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No: 69668-8
COURT OF APPEALS, DIVISION I

OF THE STATE OF WASHINGTON, SEATTLE

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

Plaintiff/Appellant

vs.

CITY OF LAKE STEVENS

Defendant/Respondent

BRIEF OF APPELLANTS

CARL A. TAYLOR LOPEZ
Lopez & Fantel, Inc., P.S.
2292 W. Commodore Way, Suite 200
Seattle, WA 98199
Tel: (206) 322-5200

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I. INTRODUCTION.

Steven Hyde and Sandra Brooke are husband and wife. Steven Hyde was injured during Lake Stevens police officer training. He brought an action against Lake Stevens under the LEOFF statute. Despite an admission by Lake Stevens that Steven Hyde's injuries were covered under LEOFF, Steven Hyde's LEOFF claims were dismissed on summary judgment with the trial court finding LEOFF did not apply, a spouse of an injured police officer has no right to bring an action under LEOFF, a release for the benefit of Taser International, Inc., also released Lake Stevens, assumption of risk, and statute of limitations.

The LEOFF statute does apply to Steven Hyde's injuries. A spouse does have the right to make a claim for injuries suffered by her husband under the LEOFF statute. A release for the benefit of Taser International, Inc., which by its terms excluded the circumstance involved here, cannot be used by Lake Stevens to avoid its negligence. Assumption of risk is inapplicable and, even if applicable, was improperly applied, and the statute of limitations, if not waived, had not run when this action was commenced.

II. ASSIGNMENTS OF ERROR

1. It was error to find that as a matter of law Steven Hyde, a

police officer in training, could not sue his employer under the LEOFF statute.

2. It was error to find that as a matter of law a spouse can bring no claim under the LEOFF statute for her husband's injuries.

3. It was error to find as a matter of law that a release generated by Taser International, Inc., which by its terms did not extinguish any rights available under workmen's compensation laws, operates as a bar to recovery for negligence by Lake Stevens.

4. It was error to dismiss Steven Hyde's claim based on assumption of risk where case law establishes that assumption of risk is a factor for the trier of fact to consider in the context of comparative negligence and cannot be used as a total bar to recovery.

5. It was error to find as a matter of law that Steve Hyde's claim for negligent tasing accrued June 10, 2009, the date he was tased, where uncontroverted evidence established Steven Hyde did not learn he was tased using improper technique until September 30, 2009.

6. It was error to find as a matter of law that Steven Hyde's claim based on negligent misrepresentation of the Lake Stevens tasing requirement accrued June 11, 2009 where uncontroverted evidence established Steven Hyde did not learn of the negligent misrepresentation until June 30, 2011.

7. It was error for the court to strike supplemental evidence and memorandum opposing summary judgment on the basis of untimeliness when it was filed and served 12 days before the summary judgment hearing.

III. ISSUES RELATED TO ASSIGNMENTS OF ERROR

A. Where Lake Stevens signed a request for admission admitting Steven Hyde's injuries were covered under LEOFF 2, where Jennifer Goss, retirement systems analyst for the Washington State Retirement Systems, whose responsibility includes LEOFF, states Steven Hyde was a "member" of LEOFF at the time he was tased, and where Lake Stevens deducted LEOFF contributions from Steven Hyde's paycheck and paid LEOFF premiums for Steven Hyde, was it error for the trial court to find the section of the LEOFF statute that permits members of LEOFF to sue their employers, RCW 41.26.281, was not available to Steven Hyde?

B. Whether it was error to find no right of action exists for a spouse under the LEOFF statute for injuries suffered as a result of negligence by a police officer's employer, where the statute specifically confers a right of action to children, widows widowers and dependents?

C. Does a release generated by Taser International, Inc., which by its terms does not extinguish any rights available under workmen's

compensation laws, operate to extinguish rights Steven Hyde has under RCW 41.26.281?

D. Was it was error to dismiss Steven Hyde's claim based on assumption of risk where case law establishes that assumption of risk is a factor for the trier of fact to consider in the context of comparative negligence and cannot be used as a total bar to recovery?

E. Was it was error to find as a matter of law that Steven Hyde's claim for negligent tasing accrued June 11, 2009, the date he was tased, where uncontroverted evidence established Steven Hyde did not learn he had been tased using improper technique until September 30, 2009:

F. Was it was error to find as a matter of law that Steven Hyde's claim based on negligent misrepresentation of the Lake Stevens tasing requirement accrued June 11, 2009 where uncontroverted evidence established Steven Hyde did not learn of the negligent misrepresentation until June 30, 2011:

G. Did Lake Stevens waive its statute of limitations defense by not asserting it until filing its motion for summary judgment after more than a year and a half of extensive discovery?

H. Whether it was error to find insufficiency of process where Lake Stevens was served three times with summons and complaint and

where there it is irrefutable the third service was sufficient, and where Defendant Lake Stevens failed to respond to legitimate discovery regarding sufficiency of process until after it felt the statute of limitations had expired more than a year and a half after the discovery request was promulgated and after more than a year and a half of extensive discovery?

I. Was it was error for the trial court to strike supplemental evidence and memorandum opposing summary judgment submitted 12 days before the summary judgment hearing based on "untimeliness"?

IV. STATEMENT OF CASE

Plaintiff/Appellant Steven Hyde was a law enforcement officer injured during training with the Lake Stevens police department. Sandra Brooke is his wife. CP 164-6.

Previously, Mr. Hyde was a law enforcement officer in Florida as well as a licensed merchant mariner. His wife has a Ph.D. in marine biology. CP 579.

A position for Dr. Brooke in the Northwest led Mr. Hyde to seek employment in law enforcement in Washington. Lake Stevens offered Mr. Hyde a position with their police department. CP 164.

As a lateral hire Mr. Hyde was required to undergo an abbreviated training course. As a part of that training Mr. Hyde was required to endure tasing. The tasing was not voluntary. CP 164; CP 579.

Mr. Hyde did not want to be tased and said so. He was told by the training officer he had to be tased if he wanted the job. CP 579-80.

Prior to the tasing Mr. Hyde was required to sign a document releasing Taser International, Inc., from any physical consequences suffered as a result of being tased. The release by its terms did not release Lake Stevens from the consequences of forcing Mr. Hyde to be tased. CP 108; CP 580.

Mr. Hyde was tased June 11, 2009. Unfortunately, the officer who tased Mr. Hyde did it in a way which Taser International, Inc., states is not recommended. CP 117. As a result Mr. Hyde suffered injury, leading to four back surgeries and the medical opinion that he probably never again will be able to work. CP 303-17.

Mr. Hyde corresponded by email with Taser International, Inc. about his tasing experience. September 30, 2009, he learned for the first time the training officer had used a technique on him that was not recommended. CP 321-329; CP 165.

