No. 40438-2

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

KIRSTEN L. LARSEN, and MARIA DE LOS ANGELES HALLMAN,
Appellants, Petitioners, Plaintiffs

v.

CHELAN COUNTY,
Respondent, Defendant

APPELLANTS' PETITION FOR DISCRETIONARY REVIEW

LACY KANE & KUBE, P.S.

PAUL S. KUBE, WSBA #24336
Attorney for
Appellants/Petitioners
300 Eastmont Avenue
East Wenatchee, WA 98802
(509) 884-9541

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Washington Cases

Statutes

Other authority:

I. INTRODUCTION

Petitioners brought employment tort claims against their former employer Chelan County ("Respondent") for alleged violations of Washington's Law Against Discrimination ("WALD") (RCW 49.60. et. al. for wrongful discharge in contravention of public policy, retaliation, gender discrimination and disability discrimination). The trial court incorrectly granted summary dismissal of all causes of action, with prejudice.

Division III of Washington State Court of Appeals filed an unpublished decision in Case No. 40438-2-III on April 17, 2025 (see Appendix A), affirming the summary dismissal with prejudice by the Superior Court of Douglas County ("Trial Court").

II. ISSUES PRESENTED FOR REVIEW

(1) Whether dismissing Petitioners' cases after Respondent received timely statutory pre-suit notices of their claims against Respondent and the Complaint was timely, but accidently, served on the Respondent's Board of County

Commissioners rather than the Respondent's Auditor's Office (2) whether Respondent's behavior was inconsistent with the assertion of the defense of insufficient service of process and (3) whether such dismissal violates the purpose of Washington's Law Against Discrimination which "shall" be strictly construed to accomplish the anti-discriminatory purpose of the law.

III. ARGUMENT

The stirring purpose of WALD prohibits the practices of discrimination against any inhabitants of Washington State and finds that discrimination threatens not only the rights and proper privileges of the State's inhabitants but menaces the institutions and foundations of a free democratic state. RCW 49.60.010.

WALD "**shall be construed liberally for the accomplishments of the purposes thereof**." RCW 49.60.020 (Emphasis added).

Petitioners timely served the statutory Notice of Claim on Defendant Chelan County providing pre-suit notice of the claims of the Petitioners and timely filed and then served the Complaints

on Chelan County before the expiration of the statute of limitations, but via a clerical error, served the Complaints on the Chelan County Board of Commissioners rather than the Chelan County Auditor.

Thus, Chelan County had more than ample timely notice of the substance and basis for the Petitioners' claims regarding their allegations regarding their claims of Chelan County's violations of Washington's Law Against Discrimination and Chelan County has not in anyway, been prejudiced by the timely, but inadvertent service on the Board of County Commissioners as opposed to the Chelan County Auditor's Office.

Summary dismissal of the Petitioners' claims based on the technical basis that the Complaint was accidently served on the Board of County Commissioners as opposed to the Auditor's Office violates both the purpose of Washington's Law Against Discrimination and the statutory basis that the Law of Discrimination "shall" be strictly construed to accomplish the anti-discriminatory purpose of the law.

To the extent Chelan County could establish some prejudice as a result of the timely but accidental service on the wrong officials at Chelan County, Chelan County waived the claim of insufficient service of process, had more than timely notice of all claims asserted and the Order Granting for Summary Judgment should be reversed in that the dismissal violates the stirring purpose of the law against discrimination stated in RCW 49.60.010 and its mandate requiring "liberal" construction for the accomplishments of its purposes pursuant to RCW 49.60.020.

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 Cnty.,* 146 Wn. 2d 420, 426, 47 P.3d 563, 566 (2002)(Emphasis added).

"The doctrine of waiver is sensible and consistent with ... our modern-day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every

action.' *King v. Snohomish Cnty.,* 146 Wn.2d 420, 424, 47 P.3d 563, 565 (2002); quoting CR 1(1) and *Lybbert v. Grant Cnty*., 141 Wn.2d 29, 39, 1 P.3d 1124, 1129 (2000).

