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No. 366839
(consolidated with 369811)

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION III

IVONNE CAMPBELL and VINCE CAMPBELL,
wife and husband and the marital community thereof

Appellants-Plaintiffs,

v.

ANA FERNANDEZ and JOHN DOE FERNANDEZ,
wife and husband and the marital community composed thereof,

Respondents-Defendants.

BRIEF OF RESPONDENT

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I. INTRODUCTION

The Respondents are Ana Fernandez and John Doe Fernandez (hereinafter, Fernandez). The Appellants, Ivonne Campbell and Vince Campbell (hereinafter, Campbell), seek reversal of the Trial Court's orders in two essentially identical cases granting dismissal and summary judgment respectively in favor of Fernandez, and against Campbell in each.

II. ASSIGNMENTS OF ERROR

1. Whether the trial court erred in dismissing the first lawsuit filed by Campbell due to a failure of proof of service of process prior to the expiration of the statute of limitations.
2. Whether the trial court erred in denying Campbell's Motion for Reconsideration after dismissal of the first suit.
3. Whether the trial court erred in dismissing the second identical lawsuit on equitable grounds including res judicata and collateral estoppel.

III. COUNTERSTATEMENT OF THE CASE

A. Facts and Procedural History.

This matter concerns a personal injury action filed by Campbell in which Campbell sought monetary damages against Fernandez regarding an

automobile accident the parties were involved in on December 22, 2015. CP 2. At the time of the accident, Fernandez resided at 728 W Agate St., Apt. B, in Pasco, Washington. CP 130.

Two and a half years later, on August 7, 2018, Campbell filed a Complaint for Damages regarding the December 22, 2015 accident with the Benton County Superior Court and that case was assigned cause number 18-2-01976-03. CP 1. Shortly thereafter, Campbell filed a Declaration of Service, whereby they asserted that Fernandez was served on August 3, 2018 through the alleged service of her “Grandmother” at 69 Jadwin, Apt 19 in Richland, Washington. CP 86-87. The Declaration of Service states that “Grandmother said Ana Fernandez lived there and she would give the documents to her. Refused to give me her name.” *Id.*

On November 8, 2018, counsel for Fernandez drove to the apartment where Ms. Fernandez was allegedly served and spoke to the person living in Apartment 19. CP 66. The tenant denied that she was Ana Fernandez or anyone related to her and stated that no such person or persons resided there at the time of service. *Id.* Counsel additionally spoke with the apartment manager at that location who subsequently provided a declaration showing that Ms. Fernandez’ tenancy at that apartment complex ended on June 6, 2017, fourteen months before the attempted service, and thus she was not a resident at the time service is alleged to have occurred. CP 68-69. Campbell was

notified of this discrepancy and commenced with alternative attempts to serve the Defendants.

On November 21, 2018, Campbell filed an Amended Affidavit of Compliance with RCW 46.64.040 Requirements for Service on Secretary of State and Declaration of Due Diligence. CP 94. Counsel for Campbell indicated therein that they employed Northwest Investigative Services, Inc. to do a background search on Ana Fernandez, and allegedly found a Nogales, Arizona address they believed to be associated with her. CP 95. There is nothing to indicate how this conclusion was reached and no declaration was provided by anyone associated with Northwest Investigative Services, Inc. *Id.* Campbell stated that on November 9, 2018 they sent a Notice to Defendants of Service of Process on the Washington Secretary of State via registered mail to Fernandez at that address. CP 72. They received back a signature card with an illegible scribble on it from the person who received it. CP 41.

Statutory notice was not attempted in any other manner or on any other address. CP 72. Fernandez thus moved for dismissal of the case based on the position that Campbell failed to comply with the requirements for service via the Secretary of State, that they never served Fernandez, and the Statute of Limitations to do so had run, leaving the Court without personal jurisdiction over Fernandez and requiring the case to be dismissed with prejudice. CP 58-64.

