No. 91696-9

SUPREME COURT
OF THE STATE OF WASHINGTON

THE COLLECTION GROUP, LLC,

Respondent,

v.

DAVID R. COOK and JANE DOE COOK,

Appellants.

THE COLLECTION GROUP, LLC'S ANSWER TO PETITION FOR REVIEW

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I. RESTATEMENT OF THE ISSUES

1. Whether the Court should deny Appellant David Cook's petition for review when Mr. Cook has failed to show that review should be granted under the Rules of Appellate Procedure. Answer: ***Yes.***

2. Whether the Court of Appeals erred when it held Mr. Cook's own evidence fell short of demonstrating insufficient service of process by a preponderance of the evidence. Answer: ***No.***

II. RESTATEMENT OF THE CASE

This case arises from a default judgment on a Citibank revolving charge account that Plaintiff /Respondent The Collection Group, LLC ("**TCG**") obtained against Defendant/Appellant David Cook on August 30, 2006 in Spokane County District Court. CP 105 - 113.

The subject Citibank account was issued subject to written terms and conditions. CP 118. The last sentence in the first paragraph of these terms and conditions (the "**Agreement**") provides the Agreement is binding on Mr. Cook because he did not cancel his Citibank account within 30 days after receiving the credit card for the account and he has used or authorized the use of his account. CP 118. Page 7 of the Agreement provides that if the account is referred to a lawyer who is not a salaried employee of the creditor, Mr. Cook "will have to pay [TCG's]

attorney's fees plus court costs or any other fees, to the extent permitted by law." CP 122.

TCG transferred its Spokane County District Court judgment against Mr. Cook to the Spokane County Superior Court. CP 1-5. Approximately seven (7) years after TCG's judgment was entered against him, Mr. Cook moved to vacate this judgment on the basis of insufficient service of process. In support of his motion to vacate, which Mr. Cook filed in Spokane County Superior Court, Mr. Cook submitted a declaration dated June 14, 2013 that stated he "never learned there was a lawsuit at all until some papers seeking supplemental proceedings were delivered [to the 1515 Lilac Lane address at issue in this case] in August 2012[.]" CP 15. Mr. Cook further declared he "did not get notice [of this lawsuit] until long after the default judgment was entered" in August of 2006. CP 15.

However, as TCG pointed out to the trial court and to Division Three of the Washington Court of Appeals, the record reflects that Mr. Cook was served with TCG's supplemental proceedings pleadings in this case on June 10, 20**09**. CP 39-40. The date of the supplemental proceedings was set for June 19, 2009. CP 39-40. The declaration of service regarding the supplemental proceedings reflects that Mr. Cook was served with the supplemental proceedings pleadings by way of his "brother/co-resident" Richard Cook, who was "residing at the

respondent's usual place of abode[.]" CP 40. The declaration of service reflects the address where Mr. Cook was served was the 1515 S. Lilac Lane address in Liberty Lake, Washington 99019. CP 40.

Further, on June 16, 2009, attorney Ralph Van Camp called TCG and spoke with Robin Inman, one of TCG's employees. CP 40. During this call, Mr. Van Camp put in a verbal notice of appearance for Mr. Cook. CP 40. TCG's case notes from that conversation evidence this call. CP 40. These notes do not reflect that Mr. Van Camp claimed during the aforesaid telephone call that TCG did not effectuate good service on Mr. Cook back on July 2, 2006. CP 40.

On June 17, 2009, attorney Dustin Deissner called TCG and spoke with Ms. Inman. CP 40. During this call, Mr. Deissner put in a verbal notice of appearance for Mr. Cook. CP 40. Ms. Inman informed Mr. Deissner during this call that Mr. Deissner's law partner, Mr. Van Camp, had also called TCG. CP 40. These notes do not reflect that Mr. Deissner claimed during the aforesaid telephone call that TCG did not effectuate good service on Mr. Cook back on July 2, 2006. CP 40.

Ms. Inman telephoned Mr. Van Camp on June 17, 2009 regarding the notice of appearance, at which time Mr. Van Camp told Ms. Inman that he would not be submitting a formal notice of appearance and that TCG should tell the judge that TCG received a call with a verbal notice of

appearance. CP 40. TCG's long distance phone records evidence this call. CP 40.

