Court of Appeals No. 69515-1-1

No. 90030-2

SUPREME COURT
OF THE STATE OF WASHINGTON

SIMONA VULETIC and MICHAEL HELGESON,

Petitioners

v.

DARRELL R. McKISSIC,

Respondent

PETITION FOR DISCRETIONARY REVIEW

Morris Rosenberg, WSBA #5800
705 Second Avenue, Suite 1200
Seattle, WA 98104
(206)903-1010

Attorney for Petitioner

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A. IDENTITY OF PETITIONER

Simona Vuletic and Michael Helgeson (hereinafter "Vuletic") ask this court to accept review of the decision designated in Part B of this motion.

B. COURT OF APPEALS DECISION

Vuletic seeks review of the Court of Appeals, Division I, decision of December 16, 2013. Her Motions for Reconsideration and to Publish were denied on January 27, 2014. Copies of the decision and the denial orders are in the Appendix.

The trial court dismissed Vuletic's action for personal injuries against Respondent, Darrell R. McKissic (hereinafter "McKissic) on the basis of insufficiency of service of process and that waiver and estoppel were not persuasive or nor applicable. CP 216-7. The Court of Appeals affirmed.

C. ISSUES PRESENTED FOR REVIEW

1. Does the Court of Appeals' holding that McKissic was not served with process conflict with the decision of Division III of the Court of Appeals, in Brown-Edwards v. Powell, 144 Wn. App. 109, 182 P.3d 441 (2008) and with Division I's own decision in Scanlan v. Townsend, ___ Wn.App ___, ___ P.3d. ___ (Case No. 69106-6-1,

decided December 30, 2013)(Petition for Review pending), rendered two weeks after the decision in this case? RAP 13.4(b)(2).

2. Does the Court of Appeals' holding conflict with or misapply this Court's decisions relating to substantial compliance relating to service of process as set forth in Sheldon v. Fettig, 129 Wn.2d 601, 919 P.2d 1209 (1996)? RAP 13.4(b)(1).

3. Does the Court of Appeals' holding conflict with or misapply this Court's decision relating to waiver of the affirmative defense of insufficiency of process as set forth in Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000)? RAP 13.4(b)(1).

D. STATEMENT OF THE CASE

A. Facts as to Sufficiency of Service of Process

Jill Corr, the nanny for McKissic's children, testified in deposition that: on the morning of January 3, 2012, she confirmed to the deputy sheriff that this was the McKissic residence, that McKissic was in the shower, and that she was over 18. (CP 80-81.) The deputy asked her if she would make sure that McKissic got the important papers he was handing her and she told him she would. (*Id.*) She placed the papers on the kitchen counter. (*Id.*) Shortly thereafter she told McKissic about the papers and she saw him head towards the kitchen. (*Id.*) That same day she told Ms. Nellermoe, McKissic's wife and an attorney, about the papers. (CP 81, 196).

Corr was nanny for the McKissic children from 2004 to 2006 and from 2008 continuing to the time of her deposition. (CP 78). She always had a key to the residence during the times she worked for McKissic. (CP 61). She works every school day from about 6:30 A.M. until she drives one of the children to school around 8:15 A.M. and while free to treat the McKissic house as her own, she typically returned around 2:30 P.M. each afternoon either picking up one child at school or meeting both children when they would return, and working there until about 6:30 P.M. (CP 59-60; 78-79). She stayed overnight in the McKissic home to care for one child on occasion when McKissic and/or his wife left town. (CP 60-61; 79).

McKissic in deposition testified he was upstairs at the time the deputy came to the house on January 3, 2012. (CP 62). When he came downstairs to leave for work, Corr told him of the papers which he picked up and moved to a basket in his home office. (CP 61). His attorney had advised him that he would be served so he expected the papers. (CP 61-62). He knows what legal papers are, knew he was the defendant in a lawsuit arising from the accident of March 1, 2009, and acknowledged that the papers were the summons, complaint, and case schedule. (CP 62).

B. Facts as to Waiver of the Insufficiency of Service Defense

On January 5, 2012, a verbal "notice of appearance" was made by phone call to Vuletic's attorney (hereinafter "Rosenberg") (CP 32). The Return (Affidavit) of Service which appeared regular on its face, was filed on January 12, 2012. CP 5. On January 26, 2012, McKissic's counsel (hereinafter "Bendele") emailed and served a Notice of Appearance. (CP 37-40). Later on January 26, Bendele and Rosenberg exchanged emails (CP 32, 41-42) with Bendele confirming that the insurance carrier had provided him the Vuletic settlement package and he requested the names of plaintiffs' health care providers for preparation of stipulations. (CP 32, 41-42). The next day Rosenberg responded with details as to Vuletic's treatment providers along with prior medical providers and requesting that Bendele provide the stipulations to secure records. (CP 32, 43).

On February 2, 2012, Rosenberg served Pattern Interrogatories on Bendele. (CP 74). Interrogatory No. 23 asked: "Do you allege insufficiency of process or of service of process? If so, please state the facts upon which you base your allegation." And Interrogatory 24 asked the details of any affirmative defenses? (CP 76). Responses were due March 5, 2012, three weeks before the statute of limitations would expire. The defense never answered nor objected to those Interrogatories. (CP 32).

On March 16, 2012, Bendele left Rosenberg a phone message inquiring as to the status of his being provided the names of Vuletic's medical providers. (CP 33). Rosenberg both called back and sent an email indicating that this information had been provided in Rosenberg's January 27, 2012, email to Bendele. (CP 33, 44-45). On March 20, 2012, Bendele confirmed by email that he would provide copies of the medical records retrieved and Rosenberg emailed him back to prepare the stipulations and send them over for signatures. (CP 33, 46-47). On March 22, 2012, Bendele emailed Rosenberg a letter that among other things indicated that State Farm wanted him to take early depositions (suggesting the weeks of May 7 or 14, 2012) "so we can start talking sooner (sic) than later regarding potential resolution of your clients' claims." (CP 33, 48-50). Bendele's letter also transmitted Medical and Employment stipulations for records release; Requests for Statement of Damages; and Interrogatories and Requests for Production which dealt solely with the merits of the claims both as to the facts of the collision and damages. (CP 33). Vuletic immediately began drafting extensive and detailed responses to the Interrogatories and Requests for Production. (*Id.*)

On March 26, 2012, the ninety days to serve process and have it relate back to the date of filing the complaint would have expired pursuant to RCW 4.16.170. (CP 33). On April 6, 2012, Rosenberg emailed Bendele

timely transmitting to him the executed stipulations and noting that it appeared the defense had yet to answer the complaint. (CP 33-34, 51).[1] On April 18, 2012, Rosenberg emailed Bendele reminding him of the April 6, email. (CP 34).

On Friday, April 20, 2012, Bendele sent an email to Rosenberg attaching McKissic's Answer. (CP 34, 52). The Answer raised the affirmative defenses of lack of service of process, insufficiency of process, and the statute of limitations for the first time. (CP 34, 53-57). On Monday, April 23, 2012, Bendele and Rosenberg spoke, and Bendele said that McKissic had indicated to him that the nanny who was served did not reside at McKissic's. (CP 34). Contrary to this assertion however, at his deposition on May 11, 2012, McKissic testified that while he did not recall when he became aware that there was a service of process issue, he (McKissic) became aware of it from Bendele or Bendele's office. (CP 62).

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

I. The Decision Is in Conflict with Two Other Decisions of the Court of Appeals as to Sufficiency of Service of Process. (Issue 1)

[1] This request is routine in King County for cases not subject to mandatory arbitration, since the plaintiff is required to file a Confirmation of Joinder, certifying that "all mandatory pleadings have been filed." King County Local Civil Rule (KCLCR) 4.2(a)(1). Pursuant to KCLCR 4(e)(2), the Confirmation is not due until 23 weeks after filing of the lawsuit. In the instant case the lawsuit was filed on December 27, 2011 (CP 2) making the Confirmation not due until May 5, 2012.

In Scanlan v. Townsend, __ Wn.App ___, __ P.3d. __ (2013)(Petition for Review pending) a different panel of Division I[2] in a published opinion considered whether the King County Superior Court erred in dismissing Scanlan's personal injury action on the basis of insufficient service of process and reversed the dismissal.

The facts in Scanlan are that at the time of service of process on defendant Townsend's father in Vancouver, Washington, Townsend actually resided in Auburn Washington. The father at a later date within the statute of limitations, gave the papers to Townsend, albeit not at her residence. The Scanlan court found the declarations and depositions established that the defendant was served. (Slip. Op. at pp. 8-9; Appendix pp. A 35-36.)

The facts in the instant case are very similar. The sworn testimony of Corr and McKissic detailed at pp. 2-4 show indisputably that McKissic received process at his own residence on January 3, 2012, well within the statute of limitations. Comparing the facts in Scanlan with the facts in the instant case shows the only potential difference is that Corr did not physically place process in the hands of McKissic.[3]

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[2] Judge Grosse is the only Judge common to both the Scanlan decision and the instant decision.

[3] In Scanlan there was acknowledgement that the father "gave" the defendant the papers but it cannot be told if that meant he actually placed them in her hands. (Scanlan Slip op. at p. 6; Appendix at p. A-33.)

