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Division II  
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NO. 54751-1-II

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

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VICTOR GUENTHER AND OLIVIA GUENTHER, a  
marital community

Appellants,

v.

GALAXY PACIFIC SERVICES, LLC, a Washington  
Limited Liability Corporation and MUHAMMAD M.  
JOYIA, an individual,

Respondents.

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**OPENING BRIEF OF APPELLANTS  
VICTOR GUENTHER AND OLIVIA GUENTHER**

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## I. INTRODUCTION

Appellants Victor and Olivia Guenther bring this action appealing the Lewis

County Superior Court's Order granting Defendants' Motion to Dismiss the appellants' Complaint for personal injury pursuant to CR 12(b)(5). Defendants Muhammad Joyia and Galaxy Pacific Services, LTD, arguing that Plaintiff could not "prove that any of the Certified Mailings sent were ever actually received by Defendants" despite the fact that they both filed a Notice of Appearance, and Defendant Joyia also filed an Answer.

## II. ASSIGNMENTS OF ERROR

- A. **Appellants respectfully assert that the Superior Court erred in granting the Defendants' Motion to Dismiss;**
- B. **Appellants further assert that the Superior Court erred by making findings of fact that Defendants**
- C. **Appellants assert that the Court erred in not granting Plaintiffs' Motion to Amend.**

## III. ISSUES

- A. **Where counsel for both Defendants filed a Notice of Appearance and Defendant Joyia filed an Answer to the Complaint, did the Superior Court err when it adopted Defendants' argument that**

**there were no facts to support actual service of process pursuant to CR 4(i)(1)(D)?**

- B. Should the Superior Court have granted Plaintiffs' Motion to Amend and related back to the original filing date when Plaintiff complied with the textual requirements of CR 15 and any neglect in the initial failure to name the correct party was excusable?**
- C. Where the reasonable inference showed that Defendants received notice of the Summons and Complaint, did the Superior Court err by granting Defendants' Motion to Dismiss when Defendants submitted no affidavit in support that they had not received the Complaint and further without holding an evidentiary hearing?**

#### **IV. STATEMENT OF THE CASE**

Plaintiffs filed a Summons and Complaint for Damages on August 28, 2019 and prayed for relief for damages arising from a motor vehicle accident that occurred on I-5 near Exit 68 on October 31, 2016. *See* Complaint for Damages.

Defendant, Galaxy Pacific Services, LLC, a Washington company was personally served on August 29, 2019. *See*, Declaration of Service of Rich Townsend. Plaintiff placed a copy of the Summons and Complaint into the U.S. Mail to Defendant Muhammad Joyia on August 27, 2019. *See*, Declaration of Kaleena Lechowicz in Support of Plaintiffs' Response to

Defendants' Motion to Dismiss Plaintiffs' Complaint for Damages, p. 3-5, 7-8.

Plaintiffs also placed a copy of the Summons and Complaint into the U.S. Mail to Defendants PS Galaxy Pacific Services, LTD, a Canadian Limited Company, and Muhammad Joyia, on September 11, 2019. *Id.* p 12 – 15; Declarations of Mailing.

Legal Counsel for both Defendants, Muhammad Joyia and GPS Galaxy Pacific Services, LTD, filed a Notice of Appearance on November 15, 2019. *See*, Notice of Appearance of Counsel.

Defendant, Muhammad Joyia, filed an Answer on December 20, 2019. *See*, Muhammad Joyia's Answer to Complaint for Damages.

Defendants Joyia and GPS Galaxy Pacific Services, LTD, filed a Motion to Dismiss pursuant to CR 12(b)(5) on February 12, 2020. Pursuant to this Motion, Defendants assumed that the factual allegations made by Plaintiffs contained in the Complaint were true. *See*, Motion to Dismiss Plaintiffs' Complaint Pursuant to CR 12(b)(5).

Plaintiffs filed a Motion to Amend the Complaint on or about February 25, 2020 to include GPS Galaxy Pacific Services, LTD, a

Canadian Limited Company, as a proper party to the Complaint. *See*, Motion to Amend Complaint for Damages.

