NO. 90224-1

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS, DIVISION I
NO. 69668-8-I

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife,

Plaintiffs/Petitioners,

vs.

CITY OF LAKE STEVENS,

Defendant/Respondent.

CITY OF LAKE STEVENS' ANSWER TO PETITION FOR REVIEW

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A. IDENTITY OF ANSWERING PARTY.

The City of Lake Stevens is a local governmental entity and a municipal corporation, and hereby answers Hyde's Petition.

B. STATEMENT OF RELIEF SOUGHT.

Pursuant to Respondent, the City of Lake Stevens seeks an Order Denying the Petition for Review. The decision in Case No. 69668-8-I, *Steven W. Hyde et al., Appellant v. City of Lake Stevens, Respondent,* filed on January 21, 2014 is unpublished, properly applied the law, and the court of appeals properly denied the motion for reconsideration on March 17, 2014.

C. ISSUE PRESENTED.

Where no RAP 13.4 (d) grounds exist for granting the Petition and Hyde has articulated no grounds, should the Petition be denied?

D. STATEMENT OF THE CASE.

In June 2009, Steve Hyde was a provisional training officer who claimed a back injury after being exposed to the Taser weapon during a training exercise. After filing a lawsuit, he twice served the City's Human Resources Director with the summons and complaint instead of serving a statutorily designated individual. The trial court dismissed on summary judgment for lack of jurisdiction based on failure of service of process,

and additional alternative theories.[1] Division One of the Court of Appeals affirmed solely on the basis of failure of jurisdiction based on insufficient service of process. As a matter of law, the statute of limitations extinguished the negligence claim before the City filed its CR 56 Motion to Dismiss. *See Hyde decision.*

On January 21, 2014, the court of appeals filed its decision in the above-captioned case and ordered that it be unpublished. The court of appeals properly affirmed the trial court's order dismissing this personal injury case against Lake Stevens for failure of service of process within the applicable statute of limitations. The court properly rejected arguments of substantial compliance and discovery rule theories. The court properly applied well settled law and held that in order to acquire jurisdiction over a municipal corporation, a plaintiff is required to strictly comply with the statutory requirements to include serving the specific statutory designee. *See Hyde decision. No conflict with this Court, divisional split, Constitutional issue, or substantial public interest was argued below. Id.*

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[1] The court of appeals did not address the additional reasons summary judgment was granted: the plain statutory language of the LEOFF statute (RCW 41.26) demonstrates that a non-commissioned officer is not entitled to sue his employer; LEOFF created no spousal consortium claim; Hyde signed an enforceable liability release one day prior to his Taser training exposure: and the doctrine of express assumption of risk applies where Hyde acknowledged in writing the possibility of the specific physical injury before the Taser training, assumed "all risks," and nonetheless chose to proceed with the Taser application.

In reaching its holding, the court properly rejected unsupported arguments that the discovery rule applied to extend the statute of limitations in this negligence action where Hyde maintained he could not have known that the Taser weapon was used improperly in training until months after his injury was received. *See Hyde decision.*

The court additionally properly rejected arguments that the mere act of participating in substantive discovery waived the assertion of the affirmative defense of insufficiency of process where the defense was timely pled in the City's Answer, and Hyde had over a year and a half to cure the defect. *See Hyde decision.*

The court of appeals' succinct decision demonstrates the correct application of well-established precedent that is without conflict with decisions in this Court or other appellate divisions.

E. ARGUMENT: GROUNDS FOR DENYING THE PETITION.

Pursuant to RAP 13.4 (d) there are no grounds to accept the petition for review. The court of appeals applied well-settled law regarding service of process on a Municipality, and the discovery rule is inapplicable to Hyde's personal injury case. None of the prerequisites of RAP 13.4 apply to grant review. There is no conflict with this Court's decisions. There is no divisional conflict. There is no Constitutional

question, and there is no issue of substantial public interest. Hyde's Petition articulates no grounds for review.

