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NO. 66741-6-1

FILED
COURT OF APPEALS DIV I
STATE OF WASHINGTON
2011 AUG 10 PM 3:44

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION 1**

GYLES R.LONG, an individual,

Appellant

vs.

KING COUNTY METRO TRANSIT, a municipality

Respondent,

**APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Andrea Darvas**

BRIEF OF APPELLANT

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I. NATURE OF THE CASE

Gyles Long appeals the summary judgment dismissal of his complaint against King County following a brutal attack on him by a Metro Transit bus driver on the last stop of his route in an somewhat isolated area (at the time) in Seattle's Rainier Beach. Long filed a summons and complaint against King County Metro Transit alleging atrocious assault and battery, emotional distress, breach of duty and intentional interference by one its drivers. Long served process on the Office of Risk Management assuming that they could receive the service because it was where he filed his notice-of-claim. Three years later, King County filed a motion for summary judgment, alleging the affirmative defense of insufficiency of service. The trial court granted King County's motion for summary judgment and Long appealed.

The nature of this case, however, is divided into two time periods; events before the summary judgment dismissal of the case and events after the summary judgment hearing and leading up to the final adjudication of the case. There is no other way to address the complexities and the bizarre nature of many of the events that have transpired since from the beginning with the attack, until now, encompassing this appeal and other post summary judgment manifestations that will have a direct influence on many of the decisions that are yet to made in order to adjudicate the present matter before this appeals court. struck a of the including the this appeal unless both time periods are considered because the post-trial

activities of the opposing parties has a direct bearing on the final adjudication of the case. For this reason, some post-trial documentation had to be submitted with the brief.

II. ASSIGNMENTS OF ERROR

No. 1 ___ Superior court erred when on August 26, 2009 it denied plaintiff's motion for a Judgment of Default against defendant for failure to answer complaint.

No. 2 ___ Superior court erred when it fail to make a ruling on plaintiff's motion for reconsideration filed on October 7, 2010.

No. 3 ___ Superior court erred when it never gave plaintiff any formal notice of its decision to grant summary in favor of defendant's motion.

No. 4___ Superior court erred when it denied plaintiff's motion to compel disclosure of investigation report compiled by Office of Risk Management.

No. 5___ Superior court erred when it granted defendant's Motion for Summary Judgment pursuant to statute of limitation based on improper service of process.

III. Issues Pertaining to Assignments of Error

No. 1 ___ Did the Superior Court Judge err when he fail to grant Long's Motion for Default Judgment when considering that the statute of limitations on the cause of action had already expired and the defendant was in default at that time?

No. 2 ___ Why was Long never officially informed about the ruling on the Summary Judgment motion until late January 2011, when the decision was apparently made on October 4, 2010?

No. 3 ___ Why was his Motion for Reconsideration totally ignored and never ruled on?

Why didn't anyone else come forward when, after speaking Judge Darvas' assistant and explaining what had happened, it was the assistant, speaking for Judge Darvas, who advised Long file a motion for reconsideration.

No. 4 ___ Why was there no Memorandum Opposing Summary Judgment when the docket clearly shows it was filed? And why was there a Declaration from Katherine Wax in the in the docket slot on that date that the Memorandum was filed?

No. 5 ___ Did the Superior Court err when it dismissed his complaint on a summary judgment motion?

IV. STATEMENT OF CASE

A. ATTACK INCIDENT

This case arises from incident on May 31, 2007, between a bus driver and Gyles R. Long, a passenger. (CP 4) After Long had fallen asleep on a King County Metro Transit bus while on his way to Veteran Hospital, he was soon awoken by the voice of the bus driver telling him he had reached the end of the bus route. (CP 4-5) Long then left the bus and walked across the street to a super market with the intention of buying a drink and returning to the same bus so he could catch it on its return trip back to the V. A. Hospital. (CP 5)

After returning to the bus, he presented his bus transfer to the driver then proceeded to reclaim a seat, he was then confronted by the driver and told he could not ride the bus. (CP 5) Initially, Long thought he had been mistaken for someone else, however, as he would later deduce, the driver knew exactly who he was talking to, it was his intention to make sure that Long would not be boarding for a return trip. (CP 5) Although it never dawn on Long at the time, it appears the driver had mistakenly assumed that it was Long's intention to just continue to ride the bus so he could sleep. (CP

