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COURT OF APPEALS
DIVISION II
STATE OF WASHINGTON
By _____

No. 407884

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

MATTHEW CLEVERLEY

Appellant

v.

CAROL CAMPBELL

Respondent

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COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
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DEPUTY

RESPONDENT'S BRIEF

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I. INTRODUCTION

Matthew Cleverley, the Appellant, (“Mr. Cleverley”) filed a lawsuit on November 30, 2009 against Carol Campbell, the Respondent, (“Ms. Campbell”) alleging the intentional tort of outrage, intentional interference with a business relationship, defamation, and also requesting injunctive relief. The lawsuit was filed in Kitsap County, a venue in which neither the defendant resides nor where the alleged unlawful acts occurred. A copy of the Summons and Complaint were served in Spokane County on an individual who was initially described as a male between the ages of 18 and 21 years old. No such person was residing with Ms. Campbell at that time; in fact, Ms. Campbell lived alone. Mr. Cleverley obtained a default judgment for all causes of action against Ms. Campbell when she failed to appear in the Kitsap County action. The judgment totaled \$225,000. Ms. Campbell moved to have the default judgment set aside as soon as she became aware of it. The trial court ruled that Ms. Campbell met her burden, and set aside the default judgment. Mr. Cleverley now appeals the trial court’s decision.

II. STATEMENT OF THE CASE

Ms. Campbell’s son, Michael, is currently going through a divorce from his wife, Colleen. Colleen worked for, and may still be working for,

Mr. Cleverley. During the course of the divorce proceedings, information came to light that led Michael to believe Colleen was involved in a romantic relationship with Mr. Cleverley. Michael apparently communicated this belief to his mother, Ms. Campbell.

Mr. Cleverley represented Colleen during a portion of the divorce proceeding, and on October 9, 2009, he conducted a deposition of Ms. Campbell. CP 5. Mr. Cleverley spent a significant portion of his time during the deposition questioning Ms. Campbell about Colleen's alleged relationship with Mr. Cleverley. CP 5. During this deposition, Ms. Campbell stated that she believed Mr. Cleverley and Colleen had, or still were having, a romantic relationship, and she further stated that she had communicated this understanding to a very few close family members. CP 5.

A short time after the deposition, Mr. Cleverley attempted to serve Ms. Campbell with this lawsuit, and purports to have done so successfully on October 31. Mr. Cleverley did not file the Summons and Complaint, however, until November 30, 2009, and did so in the Kitsap County Superior Court. At the same time, he filed his Motion and Declaration for Order of Default and Default Judgment. CP 2; CP 4. Ms. Campbell is not a resident of Kitsap County, and none of the alleged actions occurred in

Kitsap County. Mr. Cleverley was awarded a default judgment in the amount of \$225,000.

Ms. Campbell is a single woman who lives alone in the top story of a two story home. The two stories are completely independent, and she rents out the lower portion of the home as an apartment. In October of 2009, Ms. Campbell was renting out the lower portion of her home to a Hawaiian family. CP 16. The family consisted of a father, aged in his late 40's at the time, a mother, daughter, and a son who was 15 years of age in October, 2009. CP 16.

The original Declaration of Service, signed by T Beals and filed with the trial court on November 30, stated that the Summons and Complaint was served on a man, between the ages 18 and 21. The man did not identify himself. CP 3. Later, after Ms. Campbell moved to set aside the default judgment and supplied an affidavit to the trial court explaining her living situation, T Beals provided an additional narrative declaration of service. CP 19. In that second declaration, T Beals stated that the man served was an 18 year old male who could be described as Hawaiian. CP 19. This person was not at Ms. Campbell's house, but was standing on the sidewalk adjacent to Ms. Campbell's property. T Beals asked this person whether Ms. Campbell resided on the property, the

person said that she did, and took the Summons and Complaint when handed them. CP 19.

Ms. Campbell maintains that she never received the Summons and Complaint, and she had no notice of the Kitsap County proceedings until Mr. Cleverley garnished her wages in January of this year. CP 16. As soon as possible thereafter, Ms. Campbell moved to set aside the default judgment, pursuant to CR 60(b). CP 15. The trial court ruled that Ms. Campbell made the necessary showing to have the default judgment set aside, and issued an Order doing the same. CP 22; CP 23. Mr. Cleverley appeals that decision and action of the trial court.

