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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

COURT OF APPEALS, STATE OF WASHINGTON
DIVISION III

No. 352757

CANDEA BALCOM aka CANDEA SMARTLOWIT,

Plaintiff-Appellant,

v.

TAMARA BLAND and J.H. HUSCROFT, LTD.,

Defendants-Respondents.

AMENDED RESPONDENTS' BRIEF

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I. INTRODUCTION

Respondents, Tamara Bland and J.H. Huscroft, Ltd., are citizens of Canada. Appellant, Ms. Balcom, is a citizen of Washington State. After Ms. Balcom was allegedly injured in a car accident, she filed suit in Pend Oreille County Superior Court. Ms. Balcom then attempted to serve Respondents via publication in *The Newport Miner*, a Pend Oreille County periodical. Respondents filed a Motion to Dismiss for lack of jurisdiction based on insufficient service and failure to state a claim upon which relief can be granted. The trial court granted the Motion and dismissed the action with prejudice. This Court should affirm.

II. STATEMENT OF FACTS

On September 24, 2015, two days before the expiration of the statute of limitation, Ms. Balcom filed a Summons and Complaint naming Tamara Bland and J.H. Huscroft as defendants. CP at 16-17, 19-22. The Complaint alleged that, on September 26, 2012, Ms. Bland, an employee of J.H. Huscroft, negligently caused an accident that injured Ms. Balcom. CP at 20. The Complaint asserted that the Court had jurisdiction because “all acts . . . alleged occurred within Pend Oreille County, Washington.” *Id.* The Complaint alleged that Ms. Bland was a Canadian citizen and that J.H. Huscroft was a Canadian corporation. CP at 19.

On the same day that Ms. Balcom filed the Complaint, she filed a Motion for Service by Publication and Declaration. CP at 24-25. In the declaration, Aaron Lowe, Ms. Balcom's attorney, attested that Ms. Bland was "probably in Canada" and that J.H. Huscroft had no representative to accept service in the state of Washington. CP at 25. Mr. Lowe attested that "in order to perfect service on [Ms. Bland and J.H. Huscroft], service by publication is necessary." *Id.* The Court signed an Order for Service of Summons by Publication, CP at 27, and Appellant filed a Summons by Publication, CP at 29-30. Ms. Balcom published the Summons in *The Newport Miner* weekly from September 30, 2015 to November 4, 2015. CP at 42.

After no action in the case for over a year, Respondents filed a Motion to Dismiss arguing that Ms. Balcom's action should be dismissed for lack of jurisdiction based on improper service. CP at 1-35. After a hearing held on April 13, 2017, the trial court dismissed Ms. Balcom's action. CP at 59-60. The dismissal was with prejudice as the statute of limitations had expired on Ms. Balcom's claim, and thus, the Complaint failed to state a claim upon which relief could be granted. *Id.*

III. ISSUES PRESENTED FOR REVIEW

1. Whether a Washington court has jurisdiction over Canadian defendants when the plaintiff serves the Summons via publication without

strictly complying with statutes authorizing out-of-state service and when the publication does not reasonably apprise the defendants that an action has been commenced against them.

2. Whether alleged procedural irregularities during a hearing on a Motion to Dismiss warrant reversal of the trial court's decision when the record on review does not support that any irregularities took place and when the party alleging the irregularities fails to show how she was prejudiced.

IV. STANDARD OF REVIEW

An appellate court reviews CR 12(b)(2) dismissals for lack of personal jurisdiction de novo. *State v. LG Elecs., Inc.*, 186 Wn.2d 169, 176, 375 P.3d 1035 (2016). A suit that is time barred by the statute of limitations fails to state a claim upon which relief can be granted and should be dismissed. *Summerrise v. Stephens*, 75 Wn.2d 808, 811, 454 P.2d 224 (1969).

V. ARGUMENT

"A Washington court may assert personal jurisdiction over an out-of-state defendant if the long-arm statute is satisfied and if the assumption of jurisdiction meets the requirements of due process by comports with traditional notions of fair play and substantial justice." *Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, Inc.*, 154 Wn. App. 581, 584–

85, 225 P.3d 1035 (2010) (footnote omitted). “Because statutes authorizing service on out-of-state parties are in derogation of common law personal service requirements, they must be strictly construed.” *Id.* at 585 (footnote omitted). “Basic to litigation is jurisdiction, and first to jurisdiction is service of process.” *Rodriguez v. James-Jackson*, 127 Wn. App. 139, 143, 111 P.3d 271 (2005) (footnote omitted).

