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NO. 69456-1

STATE OF WASHINGTON  
COURT OF APPEALS  
DIVISION NO. I

CHARLES MOMAH

Appellant/Plaintiff

vs.

WASHINGTON CASUALTY CO., et al.  
Respondent/Defendant

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**BRIEF OF RESPONDENT**

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**I. COUNTERSTATEMENT OF THE CASE**

**A. General Nature of Case and Identity of Parties**

This is an insurance dispute. The appellant, Charles Momah (hereinafter referred to as Momah), is a former gynecologist who, at one time, had a policy of professional liability insurance with respondent Washington Casualty Company (hereinafter referred to as WCC). Beginning in September 2003, more than 30 former patients of Momah filed medical malpractice actions against him. While in court-supervised rehabilitation under RCW 48.31, at the direction of the receiver WCC settled the claims that fell within the coverage period of Momah's policy and denied others because the alleged malpractice occurred beyond the policy's coverage period.

Momah's policy contained a consent provision, and the settlements were made over Momah's objection. Momah sued WCC, alleging breach of contract and violation of the Consumer Protection Act (CPA). In an Amended Complaint, Momah added a WCC claims representative, respondent Barbara McCarthy (hereinafter referred to as Ms. McCarthy), as a defendant and added a cause of action for bad faith. Via three successive motions for summary judgment all of Momah's claims were eventually dismissed. Momah now appeals those summary judgment orders.

**B. Statement of Pertinent Facts**

Momah is a former gynecologist. CP 41. The State of Washington issued him a license to practice as a physician in March of 1993. *Id.* After allegations arose that Momah raped a patient after hours at his office, the Medical Quality Assurance Commission, on September 10, 2003, summarily suspended Momah's license, finding the allegation presented a "imminent danger to the public health, safety and welfare requiring emergency action . . . ." CP 43, 44.

Thereafter, more than 30 former patients filed medical malpractice actions against Momah, beginning in September, 2003. CP 13, 14, 45, 46. In addition to acts of medical negligence, some of the plaintiffs alleged sexual misconduct by Momah. CP 13.

At the time most of the acts alleged in the various complaints occurred, Momah had in force a professional liability policy through WCC. CP 14-36. The policy limits were \$1,000,000 per claim, with no annual aggregate. *Id.*

On March 5, 2003, approximately six months before the first lawsuit against Momah was filed, the Washington State Insurance Commissioner sought to place WCC into receivership and rehabilitation with the filing of a Verified Petition for the Appointment of a Receiver. CP 169. On March 6, 2003, the Petition was granted and an Order of

Rehabilitation and Appointment of Receiver was filed in Thurston County Superior Court, with Assistant Insurance Commissioner John Woodall appointed as Deputy Receiver of WCC. CP 176.

As deputy receiver Mr. Woodall was charged with the authority and responsibility, pursuant to statute and the superior court order, to manage the business and property of WCC in receivership (WCCR), either in his own name or in the name of WCCR, and to take steps to remove the causes and conditions which made the receivership and rehabilitation of WCCR necessary. CP 141. As deputy receiver Mr. Woodall was also charged with administering the assets of WCCR under the general supervision of the Thurston County Superior Court. CP 141. On the date he was appointed deputy receiver Mr. Woodall took possession, by court order, of all assets, books, records, files and all of the property, real and personal, contracts, and rights of action of WCCR. CP 142. The contracts Mr. Woodall took possession of included the insurance contract between Momah and WCC. *Id.*

At the time of the verified petition and order, WCCR's liabilities exceeded its assets. CP 142. WCCR had reported a risk based capital mandatory control level event and the majority of the members of WCCR's board of directors had consented to receivership under the supervision of the Insurance Commissioner for purposes of

receivership/rehabilitation. *Id.* At the time of the filing of the verified petition, WCCR's liabilities were more than \$3 million in excess of its assets and that figure, in conjunction with the statutory requirement that WCCR maintain \$6 million in capital and surplus, resulted in an impairment in excess of \$9 million. CP 142.

