69515-1

69515-1

No. 69515-1-1

COURT OF APPEALS – DIVISION I
OF THE STATE OF WASHINGTON

SIMONA VULETIC and MICHAEL HELGESON,
husband and wife,

Appellants

v.

DARRELL R. McKISSIC,

Respondent

APPELLANTS' OPENING BRIEF

Morris Rosenberg, WSBA #5800
705 Second Avenue, Suite 1200
Seattle, WA 98104
(206)903-1010

Counsel for Appellant

Table of Contents

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Treatises

I. INTRODUCTION AND SUMMARY OF THE CASE

Simona Vuletic and Michael Helgeson, a married couple (hereinafter collectively referred to as "Vuletic" unless the context indicates otherwise) were out for a Sunday drive on Eliot Avenue in Seattle on March 1, 2009. Mr. Helgeson was driving their VW Golf and Dr. Vuletic was in the passenger seat. A Toyota Highlander driven by Darrell McKissic (hereinafter "McKissic") collided with the passenger side of the Golf and totaled it. Dr. Vuletic in particular suffered significant injuries. Unable to resolve the claims, suit was commenced on December 27, 2011. On January 3, 2012, King County Deputy Sheriff Mark Hillard served the Complaint, Summons and Case Schedule on Jill Corr, the McKissic's nanny, at the McKissic residence filing a Return of Service that appeared regular on its face. (CP 5). McKissic appeared through counsel shortly thereafter. Interrogatories were served on defense counsel on February 2, 2012, which included Interrogatory No. 23: "Do you allege insufficiency of process or of service of process? If so, please state the facts upon which you base your allegation."

In the ensuing weeks and months up to late April, counsel for the parties had friendly communications and agreed to the exchange of information that would enable the defense to assess the claims with a view toward "early resolution" of the claim. On March 26, 2012, the ninety day period to serve process on the defendant and have it date back to the date of filing expired pursuant to RCW 4.16.170. On April 20, 2012,

McKissic's attorney filed an Answer to the lawsuit alleging as affirmative defenses lack of service of process, insufficiency of process, and the statute of limitations. (CP 10).[1]

The parties by agreement scheduled for the same date (August 10, 2012) cross motions: the Plaintiffs' Motion for Partial Summary Judgment Striking Affirmative Defenses; and the Defendant's Motion to Dismiss. On that date Judge Monica J. Benton heard oral argument and entered an order granting the Defendant's Motion to Dismiss. (CP 216-217). She never formally ruled upon the Plaintiffs' Motion for Partial Summary Judgment Striking Affirmative Defenses but by implication that Motion must be viewed as denied. On October 9, 2012, Judge Benton entered an order denying the Plaintiff's Motion for Reconsideration. (CP 55). This appeal followed. The detailed facts relevant to specific Assignments of Error and the related Arguments will be set out as appropriate in the legal argument sections below.

II. ASSIGNMENTS OF ERROR

1. The trial court erred in granting McKissic's Motion to Dismiss and in failing to grant Vuletic's Motion for Partial Summary Judgment.

2. The trial court erred in not holding that McKissic was served at his usual place of abode within the meaning of RCW 4.28.080(15) where process was served on an adult who was more connected to the abode than prior Washington cases approving service upon a person with lesser connections.

---

[1] The late filed Answer to the Complaint asserted the three affirmative defenses noted. Since the dispositive issue turns upon the sufficiency of service of process, for ease of reference, further discussion of the motion to dismiss and the affirmative defenses will simply reference sufficiency of service of process.

3. The trial court erred in not holding that the affirmative defense of insufficiency of service of process was waived by the tactics and actions of the McKissic defense.

4. The trial court erred in not holding McKissic estopped from asserting the affirmative defense of insufficiency of service of process as a result of the manner his defense was conducted.

5. The trial court erred in not striking the affirmative defense of insufficiency of service as a sanction for McKissic's failure to answer interrogatories.

6. The trial court erred in denying Vuletic's Motion for Reconsideration.

III. ARGUMENT WITH RELATED FACTS AND AUTHORITY

Review Is *De Novo*

The defense Motion to Dismiss asserted that McKissic had never been served and thus the statute of limitations had expired. (CP 82). The motion was supported and opposed by declarations and evidence outside the pleadings. Where matters outside the pleadings are considered the motion to dismiss is treated as a motion for summary judgment. Puget Sound Bulb Exchange v. Metal Buildings Insulation Inc., 9 Wn. App. 284, 513 P.2d 102 (1973). There was no substantial dispute as to the facts and the issue presented was a question of law for the trial court. As such on appeal the review is *de novo*. *See*, Bruff v. Main, 87 Wn. App. 609, 611, 943 P.2d 295 (1997), citing State v. Ralph Williams' North West Chrysler Plymouth, Inc., 82 Wash.2d 265, 269, 510 P.2d 233 (1973). Similarly, the

implied denial of the plaintiff's Motion for Partial Summary Judgment to Strike Affirmative Defenses should be reviewed *de novo*.

Mckissic Was Served at His Usual Place of Abode Within the Meaning of RCW 4.28.080 (15). (Assignments of Error No. 1 and 2.)

