

NO. 46798-4-II

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**COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON**

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WILLIAM LOVE, as Personal Representative of the ESTATE OF  
CAMILLE LOVE and JOSHUA LOVE, individually,

Appellants,

v.

STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, a  
governmental entity, CITY OF TACOMA, a municipal corporation and  
DOES 1-10 INCLUSIVE,

Respondents.

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**BRIEF OF RESPONDENT STATE OF WASHINGTON  
DEPARTMENT OF CORRECTIONS**

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ROBERT W. FERGUSON  
Attorney General

GARTH A. AHEARN  
Assistant Attorney General  
WSBA #29840  
Torts Division  
P.O. Box 2317  
Tacoma, WA 98401-2317  
253-593-6136  
OID #91105

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## I. INTRODUCTION

This case involves the issue of whether leaving a copy of a summons and complaint with an unidentified receptionist at the Tacoma Attorney General's Office meets the requirement of RCW 4.92.020. RCW 4.92.020 requires personal service on the Attorney General or an Assistant Attorney General (AAG) to effectively commence a lawsuit against the State. Appellants' own original declaration of service states they served a receptionist and after conducting an evidentiary hearing at the request of the appellants the trial court correctly concluded appellants failed to serve an AAG as a matter of fact. As a matter of law, the court lacks jurisdiction over the State and appellants failed to perfect service within the statute of limitations. The trial court's decision was correct and should be affirmed for the following reasons.

First, the trial court properly granted summary judgment because appellants' process server served an unidentified receptionist. At summary judgment the appellants' claimed serving a receptionist was not defective service. Counsel for the State noted the law requires the appellants to serve an AAG. The trial court properly concluded based on clear cogent and convincing evidence that appellants failed to serve an AAG as required by statute. The accuracy of this conclusion was confirmed when appellants

moved for reconsideration based on the actual declaration of service in which the process server states he served a receptionist.

Second, the trial court properly granted summary judgment because appellants' process server's assumption that a non-AAG has authority to accept service is unreasonable as a matter of law. At summary judgment appellants presented a declaration from their process server stating he assumed the person he served had authority to accept service. The trial court properly granted summary judgment because assuming anyone other than an AAG has authority to accept service is unreasonable as a matter of law. As such, the trial court's ruling should be affirmed.

Third, the trial court properly granted summary judgment because there is substantial evidence in the record to support the court's finding as a matter of fact that appellants did not serve an AAG. Despite failing to produce any evidence at summary judgment they had served an AAG, the court granted appellants' request for an evidentiary hearing. At the hearing, appellants claimed for the first time they served Glen Anderson, Senior AAG. After listening to all the evidence, the court found appellants' process server was not credible and found he did not serve an AAG. There is substantial evidence in the record in the form of testimony, photographs and contemporaneous documentation both from

the appellants and the AG's office to support the court's finding appellants' process server failed to serve an AAG.

Fourth, the trial court properly granted summary judgment because the affirmative defense of insufficient service of process was timely raised and was not waived by the State. The uncontested evidence shows appellants' counsel was served a copy of the State's Answer within the statute of limitations and plaintiffs had time to cure the defective service, which counsel did not do.

Fifth, the trial court properly granted summary judgment because appellants' claims were barred by the statute of limitations. The underlying facts of this case occurred on February 7, 2010. A claim of negligent supervision is subject to a three year statute of limitations. Appellants filed suit exactly three years later. Appellants had ninety days to serve an AAG but failed to do so. Appellants' contention that service on the City of Tacoma (City) tolled the statute of limitations is without merit because appellants did not properly commence the lawsuit against the City. More importantly, the City was dismissed from the lawsuit prior to the State filing its answer. Therefore, even if service on the City was effective it could not toll the statute of limitation once the City was dismissed.

In short, the trial court correctly concluded: 1) the plaintiffs failed to serve the State as required by RCW 4.92.020, 2) that the State properly

raised the defense, and 3) the State did not waive the defense. Therefore, the trial court's order should be affirmed.

## **II. COUNTER STATEMENT OF FACTS**

This case arises out of a shooting which occurred on February 7, 2010. A number of individuals allegedly involved were under the Washington State Department of Corrections (DOC) supervision at the time. On February 7, 2013, appellants filed suit. CP at 31-47, 76-88.

On March 5, 2010, a copy of the summons and complaint was left at the Tacoma Attorney General's Office (AGO), General Services unit. CP at 48-75. The Tacoma AGO General Services unit is comprised of non-attorney professional staff that is responsible for documenting receipt of mail, making copies and answering phones among other things at the Tacoma AGO. CP at 48-75. Summons and complaints which are personally served on an Assistant Attorney General are stamped by the General Services staff with an acknowledgement of receipt stamp. CP at 53.

The acknowledgement of receipt stamp includes a section for the Assistant Attorney General who is accepting service to sign. CP at 53. The signature of the particular Assistant Attorney General who was served is an acknowledgement that the document was served on an AAG. CP at 53. Summons and complaints which the AGO merely receives notice of by

other means, but not personally served on an AAG, are simply date stamped. CP at 50.

The General Services unit maintains a log which lists the receipt of all summons and complaints regardless of whether the summons and complaint were personally served on an AAG. CP at 75. If the documents were served on an AAG the log notes the name of the individual AAG who was served. CP at 75. If an AAG was not served, the log notes that as well. CP at 75.

On March 5, 2013, Mr. Currie, appellants' counsel's office manager and son, executed a declaration of service stating he delivered a copy of the summons and complaint to a white male receptionist at the Tacoma AGO. CP at 183-84<sup>1</sup> Tacoma AGO General Service unit records confirm the Love summons and complaint was received on March 5, 2013, but not served on an AAG. CP at 75.

#### **A. Procedural Facts**

On March 19, 2013, the City of Tacoma moved for summary judgment based on the argument it could not be sued under a negligent police investigation theory. CP at 257-70. The trial court granted the motion and dismissed the City without prejudice. CP at 286-88.

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<sup>1</sup> Mr. Currie admitted at the evidentiary hearing he noted March 6, 2013, in his declaration but the correct date was March 5, 2013. RP at 141.

On March 18, 2013, defense counsel for the Department of Corrections sent a letter to appellants' counsel which states in part original service of process cannot be made electronically between the parties. CP at 188. On April 18, 2013, the State filed its answer raising insufficient service of process as an affirmative defense. CP at 298-307.

On April 18, 2014, the State moved for summary judgment based on the fact appellants never served an AAG and the claims were now barred by the statute of limitations. In appellants' response brief, appellants' counsel made two arguments. CP at 22-30

First, counsel argued service of a receptionist was proper service under RCW 4.28.020(9). CP at 100-09. RCW 4.28.020(9) states service can be made upon the president or other head of a corporation, including a corporation's secretary among others. The only declaration filed in support of appellants' response was dated May 6, 2014, from Mr. Currie stating he served an unidentified white male wearing a badge around his neck who Mr. Currie believed to have authority to accept service for the AG's office. CP at 31-47.