As deputy receiver, Mr. Woodall had a statutory obligation under RCW 48.31.045(1) to take action respecting pending litigation that he deemed necessary in the interest of justice and for the protection of WCCR's creditors, policy holders and the public. CP 142. During WCC's receivership Barbara McCarthy was employed by WCCR and worked directly with Mr. Woodall and under his supervision, direction and control relating to his statutory duties as deputy receiver. CP 143.

WCC engaged legal counsel to represent Momah under a reservation of rights. CP 8, 183. It investigated the malpractice allegations, consulted medical experts regarding the strength of plaintiffs' allegations, consulted with plaintiffs' counsel, and consulted extensively with the attorneys WCC assigned to the cases. *Id.*, CP 8. After much consideration, Mr. Woodall and WCCR concluded that a global settlement of all of the plaintiffs' Complaints that fell within the policy's coverage period was the best and most sensible course of action. *Id.* Mr. Woodall and WCCR believed, among other things that, a global settlement would protect

Momah from the likely adverse excess judgments he would face if the cases were tried to a jury. *Id.*; CP 7-14.

In 2004, Momah was charged in King County Superior Court with one count of rape in the third degree, two counts of indecent liberties, and one count of rape in the second degree. CP 477. (copy of *State v. Momah*, 167 Wn.2d 140, 145-147, 217 P.3d 321 (2009)); King County Superior Court No. 01-1-05925-5. In November of 2005, Momah was convicted of all charges. CP 477.

During the pendency of Momah's criminal proceedings in 2005 and while under receivership and rehabilitation, WCCR began mediation of the plaintiffs' Complaints. CP 8, 10-14. Momah's WCC policy contained a consent provision (CP 35) and Momah adamantly refused to settle any of those Complaints. CP 12 In an effort to restrain WCC from settling any of the cases, Momah filed a civil Complaint against WCCR on October 21, 2005, in King County Superior Court. CP 13, CP 48-51. The court issued a temporary restraining order prohibiting WCC from continuing the mediation. CP 53-55. In compliance with the TRO, WCC ceased mediation and all settlement negotiations. CP 13.

Because of WCC's receivership status at the time, Momah's case was transferred to Thurston County Superior Court. CP 58. The parties engaged in extensive briefing (before both the King County and Thurston

County Superior Courts), and on November 20, 2008, the Thurston County Superior Court entered an order dismissing Momah's Complaint without prejudice. CP 58-60.

After Momah was criminally convicted of one count of rape in the third degree, two counts of indecent liberties, and one count of rape in the second degree, WCC, with the approval of the receiver, reached a global settlement of all of the plaintiffs' Complaints, paying out substantial sums to 32 plaintiffs. CP 13-14. Of the 32 plaintiffs whose cases WCC settled, the latest dispositive court docket entry on any of the cases was May 22, 2007. *Id.* Thirty of the cases against Momah were settled in April or May of 2006. CP 13. Two cases involved minors, which required the appointment of *guardians ad litem* and court approval of the settlements. Court approval of the two settlements involving minors occurred in May of 2007. CP 13, 14.

Two claims/cases, *McDougal* and *Saldivar*, were not settled while WCC was in receivership/rehabilitation. However, WCC denied the McDougal claim because the damage-causing behavior described in the Complaint was based on conduct that occurred after the expiration of Momah's WCC policy. CP 370, CP 380. No coverage existed for the Saldivar claim because it was never tendered to WCC and because, in any case, Momah's alleged case and treatment of Saldivar occurred on and

after May 12, 2003, beyond the coverage period of the policy. CP 524-527.

**C. Pertinent Trial Court Proceedings/Actions**

On January 28, 2011 Momah filed a complaint against WCC in King County Superior Court, alleging breach of contract and violation of the CPA. CP 1-3. The Summons and Complaint were, however, never served on WCC. CP 7. On January 12, 2012, the trial court issued an order giving Momah leave to file an Amended Complaint (Docket No. 23 – no CP). The Amended Complaint named WCC and Ms. McCarthy as defendants, and alleged breach of contract, violation of the CPA and bad faith. (Docket No. 19 – no CP). Ms. McCarthy, however, was never served with a copy of the Summons and Amended Complaint. CP 140, 141.

