COURT OF APPEALS NO. 319628-III

THE COURT OF APPEALS FOR THE STATE OF WASHINGTON,
DIVISION THREE

IRA AND ROBERT WILLIAMS,

Appellants,

v.

UNDERWIRE SERVICES, ET AL,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KITTITAS COUNTY

The Honorable Frances P. Chmelewski, Judge

REPLY BRIEF OF APPELLANTS

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A. ARGUMENT IN REPLY

1. The defendants waived the non-service affirmative defense because they engaged in substantive discovery with no objections to, or issues raised concerning, service of process at a time when service still could have been affected.

a. The defense has misinterpreted *State v. Romjue.*

Defendants argue that the commencement of discovery was just one of the factors that led to a finding of waiver in *State v. Romjue*, 60 Wn. App. 278, 803 P.2d 57 (1991). Reciting the facts in that case, defendants claim, "it was given the totality of those circumstances the court determined the defendants had waived the defense." BOR at 11, citing to *Romjue* at 282.

But this Court in *Romjue* did not talk about the totality of the circumstances. To the contrary, this Court specifically explained, "The dispositive issue is whether Mr. Fairchild waived the defense of insufficient service because he engaged in discovery before he moved to dismiss." *Romjue* at 281 (emphasis added). This Court answered that question in the affirmative holding that because the defendant had engaged in discovery unrelated to the service issue, the defendant had waived the defense.

Defendants rely upon language in *Romjue* that engaging in discovery does not necessarily waive a claim of insufficient service. BOR at 10, citing to *Romjue* at 181. But that language must be read in context. What

the court actually said was that discovery aimed at the service issue would not waive that service issue:

> However, engaging in discovery is not always tantamount to conduct inconsistent with a later assertion of the defense of insufficient service. For example, in *Matthies v. Knodel* [cite omitted], the court held the defendant took plaintiff's deposition in order to determine whether a defense existed, including whether the statute of limitation had run. Therefore, engaging in discovery did not constitute waiver of that defense.

Romjue, at 181.

The defense makes a similar mistake when describing *Lybbert v. Grant County,* 141 Wn.2d 29, 1 P.3d 1124 (2000), suggesting that it was the more extensive discovery in that case that resulted in waiver. BoR at 11-12. But *Lyybert* does not say that. Similar to *Romjue*, the court looked at the nature of the discovery rather than its quantity. The Court explained, "we note that the County's discovery efforts were not aimed at determining whether there were facts that supported the defense of insufficient service of process." *Lyybert*, 141 Wn.2d at 41-42. As even the dissent in that case recognized, *Lyybert* created a broad rule "where waiver of the defense of insufficient service of process will be found in virtually every case." *Id.* at 45 (Justice Madsen Dissent).

The defendants seek to distinguish their situation from *Lyybert* by noting that the *Lyybert* parties had talked about mediation. BoR at 13.

Their distinction is unpersuasive. As previously discussed, the holding in *Lyybert* rests upon the commencement of discovery without first asserting, or inquiring about, the lack of service. Additionally, the parties in the current case had similar discussions about settlement. As stated in Ira Williams' 2013 status letter to the trial court, the parties were planning to engage in mediation in the hope of settling the case. CP 10.

The defendants protest that they only sent out a "standard set of discovery." BoR at 1, 6, 12, 19, 20, 21, 22 & 24. In doing so, defendants miss the point. This "standard set of discovery" was precisely what put the defendants on the wrong side of existing case law. Had the defendants sent out discovery directed at or raising the lack of service, plaintiffs would have been put on notice that although discovery had begun, service was still required, and the plaintiffs had almost a month to do so. But when the defense sent out a "standard set of discovery," with none of it directed at the service issue, the defense, in effect, communicated and demonstrated its willingness to go forward with the case, making formal service on the defendants unnecessary.

Defendants' "standard set of discovery" in no uncertain terms demonstrated that the battle had been substantively engaged. This discovery encompassed approximately 33 pages, 200 interrogatory questions (inclusive of subparts), and 20 requests for production, all of which were di-

rected at substantive, personal, background, liability, and damages issues. CP 73-106. None were directed at service of process issues. CP 73-106.

The holdings in *Lyybert* and *Romjue* are controlling. Because defendants did not first assert a lack of service, their commencement of discovery unrelated to the issue of service and at a time when plaintiffs still could timely affect service, waived their right to assert that defense.

b. *Harvey v. Obermeit* does not support the defendants.

