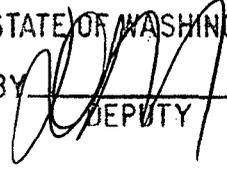


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STATE OF WASHINGTON

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Case No. 46099-8-II
IN THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

ROCHELLE TRAN,

Appellant.

v.

VICTORIA GALLARDO and "JOHN DOE" GALLARDO,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

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I. INTRODUCTION

Respondents Victoria Gallardo and “John Doe” Gallardo (“Gallardo”) present this Response Brief and respectfully request that this Court affirm that trial court’s ruling dismissing Appellant Rochelle Tran’s (“Tran”) lawsuit as time-barred.

First, Tran’s own moving papers and her arguments on appeal confirm that the trial court properly dismissed her claims. Simply proffering a Declaration of Service that fails to make a *prima facie* showing of service (i.e., when it was served on a person with a supposedly different last name than Gallardo, who had a different birthday than Gallardo, and who was served at an address which Gallardo never resided at), does not create an issue of material fact, particularly when the veracity of said declaration is controverted by clear and convincing evidence.

Second, Tran’s reliance upon *Brown v. ProWest Transport Ltd.*, 76 Wn. App. 412, 886 P.2d 223 (1995) is similarly meritless when consideration is given to the distinguishable facts underlying that case, where a defendant driver **fled** the accident scene. Gallardo did not flee the scene in this case. More importantly, *State Farm v. Seaman*, 96 Wn. App. 629, 980 P.2d 288 (1999), squarely rejected Tran’s argument when it held that, if a driver stops following their involvement in an auto-accident, makes an inspection of the accident and cooperates with the other driver,

the failure of a driver to obtain certain information following the accident does not result in the other driver amounting to a hit-and-run driver in violation of RCW 46.52.020.

Lastly, contrary to Tran's representations, she had an obvious and reasonable ability to prosecute her claims. Tran's position essentially boils down to this: because she did not attempt to prosecute her case until the statute of limitations was upon her, and because she failed to locate and properly serve Gallardo within the statute of limitations, she did not have an obvious and reasonable ability to prosecute her case. Clearly, the standard of whether or not a plaintiff had an obvious and reasonable opportunity to prosecute their claim is not based on whether or not the plaintiff did end up prosecuting a claim in time. Here, Gallardo provided Tran with her name, her phone number and her insurance information. It cannot credibly be argued that with this information Tran would not have been able to locate Gallardo for service within a three year time period—certainly when considering the fact that Tran was already working with Gallardo's insurance carrier within one month of the subject accident.

For these reasons, and the arguments below, this Court should affirm the trial court's ruling.

II. STATEMENT OF ISSUES

Whether the trial court properly dismissed Tran's claims against Gallardo as being time-barred. (Appellant's Assignment of Error I.)

Whether Gallardo should be awarded attorneys' fees and costs pursuant to RAP 18.1.

III. STATEMENT OF THE CASE

A. Factual History

On August 26, 2010, Tran and Gallardo were involved in a motor vehicle accident that gave rise to the underlying action. (CP 205.)

Immediately after the accident, Gallardo pulled her vehicle over to the side of the road and exchanged personal information with Tran. (CP 124.) That information included Gallardo's name, phone number and insurance information. (CP 125.) Gallardo's license plate was also properly displayed. (CP 125.) There were military police officers within 20 feet of Tran and Gallardo (CP 133-134.) However, neither Tran nor Gallardo requested assistance or medical aid, (CP 134; CP 205.), and no obvious injuries were apparent necessitating emergency medical aid. (CP 205.) Similarly, neither Tran nor Gallardo made a collision report following the accident. (CP 25.)

On August 10, 2010, Gallardo's insurance company performed an inspection of Tran's vehicle. (CP 03-123.) Tran also spoke with

Gallardo's insurance company prior to filing the underlying lawsuit. (CP 103-123.)

Approximately three years later, on July 9, 2013, Tran filed a Summons and Complaint in Pierce County Superior Court. (CP 13.)

