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THE COURT OF APPEALS, DIVISION ONE
OF THE STATE OF WASHINGTON

COA No. 69456-1-1

CHARLES MOMAH,
Appellant,

v.

WASHINGTON CASUALTY COMPANY/BARBARA MCCARTHY,
Defendants.

OPENING BRIEF

Charles Momah, MD.
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Coyote Ridge Correctional Center
P.O. Box 769, Connell, WA. 99326

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1. INTRODUCTION.

This appeal is about whether an insurance company's violation of a binding contract with its insured can be excused simply because the company insolvent and under receivership. The trial court dismissed the breach of contract by Washington Casualty Company (WCC) even though WCC conceded the violation, the only reason for dismissal being that WCC is in receivership.

II. ASSIGNMENT OF ERROR.

(a) When an insurance company violates a binding contract between the company and the insured, is the company not held liable simply because the company is in receivership?

(b) Did the Superior Court abuse its discretion by dismissing this lawsuit when WCC acknowledged and conceded a breach of contract by settling claims without the consent of the insured and without adequate investigation in violation of a binding contract that explicitly states that no claims shall be settled without the consent of the insured? Moreover a Temporary

Restraining Order (TRO) was filed by Dr. Momah, the Appellant in an attempt to stop the violations at issue in this appeal.

(c) The trial court abused its discretion by dismissing the Consumer Protection Act (CPA) and the Bad Faith claims since the statute of limitations were preserved by :

(1) the waiver of the defense of insufficient service of process and statute of limitation by WCC's dilatory activity of untimely assertion of that defense and "trial by ambush" when WCC waited for almost one year to assert a known defense after the statute of limitations expired. By failing to assert a known defense and deliberately waiting for the expiration of the statute of limitations and claiming insufficient service of process, WCC waived that defense for the CPA and Bad Faith claims. (VRP at page 19, 6-14).

(2) The tolling statute of RCW 4.16.190 by reason of personal disability of incarceration. This tolling statute is recognized by Washington State Supreme Court. It is also recognized by the United States Supreme Court.

III. STATEMENT OF THE CASE.

The Superior Court made several rulings in this case. On February 3, 2012, the court dismissed the CPA and Bad Faith claims based largely on the statute of limitation but reserved judgment on the Breach of Contract claims for May 25, 2012. Dr. Momah's motion for reconsideration was denied despite the fact that the CPA claim was still within the statute of limitation - May 2011, when the lawsuit was filed on December 17, 2010. The Bad Faith claim was either tolled or WCC waived that defense by their dilatory activity of not asserting that defense until the statute of limitation had expired. WCC's attorney Mr. James King filed a notice of appearance on January 11, 2011. (VRP at page 17, 4-7). On May 25, 2012, the Superior court dismissed the Breach of Contract claim. The court made that ruling even though WCC conceded the violation of the contract states that WCC cannot settle claims without the consent of the insured, the Petitioner. The court ruled that WCC was not liable simply because WCC was in receivership. The court even acknowledged that Breach of contract

was within the statute of limitation. (VRP at page 37, 8-12). The court reserved judgment of the remaining claim for September 14, 2012 which the court dismissed for lack of coverage, which the Petitioner is not contending, and not part of this appeal. Thus, on September 14, 2012 the court's decision became final. Copies of these decisions have already been sent to this court.

As explained to the Superior court, the Petitioner was sued by several former patients who alleged medical negligence and improper physical examinations, while claiming that there were no chaperones. Dr. Momah provided the court with affidavits and declarations from the medical assistants who were present during the examinations. All the allegations pertaining to these civil suits and criminal case arose after a private attorney, Mr. Harish Bharti had gathered complainants when he surreptitiously obtained the Dr. Momah's office patient masterlist from an office staff from which he recruited scores of plaintiffs. These lawsuits were filed by Mr. Bharti in 2003.

WCC failed to investigate and defend these claims, preferring to indemnify because WCC made a financial calculation that it was cheaper to do so, and failed to secure the consent of the insured as the contract dictates, thereby breaching the contract. Importantly, Dr. Momah filed a TRO on October 25, 2005 to block the settlements but WCC went ahead and settled the claims. The contract the Petitioner signed with WCC states that "however no settlement shall be made of any CLAIM or SUIT without the agreement of the NAMED INSURED". (Appendix B - Insurance contract at Def-1,Paragraph B of the DEFENSE, SETTLEMENT, SUPPLEMENTARY PAYMENT AGREEMENT). This "phrase" is repeatedly stated in the contract agreement. The failure to investigate and defend these claims implicate Bad faith and CPA violations. The Petitioner filed a TRO to enjoin WCC from settling these claims, asserting that WCC had no right to settle any claims "without his agreement". WCC settled the claims in May 2006 and May 2007.

The Petitioner presented to the trial court that the six year statute of limitation for Breach of Contract

extended to May 2012 and May 2013. The trial court agreed that the breach of contract is preserved. (VRP at Page 37, 8-12). The court struggled with the statute of limitation of the CPA violation (VRP at page 36, 1-3) as well as the role of receivership. (VRP at page 21, 6-14). But the court never considered the "dilatory activity" of WCC and the tolling statute of RCW 4.16.190 implicated in this case which the Petitioner presented to the court. (VRP at page 32, 8-18). The court granted summary judgment on the Bad Faith claim to WCC.

The CPA claim was filed within the applicable statute of limitation - May 2011. The lawsuit was filed on December 17, 2010. The statute of limitation for the Bad Faith claim extended to May 2010. All of Dr. Momah's claims arose during the period of disability, during his incarceration.

The trial court ruled that service of process was sufficient for WCC. (VRP at page 62, 11-23) but insufficient for Ms. Barbara McCarthy. (VRP at page 62, 1-7). During the briefing, WCC conceded that they

breached the contract but surprisingly stated that they had no choice but to do so because WCC was in receivership and blamed the receiver. Dr. Momah asserted to the court that the dilatory activity of WCC was a waiver: of waiting to assert a defense until when WCC believed the statute of limitation had expired. (VRP at page 15, 21-23). WCC's attorney, Mr. James King filed a notice of appearance on January 11, 2011. Dr. Momah requested for a copy of the contract between him and WCC as well as the settlement amounts and settlement dates but there was no response from WCC and Mr. King. The Petitioner then made the same request of the contract from WCC's Vice President, Ms. Barbara McCarthy on June 24, 2011. On June 30, Mr. King responded stating that WCC and Ms. McCarthy are represented by counsel and should not be contacted directly. Mr. King refused to provide a copy of the contract or the settlements which the Petitioner needed to ascertain what violations WCC had committed and how to defend Petitioner's interests.