In Scanlan the panel noted (slip op. at p. 7 [A-34]) that the issue of proper service of process is a "question of law that we review de novo" citing Streeter-Dybdahl v. Huynh, 157 Wn.App. 408, 412, 236 P.3d 986 (2010).[4] The Scanlan court upheld service of process relying upon Division III's opinion in Brown-Edwards v. Powell, 144 Wn. App. 109, 182 P.3d 441 (2008), for the proposition that the testimony of the defendant's father that he delivered a copy of process to the defendant coupled with the defendant's testimony that she received them from her father within the statute of limitations period proved the sufficiency of service:

> Here, there is no dispute that Townsend's father was competent to effect service and that he personally delivered a copy of the summons and complaint to Townsend within the statute of limitations. Townsend's deposition testimony also established proof of service under CR 4(g)(5) and (7). See also Hamill v. Brooks. 32 Wn. App. 150, 151- 52, 646 P.2d 151 (1982) ("The time [of service] was established through [the defendant's] deposition and the affidavit of [the plaintiff]'s attorney .... [The defendant's] admission is the best possible evidence that he received the summons and complaint.").

(Scanlan slip op. at p. 12 [A-39].)

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[4] Division I made the same statement (slip op. at p. 3) citing Goettemoeller v. Twist, 161 Wn. App. 103, 107, 253 P.3d 405 (2011) for the proposition. And further noted (slip op. at p. 4) that in reviewing the dismissal, the facts must be considered in "the light most favorable to the nonmoving party (here Vuletic) citing Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

The issue was raised by Vuletic in the instant case and found without merit at p. 9 of the slip opinion.

> Here, in contrast, Corr did not give the summons and complaint to McKissic. She left the documents on the counter and did not see him pick them up. Nor did she sign an affidavit of service indicating that she had handed the summons and complaint to him. For these reasons, Brown-Edwards is not helpful.

Per Scanlan the testimony and admissions are sufficient proof and the absence of an affidavit of service by the father was not critical. Slip op. at p. 12. Division I also relied upon its own decision in Hamil v. Brooks, 32 Wn. App. 150, 151-52, 646 P.2d 151 (1982), that the defendant's sworn admission is "the best possible evidence that he received the summons and complaint." Similarly, sworn statements by Corr and McKissic establish that McKissic received the papers. That leaves only the distinction that Corr "left the documents on the counter and did not see him [McKissic] pick them up." However, McKissic fills that "gap" with his testimony that he in fact picked them up, knowing what they were and put them in his home office. This is not "drop service" such as would be the case in leaving legal papers on a doorstep for example, as all events occurred within the McKissic's home.

To approve the service in Scanlan but dismiss the service in Vuletic places "form over substance" to unnecessarily cause an injustice. The

analysis of Division I in the instant case is in conflict with the Scanlan analysis which Vuletic believes was correctly decided and is in conflict with Brown-Edwards. The facts of the instant case are so close to those two cases that Vuletic urges this Court grant the Petition and find that process was "delivered" to McKissic within the meaning of RCW 4.28.080.

II. The Decision Conflicts with and Misapplies a Decision of the Supreme Court as to Substantial Compliance in Relation to Service of Process. (Issue 2)

In Sheldon v. Fettig, 129 Wn.2d 601, 609, 919 P.2d 1209 (1996), this Court in construing house of usual abode under RCW 4.28.080(15) concluded that it should be "liberally construed to effectuate service and uphold jurisdiction of the court." In the instant case, Division I (Slip op. at p. 6.) held that Sheldon's liberal construction was limited to "house of usual abode" and did not extend to a liberal construction of "resident" citing Salts v. Estes, 133 Wn.2d 160, 170, 943 P.2d 275 (1997). The service that was stricken in Salts was upon a neighbor who was checking on the house while the defendant was on vacation and by happenstance was there when the process server came. Division I relied upon this Court's comment in Salts that a liberal construction to uphold service under the Salts facts, would mean a "housekeeper, a ***baby-sitter,*** a repair person or a visitor at the defendant's home could be served" (emphasis by Division I) and such would "not comport with due process" (Slip op. at p. 5-6.) Division I went

on to consider the nanny in the instant case to be the equivalent of a baby-sitter whose "mere presence at the home as McKissic's employee does not satisfy the "resident" requirement of RCW4.28.080(15)." (Slip op. at p. 6.) But as the facts detailed above at p. 2-4 show, nanny Corr was not merely a "baby-sitter", a person who by definition cares for another's children during a short absence,[5] but was essentially a substitute parent figure.

It is respectfully submitted that Division I reads the Salts analysis of Sheldon v. Fettig too restrictively and that under the facts of the instant case, upholding service would not mean that a person who was "merely present" at the defendant's house of usual abode could be served. The four justice dissent in Salts, relying upon Sheldon and its analysis, would have upheld even the service upon the neighbor who was in the defendant's house by happenstance! Ms. Corr had vastly more connection to the McKissic residence than did the neighbor doing a temporary favor for the defendant in Salts.

III. The Decision Conflicts with and Misapplies a Decision of the Supreme Court as to Waiver of Insufficiency of Service of Process. (Issue 3)

In discussing waiver in the context of service of process the Lybbert Court stated at p. 38:

[5] See e.g., http://www.merriam-webster.com/dictionary/babysit defining babysit as "to care for children usually during a short absence of the parents".

> The waiver can occur in two ways. It can occur if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. Romjue, 60 Wn. App. at 281, 803 P.2d 57. It can also occur if the defendant's counsel has been dilatory in asserting the defense. Raymond v. Fleming, 24 Wash.App. 112, 115, 500 P.2d 614 (1979). (Emphasis added.)

In the instant case the defense conduct was inconsistent by seeking to move the case speedily to a negotiated settlement and as well as dilatory by failing to timely answer the complaint or timely respond to interrogatories, which specifically inquired as to any service affirmative defense.

In attempting to distinguish this case from Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000), Division I fails to distinguish it in any material way. Division I relied upon its own analysis of Lybbert in Harvey v. Obermeit, 163 Wn. App. 311, 261 P.3d 671 (2011), a case which discussed Lybbert at length before concluding there is no waiver. Closer scrutiny of Harvey shows it does not support Division I's affirmance in the instant case.

> Here, Obermeit raised the defense in his timely filed answer, maintained throughout discovery that service had not been proper, and then filed his motion to dismiss approximately six and a half months after Harvey first filed suit. He did not waive the defense.

163 Wn. App at 326-27. McKissic, unlike the defendant in Harvey, did not timely answer, did not raise any issue in discovery as to service much less

maintain throughout discovery like in Harvey that service was improper. Thus, unlike the defense conduct in Harvey, McKissic's defense acted inconsistent with the later asserted defense. The Court's analysis conflicts with Division III's decisions in Blankenship v. Kaldor, 114 Wn. App. 312, 57 P.3d 295, (2002)(rev. den. 149 Wn.2d 1021 (2003), Butler v. Joy, 116 Wn. App. 291, 298, 65 P.3d 671 (2003) and Romjue v. Fairchild, 60 Wn. App. 278, 803 P.2d 57 (1991).

This Court concluded in Lybbert at pp. 44-45:

> . . . the County failed to preserve the defense by pleading it in its answer or other responsive pleading before proceeding with discovery. Instead, it engaged in discovery over the course of several months and then, after the statute of limitations had apparently extinguished the claim against it, it asserted the defense. French does not remotely stand for the proposition that it is acceptable for a defendant to lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action. (Emphasis added.)

In both Lybbert and the instant case, the defense failed to answer the complaint timely, instead waiting after the running of the statute of limitations. In Lybbert the answer was three months after the statute would have expired; here McKissic answered a month after. However, once the answer is made after the statute of limitations would expire, it really does not matter if it is a month, three months, or longer. The crucial point is that

the defense has waited until the statute of limitations expired, while acting as if the case is to be negotiated or tried, without ever raising any service issue either explicitly or implicitly. In the instant case, Division I further stated that waiver could be found where a party "engages in considerable discovery not related to the defense." (Slip Op. at p. 12.) However, Lybbert does not use the term "considerable" in discussing the fact of the discovery being unrelated to the defense. Vuletic believes it is the nature of the discovery that is important, not its quantity.

The instant case is stronger than Lybbert in several regards. First, in Lybbert, the service statute mandated service on the county auditor and so when service was made upon the administrative assistant to the county commissioners (141 Wn.3d at p. 32) the return of service would on its face put plaintiff Lybbert and his attorney on notice of a service issue, which was contrary to the instant case.

Secondly, timely response by the defendant county to the interrogatories in Lybbert would have still fallen outside the statute of limitations since the plaintiff's interrogatories were served on the county only eight days before the running of the statute of limitations.[6] In the

[6] In Lybbert the accident was March 8, 1993. The case was filed August 30, 1995, and the attempted service was on September 6, 1995. Thus the last date to serve process would have been March 8, 1996. Plaintiffs served interrogatories on the defense on February 29, 1996, one of which inquired as to any affirmative defenses. The thirty days to respond

instant case, timely response by McKissic would have left three weeks for the service to be perfected before the statute of limitations expired. *See also*, Romjue v. Fairchild, 60 Wn. App. 278 , 803 P.2d 57 (Div. III, 1991)(rev. den. 116 Wn.2d 1026 (1991)) and Blankenship v. Kaldor, 114 Wn. App. 312, 57 P.3d 295, (Div. III, 2002)(rev. den. 149 Wn.2d 1021 (2003)) (in both cases the defense conducted discovery that was unrelated to service and the affirmative defenses were deemed waived where that issue was not raised to the plaintiff until after the statute of limitations would have otherwise run.)