On July 30, 2013, Tran filed a Declaration of Service alleging that Gallardo was served with a copy of the Summons and Complaint on July 22, 2013, at 1405 Clearbrook Dr. SE, Unit L 103, in Lacey, Washington. (CP 82.) Gallardo has never resided at that address and does not know anyone who resides at that address.¹ (CP 13; CP 31-32.) Rather, Gallardo has resided in the State of New York since 2012, and purchased a home there in 2013.² (CP 31-32.) Specifically, in January 2013, Gallardo and her husband purchased a home at 7742 Tirrell Hill Circle, in Liverpool, New York. (CP 31-53.) That is the address where Gallardo currently resides and where she resided on July 22, 2013, when Tran alleges she served Gallardo with a copy of the Summons and Complaint at the address in Lacey, Washington. (CP 31-32.)

On August 19, 2013, Gallardo submitted an Answer with Affirmative Defenses, asserting among other things, lack of personal

¹ Also, the person served at the Lacey address has a birthdate of September 3, 1985 with the purported last name of Miller. (CP 89; 98.) Gallardo's birthdate is August 25, 1985, and her last name is Gallardo-Dunbar. (CP 98.)

² She also filed a change of address form with the postal service at that time. (CP 107-108; CP 133-134.)

jurisdiction and insufficient process in order to obtain personal and subject matter jurisdiction. (CP 13.) Tran made no inquiries into the reason for the affirmative defenses. (CP 15.)

On August 26, 2013, the applicable statute of limitations under RCW 4.16.080(2) expired.

On October 7, 2013, the 90 day tolling period under RCW 4.16.170 triggered by filing the Summons and Complaint expired. Therefore, the time for perfecting service on Gallardo had run by that date. (CP 13.)

On October 16, 2013, Gallardo filed a Motion to Dismiss Tran's claims for insufficient service of process and for being time-barred by the statute of limitations. (CP 12.)

The trial court properly ruled on the issues of law before it and dismissed Tran's claim against Gallardo. (CP 205-206.) In doing so, the court concluded, among other things, that:

* * *

Before October 7, 2013 [Tran] served a Summons and complaint upon someone different than [Gallardo]. The evidence is irrefutable that [Gallardo] was not served within ninety days of the complaint being filed.

* * *

The Court has considered the arguments made on January 17, 2014 and the records herein. The court has considered *Brown v. ProWest*, 76 Wn. App. 412 (1995) and believes that it is clearly distinguishable from the current case and is not controlling.

(CP 206.) (emphasis added.)

The trial court further found as a matter of law that, [Tran] “had an obvious and reasonable ability to prosecute a claim against [Gallardo] within three years of the motor vehicle accident” and that “the statute of limitations was not and cannot be tolled in the present case.” (CP 206.)

B. Procedural History

On February 19, 2014, Tran filed a Motion for Reconsideration regarding the trial court’s dismissal of her lawsuit, which was denied. (CP 207; CP 255.) A few months later on April 1, 2014, Tran filed a Notice of Appeal. (CP 256.) Because Tran’s Appeal is without merit under RAP 18.14, Gallardo filed a motion on the merits to affirm the trial court’s ruling. This Court denied Gallardo’s motion on the merits, and now Gallardo submits this Response Brief.

IV. ARGUMENT

A. Standard of Review for Rulings on Summary Judgment

The standard of review for an Order Granting Summary Judgment is *de novo*; the Appellate Court performs the inquiry as the trial court. *Ruvalcaba v. Kwang Ho Baek*, 175 Wn.2d 1, 6, 282 P.3d 1083 (2012). A party may move for summary judgment, in whole or in part, on two bases. First, where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56. Second, it can point

“out to the trial court that the nonmoving party lacks sufficient evidence to support its case.” *Guile v. Ballard Community Hospital*, 70 Wn. App 18, 21, 851 P.2d 689 (1993).

The non-moving party may not rest upon mere allegations, but must instead set forth specific facts showing the existence of a genuine issue for trial. CR 56(e); *Ruffer v. St. Frances Cabrini Hosp.*, 56 Wn. App. 625, 628, 784 P.2d 1288 (1990). “If, at this point, the plaintiff ‘fails to make a showing sufficient to establish the existence of an element essential to the party’s case, and on which the party will bear the burden at trial,’ then the trial court should grant the motion.” *Young v. Key Pharmaceuticals, Inc.*, 112 Wn. 2d 216, 225, 770 P.2d 182 (1989 (quoting *Celotex Corp. v. Catrett*, 477 US 317 (1986))).