In Defendants' Motion to Dismiss, Defendant Joyia asserted that Plaintiff could not, "prove that any of the Certified Mailings sent were actually received by Mr. Joyia and GPS LTD." In making this assertion, neither Defendant Joyia nor Defendant GPS Galaxy Pacific Services, LTD, filed any Affidavit, Declaration, or any other evidence in support of this assertion. *See*, Defendant Joyia's Opposition to Plaintiffs' Motion to Amend Complaint. Moreover, neither Defendant asserted that any error existed in the addresses to which the Complaint had been sent. *Id.*

On March 6, 2020, the Superior Court heard both the Motion to Dismiss and Motion to Amend the Complaint. Without holding any kind of evidentiary hearing, the Superior Court denied Plaintiffs' Motion to Amend and granted Defendants' Motion to Dismiss.

On March 13, 2020, Plaintiffs filed a Motion for Reconsideration of the March 6, 2020 Order. On March 20, 2020, Defendants filed an opposition to Plaintiffs' Motion for Reconsideration and Evidentiary Hearing with a Proposed Order Denying the Plaintiffs' Motion. On March

26, 2020, the Superior Court granted Defendants' Order Denying Plaintiffs' Motion for Reconsideration.

## V. ARGUMENT

**A. Where all reasonable inferences indicated that both Defendants had actually received Plaintiffs' Summons and Complaint, the Superior Court erred by granting the Defendants' Motion to Dismiss pursuant to CR 12(b)(5).**

CR 4(i)(1) provides for alternative provisions for service of process in a foreign country.

**(i) Alternative Provisions for Service in a Foreign Country.**

(1) *Manner*. When a statute or rule authorizes service upon a party not an inhabitant of or found within the state, and service is to be effected upon the party in a foreign country, it is also sufficient if service of the summons and complaint is made:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or a letter of request; or

(C) upon an individual, by delivery to the party personally, and upon a corporation or partnership or association, by delivery to an officer, a managing or general agent; or

(D) by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served; or

(E) pursuant to the means and terms of any applicable treaty or convention; or

(F) by diplomatic or consular officers when authorized by the United States Department of State; or

(G) as directed by order of the court. Service under (C) or (G) above may be made by any person who is not a party and is not less than 21 years of age or who is designated by order of the court or by the foreign court. The method for service of process in a foreign country must comply with applicable treaties, if any, and must be reasonably calculated, under all the circumstances, to give actual notice.

In this case Plaintiffs mailed a copy of the Summons and Complaint in compliance with CR 4(i)(1)(D), “by any form of mail, requiring a signed receipt, to be addressed and mailed to the party to be served;” to Defendant Joyia, at his home address on August 27, 2019. Plaintiffs do not dispute that the return receipt certificate was not returned because it was for domestic mail only within the United States. However, it is also true that Kaleena Lechowicz calculated postage “for international mailing”, and further, “added in the extra fees to account for certified mailing and signed certified mailing receipt from the addressee.” *See*, Declaration of Kaleena Lechowicz, p 8. Although CR 4(i)(2) requires proof of service that, “includes a receipt signed by the addressee”, it also permits, “other evidence of delivery to the addressee satisfactory to the court.” Moreover, a “lack of return of service [neither] deprive[s] a court of jurisdiction, nor does it affect the validity of the service.” *Scanlon v. Townsend*, 181 Wn.2d 838, 848, 336 P.3d 1155 (2014) (quoting *Jones v. Stebbins*, 122 Wn.2d 471, 482, 860 P.2d 1009 (1993)).

Plaintiffs anticipate that Defendants will argue that the Hague Convention is not relevant because Canada accepted Article 10(a), and, “the Convention on the Service Abroad of Judicial and Extrajudicial Documents (“Hague Convention,” or the “Convention”) does not prohibit --, or, in the words of the Convention, does not, ‘interfere with’ – service of process by international mail.” *Brockmeyer v. May*, 383 F.3d 798, 799-800 (9<sup>th</sup> Cir. 2004).

At oral argument before the Superior Court, counsel for Defendants correctly pointed out that Plaintiff Brockmeyer withdrew his original arguments on June 28, 2004. However, the 9<sup>th</sup> Circuit replaced its original decision on August 31, 2004 and made a more complete record of the case. Plaintiffs herein rely on the August 31, 2004 decision which ultimately held that countries which have adopted the Hague Convention, allows international service by mail when such service complies for FRCP 4(f). *Brockmeyer* at 383 F.3d at 799-800.

