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NO. CA 65846-8-I

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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JAMES E. HARVEY,

Plaintiff/Appellant,

v.

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

Defendants/Respondents.

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BRIEF OF APPELLANT

King County Superior Court No. 09-2-27489-4 KNT

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COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION I

JAMES E. HARVEY,	)	
	)	CA No. 65846-8-I
Appellant,	)	
	)	BRIEF OF APPELLANT
v.	)	
	)	
RICHARD A. OBERMEIT and	)	
JANE DOE OBERMEIT,	)	
husband and wife, and their	)	
marital community,	)	
	)	
Respondents.	)	
_____	)	

**I. ASSIGNMENTS OF ERROR.**

1. In ruling on the parties' dispositive motions under CR 56 and dismissing Plaintiff's action, did the trial court commit error by not finding Defendants had waived, or were equitably estopped from asserting, their defenses related to service of process, jurisdiction, and statute of limitations given that Defendants engaged in substantial discovery inconsistent with these defenses, remained silent about and concealed them until after the limitations period lapsed, and delayed bringing their dispositive motion regarding them?
2. Did the trial court abuse its discretion by not ruling on the parties' dispositive motions based on the facts existing in the record at the time of the hearing the parties noted for their motions, particularly

when Defendants had not filed any facts by that time raising a genuine issue of material fact?

3. Did the trial court abuse its discretion by advising Plaintiff at the time of the hearing the parties noted for their motions that it would not accept his undisputed declarations and would instead require him to produce his witness-declarant to testify live at a later “fact-finding” hearing before the court would rule?
4. Did the trial court abuse its discretion by calling for this fact-finding hearing based only on the oral statement of Defendants’ attorney about what facts they disputed, when Defendants had not actually filed any facts raising a genuine issue of material fact?
5. Did the trial court abuse its discretion by calling for this fact-finding hearing *sua sponte* and over Plaintiff’s objection?
6. Even if it were not error to call for a fact-finding hearing and concerning undisputed facts, did the trial court abuse its discretion by appointing itself, rather than a jury, as the fact-finder?
7. Did the trial court abuse its discretion by allowing Defendants to submit evidence after CR 56’s deadlines, through cross-examination of Plaintiff’s witness-declarant at the fact-finding hearing minutes before the court ruled on the motions, and then using this evidence to rule against Plaintiff on the motions? Was it further error to do so where Plaintiff had no prior notice the court was going to allow and rely upon cross-examination evidence?
8. Did the trial court err by not granting Plaintiff’s Motion to Strike this untimely cross-examination evidence?
9. Did the trial court abuse its discretion by granting Defendants’

Motion to Dismiss based on Plaintiff's alleged failure to conduct a "due and diligent search" to locate Defendants "in the state" pursuant to the absent motorist statute, RCW 46.64.040, when Defendants never raised that issue in their Motion?

10. Did the trial court abuse its discretion by granting Defendants' Motion to Dismiss and denying Plaintiff's Motion for Partial Summary Judgment based on its findings on facts that Defendants previously admitted in open court were not in dispute?
11. Even assuming, *arguendo*, that Defendants had properly raised a "due and diligent search" issue in their motion and CR 56 allowed Defendants to dispute facts without filing contrary evidence, did the trial court abuse its discretion under CR 56 by determining the credibility of Plaintiff's witness-declarant itself, disregarding his entire testimony on credibility concerns, and then deciding the parties' motions on that basis?
12. Even assuming, *arguendo*, that Defendants had properly raised a "due and diligent search" issue in their motion, did the trial court err in disregarding all evidence of Plaintiff's efforts find Defendants in the state based solely on concerns about one witness-declarant's credibility, and in not construing such evidence and their inferences most favorably to the Plaintiff?
13. Did the trial court err in deciding the parties' motions based on inaccurate, immaterial, and/or improper Findings of Fact and Conclusions of Law?
14. Did the trial court err in entering Findings of Fact and Conclusions of Law and an order dismissing the action where Defendants did not give Plaintiff prior notice of presentation of their proposed Findings, Conclusions, and order of dismissal or a copy of them?

15. Did the trial court err in not granting Plaintiff's Motion for Partial Summary Judgment given that Defendants raised no genuine issue of material fact regarding their defenses of insufficient process and service of process, jurisdiction, and statute of limitations?

## **II. STATEMENT OF THE CASE.**

Plaintiff's negligence action arose out of a motor vehicle collision occurring on August 4, 2006 on Interstate 405 in Renton, Washington. *CP*

2. Plaintiff was seriously injured when Defendant Richard Obermeit crashed into the rear of Plaintiff's vehicle. *Id.* After Plaintiff filed suit against Defendants he could not locate them in Washington, so he served process upon them by substitute service upon the Washington Secretary of State. Defendants retained counsel who filed an Answer and engaged in discovery. Both parties later brought dispositive motions concerning Defendants' affirmative defenses concerning service of process, jurisdiction, and statute of limitations. The trial court denied Plaintiff's motion but it granted Defendants' motion and dismissed the action.

### **A. Plaintiff's Efforts to Locate Defendants Within the State and Service Upon the Secretary of State Under RCW 46.64.040.**

On July 23, 2009, Plaintiff filed the Summons and Complaint for

Negligence with the trial court. *CP 48*. Plaintiff's subsequent efforts to locate Defendants included consulting the address on the police report, consulting phone directories, and hiring a private investigator, who performed his own, separate trace of Defendants. *CP 182-83*.

The investigator's efforts to locate Defendants consisted of searching the Washington State Department of Licensing and vehicle databases, the King County Assessor's office, and the IRB/Accuprint skip trace database. *CP 179*. Through these efforts the investigator located a last-known address for Defendants of 22501 S.E. 277th Place, Maple Valley, Washington, 98038. *CP 179*. This was also the same address Defendant Obermeit had given the police officer at the collision. *CP 191*.

Based on these investigation efforts, Plaintiff hired a process server to attempt service at this address. This process server, who is licensed with the State of Washington and has some 35 years of successful experience, engaged in his own separate efforts to locate and serve Defendants. *CP 195* ¶ 1, ¶ 5. As he testified in his declaration describing these efforts, Mr. Conley first made four separate attempts, on different

days of the week and at different times of day, to locate and serve Defendants at the above Maple Valley address. *CP 196*, ¶ 5. These attempts occurred over the 10-day period between August 9, 2009, and August 18, 2009. *Id.* On the first attempt, (Sunday) August 9<sup>th</sup>, Mr. Conley knocked on the door but nobody answered or appeared to be home. *Id.* On (Sunday) August 16<sup>th</sup>, he again knocked on the door but nobody answered or appeared to be home. He interviewed neighbors who said the residents at that address “will take off for several weeks at a time.” *Id.* On (Monday) August 17<sup>th</sup> and (Tuesday) August 18<sup>th</sup>, he again knocked on the door but still nobody answered or appeared to be home. *Id.*

Also, on each of these days Mr. Conley inspected the garbage cans to see if anyone was actually living there; each time he looked, however, these cans were empty. *Id.*, ¶ 6. He also placed paper clips on the tops of tires to see if any of the parked vehicles were being used but when he looked later the paper clips were still there and had not moved. *Id.*

Mr. Conley confirmed that Defendants could not be found at this last-known address. *CP 197*, ¶ 7. It is his opinion that these efforts

constitute a due and diligent attempt to locate and serve Defendants. *Id.* Likewise, it is Plaintiff's counsel's separate opinion that his, his investigator's, and his process server's combined efforts all constitute a good faith and due and diligent attempt to locate and serve Defendants, and that Defendants could not be located within the State of Washington. *CP 152-53; CP 183.* Indeed, Plaintiff never found Defendants in the state before effecting service under RCW 46.64.040.

