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68179-6

No. 68179-6-I

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

VERBENA HEALTH

Respondent,

v.

MICHELLE L. MALKIN

Appellant.

BRIEF OF RESPONDENT

James F. Williams, WSBA No. 23613
Alan D. Smith, WSBA No. 24964
Karen R. Brunton, WSBA No. 41109
PERKINS COIE LLP
1201 Third Avenue, Suite 4900
Seattle, WA 98101-3099
Telephone: 206.359.8000
Facsimile: 206.359.9000

Attorneys for Respondent Verbena Health

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I. INTRODUCTION

Michelle L. Malkin ("Malkin"), a former member of the Washington State Bar Association, stole money from a small Seattle community health organization in order to fund her gambling addiction. Four years later, and with a surprising degree of indignation at the claims brought by the organization she single-handedly bankrupted, Malkin offers no defense for her actions, but nevertheless asks this Court to throw out a judgment legitimately awarded against her by the King County Superior Court.

At bottom, the narrow question presented to this Court is whether a civil defendant who asserts the Fifth Amendment privilege against self-incrimination and refuses to present a single piece of fact evidence in response to multiple attempts at discovery of relevant information, including facts supporting sufficiency of service of process, waives a defense of insufficient service of process.

For several reasons that are well grounded in Washington law and notions of procedural fairness and judicial efficiency, the Superior Court correctly held that such a waiver occurred and Verbena Health ("Verbena") submits that this Court should affirm.

Malkin assigns error to other conclusions of law made by the Superior Court, including Verbena's standing and the negative inference

that may be drawn from her assertion of the Fifth Amendment privilege, but none of these has any support whatsoever in the factual record or controlling law.

Malkin characterizes this case as a "fruitless action," a "symbolic lawsuit," and a "quixotic exercise." Verbena respectfully disagrees. Indeed, this case is about Verbena's doing what is right and trying to recover just a small part of what it lost in order to repay the donors and organizations who generously gave to Verbena, only to see its funds squandered, its clients left unserved, and its doors closed permanently by Malkin's irresponsible and deceptive actions.

As the Superior Court correctly held, this action is ripe for summary judgment and the Superior Court's entry of the Judgment against Malkin should be affirmed.

II. ASSIGNMENTS OF ERROR

Verbena makes no assignments of error. Verbena states the issues on review as follows:

1. Did the Superior Court correctly find that Malkin waived her defense of insufficient service of process based on her inconsistent and dilatory conduct?

2. Did the Superior Court correctly find that Verbena has standing to pursue a claim against Malkin because Verbena brought suit within two years of winding up its affairs?

3. Did the Superior Court correctly grant summary judgment to Verbena based on the undisputed evidence of Malkin's fraud, deceit, and embezzlement, coupled with her refusal to testify?

III. STATEMENT OF THE CASE

A. Factual Background

1. Verbena

Plaintiff-Respondent Verbena¹ was a small nonprofit provider of community health services and health education to lesbian and bisexual women, and transgender individuals. CP 118. Verbena operated in Seattle's Capitol Hill neighborhood from 1992 to 2008 and had a nearly \$500,000 annual budget, eight employees, and hundreds of volunteers. CP 118. Verbena was funded by donations from individuals as well as grants from foundations and government agencies. CP 118. As a result of Malkin's embezzlement, in May 2008, Verbena lost the ability to pay its creditors and was forced to shut down. CP 118. Although the

¹ The organization was registered with the Secretary of State as Verbena, but internal documentation and witness statements indicate the staff and Board of Directors referred to the organization as Verbena Health. CP 285; 293; 301; 302; 343; 360.

Washington Secretary of State administratively dissolved Verbena on August 30, 2011, Verbena continued to wind up its affairs and David Haack continued to represent the organization as Chair of the Board of Directors. CP 118; 122.

2. Malkin

Verbena hired Defendant-Appellant Malkin to be its Executive Director in April 2006. CP 118. Malkin's duties at Verbena included "managing the day-to-day operations of Verbena, including overseeing the budget and use of funds." CP 226-27.

During her employment at Verbena, Malkin was a licensed member of the Washington State Bar Association ("WSBA"). Verbena filed a grievance against Malkin with the WSBA in 2009, and as a result, Malkin resigned in lieu of disbarment and is no longer licensed to practice law. CP 118; 285-96.

3. Malkin Embezzled over \$80,000 of Verbena Funds to Pay for Gambling at Casinos, Cruise Ship Vacations and Other Personal Expenses

Within approximately one year of being hired, Malkin began embezzling money from Verbena to fund a gambling habit and pay her personal debts. It is undisputed that, by April 2007, Malkin began spending money from Verbena accounts at various casinos in the Seattle

area and in Nevada, and writing checks to herself and her partner Kaiser.²
CP 59-70.

Verbena deposed Malkin on September 2, 2011. Malkin asserted the Fifth Amendment and did not dispute any of the following with respect to four separate Washington Mutual bank accounts in Verbena's name ("Verbena WaMu Accounts") while Malkin was employed at Verbena:

- Malkin had regular access to and actual authority and ability to spend money from the Verbena WaMu Accounts.
- Malkin was the only person who regularly used or deposited or withdrew funds from the Verbena WaMu Accounts.
- Malkin was in possession of the debit cards and checks associated with the Verbena WaMu Accounts during her entire employment.
- The Verbena WaMu Accounts were intended to be used for Verbena business expenses and Malkin did not have authority to use the Verbena WaMu Accounts for personal expenses.

