

68179-6

68179-6

No. 68179-6

COURT OF APPEALS
DIVISION I
OF THE STATE OF WASHINGTON

MICHELLE L. MALKIN
Appellant,

v.

VERBENA HEALTH,
Respondent

2012 MAY 22 PM 3:38
COURT OF APPEALS DIV I
STATE OF WASHINGTON

APPELLANT'S BRIEF

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ORIGINAL

TABLE OF CONTENTS

I Assignment of error

1. The trial court erred when it granted summary judgment to Plaintiff Verbena Health on December 8, 2011.

II. Issues relating to Assignment of error

1. Did the trial court err in its application of principles relevant to motion for summary judgment

2. Did the trial court err in finding that Defendant Malkin waived application of the affirmative defense of failure to obtain personal jurisdiction?

3. Did the trial court err in finding personal jurisdiction through valid substitute service on third-party Lundquist?

4. Did the trial court err in finding that the evidence established standing of Verbena Health to pursue this lawsuit?

4.1 Was there inadequate evidence of corporate authorization to commence the lawsuit in June of 2010?

4.2 Did the lawsuit fail to meet statutory exceptions to the duty of a dissolved corporation to wind-up the business of the corporation?

5. Did the Court erred in drawing adverse inferences at summary judgment based upon the exercise of Fifth Amendment rights?

III. Statement of the case..... 6

IV. Argument 9

1. Principles Relevant to Motion for Summary Judgment..... 9

2. The Court erred in finding that Defendant Malkin waived application of the affirmative defense of failure to obtain personal jurisdiction 11

3. The Court erred in finding personal jurisdiction through valid substitute service on third-party Lundquist..... 13

4.	The trial court erred in finding that the evidence established standing of Verben Health to pursue this lawsuit	15
4.1	There was inadequate evidence of corporate authorization to commence the lawsuit in June of 2010	16
4.2	The lawsuit failed to meet statutory exceptions to the duty of a dissolved corporation to wind-up the business of the corporation.	16
5.	The Court erred in drawing adverse inferences at summary judgment based upon the exercise of Fifth Amendment rights.....	17
V.	Conclusion	19

TABLE OF AUTHORITIES

Table of Cases

<u>Barnes v. McLennod,</u> 128 Wn.2d 563, 810 P.2d 469 (1996).....	10
<u>Brouillet v. Cowles Publishing Co.,</u> 114 Wn. 2d 788, 791 P.3d 526 (1990).....	9
<u>Burmeister v. State Farm Ins. Co.,</u> 92 Wn. App. 359, 966 P.2d 921 (1998)	10
<u>Dutch Village Mall v. Pelletti,</u> 162 Wn. App. 531, 256 P. 3d 1251 (2011).....	17
<u>Gross v. Sundig,</u> 139 Wn. App. 54, 161 P.3d 389 (2007).....	14
<u>Homeowners Association v. Tydings,</u> 72 Wn. App. 139, 864 P.2d 392 (1993).....	9
<u>Hooper v. Yakima County,</u> 79 Wn. App. 770, 904 P.2d 1183 (1995)	10
<u>Ikeda v. Curtis,</u> 43 Wn. 2d 449, 261 P.2d 684 (1953).....	18
<u>Impecovent v. Dept. of Revenue,</u> 120 Wn. 2.d 357, 841 P.2d 757 (1992)	10
<u>Jacobsen v. State,</u> 89 Wn.2d 104, 108, 569 P.2d 1152 (1977).	10
<u>Lybbert v. Grant County,</u> 141 Wn.2d 29, 1 P.3d 1124 2000).....	12
<u>Nicholson v. Deal,</u> 52 Wn.App 814, 764 P.2d 1007 (1988)	10

