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DIVISION II
SPokane, WA
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ORIGINAL

**WASHINGTON STATE COURT OF APPEALS
DIVISION II**

NO. 36450-6-II

UNITED STATES SHEEPSKIN INC.,

Appellant,

vs.

**MAO LI YING and JOHN DOE YING, husband and wife, and
MOONSOFT SHEEPSKIN CO. LTD,**

Respondent

BRIEF OF RESPONDENT

1111 12-10-07

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I. INTRODUCTION

COME NOW RESPONDENTS, MAO LI YING and JOHN DOE YING, husband and wife, and MOONSOFT SHEEPSKIN CO. LTD, by and through their attorneys, BOSWELL LAW FIRM, P.S. and Spencer W. Harrington, and respectfully submits this memorandum in support of the respondent's request for this court to affirm the decision of the Pierce County Superior Court in granting summary judgment in the above captioned matter.

SUMMARY: The parties engaged in business for approximately six years. The parties' contract was oral. The business relationship dissolved and the parties ceased conducting business with each other. Appellant filed a complaint alleging breach of the oral contract. Appellant never properly served Respondent. Appellant knew Respondent's address in Spokane, WA, addresses in China, as well as e-mail address, telephones, and fax numbers.

Respondents moved for summary judgment on the basis that the statute of limitations for an oral contract had expired and the action was barred. The trial court agreed that the contract was an oral contract, that the statute of limitations had expired, and no circumstances existed to toll the statute of limitations. This appeal followed.

II. STATEMENT OF THE CASE

The parties had a six-year business relationship importing tanned sheepskins and other consumer products from China, until the relationship deteriorated in 2001. *CP 996 (21¹)*. The business relationship of the parties was based on an oral contract. *CP 983 (8) §4.2*. Appellant (obviously) knew Respondent's business address in China as well as Respondent's business telephone number, fax number, and e-mail address. *CP 996 (21)*. Appellant also knew Respondent's residence address in China and routinely mailed Respondent Mao birthday and Christmas cards to her residence. *CP 995-1004 (20-29)*. Respondent's residence address was also designated on the deposit receipts on the bank account to which Appellant deposited Respondent's commissions. *Id.* As late as September 11, 2001, the parties were in direct contact, meeting with each other in Tacoma. *Id.* In January 2002, Appellant filed this suit. *CP 980-986 (5-11)*. Three months later, in March 2002, the parties spoke on the telephone but Appellant did not disclose that suit had been filed. *CP 1021 (46)*. In June 2002, Appellant sought an order of the court authorizing service by publication. In support, Appellant's counsel filed an affidavit

¹ Please note the Clerks Papers were re-sent by the Pierce County Superior Court and renumbered. The number in parenthesis is the "new" number and the other number is the original Clerks Paper's numbers used between the time appellants submitted its brief and the due date for this response.

alleging Respondent was transacting business in the State of Washington and had property (bank accounts) in the State of Washington. Although the publication statute, *RCW 4.28.100*, requires a party seeking such service to mail a copy of the Summons and Complaint to a defendant at their residence address and to swear upon oath it was done (where the address is known), the original affidavit in support of publication failed to make this sworn averment and, in fact, the Summons and Complaint were never mailed to the Respondent. *CP 996 (21)*, and *CP 1023-1024 (48-49)*. Moreover, the publication statute requires that, if a party seeking publication of summons asserts a Respondent's address is unknown, this must be sworn upon oath in the original affidavit. Here, appellant's attorney also failed to swear to an unknown address.

In September, 2002, after receiving an *ex-parte* order for publication of summons, the Appellant, through its agent David Phillips, visited China and went directly to Respondent's business office there in an attempt to speak with the Respondent. *CP 1009 (34) at numbered paragraph 16*; *See also, CP 1023 (48) at numbered paragraph 9*. Later, on September 14, 2002, Respondent's employee e-mailed Appellant's agent, David Phillips, and informed him of the U.S. address of the Respondent and her Washington telephone number, among other things.

