COURT OF APPEALS NO. 319628-III

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

IRA AND ROBERT WILLIAMS,

Appellant,

v.

UNDERWIRE SERVICES, ET AL,

Respondent.

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

The Honorable Frances P. Chmelewski, Judge

BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

1. The defendants, as a matter of law, waived the right to challenge the lack of proper service when they engaged in discovery unrelated to the service issue without first raising that defense.

2. The trial court erred when it failed to find waiver on the part of the defendants who waited more than three years to assert a service of process defense.

3. The trial court erred in granting the defendant's summary judgment motion.

4. The court erred in dismissing the case based on lack of service.

Issues Pertaining to the Assignments of Error

1. Plaintiffs filed a lawsuit against out-of-state defendants. Before service was achieved, both defendants filed a notice of appearance. The defendants did not file an answer, but instead immediately began the discovery process by propounding extensive interrogatories and requests for production. None of the approximately 200 interrogatory questions were directed at a service issue. It was not until more than three years later that defendants first raised the affirmative defense of lack of service. As a matter of law, did defendants' actions waive this affirmative defense?

2. Does judicial efficiency and public policy support a bright line rule holding that a defendant waives an affirmative defense of lack of service when he or she engages in substantive, non-service related, discovery without first raising that affirmative defense in an answer or other pleading?

II. STATEMENT OF FACTS

Travis Heckmaster was a truck driver employed by Underwire Services. CP 68. On February 20, 2007, Heckmaster was driving his 18-wheeler on I-90 near Snoqualmie Pass. Conditions were snowy and chains were required. CP 68-69. Travis Heckmaster, however, elected not to stop and put on the chains. As a result, Heckmaster lost control of his big rig truck and slammed into the rear of a truck driven by Ira Williams. CP 69. Ira suffered injuries in the collision, for which she was still receiving treatment more than three years later. CP 8, 69.

On February 19, 2010, Ira Williams, and her husband, Robert Williams, filed a lawsuit in Kittitas Superior Court against Heckmaster and his employer, Underwire Services (hereafter, "Underwire"). CP 1-3. Neither Heckmaster nor Underwire resided within Washington. Accordingly, the complaint noted that Heckmaster

and Underwire would be served through the Secretary of State and the company's registered agent. CP 1-2.

On April 22, 2010, both defendants formally appeared through their attorney of record, Robert Tenney. CP 6-7. Neither defendant filed an answer, choosing instead to delve directly into substantive discovery. On April 27, 2010, defendants sent over a request for statement of damages, interrogatories, and request for production. CP 68-106.

Defendants' interrogatories were extensive. There were 71 questions, with many of those questions containing multiple sub-sections. All told, this equaled approximately 200 interrogatory questions to each plaintiff. CP 73-106. There were also 20 separate requests for production. CP 98-105. These discovery requests were all directed at liability and damage issues. None of the questions touched upon the service of process, nor gave any indication that the defendants were concerned, interested, or objected to the fact that they had not been formally served. See CP 73-106.

In light of the extensive discovery sent by both defendants, the pro-se plaintiffs believed "the lawsuit was now fully underway and that service on the Defendants was no longer a necessity." CP 7. While there still was more than sufficient time to serve the de-

fendants through the Secretary of State, plaintiffs did not do so, believing that it was no longer necessary. *Id.*

The defendants never did file an answer objecting to the process of service.

Defense counsel would later aver that he did not know his clients had not been served when he entered his appearance and sent written discovery, and that he did not learn of this fact until June 10, 2010. CP 114. His declaration did not offer an explanation for his failure to assert a service of process defense after learning of the potential service issue. See CP 113-14.

Beginning in October of 2010 there were discussions between defense counsel and Mr. Rowley, an attorney assisting the pro-se plaintiffs. CP 59; 114. These discussions related to the merits of the case, as well as the potential service issue. *Id.* Despite these informal conversations, defense counsel did not file an objection to the lack of service until more than three years after the filing of the lawsuit. CP 69. During those three years, plaintiffs never suggested that they were doing anything other than continuing with their case. *See* CP 8-10, 114.

On July 30, 2013, defense counsel filed a CR 56 summary judgment motion to dismiss for lack of service. CP 11-12

Both plaintiffs filed declarations explaining that they had not served defendants because they believed it unnecessary after defendants had sent them extensive discovery requests. CP 45, 69. As Ira Williams stated,

> [B]efore I had service of process completed on the two Defendants, I received in the mail extensive and lengthy Interrogatories, Requests for Production, and a Request for Statement of Damages from the Defendants' attorney's office. Those documents made it appear that the lawsuit was now fully underway and that service on the Defendants was no longer a necessity.