Upon subsequent hearing before the Superior Court on January 25, 2019, the Court agreed with Fernandez, and ordered dismissal of the action with prejudice. CP 107. The Court found the lack of a declaration by anyone associated with Northwest Investigative Services, Inc., who allegedly found Fernandez's address, to be detrimental to Campbell's case. VRP, Jan. 25, 2019, 16:7-14. A final Order Granting Fernandez's Motion to Dismiss with prejudice was entered on the same day. CP 107.

On or about February 1, 2019, Campbell filed a Motion for Reconsideration. CP 111. The basis of the Motion was to respond to the fact that the Judge hearing the matter questioned the proof of complying with the service requirements in that the declaration from counsel alone, which failed to append any documentation from the investigator who allegedly identified the most recent address of Fernandez, was not sufficient proof. *Id.* Thus, on reconsideration, the Plaintiffs, realizing this error, submitted declarations of two investigators regarding how they concluded they had found Fernandez's last known address to the court. CP 127; CP 137. This information was not previously provided to the Court and no reason was provided as to why it could not have been. The Motion for Reconsideration was denied. CP 147.

While the motions regarding service were at issue in cause number 18-2-01976-03, Campbell filed a new Benton County Superior Court case using a near verbatim Complaint on December 20, 2018, which was given

cause number 18-2-03274-03. CP 155. This second, essentially identical matter, involves the same parties, the same subject matter, and the same claims as the Complaint filed in the same court on August 7, 2018. CP 163. This filing occurred prior to oral argument of the initial motion to dismiss. *Id.* Despite this, Campbell intentionally failed to mention to the court or opposing counsel that they had filed the second identical action. CP 174. They had opportunity to do so in their briefing to the court on the motion to dismiss, at oral argument with the court, and in their motion for reconsideration and intentionally did not do so.

Counsel for Fernandez was not put on notice of the second identical suit until being informed of a then pending court status conference, months after the original dismissal. CP 174. Upon learning of this second matter, counsel for Fernandez immediately sent to Campbell's counsel a letter demanding immediate dismissal of the second suit as it violated the legal principles of claim splitting, res judicata, and collateral estoppel. *Id.* Said demand was ignored and Fernandez filed a motion for summary judgment in that second matter on a number of legal and equitable principles. CP 161-171.

After oral argument the Court granted summary judgment and dismissed the second matter based on those legal and equitable principles. VRP, July 10, 2019, 25-27. The Order Granting Defendants' Motion for Summary Judgment was entered on July 22, 2019. CP 327.

In the meantime, the Notice of Appeal regarding the initial case filed by Campbell was filed March 13, 2019. CP 150. Campbell filed a Motion for Stay of Appeal on July 18, 2019 “to allow time for a second appeal to come before this Court so that Appellants can move for consolidation.” The Appeal of the second matter was consolidated with the Appeal of the first matter via Commissioner’s Ruling on September 16, 2019. Fernandez now responds to Campbell’s Appellate Brief and respectfully requests that the Appeal be denied.

IV. ARGUMENT

A. Campbell’s First Lawsuit was Properly Dismissed.

1. There was Insufficient Service.

A civil action is commenced in superior court by (1) service of a summons and complaint, or (2) by filing a complaint and paying the statutory filing fee. Wash. Super. Ct. Civ. R. 3. Although the action is deemed commenced upon the occurrence of either service or filing, the action is said to be only *tentatively* commenced until both steps are taken. 14 Wash. Prac., Civil Procedure § 7:1 (2d ed.). Proper service of the summons and complaint is a prerequisite to a court obtaining jurisdiction over a party. *Woodruff v. Spence*, 76 Wn. App. 207, 209, 883 P.2d 936 (1995). Whether service of process is proper is a question of law that is subject to de novo review. *Davis v. Blumenstein*, 7 Wn. App. 2d 103, 432

P.3d 1251 (2019). Here, proper service did not occur within the statute of limitations and the court thus did not obtain personal jurisdiction over Fernandez and properly dismissed the case with prejudice.