Second, appellants' counsel argued the State waived the defense. The brief did not raise any issues regarding timely notice, or sufficient identification of the affirmative defense. It also did not raise any

arguments in regard to the statute of limitations issue. Ms. Currie, appellants' counsel, did not file a declaration in support of the brief either.

In reply, counsel for DOC pointed out RCW 4.28.020(9) does not apply to the State. CP at 120-27. At the conclusion of oral argument, the court granted summary judgment. CP at 156-58.

On June 2, 2014, appellants moved for reconsideration. CP 159-71. Appellants' counsel did not include any new evidence showing an AAG was served.<sup>2</sup> However, the briefing did contain a copy of a declaration of service executed by Mr. Currie on March 6, 2013, stating under penalty of perjury he served a white male receptionist.<sup>3</sup> CP at 183-84.

#### **B. Evidentiary Hearing Facts**

Starting on August 7, 2014, the court began conducting the evidentiary hearing requested by appellants. During the course of the hearing, the appellants presented testimony from Mr. Currie. RP at 104-55. Mr. Currie is the son of Ms. Currie and is office manager of Ms. Currie's law firm. RP at 146. He has worked at the office for over ten years and from time to time serves documents on behalf of the firm when the firm's regular process server is not available. RP at 147-48.

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<sup>2</sup> At the hearing former vice presidential and presidential candidate John Edwards had appeared on behalf of the appellants.

<sup>3</sup> This declaration had not been previously identified in appellants briefing.

During his testimony, Mr. Currie directly contradicted his March 2013 declaration of service which states he served a receptionist. Instead, he claimed for the first time in court he served Senior Assistant Attorney General Glen Anderson. Mr. Currie testified he recognized Mr. Anderson from a series of photos supplied to the appellants by the defense. He also claimed Mr. Anderson was wearing a suit and a badge around his neck at the time he served Mr. Anderson. In cross-examination, Mr. Currie again confirmed his story regarding Mr. Anderson allegedly wearing a suit and badge around his neck when he was allegedly served by Mr. Currie. RP 154-55.

Martin Heyting was also called to testify. Mr. Heyting worked at the time in the Tacoma AGO reception area. RP at 63. One of his duties was to log in summons and complaints which either are left with an AAG or received by the office through some other manner. RP at 80-81. He further testified, pursuant to office practice, if the documents were served on an AAG he would note the name of the individual AAG who was served and if an AAG was not served, he would note that in the log as well. RP at 82.

A copy of the log was introduced into the record. RP at 82. Mr. Heyting identified the log and testified the Love summons and complaint was not served on an AAG. RP at 83.

The appellants also called Glen Anderson to the stand. RP at 91. Mr. Anderson is a 25-year veteran attorney in the Attorney General's Office Torts Division and is currently the Tacoma Torts Section Chief. Mr. Anderson testified concerning his knowledge of the AGO service of process policy, the Tacoma Office's general practice concerning acceptance of service by an AAG, and the allegation that he accepted service from Mr. Currie.

Mr. Anderson is familiar with the AGO policy. RP at 97. The policy was originally instituted to protect not only the Attorney General's Office but the party serving documents by documenting whether a party had properly served an AAG. RP at 97-98. Mr. Anderson was familiar with the creation of the policy because of his work on the *Landreville*<sup>4</sup> case where a party claimed it served a receptionist who allegedly claimed to have authority to accept service on behalf of the AG's office. RP at 97-98.

Mr. Anderson also testified he was never served by Mr. Currie. RP at 96-97. He was not served, because if he had been served, Mr. Anderson would have acknowledged receipt by signing the acknowledgment of receipt stamp with his signature. RP at 96-97.

Mr. Anderson was recalled to also address what he was wearing March 5, 2013. RP at 156. Contrary to Mr. Currie's testimony,

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<sup>4</sup> *Landreville v. Shoreline Comm. College Dist. No. 7*, 53 Wn. App. 330, 332, 766 P.2d 1107 (1988).

Mr. Anderson does not have a badge or wear a badge around his neck as Mr. Currie claimed. RP at 159. The only persons in the Tacoma Attorney General's Office who are authorized to carry badges and credentials under AGO Policy I.23 are the two female investigators in the Tacoma Torts unit. CP at 31-47. Ahearn Decl. Per office policy, the badges are kept in a foldable wallet, they don't wear the badges around their neck and, neither the credentials nor the badges identify them as an Assistant Attorney General. CP at 31-47.

Mr. Anderson also testified he was not wearing a suit or a tie the day Mr. Currie allegedly left the complaint at the office. RP at 159. A copy of a group office photograph taken the day Mr. Currie left the documents at the Tacoma AGO shows Mr. Anderson in the front row of the picture not wearing a suit coat, a tie, or a badge of any kind around his neck. RP at 158-60; CP at 316.

At the conclusion of the testimony and upon review of the entire record, the court ruled Mr. Currie's testimony was not credible and as a matter of fact the appellants failed to serve an AAG. RP at 180.

### **III. COUNTERSTATEMENT OF ISSUES**

1. Did the trial court err in granting summary judgment when the documentation by both, appellants' process server and the AG's office, executed contemporaneously with the service, establish by clear cogent

and convincing evidence that plaintiffs did not serve an AAG as required by RCW 4.92.020?

2. Did the trial court err in granting summary judgment when as a matter of law any belief by appellants that anyone other than an AAG could accept service on behalf of the office is unreasonable both as a matter of law and fact in light of the State pleading insufficient service of process as a defense in its answer?

3. Did the trial court err in granting summary judgment when after conducting an evidentiary hearing at the request of the appellants the trial court found the process server's belated claim he served an AAG not credible?

4. Did the trial court err in finding the State did not waive the affirmative defense of insufficiency of service of process when the defense was raised with sufficient time for the appellants to cure service and there is no admissible evidence in the record establishing the State waived the defense?

5. Did the trial court err in granting summary judgment when the statute of limitations was no longer tolled after the City of Tacoma was dismissed from the case?

6. Did the trial court err in granting summary judgment when the case is barred by the statute of limitations?

#### IV. LAW AND ARGUMENT

##### A. Standard Of Review

Appellants appeal the trial court's ruling the appellants failed to serve an AAG as required by RCW 4.92.020 and take issue with a number of the trial court's findings of fact after conducting an evidentiary hearing at the request of appellants.

Typically, the standard of review for summary judgments is de novo. However, the general rule for de novo review applies only when the trial court has not seen or heard testimony requiring it to assess the credibility of the witnesses. *See, e.g., Progressive Animal Welfare Soc. v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). Whereas here, the proceeding at the trial court turned on credibility determinations and factual findings the appellate court applies a substantial evidence standard of review. *In re Marriage of Rideout*, 150 Wn.2d 337, 77 P.3d 1174 (2003).