A. Ms. Balcom Did Not Properly Serve Respondents, Citizens of Canada, Under Washington’s Long Arm Statute or RCW 4.28.100.

Ms. Balcom argues that service of process via publication was authorized by statute and court rules, and, if nothing else, was authorized by the trial court when it signed the Order for Service of Summons by Publication. App. Br. at 2. Because Ms. Balcom failed to strictly comply with statutory requirements, and because a court order cannot cure this failure, Ms. Balcom’s arguments fail.

1. *Ms. Balcom did not strictly comply with the statutes authorizing service on out-of-state defendants.*

Washington’s long-arm statute, RCW 4.28.185(2), specifies the required manner of service of process on defendants located outside of the state who are subject to the jurisdiction of Washington courts based on the acts specified in the statute:

Service of process upon any person who is subject to the jurisdiction of the courts of this state, as provided in this

section, may be made by *personally serving* the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state.

RCW 4.28.185(2) (emphasis added). RCW 4.28.180 specifies the form and method of service of the summons to be used in effectuating personal service outside of the state. When serving a foreign defendant under the long arm statute, the requirements of the statute trump the service provisions of CR 4. *Ralph's Concrete*, 154 Wn. App. at 585–87.

In *Ralph's Concrete*, the plaintiff attempted to serve via mail a Canadian defendant under Washington's long arm statute. *Id.* at 584. After the Canadian defendant failed to appear, the trial court entered a default judgment against it. *Id.* The Canadian defendant then sought to vacate the judgment on jurisdictional grounds (improper service) but the trial court refused to vacate the default judgment. *Id.* The Canadian defendant appealed and the Court of Appeals reversed, setting aside the entry of default. *Id.* at 592. The Court of Appeals rejected the plaintiff's arguments that, in serving the Canadian defendant, plaintiff complied with the provisions of CR 4(i)(1)(d), which, in some circumstances, allows a plaintiff to serve a foreign corporation by mail. *Ralph's Concrete*, 154 Wn. App. at 586-87. The Court of Appeals reasoned that a plaintiff cannot effectuate service under CR 4 when a statute prescribes the manner of

service, as in the case of the long arm statute. *Id.* (citing CR 4(i)(1)(D)); *Id.* at 588 (“Here, the long-arm statute mandates personal service. Thus, CR 4(i) does not apply.”).

The case at bar is nearly identical to *Ralph’s Concrete*. Here, it is undisputed that Ms. Balcom did not personally serve the Summons and Complaint upon Ms. Bland and J.H. Huscroft. Rather, Ms. Balcom attempted to effect service via publication (and by, allegedly, mailing copies to Respondents). Under the long arm statute, however, personal service is required. RCW 4.28.185(2). Just like service by mailing failed to establish jurisdiction over a Canadian corporation in *Ralph’s Concrete*, service by publication fails to establish jurisdiction over the Canadian Respondents in this case.

Ms. Balcom argues that service via publication was proper under CR 5 and RCW 4.28.100. App. Br. at 2. However, CR 5 does not authorize service by publication. RCW 4.28.100 provides in relevant part:

When the defendant cannot be found within the state, and upon the filing of an affidavit of the plaintiff, his or her agent, or attorney, with the clerk of the court, stating that he or she believes that the defendant is not a resident of the state, or cannot be found therein, and that he or she has deposited a copy of the summons (substantially in the form prescribed in RCW 4.28.110) and complaint in the post office, directed to the defendant at his or her place of residence, unless it is stated in the affidavit that such residence is not known to the affiant, and stating the existence of one of the cases hereinafter specified, the

service may be made by publication of the summons, by the plaintiff or his or her attorney in any of the following cases:

(1) When the defendant is a foreign corporation, and has property within the state;

(2) When the defendant, being a resident of this state, has departed therefrom with intent to defraud his or her creditors, or to avoid the service of a summons, or keeps himself or herself concealed therein with like intent[.]

In his declaration in support of Motion for Service by Publication, Mr. Lowe failed to establish any facts justifying service by publication under RCW 4.28.100 as to either Respondents.