Facts Related to Service

It is unchallenged that the service events that occurred on January 3, 2012, took place at McKissic's residence and usual place of abode. (CP 59). It is acknowledged that McKissic was not personally handed process. The Return of Service declares that McKissic was served by serving "a person of suitable age and discretion, then resident therein, at the shared residence and usual abode of the named party, by delivering such copy to and leaving it with, Jill Corr, nanny for the Defendant." (CP 5, 63). In contravention to his own return of service, the deputy sheriff later provided a declaration submitted in support of the McKissic Motion to Dismiss that stated that Jill Corr told him that "she did not live" at the McKissic residence. (CP 101). The issue as to this Assignment turns on whether or not service of process upon Jill Corr, the McKissic family nanny, was substantial compliance with RCW 4.28.080. That statute provides in relevant part:

> **Summons, how served.** Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:

* * *

> (15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

The facts relevant to sufficiency of service of process are not in dispute. The nanny for the McKissic children, Jill Corr, testified in deposition that: on the morning of January 3, 2012, the deputy sheriff knocked on the door; she answered it; the deputy asked if this was the residence of Darrell McKissic; and she responded it was. (CP 80). When asked if Mr. McKissic was home, she responded that she did not know but then indicated that he was in the shower. (CP 80-81). The deputy inquired if she was related to the defendant and she said she was not, that she was the nanny and he asked if she was over 18 and she responded she was. (CP 81.) He indicated he had some important paperwork for the defendant; asked her if she would make sure that he got them; and she responded that she would and she took the papers. (*Id.*) She placed them on the kitchen counter. (*Id.*) Shortly thereafter, Mr. McKissic came downstairs and she told him about the documents and she saw him head in the direction of where she had placed the documents. (*Id.)* She and McKissic did not discuss the papers again but that same day she told Ms.

Nellermoe, McKissic's wife who is an attorney, about the papers being left for Mr. McKissic and Ms. Nellermoe thanked her. (CP 51: 91).

Ms. Corr had worked for the McKissic family as the nanny to their three children from 2004 to 2006 at which time she moved away to attend college. (CP 78). In 2008, she returned and resumed employment as the children's' nanny. (*Id*). She always had a key to the residence during the times she worked for McKissic. (CP 61). She works every school day from about 6:30 A.M. until she drives one of the children to school around 8:15 A.M. and while she was free to return to the house to study her own place was nearby so she typically returned each afternoon either picking one child up at school or meeting both children when they would return to the McKissic home around 2:30 P.M. and then worked there until about 6:30 P.M. (CP 59-60; 78-79). She stayed overnight in the McKissic home while he, his wife and one of the younger children travelled out of state to return their older daughter to college, the last time before service of process being the fall of 2011. (CP 60-61; 79). Additionally, even though McKissic was still in town, in April 2012, Ms. Corr stayed overnight to care for the younger daughter when Ms. Nellermoe left town. (*Id.*).

McKissic acknowledged that he was at his home at the time the deputy came to the house on January 3, 2012, and was upstairs in the bathroom or master bedroom. (CP 62). When he came downstairs to

leave for work, the nanny told him of the papers that she had placed on the kitchen counter. (CP 61). He picked up the papers and moved them to a basket in his home office. (*Id.*) He did not pay much attention to them because his attorney had advised him that he would be served at some point. (CP 61-62). There was no question that the papers were the summons, complaint, and civil case schedule. (*Id.*) He knows what legal papers are, and knew he was the defendant in a lawsuit arising from the accident of March 1, 2009. (CP 62).

Authority and Argument Related to Service

While some jurisdictions may require exact compliance with service of process statutes, at least since 1996 such is no longer the case in Washington. Where service was not in perfect compliance with the statute, but was so close that to avoid the harshest of unjust results (dismissal), the Washington Supreme Court has found service to be satisfactory in circumstance that were less compelling than the instant case. In Sheldon v. Fettig, 129 Wn.2d 601, 919 P.2d 1209 (1996), the issue was the sufficiency of service where the summons and complaint were left with the defendant's twelve year old brother at her parents' home. There was no question that although the defendant maintained some ties with her parents' home, she had moved to and lived in Chicago for some eight months prior to the attempted service. The suit was filed

six days before the running of the statute of limitations. The service occurred some 30 days later. Fettig filed his appearance shortly thereafter and with three weeks yet remaining before the 90 day statutory period to have service date back pursuant to RCW 4.16.170, the defense filed an Answer raising the sufficiency of process.[2] To reach a just result the Court held that for service of process purposes the defendant had two houses of "usual abode". 129 Wn.2d at p. 611. The Court stated:

> In interpreting substitute service of process statutes, strict construction was once the guiding principle of statutory construction. See Muncie v. Westcraft Corp., 58 Wn.2d 36, 38, 360 P.2d 744 (1961). However, more recently, we have applied liberal construction to substitute service of process statutes in order to effectuate the purpose of the statute while adhering to its spirit and intent.

129 Wn.2d at 607. The court cited earlier Washington cases where strict compliance in various service statutes was not required. 129 Wn.2d at 607-8. The Court went on to state:

> We therefore conclude "house of [defendant's] usual abode" in RCW 4.28.080(15) is to be liberally construed to effectuate service and uphold jurisdiction of the court. This is consistent with our procedural rules in (1) RCW 1.12.010, which mandates that "[t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction"; and (2) CR 1, which states the rules "shall be construed to secure the just, speedy, and inexpensive determination of every action," which promotes

---

[2] This is unlike the instant case where the McKissic defense gave the plaintiff no indication within the 90 day period that there was going to be a service issue. Despite the issue having timely been raised in Sheldon v. Fettig, the court still found the service sufficient. This is significant to the argument beginning *infra* at p. 18 concerning waiver.

> a policy to decide cases on their merits. Indeed, " '[m]odern rules of procedure are intended to allow the court to reach the merits, as opposed to disposition on technical niceties.' (Citations omitted.)

129 Wn.2d at 609. Rather than an issue of substantial compliance as to "usual abode", the instant case involves deciding if service on the nanny was sufficient in light of her contacts to the McKissic residence. However, the principle of Sheldon would be that in appropriate circumstance substantial compliance can be sufficient.

