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No. 62902-6-I

IN THE COURT OF APPEALS
STATE OF WASHINGTON
DIVISION I

JOSEPH GRACE,

Appellant,

v.

JAMES ALEKSON and JANE DOE ALEKSON,

Respondents.

BRIEF OF RESPONDENTS

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ORIGINAL

TABLE OF CONTENTS

I.	INTRODUCTION.....	1
II.	ISSUES ON APPEAL.....	1
III.	STATEMENT OF THE CASE.....	2
	A. HISTORY PRECEDING THE ALEKSONS’ MOTION TO DISMISS	2
	B. THE ALEKSONS’ MOTION TO DISMISS, GRACE’S RESPONSE, AND THE TRIAL COURT’S DECISION.....	4
	C. HISTORY FOLLOWING THE ORDER OF DISMISSAL	5
IV.	ARGUMENT.....	5
	A. GRACE’S FACTUAL ALLEGATIONS DO NOT SUPPORT ANY ELEMENT OF “TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY” ..	5
	1. There is No Evidence of an Enforceable Contract or Business Expectancy.....	7
	2. There is No Evidence That Alekson Had Knowledge of The Alleged Relationship Between Grace and Thomas.	8
	3. Assuming a Business Expectancy, There is No Evidence That Alekson Intentionally Interfered With the Relationship.	9
	4. Assuming Intentional Interference, There is No Evidence That Alekson Interfered For an Improper Purpose or For Improper Means.	11
	B. THE TRIAL COURT DID NOT ABUSE HER DISCRETION IN AWARDING ATTORNEY FEES AND COSTS	14

C. THE TRIAL COURT PROPERLY AWARDED THE ALEKSONS ATTORNEY FEES FOR HAVING TO DEFEND GRACE'S FRIVOLOUS LAWSUIT. THIS COURT SHOULD DO THE SAME 16

V. CONCLUSION 17

TABLE OF AUTHORITIES

Cases

<i>Contreras v. Crown Zellerbach Corp.</i> , 88 Wn.2d 735, 565 P.2d 1173 (1977).....	5
<i>Fisher v. Parkview Props., Inc.</i> , 71 Wn. App. 468, 859 P.2d 77 (1993).....	8
<i>Gorman v. Garlock, Inc.</i> , 155 Wn.2d 198, 118 P.3d 311 (2005).....	6
<i>Havsy v. Flynn</i> , 88 Wn. App. 514, 945 P.2d 221.....	6, 11
<i>In re Recall Charges Against Feetham</i> , 149 Wn.2d 860, 72 P.3d 741 (2003).....	17
<i>Lewis v. Bell</i> , 45 Wn. App. 192, 724 P.2d 425 (1986).....	6
<i>Olympic Fish Prods., Inc. v. Lloyd</i> , 93 Wn.2d 596, 611 P.2d 737 (1980).....	11
<i>Pleas v. City of Seattle</i> , 112 Wn.2d 794, 774 P.2d 1158 (1989).....	13
<i>Quick-Ruben v. Verharen</i> , 136 Wn.2d 888, 969 P.2d 64 (1998).....	14
<i>Roger Crane & Associates, Inc. v. Felice</i> , 74 Wn. App. 769, 875 P.2d 705 (1994).....	9, 10
<i>Scymanski v. Dufault</i> , 80 Wn.2d 77, 491 P.2d 1050 (1972).....	7
<i>Sharbono v. Universal Underwriters Ins. Co.</i> 139 Wn. App. 383, 161 P.3d 406 (2007).....	16
<i>Skimming v. Boxer</i> , 119 Wn. App. 748, 82 P.3d 707 (2004).....	15
<i>Smith v. Okanogan County</i> , 100 Wn. App. 7, 994 P.2d 857 (2000).....	15

<i>Sofie v. Fibreboard Corp.</i> , 112 Wn.2d 636, 771 P.2d 711 (1989).....	14
<i>Suarez v. Newquist</i> , 70 Wn. App. 827, 855 P.2d 1200 (1993).....	15
<i>Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.</i> , 122 Wn.2d 299, 858 P.2d 1054 (1993).....	14

Statutes

RCW 4.84.185	passim
RCW 19.86.010	2
RCW 18.86.030	2
RCW 18.86.100(1).....	9

Rules

CR 12(b)(6).....	passim
RAP 18.1(a)	16
RAP 18.9(a)	16

Other Authorities

Restatement (Second) of Torts 767 comments c, d and f (1979).....	12
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I. INTRODUCTION

Appellant Joseph Grace brought frivolous claims against the Alekson Respondents for negligence, violations of the real estate broker statute, violations of the Consumer Protection Act, and tortious interference with business expectancy. Grace failed to allege any fact that could legally support his four claims against the Aleksos. As a result, the trial court properly dismissed all four claims and dismissed the Aleksos from Grace's lawsuit altogether.

