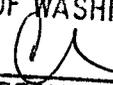


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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON

BY  DEPUTY

No. 47945-1-II

COURT OF APPEALS  
DIVISION II  
OF THE STATE OF WASHINGTON

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Ronald Mullins,

Appellant,

v.

Michael Malone and Jane Doe Malone,

Respondents.

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CORRECTED BRIEF OF APPELLANT

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ORIGINAL

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A. ASSIGNMENTS OF ERROR

(1) Assignment of Error

The trial court erred in entering the Order Granting Defendant's Motion for Dismissal of Plaintiff's Claims in its order dated July 13, 2015.

(2) Issues Relating to Assignment of Error

i. Whether the Malones waived the affirmative defense of insufficiency of service of process when they failed to answer the complaint within 20 days of actual notice, when their counsel failed to preserve any affirmative defenses, when their counsel engaged in settlement negotiations, when the Malone's counsel remained dilatory on the issue of service, and when Defendants' counsel stated that he would be answering the complaint.

ii. Whether actual notice of the lawsuit within the statutory period is sufficient to perfect service, when Defendants' counsel appeared, engaged in procedural and substantive legal discussions regarding the complaint, and whether the motion should be continued in order to discover additional facts which may support the actual notice theory.

iii. Whether Mr. Mullins would in fact be barred from freely amending the Complaint when the defense has provided no factual evidence to the contrary.

B. STATEMENT OF THE CASE

On December 1, 2014, Mr. Mullins and the Department of Labor and Industries ("Department") reached an agreement to resolve five appeals stemming from his workers' compensation claim. CP 38. The workers' compensation claim is directly related to this civil matter (they arise from the same incident of Mr. Malone rear-ending

Mr. Mullins on March 5, 2012), and the Department holds a lien pursuant to RCW 51.24.090. CP 38, 91. Through the course of clarifying emails after December 1, the parties agreed on the final language to be included in the Order on Agreement of Parties (“Order”) to be issued by the agency overseeing the appeal process, the Board of Industrial Insurance Appeals (“Board”). CP 39.

Following settlement, the Board issued an Order which contained errors. CP 39. It did not correctly portray the parties’ agreement. CP 39. This caused a unique and considerable delay, further causing the need for the parties to work to correct the Board Order. CP 39. This prevented the workers’ compensation claim from closing and finalizing the lien amount the Appellant would need to pay back to the Department to resolve this matter. CP 39. Not until July 9, 2015, did Mr. Mullins receive the final ministerial order from the Department, payment, and the final lien amount pertaining to the resolution of this third party civil matter. CP 39.

The Plaintiff worked in conjunction with the Assistant Attorney General, Mary Wilson, representing the Department in an attempt to correct the language. CP 39. First working with the Hearings Judge that issued the Order, Judge Mychal H. Schwartz. CP 39. Judge Schwartz directed the parties to seek a corrected order from J. Scott Timmons, Executive Secretary to the Board. CP 39. Mr. Timmons directed the parties to file a Motion to Vacate, which was done on February 26, 2015. CP 39, 44.

While awaiting the Board’s decision<sup>38</sup> on the Motion to Vacate, Mr. Mullins filed this third party case, on February 26, 2015, ahead of the March 5, 2015, statute of limitations. CP 39, 91. On April 2, 2015, Mr. Mullins received the Board’s denial on the Motion to Vacate. CP 39, 50.

On April 22, 2015, the Malones' attorney requested a copy of the Complaint, which was sent via email that same day. CP 40, 54. On April 23, 2015, the Malones' attorney sent an email requesting to engage in settlement negotiations on behalf of his clients. CP 40. Specifically the email noted that the Defendants were "putting in a notice of appearance, and will be filing my answer shortly." CP 40, 57. On April 27, 2015, the Defendants formally appeared in this matter via counsel. CP 40, 59. The Notice of Appearance did not reserve the defense of improper or insufficient service. CP 40, 59. The Malones never answered the Complaint or preserved any affirmative defenses, and more than 20 days have elapsed since Defendants' counsel had actual notice of the lawsuit. CP 40.

