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No. 69515-1-1

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

SIMONA VULETIC and MICHAEL HELGESON,
husband and wife,

Appellants

v.

DARRELL R. McKISSIC,

Respondent

RESPONDENT'S BRIEF

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1. Did the trial court properly grant McKissic's 12(b) Motion to Dismiss for improper service of process when it held that Vuletic's service of process on McKissic was insufficient at his usual place of abode when the process server hand-delivered the summons and complaint to his children's part-time nanny, who is not a family member and has never resided therein?

2. Did Dr. Veultic fail to meet her burden to ensure that service of process was perfected by: (a) never following up with the Deputy Sheriff to discuss or confirm the facts of his Return of Service; (b) never asking for an Answer or moving for default before the statute of limitations ran on March 26, 2012; and (3) never moving to compel interrogatory responses, even though the statute of limitations was about to run.

3. Did the trial court properly hold McKissic did not waive the affirmative defense of insufficient service of process when he only issued general, routine, and prefunctory discovery at the invitation of Vuletic and when he promptly informed Vuletic of insufficiency of process immediately upon discovering that Dr. Vueltic's agent, the Deputy Sheriff hired to effectuate service, lied in his Return of Service?

4. Did the trial court properly hold that McKissic is not estopped from asserting the affirmative defense of insufficient service of process when McKissic did not "lie in wait" or otherwise deceive Vuletic and Vuletic did not reasonably rely upon any allegedly deceptive acts of McKissic?

5. Did the trial court act properly in not striking the affirmative defense of insufficient service of process as a discovery sanction when: (a) CR 33 does not require a response until service occurs; (b) Vuletic never requested or arranged for a discovery conference; (3) Dr. Veultic never requested responses to discovery; and (4) Dr. Veultic never filed a motion to compel?

II. STATEMENT OF THE CASE

A. Underlying Cause of Action

Petitioners Dr. Simona Vuletic and Michael Helgeson (herein referred to collectively as "Vuletic") and Respondent Darrell McKissic were involved in a side-swipe automobile accident on March 1, 2009 in Seattle, Washington. Soft-tissue injuries were claimed by Dr. Vuletic. Helgeson claims loss of consortium. McKissic contended that driver Helgeson was at fault. Suit was filed nearly three years later.

B. Attempted Service

The statute of limitations expired on March 1, 2012. Vuletic did not file suit until December 27, 2011—approximately 65 days before the end of the statutory period. Vuletic did not attempt service until January 3, 2012—approximately 58 days before the end of the statutory period. The 90 day period to serve process on McKissic, and have it date back pursuant to RCW 4.16.170, expired on March 26, 2012.

Vuletic hired Sheriff Mark Hillard to serve process on McKissic. (CP 5). On January 3, 2012, Sheriff Hillard knocked on McKissic's front door at approximately 8:05 AM in the morning. (CP 5). He was greeted by McKissic's nanny, Jill Corr, who was preparing two of McKissic's children for school, one of whom is a special needs student. (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 Ms. Corr to 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. <u>Facts Regarding Sheriff Hillard</u>

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. Facts Regarding Ms. 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 in the morning and from 2:30 PM until 6:30 PM in the afternoon. (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 are once in the fall of 2011 and once in the spring of 2012. (CP 105, 108). She cared for the 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 with her boyfriend where she resides, receives mail, keeps personal items, and pays utility bills. (CP 104).

E. Facts Surrounding the Attorneys and the Pleadings

Subsequent to Sheriff Hillard leaving the Summons and Complaint with nanny Corr, McKissic's insurance carrier retained counsel to

represent him. 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). The exchange of written discovery was routine, rote, and perfunctory.

Vuletic did not: (1) request an Answer to 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).

Despite the fact Vueltic filed their Complaint only 65 days before the statute of limitations, they chose to move forward in the same manner as nearly every other civil litigation filed in King County Superior Court

in the state of Washington. Critically, Plaintiff failed to take steps necessary to ensure service of process was proper despite the fact that: (a) they filed only 65 days before the statute of limitations; and (b) Washington law firmly puts the burden of ensuring service of process is proper upon the plaintiff.

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).

Up 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.

F. McKissic's Counsel Promptly Notifies Vuletic's Counsel of Defective Service

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 Verify Service or Confirm No Service of Process Issue would be Raised

As Vuletic's opening brief demonstrates, Vuletic took no steps at all to contact Deputy Sherriff Hillier to verify the facts contained in his Service of Process prior to March 26, 2012. Not a single phone call or an email was made despite the fact that the statute of limitations ran in less than 60 days. When McKissic's paralegal contacted Deputy Sherriff Hillier, he freely admitted the statement on the Certifice 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. SUMMARY OF ARGUMENT

There are three primary reasons why Plaintiff failed to serve

Defendant prior to the statute of limitations:

1. Plaintiffs waited until shortly before the statute of limitations before filing suit (65 days) and attempting service of process (58 days);

2. The process server Plaintiffs hired knew that he did not properly serve Defendant, yet filed a false Return of Service; and

3. Plaintiffs could have taken, but chose to not take steps necessary to ensure the purported service of process was proper before the statute of limitations ran.