RCW 4.28.080 provides some of the applicable methods of service in a civil action. It allocates a variety of methods for certain specific situations, most of which are not applicable here. *Id.* The applicable method therein for service in this case was “to the defendant personally, or by leaving a copy of the summons at the house of his or her usual abode with some person of suitable age and discretion then resident therein.” RCW 4.28.080(16). Where the person cannot, with reasonable diligence, be served as described, RCW 4.28 provides other methods for service. There is no evidence that any of these other methods were attempted in the initial case filed by Campbell.

Because this suit stems from an automobile accident, RCW 46.64.040 presents another method by which Campbell could attempt to serve Fernandez and is the method on which they rely regarding the initial suit. The statute states that by using Washington roads a resident or non-resident has appointed the Washington Secretary of State to be his or her true and lawful attorney upon whom may be served all lawful summons and processes against him or her growing out of any accident in which such person may be involved. RCW 46.64.040. Service is made by leaving two

copies of the summons and a fee with the Secretary of State, and the plaintiff must also send notice of such service and a copy of the summons to the Defendant by registered mail at “the **last known** address of the said defendant”. *Id.* (Emphasis added).

Because substitute service is in derogation of the common law, a plaintiff must strictly comply with the requirements of RCW 46.64.040 to obtain personal jurisdiction over a defendant. *Davis*, 432 P.3d at 1256; *Martin v. Meier*, 111 Wn.2d 471, 479, 760 P.2d 925 (1988); *Martin v. Triol*, 121 Wn.2d 135, 144, 847 P.2d 471 (1993). Failure to adhere to the statutory requirements “renders service on the secretary a nullity.” *Heinzig v. Seok Hwang*, 189 Wn. App. 304, 312, 354 P.3d 943 (2015). “[N]otice to the defendant is essential for due process.” *Davis*, 432 P.3d at 1257.

When a defendant moves to dismiss based upon insufficient service of process, ‘the plaintiff has the initial burden of making a prima facie showing of proper service.’ *Witt v. Port of Olympia*, 126 Wn. App. 752, 757, 109 P.3d 489 (2005) (citation omitted). “A plaintiff may make this showing by producing an affidavit of service that on its face shows that service was properly carried out.” *Id.* If the plaintiff makes this showing, “the burden shifts to the defendant who must prove by clear and convincing evidence that service was improper.” *Id.* Clear and convincing evidence exists when the evidence shows the ultimate fact at issue to be highly

probable. *In re Welfare of L.N.B.-L.*, 157 Wn. App. 215, 243, 237 P.3d 944 (2010).

In this case, Campbell failed to meet their initial burden. Should the Court find otherwise, Fernandez can also prove by clear and convincing evidence that service was improper.

At the time of the subject accident, Defendant Ana Fernandez told the investigating police officer that she resided at 728 W Agate St., Apt. B, Pasco, WA 99301. CP 130. Campbell was also able to discover evidence that Fernandez later resided at 69 Jadwin, Apt. 19, Richland, WA, 99352, which was verified. CP 68-69. There is clear and convincing evidence that Fernandez did not reside there when personal service was attempted. *Id.* There was no additional admissible evidence proffered by Campbell prior to dismissal of her first lawsuit to indicate where else the Defendant resided.

During the course of the first case, Campbell attempted to serve Fernandez via the Secretary of State, but failed to follow the statutory procedure to do so. Campbell failed to strictly follow the notice provisions and failed to provide admissible evidence to the Court that any of the procedures were followed.

Regarding the failure to follow the procedure, RCW 46.64.040 requires “notice of such service and a copy of the summons or process [to be] forthwith sent by registered mail with return receipt requested, by

plaintiff to the defendant at the **last known** address of the said defendant”.
(Emphasis Added).