Justice Talmadge in his dissent in Sheldon laid out the history of the case law commenting that the Court had lurched "between liberal and stringent interpretations of statutes and rules without a firm anchor in principle." 129 Wn.2d at p. 612. He went on at length in his dissent to lament that the majority was upholding service of process even in the absence of the strict compliance which is what he would apply. A year later, Justice Talmadge wrote for the majority in Salts v. Estes, 133 Wn.2d 160, 170, 943 P.2d 275 (1997), determining that service was insufficient, a case McKissic will likely cite in his brief. The service that was stricken in Salts was upon a neighbor who was checking on the house while the defendant was on vacation and by happenstance was there when the process server came. The four justice dissent in Salts, relying upon Sheldon and its analysis, would have upheld even that service. The facts

in the instant case are not like Salts in that the nanny had vastly more connection to the McKissic residence than did the neighbor doing a favor in Salts and McKissic was even at home and picked up the papers from where the nanny told him she had placed them within a few minutes of the service events.

The Sheldon court relied on Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991). In Wichert the service was made upon an the adult daughter of the defendant's wife who happened to be staying overnight in the defendant's home while her mother and the defendant were away. The daughter did not live there, was self-supporting and kept no possessions there. In describing the Wichert decision, the Sheldon court stated:

> We focused on the "spirit and intent of the statute" rather than "the literal letter of the law" and stated that the term should be defined so as to uphold the underlying purpose of the statute. *Id.* at 151. We held the dual purpose of the statute is to (1) provide means to serve defendants in a fashion reasonably calculated to accomplish notice and (2) allow injured parties a reasonable means to serve defendants. Wichert, 117 Wash.2d at 151-52. The court found an adult family member who was in sole control of the home while its inhabitants were away would likely present the papers to defendant. *Id.* at 152. Because the underlying rationale was thus met, the court held that the daughter fit within the statutory definition of "then resident therein." *Id.* at 153.

129 Wn.2d at 608.

Jill Corr was much more aligned to the McKissic' household than the step-daughter of the defendant in Wichert who by happenstance was spending one night there when process was served. As set out in the fact recitation above, Jill Corr had always had a key to the McKissic house; she was there every weekday morning by 6:30 A.M.; she was responsible for feeding, preparing, and getting the McKissic children off to school; she returned to the home every weekday about 2:30 P.M. to be there for the children and to care for them until about 6:30 P.M. She was essentially invited by McKissic and his wife to treat the home as her own during the day and she stayed overnight on occasion. She told the Sheriff Deputy that she would make sure that Mr. McKissic got the papers and she did within a few minutes! Furthermore, to ensure that the importance of the served papers was not lost on the defendant, Ms. Corr informed McKissic's wife, an attorney, later that day that the papers have been delivered. Obviously in light of the responsibilities that McKissic and his wife placed upon Ms. Corr for the welfare of their children for many years with free run of and access to their home, they considered her a "responsible adult", and her actions confirmed her as such.

In Brown-Edwards v. Powell, 144 Wn. App. 109, 182 P.3d 441 (2008), the process server mistakenly served a neighbor (Shirley Vertress) of the defendant (Shirley Powell). Ms. Vertress, realizing the papers were

for her neighbor, subsequently delivered the papers to the defendant. The neighbor on a subsequent date signed an affidavit relating those facts. The defendant moved to dismiss on the basis of insufficient service of process. The trial court denied dismissal and Division III affirmed. In analyzing the assertion that the neighbor had in fact served the defendant the court stated:

> Ms. Vertrees certainly meets the criteria for a process server. Nothing in the rule requires that a process server have a contractual obligation to serve process. CR 4(c). Nor is there any requirement of proof of intent to serve process. CR 4(c). And we find nothing that would prohibit a person who comes into possession of a summons and complaint by defective service from being a competent process server. CR 4(c). The rule prohibits only a party to the action from serving process. CR 4(c). We conclude then that Ms. Vertrees was a competent process server. CR 4(c). (Citations and references to Appellant's Brief omitted).

144 Wn. App. at 111-12.

A distinction between the Brown-Edwards facts and those of the instant case, is that while Ms. Corr has not filed a declaration of service as proof under CR 4(g)(2), her testimony under oath should be deemed the equivalent as examination at deposition proceeds the same as "permitted at trial" and is taken on oath. CR 30(c). The instant case is actually stronger than Brown-Edwards in that in the instant case all the service events happened at the Defendant's residence and the defendant has sworn in deposition that the he in fact received the summons, complaint

and case schedule at his residence (usual place of abode) on the date the deputy came to serve him and within a few minutes of the papers being given to the nanny.

Clearly there is no constitutional problem here since McKissic was at his home, received the papers within a few minutes of them being given the nanny, turned them over to his insurance carrier as he had been expecting them, and proceeded to appear through counsel and defend. Had he never received the process and was moving to set aside a default, then it would be a different analysis but such is not the case here. To put "form over substance" under the facts of the instant case would be to deny justice to Vuletic and be contrary to the policy discussion noted above from Sheldon as to effectuating the policy of the service statutes. The misconduct of the deputy sheriff, which was totally unknown to Vuletic and their counsel until the defense filed the deputy's declaration, is of course not to be condoned. But the defense effort to make the Sheriff's Department (King County) out as the "bad" actor upon whom responsibility for the injuries to Vuletic should fall, would be a perversion of justice under the facts of this case.

The Affirmative Defenses Attacking Service of Process Were Waived By the Tactics and Actions of the Mckissic Defense.
(Assignments of Error No. 1 and 3.)

Facts Related to Waiver

On January 5, 2012, a verbal "notice of appearance" was made by phone call to Vuletic's attorney (hereinafter "Rosenberg") (CP 32) and on January 26, 2012, McKissic's counsel (hereinafter "Bendele") emailed a Notice of Appearance and served a hard copy the next day. (CP 37-40). Later on January 26, Bendele and Rosenberg exchanged emails with Rosenberg inquiring if Bendele had been provided the plaintiffs' settlement package that had been sent to the insurance carrier and offering to stipulate to the securing of medical records. (CP 32, 41-42). Bendele confirmed he had the settlement package and asked for the names of plaintiffs' pre-accident health care providers for preparation of stipulations. (*Id.*). Rosenberg responded on January 27, with details as to Dr. Vuletic's treatment providers along with prior medical providers and requesting that Bendele provide the stipulations to secure records and requesting that once secured, duplicates of the records be provided Rosenberg. (CP 32, 43).