CP 69.

Plaintiffs pointed out that under *Lybbert v. Grant County,* 141 Wn.2d 29, 1 P.3d 1124 (2000), the defendants had waived their defense of service by propounding discovery on plaintiffs. In our case, plaintiff counsel explained that had defendants first filed an answer asserting this defense before propounding the discovery; plaintiff would have known it still needed to serve the defendants. But by engaging in discovery completely unrelated to process of service, defendants signaled their intent to go forward with the case. CP 39-43; RP 3-7.

Additionally, explained plaintiff counsel, waiver is found where defendants are dilatory in raising the affirmative defense.

Here, the defendants waited more than three years to raise the issue for the first time in any pleading. CP 35, 43. This was another basis on which the court should find waiver on the part of the defendants.

Defendants replied that merely engaging in discovery before noting an objection did not waive the service issue. The defense claimed that the plaintiff must demonstrate some other factor, such as lying in weeds, before the case could be dismissed. CP 107-12.

The court heard the summary judgment motion on September 4, 2013. RP 1-19. The trial court sided with the defense and granted the summary judgment motion. CP 116-19. This timely appeal did follow.

III. ARGUMENT

THE DEFENDANTS WAIVED THE AFFIRMATIVE DEFENSE OF NO PROCESS OF SERVICE.

a. Overview of Argument

After filing suit, plaintiffs did not serve the complaint on defendants. They did not do so because both defendants had appeared and begun the discovery process, concerning only issues related to the merits of the case. Both defendants propounded ex-

tensive interrogatories and requests for production, none of which were directed at the question of service. In commencing the discovery process as they did, objectively defendants' signaled that the case had begun; they knew there was this lawsuit against them; they had an authorized attorney; their attorney had reviewed the complaint, no objection was made about a lack of service, and litigation was now underway. Therefore, plaintiffs did not go through the seemingly unnecessary step of serving the Secretary of State with the process of service.

After commencing discovery, defendants now seek to reverse course and act as if the court has no jurisdiction because of the lack of service. Washington law does not permit this type of inconsistent behavior. If a defendant begins the discovery process as to the merits of the case, without first asserting the affirmative defense of lack of service, the defendant waives that affirmative defense. *Lybbert,* at 41; *Romjue v. Fairchild,* 60 Wn. App. 278, 281, 803 P.2d 57 (1991); *Blankenship v. Kaldor*, 114 Wn. App. 312, 319, 57 P.3d 295 (2002).

Washington courts recognize two ways in which waiver can occur. First, waiver occurs if the later assertion of the defense is inconsistent with the defendant's previous behavior. *Lybbert*, at 38.

Second, it can also occur when the defense has been dilatory in asserting the defense. *Id.* Either way is sufficient. *Id.*

Although either of the two occurrences justifies waiver, in the current case both criteria are satisfied. Defendants' claim that the battle never began because of a lack of service, is inconsistent with the extensive discovery requests propounded by defendants, all of which were directed at the merits of the case. Further, by waiting for more than three years before raising the issue, and knowing the plaintiffs were continuing with, and had not abandoned their case, the defendants were dilatory in asserting the defense.

This case presents this Court with an opportunity, consistent with the *Lybbert, Romjue,* and *Blankenship* decisions, to state simply and objectively two tests for a waiver in a process of service affirmative defense, either test providing sufficient justification for a finding of waiver: (1) If, prior to limitations running due to non-service, the defendant has not affirmatively asserted in a pleading or motion non-service as a defense but yet engages in discovery solely on the merits of the case and unrelated to the service issue, there is waiver; (2) If the defendant knows that service has not taken place within the limitations time period, but waits three years or more thereafter to assert such defense in a pleading or motion,

there is waiver. The court should not have to engage in a subjective inquiry as to how much discovery was completed or what the defendant knew or did not know. Such a time consuming inquiry, without any set standards, necessarily results in inconsistent results and needless summary judgment motions and subsequent appeals.

Moreover, this bright line rule, which is just an amalgam of existing law, places no real hardship on defendants. In order to prevent waiver, defendants, if they appear in a lawsuit prior to limitations running, can either (1) answer raising the defense before propounding substantive, non-service discovery requests; or (2) enter an appearance and propound service related discovery. What they cannot do is make it appear that service is not necessary at time when it could have been accomplished but was not, because of the inconsistent conduct of the defendant.

