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COURT OF APPEALS STATE OF WASHINGTON
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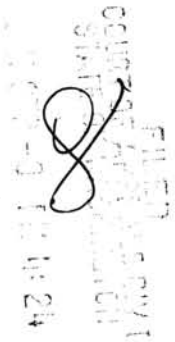

JUDY HA,

Appellant.

v.

SIGNAL ELECTRIC, INC., a Washington corporation,

Respondent.

BRIEF OF RESPONDENT SIGNAL ELECTRIC

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Of Attorneys for Respondent

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I. INTRODUCTION

On October 28, 2010, at approximately 10:50 p.m., seven pedestrians were in the process of crossing First Avenue South where it intersected with South Massachusetts Street. The intersection was well lit. Vehicles traveling in both directions on First Avenue South stopped for the group.

Juanita Mars, who was driving a passenger truck, approached the intersection in the outside southbound lane. She was extremely intoxicated. Ms. Mars failed to slow, and only began to brake as she crashed into the group, striking five pedestrians. Appellant, Judy Ha, was within the group when Ms. Mars slammed into them.

Ms. Mars was detained at the accident site. A responding police officer determined that she was grossly intoxicated. The interior of the passenger truck Ms. Mars had been driving was filled with empty and partially empty beer cans. Ms. Mars' blood alcohol content was more than three times the legal driving limit.

Ms. Mars pleaded guilty to the crime of reckless driving, and admitted that she was drunk and had failed to slow while approaching the intersection. She conceded in her guilty plea under oath that she had caused substantial bodily harm to Judy Ha.

On February 24, 2012, even though Ms. Mars' drunk driving appeared to be the only cause of Ms. Ha's injuries, Ms. Ha sued AEG Live Northwest, LLC d/b/a Showbox SODO ("Showbox SODO"), the City of Seattle, and Signal Electric, Inc. ("Signal Electric"), as well as Ms. Mars. Signal Electric had filed for protection under Chapter 11 of the United States Code almost a year earlier. After obtaining approval to have the automatic stay in Signal Electric's bankruptcy action lifted; Ms. Ha's counsel asked Signal Electric's bankruptcy attorney, J. Todd Tracy, to accept service of process on Signal Electric's behalf in the personal injury litigation.

Mr. Tracy was not Signal Electric's general counsel. He had been retained on February 23, 2011 to represent Signal Electric in its Chapter 11 proceeding. However, rather than requesting approval from Signal Electric's registered agent, Bernell Guthmiller, or its president, Jerry Kittelson, Mr. Tracy discussed the acceptance of service with Louise Tieman of vcfo Washington Inc. ("vcfo").

Mr. Guthmiller was in poor health at the time, so Mr. Tracy believed it would be best to waive service. He mistakenly concluded Ms. Tieman agreed with him. However, Ms. Tieman had no authority to waive service of process on Signal Electric's behalf. She was not even a Signal Electric employee; Ms. Tieman was employed by vcfo.

Mr. Tracy signed the acceptance of service. He then forwarded the summons and complaint to Ms. Tieman – not Mr. Kittelson or Mr. Guthmiller. Mr. Tracy never appeared as Signal Electric's counsel of record. He did not prepare or file an answer to the complaint.

Since Signal Electric had no attorney to represent it in the personal injury action, and did not know of the litigation, it did not defend against Ms. Ha's claims. Ms. Ha filed a motion for default against Signal Electric, which was granted on August 28, 2012. On January 11, 2013, Ms. Ha's order of default was reduced to a $2.2 million judgment without any contested evidence supporting either the claimed basis of Signal Electric's alleged liability or the amount of Ms. Ha's damages. Relieved of the difficult burden of proving the cause and measure of her injuries, Ms. Ha voluntarily dismissed her claims against the drunk driver who had injured her, the SODO Showbox, and the City of Seattle.

Signal Electric finally learned of Ms. Ha's action through its insurance company at the end of February 2013. Defense counsel was retained soon after, entering a notice of appearance on April 3, 2013 and preparing a motion to vacate within the same month, which was not filed until the beginning of May 2013 to accommodate Ms. Ha's deposition of Ms. Tieman. As soon as the deposition was completed, the motion to

vacate was finalized and filed, just two months after Signal Electric learned of the default and within a month of its retention of counsel.

The superior court granted Signal Electric's motion to vacate on May 20, 2013 because Mr. Tracy had not obtained approval from his client before agreeing to waive Signal Electric's substantial right to service of process and it would be manifestly unjust to prevent Signal Electric from presenting its strong defenses to Ms. Ha's claims. At the time the motion to vacate was granted, the statute of limitations on Ms. Ha's claim did not run until October 27, 2013, giving her ample opportunity to pursue her claim against Signal Electric on its merits.

This Court should affirm the superior court's vacation of the order of default and default judgment against Signal Electric.

II. ASSIGNMENTS OF ERROR

Signal Electric, Inc. assigns no error to the superior court's decision.

Issues Pertaining to Assignments of Error

Ms. Ha's "Issues Pertaining to Assignments of Error" do not properly assign any error to the superior court's decision. Signal Electric believes the issues on appeal are more properly stated as follows.

A. Whether the superior court correctly vacated the order of default and the default judgment obtained by Ms. Ha under its mandatory,

non discretionary duty to set aside void for lack of jurisdiction when: (1) Ms. Ha never served her lawsuit on Signal Electric in compliance with RCW 4.28.080(9); and, (2) Washington law clearly provides that an attorney may not unilaterally waive his client's substantial right to service of process without its consent, Signal Electric's bankruptcy attorney, Mr. Tracy, did not obtain Signal Electric's consent before executing the acceptance.

B. Whether the superior court properly exercised its discretion to set aside the order of default and the default judgment against Signal Electric where: (1) it would be manifestly unjust to waive Signal Electric's substantial right to service of process when an attorney it retained solely to represent it in its bankruptcy waived its right to service in Ms. Ha's litigation without its consent; (2) Signal Electric provided substantial evidence that Juanita Mars was the sole cause of Ms. Ha's claimed injuries; (3) Signal Electric promptly acted to set aside the default judgment once it learned of its existence in February 2013; and (4), a plaintiff cannot allege she will suffer undue hardship merely because she must prove the merits of her case.

C. Whether the Court should assess attorney fees and costs against Ms. Ha under RAP 18.1, RAP 18.9, CR 11, and RCW 4.84.185 because Ms. Ha's appeal is frivolous.

