

FILED
COURT OF APPEALS
DIVISION II
2016 FEB 26 PM 2:53
STATE OF WASHINGTON
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No. 47945-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

Ron Mullins,

Appellant,

v.

Michael Malone and Jane Doe Malone,

Respondents.

REPLY BRIEF OF APPELLANT

Jason J. Hoeft, WSBA # 39547
Emery Reddy, PLLC
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 442-9106
Attorneys for Appellant Ron Mullins

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A. REPLY ARGUMENT TO RESPONDENTS' BRIEF

This case is fact specific, and the facts reveal that the Defendants had actual notice of the lawsuit and engaged in behavior that waived the requirement of personal service. No new precedent or law will result in allowing this action to proceed because it follows the policy of allowing cases to be heard and decided on their merits as established by the Supreme Court. *Sheldon v. Fetti*, 129 Wash.2d 601, 609, 919 P.2d 1209 (1996).

The Defendants attempt to simplify the facts to show a sterile environment in which they had no knowledge of the lawsuit and thus took no action until the filing of their Motion to Dismiss. However, this ignores the greater context in which both Plaintiff and Defendants operated after the filing of the lawsuit.

In their brief, the Defendants point out several times that Plaintiff waited to file this action until seven days prior to the statute of limitations. Respondents' Brief at 1. However, the Defendants were well aware that the Plaintiff was actively working to close the Plaintiff's associated workers' compensation matter, which stemmed from the same incident date. CP 38, 57.

The Defendants were fully and completely aware of the circumstances of a pending lawsuit for years. Once the proper time occurred to file the lawsuit, Defendants almost immediately appeared, requested a copy of the Complaint, stated their intention to file an answer, and invited settlement negotiations. CP 57. The Plaintiff agreed to the Defendant's proposed plan, sent the requested complaint, and stated he would proceed with settlement discussions once the pending workers' compensation matter was complete. CP 57. Plaintiff then focused on doing just that—working diligently to bring

the workers' compensation matter to finality. CP 40-41, 63, 68, 71, 74-75.

The Defendants were also aware this was necessary because the Department of Labor & Industries held a lien against the Plaintiff's potential recovery in this matter pursuant to RCW 51.24.060. CP 41. No settlements could be achieved until the full lien amount was known to both parties. The lien of the Department of Labor and Industries is a high priority statutory lien on the recovery, and the Department has the sole discretion to compromise the amount of their lien. RCW 51.24.060(3). Plaintiff was actively waiting for a final resolution to his claim, which should have been completed in December 2014, but for a clerical error that went unresolved and over which Plaintiff had no control. CP 38-39.

In this case, unlike other, similar injury matters, Plaintiff needed far more time than the statute allowed to file his claims. Recognizing that he could wait no longer, he filed his lawsuit, and informed Defendants of the status of the underlying workers' compensation claim. CP 57. The Defendants were at no time surprised by this action or prejudiced by a lack of personal service.

The Supreme Court in *Lybbert* held that "If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised." *Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000).

The Court continued:

"[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).

Defendants Malone did exactly as the policy warns against: they appeared; requested a copy of the Complaint; invited settlement negotiations; acknowledged the status of the workers' compensation lien, including the clerical error; stated they were going to file an Answer (which they never filed); and then were dilatory awaiting the "clock to run" on Plaintiff Mullins.

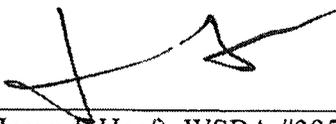
Despite their coordination of the above plan, the Defendants admittedly "did nothing" until moving to dismiss this action. Respondents' Brief at 9. Thus, Defendants lured Plaintiff into believing there were no outstanding technical issues to be addressed, and deprived Plaintiff the opportunity to cure any defects.

B. CONCLUSION

Because the Defendants had actual notice of the lawsuit and engaged in substantive and procedural discussions with the Plaintiff, service was forever waived, and the Court should have denied Defendants' motion.

DATED this 26 day of February, 2016.

Respectfully submitted,



Jason J. Hoelt, WSBA #39547
Emery Reddy, PLLC
600 Stewart Street, Suite 1100
Seattle, WA 98101
(206) 442-9106

DECLARATION OF SERVICE

I, Cassandra Clariza, hereby declare under the penalty of perjury under the law of the State of Washington that on February 26, 2016, I caused the foregoing Reply Brief to be filed with the Court of Appeals, Division II via Legal Messenger, and a true and correct copy of the same to be sent via Legal Messenger to the following:

Mathew D. Marinelli
Sweeney, Heit & Dietzler
1191 Second Avenue, Suite 500
Seattle, WA 98101

SIGNED this 26th day of February, 2016, at Seattle, WA.



Cassandra Clariza
Legal Assistant to Jason J. Hoeft

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