Court of Appeals, Case No. 72131-3-I

No. 91997-6

IN THE SUPREME COURT
STATE OF WASHINGTON

FORD SERVICES, LLC, a Washington limited liability company,

Appellant,

v.

DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee on behalf of Certificateholders of the Morgan Stanley ABS Capital 1 Inc. Trust 2006-HE6, Mortgage Pass-Though Certificates, Series 2005-HE6,

Appellee.

PETITION FOR REVIEW

Cale L. Ehrlich, #44359
Email: cehrlich@tousley.com
TOUSLEY BRAIN STEPHENS PLLC
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Tel: (206) 682-5600
Fax: (206) 682-2992
Attorneys for Appellant

TABLE OF CONTENTS

I. IDENTITY OF PETITIONER 1

II. CITATION TO COURT OF APPEALS DECISION 1

III. ISSUES PRESENTED FOR REVIEW 1

IV. STATEMENT OF THE CASE 3

A. Factual Background 3

1. The Original Foreclosure Action 3

2. Deutsche Bank Attempts to Vacate the Judgment 4

B. Procedural Background 5

V. ARGUMENT 6

A. The Appellate Court's Decision Conflicts With Established Supreme Court Precedent 7

1. The Long Arm Statute Was Meant to Expand Personal Service Out of State, Not Restrict It 7

2. The Supreme Court Has Held That, Before the Adoption of the Long Arm Statute, No Affidavit Was Required to Personally Serve a Defendant Out of State in a Foreclosure Action 9

3. The Appellate Court's Error Necessitates Reversal 14

B. The Court Should Grant Review Because Validity of Judgments is an Important Issue of Public Policy 16

VI. CONCLUSION 17

APPENDIX A

TABLE OF AUTHORITIES

Cases

Brickum Inv. Co. v. Vernham Corp.
46 Wn. App. 517, 520-21, 731 P.2d 533 (1987) 17

Ford Services, LLC v. Deutsche Bank National Trust Company
--- Wn. App. ---, --- P.3d ---, ... 1

Harder v. McKinney
187 Wash. 457, 60 P.2d 84 (1936) 13

Hatch v. Princess Louise Corp.
13 Wn. App. 378, 534 P.2d 1036 (1975) 13, 14

In re Marriage of Hardt
39 Wn. App. 493, 496, 693 P.2d 1386 (1985) 17

In re Marriage of Maxfield
47 Wn. App. 699, 702, 737 P.2d 671 (1987) 17

International Shoe Co. v. State of Washington
326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945) 9

Jennings v. Rocky Bar Gold Mining Co.,
29 Wash. 726, 70 P. 136 (1902) 2, 9, 11, 12

Lee v. Western Processing Co.
35 Wn. App. 466, 469, 667 P.2d 638 (1983) 16

Marriage of Markowski
50 Wn. App. 633, 635-36, 749 P.2d 754 (1988) 16, 17

Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces
36 Wn. App. 480, 674 P.2d 1271 (1984) 16

Mullane v. Central Hanover Bank & Trust Co.
339 U.S. 306, 319, 70 S. Ct. 652, 94 L. Ed. 865 (1950) 9

Roznik v. Becker
68 Wash. 63, 122 P. 593 (1912) 2, 12

Shaffer v. Heitner
433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977) 9

Statutes

2 Ballinger's Ann. Codes & St. § 4877 ..... 10, 11, 12
2 Ballinger's Ann. Codes & St. § 4879 ..... 10, 12, 14
RCW 4.28.100 ..... 11, 14
RCW 4.28.180 ..... passim
RCW 4.28.185 ..... passim
Rem. & Bal. Code § 228 12
Rem. & Bal. Code § 234 ..... 12, 14
Rem. Rev. Stat. § 234 ..... 13, 14

Rules

CR 60 ..... 2, 16, 17
RAP 13.4 ..... passim

I. IDENTITY OF PETITIONER

The Petitioner is Ford Services, LLC, purchaser of property sold at sheriff's sale below.

II. CITATION TO COURT OF APPEALS DECISION

Pursuant to RAP 13.4 (b)(1), Ford Services respectfully requests this court review the unpublished decision in Ford Services, LLC v. Deutsche Bank National Trust Company, --- Wn. App. ---, --- P.3d ---, Case No. 72131-3-I, filed on June 29, 2015, by Division One of the Court of Appeals (the "Decision"). A copy of the decision is attached hereto as Appendix A.