On July 28, 2011 TCG's attorney, Brad L. Williams, caused to be mailed to Mr. Cook a letter and an enclosed Notice of Withdrawal and Substitution of Counsel at the 1515 S. Lilac Lane address. CP 40. This letter was not returned as undeliverable. CP 41.

On August 23, 2011, the declaration of service that reflects the service of TCG's summons and complaint on Mr. Cook was faxed to Mr. Deissner pursuant to his request. CP 41. TCG's records reflect the transmission of this facsimile. CP 41.

On May 4, 2006 and June 5, 2006 TCG sent letters to Mr. Cook at the 1515 S. Lilac Lane address. CP 41. Neither of these letters was returned as undeliverable. CP 41. TCG still has a copy of these letters. CP 41.

Per the Spokane County Assessor's website, as of April 27, 2006, the owners of 1515 S. Lilac Lane were David R. Cook and Richard W. Cook. CP 41. Their mailing address that was on file with the Assessor as of the aforesaid date was the 1515 S. Lilac Lane address. CP 41. A copy of a printout from the Spokane County Assessor's website that TCG obtained on April 28, 2006 that reflects such is part of the record. CP 41.

The owners of the 1515 S. Lilac Lane property provided the Assessor on or prior to April 2, 2009 with a new mailing address of P.O. Box 621. CP 41. A copy of a printout from the Assessor's website that TCG obtained on April 2, 2009 that reflects such was presented to the trial court. CP 41.

Although Mr. Cook's wife, Marti Mortensen, submitted testimony to the trial court to the effect that her divorce was finalized in 2006, the fact is her divorce was not final until June 9, 20**10**. CP 41. A copy of the court docket from Ms. Mortensen's divorce proceeding is part of the record. CP 41. Said docket also reflects that Mr. Deissner was Ms. Mortensen's attorney in the divorce proceeding. CP 41.

TCG submitted to the trial court and Court of Appeals a Westlaw CLEAR comprehensive investigative report that TCG obtained regarding Marti Mortensen. CP 41. Page 2 of this report lists 1515 S. Lilac Lane as a possible address of Ms. Mortensen from October 1, 2005 through June 5, 2007. CP 42. Said report also lists Ms. Mortensen's date of birth as being 12/16/59. CP 42. Thus, according to this report, Ms. Mortensen was about 46.5 years old at the time that "Jane Doe" Cook was served with TCG's summons and complaint on July 2, 2006 at the 1515 S. Lilac Lane address. CP 42. As seen from the declaration of service at issue in this

case, TCG's process server listed the approximate age of "Jane Doe" as being mid-to-late 40s. CP 42.

TCG also submitted to the trial court and Court of Appeals a Westlaw CLEAR comprehensive investigative report that TCG obtained regarding Vernon Mortensen. CP 42. In their pleadings filed with the trial court, Mr. Cook inferred that Mr. Mortensen was living at the 1515 Lilac Lane address at the time of service on Mr. Cook. CP 42. That address is listed nowhere in this report on Mr. Mortensen. CP 42.

TCG also submitted below a Westlaw CLEAR comprehensive investigative report that TCG obtained regarding David R. Cook. CP 42. This report lists Mr. Cook's address from January 1, 1996 to February 23, 2013 as being 1515 S. Lilac Lane. CP 42.

TCG previously informed the trial court and the Court of Appeals that it ardently believes Mr. Cook and those close to him submitted false and inaccurate testimony in support of Mr. Cook's motion to vacate TCG's judgment. CP 42. TCG's research demonstrates that Marti Mortensen is the current spouse of David R. Cook, and that she lived at the 1515 S. Lilac Lane address on July 2, 2006, the date that she was served with TCG's summons and complaint in this lawsuit. CP 42. TCG's research also shows that Vernon Mortensen never lived at 1515 S. Lilac Lane. CP 42.

