NO. 46105-6-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

RONALD AUER and JOHN TRASTER,

Appellants/Cross-Respondents,

v.

J. ROBERT LEACH and JANE DOE LEACH, his wife; CHRISTOPHER KNAPP and JANE DOE KNAPP, his wife; GEOFFREY GIBBS and JANE DOE GIBBS, his wife; ANDERSON HUNTER LAW FIRM, P.S., INC.,

Respondents/Cross-Appellants.

RESPONDENTS' REPLY BRIEF IN SUPPORT OF CROSS-APPEAL

Philip R. Meade, WSBA #14671
Nicholas G. Thomas, WSBA #42154
Attorneys for Respondents/Cross-Appellants

MERRICK, HOFSTEDT & LINDSEY, P.S.
3101 Western Ave., Suite 200
Seattle, WA 98121
Telephone: (206) 682-0610
Facsimile: (206) 467-2689

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I. ARGUMENT IN REPLY

Plaintiffs' argument in response to the cross-appeal focuses on the amendment of a summons to correct an error. This case involves a different issue: whether a summons that commenced an action in the King County Superior Court may be redesignated to be a summons for an action previously filed in Snohomish County Superior Court, in order to invoke the tolling provisions of RCW 4.16.170 by treating service of the King County summons as service of a summons for the filed Snohomish County action? The simple answer is "no." Plaintiffs' malpractice claim was not commenced within the statute of limitation because Plaintiffs did not complete commencement of the Snohomish County action within three years, and did not satisfy the provisions in RCW 4.16.170 to toll the statute of limitation for the Snohomish County action.

Plaintiffs' legal negligence claim had to be commenced within three years of its accrual or it was barred. RCW 4.16.005; RCW 4.16.080(2). Under RCW 4.16.170, the statute of limitation is tolled if a Plaintiff either serves a summons or files a Complaint for an action before the limitation period expires, and then completes the second step – filing the Complaint or serving the summons – within 90 days of performing the first step. Failure to complete both steps as required allows the limitation period to lapse, regardless of a Plaintiff's intentions and regardless of

notice to the defendant that an action was filed. *Nearing v. Golden State Foods Corp.*, 114 Wn.2d 817, 820, 792 P.2d 500 (1990). Here, Plaintiffs did not serve anyone with any summons or complaint within three years of when the action accrued. Thus, the action filed in Snohomish County is time-barred unless the limitation period was tolled pursuant to RCW 4.16.070 by service within 90 days of a summons for the Snohomish County action.

In Washington, unlike most jurisdictions, serving a summons for a Superior Court action before filing the complaint in that court commences an action in the county designated in the summons:

> **RCW 4.28.020. Jurisdiction acquired, when.**
>
> From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings.

See Nearing, 114 Wn.2d at 822. *See also* CR 3. Service of a summons commences an action in the court designated in the summons for determining whether the statute of limitation was tolled by RCW 4.16.170. *Nearing*, 114 Wn.2d at 822. When analyzing an issue under RCW 4.16.170, that statute controls over the Civil Rules. *Id.* at 822.

Even if Plaintiffs did not intend to do so, their service of a Summons with the King County Superior Court designation commenced a

second action against defendants in the King County Superior Court,[1] at least for purposes of analyzing whether Plaintiffs may invoke the tolling provision in RCW 4.16.170. *See Nearing*, 114 Wn.2d at 822. Because their service of the King County Summons was a jurisdictionally significant act that invoked the jurisdiction of the King County Superior Court, the Plaintiffs could not later redesignate[2] that same summons to be a Snohomish County summons for purposes of RCW 4.16.170 by claiming the court from which they issued the summons was simply named by mistake.[3] This makes the discussion about an amendable defect

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[1] After Plaintiffs' counsel served the summons issued for a King County Superior Court action, defendants served upon Plaintiffs a Notice of Appearance for the King County action. CP 942-944. Plaintiffs did not discuss their receipt of that Notice of Appearance in their briefs before this court or before the trial court. That Notice was provided to Plaintiffs on May 17, 2011, via facsimile, along with a letter from defense counsel confirming the representation regarding claims asserted by Messrs. Auer and Traster. *Id.* Plaintiffs also received a Notice of Substitution for representation of Defendants in the Snohomish County case, on May 27, 2011. CP 1143-44.

[2] Author Bill Watterson might prefer the term "transmogrify" to describe Plaintiffs' efforts to have the King County summons redesignated as a summons issued for the Snohomish County action. *See* CP 869.