Now, in an effort to shift responsibility, the plaintiffs attempt to blame the defendant for not discovering Plaintiffs' failure in the short time before the statute of limitations ran. Washington law states that the burden of effectuating service lies solely with the plaintiffs. Because an Answer to Plaintiff's Complaint and responses to interrogatories are not required until service occurs (CR4(a)(2), 12 and 33(a)), as a matter of logic it is improper to fault a defendant for not responding when no service has occurred. Moreover, Washington courts have never been receptive to the argument that "it was the legal messenger's mistake."

Therefore, responsibility for not effectuating, and affirmatively confirming, service of process before the statute of limitations lies with the plaintiffs. Any further action the plaintiffs may wish to pursue should be directed against their process server, not the defendant.

Notwithstanding, McKissic does not deny that Vuletic presents a sympathetic set of facts. Service of Process was very nearly perfected and she was deceived by her agent, the Deputy Sherriff hired to serve

McKissic. In such situations, as is often the case, Justice Holmes has provided wise insight and guidance as follows:

> Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend.

HOLMES, J., dissenting in *Northern Securities Co. v. United States*, 193 U.S. 197, 400-01 (1904).

This axiom, which is often stated as "Good facts make bad law," reflects the fact that when judges approach a sympathetic set of facts they may be inclined to make a ruling which, although satisfying their sense of justice in the case under consideration, results in significant subsequent injustice. RCW 4.28.080 is the law of Washington. If followed, a holding supporting Vuletic's argument would eviscerate the statute of its remaining purpose and meaning. And that should only be done by an act of the legislature.

IV. ARGUMENT

A. The Court Should Affirm Dismissal Because Personal Service On Non-Resident Part-Time Nanny Is Insufficient

1. Service of Process Requirements

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.*"

The service of process requirement is taken very seriously in Washington and the appellate courts apply a stringent scrutiny. For example, in Vukich v. Anderson, 97 Wn. App. 684, 985 P.2d 952 (1999), service upon a tenant living in a home owned by the defendant was held ineffective. In Scott v. Goldman, 82 Wn. App. 1, 917 P.2d 131 (1996), service upon a person holding power of attorney for the defendant was held insufficient. In Gross v. Evert-Rosenberg, 85 Wn. App. 539, 933 P.2d 439 (1997), service at a home rented to defendant's daughter and son-in-law was held insufficient. In Salts v. Estes, 133 Wn. 2d 160, 943 P.2d 275 (1997), service upon a neighbor in defendant's home, checking on defendant's home while defendant was on vacation, was held insufficient.

2. Service was Not Made on A Resident of McKissic's Usual Place of Abode As Required By RCW 4.28.080(15)

If service papers are left at the defendant's place of abode, but are left with a person who does not reside there, service is insufficient. Salts v. Estes, 133 Wn.2d 160, 943 P.2d 275 (1997) (service upon neighbor in defendant's home, checking on defendant's home while defendant was on

vacation, held insufficient). Under rare circumstance, some courts have held that a close relative of a defendant may qualify as a "resident" under the service statute. Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991) (service was sufficient upon defendant's adult child who was overnight resident in, and sole occupant of, defendant's resident). This has been allowed where the person receiving service papers was: (1) a close relative of the defendant; (2) an overnight resident at defendant's usual house of abode at the time of service; and (3) in sole possession of the defendant's house of abode. Wichert at 152. However, Washington courts have made it clear that this method of service marks the "outer boundaries" of substitute service and have refused to stretch these boundaries any farther. Salts at 165-166.

a. Service on Nanny Corr Does Not Fall Within "Outer Boundaries" of Sufficient Service

This case is unlike Wichert which marks the "outer boundaries" of sufficient substitute service. In Wichert, plaintiff served defendants at their home while they were out of state. Wichert at 150-152. The process server left service papers with defendant's 26 year-old daughter who had stayed overnight at defendant's home the night before and had stayed there in the past as well. Id. The Supreme Court held that:

> [s]ervice upon a defendant's adult child who is an overnight resident in the house of defendant's usual abode, and then

the sole occupant thereof, is reasonably calculated to accomplish notice to the defendant.

Wichert at 152.

Thus, Wichert creates a three part test:

(1) was the person served an adult child of the defendant (close family member);

(2) was the person served an overnight resident at the time service; and

(3) was the person served the sole occupant of the family home.

