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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

Case No. 352757

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

OPENING BRIEF OF APPELLANT

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INTRODUCTION

Plaintiff, Ms. Candea Balcom (hereinafter Ms. Balcom) requests this Court reverse the order granting summary judgment in this matter in favor of defendants, (hereinafter Huscroft) that was entered on April 13, 2017, and refer this matter back to the Pend Oreille Superior Court for further proceedings in accordance with this Court's order.

ASSIGNMENTS OF ERROR

1. The superior court in this matter erred by granting the defendants' motion for summary judgment.
2. The superior court in this matter erred by allowing new materials and arguments at the time of the hearing that plaintiff was not permitted to timely address before the hearing.

STATEMENT OF CASE

In March, 2017, defendants brought a motion to dismiss this matter upon Huscroft's false assumption that this matter was not properly served. Service was permitted and ordered by the superior court by publication as outlined below. Accordingly, defendants' motion had no basis in law or fact, and the superior court in this matter improperly granted Huscroft's motion for a dismissal.

ARGUMENT

Initially, Huscroft alleged that the legal basis for their motion was CR 12 (i). CR 12(i), however, was improperly cited and quoted in defendants' memorandum. CR 12 (i) is entitled "Nonparty at Fault," and this rule does not deal with service of these defendants. Accordingly, there was not a proper legal basis cited by defendants in support of their motion, and therefore, the motion should have been dismissed. 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 .

There are many different ways service can be perfected, and service in this matter was completed within a few days after filing. *See, e.g.,* RCW 4.28.100. 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 allege 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 (1st 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.

The defendants if nothing else had property in this state which was the truck involved in this accident. The defendants were conducting business in this state by allegedly delivering their lumber products to a company in Pend Oreille County, Washington. The defendants committed a tortious act in this state by causing the accident complained of in the complaint in this matter. Consequently, there were many contacts by defendants with this state. Moreover, the plaintiff conducted due diligence in attempting to find defendants, or some representative of the defendants, to personally serve within this state because arguably defendants are illegally conducting business in this state without having a personal representative in this state to accept service, and arguably that is why the superior court earlier permitted, and ordered, service by publication. The superior court's appellate decision further erodes the reasoning why

people and businesses doing business within this state are required to a representative on their behalf in this state to accept service, otherwise, no one will have such representatives and the injured plaintiffs of this state will suffer another injury at the hands of our courts. Accordingly, the issue really is has due process been satisfied here, and did the defendants have actual notice of the proceedings here? The answer to these questions is ... Yes, to both questions.

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 in an automobile accident after complying with RCW 4.28.100. 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.

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, 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.

Since service was perfected by mailing, actual knowledge, and by court ordered publication, Huscroft then changed it arguments regarding why it believed the dismissal should be granted at the hearing of the matter. Ms. Balcom's attorney was not personally served with any responsive pleadings 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. Thus, this Court must reverse the trial court granting of summary judgment and remand this matter back to Pend Oreille County for further proceedings.

ATTORNEY FEES AND COSTS REQUEST RAP 18.1

Ms. Balcom also requests that this Court grant in accordance with RAP 18.1 her attorney fees and costs. *See, e.g., Wilson Court Limited Partnership v. Tony Maroni's Inc.* 139 Wn.2d 692, 952 P.2d 590 (1998)

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 9th day of August, 2017.

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