In compliance with RCW 46.64.040, therefore, on September 17, 2009, the Plaintiff mailed to Defendants the Declaration of Plaintiff Regarding Compliance with RCW 46.64.040, containing notice of service on the Secretary of State, and Declaration of Plaintiff's Attorney Regarding Compliance with RCW 46.64.040. These documents were sent by certified mail to the Defendants, return receipt requested, to the Maple Valley address. *CP 170; 185.* On September 22, 2009, and during the limitations period, Plaintiff served the Secretary of State with copies of the Summons and Complaint for Negligence, the required fee, and the last

known address for Defendants, pursuant to RCW 46.64.040.<sup>1</sup> *CP 187*.

On September 23, 2009, also within the limitations period, Defendant Richard Obermeit personally signed and returned the Return Receipt acknowledging his actual receipt of the Summons and Complaint and the foregoing Declarations. *CP 185*. In addition, on September 22, 2009, the Secretary of State sent the Summons and Complaint to Defendants, by certified mail, pursuant to RCW 46.64.040. *CP 187*.

The 90<sup>th</sup> day following Plaintiff's filing of this action is October 21, 2009. Therefore, after Defendants received the Summons and Complaint and actual notice of this lawsuit on September 22, 2009, 30 days still remained before the expiration of the limitations period.

**B. Defendants' Silence Regarding Their Service-Related Defenses.**

After receiving actual notice of this lawsuit, Defendants notified their insurer, Allstate, who retained defense counsel. Defendants' counsel, however, conducted activities in the lawsuit without notifying Plaintiff

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<sup>1</sup> Defendants never argued, nor did the trial court ever conclude, that Plaintiff did not comply with these technical requirements of RCW 46.64.040, and Plaintiff's compliance with them is not an issue on appeal.

within the limitations period of their defective service/lack of jurisdiction allegation. For example, on October 15, 2009 (three weeks after Defendants received the Summons and Complaint and one week before the limitations period expired), defense counsel signed a Notice of Appearance and faxed it to Plaintiff's counsel. *CP 201-02*. This was a general Notice of Appearance, however, which thus gave no indication of a defective service/jurisdiction allegation, as a special Notice would.

Also on October 15, 2009, defense counsel sent correspondence with his Notice of Appearance, as a fax cover sheet. *CP 200*. But this communication to Plaintiff's counsel said only "Notice of Appearance of Dietrich Biemiller. Service copy will follow via messenger." *Id.* Despite knowledge of the defective service defense and an opportunity to disclose it, defense counsel said nothing about service or jurisdiction. *Id.*

Then, over the next week between October 15, 2009 and the limitations period's expiration on October 21, 2009, Allstate and defense counsel had no other contact with Plaintiff's counsel and they did not communicate or attempt to communicate with him. *CP 139; 152*. During

this period, they did not inform Plaintiff about any concern with service of process or jurisdiction. *Id.* They also did not serve an Answer within this time, which would have revealed their affirmative defenses. *Id.*

The limitations period then passed on October 21, 2009. On November 2, 2009, Defendants' counsel served an Answer to the Complaint listing their service-related defenses, which for the first time notified Plaintiff of these defenses. *CP 156.* The Answer pleaded affirmative defenses of 1) failure "to serve process upon defendants in the manner and form required by law," 2) the "plaintiff has failed to issue sufficient process in order to obtain jurisdiction over defendants and the subject matter of this suit," 3) the "court lacks jurisdiction over the person of these defendants," and 4) that "this matter is barred by the Statute of Limitations." *CP 157.*

**C. Defendants' Unrelated Discovery Efforts Before Bringing Their Motion to Dismiss.**

Before bringing their Motion to Dismiss, Defendants engaged in substantial discovery that had no connection to their service of process and

jurisdiction defenses. This unrelated discovery was: On October 30, 2009, Defendants served Plaintiff with general Interrogatories and Requests for Production.<sup>2</sup> *CP 204-22*. On October 30, 2009, Defendants served a Request for Statement of Damages. *CP 224*. On October 30, 2009, Defendants filed and served a Jury Demand, paying the clerk a fee for doing so. *CP 226*. On December 21, 2009, Defendants' counsel filed and served a Notice of Unavailability. *CP 228*. On January 1, 2010, Defendants served answers and produced documents in response to Plaintiff's general Interrogatories and Requests for Production.<sup>3</sup> *CP 231-92*. On January 8, 2010, Defendants answered and served responses to Plaintiff's Request for Admissions. *CP 294-95*. On January 11, 2010, Defendants' counsel sent a letter demanding that Plaintiff produce

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<sup>2</sup> Defendant's unrelated interrogatories contained requests for Plaintiff's personal information and history; marital and family information; historical medical conditions, injuries and health care providers; employment and wage information; any criminal history or other lawsuits; collision details, photographs, witnesses, and statements; claimed medical expenses and other damages; and details about expert witnesses. This written discovery, though, did not contain any request for information concerning Plaintiff's attempts to locate or serve process upon Defendants or otherwise concerning Defendants' service of process and jurisdiction defenses. *CP 204-22*.

<sup>3</sup> These responses and documents included insurance policy information, vehicle damage repair estimates and receipts, and vehicle photographs, but contained no documents related to service or jurisdiction. *CP 241-92*.

responses to Defendants' general Interrogatories and Requests for Production. *CP 297*. On January 14, 2010, Defendants issued records depositions subpoenas to obtain Plaintiff's medical records and served them on eight different health care providers for the Plaintiff, along with a Notice of Intent Pursuant to RCW 70.02.060.<sup>4</sup> *CP 299-303*. On February 25, 2010, Defendants demanded (and later received) Plaintiff's proof of serving the deposition notice for Defendant Obermeit. *CP 305-06*. On March 2, 2010, Defendant Obermeit and his attorney traveled to Plaintiff's counsel's office in Bellevue, where Defendant Obermeit gave his discovery deposition.<sup>5</sup> *CP 308-09*. On or about April 9, 2010, Defendants retained a medical expert witness and made a CR 35 discovery request that Plaintiff submit to a medical examination by that expert. *CP 311*.