Unlike the person accepting service in Wichert, nanny Corr in this case is not a close relative of the defendant, McKissic. Unlike the person accepting service in Wichert who had spent the night at defendant's home prior to service, nanny Corr had not stayed overnight at the McKissic home and, instead, had arrived there shortly before service was attempted. Finally, nanny Corr was not the sole occupant of defendant's home at the time of service. In fact, McKissic was upstairs taking a shower at the time of service. For these reasons, service on nanny Corr is insufficient. All the process served needed to do was ask nanny Corr to have McKissic come to the front door.

b. Service Insufficient When Made On Employees and Others Who are Merely "Present" in Defendant's Home.

This case is similar to the case of Salts in which the Supreme Court held that service on employees and others who are merely present or who

have a fleeting occupancy of defendant's home is insufficient. In Salts, plaintiff's process server went to the defendant's home and left papers with a woman named Mary TerHorst who was inside defendant's home. Salts at 163. Ms. TerHorst was neither married to nor related to the defendant. Id. Ms. TerHorst was merely looking after the defendant's home for a two-week period while the defendant was out of town. Id. She visited the home to feed the dog, bring in the mail, and take care of similar matters. Id. Ms. TerHorst had never lived at defendant's home. Id.

The trial court held that service was insufficient and dismissed the lawsuit. The Court of Appeals affirmed the trial court's decision. The Supreme Court agreed and distinguished this case from cases in which service was made on a relative of defendant who had stayed overnight at defendant's home. Id. at 168-169. Citing to other cases involving service on janitors, secretaries, and housekeepers, the Supreme Court held that "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 facts of the present case are similar to the facts in the Salts. Just as the person who accepted service in Salts was at the home temporarily to care for the house, nanny Corr was only at the McKissic home temporarily to care for defendant's children and take them/pick them up from school. Just as the caretaker in Salts, nanny Corr is not

related to the defendant and had not resided overnight at the defendant's home at the time of service. As in Salts, service in this case in insufficient.

Vuletic also cites to Brown-Edwards v. Powell, 144 Wn.App. 109, 182 P.3d 441 (2008). However, Brown-Edwards concerned service upon a next door neighbor (Shirley Vertress) who personally delivered the summons and complaint to the defendant (Shirley Powell). Service was deemed proper because the court determined that Shirley Vertress met the criteria for a process server and that she properly handed the summons and complaint to the defendant. Here, Vuletic acknowledges that nanny Corr did not personally hand the summons and complaint to McKissic as required by RCW 4.28.080(15). Brown-Edwards is inapplicable here.

3. Mistake of Process Server Is Not Valid Excuse

When misunderstandings occur due to language barriers or cultural differences, as always, it is the responsibility of the plaintiff, not the defendant, to overcome such challenges. 15A Tegland and Ende, Washington Practice, § 15.6 (2011-2012), at p. 218; see, Streeter-Dybdahl v. Nguyet Huynh, 157 Wn. App. 408, 236 P.3d 986 (2010), review denied, 170 Wn. 2d 1026, 249 P.3d 182 (2011).

> Further, the cases make it clear that it is the plaintiff's responsibility to see that the proper steps are taken. 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, § 15.3 (2011-2012), at p. 216. Here, the legal messenger knew that nanny Corr was not a residence and that residency was a requirement for "abode service" to be valid. His filing a false Return of Service deceived the attorneys and parties involved. Under no circumstance should a misrepresnetation be allowed to stand as proper service of process, unless the defendant was complicit in that misrepresentation and "laid in wait" fostering such misrepresentation. Defendant did no such thing—as soon as defendant learned of the process server's misrepresentation it personally notified plaintiff's attorney to schedule a telephone conference.

B. The Court Should Affirm Dismissal Because McKissic Did Not Waive The Affirmative Defense Of Improper Service

The affirmative defense of insufficient service of process may be waived when (1) the defendant's assertion of the defense is inconsistent with the defendant's previous behavior, or (2) the defendant's counsel has been dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000).

1. Purpose of "Waiver"

"Prior to 2000, a defendant who asserted a timely objection to personal jurisdiction pursuant to CR 12 was permitted to engage in discovery and other pretrial proceedings without waiving any objection.

Thus, the defendant was permitted to file the actual motion to dismiss later, any time prior to trial." 15A Tegland and Ende, Washington Practice, § 10.21 (2011-2012), at p. 194; see, Clark v. Falling, 92 Wn. App. 805, 965 P.2d 644 (1998); Davidheiser v. Pierce County, 92 Wash. App. 146, 960 P.2d 998 (Div. 2 1998). In 2000, however, the Supreme Court held that a defendant could waive objection to service of process by engaging in discovery and settlement negotiations. Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 1 P.3d 1124 (2000). The change from the pre-2000 case law to the present thinking is premised upon the court's disapproval of a defendant calculating to deceive the plaintiff by "lying in wait" and notifying the plaintiff of the deficiency in service of process only after the statute has expired.