On July 17, 2011 Dr. Momah propounded the first set

of interrogatories and request for production of documents. There was no response to these requests. On October 23, 2011, the Petitioner made a CR 26(i) request on WCC's attorney, Mr. King to call the liaison officer Ms. Lori Wonders at 509-543-6800 at Coyote Ridge Correctional Center where the Petitioner is housed, to discuss these issues. On the same day. Dr. Momah made a jury request.

On December 21, 2011, after almost one year after this lawsuit was filed and WCC believing that the statute of limitation had expired, then responded.

Dr. Momah explained to the trial court that WCC's behavior was tantamount to a waiver of that defense for CPA and Bad Faith claims. (VRP at page, 18,15-25, page 19, 1-13).

IV. ARGUMENT.

WCC stated in their brief to the Superior court:

"WCC faced a difficult decision regarding Mr. Momah - either abide by the contractual agreement with Mr. Momah and expose its insured to an excess judgment and potentially face a claim or settle against Mr. Momah

within the policy limits, even though such a conduct may constitute breach of insurance contract". Page 18, Defendants' Memorandum of Authorities... (Appendix A).

This lawsuit was filed on December 17, 2010 but WCC waited until December 12, 2011, almost one year to raise the issue of insufficiency of service of process after the statute of limitation had expired. This delay affected the CPA and Bad Faith claims as the court ruled that the statute of limitation for Breach of Contract was preserved until May 2013. During the intervening period of one year, WCC never stated or alluded that service of process was insufficient. WCC claims it did not participate in discovery, yet there was correspondence between WCC and the Petitioner when he was attempting to obtain a copy of the insurance contract he had signed with WCC. His initial attempt to obtain a copy of the contract from Mr. King failed. The Petitioner attempted to obtain the contract directly from WCC's Vice President, Ms. McCarthy. Mr. King failed to understand that he engaged in discovery when he corresponded with the Petitioner, refusing to produce this important piece of document. WCC knew that the insurance contract would expose their blatant violation of the contract.

WCC failed to understand that the Petitioner needed a copy of the contract he signed with WCC to properly evaluate what violations WCC committed and how to protect his interests. WCC deprived the Petitioner that opportunity.

Despite the lengthy communication with WCC, they never raised the issue of insufficient service of process. Instead, they were masking their contention that service of process was sufficient and "lying in wait" for what they believed was the statute of limitation to expire before raising the issue for the first time, thereby depriving the Petitioner of an opportunity to cure the defect. (VRP at page 32, 8-24).

This is a dilatory and is tantamount to a waiver of that defense as the controlling Supreme Court cases dictate.

WAIVER BY UNTIMELY ASSERTION OF A KNOWN DEFENSE AND TRIAL BY AMBUSH.

Washington Supreme Court cases of Lybberts et. al. v. Grant County, 141 Wn. 2d. 29;1 P. 3d. 1124; 2000 Wash. LEXIS 379 and King v. Snohomish County, 146 Wn. 2d.420; 47 P.3d. 563;2002 Wash. LEXIS 331 state that untimely assertion of a known defense is tantamount to a waiver.

> The appellate court's decision reversing trial court's grant of summary judgment dismissing plaintiff's suit was affirmed. The court held that defendant had waived affirmative defense of insufficient service of process because of delay in asserting defense and failure to preserve defense by raising it in responsive pleading prior to proceeding with discovery. Lybberts et. al. v. Grant County, supra.
> Pertaining to the issue of applicability of a waiver, a defendant cannot justly lie in wait, masking by misnomer its contention that service of process has been sufficient, and then obtain a dismissal on that ground after the statute of limitation has run, thereby depriving the plaintiff of an opportunity to cure the defect. Lybberts et. al. v. Grant County, at Headnotes.
> For nine months following its attorneys' appearance in response to the Lybberts' duly filed summons and complaint, the County gave multiple indications that it was preparing to litigate this case. Only after the statute of limitation has run on the Lybberts' claim did it raise the affirmative defense of service of process. Furthermore, allowing the County to assert the defense of insufficient service of process after the statute of limitation has run would be injurious to the Lybberts because they would be left without a forum in which to pursue their claim against the county. Lybberts, 141 Wn. 2d. at 35-36.

The above infraction decried by the State's Supreme Court is precisely what WCC has done in this case. WCC waited for eleven months, concealing their intentions, then until what they believed was the statute of limitation - October 2011, to spring this defense on the Petitioner. This is a dilatory activity. WCC mistakenly believed that the timing of the TRO of October 2005 was the starting point for the statute of limitation. (VRP at

page 15, 8-14 and 21-23). But the court disagreed with WCC, instead the calculation started when they settled the last cases in May 2007, extending the limitation period to May 2013. (VRP at page 12, 6-13; page 13,17-22). The Petitioner asserted to the court that WCC knew of this defense of insufficient service of process but chose to remain silent.

> Dr. Momah: They knew of this defense in January 2011 but decided to wait until now to spring this defense on me. They were aware of this defense and they waited until now. So they waived that defense.
> The Court: Mr. King, did your client file an answer to this complaint? Did you allege insufficient service of or lack --
> Mr.King: We have not, your Honor.(VRP at page 16, line 24, page 17, 1-7).

The Washington Supreme Court again upheld its decision in Lybberts when it revisited the same issue in King.

> In Lybberts, we explained, "the doctrine of a waiver is sensible and consistent with ... our modern day procedural rules, which exist to foster and promote 'just, speedy and inexpensive determination of every action". Lybberts, 141 Wn. 2d. at 39 (quoting CR1). The doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage. Lybberts, 141 Wn. 2d. at 40, King et. al., 146 Wn. 2d. at 424, quoting Lybberts.

The Respondents were tactical in their plan, waiting

for the statute of limitation to expire before asserting a defense they knew was available to them for almost one year. When the statute of limitation expired in May 2011 (CPA), they waited for seven months until December 2011 to assert that defense. This is what the Washington Supreme Court in Lybberts and King said a litigant cannot do.