**D. The Parties' Dispositive Motions and the Trial Court's Procedural Rulings.**

On February 11, 2010, Plaintiff filed his Motion for Partial

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<sup>4</sup> Defendants later actually conducted these eight records depositions and obtained Plaintiff's medical records. *CP 140; 152*.

<sup>5</sup> Defense counsel scheduled Defendant's March 2<sup>nd</sup> deposition by agreement. *CP 140; 152*.

Summary Judgment requesting that the trial court strike the affirmative defenses. Plaintiff properly noted this motion to be heard on March 12, 2010. *CP 6*. Plaintiff's Motion was based on current law (i.e., the post-2003 version of RCW 46.64.040) and attached supporting documents and Declarations that detailed, *inter alia*, the above-referenced unsuccessful efforts to locate Defendants in the state. Defendants never filed a responsive brief or submitted any evidence contesting Plaintiff's Motion or any of the Declarations, facts and opinions supporting his Motion.

On February 10, 2010, Defendants filed their Motion to Dismiss seeking to dismiss Plaintiff's action based on their service of process, jurisdiction, and statute of limitations defenses. Defendants framed and briefed their Motion's service issue, however, as whether Plaintiff's substitute service "under the Non-Resident Motorist Statute [was] appropriate when the defendants are Washington Residents [sic], and there is no evidence of them leaving the state or attempting to evade service". *CP 92*. As discussed below, however, this issue misstates the law since RCW 46.64.040 no longer requires a showing that a defendant is not a

Washington resident or that he has departed the state or attempted to evade service; instead, the amended statute now requires only that a plaintiff make a due and diligent effort to locate a resident-defendant in the state.

In supporting this issue, Defendants' Argument section then repeatedly contended that Plaintiff erred by failing to show that Defendants departed the state or evaded service,<sup>6</sup> *CP 93-95*, and they also submitted a declaration from Defendant Obermeit contending he was a Washington resident and had never departed the state or attempted to evade service. *CP 96-97*. Nowhere in their Motion, however, did Defendants raise the issue of whether Plaintiff made a due and diligent effort to locate Defendant within the state.

In response to Defendants' Motion, Plaintiff filed his Opposition to Defendants' Motion to Dismiss, containing the declarations and facts and opinions discussed above. *CP 135-314*. Defendants filed no reply brief or

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<sup>6</sup> Further, Defendants' only cited legal authority in their Motion was *Huff v. Budbill*, 141 Wash.2d 1, 1 P.3d 1138 (2000). As discussed below, *Huff's* holding requiring a departing-the-state showing, however, is inapplicable today because it was based on the old provisions of RCW 46.64.040, which the legislature later liberally amended in 2003 to remove the "departs the state" requirement. *CP 28*. Defendants did not inform the trial court of this inaccurate statement of the law contained in their Motion.

any evidence whatsoever in response to Plaintiff's Opposition and facts.

Defendants noted their Motion to be heard on March 12, 2010. *CP 89*. On March 1, 2010, by a Stipulation and Order these Motions were continued and consolidated, to be heard together on May 7, 2010. *CP 86*.

On May 7<sup>th</sup>, the parties' counsel arrived and appeared before the assigned judge for the scheduled hearing on their Motions. At the hearing, however, the judge refused to rule on the Motions despite the fact Defendants never filed any response to Plaintiff's facts and opinions. Instead, the judge immediately declared that she wished to make factual determinations related to the Motions, that she was not going to rule on the Motions based on the submitted declarations, and that she would rule on them only after hearing live testimony at a later "fact-finding" hearing:

As to the issue of jurisdiction, or the Statute at issue here, it appears to me that there are factual—there is—there are factual disputes as to the efforts made to find the defendants. And in reading the cases, it would appear to me that what we may need so that it never comes back to us, is actually a factual determination. And in looking at the cases, the more appropriate way of handing that would be to actually take testimony where the

Court then could make appropriate findings that, of course, it would then take and apply to the law. I dare say we are not prepared to do that this morning.

*RP 2, l. 14-25.*

The way I have looked at one of the cases<sup>7</sup>, **this Court is going to have to make a factual determination. I'm not going to do it on affidavits or declarations. I will do it on testimony**, which is what this case that I just cited to suggests is the more appropriate method. And that's what I plan on doing.

*RP 10, l. 17-22 (bolding added).*

Neither party, however, requested that the court do any of these things. To the contrary, Plaintiff objected and pointed out that Defendants submitted no facts contesting Plaintiff's evidence and thus the court should rule based on the existing record. *RP 16, l. 10-22; CP 24-26.*

The court then asked the parties to state orally what facts were actually disputed. In response, defense counsel said that the following were the only facts Defendants disputed: 1) The number of times Mr.

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<sup>7</sup> The court was referring to the dissenting opinion in *Martin v. Meier*. *RP 6, l. 16-25.*

Conley attempted to serve Defendants; 2) That Mr. Conley checked garbage cans and the cans were empty; and 3) That Mr. Conley placed paper clips on the tires of vehicles and he found later that the papers clips had not moved. *RP 15, l. 23-RP 16, l. 9.*

Almost six weeks later, on June 18, 2010, the trial court conducted its fact-finding hearing. Plaintiff's process server, Alex Conley, testified. After Mr. Conley repeated his testimony contained in the Declaration of Alex Conley III, however, the trial court then allowed defense counsel to conduct cross-examination. *CP 11; 22; 320 (Conclusion of Law 1).* This cross-examination allowed the defense to elicit evidence that the court found to suggest "discrepancies" in Mr. Conley's testimony, which the court in turn believed affected Mr. Conley's entire credibility. *Id.* These alleged discrepancies were 1) that Mr. Conley did not know why his earlier Declaration of Attempted Service had two dates on it or why it was unsigned (*CP 319, Findings of Fact 8 and 9*); 2) that he placed paper clips on the tires of only two vehicles when he believed four vehicles were registered at that address (*CP 320, Finding of Fact 14*); 3) that he twice

attempted service of process (*id.*, *Finding of Fact 15*); and 4) that neighbors may have told him the residents left sometimes on the weekends rather than for weeks at a time (*id.*, *Finding of Fact 17*). The trial court, however, made no other findings questioning Plaintiff's attempts to locate Defendants within the state. *CP 319-320*.

Based solely on these alleged discrepancies (which Plaintiff will show below are not discrepancies or relevant to the issues), the trial court then entered Conclusions of Law determining that Mr. Conley was not "credible" and granted Defendant's Motion to Dismiss Plaintiff's action. *CP 320-21*. The pertinent Conclusions are: That the court found "Mr. Conley's testimony is in conflict with his declarations, and is not credible"; and two attempts at service of process were not adequate to show due diligence, and even if Mr. Conley's testimony that he made four service attempts is to be believed, they were made in a short time span during August and still show a lack of due diligence. *CP 320-21 (Conclusions of Law 1-3)*. The court also denied Plaintiff's Motion for Partial Summary Judgment. *CP 348*.