As in Lybbert and Blankenship, McKissic and his attorneys had the necessary facts within their control for nearly four months prior to filing the Answer. In contrast, Vuletic and their attorney could not have known that the return of service filed by the Deputy Sheriff was apparently false unless the defense had honored the civil rules through timely answering either the complaint or the interrogatories. A truthful answer to either would have put Vuletic on notice to look behind the face of the deputy's Return of Service. Vuletic does not believe Lybbert requires "lying in wait" as a prerequisite to finding waiver, although there was evidence of possible lying in wait in the conflict between McKissic and his attorney as to which told the other about service being an issue. See facts recited *supra* at pp. 6-7. First, one cannot

would have expired on March 30, 1996, so that the defense was not obligated to respond until after the statute of limitations would have expired.

tell from reading the opinion if the defendant county's delay was a purposeful or not. Secondly, as noted in Blankenship v. Kaldor, *supra*, 114 Wn. App at 319-20:

> While it does not appear the defense was necessarily "lying in wait" as discussed in Lybbert, the defense was tardy in asserting the insufficient service defense when it had the necessary facts within its control to make the critical assessment and failed to act earlier; in this sense, the defense was dilatory within the spirit of Lybbert. Lybbert, 141 Wash.2d at 39-41, 1 P.3d 1124. Ms. Kaldor's argument that her counsel should be excused from contacting her and ignoring Mr. Kaldor's role in the attempted service because he was retained by the insurance company and not Ms. Kaldor personally is unpersuasive. (Emphasis added.)

The affirmative defense of insufficient service of process was held waived by Division III in Blankenship. As in the instant case the defense engaged in pretrial discovery only as to the merits of the case. The discovery in Blankenship was that both parties propounded interrogatories and requests for production; the defense deposed Ms. Blankenship and took photographs of her residence. 114 Wn.App. at 319. As in both Blankenship and Romjue the defense here propounded discovery which was not aimed at developing any information as to service of process. (CP 33). McKissic also requested and received a Statement of Damages, transmitted medical stipulations for Vuletic to execute, and indicated the carrier was interested in early depositions of the plaintiffs so that resolution of the claims could be discussed "sooner rather than later". (CP 48-60). This

discovery effort by McKissic was as extensive as in Blankenship and was geared solely toward educating the defense as to damages, so negotiations could rapidly begin in an effort to settle.

Had McKissic's informal discovery (email exchanges and agreed medical stipulations) or formal discovery (interrogatories) inquired as to service issues, Vuletic's attorney would have timely been on notice and could have easily taken action to again serve McKissic. As noted in Butler v. Joy, 116 Wn. App. 291, 298, 65 P.3d 671 (Div. III, 2003), "because the process server's affidavit was filed by the plaintiffs, the County knew or should have known that the defense of insufficient service of process was available to it." Citing Lybbert, 141 Wn.2d at 42. (Emphasis added.) In Butler, the defense filed a motion for summary judgment and engaged in discovery not aimed at any service of process issue before asserting the defense of insufficient service of process after the 90 day tolling period had expired. Division III relying upon Lybbert and Romjue held that the defendant waived the defense of insufficient service of process by conducting her defense inconsistent with her later assertion of the defense after the expiration of the 90 day period. 116 Wn. App. at 298.

Division I relies upon French v. Gabriel, 116 Wn.2d 584, 806 P.2d 1234 (1991), concluding the instant case is not distinguishable. (Slip op. at pp. 20-21.) French predates the analysis in Sheldon v. Fettig, *supra*, and

Lybbert, *supra*, and this is so even though as Division I points out those cases did not overrule French. Secondly, in French while the defense had failed to answer within twenty days of service, it did answer more than a year before the statute would run in September 1987. This Court noted: "French had until September 1987 - more than a year - to attempt to correct the insufficient service after Morris raised the defense in his answer." 116 Wn.2d at 595. Division I dismisses that discussion as only relating to French's estoppel argument but it is obvious that such was a critical fact to this Court's finding there was no waiver. *Id.*

McKissic did not answer the complaint until after the statute of limitations had expired while ignoring Vuletic's interrogatories that specifically inquired as to any service issues! Vuletic did not have an opportunity like the plaintiff in French to have the issue made known to them and serve McKissic again. Division I notes that Vuletic did not request an Answer until after the statute of limitations had run. Slip Op. at p. 20. But at least since Sheldon, Lybbert and the other cases cited in this Petition, the failure to make such a request is not fatal to the waiver argument. As noted in the fact recital earlier, the request by Vuletic for an Answer was a necessary formality in King County to keep the case on "schedule". Whether by purposeful deception or innocent happenstance, the manner in which the defense was conducted until it was too late to re-serve McKissic

should constitute waiver under Washington case law. Although Division I noted (slip op. at p. 4) that the facts were to be taken in the light most favorable to Vuletic, it failed to do so.

Inserting parenthetically the facts from the instant case into the following quote from Lybbert, *supra*, 141 Wn.2d at p. 41-2, the facts are virtually indistinguishable:

> In particular we note the County's **[McKissic's]** discovery efforts were not aimed at determining whether there were facts that supported the defense of insufficient service of process. Indeed, because the process server's affidavit was filed by the plaintiffs, the County **[McKissic]** knew or should have known that the defense of insufficient service of process was available to it. Moreover, the County did more than just undertake discovery. As noted above, its detective contacted Lybberts' counsel in order to make certain that the County correctly understood the nature and extent of the Lybberts' interrogatories. **[McKissic's attorney requested a statement of damages and asked Vuletic's attorney for and received Stipulations to secure extensive medical records so McKissic attorney could determine the nature and extent of Vuletic's injuries.]** Furthermore, there were telephone calls between counsel for the respective parties at which there was a discussion about potential mediation. **[McKissic's attorney wrote suggesting early depositions "so we can start talking sooner (sic) than later regarding potential resolution of your clients' claims.]** Of particular significance is the fact that the Lybberts served the County with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process. **[Vuletic served McKissic with interrogatories that specifically inquired as to any defense related to service of process.]** Had the County **[McKissic]** timely responded to these interrogatories, the Lybberts **[Vuletic]** would have had several days **[three weeks]** to cure the defective service. The County **[McKissic]** did not answer

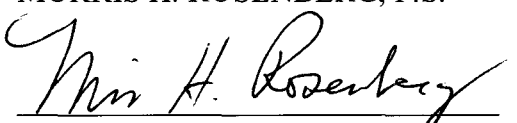
the interrogatories but instead waited until after the statute of limitations expired to file its answer and for the first time assert the defense. (Footnotes omitted.)

F. CONCLUSION

To allow dismissal under the facts of this case encourages defense counsel to simply hide their head in the sand, not discuss the case with their own client, portray to the plaintiff a preference to move the case to a negotiated resolution and if good fortune falls in their lap in the way of bad service underlying a facially proper affidavit of service, pounce on it.

RESPECTFULLY SUBMITTED this 24th day of February 2014.

MORRIS H. ROSENBERG, P.S.



Morris Rosenberg, WSBA #5800
705 Second Avenue, Suite 1200
Seattle, WA 98104
Telephone: (206)903-1010
Attorney for Petitioner

DECLARATION OF SERVICE

I, Morris H. Rosenberg, declare as follows: on this date, I caused to be served upon Respondents, at the address stated below, via the method of service indicated, a true and correct copy of the following document:

PETITIONER'S PETITION FOR REVIEW

Attorney for Defendant/Respondent: Levi Bendele Bendele & Mendel, PLLC 200 West Mercer Street, # 411 Seattle, WA 98119	**XX** Via Legal Messenger ☐ Via U.S. Mail **XX** Via Email ☐ Via Facsimile

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 24th day of February 2014.

Morris H. Rosenberg

APPENDIX

1. Copy of the decision from which review is sought. A-1 – A-25.
2. Copy of Order Denying the Motion for Reconsideration. A-26.
3. Copy of Order Denying Publication of the Decision. A-27.
4. Copy of Scanlan v. Townsend, ___ Wn.App ___, ___ P.3d. ___ (Case No. 69106-6-1, decided December 30, 2013)(Petition for Review Pending.) A-28 – A-39.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

SIMONA VULETIC and MICHAEL HELGESON, wife and husband, Appellants, v. DARRELL R. McKISSIC, Respondent.	)	No. 69515-1-I DIVISION ONE UNPUBLISHED FILED: December 16, 2013

Cox, J. — Substituted service at a defendant's usual abode requires, among other things, that the summons be served upon a person who is "then resident therein."[1] Here, the process server served a summons on the nanny at Darrell McKissic's home. Because the nanny did not live there, the service was insufficient. The trial court properly granted McKissic's CR 12(b) motion to dismiss for insufficient service of process and the running of the statute of limitations.

The facts are not disputed. On March 1, 2009, Simona Vuletic and McKissic were involved in a motor vehicle collision. Nearing the three-year statute of limitations, Vuletic and her spouse, Michael Helgeson, (collectively "Vuletic") filed this negligence action against McKissic on December 27, 2011.

On January 6, 2012, process server, Mark Hillard, handed a summons and a copy of the complaint to Jill Corr when she answered the door at the home of McKissic. Hillard later filed a return of service that stated he was "unable to

[1] RCW 4.28.080(15).

find ***Darrell R. McKissic***, named party, so [he] served a person of suitable age and discretion, then resident therein, at the shared residence and usual abode of the named party, by delivering such copy to and leaving it with, Jill Corr, nanny for the defendant."

Despite the "then resident therein" language in his return of service, Hillard later testified that Corr told him that she was McKissic's nanny, but she was not related to McKissic and did not live at his home. Moreover, Corr later testified that she took the papers from Hillard, set them on McKissic's kitchen counter, and told McKissic about them. She saw McKissic walk toward the papers, but she did not see him pick them up.

On January 26, Levi Bendele appeared as the attorney on behalf of McKissic. The notice of appearance stated that the appearance did not waive any affirmative defenses.

