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FILED
MAY -7 2015

No. 91645-4
COA No. 69456-1-I

CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

SUPREME COURT OF THE STATE OF WASHINGTON

Charles Momah,
Petitioner,

vs.

WASHINGTON CASUALTY COMPANY /
BARBARA MCCARTHY,
respondents

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2015 MAY -4 AM 9:26

PETITION FOR REVIEW

Charles Momah, M.D.
Petitioner, Pro se
888910 : CRCC : H-A-13
PO Box 769
Connell WA 99326

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I - IDENTITY OF PETITIONER

Charles Momah, M.D., petitioner, pro se, asks this court to accept review of the decision designated in Part 2.

II - DECISION

2.1 The decision of the Court of Appeals, Division One, rendered in cause number 69456-1-I, on 28 July 2014 (unpublished) which affirmed the Superior court's summary judgment dismissal of Dr. Momah's suit against Washington Casual Company/Barbara McCarthy, and held:

2.2 (1) The applicable statutes of limitation bar his CPA and bad faith claims;

2.3 (2) no material fact exists as to whether WCC breached a policy provision requiring it to obtain Dr. Momah's consent before settling third-party civil suits; and

2.4 (3) insufficient service of process on WCC's Vice President, Barbara McCarthy;

[See Attachment One - Unpublished opinion]

2.5 On 14 August 2014, Dr. Momah filed a timely Motion for Reconsideration, and on 31 January 2015, the Court of Appeals required WCC to respond to Dr. Momah's Motion for Reconsideration.

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III - ISSUES PRESENTED FOR REVIEW

- (1) THE COURT OF APPEALS ERRED WHEN IT CLAIMED THAT PETITIONER NEVER FILED ANY OF HIS SUMMARY JUDGMENT DOCUMENTS;
- (2) THE COURT OF APPEALS ERRED WHEN IT CLAIMED THAT PETITIONER NEVER FILED HIS RESPONSE BRIEFS, ATTACHMENTS, AND MOTIONS TO THE TRIAL COURT FOR RECONSIDERATION;
- (3) THE COURT OF APPEALS ERRED WHEN IT CLAIMED THAT SEVERAL DOCUMENTS ENTITLED MOTION FOR RECONSIDERATION, MOTION FOR CLARIFICATION OF SERVICE OF PROCESS AND ONE SUMMARY JUDGMENT RESPONSE BRIEF DID NOT CONTAIN THE KING COUNTY SUPERIOR COURT CLERK "FILED" STAMP, THEREBY INDICATING THAT THESE PLEADINGS WERE NOT RECEIVED OR FILED:
- (4) CONTRARY TO THE COURT OF APPEAL'S DECISION THE SETTLEMENTS AND BREACH OF CONTRACT OF MAY 2007 OCCURRED AFTER OCTOBER 2006 AFTER WCC HAD EMERGED FROM RECEIVERSHIP, WAS PRESENTED TO THE TRIAL COURT, AND THEREFORE WAS NOT UNTIMELY FOR CONSIDERATION BY THE APPELLATE COURT:
- (5) THE COURT OF APPEALS ERRED WHEN IT RULED THE CLAIM THAT "RCW 48.31.040 COMMANDS THAT THE RECEIVER INVOLVE INTERESTED PARTIES IN THE DECISION MAKING PROCESS AND TAKE INTO ACCOUNT THEIR OPINIONS AND VIEWS BEFORE DECISIONS ARE MADE" WAS NOT PRESENTED TO THE COURT OF APPEALS IN PETITIONER'S OPENING BRIEF WHEN IT WAS, AND THEREFORE WAS NOT UNTIMELY."
- (6) THE TOLLING STATUTE, RCW 4.16.190, WAS PRESENTED TO THE TRIAL COURT IN MULTIPLE BRIEFINGS, AND THEREFORE NOT "UNTIMELY".
- (7) DID THE COURT OF APPEALS ABUSE ITS DISCRETION BY AFFIRMING THE TRIAL COURT'S DISMISSAL OF BREACH OF CONTRACT OF MAY 2007 EVEN THOUGH RESPONDENT CONCEDED THAT ISSUE AND THE SETTLEMENT OCCURRED AFTER OCTOBER 2006, WHEN WCC WAS NO LONGER IN RECEIVERSHIP, WHEN THE CONTRACT STATES THAT NO SETTLEMENTS CAN BE MADE WITHOUT THE CONSENT OF THE INSURED?