> The County in Lybberts did not answer the interrogatories and this court found that failure to do so until after the statute had run waived that defense. Lybberts at 45. Finally, we noted favorably a case from another jurisdiction with similar facts, Burton v. Northern Duchess Hospital, 106 FRD 477, (S.D.N.Y 1985). In Burton, the court held that notwithstanding raising the affirmative defense, the service of process challenge was waived because an answer does not preserve a defense in perpetuity, and approximately three years of litigation was conduct inconsistent with the asserted defense...The claim filing defense could have been disposed of early in the litigation before significant expenditure of time and money had occurred and at a time when the Kings could have remedied the defect. King, 146 Wn. 2d. at 426.

As the Supreme Court noted in Lybberts and King, WCC's untimely assertion of that defense for almost a year, after significant expenditure of time, cost and energy by the Petitioner until the statute of limitation had run in May 2011 for the CPA claim, and attempting to leave the Petitioner with no forum for his grievance,

ran afoul of these controlling authorities from the State's Supreme Court.

This Court, the Court of Appeals, Division one, was even more explicit, that a defendant who waits for the statute of limitation to expire before asserting a known right, waives it.

> The court of appeals reversed summary judgment for appellee county and remanded the matter for trial because appellee waived its right and was estopped from arguing the affirmative defense of inadequate service of process because it failed to raise this defense until the after the applicable statute of limitation expired. Lybberts et. al. v. Grant County, 93 Wn. App. 627;969 P.2d.1112; 1999 Wn. App. LEXIS 102.

Other opinions from the Court of Appeals are consistent with the decision in Lybberts and King. Romjue v. Fairchild, 80 Wn. App. 278; 803 P. 2d. 57 (1991), Raymond v. Fleming, 24 Wn. App. 112; 699 P. 2d. 614; 1979 Wash. App. LEXIS 2732 and Butler v. Joy, 116 Wn. App. 291; 65 P.3d. 671; 2003 Wash. App. LEXIS 446.

> A defendant waives the defense of insufficient service of process by remaining silent after express notice, within the statutory limitation period, of the plaintiff understanding that the defendant has been properly served. Raymond v. Fairchild, supra.

This is the Petitioner's contention regarding the CPA

claim. WCC received the notice in January 2011 of the lawsuit filed on December 17, 2010. The statute of limitation for the CPA expired in May 2011. WCC waited until December 2011 to assert the defense of insufficiency of service of process. By remaining silent despite numerous communications by the Petitioner including a request for production of documents until the statute of limitation of CPA claim had expired, to assert a known defense, WCC waived the defense of insufficiency of service of process. The trial court never considered this fact at all its ruling.

> Additionally, the record indicates that Mr. Romjue's counsel sent a letter to Mr. Fairchild's counsel, **prior to the expiration of the statute of limitation,** stating it was his understanding defendants had been served. Mr. Fairchild's counsel knew at the time Mr. Romjue believed Neel Court address was Mr. Fairchild usual place of abode and was relying upon the defective service, yet he chose to say nothing until after the statute of limitation had expired. In these circumstances, we hold Mr. Fairchild waived the defense of insufficient service. Cf. Board of Regents v. Seattle, 108 Wn. 2d. 545,553;741 P. 2d. 11 (1987) (silence coupled with knowledge of adverse claim will estop party from later asserting an inconsistent claim); and Volker v. Joseph, 62 Wn. 2d. 429,436; 383 P. 2d. 301(1963) (doctrine of implied waiver by silence or acquiescence is invoked only where a forefeiture would otherwise result). We therefore reverse the summary dismissal. Romjue, 803 P. 2d. at 59.(Bold added).
>
> A defendant's conduct through his counsel may be sufficiently dilatory or inconsistent with the

later assertion of one of these defenses to justify a waiver. Romjue v. Fairchild, supra.

Holding that defendants, by virtue of their counsel's delaying tactics and conduct inconsistent with subsequent assertions, had waived any defect of service of process and were equitably estopped from asserting such a defense, the court reverses the judgment and remands the case for trial. Raymond v. Fleming, supra.

As noted in King, "[t]he doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay or misdirecting the plaintiff away from a defense for tactical advantage". King, 146 Wn. 2d. at 424. (citing Lybberts, 141 Wn. 2d. at 40).

By failing to raise the notice claim again until three days before --- after the statute of limitation had run --- the county in effect ambushed the plaintiff. King, at 425. Accordingly, the county had waived the claim filing deficiencies as affirmative defense. Id. at 427; Butler v. Joy, 116 Wn. App. 291; 65 P. 3d. at 674-75.

Consistent with these opinions, WCC waived their defense of insufficiency of the service of process and statute of limitation prior to January 2011 and May 2011, (Bad Faith and CPA claims respectively). WCC's assertion of the expiration of the statute of limitation prior to the service of process applies only to the CPA and Bad Faith claims.

The waiver of that defense and the tolling statute, RCW 4.16.190 effectively restores the CPA and Bad Faith claims within the statute of limitation. The Breach of Contract

is indisputably within the statute of limitation of May 2013. This is what Dr. Momah said to the trial court and the court's response:

> Dr. Momah: Because the breach of contract arises when a company does not do what it is supposed to do under the contract. And that breach occurred like I said, in May of 2007, June 2006 and June 2007 and also in November (2007). (VRP at page 16, 8-12).
> The Court: But as to the settlements, the May of '06 and the May of '07 settlements, we're certainly within the six-year statutes of limitations as to the allegation of the breach of contract as to the duty to consent to settlement. (VRP at page 37, 8-12).

The court agreed with Dr. Momah that the Breach of Contract is preserved.

All the opinions from various courts place great emphasis on the delaying tactics of a defendant's attorney to assert that defense and the expiration of the statute of limitation in deciding whether a waiver has occurred.

In Neel v. Port of Seattle Federal Credit Union et.al., 2007 Wash. App. LEXIS 1652, this Court, Division One, Court of Appeals relied on Lybberts et. al. v. Grant County.

> Neel relies on Lybberts v. Grant County. That case is distinguishable. There, the Lybberts sued the County for negligence, but improperly served the

> summons and complaints. The County waited for nine months to assert the defense of insufficiency of service of process, until after the statute of limitation has run. The trial court dismissed the case for failure to properly serve the County within the statute of limitations. The court of appeals reversed, holding that the County was not entitled to rely on the affirmative defense because it had waived that defense.

WCC mistakenly relied on the date of the filing of the TRO to calculate the statute of limitations, the longest being the breach of contract - October 2011. WCC filed their affirmative defense of insufficiency of service of process in December 2011, two months after WCC believed all statutes of limitations have expired, eleven months after they received the summons and complaints. This is waiver of that defense, consistent the above authorities. The TRO was filed to prevent WCC from violating the contract Dr. Momah signed with WCC. The court summarized its decision on the statute of limitation period for Bad Faith claim as follows, without any consideration whatsoever of the waiver and tolling statutes.