² While employed at Verbena, Malkin's girlfriend and partner was Tammy Kaiser. Documents discovered on Verbena computers indicate that Malkin and Kaiser both had substantial personal credit card and other debt. CP 345-54.

- Malkin incurred unauthorized charges against the Verbena WaMu Accounts, improperly withdrew money from Verbena WaMu Accounts and improperly spent Verbena money for, among other unauthorized purposes, gambling at casinos in the Seattle area, and in Las Vegas and Reno, Nevada.

CP 61-67.

The undisputed gambling charges that Malkin incurred using Verbena's WaMu Accounts total \$29,637.89 and include over \$13,000 in charges Malkin incurred during a three-day trip to Las Vegas in November 2007. CP 62-67; 84-85. In addition, Verbena's records show over \$8,3205.50 in unauthorized Verbena WaMu Account withdrawals from ATMs located at or adjacent to Seattle-area casinos. Verbena records show that Malkin was gambling at casinos with Verbena funds on at least fifty days out of a thirteen-month period. CP 84-85; 127-224.

Malkin also frequently wrote checks to herself for nonpayroll and nonlegitimate business purposes between April 2007 and May 2008. CP 119. These checks total at least \$18,803.71. CP 87. Malkin wrote thousands of dollars in Verbena checks to her partner Kaiser. CP 87. Kaiser was not employed by Verbena and had no legitimate purpose for receiving Verbena funds. CP 119. Malkin and Kaiser established fraudulent businesses in order to funnel money to themselves from

Verbena accounts. CP 119. Malkin and Kaiser collected money from these fake businesses, known as "TKK Consulting," "MLM Consulting," and "Ripcord Enterprises" for their own personal use. CP 87; 119. Checks to Kaiser, "TKK," "MLM," and "Ripcord" exceed \$16,780. CP 87.

In addition to her unauthorized use of Verbena money for gambling, it is also undisputed that Malkin used Verbena funds for other personal uses, including vacations and groceries. CP 60-61; 119. For example, Malkin went on a Carnival cruise in February 2008 and paid at least \$1,898 of trip expenses out of Verbena funds, and she wrote a check for \$1,000 from Verbena to Holland America for a cruise in October 2007. CP 86; 60-61.

By the time the Verbena Board of Directors (the "Board") discovered the embezzlement in May 2008, Malkin had stolen more than \$80,000³ and cost Verbena several hundred thousand dollars in related debts and expenses.

³ Verbena believes the amount stolen was several times that amount, but for purposes of its Motion for Summary Judgment, it relied only on the most obvious of fraudulent uses of funds and therefore provided undisputed evidence of theft and embezzlement in an amount of at least \$80,000.

4. Malkin Deceived the Board and Staff

Board meeting minutes from 2007 and 2008 demonstrate that Malkin continued to show a deceptively rosy—and entirely false—picture of Verbena's finances to the Board while depleting Verbena funds for her personal use. CP 298-303. During late 2007, Malkin reported to the Board that, because an audit had been conducted in 2006, no audit was needed in 2007. As a result of this advice, the Board did not seek an audit during 2007. CP 119. Verbena appointed David Haack as interim treasurer in April 2008 after the previous treasurer resigned. When Haack tried to recruit a certified public accountant ("CPA") to join the Board as Treasurer in April 2008, Malkin refused to meet with her and made excuses for why she could not show the CPA Verbena's financial records. CP 120. The CPA was immediately suspicious and advised Haack to investigate Verbena's books. When challenged about her evasiveness, Malkin continued to reassure Haack that everything was fine. CP 120.

Malkin also hid the Verbena financial picture from Verbena's staff. Malkin excluded Verbena staff from bookkeeping and recordkeeping functions and told them that Verbena's finances were not their problem. CP 120.

5. The Board Discovered Malkin's Embezzlement in May 2008

During early 2008, Verbena received calls from vendors, creditors, donors, and grant recipients asking why they had not been paid or why Verbena's checks had bounced. These calls increased in April and May 2008, and the Board discovered that the primary Verbena checking account was nearly depleted. CP 121.

On May 6, 2008, Malkin took a medical leave from Verbena for surgery. On or around May 7, 2008, Haack learned that in April 2008, Malkin had, on behalf of Verbena, secretly obtained a loan of \$12,000 from Verbena donors Jody Laine and Shad Reinstein, which was never deposited in any Verbena account.

On May 8, 2008, former Board Chair, Christoph Hanssman, contacted Washington Mutual and learned that the balance in Verbena's primary checking account was only \$199. CP 121. The Board discovered that there were multiple Verbena accounts, some of which had not been authorized by the Board. CP 121. The Board immediately noticed on review of the statements that Malkin had spent thousands of dollars of Verbena funds, largely for gambling at casinos in and out of state and for personal vacations. CP 121.

On May 10, 2008, the Board filed a complaint with the Seattle Police Department. On May 11, 2008, Board members Hanssman and Haack, accompanied by Seattle Police, visited Malkin's home to recover her laptop and keys, and put her on administrative leave pending an investigation. CP 121.

On May 13, 2008, the Board shut down the organization due to the overwhelming financial demands from its creditors and has not re-opened its doors. CP 122. The Washington Secretary of State administratively dissolved Verbena on August 30, 2009, and it is currently listed as "inactive" in the Secretary of State's records. CP 122; 362-67. Verbena continues to exist for the purpose of winding up its affairs and is represented by the current Chair of the Board, David Haack. CP 122.