In the present case, defendants' discovery requests were extensive, and the their delay in asserting a defense was great, more than three years. Accordingly, plaintiffs prevail regardless of whether the Court engages in a fact intensive inquiry urged by the defense or whether the Court applies the more straight forward bright line test, which is consistent with the holding and reasoning in *Lybbert.*

b. The standard of review is de novo

The appellate court reviews grants of summary judgment de novo; the trial court is entitled to no deference. *Blankenship v. Kaldor*, 114, Wn. App. 312, 57 P.3d 295 (2002). The appellate court applies the same inquiry as the trial court. *Id.* This means that all facts and reasonable inferences must be viewed in favor of the nonmoving party. *Folsom v. Burger King*, 135 Wn.2d 658, 663, 958 P.2d 301 (1998). Summary judgment is appropriate only where there is no genuine issue as to any material fact and a reasonable fact-finder could reach but one conclusion. CR 56; *Hash v. Children's Orthopedic Hosp. & Medical Ctr*, 110 Wn.2d 912, 915, 757 P.2d 507 (1988).

Summary judgment "must be employed with caution lest worthwhile causes perish short of a determination of their true merit." *Smith v. Acme Paving Co.*, 16 Wn. App. 389, 392, 558 P.2d 811 (1976). Further, "[i]t is not the purpose of the rule to cut litigants off from their right to trial by jury if they really have issues to try." *Burback v. Bucher*, 56 Wn.2d 875, 877, 355 P.2d 981 (1960).

c. Washington courts apply a broad rule of waiver to the affirmative defense of lack of process of service

Two Washington cases lay the groundwork for establishing waiver of service issues. In *Romjue v. Fairchild,* 60 Wn. App. 278, 803 P.2d 57 (1991), the plaintiff filed a lawsuit shortly before expiration. The defendant filed a notice of appearance and then sent over interrogatories. After the time period for service had past, the defense filed a motion to dismiss based on insufficient service. This Court stated, "the dispositive issue is whether Mr. Fairchild waived the defense of insufficient service because he engaged in discovery before he moved to dismiss." *Id.* at 281. The Court stated that because the discovery was not directed at the service or statute of limitations issue, the discovery constituted a waiver of the service issue. *Id.*

Eight years later, the Washington Supreme Court was called upon to decide a case involving similar facts. In *Lybbert v. Grant County*, *supra*, a driver and passenger filed a timely suit against Grant County for a poorly maintained road that had resulted in personal injuries. The county filed a notice of appearance stating it was not "waiving objections to improper service or jurisdiction." *Lybbert*, 141 Wn.2d at 32. Similar to our case, the defendants did not file a timely answer, which would have notified plaintiffs that service had been on the wrong government official. It was only af-

ter the statute of limitations had expired three months earlier, that defendants raised the service issue. *Id.* at 32-34. The defendants brought a summary judgment motion on this service issue, which was granted by the trial court. *Id.* at 34.

This Court reversed the trial court, finding that defendants had "acted in a manner inconsistent with the later assertion of the defense of insufficient service." *Lybbert v. Grant County*, 93 Wn. App. 627, 633, 969 P.2d 1112 (1999), *affirmed* 141 Wn.2d 29, 1 P.3d 1124 (2000). The defendants sought and obtained review at the Washington Supreme Court.

The Supreme Court agreed with this Court that the defendants had waived the service issue by engaging in discovery before preserving the service issue in an answer. *Lybbert*, 141 Wn.2d at 41. In doing so, the Supreme Court relied upon this Court's earlier decision in *Romjue*. The Court noted, "The issue there, as here, was whether the defendants waived the defense by participating in discovery and failing to assert the defense prior to the expiration of the statute of limitations." *Id.*

The Supreme Court explained that not all discovery will constitute waiver. Rather, only that discovery which is not directed at the service issue will create waiver:

> The *Romjue* court quite properly noted that the mere act of engaging in discovery "is not always tantamount to conduct inconsistent with a later assertion of the defense of insufficient service." *Romjue*, 60 Wn. App. at 281. **This is so because in some circumstances it may be entirely appropriate for a party to engage in discovery to determine if the facts exist to support a defense of insufficient service**. *Romjue*, 60 Wn. App. at 281; *see also Matthies v. Knodel* 19 Wn. App. 1, 5-6, 573 P.2d 1332 (1977) (observing that deposition was taken to find out if defense existed for the defendant). The *Romjue* court went on to conclude, however, that the defendants' discovery efforts were inconsistent with the later asserted defense because it was not geared toward elucidating facts relating to a defense of insufficient service of process.