<u>Redding v. Virginia Mason Medical Center,</u> 75 Wn App. 424, 878 P.2d 483 (1994).....	9
<u>Safeco Insurance v. Butler,</u> 118 Wn.2d 383, 823 P.2d 499 (1992)	10
<u>Sheldon v. Fettig,</u> 129 W2d. 601, 919 P.2d 1209 (1996).....	14
<u>Skimming v. Boxer,</u> 119 Wn. App. 748, 82 P.3d 707 (2004).....	11
<u>Streeter-Dybdahl v. Nguyet Huyhn,</u> 157 Wn. App. 408, 236 P.3d 986 (2010).....	15
<u>Tabak v. State,</u> 73 Wn.App. 691, 870 P.2d 1014 (1994).....	10
<u>Thayer v. Edmonds,</u> 8 Wn. App. 36, 503 P.2d 1110 (1973).....	11
<u>Weiss v. Glemp,</u> 127 Wn. 2d 726, 903 P. 2d 455 (1995).....	15
<u>Woodruff v. Spence,</u> 76 Wn. App. 207, 883 P.2d 936 (1994).....	14
<u>Yuan v. Chow,</u> 92 Wn. App. 137, 960 P.2d 1003 (1998).....	10

Regulations and Rules

RCW 4.28.080.....	14
RCW 4.28.080(15).....	14
RCW 24.03.470.....	15
RCW 24.03.465.....	16
RCW 23B.14.050.....	8
RCW 23B.14.050(1).....	17

CR52 (a)(5)(B)..... 11

U.S. Supreme Court Cases

Lefkowitz v. Turley,
414 US 70, 77 (1973) 18

Kastigar v. U.S.,
406 US 441 (1972) 18

Federal Cases

Doe v. Glazer
232 F. 3R 1298 (9th Cir. 2000)..... 18

U.S. Liquor Company v. Gard,
705 Fed. 2d 1499, 501 (9th Cir. 1983)..... 18

III. STATEMENT OF THE CASE

On December 8, 2011, the Honorable Kimberly Prochenau, Judge of the King County Superior Court, granted summary judgment in this cause in favor of Plaintiff Verbena Health. CP 43. Judgment was granted in the face of Ms Malkin's defenses, among others, that no personal jurisdiction was obtained over her when the Plaintiff tried to commence the action by attempted substitute service on Ms. Malkin in Illinois at the then- residence of Alice Lundquist. CP 371-385. The complaint was replete with allegations of commission of criminal acts. CP 1-16. For this reason, Ms Malkin repeatedly and unambiguously asserted her 5th Amendment privilege to remain silent in the face of criminal allegations against her. CP 20, 21, 54-73, 98, 99-109, 111-116. Additionally, and to no avail, Ms. Malkin asserted in her answer that plaintiff, a dissolved corporation, had not demonstrated standing to commence or pursue the lawsuit against her. CP 20, 21.

In this lawsuit, and because of the interposition of her 5th Amendment rights, Ms. Malkin did not attack the merits of the claims against her, claims that she, an executive officer of plaintiff, embezzled a substantial amount of money from the corporation.

Throughout the entirety of this proceeding, Ms. Malkin challenged the claim that she was properly served in Illinois. She did so in her Answer to the complaint, in her objections to Plaintiff's Interrogatories, and in her Answers to Plaintiff's Requests for Admissions. CP 20, 21, 99-110, 111-117.

The trial court granted summary judgment in this case, finding that Ms. Malkin had waived the affirmative defense of failure to obtain personal jurisdiction. This determination was based on material presented largely by the Plaintiff, which in its initial motion for summary judgment, specifically addressed the issue of failure of the defense of failure to

obtain personal jurisdiction. CP 45. That affirmative attempt to dispose of the personal jurisdiction issue at summary judgment is some evidence that there was no surprise to Verbena Health by Ms. Malkin's persistent notice that she was raising the affirmative defense of failure to obtain personal jurisdiction of her.

This appeal is prosecuted based upon what Ms. Malkin claims is a series of errors made by the Plaintiff when it attempted to commence and pursue this lawsuit some two years after it claimed that its executive officer, Ms. Malkin, had committed criminal acts against her employer, misnamed in the caption and in the body of the complaint as "Verbena Health". CP 1, 2. The actual name of the Plaintiff and what is claimed as an extant, or formerly extant, corporation is, according to the Secretary of State, "Verbena." CP 371-385; CP 117,124.

The Plaintiff filed a lawsuit under the name Verbena Health complaining that Ms. Malkin, as executive director of a non-profit corporation, converted corporate funds to her own use, thereby committing the crimes of fraud and embezzlement. CP 1-16. As noted above, Ms. Malkin answered the complaint, raising the issue of failure to obtain personal jurisdiction, and lack of standing of the Plaintiff Verbena Health, and affirmatively asserting her Fifth Amendment rights against compulsory self-incrimination.

