No. 90030-2

SUPREME COURT
OF THE STATE OF WASHINGTON

SIMONA VULETIC and MICHAEL HELGESON,
husband and wife,

Appellants

v.

DARRELL R. McKISSIC,

Respondent

RESPONDENT'S ANSWER TO PETITION FOR DISCRETIONARY REVIEW

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I. STATEMENT OF THE ISSUES

1. Does the Division One Court of Appeals ("Division I") holding in Scanlan create a conflict with the court's previous holding in this matter when the Scanlan holding is indistinguishable from the Brown-Edwards matter which was reviewed and distinguished by the court in its opinion in the instant case?

2. Did Division I err in determining that nanny Corr was not a resident of defendant's usual abode within the meaning of RCW 4.28.80(15) for substitute service when she was an employee and did not live in the McKissic home?

3. Did Division I err in holding that McKissic did not waive his service of process defense when he issued only generic and routine discovery, was not aware of the defect in service until after the expiration of the statute of limitations and the 90-day tolling period, and informed Vuletic of the defect promptly upon discovery?

II. STATEMENT OF THE CASE

A. Underlying Cause of Action and Procedural Background

Petitioners Dr. Simona Vuletic and Michael Helgeson (collectively "Vuletic") and Respondent Darrell McKissic were involved in an automobile accident on March 1, 2009 in Seattle, Washington. Vuletic filed suit against McKissic claiming that he was at fault for the accident and that he was liable for Vuletic's alleged injuries. Vuletic's suit was filed on December 27, 2012, approximately 65 days before the expiration of the statute of limitations on March 1, 2012. The 90-day tolling period to perfect service and have it relate back, pursuant to RCW 4.16.070, expired on **March 26, 2012**.

B. Attempted Service

Vuletic first attempted service on January 2, 2012, approximately 58 days before the statutory period expired. Vuletic hired Sheriff Mark Hillard to serve McKissic. (CP 5). On January 3, 2012, Sheriff Hillard knocked on McKissic's front door at approximately 8:05 AM. (CP 5). He was greeted by McKissic's nanny, Jill Corr ("nanny Corr"), who was readying two of McKissic's children for school. (CP 104, 105). Ms. Corr told Sheriff Hillard that McKissic resided at the home and that she believed he was upstairs in the shower. (CP 106). She also told Sheriff Hillard that she was not related to McKissic, that she was the nanny, and that she did not reside at the home. (CP 101). Nevertheless, Sheriff Hillard handed her papers which she placed on the kitchen table for McKissic. (CP 106). Sheriff Hillard did not request that Ms. Corr ask McKissic to come downstairs to the front door; he did not ask if he could come inside and wait for McKissic; and he did not wait outside for McKissic. (CP 100, 101). Rather, Sheriff Hillard walked away and completed a false Return of Service that indicated Ms. Corr was a resident of the home when she had told him just the opposite. (CP 5, 100, 101).

C. Sheriff Hillard

Sheriff Hilliard is an experienced process server. (CP 100). For the last 10 years of his employment he worked with the civil division of the King County Sheriff's Department and served all manner of civil process, including but not limited to, eviction notices, small claim notices,

subpoenas, child service orders, and legal service of process. (CP 100) His customary practice was to ask if the named party lived at the address. (CP 101). If the named party was not present, his practice was to ask whether the person who answered was a relative and whether they resided at the home. (CP 101). On this particular morning, Hilliard asked nanny Corr whether she was a relative of McKissic and whether she was a resident of the home. (CP 101). Hilliard confirms she told him that she was not a relative, that she was the nanny, and that she did not live at the home. (CP 101).