The substantial evidence standard of review requires the appellate court to engage in a two-step process. First, the appellate court must determine if the trial court's findings of fact were supported by substantial evidence in the record. Substantial evidence is evidence sufficient to persuade a fair-minded, rational person of the finding's truth. *State v. Solomon*, 114 Wn. App. 781, 789, 60 P.3d 1215 (2002), *review denied*,

149 Wn.2d 1025, 72 P.3d 763 (2003). If supported by substantial evidence, the appellate court does not reverse a trial court's findings of fact on appeal. *Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wn.2d 387, 391, 97 P.3d 745 (2004).

Second, if the court's findings of facts are supported by substantial evidence, the court must next decide whether those findings of fact support the trial court's conclusions of law. *Willener v. Sweeting*, 107 Wn.2d 388, 393, 730 P.2d 45 (1986). *Landmark Dev., Inc. v. City of Roy*, 138 Wn.2d 561, 573 P.2d 1234 (1999). The court's conclusions of law are subject to de novo review.<sup>5</sup>

**B. The Trial Court Properly Granted Summary Judgment Because Leaving Documents With A Receptionist Is Not Proper Service Of The State**

The trial court properly dismissed appellants' case because appellants failed to establish at the summary judgment hearing they served an AAG as required by statute. Appellants' assertion the trial court erred when their own declaration of service states they served an unidentified receptionist is without merit. It is without merit because the declaration

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<sup>5</sup> Plaintiff's reliance on *Witt v. Port of Olympia*, for the proposition that this case is subject to a de novo review is misplaced. Unlike in this case, the trial court did not conduct a hearing where it listened to testimony of any witnesses. As such, only a de novo review of the trial court's legal conclusion in *Witt* was proper. *Witt v. Port of Olympia*, 126 Wn. App. 752, 109 P.3d 489 (2005). Here, the trial court was asked by the plaintiffs to conduct an evidentiary hearing to determine whether the plaintiffs served the defendant. As such, the trial court was asked to make factual conclusion and so the findings are subject to a substantial evidence standard of review.

presumptively establishes they served a receptionist and so the trial court ruling should be affirmed.

Proper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction over a party, and a judgment entered without such jurisdiction is void. *Lee v. Western Processing Co.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983). Sufficiency of service of process is a question of law and the determination of valid service is reserved to the judge. *Gross v. Sunding*, 139 Wn. App. 54, 67, 161 P.3d 380 (2007). It is the plaintiff's burden to make a *prima facie* showing of proper service. *Witt v. Port of Olympia*, 126 Wn. App. 752 (2005).<sup>6</sup> A declaration of service is deemed presumptively correct. *Lee*, 35 Wn. App. at 470.

“When a statute designates a particular person or officer upon whom service of process is to be made in an action . . . no other person or officer may be substituted.”<sup>7</sup> *Meadowdale Neighborhood Comm. v. City*

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<sup>6</sup> For example in *Witt*, the plaintiffs' response to the defendant's motion to dismiss for insufficient service included a declaration stating they properly served copies of the petition on “the clerk”. *Witt*, at 126. Plaintiffs argued service was sufficient to comply with RCW 4.28.080 which allows for service on an office assistant. The court ultimately affirmed the trial court's dismissal because service on a clerk did not comply with the plain language of the service statute. Additionally, unlike in this case, plaintiffs did not ask the court to conduct an evidentiary hearing under CR 43. Thus the appellate court engaged in a de novo review of the same evidence reviewed by the trial court.

<sup>7</sup> Generally, equitable estoppel does not apply to representations of law. See *Chemical Bank v. Washington Public Power Supply Sys.*, 102 Wn.2d 874, 691 P.2d 524. The party asserting estoppel must show not only lack of knowledge of the facts, but also the absence of any convenient and available means of acquiring such knowledge. *Chemical Bank v. Wash. Public Power Supply Sys.*, 102 Wn.2d 874, 905, 691 P.2d 524 (1984) (citing *Leonard v. Wash. Emp., Inc.*, 77 Wn.2d 271, 280, 461 P.2d 538 (1969),

*of Edmonds*, 27 Wn. App. 261, 264, 616 P.2d 1257 (1980); *Nitardy v. Snohomish County*, 105 Wn.2d 133, 134–35, 712 P.2d 296 (1986); *Landreville v. Shoreline Comm. College Dist. No. 7*, 53 Wn. App. 330, 332, 766 P.2d 1107 (1988). Although substantial compliance may be an appropriate consideration in suits between private parties, strict compliance with service provisions is required in suits against government entities. *Meadowdale Neighborhood Comm. v. City of Edmonds*, 27 Wn. App. 261, 264, 616 P.2d 1257 (1980).

The plain language of RCW 4.92.020 states a party must serve the attorney general or leave a copy of the summons and complaint with an AAG. *Landreville v. Shoreline Comm. College District No. 7*, 53 Wn. App. 330, 766 P.2d 1107 (1988).

Here, the trial court properly granted summary judgment because appellants failed to present evidence at the summary judgment hearing that they served an AAG. In response to the State's motion, the appellants argued service of a receptionist was proper.<sup>8</sup> Presumably, appellants' counsel made this argument because she reviewed her son's March 6, 2013, declaration of service and believed his service of a receptionist was proper. However, as noted in the State's motion to the court,

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*cert. denied*, 471 U.S. 1065, 105 S. Ct. 2140, 85 L. Ed.2 d 497 (1985). In this case the convenient remedy for the plaintiffs was to serve an AAG.

<sup>8</sup> In support of their argument they included a declaration from Mr. Currie which was drafted the same day as the summary judgment response brief.

RCW 4.92.020 requires the appellants to serve an AAG or the Attorney General.

In fact, appellants provided no evidence showing they served an AAG. The May 2014 declaration submitted in support of response to summary judgment does not state an AAG was served despite appellants' knowledge that was the very issue before the court. The reason it does not state Mr. Currie served an AAG is obvious, he left the documents with a receptionist. So even if the trial court's determination that appellants failed to serve an AAG was subject to de novo review, which it is not due to the court conducting an evidentiary hearing at the appellants' request, appellants failed to present any evidence to create a *prima facie* showing that the AG or an AAG was served.

Based on the record presented, the trial court properly granted summary judgment because the evidence before the court at summary judgment established by clear and convincing evidence that appellants failed to serve an AAG. In a typical case, when a party establishes a *prima facie* case of proper service, the challenging party bears the burden of showing improper service by clear and convincing evidence. *Leen v. Demopolis*, 62 Wn. App. 473, 478, 815 P.2d 269 (1991), *review denied*, 118 Wn.2d 1022, 827 P.2d 1393 (1992). That is not the case here.