III. ISSUES PRESENTED FOR REVIEW

Review by the Supreme Court is necessary to address a conflict between the Decision of the Court of Appeals in this matter, and Washington State Supreme Court precedent governing service under Washington law before the adoption of the Long Arm Statute, RCW 4.28.185. In this case, the City of Sedro Woolley (the "City") foreclosed liens against property on which Deutsche Bank held a deed of trust. It served Deutsche Bank out of state, and did not file an affidavit pursuant to RCW 4.28.185(4) stating that Deutsche Bank could not be located within the state. Deutsche Bank moved to vacate the sale, and Ford Services, along with the City, opposed vacation on the grounds that the requirements of RCW 4.28.185(4) do not apply to foreclosure actions,

because service out of state was permitted in foreclosure actions before adoption of the Long Arm Statute, and the Long Arm Statute provides that it does not "limit[] or affect[] the right to serve any process in any manner now . . . provided at law." RCW 4.28.185(6).

The trial court vacated the judgment, and the Court of Appeal upheld the decision, finding that it was not established that personal service out of state was permissible in foreclosure actions before adoption of the Long Arm Statute. This conclusion conflicts with Roznik v. Becker, 68 Wash. 63, 122 P. 593 (1912) and Jennings v. Rocky Bar Gold Mining Co., 29 Wash. 726, 70 P. 136 (1902).

The appellate court's Decision also "involves an issue of substantial public interest." RAP 13.4(b)(4). Judgments that are based on improper service are "void" under CR 60(b)(5), and there is no time limit on when a party may move for vacation of a judgment that is void. The Court of Appeals' Decision is based on the adoption of the Long Arm Statute in 1959. Allowing defendants to reach back to 1959 in an attempt to invalidate judgments runs the risk of substantially upsetting the stability of judgments in Washington – an issue of substantial public interest.

Because the reasoning of the Court of Appeals is in direct conflict with established Supreme Court precedent, and because the petition involves an issue of substantial public interest, Ford Services respectfully requests review of the following question:

Is personal service out of state valid, notwithstanding the lack of an affidavit under RCW 4.28.185(4), where the only relief sought pursuant to the out of state service is foreclosure of the defendant's interest in property?

IV. STATEMENT OF THE CASE

A. Factual Background

The facts in this case are straightforward and not in dispute.

1. The Original Foreclosure Action

On November 1, 2012, the City filed this action against the Amaros and against Deutsche Bank seeking to foreclose municipal utilities liens against:

> Lot 6, "THYME SQUARE BINDING SITE PLAN", approved October 19, 2005 and recorded on November 10, 2005, under Auditor's File No. 2005111100117, records of Skagit County, Wash.
>
> (P123733)

(the "Property"). CP 34-36. The Amaros were named as the record owners of the Property. CP 34. Deutsche Bank was named as the successor beneficiary of two deeds of trust encumbering the property. CP 34-35. Deutsche Bank was served with the summons and complaint on November 12, 2012, in Santa Ana, California. CP 120.

Neither party answered the complaint. On January 9, 2013, the City moved for summary judgment against the Amaros. CP 61-62. The Court granted the motion for default against the Amaros on January 11, 2013. CP 93. The City moved for entry of a default judgment against Deutsche Bank. CP 117-118. The superior court granted the motion for default against Deutsche Bank on January 28, 2013. CP 121.

On April 19, 2013, the sheriff sold the property at a Sheriff's sale to Heritage Forest, LLC ("Heritage"). CP 29-30. The sale was confirmed on May 17, 2013. Id. On January 9, 2014, appellant Ford redeemed the property from Heritage and received a certificate of redemption from the Sheriff. CP 45-47. Ford Services issued a Notice of Expiration of Redemption Period on March 3, 2014, CP 51-53, and the redemption period has since expired.

2. Deutsche Bank Attempts to Vacate the Judgment

On April 10, 2014, after ignoring the lawsuit for over a year, Deutsche Bank moved to vacate the default judgment entered against it. CP 56-60. Deutsche Bank did not argue that it had not been served, or that it had not received adequate notice of the suit. In fact, it did not offer any reason that it had failed to respond to the suit. Id. Instead, it raised the purely technical issue that the City had served Deutsche Bank outside

the state of Washington, but had not filed an affidavit stating that service could not be made within the state. Id. Deutsche Bank claimed that this alleged technical defect violated RCW 4.28.185(4), and deprived the superior court of jurisdiction, necessitating vacation of the judgment.