D. Nanny Corr

Jill Corr has worked for the McKissics as a part-time nanny for a few years. (CP 104). On the weekdays, she generally works from 6:30 AM until 8:15 AM and then from 2:30 PM until 6:30 PM. (CP 104, 107). On rare occasion, Ms. Corr will spend the night at the McKissic home, usually when the parents are not at home, in furtherance of her duties as a nanny. (CP 105, 108). The most recent occasions in the last two years when nanny Corr stayed the night at the McKissic home were once in the fall of 2011 and once in the spring of 2012. (CP 105, 108). She cared for the McKissic's special needs daughter when her mother was out of town. She has never received mail at the McKissic home, nor does she keep clothing or personal items at the McKissic home. (CP 104). She maintains her own apartment where she resides, receives mail, keeps personal items, and pays utility bills. (CP 104).

E. Attorney Interactions and Pleadings

Upon retention by McKissic's insurance carrier, Vuletic's counsel and McKissic's counsel had limited brief conversations and exchanged generic letters, e-mails, and McKissic's Notice of Appearance, which contained a reservation with respect to all CR 12(b) defenses. (CP 41-51). On January 27, 2012, counsel for Vuletic sent an e-mail to McKissic's counsel offering to have his clients sign stipulations for the release of medical records. (CP 41). Counsel exchanged several email communications following up on that offer. (CP 41-51). Vuletic served McKissic with King County Pattern Interrogatories on February 2, 2012. (CP 32). Thereafter, McKissic served Vuletic with generic interrogatories and stipulations for medical records on March 22, 2012. (CP 48).

F. Discovery of Service Defect and Notification to Vuletic's Counsel

Vuletic first noted that the McKissic had yet to answer the Complaint in an e-mail dated April 6, 2012. (CP 51). Vuletic e-mailed McKissic again on April 18, 2012, the attorneys spoke, and McKissic's counsel represented it would start to work on an Answer and responses to Vuletic's written discovery. (CP 86, 95). McKissic's counsel had not begun work on the Answer or responses to written discovery prior to April 18, 2012. (CP 86, 95).

Until April 18, 2012, McKissic's counsel relied upon the Return of Service filed by Sheriff Hillier. The service of process issue was discovered thereafter when McKissic counsel turned its attention to

working on its Answer. Vuletic's counsel was notified immediately thereafter of the defect in service of process.

On April 20, 2012, McKissic's counsel filed and served its Answer and emailed Vuletic's counsel asking him to call to discuss the affirmative defenses contained therein. (CP 52-57). When the attorneys spoke on Monday, April 23, 2012, McKissic's counsel explained to Vuletic's counsel that subsequent to their conversation on April 18, 2012, he had learned that—contrary to the Return of Service filed by Sheriff Hillard—nanny Corr was not a resident. (CP 86, 95).

G. Vuletic Took No Steps to Ensure Sufficiency of Service or Request McKissic File an Answer

Vuletic took no steps to verify the facts contained in Hillard's Return of Process prior to the expiration of the 90-day tolling period on March 26, 2012. When McKissic's paralegal contacted Deputy Sherriff Hillier, he freely admitted the statement on the Certificate of Service did not accurately reflect the facts and that he had been told by nanny Corr that she was not a resident. (CP 100-101). Further, Vuletic did not: (1) Request an Answer to the Complaint (prior to March 26, 2012 when the 90-day tolling period for the statute of limitations expired); (2) Move for default (at any time); (3) Request responses to its written discovery (at any time); or (4) file a motion to compel responses to written discovery (at any time). (CP 85, 95).

III. ARGUMENT AGAINST ACCEPTING PETITION FOR REVIEW

A. The Court of Appeals' Decision Regarding Service of Process was Correct and Should not be Disturbed

1. It is Plaintiff's Responsibility to Ensure Proper Service

Washington law firmly rests the burden of ensuring proper service with the plaintiff. It is plaintiff's responsibility to see that the proper steps are taken to ensure sufficiency of service of process. Even in cases where a legal messenger makes a mistake, "the courts have never been receptive to the argument that a defense motion to dismiss for improper service should be denied because 'it was the legal messenger's mistake'" 15A Tegland and Ende, Washington Practice, § at 15.3 (2011-2012), at p. 216.

