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SEP 11 2015

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

**COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON**

Cause No: 329101

VICKI POSA, an individual,

*Plaintiff/Appellant*

v.

JOHN and LINDA ROBEL, and the marital community comprised  
thereof, d/b/a ROBEL'S ORCHARD, and JOHN DOES 1-4, and  
CORPORATION ABC,

*Defendants/Respondents*

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**REPLY BRIEF OF APPELLANT**

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## I. INTRODUCTION

Respondents John and Linda Robel d/b/a Robel's Orchard ("the Robels") concede Ms. Posa's Summons and Complaint were timely filed. They agree that, by virtue of that filing, the statute of limitations was tolled for 90 days to allow for service of process. In fact, they do not deny receiving the Summons and Complaint during the tolling period.<sup>1</sup> On appeal, the only issue addressed by the Robels is whether service of process by mail should have been permitted.

Ms. Posa made significant efforts to serve the Robels. She submitted substantial evidence establishing that the Robels evaded those attempts. Based upon that evidence, a court commissioner issued an *ex parte* order authorizing Ms. Posa to serve the Robels by mail. The Robels do not contend execution of the service by mail was deficient, but rather, that Ms. Posa should not have been granted permission to serve by mail.

The Robels offer no response to Ms. Posa's arguments and authorities concerning waiver of the defense of insufficient service of process. Finally, the Robels offer no authority supporting the trial court's order awarding attorney's fees and costs.

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<sup>1</sup> The Robels note that they argued the issue of whether alternative service was completed within the 90-day tolling period before the trial court, but appear to concede that service by mail was timely completed. *See, Respondents' Brief, pg. 6.*

## II. ARGUMENTS AND AUTHORITIES

Appellant re-states the following assignments of error:

- (1) The trial court erred in granting summary judgment to the Robels where service of process was effective and where Ms. Posa's lawsuit complied with the statute of limitations.
- (2) The trial court erred in determining that the defendants/respondents did not waive their argument of insufficiency of service of process.
- (3) The trial court erred in awarding attorney's fees and costs to the Robels.

The trial court's Order Granting Defendants' Motion for Summary Judgment should be reversed, the award of attorney's fees against Ms. Posa should be vacated, and this case should be remanded to Spokane County Superior Court for trial on the merits.

### **A. Ms. Posa Was Not Required to Attempt Service by Publication.**

The Robels repeatedly argue that Ms. Posa never attempted service by publication. *Appellant's Brief*, pgs. 6, 8, 9. However, the Robels cite no authority for the proposition that Ms. Posa was required to serve by publication prior to initiating service by mail. CR 4(d)(4) and RCW 4.28.100 permit service by mail where the trial court concludes that service

by mail is just as likely as publication to give notice to the defendants. Ms. Posa demonstrated those facts to the satisfaction of Commissioner Grovdahl, who issued a court order authorizing service by mail. *See*, CP 9, 10, 20-21, 25-27.

**B. Ms. Posa's Affidavits Were Sufficient to Permit Service by Mail.**

As set forth in Ms. Posa's opening brief, the requisite showing for service by mail is contained within RCW 4.28.100:

When the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff, his or her agent, or attorney, with the clerk of the court, stating that he or she believes that the defendant is not a resident of the state, or cannot be found therein, and that he or she has deposited a copy of the summons (substantially in the form prescribed in RCW 4.28.110) and complaint in the post office, directed to the defendant at his or her place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the service may be made by publication of the summons, by the plaintiff or his or her attorney in any of the following cases:

(2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his or her creditors, or to avoid the service of a summons, or keeps himself or herself concealed therein with like intent;

RCW 4.28.100. In sum, service may be completed by mail where the defendant could not be found within Washington after a diligent search, the

defendant was a resident of Washington and either left the state or concealed himself/herself within the state to avoid service of process. *Pascua v. Heil*, 126 Wash. App. 520, 526-27, 108 P.3d 1253, 1257 (2005).

Ms. Posa satisfied her burden under RCW 4.28.100(2). Ms. Posa's counsel arranged to have the Robels served at their property in Colbert, Washington. CP 20. Four initial attempts were made to serve the Robels at their registered place of business (according to the Washington State Department of Revenue Business Records Database). CP 26. All of the efforts were unsuccessful. The Robels knew a lawsuit was pending, as they had notified their insurer of the claim and the Summons and Complaint had been mailed to their insurer. CP 25-26; CP 159, 161.