Plaintiff presented to the trial court a physically formidable motion for summary judgment, elaborating on the criminal misconduct of Ms. Malkin. CP 24-49, 50-116, 117-367. Defendant Malkin responded to the motion reiterating the defense of failure to obtain personal jurisdiction, challenging the standing of the Plaintiff to bring the lawsuit, and continuing to insist upon her right to be free from compulsory self-incrimination under the Fifth Amendment of the Constitution of the United States. CP 371-385.

On the issue of personal jurisdiction, Ms. Malkin was supported by the declaration of Alice Lundquist who was the possessor, whether renter, or purchaser, or owner, of the residence in Illinois where the Plaintiff tried to serve Ms. Malkin. CP 384-385. Ms. Lundquist stated that she told a person later identified as a process server, Brett Starr, that Ms. Malkin had left the area to go to school and that she was not living at the Lundquist residence. CP 384-385. Additionally, Ms. Lundquist stated in her declaration that papers from the paper-bearing individuals who came to her door were never handed to her and were simply left outside the Lundquist residence. CP 384, 385. She stated that the process server came twice to her residence. CP 384-385. The second time, when an individual left the papers on her porch, she would not open the door to the individual out of fear of his threatening behavior. CP 385.

At summary judgment, Defendant Malkin raised also the issue of the standing of the corporation to bring the lawsuit. CP 371-385. Verbena Health provided evidence that the corporation had dissolved on August 30, 2009, before the lawsuit commenced. CP 122. Plaintiff's evidence indicated that declarant David Haack, who claimed to be the "Chair of the Verbena Health Board of Directors", was not Chairman of the Board of Directors: a "Christoph Hanssman" was identified by Mr. Haack as the Chairman; and the evidence did not indicate that the Board had authorized the initiation of the lawsuit. CP 117-367, 121. As noted below, the standing issue related to the existence of an entity capable of filing the lawsuit, as well as the limitations upon a dissolved corporation, imposed by Washington statutes which limit the authority of a dissolved corporation to acts which would "wind up" the business of the corporation. RCW 23B.14.050

Ms. Malkin submits that it should be apparent from the bulk of the pleadings, or at least there should be disputed material evidentiary facts in this case, that Verbena Health does not meet the statutory requirements limiting the authority of a dissolved corporation.

At summary judgment also Defendant Malkin challenged the admissibility of a number of pieces of evidence proffered by Plaintiff in support of its motion. CP 371-376. The trial court did not address at length those objections. Ms. Malkin continues to object to the evidentiary submissions in this case, focusing on hearsay objections. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 966 P.2d 921 (1998). Mr. Haack could not authenticate another entity's records which would be hearsay. CP 117-123, 372-375. However, Ms. Malkin's emphasis remains primarily with her position that Plaintiff never obtained personal jurisdiction of her and that Plaintiff did not at the time of commencing the lawsuit exist as a legal entity capable of prosecuting this lawsuit.

IV. ARGUMENT

1. Principles Applicable to Review of Summary Judgment.

Because the judgment entered was a judgment on motion for summary judgment, the Court reviews the evidence *de novo*. Brouillet v. Cowles Publishing Co., 114 Wn. 2d 788, 791 P.3d 526 (1990). Factual findings by the trial court will be disregarded by the reviewing court. Redding v. Virginia Mason Medical Center, 75 Wn. App. 424, 878 P.2d 483 (1994). In this regard, the principles of assessment applicable to a summary judgment are those required of both the trial court and the appellate court.

In reviewing a motion for summary judgment, a court must view the facts in a light most favorable to the non-moving party, in this instance, the Defendant. Homeowners Association v.

Tydings, 72 Wn. App. 139, 864 P.2d 392 (1993). All reasonable inferences from the evidence must be drawn in favor of that non-moving party. Tabak v. State, 73 Wn.App. 691, 870 P.2d 1014 (1994). A summary judgment of dismissal of a lawsuit is sustainable only if there are no genuine issues of material fact. Homeowners, *supra* at 154. The party resisting summary judgment must present some evidence, even inconsistent evidence, which will support the existence of a material issue of fact. Yuan v. Chow, 92 Wn. App. 137, 960 P.2d 1003 (1998); Barnes v. McLennod, 128 Wn.2d 563, 810 P.2d 469 (1996).

