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No. 70892-9-I

COURT OF APPEALS
OF THE STATE OF WASHINGTON, DIVISION I

ESTHER KIM, as Personal Representative of the Estate of HO IM BAE on behalf of Mi-Soon Kim, Jae C. Kim, Chang Soon Kim, Jae Hong Kim, and Kyoung Soon Kim, surviving family members, and the ESTATE OF HO IM BAE,

Plaintiff/Appellant,

v.

ALPHA NURSING & SERVICES, INC., and CHRISTINE THOMAS,

Defendants/Respondents/Cross-Appellants.

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STATE OF WASHINGTON
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RESPONDENTS/CROSS-APPELLANTS ALPHA NURSING & SERVICES, INC. AND CHRISTINE THOMAS, R.N.'S REPLY BRIEF

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I. SUMMARY OF ARGUMENT

The trial court's denial of Nurse Thomas' motion to dismiss should be reversed because Appellants failed to properly serve her in Norway under the Hague Convention within the applicable statute of limitations period. The arguments set forth by Appellants justifying their attempted service of process on Nurse Thomas rely solely upon novel interpretations of the Hague Convention, Norwegian Law, and completely fail to address a Norwegian citizen's right to be served with legal process in her native language.

Appellants' attempted service of process did not comply with Article 5 of the Hague Convention because Article 5 applies only to service conducted by the state's Central Authority or designated agency. Article 5 does not permit service by an independent private investigator. It is undisputed that Appellants' did not go through Norway's Central Authority nor was their private investigator designated by Norway's Central Authority to serve Nurse Thomas.

Similarly, Appellants' service of process did not comply with Article 19 of the Hague Convention because it permits only those methods of service from the State's internal laws that specifically allow the service of documents coming from outside the country. Article 19 does not transform a country's internal civil procedure rules for intrastate service

into methods of interstate service. There is no indication that the Norwegian court rules were meant to apply to service of documents coming from outside the country written in a foreign language or that they were meant to circumvent traditional service of process under the Hague Convention.

Further, the statute of limitations period for service on Nurse Thomas has expired. Appellants were improperly granted an indefinite period of time to serve Nurse Thomas with process under RCW 4.16.170. The time to serve Nurse Thomas was not indefinite, but needed to be conducted in a timely manner. Appellants' yearlong delay before attempting ineffective service on Nurse Thomas, however, cannot be considered timely under Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.3d 781 (1991). Appellants were informed numerous times that Nurse Thomas resided in Norway and would need to be served there under the Hague Convention. Appellants, however, waited a year to attempt service. Nurse Thomas, on the other hand was prejudiced by the Appellants' delay and the unlimited tolling of the statute of limitations because the statute of limitations has run long before summary judgment was granted, and thus, she was entitled to dismissal of the claims against her without having to file a CR 56 motion.

Nurse Thomas and Alpha are also entitled to attorneys' fees and costs pursuant to Washington's Long Arm Statute and as a sanction against Appellants for their violations of the Rules of Professional Conduct. Appellants do not address, and thus, do not oppose this request. Appellants also do not dispute that their ex parte contact with Nurse Thomas violated the Rules of Professional Conduct. Appellants assertion of mootness is invalid because nothing on the record shows that Appellant's withdrew their argument regarding the Acceptance of Service/Waiver of Affirmative Defense Form, and a mootness argument does not excuse unethical ex parte contact with a represented party.

II. REPLY ARGUMENT ON CROSS-APPEAL

A. Service of Process Under the Hague Convention Must Be Conducted by the Country's Central Authority or Designated Agency

Appellants do not deny that compliance with the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, Nov. 15, 1965, 20 U.S.T. 361, T.I.A.S. No. 6638 (the "Hague Convention"), is applicable here. The crux of Appellants' opposition is that the Hague Convention did not prohibit personal service of foreign process written in a foreign/non-native language upon Nurse Thomas, a Norwegian citizen and resident, because she accepted delivery voluntarily, and Norwegian internal law permits

service of civil legal documents by a process server at the subject's place of residence. In essence, Appellants assert that the Hague Convention authorizes "many agreed-upon methods of service," and their service on Nurse Thomas complied with those methods. Any reasonable reading of the Hague Convention and Norwegian law, however, demands the opposite conclusion.