The defendants' reliance upon *Harvey v. Obermeit*, 163 Wn. App. 311, 325, 261 P.3d 671 (2011) is misguided, as that case dealt with a different aspect of the waiver rule. As described in appellants' opening brief, there are two different rules in evaluating whether a defendant's commencement of discovery creates waiver. First, there are cases in which the defendant engages in discovery without first noting an objection to, or raising an issue about, the process of service. That is what happened in our case. In those cases, as discussed above, the court has found a waiver when the defendant engages in discovery unrelated to the service issue. See e.g., *Lyybert*, at 41; *Romjue* at 281.

Second, there are cases where the defendant does first file a timely objection and only then commences substantive discovery. The question in those cases is whether the discovery that was unrelated to the service of process issue was extensive enough to overcome the earlier formally as-

serted limitations objection. *See e.g., French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991) (one a defendant properly preserves a defense by pleading it in the answer, the defendant is not precluded from proceeding with discovery); *King v. Snohomish County*, 146 Wn.2d 420, 426, 47 P.3d 563 (2002) (extensive discovery waived earlier improper service objection).

Harvey fits within this second set of cases, as the defendants there, before engaging in discovery, raised the service issue in a timely answer filed one day after the time period for service of process had expired (not three-plus years later, as defendants in this case did with their Motion for Summary Judgment, having never filed an answer). *Harvey,* 163 Wn. App. at 314. Had the defendants in the current case done the same thing before submitting the extensive interrogatory requests, the Williamses would have been on notice that despite initiating such discovery, the defense had not waived the service issue. Thereafter, if the Williamses still did not timely serve the defendants, they would have to point to something more than the defense's commencement of discovery to overcome the earlier objection. But the defendants did not file an objection as to service, and in their discovery did not raise any concerns, issues, or questions as to the status of service. Instead they dove into wide-ranging, substantive discovery, at a time when the plaintiffs still had time to affect service. This

understandably caused the plaintiffs to believe "the lawsuit was now fully underway and that service on the defendants was no longer a necessity." CP 69. Thus, the closer examination under *Harvey* is not required.

2. Defendants' claim that they could not raise the service issue before sending out the discovery is meritless.

Defense counsel argues that he could not have raised an objection to service before sending out interrogatories because he could not yet have known whether there would be insufficient service until the 90 days had passed. BoR at 13. This is wholly unpersuasive.

If actual service of the complaint (as opposed to notice and receipt of the lawsuit, which he obviously had) was truly important to defense counsel and his clients, he had several viable options: (1) he could wait to send out discovery until after he found out service had been accomplished; (2) he could wait to send out discovery until after the 90 day period for service of process had passed; (3) he could send out discovery that incorporated service of process related inquiries, putting the plaintiffs on notice that service was still an issue and was not waived; or (4) he could file an answer asserting the lack of service at the time that pleading was filed, and then proceed with discovery. In any of these events, he would have preserved his ability to pursue this affirmative defense. But by doing none of

those options, and instead acting solely as if the substantive battle was joined, defense counsel waived the right to insist upon actual service.

3. Plaintiffs are not raising a new argument on appeal.

At the trial level, the Williamses opposed the summary judgment motion by pointing out the defendants had waived the service issue when they commenced discovery without first objecting to the lack of service. RP 3-7; CP 39-43. After the court granted summary judgment, plaintiffs raised this same issue on appeal, arguing that under *Lybbert, Romjue,* and *Blankenship v. Kaldor*,[1] defendants had lost their ability to raise a service issue when they engaged in discovery unrelated to the lack of service without first lodging an objection. See BoA at 6-9. In doing so, plaintiffs relied upon the same evidence, the same arguments, and even the same cases as raised in the trial court.

Defendants now claim that plaintiffs are challenging the trial court's ruling on new grounds not presented below. Specifically, defendants protest that plaintiffs did not say anything about a "bright line rule" at the trial court. BoR at 20-21. Defendants are mistaken. Plaintiffs have consistently argued that defendants' commencement of discovery waived the affirmative defense of insufficient process of service. As noted in the

[1] 114 Wn. App. 312, 57 P.3d 295 (2002).

opening brief, the bright line proposed by plaintiffs "is just an amalgam of existing law." BoA at 9.