1 2.6 WCC submitted an Answer to the Motion for Reconsid-
2 eration ,together with Respondent's Motion to Sub-
3 mit Additional Evidence.
4

5 2.7 On 31 March 2015, Division One issued "ORDER DENYING
6 APPELLANT'S MOTION FOR RECONSIDERATION". [See
7 Attachment Two - Order Denying MAppellant's Motion
8 for Reconsideration].
9

10 2.8 In the Order denying reconsideration, the Court
11 of Appeals stated that: "The record and files
12 in this case indicate that Momah never filed any
13 of his summary judgment documents in King County
14 Superior Court clerk's office as required under
15 CR 5. In particular, he never filed his response
16 briefs, attachments, and motions to the trial court
17 for reconsideration and to clarify. For the first
18 time in his reconsideration motion to this court,
19 he improperly submitted a few select summary judg-
20 ment documents that he never filed in King County
21 Superior Court, as noted above. He submitted sev-
22 eral documents entitled motions for reconsideration,
23 motion for clarification of service of process,
24 and one summary judgment response brief. None
25 of these documents bears the King County Superior
26 Court clerk 'filed' stamp indicating receipt and
27 filing."
28

IV - STATEMENT OF THE CASE

- 1
2 4.1 The Petitioner filed a lawsuit for breach of contract,
3 Consumer protection violation, and bad faith
4 claim against Washington Casualty Company (WCC)
5 on December 17, 2010. On January 11, 2012, the Petitioner's
6 request for amendment of complaint was
7 granted. Ms. Barbara McCarthy, WCC Vice President,
8 was added to the complaint as a defendant.
9
- 10 4.2 Multiple communications between Petitioner and
11 Respondent's attorney, Mr. James King, occurred
12 including multiple requests for documents. Mr
13 King has responded to the initial lawsuit of December
14 17, 2010 by filing a notice of appearance in
15 January 11, 2011.
16
- 17 4.3 On February 3, 2012, the trial court dismissed
18 the CPA and Bad Faith claims based largely on Statute
19 of Limitation, but reserved judgment for breach
20 of contract claims for May 25, 2012.
21
- 22 4.4 Dr. Momah's Motion for Reconsideration was filed
23 on 11 March 2012, and Motion to clarify service
24 of process was filed on 10 April 2012.
25
- 26 4.5 The trial court denied Petitioner's motion for
27 reconsideration and granted petitioner's motion
28 for clarification of service of process in part,

1 (that service of process was adequate for WCC),
2 and denied in part (that service of process on
3 Ms. Barbara McCarthy was inadequate).

4
5 4.6 On 25 May 2012, the trial court dismissed the Breach
6 of Contract claim, based largely on the fact that
7 WCC was in receivership - even though WCC conceded
8 the breach of contract.

9
10 4.7 The petitioner filed a timely appeal to the court
11 of appeals, Division One, stating:

12 4.8 (1) The insurer WCC violated a binding contract
13 between the insured and the company by settling
14 claims without the consent of petitioner as
15 the contract dictates;

16
17 4.9 (2) The Superior Court dismissed the breach of
18 contract claim even though WCC conceded because
19 WCC was in receivership;

20
21 4.10 (3) The Superior Court erred by dismissing the
22 CPA and Bad Faith claims since the statute
23 of limitations claims were preserved by:

24 4.11 (a) Waiver of the defense of insufficient
25 service of process and statute of limit-
26 ations by WCC's dilatory activity of
27 untimely assertion of that defense and
28 "trial by ambush" when WCC waited for

1 almost one year to assert a known defense
2 after the statute of limitations expired.

3
4 4.12 (b) By failing to assert a known defense
5 and deliberately waiting for the expir-
6 ation of the statute of limitations and
7 claiming insufficient service of process,
8 WCC waived that defense for the CPA and
9 Bad Faith claims. [VRP at 19, ln 6-14].

10
11 4.13 (c) The tolling statute of RCW 4.16.190 by
12 reason of personal disability due to
13 presentence incarceration tolled the
14 statute of limitations for the CPA and
15 Bad Faith claims.

16
17 4.14 There is no dispute between the parties that the
18 statute of limitation for the Breach of Contract
19 is preserved.

20 V - WHY REVIEW SHOULD BE ACCEPTED

21
22 5.1 The Court of Appeals, in its unpublished opinion
23 of 28 July 2014, states: "The parties do not dis-
24 pute the following timeline of events. . . . [one
25 of which was the settlement of] . . . two more
26 civil suits. . ." ". . . May 2011 the four year
27 CPA statute of limitations expires . . ." basing
28 its calculation from May 2007 (slip-op at 5).