### III. ARGUMENT.

The trial court committed many prejudicial errors in granting Defendants' Motion and denying Plaintiff's Motion. Any one of these separate errors should require reversal and remand of this case:

A. **The Trial Court Erred by Not Ruling That Defendants Waived, or Were Equitably Estopped from Asserting, Their Service-Related Defenses by Engaging in Unrelated Discovery, by Remaining Silent About and Concealing Their Defenses Until After the Limitations Period Lapsed, and/or by the Delay in Bringing Their Motion.**

Defendants waived their defenses by engaging in discovery unrelated to them. *Romjue v. Fairchild*, 60 Wash. App. 278, 281, 803 P.2d 57 (1991), *review denied*, 116 Wash.2d 1026, 812 P.2d 102 (1991). (A copy of *Romjue* is contained in the Clerk's Papers. *CP 148*.) The issue in *Romjue* was whether the defendant waived the defense of insufficient service because he engaged in discovery before he moved to dismiss. The only discovery defendants engaged in was serving interrogatories and a Request for Statement of Damages. Nevertheless, the Court of Appeals concluded that he waived the defense of insufficient

service because this type of discovery was inconsistent with it. *Romjue*, 60 Wn. App. at 281. This holding is in accord with other Washington decisions. See *King v. Snohomish County*, 146 Wn.2d 120, 47 P.3d 563 (2002) (waiver occurs where defendant engages in discovery inconsistent with a later defense of insufficient service); *Raymond v. Fleming*, 24 Wn. App. 112, 600 P.2d 614 (Div. I 1979), *review denied*, 93 Wn.2d 1004 (1980) (service and jurisdiction defenses were waived by defendants' counsel's actions that were dilatory and inconsistent with these defenses).

Like in *Romjue*, Defendants here likewise served a set of interrogatories and Request for Statement of Damages that were unrelated to the service issue. *Romjue* thus applies on these identical facts to show a waiver of the defense. As further evidence of waiver, though, Defendants engaged in substantially more unrelated discovery than the minimal amount the *Romjue* court found sufficient. Between October 2009 and April 2010, Defendants' counsel conducted eight records depositions of Plaintiff's health care providers and obtained his medical records, demanded responses to interrogatories and requests for production,

produced answers and documents to Plaintiff's interrogatories and requests for production, produced responses to Requests for Admission, and retained a medical expert and made a CR 35 discovery request for Plaintiff's medical examination. The principal Defendant also gave a discovery deposition. Clearly, a waiver occurred with such ample discovery that had nothing to do with the service defense.

Second, Defendants should be equitably estopped from asserting the defense by remaining silent about it until after the expiration of the limitations period knowing Plaintiff was relying upon the alleged defective service. *Romjue* also addresses this situation. *Romjue* held that the service defense was waived when defense counsel was in communications with Plaintiff's counsel within the limitations period but failed to inform him of the defective service allegation until after the period lapsed. *Romjue*, 60 Wn. App. at 281-82. Defense counsel in that case knew before the limitations period expired that plaintiff's counsel was unwittingly relying on the ineffective service, yet defense counsel chose not to correct that misapprehension until after the statute ran. *Id.*

These facts are identical to our case, where Defendants' counsel here appeared and wrote correspondence to Plaintiff's counsel within the limitations period but without disclosing the defective service allegation. After the limitations period lapsed, defense counsel then served an Answer that first informed Plaintiff of the service defense.

Third, the defenses were waived because Defendants did not bring their Motion to Dismiss as soon as reasonably practicable or by acting inconsistently with this defense. Waiver can occur if a defendant's attorney has been dilatory in asserting the defense of insufficient service of process. *Raymond v. Fleming*, 24 Wash. App. 112, 115, 600 P.2d 614 (Div. I 1979), *review denied*, 93 Wash.2d 1004 (1980). Defendants here waited over four months to bring their Motion.

The Court of Appeals here may hold that a waiver occurred or equitable estoppel applies and dispose of this appeal without deciding the remaining issues (all of which arise from the service of process question). The discussion below is directed to those remaining issues.

**B. The Trial Court Abused Its Discretion By Not Following CR 56's Procedures for Dispositive Motions.**

**1. It was Error for the Trial Court Not to Rule Based on the Record as it Existed at the Time of the Original Scheduled Hearing on May 7, 2010.**

The trial court should have ruled on both Defendant's Motion to Dismiss and Plaintiff's Motion for Partial Summary Judgment on May 7, 2010, the date that all parties properly set the hearing on their Motions. The court also should have ruled based on the record existing on that date. This was required by CR 56, which provides that the court determine dispositive motions "forthwith" and based solely on the documents filed:

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

CR 56(c) (bolding added).

As of the time of the scheduled May 7<sup>th</sup> hearing, the parties had filed and served all their respective submissions and their Motions were

ready to be decided. Defendants had filed only their Motion to Dismiss with declarations stating Defendants were Washington residents who did not attempt to evade service attempts. Defendants had not filed any response to Plaintiff's Motion for Partial Summary Judgment or any reply to Plaintiff's Opposition to Defendants' Motion to Dismiss; Plaintiff's evidence showing he conducted a due and diligent search to locate Defendants in the state was thus uncontested. Accordingly, it was error for the trial court not to treat Plaintiff's facts and opinion evidence as undisputed, to declare that it would not accept Plaintiff's declarations, to refuse to rule on the Motions at that time, and to require Plaintiff to produce the declarant to testify live at a later hearing before ruling. The court should have ruled on May 7<sup>th</sup> that Plaintiff's undisputed evidence showed he conducted a due and diligent search as a matter of law.

2. **It was Error for the Trial Court to Rely on Defendants' Counsel's Oral Statement of What Facts Were in Dispute When Defendants Had Not Filed Any Actual Evidence Disputing Them.**

For similar reasons, it was error on May 7<sup>th</sup> for the trial court to

solicit Defendants' counsel's oral representations as to which of Plaintiff's facts they disputed and then, in turn, to order an evidentiary hearing to determine those "disputed" facts. What facts defense counsel *says* are disputed is irrelevant because the only facts that may be deemed disputed under CR 56 are those to which contrary facts have been properly filed in the record. Defendants submitted no declarations or other facts so there was no valid reason to conduct a later fact-finding hearing regarding undisputed facts. Again, the trial court should have ruled using only the facts in the record as of the May 7<sup>th</sup> hearing.

3. **It was Error for the Trial Court to Advise Plaintiff it Would Not Accept His (Undisputed) Declarations and to Require Plaintiff to Produce His Witness-Declarant at a later "Fact-Finding" Hearing Before Ruling. Also, it was Error for the Trial Court Itself to Act as the Fact-Finder, and to Order the Hearing *Sua Sponte*.**

CR 56 does not provide for a fact-finding hearing.<sup>8</sup> CR 56(c) instead requires immediate entry of judgment where the affidavits and

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<sup>8</sup> CR 56 is the applicable rule governing Defendants' Motion to Dismiss, not CR 12. CR 12 provides that the Motion was required to be "treated as one for summary judgment and disposed of as provided in rule 56" since both parties presented matters outside the pleadings. *CR 12(b)*.

other records show there is no genuine issue of material fact.