[3] The impropriety of changing the designation of the court in a caption of a summons that commenced an action is analogous to the restrictions on a court's ability to enter an order *nunc pro tunc*. Such an order may be entered only to reflect what actually happened, not to add new facts or perform a different act. *Bruce v. Bruce*, 48 Wn.2d 635, 636, 296 P.2d 310 (1956); *Kent v. Lee*, 52 Wn. App. 576, 580, 762 P.2d 24 (1988). Here, Plaintiffs served a summons that had the legal effect of commencing a King County Superior Court action. Their request to change the consequence of what they did does not seek an amendment to the summons to conform to what was done, but instead seeks to change what was done by transforming the summons into something they wanted to do. Their

irrelevant because the discussion about amendment presumes the summons served on April 26, 2011, was a summons for the Snohomish County action. Unless a summons can simultaneously stand as both a summons for the King County Superior Court and a summons for the Snohomish County Superior Court, there was nothing to amend because no summons for the Snohomish County action was served on April 26, 2011.

Plaintiffs cannot establish they satisfied RCW 4.16.170 because the King County Summons they served during the 90-day period after filing their Snohomish County action simply was not a summons for the Snohomish County action – it was designated a King County summons and upon service it operated to commence a King County action, even if unintentionally. Plaintiffs did not file a Complaint in the King County Superior Court, resulting in that action lapsing. They did not serve a summons for the Snohomish County action on any defendant until June

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request to change the court named in the summons caption is not a request to amend a defect in a Snohomish County summons, but a request to deem the summons issued for a King County action a summons for a different action filed in Snohomish County; this request seeks to effect service of process *nunc pro tunc,* and thereby satisfy RCW 4.16.170's 90-day limit for completing service of the filed Snohomish County Superior Court action. While Plaintiffs phrased their request for *nunc pro tunc* relief in terms of seeking permission to retroactively file the summons they served with a change in the court named in the caption (CP 910), the request was effectively to order that what had been served (a King County summons) should be treated as something different (a Snohomish County summons).

16, 2011,[4] which was too late to invoke the tolling provision in RCW 4.16.170.

In responding to this cross-appeal, Plaintiffs framed the issue as one involving mere notice and the amendment of a defect in a pleading.[5] They rely on federal cases focusing on whether a defective summons served with a complaint nevertheless provided sufficient notice to the defendant that an action had been filed against him to avoid prejudice resulting from the defect.[6] These cases are inapposite because the summons involved in each case unquestionably pertained to a single

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[4] Plaintiffs served defendants Leach on June 16, 2011, by obtaining an acceptance of service of the Summons they had filed in the Snohomish County Superior Court on February 14, 2011. CP 938; CP 940. *See* CP 1024-1038.

[5] A summons is not a pleading. Black's Law Dictionary, 4th Ed. (1968), explains that pleadings are "the formal allegations by the parties of their respective claims and defenses for the judgment of the court." *See also* CR 7. Thus, rules that allow minor defects in pleadings to be corrected, including RCW 4.32.250 that the trial Court cited (CP 817-818), have no application here. In any event, naming the court whose jurisdiction is invoked in the summons is not a minor aspect of the summons. A Washington summons is legal process and is statutorily required to be served upon a defendant, generally by physical delivery, before a court's jurisdiction extends to the person of the defendant. *See In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988). *See also Oytan v. David-Oytan*, 171 Wn. App. 781, 806, 288 P.3d 57 (2012).

[6] Defendants have never denied that at least some of them learned in late April 2011 that Plaintiffs had filed a lawsuit in the Snohomish County Superior Court naming them as defendants. Instead, Defendants have consistently maintained Plaintiffs did not serve any defendant with a summons for that case until June 16, 2011, and therefore Plaintiffs' negligence action was not commenced timely. As discussed elsewhere, Washington courts have held that the statutory requirements for service of a summons are jurisdictional, and defendants have maintained Plaintiffs failed to comply with those requirements.

action commenced by a filed complaint; actions in federal court are commenced by filing a complaint and then serving that complaint with a summons. *See* Fed. R. Civ. P. 4(c)(1) ("A summons must be served with a copy of the complaint."). Given the federal requirements, if a summons served with the complaint contains a defect that is "amendable," there is no ambiguity as to what action the summons relates to.

Similarly, the cases Plaintiffs cited from Georgia, New Jersey, and Nebraska, and the New York cases cited by the trial court, involved rules and procedures for commencing actions that required filing the complaint to commence the action, and then serving the complaint with a summons to extend personal jurisdiction. The North Dakota decision Plaintiffs cited, *James River Nat'l Bank v. Haas*, 73 N.D. 374, 15 N.W.2d 442 (1944), also involved a singular method for commencing an action, service of a summons, which must be accompanied by a copy of the complaint (whether or not it has been filed), instead of filing the complaint. None of these cases address Washington's unusual provisions that create two methods to commence an action, with the consequence that a mistaken effort to issue a summons might inadvertently commence a different action.

