69456-1

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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.

APPELLANT'S ANSWER TO RESPONDENTS' BRIEF

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I. INTRODUCTION

The Respondents' reliance on Harvey v. Obermeit, 163 Wn. App. 311,261 P.3d. 671 (2011) is misplaced because that case is distinguishable from Momah v. WCC/McCarthy. The plaintiff in that case was notified that service of process was inadequate in an interrogatory but failed to correct the defect. In fact, the plaintiff in that case argued that service of process was adequate, failing to realize the insufficiency.

The response states on page 12, "Defense counsel did not apprise plaintiff's counsel of the impending expiration of the statute of limitations". It is not the duty of the defense counsel to apprise the plaintiff of an impending expiration of the statute of limitation. The doctrine of a waiver is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay or misdirecting a plaintiff from a defense for tactical advantage. In fact, Harvey v. Obermeit is identical to Meade v. Thomas, 152 Wn. App. 490;217 P.3d.785,787; 2009 Wash. App. LEXIS 2086 that the Appellant cited on page 42 in his Opening Brief. There, the defendant filed an answer asserting the defense of insufficient service of process but the plaintiff failed to perfect

his service.

The Appellant, Dr. Momah perfected his service of process on WCC but could not serve Ms. McCarthy despite two sheriff's attempts to perfect the service because Ms. McCarthy was evading service.

The response did not address the Summary judgment of the May 2007, the settlement that occurred after the receivership ended on October 6, 2006.

The rest of the Respondents' answer to the Opening Brief is summarized as follows:

(a) The Respondents reliance on Harvey v. Obermeit, 163 Wn. Ap. 311, 261 P.3d. 671 (2011) is misplaced.

(b) Respondents' action of waiting for almost one year to raise the issue of service of process despite numerous communication with WCC is dilatory. Most importantly, on October 23, 2011, the Appellant made a CR 26(i) request on WCC's attorney, Mr. King to resolve the "issue" of their not responding to the Appellant's multiple requests by contacting the liaison officer Ms. Lori Wonders at Coyote Ridge Correctional Center where the Appellant is housed. WCC did not respond but waited for what they erroneously believed was the statute of limitations of October 2011 to raise a defense they knew was available

to them one year before. When they believed that the statutory period had expired, raised this defense. This is what the controlling authorities in Washington State said a litigant cannot do.

(c) The trial court found that service of process was adequate on WCC but not for Ms. McCarthy. At least three attempts to serve Ms. McCarthy by sheriff at her place of work. Dr. Momah contends that Ms. McCarthy was evading service of process.

(c) The response concedes that the settlement of May 2007 which was made outside the receivership, which ended on October 6, 2006 is a violation of the contract which the Appellant signed with the Washington Casualty Company (WCC). Therefore, summary judgment is proper.

(d) The Respondents states that "Momah has not demonstrated that he was incarcerated at any time before his sentencing, nor has he demonstrated the length of presentence incarceration, if it in fact occurred. Accordingly, Momah's tolling argument should be rejected". RCW 4.16.190 tolled the statute of limitation by a period of six months.

(e) The Respondents contend that the receivership status of WCC justified the violations. But the response did not address the fact that RCW 48.31.040 also commands

that the receiver involve the "interested parties" in the decision making process and take into account their opinions and views before any decisions are made. But if a receiver did not analyze the risks inherent in the various options and failed to take into account the views of the Appellant, he may have failed in his duties. Instead, WCC and the receiver "steamrolled" the Appellant to achieve their interests. What purpose is achieved by paying meritless claims without adequate investigation? In fact, this case runs counter to most insurance cases because the insured is involved in a dispute with an insurance company usually because the company has failed to pay his or her claim, not the opposite.

II. RELIANCE ON HARVEY V. OBERMEIT IS MISPLACED.

In Harvey v. Obermeit, there was some discovery which addressed the service of process.

> In Obermeit, although there was some discovery conducted before Obermeit filed his motion to dismiss on February 10, 2010, this discovery included questions from both parties about the issues of service of process and jurisdiction and Harvey was aware throughout discovery that Obermeit was contesting service. In Obermeit's November 2009 interrogatory, he asked Harvey, "Do you assert that you have properly served all the defendants in this matter? And one of his requests for production stated "Please produce all documents, declarations and affidavits and other evidence that you have properly

> located and served defendant in this action". In Harvey's interrogatories served to Obermeit on the same day, He asked, Do you allege insufficiency of process or service of process? If so, please state the fact on which you base your allegation?" In Obermeit's response dated January 11, 2010, he answered, "Yes". Harvey v. Obermeit, 163 Wn. App. at 323.