1. THE DECISION PROPERLY APPLIED WELL ESTABLISHED PRINCIPLES OF LAW ABSENT OF CONFLICT, CONSTITUTIONAL QUESTION, OR SUBSTANTIAL PUBLIC INTEREST.

a. The Court of Appeals Correctly Held that Failure to Serve the Statutory Designee Resulted in Failed Service and No Jurisdiction as to a Municipal Defendant

Hyde and Brooke's arguments completely ignore decisive, controlling law, thereby requiring an order affirming summary judgment. Washington appellate courts require "strict compliance with the statutory requirements of service of process as a prerequisite to the Court's acquiring jurisdiction over a City." *Meadowdale Neighborhood Committee v. Edmonds*, 27 Wn. App. 261, 267, 616 P.2d 1257 (1980). "When a statute designates a particular person or officer upon whom service of process is to be made in an action against a municipality, no other person or officer may be substituted." *Meadowdale*, 27 Wn. App. at 264.[2]

Almost thirty years ago, this Court affirmed summary judgment dismissing a suit where plaintiff had erroneously served a summons and complaint on the secretary to the county executive instead of the county auditor. Strict compliance with the mandate of RCW 4.28.080 is required.

[2] *Citing*, 56 Am. Jur.2d Municipal Corporations, Counties, and Other Political Subdivisions §854 (2d Ed. 1971), *et al.*

Nitardy v. Snohomish County, 105 Wn.2d 133, 135, 712 P.2d 296 (1986).

In a later case, the Plaintiff's process server erroneously served the summons and complaint on the County Risk Management Department instead of the statutory designee, the County Auditor. The trial court granted summary judgment. *Davidheiser v. Pierce Co.,* 92 Wn. App. 146, 153-154, 960 P.2d 998 (1998); *rev. den'd,* 137 Wn.2d 1016 (1999). Division Two held that service on the County's Risk Management Department rather than the County Auditor was insufficient; defective service required dismissal. *Id.* The judgment was affirmed. *Id.* at 156.

Over twenty-five years ago, Division One rejected the same argument, holding that service on the administrative assistant to the Attorney General was defective even though the administrative assistant told the process server she was authorized to accept service. *Landreville v. Shoreline Community College Dist. No. 7,* 53 Wn. App. 330, 331-332, 766 P.2d 1107 (1988) (*citation omitted*). Strict compliance with service of the statutory designee is required to obtain jurisdiction. "When the Legislature has acted reasonably in naming one person or officer to have the responsibility for receiving service of process, service upon anyone else is insufficient." *Id.* "Actual notice [of the lawsuit] standing alone, is not sufficient." *Id.*

Division One also summarily dismissed estoppel arguments based

on the statements the administrative assistant allegedly made to the process server. "In light of the clear language designating the proper recipient for service of process, any reliance upon the process server's statements regarding the administrative assistant's authority was not reasonable." *Landreville*, 53 Wn. App. at 332. The defective service required dismissal; summary judgment was affirmed. *Id.*

This Court agreed with Division One's reliance analysis when it decided *Lybbert v. Grant,* 141 Wn.2d 29, 36-37, 1 P.3d 1124 (2000) ("The *Landreville* case, with which we are in agreement, is particularly illustrative of the point that the Lybberts' reliance was not justifiable.") The Petition should be denied because precedent is in agreement and not conflict: service failed and the trial court lacked jurisdiction.

b. The Court of Appeals Correctly Determined that Once a Timely Answer is Filed, the Defense May Engage in Discovery.

The *Hyde* decision properly rejected Petitioner's argument that even if the statute of limitations expired before he made proper service, the City waived the affirmative defense of defective service because, among other things, the City engaged in substantive discovery after filing its Answer asserting the defense. Decision at 8-9. In every lawsuit against a government entity, at the time the affirmative defense of

insufficiency of service of process is raised in an Answer, it is unknown whether the Plaintiff will take steps to cure the defect between the time the Answer is filed and the statute of limitations expires. The defense attorney faces the dilemma of engaging in discovery as the case is proceeding to trial and being accused of "waiver" of the affirmative defense, or allowing the case to remain essentially dormant during the limitations period. Depending upon how close in time to the injury/event the lawsuit was filed, this period of dilemma can be relatively short or unsettlingly long.

In that regard, the present decision provides an excellent application of a settled principle of law that is in accord across all the appellate divisions. Looking back more than twenty years, Washington courts have traditionally held that wavier of the insufficiency of process defense does not occur merely by the act of engaging in substantive discovery. *French v. Gabriel,* 116 Wn.2d 584, 594, 806 P. 2d 1234 (1991). In *Clark v. Falling*, 92 Wn. App. 805, 812-814, 965 P.2d 644 (1998), Division One concluded that once the defense of insufficiency of process is pled in the Answer, the defense attorney may proceed to engage in discovery on the merits without waiving the defense. That same year, Division Two of the Washington Court of Appeals came to a similar conclusion in *Davidheiser v. Pierce County*, 92 Wn. App. 146, 155-156,

960 P.2d 998 (1998), *rev. den'd,* 137 Wn.2d 1016 (1999) (once insufficiency of process is raised as a defense in the Answer, defense counsel is free to engage in discovery on the merits unrelated to the affirmative defense).