On February 2, 2012, Rosenberg served Pattern Interrogatories on Bendele. (CP 74). Interrogatory No. 23 asked: "Do you allege insufficiency of process or of service of process? If so, please state the

facts upon which you base your allegation." (CP 76). Interrogatory 24 asked: "Does your answer to plaintiff's complaint set forth any affirmative defenses? If so, please state the facts upon which each affirmative defense is based." (CP 76). Responses were due March 5, 2012, three weeks before the statute of limitations as to service would expire. The defense never answered nor objected to those Interrogatories. (CP 32).

On March 16, 2012, Bendele left Rosenberg a phone message inquiring as to status of him being provided the names of Vuletic's medical providers. (CP 33). Rosenberg both called back and sent an email indicating that this information had been provided in Rosenberg's January 27, 2012, email to Bendele. (CP 33, 44-45). On March 20, 2012, Bendele confirmed by email that he would provide duplicate copies of the medical records retrieved via stipulations and Rosenberg emailed him back the next day requesting Bendele prepare the stipulations and send them over for signatures by Rosenberg's clients. (CP 33, 46-47). On March 22, 2012, Bendele emailed Rosenberg a letter that among other things indicated that State Farm wanted him to take early depositions (suggesting the weeks of May 7 or 14, 2012) "so we can start talking sooner (sic) than later regarding potential resolution of your clients' claims." (CP 33, 48-50). Bendele's letter also transmitted as to each Vuletic and Helgeson, Medical Stipulations and Employment stipulations

for records release; Requests for Statement of Damages; and Interrogatories and Requests for Production which dealt solely with the merits of the plaintiffs' claims both as to the facts of the collision and the damages of each plaintiff. (CP 33). Vuletic who had suffered significant physical injuries immediately began drafting extensive and detailed responses to the Interrogatories and Requests for Production. (*Id.*)

On March 26, 2012, the ninety day period to serve process and have it relate back to the date of filing the complaint would have expired pursuant to RCW 4.165.170. (CP 33). On April 6, 2012, Rosenberg emailed Bendele timely transmitting to him the executed stipulations for both Dr. Vuletic and Mr. Helgeson, inquiring as to whether Bendele needed the signed originals sent to him, and noting that it appeared the defense had yet to answer the complaint. (CP 33-34, 51). This was a routine request because in King County for cases not subject to mandatory arbitration, the plaintiff is required to file a Confirmation of Joinder, certifying that "all mandatory pleadings have been filed." King County Local Civil Rule (KCLCR) 4.2(1). On April 18, 2012, Rosenberg emailed Bendele reminding him of the April 6, email. (CP 34). Later that day, Bendele called Rosenberg and introduced his assistant who would be working on the case and reiterating his hope to take depositions the week of May 7 or May 14, 2012. (*Id.*)

On Friday, April 20, 2012, Bendele sent an email to Rosenberg attaching the defendant's Answer and requesting that Rosenberg call him to discuss the affirmative defenses. (CP 34, 52). The Answer raised the affirmative defenses of lack of service of process, insufficiency of process, and the statute of limitations for the first time. (CP 34, 53-57). On Monday, April 23, 2012, Bendele and Rosenberg spoke, with Bendele indicating that McKissic had now indicated to him that the nanny who was served at his residence did not reside there. (CP 34). Contrary to this assertion however, at his deposition McKissic testified that he became aware that there was a service of process issue from Bendele or Bendele's office. (CP 62).

It is important to note that prior to April 20, 2012, there was no action taken or statement made by Bendele to indicate to Rosenberg that there was any issue as to service – no timely answer to the complaint had been filed and no answers to the interrogatories which specifically inquired as to any service issue or affirmative defenses had been provided. Had either been done timely, McKissic could have easily been served personally. Instead, the case was proceeding in a cooperative mode for the defense to gather medical records and the parties to attempt early resolution. It is our position that under the facts, whether by purposeful deception or innocent happenstance, the manner in which the defense was

conducted until it was too late to re-serve McKissic constituted a waiver under Washington case law.

Authority and Argument Related to Waiver

The lead case on the question of waiver in the service of process context is Lybbert v. Grant County, State of Washington, 141 Wn.2d 29, 1 P.3d 1124 (2000). It is worth quoting from Lybbert at some length.

> We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1(1). If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised. We note, also, that the common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with numerous federal and state courts having embraced it. (Citations Omitted).
>
> * * *
>
> We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed. Apropos to the present circumstances of this case, one court has acknowledged that
>
> [a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure

> the service defect. [Citing Santos v. State Farm Fire & Cas. Co., 902 F.2d 1092, at 1096 (2d Cir.1990)].

Id at 39-40.

As the court concluded in Lybbert at pp. 44-45:

> . . . the County failed to preserve the defense by pleading it in its answer or other responsive pleading before proceeding with discovery. Instead, it engaged in discovery over the course of several months and then, after the statute of limitations had apparently extinguished the claim against it, it asserted the defense. French[3] does not remotely stand for the proposition that it is acceptable for a defendant to lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action.