CP 1027-1040 (52-65). Appellant never attempted to inform Respondent of the pending court action through her U.S. address or otherwise attempted to call the number provided in the September 14, 2002 e-mail. *Id.* Appellant never attempted to provide service through Respondent's business addresses, through facsimile transmissions, or through e-mail transmissions and, as mentioned, never mailed the Summons and Complaint to the Respondents' known residence address. *Id.* Apparently, Appellants were content to wait six weeks and pursue default under the publication statute.

Six weeks after the September 14th e-mail, on October 25, 2002, Appellant obtained their default order and judgment against Respondents, never attempting to inform Respondent of the default hearing. In November 2002, Appellant obtained writs of garnishment and seized Respondent's bank account. *CP 995-1004 (20-29)*. Respondent first had notice of this suit when advised her accounts had been seized. *CP 996 (21), lines 17-18*. In December 2002, Respondent retained counsel and a special appearance was filed. Respondents prepared a motion to vacate the default orders. At the hearing, the trial court denied Respondent's motion to vacate default orders, judgment and writs of garnishment on the grounds that no due diligence in bringing a jurisdictional defect was

exercised by the Respondent. The court also found that the Appellant did not know Respondents' residence address in China and declared jurisdiction proper and appropriate. *CP 1041-1043 (66-68)*.

On October 24, 2003, Respondents moved the court to reconsider. **The court granted reconsideration on December 16, 2003.** *CP 1041-1043 (66-68)*. The court made a specific finding that, "...**jurisdiction was not properly obtained...**" and "... **the default judgment is vacated for lack of jurisdiction.**" *Id.* (Emphasis added.)

Since entry of the Order Vacating the Default Judgment in 2003, Appellants have failed to file and serve its petition within 90 days of each other as required to stay the statute of limitations. *RCW 4.16.170*.

Appellant's counsel filed a declaration on June 27, 2005, and May 15, 2006 in support of Appellant's motions to adjust trial date. These declarations stated the reason for the requested continuances was that, "the current trial date...is not practical as Defendant still remains unserved." *CP 1045-1068 (70-93) at numbered paragraph 9, and CP 1069-1072 (94-96) at numbered paragraph 9 and 10*. The June 27, 2005 declaration of counsel is verified by the Appellant. *CP 1049 (74)*.

Appellants filed a declaration of service on July 7, 2006. *CP 1129 (154)*. For unknown reasons Appellants filed another declaration of

service on July 31, 2006. *CP 1132 (157)*. Both declarations make the same allegation of service. *CP 1129 (154) and CP 1132 (157)*. Both declarations allege that service was perfected on June 24, 2006 at 9:18 pm. *Id.* Both declarations indicate that the documents were left with “DAN SIMMONS, AS DIRECTED.” *Id.* Neither declaration indicates who “directed” the process server. *Id.* Furthermore, neither declaration indicates how the person alleged to be Dan Simmons was identified by the process server. *Id.* The declaration is devoid of any statement indicating the person alleged to be Dan Simmons identified himself or that the process server had personal knowledge of Dan Simmons or could identify Dan Simmons or that service upon Dan Simmons was authorized or effective. *Id.* Dan Simmons supplied a declaration to this court denying that service was ever complete upon him. *CP 1165-1168 (190-193)*.

Respondents, through counsel, answered the Complaint on August 31, 2006. *CP 1138-1144 (163-169)*. Respondents asserted affirmative defenses; including the defense of inadequate service of process, lack of jurisdiction over the Respondent, and that the claims of the Appellant were barred by the statute of limitations. *Id.*

Respondents, through counsel, moved the trial court for summary judgment and dismissal on March 13, 2007. The basis of the summary

judgment motion was: 1) the contract was an oral contract, 2) the statute of limitations for an oral contract is three years, 3) there was no basis for tolling the statute of limitations, 4) the respondents had not been served, and 5) the statute of limitations had expired. *CP 1134-1144 (159-162)*. On May 15, 2007, the trial court granted summary judgment finding there were no genuine issues of material fact and the respondent was entitled to judgment as a matter of law.