B. Procedural Background

As the redemptioner, Ford appeared in the case, without objection, to oppose vacation of the judgment—an opposition in which it was joined by the City. CP 83-92, 78-82. Ford opposed vacation of the judgment primarily on the ground that out of state service for foreclosure actions predates the enactment of the long arm statute, RCW 4.28.185, and the long arm statute specifically exempts from its coverage "the right to serve any process in any other manner now or hereafter provided by law." RCW 4.28.185(6).

The Superior Court disagreed, holding that the long arm statute *did* affect the preexisting right to serve process out of state in foreclosure action, and therefore the judgment must be vacated. CP 104-105. The Superior Court erred in vacating the judgment because its decision is contrary to the plain language of the redemption statute. Ford therefore appealed the decision to the Court of Appeals. CP 106-110 and 111-116.

Following briefing and oral argument, the Court of Appeals upheld the judgment of the Superior Court. Although it was not explicit, the grounds on which the Court of Appeals relied differed from the grounds relied upon by the Superior Court. While the Superior Court focused on the change in the constitutional law governing service that occurred both before and after adoption of the long arm statute, the Court of Appeals expressly rejected this theory. See Decision, App'x A. at 3 (agreeing with Ford's argument that this is an issue of statutory construction, not of constitutional requirements for service.) Instead, the Court of Appeals based its decision on the lack of finding evidence that service in a foreclosure action without filing an affidavit was permissible before the adoption of the Long Arm Statute. Because that conclusion conflicts with decisions of this Court, Ford Services has filed this Petition for Review.

V. ARGUMENT

This Court will grant review with a Court of Appeals decision "is in conflict with a decision of the Supreme Court. . ." RAP 13.4(b)(1). This Court will also grant review if "the petition involves an issue of substantial public interest." RAP 13.4(b)(4). Division One's decision fits both grounds for review.

A. The Appellate Court's Decision Conflicts With Established Supreme Court Precedent

The Decision of the Court of Appeals was based on its failure to find that personal service out of state was a valid in foreclosure actions, without filing any affidavit, before adoption of the Long Arm Statute in 1959. *See,* Decision, App'x A at 3 ("But Ford does not establish the standards that applied to out-of-state personal service before 1959"). This holding conflicts with pre-Long Arm Statute decisions of this Court expressly holding that personal service out of state does not require filing of an affidavit if the action is one for foreclosure of property.

1. The Long Arm Statute Was Meant to Expand Personal Service Out of State, Not Restrict It

Washington adopted its long arm statute in 1959 to effect an expansion of jurisdiction over persons served out of state. RCW 4.28.185. The intent that the statute was to be an expansion of jurisdiction is expressed in the statute itself, as it provides that "[n]othing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided at law." RCW 4.28.185(6) (emphasis added). The long arm statute defined broad categories of acts for which one could now be personally served out of state: e.g., transaction of business, commission of torts, contracting to insure persons or property,

and ownership of property. RCW 4.28.185(1). It then preserved all other methods of service already permissible. RCW 4.28.185(6).

The Long Arm Statute also placed requirements and conditions on when and how service could be made under the Long Arm Statute. For example, service must be made by personal service. RCW 4.28.185(3). If the out of state party prevails in the action, costs and reasonable attorneys' fees may be assessed against the plaintiff. RCW 4.28.185(5). Most importantly in the context of this case, it added the requirement that for actions under the Long Arm Statute, "[p]ersonal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state," RCW 4.28.185(4). However, because the Long Arm Statute expressly disclaims any effect on "the right to serve process in any other manner" that was permitted at the time of its adoption, these requirements can only apply in actions in which personal service outside the state was not permissible before adoption of the long arm statute. RCW 4.28.185(6). The question then is whether such service would have been permissible in this case before 1959. Because Supreme Court precedent establishes that such service was appropriate, Division One's Decision conflicts with decisions of this court and review is appropriate.

The City filed a lawsuit against Deutsche Bank for foreclosure of Deutsche Bank's rights, as holder of a deed of trust, in the Property. The

City did not seek damages against Deutsche Bank, or any other "personal" relief against Deutsche Bank; it sought only foreclosure. Logically, if personal service out of state was permissible in foreclosure actions before 1959, without filing an affidavit that the defendant could not be located within the state, then service was appropriate in this case under RCW 4.28.185(6).