During the course of the initial case, at no point did Campbell attempt to give the required notice to Fernandez via registered mail to either of the two residences where it was known she previously resided, the Agate Street address or the Jadwin Street address. These were known addresses because the former was provided by Fernandez herself to the officer at the scene of the accident (CP 130) and the latter was verified by an affidavit of the apartment manager based on Fernandez’s name and birthdate (CP 68-69). RCW 46.64.040 required Campbell to send notice via registered mail to the Jadwin address, as based on the admissible evidence provided by Campbell in response to the Motion to Dismiss that was the only address that could possibly be considered “last known”.

Instead, Campbell’s attempt at notice was only made to a Nogales, Arizona address despite no proof that Fernandez ever lived there. When personal service was attempted the occupant of the home was apparently not asked if Fernandez ever lived there and only provided that a Ana Fernandez “moved back to Mexico.” CP 91. Because it was unclear that Fernandez ever resided there, the Nogales address was not Fernandez’s “last known address”. Because of this, service of Fernandez via the Secretary of State was not

completed and personal jurisdiction over Fernandez was not acquired by the Court and the case was properly dismissed.

2. There was Insufficient Proof of Service

As alluded to previously, Campbell also failed to meet their initial burden of making a prima facie showing of proper service. This is because they failed to provide admissible evidence to make the requisite showing of proper service.

In response to the initial case filed by Campbell, Fernandez filed a Motion to Dismiss on the grounds of lack of service, lack of personal jurisdiction, and the expiration of the statute of limitations. CP 56-63. In response, Campbell filed an Opposition memorandum (CP 70), which was supported solely by a declaration of counsel (CP 79).

Therein, Campbell claims they relied on an investigator's determination of what Fernandez's most recent address was, but failed to put forth any admissible evidence of how that was determined. CP 80-81. No declaration of the investigator was provided regarding who he is, what his experience he has, what identifying systems he used, how he identified the address, that he actually identified it as her last known address, what he is relying on to make such a determination, or how he reasonably believes he even has the correct Ana Fernandez. There is no identification by birthdate, driver's license, license plate, or anything that could reliably tie the alleged

last known address with Fernandez. Instead, Campbell relied solely on a declaration of her own counsel, which contains hearsay statements regarding service. CP 79-83. The declaration contains other affidavits regarding attempts at service (CP 91-97), but, importantly, none regarding the alleged service through the secretary of state.

The purpose of the statutory procedure is that there is a reasonable probability that if a plaintiff complies with the procedure, a defendant will receive actual notice. *Meier*, 111 Wn.2d at 478, 760 P.2d 925. Here, there is evidence that Fernandez did not receive actual notice via this service method and did not even learn of this action until she was personally served at a totally different address in Arizona. CP 330.

Because of this, the Court properly ruled that “the absence of any original declaration by Mr. Briggs prevents the Court from finding facts sufficient to show due diligence to bring the matter within *James*, and for that reason the defense motion is granted.” VRP, Jan. 25, 2019, 16:10-14.

Regarding *James v. McMurry*, 195 Wn. App. 144, 380 P.3d 591 (2016), Campbell makes a number of arguments regarding the fact that *James* only required the counsel’s reasonable belief, but fails to assess the lack of proof they provided. Regarding proof, *James* only addresses the need to file the statutory affidavits of compliance and due diligence with the trial court, which *James* found no such requirement. *Id.* The filing or not filing of said

affidavits is not at issue in this case. *James* simply does not speak to the issue of proof that the trial court found here and nothing else in Campbell's brief does either. *Id.* As such, the dismissal by the Trial Court was proper.

B. Campbell's Motion for Reconsideration was Properly Dismissed.

Before appealing the dismissal of their initial lawsuit, Campbell first sought relief via a Motion for Reconsideration pursuant to CR 59 (CP 111), which was denied (CP 147).

The denial of a motion for reconsideration is reviewed for an abuse of discretion. *August v. U.S. Bancorp*, 146 Wn. App. 328, 339, 190 P.3d 86, 92 (2008), *as amended* (Sept. 4, 2008). A trial court's denial of a motion for reconsideration and its decision to consider new or additional evidence presented with the motion is reviewed to determine if the trial court's decision is manifestly unreasonable or based on untenable grounds. *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000); *Chen v. State*, 86 Wn. App. 183, 192, 937 P.2d 612 (1997).