Claims on behalf of Dr. Brooke and Mr. Hyde were subsequently presented to Lake Stevens August 18, 2010. CP 68. They were presented to Steven Edin who is admitted to be the correct person for presentation of claims against Lake Stevens and who is designated as such on the Lake Stevens website. Lake Stevens also designated Steven Edin as a speaking

agent for the City of Lake Stevens. CP 137.

After the required 60 day waiting period, the summons and complaint which commenced the case at bar were served November 3, 2010. CP 79.. Counsel appeared for Lake Stevens six days later, November 9, 2010. CP 81.

The summons and complaint were filed December 13, 2010. A copy of the summons and complaint with cause number were again served on Steven Edin December 21, 2010. CP 84.

ABC Legal is the process server which served Lake Stevens. The server states Lake Stevens' mayor is present only a few days a week and that she has been instructed by Lake Stevens that three persons are authorized to accept service on behalf of Lake Stevens – the mayor, the City Clerk and Steven Edin. She further states that, when she served Steven Edin with the summons and complaint in this case, she specifically asked him if he was authorized to accept service of the summons and complaint on behalf of Lake Stevens and that Steven Edin confirmed that he was. CP 513-4.

Lake Stevens answered the complaint January 19, 2011. The answer contained the usual litany of affirmative defenses, including insufficiency of service of process, failure to state a claim, immunity, waiver, assumption of risk, contributory negligence, estoppel and release. It did not include a statute of limitations affirmative defense. CP 1013.

Plaintiffs served eight requests for admission on Defendant Lake Stevens March 22, 2011, which focused on the affirmative defenses. These were accompanied by parallel interrogatories which asked for explanation of anything other than unqualified admission. CP 86-94.

Request for Admission No. 1 stated: "Admit or deny that Plaintiffs' Complaint was properly served on the City of Lake Stevens." Lake Stevens answered with a simple denial April 22, 2011. CP 87.

Interrogatory No. 1 stated: "If your response to Request for Admission No. 1 was anything other than an unqualified admission, state all bases for your denial or qualified admission." Lake Stevens refused to answer, making the following objection:

> Objection. Unduly burdensome to the extent this interrogatory calls for "all" bases supporting the City's denial. Further objection in that it calls for a legal conclusion and attorney work product privileged information. Without waiving these objections, Defendants respond as follows: Pursuant to CR 33(c), see Defendant's August 20, 2010 response to Hyde's public disclosure request. See attached. This may be supplemented.

CP 92.

This exact language was used by Lake Stevens in response to every interrogatory related to the requests for admission with one exception - "See attached" was inserted into the language answering Interrogatory No. 1. The attachment referenced was simply the affidavit of service related to the

second service of summons and complaint on Steven Edin December 21, 2010 following acquisition of cause number. No reference was made to the original service, which took place November 3, 2010, after which counsel representing Lake Stevens had already appeared November 9, 2010. No explanation accompanied the attachment. CP 92.

April 29, 2011 Plaintiffs sent a letter to Lake Stevens asking that it withdraw its objections, answer the interrogatories, and produce the requested documents. The letter further asked Lake Stevens to let Plaintiffs know if it was not willing to do so. The letter was ignored by Lake Stevens. CP 98. (Lake Stevens did not provide the information requested by Interrogatory No. 1 until it filed its motion for summary judgment August 23, 2012.)

Extensive discovery commenced. CP 69-76. The Chief of the Lake Stevens police department was deposed June 30, 2011. At that time the Chief said tasing Mr. Hyde in fact had not been required. CP 124-129. This was the first time Mr. Hyde learned that there was no requirement that he be tased to get the job. This directly contradicted what the training officer had told him. CP 165.

April 18, 2011 Plaintiffs requested a trial date. CP 69. Lake Stevens objected. CP 100. Trial was set to occur January 23, 2012 which was within 3 years of the tasing. CP 69. Lake Stevens approached Plaintiffs and asked

if Plaintiffs would agree to continue the trial to a later date. Plaintiffs agreed, and Lake Stevens obtained a new trial date of October 8, 2012, stating it was not available for trial on an earlier date. CP 69. This new date picked by Lake Stevens was more than 3 years plus 60 days beyond the date of the tasing which injured Mr. Hyde. A statute of limitations defense had still not been asserted by Lake Stevens.

Discovery continued over the next year and a half with numerous depositions, requests for production, requests for admission and interrogatories by both sides. The case generated 9 file folders of discovery pleadings and 6 file folders of general pleadings; 23 depositions were taken. CP 69-76. August 23, 2012 Lake Stevens served Plaintiffs the summary judgment motion on appeal here, which for the first time stated the basis of its contention that there had been insufficiency of service of process and which further argued the statute of limitations had expired, although Lake Stevens had not pled statute of limitations as an affirmative defense in either its first complaint or in its amended complaint. This motion happened to be filed 3 years and 73 days after Mr. Hyde was tased, 13 days after what Lake Stevens contends is the date the statute of limitations ran. CP 76.

On receipt of the motions, Plaintiffs served Lake Stevens with summons and complaint a third time with service on the City Clerk September 4, 2012 and service on the Mayor September 24, 2012. CP 142-

3. This service was completed less than 3 years from the date Steven Hyde knew he had been improperly tased and less than 2 years from the date Mr. Hyde learned for the first time the tasing was not mandatory.

Mr. Hyde filed declarations and memoranda opposing summary judgment September 10, 2012. CP 457-587. He then filed supplemental declarations and memorandum October 5, 2012. The supplemental materials were filed 12 days before the summary judgment hearing. CP 266-362.

At the summary judgment hearing Lake Stevens opposed consideration of the supplemental declarations and memorandum, contending they were untimely, even though they were filed and served 12 days before the summary judgment hearing. The trial court agreed and entered an order granting "Defendant's motion to strike untimely 'Supplemental' Briefing and Evidence." CP 228-9.

On October 17, 2012 the trial court entered an order granting Defendant Lake Stevens' motion for summary judgment on every ground raised. Specifically, the court found: 1) service of process was defective and that the statute of limitations began to accrue June 11, 2009, the date of the tasing; 2) Steven Hyde was not entitled to the right to sue granted under RCW 41.26.281; 3) Steven Hyde's wife has no cognizable spousal consortium claim under RCW 41.26.281; 4) the written release signed by Steven Hyde before he was tased bars this negligence suit; and 5) Steven

Hyde's claim is barred by express assumption of risk. CP 230-233.

Mr. Hyde and Dr. Brooke timely filed a motion to reconsider, resubmitting their evidence and additionally submitting evidence responding to certain contentions of Lake Stevens related to application of the LEOFF statute to this case which were raised for the first time in Lake Stevens' response to Mr. Hyde's opposition to summary judgment. CP 65-233; CP 399.

The court considered all materials submitted by Mr. Hyde and Dr. Brooke on reconsideration. It then denied the reconsideration motion. CP 1.

Mr. Hyde and Dr. Brooke timely filed a notice of appeal with respect to the orders striking the "untimely" submission, granting summary judgment and denying reconsideration. CP 1029-43.

