NO. 319628-III

COURT OF APPEALS, DIVISION III

OF THE STATE OF WASHINGTON

IRA AND ROBERT WILLIAMS,

Appellant,

vs.

UNDERWIRE SERVICES, ET AL,

Respondent.

BRIEF OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Statutes

I. INTRODUCTION

This case is controlled by RCW 4.16.080, which states that actions for personal injuries must be commenced within three years. An action has not "commenced" unless Plaintiffs have filed the summons and complaint with the court and served defendants. RCW 4.16.170. Plaintiffs ask the Court to ignore this rule, and find that Plaintiffs are not required to serve Defendants because Defendants' counsel sent standard discovery requests to Plaintiffs prior to learning that Defendants had not been served. As discussed below, this would run afoul of case law regarding waiver of such a defense. The Court should therefore affirm the trial court's grant of summary judgment in favor of Defendants.

II. RESPONSE TO ASSIGNMENTS OF ERROR

1. Defendants did not waive the defense of insufficient service of process by transmitting a standard set of discovery requests to Plaintiffs.

2. Defendants did not act in a manner inconsistent with an insufficient service defense, were not dilatory in asserting such a defense, and therefore did not waive the defense.

3. The trial court properly granted Defendants' Motion for Summary Judgment.

4. The trial court properly dismissed this case because Plaintiffs failed to serve Defendants with process.

III. COUNTER STATEMENT OF CASE

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

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

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

On or about June 10, 2010, Defendants' counsel confirmed with the office of the Washington State Secretary of State that process for neither defendant was served upon the Secretary of State's office. (CP 18-19.) There were no affidavits of service in the court file.

Defendants' counsel Robert C. Tenney first communicated with Plaintiffs' counsel John H. Rowley by telephone on October 25, 2010. (CP 113.) In this very first conversation, Mr. Tenney told Mr. Rowley that Defendants had a statute of limitations defense because neither defendant 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 Defendants were not served with process. (CP 114.) These facts are undisputed.

The following table includes the pertinent dates and events:

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DATE	RELEVANT EVENT
February 20, 2007	Subject motor vehicle accident
February 19, 2010	Plaintiffs 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	Defense counsel files Notice of Appearance and sends standard discovery requests to Plaintiffs
May 20, 2010	90-day tolling period expires
June 10, 2010	Defendants' counsel learns Defendants have not been served with process
October 25, 2010	Defendants' counsel has first contact with Plaintiffs' counsel advising statute of limitations has run because Defendants not served with process

After Defendants' counsel transmitted his standard requests for discovery in April of 2010, the case remained dormant. Plaintiffs never answered these requests and Defendants never sought to compel such answers. (CP 113.) Plaintiffs 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 Plaintiffs was the minimal activity required to avoid a Clerk's dismissal. (Id.)

Defendants 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 Plaintiffs is that Defendants were not served with process, nor was any attempt made to serve Defendants. (CP 45, 69, 114.) Plaintiffs claim they did not know they were required to serve Defendants with process, and that Defendants 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 Defendants had not been served, Defendants' counsel consistently represented to Plaintiffs' counsel that there was no service prior to the expiration of the statute of limitations. (CP 108.) Further, Defendants were not dilatory in asserting the defense,

as there were no proceedings that were postponed or delayed; Plaintiffs 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.) At the trial court level Plaintiffs never asserted that the court should create a new bright line test for determining whether the defense of insufficient service of process had been waived. Plaintiffs improperly make this argument for the first time on appeal.

The trial court held that Defendants 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.) Defendants' Motion for Summary Judgment was granted. (RP 15.)

IV. ARGUMENT

A. STANDARD OF REVIEW

The appropriate standard of review for an order granting or denying summary judgment is *de novo*, and the appellate court performs the same inquiry as the trial court. Aba Sheikh v. Choe, 156 Wn.2d 441, 447, 128 P.3d 574 (2006). Summary judgment is appropriate where the pleadings and affidavits establish there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Jones v. Allstate Ins. Co., 146 Wn. 2d 291, 300-01, 45 P.3d 1068 (2002).