The next day, April 24, 2015, Plaintiff counsel responded that Mr. Mullins was indeed interested in resolving the matter, but needed to first resolve the workers' compensation claim which was nearly complete. CP 40, 57. Following the Board's April 2, 2015, Order denying the Motion to Vacate, Mr. Mullins requested on April 8, 2015, that the Department issue the final orders in accordance with the Board's original December 2014 Order. CP 40, 63. Typically the Department will issue such ministerial orders within a matter of one to two days. CP 40. The settlement demand had been started on February 6, 2015, in anticipation of receiving the final closure of the workers' compensation claim, and the correlating final lien amount. CP 40. At that point it was anticipated the demand would be sent within the next few weeks. CP 40.

On May 5, 2015, a separate third party representative from the Department inquired as to whether Mr. Mullins had filed a lawsuit, tolling the statute of limitations. CP 41, 66. Mr. Mullins responded to the third party unit representative that the case had

in fact been filed prior to the expiration of the statute of limitations. CP 41, 66. The Department filed its Notice of Statutory Interest that day. CP 41.

Over the next month, the Department continued to delay issuance of the orders, and to make matters worse, denied Plaintiff's counsel access to the file and case manager for a period of two weeks because of an administrative error. CP 41. On May 22, 2015, Plaintiff counsel demanded immediate issuance of the ministerial orders to close the claim in accordance with the December 2014 Order. CP 41, 68. This was followed up with phone calls in the next week to no avail. CP 41, 71. Plaintiff's counsel then engaged the AAG, Mary Wilson, in a new agreement to fix the incorrectly worded Board Order. CP 41, 75.

Over the first two weeks of June, 2015, Mr. Mullins' counsel again worked with the AAG to bring finality to the workers' compensation claim. CP 41, 74. On June 19, 2015, the Department issued the first of three ministerial orders in accordance with the December 2014 Board Order. CP 41. On July 6, 2015, the Department issued the second ministerial order. CP 41. On July 8, 2015, the Department issued the third and final ministerial order to effectuate claim closure. CP 41. These actions directly affect the amount of the Department lien, preventing the substantive negotiations from taking place. CP 42.

On June 16, 2015, Mr. Mullins received correspondence from the Malones' counsel stating that it was his belief that service had never been perfected on his "clients (Malone or Todd Robinson Painting)." CP 42, 78. Knowing the Malones had already appeared, had not yet answered or preserved defenses, and invited settlement negotiations, Plaintiff sent discovery requests in order to receive information as to when

the Malones had actual notice of the lawsuit and whether service had been waived. CP 42.

On June 24, 2015, the Defendants filed a Motion to Dismiss. CP 42, 80. Following a hearing, the Court granted Defendants' Motion to Dismiss on July 13, 2015. CP 8.

### C. ARGUMENT

(1) The Defendants waived the affirmative defense of insufficiency of service of process because they appeared during the statutory period and substantively and procedurally litigated the case, without complying with the answer requirements of Rule 12.

At a minimum, Rule 12 requires the Malones to submit some form of notice of their intention to raise an affirmative defense which is so frequently and routinely waived. The court is justified in declaring a waiver if a defendant conducts himself: 1) in a manner inconsistent with the later assertion of the defense of insufficient service; or 2) if the defendant has been dilatory in asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000), citing *Raymond v. Fleming*, 24 Wash.App. 112, 600 P.2d 614 (1979), review denied, 93 Wash.2d 1004 (1980) (quoting 5 C. Wright & A. Miller, Federal Practice § 1344, at 526 (1969)).

All three divisions of the Court of Appeals in Washington have recognized the common law doctrine of waiver. *Lybbert*, 141 Wn.2d at 38, citing the Division Two opinion *Davidheiser v. Pierce County*, 92 Wash.App. 146, 155, 960 P.2d 998 (1998), review denied, 137 Wash.2d 1016, 978 P.2d 1097 (1999).

The Supreme Court in *Lybbert* went on to state that the doctrine of waiver is supported by policy to prevent litigation from being inhibited by inconsistent or dilatory conduct on the part of litigants:

We believe the doctrine of waiver is sensible and consistent with the policy and spirit behind our modern day procedural rules, which exist to foster and promote "the just, speedy, and inexpensive determination of every action." CR 1(1). If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised. We note, also, that the common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with numerous federal and state courts having embraced it. See, e.g., *Trustees of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732 (7th Cir.1991) (observing that "[a] party may waive a defense of insufficiency of process by failing to assert it seasonably"); *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir.1990); *Marcial Ucin, S.A. v. S.S. Galicia*, 723 F.2d 994, 997 (1st Cir.1983); *Kearns v. Ferrari*, 752 F.Supp. 749, 752 (E.D.Mich.1990); *Burton v. Northern Dutchess Hosp.*, 106 F.R.D. 477, 481 (S.D.N.Y.1985); *Tuckman v. Aerosonic Corp.*, 394 A.2d 226, 233 (Del.Ch.1978); *Joyner v. Schiess*, 236 Ga.App. 316, 512 S.E.2d 62 (1999).