V. ARGUMENT

A. Standard of Review.

Summary judgment is only appropriate if the pleadings, answers to interrogatories, depositions, declarations and admissions reveal there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). In determining whether a genuine issue of fact exists, all evidence and all inferences that can be drawn from the evidence must be drawn in favor of the nonmoving party. Ruff v. County of King, 125 Wn.2d 697, 703, 887 P.2d 886 (1995).

For purposes of summary judgment all evidence and all inferences that can be drawn from the evidence must be construed in favor of Mr. Hyde and Dr. Brooke. Where there is any conflict in the evidence, the conflict must be resolved in favor of Mr. Hyde and Dr. Brooke for purposes of summary judgment. The trial court cannot weigh evidence.

B. It was error to find Steven Hyde could not sue his employer under the LEOFF statute.

The clearest evidence that the LEOFF 2 statute applies to Mr. Hyde is the fact that Lake Stevens admitted LEOFF 2 was applicable to Mr. Hyde's injuries in response to a request for admission. CP 88. This took the issue of whether Mr. Hyde was a LEOFF "member" out of the case.

Lake Stevens attempted to reinsert the issue for the first time in its reply to Mr. Hyde's summary judgment response. CP 399. Since the first Mr. Hyde learned Lake Stevens was attempting to avoid its admission was in its response to Plaintiffs' opposition to its summary judgment motion, Mr. Hyde submitted additional evidence of LEOFF membership on reconsideration.

On reconsideration Mr. Hyde submitted the declaration of Jennifer Goss, retirement systems analyst for the Washington State Retirement Systems, whose responsibilities include LEOFF. She stated Steven Hyde

was a LEOFF "member" at the time he was tased. CP 209-10. Further, Mr. Hyde submitted pay stubs from the relevant time period that show Lake Stevens deducted LEOFF contributions from his paycheck for the relevant time period. CP 184.

RCW 41.26.281 allows "Members" of LEOFF to sue their employers. WAC 415-02-030 (24) defines "member" in the following way: "Member means a person who is included in the membership of one of the retirement systems created by Chapters ... 41.26 ... RCW." Mr. Hyde was in fact a "member" of LEOFF when he was tased. The Goss declaration unequivocally establishes Mr. Hyde was a member of LEOFF at the time he was tased. Further, at the time Mr. Hyde was being tased deductions from his paycheck were being paid to LEOFF. CP 184. Finally, Lake Stevens was paying premiums to LEOFF on behalf of Mr. Hyde when he was tased. CP 135-6. The right to sue accrues to any "member" of LEOFF. RCW 41.26.281 includes no requirement of a commission or anything else.

The trial court was persuaded that the "right to sue" provision of LEOFF must be strictly construed against Mr. Hyde. This is not the case. LEOFF has been held by the courts to be a remedial statute. E.g. Newlun v. Department of Retirement Services, 53 Wn.App. 809, 770 P.3d 1071 (1989). Because LEOFF is a remedial statute, it must be construed

liberally in favor of the employee. Bates v. City of Richland, 112 Wn.App. 919, 939, 51 P.3d 816 (2002). A liberal construction requires that LEOFF's coverage be liberally construed in favor of the employee and that LEOFF's exceptions be narrowly defined. Id. Moreover, LEOFF's remedial provisions should be liberally construed to advance the legislature's intent. Id.

The particular portion of LEOFF conferring the right to sue is clearly remedial. The statute in relevant part states:

> If injury or death results to a member from the intentional or negligent act or omission of a member's government employer, the member, the widow, widower, child, or dependent of the member shall have the privilege to benefit under this chapter and also have cause of action against the government employer as otherwise provided by law. . .

RCW 41.26.281. The statute creates a remedy. In the course of analyzing whether an amendment to a different part of the LEOFF statute was remedial, a court stated:

> Thus we address the third circumstance, whether the amendment was "remedial" legislation. In general, "an amendment is deemed remedial. . . when it relates to. . . remedies. . . ."

Olesen v. State, 78 Wn.App.910, 914, 899 P.2d 910 (1995).

Starbe v. Von Thiele, 47 Wn.App. 558, 736 P.2d 297 (1987), review denied, held a statute is remedial when it affords remedy for

enforcement of rights or redress of injuries. RCW 41.26.281 obviously provides remedy for redress of injuries.

The Supreme Court of Washington stated that, in construing remedial statutes, the construction which will subserve the right will be preferred, if the language permits, over a construction which may perpetuate a wrong. Ingersoll v. Gorkey, 72 Wash. 462, 130 P. 743 (1913). Three years later the Supreme Court clearly stated remedial statutes must be liberally construed. Peet v. Mills, 76 Wash. 437, 136 P. 685 (1916).

Remedial legislation is construed liberally in order to accomplish the purpose for which it was enacted. State v. Douty, 92 Wn.2d 930, 603 P.2d 373 (1979). The stated purpose of the LEOFF statute is as follows:

> The purpose of this chapter is to provide for an actuarial reserve system for the payment of death, disability and retirement benefits to law enforcement officers and firefighters, and to beneficiaries of such employees, thereby enabling such employees to provide for themselves and their dependents in case of disability or death, and effect a system of retirement from active duty.

RCW 41.26.020.

The purpose of LEOFF is to give injured police officers and firefighters greater benefits than what they would receive under the worker's compensation system, including the right to sue their employers.

Hansen v. City of Everett, 93 Wn.App. 921, 926, 971 P.2d 111 (1999). The purpose of the right to sue, however, is more than to simply provide greater benefits, it is also to improve safety:

> This scheme puts an injured LEOFF member in a better position to be made whole economically than a person similarly situated claiming under worker's compensation or common law. By exposing an employer to liability for negligent acts toward its employees, the statute creates a strong incentive for improved safety.

Id. at 926.

Returning to Steven Hyde's case, Lake Stevens advocated a strict definition for LEOFF "member" in order to argue he has no right to sue. This ignores case law stating the term "member," as used in the LEOFF statute is not to be strictly limited to the definitions in the statute. Instead, the meaning of "member" as it is used in LEOFF is additionally to be determined by looking at context in relation to purpose regardless of any statutory definition. Newlun v. Department of Retirement Systems, 53 Wn.App. 809, 821, 770 P.2d 1071 (1989).

Further, Lake Stevens advocated a position that would have the court go against Washington Supreme Court precedent. In the 1990's Spokane County attempted to avoid RCW 41.26.281 (the right to sue statute) by saying it did not apply to LEOFF II members because they now come under the Industrial Insurance Act. This is a version of the same

argument made by Lake Stevens to the trial court. The Washington Supreme Court described the Spokane County position as follows:

> Petitioners contend that because the 1977 amendments expressly made Plan II members eligible for benefits under the Industrial Insurance Act, these members are subject to the Act to the exclusion of benefits under LEOFF.