III. STATEMENT OF THE CASE

A. Ms. Ha's Statement of the Case violates RAP 10.3(a)(5), and the Court should disregard it.

RAP 10.3(a)(5) requires that the appellant's Statement of the Case should be "[a] fair statement of the facts and proceedings relevant to the issues presented for review, without argument." References to the record should be included for each statement. *Id.* Significant portions of Ms. Ha's Statement of the Case violate this standard. As set forth in §V.A, *infra*, this Court should ignore these portions of Ms. Ha's Statement of the Case and her arguments based upon them. The appellant should be sanctioned for the additional costs these improprieties have added to the respondent's burden in addressing her appeal.

B. Signal Electric petitions for bankruptcy protection under Chapter 11 of the United States Code.

On February 23, 2011, Signal Electric, Inc. concluded it should seek bankruptcy protection and retained counsel for this purpose. CP 325. On March 2, 2011, Signal Electric applied to the bankruptcy court for permission to employ Mr. Tracy as its bankruptcy attorney. CP 357-61. All actions that Signal Electric sought to have approved during its employment of Mr. Tracy as its bankruptcy attorney were "subject to the control of, and further order of the Court," so that Signal Electric could perform its duties as a debtor-in-possession. CP 358. No language in

Signal Electric's request regarding its employment of Mr. Tracy asked that he be retained for any other matter or otherwise expanded the scope or terms of its corporate resolution authorizing Mr. Tracy's retention. *Id.* The total scope of Mr. Tracy's representation was clearly expressed in its original authorization: Signal Electric would "employ the firm of Crocker Law Group PLLC to represent [Signal Electric] in [its] Chapter 11 case." CP 360-61.

When Signal Electric requested permission to employ Mr. Tracy as its bankruptcy counsel, it asked that he be allowed to undertake the ordinary work performed in connection with a bankruptcy, including the defense of actions commenced against Signal Electric "in conjunction as appropriate with special litigation counsel." CP 358. Further, although Signal Electric requested that Mr. Tracy be allowed to prepare necessary filings on Signal Electric's behalf, including answers, such answers were explicitly "in connection with the administration of this [Chapter 11] case." *Id.*

No other retention agreement, corporate authorization, or communication by Signal Electric to the bankruptcy court, to Ms. Ha, or to any other party authorized Mr. Tracy to act as Signal Electric's general counsel or to undertake its defense in any other matter. Indeed, both Mr. Kittelson, who retained Mr. Tracy, (CP 320) and Mr. Tracy himself

agreed that Mr. Tracy was only and solely retained to represent Signal Electric in its bankruptcy. CP 286-87.

C. Signal Electric sets up an interim operating team during the pendency of its Chapter 11 bankruptcy.

During its bankruptcy, Signal Electric conducted its business through Mr. Kittelson, who was authorized to appear in all bankruptcy proceedings and to perfect its bankruptcy estate. CP 325. Mr. Guthmiller was Signal Electric's registered agent and consulted with Mr. Tracy on sales of real property and settlements with Signal Electric's creditors. *See e.g.*, CP 395. Signal Electric also retained Louise Tieman of vcfo to act as its financial advisor. CP 289. Ms. Tieman was not an employee of Signal Electric. CP 303. Ms. Tieman's retention was limited to financial advice. CP 289, 303.

D. A drunk driver recklessly causes Ms. Ha's injuries.

Roughly eight months after Signal Electric filed for bankruptcy protection, on October 28, 2011, Juanita Mars drove a passenger truck into a crowd of seven pedestrians who were in the process of crossing First Avenue South where it intersected with South Massachusetts Street. CP 248. The intersection was well lit. *Id.* Vehicles traveling in both the northbound and southbound direction on First Avenue South stopped for the group. *Id.* The group had crossed both the northbound lanes and the inside southbound lane when Ms. Mars, who was driving a passenger

truck, approached the intersection in the outside southbound lane. *Id.* Ms. Mars did not slow initially, but applied "heavy braking" just before slamming into five members of the group, including Ms. Ha. CP 248.

Ms. Mars was prevented from leaving the scene of the accident by a Showbox SODO security guard, who removed her keys from the truck's ignition. CP 249. The floor of the passenger truck Ms. Mars had been driving was littered with beer cans, including some empty cans and some cans with partially consumed contents. CP 250.

Police officer Michl, who responded to the scene of the accident, examined Ms. Mars and conducted a field sobriety test. CP 249. He determined that Ms. Mars was significantly impaired due to her alcohol consumption. *Id.* A legal blood draw, taken approximately two hours after Ms. Mars ran Ms. Ha down with her truck, showed that Ms. Mar's blood ethanol content was 29 percent, or more than three times the legal limit when operating a motor vehicle. CP 249.

Ms. Mars pleaded guilty to the charge of reckless driving and admitted in filings made under penalty of perjury in connection with her guilty plea:

> I drove a motor vehicle while under the influence of alcohol, and caused substantial bodily harm to Judy Ha. I was drink [sic] and driving on 1st Ave when I hit Ms. Ha.

CP 243.

Ms. Mars further stated under oath, after reviewing her final "Statement of Defendant on Plea of Guilty":

> I knew I was drinking to excess and was not focusing on my driving and failed to slow while approaching an intersection with a large group of pedestrians and ignored the waving of a construction worker.

CP 263.

E. Ms. Ha's personal injury claim against Signal Electric articulates no factual basis for her claim against it.

Shortly after Ms. Mars' guilty plea, on February 24, 2012, Ms. Ha filed suit in King County superior court for damages related to her personal injuries. CP 4, 15-16, and 94. Ms. Ha's complaint alleged that Signal Electric had created an unstated condition, breached the duty of care in an unexplained manner, and failed to ensure compliance with unidentified laws, rules and regulations. CP 6, 17-18 and 97-98. The complaint articulated no causal connection whatsoever between these alleged breaches and Ms. Mars' drunken operation of her vehicle. CP 18. Nor did the complaint identify how any alleged condition, breach, or other claimed regulatory noncompliance independently caused Ms. Ha injury. *Id.* On March 1, 2012, Ms. Ha amended her Complaint to correct defendant Mars' legal name and aliases, but otherwise presented the same claims against Signal Electric, adding no facts supporting her allegations against it. *See* CP 12-20 and 97.