1 5.2 The court denied Petitioner's claim that WCC waived
2 its service-related defense "because it engaged
3 in inconsistent and dilatory behavior".
4

5 5.3 The court stated in relation to Petitioner's tolling
6 claim, stating: "We need not review Momah's tolling
7 claim since our review of the record shows he failed
8 to raise the claim below. We generally do not
9 review issues raised for the first time on appeal."
10 RAP 2.5(a). (slip-op at 8).
11

12 5.4 On the breach of contract claim, the court of ap-
13 peals stated, "We agree with WCC that the record
14 contains no facts establishing breach by WCC in
15 connection with the receivership-authorized settle-
16 ments (slip-op at 10) but made no mention of the
17 settlement that occurred after receivership ended
18 in October of 2006 (the settlement of May 2007).
19

20 5.5 The Court of Appeals states: "Momah argues in
21 his reply brief that 'RCW 48.31.040 commands that
22 the receiver involve interested parties' in the
23 decision making process and take into account their
24 opinions and views before decision are made...."
25 "We need not address this untimely argument . .
26 . ." "AN issue raised and argued for the first
27 time in a reply brief is too late to warrant con-
28

1 sideration." (slip-op at 11).

2
3 5.6 But this argument was raised in the opinion brief
4 at page 36-37; therefor^e, the court of appeals abused
5 its discretion when it declined to consider this
6 evidence as untimely.

7
8 5.7 The court of appeals also stated, "Momah acknow-
9 ledges that the trial court never considered that
10 the May 2007 settlement occurred after the receiver-
11 ship ended. Br. of Appellant at 38. We deemed this
12 issue waived." (Slip-op at 12).

13
14 5.8 The petitioner, in his motion for reconsideration,
15 stated that the fact that the settlement of May
16 2007 occurred after the receivership ended in Oc-
17 tober 6, 2006, was raised at the trial court, but
18 the trial court never considered this fact in its
19 ruling, and did not rule on the summary judgment
20 motion (Motion for Reconsideration at 2-3; and
21 Appendix D).

22
23 5.9 In the motion for reconsideration, Petitioner pre-
24 sented evidence from his "Plaintiff's Response
25 to Defendant's Memorandum and Motion for Dismissal"
26 (at page 10). "Some of the violations at issue
27 in this lawsuit occurred after [the] "WCCR" was
28 succeeded by WCC on October 6, 2006."

1 5.10 All of these documents were presented to the trial
2 court, and were considered by the trial court in
3 making its rulings:
4

5 5.11 Appendix A: Motion for Reconsideration;

6 5.12 Appendix B: Amended Motion to Reconsider;

7
8 5.13 Appendix C: Motion for Clarification of
9 Service of Process;


10
11 5.14 Appendix D: Plaintiff's Response to Defen-
12 dant's Memorandum and Motion
13 for Dismissal.

14 5.15 Petitioner's personal copies of these records -
15 which do not contain the Superior Court's "filed"
16 stamp because they were filed from prison - are
17 the pleadings supplied as exhibits on appeal.
18 The decision of the Court of Appeals ignores these
19 facts of record, and the legal standard applicable
20 in the review of summary judgment proceedings.
21

22 VI - CONCLUSIONS

23 Based upon the foregoing facts and argument, and
24 the record and file to date, Momah asks this court
25 to review the decision of the Court of Appeals.

26 Date: 4/28/15

27
28 
Charles Momah, M.D.
888910 : CRCC : H-A-13
Petitioner, pro se
PO Box 769
Connell WA 99326

ATTACHMENT ONE

Unpublished Opinion of the Court of
Appeals.

July 28, 2014

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington
Seattle

DIVISION I
One Union Square
600 University Street
98101-4170
(206) 464-7750
TDD: (206) 587-5505

July 28, 2014

Christopher Joseph Kerley
Evans, Craven & Lackie, P.S.
818 W Riverside Ave Ste 250
Spokane, WA, 99201-0994
ckerley@ecl-law.com

James B. King
Evans, Craven & Lackie, P.S.
818 W Riverside Ave Ste 250
Spokane, WA, 99201-0994
jking@ecl-law.com

Charles Momah
DOC # 888910
Coyote Ridge Corrections Center
1301 North Ephrata
Connell, WA, 99326

CASE #: 69456-1-I
Charles Momah, Appellant v. Washington Casualty Company, Respondent

King County, Cause No. 11-2-04982-5.SEA

Counsel:

Enclosed is a copy of the opinion filed in the above-referenced appeal which states in part:

"For the reasons discussed above, we affirm."

Counsel may file a motion for reconsideration within 20 days of filing this opinion pursuant to RAP 12.4(b). If counsel does not wish to file a motion for reconsideration but does wish to seek review by the Supreme Court, RAP 13.4(a) provides that if no motion for reconsideration is made, a petition for review must be filed in this court within 30 days. The Supreme Court has determined that a filing fee of \$200 is required.

Page 2 of 2

Case No. 69456-1-I, Momah v. Washington Casualty

July 28, 2014

In accordance with RAP 14.4(a), a claim for costs by the prevailing party must be supported by a cost bill filed and served within ten days after the filing of this opinion, or claim for costs will be deemed waived.

Should counsel desire the opinion to be published by the Reporter of Decisions, a motion to publish should be served and filed within 20 days of the date of filing the opinion, as provided by RAP 12.3 (e).