III. ARGUMENT

The principal purpose of a summary judgment motion is to avoid a useless trial. *Olympic Fish Prods. v. Lloyd*, 93 Wn.2d 596, 602, 611 P.2d 737 (En Banc, 1980). Summary judgment is appropriate if the record reveals that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. *CR 56(c)*.

The moving party may meet this burden by demonstrating there is no evidence to support the non-moving party's case. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). The burden then shifts to the party that has the burden of proof at trial to “come forward with evidence sufficient to establish the existence of each essential element of its case.” *Howell v. Spokane & Inland Empire Blood Bank*, 117 Wn.2d 619, 625, 818 P.2d 1056 (1991). “This heavier burden is

imposed at the summary judgment stage as well as at trial. *Herron v. Tribune Pub. Co., Inc.* 108 Wash.2d 162 at 170, 736 P.2d 249 (1987). If the Appellant fails to do so, summary judgment is proper. *Id.* Summary judgment involving the application of a statute of limitations should be granted when there is no genuine issue of material fact as to when the relevant statutory limitation period commenced [and the period has expired]. *CR 56(c); Buxton v. Perry*, 32 Wash.App. 211, 214, 646 P.2d 779 (1982). A case presenting only issues of law is properly resolved on summary judgment. *Harris v. Harris*, 60 Wn. App. 389, 392, review denied, 116 Wn.2d 1025 (1991).

Here, there is no genuine issue of material fact that: 1) the parties contract was oral, 2) the statutorily defined period to commence an action is three years, 3) the three year period began to run in September 2001², and 4) the statutorily defined period has expired as no action has been properly “commenced.” Thus, summary judgment was appropriate.

A. APPELLANT’S CLAIMS ARE BARRED BY THE STATUTE OF LIMITATIONS, RCW 4.16.080.

Appellant asserts in the **verified complaint** the claims are based on an “**oral contract**”. *CP 983 (8) at §4.2*. No amendment to the complaint has been filed and no written contract has been produced.

² There is no issue even if the filing date of the complaint is used, 1-18-02, rather than the date the claim arose (September 2001), as more the 3 years had passed.

The trial court judge questioned Appellant's counsel regarding the oral contract. *RP 17-18*. Counsel for Appellant responded, "Now, in terms of whether it's an oral or a written contract, the circumstances under which the complaints were written was I think rather hurried." *RP 17*. Adding later, "I don't know why it says it's an oral contract your Honor, to be honest." *RP 18*.

The complaint is verified by the Appellant and the Appellant attests to the facts in the complaint. A verified complaint is equivalent to an affidavit. *Luellen v. City of Aberdeen, 20 Wash.2d 594, 148 P.2d 849(1944)*. "When a party has given clear answers to unambiguous [deposition] questions which negate the existence of any genuine issue of material fact, that party cannot thereafter create such an issue with an affidavit that merely contradicts, without explanation, previously given clear testimony." *Van T. Junkins & Assocs., Inc. v. United States Indus., Inc., 736 F.2d 656, 657 (11th Cir.1984)*; accord, *Beneficial Standard Life Ins. Co. v. Madariaga, 851 F.2d 271 (9th Cir.1988)*; *Radobenko v. Automated Equipment Corp., 520 F.2d 540 (9th Cir.1975)*. Here, the Appellant admits, in the verified complaint, the contract is oral. The Appellant may not now assert the existence of a written contract.

