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No. 71561-5-I  
COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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CYNTHIA LARSON ET VIR,

Respondents,

vs.

KYUNGSIK YOON ET UX,

Petitioners.

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RESPONDENTS' BRIEF

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STATE OF WASHINGTON

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## **I. INTRODUCTION**

Respondent/Plaintiff Cynthia Larson, responds to Appellant/Defendant Yoon's appeal of the trial court's denial of its motion for Summary Judgment alleging insufficient service of process. Larson contends that the Hague Convention requirements do not apply in this case, and that substitute service on the Secretary of State pursuant to the nonresident motorist statute (RCW 46.64.040) is sufficient.

### **A. Brief Statement of Facts**

On June 22, 2010, Cynthia Larson and her husband Keith were involved in a motor vehicle accident with the defendant. They were rear-ended on I-405. Cynthia Larson was a passenger in the vehicle. She was injured, her husband was not.

The defendant is a resident and citizen of the Republic of Korea. He was in the United States on business for his employer (Samsung) and had been driving a Hertz rental car. Hertz Corporation is self-insured and has an intercompany agreement with Samsung to indemnify the defendant and provide liability coverage. The plaintiff filed a claim with Hertz as the

defendant's agent, and Hertz was aware that Ms. Larson had been injured in the accident.

On March 27, 2013, well prior to the expiration of the statute of limitations, the plaintiff engaged the defendant in good faith negotiations to settle the claim. The plaintiff presented a demand package to Hertz Corporation. Settlement negotiations ensued. As the filing deadline approached, plaintiff's counsel provided Hertz with draft samples of the pleadings. When it did not appear a settlement could not be reached in time, counsel filed suit on June 10, 2013, to toll the statute. He then immediately served the defendant through the nonresident motorist statute, by serving the secretary of state of Washington pursuant to RCW 46.64.040. Pursuant to this statute, the nonresident motorist designates and appoints the Washington Secretary of State to be his agent for service of process and other documents. Service was perfected on June 14, 2013.

On June 19, counsel provided Hertz with copies of the pleadings filed (with cause number), case schedule, and proof of service on the Secretary of State. The next day counsel requested Hertz provide a status

on whether they were going to continue negotiating or whether opposing counsel would be appointed. Plaintiff's counsel indicated the need for an Answer to be filed within the statutory timeframe. On Wednesday, June 26, Hertz responded, thanking counsel for being patient, indicating that negotiations were ongoing (the claim was scheduled for a "round table" discussion), and that Hertz would respond by Friday, June 28.

Understanding active negotiations were underway, plaintiff's counsel agreed to the delay. By July 5, Hertz had not responded and counsel again contacted them requesting further settlement dialogue, or that opposing counsel be appointed and an Answer filed. Hertz responded on July 22, again thanking counsel for patience, indicating further review of medical records was necessary for case evaluation, and stating the matter would be referred to defense counsel. On July 24, counsel finally received a Notice of Appearance from the defense, to which he immediately responded by requesting an Answer. That request went unanswered. Out of a spirit of professionalism and collegiality, and upon the belief that the defendant was still engaging in good faith negotiations, counsel sent defense a

second courtesy letter requesting the Answer, on August 21. The next day, August 22, defense counsel filed and served its Answer. The Answer included the boiler plate defense of insufficient service of process. By this time it was too late for the plaintiff to explore the grounds for that defense or take any corrective action it deemed necessary. Nevertheless, the plaintiff served interrogatories dated September 17, requesting that information. On October 21, opposing counsel provided its responses. This was the first notice the plaintiff had that the defendant was raising the Hague Convention as an issue. (CP 51-53, 61-70).

### **B. Procedural History**

On November 20, 2013, the defendant filed a motion for Summary Judgment with the trial court. He argued that service of process was insufficient as a matter of law, due to the fact that it did not comply with Hague Convention requirements. The plaintiff filed her response to the motion, arguing sufficiency of substitute service on the Secretary of State, in accordance with RCW 46.64.040 (Nonresident Motorist Statute). The trial court heard oral argument from both sides, and on December 27,

2013, agreed with the Plaintiff/Respondent's position, entering an Order denying the Motion for Summary Judgment. (CP 87-88).

On January 6, 2014, Defendant/Petitioners filed a Motion for Reconsideration, requesting the trial court to reverse its denial of their Motion for Summary Judgment. After reviewing the moving papers of the Defendant/Petitioner, and the response of the Plaintiff/Respondent, the trial court denied the Motion for Reconsideration, thereby confirming the sufficiency of service of process. (CP 101-102).

The Defendant/Petitioner then moved for discretionary review of the trial court rulings in the Court of Appeals. After a brief hearing on May 9, 2014, discretionary review was granted.

## **II. ARGUMENT**

As a matter of law, based on the facts alleged by the plaintiff, the Superior Court correctly concluded that the plaintiff properly and sufficiently served process on the defendant through the designated agent for service, the Washington Secretary of State. Substitute service upon the Secretary of State was authorized as a matter of law (RCW 46.64.040) and

not inconsistent with the requirements of the Hague Convention. CR 56 holds that Summary Judgment should be granted only when there are no material facts in dispute, and *as a matter of law* judgment is appropriate. In this case the Court determined that, as a matter of law, judgment in favor of the defendant was not appropriate.