1. Service Was Not Proper Under Article 5 of the Hague Convention.

Appellants argue that service of foreign process, regardless of the method, is authorized under Article 5 of the Hague Convention as long as the individual accepts delivery of the document voluntarily. This novel interpretation of Article 5, however, is without support in law or fact. While Appellants' brief offers a lengthy discussion on what the Hague Convention is, Appellants offer no case law or other support to validate their interpretation of service of process under Article 5. Appellants' analysis takes a small excerpt of Article 5 out of context and attempts to expand the rule based on that single excerpt. Article 5 states in full:

> *The Central Authority of the State addressed shall itself serve the document or shall arrange to have it served by an appropriate agency*, either -
> *a)* by a method prescribed by its internal law for the service of documents in domestic actions upon persons who are within its territory, or

> *b)* by a particular method requested by the applicant, unless such a method is incompatible with the law of the State addressed.
> Subject to sub-paragraph *(b)* of the first paragraph of this Article, the document may always be served by delivery to an addressee who accepts it voluntarily.
> If the document is to be served under the first paragraph above, the Central Authority may require the document to be written in, or translated into, the official language or one of the official languages of the State addressed.
> That part of the request, in the form attached to the present Convention, which contains a summary of the document to be served, shall be served with the document.

Hague Convention, art. 5 (emphasis added).

While Article 5 permits service of process "by a particular method requested by the applicant," and subject to sub-paragraph *(b),* "served by delivery to an addressee who accepts it voluntarily," this service must be conducted by the "Central Authority of the State," or the Central Authority must "arrange to have it served by an appropriate agency." Id. Use of the term "shall" dictates that service by the Central Authority or a designated agency is mandatory. See Brockmeyer v. May, 383 F.3d 798, 801 (9th Cir. 2004) (stating that Article 5 of the Hague Convention "affirmatively requires the Central Authority to effect service in its country"). The plain language of Article 5 makes clear that its subparagraphs relate only to

service by the Central Authority or designated agency. There is no language which authorizes the subparagraphs of Article 5 to apply to other private individuals.

There is no basis for Appellants' interpretation of Article 5 as permitting service of process by any party simply based on voluntary acceptance of the individual. Appellants have offered no case law to support their argument. Appellants are nonetheless asking this Court to create a new international service of process rule based on a tiny excerpt of Article 5, read in isolation, while ignoring the entirety of Article 5. Appellants cannot mask the fact that the plain language of Article 5 permits voluntary acceptance of service of process only when conducted by the Central Authority of the State or a designated agency. It does not authorize service by an independent private investigator of foreign process written in a non-native language to a represented party.[1]

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[1] This is further supported by the Norwegian government's response to Appellants' inquiries into service of process. From March 26, 2013-April 9, 2013, Appellants' sought the assistance of the Norwegian Ministry of Justice and Public Security to properly serve Nurse Thomas. At no point does the Norwegian government offer or suggest to Appellants' to seek private service of process under Article 5, Article 19 or its own internal court rules. CP 1210-1213. The Norwegian Ministry of Justice and Public Security states, "As soon as we receive the documents, we will forward the request of the District Court…The district court will then give us reply whether the request has been complied with or not." Id.

There is no evidence in the record that Appellants used the Central Authority of Norway to serve Nurse Thomas. There is no evidence in the record that Appellants' private investigator was designated by the Norwegian Central Authority to serve Nurse Thomas. Based on the explicit language of Article 5 of the Hague Convention, Appellants' attempted service of foreign process on Nurse Thomas via independent private investigator was not authorized.