F. Shoebox SODO's affirmative defense was not an admission by Signal Electric's attorneys.

The defendants who were represented by counsel answered Ms. Ha's claims. *See* CP 511. The Showbox SODO was represented by attorneys from the law firm of Lee Smart, P.S., Inc. CP 511. On May 15, 2012, nearly a year before Signal Electric's defense counsel appeared in this litigation, the Showbox SODO filed an answer asserting an affirmative defense that third parties, including the other defendants such as Signal Electric, might be responsible for Ms. Ha's claimed damages. *Id.* This affirmative defense did not constitute an admission by Signal Electric's attorneys that there was any merit whatsoever to Ms. Ha's claims regarding its purported liability. *Contra* App. Br., p. 5, FN 1.

G. Ms. Ha's counsel asks Signal Electric's bankruptcy attorney to accept service in the personal injury litigation on Signal Electric's behalf.

When Ms. Ha filed her Amended Complaint for Damages, litigation against Signal Electric was subject to a stay under Chapter 11. CP 327. Ms. Ha petitioned the bankruptcy court to lift the litigation stay on April 16, 2012. *Id.* The order granting relief from stay expressly provided it was "for the sole purpose of establishing debtor's liability for the automobile versus pedestrian accident at issue in the State Action." CP 355. The stay was lifted only as to insurance proceeds that might be available to satisfy the judgment and not as to Signal Electric's assets. *Id.*

Rather than attempting service on Signal Electric, Ms. Ha's counsel approached its bankruptcy attorney, Mr. Tracy, and requested that he agree to accept service of process in the personal injury litigation on Signal Electric's behalf. CP 286 ¶3. Mr. Tracy had not entered a Notice of Appearance indicating that he was representing Signal Electric in the personal injury litigation when he was requested to accept service. *See* CP 286-87.

H. Mr. Tracy concludes he should agree to accept service, without seeking Signal Electric's approval to do so.

Mr. Tracy spoke with Ms. Tieman regarding whether he should accept service of process of Ms. Ha's litigation on Signal Electric's behalf. CP 287 ¶¶5-8; CP 290 ¶8. When this discussion occurred, Mr. Guthmiller was in ill health and both believed it would be in Mr. Guthmiller's best interest if Mr. Tracy accepted service. CP 287 ¶8; . However, Mr. Tracy never confirmed this understanding with Mr. Kittelson, who had retained him. CP 320 ¶5. Mr. Tracy only spoke with Ms. Tieman about accepting service, but she did not have the authority to authorize Mr. Tracy to accept service. CP 290 ¶8.

Ms. Tieman's authorization to act on behalf of Signal Electric was expressly limited to the terms of her engagement letter and incorporated by reference into the bankruptcy order approving her employment. CP

289 ¶3. Ms. Tieman's engagement letter specifically states, "vcfo is not a law firm and its services do not constitute legal advice." CP 290 ¶4. Furthermore, "[n]either vcfo nor any of its employees or contractors is permitted to take titles or other internal roles in [Signal Electric's] organization nor shall vcfo be an authorized signatory for [Signal Electric] for any purpose . . ." CP 290 ¶5.

Mr. Tracy mistakenly interpreted Ms. Tieman's opinion regarding Mr. Guthmiller's poor health as authorization to execute the acceptance of service. CP 287 ¶7. But, Ms. Tieman did not intend to allow Mr. Tracy to accept service and lacked any authority to agree that he could. CP 290 ¶6. Mr. Tracy's time records do not demonstrate that either Mr. Kittelson or Mr. Guthmiller, who could have approved such a request, were contacted by Mr. Tracy before he executed the acceptance of service and waived service of process on Signal Electric's behalf. CP 450.

I. Ms. Ha's personal injury suit is not transmitted to Signal Electric's president or registered agent.

Although he had not obtained Signal Electric's permission to do so, Mr. Tracy signed an acceptance of service of Ms. Ha's summons and complaint on July 11, 2012. CP 478; CP 450. Mr. Tracy then forwarded the summons and complaint to Ms. Tieman, rather than Mr. Kittelson or Mr. Guthmiller. CP 291 ¶10. Because Signal Electric had not been

served and its registered agent and its president had not received notice of the litigation from its bankruptcy attorney, Signal Electric did not appear or answer Ms. Ha's complaint. CP 329. Although Signal Electric had never indicated Mr. Tracy was authorized to represent it in the personal injury litigation, Ms. Ha's counsel kept up a string of email communications with Mr. Tracy. *See e.g.,* CP 328-29. Mr. Tracy was not responsive to these efforts. *Id.*

J. After accepting service in Ms. Ha's litigation, Mr. Tracy accepted service in two additional tort actions.

Five months after his acceptance of service in Ms. Ha's personal injury litigation, Mr. Tracy accepted service on behalf of Signal Electric in the matter of *OMA Construction, Inc. v. Signal Electric*. CP 431. During roughly the same period, Mr. Tracy and Mr. Guthmiller corresponded regarding a declaration and order approving the sale of a specific commercial property. CP 395. However, no December 2011 time entry by Mr. Tracy reflects any discussion with Mr. Guthmiller regarding acceptance of service of process in the *OMA Construction* litigation. CP 395.

Seven months after waving service at Ms. Ha's request, Mr. Tracy executed another acceptance of service in the matter of *Washington Industrial Coatings, Inc. v. Signal Electric*. CP 478. That complaint was

transmitted to an unspecified person identified as "client" on February 3, 2012. CP 443. However, no February 2012 entry reflects any effort by Mr. Tracy to secure approval before accepting service on February 13, 2012. CP 473; *contra* App. Br. 14. There is no entry at all on February 13, 2012 reflecting any discussion of the acceptance of service. *Id.*

Mr. Tracy's billing records do not demonstrate that he created any separate billing matter for any of these personal injury litigations or took any other action in these litigations. *See* CP 328-29, 395, 443. Mr. Tracy's lack of activity creates the strong inference that he did not believe he was Signal Electric's counsel in these litigations when he accepted service.

K. Ms. Ha pursues a default against Signal Electric.

On August 16, 2012, Ms. Ha filed an unopposed motion for default against Signal Electric, which was granted on August 28, 2012. CP 493. Even though Mr. Tracy still had not appeared on behalf of Signal Electric in the personal injury action, Ms. Ha's counsel forwarded the unopposed default to his attention. CP 329. Default in hand, Ms. Ha elected to dismiss all other parties to her original action, including Ms. Mars, the Showbox SODO, and the City of Seattle without developing any evidence

against them or otherwise conducting any discovery. CP 330 ¶21. Ms. Ha's default was reduced to judgment on January 29, 2013. CP 103.

