No. 90224-1

SUPREME COURT
OF THE STATE OF WASHINGTON

COURT OF APPEALS
DIVISION I
No: 69668-8

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

Plaintiff/Petitioners

vs.

CITY OF LAKE STEVENS

Defendant/Respondent

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APPELLANTS' PETITION FOR REVIEW

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1. IDENTITY OF PETITIONERS. Petitioners Steven Hyde and Sandra Brooke are husband and wife. They were plaintiffs in the Superior Court action and appellants in the Court of Appeals.

2. CITATION TO COURT OF APPEALS DECISION. The Court of Appeals decision was filed January 21, 2014. A motion for reconsideration was timely filed by Hyde and Brooke; a motion for publication was filed by Lake Stevens. Both motions were denied March 17, 2014. The Court of Appeals decision and orders denying reconsideration and publication are found in Appendices A and B, respectively.

3. ISSUES PRESENTED FOR REVIEW

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 Court of Appeals 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. RCW 4.28.080(2) provides the mayor of Lake Stevens can designate an agent 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 who represented he was authorized to accept service of summons and complaint?

C. 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, acting as if it was proceeding toward trial, until after it felt the statute of limitations had run, at which time it for the first time stated Steve Edin was not authorized to accept service of process Should Lybbert and waiver operate to deny Lake Stevens the benefit of an insufficiency of service of process defense?

4. STATEMENT OF THE CASE.

Plaintiff/Appellant Steven Hyde was a law enforcement officer injured during training with the Lake Stevens police department. CP 164-6. As a part of that training Mr. Hyde was required to endure tasing. CP 164; CP 579.

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.

Summons and complaint in this case were served November 3, 2010 on Steven Edin, whom Lake Stevens states is its speaking agent and who represented he was authorized to accept service of summons and complaint on behalf of Lake Stevens. CP 79, 137, 513-14. Counsel appeared for Lake Stevens six days later, November 9, 2010. CP 81.

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

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. CP 1013.

Plaintiffs served requests for admission and interrogatories on

Defendant Lake Stevens March 22, 2011, which focused on the affirmative defenses. 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. The attachment referenced was simply the affidavit of service related to the second service of summons and complaint on Steven Edin. 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 for its inclusion with the interrogatory objection accompanied the attachment. CP 92.

April 29, 2011 Plaintiffs sent a letter to Lake Stevens asking that it withdraw its objection and answer the interrogatory. 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.

April 18, 2011 Plaintiffs requested a trial date. CP 69. Lake Stevens objected. CP 100. Over Lake Stevens' objection trial was set for January 23, 2012. CP 69. Counsel for 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.

Discovery was aggressively pursued over the next year and a half by Lake Stevens. 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. In its motion Lake Stevens for the first time stated Edin was not authorized to accept service. CP 76.

On receipt of the motion, Plaintiffs served Lake Stevens with summons and complaint a third time, serving the city clerk September 4, 2012 and on the mayor of Lake Stevens September 24, 2012. CP 142-3. This service was completed within 3 years of the date Steven Hyde discovered he had been improperly tased.

October 17, 2012 the trial court entered an order granting Defendant

Lake Stevens' motion for summary judgment. Steven Hyde timely filed a motion to reconsider. The court considered all materials submitted by Hyde on reconsideration. It denied the reconsideration motion. CP 1.

Notice of appeal was timely filed. CP 1029-43. The Court of Appeals affirmed the summary judgment based only on the statute of limitations in an unpublished opinion. A copy of said unpublished opinion is attached as Appendix A. A motion for reconsideration was filed; Lake Stevens moved for publication. Both motions were denied March 17, 2014. Appendix B contains the orders denying reconsideration and publication.

5. 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).

B. It was error for the Court of Appeals to find as a matter of law that Steven 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.

Longstanding Washington State Supreme Court precedent establishes a person's claim accrues when he "discovers or in the exercise of reasonable diligence should have discovered" the salient elements of his cause of action. 1000 Virginia Limited Partnership v. Vertecs Corporation, 158 Wn.2d 566, 575-76; 146 P.3d 423 (2006). The Court of Appeals in its opinion has changed the standard established by the Washington Supreme Court for application of the discovery rule. The Court of Appeals in its opinion states the discovery rule is inapplicable where an individual fails to submit evidence establishing he "could not have discovered" the salient elements of his cause of action sooner. Opinion, p. 1. In contrast the Supreme Court has repeatedly held a claim accrues when a person "discovers or with reasonable diligence should have discovered" the salient elements of his cause of action.