The burden lies with the moving party to show the absence of material facts as to its various claims. Safeco Insurance v. Butler, 118 Wn.2d 383, 823 P.2d 499 (1992); Nicholson v. Deal, 52 Wn. App. 814, 764 P.2d 1007 (1988). Where issues of fact are presented, a court may not decide a factual issue unless reasonable minds can reach only one conclusion from the evidence presented. Hooper v. Yakima County, 79 Wn. App. 770, 904 P.2d 1183 (1995). The party moving for summary judgment must establish through presentation of admissible evidence the absence of any material disputed fact. Jacobsen v. State, 89 Wn.2d 104, 108, 569 P.2d 1152 (1977). Hearsay evidence is not admissible evidence. Burmeister v. State Farm Ins. Co., 92 Wn. App. 359, 966 P.2d 921 (1998). Supporting documents at summary judgment must be authenticated. 122 Wn. App. 736. Summary judgment may be entered in favor of the non-moving party, even on appeal. Impecovent v. Dept. of Revenue, 120 Wn. 2.d 357, 841 P.2d 757 (1992).

Ms. Malkin objected to the trial court's decision to enter findings of fact and conclusions of law in connection with the summary judgment, CP 428-430. She objected to those findings because Washington courts make clear that findings and conclusions are superfluous in the summary judgment context, in good measure because the appellate court

reviews the evidence presented at the hearing *de novo*. CR 52(a) (5) (B); Skimming v. Boxer, 119 Wn. App. 748, 82 P.3d 707 (2004).

Ms. Malkin continues to object to the trial court's requirement in granting summary judgment that a transcript of the hearing was required to be prepared and submitted to the appellate court. CP 434-435, 431-433. Ms. Malkin did not have the money to purchase the transcript. And of more importance, the transcript of those proceedings, again in light of the *de novo* review of the case, was supererogatory. That requirement by the trial court imposed an unnecessary and onerous impediment to Ms. Malkin's right of appeal of this civil case.

2. The Court erred in finding that Defendant Malkin waived application of the affirmative defense of failure to obtain personal jurisdiction.

The parties submitted contradicting affidavits, or declarations, relating to the attempted service of process upon Ms. Malkin in Illinois. CP 112- 114 and CP 384-385. Significantly, for purposes of the service argument, what service that was attempted did not engage directly Ms. Malkin but rather Ms. Lundquist , who lived with her daughter at the address where the process terminated. Substitute service in this case was attempted upon a third party whose actions should not be viewed in the same way as one might view an evasive defendant. Because even an evasive defendant owes no duty of cooperation to a process server, Ms. Lundquist, a non-participating third party, should owe even less obligation. Thayer v. Edmonds, 8 Wn. App. 36, 503 P.2d 1110 (1973).

The primary argument of Plaintiff with regard to service in this case was that somehow Ms. Malkin waived the defense of insufficiency of service. CP 386-394. Evidence in the court record of that waiver is chimerical. Ms. Malkin, answering the complaint, raised the issue of insufficiency of service. CP 17-21. Thereafter, when interrogatories, and when requests for admissions, were submitted by Plaintiff, Ms. Malkin continued to assert

explicitly her position that there was no valid personal jurisdiction of her in the case. CP 89-110, 111-117. When a deposition of Ms. Malkin was taken in Illinois by Plaintiff's pro bono attorneys, Ms. Malkin persisted in asserting her Fifth Amendment rights in connection with the criminal accusations against her, an assertion which provided little weight to the argument of waiver. CP 54-73.

The Plaintiff may not straight-facedly claim that Ms. Malkin misled the plaintiff into supposing that she had abandoned her claim of lack of personal jurisdiction. That defense was affirmatively addressed, and made an issue of fact, in Verbena Health's motion for summary judgment. CP 45-49. There is no explanation why the Plaintiff did not attempt to eviscerate that defense earlier in the lawsuit.