2. *Service Was Not Proper Under Article 19 of the Hague Convention or Norwegian Law.*

Further, Appellants argue their service of process on Nurse Thomas was authorized under Article 19 of the Hague Convention because Norwegian Court Rules permit service of civil legal documents by a process server at the subject's place of residence. Appellants however, have failed to offer any support that Norway's internal court rules were intended to offer foreign parties alternative avenues for service of process under the Hague Convention. Article 19 states:

> To the extent that the internal law of a Contracting State permits methods of transmission, other than those provided for in the preceding Articles, *of documents coming from abroad*, for service within its territory, the present Convention shall not affect such provisions.

Hague Convention, art. 19 (emphasis added).

Article 19 provides that service of documents from abroad may be made by any method permitted by the internal law of the receiving state. Brockmeyer v. May, 383 F.3d 798, 801-02 (9th Cir. 2004). Article 19 has been interpreted to authorize only those methods of service "that specifically allow the service of documents coming from outside the country in question." GMA Accessories, Inc. v. BOP, LLC, No. 07-civ-3219-PKC-DCF, 2009 WL 2856230 (S.D.N.Y. Aug. 28, 2009). See also ePlus Technology, Inc. v. Aboud, 155 F.Supp.2d 692, 700 (E.D. Va. 2001) ("Article 19 is appropriately and sensibly read as allowing only those methods of service explicitly sanctioned by the contracting state"); Banco Latino, S.A.C.A. v. Gomez Lopez, 53 F.Supp.2d 1273, 1279–80 (S.D. Fla. 1999) (holding that Article 19 permits service methods expressly provided for by another country); EOI Corp. v. Med. Mkt. Ltd., 172 F.R.D. 133, 136 (D.N.J. 1997) ("Article 19 provides for service by any means envisioned by the internal laws of the country in which service is made"). Thus, unless explicitly stated, Article 19 "does not transform internal methods of intrastate service into methods of interstate service." In re Mak Petroleum, Inc., 424 B.R. 912, 920 (Bankr. M.D. Fla. 2010) (*quoting* Humble v. Gill, No. 1:08-cv-00166-JHM-ERG, 2009 WL 151668 (W.D. Ken. Jan. 22, 2009)).

Norwegian Courts of Justice Act, ch. 9 §§ 165, 168[2] (2005), are not written to comply with Article 19 because they lack explicit language indicating that they were meant to apply to "documents coming from abroad." Section 165, translated from Norwegian, states in full:

> § 165. Service of process by other than postal means pursuant to § 163 a may always be performed by a process server.
>
> Instead of a process server, public authorities may use a police or probation services employee for service of process in criminal cases. Service of process in relation to currently serving military personnel in criminal cases may also be performed by officers or military police. Where it is necessary to save time, public authorities may allow service to be performed in other cases by a party authorised by the court to do so. To those parties thus performing service of process, the provisions relating to process servers apply.

Norwegian Courts of Justice Act, ch. 9 § 165.[3] Section 168,[4] translated from Norwegian, states in full:

> § 168. Service of process by a process server shall to the greatest possible extent take place in person, preferably at the recipient's place of residence or regular workplace.

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[2] Incorrectly cited in Appellants' Brief as Section 167.

[3] An unofficial translation of the Norwegian Court rules can be located at: http://www.domstol.no/en/National-Courts-Administration/Publications/.

[4] Appellants' brief incorrectly cites to Section 167 of the Norwegian Court Rules. Section 167 states, "[s]ervice of process should not take place on public holidays or outside normal daytime hours, unless this is unavoidable."

> Where he/she is personally served, the service is valid regardless of where the encounter takes place.

