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No. 67009-3-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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DEBRA STEWART,

Appellant,

v.

GRIFFITH INDUSTRIES, INC., ET. AL,

Respondent.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE JUDGE KIMBERLY PROCHNAU

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BRIEF OF RESPONDENT

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## **I. NATURE OF THE CASE**

Plaintiff /Appellant Debra Stewart (“Stewart”) claimed injuries as a result of a slip and fall. Stewart filed suit and promptly served Defendant Griffith Industries, Inc. (“Griffith”) with process. Stewart attempted to serve process on Defendant / Respondent Cesar Rosales (“Rosales”). Stewart’s claims against Griffith were dismissed on summary judgment. After Griffith’s dismissal was upheld by this court, Rosales moved for summary judgment as personal service was not accomplished. After conducting a fact finding hearing on the personal service issue, the trial court dismissed the case for lack of service of process. Stewart appeals the trial court’s ruling that Rosales did not waive his service of process affirmative defense and the trial court’s ruling denying Stewart’s motion to strike Rosales affirmative defense of lack of service of process.

## **II. ISSUES PRESENTED**

1. Did the trial court properly conclude that Rosales did not waive the affirmative defense of service of process?
2. Did the trial court properly deny Stewart’s motion to strike Rosales’ affirmative defense of service of process?

### **III. STATEMENT OF THE CASE**

Stewart alleges to have been injured on August 9, 2006 when she claims to have slipped and fell as a result of adhesive left on newly installed flooring in her apartment. CP 14-15.

On March 20, 2008 Stewart filed suit against Griffith and Rosales. CP 13.

On April 1, 2008 Stewart served Griffith's registered agent with the Summons and Complaint. CP 46.

On April 29, 2008 J.D. Smith, Stewart's attorney, filed a Confirmation of Service with the court indicating that Rosales had not been served. CP 17-18.

On May 15, 2009 Rosales attorney Bob Reinhard sent Rosales' First Interrogatories and Requests for Production and Request for Statement of Damages via legal messenger to Stewart's counsel J.D. Smith. CP 106-107.

Stewart never answered Rosales' discovery requests. No discussions were held between counsel regarding discovery requests sent to Stewart. No letters were sent by Rosales' counsel to procure responses to Rosales' discovery requests to Stewart. No CR 26(i) conference was held and no Motion to Compel was either prepared or filed by Rosales. CP 107.

There were no discussions between counsel concerning an answer to the complaint or any of defendant Rosales' affirmative defenses. Stewart did not file a Motion for Default. Stewart did not serve any discovery responses on Rosales. Rosales did not participate in any discovery that occurred between Griffith and Stewart. CP 107.

On July 27, 2009 the court granted Griffith's Motion for Summary Judgment and Stewart timely appealed. CP 46.

During the time period where the parties were waiting to find out the appellate court's ruling Rosales' attorney Robert Reinhard ("Reinhard") agreed to continue the trial on two separate occasions in January and May of 2010. Rosales also provided a witness list. CP 82.

On September 10, 2010 Mark Dietzler ("Dietzler") took over as Rosales' counsel as attorney Reinhard retired. Dietzler took over Reinhard's active case load of over forty litigated files in early September of 2010. CP 52-53.

Dietzler's initial review of this file in early September 2010 indicated that the trial date had been continued because Griffith was granted summary judgment dismissal which was appealed by Stewart. CP 53.

On October 11, 2010, Dietzler was emailed a copy of the Court of Appeals decision upholding Griffith's dismissal at which time Dietzler

conducted a more thorough review of the pleadings and discovered that an answer had not been filed and that Stewart had not served Rosales with process. CP 107.

On November 12, 2010 Rosales' Answer and Affirmative Defenses was filed with the court alleging service of process as a defense. Attorney Dietzler then began researching the legal issues and prepared a motion for summary judgment seeking dismissal of defendant Rosales because he had not been served. This motion was filed on November 29, 2010 and was noted to be heard on January 21, 2011. CP 107-108. CP 45-51.