The driver then attack Long, striking him with punches to his upper torso and then pushing him violently out the bus causing him to land on his ankle and causing it to fracture. (CP 5) As Long lay helplessly on the dirt covered ground, unable to stand, the driver uttered some

obscenities at him, and then took his seat and drove off without ever checking to see if he was in need of assistance. (CP 5) After laying there approximately an hour pleading with whomever would show at the bus stop (most of them bus driver) to call aid for him, Long finally convinced a high school age girl to call an ambulance for him.(CP 6)

B. NOTICE—of—CLAIM

Within approximately two weeks after the incident at the bus stop, Long filed a notice-of-claim with the Office of Risk Management. (CP 6) On or about June 20, 2007, Long spoke with his assigned claims examiner Ms. Christine Oh and gave her a statement. (CP 6) She also told him that she would keep in touch with him on a fairly regular basis touch so she could keep him abreast of how the investigation was progressing. (CP 6)

So Long waited month after month to hear from Ms. Oh, but he never heard a word, so finally, starting in November of that year, he started to call periodically and leave messages on her voice mail hoping she would call him back but she never did. This activity went on until late December when she finally answered one of his calls. (CP 6) He then inquired about the status of the investigation and was told that she could not find anybody that knew anything about it. (CP 6 (CP 7) Long thought Six and a half months was a bit long just to find out that “nobody knew anything about it” so he asked if she would send more details and she said she would but Long has never received had with Ms. Oh. (CP 7)

C. Default Motion

On May 29, 2009, Long filed a Summons and Complaint against King County Metro Transit. (CP 3) On June 15, 2009, he amended that original complaint. (CP 17) On or about June 30, 2009 Long received a notice of appearance from King County (CP , however, he never received an answer to the complaint.

On August 16, 2009, Long filed a motion for default asserting that he never received an answer from the defendant. (CP 30) On August 21, he sent a Notice for Default Judgment hearing to King County noting the docket scheduling for the ex parte hearing. On August 27, he received the answer to his original complaint but not the amended one. (CP 32) The next day, at the hearing, the judge ruled that even though the answer was turn in at the eleventh hour before the hearing, since they were turned in prior to the hearing taking place, it was acceptable and default was not warranted. (CP 43) Although Long did not challenge any of the legal aspects of the ruling at that time, there were a number issues he felt should have been considered in the judge's ruling but weren't, among these issues were; He point out, however, should the defendant have been allowed to turn in a late answer without leave of the court? ; should the answer submitted have been to the amended complaint or the original complaint? and; should the fact that the statute of limitation had run on one of his causes of action have been factored into the court's decision?

D. Motion to Compel Disclosure of Documents

It is On July 7, 2007, Plaintiff filed a notice of claim with the Office of Risk Management (ORM) following an incident in which he was injured by a bus driver. (CP 46) An investigation was initiated by (ORM) to assess the validity of the allegations made by Long. (CP 46) During the month of December 2009, the plaintiff, Long, sent letters to the Office of Risk Management (ORM) and the Department of Transportation (DOT) seeking to gain access to various documents and other related materials to the attack incident and subsequent investigation, pursuant to the Public Disclosure Act. (CP at 48)) In their letters acknowledging receipt the request, both agencies promised to cooperate fully and turn over the information within two to three weeks. This was not the case, however, and even after initially agreeing to the release the documents he requested, both the ORM and DOT reneged on their promises to make available for studying and copying the public documents and tapes that Long had requested.(CP at 48) (Ex 3) Although Craig McMundo at the DOT did provide some employee photographs of bus drivers who might have been in the area at the time of the assault incident, those photographs were the only the only thing that was provided that had any probative value, the rest of the things he provided consisted of an employee manual and bus schedules, and ORM provided nothing. (Ex. 4)

So on April 15, 2010, Long filed a motion to compel disclosure of the investigation report that should have been generated when he initiated ORM's participation by filing the notice-of-claim with that agency. (CP

46) and although he felt that he presented convincing arguments in support of compelling disclosure, Judge Darvas ruled in favor of the defense. He did feel, however, at the very least, there should have been an attempt to redact certain portions of the various documents instead of withholding them all in their entirety, after all, if they exist, they are public documents that have a direct impact on issues that involves the claimant the appellant Long's belief that the trial court erred when it refused to allow him access the investigation report that should to have been generated when the Office of Risk Management was supposed to have initiated an investigation to determine the validity of accusations made by Long when he filed a notice-of-claim with that agency asserting that he had been attacked by a King County Metro bus driver. That investigation report is a public record and as such it should have been made available pursuant to RCW 42.56.290 and RCW 5.60.060 of the Public Record Act. (CP 47-48)

