SUPREME COURT 91506-7
COURT OF APPEALS NO. 319628-III

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

IRA AND ROBERT WILLIAMS,

Petitioners,

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

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioners Ira and Robert Williams, plaintiffs below, ask this Court to review the decision of the Court of Appeals referred to in Section B below.

B. COURT OF APPEALS DECISION

The trial court granted the defendants' motion for summary judgment, which the Court of Appeals affirmed in *Williams v. Underwire Services,* Slip Op. No. 31962-8-III (filed Feb. 24, 2015).

C. ISSUES PRESENTED FOR REVIEW

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. The court of appeals found the defendants had not waived the inadequate service of process issue. Is this ruling inconsistent with this Court's holding

in *Lybbert v. Grant County,*[1] thereby making review appropriate under RAP 13.4(b)(1)?

2. Despite this Court's ruling in *Lybbert,* lower courts continue to struggle with how the waiver doctrine should be applied to the affirmative defense of improper or no service. This has led to lengthy factual inquiries at the trial and appellate levels, confusion over what factors should be considered, and inconsistent results. *Lybbert* suggested, without specifically stating, a bright line rule: 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. Because the absence of a clearly stated bright line rule results in confusion and unnecessary litigation, should this Court accept review under RAP 13.4(b)(4)?

D. 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 Wil-

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

liams. 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 interrogatories and requests for production to plaintiffs, as well as a request for statement of damages. 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 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 defendants 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 lack of service. 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.

On July 30, 2013, defense counsel filed a CR 56 summary judgment motion to dismiss for lack of service. CP 11-12. The Williams responded with *Lybbert v. Grant County,* 141 Wn.2d 29, 1 P.3d 1124 (2000), a case in which this Court found that defendants waive their right to require formal service when they commence discovery completely unrelated to any service issue. Plaintiffs' counsel explained that had defen-

dants first filed an answer asserting this defense before propounding the discovery, plaintiffs would have known service was still necessary. 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.

Defendants replied that merely engaging in discovery before noting an objection did not waive the service issue. The defense claimed that under *Lybbert*, plaintiffs must demonstrate some other factor, such as lying in weeds, before the case could be dismissed. CP 107-12. Defense counsel stated that at the time he sent over the discovery requests, he did not know that service had not been completed, and therefore there could be no waiver. CP 113-14. The trial court agreed with the defense and granted the summary judgment motion. CP 116-19.

The court of appeals affirmed the dismissal in a 21-page unpublished decision. *Williams v. Underwire Services,* Slip Op. No. 31962-8-III (filed Feb. 24, 2015). In that lengthy decision, the court attempted to weigh a number of factors, including the amount of discovery that occurred, the defendants' subjective motivation, as well as the plaintiffs' efforts to achieve service. The court believed that the existing law required it to reexamine all of these factors in a de novo review, rather than applying a bright line rule that once the defense joins the battle by commencing

discovery, the defense waives the right to demand further formal service of process. Slip Op. at 14-15.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

1. Overview

This Court in *Lybbert* recognized a very broad rule of waiver when applied to the affirmative defense of lack of service. The defendant in that case commenced discovery without first objecting to the lack of service. *Lybbert,* 141 Wn.2d at 32-34. This Court held that by engaging in discovery unrelated to the service issue, at a time in which the plaintiff could have still perfected service, the defense had waived the right to later assert that it had never received proper notice of the lawsuit. *Id.* at 41.

Unfortunately, the *Lybbert* rule has not always been embraced by lower courts, which instead place undue emphasis on the particular facts of *Lybbert*. *See e.g., Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 416-17, 236 P.3d 986 (2010). Although *Lybbert* recognized that the dispositive issue was whether the defense commenced discovery without first objecting to the lack of service, there was additional discussion within *Lybbert* that the defendant should have known that the summons had not been properly served. *Lybbert,* at 41-42. Focusing upon the specific facts in *Lybbert*, rather than the rationale, the court of appeals in the instant case believed plaintiffs were required to present evidence of the defendants'

subjective knowledge at the time they commenced discovery. Slip Op. at 18-19.

This misunderstanding is based, in part, upon a particular sentence in *Lybbert* that is taken out of context. This Court in *Lybbert* stated, "the mere act of engaging in discovery 'is not always tantamount to conduct inconsistent with a later assertion of the defense of insufficient service.' [internal citation omitted]" *Lybbert* 141 Wn.2d at 41. On its own, this sentence suggests that mere commencement of discovery might be insufficient to create waiver. In context, however, what this Court stated was that not all discovery creates a waiver, as some discovery may be directed at the service issue. *Lybbert* 141 Wn.2d at 41. This current case provides this Court with an opportunity to clear up this misunderstanding.

The present case presents this Court with an opportunity to state simply and objectively the two alternative tests for a waiver in a process of service affirmative defense: (1) If, prior to the statute of limitations running, the defendant has not formally asserted the affirmative defense, 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 lower 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 appearing before the limitations period has run, can either (1) file an answer that raises 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 a time when it could have been accomplished but was not, because of the inconsistent conduct of the defendant.