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

emp

Enclosure

c: The Honorable Carol Schapira

2014 JUL 28 AM 9:31

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHARLES MOMAH,)	NO. 69456-1-1
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
WASHINGTON CASUALTY)	
COMPANY/BARBARA McCARTHY,)	UNPUBLISHED OPINION
)	
Respondent.)	FILED: July 28, 2014
_____)	

LAU, J. — Charles Momah sued his liability insurer, Washington Casualty Company (WCC), for violation of the Consumer Protection Act (CPA), chapter 19.86 RCW, insurance bad faith, and breach of contract. For the reasons discussed below, we affirm the summary judgment dismissal of Momah’s suit, holding that (1) the applicable statutes of limitation bar his CPA and bad faith claims, (2) no material fact issue exists as to whether WCC breached a policy provision requiring it to obtain Momah’s consent before settling third party civil suits, and (3) insufficient service of process on WCC vice president Barbara McCarthy warranted her dismissal from the lawsuit.

FACTS

Over 30 patients sued former gynecologist Charles Momah for medical malpractice and sexual misconduct.¹ Momah's WCC professional liability insurance policy contained a consent provision stating, "[N]o settlement shall be made of any claim or suit without the agreement of the named insured [Momah]." (Capitalization omitted.)

Approximately six months before the first lawsuit was filed in September 2003, the superior court granted the Washington State Insurance Commissioner's petition to place WCC into receivership and rehabilitation.² The court appointed an assistant insurance commissioner as WCC's receiver. By court order and statute, the receiver took possession of all assets owned by WCC, including Momah's WCC insurance policy.

During the rehabilitation proceeding, WCC defended Momah's civil suits under a reservation of rights. After considering its potential exposure, the receiver decided to pursue a global settlement. WCC vice president of claims Barbara McCarthy and the receiver collaborated to implement the rehabilitation plan. McCarthy testified by declaration, "The number of allegations and severity of some of the claims put both WCC and Mr. Momah at significant financial peril."

¹ The Washington State Medical Quality Assurance Commission suspended Momah's license in September 2003.

² WCC's liabilities exceeded its assets. WCC reported a risk based capital mandatory control level event, and a majority of its board of directors consented to receivership under the insurance commissioner's supervision for purposes of receivership and rehabilitation.

In 2004, the State charged Momah with multiple sex crimes. During the criminal proceedings, WCC sought to mediate Momah's civil suits. McCarthy testified, "I was made aware before the mediation that Mr. Momah would not provide consent to settle the pending claims even though I had recommended to his counsel that such consent be given." Momah was apparently concerned that publicity surrounding the settlement would prejudice his defense in the ongoing criminal proceeding.

On the day the mediation commenced, Momah filed a complaint seeking an "[i]njunction preventing [WCC] from negotiating settlement of any claim on behalf of Dr. Momah and any other relief as the court may deem proper." The complaint, filed on October 21, 2005, alleged, "Dr. Momah has a reasonable basis for withholding consent to settlement in that the settlement of the civil cases will substantially prejudice his criminal defense and will also prejudice his defense in a pending administrative matter." The court entered a temporary order enjoining WCC from "entering into any settlement discussions or mediation" in the civil cases. Based on the order, WCC withdrew from the mediation. The order expired in November 2005. That same month, a jury convicted Momah of multiple sex crimes.

Following the convictions, 32 of Momah's civil suits settled. The receiver settled 30 cases in April or May 2006, during the rehabilitation proceeding. WCC settled the remaining cases in May 2007, after the rehabilitation proceeding terminated.³

³ Our record shows that WCC settled civil suits filed by Michael Auraz and Jeannine LaPoint in May 2007. McCarthy testified by declaration, "All but two of the thirty-two cases WCC settled on Mr. Momah's behalf were settled in April or May 2006. The two remaining cases involved minors, which required the appointment of and approval by guardians ad litem. Court approval of the settlements in the two cases involving minors occurred in May 2007."

In January 2011, Momah sued WCC for breach of contract and violation of the CPA.⁴ He failed to serve the summons and complaint.

In January 2012, the court granted Momah leave to file an amended complaint. Momah filed an amended complaint alleging violation of the CPA, insurance bad faith, and breach of contract. He named WCC and McCarthy as defendants. He alleged that WCC settled the civil suits without his consent and without adequate investigation. This time, he properly served WCC but failed to serve McCarthy.

On March 1, 2012, the trial court dismissed the CPA and bad faith claims based on the expiration of the respective statutes of limitation. The breach of contract claim remained. On May 30, 2012, the court summarily dismissed the breach of contract claim, ruling in part that WCC could not be liable for the settlement actions of the court-appointed receiver.⁵ Momah appeals.