Bendele and Vuletic's attorney, Morris Rosenberg, communicated about the case over the course of the next three months. There was also some discovery during this period.

On March 1, 2012, the three-year statute of limitations for this negligence action expired. On March 26, the ninety-day period to serve process that related back by statute to the December 27, 2011 date of filing of this action expired.

On April 6, Rosenberg sent Bendele completed stipulations and asked about an answer to the complaint. Rosenberg wrote, "Unless, I missed it, I do not believe an Answer has been filed on behalf of your client so please get that to me in the next ten days."

On April 20, Bendele filed the answer that asserted, for the first time, the affirmative defenses of lack of service of process, insufficiency of process, and statute of limitations.

In July, Vuletic moved for partial summary judgment striking these affirmative defenses. In response, McKissic moved to dismiss under CR 12(b) based on insufficient service of process and the statute of limitations.

The trial court granted McKissic's motion to dismiss "for lack of sufficiency of service of process." The court also ruled that "[w]aiver and estoppel are not persuasive, nor applicable here." The trial court implicitly denied Vuletic's motion without entering an order. The trial court also denied Vuletic's motion for reconsideration.

Vuletic appeals.

SUBSTITUTED SERVICE

Vuletic argues that the trial court erred when it granted the CR 12(b) motion to dismiss because service of process of the summons and complaint upon McKissic's nanny was in substantial compliance with the requirements for substituted service. Because substantial compliance with the statute is not the proper standard and service was insufficient under the statute, we disagree.

"Proper service of the summons and complaint is a prerequisite to a court[] obtaining jurisdiction over a party."[2] "Whether service of process was proper is a question of law that this court reviews de novo."[3]

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[2] Harvey v. Obermeit, 163 Wn. App. 311, 318, 261 P.3d 671 (2011).

[3] Goettemoeller v. Twist, 161 Wn. App. 103, 107, 253 P.3d 405 (2011).

Further, this court treats a motion to dismiss as a motion for summary judgment "when matters outside the pleading are presented to and not excluded by the court."[4] When reviewing an order of summary judgment, an appellate court engages in the same inquiry as the trial court.[5] Thus, this court considers the facts in the light most favorable to the nonmoving party.[6] Summary judgment is appropriate only if there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law.[7]

Under RCW 4.28.080(15), a plaintiff may effectuate "substituted" service or "abode" service if three requirements are met: "(1) the summons must be left at the defendant's 'house of his or her usual abode'; (2) the summons must be left with a 'person of suitable age and discretion'; and, (3) the person with whom the summons is left must be 'then resident therein.'"[8]

Here, only the third requirement is at issue. Specifically, the issue is whether service upon a nanny, an employee who did not live in the defendant's house of usual abode, was "then resident therein" at the time of service of the summons.

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[4] Sea-Pac Co., Inc. v. United Food and Commercial Workers Local Union 44, 103 Wn.2d 800, 802, 699 P.2d 217 (1985).

[5] Right-Price Recreation, LLC v. Connells Prairie Cmty. Council, 146 Wn.2d 370, 381, 46 P.3d 789 (2002).

[6] Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc., 162 Wn.2d 59, 70, 170 P.3d 10 (2007).

[7] CR 56(c).

[8] Salts v. Estes, 133 Wn.2d 160, 164, 943 P.2d 275 (1997) (quoting RCW 4.28.080(15)).

The supreme court has explained that the word "then" means "the time of service," and the word "therein" means "the defendant's usual place of abode."[9]

In Salts v. Estes, the supreme court held "for purposes of RCW 4.28.080(15) that 'resident' must be given its ordinary meaning—a person is resident if the person is actually living in the particular home."[10] Citing a number of cases from other jurisdictions, the supreme court explained that "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."[11]

Further, the court declined to interpret the term "resident" so that "mere presence in the defendant's home or 'possession' of the premises [would be] sufficient to satisfy the statutory residency requirement."[12] The court explained,

> 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

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[9] Wichert v. Cardwell, 117 Wn.2d 148, 151, 812 P.2d 858 (1991).

[10] 133 Wn.2d 160, 162, 170, 943 P.2d 275 (1997) (concluding that "a person who was not living in the defendant's home, but agreed to take in his mail and feed his dog while he was on vacation" was not a "resident" under RCW 4.28.080(15)).

[11] Id. at 168-69 (citing Hardy v. Kaszycki & Sons Contractors, Inc., 842 F. Supp. 713 (S.D.N.Y. 1993); Hasenfus v. Corporate Air Servs., 700 F. Supp. 58 (D.C. 1988); Polo Fashions Inc. v. B. Bowman & Co., 102 F.R.D. 905 (S.D.N.Y. 1984); Zuckerman v. McCulley, 7 F.R.D. 739 (E.D. Mo. 1947); Bible v. Bible, 259 Ga. 418, 383 S.E.2d 108 (1989)).

[12] Id. at 169-70.

> principles of due process that underlie service of process statutes.[13]

Here, the parties agree in their briefing that the process server handed McKissic's nanny, Corr, the summons and complaint. They also agree in the same briefing that Corr did not live in McKissic's home at the time of service. Under Salts and the plain words of the statute, Corr was not "then resident therein" for the purposes of substituted service. That is because she was not "actually living in [McKissic's] home" at the time of service.[14]

We also note that the Salts court indicated that it was not choosing to relax the "resident" requirement to include people like babysitters.[15] For purposes of this analysis, Corr, a nanny employed by the defendant, is sufficiently similar to a babysitter. Corr's mere presence at the home as McKissic's employee does not satisfy the "resident" requirement of RCW 4.28.080(15).[16]

Vuletic argues that Washington only requires substantial compliance with the substituted service requirements. He cites Sheldon v. Fettig to support this assertion.[17] But that case does not do that.

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[13] Id. at 170 (emphasis added).

[14] See Salts, 133 Wn.2d at 170.

[15] Id.

[16] See id. at 169-70.

[17] Appellant's Opening Brief at 7 (citing Sheldon v. Fettig, 129 Wn.2d 601, 919 P.2d 1209 (1996)).

In Sheldon, the supreme court examined the term "house of [defendant's] usual abode" in RCW 4.28.080(15) and concluded that it should be "liberally construed to effectuate service and uphold jurisdiction of the court."[18]

Here, the definition of the term "resident" is at issue, not the term "house of [defendant's] usual abode." As discussed above, Salts defined the former term as a person "actually living in the particular home [of usual abode]" at the time of service.[19] Moreover, this definition of "resident" came ***after*** Sheldon's recognition of "liberal construction" principles.[20] Thus, the definition in Salts is the law.

We also note that the Salts court distinguished Sheldon by characterizing Sheldon as marking the outer boundaries of what the service statutes required.[21] In Salts, the supreme court was not prepared to extend the law beyond the facts of Sheldon.

For these reasons, Vuletic's reliance on Sheldon and her corresponding arguments are not persuasive.

Similarly, Vuletic's reliance on Wichert v. Cardwell is not helpful.[22] There, the supreme court held that service upon a defendant's adult child staying

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[18] Sheldon, 129 Wn.2d at 609 (alteration in original).

[19] Salts, 133 Wn.2d at 170.

[20] Compare id. at 160, with Sheldon, 129 Wn.2d at 601.

[21] Salts, 133 Wn.2d at 166.

[22] Appellant's Opening Brief at 10 (citing Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991)).

overnight at her parents' home was sufficient service upon the defendant parents.[23] But the Salts court distinguished Wichert from that case because "the daughter was related to the defendants, and had actually slept in the home of the defendants the previous night at the time service was accomplished."[24] As in Salts, these facts are not present in this case.

Here, service on a nanny, an employee of the defendant who did not live in the defendant's house and was not related to the defendant, falls outside these boundaries.

Vuletic also points out that Salts was a 5 to 4 decision, and that "the four Justice dissent would have upheld service under facts significantly less compelling than the facts in the instant case." That is irrelevant. The definition of the five-member majority is the law in this state.

Finally, Vuletic cites Brown-Edwards v. Powell to support the assertion that the requirements of substituted service were met.[25] But that case is also distinguishable. There, a process server inadvertently served the defendants' neighbor, who had the same first name as one of the defendants.[26] The neighbor brought the papers to the defendants, and she later signed an affidavit

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[23] Wichert, 117 Wn.2d at 152.

[24] Salts, 133 Wn.2d at 169.

[25] Appellant's Opening Brief at 12-13 (citing Brown-Edwards v. Powell, 144 Wn. App. 109, 182 P.3d 441 (2008)).

[26] Brown-Edwards, 144 Wn. App. at 111.

swearing that she was competent to serve papers and she had served them.[27] Division Three concluded that the neighbor properly served the defendants.[28]

Here, in contrast, Corr did not give the summons and complaint to McKissic. She left the documents on the counter and did not see him pick them up. Nor did she sign an affidavit of service indicating that she had handed the summons and complaint to him. For these reasons, Brown-Edwards is not helpful.

In sum, the trial court properly concluded that there was a "lack of sufficiency of service" by serving Corr. At the time of service, Corr was not "then resident" in McKissic's home.

WAIVER OF SERVICE OF PROCESS DEFENSE

Assuming without conceding that service of process on Corr was insufficient, Vuletic argues that McKissic waived this defense. We disagree.

Washington courts recognize that in certain cases, the common law doctrine of waiver will preclude a defendant from asserting the defense of insufficient service of process.[29] "[A] defendant may waive an affirmative defense if either (1) assertion of the defense is inconsistent with defendant's prior behavior or (2) the defendant has been dilatory in asserting the defense."[30]

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[27] Id.