The decision to consider new or additional evidence presented with a motion for reconsideration is squarely within the trial court's discretion. *Chen*, 86 Wn. App. at 192, 937 P.2d 612. "In the context of summary judgment, unlike in a trial, there is no prejudice if the court considers additional facts on reconsideration." *August*, 146 Wn. App. 328, 347, 190 P.3d 86 (2008) (quoting *Chen*, 86 Wn. App. at 192, 937 P.2d 612).

Generally, nothing in CR 59 prohibits the submission of new or additional materials on reconsideration. *Chen*, 86 Wash.App. at 192, 937 P.2d 612. However, equally, there is no requirement for the court to accept new or additional evidence. *Id.*

Additionally, when a motion for reconsideration is based on newly discovered evidence, the court will normally deny the motion if the evidence was available earlier but was simply not presented in a timely manner. *Morinaga v. Vue*, 85 Wn. App. 822, 935 P.2d 637 (1997); CR 59(a)(4).

Here, the trial court had the discretion to view the additional/new evidence presented by Campbell and chose not to. In denying the Motion, the Court reasoned that “[t]he unsupported portions of counsel’s original declaration, where counsel was not a percipient witness to the events surrounding the attempted service location but was instead the recipient of hearsay statements concerning these events, are not deficiencies that can be remedied by subsequent submissions. Nor are they properly cognizable as surprise or otherwise under the rules for reconsideration.” CP 154.

It is clear that Campbell had access to this information at the time of responding to the motion to dismiss and simply chose not to properly provide it. The Court recognized this and rightfully chose not to consult it on reconsideration and the Trial Court’s decision should be upheld.

C. Campbell's second Identical lawsuit was also Properly Dismissed.

As indicated above, before the Motion to Dismiss in the first action was even heard, Campbell filed a second, essentially identical lawsuit, making identical claims regarding the same auto accident and involving the same parties. CP 155. Campbell did so while intentionally failing to put the court or opposing counsel on notice of the filing and continued to prosecute the initial action as if the second action did not exist. CP 174. Campbell has admitted doing so explicitly to extend the amount of time after their initial filing that they had to complete service.

1. Campbell's only Legal Basis for filing two Identical Cases was *Banzeruk*, which does not Support it.

In responding to Fernandez's Motion for Summary Judgment, Campbell's primary argument that it was permissible to file two complaints regarding the same subject at the same time was reliant on dicta from *Banzeruk v. Estate of Howitz*, 132 Wn. App. 942, 135 P.3d 512 (2006). Campbell continues to rely on *Banzeruk* herein. Their reliance was found to be, and continues to be, unsupported, as that is simply, not what *Banzeruk* stands for.

Like this case, in *Banzeruk*, the plaintiff filed a complaint for personal injury after an automobile accident shortly before the end of the

three-year statute of limitations. *Id.* Service was not effectuated within 90 days and Plaintiff filed an amended complaint to attempt to extend the 90-day period. *Id.* The Court found that doing so did not extend the period and the statute of limitations had run and the case was dismissed. *Id.*

At the end of the opinion, the court generally stated, in dicta, that the plaintiff could have filed another complaint before the three-year statute of limitations ran instead of simply amending the complaint and the 90-day period would have started then. *Id.* This appears in the opinion as a short, generalized statement by the Court, in dicta, with no bearing on the opinion. As such, it does not go through all the steps that would obviously be required to comply with that advice, which would necessarily include dismissing the first action. In fact, the opinion does not affirmatively state that in such a scenario the first action would be allowed to continue when the second action is filed or that the plaintiff there would have had to dismiss the first action before filing the second. *Id.* This may be because it is obvious, but it is also likely because it is dicta and unnecessary to the opinion. Numerous legal doctrines would obviously declare that such simultaneous filings of identical cases are improper, as outlined previously and below, due to the myriad of issues that could result.