The distinction is significant. By holding the discovery rule does not apply where someone "could have" immediately discovered the cause of injury, the opinion in effect eliminates the discovery rule altogether. The correct standard is "reasonably should have," not "could have." Someone always "could" discover the cause of his injury, the question is whether that person "reasonably should have" discovered the salient elements of his cause of action sooner than he did; that is, was there reasonable diligence?

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 he first discovered he was tased using improper technique when he received an email September 30, 2009 from Taser International stating the method of application used on him was not recommended. CP 164-5. Whether it was reasonable for him to fail to discover this element of his cause of action sooner than 4 months after the tasing is at most a question of fact for the jury.

The Court of Appeals found as a matter of law 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 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 Coast Air Services, Ltd. He "could have" discovered this earlier, and under the new standard described by the Court of Appeals in this case, the discovery rule would not apply. The Supreme Court in North Coast found otherwise.

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. Note that in North Coast the plaintiff "could have" discovered the salient elements of his cause of action sooner, but the discovery rule was applied.

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.

In Steven Hyde's case 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. September 30, 2009 he learned for the first time the method of taser application may have been negligent. 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.

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. Suit was filed November 2, 2010; counsel for Lake Stevens appeared November 10, 2010 and commenced extensive 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 Tyson balance weighs heavily in favor of application of the discovery rule.

Hyde's efforts satisfy the due diligence requirement and his claim clearly had not grown stale. The discovery rule should apply, and Hyde's claim based on negligent taser exposure did not accrue until the end of September 2009, which meant the 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), which was after the third service of summons and complaint on both mayor and city clerk. CP 370, 456.

Whether reasonable diligence was employed in this case is a question of fact which should be decided by a jury, not summarily.

C. RCW 4.28.080(2) provides a mayor can designate an agent to accept service of summons and complaint. It does not provide guidance as to how that designation is to be made. Accordingly, it was reasonable for the process server to rely on the representation of Lake Stevens' speaking agent that he was authorized to accept service.

The provision of RCW 4.28.080(2) permitting the mayor to designate an agent to receive service of process has never before been considered by the courts. Since the statute provides no guidance as to how that designation is to be communicated to the outside world, the question

of whether the representations of a speaking agent for the city can be relied on for jurisdictional purposes is of significance.

Lake Stevens stated Steve Edin is its speaking agent. CP 137. RCW 4.28.080(2) states summons can be served on the mayor, city clerk, or on the mayor's designated agent. Appendix C. 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.

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

The Court of Appeals Opinion at p. 4-5 notes that the City Clerk stated Steve Edin was not authorized to accept service. However, there are two problems with accepting the city clerk's assertion. First, the assertion merely creates a conflict in the evidence which cannot be weighed; second, it is the mayor, not the city clerk, who designates an agent, and moving parties are aware of no assertion in the record by the

mayor or attributed to the mayor that Steve Edin had not been designated by him as someone who could accept service of summons and complaint on behalf of Lake Stevens.

However, even assuming there had been such an assertion by the mayor, the question becomes whether it can be said as a matter of law the representations of an admitted speaking agent for Lake Stevens cannot reasonably be relied on. The Court of Appeals Opinion at p. 4 cites Davidheiser v. Pierce County, 92 Wn.App. 146, 960 P.2d 998 (1998) for the proposition that relying on a government employee's direction cannot support estoppel or waiver of Lake Stevens' jurisdictional defense. However, Davidheiser is factually different from the case at bar. Davidheiser did not involve representations by an admitted speaking agent.

At a minimum waiver and estoppel should apply to defeat Lake Stevens' jurisdictional defense where there is evidence its admitted speaking agent represented he was authorized to accept service of summons and complaint on behalf of Lake Stevens and where a statute specifically authorizes the mayor to designate such a person.

D. Lybbert And Waiver Should Apply To Prevent Lake Stevens' Attempt To Raise An Insufficiency Of Process Defense.

The Court of Appeals opinion in this case conflicts with Lybbert v. Grant Country, 141 Wn.2d 29, 1 P.3d 1124 (2000).

The Washington Supreme Court has made clear that equitable estoppel and waiver 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). 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." Id. at 624.

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.