In Lybbert the Supreme Court clarified this policy and concluded as follows:

> We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed. Apropos to the present circumstances of this case, one court has acknowledged that
>
> > [a] defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of

> limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect.
>
> *Santos*, 902 F.2d at 1096.

Lybbert v. Grant County, State of Wash., 141 Wn.2d 29, 40, 1 P.3d 1124, 1130 (2000). (Underline added.) At the heart of the Lybbert decision is the concern that procedural rules will be compromised or subverted by parties who engage in delay tactics, who "lie in wait," or adopt a "trial-by-ambush" style of advocacy. Id. at 39-40.

Critical then, to the application of waiver in the service of process context, is the phrase "in appropriate circumstances." Waiver is appropriate only when a defendant deceives a plaintiff by lying in wait. The doctrine of waiver is "designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage." King v. Snohomish County, 146 Wn.2d 420, 47 P.3d 563 (citing Lybbert v. Grant County, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000)).

2. McKissic's Assertion of Insufficient Service Defense Is Not Inconsistent With Prior Behavior.

a. Issuing Generic and Routine Discovery Is Not "Extensive Discovery" Tantamount to Waiver

The Washington Supreme Court has held that "engaging in discovery 'is not always tantamount to conduct inconsistent with a later

assertion of the defense of insufficient service.' " O'Neill v. Farmers Ins. Co. of Washington, 124 Wn. App. 516, 139, 125 P.3d 134 (2004), citing Lybbert, 141 Wash.2d at 41, 1 P.3d 1124 (quoting Romjue v. Fairchild, 60 Wash.App. 278, 281, 803 P.2d 57, rev. denied, 116 Wash.2d 1026, 812 P.2d 102 (1991)). Rather, a defendant acts inconsistently with prior behavior so as to waive the affirmative defense of insufficient service where he engages in significant expenditures of time and money in litigating the case. Blankenship v. Kaldor, 114 Wn. App. 312, 57 P.3d 295 (2002); King v. Snohomish County, 146 Wn.2d 420, 47 P.3d 563 (2002).

It is important to note that Blankenship is a Division III case that is merely persuasive to a Division I court. State v. Brooks, 157 Wn.App. 258, 236 P.3d 250 (2010). Vuletic cites the Blankenship decision for a proposition that appears to exceed and go beyond the Supreme Court holding in Lybbert and appears to argue that Blankenship mandates a waiver of service of process simply upon a defendant issuing standard, generic, and perfunctory interrogatories. That is an inaccurate reading of the case and it is not binding upon this court. To the contrary, the Lybbert decision is firmly based upon the concern that procedural rules will be compromised or subverted by parties who engage in delay tactics, who "lie in wait," or adopt a "trial-by-ambush" style of advocacy. Lybbert v.

Grant County, State of Wash., 141 Wn.2d 29, 39-40, 1 P.3d 1124, 1130 (2000).

In Blankenship, plaintiff attempted to serve the minor defendant by leaving service papers with her father at her father's house. Blankenship 314-315. The defendant had previously lived with her father but at the time of service she was living in Oregon. Id. Without answering the complaint, defendant's counsel served interrogatories and requests for production, took the deposition of the plaintiff, and took photographs of her residence. Id. The Blankenship Court held that by engaging in extensive discovery requiring "significant expenditures of time and money," defendant waived the service of process defense.

In the case of King, the plaintiff filed a lawsuit against a county without first filing a claim with the county as required by local code. King, 146 Wn.2d at 423. The defendant answered the complaint and raised affirmative defenses including the defense of "claim filing." Id. The parties then 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

more time to answer the complaint, McKissic made no such effort to delay proceedings or conceal facts from Vuletic.

In Romjue, the plaintiff filed a complaint nearly one month before the statute of limitations ran. Romjue at 279-280. The process server left the service papers at the defendant's mother's home where defendant was not a resident. Id. The defendant appeared in the suit and served plaintiff with interrogatories, requests for production, and a request for statement of damages. Id. Plaintiff also sent defendant a letter stating "it is my understanding that the defendants have been served." Id. at 281. Defendant did not respond to this letter but instead filed a motion to dismiss for insufficient service two weeks after the 90-day tolling period had expired. Id. at 281-282. The trial court granted the motion.

On appeal, the Appellate Court reversed and held that the defendant waived the defense of service of process. Id. at 278. Most critical to the court's decision was the fact that the defendant remained silent in response to plaintiff's letter even though he had knowledge of the defective service. Id. at 282. (Underline added.)