Fray v. Spokane County, 134 Wn.2d 637, 647, 952 P.2d 601 (1998). Fray stated:

> Petitioners argue the plain language of the statute "returns" Plan II members to the Act without any limitations. Courts should interpret statutes to avoid absurd or strained results so as not to render any language superfluous. Contrary to Petitioner's argument, Plan II members are not returned to the ACT, but instead are merely made "eligible" for benefits under the act. RCW 41.26.480 provides:
>
> > Notwithstanding any other provision of law, members shall be eligible for industrial insurance as provided by Title 51 RCW, as now or hereafter amended, and shall be included in the payroll of the employer for such purpose.
>
> Petitioners claim this provision returns Plan II members to the Act "as now or hereafter amended", without any limitation, "notwithstanding any other provision of law." Petitioners argue the phrase "notwithstanding any other provision of law" confines Plan II members to the ACT to the exclusion of benefits under LEOFF. We do not agree. We agree instead with the interpretation of the court of appeals that it means "in spite of any other provisions in LEOFF a member is still entitled to industrial insurance benefits." RCW 41.26.480

> states that Plan II members "shall be eligible" for industrial insurance benefits. It does not state the members are limited only to those benefits. The language is clear and unambiguous.

Fray at 648. Fray concludes the analysis by stating:

> The fact the Legislature did not restrict the right to sue, while granting benefits under the Industrial Insurance Act, leads to an inference it intended to confer both benefits upon police officers and firefighters.

Id. at 648-9.

Lake Stevens cited Hauber v. Yakima County, 147 Wn.2d 655, 56 P.3d 559 (2002) to the trial court as support for its position that Mr. Hyde cannot sue under LEOFF. Hauber involved a fire fighter who was injured while on a volunteer search and rescue mission. The Supreme Court noted that, had the fire fighter been on a mission for the fire department, he could have brought suit against his employer under the LEOFF statute. However, the court noted Hauber was not on a fire department mission. He was on a volunteer search and rescue mission, and, as a search and rescue volunteer, the County had immunity from suit by him under RCW 38.52.190. The Supreme Court stated that, had Hauber been killed as a fire fighter rather than as a search and rescue volunteer, he could have brought the suit against the County. Unlike Hauber, in the case at bar there is no question Mr. Hyde was injured in the course of activity on behalf of the Lake Stevens Police

Department.

However, Lake Stevens in bringing up Hauber failed to cite the most significant aspect of the case for purposes of this litigation. In Hauber the Supreme Court stated:

> While the Industrial Insurance Act immunizes most employers from job related negligence suits, firefighters and police officers, because of the vital and dangerous nature of their work are provided extra protection and are allowed to both collect worker's compensation and bring job related negligence suits against their employers. RCW 51.04.010, RCW 41.26.281.

Hauber at 660.

"Members" of LEOFF have a right to sue their employer. Since RCW 41.26.281 is a remedial section of a remedial statute, "member" needs to be liberally construed to achieve the statute's purpose. The purpose of the statute has been stated to provide benefits to law enforcement and firefighters beyond the Industrial Insurance Act. Additionally, the purpose of RCW 41.26.281 is to create a "strong incentive" in employers of police and firefighters "for improved safety." Given these rules of construction and policies, it seems clear that there is no rational basis for depriving one hired by Lake Stevens to be a police officer of the right to sue his employer for unsafe training technique because the officer is still in training. Presumably, the policy supporting

strong incentive for improved safety rationally should apply to the training practices employed. Further, when Mr. Hyde was tased he had already been issued a gun, badge and commission card and was going out on patrols as well as performing other police duties for Lake Stevens. CP 164-84.

Lake Stevens cannot evade the "member right to sue" section of LEOFF by attempting an extremely narrow interpretation of a remedial statute which ignores both the facts and the policies behind the statute. If it was error for Lake Stevens to give Mr. Hyde a badge, commission card and gun, that error does not eliminate the right of Mr. Hyde to sue for negligence in the course of his training to become a Lake Stevens police officer.

The LEOFF statute clearly confers a right to sue one's employer. No case supports Lake Stevens' position, which is that an officer in training cannot take advantage of the right to sue portion of LEOFF.

C. Sandra Brooke has the right to bring a claim under the LEOFF statute for her husband's injuries.

Lake Stevens argues Mr. Hyde's wife should be allowed no claim under the LEOFF statute, stating she does not fit into any of the statutory categories described in RCW 41.26.281. The argument thus is that, although widows and children are specifically named potential claimants,

absence of the word "spouse" in the statute means Dr. Brooke can take no claim. This argument can only be made if the language of the statute is ignored. No case supports Lake Stevens' argument, and there have been several cases appealed under the LEOFF statute in which the spouse was a named party. e.g., Kevin and Tori Locke in Locke v. The City of Seattle, 162 Wn.2d 474, 172 P.3d 705 (2007).

In the first place widows and widowers are spouses, so the statute does contemplate recovery for spouses. It is hard to imagine a rational basis for an interpretation that would provide a widow could recover for her dead husband while the wife of a paralyzed police officer could not.

Fortunately, the statutory language supports broader interpretation than what is advocated by Lake Stevens. In addition to widows, widowers and children the LEOFF statute specifically gives any "dependent of the member" a right of action. RCW 41.26.281. A spouse is a dependent and accordingly is included.

The remedial purpose of LEOFF described in the preceding section applies to spouse claims as well. LEOFF is to be construed liberally to achieve its purpose. Its stated purpose includes provision for "beneficiaries" of employees and to provide for employees' "dependents" in case of disability or death... ." RCW 41.26.020. Additionally, the courts have stated the "right to sue" provision has as its purpose to provide a "strong incentive

for improved safety." Hansen v. City of Everett, 93 Wn.App. 921, 926, 971 P.2d 111(1999).

No case exists which establishes the spouse of an officer who survives his injuries has no right of action. Nowhere does the LEOFF statute state a spouse cannot be considered a dependent, and dependents clearly can pursue actions. RCW 41.26.281. Lake Stevens cited as support for its novel position RCW 51.08.050, which does not include "spouse" in its "dependent" definition under Title 51. However, Lake Stevens failed to draw the trial court's attention to RCW 51.08.0210, which reveals the reason for this omission. RCW 51.08.020 states a spouse is considered a "beneficiary" under Title 51, which obviates the need to name a spouse as a "dependent" in RCW 51.08.050.

Given the exhortation by the courts that LEOFF as a remedial statute must be interpreted liberally to accomplish it purposes, a spouse cannot be excluded from the right to sue conferred by RCW 41.26.281.

D. The release generated by Taser International, Inc., which by its terms does not extinguish any rights available under workmen's compensation laws cannot operate to extinguish rights Steven Hyde has under RCW 41.26.281.

Defendant Lake Stevens successfully argued that, because Mr. Hyde was required to sign a Taser International release before he was forced to undergo "voluntary" tasing, he waived his right to bring a lawsuit against

Lake Stevens. Ignoring the coercive circumstance that led to the release being signed, the release on its face makes it clear that Mr. Hyde's right to bring suit against the City of Lake Stevens is not released.