As to Ms. Bland, Mr. Lowe alleged that Ms. Bland “has departed this state it is believed to avoid service in this matter, and is probably in Canada.” CP at 25. Mr. Lowe further represented, “It is unknown if Ms. Bland will ever come back to the United States.” *Id.* The only conceivable ground under RCW 4.28.100 that would permit Ms. Balcom to serve Ms. Bland via publication is RCW 4.28.100(2). Subsection (2) does not apply, however, because Ms. Bland is not a “resident of [Washington].” RCW 4.28.100(2). Indeed, in Ms. Balcom’s Complaint, she identified Ms. Bland as “a resident of Creston, British Columbia . . . , Canada.” CP at 19.

Even if Ms. Bland was a resident of Washington, Mr. Lowe's allegation that Ms. Bland "departed this state it is believed to avoid service in this matter," CP at 25, is completely conclusory and unsupported. *Cf. Brennan v. Hurt*, 59 Wn. App. 315, 317, 796 P.2d 786 (1990) ("Affidavits supporting service by publication must set forth facts, not just conclusions."); *see also Kent v. Lee*, 52 Wn. App. 576, 579, 762 P.2d 24 (1988) (dismissing action when affidavit supporting service by publication showed only that plaintiff and her attorney, "after a not very exhaustive local search, were unable to locate [the defendant]."); *Lepeska v. Farley*, 67 Wn. App. 548, 554, 833 P.2d 437 (1992) (affidavit in support of alternative service deficient when it failed to set forth any facts showing that the defendant left the state with the intent to avoid service). As Ms. Bland is a Canadian citizen, it is logical that she would return to her home in Canada. Simply returning to her home country cannot support a reasonable inference that Ms. Bland departed Washington with the intent to avoid service of process. Mr. Lowe failed to establish any facts justifying service by publication as to Ms. Bland under RCW 4.28.100.

As to J.H. Huscroft, Mr. Lowe's declaration, CP at 24-25, did not identify any real or personal property that J.H. Huscroft maintained in Washington, which could conceivably be grounds for service by publication under RCW 4.28.100(1). On appeal, however, Ms. Balcom

argues, “The defendants if nothing else had property in this state which was the truck involved in the accident.” App. Br. at 4. At no point in these proceedings has Ms. Balcom established that J.H. Huscroft owned the truck or offered any proof of where the truck is located. Ms. Balcom cannot show that service by publication was sufficient under RCW 4.28.100(1) because she never made a showing that J.H. Huscroft had any “property within the state.” Moreover, conducting business or committing a “tortious act” in Washington, *see* App. Br. at 4, are not acts that authorize a plaintiff to serve a Summons by publication under RCW 4.28.100.

2. *The Court’s Order for Service of Summons by Publication does not confer jurisdiction over Respondents.*

Ms. Balcom notes that a court order is not required to serve the Summons via publication; thus, Ms. Balcom argues, the Court’s Order for Service of Summons by Publication, CP at 27, validates her chosen method of serving the Summons in this case. App. Br. at 3. Appellant finds support in *Ashley v. Superior Court*, 83 Wn.2d 630, 633, 521 P.2d 711, *amending* 82 Wn.2d 188, 509 P.2d 751 (1974). The issue before the Court in *Ashley* is completely different than the issue in the case at bar.

Ashley was a marital dissolution case in which the indigent wife seeking to divorce her out-of-state husband sought to waive the

publication costs of serving her husband. In the context of marital dissolution, “a state may not, consistent with the obligations imposed upon it by the due process clause of the Fourteenth Amendment, preempt the right to dissolve the legal relationship of marriage without affording all citizens access to the means prescribed for doing so.” *Id.* at 633 (citing *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971)). The *Ashley* court formulated the issue of that case as:

a case in which a plaintiff who has the right to bring her action for divorce in the Superior Court of this state will be effectively denied the exercise of that right if our rules providing methods of process and strictly imposed, since both publication of summons and complaint and service by the sheriff of the foreign jurisdiction involve expenses which the plaintiff cannot afford to pay.

Id. at 637. To solve the “dilemma” presented in that case, the Court stated that the plaintiff could satisfy due process by mailing the summons and complaint to the husband’s parents’ house with a letter requesting that the parents forward the pleadings to the husband. *Id.* at 637-38.