[28] Id. at 112.

[29] Lybbert v. Grant County, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000).

[30] King v. Snohomish County, 146 Wn.2d 420, 424, 47 P.3d 563 (2002).

"'[T]he doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote the just, speedy, and inexpensive determination of every action.'"[31]

This 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."[32]

Whether a defendant has waived an affirmative defense, such as insufficient service of process, is a fact-specific inquiry.[33]

Prior Behavior

Vuletic first argues that McKissic waived the defense of insufficient service of process because his assertion of the defense was inconsistent with McKissic's prior behavior. She points to the following behavior: (1) McKissic's statements that he wanted to quickly resolve the claims, (2) McKissic's participation in discovery, and (3) McKissic's failure to answer interrogatories related to service. She contends that the doctrine of waiver applies to this case given this prior behavior along with the fact that McKissic did not assert the defense until after the statute of limitations expired. None of these support waiver.

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[31] Id. (alteration in original) (internal quotation marks omitted) (quoting Lybbert, 141 Wn.2d at 39).

[32] Id.

[33] See Lybbert, 141 Wn.2d at 38-39; see also 14 KARL B. TEGLAND, WASHINGTON PRACTICE: CIVIL PROCEDURE § 4:44 (2d ed. 2013) (explaining that whether the doctrine of waiver applies is "fact-specific").

In Harvey v. Obermeit, this court explained three circumstances where courts have found that a party waived a defense based on prior behavior.[34]

First, a party may waive a defense where "the party's actions indicate that it has abandoned the defense."[35] For instance, in King v. Snohomish County, the defendants asserted a "claim filing" defense in their answer, but they "did not clarify the defense in response to [a later] interrogatory," and they "filed a motion for summary judgment that did not mention the defense."[36] Further, the parties engaged in "45 months of litigation and discovery" before making a motion to dismiss based on this defense.

Second, a party may waive a defense "where there are indications the defendant actively sought to conceal the defense until after the expiration of the statute of limitations and 90-day period for service."[37] For example, in Romjue v. Fairchild, the record showed that plaintiff's counsel had written to defense counsel ***before*** the statute of limitations expired and stated that "it was his understanding defendants had been served."[38] At that time, defense counsel

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[34] 163 Wn. App. 311, 323-24, 261 P.3d 671 (2011).

[35] Id. at 323.

[36] Id. (citing King v. Snohomish County, 146 Wn.2d 420, 47 P.3d 563 (2002)).

[37] Id. at 324.

[38] 60 Wn. App. 278, 281-82, 803 P.2d 57 (1991).

knew that plaintiff's counsel had the wrong address for the defendant "yet he chose to say nothing until after the statute of limitation had expired."[39]

Finally, a party may waive a defense "where a party engages in considerable discovery not related to the defense."[40] "However, the mere act of engaging in discovery 'is not always tantamount to conduct inconsistent with a latter assertion of the defense of insufficient service.'"[41] "Instead, the cases indicate that a party must do more than simply conduct discovery."[42]

This court cited Lybbert v. Grant County to show how a defendant engages in "considerable discovery not related to the defense."[43] There, "the defendant acted as if it were preparing to litigate the merits of the case by engaging in discovery" that did not relate to sufficiency of service for nine months.[44] Additionally, the defendant "associate[d] with outside counsel; discuss[ed] the merits of the case and the possibility of mediation with opposing counsel; and [fail]ed to timely respond to the plaintiff's interrogatory asking whether the defendant planned to rely on any affirmative defenses, where a

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[39] Id. at 282.

[40] Harvey, 163 Wn. App. at 324.

[41] Id. (quoting Lybbert, 141 Wn.2d at 41).

[42] Id. at 325.

[43] Id. at 324 (citing Lybbert v. Grant County, 141 Wn.2d 29, 41, 1 P.3d 1124 (2000)).

[44] Id. at 325 (citing Lybbert, 141 Wn.2d at 32).

timely response would have allowed the plaintiff several days to cure defective service."[45]

Here, none of the three circumstances that Harvey outlines are present.

First, the record shows that soon after McKissic asserted the insufficient service of process defense in his answer, he moved to dismiss Vuletic's claims. Thus, unlike King, McKissic did not abandon the defense.[46]

Second, unlike Romjue, there was no evidence that McKissic was concealing the defense or lying in wait for the statute of limitations to expire.[47]

This record shows that the inaccurate return of service was filed on January 6, 2012. Contrary to the evidence later provided, that return of service incorrectly recited that Corr was a resident at McKissic's at the time of service. It appears that neither side was aware of this inaccuracy until Vuletic requested an answer. Vuletic's request came in April, which was ***after*** the statute of limitations expired in March.

More specifically, on April 6, Rosenberg e-mailed Bendele regarding a number of issues, including Bendele's failure to answer the complaint. Rosenberg followed up on this e-mail on April 18. In McKissic's motion to dismiss, he asserts that Bendele did not know about the inaccurate return of service until April 18, when Bendele started working on the answer. Two days later, Bendele filed an answer asserting the service of process defense. There is

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[45] Id. (citing Lybbert, 141 Wn.2d at 31-34).

[46] See King, 146 Wn.2d at 426.

[47] See Romjue, 60 Wn. App. at 282.

nothing in the record to dispute McKissic's assertion that he did not know there was an insufficient service defense until Vuletic requested an answer, which was after the statute of limitations had expired.

Vuletic argues that one of McKissic's statements disputes the assertion. She argues that "at his deposition McKissic testified that he became aware that there was a service of process issue from Bendele or Bendele's office." While McKissic made this statement during his deposition, this statement is not necessarily contrary to the assertion by Bendele. This statement does not indicate ***when*** Bendele learned about the defense. Thus, Vuletic presents no evidence to dispute this assertion.

Because there was no evidence that McKissic was concealing the defense or lying in wait for the statute of limitations to expire, the second circumstance is not present in this case.

The closer question is whether the third circumstance is present: whether McKissic engaged in "considerable discovery not related to the defense."[48]

The record shows that starting in January 2012, the parties' attorneys exchanged phone calls and emails about a settlement package and contact information for medical providers.

The parties' attorneys continued to communicate during February and March. In March, the parties discussed the possibility of scheduling Vuletic's deposition in May. On March 22, Bendele sent Rosenberg medical and

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[48] Harvey, 163 Wn. App. at 324 (citing Lybbert, 141 Wn.2d at 41).

employment stipulations, requests for a statement of damages, interrogatories, and requests for production.

Comparing these undisputed facts to the facts in Lybbert, it appears that McKissic did not engage in "considerable discovery not related to the defense."[49] Although McKissic engaged in some discovery, he did so for approximately three months, unlike the defendant in Lybbert, who engaged in discovery for nine months.[50] Moreover, as McKissic argues, the discovery requests appear to have been "generic and routine." When Bendele discovered the availability of the insufficient service of process defense, he promptly asserted it. Also, unlike Lybbert, McKissic did not associate with outside counsel.[51]

Vuletic argues that "the instant case is a stronger one than Lybbert for application of waiver." Specifically, she points to the fact that on February 2, Vuletic served pattern interrogatories on McKissic, which included the question: "Do you allege insufficiency of process or of service of process? If so, please state the facts upon which you base your allegations." Answers to the interrogatories were due 30 days after service. As in Lybbert, she contends that if McKissic completed the interrogatories by this deadline, she could have perfected service before the statute of limitations expired.[52] But, unlike Lybbert,

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[49] Id.

[50] See Lybbert, 141 Wn.2d at 32.

[51] See id. at 31-34.

[52] See id. at 42.

the record here does not show that parties discussed McKissic missing the deadline for what appears to be "generic and routine" interrogatories.[53]

Moreover, unlike Lybbert, the fact that substituted service was improper was not immediately apparent from the return of service.[54] In Lybbert, the supreme court noted that the county "knew or should have known that the defense of insufficient service of process was available to it" because it was apparent from the face of the process server's affidavit.[55] In contrast, here, the defense was not apparent from the face of Hillard's affidavit. The return of service stated that McKissic's nanny was a resident of his home, and it was not unreasonable for Bendele to assume that the nanny lived in the home. While this argument appears to go more toward the second circumstance for waiver, it is not persuasive given that the defense in this case was more difficult to discover than in Lybbert.

In sum, the undisputed facts show that McKissic did not waive the service of process defense because he engaged in "considerable discovery not related to the defense."[56]

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[53] See id. (explaining that the county "did more than just undertake discovery" because its "detective contacted Lybberts' counsel in order to make certain that the [c]ounty correctly understood the nature and extent of the Lybberts' interrogatories").

[54] See id.

[55] Id.

[56] See Harvey, 163 Wn. App. at 324 (citing Lybbert, 141 Wn.2d at 41).

Vuletic argues that Blankenship v. Kaldor and Butler v. Joy support a finding that McKissic waived his insufficient service of process defense.[57] But those cases are distinguishable.

In Blankenship, Division Three of this court concluded that the defendant waived an insufficient service of process defense.[58] It pointed to three circumstances that supported this conclusion.[59] First, the parties engaged in discovery: both parties propounded interrogatories and requests for production, the defendant deposed the plaintiff, and the defendant took photographs of her residence before asserting the defense.[60] Second, the process server testified that the defendant's father assured the process server that he would turn the legal documents over to his insurance company who also insured his daughter, the defendant.[61] Third, the court noted that if defense counsel would have "seasonably attempted to contact his client, he would have learned she resided in Portland and not at her father's house at the time of service."[62]

Here, in comparison, McKissic appears to have engaged in less discovery than the defendant in Blankenship. He did not take actively collect evidence or

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[57] Appellant's Opening Brief at 22-24, 25, 28 (citing Blankenship v. Kaldor, 114 Wn. App. 312, 57 P.3d 295 (2002); Butler v. Joy, 116 Wn. App. 291, 65 P.3d 671 (2003)).