The policy reasons underlying the waiver doctrine does not allow a Respondent to preserve any and all defenses by merely citing an exhaustive list of potential defenses in a Notice of Appearance or Answer, to do so would not "… foster the just, speedy, and inexpensive resolution of an action that we called for in *Lybbert." King v. Snohomish Cnty.,* 146 Wn. 2d 420, 426, 47 P.3d 563, 566 (2002).

The factual background below is taken from the Declarations of Petitioners' counsel Paul Kube and Petitioners' Paralegal Lisa Russell. (CP 105-112 and CP 80-87)

A Tort claim package was mailed to the Chelan County Auditor's Office for Plaintiff Larsen on 02/16/23 and for Plaintiff Hallman on 03/03/23. (CP 105-112 and CP 80-87)

Plaintiff Larsen filed her individual suit on 04/12/23, with the potential statute of limitations tolling on 04/20/23; 8 days

prior to the statute of limitations. Paralegal Lisa Russell of Plaintiff's counsel's law office requested that the process server serve the filed lawsuit on Chelan County (Board of) Commissioners at the address of 400 Douglas Street #201, Wenatchee, WA 98801, which was the County address listed in both the 07/06/22 email and letter from Chelan County and in the 08/24/22 letter from the Chelan County. (CP 80-87 and CP 88-91)

Plaintiff Larsen's individual suit was personally served upon the Board of Commissioners for Chelan County on 04/20/23 at the address of the Chelan County as stated on CP 88-90 and CP 91.

Between 04/20/23 and 05/11/23 Respondent's known counsel, Robert Sealby, did not file an Answer or Notice of Appearance in Plaintiff Larsen's individual case and our office did not receive any notice from Respondent regarding insufficient service in response to Larsen's individual suit that was served on 04/20/23. (CP 105-112 and CP 80-87)

Petitioners then amended the Summons and Complaint to include Plaintiff Hallman which was filed on 05/11/23, the "current lawsuit." That suit was filed about seven (7) months and twenty (20) days prior to the expiration of the statute of limitations applicable to Plaintiff Hallman. Paralegal Lisa Russell initiated process service on that same day, 05/11/23, following the same procedure for service with the process server at the address provided on CP 88-92. The current lawsuit was personally served upon the Board of Commissioners for Chelan County on 05/11/23. (CP 105-112 and CP 80-87)

Between 05/11/23 and 01/29/24 (approximately six (6) months) Petitioners' counsel's office did not receive any notice from Respondent regarding insufficient service, or any other communications. (CP 105-112, CP 80-87 and CP 93-94)

Respondent's current counsel, Kirk Ehlis, substituted for Robert Sealby as Respondent's counsel on 07/21/23. (CP 105-112 and CP 80-87)

Respondent's Answer was received by Petitioner's counsel's office on 08/28/23, over 90 days following the filing of the Amended Complaint, which Answer included standard boilerplate language typical in early pleadings which did include an affirmative defense regarding service. (CP 105-112 and CP 80-87)

Other than the boilerplate language of the Answer, Petitioners did not receive any notice from Respondent regarding insufficient service or any other substantive communications from Respondent's counsel between 08/28/23 and 10/26/23. (CP 105-112 and CP 80-87)

Plaintiff's counsel's office sent 1st discovery propounded to Respondent on 10/26/23. (CP 105-112 and CP 80-87 and CP 93-94)

On 01/29/24, Paul Kube emailed Kirk Ehlis to discuss the Respondent's overdue responses to 1st interrogatories (which were about 2 months overdue at that point). (CP 113-114)

Kirk Ehlis replied to Paul Kube via email on 01/30/24 stating he had forwarded the discovery to the County and they then just fell off of his radar screen. (CP 113-114)

Mr. Kube replied to Mr. Ehlis on 02/07/24 stating he would call Mr. Ehlis on Friday (02/09/24) and Mr. Ehlis replied on 02/07/24 that he was unavailable that day, and that he was meeting with Chelan County folks the next day (02/08/24) to work on the discovery with hopes to have responses to Mr. Kube within the next couple of weeks. Mr. Ehlis also stated he didn't think a CR 26(i) was necessary. Mr. Kube responded in agreement that a CR 26(i) was not needed in light of the update provided by Mr. Ehlis on 02/07/24 (about 3.5 months after 1st discovery was propounded). (CP 115-119)