B. NO WRITTEN CONTRACT EXISTS

“The burden of proving a contract, whether express or implied, is on the party asserting it, and he must prove each essential fact, including the existence of a mutual intention.” *Cahn v. Foster & Marshall, Inc.*, 33 *Wash.App.* 838, 840 (1983) (citing *Johnson v. Nasi*, 50 *Wash.2d* 87, 91 (1957)). Here, Appellant cannot prove each essential fact of a contract as required. Appellant has not shown any writing that identifies the subject matter of the contract, the parties, the terms and conditions, the price (compensation), and the existence of mutual intention. No writing exists that contain the essential elements required. No genuine issue of material fact exists on this point.

“A written agreement for purposes of the 6 year statute of limitations must contain all the essential elements of the contract, and if **resort to parol evidence is necessary to establish any essential element, then the contract is partly oral and the 3 year statute of limitations applies.**” *Id.* at 840-41(emphasis added), (citing *Ingalls v. Angell*, 76 *Wash.* 692, 695-96 (1913); *National Bank of Commerce v. Preston*, 16 *Wash.App.* 678, 679 (1977)).

Here, the absence of any written instrument with the essential elements combined with Appellant’s admission in its own verified

pleadings require the application of the three-year statute of limitations for oral contracts pursuant to RCW 4.16.080.

Appellant cites two Washington State Supreme Court decisions in support of their position. Both cases are distinguishable on several grounds and are not on point and not applicable to the case at bar.

First, Appellant cites to *St. Paul & Tacoma Lumber Co. v. Fox at 124*, for the proposition that a “contract need not be contained in one document, but may be comprised of several documents, including antecedent correspondence and prior written memorandums.” *St. Paul & Tacoma Lumber Co. v. Fox, 26 Wash.2d 109 (1946)*. However, **the case cited makes no such statement**. The *St. Paul* decision speaks to the contract rule wherein all prior negotiations and writings are deemed merged into the final written contract, “...the rule excluding evidence of prior or contemporaneous oral agreements to contradict or to modify a written contract.” *Id. at 124*. This is a merger case, that defines the parol evidence rule, which is a rule of substantive law prohibiting parol evidence to contradict a written contract. *Id, at 124*. Thus, **the cited case does not apply to the case at bar as the cited case pertains to a written contract and the exclusion of parol evidence to change a written contract**.

Second, Appellant cites to *Smith v. Skone* which cites to *Boyd v. Davis*, for the above stated proposition that a “contract need not be contained in one document, but may be comprised of several documents, including antecedent correspondence and prior written memorandums.” *Boyd v. Davis*, 127 Wash.2d 256, 261, (1995). However, the *Boyd* court does not make this statement.

In *Boyd*, the court was determining whether five separate **written** agreements / contracts should be read as a single contract. *Id at 261*. The court restated the general rule, “As a general rule ..., where several [**written**] instruments are made as part of one transaction, they will be read together, and each will be construed with reference to the other. This is true, although the instruments do not in terms refer to each other.” *Id. at 261*, citing, *Levinson v. Linderman*, 51 Wash.2d 855, 859, 322 P.2d 863 (1958) (quoting 17 C.J.S. Contracts § 298, at 714 (1939)). **Once again, Appellants rely on a case completely distinguishable from the case at bar. The *Boyd* court had several written contracts and was charged with determining whether the five separate written contracts as part of one transaction should be read together. Here, there is not even one written contract.**

Appellant then takes the *Boyd* court's words out of context to change the court's meaning and intent when they state, "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." *Appellants Brief at page 14*. Appellant relies on *Urban Development, Inc v. Evergreen Bldg. Products, LLC, 114 WnApp. 639, 651 (2002)*. What the *Urban Development* court actually said was:

But the inquiry here is not whether Urban Development accepted R & E's offer; it is undisputed that it did, and that a contract was formed. The proper inquiry is whether the writing contains the essential elements for purposes of the six-year statute of limitation. We conclude it does. Signatures of both parties are not essential elements: " 'Ex parte writings are sufficient to bring a contract within the 6-year statute of limitations if the writing contains all of the elements of a contract.' "

Id., at 650 (*emphasis added*). *Urban Development* is distinguishable because a single writing containing all the essential elements of a contract existed. **Here, no writing exists that contains the essential elements of a contract.** If Appellant had a written contract or any documents containing all essential terms, surely they would have produced it by now.