Because the court of appeals ruling is contrary to this Court's decision in *Lybbert*, review is appropriate under RAP 13.4(b)(1). Further, review is appropriate under RAP 13.4(b)(4) when the challenged ruling presents a standard that "invites unnecessary litigation . . . and creates confusion generally." *State v. Watson*, 155 Wn. 2d 574, 577, 122 P.3d 903 (2005). This service issue is one that cries for clarification and an easily implemented bright line rule.

2. The court of appeals misconstrued the test for waiver set forth in *Lybbert v. Grant County* and *Romjue v. Fairchild.*

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 passed, the defense filed a motion to dismiss based on insufficient service. The *Romjue* 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 service or statute of limitations issues, the discovery constituted a waiver of the service issue. *Id.*

Eight years later, this 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 after

the statute of limitations expired that defendants raised the service issue. *Id.* at 32-34. The defendants moved for summary judgment based on improper service, which was granted by the trial court. *Id.* at 34.

The court of appeals 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 the court of appeals 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, this Court relied upon the 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.*

This 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 insuffi-

> cient 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 41-42 (emphasis added). In the present case, the court of appeals took the first sentence of the above quote out of context, ruling that, "A party must do more than simply conduct discovery." Slip Op. at 15. Other courts have similarly misinterpreted this language. *See e.g., Harvey v. Obermeit*, 163 Wn. App. 311, 261 P.3d 671 (2010); *Dybdahl*, 157 Wn. App. at 416-17.

The court of appeals placed great emphasis on defense counsel's averment that he did not know whether service had been achieved at the time he commenced discovery. Slip Op. at 19. The court of appeals appears to believe that a defendant must be aware of deficient service before he can waive the issue. Such reasoning is flawed. By commencing discovery before the expiration of the 90 day service of process period, and without objecting to the lack of service or even ascertaining whether ser-

vice had been achieved, defendants communicated that the battle was joined. Service was unnecessary.

The court of appeals also distinguished the current case from other published cases on the basis that "the Williamses present no evidence that they took any steps to perfect service." Slip Op. at 20. The court noted that in these other cases the plaintiffs attempted service on the defendant. *Id.* But this misses the point. The concept behind waiver is that once the defense has signaled intent to waive a particular right or procedure, no additional action is needed. In the current case, the defendants commenced discovery before the Secretary of State had been served. In doing so, defendants engaged in litigation that rendered pursuit of service unnecessary. The court of appeals reasoning highlights the continuing confusion associated with this issue.

There are strong policy reasons supporting *Lybbert's* 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 misled to their detriment by inconsistent or dilatory behavior on the part of defendants.

3. The court of appeals reliance upon *Harvey v. Obermeit* highlights the confusion under existing law.

The court of appeals placed great reliance upon *Harvey v. Obermeit*, *supra*, in holding that something more than just unrelated discovery is needed to establish waiver. See Slip Op. at 16-18. The court's reliance on *Harvey* is misguided, as that case dealt with a different aspect of the waiver rule. There are two different rules in evaluating whether a defendant's commencement of discovery creates waiver. First, there are cases in which the defendant engages in discovery without first noting an objection to, or raising an issue about, the process of service. That is what happened in our case. In these types of cases, the court has found waiver when the defendant engages in discovery unrelated to the service issue. See e.g., *Lyybert*, at 41; *Romjue* at 281.

Second, there are cases where the defendant does first file a timely objection and only then commences substantive discovery. The question in those cases is whether the discovery that was unrelated to the service of process issue was extensive enough to overcome the earlier formally as-

serted limitations objection. *See e.g., French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991) (once a defendant properly preserves a defense by pleading it in the answer, the defendant is not precluded from proceeding with discovery); *King v. Snohomish County*, 146 Wn.2d 420, 426, 47 P.3d 563 (2002) (extensive discovery waived earlier improper service objection). *Harvey* fits within this second set of cases, as the defendants there, before engaging in discovery, raised the service issue in a timely filed answer. *Harvey,* 163 Wn. App. at 314.

Had the defendants in the current case done the same thing before submitting the extensive interrogatory requests, the Williamses would have been on notice that despite initiating such discovery, the defense had not waived the service issue. Thereafter, if the Williamses still did not timely serve the defendants, they would have to point to something more than the defense's commencement of discovery to overcome the earlier objection. But the defendants did not file an objection as to service, and in their discovery did not raise any concerns, issues, or questions as to the status of service. Instead they dove into wide-ranging, substantive discovery, at a time when the plaintiffs still had time to effect service. This understandably caused the plaintiffs to believe "the lawsuit was now fully underway and that service on the defendants was no longer a necessity."

CP 69. The court of appeals misapplication of *Harvey* to the facts in the present case reveals the level of confusion surrounding the waiver issue.

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

Judicial efficiency is promoted at the trial and appellate level by a black letter rule that process of service issues are waived when defendant engages in unrelated discovery. Such a rule is easily understood and applied. 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? The current case demonstrates the inefficiency in the process. Not only was there a summary judgment hearing, and follow up appeal, but it took the court of appeals 21 pages to try and balance the various factors. As noted above, without proper standards in this area, many of the factors the court did address were not proper considerations for whether defendants had waived this affirmative defense.