The trial court extrapolated a waiver from the record in spite of Ms. Malkin's resistance to participation in pre-trial proceedings, and despite her repeated assertions of the failure to obtain personal jurisdiction of her. The Plaintiff's argument of waiver was anchored to the case of Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000). CP 386-394. Washington's Supreme Court was not unanimous in its ruling in that case. An emphatic dissenting opinion was entered by Chief Justice Madsen, who insisted that application of the majority's decision flew in the face of the history of the common law doctrine of waiver and created the kind of precedent which would effectively obliterate the defense of insufficient service of process in any civil case. Lybbert, *supra* at 30.

The majority in the Lybbert court observed that the defendant county participated actively in the action in a manner inconsistent with its claim of lack of jurisdiction. Lybbert, *supra* at 41, 42. The Lybbert majority held that waiver of the defense could be inferred from misleading or dilatory conduct on the part of the litigants. *Id.* In Lybbert, there was evidence

that the Plaintiff had served interrogatories inquiring about the jurisdiction of defense. Lybbert, *supra* at 42. The Defendant County's culpable behavior consisted of failure to answer the interrogatories and waiting until the statute of limitations had run before raising the jurisdictional issue for the first time. *Id.* at 42.

The damning behavior of the defendant was described by the Lybbert majority:

“By contrast, here, the County failed to preserve the defense by pleading it in its answer or other responsive pleading before proceeding with discovery. Instead it engaged in discovery over the course of several months and then after the statute of limitations had apparently extinguished the claim against it, it asserted the defense.”

Lybbert *supra* at 44.

The course of proceedings described and condemned by the Court in Lybbert simply lacks shared opprobrious characteristics with the proceedings in Ms. Malkin's case. Because of the absence of shared factual delinquencies, neither the opinion of the Lybbert majority, nor the Lybbert dissent would be offended by the determination by this Court that Ms. Malkin did not waive her defense of lack of personal jurisdiction.

What the records in this proceeding should establish is the fact that Ms. Malkin was not dilatory in filing in her answer her defense of insufficient service of process, that she did nothing to mislead the Plaintiff with the suggestion that she was not insisting on application of the defense, and that her participation in the proceedings in no way confused the Plaintiff about the fact that she was relying, among other reasons, on that defense.

3. **The trial court erred in finding valid substitute service on the third party Lundquist.**

The defendant countered the Affidavit of Brett K. Starr, Plaintiff's process server in this case, with the Declaration of Alice Lundquist, the person upon whom service of process was attempted. CP 111-113; 384, 385. Ms. Lundquist stated that on June 20, 2010, she

informed a person asking for Ms. Malkin, that Ms. Malkin had left the area and would not return until at least August of 2010, and that Ms. Malkin had made forwarding arrangements for her mail. CP 385. She also indicated that papers, presumably a copy of the Summons and Complaint, were left outside her house. (*Id.*)

Proof of proper service is a prerequisite to the obtaining of personal jurisdiction over a party. Woodruff v. Spence, 76 Wn. App. 207, 883 P.2d 936 (1994). A plaintiff in a given case has the burden of establishing a *prima facie* case of sufficient service. Gross v. Sundig, 139 Wn. App. 54, 161 P.3d 389 (2007). The statutory requirements for service reside in RCW 4.28.080. A relevant portion of that statute, and presumably the portion upon which Plaintiff relies, mandates the manner of service:

(15). In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

RCW 4.28.080(15).

In this case, a copy of the Summons and Complaint were not served on the Defendant. Instead it is claimed that the papers were “left” with Ms. Lundquist at Ms. Malkin’s usual place of abode. The term “leave with” is not a synonym for does not mean “leave outside of”. The term “usual place of abode” is interpreted to mean “the center of one’s domestic activity ...” Sheldon v. Fettig, 129 Wn.2d. 601, 919 P.2d 1209 (1996).

In this instance, the service address was not the usual place of abode of Ms. Malkin: it was not her family residence; and it was not the center of her domestic activity. It was the residence of Alice Lundquist and her daughter; and the manner of service, leaving process outside a residence, was not performed with any concrete expectation that Ms. Lundquist would pick up the documents and provide them to Ms. Malkin in another part of Illinois. Ms.

Lundquist avers that before the date of contact with the process server, Ms. Malkin, who had been living at the address, left that address to go to school in another part of the State of Illinois. CP 384, 385. She informed her interrogators of those facts. CP 384, 385. Her duty owed any one ended with her statement to the process server.