ANALYSIS

Momah contends the trial court erred in dismissing his CPA and bad faith claims based on the expiration of the respective statutes of limitation. He also contends the court erroneously dismissed his breach of contract claim "simply because WCC was in receivership." Br. of Appellant at 3. For the reasons discussed below, we affirm.

On appeal from an order granting summary judgment, we review de novo whether "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material

⁴ Our record contains an incomplete copy of Momah's complaint.

⁵ The court reserved ruling on the breach of contract claim involving a civil suit filed by Perla and Albert Saldivar. The court later dismissed this claim in its September 19, 2012 summary judgment order. Momah assigns no error to this order.

fact and that the moving party is entitled to a judgment as a matter of law.” CR 56(c).

We view all facts and reasonable inferences in the light most favorable to Momah.

Elcon Constr., Inc. v. E. Wash. Univ., 174 Wn.2d 157, 164, 273 P.3d 965 (2012).

CPA claims are subject to a four-year statute of limitations. RCW 19.86.120;

O’Neill v. Farmers Ins. Co. of Wash., 124 Wn. App. 516, 530, 125 P.3d 134 (2004).

Insurance bad faith claims are subject to a three-year statute of limitations. Moratti ex

rel. Tarutis v. Farmers Ins. Co. of Wash., 162 Wn. App. 495, 502, 254 P.3d 939 (2011).

The parties do not dispute the following timeline of events:

- | | |
|----------------|---|
| March 2003 | The rehabilitation proceeding commences. |
| September 2003 | Third parties begin to file civil suits against Momah. |
| April-May 2006 | The receiver settles 30 of Momah’s civil suits. |
| October 2006 | The rehabilitation proceeding terminates. |
| May 2007 | WCC settles two more civil suits. |
| May 2010 | The three-year bad faith statute of limitations expires. |
| January 2011 | Momah sues WCC for breach of contract and violation of the CPA. Momah fails to serve the summons and complaint. WCC does not answer the complaint. |
| May 2011 | The four-year CPA statute of limitations expires. |
| December 2011 | WCC moves for summary judgment dismissal of Momah’s January 2011 complaint. Momah files an amended complaint alleging breach of contract, violation of the CPA, and bad faith. He names WCC and McCarthy as defendants. |
| January 2012 | The trial court grants Momah leave to file his amended complaint. |
| March 2012 | The trial court dismisses Momah’s CPA and bad faith claims based on the expiration of the statute of limitations. WCC |

moves for summary judgment dismissal of Momah's breach of contract claim.

May 2012 The trial court dismisses Momah's breach of contract claim.

Dismissal of CPA Claim

Momah filed his CPA claim in January 2011. The four-year statute of limitations expired in May 2011. Therefore, Momah filed his CPA claim within the statute of limitations. WCC nevertheless argues that Momah failed to perfect service within the limitations period. Momah responds that WCC waived its service-related defense because it engaged in inconsistent and dilatory behavior. We hold that the trial court properly dismissed Momah's CPA claim as time barred.

Under the doctrine [of waiver], affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law. 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. It can also occur if the defendant's counsel has been dilatory in asserting the defense.

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

Momah relies on Lybbert, Romjue v. Fairchild, 60 Wn. App. 278, 803 P.2d 57 (1991), and King v. Snohomish County, 146 Wn.2d 420, 424, 47 P.3d 563 (2002).

These cases are distinguishable. In Lybbert, the court held that the defendant waived its insufficient service defense because, for nine months prior to asserting the defense, it engaged in discovery unrelated to the defense and ignored an interrogatory asking whether it would be relying on the defense. In Romjue, the defendants waived their insufficient service defense because they propounded discovery requests unrelated to the defense and failed to respond to a letter from plaintiff's counsel stating, "Please be advised that it is my understanding that the defendants have been served in the above

matter” Romjue, 60 Wn. App. at 281 (emphasis omitted). Finally, in King, the court held that the defendant waived its service-related defense, which it asserted in a motion to dismiss just three days before trial, based on inconsistent prior behavior. The court noted that the defendant raised the defense in its answer but failed to clarify the defense in response to an interrogatory. It also noted that the parties engaged in 45 months of litigation and discovery, during which time the defendant sought four continuances and filed a motion for summary judgment that did not mention the defense. It concluded, “The [defendant’s] assertion of a claim filing defense is inconsistent with its behavior for the four years prior to trial.” King, 146 Wn.2d at 424.

Here, WCC engaged in no discovery prior to asserting its defense. Momah never attempted to confirm whether WCC planned to rely on the defense. And WCC never answered Momah’s complaint. Finally, WCC raised the defense less than a year after Momah attempted service, in its first summary judgment motion. These facts are unlike those justifying waiver in Lybbert, Romjue, and King. Because WCC engaged in no actions consistent with waiver of its insufficient service defense, Momah’s waiver claim fails as a matter of law.