The legal messenger here knew that nanny Corr was not a resident and that service was ineffective. Despite this, he filed a false Return of Service, which gave rise to this situation. McKissic did not "lie in wait" and use the messenger's mistake to his advantage. Instead, he reported the defect to Vuletic as soon as it was discovered. This Court's review here should be mindful of the fact that the misrepresentation and deceit creating this issue came from the messenger and was not to product of any action by McKissic. The final analysis, in any event, places the responsibility for ensuring proper service with plaintiff. Service was not proper here and the lower courts rightfully dismissed Vuletic's claims and affirmed the dismissal. Those decisions need not be reviewed.

2. The Court's Decision is not in Conflict with Other Service of Process Decisions

Vuletic's position regarding the Scanlan v. Townsend, __ Wn.App. __, __ P.3d __ (2013) matter is the same as previously outlined in her Motion for Reconsideration to Division I after the lower court upheld the trial court's dismissal of her claims against McKissic. The Scanlan holding relies upon the Division III opinion in Brown-Edwards v. Powell, 144 Wn.App. 109, 182 P.3d 441 (2008). Division I reviewed the Brown-Edwards matter in determining its holding in the instant case. The lower court stated that Brown-Edwards was distinguishable and "not helpful," as nanny Corr did not actually give the Summons and Complaint to McKissic. (Slip op. at 8-9). By contrast, in Brown-Edwards, the Summons and Complaint were personally delivered to the defendant. Brown-Edwards, 144 Wn.App. at 110. The key facts in Scanlon are indistinguishable from Brown-Edwards. As such, the Scanlon holding is not on-point in this matter. Nanny Corr did not personally serve Mr. McKissic, which is the critical distinguishing fact between the instant case and both Scanlon and Brown-Edwards.

The "conflict" Vuletic argues is contrived and the cases in question do not actually reach different conclusions. The conflict is only related to the facts of the cases at issue. The controlling fact, as outlined above, is that the Summons and Complaint were personally served on defendant in Scanlon and Brown-Edwards and not in the instant case. In reality, Vuletic's argument requests that this Court disregard the requirement of

personal service simply because the process eventually ended up with McKissic. Vuletic argues this is "form over substance." The requirement that defendant actually be personally served, however, by substitute service, is a well-established and long-standing principle.

Division I reviewed the question of whether the facts in the instant case comply with Brown-Edwards. The lower court found Brown-Edwards not to provide controlling or persuasive authority. The Scanlon holding is based on the same analysis as Brown-Edwards, so it does not provide direction either. Division I's opinion in Scanlon does not change the analysis in the instant case at all. Instead, Vuletic is requesting that this Court forego the personal service requirement in RCW 4.28.080 and allow "delivery," so long as it eventually gets to the defendant. This would, of course, completely undermine the requirements of the statute. Moreover, Vuletic does not offer any actual authority for her proposition that personal service should not be required.

The Division I opinion in Scanlon does not alter any previous analysis in the instant case. It also does not provide authority for the relief requested by Vuletic. Review should not be granted on this issue.

3. There is no Substantial Compliance in this Case

Vuletic attempted to serve McKissic pursuant to RCW 4.28.080(15). This statute authorizes substitute service. For substitute service to be effective, the plaintiff must satisfy three requirements: (1) the papers must be left at the defendant's place of abode; (2) the papers must be left with a person of suitable age and discretion, and (3) the person with

whom the service papers are left must be "**then resident therein**." RCW 4.28.080(15)(emphasis added). Vuletic argues that the lower court erred in its opinion that plaintiff's service upon nanny Corr was substantially compliant with the statute.

Division I reviewed the language from Sheldon v. Fettig, 129 Wash.2d 601, 919 P.2d 129 (1996) cited here by plaintiff. (Slip op. at p. 6.). Plaintiff uses this language to argue that the lower court incorrectly relied upon the holding Salts v Estes, 133 Wn.2d 160, 943 P.2d 160 (1997). The reality is, however, that a reading of Sheldon which validates the method of service in the instant case would overturn the decision in Salts and the multiple cases leading to it regarding service on employees of the defendant.