Where the evidence does not establish service upon a Defendant's usual place of abode, the service is not jurisdictionally sufficient. Streeter-Dybdahl v. Nguyet Huyhn, 157 Wn. App. 408, 236 P.3d 986 (2010). In that case, service on the address listed as the Defendant's address through the Department of Licensing, was found insufficient when it was established that the Defendant had moved on to another address.

Simply leaving a copy of a summons and complaint outside the building where the person to be served is known to be present is not sufficient service. Weiss v. Glemp, 127 Wn. 2d 726, 903 P. 2d 455 (1995). Similarly, the act of leaving the complaint and the summons outside the house of a person who has not agreed to accept vicarious service is not service and does not satisfy the requirement of "leaving" the papers with a person of suitable age at Ms. Malkin's usual place of abode.

4. The trial court erred in finding that the evidence established standing of Verbena Health to pursue this lawsuit.

The Defendant contested the issue of the standing of Verbena Health to bring this lawsuit in two, and perhaps three, ways. Ms. Malkin contested the standing of David Haack, without more, to bring the lawsuit, absent proof that the lawsuit was properly authorized by the corporate structure of Verbena Health. If Mr. Haack was acting only in his own behalf, or out of his generalized sense of fairness, or if he was acting outside the scope of his official corporate authority, the mere use of the corporate name would not confer standing upon that individual. RCW 24.03.470.

4.1. There was inadequate evidence of corporate authorization to commence the lawsuit in June of 2010.

The evidence provided in this case indicated that “Verbena Health” terminated all of its employees on May 13, 2008. CP 122. Plaintiff concedes that it was administratively dissolved on August 30, 2009. CP 122. This lawsuit was not commenced until June 17, 2010, over two years after Plaintiff discovered what are claimed as criminal acts of Ms. Malkin. CP 1.

While it may be true that the complaint alleges a profound and troubling pattern of wrong-doing by the Defendant, the face of the complaint alone does not confer standing on Verbena Health to bring this lawsuit. The evidence indicates that a residual “Chair” of Verbena Health Board of Directors was Christoph Hanssman and not David Haack. CP 111. There is no indication that as a sole and vestigial director, he had written authority from the corporation itself to bring the lawsuit. CP 117-367. The law requires more. RCW 24.03.465, requiring a written record executed by various members entitled to vote, or “all of the directors”.

4.2. The lawsuit failed to meet statutory exceptions to the duty of a dissolved corporation to wind-up the business of the corporation.

Assuming that there was a residual corporate entity having the capacity to authorize commencement of the lawsuit, there remains the issue of whether or not the enlisting of a team of attorneys in what had every indication of being an expensive and ultimately profitless lawsuit for Verbena Health, falls within the express limitations of RCW 23B.14.050, which states that a dissolved corporation “may not carry on any business except

that appropriate to wind up and liquidate its business and affairs”. RCW 23B.14.050(1). It is submitted that in these circumstances the lawsuit does not fall within the statutory limitations upon the powers of a dissolved corporation. The lawsuit constituted an additional and prolonged drag upon non-existent assets and raised the question of whether any party, person, or class of persons, could benefit financially from the outcome of the lawsuit.

A corporation is an artificial entity created by statute and may only appear in a lawsuit through representation by an attorney. Dutch Village Mall v. Pelletti, 162 Wn. App. 531, 256 P. 3d 1251 (2011). The present case suggests that the only cognizable entity in this case is the office of Plaintiff’s attorneys, and perhaps Mr. Haack. If this were the case, this litigation, however laudable, is a quixotic exercise pursued by a team of attorneys for a non-existent client in pursuit of an unattainable goal.

5. The Court erred in drawing adverse inferences at summary judgment based upon the exercise of Fifth Amendment rights.

The defenses of failure to obtain personal jurisdiction and lack of standing of Verbena Health did not implicate the testimony, or silence, of Ms. Malkin: that evidence of those defenses related to the testimony of others. No adverse inferences were appropriately drawn at least as regards those defenses. The complaint in this case was freighted with allegations of commission of criminal acts on the part of Ms. Malkin. Standing out among these allegations was a claim that the tort or crime of embezzlement was committed. CP 1-16. Plaintiff’s evidence indicated also that a Seattle Police Department and FBI investigation existed. CP 123. For these reasons, it should not cause astonishment that Ms. Malkin declined to respond to Plaintiff’s discovery assays in this action and instead interposed her Fifth Amendment rights, or privileges.