The Taser International release states: "This release does not release any rights under Worker's Compensation Laws." CP 108. Lake Stevens has admitted the following: "LEOFF II is the worker's compensation laws applicable to Mr. Hyde's injury." CP 88. LEOFF II specifically gives Mr. Hyde the right to bring a lawsuit against his employer. RCW 41.26.281; Fray v. Spokane County, 134 Wn.2d 637, 952 P.2d 601 (1998).

Since the release on its face states it does not release any rights under worker's compensation laws and since Lake Stevens has admitted LEOFF II is the worker's compensation law applicable to Mr. Hyde's injury, it cannot argue he has given up his right to sue under LEOFF II by signing the release.

E. Case law establishes that assumption of risk is a factor for the trier of fact to consider in the context of comparative negligence and cannot be used as a total bar to recovery. The trial court erred in dismissing Steven Hyde's claim on that basis.

Lake Stevens argued assumption of risk mandated dismissal of Mr. Hyde's claim. The argument was that the risks of tasing were disclosed to Mr. Hyde prior to his tasing and that Lake Stevens was thereby released from liability, even if he was required to be tased if he wanted the job. There are two problems with Lake Stevens' position. First, even if the risks were

disclosed, the exception does not apply where the taser application was performed negligently; second, the exception, even assuming nonnegligent application, cannot result in dismissal. Fortunately, there is a 2007 case remarkably similar to Mr. Hyde's case which explains this.

Lascheid v. City of Kennewick, 137 Wn.App. 633, 154 P.3d 307 (2007) involved a police officer with the City of Kennewick who was injured during training. The City required him to drive an emergency vehicle obstacle course which he had successfully driven before. Unfortunately, this time he did not do as well, losing control, going over a curb and smashing into a pole which totaled his car and injured him.

Officer Lascheid sued the City for damages in excess of his L&I benefits, which the appellate court noted was permitted by LEOFF. He claimed the City was negligent. The City stated his suit was barred by the doctrine of implied primary assumption of risk.

Kennewick's argument was described as follows:

> The City contends that Officer Lascheid knowingly and voluntarily assumed the risk of a known hazard. This, it argues, satisfies the requirements of implied primary assumption of risk and is an absolute bar to recovery.

Id at 639.

The Lescheid court noted:

> The City contends that Officer Lescheid knew and assumed the risks of this course on the day he was

> hired. The City argues that he also acquired knowledge of those risks during 11 post-hire training sessions on this same training course.

Id [citation omitted].

The court stated:

> The defendant here, the City of Kennewick, must show that Officer Lashceid knew of the precise hazard when he made the decision to accept the risk. The standard is subjective. It is specific to the particular plaintiff and the particular facts. It is not enough for the City to show that Officer Lascheid could have or should have foreseen that high-speed vehicle obstacle course training would be mandatory. It had to show he actually knew the specific risks and accepted them.

Id at 642 [citations omitted].

The Lascheid court stated that the doctrine of implied primary assumption of risk is construed narrowly. It noted that the doctrine could not be used to prevent a claim for negligence beyond the inherent hazard in the activity, citing two Washington State Supreme Court decisions. Id at 641.

The court noted:

> An assuming the risk of hazards inherent in an activity does not mean assuming the risk of unknown hazards created by future negligence.

Id at 643. The court then went on to emphasize that even where a plaintiff knows about an existing risk created by the defendant's existing negligence, there is no complete bar to recovery:

> By contrast, implied *reasonable* or *unreasonable* assumption of risk may arise when a plaintiff knows about an existing risk created by the defendant's existing negligence – and yet voluntarily chooses to encounter that risk. But again, this is not a complete bar to recovery. Rather the jury weighs it in determining fault.

Id at 643 [emphasis in text].

The court concluded by stating:

> Here, even if we accept the City's theory that Officer Lascheid assumed the risks inherent in emergency driving training, this would not relieve the City of its duty to provide training on a properly designed course, equipped with available safety technology, and properly supervised.

Id.

Turning to the case at hand, it is plain Mr. Hyde's cannot be dismissed based on assumption of risk. The doctrine is narrowly construed and cannot operate to relieve the City of Lake Stevens from negligence in its application of the taser or from negligently misrepresenting that he had to be tased. Further, even if Mr. Hyde had known in advance that the method of taser application was negligent, Lascheid makes it clear that this would not be an absolute bar, but would merely be a factor for the fact finder to weigh when considering comparative negligence.

The Washington State Supreme Court recently addressed assumption of risk. Gregoire v. City of Oak Harbor, 170 Wn.2d 628, 244

P.3d 924 (2010). The court stated:

> Four varieties of assumption of risk operate in Washington: (1) express, (2) implied primary, (3) implied unreasonable, and (4) implied reasonable assumption of risk.

Id. at 636. The court went on to state:

> The first two types, express and implied primary assumption of risk, arise when a plaintiff has consented to release the defendant of a duty – owed by the defendant to the plaintiff – regarding specific known risks.

Id. The Supreme Court stated:

> Express and implied primary assumption of risk share the same elements of proof: The evidence must show the plaintiff (1) had full subjective understanding (2) of the presence and nature of the risk, and (3) voluntarily chose to encounter the risk.

Id. That obviously is not the case involved here, since it cannot be said as a matter of law Mr. Hyde had full subjective understanding of the nature of the risk and since Mr. Hyde did not voluntarily choose to encounter the risk. He was told he had to be tased if he wanted the job.

Dismissal based on assumption of risk was error.

F. It was error to find as a matter of law that Steven Hyde's claim for negligent tasing accrued June 11, 2009, the date he was tased, where uncontroverted evidence established Steven Hyde did not learn he had been tased using improper technique until September 30, 2009.

The applicable statute of limitations is three years. RCW 4.16.080. An extra 60 days is added to allow for the required claim period. RCW

4.96.020(4). The statute of limitations does not begin running until a cause of action accrues. RCW 4.16.005. A claim for negligence accrues after the injured party discovers, or reasonably should have discovered, "all the essential elements of the cause of action, specifically duty, breach, causation and damages." In re Estates of Hibbard, 118 Wn.2d 737, 752, 826 P.2d 690 (1992). When an injured party discovers, or should have discovered, the elements of the cause of action is a question of fact for the jury. Green v. A.P.C., 136 Wn.2d 87, 960 P.2d 912 (1998).

Mr. Hyde has testified the earliest he discovered the possibility of negligence in the taser application was when he received an email September 30, 2009 from Taser International which stated the method of application on him was not recommended. CP 164-5. This testimony must be accepted as true for purposes of summary judgment. Whether it was reasonable for him to fail to discover this element of his cause of action sooner is at most a question of fact for the jury. It cannot be summarily decided. Frankly, since Lake Stevens claims taser application was not negligently performed, it would be hard pressed to argue, much less prove, Steven Hyde should have discovered this negligence sooner.