Petitioners sent 2nd discovery propounded to Respondent on 02/13/24 and Mr. Ehlis acknowledged receipt of same on 02/16/24. (CP 103-104)

The 2nd discovery propounded was standard including requests for all supportive information of Respondent's Denials

and Affirmative Defenses. After serving this 2nd discovery on 02/13/24, Plaintiff then on 02/22/24 finally received responses to 1st discovery signed on 02/20/24 by Mr. Ehlis (signed 7 days after the 2nd discovery was sent to Respondent). Respondent held discovery responses until after the Statute of Limitations had tolled for Ms. Hallman's claims. (CP 105-112 and CP 80-87)

On 03/13/24, Mr. Kube emailed Mr. Ehlis regarding review of Respondent's responses to 1st discovery and requested some information be supplemented. Mr. Kube also requested depositions of Respondent representatives. (CP 121-123)

Also on 03/13/24, Paul Kube emailed Mr. Ehlis under ER 408 asking if Respondents were interested in early mediation. (CP 120)

The next day, 03/14/24, Mr. Ehlis thanked Mr. Kube and indicated that Mr. Ehlis would discuss mediation with his clients. (CP 120)

Mr. Ehlis replied on 03/15/24 stating he was checking on supplementing the discovery with the County, stating "…No

need to schedule a CR 26(i) or Motion to Compel. We will get you what we have and can find and let you know what we don't have and why. **I want to be totally transparent on that**." (CP 121-123) (Emphasis added)

Mr. Ehlis also stated in his 03/15/24 email, "…On the deposition front when were you thinking you wanted to conduct those? Get me some proposed dates and I will check my calendar and work with the County to determine availability of witnesses…" (CP 121-123.)

On 03/15/24, the same day, Paralegal Lisa Russell replied to Mr. Ehlis's date inquiry and provided Mr. Kube's availability for depositions. (CP 95-97)

On 04/01/24 Paralegal Lisa Russell emailed Mr. Ehlis following up on the dates previously provided to him on 03/15/24, in addition to following up on Respondent's overdue discovery responses and regarding mediation, referenced as previously discussed with Mr. Kube (CP 93-94)

Paul Kube testified in his Declaration that never, at any time, did he have any thought that this lawsuit was not properly served, especially in light of the parties' discussions regarding the potential of early mediation and related deposition scheduling. (CP 105-112)

Paralegal Lisa Russell advised Paul Kube on 04/03/24 regarding Respondent's 04/02/24 Memorandum in Support of Summary Judgment which raised the service argument. At the direction of Paul Kube, Lisa Russell then promptly had the Amended Summons and Amended Complaint served upon the Chelan County Auditor's Office the same day (04/03/24) and routed the conformed copy of the Declaration of Service to Respondent's counsel the next morning. (CP 105-112 and CP 80-87)

Then on 04/03/24, the day after sending the unilaterally scheduled summary judgment hearing notice and related pleadings to Plaintiff's counsel's office, Plaintiff's counsel received an email from Mr. Ehlis's office which attached

Respondent's responses to 2nd discovery, wherein Respondent responds by informing of the basis for the claim that service upon Respondent was insufficient. (CP 105-112 and CP 80-87)

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 Cnty.,* 146 Wn. 2d 420, 426, 47 P.3d 563, 566 (2002).

"The doctrine of waiver is sensible and consistent with ... our modern-day procedural rules, which exist to foster and promote 'the just, speedy, and inexpensive determination of every action.' *King v. Snohomish Cnty.,* 146 Wn.2d 420, 424, 47 P.3d 563, 565 (2002); quoting CR 1(1) and *Lybbert v. Grant Cnty*., 141 Wn.2d 29, 39, 1 P.3d 1124, 1129 (2000).