Appellant next cites to *Smith* stating, "the 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 Wash.App. 199, 206 (2001).

Again, *Smith* is easily distinguishable.

First, the court actually stated,

For the purposes of the general statute of limitations for written contracts (RCW 4.16.040(1)), a written contract is required to contain all the essential elements of a contract, including the subject matter, the parties, the terms and conditions, and the price or consideration. *Barnes v. McLendon*, 128 Wash.2d 563, 570, 910 P.2d 469 (1996); *Browning v. Howerton*, 92 Wash.App. 644, 649, 966 P.2d 367 (1998). Under the common law, the contract need not be contained in one document, but may be comprised of several documents, including antecedent correspondence and prior written memorandums. *Boyd v. Davis*, 127 Wash.2d 256, 261, 897 P.2d 1239 (1995); *St. Paul & Tacoma Lumber Co. v. Fox*, 26 Wash.2d 109, 124, 173 P.2d 194 (1946).

The trial court found that S & C sent Mr. Smith detailed records of the packing and sales transactions, including the weights of the potatoes harvested and sold, the pack-out records, sales reports, and an accounting based on the "agreed price" of \$70 per ton for packing. CP at 135. These findings are substantially supported by Mr. Connors's testimony and the account statements. *Landmark Dev., Inc. v. City of Roy*, 138 Wash.2d 561, 573, 980 P.2d 1234 (1999) (review of findings of fact). Mr. Smith received these statements at least by the November 1995 meeting with S & C. At the November 1995 and January 1996 meetings, Mr. Smith did not object to the \$70 per ton packing charge. He accepted a check from S & C consistent with the accounting contained in the statements. The statements confirmed the oral agreement between the parties and contained the essential terms of the agreement, including amounts, prices, costs for processing and packing, and the commission.

Id, at 206-207.

In *Smith*, there was a writing that contained all essential elements of a contract.. Furthermore, in *Smith*, the court had a clear record of financial documents over a short period of time to show the intent and agreement of the parties. Here, no such writings were produced or exist. **No such writing to show the essential elements, nor multiple writings to show the essential elements, has been produced.** Appellant alleges casual e-mails and facsimiles over the years 1996-2001 is sufficient to establish the existence of a written contract allegedly entered into in 1999. This is an untenable position and no case has ever stated (and Appellant cites no case) where a contract was implied against parties based on correspondence occurring over a number of years. The proposition is without any support. *State v. Young*, 89 Wash.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (courts may assume that where no authority is cited, counsel has found none after search).

Appellant has failed to produce a written contract with all the necessary elements either as a single writing or by multiple writings. Appellant cannot, and has not, provided a written contract and cannot provide the specific terms of the alleged written contract as required by law. The Appellant's failure to produce or prove a written contract

supports the trial court's findings that no written contract existed and the three-year statute of limitations pursuant to RCW 4.16.080 applies.

Substantial evidence exists in the record to sustain the trial court.

C. APPELLANT'S ALLEGED SERVICE OF PROCESS

The issue of service of process was argued extensively below. It confounds common sense why the Appellant, more than five-years after filing, has not yet served Respondent. Appellant has at all times had a mailing address for the Respondent. **“Mr. Phillips at all times had a business address for Defendant Mao”, and “Mr. Phillips does not refute Mao’s claim that he had a residential address for Mao...”** *CP 1042(67) lines 4-8*. Yet Appellant failed to serve Respondent personally. Remarkably, Appellant never asked the court for alternative service of process by mail or otherwise (except in an unlawful publication attempt to default Respondent).

