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**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

**WILLIAM LOVE, as personal representative of the ESTATE OF
CAMILLE LOVE, and JOSHUA LOVE, a single man,**

Appellants,

v.

**STATE OF WASHINGTON DEPARTMENT OF CORRECTIONS, a
governmental entity, et al.,**

Respondents.

APPELLANT'S AMENDED OPENING BRIEF

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I. INTRODUCTION

"... the government should be just when dealing with its citizens."

Lybbert v. Grant County, 140 Wn. 2d 29, 37, 1 P.3d 1124 (2000).¹

The notion of "dealing justly" with others, animates the notion that cases should be decided on the merits, and not procedural traps, which could be characterized as "gotchas":

In 1967, this Court completely revised the Washington Rules of Civil Procedure. The goal, as stated at the time, was '[t]o eliminate many procedural traps now existing in Washington practice;' ... the instant case provides a prime example of anomalous, purely accidental, and unnecessary but fatal procedural snare for the unwary or less fleet of foot. The new rules should serve as a manual or bible of civil procedure. Hopefully, careful adherence to the rules of the manual will avoid embarrassment to members of the Bar because of delay and even the loss of lawsuits occasioned by unnecessary complex and vagrant procedural technicalities. In other words, the basic purpose of the new Rules of Civil Procedure is to eliminate or at least minimize technical miscarriage of justice inherent in archaic procedure concepts once characterized by the Vanderbilt as 'the sporting theory of justice'. (Citations omitted)

Curtis Lumber Co v. Sortor, 83 Wn. 2d 764, 766-67, 522 P2d 822 (1974).

The statute at issue in this case is RCW 4.92.020, which under the heading of "Service of Summons and Complaint" provides:

Service of Summons and Complaint in such action shall be served in the manner prescribed by law upon the attorney

¹ While in *Lybbert* the Supreme Court declined to impose a heightened duty on governmental lawyers, it did credit this basic proposition.

general, or by leaving the Summons and Complaint in the office of the attorney general with an Assistant Attorney General.

It is respectfully suggested that when entrusting the Attorney General and his/her Assistants with receipt of service of process on behalf of the State, and its agencies, the Legislature presumed such duties would be performed faithfully and justly, without consideration of the inherent conflict created by the fact that the same agency is statutorily obligated to defend the State in the very lawsuit which is being served. See RCW 4.92.030. It cannot be ignored that this statute is part of the same statutory scheme which contains Washington's waiver of sovereign immunity, which encompasses the legislative intent that it is acceptable and desirable that governmental entities, such as the State of Washington, be held accountable in suits brought by its citizens. See *Finch v. Matthews*, 74 Wn. 2d 161, 176, 443 P.2d 833 (1968). Stated another way, when interpreting these statutes it must be presumed "the legislature takes the view that tort liability will have a salutary effect on the seriousness with which the State executes its responsibilities. As the Supreme Court observed in a related context, the existence of some tort liability will encourage [state agencies] to avoid negligent conduct and leave open the possibility that those injured by [state agency] negligence can recover."

Babcock v. State, 116 Wn. 2d 596, 622, 809 P.2d 143 (1991); *Yonker v. DSHS*, 87 Wn. App. 71, 81, 930 P.2d 958 (1997).

With such policies in mind, and turning to the facts of this case, it is quite clear that the Trial Court in this matter "lost the trees through the forest" by focusing on nearly irrelevant hyper technical arguments, as opposed to the undisputed facts which were squarely before it. The undisputed facts establish that the Summons and Complaint in this action were brought to the Tacoma offices of the Attorney General, and ultimately were delivered to an Assistant Attorney General. The fact of delivery to an Assistant Attorney General was irrefutably established by the fact that an Assistant Attorney General had to have reviewed the Complaint for Damages in order to draft the detailed Answer which was filed in this case.² (CP 289-297)

As the recent Supreme Court opinion in *Scalan v. Townsend*, 181 Wn. 2d 838, 336 P.3d 1155 (2014) establishes, what is relevant under Washington service of process law is the fact of delivery to the statutory target of service, and not the intent of the individual who performs the task.

² In that respect RCW 4.92.020 is unique in that the target of service of process, more likely than not, will have the same status of the individual who is actually defending the lawsuit, i.e. that status of being an "Assistant Attorney General". This, of course, unless outside counsel is retained by the state - something which did not occur here.

The fact that an Assistant Attorney General had to be delivered a copy of the Complaint, in order to draft a detailed answer, should have been sufficient to meet the plaintiffs' initial burden of establishing a "prima facie" case of sufficient service, resulting in shifting the burden to the defense to establish or to demonstrate by "clear and convincing evidence" that service was improper. *Scalan v. Townsend*, 181 Wn. 2d at 847, citing to *Streeter v. Dyedahl*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010).

Under such circumstances the Trial Court should have recognized that the attorney general had the obligation of establishing that the individual who ultimately delivered the Summons and Complaint to the Assistant Attorney General, who drafted the answer, **was not over the age of 18, or was otherwise or was not competent to testify as a witness in this case - both propositions are highly implausible.** See CR 4(c) ("service of summons of process ... shall be by the sheriff of the county wherein the service is made, or by his deputy, **or by any person over 18 years of age who is competent to be a witness in the action, other than a party.**").

Similarly, the Trial Court also ignored the fact that Plaintiffs made reasonable efforts to directly serve an Assistant Attorney General, at the Attorney General's office location in Tacoma, Washington. Under the

terms of the above-referenced statute, if an Assistant Attorney General is to be the target of service, he/she must be served at an office of the Attorney General, i.e. a specific location. Here, testimony from those aligned with the defense, clearly establish that, at the Tacoma location, any process server would be confronted with a glass partition with a delivery slot, and a locked door between the process server and any Assistant Attorney General officed at that location. (RP IV P.157-58). (Appendix No. 1 - Exhibit No. 8). According to the testimony of the State's own personnel, when someone presents themselves with a Summons and Complaint at the glass partition delivery window, they must tell whoever is at the window specific words to the affect they "needed to serve the attorney general's office", prior to triggering the Attorney General's alleged service process. This appears to be true even though the documents pushed through the delivery slot are clearly labeled as being "Summons and Complaint". (RP III P. 66-68).

Given such physical and human barriers at a statutory location where service must occur, the Trial Court erred by failing to use the wide variety of equitable remedies available to it when addressing such circumstances, including the doctrines of constructive service, constructive tender, equitable estoppel and, perhaps most significantly, waiver.

For the reasons discussed below, the decision of the Trial Court in favor of the State of Washington and the Department of Corrections should be reversed, and this matter remanded for further proceedings.

II. ASSIGNMENTS OF ERROR

1. The Trial Court erred in dismissing this case, on inadequate service of process grounds, when the facts presented below were sufficient to establish a "prima facie" case of adequate service, and the defendant failed to establish, by clear and convincing evidence, that service was not performed.

2. The Trial Court erred by failing to recognize that there must have been at least "second hand service" in this case, given the fact that an Assistant Attorney General, the statutory service target, filed a detailed answer in this case, a task which only could have been performed by having a copy of the complaint in his possession.

3. The Trial Court erred in its application of the *Sidis* rule by failing to recognize that at the time the Trial Court dismissed the State of Washington on Statute of Limitation grounds the statute was tolled, and continued to be tolled until December 12, 2014 when the Trial Court entered an order dismissing the City of Tacoma defendants "Does 1-10".³

³ See *Sidis v. Brodie/Dohrmann, Inc.*, 117 Wn. 2d 325, 815 P.2d 781 (1991), recently reaffirmed by *Powers v. W.B. Mobile Services, Inc.* 182 Wn. 2d 159, 339 P.3d 173 (2014).

4. The Trial Court erred by failing to recognize that given the physical and human barriers placed before the process server at the statutory service location, the application of the doctrine of constructive service and/or constructive tendering, should be applied in order to avert an inequitable result.

5. The Trial Court erred in failing to recognize that the doctrine of equitable estoppel precluded the State from asserting a service of process defense, given the fact that it controls the scenario in which service can occur and a reasonable person would have reasonably relied/believed that service had been properly accomplished on March 5, 2013.

6. The Trial Court erred in failing to apply the doctrine of waiver given the State's inconsistent and/or dilatory conduct in raising a service of process defense.

7. The Trial Court erred in failing to recognize that there were genuine issues of material fact regarding service of process precluding the grant of summary judgment in favor of the State.

8. The Trial Court abused its discretion by failing to grant Plaintiff's motion for reconsideration under the circumstances of this case.

9. The Trial Court erred in entering Findings of Fact and Conclusions of Law, when denying Plaintiff's Motion for Reconsideration,

when such Findings of Facts and Conclusions of Law are not authorized under the terms of CR 59, which only permits the entry of Findings of Fact and Conclusions of Law when a motion for reconsideration/new trial has been granted and not denied.⁴ (Appendix No. 2).

10. Assuming *arguendo* that the Trial Court appropriately entered in Findings of Facts, the Trial Court erred in entering Finding of Fact No. 4 because it is incomplete, thus not supported by substantial evidence.

11. Assuming *arguendo* that the Trial Court appropriately entered in Findings of Facts, the Trial Court erred in entering a Finding of Fact No. 11 because the substantial evidence supported the exact contrary, i.e. that the defense engaged in statement and acts which were inconsistent with such an affirmative defense.

12. Assuming *arguendo* that the Trial Court properly entered in the Findings of Facts, the Trial Court erred in entering in Finding of Fact No. 13 because it's not supported by substantial evidence and contains a legal conclusion that "the statements of the receptionist unidentified" constituted hearsay.

13. Assuming the Trial Court properly entered into the Findings of Fact, the Trial Court erred in entering Finding of Fact No. 18

⁴ See CR 59(f).

because it is not supported by substantial evidence and is contrary to the evidence which was presented below.

14. The Trial Court erred in entering Findings of Fact No. 13, 17, 18, 22, 23 and 23 because there is no requirement that there be a "affidavit of service" in order for there to be proper service of process under Washington law, thus, the content of any affidavit and/or declaration of service was irrelevant and failed to support the Trial Court's conclusions of law.⁵

15. Assuming the Trial Court properly entered into the Findings of Fact, the Trial Court erred in entering Findings of Fact 45, 46, 49, 50, 56, 57, 58 and 59 because such Findings of Facts are irrelevant, and do not support any relevant conclusion of law.

16. Assuming the Trial Court properly entered into the Findings of Fact, the Trial Court erred in entering Finding of Fact No. 59(2) because substantial evidence does not support the court's conclusion that service was never completed by properly serving an AAG.

III. ISSUES RELATING TO ASSIGNMENTS OF ERROR

1. Did the Trial court err by granting defendant's Motion for Summary Judgment when the combination of evidence submitted by the

⁵ See, CR 4(g)(7) ("Failure to make proof of service does not effect the validity of the service"), see also, *Jones v . Stebbins*, 112, Wn. 2d 471, 42, 860 P.2d 10009 (1993) (it is the fact of service that creates jurisdiction not the return of service).

parties was more than adequate to establish, at least a question of fact and/or a *prima facie* showing that plaintiffs had adequately served process in this case, despite the fact that the process server submitted two declarations of service, which, when placed in context, were more clarifying than contradictory?

2. Did the Trial Court err when granting defendant's Motion for Summary Judgment, given the defendant wholly failed to establish by "clear and convincing evidence" that service of process was insufficient?

3. Did the Trial Court abuse its discretion in denying plaintiff's Motion for Reconsideration of its summary judgment determination decision in this case, on "service of process" and statute of limitations grounds, when the undisputed evidence was more than adequate to establish a *prima facie* showing of sufficient service of process and the State failed to rebut such a showing with "clear and convincing evidence"?

4. Did the Trial Court commit reversible error by failing to recognize that the undisputed evidence, and the facts which were before it, overwhelmingly established that the statutory target of service, i.e. an Assistant Attorney General, by way of at least "secondhand service" and/or a gratuitous agency, timely received a copy of the Summons and Complaint?

5. Did the Trial Court err in failing to recognize that there were at a minimum material questions of fact, precluding summary judgment on a determination of whether or not equitable remedies should be applied barring the State from asserting a service of process and/or statute of limitations defense based on the equitable doctrines of, (1) constructive service; (2) constructive tendering/delivery; (3) equitable estoppel, and/or (4) waiver?

6. Did the Trial Court err by entering Findings of Facts and Conclusion of Law, when such actions are not authorized by any court rule and appear to be contrary to the terms of CR 52, CR 56, and CR 59?

IV. STATEMENT OF FACTS

As this case was dismissed on procedural grounds and not on its merits, the underlying factual background of this matter must be gleaned from the detailed “complaint for damages” filed by the plaintiffs. (CP 1-17). This lawsuit arises out of the horrific and tragic events which occurred on February 7, 2010 which resulted in the death of Camille Love and the shooting of Joshua Love by marauding gang members, all of whom were under the supervision of Washington State’s Department of Corrections (DOC). (CP 2-5). As indicated at Page 2 of the complaint on that date:

Camille Love was driving a red vehicle on the way to a friend's house with her brother Joshua Love riding in the passenger seat. The above-referenced individuals [gang members under DOC supervision] were driving in [a] stolen white van searching for members of a rival gang to retaliate against for an earlier shooting. The gang members chased the victims for a short time before opening fire on the vehicle. Camille Love was struck several times and was mortally wounded. Her brother Joshua sustained multiple gunshot wounds but survived.... (CP 2).

In the complaint, the plaintiffs asserted negligence-based causes of action against three category of defendants (1) the State of Washington Department of Corrections (hereafter State); (2) the City of Tacoma; and (3) "Does 1-10 inclusive." (CP 5-7)

With respect to the "City of Tacoma" Does defendants, it is noted that paragraph 2.4 of plaintiff's complaint is specifically alleged that these individuals were at relevant times acting as "employees and/or agents" for the City of Tacoma, and that the City of Tacoma was being sued on agency/"respondent superior" principles. (CP 6).

