696608-8

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

REPLY BRIEF OF APPELLANTS

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I. SUMMARY

Jurisdiction was acquired no later than September 4, 2012 by any measure. This date was beyond the statute of limitations only if one ignores the discovery rule.

The issues of jurisdiction and statute of limitations are only significant if Lake Stevens' assumption that the statute of limitations began running the moment Steven Hyde was tased. It did not.

However, if in fact the statute of limitations had run before jurisdiction was acquired, Lake Stevens' behavior in achieving that result does violence to the principles of legal conduct imposed on government entities by the Washington Supreme Court. Application of those principles would prevent Lake Stevens from asserting its jurisdiction/statute of limitations defenses even if jurisdiction had not been timely acquired.

The real issue in this case concerns whether the law should be changed to deny an officer in training the right to sue his employer for negligence. The law should not be so changed.

II. ISSUES

A. The discovery rule provides the statute of limitations does not begin running until the injured party discovers, or reasonably should have discovered the elements of his cause. Steven Hyde did not discover he had been tased by a training officer using improper technique until so informed

by Taser International, Inc., September 30, 2009. Should the trial court have found as a matter of law that Steven Hyde's claim accrued the moment he was injured regardless of when he learned the technique used to tase him was improper?

B. Steven Hyde was told by his training officer he had to be tased if he wanted the job. When the Lake Stevens police chief was deposed June 30, 2011 Steven Hyde discovered being tased was not a job requirement. Should Steven Hyde's claim for negligent misrepresentation of the tasing requirement have been dismissed where the statute of limitations does not run on that claim until August 29, 2014?

C. RCW 4.28.080(2) provides the mayor of Lake Stevens can designate an agent in addition to the city clerk to accept service of process. Steve Edin, a speaking agent for Lake Stevens, informed a professional process server that he was authorized to accept service of summons and complaint on behalf of Lake Stevens. Should Lake Stevens be allowed to claim insufficiency of service of process where service of process was accepted on behalf of Lake Stevens by a speaking agent of Lake Stevens?

D. Lybbert v. Grant Country, 141 Wn.2d 29, 1 P.3d 1124 (2000) holds a Defendant claiming lack of jurisdiction through insufficiency of service of process cannot "lie in the weeds" and attempt to spring the defense after the statute of limitations has run. Lake Stevens claimed insufficiency

of service of process and failed to answer specific interrogatories asking for the basis of the defense and instead provided a misleading response and conducted extensive pretrial discovery for nearly two years, until after it felt the statute of limitations had run, at which time it provided a clear and concise explanation of the basis of its defense in a motion for summary judgment. Should Lybbert and equitable estoppel operate to deny Lake Stevens the benefit of an insufficiency of service of process defense?

E. Lake Stevens admitted LEOFF II was the workers compensation law appliable to injuries suffered by Steven Hyde. LEOFF II provides Lake Stevens can be sued for negligence and the Taser International release excludes rights afforded pursuant to workers compensation laws. Should Lake Stevens' admission have been disregarded and summary judgment granted with respect to the applicability of LEOFF II and the Taser International release?

III. LEGAL ARGUMENT.

A. Steven Hyde Makes Two Claims, Both Of Which Were Made Within The Statute of Limitations.

One of Steven Hyde's claims is for negligent taser application. The other is for negligent misrepresentation of the taser requirement.

Lake Stevens argues the claim for negligent taser application is made beyond the statute of limitations because as a matter of law the

discovery rule cannot apply to such a claim. With respect to negligent misrepresentation, Lake Stevens, apparently realizing it can make no statute of limitations argument on that claim since the fact of misrepresentation was only discovered June 30, 2011, instead argues the misrepresentation claim is not and never has been in this case.

The issues related to statute of limitations will be dealt with in the following order. First, jurisdiction will be addressed. Then the issue of statute of limitations as it relates to improper tasing technique will be addressed. The issue of negligent misrepresentation, which is not really a statute of limitations issue, but instead a pleadings issue, will then be addressed.

1. Jurisdiction.

There is no question that at least the third service of summons and complaint on both the city clerk and the mayor in September of 2012 was proper and conferred jurisdiction on the Superior Court. CP 142-3. The very latest this action can be said to have commenced for purposes of the statute of limitations is September 4, 2012, when the city clerk was unquestionably served. If the statute of limitations had not run by that date, jurisdiction was acquired within the statute of limitations.