In authorizing international service by mail, the Ninth Circuit Court of Appeals, adopted the holding and rationale adopted by the Second Circuit, which held that:

“[T]he meaning of “send” in Article 10(a) includes “serve.” See *Ackermann*, 788 F.2d at 838. In so doing, we also join

the essentially unanimous view of other member countries of the Hague Convention. *See, e.g.,* Case C-412/97, *E.D. Srl. v. Italo Fenocchio*, 1999 E.C.R. I-3845, [2000] C.M.L.R. 855 (Court of Justice of the European Communities) ("Article 10(a) of [the Hague Convention] allows service by post."); *Integral Energy & Envtl. Eng'g Ltd. v. Schenker of Canada Ltd.*, (2001) 295 A.R. 233, 2001 WL 454163 (Alberta Queens Bench) ("Article 10(a) of the Hague Convention provides that if the state of destination does not object, judicial documents may be served by postal channels"), *rev'd on other grounds*, (2001) 293 A.R. 327; *R. v. Re Recognition of an Italian Judgment*, [2002] I.L.Pr. 15, 2000 WL 33541696 (Thessaloniki Court of Appeal, Greece) ("It should be noted that the possibility of serving judicial documents in civil and commercial cases through postal channels ... is envisaged in Article 10(a) of the Hague Convention.")”

*Id.* at 802.

The *Brockmeyer* Court held:

“We agree with the Second Circuit that this holding is consistent with the purpose of the Convention to facilitate international service of judicial documents. *See* Hague Convention, art.1 (“[T]he present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extrajudicial document for *service* abroad.”) (emphasis added); *see also* 1 Moore's Federal Practice § 4.52[2][d] (stating that "it comports with the broad purpose of the Hague Convention" to construe "send" to mean "serve").

Commentaries on the history of negotiations leading to the Hague Convention further indicate that service by mail is permitted under Article 10(a). According to the official Rapporteur's report, the first paragraph of Article 10 of the draft Convention, which "except for minor editorial changes" is identical to Article 10 of the final Convention, was intended to permit service by mail. *See* 1 Bruno A. Ristau, *International Judicial Assistance* § 4-3-5, 803\*803 at 204-05 (2000) (quoting the Service Convention Negotiating Document) (translated from French by Ristau). A "Handbook" published by the Permanent Bureau of the Hague Convention, which summarizes meetings of a "Special Commission of Experts," states that to

interpret Article 10(a) not to permit service by mail would "contradict what seems to have been the implicit understanding of the delegates at the 1977 Special Commission meeting, and indeed of the legal literature on the Convention and its predecessor treaties." Permanent Bureau of the Hague Convention, *Practical Handbook on the Operation of the Hague Convention of 15 November 1965 on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters* 44 (1992). As further evidence of the understanding of the parties at the time the Hague Convention was signed, the United States delegate to the Hague Convention reported to Congress that Article 10(a) permitted service by mail. *See*, S. Exec. R. No. 6, at 13 (1967) (statement by Philip W. Amram)."

After concluding that international service by mail was sufficient, the *Brockmeyer* Court next analyzed the provisions set forth in FRCP 4(f) to determine whether service made by Plaintiff Brockmeyer was in compliance with the applicable rule. FRCP 4(f) provides:

(f) ... Unless otherwise provided by federal law, service upon an individual from whom a waiver has not been obtained and filed ... may be affected in a place not within any judicial district of the United States:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents[.]

Although the wording between Washington's Civil Rules and the Federal Rules of Civil Procedure are not identical, they both provide for similar methods of service on inhabitants of a foreign country. CR 4(i)(1)(E) allows for service, "pursuant to the means and terms of any applicable treaty or convention;"