Appellants failed to establish a *prima facie* case at the summary judgment motion so the trial court properly granted summary judgment.

Further, the trial court properly granted summary judgment because there was clear and convincing evidence establishing at summary judgment the appellants did not serve an AAG. In addition to appellants own evidence which failed to show they served an AAG, the AGO's internal records, which records how documents are received by the office, show the documents were not served on an AAG. Furthermore, the original declaration of service which appellants submitted in support of their motion for reconsideration conclusively establishes that a receptionist, not the AG or an AAG, was served.<sup>9</sup> Thus, the trial court's ruling should be affirmed because the evidence presented at both the summary judgment hearing and the motion for reconsideration established by clear and convincing evidence the appellants failed to serve an AAG.

**C. The Trial Court Properly Granted Summary Judgment Because There Is Substantial Evidence In The Record To Support The Trial Court's Factual Conclusion Appellants Failed To Serve An AAG**

At the threshold, the trial court properly granted summary judgment and so there was no need to conduct an evidentiary hearing because appellants failed to show there was a question of fact. The

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<sup>9</sup> It is not clear why appellants did not file the original declaration of service in response to the summary judgment motion.

uncontested evidence before the trial court at summary judgment established appellants did not serve an AAG.

However, the trial court's granting of summary judgment should also be affirmed because after conducting an evidentiary hearing at the appellants' request, there is substantial evidence in the record to support the court's factual finding plaintiffs failed to serve an AAG. In turn these factual findings support the trial court's conclusion as a matter of law the appellants failed to perfect service. As such, the trial court's granting of summary judgment should be affirmed.

**1. The Court Found Mr. Currie's Testimony Was Not Credible**

The appellants assert the trial court erred because Mr. Currie testified at the evidentiary hearing he served an AAG. This assertion is meritless because the court determined his testimony was not credible.

The court, in its discretion, may direct that an issue be heard on oral testimony if that is necessary for a just determination. *Swan v. Landgren*, 6 Wn. App. 713, 495 P.2d 1044 (1972); CR 43(e)(1). This includes when the issue such as proper service turns on a determination of credibility. *Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671 (2011); CR 43(e)(1).<sup>10</sup> Credibility determinations are solely for the trier of fact.

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<sup>10</sup> A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of

Credibility determinations cannot be reviewed on appeal. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

In this case, the trial court's granting of summary judgment should be affirmed because of the issue of proper service in this case turned on the issue of credibility once the appellants requested an evidentiary hearing and claimed Mr. Currie served an AAG in direct contradiction to his original declaration of service in which states he served a receptionist.

At the conclusion of the evidentiary hearing, the trial court rejected Mr. Currie's testimony and found it to be not credible and found he did not serve an AAG. The court's determination of credibility is not subject to appeal and appellants waived any objection to the court making a determination of credibility when the appellants requested the court conduct an evidentiary hearing.

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witness credibility. *See Autera v. Robinson*, 419 F.2d 1197, 1202 (D.C. Cir.1969). That was not the case here but none the less the court had the authority to grant the request of the plaintiffs to conduct the hearing.

**2. The Trial Court Properly Granted Summary Judgment Because There Is Substantial Evidence To Support The Trial Court's Conclusion As A Matter Of Fact Appellants Failed To Serve An AAG**

There is substantial factual evidence in the record supporting the court's conclusion an AAG was never served as well.<sup>11</sup> A recap of the case underscores this point.

Appellants try to ignore the fact it was only after the court granted summary judgment that appellants argued in their motion for reconsideration Mr. Currie served an AAG. Up until that time Ms. Currie adamantly claimed service of a receptionist is proper service of the state. Faced with the mistake, appellants' counsel then tried to get around the court's ruling by claiming Mr. Currie served an AAG in her motion for reconsideration despite the fact there was not a single document in the record showing Mr. Currie served an AAG. Counsel even went so far as to claim defense counsel was distorting the record when it was pointed out

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<sup>11</sup> The appellants' argument that the trial court's entry of findings of fact and conclusion of law was inappropriate is misplaced. Appellants waived the argument by asking the court to conduct an evidentiary hearing. Also, the argument is misplaced because the trial court was within its authority to make independent findings of fact regarding whether it had jurisdiction over the state. *See Harvey v. Obermeit*, 163 Wn. App. 311, 319, 261 P.3d 671 (2011). The findings of fact objected to by the plaintiffs are supported by substantial evidence and support the trial court's conclusion the court did not have jurisdiction over the State. As such they are not improper. To the extent the court's factual findings do not relate to the court's legal finding that it lacked jurisdiction over the State, which they all do, appellants' arguments remain meritless because the trial court still properly concluded as a matter of law even under a de novo review standard that appellants' claims were barred by the statute of limitations, the State did not waive any defenses, and the defense was raised in a timely fashion.

in response to the motion for reconsideration that Mr. Currie's declaration of March 6, 2013, directly states under penalty of perjury he served a male receptionist. CP at 201 ll. 2-4.

At the evidentiary hearing the court was also presented with evidence concerning Mr. Currie's bias. Mr. Currie was a staff member of Ms. Currie's firm; he is also Ms. Currie's son. So not only did he have a potential pecuniary interest in the outcome of the case, it is not unreasonable to infer he was concerned his mistake could negatively impact his mother.

Further, Mr. Currie never provided any plausible explanation for why he was contradicting his original declaration of service which states he served a receptionist. His claim he simply made a mistake is self-serving at best. This is especially true given the fact neither of his two previous declarations claim he served an AAG.

Simply contradicting your own testimony in an attempt to create an issue of fact is not a basis for reversing the court's ruling on summary judgment. *See Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 121, 22 P.3d 818 (2001) (citing, *Marshall v. Bally's PacWest, Inc.*, 94 Wn. App. 372, 379, 972 P.2d 475 (1999)) (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).

Additionally, Mr. Currie's claim he served Mr. Anderson is particularly not credible given the fact Mr. Anderson is intimately familiar with the requirements regarding the service of the AGO. He was involved in the creation of the policy based on his experience litigating *Landreville* which is directly on point in this case.

Even putting that aside, Mr. Currie's description of the alleged service of Mr. Anderson was demonstrably false. Mr. Currie's entire story at the evidentiary hearing was predicated on the assertion Mr. Anderson was wearing a full suit and tie, along with a badge around his neck when Mr. Anderson was allegedly served.

Substantial evidence in the record showed attorneys in the AGO office are not issued badges. More importantly a photo taken that day shows Mr. Anderson was not wearing a suit, a tie or a badge of any kind. As such, in light of the entire testimony presented to the court, there was substantial evidence in the record to support the trial court's conclusions appellants did not serve an AAG.

