

WASHINGTON CASE UPDATE

Painting in the Lines: Substitute Service Strictly Construed

From the desk of Kyle D. Riley: When a plaintiff in a motor vehicle accident related claim is unable to serve process on a defendant by normal means, will service on the Secretary of State and notice to the defendant's attorney be effective to serve the defendant? Read on to see what is required for a party to effect service on a party under Washington's "nonresident" service statute.

Claims Pointer: In this auto accident case, the Washington Court of Appeals held that substitute service under RCW 46.64.040 must comply strictly with the statutory requirements. In the following case, a plaintiff's claim was dismissed for lack of service within the statute of limitations. Service was ineffective because the plaintiff failed to send the required documents by registered mail to the defendant's last known address. Furthermore, the defendant did not waive his right to challenge service of process due to delay because plaintiff was not prejudiced by the delay.

case in point...

Heinzig v. Hwang, No. 72269-7-I, Washington Court of Appeals, Div. 1, (June 29, 2015).

Mark Heinzig filed a negligence suit against Seok Hwang after the two were involved in a motor vehicle accident in Washington. The crash occurred on June 5, 2010 and Heinzig filed suit on May 13, 2013. The statute of limitations for negligence is 3 years in Washington, but that period is tolled for 90 days after a complaint is filed. Heinzig hired a process server on May 14 to personally serve Hwang. Heinzig's attorney sent an email to Hwang's attorney with the summons and complaint. Hwang's attorney responded, "Got it. Thanks." The process server was unable to serve Hwang and sent a signed "Declaration of Diligence" to Heinzig's attorney.

On June 4, Heinzig's attorney mailed a letter to the Washington Secretary of State in which he stated that he was unable to serve Hwang. With the letter, Heinzig enclosed two copies of the summons and complaint and the process server's "Declaration of Diligence" to Hwang's last known address. On June 7, the Secretary of State's office confirmed receipt of Heinzig's letter and on June 10, sent the summons and complaint by regular mail to the address provided. Heinzig did not mail the notice of service on the Secretary of State to the address provided or append an affidavit of compliance with the statute or the affidavit of due diligence. The Secretary of State's letter was returned as undeliverable.

On January 30, 2014, Hwang filed a motion to dismiss for lack of service of process because Heinzig failed to conform to the requirements of the substitute service statute, RCW 46.64.040. Heinzig argued that he properly served Hwang and Hwang waived his defense because he failed to raise it in a timely filed answer, which was due August 15,

2013. The trial court granted Hwang's motion, ruling that Heinzig did not strictly comply with the statute and that Hwang did not waive his right to challenge service. Heinzig appealed.

The Washington Court of Appeals affirmed the trial court's ruling. Heinzig argued that he "sufficiently complied" with RCW 46.64.040. The Court explained that for substituted service to be effective, the statute must be followed strictly. The Court stated that Heinzig's failure to include a notice of service upon the Secretary of State and an affidavit of compliance with the statute was fatal to his argument. Heinzig's argument to the court that the Secretary of State had already mailed the required documents was rejected. While substantial compliance has been recognized to disregard service defects in some cases, service on the Secretary of State for automobile accident cases must strictly comply with the requirements of the statute.

Heinzig also argued that Hwang had waived his defense of invalid process by waiting for six months to file his motion to dismiss. The Court observed that there is not a waiver unless the plaintiff was prejudiced by the delay. Here, Heinzig was not prejudiced because even if Hwang had asserted the defense in a timely filed answer, Heinzig would not have had time to cure the defect. The Court calculated that based on the fact that the Secretary of State sent Hwang a mailing on June 10, the earliest it would have gotten to Hwang would have been June 11, 2013. The statute of limitations ran on August 11, 2013. Hwang could have timely waited until August 15, 2013 to raise the defense and the statute of limitations would already have expired.



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