On March 2, 2012, the trial court issued a summary judgment order dismissing Momah's CPA and bad faith claims, CP 116-118, leaving only the breach of contract claim. On May 30, 2012, the trial court issued a summary judgment order dismissing all remaining claims against WCC and Ms. McCarthy, except those relating to WCC/Ms. McCarthy's actions concerning a claim asserted against Momah by Perla and Albert Saldviar. CP 383-385. On September 19, 2012, the trial court issued a summary judgment order dismissing all of Momah's claims relative to Saldviar,

which order disposed of all of Momah's claims against all defendants. This appeal followed. CP 538-39.

## II. ARGUMENT AND AUTHORITIES

### A. Standard of Review with Respect to Summary Judgment Orders

A party against whom a claim is asserted may move for summary judgment in his favor as to all or any part thereof. CR 56(b) provides:

The judgment sought shall be rendered forthwith if 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 fact and that the moving party is entitled to a judgment as a matter of law.

CR 56(c). A motion for summary judgment presents a question of law that is reviewed de novo. *Denaxas v. Sandstone Court of Bellevue, LLC*, 148 Wn.2d 654, 662, 63 P.3d 125 (2003).

Even though the evidence presented on summary judgment is to be viewed in a light most favorable to the non-moving party (*Osborn v. Mason County*, 157 Wn.2d 18, 22, 134 P.3d 197 (2006)), when there is no genuine issue as to any material fact, summary judgment is proper. *Id.*

**B. The Trial Court's First Summary Judgment Order Properly Dismissed Momah's Bad Faith and Consumer Protection Action Claims on the Ground of the Statute of Limitations**

**1. Applicable statute of limitations for CPA and Bad Faith claims, Momah's filing and failure to serve.**

The statute of limitations for a CPA claim is four years. RCW 19.86.12; *McKee v. AT&T, Corp.*, 164 Wn.2d 372, 399, 191 P.3d 845 (2009). A bad faith claim against an insurance company sounds in tort, and such a claim is thus subject to the three year statute of limitations. *Safeco Ins., Co. of Am. v. Butler*, 118 Wn.2d 383, 389, 823 P.2d 499 (1992); RCW 4.16.080.

The last settlement of the claims against Momah occurred in May of 2007. Thus, the four year statute of limitations for a CPA claim ran at the end of May 2011, and the three statute for a bad faith claim ran at the end of May 2010. Momah filed his Complaint against WCC for breach of contract and violation of the Consumer Protection Act on January 28, 2011, after the statute of limitations for a bad faith claim expired. The Complaint was filed before the expiration of the statute of limitations on the CPA claim. However, Momah never accomplished service on WCC so as to effectively commence his action before the expiration of the statute. Accordingly, the trial court properly granted summary judgment on

Momah's CPA and Bad Faith claims on the ground of expiration of the statute of limitations and insufficiency of service of process.

2. **WCC and Ms. McCarthy did not waive the defenses of statute of limitations/insufficiency of service of process**

Momah claims WCC and Ms. McCarthy waived their statute of limitations and insufficiency of service of process defenses. For the following reasons, Momah's argument is not well taken.

First, Momah argues that WCC, through defense counsel, engaged in dilatory conduct after Momah filed his Complaint and defense counsel filed and served his Notice of Appearance. However, the conduct described by Momah as dilatory is not supported by any affidavits or declarations made part of the summary judgment record. For that reason alone Momah's waiver argument should be rejected.

Even if the conduct described by Momah in his brief was supported by the summary judgment record, which it is not, that conduct did not amount to a waiver. In certain circumstances the common law doctrine of waiver will preclude a defendant from raising the defense of insufficiency of service of process and expiration of the statute of limitations. *Lybbert v. Grant County*, 141 Wn.2d 29, 38, 1 P.3d 1124 (2000). A defendant may waive the affirmative defenses if (1) assertion of the is inconsistent with defendant's prior behavior or (2) the defendant has

been dilatory in raising the defense. *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002).

