

71340-0

71340-0

NO. 71340-0

COURT OF APPEALS STATE OF WASHINGTON
DIVISION I

KAY B. KAYONGO,

Appellant.

v.

WESTFIELD, LLC,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

Respondent/defendant Westfield, LLC was the owner and manager of Southcenter Mall in Tukwila, Washington. On November 25, 2013, Judge William Downing of the King County Superior Court granted summary judgment to Westfield, dismissing all claims of the plaintiff/appellant Kay B. Kayongo regarding alleged injuries sustained on June 15, 2010, when she allegedly contracted contact dermatitis from using paper towels in the public restroom at Southcenter Mall. Judge Downing granted summary judgment because, first, Ms. Kayongo failed to perfect service of process within the three year statute of limitation. Second, even if she had completed service, Ms. Kayongo brought the lawsuit as a product liability action when Westfield was undisputedly not the manufacturer, distributor or retailer of the paper towels. Third, even if Ms. Kayongo had properly designated the cause of action as a premises liability suit, her claim still fails because she presents no evidence that Westfield knew or should have known that the paper towels, supplied by a janitorial service, were somehow defective.

II. ISSUES PRESENTED

Westfield disagrees with the assignment of errors set forth in Appellant's Amended Opening Brief. Respondent submits that no errors

occurred in the trial court's ruling, and asks that this court consider the following issues raised by the appeal:

A. Whether service is proper by leaving the summons and complaint with a receptionist rather than a secretary of a managing agent?

B. Whether the Statute of Limitations bars appellant's law suit?

C. Whether Westfield manufactured the paper towels that injured appellant as alleged in the complaint?

D. Whether Westfield supplied the paper towels that allegedly injured plaintiff?

E. Whether appellant established that Westfield was on notice that the paper towels were defective?

F. Whether this court should grant Westfield its fees and costs pursuant to RAP 18.9(a) for responding to a frivolous appeal?

III. STATEMENT OF THE CASE

A. Appellant failed to properly serve Westfield

Appellant/Plaintiff Kay B. Kayongo ("Ms. Kayongo"), acting *pro se*, complains that she contracted contact dermatitis from paper towels used in the public restrooms of the Southcenter Mall in Tukwila, Washington on June 15, 2010. CP 328-329. In her Complaint for Damages Based on Product Liability, she alleges that Westfield was

responsible for the manufacture of the paper towels and claimed \$20,000,000.00 in damages. CP 343. But she asserts only a single injury-related doctor's visit following the incident. CP 85.

At no point did Ms. Kayongo properly serve an authorized agent for Westfield. She filed an Affidavit of Personal Service in this case from a Walo Okako. CP 347. And the affidavit of service reports that the summons and complaint were left at the offices of Westfield, LLC on May 29, 2013. It states in relevant part:

On 5-29-2013, I served a true copy of summons and complaint to the defendant Westfield, LLC, received by defendant's secretary at 633 Southcenter #2800, Tukwila WA 98188.

Id. Ms. Kayongo then filed the subject lawsuit with the King County Superior Court on June 28, 2013. CP 347.

However, Ms. Kayongo left the summons and complaint with receptionist Christina Samples. CP 353-54. As set forth in her declaration, Ms. Samples is a receptionist, responsible for answering telephones, and sorting mail addressed to 11 different employees of the management office at the Southcenter Mall. *Id.* Ms. Samples is not an authorized agent for service nor is she a secretary to the manager of Westfield, LLC. *Id.*

Defendant Westfield, LLC is a Delaware Corporation. CP 407. As set forth in the Declaration of Regional Manager Andrew Ciarrocchi, Westfield, LLC has formed and managed Westfield holdings throughout the United States. It had responsibilities at Southcenter Mall until June 1, 2009, when that role was taken over by owner and manager, WEA Southcenter. *Id.* ¶ 2. Westfield’s appointed agent for service is CT Corporation in Olympia, Washington. CP 325, 410.