2. The Supreme Court Has Held That, Before the Adoption of the Long Arm Statute, No Affidavit Was Required to Personally Serve a Defendant Out of State in a Foreclosure Action

At least two times before adoption of the Long Arm Statute, this Court directly addressed the question of the procedural requirements for out of state service in foreclosure actions.[1] First, in Jennings v. Rocky Bar Gold Mining Co., 29 Wash. 726, 70 P. 136 (1902), the plaintiff served one of the defendants, Towne, in the state of Idaho. Id. at 727. Just as in this case, no party appeared, the court entered default judgment, and the defendant moved to vacate the judgment. Id. At issue were two statutes that are the predecessors to Washington's current service statutes: 2

[1] There are many more decisions of this Court and others, including the United States Supreme Court, addressing substantive Constitutional rights related to service of process, both before and after adoption of the Long Arm Statute. See, e.g., Shaffer v. Heitner, 433 U.S. 186, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 319, 70 S. Ct. 652, 94 L. Ed. 865 (1950); and International Shoe Co. v. State of Washington, 326 U.S. 310, 316, 90 L. Ed. 95, 66 S. Ct. 154 (1945). The Constitutional impact of these cases is not relevant here, as no party disputes the constitutionality of service in this case. The only question is whether the service also complied with statutory or common law requirements for service.

Ballinger's Ann. Codes & St. § 4877 and 2 Ballinger's Ann. Codes & St. § 4879.

Section 4879 was the predecessor to modern RCW 4.28.180, and provided:

> Personal service on the defendant out of the state shall be equivalent to service by publication, and the summons upon the defendant out of the state shall contain the same as personal summons within the state, except it shall require the defendant to appear and answer within sixty days after such personal service out of the state.

2 Ballinger's Ann. Codes & St. § 4879.[2] Section 4877 was the predecessor to modern RCW 4.28.100, and provided:

> When the defendant cannot be found within the state . . . and upon the filing of an affidavit of the plaintiff . . . stating that he believes that the defendant is not a resident of the state, or can not [sic] be found therein . . . the service may be made by publication of the summons, by the plaintiff or his attorney in either of the following cases:
>
> ***
>
> 5. When the subject of the action is real or personal property in this state and the defendant has or claims a lien or interest, actual or contingent, therein, or the relief demanded consists wholly, or partly, in excluding the defendant from any interest or lien therein;

[2] This statute is substantially the same as modern RCW 4.28.180, except RCW 4.28.180 provides that the service has the force of service by publication if made on a party that has not submitted to the jurisdiction of the state, otherwise it has the force of publication.

> 6. When the action is to foreclose, satisfy, or redeem from a mortgage, or to enforce a lien of any kind on real estate in the county where the action is brought, or satisfy or redeem from the same; . . .

Ballinger's Ann. Codes & St. § 4877.[3]

The defendant argued that personal service out of state was not proper, because service out of state was "equivalent to service by publication" and no affidavit had been filed as required for service by publication. Jennings, 29 Wash. at 727-28. The court first noted that "[t]he right to subject property within the state to the jurisdiction of its courts is undoubted." Id. at 728. The court then held that although service requirements must be strictly followed "[§ 4879] provides for personal service out of the state, and declares it shall be equivalent to service by publication." Id. Therefore, personal service was proper, and did not "require the affidavit made necessary in service by publication." Id. Under the statutory scheme that predated RCW 4.28.185, and lives on in RCW 4.28.100 and 180, this Court held that no affidavit was required for personal service out of state in a foreclosure action.

The court addressed the same question ten years later in Roznik v. Becker, 68 Wash. 63, 122 P. 593 (1912). In Roznik, plaintiff brought an action to attach and foreclose personal property belonging to the

---

[3] This statute is substantially the same as modern RCW 4.28.100 except that some of the permissible uses of summons by publication have been modified (although not the two mentioned above).

defendant. Id. at 64-65. Plaintiff served defendant out of state in New York. Id. at 65. The defendant raised numerous objections to service, including that "the service was void because made without the state and there was no preliminary showing that the appellant was a nonresident of the state, and could not be found therein." Id. at 69. This was the same argument advanced in Jennings, although now under the successor (but identical) statutes, Rem. & Bal. Code § 228 (former § 4877 governing service by publication) and Rem. & Bal. Code § 234 (former § 4879 governing personal service out of state).

The court again rejected the argument, holding:

> But such a showing while a preliminary requisite to the service of a summons by publication is not such a requisite where the service is personal on the defendant although without the state. The statute, it is true, provides that personal service without the state shall be equivalent to service by publication, but this does not mean that the preliminary requisite to making the one form of service is necessary to making the other.

Id. at 69. Twice the court was squarely asked to determine whether, in a foreclosure action, a party could personally serve a defendant out of state to initiate a foreclosure action *without* filing an affidavit that the person served could not be located within the state. Both times, the Supreme Court upheld service without an affidavit.