B. The Trial Court Properly Dismissed Tran’s Claim as Time-Barred Under the Applicable Statute of Limitations

1. The law in Washington regarding the commencement of actions within the statute of limitations is clear

RCW 4.16.080(2) requires that a lawsuit for personal injuries “shall be commenced within three years.” An action is deemed commenced when the Summons and Complaint are filed and one or more of the defendants are served with a copy of the Summons and Complaint. RCW 4.16.170. The statute of limitations will be tolled for 90 days if service has not been made on a defendant prior to the filing of the

Summons and Complaint. *Id.* If a defendant has not been served with a copy of the Summons and Complaint within 90 days of the plaintiff filing the Summons and Complaint, the action will not have commenced. *Id.*

The statute states, in relevant part, as follows:

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 [. . .] 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.

(emphasis added).

Here, the subject accident occurred on August 26, 2010. Tran then filed suit against Gallardo on July 9, 2013, just a few weeks prior to the three-year expiration of the statute of limitations. To properly commence the lawsuit under RCW 4.16.170, Tran had an additional 90 days, or until October 7, 2013, to serve Gallardo with a copy of the Summons and Complaint. That did not occur in this case.

2. The evidence is irrefutable that Gallardo was not served within the applicable statute of limitations under RCW 4.16.080 or within the 90 day tolling period under RCW 4.16.170

A plaintiff bears the initial burden to produce an affidavit of service that on its face shows that service was properly carried out. *Witt v.*

Port of Olympia, 126 Wn. App. 752, 757, 109 P.3d 489 (2005). If the plaintiff makes this showing, the burden then shifts to the defendant to prove by clear and convincing evidence that service was improper. *Id.*

Here, Tran did not meet her burden of establishing proper service. Although she submitted a Declaration of Service alleging that she served Gallardo with a copy of the Summons and Complaint on July 22, 2013, at 1405 Clearbrook Dr. SE, Unit L 103, in Lacey, Washington, (CP 82.), the person who was served has a birthdate of September 3, 1985 with the likely last name of Miller. (CP 89; 98.) Gallardo's birthdate is August 25, 1985, and her last name is Gallardo-Dunbar. (CP 98.)

Even assuming Tran met her burden, however, Gallardo has provided clear and convincing evidence that Tran's alleged service of process was improper. (CP 124-129; CP 206.) A party cannot create genuine issues of material fact by "mere allegations, argumentative assertions, conclusory statements, and speculation." *Greenhalgh v. Dep't of Corr.*, 160 Wn. App. 706, 714, 248 P.3d 150 (2011) (internal citations omitted). The nonmoving party cannot merely claim contrary facts and may not rely on speculation, argumentative assertions that unresolved factual issues remain, **or on affidavits considered at face value.** *Shoulberg v. Public Utility Dist. No. 1 of Jefferson County*, 169 Wn. App. 173, 177, 280 P.3d 491 (2012) (internal citations omitted) (emphasis

added). Here, Tran's reliance on the subject declaration of service is misguided, as it is indisputably deficient.

First, as noted above, Tran's own evidence that she submitted to the trial court shows that the person served at the address in Lacey, Washington has a different birthdate and last name than Gallardo. (CP 89; 98.)

Second, Gallardo declared under oath and provided evidence to the trial court that she has never resided at the address in Lacey, Washington, and she does not know anyone who resides at that address. (CP 13; CP 31-32.)

Third, Gallardo provided evidence to the trial court that she has resided in the State of New York since 2012. (CP 31-32.)

Fourth, Gallardo provided evidence to the trial court that she and her husband purchased a home at 7742 Tirrell Hill Circle, in Liverpool, New York in January 2013, (CP 32-53.), which is the address where she currently resides and where she resided on July 22, 2013, when Tran alleges she served Gallardo with a copy of the Summons and Complaint at the address in Lacey, Washington. (CP 32.)

