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STATE OF WASH  
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NO. 37715-2-II

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COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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Charity Meade,

Appellant,

vs.

Michael Thomas,

Respondent.

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**Reply Brief of Appellant**

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David A. Nelson  
NELSON LAW FIRM, PLLC  
Attorneys for Plaintiff Charity Meade

1516 Hudson Street, Suite 204  
Longview, WA 98632-3046  
(360) 425-9400

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## I. INTRODUCTION

A defendant waives the affirmative defense of insufficient service of process if he has been dilatory in asserting the defense, or if the assertion of the defense is inconsistent with his previous behavior.

*Lybbert v. Grant County*, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000).

Here, Respondent Michael Thomas (“Thomas”) does not dispute the material facts. He admits that (a) he knew he had not been served, (b) delayed filing an answer or otherwise asserting the defense of insufficient service of process for months, until days before the statute of limitations expired, while (c) conducting discovery directed toward the merits of the case.

Thomas waived the defense of insufficient service of process by engaging in dilatory and inconsistent behavior. The trial court’s order dismissing Appellant Charity Meade’s (“Meade”) claims should be reversed.

## II. ARGUMENT AND AUTHORITY

### A. Thomas Took No Action to Preserve the Defense of Insufficient Service of Process.

Thomas argues that the defense of inadequate service was not waived because his notice of appearance purported to preserve it. (Resp’t Br. p. 6.) A notice of appearance is not a responsive pleading, and cannot

preserve the affirmative defense of service of process. *Lybbert*, 141

Wn.2d at 43.

Furthermore, contrary to Thomas' assertions, Meade does not argue that a defendant should always refrain from taking any action to advance a case toward resolution until service has been completed. (Resp't Br. pp. 5-6.) Nor does she argue that a defendant must always conduct discovery on the issue of service where a defendant knows he has not been served. (*Id.* at pp. 4-5.)

Rather, Meade argues that the defense of insufficient service of process is waived where a defendant conducts discovery related to the merits of the case months before asserting the defense in a delayed responsive pleading, served days before expiration of the statute of limitations.

Thomas had two options to preserve the defense of insufficient service of process in this matter. Because he knew he had not been served, he could have filed an answer raising the defense of service of process *first*, and then proceeded with discovery directed toward the merits of the case. *See, e.g., Clark v. Falling*, 92 Wn. App. 805, 813-14, 965 P.2d 644 (1998) (relied upon by Thomas and holding that the defendant can preserve the defense of insufficient service of process by pleading it in its answer before proceeding with discovery directed toward

the merits of the case). Conversely, he could have conducted discovery directed toward the issue of service of process, as he did after the statute of limitations expired, and *then* filed an answer. See *Romjue v. Fairchild*, 60 Wn. App. 278, 281, 803 P.2d 57 (1991) (holding that it may be appropriate for a defendant to engage in discovery to determine if the facts exist to support a defense of insufficient service).

Thomas chose neither option to preserve the defense. Instead, he conducted substantive discovery while delaying filing an answer for four months, lying in wait until days before the statute of limitations was to expire. Such dilatory and inconsistent behavior amounts to waiver of the defense of insufficient service of process. *Lybbert*, 141 Wn.2d at 41; *King v. Snohomish County*, 146 Wn.2d 420, 425-26, 47 P.3d 563 (2002); *Blankenship v. Kaldor*, 114 Wn. App. 312, 319-20, 57 P.3d 295 (2002); *Romjue*, 60 Wn. App. at 281.

**B. Thomas Waived the Defense of Insufficient Service of Process Because His Conduct Was Dilatory and Inconsistent.**

Washington cases underscore that it is a defendant's conduct—not a minimum amount of time that must pass before the answer is filed nor a minimum amount of substantive discovery that must be completed—that determines whether a defendant waives the defense of insufficient service of process. In light of Thomas' dilatory and inconsistent conduct, his

arguments that Meade had “plenty of time to complete service” and that he “merely served written discovery requests” fall flat. (Resp’t Br. pp. 6, 8.)

**1. Thomas’ Delayed Answer Was the Result of Dilatory and Intentional Conduct.**

Thomas knew that he had not been served. (Resp’t Br. p. 4.) Yet, he provides no justifiable explanation as to why he requested Meade’s deposition and served interrogatories and requests for production on the merits of the case before answering or otherwise asserting the defense of insufficient service of process. Similarly, Thomas provides no justifiable explanation as to why he waited until five days before the statute of limitations expired to answer. The only supportable conclusion is that Thomas’ delay was tactical—and intended to bury the issue.