Lybbert 141 Wn.2d at 41 (emphasis added).

Defendants in the current case attempt to distinguish *Lybbert* on the basis that defendants engaged in more discovery in that case, but their argument is not persuasive. The Court did not focus on the quantity of the discovery. Rather, the question was whether the defendants engaged in discovery unrelated to the service issue: "The County's conduct was similar to that of the defendants in *Romjue.* In particular, we note that the County's discovery efforts were not aimed at determining whether there were facts that supported the defense of insufficient service of process." *Id.* at 41-42. It is also of note that in *Lybbert,* the defendant raised the issue just three months after the statute of limitations expired, and less than six

months after suit was filed. *Id.* at 32-34. By contrast, in the current case, the defense waited more than three years to bring the motion.

Even the dissent in *Lybbert* recognized that the Court had created a very broad rule. "The majority purports to apply the common law doctrine of waiver, but instead creates a rule where waiver of the defense of insufficient service of process will be found in virtually every case." *Id.* at 45 (Justice Madsen Dissent). Both the majority and dissent correctly understood that *Lybbert* created a very broad rule of waiver in Washington; they simply disagreed on whether that was advisable.

It makes sense that *Lybbert* created such a broad rule of waiver in this particular context. After all, anytime a defendant propounds discovery requests on a plaintiff, it is apparent the defendant has notice of the lawsuit. While our legislature has determined that a defendant has a right to service of process, and not just knowledge of the lawsuit, this is not a due process right that goes to the heart of the justice system. Defendants will not suffer in the presentation of their case because they had knowledge but not service. Accordingly, it is only reasonable that the courts are more willing to find waiver of this particular defense. This is especially true when it is balanced against the need for judicial efficiency and

the very real concern that plaintiffs will be mislead to their detriment by inconsistent or dilatory behavior on the part of defendants.

d. Post-*Lybbert* cases continue to recognize that a defendant waives the defense of improper service by commencing discovery before raising the objection

In *Blankenship v. Kaldor*, 114 Wn. App. 312, 57 P.3d 295 (2002), the defense attorney retained by the insurance company filed a notice of appearance in which he reserved all defenses, including service of process. But instead of answering the complaint, defense counsel "sent interrogatories and requests for production, without specifically inquiring about service." There was also a deposition. *Id.* at 315.

Approximately nine months after filing suit, plaintiff asked for an answer to the complaint. *Id.* Defense counsel eventually answered the complaint asserting the affirmative defenses of insufficiency of service and statute of limitations. *Id.* Defense counsel then brought a summary judgment on that service issue, which the trial court granted, dismissing the case. *Id.*

On appeal, this Court in *Kaldor* noted that the defendants' actions were similar to the defendants in *Romjue* and *Lybbert*. Specifically, "Ms. Kaldor's discovery efforts were not aimed at de-

termining whether facts existed supporting the defense of insufficient service of process." *Id.* at 319. Accordingly, this Court reversed the summary judgment motion, finding that defendants have waived this affirmative defense. See also, *Butler v. Joy,* 116 Wn. App. 291, 65 P.3d 671 (2003) (Waiver where defendant filed motion on unrelated issue before bringing insufficient process of service claim).

e. The defendants' reliance upon *Harvey v. Obermeit* is based on a misreading of that case

The defense below relied upon *Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671 (2010) to support its position. Specifically, defense counsel cited to this decision for the proposition that there must be something more than just discovery to waive the defense. CP 108. But this is a misreading of *Harvey*. A closer examination of *Harvey* reveals that it deals with a significantly different fact pattern and issue.

In *Harvey*, the defense filed a notice of appearance. A week later, the statute of limitations expired. *Harvey,* at 314. The defendant then filed a timely answer in which he raised the affirmative defense of process of service. Having put on the record its objection to service, the defense then sent out interrogatories and began

engaging in discovery. *Id.* at 315. About three months later, the defendant brought a motion to dismiss based on insufficient service. Plaintiff responded by arguing that defendant waived the earlier objection by later engaging in discovery. *Id.*

Plaintiff relied upon *King v. Snohomish County*, 146 Wn.2d 420, 47 P.3d 563 (2002). In that case, defendants noted an objection to improper service of process, but then engaged in extensive discovery. *Id.* at 422. The Washington Supreme Court concluded that given the extent of the discovery and the passage of time before bringing a motion to dismiss based on the improper service, the defense had waived its earlier objection. *Id.* at 426.