The one case defendants cite to in support of this argument, *Silverhawk v. Keybank*, 165 Wn. App. 258, 268 P.3d 958 (2011), does not support the defense argument.[2] In that case, the trial court ruled against plaintiff Silverhawk in a contractual dispute. On appeal, Silverhawk raised a new argument based on a new theory under an entirely different section of the contract. *Id.* at 244-65. The appellate court found that Silverhawk was not entitled to raise a completely new argument on appeal. *Id.* at 265-66. In contrast to *Silverhawk*, plaintiffs here have relied upon the same facts, the same law, and the same legal theory of waiver to support its position.

4. Defendants also waived their right to assert limitations as an affirmative defense, because they were dilatory in waiting three years to formally raise it by answer or by summary judgment motion.

According to respondent, "The fact that defendants now assert the defense, once they were aware the defense exists, does not mean the defense was waived." BoR at 24. But defendants did not assert the defense when they discovered it existed. But for the previously discussed waiver, limitations would have existed as an absolute defense on about May 20,

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[2] Defendants do cite to two other cases, for the black letter law that new issues cannot be raised on appeal. *See Douglas v. Jepson* 88 Wn. App. 342, 945 P.2d 244 (1997) and *1519-1525 Lakeview Blvd Condominium Ass'n v. Apartment Sales Corp.*, 101 Wn. App. 923, 6 P.3d 74 (2000). Neither of those cases, however, actually involved or discussed that issue.

2010 since no service had occurred prior to the expiration of 90 days after suit was filed. Defendants acknowledge they knew of such non-service about 20 days later on June 10, 2010 (CP 114). Logic dictates that if Defendants truly believed in such a dispositive defense, they would formally assert it soon thereafter. Instead, they waited more than three years to do so. Accordingly, in addition to the defendants' waiver by commencement of discovery as discussed above, the defendants also waived the same affirmative defense by being dilatory in waiting three years to assert the defense. See *Lyybert* at 38 (a dilatory assertion of inadequate service waives that affirmative defense).

The defendants filed no pleadings raising this alleged affirmative defense while plaintiffs provided yearly status updates to the court indicating that the case was still on going. CP 8-10. Approximately a year after the lawsuit was filed, Ira Williams sent a letter to the superior court clerk asking that the case be kept open. CP 8. In her letter dated April 21, 2011, Ira explained that although she had received discovery, which she hoped to answer soon, she was still in treatment for her injuries. Ira stated that she hoped to have settlement discussions soon thereafter. *Id.* The defense filed no responsive pleading, and did not claim a lack of jurisdiction.

On May 2, 2012, Ira sent another letter to the superior court, again asking that the case remain open. CP 9. Again defense counsel filed nothing.

On April 25, 2013, Ira wrote a third letter to the trial court stating, "the parties are going to have a mediation to hopefully settle the case." CP 10. Once again, defense counsel did not dispute this representation made to the court.

Defense counsel never filed an objection to the lack of service until July 30, 2013, more than three years after the filing of the lawsuit. CP 69. On that date, defense counsel filed a CR 56 summary judgment motion to dismiss for lack of service. CP 11-12

In attempting to justify the three-year delay, defendants claim there was no need to assert this affirmative defense as the parties were not engaged in active discovery. This argument fails for a number of reasons. First, one of the policy reasons behind the waiver rule is to promote judicial efficiency and conservation of court resources. *Lyybert,* 141 Wn.2d at 40. Allowing a case to linger on the dockets for three years before asserting a lack of jurisdiction is contrary to that policy. Second, sitting silent while plaintiffs assured the court that the case was moving forward and that the parties would be engaging in negotiations, is contrary to a later assertion of waiver. Finally, the defendants' actions fit squarely within the

meaning of the word dilatory. Dilatory means causing a delay, tending to be late, or slow to do something. *Merriam Webster On-Line Dictionary.* [3] By defendants' own acknowledgment, they had all the facts necessary to raise the defense nearly three years before actually doing so. There is no reasonable interpretation of dilatory that would excuse a three-year delay of asserting a known defense. Neither policy considerations nor case law can justify such a delay.