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 must engage in the exact same time consuming examination as that conducted by the trial court. *See e.g., Blankenship v. Kaldor*, 114, Wn. App. 312, 57 P.3d 295 (2002). The *Lybbert* test can prevent this needless inquiry.

Under *Lybbert*, the test is clear: engaging in non-service related discovery waives the service 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 lying 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. As noted above, while this is a legislatively created right, it is not the type of due process right that impacts the defendants' ability to respond to a lawsuit. As such, a broad rule of waiver is consistent with public policy that cases be decided on the merits in a timely fashion. Allowing defendants who have caused harm to easily avoid litigation subverts the goals of the legal system. *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 effected service upon the Secretary of State. Defendants should not profit from their failure to file a timely objection.

5. The three-year delay in bringing a motion to dismiss constitutes waiver.

Standing alone, the commencement of discovery unrelated to the service issue before the expiration of the service period, waives an insufficient service of process defense. But this current case presents another area in which the court can clarify the waiver issue. Here, the 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. Additionally, waiver is established through defendants' silence in response to plaintiffs' status update letters to the trial court. In her letter dated April 21, 2011, Ira Williams explained that although she had received discovery, which she hoped to answer soon, she was still in treatment for her injuries. Ira stated that she hoped to have settlement discussions soon thereafter. *Id.* The defense filed no responsive pleading, and did not claim a lack of jurisdiction.

On May 2, 2012, Ira sent another letter to the superior court, again asking that the case remain open. CP 9. Again defense counsel filed nothing. On April 25, 2013, Ira wrote a third letter to the trial court stating, "The parties are going to have a mediation to hopefully settle the case."

CP 10. Once again, defense counsel did not dispute this representation made to the court. In fact, defense counsel never filed an objection to the lack of service until July 30, 2013, more than three years after the filing of the lawsuit. CP 69. The court of appeals reasoned that because no real discovery was taking place, the defense had no obligation to bring the motion. But regardless of how much or how little discovery occurred during that time period, judicial economy suffers 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.* The current case provides this Court with an opportunity to crack down on dilatory behavior that deprives citizens of their day in court.

F. CONCLUSION

The court of appeals acknowledged the confusion in this area of law:

> Washington decisions addressing waiver of lack of service of process rarely mention the standard elements for waiver and omit analyzing a claim of waiver under the stand principles applied in other settings. This omission may result from the waiver elements being relaxed in the setting of this affirmative defense. Washington decisions addressing

> the defense of lack of service also blur the distinction between waiver and estoppel.

Slip Op. at 9. This language can be read as a request for more clarity and guidance in this area of law. While *Lybbert* appears to be clear in its holding, there is language in *Lybbert* which continues to cause confusion. The present case provides the court with an excellent opportunity to clear up that confusion. Petitioner respectfully submits that review is appropriate under RAP 13.4(b)(1) and RAP 13.4(b)(4).

Respectfully submitted: March 25, 2015

James R. Dixon, WSBA #18014
Attorney for Petitioners

CERTIFICATE OF SERVICE

I, James R. Dixon, certify that on March 26, 2015, 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 March 26, 2015, in Seattle, WA

James R. Dixon

FILED
FEB 24, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

IRA WILLIAMS and ROBERT WILLIAMS, Appellants, v. UNDERWIRE SERVICES, LLC and TRAVIS HECKMASTER, Respondents.	)	No. 31962-8-III UNPUBLISHED OPINION

FEARING, J. — We address another appeal involving a plaintiff's failure to timely serve process and then arguing the defendants waived the defense of lack of service. Plaintiffs Ira and Robert Williams filed their lawsuit one day before the statute of limitations expired and still have not served either defendant, Travis Heckmaster or Underwire Services, with the summons and complaint. The trial court dismissed the Williamses' claim for lack of service. We affirm 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.

FACTS

Because the trial court granted Travis Heckmaster's and Underwire Services' summary judgment motion, we write the facts of the accident and procedural background in a light most favorable to Ira and Robert Williams. On February 20, 2007, Heckmaster drove an 18-wheel semitruck and trailer on Interstate 90 near Snoqualmie Pass. Heckmaster then worked for Underwire Services, a Florida LLC. Snowy weather demanded the use of chains, but Heckmaster failed to stop and install chains. Heckmaster lost control of his truck, which collided with Ira Williams' vehicle. The collision injured Ira Williams.

PROCEDURE

On February 19, 2010, Ira and Robert Williams filed suit for negligence against Underwire Services, LLC, and Travis Heckmaster. Ira Williams and her husband are Texas residents. The Williamses proceeded pro se with limited assistance from Texas attorney John Rowley. The complaint alleged, in part:

> 3.1 Defendant Underwire Services, LLC is a Florida corporation, with their its [sic] office located at 18377 Foliage Rd Diamond, MO 64840. It's [sic] registered agent, upon whom service made [sic] by made is James Carter, at 1111 3rd Ave W, Suite 150, Bradenton, FL 34205. . . .
>
> 3.2 Defendant Travis Heckmaster, was an agent and/or employee of Underwire Services, LLC on the day in question described above. His whereabouts are presently unknown. If he is not able to be located, service will take place on him through the Secretary of State of Washington, in accordance with ***RCW 46.64.040***.