The *Harvey* court addressed the same issue, a timely filed answer objecting to service, followed by discovery. In *Harvey*, the court found that in light of the early assertion of the service of process defense, the limited discovery alone did not create a waiver. The Court explained:

> Although there was some discovery conducted before Obermeit filed his motion to dismiss on February 10, 2010, this discovery included questions from both parties about the issues of service and jurisdiction, and Harvey was aware throughout discovery that Obermeit was contesting service.

Id. at 325.

Harvey's holding that a prior objection is not necessarily waived by subsequent minimal discovery is consistent with earlier cases. For instance, in *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991), the court found that once a defendant properly preserves a defense by pleading it in the answer, the defendant is not precluded from asserting the defense by proceeding with discovery. Similarly, in *Voicelink Data Service v. Datapulse*, 86 Wn. App. 613, 937 P.2d 1158 (1997), the court held that participation in substantive discovery does not result in waiver of an affirmative defense if it was pleaded prior to engaging in discovery.

Our case stands in sharp contrast. Unlike the defendants in *Harvey*, the defendants here sent out discovery without first asserting the inadequate service of process defense. In doing so, defendants communicated that the battle was joined. Service was unnecessary. This puts our case squarely within the reasoning and holding of *Lybbert*. *Harvey* provides no refuge for the defendants in the current case.

Defendants also relied upon *Omaits v. Raber*, 56 Wn. App. 668, 785 P.2d 462 (1990) to argue that discovery alone does not create a waiver. Given that this Division Two case was decided ten years prior to *Lybbert*, it has little persuasive authority. Moreo-

ver, it was not soundly decided. It cites to *Matthies v. Knodel*, for the proposition that the serving of interrogatories does not necessarily waive the objection. *Id.* at 671. But what *Knodel* actually said was that discovery directed at the service issue is not necessarily inconsistent with asserting a statute of limitations defense. *Matthies v. Knodel*, 19 Wn. App. 1, 5-6, 573 P.2d 1332 (1977). In our case, none of the voluminous interrogatories and requests for production were directed at the service issue. *Omaits* provides no help to the defense in this case.

f. The notice of appearance did not preserve the process of service claim

Defense counsel filed a notice of appearance on behalf of both defendants. The notice contained the standard caveat that the defense was not "waiving objections as to improper venue, lack of jurisdiction, insufficiency of process, or insufficiency of service of process." CP 6-7. Apparently the trial court found this significant, as this part of the notice in the court file is underlined. *Id.* Contrary to the trial court's assumption, however, this language does not constitute notice of the defense.

As the *Lybbert* Court explained, "it is also of no significance to our waiver analysis that the notice of appearance, filed by one of

the attorneys for the County, included a statement that counsel was appearing 'without waiving objections to improper service or jurisdiction.'" 141 Wn.2d at 43. The Court continued, "we see no reason why filing the notice of appearance with the caveat should serve as a vehicle to preserve it." *Id.* To the extent that the trial court relied upon the notice of appearance, the trial court was mistaken.

g. Public policy and judicial efficiency support a broad waiver rule and an easy to apply test

The Court in *Lybbert* found waiver when the defendants engaged in unrelated discovery without first noting an objection to the lack of service. Defendants, however, argue that there were other factors at play in *Lybbert* and *Romjue*, and that engaging in discovery is not enough. But regardless of the specific facts in those cases, it is clear from the court's reasoning that the dispositive factor in each case was that the defendants engaged in discovery unrelated to the service issue. The defense argument not only runs contrary to the plain language in *Lybbert,* it runs contrary to public policy as well.

Judicial efficiency is promoted at the trial and appellate level by a black letter rule that process of service issues are waived when the defendant engages in unrelated discovery. This is an

easy to understand, and easy to apply, rule. As the United States Supreme Court recently explained, the value of a simple rule to follow is that it "keeps an easy case easy." *Florida v. Jardines*, __ U.S. __, 133 S. Ct. 1409, 1417, 185 L. Ed. 2d 495 (U.S. 2013). By contrast, the waiver rule envisioned by the defense is difficult to implement. Should each trial court be required to weigh how much discovery is needed to waive the defense, or to engage in seemingly endless inquiry as to what the defense knew and what the plaintiff assumed?