On August 23, 2013, Mr. Cook obtained an order to show cause as to why TCG's judgment against him should not be vacated due to defective service of process back in 2006. CP 25. After hearing argument from counsel during the September 27, 2013 hearing on Mr. Cook's motion to vacate TCG's judgment, the trial court determined TCG's declaration of service is good on its face, and is therefore entitled to a presumption of validity. *See* Verbatim Report of Proceedings at 23, line 12; VRP at 25, lines 8-9. The trial court also noted it appeared that Mr. Cook was aware of TCG's judgment for at least four years and apparently took no steps to do anything about it until fairly recently. *See* VRP at 24, lines 14-17. Additionally, the trial court recognized Mr. Cook "is clearly showing as an individual who has I'll call it just an ownership interest in this Liberty Lake property" and that "it is not unusual in this day and age for folks to have several places of usual abode even in the same town." VRP at 23-24.

The trial court denied Mr. Cook's motion to vacate TCG's judgment on September 27, 2013, and Mr. Cook filed his notice of appeal concerning this ruling on October 22, 2013. CP 102, 103. Division Three of the Washington Court of Appeals affirmed the trial court's ruling by way of an unpublished decision filed on April 9, 2015. A copy of this decision is attached hereto as an appendix.

The Court of Appeals held Mr. Cook failed to prove that service upon him was defective by a preponderance of the evidence. That court further determined "the factual discrepancies in Ms. Mortensen's and Mr. Cook's declarations that Mr. Deissner was required to concede reflect negatively on both witnesses' credibility." As part of its ruling, the Court of Appeals awarded TCG its attorney's fees and costs incurred on appeal pursuant to the Agreement.

The certificate of service attached to Mr. Cook's petition for review states a copy of the petition was mailed to TCG's attorneys on May 12, 2015.

III. ARGUMENT

A. The Decision Of The Court Of Appeals Is Not In Conflict With A Decision Of The Supreme Court Or Another Decision Of The Court Of Appeals.

A petition for review will be accepted by the Washington Supreme Court only: (1) If the decision of the Court of Appeals is in conflict with a decision of the Washington Supreme Court; or (2) If the decision of the Court of Appeals is in conflict with another decision of the Court of Appeals. RAP 13.4(b).

Mr. Cook asserts the ruling of the Court of Appeals in this case "effectively overturned" the Washington Supreme Court's ruling in *John Hancock Mut. Life Ins. Co. v. Gooley*, 196 Wash. 357, 83 P.2d 221 (1938).

Mr. Cook asserts *Gooley* held that where an affidavit of service fails to recite that service was made at the defendant's usual place of abode, the enhanced burden of proof otherwise required to overturn a judgment is not applicable, and the defendant need only prove inadequate service by a simple preponderance of the evidence. [1]

The Court of Appeals did not issue an opinion that is contrary to *Gooley*. The Court of Appeals simply held that "Mr. Cook failed to demonstrate by even a preponderance of the evidence that the Lilac Lane address was not a usual place of abode for him at the time of service." There is nothing about this ruling that is in conflict with *Gooley*. In fact, this ruling is consistent with *Gooley*, which held that the "actual facts" regarding service of process control, and that if jurisdiction was actually acquired over the person of the defendant, that fact should govern, regardless of the form of the original declaration of service. *Id.* at 363. Accordingly, there is no basis for accepting review of the Court of Appeals' ruling under RAP 13.4(b)(1) or (2), as the Court of Appeals' ruling is not in conflict with any other Washington appellate court decision.

[1] Petition for Review at 4-5.

B. The Petition For Review Does Not Involve An Issue Of Substantial Public Interest That Should Be Determined By The Supreme Court.

A petition for review can be accepted under RAP 13.4(b)(4) if the petition involves an issue of substantial public interest that should be determined by the Washington Supreme Court. RAP 13.4(b)(4). Although Mr. Cook asserts this is such a case, the reality is otherwise. The Court of Appeals' ruling does not, as Mr. Cook claims, make abode service "essentially unassailable"; and contrary to Mr. Cook's charge, this is not a case where "no diligence was expended" to determine whether Mr. Cook lived at the address in question. [2] The fact is the Court of Appeals' ruling in this case does not expand or overturn existing precedent, and this case does not involve an issue of substantial public interest that should be determined by the state supreme court.