Prior to the time of filing this lawsuit, counsel for the plaintiffs below Vicky Currie on November 30, 2012 filed a "tort claim" with the state's Department of Risk Management as required under the terms of RCW 4.92.100. (CP 80-88). There is no dispute this lawsuit was timely filed when taking into consideration the 60-day tolling period otherwise afforded by RCW 4.92.110. It is not disputed below that the filing of the complaint on February 7, 2015 commenced the 90-day time frame in

which to serve one of the defendants in the action in order to toll (beyond 90 days) the applicable statute of limitation. See RCW 4.16.170.⁶

As developed below, at the commencement of this lawsuit plaintiff's counsel took efforts to serve a copy of the Summons and Complaint both on the City of Tacoma and the State. . (CP 89-99).

(It is interesting to note that "declarations of service" were not contemporaneously filed within the Superior Court's file).

As established during the course of proceedings below, on or about March 5, 2013 Stephen Currie travelled about within the City of Tacoma in order to serve the summons and complaint, which had previously been filed.⁷⁸ (CP 55-70).

According to a declaration signed on May 6, 2014 by process server Currie:

On March 6, 2013 I personally served copies of the order setting case schedule, summons and complaint at the attorney general's office located at 1250 Pacific Avenue, Suite 105, Tacoma,

⁶ *Sidis v. Brodie/Dohrmann, Inc., supra, Wakeman v. Lommers*, 67 Wn. App. 819, 840 P.2d 232 (1992) (*Sidis* rule applies even when the liabilities of multiple defendants' predicated on different events and/or incidents).

⁷ Stephen Currie is plaintiff's counsel's Vicky Currie's son and her law office manager. On the day in question the Currie law firm's regular process server was unavailable, thus Mr. Currie assumed the task.

⁸ It was undisputed that on March 5, 2013 Mr. Currie traveled to City of Tacoma municipal headquarters and served a copy of the summons and complaint on Jean Homan, an assistant city attorney for the City of Tacoma. The City of Tacoma prior to filing answer, filed a motion pursuant to CR 12(b)(6). The City's motion for dismissal was granted but without prejudice. (Appendix No. 4) The dismissal order regarding the City of Tacoma **did not include the "Does 1-10 defendants amongst the parties who were subject to dismissal.**

Washington 98402. I approached the receptionist's desk and asked who accepted service in their office. The receptionist left and returned with a tall Caucasian male who agreed to accept service on behalf of the attorney general's office. The man who agreed to accept service was dressed in a suit and tie and he was wearing a badge, therefore I assumed he was the appropriate person to accept service.⁹

(CP 180-81). (Appendix No. 3).

The process server presence at the Tacoma Attorney General's Office was verified by the fact that during the course of proceedings below, plaintiff was able to produce a copy of the first page of the summons and a first page of the complaint, which clearly had "received" stamps from the Attorney General's Office, dated March 5, 2013. (CP 55-80) (Appendix No.'s 5 & 6).

As previously mentioned the City of Tacoma (only) filed a CR 12(b)(6) motion asserting that plaintiff's complaint failed to state a claim against the City of Tacoma. This motion was heard on March 29, 2013 and resulted in a order of partial dismissal without prejudice of the City of Tacoma.¹⁰

⁹ This declaration contained a scrivners error in that it is undisputed that Mr. Currie actually was at the Tacoma Attorney General's Office on **March 5, 2013**. Mr. Currie also in his testimony explained he is not a process server and the initial declaration was inaccurately and poorly drafted. (RP IV P.140-141).

¹⁰ At the same time the City of Tacoma was served a copy of the summons and complaint in this case, it was also served a claim for damages under the terms of RCW 4.96.020. Clearly plaintiffs' lawsuit against the City of Tacoma was filed prematurely because they had failed to wait the 60 day period required under the terms of RCW4.96.020 before filing a lawsuit against the City and its officials. (CP 89-99). This procedural defect would have been easily curable on the part of the plaintiffs. Apparently the City recognized this and opted to file a substantive motion pursuant to CR 12(b)(6), as

On April 9, 2013 the State filed a detailed Answer to the plaintiff's complaint signed by Assistant Attorney General (AAG) Garth Ahearn. In the State's Answer, Mr. Ahearn painstakingly addresses each and every allegation in plaintiff's complaint. (CP 284-297) (Appendix No. 7). The State's answer also included what could be characterized as "boiler plate" or "shotgun" affirmative defenses. Included within these "boiler plate" affirmative defenses were the terms "defendant alleges that the summons and complaint was the process served was insufficient" [sic?].¹¹

opposed to raising compliance with RCW 4.96 seeking dismissal. Even had such a motion been filed and granted given the tolling afforded by RCW 4.96.020(4) (after the lapse of 60 days, a party has a 5-day window in which to file a lawsuit, even if in the interim the Statute of limitations has elapsed). Even if the City of Tacoma acquired a dismissal due to the failure to wait the requisite 60-day time period, there was still sufficient time for the plaintiffs to wait for the expiration of the 60 days, and file a new and separate lawsuit against the City of Tacoma which could have been consolidated with this matter. As it is the plaintiff is not appealing the dismissal of the City of Tacoma in this appeal. The only reason why this is being addressed is because, apparently in an effort to impune plaintiff's trial counsel, the defense had raised this issue below.

¹¹ One can only presume that the language utilized within the Answer was intended to be an insufficient service of process affirmative defense but given the inarticulate nature of the language used that is at best a guess. (CP 294). Under the terms of CR 8 averment in pleadings should be "simple, concise and direct", and one can question whether or not the above-referenced language meets such a standard. While "insufficient service of process" is not amongst the affirmative defenses listed in CR 8(c), it is treated as an affirmative defense in CR 12(b)(5) and under the terms of that rule must be raised by way of a motion to dismiss and/or included as an affirmative defense within the answer, and failure to do so results in the waiver of their defense. Despite the position taken by the State below, it is highly debatable as to whether or not the State preserved its affirmative "insufficient service of process" defense by clearly asserting it within its Answer, given the tortured language. See *Lybbert v. Grant County*, *supra*, see also *Henderson v. Tyrrell*, 80 Wn. App. 592, 540-41, 910 P.2d 522 (1996). Further, even if we assume *arguendo* that the inartful language used by Attorney Ahearn in the Answer was sufficient to raise such a defense, the fact that the statement is unclear further supports plaintiff's position that the doctrine of waiver should be applied. Finally, it is noted that under the terms of CR 8(c) a statute of limitation defense must be specifically pled as an affirmative defense or it is waived. Here the defendants fail to assert any statute of limitation defense within its Answer, and to the extent that the Trial Court rested its

Following receipt of the Answer, plaintiff's counsel, on September 13, 2013 filed a "confirmation of joinder" specifically representing to the trial court that, among other things, "All parties have been served or waived service." Defense counsel Ahearns, nor any other AAG objected to the filing of this document. (Appendix No. 8).

On October 2, 2013 Attorney Ahearns corresponded with Ms. Currie in a manner which indicated that the State was well aware of the lawsuit and intended to process it as if it had been. In that regard, following the State's Answer, the parties engaged in substantial discovery including the propounding of extensive interrogatories and requests for production to the Plaintiffs. Both plaintiffs' depositions were taken on April 28, 2014 and none of the discovery perpetrated by the State was directed towards the issue of whether or not there had been adequate service of process. (CP 173).

Despite such facts, and despite the fact that Ms. Ahearns obviously had possession of the summons and complaint, when he drafted the Answer in this matter, on April 18 DOC filed a motion for summary judgment alleging for the first time that the plaintiffs had failed to serve process in accordance with RCW 4.92.020, and alleging that such a defect could not be cured due to the lapse of the statute of limitations which had

decision to dismiss this case on the lapse of the statute of limitations, such actions were error.

transpired since the initial filing of the case. (CP 22-29). In support of the State's position it produced declarations from employees of Mr. Ahearn's office, which included, among other things, a log allegedly kept at the Tacoma office related to receipt of summons and complaints at that location. According to the defense, an entry which provided "not served" on March 5, 2013 related to a case filed by a plaintiff named "Vicky Love", against "DOC", was indicative that the summons and complaint had not been served on a "Assistant Attorney General", despite the fact that Mr. Ahearn obviously had been delivered a copy of such documents given his detailed Answer. Plaintiffs responded to defendant's motion for summary judgment arguing both that service had occurred and/or that the application of the doctrine of waiver. (RP III P. 87). (Appendix No. 9). Plaintiff's response included the was the March 6, 2014 declaration of process server Currie.¹²

On May 23, 2014 the trial court heard and granted the defendant's motion for summary judgment and dismissed the state defendant with prejudice.

On June 2, 2014 plaintiff filed a motion for reconsideration. During the pendency of this motion North Carolina attorney, (and former

¹² Oddly, an earlier declaration of service signed by Mr. Currie was filed within the court file, but not as part of any particular pleadings. This earlier declaration of service, ultimately came to be a matter of great confusion in subsequent proceedings.

vice presidential and presidential candidate) John Edwards, appeared on behalf of the plaintiffs by way of an order granting his motion for limited admission (pro hac vice).

On June 23, 2014 the Trial Court heard his motion for reconsideration, with Mr. Edwards arguing on behalf of the plaintiffs. The trial court, although it appeared to be overly concerned by Mr. Curries' earlier declaration of service which was supplemented and clarified by his May 6, 2014 declaration, nevertheless ordered a 1-hour evidentiary hearing in order to fully vet the service of process issue. (RP II p. 32-43).¹³

The “evidentiary hearing” spanned the afternoons of both August 7 and August 8, 2014. During the course of the hearing, three witnesses were called, (1) Martin Heyting a clerical employee at the Tacoma attorney general’s office, (2) Stephen Currie the “process server” and attorney Currie’s son, and (3) Glenn Anderson, an Assistant Attorney General, officed at the Tacoma location and AAG Ahearn’s supervising attorney. (RP III p. 57 to RP IV p. 183).

Mr. Heyting acknowledged that March 5, 2013, the date Mr. Currie presented himself at the Tacoma Attorney General’s Office, it was not a

¹³ Mr. Curries earlier declaration, was not contradictory of his subsequent declaration, but clarified and supplemented what actually transpired at the Attorney General's office location. See generally, *Schonauer v. DCR Entertainment, Inc.*, 79 Wn.App. 808,818, 905 P2d 392 (1995).

routine day at that location. On that date the newly-elected Attorney General, Bob Ferguson was conducting his first visit at that office. (RP III p. 77-78). It was established that near the entry of the Tacoma Attorney General's office, there is a glass partition, (with a delivery slot), separating members of the public from the Assistant Attorney Generals, and other staff at that location. The door between the public reception area and the state offices are locked. (RP IV p. 157-58).

Though he had no recollection of Mr. Currie, Mr. Heyting testified about internal AAG office procedures relating to the receipt and/or service of summons and complaints, and indicated that when someone such as Mr. Currie presented himself at the front window, pushing a summons and complaint through the deliver slot, he would only call an Assistant Attorney General into the location only if a member of the public specifically indicated that they were there for the purposes of serving process on an Assistant Attorney General. (RP III p. 67-9; p. 74). Mr. Heyting subsequently volunteered that when someone approaches the front counter with a summons and complaint he would specifically ask if they were simply dropping the documents off, or desired to serve an Assistant Attorney General. (*Id.* p. 82).

Although he has no specific recollection of the event, Mr. Heyting was the individual who authored the log entries in which the State asserted

served to prove that service had not been properly performed. (*Id.* p. 74, p. 80-83.) Mr. Heyting speculated based on his log entry addressing the “Vicky Love” matter, that whoever brought the summons and complaint to the Tacoma attorney general’s office told him they were just “dropping it off; and then they leave.” (*Id.* p. 82).¹⁴

Mr. Ahearn's supervisor, Glenn Anderson testified that he personally did not receive services of the Love summons and complaint, but did admit that it was his determination to assign the case to Mr. Ahearns for prosecution of the defense. (*Id.* p. 93).¹⁵

Mr. Currie testified that based on a “photo montage” of Tacoma AAG personnel, he identified Glenn Anderson as being the individual who the receptionist brought to receive service of the summons and complaint. Mr. Anderson denied the accuracy of Mr. Currie’s representations.

¹⁴ It is respectfully suggested that it seems to be “implausible” that Mr. Currie, who on the same day successfully served the City of Tacoma, would have answered no to the question of whether or not he was present at the Attorney General’s office for the purpose of serving process, when obviously he was.

¹⁵ Due to the fact that Mr. Anderson assigned Mr. Ahearns the responsibilities of defending this case, one could assume that he actually reviewed the summons and complaint prior to making a determination as to which subordinate attorney the case should be assigned. (RP III p. 102). The act of assigning an attorney to defend a case is consistent with the notion that the AG’s office, was well aware that a lawsuit had been commenced, the State had been served and a defense was needed. It is noted that once the complaint was received in Tacoma it was sent to the Tumwater torts office which processes all of the tort lawsuits filed against the State. *Id.*

Despite the fact that an Assistant Attorney General obviously had been delivered a copy of the summons and complaint, the trial judge denied reconsideration.¹⁶

On September 26, 2014 the plaintiff filed a timely notice of appeal. Curiously, presumptively because this Court was questioning the entry of a final judgment under the terms of RAP 2.2, in early December 2014 plaintiffs filed an unopposed motion to voluntarily dismiss the remaining defendants Does 1-10.” Such an order was granted on December 12, 2014 and on December 30, 2014 this Court issued a “perfection notice”.

V. ARGUMENT

A. Standard Review Applicable to This Appeal

Appellate Courts review summary judgment determinations *de novo* engaging in the same inquiry as the Trial Court. *See Powers v. W. B. Mobile Servs., Inc.*, 182 Wn.2d at 164. The Appellate Court considers all facts and the reasonable inferences from the facts in a light most favorable to a non-moving party. *Id.* Summary judgment is only appropriate if the materials on file demonstrate the absence of any genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. *Kelley v. Pierce County*, 179 Wn.App. 566, 573, 319 P.3d 74 (2014). A

¹⁶ Not only did the trial court deny plaintiff’s motion for reconsideration, but also entered into findings of facts and conclusions of law that it appeared to be unauthorized by our court rules.

material fact is one in which, in whole or in part, the outcome of the litigation depend. *Id.* citing to *Anderson v. Dussault*, 177 Wn.App. 79, 88, 310 P.3d 854 (2013). The Appellate Court when reviewing a motion for summary judgment construes all facts and reasonable inferences in a light most favorable to the non-moving party and reviews issues of law *de novo*. *Id.* citing to *Derrocal v. Fernandez*, 155 Wn.2d 585, 590, 121 P.3d 82 (2005).