Here, there is no evidence to suggest this was the case. Unlike the plaintiff in Romjue who communicated to defendant regarding the issue of service, Vuletic made no such effort to contact McKissic to inquire as to the issue of service. Unlike the defendant in Romjue who remained silent

while knowing plaintiff was relying on defective service, neither McKissic nor his counsel were aware of the defective service until after the 90-day tolling period had expired. Defendant promptly notified plaintiff on April 20, 2012, two days after first discovering the service issue on April 18.

3. McKissic Was Not Dilatory In Asserting Defense

The affirmative defense of insufficient service of process may be waived when a defendant is dilatory in asserting the defense. Lybbert at 35. The defense of service of process is not waived merely because a defendant does not alert a plaintiff to the defective service before the 90-day tolling of the statute of limitations expires. Harvey v. Obermeit, 163 Wn. App. 311, 326-327, 261 P.3d 671 (2011).

a. McKissic Had No Duty to Answer Complaint When Service Is Insufficient

McKissic's failure to file a timely answer does not result in a waiver of the service of process defense because he had no duty to provide one. A defendant's answer to a complaint is not due and will not be due until 20 days after he served with process.

CR 4(a)(2) states:

> Unless a statute or rule provides for a different time requirement, the summons shall require the defendant to serve a copy of his defense within 20 days after the service of summons, exclusive of the day of service. ...

CR 12 states:

> (a) When Presented. A defendant shall serve his answer within the following periods: (1) Within 20 days, exclusive of the day of service, after the service of the summons and complaint upon him pursuant to rule 4…
>
> (Underline added.)

Washington's civil rules do not require a defendant to provide an Answer to a plaintiff's Complaint until after he has been served with a summons and complaint. Here, service has never occurred. Therefore, Defendant has never been obligated or required to answer Plaintiffs' Complaint.

CR 33 is similar and states:

> (a) … Interrogatories may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party with or after service of the summons and complaint upon that party.
>
> (Underline added.)

With respect to defendants (i.e. any other party), interrogatories are not required to be answered until after service of process is perfected. The rule is completely different with respect to plaintiffs. Plaintiffs must respond to interrogatories after a complaint is filed even though service of process has not occurred. Vuletic's opening brief claims McKissic selectively comported with the civil rules when convenient. (App. Op. 33). However, it is the civil rules, not McKissic, that place different burdens

upon plaintiffs and defendants. CR 33 requires a plaintiff to answer interrogatories when no jurisdiction over the defendant exists (before service of process is perfected.) Vuletic has presented no authority to the contrary—the subject civil rules are plainly written.

b. Service of Process Defense Is Not Waived by Untimely Answer—French Case

Even if a defendant were required to answer discovery despite insufficient service, Washington Courts are clear that the defense of service of process is not waived merely because a defendant does not timely file an answer. French v. Gabriel, 116 Wn.2d 584, 593-595, 806 P.2d 1234, 1239 - 1240 (1991).

The French opinion is illustrative of Washington courts' long-standing dilatory conduct analysis in the waiver of service of process context. There, the plaintiff, French, argued that the defendant, Morris, delayed filing an answer and such dilatory conduct supported a waiver of a jurisdictional defense based on insufficient service. French cited a number of cases for the general proposition that the defense of lack of personal jurisdiction may be waived. The court pointed out, however, that each of those cases was distinguishable because the party either invoked or benefited from the court's jurisdiction before raising the defense of lack of personal jurisdiction. See, Kuhlman Equip. Co. v. Tammermatic, Inc., 29

Wn.App. 419, 628 P.2d 851 (1981); Bauer v. Bauer, 5 Wn.App. 781, 490 P.2d 1350 (1971); In re Russell, 54 Wn.2d 882, 344 P.2d 507 (1959); In re the Estate of Stoops, 118 Wn. 153, 203 P. 22 (1922).

The French court stated that once the defendant was late in filing his answer, the plaintiff could have moved for a default judgment pursuant to CR 55(a), but he chose not to. In conclusion, the Supreme Court held:

> Nonetheless, we agree with the Court of Appeals that "[w]hile not to be condoned, mere delay in filing an answer does not constitute a waiver of an insufficient service defense.

French, 57 Wn.App. at 222, 788 P.2d 569.

Here, McKissic's conduct is consistent with the conduct of the defendant in the French decision. Although McKissic did not timely file an answer, Vuletic never: (1) requested an answer prior to the running of the 90-day tolling period; (2) move for default; or (3) request or seek to compel discovery responses. In addition, McKissic never invoked or benefited from the court's jurisdiction. McKissic never issued a subpoena or conducted a deposition. Rather, he merely appeared in the case so as to avoid a default judgment and then served only perfunctory and generic discovery responses, which CR 33 specifically allows to occur prior to service of process. Furthermore, McKissic only discovered the deficiency of service after the expiration of the 90-day tolling period.