C. The Court of Appeals Ruled Correctly When It Declined To Vacate The Judgment That Was Entered Against Mr. Cook.

The Court of Appeals ruled correctly when it declined to vacate the judgment that was entered against Mr. Cook. The reality is Mr. Cook failed to prove insufficient service by even a preponderance of the evidence. The Court of Appeals recognized that although Mr. Cook provided a declaration stating that he was residing primarily in California

[2] Petition for Review at 5.

and staying temporarily in North Idaho during the time of the service, he provided "no records of property ownership in California or Idaho, no rental agreement for a residence in either state, and no addresses for his ostensible 'true' places of abode." The court understandably noted that when a party such as Mr. Cook fails to produce relevant evidence within his control, without satisfactory explanation, the inference is that such evidence would be unfavorable to the producing party.

Moreover, the Court of Appeals rightly determined that when a defendant challenging service fails to identify his "true" place of abode, like Mr. Cook in this case, an adverse inference is reasonably drawn. As such, and in light of the "factual discrepancies in Ms. Mortensen's and Mr. Cook's declarations that ... reflect negatively on both witnesses' credibility," there simply is no doubt that the Court of Appeals reached the proper result in this case. The reality is Mr. Cook failed to prove defective service by even a preponderance of the evidence.

D. The Court Should Award TCG Reasonable Attorney's Fees And Costs Incurred In Responding To The Petition For Review.

If attorney fees and expenses are awarded to the party who prevailed in the Court of Appeals, and if a petition for review to the Washington Supreme Court is subsequently denied, reasonable attorney fees and expenses may be awarded for the prevailing party's preparation

and filing of the timely answer to the petition for review. RAP 18.1(j). A party seeking attorney fees and expenses should request them in the answer to the petition for review. *Id.*

The Court of Appeals awarded attorney fees to TCG pursuant to contract in accordance with *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wn.2d 799, 314 P.2d 935 (1957). *Lillions* held that where attorney fees are provided for by agreement, which is the case herein, they are allowed when an appeal is required to gain a final judgment. *Id.* Accordingly, if the Court denies Mr. Cook's petition for review, TCG respectfully requests an award of attorney fees and expenses pursuant to RAP 18.1(j) and *Lillions.*

IV. CONCLUSION

The decision of the Court of Appeals is not in conflict with a decision of the Washington Supreme Court or another decision of the Court of Appeals, and this case does not involve an issue of substantial public interest. Moreover, it is abundantly clear that the judgment entered against Mr. Cook should stand given Mr. Cook's failure to prove insufficient service of process by even a preponderance of the evidence. For these reasons, the Court should deny Mr. Cook's petition for review

and lay this case to rest once and for all.

RESPECTFULLY SUBMITTED this 9 day of June, 2015.

EISENHOWER CARLSON PLLC

By: _____
Alexander S. Kleinberg, WSBA # 34449
Attorneys for The Collection Group, LLC

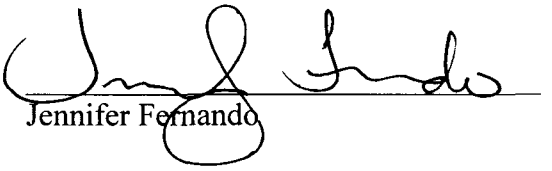
DECLARATION OF SERVICE

I, Jennifer Fernando, am a legal assistant with the firm of Eisenhower Carlson PLLC, and am competent to be a witness herein. On June 9, 2015, Tacoma, Washington, I caused a true and correct copy of The Collection Group, LLC's Answer to Petition for Review to be served upon the following in the manner indicated below:

Counsel for Appellant **Dustin Deissner** Deissner Law Office 1707 W. Broadway Ave. Spokane, WA 99201	☐	U.S. Mail, postage prepaid
	☐	Hand Delivered via Messenger Service
	☒	Overnight Courier
	☒	Electronically via email
	☐	Facsimile
Counsel for Respondent **Robert Sealby** 37 S. Wenatchee Ave., Suite F Wenatchee, WA 98807 **Andrea Asan** 522 West Riverside Ave., Ste. 560 Spokane, WA 99201	☐	U.S. Mail, postage prepaid
	☐	Hand Delivered via Messenger Service
	☐	Overnight Courier
	☒	Electronically via email
	☐	Facsimile

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 9 day of June, 2015, at Tacoma, Washington.