Norwegian Courts of Justice Act, ch. 9 § 168. At most, the plain language of these rules reflect that service of process can be conducted by a process server authorized by the local court, in person, preferably at the recipient's place of residence. There is no indication that these rules also apply to service of process originating from outside Norway. Further, there is no indication these rules were meant to permit service of process written in a non-native foreign language. This is further evidenced by the fact that the Court Rules, cited by Appellants, were translated by the Norwegian Government from Norwegian into English. There is no indication that the Norwegian government would allow non-translated service of process on its own citizens. And, there is no indication that these rules were meant to circumvent traditional service of process under the Hague Convention. Finally, there is simply nothing in the record that the process server was a police or probation services employee, or alternatively, was granted specific authorization by a court to serve Nurse Thomas.

Appellants offer no substantive analysis of Article 19 or the Norwegian court rules other than to conclusively state that their personal service on Nurse Thomas was proper. There is no support for Appellants' argument, nor have they offered any. Yet, Appellants are asking this

Court to ignore the explicit language of Article 19, and allow any method of service that satisfies a state's internal laws for service of process, regardless of whether the rule specifically authorizes parties to use that method to serve "documents coming from abroad." Granting Appellants' interpretation of Article 19 would render the terms "of documents coming from abroad" meaningless because any method of service authorized under a state's internal laws would satisfy Article 19, regardless of whether the state's lawmakers intended for those methods to apply to documents coming from another country.

In sum, Appellants are asking this Court to bypass all of the Hague Convention's procedures, ignore Norwegian law and simply allow service of documents in a foreign country without compliance with that country's domestic service rules. There is no support for such an outcome.

B. The Statute of Limitations Was Not Tolled Indefinitely

Appellants do not dispute that the three year statute of limitations began to run from the date of Ms. Bae's death, March 30, 2009, and expired on March 30, 2012. Appellants argue that pursuant to Sidis v. Brodie/Dohrmann, Inc., 117 Wn.2d 325, 815 P.3d 781 (1991), service on Alpha tolled the statute of limitations on Nurse Thomas for an indefinite period of time. Sidis, however, does not toll the statute of limitations indefinitely. As made clear by the Supreme Court:

> While it is true that RCW 4.16.170, literally read, tolls the statute of limitation for an *unspecified* period, that period is not *infinite* as the court implied. Plaintiffs must proceed with their cases in a timely manner as required by court rules, and must serve each defendant in order to proceed with the action against that defendant. A plaintiff who fails to serve each defendant risks losing the right to proceed against unserved defendants if the served defendant is dismissed[.]

Sidis, 117 Wn.2d at 329-30 (emphasis in original). The tolling period is not infinite, but requires that plaintiffs proceed in a "timely manner." Id. The potential for dismissal serves to limit how long a plaintiff can wait to serve all named defendants. Bosteder v. City of Renton, 155 Wn.2d 18, 49, 117 P.3d 316 (2005).

Appellants delayed efforts to serve Nurse Thomas in Norway go beyond what could be considered timely under Sidis. The rationale offered by Appellants to explain the one year delay in attempted service of process is nothing more than a red herring which takes liberties with the facts on record. First, Appellants argue that Nurse Thomas "did not make herself available for service." See Appellant's Reply, at p. 21. This is not a legitimate reason for the delay and incorrectly imputes a duty on Nurse Thomas to be available for service. Nurse Thomas had no affirmative duty to ensure availability at a time/location of Appellants' choosing to be

served. The duty to serve Nurse Thomas with process was on the Appellants, not Nurse Thomas.

Second, Appellants assert that Nurse Thomas "left the United States to reside in a foreign county." Id. That fact that Nurse Thomas is a citizen and resident of Norway does not justify the year delay in service. Appellants were well aware of Nurse Thomas's residence and the service of process rules under the Hague Convention and, had they chose to timely utilize those measures, could have appropriately served Nurse Thomas without delay. Nowhere is there any allegation that Nurse Thomas moved to avoid service of process. A defendant is not prevented from returning home just because she may or may not be served with process. This is not a legitimate justification.