The trial court later awarded the Aleksos attorneys' fees and costs for having to defend Grace's frivolous lawsuit. The Aleksos ask this Court to affirm both of the trial court's decisions. The Aleksos further ask this Court to award additional attorneys' fees and costs for having to defend Grace's frivolous appeal.

II. ISSUES ON APPEAL

A. Dismissal under CR 12(b)(6) is appropriate where a plaintiff can prove no set of facts which would entitle him to relief. Grace's alleged facts do not support his four claims against the Aleksos. Did the trial court error in dismissing all of Grace's claims against the Aleksos?

B. RCW 4.84.185 authorizes an award of attorney fees and costs where claims are frivolous and advanced without reasonable cause. Grace's claims against the Aleksos are unsupported by any rational legal

or factual argument. Did the trial court abuse its discretion when it awarded the Aleksons fees and costs?

C. A party is entitled to attorneys' fees on appeal if a statute permits recovery of attorneys' fees at trial and the party is the substantially prevailing party. The trial court awarded attorneys' fees to the Aleksons because Grace's claims were frivolous. Should this Court also award the Aleksons their attorney's fees for having to defend this frivolous appeal?

III. STATEMENT OF THE CASE

A. HISTORY PRECEDING THE ALEKSONS' MOTION TO DISMISS

Between January 25, 2008 and August 14, 2008, Grace filed three versions of a complaint against six parties. CP 209-15, 216-23, and 243-49. Against all defendants – including the Respondents – Grace asserted three claims for relief: (i) common-law negligence; (ii) “conflict of interest/breach of fiduciary duty” based on RCW 18.86.030; and (iii) *per se* violation of Washington's Consumer Protection Act, RCW 19.86.010, *et seq.*, based on the alleged violation of RCW 18.86.030. CP 213-15, 220-22, and 248-49.

The complaints related to Grace's unsuccessful attempt to purchase a residential condominium unit at a development that Grace alleges was jointly developed by two commercial entities: Urban Venture, LLC, and Milliken Development, LLC. CP 245, ¶ 2.1.

Grace's complaints focused nearly exclusively on purchase

negotiations with a real estate listing agent – Damon Thomas – who was allegedly engaged by the developers. Specifically, Grace alleged that (a) he expressed interest in purchasing unit W001 to Thomas; (b) he informed Thomas one evening that he was “ready, willing and able” to submit the required paperwork and deposit to reserve the unit; (c) Thomas reassured Grace that he need not submit the paperwork that very evening to reserve the unit; (d) the next morning, Grace nevertheless slid the required paperwork and deposit “under the door of the sales office where Thomas worked,” before the office opened; and (e) Thomas had in the meantime accepted a reservation from (and ultimately sold the unit to) another purchaser “using the confidential information provided by plaintiff regarding plaintiff’s desire to purchase the unit.” CP 243-49, ¶¶ 2.2 – 2.7.

Although the allegations center on Thomas, Jim Alekson and his wife were also named in the lawsuit. CP 244, ¶ 1.4. According to the complaints, Jim Alekson was an agent or representative of Milliken Development, one of the two developers involved in the project. *Id.* Yet, of the two development companies, Urban Venture, LLC, is the only entity named in the lawsuit. CP 245, ¶ 1.7. And Mr. Alekson is the sole party linked to Milliken.

Although named in the lawsuit, the allegations did not involve the Aleksons. CP 209-15, 216-23, and 243-49. The only action ascribed to Alekson is that he “refused to intercede, to honor plaintiff’s right to

purchase the unit, or to otherwise cure the misconduct of defendant Thomas.” CP 247 ¶ 2.8. The complaints contain no allegations regarding any relationship between the Aleksons and Grace, or between the Aleksons and any of the other defendants, including Thomas. CP 209-15, 216-23, and 243-49.