CR 56 also does not provide for a fact-finding hearing with the trial judge acting as fact-finder. Appellate decisions confirm that in trying facts itself, the trial court went beyond its limited discretion. On a motion for summary judgment, the court does not try issues of fact; it only determines whether or not factual issues are present which should be tried. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 616 P.2d 1223 (1980); *Aetna Ins. Co. v. Cooper Wells & Co.*, 234 F.2d 342 (6<sup>th</sup> Cir. 1956). The trial court's discretion on a dispositive motion is thus limited to denying or granting the motion based on whether there is a genuine issue of material fact raised in the parties' documents and exhibits.<sup>9</sup> It thus does not have discretion to disregard a party's undisputed declaration testimony or to try those undisputed facts itself.

Also, a Jury Demand had been previously filed, so the jury is this case's finder of fact. *CP 226*. While the trial court should have denied the

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<sup>9</sup> The court does have additional discretion under CR 56(d) to specify facts that are without substantial controversy in cases not fully adjudicated on the motion, but that part of the rule is not applicable in this case.

Motion to Dismiss, a jury would have been required to decide any factual issue that had actually existed. *Graves, supra*.

Last, neither party requested a fact-finding hearing before the trial court ordered it, so even if CR 56 did provide for one there is nothing in that rule or other allowed basis for the trial court ordering it *sua sponte*.

4. **It was Error for the Trial Court to Allow Defendants to Submit Additional Evidence in Support of Their Motion Through Cross-Examination of Plaintiff's Witness-Declarant Minutes Before the Court Ruled on the Motion, Particularly Where Plaintiff had no Prior Notice the Court Would Allow and Rely Upon Such Evidence. The Trial Court Further Erred in Denying Plaintiff's Motion to Strike This Late-Disclosed Evidence.**

Moreover, when it did conduct the fact-finding hearing, the trial court improperly allowed the defense to produce evidence in support of its position in violation of CR 56(c)'s filing and notice requirements, by allowing cross-examination of Mr. Conley. Under CR 56(c), Defendants were required to produce all evidence supporting their Motion no later than 28 days before the hearing, and no later than five days before the hearing if in strict reply to Plaintiff's response. *CR 56(c)*. See *White v.*

*Kent Medical Center Inc.*, 61 Wash. App. 163, 168, 810 P.2d 4 (1991)  
 (“[CR 56(c)] sets out the timetable for filing and serving the motion and supporting evidence and for the nonmoving party to file its opposing memoranda, affidavits, and other documentation.”)

This cross-examination evidence was highly prejudicial to Plaintiff given that the trial court then chose to interpret it as suggesting Mr. Conley was not credible, and then the trial court specifically, and solely, relied upon its belief that Mr. Conley was not credible in immediately granting Defendants’ Motion at the conclusion of Mr. Conley’s live testimony. Allowing cross-examination of the witness, both by the defense and the court, thus improperly allowed Defendants to submit what the trial court deemed to be critical evidence in violation of CR 56’s notice requirements. Defendants were allowed to submit this evidence in support of their Motion literally *minutes* before the court ruled, not many days before the hearing as CR 56(c) requires.

The trial court also never informed Plaintiff at the May 7<sup>th</sup> hearing or anytime before the June 18, 2010 fact-finding hearing that cross-

examination of Mr. Conley would be allowed to enable Defendants to elicit additional evidence favorable to their Motion. *RP 1-18*. In fact, the court's first discussion of cross-examination occurred only after Plaintiff completed his questioning of Mr. Conley at the fact-finding hearing. *CP 12, l. 3-6; 41*. This further compounded the surprise and prejudice to Plaintiff. Plaintiff objected to the cross-examination testimony of Mr. Conley and moved to strike it. *CP 12, l. 7-8; 41*. The court erred by not granting this Motion to Strike.

5. **The Trial Court Erred in Deciding Legal and Factual Issues That Were Not Before it.**

- a. **The trial court erred in granting Defendants' motion based on the due and diligent search requirement of RCW 46.64.040 when Defendants never raised that issue in their Motion. Defendants instead raised only an immaterial issue of law based on the old statute.**

The trial court erred by ruling on issues that were not before it and then relying on those determinations in granting Defendants' Motion.

First, the trial court erred in dismissing Plaintiff's action based on the service issue Defendants raised in their Motion. That issue was

whether Plaintiff's substitute service "under the Non-Resident Motorist Statute [was] appropriate when the defendants are Washington Residents [sic], and there is no evidence of them leaving the state or attempting to evade service". CP 92.

The rule is that a party moving for summary judgment must raise, in its opening memorandum, all the issues on which it believes it is entitled to summary judgment. *White v. Kent Med. Ctr., Inc., P.S.*, 61 Wash. App. 163, 168, 810 P.2d 4 (1991). Consequently, the trial court may not grant summary judgment to the moving party on issues raised later, for example, in a reply brief. *White*, at 169; *Molloy v. City of Bellevue*, 71 Wn.App. 382, 385, 859 P.2d 613 (1993).

Defendants' issue that Plaintiff must show they were nonresidents or had departed the state, however, is based on a completely incorrect statement of the law. In 2003, the legislature significantly amended RCW 46.64.040 in response to the supreme court's holding in *Huff v. Budbill*, 141 Wash. 2d 1 (2000) (on which Defendants relied in their Motion to Dismiss). The 2003 amendment removed both the non-residency

requirement as well as the “departs from this state” showing, and made the statute now apply even to a resident who “cannot, after a due and diligent search, be found in this state. . .” The current statute’s new language thus provides, in pertinent part, as follows:

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

*RCW 46.64.040<sup>10</sup>; CP 28* (emphasis added).

Plaintiff was not required to show Defendants were nonresidents, departed the state, or were evading service. Defendants’ issue based on

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<sup>10</sup> The legislature’s 2003 amendment essentially codified this Court’s holding in *Huff v. Budbill* that the supreme court later reversed. *See Huff v. Budbill*, 93 Wash. App. 258, 267, 969 P.2d 1085 (Div. I 1998):

Thus, it would appear that the dispositive factor in every absent motorist case may not be whether the defendant has actually departed the state or, as the sole alternative, whether the plaintiff has a good faith belief, reasonable under the circumstances, that the defendant has departed the state. Rather, the dispositive factor may be the plaintiff’s inability to find and serve the resident motorist defendant notwithstanding the good faith exercise of due diligence in attempting to find and serve the defendant. We agree with the trial court in the instant matter that Troil stands for the latter proposition.

this old law is, nevertheless, the issue they chose to raise in their Motion. (Under no facts, therefore, could the trial court have properly granted Defendants' motion.) Defendants did not raise the issue of whether Plaintiff conducted "a due and diligent search" to locate Defendants "in the state." Because these former showings required under the prior statute (and thus the 2003 *Huff* holding, as well) are not *material* ones today, the trial court should have denied the Motion to Dismiss as not raising a genuine issue of material fact under CR 56. Nevertheless the trial court's Conclusions of Law recited the statute's new "due and diligent search" language, confirming that it granted Defendants' Motion based upon the current statute and thus upon an issue that was not before it. *CP 320-21*.