[58] Blankenship, 114 Wn. App. at 319-20.

[59] Id.

[60] Id. at 319.

[61] Id. at 320.

[62] Id.

depose any witnesses ***before*** asserting the defense. Further, the nanny was not related to McKissic or tied to the case the way the defendant's father was involved with the case in Blankenship. Finally, Bendele appeared to be in communication with McKissic, but this communication would not necessarily have revealed that the nanny did not live with McKissic like it would have revealed the defendant's residence in Blankenship.

Butler is also distinguishable. There, Division Three focused on the fact that the defendant's first pleading was a motion for summary judgment asserting that the plaintiff's complaint presented no issue of fact as to negligence, liability, or causation.[63] This motion made no mention of an insufficient service of process defense.[64] Thus, the absence of this defense in the motion was inconsistent with the later assertion of the defense in the answer.[65]

Here, McKissic's first pleading filed with the court was his answer asserting the affirmative defense of insufficient service of process. Unlike Butler, this pleading was not inconsistent with any other pleading. Thus, the conclusion in Butler is not helpful.

While some of the facts in the cases where waiver applied are also present in this case, those cases are distinguishable when all of the undisputed facts of this case are considered. The trial court did not err when it concluded that McKissic did not waive this defense based on his prior behavior.

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[63] Butler, 116 Wn. App. at 294, 298.

[64] Id. at 294.

[65] Id.

Dilatory in Asserting Defense

Vuletic next argues that McKissic waived the defense of insufficient service of process because he was dilatory in asserting the defense. Specifically, Vuletic contends that McKissic was dilatory because he did not file an answer asserting the defense until three and a half months after the return of service was filed. Because McKissic promptly asserted the defense in his answer after first learning of it, we disagree.

Generally, a defendant is not dilatory in asserting a defense if the defendant asserts the defense in the answer.[66] Further, delay in filing an answer does not necessarily waive a defense.[67]

In French v. Gabriel, the supreme court concluded that the defendant was not dilatory in asserting the defense of insufficient service of process even though he asserted the defense in an untimely answer.[68] In reaching this conclusion, the court highlighted the following: (1) the plaintiff did not ask the defendant to file an answer sooner than he did; (2) when the defendant failed to file a timely answer, the plaintiff could have moved for a default judgment but chose not to do so; and (3) the plaintiff did not object to the untimely answer.[69]

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[66] King, 146 Wn.2d at 424.

[67] See French v. Gabriel, 116 Wn.2d 584, 593-94, 806 P.2d 1234 (1991); Gerean v. Martin-Joven, 108 Wn. App. 963, 973, 33 P.3d 427 (2001).

[68] 116 Wn.2d 584, 593-94, 806 P.2d 1234 (1991).

[69] Id. at 593.

The supreme court explained that "'[w]hile not to be condoned, mere delay in filing an answer does not constitute a waiver of an insufficient service defense.'"[70]

Here, McKissic asserted the defense in an untimely answer. But like French, similar facts support the conclusion that the failure to file the answer when due did not waive the defense. Vuletic could have moved for an order of default or could have objected when McKissic failed to timely answer. Instead, Vuletic asked McKissic to file an answer ***after*** the statute of limitations had already expired. As discussed above, this record indicates that Bendele did not know of the insufficient service of process until ***after*** Rosenberg requested an answer. Once Bendele discovered the defense, he promptly asserted it.

On this record, there is no showing of waiver of the defense by dilatory conduct.

Vuletic argues that French should not control this case because it "predates" waiver cases such as Lybbert and King.[71] While this is true, these latter cases do not overrule French.[72] Rather, these cases distinguish French in their factual analyses.[73] Thus, this argument is not helpful.

Vuletic also contends that "the facts in French show that while the defense had failed to answer within twenty days of service, it did answer more than a year

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[70] Id. at 593-94 (alteration in original) (quoting French, 57 Wn. App. at 222).

[71] Appellant's Reply Brief at 10-14 (citing Lybbert, 141 Wn.2d at 29; King, 146 Wn.2d at 420).

[72] Lybbert, 141 Wn.2d at 44; King, 146 Wn.2d at 425.

[73] Id.

before the statute would run." But the supreme court's discussion regarding the statute of limitations was in response to French's equitable estoppel argument.[74] Further, as noted above, Vuletic did not request an answer until ***after*** the statute of limitations expired. Thus, this argument is not persuasive.

EQUITABLE ESTOPPEL

Vuletic argues that the trial court erred when it granted the motion to dismiss because McKissic should have been estopped from asserting the defense of insufficient service of process. We disagree.

"Equitable estoppel is based on the notion that 'a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon.'"[75] "The elements of equitable estoppel are: '(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.'"[76]

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[74] See French, 116 Wn.2d at 594-95.

[75] Lybbert, 141 Wn.2d at 35 (quoting Kramarevcky v. Dep't of Soc. & Health Servs., 122 Wn.2d 738, 743, 863 P.2d 535 (1993)).

[76] Id. (quoting Bd. of Regents v. City of Seattle, 108 Wn.2d 545, 551, 741 P.2d 11 (1987)).

"Equitable estoppel must be shown 'by clear, cogent, and convincing evidence.'"[77]

In Lybbert, the supreme court explained that the first element of equitable estoppel was met because the defendant "acted in a way that was inconsistent with its eventual assertion of the defense of insufficient service of process."[78] The court stated, "For nine months following its attorneys' appearance in response to the [plaintiffs'] duly filed summons and complaint, the [defendant] gave multiple indications that it was preparing to litigate this case."[79]

Here, unlike Lybbert, the first element of equitable estoppel has not been established. As discussed above, the undisputed facts show that some of McKissic's behavior was inconsistent, but it was not enough given the short time period. Unlike Lybbert, McKissic did not act like he was going to litigate the merits of the case for nine months.[80] Instead, McKissic merely engaged in preliminary discussions and discovery for three months before discovering the defense.

In sum, even after viewing the evidence in the light most favorable to Vuletic, she has not established the first element by clear, cogent, and

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[77] Id. (quoting Berschauer/Phillips Constr. Co. v. Seattle Sch. Dist. No. 1, 124 Wn.2d 816, 831, 881 P.2d 986 (1994)).

[78] Id. at 35-36.

[79] Id.

[80] See id.

convincing evidence. McKissic is not equitably estopped from asserting the insufficient service of process defense.

Having failed to establish the first element, all other factual disputes for the other elements are not material for summary judgment purposes. Accordingly, we do not discuss them further.

DISCOVERY SANCTION

Vuletic argues that the trial court abused its discretion when it implicitly denied her motion for partial summary judgment to strike McKissic's affirmative defenses as a discovery sanction. We disagree.

CR 37(d) authorizes a court to impose a broad range of sanctions for noncompliance with discovery rules. Specifically, a trial may impose sanctions if a party fails to "serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories."[81] Under CR 33(a), "Interrogatories may, without leave of court, be served . . . upon any other party with or after service of the summons and complaint upon that party."

A trial court's decision on sanctions will not be disturbed on appeal absent a clear showing of abuse of discretion.[82]

Here, the trial court did not abuse its discretion when it implicitly denied Vuletic's motion for summary judgment striking affirmative defenses as a

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[81] CR 37(d)(2).

[82] Burnet v. Spokane Ambulance, 131 Wn.2d 484, 494, 933 P.2d 1036 (1997).

sanction. As previously discussed, the affirmative defense was proper and there was no reason to grant the motion to strike it.

Vuletic contends that if McKissic had answered the interrogatories regarding process of service "within the mandated thirty days, plaintiffs would have had three weeks to cure any defect and to effect service upon McKissic." She cites Lybbert to support this argument.[83] But, as Vuletic acknowledges, Lybbert did not address discovery sanctions.[84] She cites the portion of the opinion that addresses waiver.[85] Thus, this argument is not persuasive.

McKissic also argues that the trial court did not abuse its discretion when it did not strike the affirmative defenses as a discovery sanction because Vuletic failed to follow CR 26's meet and confer requirement. Vuletic argues that the "trial court has the inherent power under the appropriate circumstances to grant the requested relief whether or not there had been a CR 26(i) conference." The parties present different interpretations of Amy v. Kmart of Washington LLC[86] and Magana v. Hyundai Motor America[87] to support their respective arguments regarding CR 26's requirements. But, given the discussion above, we need not address these arguments.

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[83] Appellant's Opening Brief at 34 (citing Lybbert, 141 Wn.2d at 42).

[84] Id.

[85] Id. (citing Lybbert, 141 Wn.2d at 42).

[86] 153 Wn. App. 846, 223 P.3d 1247 (2009).

[87] 167 Wn.2d 570, 220 P.3d 191 (2009).

MOTION TO STRIKE AND REQUEST FOR SANCTIONS

After Vuletic submitted her reply brief, McKissic filed a "surreply" that addressed two factual disputes. Vuletic subsequently moved to strike the "surreply" and requested that the court impose sanctions under RAP 18.9. We grant the motion, disregard the unauthorized surreply, and impose sanctions.

Under RAP 10.1(b), the surreply is not authorized. McKissic concedes that he failed to make a motion to allow for additional briefing. Consequently, we disregard this unauthorized brief.