A Trial Court's denial of a motion for reconsideration is reviewed under an abuse of discretion standard. *See Pacific Industries, Inc. v. Singh*, 120 Wn.App. 1, 11, 86 P.3d 778 (2003). A Trial Court abused its discretion if its decision is manifestly unreasonable or is exercise on untenable grounds or for untenable reasons. *See Salas v. Hi-Tech Erectors*, 168 Wn.2d 664, 668-69, 230 P.3d 583 (2010). "A discretionary decision is based on untenable grounds or made for untenable reasons if it rests on facts unsupported by the record or as reached by applying the wrong legal standard." *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. 744, 758, 260 P.3d 967 (2011).

To the extent that the Trial Court's findings of facts and conclusion of law in this matter relate to the summary judgment motion which is subject to reconsideration, the court should not consider such findings because they are superfluous, given the *de novo* standard of review

applicable to summary judgment motions. *See Duckworth v. City of Bonnie Lake*, 91 Wn.2d 19, 21-22, 586 P.2d 860 (1978).

Additionally under the terms of CR 59(f) a "statement of reasons" (findings of fact and conclusions of law) need only be entered when a motion pursuant to Rule CR 59 for a new trial **has been granted**. As such, the Trial Court's finding of facts and conclusions of law relating to the denial of claimant's motion for reconsideration, brought pursuant to CR 59, should also be deemed superfluous and disregarded. Further, under the terms of CR 52(a)(5)(B) findings of fact and conclusions of law are not necessary in decisions involving motions, save for very limited circumstances.

Assuming arguendo that the Trial Court appropriate entered into findings of fact and conclusions of law, findings of facts are reviewed to determine whether they are supported by "substantial evidence". *McCoy v. Kent Nursery, Inc.*, 163 Wn.App. at 758. "Substantial evidence is evidence of sufficient quantity to convince a fair-minded person of the truth of the declared premise." *Id.* citing to *Holland v. Boeing Co.*, 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978). A Trial Court's conclusions of law are reviewed *de novo*. *Id.*

This Court previously has found dismissals based on service of process grounds to be subject to *de novo* review, because such matters

involve inherently legal issues. *See Witt v. Port of Olympia*, 126 Wn.App. 752, 755, 109 P.3d 489 (2005).

B. Substantial Circumstantial Evidence Support That There Was At Least "Secondhand" Service and, At a Minimum, Questions of Fact Which Should Have Precluded the Grant of Summary Judgment.

It is unfortunate that the Trial Court did not have available to it our Supreme Court's recent opinion in *Scanlan v. Townsend*, *supra*, which was issued after the dismissal of this case. In *Scanlan*, our Supreme Court embraced the notion that direct, hand-to-hand, but "secondhand" service of process satisfies Washington's service of process requirements. In *Scanlan*, the plaintiff attempted to serve the defendant at her father's home believing that it was her "usual abode" for RCW 4.28.080(15) purposes. The defendant sought dismissal alleging that she had not resided at her father's home for over a decade. However, as the case developed it was ultimately learned that the defendant's father had actually delivered a copy of the summons and complaint to her in an unspecified manner.

This "secondhand" delivery occurred within the 90-day tolling period afforded by RCW 4.16.170. Despite evidence of such delivery of the summons and complaint to the defendant, the Trial Court nevertheless dismissed the case on inadequate service of process grounds. The court of appeals reversed. *Scanlan v. Townsend*, 178 Wn.App. 609, 315 P.3d 594

(2013). In affirming the Court of Appeals' reversal and remand of the case, the Supreme Court focused on the fact of delivery and the characteristics of the person who performed the delivery, as opposed to that person's intent to act as a process server. The Court reasoned that since the defendant's father met the *de minimis* qualifications under Washington law for a process server, his delivery of the summons and complaint to his daughter met statutory requirements.

The Appellate Court reached a similar conclusion in the case of *Brown-Edwards v. Powel*, 144 Wn.App. 109, 182 P.3d 441 (2008) which was cited with approval in *Scanlan*. In *Brown-Edwards*, the process server served the defendant's neighbor who in turn personally delivered the documents to the defendant. In upholding the Trial Court's refusal to dismiss the lawsuit based on inadequate service of process grounds, the *Brown-Edwards* courts observed the following:

Any person who is (1) over 18 years old, (2) competent to be a witness, and (3) not a party to the action may serve process. CR 4(c) Any person means any person. *Roth v. Nash*, 19 Wn.2d 731, 734-35, 144 P.2d 271 (1943). Ms. Vertrees [the neighbor] certainly meets the criteria for a process server. **Nothing in the Rule requires that a process server have a contractual obligation to serve process. CR 4(c). Nor is there any requirement of proof of intent to serve process. CR 4(c). And we find nothing that would prohibit a person who comes into possession of a summons and complaint by defective service from becoming a competent process server. CR 4(c). The Rule would prohibit only a party to the action**

from serving process. CR 4(c), *Columbia Valley Credit Exch., Inc. v. Lampson*, 12 Wn.App. 952, 953, P.2d 152 (1975); see *State v. Delgado*, 148 Wn.2d 723, 729, 63 P.3d 792 (2003). Under *expressio inius exclusio alterius*, Canon of Statutory Construction, to express one thing in a statute implies exclusion of the other. We conclude then that Ms. Vertrees [the neighbor] was a competent process server. CR 4(c) (emphasis added) (citations omitted).

As noted in *Scanlan* at Page 847, when adjudicating service of process issues, the plaintiff bears the initial burden to prove a *prima facie* case of sufficient service. If a *prima facie* case is established, the party challenging the service of process must demonstrate by clear and convincing evidence that the service was improper. See also *Woodruff v. Spence*, 76 Wn.App. 207, 210, 883 P.2d 936 (1994). In order to establish a "*prima facie* case of service", as shown by *Scanlan*, there is no requirement that the plaintiff produce an affidavit of service from the process server. In *Scanlan* the defendant's own testimony established the significant facts which the court found *prima facie* service, which was not rebutted by "clear and convincing evidence".

In the gratuitous service/secondhand service context the defendant's admission is the best possible evidence that he received the summons and complaint." See *Hamill v. Brooks*, 32 Wn.App. 150, 151-52, 646 P.2d 151 (1982) (defendant admitted that he was given a copy of the summons and complaint by his brother).

As touched on above, there was more-than-adequate information before the Trial Court from which to reasonably, if not irrefutably, conclude that at a minimum by way of a gratuitous agency and/or "secondhand service", that an assistant attorney general received a copy of plaintiff's Summons and Complaint. Such a fact should have been deemed conclusively established by the Answer that was authored by Mr. Aherns, and filed with the court under his signature. (CP 289-297). This, combined with evidence of the Attorney General's March 5, 2013 filing stamp on a copy of both the Summons and Complaint establishes, at a minimum, a question of fact that there was a timely delivery to an Assistant Attorney General. Even if service was not accomplished on March 5, 2013 it was consummated at some point prior to the filing of the State's Answer.¹⁷ (CP 55; 56).

The clear inferences from such evidence is that someone within the Attorney General's Office provided Mr. Aherns with a copy of the Summons and Complaint. Given the unlikelihood that such an individual would have been below the age of 18, or otherwise an incompetent, these facts alone should have been sufficient to shift the burden onto the

¹⁷ It is also noted that Mr. Aherns' supervisor, Mr. Anderson, testified that he assigned this case to Mr. Aherns for defense. One would assume that Mr. Anderson, as a responsible supervisor, would have reviewed the Summons and Complaint prior to making a determination as to which one of his subordinate AAGs he would assign the case.

defendant to establish by "clear and convincing evidence" that service was improper.

To be clear, plaintiff is not advocating that any time a defendant files an Answer it can be deemed as an admission that service of process has occurred. Rather, what is at issue is service under the terms of RCW 4.92.020 which requires that the summons and complaint be placed in the hands of an Assistant Attorney General, a specific class of individuals which included the individual who drafts the Answer and is defending the lawsuit against the State.¹⁸

On this basis alone the Appellate Court should reverse the Trial Court's dismissal of this case and remand it for further proceedings.

C. Under the Sidis Rule the Statute of Limitations was Tolloed.

The defendant's motion for summary judgement was predicated on both insufficient service of process **and** expiration of the applicable statute of limitations. As previously noted the State failed to assert a statute of limitation defense in the affirmative defenses set within its Answer, thus waived such a defense. Given such a waiver, even if the Trial Court was inclined to find that there was not appropriate service of process by the

¹⁸ Given the fact that Mr. Aherns himself attached a copy of the Summons and Complaint to his materials he submitted in support of his motion for summary judgment, he certainly cannot deny he had possession of such documents **at his office, at least as of April 18, 2014 when he filed a Declaration of Jennifer Watsek in support of the motion for summary judgment that he filed which had the documents as an attachment.** (CP 48-75).

State, it should have exercised its discretion and directed that such service occur, as opposed to dismissing this case.¹⁹ Ignoring the existence of the "Does" defendants, it was the State's theory that it was entitled to dismissal because there no longer remained a "served" defendant, because the City of Tacoma's dismissal extinguishing the tolling provided by RCW 4.16.170. The State, while acknowledging that under the terms of RCW 4.16.170 in multiple defendant cases that serves a process on one defendant tolls the statute of limitation as to the others, argued that dismissal was nevertheless appropriate. See *Sidis v. Nordie Dorman, Inc.*, supra, *Fox v. Sumaster Products, Inc.*, 63 Wn.App. 561, 821 P.2d 902 (1991).

Such a position taken by the defense clearly was erroneous because, as discussed above, the State in fact was served in the 90-day timeframe afforded by RCW 4.16.170. Additionally, as borne out by the procedural history of this case, the State's position fails to take into account the "Does" defendants which were not dismissed from this case until months after the State.

¹⁹ The affirmative defenses listed within CR 8(c) must be affirmably plead and if not, they are deemed waived. See *Farmers Ins. Co. of Washington v. Miller*, 87 Wn. 2d 70, 76, 549 P.2d 9 (1976). In review of defendant's Answer, it is noted that there is no language anywhere within its terms which any way suggests that a statute of limitation defense was being raised in this case. A pleading, including affirmative defenses with an answer, are insufficient if they do not give fair notice of what the defense is, and the grounds upon which it rests. See *Heath v. Uraga*, 106 Wn.App. 506, 516n12, 24 P.3d 413 (2001). There is nothing within the language of defendant's answers which even remotely suggests that it intended to raise a statute of limitation defense.

It is undisputed the City of Tacoma was served of the summons complaint. (CP 89-99). In the Complaint it is specifically alleged that the Doe defendants were acting within the scope of their employment. Thus, such "Doe" defendants are essentially the "alter ego" of the City in the sense that under respondeat superior principals the City would be automatically liable to the same extent as the deputies. See *La Plant v. Snohomish County*, 162 Wn.App. 476, 480, 271 P.3d 254 (2011).²⁰

As in the recent case of *Powers v. WB Mobile Services, Inc.*, 182 Wn.App. 159, 339 P 3d 173 (2014) indicates simply because the case "Doe" defendants who are unnamed, does not impact the "*Sidis*" rule.

Arguably, given the "Doe" defendants were not dismissed until December 12, 2014, the whole premise of the State's summary judgment motion was flawed. Given the Summons and Complaint were marked Exhibits during the August 2014 evidentiary hearing, it would strain credibility to assert that the documents had not found their way, at least by that time, into the hands of the statutory target of service, and Assistant Attorney General.

²⁰ When respondeat superior principals apply the plaintiff has the option of suing either the employer, or the employee, or both. See *Orwick v. Fox*, 65 Wn.App. 71, 80, 828 P.2d 12 (1992). It is noted that RCW 4.96.020, a statutory claim for damages has to be filed before a commencement of suit even in an action where the employee defendant sued without the naming of his governmental employer as a party. See, *Melin v. Schilling v. Imm*, 149 Wn.App. 588, 205 P.3d 905 (2009); *Atkins v. The Bremerton School Dist.*, 396F. Supp. 2d 1065 (W.D. Wash. 2005).

D. Based on the Facts and Circumstances of this Case the Doctrines of Constructive Service and/or Constructive Tendering Should Have Been Applied.

From the testimony of State's own personnel, and as evidenced by Attorney's General office's internal services process policies, it should have been abundantly clear to the Trial Court that the personnel at the Tacoma location of the Attorney General's Office have substantial and extraordinary control over whether or not service of process, under RCW 4.92.020, can be accomplished. The location has a locked door and glass partitions which separate the targets of service, Assistant Attorney Generals, from the general public. Papers can only be delivered through a "delivery slot" within the glass partition.²¹

This matter came before the Trial Court by way of a motion for summary judgment. It was obligated to consider the May 6, 2014 declaration of process server Currie. See *supra*; *State Farm v. Treciak*, 17 Wn.App. 402, 408-09, 71 (2003); see also *Safeco Insurance Company v.*

²¹ It is again emphasized that under the terms of RCW 4.92.020 service on an Assistant Attorney General must be accomplished at an Attorney General's Office location. It cannot occur out in the street or at their home. According to Mr. Anderson, because of security concerns, he personally would not accept service from a higher glass partition and will not venture out into the common lobby area even to accomplish this task. (RP IV p. 179). Although it is a little unclear, it appears that often service upon an assistant attorney general at the Tacoma location is accomplished by way of "secondhand" service because the documents may actually be handed to the AAG by clerical staff, who originally received them through the partitions delivery slot. According to supervising AAG Anderson, when he receives/accepts service he does not take the documents from the process server but usually finds them on the counter in the receptionist area behind the glass partition. (RP IV p. 157-58). Thus, in a technical sense it is his own receptionist/clerical personnel who are actually performing service.