This Court's decision in *Lybbert v. Grant County,* 141 Wn.2d 29, 38-45, 1 P.3d 1124 (2000) spawned a close examination of the timing of filing an Answer to alert a Plaintiff of insufficiency of process.[3] In the case at bar, Lake Stevens timely filed its Answer before the statute of limitations had expired. In *Lybbert,* the Answer asserting the affirmative defense of insufficiency of service of process was not filed until ***after*** the statute of limitations had expired. It was in that context that this Court discussed the concept of whether engaging in discovery on the merits can constitute waiver of the affirmative defense. *Id.* at 44.

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[3] Case law is in accord generally finding waiver when the Answer is filed after the statute of limitations has run, and not finding waiver when the Answer is timely filed before the limitations period has run. *E.g., Harvey v. Obermeit,* 163 Wn. App. 311, 325, 261 P.3d 671 (Div. I 2011) (finding no waiver: the Answer asserting the affirmative defense of insufficient service of process was timely filed); *Meade v. Thomas,* 152 Wn. App. 490, 494-95, 217 P.3d 785 (Div. II 2009) (finding no waiver: defendant raised the defense of failure to serve in his Answer filed before the statute of limitations ran); *Butler v. Joy,* 116 Wn. App. 291, 298, 65 P.3d 671 (Div. III 2003) (finding waiver: Answer asserting the insufficient service of process defense was filed after a summary judgment motion was filed and after the statute of limitations had expired); *Blankenship v. Kaldor,* 114 Wn. App. 312, 319-20, 57 P.3d 295 (Div. III 2002) (finding waiver: Answer was filed after the statute of limitations had expired); *O'Neill v. Farmers,* 124 Wn. App. 516, 529, 125 P.3d 134 (Div. I 2004) (finding no waiver: Answer was filed asserting the defense before the statute of limitations expired). *See also,* 15A Karl B. Tegland, Washington Practice: Washington Handbook on Civil Procedure Sect. 4:44, (2013) (discussing cases addressing waiver).

Because Lake Stevens properly and timely filed its Answer in this case, the clarifying distinction made in *Lybbert* is inapplicable. The *Hyde* decision followed longstanding precedent that makes clear once the affirmative defense of defective service is timely pled in the Answer, the defendant may engage in substantive discovery without waiving the defense. The *Hyde* decision is consistent with this Court's analysis: Engaging in discovery is not, by itself, "'tantamount to conduct inconsistent with a later assertion of the defense.'" *Lybbert,* 141 Wn.2d at 41. The absence of conflict in appellate courts, Constitutional question, or substantial public interest requires denying the Petition.

c. The Court of Appeals Correctly Applied the Rule of Law Pertaining to the Discovery Rule in Ordinary Personal Injury Cases.

The *Hyde* decision begins with: "When a plaintiff brings a suit for injury caused by negligent use of a weapon and he fails to show that he could not have immediately discovered that this was a possible cause of his injury, the statute of limitations began to run from the date of the injury." Decision at 1. The court of appeals properly applied harmonious Washington precedent to reject Hyde's argument that the discovery rule applies to extend the statute of limitations where a plaintiff claims that a training tool was negligently used and caused personal injury.

The *Hyde* decision correctly applied the fundamental premise of tort law that the three year statute of limitations applies to personal injury claims allegedly caused by negligence.[4] In a traditional negligence case such as the case at bar, the statute of limitations begins to run at the time of injury whether or not the litigant is aware of the particular legal basis or theories for negligence. "In personal injury actions, the cause of action ordinarily accrues when the injury is suffered, since it usually coincides with the defendant's negligent act and the plaintiff's awareness of injury." 16 Wash. Prac., Tort Law and Practice § 9.2 (3rd ed.). Hyde and Brooke's arguments to the contrary are legally erroneous. *See e.g., In re Estates of Hibbard,* 118 P.2d 737, 744, 826 P.2d 690 (1992) ("The general rule in ordinary personal injury actions is that a cause of action accrues at the time the act or omission occurs."); *Clare v. Saberhagen Holdings, Inc.*, 129 Wn. App. 599, 602-03, 123 P.3d 465 (2005), *rev. den'd,* 155 Wn.2d 1012 (2005)("Generally, accrual of the statute of limitations begins at the time the act or omission causing the tort injury occurs").[5]

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[4] RCW 4.16.080(2).

