**Reversed, Remanded, and Memorandum Opinion filed January 9, 2018.**

**In The**

# Fourteenth Court of Appeals

**NO. 14-14-00012-CV**

**TARA MENON, Appellant**

**V.**

**WATER SPLASH, INC., Appellee**

**On Appeal from the 212th District Court**
**Galveston County, Texas**
**Trial Court Cause No. 13-CV-0205**

## M E M O R A N D U M  O P I N I O N

This case, an appeal from a no-answer default judgment, is before us on remand from the United States Supreme Court, which held that Article 10(a) of the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("the Hague Service Convention")[1] permits service of process abroad by direct mail to the person to be served if (a) the receiving state

[1] *Opened for signature* Nov. 15, 1965, 20 U.S.T. 361, 658 U.N.T.S. 163.

does not object, and (b) the service is authorized by otherwise-applicable law. *Water Splash, Inc. v. Menon*, –U.S.–, 137 S. Ct. 1504, 1513, 197 L. Ed. 2d 826 (2017). On remand, defendant/appellant Tara Menon, a resident of Québec, Canada, argues that the service upon her satisfied neither requirement.

The question of whether the receiving state objects to service abroad is not before us on remand because it already has been established that Canada does not object to service by mail under Article 10(a). We conclude, however, that Menon has adequately preserved, and has not waived, her new argument that under Texas Rule of Civil Procedure 103, the person who served her—a legal assistant employed by plaintiff/appellee Water Splash, Inc.'s trial counsel—was not authorized to do so. We therefore hold that the trial court abused its discretion in denying Menon's motion for new trial. We reverse the default judgment against Menon and remand the case for further proceedings consistent with this opinion.

## I. BACKGROUND

Québec resident Tara Menon formerly was the North Texas regional sales representative for Water Splash, Inc., which manufactures "aquatic playground systems" known as "splash pads." Water Splash alleges that while working for Water Splash, Menon also was working as sales manager for South Pool and Spa, Inc. and that the two conspired to steal Water Splash's designs and propriety information for conversion to their own use.

Water Splash sued Menon, South Pool, and South Pool's owner Muhammad Tello in a Galveston County district court for conversion, quantum meruit, violations of the Texas Theft Liability Act, tortious interference with prospective business relations, conspiracy, fraud, and negligent misrepresentation. Water Splash pleaded an additional claim against Menon for breach of fiduciary duty.

After attempting service on Menon unsuccessfully through the Texas Secretary of State, Water Splash filed a motion for substituted service pursuant to Article 10(a) of the Hague Service Convention, which states, in the English version, "Provided the State of destination does not object, the present Convention shall not interfere with . . . the freedom to send judicial documents, by postal channels, directly to persons abroad . . . ." Water Splash correctly pointed out that Canada does not object to service under Article 10(a).[2] Service pursuant to the Hague Service Convention is permitted under Texas Rule of Civil Procedure 108a, which states, "Service of process may be effected upon a party in a foreign country if service of the citation and petition is made . . . pursuant to the terms and provisions of any applicable treaty or convention . . . ." TEX. R. CIV. P. 108a(1)(d).

The trial court granted the motion and rendered an order permitting service by publication, by first class mail, by certified mail with return receipt requested, by Federal Express, and by email to four of Menon's last-known email addresses.

A couple of months later, Water Splash moved for default judgment on liability and damages. Water Splash stated in its motion that at the time of the hearing on the motion, proof of service would have been on file for at least ten days. As proof of service, Water Splash attached the affidavit of Nancy Jacobs, a legal assistant with the law firm of Water Splash's trial counsel, Hawash Meade Gaston Neese & Cicack LLP. Jacobs attested that she attempted to notify Menon of the suit in accordance with the trial court's order for substituted service by sending copies of the original petition, the first amended petition, and the order of substituted service

[2] *See* Canada—Central Authority & Practical Information, HAGUE CONF. OF PRIVATE INT'L. L., https://www.hcch.net/en/states/authorities/details3/?aid=248 (last updated Nov. 22, 2017) (stating "No opposition" to Art. 10(a)).

to Menon via registered mail, Federal Express, and email.[3] The day before the hearing on the motion for default judgment, Water Splash filed a supplemental motion asking for a permanent injunction and exemplary damages.

At the hearing the next day, the trial court granted the motions and awarded Water Splash actual damages of $60,000, exemplary damages of $60,000, attorney's fees of $9,500 through trial, and conditional appellate attorney's fees of up to $22,500. The trial court also permanently enjoined Menon from engaging in a variety of acts of unfair competition.