Plaintiffs had the initial burden to show that service was sufficient. *Scanlon v. Townsend*, 181 Wn.2d 838, 847 (2014). In this case it is undisputed that the Summons and Complaint were sent by registered mail to both Defendants. It is also undisputed that legal counsel for both Defendants filed a Notice of Appearance, and Defendant Joyia filed an Answer. This is, without a doubt, clear evidence that service was sufficient and realized. Had it not been for actual receipt of the Summons and Complaint, Defendants would have no knowledge of the legal action against them and would not have been able to file a Notice of Appearance or Answer (for Defendant Joyia). Having met their initial burden, then it is Defendants' burden to show by clear and convincing evidence that service was improper. *Scanlon*, 181 Wn.2d at 847. In this case, Defendants have not met their burden of clear and convincing evidence as they did not present any evidence by way of Declaration, Affidavit, or any other evidence that service was insufficient to place them on notice that a lawsuit had been initiated against them. The Court erred by granting the Motion to Dismiss against Defendant Joyia.

As to Galaxy Pacific Services, LLC, it was personally served on August 29, 2019. As to GPS Galaxy Pacific Services, LTD, a Canadian Limited Company, it has not yet been made a party to this case as the Court denied Plaintiffs' Motion to add it as a Defendant. Although GPS Galaxy

Pacific Services, LTD, the Canadian Company, filed a notice of appearance “in an abundance of caution”, until the Complaint has been amended, although it certainly knew that but for a mistake concerning its identity, it would have been a party to this action, which is undoubtedly why it filed their motion notwithstanding the fact that it technically was not a party. Consequently, dismissal of GPS Galaxy Pacific Services, LTD, is not necessary and the Superior Court erred in granting the Motion to Dismiss against it.

**B. The Superior Court erred by not granting Plaintiffs’ Motion to Amend and relate back to the original filing date when Plaintiffs complied with the textual requirements of CR 15 and any neglect in the initial failure to name the correct party is excusable.**

An amended complaint adding a new party relates back to the date of filing when: (1) the added party received notice of the action within the limitations period such that he or she will not be prejudiced in maintaining his or her defense on the merits, and (2) the added party must have known or should have known that but for a mistake concerning his or her identity, the action would have been brought against him or her. CR 15(c); *Martin v. Dematic*, 182 Wn.2d 281, 288, 340 P.3d 834 (2014).

There was previously a third judicially created requirement that the failure to add a party must not be due to “inexcusable neglect.” *Id.* Inexcusable neglect exists when no reason for the initial failure to name the

party appears in the record. *Segaline v. State*, 169 Wn.2d 467, 477, 238 P.3d 1107 (2010). This judicially created requirement was added by following federal case law in 1981. However, that federally created requirement has now been eliminated. *Martin*, 182 Wn.2d at 290-291; *See, Krupski v. Costa Crociere S.P.A.*, 560 U.S. 538, 541, 130 S.Ct. 2487, 177 L.Ed.2d 48 (2010).

In this case, GPS Galaxy Pacific Services, LTD received “actual notice” on September 11, 2019 by mail which was well within the limitations period. The requirement in CR 15 for “actual notice” is not the same requirement as for personal service. *Martin*, 182 Wn.2d at 289. In *Martin*, Plaintiff Martin satisfied proof of “actual notice” of FCCNA by demonstrating that three weeks before the statute of limitations expired, the wrongly named defendant, GCC, tendered the defense to and demanded indemnity from FCCNA. *Id.* at 289. In this case, Galaxy Pacific Services, LTD, the Canadian Limited Company, presumptively received the mail sent, with proper postage, at least by September 16, 2019 pursuant CR 5. Proof of mailing gives rise to a presumption that the mail was in fact received. *Avgerinion v. First Guarantee Bank*, 142 Wash. 73, 78, 252 P. 535 (1927).

Moreover, if Galaxy Pacific Services, LTD, and Defendant Joyia never received the mail containing the Summons and Complaint, they could

not have ever known about the existence of this lawsuit to file their notice of appearance “in an abundance of caution.” Defendant Joyia could never have filed an Answer, if he had never received the Summons and Complaint mailed to him on August 27, 2019. *There is no other evidence in the record of any communication from Plaintiffs to Defendants Joyia and Galaxy Pacific Services, LTD, other than the mail sent on August 27, 2019 and September 11, 2019.* There is no evidence in the record that either Defendant Joyia or GPS Galaxy Pacific Services, LTD, had any communication from any other third party about this case. The only logical conclusion supported by the facts is that GPS Galaxy Pacific Services, LTD, and Defendant Joyia received the Summons and Complaint mailed to them. As such, the Superior Court should have found that both Defendants had “actual notice” of this matter on or before September 16, 2019.