The critical fact is that Harvey was aware of that Obermeit was contesting service of process and was given an opportunity to perfect service but Harvey failed to do so. Instead, Harvey argued that service was sufficient when it was not. Obermeit did not conceal the fact that service was insufficient. This fact is line with all the precedent authorities that ruled that there was not a waiver. The Court in Harvey referred to the State's Supreme Court's opinion in King et.al. v. Snohomish County,140 Wn. 2d. 420;47 P.3d. 563; 2002 Wash. LEXIS 379 where the King Court said:

> Court also found assertion of a service-related defense inconsistent with a defendant's prior behavior where there are indications the defendant actively sought to conceal the defense until after the expiration of the statute of limitations and 90 day period of service. Harvey v.Obermeit, 163 Wn. App. at 324, quoting King v. Snohomish County, supra.

Momah v. WCC is unlike Harvey v. Obermeit and much more like King and Lybberts et. al. v. Grant County, 141 Wn.2d. 29; 1 P.3d. 1124; 2000 Wash. LEXIS 379.

As the Appellant stated in his Opening Brief, a defendant who conceals a known defense and waits for the statute of limitations to expire before asserting that defense waives it.

Obermeit gave Harvey multiple opportunities to perfect his service and maintained throughout discovery that service has not been proper but plaintiff failed to perfect his service of process.

As the Appellant said in his Opening Brief on pages 10 to 19, WCC's action was tantamount to a waiver. This Court said in Lybberts et. al. v. Grant County, 93 Wn. App. 627; 969 P. 2d. 1112;1999 Wn. App. LEXIS 102,

> The court of appeals reversed summary judgment for appellee 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 after the applicable statute of limitation expired.

Other Court of Appeals have made similar rulings. In Raymond v. Fleming, 24 Wn. App. 112;699 P. 2d. 614;1979 Wash. App. LEXIS 2732 said:

> 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.

In reaching their decision, this Court in Harvey v. Obermeit also relied on Romjue v. Fairchild, 80 Wn.App. 278; 803 P.2d. 57 (1991), another opinion Dr. Momah cited in his Opening Brief where that court said:

> A defendant engaged in discovery unrelated to service-related defense before moving to dismiss, and waited until three months after the statute of limitation expired to notify plaintiff's counsel of insufficient service, although plaintiff's counsel wrote to defendant's counsel prior to the expiration of the statute of limitations that he understood the defendants had been properly served. The court held the defendant waived the defense by conducting himself in a manner inconsistent with the later assertion of the defense. Harvey v. Obermeit, 163 Wn. App. at 323.

In Momah v. WCC, as had been clearly stated in the Opening Brief, the Respondents waited for almost one year for the statute of limitation to run on the CPA claim to assert a known defense. The Bad Faith claim is a debatable close issue as tolling statute is pertinent in restoring this claim to the statute of limitation. The Appellant detailed communications with WCC as stated on pages 13 and 14 of his Opening Brief illustrates the point Dr. Momah is making about the Respondents' conduct, especially his request of October 23, 2011 where the Appellant sought to clarify the "issue" (which evidently turned out to be service of process) of their not responding to the Appellant's requests. The Respondents at that time had

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a duty to state the issue of insufficient of process as the reason why they have not responded and raise the insufficient service of process anytime between December 2010 and December 2011. Instead, they were masking their contention about improper service of process and "lying in wait' for what they believed was the statute of limitations to expire before raising that defense. This is what the Supreme Court in Lybberts said was "trial by ambush". In this instant case, it is clear to the defendants that the Appellant, Dr. Momah was relying on adequate service of process when he made these communications with WCC and as soon as Dr. Momah was made aware that service of process was insufficient, he promptly perfected service on WCC.

This distinguishes Momah v. WCC/McCarthy from Harvey v. Obermeit and Meade v. Thomas. The Meade Court said: "On appeal, the court found that plaintiff was aware of defendant's claim of non-service in time to properly complete service", and the court further said " defendant does not waive the defense of insufficient service of process by engaging in discovery on the merits of the action before asserting the defense if the quantity and duration of discovery are not great, the plaintiff is not unaware

of the failure to serve, and the defense is asserted in an answer filed before the statutory time limitation applicable to the action has run". At Overview and Headnotes (Underline Added).

The Meade Court also found that "Thomas counters that Meade was aware of the defense in time to properly complete service". Meade v. Thomas, 217 P.3d. at 786.