On Friday, January 7, 2011 Dietzler received an email from Stewart attorney Jamila A. Taylor ("Taylor") attaching a copy of the Juston Smith Declaration alleging service on Rosales. Dietzler spoke with Taylor after reviewing her email and Juston Smith's Declaration. Taylor wanted to know whether Dietzler would strike Rosales' Motion for Summary Judgment. Dietzler informed Taylor that this was the first notice that Rosales had allegedly been served. Dietzler told Taylor that he wanted to investigate the allegations contained in Juston Smith's Declaration. Dietzler granted Taylor an extension until January 12, 2011 to file Stewart's Opposition to Rosales' Motion for Summary Judgment

and would get back to Taylor concerning her request that the motion be struck. CP 108.

On January 11, 2011 Dietzler left a voice message for Taylor at 10:38 a.m. that Rosales would not strike the motion and then sent Taylor the following email message on January 11, 2011 at 10:40 a.m.:

Jamila:

This follows my voicemail left today at 10:38 a.m. My private investigator has confirmed that the person you served was not my client. I have agreed to extend your response to tomorrow and I will accept your response tomorrow by fax and/or email.

Regards,

Mark Dietzler

CP 108.

Stewart's counsel did not file the January 6<sup>th</sup>, 2011 Juston Smith Declaration with the court until January 13, 2011. CP 108. CP 81, CP 83-88, Ex 1. Juston Smith's father is J.D. Smith one of Stewart's attorneys. CP 88.

Roy B. Rutherford ("Rutherford") was retained by Dietzler to investigate the validity of service on Rosales. Rutherford worked as a police officer for 14 years prior to establishing his own private investigation firm in 1993. CP 99-100.

Rutherford reviewed the declarations of Juston Smith and Taylor. Rutherford noted that Taylor did not provide a declaration from a person with testimonial knowledge supporting her contention that Cesar Alberto Rosales was “believed to be linked” to an address at 16945 NE 80<sup>th</sup> Street in Redmond. CP 100.

Rutherford conducted a thorough and detailed search concerning the alleged service as outlined in his declaration. Rutherford concluded that:

My research has revealed several addresses for Cesar Alberto Rosales or Cesar Alberto Rosales-Portillo, none of which have ever been associated with the name Cesar Abarca Rosales or the 16945 NE 8th Street Redmond, Washington address. I have not found any documents or evidence indicating or supporting that Cesar Abarca Rosales is the same person as Cesar Alberto Rosales or Cesar Alberto Rosales Portillo.

CP 102.

On January 21, 2011 the parties appeared before Judge Kimberly Prochnau to argue Rosales’ Motion for Summary Judgment. Judge Prochnau entered an order finding that the statute of limitations has now run and that Rosales did not waive the defense of proper service. Judge Prochnau continued the hearing until March 15, 2011 and ordered the parties to exchange additional documents by March 8, 2011. CP 111.

At the hearing on January 21, 2001, Judge Prochnau found as follows:

The court finds as a matter of law that the statute of limitations - - this is a little bit convoluted, but assuming that there has been no effective service that the statute of limitations has now run, that there has been no waiver of the right to proper service.

The court distinguished Lybbert from this case. Lybbert was a case where the court felt - - and there was a very vigorous dissent by certain members of the Supreme Court - but the majority decision particularly focused on the county's letter to the - - the county having received a letter from the plaintiff indicating the plaintiff had - believed that they had properly served the county, the county engaging in action on this case, and the county essentially, supposedly, laying in wait in this case and not raising the issue of service of process until the statute of limitations had run.

In this case, there can be hardly any laying in wait when the -Mr. Rosales is not put on - Counsel is not put on notice that plaintiff believes that he had been served. In fact, the only thing in the court file until this motion for summary judgment was a specific statement that he hadn't been served at that point when the - it was required to file the confirmation of issues, I believe. So he had no reason to believe that he had been served, and the - he is not required to assist the process server or to effect service on himself. It is the plaintiff's responsibility, of course, to effect service.

1 RP 24-25.

Although Stewart did not request a continuance at the January 21, 2011 hearing, Judge Prochnau continued the hearing to provide Stewart with an opportunity to determine only if there was proper abode service on Rosales. CP 146, 149. 1 RP 25-26.

Taylor improperly attempted to note the deposition of Rosales for March 2, 2011 by sending the deposition notice to Dietzler via email. A hard copy of the notice of deposition was not served on Dietzler's office.