Nor would the waste of judicial resources be limited to the trial court. First, in the absence of a straightforward test, there are multiple unnecessary appeals following summary judgment. Second, because the standard of review is de novo, the appellate court now has to engage in the exact same time consuming examination as that conducted by the trial court. But *Lybbert* demonstrates that the waiver test need not be complex: engaging in non-service related discovery waives that issue. Such a rule does not create any hardship on defendants. If service has not been completed, they need do nothing more than list the lack of service as an affirmative defense in their answer to the complaint. The clear cut rule avoids the threat of defendants laying in the weeds and giving a false

sense of assurance, and conserves judicial resources by encouraging these issues to be resolved in a timely fashion.

Defendants will not be prejudiced in the presentation of their defense as a result of this waiver rule. Nor does this rule delay resolution of the case, which is the rationale behind the statute of limitations. The lawsuit must still be filed within the statute of limitations and the defendant must have actual notice of the suit (as demonstrated by the notice of appearance and the commencement of discovery). The only right that is lost, is the right to insist upon actual service. While this is a legislatively created right, it is not the type of due process right that has an impact on the defendants' ability to respond to a law suit. As such, a broad rule of waiver is consistent with public policy that cases be decided on the merits in a timely fashion.

When balancing the equities, there is little need to protect those defendants who caused harm and who had actual notice of the lawsuit, when balanced against the need for judicial efficiency. *See Lybbert*, 141 Wn.2d at 40 (Our holding as to waiver "underscores the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of the litigants.")

That policy applies with equal force here. As set forth in the complaint, plaintiffs intended on serving the out of state defendants through Underwire's registered agent and the Secretary of State. The only reason this did not happen was because defendants propounded discovery on plaintiffs, thereby signifying that defendants were acknowledging the suit and moving forward with the case. Had defendants objected to the lack of service before sending over the discovery, plaintiffs would have affected service upon the Secretary of State. Defendants should not profit from their failure to file a timely objection.

h. There was more than "just discovery" demonstrating the defendants' waiver of the service issue

This appeal can and should be decided on the black letter law that a challenge to the lack of service is waived by engaging in unrelated discovery without first raising the affirmative defense. But should this Court accept the defense's invitation to require something more than just discovery, such evidence exists in this case.

First and foremost, defendants waited more than three years to file any type of objection to service. In *Raymond v. Fleming, 24 Wn. App. 112, 115, 600 P.2d 614 (1979)* , the court concluded that

defendants were dilatory in waiting a little less than 12 months to raise the issue.

In our case, the delay was much more extreme. Defendants here sat silent for more than three years before even raising this jurisdictional issue. The defense has offered no explanation. Regardless of how much or how little discovery occurred during that time period, judicial economy and efficiency suffer greatly when defendants are allowed to wait 37 months before challenging the court's jurisdiction to hear the case. As explained in *Lybbert,* the waiver rule is "sensible and consistent with the policy and spirit behind our modern day procedural rules." *Id.* at 39. Those rules exist to promote the just, speedy, and inexpensive determinations in every case. *Id.* This delay of over three years, even standing alone, supports a finding that defendants waived their challenge.

Finally, it is worth re-noting that the discovery propounded on plaintiffs was not minimal. As previously discussed, there were 71 interrogatories with multiple sub-questions, in addition to the 20 requests for production. The quantity and character of the interrogatories clearly signaled that the battle was joined and service was no longer an issue.

IV. CONCLUSION

There is a simple means of determining whether defendants waived the service of process defense: did the defendants wade into battle before raising the defense? If they sent out unrelated discovery requests without filing an answer raising that defense, then the issue is waived. There is no need to engage in a fact specific examination. Further, if a Defendant believes it has an affirmative defense of lack of formal service, but chooses to wait over three years to assert it, that is simply too long, and waiver again applies. The Court erred in granting summary judgment in favor of the defendants.

Respectfully Submitted on this 12th Day of February, 2014

James R. Dixon, WSBA #18014
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CERTIFICATE OF SERVICE

I, James R. Dixon, certify that on February 12, 2014, I caused a true and correct copy of this Brief of Appellant to be served on the following in the manner indicated below:

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Dated this 12th Day of February, in Seattle, WA

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