B. Procedural History

1. Verbena Filed a Complaint and Served Malkin in July 2010

Verbena engaged pro bono counsel in 2009, but delayed in filing suit while it attempted to engage Malkin in an alternative reconciliation process. When Malkin refused to participate or even issue an apology, Verbena filed a Complaint on June 17, 2010, alleging, among other causes of action, breach of contract, fraud, and conversion. CP 1-13.

Verbena hired a private detective to locate Malkin, who had left Washington state soon after she was terminated. CP 112-14. The

detective, Mr. Brett K. Starr ("Starr"), stated in his signed, notarized affidavit that he used commercial databases, including a Verizon cell phone associated with Malkin, to identify Malkin's current residence as 224 Willow Parkway, Buffalo Grove, Illinois 60089. CP 112. Starr conducted a search using the same cell phone number and identified a Gambler Anonymous meeting list showing the same number as belonging to a meeting attendee named "Michelle M." CP 112-13.

On Thursday, June 17, 2010 and, Sunday, June 20, 2010, Starr visited Malkin at 224 Willow Parkway in Buffalo Grove to attempt service. CP 113-114. Starr spoke with Malkin's roommate, Alice Lundquist ("Lundquist") each time. On both occasions, Lundquist verified that she and Malkin were "co-tenants." CP 113-114. Starr also spoke with the next-door neighbors who were familiar with Malkin and thought they had seen her in the last week. CP 113. Starr then "served a copy of the summons and complaint in the above-captioned matter upon the defendant's co-tenant Alice Lundquist" at 9:23 p.m. on July 20, 2010. CP 114. The Superior Court found that "Mr. Starr's affidavit of service is presumptively valid" and that it "conforms to the form recognized by the State of Washington." RP 32.

Counsel for Malkin entered an appearance on August 17, 2010.⁴ On September 1, 2010, Verbena moved for a default judgment against Malkin, attaching a copy of the affidavit of service from Starr to its motion, and set a hearing for September 10, 2010. Malkin filed an Answer on September 7, 2010. CP 401-05. In her Answer, Malkin asserted the Fifth Amendment privilege against self-incrimination ("Privilege") in response to substantially all of the allegations in the Complaint. Malkin asserted eight affirmative defenses, including "Plaintiff has failed to secure sufficient process upon Defendant." CP 404. Malkin did not provide any detail regarding why service was purportedly insufficient.

2. Malkin's Evasion of CR 26 Discovery Obligations

Verbena served Malkin with Requests for Production, Interrogatories, and Requests for Admission on March 24, 2011. CP 90-109. On April 22, 2011, Malkin responded by asserting the Privilege to each request. Malkin refused to respond to interrogatories that could in no way incriminate her and which were directly relevant to the issue of Verbena's efforts to locate and serve her. CP 95. For example, Malkin

⁴ Verbena has supplemented the designation of clerk's papers pursuant to RAP 9.6, but has not yet received numbered supplemental papers. At the Court's request, Verbena will submit a revised brief including updated citations.

asserted the Privilege in response to a request to state her "present address" and "state all other addresses at which you have resided for the past ten years and the dates you resided at each address." CP 95. Malkin further asserted the Privilege in response to a request to "Please identify any witnesses with knowledge of information relevant to the subject matter of this action and identify all Documents referring or relating to such witness and all persons with knowledge thereof." CP 96. Malkin's refusal to respond to these requests deprived Verbena of information to which it was entitled about where Malkin resided when it served her and witnesses regarding service.⁵

Verbena's counsel requested on several occasions that Malkin supplement her discovery responses, but Malkin refused. *See* CP 116.

While refusing to respond to Verbena's discovery requests, Malkin nevertheless served discovery on Verbena in July and August 2011. The July requests sought information related to Verbena's standing to sue, insurance coverage, and the merits of Verbena's claims, but did not seek any information regarding service of process on Malkin. CP 409-11. The

⁵ Malkin asserted the Privilege and thus did not deny the requests for admissions regarding her liability, including for example, "on multiple occasions while serving as Executive Director without authorization or approval of Verbena's Board of Directors you used Verbena's funds, checking accounts, credit cards and/or debit card for your own personal use." CB 105-06.

August request was similarly unrelated to service and sought all documents received in response to Verbena's subpoena to J.P. Morgan Chase. CP 507-12.

Verbena deposed Malkin on September 2, 2011, in Chicago, Illinois. Malkin invoked the Privilege and, after stating her name, declined to answer any of Verbena's questions, even basic biographical information that could in no way incriminate her. CP 56-57. Importantly, Malkin refused to respond to questions regarding service of process, including the following:

Q: Have you ever lived with Alice or Janet Lundquist?

A: I respectfully decline to answer based on my Fifth Amendment right against self-incrimination.

Q: Do Alice or Janet Lundquist live at 224 Willow Parkway in Buffalo Grove, Illinois?

A: I respectfully decline to answer based on my Fifth Amendment right against self-incrimination.

Q: Did Alice Lundquist live at 224 Willow Parkway in Buffalo Grove, Illinois on or around June 20, 2010?

A: I respectfully decline to answer based on my Fifth Amendment right against self-incrimination.

Q: Did Janet Lundquist live at 224 Willow Parkway in Buffalo Grove, Illinois on or around June 20, 2010?

A: I respectfully decline to answer based on my Fifth Amendment right against self-incrimination.

Q: Did you live at 224 Willow Parkway in Buffalo Grove, Illinois on or around June 20, 2010?

A: I respectfully decline to answer based on my Fifth Amendment right against self-incrimination.