Clerk's Papers (CP) at 1 (alternation in original). On February 19, the Williamses also filed separate summonses against Underwire Services and Heckmaster.

The three-year statute of limitations for the Williamses' claim ran on February 20, 2010. RCW 4.16.080. Under RCW 4.16.170, however, the Williamses had 90 additional days, or until May 21, in which to complete service. The Williamses never completed service. The record is devoid of any attempt by the Williamses to serve either defendant.

On April 27, 2010, attorney Robert Tenney filed a notice of appearance for defendants Underwire Services and Travis Heckmaster. The notice read:

> YOU ARE HEREBY NOTIFIED that MEYER, FLUEGGE & TENNEY, P.S., without waiving objections as to improper venue, lack of jurisdiction, insufficiency of process, or insufficiency of service of process, hereby appear as attorneys for UNDERWIRE SERVICES, LLC, and TRAVIS HECKMASTER.

CP at 6. The record shows no answer has been filed by either defendant.

Also on April 27, 2010, defendants sent husband Robert Williams discovery requests with 21 interrogatories and five requests for production. Examples included:

> INTERROGATORY NO. 2: State the extent of your education, giving the full details thereof.
>
> INTERROGATORY NO. 3: Please state the names and ages of all your children and the identity of each child's natural father.
>
> . . . .
>
> INTERROGATORY NO. 6: List the names and addresses of all hospitals, doctors, osteopaths, chiropractors or healers who have examined or treated you in the last ten (10) years preceding the occurrence referred to in your complaint, the nature of the treatment, and the approximate dates thereof.
>
> . . . .

> INTERROGATORY NO. 11: Please state the names and addresses of any and all persons having any knowledge whatsoever concerning the circumstances of the occurrence referred to in your complaint, of your physical condition or having knowledge of relevant facts pertaining to the above-entitled cause, stating for each whether or not they were an eyewitness to the occurrence, and state his or her present occupation, address and phone number.
>
> . . . .
>
> INTERROGATORY NO. 17: Describe your present physical condition with regard to any mental or psychiatric condition that you now allegedly suffer.
>
> . . . .
>
> REQUEST FOR PRODUCTION 1: Please produce legible copies of any records related to you of any health care providers or entities identified by you in your answers to Interrogatories 6, 7, 8 and 9.
>
> . . . .
>
> REQUEST FOR PRODUCTION 5: Please produce legible copies of any other materials, documents, and other tangible items or things, not previously provided, related to the subject matter of your lawsuit, including liability and damages.

CP at 47-55.

On April 27, 2010, defendants requested a "STATEMENT OF DAMAGES" from Ira Williams. CP at 71. Defendants also sent Ira Williams a discovery request with 71 interrogatories and 20 requests for production of documents. Through these extensive discovery requests, defendants sought information and records relating to Ira Williams' negligence claim and more. No discovery request asked about any defense of insufficiency of service.

In June 2010, Robert Tenney learned from his client Underwire Services of a lack of service on defendants. Attorney Tenney spoke with the Williams' Texas counsel, John

Rowley, on October 25, 2010. Tenney declared, in support of a motion for summary judgment:

> I told Mr. Rowley that Defendants had a statute of limitations defense because Defendants had not been served with process and the statute had run. I continued to tell Mr. Rowley that the statute of limitations had run because our clients had not been served in our occasional telephone conversations over the years.

CP at 113-14.

On April 22, 2011, in response to a clerk's motion to dismiss for lack of prosecution, Ira Williams filed a letter with the Kittitas County Clerk asking to keep the case open and pending. Williams mentioned that she hoped to respond to Underwire's discovery requests and then settle the case. Williams sent a copy of the letter to Robert Tenney.

On May 4, 2012, Ira Williams filed a second letter with the Kittitas County Clerk asking her to keep this case open and pending. On April 26, 2013, Ira Williams filed a third letter with the Kittitas County Clerk asking her to keep this case open and pending. Williams wrote: "The parties are going to have a mediation to hopefully settle the case." CP at 10.

On July 31, 2013, defendants moved for summary judgment. Defendants argued that the Williamses failed to commence the personal injury suit within the three-year statute of limitations, because the Williamses never served either defendant.

Ira and Robert Williams argued, in response to defendants' summary judgment

motion, that defendants waived service by either participating in discovery or being dilatory in asserting the defense. Husband Robert Williams, in an affidavit opposing the motion, declared:

> 3. On February 19, 2010, I (along with my wife Ira) filed our pro se complaint against the two Defendants. We had a summons issued on the same day as we intended at that point to serve Underwire Services, LLC and Travis Heckmaster.
>
> 4. From that date forward, I never communicated, nor had anyone else on my behalf, communicate to the Defendants, their insurance carrier HARCO (who had sent me some correspondence), or their attorneys that I had filed a Complaint. Nonetheless, on April 22, 2010, or within a very few days thereafter, I received in the mail the Notice of Appearance in this case, even though at such time I had not yet affected service of process on the two Defendants.
>
> 5. Then on April 27, 2010 or within a very few days thereafter, and again before I had had service of process completed on the two Defendants, I received in the mail Interrogatories, Requests for Production, and a Request for Statement of Damages. Those documents made it appear that the lawsuit was now fully underway and that service on the Defendants was no longer a necessity.

