

**FILED**

APR 06 2018

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

COURT OF APPEALS,  
DIVISION III  
OF THE STATE OF WASHINGTON  
Cause No: 353940

WESTERN NATIONAL ASSURANCE COMPANY,

*Respondent*

v.

JOHN AND LINDA ROBEL, individually  
and as husband and wife; and ROBEL'S  
ORCHARD, a Washington Corporation  
and/or sole proprietorship owned by John  
and Linda Robel; and VICKI LYNN POSA, a single person,

*Appellant*

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REPLY BRIEF OF APPELLANT

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**TABLE OF CASES AND AUTHORITIES**

**Cases Cited:**

*Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 1 P.3d 1124  
(2000) ... .....1

*Stuart v. American States Ins. Co.*, 134 Wash.2d 814, 953 P.2d 42, (1998)  
.....2

## **I. ARGUMENT**

Comes now Vicki Posa and replies to Western National's Amended Respondent's Brief in corresponding paragraphs as follows.

### **1. Ambiguity in the Contract**

Ms. Posa reasserts her argument regarding the language in the contract on Reply. Western National makes no analysis in its response regarding the actual language in the contract for insurance between the Robels and Western National, such as whether instruction to a visitor – not employee – on use of a ladder on a farm was the Robel's "business in nature." Western National argues further that the Court of Appeals should not "second guess" the ruling of the Superior Court. Ms. Posa disagrees, and asserts that the very role of the Court of Appeals is to review the findings of the lower court. Ironically, Western National failed to mention the "Standard of Review" in its Memorandum. The standard of review on appeal is a *de novo* review of the facts presented and involves a thorough investigation as to whether the lower court appropriately applied the fact to the law. *Lybbert v. Grant County, State of Washington*, 141 Wash.2d 29, 34, 1P.3d 1124 (2000).

## **2. Breach of Duty to Insureds**

Western National argues that Posa is making “revisionist history.” Posa objects to this characterization insofar as Western National is making a veiled attempt to call a party to this litigation a liar. Posa represents to the Court that she filed an Amended Complaint in the companion case in a timely manner, and based upon facts received by her in the course of this litigation from Plaintiff Western National. She did so as soon as reasonably possible after being advised of the evidence in question by the statements of the Robels. Western National is basically asking the Court to ignore the law and the standards set forth in precedence, and make a ruling with a dearth of evidence to support it.

## **3. Western National owed a Duty to John and Linda Robel**

Posa did not set forth a duty owed to John and Linda Robel by Western National. Rather, Posa argues that as the drafter of the insurance contract, Western National knew the activities that took place on the farm, and devised a contract which reflected those activities. Said activities included selling fruit, but no evidence was presented to the lower Court upon which it could make a ruling that the Robels were in a “business pursuit” pursuant to the requirements of *Stuart v. American States Ins. Co.*, 134 Wash.2d 814, 953 P.2d 42 (1998).

#### **4. Ambiguity in the Contract**

Western National essentially argues that the Court should make a ruling regarding whether the Robels were in a “business pursuit” based upon the deposition testimony of Posa alone. As a one time visitor to the Robel property, Posa has no foundation to determine the elements of the business pursuit for a business being run by the Robels. This testimony must be elicited from the business owner. As already argued, the statements Western National presented from the Robels, without sworn testimony, establish lack of a “business pursuit.”

#### **5. Use of a ladder as “business in nature”**

Even if the Court were to find that the Robels were selling fruit from their farm, it is not reasonable to expect that the “business in nature” would include setting up ladders for casual visitors to climb. Common sense dictates that an average person would need several hours of training before using a tripod ladder. No one would envision a farm allowing people to come to the premises and climb up trees on ladders without proper instruction and supervision. This is an activity that is related to the business, but not the “business in nature.” CP 98.

## **6. Judicial Estoppel**

Western National argues that Posa is judicially estopped from amending her original Complaint to reflect the evidence presented by Western National in their motion for summary judgment. On the contrary, parties are duty bound to modify pleadings when evidence arises during the course of the litigation supporting amendment of the Complaint or other pleading before the Court. As the Robels had not yet been deposed in the companion case, Posa had no reason to learn of the evidence presented regarding the Robel's activities that day and previous days except upon receipt of the evidence from Western National themselves. Western National did not raise the issue that Posa's Complaint erroneously set forth that the Robels were in the regular business of a pay to pick until their Summary Judgment Reply Brief was received by her. Upon being advised of said argument, Posa rightfully filed an Amended Complaint in the companion case. Western National is not a party to the companion case, and therefore does not need to be served with the Amended Complaint pursuant to the Washington rules of service. It is obvious from the record that counsel and the Court were personally served with the Amended Complaint in the companion case on the day of Summary Judgment oral argument and on the day that it was filed with the Court.

Respectfully submitted this 6<sup>th</sup> day of April, 2018.



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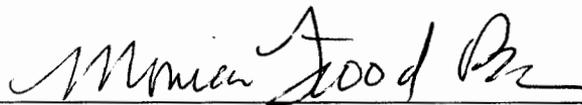
WASH BAR #42310

**CERTIFICATE OF SERVICE**

I certify under penalty of perjury under the laws of the State of Washington that on the 6 day of April, 2018, a true and correct copy of the foregoing Brief of Appellant was served upon the following parties and their counsel of record in the manner indicated below:

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