CP 57. Malkin also refused to supplement any of her interrogatory responses or responses to requests for production. CP 71.

In addition to refusing to respond to discovery addressing service of process issues, in response to discovery and other opportunities during almost two years of litigation, Malkin has not produced a single document, declaration, or other item of factual evidence in support of any purported defense to the merits of Verbena's claims.

3. Verbena's Motion for Summary Judgment

Verbena moved for summary judgment on October 20, 2011. CP 24-46. Because Malkin had evaded discovery, Verbena based its motion on documentation gathered from Verbena's files and affidavits from witnesses. CP 50-367. Nevertheless, the documentation relied on— primarily Verbena bank statements showing Malkin's repeated

unauthorized use of the Verbena WaMu Accounts to fund her gambling habit—was clear, uncontroverted, and overwhelming. No genuine issues of material fact remain. Verbena asked the court to enter a judgment for Verbena for damages of \$80,000 plus prejudgment interest. CP 49.

Malkin opposed summary judgment on four grounds: (1) service of process, (2) standing, (3) the negative inference from Malkin's invocation of the Privilege, and (4) purported evidentiary objections. CP 371-375.

As in this appeal, Malkin's primary legal argument focused on service of process. Despite her persistent refusal during discovery to provide any evidence in her defense, Malkin submitted a two-page declaration that purports to be from Lundquist, dated November 1, 2011. CP 384-85. The declaration alleges that Lundquist told Starr on July 10, 2010, that Malkin was "away from the area for at least a couple of months" and disputes his description of the events surrounding his service of papers on Lundquist. CP 384-85.⁶ Malkin contends that the declaration, purportedly created over fifteen months after service by a

⁶ Malkin has never submitted any evidence whatsoever, whether by declaration, deposition testimony, or otherwise, regarding her actual residence at the time of service or receipt of service.

third-party witness who was never named in response to discovery requests, precludes summary judgment.

Verbena argued in reply that it properly served Malkin's roommate Lundquist under Washington's substitute service law and that even if service was disputed, Malkin waived her defense of improper service through her delay, inconsistent conduct, and evasion of discovery.

4. The Superior Court Granted Verbena's Motion for Summary Judgment

Judge Prochnau of the King County Superior Court in Seattle heard oral argument on Verbena's Motion for Summary Judgment on November 17, 2011 and made findings, including the following summarized below. RP 2.

a. Service of Process

The Superior Court found that, based on the facts in the record, coupled with the presumptive validity of Starr's affidavit of service, that "the competent evidence does not disprove Ms. Malkin's domicile" and that 224 Willow Parkway "was at least one center of her domestic residence" under Washington law. RP 32. However, the Superior Court did not reach—and decided it did not need to reach—the issue of whether service was effective. "Given that Mr. Starr does not make clear how he served the papers," there were fact issues regarding whether service had

been accomplished. RP 33. Nevertheless, the Superior Court concluded that Malkin "has waived her claim of ineffective service." RP 33.

The Superior Court found the following factors supported waiver: (1) in her Answer to discovery, Malkin "refused to answer questions with regards to her claims regarding service or lack of personal jurisdiction" even though "it can hardly be imagined how she could suffer criminal prosecution from simply answering whether in fact she lived at the residence in question on the date of service"; (2) Malkin delayed in "bringing forth any arguments, much less evidence, as to the lack of service"; and (3) Malkin took an "inconsistent position by affirmatively engaging in discovery unrelated to the issue of service." RP 33-34.

b. Standing

The Superior Court found that Verbena had standing despite Malkin's arguments that Board Chair David Haack lacked authority to act as an agent for Verbena. The Superior Court disagreed and found that Haack had authority to bring suit for Verbena. RP 34-35. The Superior Court also disagreed with Malkin's arguments that the inconsistent use of the titles "Verbena" and "Verbena Health" in the organization's various documents precluded standing, concluding that the distinction was not material. RP 35-36.

c. Malkin's liability

The Superior Court similarly was unpersuaded by Malkin's arguments regarding evidentiary objections and the Court's ability to draw a negative inference from Malkin's assertion of the Privilege. Because Verbena had presented sufficient admissible evidence of Malkin's theft and Verbena's damages and the Court was permitted to draw an adverse inference from Malkin's silence, the Superior Court granted summary judgment and entered a Judgment in the amount of \$112,114 for Verbena on December 7, 2011. CP 437; RP 39.

Verbena submits the Superior Court was correct in all these rulings.⁷

IV. STANDARD OF REVIEW

The standard of review from an order granting summary judgment is de novo. *Trimble v. Wash. State Univ.*, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000). The relevant inquiry is whether the trial court properly found that the "pleadings, depositions, affidavits, and admissions, viewed in a light most favorable to the nonmoving party, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a

⁷ Verbena submits the Superior Court could and should have found that service was effective, but under these circumstances that finding was not necessary for its Judgment.

matter of law." *Pulcino v. Fed. Express Corp.*, 141 Wn.2d 629, 639, 9 P.3d 787 (2000). "[B]are assertions that a genuine material issue exists will not defeat a summary judgment motion in the absence of actual evidence." *Trimble*, 140 Wn.2d at 93. "When a nonmoving party fails to controvert relevant facts supporting a summary judgment motion, those facts are considered to have been established." *Cent. Wash. Bank v. Mendelson-Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). This Court may affirm the trial court's order granting summary judgment on any basis supported by the record. *See, e.g., Ertman v. City of Olympia*, 95 Wn.2d 105, 108, 621 P.2d 724 (1980); *Pannell v. Thompson*, 91 Wn.2d 591, 603, 589 P.2d 1235 (1979).