These decisions comport with later decisions, both pre- and post-Long Arm Statute. For example, in Harder v. McKinney, 187 Wash. 457,

60 P.2d 84 (1936), the defendant was served in Oregon for a foreclosure action in Washington. Although the issue of an affidavit was not directly raised (and did not need to be, having been resolved more than 20 years earlier), the court did again note that personal service out of state was equivalent to service by publication and was appropriate in a foreclosure action. Id. at 460-61.[4]

The post-Long Arm Statute case of Hatch v. Princess Louise Corp., 13 Wn. App. 378, 534 P.2d 1036 (1975) presented a similar issue. In Hatch, the plaintiff sued seeking foreclosure of a lien and seeking a personal judgment against defendant. The plaintiff did not file the affidavit required by RCW 4.28.185(4) before entry of the judgment. Id. at 379. The defendant challenged the personal judgment for failure to file the affidavit, but both parties presumed that, in accordance with pre-Long Arm Statute law, the "*in rem*" judgment foreclosing the lien was valid without an affidavit. Id. The court of appeals reversed the trial court's judgment for lack of jurisdiction "as to the exercise of personam jurisdiction over the Princess Louise Corporation" but affirmed the judgment "as to the exercise of in rem jurisdiction in foreclosing the mortgage on the hulk." Id. at 380.[5]

---

[4] Again, this case involved a predecessor statute to RCW 4.28.180, in this case Rem. Rev. Stat. § 234.

[5] Admittedly, the defendant did not challenge the foreclosure, presuming it to be valid, but the fact that the defendant presumed the foreclosure valid is in line with the Supreme Court precedent holding such judgments valid without an affidavit.

In light of this court's decisions interpreting the predecessors to RCW 4.28.180 and RCW 4.28.100, the appellate court's Decision is in direct conflict with Supreme Court precedent.

3. The Appellate Court's Error Necessitates Reversal

The Decision of the Court of Appeals is not only in direct conflict with Supreme Court precedent, but the conflict is on an issue that necessitates reversing the appellate court's decision. The Long Arm Statute requires the filing of an affidavit before the court exercises jurisdiction over a defendant. RCW 4.28.185(4). The long arm statute also provides, however, that any method of service that was valid at the time of the enactment of the long arm statute remains valid following its enactment. RCW 4.28.185(6). As discussed above, this catch-all clause is in line with the Long Arm Statute's purpose of expanding service out of state.

Before the enactment of the Long Arm Statute, under the predecessors to RCW 4.28.180, specifically 2 Ballinger's Ann. Codes & St. § 4879, Rem. & Bal. Code § 234, and Rem. Rev. Stat. § 234, personal service out of state was permissible in an action to foreclose an interest in property. The Supreme Court held multiple times that although this service was "equivalent to service by publication" personal service out of state did not carry the requirement of service by publication that the plaintiff file an affidavit stating that the party could not be found within

the state. Therefore, before the enactment of RCW 4.28.185, personal service out of state was permissible in a foreclosure action without filing an affidavit.

The successor to the statutes under which such service was permissible remains in effect today, RCW 4.28.180. If such service is no longer permissible, it must be due to the enactment of the Long Arm Statute in the intervening period, but the Long Arm Statute expressly disclaims any effect on pre-existing methods of service.

The City's service in this case, out of state service to foreclose a lien, without filing an affidavit, was appropriate before enactment of the Long Arm Statute. By the statutes own terms, it remains valid after enactment of the Long Arm Statute. The Court of Appeals erred in overlooking Supreme Court precedent to the contrary, and review is appropriate.

B. The Court Should Grant Review Because Validity of Judgments is an Important Issue of Public Policy

In addition to the conflict discussed above, this Court should grant review because the appellate court's Decision will have wide ranging implications for all judgments entered after 1959, the year the legislature enacted the Long Arm Statute. Motions to vacate a judgment are governed by CR 60, which provides a list of grounds on which a court may vacate a judgment. CR 60(b). For most of these grounds, a motion to vacate "shall be made within a reasonable time" and when based on certain circumstances "shall be made . . . not more than 1 year after the judgment, order, or proceeding was entered or taken." CR 60(b). This naturally limits the retrospective impact of any opinion regarding vacation of judgments, because only parties who had judgments entered against them in the relatively recent past could take advantage of the opinion.