2. Negligent tasing.

Service on the City Clerk took place September 4, 2012. The applicable statute of limitations is conceded by all to be three years plus 60 days to accommodate the claim filing requirement of Chapter 4.96 RCW. The evidence presented at summary judgment and on reconsideration was that Steven Hyde did not discover improper tasing technique was used on him until he received an email to that effect from Taser International, Inc., dated September 30, 2009. CP 165. Three years plus 60 days beyond that date was November 29, 2012. Since jurisdiction was acquired by service of summons and complaint no later than September 4, 2012, the action was commenced within the statute of limitations.

Lake Stevens' argument reduced to its simplest terms is that it does not like the discovery rule. It tries to push Steven Hyde's circumstance into the same pigeonhole as an uncomplicated motor vehicle accident. However, knowledge of correct application of taser for training purposes is not universally known or obvious in the way of a car accident. Accordingly, it is precisely the sort of thing the discovery rule was designed to address.

The issue of whether Steven Hyde should have discovered the taser was incorrectly applied to him prior to September 30, 2009 is a question of fact. Summary dismissal on that basis was erroneous.

3. Negligent misrepresentation.

Lake Stevens avoids the fact that the claim for negligent misrepresentation was clearly made within the required statute of limitations by arguing the claim is not in the case.

Turning first to the statute of limitations with respect to negligent misrepresentation, Steven Hyde did not want to be tased and said so. He was told he had to be tased if he wanted the Lake Stevens police officer job. He reluctantly agreed and was injured. CP 164-5.

Steven Hyde did not discover he was not required to be tased until June 30, 2011. This is when the Lake Stevens Chief of Police testified at deposition that tasing had not been required for Steven Hyde to get the job. Steven Hyde states this is the first he learned of this. Id.

As was described above, the statute of limitations applicable is three years plus 60 days. Three years plus 60 days beyond June 30, 2011 is August 29, 2014. The city clerk was served September 4, 2012. This was within the applicable statute of limitations. Whether Steven Hyde should have discovered the misrepresentation sooner than June 30, 2011 is at a minimum a question of fact preventing summary dismissal with respect to that claim.

Turning to whether the issue of negligent misrepresentation was in the case, Lake Stevens in a footnote in its brief argues it was not. Brief of Respondent, p.18, fn.12. The argument is unfounded.

The complaint states in general terms that Steven Hyde was injured as a direct and proximate result of the negligence of Lake Stevens. CP 1027. It does not limit the cause to any particular act of negligence. In fact it was anticipated facts supporting this would be revealed over the course of the litigation, which is what happened.

Lake Stevens also asserts the negligent misrepresentation was only made on reconsideration and not made in Steven Hyde's original opposition to Lake Stevens' summary judgment. This is untrue. The negligent misrepresentation argument was made in the original summary judgment opposition as well as on reconsideration. CP 465.

Summary dismissal of the negligent misrepresentation claim was improper. The claim was in the case, and it was unquestionably made within the statute of limitations.

B. It Was Reasonable to Serve Lake Stevens' Speaking Agent Where He Stated He Was Authorized To Accept Service.

Lake Stevens states Steve Edin is its speaking agent. CP 137. RCW 4.28.080(2) states the Lake Stevens mayor can designate an agent other than the City Clerk or himself as authorized to accept service of

summons and complaint on behalf of Lake Stevens. RCW 4.28.080 provides summons shall be served by delivering a copy "to the mayor, city manager, or during normal business hours, to the mayor's or city manager's designated agent or the city clerk thereof." RCW 4.28.080(2).

The professional process server from ABC Legal Messengers states she specifically asked Steve Edin if he was authorized to accept service of summons and complaint on behalf of Lake Stevens. She testifies that she was told by him that he was. CP 139-40.

RCW 4.28.080(2) authorizes the mayor to designate others to accept service of summons and complaint on behalf of Lake Stevens. However, the statute provides no instruction regarding how this fact is to be communicated to the outside world and includes no formal requirement with respect to how such an individual is identified or discoverable and includes no requirement about how the designation is to be made.

It was reasonable for the process server to rely on Lake Stevens' speaking agent statement that he had such authority. The fact that Steve Edin has denied making such a representation merely creates an issue of fact for the purposes of summary judgment. His statement cannot be weighed against the testimony of the process server on summary judgment.

Ignored by Lake Stevens is a fundamental question: What harm or prejudice has it suffered by service on Steve Edin? Counsel representing Lake Stevens appeared within a week of the first service on Steve Edin in November of 2010. CP 69-76. Two years of aggressive discovery has been pursued by Lake Stevens. No harm has been visited upon Lake Stevens by virtue of service on its speaking agent, rather than on the mayor or city clerk. Further, it seems that an acknowledged agent with apparent authority is in a position to bind his principal, which in this case is Lake Stevens.