III. ARGUMENT

A. Standard of Review

Trial courts have broad discretion in setting aside default judgments, and their actions will be reviewed only for an abuse of that discretion. *Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). The trial court can liberally set aside default judgments pursuant to CR 55(c), CR 60(b), and also for equitable reasons in the interest of fairness and justice. *Id.* at 748.

Where a party claims that it failed to respond to litigation as a result of excusable neglect, under CR 60(b)(1), the court should be able to find the following elements of a four part test: 1) That there is evidence to support at least a prima facie defense to the claims against it; 2) that the party's failure to appear in the action was occasioned by mistake, inadvertence, surprise or excusable neglect; 3) that the moving party acted with due diligence after discovery of the action; and 4) that no substantial hardship will result to the injured party. *Id.* at 755. A trial court can also set the default judgment aside for any of the other reasons contained in CR 60(b), including misconduct of the adverse party, and any other reason justifying relief from operation of the judgment. CR 60(b)(4); CR 60(b)(11).

Abuse of discretion is less likely to be found in cases where the trial court set aside the default judgment. *Griggs v. Averbek Realty, Inc.*, 92 Wn.2d 576, 599 P.2d 1289 (1979). An abuse of discretion only exists where no reasonable person could take the position adopted by the trial court. *Id.* In *Griggs*, the Supreme Court upheld the trial court's decision setting aside the default judgment. The Court held that even though the defendant had not supplied affidavits setting forth specific facts that gave rise to a prima facie defense, the trial judge was not unreasonable in

setting aside the default judgment, and properly exercised his discretion with the facts and the theory of the defense known to him. *Id.*

B. The Trial Court Properly Applied Its Liberal Discretion

The trial court found that Ms. Campbell showed that she had a prima facie defense to Mr. Cleverley's claims. In examining all of the information that the trial court had before it, this finding was entirely legitimate.

1. *Ms. Campbell Has a Prima Facie Defense to Defamation*

Mr. Cleverley alleged in his Complaint that Ms. Campbell made defamatory statements about him to others. CP 2. To prove defamation, one must conclusively show the following elements: 1) a false and defamatory communication; 2) lack of privilege; 3) fault; and 4) damages. See *Woody v. Stapp*, 146 Wn. App. 16, 189 P.3d 807 (2008); see also *Mohr v. Grant*, 153 Wn.2d 812, 108 P.3d 768 (2005). A statement is defamatory if it is a false assertion of fact that subjects the plaintiff to hatred, contempt, ridicule, or obloquy. *Loeffelholz v. Citizens for Leaders With Ethics and Accountability Now (C.L.E.A.N.)*, 119 Wn. App. 665, 82 P.3d 1199 (2004). The plaintiff must show that the statement tends to harm him in the estimation of the community or to deter third persons from associating or dealing with him. See *Right-Price Recreation, LLC v.*

Connells Prairie Community Council, 146 Wn.2d 370, 46 P.3d 789 (2002), *cert. denied*, 540 U.S. 1149 (2004).

Even where a statement is defamatory, it may be subject to a privilege. Courts have recognized that a qualified privilege may exist in a family relationship. See e.g. *Kimble v. Kimble*, 14 Wash. 369, 44 P. 866 (1896). “Falsity of the information conveyed does not defeat the privilege if there is a reasonable ground for believing the information true, and if the circumstances warrant the disclosure of the information.” 16A Washington Practice § 19.19, pg. 26 (2006) (citing Restatement (Second) of Torts § 597).

Finally, the plaintiff must be able to show that those defamatory statements which are not privileged caused actual damages. In matters involving private figures and private concerns, there are no presumed damages. 16A Washington Practice § 19.42, pg. 36 (2006). The plaintiff must prove the amount of his damages, and must also prove that those damages would not have occurred but for the defendant’s wrongful conduct. See e.g. *Schmalenberg v. Tacoma News, Inc.*, 87 Wn. App. 579, 943 P.2d 350 (1997).

