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NO. 71561-5-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

CYNTHIA LARSON, and her husband KEITH LARSON, and the
MARITAL COMMUNITY COMPOSED THEREOF,

Respondents,

v.

KYUNGSIK YOON, and his wife, JANE DOE YOON, and the
MARITAL COMMUNITY COMPOSED THEREOF,

Petitioners.

APPELLANTS' BRIEF

Frank J. Steinmark, WSBA No. 23056
McCAFFERTY & STEINMARK, PLLC
520 Pike Street, Suite 2210
Seattle, WA 98101
(206) 728-0260
fjs@mccaffertysteinmark.com
Attorney for Appellants
Kyungsik Yoon and Jane Doe Yoon

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I. INTRODUCTION

On November 20, 2013, Defendants/Petitioners Kyungsik Yoon and Jane Doe Yoon (“Yoon”) filed a Motion for Summary Judgment in the trial court. Based upon the undisputed facts that (a) Yoon was at all relevant times a citizen and resident of the Republic of Korea (“Korea”) and that (b) Plaintiffs Keith and Cynthia Larson (“Plaintiffs”) had failed to accomplish process service upon Yoon in accordance with the Hague Convention rules on service of process within the applicable three year statute of limitations, Yoon’s Motion sought dismissal of Plaintiffs’ claims. Without explanation, the trial court denied Yoon’s Motion for Summary Judgment and subsequent Motion for Reconsideration. On May 19, 2014, this Court accepted discretionary review of the trial court’s orders.

Plaintiffs were absolutely bound by Hague Convention process service. Having failed to properly serve Hoon, the three year statute of limitations for Plaintiffs’ negligence claims expired. This Court should reverse the trial courts orders and dismiss Plaintiffs’ claims against Yoon with prejudice.

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II. ASSIGNMENTS OF ERROR

A. Assignments of Error.

1. The trial court erred in denying Yoon's Motion for Summary Judgment.

2. The trial court erred in denying Yoon's Motion for Reconsideration.

B. Issues Pertaining to Assignments of Error.

1. Did the trial court commit error by denying Yoon's Motion for Summary Judgment and Motion for Reconsideration seeking dismissal of Plaintiffs' claims for their failure to properly serve Yoon pursuant to the Hague Convention within the three year statute of limitations where (a) it is undisputed that Yoon was at all relevant times a resident and citizen of Korea, and where (b) Korea has objected to service upon its citizens through either postal channels or through judicial officers or officials of the State of origin thus requiring service under the Hague Convention to be performed by serving Yoon through Korea's Central Authority? (Assignment of Errors Numbers 1-2).

2. Did the trial court commit error by denying Yoon's Motion for Summary Judgment and Motion for Reconsideration by holding that service upon a resident of Korea via Washington's non-resident motorist service statute (RCW 46.64.040) is valid service

despite being in direct conflict with the requirements of the Hague Convention, Washington Supreme Court case law, U.S. Supreme Court case law and the Supremacy Clause found at Article VI of the United States Constitution? (Assignment of Errors Numbers 1-2).

III. STATEMENT OF THE CASE

A. Plaintiffs' Claims Arise Out Of A June 22, 2010 Vehicle Accident.

This matter arises out of a June 22, 2010 automobile accident in Bellevue, Washington in which Plaintiffs claim they were injured by the actions of Yoon, a Korean resident. CP 1-3. The accident police report identifies a valid Korean address for Yoon as follows:

416 Maetan-3 Dong, Yeongdong-Gu
Suwon-City, Gyeonggi-D
Korea 443-142

CP 28-29. Thus, at or around the time of the motor vehicle accident, Plaintiffs knew that Yoon was a resident of Korea; moreover, Plaintiffs were in possession of a valid Korean address for Yoon. CP 46-47.