Appellant has not acted with due diligence in their attempts to serve Respondents. Appellants have chosen a single course of action to personally serve Respondent and, despite the inability of the process server to affect service; the Appellant still chose not to pursue other available methods to perfect service. Appellant, at their own peril and for reasons known only to them, sought no alternate methods to serve the

Respondent. The result is that the Respondents still remain unserved over five years after the complaint was filed.

Appellant also attempts to construe a declaration of non-service as actual service on the Respondents. Mr. Daniel Simmons provided the court with a declaration stating in no uncertain terms that he has not, at any time, place, or manner, been served with any summons or complaint in this action. *CP 1165-1168 (190-193)*. This position is also supported by Appellant's own statements.

Appellant's counsel filed a declaration on June 27, 2005, and May 15, 2006 in support of Appellant's motions to adjust trial date. These declarations stated the reason for the requested continuances was that, "the current trial date...is not practical as Defendant still remains unserved." *CP 1045-1068 (70-93) at numbered paragraph 9, and CP 1069-1094 (94-118) at numbered paragraph 9 and 10*. The June 27, 2005 declaration of counsel is verified by the Appellant. *CP 1049 (74)*.

Furthermore, declarations of alleged service attached as exhibits to the declaration of Jordan Foster state, "...gated community, resident gave server permission to go through gate..." *CP 1223 (248)*. The next exhibit to Jordan Foster's declaration is another alleged declaration of service by the **same process server**. *CP 1225 (250)*. The process server

makes no mention of any gated community in the second declaration and provides no explanation regarding the gated community in one declaration and the lack of a gated community in a subsequent declaration.

In response to confusion regarding the address of Respondent, counsel for respondent personally made the trip to the respondent's address. *CP 1367-1410 (392-435)*. The declaration of counsel details the location, the fact that Respondent does not live in a gated community, and makes clear that the process servers were at the wrong location when they attempted service on the respondents. *Id.*

D. STATUTE OF LIMITATIONS IS NOT TOLLED.

Appellant now asserts that the statute of limitations should be tolled because the Respondent has "concealed" herself. Appellant cites to RCW 4.16.180 but the statute does not apply to the factual circumstances of this case. Appellant at all times had knowledge of Respondent's business address and, as of 2002, a residential address. *CP 1041-1043 (66-68)*.

The pertinent statute on tolling the statute of limitations due to concealment of a Respondent is *RCW 4.16.180*. It provides:

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.

Judicial interpretations of the standard of “concealment” necessary to tolling of the statute of limitations are scarce but plain. *Bethel v. Sturmer*, 3 Wash.App. 862, 867 (1970). Concealment under RCW 4.16.180 is defined as a “ ‘clandestine or secret removal from a known address’ ”. *Caouette v. Martinez*, 71 Wash.App. 69, 74 (1993) (quoting *Patrick v. DeYoung*, 45 Wash.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 Wash.2d 36, 38 (1961). Respondents could have been served by publication of summons pursuant to RCW 4.28.100 if “filing of an affidavit of the Appellant, his agent, or attorney, with the clerk of the court, stating that he believes that the defendant is not a resident of the state, or cannot be found therein, and that he has deposited a copy of the summons (substantially in the form prescribed in RCW 4.28.110) and complaint in the post office, directed to the defendant at his place of residence...”. However, here the Appellant NEVER mailed a copy of the

complaint to the Respondent. Appellant NEVER sought service by mail, and has not sought service by publication since the Respondent moved to Spokane, WA, in 2002.

Thus, the Appellant is in the impossible position of providing evidence the Respondent was willfully concealed. Appellant has provided no evidence to support this proposition. Again, Appellant merely states they hired a process server who failed to complete service. There is no evidence the Respondents concealed themselves.

There is ample evidence in the court record indicating the Respondent could have been served at her registered corporate address in Mica, WA, since 2002 or her business address in China since the inception of this matter. The fact remains, **Appellants failed to serve Respondent for reasons unrelated to the Respondents' conduct.** There is no declaration of service in the file regarding service on Ms. Simmons (F/K/A, Mao.). There is no declaration of service on Moonsoft Sheepskin, and no valid declaration of service on Dan Simmons.