This case is not a divorce case involving an indigent party. The special due process concerns about not inhibiting citizens’ legal rights to dissolve the legal relationship of marriage present in *Ashley* are not present here. Thus, service by mail (pursuant to a court order) in *Ashley* may have been proper as an inexpensive alternative to publication and because it was reasonably calculated to give the husband notice of the

action. But in this case, a personal injury action involving international defendants, the rationale underlying the *Ashley* decision does not apply. The Court should reject Ms. Balcom's argument that *Ashley* permitted the trial court in this case to "form its own process regarding how service would be completed in a particular case." App. Br. at 3.

Ms. Balcom failed to properly serve Respondents under Washington's long arm statute, RCW 4.28.185, because she did not personally serve Respondents with the Summons and Complaint. Moreover, Ms. Balcom never made any showing that grounds for service by publication existed under RCW 4.28.100. Because Ms. Balcom did not strictly comply with these statutes authorizing service on out-of-state parties, Ms. Balcom failed to establish the court's jurisdiction over Respondents. The trial court's Order for Service of Summons by Publication does not remedy the fact that Ms. Balcom failed to strictly comply with these statutes.

B. Ms. Balcom's Publication of the Summons Does Not Satisfy Due Process Requirements.

"A Washington court may assert personal jurisdiction over an out-of-state defendant . . . if the assumption of jurisdiction meets the requirements of due process by comports with traditional notions of fair play and substantial justice." *Ralph's Concrete*, 154 Wn. App. at 584-85,

(footnote omitted). Due process requires notice reasonably calculated, under all the circumstances, to apprise interested parties of a pending action. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *see also Schroeder v. City of New York*, 371 U.S. 208, 212-13, 83 S.Ct. 279, 282, 9 L.Ed.2d 255 (1962) (“[N]otice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interests are directly affected by the proceedings in question.”). Due process sets a floor for minimum service requirements: “[B]eyond due process [requirements], statutory service requirements must be complied with in order for the court to finally adjudicate the dispute between the parties.” *Weiss v. Glemp*, 127 Wn.2d 726, 734, 903 P.2d 455 (1995).

In this case, even if Ms. Balcom had strictly complied with the out-of-state service statutes, her efforts to publish the Summons in *The Newport Miner*, a local Pend Oreille County periodical, would not satisfy due process safeguards. Such safeguards required that Ms. Balcom give the Canadian defendants notice reasonably calculated to apprise interested parties of a pending action. Using a local periodical with a small circulation to provide notice to a defendant in another country is a “mere

gesture” at giving notice to the defendant; it is not due process. *Mullane*, 339 U.S. at 315, 70 S. Ct. 652.

Ms. Balcom appears to argue that due process is satisfied because Respondents had actual notice of her lawsuit by virtue of the fact that she mailed copies of the Summons and Complaint to Respondents and that Respondents “admitted” receiving actual notice. App. Br. at 3-4. Respondents never admitted having actual notice of Ms. Balcom’s action. And the record contains no evidence that Ms. Balcom mailed the Summons and Complaint to Respondents except for Mr. Lowe’s representation that he would “forward a copy of the complaint and summons to defendants.” CP at 25. Even if Respondents received copies of the Summons and Complaint in the mail, “[m]ere receipt of process and actual notice alone do not establish valid service of process.” *Ralph’s Concrete*, 154 Wn. App. at 585 (footnote omitted); *see also Macchia v. Russo*, 496 N.E.2d 680 (N.Y. 1986) (“In a challenge to service of process, the fact that a defendant has received prompt notice of the action is of no moment Notice received by means other than those authorized by statute does not bring a defendant within the jurisdiction of the court.” (Internal and subsequent citations omitted)).

Appellant cites to *Dobbins v. Beal*, 4 Wn. App. 616, 621, 483 P.2d 874 (1971) in support of her argument that actual notice of an action

establishes the Court's jurisdiction over Respondents. App. Br. at 5-6. In that case, Dobbins filed suit against Beal after Beal allegedly injured Dobbins in a car accident. *Dobbins*, 4 Wn. App. at 617. After he was unable to locate Beal, Dobbins served the Summons via publication based on facts alleged in an affidavit signed by Dobbins's attorney. *Id.* at 617-18. Beal filed a motion to dismiss, which the trial court granted after finding that the attorney's affidavit was insufficient to support service by publication. *Id.* at 618.