As stated in *White*, it is error for a trial court to grant a motion based on an issue not raised in the opening memorandum. The only proper solution was for Defendants to raise the other issue in a separately-filed motion, which they never did:

**In sum, it is incumbent upon the moving party to determine what issues are susceptible to resolution by summary judgment, and to**

**clearly state in its opening papers those issues upon which summary judgment is sought.[fn]** If the moving party fails to do so, it may either strike and refile its motion or raise the new issues in another hearing at a later date. **Accordingly, we hold that it was error for the court to consider the proximate cause issue first raised in Defendants' reply memorandum and to rely on that issue as a basis for granting summary judgment. . . .**

*White*, 61 Wash. App. at 168-69 (bolding added).

Defendants did not raise in its opening memorandum the issue of whether Plaintiff performed “a due and diligent search” to locate Defendants “in the state,” which is the only material issue Defendants *could* have raised consistent with existing law. Defendants did not discuss this standard in its Statement of the Issues or anywhere else in their Motion. The trial court nevertheless adopted this as the issue and used it to dismiss the action. Doing so, and doing so *sua sponte*, were errors.

- b. **Even Assuming, Arguendo, that Defendants had Properly Raised a Material Issue and CR 56 Allowed Defendants to Contest Facts Without Contrary Evidence, the Trial Court Erred In Not Treating as Undisputed the Facts Defendants Did Not Dispute.**

While the trial court never should have asked for or relied upon defense counsel's May 7<sup>th</sup> statement about what facts were disputed, once the court did so, however, Defendants should have been bound by these admissions and the court erred when it did not follow them.

A party's statements in open court are binding judicial admissions. *See In re Lynch*, 114 Wn.2d 598, 603, 789 P.2d 752 (1990) (statements made in the course of his argument and in response to questions from the court are binding against him as judicial admissions); *U.S. v. Bentson*, 947 F.2d 1353, 1356 (9th Cir.1991) (holding that a concession made during closing argument is a binding judicial admission).

A judicial admission is binding on the party who makes it and an admission of fact by an attorney is also binding on that party. *Stemper v. Stemper*, 415 N.W.2d 159, 160 (S.D. 1987); *see Kohne v. Yost*, 250 Mont. 109, 818 P.2d 360, 362 (1991) ([Attorney's] sayings and doings in the presence of the court concerning the trial of the cause are the same as though said and done by the party himself."). A judicial admission is binding before both the trial and appellate courts. *Bentson*, 947 F.2d at

1356. *See also* Michael H. Graham, FEDERAL PRACTICE AND PROCEDURE: EVIDENCE § 6726 (Interim Edition) (Judicial admissions are formal concessions in the pleadings, or stipulations by a party or its counsel, that are binding upon the party making them. They may not be controverted at trial or on appeal. Indeed, they are “not evidence at all but rather have the effect of withdrawing a fact from contention.”); CR 2A (agreements or consents between the parties or attorneys in respect to the proceedings in a cause, the purport of which is disputed, will not be regarded by the court “unless. . .made and assented to in open court on the record. . .”).

Defendants’ counsel said in the May 7<sup>th</sup> hearing, on the record, that they disputed only these three facts: The number of Mr. Conley’s different attempts to serve Defendants (i.e., four or two); that he checked garbage cans and the cans were empty; and that he placed paper clips on the tires of vehicles and later found that the papers clips had not moved. *RP 15-16*. Through this stipulation, the trial court thus should have deemed all other

facts as undisputed.<sup>11</sup>

Instead, the trial court did not treat these other facts as undisputed and, to the contrary, it entered Findings of Fact and Conclusions of Law that were inconsistent with and often contradictory of them. This includes Findings 1, 2, 4, 8, 9, 14, 15, 16, 17, and 18, and Conclusions 1 through 9. For example, the court improperly entered key Findings and Conclusions adverse to Plaintiff on these facts Defendants said they did not dispute:

- Whether Mr. Conley's Declaration of Attempted Service was properly authenticated (i.e., signature and dates);
- Whether neighbors told him that the residents at the subject address were gone for weeks at a time or just weekends;
- Whether he personally felt he had done an adequate job of attempting service;
- Whether he left paper clips upon *all* the vehicles registered at the subject address;
- Whether he was a credible witness; and
- Whether there was "due diligence on the part of the plaintiff to personally serve the defendants."

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<sup>11</sup> Regardless of this admission, the court should have treated these three facts as undisputed as a matter of law under CR 56 because Defendants never submitted evidence contradicting them.

These facts and their inferences, when view most favorably to Plaintiff on the due and diligent search question, require denial of Defendants' Motion and granting of Plaintiff's Motion aside from the others bases for doing so that are discussed herein.

As further prejudice, Plaintiff's counsel was told in the May 7<sup>th</sup> hearing that the above three fact were the only facts to be determined at the future fact-finding hearing, and the trial court never informed Plaintiff it deemed other facts to be at issue at the hearing. Plaintiff had no notice or opportunity to prepare for these other questions improperly raised at the fact-finding hearing.

6. **The Trial Court Erred in Evaluating Mr. Conley's Credibility, Disregarding his Entire Testimony on Credibility Concerns, and Then Deciding the Motion on That Basis.**

While the trial court abused its discretion by ruling on Mr. Conley's credibility after Defendants admitted they were not disputing it, the court also erred by assessing his credibility at all.

Questions of credibility should not be determined by the court on

summary judgment. *Amend v. Bell*, 89 Wash. 2d 124, 129, 570 P.2d 138 (1977). If a credibility question arises, the motion should be denied. *Id.*; *Powell v. Viking Ins. Co.*, 44 Wash. App. 495, 722 P.2d 1343 (1986); *Hays v. Lake*, 36 Wash. App. 827, 836, 677 P.2d 792 (1984). This is consistent with our appellate courts' decisions that the trial court may decide factual disputes on summary judgment only where *all* reasonable persons could reach only one conclusion, which cannot be said here. Consequently, a trial court commits reversible error in granting summary judgment unless

after considering all the pleadings, affidavits, depositions or admissions and all reasonable inferences drawn therefrom in favor of the nonmoving party, it can be said (1) that there is no genuine issue as to *any* material fact, (2) that *all* reasonable persons could reach only one conclusion, *and* (3) that the moving party is entitled to judgement as a matter of law.

*Baker v. Schatz*, 80 Wn.App. 781, 782, 912 P.2d 501 (1996), *review denied*, 129 Wn.2d 1031 (1996) (emphasis added).