During her deposition, Ms. Campbell stated that she had heard testimony given by her son and Colleen’s ex-Nanny. CP 5. That

testimony, along with other information, led Ms. Campbell to believe that Mr. Cleverley and Colleen had a romantic relationship of some kind. CP 5. When Mr. Cleverley asked if she had talked about this romantic relationship with anyone else, Ms. Campbell indicated that she probably had mentioned it to family members (though she couldn't remember any specific instances) as it was something commonly accepted as the truth among the family members. CP 5.

In his Complaint, Mr. Cleverley did not set forth the elements necessary to create a prima facie case, nor did he state any facts to support his conclusory allegation that Ms. Campbell made defamatory statements. CP 2. In his Affidavit in Support of Default Judgment, Mr. Cleverley stated that Ms. Campbell admitted in her deposition that the "re-broadcasting" of Michael's statements about Mr. Cleverley had damaged his reputation. CP 5. Mr. Cleverley then cited to pages 61 and 62 of Ms. Campbell's deposition. In truth, those pages reveal that Ms. Campbell refutes the idea that her discussion of Mr. Cleverley in any way injured his reputation.

Q: And do you think that that is an attempt to discredit me in a professional capacity with Colleen?

A: No, I don't. I think facts are facts. And there's facts. I don't think any way it discredits you in a professional way, because facts are just facts.

...

Q: And do you think that Michael's comments about me having an affair with Colleen damaged my reputation with your children?

A: Well, I don't think my children really care, to be honest. They don't care about your reputation.

This line of questioning was also objected to by Ms. Campbell's attorney at the time, Mr. Kelley, as being irrelevant to the subject matter of the divorce proceedings. CP 5.

In regard to the amount of damages, the only information provided by Mr. Cleverley is this single statement in his Affidavit: "The damages caused in this case are difficult to quantify, but I believe that \$75,000 for each claim is an appropriate measure of damages." No further information or evidence is provided to support this amount.

The trial court was correct in finding that Ms. Campbell established a prima facie defense against the defamation claim. First, she disputes that the statements in question were false, and has continually maintained her belief that the statements are true. The only evidence provided of falsity is Mr. Cleverley's denial. Further, Ms. Campbell indicated that all communications had occurred in a family context, and there is a qualified privilege for communication within a family. The trial

court also had the benefit of examining the evidence presented by Mr. Cleverley to support a prima facie case. Mr. Cleverley did not supply enough information or evidence to establish a prima facie case of defamation, and that itself is a defense to the claim. See also *Caouette v. Martinez*, 71 Wn. App. 69, 856 P.2d 725 (1993) (Appellate court affirmed trial court's order setting aside the default judgment on the basis that nothing in the plaintiff's materials set forth the necessary facts that would support its causes of action; the plaintiff cannot rely on the Complaint or other statements of conclusory facts).

2. *Ms. Campbell Has a Prima Facie Defense to Tortious Interference*

Interference with a contractual relationship must be shown by the following elements: 1) the existence of a valid contractual relationship; 2) knowledge of the contractual relationship on the part of the interferor; 3) intentional interference that causes a breach or termination of the contractual relationship; 4) resulting damage to the plaintiff; and 5) a duty of noninterference on the part of the defendant. See *Koch v. Mutual of Enumclaw Ins. Co.*, 108 Wn. App. 500, 31 P.3d 698 (2001). To show intentional interference, the plaintiff must prove that the interference was wrongful, and either for an improper motive or purpose or by wrongful

means. See generally, *Pleas v. City of Seattle*, 112 Wn.2d 794, 774 P.2d 1158 (1989).

Mr. Cleverley did not plead the necessary elements in his Complaint. He did not allege that Ms. Campbell took any action that was intentionally and wrongfully designed to interfere with any existing contractual relationship. Mr. Cleverley also did not allege that Ms. Campbell owed him a duty of noninterference. Mr. Cleverley's failure to plead the necessary elements, and his additional failure to provide any evidence of his claims, either prior to or after entry of the default judgment, is a prima facie defense to those claims.

Ms. Campbell has made clear that she did not do anything with the intent of injuring Mr. Cleverley, and testified under oath that she did not believe anything she had done discredited him professionally. Ms. Campbell maintains that her alleged acts and statements were not intentional or wrongful. This is a prima facie defense to the tort of intentional interference, and constitutes sufficient grounds for the trial court to set aside the default judgment.