That is not the case, however, in cases where the objection to the judgment is on the basis of improper service. "Proper service of the summons and complaint is essential to invoke personal jurisdiction over a party, and a default judgment entered without proper jurisdiction is void." Marriage of Markowski, 50 Wn. App. 633, 635-36, 749 P.2d 754 (1988) (citing Mid-City Materials, Inc. v. Heater Beaters Custom Fireplaces, 36 Wn. App. 480, 674 P.2d 1271 (1984); Lee v. Western Processing Co., 35 Wn. App. 466, 469, 667 P.2d 638 (1983)). Courts have a nondiscretionary

duty to vacate void judgments. Brickum Inv. Co. v. Vernham Corp., 46 Wn. App. 517, 520-21, 731 P.2d 533 (1987). Therefore, "[m]otions to vacate under CR 60(b)(5) [for void judgments], may be brought at any time after entry of judgment." Marriage of Markowski, 50 Wn. App. at 635 (citing In re Marriage of Maxfield, 47 Wn. App. 699, 702, 737 P.2d 671 (1987) ("[v]oid orders and judgments may be vacated irrespective of lapse of time"); In re Marriage of Hardt, 39 Wn. App. 493, 496, 693 P.2d 1386 (1985)).

The lack of a time restriction on motions to vacate for lack of jurisdiction means that, contrary to the standard case in which a decision on a motion to vacate may reach back as much as a year, this Decision potentially implicates all foreclosure judgments entered since the enactment of the Long Arm Statute in 1959. Opening that door is not an action that the courts should undertake lightly, and it is appropriate for the Supreme Court to weigh in on the policy implications of potentially upsetting the stability of judgments in Washington so substantially.

VI. CONCLUSION

The Court should accept review pursuant to RAP 13.4(b)(1) in order to resolve the conflict between the Decision of the Court of Appeals and the Supreme Court's pre-Long Arm Statute cases. This Court should also accept review pursuant to RAP 13.4(b)(4) because enabling parties to

seek vacation of longstanding judgments would upset the stability of judgments in Washington and is an issue of substantial public interest.

DATED this 29TH day of July, 2015.

TOUSLEY BRAIN STEPHENS PLLC

By: _____

Cale L. Ehrlich, #44359
Email: cehrlich@tousley.com
1700 Seventh Avenue, Suite 2200
Seattle, WA 98101
Tel: (206) 682-5600
Fax: (206) 682-2992
Attorneys for Purchaser/Petitioner

CERTIFICATE OF SERVICE

I, Jane A. Mrozek, hereby certify that on the 29th day of July, 2015, I caused to be served true and correct copies of the foregoing to the following person(s) in the manner indicated below:

John E. Glowney, #12652 Stoel Rives LLP 600 University Street, Suite 3600 Seattle, WA 98101 *Attorneys for Plaintiff*	☐ ☒ ☐ ☐ ☐	U.S. Mail, postage prepaid Hand Delivered Overnight Courier Facsimile Electronic Mail
Craig D. Sjostrom, #21149 Attorney at Law 1204 Cleveland Avenue Mt. Vernon WA 98273 *Attorneys for Deutsche Bank National Trust Company*	☐ ☒ ☐ ☐ ☒	U.S. Mail, postage prepaid Hand Delivered Overnight Courier Facsimile Electronic Mail

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 29th day of July, 2015, at Seattle, Washington.

Jane A. Mrozek, Legal Assistant

Appendix A

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

FORD SERVICES, LLC, a Washington limited liability company, Appellant, CITY OF SEDRO-WOOLLEY, a Washington municipal corporation, Respondent, v. DEUTSCHE BANK NATIONAL TRUST COMPANY, as Trustee on behalf of Certificateholders of the Morgan Stanley ABS Capital 1 Inc. Trust 2006-HE6, Mortgage Pass-Through Certificates, Series 2005-HE6, Respondent. JOSE JUAN AMARO & MARY AMARO, husband and wife, Defendants.	No. 72131-3-I UNPUBLISHED OPINION FILED: June 29, 2015

VERELLEN, A.C.J. — We must decide the narrow issue whether the long-arm statute's affidavit requirement applies to out-of-state personal service upon a foreign corporation in a utility lien foreclosure action. Under these facts, and upon this briefing, we conclude that it does. When a plaintiff makes out-of-state personal service upon a defendant who has submitted to the jurisdiction of Washington courts, the long-arm statute's affidavit requirement applies. The trial court did not err in concluding that

absent such an affidavit, the default judgment against Deutsche Bank must be vacated. We affirm.

