

NO. 74626-0

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

TAMARA ZAITSEV,

Appellant.

v.

SHAWN KELLER, DDS ,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Appellant-Plaintiff, Elena Zaitsev, filed a lawsuit against her former dentist, Respondent-Defendant Shawn Keller. After filing her lawsuit, Appellant served process on Respondent's counsel, however a dispute exists as to which documents were actually served. Respondent contends his counsel only received an Order Setting Case Schedule; Appellant contends she gave all the required initiating documents to the sheriff for service, but somehow only the Order was delivered.

However, neither party disputes that whatever documents were served, they were served on Respondent's counsel, not on the respondent. Appellant failed in the trial court to put forth a prima facie case of proper service of process, since she concedes she served counsel, not the party. Appellant further failed to put make a sufficient showing that counsel was authorized to accept service, or that Appellant waived the right to challenge it. Failing to make a sufficient showing her service of process was proper, the trial court properly dismissed her claims.

II. ASSIGNMENTS OF ERROR

Respondent assigns no error to the superior court's decision.

III. STATEMENT OF THE CASE

This is an appeal from the dismissal of a dental malpractice case filed by Appellant, Tamara Zaitsev, against her former dentist, Respondent Shawn Keller, D.D.S. CP 68.

Appellant was a patient of Respondent's in 2012. CP 3. On June 21, 2012, while in the process of placing dental implants, a three millimeter piece of a pilot drill broke off. CP 3. Respondent's attempts to retrieve it were unsuccessful. CP 3. After consultation with oral surgeons, the decision was made to leave the drill bit in place and monitor it. CP 3.

Almost three years later, on May 5, 2015, Appellant filed a complaint against Respondent in King County Superior Court. CP 3-4. On May 12, 2015, Deputy Alan Kelley with the King County Sheriff's Office served an "Order" on Respondent's counsel. CP 49. A factual dispute exists regarding which documents Deputy Kelley served: Respondent submitted declarations from his counsel showing he only received the Order Setting Case Schedule. CP 25-26. Appellant submitted declarations which state she gave copies of the Summons, Complaint, and Order Setting Case Schedule to the sheriff's office for service. CP 44-46. Regardless of what documents were served, it is undisputed that whatever documents Appellant served, she served them on

Respondent's counsel, not the Respondent. CP 44-46; CP 25-26.

Appellant never filed a return of service from the sheriff's office. CP 70.

On May 21, 2015, Respondent's counsel filed a Notice of Appearance. CP 13. The Notice of Appearance specifically reserved the right to object to improper service of process. *Id.* The Notice of Appearance also specifically directed Appellant to serve all future papers, **except service of process**, on Respondent's counsel. *Id.*

After filing her lawsuit, Appellant did not pursue any discovery, and the parties did not conduct any settlement discussion. CP 56. In fact, other than Respondent filing a required possible witness disclosure, CP 36-39, and the Respondent moving for dismissal, no action in the case occurred at all. CP 56-57.

On November 16, 2015, Respondent filed a Motion to Dismiss. CP 16-35. The hearing date for the motion was December 22, 2015. CP. 16. In the Motion, Respondent argued the trial court lacked jurisdiction because Appellant failed to effect personal service of process when she served the Order Setting Case Schedule on Respondent's attorney. CP 18-24. Appellant responded on December 12, 2016, CP 40-50. Appellant argued she gave all the required documents to be served to the sheriff's office, but an error occurred and only the Order Setting Case Schedule was delivered. CP 40-41. However, Appellant conceded she served

Respondent's attorney, instead of Respondent personally, claiming she did so because she was under the impression she was not to have any direct contact with the Respondent. CP 41.

On December 3, 2016, pursuant to the Order Setting Case Schedule, Respondent filed his disclosure of possible primary witnesses. CP 36. The disclosure identified only witness who would offer testimony as to service of process, Respondent and his staff. *Id.*

Respondent never filed an answer to the complaint. *See* Clerk's Papers.

When Respondent's Motion to Dismiss motion came on for hearing on December 22, 2015, it became apparent Appellant did not speak English; the trial court noted:

THE COURT: Okay. Well, we're hear on a motion for dismissal, a 12(b)(6) motion it's called, seeking dismissal of the action because of noncompliance with the court rules and statutes. The question I have is where you think we stand.

MS. ZAITSEVA¹: She doesn't understand the question.

THE COURT: Okay. All right. Well, I'm not - - I'm not sure that we can really conduct an actual hearing this morning without a court interpreter, so it may be that one of two things will need to happen. The matter could be rescheduled to a time when a court interpreter is here, or I

¹ Ms. Elena Zaitseva is the Appellant's daughter, who provided unofficial interpretation services at the hearing on the Motion to Dismiss. Verbatim Report of Proceedings, p. 4:13-25.

could simply decide the motion based on the written submissions that I have received.

Verbatim Report of Proceedings, p. 5:5-20. When given the choice whether to proceed on the briefing only or continue the hearing, Appellant elected to have the court decide the motion on the briefing. Verbatim Report of Proceedings, p. 5:21-22. The court then continued its colloquy:

THE COURT: Okay. All right. Mr. Mooney?

MR. MOONEY: Your honor, we have no objection to the court proceeding today. To be honest with you, we're a little bit blind-sided, as the court is, by the need for an interpreter. This matter has been going on for prelitigation attempts to resolve this and now it's been in litigation since May. There's been no indication in any prior dealings that an interpreter would have been needed.

THE COURT: Right.

THE COURT: Good. Well, I'm inclined not to take any substantive information from either side this morning. The reasons for that is the absence of a court interpreter. The plaintiff, Ms. Tamara Zaitsev, is unrepresented. She's accompanied by her daughter, Elena Zaitseva, who has been interpreting informally for her mom.

