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I. Introduction

Plaintiff was rear-ended in a motor vehicle accident on August 4, 2004. She filed suit in March of 2007, well within the three year statute of limitations. However, she never completed service. She is now appealing the trial court's order granting summary judgment to defendant.

On July 30, 2007, defendant filed an answer. The answer affirmatively alleged that the complaint had not been served, and that the action "is or will be barred by the applicable statute of limitations." At that time, there was one full week remaining until the statute of limitations would expire. Plaintiff took no action.

The trial court granted defendant's motion for summary judgment. Plaintiff filed the present appeal, arguing in essence that defense counsel waived service by conducting or attempting to conduct certain discovery. Defendant offers the present brief to demonstrate that the trial court decision should be affirmed.

II. Response to Assignments of Error

The trial court did not err in granting the defendant's motion for summary judgment. The undisputed facts demonstrated that service was not completed by plaintiff or waived by defendant.

III. Issues Pertaining to Assignment of Error

When defendant knows he has not been served and that the plaintiff has ample time to complete service, would written discovery on the issue of service accomplish anything?

Should a lawyer refrain from taking any action to advance a case toward resolution until service has been completed?

Does the case law support the notion that a defendant waives service of the summons and complaint when his attorney decides to send plaintiff a routine set of interrogatories?

IV. Statement of the Case

On August 4, 2007, plaintiff was rear-ended by Samantha Gross (Appellant's brief, p. 2). Ms. Gross is not a party to this action. Instead, the complaint mistakenly identifies her boyfriend, Michael Thomas, as the driver who rear-ended plaintiff. Mr. Thomas owned the vehicle Ms. Gross was driving, but he was not in the vehicle when the accident occurred (Id).

The complaint did not mention Ms. Gross, and it did not assert any theory of relief that might apply to Mr. Thomas. However, the parties have agreed that all defenses based upon the erroneous identification of Mr. Thomas as the driver will be addressed at a later date, if necessary (CP 013, n. 3). For purposes of the present appeal, we can assume that Mr. Thomas is the proper defendant.

Plaintiff filed this action on 03/12/07 (CP 003-005). Defendant's attorney filed a notice of appearance on 03/21/07 (CP 013). At that time, plaintiff had not completed service upon the defendant or upon Ms. Gross. The notice of appearance specifically reserved any defenses based upon lack of service. However, plaintiff still had more than 80 days to complete

service, and defense counsel had no reason to think plaintiff would not follow through (CP 013).

Defense counsel knew that service had not been completed, and he expected plaintiff to complete service in the near future. Therefore, he did not seek discovery on the issue of service. Instead, when he sent plaintiff the notice of appearance, he also sent plaintiff his “standard” motor vehicle accident interrogatories (CP 013). The interrogatories did not address the issue of service.

On 06/07/07, defendant sent plaintiff an e-mail reminder regarding the discovery, which was long overdue. In addition, he asked about possible dates for plaintiff’s deposition (CP 013). A week later, having received no response, defendant sent a follow up to plaintiff (CP 013). There is nothing in the record to suggest that plaintiff bothered to respond (Id). However, plaintiff did send unsigned discovery responses to defendant on 07/24/07.

On 07/30/07, defendant filed an answer by mail. Defendant served the answer by mail, with a courtesy copy by fax. The answer specifically denied that the defendant was involved in an accident with the plaintiff. The answer also alleged that the complaint had not been served, and that the action “is or will be barred by the applicable statute of limitations” (CP 009). Plaintiff took no action in response to this answer.

There had been no immediate need for the defendant to file an answer at that particular time. Plaintiff had not filed a motion for default,

and her attorney had not asked defendant to file an answer (CP 013). There also was no need to send a copy of the answer via fax. Although the time to complete service of the original complaint had already expired, plaintiff still had one full week to file a whole new action.¹

Defendant filed a motion for judgment on the pleadings. In the alternative, defendant moved for summary judgment. The trial court granted the motion for summary judgment. This appeal followed.

V. Argument

A. There was no reason for defendant to request discovery on issue of service

Plaintiff contends that defendant waived service by conducting discovery “that did not address the issue of insufficient service of process” (Appellant’s brief, p 7). However, plaintiff fails to identify any reason for defendant to conduct discovery on this issue. Defendant already knew that he had not been served. It would waste time, paper, and money for a defendant to ask questions when he already knows the answer. Moreover, it would arguably violate the Rules of Professional Conduct, which prohibit a lawyer from making a “frivolous discovery request.” RPC 3.4(d).

It would be especially wasteful to conduct discovery on an issue that is not yet ripe, and which is unlikely to become ripe. In the present

¹ The statute of limitations would ordinarily expire on 08/04/07, but that particular date was a Saturday, so plaintiff could have filed on the following Monday, 08/06/07.

case, when defense counsel served routine interrogatories upon plaintiff, plaintiff still had over 80 days to complete service (CR 013). It is undisputed that defense counsel expected plaintiff to complete service within that time frame (Id).

Under the present facts, the only conceivable reason to conduct discovery on the issue of service would be to alert plaintiff's counsel of the impending deadline. Defense counsel has no duty to advise plaintiff of the deadline. Defense counsel's duty is to represent the defendant.

B. Defense counsel had an obligation to try to keep case moving

Plaintiff seems to contend that the defendant should have done nothing to address the merits of the case until the question of service had been completely resolved. Such an argument (a) conflicts with the Rules of Professional Conduct and (b) ignores the fact that there is no proof that plaintiff would have completed service even if discovery had been limited to the issue of service.