In both Lybbert and the instant case, the defense failed to answer the complaint timely and waited until after the statute of limitations would have expired. In Lybbert the answer was three months after the statute would have expired and McKissic in the instant case answered a month after. However, once the delayed answer by the defense is made after the statute of limitations would expire, it really does not matter if it is a month or three months as in Lybbert or longer. The critical point is that the defense has waited until the statute of limitations expired, while acting as if the case is to be negotiated or prepared for trial, without ever raising the issue in any of the previously filed documents or communications. The

---

[3] French v. Gabriel, 116 Wn.2d 584, 806 P.2d 1234 (1991), is discussed in detail in this brief beginning at p. 26.

instant case is stronger than Lybbert in several regards. First, in Lybbert, the service statute mandated service on the county auditor and so when service was made upon the administrative assistant to the county commissioners (141 Wn.3d at p. 32) the return of service would have put plaintiff Lybbert and his attorney on notice of a service issue. Secondly, timely response by the defendant county to the interrogatories in Lybbert would have still fallen outside the statute of limitations since the plaintiff's interrogatories were served on the county only eight days before the running of the statute of limitations.[4] In the instant case, timely response by McKissic would have left three weeks for the service to be perfected before the statute of limitations expired. *See also*, Romjue v. Fairchild, 60 Wn. App. 278 , 803 P.2d 57 (Div. III, 1991)(rev. den. 116 Wn.2d 1026 (1991)) and Blankenship v. Kaldor, 114 Wn. App. 312, 57 P.3d 295, (Div. III, 2002)(rev. den. 149 Wn.2d 1021 (2003)) (in both cases the defense conducted discovery that did not inquire as to service and the affirmative defenses were deemed waived where that issue was not raised to the plaintiff until after the statute of limitations would have otherwise run.)

---

[4] In Lybbert the accident was March 8, 1993. The case was filed August 30, 1995, and the attempted service was on September 6, 1995. Thus the last date to serve process would have been March 8, 1996. Plaintiffs served interrogatories on the defense on February 29, 1996, one of which inquired as to any affirmative defenses. The thirty days to respond would have expired on March 30, 1996, so that the defense was not obligated to respond until after the statute of limitations would have expired.

Further, in discussing waiver in the context of service of process the Lybbert Court stated at p. 38:

> The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior . Romjue, 60 Wn. App. at 281, 803 P.2d 57. It can also occur if the defendant's counsel has been dilatory in asserting the defense. Raymond v. Fleming, 24 Wash.App. 112, 115, 500 P.2d 614 (1979). (Emphasis added.)

In the instant case the defense conduct was both. It was inconsistent by the defense seeking to move the case to negotiated settlement as well as dilatory in failing to timely answer the complaint or timely respond to interrogatories, one of which specifically inquired as to any service affirmative defense.

Similar to Lybbert (141 Wn.2d at p. 32), in the instant case the defense acted as though it wanted to move the case to a negotiated settlement or litigate as to the merits by Bendele indicating to Rosenberg that State Farm wanted him to take early depositions "so we can start talking sooner (sic) than later regarding potential resolution of your clients' claims." (CP 49). The defense made no inquiry in its discovery requests regarding the sufficiency or the lack of service of process. (CP 33). All the discovery requests dealt with the merits of the Vuletic claims both as to the facts of the collision and the damages to each plaintiff. (*Id.*) Bendele sought and secured Rosenberg's and Vuletic's timely cooperation

in providing the names of medical providers and executing stipulations authorizing the defense to secure medical records all with no assertion, in fact or by implication, that there was any service of process issue. That issue was first raised in the Answer sent to plaintiffs' counsel by email on Friday, April 20, 2012, and served on plaintiffs' counsel on Monday, April 23, all nearly four months after the service of process. In that April 23, 2012, conversation which was four weeks after the running of the statute of limitations, Bendele told Rosenberg that McKissic had now told him that the nanny did not reside at his house. (CP 34). Less than three weeks later, at his deposition on May 11, 2012, McKissic testified that although he could not recall when, he had learned of the service of process issue from Bendele or Bendele's office. (CP 62).

McKissic argued to the trial court, and will no doubt argue on appeal, that the waiver concept as applied in Lybbert, *supra*, is premised upon a purposeful ambush being required in order to apply the waiver doctrine. However, Lybbert does not require such. First, one cannot tell from reading the opinion if the defendant county's delay was a purposeful ambush or not. Secondly, as noted in Blankenship v. Kaldor, *supra*, 114 Wn. App at 319-20:

> While it does not appear the defense was necessarily "lying in wait" as discussed in Lybbert, the defense was tardy in asserting the insufficient service defense when it had the

> necessary facts within its control to make the critical assessment and failed to act earlier; in this sense, the defense was dilatory within the spirit of Lybbert. Lybbert, 141 Wash.2d at 39-41, 1 P.3d 1124. Ms. Kaldor's argument that her counsel should be excused from contacting her and ignoring Mr. Kaldor's role in the attempted service because he was retained by the insurance company and not Ms. Kaldor personally is unpersuasive. (Emphasis added.)

As in Blankenship, it was the defense that had all the necessary facts within its control for nearly four months prior to filing the Answer. In contrast, Vuletic and their attorney could not have known that the return of service filed by the Deputy Sheriff was apparently false unless the defense had honored the civil rules through timely answering the complaint or the interrogatories that specifically asked about service of process affirmative defenses.

In the trial court, the defense also relied upon King v. Snohomish County, 146 Wn.2d 420, 47 P.3d 563 (2002) (citing Lybbert) for the proposition that "deception" by the defense is required. But as noted above in the Blankenship discussion of Lybbert, an intent of "lying in wait" is not critical to the Lybbert determination and one cannot tell from the facts if there was intent to deceive by the defense or not. However, as noted *supra*, at p. 22, the facts of the instant case allow for a reasonable inference that the defense may have indeed been "lying in wait".

The affirmative defense as to insufficiency of service of process

was held in Blankenship to have been waived and the trial court's dismissal of plaintiff's case reversed. There, the defense engaged in pretrial discovery only as to the merits of the case. The discovery in Blankenship was that both parties propounded interrogatories and requests for production; the defense deposed Ms. Blankenship and took photographs of her residence. 114 Wn.App. at 319. Of importance to the Vuletic's position on appeal is that the court in Blankenship noted that the defense discovery efforts "were not aimed at determining whether facts existed supporting the defense of insufficient service of process." *Id.* Such is exactly the case in this appeal as is shown by the facts and citations to the record noted *supra* at pp. 14-17. And in fact, McKissic actually engaged in more discovery than in Blankenship.