Lake Stevens raised an insufficiency of service of process defense among other defenses. 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 despite the interrogatory asking for the information. 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 is 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 73 days after Steven Hyde was tased. At that time Lake Stevens for the first time stated Steve Edin was not authorized to accept service. CP 829.

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 had told the process server he was authorized to accept service, and this representation was relied upon.

In Lybbert v. Grant Country, 141 Wn.2d 29, 1 P.3d 1124 (2000), 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.

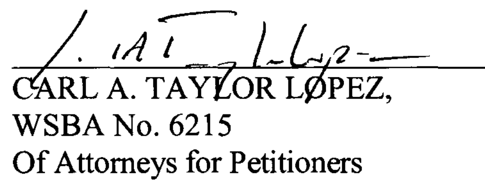
This is a case where for a year and a half Lake Stevens acted as if it were preparing to litigate the merits. CP 69-76. Lake Stevens did not want Plaintiffs to discover the basis of their affirmative defense, because it did not want Plaintiffs to correct the problem in time to avoid dismissal. This is classic "trial by ambush" of the nature criticized by Lybbert. The behavior should not be rewarded.

6. CONCLUSION.

The Court of Appeals decision should be reversed. This cause should be remanded for trial.

Dated this 16th day of April, 2014.

LOPEZ & FANTEL, INC., P.S.



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APPENDIX A

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife,	)	No. 69668-8-I
Appellant,	)	DIVISION ONE
v.	)	UNPUBLISHED OPINION
CITY OF LAKE STEVENS,	)	
Respondent.	)	FILED: January 21, 2014

GROSSE, J. — When a plaintiff brings suit for injury caused by negligent use of a weapon and he fails to show that he could not have immediately discovered that this was a possible cause of his injury, the statute of limitations began to run from the date of injury. Because Steven Hyde failed to serve someone authorized to accept service for the city of Lake Stevens under RCW 4.28.080(2) within that limitation period, the trial court properly granted summary judgment for the city of Lake Stevens and dismissed the claims. Accordingly, we affirm.

FACTS

On June 2, 2009, the city of Lake Stevens (City) offered Steven Hyde a position as a police officer. As part of his training, Hyde participated in taser training. He completed the written taser training portion on June 10, 2009 and on the next day, June 11, 2009, Hyde participated in the practical taser application and testing.

During this part of the training, Hyde was subjected to a short burst of the taser weapon in accordance with the taser training protocol. Before the tasing took place, Hyde signed a release from Taser International, the manufacturer of the weapon. Hyde then lied down on the floor with clips attached to his right arm and left ankle and a certified taser instructor applied the taser on him for a few seconds. Afterward he complained of back pain and on that same day, he filed an injury report of the incident with the City.

On August 28, 2009, Hyde had surgery on his back because the pain had not resolved. On September 25, 2009, Hyde contacted Taser International, inquiring about the recommended methods of exposure during taser training. On September 30, 2009, Hyde received an e-mail from the training manager at Taser International, who responded that the training guidelines state to target the back or the legs and that shoulder and foot exposures were not recommended.

Hyde filed a negligence lawsuit against the City seeking damages under the Law Enforcement Officers' and Firefighters' Retirement System Act (LEOFF), chapter 41.26 RCW, and on November 3, 2010, served a summons and complaint on the City's Human Resource (HR) Director, Steve Edin. The Declaration of Service stated:

> [T]he declarant duly served the above described documents upon NORMA SCOTT as CITY CLERK for CITY OF LAKE STEVENS by then and there personally delivering 1 true and correct copy(ies) thereof, by then presenting to and leaving the same with STEVE EDIN HR DIRECTOR.

On November 9, 2010, the City filed a notice of appearance "without waiving any defects as to lack of jurisdiction over subject matter, lack of jurisdiction over person, improper venue, insufficiency of process, insufficiency of service of

process . . . ."

On December 21, 2010, Hyde again served the summons and complaint on Edin. On January 19, 2011, the City filed an answer, asserting insufficient process. On April 19, 2011, the City again denied proper service in response to Hyde's request for admissions.

On August 23, 2012, the City filed a motion for summary judgment, seeking dismissal because Hyde had failed to properly serve the City within the statute of limitations, arguing that the HR director was not authorized to accept service for the City. The City further contended that Hyde was not a commissioned police officer and therefore not entitled to relief under the LEOFF statute, Hyde's wife had no cognizable spousal consortium claim under the LEOFF statute, and Hyde's claims were barred by his signed release and express assumption of risk.