The Findings and Conclusions show the trial court relied solely on its credibility determination about Mr. Conley in making its ultimate

rulings on the Motions. The court even disregarded Mr. Conley's *entire* testimony, even as to facts bearing on his efforts to locate Defendants, about which the court did not find any discrepancies.<sup>12</sup>

7. **Even Assuming, *Arguendo*, that Defendants had Raised a Material Issue in their Motion, the Trial Court Erred in Disregarding all of Mr. Conley's Efforts to Find Defendants Based on Its Concerns About his Credibility, and in Not Construing the Evidence and Their Inferences Most Favorably to the Plaintiff and Least Favorably to Defendants.**

The trial court did not view Mr. Conley's declarations and their inferences in a light most favorable to Plaintiff on the only possible relevant issue (even if Defendants had properly raised it): whether Plaintiff made a due and diligent search to locate Defendants in the state.

In ruling on a motion for summary judgment, the court must view the evidence and all reasonable inferences from the evidence in the light

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<sup>12</sup> For example, the trial court found no discrepancies regarding Mr. Conley's testimony that he made at least two different unsuccessful attempts at service over a nine-day period (on August 9<sup>th</sup> and 16<sup>th</sup>); that he checked garbage cans on each visit and they contained no trash over this period; that he put paper clips on the tires of at least two vehicles and discovered nine days later they had not been moved; and his opinion that Defendants could not be located at this address and that his efforts constituted "a due and diligent attempt to locate and serve" them. (Defendants also did not identify these as part of their "disputed" facts at the May 7<sup>th</sup> hearing.)

most favorable to the nonmoving party and most unfavorable to the moving party. A genuine issue of fact exists when reasonable minds could reach different conclusions in considering the evidence most favorably for the nonmoving party. *Klinke v. Famous Recipe Fried Chicken, Inc.*, 94 Wash. 2d 255, 616 P.2d 644 (1980); *Olympic Fish Products, Inc. v. Lloyd*, 93 Wash. 2d 596, 611 P.2d 737 (1980); *Lamon v. McDonnell Douglas Corp.*, 91 Wash. 2d 345, 588 P.2d 1346 (1979). The nonmoving party on summary judgment is thus given the benefit of all favorable inferences that can be drawn from the evidence. *Meadows v. Grant's Auto Brokers, Inc.*, 71 Wash. 2d 874, 881, 431 P.2d 216 (1967).

Similarly, even if the basic facts are not in dispute, if those facts are reasonably subject to conflicting inferences, summary judgment is improper. *Eriks v. Denver*, 118 Wash.2d 451, 824 P.2d 1207 (1992); *Coffel v. Clallam Cy.*, 58 Wash. App. 517, 520, 794 P.2d 513 (1990); *Southside Tabernacle v. Pentecostal Church of God*, 32 Wash. App. 814, 650 P.2d 231 (1982). Summary judgment should thus be granted only if, from all the evidence, a reasonable person could reach but one conclusion.

*Morris v. McNichol*, 83 Wash. 2d 491, 494, 519 P.2d 7 (1974); *Meissner v. Simpson Timber Co.*, 69 Wash. 2d 949, 421 P.2d 674 (1966).

Here, the only relevant issue that could have existed under RCW 46.64.040, assuming, *arguendo*, that Defendants had properly raised it, is whether Plaintiff made a good faith and due and diligent search to locate Defendants in the state before serving the Secretary of State.

The court did not follow the above principles in considering Mr. Conley's testimony as to this issue. For example, Mr. Conley testified twice to the facts contained in the Declaration of Alex Conley, III. The court was required to view these facts and all reasonable inferences from them in the light most favorable to the nonmoving party (Plaintiff) and most unfavorable to the defendants, regardless of whether the court believed Mr. Conley to be credible. These facts Mr. Conley testified to that should have been viewed most favorably to Plaintiff include:

- Over a nine-day period, Mr. Conley made four different attempts at service at Defendants' last known address, on different days and at different times of day;
- During these attempts Mr. Conley could not find Defendants at

this address;

- Mr. Conley's other efforts corroborated that Defendants could not be found at this address, including multiple vehicle checks with paper clips (revealing that the vehicles had not been moved), and checks of garbage cans (revealing no trash);
- Mr. Conley's opinion is that Defendants could not be located within the state at this address and that his efforts constituted a due and diligent attempt to locate and serve Defendants.

This evidence and their inferences required denial of Defendants' Motion and granting of Plaintiff's Motion. It is clear under that these efforts to locate Defendants were sufficient as a matter of law. In *Martin v. Troil*, 121 Wash. 2d 135, 847 P.2d 471 (1993), the supreme court found that a plaintiff's attempt to serve defendants over merely a *five-day* period was sufficient as a matter of law to comply with the due diligence requirement under this statute. *Martin*, 121 Wash. 2d at 150-51. Also, the court held that "due diligence' under the statute requires that plaintiff make honest and reasonable efforts to locate the defendant. Not all conceivable means need be employed, but, at the least, the accident report, if made, must be examined and the information [in it] investigated with

reasonable effort.” *Id.* at 150 (emphasis added). In *Martin*, the supreme court found that plaintiff’s efforts were sufficient where plaintiff located defendant’s (Washington) residence, contacted neighbors, and attempted service at that location. *Id.* Likewise, this Court has held that a plaintiff strictly complied with the procedural requirements of this statute as a matter of law with four unsuccessful service attempts over a 13-day period. *Huff v. Budbill*, 93 Wash. App. 258, 969 P.2d 1085 (Div. I 1998).

8. **Even Assuming Defendants had Raised a Material Issue in Their Motion, the Trial Court Erred in Disregarding the Additional Facts in The Record, Other than Mr. Conley’s, Showing Plaintiff’s Honest and Reasonable Efforts to Find Defendants in the State. The Court Did Not Construe These Facts and Their Inferences Most Favorably to the Plaintiff and Least Favorably to Defendants.**

Apart from Mr. Conley’s evidence, the trial court did not consider (nor discuss in its Findings and Conclusions) the host of *additional* facts in the record showing Plaintiff’s honest and reasonable efforts to locate Defendants within the state, which themselves would separately require

denial of Defendant's Motion.<sup>13</sup> These additional facts include:

- Consulting the address on the police report, consulting phone directories, and hiring a private investigator who performed his own exhaustive "skip-trace" of Defendants.
- Locating a last-known address for Defendants.
- Verifying this last-known address by searching the Washington State DOL and vehicle databases, the King County Assessor's office, and the IRB/Accuprint skip trace database.
- Plaintiff's counsel's statement that Defendants could not be located in the state after a due and diligent attempt.
- Plaintiff's counsel's opinion that his, his investigator's, and his process server's combined efforts constituted a good faith and due and diligent attempt to locate and serve Defendants within the state and that after such attempt, Defendants could not be located within the state.