> There is, of course -- this is again the insurance company has a duty you know, not to put its interests in front of the insured's. I'm not saying you did that, but again it's I think a clear reading of the contract that he wanted to be able to consent

> to this, that was something he bargained for, and certainly the May -- pardon me -- the October '05 TRO leaves no question about what he thought was in his best interests, so I am saying that this is wouldn't satisfy a bad-faith analysis, but I think the statute of limitation is irrefutable because it would be three years I think at the longest. (VRP at page 38, 17-25, page 39, 1-3).

The statutory limitation period for the Bad Faith claim expired in May 2010 but the tolling statute and the waiver establishes this claim within the statute of limitation.

STATUTE OF LIMITATION TOLLED BY PERSONAL DISABILITY OF INCARCERATION - RCW 4.16.190.

The Washington State statute, RCW 4.16.190 dictates that a personal disability such as imprisonment tolled the statute of limitation. This is so for both the CPA and the Bad Faith claims. Dr. Momah has been incarcerated since November 2005. The period of incapacity of incarceration was at least one year. This restores the statute of limitation to Janaury 2011. The lawsuit was filed on December 17, 2010.

> RCW 4.16.190 - Statute tolled by personal disability. (1) Unless otherwise provided in this section, if a person is entitled to bring action mentioned in this chapter, except for a penalty of forfeiture, or against a sheriff or other, for an escape, be at the time the cause of action accrued either under the age of eighteen years, or incompetent

> or disabled to such a degree that he cannot understand the nature of the proceedings, such incompetency or disability as determined according to chapter 11.88 RCW or imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be a part of the time limited for the commencement of action.
>
> For Wash. Rev. Code 4.16.190 to apply, a plaintiff's incompetency or disability must exist at the time the cause of action accrues. Rivas v. Overlake Hospital Medical Center et.al., 164 Wn. 2d. 261; 189 P.3d. 753; 2008 Wash. LEXIS 758.

In Rivas, our Supreme Court determined that a four-day period of incapacity tolled the statute of limitation when Rivas filed her lawsuit two days after the statute of limitation. The Supreme Court said:

> Holding that disputed issues of material fact remain as to whether the plaintiff was sufficiently incapacitated during the four days in the intensive care to trigger application of the statutory tolling provision, the court reverses the decision of the Court of Appeals, reinstates the trial court's order, and remands the case for further proceedings.

The statute of limitation for medical negligence was three years under Wash. Rev. Code 4.16.350, the same duration as the Bad Faith claim.

The patient, Ms. Rivas filed her action three years and two days after her operation that was the basis for her claim. The patient claimed she was sufficiently

incapacitated to toll the statute of limitation under RCW 4.16.190. The State's Supreme Court agreed.

The purpose of the statutory time limitation tolling provision is to ensure that all persons subject to a particular statutory limitation period enjoy the full benefit of the tolling statute. Other jurisdictions recognize Washington's RCW 4.16.190.

> In Washington State, a statute of limitation may be tolled during minority, incompetency,incarceration or military enlistment of the potential plaintiff. RCW 4.16.190; RCW 38.58.090. Hays v. Spokane, 2011 U.S. Dist. LEXIS 118424.
>
> Washington law provides for the tolling of the statute of limitations for an individual who is imprisoned at the time a cause of action accrues. RCW 4.16.190 (stating that, if an individual who is "imprisoned on a criminal charge prior to sentencing, the time of such disability shall not be part of the time limited for the commencement of action)". However, the statute of limitations begins to run upon an individual's release from imprisonment and no subsequent imprisonment tolls its operation. Bagley, 923 F. 2d. at 726 & n4 (citing Pederson v. Dep't of Transp.,43 Wash. App. 413,422; 717 P. 2d.773 (1986), See also Bianchi v. Bellingham Police Dep't, 909 F. 2d. 1316, 1318 (9th Cir.1990) ("[A]ctual, uninterrupted incarceration is the touchstone for determining disability by incarceration"). Watkins v. Buss et.al., 2011 U.S. Dist. LEXIS 69376.

The United States Supreme Court recognizes a state's tolling statute such as Washington's RCW 4.16.190.

> The Court noted other state statutes which currently allow some tolling of the limitations period for prisoner's lawsuit including Washington's RCW 4.16.190.
> In short the Supreme Court ruled that if a state has tolling provision which applies to prisoners, it is to be applied in prisoner 1983 suit.
> Clearly, RCW 4.16.190 is such a provision tolling the statute of limitations while a prisoner is imprisoned in execution under a sentence of a court less than his natural life. This court does not find the statute to be ambiguous requiring the interpretation of the Washington Supreme Court. The term less than natural life is clear. A person who is released on parole is not imprisoned for his entire natural life. Bianchi v. Kincheloe, 714 F. Supp. 443,1989 U.S. Dist. LEXIS 6758.

The heart of WCC's argument for the expiration of the statute of limitation for the Bad Faith claim was that it was not tolled. WCC's attorney, Mr. King stated:

> A claim of bad faith accrues and the statute begins to run at the point in time when the bad conduct occurs. By Dr. Momah's argument, it occurred when they settled the cases. So given to May of '07 because that's the last date at which any case was settled. Three years from there is to May of 2010. No lawsuit was filed. The statute was not tolled. The bad faith claim does not survive. The bad faith claim was barred by the statute of limitations before he filed the lawsuit in January of '11. (VRP at page 14, 12-21). (Underline added).

WCC's argument fails for three reasons. (1) The lawsuit was filed on December 17, 2010, not January of '11. (2) The lawsuit was tolled by RCW 4.16.190 by reason of incarceration and (3) the dilatory activity of WCC's

attorney waived the claim of insufficiency of service of process prior to the expiration of the statute of limitation.

DISMISSAL OF THE BREACH OF CONTRACT BY VIRTUE OF WCC'S RECEIVERSHIP STATUS IS ABUSE OF DISCRETION.

The Superior court dismissed the Breach of Contract claim by virtue of WCC's receivership status without any other consideration. This novel approach creates a loophole for a company to evade its obligations and violate a binding contract. Insurance companies are bound by the contract they enter with their insured. Being in receivership does not invalidate such a binding contract. The Superior court's ruling seem to nullify an existing contract once a company is insolvent. But there are laws and statute designed to protect the insured when an insurance company is insolvent. One such statute is Washington Insurance Act - which exists to protect both claimants and insured from insolvent carriers.