Defendants assert that about 4½ months after discovering no service of process had been made, defendants' counsel represented to plaintiffs' counsel that the statute of limitations had run. BoR 4. Furthermore, defense counsel states that he repeated this to plaintiffs' counsel on a number of occasions (CP 108). The defendants appear to offer this as an excuse for the three-year delay in asserting the defense in court. If anything, this is simply additional evidence of waiver. If defendants' truly believed they had a legitimate limitations defense beginning June 20, 2010, then their conduct would be to timely, and formally assert it and attempt to dispose of the case. But this they did not do. These statements

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[3] *See Western Telepage v. City of Tacoma*, 140 Wn.2d 599, 609, 998 P.2d 884, 890, 2000 Wash. LEXIS 289, 16 (Wash. 2000) ("Because those terms are not defined in the statute, we turn to their ordinary dictionary meaning.")

by defense counsel, followed by no action, further support a finding of waiver.

5. Plaintiffs have not advanced "a liberal construction" of the service rule.

The defendants accuse plaintiffs of employing a liberal construction of the service rule as a means of abandoning the statutory language. BoR at 23. That is not correct. The issue in this case is not whether the plaintiffs complied with the service rule. They did not. The issue is whether the defendants' actions resulted in waiver of their right to assert that defense.

In arguing against waiver, defendants march forth a parade of horribles that will befall the justice system if the court were to rule in the plaintiffs' favor. First, defendants argue that requiring them to object to service before the 90 days had elapsed would violate the RPCs and expose defense counsel to CR 11 sanctions. This is nonsense. If at the time at which the answer is filed there has been no service, then an objection to that fact should be noted. The fear that this would result is promoting a "gratuitous motion practice" is unfounded. If service does occur, the defense becomes moot, even though it was well-founded when made. Certainly the defense is not contending that parties would be appearing in court to litigate that motion after service had occurred.

Contrary to defendants' argument, plaintiffs' approach would reduce needless motions. Consistent with *Lyybert* and *Romjue*, if the defense engages in discovery before the expiration of the 90 day service of process period, and does not object or raise an issue to service, such defendant waives the ability assert that defense at a later time. This straightforward approach is easy to understand, easy to implement, and avoids the time consuming task favored by the defense of trying to determine the defendants' intent when filing the discovery. As discussed in appellants' opening brief, in determining how broadly the court should interpret the waiver rule, it is helpful to look at the values protected by the rule. The right to receive service, as opposed to actual notice, is a legislatively created right. RCW 4.16.170. As such, it cannot be ignored. At the same time, it has no bearing on substantive justice. A defendant who does not receive actual service, but engages in substantive discovery, has not lost any ability to present any evidence in his defense. Nor does it create a delay in bringing the case to trial.

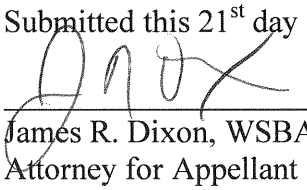
In the current case, the only reason plaintiffs did not serve the defendants was that they were led to believe that it was no longer necessary after defense counsel commenced discovery unrelated to the service issue. CP 69.

The trial court erred in failing to find waiver. The trucking company and its driver, who slammed into the back of Ira Williams' vehicle, both being fully represented by an attorney who timely received actual knowledge of the suit and the Complaint, should not be allowed to escape responsibility for the injuries caused to the Williamses. Given the equities on each side of the equation, it is understandable why Washington courts have created a very broad waiver rule that, in the words of Justice Madsen, "will be found in virtually every case." *Lyybert*, 141 Wn.2d at 45.

B. CONCLUSION

By commencing discovery before the expiration of the 90 day service of process period, and without raising an objection or issue as to the lack of service, the defendants communicated their intent to engage plaintiffs in battle. Then they delayed asserting their alleged right for more than three years. The trial court's narrow interpretation of the waiver rule, however, deprived Ira Williams of her ability to seek compensation for her injuries despite the defendants' obvious fault for the collision. For the reasons set forth above and in appellants' opening brief, the trial court's ruling should be reversed.

Submitted this 21st day of April, 2014



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CERTIFICATE OF SERVICE

I, James R. Dixon, certify that on April 21, 2014, I caused a true and correct copy of this Reply Brief of Appellants to be served on the following in the manner indicated below:

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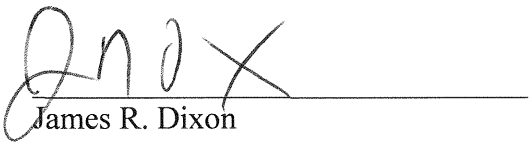

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