V. ARGUMENT

Malkin assigns error to all of the findings of the Superior Court, but her arguments fall into three categories that are addressed below:

(1) service of process; (2) standing; and (3) Malkin's liability.

A. **The Superior Court Correctly Concluded that Malkin Waived the Defense of Insufficient Service of Process Based on Her Inconsistent and Dilatory Conduct**

Malkin's primary legal argument is that this Court lacks personal jurisdiction over her based on insufficient service of process. In support of its Motion for Summary Judgment, Verbena presented the sworn affidavit of service from Starr. Verbena submits that service was

accomplished because Verbena served an adult of suitable age and discretion who was living with Malkin at the time of service. Nonetheless, as the Superior Court concluded, this Court need not reach the issue of sufficiency of service because Malkin has waived her right to assert the defense based on her inconsistent and dilatory conduct.

The doctrine of waiver is well recognized in Washington. A defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with the defendant's previous behavior or (2) the defendant has been dilatory in asserting the defense. *Lybbert v. Grant Cnty., State of Wash.*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000). The Washington Supreme Court explained that the doctrine:

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.' If litigants are at liberty to act in an inconsistent fashion or employ delaying tactics, the purpose behind the procedural rules may be compromised.

Id. at 39 (citation omitted).

"The doctrine is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." *King v. Snohomish Cnty.*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002). Of

particular concern is that a defendant should not be allowed to "lie in wait" and then obtain a dismissal on insufficient service grounds on the eve of trial or after the statute of limitations has run and the plaintiff cannot remedy the defect. *Id.*

Malkin argues that the facts do not support a waiver in this case.

Malkin's arguments are deficient for several reasons, including:

(1) Malkin's inconsistent and dilatory conduct is sufficient to find waiver under *Lybbert*; (2) Malkin ignores other Washington case law holding that waiver can occur under a variety of circumstances; and (3) Malkin's evasion of discovery and unnecessary assertion of the Privilege in response to questions about service waived the defense.

1. Malkin's Inconsistent and Dilatory Conduct is Sufficient to Find Waiver Under *Lybbert*

Malkin argues that her actions do not support waiver under the standard set forth in *Lybbert*. In *Lybbert*, plaintiffs sued Grant County for injuries suffered while driving on a county road. Although they were required to serve process on the County auditor, plaintiffs mistakenly served an administrative assistant. The County appeared and noted that it was not waiving any objections to improper service. The County then proceeded to litigate with plaintiffs over the next nine months "as if it were preparing to litigate the merits of the case." 141 Wn.2d at 32. The

County served discovery on the plaintiffs, but made no inquiry regarding sufficiency of the service of process. *Id.* Shortly thereafter, the County filed an answer and a motion for summary judgment, asserting the defense of insufficient service of process.

The Court of Appeals held that the County had waived the defense of insufficient service and the Washington Supreme Court affirmed, setting out two ways that waiver can occur if: (1) defendant's "assertion of the defense is inconsistent with the defendant's previous behavior" (citing *Romjue v. Fairchild*, 60 Wn. App. 278, 281, 803 P.2d 57 (1991)), or (2) if defendant "has been dilatory in asserting the defense" (citing *Raymond v. Fleming*, 24 Wn. App. 112, 115, 600 P.2d 614 (1979)). *Id.* at 39. Both types of conduct appeared to be present in *Lybbert*. First, the County acted inconsistently because it engaged in discovery unrelated to the service of process issue. While engaging in discovery "is not always tantamount to conduct inconsistent with a later assertion of the defense of insufficient service," such discovery may indicate waiver if it is unrelated to determining whether facts exist to support a defense of insufficient service. *Id.* at 41. Indeed, the court noted that the County had received a copy of the process server's affidavit from plaintiffs, so it should have known that the defense of insufficient service was available, but it failed to conduct any discovery related to the defense. Second, the County was

dilatory because, among other reasons, it waited to file its answer and assert the defense for nine months and until after the statute of limitations had run.

Here, Malkin's inconsistent and dilatory conduct consists of at least: (1) Malkin served two sets of discovery requests on Verbena, neither of which sought to determine facts regarding insufficient service of process; (2) Malkin received the process server's affidavit and, therefore, had all the necessary facts, but did nothing to inquire further about service; (3) Malkin acted as if she was preparing to litigate the merits of the case by seeking discovery regarding Verbena bank records and other documents supporting Malkin's liability; (4) Malkin refused to answer discovery requests related to evidence of service of process and refused to supplement her responses; and (5) Malkin appeared for a deposition and refused to answer questions regarding service of process or to deny facts in support of service.⁸

Malkin argues that she did not waive service under the standard set forth in *Lybbert*. As an initial matter, Malkin mischaracterizes the legal

⁸ Verbena notes that Malkin waited to pursue the defense for more than three years after the Board discovered her embezzlement in May 2008. Assuming for the sake of this appeal that the three-year statutes of limitation for fraud, conversion, breach of fiduciary duty, and breach of oral employment contract apply, Malkin's delay precludes Verbena from remedying any purported defect in service. *See* RCW 4.16.080.

standard stated in *Lybbert* and cites the more stringent standard for waiver proposed by the dissent in *Lybbert*. Unlike the majority, the dissent would have required more than just inconsistent conduct, but rather conduct that was actually "misleading." *Id.* at 46 (Madsen, J., dissenting) (waiver may be shown by "*misleading conduct*" or "conduct which *misled* the plaintiff.")⁹ Malkin argues that Malkin did "nothing to mislead" Verbena. Appellant's Br. 12-13. But because *Lybbert* and subsequent decisions only require "inconsistent" conduct, Malkin's argument that she did not intentionally mislead Verbena is irrelevant if she acted in an inconsistent or dilatory manner. *Id.*; *see also Romjue*, 60 Wn. App. at 281 ("inconsistent" behavior constitutes waiver of defenses); *King v. Snohomish Cnty.*, 146 Wn.2d at 424 (County's assertion of defense "inconsistent" with its behavior); 141 Wn.2d at 46 (Madsen J., dissenting).