In Sheldon, this Court determined that the home where plaintiff sought to effect substituted service was **actually the defendant's usual place of abode** when plaintiff attempted substitute service of plaintiff by leaving a copy of the summons and complaint with defendant's brother. Sheldon, 129 Wash.2d at 603. The issue in Sheldon was "whether the place the summons was left constitutes defendant's house of usual abode." Id. The Sheldon case does not provide compelling authority to the question here, because the issue in Sheldon was whether the home served was **defendant's** place of abode and not whether the substitute service agent was actually a resident of defendant's abode. That is a different question entirely than is presented here.

Vuletic argues that the Division I opinion's interpretation of the Salts matter is in error due to the holding in Sheldon. This argument is flawed. As noted above, the issues are not the same. Also, Salts was decided **after** Sheldon and this Court analyzed Sheldon in its decision. Salts, 133 Wash.2d at 165-166. As such, if Sheldon should be the basis for a different outcome here, it should have been the basis for a different outcome in Salts. In Salts, this court described the Sheldon decision as the "outer boundaries" of RCW 4.28.080(15). Id.

Unlike Sheldon, the Salts case is directly on point as it analyzes the "resident therein" requirement of RCW 4.28.080(15), which is at issue here (with respect to this argument from Vuletic). Id. at 162. In Salts, the plaintiff served defendant's neighbor who was looking after defendant's home while he was out of town for a couple of weeks. Id. at 163. The trial Court granted defendant dismissal, holding that the neighbor was not a resident for the purpose of RCW 4.28.080(15). Id. at 164. The Court of Appeals upheld the dismissal and review was granted. Id. This Court determined, ultimately, that being a "[r]esident requires something more than "present" in the defendant's usual abode" and that, for RCW 4.28.080(15), "a person is a resident if the person is actually living in the particular home." Id. at 167, 170. The trial court's dismissal was affirmed by this Court. In its discussion, the court provided the following discussion:

> "We decline to interpret RCW 4.28.080(15) so that mere presence in the defendant's home or "possession" of the

> premises is sufficient to satisfy the statutory residency requirement. Under such a view, service on just about any person present at the defendant's home, regardless of the person's real connection with the defendant, will be proper. A housekeeper, a baby-sitter, a repair person or a visitor at the defendant's home could be served. **Such a relaxed approach toward service of process renders the words of the statute a nullity and does not comport with the principles of due process that underlie service of process statutes**.
>
> Our duty is to effectuate the intent of the Legislature in enacting a statute. If a statute is unambiguous, as is RCW 4.28.080(15), we are obliged to apply the language as the Legislature wrote it, rather than amend it by judicial construction....We must provide consistency and predictability to the law so the people of Washington may conform their behavior accordingly. The language of RCW 4.28.080(15) sets forth the standards for substituted service of process. We best accomplish the purpose of establishing predictable standards by not stretching the meaning of those standards beyond their plain boundaries." Id., at 169-170. (emphasis added).

Division I in this matter took its decision on this issue directly from this Court's holding in Salts. (Slip op. at 7-8). It is not in error and needs not be reviewed. Nothing in the record establishes that nanny Corr is a resident in the McKissic abode. The "usual rule is that service on employees and others who do not reside in the defendant's home does not comport with due process." Salts, at 168. Plaintiff is asking the court to draw some manner of difference between a baby-sitter and a nanny for the purpose of service. This question has already been answered by this Court in Salts: "service on an employee of the defendant who spends only a part of his time at defendant's residence is defective." Id. at 169.

The point the court is making in Salts by determining that a housekeeper, babysitter, repair person, etc. are **not** sufficient targets for service of process is defined by the fact that these types of people do not reside at the home of the plaintiffs, which is the requirement in the statute. In the instant case, nanny Corr does not represent any distinguishing type of non-resident. Nanny Corr is an employee who does not reside with defendant. Vuletic's argument that she is a "substitute parent figure" is speculative and no authority is provided to show that such a relationship (were it to exist) would change the outcome in this matter.