Jennifer Fernando

APPENDIX

FILED
APRIL 9, 2015
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

THE COLLECTION GROUP, LLC, a Washington Limited Liability Company,	)	No. 32020-1-III
Respondent,	)	
v.	)	
DAVID R. COOK AND JANE DOE COOK, husband and wife, and their marital community composed thereof,	)	UNPUBLISHED OPINION
Appellants.	)	

SIDDOWAY, C.J. — David Cook appeals the trial court's refusal to set aside a 2006 default judgment entered in a collection action by the Collection Group (TCG), which he claims is void for insufficient service of process. He contends the trial court erred in applying the presumption that a facially correct affidavit of service is valid and refusing to vacate the default judgment based on his evidence that the address listed on the return of service was not his usual place of abode. Because the return of service was sufficient as to the matters it addressed and was supplemented by additional evidence, and because Mr. Cook's own evidence fell short of demonstrating insufficient service of process by even a preponderance of the evidence, we affirm.

PROCEDURAL BACKGROUND

On July 2, 2006, TCG commenced this action against David Cook to collect $5,993.80 he allegedly owed on a credit card account, by delivering two summonses and complaints to an adult at the home located at 1515 S. Lilac Lane in Liberty Lake, Washington—the address listed on Mr. Cook's latest billing statement for the delinquent account.

After Mr. Cook failed to timely respond, TCG moved for an order of default, which the Spokane County District Court entered on August 30, 2006. With prejudgment interest, attorney fees and costs, the judgment entered totaled $10,444.78. TCG thereafter transferred the judgment to the Spokane County Superior Court for collection.

TCG commenced supplemental proceedings against Mr. Cook on June 12, 2009 by serving copies of the pleadings on his "brother/co-resident," Richard Cook, at the Lilac Lane address. Clerk's Papers (CP) at 47. A few days later, one of TCG's lawyers received a call from Ralph Van Camp, who identified himself as a lawyer and put in a verbal notice of appearance on behalf of Mr. Cook. The next day, TCG received a second call from a second lawyer, Dustin Deissner, who again provided a verbal notice of appearance and explained that Mr. Van Camp was his partner. On August 23, 2013—four years after the telephonic appearances and nearly seven years after entry of the default—Mr. Deissner filed a motion on behalf of Mr. Cook to vacate the judgment under CR 60, alleging that it was void for lack of personal service.

A return of service had been filed with the district court on July 10, 2006. It stated that the process server had left two copies of the summons and complaint at the Lilac Lane address with "a white female, who would not give her name, approximately mid to late 40's, 5'2", glasses, above shoulder blond hair, who stated she lived there." CP at 111. In support of his motion to vacate the judgment, Mr. Cook submitted his own declaration and that of Marti Mortensen, who claimed to have personal knowledge as to the occupancy of the Lilac Lane house. Both declarations stated that at the time of service, Mr. Cook's brother was leasing the Lilac Lane house to Timber-Land-Ag, LLC, a limited liability company owned by Ms. Mortensen and her former husband, Vernon Mortensen.

In his declaration, Mr. Cook denied residing at the Lilac Lane house at the time of service. He claimed he was in the process of buying a home in California in June and July 2006, that neither he nor his brother received copies of any legal papers, and that he did not know who the summons and complaint copies were supposedly served upon. Mr. Cook claimed that he first learned of this action when "some papers seeking supplemental proceedings were delivered [to the Lilac Lane address] in August 2012 to my mother who was there cleaning the house so it could be re-rented." CP at 17.

Ms. Mortensen asserted in her declaration that the Timber-Land-Ag LLC that she jointly owned with Mr. Mortensen rented the house from Richard Cook from August 2005 to August 2006, when her divorce from Mr. Mortensen became final. Nonetheless,

she stated that during that timeframe she was living full time in Moyie Springs, Idaho. She claimed that she was in northern Idaho preparing for a hearing in the divorce trial on the day the summonses and complaints were allegedly served.

