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NO. 71561-5-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

2014 OCT 22 11:21 AM
COURT OF APPEALS
STATE OF WASHINGTON
ST. JAMES COURT

CYNTHIA LARSON, and her husband KEITH LARSON, and the
MARITAL COMMUNITY COMPOSED THEREOF,

Respondents,

v.

KYUNGSIK YOON, and his wife, JANE DOE YOON, and the
MARITAL COMMUNITY COMPOSED THEREOF,

Petitioners.

APPELLANTS' REPLY BRIEF

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I. INTRODUCTION

Respondents' Brief either mischaracterizes or ignores applicable authority including *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 108 S. Ct. 2104, 100 L. Ed. 2d 722 (1988), *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 10 P.3d 371 (2000) and a host of Washington decisions addressing waiver/abandonment of the defective service affirmative defense. The applicable facts and law lead to an inescapable reality: (i) Plaintiffs Cynthia and Keith Larson ("Larson") failed to serve Korean resident defendant Kyungsik Yoon ("Yoon") in accordance with the Hague Convention rules on service of process, (ii) the Hague Convention applied to process service on Yoon, (iii) the Hague Convention service requirements preempt Washington's non-resident motorist statute per *Volkswagenwerk* and *Broad* and other out of state authority, (iv) Yoon did not waive or abandon his defective service defense through misconduct or otherwise, and (v) the three year statute of limitations on Larson's claims has expired. This Court should reverse the trial courts orders and dismiss Larson's claims against Yoon with prejudice.

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II. ARGUMENT

A. **Larson Misinterprets *Volkswagenwerk* and *Broad*.**

As confirmed by *Broad*, the Supreme Court made clear in *Volkswagenwerk* that the Hague Convention preempts inconsistent process service methods prescribed by state law in all cases in which the Hague Convention applies. *Volkswagenwerk*, 486 U.S. 694 at 699; *Broad*, 141 Wn.2d 670 at 674-75. Again, the Hague Convention applies here because Larson employed RCW 46.64.040, Washington's nonresident motorist statute – a statute which requires the transmission of documents by mail to serve abroad via the Washington Secretary of State.¹ CP 13, 30. Indeed, Larson prefers to gloss over the reason why the *Volkswagenwerk* Court ruled that the Hague Convention did not apply there -- the Illinois long-arm statute authorized service on a subsidiary corporation without transmittal of the documents abroad.

Applying this analysis, we conclude that this case does not present an occasion to transmit a judicial document for service abroad within the meaning of Article 1. Therefore the Hague Service Convention does not apply, and service was proper.

Volkswagenwerk, 486 U.S. 694 at 707-08.

¹ Larson correctly states that whether Larson complied with the strict requirements of Washington's nonresident motorist statute alone – the Hague Convention preemption aside for the sake of argument -- is not at issue in this appeal. However, Yoon has not waived any potential argument in this regard at the trial court level.

Larson similarly attempts to turn the *Broad* decision on its head. The *Broad* plaintiffs sent pleadings (written in English) to the German central authority near the end of the statute of limitations period for service pursuant to the Hague Convention. *Broad*, 141 Wn.2d 670 at 675. The central authority informed the plaintiffs that the pleadings needed to be translated to German. After the pleadings were translated and service on the defendant was made, the 90 day tolling period for the statute of limitations had passed. *Id.* The *Broad* plaintiffs asserted that service on the central authority effectively constituted service on the defendant’s agent for the purpose of the tolling period akin to the RCW 46.64.040 traditional nonresident motorist service. The Washington Supreme Court rejected this argument as squarely inconsistent with the Hague Convention – “[t]he Hague Convention clearly contemplates, and explicitly states, that the central authority itself serves the defendant, not that the central authority itself may be served.” *Broad*, 141 Wn.2d at 677-78. Larson’s contention at page 9 of its Brief that “*Broad* distinguishes itself specifically from situations involving the nonresident motorist statute” is disingenuous; Larson knows better.

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B. Larson Purposefully Side-Steps Authority From Other Jurisdictions.

Other than correctly stating that the decisions are not binding on this Court, Larson ignores on-point authority from other jurisdictions. Those Courts considered similar facts and circumstances as presented here and ruled that the Hague Convention preempted the (extremely similar) other state nonresident motorist statutes because – like Washington’s nonresident motorist statute -- they required the transmittal of documents abroad. *See Heredia v. Transport S.A.S., Inc.*, 101 F.Supp.2d 158 (2000); *Curcuruto v. Cheshire*, 864 F.Supp. 1410 (1994). Larson does not dispute that Washington’s nonresident motorist statute requires the transmittal of documents abroad; but, Larson then cannot dispute that the service requirements of the Hague Convention apply and it is undisputed that Larson did not comply with Korea’s service requirements under the Hague Convention.

C. Larson Ignores Washington Waiver/Abandonment Authority.

Larson relies upon no authority in asserting that Yoon raised his defective service defense in bad faith or otherwise improperly “laid in the weeds” such that Larson’s own service failure should be excused. Moreover, Larson wholly ignores the authority relied upon by Yoon in

its briefing addressing affirmative defense waiver or abandonment – e.g., *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002); *Harvey v. Obermeit*, 163 Wash. App. 311, 261 P.3d 671 (2011); and *Meade v. Thomas*, 152 Wash. App. 490, 217 P.2d 785 (2009). Larson also mischaracterizes the underlying facts.

Quickly, Yoon did not waive or abandon its defective process service defense: (i) Yoon’s actions do not indicate abandonment; (ii) Yoon did not actively conceal the defense (to the contrary, he raised the inadequate service defense in his Answer significantly prior to the expiration of the statute of limitations); and (iii) Yoon did not participate in substantial discovery unrelated to the defense. *See Harvey v. Obermeit*, 163 Wash. App. 311, 323-34, 261 P.3d 671 (2011); CP 4-9, 14. Larson filed the lawsuit when he did because he was acutely aware of the looming statute of limitations issue; he simply pursued the wrong process service procedure. Blaming Yoon for Larson’s own failure to properly effectuate process service pursuant to the Hague Convention should be rejected.²

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² Larson’s repeated reference to Yoon’s liability coverage continues to be improper per ER 411 and is further irrelevant as prejudice or the alleged lack thereof is not a proper consideration in determining the validity of process service.

III. CONCLUSION

Washington's nonresident motorist statute requires the transmittal of documents abroad. As such, Larson was obligated to serve Yoon, a Korean citizen and resident, with process pursuant to the triggered Hague Convention. Having failed to timely do so, Larson permitted the three year statute of limitations to expire. Blaming his own process service deficiency on Yoon's conduct does not alter the conclusion particularly when Yoon asserted the inadequate service of process defense in his Answer served on Larson weeks before the statute of limitations expired. It is appropriate for this Court to reverse the trial court's orders denying summary judgment and reconsideration and dismiss all claims against Yoon with prejudice. Costs on appeal should be awarded to Yoon.

RESPECTFULLY SUBMITTED this 22nd day of October, 2014.

McCAFFERTY & STEINMARK, PLLC

By: 
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Kyungsik Yoon and Jane Doe Yoon

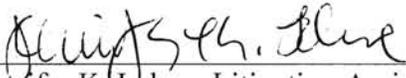
CERTIFICATE OF SERVICE

I, Jennifer K. Lehne, hereby certify under penalty of perjury under the laws of the State of Washington that on this date I sent a copy of the foregoing **APPELLANTS' REPLY BRIEF** properly addressed, prepaid, for delivery to the following persons in the manner indicated:

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SIGNED at Seattle, Washington on October 22, 2014.



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