Vuletic's reading of Sheldon is self-serving and does not comport with on-point authority coming after the Sheldon holding. In addition, as outlined in Salts, such a reading would eviscerate the statute and render its requirements meaningless. This Court should not grant review on the issue of substantial compliance.

B. McKissic's Service of Process Defense was not Waived

In 2000, this Court held that a defendant could waive a service of process defense by engaging in discovery and settlement negotiations. Lybbert v. Grant, 141 Wn.2d 29, 1 P.3d 1124 (2000). The Lybbert decision is premised upon the court's disapproval of a defendant "lying in wait" and notifying a plaintiff of a deficiency in service only after the statute has expired. According to the Lybbert holding, Waiver is appropriate "to prevent a defendant from **ambushing** plaintiff during litigation either through **delay in asserting a defense** or **misdirecting the plaintiff away from a defense for a tactical advantage**. King v.

Snohomish County, 146 Wn.2d 420, 47 P.3d 563 (citing Lybbert v. Grant County, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000)). (emphasis added).

In Lybbert, this Court held that a party could waive its defense of insufficient service of process when (1) defendant's assertion of the defense is inconsistent with defendant's previous behavior, or (2) defendant's **counsel** has been dilatory in asserting the defense. Lybbert, 141 Wn.2d at 39.

Since the Lybbert ruling, this Court has identified three circumstances where a party has waived a service of process defense: (1) where a party's actions indicate that the defense is abandoned, (2) where defendant actively sought to conceal the defense until after the expiration of the statute of limitation and the 90-day tolling period, and (3) where defendant engages in considerable discovery not related to the defense. Harvey v. Obermeit, 163 Wn.App. 311, 261 P.3d 671 (2011).

While a waiver of a service of process defense is certainly possible, the authorities that plaintiff relies upon are all distinguishable from the instant case and do not provide an on-point basis for determining that McKissic waived his service of process defense. In addition, Vuletic's factual contentions and argument (based on the same) do not accurately apprise the court of the situation at hand. As a reminder, nanny Corr was not a resident. Sheriff Hillard, who attempted service, prepared and filed a false Return of Service indicating that nanny Corr was a resident. Vuletic requested McKissic file an Answer in April 2012, **after**

the state of limitations and 90-day tolling period had expired in March 2012. Neither party knew of the inaccuracy in the Return of Service until Vuletic requested the Answer. To that point, McKissic's counsel (Mr. Bendele) relied upon the inaccurate Return of Service. Mr. Bendele promptly notified Vuletic of the service of process issue two days after it was discovered.

Division I considered the conduct of McKissic prior to asserting the service of process defense. Specifically, it considered McKissic's statements regarding quick resolution, his participation in discovery, and his failure to answer interrogatories regarding service, and the court still determined a waiver had not occurred. (Slip op. at 10). All of Vuletic's cited authority regarding waiver is distinguishable based on the foregoing facts, which Division I found to be undisputed.

1. McKissic's Assertion of Service of Process Defense is not Inconsistent with Prior Behavior as he did not Conduct Considerable Discovery and did not Abandon the Defense

The mere act of conducting some discovery is not necessarily give rise to a waiver of a service of process defense. Harvey, 163 Wn.App. at 324 (citing to Lybbert, 141 Wn.2d at 41). The discovery conducted must be considerable. Id. Vuletic cites to the Lybbert matter as her primary authority on this issue. In Lybbert, however, the defendant conducted discovery that did not relate to the issue of service of process for nine months. Lybbert, 141 Wash.2d at 35. When compared with the facts of Lybbert, McKissic did not conduct "considerable" discovery. Instead,

McKissic engaged in limited, generic, and perfunctory discovery for approximately three months.