[5] *See also, Hamilton v. Arriola Bros.,* 85 Wn. App. 207, 211, 931 P.2d 925 (Div. III 1997) (discovery rule is the exception to the general rule in ordinary personal injury case that the cause of action accrues at the time the act or omission occurs); *Cox v. Oasis Physical Therapy, PLLC,* 153 Wn. App. 176, 190, 222 P.3d 119 (Div. III 2009) (trial court properly found that cause of action accrued at time of injury and was barred by statute of limitations).

By contrast, the discovery rule is a limited exception to the general accrual rule, and may apply where "...injured parties do not, or cannot, know they have been injured." *Estates of Hibbard* at 744, 749. "Application of the rule is limited to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting, or concealment of information by the defendant." *Id.* at 749-50. "'The key consideration under the discovery rule is the factual, as opposed to the legal, basis of the cause of action.'" *Cox v. Oasis Physical Therapy, PLLC,* 153 Wn. App. 176, 190, 222 P.3d 119 (2009), *citing, Adcox v. Children's Orth. Hosp. & Med. Ctr.,* 123 Wn.2d 15, 35, 864 P.2d 921 (1993).

Hyde's reference to a contract case decided by this Court provides no different result. Pet. at 7. *1000 Virginia Ltd. Pship. v. VERTECS,* 158 Wn.2d 566, 146 P.3d 423 (2006). This Court emphasized that application of the discovery rule "does not mean that the action accrues when the plaintiff learns that he or she has a legal cause of action; rather, the action accrues when the plaintiff discovers the salient facts underlying the elements of the cause of action." *Id at 576 (citation omitted).*

The *Hyde* decision aptly follows Washington Supreme Court precedent generally addressing the discovery rule in products liability

contexts, and analyzing why those cases are distinguishable;[6] the earlier cases provide the agreed principals for rejecting Hyde's argument regarding factual knowledge of the injury but only later knowledge of a legal theory that the training device may have been negligently applied.

The *Hyde* decision in this factual context applies earlier precedent: "[t]he plaintiff bears the burden of proving that the facts constituting the claim were not and could not have been discovered by due diligence within the applicable limitations period." *E.g., Clare,* 129 Wn. App. at 603.[7] The *Hyde* decision affirmatively answers this question consistent with prior precedent. Inasmuch as the decision applies earlier harmonious precedent to Hyde's fact pattern without creating any conflict in law, or addressing a Constitutional question or matter of substantial public interest, the Petition should be denied.

F. CONCLUSION.

The court of appeals' decision in *Hyde* properly applied well-established precedent to undisputed facts and properly refused to apply the discovery rule to a run of the mill personal injury case. Because the decision does not present a conflict with this Court's precedent, there is no

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[6] *E.g., In re Estates of Hibbard,* 116 Wn.2d 737, 744, 826 P.2d 690 (1992); and *North Coast Air Servs., Ltd v. Grumman Corp.,* 111 Wn.2d 315, 319, 759 P.2d 405 (1988).

[7] In *Clare,* this Court rejected the discovery rule on appeal where plaintiffs had sufficient knowledge of lung disease allegedly caused by industrial exposure within three year limitations period (products liability and negligence claims).

divisional appellate conflict, there is no Constitutional issue presented, and there is no issue of substantial public importance, the Petition should be denied.

DATED this 15th day of May, 2014.

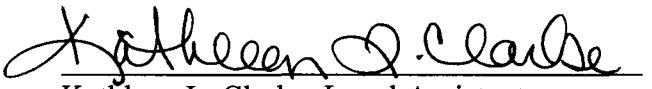
Keating, Bucklin & McCormack, Inc., P.S.

By: _____
Brenda L. Bannon, WSBA 17962
Attorneys for City of Lake Stevens

CERTIFICATE OF SERVICE

I, Kathleen L. Clarke, hereby certify under penalty of perjury of the laws of the State of Washington that I am of legal age and not a party to this action; that on the 15th day of May, 2014, I caused a copy of City of Lake Stevens' Answer to Petition to be delivered as follows:

[ ]	faxed; and/or	Carl A. Taylor-Lopez
[ ]	emailed; and/or	Lopez & Fantel, Inc., P.S.
[ ]	mailed via U.S. Mail, postage pre- paid; and/or	2292 W. Commodore Way, Suite 200 Seattle, WA 98199
[X]	sent via ABC Legal Messengers, Inc.	Facsimile: 206-322-1979 Email: clopez@lopezfantel.com



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