Appellants' third, fourth and fifth reasons claim that "defense counsel withheld Thomas' address," "Kim sought information regarding Thomas' whereabouts," and "once locating Thomas, Kim made every effort to comply with the laws of Washington, the laws of Norway and the Hague Convention to effect proper service." Id. All of these assertions are unsupported by the record. The record makes clear Nurse Thomas' address was not withheld, and that any delay in service was the result of Appellants' lack of diligence despite being repeatedly informed about Nurse Thomas's Norwegian residence:

March 21, 2012 – Appellants name Nurse Thomas as a defendant. CP 924-933.

March 30, 2012 – Statute of limitations runs. CP 924-933.

April 30, 2012 (six weeks post-amended complaint) – Appellants sent Request for Admissions solely to Alpha. CP 1164-1168.

May 3, 2012 (six months post-amended complaint) – Alpha responded to the Requests indicating that Nurse Thomas had not been served. Id.

September 25, 2012 (eight months post-amended complaint) – Four and a half months later, Appellants served overbroad discovery requests upon Alpha seeking among other things, contact information for all former and current Alpha employees who ever treated Alpha patients at Lakeside. CP 1170-1174.

November 2012 (nine months post-amended complaint) – Appellants were advised that Nurse Thomas was a Norwegian citizen and entitled to the protection of the Hague Convention. CP 1255-1264.

December 11, 2012 (11 months post-amended complaint and 11 weeks after Nurse Thomas home address was known) – Counsel reached an agreement regarding Alpha's objections to the overbroad request, and Alpha provided the current contact information for Nurse Thomas. CP 1192-1195.

February 27, 2013 (12 months post-amended complaint and 14 weeks after Nurse Thomas' home address was known) – Two and a half months after receiving Nurse Thomas' contact information, Appellants again requested, via e-mail, Nurse Thomas' contact information. CP 1199.

March 21, 2013 – Appellants retained a private investigator to hand copies of the First Amended Summons and First Amended Complaint to Nurse Thomas in Norway. CP 1236-1254.

April 4, 2013 – Appellants' counsel offered evidence regarding his research on service under the Hague Convention, dated two days after Nurse Thomas filed her CR 12 motion to dismiss. CP 1066-1067.

Counsel for Nurse Thomas acted diligently and appropriately to respond to Appellants' discovery requests. Nurse Thomas' address was not withheld. The fact that Appellants served objectionable discovery requests, and failed for months to appropriately tailor their discovery, does not equate to withholding of information, nor does it justify a year delay in service. In Bosteder, the Court excused an 11-month delay where the plaintiff had incorrectly identified a defendant and believed the defendant to be served. No such mistaken identity exists here. Appellants were informed multiple times that Nurse Thomas resided in Norway and would need to be served there under the Hague Convention. Appellants' yearlong delay is unreasonable and solely the result of their own inaction.

The real issue is the trial court's (Judge Okrent) ruling that the statute of limitations was tolled indefinitely and that the Appellants had forever to properly serve Nurse Thomas. This ruling certainly drew the attention of the same trial court when it was considering whether to certify the order for immediate appeal. Specifically, Judge Ellis recognized the import of Judge Okrent's order when she certified the following issues for immediate review:

> (1) the potential tolling of the statute of limitations, indefinitely, as to one defendant where another co-defendant was timely served;
>
> (2) whether a Norwegian citizen must be served in accordance with the Hague Convention; and
>
> (3) whether a plaintiff may seek and obtain a waiver of affirmative defenses via ex parte with a defendant who is represented by counsel.

CP 532-534.