McGrath, 63 Wn.App. 70, 87 P.2d 861 (1991). According to Mr. Currie when he brought the paperwork to the Tacoma AAG's office clerical staff called an individual out of the back of the office, who from all reasonable appearances would have been authorized to accept service.²²²³

In many respects this case is similar to the case of *Stevens v. City of Centralia*, 86 Wn.App. 135, 936 P.2d 1141 (1997) which dealt with an analogous issue. In *Stevens*, the plaintiff on the last day available attempted to file a statutory claim for damages with the City of Centralia clerk's office. He told the clerk he wished to file a claim for damages, but the clerk refused to file the claim which he presented because it was not on

²² This case is readily distinguishable from the case of *Landreville v. Shoreline Community College District* 53 Wn.App. 330, 766 P.2d 1107 (1989) heavily relied upon by the State below. In that case, someone whom the process server knew was an administrative assistant, indicated that she was authorized to accept service. Given that the process server under such circumstances knew that the individual accepting the paperwork was not a statutory target of service, (an Assistant Attorney General), the court was disinclined to afford equitable remedies, given the clear letter of the law made reliance on the administrative assistant's statement unreasonable. Mr. Currie is not a professional process server. Even if he were, no rule, statute or case requires the inquiry the Trial Court would want to impose. Naturally, in hindsight it would have benefitted that everyone if he had asked for ID or, for that matter, taken a cell phone picture of whomever he delivered documents to. Here, the circumstances manufactured by the employees of the Attorney General Office would have lead a reasonable person to believe that service was being performed on an actual Assistant Attorney General, the proper statutory target of service.

²³ It was the Trial Court's position that Mr. Currie should have done something more to discover the identity of the individual who he believed to be an Assistant Attorney General. Such a position assumed without a factual basis that such inquiry would have been favorably received. Given the fact that assistant attorney Glen Anderson testified that he did not even venture out into the common lobby area of the offices to accept service, it would be hard to imagine that he would be willing to give a stranger his name and/or his driver's license in order to satisfy their concerns. As it is, even if we assume that the procedures, as outlined by the State's witnesses were followed, the Trial Court should have taken into account that communicating and/or procuring identification from someone behind a locked door and glass partition, could be problematic.

the preprinted form provided by the City of Centralia. After consulting with his attorney the next day he returned to the clerk's office and insisted that his claim for damage be filed "as is", but it was too late.

After suit was filed, the City moved to dismiss *Stevens'* case because he had failed to timely file an administrative claim with the City. The trial court agreed and for that reason, among others, dismissed Mr. Stevens' claims.

On appeal this court took a dim view of the City's actions, and found that although it did not find that the claim was "constructively filed", it was "constructively accepted" at the point Mr. Stevens "tendered" or presented it to the City clerk's office for filing. *Id.* at 152. The court reasoned that a failure to provide relief would lead to an inequitable result. Id.

Here, the court should conclude that the summons complaint and was constructively served upon an Assistant Attorney General when the process server went to the proper location for service and State personnel placed before him an individual who by all appearances was a statutory target of service. To not do, like *Stevens* would lead to an inequitable result.

Alternatively the court should find that the complaint was constructively served under the principals set forth in *United Pac. Ins. Co.*

v. Discount Co., 15 Wn.App. 559, 562, 550 P.2d 699 (1976). Under such principal, the summons and complaint does not have to be placed into the defendant's hands in order to effect service. Rather service is completed when the process server attempts to "yield possession and control of the document" to the defendant while the process server is positioned to accomplish that act. *Id.* A party should not be permitted to evade service by refusing process or by misdirecting it away from the proper target. See generally *State v. Vahl*, 56 Wn.App. 603, 607, 784 P.2d 1280 (1990); see also *Nielsen v. Braland*, 119 N.W. 2d 737 (Minn. 1963).

In this case, Mr. Currie went to the statutorily required place to serve process and gave the documents to an individual who under the State's own policy maintains substantial control over whether or not service will actually occur. Under such circumstances process should have been deemed completed when the summons complaint was tendered through the delivery slot.

E. The Defendants Should Be Estopped from Asserting a Service of Process Defense in this Case.

The doctrine of equitable estoppel is based on the notion that a party should be held to a representation made or a position assumed when in equitable consequences would result to another party who justifiably and in good faith relied on such representations. See *Lybbert v. Grant*

County 141 Wn.2d at 35. As indicated in *Lybbert*, the elements of equitable estoppel are:

(1) An admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in reasonable reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.

In *Landreville, supra*, the court refused to apply equitable estoppel in a case involving service under RCW 4.92.020, reasoning that under the facts it was unreasonable for the process server to rely on asserts made by someone who was not the statutory target of service, and under the law never could be. It was unreasonable for the plaintiff to rely on an administrative assistant's representations that she had authority to accept service.

Equitable estoppel can be used to prevent a defendant from inequitably resorting to a statute of limitation defense. *Central Heat, Inc. v. Daily Olympian, Inc.* 74 Wn.2d 126, 134, 443 P2d 544 (1968).

In this case, the actions of the state employees on March 5, 2013 were inconsistent with the subsequent position that process had not been appropriately served. The state personnel stamps a copy of the summons and complaint with a received stamp and returned such documents to plaintiff's process server. According to plaintiff's process server when he presented such paperwork to those in control of those at the statutory

service location, a person whom by all appearances was authorized to accept service was called out of the back.

Thereafter, an Assistant Attorney General, Mr. Ahearns, filed a detailed Answer which, at best, nearly incoherently, attempted to assert an insufficient service of process affirmative defense. The Answer **did not** include a statute of limitations defense, which logically would go "hand in hand" with a insufficiency of process defense. Instead, the Answer and included a number of affirmative defenses that frankly are confusing, and included at least one which clearly has no application to the claims being brought in plaintiff's complaint.²⁴

Moreover, the defense did not object to the content of the "confirmation of joinder" filed by the plaintiffs and engaged in communication with plaintiff counsel consistent with a lawsuit being properly commenced, as further evidenced by the fact that the parties

²⁴ In affirmative defense "11" the defendant asserted a qualified immunity defense against a claim brought pursuant to 42 U.S.C. § 1983, even though plaintiff's complaint never asserted such a claim. (CP 295). In affirmative defense No. "3" the state asserted that plaintiff had failed to file a statutory claim under RCW 4.92.100 and .110 despite the fact that the undisputed evidence placed into the court record, by the defense, established that such a claim was filed in excess of 60 days prior to the commencement of this lawsuit. (CP 294). While a number of the State's affirmative defenses appear to be appropriate and "on point", a few others are certainly questionable and confusing. At affirmative defense No. 6 it appears that the State is asserting a "discretionary immunity" defense despite the fact that in *Taggart v. State* 118 Wn.2d 195, 213-15, 82 P2d 243 (1992) the Supreme Court rejected application of such immunity in the context of the State's negligent failure to adequately supervise criminal offenders, the very claim brought in this case. (CP 295).

engaged in substantial discovery in the several months after the defense filed an Answer, but before it filed its motion for summary judgment.²⁵

Finally, this case also provides an appropriate circumstance for the application of estoppel by silence. See *Huff v. Northern Pacific Ry. Co.* 38 Wn.2d 103, 114-16, 228 P2d 121 (1951) *Sorenson v. Pyeatt* 158 Wn.2d 523, 538-39, 146 P3d 1172 (2006). The basic premise of estoppel by silence is that “if one maintains silence when in conscience he ought to speak, equity will debar him from speaking when in conscience he ought to have remained silent.” *Huff* citing to *Harms v. O’Connell Lumber Co.* 181 Wn. 696, 700, 44 P2d 785 (1935). Estoppel by silence arises when the individual who has remained silence has full knowledge of the facts and has a duty to speak. See *Consolidated Freight Lines v. Goenen* 110 Wn.2d 672, 677, 117 P2d 966 (1941) citing to, *Blanck v. Pioneer Mining Co.* 93 Wn. 26, 34, 159 P. 177 (1916).

According to the State’s own witness, Mr. Heyting, when executing the State’s internal service of process policy, arguably when he

²⁵ Plaintiff concedes that the defense’s failure to object to the content of the confirmation of joinder, **standing alone**, does not waive its service of process defense. See *Clark v. Faling* 92 Wn.App. 805, 813, 965 P2d 644 (1998); *Parry v. Windermere Real Estate* 102 Wn.App. 920, 925, 10 P3d 506 (2000). However, that does not mean that such a failure to act cannot be viewed as an admission by silence and indicative that the defense was engaging in inconsistent conduct with its’ later asserted position that there had been a problem with service of process. An admission by silence can occur when a party opponent is aware of a statement, was able to respond and the circumstances surrounding the statement were such that it was reasonable to conclude that the party opponent would have responded “had there been no intention to acquiesce.” See *State v. Cotten* 75 Wn.App. 669, 689, 879 P2d 971 (1994).

is asked the right question, he will seek clarification as to whether or not the summons and complaint being presented at the delivery window is simply being dropped off, or service upon an Assistant Attorney General is intended.²⁶ According to Mr. Heyting, it is the State's policy to speak and the court should hold the State to its representations.

Had Mr. Currie been told that something more needed to be done in order to accomplish the very act in which brought him to the Attorney General's Office on March 15, 2013 in good conscience he should have been provided such information by the defendant employee.

F. The Defendant Waived Any Insufficient Service of Process and Statute of Limitation Defenses.

As previously discussed, the State waived any statute of limitation and/or insufficient service of process defense when it failed to raise such defense within its Answer, or by failing to coherently do so in a manner which provided the plaintiffs fair notice that such a defense was being asserted.

Additionally, the common law doctrine of waiver, should be reviewed as having full application in this case.

Shortly after our civil rules were enacted the Court of Appeals adopted a waiver doctrine to prevent a defendant from using delay or

²⁶ The State's internal policies and directives provide evidence as to the scope of the applicable standard of care. See *Joyce v. State* 155 Wn.2d 306, 324, 119 P3d 825 (2005); WPI 60.03.

subterfuge as a procedural snare when asserting the defenses enumerated in Rule 12(d). The court held that “[a] defendant’s conduct through his counsel may be ‘sufficiently dilatory or inconsistent with a later assertion of one of these defenses to justify declaring a waiver.’” *Raymond v. Fleming* 24 Wn.App. 112, 115, 60 P2d 614 (1979).

In the decades since, Washington courts have repeatedly recognized that dilatory and inconsistent conduct are two grounds for finding waiver. See, e.g., *King v. Snohomish County* 146 Wn.2d 420, 424, 47 P3d 563 (2000) (“[A] defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant’s prior behavior or (2) the defendant has been dilatory and asserted a defense.”, citing *Lybbert* 141 Wn.2d at 39).

The above are two separate standards which should be analyzed separately and called different types of behaviors in question.

The term “dilatory” is synonymous with “delay”. See, e.g., *Black’s Law Dictionary* 488 (8th ed. 2004) defining “dilatory” as “[t]ending to cause delay”). As the First Circuit Court of Appeals has noted, dilatory assertion of Rule 12 defenses runs counter to one of the major procedural objectives of our modern rules, which is “to eliminate unnecessary delay at the pleading stage.” See *Marciel Ucin, S.A. v. SS Galicia*, 723 F2d 904, 997 (1st Cir. 1983). In *Marciel*, not only did the defendant delay in filing

its answer, but also engaged in pretrial discovery taking several depositions. Based on such facts, the First Circuit found waiver because defendant's actions were both dilatory and inconsistent. A defendant engaging in discovery raises concerns about deception and the reliance interests of the plaintiff.

A Washington decision, *Butler v. Joy* 116 Wn.App 291, 65 P3d 671 (2003) is also illustrative. In *Butler* defendant filed an Answer asserting insufficient service of process 9 months after his attorney first appeared. *Id* at 294. According to Division 3, the defendant was not dilatory because he filed the answer. *Id* at 298. Nevertheless, the court found waiver on the other prong because the defendant directed discovery to issues other than insufficient service of process. *Id*. Thus, *Butler* further shows that the two prongs of the waiver doctrine may overlap in some cases, but not all, thus they should be analyzed separately.

The case of *Blankenship v. Kalgor* 141 Wn.App 302, 320, 57 P3d 295 (2002) is instructive on this issue. In *Blankenship* the court found waiver on both of the two grounds for waiver. The fact that the defendant in *Blankenship* had engaged in discovery was a fact relevant to the court's determination that the defendant had behaved inconsistently with an insufficient service of process defense. *Blankenship* 114 Wn.App at 319-20. The court in *Blankenship* also separately found the defendant was

dilatory because “the defense was tardy in asserting the insufficient service of process defense when it had the necessary facts in its control to make the critical assessment and failed to act earlier.” Id at 320, see also *Kahclamat v. Yakima County* 31 Wn.App 464, 643 P2d 453 (1982) (finding waiver applicable to motion to change venue because the defendant had waited 1 year after the action was filed before filing such a motion). When delay is at issue, the doctrine of waiver is sensible and consist with our modern day procedural rules which exist to foster and promote “that just, speedy and inexpensive determination of every action.” See *Haywood v. Aranda* 143 Wn.2d 231, 239-40, 19 P3d 406 (2011) citing to *Lybbert* 141 Wn.2d at 39.

From the beginning the State, through its Assistant Attorney Generals, acted grossly inconsistent with the notion there was a problem with service of process. Further, other than "ambush" it is hard to conceive of a reason why the State who allegedly had service concerns from the outset would delay in raising the issue until over a year after the case was filed. One could surmise that the State was waiting for the time it could inflict maximum damage.

The State should not be given an "eternal life preservation" based on the alleged assertion of a vague, inarticulate and/or nearly unintelligible service of process defense within tis Answer.

Finally, it is noted that the State also waived its insufficient process and/or statute of limitations defense under the principles of waiver by silence. See *Ronjue v. Fairchild*, 60 Wn.App. 278, 282, 803 P.3d 57 (1991); *Board of Regents v. Seattle*, 108 Wn.2d. 945, 533, 741 P.2d 11 (1987).

Given the fact that it is undisputable that a copy of plaintiff's Summons and Complaint was placed into the hands of, at minimum, the Assistant Attorney Generals acting as advocates in this case, they simply did not have a prerogative of standing silent and not explaining how they came into possession of such documents. In view of the context of this case, permitting the Attorney General's office to gain a procedural advantage, based on their obvious superior knowledge with respect to the issue squarely before the Trial Court, would be inequitable. All lawyers have an obligation to act in "good faith" and to bring forth wholly meritorious and factual assertions. See RPC 3.1. On occasion zealous representation of a client's interests, must give way to the professional obligation of treating others fairly and on order to practice candor towards the tribunal. See RPC 3.3 and 3.4.