Momah argues, without citing the record, that he sent WCC “numerous communications . . . including a request for production of documents.” Br. of Appellant at 15. Even assuming the truth of this assertion, the issue is not whether Momah actively communicated with WCC or propounded discovery requests.⁶ The issue is

⁶ Momah claims he propounded a “set of interrogatories and [a] request for production of documents” and a “CR 26(i) request.” Br. of Appellant at 7-8. He also claims “there was correspondence between WCC and [Momah] when he was

whether WCC responded to Momah's communications or discovery requests in a manner inconsistent with its present insufficient service defense. Momah cites nothing in the record establishing WCC's inconsistent or dilatory actions.

Dismissal of Bad Faith Claim

Momah concedes that he brought his bad faith claim after the three-year statute of limitations expired in May 2011. But he contends his disability by reason of incarceration tolled the limitations period under RCW 4.16.190. Under this tolling provision, the time a plaintiff spends "imprisoned on a criminal charge prior to sentencing" must be excluded from the "time limited for the commencement of action." RCW 4.16.190(1).

We need not review Momah's tolling claim, since our review of the record shows he failed to raise the claim below. We generally do not review issues raised for the first time on appeal. RAP 2.5(a).⁷ In any event, the argument fails. The tolling provision's subsection (1) applies only to imprisonment "prior to sentencing." RCW 4.16.190(1). The burden to establish tolling under this statute rests on Momah. Rivas v. Overlake

attempting to obtain a copy of the insurance contract he had signed with WCC." Br. of Appellant at 9. Contrary to RAP 10.3(a)(6), he fails to cite the record.

⁷ RAP 2.5(a) provides in part, "The appellate court may refuse to review any claim of error which was not raised in the trial court." As Division Three of this court recently observed, RAP 2.5(a) "reflects a policy of encouraging the efficient use of judicial resources and refusing to sanction a party's failure to point out an error that the trial court, if given the opportunity, might have been able to correct to avoid an appeal." In re Guardianship of Cornelius, ___ Wn. App. ___, 326 P.3d 718, 728 (2014).

Hosp. Med. Ctr., 164 Wn.2d 261, 267, 189 P.3d 753 (2008). Momah cites nothing in the record showing he was imprisoned prior to sentencing.⁸

Momah also argues that the bad faith claim survives because WCC waived the statute of limitations through the “dilatatory activity” of its attorney. Br. of Appellant at 22. He cites no controlling authority and points to no record evidence supporting this claim. We are not persuaded that WCC waived the statute of limitations.

Dismissal of Breach of Contract Claim

Momah contends that WCC and its vice president, Barbara McCarthy, breached the insurance contract by settling civil suits without his consent. WCC acknowledges that “Momah’s policy contained a consent provision, and the settlements were made over Momah’s objection.” Resp’t’s Br. at 1. But it argues that because the court-appointed receiver authorized and executed the settlements during the rehabilitation proceeding, only the receiver can be liable to Momah for breach of contract.⁹

Momah’s policy contained the following consent clause:

With respect to claims or suits brought within the United States . . . the company shall defend any suit against an insured containing allegations covered by this agreement and seeking damages on account thereof, even if such SUIT is groundless, false, or fraudulent, and the company may make such investigation it deems expedient; provided, however, no settlement shall be made of any claim or suit without the agreement of the named insured.

⁸ Momah appears to argue that the tolling provision also applies to his CPA claim. To the extent he intended this argument, the claim fails for the reason discussed above—nothing in the record shows Momah was imprisoned “prior to sentencing.” RCW 4.16.190(1).

⁹ WCC argued below that Momah’s breach of contract claim should be dismissed based on the expiration of the six-year statute of limitations. WCC appears to have abandoned this argument on appeal.

(Emphasis added.) (Capitalization omitted.) WCC acknowledges that Momah “adamantly refused” to settle any of the civil suits. Resp’t’s Br. at 5.

“A breach of contract is actionable only if the contract imposes a duty, the duty is breached, and the breach proximately causes damage to the claimant.” Nw. Indep. Forest Mfrs. v. Dep’t of Labor & Indus., 78 Wn. App. 707, 712, 899 P.2d 6 (1995).

We agree with WCC that the record contains no facts establishing breach by WCC in connection with the receiver-authorized settlements. All third party civil suits against Momah commenced while WCC was participating in court-ordered rehabilitation. The rehabilitation order vested title and control of WCC’s assets, including the policy Momah claims WCC breached, in the receiver.¹⁰ It also authorized the receiver to conduct WCC’s business and to “take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the Court may approve”¹¹ It also prohibited WCC from “interfering with the Receiver’s title, possession and use of any and all of the property of Washington Casualty; and from disposing of, removing, paying out, parting with, withdrawing, alienating or encumbering any of the assets or other property of Washington Casualty.” The receiver undisputedly settled 30 suits during the rehabilitation proceeding.