Menon moved for a new trial, arguing that service was defective for three reasons: (1) service by mail does not comport with Article 10(a) of the Hague Service Convention because Québec requires requests for service to be sent to its Central Authority,[4] (2) there is no indication that she actually received or evaded service, and (3) service by email is improper. She argued in the alternative that even if the service was not defective, she was entitled to a new trial because all of the criteria stated in *Craddock v. Sunshine Bus Lines, Inc.*[5] for setting aside a default judgment were satisfied. After the trial court denied Menon's motion for new trial, Water Splash dismissed the other defendants with prejudice, and Menon appealed the rulings against her.

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[3] Jacobs also refers to a letter she sent to Menon via first-class mail, but because the letter was sent before the trial court issued its order authorizing substituted service, we do not consider it. *Cf. HD Mech., Inc. v. Enriquez Enters., Inc.*, No. 13-05-353-CV, 2006 WL 2327838, at *2–3 (Tex. App.—Corpus Christi Aug. 10, 2006, no pet.) (mem. op.) (holding that the trial court could not consider a private process server's attempts to serve the defendant where the attempts were made before the trial court authorized the server to do so).

[4] Service through a State's Central Authority is addressed in Arts. 2–6, 13, and 18 of the Hague Service Convention. Water Splash sought to serve Menon only under Art. 10(a), in which service is mailed directly to the person to be served.

[5] 134 Tex. 388, 393, 133 S.W.2d 124, 126 (1939).

When the case was first before us, Menon did not reurge most of the arguments made in her motion for new trial, but instead stated, "If Article 10(a) authorizes service of process by a litigant mailing or emailing documents directly to a party, without going through the Central Authority of the receiving nation, then the service in this case was good;" but if not, then the service was defective. She argued that because Article 10(a) used the word "send" rather than "serve," it did not apply to service of process, and thus, service of process under the Hague Service Convention does not include service by mail. A divided panel of this court agreed with Menon. *See Menon v. Water Splash, Inc.*, 472 S.W.3d 28 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

The Texas Supreme Court denied review, but the United States Supreme Court granted certiorari and reversed. The Court held that, "in cases governed by the Hague Service Convention, service by mail is permissible if two conditions are met: first, the receiving state has not objected to service by mail; and second, service by mail is authorized under otherwise-applicable law." *Water Splash*, – U.S.–, 137 S. Ct. at 1513, 197 L. Ed. 2d 826 (citing *Brockmeyer v. May*, 383 F.3d 798, 803–04 (9th Cir. 2004)). The Court vacated our judgment and noted that because we had concluded that the Hague Service Convention barred service of process by mail, we "had no occasion to consider whether Texas law authorizes the methods of service used by Water Splash." *Id.* The Court "[left] that question, and any other remaining issues, to be considered on remand to the extent they are properly preserved." *Id.*

## II. DOES CANADA OBJECT TO SERVICE BY MAIL?

Because Menon argues on remand that Québec does not authorize service by mail, the U.S. Supreme Court's holding bears repeating: The Hague Service Convention permitted Menon to be served by mail if (1) "the receiving *state* has not

objected to service by mail," and (2) "Texas law authorized the methods of service used by Water Splash." *Id.* (emphasis added).

The U.S. Supreme Court already has ruled that the first requirement is met. Because Menon lives in the Canadian province of Québec, Canada is "the receiving state," and Canada does not object to service by direct mail under Article 10(a). *See id.*, –U.S.–, 137 S. Ct. at 1512 n.7 ("Canada, for example, has stated that it 'does not object to service by postal channels.'" (citing Dutch Govt. Treaty Database: Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters: Parties With Reservations, Declarations and Objections, (entry for Canada) online at https://treatydatabase.overheid.nl/en/Verdrag/Details/004235_b));[6] *see also* note 2, *supra*.

Because the Court did not remand that settled matter to this court, we do not consider Menon's arguments about whether the law of Québec authorizes service by direct mail.

## III. Does Texas Authorize the Methods Used to Serve Menon?

Our instruction on remand is to decide, to the extent that issue is preserved, whether Texas law authorized the way in which Menon was served. Menon now argues for the first time that she was served by a person not authorized to do so; however, "[w]hen a party fails to preserve error in the trial court or waives an argument on appeal, an appellate court may not consider the unpreserved or waived issue." *Fed. Deposit Ins. Corp. v. Lenk*, 361 S.W.3d 602, 604 (Tex. 2012). We therefore must first determine whether we can consider Menon's new argument.

