

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

FILED

Cause No: 329101

JUN 02 2015

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

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

BRIEF OF APPELLANT

BRENNAN LAW OFFICES, P.C.
Monica Flood Brennan, WSBA #42310
Spokesman Review Building
608 Northwest Boulevard, Suite 101
Coeur d'Alene, Idaho 83814
ATTORNEY FOR APPELLANT

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I. INTRODUCTION

This appeal concerns a premises liability personal injury lawsuit brought by Vicki Posa (“Ms. Posa”) against John and Linda Robel, and their business, Robel’s Orchard (hereinafter collectively, “the Robels”). Ms. Posa was injured on the Robels’ property on July 20, 2010. On July 18, 2013, Ms. Posa filed suit in Spokane County Superior Court. Ms. Posa made numerous unsuccessful attempts to personally serve the Robels. She therefore obtained an order from a court commissioner permitting service of process by mail. She served the Robels by mail on October 15, 2013, and the Robels concede they received service by mail.

Nearly one year later, the Robels filed a Motion for Summary Judgment contending that Ms. Posa should not have been allowed to serve them by mail, therefore service was ineffective, and the statute of limitations barred her claims. The trial court agreed with the Robels and dismissed Ms. Posa’s case. It likewise ordered Ms. Posa to pay the Robels’ attorney’s fees and costs incurred in defense of the lawsuit.

II. ASSIGNMENTS OF ERROR

Appellant submits three 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.

III. STATEMENT OF THE CASE

A. Facts Giving Rise to Ms. Posa's Lawsuit.

On July 20, 2010, Vicki Posa went to Robel's Orchard in Colbert, Washington to pick cherries. CP 4, 128. She had called Robel's Orchard in advance of her visit to confirm that the orchard would be open for "U-pick" cherry-picking. CP 128. Ms. Posa arrived at the orchard with a friend, Ken

Stockton. *Id.* The two spoke to an employee who explained how picking worked and how they would pay for their cherries. *Id.* Ms. Posa and Mr. Stockton were supplied with buckets. *Id.* The employee directed Ms. Posa and Mr. Stockton into the trees, where they were told they would find ladders. *Id.*

The ladders were taller than ordinary household ladders and had three legs. CP 129. The ladder used by Ms. Posa was not properly placed and Ms. Posa, in the midst of picking cherries, fell to the ground. CP 129-130. The ladder fell on top of her. *Id.* She sprained her left foot and sustained a “Jones fracture” on her left foot. CP 130. The fracture required an open reduction internal fixation surgery, followed by many months of non-weight bearing and an inability to work. CP 130. Multiple surgeries ensued. *Id.* It is anticipated that she suffer from life-long pain in her foot as a result. *Id.* Ms. Posa also tore the rotator cuff in her right shoulder, sustained significant damage to her spine, a hand fracture, and many other painful but less serious injuries in the fall. CP 131-132.

B. Filing and Service of Ms. Posa’s Lawsuit.

Ms. Posa filed suit against John and Linda Robel d/b/a Robel’s Orchard in Spokane County Superior Court on July 18, 2013. CP 1-7. Her Complaint set out a premises liability claim. *Id.* She alleged the Robels did

not properly instruct patrons how to use the ladder, did not assist patrons with the ladder, and/or did not properly maintain the orchard in a reasonably safe manner. CP 6.

Although the lawsuit was filed on July 18, 2013, Ms. Posa had difficulty effecting service of process upon the defendants. CP 20. Ms. Posa's counsel arranged to have the Robels served on four different occasions at their property in Colbert, Washington. CP 20.

On one occasion, a man fitting the description of John Robel drove up to the house. CP 23-24. The process server called out to the man, who was close enough to see and hear him. CP 24. Once the man saw the process server, he turned his car around and headed in the other direction. *Id.* The process server taped a copy of the Summons and Complaint on the Robels' door. *Id.* When the process server returned on a subsequent occasion, he discovered that the Robels had posted a sign on their property declaring their intent to shoot any intruders to their property. CP 20. They likewise posted a "no trespass" sign after the first attempt. *Id.* The Robels were aware of the lawsuit, or at least, the pending claim. CP 20-21. The Robels submitted the claim to their insurance carrier. *Id.* Ms. Posa's counsel had discussed the matter with the Robels' insurance carrier, and likewise sent a courtesy copy of the Summons and Complaint to the insurance carrier. *Id.*

On one occasion a process server went to the Robel residence and stayed for two hours, going to the door several times with no answer. *Id.*

The process server signed a declaration expressing his belief that the Robels were attempting to evade service of process. CP 23-24. Ms. Posa's counsel likewise swore in a declaration that she believed the Robels were attempting to evade service of process. CP 21.