In fact, at oral argument of this issue, counsel for Campbell could not ultimately disagree that the language they rely on from *Banzeruk* is dicta.

VRP, July 10, 14-15: 22-3. In assessing this argument, the trial court agreed and explained in detail how this part of the opinion is dicta. *Id.* at 14-15:8-1. It then expressed numerous concerns with the issues that could result from having multiple identical complaints being active at once and the potential precedent of doing so, and those concerns are not unfounded. *Id.*

In summary, *Banzeruk* simply does not provide the authority Campbell claim it does. It is clear dicta, without citation to rule or authority allowing two identical cases to proceed simultaneously. It does not clearly state that both hypothetical cases would still be active, and because of that, does not provide the authority claimed. Campbell has further failed to find any authority that would affirmatively allow such duplicitous actions. Quite simply, there is no legal basis for filing two identical cases that are active simultaneously, and this Court should deny this second Appeal as a result.

2. No Support for Claim that Res Judicata does not Apply.

On Appeal, Campbell spends the vast majority of their argument regarding dismissal of the second identical case they filed on the basis that Res Judicata allegedly does not apply as used and proceed to make arguments almost solely based on this. While a surface analysis may lend some credence to their argument, a deeper dive into the equitable doctrine demonstrates just the opposite and why their conclusion does not apply here.

Application of res judicata is reviewed de novo. *See Fortson-Kemmerer v. Allstate Ins. Co.*, 198 Wn. App. 387, 393, 393 P.3d 849, 853 (2017), rev. denied, 189 Wn. 2d 1039, 409 P.3d 1071 (2018) (stating “[r]es judicata is an issue of law, subject to de novo review on appeal”; quotation omitted); *NOVA Contracting, Inc. v. City of Olympia*, 191 Wn. 2d 854, 864, 426 P.3d 685, 689 (2018) (stating “[w]e review a trial court’s grant of summary judgment de novo, taking all facts and inferences in the light most favorable to the nonmoving party”).

Campbell’s argument is that res judicata cannot apply to dismiss a case that was not previously dismissed on the merits. In support, they cite a vast number of cases for the proposition that dismissal for lack of service is not on the merits and also cite an equally vast number of cases for the proposition that res judicata does not apply to a dismissal that was not on the merits. They fail to cite anything that would definitively link the two propositions, especially as it concerns the facts of this case, which provide a heightened need to allow for res judicata.

Campbell’s ultimate argument is that “service does not have anything to do with the merits of the claim for which the defendant is brought before the court”, but cite nothing for that proposition. They later claim procedural defenses have “nothing to do with the merits of the action”, but again cannot support this. As such, Campbell makes the concession that “there appear to be

no Washington cases directly on point” that link their two propositions. However, this should be adjusted to read that there are no Washington cases directly on point that support Campbell’s position.

As alluded to, the unique factual aspect of this case, one intentionally created by Campbell, is that the first suit was dismissed with prejudice after the statute of limitations had already run. CP 107. Thus, not only was there the defense of insufficiency of service of process, but also the lack of personal jurisdiction that ensued and the inability to refile. Campbell sought to get around this by filing a second suit just days before the statute of limitations was set to run despite having already filed the same claim.

In analyzing the cases cited by Campbell in their brief regarding res judicata, the clear theory as to why res judicata does not apply to a decision that is not on the merits is because the dismissed party generally still has the ability to re file. This is supported by the early cases on this subject. In *State ex rel. Hamilton v. Cohn*, 1 Wn.2d 54, 62–63, 95 P.2d 38, 42 (1939), the Court explained this by stating that a judgment or decree will not take effect upon rights not then existing. The court found that the “dismissal of an action, on the ground that it was prematurely brought-the cause of action not having yet accrued-is not a bar to another action on the same demand after time has removed the objection.” *Id.* quoting 2 Black on Judgments, 2d Ed., p. 1072; § 714; 34 C.J. p. 775, § 1194; 2 Freeman on Judgments,

5th Ed., p. 1534, § 725. It is because of this ability to cure that “[i]t is not an adjudication on the merits.” *Id.* The problem is, the facts of this case do not present an ability to cure.