Presumably the purpose of requiring service on particular individuals is to make sure notice of suit is provided the involved defendant. The involved defendant plainly had notice in the case at bar. There is no reason to allow Lake Stevens to take advantage of its claimed insufficiency of service of process defense beyond slavery to form over function.

C. Lybbert And Equitable Estoppel Should Apply To Prevent Lake Stevens' Attempt To Make An Insufficiency Of Process Defense.

Even if the discovery rule did not apply and even if the court were to find negligent misrepresentation of the tasing requirement is not in the case, Lake Stevens should not prevail on its jurisdiction/statute of

limitations defense. Equitable estoppel applies to government entities and would operate in this case to defeat the defenses.

Lake Stevens attempts to circumvent equitable estoppel. However, it is plain equitable estoppel applies to two aspects of this case – the request for admission about LEOFF II and the subterfuge surrounding jurisdiction.

The Supreme Court of the State of Washington made clear that equitable estoppel can be applied against governmental entities to prevent enforcement of jurisdictional requirements in Shafer v. State, 83 Wn.2d 618, 521 P.2d 736 (1974). Shafer involved a woman who tripped and fell in a Washington State liquor store. She suffered serious injury. A few days after her fall her husband contacted employees at the store, who referred him to the Washington State Liquor Control Board District Store Supervisor. Mr. Shafer telephoned this individual and informed him of the circumstances surrounding the fall. Mr. Shafer was referred to another individual who in turn referred him to the assistant attorney general assigned as legal counsel to the liquor control board.

Mrs. Shafer subsequently contacted the assistant attorney general, identified herself, and related the circumstances of her injury. The attorney stated he was aware of her situation and already had a file on the case. Mrs. Shafer then informed the attorney of some additional medical

complications and expressed concerns her health insurance was insufficient to cover the expense. She requested a representative of the state be dispatched to see about making a partial settlement to help defray medical expenses. The state's attorney replied that the state could not do it that way. He stated she would have to wait until all medical expenses were incurred and her doctor had dismissed her, after which she should submit a claim through her own attorney. Mrs. Shafer informed her own attorney of the content of this conversation.

Approximately four months later Mrs. Shafer's attorney contacted the Liquor Control Board District Store Supervisor, who recalled Mr. Shafer's earlier telephone communication. The supervisor stated the store manager had made an investigation of the accident, including interviewing and recording statements of witnesses and taking photographs. He stated he had written a report and had submitted it along with the photographs and statements to the assistant attorney general.

Subsequently, a late claim was filed against the state and a lawsuit begun. The lawsuit was dismissed on motion. However, the trial court included a finding that the state had completely investigated the accident within 45 days of occurrence and that it had accordingly acquired all of the facts it would have acquired had the claim been timely filed. The trial

judge additionally noted the state had not been prejudiced by the late filing of the claim.

Shafers appealed the dismissal. The Supreme Court reversed the trial court, finding that principles of equitable estoppel should be applied against the state. The Supreme Court stated:

> Where our legislature has determined that the state "whether acting in its governmental or proprietary capacity, shall be liable for damages arising out of its tortious conduct to the same extent as if it were a private person or corporation," RCW 4.92.090, we no longer feel it appropriate to withhold under proper circumstances, application of the doctrine of equitable estoppel in relation to the claim provisions of RCW 4.92.100 and .110. Our holding to the contrary. . . is no longer viable and is hereby overruled.

Id. at 623.

The Supreme Court laid out the requisites of equitable estoppel. It stated:

> The requisites of equitable estoppel are: (1) an admission, statement, or act, inconsistent with the claim afterwards asserted; (2) action by the other party on the faith of such admission, statement, or act; and (3) injury to such other party arising from permitting the first party to contradict or repudiate such admission statement or act.

Id. It then applied the requisites to the facts:

> Employees of the state on scene of the accident became immediately aware of the incident, and

> communicated their awareness by subsequent written reports, statements and photographs to their supervisors who, in turn forwarded the information to the state's legal representative, an assistant attorney general. Mr. and Mrs. Shafer likewise contacted representatives of the state and further alerted them to the circumstances of the incident and to the fact that recompense was expected. And when Mrs. Shafer contacted the assistant attorney general 45 days after the accident concerning the prospects of a partial settlement she was, in essence, advised that: (1) the assistant attorney general was aware of the facts and circumstances surrounding her claim; (2) the filing of a claim was not immediately necessary; and (3) a claim should not be filed until all of her medical expenses had been incurred.

Id. at 623-4.