The policy reasons underlying the waiver doctrine does not allow a Respondent to preserve any and all defenses by merely citing an exhaustive list of potential defenses in a Notice of Appearance or Answer, to do so would not "… foster the just,

speedy, and inexpensive resolution of an action that we called for in *Lybbert." King v. Snohomish Cnty.,* 146 Wn. 2d 420, 426, 47 P.3d 563, 566 (2002).

"Prior to 2000, a defendant who asserted a timely objection to personal jurisdiction pursuant to CR 12 was permitted to engage in discovery and other pretrial proceedings without waiving the objection." 15A Wash. Prac., Handbook Civil Procedure § 10.21 (2024 ed.)

"Thus, the defendant was permitted to file the actual motion to dismiss later, any time prior to trial." *Clark v. Falling*, 92 Wash. App. 805, 965 P.2d 644 (Div. 1 1998); *Davidheiser v. Pierce County*, 92 Wn. App. 146, 960 P.2d 998 (Div. 2 1998); 15A Wash. Prac., Handbook Civil Procedure § 10.21 (2024 ed.)

"In 2000, however, the Supreme Court held that a defendant waived any objection to service of process by engaging in discovery and settlement negotiations, where, according to the court, (1) the facts surrounding service of process were not in dispute; (2) the process server's affidavit,

filed with the court, immediately showed that service was insufficient; (3) the defendant nevertheless engaged in discovery and other discussions regarding the merits of the case, not the potential defense of insufficient service; and (4) the defendant failed to provide a timely response to Petitioners' interrogatory, asking whether the county intended to rely upon a defense of insufficient service. *Lybbert v. Grant County, State of Wash.*, 141 Wash. 2d 29, 1 P.3d 1124 (2000) (one justice concurred with result only; two dissents)." 15A Wash. Prac., Handbook Civil Procedure § 10.21 (2024 ed.)

Waiver of the affirmative defense of insufficient service of process can occur in primarily two ways *Blankenship v. Kaldor,* 114 Wn. App. 312, 318, 57 P.3d 295, 298 (2002), as amended (Nov. 12, 2002); *Lybbert v. Grant Cnty.*, 141 Wash. 2d 29, 38, 1 P.3d 1124, 1129 (2000).

The first way is through the defendant's behavior that is inconsistent with the assertion of the defense *Gross v. Sunding,* 139 Wn. App. 54, 62, 161 P.3d 380, 384 (2007).

The second way is when the defendant or their counsel has been slow, or dilatory, in asserting the defense *Blankenship v. Kaldor,* 114 Wash. App. 312, 318, 57 P.3d 295, 298 (2002), as amended (Nov. 12, 2002), *Gross v. Sunding,* 139 Wash. App. 54, 62, 161 P.3d 380, 384 (2007).

Like *King,* Respondent Chelan County did file an Answer asserting among others, the affirmative defense of insufficient service of process. Again, this was provided more than 90 days after the filing of the Amended Complaint. Also, like *King*, the court stated in *Lybbert*, "of particular significance is the fact that the Lybberts served the County with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process." *King v. Snohomish Cnty*., 146 Wn. 2d 420, 425–26, 47 P.3d 563, 566 (2002); *Lybbert,* at 42, 1 P.3d 1124.

The County in *Lybbert* did not answer the interrogatories and the court found that failure to do so until after the statute of limitations had run waived the defense. *Lybbert,* at 45, 1 P.3d

1124 *King v. Snohomish Cnty*., 146 Wn. 2d 420, 426, 47 P.3d 563, 566 (2002).

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 Cty.,* 146 Wn.2d 420, 424, 47 P.3d 563 (2002(Emphasis added). In discussing a case involving service of process, our Supreme Court noted, "[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." *Lybbert v. Grant Cty.*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000).

Defense counsel's repeated requests for additional time to opposing counsel is completely inconsistent with the later claim that the court had no jurisdiction as a result of an affirmative defense asserting insufficient service, thus such affirmative

defense may be waived. *Raymond v. Fleming*, 24 Wash. App. 112, 115, 600 P.2d 614, 616 (1979).