In September 2013, TCG sent a letter to Mr. Deissner requesting that he withdraw the motion to vacate on the grounds that it contained "blatantly false" information, pointing out a number of discrepancies from information TCG had obtained from several sources.[1] CP at 93. Mr. Deissner later filed a declaration conceding that some of the information he and Ms. Mortensen provided about her divorce (in which Mr. Deissner had represented Ms. Mortensen) was mistaken.

The trial court denied Mr. Cook's motion to vacate, concluding that "the affidavit of service is facially valid," even though it did not fill in "every conceivable blank." Report of Proceedings (RP) at 23. Mr. Cook timely appealed, seeking review of the court's order denying his CR 60 motion to vacate the default judgment.

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[1] We will not elaborate on the discrepancies, a number of which were revealed in Westlaw "CLEAR" investigative reports on Mr. Cook, Ms. Mortensen, and Mr. Mortensen that TCG filed with the court. While the reports contradict Mr. Cook's and Ms. Mortensen's sworn testimony in a number of respects, they are hearsay and TCG has not established their admissibility as market reports or commercial publications "generally used and relied upon by the public or by persons in particular occupations." ER 803(a)(17). We have not relied upon them in our de novo review of the trial court's denial of the CR 60(b)(5) motion.

ANALYSIS

Mr. Cook contends the trial court erred in refusing to vacate the default judgment because he was never properly served with the summons and complaint. "Proper service of the summons and complaint is a prerequisite to the court obtaining jurisdiction over a party, and a judgment entered without such jurisdiction is void." *Woodruff v. Spence*, 76 Wn. App. 207, 209, 883 P.2d 936 (1994); *In re Marriage of Markowski*, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988). Under CR 60(b)(5), a court "may relieve a party" from a final judgment or order on the grounds that "[t]he judgment is void." A motion to vacate a void judgment under CR 60(b)(5) may be brought at any time after entry of the judgment. *Markowski*, 50 Wn. App. at 635; *Allstate Ins. Co. v. Khani*, 75 Wn. App. 317, 323, 877 P.2d 724 (1994).

Because courts have a mandatory duty to vacate void judgments, we review a trial court's decision to grant or deny a CR 60(b)(5) motion to vacate a default judgment for lack of jurisdiction de novo. *Dobbins v. Mendoza*, 88 Wn. App. 862, 871, 947 P.2d 1229 (1997). Likewise, while "[r]eview of a denial of a CR 60(b) motion is generally limited to the propriety of the denial, and is not a review of the original judgment[, . . .] if questions are raised concerning lack of trial court jurisdiction and fundamental constitutional rights, these issues may be determined on appeal as justice may require." *In re Marriage of Maxfield*, 47 Wn. App. 699, 703, 737 P.2d 671 (1987).

I. Standard of proof

Mr. Cook argues that the trial court applied the wrong standard of proof in deciding the jurisdictional issue. It is well settled that "[a] facially correct return of service is presumed valid and, after judgment is entered, the burden is on the person attacking the service to show by clear and convincing evidence that the service was irregular." *Woodruff v. Spence*, 88 Wn. App. 565, 571, 945 P.2d 745 (1997); *see also, e.g., Yukich v. Anderson*, 97 Wn. App. 684, 687, 985 P.2d 952 (1999); *In re Dependency of A.G.*, 93 Wn. App. 268, 277, 968 P.2d 424 (1998); *Lee v. Western Processing Co.*, 35 Wn. App. 466, 469, 667 P.2d 638 (1983) ("An affidavit of service, regular in form and substance, is presumptively correct.") Mr. Cook argues that the return of service in this case is not entitled to the presumption of validity because it failed to state that the Lilac Lane address was his usual place of abode and it failed to identify the basis for that assertion. Br. of Appellant at 8-9. As a result, he claims that he was required to prove insufficient service by only a preponderance of the evidence. He relies on *John Hancock Mutual Life Insurance Co. v. Gooley*, 196 Wash. 357, 360, 83 P.2d 221 (1938), in which a process server's original affidavit of service was found defective in part because it failed to state that the place of service was the defendants' usual place of abode.