On September 4, 2012, Hyde served the summons and complaint on Norma Scott, the city clerk. On September 10, 2012, Hyde filed a response to the summary judgment motion. On September 24, 2012, Hyde served the summons and complaint on the mayor.

On October 5, Hyde submitted supplemental briefing and evidence on the summary judgment motion and the City moved to strike these materials as untimely submitted. On October 17, 2012, the court granted the motion to strike the supplemental materials and granted the City's summary judgment motion. Hyde moved for reconsideration, which was denied. Hyde appeals.

ANALYSIS

Hyde challenges the court's dismissal based on his failure to properly serve the City within the statute of limitations. In its order granting summary judgment, the court concluded that "Service of Process is Defective; the statute of limitations began to accrue on June 11, 2009." We agree.

Service on the HR director was not proper service as required by RCW 4.28.080(2), which provides in part:

> Service made in the modes provided in this section shall be taken and held to be personal service. The summons shall be served by delivering a copy thereof, as follows:
>
> . . . .
>
> If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.

Our courts require "strict compliance with the statutory requirements of service of process as a prerequisite to the court's acquiring jurisdiction over a city."[1] Accordingly, "[w]hen a statute designates a particular person or officer upon whom service of process is to be made in an action against a municipality, no other person or officer may be substituted."[2] Nor is it reasonable to rely on a government employee's representation rather than the statutory language.[3]

Here, the City served the HR director, Steve Edin, on November 3, 2010, and again on December 21, 2010. Under the plain language of the statute, this does not constitute proper service. Indeed, the city clerk confirmed that the HR

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[1] Meadowdale Neighborhood Comm. v. Edmonds, 27 Wn. App. 261, 267, 616 P.2d 1257 (1980).

[2] Meadowdale, 27 Wn. App. at 264.

[3] Davidheiser v. Pierce Cnty., 92 Wn. App. 146, 152-55, 960 P.2d 998 (1998), rev. denied, 137 Wn.2d 1016 (1999) (rejecting plaintiffs' estoppel argument that they relied on a government employee's direction to serve the wrong person).

director was not authorized to accept service for the City. While Hyde did eventually serve the city clerk on September 4, 2012 and the mayor on September 24, 2012, this was beyond the statute of limitations period, which, as the trial court correctly concluded, began to run from the date of injury on June 11, 2009 and expired on August 10, 2012.[4]

Hyde contends that the statute of limitations did not begin to run until September 30, 2009, when he first learned that his injury was caused by the training officer's negligence.[5] Thus, he contends, it did not expire until November 29, 2012, after he served the city clerk.[6] Hyde invokes the "discovery rule," which applies "[i]n certain torts [when] injured parties do not, or cannot, know they have been injured; in these cases, a cause of action accrues at the time the plaintiff knew or should have known all of the essential elements of the cause of action."[7] The rule has been applied in products liability cases when a claimant cannot readily ascertain the factual causal relationship between a defective product and harm at the time the harm actually occurred.[8]

Hyde relies on North Coast Air Services v. Grumman Corp., where the court addressed the applicability of the rule to RCW 7.72.060(3), which provides

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[4] RCW 4.16.080(2) (an action for any "injury to the person" shall be commenced within three years); RCW 4.96.020(4) (providing an additional 60-day claim period for tort claims against local government entities); Matter of Estates of Hibbard, 118 Wn.2d 737, 744, 826 P.2d 690 (1992) ("The general rule in ordinary personal injury actions is that a cause of action accrues at the time the act or omission occurs.").

[5] September 30, 2009, was the date on which Hyde received the e-mail from Taser International stating that shoulder and foot exposures were not recommended during taser training.

[6] Brief of Appellant at 37.

[7] White v. Johns-Manville Corp., 103 Wn.2d 344, 348, 693 P.2d 687 (1985).