CP at 45.

Ira Williams also signed an affidavit opposing defendants' motion for summary judgment. The affidavit repeated the testimony of Robert Williams. The affidavit further declared:

> I did not receive any documents from [Underwire Services] informing me that they objected that [they] had never been served, nor asserting that limitations should preclude my lawsuit on the basis that [they] were not served, until over three years later on July 30, 2013.

CP at 69. Neither Ira Williams nor Robert Williams disclosed, in their declarations, any

efforts exerted to serve process on either defendant.

Defense counsel Robert Tenney averred in a declaration supporting the summary judgment motion:

> 2. Defendants served Plaintiffs with basic written discovery requests on April 27, 2010. To date, Plaintiffs have not answered said discovery, nor have Defendants sought to compel answers to said discovery. Plaintiffs have not initiated any discovery at any time.
>
> 3. My first communication with Plaintiffs' counsel, John H. Rowley, was by telephone on October 25, 2010. I told Mr. Rowley that Defendants had a statute of limitations defense because Defendants had not been served with process and the statute had run. I continued to tell Mr. Rowley that the statute of limitations had run because our clients had not been served in our occasional telephone conversations over the years.
>
> 4. When I filed my Notice of Appearance and sent plaintiffs routine written discovery on April 27, 2010, I did not know my clients had not been served. My Notice of Appearance expressly reserves the defenses of "insufficiency of service of process" and "insufficiency of process."
>
> 5. I did not learn my clients had not been served until after the statute of limitations had run on February 20, 2010.
>
> 6. I did not learn my clients had not been served until more than ninety days after plaintiffs filed their Complaint on February 19, 2010.
>
> 7. I learned my clients had not been served with process in June, 2010.

CP at 113-14.

The trial court granted defendants' summary judgment motion.

LAW AND ANALYSIS

Ira and Robert Williams contend the trial court erred when it granted summary judgment to the defendants for lack of service within the applicable statute of limitations. Under familiar principles of summary judgment jurisprudence, this court reviews a

summary judgment order de novo, engaging in the same inquiry as the trial court. *Highline School Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 15, 548 P.2d 1085 (1976); *Mahoney v. Shinpoch*, 107 Wn.2d 679, 683, 732 P.2d 510 (1987). Summary judgment is proper if the records on file with the trial court show "there is no genuine issue as to any material fact" and "the moving party is entitled to a judgment as a matter of law." CR 56(c). This court, like the trial court, construes all evidence and reasonable inferences in the light most favorable to Ira and Robert Williams, as the nonmoving parties. *Barber v. Bankers Life & Cas. Co.*, 81 Wn.2d 140, 142, 500 P.2d 88 (1972); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). A court may grant summary judgment if the pleadings, affidavits, and depositions establish that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *Lybbert v. Grant County*, 141 Wn.2d 29, 34, 1 P.3d 1124 (2000).

The Williamses concede that they failed to serve Underwire Services or Travis Heckmaster. They argue the defendants waived the defense of lack of service of process. They do not assert estoppel.

Waiver is the voluntary relinquishment of a known right. *Spokane School Dist. No. 81 v. Spokane Educ. Ass'n*, 182 Wn. App. 291, 313, 331 P.3d 60 (2014); *Cornerstone Equip. Leasing, Inc. v. MacLeod*, 159 Wn. App. 899, 909, 247 P.3d 790 (2011). Waiver may be inferred from circumstances indicating an intent to waive. *224 Westlake, LLC v. Engstrom Props., LLC*, 169 Wn. App. 700, 714, 281 P.3d 693 (2012). To constitute

implied waiver, there must exist unequivocal acts or conduct evidencing an intent to waive. *Harmony at Madrona Park Owners Ass'n v. Madison Harmony Dev., Inc.*, 143 Wn. App. 345, 361, 177 P.3d 755 (2008). Waiver will not be inferred from doubtful or ambiguous factors. *Cent. Wash. Bank v. Mendelson–Zeller, Inc.*, 113 Wn.2d 346, 354, 779 P.2d 697 (1989). The intention to relinquish the right or advantage must be proved, and the burden is on the party claiming waiver. *Jones v. Best*, 134 Wn.2d 232, 241-42, 950 P.2d 1 (1998).

No evidence points to any express surrender by Underwire Services or Travis Heckmaster of a defense of lack of service after knowledge of the right. To the contrary, defense counsel warned the Williamses' Texas lawyer of the availability of the defense. The Williamses claim defendants waived the defense by engaging in discovery on other issues and waiting three years to bring a motion to dismiss. We consider these factors to be equivocal, particularly in light of the warning sounded.