Dietzler advised Taylor in emails dated January 31, 2011 and February 28, 2011 that his private investigator had not located Rosales and that therefore Rosales could not be made available for a deposition. Stewart did not send any discovery requests to Rosales after the January 21, 2011 summary judgment hearing. CP 147, 149. CP 134-138.

On March 4, 2011, Rosales filed his Supplemental Memorandum of Authority in Support of Defendant Rosales' Motion for Summary Judgment and Motion to Continue Trial Date and the Declarations of Steve Foltz and Rosa Diaz. CP 114-120; CP 121-123; CP 125-126.

The Declarations of Steve Foltz and Rosa Diaz prove that Defendant Cesar Alberto Rosales did not reside at 16945 NE 80<sup>th</sup> Street in Redmond, Washington in August of 2009 at the time he was allegedly served by Juston Smith. CP 121-123; CP 125-126; CP 83-88, Ex 1.

Stewart's counsel did not file any documents on or before the March 8, 2011 deadline to file responsive documents related to the issue of whether abode service was proper on Rosales. CP 146-147, 149. CP 111. 2 RP 21-22.

On March 10, 2011 Stewart filed a Motion to Shorten Time to hear Stewart's Motions for Terms and Conditions Pursuant to CR 37 and Motion for Continuance of Motion for Summary Judgment. CP 139-141.

On March 15, 2011 Judge Prochnau granted Stewart's Motion to Shorten Time; denied Stewart's Motion for Terms pursuant to CR 37 finding that the court lacked jurisdiction over Rosales as he had not been served; denied Stewart's Motion to Continue Rosales' Motion for Summary Judgment; and granted Rosales' Motion for Summary Judgment. CP 155. 2 RP 22-25.

#### **IV. SUMMARY OF ARGUMENT**

The trial court properly dismissed Stewart's case because Rosales was not served with service of process. Rosales provided clear and convincing evidence that he was not served. The superior court on its own initiative continued the January 21, 2011 summary judgment hearing to March 15, 2011 to permit Stewart time to come forward with additional evidence of abode service, which Stewart failed to do.

Stewart contends the trial court erred when 1) it found that Rosales did not waive his service of process defense; and 2) it denied Stewart's motion to strike Rosales' service of process defense. The trial court correctly exercised its broad authority to determine matters before it. There is substantial evidence in the court file that Rosales did not waive his service of process defense. The trial court's order should be affirmed.

## V. ARGUMENT

### A. ROSALES DID NOT WAIVE THE DEFENSE OF INSUFFICIENT SERVICE OF PROCESS.

Generally, waiver of the defense of insufficiency of process requires "the intentional abandonment or relinquishment of a known right. It must be shown by unequivocal acts or conduct showing an intent to waive, and the conduct must also be inconsistent with any intention other than to waive." *Clark v. Falling*, 92 Wn. App. 805, 812-13, 965 P.2d 644 (1998) quoting *Mid-Town Ltd. Partnership v. Preston*, 69 Wn.App. 227, 233, 848 P.2d 1268, rev. denied, 122 Wn.2d 1006 (1993). The defense of insufficiency of process may be waived by dilatory conduct or conduct inconsistent with asserting the defense. *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000). Rosales did not take any action inconsistent with the defense nor was he dilatory in asserting the defense after Griffith's dismissal was upheld on appeal.

The defense of insufficient service of process is not waived if it is asserted in a responsive pleading. *Gerean v. Martin-loven*, 108 Wn. App. 963, 972-73, 33 P.3d 427 (2001), rev. denied, 146 Wn.2d 1013 (2002). It is undisputed that Rosales properly raised the defense in his answer after Griffith's dismissal was upheld by this court. CP 37.

The accident underlying Stewart's complaint occurred on August

9, 2006 and Stewart's complaint was filed on March 20, 2008 within the three year statute of limitations applicable to personal injury claims. RCW 4.16.080(2). Stewart filed a pleading with the court indicating that Griffith was served with the Summons and Complaint on April 1, 2008. Stewart also filed a pleading with the court on April 29, 2008 wherein Stewart's counsel acknowledged that Rosales had not served. CP 17-19. Griffith was granted summary judgment on July 27, 2009 and Stewart timely appealed.