I have not administered an oath to Elena because it would really not be proper to have her serving in that capacity as a court interpreter. Being related to the person for whom the interpreting is being done is generally a disqualifier. And so under these circumstances I'm - - I think it is prudent to simply not take any substantive information or argument from either side.

I am comfortable simply deciding the case based on the written submissions. In doing so, I would issue a brief order explaining my thinking. That, of course, would be subject to being translated, and I think that's probably the best court of action at this point.

All right. Mr. Mooney, do you have any other thoughts?

MR. MOONEY: Well, Your Honor, my client would like this matter decided as soon as possible. This was a properly noted motion.

THE COURT: Understood, yeah.

MR. MOONEY: Obviously the obligation was on Ms. Zaitseva (sic) to alert the parties and the court that an interpreter would be needed. Obviously, we're, you know, we're not trying to pull one over on her because she can't, you know, effectively communicate or represent herself.

I think that the briefing is thorough by both parties. I don't know if the court has received - - Ms. Zaitseva (sic) submitted a declaration yesterday. I just got a copy of it this morning, but it sounds like everything that the court would need to decide the motion is before the court in the briefing.

THE COURT: All right. Thank you.

Verbatim Report of Proceedings, pp. 5:23-8:19. After this discussion, the court entered a written order based on the briefing it had properly before it on the motion to dismiss. CP 69-70. Appellant then timely filed a Notice of Appeal, bringing the matter before this Court. CP 71-72.

IV. SUMMARY OF ARGUMENT

The superior court did not err when it concluded it lacked jurisdiction. First, Plaintiff failed to present prima facie evidence of

proper service of process, because she admitted she served only Respondent counsel, not Respondent personally. Washington law clearly holds that acceptance of service is a substantial right that an attorney may not waive without his client's knowing consent, which was never granted. Because Respondent's attorney was not expressly authorized to accept service of process on his behalf and Appellant had no reasonable basis to believe he was, Appellant's service on counsel was ineffective, thereby depriving the court of jurisdiction. Lacking jurisdiction over the parties, the superior court properly dismissed the action.

Second, the trial court properly found Respondent did not waive his right to challenge service of process, and is not estopped from doing so, because he did not engage in conduct inconsistent with the intent to challenge service of process, was not dilatory in asserting the defense, and Appellant had no reasonable basis on rely on the fact that Respondent would not assert the defense.

Finally, excusable neglect does not, and cannot, save Appellant's failure to obtain jurisdiction over the Respondent, and the trial court did not deny her a fair day in court or otherwise abuse its discretion.

V. ARGUMENT

A. **This court must disregard several issues Appellant raises for the time on appeal.**

This court may dispose of issues solely because an appellant raises them for the first time on appeal (other than narrow exceptions not relevant here). RAP 2.5(a); *N. Pac. Bank v. Pierce Cty.*, 24 Wn.2d 843, 857-58, 167 P.2d 454 (1946). Appellant raises several issues for the first time on appeal: (1) waiver, (2) estoppel, (3) excusable neglect, and (4) insufficient time to prepare for hearing. Appellant did not brief or argue these issues to the trial court, so this court should summarily dispose of them. CP 40-43. Nevertheless, even if this court construes her briefing to the trial court extremely liberally, and finds the issues properly preserved for appeal, the trial court still properly dismissed her case, as discussed more fully, below.

B. **A *de novo* standard of review applies when the superior court dismisses an action for lack of jurisdiction.**

“First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process.” *Painter v. Olney*, 37 Wn. App. 424, 427, 680 P.2d 1066, *review denied*, 102 Wn.2d 1002 (1984). When a trial court considers matters outside the pleadings on a motion to dismiss for lack of personal jurisdiction, the decision is reviewed under the *de novo* standard of review for summary judgment. *State v. LG Electronics, Inc.*,

185 Wn. App. 394, 404-05, 341 P.3d 346 (2015), citing *Columbia Asset Recovery Grp., LLC v. Kelly*, 177 Wn. App. 475, 483, 312 P.3d 687 (2013). See also *Wells v. Olsten Corp.*, 104 Wn. App. 135, 139-40, 15 P.3d 652 (2001). (“Where, as here, the facts are not at issue, we conduct a de novo review of rulings on motions for summary judgment, motions to dismiss for lack of jurisdiction under CR 12(b), and motions to dismiss for failure to state a claim under CR 12(b)(6).”)

C. Plaintiff did not obtain personal jurisdiction over the Respondent-Defendant through service of process in compliance with RCW 4.28.080.

Proper service of the summons and complaint is a prerequisite to a court obtaining jurisdiction over a party. *Harvey v. Obermeit*, 163 Wn. App. 311, 318, 261 P.3d 671 (2011) (citation omitted). Service of process is sufficient only if it satisfies the minimum requirements of due process and the requirements set forth by statute. *Powell v. Sphere Drake Inc., PLC*, 97 Wn. App. 890, 999, 988 P.2d 12 (1999).

The applicable statute, RCW 4.28.080, provides in relevant part:

Service made in the modes provided in this section **shall** be taken and held to be personal service. The **summons shall** be served by delivering a copy thereof, as follows

...

(16) 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 a resident therein.

(emphasis added).

Where a statute is unambiguous, the court assumes the legislature means what it say and will not engage in statutory construction past the plain meaning of the words. *In re Estate of Jones*, 152 Wn.2d 1, 11, 93 P.3d 147 (2004) (citing *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963-64, 977 P.2d 554 (1999)). Unless clear contrary legislative intent exists, the would “shall” is a statute is a mandatory directive. *Kabbae v. Dep't of Social & Health Servs.*, 144 Wn. App. 432, 441, 192 P.3d 903 (2008).