B. The Hague Convention Requirements For Service On A Resident Of Korea.

The United States and Korea are signatories of the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (the "Hague Convention"). The Hague Convention provides that each nation designate a Central Authority for which a party

may effectuate process of service. Hague Convention, Article 2. A nation may allow other procedures for process service within its boundaries, or it may expressly object to a particular method of service. Critically, Korea expressly objected to: (1) the freedom to send judicial documents by postal channels, direct to persons abroad; (2) the freedom of judicial officers, officials or other competent persons of the State of origin to effect service of judicial documents directly through judicial officers or other competent persons of the State of destination; and (3) the freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through judicial officers, officials or other competent persons of the State of destination.¹

C. Plaintiffs Failed To Serve Yoon Per The Hague Convention Within The Three Year Statute Of Limitations.

Rather than serve Yoon in accordance with the Hague Convention, Plaintiffs elected to attempt nonresident motorist service pursuant to RCW 46.64.040.

On June 10, 2013, Plaintiffs filed their Summons and Complaint in King County Superior Court, approximately nine days before the expiration of the three year statute of limitations for a personal injury claim. CP 1-3, 12, 90. As provided in RCW 4.16.070, the statute of

¹ The full text of Korea's declaration is available on the Hague Convention's website, www.HCCH.net.

limitations was then tolled for a period of ninety days after Plaintiffs filed the Complaint so long as Plaintiffs accomplished process service on Yoon within that ninety day period.² Pursuant to the Hague Convention rules for service of process, Plaintiffs were required to send to Korea's Central Authority for Service two copies of the Summons and Complaint translated into Korean. Instead, on or about June 14, 2013, Plaintiffs pursued nonresident motorist service with the Washington Secretary of State pursuant to RCW 46.64.040. CP 13, 30.

The ninety day tolling period following the June 10, 2013 filing of the Complaint expired on or about September 13, 2013. CP 12-13, 90. At no time has Yoon been personally served with process in Korea. He has not received a mailed copy of the Summons and Complaint purportedly filed by the Plaintiffs in this matter from the Washington Secretary of State, nor has he received any contact or service from Korea's Central Authority per the Hague Convention. CP 46-47.

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² RCW 4.16.170 sets forth the 90 day tolling/service requirement:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served, whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served . . . within ninety days from the date of filing the complaint. . . . If following . . . filing, service is not so made, the action shall be deemed to not have been commenced for the purposes of tolling the statute of limitations.

D. The Pleadings And Actions Undertaken By Yoon.

On or about July 24, 2013, Yoon entered a Notice of Appearance in this action through counsel -- in doing so Yoon expressly did not waive service of process, the statute of limitations or any other defense in this matter. CP 21, 32-34. On or about August 22, 2013, Yoon served and filed his Answer and Affirmative Defenses to Plaintiffs' Complaint for Damages. CP 4-9, 14. Yoon's Answer and Affirmative Defenses were served upon Plaintiffs **several weeks prior to the expiration of the statute of limitations** which, pursuant to the 90 day tolling provision, expired on or about September 13, 2013. CP 14. In his Answer and Affirmative Defenses, Yoon asserted the following affirmative defenses:

3. Insufficient service and/or service of process upon these answering Defendants.

...

5. Plaintiffs' claims may be barred by the applicable statute of limitations.

CP 6-7. On or about September 26, 2013, Yoon timely responded to Plaintiffs' First Set of Interrogatories and Requests for Production within the 30 day requirement for serving answers to written discovery and specifically, Interrogatory No. 8 as follows:

Interrogatory No. 8: Set for each and every fact relied upon to support the contention of insufficient service and/or service of process upon the defendants.

Response: Mr. Yoon was and is a resident of the Republic of Korea (South Korea) at all times relevant to this action. The Republic of Korea is a party to the Hague Convention on the service abroad of judicial and extrajudicial documents in civil and commercial matters. The Republic of Korea has formally objected to service under Article 10 and does not permit service via postal channels. As a result, service must be accomplished directly through Korea's central authority for the Hague Service Convention. Non-resident service through the Washington Secretary of State is not an appropriate manner for serving Mr. Yoon as a resident of the Republic of Korea. The defendants understand that the statute of limitations has passed and that proper service pursuant to the Hague Convention has not been accomplished.