The Office of Risk Management's contention is that the investigation report that Long requested is protected from disclosure based on attorney-client privilege, however, is without merit because the RCW 5.60.060(2) (a) the factThe attorney-client privilege is very narrow in its scope and its main focus is directed towards communication between an attorney and his client, and that the report and other documents were compiled in response to the Long's notice-of-claim, are shielded because of. nt RCW 42.56.290 points out that; pursuant to the Public Records Act, the work product doctrine does not shield records sought for release

that were created during the ordinary course of business. (CP 50) The investigation report that Long seeks is a report that was generated because the Office of Risk had a duty to perform that investigation, regardless of any other motivation they might have had such as; litigation, they had to perform, Long's investigation.

E. Motion for Summary Judgment

In late July of 2010, as Long found himself preparing to go to trial in November of that year, he received a number of discovery request from the attorney for the defendant Katherine Wax. The items that made up Ms. Wax's request were; a request for release of medical records, a disclosure of a list of the possible witnesses with their addresses and phone numbers and a notice informing Long that she had made arrangements to take a deposition from him on August 4, 2010.

Having never been involved in any type of trial preparation before, he assumed that Ms. Wax's requests were just part of her pre-trial preparation, and although he had been doing some discovery endeavors himself, he felt his efforts from then on would have to be done with a more heighten since of resolve. So taking a signal from her lead, Long began to prepare for trial in a similar fashion by lining up his possible his possible witnesses, compiling medical records, police reports, and so on. There was a lot of things to get done before trial, but he felt he could stayed focused he accomplish his objective.

On August 4, 2010, a deposition was taken from Long by Ms. Wax and another attorney, but the other attorney never spoke, and at present, his name can't really be recalled. Giving the deposition was a long grueling experience that lasted almost 5 hours, however, Long was glad it over so his attentions could once again be focused on his preparation for the trial. He spent the rest of the month of August compiling his evidence and forwarding a number of documents to Ms. Wax.

On or about September 2, Long received Declarations from Ms. Wax and clerk of King County Council Anne Norris, he also received a copy of a Motion for Summary Judgment. The motion stated that service of process had been defected and that the statute of limitation had run on all the causes of action and as a result they were petitioning the court to dismiss the complaint. The hearing to decide the motion was set to be heard on October 1, 2010, which was less than a month away.

Long was completely taken back by the sudden turn of events. Within the span of one day, not only was his opportunity to go to court and present his case in complete limbo, but with his trial date only a couple of months away, he was forced to, very quickly, do a complete about face and totally abandon all of his trial preparation in order to tackle the monumental task of trying to salvage his case by challenging a professional attorney on the subject of "service of process", all within the span of a few weeks before the hearing. Although he put up what he felt was a valiant effort to try and salvage his case from being dismissed, some

serious computer problems caused him to lose almost all of his work with less than two weeks to go before hearing date, and he had to basically start again from scratch. His efforts fell short though when he was only able to file his Memorandum in Opposition to Summary Judgment the day before the hearing. It was Long's intention, however, to explain the circumstances to the judge at the hearing and hopefully ask for a continuance.

F. Motion for Reconsideration

After the fiasco ended that found Long in a Seattle Court House while the hearing was actually at the Kent Justice Center, he called and spoke with the clerk in Judge Darvas's office, and after explaining to her what had happened with the mix up, she told him that judge Darvas said that he could file Motion for Reconsideration and she would examine his evidence and then make a ruling on the motion, she even told him where to find the rule that applied, so Long file the motion on October 7, 2010, then waited on the ruling to be made.

Not knowing how long he should normally expect a ruling of that nature should take, he was not terribly concern when months began to roll by and there was still no ruling on his motion. Then on January 7, 2011, he received a copy of a motion filed by King County asking the court to rule on their request for attorney fees and cost. Even at this juncture of the case, Long was not really sure of everything that going on because he had not received any notice that the case had been finally adjudicated, so he

assumed that the motion pertained to the future hearing which, according to the motion sent by King County, was set for January 21, 2011.

On January 27, 2011 Long received a letter from Judge Andrea Darvas informing him that she a made a ruling back in October 4, 2010. That's quite bizarre since she is the one that told him to file a motion for reconsideration.