A quick look at the cases in which it was determined that res judicata did not apply as there was a lack of jurisdiction will find that those cases specifically had additional time to cure the procedural issue. See e.g. *In re Cogswell's Estate*, 189 Wn. 433, 436, 65 P.2d 1082, 1082 (1937). There is no such time here. Here there is no ability for Campbell to refile this case because the statute of limitations has run. Campbell knew this and decided to file a second identical complaint to try and get around this issue.

3. Res Judicata Applies because the Initial Case was dismissed with Prejudice.

Further, even if the Plaintiff’s conclusory stance on res judicata and the necessity of an on the merits dismissal were true, the cases cited by Campbell provide another way res judicata applies directly to this second case. In *Hisle v. Todd Pac. Shipyards Corp.*, 151 Wn.2d 853, 866, 93 P.3d 108, 115 (2004), the opinion states that “[a]lthough the Court of Appeals did not expressly address whether the [prior] dismissal was a final adjudication on the merits...this threshold res judicata requirement is satisfied because *Adams* was dismissed with prejudice.” *Quoting Maib v. Md. Cas. Co.*, 17

Wn.2d 47, 52, 135 P.2d 71 (1943) (a dismissal with prejudice constitutes a final judgment on the merits).

Similarly here, the initial action filed by Campbell was also dismissed with prejudice. CP 107. Because it was dismissed with prejudice, *Hisle* and *Maib*, supra, specifically declare that a dismissal with prejudice provides res judicata effect to a later case. Again, this is something that none of Campbell's "on the merit" cases directly state. There is thus substantial, on point, precedent that res judicata applies to the second matter herein and dismissal was appropriate. The trial court should be upheld.

As a final point on res judicata, in their Brief, Campbell cites exactly why res judicata must apply here:

The rationale underlying res judicata and similar preclusion principles is that, in the interest of finality of judgments, a litigant is only entitled to one bite of the apple. *See Reninger v. State Dep't of Corr.*, 134 Wn.2d 437, 454, 951 P.2d 782, 791 (1998) (stating plaintiffs "were entitled to one bite of the apple, and they took that bite. That should have been the end of it").

Appellant's Brief at 9.

By filing multiple essentially identical concurrent complaints, Campbell took more than one bite out of the proverbial apple. Campbell also proposes that litigants are entitled to at least one bit of the apple, but with statutes of limitations there simply is no such guaranteed bite.

4. Estoppel also still Applies.

While it is considered a general rule that when a case has been dismissed on a procedural issue, the court has not given the prior determination res judicata effect because the dismissal was not on the merits, there is other substantial precedent that a dismissal on a procedural point can still have a direct estoppel effect in subsequent litigation. 14A Wash. Prac., Civil Procedure § 35:46 (3d ed.).

This occurs where the same cause of action is the basis of subsequent litigation between the same parties, and there is a prior nonmerit determination that has been actually litigated. 14A Wash. Prac., Civil Procedure § 35:55 (3d ed.). Courts have found this should be binding in the subsequent litigation. *Id.* “Thus, where a determination is made that the court has no jurisdiction, or that plaintiff lacks capacity to sue, or that another action on the same claim is pending, or that there is a nonjoinder of parties, the nonmerit determination will be binding in a subsequent action between the same parties.” *Id.* (Emphasis added).

This is exactly the situation presented here. After it was found in the first case there was no jurisdiction, there was no opportunity for the court to assess jurisdiction again. The same argument can be made for the assertion of the same claim being pending at the time the first was dismissed. Campbell spent exactly one footnote discussing estoppel in their brief because the law is clear that Campbell is estopped from reasserting

these claims. As such, it is respectfully requested that the dismissal of the second suit on res judicata and collateral estoppel.