A trial court does not have jurisdiction over a defendant who is not properly served. *Scott v. Goldman*, 82 Wn. App. 1, 6, 917 P.2d 131 (1996). If a trial court has not acquired jurisdiction over a defendant, that defendant is entitled to immediate dismissal. *See Bethel v. Sturmer*, 3 Wn. App. 862, 865-66, 479 P.2d 131 (1970) (citation omitted).

A plaintiff has the initial burden of proof to establish a prima facie case of sufficient service. *Streeter-Dybhahl v. Nguyet Huynh*, 157 Wn. App. 408, 412, 236 P.3d 986 (2010). An affidavit of service is presumptively correct. *Id.*

Ms. Zaitsev, acting *pro se*, timely filed her initial complaint on May 7, 2015. Despite the plain language of RCW 4.28.080 requiring the Respondent be personally served, Appellant did not serve Dr. Keller in the manner the statute directs. Instead, Appellant had Respondent's counsel

served. Though a factual dispute exists as to which documents were served, it is immaterial to this appeal, as the decisive fact is undisputed: whatever documents were served, they were served on Respondent's counsel, not Respondent. Such service violates the plain language of the statute and was insufficient to confer jurisdiction.

This is a mistake attorneys, as well as pro se plaintiffs, sometimes make that has harsh results and fatal consequences for the action. Ms. Zaitsev failed to properly effect service of process on Dr. Keller because she did not personally serve him. Because of the statutory mandate, and because Appellant failed to present prima facie evidence of proper service, the trial court properly dismissed her action.

1. In order for service to have been effective on Respondent's counsel, Appellant needed to establish Appellant's counsel had Respondent's knowing consent.

Under the law of agency, the general rule is that if an attorney is authorized to appear on a client's behalf, the attorney's acts are binding on the client. *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). Thus, an attorney's negligence or other acts are ordinarily attributable to the client. *Id.* at 547. However, Washington has clearly identified an exception to the general rule: an attorney may not surrender a substantial right of his client without special authority granted by the client. *Graves*

v. P.J. Taggares Co., 94 Wn.2d 298, 303, 616 P.2d 1223 (1980). For this reason, an attorney needs his client's express authority to accept service of process, *Ashcraft v. Powers*, 22 Wash. 440, 443, 61 P. 161 (1900); to settle or compromise a claim, *Grossman v. Will*, 10 Wn. App. 141, 149, 516 P.2d 1063 (1973); or to waive a jury trial. *Graves*, 94 Wn.2d at 305. Requiring express authority is necessary to protect clients from possibly serious consequences arising from a misunderstanding between the client and the attorney. *Ha v. Signal Electric, Inc.*, 182 Wn. App. 436, 447, 332 P.3d 991 (2014), *review denied* 182 Wn.2d 1006, 342 P.3d 327 (2015), citing *Graves*, 94 Wn.2d at 304. It also ensures clients will be consulted on all important decisions if they so choose. *Id.*

Graves v. P.J. Taggares Co. analyzed in detail the limitations on the authority an attorney may exercise with his client's consent. In that case, the attorney for the defendant entered into a series of stipulations and conditions with the opposing side without any authorization from, or notice to, his client. Upon learning of its attorney's actions, the defendant moved to vacate the judgment against it. *Id.* at 121. Identifying an exception to the general rule that a party will be bound by the acts of his attorney, the court held that the attorney's unauthorized surrender of substantial rights warranted vacation of the judgment against his client under CR 60(b)(11). *Graves*, 25 Wn. App. at 126.

Here, the trial court properly found Mr. Versnel did not have Respondent's consent to accept service of process, and Appellant presented none. CP 70. Respondent and his counsel both submitted declarations stating that Respondent had not authorized counsel to accept service of process on his behalf. CP 25-26, 33. In response, Appellant submitted nothing to indicate Respondent had in fact given his express consent to his counsel to accept service of process. *See* CP 40-48. Instead, Appellant submitted two letters from Respondent's counsel, sent before Appellant filed her lawsuit, requesting Appellant's former attorney to respond to correspondence and not to directly contact Respondent for purposes of obtaining information. CP 47-48. The letters say nothing about counsel accepting service of process, or being authorized to do so. As the letters are silent as to service of process, they are not evidence of Respondent's consent. As such, the trial court proper found Appellant failed to establish counsel was authorized to accept service.

2. Appellant had no objectively reasonable basis to conclude Respondent had granted Mr. Versnel authority to accept service of her personal injury action.

It is a basic principle of Washington's common law that the actions of an agent do not establish the grant of authority he has from his principal. "An agent has apparent authority when a third-party reasonably

believes the agent has authority to act on behalf of the principal **and that belief is traceable to the principal's manifestations.**" Restatement (Third) Agency § 203 at 113 (2006) (emphasis added). In other words, apparent authority may only be established by the principal's objective manifestations that: (1) "cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal," and (2) "the claimant's actual, subjective believe is objectively reasonable. *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 913, 154 P.3d 882 (2007) (quoting *King v. Rieveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994)).

Respondent did not indicate to Appellant that Mr. Versnel had authority to accept service of process on his behalf, and in fact did not authorize Mr. Versnel to do so. Appellant offered no evidence of any act or other manifestation of Respondent indicating counsel had his authority to accept service of process; in fact, Appellant offered no in evidence of any interaction, statement, correspondence, or anything else that could be deemed a manifestation of the scope of counsel's authority. Absent such evidence, Appellant failed to make a sufficient showing she had an objectively reasonable belief as to counsel's apparent authority, and her arguments regarding his alleged authority to waive Respondent's

substantial right to personal service of process fails on the fact as well as the law.