The Court of Appeals reversed after finding that the affidavit satisfied the criteria of RCW 4.28.100. The Court of Appeals noted that Dobbins's counsel's affidavit established that (1) Beal had a Seattle address, (2) Beal had worked for Boeing at the time of the accident, (3) mail to Beal's address was returned indicated "moved, leaving no forwarding address," and (4) mail to Beal's family in Nebraska was forwarded to same Seattle address. *Id.* at 618. The sheriff also submitted a "return of not found." *Id.* at 617. Central to the Court of Appeals decision to reverse the trial court's dismissal of the action was the fact that Beal did not "materially challenge[] . . . the integrity of the [Dobbins's counsel's] affidavit and the sheriff's return of not found." *Id.* at 619. The Court of Appeals did not base its decision on the fact that Beal had actual notice of the action. The text cited by Ms. Balcom on pg. 5 of her Brief is part of the

Court's discussion rejecting the defendant's argument that "RCW 4.28.100(2) is an in rem state which does not confer jurisdiction upon the court to render an in personam judgment." *Dobbins*, 4 Wn. App. at 620.

The case at bar is dissimilar to *Dobbins*. Unlike the affidavit supporting publication in *Dobbins*, Mr. Lowe's declaration is entirely devoid of facts demonstrating strict compliance with RCW 4.28.100. Moreover, Respondents in this case materially challenged the integrity of Mr. Lowe's declaration supporting service by publication, which set forth significantly fewer facts than the affidavit in *Dobbins*. The reversal in *Dobbins* was based on Beal's failure to challenge the affidavit supporting publication, not based on the fact that Beal had actual notice. Appellant's citation to the "actual notice" language contained in *Dobbins* was not central to the Court of Appeal's ruling and is arguably dicta.

In conclusion, even if Ms. Balcom somehow strictly complied with statutory service requirements, her service of process in this case would still be insufficient because publishing the Summons in *The Newport Miner* does not satisfy due process, i.e., was not reasonably calculated to apprise the Canadian defendants of her pending action. Further, the fact that Respondents may have had actual notice of Ms. Balcom's action does not establish that Respondents received the process that was their due.

C. **Appellant's Alleged Procedural Irregularities Are Factually Unsupported; Even If There Were Procedural Irregularities, Any Errors Were Harmless as Appellant Fails to Show Prejudice.**

Without citation to the record, Ms. Balcom's second assignment of error states: "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." App. Br. at 1. Mr. Lowe alludes to the fact that he "was not personally served with any responsive pleadings in reply to Respondents' motion to dismiss, but when he arrived at the hearing, he was served with a reply memorandum." App. Br. at 6. Mr. Lowe further argues that he objected to "these new arguments, but the superior court judge allowed them anyway and improperly considered them in executing the motion to dismiss." *Id.* at 6-7.

The Court need not, and should not, reach Ms. Balcom's alleged errors concerning procedural irregularities. "A party seeking review has the burden of perfecting the record so that the court has before it all evidence relevant to the issue on appeal." *State ex rel. Dean by Mottet v. Dean*, 56 Wn. App. 377, 382, 783 P.2d 1099 (1989) (citing, inter alia, RAP 9.2(b)). "Matters not in the record will not be considered by the appellate court." *Id.*; see also RAP 10.3(a)(5). ("Reference to the record must be included for each factual statement."). Further, "An appellate

court will not consider a claim of error that a party fails to support with legal argument in her opening brief.” *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 845, 347 P.3d 487 (2015) (citing, inter alia, RAP 10.3(a)(6)). Ms. Balcom has not provided the Court of Appeals with a Verbatim Report of Proceedings and cannot cite to any evidence from the record on review supporting her factual allegations. Further, Ms. Balcom offers no legal argument as to why these alleged procedural irregularities justify or mandate reversing the trial court’s dismissal of this action.

If the Court were to reach the merits of Appellant’s procedural irregularities argument, the record on review supports as follows: Respondents served Mr. Lowe with their Reply re: Motion to Dismiss via fax and U.S. Mail on April 12, 2017. CP at 58. The hearing on the Motion took place on April 13, 2017. CP at 59. Under Pend Oreille Superior Court Local Rule 6(d)(2)(D), a paper in “strict reply shall be filed [and served] . . . no later than 12:00 noon on the court day before the date of the hearing.” Although the record does not establish the precise time Respondents

served Mr. Lowe with their Reply¹, the record suggests that Mr. Lowe had the Reply (via fax) the day before the hearing as required by local rules.