In Lybbert, defendant also did not respond to discovery requests about the service of process issue when a timely response would have allowed the plaintiff several days to cure the defective service. Id. at 42. Here, that would have been an impossibility as McKissic did not know of Vuletic's defective service until after the 90-day tolling period had expired and after the opportunity to cure the defect. In addition, plaintiff requested responses to his pattern interrogatories in Lybbert. Id. at 50. Vuletic made no such requests here. Despite Vuletic's urging that the instant case is "virtually indistinguishable" from the Lybbert holding, key facts do not align when the matters are compared.

In Blankenship v. Kaldor, 114 Wn.App. 312, 319-320 57 P.3d 295 (2012), defendant conducted written discovery, depositions, and extensive evidence gathering not related to the service of process defense **after** defendant knew or should have known it existed. The court determined that defendant had engaged in significant expenditures of time and money litigating the case and, as such, waived his defense. Id.

In King v. Snohomish Co, 146 Wn.2d 420, 47 P.3d 563 (2002), the parties engaged in 45 months of litigation and discovery including participation in mediation, 18 depositions, and motions for summary judgment on issued unrelated to the claim filing defense. Id. As trial neared, defendant moved to dismiss plaintiff's claims based upon the

"claim filing" defense. Id. The trial court denied the motion and the Court of Appeals reversed. Id. When the case was brought before the Supreme Court, this Court held that the defendant acted inconsistently with its affirmative defense by engaging in extensive, costly, and prolonged discovery and litigation and, therefore, had waived the defense. Id. at 426.

Both King and Blankenship are distinguishable based on the sheer amount of discovery and litigation that occurred prior to defendant asserting the service of process defense. The Court of Appeals reviewed the litigation and discovery conducted by McKissic prior to his assertion of the service of process defense and determined that it did not constitute a waiver. The cases relied upon by Vuletic are factually distinguishable and she does not provide any novel analysis of the issue to support review.

2. McKissic did not Waive the Service of Process Defense it was not Concealed and was Asserted Promptly after it was Discovered

There is no evidence in the record to show that McKissic – or Mr. Bendele – knew of the defect before the expiration of the statute of limitations. At the very least, this shows that it is impossible for McKissic to have been intentionally misdirecting the plaintiff for the purpose of a tactical advantage. As the Division I opinion in this matter indicates, the doctrine of "waiver is designed to prevent a defendant from ambushing plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." (Slip op. at 10 *citing* Lybbert, 141 Wn. 2d at 39). The facts simply do not support Vuletic's position that McKissic was dilatory. Instead, they

indicate the opposite outcome. McKissic was unaware of the false Return of Service and, as a result, was unaware of the basis for the service of process defense before the 90-day tolling period had expired. McKissic informed Vuletic of the service issue two days after learning of it. The defense is not waived simply because McKissic did not notify Vuletic of the defective service before the 90-day tolling period expired. Harvey, 163 Wn.App. at 326-327.

Vuletic contends that Lybbert serves as its strongest authority related to her argument that McKissic was dilatory in asserting the defense. The position is flawed. Vuletic argues that like Lybbert, the return of service would have been defective on its face and put defendant and his counsel on notice of the defect. That is not the case here, as the process server's information was false but would not have appeared defective to Mr. Bendele. Vuletic presented the same argument to Division I and the lower court did not find it compelling as the defect would have been more difficult to discover in the instant case than in Lybbert. (Slip op. at 16). In addition, this argument is based upon the misrepresentations of Vuletic's process server which, as outlined above, should not be burdened upon McKissic.

In Romjue v Fairchild, 60 Wn.App 278, 803 P.2d 57 (1991), defendant intentionally concealed his knowledge of the service of process defense and did not assert the defense until after the expiration of the statute of limitations, despite having known of it before the expiration. In

addition, plaintiff's counsel corresponded with defendant regarding the sufficiency of service, to which defendant remained silent. Id. at 281. Romjue is distinguishable from the instant as defendant remained silent in response to plaintiff's correspondence despite having knowledge of the defective service.