[8] North Coast Air Servs., Ltd. v. Grumman Corp., 111 Wn.2d 315, 319, 759 P.2d 405 (1988).

that the statute of limitations for products liability claims begins to run "from the time the claimant discovered or in the exercise of due diligence should have discovered the harm and its cause."[9] There, a pilot died in a plane crash and the initial investigation attributed the cause to pilot error and concluded there were no mechanical defects in the plane.[10] The pilot's father learned 11 years later that the crash was a result of a defect in the plane only after he heard of later incidents involving this same aircraft where the defect resulted in similar crashes.[11]

The court interpreted RCW 7.72.060(3) to require that "the claimant in a product liability case must have discovered, or in the exercise of due diligence should have discovered, a factual causal relationship of the product to the harm," in order for the statutory limitation period to start running.[12] Accordingly, the court held:

> [I]n this case the action did not accrue at the time claimant knew of the harm (death) and knew that the apparent and immediate cause was the crash. . . . [W]e hold that the claimant must know or should with due diligence know that the cause in fact was an alleged defect.[13]

But here, there is no products liability claim. Thus, the rule in North Coast does not apply. And while the discovery rule has been applied in other contexts, our courts have been careful to limit its application

> to claims in which the plaintiffs could not have immediately known of their injuries due to professional malpractice, occupational diseases, self-reporting or concealment of information by the defendant. Application of the rule is extended to claims in which

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[9] North Coast, 111 Wn.2d at 317.
[10] North Coast, 111 Wn.2d at 317.
[11] North Coast, 111 Wn.2d at 317-18.
[12] North Coast, 111 Wn.2d at 319.
[13] North Coast, 111 Wn.2d at 319.

> plaintiffs could not immediately know of the cause of their injuries.[14]

Hyde alleges no such claims. Rather, Hyde's complaint simply alleges negligence that caused an injury sustained on June 11, 2009 from the tasing:

> 6. On or about June 11, 2009 Plaintiff Steven W. Hyde in the course of his employ by Defendant was tased. As a result of said tasing Plaintiffs suffered injury.
> 7. The injury described above was directly and proximately caused by the negligence of Defendant City of Lake Stevens.
> 8. The tasing described above was an inherently and abnormally dangerous activity rendering Defendant liable for any resulting harm to Plaintiffs.
> 9. As a direct and proximate result of the negligence and inherently dangerous activity described above, Plaintiffs have suffered, and will in the future suffer, medical costs and expenses, financial loss, physical injury, pain and suffering, emotional distress, mental anguish, loss of consortium and other damages to be identified and proved at the time of trial.

While Hyde did not in fact discover at the time of the injury that a possible cause of the injury was misuse of the taser, he fails to show that he could not have made that inquiry at the time. Accordingly, as an ordinary personal injury claim, the general rule is that a cause of action accrues at the time the act or omission occurs.[15] In this case, this was when the tasing and resulting injury occurred, on June 11, 2009.

Hyde also asserts that he brought a claim of negligent misrepresentation based on his later discovery that being tased was not a requirement to become a police officer. He alleges that this was not what he was told at the time of the taser training and did not learn this until June 20, 2011. Thus, he contends that the statute of limitations for the claim did not expire before he served the city

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[14] Hibbard, 118 Wn.2d at 749-50.
[15] Hibbard, 118 Wn.2d at 744 (refusing to apply discovery rule in wrongful death, rape, and negligence case).

clerk. But as the City correctly points out, Hyde did not plead any claim of negligent misrepresentation. As noted above, his complaint simply alleged negligence resulting in an injury from the tasing on June 11, 2009 and he points to no amended complaint in the record that reflects the addition of this claim. The only mention of such a claim was raised in Hyde's motion for reconsideration, which was rejected by the trial court and to which he has not assigned error.[16] Thus, this argument is without basis.

Finally, Hyde contends that even if the statute of limitations had expired before he made proper service, the trial court should have found that the City waived the affirmative defensive of defective service because it had impermissibly "lied in wait," and then asserted insufficient process only after the limitation period had run, thereby depriving him of the opportunity to cure the service defect. Hyde relies on Lybbert v. Grant County, where the court held that the county waived its right to assert insufficiency of service when it sought dismissal based on Lybbert's failure to properly serve the county within the statute of limitations.[17] The court explained that such a waiver can occur "if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior," or "if the defendant's counsel has been dilatory in asserting the defense."[18] The court held that the county waived the defense because it had initially represented that it was preparing an answer shortly after the complaint

[16] While Hyde included the order on reconsideration in his notice of appeal, he has waived review of it by failing to assign it as error and argue it in his opening brief. State v. Sims, 171 Wn.2d 436, 441, 256 P.3d 285 (2011) ("an appellant is deemed to have waived any issues that are not raised as assignments of error and argued by brief.").
[17] 141 Wn.2d 29, 32, 1 P.3d 1124 (2000).
[18] Lybbert, 141 Wn.2d at 39.

was filed, but in fact did not file an answer or assert defective process until after the statute of limitations expired and up until that point had acted as though it was preparing to litigate the merits without any mention of defective process.[19]

Hyde argues that similarly here, the City waived its defenses of insufficient process and statute of limitations by filing a notice of appearance after the initial service on Edin, continuing to engage in discovery until the statute of limitations expired, and then moving for summary judgment after it expired based on insufficient process. But unlike in Lybbert, Hyde fails to show that the City's assertion of insufficient service was inconsistent with its previous behavior or that its counsel was dilatory in asserting the defense.[20] Rather, the record shows that the City asserted insufficient service of process more than once and did so well before the statute of limitations expired. On January 19, 2011, the City filed an answer, asserting insufficient process. On April 19, 2011, the City again denied proper service in response to Hyde's request for admissions. In response to requests for production, on April 21, 2011, the City submitted a copy of the process server's declaration showing that the HR director was served. Thus, Hyde had over a year to cure the defect before the statute of limitations expired, unlike the plaintiff in Lybbert who was unfairly surprised with the defense only after the limitation period expired.

The trial court did not err by concluding that the statute of limitations began to run from the date of the tasing injury and expired before proper service

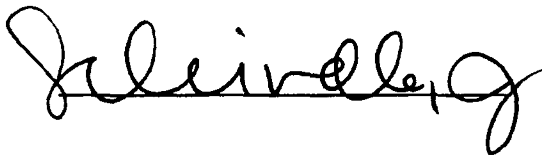
[19] Lybbert, 141 Wn.2d at 33

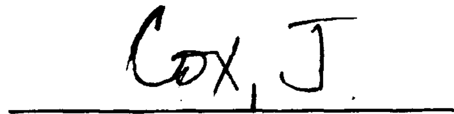
[20] See Lybbert, 141 Wn.2d at 41 (recognizing that "the mere act of engaging in discovery 'is not always tantamount to conduct inconsistent with a later assertion of the defense of insufficient process'") (quoting Romjue v. Fairchild, 60 Wn. App. 278, 281, 803 P.2d 57 (1991)).

was made on the City. Thus, the trial court properly dismissed the lawsuit on this basis alone. Accordingly, we need not reach the remaining arguments addressing the substance of the claims.

We affirm.

WE CONCUR:





APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

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

Appellants,

v.

CITY OF LAKE STEVENS,

Respondent.

No. 69668-8-I

ORDER DENYING MOTION FOR RECONSIDERATION

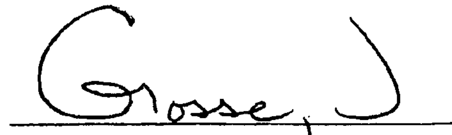
The appellants, Steven Hyde and Sandra Brooke, have filed a motion for reconsideration herein. The court has taken the matter under consideration and has determined that the motion for reconsideration should be denied.

Now, therefore, it is hereby

ORDERED that the motion for reconsideration is denied.

Done this 17th day of March, 2014.

FOR THE COURT:



Judge

FILED
COURT OF APPEALS DIV 1
STATE OF WASHINGTON
2014 MAR 17 AM 11:32

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STEVEN W. HYDE and SANDRA D. BROOKE, husband and wife,	)	No. 69668-8-I
Appellants,	)	ORDER DENYING MOTION TO PUBLISH
v.	)	
CITY OF LAKE STEVENS,	)	
Respondent.	)	

The respondent, City of Lake Stevens, has filed a motion to publish herein. The appellants, Steven Hyde and Sandra Brooke, have filed a response to the motion. The court has taken the matter under consideration and has determined that the opinion is not of precedential value.

Now, therefore, it is hereby

ORDERED that the unpublished opinion filed January 21, 2014, shall remain unpublished.

Done this 17th day of March, 2014.

FOR THE COURT:

Grosse, J.

Judge

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STATE OF WASHINGTON
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APPENDIX C

RCW 4.28.080
Summons, how served.

Service made in the modes provided in this section is personal service. The summons shall be served by delivering a copy thereof, as follows:

(1) If the action is against any county in this state, to the county auditor or, during normal office hours, to the deputy auditor, or in the case of a charter county, summons may be served upon the agent, if any, designated by the legislative authority.