Based on the foregoing, the trial court properly determined that Tran served someone different than Gallardo. (CP 206.) Accordingly, the trial court also properly concluded that, "the evidence is irrefutable that

Gallardo was not served within 90 days of the Summons and Complaint being filed.” (CP 206.) Because Tran failed to serve Gallardo with a copy of the Summons and Complaint within 90 days of filing her lawsuit, the statute of limitations expired and Tran’s claims against Gallardo became time-barred.

C. The Trial Court Properly Held That *Brown v. ProWest* Was Not Applicable to the Present Matter

In *Brown v. ProWest Transport Ltd.*, 76 Wn. App. 412, 886 P.2d 223 (1995) , a defendant driving his employer’s tractor-trailer left the scene of an accident in which the plaintiff’s vehicle lost control and rolled up an embankment. *Id.* The defendant did not stop, did not provide information or make a report and did not provide assistance despite the obvious damage to the plaintiff’s vehicle. *Id.* The defendant’s employer who owned the tractor-trailer also failed to cooperate when the accident was investigated by law officials and failed to respond to communications by either the plaintiff’s attorney or the employer’s own insurance company. *Id.*

After the lawsuit was filed, the defendants moved for dismissal on the basis that the plaintiff failed to obtain proper service and the statute of limitations expired. *Id.* The trial court entered summary judgment in favor of the defendants and the plaintiff appealed. *Id.* The appellate court

overturned the trial court's ruling, concluding that, because the defendants had violated RCW 46.52.020 and .030 (Washington's hit-and-run statute) by fleeing the scene of the accident, there was a question of fact as to whether the statute of limitations should have been tolled. *Id.*

As discussed more fully below, *Brown* is clearly distinguishable from this case. Here, unlike *Brown*, the accident was not a hit-and-run for the purpose of invoking RCW 46.52.020 and .030. Gallardo stopped and provided all of the information requested by Tran, including her name, her phone number and her insurance information. (CP 107-108; CP 133-134.) However, even if RCW 46.52.020 and .030 are applicable, Gallardo complied with those statute's requirements unlike the defendants in *Brown*.

Thus, the trial court properly concluded that *Brown* is distinguishable from this case and not controlling. (CP 206.)

1. Gallardo complied with RCW 46.52.020 and .030

RCW 46.52.020 is Washington's hit-and-run statute. This statute may be violated in two ways: either by unlawfully leaving the scene of an accident resulting in injury to or death of "any person," or by unlawfully leaving the scene of an accident resulting in damage to a vehicle or other property. In either case, the drivers involved in the accident must remain at the scene of the accident to exchange identification information and to

render assistance to “any person injured in such accident.”
RCW 46.52.020(3).

No hit-and-run occurred in this case. Neither party left the scene of the accident. Both parties remained at the scene and exchanged identification information. (CP 107-108; CP 133-134.) Gallardo specifically provided her name and insurance information. (CP 107-108; CP 133-134.) No injuries were apparent necessitating emergency medical aid and no police were called to the scene. (CP 107-108; CP 133-134.) Thus, Gallardo complied with RCW 46.52.020(3). If both Tran and Gallardo were not in a condition to receive identification information and no police officer was present at the scene of the accident, then RCW 46.52.020(7) requires that both drivers report the accident to their nearest police office. This provision specifically states as follows:

If **none** of the persons specified are in condition to receive information [. . .] and no police office is present [. . .] **the driver of any vehicle** involved in such accident [. . .] shall forthwith report such accident to the nearest office of the duly authorized police authority.

RCW 46.52.020(7) (emphasis added).

Here, both parties were able to exchange identification information negating the obligation to report the accident to their nearest police authority in accordance with RCW 46.52.020(7). (CP 107-108; CP 133-134.) The fact that Tran may have been in shock as alleged did not

prevent her from exchanging identification information with Gallardo. And, even if Tran was not in a condition to exchange identification information, the statute requires that both parties not be in a condition to receive information before they are obligated to report the accident to their nearest police authority. Neither party reported injuries at the scene of the accident, and Gallardo duly provided her identification information.