**3. The Trial Court Properly Concluded As A Matter Of Law Appellants Service Of Process Was Insufficient And The Trial Court's Granting Of Summary Judgment Should Be Affirmed**

The trial court properly granted summary judgment because as a matter of law leaving copies of the summons and complaint with anyone other than an AAG is insufficient service. Appellants' assertion the trial court erred because the process server believed the person he provided a copy of the summons and complaint to had authority to accept service is without merit as a matter of law. *Landreville* is directly on point.

In *Landreville*, the plaintiff's process server left the summons and complaint with an administrative assistant. *Landreville v. Shoreline Comm. College Dist. No. 7*, 53 Wn. App. 330, 766 P.2d 1107 (1988). The plaintiff alleged that the administrative assistant had represented that she had authority to accept service. *Id.* The court found that the plain language of RCW 4.92.020 is so clear that reliance on the assertions allegedly made by the administrative assistant were not reasonable as a matter of law. Thus, the State was not estopped from asserting the service was insufficient. *Landreville*, 53 Wn. App. 330; *see* RCW 4.92.020.

Just as in *Landreville*, Mr. Currie's belief he gave the documents to a person who had authority to accept service does not get around the fact service was insufficient as a matter of law. Even if he left the documents

with an unidentified receptionist who stated they had authority to accept service, the statute is so plainly written any reliance on the assertion is unreasonable as a matter of law. *See Landreville*.

Appellants attempt to distinguish *Landreville* from this case is meritless. Mr. Currie's own declaration states he left the documents with a receptionist and his assumptions remain unreasonable regardless of whether he is a professional process server or not. Even if the law made a distinction between professional process servers and a college educated law office manager with ten years of experience who sometimes handles process serving duties, the law certainly does not excuse Ms. Currie for not correcting the problem once she was timely notified the service was improper.<sup>12</sup> *Davidheiser v. Pierce County*, 92 Wn. App. 146, 960 P.2d 998 (1998).

In *Davidheiser*, the plaintiffs failed to serve the county auditor as required by statute. *Id.* Plaintiffs claimed Pierce County was estopped from raising the claim of insufficient service because an unidentified Pierce County employee told them they could serve the documents at the Risk Management Office. *Id.*

In upholding the trial court's dismissal of plaintiff's suit for insufficient service the court noted even if the plaintiffs could have

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<sup>12</sup> RP 105, 146.

reasonably relied on the representation to serve the summons and complaint on the Risk Management Department, such reliance was no longer reasonable after the County served its answer asserting that service was improper. Because the defense was raised within the statute of limitations, plaintiffs could have properly served the County within the statutory period. *Id.* As such, the County was not estopped from raising the defense of insufficient service.<sup>13</sup>

Just as in *Davidheiser*, regardless of what if anything was said or was not said by an unidentified receptionist, once appellants' counsel received notice the service was improper any alleged reliance on their part was no longer reasonable.<sup>14</sup> Appellants' counsel was informed by the State that the service was defective in a timely manner. As such, the trial court properly concluded as a matter of law appellants failed to serve an AAG and summary judgment should be affirmed.

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<sup>13</sup> Appellants' constructive tender and estoppel by silence arguments are equally meritless. There is no evidence an AAG refused to accept service. A close look at CP 75 shows multiple Assistant Attorneys General accept service on a regular basis. Also there is no case law indicating an unidentified state employee has a duty to give a process server legal advice. Regardless of what was said or not said by the unidentified receptionist, estoppel by silence does not apply here because appellants were notified the service was defective in a timely manner so they had the opportunity to cure the service but failed to do so.

<sup>14</sup> There is no actual evidence in the record appellants counsel relied on any statements allegedly made to Mr. Currie when he left the summons and complaint at the AG's office with a receptionist. Nonetheless, even if Ms. Currie did, her reliance would be unreasonable as well.

**D. The Trial Court Properly Dismissed Appellants Case Because The Case Is Barred By The Statute Of Limitations**

The trial court properly granted summary judgment because the appellants' claims are barred by the statute of limitations. Appellants' assertion the trial court erred because the claims are not barred by the statute of limitations is without merit. It is without merit because appellants failed to serve an AAG within ninety days of filing suit.

**1. The Trial Court Properly Granted Summary Judgment Because Appellants' Claims Are Barred By The Statute Of Limitations**

Civil actions are generally subject to dismissal if not commenced within the prescribed statute of limitations. *See, e.g., Unisys Corp. v. Senn*, 99 Wn. App. 391, 994 P.2d 244 (2000). Under RCW 4.16.170, the statute of limitations is tentatively tolled for ninety days once the complaint is filed or the summons and complaint have been served. *Kramer v. J.I. Case Mfg. Co.*, 62 Wn. App. 544, 815 P.2d 798 (1991). However, if both filing and service are not accomplished within ninety days of each other, it is as if neither step was accomplished for the purposes of the statute of limitations. RCW 4.16.170. Therefore, the statute only acts as a temporary toll, not an automatic extension of the statute of limitations. *See Kiehn v. Nelsen's Tire Co.*, 45 Wn. App. 291, 724 P.2d 434 (1986).

In this case, the trial court properly granted summary judgment because appellants did not commence their suit within the statute of limitations. At summary judgment, appellants did not argue the statute of limitations had not run. As such they waived any right to raise the issue now and should be precluded from doing so. RAP 2.5.

Even if they did not waive the issue, which they did, negligent supervision claims are subject to a three-year statute of limitations. RCW 4.16.080. The actions at issue in this case occurred on February 7, 2010. Appellants filed suit on February 7, 2013, but failed to serve an AAG within ninety days. Appellants' had ninety days from filing their lawsuit to properly serve an Assistant Attorney General and failed to do so. As such the trial court properly granted summary judgment because appellants failed to serve an AAG prior to the case being barred by the statute of limitations.<sup>15</sup>

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<sup>15</sup> Plaintiffs' assertion DOC waived its statute of limitations defense by not raising it in the answer is meritless. DOC is not required to alert counsel they may have a potential statute of limitations problem because they fail to properly serve the defense. Raising it prior to the running of the statute would have been a frivolous defense because the statute of limitations had not run. To the extent DOC had any obligation to inform plaintiffs about its affirmative defenses, DOC met that obligation when plaintiffs were alerted in a timely manner their service of process was insufficient. Insufficiency of service is the ultimate issue here not failure to file before the statute of limitations. *Gross v. Sunding*, 139 Wn. App. 54, 161 P.3d 380 (2007). Plaintiffs failed to cure the defect and as such their claims are now barred by the statute of limitations

## **2. The Trial Court Properly Dismissed Appellants' Case Because The Statute Of Limitations Was Not Tolloed**

The trial court properly granted summary judgment because the statute of limitations was tolled. Appellants' assertion the court erred in granting summary judgment because the statute of limitations remained tolled after the City of Tacoma was dismissed is without merit.