In *Lybbert v. Grant County*, the Court stated:

> If litigants are at liberty to act in an **inconsistent fashion or employ delaying tactics,** the purpose behind the procedural rules may be compromised. We note, also, that the common law doctrine of waiver enjoys a healthy existence in courts throughout the country, with numerous federal and state courts having embraced it.

Lybbert v. Grant Cnty., 141 Wn. 2d 29, 39, 1 P.3d 1124, 1129–30 (2000)(Emphasis added).

In *Blankenship* the Court stated:

> In *Romjue,* defendants' discovery efforts in Romjue were inconsistent with an insufficient service of process defense because it was not geared toward revealing facts relating to the service of process. We held that the defendant waived the defense of insufficient service. *Romjue*, 60 Wash.App. at 282, 803 P.2d 57. Our Supreme Court rendered the same holding in *Lybbert,* based on similar facts. Lybbert, 141 Wash.2d at 45, 1 P.3d 1124.

Blankenship v. Kaldor, 114 Wash. App. 312, 319, 57 P.3d 295, 299 (2002), as amended (Nov. 12, 2002)(Emphasis added).

As discussed above, in *Lybbert*, our Supreme Court noted, "[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." *Lybbert v. Grant Cty.*, 141 Wn.2d 29, 40, 1 P.3d 1124 (2000). Further, a defendant cannot misdirect the plaintiff away from a defense for tactical advantage." *King v. Snohomish Cty.,* 146 Wn.2d 420, 424, 47 P.3d 563 (2002)..

Like, *Lybbert* Chelan County is not at liberty to act in an inconsistent fashion or employ delaying tactics, because the purpose behind the procedural rules would be compromised. *See, Lybbert v. Grant Cnty.*, 141 Wn. 2d 29, 39, 1 P.3d 1124, 1129–30 (2000)(Emphasis added).

Again, doctrine of waiver is to prevent the very thing Chelan County did, 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 Cty.,* 146 Wn.2d 420, 424, 47 P.3d 563 (2002).

IV. ATTORNEYS' FEES AND EXPENSES.

Pursuant to RAP 18.1, Petitioners will request attorneys' fees and expenses including those in this appeal.

V. CONCLUSION

For the reasons discussed above, this Court should grant discretionary review in this matter.

I certify the number of words contained in this document is 3,070.

s/Paul S. Kube
WSBA #24336
Lacy Kane & Kube, P.S.
300 Eastmont Avenue
East Wenatchee, WA 98802
Telephone: 509-884-9541
Fax: 509-884-4805
Email: paul@lacykane.com

CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of May 2025, I caused to be served via e-service a true and correct copy of ***Appellants' Petition for Discretionary Review*** to:

Kirk A. Ehlis
Menke Jackson Beyer, LLP
807 North 39th Avenue
Yakima, WA 98902

s/Paul S. Kube
WSBA #24336
Lacy Kane & Kube, P.S.
300 Eastmont Avenue
East Wenatchee, WA 98802
Telephone: 509-884-9541
Fax: 509-884-4805
Email: paul@lacykane.com

FILED
APRIL 17, 2025
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

KIRSTEN L. LARSEN, and MARIA DE LOS ANGELES HALLMAN, Appellants, v. CHELAN COUNTY, a municipal entity existing under the laws of Washington State, Respondent.	)	No. 40438-2-III UNPUBLISHED OPINION

COONEY, J. — Kirsten Larsen and Maria Hallman[1] appeal the summary judgment dismissal of their claims against Chelan County (County). Their claims stem from the termination of their employment with the County. The County responds that the Plaintiffs' claims were properly dismissed because it did not waive its defense of improper service of process, and it was not properly served before the statute of limitations expired. We agree with the County and affirm.

[1] Ms. Larsen and Ms. Hallman are referred to collectively as "Plaintiffs."

APPENDIX A

BACKGROUND

In April 2020, Ms. Larsen's position with the County was eliminated due to restructuring in her department. Later, on December 31, 2020, Ms. Hallman's employment with the County was also eliminated due to reorganization of the Douglas County Sheriff's Office. Ms. Larsen and Ms. Hallman retained an attorney to investigate potential wrongful termination claims against the County.