Thomas argues that there was no reason to file an answer because Meade had not filed a motion for default and she had not asked for an answer. (Resp’t Br. pp. 3-4.) This position disregards the policy and spirit behind the procedural rules and their intent to promote the just, speedy, and inexpensive determination of every action. *Lybbert*, 141 Wn.2d at 39 (citing CR 1(1)). It also ignores established Washington case law. Indeed, the Washington Supreme Court has rejected Thomas’ argument, holding that a defendant’s routine avoidance of answering the complaint until a motion for default is brought does not justify dilatory conduct in filing an answer. *Id.* at 43.

Additionally, Thomas' "good faith belief" that he would be served does not excuse his dilatory conduct. (Resp't Br. p. 8.) A defendant's conduct is dilatory when he knows or should know the necessary facts and fails to act earlier. *Blankenship*, 114 Wn. App. at 320. Therefore, Meade does not need to show that Thomas engaged in trickery or purposefully misled her in an attempt to gain a tactical advantage. *See id.* Nonetheless, the evidence certainly suggests that the timing of the answer was intentional. In fact, Thomas admits as much. (Resp't Br. p. 9 ("[t]he timing of the answer and the manner in which it arrived should have caused plaintiff to review the answer carefully".)) The evidence raises, at a minimum, a genuine issue of material fact that Thomas engaged in the same dilatory conduct condemned by the *Lybbert* court. *See Lybbert*, 141 Wn.2d at 40.

Thomas' argument that his conduct was not dilatory because discovery occurred over a short period of time is similarly without merit. (Resp't Br. p. 7.) In *Romjue*, the defendant served substantive interrogatories, requests for production, and a request for a statement of damages before answering. 60 Wn. App. at 280. The parties litigated for only three months before the statute expired, and the defendant raised the issue of insufficient service of process for the first time. *Id.* at 279-80. The *Romjue* court found that the defendant's silence, coupled with his

knowledge that the defendants had not been served, was dilatory conduct resulting in waiver notwithstanding the short period of time that the parties litigated the case. *Romjue*, 60 Wn. App. at 281-82.

Finally, the fact that Thomas filed the answer five days before the statute of limitations expired does not mitigate his delay, but rather emphasizes it, as it did not leave meaningful time for Meade to serve Thomas.

**2. Thomas Engaged in Discovery That Was Inconsistent With His Later Defense of Insufficient Service of Process.**

Thomas argues that he did not waive the defense of insufficient service of process because he did not “intentionally abandon” the defense—he “merely” served standard motor vehicle accident discovery requests. (Resp’t Br. pp. 3, 6.) However, the written discovery requests, and communications regarding Meade’s deposition, showed a desire to litigate the case, and were inconsistent with his later assertion that service of process was insufficient. *See Romjue*, 60 Wn. App. at 281 (holding that “[i]f a defendant conducts himself in a manner inconsistent with the later assertion of the defense of insufficient service, the court is justified in declaring a waiver”). The discovery was not designed to elucidate facts related to the defense that Thomas later raised. *See Lybbert*, 141 Wn.2d at 41.

In *King*, the defendant answered within a month after the complaint was filed, and raised the affirmative defense of failure to file a claim with a governmental entity, before conducting substantive discovery (as opposed to Thomas here). 146 Wn.2d at 422-23. The Washington Supreme Court found that the assertion of the affirmative defense was not dilatory; however, the defendant conducted discovery as to the merits of the case over the next four years before bringing a motion to dismiss. The court, relying on *Lybbert*, found that the defendant's inconsistent behavior waived the defense. *Id.* at 424.

Here, even if Thomas' answer could be considered "timely" because it was filed before the statute of limitations expired, Thomas waived the defense solely by his inconsistent behavior of conducting discovery as to the merits of the case before raising the defense. *See King*, 146 Wn.2d at 426.

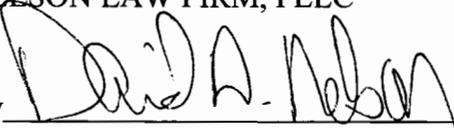
### III. CONCLUSION

Thomas engaged in dilatory and inconsistent behavior when he conducted discovery on the merits of the case and then filed an answer days before the statute of limitations expired, asserting for the first time insufficient service of process. For the reasons in Meade's opening brief

and this reply, the trial court's order of dismissal should be reversed.

DATED this 5<sup>th</sup> day of January, 2009.

NELSON LAW FIRM, PLLC

By  \_\_\_\_\_

David A. Nelson, WSBA #19145  
Attorneys for Charity Meade

Copy to Counsel for Respondent  
Christopher Rounds  
500 E. Broadway, Suite 425  
Vancouver, WA 98660

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**CERTIFICATE OF SERVICE**

I hereby certify that under penalty of perjury of laws of the State of Washington that I served the document to which this certificate is attached on the attorney for Respondent, Christopher Rounds, by first class mail, postage prepaid on the date signed below.

DATED this 5th day of January, 2009, at Longview, Washington.

[Signature]  
Sandra L. Good, Paralegal to David A. Nelson