In this case, GPS Galaxy Pacific Services, LTD, knew or should have known, but for a mistake concerning its identity that the action should have been brought against it. The action named its employee, Defendant Joyia, as a driver, who also had “actual notice” of this matter. GPS Galaxy Pacific Services, LTD “in an abundance of caution” filed a Notice of Appearance. More importantly, GPS Galaxy Pacific Services, LTD, never even denied that it knew or should have known. It merely argued that they

had not received actual notice on or before November 26, 2019, despite the fact that a Notice of Appearance was filed on November 15, 2019.

The Superior Court erred by not granting the Plaintiffs' Motion to Amend the Complaint by adding GPS Galaxy Pacific Services, Ltd as a party.

**C. The Superior Court erred by not holding an evidentiary hearing before granting the Defendants' Motion to Dismiss.**

Whether Defendant Joyia received his mail containing the Summons and Complaint is a factual issue necessary for a just determination, as is the factual determination of whether GPS Galaxy Pacific Services, LTD received, "actual notice of the action within the limitations period." Although Defendants Joyia and GPS Galaxy Pacific Services, LTD, provided no evidence that it had not received mail, and merely argued that Plaintiffs could not prove receipt – even though the evidence creates compelling circumstantial evidence that they both received the Summons and Complaint, the Superior Court, by granting the Defendants' Motion to Dismiss appears to have made the finding that they did not receive their mail.

Pursuant to CR 43(1), a motion may be heard wholly or in part on oral testimony. Testimony may be called for where a motion to set aside a default judgement results in conflicting affidavits as to personal service.

*Woodruff v. Spence*, 76 Wn.App. 207, 883 P.2d 936 (Wash. App. Div. 3, 1994). A court may abuse its discretion by failing to hold an evidentiary hearing when affidavits present an issue of fact whose resolution requires a determination of witness credibility. *Id.*

In this case, as in *Woodruff*, where there is seemingly two competing statements of fact about whether or not service, or mailing, had occurred, the Superior Court abused its discretion by not holding an evidentiary hearing to allow witnesses to be cross-examined to determine the facts necessary for a just determination.

As stated above, although the Court's findings are similar, they are, in fact, independent to each motion because the law and the parties involved are different. With regards to the Motion to Dismiss, GPS Galaxy Pacific Services, LTD, is not a party unless the Court granted Plaintiffs' Motion to amend the Complaint to add GPS Galaxy Pacific Services, LTD as a party to the action. As such, GPS Galaxy Pacific Services, LTD could not be dismissed from this case as it was never added as a party. Since GPS Galaxy Pacific Services, LTD was not added as a party, any finding as to whether it received adequate notice is not relevant.

With regards to Plaintiffs' Motion to Amend which requires "actual notice" of the original complaint, it is not relevant whether Defendant Joyia

received “actual notice” of the original complaint, as this issue only applies to GPS Galaxy Pacific Services, LTD.

Based on the above, the Superior Court abused its discretion by not holding an evidentiary hearing to resolve factual issues for a just determination. Accordingly, this Court should reverse the Superior Court’s Order granting the Motion to Dismiss and hold an evidentiary hearing to determine whether or not Defendants had received the Summons and Complaint as this is the relevant question necessary for a just determination.

## **VI. CONCLUSION**

Based on the above, this Court should vacate the Superior Court’s Order granting the Defendants’ Motion to Dismiss, or in the alternative, grant Plaintiffs’ Motion to Amend Complaint and Order the Superior Court to hold an evidentiary hearing to determine whether proper service of the original Complaint occurred upon Defendant Joyia and/or whether Defendant Joyia and GPS Galaxy Pacific Services, LTD received mail sent to them on September 11, 2019, that contained the Summons and Complaint.

RESPECTFULLY SUBMITTED this 5th day of August, 2020.

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**CERTIFICATE OF SERVICE**

I certify that on August 5, 2020, I caused the original and copy of the **Appellant's Opening Brief** to be filed via Electronic Filing, with the Court of Appeals, Division II and that I further served a true and correct copy of same to the below recipients:

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