To wit, the statute requires that Tran or Gallardo report the accident if neither of them are in condition to receive information at the time of the accident, but the statute does not place that obligation on one party or the other. Therefore, Tran's contention that Gallardo somehow violated this provision of RCW 46.52.020 by not reporting the accident to her nearest police authority is without merit.³

Similarly, Gallardo complied with RCW 46.52.030. This statute states that:

(1) Unless a report is to be made by a law enforcement officer under subsection (3) of this section, **the driver of any vehicle involved in an accident resulting in injury to [. . .] any person or damage to the property [. . .] to an apparent extent equal to or greater than the minimum amount established by rule adopted by the chief of the Washington state patrol in accordance with subsection (5) of this section, shall, within four days after such accident, make a written report of such accident to the chief of police of the city or town if such accident occurred within an**

³ Under the statute, Tran would have had that same obligation if both parties could not exchange identification information at the scene of the accident.

incorporated city or town or the county sheriff or state patrol if such accident occurred outside incorporated cities and towns.

(emphasis added.)

Just like RCW 46.52.020, this statute does not place the obligation to report an accident on any one party. Rather, the driver of **any vehicle** shall report an accident **resulting in injury** to a person **or damage to property to an apparent extent** equal to or greater than the minimum amount established by rule. Under RCW 46.52.020(5), the minimum accident-reporting threshold is five-hundred dollars.

In other words, if a person suffers from an injury **or** it is apparent that the property damage threshold is met in an accident, **any driver** involved in the accident is required to report the accident. RCW 46.52.030. Here, neither Tran nor Gallardo reported injuries at the scene of the accident. (CP 07-108; CP 133-134.) Both parties were in a position, and did, exchange personal information. Similarly, neither Tran nor Gallardo have submitted evidence to the trial court or to this Court that the property damage to their vehicles was to **an apparent extent** equal to or greater than five-hundred dollars.⁴ And, even it was “apparent” at the

⁴ Notably, when Gallardo’s insurance company inspected Tran’s vehicle after the accident, an estimate was generated for property damage to the bumper of Tran’s vehicle for approximately \$647.82. (CP 137.) This estimate, even if it was known at the scene of the accident by either party, does not rise to the level of an “apparent” amount equal to or greater than five-hundred dollars for which Tran

scene of the accident that one or both of the vehicles sustained property damage greater than five-hundred dollars, both Tran and Gallardo could have reported the accident. Again, the obligation is not placed on one party over the other.

2. Even if Gallardo technically failed to comply with RCW 46.52.020 and .030, *Brown v. ProWest* does not apply for the purpose of tolling the statute of limitations

In *Brown*, the appellate court held that, because defendants had violated RCW 46.52.020 and .030 by fleeing the scene of the accident, there was sufficient evidence to toll the statute of limitations. *Id.* Even then, however, the appellate court did not actually toll the statute of limitations based on the statutory violations. *Id.*

The appellate court reasoned that, if the defendants' violations of these statutes created an "obvious inability" of the plaintiff to prosecute the cause of action, then the statute of limitations would be suspended. *Id.*, at 418. Despite the fact that the defendant driver fled the scene of the accident and the defendants attempted to conceal their identities in violation of RCW 4.16.180, the appellate court in *Brown* did not conclude that the plaintiff was unable to prosecute his case for the purpose of tolling the statute of limitations. *Id.*

and Gallardo would have been required to report the accident under RCW 46.52.030(1).

This case is clearly distinguishable. As discussed, this case did not involve a hit-and-run. Gallardo stopped and provided all of the information requested by Tran. Thus, Gallardo did not violate RCW 46.52.020 or .030. Even if Gallardo had violated those statutes, however, the trial court properly held that *Brown* does not apply for the purpose of tolling the statute of limitations in this case because the appellate court in *Brown* did not even toll the statute of limitations when there were violations of RCW 46.52.020 and .030. Moreover, although the appellate court in *Brown* did not rule on the issue of whether plaintiff had an obvious inability to prosecute his case based on the facts in that case (defendants fleeing the scene and concealing their identities), the facts of this case establish that Tran could have prosecuted her case against Gallardo within the requisite statute of limitations.

3. The evidence establishes that Tran had an obvious and reasonable ability to prosecute her claim against Gallardo within the requisite statute of limitations

The trial court properly concluded as a matter of law that Tran had an obvious and reasonable ability to prosecute a claim against Gallardo within the requisite statute of limitations. (CP 206.)

After the accident, Gallardo immediately stopped and provided all of the information requested by Tran, including her name, her phone number and her insurance information. (CP 107-108; CP 124-129;

CP 133-134.) An estimate was also performed by Gallardo's insurance company on Tran's vehicle within the month following the accident which allowed her to engage in the prosecution of her case with Gallardo's insurance company. (CP 131-132; CP 135-153.) Specifically, Tran used the information provided by Gallardo at the scene to seek redress for her alleged injuries from Gallardo's insurance company. (CP 124-129.) Tran also corresponded with Gallardo's insurance company up through the filing of the lawsuit. (CP 124-129; CP 131-132; CP 135-153.)

Meanwhile, Gallardo was available for service in the state of Washington for two years after the accident and made no attempt to evade Tran. (CP 124-129.) When Gallardo moved to New York in 2012 she also filed a change of address form with the post office. (CP 107-108; CP 124-129; CP 133-134.) Additionally, from the day of the accident over three years ago until now, Tran had Gallardo's phone number and insurance information. (CP 124-129; CP 107-108; CP 133-134.) Thus, Tran had sufficient time and information to perfect service on Gallardo within the requisite statute of limitations. Tran's circular argument that she did not have an obvious and reasonable ability to prosecute her claim because she did not do so in time is therefore without merit.

4. **In *State Farm v. Seaman*, this Court squarely rejected the same argument advanced now by Tran—that an alleged technical deficiency in the exchange of**

information following an accident results in a driver committing a hit-and-run

In *State Farm v. Seaman*, 96 Wn. App. 629, 980 P.2d 288 (1999), the plaintiff made an analogous argument to the one Tran is presently making with respect to Washington's hit-and-run statute. In that case, Seaman was an insured driver who was involved in a rear-end collision with another driver. Following the accident, both drivers pulled over to investigate. *Id.* at 631. Further, each driver asked if the other was okay; both drivers responded in the positive. *Id.* Following this exchange, the driver of the vehicle that hit Seaman stated, "I guess it's okay then." *Id.* As a result, both drivers returned to their vehicles and drove away. *Id.*

During her deposition, Seaman stated that, when her vehicle was hit she felt a popping sensation in her neck and back. *Id.* She also stated that for up to 10 minutes following the accident she felt "stunned" and described her mental state as "[s]hook up," "[t]ense," and "[f]rightened." *Id.* Seaman neither asked for nor obtained any information from the driver of the other vehicle before he left the scene. *Id.* She did not write down the license plate number or the make and model of the other vehicle. *Id.* She stated that she failed to do so because she was "stunned" and "shook up." *Id.*

One day after the accident, Seaman developed neck and back pain. *Id.* at 632. Seaman then submitted a claim for UIM benefits to her insurer, State Farm, on the basis that she was involved in an accident with a “hit-and-run” driver. State Farm disagreed, denied her claim and sought a declaratory judgment. *Id.* Seaman’s insurance policy with State Farm included a UIM provision that State Farm would pay the insured for damage for bodily injury caused by a hit-and-run driver. *Id.* at 633. The parties disputed the meaning of “hit-and-run” within the policy language at issue, and Seaman urged the court to adopt the definition of a hit-and-run driver as codified in RCW 46.52.020, Washington’s criminal hit-and-run statute. *Id.* at 632.

With regard to whether the unidentified driver in *Seaman* was a hit-and-run driver under RCW 46.52.020, the court stated that:

Here, the unidentified driver complied with his duties under RCW 46.52.020. Upon striking Seaman’s vehicle, he exited his own vehicle, investigated the cars for property damage, and asked Seaman about her physical well-being. Finding no apparent property damage and based upon Seaman’s representation that she was not injured, the unidentified driver returned to his car and departed. He undertook a reasonable investigation of the accident scene by confirming that there were no signs of visible damage and in receiving Seaman’s assurance that she was not injured. Thus, he was not a “hit-and-run” driver within the meaning of the criminal hit-and-run statute.

Id. at 634.