Malkin also argues that her inconsistent and dilatory actions "lack shared opprobrious characteristics" with *Lybbert*. Appellant's Br. 13. Again, Malkin reads too much into the majority opinion in *Lybbert*. A plaintiff need not show "culpable" or "opprobrious" behavior in order to

⁹ Malkin asks this Court to set aside the majority opinion in *Lybbert* in favor of Justice Madsen's "emphatic" dissent. Besides lacking precedential value, it is worth noting that Justice Madsen's dissent in *Lybbert* was followed just two years later by a case in which Justice Madsen wrote the majority opinion and which upheld the standard announced in *Lybbert*, namely *King v. Snohomish Cnty.*, 146 Wn.2d 420, 47 P.3d 563 (2002).

find a waiver. Appellant's Br. 13. For example, in *Blankenship v. Kaldor*, 114 Wn. App. 312, 57 P.3d 295 (2002), the defendant argued that substitute service was ineffective. Instead of answering the complaint, the defendant first conducted discovery and later asserted the defense in her Answer. *Id.* at 315. Because the defendant had received and reviewed a copy of the process server's affidavit stating that service had been accomplished at her father's home, the defendant had the necessary facts within her control. Her failure to assert the defense earlier was therefore "dilatory within the spirit of *Lybbert*." *Id.* at 320. The court explained the importance of raising procedural defenses "before any significant expenditures of time and money had occurred and at a time when the [plaintiff] could have remedied the defect." *Id.* at 319 (internal quotation marks and citations omitted). While defendant was not necessarily "lying in wait," the Court of Appeals found that she was nonetheless tardy in asserting the insufficient service defense.

Likewise, although Malkin recited the defense of insufficient service in filed pleadings, she took no action to support such a defense and affirmatively prevented Verbena from learning of any support for the defense for over a year. Like the defendant in *Blankenship*, Malkin received the process server's affidavit and had the necessary facts to assert the defense. Yet she delayed for over a year and after significant

expenditure of time and money to take any action in support of the defense. Malkin's conduct was comfortably within the spirit of the standards set forth in *Lybbert*, even if not squarely on point with all of the facts of *Lybbert*.¹⁰

2. Malkin Ignores Other Washington Case Law Holding that Waiver Can Occur Under a Variety of Circumstances

Whether waiver has occurred depends on the facts of each case. Washington courts have stated that circumstances supporting waiver need not fit narrowly within the facts in *Lybbert*. For example, in *King*, 146 Wn.2d at 424-25, the defendant raised a claim-filing defense in its answer, but later failed to clarify the defense in response to an interrogatory and filed a motion for summary judgment that did not mention the defense. After the parties engaged in 45 months of litigation and discovery, the defendant moved to dismiss based on the defense. *Id.* Attempting to distinguish *Lybbert*, the defendant argued that, unlike in *Lybbert*, it had raised the affirmative defense in its answer. The court was unpersuaded. As an initial matter, other jurisdictions have held that "an answer does not preserve a defense in perpetuity." *Id.* at 426 (citing *Burton v. N. Dutchess*

¹⁰ Indeed, Malkin's dilatory conduct has persisted. After filing a notice of appeal on January 6, 2012, Malkin requested and received two extensions of time to file her opening brief and nevertheless filed May 22, 2012, a day after this Court's deadline. CP 438.

Hosp., 106 F.R.D. 477 (S.D.N.Y. 1985) (notwithstanding timely answer raising service of process defense, the defense was waived after three years of litigation and conduct inconsistent with defense.) Moreover, the Court explained:

Such a narrow reading of *Lybbert* ignores the policy reasons underlying the waiver doctrine. Allowing a defendant to preserve any and all defenses by merely citing an exhaustive list does not foster the just, speedy, and inexpensive resolution of an action that we called for in *Lybbert*. Here, both the County and the Kings engaged in extensive, costly, and prolonged discovery and litigation preparation only to have the case decided on procedural grounds completely unrelated to the discovery in which they were engaged. The claim filing defense could have been disposed of early in the litigation before any significant expenditures of time and money had occurred and at a time when the Kings could have remedied the defect.

Id.

Similarly, here, Malkin argues that she preserved her defense in perpetuity by asserting it in her Answer. Like the defendant in *King*, Malkin's subsequent engagement in litigation and delay in waiting to assert any further factual or legal basis for the defense constitutes dilatory or inconsistent conduct. Also similar to *King*, the parties have already engaged in prolonged discovery and the applicable statute of limitations

has likely run. Allowing Malkin to preserve the defense by citing it in a list of defenses, despite her later inconsistent conduct, is contrary to the goal of fostering just, speedy, and inexpensive resolution of actions.

By contrast, in a case where this Court found no waiver, *Harvey v. Obermeit*, 163 Wn. App. 311, 325-27, 261 P.3d 671 (2011), the defendant asserted the defense of insufficient service in his answer, conducted subsequent discovery that included issues of service of process and jurisdiction, stated in response to interrogatories from the plaintiff that he had "resided at his current residence for almost ten years," and then moved to dismiss based on insufficient service just two months later. *Id.* at 325.