The first process server to file a declaration, Lynn Taylor, indicated that he attempted service on October 12, 2013 and October 13, 2013. CP 23-24. An Affidavit of Non Service was subsequently filed by a different process server describing three other attempts at service (CP 32-33). The Affidavit of Non Service described multiple attempts at the door, and the fact that documents previously clipped to the fence had been apparently thrown to the ground. CP 32-33.

In light of the Robels' evasion of service, Ms. Posa filed a Motion for Service by Mail, supported by Declarations from Lynn Taylor (process server), and Ms. Posa's counsel. CP 20-24. The Motion requested permission to serve the Robels by mail pursuant to RCW 4.28.100. CP 25-27. Ms. Posa's counsel advised the Court that the Robels' address had been confirmed through the Washington State Department of Revenue State Business Records Database detail. CP 20. The Motion recited the Colbert

address for the Robels, indicated that the Robels had turned the matter over to their insurance carrier, and explained that mail was likely to give notice of the pending lawsuit to the Robels. CP 26-27.

On October 16, 2013, Commissioner Steven Grovdahl signed an Order for Service by Mail and For Extension of Time For Service. CP 9-10.¹ The Order contained the following findings:

It appears that the Defendants are purposefully avoiding service of process.

It appears Plaintiff has made numerous attempts to serve the Defendants in person.

CP 9-10. Based upon those findings, the Court stated: “Plaintiff is granted leave to conduct service by mail upon the Defendants at [the Defendants’ address].” *Id.* The day immediately prior to entry of Commissioner Grovdahl’s Order (October 15, 2013), the Summons and Complaint were sent to the Robels by U.S. Mail and Certified Mail. CP 18-19. The Robels, through counsel, conceded that they received the mailed documents. RP 3, lines 12-15. The Robels appeared in the lawsuit by counsel on October 23, 2013, eight (8) days after the mailing was sent. CP 29-30.

¹ The Order was amended later the same day by Commissioner Grovdahl to exclude a provision which allowed plaintiff an extension of 14 days for service by mail. CP 10.

C. The Robels' Participation in the Litigation.

After they appeared, the Robels actively participated in the litigation. They served two sets of interrogatories and requests for production on Ms. Posa. CP 40-41. When Ms. Posa was unable to answer the second requests due to the death of her mother and other matters, the Robels filed a Motion to Compel and requested terms. CP 40-45. The matter was heard by the Court, and an Order on Motion to Compel was entered. CP 53-54. A judgment was entered awarding defense counsel \$500 in attorney's fees in connection with the Motion to Compel. CP 56. The Robels filed a demand for a twelve person jury and paid the filing fee associated with the same. CP 58.

On May 21, 2014, the parties entered into an agreement to continue the trial date and amend the Civil Case Schedule Order. CP 60. An Amended Civil Case Schedule Order was issued by the Court. CP 62. Approximately four (4) months later, and ten (10) months after their appearance in the case, the Robels filed a Motion for Summary Judgment raising, for the very first time, the defense of insufficient service of process and claimed that as a consequence, Ms. Posa's claims were time-barred. CP 100-101; CP 86-99. The Motion also claimed that Ms. Posa could not satisfy her evidentiary burdens by demonstrating a prima facie case of premises

liability. *Id.* In support of the Robels' Motion, Mrs. Linda Robel signed a Declaration addressing her version of the events giving rise to the liability claim, and also proclaiming that the Robels were not attempting to evade service. CP 67-68. Mrs. Robel did **not** deny having received service by mail. *Id.* Nor did she deny having received the copies of the Summons and Complaint attached to their door or fence. *Id.* At oral argument, defense counsel conceded that the Robels received the mailed process. RP, pg. 3.