Therefore, Appellants bald assertions of concealment are unsupported by the record and the evidence. The record supports that Appellant attempted to default (and did temporarily default Respondent) Respondent by service by publication without mailing a copy of the

summons and complaint to the Respondent at a KNOWN address. Appellant's default was vacated in 2003 due to insufficiency of process and lack of jurisdiction. The trial court never had personal jurisdiction over the Respondent (because it was unlawfully asserted) and the Appellant has never remedied the lack of jurisdiction over the Respondents despite ample time and resources to do so. Appellants lack any evidence to support the asserted concealment. Thus, no tolling of the statute pursuant to concealment has occurred and the statute of limitations has expired. **Appellant even admits that if service upon the person erroneously believed to be Dan Simmons was not Dan Simmons, the statute of limitations has not been tolled.** *CP 1182 (207) lines 26 to 1183 (208) line 1.* Thus, on at least two separate occasions after the statute of limitations expired, the Appellant admits that the Respondent has not been served; 1) on June 27, 2005, *CP 1047 (72)*, and 2) on May 15, 2006, *CP 1071 (96)*.

E. RESPONDENT HAS NOT WAIVED JURISDICTION OR SERVICE REQUIREMENTS BY SPECIAL APPEARANCE

Appellant next proposes that because the Respondent appeared for the purpose of challenging the unlawful default and garnishment secured by the Appellant that the Respondent has actual notice of the proceeding and personal service is therefore unnecessary. This theory is

without any statutory or common law support. In essence, Appellant asks this court to sanction the unlawful default and garnishment by the Appellant and then reward the Appellant for this unlawful conduct by disposing with the requirement of personal service. *Appellant's Brief at 19-20*. The proposition is without any support. *State v. Young*, 89 Wash.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (courts may assume that where no authority is cited, counsel has found none after search)

F. RESPONDENT'S HAVE NOT WAIVED JURISDICTIONAL DEFENSES

Appellant relies on *Kuhlman Equipment Co. v. Tammermatic, Inc.*, 29 Wash.App. 419, 628 P.2d 851 (1981), to advance the theory of waiver of jurisdictional defenses. The *Kuhlman* case is readily distinguishable in several critical respects.

First, the *Kuhlman* court addressed waiver: "The question of waiver may be more precisely phrased this way: Can the jurisdictional defense of lack of personal jurisdiction, as set forth in *CR 12(b)*, be waived in some way other than by failure to timely assert the defense, specifically, by joining it with a **noncompulsory** claim for affirmative relief?" *Kuhlman*, at 422. The *Kuhlman* court found that the Respondent's "impleader of third party defendants under *CR 14*, ... is [was] permissive

and not compulsory.” *Id.* at 422 (Footnote 2). Thus, the facts in *Kuhlman* are significantly different in that the Respondent in *Kuhlman* filed **NON COMPULSORY** cross claims. **In the case at bar no such non-compulsory (permissive) cross claims were filed.** Thus, *Kuhlman* is not applicable to the current case before the court, and the respondent’s jurisdictional defenses are preserved.

Appellants then cite to *Livingston v. Livingston*, 43 Wash.App. 669, 719 P.2d 166 Wash.App. (1986) (should be cited as *In re Support of Livingston*). The *Livingston* case is also readily distinguishable.