¹⁰ RCW 48.31.040(4) provides, “The order to rehabilitate the insurer by operation of law vests title to all assets of the insurer in the rehabilitator.”

¹¹ RCW 48.31.040(1) provides, “An order to rehabilitate a domestic insurer shall direct the commissioner forthwith to take possession of the property of the insurer and to conduct the business thereof, and to take such steps toward removal of the causes and conditions which have made rehabilitation necessary as the court may direct.”

Momah cites no evidence that WCC took any action with respect to the receiver-authorized settlements.¹² He thus cites no evidence of breach in connection with those settlements. The trial court properly granted WCC summary judgment on this issue.¹³

Momah argues that WCC incurred liability for the receiver's actions as the receiver's "successor." Br. of Appellant at 25. He relies on the doctrine of successor liability, under which a corporation that purchases another corporation's assets may, under defined circumstances, become liable for the selling corporation's debts. See Eagle Pac. Ins. Co. v. Christensen Motor Yacht Corp., 135 Wn.2d 894, 901, 959 P.2d 1052 (1998). Momah cites no controlling authority applying this doctrine to an insurer that has passed through statutory rehabilitation. We are not persuaded that the doctrine applies here. See Bert Kutzy Revocable Living Trust ex rel. Nakano v. Mullen, 175 Wn. App. 292, 314, 306 P.3d 994 (2013) (application of successor liability doctrine presupposes a transfer, in some form, of assets from one business to another).

Momah also contends WCC breached the insurance policy by settling two cases in May 2007, after the rehabilitation proceeding ended. He argues that "the violations of May 2007 [are] unaffected by the WCC's argument regarding WCC's receivership status." Br. of Appellant at 26. On this claim, WCC offers no response. But we need not address the claim, since our review of the record shows Momah failed to raise the

¹² After deciding to pursue global settlement, the receiver directed, authorized, and supervised McCarthy's claims settlement efforts.

¹³ Momah argues in his reply brief that "RCW 48.31.040 commands that the receiver involve the 'interested parties' in the decision making process and take into account their opinions and views before any decisions are made." We need not address this untimely argument. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) ("An issue raised and argued for the first time in a reply brief is too late to warrant consideration.").

issue below. RAP 2.5(a). Momah acknowledges that the trial court “never considered that the May 2007 settlement occurred after the receivership ended.” Br. of Appellant at 38. We deem this issue waived.

As stated above, Momah named McCarthy as an additional defendant in his amended complaint. It is undisputed that McCarthy was never properly served with process.¹⁴ “A court does not have jurisdiction over a defendant who is not properly served.” Oytan v. David-Oytan, 171 Wn. App. 781, 806, 288 P.3d 57 (2012). We conclude that the trial court properly dismissed Momah’s claims against McCarthy.

CONCLUSION

For the reasons discussed above, we affirm.

WE CONCUR:

Cox, J.

Jau, J.

Becker, J.

¹⁴ Momah argues in his reply brief, “The trial court found that service of process was adequate on WCC but not for Ms. McCarthy. At least three attempts [were made] to serve Ms. McCarthy by sheriff at her place of work. Dr. Momah contends that Ms. McCarthy was evading service of process.” Reply Br. of Appellant at 3. We need not address this untimely argument. Cowiche Canyon, 118 Wn.2d at 809.

ATTACHMENT TWO

Unpublished Opinion of the Court
of Appeals.

March 31, 2015

RICHARD D. JOHNSON,
Court Administrator/Clerk

*The Court of Appeals
of the
State of Washington*

DIVISION I
One Union Square
600 University Street
Seattle, WA
98101-4170
(206) 464-7750
TDD: (206) 587-5505

March 31, 2015

Christopher Joseph Kerley
Evans, Craven & Lackie, P.S.
818 W Riverside Ave Ste 250
Spokane, WA, 99201-0994
ckerley@ecl-law.com

James B. King
Evans, Craven & Lackie, P.S.
818 W Riverside Ave Ste 250
Spokane, WA, 99201-0994
jking@ecl-law.com

Charles Momah
DOC # 888910
Coyote Ridge Corrections Center
1301 North Ephrata
Connell, WA, 99326

CASE #: 69456-1-I
Charles Momah, Appellant v. Washington Casualty Company, Respondent

Counsel:

Enclosed please find a copy of the order denying appellant's motion for reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,



Richard D. Johnson
Court Administrator/Clerk

c: The Honorable Carol A. Schapira

2015 MAR 31 PM 2:31

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

CHARLES MOMAH,)	NO. 69456-1-I
)	
Appellant,)	DIVISION ONE
)	
v.)	
)	
WASHINGTON CASUALTY)	ORDER DENYING APPELLANT'S
COMPANY/BARBARA McCARTHY,)	MOTION FOR RECONSIDERATION
)	
Respondent.)	
)	

Appellant Charles Momah timely moved for reconsideration of the court's unpublished opinion filed on July 28, 2014. This court considered the motion, respondents' response brief, Momah's reply brief, and the files and records on appeal. Respondents also moved pursuant to RAP 9.11 to supplement the summary judgment record with the supplemental declaration of Barbara McCarthy dated February 6, 2015.