The Robels withdrew their claim that Ms. Posa could not set forth a prima facie case of premises liability, conceding that an issue of fact existed precluding summary judgment. RP 2-3.

IV. ARGUMENT

A. Standard of Review.

On appeal of a summary judgment order, the proper standard of review is de novo, and thus, the appellate court performs the same inquiry as the trial court. *Lybbert v. Grant County, State of Wash.*, 141 Wash.2d 29, 34, 1 P.3d 1124, 1127 (2000). "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." *Id.* An issue of whether service of process was proper is also reviewed by appellate courts under the *de novo* standard. *Pascua v.*

Heil, 126 Wash.App. 520, 526-527, 108 P.3d 1253, 1257 (Div.2, 2005) citing *Charboneau Excavating, Inc. v. Turnipseed*, 118 Wash.App. 358, 361, 75 P.3d 1011 (Div.2, 2003), *review denied*, 151 Wash.2d 1020, 91 P.3d 95 (2004).

B. Ms. Posa Properly Commenced Her Lawsuit Against the Robels.

A trial court acquires jurisdiction over a lawsuit when the summons is served or when the complaint is filed. RCW 4.28.020. A lawsuit is deemed “commenced” when the summons and complaint have been both filed and served:

For the purpose of tolling any statute of limitations an action shall be deemed commenced when the complaint is filed or summons is served whichever occurs first. If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. If the action is commenced by service on one or more of the defendants or by publication, the plaintiff shall file the summons and complaint within **ninety days** from the date of service. If following service, the complaint is not so filed, or following filing, service is not so made, the action shall be deemed to not have been commenced for purposes of tolling the statute of limitations.

RCW 4.16.170 (Emphasis added).

Insofar as timing is concerned, service by mail of an original summons and complaint is valid on the date it is mailed. *Jones v. Stebbins*, 122 Wash. 2d 471, 476, 860 P.2d 1009, 1011 (1993); *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wash. 2d 670, 679, 10 P.3d 371, 376 (2000).

Civil Rule 4(d) describes how service of the summons and complaint may be accomplished. The summons and complaint must be served together. *Id.* Service can be personal, by publication, or by mail. *Id.* Service by mail is permitted as follows:

(4) *Alternative to Service by Publication.* In circumstances justifying service by publication, if the serving party files an affidavit stating facts from which the court determines that service by mail is just as likely to give actual notice as service by publication, the court may order that service be made by any person over 18 years of age, who is competent to be a witness, other than a party, by mailing copies of the summons and other process to the party to be served at his last known address or any other address determined by the court to be appropriate. Two copies shall be mailed, postage prepaid, one by ordinary first class mail and the other by a form of mail requiring a signed receipt showing when and to whom it was delivered. The envelopes must bear the return address of the sender. The summons shall contain the date it was deposited in the mail and shall require the defendant to appear and answer the complaint within 90 days from the date of mailing. Service under this subsection has the same jurisdictional effect as service by publication.

The “circumstances justifying service by publication” are defined by CR 4(d)(3): “*By Publication.* Service of summons and other process by

publication shall be as provided in RCW 4.28.100 and .110, 13.34.080, and 26.33.310, and other statutes which provide for service by publication.”

Service of a summons by publication is available:

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.

Although RCW 4.28.100 requires the summons and complaint to be deposited in the mail prior to filing the affidavit, the Supreme Court has held that mailing the documents can occur before or after filing the affidavit. *See, Stebbins*, 122 Wash. 2d at 481 (“We conclude that it is not necessary to require a plaintiff to mail a copy of the original summons and complaint

to the defendant prior to obtaining an order to allow service by mail”). The affidavit in support of publication or service by mailing must show that all statutory conditions are present. *Boes v. Bisiar*, 122 Wash. App. 569, 577, 94 P.3d 975, 979-80 (Div.3, 2004). It is **not** required that the affidavit clearly prove an intent to avoid service. *Id.*

The Robels do not dispute the fact that Ms. Posa’s lawsuit was timely filed (July 18, 2013) prior to the expiration of the statute of limitations (July 21, 2013). CP 1-7; RCW 4.16.080(2), *Hill v. Withers*, 55 Wash.2d 462, 464, 348 P.2d 218 (RCW 4.16.080 applicable to negligence lawsuits). The Robels further concede that they *actually* received service by mail. RP, 3, lines 12-17. However, the Robels contend that Ms. Posa did not make an adequate showing that service of process by alternate means was necessary. Therefore, they claim, service of process was defective and the statute of limitations expired on Ms. Posa’s claims.