In June 2022, the Plaintiffs' attorney requested Ms. Larsen's personnel records from the County. Shortly thereafter, the County Administrator/Interim Human Resources Director (Administrator) with the Chelan County Board of County Commissioners (BOCC) responded to the records request via e-mail. The e-mail contained a letter from the Administrator, with the letterhead listing an address for the BOCC:

> COUNTY ADMINISTRATION BUILDING
> 400 DOUGLAS STREET #201
> WENATCHEE, WA 98801.

Clerk's Papers (CP) at 90. Plaintiffs' counsel made a second request for the Plaintiffs' personnel records in August 2022. The County again responded by e-mail with an attached letter referencing the same address.

On April 12, 2023, Ms. Larsen filed a lawsuit against the County, alleging, among other claims, that her termination was wrongful and in violation of the Washington Law Against Discrimination (WLAD). Ms. Larsen's summons and complaint were served on the BOCC at the address provided in the letters attached to the earlier e-mails from the

Administrator. On May 11, 2023, an amended complaint was filed, adding Ms. Hallman as a plaintiff. Ms. Hallman also alleged her termination was wrongful and in violation of the WLAD. The amended summons and complaint were served on the BOCC on May 11, 2023, at the same address as before. On August 28, 2023, the County filed its answer that asserted an affirmative defense for insufficient service of process.

On October 26, 2023, the Plaintiffs served the County with their first set of interrogatories and requests for production. This first set of discovery did not inquire into the County's affirmative defense of improper service of process. On January 29, 2024, Plaintiffs' counsel sent an e-mail to the County's attorney since the County had failed to respond to the discovery requests. Over the next two weeks, Plaintiffs' counsel and the County's attorney discussed when the County anticipated it would respond to discovery.

On February 13, 2024, the Plaintiffs served the County with a second set of interrogatories and requests for production, this time inquiring into the County's reliance on the affirmative defense of improper service of process. At this time, the statute of limitations had expired on both Ms. Larsen's and Ms. Hallman's claims. Shortly thereafter, the County sent the Plaintiffs' attorney its responses to their first discovery requests.

In mid-March 2024, Plaintiffs' counsel sent e-mails to the County to begin scheduling depositions and inquiring as to whether the County would be interested in

mediation. The County's attorney responded that he would discuss mediation with the County and asked Plaintiffs' counsel to propose dates for the depositions.

On April 3, 2024, the County e-mailed its answers to the Plaintiffs' second set of interrogatories and requests for production. In response to the Plaintiffs' inquiry about affirmative defenses, the County answered, "plaintiff has failed to perfect service upon [the County] in accordance with RCW 4.28.020." CP at 166. On April 8, 2024, the County filed a motion for summary judgment dismissal of the Plaintiffs' claims, contending the statute of limitations had expired prior to the County being properly served with the summons and complaint. The trial court granted the County's motion, concluding that the Plaintiffs had failed to properly serve the County prior to the expiration of the statute of limitations.

The Plaintiffs timely appeal.

ANALYSIS

The Plaintiffs argue the trial court erred in granting summary judgment in favor of the County because the County waived its defense of insufficient service of process when it engaged in certain pretrial conduct. The County responds that its pretrial conduct did not amount to a waiver of its affirmative defense of improper service of process. We agree with the County.

We review orders on summary judgment de novo. *Keck v. Collins*, 184 Wn.2d 358, 370, 357 P.3d 1080 (2015). Summary judgment is only appropriate if there are no

genuine issues of material fact, and "the moving party is entitled to judgment as a matter of law." *Id.*; CR 56(c). The moving party bears the initial burden of establishing that there are no disputed issues of material fact. *Young v. Key Pharms., Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). "A material fact is one upon which the outcome of the litigation depends in whole or in part." *Atherton Condo. Apartment-Owners Ass'n Bd. of Dirs. v. Blume Dev. Co.*, 115 Wn.2d 506, 516, 799 P.2d 250 (1990).