L. Signal Electric moved expeditiously to set aside the default and default judgment once it learned of them.

Signal Electric finally learned of Ms. Ha's action and default judgment through its insurance company near the end of February 2013. CP 330 ¶25. Defense counsel was retained and entered a notice of appearance roughly a month later on April 3, 2013. CP 214-15. Signal Electric's motion for vacation of the default judgment was ready for filing within 20 days of defense counsel's retention and only delayed at the request of Ms. Ha's counsel so that Ms. Tieman could be deposed. CP 229 ¶6. When the motion to vacate was filed, the statute of limitations on Ms. Ha's claim was set to expire on October 27, 2013. CP 219. The Hon. Monica Benton concluded the orders should be vacated on May 20, CP 543. This appeal followed.

IV. SUMMARY OF ARGUMENT

The superior court did not err when it concluded the order of default and default judgment entered against Signal Electric, Inc. were void for lack of jurisdiction. Washington common law clearly holds that acceptance of service is a substantial right that an attorney may not waive without her client's knowing consent.

Signal Electric's attorney, Mr. Tracy, admitted he did not consult with an officer of Signal Electric before unilaterally agreeing to waive service at the appellant's request. Because Signal Electric was not consulted about Ms. Ha's request that it waive service of process, and its attorney could not unilaterally waive service on its behalf, service of process was not had and personal jurisdiction over Signal Electric was not obtained, rendering the order of default and default judgment void.

The superior court did not err when it exercised its discretion to prevent the manifest injustice that would result from denying Signal Electric the opportunity to defend against Ms. Ha's $2.2 million judgment when its substantial right to service of process was waived without its consent, there was substantial evidence that Ms. Mars was the sole cause of Ms. Ha's injuries, Signal Electric acted promptly to have the order of default and default judgment vacated once it learned of the personal injury action, and Ms. Ha will not be unduly burdened by proving her claim on its merits.

This court should affirm the superior court's vacation of the order of default and default judgment against Signal Electric.

V. ARGUMENT

A. Ms. Ha's Statement of the Case repeatedly violates the RAPs, and these many and serious violations preclude review.

Ms. Ha's Statement of the Case violates the standards set out in the Rules of Appellate Procedure for appellate briefing. The RAPs set strict requirements for content, style, and form for all appellate briefs. *See* RAP Title 10. Factual statements included in an appellant's brief must be supported by citation to the record. See RAP 10.3(a)(4). Appellate courts are not required to search the record to locate those portions relevant to a litigant's arguments. *Mills v. Park*, 67 Wn.2d 717, 721, 409 P.2d 646 (1966). Arguments should be made "with citations to legal authority and references to relevant parts of the record." RAP 10.3(a)(5). Arguments that are not supported by any reference to the record or by any citation of authority need not be considered. *Sherry v. Financial Indem. Co.*, 160 Wn.2d 611, 615 n. 1, 160 P.3d 31 (2007).

Ms. Ha's Statement of the Case brief repeatedly violates these rules. Ms. Ha's brief is littered with argument and unfounded allegations against both Signal Electric and its defense counsel. These violations are so pervasive that a complete recitation would require a response in excess of the page limitations on appeal, but several examples illustrate them.

First, the Appellant's Brief omits relevant portions of cited

materials to impermissibly skew its presentation of the alleged facts. For example, appellant extensively quotes Signal Electric's application to the United States bankruptcy court for Mr. Tracy's appointment but, selectively limits her citation to the misleading phrase that Mr. Tracy's work would necessarily entail preparing "answers . . . required from [Signal Electric]," so that she can then argue with emphasis "wherein objections to service of process may be waived." App. Br. 12 (emphasis omitted). The omitted portion of the sentence Ms. Ha relies upon demonstrates why this truncation is misleading. The answers Mr. Tracy would be allowed to prepare were " . . . in connection with the administration of this [bankruptcy] case." CP 358. Worse, Ms. Ha's Statement of Facts fails to disclose that Signal Electric's request for Mr. Tracy's appointment clearly contemplated that all of Mr. Tracy's services were to be rendered "[s]ubject to the control of, and further order of the [United States Bankruptcy] Court." *Id.*

Second, the appellant misrepresents Mr. Tracy's exchanges with Signal Electric to create the false impression that Mr. Tracy sought approval at some point to accept service on Signal Electric's behalf in other personal injury litigations. For example, the appellant claims Mr. Tracy corresponded with Signal Electric regarding acceptance of service once he received a summons and complaint in the *OMA Construction, Inc.*

v. Signal Electric matter. App. Br. 13. The full record shows Mr. Tracy and Mr. Guthmiller's exchange occurred nearly a week after Mr. Tracy learned of the *OMA Construction* complaint and concerned the sale of a specific commercial property – not acceptance of service as the appellant falsely implies. CP 395. There is no December 2011 time entry by Mr. Tracy reflecting a discussion with Mr. Guthmiller regarding acceptance of service of process in that litigation. CP 395. Indeed, the record shows that Mr. Tracy did not even bill Signal Electric for any aspect of that representation other than OMA Construction's violation of the bankruptcy stay. *See* CP 395.

Similarly, while Mr. Tracy apparently transmitted the *Washington Industrial Coatings, Inc. v. Signal Electric* complaint to someone connected to Signal Electric on February 3, 2012, who was described as "client" (CP 443), there is no February 2012 entry reflecting any effort by Mr. Tracy to secure approval before he accepted service on February 13, 2012. CP 473; *contra* App. Br. 14. There is no entry on February 13, 2012 reflecting any discussion of the acceptance of service at all. *Id.* No billing reflects the creation of a new litigation matter or time expended on that matter. *See* CP 443.

Third, and finally, appellant's rhetoric becomes so overheated that it misstates the facts. For example, Ms. Ha's counsel falsely contends on

several occasions that "[Signal Electric's] own attorneys certified, pursuant to CR 11, that they have a good faith belief, well-grounded in fact, that Signal Electric is responsible for some portion of Ms. Ha's damages." App. Br. 32; *see also* App. Br. 5, FN 1, 7.