Here, WCC did not engage in any conduct inconsistent with its moving for summary judgment based on the expiration of the statute of limitations and insufficiency of service of process. WCC never filed an Answer to Momah's Complaint(s). The defenses of expiration of the statute of limitations and insufficiency of service of process may, however, be raised for the first time in a motion. *See* CR 12(b) and (h).

After Momah's initial Complaint was filed on January 28, 2011, it was not served on WCC. Defense counsel filed his Notice of Appearance on August 11, 2011. (Docket #9 – No CP). Then, on December 14, 2011, WCC filed and served its Motion for Summary Judgment. CP 4-6. Before moving for summary judgment, defense counsel did not engage in any conduct inconsistent with the assertion of the defenses of expiration of the statute of limitations and insufficiency of service of process. More specifically, neither WCC nor defense counsel engaged in any discovery or indicated in any way to Momah that his action was timely or that WCC was waiving the defenses of the statute of limitations and insufficiency of service of process.

Momah argues that WCC waived their defenses by "lying in wait" until the statute of limitations expired before raising the defenses of

expiration of the statute and insufficiency of service of process. Brief of Appellant, page 10. But where a defendant is not served with a copy of the Summons and Complaint before the expiration of the statute of limitations, query how the defendant can "lie in wait."

Even where a defendant has filed and served a notice of appearance before the expiration of the statute of limitations, he has no obligation to raise the issue of insufficiency of service of process in an answer or otherwise give notice to the plaintiff before the statute expires, as long as counsel does not engage in conduct that might otherwise amount to waiver. Illustrative of this point is *Harvey v. Obermeit*, 163 Wn.App. 311, 261 P.3d 671 (2011). There, the subject car accident occurred on August 2, 2006. On July 23, 2009, the plaintiff filed a negligence action against the defendant. However, the plaintiff was unable to locate the defendant for service and ultimately attempted substitute service under the non-resident motorist statute. After receiving notice of the lawsuit, the defendants' insurer retained defense counsel, who served a Notice of Appearance on October 15, 2009. The statute of limitations expired on October 21, 2009. Defense counsel did not apprise plaintiff's counsel of the impending expiration of the statute of limitations. On November 2, defense counsel filed an Answer asserting the affirmative defenses of insufficiency of service of process and expiration of the statute

of limitations. Defense counsel, on the same day, served plaintiff's counsel with interrogatories and requests for production, a request for statement of damages, and a jury demand. On November 2, the plaintiff's counsel served defense counsel with pattern interrogatories and requests for production. In early January 2010, defense counsel responded to the plaintiff's discovery request. In mid-January, defense counsel issued records depositions subpoenas to obtain the plaintiff's medical records, and serve them on healthcare providers.

On February 10, 2010, the defendant filed a Motion to Dismiss under CR 12, citing lack of service of process and expiration of the statute of limitations. The motion was granted, and the Court of Appeals affirmed, holding that waiver did not apply.

If the facts of *Harvey, supra*, do not support waiver, then surely the facts of the instant case do not. The statute of limitations had expired by the time defense counsel appeared for WCC in August of 2011. And defense counsel did not engage in any conduct inconsistent with the later assertion of the affirmative defenses of expiration of the statute and insufficiency of service of process.

3. **The statute of limitations was not tolled by any personal disability of Momah**

Momah claims the statute of limitations was tolled under RCW 4.16.190 because of the "personal disability" of his incarceration. Momah's tolling argument is misplaced.

Under RCW 4.16.190, imprisonment is a form of personal disability that can toll the statute of limitations. However, the only imprisonment that tolls the statute is imprisonment "on a criminal charge prior to sentencing . . ." RCW 4.60.190(1)(emphasis added). Post-sentencing imprisonment does not toll the statute. *See, Gausvik v. Perez*, 239 F.Supp.2d 1108 (Ed.Wash. 2002), reversed in part on other grounds, 345 F.3d 813.