This is the critical differentiating factor between Momah v, WCC on one hand and Harvey v. Obermeit and Meade v. Thomas, on the other, where both courts found that there was no waiver because both plaintiffs were aware of the improper service but chose not to perfect it.

An insight into WCC's strategy was their assertion that all statute of limitations expired in October 2011. WCC did not respond to the Appellant's request in October 2011 because WCC knew that Dr. Momah would had an opportunity to perfect his service within the statute of limitations.

The trial court ruled that Ms. Barbara McCarthy was not served but the Appellant made three attempts to serve McCarthy as the Sheriff's notations indicated. The first attempt which served Mr. John Layton, Director of Operations at the WCC's headquarters on January 10, 2012.

When WCC complained that McCarthy had not been served, the Appellant made two further attempts to serve on March 26 and March 28, 2012. The Sheriff's noted:

> Date 3/26/2012 @ 10.25 - WASHINGTON CASUALTY COMPANY 6520 226th PLACE SE ISSAQUAH, WA. 98027-8969
> Notes: Spoke with call receiver, Lisa who confirmed Maple Valley address and that McCarthy works at that location.
> Date 3/28/2012 @ 1300 - WASHINGTON CASUALTY COMPANY 6520 226th PLACE SE, ISSAQUAH, WA. 98027-8969
> Notes: Advised that Barbara McCarthy does work for the Company, but she actually in the Idaho region. (See enclosed Appendix F).

RESPONDENTS CONCEDES SUMMARY JUDGMENT OF THE MAY 2007 SETTLEMENTS THAT OCCURRED OUTSIDE THE RECEIVERSHIP.

The response concedes the summary judgment of May 2007 settlement. As the Appellant stated in his Opening Brief that that settlement is unaffected by the receivership status. From pages 38 to 41, the Appellant explained why summary judgment is appropriate.

ROLE OF RCW 4.16.190

The response at page 15 footnotes, states "In his brief, Momah makes no argument that he was incarcerated at all before his conviction and sentencing".

The Appellant was convicted in November 2005. Sentencing commenced in February 2006 and ended in April 2006 when the Appellant was transfered from the county jail to

Twin Rivers Unit in Monroe, Washington. This provides a tolling period of approximately six months. The CPA claim is tolled to November 2011.

As stated above, the waiver of the defense of the insufficiency of the service of process preserves the CPA violation.

RECEIVERSHIP STATUS RCW 48.31.040 ALSO PROTECTS APPELLANT'S INTERESTS.

The respondents contend that the receivership status of WCC justified the violations of the contract and therefore blamable on the receiver himself. But the response ignores the fact that RCW 48.31.040 also protects the Appellants because RCW 48.31.040 commands that the receiver involve the "interested parties" in decision making process and take into account their opinions and views before decisions are made. But the receiver and WCC ignored the Appellant's opinions and views despite the fact that the contract enjoined them from settling claims against Appellant's wishes. But the receiver failed in his duties by failing to take into account the interests of the various parties involved. If the decision of the trial court is upheld regarding the receivership, the Appellant raises two questions about insurance

contract.

(1) What is the meaning of an insurance contract if the contract rendered null and void once the insurer becomes insolvent?

(2) Should an insurance company include a clause in their contract stating that the contract may no longer be binding once the company becomes insolvent?

The answers to these questions demand that insurance contracts during insolvency need to be protected by law to prevent violations of the contracts.

It is true that RCW 48.31.040 affords immunity to a receiver if he or she acts within the limits of the receivership. But if a receiver violates any part of the statute such as not taking into consideration the opinions and views of an interested party, RCW 48.31.040 may not provide immunity for the actions of the receiver. Mr. Woodall made all the decisions to settle based on the advice Ms. McCarthy. Both ignored all the opinion provided by the medical expert hired by the Appellant, Dr. Philip Welch and the counsels for the Appellant, Ms. Cheryl Comer and Mr. David Allen, that the allegations are frivolous and fabricated, and adequate investigations would be successfully defended. The fact that two very

similar civil cases involving nine complainants were successfully defended despite the Appellant's criminal conviction illustrates the point the Appellant is making: that there was a rush to indemnify rather than defend. These cases are Saldivar v. Momah in 2006 and Collier et. al. v. Momah in 2007. Mr. Woodall did not involve Dr.Momah, Ms. Comer or Mr. Allen in his decision to settle these claims. The response failed to state who Mr. Woodall consulted before he made the decision to settle because Ms. Comer and Mr. Allen were involved in these cases, civil and criminal, respectively, while Dr. Welch reviewed all the cases. They all came to the same conclusion: that the allegations were orchestrated for financial gain and Mr. Bharti was the orchestrator.