That being said, it is noted that this appeal addresses a relatively unique factual and legal scenario where counsel for one of the parties is also a statutorily mandated target for service of process. See

RCW 4.92.020. Given our Supreme Court's recent embrace of "secondhand" service principles in *Scanlan*, it is likely to take some time to figure out the balance to be defined between an AAG as an advocate, and the role as a statutory target of service. It is suggested that perhaps the best resolution is once an AAG has a copy of a Summons and Complaint in his possession, he should think twice about raising a insufficient service of process defense. To not do so would likely create a situation where what he or she knew, and when she knew it, will become a distracting target of discovery.

CONCLUSION

For the reasons stated above, the Trial court's grant of defendant's Motion for Summary Judgment should be reversed and this matter remanded for further proceedings, including trial.

Submitted this 15 day of July, 2015.


Paul A. Lindenmuth
Attorney for Appellants
WSBA No. 15817

FILED
COURT OF APPEALS
DIVISION II
2015 JUL 15 PM 3:12
STATE OF WASHINGTON
DEPUTY

CERTIFICATE OF FILING & SERVICE

I, Tiffany Dixon, hereby declare under the penalty of perjury under the laws of the State of Washington that the following is true and correct.

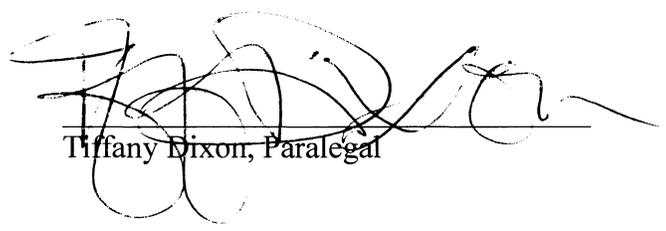
On the 15th day of July, 2015, a true and correct copy of **Appellant's Amended Opening Brief** was delivered and filed with the Court of Appeals, Division II:

Court of Appeals, Division II
950 Broadway, Suite 300
Tacoma, WA 98402
coa2filings@courts.wa.gov

In addition, a true and correct copy was delivered to:

Attorneys for Respondent:
Garth Ahearn
Office of the Attorney General - Tacoma
P.O. Box 2317
Tacoma, WA. 98401-2317
gartha@atg.wa.gov
NatashaC@atg.wa.gov
DeniseH1@atg.wa.gov

DATED at Tacoma, Washington this 15th day of July, 2015.


Tiffany Dixon, Paralegal

APPENDIX 1

10/17/70



APPENDIX 2

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HONORABLE KATHERINE M. STOLZ

**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

WILLIAM LOVE, as Personal Representative
of the ESTATE OF CAMILLE LOVE and
JOSHUA LOVE, individually,

Plaintiffs,

v.

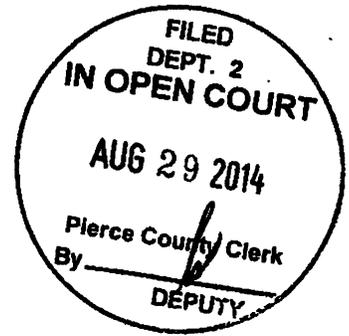
STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS, a
governmental entity, CITY OF TACOMA, a
municipal corporation and DOES 1-10
INCLUSIVE,

Defendants.

NO. 13-2-06154-1

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Handwritten initials



THIS MATTER regularly came before the Court upon the motion of Plaintiffs' Motion for Reconsideration, and Defendant State of Washington appearing by and through its counsel, Robert W. Ferguson, Attorney General, and Garth A. Ahearn, Assistant Attorney General, and Plaintiffs' appearing by and through their counsel, Vicky J. Currie, and heretofore presents its Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. This is a wrongful death and negligence action based on an incident which occurred on February 7, 2010.
2. On February 7, 2013, plaintiff's filed suit against Department of Corrections (DOC) and the City of Tacoma.

1 3. On March 5, 2013, Plaintiffs' served the City of Tacoma with a copy of the suit along with
2 a tort claim.

3 4. On March 5, 2013, Mr. Currie delivered a copy of the summons and complaint to a white
4 *male* receptionist at the Tacoma Attorney General's Office (AGO). *Per his affidavit of service.*
5 *Dated March 6, 2013.*

6 5. Mr. Currie has been the office manager for the Currie Law Firm for ten years. He reports to
7 and works under the direction of Ms. Currie. Ms. Currie is an attorney and also Mr. Currie's
8 mother.

9 6. On March 18, 2013 Mr. Ahearn wrote a letter to Ms. Currie which states in part that
10 original service of process could not be served by electronic mail, *did not address adequacy*
11 *of plaintiffs service of process.*

12 7. On March 29, 2013 the City of Tacoma was dismissed from the suit.

13 8. On April 9, 2013, The Department of Corrections (DOC) answered the complaint and
14 raised sufficiency of process as an affirmative defense.

15 9. On April 9, 2013, Ms. Currie received notice of the affirmative defense.
OR ABOUT

16 10. Ms. Currie did not attempt to cure service by serving an AAG after DOC timely raised its
17 affirmative defense.

18 11. There is no admissible evidence in the record that counsel for the defense engaged in any
19 act, statement or admission that was inconsistent with the affirmative defense.

20 12. On April 18, 2014, the defendants moved for summary judgment based on insufficient
21 service of process and statute of limitations.

22 13. Plaintiffs' response filed May 6, 2014, included a declaration from Mr. Currie drafted the
23 same day, stating he served an unidentified white male with a badge around his neck, who Mr.
24 Currie believed to have authority to accept service for the AG's office, *based on the statements*
25 *of a receptionist (unidentified) + which was hearsay.*

26 14. Plaintiffs' summary judgment response briefing argued service of a receptionist constituted
proper service.

15. On May 23, 2014, the court heard oral argument concerning the summary judgment motion.

16. Mr. Currie was present in the court for oral argument.

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A.G. *5/1/14*

1 17. ~~Mr. Currie~~, Plaintiffs' counsel, again represented to the court that service of a receptionist is
2 proper service of the State.

3 18. It was manifestly clear ~~Mr. Currie~~ was not aware proper service of the State requires the
4 summons and complaint to be served on an AAG.

5 19. The court granted summary judgment.

6 21. On June 2, 2014, plaintiffs moved for reconsideration.

7 22. In support of the motion for reconsideration, plaintiffs' counsel submitted for the first time a
8 copy of Mr. Currie's March 6, 2013, declaration of service stating he served a white male
9 receptionist.

10 23. The March 6, 2013, declaration was supposed to state Mr. Currie served a white male
11 receptionist on March 5, 2013. The March 6th date was a scrivener error.

12 24. The declaration of service was neither referenced, nor included in, the plaintiffs' summary
13 judgment response.

14 25. Mr. John Edward's appeared at the motion for reconsideration on behalf of the plaintiffs
15 and argued the suit was properly served, based on pleadings filed. *is that safe*
16 26. Mr. Currie was present for the motion for reconsideration. *but requested an evidentiary hearing - Court granted that w/ reservations.*

17 27. None of the evidence provided by plaintiffs in their motion for reconsideration or at oral
18 argument for the motion established an AAG was served. However, the court granted plaintiffs
19 request for an evidentiary hearing.

20 28. On March 8, 2014, Mr. Currie testified at the evidentiary hearing and *stated* ~~claimed~~ he served
21 Senior AAG Glen Anderson on March 5, 2013. Mr. Anderson is the Tacoma Tort's Division
22 Section Chief. He supervises three attorneys. He, along with the other three attorneys in his unit,
23 regularly is asked to accept service.

24 29. Mr. Anderson was at work on March 5, 2013.

25 30. Mr. Currie *stated* ~~claimed~~ the person he served was wearing a suit.

26 31. Mr. Anderson *stated* ~~testified~~ he was not wearing a suit.

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1 58. The Love summons and complaint does not have an acknowledgment of receipt stamp with
2 Mr. Anderson's or any other AAG's signature.

3 59. Mr. Currie's declaration of service made close in time to when he delivered the summons
4 and complaint to the Tacoma AGO, ^{dated 03/06/13 was} ~~states~~ ^{that declaration states} he served a receptionist, ^{RSW} not Mr. Anderson or any other
5 AAG. ^{white male.}

6 59. In light of the all the evidence in the record, ~~Mr. Currie's testimony he served Mr. Anderson~~
7 ~~is not credible.~~ ^{The Court finds that service was NEVER completed by}
8 ^{properly serving an AAG.} CONCLUSIONS OF LAW ^{(M) RSW}

9 1. The plaintiffs failed to establish a prima facie case establishing they properly served the
10 State.

11 2. The totality of the record establishes by clear cogent and convincing evidence the
12 plaintiffs did not perfect service against the State by serving an AAG at any time.

13 ~~3. Mr. Currie served a white male receptionist.~~ ^{(M) RSW}

14 4. The plaintiffs did not serve Mr. Anderson or any other AAG the summons and complaint.

15 5. Mr. Currie's and Ms. Currie's assumption that delivering a copy of a summons and
16 complaint to a receptionist amounts to proper service of the State is not reasonable as a
17 matter of law.

18 6. ~~Mr. Currie's assumptions about a receptionist's authority to accept service for the State is~~
19 ~~not reasonable as a matter of law either.~~ ^{The assertions that} ^{unreasonable} ^{(M) RSW}

20 7. The Department of Corrections timely raised the defense of insufficient service of process
21 in its answer.

22 8. The State is not estopped from raising the insufficiency of service defense. ^{(M) RSW}

23 9. ~~Ms. Currie~~ ^{Plaintiff's attorney} had sufficient time after she was placed on notice of the affirmative defense of
24 insufficiency of service to properly cure service prior to the running of the statute of
25 limitations.

26 10. DOC ^{did not} ~~did~~ waive the defense of sufficiency of service. ^{(M) (M) RSW}

~~NOT~~ ^{(M) (M) 2/2/10}

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Party	Method of Service
Vicky J. Currie Attorney at Law 732 Pacific Avenue Tacoma, WA 98402	<input type="radio"/> US Mail Postage Prepaid <input type="radio"/> UPS Next Day Air <input type="radio"/> Certified Mail Postage Prepaid <input type="radio"/> By Fax <input type="radio"/> State Campus Mail <input type="radio"/> By Email <input type="radio"/> ABC/Legal Messenger • Hand delivered by:
Party	Method of Service
Roger S. Wilson 918 N. Yakima Tacoma, WA 98403	<input type="radio"/> US Mail Postage Prepaid <input type="radio"/> UPS Next Day Air <input type="radio"/> Certified Mail Postage Prepaid <input type="radio"/> By Fax <input type="radio"/> State Campus Mail <input type="radio"/> By Email <input type="radio"/> ABC/Legal Messenger • Hand delivered by:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this ____ day of August, 2014, at Tacoma, WA.

AMY KUJA, Legal Assistant

APPENDIX 3

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**SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE**

WILLIAM LOVE, as Personal
Representative of the ESTATE OF
CAMILLE LOVE and JOSHUA LOVE a
single man,

NO. 13-2-06154-1

**DECLARATION OF
STEPHEN CURRIE
(DCLR)**

Plaintiffs,

vs.

STATE OF WASHINGTON DEPARTMENT
OF CORRECTIONS, a governmental
entity, CITY OF TACOMA, a municipal
corporation and DOES 1-10 INCLUSIVE,

Defendants.

This declaration is made by:

Name: STEPHEN CURRIE

I DECLARE that:

I declare under the penalty pursuant to the laws of the State of Washington that I am
now, and at all times herein-mentioned, have been a resident of the State of Washington, a
citizen of the United States of America, am over the age of eighteen years, and competent to
testify as a witness in this matter, am not a party to the above-entitled action,

180

1 On March 6, 2013, I personally served copies of the Order Setting Case Schedule, Summons
and Complaint at the Attorney General's office located at 1250 Pacific Avenue Suite 105
3 Tacoma, Washington 98402. I approached the receptionist desk and asked who accepted
4 service in their office. The receptionist left and returned with a tall Caucasian male who agreed
5 to accept service on behalf of the Attorney General's office. The male who agreed to accept
6 service was dressed in a suit and tie and he was wearing a badge, therefore I assumed he was
the appropriate person to accept service.

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

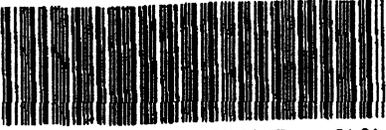
9 Signed at Tacoma, [City] WA [State] on 05/06/2014 [Date].

10 Stephen Currie
11 Stephen Currie
Signature

12 DO NOT ATTACH FINANCIAL RECORDS TO THIS DECLARATION. FINANCIAL RECORDS
SHOULD BE SERVED ON THE OTHER PARTY AND FILED WITH THE COURT
14 SEPARATELY USING THE SEALED FINANCIAL SOURCE DOCUMENTS COVER SHEET
(WPF DRPCU 09.0220). IF FILED SEPARATELY USING THE COVER SHEET, THE
15 RECORDS WILL BE SEALED TO PROTECT YOUR PRIVACY (ALTHOUGH THEY WILL BE
AVAILABLE TO THE OTHER PARTIES IN THE CASE, THEIR ATTORNEYS, AND CERTAIN
OTHER INTERESTED PERSONS. SEE GR 22 (C) (2)).

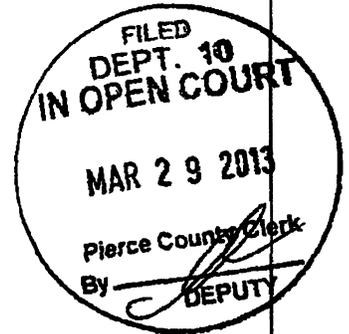
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APPENDIX 4



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THE HONORABLE GAROLD E. JOHNSON



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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF PIERCE

WILLIAM LOVE, as Personal
Representative of the ESTATE OF
CAMILLE LOVE and JOSHUA LOVE,
a single man,

Plaintiffs,

vs.

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS,
a governmental entity, CITY OF
TACOMA, a municipal corporation
and DOES 1-10 INCLUSIVE,

Defendants.