On February 10, Long filed a motion for appeal.

V ARGUMENTS

A Long Was Entitled to Default Judgment on his motion

The Superior Court erred in denying Long's motion for default judgment based on the fact that the statute of limitation had already expired on his *atrocious assault and battery* cause of action when King County filed its answers on August 26, 2009, the expiration date on that cause of action expired on July 31, 2009. The answer to the complaint filed by Long was due twenty days after they received it, which would put the time for answering on or about the 20th of June. That would mean that King County was in default status well over a month when the cause of action expired on July 31, and it would be almost another month before they actually answered the complaint on August 26, putting them in default status .for almost two months when that cause ran its statute limitation. In addition, Long file an amended complaint on June 17, 2009, and King County never answered that complaint until in July 2010.

The FRCP Rule 55(a) clearly states that, “When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by affidavit or otherwise, the clerk must enter the party's default.”

One of the primary standard for this Rule hinges on whether Long’s ability to pursue is claim has been injured by the late answers of King County, and the answer to that question is a resounding yes. Since the statute of limitation expired when King County was in default status, Long’s case has been irreversibly prejudiced since he no longer has an avenue or forum in which to pursue his claim .on the atrocious assault and battery cause of action, and given those realities, it should have been an imperative for and a matter of law for the Superior Court grant his motion for default.

. The deception employed by King County in making the other party think they are preparing to go to trial and then when the opposing party is distracted, they file for summary judgment on a “service of process” issue. This ploy is not an isolated event, Long has examined a number of cases that follow the same pattern of deception and most are municipalities of some sort. One such case can be illustrated by examining Lybbert v. Grant County, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000). In Lybbert, Grant County made no attempt to submit its answer until after the statute of limitation had run on Lybbert’s cause of action. it then moved for summary judgment on the basis of improper service. In

Long, King County also made no attempt to file its answer until after Long's causes of action had run on his atrocious assault battery (which is two years).

There is a major distinction, however, in order for King County to maintain its subterfuge, they were forced to wait an additional year until the statute of limitation had also run on all of the causes of actions with three year limitations, and in doing so, when Long filed his motion for default judgment because of the late answers, they were also faced with another major distinction from the Lybbert case, and that distinction was, Lybbert never filed a motion for a default judgment as Long did, and because of that fact, his motion for default should have been granted because the statute of limitation for the atrocious assault and battery cause of action had already expired almost a month before King County filed its late answer to the complaint. And as in Lybbert, the defendant failed to raise his run, thereby intentionally allowing the plaintiff to believe service was effective and depriving him of a forum in which to pursue the claim. The Supreme Court of Washington concluded that under those circumstances, the County had waived the defense by failing to file an answer or other responsive pleading raising the defense before the limitations period ran,

Regardless of any excuse the defendant has used to try and establish justification based on excusable neglect, the primary issue the court should consider in determining any justification is whether or not Long's case of

the key issues in Long is whether are not he has been damaged by the late pleading of King County and the answer to

In Haynes v. B. F. Schwartz Co. 5 Wash. 433, 32 P. 220, when defendant B. F. Schwartz failed to answer within the 20 days and the plaintiff then moved for default and had served his notice of motion for default upon defendant and under the rules of the court, he could not then file his answer without leave of the court. The action of the court in granting the default must relate back to the time at which the motion for default was made. To Long's knowledge, no leave of the court was ever sought or granted to the defendant.

Since King County was in default status when Long made his motion for default judgment, according to CR 12(h)(1), it was then precluded from filing its late answers without leave from the court, and there is no evidence to show that it ever sought leave or was granted leave to file its late answer. So under that criteria the court should never have accepted the late answer from King County and Long should have been granted the default judgment he sought. See also, Skidmore v. Pacific Creditors, 18 Wash.2d 157, 138 P.2d 664

The tactics employed by King County to ensnare the Pro se litigant or even the neophyte attorney, does not happen just by accident, it is a well-orchestrated and well thought out deception. This deception has been fed by the ambiguity of the complaint filing statute of who actually receives service of process.

I know that the courts like to see a sense of fair play among litigants, however, when a defendant waits an entire year after the statute of limitation has run on a cause of action before bringing up the issue, just so he can make sure the opposing party is being kept in the dark and not alerted until the statute of limitation have run on all of his causes of action, then the fair play can seem to be a bit one sided.