B. Appellant failed to establish that Westfield knew or should have known that paper towels placed in Mall bathrooms were defective.

Neither Westfield, LLC nor WEA Southcenter manufactured the paper towels from which plaintiff claims to have contracted contact dermatitis. CP 498. Neither Westfield nor WEA Southcenter purchased, supplied, or distributed the paper towels in the Southcenter Mall restrooms. That task was performed by an independent contractor, National Janitorial Services, Inc. *Id.* ¶ 5. Moreover, there is no evidence that Westfield knew or should have known that the paper towels were somehow defective and could cause contact dermatitis. *Id.* ¶ 6.

C. Judge William Downing of the King County Superior Court granted summary judgment.

Judge William Downing granted respondent Westfield summary judgment, entering an “Order Granting Summary Judgment to Defendant

Westfield, LLC.” CP 429-430. In granting summary judgment, Judge

Downing wrote:

This order is based on both of the grounds presented, i.e., (1) The plaintiff failed to accomplish timely and effective service on the defendant and the Statute of Limitations has run; and (2) Even if jurisdiction over this defendant was established, no evidence has been presented tending to prove essential elements of a product liability or premises liability claim against this defendant.

CP 430.

Ms. Kayongo originally filed a motion for reconsideration with the trial court which was denied. CP 243. She also filed an appeal both to the Washington Supreme Court and now to Division I of the Court of Appeals. Respondent filed her Opening Brief of Pro Se Appellant before this court on November 4, 2014 but was ordered to resubmit that brief to conform to appellate court rules. Plaintiff served an Amended Opening Brief of Appellant on November 14, 2014. This court has ordered that Westfield file a response brief by December 29, 2014.

IV. SUMMARY OF THE ARGUMENT

This court should affirm the trial court’s order granting summary judgment. The trial court’s order is clearly supported by undisputed facts and involves well settled principles of law. The record establishes that plaintiff/appellant Kay B. Kayongo failed to complete service of process under RCW 4.28.080(10). Ms. Kayongo alleges that she was injured on

June 15, 2010 when she contracted dermatitis from paper towels provided in the public restroom at Southcenter Mall. The applicable three-year statute of limitations under RCW 4.16.080(2) therefore barred the action as of June 15, 2013. Moreover, defendant Westfield, LLC has no liability as a matter of law under the products liability theory pleaded by Ms. Kayongo. Westfield did not manufacture, retail, or distribute the paper towels used in the Southcenter Mall restrooms. The paper towels were in fact purchased by the janitorial contractor, NJSI. Even if the court considers the claim under premises liability law, there is no evidence that Westfield was on notice that the paper towels were somehow defective.

Finally, Westfield respectfully asserts that Ms. Kayongo's appeal is so utterly devoid of merit as to be frivolous. This court should consider the record and conclude that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. Moreover, Ms. Kayongo insists on haphazardly and aggressively asserting this matter to the courts: King County Superior Court, Division I and the Washington State Supreme Court. She has been unwilling to acknowledge that her case is meritless, but, as shown in the record of this case, simply losing in court has not and will not deter future litigation. With this in mind, Westfield seeks an award of reasonable attorney fees and costs in the appeal

V. ARGUMENT

A. **The issues on review are controlled by well settled law: Plaintiff failed to effect service under RCW 4.28.080.**

Respondent Westfield submits its motion for summary judgment for consideration by the Court of Appeals. CP 314. As in the trial court, Westfield relies on RCW 4.28.080(10) which states in relevant part: “the summons shall be served by delivering a copy thereof, as follows: (10) If the suit be against a foreign corporation...to any agent, cashier or secretary thereof.” RCW 4.28.080(10). Appellant left the summons and complaint with a receptionist whose duties did not include receiving service of process. CP 353-54.

Washington state courts have held that service on a receptionist for a corporation is ineffective. See *Lockhardt v. Burlington Northern Railroad Co.*, 50 Wn. App. 809, 750 P.2d 1299 (1988) (purported service of process on receptionist for railroad was ineffective and did not commence action so as to toll limitations period, where it was uncontradicted that receptionist had no authority to accept service and had never done so).