A party asserting he is entitled to a tolling of the statute of limitations bears the burden of proof on that issue. *Rivas v. Overlake Hospital Medical Center*, 164 Wn.2d 261, 267, 189 P.3d 753 (2008); *Cannavina v. Poston*, 13 Wn.2d 182, 190-91, 124 P.2d 787 (1942). On September 15, 2004, King County charged Momah with raping or taking indecent liberties with four of his patients, and with insurance fraud. In November of 2005, Momah was convicted of rape and indecent liberties and sentenced to 20 years in prison. The Court of Appeals affirmed

Momah's convictions. *See, State v. Momah*, 141 Wn. App. 705, 171 P.3d 1064 (2007), *rev. granted*, 163 Wn.2d 1012 (2008).

Here, Momah has not demonstrated that he was incarcerated at any time before his sentencing, nor has he demonstrated the length of pre-sentence incarceration, if it in fact occurred. Accordingly, Momah's tolling argument should be rejected.<sup>1</sup>

**C. The Trial Court's Second Summary Judgment Order Properly Dismissed Momah's Breach of Contract Claims**

The trial court's second summary judgment order properly dismissed Momah's breach of contract claim because the cases/claims against Momah were settled at the direction of and under the authority of Mr. Woodall, the receiver, while WCC was in receivership, and neither WCC nor Ms. McCarthy can be held liable for the actions of the receiver. The second summary judgment order was proper as against Ms. McCarthy on the additional grounds that she was not a party to the insurance contract between Momah and WCC and was never served with process.

**1. Effect of receivership**

The legislature has vested in the Washington State Insurance Commissioner the authority to exercise realistic and meaningful control over an insurance company in need of rehabilitation. RCW 48.31.040. The

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<sup>1</sup> In his brief, Momah makes no argument that he was incarcerated at all before his conviction and sentencing. Instead, Momah states on page 19 of his Brief: "Dr. Momah has been incarcerated since November 2005."

statute authorizes the Insurance Commissioner to "take possession of the insurer and to conduct the business thereof..." *Id.* The legislature's grant of authority to the Insurance Commissioner is intended to benefit the public in general, not simply the insurer or its insureds. *Herrman v. Cissna*, 82 Wn.2d 1, 507 P.2d 144 (1973).

Under RCW 48.31 et seq., the Insurance Commissioner, acting through the receiver, enjoys plenary powers in supervising an insurance company in receivership or rehabilitation. The rehabilitator is charged by statute with taking such action respecting any pending litigation as he or she may deem necessary in the interest of justice and for the protection of creditors, policy holders, and the public. RCW 48.31.045. A petition for rehabilitation, by virtue of RCW 48.31.040, gives the rehabilitator/receiver the immediate right to possession and control of all of the assets of the insurer and the receiver is charged with administering those assets under the general supervision of the court. RCW 48.31.040(4). The receiver is afforded immunity from suit or liability under RCW 48.31.115, and this immunity extends to the Commissioner and any other receiver or administrative supervisor responsible for conducting proceedings. The immunity extends to any claims for damages to or loss of property or personal injury or other civil liability caused by or resulting from an

alleged act or omission of the Commissioner or an employee rising out of or by reason of his or her duties or employment. RCW 48.31.115(2).

In short, the rehabilitation process and appointment of a receiver divests an insurance company and its employees of control over the insurers assets and the resolution of claims against the insurer. Consistent with this, the common law recognizes that, in the absence of a specific statute or agreement imposing liability upon them, neither a corporation in receivership nor an employee of that corporation are responsible for the contractual undertakings of the receiver, or for liabilities arising from the torts of the receiver or his employees. *See* 65 Am.Jur.2d Receivers §285; 16 Fletcher Cyc. Corp. §7798; *Fryar v. Hazelwood Holstein Farms*, 97 Wash. 78, 165 P. 1084 (1917).

In the instant case WCC had no authority to make determinations regarding whether to settle or defend the Momah claims. WCC did not own the insurance contract or control the administration of the insurance contract it previously entered into with Momah. The insurance contract and the right to administer it belonged to Mr. Woodall as the receiver of the company. It was Mr. Woodall who made the decision to settle the Momah claims and he directed a WCCR employee, Ms. McCarthy, to pursue and consummate the settlements. Mr. Woodall's rationale for settling the claims against Momah was, according to both his declaration

and that of Barbara McCarthy (CP 8), prompted by what in his judgment was in the best interest of WCCR, its creditors, policy holders and the general public.