3. *Ms. Campbell Has a Prima Facie Defense to Outrage*

To establish that someone has committed the tort of outrage, the plaintiff must do more than show the defendant acted with intent, even

criminal intent, or that his conduct can be characterized by malice. See *Grimby v. Samson*, 85 Wn.2d 52, 530 P.2d 291 (1975). Instead, the plaintiff has to prove that the defendant's conduct was outrageous in the extreme, in both character and degree, such that it goes beyond all possible bounds of decency, and is regarded as atrocious and utterly intolerable in a civilized community. See *Hope v. Larry's Markets*, 108 Wn. App. 185, 29 P.3d 1268 (2001). The plaintiff must further show that he was personally the object of the outrageous conduct, and was present at the time of the conduct. *Reid v. Pierce County*, 136 Wn.2d 195, 961 P.2d 333 (1998). In *Reid* the County appropriated and displayed autopsy photographs of the plaintiff's deceased relatives. The Washington Supreme Court held that the plaintiffs could not prevail on their cause of action for outrage because they were not present at the time the photographs were displayed. *Id.* at 202.

Ms. Campbell maintains that her alleged statements did not rise to the level of inciting such extreme outrage, and were not atrocious and utterly intolerable. The only thing Ms. Campbell is alleged to have done is communicate with members of her own family about the details involved in her son's divorce. Mr. Cleverley has not provided any information that would indicate Ms. Campbell's actions were extreme and

outrageous, nor was he present when the alleged statements were made.

The trial court found that she had at least established a prima facie defense to the tort, and there is nothing in the record to indicate that such a finding was an abuse of discretion.

C. Substituted Service on Ms. Campbell Was Improper

The trial court questioned the validity of the substituted service on Ms. Campbell, and rightfully so. Mr. Cleverley cites *Miebach v. Colasurdo*, 102 Wn.2d 170, 685 P.2d 1074 (1984), for the proposition that a facially correct return of service is difficult to overturn. But that case is easily distinguishable from the one at hand.

In *Miebach*, the defendant was served by substituted service on his 15 year old foster daughter, who resided with him in his home. The court held that service was proper, but only after making significant factual findings. The court found that the daughter was “talented, familiar with the court system and held an appreciation for the consequences of violating the law.” *Id.* The court also found that the foster daughter was the leader of her peer group and concerned with her future, and she could read and was of at least average intelligence. *Miebach v. Colasurdo*, 35 Wn. App. 803, 670 P.2d 276 (1983).

In our case, we have an affidavit of service that says the Summons and Complaint were served on an unidentified male, 18-21 years of age, standing on the sidewalk in front of Ms. Campbell's home. We know that no such person was living either with Ms. Campbell, or in the basement apartment of her home. The only person that could come close to fitting such a description was a 15 year old Hawaiian boy living in the completely separate basement apartment with his family. However, even if it is accepted that service was made on this 15 year old boy, we do not have any additional evidence regarding his suitability for service. He did not live with Ms. Campbell, was not related to Ms. Campbell (even in a foster capacity), and we have no findings in the record to show that he was talented, familiar with the court system or held an appreciation of the law. We don't know if he was concerned about his future; we don't even know if he could read.

Based on these issues, the trial court was justified in questioning the suitable age and discretion of the person served with the Summons and Complaint.

D. There Were Irregularities in Obtaining the Default Judgment, and Mr. Cleverley's Conduct was Improper

CR 60(b)(1) allows a trial court to set aside a default judgment where there are irregularities in how the default judgment was obtained. CR 60(b)(4) states that the default judgment will be set aside where the plaintiff's conduct in obtaining the judgment was improper.