In this case, there simply is no indicia of "lying in wait" or deceit on the part of McKissic. This is a critical element and requisite finding of the Washington line of cases holding that it is possible for a defendant to waive his due process rights and the affirmative defense of insufficiency of process. Such stringent scrutiny is applied because absent proper service, a defendant's right to due process has been violated. Consequently, waiver is not an appropriate remedy in this matter, especially given the fact that the process server knew that his attempted service was not effective. Misrepresentation should never be allowed to serve as the basis for service of process. Vuletic's remedy should now lie against the process server who knowingly filed a false Return of Service.

c. Service of Process Defense Is Not Waived by Untimely Answer—Gerean Case

In Gerean v. Martin-Joven, 108 Wn.App. 963, 33 P.3d 427 (2001), the plaintiff served the defendant's father at a place that was not the defendant's usual place of abode. Id. at 967-968. According to the process server, the father stated that the daughter would be back later and accepted the service paper. Id. The defendant's counsel filed a notice of appearance reserving all affirmative defenses. Id. Defendant's counsel also requested a copy of the return of service, which was never provided but was filed with the court. Id.

intentional evasion by Huynh. Rather, the record indicates that it was a result of the process server's mistaken belief that he personally served Huynh and Streeter–Dybdahl's failure to correct that error before the service deadline."

Here, as discussed above, the process server's conduct was not mere "mistaken belief" as was the case in Streeter-Dybdahl. It went much further. The process server knew service was improper when he handed nanny Corr the papers and, nevertheless, filed a false Return of Service. If waiver is prohibited when the process server was mistaken like in Streeter-Dybdahl, plaintiff waiver argument should most certainly not be allowed when the process server had actual knowledge of the insufficiency of service and nevertheless filed a false Return of Service. As was the case in Streeter-Dybdahl, Defendant did not intentionally deceive or evade plaintiff regarding service of process. In Washington, it is plaintiff's burden to ensure service is proper. 15A Tegland and Ende, Washington Practice, § 15.6 (2011-2012), at p. 218.

C. The Court Should Affirm Dismissal Because McKissic's Behavior Does Not Warrant Estoppel

The doctrine of equitable estoppel is based on the notion that a party who makes a representation should be held to that representation when another relies in good faith with detrimental results. Lybbert at 35.

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, and (3) injury to the relying party from allowing the first party to change or repudiate the prior admission, statement, or act. Id.

1. No Estoppel Where Misrepresentations Were Made By Third Party

Courts have held that the doctrine of equitable estoppel does not bar a defendant from raising the defense of insufficient service where the misrepresentation was made by someone other than the defendant. Gerean, 108 Wn. App. 963.

In Gerean, the process server attempted to serve a defendant at her father's residence. Id. at 967-8. The process server claimed that the father misled him into believing the defendant lived at the residence when the father stated that the daughter would return later in the day when, in fact, the daughter actually lived in a different city. Id. The Court refused to apply the doctrine of estoppel to bar the service of process defense. The Court reasoned that "[the defendant] was not estopped from acting inconsistently with a statement by a third party." Id. at 974.

As in Gerean where the misrepresentation regarding service was made by a third party (the defendant's father), here, it was Vuletic's own process server who made the misrepresentation regarding service. Deputy

Sheriff Hillard left the service papers with nanny Corr even though he knew she was not a resident in McKissic's home. Furthermore, he knowingly signed a false Return of Service to state that he had served a resident in McKissic's place of usual abode. (CP 100-101). McKissic should not be estopped from asserting the service of process defense merely because it contradicts a representation made by Vuletic's own process server.

2. No Estoppel Where Defendant Remains Silent or Fails To Complain of Defective Service

The plaintiff in Gerean also argued that estoppel applied because she "reasonably perceived [defendant's] appearance in the action and her failure to complain about the manner of service as a representation that all was well." However, the Court disagreed and held:

> [e]stoppel will not lie where both parties are in a position to determine the law and the facts. *Lybbert*, 141 Wash.2d at 35, 1 P.3d 1124. Nothing in the record hints that [plaintiff] made any attempt to find out [defendant's] current address or that [defendant] was not available to receive properly tendered service.

Gerean at 974.

In this case, the fact that McKissic did not alert Vuletic to the deficiency of service does not estop him from asserting such a defense. Here, both parties had equal access to the law and the facts. There is no indication that Vuletic made any attempt to question the process server

and confirm that service was properly made. Vuletic could easily have done so. Furthermore, Vuletic should have been vigilant as to the issue of service of process considering she had less than 90 days to effectuate service. When she noticed that service papers were left with a nanny rather than a person with the same last name as defendant, she should have questioned her process server further to confirm that the nanny was indeed a resident. She should have moved for default if no answer was filed.