FACTS

The material facts are undisputed. The City of Sedro-Woolley (City) filed suit to foreclose utility liens on property owned by the Amaros. Deutsche Bank had a recorded deed of trust on the property of the Amaros. The City personally served Deutsche Bank in California, but Deutsche Bank did not answer the complaint. The City was granted a default judgment.

Heritage Forest purchased the property at a sheriff's sale. That same day, the Amaros executed a quitclaim deed to Zion Services. Zion Services assigned its interest in the property to Ford Services, LLC (Ford). Ford later redeemed the property from Heritage Forest.

Washington's long-arm statute, RCW 4.28.185, permits personal service outside the state. But personal service outside the state is "valid only when an affidavit is made and filed to the effect that service cannot be made within the state." RCW 4.28.185(4). The City did not make or file such an affidavit.

Deutsche Bank sought to vacate the default judgment one year after it was entered. Deutsche Bank argued below that since no affidavit was ever filed, the default judgment was void.

The trial court determined that "no affidavit, as required by RCW 4.28.185(4), was filed before the default judgment against Deutsche Bank was entered."[1] The trial court therefore vacated the default judgment.

---

[1] Clerk's Papers at 104.

Ford appeals.

ANALYSIS

When the facts are undisputed, the determination of a superior court's personal jurisdiction over a party is a question of law. Lewis v. Bours, 119 Wn.2d 667, 669, 835 P.2d 221 (1992). We review questions of law de novo. City of Bonney Lake v. Kanany, 185 Wn. App. 309, 314, 340 P.3d 965 (2014).

Out-of-state personal service is governed by statute. RCW 4.28.180-.185; see Ralph's Concrete Pumping, Inc. v. Concord Concrete Pumps, 154 Wn. App. 581, 585-86, 225 P.3d 1035 (2010). Statutes allowing service outside the state are in "derogation of common law" and must be "strictly construed." Ralph's Concrete, 154 Wn. App. at 585. "At common law it was fundamental that personal service of summons upon a defendant must be had upon him within the limits of the state, in order to confer jurisdiction upon a court of that state." Gerrick & Gerrick Co. v. Llewellyn Iron Works, 105 Wash. 98, 102, 177 P. 692 (1919); see also State ex rel. Hopman v. Superior Court of Snohomish County, 88 Wash. 612, 617, 153 P. 315 (1915).

Ford contends the issue here is a matter of statutory construction. We agree. There is no constitutional controversy here. The constitutional due process notice and minimum contacts standards for personal jurisdiction apply equally to actions in rem, quasi in rem, or in personam. Shaffer v. Heitner, 433 U.S. 186, 212, 97 S. Ct. 2569, 53 L. Ed. 2d 683 (1977); Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314, 70 S. Ct. 652, 94 L. Ed. 865 (1950).

Specifically, Ford contends RCW 4.28.180 should be interpreted to permit out-of-state service separate and apart from RCW 4.28.185 and its requirements. But Ford's arguments are unpersuasive.

Ford argues that before the legislature enacted RCW 4.28.185 in 1959, the prior version of RCW 4.28.180 allowed out-of-state personal service with no affidavit requirement. Therefore, Ford contends the savings clause of RCW 4.28.185(6)—"[n]othing herein contained limits or affects the right to serve any process in any other manner now or hereafter provided by law"—allows out-of-state personal service under RCW 4.28.180 in current foreclosure actions. But Ford does not establish the standards that applied to out-of-state personal service before 1959. Ford relies on Harder v. McKinney, 187 Wash. 457, 60 P.2d 84 (1936). But that case resolved only the narrow issue whether a complaint had to be filed before a party effectuated out-of-state service on a nonresident defendant in a foreclosure action. Harder did not analyze or discuss any other requirements for out-of-state personal service.

Ford also cites Hatch v. Princess Louise Corp., 13 Wn. App. 378, 534 P.2d 1036 (1975). Hatch obtained both a money judgment and a decree foreclosing a chattel mortgage. This court concluded the money judgment was invalid because Hatch failed to file an affidavit as required by RCW 4.28.185(4). In dicta, this court affirmed the foreclosure decree, but the Princess Louise Corporation did "not contest the foreclosure portion of the judgment." Hatch, 13 Wn. App. at 379. Hatch's dicta regarding the undisputed jurisdiction for foreclosure is not compelling. Hatch offers no support for Ford's position that RCW 4.28.185(4)'s affidavit requirement does not apply to a utility

lien foreclosure action. Additionally, Ford offers no legislative history addressing affidavit requirements that existed before 1959.

