

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

Case No. 352757

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Appeal from Pend Oreille County Superior Court, No.15-2-001341

Ms. Candea Balcom- Smartlowit  
Plaintiff/ Appellant

Vs.

J.H. Huscroft, et al.  
Defendants/Respondents

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REPLY BRIEF OF APPELLANT

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## I. ARGUMENT

Huscroft now agrees that the original legal basis for their motion to dismiss was CR 12 (i). CR 12 (i) is entitled “Nonparty at Fault,” and this rule does not deal with service of these defendants, and it is an improper legal basis for dismissal of this action. Accordingly, there was not a proper legal basis cited by defendants in support of their opening memorandum, and therefore, the motion should have been dismissed before the trial court, and must be dismissed now. In Huscroft’s opening brief in support of their motion to dismiss, it cited a case which outlined one way to perfect service upon Huscroft, but it was not the only way.

There was also not a factual basis for defendants’ motion. Defendants falsely assumed that service was not perfected when this matter was served, but service was perfected by publication as the Affidavit of Service shows, and as by permitted, and ordered, by the superior court. CR 5 .

As stated before, there are many different ways service can be perfected, and service in this matter was completed within a few days after filing. The trial court ordered that service could be perfect by publishing the summons against the defendants, and the trial court had the right and power to direct how service could be perfected. *Ashely, supra*. The

statute of limitations was tolled on the first date of publication. *See, e.g., Lund v. Benham*, 109 Wa.App. 263, 34 P.3d 902 (Div. III 2001).

It was not necessary for a court to issue an order regarding service by publication. *See, e.g., Goore v. Goore*, 24 Wash. 139, 63 P. 1092 (1901). The superior court, however, issued an order which in part provided that service could be perfected by serving "...the defendants by publication." The Court in *Ashley v. Superior Court*, 82 Wash. 2d 188, 509 P.2d 751, on reh'g 83 Wash.2d 521 P.2d 711 (1974), essentially held that a court in general has wide powers to form its own process regarding how service would be completed in a particular case, and it was improper for this same court to later hold that service was not permitted. Essentially, the superior court was acting as its own appellate court regarding its earlier order by granting this motion to dismiss. The Court in *Ashley, supra*, also noted that this service of process would not be effective if it violated the defendant's due process rights. *Id.* at 197. The defendants here, however, did not, and have not alleged a violation of their due process rights because those rights were not violated. These defendants' rights were not violated because they have had actual notice of the lawsuit.

Besides publication of this summons, a copy of the complaint and summons was sent, and received, by mail to the defendants

so they had actual notice of the proceedings against them, and they admit they had actual notice of these proceedings. Statements in pleadings are indisputable judicial admissions of fact. *See, e.g., Kassel v. Gannett Co., Inc.*, 875 P.2d 935 (1<sup>st</sup> Cir. 1989) as cited in 5B Wash. Prac. Page 446. This indisputable admitted fact, or judicial admission, is binding upon the parties and the superior court, it is even improper to even attempt to dispute such facts further. The defendants did not claim that their actual notice somehow violated their due process rights, and the reason they have not made such a claim is that their due process rights have not be violated because they have had actual notice of this lawsuit from multiple sources and methods.

Even though Huscroft attempt to distinguish the cases cited herein upon the different facts of each case, the hornbook law relied upon within these cases are still good case authority that has not been overturned by any appellate court in this state. These similar issues were discussed in *Dobbins v. Beal*, 4 Wn.App. 616, 483 P.2d 874 (1971). In *Dobbins, supra*, the plaintiff obtained service by publication. The defendant also objected to service by publication by citing RCW 4.28.185, but the court in upholding jurisdiction stated:

Its adequacy [of substituted service by publication] so far as due process is concerned is dependent on whether or not the form of substituted service is provided for such cases

and employed is reasonably calculated to give him (the defendant) *actual notice* of the proceedings of the proceedings and an opportunity to be heard. If it is, the traditional notions of fair play and substantial justice implicit in due process are satisfied. ( Emphasis added, citations omitted).

*Id.* at 620. Accordingly, due process hinged upon whether or not the defendant had actual notice of the proceedings, and whether or not they had an opportunity to be heard.

The court went on to hold that service by publication is another manner to obtain service in these sorts of automobile accidents where the defendant cannot be found in the state. *Id.* at 621. Applying this holding to this matter, the defendants by way of a judicial admission admit they have actual notice of these proceedings, they have had an opportunity to be heard, and they have not even alleged that their due process rights have been violated. Accordingly, this Court must reverse the trial court's granting of summary judgment in this matter.

Besides conducting business in this state, and traveling this state's highways, the defendant employed an insurance agent in this state. It was plaintiff's understanding that this agent was communicating with the defendants, and forwarding correspondence to the defendants from plaintiff.

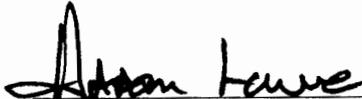
Even though Huscroft attempts to argue otherwise now, Ms. Balcom's attorney stands by what happened regarding Huscraft's lack of service of any reply materials upon Ms. Balcom, that Huscroft's changed its legal basis for its motion to dismiss at the hearing; thereby not allowing Ms. Balcom to properly respond to this change in legal strategy at the hearing. Ms. Balcom's attorney was not personally served with any responsive pleadings before the hearing in reply to Huscroft's motion to dismiss, but when he arrived at the hearing, he was served with a reply memorandum. Moreover, this reply memorandum had new citations and arguments that should have been in the opening brief because Ms. Balcom's attorney could not timely and properly respond to these new citations and arguments as required within CR 56 and its construing case authority. Ms. Balcom objected to the latest of these new arguments, but the superior court judge allowed them anyway and improperly considered them in executing the motion to dismiss. These new arguments and case authorities should have been ruled inadmissible, mere surplusage, and should have been disregarded by the superior court, rather than encouraged, *Washington PUD Systems v. PUD No. 1 of Callam County*, 112 Wn.2d 1, 771 P.2d 701 (1989). Courts are prohibited from considering inadmissible evidence when determining summary judgment motions. *Dunlap v. Wayne*, 105 Wn.2d 529, 716 P.2d 842 (1986).

Accordingly, defendants' new arguments should not have been allowed or considered at the hearing. Every court rule is formulated to guard against a hearing by surprise, which occurred here before the trial court. Thus, this Court must reverse the trial court granting of summary judgment and remand this matter back to Pend Oreille County for further proceedings.

## II. CONCLUSION

For all of the above reasons, plaintiff requests that superior court's granting summary judgment be reversed because the motion had no basis in fact or law as outlined above.

Dated this 5<sup>th</sup> day of Oct., 2017.

  
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