This contention is patently untrue. It stems from the false premise that an affirmative defense asserted by a now dismissed defendant, Showbox SODO, should be attributed to Signal Electric's attorneys because the same law firm formerly represented Showbox SODO. CP 511. Lastly, the appellant's brief incorrectly characterizes Mr. Tracy as Signal Electric's "general counsel." *See* App. Br. 35. No reading of the record, even a zealous one, supports any such representation. The corporate authorization for Mr. Tracy's retention clearly demonstrates otherwise. CP 360-61.

This Court may impose sanctions against a party who submits an improper brief. RAP 10.7; *Chevron U.S.A., Inc. v. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn.2d 131, 139, 124 P.3d 640, 643 (2005). This Court should award Signal Electric its costs arising from these improprieties, which have significantly increased the cost of responding to Ms. Ha's arguments.

B. A *de novo* standard of review applies when the superior court vacates a void judgment under CR 60(b)(5).

"First and basic to any litigation is jurisdiction. First and basic to jurisdiction is service of process." *Painter v. Olney*, 37 Wn. App. 424, 427, 680 P.2d 1066, *review denied*, 102 Wn.2d 1002 (1984). "Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void." *In re Marriage of Markowski*, 50 Wn. App. 633, 635–36, 749 P.2d 754 (1988).

"Because courts have a mandatory, nondiscretionary duty to vacate void judgments, a trial court's decision to grant or deny a CR 60(b) motion to vacate a default judgment for want of jurisdiction is reviewed *de novo*." *Ahten v. Barnes*, 158 Wn. App. 343, 349-50, 242 P.3d 35, 38-39 (2010)(internal quotation omitted). A party may bring a motion to vacate under CR 60(b)(5) at any time after entry of judgment. *Lindgren v. Lindgren*, 58 Wn. App. 588, 596, 794 P.2d 526 (1990); *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323–24, 877 P.2d 724 (1994) ("Void judgments may be vacated regardless of the lapse of time."). Signal Electric agrees with the appellant that the standard of review on this issue is *de novo* review.

C. Ms. Ha did not obtain personal jurisdiction over Signal Electric through service of process in compliance with RCW 4.28.080.

It is undisputed that the plaintiff did not complete service of process on any of Signal Electric's corporate representatives identified in RCW 4.28.080. The statute states in relevant part that personal service on a domestic corporation may be made:

> . . . to the president or other head of the company or corporation, the registered agent, secretary, cashier or managing agent thereof or to the secretary, stenographer or office assistant of the president or other head of the company or corporation, registered agent, secretary, cashier or managing agent.

RCW 4.28.080(9). The Washington business corporation act, RCW Ch. 23B, separately provides that "a corporation's registered agent is the corporation's agent for service of process[.]" RCW 23B.05.040.

Plaintiff made no effort to serve Signal Electric according to statute. Instead, the plaintiff attempted service by a method outside the statute, an acceptance of service by Mr. Tracy. CP 328 ¶8. However, as discussed below, Mr. Tracy could not waive Signal Electric's substantial right to proper service and service of process without its consent; consent Mr. Tracy never properly sought or obtained.

D. Mr. Tracy was obligated to consult with Signal Electric before surrendering its substantial rights.

Under the law of agency, the general rule is that if an attorney is authorized to appear on behalf of a client, the attorney's acts are binding on the client. *Haller v. Wallis*, 89 Wn.2d 539, 547, 573 P.2d 1302 (1978). Thus, the attorney's negligence is ordinarily attributable to the client. *Id.* at 547. However, Washington has clearly identified an exception to the general rule: an attorney may not surrender a substantial right of his client without special authority granted by the client. *Graves v. P.J. Taggares Co.*, 94 Wn.2d 298, 303, 616 P.2d 1223 (1980). For this reason, an attorney needs her client's express authority to accept service of process, *Ashcraft v. Powers*, 22 Wash. 440, 443, 61 P. 161 (1900); to settle or compromise a claim, *Grossman v. Will*, 10 Wn. App. 141, 149, 516 P.2d 1063 (1973); and to waive a jury trial, *Graves*, 94 Wn.2d at 305.

Graves v. P.J. Taggeres Co., analyzed in detail the limitations on the authority an attorney may exercise without her client's consent. *Graves v. P .J. Taggares Co.*, 25 Wn. App. 120. In *Graves*, the attorney for the defendant in a personal injury case entered into a series of stipulations and conditions with the opposing side without any authorization from, or notice to, his client. Upon learning of its attorney's actions, the defendant moved to vacate the judgment against it. *Id.* at 121. Identifying an exception to the general rule that a party will be bound by

the acts of his attorney, the court held the attorney's unauthorized surrender of substantial rights warranted vacation of the judgment against his client under CR 60(b)(11). *Graves*, 25 Wn. App. at 126; *accord Barr v. MacGugan*, 119 Wn. App. 43, 48, 78 P.3d 660 (2003)(limiting exception "to situations where an attorney's condition effectively deprives a diligent but unknowing client of representation").

E. Appellant's reliance on non-controlling federal precedent is not persuasive.

Appellant's reliance on federal precedent, *In re Focus Media*, 387 F.3d. 1077 (9th Cir. 2004), does not change this result because Ms. Ha's analysis of the holding in that case is incomplete. *Focus Media* does not stand for the general proposition that an agent's actions may demonstrate his implied authority. *Contra* App. Br. 27.

Rather, the *Focus Media* Court identified two elements related to its final decision regarding the attorney's implied authority to accept service. *In re Focus Media, Inc.*, 387 F.3d at 1079. The *Focus Media* Court held the attorney had implied authority to accept service because he had accepted service previously **and** because his client filed a declaration in state court identifying the attorney as his general counsel and attorney in the bankruptcy matter and in related matters. *In re Focus Media Inc.*, 387 F.3d at 1084 (emphasis added).

Signal Electric made no such representation in Ms. Ha's case. Mr. Tracy's actions alone cannot reasonably alter the scope of his agency because an agent cannot expand the scope of authority he has been granted by his principal absent some expression of that change in scope by the principal. Ms. Ha has not shown, and cannot show, that Signal Electric had any idea Mr. Tracy had accepted service on its behalf in her personal injury matter, that it ever received her motion for default, or that it granted Mr. Tracy express authority to defend it in any respect from her personal injury litigation.

The sworn statements of Mr. Kittelson, Ms. Tieman, and Mr. Tracy amply demonstrate these facts. Mr. Tracy acknowledged that he only spoke with Ms. Tieman. CP 287 ¶¶5-7. Mr. Kittelson expressly declared that he received no request that Mr. Tracy be authorized to accept service. CP 320 ¶5. Ms. Tieman acknowledged that she was contacted regarding Mr. Tracy's acceptance of service, but neither could, nor did, authorize any such acceptance. CP 290 ¶6. Mr. Tracy's mistaken belief that he was authorized to accept service in Ms. Ha's case or in any later personal injury action does not constitute an acknowledgement by Signal Electric that Mr. Tracy was ever authorized to act on its behalf and waive its substantial right to service.

F. Mr. Tracy was not granted authority to accept service on Signal Electric's behalf.

The appellant's exaggerated contention that Signal Electric was obligated to frame its argument for vacation by affirmatively stating Mr. Tracy lacked authority to accept service in her personal injury action during July 2012 is a red herring. Mr. Kittelson affirmatively described the scope of Mr. Tracy's retention in his declaration. CP 320 ¶3. Mr. Tracy confirmed that he, too, understood his only scope of retention was the bankruptcy. CP 286 ¶¶1, 8. Mr. Tracy did not appear in the personal injury action, take any steps to defend against the default judgment, or bill Signal Electric for that matter. CP See CP 287 ¶8; *see also* CP 328 ¶¶10, 15, 17. This demonstrates both Mr. Tracy's and Signal Electric's contemporaneous understanding of the scope of Mr. Tracy's retention. Appellant's *ad hominem* attack does not alter this outcome. App. Br. 25.

G. Ms. Ha had no objectively reasonable basis to conclude Signal Electric had granted Mr. Tracy authority to accept service of her personal injury litigation.

It is a basic principle of Washington's common law that the actions of an agent do not establish the grant of authority he has from his principal. "An agent has apparent authority when a third-party reasonably believes the agent has authority to act on behalf of the principal **and that belief is traceable to the principal's manifestations.**" Restatement

(Third) Agency § 203 at 113 (2006) (emphasis added). In other words, apparent authority may only be established by the principal's objective manifestations that: (1) "cause the one claiming apparent authority to actually, or subjectively, believe that the agent has authority to act for the principal," and (2) "the claimant's actual, subjective belief is objectively reasonable." *Udall v. T.D. Escrow Servs., Inc.*, 159 Wn.2d 903, 913, 154 P.3d 882 (2007) (quoting *King v. Rieveland*, 125 Wn.2d 500, 507, 886 P.2d 160 (1994)). Because Signal Electric did not indicate Mr. Tracy had authority to represent it in any matter other than its bankruptcy and Ms. Ha had no objectively reasonable basis to conclude Mr. Tracy was Signal Electric's agent in the personal injury litigation, her arguments regarding his alleged authority to waive Signal Electric's substantial right to service of process fail on the facts as well as the law.

H. Signal Electric's only express grant of authority to Mr. Tracy was to represent it in its bankruptcy.

1. Signal Electric's only representation identified that Mr. Tracy was its bankruptcy counsel.

Signal Electric made only one affirmative representation regarding the scope of Mr. Tracy's retention: that he was its bankruptcy attorney. Signal Electric's application to the bankruptcy court clearly identified that Mr. Tracy was retained to perform four main functions in its bankruptcy case, subject to the bankruptcy court's approval. CP 358-59. Mr. Tracy

was to: (1) to preserve the bankruptcy estate (which as discussed below might include defending actions against Signal Electric in connection with special litigation counsel); (2) to prepare necessary documents, including motions, in connection with the administration of the bankruptcy case; (3) to negotiate, prepare and implement a Chapter 11 plan; and, (4) to provide Signal Electric advice in connection with its Chapter 11 case. *Id.*

This is not the broad grant of authority Ms. Ha would have it. Most of the functions included in Signal Electric's application are clearly restricted to the administration and liquidation of the bankruptcy estate. Mr. Tracy was not authorized to conduct negotiations concerning litigation generally, only with respect to the Chapter 11 plan. CP 361 ¶4.c. Mr. Tracy could not prepare all legal answers on behalf of Signal Electric, only answers required from Signal Electric as a debtor-in-possession in connection with the administration of its bankruptcy case. CP 360 ¶4.b. Finally, some of the authority sought by Signal Electric's request for Mr. Tracy's appointment as its bankruptcy attorney, such as the request that he be allowed to defend actions commenced against Signal Electric, could be stretched to confer a more broad grant of authority. CP 348 ¶4.a. But, even if a broader grant of authority is implied from the application, which Signal Electric does not concede would be a reasonable implication; such a grant, without more, did not allow Mr. Tracy to waive Signal Electric's

substantial right to service of process without its express consent. Long-standing Washington precedent clearly held so before Ms. Ha requested the waiver from Mr. Tracy.

2. Signal Electric's corporate resolution does not make Mr. Tracy its general counsel.

Signal Electric's February 23, 2011 corporate resolution which authorized Mr. Kittelson to employ Mr. Tracy is consistent with its application to the bankruptcy court. CP 325 ¶5. Signal Electric did not direct Mr. Kittelson to employ Mr. Tracy as Signal Electric's general counsel or its personal injury counsel. *Id.* Mr. Kittelson was only to "employ J. Todd Tracy, Shelly Crocker, attorney, and the law firm of Crocker Law Group, PLLC to represent the Company in such bankruptcy case." CP 325 ¶5. Appellant's efforts to convert Mr. Tracy into Signal Electric's general counsel should fail.

3. Both Mr. Kittelson and Mr. Tracy understood the limited scope of Mr. Tracy's representation.

Mr. Tracy's limited retention as Signal Electric's bankruptcy counsel is consistent with both Mr. Kittelson's and Mr. Tracy's contemporaneous understanding of Mr. Tracy's authority to represent Signal Electric. Mr. Kittelson affirmatively stated that he understood the scope of Mr. Tracy's retention was limited to its bankruptcy case and nothing more. CP 319 ¶3. This is the same scope of work Mr. Tracy

expected and believed to apply to his representation of Signal Electric. CP 286 ¶1. Finally, if Mr. Tracy's retention was somehow broader, that scope would have been stated in his retention letter, which was an exhibit to Signal Electric's application to the bankruptcy court to employ Mr. Tracy, but which Ms. Ha elected to exclude from the record on appeal. CP 359.

I. Signal Electric did not imply Mr. Tracy was authorized to represent it in Ms. Ha's personal injury action.

1. Mr. Tracy never appeared or defended Signal Electric in the personal injury litigation.

An attorney appears, either formally through a court filing or informally, through a writing to counsel. CR 4(a). The rule is mandatory, not precatory in its formulation, so there will be no confusion as to the state of an attorney's representation. It is undisputed that Mr. Tracy did not enter a formal appearance in writhing in Ms. Ha's personal injury litigation. *See* CP 286 ¶1. It is also undisputed that Mr. Tracy did not defend against Ms. Ha's default-related motions or even respond to the appellant's correspondence in some instances. *See* CP 328 ¶¶10, 15, 17. Thus, Mr. Tracy's actions further bolster the conclusion that he believed he was not Signal Electric's counsel in the personal injury matter.

2. Mr. Tracy's acceptance of service in other personal injury matters does not support Ms. Ha's allegation regarding his agency.

Mr. Tracy may have accepted service in other personal injury matters after his acceptance of service in Ms. Ha's matter, but there is no evidence that he ever appeared or defended those matters. Furthermore, Mr. Tracy's actions long after he executed an acceptance of service in the appellant's personal injury litigation can have no possible bearing on Ms. Ha's claimed belief that he had implied authority to accept service in her litigation during July 2011.

3. An agent cannot establish the scope of his agency.

The appellant's entire argument regarding Mr. Tracy's scope of authority relies on Mr. Tracy's actions rather than upon Signal Electric's manifestations of approval for those actions. Ms. Ha cannot show Signal Electric ever knew Mr. Tracy accepted service on its behalf in any litigation. Her citation to Mr. Tracy's time records actually undercuts her position because Mr. Tracy never created any separate billing matter for the personal injury litigation, has no time records reflecting work on that matter, and no entries reflect any discussion between Mr. Tracy and an authorized agent of Signal Electric regarding her acceptance of service. Finally, it is undisputed that Ms. Ha's arguments regarding Mr. Tracy's acceptance of service in other personal injury litigations occurred **after**

Mr. Tracy executed the acceptance of service in her personal injury litigation and so could not form a course of dealing from which she could objectively imply his authority to accept service on Signal Electric's behalf in the underlying personal injury action.

J. The superior court's equitable authority should not be disturbed absent an abuse of discretion and no such abuse has been shown by the appellant.

Signal Electric was not properly served. Thus, the order of default and the default judgment against it were void for lack of personal jurisdiction and properly vacated under CR 60(b)(5). However, equitable considerations further supported the superior court's exercise of its discretion to vacate the order of default and the default judgment against Signal Electric in order to prevent a manifest injustice.

1. The standard of review under CR 60(b) for relief from an order or judgment arising from mistake, inadvertence, or excusable neglect is abuse of discretion.

A motion to vacate a default judgment that is not jurisdictionally defective is addressed to the sound discretion of the superior court. *Griggs v. Averbeck Realty, Inc.*, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979); *Hwang v. McMahill*, 103 Wn. App. 945, 949, 15 P .3d 172 (2000). Appellate courts should not disturb the superior court's disposition unless its decision was manifestly unreasonable, based on untenable grounds, or made for untenable reasons. *Griggs*, 92 Wn.2d at 582. A superior court's

decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; a decision is based on untenable grounds if the factual findings are unsupported by the record; a decision is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). "[T]he discretionary judgment of a trial court of whether to vacate [an order] is a decision upon which reasonable minds can sometimes differ." *Lindgren*, 58 Wn. App. at 595. If the superior court's decision "is based upon tenable grounds and is within the bounds of reasonableness, it must be upheld." *Id.*

Here, the superior court's decision to vacate the order of default and default judgment against Signal Electric was soundly based upon tenable grounds and within the bounds of reasonableness. The decision should be affirmed because it was necessary to prevent injustice and allow a resolution of this controversy on its merits.

2. The superior court properly exercised its discretion to prevent a manifest injustice under CR 60(b)(11).

Although not a proceeding in equity, the decision to vacate a judgment should be made in accordance with equitable principles. *White*

v. Holm, 73 Wn.2d 348, 351, 438 P.2d 581 (1968). Moreover, it is a long standing principle that:

> [N]o client should be at the mercy of his attorney, who, without the authority or knowledge of his client stipulates away such a [substantial] right directly contrary to the client's interest, as was done in the case at bench. **If there is substantial doubt, the client's interest should be protected**.

Graves v. P.J. Taggares Co., 25 Wn. App. at 125 (emphasis added). There is compelling evidence that Mr. Tracy waived a substantial right of Signal Electric's without its consent. The declarations of Mr. Tracy, Ms. Tieman, and Mr. Kittelson clearly identified the source of the error which led to the default judgment against Signal Electric: a mistaken decision to accept service without obtaining the client's consent. The superior court properly exercised its discretion to vacate the default judgment entered against Signal Electric because it would be unjust to prevent Signal Electric from defending against the appellant's claim on its merits based on these facts.

3. The superior court properly set aside the default judgment for mistake, inadvertence, surprise, and/or excusable neglect.

The superior court also properly concluded the default should be vacated for inadvertence and/or mistake. Four factors are used to evaluate whether a default judgment should be vacated for mistake:

> (1) That there is substantial evidence extant to support, at least prima facie, a defense to the claim asserted by the opposing party; (2) that the moving party's failure to timely appear in the action, and answer the opponent's claim, was occasioned by mistake, inadvertence, surprise or excusable neglect; (3) that the moving party acted with due diligence after notice of entry of the default judgment; and (4) that no substantial hardship will result to the opposing party.

White v. Holm, 73 Wn.2d at 352.

The most important factors are whether the defaulting party has demonstrated at least a *prima facie* defense to the claim asserted by the opposing party and whether the defaulting party's failure to answer was occasioned by mistake, inadvertence, surprise or excusable neglect. *Fowler v. Johnson*, 167 Wn. App. 596, 605, 273 P.3d 1042 (2012). When the defendant promptly moves to vacate and has a strong case for mistake, the actual strength of the defense is less important to the reviewing court. *White*, 73 Wn.2d at 353. The overriding concern is to ensure that justice is done. *Griggs*, 92 Wn.2d at 582. Here, the superior court properly found Signal Electric met all four of the criteria for vacating Ms. Ha's default judgment.

a. Signal Electric provided substantial evidence of a *prima facia* defense.