B. THE ALEKSONS’ MOTION TO DISMISS, GRACE’S RESPONSE, AND THE TRIAL COURT’S DECISION

On September 29, 2008, the Aleksons moved to dismiss Grace’s claims. CP 1-9. Grace responded to the Aleksons’ CR 12(b)(6) motion by filing a third motion to amend his complaint, wherein Grace dismissed the very claims the Aleksons contested. CP 22. Grace did not supplement the factual allegations for his existing claims, but instead alleged new facts and a new claim, neither of which appeared in the docket during the nearly eight months of litigation. CP 22-26. Grace alleged:

Defendant James Alekson stated [to Plaintiff] that he assisted Mr. Thomas with reserving the unit for his other client. Mr. Alekson worked with Mr. Thomas to contact the other client and helped convince that client to reserve the unit before plaintiff did. Mr. Alekson improperly used his influence and position to interfere with plaintiff [sic] attempts to obtain the unit.

CP 86, ¶ 2.8. Based on this new allegation, Grace asserted a claim for “tortious interference with business expectancy” for Alekson’s alleged

intentional and improper interference in “the business relationship between Grace and Thomas. *Id.* at ¶ 3.1.2.

The trial court granted both parties’ motions and entered orders for each on November 14, 2008. CP 71-72, 69-70. The trial court dismissed all claims against the Aleksons, and dismissed them from the lawsuit. CP 71-72. Although Grace believed the trial court would allow him to proceed on his tortious interference claim, the trial court made clear in a second order her intention to have the Aleksons dismissed from the lawsuit altogether because none of Grace’s claims involved facts which would entitle the Grace to relief. CP 90-92, 113-14.

C. HISTORY FOLLOWING THE ORDER OF DISMISSAL

The Aleksons subsequently asked the trial court for an award of fees and costs under RCW 4.84.185 because Grace’s claims were frivolous and advanced without reasonable cause. CP 137-46, 187-90. The trial court granted the Aleksons’ request on April 10, 2009. CP 196-98.

IV. ARGUMENT

A. GRACE’S FACTUAL ALLEGATIONS DO NOT SUPPORT ANY ELEMENT OF “TORTIOUS INTERFERENCE WITH BUSINESS EXPECTANCY”

A CR 12(b)(6) motion to dismiss questions the legal sufficiency of the allegations in the pleadings. *Contreras v. Crown Zellerbach Corp.*, 88 Wn.2d 735, 742, 565 P.2d 1173 (1977). To avoid dismissal of his tortious

interference claim, Grace was required to present sufficient allegations to support all elements, including: (1) Grace had a valid contractual relationship or business expectancy with a third party; (2) Alekson had knowledge of that relationship; (3) Alekson intentionally interfered with that relationship, inducing or causing a breach or termination of the relationship or expectancy; (4) Alekson interfered for an improper purpose or used improper means; and (5) Grace suffered resultant damage. *See Havsy v. Flynn*, 88 Wn. App. 514, 518-19, 945 P.2d 221 (1997). Because Grace's factual and legal allegations are deficient as to each element, the trial court properly dismissed Grace's claim for tortious interference with business expectancy.

Moreover, hypothetical theories cannot cure the deficiencies in Grace's claims. "While a court must consider any hypothetical facts when entertaining a motion to dismiss for failure to state a claim, the gravamen of a court's inquiry is whether the plaintiff's claim is legally sufficient." *Gorman v. Garlock, Inc.*, 155 Wn.2d 198, 215, 118 P.3d 311 (2005). "If a plaintiff's claim remains legally insufficient even under his or her proffered hypothetical facts, dismissal pursuant to CR 12(b)(6) is appropriate." *Id.* Inexpert pleadings may survive dismissal, but insufficient pleadings cannot. *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986).

Grace's discussion of hypothetical scenarios has no place in this appeal because Grace has failed to present any factual scenarios that are different from those in the record. More importantly, and as set forth below, no hypothetical scenario can cure the legal deficiencies in Grace's tortious interference claim. Like Grace's three other dismissed claims, his claim for tortious interference fails as a matter of law.

1. There is No Evidence of an Enforceable Contract or Business Expectancy.

Grace has failed to provide sufficient evidence of the first element of tortious interference: A valid contractual relationship or business expectancy with a third party. The law does not require an enforceable contract. It does, however, require proof of a business expectancy, defined as a "relationship between parties contemplating a contract, with at least a reasonable expectancy of fruition." *Scymanski v. Dufault*, 80 Wn.2d 77, 84-85, 491 P.2d 1050 (1972). Grace's subjective hope that he would be the one to purchase the condominium, and his subsequent disappointment when that hope was dashed, do not constitute a business expectancy.