B. Long Should Have Been Allowed to View the Documents Pursuant to Public Disclosure Act

The superior court erred when it denied Plaintiff's motion to compel King County's Office of Risk Management to release the notice-of-claim investigation report it should have compiled when it conducted the investigation related to his claim. Based on the PDA pronouncement, Long had a right to view any public record and base on that criteria. There should be two questions asked in order to determine if Long has a right to view the documents he seeks; (1) are the record he seeks a public record document? ; And, if so, (2) are those records sought by Long exempt from disclosure base on any type of statutory principles?

To answer the first question one would have to look at who and why those documents were created: The investigation report, if one exists, was compiled by the Office of Risk Management, which is a local agency of the municipality King County. RCW 42.56.060 defines local agency as:

“Local agency” includes every county, city, town, municipal corporation, quasi-municipal corporation, or special purpose district, or any office, department, division bureau, board, commission, or agency thereof, or other local public agency.

Since it is apparent that the Office of Risk Management is a local agency, then any writing of that local agency becomes a public record just as the investigation report and other related materials maintained by the Office of Risk Management concerning Long’s claim have become. RCW 42.56.010 also explains what constitutes a public record:

“Public Record” includes any writing containing any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.

King County’s Office of Risk Management relies on RCW 42.56.290 and RCW 5.60.060 to assert that their refusal is justified. Those two statutes use the “work product doctrine” and “attorney-client privilege” to shield records from disclosure, however, the Office of Risk Management’s contentions are based on faulty premises.

Work Product Doctrine

In order to invoke the work product doctrine the records sought must be relevant to a controversy and they must not have been done in the ordinary course business. In other words; the reason(s) ORM created the documents is paramount to the whether or not the documents sought are exempt under the “work product” doctrine. First, when looking at the relevant to a controversy issue, any party, at any time, could claim that information sought by the other party was created because they anticipated

litigation, whether or not that was actually the case would be very hard to disprove. That's why, the best barometer that could be used to measure the whether a document or any other form of communication sought is shielded from disclosure is, "why". Why was that information compiled in the place?

In the present case, the documents Long seeks were compiled for one reason and that one reason was to investigate the allegations contained in the notice-of-claim filed by Long with that agency. It was the only reason that investigation was initiated. Once the notice- of- claim was filed with that agency (ORM) it became their legislative mandate to investigate the allegation contained within that claim. Not to investigate it would have been against the law. Pursuant Title 4 of the King County Code Chapter 4.12, the Office of Risk Management not only had a mandate to conduct an investigation the claim submitted to them by Plaintiff. King County Ordinance No. 3581, section (4) (c) (6) explains the duties of the Risk Manager (RM):

The RM shall maintain histories of all claims and claims litigation and investigation of claims and incident reported. In addition, he is to ensure that complete files are maintained of all claims against King County and all incidents reported to the office of risk management sufficient to document for at least years.

There are very few circumstances there never was any other options for the ORM. Once the notice-of-claim had been filed, they had to investigate at some level. The investigation was not conducted because they anticipated litigation. It conducted because they had to. In *Morgan*

v. City of Federal Way, 166 Wash.2d 747, 313P.3d it was held it was held that;

Investigation report of municipal court employee's hostile work environment complaint was conducted pursuant to city's anti-harassment policy and had remedial purpose, and was not conducted in anticipation of litigation, and thus report was not attorney work product shielded from disclosure under the Public Records Act.

document and thus investigation was a public record subject to disclosure pursuant Public Records Act (PRA). In addition, there are very situations that would allow the complete holding of all records that are sought as was done with the ORM. At the very least, Long should have been allowed to view redacted portions of the report instead of blanket, No! to the entire document. This point was driven home in *PROGRESSIVE ANIMAL WELFARE SOCIETY, v UNIVERSITY OF WASHINGTON* 125 Wash. 2d 243, 8845 P.2d 592, "Public Records act clearly and emphatically prohibits silent withholding dby agencies of records relevant to public records request". RCW 42.56 requires that all public document held by an agency be available for inspection and copying upon reuest pursuant to the Public Records Act (PRA)

Ordinary Course of Business

RCW 42.56.290 points out that; pursuant to the Public Records Act, the work product doctrine does not shield records sought for release that were created during the ordinary course of business. In *Coltec Industries, Inc. v. American Motorists* 197 F.R.D. 368 – Fed Civ Proc 1600(3) "work product" is defined in this manner:

“Work product” is defined as those materials produced because of the anticipation of litigation; thus, there is a “causation” element insofar as production of the materials must be caused by the anticipation litigation; if materials are produced in the ordinary and regular course of a discovery opponent’s business, and not to prepare for litigation, they are outside the scope of the work product doctrine.