In Raymond v. Fleming, 24 Wn.App. 112, 600 P.2d 614 (1979), plaintiff repeatedly asked defendant to file an Answer and defendant repeatedly asked for additional time to prepare it. Almost eight months after defendant appeared, plaintiff moved for default judgment and moved to compel answers to written discovery. Id. at 113. When the statute of limitations expired, defendant moved for dismissal based upon insufficient service of process. Id. On appeal, defendant's conduct was determined to be both dilatory and inconsistent with the assertion of the service of process defense. Id. at 115.

Knowledge of the defect in service of process **prior to** the expirations of the statute of limitations and 90-day tolling period without asserting the service of process defense is a critical element in Washington cases finding waiver due to dilatory conduct. That element is not present in the instant case. Division I indicated there is nothing in the record to dispute the accuracy of McKissic's assertion that he did not know of the defect in service until after the statute of limitations had expired. (Slip op. at 13-14). Moreover, the record shows that Mr. Bendele informed Vuletic

of the defense and insufficient of service of process **two days** after it was discovered. This conduct is not dilatory. It is prompt and appropriate.

3. McKissic's Failure to File a Timely Answer or Respond to Interrogatories is not a Waiver

Vuletic incorrectly argues that if McKissic had "honored" the Civil Rules by providing a timely answer then Vuletic would have had an opportunity to cure the defect. First, as outlined in French v. Gabriel, 57 Wash.App. 217, 222, 788 P.2d 569 (1990), defendant has not waived his service of process defense merely by failing to timely file an Answer to plaintiff's Complaint. As in French, Vuletic could have (1) requested defendant Answer the Complaint sooner than he did, (2) moved for default judgment, or (3) object to the untimely Answer. He did not.

Second, McKissic was under no duty to Answer the Complaint or respond to written discovery as service had not been effected upon him. CR 4(a)(2) and CR 12(a) only require defendant to serve and file an Answer **after** service of the summons and complaint. Similarly, CR 33(a) requires that plaintiff serve summons and complaint prior to propounding discovery to the defendant. Because Vuletic did not properly serve McKissic, he was under no obligation to respond to Vuletic's Complaint or her written discovery. At the very least, Vuletic's position regarding McKissic's procedural improprieties should be viewed in light of the procedural impact of Vuletic's own failures.

In sum, no waiver has occurred and the lower court's holding on this issue is correct. Stringent scrutiny of this issue must be applied as

without proper service, McKissic's due process has been violated. In addition, the issue of waiver, as a whole, should be viewed within the context that Vuletic's process server knew the attempted service was not effective and filed an inaccurate service affidavit. This misrepresentation – and any subsequent confusion – should not be visited upon McKissic and should not be construed as proper service, regardless of the method.

IV. CONCLUSION

McKissic respectfully request this Court deny Vuletic's Petition for Review. The recent holding in Scanlan does not conflict with the unpublished opinion in this matter and, in reality, Vuletic is requesting that this Court negate the necessity for personal service entirely. Nanny Corr was not a resident of the McKissic abode within the meaning of RCW 4.28.080(15). McKissic did not waive his defense by taking a position inconsistent with assertion of the defense or through dilatory conduct.

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without proper service, McKissic's due process has been violated. In addition, the issue of waiver, as a whole, should be viewed within the context that Vuletic's process server knew the attempted service was not effective and filed an inaccurate service affidavit. This misrepresentation – and any subsequent confusion – should not be visited upon McKissic and should not be construed as proper service, regardless of the method.

IV. CONCLUSION

McKissic respectfully request this Court deny Vuletic's Petition for Review. The recent holding in Scanlan does not conflict with the unpublished opinion in this matter and, in reality, Vuletic is requesting that this Court negate the necessity for personal service entirely. Nanny Corr was not a resident of the McKissic abode within the meaning of RCW 4.28.080(15). McKissic did not waive his defense by taking a position inconsistent with assertion of the defense or through dilatory conduct.

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