Nurse Thomas, on the other hand, was prejudiced by Appellants' delay and the unfettered tolling of the statute of limitations because the statute of limitations had run before service was properly made on her, and thus, she was entitled to dismissal of the claims against her. Indeed, as of June 1, 2013, a month after the summary judgment hearing, Appellants' were still waiting to complete proper service of Nurse Thomas. CP 1042-

1044. Appellants' actions cannot be considered timely under Sidis, and they should not benefit from their inaction.

C. Appellants Do Not Dispute that Nurse Thomas is Entitled to Attorneys' Fees and Costs Under the Long Arm Statute

Rule 18.1(a) of the Washington Rules of Appellate Procedure states that if "applicable law grants to a party the right to recover reasonable attorney fees or expenses on review before either the Court of Appeals or Supreme Court, the party must request the fees or expense as provided in this rule, unless a statute specifies that the request is to be directed to the trial court. Wa. R.A.P. 18.1(a). The party must "devote a section of its opening brief to the request for the fees or expenses. Wa. R.A.P. 18.1(b).

It is undisputed that Appellants attempted service on Nurse Thomas pursuant to Washington's Long Arm Statute, R.C.W. 4.28.185. CP 1246-1254. In compliance with Rule 18.1, Respondents/Cross-Appellants devoted a section of their opening brief outlining their entitlement to attorneys' fees and costs under the Long Arm statute. Appellants' Brief does not address, let alone oppose this request. Thus, if service of process under the Long Arm Statute is found improper, then Nurse Thomas' request for attorney's fees and costs should be granted. Therefore, this Court is requested to do two things: first, award fees and

costs for this appeal to Nurse Thomas; and second, remand this matter to the trial court for an award of fees and costs incurred in the trial court, per Washington's Long Arm Statute.

D. The Acceptance of Service/Waiver of Affirmative Defense Form Was Not Withdrawn

Instead of asserting that their ex-parte extraction of a waiver of affirmative defenses from Nurse Thomas was ethical under the Rules of Professional Conduct, Appellants attempt to sidestep this issue by arguing mootness. Indeed, Appellants make no attempt to justify or explain their conduct. Moreover, Appellants' offer no support for their assertion that mootness can somehow alleviate or cure a violation of RPC 4.2. Appellants simply make vague reference to the fact that they previously waived argument regarding the legal efficacy of the service/waiver form without any citation to the record.

There is nothing in the record which indicates that the Appellants' argument regarding the Acceptance of Service/Waiver of Affirmative Defense Form was actually withdrawn, nullifying Appellants' mootness argument. As such, Appellants' unethical conduct is very much alive and at issue before this Court. The undisputed record shows Appellants' sought to obtain a waiver of affirmative defenses via ex-parte contact with Nurse Thomas, who Appellants knew was represented by counsel. These

facts are undisputed, and warrant reversal of the trial court's initial endorsement of the unethical conduct and referral to the Washington State Bar Association for further investigation.

The Court should take note that Nurse Thomas, in her opening brief, pointed to not only the original RPC 4.2 violation, but also to Appellants' trial counsel's aggressive and continued defense of the RPC 4.2 violation during motion practice before the trial court as evidence of the attorneys' continued refusal to recognize the reportable RPC violation. The Court should not overlook that appellate counsel for Appellants have not advanced the argument that the ex parte contact was ethical. The failure to advance such an argument is a tacit recognition of the ethical violation simply because Appellants' appellate counsel recognize the Rules of Professional Conduct and will not endorse the conduct of Appellants' trial counsel.

III. CONCLUSION

Alpha and Nurse Thomas request that the trial court's grant of summary judgment be affirmed. In addition, Nurse Thomas asks this Court to reverse the trial court's denial of the CR 12(b) Motion and award fees and costs to Nurse Thomas pursuant to RCW 4.28.185(5) and RAP 18.1.

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RESPECTFULLY SUBMITTED this 16th day of June, 2014.

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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on June 16, 2014, I caused copies of the foregoing document to be served on the following parties as indicated below:

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SIGNED AND DATED at Seattle, Washington, this 16th day of June, 2014.

Bonnie L. Enera, Legal Assistant

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