somehow unknown to Defendants.

Defendants' actions prior to the Motion for Summary Judgment show unequivocal acts of an intent to waive. Defendants submitted an Answer, Affirmative Defenses and Counterclaims, on August 31, 2006, containing counterclaims such as breach of contract and violation of the Consumer Protection Act that are arguably not compulsory. CP 1138-1144. Thereafter Defendants filed a jury demand, and also filed a list of possible primary witnesses in accordance with the case schedule. Defendants filed a Motion for a Protective Order in December, 2006, seeking protection from disclosure of bank account information and further, the length of time between the filing of this Motion and the Defendants' filing of Affirmative Defenses in August demonstrate that the Defendant Mao had been dilatory in asserting the defense and taking affirmative action.

D. MATERIAL ISSUES OF FACT EXISTED AS TO DEFENDANTS' BREACH OF CONTRACT

At the summary judgment hearing, the trial court did not consider the evidence in regard to Defendants' breach of contract with US Sheepskin. Because material issues of fact exist as to Defendants' breach, the action should be remanded to be tried on the merits.

"[T]he essence of a contract is that it binds the parties who enter into it and, when made, obligates them to perform it, and any failure of any of them to perform constitutes in law, a breach of contract." *Carboneau v. Peterson*, 1 Wn.2d 347, 374, 95 P.2d 1043 (1939). Thus, a breach can be defined as the failure without legal excuse to perform any promise making up a contract and may be inferred from the refusal of a party to recognize the existence of a contract, or when, in anticipation of the time for performance, one definitely and specifically refuses to do something which he is obligated to do. In the case at hand, Defendants actions of inflating prices constituted a breach of the agreement between the parties for payment of services and goods for a specific price.

In support of US Sheepskin's contention that Defendant breached the contract, US Sheepskin submitted a Declaration of Jacob Engelstein. CP 1187-1197. Therein, evidence was presented that on January 7, 2002, Defendant Mao prepared a letter to Jacob Engelstein of Classic Accessories, one of US Sheepskins biggest clients and business associates and was received via facsimile on January 8, 2002, by Mr. Engelstein.

Decl. Mr. Engelstein May 7, 2007. CP 1187 – 1197. This letter contained an unequivocal confession by Defendant Mao which states as follows:

“You may have heard about me from David Phillips from U.S. Sheepskin because I was [U.S. Sheepskin’s] agent from 1995 until Sept. 11 [2001].” ... “I helped [U.S. Sheepskin] locate good tanneries, watched their production, helped educate them, did the inspection piece by piece, booked vessels, prepared for all the shipping documents.” ... “[U.S. Sheepskin] paid me 1% commission for steering wheel cover and seat belt cover. For other accessories, commission varied from between 2%-4%. [U.S. Sheepskin] had a lot of emergency orders, emergency air-shipments, and emergency demand for price quotation. We tried our best to meet [U.S. Sheepskin’s] needs to help keep [their] sales increase step by step.” ... “[Two tanneries] wanted me to increase a little bit of the prices on several items, which I did from 1999 on a few accessory items. I didn’t see anything wrong for doing that.” ... “[Mr. Ying and Becky Wu] email[ed] and fax[ed] David all the paper work that we gave to the tannery to let David know that I inflated the prices on a few items.” ... “I hope that you might keep this secret from David.”

Decl. Engelstein, May 7, 2007, Letter from Mao January 7, 2002. CP 1187 – 1197.

Invoice records obtained by U.S. Sheepskin show that Defendant Mao assisted in inflating prices from 1998 through 2001. Defendant Mao, in concert with the tanneries, would send an original invoice to US Sheepskin containing an inflated price. Thereafter, Defendant Mao would create an individual invoice that was sent only to the tannery, which contained the actual or a lower price. Attached to the Declaration of Mr.

Phillips May 7, 2007 as Exhibit "B" was one select excerpt from the invoices US Sheepskin paid, followed by the actual invoice, which Defendant Mao sent to the tannery. CP 1230 – 1289. This Invoice is numbered 99MD007. On the U.S. Sheepskin invoice to the tannery (Henan Chanqi Leather) it lists an order for 25,920 sheepskin steering wheel covers ("SWC") at a price of \$1.75 each (U.S. Dollars). However, on the Defendant Mao's invoice it shows the actual price or lower price of \$1.66 each. This is a nine cent difference in price, which on an order of 25,920 equates to an additional profit of \$2,332.80 to Defendant Mao. An accounting summary containing the differences between the inflated price and the actual price is attached to the Declaration of Mr. Phillips May 7, 2007, as Exhibit "C," which is in excess of \$100,000. CP 1230 – 1289.

IV. CONCLUSION

Summary Judgment was not appropriate. The action should be remanded to the court for trial on the merits. Material issues of fact existed demonstrating that the Defendants were served, either under the six year statute of limitations, or under the three year statute. Further, the three year statute of limitations, RCW 4.16.080, was tolled by service on Defendant in February, 2004, or was tolled during Defendants' willful concealment. Defendants additionally waived their jurisdictional defenses.

DATED this 31st day of October, 2007.

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CERTIFICATION OF SERVICE

Under penalty of perjury of the laws of the State of Washington, I hereby certify that I served the above Appellant's Brief to counsel of record as follows:

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DATED this 31st day of October, 2007.



 Jessica L. Ether

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