More critical, even accepting Grace's allegations as true, Grace's dashed hope did not amount to a "business expectancy" because the contract he desired was one between Grace and the condominium seller; the relationship Grace set forth in his complaint, however, is between Grace and a broker or agent. Grace has not alleged, and there is no factual

support for, the notion that the Aleksons interfered with an existing relationship or expectancy between Grace and the seller. This is a fatal flaw that Grace cannot overcome.

2. There is No Evidence That Alekson Had Knowledge of The Alleged Relationship Between Grace and Thomas.

Assuming Grace has met his burden on the first element, Grace's claim fails because there is insufficient evidence of the second element: that Alekson, the alleged interferor, had existing knowledge of the relationship between Thomas and Grace at the time of the alleged interference. *See Fisher v. Parkview Props., Inc.*, 71 Wn. App. 468, 480, 859 P.2d 77 (1993).

Grace admits in his complaint that Alekson was not a party to any of the prior dealings between Grace and Thomas. CP 84-86. Nowhere in the complaint does Grace set forth different facts that suggest actual knowledge. *Id.* The sole factual reference to knowledge is set forth in Section 2.8 of Grace's complaint. CP 86. There, Grace alleges: "Mr. Alekson worked with Mr. Thomas to contact the other client and helped convince the client to reserve the unit before plaintiff did." *Id.* While this allegation suggests that Alekson had a role in the ultimate sale of the unit, it fails to allege that Alekson knew of a relationship between Thomas and Grace at the time he assisted in the sale.

Moreover, there is no evidence that Alekson possessed imputed knowledge. By law, a real estate agent or broker's knowledge is not imputed to the principal. RCW 18.86.100(1). Thomas' knowledge could not, therefore, be imputed to Alekson. In sum, Grace has failed to present any facts that – when viewed in his favor – show Alekson knew about the relationship between Grace and Thomas at the time of the alleged interference.

3. Assuming a Business Expectancy, There is No Evidence That Alekson Intentionally Interfered With the Relationship.

Assuming the legal sufficiency of the first and second elements of Grace's tortious interference claim, Grace fails to provide sufficient evidence of the third element: Intentional interference. The substance of Grace's complaint is that Alekson failed to reverse Defendant Thomas' alleged misconduct after-the-fact. CP 84-86. Grace also vaguely asserts that Alekson was somehow involved with reserving the unit for a different buyer. CP 86, ¶ 2.8. Even accepting this allegation as true, Grace fails to set forth a single fact that suggests Alekson's alleged interference was intentional.

In *Roger Crane & Associates, Inc. v. Felice*, 74 Wn. App. 769, 777-778, 875 P.2d 705 (1994), the Court affirmed the dismissal of a tortious interference claim for insufficient evidence of intentional interference and improper purpose. There, the *Crane* plaintiff alleged it

was owed a real estate commission on a home purchase. *Id.* at 773. Although the plaintiff had represented the buyer in other real estate purchases, and had briefly assisted with the subject home, plaintiff's decision to purchase the property was based on assistance from a friend. *Id.* at 771-73. The *Crane* plaintiff sued the buyer's friend for tortious interference. *Id.* at 773.

Like Grace has done, the *Crane* plaintiff asserted that the defendant was engaged in some sort of "secret arrangement," which the plaintiff argued amounted to intentional interference for improper means. *Id.* at 777. The Court wholly rejected the suggestion, however, finding no evidence or reasonable inference that the defendant had intentionally interfered with the relationship between the agent and buyers, nor evidence from which to infer an improper purposeful intent. *Id.* at 778. As in *Crane*, Grace has provided no evidence to support his allegation that Alekson participated in the use of Grace's confidential information for his own advantage.

Moreover, as described *supra*, Section IV.A.1, Grace cannot legally claim that his expression of interest to Thomas created a "business expectancy" with the seller. While the only business relationship or expectancy hypothetically involved would have been with the condominium seller, Grace made no such allegation. Even if he had, Grace's claim would have failed because "an action for tortious

interference with a contractual relationship lies only against a third party. A party to the contract cannot be liable in tort for inducing its own breach.” *Olympic Fish Prods., Inc. v. Lloyd*, 93 Wn.2d 596, 598, 611 P.2d 737 (1980). In other words, a party cannot interfere with its own contract.

As the developer’s officer, Alekson was an agent of the other party to the “business relationship” — not an agent to an unrelated third party. Where an officer or director of a corporation has acted in good faith, he cannot be held liable for interfering with a contract between his principal corporation and another party. *Id.* at 599. Importantly, good faith “means nothing more than an intent to benefit the corporation.” *Id.*; *see also Havsy*, at 88 Wn. App. at 519 (“[e]xercising in good faith one’s legal interests is not improper interference”) (internal quotation omitted).