On page 4, the Respondents claim that Barbara McCarthy was employed by WCCR. This is not entirely accurate. Ms. McCarthy had been employed by WCC for a long time prior to the receivership in 2003 and after the receivership remains with WCC as the Vice President of Operations. Ms. McCarthy had been influential in the decisions made by Mr. Woodall. If Ms. McCarthy had recommended thorough investigations and defense of these case, that would been Mr. Woodall course of action.

The Respondents are merely attempting to insulate their inactions with the WCC's receivership status.

The key question is whether Mr. Woodall analyzed the various known options and brought to the attentions of interested parties, for their consideration at the time the court approved his actions, not just what was in WCC's best interests. In a case that this court upheld a receiver's action, the court found the following:

> In order to obtain court approval of the lease, Koll submitted a lengthy analysis of the lease and market conditions, including two declarations which the court considered. The second declaration specifically addressed and analyzed EMOP's objections to the proposed lease. Thus, Koll twice analyzed the various known options and risks, and twice set them forth for consideration by EMOP and the court. In addition, Koll brought three options (counteroffer walk-away, or approval) to the attention of the court and set forth the risks and benefits of each. The court was fully advised of and considered, the available risks and options when it approved the lease. Travelers Insurance Co. v. Gregory et. al., 1998 Wash. App. LEXIS 1517 under Discussion at 11.

WCC and its receiver did not exhibit the diligence and care stated above, and did not considered the views, opinions and more importantly the risks to the Appellant when they made their decision to settle meritless claims.

The Washington State Supreme said, " a receiver is bound to exercise reasonable care and diligence in the management of his trst, and he and his surety are

responsible in damages to persons who suffer loss because of the failure of the receiver to perform his duty". Yakima Finance Corp. v. Thompson, 171 Wash. 309,316, 17 P. 3d. 908, (1933).

As Appellant stated in his Opening Brief at page 23, the Washington Insurance Guaranty Act is designed to protect both claimants and insureds from insolvent insurers.

> The objective of the Washington Insurance Guaranty Act (chapter 48.32 RCW) is to place both the claimant and the insured into the position they would have occupied had the insurer been solvent. Gallagher v. Sidhu et. al., 126 Wn. App. 913; 109 P.3d. 840;2005 Wash. App. LEXIS 353.

The Appellant's "position" means the contract the Appellant signed with WCC should remain in force despite WCC's insolvency. This is what is at issue in this appeal. The Respondents have stated that the breach of contract occurred because WCC in receivership had no choice but to do so. This is in violation of Washington Insurance Guaranty Act. The Respondents' use of "WCCR" or Mr. Woodall as a cover for the breach of contract should be rejected.

The Washington Insurance Guaranty Act and similar laws were designed to protect insureds from events such as occurred in this instant case.

SUCCESSOR LIABILITY DOCTRINE

The Appellant's reference to successor liability doctrine was raised because the Respondents stated to the trial court that "WCCR" is a predecessor to WCC, and that WCCR no longer exists. Respondents also stated that "all the assets vested in the receiver and WCCR were transferred back to WCC". By that line of argument, WCC becomes a "successor" to WCCR. As a successor corporation to WCCR, WCC becomes responsible for the assets and liabilities of WCCR. The Appellant acknowledges that this may be an case of first impression.

The Respondents stated at page 18 of their response: "Obviously, the imposition of such liability would frustrate the purpose of receiver/rehabilitation". The Appellant respectfully disagrees but instead argues that imposition of liability would ensure that a receiver acknowledge and enforce a binding contract between an insolvent insurer and its insured, consider the views and opinion of the "interested parties" and risks to these parties before making a decision. Decisions made solely to preserve the interests of the company without regard to the interests of the insured cannot be a fully informed decision.

CONCLUSION.

The Appellant requests this Court to grant his summary judgment on the breach of contract of May 2007 that occurred after the receivership ended on October 6, 2006, overturn the rulings of the trial court dismissing this case and reinstate this civil action.

RESPECTFULLY SUBMITTED this 8th day of January, 2014.

Charles Momah MD.

Appellant.

CERTIFICATE OF SERVICE

I, Charles Momah hereby certify under penalty of perjury that on January 28 2014 a copy of the Appellant's answer to the Respondents' brief was mailed to the Respondents' attorney, Mr. C. Kerley at his address below.

cc: Mr. C. Kerley
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