Ms. Posa pointed out that process server Lynn Taylor waited hours outside of the Robels' residence and made multiple efforts to go to the door. CP 23-24. It appeared as though the Robels were inside, but refused to come to their door. *Id.* Again, they knew a claim was pending. Mr. Taylor talked to the Robels' neighbor, confirming Mr. Robel's physical appearance and the Robels' address. *Id.* After Mr. Taylor's first efforts, he returned to find a "no trespass" sign threatening to shoot trespassers. CP 23. Nevertheless, Mr. Taylor continued with his efforts. CP 23-24. Mr. Taylor called out to a man fitting Mr. Robel's description, and the man was close enough to hear. *Id.* Mr. Taylor believed the man to be Mr. Robel. *Id.* When Mr. Taylor

attempted to approach him, the man turned his car around and left the area. *Id.* Mr. Taylor posted the pleadings on the Robels' door. *Id. at 24.* Based upon these facts, it was Mr. Taylor's opinion the Robels were evading service. *Id.*

Two other process servers, Shannon Nelson and Joe Griffin made multiple unsuccessful attempts to serve the Robels. CP 32-33. Despite seeing Ms. Robel's vehicle parked in the driveway, honking the horn of their vehicle, and going to the door, the Robels would not exit their residence. *Id.* Again, copies of the pleadings were clipped to the Robels' fence. *Id.* When the process servers returned, it appeared the documents had been removed from the fence and thrown to the ground. *Id.*

The Robels cite language in *Kent v. Lee*, 52 Wash. App. 576, 579, 762 P.2d 24 (Div.2, 1988) regarding the sufficiency of facts supporting alternate service. Notably, in *Kent*, service was deemed deficient where the plaintiffs offered *no facts* concerning efforts to serve the defendant. Instead, the plaintiff, in the supporting affidavit, merely quoted the language of RCW 4.28.100:

5. Defendants DR. C.J. LEE and "JANE DOE" LEE, after diligent inquiry, to [*sic* ] include contacting the Medical Association, and checking telephone directories within the City of Tacoma, cannot be located....

6. Affiant, on information and belief, concludes that the Defendants can not be found in the County of Pierce, State of Washington, and that they have departed this state, or are concealing themselves therein, with intent to defraud creditors or avoid the service of process herein, and therefore prays for an order directing service of process by publication pursuant to Civil Procedure R.C.W. 4.28.100 upon Defendants DR. C.J. LEE and “JANE DOE” LEE, husband and wife.

*Id. at 577.*

The Court of Appeals found the affidavit was not sufficient to satisfy RCW 4.28.100 where there were no facts demonstrating plaintiffs were attempting to evade service and no description of efforts undertaken to serve the defendants, aside from a cursory search for their whereabouts. Moreover, in *Kent*, all efforts to serve the defendants were undertaken in Washington, despite that the defendants were residents of California.

The same is true of the *Bruff* case cited by the Robels. There, affidavits were deemed insufficient where they “recited only that an investigation revealed no trace of Main in the greater Seattle area and that Main's father did not know his whereabouts.” *Bruff v. Main*, 87 Wash. App. 609, 611, 943 P.2d 295 (1997). The court stated: “Such conclusory allegations, which did not identify the steps undertaken to serve Main personally, are insufficient to support service by publication.” *Id.*

Unlike the cases cited by the Robels, Ms. Posa pointed to clear actions taken in an effort to personally serve the Robels. Similarly, Ms. Posa provided evidence indicating the Robels were attempting to conceal themselves from service: Mr. Robel evading the process server, the Robels refusing to answer their door, the posting of a sign threatening to shoot trespassers after process servers attempted to serve the Robels<sup>2</sup> – all while the Robels knew of the pendency of litigation.

**C. RCW 4.28.100 Did Not Require Ms. Posa to Clearly Prove An Intent By the Robels to Evade Service.**

Finally, the Robels contend Ms. Posa failed to satisfy the “intent requirement” contained in RCW 4.84.100.<sup>3</sup> The Robels claim Ms. Posa was required to clearly prove the Robels’ actions were undertaken with the “requisite intent” to avoid service of process. On this point, the Robels rely exclusively on *Bruff, supra*. This Division, however, has rejected *Bruff* insofar as it could be read to suggest the proponent of service must “clearly prove” that the party challenging service intended to avoid service:

The parties argue over the standard of proof required by *Bruff*. Mr. Bisiar argues that the affidavit for

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<sup>2</sup> The Robels characterize the sign as a “joke.” However, the Court’s focus on an issue of evasion of service is the moving party’s submissions, not the explanation offered in response by the party allegedly evading service. *Boes v. Bisiar*, 122 Wash. App. 569, 578-579, 94 P.3d 975, 980 (2004); *Kent, supra*, 52 Wash. App. 578 FN 1.