[6] Last visited January 4, 2018.

### A. The Issue Was Preserved in the Trial Court.

Menon complained in her motion for new trial that she "was not properly served." Citing Texas Rule of Civil Procedure 124, she argued that "[a] default judgment is void unless the defendant: (1) was served with process in *strict compliance with* the law; (2) accepted or waived service; or (3) made an appearance."[7] She further stated that "[e]ven if the defendant has actual notice of the lawsuit, without proper service, the defendant has no duty to act; thus the court cannot enter a default judgment." From these statements, we conclude that Menon's motion for new trial preserved for appeal the issue of whether the service on her was defective.

### B. Menon's New Arguments Were Not Waived on Appeal.

Although a litigant generally cannot raise a new, non-jurisdictional issue on appeal, the litigant can construct new appellate arguments in support of an issue that already is properly before the reviewing court. *See Greene v. Farmers Ins. Exch.*, 446 S.W.3d 761, 764 n.4 (Tex. 2014). On the other hand, a litigant also can concede or waive issues and arguments on appeal, and Menon initially appeared to do so. Subsequent events, however, have recast her earlier apparent concession in a different light.

When this case first was before us, Menon stated in her appellate brief, "If Article 10(a) authorizes service of process by a litigant mailing or emailing documents directly to a party, without going through the Central Authority of the receiving nation, then the service in this case was good." Given certain language in the U.S. Supreme Court's opinion, however, we conclude that Menon's statement did not waive her right to argue that she was served by an unauthorized person in

[7] Emphasis in original.

violation of the Texas Rules of Civil Procedure. Specifically, the U.S. Supreme Court stated that "Article 10(a) encompasses service by mail. To be clear, this does not mean that the Convention affirmatively *authorizes* service by mail." *Water Splash*, –U.S.–, 137 S. Ct. at 1513, 197 L.Ed.2d 826 (emphasis in original). Indeed, it is precisely because Article 10(a) does not itself authorize service by mail that we instead must look to the "otherwise-applicable law" for such authorization.

Because Menon's earlier concession applied only if Article 10(a) authorized service by direct mail, the Court's holding that Article 10(a) does not authorize such service means that the concession does not apply. Menon therefore is free to argue that she was not properly served under the "otherwise-applicable law," and we will consider the new argument she has raised on remand in support of her defective-service complaint.

**C. Menon Was Not Validly Served.**

To satisfy the second requirement for valid service under Article 10(a), Menon had to be served in a manner authorized by "otherwise-applicable" law. Because the case was filed in a Texas state district court, the "otherwise-applicable" law is the law governing service of process in that court. With rare exceptions inapplicable here,[8] service of process in state district courts is governed by the Texas Rules of Civil Procedure. Thus, if the service on Menon violated these Rules, then there effectively was no service, because "[r]eceiving suit papers or actual notice through a procedure not authorized for service is treated the same as never receiving them." *Fid. & Guar. Ins. Co. v. Drewery Constr. Co*., 186 S.W.3d 571, 574 n.1 (Tex. 2006) (per curiam).

[8] *See, e.g.*, TEX. R. CIV. P. 110 (stating that, with the exception of citation in certain tax suits, if a special statutory procedure expressly provides a different method of service by publication than is provided by the Texas Rules of Civil Procedure, the statute prevails).

In accordance with Texas Rule of Civil Procedure 106(b)(2), the trial court's order for substituted service authorizes service by certain additional methods that it found would be reasonably effective to give Menon notice of suit. The trial court was not asked to authorize any private individual to serve process, and the trial court did not do so. In Menon's dispositive argument, she contends that the attempted service was performed by a person unauthorized to do so under Texas Rule of Civil Procedure 103. We agree.

We construe the Texas Rules of Civil Procedure using the same rules of construction that apply to statutes, that is, by looking first to the rule's language and construing it by its plain meaning. *In re Bridgestone Americas Tire Operations, LLC*, 459 S.W.3d 565, 569 (Tex. 2015) (orig. proceeding). Rule 103 provides that process may be served (1) by a sheriff, constable, or other person authorized by law; (2) by a person who is at least eighteen and who is authorized by law or by a written court order; (3) by a person certified under order of the Texas Supreme Court; or (4) upon request, by the clerk of the trial court via registered mail, certified mail, or publication. TEX. R. CIV. P. 103. After identifying these people authorized to serve process, Rule 103 states an exception: "But no person who is a party to or interested in the outcome of a suit may serve any process in that suit."