Furthermore, even if the summons and complaint eventually notified the corporation of this lawsuit, such actual notice does not relegate the requirements of RCW 4.28.080. For a court to finally adjudicate a dispute, statutory service requirements must be complied with

beyond due process requirements. *Weiss v. Glemp*, 127 Wn.2d 726, 734, 903 P.2d 1110 (1972); *Thayer v. Edmonds*, 8 Wn. App. 36, 40, 503 P.2d 1110 (1972). It is irrelevant that plaintiff's service was constitutionally adequate; the concern here is whether she complied with the requirements of RCW 4.28.080, which she has not.

B. Appellant's claim is barred by the statute of limitations.

The statute of limitation on a personal injury action is three (3) years from the date of the accident. RCW 4.16.080(2); *Nelson v. Schnautz*, 141 Wash. App. 466, 475, 170 P.3d 69, review denied 163 Wn.2d 1054, 187 P.3d 752 (2007). In her claim, Ms. Kayongo complains of sustaining her injury on June 15, 2010. CP 329.

A civil action is commenced by either filing a complaint with the court or by serving the summons and complaint on the defendant. CR 3(a). In either instance, if the plaintiff files with the court first, then the plaintiff must serve at least one named defendant within 90 days or the action is treated as if it was never commenced for purposes of the statute of limitation. RCW 4.16.170; *Banzeruk v. Estate of Howitz ex rel. Moody*, 132 Wash. App. 942, 945-46, 135 P.3d 512, review denied 159 Wash.2d 1016, 157 P.3d 403 (2007). A plaintiff only gets one 90-day tolling period. *Id.* When a plaintiff has filed first without serving, the 90-day rule pertains only to tolling the statute of limitations. The rule does not

establish a general requirement that service be accomplished within 90 days after filing in all cases. If filing and service are both accomplished within the time allowed by the statute of limitation, it is immaterial whether the plaintiff serves the defendant within 90 days after filing. *Hansen v. Watson*, 16 Wn. App. 891, 559 P.2d 1375 (1977).

Ms. Kayongo's complaint establishes the following timeline:

June 15, 2010: Plaintiff was allegedly injured when using paper towels in a bathroom at the Southcenter Mall. CP 328-29, ¶ 5.

May 29, 2013: According to the Affidavit of Walo Okako, he left a copy of the summons and complaint with "defendant's secretary at 633 Southcenter #2800, Tukwila, WA 98188. CP 347-48.

June 28, 2013: Plaintiff filed the Summons and Complaint with the King County Superior Court. CP 347.

Because more than three years have passed after the date of the accident before a personal injury action was commenced, any action against Westfield is barred by the statute of limitations. See, e.g., *Lockhart v. Burlington Northern R. Co.*, 50 Wash. App. 809, 811, 750 P.2d 1299, reconsideration denied, review denied (1988).

C. Even if service is deemed proper, Ms. Kayongo does not show that Westfield is a manufacturer, retailer, or supplier of the paper towels.

To sustain a cause of action in a product liability suit, a plaintiff must establish that the defendant manufactured, distributed, or sold the product alleged to have caused the injury. *Lockwood v. A C & S, Inc.*, 109 Wn.2d 235, 744 P.2d 685 (1987). In addition, the plaintiff “must establish a reasonable connection between the injury, the product causing the injury, and the manufacturer of that product.” *Id.* at 245. Plaintiff must also “identify the particular manufacturer of the product that caused the injury.” *Id.* (citing *Martin v. Abbott Labs.*, 102 Wn.2d 581, 590 (1984)).

Neither Westfield, LLC nor WEA Southcenter manufactured the paper towels of which plaintiff complains. As the Declaration of Andrew Ciarrocchi details, Southcenter Mall’s janitorial tasks are contracted to a national janitorial service, Nationwide Janitorial Services, Inc (“NJSI”). CP 408 ¶¶ 5-6. In fact, Westfield does not retail the paper towels or even supply them. The paper towels are for the use of mall patrons and are not a product sold by the mall. Westfield does not lend its name to the paper towels, or perform any act that could in any way give rise to liability under product liability law.