In *Gooley*, the plaintiff commenced an action against Edward and Pauline Gooley (among others). Mr. and Mrs. Gooley had lived for 30 years at their Lincoln County farm but at the time of the lawsuit were temporarily in Spokane, where Mrs. Gooley had

been hospitalized. *Id.* at 359. Rather than await the Gooleys' return to the farm, the process server left a copy of the summons and complaint with the Gooleys' daughter-in-law at the Englehorn hotel in Spokane, where Mr. and Mrs. Gooley temporarily occupied a light housekeeping room after Mrs. Gooley was released from the hospital. *Id.* at 358-60. The affidavit of service stated that the Gooleys were served by leaving the documents with Mrs. August Gooley "at the Englehorn hotel . . . , [the defendants] each being absent therefrom, and the said Mrs. August Gooley being a person of suitable age and discretion then resident therein." *Id.* at 359.

A default judgment was entered, which the Gooleys attacked on the basis of insufficient service of process. They challenged in part the fact that the plaintiff's return of service did not recite that the Englehorn hotel was the Gooleys' house of usual abode. The plaintiff responded by filing an amended affidavit of service in which the process server testified that, at the time of service, the Englehorn hotel "was then the house of usual abode of Mr. and Mrs. Gooley." *Id.* at 360.

The Washington Supreme Court found the original affidavit of service defective. As Mr. Cook argues, this was in part because it failed to state that the Englehorn hotel was the Gooleys' house of usual abode. In that respect, TCG's return of service also fell short of establishing all facts essential to effective substitute service. *Cf.* CR 4(g)(7) (the return must state the manner of service); RCW 4.28.080(15) (authorizing substitute service by "leaving a copy of the summons at the house of [the defendant's] usual abode

with some person of suitable age and discretion then resident therein"). But the more pertinent holding of *Gooley* for purposes of this case is that it is proper to permit the filing of an amended return of service "as the actual facts control; and if jurisdiction was actually acquired over the persons of the defendants, that fact should govern." *Id.* at 363. The court added that "[i]t is the fact of service which confers jurisdiction, and not the return, and the latter may be amended to speak the truth." *Id.*

A return of service that fails to include all facts essential to effective service is defective in the sense that it is incomplete. The plaintiff can address any shortcomings by amending the return or by additional evidence. *Williams v. Steamship Mut. Underwriting Ass'n*, 45 Wn.2d 209, 226-27, 273 P.2d 803 (1954) (proper remedy would be to permit amended return of service); *Burdick v. Powell Bros. Truck Lines*, 1 F.R.D. 220 (N.D. Ill., 1940) (return of service could be amended under parallel federal rule).

Modern civil rules make clear that "[f]ailure to make proof of service does not affect the validity of the service." CR 4(g)(7); *Scanlan v. Townsend*, 181 Wn.2d 838, 848, 336 P.3d 1155 (2014). "A 'lack of return of service [neither] deprive[s] a court of jurisdiction, nor does it affect the validity of the service.'" *Id.* (quoting *Jones v. Stebbins*, 122 Wn.2d 471, 482, 860 P.2d 1009 (1993)).

II. Insufficient proof of improper service

Mr. Cook has not shown by clear and convincing evidence, or even by a preponderance of the evidence, that the Lilac Lane house was not his usual place of

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abode. The initial submissions in support of the motion for an order of default demonstrated that the Lilac Lane address had been the address of record for Mr. Cook's credit card account. While Mr. Cook complains that the account address was several years old, TCG demonstrated that before commencing its collection action, it consulted the Spokane County assessor's website to confirm that Mr. Cook and his brother not only owned the Lilac Lane property, but that they listed it as their address. TCG's printout from the assessor's website is dated April 28, 2006, reflecting information as of April 27, 2006. TCG established by declaration and exhibits that it thereafter sent demand letters to Mr. Cook at the Lilac Lane address twice, in May and June 2006, and that neither letter was returned as undeliverable. That serves as some evidence that the address was a usual place of abode for Mr. Cook. *Cf. Automat Co. v. Yakima County*, 6 Wn. App. 991, 995, 497 P.2d 617 (1972) (citing *Avgerinton v. First Guar. Bank*, 142 Wash. 73, 78, 252 P. 535 (1927)) (once there is proof of mailing, it is presumed that the mails proceed in due course and that the letter is received by the person to whom it is addressed).