<sup>3</sup> The Robels mistakenly cite to RCW 4.84.100 (costs on postponement of trial) as the statute giving rise to the alleged “intent requirement.” *Respondents’ Brief*. However, the content of *Bruff* makes it clear that the Robels intended to cite RCW 4.28.100 (service of summons by publication).

publication must set forth facts that “clearly suggest” intent to avoid service; he urges this showing has not been made here. Resp't's Br. at 20 (citing *Bruff*, 87 Wash. App. at 613, 943 P.2d 295). But it is the *affidavit* that must “ ‘clearly show [ ] all the conditions required.’ ” *Bruff*, 87 Wash. App. at 612, 943 P.2d 295 (emphasis added) (quoting *Jones v. Stebbins*, 122 Wash.2d 471, 482, 860 P.2d 1009 (1993)) (citing *Jesseph v. Carroll*, 126 Wash. 661, 666, 219 P. 429 (1923)). This relates to the sufficiency of the affidavit. Where a particular affidavit “clearly shows” that all statutory conditions are present for service by publication, the affidavit is sufficient. *Bruff*, 87 Wash. App. at 612, 943 P.2d 295; *Jones*, 122 Wash.2d at 482, 860 P.2d 1009; *Jesseph*, 126 Wash. at 666, 219 P. 429. The affidavit must *clearly articulate facts* to meet the required conditions, not *clearly prove intent* to avoid service. *Bruff*, 87 Wash. App. at 612, 943 P.2d 295; *Jones*, 122 Wash.2d at 482, 860 P.2d 1009; *Jesseph*, 126 Wash. at 666, 219 P. 429. Indeed, short of a full fact-finding hearing, a finding on what Mr. Bisiar knew or intended when he left the state is impossible. 15A Karl B. Tegland & Douglas J. Ende, *Washington Practice: Washington Handbook on Civil Procedure* § 16.3, at 158 (2004). And the statute does not require or even contemplate such a hearing. RCW 4.28.100(2).

*Boes v. Bisiar*, 122 Wash. App. 569, 577, 94 P.3d 975, 979-80 (Div.3, 2004).

**D. The Trial Court Erred in Determining the Robels Did Not Waive Their Insufficiency of Service of Process Defense.**

The Robels offer no response to Ms. Posa’s authorities on the issue of waiver. Ms. Posa cited ample authority for the proposition that waiver of the defense of insufficient service of process occurs when the defendant is

dilatory in asserting the defense. *See, Lybbert v. Grant Cnty., State of Wash.*, 141 Wash. 2d 29, 38-39, 1 P.3d 1124, 1129 (2000); *French v. Gabriel*, 116 Wash.2d 584, 806 P.2d 1234 (1991); *Romjue v. Fairchild*, 60 Wash. App. 278, 281, 803 P.2d 57, *review denied*, 116 Wash.2d 1026, 812 P.2d 102 (1991); *Raymond v. Fleming*, 24 Wash. App. 112, 115, 600 P.2d 614 (1979).

The Robels likewise do not take issue with the facts supporting waiver. The Robels fully engaged in the case, serving *two* sets of written discovery requests unrelated to the sufficiency of service of process defense (CP 41), scheduling depositions (CP 144), setting litigation deadlines, litigating discovery issues inclusive of oral argument (CP 53-54), and, ultimately, delaying raising the service of process for one year (CP 69-70; 144).

Even if service of process was insufficient, the trial court erred in finding that the Robels did not waive the defense.

**E. The Trial Court Erred in Awarding Attorney's Fees and Costs to the Robels.**

The Robels likewise offer no response to Ms. Posa's appeal of the trial court's award of attorney's fees and costs. (CP 136-137). Where there exists no statutory, contractual, equitable, or judicially recognized authority for an award of attorney's fees and costs, the trial court's determination must be reversed.

## V. CONCLUSION

The trial court's decisions concerning the Robels' Motion for Summary Judgment are erroneous and should be reversed. This case should be remanded for trial on the merits.

DATED this 11 day of September, 2015.

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By 

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 11 day of September, 2015, a true and correct copy of the foregoing *Reply Brief of Appellant*, was served upon the following parties and their counsel of record in the manner indicated below:

Andrew Borhnsen  
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Via Regular Mail	[ ]
Via Certified Mail	[ ]
Via Overnight Mail	[ ]
Via Facsimile	[ ]
Hand Delivered	<input checked="" type="checkbox"/>

Dated: 9/11/15

Monica Brennan  
MONICA BRENNAN