CP 14-15, 59, 76-80.

Yoon has not propounded any written discovery on Plaintiffs, nor has he done anything to waive the defenses of insufficient service of process and/or expiration of the statute of limitations. CP 15.

E. Yoon's Motion For Summary Judgment And Motion For Reconsideration Regarding Service Under The Hague Convention And The Expiration Of The Statute Of Limitations.

On November 20, 2013, Yoon brought a Motion for Summary Judgment seeking dismissal of Plaintiffs' claims based upon failure to comply with the Hague Convention rules of service, Plaintiffs' defective process service pursuant to Washington's nonresident motorist service statute and the expiration of the statute of limitations. CP 10-19, 20-45,

46-50. Yoon's Motion for Summary Judgment relied in part on the decisions in *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988) and *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 10 P.3d 371 (2000). Yoon argued to the trial court that under the Supremacy Clause of the United States Constitution, the Hague Convention preempts inconsistent methods of process service such as the nonresident motorist statute.

In opposition to Yoon's Motion for Summary Judgment, Plaintiffs argued Washington's nonresident motorist service statute preempts the Hague Convention rules of service of process on a Korean resident, that Yoon was properly served under RCW 46.64.060, and that the Court's ruling in *Broad* can be distinguished. CP 51-58. Plaintiffs further asserted "bad faith" conduct on the part of Yoon -- that the actions of Yoon "lulled" Plaintiffs into not discovering the requirement to serve a Korean resident pursuant to the requirements of the Hague Convention. CP 51-58, 59-78.

The trial court entered an Order Denying Yoon's Motion for Summary Judgment on December 27, 2013 without providing a basis for the ruling. CP 87-88. On January 6, 2014, Yoon filed a Motion for Reconsideration of the trial court's Order Denying Summary Judgment to which Plaintiffs filed a Response. CP 89-97, 98-100. On January 28,

2014, the trial court issued an Order Denying Defendants' Motion for Reconsideration, again, without explanation. CP 101-102.

On February 25, 2014, Yoon filed and served a Notice of Discretionary Review to the Court of Appeals within 30 days of the Order Denying Defendants' Motion for Reconsideration in accordance with RAP 5.2. CP 103-106. This Court accepted Discretionary Review on May 19, 2014.

IV. SUMMARY OF ARGUMENT

The trial court erred in denying Yoon's Motion for Summary Judgment and Motion for Reconsideration. Proper service of the Summons and Complaint is a prerequisite to the court obtaining jurisdiction over a party. Plaintiffs were obligated to comply with the Hague Convention in serving Yoon, a resident of Korea. The Hague Convention's service requirements supercede Washington's nonresident motorist statute per the United States Supreme Court, the Washington Supreme Court and the Supremacy Clause of the United States Constitution.

Having failed to serve Yoon as required by the Hague Convention, the statute of limitations on Plaintiffs' claims expired last September. This Court should reverse the trial court's denials of Yoon's

Motion for Summary Judgment and Motion for Reconsideration and dismiss Plaintiffs' claims accordingly.

V. ARGUMENT

The plaintiff has the initial burden of proof to establish a prima facie case of sufficient service. *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wash. App. 408, 412, 236 P.3d 986 (2010). Whether or not process service is proper is a question of law. On appeal, this question of law is reviewed de novo. *Id.* Review of a summary judgment order is also de novo. *Atherton Condo. Apartment–Owners Ass'n v. Blume Dev. Co.*, 115 Wash.2d 506, 515–16, 799 P.2d 250 (1990). The appellate court engages in the same inquiry as the trial court. *Id.* Thus, the appellate court considers the facts in a light favorable to the nonmoving party. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 70, 170 P.3d 10 (2007). Whether or not a defendant has waived or abandoned an affirmative defense is a fact-specific inquiry. *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000).

Entry of summary judgment is warranted “if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

A. The Trial Court Erred By Refusing To Recognize And Enforce The Hague Convention Rules For Service Of Process On Korean Resident Yoon.