*Id.*, 141 Wn.2d at 39. The Court continued:

...the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed. Apropos to the present circumstances of this case, one court has acknowledged that: '[a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect.'

*Id.*, 141 Wn.2d at 40, citing *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir.1990).

In the present case the Malones did exactly as the policy warns against: they appeared; requested a copy of the Complaint; invited settlement negotiations; stated they were going to file an Answer; and then were dilatory awaiting the "clock to run" on Mr. Mullins. While the Malones did not engage in discovery, it is presumed discovery was only delayed because they were awaiting the requested demand from Plaintiff.

This demand was ultimately delayed because of an unforeseen procedural delay in

closing Mr. Mullins' underlying workers' compensation claim. Tegland makes clear that the Defendants can act in a manner inconsistent with the later assertion of the defense of insufficient service through the engagement of not only discovery but "settlement negotiations" as well. Karl B. Tegland, 14 Wash. Prac., Civil Procedure § 4:44 (2d ed. 2014).

Here, the Court should hold that the Defendants waived the defense of insufficient service by failing to raise it in the Notice of Appearance, and subsequently in failing to timely answer the Complaint. There is no question that the Malones engaged in substantive, meaningful case discussions, and that the Mr. Mullins had purposefully waited in pursuing continued discussions because of delayed actions by the Department and the Board. Defendants' counsel even went as far as to state that he would be answering the complaint. If he had done as he stated, and then raised (or not raised) insufficiency of service of process, the matter could have been addressed by Plaintiff. At that point, Plaintiff would have been put on notice of the defense, and would have no excuse or claim of waiver.

Instead, it appears that Defendants' counsel planned to set a trap for Plaintiff. Knowing that the matter was awaiting DLI action, Defendants' counsel lured Plaintiff into believing there were no outstanding technical issues to be addressed. Indeed, the Malones' counsel, while perhaps not ethically bound to raise the affirmative defense in informal communications with Plaintiff, was required by Rule 12 to answer within 20 days. It is anticipated that the Malones will argue that Rule 12 does not require an answer until service, but that is not the case. Rule 12 actually requires the Defendants to answer as soon as some form of notice is received, and then to raise any and all affirmative

defenses. This never happened.

Because the Defendants had actual notice of the lawsuit, and engaged in substantive and procedural discussions with Mr. Mullins, and because the Malones filed notices with the Court, they were required at a minimum to raise the affirmative defense of insufficiency of service of process. Since this was never raised until after the very moment in which Plaintiff could cure the error, it was forever waived, and the Court should have denied Defendants' motion.

(2) Defendants had actual knowledge of the lawsuit within the statutory period, and the extent of that actual knowledge is as yet unknown.

In addition to the doctrine of waiver, the courts have recognized fact-specific scenarios where actual notice of a lawsuit within the statutory period is sufficient to perfect service. Here, it is unknown the extent to which the Malones actually knew a lawsuit had been started against them because the Defendants have not answered discovery.

In *Sheldon v. Fetti*, the Supreme Court held that the service statutes are to be liberally construed to effectuate service and uphold jurisdiction of the court. *Sheldon v. Fetti*, 129 Wash.2d 601, 609, 919 P.2d 1209 (1996). This was consistent with our procedural rules in (1) RCW 1.12.010, which mandates that “[t]he provisions of this code shall be liberally construed, and shall not be limited by any rule of strict construction”; and (2) CR 1, which states the rules “shall be construed to secure the just, speedy, and inexpensive determination of every action,” which promotes a policy to decide cases on their merits. *Id.*

It is essential that discovery be completed in order to resolve this vital factual hole. For instance, if the Malones were put on notice by their counsel that they may be

served in order to avoid the shock of personal service, this is a material fact which must be discovered. The Defendants may have requested that counsel waive service in order to avoid the unpleasant personal delivery of legal documents at his home or workplace, which he already knew about, and for which they were already represented. Service could have quickly and easily been waived by a simple email. Indeed, that is what Plaintiff believed had happened.