Unlike the defendant in *Harvey*, though, Malkin refused to respond to any questions regarding her residence, and waited fifteen months from the time of service to raise any facts regarding the defense. As the court suggested in *King*, a narrow reading of *Lybbert* would undermine the policy reasons for the waiver doctrine. Given the facts demonstrating Malkin's delay and inconsistent behavior, Verbena submits that she waived her defense and this Court should affirm the Superior Court's Order.

3. Malkin's Evasion of Discovery and Unnecessary Assertion of the Privilege in Response to Questions About Service Waived the Defense

Washington case law on the application of the Fifth Amendment Privilege in a civil case is limited. *See Ikeda v. Curtis*, 43 Wn.2d 449, 457-58, 261 P.2d 684 (1953); *King v. Olympic Pipeline Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000). But for similar policy reasons that Washington courts have found waiver—preventing obstruction of the discovery process and unfair surprise—courts in other jurisdictions have held that a defendant cannot use the Fifth Amendment "to shield herself from the opposition's inquiries during discovery only to impale her accusers with surprise testimony at trial." *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 577 (1st Cir. 1989). Malkin's evasion of discovery, including questions about service, should likewise preclude her from later presenting new evidence on the same topic on summary judgment.

This principle is one of basic fairness and has been recognized by federal courts in analogous circumstances. As an initial matter, federal courts have noted that, unlike in a criminal action, a defendant may not refuse to be deposed or invoke a blanket privilege protection, but must instead assert the privilege on a question-by-question basis. *See Nat'l. Life Ins. Co. v. Hartford Accident & Indem. Co.*, 615 F.2d 595 (3d Cir. 1980)

(witness in a civil proceeding may not invoke a blanket Fifth Amendment privilege); *United States v. Hansen*, 233 F.R.D. 665 (S.D. Cal. 2005) (privilege could be asserted on a question-by-question basis in a deposition, but only if defendant had a reasonable basis to apprehend a danger of prosecution due to answering).

Courts in other jurisdictions have also precluded a defendant from offering evidence of a claim or defense on a motion for summary judgment after refusing to answer questions about the same topics. *In re Edmond*, 934 F.2d 1304, 1308-09 (4th Cir. 1991) (sustaining district court order striking affidavit opposing summary judgment after party had refused to answer questions at deposition); *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) (same). Thus, while a defendant is free to assert her Fifth Amendment privilege and refuse to answer questions at a deposition, "it would be an abuse of the Fifth Amendment privilege to allow a civil litigant to use it to offer proofs while denying the adversary discovery of his contentions." *SEC v. Benson*, 657 F. Supp. 1122, 1129 (S.D.N.Y. 1987).

The circumstances in *Benson* were analogous to this case. The defendant, former President and CEO, was accused of misappropriation of company funds and numerous violations of federal securities laws. In response to the complaint, the defendant asserted general denials and

several affirmative defenses, including that he used the funds for corporate and charitable purposes. *Id.* at 1128-29. When the SEC sought discovery, the defendant refused and claimed privilege under the Fifth Amendment. In order to prevent the defendant from gaining an unfair advantage, the court precluded the defendant from offering evidence in support of positions on which he had previously withheld information in discovery. *Id.* at 1129 (citing *Lyons v. Johnson*, 415 F.2d 540, 542 (9th Cir. 1969)). "By hiding behind the protection of the Fifth Amendment as to his contentions, he gives up the right to prove them. By his initial obstruction of discovery and his subsequent assertion of the privilege, defendant has forfeited the right to offer evidence disputing the plaintiff's evidence or supporting his own denials." *Id.*

Like the defendant in *Benson*, Malkin has forfeited her right to offer evidence disputing Verbena's affidavit of service because of her refusal to answer questions about the same issue during discovery. Indeed, while the question of waiver based on assertion of the Fifth Amendment privilege during discovery does not appear to have been addressed in Washington, such a waiver comports with the equitable principles cited by the court in *Lybbert*. A defendant should not be allowed to lie in wait, hiding behind the cloak of the Privilege, only to surprise an opposing party with evidence on the same subject years after

litigation has commenced and after the statute of limitations has run. Malkin's unnecessary and obstructive assertion of the Privilege supports waiver and this Court should affirm summary judgment.

B. The Superior Court Correctly Held that Verbena Had Standing to Bring this Action

Malkin assigns error to the Superior Court's finding that Verbena had standing to pursue this action. Malkin argues that Verbena lacks proof that the Board authorized this action, and that the action is not within the organization's duties to wind up its affairs. Appellant's Br. 15-17.

First, Malkin argues that Board Chair David Haack lacks authority to pursue this action. As the Superior Court correctly held, under Washington law, an agent's authority to act on behalf of the principal may be established by direct testimony from the agent. RP 34 (citing *Blake Sand & Gravel, Inc. v. Saxon*, 98 Wn. App. 218, 223, 989 P.2d 1178 (1999)). Haack's direct testimony, through his sworn affidavit, is sufficient to confer such authority.¹¹

Second, Washington law permits a nonprofit to sue or be sued within two years after dissolution as part of winding up its affairs. *See*

¹¹ Malkin cites several Washington statutes in her standing argument, but fails to explain why the applicable facts or law preclude standing. Appellant's Br. 15-16.