> The objective of the Washington Insurance Guaranty Act is to protect both claimants and insureds from insolvent insurers. The purpose of Wash. Rev. Code ch. 48.32 is to avoid financial loss to claimants when insurers become insolvent. Wash. Rev. Code 48.32.010.
> The objective of place both claimants and insureds in the same position they would be had the insurer been solvent. Gallagher et. al. v. Sidhu et. al,

126 Wn. App. 913;109 P.3d.840;2005 Wash. App. LEXIS 353.

WCC argues that the company, "WCC in Receivership" which they termed "WCCR" is a different company from WCC and therefore cannot be held liable for any breach of contract and other violations during the duration of insolvency. This argument is absurd. The implication of this sort of argument is far reaching.

The relevant contrast to this argument is that WCC and WCCR are the same company. Not only does WCC maintain the same location as WCCR, it maintains the officers and personnel as WCCR and continues the same line of business as WCCR. The assets of WCCR was transferred to WCC after the receivership in October 2006. These facts in principle, should control the responsibility and liability of WCC.

> A party which acquires a manufacturing business and continues the output of its line of product assumes the tort and liability for defects in the units of the same product line previously manufactured and distributed by the entity from which the business was acquired.
> In order for there to be a transfer of liability from a predecessor corporation to a successor corporation, an actual transfer of assets between the corporation must occur. Meisel v. M&N Hydraulic Press Company et. al, 97 Wn. 2d. 403; 645 P. 2d. 689; 1982 Wn. LEXIS 1388.

> A corporation can succeed to the debts and liabilities of a sole proprietorship if the corporation is merely a continuation of a sole proprietorship. In determining whether a corporation is a continuation of a sole proprietorship, a court considers several factors, including whether there is a common identity or continuity of persons in control of the two entities, whether the business performed by the corporation is the same business that was performed by the sole proprietorship, and whether the corporation serves the same clients who were served by the sole proprietorship. The court's objective is to discern whether the corporation represents merely a "new hat" for the sole proprietorship. Cambridge Town Homes LLC et. al. v Pacific Roofing Inc. et. al., 168 Wn. 2d. 475; 209 P. 3d. 863; 2009 Wn. LEXIS 625.
>
> A successor corporation cannot be held liable under the product line theory of liabililty unless it continues to manufacture or sell the type of products as that which caused the injury. George v. Parke-Davis, 107 Wn. 2d. 584; 733 P. 2d. 507;1978 Wn. LEXIS 1040.

WCC states that all the violations of the contract were made by WCCR and the receiver, Mr. Woodall, and as WCCR no longer exists, WCC cannot be held liable for these violations. WCC also asserted to the trial court that "all the assets of Washington Casualty including its contracts and obligations vested in thee Receiver" was transferred back to WCC after the receivership ended in October 2006. By this argument, WCC therefore becomes in principle a "successor" of WCCR and inherits all its assets and liabilities. It follows that WCC also inherits all the violations it is trying to defer to

WCCR and should be held for the claims of the Petitioner.

> Under the doctrine of successor liability, a corporation that purchases the assets of another corporation is liable for the debts of the selling corporation if the purchasing corporation is a mere continuation of the selling corporation or the transfer of assets is for fraudulent purpose of escaping liability to creditors. **Liability is imposed regardless of the exact form by which the corporate assets are transferred.** Eagle Pacific Insurance Company v. Christensen Motor Yacht Corporation et. al., 135 Wn. 2d.894;959 P. 2d. 1052;1998 Wash. LEXIS 570. (Bold added)

Once WCC argued that all the assets of WCCR were transferred back to WCC after the receivership in October 2005, WCC becomes liable for the contract violations especially those that occurred after the receivership ended in October 2006 such as the **settlements of May 2007.** WCC cannot blame Mr. Woodall and WCCR for the violations of the contract in 2007 - the settlements of May 2007 since Mr. Woodall was no longer in the picture in May 2007, having relinquished his receivership status on October 6, 2006. **Therefore, the violations of May 2007 is unaffected by the WCC's argument regarding WCC's receivership status.**

> Where the transfer strips a debtor corporation of all its assets and disables the corporation from earning money to pay its debts, thus leaving the creditors and holders of claims no resources to

> which they may look for the payment of their due, the net result is in legal effect a fraud; and the court will subject the transferee to liability for the satisfaction of the claim against the corporation whose assets it has absorbed. Eagle Pacific Corp., 135 Wn. 2d. at 906, quoting Avery, 80 P.2d. at 1101.
>
> Keeping these purposes in mind, the court articulated three justifications for successor liability: (1) the virtual destruction of the plaintiffs remedies against the original manufacturer caused by the successor's acquisition of the business, (2) the successor's ability to assume the original manufacturer's risk spreading role, and (3) the fairness of requiring a successor to assume a responsibility for the defective products that was a burden necessarily attached to the original manufacturer's goodwill being enjoyed by the successor in the continued operation of the business. Id. Ostensibly, these justifications apply to Meisel's case. Meisel, 97 Wn. 2d. at 406-7.
>
> A party which acquires a manufacturing business and continues to sell a line of products previously sold by the acquired business is strictly liable for defects in those previously manufactured products if the acquisition involved substantially all the acquired business assets, and the party hold itself out to the public as a continuation of the acquired business by selling the same product line under a similar name, and the party benefited from the goodwill of the acquired business. Martin v. Abbott Lab., 102 Wn.2d. 581;689 P.2d 368;1984 Wn. LEXIS1094.

These line of cases dictates that WCC should in principle be held accountable for the violations of the contract during receivership. The same pattern of conduct, settling cases without the consent or "agreement" of the insured, Dr. Momah, occurred after October 2006, when the assets of WCCR was transferred back to WCC, (May 2007

settlements)

FAILURE TO INVESTIGATE AND RUSH TO INDEMNIFY.

WCC did not investigate the allegations in these lawsuits to ascertain their veracity preferring to indemnify rather than defend these false allegations orchestrated for purely financial gain. WCC's decision to indemnify because it was cheaper for them to do so, had disastrous and lasting consequences for Dr. Momah: loss of freedom, career and reputation. At the beginning of these cases in 2003, there was saturating media publicity propagating these false allegations. WCC and their attorneys made no efforts to defend and refute these allegations when there was credible evidence that these allegations are false and fabricated. As stated on page 2 of the TRO (Appendix C), "Dr. Charles Momah will suffer irrefutable harm if Washington Casualty Company is permitted to enter into settlement negotiations without his consent". If WCC had afforded the Appellant, Dr. Momah a vigorous defense, the outcome of these cases and the criminal would have been different. Once the false and fabricated allegations took hold, it became difficult to change public perception and the potential jurors, and the stigma continues to this day.