Under RAP 18.9(a), this court may order a party who fails to comply with the rules to pay terms or compensatory damages to any other party who has been harmed by that violation. Based on this rule, we impose sanctions because McKissic failed to comply with RAP 10.1. McKissic shall pay Vuletic the reasonable expenses of preparing and filing the motion to strike.[88] The amount shall be determined by a commissioner of this court following submission to the court of proper proof of such expense.

We affirm the order granting McKissic's motion to dismiss. We also disregard the "surreply" and impose sanctions under RAP 18.9(a) for the necessity to respond to it.

COX, J.

WE CONCUR:

[88] See, e.g., Chevron U.S.A., Inc. v. Puget Sound Growth Mgmt. Hearings Bd., 156 Wn.2d 131, 139-40, 124 P.3d 640 (2005).

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SIMONA VULETIC and MICHAEL HELGESON, wife and husband, Appellants, v. DARRELL R. McKISSIC, Respondent.	)	No. 69515-1-I ORDER DENYING MOTION FOR RECONSIDERATION

Appellants, Simona Vuletic and Michael Helgeson, have moved for reconsideration of the opinion filed in this case on December 16, 2013. The panel hearing the case has called for a response from Respondent, Darrell McKissic. The court having considered the motion and Respondent's answer has determined that the motion for reconsideration should be denied. The court hereby

ORDERS that the motion for reconsideration is denied.

Dated this 27th day of January 2014.

FOR THE PANEL:

Cox, J.

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

SIMONA VULETIC and MICHAEL HELGESON, wife and husband,	)	No. 69515-1-I
Appellants,	)	ORDER DENYING MOTION TO PUBLISH OPINION
v.	)	
DARRELL R. McKISSIC,	)	
Respondent.	)	

Appellants, Simona Vuletic and Michael Helgeson, have moved for publication of the opinion filed in this case on December 16, 2013. The panel hearing the case has considered the motion and has determined that the motion to publish should be denied. The court hereby

ORDERS that the motion to publish the opinion is denied.

Dated this 27th day of January 2014.

FOR THE PANEL:

Cox, J.

Judge

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

THERESA SCANLAN, Appellant, v. KARLIN TOWNSEND and "JOHN DOE" TOWNSEND, wife and husband, Respondents.	)	No. 69106-6-I DIVISION ONE PUBLISHED OPINION FILED: December 30, 2013

SCHINDLER, J. — Service of process is effective under RCW 4.28.080(15) where a person over the age of 18 personally delivers a copy of the summons and complaint to the defendant. Here, the defendant's father personally delivered a copy of the summons and complaint to the defendant, and there is no dispute the defendant received the pleadings and service was within the statute of limitations. Because service was effective, we reverse dismissal of the lawsuit and remand.

FACTS

Teresa Scanlan and Karlin Townsend were involved in a car accident on October 28, 2008. On October 27, 2011, Scanlan filed a personal injury action against Townsend. Scanlan alleged that as Townsend was turning onto 348th Street in Federal Way, she failed to yield and her Ford Taurus hit the 1999 Nissan Maxima Scanlan was driving.

On November 8, 2011, Scanlan asked ABC Legal Services Inc. to locate the current residential address for Townsend. Through a records search, ABC identified an address in Puyallup, Washington and an address in Vancouver, Washington. The Puyallup address "appear[ed] on an SSN[1]/Address trace for the Defendant reported 05/2011" and the United States Postal Service confirmed mail delivery for Townsend at the Puyallup address. Court records showed that Townsend lived at the Vancouver address 2124 NE 155th Street, Vancouver, Washington 98686, "as of 10/04/2010." Clark County tax assessor records listed Townsend's father Charles William Pyne as the owner of real property at the Vancouver address. Washington State Department of Licensing records showed a vehicle registered to Townsend with Pyne listed as the co-owner of the vehicle.

On December 8, an ABC process server attempted to serve a copy of the summons and complaint at the Puyallup address. The resident at the Puyallup address told the process server that he did not know Townsend and she did not live at that address. On December 21, the process server attempt to serve the summons and complaint at the Vancouver address. The declaration of service states that on December 21, the process server delivered two copies of the summons and complaint at "2124 NE 155th Street, Vancouver, Clark County, WA 98686" to a "co-resident, . . . a person of suitable age and discretion who stated they reside at the defendant's/respondent's usual place of abode listed above."[2]

[1] (Social Security number.)

[2] (Emphasis omitted.)

Three months later, Townsend filed a motion to dismiss the lawsuit for lack of service. Townsend submitted her declaration in support of the motion to dismiss. Townsend states she lived at the Puyallup address from March to October 2011 but beginning in October 2011, she has lived in Auburn. Townsend states her parents live at the Vancouver address and she has not "resided there since 1991" or "used this address as my usual abode for any reason since then." The declaration states, in pertinent part:

> 4. . . . I have resided at . . . 6628 - 130th St. Ct. E., Puyallup, Washington 98373 from March 2011 to October 2011. These were rental accommodations. I purchased a home at 6317 Thomas Place SE, Auburn, Washington 98092 and have resided there since October 2011.
>
> 5. I am aware of an Affidavit of Service in this matter indicating that I was served on December 21, 2011 . . . at 2124 NE 155th Street, Vancouver, WA 98686 by leaving the documents with [my father].
>
> 6. This is my parents['] address and I have not resided there since 1991. I have not used this address as my usual abode for any reason since then. I would visit my parents at their address 2-3 times a year. My usual abode at the time of attempted service was my home at 6317 Thomas Place, SE, Auburn, Washington.

In opposition to the motion to dismiss, Scanlan submitted a declaration from an ABC investigator describing the efforts to locate a residential address for Townsend and an amended declaration of service from the process server. The amended declaration states that the man who answered the door at the house in Vancouver identified himself as Townsend's father, told her that Townsend was staying there, and agreed to "take the documents and make sure [Townsend] got them when she gets back." The amended declaration of service states, in pertinent part:

> On the **21st day of December, 2011**, at approximately **4:40 PM**, I arrived at the address of **2124 NE 155TH Street, VANCOUVER, Clark County, WA 98686**. I knocked on the front door and a gray-haired white male . . . opened the door. . . . I asked him if Karlin Townsend was there and he replied she was not. I recall saying I had some paperwork for her

> and asking him if she lived there and he respond[ed] that she was staying there. He was very talkative and friendly, and I do believe I recall him also mentioning Karlin came back to live with us. I told him that I had some paperwork for her and this was the address I was given, I then asked if I could leave the documents with him. He replied he would take the documents and make sure she got them when she gets back. When I asked his name, he put out his hand to shake, said he was her father . . . . I shook his hand as I gave him my name, and then left.
>
> On the **21st day of December, 2011**, at **4:49 PM**, at the address of **2124 NE 155TH Street, VANCOUVER, Clark County, WA 98686**, this declarant served the above described documents upon **KARLIN TOWNSEND** and **JOHN DOE TOWNSEND** by then and there personally delivering **2** true and correct copy(ies) thereof, by then presenting to and leaving the same with **John Doe, CO-RESIDENT/FATHER, a gray-haired white male** . . . , a person of suitable age and discretion who stated they reside at the defendant's/respondent's usual place of abode listed above.[3]

Scanlan argued that by serving Townsend's father at her usual place of abode, service of process on Townsend was effective. Scanlan asserted the amended declaration of the process server showed that Townsend was living with her parents at the Vancouver address on December 21, 2011. Scanlan argued the court should deny the motion to dismiss. In the alternative, Scanlan requested the court conduct an evidentiary hearing or continue the hearing to allow the parties to engage in discovery. The trial court granted the request to continue the hearing to conduct discovery.

During her deposition, Townsend admitted her father delivered a copy of the summons and complaint to her at the end of December 2011 or in early January.

> Q. . . . Did -- did you get documents from your dad?
> A. They told me that they were there.
> Q. Well, when this all occurred, December of 2011, what were you doing? Were you employed at that point?
> A. I was working.
> Q. Okay. And living where?
> A. In Seattle, up here.
> Q. Were you visiting your parents often during that period of time?

[3] (Emphasis in original.)

A. No.
Q. Well, this was just four days before Christmas. Had you -- did you spend --
A. I don't always have holidays off. I don't . . . have every holiday off.
Q. Okay. Do you know if you worked Christmas Day 2011?
A. Yeah, I believe I worked. Yes. I'm sorry.
Q. [The declaration of service] goes on to state, He replied he would take the documents and make sure she got them when she get[s] back. Did he give you those documents?
A. Yes, he did.
Q. Okay. And when did he give you the documents . . . ?
A. I don't know.
. . . .
Q. Okay. So after the first of the year, maybe?
A. Yeah. Yes.
Q. And would you have gone to their house, or would they have come to visit you in Seattle, or what?
A. I can't remember if they came up here. I think I went down there.

Following discovery, Scanlan filed an amended response to the motion to dismiss for lack of service. Scanlan argued the record established Townsend's father agreed to deliver a copy of the summons and complaint to Townsend and that he personally served her before December 30, 2011. In addition to Townsend's deposition testimony, Scanlan pointed to the amended declaration of service that states Townsend's father agreed to "take the documents and make sure [Townsend] got them," and the notice of appearance Townsend filed on December 30, 2011.

In reply, Townsend submitted a declaration from her father. The declaration states that he told the process server that Townsend "did not reside at this address" and lived in the Seattle area. The declaration states, in pertinent part:

1. I am over the age of eighteen, have personal knowledge of and am competent to testify to the following. I am the father of the defendant Karlin Townsend.