Water Splash's proof of service establishes that its attempts at substituted service violated Rule 103 because those attempts were performed by an unauthorized person. *See Primate Constr., Inc. v. Silver*, 884 S.W.2d 151, 152 (Tex. 1994) (per curiam) ("The weight given to the return [of service] is no less when the recitations impeach the judgment than when they support it."). Its proof of service consisted of the affidavit of Nancy Jacobs, who attested that she is a legal assistant for Water Splash's trial counsel. Jacobs's position as a legal assistant for Water

Splash's trial counsel gives her an interest in the case's outcome.[9] The order for substituted service says that the trial court "permits Plaintiff to use [the listed] methods to achieve service," but this cannot be read to authorize service by a person who is interested in the outcome of the case. *See State v. Bristol Hotel Asset Co*., 65 S.W.3d 638, 641 (Tex. 2001) (corr. op. on denial of reh'g) ("Under our civil procedure rules, a citation . . . can be served by anyone over eighteen whom the court has authorized to do so, as long as the person is not a party and has no interest in the suit's outcome."). The trial court accordingly could not, and did not, authorize Jacobs to serve Menon.

Service of process by an unauthorized person violates Rule 103, and such defective service is treated as if there were no service. *See Rogers v. Stover*, No. 06-05-00065-CV, 2006 WL 859305, at *2 (Tex. App.—Texarkana Apr. 5, 2006, no pet.) (mem. op.); *see also Allied Collision Ctr., Inc. v. Clark*, No. 14-15-01098-CV, 2017 WL 626637, at *2 (Tex. App.—Houston [14th Dist.] Feb. 14, 2017, no pet.) (mem. op.) (because defective service is treated as no service, a "proof of service" signed only by the plaintiff's attorney constituted evidence corroborating the

[9] Jacobs is interested through Water Splash's counsel, and for at least two reasons, a party's attorney is interested in the suit's outcome. First, the attorney is the client's agent. *See Gracey v. West*, 422 S.W.2d 913, 916 (Tex. 1968) ("[A]s long as the attorney-client relationship endures, with its corresponding legal effect of principal and agent, the acts of one must necessarily bind the other as a general rule."). And second, the attorney benefits if the suit's outcome favors the attorney's client. *See Gen. Prod. Co. v. Black Coral Invs.*, 715 S.W.2d 121, 123 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.) (explaining that a person is interested in the suit's outcome if the person would be benefited in some manner if the suit's outcome favored a particular side of the dispute). As a person interested in the suit's outcome, a party's trial counsel cannot circumvent Rule 103's restrictions by delegating service of process to an employee, for just as trial counsel is the client's agent, an employee of trial counsel's law practice is the trial counsel's agent. *See Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 235 S.W.3d 695, 700 (Tex. 2007) (identifying an employer-employee relationship as an agency relationship). Thus, under Rule 103, neither a party's trial counsel nor counsel's employee can validly serve process in the case. *See Jackson v. United States*, 138 F.R.D. 83, 87–88 (S.D. Tex. 1991) (secretary employed at the office of the plaintiff's counsel is the attorney's agent, and thus, the secretary's service of process on another party in the suit is not authorized by Texas Rule of Civil Procedure 103).

defendant's testimony that it did not receive the suit papers). Because service by mail in this case was permitted under Article 10(a) of the Hague Service Convention only if "authorized under otherwise-applicable law," Jacobs's service in violation of Texas Rule of Civil Procedure 103 was not permissible under Article 10(a). Thus, the service in this case instead was defective under both the Texas Rules of Civil Procedure and under the Hague Service Convention.

We agree with Menon that she had not been validly served with process when the trial court rendered the default judgment against her. We therefore hold that the trial court abused its discretion in denying the motion for new trial in which Menon complained of defective service of process.

## IV. CONCLUSION

Although Canada does not object to the international service of process on its residents by direct mail, Menon was served by an unauthorized person, and thus, Menon was not validly served under the Texas Rules of Civil Procedure or Article 10(a) of the Hague Service Convention. Because the defective service amounted to no service, the trial court abused its discretion in failing to grant her motion for new trial. *See Drewery Constr.*, 186 S.W.3d at 574 & n.1.

We accordingly reverse the trial court's judgment and remand the case for further proceedings consistent with this opinion.

/s/ Tracy Christopher
Justice

Panel consists of Justices Christopher, Donovan, and Wise.