Lake Stevens argued accrual in Mr. Hyde's case took place at the moment of injury because he knew both the fact of injury and its cause – tasing. This approach to traumatic injury accrual has been advocated by

defendants before and rejected by the Washington State Supreme Court. North Coast Air Services, Ltd. V. Grumman Corporation, 111 Wn.2d 315, 759 P.2d 405 (1988).

North Coast was a products liability action brought following a plane crash. The crash occurred in 1974. The action was filed 12 years later. The plaintiffs were the corporate owner of the airplane, the personal representative of the pilot killed in the crash, and the pilot's father, who was also chief executive officer of the corporate owner.

Investigating authorities attributed the crash to pilot error. The father submitted an affidavit stating investigating authorities had concluded there was no mechanical defect in the plane and that he did not learn otherwise until more than 11 years later.

The father stated that May 6, 1984 he learned of other incidents involving the same model of the plane involving an alleged defect in the elevator control assembly. At that point he realized the 1974 crash may have been caused by the same problem. Only then did he begin an investigation of the crash that killed his son. He stated he located a piece of the plane's wreckage which contained a defective elevator linkage. He had never investigated the crash before despite his position as CEO of North Cost Air Services, Ltd.

Grumman Corporation moved for dismissal based on the statute of

limitations. The Supreme Court described Grumman's position as follows:

> Thus, defendant reasons that the cause of action accrued at the time of the crash because plaintiff knew the harm (death of the pilot) and its cause (crash of the plane).

Id at 319. The Supreme Court rejected Grumman's position, stating:

> At the time of the crash obviously the claimant knew of the harm. Equally obvious is that claimant knew the ostensible cause was the crash. Defendant would have that suffice. For reasons discussed hereafter we hold that the claimant must know or should with due diligence know that the cause in fact was an alleged defect. Whether the claimant knew or should have known will ordinarily be a question of fact. That the causal connection usually is a question of fact is recognized.

Id.

The Supreme Court stated:

> Defendant is candid in its assertion that the discovery rule should not be applied to a traumatic injury case. Brief of Appellant, at 17. It advances the notion that the claim accrues "when the claimant knew or should have known the harm and the immediately apparent basis for the harm." Brief of Appellant, at 34. This approach literally equates "cause" with the traumatic event. Thus, any airplane crash with known resultant injuries would automatically start the running of the statute of limitations. This would be true despite the possibility that pilot error, weather conditions, faulty tower control, or whatever was the cause in fact. Likewise an automobile crash with known resultant injuries would accrue the claim, even though the cause in

> fact might be thought to be driver error, road conditions or anyone of myriad causes, but was in fact a defect in the automobile.

Id at 322. It then specifically rejected the notion advocated in this case by Lake Stevens that a claim based on traumatic injury necessarily accrues at the time of the traumatic event.

The Washington Supreme Court explained the purpose of the statute of limitations in Tyson v. Tyson, 107 Wn.2d 72, 727 P.2d 226 (1986):

> Statutes of limitation assist the courts in their pursuit of truth by barring stale claims. A number of evidentiary problems arise from stale claims. As time passes evidence becomes less available.

Id. at 75. The Supreme Court then noted that, to determine whether to apply the discovery rule, the court must balance the risk of stale claims against the unfairness of precluding justified causes of action. The court stated:

> In prior cases where we have applied the discovery rule, there was objective, verifiable evidence of the original wrongful act and the resulting physical injury. This increased the possibility that the fact finder would be able to determine the truth despite the passage of time, and thus diminished the danger of stale claims.

Id. at 76.

The Tyson court gave examples of cases where the discovery rule had been applied. In each case the passage of time before discovery was measured in decades. Ruth v. Dight, 75 Wn.2d 660, 453 P.2d 631 (1969) (discovery 22 years after negligence); Ohler v. Tacoma General Hospital, 92 Wn.2d 507, 598 P.2d 1359 (1979) (products case where discovery was 26 years after date of injury); Sahlie v. Johns-Manville Sales Corp., 99 Wn.2d 550, 663 P.2d 473 (1983) (accrual of claim delayed more than 40 years by application of discovery rule). Despite the passage of time Tyson found application of the discovery rule appropriate in these cases. The court explained:

> Because of the availability and trustworthiness of objective, verifiable evidence in the above cases, the claims were neither speculative nor incapable of proof. Since the evidentiary problems which the statute was designed to prevent did not exist or were reduced, it was reasonable to extend the period for bringing the actions.

Tyson at 77. The court held:

> It is proper to apply the discovery rule in cases where the objective nature of the evidence makes it substantially certain that the facts can fairly be determined even though considerable time has passed since the alleged events occurred.

Tyson at 79.

Returning to Mr. Hyde's case it becomes clear that the balance advocated by the Tyson court between stale claims and the unfairness of precluding justified causes of action favors adoption of the discovery rule in his circumstance. Steven Hyde was tased June 11, 2009. He had surgery in August 2009. At the end of September 2009 he learned for the first time the method of taser application may have been negligent. Accordingly, it could be reasonably found his claim based on negligent tasing accrued September 30, 2009. This application of the discovery rule results in accrual of the claim for negligent application of the taser exposure only 46 days after the traumatic event.

Further, a claim was filed with Lake Stevens August 18, 2010. This gave Lake Stevens the notice it needed to investigate and prevent evidence from disappearing. Finally, suit was filed November 2, 2010; counsel for Lake Stevens appeared November 10, 2010 and commenced discovery. Lake Stevens has argued the statute of limitations expired August 10, 2012; it is important to note virtually all discovery in this case had been completed by that date. CP 69-76. The detailed discovery in Mr. Hyde's case eliminated any possibility of the risk that the claim might become stale. The balance clearly weighs in favor of application of the discovery rule.

Another Washington Supreme Court case underlines why application of the discovery rule is utterly appropriate in Mr. Hyde's case with respect to his claim of negligent application of taser exposure. Allen v. State, 118 Wn.2d 753, 836 P.2d 200 (1992) involved a woman who sued the state for paroling two men who later murdered her husband. The murders took place December 18, 1979. In May 1982 the two men were convicted. At the time of the murders the two men were on parole. The woman stated she did not know of the convictions despite widespread publicity.

October 1985 the woman filed suit against the state for negligently paroling the killers. The State moved for summary judgment, arguing the 3 year statute of limitations had expired. Summary judgment was granted because the trial court found as a matter of law she should have discovered her cause of action in May 1982, when newspaper articles about the trial and previous homicide convictions were printed.

The Supreme Court granted review in Allen to decide whether application of the discovery rule was appropriate. The Supreme Court noted:

> Under the discovery rule, a cause of action accrues when the plaintiff knew or should have known the essential elements of the cause of action: duty, breach, causation and damages.

Id. at 757-8. The court, further, stated:

> The discovery rule requires a plaintiff to use due diligence in discovering the basis for the cause of action. In other words, the discovery rule will postpone the running of a statute of limitations only until the time when a plaintiff, through exercise of due diligence, should have discovered the basis for the cause of action. A cause of action will accrue on that date even if actual discovery did not occur until later.