Washington decisions addressing waiver of lack of service of process rarely mention the standard elements for waiver and omit analyzing a claim of waiver under the standard principles applied in other settings. This omission may result from the waiver elements being relaxed in the setting of this affirmative defense. Washington decisions addressing the defense of lack of service also blur the distinction between waiver and estoppel. Waiver emphasizes the intentional conduct of the party denying waiver and estoppel focuses on the detriment to the party asserting estoppel by the other party's

conduct. *Kessinger v. Anderson*, 31 Wn.2d 157, 169, 196 P.2d 289 (1948).

Lybbert v. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000) is the leading Supreme Court decision on waiver of improper service of process. The Supreme Court held that the county waived the affirmative defense as a matter of law and established at least two circumstances under which courts will impose the doctrine. *Lybbert* teaches that a defendant can waive service in two ways: (1) if the defendant has been dilatory in asserting the defense, or (2) if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior. *King v. Snohomish County*, 146 Wn.2d 420, 424, 47 P.3d 563 (2002); *Lybbert*, 141 Wn.2d at 38-39. We address below these independent grounds for waiver.

The doctrine of waiver is designed to prevent a defendant from ambushing a plaintiff during litigation either through delay in asserting a defense or misdirecting the plaintiff away from a defense for tactical advantage. *King v. Snohomish County.*, 146 Wn.2d at 424; *Harvey v. Obermeit*, 163 Wn. App. 311, 323, 261 P.3d 671 (2011). Therefore, Washington courts generally require indicia of "lying in wait," to deprive the plaintiff of an opportunity to cure defective service, before applying waiver. *Streeter-Dybdahl v. Nguyet Huynh*, 157 Wn. App. 408, 416-17, 236 P.3d 986 (2010). As analyzed below, Washington courts also have not applied the doctrine without prejudice to the plaintiff.

Underwire Services and Travis Heckmaster filed a notice of appearance, in which

they reserved the defense of lack of service. A notice of appearance has no bearing on the issue of waiver. An express reservation in a notice of appearance is unnecessary to preserve the defense. *Adkinson v. Digby, Inc.*, 99 Wn.2d 206, 209, 660 P.2d 756 (1983). Since the filing of a notice of appearance without including the caveat cannot constitute a waiver of the defense, filing the notice of appearance with the caveat should not serve as a vehicle to preserve it. *Lybbert*, 141 Wn.2d at 43. Neither is a notice of appearance a pleading under CR 7(a) that might preserve the defense. *Lybbert*, 141 Wn.2d at 43.

Dilatory Assertion of Defense

The Williamses fault Underwire Services and Travis Heckmaster for waiting more than three years to object to service. As noted in *Lybbert*:

> [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.

141 Wn.2d at 40 (quoting *Santos v. State Farm Fire & Cas. Co.*, 902 F.2d 1092, 1096 (2d Cir. 1990)).

The law stresses the importance of raising procedural defenses before any significant expenditure of time and money has occurred and at a time when the plaintiff could remedy the defect. *King v. Snohomish County*, 146 Wn.2d at 426; *In re Marriage of Tsarbopoulos*, 125 Wn. App. 273, 288, 104 P.3d 692 (2004). Nevertheless, delay in

filing an answer does not waive the defense. *Gerean v. Martin-Joven*, 108 Wn. App. 963, 973, 33 P.3d 427 (2001).

Two cases assist in determining whether defendants' delay constitutes waiver: *Raymond v. Fleming*, 24 Wn. App. 112, 600 P.2d 614 (1979) and *French v. Gabriel*, 116 Wn.2d 584, 806 P.2d 1234 (1991). In *Raymond*, defendant filed a timely notice of appearance on May 31, 1977, but failed to file an answer. Plaintiff repeatedly asked for an answer to the complaint, and defendant repeatedly requested, and was granted, continuances. On January 23, 1978, almost eight months after defendant noted his appearance, plaintiff moved for a default judgment. Plaintiff also moved to compel answers to interrogatories served on October 5, 1977. Defendant asked for, and was granted, two more continuances. On March 3, 1978, defendant moved for dismissal based on insufficient service of process.

In *Raymond v. Fleming*, this court held: "Defense counsel's repeatedly requesting more time, his not responding to the interrogatories, and his obtaining two orders of continuance were both dilatory and inconsistent with the later assertion of the defense of insufficient service of process." 24 Wn. App. at 115. This court further noted that these delays were not aimed at determining whether a defense for insufficient service existed.

In *French v. Gabriel*, our Supreme Court found that the defendant had not waived service. The plaintiff filed a malpractice claim in January 1986; the defendant filed a notice of appearance on February 28, 1986; and the defendant filed an answer, asserting

for the first time insufficient service, on August 26, 1986. The *French* court distinguished *Raymond*, writing: "Unlike the defendant in *Raymond*, [the defendant in *French*] raised the defense of insufficient service of process in his first action of record, his answer. The inconsistency that concerned the *Raymond* court is simply not present here." 116 Wn.2d at 593. The plaintiff could have moved for default judgment, but did not. *French*, 116 Wn.2d at 593. The high court agreed with this court that "'[w]hile not to be condoned, mere delay in filing an answer does not constitute a waiver of an insufficient service defense.'" *French*, 116 Wn.2d at 593-94 (quoting and affirming *French v. Gabriel*, 57 Wn. App. 217, 222, 788 P.2d 569 (1990)).