D. Ms. Kayongo also failed to establish the necessary elements of a premises liability claim.

While plaintiff mistakenly pleaded this case as a product liability claim, the proper theory is premises liability. But even if applied, summary judgment is warranted. Plaintiff cannot show that Westfield or its successor, WEA Southcenter, knew or should have known that the paper towels were unsuitable and created an unreasonable risk of danger. There is no other evidence that a patron was injured by the paper towels or for that matter, injured in any other respect.

In any negligence action, the plaintiff must prove duty, breach, harm, and proximate cause. *Ford v. Red Lion Inns*, 67 Wn. App. 766, 769, 840 P.2d 198 (1992). In actions involving premises liability, the plaintiff's status as an invitee, licensee, or trespasser determines the scope of the duty of care owed by the owner or occupier of the property. *Tincani v. Inland Empire Zoological Soc'y*, 124 Wn.2d 121, 127-28, 875 P.2d 621 (1994).

Washington has adopted the Restatement (Second) of Torts § 343 as the appropriate test for determining landowner liability to invitees. *Ford*, 67 Wn. App. at 770 (citing *Jarr v. Seeco Const. Co.*, 35 Wn. App. 324, 326, 666 P.2d 392 (1983)). The Restatement provides:

Dangerous Conditions Known to or Discoverable by Possessor.

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if he:

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

Restatement § 343.

Plaintiff cannot show multiple requirements under the Restatement in this case. First, the named defendant, Westfield, is not a possessor of the land at the time of the alleged injury in June of 2010. That entity was WEA Southcenter. CP 408. Second, there is no evidence that either Westfield, or its successor, WEA Southcenter, knew or in the exercise of care should have known that the paper towels were somehow hazardous, containing some chemical or other agent that would cause injury to plaintiff. The mall manager, Andrew Ciarrocchi, attests that there has been no previous complaint that the paper towels caused contact dermatitis or any other injury. CP 408, ¶ 6. To Westfield's knowledge, the paper towels were of a national brand supplied by NJSI in the exercise of its contractual duties. There is simply no evidence that NJSI would have

supplied a defective paper towel in the exercise of these duties, or, if it had, that Westfield would have known of that practice.

E. Ms. Kayongo’s appeal raises arguments not presented to the trial court.

RAP 2.5(a) provides that an appellate court may refuse to review any claim or error which was not raised in the trial court. RAP 2.5(a). A failure to preserve a claim or error by presenting it first to the trial court generally means the issue is waived. While an appellate court retains the discretion whether to consider an issue raised for the first time on appeal, such discretion is rarely exercised. *Karlberg v. Otten*, 167 Wn. App. 522, 531-32, 280 P.3d 1123 (2012), citing *Bellevue Sch. Dist. No. 405 v. Lee*, 70 Wn.2d 947, 950, 425 P.2d 902 (1967).

While Ms. Kayongo’s appeal appears intent on discrediting the record submitted by Westfield before the trial court, including the declarations of Christina Samples and Andrew Ciarrochi, Appellant Opening Br. p. 52, she gives no theory supported by the record that renders inadmissible the evidence proffered by Westfield. She uses terms like “fraud”, “concealment” and “misrepresentation” without pointing to facts in the record supporting any such allegations. Appellant Opening Br. pp 37-41. She also apparently argues that the court should consider NJSI an agent for Westfield. Appellant Opening Br. pp. 42-45. However,

Ms. Kayongo at no point raised this argument before the trial court. And in any case, Mr. Ciarrochhi's declaration establishing NJSI as an independent contractor is unrebutted. CP 408 ¶ 5; *Blodgett v. Olympic Sav. & Loan Ass'n*, 32 Wn. App 116, 128-29, 646 P.2d 139 (1982) (actions of an independent contractor are not imputed to a principal under an agency theory).