In a suit where there are multiple defendants, the service of process on one defendant temporarily tolls the statute of limitations as to the others. *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn.2d 325, 815 P.2d 781 (1991). However, the tolling of the statute is not unlimited. *Id.* Plaintiffs must serve each defendant to proceed with the action against each defendant. *Id.* Plaintiffs' case against an unserved defendant is subject to dismissal if the served defendant is dismissed. *Id.* In *Fox v. Sunmaster Products, Inc.*, the court of appeals upheld the dismissal of an unserved party after the served party was dismissed. *Fox v. Sunmaster Products, Inc.*, 63 Wn. App. 561, 821 P.2d 502 (1991).

Here, the trial court properly granted summary judgment because the statute of limitations was not tolled for four reasons.

First, summary judgment was proper because the appellants implicitly conceded at summary judgment that because of the appellants' defects in perfecting their claim against the City, serving the City did not

toll any service time frames against the State. Appellants did not offer any argument in opposition to defendant's briefing on this issue before the trial court and should be precluded from doing so now. RAP 2.5.

Second, the trial court properly granted summary judgment because appellants' did not properly commence their lawsuit against the City. Even if appellants had responded to the argument before the trial court, they failed to properly commence their suit so the statute was not tolled.

As a condition predicate to commencing a suit against a municipality, a plaintiff must file a tort claim and wait sixty days before filing suit against the City. RCW 4.96.020. Failure to comply with statutory claim filing requirements mandates dismissal of the suit. *Andrews v. State*, 65 Wn. App. 734, 738, 829 P.2d 250 (1992) (statute and a long line of cases interpreting it require dismissal for failure to comply with claim filing requirements). The claim filing requirements are mandatory and must be strictly construed, even if these requirements seem harsh or technical. *Levy v. State*, 91 Wn. App. 934, 942, 957 P.2d 1272 (1998).

Appellants in this case did not comply with the sixty-day waiting period after they filed their tort claim with the City. They served the City with the lawsuit the same day. CP at 89-99. Serving the City in this case

therefore could not toll the statute because the suit was never properly commenced against the City.

Third, the trial court properly granted summary judgment because even if one assumes serving the City with a copy of a lawsuit which is not properly commenced has any tolling effect in relationship to DOC, any tolling effect ended when the City was dismissed from the suit. When the court dismisses an action, a statute of limitations is deemed to continue running as though the action had never been brought. *Hintz v. Kitsap County*, 92 Wn. App. 10, 16, 960 P.2d 946 (1998).

Appellants in this case were served with a copy of the State's Answer after the City of Tacoma was dismissed. Appellants' counsel had notice an AAG was not served and had sufficient time to properly serve an AAG and failed to do so. As such the trial court ruling should be affirmed.

Fourth, the trial court properly granted summary judgment because the naming of unserved John Does, defendants, does not get around the fact the statute of limitations was no longer tolled. Appellants' assertion the trial court ruling was improper because "John Doe" defendants were named in the suit is based on a misinterpretation of the ruling in *Sidis*.<sup>16</sup>

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<sup>16</sup> Appellants' reliance on *Powers* is misplaced. In *Powers* the timely and properly served defendant was not dismissed from the suit so the statute of limitations was tolled. *Powers v. W.B. Mobile Services, Inc.*, 182 Wn.2d 159, 339 P.3d 173 (2014).

The court holding in *Sidis* is predicated on the fact at least one defendant is properly served which temporarily tolls the statute for the remaining unserved defendants. As the court recognized in *Sidis*, the tolling is not infinite; failing to serve each defendant risks losing the right to proceed against unserved defendants if the served defendant is dismissed, as occurred in *Fittro v. Alcombrack*, 23 Wn. App. 178, 180, 596 P.2d 665 (1979). *Sidis* requires all parties to be served and the tolling of the statute based on the service of one party only lasts as long as the served defendant remains a party.

That is not the case here because appellants never properly commenced their suit against the City and any tolling effect ended when the City was dismissed. The fact unnamed and unserved John Does were listed in the caption does not get around that fact and so the trial court's granting of summary judgment should be affirmed.

**E. The Trial Court Properly Granted Summary Judgment Because The Defense Of Insufficient Service Of Process Was Raised In A Timely Fashion With Sufficient Time For Appellants To Cure Service**

The trial court properly granted summary judgment because the defense of insufficient service of process was raised in a timely fashion.

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Here even if serving the City had any tolling effect, which it did not, the tolling effect ended when the City was dismissed.

Appellants' assertion the defense waived the affirmative defense is without merit.

The defense of insufficient service of process is not waived if it is asserted in either a responsive pleading or a CR 12(b)(5) motion, and filing a notice of appearance does not waive the defense either. *French v. Gabriel*, 116 Wn.2d 584, 593-94, 806 P.2d 1234 (1991). Simply engaging in discovery following the assertion of an affirmative defense does not indicate waiver. *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (once a defendant properly preserves a defense by pleading it in the answer, the defendant is not precluded from asserting the defense by proceeding with discovery). *See also Voicelink Data Services., Inc. v. Datapulse, Inc.*, 86 Wn. App. 613, 937 P.2d 1158 (1997) (defendant's participation in substantive discovery does not result in waiver of an affirmative defense if it was pleaded prior to engaging in discovery).

Waiver is “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.” *Mid-Town Ltd. Partnership v. Preston*, 69 Wn. App. 227, 233, 848 P.2d 1268 (1993). Once a party properly preserves the defense, it is not waived merely by proceeding with discovery, “even if the discovery is not directly related to the defense.”

*Clark v. Falling*, 92 Wn. App. 805, 813-14, 965 P.2d 644 (1998) (citing *French v. Gabriel*, 116 Wn.2d 584, 594, 806 P.2d 1234 (1991)).

Here, the trial court properly granted summary judgment because DOC timely raised the affirmative defense with sufficient time for appellants to cure the defect. Nowhere in the record is any evidence showing DOC failed to raise the defense in a timely manner.<sup>17</sup> Even if the statute was tolled while the City remained in the case, appellants still had sufficient time to perfect service and avoid the claim being barred by the statute of limitations.

There is also no admissible evidence in the record showing DOC engaged in any affirmative behavior which amounted to a waiver of the defense either. Appellants' counsel did not provide a single declaration pinpointing any action by DOC which can be interpreted as an affirmative assertion of waiver. The absence of any such declaration is telling. Either appellants' counsel never reviewed the answer or simply assumed service of a receptionist was sufficient, and failed to cure service despite having time to do so. In either event, this is not evidence DOC waived the defense.