Ms. Posa filed two declarations to comply with RCW 4.28.100. Both declarations established that the Robels had been avoiding service of process. Ms. Posa had process servers make four different attempts to serve the Robels. CP 20. After the first attempt, and after the Summons and Complaint were taped to the Robels’ front door, the Robels posted a sign on

their property declaring their intent to shoot any intruders to their property.² *Id.* Nevertheless, the process servers continued their efforts. *Id.* A man fitting the description of Mr. Robel drove up to Robel's Orchard during one of the visits by a process server. CP 23-24. When the process server attempted to confirm his identify for service, the driver turned his car around and drove away. *Id.*

The Robels were aware of the pending claim and lawsuit, as they submitted notice of the claim to their insurance carrier and a copy of the Summons and Complaint were posted to their door and gate. CP 20-24. Both a process server and Ms. Posa's counsel signed Declarations concluding that the Robels were attempting to evade service of process. *Id.*

In light of the Robels' evasion of service, Ms. Posa filed a Motion for Service by Mail, supported by Declarations from Lynn Taylor (process server), and Ms. Posa's counsel. CP 20-24. The Motion requested permission to serve the Robels by mail pursuant to RCW 4.28.100. CP 25-27. The Motion recited the Colbert address for the Robels, indicated that the

² Ms. Robel eventually filed an affidavit claiming the sign was a joke rather than a threat. CP 67-68. However, the inquiry of the trial court and court of appeals is limited to the facts submitted by the party seeking to serve by publication or mail (i.e., Ms. Posa). *See, Boes*, 122 Wash.App. at 578 ("Mr. Bisiar argues that the true purpose of this trip was to accompany his grandfather [plaintiff had alleged the trip was to evade service of process], who was uncomfortable flying, on a trip to New York. But our focus is on the showing in Ms. Boes' affidavits").

Robels had turned the matter over to their insurance carrier, and explained that mail was likely to give notice of the pending lawsuit to the Robels. CP 26-27.

On October 16, 2013, Commissioner Steven Grovdahl signed an Order for Service by Mail and For Extension of Time For Service. CP 9-10.3 The Order contained the following findings:

It appears that the Defendants are purposefully avoiding service of process.

It appears Plaintiff has made numerous attempts to serve the Defendants in person.

CP 9-10. Based upon those findings, the Court stated: “Plaintiff is granted leave to conduct service by mail upon the Defendants at [the Defendants’ address].” *Id.* The day immediately prior to entry of Commissioner Grovdahl’s Order, the Summons and Complaint were sent to the Robels by U.S. Mail and Certified Mail. CP 18-19. Both entry of the Order for Service by Mail (CP 9-10) and mailing of the Summons and Complaint for Damages occurred during the 90-day period permitted by RCW 4.16.170. CP 11-19. Thus, the lawsuit was “commenced” as defined by RCW 4.16.170 prior to the expiration of the statute of limitations.

³ The Order was amended later the same day by Commissioner Grovdahl to exclude a provision which allowed plaintiff an extension of 14 days for service by mail. CP 10.

The Robels never contended before the trial court that they did not receive the mailed service of process. They conceded they *did* receive it. RP, pg. 3. Thereafter, they appeared in the lawsuit by counsel on October 23, 2013, eight (8) days after the mailing was sent. CP 29-30. They had a full and fair opportunity to litigate the claims against them.