RCW 24.03.300. Verbena was administratively dissolved in 2009 and properly brought this action within two years of dissolution. Verbena seeks to recover a small portion of its damages in order to repay its creditors. Such a suit is appropriate to wind up its affairs. *Ballard Square Condo. Owners Ass'n v. Dynasty Constr. Co.* 158 Wn.2d 603, 609, 146 P.3d 914 (2006) (entity may sue or be sued after dissolution).

C. The Superior Court Correctly Held that a Negative Inference May be Drawn from Malkin's Silence and There are No Genuine Fact Issues Regarding Liability

Malkin concedes that in Washington the Fifth Amendment does not bar the fact finder in a civil proceeding from drawing an adverse inference from a person's silence. *Ikeda*, 43 Wn.2d at 457-58. Although a refusal to testify, taken alone, does not justify such an adverse inference, an inference may be drawn from a refusal to testify coupled with, and considered with, proper and relevant evidence tending to prove such an adverse fact. *Id.*; *see also Baxter v. Palmigiano*, 425 U.S. 308, 318, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976).

In a summary judgment proceeding, the "[p]arties are free to invoke the Fifth Amendment . . . , but the court is equally free to draw adverse inferences from their failure of proof." *See SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998); *United States v. Certain Real Prop. & Premises Known as 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3d 78,

83 (2d Cir. 1995) ("claim of privilege will not prevent . . . summary judgment if the litigant does not present sufficient evidence to satisfy the usual evidentiary burdens in the litigation"). Such adverse inferences may be drawn when "independent evidence exists of the fact to which the party refuses to answer." *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000); *Ikedda*, 43 Wn.2d at 458 ("To hold that no inference could be drawn from the refusal of these witnesses to explain their dealings, in the face of so many suspicious circumstances, would be an unjustifiable extension of the privilege for a purpose it was never intended to fulfill.") (internal quotation marks and citations omitted). In this case, the Superior Court was more than justified in drawing inferences from Malkin's refusal to explain the "suspicious circumstances"— checks written by Malkin on Verbena accounts to casinos, withdrawals from ATMs within casinos, and payments to Malkin's and her partner's fictitious businesses. But Verbena does not rely solely on Malkin's assertion of the Privilege. Verbena provided overwhelming evidence of facts independent of Malkin's refusal to testify. Malkin had the opportunity at the summary judgment stage to counter Verbena's evidence. She failed to provide a shred of evidence for that purpose.¹²

¹² Malkin's assertion of the Privilege is thus a red herring with respect to the merits of the summary judgment. This is not a case where the adverse

Malkin alleges that the Superior Court erred in drawing an adverse inference on summary judgment based on her assertion of the Privilege. Appellant's Br. 17-18. But Malkin does not offer any factual or legal support in favor of reversal of the Superior Court's Order. *See Baldwin v. Sisters of Providence in Wash., Inc.*, 112 Wn.2d 127, 132, 769 P.2d 298 (1989) (the opposing party may not rely on the bare allegations in its pleadings to defeat summary judgment, and must set forth specific facts establishing that there is a genuine issue for trial).

The Superior Court found that the admissible evidence of Malkin's liability included at least: (1) Malkin wrote checks to herself that were not for compensation; (2) Malkin wrote checks from Verbena WaMu Accounts for cruise vacations; (3) Malkin wrote checks to consulting agencies that did not appear to be legitimate and that were in her name or her partner's name; and (4) Malkin excluded the Board from financial records. RP 37-38. As the Superior Court correctly held, the facts on the record are "more than enough evidence, when coupled with the reasonable inference the Court is entitled to draw from Malkin's Fifth Amendment claims, to provide a basis for the summary judgment motion." RP 39.

inference from assertion of the Privilege fills a small gap in the proof, allowing the court to reach negative conclusions from facts that otherwise might be explained. Here, there is no need for such use because there are no gaps in the evidence.

VI. CONCLUSION

Verbena asks this Court to affirm the Summary Judgment Order and the Judgment entered in the Superior Court.

RESPECTFULLY SUBMITTED this 21st day of June, 2012.

PERKINS COIE LLP

By: 

James F. Williams, WSBA No. 23613

Alan D. Smith, WSBA No. 24964

Karen R. Brunton, WSBA No. 41109

PERKINS COIE LLP

1201 Third Avenue, Suite 4900

Seattle, WA 98101-3099

Telephone: 206.359.8000

Facsimile: 206.359.9000

Attorneys for Respondent Verbena
Health

CERTIFICATE OF SERVICE

SHARON SUNDMARK states as follows:

1. I am a secretary at the law firm of Perkins Coie LLP, have personal knowledge of the facts set forth herein and am competent to testify thereto.
2. On the 21st day of June, 2012, I made arrangements for the original and one reproducible copy of the foregoing Brief of Respondent to be filed with the Clerk of the above-entitled Court.
3. On the same day, I made arrangements for a true and correct copy to be sent by hand delivery to Appellant's counsel and the court reporter as follows:

Counsel for Appellant:

Charles S. Hamilton III, WSBA #5648
500 Union Street, Suite 500
Seattle, WA 98101-4047
Telephone: 206-623-6619
Facsimile: 206-448-0573
E-mail: cshamiltoniii@qwest.net

COURT OF APPEALS
STATE OF WASHINGTON
2012 JUN 21 PM 4:02

I CERTIFY UNDER PENALTY OF PERJURY under the laws of the State of Washington that the foregoing is true and correct.

DATED at Seattle, Washington this 21st day of June, 2012.

Sharon Sundmark
Sharon Sundmark