What caused the investigation to happen at the Office of Risk Management was a notice-of-claim filed by Plaintiff and no other reason.

Attorney-Client Privilege

Next, the respondents have stated that their refusal was also based on attorney-client privilege. RCW 5.60.060(2)(a) states that: “An attorney or counselor shall not, without the consent of his or her client, be examined as to any communication made by the client to him or her, or his or her advice given thereon in the course of professional employment.”

In *Dietz v. Doe*, 131 Wn.2d at 842 it states that “ it states that: “The attorney-client privilege applies to communications and advice between an attorney and client and extends to documents that contains a privileged communication.” The investigation report is certainly not a private communication between anyone; it is an investigation of the events between third parties that led to the injury of passenger, it has nothing to do with communication between the attorney and client. Even in the unlikely event there might be some portion of the report that would fit the privilege communication definition, that part of the report could simply be redacted from the document(s) and the rest of made available for public inspection, as the Public Disclosure Act requires.

C. The Superior Court failed to render a decision on Long's motion for Reconsideration:

On October 1, 2010, a hearing was docketed for a ruling on Motion for Summary Judgment that was filed by the defendant King County. Representing King County at that particular time was the attorney Katherine Wax, she had recently replaced the attorney who started the case, Linda Gallagher.

Approximately a month prior to the hearing Long received a declaration from Katherine and Anne Norris. Anne is an individual in the county clerk's office, who, at the time, was responsible for receiving the lawsuits filed against King County. Accompanying their declarations was a copy of the Motion for Summary Judgment and the docket scheduling sheet detailing the time and the venue. According to the docket, CP at 12, the hearing was scheduled for 10:00 a.m. on October 1, 2010, at the King County Court House in **Seattle**, so Long went to the courthouse in Seattle expecting to be heard in court only to find out the hearing was scheduled to be held in the Regional Justice Center in Kent, WA., not Seattle, WA. as was described on the scheduling docket cover sheet. Whether the confusion of that morning was intentional or accidental is of little consequence, the end result was that Long was denied his "day in court" and the opportunity to present his arguments in court before a ruling could be made on the motion that would decide the future of his case. It should be pointed out, however, Katherine Wax was at the correct courthouse

although the docket cover sheet she sent to Long clearly says **Seattle** in bold type.

October 1, 2010 was on a Friday, despite a number of attempts to contact Judge Darvas on that day Long was unsuccessful. On Monday, October 4, 2010, Long was finally able to contact Judge Darvas' office and after talking to her assistant and explaining to her what had happened on Friday, the day of the hearing, she explained to him that, according to judge Darvas, the best way to try and rectify the situation would be for me him to file a motion for reconsideration and then the judge would rule on that motion. So on Thursday, October 7, 2010, Long filed a Motion for Reconsideration in King County Superior Court and waited for a response from the judge.

Not being aware of the time frame protocols required to make a decision on a motion like his, Long was not overly concerned when the months begin to pass and he hadn't heard anything concerning a ruling on his motion, he felt as though it was the normal span of time required to rule on a motion of that type. However, on or about January 3, 2011, he received a certified letter from attorney Linda Gallagher, informing him that Katherine Wax was no longer handling the case and she had resume control of the case. A few days later he received another certified letter notifying him that an ex parte hearing had been scheduled on January 21, 2011 to decide the issue of attorney fees for the summary judgment case recently adjudicated. Initially, it had not sunk in what was taking place, he

felt that the hearing on January 21, 2011 was to decide the Summary Judgment matter, and the attorney fees would have to be paid if he lost the motion, after all, he had never received any type of notification of a ruling on that motion.

Later that month, around January 27, Long was in a state of shock! Not only had he not received any ruling on his Motion for Reconsideration, he had never received any kind of notification informing him of a decision on the Summary Judgment motion filed by attorney Katherine Wax.