C. The Trial Court Erred in Determining that the Robels Did Not Waive its Insufficiency of Service of Process Defense.

The common law doctrine of waiver can preclude the defense of insufficient service of process. *Lybbert*, 141 Wash. 2d 29, 38-39, 1 P.3d 1124, 1129 (2000). Waiver of insufficiency of service of process can occur under either of two circumstances: (1) when the defendant has been dilatory, or (2) the defendant's conduct has been inconsistent with assertions of the defense. *Id.* The *Lybbert* court described its ruling as "underscore[ing] the importance of preventing the litigation process from being inhibited by inconsistent or dilatory conduct on the part of litigants." *Id.*

Ms. Posa concedes that engaging in discovery, in and of itself, may not waive an insufficient service of process defense. *See, Raymond v. Fleming*, 24 Wash.App. 112, 600 P.2d 614 (1979), *review denied*, 93 Wash.2d 1004 (1980) (quoting 5 C. Wright & A. Miller, *Federal Practice* § 1344, at 526 (1969)). However, such cases are limited to instances in which the defendant engages in discovery to determine whether the defense

they seek to pursue is valid. *See, Matthies v. Knodel*, 19 Wash.App. 1, 5-6, 573 P.2d 1332 (1977) (the court held the defendant took plaintiff's deposition in order to determine whether a defense existed, including whether the statute of limitation had run); *Romjue v. Fairchild*, 60 Wash. App. 278, 281, 803 P.2d 57, 59 (Div.3, 1991) (Discovery not directed toward determining whether facts to support insufficient service existed. The record showed that defense counsel "should have known of this defense when he received the copy of the process server's affidavit from [plaintiff]'s counsel, some 3 weeks before he initiated discovery").

The record before the Court is that Robels served *two sets* of discovery requests. CP 41. The discovery requests made no mention of service of process issues, nor did defense counsel bring the issue up at any point prior to filing the Motion for Summary Judgment. CP 144. To the contrary, *all of the evidence* relied upon by the Robels in claiming service of process was defective was available in October of 2013, nearly one year before they filed their motion. CP 69-70, Paragraphs 3-4. The parties had set up depositions of the surgeon who performed surgery on Ms. Posa's foot (which was eventually postponed). CP 144.

The record in this case shows that the Robels actively participated in the litigation. They served two sets of discovery requests (CP 40-41),

filed a motion to compel and attending the hearing on the same (CP 53-54), and entered an order and judgment on the motion to compel. CP 56. The Robels filed a jury demand (CP 58), and entered an agreement with Ms. Posa's counsel to amend the Civil Case Schedule Order (CP 60). It was not until 10 months after they were served that the Robels first raised the insufficient service of process defense in their summary judgment motion.⁴

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

Washington follows the American rule as to awards of attorney's fees. *Dayton v. Farmers Ins. Grp.*, 124 Wash. 2d 277, 280, 876 P.2d 896, 897-98 (1994). "Under that rule, a court has no power to award attorney fees as a cost of litigation in the absence of contract, statute, or recognized ground of equity providing for fee recovery." *Id.*, citing, *State ex rel. Macri v. Bremerton*, 8 Wash.2d 93, 113-14, 111 P.2d 612 (1941).

In the present case, when the Robels prevailed on summary judgment, the trial court awarded them their attorney's fees incurred in the defense of the lawsuit. CP 136-137 ("and defendants are GRANTED an award of attorney's fees and costs incurred in defending this matter in amount to be determined at further hearing to be scheduled by defendants").

⁴ The Robels never filed an Answer to Ms. Posa's Complaint.

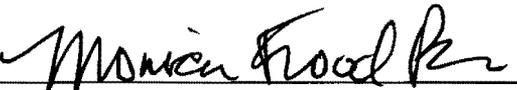
There was no request for fees made in the summary judgment briefing, nor was any request made during oral argument. *See Generally*, CP 67-102, RP. There is no support in the record justifying an award of attorney's fees. The trial court's award requires reversal.

V. CONCLUSION

Pursuant to a validly issued court order, Ms. Posa served the Robels by mail. The Robels received the mailed Summons and Complaint. Ms. Posa's lawsuit should not have been dismissed and the Robels should not have been awarded their attorney's fees.

DATED this 3 day of June, 2015.

MONICA FLOOD BRENNAN

By 
MONICA FLOOD BRENNAN, #42310
Attorney for Appellants
608 Northwest Boulevard
Coeur d'Alene, Idaho 83814

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 3 day of June, 2015, 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:

Andrew Borhnsen
Attorney at Law
312 West Sprague Avenue
Spokane, WA 99201

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

Dated: 6/3/15

Monica Brennan
#2310