B. DEFENDANTS DID NOT WAIVE THE DEFENSE OF INSUFFICIENT SERVICE OF PROCESS

Waiver of the defense of insufficient service of process may occur in one of two ways: (1) the defendant's assertion of the defense is inconsistent with prior behavior; or (2) defense counsel has been dilatory in asserting the defense. Lybbert v. Grant County, 141 Wn. 2d 29, 39, 1 P.3d 1124 (2000). The waiver doctrine is aimed at reducing "the likelihood that the

'trial by ambush' style of advocacy" will be used. Id. at 40, 1 P.3d 1124. The court in Lybbert explained that

> 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.

In this case, Defendants did not lie in the weeds, neither acting in an inconsistent or dilatory manner with asserting an insufficient service of process defense. As such, the defense has not been waived.

1. Defendants Did Not Act in a Manner Inconsistent With Asserting the Defense of Insufficient Service of Process

If a defendant's conduct is inconsistent with a later assertion of the defense of insufficient service of process, the court may determine the defendant has waived the defense. Romjue v. Fairchild, 60 Wn. App. 278, 281, 803 P.2d 57 (1991). The mere act of engaging in discovery is not

necessarily inconsistent with the later assertion of an insufficient service defense. Id. at 281, 803 P.2d 57.

Plaintiffs assert that Romjue supports their position that engaging in discovery waives the privilege of insufficient service of process. In Romjue, not only had the defendants sent discovery requests to the plaintiff, but some three weeks prior to transmitting those requests, defense counsel received a copy of the process server's affidavit from plaintiff's counsel which showed service of process was defective. Id. at 281, 803 P.2d 57.

Further, plaintiff's counsel sent a letter to defense counsel, prior to the expiration of the statute of limitations, stating that it was his understanding that the defendants had been served. Id. at 281, 803 P.2d 57. Defense counsel then waited until after the expiration of the limitations period to file a motion for summary judgment. Id. at 282, 803 P.2d 57.

When evaluating whether the defendants in Romjue had waived the defense of insufficient service of process, the court

noted that not only had the defendants' counsel transmitted discovery requests to the plaintiff after learning that service of process was insufficient, but counsel chose to ignore plaintiff's counsel's inquiry as to the sufficiency of service until after the expiration of the statute of limitations. Id. at 281-82, 803 P.2d 57. It was given the totality of those circumstances that the court determined the defendants had waived the defense. Id. at 282, 803 P.2d 57.

Plaintiffs similarly assert that Lybbert underscores their argument that Defendants waived the defense of insufficient service of process. There, the defendant had done "more than just undertake discovery." Lybbert, supra at 42, 1 P.3d 1124. The defendant's detective had contacted the plaintiffs' counsel in order to ensure that the defendant correctly understood the nature and extent of the plaintiffs' 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. "Of 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 those 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 court 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.

These circumstances are highly distinguishable from the facts at hand. In this case, Defendants' counsel transmitted his standard set of discovery requests to Plaintiffs, and did so prior to discovering that Defendants had not properly been served

with process. (CP 113-14.) Several months of discovery did not take place, nor did Plaintiffs transmit any discovery requests to Defendants to which Defendants failed to timely respond. (CP 113.)

Further, Defendants' counsel did not "lie in wait" knowing service was insufficient but failing to notify Plaintiffs' counsel of the same until after the expiration of the limitations period. Instead, because no service was attempted prior to the expiration of the statute of limitations, Defendants' counsel could not have known of the insufficient service prior to the expiration of the limitations period. (CP 114.) Finally, Defendants' counsel did not learn that the Secretary of State had not been served with process until June 10, 2010—after the statute of limitations expired. (CP 18-19.)

Unlike counsel in Romjue, Defendants' counsel did not know service was insufficient but continue to proceed with sending discovery to Plaintiffs. Further, Defendants' counsel

did not learn of insufficient service but conceal this fact from Plaintiffs' counsel like counsel in Romjue and Lybbert.