Service of process on one defendant tolls the statute of limitation as to unserved defendants pursuant to RCW 4.16.170. *Sidis v. Brodie/Dohrmann, Inc.* 117 Wn.2d 325, 329, 815 P.2d 781 (1991). The unspecified period of time that statute of limitations is tolled upon service on one defendant is not indefinite; plaintiffs must proceed with their case in timely manner as required by court rules and must serve each defendant in order to proceed with action against that defendant. *Id.*, at 328-29. A plaintiff who fails to serve each defendant risks losing the right to proceed against unserved defendants if a served defendant is dismissed. *Id.*, at 328-29.

Where an action is dismissed, the statute of limitations continues to run as though an action had never been brought. *Fittro v. Alcombrack*, 23 Wn.App. 178, 596 P.2d 665 (1975). In *Fittro*, Alcombrack was timely

served with the summons and complaint but was dismissed before his employer State Farm was served. State Farm was not served until after the three year statute of limitations had run. The *Fittro* court upheld State Farm's dismissal holding that the statute of limitations was not tolled once Alcombrack was dismissed.

In September of 2010 the undersigned took over as counsel for Rosales taking over a case load of over 40 litigation files from Rosales attorney Reinhard due to his retirement. CP 52. An initial determination was made by the undersigned that Stewart had filed an appeal of the Griffith dismissal. CP 53.

On October 11, 2010, the undersigned was emailed a copy of the decision upholding Griffith's dismissal. A more thorough review of the file was completed at that time. It was discovered that Rosales had not yet answered the complaint and that Stewart had not served Rosales with the summons and complaint. Rosales filed his answer and affirmative defenses on November 12, 2010 and his Motion for Summary Judgment on November 29, 2010. CP 35, 106-107.

Stewart contends that Rosales' filing his answer after the statute of limitations is a waiver of the defense of service of process even though Stewart did nothing to prosecute her case against Rosales from the date the complaint was filed on March 20, 2008 through Griffith's dismissal on

October 11, 2010. The statute of limitations was tolled until this court upheld Griffith's dismissal on October 11, 2010.

Stewart did not file her declaration of the purported service on Rosales until January 13, 2011. This declaration was signed by Juston Smith, son of Stewart attorney J.D. Smith on January 6<sup>th</sup>, 2011. CP 88. There is no explanation in the record as to why Stewart failed to timely file the purported declaration of service.

At the time Rosales filed his answer and motion for summary judgment, both in November of 2010, Rosales' counsel had no reason to believe that Rosales had been served. CP 106-109.

The facts in this case are distinctly different from the cases cited by Stewart. (Appellant's Brief 6-10). Stewart relies primarily on *Lybbert*. In *Lybbert* the court held that the defendant's representatives waived the defense of service of process by failing to respond to discovery sent by plaintiff directed to the service of process defense; by sending discovery to plaintiff that plaintiff answered; by knowing that plaintiff had served the wrong party; by discussing mediation; defendant's representatives knew plaintiff's declaration of service was improper; and defendant's representative asserted the defense after the expiration of the statute of limitations.

Critical to the court's decision in *Lybbert* was the fact that the defendant had reason to believe that plaintiff was unaware that service of process was ineffective because plaintiff's counsel had filed the process server's affidavit. Also critical to the court's analysis in *Lybbert* was the fact that if the county had responded to the specific interrogatory regarding service of process, plaintiff would have had time to cure the improper service prior to expiration of the statute of limitations. *Id.*, page 41-42. In this case, Stewart initiated no discovery to Rosales and never discussed with counsel Rosales' answer or affirmative defenses to Stewart's complaint. Stewart did not file the declaration of service until after Rosales answered and filed its motion for summary judgment alleging improper service of process.

Appellant also relies on *Meade v. Thomas*, 152 Wn.App. 490, 217 P.3d 785 (2009). In *Meade*, the defendant sent interrogatories and requests for production to the plaintiff. The interrogatories served by the defendant in *Meade* did not address the issue of service of process. The plaintiff in *Meade* answered the defendant's discovery and there was discussion of plaintiff's deposition. Five days prior to the statute of limitations the plaintiff in *Meade* filed its answer alleging improper service of process. The *Meade* court held that service of Interrogatories and Requests for Production by the defendant did not waive the defense of

service of process where plaintiff never filed an affidavit of service and defense counsel had no reason to believe that the defendant had been served successfully.