The Court continued by stating that, “Our Supreme Court in *Hartford Acc. & Indem. Co. v. Novak*, 83 Wn.2d 576, 585, 520 P.2d 1368 (1974), defined a ‘hit-and-run’ as ‘a car involved in an accident causing damages where the driver flees from the scene.’ Thus, as defined by the Supreme Court, a hit-and-run denotes only a situation where a driver flees the scene of an accident.” *Id.* at 634-635 (emphasis added). The court in *Seaman* noted that the unidentified driver did not flee. Rather, he promptly exited his vehicle and approached Seaman to inquire about her condition and the condition of her vehicle. *Id.* at 635. The court concluded that, “**under the facts of this case, we hold that the term ‘hit-and-run’ is not ambiguous; the term does not encompass a situation where a driver promptly exits his vehicle, undertakes an investigation, is assured there is neither injury nor damage, and departs.**” *Id.*

Here, immediately after the accident, Gallardo pulled her vehicle over to the side of the road and exchanged personal information with Tran. (CP 124.) That information included Gallardo’s name, phone number and insurance information. (CP 125.) Gallardo’s license plate was also properly displayed. (CP 125.) Neither Tran nor Gallardo requested assistance or medical aid, and no obvious injuries were apparent necessitating emergency medical aid. (CP 134; CP 205.)

The fact that Tran may have been in shock as alleged did not prevent her from exchanging identification information with Gallardo. The court in *Seaman* contemplated the same contention, and ultimately held that, if a driver stops and cooperates with another driver following an accident, that driver cannot be said to have “fled” after the accident, even if a driver allegedly in shock could have obtained additional information, but failed to do so because of an alleged state of shock. Here, although Tran alleges that she was in a state of shock following the accident, she has never alleged that she requested any information from Gallardo which Gallardo refused to provide, nor has Tran stated Gallardo’s license plate number was not displayed, or alleged that Gallardo refused to cooperate in anyway.

Regardless of whether Tran was in a state of “shock,” Gallardo’s actions following the accident (including stopping and exchanging information with Tran), clearly establishes that Gallardo was not a “hit-and-run” driver within the meaning of RCW 46.52.020 or the applicable case law interpreting the same. For this reason, Tran’s arguments and reliance upon *Brown* are erroneous.

D. Request for Attorney Fees and Expenses

Pursuant to RAP 18.1, Gallardo requests attorney fees and expenses incurred in defending against the Tran’s Appeal. The basis for

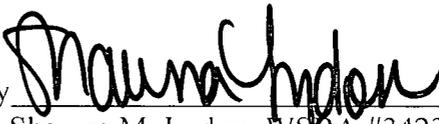
fees and expenses on appeal are similar to fees allowable at trial, e.g., by statute, equity, or agreement. *Landberg v. Carlson*, 108 Wn. App 749, 33 P.3d 406 (2001). Moreover, this Court, upon motion of a party or on its own initiative, may order a party who files a frivolous appeal or fails to comply with the appellate rules to pay terms or compensatory damages to another party. RAP 18.9. Given the fact that Tran's Appeal is squarely addressed by settled law as discussed, the Appeal is frivolous. For this reason, Gallardo requests attorney fees and expenses incurred in defending against Tran's Appeal.

V. CONCLUSION

Tran has failed to present any basis for this Court to disturb the trial court's ruling. The well-settled law in Washington regarding the statute of limitations and the evidence presented at trial support the conclusion that Tran's lawsuit against Gallardo was time-barred. Accordingly, the trial court's ruling should be affirmed.

DATED this 8th day of January, 2015.

BETTS, PATTERSON & MINES, P.S.

By 
Shawna M. Lydon, WSBA #34238
Attorney for Respondents

CERTIFICATE OF SERVICE

I, Sandra Nokes, declare as follows:

1) I am a citizen of the United States and a resident of the State of Washington. I am over the age of 18 years and not a party to the within entitled cause. I am employed by the law firm of Betts Patterson & Mines, One Convention Place, Suite 1400, 701 Pike Street, Seattle, Washington 98101-3927.

2) By the end of the business day on January 9, 2014, I caused to be served upon counsel of record the following documents by legal messenger at the below address.

- **Brief of Respondents; and**
- **Certificate of Service.**

Counsel for Appellant
 Joel M. Flores
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 Tacoma, WA 98467-3298

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 DIVISION II
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 STATE OF WASHINGTON
 BY  DEPUTY

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of January, 2015.



Sandra Nokes