The policy behind the waiver doctrine is to prevent a party from masking the insufficient service until after the expiration of the statute of limitations, only to unfairly assert the defense once the limitations period has expired. That simply did not occur here. Defendants' counsel sent standard requests for discovery before learning that there was no service of process. No representations to the contrary were ever made, nor did Defendants' counsel ever conceal this fact from Plaintiffs' counsel. As such, the policy behind the waiver doctrine is not applicable.

Defendants have not acted in a manner inconsistent with the assertion of the defense of insufficient service of process, and the decision of the trial court should be upheld.

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2. Defense Counsel Was Not Dilatory in Asserting the Defense of Insufficient Service of Process

Where a defendant's conduct is sufficiently dilatory in relation to the later assertion of a service of process defense, the defense may be waived. Raymond v. Fleming, 24 Wn. App. 112, 115, 600 P.2d 614 (1979). For instance, where a defendant's counsel repeatedly requested additional time, failed to respond to interrogatories, and obtained two orders of continuance, this dilatory behavior barred the later assertion of an insufficient service of process defense. Id. at 115, 600 P.2d 614.

In this case, Defendants' counsel was not dilatory in asserting the insufficient service of process defense. Counsel never requested additional time, failed to respond to discovery requests from Plaintiffs, or engaged in any conduct to delay or prolong the proceedings. (CP 113; RP 14-15.) Plaintiffs have done nothing to prosecute their lawsuit, and ultimately, after this matter came up for Clerk's dismissal on three separate

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

Defendants 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 Defendants, and as such, there has been no waiver of the defense of insufficient service of process. The decision of the trial court should therefore be upheld.

3. *Harvey v. Obermeit* Holds a Party Must Do More Than Simply Engage in Discovery to Waive Service of Process Defense

The court in Harvey summarized waiver doctrine case law by stating that:

> a party must do more than simply conduct discovery. In Lybbert, for instance, waiver of a service-related defense was found where the defendant acted as if it were preparing to litigate the merits of the case by engaging in discovery, none of which had to do with sufficiency of service of process; associating with outside counsel; discussing the merits of the case and the possibility of mediation with opposing counsel; and failing to timely respond to the plaintiff's

> interrogatory asking whether the defendant planned to rely on any affirmative defenses, where a timely response would have allowed the plaintiff several days to cure defective service.

Harvey v. Obermeit, 163 Wn. App. 311, 325, 261 P.3d 671 (2011).

While the underlying fact pattern of Harvey may differ from what is presented in the case at hand, the court in Harvey clearly held that "a party must do more than simply conduct discovery" in order to waive the defense of insufficient service of process. Id. at 325, 261 P.3d 671.

Here, Defendants' counsel has done nothing beyond transmitting a standard set of discovery requests to Plaintiffs. (RP 14.) There has been no associating with outside counsel, no discussing the merits of the case with opposing counsel, no discussing mediation with opposing counsel, and no failure to respond to discovery. See Harvey, supra (citing Lybbert, supra). The single measure taken by Defendants has been sending routine written discovery requests. (RP 14.) Without

more, Defendants have not waived the insufficient service of process defense. See, Harvey, supra. As such, the decision of the trial court should be upheld.

4. Post-*Lybbert* Case Law Underscores Defendants' Position That Service of Process Defenses Were Not Waived

Plaintiffs assert that post-Lybbert case law—specifically, Blankenship v. Kaldor—indicates that a party waives service of process defenses by simply commencing discovery. However, this is a mischaracterization of the discovery that took place in Blankenship.

There, the defendant deposed the plaintiff, took photographs of the plaintiff's home, and engaged in discovery that was not aimed to determine whether there was a viable insufficient service of process defense. Blankenship v. Kaldor, 114 Wn. App. 312, 319, 57 P.3d 295 (2002). Further, the defense had access to and control of the facts necessary to contest service prior to the expiration of the 90-day tolling period following attempted service. Id. at 319, 57 P.3d 295.

The court concluded the defendant was dilatory in failing to assert the insufficient service defense when "the defense had access to and under its control the necessary facts to contest service" prior to the expiration of the 90-day tolling period following service, but failed to act earlier. Id. at 320, 57 P.3d 295.