At the trial court, respondents filed three summary judgment motions that are the subject of this appeal. We affirmed the trial court's orders granting summary judgment and dismissing Momah's lawsuit.

The record and files in this case indicate that Momah never filed any of his summary judgment documents in the King County Superior Court clerk's office as required under CR 5. In particular, he never filed his response briefs, attachments, and

motions to the trial court for reconsideration and to clarify.¹ For the first time in his reconsideration motion in this court, he improperly submitted a few select summary judgment documents that he never filed in King County Superior Court, as noted above. He submitted several documents entitled motions for reconsideration, motion for clarification of service of process, and one summary judgment response brief. None of these documents bears the King County Superior Court clerk "filed" stamp indicating receipt and filing.

In addition, his motion for reconsideration repeats arguments that were rejected in the opinion and purports to rely on documents not part of the record on appeal.

Accordingly, we deny Momah's motion for reconsideration. Given this resolution, we need not address respondents' motion to supplement the record. It is therefore

ORDERED that appellant Charles Momah's motion for reconsideration is denied.

Dated this 31st day of March 2015.

FOR THE PANEL:



Judge

¹ Momah did provide the verbatim report of the summary judgment oral argument proceedings.

IN FORMA PAUPERIS

STATEMENT OF FINANCES
PLRA IN FORMA PAUPERIS STATUS
REPORT.

REQUEST FOR
: WAIVER OF FILING FEE

Unit

04/14/2015

Department of Corrections

PAGE: 01 OF 01

BNPEREZ

COYOTE RIDGE CORRECTIONS CENTER

OIRPLRAR

10.2.1.18

PLAINFORMA PAUPERIS STATUS REPORT
FOR DEFINED PERIOD: 09/30/2014 TO 03/31/2015

DOC#: 0000888910 NAME: MOMAH CHARLES ADMIT DATE: 03/21/2006
DOB: 07/16/1956 ADMIT TIME: 11:45

AVERAGE MONTHLY RECEIPTS	20% OF RECEIPTS	AVERAGE SPENDABLE BALANCE	20% OF SPENDABLE
51.67	10.33	342.30	68.46

STATEMENT OF FINANCES

1. Charles Momah, certify that I cannot afford to pay the \$250 filing fee normally required to file a Petition for Review.

1. I request that the filing fee be waived and that I be allowed to file Petition for review without prepayment of the filing fee.

2. My request in this matter is brought in good faith.

3. I am _____ am not employed. My salary or wages amount to \$ 0 per month. My employer is (Name and address):

4. I do _____ do not have any checking or savings accounts in any financial institutions. The total amount of funds I have in any such accounts of any type is \$ _____.

5. In the past 12 months, I did _____ did not receive any interest, dividends, rental payments, or other money. The total amount of such money I received was \$ 0. The total amount of cash I have other than otherwise indicated above is \$ 0.

6. I own or have an interest in the following real estate, stocks, bonds, notes, and other property (list any property of a present value of more than \$50, its current value and the amount, if any, currently owed against said property):

<u>Item</u>	<u>Value</u>	<u>Amount Owed</u>
(for example: an automobile, make, model, and year; the present value, \$3,000.00; still owe \$500.00).		

<u>N/A</u>	_____	_____
_____	_____	_____
_____	_____	_____

7. I am _____ am not married. My spouse is _____ is not _____ employed. His or her salary or wages amount to \$ _____ per month. _____ or she owns the following property not already described above:

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STATE OF WASHINGTON
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8. These following persons depend on me for support (list name, relationship to you, and address for each person):

N/A

9. I owe the following bills (list name and address of creditors and any amount currently owed):

Civil Judgment of \$2.2 million

[IF APPLICABLE - Petitioner incarcerated in a correctional facility-COMplete #10]

10. I have a spendable balance of \$ 140 in my prison or institutional account as of the date of this financial statement.

I declare under the penalty of perjury (pursuant to the laws of the State of Washington) that I have read this financial statement, know its contents, and I believe all of the information and statements contained therein to be true.

Dated this 28th day of April, 2015

[Signature]
PETITIONER

CERTIFICATION

I, Charles Momah hereby certify that on April 28, 2015, I mailed a copy of Petition for Review to the Respondents' Attorney, Mr. C. Kerley at his address below.

CM
Charles Momah
Dated: 28th April 2015

c/ Mr. Chris Kerley
Evans, Craven and Lacey, PC
818 W. Riverside Ave, #250
Spokane, WA 99201-0994

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