NO. 13-2-06154-1

ORDER GRANTING DEFENDANT
CITY OF TACOMA'S MOTION TO
DISMISS FOR FAILURE TO STATE
A CLAIM

Noted for: March 29, 2013
Assigned: Judge Johnson

ORDER GRANTING DEFENDANT CITY OF
TACOMA'S MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM - Page 1 of 3
(13-2-06154-1)

ORIGINAL

Tacoma City Attorney
Civil Division
747 Market Street, Room 1120
Tacoma, Washington 98402-3767
(253) 591-5885 / FAX 591-5755

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THIS MATTER having come on regularly to be heard before the undersigned judge of the above-entitled court upon Defendant City of Tacoma's Motion to Dismiss for Failure to State a Claim; said defendants being represented by Deputy City Attorney Jean P. Homan; plaintiffs appearing by through their attorney of record, Vicky J. Currie; and the Court having reviewed the records and files herein, plus all attachments and exhibits thereto; and being fully advised in the premises, it is hereby

ORDERED, ADJUDGED AND DECREED that Defendant City of Tacoma's Motion to Dismiss for Failure to State a Claim is hereby GRANTED; it is further

ORDERED, ADJUDGED AND DECREED that plaintiffs' claims against said Defendant City of Tacoma are hereby DISMISSED in their entirety and *without prejudice.*

DATED this 29 day of May, 2013.

[Signature]
HONORABLE GAROLD E. JOHNSON

FILED
DEPT. 10
IN OPEN COURT
MAR 29 2013
Pierce County Clerk
By: *[Signature]*
DEPUTY

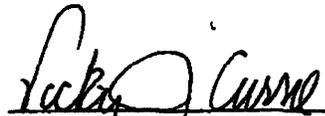
Presented by:

ELIZABETH A. PAULI, City Attorney

By 
JEAN P. HOMAN
WSBA #27084
Deputy City Attorney
Attorney for Def. City of Tacoma

Approved as to form:

LAW OFFICES OF VICKY J. CURRIE

By: 
VICKY J. CURRIE
WSBA #24192
Attorney for Plaintiffs

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APPENDIX 5

February 07 2013 8:30 AM

KEVIN STOCK
COUNTY CLERK
NO: 13-2-06154-1

RECEIVED

MAR 05 2013

OFFICE OF THE ATTORNEY GENERAL
TACOMA GENERAL SERVICES UNIT

SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

WILLIAM LOVE, as Personal
Representative of the ESTATE OF
CAMILLE LOVE and JOSHUA LOVE
individually,

Plaintiffs,
vs.

STATE OF WASHINGTON DEPARTMENT
OF CORRECTIONS, a governmental
entity, CITY OF TACOMA, a municipal
corporation and DOES 1-10 INCLUSIVE

Defendants.

NO.

SUMMONS ISSUED TO THE
STATE OF WASHINGTON

(20 DAYS)

TO THE DEFENDANT THE STATE OF WASHINGTON: A lawsuit has been
started against you in the above entitled court by WILLIAM LOVE, as Personal
Representative of the ESTATE OF CAMILLE LOVE and JOSHUA LOVE. Plaintiff's
claim is stated in the written complaint, a copy of which is served upon you with this
summons.

SUMMONS (SM) - Page 1 of 2

Vicky J. Currie
Attorney at Law
535 Dock Street, Suite 209
Tacoma, WA 98402
(253) 588-9922 Phone
(253) 983-1545 Fax

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In order to defend against this lawsuit, you must respond to the complaint by stating your defense in writing, and by serving a copy upon the person signing this summons within 20 days after the service of this summons, excluding the day of service, or a default judgment may be entered against you without notice. A default judgment is one where plaintiff is entitled to what they ask for because you have not responded. If you serve a notice of appearance on the undersigned person, you are entitled to notice before default judgment may be entered.

You may demand the plaintiff file this lawsuit with the court. If you do so, the demand must be in writing and must be served upon the person signing this summons. Within 14 days after you serve the demand, the plaintiff must file this lawsuit with the court, or the service on you of this summons and complaint will be void.

If you wish to seek the advice of an attorney in this matter, you should do so promptly so your written response, if any may be served on time.

This summon is issued pursuant to rule CR4 of the Superior Court Civil Rule of the State of Washington.

Dated this 16th Day of February, 2013.


Vicky J. Currie, WSBA# 24192
Attorney for Plaintiff

APPENDIX 6

February 07 2013 8:30 AM

KEVIN STOCK
COUNTY CLERK
NO: 13-2-06154-1

RECEIVED

MAR 05 2013

OFFICE OF THE ATTORNEY GENERAL
TACOMA GENERAL SERVICES UNIT

SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE

WILLIAM LOVE, as Personal
Representative of the ESTATE OF
CAMILLE LOVE and JOSHUA LOVE a
single man,

NO.

COMPLAINT FOR DAMAGES

Plaintiffs,
vs.

STATE OF WASHINGTON DEPARTMENT
OF CORRECTIONS, a governmental
entity, CITY OF TACOMA, a municipal
corporation and DOES 1-10 INCLUSIVE,

Defendants.

COME NOW the Plaintiffs William Love, as Personal Representative of the Estate of
Camille Love, (the Estate) and Joshua Love (Love), against the above-named Defendants, and
state and alleges in this Complaint as follows;

COMPLAINT
Page 1 of 17

Vicky J. Currie
Attorney at Law
535 Dock Street, Suite 209
Tacoma, WA 98402
(253) 588-9922 Phone
(253) 983-1545 Fax

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I. INTRODUCTION

1.1 This lawsuit arises from the murder of Camille A. Love and the assault and shooting of the plaintiff Joshua Love. The following named persons are members of the East Side Lokotos Surenos gang, (herein after gang members) operating primarily in Tacoma, Washington:

Saul Antonio Mex;

Eduardo Sandoval;

Jarrod Messer;

Dean Salavea;

Time Time;

Santiago Mederos; and

Richard Sanchez.

Each of the individuals named above were under the community custody and supervision of the Washington State Department of Corrections (DOC) on February 7, 2010, when Camille Love was murdered and Joshua Love was assaulted.

On February 7, 2010, Camille Love was driving a red vehicle on the way to a friend's house with her Brother Joshua Love riding in the passenger seat. The above referenced individuals were driving in stolen white van searching for members of a rival gang to retaliate against for an earlier shooting.

The gang members chased the victims for a short time before opening fire on the vehicle. Camille Love was struck several times and was mortally wounded. Her brother Joshua sustained multiple gunshot wounds but survived. Ms. Love was 20 years old at the time of her murder and

1 was planning to attend college to become a veterinarian. Neither Ms. Love or her brother Joshua
2 were gang members, they were innocent victims simply driving down the street in a red vehicle.

3
4 1.2 This lawsuit also arises from the negligent and grossly negligent acts and omissions
5 committed by the DOC and its employees when it failed to adequately supervise and/or monitor
6 Messer, Mex, Sandoval, Salavea, Time, Mederos and Sanchez who were all high risk felons or
7 high violent offenders by the DOC well before the murder and assault.

8 Saul Mex was under DOC supervision since April of 2009. While under DOC
9 supervision he was arrested for taking a motor vehicle and charged with felony drug possession.
10 In August of 2010, while in custody Mex was involved in a gang fight and admitted to DOC that
11 he was a member of the Surenos gang.

12 Eduardo Sandoval has been under DOC supervision since 2009. In November 2009 he
13 was arrested for using a controlled substance while under DOC supervision. In January 2010 he
14 tested positive for marijuana while under DOC supervision, a violation of the terms of his
15 release. In February 2010 he failed to report to his mandatory meeting with his probation officer.
16 In April 2010 he admitted to the DOC he was a member of the Surenos street gang. In August of
17 2004 he failed to report to his drug treatment program as mandated by the terms of his release.

18 Dean Salavea has been under DOC supervision since 2007. In August of 2007, while in
19 custody, DOC placed Salavea in isolation for poor behavior with DOC staff members. In
20 September of 2007, DOC noted that Salavea had a history of problems with violence, fighting
21 and refusal to take his mental health medications. In January of 2008, Salavea told DOC he did
22 not care if he was released and doubted he would comply with conditions of release. In May of
23 2008, Salavea failed to report to his probation officer on two separate occasions and failed to
24
25

1 report for mental health treatment. In early February 2010, Salavea failed to report to his
2 probation officer and failed to report for mental health treatment.

3
4 **Time Time** has been under DOC supervision since April of 2008. In April of 2008 Time
5 failed to report to his probation officer. In August of 2008, Time was arrested for hit and run in
6 Pierce County Washington. In April of 2009, Time failed to report to his probation officer and
7 failed to notify the DOC of his change of address. In June of 2009, Time tested positive for
8 Marijuana a violation of the conditions of his release.

9 **Jarrold Messer** has been under DOC supervision since 2009. In February 2009, Messer
10 failed to report to his probation officer and tested positive for marijuana. In April 2009, Messer
11 admitted to being a member of the Sureneos gang; was witnessed shooting a gun, and was
12 arrested with a gun in a nearby trashcan. In May of 2009, Messer failed to report to his Probation
13 Officer.

14 **Richard Sanchez** has been under DOC supervision since 2004. In August 2004, Sanchez
15 was arrested for malicious mischief. In September of 2005, Sanchez was arrested for Assault
16 with a deadly weapon. In September 2008, Sanchez was arrested for possession of a firearm.
17 Sanchez is an illegal immigrant and is currently wanted for his involvement in the murder of
18 Camille Love and the assault and battery of Joshua Love.

19 **Santiago Mederos** has been identified as a member of the Sureneos and a participant in
20 the murder of Camille Love and the assault and battery of Joshua Love. Mederos is currently
21 being sought by law enforcement for his involvement in the crimes.

22 Given the gang members high offender classifications, the DOC was obligated by
23 Washington State Offender Accountability Act (OAA) and the Departments own policies, rules
24

1 and procedures to devote all known and available resources to supervising the gang members and
2 protecting the public from their unlawful activities. The DOC blatantly and egregiously failed in
3 this regard, and as a result improperly allowed the gang members to remain free for several
4 months prior to the murder and assault. The DOC did virtually nothing to apprehend the gang
5 members months before the murder and assault, while knowing that these felons has violated
6 numerous conditions of their community supervision and that they posed a very serious risk of
7 danger to the public at large. Camille Loves' death and Mr. Love's injuries were a direct and
8 proximate cause of the DOC's negligent, grossly negligent and reckless acts and omissions when
9 it failed to properly supervise and/or monitor the gang members, and when it failed to perform
10 reasonable efforts to apprehend and arrest the gang members before the murder and assault on
11 February 7, 2010.
12

13 This was not the first time that the DOC failed to supervise a known high violent offender
14 where such failure caused the death and/or serious injury of an innocent citizen. In fact, the DOC
15 has exhibited a pattern of such negligent, grossly negligent and/or reckless conduct and/or
16 omissions over the past several years related to its obligation to monitor and supervise high risk
17 violent felons and this has caused many innocent citizens, including several law enforcement
18 officers, to die or becomes severely injured.
19

20
21 **II. PARTIES AND JURISDICTION**

22
23 2.1 Plaintiff William Love is at all relevant times hereinafter a resident of the State of
24 Washington. Mr. Love is the personal representative of the Estate of Camille Love. Plaintiff
25 brings this action on behalf of the Estate for the wrongful death of Camille A. Love.

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2.2 Plaintiff Joshua Love is at all relevant times hereinafter a resident of the State of Washington.

2.3 Defendant State of Washington Department of Corrections (DOC) is a governmental entity within the State of Washington (State). At all times material hereto the DOC was charged with supervising and monitoring the convicted felons listed in section 1.2 above. At all times material hereto, the DOC was liable for the acts and/or omissions of its employees and/or agents described herein under the legal theories of principle/agent, master/servant and/or respondent superior.

2.4 Defendant City of Tacoma (City) is a municipal corporation and/or governmental entity located in Pierce County Washington. At all times material hereto, the City was liable for the acts and/or omissions of its employees and/or agents described here., including those of its law enforcement officers, under the legal theories of principal/agent, master servant, and/or respondent superior.

2.5 The true names and capacities, whether individual, corporate, associate, governmental or otherwise, of Defendants sued herein as DOES 1-5, inclusive, are currently unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names.

2.6 The true names and capacities of individual Defendants sued herein as DOES 6-10, inclusive are currently unknown to Plaintiffs, who therefore sue said Defendants by such fictitious names.

2.7 Plaintiffs are informed and believe, and based thereon alleges, that each of the Defendants designated as a DOES 1-10 are legally responsible in some manner for the events, incidents, and happenings described herein, and caused injuries and damages to Plaintiffs.

1 Plaintiffs will seek leave of court to amend this Complaint to substitute the true names and
2 capacities for the Defendants designated herein as DOES 1-10 when the true names have been
3 ascertained or in the alternative dismiss said DOES 1-10 if their identities cannot be ascertained.
4

5 2.8 Plaintiff is informed and believes, and based thereon alleges that at all relevant times the
6 individual DOE Defendants, Does 1-10, are and have been residents of the United States and the
7 State of Washington.

8 2.9 Plaintiff reserves the right to amend this Complaint by adding additional plaintiffs and/or
9 claims as appropriate against one or more of these defendants.

10 2.10 Pierce County is a proper venue for this action because the defendant is located and/or
11 conducts its business in Pierce County, and because the murder and assault occurred in Pierce
12 County.