Dr. Momah purchased a "Claims Made" policy which is significantly more expensive than an "Occurrence" policy. The Claims Made policy differs from an Occurrence policy in that it resides the decision to settle claims with the insured in contrast to the Occurrence policy where insurance carrier makes all the settlement decisions. That was the contract I negotiated with WCC. Because insurers have a tendency to settle claims because it is less expensive than defending claims, a Claims Made policy is more expensive than an Occurrence policy where an insurer makes settlement decision without the consent of the insured. WCC in effect nullified my Claims Made policy and substituted it for an Occurrence policy, which is an inferior policy despite the significant difference in cost between the policies.

The Appellant paid over one hundred and fifty thousand dollars to WCC to purchase the policy, an investment in the contract and obligation for WCC to do what it said it would do: investigate and defend him and let make settlement decisions. WCC failed in this obligation. WCC put its interests ahead of the Appellant. The trial court reiterated this fact when the court said:

> in fact, the insurance company has a duty to investigate. They can't simply their own interests

in front of Mr. Momah's.
Dr. Momah: That's what it did. (VRP at page 36,22-25, page 37, line 1).

The Court repeated this admonition at page 38:

> There is, of course -- this again the insurance company has a duty to not put its interests in front of the insured's. I'm not saying that you did that, but again it's a clear reading of the contract that he wanted to be able to consent to this, that was something he bargained for, and certainly the May -- pardon me -- the October of '05 TRO leaves no doubt what he thought was in his best interests. (VRP at page 38, 17-25).

The implied covenant of good faith and fair dealing in the policy should necessarily require the insurer to conduct any necessary investigations in a timely fashion and to conduct a reasonable investigation before any settlement decision is made. In the event the insurers fails in either regard, it will have breached the covenant and, therefore the policy. As previously stated, there are laws designed to promote the performance of insurance companies and protect the rights of the insured during an insurance insolvency.

> Wash. Rev. Code 48.43.055 and Wash. Admin. Code 284-43-322 set forth requirements for the fair resolution of the disputes arising out of agreements between carriers and providers. In regulating the carrier-provider relationship, 48.43.055 protects, at least indirectly, the promises that carriers make to their insureds in the subscriber agreements.

> Kruger Clinics Orthopedics et. al v. Regence Blueshield, 157 Wn. 2d. 290;138 P.3d.936;2006 Wash. LEXIS 537.
> By protecting the carrier-provider relationship, the statute and the WAC regulation strengthen the reliability of the health insurance carrier's promises to its insured thereby "regulat[e] the business of insurance" within the meaning of McCarran-Ferguson Act. Kruger Clinics Orthopedics, 157 Wn. 2d. at 306.

Other jurisdiction have sought to protect the rights of the insured during an insurance company's insolvency.

> Statute aimed at promoting or regulating the relationship between the insurer and the insured, directly and indirectly, are laws regulating the "business of insurance", within the meaning of the phrase in the McCarran-Ferguson Act. A state statute meets this standard where it is designed to carry out the enforcement of the insurance contracts by ensuring the payment of policyholders' claims despite the insurance company's intervening bankruptcy. Ariz. Rev. Stat. 20-614 have been enacted to serve the interests of promoting the **performance of insurance contracts during insolvency** and therefore, are statutes regulating the business of insurance within the meaning of McCarran-Ferguson Act. U.S. Financial Corp. v. Warfield, 839 F. Supp. 684; 1993 U.S. Dist. LEXIS 17340. (Bold added).

A duty of good faith and fair dealing is implied in every contract.

> An insurance policy is construed as a contract. The policy is considered as a whole and given a fair, reasonable and sensible construction as would be given by the average person purchasing insurance. If the policy language is clear and unambiguous, the court must enforce it as written and may not modify it or create ambiguity where none exists. The principle of insurance contract interpretation require that the court resolve any dispute in favor of the insured. An ambiguity exists where the

> insurance policy's language is susceptible to more than one reasonable interpretation. Australian Unlimited, Inc.,et.al. v. Hartford Casualty Insurance Company et. al., 147 Wn. App. 758;198 P.3d. 514;2008 Wash. App. LEXIS 2872.

WCC FAILED IN ITS DUTY TO DEFEND, PREFERRING TO INDEMNIFY. The plain meaning of the duty to "defend" mean more than a mere concession to another party's claim. "Defend" is defined as "to deny, contest or oppose" an allegation or claim. An interpretation of the meaning "to defend" that includes a mere concession to another party's claim regardless of merit would render "to defend" superfluous.

> [T]he duty to defend is different and broader than the duty to indemnify. Am. Best Food Inc. v. Alea London Ltd., 168 Wn. 2d. 398,404;229 P.3d. 693(2010). In the context of an insurance, the duty to defend is antecedent to the duty to indemnify and does not hinge upon the insurers potential liability. Edmundson et.al. v. Popchoi, et. al., 155 Wn. App. 376;228 P.3d. 780,786; 2010 Wash. App. LEXIS 686.

WCC claimed that Mr. Woodal made all the decisions including the decision to settle meritless claims; false and fabricated allegations without the benefit of adequate investigations. But Mr. Woodall's decisions were based on the advice given by Ms. McCarthy, the company's Vice-President and others. In her capacity, she was influential in any decisions made by Mr. Woodall because he was not operating in a vacuum. Mr. Woodall

was guided and influenced by Ms. McCarthy. WCC's attorney, in his "Defendants Memorandum of Authorities...", stated that "at all relevant times, WCC's Vice-President of claims Barbara McCarthy was acting within the scope of her employment". It was her duty to further the interests of her company.

> An insurance company is bound by the acts of its agents even if the acts exceeded their authority if the company ratified such actions. Sobn v. American Family Insurance Co. et. al., 755 F.Supp. 2d. 852; 2010 U.S. Dist. LEXIS 134835.
> It is well settled that an agent occupies a fiduciary relation towards his principal, and that he is bound, in the execution of the agency, to act in the most perfect good faith and with loyalty to the interests of his principal;....The principal trusts the agent, whom he has employed to faithfully use all reasonable efforts to advance his interests. John, as Receiver of the Pioneer Fire Insurance Company v. Arizona Fire Insurance Company et. al., 76 Wash. 349;136 P.120,125;1913 ash. LEXIS 1818.