The Supreme Court was not moved by the fact that Mr. and Mrs. Shafer also had private counsel, stating:

> This information was then communicated by Mrs. Shafer to her attorney who apparently relied on it. While we recognize that Mrs. Shafer's attorney should have been more cautious with respect to the advice purportedly communicated from the assistant attorney general through Mrs. Shafer, we do not deem this fact, standing alone, should descend as an unyielding bar to plaintiff's claim.

Id. at 624.

The Supreme Court then stated that the government needs to conduct itself to a particularly high standard with respect to its citizens:

> The conduct of the government should always be scrupulously just in dealing with its

> citizen; and where a public official, acting within his authority and with knowledge of the pertinent facts, has made a commitment and the party to whom it was made has acted to his detriment in reliance on that commitment, the official should not be permitted to revoke that commitment.

Id. The Supreme Court stated under the facts presented that Mrs. Shafer "was entitled to rely upon statements made to her by responsible state officials, acting within the scope of their authority, which she did to her deteriment." Id. Equitable estoppel was applied, and the dismissal was vacated.

Lybbert v. Grant Country, 141 Wn.2d 29, 1 P.3d 1124 (2000) basically applies the Shafer principles to governmental claims of insufficiency of process. Simply stated, the government is expected to be "scrupulously just in dealing with its citizens" and, where it engages in behavior inconsistent with its jurisdictional defense and has suffered no prejudice beyond the benefit of dismissal, it will be estopped from claiming the defense.

RCW 4.28.080(2) provides the mayor of Lake Stevens is authorized to name individuals authorized to accept service on behalf of Lake Stevens. There is evidence in the case at bar that Steve Edin, whom Lake Stevens states is its speaking agent, informed a professional process server that he was authorized to accept service of process on behalf of

Lake Stevens. CP 139-40. Based on that representation he was on two occasions served with summons and complaint in this case. The first service took place November 3, 2010. CP 79. The second service took place December 21, 2010. CP 84. Lake Stevens' counsel appeared in this case November 9, 2010. CP 81-2. This was even before the second service on Steve Edin.

Counsel for Lake Stevens answered, raising an insufficiency of service of process defense among others. Steven Hyde immediately sent requests for admission accompanied by a companion interrogatory seeking to discover the basis of the jurisdictional defense. The relevant admission stated: "Admit or deny that Plaintiffs' Complaint was properly served on the City of Lake Stevens." CP 87. The related interrogatory asked: "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." CP 92.

Lake Stevens did not answer the interrogatory, choosing to object. It also provided a copy of the affidavit of service related to the second service on Steve Edin as an attachment to the interrogatories without comment. CP 92, 95-6. This provided no real information, since counsel for Lake Stevens had appeared before the second service on Lake Stevens and since Steve Edin, speaking agent, had represented he was authorized

to accept service. CP 139-40. Lake Stevens did not reveal its contention Steve Edin was not authorized to accept service of process on behalf of Lake Stevens at that time. Lake Stevens did not reveal its contention Steve Edin was not authorized to accept service until it filed its motion for summary judgment nearly two years later. CP 829. The reality is that Lake Stevens did not want the foundation of its defense to be discovered before the statute of limitations ran because it did not want Steven Hyde to correct the problem in time.

Lake Stevens and plaintiffs embarked on nearly two years of extensive discovery. CP 69-75. During this period Steven Hyde requested a trial setting; Lake Stevens objected. CP 100. Over the objection, a trial date of January 23, 2012 was set. CP 1006. Counsel for Lake Stevens approached counsel for Hyde about changing the trial date from the scheduled date. Counsel for Hyde agreed and new dates were sought from the court. Lake Stevens claimed conflicts in its schedule preventing a trial date before October 2012. Counsel for Hyde accommodated Lake Stevens, and trial was moved to October 8, 2012. CP 69; CP 995. This date happens to be more than 3 years plus 60 days after Steven Hyde was tased. It seems obvious Lake Stevens was maneuvering the trial date beyond what it considered to be the expiration of the statute

of limitations, again to avoid revelation of the basis of its service of process defense in time for Steven Hyde to make a correction.

August 23, 2012 Lake Stevens made a motion for summary judgment based on its jurisdictional defense. This motion was made 3 years plus 78 days after Steven Hyde was tased. At that time Lake Stevens was able to clearly articulate the basis of its jurisdictional defenses, despite the fact that it had found the direct interrogatory on the subject unanswerable in March of 2011. CP 829.