D. Respondent did not waive the defense of insufficient service of process, but rather intentionally preserved it.

Respondent did not waive his right to challenge service of process. As an initial matter, a defendant's actual notice of litigation is not a substitute for service of process; the statutory procedures are jurisdictional, and failure to comply deprives a court of personal jurisdiction over the defendant, even if he received actual notice of the proceeding. *Weiss v. Glemp*, 127 Wn.2d 726, 903 P.2d 455 (1955) (failure to strictly comply with service of process resulted in failure to acquire jurisdiction over the person); *Longview Fibre Co. v. Stokes*, 52 Wn. App. 241, 758 P.2d 1006 (1988) (failure to comply deprives the court of in rem jurisdiction). Also, a voluntary notice of appearance is not the equivalent of service of process, and does not waive any argument relating to personal jurisdiction and improper service of process, or statute of limitations. *Matthies v. Knodel*, 19 Wn. App. 1, 573 P.2d 1332 (1977). Waiver can occur in one of two ways: it can occur if the party's assertion of the defense is inconsistent with that party's previous behavior, or if that party's counsel is dilatory in asserting the defense. *Lybbert v. Grant Cty.*, 141 Wn.2d 29, 1 P.3d 1124 (2000) (citations omitted).

1. Respondent's assertion of the defense is consistent with Respondent's behavior.

A party acts inconsistently with the intent to raise the defense of service of process when they engage in significant conduct on the case inapposite of the defense. In *Lybbert*, the Court found it “readily apparent” the county acted inconsistently with the intent to assert the defense. *Lybbert*, at 35-36. The Court made this finding where, for nine months following the attorney’s appearance the County gave multiple indications it was preparing to litigate the case. For example, the County filed a notice of appearance, and then served interrogatories, requests for production, and a request for statement of damages. The County also associated counsel from an outside law firm and duly filed a “notice of association of counsel.” One of the attorneys for the County also discussed insurance coverage issues and potential mediation with the plaintiff’s attorney, never once mentioning service of process issues. The County also received discovery requests and indicated it would respond, including answering those discovery requests asking whether insufficient service of process would be raised as a defense. After all that over the span of nine months had occurred, the County finally filed its answer, asserting for the first time the defense of improper service of process.

Lybbert, at 32-34. The County then moved for summary judgment, based on improper service of process. *Id.* at 33-34.

Unlike in *Lybbert*, Respondent acted consistently with the intent of asserting the defense of service of process. There was no correspondence between the parties after Appellant filed her lawsuit, the parties did not engage in discovery nor even exchange written discovery requests. CP 56. In fact, other than the filing of a required witness disclosure, which disclosed only those witnesses who would have knowledge about service of process, there was no action on the case after it was filed at all. It was not the case that the Respondent engaged in significant case development, as the County did in *Lybbert*. Rather, when Appellant failed to properly serve him, Respondent took no action on case, including not filing an answer. Such conduct clearly evinced the intent to, and was consistent with, asserting the defense of improper service of process.

2. Respondent was not dilatory in asserting the defense of service of process, and he had no duty to alert her to her error.

In order to waive the defense of service of process for being dilatory, a party must delay the proceedings in a significant manner. In *Raymond v. Fleming*, 24 Wn. App. 112, 600 P.2d 614 (1979), Division I of the Court of Appeals found the defendant waived the defense of service of process after being dilatory in asserting the defense. In that case, after a

complaint was served, defense counsel repeatedly requested more time to answer, did not respond to plaintiff's interrogatories, and obtained two orders of continuance. *Id.* at 114. All told, counsel asked for extensions and sought continuances for nearly a year.² It was not until substitute counsel signed on to the case nearly a year after filing that the issue of service of process was raised for the first time. The court held original counsel's repeated requests for more time, his not responding to discovery, and his obtaining two continuances was dilatory and inconsistent with the later assertion of the defense of insufficient service of process. *Id.* at 115.

In the present case, the Respondent's counsel did not engage in conduct remotely similar to that in *Raymond*. First, Respondent's counsel never discussed filing an answer to the complaint with Appellant, and in fact never did file one. *See* Clerks Papers. Second, Respondent did not fail to respond to discovery requests, and in fact never received any. CP 56. Respondent also did not serve and discovery. CP 56. Third, Respondent never sought relief from the court of any kind, as did the defense counsel in *Raymond*, until moving for dismissal. *See* Clerks Papers.

² Counsel filed the Notice of Appearance on May 31, 1977; the Motion to Dismiss based on insufficient service of process was filed 354 days later, on April 21, 1978. *Raymond*, at 114.

Instead, Respondent's counsel received notice of the lawsuit when, assuming Appellant's version of events, she served the summons, complaint, and order setting case schedule on counsel, not the Respondent. Since such service was not proper, it did not trigger a duty to respond at all, or require filing an answer, and Appellant have failed to properly commence her lawsuit by serving the correct individual, failed to trigger any duty of either Respondent or his counsel to take any action on the case or alert Appellant to her error. *See Gerean v. Martin-Joven*, 108 Wn. App. 963, 33 P.3d 427 (2001) (A defendant is under no obligation to alert the plaintiff prior to the expiration of the statute of limitations that a motion to dismiss will be filed based on improper service of process).

Such conduct was an entirely proper response to Appellant's improper service of process, as Respondent had no duty to make sure Appellant properly sued him. As the Supreme Court in *Lybbert* pointed out when discussing the doctrine of waiver of the right to claim improper service of process:

Despite embracing this doctrine of waiver, we quickly add that the doctrine does not alter the traditional duties litigators owe to their adversaries. Those duties, which are memorialized in the Rules of Professional Conduct and refined by case law from this court remain the same.

Lybbert v. Grant Cty., 141 Wn.2d 29, 1 P.3d 1124 (2000) (citations omitted).