Like the facts of *Meade*, Rosales sent Stewart interrogatories and requests for production via legal messenger on May 15, 2009. The Rosales interrogatories did not address the service of process issue. Unlike the facts in *Meade*, Stewart never answered Rosales' discovery, Rosales never filed a motion to compel, and no CR 26(i) discovery conference was ever held to discuss when Rosales would receive Stewart's discovery responses. Stewart did not file a motion for default. Rosales did not participate in any of the discovery between Griffith and Stewart. Stewart never sent any discovery requests to Rosales. A service of process defense is not waived by an attorney serving interrogatories. *Omais v. Raber*, 56 W. App. 668, 671, 785 P.2d 462, rev. denied, 114 Wn.2d 1028 (1990).

Like the facts in *Meade*, Rosales filed an answer alleging improper service of process and at the time of filing the answer there was no declaration of service filed with the court. The defendant in *Meade* filed his answer five days prior to the expiration of the statute of limitations. Rosales filed his answer on November 12, 2010 after this court upheld

Stewart's appeal of the dismissal of Griffith on October 11, 2010, which ceased tolling of the statute of limitations.

Like *Meade*, Rosales' counsel had no reason to believe that Rosales had been allegedly served until receipt of the January 6, 2011 declaration of Juston Smith. The trial court did not abuse its discretion by ruling that Rosales did not waive its defense to service of process where defense counsel had no reason to believe that Rosales had been served and where Stewart did absolutely nothing to prosecute her claims against Rosales from the filing of the complaint on March 20, 2008 until the Griffith dismissal was upheld on appeal, and where the facts do not support an argument that Rosales' conduct was inconsistent with the defense. Rosales did nothing to conceal the defense and did nothing to mislead appellant about the defense. There was no waiver.

***B. THE COURT DID NOT ERR IN DENYING STEWART'S MOTION TO STRIKE THE DEFENSE OF INSUFFICIENT SERVICE OF PROCESS.***

A trial court's denial of a motion to strike an affirmative defense is a discretionary ruling that is reviewed for abuse of discretion. *Oltman v. Holland America Line USA, Inc.*, 163 Wash.2d 236, 244, 178 P.3d 981 (2008).

The only discovery Stewart sought in this case was an improper attempt to note the deposition of Rosales for March 2, 2011 after the first

hearing on Rosales summary judgment motion on January 21, 2011. Taylor emailed a copy of the Notice of Deposition to Dietzler but never served a hard copy on Dietzler's office. CP 147, 149.

Stewart's counsel knew on January 31, 2011 and February 28, 2011 through receipt of emails from Dietzler that Rosales had not been located and was not available for a deposition. CP 134-138.

Stewart's counsel was required by the court's order of January 21, 2011 to respond to the issue of abode service upon Mr. Rosales by March 8, 2011 and Stewart did not provide any response to the court by that date. Stewart's counsel admitted to the court at the March 15, 2011 that it did not have any additional evidence to produce on this issue. 2 RP 21-23.

Rosales filed and served his response to the abode service issues on March 4, 2011 proving through the declarations of Steve Foltz and Rosa Diaz that Stewart served the wrong Rosales.

On March 10, 2011, five days prior to the March 15, 2011 hearing on the issue of abode service and after the court's March 8, 2011 deadline for providing additional documents prior to the hearing, Stewart filed a motion to shorten time seeking to strike the affirmative defense of service of process and to continue Rosales summary judgment hearing.

Judge Prochnau found by clear, cogent, and convincing evidence that Rosales had not been served. Judge Prochnau found that since

Rosales had not been served the court lacked jurisdiction to compel Rosales to appear for a deposition and for that reason the court denied Stewart's motion to strike and for terms. 2 RP 17-26. This was not an abuse of discretion.

**VI. CONCLUSION**

The trial court dismissed Stewart's complaint for lack of service of process. Both the process undertaken by the trial court and its conclusions are sound. Dismissal should be affirmed.

DATED this 14<sup>th</sup> day of November, 2011.

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