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<sup>17</sup> Any claim respondent's waived the defense of insufficient service because of any spelling or grammar mistakes in its answer are misplaced. Respondent raised the defense in a timely manner and appellants never claimed before the trial court they were somehow confused by the pleading of the respondent. In fact, appellants' counsel at RP at 12 acknowledged during the summary judgment hearing the defense was raised.

None of the evidence presented by appellants at the motion for reconsideration established waiver either. Appellants' counsel's compliance with the claim filing requirements does not establish waiver. A letter from respondent's counsel dated March 18, 2013, stating original service of process cannot be made electronically between the parties does not establish an affirmative intent to waive either. It especially does not establish an affirmative intent to waive when on April 18, 2013, the respondent filed its answer alerting appellants that service was insufficient.

Appellants' counsel filing a confirmation of joinder report to the court does not amount to waiver as well. A party filing a confirmation of joinder report with the court stating service of process was complete does not mean another party waives a properly raised affirmative defense.

Courts have held that even signing of a confirmation of joinder does not waive a party's properly raised defense of sufficiency of service. *Parry, v. Windermere Real Estate/East, Inc.*, 102 Wn. App. 920, 10 P.3d 506 (2000). In rendering its ruling, the court stated "it would defy logic to hold a party's properly raised defense is waived merely by signing a form required by local rule for case scheduling and management. *Id.* at 510.

A case management report to the court is not a substantive pleading, does not amount to a stipulation under CR 2A, and makes no

assertions about the sufficiency of service concerning appellants' service of the AG's office. More importantly, any reliance by the appellants on her own assertions to the court was not reasonable because subsequently she was notified service was improper. As such, the insufficiency of service defense was not waived and the trial court ruling should be affirmed.

**F. Appellants' Brief Failed To Rebut The Fact There Is No Evidence Appellants Served An AAG**

Before the trial court appellants argued the court should not grant summary judgment because the State "knew" about the suit. However, the trial court properly rejected this argument because it essentially boils down to the contention that defective service such as leaving a copy of the summons with a receptionist when the statute requires the document be left with an AAG is cured by actual notice. But, case law in this state is clear that actual notice does not constitute sufficient service. *Thayer v. Edmonds*, 8 Wn. App. 36, 41-42, 503 P.2d 1110 (1972).

Trying to get around the fact they failed to effect proper service and that notice does not cure defective service, counsel relies on a series of speculative assumptions which are not supported by the facts and raise a number of new arguments based on case law which do not apply to the

state. As such, the speculative assumptions, newly raised arguments and inapplicable case law deserve being addressed here.

**G. The Trial Court's Entry Of Findings Of Fact And Conclusions Of Law Does Not Rebut The Fact Appellants Failed To Establish They Served An AAG**

The appellants' argument that the trial court's entry of findings of fact and conclusions of law was inappropriate is misplaced. The argument is misplaced because the trial court was within its authority to make independent findings of fact regarding whether it had jurisdiction over the state. *See Harvey v. Obermeit*, 163 Wn. App. 311, 319, 261 P.3d 671 (2011).

The findings of fact objected to by the appellants are supported by substantial evidence and support the trial court's legal conclusion the court did not have jurisdiction over the State. As such they are not improper.

To the extent the court's factual findings do not relate to the court's legal finding that it lacked jurisdiction over the state, which they all do, appellants' arguments remain meritless because the trial court's remaining legal conclusions were all proper. For the reason cited in this brief, the State did not waive any defenses, the defense of service of process was raised in a timely fashion and Mr. Currie's assumptions about an unidentified receptionist are unreasonable as a matter of law. As such the trial court properly granted summary judgment.

## H. Notice Of The Lawsuit Does Not Cure Defective Service

Because notice of a lawsuit does not constitute proper service, appellants are now for the first time raising a conflated theory of notice and “second hand” service to get around the fact they served a receptionist. Their reliance on this theory is misplaced for multiple reasons.

First, this theory is meritless because appellants waived the argument by not making it before the trial court. RAP 2.5(a). Appellants’ original argument was service of a receptionist was proper and then they claimed they served an AAG directly. At no time did they argue or even raise the issue of second hand service. It is expected in rebuttal appellants will argue they could not make this argument because the Supreme Court had not ruled on *Scanlan v. Townsend*<sup>18</sup> at the time of the trial court granted summary judgment. However, the argument of second hand service is not a new argument. The Supreme Court cites to *Brown–Edwards*, which was decided well before this suit was filed, where the appellate court upheld a trial court’s decision not to grant summary judgment based on a second hand service theory. *Brown–Edwards v. Powell*, 144 Wn. App. 112, 182 P.3d 441 (2008). So in this case,

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<sup>18</sup>*Scanlan v. Townsend*, 181 Wn.2d 838, 336 P.3d 1155 (2014).

appellants waived the argument by not raising it before the trial court and should be precluded from do so now.

Second, it is misplaced because the trial court concluded as a matter of fact they did not serve an AAG. The court's conclusion they failed to serve an AAG is supported by substantial evidence including appellants' process server's declaration he served a receptionist. So even if they had not waived the argument, which they did, the argument fails because the argument is not sufficient to overcome the court's factual and legal conclusions.

Third, appellants "second hand" service theory does not apply to the State. No court in the state of Washington has found a party can overcome the strict requirement of RCW 4.92.02 through the use of second hand service. The court should reject any invitation to do so here. While not directly stated, appellants' arguments seeks the court to render the legislature's requirement an AG be served meaningless by allowing defective service of the state be cured any time the state gains notice of a lawsuit.

As a general rule, strict compliance is required with statutes naming particular persons upon whom service of process must be made in actions against government entities. Under appellants' theory in this case, instead of having the courts engage in the rather straight-forward

determination of whether appellants' process server served an AAG as required by the statute, appellants are seeking the court to open the door to a host of problems which would inevitably arise in similar situations as what occurred here.

Courts would be routinely be called upon to decide, for example, whether delivery of the summons to a secretary at the Department of Corrections, or to an administrative assistant to the governor, or to the secretary to an administrative assistant of a legislator, and so on, constitutes proper service simply because an AAG ultimately gains notice of the suit and files an answer to the complaint. This would include even circumstances such as here, where there is no evidence the unidentified person even agreed to accept service or agreed to act as a process server for the appellants.

Appellants' theory also forces the Attorney General's Office into engaging in actions which are *ultra vires*. The Washington State Constitution specifically reserves the right of the legislature to regulate lawsuits against governmental entities by providing that the legislature "shall direct by law, in what manner, and in what courts, suits may be brought against the State." Const. art. II, § 26.

The AG's office as a creature of the state derives its authority, powers and duties from the legislature. *Campbell v. Saunders*, 86 Wn.2d

572, 546 P.2d 922 (1976). Individuals acting outside that authority are engaging in an *ultra vires* act. In the absence of a statutory provision allowing the AG to appoint non-AAGs to accept service on behalf of an AAG, or to allow non-attorney AGO employees to act as an agent of the plaintiffs to serve an AAG, such an appointment would be beyond the AG's authority and therefore have no effect. *Id.* at 267 n.4.