The record on review also is silent as to what “new arguments and case authorities” the trial court improperly considered. Although not in the record on review, defense counsel did provide Mr. Lowe and the trial court with copies of the *Ralph's Concrete* case cited *supra*. Defense counsel did not cite this case in the Motion to Dismiss and Reply briefing. However, the *Ralph's Concrete* case is controlling legal authority on the issues in this case, and attorneys for both parties had an ethical obligation to bring the case to the trial court’s attention. *See* RPC 3.3; *see also* Pend Oreille Local Rule 5(b)(2)(C)(iv)(i)² (“[P]hotocopies of reported cases . . . may be furnished directly to the judge hearing the matter[.]”). The *Ralph's Concrete* case supported, and did not change, Respondents’ argument that the trial court lacked jurisdiction over Respondents because Ms. Balcom’s service of process was insufficient.

¹Defense counsel possesses the fax transmittal confirmation indicating that the Reply was faxed to Mr. Lowe prior to 12:00 noon. Respondents could supplement the record on review with this document if it would be useful to the Court.

²The outline numbering of this rule appears to be incorrect. Respondents seek to cite to the last provision in this rule.

Even if the record supported any procedural irregularities, Ms. Balcom fails to show that she was prejudiced by the alleged irregularities or why they warrant reversing the trial court. The trial court's ruling was based only on the pleadings and the argument of counsel; this was not a summary judgment motion as argued by Ms. Balcom, App. Br. at 7. Short of an appeal, if Ms. Balcom had been concerned about not having an opportunity to respond to the authority cited by defense counsel at the hearing, Ms. Balcom could have filed a Motion for Reconsideration addressing that authority. Ms. Balcom did not file a Motion for Reconsideration. Ms. Balcom further fails to even cite to the *Ralph's Concrete* case in her Opening Brief much less explain why the trial court's consideration of the case at the hearing caused her prejudice.

The Court of Appeals should not reach Ms. Balcom's procedural irregularities arguments because they are factually and legally unsupported. If the Court does reach the merits of Ms. Balcom's argument, the Court should conclude that any procedural irregularities did not prejudice Ms. Balcom and were, at most, harmless errors. *See Anfinson v. FedEx Ground Package Sys., Inc.*, 159 Wn. App. 35, 44, 244 P.3d 32 (2010), *aff'd*, 174 Wn.2d 851, 281 P.3d 289 (2012) ("A harmless error is an error which is trivial, or formal, or merely academic, and was

not prejudicial to the substantial rights of the party assigning it, and in no way affected the final outcome of the case.”).

D. Ms. Balcom is Not Entitled to Attorney’s Fees under RAP 18.1; Respondents Should Be Awarded Their Attorney’s Fees on Appeal Because Ms. Balcom’s Appeal is Frivolous.

Ms. Balcom requests that the Court award her attorney fees on appeal under RAP 18.1(a). App. Br. at 7. “Under RAP 18.1(a), a party on appeal is entitled to attorney fees if a statute authorizes the award.” *West v. Thurston Cty.*, 169 Wn. App. 862, 867–68, 282 P.3d 1150, 1153 (2012). Ms. Balcom cites no statute or other basis that provides grounds to award her attorney fees on appeal. Thus, the Court should deny her request for attorney’s fees.

On the other hand, Respondents are entitled to attorney’s fees incurred in defending this frivolous appeal. RAP 18.9(a) authorizes the appellate court to award compensatory damages when a party files a frivolous appeal. *Kearney v. Kearney*, 95 Wn. App. 405, 417, 974 P.2d 872 (1999). “An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *In re Estate of Muller*, 197 Wn. App. 477, 490, 389 P.3d 604 (2016) (internal quotation marks and alterations omitted).

In this case, Ms. Balcom's arguments do not raise "debatable issues" and they are "totally devoid of merit." Further, this case never would have reached this appeal but for Mr. Lowe's questionable representations made to the trial court in initiating and perpetuating this action.