As in Blankenship and Romjue the defense here propounded discovery which was not aimed at developing any information as to service of process. (CP 33). But the defense here also requested a Statement of Damages and in transmitting the discovery requests also transmitted the various medical stipulations for Vuletic to execute and in the cover letter indicated the carrier was interested in early depositions of the plaintiffs so that resolution of the claims could be discussed "sooner rather than later" with several dates being proposed for the deposition. (CP 48-60). This discovery effort by the McKissic defense was more

extensive than that in Blankenship and was solely geared toward educating the defense as to damages, so negotiations could rapidly begin in an effort to settle. Had any of Bendele's informal discovery requests or the formal discovery (their interrogatories) inquired as to service issues, Rosenberg would have timely been on notice and could have easily taken action to again serve McKissic. As noted in Butler v. Joy, 116 Wn. App. 291, 298, 65 P.3d 671 (2003), "because the process server's affidavit was filed by the plaintiffs, the County knew or should have known that the defense of insufficient service of process was available to it." Citing Lybbert, 141 Wn.2d at 42. In Butler, the defense filed a motion for summary judgment and engaged in discovery not aimed at any service of process issue before asserting the defense of insufficient service of process after the 90 day tolling period had expired. Division III relying upon Lybbert and Romjue held that the defendant waived the defense of insufficient service of process by conducting her defense inconsistent with her later assertion of the defense after the expiration of the 90 day period. 116 Wn. App. at 298.

The most recent appellate decision we have found on waiver of the defense of insufficient service of process is the Division I case of Harvey v. Obermeit, 163 Wn. App. 311, 261 P.3d 671 (2011). This court discussed many of the cases cited above and determined that the defendant had not waived the issue of sufficiency of service.

> Here, Obermeit raised the defense in his timely filed answer, maintained throughout discovery that service had not been proper, and then filed his motion to dismiss approximately six and a half months after Harvey first filed suit. He did not waive the defense.

163 Wn. App at 326-27. Without being overly repetitious we again note that in the instant case McKissic, unlike the defendant in Harvey, did not timely answer, did not raise any issue in discovery as to service much less maintain throughout discovery like in Harvey that service was improper. Thus, unlike the defense conduct in Harvey, McKissic's defense acted inconsistent with the later asserted defense. We believe Harvey is supportive of our position of waiver under the facts of the instant case.

Lastly in dealing with waiver, the defense in the trial court argued it engaged in no "dilatory conduct" and relied upon French v. Gabriel, 116 Wn.2d 584, 806 P.2d 1234 (1991) and cases cited therein. These cases are inapposite for two reasons. First, French and the cases it relies upon all predate the analysis in Sheldon v. Fettig, *supra*, and Lybbert, *supra*, both discussed earlier. Secondly, the facts in French show that while the defense had failed to answer within twenty days of service, it did answer more than a year before the statute would run in September 1987. So as the Court noted: "French had until September 1987 - more than a year - to attempt to correct the insufficient service after Morris raised the defense in his answer." 116 Wn.2d at 595. In the instant case, McKissic did not

answer the complaint until after the statute of limitations had expired and in the meantime ignored answering Vuletic's interrogatories that specifically inquired as to any service issues! So Vuletic did not have an opportunity like the plaintiff in French to have the issue made known to them and serve McKissic again. The defense tries to shift blame to the plaintiffs for not demanding an answer to the complaint or to the interrogatories, or motioning the court but at least since Sheldon, Lybbert and the other cases cited above such is not fatal to the waiver argument.

The implication of the McKissic position is that Vuletic does not have clean hands and that Vuletic and Rosenberg got themselves into trouble by filing so close to the statute of limitations. There is of course no evidence of any unclean hands on the part of Vuletic or Rosenberg who in no way condone the deputy sheriff's conduct. But insofar as to filing close to the statute of limitations, this case was not filed on the "eve" of the statute. The accident was March 1, 2009, and the plaintiffs filed December 27, 2011, (CP 1) with the events of the challenged service occurring January 3, 2012. (CP 6). The three year statute of limitations would not expire until March 1, 2012, and pursuant to RCW 4.16.170, the tolling statute, McKissic could have been served up until March 26, 2012, which is 90 days after December 27, 2011, and the service would date back to December 27, 2011. Such is not waiting to the last minute and

this court routinely sees cases filed on the actual eve of the statute running. In Blankenship, *supra,* the plaintiff filed five days before the statute of limitations ran and in Butler, *supra*, the case was filed the day before the statute of limitations expired. Both cases found that the defense was waived by the conduct of the defendant and filing truly on the "eve" of the expiration of the statute of limitations was not relevant to the courts' discussion.

The Defense Should Be Estopped from Asserting the Affirmative Defenses.

(Assignments of Error No. 1 and 4.)

Facts Related to Estoppel

For the most part the significant facts as to this assignment of error are set out above but any additional facts appropriate to this issue will be set forth as necessary in the Argument.

Authority and Argument Related to Estoppel

An additional ground for striking the affirmative defenses related to service is that McKissic should be estopped from asserting the defenses. As noted in Lybbert, 141 Wn.2d at 35:

> The elements of equitable estoppel are: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission."

The Court felt it readily apparent that Lybbert had established the first element (inconsistent action by the Defendant County with the position later asserted) and the third element (injury to Lybbert via dismissal of their case) but had failed to show "reasonable reliance" upon the conduct of the County's counsel. The Court noted that Lybbert had served process upon an administrative assistant to the County Commissioners while the statute in question (RCW 4.28.080(1)) mandated service upon the County Auditor. Thus the Court noted at p. 36: "Given the clear statutory mandate to serve the county auditor, it was not at all reasonable, much less justifiable, for the Lybberts to rely on the County's failure to expressly claim, prior to the expiration of the statute of limitations, that the service upon it was ineffective."