Strictly interpreting the statute to require only direct personal service of an AAG does not violate equal protection. The fact "second hand" service may be allowed in a private context is inconsequential.<sup>19</sup> The legislature has determined who must be served and the fact different entities have different recipients does not violate equal protection. *Nitardy v. Snohomish County*, 105 Wn.2d. 133, 712 P.2d 296 (1986).

Also the requirement that any AAG be served is not burdensome to the litigants and does not create a substantial impediment to appellants suing the State. It also serves a legitimate interest for the litigants by avoiding any confusion and uncertainty regarding who at the State can be served lawsuits. For example, the appellants in this case after being placed on notice that service was improper simply could have returned to

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<sup>19</sup> Minor procedural burdens in the governmental context have been upheld even when there is not an exact counterpart in the non-governmental context. *See Hall by Hall v. Niemer*, 97 Wn.2d 574, 580–81, 649 P.2d 98 (1982).

the Tacoma AGO and served an AAG in a timely fashion thus avoiding having their case dismissed.

Finally, even if the State could be served under a “second service theory,” which it should not be given the reasons cited in the last section, appellants’ reliance on the argument is misplaced because it is based on impermissible speculative assumptions. Unlike in *Brown and Scanlan*, appellants have never presented any evidence establishing who allegedly performed the act of second hand service. In *Brown and Scanlan* the plaintiffs were able to identify the specific person they gave the documents to, that person then admitted they provided the documents to the person who was the target of service.

Here, the facts are the exact opposite. The evidence in the record shows appellants left the documents with an unidentified receptionist. The fact an AAG fortuitously gained notice of the case and filed an answer raising the defense of insufficient service in a timely manner does not cure the fact service was defective, nor does it establish an AAG was ever properly served. As such, the trial court properly concluded as a matter of fact and law the appellants failed to properly serve an AAG.

So in sum, the trial court properly granted summary judgment because 1) service of a receptionist is not proper service of the state; 2) notice does not cure improper service; 3) the theory of second hand

service does not apply to the state; and 4) even if it does, appellants failed to establish second hand service occurred in this case.

**I. Appellants Failed To Rebut The Fact DOC Did Not Waive The Defense Of Insufficient Service**

Appellants' assertion DOC waived the defense of insufficient service is meritless because the cases relied on by the appellants are not applicable to the facts of this case. For example, appellants rely on *French v. Gabriel*, but the court found the defendant did not waive the defense of sufficiency of service because they timely raised it in their answer with sufficient time for the plaintiff to cure the problem before the statute of limitations ran. *French v. Gabriel*, 57 Wn. App. at 217. That is the case here so the trial court properly granted summary judgment.

Appellants' reliance on *Lybbert* is also misplaced because as the *Lybbert* court emphasized, the mere act of engaging in discovery is not necessarily inconsistent with a later assertion of the defense of insufficient service. *Lybbert v. Grant County, State of Wash.*, 141 Wn.2d 29, 41, 1 P.3d 1124 (2000). It is where circumstances indicate that the defendant was lying "in wait" for the statute of limitations to run before placing the plaintiff on notice of the defect, waiver will apply. *Lybbert*, 141 Wn.2d at 45. For instance, in *Lybbert* the defense waited until after the statute of limitations had run before answering the complaint and raising the defense

of insufficiency of service for the first time. Again, that is not the case here; DOC timely raised the defense in its answer and the plaintiffs have not contested the fact they had sufficient time to cure the defect but failed to do so.

Appellants' reliance on *Romjue* and *Blankenship* is equally misplaced and *Butler*. In *Romjue v. Fairchild*, 60 Wn. App. 278, 281, 803 P.2d 57 (1991), plaintiff's counsel had written to defense counsel before the statute of limitations expired, stating that he understood the defendants had been properly served. Nonetheless, the defendant waited until three months after the statute of limitations expired to notify plaintiff's counsel of insufficient service. *Romjue*, 60 Wn. App. at 281-82. In *Blankenship*, the attorney waited after the statute had run and nine months after he first filed a notice of appearance to answer the complaint and place the plaintiff on notice that service was insufficient. *Blankenship v. Kaldor*, 114 Wn. App. 312, 57 P.3d 295 (2002). Unlike, in *Butler*, plaintiff has not shown DOC waived the defense. *Butler v. Joy*, 116 Wn. App 291, 65 P.3d 671 (2003). DOC did not file a summary judgment motion prior to the statute of limitations running asserting other defenses. The only motion filed by DOC in this case is the one now at issue. Appellants' citation to *King v. Snohomish County* for the proposition that a defendant can waive an affirmative defense is no less instructive based on the facts of this case.

*King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002). In *King*, the County waited until three days before trial before raising the claim filing defense with the court. *Id.* At that point the matter had been in litigation for over 45 months, both parties had moved for summary judgment on grounds not related to claim filing, mediation was conducted, 18 discovery depositions were taken, and the County sought four continuances. *Id.*

Unlike in *King*, the respondent's summary judgment was not raised on the eve of trial. Further, 18 depositions were not taken in this case; DOC never requested a continuance, filed summary judgment on other issues or engaged in mediation. As such, the trial court properly determine DOC did not waive the defense and so the trial court's ruling should be affirmed.

## V. CONCLUSION

This court should affirm the trial court's dismissal of the appellants' claims. The trial court properly granted summary judgment because the legislature requires the plaintiff to serve an AAG. Appellants' process server's declaration of service states he served a receptionist and there is substantial evidence in the record to support the court's conclusion that appellants as a matter of fact failed to serve an AAG.

Appellants were timely notified service was insufficient and failed to present any admissible evidence establishing DOC affirmatively waived the defense. As such, respondent DOC asks the court to affirm the trial court granting of summary judgment.

RESPECTFULLY SUBMITTED this 3 day of September, 2015.

ROBERT W. FERGUSON  
Attorney General



GARTH A. AHEARN  
WSBA #29840; OID #91105  
Assistant Attorney General  
Attorney for Respondent  
1250 Pacific Avenue, Suite 105  
Tacoma, WA 98401-2317  
253-593-5243  
[gartha@atg.wa.gov](mailto:gartha@atg.wa.gov)

**CERTIFICATE OF SERVICE**

I certify that I served a copy of this document on Paul A. Lindenmuth and Vicky J. Currie, plaintiff's counsels of record, on the date below as follows:

- US Mail Postage Prepaid
- ABC/Legal Messenger
- State Campus Delivery
- Hand delivered by Amy Kuja

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 3rd day of September, 2015, at Tacoma, Washington.

*/s/ Natasha Cepeda*  
NATASHA CEPEDA, Legal Assistant