> 2. I do recall speaking with a process server who was attempting to locate Karlin at my address which is 2124 NE155th Street, Vancouver, WA.
>
> 3. I recall specifically telling the process server that Karlin was my daughter and that she did not reside at this address. My recollection is that I told the process server that my daughter had her own residence in the Greater Seattle area.
>
> 4. I am aware of a declaration from the Process Server that states that I may have indicated that Karlin had "come back to live with us". I never made such a statement. In fact Karlin had recently purchased her own home in Auburn a few months previous to my conversation with the Process Server and, in any event, has not lived at my address in Vancouver, WA for a long time before the subject accident of October 28, 2008.

Townsend argued her father's declaration established service of process was not effective because "[t]here can be no question that the Vancouver, WA address was NOT the usual abode of Defendant Karlin Townsend (now Emerson) at the time of purported service."[4] Townsend also argued that her father's "accidental service" on her did not constitute valid service of process.

At the hearing on the motion to dismiss, Townsend's attorney stipulated that her father delivered a copy of the summons and complaint to Townsend within the 90-day tolling period.[5] Townsend argued service of the summons and complaint by her father was "fortuitous" and did not comply with the statutory proof of service requirements.

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[4] (Emphasis in original.)

[5] THE COURT: Well, in this case, the proof of service --
[TOWNSEND'S ATTORNEY]: Yes.
THE COURT: -- comes from the Defendant herself when she was asked in her deposition, did your father give it to you.
[TOWNSEND'S ATTORNEY]: Correct.
THE COURT: At first in her deposition she said, you know, he told me it was at his home. And that's not good enough. Right? If he went to her home and left it under the doormat, that wouldn't work. But then she was asked did your father give it to you and she said yes. And that's under -- that's a statement under oath. Yes, I was personally served with these documents.
[TOWNSEND'S ATTORNEY]: Yeah. And we're not disputing that.

The trial granted the motion to dismiss the lawsuit for lack of service. The order states, in pertinent part: "Defendant's deposition testimony that her father gave her the summons and complaint is insufficient proof of service."

ANALYSIS

Scanlan contends the court erred in granting the motion to dismiss on the grounds of insufficient service of process and proof of service. Scanlan asserts service was effective because the undisputed record establishes Townsend's father personally delivered a copy of the summons and complaint to Townsend and proof of service is established by her admission that she received the summons and complaint within the 90-day tolling period. We agree.

An action may be commenced by filing a complaint and serving the summons and complaint on the defendant within 90 days. RCW 4.16.170; CR 3(a). Proper service of the summons and complaint is a prerequisite to the court obtaining personal jurisdiction over a party. Streeter-Dybdahl v. Huynh, 157 Wn. App. 408, 412, 236 P.3d 986 (2010). "[P]roper service of process must not only comply with constitutional standards but must also satisfy the requirements for service established by the legislature." Farmer v. Davis, 161 Wn. App. 420, 432, 250 P.3d 138 (2011). Whether service of process was proper is a question of law that we review de novo. Streeter-Dybdahl, 157 Wn. App. at 412.

RCW 4.28.080 authorizes service of the summons and complaint "by delivering a copy thereof . . . to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein." RCW 4.28.080(15).[6] The plain and unambiguous language of the statute permits service either by delivering a copy of the summons and complaint "to the defendant personally" or by substitute service—leaving a copy with someone of suitable age and discretion then in residence. RCW 4.28.080(15); Weiss v. Glemp, 127 Wn.2d 726, 731, 903 P.2d 455 (1995).

Under CR 4(c), "any person over 18 years of age who is competent to be a witness in the action, other than a party," may serve process. Brown-Edwards v. Powell, 144 Wn. App. 109, 111, 182 P.3d 441 (2008). "Any person" means any person other than a party to the action. Brown-Edwards, 144 Wn. App. at 111.

Proof of service is established either by written acceptance or by the admission of a defendant of the time, place, and manner of service. CR 4(g)(5), (7). CR 4(g) provides, in pertinent part:

> Proof of service shall be as follows:
>
> . . . .
>
> (5) The written acceptance or admission of the defendant, his agent or attorney;
>
> . . . .
>
> (7) In case of service otherwise than by publication, the return, acceptance, admission, or affidavit must state the time, place, and manner of service. Failure to make proof of service does not affect the validity of the service.

[6] We note the legislature amended RCW 4.28.080 in 2011 and 2012; however, the amendments did not affect subsection (15). LAWS OF 2011, ch. 47, § 1; LAWS OF 2012, ch. 211, § 1.

Where the defendant challenges jurisdiction based on insufficient service of process, the plaintiff has the initial burden to establish a prima facie case of sufficient service. Streeter-Dybdahl, 157 Wn. App. at 412. Scanlan contends that as in Brown-Edwards, personal service on Townsend was effective. Scanlan asserts the undisputed record establishes that Townsend's father delivered the summons and complaint to Townsend, that he was qualified to act as a process server under CR 4(c), and that Townsend admitted receiving the pleadings from her father within the 90-day tolling period.

Townsend does not dispute that her father delivered a copy of the summons and the complaint to her, that he was competent to effect service of process, and that she received the pleadings within the 90-day tolling period. Townsend argues that RCW 4.28.080(15) "places a specific and undelegable duty" on Scanlan to personally effect service on her. Townsend also argues Brown-Edwards was wrongly decided and the decision in Gerean v. Martin-Joven, 108 Wn. App. 963, 33 P.3d 427 (2001), controls.

The meaning of a statute is a question of law reviewed de novo. Dep't of Ecology v. Campbell & Gwinn, L.L.C., 146 Wn.2d 1, 9, 43 P.3d 4 (2002). If the statute is unambiguous, we determine legislative intent from the plain language of the statute as written. Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles, 148 Wn.2d 224, 239, 59 P.3d 655 (2002). The plain language of the service statute does not require Scanlan to personally effect service. RCW 4.28.080 states only that "[t]he summons shall be served."[7]

[7] (Emphasis added.)

We also conclude that Gerean does not control and Brown-Edwards does not conflict with the decision in Gerean. In Gerean, the defendant Martin-Joven lived with her parents in Spokane while her spouse was stationed overseas in the military. Gerean, 108 Wn. App. at 967. On December 21, 1996, Gerean and Martin-Joven were involved in a car collision. On December 17, 1999, Gerean filed a personal injury lawsuit against Martin-Joven. Gerean, 108 Wn. App. at 967. On January 2, 2000, the process server left a copy of the summons and the complaint with Martin-Joven's father at his house. Gerean, 108 Wn. App. at 967. Martin-Joven and her spouse had moved to Walla Walla the previous year in January 1999. Gerean, 108 Wn. App. at 967. The next day, the father gave Martin-Joven a copy of the summons and complaint while he was in Walla Walla on business. Gerean, 108 Wn. App. at 967. The trial court dismissed the lawsuit for insufficient service of process. Gerean, 108 Wn. App. at 968.

On appeal, Gerean argued that "by setting in motion a series of events that culminated" in Martin-Joven actually receiving the summons and complaint, she complied with the statutory requirements for service. Gerean, 108 Wn. App. at 969. The court affirmed dismissal of the lawsuit. The court rejected the argument that where the father "fortuitously delivered" the pleadings to Martin-Joven, defective substitute service of the summons and complaint is cured by actual notice. Gerean, 108 Wn. App. at 972.

In Brown-Edwards, the process server mistakenly delivered a copy of the summons and complaint to the defendant's neighbor. Brown-Edwards, 144 Wn. App. at 111. The neighbor delivered the pleadings to the defendant and signed an affidavit of service. Brown-Edwards, 144 Wn. App. at 111. Because the neighbor was qualified to

serve process, personally delivered the pleadings to the defendant, and signed an affidavit of service, the court held service of process complied with the requirements of RCW 4.28.080(15). Brown-Edwards, 144 Wn. App. at 112.

The court in Brown-Edwards addressed its previous decision Gerean and held that Gerean "should be limited to its facts and the particular arguments made there." Brown-Edwards, 144 Wn. App. at 112. In addressing the decision in Gerean, the court points out that as framed by the parties on appeal, the question in that case "was whether the hired process server—and not [the father]—properly served Ms. Martin-Joven," and not whether the father's "act of delivering the summons to [his daughter], by itself, satisfied the statutory requirement for personal service." Brown-Edwards, 144 Wn. App. at 113.

> "Ms. Gerean contends that, by setting in motion a series of events that culminated in Ms. Martin-Joven receiving the summons, she complied with the statute." . . . We concluded that was not enough. . . . And so we did not address whether [the father]'s act of delivering the summons to Ms. Martin-Joven, by itself, satisfied the statutory requirement for personal service.

Brown-Edwards, 144 Wn. App. at 113 (quoting Gerean, 108 Wn. App. at 969).

Further, the court points out that "[t]he plaintiff in Gerean did not argue that the defendant's father was competent to effect service, nor did he file an affidavit of service." Brown-Edwards, 144 Wn. App. at 113. The court in Brown-Edwards states, "Ultimately, we concluded in Gerean that service was insufficient because, while the hired process server's act may have resulted in actual notice, it was not the required 'service.' " Brown-Edwards, 144 Wn. App. at 113.

Here, there is no dispute that Townsend's father was competent to effect service and that he personally delivered a copy of the summons and complaint to Townsend within the statute of limitations. Townsend's deposition testimony also established proof of service under CR 4(g)(5) and (7). See also Hamill v. Brooks, 32 Wn. App. 150, 151-52, 646 P.2d 151 (1982) ("The time [of service] was established through [the defendant's] deposition and the affidavit of [the plaintiff]'s attorney . . . . [The defendant's] admission is the best possible evidence that he received the summons and complaint.").

Because the undisputed record establishes effective service of process, we reverse the order of dismissal and remand.

WE CONCUR: