SUPREME COURT NO. 91506-7
COURT OF APPEALS NO. 31962-8-III

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IRA AND ROBERT WILLIAMS,

Petitioners,

v.

UNDERWIRE SERVICES, ET AL.,

Respondent.

RESPONDENT'S ANSWER TO PETITION FOR REVIEW

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I. IDENTITY OF RESPONDENT

Respondents are Underwire Services, LLC and Travis Heckmaster, Defendants below ("Respondents").

II. COURT OF APPEALS DECISION

The trial court granted Defendants' Motion for Summary Judgment, which was affirmed by the Court of Appeals in Williams v. Underwire Services, Slip Op. No. 31962-8-III (filed February 24, 2015).

III. RESPONSE TO ISSUES PRESENTED FOR REVIEW

1. Respondents' counsel filed a Notice of Appearance for Respondents, and on the same day, sent a standard set of discovery requests to the Petitioners. At that time, Respondents' counsel was unaware neither respondent (Defendants below) had been served with process. Approximately one-and-a-half months after filing the Notice of Appearance and transmitting discovery, Respondents' counsel discovered Respondents had not been served with process prior

to the expiration of the statute of limitations. When Respondents' counsel was contacted by Petitioners' counsel approximately four-and-a-half months later, counsel told Petitioners' counsel that Respondents were not served prior to the expiration of the limitations period. The Court of Appeals determined Respondents did not waive the defense of lack of service of process. This ruling is consistent with the Court's prior holding in Lybbert v. Grant County,[1] and review is inappropriate under RAP 13.4(b)(1).

2. The lower courts' rulings in this case are consistent with Lybbert and other Washington case law. The bright line rule proposed by Petitioners promotes confusion and unnecessary litigation, while the existing rule has been easily and consistently applied. Further, the Court of Appeals decided this matter in a unanimous, unpublished decision. Review is inappropriate under RAP 13.4(b)(4).

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[1] 141 Wn. 2d 29, 1 P.3d 1124 (2000).

IV. COUNTER STATEMENT OF FACTS

This case arises from a motor vehicle accident on February 20, 2007. Petitioner Ira Williams was operating a semi-truck and alleges she was negligently rear-ended by a semi-truck owned by Respondent Underwire Services, LLC, operated by Respondent Travis Heckmaster. (CP 2.)

On February 19, 2010, Petitioners filed a summons and complaint in Kittitas County Superior Court. (CP 1, 4, 5.) Neither respondent was served with process. (CP 45, 69, 114.)

Respondents' counsel filed a Notice of Appearance for Respondents on April 27, 2010. (CP 6.) Also on that date, counsel sent standard discovery requests to Petitioners. (CP 114.) At that time counsel was unaware neither respondent had been served with process. (CP 114.)

On or about June 10, 2010, Respondents' counsel confirmed with the office of the Washington State Secretary of State that process for neither respondent was served upon the

Secretary of State's office. (CP 18-19.) There were no affidavits of service in the court file.

Respondents' counsel Robert C. Tenney first communicated with Petitioners' counsel John H. Rowley by telephone on October 25, 2010. (CP 113.) In this very first conversation, Mr. Tenney told Mr. Rowley that Respondents had a statute of limitations defense because neither respondent had been served with process and the statute of limitations had run. (CP 113-114.) In each subsequent communication over the years, Mr. Tenney reiterated his belief that the statute of limitations had run because Respondents were not served with process. (CP 114.) These facts are undisputed.

The following table includes the pertinent dates and events:

DATE	**RELEVANT EVENT**
February 20, 2007	Subject motor vehicle accident
February 19, 2010	Petitioners file Summons and Complaint in Kittitas County Superior Court

February 20, 2010	Three-year statute of limitations expires, provided service is not accomplished within 90 days
April 27, 2010	Respondents' counsel files Notice of Appearance and sends standard discovery requests to Petitioners
May 20, 2010	90-day tolling period expires
June 10, 2010	Respondents' counsel learns Respondents have not been served with process
October 25, 2010	Respondents' counsel has first contact with Petitioners' counsel advising statute of limitations has run because Respondents not served with process

After Respondents' counsel transmitted his standard requests for discovery in April of 2010, the case remained dormant. Petitioners never answered these requests and Respondents never sought to compel such answers. (CP 113.) Petitioners never initiated any discovery. (CP 113.) There was so little activity in the case that it came up for clerk's dismissal for lack of prosecution on three separate occasions in three consecutive years. (CP 8-10.) The only action taken by

Petitioners was the minimal activity required to avoid a Clerk's dismissal. (Id.)

Respondents filed their Motion for Summary Judgment on July 31, 2013 on the basis that service of process did not occur prior to the expiration of the statute of limitations. (CP 11-13.)

Uncontroverted by Petitioners is that Respondents were not served with process, nor was any attempt made to serve Respondents. (CP 45, 69, 114.) Petitioners claim they did not know they were required to serve Respondents with process, and that Respondents waived the defense of insufficient service by acting in an inconsistent and dilatory manner with a later assertion of the defense. (CP 38-39, 42, 45, 69.)

In fact, from the time it was discovered that Respondents had not been served, Respondents' counsel consistently represented to Petitioners' counsel that there was no service prior to the expiration of the statute of limitations. (CP 108.) Further, Respondents were not dilatory in asserting the defense,

as there were no proceedings that were postponed or delayed; Petitioners took no action beyond filing a Summons and a Complaint to create any proceedings to be postponed or delayed. (CP 110.)

The matter was heard by Judge Frances P. Chmelewski on September 4, 2013. (RP 1.) The trial court held that Respondents had not waived their defense:

> . . . Plaintiff argues interestingly when we look at those two standards that came . . . out of the Libert [Lybbert] and saying okay well did they waive this, were they dilatory and were their actions inconsistent with them raising this later, and argue well their actions were inconsistent because they did nothing. That's a little darn if you do, darn if you don't argument from this Court's standpoint. . . . this Court finds that . . . they [Defendants] file interrogatories period. End of story. There was no motion to compel along the way . . . and as we all know Plaintiff never filed any requests or any discovery whatsoever, and it literally . . . it just stopped. And there was no, as pointed out through the various cases, there were no similar types of engagement of discovery along the way. In fact . . . when you look at the public policy argument that came out of Libert [Lybbert] saying . . . we don't want this situation where the defense can just lie and wait and sort of do this ambush. In looking at this I almost saw this as sort of an ambush from

> the opposite direction. Had Defense . . . along the way done a motion to compel or hey what are you all doing or maybe even filed something or filed their answer, that's chipping away at it and adding, if you will, actions on their part which could potentially be deemed inconsistent with later moving to dismiss . . . for lack of service or insufficient service. So . . . in the dilatory in terms of waiting for three years to file motion for summary judgment, my review of the case is when the dilatory issue was raised. That goes hand in hand with inconsistent behaviors. Not just simply waiting to file this. This Court doesn't find that the defendant . . . necessarily had that burden . . . this had to happen as a result of no action being taken by Plaintiffs. Comes up for want of prosecution, comes up for want of prosecution, comes up for want of prosecution, comes up for want of prosecution, and I think it's perfectly reasonable that Defense is thinking well maybe it's just going to die at this point . . . and it didn't.

(RP 14-15.) Respondents' Motion for Summary Judgment was granted. (RP 15.)

The Court of Appeals unanimously affirmed the trial court's decision to grant summary judgment

> on the principal basis that defense counsel was unaware of the lack of service on his clients until after the statute of limitations expired and did not take steps to mislead the Williamses.

Williams v. Underwire Services, Slip Op. No. 31962-8-III, 1 (filed February 24, 2015) (unpublished decision).

V. ARGUMENT WHY REVIEW SHOULD NOT BE ACCEPTED

A. The Court of Appeals Correctly Applied the Tests of *Lybbert* and *Romjue*.

Petitioners incorrectly assert that the Court of Appeals misconstrued the waiver test as set forth in Lybbert and Romjue.

According to Romjue, a defendant waives the defense of insufficient service of process if his conduct is inconsistent with a later assertion of the defense. Romjue v. Fairchild, 60 Wn. App. 278, 281, 803 P.2d 57 (1991). For instance, the defendants in Romjue had received a copy of the process server's affidavit from plaintiff's counsel showing service of process was defective some three weeks prior to transmitting discovery requests to the plaintiff. Id. at 281, 803 P.2d 57.

Further, Lybbert established that the defense of insufficient service of process could be waived in two ways:

first, if the defendant's assertion of the defense was inconsistent with prior behavior; and second, if defense counsel was dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn. 2d at 39, 1 P.3d 1124 (2000). In Lybbert, the defendant had done "more than just undertake discovery," which included the defendant's detective contacting the plaintiff's counsel to ensure that the defendant correctly understood the nature and extent of the plaintiff's interrogatories. Id. at 42, 1 P.3d 1124. Counsel for the respective parties also had conversations about mediation. Id. at 42, 1 P.3d 1124. Further and "[o]f particular significance" was that the plaintiffs had served the defendant with interrogatories to determine whether the defendant was going to assert an insufficient service of process defense, and had the defendant timely responded to the interrogatories, the plaintiffs would have had several days to cure defective service. Id. at 42, 1 P.3d 1124. Instead, the defendant did not answer the interrogatories and waited until after the expiration of the

limitations period to file an answer and assert the defense. Id. at 42, 1 P.3d 1124.

The Lybbert court also noted the defendant "engaged in discovery over the course of several months and then, after the statute of limitations had apparently extinguished the claim against it," the defendant asserted the defense. Id. at 44, 1 P.3d 1124 (emphasis added). Therefore, the court determined the defense had been waived. As the court explained

> a defendant cannot justly be allowed to lie in wait, masking by misnomer its contention that service of process has been sufficient, 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. at 40, 1 P.3d 1124.

Unlike the defendants in Romjue and Lybbert, counsel for Respondents was not aware that Respondents had not been served at the time a standard set of discovery requests was transmitted to Petitioners. As noted by the Court of Appeals, such behavior was not inconsistent with a later assertion of an

insufficient service of process defense, because counsel was not aware the defense existed at the time discovery was transmitted. Slip Op. at 20.

The defendants in Romjue and Lybbert had knowledge that service was not proper and/or engaged in protracted discovery until the statute of limitations expired in order to then assert the insufficient service and statute of limitations defenses. However, Respondents here were unaware that service was not affected prior to serving discovery, and after discovering Respondents were not served prior to the expiration of the limitations period, informed Petitioners' counsel during their first communication. This is no way constitutes conduct inconsistent with waiving an insufficient service of process defense as established by Washington case law.

B. The Court of Appeals Decision is Consistent With Existing Law.

As noted, the Court of Appeals' application of existing case law to the facts at hand is entirely consistent with

Washington law. Further, as the Court of Appeals correctly observed, in all other Washington decisions, the plaintiff took some step and believed they had performed service. Slip Op. at 20. However, Petitioners have not claimed to have been misled into believing they had served Respondents, and have openly admitted they did not attempt service.

It is impossible for a defendant to assert a defense prior to knowing the defense exists. To suggest otherwise would indicate a defendant should assert the existence of every Rule 12(b) defense prior to knowing whether the defense is available. Not only does this present issues with the attorney certification requirement of Rule 11, but it raises ethical issues with regard to the Rules of Professional Conduct.

C. The Proposed Bright Line Rule is Inconsistent With Current Law.

According to Petitioners, the Court should create a bright line rule whereby a defendant waives the insufficient service of process defense by engaging in discovery unrelated to the

defense. Therefore, they argue that Respondents should have objected to the lack of service before sending a standard set of discovery requests to Petitioners. This, of course, would have required Defendants to object to lack of service prior to the expiration of the statute of limitations—whereby Petitioners still had the opportunity to properly affect service—and prior to Respondents' counsel discovering there had been no service. (CP 114.) Thus, the proposed rule would require Respondents to assert a defense without knowing if the defense existed, expending the time and resources of counsel and the court. Such a requirement would also raise grave Civil Rule 11 and Rules of Professional Conduct ethical issues.

It can hardly be said that a rule requiring a party to act without having knowledge of whether such action is necessary would promote judicial efficiency or public policy. Instead, it would only succeed in creating a burden by expending unnecessary resources and adding gratuitous motion practice. Further, Petitioners' proposed bright line test promotes a policy

whereby plaintiffs are permitted to openly flout the civil rules and deprive defendants of their Constitutional rights with no repercussions for their own failure to act.

Despite whatever lens of liberal construction may be used to evaluate the service statute, "[l]iberal construction does not mean abandoning the statutory language entirely." Gerean v. Martin-Joven, 108 Wn. App. 963, 972, 33 P.3d 427 (2001). This is because "actual notice does not constitute sufficient service" and "proper service requires actual service on the defendant." Id. at 972, 33 P.3d 427.

It is of no import that Respondents' counsel ultimately learned of the pendency of this suit. Petitioners were required to affect service upon Respondents, and openly admit that not only were Respondents not served, but Petitioners did not even attempt service. (CP 69.) However, because Petitioners failed to conform to their duties under the civil rules, they now argue for the introduction of a bright line test excusing their neglect.

The responsibility was Petitioners' to serve Respondents. They failed to do so. Respondents' counsel did not learn of this failure until after a standard set of discovery requests was served upon Petitioners and after the statute of limitations had expired. Petitioners concede there was no malfeasance on the part of Respondents' counsel. (RP 4.) The fact that Respondents now assert the defense, once they were aware the defense exists, does not mean the defense was waived.

D. A Three-Year Delay in Bringing a Motion for Summary Judgment Does Not Constitute Waiver.

As explained in Lybbert, the defense of insufficient service of process may be waived if defense counsel has been dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn. 2d at 39, 1 P.3d 1124. Again, such a rule is aimed at reducing "the likelihood that the 'trial by ambush' style of advocacy" will be used. Id. at 40, 1 P.3d 1124.

In Raymond v. Fleming, 24 Wn. App. 112, 600 P.2d 614 (1979), it was determined that defense counsel was dilatory in

asserting a service of process defense, not because counsel waited close to 12 months to assert the defense, but because counsel had repeatedly requested additional time to respond to interrogatories, failed to respond to interrogatories, and obtained two orders of continuance during that nearly 12-month period. This typifies the "lying in wait" and "trial by ambush" described in Lybbert.

Unlike counsel in Raymond, counsel for Respondents did not "lie in wait" for three years prior to asserting an insufficient service of process and statute of limitations defense. Instead, counsel notified counsel for Petitioners during their first telephone conversation that Respondents were not served prior to the expiration of the statute of limitations. Counsel never requested additional time, failed to respond to discovery requests from Petitioners, or engaged in any conduct to delay or prolong the proceedings. (CP 113; RP 14-15.) Petitioners have done nothing to prosecute their lawsuit, and ultimately, after this matter came up for Clerk's dismissal on three separate

occasions, Respondents filed their Motion for Summary Judgment. (RP 14.)

Respondent have not delayed the proceedings in this matter. There have been no proceedings to delay. There has been no dilatory conduct on the part of Respondents, and as such, there has been no waiver of the defense of insufficient service of process.

VI. CONCLUSION

The petition for review does not involve a Court of Appeals decision that is in conflict with that of this Court, nor another decision of the Court of Appeals. It does not present a significant question of law under the Washington State Constitution or the United States Constitution. Further, it does not present an issue of substantial public interest. Instead, it asks the Court make a decision in direct contravention to existing case law, thereby creating a bright line rule that conflicts with the rules of civil procedure and professional conduct. As such, review should be denied.

Respectfully submitted this 23rd day of April, 2015.

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CERTIFICATE OF TRANSMITTAL

I certify under penalty of perjury under the laws of the State of Washington that the undersigned caused a copy of this document, Respondent's Answer to Petition for Review, to be sent to the attorney(s) of record listed below as follows:

For Petitioners: James R. Dixon Dixon & Cannon, Ltd. 601 Union Street, Ste. 3230 Seattle WA 98101	**_X_ via U.S. Mail** **_X_ via e-mail**

DATED this 23rd day of April, 2015, at Yakima, Washington.

Carol L. Switzer, Legal Assistant
Meyer, Fluegge & Tenney, P.S.

OFFICE RECEPTIONIST, CLERK

To: Carol Switzer
Cc: james@dixoncannon.com; Robert Tenney; Erin Moore
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RE: Williams v. Underwire Services, Supreme Court No. 91506-7, Court of Appeals No. 319628-III

Dear Clerk:
Attached for filing with the Court is Respondent's Answer to Petition for Review. If you have any questions or comments, please let us know. Thank you.
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