13 **III. SERVICE OF CLAIM FOR DAMAGES**

14
15 3.1 Pursuant to RCW 4.92.100, Plaintiff the Estate of Camille Love properly served a
16 completed signed and valid claim for damages on the State of Washington and its agency the
17 DOC. More than (60) sixty days have elapsed since the date of service of the Estate's Claim for
18 Damages and therefore the Estate's Claims are properly before the above-entitled Court.
19

20 3.2 Pursuant to RCW 4.96.020, Plaintiff the Estate of Camille Love properly served a
21 completed signed and valid claim for damages on the City of Tacoma. A Complaint was sent to
22 DOC which named The City of Tacoma as a Defendant, however; DOC acknowledged receipt of
23 the complaint against the Tacoma Police Department and assigned a claim number of
24 (#90070398). Subsequently a complaint was forwarded to the City of Tacoma. The DOC
25

1 acknowledged receipt the complaint and assigned a claim number. More than (60) sixty days
2 have elapsed since the date of service of the Estate's Claim for Damages and therefore the
3 Estate's Claims are properly before the above-entitled Court.
4

5 3.3 Pursuant to RCW 4.92.100, Plaintiff Joshua Love properly served a completed signed
6 and valid claim for damages on the State of Washington and its agency the DOC. A Complaint
7 was sent to DOC which named The City of Tacoma as a Defendant, however, DOC
8 acknowledged receipt of the complaint against the Tacoma Police Department and assigned the
9 Claim Number of (#90070398). Subsequently a complaint was forwarded to the City of Tacoma.
10 The DOC acknowledged receipt the complaint and assigned a claim number. More than (60)
11 sixty days have elapsed since the date of service of the Plaintiff's Claim for Damages and
12 therefore the Plaintiff's Claims are properly before the above-entitled Court.
13

14 3.4 Pursuant to RCW 4.96.020, Plaintiff Joshua Love properly served a completed signed
15 and valid claim for damages on the City of Tacoma. More than (60) sixty days have elapsed
16 since the date of service of the Estate's Claim for Damages and therefore the Plaintiff's Claims
17 are properly before the above-entitled Court.
18

19 IV. RELEVANT FACTS

20 Facts Giving Rise to this Lawsuit.

21
22 4.1 On or about February 7, 2010, Camille and Joshua Love were traveling in a red car on
23 their way to a friend's house on Portland Ave S. in Tacoma Washington. Camille was the driver
24 and Joshua was the passenger. As they stopped at a traffic light several blocks from their
25

1 destination, Joshua Love noticed a white van stopped in the lane beside them. Mr. Love noticed
2 that a Hispanic male was staring at them from the van. Frightened, Camille Love attempted to
3 speed away from the van but was not successful. The van caught up to the victim's car and the
4 occupants of the van began shooting at the Love's vehicle.
5

6 4.2 Camille Love was struck several times and died at the scene. Her brother Joshua was
7 struck twice and rushed to the emergency room at Tacoma General Hospital.

8 4.3 The Loves were innocent law abiding citizens on their way to a friend's home and were
9 targeted simply because they were driving a red car. Mr. Love was seriously injured and
10 traumatized by witnessing the death of his sister at the hands of violent offenders.

11 4.4 Saul Antonio Mex, Eduardo Sandoval, Jarrod Messer, Dean Salavea, Time Time;
12 Santiago Mederos, and Richard Sanchez were the occupants of the white van and all members of
13 East Side Lokotos Surenos gang. The gang members targeted the Loves because they were
14 driving a red vehicle mistakenly believing they were from a rival gang.

15 4.5 Eduardo Sandoval was convicted of First Degree Murder, First Degree Assault and
16 Conspiracy to Commit Murder in the First Degree. Sandoval was sentenced to seventy-five years
17 in prison for his part in the crime.
18

19 4.6 Time Time was convicted of leading organized crime and was sentenced to twelve years
20 in prison.

21 4.7 Saul Antonio Mex was convicted of murder in the first degree with a firearm
22 enhancement. Mex was sentenced to thirty-five years in prison.

23 4.8 Dean Salavea was convicted of leading organized crime and was sentenced to eleven
24 years in prison.
25

1 4.9 Jarrod Messer was convicted of First Degree Murder and sentenced to thirty-five years in
2 prison.

3 4.10 Richard Sanchez is an illegal immigrant and is currently wanted for his involvement in
4 the murder of Camille Love and the assault and battery of Joshua Love.

5 4.11 Santiago Mederos is an illegal immigrant and is currently wanted for his involvement in
6 the murder of Camille Love and the assault and battery of Joshua Love.
7

8
9 **Facts Giving Rise to Claims Against The Department of Corrections.**

10 4.12 At the time of the murder and assault, the gang members were convicted felons under the
11 community custody and supervision of the Washington State Department of Corrections (DOC).
12 The DOC's community custody and supervision services are performed by the Departments
13 Division of Community Corrections, and were formerly referred to as the Department's
14 probation and parole services.

15 4.13 According to the DOC's own written mission statement(s) and/or policies, the public's
16 safety is the absolute priority when the DOC is monitoring and supervising convicted felons
17 under its community corrections division.
18

19 4.14 The DOC's Division of Community Corrections exists to protect the community from the
20 dangers posed by criminal offenders under the Department's supervision as directed by the
21 courts and the laws of the State of Washington. The position of Community Corrections Officer
22 (CCO) within this division is responsible for the assessment, supervision and control of high risk
23 and high need offenders residing in the community.
24
25

1 4.15 The DOC and its employees have known for several years that the failure to enforce
2 and/or comply with DOC's own policies, rules and procedures with respect to monitoring and
3 supervising convicted felons under its community custody may endanger the public's safety and
4 cause serious and preventable injuries and death to innocent people.
5

6 4.16 One important purpose of the DOC's community custody supervision mandate is to hold
7 offenders accountable to their imposed conditions as they resume life within the community after
8 being incarcerated. To protect the public, the DOC's community correction policy requires that it
9 swiftly sanction those high risk or high violent offenders who are non-compliant and/or who
10 poses a safety risk to the public, including the imposition of more jail time against the offender if
11 necessary.
12

13 4.17 At all time material hereto, Messer, Mex, Sandoval, Salavea, Time, Mederos and Sanchez
14 were gang members with extensive prior criminal history, to include criminal convictions for
15 drug possession, assault with a deadly weapon, protection order and/or no contact order
16 violations, auto theft, eluding the police, reckless driving, obstruction, possession of a firearm,
17 domestic violence, resisting arrest among others.

18 4.18 Each of the gang members have been under the DOC's supervision for years, some
19 dating back to 2004. Each of the gang members had been sentenced to community supervision
20 numerous times prior to the murder and assault. In addition, the gang members committed
21 multiple violations of the conditions of their release from prison.

22 4.19 Each of the gang members have been classified by the DOC as high risk and dangerous
23 offender, or a high violent offender, because of their gang ties, extensive criminal background
24 spanning several years and because of the amount of harm they had caused to society by their
25

1 previous criminal activities. By classifying the gang members as high violent offender, the DOC
2 determined that they posted the greatest level of risk among other supervised felons to re-offend
3 in the future. The DOC's own policy required that it should therefore devote a higher allocation
4 of agency resources to monitor and supervise Messer, Mex, Sandoval, Salavea, Time, Mederos
5 and Sanchez while they were under the authority and/or control of the Department's Community
6 Corrections Division.

7
8 4.20 As an high violent offender, the DOC was legally obligated by the Washington State
9 Offender Accountable Act (OAA), as well as the DOC's own policies, rules and procedures, to
10 devote the highest allocation of agency resources to closely monitor and supervise the gang
11 members and to protect the public from their unlawful activities.

12 4.21 By the end of 2009, the DOC knew that the gang members had significant prior history of
13 repeatedly violation their conditions for community supervision by failing to report to DOC
14 when required, failing to comply with chemical dependence treatment, failing to comply with
15 mental health treatment, failing to pass drug test, changing residence without permission and by
16 continuing to use illicit drugs.
17

18 **V. CAUSE OF ACTION AGAINST ALL DEFENDANTS-NEGLIGENCE.**

19
20
21 5.1 Plaintiff re-alleges all matters described above, and incorporates the same as if alleged
22 in full.

23 5.2 The Defendants owed the Plaintiff's and the decedent a duty of care and a duty to act
24 reasonably and carefully.
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5.3 The Defendants breached their duty of care and their duty to act carefully by negligently and or recklessly performing acts and/or omissions which ultimately caused the death of Camille Love and the assault and battery of Joshua Love. Joshua Love suffered serious and permanent injuries caused by the Defendants negligence.

5.4 As a result of the Defendants negligent, grossly negligent and/or reckless conduct and omissions, the Plaintiffs and/or the decedent were injured, suffered, and continue to suffer, physical disability and pain, emotional trauma, medical expenses, loss of earnings and earning capacity, loss of consortium and other damages.

VI. CAUSE OF ACTION AGAINST DEFENDANT STATE OF WASHINGTON.

6.1 Plaintiff re-alleges all matters described above, and incorporates the same as if alleged in full.

6.2 Defendant State of Washington by and through its Department of Corrections owed the Plaintiffs and the decedent a duty to act reasonably and carefully.

6.3 The defendant breached its duty of care and its duty to act carefully and reasonably by, among other things, failing to comply with the OAA and its own rules, policies and procedures with respect to the monitoring and supervision of the gang members.

6.4 The defendant breached its duty of care and its duty to act carefully and reasonable by, among other things, failing to adequately monitor and supervise the gang members, failing to timely request a Secretary Warrant for the gang members immediate apprehension and arrest,

1 and failing to use all known and available resources to locate, search for and apprehend the gang
2 members after warrants had been issued for their arrest.

3
4 6.5 As a result of this Defendant's negligent, grossly negligent and/or reckless conduct.
5 Plaintiffs and decedent were injured, suffered, and continue to suffer, physical disability and
6 pain, emotional trauma, medical expenses, loss of earnings and earning capacity, loss of
7 consortium and other damages.
8

9 **VII. CAUSE OF ACTION-WRONGFUL DEATH.**

10
11 7.1 Plaintiffs re-alleges all matters previously described and they are incorporated by
12 reference.

13 7.2 The defendants negligent, grossly negligent and/or reckless acts and/or omissions caused
14 the wrongful death of Camille A. Love.

15 7.3 As a proximate cause of the defendants negligent, grossly negligent, reckless and/or
16 tortuous conduct, the Estate of Camille A. Love, has suffered damages including the loss of the
17 accumulation of income and incurred medical, funeral, and burial expenses, and the conscious
18 pain, suffering, anxiety and fear of impending death experienced by the decedent, in such
19 amounts as will be proven at trial together with interest thereon at the statutory rate from the date
20 of death or the date the expenses were incurred.
21

22 7.4 As a proximate cause of the defendants negligent, grossly negligent, reckless and/or
23 tortuous conduct the Estate's beneficiaries have suffered damages including economic loss, loss
24 of consortium, destruction of the parent-child relationship and the loss of love, care, affection,
25

1 companionship, instruction, protection, and guidance expected from a daughter and sister in such
2 amounts will be proven at the time of trial.
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5
6 **VIII. CAUSE OF ACTION-NEGLIGENT HIRING AND SUPERVISION.**
7

8 8.1 Plaintiffs re-alleges all matters previously described and they are incorporated by
9 reference.

10 8.2 Defendant State of Washington by and through its Department of Corrections, Defendant
11 City of Tacoma and Does 1-10, have negligently and grossly negligently failed to properly hire,
12 train and/or supervise its employees and/or its agents with due care and good judgment.

13 8.3 As a proximate cause of Defendants failure to properly hire, train and/or supervise its
14 employees and/or agents, the Plaintiffs and the decedent were injured, suffered, and continue to
15 suffer, physical disability and pain, emotional trauma, medical expenses, loss of earnings
16 capacity, loss of consortium and other damages.
17

18
19 **IX. CAUSE OF ACTION-TORT OF OUTRAGE.**
20

21 9.1 Plaintiffs re-alleges all matters previously described and they are incorporated by
22 reference.

23 9.2 Defendant State of Washington by and through its Department of Corrections has
24 exhibited a pattern over the previous ten to fifteen years of failing to properly monitor and/or
25

1 supervise its convicted felons, and as a result, they have killed and/or harmed numerous innocent
2 citizens in Washington State, including plaintiffs.

3
4 9.3 This defendant's failure to supervise the gang members and its repeated failure to
5 supervise many other convicted felons over the years, is extremely egregious and outrageous.

6 9.4 As a result of the defendants extreme and/or reckless conduct, the Plaintiffs and the
7 estate's beneficiaries have suffered, and will continue to suffer, extreme and severe emotional
8 distress.

9
10 **X. CAUSE OF ACTION AGAINST THE DEFENDANT CITY OF TACOMA.**

11
12 10.1 Plaintiffs re-alleges all matters previously described and they are incorporated by
13 reference.

14 10.2 Defendant City of Tacoma, by and through its Police Department and/or law enforcement
15 officers owed the Plaintiffs the duty of care and a duty to act reasonably and carefully.

16 10.3 Defendant City of Tacoma violated its duty of care and its duty to act reasonably and
17 carefully by failing to arrest known gang members who posed a serious threat to the public.

18 10.4 As a result of this Defendant's negligent, grossly negligent and/or reckless conduct,
19 Plaintiffs were injured, suffered, and continue to suffer, physical disability and pain, emotional
20 trauma, medical expenses and loss of earning capacity.
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XI. PRAYER FOR RELIEF.

WHEREFORE, Plaintiffs pray for judgment against the Defendants, jointly and severally, as follows:

11.1 For all damages sustained by Plaintiffs in an amount proven at trial, including past and future medical expenses and other health care expenses, pain and suffering, both mental and physical, past and future permanent partial disability and disfigurement, loss of enjoyment of life, damages to property, past and future special and economic damages, loss of income and earning capacity, loss of consortium, destruction of the parent-child relationship and other damages;

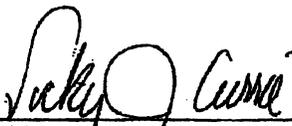
11.2 Interest calculated at the maximum amount allowable by law, including pre and post-judgment interest;

11.3 A reasonable attorney's fee as allowed by law;

11.4 Costs and disbursements pursuant to statute; and

11.5 Other and further relief as this Court may deem just and equitable.

DATED this 14th day of February, 2013.



Vicky J. Currie, WSBA #24192
Attorney for Plaintiff

APPENDIX 7

April 09 2013 1:34 PM

KEVIN STOCK
COUNTY CLERK
NO: 13-2-06154-1

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The Honorable Garold E. Johnson

**STATE OF WASHINGTON
PIERCE COUNTY SUPERIOR COURT**

WILLIAM LOVE, as Personal
Representative of the ESTATE OF
CAMILLE LOVE and JOSHUA
LOVE, individually,

Plaintiffs,

v.

STATE OF WASHINGTON
DEPARTMENT OF CORRECTIONS,
a governmental entity, CITY OF
TACOMA, a municipal corporation and
DOES 1-10 INCLUSIVE,

Defendants.

NO. 13-2-06154-1

DEFENDANT STATE OF
WASHINGTON DEPARTMENT OF
CORRECTIONS ANSWER TO
PLAINTIFFS' COMPLAINT FOR
DAMAGES

Defendant State of Washington Department of Corrections, in answer to Plaintiffs' complaint, admits, denies, and alleges as follows:

I. INTRODUCTION

1.1 Defendant admits Plaintiff Camille Love was killed and Joshua Love was shot on February 7, 2010. Defendant also admits Eduardo Sandoval and Dean Salavea were on supervision. Defendant has insufficient information to admit or deny all other remaining allegations contained in paragraph 1.1.