5. There are Numerous Equitable and Public Policy rationales for dismissal of the Second Suit.

Campbell would like the Court to think that their second matter was dismissed almost exclusively due to res judicata. However, the oral opinion of the trial court is much more nuanced than that and looks at a number of legal and equitable issues. A large section of that opinion is inserted herein as it dutifully outlines many of the concerns about what occurred in these cases.

But let's go back to the other concern, which is that -- and again, it's it's -- it's been awhile, and and you can correct me if my facts are wrong, but my understanding of the original case was that your -- your position was, "We tried to serve her here locally. We couldn't find a residence. We found a family member in Arizona, the sister, an aunt, female relative of some sort. Our process server talked to them and was told she doesn't live here anymore. She moved to Mexico or somewhere that was not Arizona," and then as a result of a continuation of this case, with that information you were able to actually locate her in person. Don't I want to prevent the effect -- don't I want to pre -- prevent the advantage that you may have gotten by stirring the water with the one case and having the procedure, and then serving her essentially while we were arguing service in the first case nearabouts?

VRP, July 10, 2019, 21-22: 25-17.

Here, the concern is whether two actions can exist simultaneously, asking for the same theory of recovery...based on the same events, and whether if there is a final decision in one of those matters, whether the other one can survive.

VRP, July 10, 2019, 25-26: 25-4.

I'm not persuaded that Banzeruk provides authority for the existence of two cases at the same time, with the same theory of recovery, and even if there were the dismissal of the one action while the other action is pending, whether viewed under *res judicata* or collateral estoppel, serves to terminate the other case which seeks recovery on an identical theory. Here, the Court's view -- and again, this is the Court's dicta view of what I believe is dicta in Banzeruk is that to pursue that ability to seek the additional 90 days one has to dismiss, and that's what "new complaint" means, or that, at a minimum, the plaintiff needs to elect before there is a decision dismissing the matter.

VRP, July 10, 2019, 26-27: 15-3

These issues identified by the Trial Court should ring true to all participants in our legal system. The actions by Campbell violate some of the core policies and tenants of the legal system. It is thus encouraged that this Court take heed of the issues these cases present and declare in uncertain terms why such multiple filings cannot be tolerated in our system.

Given the fact that Campbell actively tried to hide the fact that two complaints were simultaneously at issue in this case, Campbell's reliance on equity for allowing these cases to continue is not an especially sympathetic position. One must ask what is more inequitable than filing two identical lawsuits to try and game the system and extend a statute of limitations? Unfortunately, Campbell's process has been a deceptive one and should not become precedent for future cases. The Trial Court found a number of

equitable and public policy arguments against allowing this and the reasoning is particularly on point. Fernandez encourages this court to similarly rule.

V. CONCLUSION

Campbell filed suit in this matter near the time when the statute of limitations was set to run. They were unable to personally serve Fernandez and attempted to serve her through the Secretary of State. In doing so they did not serve the last known address and failed to provide any evidence of how they determined what that address was and the matter was dismissed with prejudice.

Despite this, Campbell filed a second identical action while the first was pending to get additional time to serve. No notice was provided and Campbell waited. Once the first case was dismissed, they attempted to move forward on a case that had already been dismissed with prejudice in another action. They are estopped from doing so and res judicata and other equitable and public policy reasons prevent them from moving forward on the second suit, which was also properly dismissed.

DATED this 9th day of March, 2020.

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CERTIFICATE OF SERVICE

I certify that on the 9th day of March, 2020, I caused a true and correct copy of the foregoing document to be served electronically on the clerk of the above entitled court and on the following in the manner indicated below:

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DATED this 9th day of March, 2020 in Kennewick, Washington.

s/John A. Raschko
JOHN A. RASCHKO

MILLER MERTENS & COMFORT

March 09, 2020 - 4:02 PM

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