Proper service of the Summons and Complaint is a prerequisite to the court obtaining jurisdiction over a party and a judgment entered without such jurisdiction is void. *Streeter-Dybdahl*, 157 Wash. App. at 412.

1. The Hague Convention Background.

Formed in 1964, the Hague Convention is a multinational treaty to which both the United States and Korea are signatories. The Hague Convention drafters set out to create a uniform approach to address the problems involved in serving process abroad. Under the Hague Convention, service of process is made through a Central Authority in the destination country; that country is then responsible for effectuating international process service. See Hague Convention, Articles 1-6.

The United States Supreme Court left no doubt as to the preemptive effect of the Hague Convention. “[B]y virtue of the Supremacy Clause, U.S. Const., Art. VI, the [Hague] Convention pre-empts inconsistent methods of service prescribed by state law in all cases

to which it applies.” *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 699, 108 S.Ct. 2104, 2108, 100 L.Ed.2d 722 (1988).³

Article VI, Clause 2 of the United States Constitution establishes that the U.S. Constitution, federal statutes and U.S. treaties are “the supreme law of the land.” Pursuant to Clause 2, the Hague Convention is the highest form of law in the United States legal system and it mandates that all state judges must follow federal law when a conflict arises between the Hague Convention and either the state constitution or any state law.

2. Hague Convention – Korea.

Again, Korea is a signatory to the Hague Convention. Article 10(a) of the Hague Convention states that it shall not interfere with the “freedom to send judicial documents, by postal channels, directly to persons abroad.” However, this provision applies only if the destination country does not object to it – Korea specifically objected to Article 10(a) via declaration. Korea objected to service by postal channels and further objected to officials or persons of the State of origin

³ The second clause of Article VI of the U.S. Constitution provides: “This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”

(Washington) effectuating service through officials or persons of the State of destination (Korea), and to any interested party in the litigation effectuating service through officials or persons of the state of destination (Korea).

3. Hague Convention Applies To This Action And Service Upon Yoon.

The Hague Convention is broad in scope – it “shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for service abroad.” Hague Convention, at Article 1. At all relevant times, Yoon has been a citizen and resident of Korea and Plaintiffs were aware of his Korean address. CP 46-47. Plaintiffs employed RCW 46.64.040, the non-resident motorist statute – a statute which requires the transmission of documents by mail to serve abroad via the Washington Secretary of State. CP 13, 30. As such, the Hague Convention applies to this action generally and this service specifically. *See Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 674-75, 10 P.3d 371 (2000).

In *Broad*, the Washington Supreme Court addressed the Hague Convention in the context of service upon a foreign defendant/corporation. As the Washington Supreme Court noted at Footnote 5, the Hague Convention is not a long-arm device providing for

independent authorization for service abroad. Rather, it provides for methods of service if and when a state long-arm statute or federal statute authorizes service abroad. *Broad*, 141 Wn.2d at 678, FN5.

In addressing and interpreting the Hague Convention, the *Broad* Court noted that the Hague Convention applies where the address of the person to be served in the foreign jurisdiction is known to the plaintiff. *Broad*, 141 Wn.2d at 678. Here, Plaintiffs were indeed aware at the time of the accident and at the time of their nonresident motorist service attempt via the Secretary of State that Yoon was a resident of Korea and they had a correct address for him listed in both the police report and the Secretary of State non-resident service documents. CP 13, 30, 46-47.

The Hague Convention preempts Washington's nonresident motorist service statute.

The United States Supreme Court has held that by virtue of the supremacy clause, U.S. Const. art. VI, the Hague Convention preempts inconsistent methods of service prescribed by state law in all cases to which the Hague Convention applies. [Citation omitted]. The Hague Convention applies "where there is occasion to transmit a judicial or extrajudicial document for service abroad." Art. 1.

Broad, 141 Wn.2d 670 at 674-5; *Volkswagenwerk*, 486 U.S. 694 at 699.