D. The Court Should Affirm Dismissal Because McKissic's Failure to Respond to Discovery Does Not Warrant Sanctions

1. No Duty to Respond To Discovery Where Service Is Insufficient

As with a defendant's answer to complaint, a defendant's answers to a plaintiff's interrogatories are not due and will not be due until after being served with process.

CR 33(a) states:

> Interrogatories may, without leave of court, be served upon the plaintiff after the summons and a copy of the complaint are served upon the defendant, or the complaint is filed, whichever shall first occur, and upon any other party [i.e. Defendant] with or after service of the summons and complaint upon that party.

(Underline added.)

Washington's civil rules do not require a defendant to answer interrogatories until he has been served with a summons and complaint.

Here, service never occurred. Therefore, Defendant was never obligated or required to answer Vuletic's interrogatories (or Vuletic's Complaint).

2. No Support for Imposing CR 37 Discovery Sanctions

Even if McKissic were required to respond to Dr. Vueltic's discovery requests, Vuletic's argument that McKissic's affirmative defense should be dismissed as a discovery sanction is unsupported by Washington law. Importantly, McKissic's counsel was unable to find any case law directly on point that would support Vuletic's CR 37 argument and the Vuletic has cited none. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171, 1179 (1978).

While not directly on-point, Vuletic cites to the Lybbert decision to support her argument that defense of service of process should be dismissed as a discovery sanction. This argument fails for two reasons.

First, the facts of this case are distinct from the facts of Lybbert. The conduct of the defendant in Lybbert went well beyond merely failing to respond to discovery requests by a few weeks as was the case here. In Lybbert, the defendant participated in the case and litigated it for nine months. Id. at 32-34. The defendant's counsel associated with an outside law firm, which presumptively involved contract and term negotiations

with the associating counsel, and filed a notice of association of counsel. Id. Critically, the defendant "did more than just undertake discovery. ... its [employee] contacted [plaintiff's] counsel in order to make certain that the [defendant] correctly understood the nature and extent of the [plaintiff's] interrogatories." Id. at 42.

Secondly, the Court's decision to bar defendant's service of process defense in Lybbert was not based upon CR 37. The Court barred defendant from asserting the defense of service of process based upon the doctrine of estoppel for actively engaging in discovery and litigation for a period of nine months rather than as a sanction for untimely discovery.

3. Vuletic Failed To Follow CR 26 "Meet and Confer" Requirement

King County LCR 37 states:

(a)-(c) [Reserved].

> (d) Failure of Party to ... Serve Answers to Interrogatories... If a party ... fails ... (2) to serve answers or objections to interrogatories submitted under rule 33, after proper service of the interrogatories ... the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others, it may take any action authorized under CR 37.

(e) Conference of Counsel . See CR 26 (i)

CR 26(i) states:

> **Motions; Conference of Counsel Required.** The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with

> respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. ... Any motion seeking an order to compel discovery or obtain protection shall include counsel's certification that the conference requirements of this rule have been met.

Here, Vuletic did not request answers to interrogatories or request a discovery conference as required by CR 26. To be clear, Vuletic have not merely failed to certify that a discovery conference occurred, they have failed to ever conduct the requisite discovery conference. Consequently this court may not entertain any motions or issue any sanctions with respect to CR 26 through 37. Defendant has been unable to find any case law supporting the plaintiffs' CR 37 argument and the plaintiffs have cited none. "Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none." State v. Young, 89 Wn.2d 613, 625, 574 P.2d 1171, 1179 (1978).

At the trial court level, Vuletic accused McKissic's counsel of misreading and misstating the holding of Amy v. Kmart of Washington LLC, 153 Wn. App 846, 223 P.3d 1247 (2009). Counsel has reread the decision and stands by its statements made to the trial court during oral argument. That is, Amy concerns "a defective CR 26(i) certification," not

a total absence of a CR 26 conference. The Amy decision states as follows:

> Kmart next argues that the court erred by deciding that it could hear the motion to compel and to supplement discovery because Amy's CR 26(i) certification was allegedly defective. We hold that the trial court correctly exercised its discretion to hear this motion.

Id. at 860, 1254. (Underline added.) Further, Footnote 35 states:

> Actually, the plaintiff's attorney does not certify that he has 'met' with the defense attorney. However, ***because the defense has not objected to this requirement being met*** and that the attorneys are over 100 miles apart ***the court deems this requirement waived.***

Id. (Underline added.)

The court went on to state:

> The trial court did not demonstrate an erroneous view of CR 26(i) by deciding to hear this discovery motion. Kmart argues that Amy's CR 26(i) certification is facially deficient. Specifically, Kmart claims that the certification does not indicate that the CR 26(i) conference was in person or by telephone, and does not indicate that the conference addressed the motion, as opposed to the underlying discovery dispute. For the following reasons, we reject this assertion.

Id. (Underline added.)