In *Harvey v. Obermeit*, 163 Wn. App. 311, 323, 261 P.3d 671 (2011), the court held that raising the defense was not dilatory since the defendant asserted the defense in his answer to the complaint. The defendant did not file a motion to dismiss until a half year after the lawsuit commenced.

This appeal is more like *French*. The Williamses could have moved for default judgment, but did not. The parties hoped to settle the case. In sparse discussions, the defendants stated their belief that they possessed a defense of insufficient service. In its first action of record, a summary judgment motion, the defendants asserted the defense. The record contains no evidence that the defendants laid in wait for the statute of limitations to expire or masked its defense of lack of service. The Williamses emphasize that defendants waited three years to seek dismissal. We find no decision where the

defendant waited this long to assert the defense. Nevertheless, Ira Williams presents no evidence of prejudice such as was present in *French*. By the time defendants knew of the lack of service, the Williamses could not correct the defect.

Inconsistent Behavior

The Williamses argue that the defendants' extensive discovery requests are inconsistent with its asserting a lack of service defense. The Williamses ask this court to apply a bright line rule: "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." Br. of Appellant at 7. No such bright line exists.

Courts find assertion of a service-related defense inconsistent with a defendant's prior behavior when the record suggests the defendant actively sought to conceal the defense until after the expiration of the statute of limitations and 90-day period for service. In *Romjue v. Fairchild*, 60 Wn. App. 278, 803 P.2d 57 (1991), a defendant engaged in discovery unrelated to a service-related defense before moving to dismiss and waited until three months after the statute of limitations expired to notify plaintiff's counsel of insufficient service, although plaintiff's counsel wrote to defendant's counsel prior to the expiration of the statute of limitations that he understood the defendants had been properly served. The court held the defendant waived the defense by conducting himself in a manner inconsistent with the later assertion of the defense.

Another circumstance in favor of finding waiver is where a party engages in considerable discovery not related to the defense. *Harvey v. Obermeit*, 163 Wn. App. at 324 (2011). However, the mere act of engaging in discovery is not always tantamount to conduct inconsistent with a later assertion of the defense of insufficient service. *Lybbert*, 141 Wn.2d at 41; *Harvey v. Obermeit*, 163 Wn. App. at 324; *Romjue*, 60 Wn. App. at 281; *Omaits v. Raber*, 56 Wn. App. 668, 670-71, 785 P.2d 462 (1990). A party must do more than simply conduct discovery. *Harvey v. Obermeit*, 163 Wn. App. at 325.

In *Lybbert*, waiver of a service-related defense was found when 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. The county's counsel associated with outside counsel and discussed the merits of the case and the possibility of mediation with opposing counsel. The defendant also failed to timely respond to the plaintiff's interrogatory asking whether the defendant planned to rely on any affirmative defenses. A timely response would have allowed the plaintiff several days to cure defective service.

In *King v. Snohomish County*, 146 Wn.2d 420, the county raised a claim-filing defense in its answer but did not clarify the defense in response to an interrogatory. The parties engaged in 45 months of litigation and discovery, during which time the defendant sought four continuances and filed a motion for summary judgment that did not mention the defense. The court found waiver on the basis that the county's assertion of the claim-

filing defense, in a motion to dismiss after the case was set for trial, was inconsistent with this prior behavior.

Another illustrative decision on waiver is *Harvey v. Obermeit*, 163 Wn. App. 311, 314, 261 P.3d 671 (2011). James Harvey suffered injuries when he and Richard Obermeit were involved in a car accident on August 4, 2006. Obermeit's address in Maple Valley was noted on the accident report. On July 23, 2009, Harvey filed a negligence action against Obermeit. After Harvey's process server unsuccessfully attempted to serve papers on Obermeit at the latter's home, Harvey decided to affect substitute service under the nonresident motorist statute, RCW 46.64.040.

On October 15, 2009, Richard Obermeits' counsel sent a notice of appearance to Harvey's counsel. From October 15 to October 21, Obermeits' counsel had no other contact with Harvey. The 90-day service period expired on October 21. On November 2, Obermeit filed an answer that asserted affirmative defenses regarding Harvey's failure to serve process as required by law, lack of jurisdiction, and expiration of statute of limitations. The same day, Obermeit served Harvey with general interrogatories and requests for production, a request for statement of damages, and a jury demand. Also on November 2, Harvey served Obermeit with pattern interrogatories and requests for production. On January 8 and January 11, 2010, Obermeit responded to Harvey's discovery requests. On January 14, Obermeit issued records deposition subpoenas to obtain Harvey's medical records and served them on health care providers, along with a

notice of intent pursuant to RCW 70.02.060. *Harvey v. Obermeit*, 163 Wn. App. at 314-15.