In sum, Mr. Woodall was vested with the absolute authority, subject to final court approval, to manage and administer the entire business of WCC including the administration of its insurance contracts. Neither WCC nor Ms. McCarthy can be held liable for the actions of Mr. Woodall.

**2. Corporate successor liability principles do not apply**

Without citing any authority on point, Momah argues that principles of corporate successor liability make WCC liable for the actions of the receiver, Mr. Woodall, now that WCC has emerged from receivership/rehabilitation. Respondents are not aware of a single reported case applying concepts of successor liability to an insurance company that has emerged from rehabilitation or receivership so as to saddle the rehabilitated company with liability for the act of the receiver. Obviously, the imposition of such liability would frustrate the purpose of receivership/rehabilitation, and this argument should be rejected.

**3. The Court order approving Mr. Woodall's actions as receiver cannot be collaterally attached**

Notwithstanding the above, on October 6, 2006, after a hearing on adequate notice to all interested parties involved in the rehabilitation and receivership of WCC, the Thurston County Superior Court ordered that all actions and determinations taken by Mr. Woodall in connection with his activities as deputy receiver would be approved and confirmed. The Thurston County Superior Court issued its order, which it classified as a final judgment, determining that the receivership was completed, should be terminated, that the receiver and his agents and employees should be discharged and the liquidation receivership proceedings terminated and closed. This judicial determination by the Thurston County Superior Court conclusively established that all activities taken by Mr. Woodall in connection with his task as receiver, including the determination made to settle the civil claims against Momah, were in the best interests of WCCR, its creditors, policy holders, and the general public be approved and confirmed. Momah did not appear, offered no objection and is now barred from attacking that determination.

**4. Breach of Contract Claim Against Ms. McCarthy**

The breach of contract claim against Ms. McCarthy was properly dismissed because Ms. McCarthy was not a party to the insurance

company between Momah and WCC. A contract can be enforced or a breach sued upon only against those who are parties to the contract. *McIntyre v. Johnson*, 66 Wash. 567, 120 P. 92 (1912). The policy of insurance was between WCC and Momah. Ms. McCarthy was not a party to that contract. Accordingly, the breach of contract claim was properly dismissed.

5. **Lack of Service of Amended Complaint on Ms. McCarthy**

The claim against Barbara McCarthy was properly dismissed because she was never served with process. RCW 4.28.080(15) requires service of process to be made by personal service, and service can be accomplished by leaving the Summons and Complaint at the house of the party's usual abode with a resident therein of suitable age and discretion. *Id.* Personal service of a summons or other process may be made upon any party outside of the state, but service still must be obtained by personal service. RCW 4.28.180.

Here, Ms. McCarthy was never served with process. Accordingly, the claims against her were properly dismissed.

**III. CONCLUSION**

Based on the foregoing argument and authorities, Respondent WCC and Ms. McCarthy respectfully request that the trial court's summary judgments be affirmed.

RESPECTFULLY SUBMITTED this 17 day of December, 2013.

EVANS, CRAVEN & LACKIE, P.S.

By 

CHRISTOPHER J. KERLEY, #16489  
Attorneys for Respondent/Defendants

**CERTIFICATE OF SERVICE**

Pursuant to RCW 9A.72.085, the undersigned hereby certifies under penalty of perjury under the laws of the state of Washington, that on the 17 day of December, 2013, the foregoing was delivered to the following persons in the manner indicated:

**LEGAL MAIL**

CHARLES MOMAH, Inmate No. 888910  
COYOTE RIDGE CORRECTIONS  
CENTER – HA4  
P.O. BOX 769  
CONNELL, WA 99326

VIA REGULAR MAIL   
VIA CERTIFIED MAIL [ ]  
VIA FACSIMILE [ ]  
HAND DELIVERED [ ]

12/17/13 / Spokane, WA  
(Date/Place)

  
\_\_\_\_\_

12/17/13 11:57