Moreover, when Dr. Momah refused to consent to settle the claims, Ms. McCarthy stated in her declaration, at page 8, paragraph 32, "Mr. Woodall was made aware before the mediation that Dr. Momah would not provide consent to settle the pending claims even though WCCR had recommended to his counsel that consent be given". The earlier statement of WCC's attorney, Mr. Scharosch reinforces the decision of WCC to settle claims regardless of contract requirements and above all, without the

of contract requirements and above all, without the benefit of a thorough investigation. Mr. Scarosch said:

> WCC faced a difficult decision regarding Mr. Momah - either abide by its contractual agreement with Mr. Momah and expose its insured to an excess judgment and potentially face a claim of bad faith or settle the against Mr. Momah within the policy limits, even though such action may constitute a breach of the insurance contract. Page 18, Defendants' Memorandum of Authorities...

Duty to indemnify, as above does not supersede the duty to defend. Our State Supreme Court have stated their opinion in a related case, regarding the issue of settling claims without adequate investigations of cases that are meritless.

> Specifically, this case presents the question whether a grantor' duty to defend against another's claim to title is satisfied by that grantor's independent decision to settle a claim whatever its merit and pay the grantee's damages for the breach of warranty. We hold that the duty to defend require a grantor to defend in good faith.....Kiss breached the duty to defend in good faith....Kiss immediately sought to concede and settle the claim, without any evident consideration for the merits, because it would be most cost effective for him. Edmundson et. al., Plaintiff v. Ivan G. Popchoi et.al, Defendants, Csaba Kiss, Petitioner, 256 P.3d 1223; 2011 Wash. LEXIS 597.
>
> Both the Court and the trial court in this case found that Kiss had a duty to investigate. A duty to investigate can be found in insurance law. See eg., WAC 284-30-334(4). Edmundson et.al, at Footnote.

A company in receivership still has a duty to investigate

claims thoroughly before a decision to settle and consent given by the insured because this is what the contract states. It is even more pertinent in this case where there are multiple red flags, that the allegations are false and fabricated as evidence now available indicates. But these evidence was available in 2003. WCC did not seek to find these evidence in their rush to indemnify. Such evidence from the many medical assistants and chaperones who were present during the physical examinations who stated that the allegations are not true was available then and much more. Most importantly, **no medical assistant-chaperone has ever said that anything abnormal or improper occurred during a physical examination.** WCC did not seek to find these important witnesses, instead believing the allegations Mr. Bharti and his clients were making, some of the allegations so preposterous. WCC claimed it had no choice but to settle these claims.

But in 2006 when WCC was settling these claims, WCC was aggressively defending other lawsuits. One such case was Leighton et.al. v. Urology Northwest, P.S et.al., 2006 Wash. App. LEXIS 1838.

> On March 6, 2003, Leighton moved to compel discovery and Mr. Jacoby's attendance at a March 13,

> deposition. But before the court considered Leighton's motion, an Order of Rehabilitation and and Appointment of Receiver was entered against Dr. Jacoby's medical malpractice insurer, Washington Casualty Company (WCC) in an unrelated case, requiring a stay of proceedings in which WCC was a party to or obligated to defend. In May 2003, the trial court stayed Leighton's case pending the outcome of WCC's receivership proceedings. In the fall of 2004, the trial court set a trial date of November 14, 2005. Discovery problems continued where they left off, and the relationship between the parties' attorney remained acrimonious. Leighton et. al., 2006 Wash. App. 1838 supra.

The Leighton's case was filed in 2001, litigated through 2003 until WCC succeeded in having this lawsuit dismissed in August 2006. WCC defended this case and did not seek to indemnify. This case is being submitted for illustrative purposes.

The Washington State Supreme Court states that receiver is bound to exercise reasonable care and diligence in the management of his trust, and that he and his surety are responsible in damages to persons who suffer loss because of failure of the receiver to perform his duty. Travelers Insurance Company, Respondents, v. Gregory et.al.,Appellants, v. Koll Management Services,Respondent, 1998 Wash. App. LEXIS 1517, at Headnotes.

In this Division One Court of Appeals case, this Court said:

> If the court and interested parties are fully advised

> of the risks and options available to a receiver, given an opportunity to state their views on the proposed action, and the court's order then adopts the receiver's proposal, it would be difficult indeed to fault a receiver for following that order. To the extent an order is born out of a fully informed process, a receiver may justifiably assert derivative judicial immunity based upon the order. But if a receiver did not analyze the risks inherent in the various known options and bring the risks to the attention of the court and the parties for consideration in the decision making process, then the court order will not provide immunity and a receiver will have to defend itself on the merits of whether it acted with reasonable business judgment. Similarly, receivers are not personally liable for honest mistakes in the reasonable exercise of their best judgment. Travelers Insurance Company et. al., at Headnotes. (Underline added).

The Appellant's right to an aggressive defense and the failure of WCC to provide that defense is what at issue in this appeal.

INTERPRETATION OF INSURANCE CONTRACTS AND PUBLIC POLICY CONCERNS.

> Insurance policies are contracts, and the principles of contract interpretation apply to them.
> The cardinal rule which all contract interpretation begins is that its purpose is to ascertain the intention of the parties. The explicit language of an insurance cannot be disregarded, nor the interpretation given the policy at variance with the clearly disclosed intent of the parties.
> Interpretation of an insurance contract is a question of law that is reviewed de novo by the appellate court. West Coast Pizza Co. v. United National Insurance Co., Policy XTP0079005, 166 Wn. App. 33; 271 P. 3d. 894. (2011).

Both courts and legislature have recognized that

> insurance contracts are imbued with public policy concerns. Or. Auto. Insurance Co. v. Saltzburg, 85 Wn. 2d. 372,376-7; 535 P. 2d. 816 (1975); RCW 48.01.030. "The business of insurance is one affected by public policy interest". Id. supra.
> [i]nsurance contracts are unique in nature and purpose. An insured does not enter an insurance contract seeking profit, but instead seeks security and peace of mind through protection from calamity ...Id. supra.

If the decision of the trial court is left as it is, this would create a moral hazard, encouraging insurers to breach their contractual obligations, knowing that their receivership status would bail them out. It is important for the Court to acknowledge that **WCC breached the contract after the receivership when they settled the May 2007 cases when the company was no longer in receivership, which ended on October 6, 2006.** Therefore, this behavior appears to be a pattern of conduct, " a modus operandi" and the way WCC does business. The Superior Court never considered that the May 2007 settlement occurred after the receivership ended.