Id. at 758.

The Supreme Court then analyzed the efforts made to discover in the Allen case. It noted her efforts were minimal. The court noted she maintained little contact with the investigators. The court noted the May 1982 trial had received considerable media attention. The court noted her own family even had copies of the 1982 articles on the case, emphasizing that the information was clearly discoverable with little or no effort by at least May 1982, yet she did not file for more than 3 years after that date. The court concluded due diligence would have caused her to discover the basis of her cause of action more than 3 years before she ultimately filed.

Returning to Mr. Hyde's cause of action it is clear that his efforts to discover satisfy the due diligence requirement. He was tased June 11, 2009. He had surgery in late August 2009. CP 211-26. By the end of September 2009 he contacted Taser International to ask about whether the appropriate method for voluntary taser exposure was used on him. This

was diligent, and it is appropriate in this circumstance to find his claim for negligent taser exposure did not accrue until the end of September 2009, which meant his statute of limitations began running at that time, which meant his statute of limitations on his claim for negligent taser exposure at earliest did not expire until November 29, 2012 (3 years plus 60 days after September 30, 2009).

Mr. Hyde alleges Officer Auckerman was negligent in the manner in which he tased Mr. Hyde. Mr. Hyde testifies that he did not know his taser exposure was performed in a way that was not recommended by Taser International until he received an email September 30, 2009 from Ray Minor of Taser International saying so. This must be taken as fact for purposes of summary judgment.

The fact that taser exposure was performed in an unrecommended manner was not known by Mr. Hyde prior to the email. Further, the proper method for applying voluntary taser exposure is not something casually known. The issue of whether Mr. Hyde should reasonably have discovered the negligent application sooner than three months after his exposure and less than a month after his surgery is at most question of fact.

G. Steven Hyde's claim based on Aukerman's misrepresentation of the Lake Stevens tasing requirement should not have been dismissed under the statute of limitations where uncontroverted evidence established Steven Hyde did not learn of the negligent

> misrepresentation until June 30, 2011, which means the statute of limitations related to this issue still has not expired.

Mr. Hyde's claim based on negligent misrepresentation did not accrue until June 30, 2011. That was when he first discovered being tased was not a requirement of becoming a Lake Stevens police officer, contrary to the representation of his training officer. CP 164-5.

It was error to dismiss Mr. Hyde's claim for negligent misrepresentation based on the statute of limitations. Mr. Hyde states he was told he had to be tased if he wanted the job. He states he did not want to be tased. He states he had no reason to believe being tased was not a requirement of the job until Chief Celori so stated at his deposition. Chief Celori's deposition took place June 30, 2011. Steven Hyde's statements must be taken as fact for purposes of this motion.

The issue of whether Mr. Hyde should have discovered sooner that the tasing requirement had been misrepresented by his training officer is a fact issue which prevents summary judgment on the statute of limitations. The Washington courts have found that claims for negligent misrepresentation do not accrue until the misrepresentation is, or reasonably should have been, discovered. Samuelson v. Community College District No.2, 75 Wash.App. 340, 877 P.2d 734 (1994), review denied 125 Wash.2d 1023, 890 P.2d 464.

Samuelson involved a Grays Harbor Community college professor who claimed the community college was negligent for failing to inform him of his eligibility to participate in a retirement annuity purchase plan. The trial court dismissed the claim based on the statute of limitations. The appellate court reversed and held the question of when he should have discovered his eligibility to participate was a question of fact that precluded summary judgment on the basis of the statute of limitations.

The Samuelson court noted that the discovery rule, although first adopted in a medical malpractice case, Ruth v Dight, 75 Wn.2d 660, 453 P.2d 631 (1969), has since been extended to other causes. The Samuelson court noted: "The decision to extend the discovery rule to a cause of action is a matter of judicial policy." Samuelson at 346. The Samuelson court then held:

> We believe that the policies underlying the discovery rule are served by applying it in this case. In U.S. Oil & Ref. Co v. Department of Ecology, 96 Wn.2d 85, 633 P.2d 1329 (1981), the court noted that statutes of limitation operate upon the premise that when an adult has a justifiable grievance, he usually knows it, and the law affords him ample opportunity to assert it in the courts. That premise is inapplicable, however, where the plaintiff must rely on the defendant's self reporting, because the probability increases that the plaintiff will be unaware of any cause of action. U.S. Oil, 96 Wn.2d at 93. This case falls into that category because Samuelson apparently had no actual knowledge of his eligibility... He was relying, as most employees do, on his employer to inform him of his eligibility for certain benefits.

Id. at 346. The Samuelson court held when plaintiff should have discovered his eligibility was a question for the trier of fact that precluded summary judgment, despite the fact that published regulations, if read, would have revealed his eligibility.

Mr. Hyde's claim for negligent misrepresentation should not be dismissed. He did not discover the misrepresentation until June 30, 2011. The statute on that claim will not run until July 1, 2014.

H. At the time of the summary judgment hearing the court unequivocally had jurisdiction over this cause, and Lake Stevens' actions would support waiver of any statute of limitations defense even if the statute of limitations had expired.

Defendant Lake Stevens made a jurisdictional argument to the trial court, claiming insufficient service of process. It then blended an affirmative defense of statute of limitations, which it had not pled, in with its jurisdictional argument to accomplish dismissal of Plaintiffs' claims on a technicality which does not apply.

It is important to parse Lake Stevens' jurisdictional argument from its statute of limitations argument. The jurisdictional argument suggested by Lake Stevens is that it had not been properly served; therefore, the court did not have jurisdiction to hear this matter.

Plaintiffs served Lake Stevens with summons and complaint

November 3, 2010. The affidavit of service indicates service on the City Clerk Norma Scott by delivery to Steve Edin, Lake Stevens Director of Human Resources, whom Lake Stevens states is a speaking agent for the City. CP 79; CP 137. Counsel for Lake Stevens appeared six days later. CP 81-2.

Plaintiffs served Steve Edin December 21, 2010 with another summons and complaint. The affidavit of service related to this second service is the one Defendant Lake Stevens relied on in its summary judgment motion. CP 84.

Finally, Plaintiffs served Lake Stevens a third time after receiving the summary judgment motion. The City Clerk was served with summons and complaint September 4, 2012. The Mayor of Lake Stevens was served with summons and complaint September 24, 2012. CP 142-3. The third service of process was performed to make absolutely sure there could be no doubt that there had been sufficient and proper service of process and that the trial court, accordingly, had jurisdiction to hear this cause. The September services were thus completed before either the negligent tasing or negligent misrepresentation statutes of limitation ran.

Whether the first and second service of summons and complaint were sufficient to acquire jurisdiction has become irrelevant because there is no question the court has jurisdiction by virtue of the third service of

process on both the City Clerk and the Mayor in September 2012.