Unlike Blankenship, Defendants transmitted only a standard set of discovery requests to Plaintiffs without engaging in further discovery like depositions and the taking of photographs. (CP 113.) Unlike Blankenship, Defendants' counsel did not have possession and control of the necessary facts to determine that Defendants were not served prior to the expiration of the limitations period. (CP 113-14.)

In fact, here it was not possible for the defense to determine Defendants were not served within the statute of limitations until after the statutory time had run. And unlike Blankenship, there was no ineffective attempt at service and no obvious violation of the service rules to indicate to Defendants'

counsel prior to the running of the statute of limitations that service was insufficient. (RP 10.)

Defendants' counsel could not have known that service was not accomplished within the limitations period until after the expiration of the statute of limitations. (CP 113-14.) Further, counsel transmitted a standard set of discovery requests to Plaintiffs without engaging in any additional discovery. Therefore Defendants have not waived their defense of insufficient service of process, and the trial court's decision granting summary judgment in favor of the Defendants should be upheld.

C. PLAINTIFFS ARE NOT PERMITTED TO ARGUE FOR THE CREATION OF A BRIGHT LINE TEST FOR THE FIRST TIME ON APPEAL

While the appellate court engages in the same inquiry as the trial court, it can only consider evidence and issues raised at the trial court level. Douglas v. Jepson, 88 Wn. App. 342, 347, 945 P.2d 244 (1997). Arguments not made to the trial court

should not be considered. See 1519-1525 Lakeview Blvd. Condominium Ass'n v. Apartment Sales Corp., 101 Wn. App. 923, 6 P.3d 74 (2000). Further, an argument that is "neither pleaded nor argued to the trial court cannot be raised for the first time on appeal." Silverhawk, LLC v. KeyBank Nat. Ass'n, 165 Wn. App. 258, 265, 268 P.3d 958 (2011).

Plaintiffs argue in their brief to this Court that the Court should create a bright line test whereby Defendants lose "the right to insist upon actual service" by transmitting a standard set of discovery requests to Plaintiffs. However, this is not the current state of the law. See Lybbert, supra; see also Romjue, supra. The creation of a bright line test was not argued or addressed at the trial court level. (See RP.) As such, any arguments addressing this issue should be disregarded. See Silverhawk, supra.

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1. Public Policy and Judicial Efficiency Support a Finding That Defendants Did Not Waive the Defense of Insufficient Service of Process

If the Court elects to evaluate Plaintiffs' arguments regarding the creation of a bright line rule, it is important to note that such a rule is not only inconsistent with current law, but is neither supported by public policy nor judicial efficiency.

Plaintiffs argue that Defendants should have objected to the lack of service before sending a standard set of discovery requests to Plaintiffs. This, of course, would have required Defendants to object to lack of service prior to the expiration of the statute of limitations—whereby Plaintiffs still had the opportunity to properly affect service—and prior to Defendants' counsel discovering there had been no service. (CP 114.) Therefore, Defendants would have 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, Plaintiffs' proposed bright line test promotes a policy whereby plaintiffs are permitted to openly flout the civil rules 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 Defendants' counsel ultimately learned of the pendency of this suit. Plaintiffs were required to affect service upon Defendants, and openly admit that not only

were Defendants not served, but Plaintiffs did not even attempt service. (CP 69.) However, because Plaintiffs 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 Plaintiffs' to serve Defendants. They failed to do so. Defendants' counsel did not learn of this failure until after a standard set of discovery requests was served upon Plaintiffs and after the statute of limitations had expired. Plaintiffs concede there was no malfeasance on the part of Defendants' counsel. (RP 4.) The fact that Defendants now assert the defense, once they were aware the defense exists, does not mean the defense was waived. The trial court's grant of summary judgment in favor of Defendants should be upheld.

V. CONCLUSION

This Court should affirm the trial court's grant of summary judgment in favor of Defendants.

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Respectfully submitted this 11th day of March, 2014.

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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, Brief of Respondent, to be sent to the attorney(s) of record listed below as follows:

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DATED this 11th day of March, 2014, at Yakima, Washington.

Carol L. Switzer

Carol L. Switzer, Legal Assistant