Among those unaltered duties required by the Rules of Professional Conduct is the duty of undivided loyalty to the client. *Schroeder v. Excelsior Management Group, LLC*, 177 Wn.2d 94, n. 3, 297 P.3d 677 (2013), citing *Mazon v. Krafchick*, 158 Wn.2d 440, 448-49, 144 P.3d 1168 (2006). That duty of undivided loyalty includes the duty of zealous advocacy in the pursuit of a client's case. *Slattery v. Seattle*, 169 Wash. 144, 149, 13 P.2d 464 (1932). "The common opinion of all mankind has fixed this as the measure of his professional responsibility. In the discharge of this duty a reasonable latitude must be allowed him." *Id.*

Among those duties is not the duty to ensure that an opposing party properly commences a lawsuit against the client, as ensuring their client gets sued would be most basic form of working counter to the client's interests. Even RPC 3.4, which deals with fairness to an opposing party, does not entail the duty to ensure the opposing party properly commences their lawsuit, or the duty to alert them when they have done so improperly; rather, it only prohibits counsel from destruction or concealment of evidence, improperly influencing a witness, obstructive tactics in discovery, and the like. RPC 3.4, Comment 1. *See also See Gerean v. Martin-Joven*, 108 Wn. App. 963, 33 P.3d 427 (2001). Accordingly, Respondent's counsel was under no obligation to alert Appellant to her

improper service of process, and in fact he had a duty to his own client not to alert her to it.

E. Respondent was not equitably estopped from asserting the defense of service of process.

Appellant argues Respondent is estopped from asserting the defense of insufficient service of process because he allowed her to be lulled into a false sense of security. Appellant's Brief, p. 9. Although not entirely clear, it appears Appellant's argument is that of equitable estoppel. To the extent this constitutes an argument first raised on appeal, it should not be considered. *N. Pac. Bank v. Pierce Cty.*, 24 Wn.2d 843, 857-58, 167 P.2d 454 (1946). To the extent this issue is properly before this court, the trial court properly allowed Respondent to assert the argument.

Equitable estoppel is based on the notion "a party should be held to a representation made or a position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." *Kramarevcky v. Dept. of Soc. & Health Servs.*, 122 Wn.2d 738, 743, 863 P.2d 535 (1993) (citations omitted). Equitable estoppel requires: "(1) an admission, statement or act inconsistent with a claim afterwards, (2) action by another party in [reasonable] reliance upon that act, statement or admission, and (3) injury

to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission.” *Lybbert*, 141 Wn.2d at 35, citing *Board of Regents v. City of Seattle*, 108 Wn.2d 545, 551, 741 P.2d 11 (1987).

Appellant satisfies none of the elements for equitable estoppel, and the trial court correctly did not apply the doctrine. Appellant argues Respondent should be estopped because he did nothing to alert her to the fact she failed to properly served him. Appellant’s Brief, p. 8. Under such a theory, she implicitly cannot point to an admission, statement, or act at all, since inherent in her argument is that Respondent and his counsel did nothing. Even if she could, she cannot point to an admission, statement, or act inconsistent with the intent to raise the defense of improper service of process.

1. Respondent acted consistently with the intent to assert the defense of service of process.

A party acts inconsistently with the intent to raise the defense of service of process when they engage in significant conduct on the case. In *Lybbert*, the Court found it “readily apparent” the County acted inconsistently with the intent to assert the defense. *Lybbert*, at 35-36. The Court made this finding where, for nine months following the attorney’s appearance, the County gave multiple indications it was preparing to

litigate the case: the County appeared in the action, served discovery requests and a request for statement of damages, associated counsel from an outside law firm and filed a notice of association, discussed insurance coverage issues and potential mediation with the plaintiff's attorney, never once mentioning service of process issues. The County also received discovery requests and indicated it would respond to discovery, including those requests asking if insufficient service of process would be raised as a defense. After all this, the County filed its answer, asserting for the first time the defense of improper service of process. *Lybbert*, at 32-34.

Unlike in *Lybbert*, Respondent acted consistently with the intent of asserting the defense of service of process. There was no correspondence between the parties after Appellant filed her lawsuit, the parties did not engage in discovery nor even exchange written discovery requests. CP 56. All the other correspondence Appellant referenced in her brief occurred prefilling. Respondent acted consistently with the intent of asserting the defense of service of process. There was no correspondence between the parties after Appellant filed her lawsuit, the parties did not engage in discovery nor even exchange written discovery requests. CP 56. In fact, other than the filing of a required witness disclosure, which disclosed only those witnesses who would have knowledge about service of process, there was no action on the case after it was filed at all. It was

not the case that the Respondent engaged in significant case development, as the County did in *Lybbert*. Rather, when Appellant failed to properly serve him, Respondent took no action on case, including not filing an answer. Such conduct clearly evinced the intent to, and was consistent with, asserting the defense of improper service of process.

2. Even if Respondent engaged in conduct inconsistent with the intent to assert service of process as an affirmative defense, Appellant cannot show she reasonably relied.

It is well settled in Washington that the failure to comply with clear statutory directives precludes any reasonable reliance. *See, e.g., Lybbert*, 42 Wn.2d at 36 (failure to comply with service of process requirements of RCW 4.28.080(1) precluded reasonable reliance argument); *Overhulse Neighborhood Ass'n v. Thurston Cty.*, 94 Wn. App. 593, 972 P.2d 470 (1999) (holding unambiguous mandate of statutory service provisions made reliance unreasonable). *See also Davidheiser v. Pierce County*, 92 Wn. App. 146, 154, 960 P.2d 998 (1998) (rejecting equitable estoppel claim because clarity of statutory provision precluded any reasonable reliance), *review denied* 137 Wn.2d 1016, 978 P.2d 1097 (1999); *Landreville v. Shoreline Community College Dist. No. 7*, 53 Wn. App. 330, 332, 766 P.2d 1107 (1988) (failure to comply with service

requirements of RCW 4.92.020 precluded reliance on process server's statements regarding service).