D The trial court erred on its Summary Judgment Ruling by deciding that the Statute of Limitations on Long's causes of actions had run pursuant to insufficient service of process:

When considering Katherine Wax's motion for summary judgment, there are a number of inescapable observations that should be evaluated, (1) in order to raise the issue of insufficient service of process, the defendant has to raise the issue in a responsive pleading or a motion to dismiss, and this should be done before the expiration of the defendant's time to answer the complaint, and (2) if King County intentions were to raise the issue of insufficient service of process, then, why would they not have raised it when the two year atrocious assault and battery cause of action expired, on July 31, 2009? The answer is simple, they wanted make sure Long was kept in the dark about their true intentions until after

the expiration of all of the causes of action (the one two year cause of action and the remaining three causes of action as well). In that way, Long would not be alerted and try and correct any defects in service until all of the causes of action had run. That would be the only reason to wait an entire year before calling this defective service to the attention of the court. The correct time to raise that issue would have been in a timely motion before the statute of limitation expired

E. Superior Court erred when it failed to include Memorandum before making its decision:

With his trial set to begin during the month of November 2010, the plaintiff, Long, spent most of the month of August trying to preparing to go to trial. His preparations came to an abrupt and frightening halt, however, when he learned that he would have to funnel all of his efforts to the new and immediate threat of defendant's motion for summary judgment. Long did not have even an inkling of a clue or anticipation that this type of action was forthcoming, he was taken totally by surprise. His shock was understandable though especially when you consider the fact that just a few weeks earlier, on August 4, 2010, he had given an exhausting five hour deposition to the attorney Katherine Wax. During the entire time of the deposition, there was never any indication that we were doing anything else but preparing to go to trial. Not one question

was ever directed toward ascertaining any facts about service of process. It was as if they were deliberately trying not to give anything away.

On September 3, 2010 Long received a certified letter informing him that a summary judgment hearing was scheduled for October 1, 2010, this meant that he had less than a month to research and try to assemble enough information to defeat a motion brokered by a professional who obviously possessed enough legal knowledge to pass the bar exam, and one who more likely than not, possessed at least some legal experience (especially considering the fact that he possessed none). So there he was facing a monumental challenge as a complete neophyte with very little legal knowledge, and absolutely no legal experience or skills, about to enter an arena that was not designed for the faint at heart. It should be pointed out that even a skilled professional would face some challenges, but given the time window Long was forced to operate in, there could be very little room for error or wasted effort.

Then the unthinkable happens, with only two weeks left before the scheduled hearing, and a little bit of light beginning to show at the end of the tunnel, his used laptop computer completely breaks down and all his data is irretrievably lost. It was a nightmare scenario to end all nightmare scenarios, and it left Long wondering if he should just save himself some grief and throw in the towel. He really had to convince himself not to take the easy way out and just give up, but he did convince himself, and he fought hard each day to hang in there and try

With time for the hearing quickly approaching, Long found himself running out of time and as each day passed it becomes more and more apparent that there was a strong possibility that if he is able to make the deadline it will be with very little time to spare, and as it turned out, that line of thinking prove to be prophetic as he was only able to beat the hearing by a day. So on Thursday, September 30, 2010 at 4:00 p.m. Long filed his memorandum opposing the Motion for Summary Judgment filed by King County, and even though it was an eleventh hour filing, it was intention to hopefully explain the circumstances to the court and ask for a continuation so he could give the memorandum to the defendant, however, because of the mix up he never got the chance to address the court.

King County's engagement in substantive discovery is inconsistent with its defense of insufficiency of service of process.

CR 3: Waiver of objection by engaging in discovery or other conduct inconsistent with intent to seek dismissal

With the trial date approaching and just over two months away, there was a flurry of discovery activity from Ms. Wax and King County sending the message that were preparing to litigate the case such as: Authorization for use and Disclosure of protected Health care information, Defendants's Disclosure of possible primary witness, Deposition Hearing, and so on, It was all just a ruse to make Long think he was proceeding to trial on the merits of the case.