As the U.S. Supreme Court stated in *Volkswagenwerk*:

The Convention provides simple and certain means by which to serve process on a foreign national. Those who eschew its procedures risk discovering that the forum's internal law required transmittal of documents for service abroad, and that the Convention therefore provided the exclusive means of valid service.

Volkswagenwerk, 486 U.S. at 706.

Broad eliminates any doubt -- the Supremacy Clause of the United States Constitution establishes that the Hague Convention preempts any inconsistent methods of service prescribed by state law including Washington's nonresident motorist service statute. See *Broad*, 141 Wn.2d at 674-75.

4. Hague Convention Preempts Inconsistent Non-Resident Motorist Statutory Service.

Plaintiffs attempted to effectuate service of process on Yoon via the nonresident motorist statute – a method objectionable to Korea. Again, Korea specifically objects to:

- The freedom to send judicial documents, by postal channels, directly to persons abroad.
- The freedom of judicial officers, officials or other competent persons of the State of origin (Washington) to effect service of judicial documents directly through the judicial officials or other competent persons of the State of destination (Korea).

- The freedom of any person interested in a judicial proceeding to effect service of judicial documents directly through the judicial officers, officials or other competent persons of the State of destination.

In *Heredia v. Transport S.A.S., Inc.*, 101 F.Supp.2d 158 (2000), the United States District Court, Southern District of New York, considered the propriety of process service via New York's non-resident motorist statute on Canadian residents. First, the Court concluded the Hague Convention applied to service there because the non-resident motorist statute required the transmittal of documents abroad. *Id.*, at 160-61. However, since Canada, unlike Korea, does not object to service by postal channels, the Court upheld the non-resident motorist service. *Id.*, at 161.

In *Curcuruto v. Cheshire*, 864 F.Supp. 1410 (1994), the United States District Court, Southern District of Georgia, similarly ruled on the applicability of the Hague Convention to Georgia non-resident motorist statute service on a Canadian defendant. The Court preliminary concluded that the Hague Convention applied to that case as the non-resident motorist statute required a mailing of documents abroad. *Id.*, at 1411. The Court upheld the nonresident motorist statute service, ruling that “[s]o long as no objection is made by the country where service is

being attempted, service by registered mail should be permitted under Article 10(a) of the Hague Convention as an effective means of service.” *Id.*, at 1412. Again, Canada does not object to service by postal channels; critically, Korea does so object.

The Hague Convention preempts inconsistent state process service mechanisms. Plaintiffs failed to submit an appropriate service request to Korea’s Central Authority responsible for service of process. Plaintiffs failed to translate the documents into Korean. Service on Yoon via the nonresident motorist statute was improper. As such, the statute of limitations on Plaintiffs’ claims has expired.

5. Yoon Did Not Waive Hague Convention Protection By Voluntarily Operating A Vehicle On Washington Highways.

Plaintiffs’ argument that Yoon waived the protections of the Hague Convention by voluntarily operating a vehicle on a Washington highway per RCW 46.64.040 fails. Admittedly, one of the purposes behind RCW 46.64.040 is to minimize difficulties associated with bringing lawsuits against nonresident motorists. See *Martin v. Triol*, 121 Wn.2d 135, 147, 847 P.2d 471 (1993). However, Plaintiffs’ RCW 46.64.040 waiver argument is squarely inconsistent with the preemption reality set forth in *Broad* and *Volkswagenwerk*. Plaintiffs eschewed the Hague service requirements for service on Korean resident Yoon and

attempted ineffective/pre-empted service on Yoon via Washington's non-resident motorist service statute. That statute is pre-empted by the Hague Convention and no service has been effected on Mr. Yoon.

C. Yoon Did Not Waive Or Abandon Insufficiency Of Process Defense.

Any argument by Plaintiffs that Yoon waived the insufficiency of process defense via improper litigation conduct or somehow "lulled" Plaintiffs into defective process service or missing the statute of limitations is unsupported by the facts and the law.