**A. Standard of Review for Motions for Summary Judgment.**

The review of a summary judgment order is done de novo. *Atherton Condo. Apartment-Owners Ass'n v. Blume Dev. Co.*, 115 Wn. 2d 506, 799 P.2d 250 (1990). The Court of Appeals will engage in the same inquiry and perform the same function as the trial court.

Pursuant to CR 56 (c) & (d), summary judgment will be granted as to those issues upon which there are no genuine issues of material fact, and the moving party is entitled to a judgment as a matter of law. *Brame v. St. Regis Paper Co.*, 97 Wn. 2d 748, 649 P.2d 836 (1992). This determination will be made after examination by the Court of the pleadings, depositions, answers to interrogatories, admissions on file, affidavits and other exhibits. *Neubert v. Yakima-Tieton Irrigation Dist.*,

117 Wn. 2d 232, 814 P.2d 199 (1991). The facts and all reasonable inferences from the facts must be viewed in the light most favorable to the non-moving party. *Postema v. Pollution Control Hearings Board*, 142 Wn. 2d 119, 11 P.3d 726 (2000).

**B. By Voluntarily Operating a Motor Vehicle on the State Highways, the Defendant Appointed a Substitute Agent for Service of Process, was Properly Served Through that Agent Under RCW 46.64.040; and the Strictures of the Hague Convention Do Not Apply.**

Operating a motor vehicle in the state of Washington is a privilege, not a right. In exchange for exercising that privilege, a non-resident motorist consents to the appointment of the Secretary of State as his designated, substitute agent for service of process. This occurs pursuant to the Non-Resident Motorist Statute, RCW 46.64.040.

The acceptance by a nonresident of the rights and privileges conferred by law in the use of the public highways of this state, as evidenced by his or her operation of a vehicle thereon . . . **shall be deemed equivalent to and construed to be an appointment by such nonresident of the secretary of state of Washington to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident, collision, or liability in which such nonresident may be involved while operating a vehicle upon the public highways . . . and such operation and acceptance shall be a signification of the nonresident's agreement that any summons or process**

**against him or her which is so served shall be of the same legal force and validity as if served on the nonresident personally within the state of Washington.**

RCW 46.64.040 (emphasis added). After arriving in Washington State on business, Mr. Yoon chose to exercise this privilege by operating a Hertz rental car for his personal convenience. He was not required to rent a car for transportation, and certainly had many other transportation options available to him – limousine, taxi, shuttle, rail, bus etc. However, by choosing of his own volition to operate a motor vehicle on the public highways of this state, he designated the Secretary of State as his agent for service of process.

It is not contested that the plaintiff properly served the defendant pursuant to RCW 46.64.040. The defendant's issue and contention is that service was not perfected in accordance with the Hague Convention. However, by voluntarily operating a motor vehicle, the defendant submitted to the strictures of RCW 46.64.040 and waived the service requirements of the Hague Convention. In short, the defendant designated

the secretary of state as the agent for service, and the secretary of state was served.

The Hague Convention does not apply when substitute service of process is made on a designated agent. In *Volkswagenwerk Aktiengesellschaft v. Schlunk*, the U.S. Supreme Court held that the Hague Service Convention does not apply when process is served on a foreign corporation by serving its domestic subsidiary which, under state law, is the foreign corporation's involuntary agent for service. *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694 (1988).

Here, the plaintiff brought a wrongful death action against Volkswagenwerk Aktiengesellschaft (VWAG), a German corporation, for design defects that caused or contributed to the deaths of his parents. He then served VWAG by serving Volkswagen of America (VWoA, a wholly owned subsidiary of VWAG), as its agent, in the United States, in accordance with applicable Illinois State service statutes. VWAG challenged service on the grounds that it failed to comply with the service

requirements of the Hague Convention. Additionally, it argued that it had not formally appointed VWoA as an agent for service of process.

The Court noted that Illinois service statutes enabled the plaintiff to serve VWoA as a substitute agent (within the state). VWAG argued that at some point, the documents would have to be transmitted to them in Germany, and this triggered the service requirements of the Hague Convention. The Court held, “where service on a domestic agent is valid and complete under both state law and the Due Process Clause, our inquiry ends and the Convention has no further implications.” *Id.* at 707.

In the facts of the present case are directly analogous. By operating a motor vehicle on the public highways of Washington, Mr. Yoon designated the Secretary of State as his domestic agent for service of process. This occurred automatically and as a matter of state law. Service on the Secretary of State as Mr. Yoon’s domestic agent, was valid, complete, and in accordance with RCW 46.64.040.<sup>1</sup> Mr. Yoon has been

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<sup>1</sup> It has been previously established that the procedures under RCW 46.64.040 satisfy due process requirements. *Martin v. Triol*, 121 Wn.2d 135, 847 P.2d 471 (1993).

represented by legal counsel and has participated in all aspects of the current litigation. He has not suffered harm or prejudice because service was not done under the Hague Convention. Therefore service was proper and the trial court's rulings should be affirmed.