Irregularities pursuant to CR 60(b)(1) occur when there is a failure to adhere to some prescribed rule or mode of proceeding, such as when a procedural matter that is necessary for the orderly conduct of trial is omitted or done at an unreasonable time or in an improper manner. See *Mosbrucker v. Greenfield Implement*, 54 Wn. App. 647, 774 P.2d 1267 (1989). In *Mosbrucker* the trial court denied defendant's motion to vacate the default judgment against him. The Court of Appeals disagreed with the trial court's refusal, and remanded the case to the trial court for reconsideration. *Id.* The Court of Appeals based its reasoning on the fact that the plaintiff had failed to reveal to the trial court important facts that could have exonerated the defendant from liability. *Id.*

In this matter, the filing of the case itself was irregular because it was not filed in the proper venue. Venue is proper in the county where the defendant resides, or in the county where the cause of action arose. RCW

4.12.020. CR 55(c)(2) states that where a default judgment is procured in a county of improper venue, the trial court will vacate that judgment for irregularity pursuant to CR 60(b)(1). Mr. Cleverley filed this case in Kitsap County Superior Court. Ms. Campbell resides, and did reside at all times material to this case, in Spokane County. Mr. Cleverley was aware of this, as shown by his attempt to serve Ms. Campbell in Spokane. Further, Ms. Campbell did not make any of the alleged statements in Kitsap County, as there is no evidence of Ms. Campbell having even been in Kitsap County during any time material to this action. In the trial transcript, the trial court expressed doubt that the venue was proper, and Mr. Cleverley agreed to stipulate that Spokane County is the proper venue.

Filing the case in the wrong venue is not only an irregularity, it also demonstrates improper conduct on the part of Mr. Cleverley. He made certain that Ms. Campbell would have minimal opportunity to learn about the lawsuit by filing it in a distant county to which Ms. Campbell had no connections, and also by not filing the case until the same day he filed his Motion for Default. This can only be described as improper conduct, and lends further support to the trial court's decision to set aside the default judgment.

E. Equitable Considerations Require the Default to be Set Aside

The prime concern of the courts is to do justice. *Beckett v. Cosby*, 73 Wn.2d 825, 440 P.2d 831 (1968). The court has the power to vacate a default judgment where an injustice would result from the defendant's technical failure. *Id.* at 827-828. CR 60(b)(11) allows a trial court to set aside a default for any reason in the interest of justice.

The trial court did not abuse its discretion when it employed its equitable powers and set aside the default judgment. If the judgment had been allowed to stand, Mr. Cleverley would be holding a \$225,000 judgment against Ms. Campbell, allowing him to take everything she has and sending her into deep financial insolvency. This, without ever having to prove the claims he brought against her; indeed, without even providing enough evidence to amount to a prima facie case. On the other hand, setting aside the default judgment allows Ms. Campbell to provide evidence of her defenses, and will require Mr. Cleverley to put on proof of his claims.

This is not *Rosander v. Nightrunners Transp. Ltd.*, 147 Wn. App. 392, 196 P.3d 711 (2008), cited by Mr. Cleverley, where the defending parties admittedly knew about the pending action but nevertheless failed to take steps to defend themselves. This is not *Miebach v. Colasurdo*, 102

Wn.2d 170, 685 P.2d 1074 (1984), where the person served with substituted service could be identified, and a reasonable inquiry could be made into her suitability to accept service. This is not *Little v. King*, 160 Wn.2d 696, 161 P.3d 345 (2007), also cited by Mr. Cleverley, where the defendant was actually present at the time of the default hearing but chose not to defend, and where the defendant's insurer knew about the case and the hearing but chose not to intervene in a timely fashion.

This is a case where Ms. Campbell did not have notice of the claims against her. No reasonable person can believe that she would have sat idly by with the knowledge that a judgment would be entered against her which had the potential to wipe out everything she owns. This is a case where justice and equity cry out for a full trial on the merits, and the trial court did not abuse its discretion when it took steps to ensure that such justice could be done.

F. Attorney Fees Should Be Granted to Ms. Campbell Pursuant to CR 11 and RAP 18.1

RAP 18.1 states that on appeal, a party should request attorney fees if applicable law grants a party the right to seek such fees and costs. CR 11 states that the signature of an attorney on a pleading is a certification that the pleading is 1) well grounded in fact; 2) warranted by existing law;

and 3) not interposed for any improper purpose, such as to harass, unnecessarily delay or needlessly increase litigation costs. If it is found that a pleading is signed in violation of the rule, the court may award attorney fees and costs to the opposing party, and may impose other sanctions as it sees fit. CR 11 is applicable at the appellate level, just as at the trial court level. See *Steinberg v. Rettman*, 54 Wn. App.841, 776 P.2d 695 (1989).