First, as addressed *supra*, when Mr. Lowe sought an Order for Service by Publication based on his declaration that made conclusory allegations in an attempt to justify service by publication. He claimed that Ms. Bland (not a Washington resident) departed the state with an intent to avoid service. CP at 25. He apparently searched for a registered agent of J.H. Huscroft in Washington, but after not finding one, claimed that the only way to serve J.H. Huscroft was by publication. *Id.* Mr. Lowe made no effort to cite any grounds justifying service by publication as to J.H. Huscroft under RCW 4.28.100. Mr. Lowe should never have sought to serve the Summons via publication and never should have represented to the trial court that service via publication was authorized.

After Mr. Lowe published the Summons, he took no action in the case for over a year. The trial court issued a Notice to Dismiss for Want of Prosecution. CP 32. Mr. Lowe responded to this Notice by attesting that "[t]he parties agreed to attempt to settle this matter." CP at 35. Defense counsel never participated in any settlement discussions with Mr. Lowe

and had no knowledge of any settlement discussions taking place. CP at 13. In his response to Respondents' Motion to Dismiss, Mr. Lowe did not attempt to argue otherwise. Had Mr. Lowe not made (apparently) false representations to the trial court, this matter could have been dismissed for lack of prosecution.

Instead, because the case was not dismissed for lack of prosecution, Respondents were required to bring their Motion to Dismiss. The substance of Respondents' arguments is presented *supra*. In response to Respondents' arguments, at the trial court level and now on appeal, Mr. Lowe makes arguments that are "totally devoid of merit."

To successfully serve the Canadian defendants in this matter, Ms. Balcom was required to strictly comply with the statutes authorizing out-of-state service. RCW 4.28.100; RCW 4.28.185. In her Opening Brief, Ms. Balcom makes no attempt to show that she attempted to comply with these statutes, other than to argue, without support, that Respondents' truck constituted "property" within Washington. Ms. Balcom seems to argue that, even if she didn't strictly comply with the out-of-state service statutes, any failings were excusable because Respondents had actual notice of the lawsuit and because the Court ordered service by publication. As addressed above, these arguments are not supported by Washington law. Finally, Ms. Balcom's arguments relating to her second assignment

of error are made without any citation to the record and without any legal argument why any alleged procedural irregularities warrants reversal.

In sum, the act that is subject to this appeal, i.e., service of process via publication, was initiated by Mr. Lowe's insufficient declaration. This suit continued because Mr. Lowe made an (apparently) false representation to the trial court that the parties had agreed to attempt to settle this case. Now, on appeal, Mr. Lowe makes arguments that are not supported by Washington law and that are not factually supported by the record on review. Respondents respectfully request an award of attorney fees under RAP 18.9(a) for defending this frivolous appeal.

VI. CONCLUSION

Dismissal of Ms. Balcom's action was proper under CR 12(b)(2) because the trial court lacked jurisdiction due to insufficient service of process. The trial court properly dismissed the action with prejudice because the statute of limitations has run; thus, Ms. Balcom's Complaint fails to state a claim upon which relief can be granted. CR 12(b)(6). Respondents respectfully request that the decision of the trial court be affirmed and that they be awarded their attorney fees on appeal.

RESPECTFULLY SUBMITTED this 11TH day of September, 2017.

PAINE HAMBLEN LLP

A handwritten signature in black ink, appearing to read "Scott", written over a horizontal line.

By: _____

Scott C. Cifrese, WSBA #25778
Paul S. Stewart, WSBA #45469

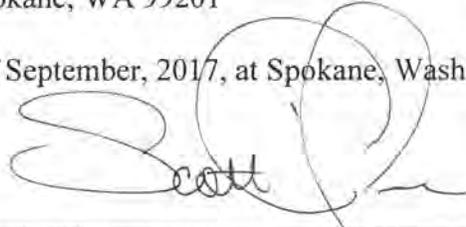
Attorneys for Respondents Tamara
Bland and J.H. Huscroft, Ltd.

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that a true and accurate copy of the document to which this declaration is affixed was sent via regular mail, postage prepaid, on this day, to:

Aaron L. Lowe
Aaron L. Lowe & Assoc., P.S.
W. 1403 Broadway
Spokane, WA 99201

Dated this 11TH day of September, 2017, at Spokane, Washington.

A handwritten signature in black ink, appearing to read "Scott C. Cifrese", written over a horizontal line.

Scott C. Cifrese