Mr. Yoon argues that Hague Convention does apply to situations involving non-resident motorist statutes, but the cases cited are not from this jurisdiction. He provides no authority binding on this court to support his proposition.

Mr. Yoon cites *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 10 P.3d 371 (2000) as instructive with regards to the Hague Convention. However, *Broad* can be distinguished. In fact the court in *Broad* distinguishes itself specifically from situations involving the nonresident motorist statute. In *Broad*, the plaintiff filed suit for injuries received from the defendant, a German corporation. The plaintiff followed the service procedures set forth in the Hague Convention, providing (as required) the necessary legal documents to the German central authority for service upon the defendant. The central authority,

which was the only agency by Convention that could serve the defendant, delayed in doing so. The delay was sufficient to enable the defendant have the suit dismissed as untimely. The plaintiff argued that the Convention in effect made the central authority a *substitute agent* for service of process. The court rejected the argument, pointing out the Convention held no such provision or intent. *The court went on to contrast its case with those involving nonresident motorists, where a substitute agent was created by statute.*

Here, the nonresident motorist statute (RCW 46.64.040) applies, and the issue of service is determined by state statute. As the *Broad* court correctly identified, the secretary of state is the designated and appointed agent for service of process, and therefore service of process on the secretary of state per RCW 46.64.040 meets service requirements, and tolls the statute of limitations per RCW 4.16.070, 080.

Certainly the defendant Mr. Yoon, as an adult, had the right and ability to voluntarily waive rights and protections afforded him under such things as the Hague Convention. He did so in this case by voluntarily

exercising the privilege of operating a motor vehicle on the state highways. This act designated the Secretary of State as his agent for service, and operated as his tacit agreement to be served through the Secretary pursuant to RCW 46.64.040. Service through this method was proper and complete.

Ultimately the Supreme Court's holding in *Volkswagenwerk* controls. The Hague Convention does not apply where service is made upon a designated substitute agent. Service through the Secretary of State was proper and sufficient. The trial court was correct in dismissing the motion for summary judgment.

**C. The Defendant Does Not Raise this Defense in Good Faith, and has Suffered No Harm or Prejudice.**

The defendant does not raise this defense in good faith. Rather this is the product of a lengthy course of delay and disingenuous dealings. As set forth in the Statement of Facts and the email communications (CP 61-70), the plaintiff and Hertz Corporation (defendant's agent) had been in continuous communication and negotiation over this claim. Plaintiff's

counsel provided a demand package months in advance of filing, responded to requests for additional information and documentation, provided courtesy drafts of the pleadings, provided copies of the actual case filings along with case schedule and proof of service, and time and again requested an Answer be filed. The Hertz Corporation would request additional information, indicate they were still evaluating the case, and thank counsel for his patience. All of this creating the belief that good faith negotiations were ongoing.

When opposing counsel was finally appointed, late in the day, the plaintiff had to send two professional courtesy letters to get an Answer filed. The defendant knowingly waited until August 22 to file its Answer, when it was too late for the plaintiff to correct any deficiencies in service alleged by the defendant. Thus the defendant laid in the weeds leading the plaintiff to believe they were involved in active, ongoing, good faith negotiations. By the time the defendant raised service of process as an affirmative defense in its Answer, it was both too late for the plaintiff to

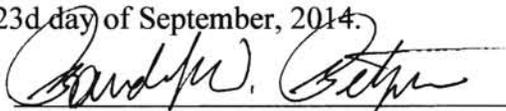
discover the Hague Convention argument or take actions to correct it, if need be.

The defendant will not be prejudiced or harmed by allowing this suit to go forward. The purpose of the service statutes is to provide notice so that the defendant has the proper opportunity to respond. As stated in his answers to interrogatories, the defendant is protected by an intercompany indemnity agreement between Samsung (his employer) and Hertz Corporation. Hertz, as agent for the defendant, has had notice of the claim and in fact been in settlement negotiations prior to the filing of this suit. There is absolutely no claim for surprise or prejudice in this matter. Furthermore, the defendant is indemnified up to \$100,000 pursuant to the indemnification agreement. Pursuant to the plaintiff's Statement of Damages filed and served on November 13, the amount in controversy is less than the indemnification amount. Therefore, regardless of the outcome, the defendant will not be harmed or prejudiced.

### III. CONCLUSION

In exchange for the privilege of operating a motor vehicle on the public highways of the State of Washington, Defendant Yoon, appointed the Secretary of State as his designated agent for service of process. In so doing, he agreed “that any summons or process against him . . . which is so served shall be of the same legal force and validity as if served on (him) personally within the state of Washington.” RCW 46.64.040. It is clearly established by the Supreme Court that service on a substitute agent is permissible, valid, and does not implicate the Hague Convention. There is no dispute that Mr. Yoon was served within the parameters of RCW 46.64.040. Given that the Hague Convention does not apply in such circumstances, the trial court did not err in dismissing Yoon’s motion for summary judgment and its ruling should be affirmed.

DATED this 23d day of September, 2014.



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