1.2 Defendant denies the allegations contained in paragraph 1.2.

2085

1 **II. PARTIES AND JURISDICTION**

2 2.1 Defendant admits the allegations contained in paragraph 2.1.

3 2.2 Defendant admits the allegations contained in paragraph 2.2.

4 2.3 Defendant admits Department of Corrections is a governmental agency. The remainder
5 of the paragraph calls for a legal conclusion and no response is required. To the extent a
6 response is required, the remaining allegations in paragraph 2.3 are denied.

7 2.4 No response is required.

8 2.5 Paragraph 2.5 fails to identify any persons by name so no response is required. To the
9 extent a response is required, defendant denies the allegations contained in paragraph 2.5.

10 2.6 Paragraph 2.6 fails to identify any persons by name so no response is required. To the
11 extent a response is required, defendant denies the allegations contained in paragraph 2.6.

12 2.7 Defendant denies the allegations contained in paragraph 2.7.

13 2.8 Defendant is without knowledge or information sufficient to form a belief as to the
14 truth of the allegations contained in paragraph 2.8 and, therefore, denies the same.

15 2.9 Defendant denies the allegations contained in paragraph 2.9.

16 2.10 Defendant admits the allegations contained in paragraph 2.10.

17 **III. SERVICE OF CLAIM FOR DAMAGES**

18 3.1 Defendant admits plaintiffs filed a claim. As to the remaining allegations contained in
19 paragraph 3.1, they require a legal conclusion and therefore, denies the same.

20 3.2 Defendant is without knowledge or information sufficient to form a belief as to the
21 truth of the allegations contained in paragraph 3.2 and, therefore, denies the same.

22 3.3 Defendants admit sixty (60) days have elapsed and plaintiffs served a claim. The
23 remainder of the paragraph calls for a legal conclusion and no response is required. To the
24 extent a response is required, defendants deny the remaining allegations contained in paragraph

25 3.3.

1 3.4 Defendant is without knowledge or information sufficient to form a belief as to the
2 truth of the allegations contained in paragraph 3.4 and, therefore, denies the same.

3
4 **IV. REVELANT FACTS**

4 4.1 Defendant admits on February 7, 2010, Camille and Joshua Love were shot at.
5 Defendant is without knowledge or information sufficient to form a belief as to the truth of the
6 remaining allegations contained in paragraph 4.1 and, therefore, denies the same.

7 4.2 Defendant admits Camille Love died and Joshua Love was shot. Defendant is without
8 knowledge or information sufficient to form a belief as to the truth of the remaining allegations
9 contained in paragraph 4.2 and, therefore, denies the same.

10 4.3 Defendant is without knowledge or information sufficient to form a belief as to the
11 truth of the allegations contained in paragraph 4.3 and, therefore, denies the same.

12 4.4 Defendant is without knowledge or information sufficient to form a belief as to the
13 truth of the allegations contained in paragraph 4.4 and, therefore, denies the same.

14 4.5 Defendant admits the allegations contained in paragraph 4.5.

15 4.6 Defendant admits the allegations contained in paragraph 4.6.

16 4.7 Defendant admits the allegations contained in paragraph 4.7.

17 4.8 Defendant admits the allegations contained in paragraph 4.8.

18 4.9 Defendant admits the allegations contained in paragraph 4.9.

19 4.10 Defendant admits the allegations contained in paragraph 4.10.

20 4.11 Defendant admits the allegations contained in paragraph 4.11.

21 4.12 Defendant denies the allegations contained in paragraph 4.12.

22 4.13 This paragraph does not require a response because the Department's Mission Statement
23 and policies speak for themselves.

24 4.14 Defendant denies the allegations contained in paragraph 4.14.

25 4.15 Defendant denies the allegations contained in paragraph 4.15.
26

1 4.16 Defendant denies the allegations contained in paragraph 4.16.

2 4.17 Defendants admit Saul Mex, Eduardo Sandoval, Dean Salavea, Time Time, Jarrod
3 Messer, Richard Sanchez, and Santiago Mederos had criminal histories.

4 4.18 DOC admits Messer, Saul Mex, Eduardo Sandoval, Dean Salavea, Time Time, Jarrod
5 Messer, Richard Sanchez, and Santiago Mederos had at one time or another been supervised by
6 the department.

7 4.19 Defendant denies the allegations contained in paragraph 4.19.

8 4.20 Defendant denies the allegations contained in paragraph 4.20.

9 4.21 Defendant denies the allegations contained in paragraph 4.21.

10 **V. CAUSE OF ACTION AGAINST ALL DEFENDANTS – NEGLIGENCE**

11 5.1 Defendant reasserts its responses to the preceding paragraphs and deny the allegations
12 contained in paragraph 5.1.

13 5.2 Paragraph 5.2 calls for a legal conclusion and no response is required. To the extent a
14 response is required, defendants deny the allegations contained in paragraph 5.2.

15 5.3 Defendant denies the allegations contained in paragraph 5.3.

16 5.4 Defendant denies the allegations contained in paragraph 5.4.

17 **VI. CAUSE OF ACTION AGAINST DEFENDANT STATE OF WASHINGTON**

18 6.1 Defendant reasserts its responses to the preceding paragraphs and deny the allegations
19 contained in paragraph 6.1.

20 6.2 Paragraph 6.2 calls for a legal conclusion and no response is required. To the extent a
21 response is required, defendants deny the allegations contained in paragraph 6.2.

22 6.3 Defendant denies the allegations contained in paragraph 6.3.

23 6.4 Defendant denies the allegations contained in paragraph 6.4.

24 6.5 Defendant denies the allegations contained in paragraph 6.5.

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VII. CAUSE OF ACTION – WRONGFUL DEATH

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2 7.1 Defendant reasserts its responses to the preceding paragraphs and deny the allegations
3 contained in paragraph 7.1.

4 7.2 Defendant denies the allegations contained in paragraph 7.2.

5 7.3 Defendant denies the allegations contained in paragraph 7.3.

6 7.4 Defendant denies the allegations contained in paragraph 7.4.

7 **VIII. CAUSE OF ACTION – NEGLIGENT HIRING AND SUPERVISION**

8 8.1 Defendant reasserts its responses to the preceding paragraphs and deny the allegations
9 contained in paragraph 8.1.

10 8.2 Defendant denies the allegations contained in paragraph 8.2.

11 8.3 Defendant denies the allegations contained in paragraph 8.3.

12 **IX. CAUSE OF ACTION – TORT OF OUTRAGE**

13 9.1 Defendant reasserts its responses to the preceding paragraphs and deny the allegations
14 contained in paragraph 9.1.

15 9.2 Defendant denies the allegations contained in paragraph 9.2.

16 9.3 Defendant denies the allegations contained in paragraph 9.3.

17 9.4 Defendant denies the allegations contained in paragraph 9.4.

18 **X. CAUSE OF ACTION AGAINST THE CITY OF TACOMA**

19 10.1 Defendant reasserts its responses to the preceding paragraphs and deny the allegations
20 contained in paragraph 10.1.

21 10.2 Paragraph 10.2 is not addressed to the State, therefore, Defendant is without knowledge
22 or information sufficient to form a belief as to the truth of the allegations contained in
23 paragraph 10.2 and, therefore, denies the same.

24 10.3 Paragraph 10.3 is not addressed to the State, therefore, Defendant is without knowledge
25 or information sufficient to form a belief as to the truth of the allegations contained in
26 paragraph 10.3 and, therefore, denies the same.

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1 10.4 Paragraph 10.4 is not addressed to the State, therefore, Defendant is without knowledge
2 or information sufficient to form a belief as to the truth of the allegations contained in
3 paragraph 10.4 and, therefore, denies the same.

4 **XI. PRAYER FOR RELIEF**

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6 Defendant denies Plaintiffs are entitled to judgment against them and further denies that
7 Plaintiffs are entitled to the relief sought in subparagraphs 11.1 – 11.5 on page 17 of Plaintiffs'
8 complaint.

9 **XII. AFFIRMATIVE DEFENSES**

10 By Way of FURTHER ANSWER and FIRST AFFIRMATIVE DEFENSE, Defendant
11 alleges that the summons and complaint was the process served was insufficient.

12 By Way of FURTHER ANSWER and SECOND AFFIRMATIVE DEFENSE,
13 Defendant alleges

14 By Way of FURTHER ANSWER and THIRD AFFIRMATIVE DEFENSE, Defendant
15 alleges that the plaintiffs have failed to file a claim against the State of Washington as required
16 by RCW 4.92.100 and .110.

17 By Way of FURTHER ANSWER and FOURTH AFFIRMATIVE DEFENSE,
18 Defendant alleges that the damages and/or injuries, if any, were caused by the fault of a
19 nonparty for purposes of RCW 4.22.070(1). The identity of the nonparty is: Saul Mex,
20 Eduardo Sandoval, Dean Salavea, Time Time, Jarrod Messer, Richard Sanchez, and Santiago
21 Mederos.

22 By Way of FURTHER ANSWER and FIFTH AFFIRMATIVE DEFENSE, Defendant
23 alleges that the plaintiffs' injuries/damages, if any, were caused by intentional conduct of Saul
24 Mex, Eduardo Sandoval, Dean Salavea, Time Time, Jarrod Messer, Richard Sanchez, and
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Santiago Mederos. The damages caused by the intentional conduct must be segregated from injuries/damages allegedly caused by fault.

By Way of FURTHER ANSWER and SIXTH AFFIRMATIVE DEFENSE, Defendant alleges that all actions of the defendant, State of Washington, herein alleged as negligence, manifest a reasonable exercise of judgment and discretion by authorized public officials made in the exercise of governmental authority entrusted to them by law and are neither tortious nor actionable.

By Way of FURTHER ANSWER and SEVENTH AFFIRMATIVE DEFENSE, Defendant alleges that the plaintiffs have failed to state a claim upon which relief may be granted.

By Way of FURTHER ANSWER and EIGHTH AFFIRMATIVE DEFENSE, Defendant alleges that the defendant at all times acted in good faith in the performance of its duties and is therefore immune from suit for the matters charged in plaintiffs' complaint.

By Way of FURTHER ANSWER and NINTH AFFIRMATIVE DEFENSE, Defendant alleges that the defendant is immune from suit for the matters charged in plaintiffs' complaint.

By Way of FURTHER ANSWER and TENTH AFFIRMATIVE DEFENSE, Defendant alleges that the claims against the defendant are barred by the doctrine(s) of absolute (quasi-judicial and or quasi-prosecutorial) immunity.

By Way of FURTHER ANSWER and ELEVENTH AFFIRMATIVE DEFENSE, Defendant alleges that the claims alleged under 42 U.S.C. § 1983 against the state employees are barred by the doctrine of qualified immunity.

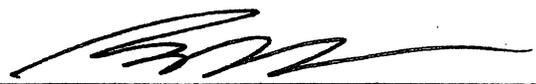
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WHEREFORE, Defendant prays that Plaintiffs complaint be dismissed with prejudice as to the State of Washington Department of Corrections and that Plaintiffs take nothing by their complaint and that Defendant be allowed their costs and reasonable attorney fees herein.

DATED this 9 day of April, 2013.

ROBERT W. FERGUSON
Attorney General



GARTH AHEARN, WSBA No. 29840
Assistant Attorney General
Attorney for State

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PROOF OF SERVICE

I certify that I served a copy of this document on all parties or their counsel of record on the date below as follows:

Party	Method of Service
Vicky J. Currie Attorney at Law 535 Dock Steet, STE 209 Tacoma, WA 98402	X US Mail Postage Prepaid o UPS Next Day Air o Certified Mail Postage Prepaid o By Fax o State Campus Mail o By Email o ABC/Legal Messenger o Hand delivered by:
Party	Method of Service
Jean P. Homan City of Tacoma Attorney 747 Market Street #1120 Tacoma, WA 98402-3701	X US Mail Postage Prepaid o UPS Next Day Air o Certified Mail Postage Prepaid o By Fax o State Campus Mail o By Email o ABC/Legal Messenger o Hand delivered by:

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 9th day of April, 2013, at Tacoma, WA.



JODI ELLIOTT, Legal Assistant

097

APPENDIX 8

September 19 2013 1:09 PM

KEVIN STOCK
COUNTY CLERK
NO: 13-2-06154-1

**SUPERIOR COURT OF WASHINGTON
COUNTY OF PIERCE**

WILLIAM LOVE, as Personal
Representative of the ESTATE OF
CAMILLE LOVE and JOSHUA LOVE, a
single man,

Plaintiffs,

vs.

STATE OF WASHINGTON DEPARTMENT
OF CORRECTIONS, a governmental
entity, CITY OF TACOMA, a municipal
corporation and DOES 1-10 INCLUSIVE,

Defendants.

NO. 13-2-06154-1

**CONFIRMATION OF JOINDER
OF PARTIES, CLAIMS, AND
DEFENSES**

(CJNSC)

CJNSC [X] The Parties make the following joint representations:

1. The case is not subject to mandatory arbitration. (If it is, this report should not be filed; instead, no later than the deadline for filing this report, a statement of arbitrability should be filed.)
2. No additional parties will be joined.
3. All parties have been served or have waived service.
4. All mandatory pleadings have been filed.
5. No additional claims or defenses will be raised.
6. The parties anticipate no problems in meeting the deadlines for disclosing possible witnesses and other subsequent deadlines in the Case Schedule.

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2
3 **CJ** **The parties do not join in making the following representations, as explained below (if appropriate, check the box at left and every applicable box below.)**

4 An additional party will be joined.

5 A party remains to be served.

6 A mandatory pleading remains to be filed.

7 An additional claim or defense will be raised.

8 One or more parties anticipate a problem in meeting the deadlines for disclosing possible witnesses or other subsequent deadlines in the Case Schedule.

9 Other explanation:

10 **DATED** this 29th day of August, 2013.

11 **Vicky J. Currie**

12 /s/ Vicky J. Currie

13 Vicky J. Currie, WSBA #24192

14 Attorney for Plaintiffs

15 732 Pacific Avenue

16 Tacoma, WA 98402

17 Phone: 253-588-9922