The Rules of Professional Conduct require a lawyer to "make reasonable efforts to expedite litigation consistent with the interests of the client." RPC 3.2. There is nothing in the Rules of Professional Conduct to suggest that a lawyer is exempt from RAP 3.2 until his or her client has been served with a summons and complaint. Therefore, because defense counsel expected plaintiff to eventually complete service, he was required to take reasonable steps towards resolving the case on the merits. Waiting

more than 80 days to see if plaintiff completed service would arguably violate RPC 3.2.

Even if it were proper to put normal discovery “on hold” pending resolution of the service issue, there is no proof that doing so would have made any difference. While the process of responding to interrogatories regarding service might have alerted plaintiff to her failure to serve the defendant, it would not have alerted her to the fact that she named the wrong defendant in her complaint. Moreover, in the absence of reminders from defense counsel, it is questionable whether plaintiff would have responded to any discovery before the statute of limitations expired.

C. Case law does not support plaintiff’s waiver argument

Waiver requires “the intentional abandonment or relinquishment of a known right.” It “must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive.” *Clark v. Falling*, 92 Wn. App. 805, 812-13, 965 P.2d 644 (1998).

In the present case, it is undisputed that defendant and defense counsel were aware of the service issue. In other words, service was a “known right.” However, that right was not intentionally abandoned. On the contrary, the notice of appearance purported to reserve the defense of inadequate service. In addition, the record in the present case reveals no “unequivocal acts or conduct showing an intent to waive” service. Defense counsel merely served written discovery requests and followed up

when those requests were long overdue. This conduct was not “inconsistent with any intention other than to waive.” It was consistent with the desire to keep the case moving forward as not only required by RPC 3.2, but also by a common sense desire to serve one’s clients in a timely fashion.

The cases cited by plaintiff are readily distinguishable. For example, in *Lybbert v. Grant County*, 141 Wn.2d 29 (2000), the plaintiff had served upon the defendant an interrogatory asking whether the defendant denied proper service. Had the defendant responded in a timely fashion, the plaintiff would have been alerted to the defense while there was still time to take action. However, the defendant did not respond in time. It waited until the statute had expired to assert the defense of lack of service. By contrast, the plaintiff in the present case never asked the defendant about any affirmative defenses, and the defendant filed his answer while there was still a full week left for plaintiff to take corrective action.

The defendant in *Lybbert* conducted discovery over a period of nine months, and it gave “multiple indications that it was preparing to litigate this case.” In the present case, on the other hand, discovery occurred over a much shorter period of time, and it took as long as it did only because plaintiff did not respond to the discovery in a timely fashion.

Lybbert is also distinguishable from the present case because the defendant in *Lybbert* had reason to believe that the plaintiff’s attorney was

unaware of the service issue. (Instead of serving the defendant county's auditor, the plaintiff had served the administrative assistant to the county commissioners). In the present case, on the other hand, the defendant knew plaintiff still had plenty of time to complete service, and he expected her to do so.

As in *Lybbert*, the defendants in *Romjue v Fairchild*, 60 Wn. App. 278 (1991) had reason to know that plaintiff was unaware service was defective. The plaintiffs' lawyer in *Romjue* had written a letter to the defendants' attorney stating his understanding that the defendants had been served. Instead of correcting the misunderstanding, the defendant waited until the statute of limitations expired before filing an answer or doing anything else to alert the plaintiff to the problem. In the present case, on the other hand, the defendant had no reason to think that plaintiff would not complete service.

Plaintiff cites *Blankenship v. Kaldor*, 114 Wn. App. 312 (2002) for the proposition that the defendant waived service by propounding written discovery that was not focused upon the issue of discovery. Unlike the present defendant, who expected plaintiff to complete service eventually, the defendant in *Blankenship* had reason to believe that plaintiff was mistaken about service (service had purportedly been completed at the defendant's parent's house). In addition, the defendant in *Blankenship* waited approximately 15 months to file an answer. Before doing so, the defendant had conducted written discovery, deposed the plaintiff, and

photographed her house. More importantly, the defendant in *Blankenship* filed the answer long after the statute of limitations had expired. The defendant in the present case filed the answer when plaintiff still had a full week to file a complaint.

The timing of the answer and the manner in which it arrived should have caused plaintiff to review the answer carefully and take appropriate action. Plaintiff had not asked defense counsel to file an answer, and he had not filed for default. In addition to serving the answer by mail, defense counsel faxed a copy to plaintiff's counsel. There is no reason to think that plaintiff would have done anything differently had the answer been filed two or three months earlier.

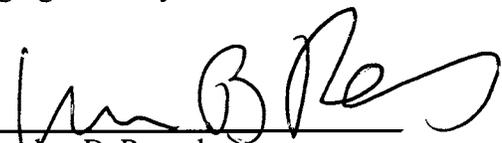
VI. Conclusion

The facts of this case do not support plaintiff's waiver argument. The trial court decision should be affirmed.

Dated this 5th day of December, 2008

LAW OFFICES
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By:



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Certificate of Mailing

1. I, Melissa Tofell, declare under the penalty of perjury of the laws of the state of Washington that the following is true and correct.

2. I am over the age of 18 years and am not a party to this lawsuit.

3. On this day, I caused to be served on the counsel of record named below, postage paid, a true and correct copy of Respondent Thomas' Response Brief. I caused a copy of this document to be served by:

xx	US mail, postage prepaid;
	Overnight delivery;
	Next day hand delivery; or
	Other: facsimile

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 BY _____
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To the attorneys or parties of record listed below:

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Dated this 5th day of December, 2008



 Melissa Tofell

Copy to Counsel for Respondent
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CERTIFICATE OF SERVICE

I hereby certify that under penalty of perjury of laws of the State of Washington that I served the document to which this certificate is attached on the attorney for Respondent, Christopher Rounds, by first class mail, postage prepaid on the date signed below.

DATED this 2nd day of October, 2008, at Longview, Washington.

[Signature]
Sandra L. Good, Paralegal to David A. Nelson