Jurisdiction having been established, the statute of limitations needs to be addressed. Statute of limitations is an affirmative defense which was never alleged in Defendant's Answers despite the requirement of CR 8(c). It is not a jurisdictional defense; it can be waived. Setting aside the "lying in the weeds" aspect of the City of Lake Stevens' behavior, which would defeat the City's attempt at dismissal based on statute of limitations in any event, the statute of limitations had not yet run at the time of the third service of process on Lake Stevens and still has not run.

However, in the case at bar, even if the statute of limitations had expired prior to acquisition of jurisdiction by the court (which is not the case), it would not be a bar to recovery. The City of Lake Stevens engaged in classic "lying in the weeds" behavior of a type condemned by the Washington State Supreme Court. Lybbert v. Grant Country, 141 Wn.2d 29, 1 P.3d 1124 (2000).

Lybberts brought suit against Grant County for injuries suffered in an automobile accident on a country road. They mistakenly served summons and complaint on the administrative assistant to the County Commissioners. Nevertheless, a few days after "service" counsel appeared, asserting that objections for improper service or jurisdiction

were not being waived. For nine months the County acted as if it were preparing to litigate the merits. Lybberts sent an interrogatory asking whether Grant County "would be relying on the affirmative defense of insufficient service of process." Id. at 33. Seven months later the County filed its answer and asserted its affirmative defense of insufficient service of process. The County then successfully moved for summary judgment based on insufficient service of process in combination with expiration of the statute of limitations.

The Court of Appeals reversed the trial court in Lybbert and the Supreme Court affirmed, holding Grant County by its actions had waived its right to assert insufficiency of service and statute of limitations defense.

The Supreme Court stated:

> We are satisfied, in short, that the doctrine of waiver complements our current notion of procedural fairness and believe its application, in appropriate circumstances, will serve to reduce the likelihood that the "trial by ambush" style of advocacy, which has little place in our present-day adversarial system, will be employed.

Id. at 40. The Supreme Court then stated:

> Apropos to the present circumstances of this case, one court has acknowledged that a defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been insufficient, and then obtain a dismissal on that ground only after the statute of limitations has run, thereby depriving the plaintiff of the opportunity to cure the service defect.

Id.

The facts involved here are even more compelling than Lybbert. Plaintiffs sent a specific interrogatory asking for the bases of Lake Stevens' affirmative defense that there had been insufficient service of process. Lake Stevens pretends it answered this interrogatory. It did not; it objected claiming the question was unduly burdensome, called for a legal conclusion and was attorney work product. It also attached a copy of the affidavit of service on Steve Edin. There was no explanation related to the affidavit attached; further, Plaintiffs had an earlier affidavit of service that included the city clerk.

In response to the failure to respond to the interrogatory, Plaintiffs sent Defendant Lake Stevens a letter asking that the interrogatory be answered. The letter was ignored. Now Lake Stevens seeks to take advantage of its failure to provide discovery.

Presumably, Lake Stevens should not be allowed to simply attach an affidavit of service and say "guess what our theory is" in response to a direct question asking for all bases underlying their insufficient service of process defense. Lake Stevens essentially argued it met its discovery obligation by handing Plaintiffs the affidavit and saying, "You figure it out." Further, the objections, including that the interrogatory was unreasonably burdensome, do not stand scrutiny either. A simple answer

to the question could have been given a year and a half ago that would have totally explained the basis of the defense. All Lake Stevens had to say is "You served the wrong person," which does not appear particularly burdensome. Instead, Lake Stevens refused to answer the question, playing for time with a strategy aimed at letting the statute of limitations run. It should be noted that Lake Stevens had no problem providing the information asked for in the interrogatory when it filed its motion for summary judgment.

Lake Stevens argues that it should have been apparent to Plaintiffs that process was insufficient by virtue of the fact that the service declaration it attached identified Steven Edin and, since Steve Edin is neither mayor nor city clerk, Plaintiffs should have divined he could not accept service. This argument ignores both the law and the facts. First, Plaintiffs had in their possession an apparent declaration of service on the city clerk. CP 79. Second, the process server states she specifically asked Steve Edin, whom Lake Steven states is its speaking agent, if he was authorized to receive service of summons and complaint and received an affirmative answer. CP 139-40. Third, although Lake Stevens is correct in stating service of process by statute can be made on the mayor or city clerk, it ignores the part of the statute that also states service can be made during normal office hours to the mayor's designated agent. RCW

4.28.080(2). There is no requirement in the statute that the designated agent be formally named as such in writing or otherwise. Accordingly, merely attaching an affidavit of service on Steve Edin did not reveal the basis of Lake Stevens' claim that there had been insufficient service of process, since Steven Edin was to all appearances a designated agent.

This is a case where for a year and a half Lake Stevens acted as if it were preparing to litigate the merits. Extensive discovery was conducted. Nine file folders of discovery pleadings were generated; six file folders of general pleadings were generated; twenty-three depositions were taken. CP 69-76. Further, when a trial date was requested, Lake Stevens opposed it. When the trial date of January 23, 2012 was assigned, Lake Stevens approached Plaintiffs and requested the date be changed. Plaintiffs agreed and Lake Stevens stated it had no availability for a trial date sooner than October 8, 2012, which happened to be beyond the statute of limitations date Lake Stevens claims. CP 69. In hindsight, it seems Lake Stevens conducted a deliberate strategy of maneuvering the trial date to a time beyond when it perceived the statute of limitations would run.

The reality is Lake Stevens did not want Plaintiffs to discover the basis of their affirmative defense, because it did not want Plaintiffs to correct the problem in time to avoid dismissal. This is classic "trial by

ambush" of the nature criticized by the Supreme Court. Lake Stevens' behavior would mandate waiver of affirmative defenses if the statute of limitations actually had run before the court acquired jurisdiction.

However, the statute of limitations still had not expired at the time of the summary judgment hearings, so application of the doctrine of waiver is not needed. If there ever was any error related to service of process, it was corrected in time by the third service of summons and complaint on both the City Clerk and Mayor in September 2012.

I. The order striking supplemental evidence and memorandum submitted 12 days before the summary judgment hearing was erroneous.

Plaintiffs/Appellants submitted supplemental evidence and a memorandum to the trial court 12 days before the summary judgment hearing. CP 271. Case law clearly states all evidence in opposition submitted prior to entry of the order on summary judgment is to be considered by the court even if that evidence is submitted after the oral decision is made. Meridian Minerals Co. v. King County, 61 Wn.App. 195, 810 P.2c 31 (1991). The reason for this is explained:

> In the context of summary judgment, unlike trial, there is no prejudice to any findings if additional facts are considered.

Id. at 203.

The supplemental evidence submitted October 3, 2102 was properly a part of the record at the time summary judgment as granted. The request for an order striking it should not have been granted.

VI. CONCLUSION

The orders granting summary judgment and denying reconsideration should be reversed. This cause should be remanded for trial.

Dated this 29th day of April, 2013.

LOPEZ & FANTEL, INC., P.S.

CARL A. TAYLOR LOPEZ,
WSBA No. 6215
Of Attorneys for Appellants