When considering a motion for summary judgment, evidence is considered in a light most favorable to the nonmoving party, here, the Plaintiffs. *Keck*, 184 Wn.2d at 370. If the moving party satisfies its burden, then the burden shifts to the nonmoving party to establish there is a genuine issue for the trier of fact. *Young*, 112 Wn.2d at 226. While questions of fact typically are left to the trial process, they may be treated as a matter of law if "reasonable minds could reach but one conclusion." *Hartley v. State*, 103 Wn.2d 768, 775, 698 P.2d 77 (1985).

A nonmoving party may not rely on speculation or having its own affidavits accepted at face value. *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 13, 721 P.2d 1 (1986). Instead, a nonmoving party must put "forth specific facts that sufficiently rebut the moving party's contentions and disclose that a genuine issue as to a material fact exists." *Id.*

In an action against any county of this state, "[t]he summons shall be served by delivering a copy thereof . . . to the county auditor." RCW 4.28.080(1).

The parties do not dispute that Ms. Larsen initially improperly served the BOCC, instead of the county auditor on April 20, 2023. They also do not dispute that this same error was made when the amended summons and complaint, adding Ms. Hallman as a plaintiff, was served on May 11, 2023. Because the statute of limitations had expired on April 3, 2024, before the County was properly served, the Plaintiffs would have to show the County waived its improper service of process defense to overcome summary judgment dismissal of their claims. The Plaintiffs fail to make this showing.

"Under the [waiver] doctrine, affirmative defenses such as insufficient service of process may, in certain circumstances, be considered to have been waived by a defendant as a matter of law." *Lybbert v. Grant County*, 141 Wn.2d 29, 38-39, 1 P.3d 1124 (2000). Waiver can occur in two ways: (1) "if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior," or (2) "if the defendant's counsel has been dilatory in asserting the defense." *Id.* at 39.

The Plaintiffs argue the County acted inconsistently with its assertion of the defense of insufficient service of process. However, there is nothing in the briefing or the record supporting this notion. The Plaintiffs' attempt to support their argument by pointing to the County's pretrial behavior, namely, their responses to two discovery requests, discussions involving potential mediation, and communications regarding the scheduling of depositions. Nonetheless, this argument quickly fails in light of *Lybbert*.

In *Lybbert*, the county was improperly served by the plaintiff, yet "[f]or the next nine months . . . acted as if it were preparing to litigate the merits of the case that the Lybberts were attempting to mount against it." 141 Wn.2d at 32. There, the county, without filing an answer or making any mention of an issue surrounding sufficiency of the service of process, (1) served the Lybberts with interrogatories, requests for production, and a request for a statement setting forth general and special damages, (2) retained counsel from an outside law firm, (3) and engaged in conversations about insurance coverage and mediation *Id.* at 42. Significantly, the Lybberts "served the [c]ounty with interrogatories that were designed to ascertain whether the defendant was going to rely on the defense of insufficient service of process." *Id.* "The [c]ounty did not answer the interrogatories but instead waited until after the statute of limitations expired to file its answer and for the first time assert the defense." *Id.* The Supreme Court held that the county waived its improper service defense by engaging in this behavior, reinforcing that a defendant cannot "lie in wait, engage in discovery unrelated to the defense, and thereafter assert the defense after the clock has run on the plaintiff's cause of action." *Id.* at 45.

The facts here are distinguishable from *Lybbert*. First, the County filed its answer asserting the affirmative defense of insufficient service of process on August 28, 2023, well before the expiration of the statute of limitations and two months *before* the Plaintiffs served their first set of interrogatories. Second, the Plaintiffs' first set of

interrogatories did not inquire about the County's reliance on the insufficient service of process defense. It was not until the Plaintiffs' second set of interrogatories, served after the statute of limitations had expired, that they inquired into the County's affirmative defenses. Finally, unlike the defendant in *Lybbert*, here the County never served the Plaintiffs with discovery requests or acted as if it were preparing to litigate the merits of the case. Based on the record before us, the County did not act inconsistently with its defense nor did it "lie in wait" until the statute of limitations expired. *Id.* at 45.

The County did not waive its affirmative defense of insufficient service of process.