Reading the mandate of the statute and the return of service would have put Lybbert's attorney on notice that the service was defective. In the instant case, reading the statute that required that service be upon an adult then resident in the defendant's usual place of abode, together with the Sheriff's Return of Service which recited that an adult residing at the defendant's usual place of abode was served, would not put Rosenberg on notice of any defect in service.

Additionally, acting in good faith reliance upon the Bendele email that the carrier wished him to secure records and conduct discovery and

depositions "sooner" so that they could assess the value of the case and pursue resolution, Vuletic acted very timely providing the names and contact information of medical providers; in executing and returning Stipulations for Medical Records; and working on and getting the responses prepared to the Defense Interrogatories and Requests for Production. In Raymond v. Fleming, 24 Wn. App. 112, 600 P.2d 614, (Div. I, 1979) (rev. den. 93 Wn.2d 1004(1980)) this Court found both waiver and equitable estoppel where the defense delayed in raising the insufficiency of process issue until after the statute of limitations would otherwise have run. The court noted at p. 115:

> Raymond's inaction with respect to jurisdiction over the defendants was on the faith of these actions. If the unfair tactical advantage demonstrated in the circumstances is permitted, Raymond will be denied a forum for his grievances. (Citation omitted.)

Plaintiffs in the instant case will similarly be denied a forum for their grievances if under these facts a defendant can escape trial. It should be noted that Vuletic relied on the actions by the McKissic's defense. The defense asserted their wish to move swiftly in order to attempt to negotiate a resolution of the case; requested and timely received extensive confidential and legally protected healthcare and personal information. (CP 42-51). These discovery efforts by the defense were later claimed to be "perfunctory, rote and routine" (CP 126) which supports Vuletic's

position that the McKissic's defense was concerned with gathering information and attempting to settle and not with investigating any affirmative defense. The McKissic defense's approach created a strong impression of sincerity to move the case forward in an expedient manner, and gave no indication that there was any procedural issue. The plaintiffs responded timely, extensively and without reservation to all the personally intrusive requests and questions posed by the defense. Had there been any notion that the defense was engaging in stalling tactics so the statute would run, Vuletic's counsel would have had reasons to probe the issue further and demand a timely answer to the complaint within the statutory timeframe. Given the fact that the case was seemingly advancing toward early resolution at the defense request, Vuletic and Rosenberg had no reason to believe that there were any issues that could pose such a problem. Therefore, the reliance on the defense conduct is a significant factor in the plaintiffs' assertion of the estoppel. It is our position that these changes in position in reasonable reliance upon the conduct of the McKissic defense are sufficient to meet the second element noted in Lybbert, *supra*.

The Affirmative Defenses as to Service Should be Dismissed Due to Defendant's Failure to Timely Respond to Interrogatories
(Assignments of Error No. 1 and 5.)

Facts Related to Failure to Respond to Interrogatories

Rosenberg served King County Pattern Interrogatories on the Bendele on February 2, 2012. Interrogatory No. 23 asked: "Do you allege insufficiency of process or of service of process? If so, please state the facts upon which you base your allegation." (CP 74-76). CR 33 provides that answers and objections to interrogatories "shall" be served within thirty days. McKissic never answered or objected or sought a protective order. The thirty days to respond expired on Monday March 5, 2012. Pursuant to RCW 4.16.170, the ninety say period to serve process and have it date back to the date of filing would have expired on Monday March 26, three weeks later. The Vuletic Motion for Partial Summary Judgment Striking Affirmative Defenses included a request of the trial court to strike the affirmative defenses challenging service for failure to respond to interrogatories. (CP 26-27). The trial court never specifically ruled upon this grounds of the motion and by implication should be deemed to have denied it.

In the trial court, without citing any case authority, McKissic repeatedly asserted that as a defendant he is legally not required to answer the complaint, nor answer interrogatories until service was perfected. (CP

114, 131-32). Yet, the McKissic defense invoked the power of the court by serving Requests for Statement of Damages which were responded to by each plaintiff (CR 50); Interrogatories and Requests for Production, (which were answered by Plaintiff Vuletic before the defense asserted that the only issue to be pursued until resolution was the just raised service issue) (CP 50, 180-187); and multiple stipulations that were approved by both Plaintiffs Vuletic and Helgeson and timely returned to defense counsel. (CP 33, 51). Thus, McKissic when convenient invoked the jurisdiction (power) of the court to secure information and evidence from the Vuletic and when convenient denied the court had jurisdiction over him such that he was not required to answer the complaint or interrogatories.

Authority and Argument Related to Failure to Respond to Interrogatories

CR 37(d)(2) provides that if a party fails "to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories", the Court may on motion make such orders regarding the failure as "are just" and may take any action that is authorized under sections (A), (B), and (C) of CR 37(b)(2). Those actions include refusing "to allow the disobedient party to support or oppose" designated defenses (B) or striking out pleadings or parts thereof (C).

Vuletic made such a motion in her Motion for Partial Summary Judgment to Strike Affirmative Defenses. (CP 26-27).

The appropriate remedy for the failure to respond to interrogatories in this case is to strike the affirmative defense. While it related to the issue of waiver, the Lybbert court, 141 Wn.2d at p. 42 noted:

> Of particular significance is the fact that the Lybberts served the County with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process. Had the County timely responded to these interrogatories, the Lybberts would have had several days to cure the defective service. The County did not answer the interrogatories but instead waited until after the statute of limitations expired to file its answer and for the first time assert the defense.

In the instant case, had McKissic answered the interrogatories, and in particular Interrogatory No. 23, within the mandated thirty days, plaintiffs would have had three weeks to cure any defect and to effect service upon McKissic. In light of the defense "sitting on its hands" in the instant case, there can be no remedy under CR 37 that is "just" to Vuletic except the striking of the affirmative defenses relating to service.