In this case, the service requirements under RCW 4.28.080 are perfectly clear, and required service of process on the Respondent personally, not on his attorney. Notwithstanding the dispute regarding what documents Appellant actually served on Respondent's counsel, she freely admits she served Respondent's counsel. This is plainly insufficient under the statute, which required personal service. Accordingly, Appellant cannot show reasonable reliance such as would support a claim of equitable estoppel.

3. Respondent's counsel did not mislead Appellant as to whether she was required to comply with the service of process statutes.

Appellant claims she was confused by counsel as to whether or not she was supposed to personally serve Respondent. Appellant's Brief, p. 10. In support of this position, Appellant submitted two letters from Respondent's counsel, sent before Appellant filed her lawsuit, requesting Appellant's former attorney to respond to correspondence and not to directly contact Respondent for purposes of obtaining information. CP 47-48. The letters say nothing about counsel accepting service of process, or being authorized to do so. As the letters are silent as to service of process, Appellant cannot reasonably claim they instructed her as to

service of process or waived the requirement of doing so. And while the letters do instruct not to have any direct contact with Respondent for purposes obtaining information, the law requires personal service of process even if a party is represented by counsel.

F. Appellant's failure to properly effect service of process was not the result of excusable neglect.

Because of the jurisdictional issues relating to service of process, the doctrine of excusable neglect cannot cure improper service of process, and Appellant cites no authority that it can. *See Lodis v. Corbis Holdings, Inc.*, 172 Wn. App. 835, 862, 292 P.3d 779 (2013) (failure to cite authority constitutes a concession that the argument lacks merit); *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193, 195 (1962) (courts may assume that where no authority is cited, counsel has found none after diligent search).

However, even if this Court were to find the doctrine applicable to cure improper service of process, Appellant's failure to serve Respondent was not due to excusable neglect as a matter of law. When a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, it is not excusable under CR 60(b)(1). *Ha v. Signal Electric*, 182 Wn. App. 436, 450-51, 332 P.3d 991 (2014), citing *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal*

Supplies, Inc., 140 Wn. App. 191, 212–13, 165 P.3d 1271 (2007). Neglect was inexcusable when the summons and complaint were mislaid while general counsel was out of town. *Prest v. Am. Bankers Life Assurance Co.*, 79 Wn. App. 93, 100, 900 P.2d 595 (1995). Similarly, in *Johnson v. Cash Store*, failure to respond was deemed inexcusable when an employee other than general counsel accepted service of process and then neglected to forward the complaint. 116 Wn. App. 833, 848–49, 68 P.3d 1099 (2003). *Brooks v. University City, Inc.*, 154 Wn. App. 474, 479, 225 P.3d 489 (2010) (where the registered agent failed to forward the summons to its legal department.)

Appellant contends somehow a mistake occurred between when she claims she gave the summons, complaint, and order setting case schedule to the sheriff, and the sheriff delivering the documents to Respondent's counsel, and that she intended to serve all three documents on counsel. Appellant's Brief, pp. 9-10. However, as a matter of law this does not qualify as excusable neglect, as the case law clearly shows administrative errors of this nature do not constitute excusable neglect. Furthermore, she failed to file a return of service, so there is no way for her to establish which documents were actually served. Finally, even if her failure to serve the proper documents was excusable, she served them on counsel, rather than the Respondent personally. As discussed above,

service on counsel was insufficient, even if all the required documents had been served.

G. The trial court did not unfairly deny Appellant her day in court.

Appellant argues the trial court erred by denying her a day in court because there was no interpreter present, she did not receive the full amount of time to prepare for the hearing, and the trial court did not disclose what documents it relied upon in making its ruling. Appellant's Brief, p.10. As discussed below, none of these arguments holds water, and the trial court did not err.

1. The trial court offered Appellant the choice to continue the hearing and get a translator, or have the court rule based on the written briefing.

Appellant argues the trial court erred by denying her a day in court by not providing her with an interpreter. Appellant's Brief, pp. 10-11. It is the policy of the State of Washington to protect the rights of non-English speaking individuals by having qualified interpreters available to assist them during legal proceedings. RCW 2.43.010. *See also State v. Gozalez-Morales*, 91 Wn. App. 420, 423, 958 P.2d 339 (1998). “[W]hen a non-English speaking person is involved in a legal proceeding, the appointing authority shall appoint a qualified interpreter.” RCW 2.43.030(1)(c). “Appointing authority” means the presiding officer or similar office of any court. RCW 2.43.030(1).

However, the appointment of an interpreter is a matter within the discretion of the trial court, to be disturbed only upon a showing of abuse. *State v. Gonzales-Morales*, 138 Wn.2d 374, 979 P.2d 826 (1999). A trial court abuses its discretion when it exercises it in a manifestly unreasonable manner or bases it upon untenable grounds or reasons. *State v. Stenson*, 132 Wn.2d 668, 701, 940 P.2d 1239 (1997), *cert. denied*, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998).

The trial court did not abuse its discretion in the way in handled Appellant's needs of an interpreter. The trial court's colloquy with the parties on the date of the hearing is particularly instructive:

THE COURT: Okay. Well, we're hear on a motion for dismissal, a 12(b)(6) motion it's called, seeking dismissal of the action because of noncompliance with the court rules and statutes. The question I have is where you think we stand.

MS. ZAITSEVA³: She doesn't understand the question.

THE COURT: Okay. All right. Well, I'm not - - I'm not sure that we can really conduct an actual hearing this morning without a court interpreter, so it may be that one of two things will need to happen. The matter could be rescheduled to a time when a court interpreter is here, or I could simply decide the motion based on the written submissions that I have received.

MS. ZAITSEVA: She would like that you decide today.