Mr. Cleverley filed a Complaint which failed to lay out the necessary elements of his claims. Further, he has failed to provide any evidence that supports his claims, and the facts that he relies on only serve to contradict those claims. Mr. Cleverley alleges he was damaged by defamatory statements, but the evidence in the record shows that it is unlikely his reputation has been in any way damaged. He also states that his business relationships were interfered with, but a) he has not been able to identify any such relationship that was directly or indirectly harmed by Ms. Campbell, and b) the evidence in his possession at the time of filing the Complaint indicates only that Ms. Campbell never intended to harm him or his business. Mr. Cleverley claims he has suffered extreme emotional distress, but he has provided no evidence of any such emotional distress. In addition, no reasonable person could decide that someone

talking amongst her close family members about her son's divorce could be considered "atrocious and utterly intolerable in a civilized community." Nevertheless, Mr. Cleverley chose to sign and file his Complaint against Ms. Campbell, when he knew or should have known that he could not prove the elements of his claims.

The transcript of Ms. Campbell's deposition, taken by Mr. Cleverley, reveals that Mr. Cleverley's intent going into the deposition was to find some basis for a personal claim against Ms. Campbell and against her son. As the objection by Mr. Kelley suggests, none of Mr. Cleverley's questioning was directed at issues relevant the divorce case.

Very soon after the deposition, Mr. Cleverley had the Summons and Complaint in this case completed. They were served on an unidentified man of whom we know very little. The case was filed in a County that had no reasonable connections to Ms. Campbell or the alleged facts underlying the causes of action. Mr. Cleverley made certain not to file the Complaint until he could also file his Motion for Default. And then, when the default judgment was set aside, Mr. Cleverley immediately appealed, largely in an attempt to avoid a trial on the merits because he knows that he cannot possibly prevail on those merits. Mr. Cleverley

knows that his only hope of obtaining a judgment against Ms. Campbell is through her technical default.

This case, as represented in the pleadings signed by Mr. Cleverley (including both the Complaint and Appellant's Brief), is not well grounded in fact, it is not warranted by existing law, and it has been prosecuted only with the intent of harassing Ms. Campbell and increasing her litigation costs. As a result, CR 11 sanctions are warranted, and this Court has the power to award Ms. Campbell her attorney fees and costs incurred in defending this action.

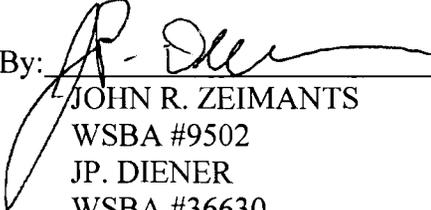
IV. CONCLUSION

The trial court did not abuse its discretion by setting aside the default judgment. This case was filed in an improper venue. Service was attempted on an unidentified man who does not reasonably fit the description of anyone residing with Ms. Campbell; in fact, Ms. Campbell lived alone. As soon as Ms. Campbell became aware of the judgment against her, she took action to set it aside. And Ms. Campbell has reasonably demonstrated that she can raise defenses to the claims against her. Mr. Cleverley's Complaint was not well grounded in fact, it was not warranted by law, and it was intended only to harass and harm Ms. Campbell. Based on the foregoing, Ms. Campbell respectfully requests

that this Court affirm the decision of the trial court, remand this case for a trial on the merits, and award Ms. Campbell her costs and attorney fees incurred in defending this appeal.

DATED this 22 day of October, 2010.

FELTMAN, GEBHARDT, GREER
& ZEIMANTZ, P.S.

By: 

JOHN R. ZEIMANTS
WSBA #9502
JP. DIENER
WSBA #36630
Attorneys for Respondent

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Appellant

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CAROL CAMPBELL

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DECLARATION OF SERVICE

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—*Co-Counsel for Respondent CAROL CAMPBELL*

I, JAN PERREY, am a citizen of the United States and a resident of the State of Washington; I am over the age of eighteen (18) years; I am competent to be a witness in a court of law; and I am not a party to the within-entitled action.

On the 22 day of October, 2010, I sent via the method indicated below, to each of the parties listed the following pleadings:

- Respondent's Appeal Brief

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DATED this 22 day of October, 2010.



JAN PERREY