In *James River Nat. Bank*, the North Dakota Supreme Court explained its leniency toward service of a summons bearing a mistyped

court title by explaining that in North Dakota, a summons is not traditional process, but is merely a notice. 15 N.W. at 445. The Court discussed decisions in other jurisdictions that similarly treated a summons as merely a notice that would be provided to a defendant with a copy of a filed complaint and, in those circumstances, a defect in the notice was excusable as long as the defect did not prejudice the defendant by denying notice. *See id.* at 451.

Washington, in contrast, allows an action to be commenced in any of its thirty-nine counties' Superior Courts[7] by serving a summons. Rather than merely providing notice to a defendant that a complaint has been filed to commence the action against him (naming the court in which the Plaintiff filed the action), a summons issued in Washington has jurisdictional effect,[8] at least when a Plaintiff seeks to invoke the saving provision in RCW 4.16.170 to excuse the late commencement of a civil action.

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[7] Washington's Constitution establishes separate Superior Courts in each County. Art. IV, section 5; see also sec. 11. The separateness of these county Courts is recognized in the rules of procedure for Washington practice, including matters such as the court in which a party should file an appearance or answer, seek a default order, or record a judgment (CR 5(e)), and where a party must file a Notice of Appeal (RAP 5.2(a)).

[8] RCW 4.28.020. Jurisdiction acquired, when.

From the time of the commencement of the action by service of summons, or by the filing of a complaint, or as otherwise provided, the court is deemed to have acquired jurisdiction and to have control of all subsequent proceedings.

Plaintiffs and the trial court each acknowledged that Washington courts have rigorously enforced the statutes governing the manner of service, while being more lenient about the form of a summons. CP 816, Order Denying Defendants' Motion for Partial Summary Judgment, at 6, *citing* 14 Karl B. Tegland, Washington Practice: Service of Process § 8.2 (2d ed. 2009); Appellants' Brief in Response to Cross Appeal at 37, citing *Quality Rock Products, Inc. v. Thurston County*, 126 Wn. App. 250, 108 P.3d 805 (2005) (including citation to 14 Karl B. Tegland, Washington Practice: Service of Process § 8.2 (Supp. 2004)). When the summons served on April 26, 2011 is recognized to be a summons for a King County action rather than one for a Snohomish County action, these authorities support dismissal of the Plaintiffs' action as not timely commenced.

Washington courts have held that the statutory requirements for service of a summons are jurisdictional, and that failure to comply with those requirements deprives the court of personal jurisdiction over the defendant, even if the defendant received actual notice of the proceeding. *Weiss v. Glemp*, 127 Wn.2d 726, 734, 903 P.2d 455 (1995)("Beyond due process [requirements], statutory service requirements must be complied with in order for the court to finally adjudicate the dispute between the parties"); *Gerean v. Martin-Joven*, 108 Wn. App. 963, 971-972, 33 P.3d

427 (2001) ("the cases in this state are clear: actual notice does not constitute sufficient service"). Service of a summons to commence an action is, therefore, a jurisdictional action. *See also* RCW 4.28.020. Neither a Plaintiff nor a trial court can rewrite history to change what was performed to something different that might have been intended.

Here, Plaintiffs did not serve a summons for the Snohomish County action until June 16, 2011. That was more than 90 days after they filed the action, on February 14, 2011. Plaintiffs cannot avail themselves of the tolling provision in RCW 4.16.170, and the statute of limitation bars their legal malpractice claims. The trial court erred in failing to dismiss these claims based on the statute of limitations, and its later order dismissing those claims should be affirmed on the additional basis that the action is barred by RCW 4.16.005 and RCW 4.16.080(2).

RESPECTFULLY SUBMITTED this 15th day of October, 2014.

MERRICK, HOFSTEDT & LINDSEY, P.S.

By _____
Philip R. Meade, WSBA #14671
Nicholas G. Thomas, WSBA #42154
Of Attorneys for Respondents/Cross-Appellants

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On October 15, 2014, I caused to be served a copy of the document described as **RESPONDENTS' REPLY BRIEF IN SUPPORT OF CROSS-APPEAL** on the interested parties in this action, by United States, First Class Mail and email, addressed as follows:

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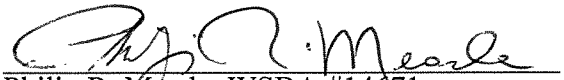
Law Offices of Brian H. Krikorian
4100 194th Street SW, Suite 215
Lynnwood, WA 98036

Attorney for Appellants/Cross-Respondents

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

Executed this 15th day of October, 2014.



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