As this Court affirmed during its 2007 analysis of the standards applicable to a superior court's decision regarding the vacation of a default judgment, a defendant satisfies its burden of demonstrating the existence

of a *prima facie* defense if it is able to produce evidence which, if later believed by the trier of fact, would constitute a defense to the claims presented.. *TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 202-03, 165 P.3d 1271 (2007)(citation omitted). A superior court does not act as a trier of fact in making such a determination and may not conclusively determine which party's facts control. *Id.* at 203.

Here, evidence of Signal Electric's *prima facie* defense is substantial. Ms. Ha's complaint articulated no possible causal connection between Ms. Ha's alleged injuries and any action of Signal Electric. CP 97-98. It is undisputed that Ms. Mars struck Ms. Ha in a well-lighted cross walk as she traversed First Avenue South with six other people. CP 248. There is no dispute that other drivers traveling in three lanes of traffic at the same intersection that might had no difficulty allowing the pedestrians to cross. CP 248. Only Ms. Mars failed to stop and struck Ms. Ha. CP 243. Ms. Mars admitted in her guilty plea that she was severely intoxicated at the time she struck Ms. Ha and made no effort to slow. CP 263. Signal Electric has demonstrated not only a *prima facie*, but a strong, possibly conclusive, defense to Ms. Ha's claim, because Ms. Mars has admitted she was the sole cause of Ms. Ha's alleged damages.

Ms. Ha incorrectly contends that Signal Electric must prove this defense in its entirety to provide substantial evidence of the defense. Her argument is false. Signal Electric was merely required to articulate and provide specific evidence demonstrating that it had a viable defense to Ms. Ha's claim. It did so. The superior court properly determined this equitable factor was met.

b. Signal Electric did not delay in seeking to have the default vacated.

A motion to vacate under CR 60(b) must be filed within a "reasonable time." The critical period is the period between the party's discovery of the judgment or order and the filing of the motion to vacate. *Luckett v. Boeing Co.*, 98 Wn. App. 307, 312, 989 P.2d 1144 (1999). What constitutes a "reasonable time" depends on the facts and circumstances of each case. *Id.* Thus, **a party** that has received notice of a default judgment and does nothing for three months has failed to demonstrate due diligence. *In re Estate of Stevens*, 94 Wn. App. 20, 35, 971 P.2d 58 (1999)(emphasis added). Conversely, a party that moves to vacate a default judgment within a month of notice satisfies CR 60(b)'s diligence prong. *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003).

Ms. Ha calculates the date of notice to Signal Electric based upon notice to Mr. Tracy. App. Br. 39; CP 328-329. Based on this argumentative calculation, Ms. Ha contends Signal Electric waited eight months from notice of the default to seek vacation. This is incorrect. Signal Electric received notice of the default at the end of February 2013 (CP 218 ll. 9-12), its counsel appeared on April 3, 2013 (CP 215) and filed a motion to vacate (delayed by two weeks to accommodate Ms. Ha's deposition of Ms. Tieman) on May 2, 2013 – two months from notice and less than a month after its attorneys appeared. CP 227, 229 ¶6. The superior court properly determined Signal Electric had not willfully delayed its response to the order of default.

c. Signal Electric's failure to defend, was occasioned by an external mistake.

Washington courts have held that where "a company's failure to respond to a properly served summons and complaint was due to a breakdown of internal office procedure, the failure was not excusable." *Puget Sound Medical Supply v. Washington State DSHS*, 156 Wn. App. 364 (2010) (citation omitted). This proscription also applies to delays by the party's attorney – so long as the client is aware that its attorney is nonresponsive. *See MacGugan*, 119 Wn. App. at 46.

In this instance, Signal Electric's failure to timely appear and defend against the lawsuit was due to Mr. Tracy's mistake, rather than its own neglect. Signal Electric could not anticipate that its bankruptcy attorney would confer with its financial consultant, rather than with a person authorized to accept service on Signal Electric's behalf. See CP 290 ¶8. Signal Electric did not learn of Ms. Ha's lawsuit until after the default judgment had been entered. CP 320 ¶6; *see also* CP 218 ll. 9-12. The superior court correctly exercised its discretion to allow Signal Electric the opportunity to appear and defend against Ms. Ha's claims because the mistake leading to default was not Signal Electric's mistake.

d. An appellant cannot claim that she will suffer hardship merely because she is required to prove her case on its merits.

"[V]acation of a default inequitably obtained cannot be said to substantially prejudice the nonmoving party merely because the resulting trial delays resolution on the merits." *Johnson v. Cash Store*, 116 Wn. App. 833, 842, 68 P.3d 1099 (2003); *see also Shepard Ambulance, Inc. v. Helsell, Fetterman, Martin, Todd & Hokanson*, 95 Wn. App. 231, 244, 974 P.2d 1275, 1284 (1999)(rejecting claim of hardship based on loss of "tactical advantage" and plaintiff's assertion that he might die before trial could be completed).

Ms. Ha's only claim regarding the hardship she will face is that she will be forced to prove her case and may have to re-commence litigation against the parties she voluntarily dismissed. App. Br. 40. This is simply the burden of proof that any litigant must bear and no hardship at all. Signal Electric should be allowed to defend against the appellant's claim.

K. Signal Electric 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).

Signal Electric, Inc. should be awarded its attorney fees and costs under RAP 18.9. Ms. Ha's appeal is without merit and intentionally

misrepresents the record, thereby unnecessarily increasing the time required for Signal Electric's counsel to respond. See § V.A. *supra*. This is precisely the abuse RAP 18.9 is intended to address. Signal Electric should be awarded its reasonable attorney fees and costs incurred in opposing Ms. Ha's appeal.

VI. CONCLUSION

Ms. Ha's arguments regarding the scope of Mr. Tracy's authority to waive service are contrary to the law and unsupported by the record. She has offered no compelling authority whatsoever to establish that the superior court misapplied the law or abused its discretion. This court should affirm the superior court's decision in its entirety and award Signal Electric, Inc. its reasonable attorney fees and costs pursuant to RAP 18.9.

Respectfully submitted this 3rd day of September, 2013.

LEE SMART, P.S., INC.

By: _____
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Of Attorneys for Respondent Signal Electric, Inc.

DECLARATION OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington, that on September 3, 2013, I caused service of the foregoing pleading on each and every attorney of record herein:

VIA LEGAL MESSENGER

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