³ Ms. Elena Zaitseva is the Appellant's daughter, who provided unofficial interpretation services at the hearing on the Motion to Dismiss. Verbatim Report of Proceedings, p. 4:13-25.

THE COURT: Okay. All right. Mr. Mooney?

MR. MOONEY: Your honor, we have no objection to the court proceeding today. To be honest with you, we're a little bit blind-sided, as the court is, by the need for an interpreter. This matter has been going on for prelitigation attempts to resolve this and now it's been in litigation since May. There's been no indication in any prior dealings that an interpreter would have been needed.

THE COURT: Right.

THE COURT: Good. Well, I'm inclined not to take any substantive information from either side this morning. The reasons for that is the absence of a court interpreter. The plaintiff, Ms. Tamara Zaitsev, is unrepresented. She's accompanied by her daughter, Elena Zaitseva, who has been interpreting informally for her mom.

I have not administered an oath to Elena because it would really not be proper to have her serving in that capacity as a court interpreter. Being related to the person for whom the interpreting is being done is generally a disqualifier. And so under these circumstances I'm - - I think it is prudent to simply not take any substantive information or argument from either side.

I am comfortable simply deciding the case based on the written submissions. In doing so, I would issue a brief order explaining my thinking. That, of course, would be subject to being translated, and I think that's probably the best court of action at this point.

All right. Mr. Mooney, do you have any other thoughts?

MR. MOONEY: Well, Your Honor, my client would like this matter decided as soon as possible. This was a properly noted motion.

THE COURT: Understood, yeah.

MR. MOONEY: Obviously the obligation was on Ms. Zaitseva (sic) to alert the parties and the court that an interpreter would be needed. Obviously, we're, you know, we're not trying to pull one over on her because she can't, you know, effectively communicate or represent herself.

I think that the briefing is thorough by both parties. I don't know if the court has received - - Ms. Zaitseva (sic) submitted a declaration yesterday. I just got a copy of it this morning, but it sounds like everything that the court would need to decide the motion is before the court in the briefing.

THE COURT: All right. Thank you.

Verbatim Report of Proceedings, pp. 5:5-8:19. The Clerk's Minute Entry provides a concise summary of the above colloquy, and further shows the trial court gave due consideration to the situation before it:

MINUTE ENTRY:

Defendant's Motion to Dismiss:

Court inquires of Plaintiff through the assistance of her daughter as to continuing the hearing to obtain the assistance of a court certified interpreter or for the Judge to follow with a written decision and no argument would be heard today. Pro se plaintiff and respective counsel elect for judge to render a written decision.

Court takes under advisement and will render a written decision and forward copies to pro se plaintiff and respective counsel at a future date.

CP 62.

The trial court acted well within its discretion in handling the hearing on the Motion to Dismiss. Appellant did not alert anyone she

would be needed an interpreter, so the court was unable to have one present on the day of the hearing. Nevertheless, when the duly noted hearing date arrived and the court learned of her limited English proficiency, the court, using her daughter as translator, offered Appellant the option of continuing the hearing until a registered interpreter could be present or having the motion decided on the written briefing. Appellant, with full knowledge and understanding as to what was being asked, elected to have the motion decided by the written briefing. In fact, Appellant specifically said she wanted her daughter to be her spokesperson, saying:

My mother would like me to speak for her, to be her spokesperson because I know more about the case than she was (sic). I was basically preparing the paperwork and talking to the pro bono attorney.

Verbatim Report of Proceedings, p. 6:19-23. As this statement clearly indicates, Appellant knowingly elected her daughter to speak for her, and she should not be allowed to complain on appeal that her daughter's translations deprived her the opportunity for a hearing.

Furthermore, despite voluntarily electing to allow her daughter to speak on her behalf at the hearing, Appellant now claims on appeal her daughter did not accurately translate, causing her to agree to written briefing when she would otherwise have not done so. Appellant's Brief,

pp. 6-7. However, Appellant's briefing betrays this argument, as her briefing accurately summarizes the options with which the court presented her: "At the time of the hearing, the court informed Zaitsev that she had an option to allow the court to make judgment without oral arguments, based on the written documents that court had." Appellant's Brief, p. 7. Clearly, the limited interpreting Appellant's daughter provided was accurate, since Appellant understands precisely what the court was saying at the hearing.

When Appellant appeared for the duly noted hearing without advising the court of her need for an interpreter, the court declined to hear substantive oral arguments on the motion. Communicating through Appellant's daughter, who Appellant requested the court allow to be her spokesperson, the court offered her the option of continuing the hearing until an interpreter could be present or to have the motion decided on just the written briefing. As her briefing indicates, Appellant understood this choice when she made her decision, so her daughter's translation was clearly accurate. The court's "appointment" of Appellant's daughter as translator was reasonable, particularly under the circumstances and for the limited purpose she was, and the decision to do so was based on reasonable grounds of dealing with a properly noted motion and a party who did not alert anyone she would need an interpreter. As such, the trial court did not abuse its discretion, and this court should affirm.

2. Appellant received the full amount of time allotted under the civil rules to respond to Respondent's motion.

Appellant contends, for the first time on appeal, she was denied the full amount of time to respond to Appellant's arguments and prepare for hearing because she did not receive Appellant-Defendant's Reply brief until four days before the hearing. Appellant's Brief, p. 11. Based on Federal Rule of Civil Procedure 6(c)(2), Appellant argues she is entitled to seven. *Id.*

However, this matter is governed by Washington's Rules of Civil Procedure. CR 1. ("These rules governs the procedure in the superior court in all suits of a civil nature[.]"); *Christensen v. Ellsworth*, 162 Wn.2d 365, 374, 173 P.3d 228 (2007) ("Consequently, the civil rules, by their terms, govern the procedure in all civil actions in superior court, with the exception of special proceedings under CR 81.")