There is clearly an interplay between the current RCW 4.28.180 and RCW 4.28.185. In 1959, the legislature amended RCW 4.28.180 and adopted RCW 4.28.185 "in the same piece of legislation." Lewis H. Orland, *Washington's Second Longarm?*, 17 GONZ. L. REV. 905, 908 (1981-82). Both statutes have corresponding provisions governing those who have submitted to the jurisdiction of Washington courts. The words and concepts in the current RCW 4.28.180 "parallel the words and concepts of" RCW 4.28.185. Id.

RCW 4.28.185(1) recognizes that a person who does any of the acts enumerated in RCW 4.28.185(1)(a)-(f) "thereby submits . . . to the jurisdiction of the courts of this state as to any cause of action arising from the doing of any of said acts." RCW 4.28.185(2) also recognizes that service of process "upon any person who is subject to the jurisdiction of the courts of this state, as provided in this section, may be made by personally serving the defendant outside this state, as provided in RCW 4.28.180, with the same force and effect as though personally served within this state." In turn, RCW 4.28.180 provides that personal service "may be made upon any party outside the state"; if such service is upon a "person who has submitted to the jurisdiction of the courts of this state, it shall have the force and effect of personal service within this state."

The parties agree that Deutsche Bank has "submitted" itself to the jurisdiction of Washington courts. Deutsche Bank lent money and recorded a deed of trust on property located in this state. See Mennonite Bd. of Missions v. Adams, 462 U.S. 791,

798, 103 S. Ct. 2706, 77 L. Ed. 2d 180 (1983) (holding that "a mortgagee clearly has a legally protected property interest" that "is significantly affected" by a foreclosure sale). Having "submitted" to the jurisdiction of Washington courts, both RCW 4.28.180 and RCW 4.28.185 apply to any out-of-state service upon Deutsche Bank. We need go no further to resolve the narrow issue presented here. For those who have "submitted" themselves to the jurisdiction of Washington courts, like Deutsche Bank, we read RCW 4.28.180 and RCW 4.28.185 together as authorizing out-of-state personal service. But for such service to be valid, a party must comply with RCW 4.28.185(4)'s affidavit requirement.

We note the long-established "policy of the law is to require the plaintiff to give the defendant the best service possible under the circumstances." Nw. & Pac. Hypotheek Bank v. Ridpath, 29 Wash. 687, 709, 70 P. 139 (1902). Before the legislature chose to allow out-of-state service upon those who had submitted to the jurisdiction of Washington courts, it was reasonable to require some showing that in-state service was impractical under the circumstances. RCW 4.28.185(4)'s affidavit requirement for out-of-state personal service is consistent with this policy consideration.

We need not analyze the entire landscape of out-of-state personal service under Washington law. We conclude that a plaintiff who seeks out-of-state personal service on a person who has "submitted" to the jurisdiction of Washington courts must comply with RCW 4.28.185(4)'s affidavit requirement. Absent the filing of an affidavit, the trial court lacks personal jurisdiction over the defendant and any judgment against that defendant is void.

Finally, the City of Sedro-Woolley mirrors many of Ford's arguments. The City also argues that if the service upon Deutsche Bank was invalid, it should not impact the foreclosure's validity as to others who claimed an interest in the property.[2] But the only order entered by the trial court was the vacation of the default judgment against Deutsche Bank. The City did not appeal or cross appeal from that order, and there does not appear to be any other order by the trial court specifically addressing the impact upon others asserting an interest in the property. We decline to offer an advisory opinion on issues that have not yet been presented to or ruled upon by the trial court.

We affirm the order vacating the default judgment against Deutsche Bank.

WE CONCUR:

[2] The panel has considered the City's reply brief. See Notation Ruling of Feb. 23, 2015.

OFFICE RECEPTIONIST, CLERK

To: Jane Mrozek
Cc: Cale Ehrlich
Subject: RE: Petition for Review - Ford Services v. Deutsche Bank (Court of Appeals No. 72131-3-I)

Received July 29, 2015.

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Jane Mrozek [mailto:jmrozek@tousley.com]
Sent: Wednesday, July 29, 2015 2:08 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Cale Ehrlich
Subject: Petition for Review - Ford Services v. Deutsche Bank (Court of Appeals No. 72131-3-I)

Attached please find a Petition for Review for the above-referenced case.

Jane Mrozek
Legal Assistant
jmrozek@tousley.com
Direct Dial: 206.695.9274

Tousley Brain Stephens PLLC - 1700 7th Avenue, Suite 2200, Seattle WA 98101
T: 206.682.5600 | F: 206.682.2992 | www.tousley.com