On February 10, 2010, Richard Obermeit filed a motion to dismiss pursuant to CR 12(b)(2) and CR 12(b)(5), citing lack of service of process, lack of jurisdiction, and expiration of statute of limitations. He argued that service under RCW 46.64.040 was not appropriate because Obermeits was a Washington resident and there was no evidence that he left the state or attempted to evade service. The day after Richard Obermeit filed his motion, James Harvey filed a motion for partial summary judgment to dismiss Obermeit's affirmative defenses. Obermeit gave his deposition on March 2, 2010. On or about April 9, Obermeit retained a medical expert witness and made a CR 35 discovery request that Harvey submit to a medical examination. *Harvey v. Omermeit*, 163 Wn. App. at 315-16.

The trial court concluded that service on the secretary of state was improper because Richard Obermeit was found within the state but not personally served. Harvey did not make a due and diligent search. The court ruled that Harvey lacked personal jurisdiction over Obermeit, and the statute of limitations had expired.

On appeal, James Harvey argued, in part, that Richard Obermeit waived the issue of ineffective service of process by engaging in discovery unrelated to that issue, not bringing a motion to dismiss as soon as reasonably practicable, and acting inconsistently with this defense. This court answered "no." Although Obermeit conducted some

discovery before he filed his motion to dismiss on February 10, 2010, this discovery included questions from both parties about the issues of service of process and jurisdiction. Harvey was aware throughout discovery that Obermeit was contesting service. Some discovery between the parties took place *after* Obermeit filed his motion to dismiss. Although Obermeit did not alert Harvey to the issue of ineffective service of process before the 90-day service period or the statute of limitations expired, none of the cited authorities supports the proposition that waiver necessarily follows because a defendant does not do this. Furthermore, there was no indication in the record that Obermeit wrongfully led Harvey to believe that service had been accomplished.

Travis Heckmaster and Underwire Services took no steps to hide the lack of service during the time that Ira Williams could have corrected the insufficiency. The defendants appeared through counsel before the expiration of the 90-day service window, but counsel had no knowledge of a lack of service until thereafter. Defendants sent standard discovery requests to both plaintiffs, but the Williamses made no effort to answer discovery.

This appeal differs from cases where Washington courts found waiver of service on the basis of inconsistent conduct. Unlike *King* and *Lybbert*, the defendants did not fail to answer an interrogatory that sought to clarify the defense or, unlike *King*, engage in 45 months of litigation and discovery. Also unlike *King*, the Williamses and defendants did not engage in extensive discovery over an extended time. The Williamses never sent

discovery requests inquiring about potential affirmative defenses, let alone any interrogatories or requests for production. Instead, in the three years between the Williamses filing this suit and defendants moving for summary judgment, the case lay placid such that the county clerk repeatedly sought to dismiss it for want of prosecution.

Unlike *Romjue*, the defendants did not seek to conceal the defense until after the statute of limitations expired. In *Romjue*, the record indicated the defendant's counsel should have known of the defense when he received the copy of the process server's affidavit from Romjue's counsel, some three weeks before he initiated discovery. Underwire Services' and Travis Heckmaster's counsel learned of the lack of service after the statute of limitations expired.

This appeal also diverges from *Lybbert*. In *Lybbert*, the process server's affidavit was filed by the plaintiffs, such that Grant County knew or should have known that the defense of insufficient service of process was available to it. The undisputed facts, on appeal, show the defendants did not earlier learn of the defense from a process server's affidavit, because the Williamses never attempted service.

Ira and Robert Williams argue that *Blankenship v. Kaldor*, 114 Wn. App. 312, 57 P.3d 295 (2002) controls the outcome of the appeal. Julianne Kaldor engaged in general discovery before filing a motion to dismiss for lack of service. Although the court relied on discovery efforts in its ruling, the court also noted that Kaldor's father misled Blankenship's process server into believing that service on him was acceptable and the

suit would be answered by his insurance company. Blankenship could have corrected the defect in service if the defense had timely warned her that Julianne Kaldor did not live with her father.

The Williamses argue that the quantity of discovery is relevant, but they cite no law to support this position. The quantity and extent to which a party participates in discovery, through logic and experience, necessarily concern whether a later assertion of the defense is inconsistent. Defendants' discovery requests are not inconsistent with its lack of service defense because their counsel did not know of the defense when he sent those initial requests. While counsel might be encouraged to talk to his client before flooding plaintiffs with discovery requests, there is no evidence of bad faith or misconduct showing that counsel laid in wait. The type of interrogatories and requests for production were typical for a personal injury case and civil defense counsel routinely send initial discovery requests within days of filing the notice of appearance.

This appeal has an important element missing from any other Washington decision. The Williamses present no evidence that they took any steps to perfect service. In all reported decisions, the plaintiff took some step and believed they had performed service thereby. The Williamses can make no claim to have been misled into believing they had served the defendants. Defendants took no steps to ambush or lull Ira or Robert Williams into a safe slumber.

CONCLUSION

We affirm the summary judgment dismissal of plaintiff's complaint based on the lack of service on the defendants.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Fearing, J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, J.