Respondent noted this motion according to the procedures of CR 56 for hearing on December 22, 2015. CP 16. CR 56 provides in relevant part:

The motion and any supporting affidavits, memoranda of law, or other documentation shall be filed and served not later than 28 calendar days before the hearing. The adverse party may file and serve opposing affidavits, memoranda of law or other documentation not later than 11 calendar days before the hearing. The moving party may file and serve

any rebuttal documents not later than 5 calendar days prior to the hearing.

CR 56(c).

Under this rule, Respondent's motion needed to be filed 28 days before December 22, 2015; Respondent filed his brief on November 16, 2015, and service was deemed complete under CR 6(e) on November 19, 2015, 34 days before the hearing. CP 34-35. Appellant filed her brief on December 10, 2015, and service was deemed complete under CR 6(e) on December 12, 2015, 11 days before the hearing. CP 50. Respondent's reply was filed on December 16, 2015, and served by overnight courier on December 17, 2015, six days before the hearing. CP 60-16.

CR 56(c) requires reply briefs are filed and served at least five days before the hearing. Respondent filed his seven days before the hearing and served it six days before the hearing. Appellant was provided with more time to prepare for the hearing than the civil rules require, so she cannot complain she was unfairly denied time to prepare for it.

3. Appellant should be held to the same standard as an attorney and this Court should not consider her pro se status.

It is well settled that in Washington, a pro se litigant, such as Ms. Zaitsev, is required to follow procedural and substantive laws, and is held to the same standards of practice, as an attorney. "The law does not distinguish between one who elects to conduct his or her own legal affairs

and one who seeks the assistance of counsel.” *In re Marriage of Olson*, 69 Wn. App. 621, 626, 850 P.2d 527 (1993) (quoting *In re Marriage of Wherley*, 34 Wn. App. 344, 349, 661 P.2d 155 (1983)). In fact, a *pro se* litigant is to be held to the same standard as an attorney. *Carver v. State*, 147 Wn. App. 567, 575, 197 P.3d 678 (2008) citing *Batten v. Abrams*, 28 Wn. App. 737, 739 n. 1, 626 P.2d 984, rev. denied, 95 Wn.2d 1033 (1981); *Edwards v. Le Duc*, 157 Wn. App. 455, 460, 238 P.3d 1187 (2010) rev. denied 170 Wn.2d 1024, 249 P.3d 623 (2011). *see also State Farm Mut. Auto. Ins. Co. v. Avery*, 114 Wn. App. 299, 310, 57 P.3d 300, 306 (2002) (a plaintiff’s *pro se* status has no relevance whatsoever to her compliance with the rules for appellate procedure).

There is an exception where the *pro se* plaintiff suffers from a significant mental disability that prevents him from understanding the law and legal proceedings such that he is unable to represent himself or is denied a fair hearing. *Carver v. State*, 147 Wn. App. at 575, (holding that collateral estoppel did not apply to a *pro se* plaintiff who suffered from dementia and could not perform basic office work). Although Ms. Zaitsev says she suffers handicaps, her pleadings demonstrate that hers is not the type of disability, which puts her within this category. As such, the fact Appellant is *pro se* should not be considered by this court, and does not cure her failure to properly obtain jurisdiction over the Appellant.

H. Respondent should be awarded fees and costs under RAP 18.9(a).

RAP 18.9(a) provides that:

[T]he appellate court on its own initiative ... may order a party or counsel who uses these rules for the purpose of delay ... to pay terms or compensatory damages to any other party who has been harmed by the delay . . .

RAP 18.9(a) permits an appellate court to award a party its attorney fees as sanctions, terms, or compensatory damages when the opposing party files a frivolous appellate action. An appeal is frivolous if the court is convinced, after considering the entire record, that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Dutch Vill. Mall v. Pelletti*, 162 Wn. App. 531, 540, 256 P.3d 1251 (2011) review denied, 173 Wn.2d 1016, 272 P.3d 246 (2012) and cert. denied, 133 S. Ct. 339, 184 L. Ed. 2d 158 (2012).

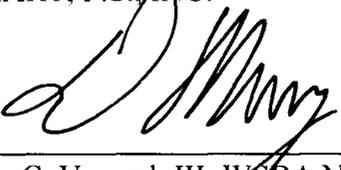
Respondent should be awarded its attorney fees and costs under RAP 18.9. Appellant's appeal is without merit, and is merely an attempt to get a second bite at the apple. She presents absolutely no facts or law showing the trial court erred. This is precisely the abuse RAP 18.9 is intended to address. Respondent should be awarded its reasonable attorney fees and costs incurred in opposing this appeal.

VI. CONCLUSION

Appellant did not serve the summons and complaint on the Respondent, but instead served Respondent's attorney, who was not authorized to accept it. Her arguments regarding the scope of counsel's authority to accept service are contrary to the law and unsupported by the record. She has offered no compelling authority or evidence whatsoever to establish that the superior court misapplied the law or abused its discretion. This court should affirm the superior court's decision in its entirety and award Respondent his reasonable attorney fees and costs pursuant to RAP 18.9.

Respectfully submitted this 4th day of November, 2016.

LEE SMART, P.S., INC.

By: 

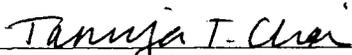
John C. Versnel, III, WSBA No. 17755
Daniel C. Mooney, WSBA No. 44521
Of Attorneys for Respondent

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on November 4, 2016, I caused service of the foregoing pleading on the following via United States First-Class Mail:

Ms. Tamara Zaitsev
15409 NE 12th Street, Apt. G-351
Bellevue, WA 98007

DATED this 4th day of November, 2016 at Seattle, Washington.



Taniya T. Chai, Legal Assistant