Grace has set forth no facts to suggest Alekson acted in bad faith. The record is devoid of evidence that Alekson intentionally interfered in the relationship between Thomas and Grace. As a matter of law, Alekson cannot be liable for tortious interference.

4. Assuming Intentional Interference, There is No Evidence That Alekson Interfered For an Improper Purpose or For Improper Means.

Perhaps the most deficient element of Grace’s tortious interference claim is with respect to the allegation of an improper purpose or improper means. Even assuming as true Grace’s allegation that Alekson knowingly interfered with Grace’s supposed business expectancy, Grace’s complaint,

identifies no motive or basis for Alekson's alleged interference. As a result, Grace's factual allegations provide no evidence in support of this fourth required element of his tortious interference claim.

The nature of an actor's conduct, his motive, and his interest, are important factors in determining whether intentional interference is improper. The Restatement (Second) of Torts 767 comments c, d and f (1979). Examples of improper conduct include physical violence, misrepresentations, and use of economic pressure. *Id.* at comment c. Because intent to interfere is insufficient absent an improper means or purpose, courts often consider whether an actor desired – or had the motive – to interfere with the business expectancy. *Id.* at comment d. “Usually the actor's interest will be economic, seeking to acquire business for himself. An interest of this type is important and will normally prevail over a similar interest of the other if the actor does not use wrongful means.” *Id.* at comment f.

To determine improper purpose, courts must weigh all factors, but “greater protection is given to the interest in an existing contract than to the interest in acquiring prospective contractual relations, and as a result permissible interference is given a broader scope in the latter instance.” *Id.* at comment j.

Grace argues that Alekson's alleged interference was for his own advantage. Appellant's Brief at 15. Yet nothing in the language of

Grace's complaints, nor his brief, explains the substance of that "advantage." There is no evidence of violence, misrepresentation or economic pressure. There is no evidence that Alekson wanted to disrupt an existing relationship with the seller. And there is no evidence that Alekson had an improper business purpose.

Tortious interference must be "wrongful by some measure beyond the fact of the interference itself." *Pleas v. City of Seattle*, 112 Wn.2d 794, 804 774 P.2d 1158 (1989) (quotation omitted). For example, in *Pleas*, the court found this element satisfied because the City had been deemed arbitrary and capricious in interfering with a builder's development project. *Id.* at 804-05. The court found an "improper purpose" based on "the City officials' apparent desire to gain the favor of a politically active and potentially influential group opposing the...project." *Id.* The court found "improper means" in the City's abuses of administrative processes "in refusing to grant necessary permits and arbitrarily delaying the project." *Id.* Grace has alleged nothing remotely approaching the kind of wrongful purpose or means demanded in the case law to support a tortious interference claim.

Put simply, Grace has merely alleged that a seller sold a condominium unit to another purchaser for more money, even though Grace had told the seller's real estate agent he was interested in purchasing the unit. Grace has not alleged that any contract or promise (with the real

estate agent or the seller) was made or has been breached. Grace has not alleged that the Aleksons had any knowledge of the agent's alleged misconduct. In fact, Grace has not alleged any wrongful behavior by the Aleksons. Grace conceded that its initial round of claims against the Aleksons lacked any basis in fact or law. Grace's claim for tortious interference suffers the same fate. In sum, the trial court appropriately dismissed Grace's Complaint against the Aleksons with prejudice.

B. THE TRIAL COURT DID NOT ABUSE HER DISCRETION IN AWARDING ATTORNEY FEES AND COSTS

The trial court's grant of fees under RCW 4.84.185 is reviewed for an abuse of discretion. *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 338, 858 P.2d 1054 (1993). Under the abuse of discretion standard, the question is whether the trial court was manifestly unreasonable or based its decision on untenable grounds. *Fisons*, 122 Wn.2d at 339. Reversal is not appropriate unless no judge acting reasonably would have reached the same conclusion. *Sofie v. Fibreboard Corp.*, 112 Wn.2d 636, 667, 771 P.2d 711 (1989).