Ms. Kayongo's brief simply attempts to complicate what are in fact very straight forward questions. Ms. Kayongo served suit papers on a receptionist, not an agent of service recognized under Washington State law. She then alleged products liability when Westfield was not the manufacturer, supplier, or the retailer of the paper towels. Finally, even when invited to show liability under a premises liability theory, she can provide no evidence that Westfield was on notice that paper towels supplied by a janitorial contractor were defective.

F. Westfield should be awarded fees and costs under RAP 18.9(a).

RAP 18.9(a) provides that:

[T]he appellate court on its own initiative ... may order a party or counsel who uses these rules for the purpose of delay ... to pay terms or compensatory damages to any other party who has been harmed by the delay . . .

RAP 18.9(a) permits an appellate court to award a party its attorney fees as sanctions, terms, or compensatory damages when the

opposing party files a frivolous appellate action. An appeal is frivolous if the court is convinced, after considering the entire record, that the appeal presents no debatable issues upon which reasonable minds might differ, and that the appeal is so devoid of merit that there is no possibility of reversal. *Dutch Vill. Mall v. Pelletti*, 162 Wn. App. 531, 540, 256 P.3d 1251 (2011) review denied, 173 Wn.2d 1016, 272 P.3d 246 (2012) and cert. denied, 133 S. Ct. 339, 184 L. Ed. 2d 158 (2012).

Ms. Kayongo at the outset of this law suit sought \$20,000,000.00 in damages for contact dermatitis. Then, having failed to establish jurisdiction with the court or any grounds for recovery of even nominal damages, the trial court entered summary judgment against her. She then challenged that ruling by notice of reconsideration and then a notice to show cause in a separate department of the King County Superior Court. CP 267. At the same time, Ms. Kayongo filed a Notice of Appeal. CP 261. Ms. Kayongo's appeal is not only frivolous on the merits, but has been pursued in a haphazard and wasteful manner.

There are no debatable issues upon which reasonable minds might differ. The record clearly establishes that Ms. Kayongo attempted improper service of this case where a Westfield agent for service was a matter of public record. She then pleads the case as a products liability claim, where Westfield manages the mall, and had nothing to do with the

manufacture, distribution, or retail of paper towels. Finally, despite creating a voluminous record, Ms. Kayongo provides no facts that would rebut summary judgment on the merit—that Westfield had no notice that the paper towels in question were somehow defective. She simply reiterated that Westfield somehow has liability under a premises liability theory. However, saying so, even repeatedly, does not make it true.

VI. CONCLUSION

For the foregoing reasons, this Court should affirm the trial court's grant of summary judgment and award Westfield reasonable attorney fees and costs for a frivolous appeal. The issues of this case involved well settled legal principles and clearly established, undisputed facts. Appellant/plaintiff Kay Kayongo failed to properly serve Respondent Westfield, LLC, a Delaware corporation, under RCW 4.28.080(10). The court has never properly exercised jurisdiction over Westfield. Even if the court could exercise jurisdiction, Ms. Kayongo's claims are barred through the applicable statute of limitations, which runs three years after the June 15, 2010 incident. Ms. Kayongo failed to perfect service within 90 days of filing the present lawsuit.

Even if Ms. Kayongo did perfect adequate service of process, she has provided no evidence establishing a question of fact as to Westfield's liability. Westfield as an owner and manager of a mall, did not

manufacture the paper towels in use in its restrooms. Moreover, even if properly presented as a premises liability suit, plaintiff has provided no evidence that Westfield knew or should have known that the commercially provided paper towels were somehow defective, and would have caused plaintiff's alleged contact dermatitis.

The appellant's appeal being clearly without merit, respondent Westfield, LLC requests that this court affirm the trial court's grant of summary judgment and award reasonable attorney fees and costs for the appeal.

Respectfully submitted this 16 day of December, 2014.

By: 
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