Although not explicitly stated, the Plaintiffs seem to argue that their claims should not be barred because the County had notice of the lawsuit and barring their claims would undermine the purpose and language of the WLAD. The County responds that the Plaintiffs' claims are barred because they failed to properly serve the auditor pursuant to RCW 4.28.080(1) within the statutory period. We agree with the County.

Claims under the WLAD must be brought within three years "under the general three year statute of limitations for personal injury actions." *Antonius v. King County*, 153 Wn.2d 256, 261-62, 103 P.3d 729 (2004).

The parties do not dispute that Ms. Hallman's WLAD claims expired on December 31, 2023, and they generally agree that Ms. Larsen's claims expired sometime between April 20 and May 5, 2023. Thus, Ms. Larsen and Ms. Hallman were required to bring their claims on or before these respective dates.

To toll any statute of limitations, "an action shall be deemed commenced when the complaint is filed or summons is served, whichever occurs first." RCW 4.16.170. If the plaintiff files the complaint before serving the defendant, then the plaintiff has 90 days to personally serve the defendant. *Id.* If the plaintiff fails to serve the defendant after 90 days following the filing, "the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations." *Id.*

Here, the action was never commenced because the Plaintiffs failed to properly serve the County before the statute of limitations expired on their respective claims. Ms. Larsen filed her WLAD claims on April 12, 2023, and Ms. Hallman filed her claim via amended complaint on May 11, 2023. However, after filing, the Plaintiffs failed to serve the county auditor within 90 days, as required by statute. *See* RCW 4.28.080(1). Instead, they served the BOCC twice, and failed to perfect service until April 4, 2024, after the statute of limitations tolling period on both their claims had expired.

The Plaintiffs maintain that the County had adequate notice of the lawsuit through service upon the BOCC. However, "actual notice, standing alone, is insufficient to bring [a municipality] within the court's jurisdiction." *Meadowdale Neighborhood Comm. v. City of Edmonds*, 27 Wn. App. 261, 268, 616 P.2d 1257 (1980). The County's notice of the lawsuit did not toll the statute of limitation period.

Finally, the Plaintiffs' argue that their WLAD claims justify overriding the statutory service requirements in RCW 4.28.080(1). Despite the noble purpose and

language in the WLAD to prevent discrimination and for it to be "construed liberally" to accomplish this objective, "[t]he general rule is that *strict compliance* is required with statutes naming particular persons upon whom service of process is to be made in actions against municipalities." *Meadowdale*, 27 Wn. App. at 265 (emphasis added); RCW 49.60.020. Accordingly, the Plaintiffs' failure to timely serve the county auditor is dispositive.

The Plaintiffs' claims are barred by the statute of limitations. We affirm the trial court's summary judgment dismissal of the Plaintiffs' claims.

The Plaintiffs request their attorney fees pursuant to RAP 18.1, RCW 49.48.030, and RCW 49.60.030(2). Because the Plaintiffs have not prevailed in this appeal, they are not entitled to an award of attorney fees.

Affirmed.

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.

Cooney, J.

WE CONCUR:

Fearing, J.

Murphy, M.

LACY KANE & KUBE, P.S.

May 06, 2025 - 11:22 AM

Transmittal Information

Filed with Court:	Court of Appeals Division III
Appellate Court Case Number:	40438-2
Appellate Court Case Title:	Kirsten L. Larsen, et al v. Chelan County
Superior Court Case Number:	23-2-00125-4

The following documents have been uploaded:

- 404382_Petition_for_Review_20250506104127D3463278_9935.pdf
  This File Contains:
  Petition for Review
  The Original File Name was SIGNED Appellants Petition for Discretionary Review with Appendix.pdf

A copy of the uploaded files will be sent to:

- janet@mjbe.com
- kehlis@mjbe.com

Comments:

Sender Name: Lisa Russell - Email: lisa@lacykane.com
Filing on Behalf of: Paul S Kube - Email: paul@lacykane.com (Alternate Email: lisa@lacykane.com)

Address:
300 Eastmont Ave.
East Wenatchee, WA, 98802
Phone: (509) 884-9541

Note: The Filing Id is 20250506104127D3463278