RCW 4.84.185 allows the trial court to order the nonprevailing party to pay the prevailing party's reasonable expenses, including attorney fees, when the action as a whole is frivolous and advanced without reasonable cause. *Quick-Ruben v. Verharen*, 136 Wn.2d 888, 903, 969 P.2d 64 (1998). A lawsuit is frivolous when it cannot be supported by any

rational argument on the law or facts. *Smith v. Okanogan County*, 100 Wn. App. 7, 24, 994 P.2d 857 (2000). “The statute is designed to discourage abuses of the legal system by providing for an award of expenses and legal fees to any party forced to defend against meritless claims advanced for harassment, delay, nuisance, or spite. *Skimming v. Boxer*, 119 Wn. App. 748, 756, 82 P.3d 707 (2004) (citing *Suarez v. Newquist*, 70 Wn. App. 827, 832-33, 855 P.2d 1200 (1993)).

The trial court dismissed all of Grace’s claims against the Aleksons with prejudice, and without leave to amend because Grace’s complaints failed to state claims upon which relief could be granted. CP 71-72, 113-14. As a result, the trial court dismissed the Aleksons from the lawsuit twice: (1) first, based on Grace’s claims in his Second Amended Complaint, and (2) second, based on the tortious interference claim in his Third Amended Complaint. *Id.*

The Aleksons subsequently asked the trial court to award fees and costs pursuant to RCW 4.84.185. The trial court granted the Aleksons’ request, concluding.

Plaintiff initially asserted three claims for relief against the Aleksons. The Aleksons argued that these claims lacked merit in their CR 12(b)(6) motion to dismiss. Plaintiff chose not to defend or make any argument in favor of these claims. Rather, in seeking to amend his complaint, Plaintiff agreed to voluntarily dismiss all of these claims against the Aleksons. Thus, these claims are

deemed frivolous and were advanced without reasonable cause.

CP 196-98. Finally, the trial court concluded that, like Grace's prior three claims, Grace's fourth claim for tortious interference was dismissed because it failed to state a claim upon which relief could be granted. *Id.* Grace now argues that the trial court abused her discretion because, as he asserts, his tortious interference claim is "debatable." Appellant's Brief at 16. Grace's argument is antithetical to the notion of abuse of discretion. The word "debatable" suggests that something is open to dispute or questionable. To meet his burden, Grace must show that no judge acting reasonably would have reached the same conclusion. Grace cannot and has not met this burden.

C. THE TRIAL COURT PROPERLY AWARDED THE ALEKSONS ATTORNEY FEES FOR HAVING TO DEFEND GRACE'S FRIVOLOUS LAWSUIT. THIS COURT SHOULD DO THE SAME

Where a prevailing party is entitled to attorney fees in the trial court, they are generally also entitled to attorney fees if they prevail on appeal. *Sharbono v. Universal Underwriters Ins. Co.* 139 Wn. App. 383, 161 P.3d 406 (2007). The trial court determined that the Aleksons were entitled to attorney fees and costs pursuant to RCW 4.84.185. Accordingly, should the Aleksons prevail on appeal, the Aleksons ask this Court to award them additional attorney fees for defending against a frivolous appeal under RAP 18.1(a), RAP 18.9(a), and RCW 4.84.185.

An appeal is frivolous if there are no debatable issues on which reasonable minds can differ and is so totally devoid of merit that there was no reasonable possibility of reversal. *In re Recall Charges Against Feetham*, 149 Wn.2d 860, 872, 72 P.3d 741 (2003). The Aleksons have satisfied this standard. Despite Grace's use of the term "debatable," he has failed to identify any debatable issue on appeal in support of reversal. Accordingly, the Aleksons request the award of attorney fees for defending this frivolous appeal.

V. CONCLUSION

The Aleksons respectfully ask this Court to affirm the order of dismissal with prejudice, and the award of attorney fees and costs pursuant to RCW 4.84.185. The Aleksons also request an additional award of attorney fees for defending this appeal.

DATED this 10 day of July, 2009.

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CERTIFICATE OF SERVICE

I, Betty Lou Taylor, hereby certify that on the 10th day of July, 2009, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

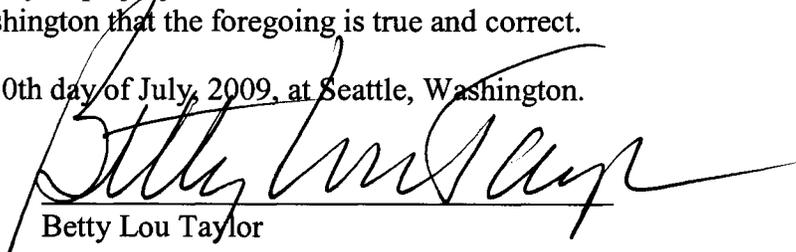
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Attorneys for Appellant

I certify under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct.

EXECUTED this 10th day of July, 2009, at Seattle, Washington.


Betty Lou Taylor

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