A litigant may waive the insufficient service of process defense if pursuing the defense is inconsistent with its prior actions. *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). Alternatively, the affirmative defense can be deemed waived if the party has been dilatory in asserting/pursuing it. *Id.* The purpose behind this waiver doctrine is to discourage a "ambush" or misdirection litigation strategy. *Id.* A defendant which asserts the insufficiency of process defense in its Answer is not dilatory in pursuing it. *Id.* Moreover, the delayed filing of an Answer does not by itself waive a defense. *King*, 146 Wn.2d at 424.

A defense can be waive or abandoned based upon prior defendant conduct if (a) the actions of the defendant indicate abandonment, (b) if it

appears that the defendant actively concealed the defense until the statute of limitations and service expired, or (c) if the defendant participated in substantial discovery unrelated to the defense. *Harvey v. Obermeit*, 163 Wash. App. 311, 323-34, 261 P.3d 671 (2011). Merely engaging in discovery is not necessarily inconsistent with later maintaining an insufficiency of process defense. *Lybbert*, 141 Wn.2d at 41. If the insufficiency of process defense is raised prior to the expiration of the statute of limitations, a court is unlikely to rule that the defense is waived. *Id.*, at 325. Applying the waiver doctrine to a situation in which the service defense was raised prior to the expiration of the statute of limitations is less compelling. *Meade v. Thomas*, 152 Wash. App. 490, 494, 217 P.2d 785 (2009).⁴

Here, Plaintiffs concede awareness of the rapidly approaching statute of limitations deadline at the time they filed the action. CP 64-65. Yoon asserted its affirmative defense of insufficiency of process in his Answer long prior to the expiration of the statute of limitations. CP 4-9, 14. Yoon further timely responded to Plaintiffs' written discovery

⁴ Courts are unlikely to find waiver absent extreme delays/conduct. For example, the litigant in *King* waited four years after the Complaint was filed and engaged in substantial unrelated motions practice and discovery before moving to dismiss just prior to trial for failure to comply with claim notice provisions. *King*, 146 Wn.2d at 423-25. Washington's Supreme Court held that this extreme conduct constituted an impermissible "ambush." *Id.* To be sure, the facts here are nothing like those in *King*.

requests explaining in detail its insufficiency of process defense. CP 14-15, 59, 76-80. Yoon did not ambush or misdirect Plaintiffs with respect to the defense. At no time did Yoon indicate that he was not pursuing the defense, nor did Yoon conceal the defense at any point. Yoon did not issue any written discovery to the Plaintiffs. Any lingering argument by Plaintiffs that the defense was waived or abandoned must be rejected.

VI. CONCLUSION

Yoon is a Korean citizen and resident. Plaintiffs, aware of Yoon's Korean address, failed to properly serve him as required by the Hague Convention. At no point did Yoon engage in conduct implicating waiver or abandonment of the insufficiency of process defense. The statute of limitations for Plaintiffs' claims has expired. For all the reasons set forth herein, it is appropriate for this Court to reverse the trial court's orders denying summary judgment and reconsideration and dismiss all claims against Yoon with prejudice. Costs on appeal should be awarded to Yoon.

RESPECTFULLY SUBMITTED this 1st day of August, 2014.

McCAFFERTY & STEINMARK, PLLC

By: 

Frank J. Steinmark, WSBA No. 23056
Attorney for Defendants/Petitioners
Kyungsik Yoon and Jane Doe Yoon

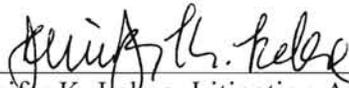
CERTIFICATE OF SERVICE

I, Jennifer K. Lehne, hereby certify under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of the foregoing **APPELLANTS' BRIEF** properly addressed, prepaid, for delivery to the following persons in the manner indicated:

Via Legal Messenger

Randolph O. Petgrave
Petgrave & Petgrave, PLLC
100 South King Street, Suite 400
Seattle, WA 98104-3844

SIGNED at Seattle, Washington on August 1, 2014.



Jennifer K. Lehne, Litigation Assistant/Paralegal