The *Livingston* court relied upon the decision in *Kuhlman* to extend the doctrine of waiver to all non-compulsory (permissive) counterclaims. The petition before the *Livingston* court was brought by the Appellant requesting enforcement of a foreign child support order. **The Respondent filed a permissive (not compulsory) counterclaim for visitation.** The court stated, “We conclude that the nonresident spouse by her actions waived her objection to the court’s personal jurisdiction over her.” *Id.* The nonresident’s “actions” were the filing of permissive (non-compulsory) counterclaims. **In the instant case, no such permissive counterclaims were filed.**

In the instant case, the Respondent answered the complaint and filed only **compulsory** counterclaims as required by CR 13. The rule states, in relevant part,

- (a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

Respondents were required to file their compulsory counterclaims or lose the right to plead them without leave of the court. *CR 13*. The Appellant's reading of the cited cases and rules yields an untenable result; either forgo raising valid compulsory counterclaims or waive personal jurisdiction. The Respondent is permitted to assert all compulsory counterclaims, but not permissive counterclaims or cross claims, in order to preserve jurisdictional defenses. The respondent followed the rule and case law to preserve available jurisdictional defenses. The assertion of compulsory counterclaims does not waive jurisdictional defenses and the Appellant has provided no case, and no such case exists, that states a Respondent waives jurisdictional defenses by filing compulsory counterclaims. The proposition is also without any support. *State v. Young*, 89 Wash.2d 613, 625, 574 P.2d 1171, *cert.*

denied, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (courts may assume that where no authority is cited, counsel has found none after search)

G. MOTION TO DISMISS PER CR 41 DID NOT WAIVE JURISDICTIONAL DEFENSES

Appellant asserts that Respondents motion to dismiss pursuant to CR 41 constitutes a waiver of Respondents' jurisdictional defense.

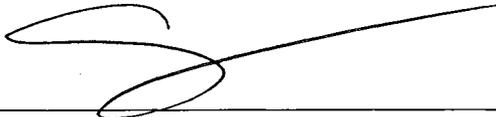
Appellants Brief at 24. Appellant confuses a motion pursuant to CR 12 (which was heard in June 2007) with Respondent's motion to dismiss pursuant to CR 41 (which was heard in May 2006). Appellant provided no case law in support of the proposition that CR 12 defenses are waived by Respondents CR 41 motion. The proposition is without any support. *State v. Young*, 89 Wash.2d 613, 625, 574 P.2d 1171, *cert. denied*, 439 U.S. 870, 99 S.Ct. 200, 58 L.Ed.2d 182 (1978) (courts may assume that where no authority is cited, counsel has found none after search).

V. CONCLUSION

Appellant has failed to "commence" this litigation during the statutorily required period. The trial court did not have personal jurisdiction over the respondent's and never had jurisdiction over the respondent's. Appellant has failed to bring its claims within the limitations

period and is therefore barred from bringing said claims. Therefore, summary judgment dismissing all claims was proper. This court should affirm.

BOSWELL LAW FIRM, P.S.



Spencer W. Harrington, WSBA 35907

Attorney for Respondents

Note:

Appellant's brief includes several citations wherein the Appellants name, US Sheepskin, appears in the alleged citation to case law or statute. It appears Appellant has used the "find / replace" function of a word processing program and erroneously inserted the name of Appellant, US Sheepskin, in place of a named party or the word "plaintiff."

These errors occur in Appellant's brief at:

- 1) Page 9, line 4;
- 2) Page 14, second to last line; and
- 3) Page 15, lines 3-4.

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WASHINGTON

United States Sheepskin Inc.,)
Appellants.)
v.)
Mao Li Ying and John Doe Ying, et al.)
Respondents.)

Case No. 36450-6-II

DECLARATION OF SERVICE

STATE OF WASHINGTON)
County of Spokane)ss.
)

ELIZABETH RADDATZ Declares:

I am now and at all times hereinafter mentioned was a citizen of the United States and a resident of Spokane County, State of Washington, over the age of 18 years, competent to be a witness in the above entitled proceeding and not a party thereto, and that I caused to be mailed by first class mail through the United States Postal Service, postage prepaid, a copy of Brief of the Respondent to appellant's counsel, Kelly Delaat-Maher, Maher Ingels Shakotko Christensen LLP, 1015 Pacific Ave., Ste. 300, Tacoma, WA, 98402, on the 10th day of December, 2007. I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.


ELIZABETH G. RADDATZ

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