In the court below, McKissic argued as a grounds for denying the request to Strike, that there had been no CR 26(i) conference. (CP 130). The trial court, which never specifically ruled upon Vuletic's request in this regard, should have considered the request to strike irrespective of the

absence of a CR 26(i) conference or certification. CR 26(i) provides in relevant part:

> Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

(Emphasis added). Vuletic was not seeking an order from the trial court to "compel discovery" or "obtain protection". Vuletic was seeking an order striking the affirmative defenses for failure to respond to the interrogatories. Even so, Division I has held that the meet and confer requirement applies. Amy v. Kmart of Washington LLC, 153 Wn. App. 846, 850-1, 223 P.3d 1247 (Div. 1, 2009). Of course, under McKissic's view, why would his defense even respond to a request for a discovery conference if the defense is not legally required to respond to anything until it is properly served? And, since the interrogatories were the King County Pattern Interrogatories, what valid objection or protection could McKissic have sought?

But the same Amy case holds that the trial court has the inherent power under the appropriate circumstances to grant the requested relief whether or not there had been a CR 26(i) conference. In Amy the court upheld the imposition of a significant monetary fine for discovery violation by the defense. The question presented was:

> Does a court have authority to hear a motion to compel discovery or a motion for sanctions either in the absence of a CR 26(i) certification or where the certification is allegedly defective? We hold that a court has authority to hear such motions, subject to the exercise of its sound discretion.

Division 1 found that the failure to follow CR 26(i) does not divest the trial court of jurisdiction to hear a discovery sanction motion and that hearing the motion rested in the sound discretion of the trial court and would not be disturbed, absent its being manifestly unreasonable or based upon untenable grounds. Amy at pp. 858, 863-4. This Court, quoted with approval the language of a dissent by Judge Morgan of Division II that "the rule should be a shield that protects the court from becoming involved in half-baked discovery disputes, not a sword for the discovery violator to wield against the court." (Amy at p. 857 quoting Morgan dissenting in Case v. Dundom, 115 Wn. App 199, 58 P.3d 919 (2002).) Such is of course consistent with CR 1 which provides that the civil rules shall "be construed and administered to secure the just, speedy, and inexpensive determination of every action." While McKissic reads the Amy case as allowing the consideration of the motion to strike only where there was a conference but the certification was defective, we do not read the case that narrowly nor does Tegland who notes that contrary to Division I, Division II requires the conference in any event. *See*. Washington Practice Vol 15A (2012) §53.2 at p. 473.

In Magana v. Hyundai Motor America, 167 Wn.2d 570, 220 P.3d 191 (2009), the Supreme Court upheld the sanction of an $8,000,000

default judgment for discovery violations. There is no mention in the fact recital of any CR 26(i) conference before the plaintiff motioned for the sanction of entry of a default judgment. The Court noted:

> A court should issue sanctions appropriate to advancing the purposes of discovery. (Citation omitted). The discovery sanction should be proportional to the discovery violation and the circumstances of the case. (Citation omitted). "[T]he least severe sanction that will be adequate to serve the purpose of the particular sanction should be imposed. The sanction must not be so minimal, however, that it undermines the purpose of discovery. The sanction should insure that the wrongdoer does not profit from the wrong." (Citation omitted). "Before resorting to the sanction of dismissal, the trial court must clearly indicate on the record that it has considered less harsh sanctions under CR 37. Its failure to do so constitutes an abuse of discretion." (Citation omitted).

167 Wn.2d at 590. (Emphasis added.) Here Vuletic does not seek such a drastic sanction as a default judgment but so that McKissic does not "profit" from ignoring the duty to timely assert the service of process defense, the appropriate sanction is to strike the defense and allow the case to proceed on to a merits determination. The logic of not allowing the rules to be used as "sword" by the discovery violator (here McKissic) is perfectly apropos for application to the instant case.

The Trial Court Should Have Granted the Motion For Reconsideration.

(Assignment of Error No. 6.)

Vuletic motioned for reconsideration on August 20, 2012. (CP 2185-228). The trial court called for a response by McKissic which was

filed on September 7, 2012. (CP 229-247). On October 9, 2012, the trial court denied the motion for reconsideration (CP 255) and this appeal followed. The arguments will not be set forth again but for the same reasons as noted above, the trial court should have reconsidered its granting of the Motion to Dismiss and instead reversed itself by denying the Motion to Dismiss and by granting the Motion for Partial Summary Judgment Striking Affirmative Defenses.

IV. CONCLUSION

For any and all of the above reasons, the trial court's dismissal of this case should be reversed with direction to enter an order granting Vuletic's Motion for Partial Summary Judgment Striking Affirmative Defenses and setting the matter to proceed to trial.

RESPECTFULLY SUBMITTED this 10th day of January 2013.

MORRIS H. ROSENBERG, P.S.

By: 

Morris Rosenberg, WSBA #5800
705 Second Avenue, Suite 1200
Seattle, WA 98104
Telephone: (206)903-1010
Attorney for Appellants

DECLARATION OF SERVICE

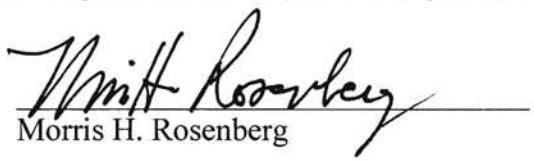
I, Morris H. Rosenberg, declare as follows: on this day, I caused to be served upon Respondent, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

APPELLANT'S OPENING BRIEF

Attorney for Defendant/Respondent: Levi Bendele Bendele & Mendel, PLLC 200 West Mercer Street, # 411 Seattle, WA 98119	☒ Via Legal Messenger ☐ Via U.S. Mail ☐ Via Email ☐ Via Facsimile

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

DATED at Seattle, Washington this 10th day of January 2013.



Morris H. Rosenberg