PETITIONER 1S ENTITLED TO SUMMARY JUDGUMENT ON THE BREACH OF CONTRACT CLAIM AS THERE IS NO GENUINE ISSUE OF DISPUTE.

Given that WCC conceded a breach of contract and the

trial court found that the breach of contract is within the six-year statute of limitation, (VRP at page 37, 8-12) and that the May '07 settlement occurred outside the receivership, Dr. Momah is entitled to summary judgment on the breach of contract as there is no genuine issue of material facts surrounding the breach of contract violation. WCC settled the May 2007 cases without the consent of the insured. This is a material fact. "A party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion". Celotex Corp. v. Catrett, 477 U.S 317,322-23; 106 S. Ct. 2458 (1986).

> Summary judgment is proper when there is no genuine issues of fact and the moving party is entitled to a judgment as a matter of law. CR56(c).
> In general, the moving party on summary judgment bears the initial burden of showing absence of material fact. Young v. Key Pharm. Inc., 112 Wn.2d. 216,225;770 P.2d. 182 (1989).
> A material fact is one upon which the outcome of the litigation depends. Barrie v. Hosts of Am. Inc., 94 Wn. 2d. 640,640; 618 P. 2d. 96 (1980).
> The nonmoving party cannot rely on speculation to defeat summary judgment. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn. 2d. 1,13;721 P. 2d. 1 (1986). Uwem Usoro et.al. v. Charles Helm et.al., 2011 Wash. App. LEXIS 2415.
>
> In general, the moving party on summary judgment bears the initial burden of showing absence of material fact. Young v. Key Pharm. Inc., supra.

WCC had numerous opportunities to question the veracity

and validity of the claims WCC settled. The Vice-President of claims for WCC, Ms. McCarthy, in an affidavit of March 6, 2006 stated that, "Mr. Bharti also claims that one of the terms of the settlement was Dr. Momah and/or his attorneys in this action would sign a Settlement Agreement and Release in favor of the Plaintiffs. That was not a term of my agreement with Mr. Bharti, and I can state based on my 40 years experience as an insurance claim professional that having a Defendant/alleged tortfeasor and his or her counsel also sign a Settlement and Release would be highly unusual". (Appendix D).

This evidence raises a red flag. What was Mr. Bharti and his clients worried about to demand that Dr. Momah sign a release agreement for him and his clients? Evidently, Ms. McCarthy noticed this was odd. WCC should have seen that there was more to this case that the media and Mr. Bharti was portraying, and should have demanded greater scrutiny from WCC before making any settlement decisions.

Ms. Michelle Fjeld, one of the medical assistants who was a chaperone during the physical examinations stated in a sworn affidavit the following:

> During the time I worked for Dr. Momah, I was able to observe his normal practices and his treatment

> of patients. I have always seen Dr. Momah wear gloves when he examined patients. Dr. Momah always had me in the exam room during treatment sessions. I have never witnessed Dr. Momah act inappropriately with his patients. I would have remembered if he had done something inappropriate .... I recall Mr. Bharti brought up "Nigerian gangs" and mentioned that Dr. Momah was "threatening". Mr. Bharti wrote down that Nigerian gangs were going after me. This was ridiculous and untrue and I told him it was untrue. Mr. Bharti wanted me to confirm that Dr. Momah had threatened me with his Nigerian gangs contacts. I told Mr. Bharti that was untrue. I recall Mr. Bharti talked a lot about money in the first meeting with me...Mr. Bharti talked a lot about money in the second and third meetings that I attended with him. He told me this was a big case and that I would get "a cut" of the proceeds.....During my conversation with Mr. Bharti, he would make a statement about Dr. Momah and then wait for me to endorse the statement. He did not ask me questions. He just kept asking me to endorse what he was saying to me about Dr. Momah. (Appendix E) (Underline added).

When Mr. Bharti talked "about money", he was talking about WCC's money. That Dr. Momah refused to give consent, combined with all the evidence available should have led to an adequate investigation of the claims.

IV. CONCLUSION.

The evidence presented in this case deserve that this Court overturn the rulings of the trial court that granted summary judgment to WCC on Bad Faith and CPA claims based on statute of limitations, and Breach of Contract claim based on the receivership status of WCC without even

considering that the last breach occurred in May 2007, after the receivership had ended in October 2006. WCC was aware of the defense of insufficient service of process prior to the expiration of the statute of limitations. By waiting for eleven months for the statute of limitations to run before asserting a defense they knew was available to them all along, WCC waived that defense. This Court's in its opinion on Lybberts v. Grant County said:

> [t]he Court of Appeals placed emphasis on what it described as a duty on the part of the government to conduct litigation "in a manner above reproach" and to be "scrupulously just in dealing with its citizens". Lybberts et. al. v. Grant County, 93 Wn. App. 627,634;969 P.2d.1112, review granted, 138 Wn. 2d. 1002; 984 P.2d. 1034 (1999). In light of that duty, the court opined, counsel for the County "should have raised the issue of insufficient service prior to the expiration of the statute of limitations". Lybberts, 93 Wn. App. at 634.

Significantly, all three divisions of the Court of Appeals and the Supreme Court of this State have recognized the doctrine of a waiver by not asserting a defense prior to the expiration of the statute of limitation, especially if the plaintiff believed that the defendant has been sufficiently served. In the court that upheld the defense of insufficient service of process found that that defense was asserted prior to the expiration of the statute of limitation. In Meade v. Thomas, 152 Wn. App. 490;217 P.3d. 785,787; 2009 Wash. App. LEXIS 2086, the Court of Appeals,

Division Two, in distinguishing this case from Lybberts and upholding a defense of insufficient service of process said:

> Finally and importantly, Thomas filed his answer **asserting the failure to serve defense within the statute of limitation**, leaving Meade enough time to properly serve Thomas. Thomas failed to perfect his service. Meade, at 217 P.3d. at 787. (Underline added).

The trial court found that Dr. Momah had properly served WCC. VRP - page 62,11-20. The tolling statute, RCW 4.16.190 tolled the statute of limitation for the CPA and Bad Faith claims. The statute of limitation for the Breach of Contract claim is preserved.

Dr. Momah asks that the Court to grant his request by overturning the rulings of the Superior Court and grant summary judgment on the Breach of Contract claim as there is no genuine issue of dispute.

Respectfully Submitted,

Charles Momah, Appellant.