It seems clear Lake Stevens embarked on a deliberate strategy of deception with the hope of achieving dismissal without having to face the merits of this case. Lake Stevens has been anything but "scrupulously just" in dealing with Steven Hyde. It has engaged in classic lying in the weeds behavior. It has suffered no prejudice as a result of the claimed insufficient service. It has acted all along as if the court had jurisdiction, conducting extensive discovery and proceeding toward trial. Its speaking agent told the process server he was authorized to accept service, and this representation was relied upon. Lake Stevens never did raise a statute of limitations defense before moving for summary judgment, again the obvious strategy was to avoid tipping Steven Hyde off.

Equitable estoppel should operate to prevent Lake Stevens from taking advantage of its strategy even if jurisdiction had not been successfully achieved within the statute of limitations, which it was.

D. Lake Stevens' LEOFF II Admission Should Be Enforced.

Lake Stevens has admitted: "LEOFF II is the worker's compensation laws applicable to Steve Hyde's injury." CP 88. Based on this admission Lake Stevens should be prevented from denying the applicability of LEOFF II to Steven Hyde's injuries. Reliance on this admission shaped Steven Hyde's approach to this case. Given the admitted applicability of LEOFF II, Steven Hyde was led to believe the right to sue provision was not at issue; additionally, he was led to believe the issue of the release was out of the case as well, since the release by its terms "does not release any rights under Worker's Compensation Laws." CP 108. Steven Hyde did not realize Lake Stevens intended to try to avoid its admission until receiving Lake Stevens' reply to his memorandum opposing summary judgment. His first opportunity to provide evidence to the contrary was on reconsideration, which he did. CP 61-226.

Steven Hyde relied on Lake Stevens' admission regarding LEOFF II to his detriment. Equitable estoppel is an additional reason why Lake

Stevens should not be allowed to avoid the right to sue provision of LEOFF II or taken advantage of the Taser International release.

Equitable estoppel should prevent Lake Stevens from raising an insufficiency of process defense or a statute of limitations defense. It should also prevent Lake Stevens from reneging on its admission that LEOFF II applies.

Summary dismissal based on release and unavailability of the right to sue provision of LEOFF II was improper.

E. Reconsideration Denial Has Been Appealed And Evidence Relied On For Purposes Of Appeal Was Not Excluded By The Trial Court.

Lake Stevens suggests denial of reconsideration has not been appealed. It was. CP 1029-30; 1041-42. Further, Steven Hyde's opening brief dealt with issues related to the grant of summary judgment and denial of reconsideration. Lake Stevens also argues relevant evidentiary rulings were not appealed. They were. CP 1029-30; 1044-46. In addition, all evidence relied on by Steven Hyde was also submitted on reconsideration, and the trial court did not exclude any of the evidence submitted by Plaintiffs on reconsideration. CP 61-226; CP 1041-42.

Lake Stevens argues certain evidence highlighted by Appellants was stricken or refused on reconsideration. In fact none of the evidence presented by Appellants on reconsideration was stricken or refused. The

court's order denying reconsideration, which was drafted by Lake Stevens, specifically stated the court "considered the argument, briefing, declarations and exhibits by the parties." CP 1041. There is no exclusion of Steven Hyde's reconsideration submissions by the trial court. If there had been, the exclusion would have been appealed.

Lake Stevens cites CP 227-229 and CP 1045-1046 as support for its representation that evidence had been stricken on reconsideration. Brief of Respondent at p. 4. In fact neither order deals with any of the submissions made on reconsideration. CP 227-229 was an order by the court at the summary judgment hearing; it had nothing to do with the reconsideration. Similarly, CP 1045-1046 does not relate to the documents submitted on reconsideration. The documents enumerated in that order were not the documents submitted on reconsideration. CP 1046-1046 simply put to writing one of the court's evidentiary rulings made at the summary judgment hearing. It does not relate to the documents submitted on reconsideration. Reconsideration documents had not even been submitted when the court made its ruling on the documents described in CP 1045-1046.

Contrary to Lake Stevens' assertion, none of the documents submitted by Appellants were stricken or refused on reconsideration.

Steven Hyde did appeal the trial court's evidentiary ruling related to so-called late submissions. CP 1029-30; 1038-39. Those documents were improperly excluded based on lateness when, in fact, they were submitted 12 days before the summary judgment hearing. Those documents should have been considered. They were not late. The documents are found at CP 226-362.

Steven Hyde's appeal is based on evidence which was properly before the trial court. Both the grant of summary judgment and denial of reconsideration are properly on appeal.

IV. CONCLUSION

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

Dated this 12th day of July, 2013.

LOPEZ & FANTEL, INC., P.S.

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