Washington State Supreme Court tried to curtail a lot this type of deception by holding that: “In 2000, however, the Supreme Court held that a defendant waived any objection to service of process by engaging in discovery and settlement negotiations, where according to the court, (1) the facts surrounding service of process were not in dispute; (2) the process server’s affidavit, filed with the court immediately showed that service was insufficient; (3) the defendant nevertheless engaged in discovery and other discussions regarding the merits of the cause, not the potential defense of insufficient service; and (4) the defendant failed to provide a timely response to plaintiff’s interrogatory, asking whether the county intended to rely upon a defense of insufficient service. Lybbert v. Grant County, 141 Wn.2d 29, 1 P .3d

King County gave every indication they were preparing to litigate the case before the courts on the merits of the case right up until the last minute and then they file for summary judgment. All of the discovery requests to date had been items one would expect an attorney to need in preparation for a trial. In *Romjue v. Fairchild* 60 Wash.App. 278, 281 803 P .2d 102 (1991), Thomas J. held “defendant waived defense of insufficiency of service by engaging in discovery not directed toward determining whether facts existed to support defense of insufficient service and by choosing to say nothing until the statute of limitation expired. See also, *Blandenship v. Kaldor* “ 114 Wash.App. 312, 57 P .3d 295.

F. Missing Memorandum Document:

Judge Darvis mentioned in her decision that Long never filed any opposing arguments, however, this was not the case, and as was previously explained, even though it was an eleventh hour filing, the court

docket clearly shows that it was filed on the 30th . In fact, on October 4, 2010, when Long called and spoke with Judge Darvis' assistant, he explained the circumstances that caused him to miss the hearing, and he also explained that he filed the opposing memorandum on the 30th. It was then that she gave him instructions on filing the motion for reconsiderations.

It has recently become apparent that someone has removed the opposing memorandum from the docket. A printout of court docket clearly shows that something was filed on the 30th of September, however, instead of the memorandum; it shows a Declaration from Katherine Wax filed on that date. In fact, there are two Declarations for Katherine Wax, one filed on September 3, 2010, and one filed on September 30th. The date of the Declaration on the 30th obviously should not be there, after all, why would Katherine Wax file Declaration a day before the hearing is scheduled.

Although the memorandum was not filed until September 30, 2010, it was a part of the court record and Long should have had the opportunity to explain the circumstances in court on October 1, 2010, and the memorandum should have remained as part of the record and should not have removed.

preparing to go to trial. His preparations came to an abrupt and frightening halt, however, when he learned that he would have to funnel all of his efforts to the new and immediate threat of defendant's motion for

summary judgment. Gyles did not have even an inkling of a clue or anticipation that this type of action was forthcoming, he was taken totally by surprise. His shock was understandable though especially when you consider the fact that just a few weeks earlier, on August 4, 2010, he had given an exhausting five hour deposition to the attorney Katherine Wax. During the entire time of the deposition, there was never any indication that we were doing anything else but preparing to go to trial. Not one question was ever directed toward ascertaining any facts about service of process. It was as if they were deliberately trying not to give anything away.

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VI. CONCLUSION

On August 28, 2009, Gyles Long was denied the default judgment he should have been awarded in his motion. At the very least, he should be awarded the judgment on his atrocious assault and battery cause of action as a matter of law since the defendant was in default status when the statute of limitations on that cause of action expired and because of that his cause of action was prejudiced and he no longer has a avenue in which to pursue his claim on that cause of action. The ambush tactics employed by the defendant are the very tactics our Supreme Court was trying hard to eliminate in its decision in Lybbert.

The bizarre chain of events that occurred just prior to the summary judgment hearing and those afterwards might not be unique to the annals of jurisprudence, however, Long would hazard to guess that there aren't very many, and being the neophyte law researcher that he is, he couldn't find any, for example, he couldn't find any, where; (1) the attorney for the opposing party mails the pro se plaintiff a docket schedule telling him to go to the wrong courthouse for a hearing on the summary judgment motion sponsored by the defendants, while she shows up at the right courthouse, or; (2) the trial court judge failing to make a ruling on a motion for reconsideration that she advised him to file, or; (3) the Memorandum opposing summary judgment missing from the court docket when it clearly shows it was filed and he has the copy showing it was filed, or; (4) the exhibits supporting his contention that he was sent to the wrong court by the opposing attorney, or; (5) the judge never informing the plaintiff in a summary judgment motion that the case has already been adjudicated

and he wasn't the winner, or; (6) the Summons he filed showing up in the Clerks Papers unsigned when he knows for sure he signed them; and after all, what sharp attorney would answer a summons that they knew wasn't signed, not to mention the many others who have look at it and handled it, and noticed it wasn't signed and still passed it on. Not to mentioned the strange markings on the paper (like the number two) nothing has been said about unsigned summons that I am aware of, however, I will challenge any accusation that it wasn't signed.

DATED this 4 day of August, 2011

By Gyles R. Long

Appellant, Pro Se Gyles R. Long