Contrary to the plaintiffs' interpretation, Amy is concerned with whether a discovery conference certification that fails to specifically use the words "met and conferred" is sufficient. Amy stands for the proposition that the certification does not need to use the magic words "met and conferred" in order to comply with CR 26. However, it does not

state that no CR 26(i) discovery conference is required pursuant to King County LCR 37. The local rule is clearly written and requires a conference before sanctions may be awarded.

Vuletic also misinterprets Magana v. Hyundai Motor America, 167 Wn.2d 570, 220 P.2d 191 (2009). There, it appears that CR 26(1) was not discussed because it was not an issue. Magana moved for a motion to compel discovery and the fact that the decision does not mention a CR 26(i) conference implies on occurred and was properly certified in Magana's motion.

E. Conclusion

Plaintiff waited until shortly before the statute of limitations to file suit. Plaintiffs' experienced process server, King County Deputy Sheriff Mark Hillard, handed the Summons and Complaint to Defendant's nanny, Jill Corr, who explicitly told the deputy Sheriff that she was not a resident. She also told him that Defendant McKissic was at home and upstairs. Despite knowing that it was improper to serve a nonresident, the deputy Sheriff did not simply request the nanny to ask McKissic to come to the door. Rather, he handed the papers to the nanny and signed a false Return of Service stating that she was a resident when she had explicitly told him that she was not.

When the defendant's attorneys realized that the Return of Service was false, an Answer was immediately filed and served asserting the affirmative defenses of lack of service of process, insufficiency of process, and statute of limitations. Plaintiffs were immediately notified and a

personal phone conference was scheduled.

Regarding waiver:

> A waiver is the intentional and voluntary relinquishment of a known right or such conduct as warrants an inference of the relinquishment of such right. It is a voluntary act which implies a choice, by the party, to dispense with something of value or to forego some advantage. [citation omitted]. The one claimed to have waived a right must intend to relinquish such right, advantage or benefit and her actions must be inconsistent with any other intention than to waive them.

Public Utility Dist. No. 1 of Lewis County v. Washington Public Power Supply System, 104 Wn.2d 353, 365, 705 P.2d 1195, 1204 - 1205 (1985).

> Waiver is essentially a matter of intention. Negligence, oversight or thought-lessness does not create it.

Reynolds Metals Co. v. Electric Smith Const. & Equipment Co., 4 Wn. App. 695, 700-701, 483 P.2d 880, 883 (1971). Waiver is simply not present or applicable in this case.

Regarding estoppel:

> In order to create an estoppel, it is necessary that the party claiming to have been influenced by the conduct or declarations of another was either destitute of knowledge of the true facts or without means of acquiring such facts. *Chemical Bank II*, 102 Wn.2d at 905, 691 P.2d 524.

Id. at 365, 1205. (Underline added.) Here, the plaintiff not only had the means of ensuring service of process was proper, it also had the legal burden and responsibility to do so. A person seeking equity must come into court with clean hands. In re Marriage of Buchanan, 150 Wn. App. 730, 737, 207 P.3d 478 (2009). In other words, the party seeking equity

must not have conducted himself in a manner that is "unconscientious, unjust, or marked by the want of good faith...." Portion Pack, Inc. v. Bond, 44 Wn.2d 161, 265 P.2d 1045 (1954). By failing to ensure service of process was proper after choosing to wait until shortly before the statute of limitations, plaintiff was "unconscientious" such that equitable relief is inappropriate.

Misrepresentation—such as the one perpetuated by the Deputy Sheriff—should never serve as a basis for service of process, unless the defendant knew of and perpetuated the fraud by lying in wait. Defendant McKissic did no such thing. The proper remedy in this situation is to dismiss this action due to lack of service of process as there is no "lying in wait" or deceit by the defendant. Because Plaintiff filed suit so close to the statute of limitations, Plaintiff should have taken steps to ensure there was no objection to service—Plaintiff does not come before this court with clean hands. As a result, Plaintiffs' action must now lie against the experienced process server who knowingly filed the false Return of Service, not the defendant.

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

SIMONA VULETIC and MICHAEL HELGESON, wife and husband, Plaintiffs/Appellants, vs. DARRELL R. McKISSIC, Defendant/Respondent.	KING COUNTY NO: 11-2-44358-2 SEA COURT OF APPEALS NO: 69515-1-I PROOF OF SERVICE OF RESPONDENT'S BRIEF

I, Christy Palmer, hereby certify that I am over the age of 18 years old and not a party to the above-referenced action. I am an attorney with Bendele & Mendel, 200 West Mercer Street, Suite 411, Seattle, WA 98119, attorney of record for defendant/respondent. On this date, a true and correct copy of the Respondent's Brief was sent by legal messenger to the following:

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I hereby certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED: February 8, 2013

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