The efforts in *Martin* that the supreme court approved were obviously were much less extensive than Mr. Conley's four service attempts over a *nine-day* period, plus Plaintiff's counsel's and his private investigator's additional efforts to locate Defendants. The trial court

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<sup>13</sup> See, e.g., Declaration of Skip Trace Efforts (*CP 179*); Declaration of Plaintiff Regarding Compliance with RCW 46.64.040 (*CP 170*); Declaration of Plaintiff's Attorney Regarding Compliance with RCW 46.64.040 (*CP 182*); and Declaration of Plaintiff's Counsel (*CP 152*).

should have considered these additional efforts, which Defendants said they did not dispute, and found them to meet the *Martin* standard of “honest and reasonable efforts to locate the defendant.”

The trial court erred by deciding the Motions solely on what Mr. Conley had to say. The totality of the facts, when viewed in a light most favorable to Plaintiff, required ruling for Plaintiff, particularly when RCW 46.64.040 is supposed to be “liberally construed” to effectuate its purpose of providing a means of service upon defendants who cannot be located in the state. *Huff v. Budbill*, 93 Wash. App. 258, 267, 969 P.2d 1085 (1998). “This interest is not dependent on the defendant’s actual location.” *Martin v. Meier*, 111 Wn.2d 471, 480, 760 P.2d 925 (1988).

9. **In any Event, the Trial Court Erred in Deciding the Motions Based on Inaccurate, Immaterial, and/or Improper Findings of Fact and Conclusions of Law.**

In any event, the Findings and Conclusions do not support the trial court’s rulings for other reasons. First, the Findings and Conclusions were mistakenly based upon Plaintiff’s efforts to personally *serve* Defendants rather than the relevant statutory standard of his efforts to *locate them in*

*the state. CP 320-21* (Conclusions of Law 2 and 3). Due diligence in attempting actual personal service is not required under RCW 46.64.040. Nevertheless, the Findings and Conclusions were expressly based upon Plaintiff's attempts at actual service. Also, the trial court entered no Conclusion indicating that Plaintiff did not make a due and diligent search to locate Defendants in the state. The court thus never identified any proper basis under RCW 46.64.040 for dismissing Plaintiff's action and it identified only an improper basis.

Second, several key Findings and Conclusions the trial court relied upon are mistaken or irrelevant:

Finding 14: This finding does not reveal an actual discrepancy, as the trial court concluded. Mr. Conley testified he put papers clips on tires of the two vehicles that were present at the address. This fact is true. There is no evidence that all four vehicles apparently registered there were actually *present* on the days he went there.

Finding 15: This finding is incorrect since Mr. Conley testified to *his four different service attempts*, not two. *CP 196.*

Finding 16: Mr. Conley's subjective beliefs are irrelevant to the *objective* legal standard that applies, i.e., Plaintiff's honest and reasonable efforts in conducting a due and diligent search.

Finding 17: This is incorrect since Mr. Conley said in his declaration that neighbors told him the residents left for weeks at a time, not sometimes on weekends. It is also irrelevant because he testified nobody was home when he attempted service on Monday and Tuesday too.

Conclusion 5: This is in error since Defendants were never found within the state and there are no facts showing otherwise. To the contrary, all evidence showed that Plaintiff never located them.

Conclusion 7: This is in error since Mr. Conley later incorporated the content of his Declaration of Attempted Service into the Declaration of Alex Conley III and attached a copy of it. *CP 195-98*. This cured any possible "authenticity" defect based on signature or date. There is no question this is authentic testimony from Mr. Conley.

Conclusion 8: This Conclusion regarding the statute of limitations is in error because Plaintiff effected timely service of process.

Third, the trial court did not include in its Findings the many material facts supporting Plaintiff, such as the efforts to locate Defendants in the state, the fact Defendants received actual service of the Summons and Complaint by mail before the limitations period lapsed, the defense's litigation actions showing waiver of defenses, and the other facts above.

10. **The Trial Court Erred in Entering the Findings and Conclusions and Order of Dismissal Where Defendants Admittedly did not Give Plaintiff Notice of Presentation of These Proposed Documents or serve a copy of them.**

Defendants did not give prior notice to Plaintiff of presenting their proposed Findings, Conclusions, and dismissal order, nor did they provide Plaintiff a copy. *CP 22; CP 30-31*. *CR 54* governs notice of presentation and provides that “[n]o order or judgment shall be signed or entered until opposing counsel have been given 5 days’ notice of presentation and served with a copy of the proposed order. . .,” absent an emergency, prior approval or waiver of the proposed order, or after a verdict while in open court. *CR 54(f)(2)* (underline added). Other superior court rules similarly require that all counsel be given prior notice and copies of pleadings and

proposed Orders. *CR 5(a), (b); CR 7; KCLR 7; CR 56.*

Defendants' counsel admitted to his failure to provide Plaintiff this notice in his (ex parte) e-mail to the court dated July 7, 2010. *CP 30-31.* Nevertheless, the trial court signed and entered Defendants' proposed Findings and Conclusions anyway, and the very same day, July 7, 2010, all in violation of CR 54. The Plaintiff's first notice that Findings and Conclusions and a dismissal order had been presented was only after Plaintiff's counsel was sent a copy that the court signed. *CP 22.* Plaintiff was prejudiced by this violation in that he did not have an opportunity to respond and/or object to the Findings and Conclusions and the trial court then relied upon them in ruling against Plaintiff.

**C. The Trial Court Erred in Not Granting Plaintiff's Motion for Partial Summary Judgment and Striking Affirmative Defenses.**

The trial court should have granted Plaintiff's Motion for Partial Summary Judgment. First, the court should have stricken the defense of subject matter jurisdiction because this collision occurred in Renton and under Article IV, Section 6 of the Washington Constitution, the superior

court has subject matter jurisdiction over the action.

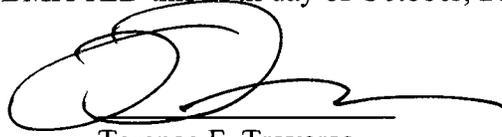
Second, this action was properly commenced on July 23, 2009, within three years of the August 4, 2006 motor vehicle collision. Filing the action tolled the statute of limitation for 90 days as provided by statute. *See* RCW 4.16.170 (“If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint.”). Plaintiff then properly served Defendants within this 90-day period by serving the Secretary of State on September 22, 2009, and again serving Defendants by certified mail on September 23, 2009.

Third, for all the reasons already discussed herein, the court should have stricken the defenses related to process and personal jurisdiction.

#### **IV. CONCLUSION.**

Plaintiff requests that the Court of Appeals reverse the trial court’s rulings on Plaintiff’s Motion for Partial Summary Judgment and Defendant’s Motion to Dismiss and reinstate Plaintiff’s action.

RESPECTFULLY SUBMITTED this 25th day of October, 2010.

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke extending to the right.

Terence F. Traverso  
WSBA #21178  
Attorney for Appellant