Because there are insufficient facts pertaining to actual notice, the Court should have denied or continued Defendants' Motion to allow discovery until actual notice may be established.

(3) Whether Plaintiff would in fact be barred from freely amending the Complaint when the defense has provided no factual evidence to the contrary.

The whole of Defendants' Motion to Dismiss appears to be based on the argument that Plaintiff's inexcusable neglect is a bar against them joining an unnamed entity. Presumably, this entity is Todd Robinson Painting as defense counsel declared them his client as well as Mr. Malone for the first time in his June 16, 2015, email. Yet this disclosure occurred after the ninety days period following the statute of limitations, and the Malones failed to identify any facts whatsoever that would amount to inexcusable neglect, thus barring a CR 15 amendment. Defendants' counsel had a duty to inform a fellow attorney, and the Court, that a missing or unknown defendant had appeared, and yet took no action to identify this party until after the purported running of the statute. Again, the Defendants were dilatory and quite purposeful in his actions until after the time period where Plaintiff could correct his mistake.

The Defendants also failed to cite facts to support the claim that Mr. Malone, the tortfeasor, is an "improper party" as defined in the cited language from the Teller

opinion. The lack of factual foundation on both of these arguments from the defense demands that their Motion fail. It is the Plaintiff's position that Mr. Malone remains a proper party for rear-ending Mr. Mullins.

Prior to July 13, 2015 Order, no responsive pleading, as defined by CR7(a) had been filed, and Plaintiff stood in a place to file freely an amended complaint that would relate back to the original filing due to the lack of foundational factual support to the contrary.

Even assuming that Mr. Malone is an improper party and that Todd Robinson Painting is alone vicariously liable for the accident of March 5, 2012, it appears again that Defendants' counsel was aware of the defects ahead of the ninety days running and engaged in a manner that was inconsistent with his presentation to the Plaintiff. His actions also lack candor toward the tribunal—he never filed an accurate or complete Notice of Appearance. He remained silent on all defects beyond a point when Plaintiff could cure the defects. It was not until June 16, 2015, that he identified Todd Robinson Painting as his client as well.

It can also therefore be assumed that as counsel for the corporation, Todd Robinson Painting does have actual notice of this suit. For corporate defendants, the facts are even more pertinent, because a corporate defendant can so easily be served in the judicial system. Any corporate officer may receive service. Corporate defendants may be served in almost any jurisdiction. In addition, an attorney may be served on behalf of the corporation in many instances. While it may be true that a corporation must designate a specific agent, this is not the only means of service. Thus, when Defendants' counsel appeared, it was absolutely appropriate, if not required by Rule 12, that the affirmative

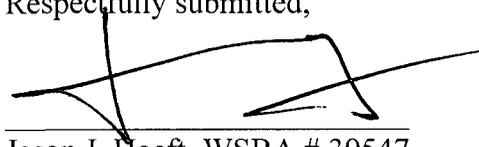
defense be raised immediately or be forever waived.

D. CONCLUSION

There is ample evidence in the record that demonstrates that the behavior and silence of Defendants on the issue of service amount to waiver, such that Defendants' Motion for Dismissal should have been denied. The Court's July 13, 2015, Order should be reversed, and this case remanded for trial on Mr. Mullins's claims.

DATED this 6 day of January, 2016.

Respectfully submitted,



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**CERTIFICATE OF SERVICE**

I, Cassandra Clariza, under penalty of perjury of the laws of the state of Washington, certify and declare that I caused a true and correct copy of the foregoing document to be served on the following parties as indicated below:

<b><u>January 6, 2016</u></b> Mathew D. Marinelli Sweeney, Heit & Dietzler 1191 Second Avenue Suite 500 Seattle, WA 98101	<input type="checkbox"/> By United States Mail <input checked="" type="checkbox"/> By Legal Messenger <input type="checkbox"/> By Electronic CM/ECF <input type="checkbox"/> By Overnight Express Mail – Fed Ex <input type="checkbox"/> By Facsimile <input type="checkbox"/> By Email
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Dated 6<sup>th</sup> day of January, 2016, in Seattle, WA.

  
\_\_\_\_\_  
Cassandra Clariza