In response, Mr. Cook provides a declaration stating that he was residing primarily in California and staying temporarily in North Idaho during the time of the service. But he provides no records of property ownership in California or Idaho, no rental agreement for a residence in either state, and no addresses for his ostensible "true" places of abode. "When a party fails to produce relevant evidence within its control, without satisfactory explanation, the inference is that such evidence would be unfavorable to the

nonproducing party." *Lynott v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 123 Wn.2d 678, 689, 871 P.2d 146 (1994) (citing *Pier 67, Inc. v. King County*, 89 Wn.2d 379, 385-86, 573 P.2d 2 (1977)). When a defendant challenging service fails to identify his "true" place of abode, an adverse inference is reasonably drawn. An address would ordinarily be simple to provide and would demonstrate Mr. Cook's confidence that his claim as to his "true" place of abode would withstand investigation by TCG. A bald allegation as to a defendant's true place of abode is unlikely to be sufficient when weighed against a conflicting allegation that is backed by at least some substantiation. *Cf. Gooley*, 196 Wash. at 368 (rejecting process server's unsubstantiated allegation by amended return that hotel was defendants' usual place of abode in light of the conflicting, substantiated allegations of defendants).

Ms. Mortensen's declaration is weak evidence for the same reason. And the factual discrepancies in Ms. Mortensen's and Mr. Cook's declarations that Mr. Deissner was required to concede reflect negatively on both witnesses' credibility. Finally, Mr. Cook's evidence that Mr. Mortensen's secretary made mortgage payments on the Lilac Lane home is neutral, since the record on appeal reveals that Ms. Mortensen was separated from her husband at the time of service and was in the process of divorce. Without more, the payments by the Mortensens' LLC that Mr. Mortensen was causing his secretary to make could have been on Ms. Mortensen's behalf, for housing that she cohabited with its owners.

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The term "usual abode" is to be liberally construed to effectuate service and uphold jurisdiction of the court. *Sheldon v. Fettig*, 129 Wn.2d 601, 607, 919 P.2d 1209 (1996). "[U]nder certain circumstances a defendant can maintain more than one house of usual abode," *Id.* at 611, and "one who asserts a change of residence bears the burden of proof." *Sheldon v. Fettig*, 77 Wn. App. 775, 779, 893 P.2d 1136 (1995).

Mr. Cook failed to demonstrate by even a preponderance of the evidence that the Lilac Lane address was not a usual place of abode for him at the time of service. The trial court did not err in denying his motion to vacate.

III. Attorney fees

TCG requests its attorney fees on appeal. RAP 18.1 permits recovery of reasonable attorney fees or expenses on review if applicable law grants that right. Washington law generally provides for an award of attorney fees "when authorized by a private agreement, a statute, or a recognized ground of equity." *Labriola v. Pollard Grp., Inc.*, 152 Wn.2d 828, 839, 100 P.3d 791 (2004). "A party may be awarded attorney fees based on a contractual fee provision at the trial and appellate level." *Renfro v. Kaur*, 156 Wn. App. 655, 666-67, 235 P.3d 800 (2010).

TCG is the assignee of Citibank, whose card agreement with Mr. Cook includes the following provision regarding collection costs:

> If we refer collection of your account to a lawyer who is not our salaried employee, you will have to pay our attorney's fee plus court costs or any

> other fees, to the extent permitted by law. If we sue to collect and you win, we will pay your reasonable legal fees and court costs.

CP at 122. Such provisions are construed as entitling a prevailing party to reasonable attorney fees for all services required to prosecute the action to its "ultimate conclusion." *Puget Sound Mut. Sav. Bank v. Lillions*, 50 Wn.2d 799, 807, 314 P.2d 935 (1957). We award TCG its reasonable fees and costs on appeal subject to its compliance with RAP 18.1(d).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

Siddoway, C.J.

WE CONCUR:

Korsmo, J.

Lawrence-Berrey, J.