(2) If against any town or incorporated city in the state, to the mayor, city manager, or, during normal office hours, to the mayor's or city manager's designated agent or the city clerk thereof.

(3) If against a school or fire district, to the superintendent or commissioner thereof or by leaving the same in his or her office with an assistant superintendent, deputy commissioner, or business manager during normal business hours.

(4) If against a railroad corporation, to any station, freight, ticket or other agent thereof within this state.

(5) If against a corporation owning or operating sleeping cars, or hotel cars, to any person having charge of any of its cars or any agent found within the state.

(6) If against a domestic insurance company, to any agent authorized by such company to solicit insurance within this state.

(7)(a) If against an authorized foreign or alien insurance company, as provided in RCW 48.05.200.

(b) If against an unauthorized insurer, as provided in RCW 48.05.215 and 48.15.150.

(c) If against a reciprocal insurer, as provided in RCW 48.10.170.

(d) If against a nonresident surplus line broker, as provided in RCW 48.15.073.

(e) If against a nonresident insurance producer or title insurance agent, as provided in RCW 48.17.173.

(f) If against a nonresident adjuster, as provided in RCW 48.17.380.

(g) If against a fraternal benefit society, as provided in RCW 48.36A.350.

(h) If against a nonresident reinsurance intermediary, as provided in RCW 48.94.010.

(i) If against a nonresident life settlement provider, as provided in RCW 48.102.011.

(j) If against a nonresident life settlement broker, as provided in RCW 48.102.021.

(k) If against a service contract provider, as provided in RCW 48.110.030.

(l) If against a protection product guarantee provider, as provided in RCW 48.110.055.

(m) If against a discount plan organization, as provided in RCW 48.155.020.

(8) If against a company or corporation doing any express business, to any agent authorized by said

company or corporation to receive and deliver express matters and collect pay therefor within this state.

(9) If against a company or corporation other than those designated in subsections (1) through (8) of this section, to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

(10) If against a foreign corporation or nonresident joint stock company, partnership or association doing business within this state, to any agent, cashier or secretary thereof.

(11) If against a minor under the age of fourteen years, to such minor personally, and also to his or her father, mother, guardian, or if there be none within this state, then to any person having the care or control of such minor, or with whom he or she resides, or in whose service he or she is employed, if such there be.

(12) If against any person for whom a guardian has been appointed for any cause, then to such guardian.

(13) If against a foreign or alien steamship company or steamship charterer, to any agent authorized by such company or charterer to solicit cargo or passengers for transportation to or from ports in the state of Washington.

(14) If against a self-insurance program regulated by chapter 48.62 RCW, as provided in chapter 48.62 RCW.

(15) In all other cases, to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.

(16) In lieu of service under subsection (15) of this section, where the person cannot with reasonable diligence be served as described, the summons may be served as provided in this subsection, and shall be deemed complete on the tenth day after the required mailing: By leaving a copy at his or her usual mailing address with a person of suitable age and discretion who is a resident, proprietor, or agent thereof, and by thereafter mailing a copy by first-class mail, postage prepaid, to the person to be served at his or her usual mailing address. For the purposes of this subsection, "usual mailing address" does not include a United States postal service post office box or the person's place of employment.

[2012 c 211 § 1; 2011 c 47 § 1; 1997 c 380 § 1; 1996 c 223 § 1; 1991 sp.s. c 30 § 28; 1987 c 361 § 1; 1977 ex.s. c 120 § 1; 1967 c 11 § 1; 1957 c 202 § 1; 1893 c 127 § 7; RRS § 226, part. FORMER PART OF SECTION: 1897 c 97 § 1 now codified in RCW 4.28.081.]

Notes:

Rules of court: Service of process -- CR 4(d), (e).

Effective date, implementation, application -- Severability -- 1991 sp.s. c 30: See RCW 48.62.900 and 48.62.901.

Severability -- 1977 ex.s. c 120: "If any provision of this 1977 amendatory act, or its application to any person or circumstance is held invalid, the remainder of the act, or the application of the provision to other persons or circumstances is not affected." [1977 ex.s. c 120 § 3.]

Service of process on
foreign corporation: RCW 23B.15.100 and 23B.15.310.
foreign savings and loan association: RCW 33.32.050.
nonadmitted foreign corporation: RCW 23B.18.040.

nonresident motor vehicle operator: RCW 46.64.040.