The Fifth Amendment to the United States Constitution extends to civil proceedings. Lefkowitz v. Turley, 414 US 70, 77 (1973); Kastigar v. U.S., 406 US 441 (1972). The privilege applies if there exists a “possibility of prosecution” for criminal acts. U.S. Liquor Company v. Gard, 705 Fed. 2d 1499, 501 (9th Cir. 1983). Because the privilege applies, the question arises of how it should be applied in a summary judgment context in a civil case. In this case, it is indisputable that Plaintiff alleged commission of criminal acts on the part of the Defendant. The sole state case offered by Verbena Health as vindicating summary judgment based upon exercise of Fifth Amendment rights was a case in which the issue was whether or not a jury in a civil jury trial, as opposed to the summary judgment context, would be allowed to draw adverse inferences from invocation of a defendant’s constitutional rights. Ikedo v. Curtis, 43 Wn. 2d 449, 261 P.2d 684 (1953). Regardless of the approach taken by the Court in that case, summary judgments may not be based solely upon the exercise of Defendant’s Fifth Amendment rights; there must be evidence, admissible in the summary judgment context, which allows a court to find that regardless of the exercise of constitutional rights, admissible evidence presented at summary judgment establishes that the movant has satisfied its burden of proving its various claims. Doe v. Glazer, 232 F.3d 1258 (9th Cir. 2000).

CONCLUSION

Throughout the lawsuit Ms. Malkin asserted unambiguously her defense that the Plaintiff never obtained personal jurisdiction of her in this case. As evident in Verbena Health’s motion for summary judgment, Verbena Health was fully aware of the existence of the defense. It has not explained why it waited until its motion for summary judgment before either moving for partial summary judgment on the issue of jurisdiction or exploring with

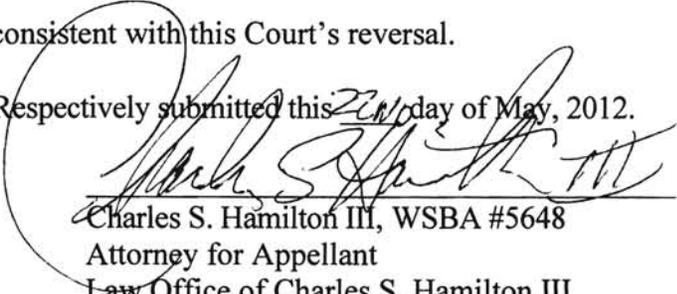
any degree of energy, the reasons for the interposition of the defense. Employment of the Lybbert case as a vindication of the mutual concept of waiver simply was not supported by evidence of acts inconsistent with an assertion of the defense nor by evidence that Ms. Malkin was dilatory in insisting upon that defense.

Whether the Plaintiff is “Verbena Health,” a misnomer, or “Verbena,” is a matter upon which that dissolved corporation should have knowledge. A corporation should know its own name. Of more importance, there was no sufficient evidence, or at least there was insufficient evidence, that the corporation, consistent with relevant statutes, had authorized pursuit of this action or that the fruitless action of a dissolved corporation was in any way consistent with the constraining statutory mandate to wind up the business of the corporation.

Instead this lawsuit was a symbolic lawsuit; and it might be conceded that the symbolic nature of the lawsuit may be appreciated, assuming the truth of the allegations. On the other hand, the lawsuit must be pursued consistent with requisite civil procedure and within statutory perimeters. Because that was not done, it is respectfully submitted that the trial court did not have jurisdiction over Ms. Malkin or the case, or that disputed material fact trumped the granting of summary judgment.

For the reasons set forth above, it is respectfully submitted that the trial court’s decision in to grant summary judgment in this case should be reversed and the case should be remanded to the trial court for action consistent with this Court’s reversal.

Respectively submitted this 20th day of May, 2012.



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vs.

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NO. 68179-6-I

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that I served a copy of **APPELLANT'S BRIEF** to be filed with the Washington Court of Appeals, Division I, by hand delivery at the following address:

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DATED this 22nd day of May, 2012.


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